



An Roinn Post, Fiontar agus Nuálaíochta  
Department of Jobs, Enterprise and Innovation

## **Regulatory Impact Analysis**

# **Transposition of the Orphan Works Directive**

**October 2014**

**Intellectual Property Unit  
Department of Jobs, Enterprise and Innovation**



OPTIONS			
Option No.	COSTS	BENEFITS	IMPACTS
1	<ul style="list-style-type: none"> <li>- No direct costs but would result in significant risk of EU fines and court actions.</li> </ul>	<ul style="list-style-type: none"> <li>- None</li> </ul>	<ul style="list-style-type: none"> <li>- Failure to comply with EU obligations and would incur infringement proceedings by the European Commission.</li> <li>- The State would be vulnerable to legal proceedings by affected parties.</li> <li>- No legislative framework for use of orphan works.</li> </ul>
2	<ul style="list-style-type: none"> <li>- Cost for beneficiary institutions to carry out diligent search.</li> <li>- Cost for beneficiary institutions of digitisation project for orphan works.</li> </ul>	<ul style="list-style-type: none"> <li>- Compliance with EU law.</li> <li>- Greater access for the public to orphan works, particularly online.</li> <li>- Use of funds generated under public private partnership to cover the costs associated with digitising orphan works.</li> <li>- Digitisation allowing for legitimate electronic preservation for fragile orphan works.</li> <li>- Business opportunity for third parties to carry out diligent searches on behalf of beneficiary institutions.</li> <li>- Potential for greater rights owner identification resulting from diligent search for works previously considered orphan works.</li> </ul>	<ul style="list-style-type: none"> <li>- No impact on competitiveness.</li> <li>- Compliance burden for beneficiary institutions to carry out diligent search in order to make use of orphan work.</li> </ul>

## Table of Contents

<b>Description of Policy Context and Objectives.....</b>	<b>5</b>
Introduction .....	5
Context .....	5
Objective .....	5
Main Elements of the Directive .....	6
<b>Identification and Description of Options .....</b>	<b>7</b>
Option 1 .....	7
Option 2.....	7
Chosen Option.....	7
Means of Transposition.....	7
<b>Analysis of Costs, Benefits and Impacts for all Options .....</b>	<b>8</b>
Costs .....	8
Benefits .....	8
Impacts .....	9
<b>Consultation .....</b>	<b>9</b>
<b>Enforcement and Compliance .....</b>	<b>10</b>
National Competent Authority .....	10
Diligent Search .....	10
Entry to Online Database .....	11
Orphan Works Approval Process .....	12
Process for Ending Orphan Work Status.....	12
<b>Review.....</b>	<b>13</b>
<b>Publication .....</b>	<b>13</b>

## Description of Policy Context and Objectives

### Introduction

The purpose of this document is to analyse the impact of transposing *Directive 2012/28/EU of the European Parliament and of the Council on Certain Permitted Uses of Orphan Works* (the Directive). The Directive came into force on 28 October 2012 and Member States are required to transpose its provisions into national law by 29 October 2014.

### Context

Orphan works are works such as newspaper or magazine articles, books or films that are still protected by copyright but for which the copyright owners cannot be located or identified in order to obtain copyright permissions to use the work in question. A study by the European Commission (May 2010)<sup>1</sup> provided a cautious estimate that 3 million books (13% of books still in copyright) and 200,000 films in Europe are orphans, and that 90% of the tens of thousands of individual photographs held in European libraries, museums and archives are orphans.

The digitisation and dissemination of orphan works poses a particular cultural and economic challenge: the absence of a known rights owner means that institutions are unable to obtain the required authorisation, for example, to digitise a book. That is why common rules on how to deal with such works were needed in order to proceed with large-scale digitisation projects.

As part of its Intellectual Property Rights Strategy, the European Commission adopted a proposal on 24 May 2011 to establish common rules on the digitisation and online display of so-called 'orphan works'. Directive 2012/28/EU of the European Parliament and of the Council on Certain Permitted Uses of Orphan Works<sup>2</sup> tackles the specific problem of the legal determination of orphan work status and its consequences in terms of permitted users and permitted uses of works or sound recordings considered to be orphan works.

### Objectives

The Directive applies to the following beneficiary institutions:

- publicly accessible libraries, educational establishments, museums;
- archives;
- film or audio heritage institutions;
- public service broadcasters (up to 31 December 2002).

