



Study on the application of the Orphan Works Directive (2012/28/EU)

Final report

Written by Milieu
April 2021



EUROPEAN COMMISSION

Directorate-General of Communications Networks, Content & Technology
Directorate R – Resources and Support
Unit R2 – Administration and Finance

Study on the application of the Orphan Works Directive (2012/28/EU)

Final report



List of authors

Jennifer McGuinn

Jūlija Sproģe

Ela Omersa

Camille Borrett

Dr. Prof. Maurizio Borghi

Dr. Prof. Lucie Guibault

By the European Commission, Directorate-General of Communications Networks, Content & Technology

The information and views set out in this publication are those of the author(s) and do not necessarily reflect the official opinion of the Commission. The Commission does not guarantee the accuracy of the data included in this study. Neither the Commission nor any person acting on the Commission's behalf may be held responsible for the use which may be made of the information contained therein.

The European Commission is not liable for any consequence stemming from the reuse of this publication.

Luxembourg: Publications Office of the European Union, 2021

© European Union, 2021

The reuse policy of European Commission documents is implemented based on Commission Decision 2011/833/EU of 12 December 2011 on the reuse of Commission documents (OJ L 330, 14.12.2011, p. 39).

For any use or reproduction of elements that are not owned by the European Union, permission may need to be sought directly from the respective rightholders.

Abstract

The Orphan Works Directive was created to improve legal certainty across the EU for the digitisation and dissemination of a copyright-protected work for which rightholders are impossible to identify or uncontactable. In particular, the Directive was intended to fill the gap between the public-interest mission of cultural heritage institutions to share their works with the general public and the protection of rightholders. The aim of this report is to assess and justify for possible options to improve the application and effects of the Directive. It presents factual information on the actual application of the Directive and provides an objective quantitative and qualitative assessment of the implementation of the Directive's provisions. Chapter 2 of the report evaluates the overall effectiveness of the Directive in achieving its main objective, while Chapter 3 identifies possible recommendations to improve the implementation of the Directive, including possible amendments.

Résumé

La directive sur les œuvres orphelines a pour objectif de créer un cadre juridique à travers l'UE pour faciliter la numérisation et la diffusion d'œuvres protégées par le droit d'auteur pour lesquelles les titulaires de droits sont impossibles à identifier ou à joindre. La directive vise en particulier à combler le fossé entre l'intérêt public de la diffusion du patrimoine culturel Européen et le droit à la rémunération des titulaires de droits. L'objectif de cette étude est d'évaluer différentes possibilités d'actions visant à améliorer l'application et l'efficacité de la directive. Pour ce faire, l'étude présente des informations factuelles sur la transposition de la directive ainsi qu'une évaluation quantitative et qualitative de sa mise en œuvre. Le chapitre 2 de l'étude analyse l'efficacité globale de la directive dans la réalisation de son objectif principal. Le chapitre 3 identifie de possibles recommandations pour améliorer la mise en œuvre de la directive, y compris de possibles amendements.

TABLE OF CONTENTS

ABSTRACT	5
LIST OF FIGURES.....	9
LIST OF TABLES	9
LIST OF BOXES.....	9
COUNTRY CODES.....	11
ABBREVIATIONS AND ACRONYMS	12
DEFINITIONS	14
EXECUTIVE SUMMARY	16
SYNTHÈSE	21
1. INTRODUCTION AND METHODOLOGY	27
1.1. Study objectives and scope	27
1.1.1. Objectives and scope.....	27
1.1.2. Structure of this report.....	27
1.2. Background and context of the study	27
1.2.1. Legal and policy background	27
1.2.2. Orphan Works Directive and its transposition	30
1.2.3. National legal and policy developments in view of the Digital single Market Directive.....	36
1.3. Methodology	37
1.3.1. Literature review	37
1.3.2. Country-level research	37
1.3.3. Stakeholder consultation.....	37
1.3.4. Stakeholder interviews.....	40
2. OVERVIEW OF IMPLEMENTATION AND EFFECTIVENESS OF THE ORPHAN WORKS DIRECTIVE	42
2.1. Definitions and concepts	42
2.1.1. Orphan works	42
2.1.2. Orphan works with several rightholders	42
2.1.3. Anonymous and pseudonymous works	43
2.1.4. Musical works and phonograms.....	44
2.2. Scope of the Orphan Works Directive.....	44
2.2.1. Types of beneficiaries (subjective scope).....	44
2.2.2. Types of works and/or materials (objective scope)	46
2.2.3. Cut-off dates.....	48
2.3. Permitted uses	49
2.4. Diligent search	51
2.4.1. Definition of a diligent search	52
2.4.2. List of sources	55
2.4.3. Diligent search procedure	61
2.4.4. Diligent search with cross-border element.....	65
2.4.5. Presumptions and their relevance for diligent search	66
2.5. The EUIPO database and national databases.....	68

2.5.1.	Orphan works databases and their interoperability	68
2.5.2.	Contents of the EUIPO database	69
2.5.3.	Effectiveness of the EUIPO database	70
2.6.	Mutual recognition	71
2.7.	End of orphan work status	71
2.7.1.	Procedure to put an end to an orphan work status	74
2.7.2.	Compensation for rightholders	74
2.8.	Coherence and alternatives	76
2.8.1.	Coherence with other areas of law	77
2.8.2.	Coherence with other regulatory schemes	77
2.8.3.	Coherence with regulations on out-of-commerce works	80
3.	KEY CONCLUSIONS	84
3.1.	Use of the orphan works exception	84
3.2.	Key strengths of the OWD system	84
3.2.1.	Transposition and coherence with copyright and other rules	85
3.2.2.	No extra fees and no time limitations	85
3.2.3.	Mutual recognition	85
3.2.4.	Reliability of a diligent search	86
3.2.5.	Ease of ending orphan work status	86
3.2.6.	Examples of best practice	87
3.3.	Key issues with the OWD system	87
3.3.1.	Issues with the scope and permitted uses of the Directive	87
3.3.2.	Issues with diligent search and the list of sources	88
3.3.3.	Issues with the EUIPO database	90
3.3.4.	Issues with redress for rightholders	90
3.3.5.	National specificities	91
3.3.6.	Overlaps between the OWD and other regulatory schemes	91
3.4.	Key conclusions	92
4.	RECOMMENDATIONS	97
	REFERENCES	102
	ANNEX I: DETAILED ANALYSIS OF NATIONAL IMPLEMENTATION	114
	ANNEX II: SURVEY REPORT	168
	I – About the respondent	169
	II – Is the Directive effective?	173
	<i>Overall effectiveness of the OWD</i>	173
	<i>Scope of the OWD</i>	176
	<i>Permitted uses of orphan works</i>	180
	<i>Effectiveness of the diligent search</i>	181
	<i>Effectiveness of putting an end to the orphan work status</i>	186
	<i>Effectiveness of the mutual recognition system</i>	191
	<i>Effectiveness of the EUIPO database</i>	192
	III – Coherence and alternatives in the approach to the OWD	198
	<i>Overview of stakeholder’s assessment</i>	198
	<i>Stakeholder views on rules on anonymous or pseudonymous works</i>	198
	<i>Stakeholder views on rules on out-of-commerce works</i>	199

Stakeholder views on extended collective licensing (ECL) schemes 201
Stakeholder views on the rules on works in the public domain 202

List of Figures

Figure 1: Overview of stakeholder views	17
Graphique 1: Aperçu de l’avis des parties intéressées.....	23
Figure 2: What type of beneficiary organisation do you represent? (N=29)	39
Figure 3: Respondents, by stakeholder type (N=87).....	39
Figure 4: Which sector(s) is your organisation active in? Multiple answers possible (N=87)	40
Figure 5: Breakdown of respondent sectors (N=87)	40
Figure 6: If yes, which other types of institutions should be included in the scope of the OWD? Please mark all that apply. (N=28)	46
Figure 7: Based on your experience, how would you assess the following difficulties linked to the sources to be consulted for diligent searches?	60

List of Tables

Table 1: Overview of national transposition and application dates	31
Table 2: OWD soft law and guidelines.....	33
Table 3: Overview of relevant projects set up to facilitate implementation of the OWD	35
Table 4: Responses by country	38
Table 6: Overview of the national transposition of the list(s) of sources	56
Table 7: Overview of national transposition of the diligent search procedure	61
Table 8: Overview of national transposition of the end of orphan work status	72
Table 9: Comparison of the OWD and the national licensing schemes for orphan works	79
Table 10: Overview of national implementation in relation to the use of the OWD	94
Table 11: Recommendations	98
Table 13: Musical work definition	114
Table 14: Phonogram definition	114
Table 15: Overview of national definitions of diligent search	116
Table 16: Overview of national diligent search requirements	118
Table 17: Overview of national rules in cases with cross-border elements	129
Table 18: Overview of national presumptions	132
Table 19: Rules on the right to put an end to an orphan work status	147
Table 20: Rules on fair compensation	153
Table 21: Overview of national orphan works databases	164

List of Boxes

Box 1: Article 9(1) of the OWD	31
Box 2: Article 2(1) of the OWD	42
Box 3: Article 2(2), (3) and (4) of the OWD	42
Box 4: Article 2(5) of the OWD	43
Box 5: Article 1(1) of the OWD	44
Box 6: Article 1(2), (3) and (4) of the OWD	46
Box 7: Article 6(1) and (2) of the OWD.....	49
Box 8: Article 6(4) of the OWD	50

Box 9: Article 3(1) of the OWD	52
Box 10: Article 3(2) of the OWD	55
Box 11: Annex to the OWD	55
Box 12: Article 3(5) and (6) of the OWD	61
Box 13: Article 3(3) and (4) of the OWD	65
Box 14: Article 3(6) of the OWD	68
Box 15: Article 4 of the OWD – Mutual recognition of orphan work status	71
Box 16: Article 5 of the OWD – End of orphan work status	74
Box 17: Article 6(5) of the OWD	74
Box 18: Article 7 of the OWD - Continued application of other legal provisions.....	77

Country codes

Country code	Country name
AT	Austria
BE	Belgium
BG	Bulgaria
CZ	Czechia
CY	Cyprus
DE	Germany
DK	Denmark
EE	Estonia
EL	Greece
ES	Spain
FI	Finland
FR	France
HR	Croatia
HU	Hungary
IE	Ireland
IS	Iceland
IT	Italy
LI	Liechtenstein
LT	Lithuania
LU	Luxembourg
LV	Latvia
MT	Malta
NL	The Netherlands
NO	Norway
PL	Poland
PT	Portugal
RO	Romania
SE	Sweden
SI	Slovenia
SK	Slovakia
UK	United Kingdom
US	United States of America

Abbreviations and acronyms

Abbreviation or acronym	Meaning
764/2013	<i>Laki orpoteosten käyttämisestä</i>
846/2014	Finish Decree of the Ministry of Education and Culture on the Use of Orphan Works (<i>Opetus- ja kulttuuriministeriön asetus orpoteosten käyttämisestä</i>)
APIs	Application Programming Interfaces.
ARROW	Accessible Registries of Rights Information and Orphan Works towards Europeana
ATGTI	<i>Lietuvos Respublikos autorių teisių ir gretutinių teisių įstatymas</i>
Autorský zákon	<i>Zákon č. 185/2015 Zb. z 1.júla 2015</i>
CMO(s)	Collective management organisation(s)
CRRA	Bulgarian Copyright and Related Rights Act (<i>Закон за авторското право и сродните му права, В сила от 01.08.1993 г., Отразена деноминацията от 05.07.1999 г</i>)
Decree	Slovenian Government Decree determining the method of calculation and payment of fair compensation for the use of orphan works in the case of the end of orphan work status (<i>Uredba o določitvi načina izračunavanja in plačila pravičnega nadomestila za uporabo del, ki jim preneha status osirotelega dela</i>)
DOI	Digital object identifier
DSM Directive	Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC
ECL	Extended collective licensing
EEA	European Economic Area
EnDOW	Enhancing access to 20 th century cultural heritage programme
EU	European Union
EUIPO	European Union Intellectual Property Office
EUIPO database	EUIPO Orphan Works Database
FAQ(s)	Frequently Asked Questions
HIPO	Hungarian Intellectual Property Office
HUF	Hungarian Forint
IP	Intellectual Property
IPO	UK Intellectual Property Office
MoU	Memorandum of Understanding
NCA(s)	National competent authority(-ies)

Abbreviation or acronym	Meaning
NGO	Non-government organisation
OHIM	Office for Harmonisation in the Internal Market
OWD	Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works
Sztj	Hungarian Copyright Act (<i>A szerzői jogról szóló 1999. évi LXXVI. törvény</i>)
TRLPI	Law 21/2014 of 4 November modifying the Consolidated Text of the Intellectual Property Law (<i>Texto Refundido de la Ley de Propiedad Intelectual</i>)
WER	Code of Economic Law (<i>Wetboek Economisch Recht</i>)
ZAPSP	Croatian Copyright and Related Rights Act (<i>Zakon o autorskom pravu i srodnim pravima</i>)
ZASP	Slovenian Copyright and Related Rights Act (<i>Zakon o spremembah in dopolnitvah Zakona o avtorski in sorodnih pravicah</i>)

Definitions

Definition	Meaning
Anonymous or pseudonymous works	Works protected by copyright that were published anonymously or under a pseudonym (i.e. an assumed name).
Beneficiary organisation or beneficiary	Organisation listed in Article 1(1) OWD, such as publicly accessible library, educational establishment, museum, archive, film or audio heritage institution and public service broadcasting organisation established in an EU Member State or EEA state that uses orphan works.
Born-digital	Materials that originate in a digital form.
Collective management organisations (CMOs)	Organisations that facilitate rights clearance in the interest of both beneficiaries and rightholders, as well as economic reward for rightholders through licensing schemes. In most cases, CMOs are either private or public non-for-profit entities.
Embedded works	Visual works, including fine art, photography, illustration, design, architecture, sketches of the latter works and other such works that are contained in books, journals, newspapers and magazines or other works.
Extended collective licensing (ECL)	The licence (authorisation for use) granted by a collective rights management organisation on behalf of its members, which is extended by law to cover all non-member rightholders of the same category.
National competent authority	Institution in EU Member State or EEA State responsible for reviewing information about orphan works in the EUIPO Orphan Works Database.
Orphan works	Works protected by copyright or related rights for which no rightholder is identified or, even if identified, is not located. The works in question need to be published, and the first publication must take place on the territory of an EU Member State or an EEA State.
Other stakeholders	Other stakeholders such as cultural organisation, collective management society, civil society group/NGO, as well as individual respondent.
Out-of-commerce works	Also known as out-of-print or out-of-distribution works, these are works that are not available to the public through customary channels of commerce. Contrary to orphan works, these are works whose rightholders (known or unknown) have decided to no longer actively exploit their commercial rights.
Phonogram	Phonogram means the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the

Definition	Meaning
	form of a fixation incorporated in a cinematographic or other audiovisual work. The term phonogram can include film soundtracks, if exploited separately from the audiovisual work.
Rightholders' organisation	Association or entity representing the interests of rightholders or a (potential) rightholder.

Executive summary

The Orphan Works Directive (OWD or Directive) contains a review clause that requires ongoing monitoring and reporting on its application, as well as the suitability of its scope and functioning. More specifically, the Commission is required to submit annual reports on the possible inclusion of publishers and works not currently included within the scope of the Directive (e.g. stand-alone photographs and other images). In its review of the Directive, the Commission should consider the development of digital libraries and the proper functioning of the internal market.

The aim of this report is to support the Commission in carrying out its reporting and review duties. To that end, the report collects factual information about the actual application of the Directive. It provides an objective quantitative and qualitative assessment of the implementation of the Directive's provisions and an evaluation of its overall effectiveness in achieving its main objectives. Building on this assessment, the report identifies possible options, including potential amendments, to improve the application and effects of the Directive.

This report covers all of the Member States of the European Union (EU) and European Economic Area (EEA), as well as the United Kingdom. The report is the result of the study conducted from April 2020 to March 2021.

As an overall conclusion, the report finds that six years after the entry into force of the OWD, the current situation is far from the large-scale digitisation that was expected. Only a limited number of works from a limited number of institutions have been made available through the orphan works exception. The report finds that the resource-intensive nature of the diligent search - which does not provide for risk-free use of the work - is the major barrier hindering use of the OWD. The individual characteristics (notably in terms of resources) of cultural heritage institutions appear to be a key determining factor in the successful use of the OWD. However, the OWD itself and its national implementation do not facilitate the use of the orphan works system and in some cases create a considerable burden.

Current approach and transposition:

The OWD rests on three pillars, namely: (i) rules on how to identify orphan works through the diligent search; (ii) determination and mutual recognition of the orphan work status and (iii) the uses that can be made of the orphan works as well as the conditions for such uses, depending on their nature.

These material rules governing the use of orphan works are enshrined in the first six articles of the Directive (Article 1 - Subject-matter and scope; Article 2 - Orphan works; Article 3 - Diligent search; Article 4 - Mutual recognition of orphan work status; Article 5 - End of orphan work status and Article 6 - Permitted uses of orphan works), whereas Articles 7 to 12 serve more as additional or final articles.

Article 1 of the OWD sets out the general scope of the Directive, limiting its application to certain types of orphan works, namely writings such as books, journals, newspapers and magazines; cinematographic or audiovisual works; phonograms; and embedded works such as photographs or other illustrations contained in a published work. The scope is also limited to certain types of institutions, namely beneficiaries that can demonstrate a public-interest mission (publicly accessible libraries, educational establishments and museums, as well as archives, film or audio heritage institutions and public-service broadcasting organisations). Finally, the Directive can only be used for certain uses, such as making orphan works available to the public by acts of

reproduction for the purposes of digitisation, and making available, indexing, cataloguing, preservation or restoration.

