

# SEVERAL ASPECTS REGARDING ORPHAN WORKS AFTER THE ADOPTION OF EU DIRECTIVE 2012/28/EU OF THE EUROPEAN PARLIAMENT AND THE COUNCIL OF 25 OCTOBER 2012

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## **Abstract**

*This study aims at presenting the new legal provisions at EU level regarding orphan works (Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works) and their transposition into national law. The study explains the content of the Directive and raises some issues regarding the transposition into national law. It also highlights several problems which can occur in this process because of errors in translation.*

**Keywords:** *transposition, errors in translation, efficiency, orphan works*

**JEL Classification:** *K33, K39*

## **I. Introduction**

The concept of orphan works has received its own legislative framework through the Directive 2012/28/EU of the European Parliament and the Council from 25 October 2012 on certain permitted uses of orphan works. The need to adopt legislation in this field can be explained through the necessity to allow the institutions embarked on public interest missions to digitize orphan works from their own collections or archives, with the purpose to create european digital libraries. Digital libraries are important means to support the research process and, as such, to stimulate innovation. An important part of Europe 2020 Strategy is the creation of a European Digital Agenda. Furthermore, the Directive states in paragraph 5 that „Mass digitisation<sup>2</sup> and dissemination of works is therefore a means of protecting Europe's cultural heritage”.

## **II. The transposition into national law of the Directive 2012/28/EU**

We have to begin this article by specifying that, although the articles of the Directive are mostly presented in this article as quotes, there is a difference from the Romanian official version. In our opinion, this difference can be explained by the fact that the translation into Romanian does not correspond to the English and French versions. The most important consequence is the restraining of the effects of Directive. The Romanian translation speaks of „copyright owners”, while the English and French versions mention „rightholders”. The conceptual difference is significant if we consider that the Directive does not refer itself only to works, where we have only copyright owners, but also to phonograms, where there are two categories of rightholders: copyright owners (authors) and related rightholders (performers and phonogram producers). The misuse of the wording „copyright owners” leads to an inaccurate interpretation of the text by excluding, when speaking of phonograms, two types of rightholders (performers and phonogram producers).

The Directive, in Art. 2, considers a work or a phonogram to be an orphan work if none of the rightholders in that work or phonogram is identified or, even if one or more of them is identified, none is located despite a diligent search for the rightholders having been carried out and recorded. As such, we understand that an orphan work is not a work for which the duration of the copyright has expired and, by consequence, is free to be used by any interested person (the so-called

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<sup>2</sup> Digitization supposes digital capture, the transformation from analog to digital, the description and the representation of the objects of patrimony and of the documentation related to them, the processing, ensuring the access to the digitized content and its long-term conservation - definition from „The study of feasibility on digitization, digital conservation and on-line availability of the resources of libraries” of the National Library of Romania (2007), quoting <http://www.calimera.org/lists/guidelines/digitisation>

”public domain” works), nor an ”out-of-commerce” work, meaning a work that is currently being protected by copyright law, but is no longer commercially available, due to the fact that the copyright owner no longer wants to publish it or to offer it to the public.

An orphan work is a work or a phonogram protected by copyright law or other laws, whose author is not known or, if he/she is known, can no longer be located. As an example we can mention a library photography, whose creation date is mentioned in its content. By knowing that, we can conclude that this work is still being protected by copyright law. Unfortunately, there is no mention of its author or if his name is written on the document, he can not be found. Although, at a first sight, we might presume that these orphan works seem to be in a very limited number, because we can not imagine that there are many rightholders who are not aware of their rights, real facts seem to suggest otherwise. The British Library estimates that 40% of the copyrighted work in its archive is orphaned; the Imperial War Museum stores 2m photographs that have no identified owner.

The problem of orphan works is that, in the absence of rightholders, these works can not be used. Of course, a museum is able to expose a work that belongs to it, but it can not use it in other ways, due to the fact that it owns the material support of the work, and not any copyright components.

