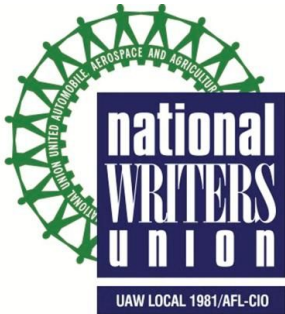




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January 20, 2020

To: European Union Intellectual Property Office (EUIPO)
Digital Transformation Department (DTD)
Avenida de Europa, 4
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SPAIN

by e-mail: observatory@euiipo.europa.eu
cc: copyright@dbei.gov.ie

The undersigned organizations of journalists and authors in a variety of genres and media welcome the opportunity to submit the comments below to the European Union Intellectual Property Office in response to your draft document, “The Out-of-Commerce Works Portal – High Level Specification, Version 0.12 – 17/12/2019”.¹

1. We have been unable to find the draft specifications or any notice of this consultation on the EUIPO website. However, notice of this consultation and a copy of the draft

The International Federation of Journalists (IFJ) is the world's largest organization of journalists, representing 600,000 media professionals from 187 trade unions and associations in more than 140 countries. Established in 1926, the IFJ is the organization that speaks for journalists within the United Nations system and within the international trade union movement. The IFJ organizes collective action to support journalists' unions in their fight for fair pay, decent working conditions and in defense of their labor rights; promotes international action to defend press freedom and social justice through strong, free and independent trade unions of journalists; fights for gender equality in all its structures, policies and programs; opposes discrimination of all kinds and condemns the use of media as propaganda or to promote intolerance and conflict; and believes in freedom of political and cultural expression.

The National Writers Union (NWU) is a national labor union in the USA that advocates for freelance and contract writers. The NWU includes local chapters as well as at-large members nationwide and abroad. The NWU works to advance the economic conditions of writers in all genres, media, and formats. NWU membership includes, among others, fiction and nonfiction book authors, journalists, business and technical writers, website and e-mail newsletter content providers, bloggers, poets, novelists, playwrights, editors, and academic writers. Many NWU members are also publishers as self-publishers of some or all of their works, in digital and/or printed formats. The NWU is also the holder of some or all rights to various works published in the name of the NWU, including books such as our "Freelance Writers' Guide" and our Web site, nwu.org. The NWU is a national amalgamated union, Local 1981, of the United Auto Workers, AFL-CIO, and is a member of the International Federation of Journalists.

Science Fiction and Fantasy Writers of America, Inc., (SFWA) is the national organization in the USA for professional authors of science fiction, fantasy, and related genres. Founded in 1965, SFWA is a California 501(c)(3) member organization. SFWA has nearly 2,000 members, the majority of whom are professional freelance authors of novels and/or short fiction. SFWA members publish works of prose, dramatic scripts for film and television, and games related to science fiction and fantasy. Of particular note, SFWA's membership includes writers publishing with traditional book and magazine publishers and in online short fiction venues, as well as writers who self-publish their works in print and electronic form.

IFJ, NWU, and SFWA are concerned that the draft specifications omit some functional features that are essential for the portal to fulfill the mandate of Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC ("the Directive").

As authors and rightsholders, we are particularly concerned with the mechanisms for authors to exclude some or all of their works or rights from uses that would be permitted under the Directive (and the pre-existing EU Orphan Works Directive²) on an "opt-out" basis.

specifications were sent to us by the Copyright Section, Intellectual Property Unit, Department of Business, Enterprise and Innovation, Government of Ireland.

2. Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works.

The Directive requires that any rightsholder be able to to, “at any time, easily and effectively” exclude any or all of her works from:

- (a) licensing pursuant to Article 8, Paragraph 1;
- (b) exception or limitation pursuant to Article 8, Paragraph 2; and/or
- (c) Extended Collective Licensing pursuant to Article 12, Paragraph (3)(c)

An “opt-out” requirement is a formality prohibited by the Berne Convention. The more burdensome the opt-out process, the more clearly it constitutes a prohibited formality.