The countries were given two years to transpose the OWD into their national legal systems, meaning that the Directive needed to be implemented by 29 October 2014.

The report finds that the OWD was transposed in all countries largely ad verbatim. Only minor nuances and a very limited number of exceptions in the transposition of the Directive were detected. On the other hand, the report finds that the actual practical implementation of the OWD was often overlooked by the countries, with few providing additional guidance for stakeholders (e.g., on how to perform a diligent search or rules on the compensation for reappearing rightholders).

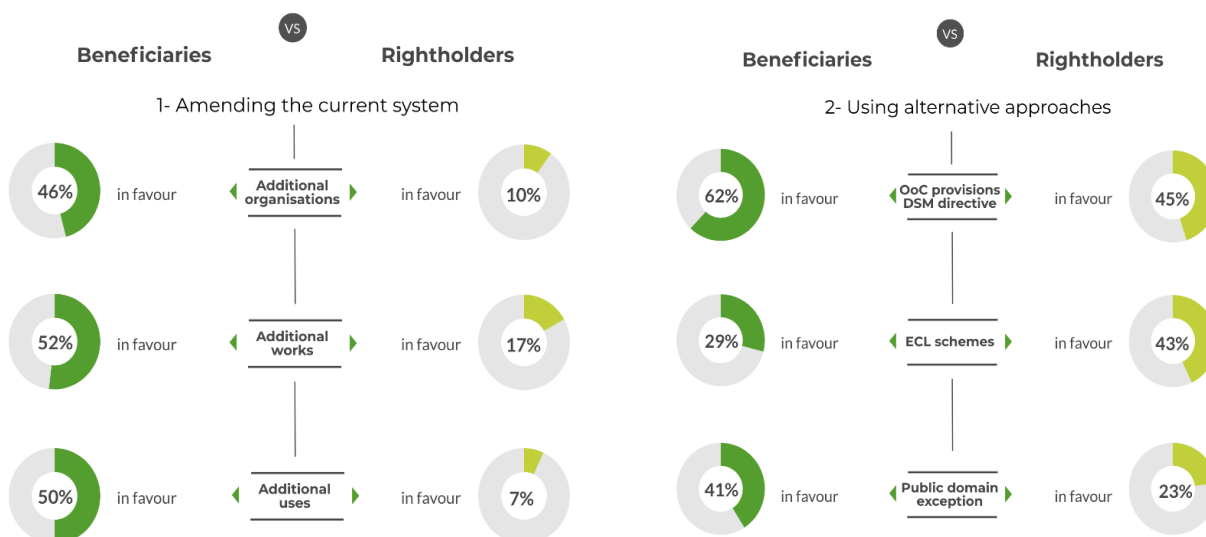
The views of stakeholders:

Stakeholders were consulted through an online survey, focussing on two core aspects: (i) the 'effectiveness' of the OWD, i.e. the extent to which it meets the objective of mass digitisation and dissemination of orphan works; and (ii) the coherence of the OWD with other relevant areas of the EU copyright law and possible improvements to the system. The survey targeted all relevant stakeholders (beneficiary organisations, national competent authorities and rightholder organisations) in all of the countries covered by the study. The survey gathered a total of 87 responses from organisations in 22 Member States of the European Union and 3 Member States of the European Economic Area, along with responses from the United Kingdom, the United States of America, as well as pan-European and international level organisations.

In order to clarify some data obtained through the survey, thirteen interviews with the stakeholders were conducted with the aim to obtain an understanding of the main legal and administrative difficulties encountered, to identify best practices and possible solutions as well as improvements.

The results of the stakeholder consultation show that only a minority of stakeholders believe that the OWD has led to significant improvements in the digitisation and dissemination of orphan works since its entry into force. All types of stakeholders generally agree that the system introduced by the OWD has weaknesses and that there is scope for improvement. The main points of divide between stakeholders are over the extent to which the system should be reformed – making amendments to the current system vs. using an alternative approach – and the direction that reform should take.

Figure 1: Overview of stakeholder views



Overall, the report found that beneficiary organisations have made little use of the OWD exception. In June 2020, only 18,649 orphan works were recorded in the EUIPO Orphan Works Database (EUIPO database) across the entire EU/EEA, 60 % of which were recorded by the British Library. Since the end of the Brexit transition period (31 December 2020), the works recorded by British institutions have been removed from the database, meaning that as of January 2021 there are only 5,480 main works and 1,406 embedded works available to the public in the database. In addition, only 72 institutions from 17 countries EU/EEA-wide have recorded works in the EUIPO database, with five of those 17 institutions contributing over 90 % of the works.

Looking forward:

The report finds that the OWD has been an important tool for certain beneficiaries to digitise and make available orphan works, as it has the key advantage of not requiring licensing fees nor introducing time limitations for using orphan works.

The recently adopted DSM Directive and its provisions on out-of-commerce works could potentially offer additional solutions for digitising orphan works in the future, as practically all orphan works can also be considered out-of-commerce, with beneficiaries having the flexibility to choose between both options. However, the provisions of the DSM Directive are yet to be tested and much will depend on the approach taken by each Member State in the transposition of the DSM Directive. In theory, the potential solution introduced by the DSM Directive for out-of-commerce works could provide a sign-post for national-level legislators when regulating digitisation of orphan works. In addition, synergies could be found through developing practical tools and guidelines which facilitate the use of both the OWD and the out-of-commerce system, as in both cases the fundamental issue is to correctly and efficiently perform a general rights clearance procedure. Further digitisation is a continuous source of additional change for orphan works, with challenges likely to continue despite the solutions provided by the OWD. The numerous suggestions provided in this report point to the possibility for various improvements to develop the practical utility of the OWD.

At EU level, a number of further improvements could be considered, such as an extension of the scope of the OWD to other types of works, notably visual works (a cut-off date for more recent visual works could be introduced to protect the livelihood of rightholders which are particularly vulnerable in this sector). Furthermore, the permitted uses of orphan works could be extended to include offline use, such as public performance or broadcasting of dramatic and cinematographic works and (potentially) derivative use. An introduction of a 'lighter' version of a diligent search for embedded works could be achieved by reducing the number of mandatory sources to be consulted or making the list of sources non-mandatory.

Minimising the number of sources which must be consulted throughout the diligent search could be considered, notably by removing the word 'at least' from the Directive, as well as making the list of sources non-mandatory. The notion of fair compensation could also be made clearer with an EU-wide system established in the OWD.

At national level, in case of a mandatory list of sources, the sources could be kept to a strict minimum. Ideally, however, the list of sources would be non-mandatory and not embedded within the national legislation to enable more flexibility.

It is recommended that Member States do not simply copy the list of sources in the Annex to the OWD, but establish a tailored national list which can be regularly updated and includes more relevant sources. Alternatively, it could be made explicit that outdated sources can be omitted. Member States could also ensure that all

sources are accessible online, of good quality and free of charge. The notion of fair compensation could be clear at national level in the implementing national laws.

In addition, the provisions in the OWD (diligent search, redress for rightholders) should be developed further, either in national laws or through soft law instruments such as guidelines and recommendations tailored to the national system. Training should be provided at national level on the diligent search procedure.

Conclusions:

The study identified the following **key strengths** of the OWD system:

- **No extra fees for beneficiary organisations**

The OWD system is based on an exception, meaning that once a diligent search is performed, beneficiaries are free to use the orphan work without any further restrictions or costs.

- **No time limitations for using an orphan work**

The diligent search procedure under the OWD is a one-off event, as opposed to licenses which are time-bound. The diligent search does not need to be renewed on a regular basis.

- **Mutual recognition throughout the EU/EEA**

A work which is considered an orphan work in one EU/EEA Member State is considered an orphan work in all Member States and may be used accordingly.

- **Reliability of the diligent search**

The reappearance of rightholders of orphan works seems to be a rare occurrence. While some stakeholders believe that this is due to the fact that rightholders are rarely aware of the use of their works, others argued that this proves that the diligent search works and helps correctly identify orphan works.

- **Ease of ending an orphan work status**

Once a claim to an orphan work is made, a normal rights-clearance procedure is initiated to determine the conditions in which the work can be used.

- **Some beneficiaries rely on the OWD to digitise orphan works**

Although the OWD does not seem to work for mass digitisation of orphan works there are examples of beneficiaries that have successfully used the OWD exception. The stakeholder consultation found that these have sufficient resources and in-house legal expertise in intellectual property law. This expertise helps to develop specific lists of sources and decision trees that direct their diligent searches. Such expertise also helps them to assess the risks of using an orphan work after a diligent search has been performed.

The following **key issues were identified**:

- **Limited scope of the directive (works and uses)**

Half of the beneficiary survey respondents are in favour of extending the scope of the OWD to stand-alone graphic works such as photographs, posters, illustrations or postcards, notably as there are many works within their collections that currently cannot be digitised. Rightholders in visual sector, however, are strongly against extending the OWD to graphic works, arguing that digitisation strips the metadata associated with the works. Beneficiaries are of the opinion that the permitted uses of orphan works are too limited and should include non-online use of orphan works, such as public performance or broadcasting of dramatic and cinematographic works, use for

educational purposes and non-commercial reuse of orphan works within new works (i.e. derivative use).

- **Issues with the sources that must be consulted for diligent search**

The vast majority of beneficiary organisations argue that the diligent search procedure is the key reason behind the ineffectiveness of the OWD. Part of the problem with the diligent search lies in the mandatory list of sources that must be consulted and the fact that the list only presents the minimum number of sources (some of which are outdated). This list of sources is enshrined within the Annex of the OWD and extended in the national legislations. The stakeholders highlighted that the number of sources is excessive and that many sources are inaccessible and/or irrelevant.

- **Complexity and resource intensive nature of the diligent search**

Another key issue put forward by many beneficiaries is the resource-intensive nature of the diligent search procedure, in terms of finance, time and manpower, particularly for underbudgeted beneficiaries. In addition, trained-personal with legal expertise in copyright and intellectual property law is often required.

- **Unclear notion of 'fair compensation'**

The second major barrier in using the OWD highlighted by beneficiaries is the financial risk due to the potential reappearance of a rightholder and the uncertainty surrounding the level of compensation.

- **Limited guidance provided at national level for the practical implementation of the Directive.**

In most countries, the provisions of the OWD were transposed *ad verbatim* without tailored solutions for the national system. The study found that beneficiaries most successful in using the OWD are from countries that provided additional guidelines and trainings.

- **Issues with the EUIPO database**

Several stakeholders argued that the interface of the EUIPO database is cumbersome and difficult to navigate. A key issue is the lack of links or images of the recorded works, making it particularly difficult to identify the works, many of which do not have clear titles.

- **Potential overlap between orphan works & out-of-commerce works**

Many stakeholders seem to believe there is an overlap between the definition of orphan works and out-of-commerce works, as orphan works are often, if not always, also out-of-commerce. This may lead to potential overlaps between the systems in the OWD and the Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (DSM Directive) (once it has been transposed in the Member States).

Synthèse

La directive sur les œuvres orphelines (ci-après appelée Directive) contient une clause de réexamen prévoyant des évaluations et rapports réguliers sur l'état de son application, ainsi que sur la pertinence de son champ d'application et de sa mise en œuvre. Plus particulièrement, la Commission européenne doit soumettre des rapports annuels évaluant la possibilité d'inclure les maisons d'éditions ainsi que certaines œuvres qui ne sont pas incluses dans le champ d'application de la Directive (par exemple, les photographies et autres images qui existent en tant qu'œuvres indépendantes). Par ailleurs, lors de son réexamen de la Directive, la Commission est tenue de prendre en compte le développement des bibliothèques numériques et de veiller au bon fonctionnement du marché intérieur.