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<sup>1</sup> Anna Vuopala: Assessment of the orphan works issue and costs for rights clearance, *EC DG InfoSoc, May 2010*, [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/info\\_centre/orphan\\_works/index\\_en.htm](http://ec.europa.eu/information_society/activities/digital_libraries/info_centre/orphan_works/index_en.htm)

<sup>2</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:299:0005:0012:EN:PDF>

The Directive provides for an exception to copyright law for these organisations which applies to the following categories of works that are first published in the EU and which are still protected by copyright but whose authors or other rights owners cannot be identified and located:

- works in the print sector (books, journals, magazines and newspapers);
- cinematographic and audio-visual works;
- sound recordings;
- Works embedded or incorporated in other works or phonograms (e.g. pictures in a book).

The Directive also applies to unpublished works (such as letters, manuscripts, etc.) under certain conditions.

These beneficiary institutions will be able to avail of an exception to copyright applicable in the EU, allowing them to digitise orphan works and make them publicly available online in all Member States. While the Directive allows for the reproduction and making available of an orphan work such as digitisation and online publication on an organisation's website, it does not allow for publication in a book or communication to the public by means of a TV programme.

The Directive includes embedded works and images but excludes stand-alone images such as photographs and paintings or other visual arts. There is a review clause in the Directive (Article 10) which could potentially allow for the possible inclusion of publishers within the scope of the Directive as well as stand-alone photos and other images at a later date.

### **Main Elements of the Directive**

**Identifying an orphan work.** A beneficiary institution (as defined above) that wishes to digitise and make the work available has to conduct a diligent search to find its rights owner. In this search, it will rely on prescribed sources such as databases and registries.

**Confirming an orphan work.** The Directive establishes that if a diligent search does not yield the identity or location of the rights owner, the work shall be recognised as an orphan work. This status shall then, by virtue of mutual recognition, be valid across the European Union. This implies that once a work is recognised as an orphan work, it shall be recognised as such across the European Union and the relevant institutions will be able to make it available online in all Member States. The Directive also foresees the establishment of a single European registry of all recognised orphan works that will be set up and run by the Office of Harmonisation for the Internal Market (OHIM), the European Trade Mark Office based in Alicante.

**Use of an orphan work.** The beneficiary institutions will be entitled to use orphan works to achieve aims related to their public interest mission. They will be allowed to conclude public-private partnerships with commercial operators and to generate revenues from the use of orphan works to cover the digitisation costs.

**End of orphan work status.** The Directive also foresees that Member States shall put in place a mechanism to allow a rights owner of a work which has been deemed an orphan work to assert his/her copyright and thereby end the orphan work status. Fair compensation for the use of the work may also be payable to the rights owner depending on the type and extent of the use of the work. Member States must make provision for fair compensation in the implementing legislation, but it is up to Member States to determine the circumstances under which such payment is to be organised.

## **Identification and Description of Options**

### **Option 1: Do nothing/No policy change**

This option would result in a failure to comply with our EU obligations and would in all likelihood result in prosecution by the European Commission through the Court of Justice of the European Union leading ultimately to the imposition of sanctions, such as daily fines, as well as leaving the State vulnerable to legal proceedings by affected parties.

### **Option 2: Transpose the Directive by Statutory Instrument under the European Communities Act 1972.**

This option would involve the transposition of the Directive into Irish law by Statutory Instrument. As there is currently no prescribed legislative framework in place for the use or digitisation of orphan works, the transposition of the Directive into Irish law will facilitate significant digitisation projects that could be undertaken by Irish libraries, museums and other beneficiary institutions. The transposition of the Directive will allow for the creation of a legal framework enabling such organisations to provide on-line access to orphan works contained in their collections through digital libraries and archives in line with their public interest mission.

### **Chosen Option**

The chosen option is Option 2, the transposition of the Directive by means of Statutory Instrument.

### **Means of Transposition**

The transposition of the Directive into Irish law by the amending of the existing Irish legislation by Ministerial regulations under section 3 of the European Communities Act 1972 (No. 27 of 1972).

## **Analysis of Costs, Benefits and Impacts for all Options**

### **Costs:**

#### **Option 1: Do nothing/No policy change**

There are no direct costs associated with Option 1. However, Ireland would face a substantial risk of significant lump sum and daily fines imposed by the Court of Justice of the European Union for the non-transposition of the Directive and the risk also of court damages and costs arising from affected parties taking proceedings against the State.

#### **Option 2: Transpose the Directive by Statutory Instrument under the European Communities Act 1972.**

**Exchequer:** There are no direct costs to the Exchequer.

**Cost for beneficiary institutions to carry out diligent search:** The carrying-out of a diligent search can be costly in terms of staff time and resources for beneficiary institutions depending on the type and circumstances of orphaning of the work. Should a beneficiary institution wish to make use of an orphan work under the terms of the Directive, it must carry-out a diligent search or engage a third party to do so on its behalf.

**Cost for beneficiary institutions of digitisation and making available of orphan works:** There is a cost implication for the digitisation and making available of orphan works, however, there is provision under Article 6(2) to enter into public private partnership arrangements, solely to cover the costs associated with these uses.

