

## Transposition of the “Directive of the European Parliament and of the Council on certain permitted uses of orphan works” into national legislation – Recommendations and FAQ

On 25 October 2012, the Orphan Works Directive (OWD) has been officially published and entered into force. Member States (MS) have now **two years** to transpose the Directive into national legislation.

We urge you to follow the implementation process in your country as close as possible, and to keep ACE informed so we can report back to the Commission, and eventually help you in the process.

Please pay attention that the national legislation does not fall behind what has been already achieved on European level. The very first step is to check who is the responsible body in your country for transposing the DOW.

This paper will summarize the main features of the OWD and hopefully help to answer some of your questions (*underlines ACE*).

Please feel free to contact us for any further clarification or doubt. This is vital to the future of all archives, and any step back in any Member State risks to endanger the transposition for all the others.

### Here you can find the text of the OWD

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32012L0028:EN:NOT>

## I. RECOMMENDATIONS

1. As a first step, please find out which is the responsible body in your country for transposing the OWD.

- Film heritage is clearly included in the text of the Directive.  
**Make sure that film is not excluded in your national law!**
- **Only institutions that are clearly designated in the legislative process can take advantage from the transposition of the Directive.**  
How the “designation” process works depends on the national law. The Directive is not more precise on this point.  
**Please check if your institution is/ will be/ formally designated!**

2. Beneficiaries of the OWD “are organisation as referred to in point (c) of Article 5(2) of Directive 2001/29/EC and film or audio heritage institutions **which operate on a non-profit making basis.**”(OWD, Recital 20).

**ACE recommends that all commercial or semi-commercial archives, also on national level, are excluded from the transposition of the Directive. The whole point of the OWD is that us, non-for-profit institutions that cared and conserved Orphan Works can make them available in the public interest. Letting for-profit or semi-for-profit archives**

**profit from the Directive means taking Orphans out of one drawer and lock them up into another!!!!**

3. Permitted uses of orphan works are limited to acts of reproduction for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration. To improve the OWD on national level, **ACE recommends that the interpretation of “making available” is as wide as possible to respond to the reality of today and to include ALL type of activities that are part of the beneficiary’s public interest mission including screenings, exhibitions, internet, and any other method that allows “making the works available to the public”. Limiting this to internet (as some as suggesting) does not make any sense.**

4. Diligent Search: Relevant sources for a diligent search are listed in the Annex of the OWD. However, it is up to the MS to determine the appropriate sources. Identification of Orphans must be an efficient and effective process: adding thousands of irrelevant steps is simply a way to stall the process. **Please pay attention that the list of sources is not unnecessarily extended on national level.**

## **II FAQ**

### **1. What kind of works are covered by the OWD?**

(Art. 1)

“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;”

The OWD **also** covers:

- **Embedded works** (e.g. photos in books, magazines etc.)
- **Unpublished works**
- **Partial orphan works** (if there are several rights holders, and you have identified and located one, you clear the rights with the rights holder who is known). An identified rights holder can give authorisation only in relation to the rights that he / she holds. The “rest” of the work remains an OW.

**Important Note!:** Photos are not covered!

### **2. Who can use an orphan work?**

Beneficiaries are publicly accessible libraries, educational establishments and museums, archives, film or audio heritage institutions and public-service broadcasting organisations, established in the Member States (MS).

These organisations can use orphan works in order to achieve aims related to their public-interest mission.

(Recital 20) “That exception or limitation should permit certain organisations, as referred to in point (c) of Article 5(2) of Directive 2001/29/EC and film or audio heritage institutions which operate on a non-profit making basis, as well as public-service broadcasting organisations, to reproduce and make available to the public, within the meaning of that Directive, orphan works, provided that such use fulfils their public interest missions, in particular the preservation of, the restoration of, and the provision of cultural and educational access to, their collections, including their digital collections. Film or audio heritage institutions should, for the purposes of this Directive, cover organisations designated by Member States to collect, catalogue, preserve and restore films and other audiovisual works or phonograms forming part of their cultural heritage.”

