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Department of Jobs, Enterprise and Innovation

**Consultation on Transposition of the Orphan Works Directive and the Use of
Orphan Works under Irish Law**

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Consultation on Transposition of the Orphan Works Directive and the Use of Orphan Works under Irish Law

A. Overview

1. Orphan Works

Orphan works are works such as books, newspaper or magazine articles, or films that are still protected by copyright but for which the copyright holders 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)¹ 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 right holder 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 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 Works² 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 phonograms (sound recordings) considered to be orphan works. 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.

2. Scope of the Directive

The Directive applies to

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

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

- works in the print sector (books, journals, magazines and newspapers)
- cinematographic and audio-visual works
- phonograms
- 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 organisations 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 on-line in all Member States. While the Directive allows for the reproduction and making available of an orphan work such as

¹ 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
² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:299:0005:0012:EN:PDF>

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 under the scope of the Directive as well as stand-alone photos and other images at a later date.

3. Main Elements of the Directive

Identifying an orphan work. A beneficiary organisation (as defined above) that wishes to digitise and make the work available has to conduct a diligent search to find its rightsholder. 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 rightsholder, 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 organisations 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 organisations 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.

Revocation of orphan work status. The Directive also foresees that Member States shall put in place a mechanism to allow a rightsholder 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 can also be payable to the rightsholder depending on the type and extent of the use of the work. Member States must make provision for fair compensation, but it is up to Member States to determine the circumstances under which such payment is to be organised.

B. Implementation of the Directive

1. Status Quo of Orphan Works

Orphan works are not defined in the Copyright and Related Rights Act, 2000 (as amended) and as such, the absence of a known rightsholder means that users are currently unable to obtain the required authorisation to use the work in question. As there is 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.

2. Permitted Uses of Orphan Works under the Terms of the Directive

Member States are to provide in their national law for an exception or limitation on the rights of reproduction and representation of authors in order to authorise the relevant institutions to make

the works available to the public and to reproduce same, in particular for the purpose of their digitisation, indexation, restoration and preservation.

It is intended under the Directive that these uses are restricted solely 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.

Article 6 contains a provision which would allow the relevant organisations to generate revenue from the use of an orphan work for the exclusive purpose of covering the cost of digitising and making the work available to the public. The Directive is without prejudice to the freedom of contract of such organisations in the pursuit of their public-interest missions, particularly in respect of public-private partnership agreements. Any use of an orphan or part-orphan work must indicate the name of any known author or identified rights holder.

3. Envisaged Process for the Use of an Orphan Work

National Competent Authority

For the purposes of the transposition of the Directive, it is proposed that the Irish Patents Office will be nominated as the national competent authority for Ireland. The role of the national competent authority 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 rightsholders in the work or phonogram must be carried out in good faith. This includes rightsholders in works and other protected subject-matter that are embedded or incorporated in the work or phonogram 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 rightsholders 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 phonogram 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 phonograms 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 rightsholders 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 remain available as before.

Entry to Online Database

The Office of Harmonisation for the Internal Market (OHIM) has been tasked³ with the creation and management of a single publicly assessable 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 organisation 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
- Use of the orphan work

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

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.

4. Process for Revocation of Orphan Work Status

In the event that a work has been wrongly attributed orphan work status, rightsholders 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.

Rightsholders 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 organisation that uses an orphan work is established. Member States are

³ 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.

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 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 rightsholders.

It is suggested that fair compensation should be agreed between a rightsholder 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, it is proposed that this could be referred to the Controller of Patents, Designs and Trademarks for determination.

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

5. Optional Provision re Deposits of Orphan Works before 29 October 2014

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.

It is the preliminary view of the Department that this 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.

6. Deadline for Transposition of the Directive : 29th October 2014

Member States are instructed to bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 29th October 2014. The provisions adopted must reference the Directive and the text must be communicated to the Commission.

There is a review clause in Article 10 of the Directive where the Commission undertake to keep the developments in this area under review and report annually on the possible inclusion of publishers and of works or other protected subject-matter not currently included in the scope of the Directive, and in particular stand-alone photographs and other images.

The Commission have also undertaken to submit to the European Parliament, the Council and the European Economic and Social Committee by 29 October 2015, a report on the application of the Directive, in the light of the development of digital libraries. When necessary, in particular to ensure the functioning of the internal market, the Commission will submit proposals for amendment of the Directive.

C. Consultation on Transposition of the Orphan Works Directive and the Use of Orphan Works under Irish Law

1. Submissions

Submissions are welcome in relation to the transposition of the Directive in general and in particular in response to the following aspects:

1. The Annex to the Directive provides a list of appropriate sources to consult when carrying out a diligent search for different categories of works. Are there any further sources that should be added to this list, under the relevant headings, in an Irish context?
2. It is the preliminary view of the Department that it is unnecessary to introduce the optional provision contained in Article 1(3) of the Directive which would limit the application of the Directive to works that have been deposited with beneficiary organisations before 29 October 2014. Submissions on this matter are welcome from all interested parties.

Respondents are requested to make their submissions in writing where possible, by email.

Submissions to the consultation should be sent to copyright@djei.ie or posted to:

Orphan Works Consultation,
Copyright Section,
Intellectual Property Unit,
Department of Jobs, Enterprise and Innovation,
Kildare Street,
Dublin 2.

The closing date for receipt of submissions is **Wednesday 23rd April 2014**. Any questions regarding the consultation can be emailed to copyright@djei.ie or contact Síona Ryan (01 6312591).

2. Confidentiality of Submissions

Contributors are requested to note that it is the Department's policy to treat all submissions received as being in the public domain unless confidentiality is specifically requested. Respondents are, therefore, requested to clearly identify material they consider to be confidential and to place same in a separate annex to their response, labelled "confidential". Where responses are submitted by email, and those emails include automatically generated notices stating that the content of same should be treated as confidential, contributors should clarify in the body of their emails as to whether their comments are to be treated as confidential.

3. Relevant provisions of Freedom of Information Act 1997 (as amended)

Respondents' attention is drawn to the fact that information provided to the Department may be disclosed in response to a request under the Freedom of Information Acts. Therefore, should you consider that any information you provide is commercially sensitive, please identify same, and specify the reason for its sensitivity. The Department will consult with any potentially affected respondent regarding information identified as sensitive before making a decision on any Freedom of Information request.