L'objectif de cette étude est d'apporter un soutien à la Commission pour son réexamen de la Directive. Pour ce faire, l'étude présente des informations factuelles sur l'application de la Directive, ainsi qu'une analyse quantitative et qualitative de sa mise en œuvre et de son efficacité à atteindre ses objectifs principaux. En s'appuyant sur cette analyse, l'étude identifie ensuite de possibles actions, y compris de possibles amendements, afin d'améliorer l'efficacité de la Directive.

L'étude, réalisée d'Avril 2020 à Mars 2021, couvre tous les Etats membres de l'Union Européenne (UE) et de l'Espace économique européen (EEE), ainsi que le Royaume-Uni.

En conclusion générale, l'étude montre que six ans après l'entrée en vigueur de la Directive, la situation est très loin de la numérisation à grande échelle anticipée. Seul un nombre limité d'œuvres orphelines, d'un nombre limité d'institutions de gestion du patrimoine ont été mises à disposition du public à travers l'exception instaurée par la Directive. L'étude montre que la recherche diligente pour les titulaires de droits est l'obstacle principal à l'utilisation de la Directive. En effet, celle-ci nécessite un investissement en temps et en ressources (humaines et financières) considérable, mais ne permet pas une utilisation de l'œuvre sans risques financiers en cas de réapparition d'un titulaire de droit. L'étude montre également que les caractéristiques individuelles des institutions de gestion du patrimoine (notamment en termes de ressources humaines et financières) jouent un rôle clef dans la capacité de ces dernières à utiliser la Directive avec succès. Cependant, la Directive en elle-même ainsi que sa mise en œuvre au niveau national ne facilitent pas son utilisation, créant même des obstacles et charges supplémentaires.

L'approche introduite par la Directive et sa transposition dans les législations nationales:

La Directive repose sur trois piliers : (i) l'obligation d'effectuer une recherche diligente des titulaires de droits afin d'identifier et de déterminer le statut d'œuvre orpheline ; (ii) la reconnaissance mutuelle de ce statut à travers l'UE/EEE ; (iii) les utilisations autorisées et les conditions d'utilisation des œuvres orphelines en fonction du type d'œuvre.

Ces règles matérielles sont inscrites dans les six premiers articles de la Directive (Article 1 - Objet et champ d'application ; Article 2 - Œuvres orphelines ; Article 3 - Recherche diligente des titulaires de droits ; Article 4 - Reconnaissance mutuelle du statut d'œuvre orpheline ; Article 5 - Fin du statut d'œuvre orpheline ; Article 6 - Utilisations autorisées des œuvres orphelines). Les articles 7 à 12 représentent plutôt des articles additionnels/finaux.

Article 1 définit le champ d'application de la Directive, qui se limite à certains types d'œuvres orphelines, c'est-à-dire, aux œuvres publiées sous forme de livres, revues, journaux ou magazines ; aux œuvres cinématographiques ou audiovisuelles ; aux phonogrammes ; et aux œuvres qui sont incorporés ou qui font partie intégrante des œuvres principales (tels que des photographies et illustrations). Le champ d'application est également limité à certains types d'institutions (ci-après appelés 'bénéficiaires'), qui sont des institutions de gestion du patrimoine ayant une mission d'intérêt public (par exemple, les bibliothèques, les établissements d'enseignement et les musées accessibles au public, ainsi que les archives, les institutions dépositaires du patrimoine cinématographique ou sonore et les organismes de radiodiffusion de service public). Enfin, la Directive limite les utilisations des œuvres orphelines à la mise à disposition du public de l'œuvre orpheline et à la reproduction à des fins de numérisation, d'indexation, de catalogage, de préservation ou de restauration.

La transposition de la Directive dans les législations nationales devait être effectuée deux ans après l'adoption de la Directive, c'est-à-dire pour le 29 octobre 2014.

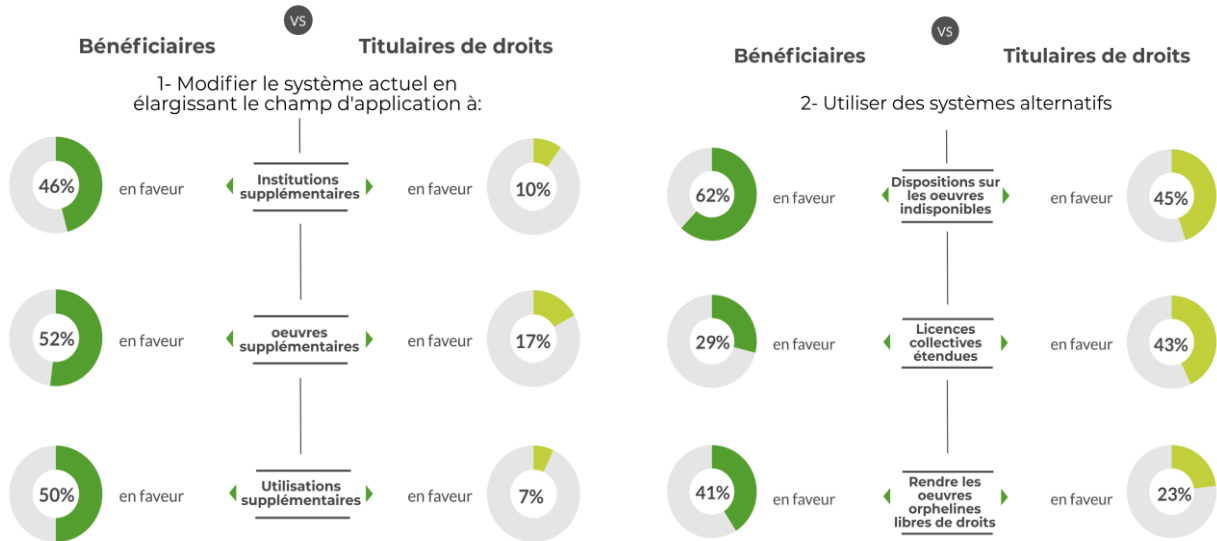
L'étude montre que la Directive a été transposée correctement dans tous les pays, dans la grande majorité des cas presque mot pour mot, avec seulement de très légères nuances et un nombre limité d'exceptions. Cependant, l'étude a également permis de constater qu'au niveau national la mise en œuvre de la Directive a souvent été négligée d'un point de vue pratique. En effet, très peu de pays ont fourni des instructions, explications ou conseils supplémentaires pour aider les bénéficiaires à utiliser la Directive (par exemple, des explications sur comment effectuer correctement une recherche diligente, ou vis-à-vis de la compensation équitable pour les titulaires de droits mettant fin au statut d'œuvre orpheline).