**Note: Check if your institution is “designated” by your government!**

### 3. How to identify an orphan work?

Definition:

“A work or a phonogram shall be considered 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 in accordance with Article 3”.

### 4. What does a “diligent search” imply?

- A diligent search must be performed title per title
- It must be performed in only one MS (for AV material in the country of production)
- In case of co-productions, the search must be conducted in all countries of production
- A diligent search must be carried out prior to the use of a work

**Film Heritage Institutions have to maintain records of their searches, the uses they are making of an orphan work, and of any change of the status of an orphan work. Just to do your research and keep a clear track of what you did. This is very important in case a rights holder shows up.**

MS shall take the necessary measures to ensure that this information is recorded in a “single publicly accessible online database established and managed by the Office for Harmonization in the Internal Market...” (Art. 3).

**The implementation of this central European database is still a work in progress, and as ACE we will do our best to understand how it will work.**

### 5. What kind of uses/ forms of exploitation are allowed?

Non-profit use (“in order to achieve aims related to their public-interest mission”).

What your institution is exactly allowed to do depends on your statutes.

Although the OWD was conceived as an internet specific instrument (and most precisely to serve the purposes of Europeana), the text is rather vague and states that permitted uses “are restricted to acts of reproduction for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration”.

The definition “making available” does not explicitly excludes any form of delivery and rightly so, we think.

**So we recommend to avoid that the transposition limits the uses to the internet.** Why not public screenings or other ways? Why allowing internet access and not, for example, the delivery of a DVD?

We should make the point that the Directive allows designated institution to “make available” Orphan works. This should not be restricted to one delivery method or another.

The initial Commission proposal also covered commercial uses, but the respective article has been skipped during the negotiation process by the Council.

**However, non-profit doesn’t mean that you must give free access to the material.**

“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.” (Art. 6.2)

**Note: Screenings and broadcasting of orphan works are not openly permitted, but they are not explicitly excluded in the final text of the Directive.**

**So, ACE recommends extending the permitted uses to all type of “access” that are part of the beneficiary’s public interest mission.**

## **6. What is “mutual recognition of the orphan work status”? (Art. 4)**

This means that once a work is recognised as an orphan work in a Member State, it shall be recognised as such across the European Union and the organisations will be able to make it available online in all Member States.

## **7. What happens if the rights holder appears?**

Member States must ensure that a rights holder can put at any time an end to the orphan works status. MS must ensure that the beneficiaries must indicate the name of identified rights holders in any use of an orphan work.

### **Fair compensation:**

MS shall provide that a fair compensation is due to rights holders that put an end to the orphan work status of their works or other protected subject-matter for the use that has been made by the organisations referred to in Article 1(1) of such works and other protected subject-matter in accordance with paragraph 1 of this Article.

Member States shall be free to determine the circumstances under which the payment of such compensation may be organised. The level of the compensation shall be determined, within the limits imposed by Union law, by the law of the Member State in which the organisation which uses the orphan work in question is established.

**Level of compensation:** “For the purposes of determining the possible level of fair compensation, due account should be taken, inter alia, of Member States’ cultural promotion objectives, of the non-commercial nature of the use made by the organisations in question in order to achieve aims related to their public-interest missions, such as promoting learning and disseminating culture, and of the possible harm to rightholders.” (Recital 18, p. 7)

Note: The proof of copyright ownership is not mentioned in the OWD.

Fair compensation: it is left to the MS to organise the payment. This may include the involvement of Collecting Societies – or the beneficiaries may organise the payment themselves. MS will determine the level of payment and the time when the payment is due.

**We recommend that you lobby so that the level of payment is defined in a way that protects the institutions from unjustified requests. For example, a share of the eventual income generated, AFTER the deduction of the digitisation costs.**

#### **8. What is the time frame for transposing the OWD into national law?**

The Directive must be transposed into national law by 29 October 2014. The laws and regulations must comply with the OWD. MS shall communicate to the Commission the text of the main provisions of national law, which they adopt in the field covered by the Directive (Art. 9)

#### **9. What is the legal status of the OWD?**

The OWD is a mandatory exception in addition to those provided for in Article 5 of the EU Copyright Directive (2001/29/EC).

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML>