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Content Space

New Rules on Orphan Works

The challenge around orphan works is one that permeates the cultural heritage sector and is one that has become particularly acute as a result of digitisation. The content of our cultural heritage is rich and vibrant. Copyright subsists in the content where the author died less than 70 years ago, but it is often very hard to find the owner of the copyright to ask for permission to re-use that content. The name may not be on the work or the owner may have died, and the ownership of the copyright passed to many heirs fragmenting ownership. To try and address this, the Orphan Works Directive came into force in 2014.

Q: What is the Orphan Works Directive?

A: The orphan works directive (OWD) was to be implemented into the laws of Member States by 29 October 2014. As this is only very recent, it remains to be seen how useful it will be

Q: What is an orphan work?

A: An orphan work is one that is in copyright protection, but where none of its rights-holders can be identified or, where identified, cannot be found after a diligent search. If one of a number of rights-holders is located, then the work can be used even if the other rights-holders cannot be identified or located. If a rights-holder is located, the work is no longer considered an orphan work, even if the other rights-holders cannot be identified or located.

Q: What is a diligent search?

A: An Institution to whom the OWD applies can only decide that a work is orphan after a diligent search has been carried out in good faith and in respect of each work by consulting appropriate sources. Embedded works must undergo a diligent search because they are treated as separate works from the main work.

What is counted as an appropriate source is to be determined in each Member State in consultation with rights-holders and users. It is to include at least the sources listed in the Annex to the OWD. These sources include where appropriate to the work, legal deposit; library, film, audio heritage databases; databases of collecting societies; sources that integrate multiple databases and registries; ISSN.

The search must be carried out in the Member State of first publication and before the work is used.

Records must be kept of the diligent search and the results reported to the appropriate government agency along with the uses made of the orphan work and if the work ceases to be an orphan. This information must be made available in a publicly accessible online database managed by the Office for Harmonisation in the Internal Market. The database can be found here: <https://oami.europa.eu/orphanworks/>

Q: To which institutions does the OWD apply?

A: The OWD applies to publicly accessible libraries; educational establishments; museums; archives; film or audio heritage institutions; public-service broadcasting organisations (which have some special arrangements in the OWD) established in Member States. The OWD applies to certain uses of orphan works by these Institutions in order to achieve their public interest missions.

Q: What is within the Institutions' public interest mission?

A: The OWD provides that a public interest mission can be fulfilled in particular through the preservation of, the restoration of, and the provision of cultural and educational access to their collections including digital collections.

Q: What works does the OWD apply to?

A: The OWD applies to the following categories of works:

- Published written works first published in a Member State;
- Films, audiovisual works and sound recordings;

- Unpublished works that have been publicly available with the consent of the rights-holders provided that it is reasonable to assume that the rights-holders would not oppose the use of the work according to the permitted uses of the work.

In each case the work must be one held in an Institution to which the OWD applies.

Q: What uses can be made of orphan works?

A: There are a number of permitted uses of orphan works:

- Making the work available to the public
- Reproducing the work for the purposes of digitisation, making available, indexing, cataloguing, preservation and restoration.

These uses must be in accordance with the public interest missions of the Institution invoking the OWD. Institutions can generate revenue, but only for cost recovery purposes.

Q: What about remuneration?

A: Member States are required to provide that a fair compensation is due to any rights-holder who appears and puts an end to the orphan status of the work. The circumstances and level of compensation are to be decided by the Member State in which the Institution using the orphan work is established.

The non-commercial nature of the use, the public interest mission of the institution and the possible harm to the rights-holder are to be taken into account in determining the amount.

Q: What is the implication of mutual orphan work recognition?

A: If a work is recognised as orphan in one Member State, then it is recognised as orphan in all Member States and may be used accordingly

Q: (When) does a work cease to be an orphan work?

A: If the rights-holder appears then the work will no longer be orphaned. Users can only continue using the work if the rights-holder consents.