

France to amend its IP and heritage codes

Bird & Bird's **Nathalie Ruffin** and **Vincent Robert** review three new directives introduced under the country's IP regime



On 20 November 2014, the French parliament took the first steps to implement three recent EU directives in the field of copyright, related rights and cultural heritage.

Directive 2011/77/EU of 27 September 2011 on the term of protection of copyright and certain related rights, which extends the term of protection of musical performers' rights and phonogram producers from 50 to 70 years, aims at facing the record industry crisis and ensuring a better remuneration for artists.

Directive 2012/28/EU of 25 October 2012 on certain permitted uses of orphan works, which allows libraries, museums and schools to reproduce and communicate certain orphan works to the public, aims to remove obstacles to freedom of access to information.

Directive 2014/60/EU of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a member state facilitates the actions left to the member states, to protect their national treasures and heritage.

As France was about to be condemned by the European Union for not having implemented Directive n°2011/77 of 27 September 2011 in due time, the French government had to use the urgency procedure for implementing the directive. Unexpectedly, the government has also taken this opportunity to implement, at the same time, the two other directives, which may appear quite far removed from each other, except that they all fall within the jurisdiction of the Ministry of Culture.

The urgency procedure will not allow full debate on the draft by the parliament, which will proceed with a full and literal implementation of these European directives.

The draft law voted by the National Assembly will now be examined by the senate on December 2014, and should be definitely adopted in 2015.

Improving rights of music performers and phonogram producers

The new law first extends the term of protection for musical performers' rights and phonogram producers only.

In practice, the initial period of protection will remain 50 years starting 1 January following the year of the performance for performers and of the fixation in a phonogram for producers.

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However, if the fixation of the performance is lawfully made available during this initial period, the term of protection will be increased from 50 to 70 years, from 1 January following the year of the date of first publication through physical copies, or the date of first communication of the phonogram to the public.

Reinforcing position of performers in their contractual relationships with producers

The extension of performers' rights duration will mostly benefit phonogram producers,

as contracts concluded between musical performers are often signed for the whole duration of their rights.

Performers' position in their relationship with producers is therefore clearly reinforced by the draft law.

First, it introduces the “*use it or loose it*” principle into French law. During the 20-years additional period of rights provided by the new law, performers will be entitled to terminate their contract with their producers, and to recover their rights if producers do not offer copies of their phonogram for sale in “*sufficient quantity*”, and do not make the recordings available to the public on the Internet. This right of termination will be enforceable if the producer fails to remedy to this lack of exploitation within a year from the date of notification by the artist.

Secondly, pursuant to the future text, the artists' remuneration will be significantly raised during the 20-years additional period of protection provided by the directive.

In this respect, the texts draws a distinction between contracts that provide for a proportional (recurrent) remuneration and contracts that only provide for a lump sum to the artist.

Performers whose contracts only provide for a non-recurring remuneration will now receive, for the additional period of time granted by the directive, an annual remuneration of 20% of the producer's receipts derived from the exploitation of the phonograms concerned. These provisions will, however, not apply for small recording companies of less than 10 employees and which annual turnover does not exceed €2m.

For performers whose contracts provide for a proportional remuneration, the draft law provides that for the additional period of rights, any advance paid by the producer will not be recoupable anymore on the royalties. The artist will perceive his proportional remuneration

even if the producer did not recoup the advance. Moreover, the new law provides that the performer will be able to renegotiate his proportional remuneration during the additional period of rights, at his own benefit only.

The implementation of Directive of 27 September 2011, responds to economic considerations, which may be considered as far removed from the French conception of artistic property. It should however help producers to face the record crisis and to participate to the music creation by producing new talents. It will also reduce the difference of protection between artists and authors, who have their works protected 70 years *post mortem*.

Permitting certain uses of orphan works

Orphan works are defined by Article L. 113-10 of the French Intellectual Property Code as works protected by copyright and divulged, but whose rightholders are unknown or cannot be traced despite diligent and serious search.

