

Kluwer Copyright Blog

The Orphan Works Directive is broken but the Commission won't fix it!

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In August 2020, a review of the [Orphan Works Directive \(2012/28/EU\)](#), or OWD, was initiated by the European Commission. The study concluded that the OWD has had limited practical impact, but the European Commission has not proposed any modifications to the Directive. This post provides a short introduction to the OWD, an overview of the highlights of the independent study. The post ends with an alternative opportunity for cultural heritage institutions to deal with the same challenge that OWD tried to address.

Overview of the OWD

The OWD, was intended to facilitate the digitisation and dissemination of cultural heritage materials the rightholders of which were difficult to identify or locate (Recital 3 OWD). The Directive does this through a mandatory exception for copyright infringement that allows cultural heritage institutions and educational institutions to reproduce and make available orphan works from their collections to the public. The provision only applies to literary works, audiovisual work, phonograms, and visual works embedded into these works e.g. books (article 1(2) OWD).

The cultural heritage institutions that want to use this system must conduct a diligent search for the rightholders (article 3 OWD). The lack of concluding results leads to a work being considered orphan. This includes checking a list of mandatory sources determined by the Directive and further refined by each Member State. After going through this process, cultural heritage institutions need



'Laziness' by Ramón Casas, provided by the Museu Nacional d'Art de Catalunya, available [here](#)

to register the work at the [EUIPO Orphan works database](#) (or via a national intermediary in certain Member States).

Since its adoption, the Directive was met with strong scepticism from the cultural heritage sector. A system based on a lengthy search for rightholders with a possible compensation at the end looked like the usual rights clearance nightmare, disguised as an exception to copyright. Some strong-willed cultural heritage institutions made an effort to use the system, and only a few succeeded. As a result, the impossibility to disseminate valuable cultural heritage remained.

The 2022 study on the application of the OWD and the flaws of the OWD

Over seven years later than the date established in Article 10 OWD, the review of the Directive was initiated. On the basis of desk research, a stakeholder survey, and interviews, an independent “Study on the application of the Orphan Works Directive” commissioned by the European Commission was conducted in 2022 by the Belgian consultancy “Milieu”. The study confirms that the number of works registered as orphan ‘represents a tiny proportion of the estimated orphan works existing in the collections of cultural heritage institutions across the EU’ (page 84). The [Orphan Works Database](#) contains 6,031 works as of March 6th 2023, whereas a 2001 estimate showed for instance that up to 1.25 billion periodicals could be orphan works. (idem, footnote 131). All in all, it confirms that the OWD has not achieved its objectives.

Various aspects of the OWD were identified as particularly challenging and causing this difference between the numbers of potentially existing orphan works and orphan works registered in the database, namely:

1. The scope in terms of the types of cultural heritage items that can be registered as orphan is very limited.
2. The inclusion of embedded works (for example, the multiple works contained in a scrapbook) amongst materials the rightholders of which have to be searched for makes the determination extremely time-consuming and almost impossible. The [digitisingmorgan.org](#) project is a great example of this.
3. The narrow permitted uses, consisting of making copies for digitisation purposes and disseminating online via non-commercial websites are problematic. Half of the cultural heritage institution respondents of the study believe that non-commercial offline uses should be permitted (page 88).
4. The mandatory sources to be consulted as part of the diligent search for rightholders are often too many, irrelevant and difficult to access. Pertinent sources are sometimes not included in local acts or regulations.
5. The time and resources that an institution needs to dedicate to conducting a diligent search is disproportionate, particularly given that completing this process provides no guarantee that the institution will always be able to use the work lawfully.
6. The EUIPO Orphan Works database can be cumbersome when working with large datasets and is not sufficiently interoperable with the repositories of cultural heritage institutions.
7. The insufficient level of clarity regarding the compensation that rightholders can claim strongly disincentives cultural heritage professionals from relying on this scheme.

The results of the public consultation conducted by Milieu with 87 respondents, as part of the independent study, show that only 24% of the cultural heritage institutions respondents ‘believe that the [OWD] has led to significant improvements in the digitisation and dissemination of orphan works’ (page 84). It is worth noting that the results of this part of the study mainly includes institutions who have succeeded to work with the OWD and managed to overcome the administrative barriers to using the system, which can lead to overestimating the effectiveness or applicability of the OWD. Even then, the overall results of the study show a failed Directive.

On the basis of the independent study, the European Commission acknowledged in a [Report on the application of the Orphan Works Directive](#) that *‘the [orphan works] Directive’s mechanism has been rarely used in practice and its relevance as a potential tool for the mass digitisation of cultural heritage has therefore proven to be limited’*. It also notes that *‘there are practical difficulties affecting the Directive’s efficiency, especially regarding specific requirements for the diligent search’*.