### **Benefits**

#### **Option 1: Do nothing/No policy change**

There are no benefits associated with Option 1.

#### **Option 2: Transpose the Directive by Statutory Instrument under the European Communities Act 1972.**

**Compliance with EU Law:** The implementation of option 2 would ensure Ireland's compliance with its obligations under EU law.

**Greater access for the public to orphan works:** The transposition of the Directive will result in greater public access to, and awareness of, orphan works, particularly online. The possibility to use funds generated under public private partnership to cover the costs associated with digitisation of orphan works could render the making available online of orphan works a cost neutral project for beneficiary institutions.

**Preservation of orphan works:** The digitisation of orphan works has the advantage of providing for legitimate electronic preservation of fragile orphan works.

**Rights owners:** As a result of beneficiary institutions carrying out a diligent search prior to the use of an orphan work, there will be greater potential for rights owner

identification in works previously considered orphan works and subsequent opportunities for the rights owner for the commercial exploitation of these works.

**Diligent search:** Under the provisions of the Directive there is a potential business opportunity for third parties to carry out diligent searches on behalf of beneficiary institutions.

### **Impacts**

#### **Option 1: Do nothing/No policy change**

There is a substantial risk of significant fines imposed by the Court of Justice of the European Union for the non-transposition of the Directive and the risk of court damages and costs arising from affected parties taking proceedings against the State.

#### **Option 2: Transpose the Directive by Statutory Instrument under the European Communities Act 1972.**

**National competitiveness:** As the Directive is required to be implemented in all Member States, there should not be any impact on competitiveness as all will be in a similar position.

**Compliance burden:** The carrying-out of a diligent search can be costly in terms of staff time and resources for beneficiary institutions depending on the type and circumstances of orphaning of the work. Should a beneficiary institution wish to make use of an orphan work under the terms of the Directive, it must carry-out a diligent search or engage a third party to do so on its behalf.

There are no adverse impacts for the socially excluded and vulnerable groups/ North-South / East-West relations / gender balance / poverty proofing / rural communities / the environment / consumer and competition / the rights of citizens.

### **Consultation**

A public consultation by the Department of Jobs, Enterprise and Innovation was launched on 20 March 2014. The [consultation paper](#) was posted onto the Department's website in the Copyright pages of the Intellectual Property section. This was accompanied by an awareness-raising campaign of the consultation process to targeted stakeholders as well as to the general copyright community through the copyright circulation list maintained by the Department. Views were sought on any or all aspects of the transposition of the Directive into Irish law. The consultation closed on Wednesday 24<sup>th</sup> April 2014. There were nine submissions to the consultation received by the closing date.

The Irish Patents Office was suggested by the Department of Jobs, Enterprise and Innovation as the National Competent Authority for Orphan Works under the terms of the Directive. This was welcomed by stakeholders with the proviso that the Office should be adequately resourced for carrying out this function.

The Directive has an optional provision whereby Member States can opt to limit the application of the Directive to works and phonograms which have been deposited in beneficiary organisations before 29 October 2014. The rationale for the inclusion of this provision in the Directive was to provide a safety net to address concerns on moral rights and to limit the use of unpublished works to the past. The preliminary view of the Department: that the provision would impose an arbitrary restriction on the use of any orphan work which is already in existence but has not as yet been deposited in a relevant institution, was set out in the consultation paper and submissions were invited in this regard. There was widespread agreement from stakeholders that this optional provision should not be implemented and there were no submissions to the contrary.

The Annex to the Directive provides a list of appropriate sources to consult when carrying out a diligent search for different categories of works. The consultation paper requested suggestions for inclusion of any further sources that should be added to this list, under the relevant headings, in an Irish context. Several stakeholders requested further time for consultation on this matter and an extension for submission of responses on this item was accorded until 30 May 2014.

There were representations in the submissions from stakeholders for the consideration of matters which are outside the scope of the Directive: the inclusion of stand-alone images and the introduction of an Irish orphan works licencing scheme. These submissions were noted by the Department and will form part of wider consideration in the copyright legislative modernisation agenda which is currently ongoing both at national and European level.

## **Enforcement and Compliance**

### **National Competent Authority**

For the purposes of the transposition of the Directive, the Irish Patents Office will be nominated as the National Competent Authority for Ireland (NCA). The role of the NCA will be to act as the receiving office for declarations from those organisations attesting to the fact that a diligent search has been carried out and requesting that the work be designated as an orphan work.

### **Diligent Search**

Before a work or phonogram can be considered an orphan work, a diligent search for the rights owner in the work or phonogram must be carried out in good faith. This includes rights owners in works and other protected subject-matter that are embedded or incorporated in the work or sound recording and must be carried out before any use of the work is made.