Le point de vue des parties intéressées:

Une consultation des parties intéressées a été effectuée à travers un questionnaire en ligne se focalisant sur deux aspects clefs : (i) l'efficacité de la Directive, c'est-à-dire dans quelle mesure la Directive atteint son objectif de numérisation et de diffusion massive d'œuvres orphelines ; (ii) la cohérence de la Directive vis-à-vis d'autres domaines pertinents du droit d'auteur européen, ainsi que sur de possibles améliorations de la Directive. Le questionnaire a été diffusé à toutes les parties intéressées pertinentes (c.-à-d., les institutions bénéficiaires, les autorités nationales compétentes et les organisations représentant les titulaires de droits) dans tous les pays couverts par l'étude. 87 réponses au total ont été collectées d'organisations dans 22 Etats membres de l'UE, 3 Etats membres de l'EEE, ainsi que du Royaume-Uni, des Etats-Unis et d'organisations paneuropéennes et internationales.

Afin de clarifier certaines données collectées à travers le questionnaire, treize entretiens ont été effectués avec des parties intéressées dans le but de mieux comprendre les défis juridiques et administratifs auxquels font face les différents types d'organisations, ainsi que d'identifier les meilleures pratiques et solutions pour répondre à ces défis.

Les résultats de la consultation des parties intéressées démontrent qu'une grande majorité d'organisations considère que la Directive n'a pas permis de sensiblement faciliter la numérisation et la diffusion d'œuvres orphelines. Les différentes parties intéressées s'accordent à dire que le système introduit par la Directive comporte d'importantes faiblesses et pourrait être amélioré. En revanche, les opinions divergent sur le type et l'ampleur des réformes nécessaires pour faciliter la numérisation et l'utilisation des œuvres orphelines – modifier le système actuel versus utiliser des systèmes alternatifs (ex, licences collectives étendues).

Graphique 2: Aperçu de l’avis des parties intéressées


Dans l’ensemble, l’étude révèle que les bénéficiaires n’ont que très peu utilisé le système d’exception introduit par la Directive. En juin 2020, seulement 18 649 œuvres orphelines ont été enregistrées dans la base de données de l’Office de l’UE pour la Propriété Intellectuelle (OUEIP) à travers tout l’UE/EEE, et 60 % de ces œuvres ont été enregistrées par la Bibliothèque Nationale Britannique. De plus, depuis la fin de la période de transition du Brexit (31 décembre 2020), les œuvres orphelines enregistrées par des institutions britanniques ont été retirées de la base de données. Par conséquent, en janvier 2021, seulement 5 480 œuvres indépendantes et 1 406 œuvres incorporées ont été disponibles dans la base de données publique. Par ailleurs, seulement 72 institutions de 17 pays à travers l’UE/EEE ont enregistré des œuvres orphelines dans la base de données de l’OUEIP, cinq de ces 72 institutions ayant contribué plus de 90 % des œuvres.

Regard vers le futur:

L’étude montre que la Directive a été un outil important pour certains bénéficiaires afin de numériser et de mettre à disposition leurs œuvres orphelines, car le système instauré par la Directive a le principal avantage de permettre l’utilisation des œuvres orphelines sans restriction ou coûts supplémentaires.

La directive sur le droit d’auteur dans le marché unique numérique récemment adoptée et ses dispositions sur les œuvres indisponibles dans le commerce pourraient potentiellement offrir une solution supplémentaire pour numériser les œuvres orphelines à l’avenir, en donnant la flexibilité aux bénéficiaires de choisir entre les deux options, car presque toutes les œuvres orphelines peuvent également être considérées comme indisponibles. Toutefois, les dispositions de la nouvelle directive sur le droit d’auteur n’ont pas encore été testées dans la pratique et beaucoup dépendra de l’approche adoptée par chaque État membre dans sa transposition de cette nouvelle directive. En théorie, la solution introduite par la nouvelle directive pour les œuvres indisponibles pourrait servir d’inspiration pour les législateurs nationaux en ce qui concerne les règles pour la numérisation des œuvres orphelines. De plus, des synergies pourraient être trouvées à travers l’élaboration d’outils et de guides pratiques facilitant à la fois l’utilisation de la Directive sur les œuvres orphelines et le système sur les œuvres indisponibles, car dans les deux cas, la question clef est

d'effectuer correctement et efficacement la procédure générale d'obtention des droits d'exploitations. La numérisation du patrimoine culturel européen présente de nombreux défis, notamment en ce qui concerne les œuvres orphelines, qui sont susceptibles de perdurer malgré les solutions fournies par la Directive. Les nombreuses recommandations présentées dans cette étude indiquent toutefois qu'il y a de diverses améliorations possibles quant à l'efficacité de la Directive.

Au niveau européen, un certain nombre d'améliorations pourraient être envisagées, telles qu'une extension du champ d'application de la Directive à d'autres types d'œuvres, notamment aux œuvres visuelles (avec par exemple une date limite excluant les œuvres visuelles plus récentes afin de protéger les titulaires de droits qui sont particulièrement vulnérables dans ce secteur). En outre, les utilisations autorisées des œuvres orphelines pourraient être étendues à certaines utilisations hors ligne, telles que les performances publiques ou la diffusion d'œuvres dramatiques et cinématographiques et (potentiellement) aux utilisations dérivées. L'introduction d'une version « allégée » de la recherche diligente pour les œuvres intégrées aux œuvres orphelines pourrait également être considérée, notamment en réduisant le nombre de sources obligatoires à consulter ou en rendant la liste des sources non obligatoire.