The Directive requires that opt-out be “easy” and “effective”. This is an explicit, mandatory requirement of the Directive, and it must be treated as such in the development of specifications and in implementation and ongoing operation of the portal.

For opt-out to be easy and available “at any time” and for all works of a rightsholder, and to minimize the burden of the prohibited formality, it must be possible for a rightsholder, *before* any of her works have been deemed “out of commerce”, to exclude all of her works (without having to itemize them, which would rarely be easy and in many cases would be impossible) from any or all of these licensing mechanisms or exceptions, in all EU member states, through a single, one-time exclusion request through the EUIPO portal, effective in all member states.

A system that requires a rightsholder to opt out separately in each EU member state would be neither “easy” nor “effective”, and would not comply with the Directive or the Berne Convention.

A system that requires a rightsholder to itemize her works to opt out would be neither “easy” nor “effective”, and would not comply with the Directive or the Berne Convention.

A system that requires a rightsholder to wait until certain of her works have been identified as “out of commerce” before she can exclude them (and which thus requires her to make searches for each of her works, at regular intervals, in some database of works so identified) would be neither “easy” nor “effective”, and would not comply with the Directive or the Berne Convention.

A system that requires a rightsholder to opt out separately from each type of default licensing or exception would be neither “easy” nor “effective”, and would not comply with the Directive or the Berne Convention.

This is equally true with respect to the pre-existing Orphan Works Directive, pursuant to which a rightsholder is entitled to exclude works to which she holds rights from use as “orphan” works. Most authors who want to exclude their works from licensing or use under an exception as “out-of-commerce” works will also want to exclude them from use as “orphan” works.

It is impossible for an author to anticipate whether, or in which country or countries, a work will be determined to be an out-of-commerce work, an orphan work, included in an ECL scheme, or some combination of these. To be effective, as required by the Directive, an opt-out directive must be applicable to all of these limitations and exceptions in all EU member states.

It would be common sense – avoiding duplication of effort both by the EUIPO and by rightsholders and minimizing the burdens of the prohibited opt-out formalities and the violations of the Berne Convention – to integrate the “orphan works” and “out-of-commerce works” portals. No benefit would be obtained by building two separate and parallel portals providing essentially similar functionality, or by requiring authors and other rightsholders to make separate searches and opt-out directives with respect to the same works through two separate portals.

The specifications for this common portal should require that a rightsholder be able to, at any time including before any of her works have been deemed “out of commerce”: (a) search for works that have been included or proposed for inclusion in any of these four opt-out licensing or exception schemes (licensing pursuant to Article 8, Paragraph 1; exception or limitation pursuant to Article 8, Paragraph 2; Extended Collective Licensing pursuant to Article 12, Paragraph (3)(c) of the Directive; and use pursuant to the Orphan Works Directive) through a single search query; and (b) indicate in a single exclusion directive, through the portal, that works or rights be excluded from all four of these schemes, or any combination thereof, in all EU member states.

The draft specifications appear to fall short of this in several respects, and appear likely to result in a portal which would not fulfill the requirements of the Directive and which would result in gratuitously burdensome opt-out formalities and gratuitously excessive violations of the rights of authors and rightsholders pursuant to the Berne Convention.

To understand why the opt-out process that seems to be contemplated by the draft specifications would be needlessly burdensome and neither easy nor effective for authors, it may be helpful to start by considering a typical “use case” for an author who wants to opt out.

Each author has a different personal business model and mix of revenue sources.³ There is no “typical” author, and different authors will want to make different opt-out choices. But it is possible to consider, as an example, the choices one author might want to make.

An author may want to exclude:

(a) All of her works from the exception or limitation pursuant to Article 8, Paragraph 2 of the Directive (because any such use would be unremunerated);

3. For a taxonomy of some of these variations, see, “How writers monetize words: The marketplaces for writing in digital formats,” NWU presentation at an inter-agency workshop organized by the copyright division of the U.S. Patent and Trademark Office, March 28, 2019. Video archive: <<https://nwu.org/how-writers-monetize-words-the-marketplaces-for-writing-in-digital-formats/>>. Annotated slides: <<https://nwu.org/wp-content/uploads/2019/03/Hasbrouck-NWU-words-into-dollars-28MAR2019-notes.pdf>>.