A diligent search must be carried out in the Member State where the work was first published or broadcast. In the case of cinematographic or audio-visual works, the diligent search shall be carried out in the Member State of the producer's headquarters or habitual residence. If there is evidence to suggest that relevant information on rights

owners is to be found in other countries, sources of information available in those other countries must also be consulted.

Beneficiary organisations must retain all evidence related to the diligent search, such as a search record and the result of the search. The search record should be kept on file in order for the organisation to substantiate that the search was diligent. The Directive allows for the diligent search to be carried out by the potential user or by third party organisations. Third party organisations may charge a fee for carrying out a diligent search.

Under the terms of the Directive, proposed users will be required to provide the following information to the national competent authority i.e. the Irish Patents Office through the OHIM Database:

- (a) the results of the diligent searches that the organisation has carried out and which have led to the conclusion that a work or a sound recording is considered an orphan work;
- (b) the use that the organisation intends to make of the orphan work in accordance with the Directive;
- (c) any changes in the orphan work status of works and sound recordings that the organisations use;
- (d) the relevant contact information of the organisation concerned.

Under Article 3(2), there is an annex to the Directive which provides a list of appropriate sources to carry out a diligent search for different categories of works. Member States have been directed to consult with users and rights owners in preparing a list of relevant sources including at least those set out in the Annex of the Directive for different categories of works.

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 legislation are available under the Copyright and Related Rights Act 2000 (as amended).

### **Entry to Online Database**

The Office of Harmonisation for the Internal Market (OHIM) has been tasked<sup>3</sup> with the creation and management of a single publicly accessible online database to record orphan works throughout the EU. The OHIM database will consist of a user interface which will be used by beneficiary organisations to register an orphan work.

The beneficiary institution will be required to submit information on the following:

- General information such as contact details;
- Information on the orphan work e.g. title, category of work;
- Results of the diligent search;

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<sup>3</sup> Regulation (EU) No 386/2012 of the European Parliament and of the Council of 19 April 2012 on entrusting the Office for Harmonization in the Internal Market (Trade Marks and Designs) with tasks related to the enforcement of intellectual property rights, including the assembling of public and private-sector representatives as a European Observatory on Infringements of Intellectual Property Rights.

- Use of the orphan work

When a beneficiary institution is registering a new orphan work, they will be presented with a drop down menu to choose the registered NCA for their country. Once an application is completed and saved it will be transmitted by the NCA to OHIM.

The online database became operational on 28 October and is accessible at <https://oami.europa.eu/ohimportal/en/web/observatory/orphan-works-database>

### **Orphan Works Approval Process**

In Ireland, the Irish Patents Office will receive, by electronic means, a self-declaration from the organisation concerned that they have conducted a diligent search in good faith and request that orphan work status should be accorded to the work in question. In practice this information will be received through the mechanism of the OHIM Database as set out above and processed by the Irish Patents Office.

Once a work has been recognised as an orphan work, it shall be recognised as such across the European Union and the user will be able to make it available online in all Member States and for use by other relevant institutions in line with the Directive. Once a work has been recorded on the database it will be searchable by public users who search the database.

### **Process for Ending Orphan Work Status**

In the event that a work has been wrongly attributed orphan work status, rights owners are entitled to put an end to this status when they come forward to claim their rights in the work or other protected subject-matter under Article 5 of the Directive.

Rights owners that put an end to the orphan work status of a work or other protected subject-matter are entitled to receive fair compensation for the use that has been made of their works or other protected subject-matter under Article 6 (5) of the Directive, to be determined by the Member State where the institution that uses an orphan work is established. Member States are free to determine the circumstances under which the payment of such compensation may be organised, including the point in time at which the payment is due.

In determining the possible level of fair compensation, Recital 18 states that due account should be taken of Member States' cultural promotion objectives, of the non-commercial nature of the use made by the institutions 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 the rights owner.

Fair compensation should be agreed between a rights owner and the beneficiary institution. In the event of a dispute arising from the determination of the payment of fair compensation under the terms of the Directive, this can be referred to the Controller of Patents, Designs and Trademarks for determination.

The change in status of the work which has its orphan status ended must be communicated by the beneficiary institution through the online database managed by OHIM.

## **Review**

Under the terms of the Directive, the European Commission has committed that by 29 October 2015, and at annual intervals, it will submit a report concerning the possible inclusion in the scope of application of the Directive of publishers and of works or other protected subject-matter not currently included in the scope, and in particular stand-alone photographs and other images.

The European Commission has also committed to submitting a report on the application of the Directive, in the light of the development of digital libraries, to the European Parliament, the Council and the European Economic and Social Committee by 29 October 2015.