Art. 2 para. 2 provides us with an exception, for the case in which the work has been created by joint authors and some of the rightholders have been identified or located : „Where there is more than one rightholder in a work or phonogram, and not all of them have been identified or, even if identified, located after a diligent search has been carried out and recorded in accordance with Article 3, the work or phonogram may be used in accordance with this Directive provided that the rightholders that have been identified and located have, in relation to the rights they hold, authorised the organisations referred to in Article 1(1) to carry out the acts of reproduction and making available to the public covered respectively by Articles 2 and 3 of Directive 2001/29/EC”. As such, if some of the rightholders have been identified or located, they must express their agreement in order for a work to be used as an orphan work. This article, together with paragraph 17 of the Preamble (”If at least one rightholder has been identified and located, a work or phonogram should not be considered an orphan work”), can be interpreted as follows: the works mentioned in Art. 2 are not considered orphan works, but can be used as such.

Art. 1 para. 1 defines the categories of users of orphan works: publicly accessible libraries, educational establishments and museums, archives, film or audio heritage institutions and public-service broadcasting organisations, established in the Member States, in order to achieve aims related to their public-interest missions. This article points out the basis of the use allowed by the Directive to be the concept of “public interest”, by allowing the above mentioned institutions to use the work on a non-commercial basis.

Art. 1 para. 2 defines the application area, by showing that the Directive has in view:

(a) works published in the form of books, journals, newspapers, magazines or other writings contained in the collections of publicly accessible libraries, educational establishments or museums, as well as in the collections of archives or of film or audio heritage institutions;

(b) cinematographic or audiovisual works and phonograms contained in the collections of publicly accessible libraries, educational establishments or museums, as well as in the collections of archives or of film or audio heritage institutions; and

(c) cinematographic or audiovisual works and phonograms produced by public-service broadcasting organisations up to and including 31 December 2002 and contained in their archives;

which are protected by copyright or related rights and which are first published in a Member State or, in the absence of publication, first broadcast in a Member State.

According to Art. 1 para. 3, it also applies to works and phonograms referred to in paragraph 2 which have never been published or broadcast, but have been made publicly accessible by the above mentioned organisations with the consent of the rightholders, provided that it is reasonable to assume that the rightholders would not oppose the uses specified by the Directive. The Directive applies also to works and other protected subject-matter that are embedded or incorporated in, or constitute an integral part of, the works or phonograms referred to in paragraphs 2 and 3.

The balancing point between the rightholders and the users of orphan works is the concept of „diligent search”. As such, the Directive tries to prevent an abuse from the users` side to consider as orphan works other works as well. According to Art. 3 para.1 the organisations that use orphan works shall ensure that a diligent search is carried out in good faith in respect of each work or other protected subject-matter, by consulting the appropriate sources for the category of works and other protected subject-matter in question. The diligent search shall be carried out prior to the use of the work or phonogram. The Directive allows member states to establish extra searching sources for each category of works, alongside those mentioned in the annex of the Directive.

Art. 3 and 4 specify the location searching criteria, mainly being in the Member State of first publication or, in the absence of publication, first broadcast. If there is evidence to suggest that relevant information on rightholders is to be found in other countries, sources of information available in those other countries shall also be consulted. At this point, we wanted to raise what we consider an interesting question: could, for example, a library carry out a diligent search just by using a internet-connected computer? By reading the annex to the Directive, at the category of newspapers, magazines, journals and periodicals, we understand that a diligent search in this category must comprise at least a check of:

- (a) the ISSN (International Standard Serial Number) for periodical publications;
- (b) indexes and catalogues from library holdings and collections;
- (c) legal deposit;
- (d) the publishers' associations and the authors' and journalists' associations in the respective country;
- (e) the databases of relevant collecting societies including reproduction rights organisations.

The member states can extend the above-mentioned searching criteria.

If the specific member state has all the necessary information available online, the most likely answer would be yes. If not, the answer would be negative, which means that a diligent search requires use of own financial resources of the agreed users. Another problem that we foresee in this case is the situation in which the users are encouraged to create two types of orphan works: „attractive” orphan works for the public, which are able to be a magnet for the necessary resources for a diligent search to be carried out and to be digitised and „uninteresting” orphan works, which will remain largely unknown.

It is important for us to mention that, up to this point, the Directive has not been applied in the Romanian law, the deadline for its transposition being 29 October 2014. Likewise, Law. No. 8/1996 does not mention in its content the concept of orphan work.