In accordance with Directive 2012/28/EU of 25 October 2012 on certain permitted uses of orphan works, the draft law will allow public libraries, museums, archives, films or audio heritage institutions and educational establishments, to digitalise and make publicly available orphan works under certain conditions.

As stated by the directive, the future text will only cover works published in a written form (books, journals, newspaper, and magazines) and audio and audiovisual works. Still images are expressly excluded by the draft.

The list of beneficiaries drawn by the draft is limitative, and the rights granted can only be exercised in the course of their "cultural, educational and research missions", which correspond to the "public interest missions" mentioned in the Community Directive of 25 October 2012.

Preliminary diligent search

The text also establishes a procedure that must be followed by the beneficiaries, in order to benefit from the orphan work exception.

Libraries, museums and schools concerned will first have to check the Office for Harmonization in the Internal Market's (OHIM) orphan works public database if the works concerned are already listed as orphan works. In this case, they will have to inform the Ministry of Culture the intended use of the orphan work.

If the works concerned are not mentioned as orphan works in the OHIM database, the beneficiaries will have to conduct "diligent search" on relevant sources that will be defined by decree (legal deposits, available databases,

publishers/producers associations etc.) If said search does not allow identifying, or tracing the right owners, the beneficiaries concerned will have to communicate the results of their search to the Ministry of Culture, which will then forward them to OHIM.

Compensation for right owners

The right owner will be able to make himself known any time to the beneficiary. The beneficiary will then have to inform the Ministry of Culture, to pay a "fair compensation", negotiated with the right owner for the past use of the work and to obtain the authorisation from the right owner for any future use of the work.

The draft law, which reverses the burden of proof to the benefit of certain orphan work users, should lift obstacles to the communication of orphan works to the public, while preserving the interests of the right owners, once they will make themselves known.

Reinforcing fight against illicit circulation of national treasures

The draft law, which implements Community Directive 2014/60/EU of 15 May 2014, will also strengthen and clarify the applicable legislation on the illicit circulation of national treasures.

The French Heritage Code already provides for mechanisms of cooperation with other member states, in order to fight against illicit circulation of cultural goods within the European Union. However, the existing system has been criticised, as being unclear and inefficient.

The draft law will first clarify the definition of national treasures provided in article L. 111-1 of the French Heritage Code. As a result, national treasures will now be considered as:

- Goods that belong to the French museums' collections.
- Public and historical records.
- Other movable goods that are part of the public domain, as defined by the French Code of Public Persons Property.
- Other goods that are of major interest for the national heritage with respect to history, art or archeology.

The current provisions of the French Heritage Code do not expressly mention "public records" and do not refer to the definition of goods from the public domain recently provided by French Code of Public Persons Property.

The new law will also extend the time limits within which the member state will be able to (i) investigate on the nature of the cultural object concerned and to (ii) initiate proceedings with the aim of securing the return of the object concerned.

Under the current legal provisions, the state has two months to investigate on the nature of the cultural good found in another member state and one year to take legal action in restitution. These time limits, which were considered as too short, will be extended respectively to six months and three years under the new law.

The indemnification procedure of the possessor of the cultural object concerned will also be modified. Pursuant to the current texts, if a cultural good is returned to the state, the possessor of good faith is entitled to receive a fair compensation, provided that he exercised due care and attention in acquiring the object.

The new article L. 112-8 of the Heritage Code will define precisely on which elements the court will determine whether the possessor exercised due care, among which the documentation available on the object's provenance, or the consultation by the possessor of accessible registers of stolen cultural objects, and any other relevant information. These new provisions would have the effect, in practice, to reverse the presumption of good faith set by article 2268 of the Civil Code for possessors of goods.

This future law will thus constitute a significant improvement for the fight against illicit circulation of cultural goods within the European Union, and may contrast with the international conventions ratified by France, which do not provide the same level of cooperation between member states as of yet.

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