(b) Certain specified works or categories of works from any licensing pursuant to Article 8, Paragraph 1, and Extended Collective Licensing pursuant to Article 12, Paragraph (3)(c) of the Directive, and if possible also from use pursuant to the Orphan Works Directive (for example, because these works have been superseded by new, revised, or updated editions or versions, because they no longer reflect the author's views, or because she thinks that they are of poor quality or that distribution of them would not enhance the value of her total body of works);

(c) Certain rights to certain other specified works from licensing pursuant to Article 8, Paragraph 1, and Extended Collective Licensing pursuant to Article 12, Paragraph (3)(c) of the Directive, and if possible also from use pursuant to the Orphan Works Directive, because she is already exploiting those rights to those works in some other way which she believes will generate greater revenues or other benefits for her than these licensing schemes (for example, rights to digital distribution of works that she already makes available through a website that generates advertising, subscription, and/or download revenues from EU visitors).

An author is entitled by the Directive to make these exclusions easily and effectively.

An author is entitled by the Directive to exclude any or all of her works at any time. She almost certainly will want to make this opt-out decision (a) before any of her works have been identified as out-of-commerce works, (b) only once, so as not to have to spend time periodically searching for whether any of her works have been newly identified as out-of-commerce works, and (c) for all EU member states through a single portal in her choice of language.

Will this opt-out “use case” actually be possible, easy, and effective for such an author if the draft specifications for the EUIPO portal for out-of-commerce works are implemented?

Several aspects of the draft specifications suggest that it will not be easy or effective, and may not be possible at all.

First, the draft specifications refer to, “potentially, a feature facilitating general opt-out requests”. To comply with the mandate of the Directive for easy and effective opt-out, general opt-out functionality must be a mandatory feature of the portal before it is deployed.

Second, it is not clear from the draft specifications whether opt-out will be possible before a work has been determined by some cultural heritage institution to be an “out-of-commerce work”. In particular, Figure 2 on page 9 of the draft specifications identifies “Opt-out” as a subsidiary function available only within an “Out of Commerce Work(s) Record”, while the draft specifications would not allow authors or other rightsholders to create such a record.

Moreover, the draft specifications provide that functionality for “public users” (the category in which authors and other rightsholders would be placed) would include, “potentially initiate a general opt-out request (using an e-form which will generate a notification to the registered user(s))”. Aside from the need to remove the qualification “potentially” and make this

functionality mandatory, it is unclear to which “registered user(s)” such a notification would be sent if there is no “Out of Commerce Work(s) Record” corresponding to the opt-out request or if it is unclear (as it often will be) to which such record(s) an opt-out request pertains.

To comply with the mandate of the Directive for opt-out to be possible (and easy and effective) “at any time”, the draft specifications must require that opt-out through the portal be possible at any time, regardless of whether any “Out of Commerce Work(s) Record” has previously been created for any of the works being excluded.

This will require either (a) that authors and other rightsholders be able to create new records for excluded works or categories of works (*e.g.*, for all works by a specified author); or (b) that the EUIPO be assigned explicit responsibility for creating records for excluded works.

The fact that the draft specifications appear to have been developed without consideration of some of the most common “use cases” for authors, particularly non-EU authors, reinforces the importance of including non-EU authors as a distinct class of stakeholders in the stakeholder dialogues required by Article 11 of the Directive, and of ensuring that remote participation in these dialogues is possible for foreign authors and other foreign stakeholders. IFJ, NWU, and SFWA would welcome the opportunity to participate in these stakeholder dialogues with the EUIPO.

We do not intend or consider this submission to be confidential. We authorize the public disclosure of these comments.

Respectfully submitted,

_____/s/_____

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