The information gathered by the beneficiary organisations, according to Art. 4 para.5 from the Directive, meaning:

- (a) the results of the diligent searches that the organisations have carried out and which have led to the conclusion that a work or a phonogram is considered an orphan work;
- (b) the use that the organisations make of orphan works in accordance with this Directive;
- (c) any change, pursuant to Article 5, of the orphan work status of works and phonograms that the organisations use, must be kept in their evidence.

The information specified in para. 5, points a), b), and c), plus the relevant contact information of the organisation concerned, must be provided to the competent national authorities, who will forward them to the Office for Harmonization in the Internal Market ('the Office'), which will establish and manage a single publicly accessible online database at EU level.

As such, any interested person will be able to find out the list of orphan works in the EU, due also to the fact that, according to Art. 4, a work or phonogram which is considered an orphan work in a Member State shall be considered an orphan work in all Member States. This provision applies also to the works and phonograms with several unknown rightholders. We consider that in this case the text of the Directive is being contradictory, because a work which has known and unknown rightholders and the known ones must agree to the use of the work, can not be, at the same time, an orphan and a non-orphan work. Art. 2 para.2 allows the institutions to use the work

similar to an orphan work, but we still support the idea that a work which has several known rightholders should not be considered as an orphan work and mentioned in the same list.

Going back to the online database, we consider it to be useful mainly for the rightholders to be able to put an end to the orphan work status. According to Art. 5, Member States shall ensure that a rightholder in a work or phonogram considered to be an orphan work has, at any time, the possibility of putting an end to the orphan work status in so far as his rights are concerned. At the point at which a work is being listed in the online database, the maximum goal of the Directive, the digitization, should have already been achieved. The work is available online to the public and, thereafter, another type of use from the institutions is no longer authorized. The online database has also an informing character.

The Directive mentions in Art. 6 the permitted uses of orphan works:

- making the orphan work available to the public, within the meaning of Article 3<sup>3</sup> of Directive 2001/29/EC and
- acts of reproduction, within the meaning of Article 2<sup>4</sup> of Directive 2001/29/EC, for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration.

From the perspective of the Romanian legislation, we consider that, until the date of the adoption of the Directive, one of the organisms from Art. 1 para. 1 could have used a work by making it available to the public as a read-only copy or by public display or offering it to be viewed, on the grounds that a work which is owned by a library, archive or a museum belongs to one of these organisms because its author has exercised his right to divulge it and he wanted it to be available to the public. According to Art. 25 para. 2 of Law No.8/1996<sup>5</sup>, a manuscript which has never been published, even if it were declared orphan, could not be made available to the public if there were no solid reasons to prove the authors intention in this respect.

Art. 6 para. 2 states firmly the non-commercial use allowed to the organisations: „the organisations referred to in Article 1(1) shall use an orphan work in accordance with paragraph 1 of this Article only in order to achieve aims related to their public-interest missions, in particular the preservation of, the restoration of, and the provision of cultural and educational access to, works and phonograms contained in their collection. The organisations may generate revenues in the course of such uses, for the exclusive purpose of covering their costs of digitising orphan works and making them available to the public”. As such, any type of commercial use is ruled out, which

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<sup>3</sup> **Article 3: Right of communication to the public of works and right of making available to the public other subject-matter**

1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

(a) for performers, of fixations of their performances;

(b) for phonogram producers, of their phonograms;

(c) for the producers of the first fixations of films, of the original and copies of their films;

(d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.

<sup>4</sup> **Article 2: Reproduction right**

Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

(a) for authors, of their works;

(b) for performers, of fixations of their performances;

(c) for phonogram producers, of their phonograms;

(d) for the producers of the first fixations of films, in respect of the original and copies of their films;

(e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.

<sup>5</sup> The person who communicates to the public, in a legal manner, for the first time, after the duration of the protection of the work has expired, a work which has not been published before, enjoys protection similar to the one of the patrimonial rights of the author. The duration of protection of these rights is of 25 years, starting with the moment the work has been legally made available to the public for the first time.

raises the question if the Member States could internally create legislation for the commercial use of orphan works.