In light of these findings, it would be reasonable to expect that the Commission initiates a legislative procedure to improve the current regime. Instead, the Commission does not propose any modifications to the OWD or measures to ensure that it has a bigger impact. The Directive will therefore continue to exist as it is, with no changes to its scope or its system. The ‘practical difficulties’ that the Commission acknowledges in its conclusions, which in our view stem from the regime designed in the OWD rather than the Member States’ implementation or practices, will continue to exist.

Contrary to the Commission’s position, we believe that the OWD should be subject to several improvements. These include, to name a few, broadening its scope of application to include any type of material in the collections of cultural heritage institutions, in particular photographic works; making the consultation of mandatory sources optional; removing the obligation to conduct a diligent search on ‘embedded’ materials; expanding the permitted uses of orphan works; adjusting the ‘diligent search requirements’ to be satisfied by reasonable efforts to be conducted in good faith; and removing the possibility for rightholders to claim compensation for the use made of the orphan works in line with the OWD.

A solution in the out of commerce works system?

In the meantime, it continues to be crucial to find a solution that addresses the challenge of digitising and disseminating cultural heritage items the copyright of which cannot be cleared, and in fact, the adoption of the [Copyright in the Digital Single Market \(2019/790/EU\) Directive](#) (CDSM Directive) offers some light at the end of the tunnel.

The CDSM Directive created a legal solution so that cultural heritage institutions from across the European Union can share online out of commerce works (OOCWs) without the need to ask rightholders for permission. The OOCWs provisions in the CDSM Directive are an important opportunity for many cultural heritage institutions to overcome one of their most important copyright problems.

For this purpose, the CDSM Directive introduces an extended collective licensing system and a

fall-back exception for cultural heritage institutions to digitise and make available online copyrighted materials in their collections that are out of commerce. Unlike the OWD, no type of material is excluded from this system, no diligent search for rights holders is required, and no compensation can be claimed. Only a “reasonable effort” is required to verify that the materials in question are not in commercial circulation, followed by a declaration through a database run by the EUIPO.

However, to make OOCWs available online, a licence needs to be concluded with a collective management organisation (CMO) that is, on the basis of its mandates, sufficiently representative of the type of materials and of the rights (Article 8(1)(a) CDSM). If no such organisation exists, the fallback exception becomes applicable (article 8(2) CDSM) and no permission is required.

In this regard, it is crucial the Member States clearly define the requirements to consider CMOs sufficiently representatives, taking into account the category of rights managed, the ability to manage the rights, the creative sector in which CMOs operate, and whether they cover a significant number of rightholders for the type of works or other materials for the relevant type of use in accordance with [Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market \(2014/26/EU\)](#).

The OWD and the CDSM Directive’s OOCW provisions now coexist as two distinct options that cultural heritage institutions can rely on for clearing rights. They offer different approaches, but overlap in some of the types of materials that fall within their scope. We can assume that all orphan works are necessarily also OOCWs, given that commercial exploitation would require permission by an (identified) rightholder.

Given that the OWD has only ‘partially (sic) fulfilled the goal of facilitating the mass digitisation of orphan works’, it is even more important that Member States transpose the out of commerce works provisions in full respect of the scope and requirements set out in the CDSM Directive.

To ensure that the OOCWs system works in practice, it is necessary to encourage stakeholders dialogue between cultural heritage institutions, collective management organisations and rights holders (article 11 CDSM).

The authors look forward to seeing the out of commerce works system become more successful than the OWD. If not, we will be back with another post in a couple of years!

This post is based on an earlier [publication](#). The authors are part of the Europeana Network Association’s [Europeana Copyright Community](#), which has a [Working Group on Out Of Commerce works](#).

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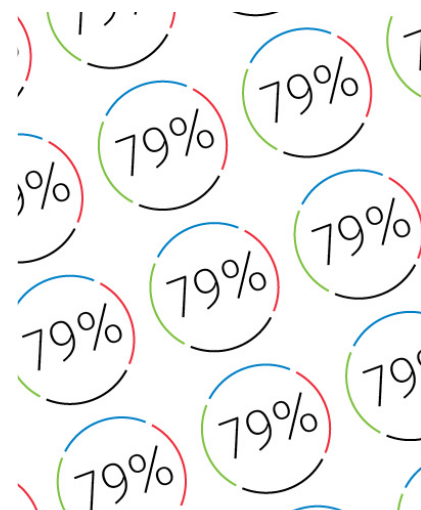
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