An important provision is to be found in Art. 6 para. 5, which must provide fair compensation for rightholders that put an end to orphan work status of their works or other protected subject-matter for the use that has been made by the organisations mentioned above. The member states have the freedom to determine the circumstances under which the payment of such compensation may be organised. A question to be raised in this case is who will provide the fair compensation? One answer might be the beneficiary organisations. They are the users of the works and they should pay in exchange for using them. We do not support this type of solution because it would discourage a library or a museum to declare a work as an orphan work. One could not justify, from an economical point of view, the investment to carry out a diligent search, followed by declaring the work as an orphan work and digitizing it so, in the end, the organization to be liable to pay a fair compensation. Actually, the Directive allows only a non-commercial use. In this situation, who should provide the fair compensation? Maybe the Internal Offices of the member states which deal with copyright issues (in Romania, for example, it is the Romanian Copyright Office). It might be a possibility, although we believe that these institutions will not accept extracompetences to burden their frale budgets.

The costs of declaring a work as orphan can increase if, according to para. 13 of the Preamble, the Member State should decide to allow other organisations than those mentioned in Art. 1 to carry out the diligent search, in exchange for a fee: „Before a work or phonogram can be considered an orphan work, a diligent search for the rightholders in the work or phonogram, including rightholders in works and other protected subject-matter that are embedded or incorporated in the work or phonogram, should be carried out in good faith. Member States should be permitted to provide that such diligent search may be carried out by the organisations referred to in this Directive or by other organisations. Such other organisations may charge for the service of carrying out a diligent search”.

This possibility would benefit the organisations referred to in the Directive because it would not involve costs from their own budget, but, at the same time, it would disadvantage the states, because it would require extra budgetary expenditures. The possibility to externalize the diligent search has also the advantage that it would cover liability issues for the situation in which the rightholder goes to the court to claim that a diligent search had not been carried out (para. 19 of the Preamble states that: ”If a work or phonogram has been wrongly found to be an orphan work, following a search which was not diligent, the remedies for copyright infringement in Member States' legislation, provided for in accordance with the relevant national provisions and Union law, remain available”.

### III. Conclusions

If we would draw a conclusion of the content of this Directive, we can consider that, even though it has a commendable goal, its enforcement can prove more difficult than expected. It is hard to say, at this point, how much of its stated goal, to help digitize orphan works, can be achieved, if we consider the fact that, sometimes, it might be easier for a library to pay a specific sum of money to the rightholder in order to digitize a work, than to invest in a diligent search that would lead to a potentially reversible and financially burdening orphan work status.

We believe that the Directive would have been more effective had it allowed the specific organisations to use the orphan works without any potential financial damage, due to the fact that the allowed use is strictly related to their public-interest missions.

### ANNEX

The sources referred to in Article 3(2) include the following:

(1) for published books:

- (a) legal deposit, library catalogues and authority files maintained by libraries and other institutions;
- (b) the publishers' and authors' associations in the respective country;
- (c) existing databases and registries, WATCH (Writers, Artists and their Copyright Holders), the ISBN (International Standard Book Number) and databases listing books in print;
- (d) the databases of the relevant collecting societies, in particular reproduction rights organisations;
- (e) sources that integrate multiple databases and registries, including VIAF (Virtual International Authority Files) and ARROW (Accessible Registries of Rights Information and Orphan Works);

(2) for newspapers, magazines, journals and periodicals:

- (a) the ISSN (International Standard Serial Number) for periodical publications;
- (b) indexes and catalogues from library holdings and collections;
- (c) legal deposit;
- (d) the publishers' associations and the authors' and journalists' associations in the respective country;
- (e) the databases of relevant collecting societies including reproduction rights organisations;

(3) for visual works, including fine art, photography, illustration, design, architecture, sketches of the latter works and other such works that are contained in books, journals, newspapers and magazines or other works:

- (a) the sources referred to in points (1) and (2);
  - (b) the databases of the relevant collecting societies, in particular for visual arts, and including reproduction rights organisations;
  - (c) the databases of picture agencies, where applicable;
- (4) for audiovisual works and phonograms:
- (a) legal deposit;
  - (b) the producers' associations in the respective country;
  - (c) databases of film or audio heritage institutions and national libraries;
  - (d) databases with relevant standards and identifiers such as ISAN (International Standard Audiovisual Number) for audiovisual material, ISWC (International Standard Music Work Code) for musical works and ISRC (International Standard Recording Code) for phonograms;
  - (e) the databases of the relevant collecting societies, in particular for authors, performers, phonogram producers and audiovisual producers;
  - (f) credits and other information appearing on the work's packaging;
  - (g) databases of other relevant associations representing a specific category of rightholders.

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