Minimiser le nombre de sources qui doivent être consultées pour la recherche diligente pourrait être envisagée, notamment en supprimant le terme « au moins » de la Directive, ainsi qu'en rendant la liste des sources non obligatoire. La notion de compensation équitable pourrait également être rendue plus claire avec un système au niveau européen établi dans la Directive.

Au niveau national, si la liste des sources à consulter est obligatoire, ces sources devraient être maintenues à un strict minimum. Toutefois, dans l'idéal, la liste des sources ne serait pas obligatoire et ne serait pas intégrée à la législation nationale afin d'offrir une plus grande flexibilité.

Il est recommandé que les États membres ne se contentent pas de copier la liste des sources de l'Annexe à la Directive, mais qu'ils établissent une liste adaptée au contexte nationale et s'assurent que celle-ci puisse être régulièrement mise à jour avec des sources plus pertinentes. Par ailleurs, les lois nationales pourraient explicitement clarifier que les sources qui ne sont plus à jour/inaccessibles peuvent être omises lors de la recherche diligente. Les États membres pourraient également veiller à ce que toutes les sources soient accessibles en ligne, de bonne qualité et gratuites. La notion de compensation équitable pourrait être plus claire dans la mise en œuvre des lois nationales.

De plus, les dispositions dans la Directive (recherche diligente, recours pour les titulaires de droits) pourraient être développées davantage soit dans les lois nationales, soit par le biais d'instruments juridiques non-contraignants (soft law) tels que des guides pratiques et des recommandations adaptées au système national. Des formations pourraient également être dispensées au niveau national sur la procédure de recherche diligente.

Conclusions:

D'une part, l'étude a identifié les **points forts** suivants du système mis en place par la Directive :

- **Pas de frais supplémentaires pour les bénéficiaires (autres que les dépenses liées à la recherche diligente)**

La Directive met en place un système d'exception, ce qui veut dire que lorsqu'une recherche diligente a été effectuée, les bénéficiaires sont libres d'utiliser l'œuvre déclarée comme étant orpheline sans restriction ou coûts supplémentaires.

- **Pas de limite de temps pour l'utilisation des œuvres orphelines**

La recherche diligente doit être effectuée une fois seulement et ne doit pas être renouvelée, contrairement aux licences d'exploitation qui sont limitées dans le temps.

- **La reconnaissance mutuelle du statut d'œuvre orpheline à travers l'UE/EEE**

Une œuvre reconnue comme orpheline dans un Etat membre est reconnue comme telle dans tous les pays de l'UE/EEE et peut être utilisée en conséquence.

- **La fiabilité de la recherche diligente**

D'après les données récoltées pour cette étude, la réapparition d'un titulaire de droit semble être rare. Certaines parties intéressées considèrent que ceci peut s'expliquer par le fait que les titulaires de droits sont rarement au courant de l'utilisation faite de leur œuvre, d'autres en revanche considèrent que c'est un signe que la recherche diligente est efficace et permet de correctement identifier les œuvres qui sont réellement orphelines.

- **La facilité de mettre fin au statut d'œuvre orpheline**

Dès qu'un titulaire de droits potentiel revendique une œuvre classée comme orpheline, cela engendre une négociation pour l'obtention des droits et les conditions d'utilisations de l'œuvre.

- **Certains bénéficiaires ont largement recours à la Directive pour numériser les œuvres orphelines de leurs collections**

Bien que la Directive ne semble pas fonctionner dans le cadre de projets de numérisation à grande échelle, il y a cependant certains bénéficiaires qui utilisent la Directive avec succès. Ces bénéficiaires possèdent les ressources financières et humaines nécessaires et disposent de compétences juridiques en propriété intellectuelle en interne. Cette expertise juridique leur permet notamment de plus facilement développer des listes de sources à consulter ainsi que des schémas décisionnels pour encadrer les recherches diligentes. De plus, cette expertise permet également d'évaluer les risques juridiques/financiers liés à l'utilisation d'une œuvre orpheline au terme de la recherche diligente.

D'autre part, l'étude a également identifié un nombre de **difficultés**:

- **Le champ d'application limité de la Directive en termes d'œuvres et d'utilisations autorisées**

La moitié des bénéficiaires qui ont répondu au questionnaire sont favorables à un élargissement du champ d'application de la Directive aux arts visuels indépendants, tels que des photographies, posters, illustrations ou cartes postales, car beaucoup d'œuvres de leurs collections ne peuvent actuellement pas être numérisées par le biais de la Directive. Cependant, les organisations représentant les titulaires de droits dans le secteur des arts visuels sont fortement opposées à l'extension de la Directive aux arts visuels indépendants, ils remarquent que le processus de numérisation retire les métadonnées associées aux œuvres, augmentant ainsi le risque que l'œuvre soit faussement considérée comme orpheline. Par ailleurs, de nombreux bénéficiaires considèrent que les utilisations autorisées des œuvres orphelines sont trop restrictives. Ils sont d'avis que la Directive devrait également permettre les utilisations hors ligne des œuvres orphelines, tels que les représentations ou diffusions publiques d'œuvres dramatiques ou cinématographiques, des utilisations à des fins d'éducation, ainsi que la réutilisation des œuvres au sein de nouvelles œuvres (utilisations dérivées) à des fins non-commerciales.

- **Des problèmes liés aux sources qui doivent être consultées lors de la recherche diligente**

La majorité des bénéficiaires considèrent que la recherche diligente est l'obstacle principal nuisant à l'efficacité de la Directive. La liste des sources qui doit obligatoirement être consultée afin de compléter une recherche diligente est notamment au cœur des difficultés. Cette liste est à la fois inscrite dans l'Annexe de la Directive (dont certaines ne sont plus à jour) et est étendue dans les législations nationales, ce qui mène à une liste considérée comme excessive par les parties intéressées de certains pays. Par ailleurs, la majorité des bénéficiaires remarquent que de nombreuses sources ne sont plus accessibles en ligne ou ne sont pas pertinentes.

- **La complexité du processus et les ressources considérables nécessaires pour effectuer une recherche diligente**

Les ressources financières et humaines ainsi que le temps nécessaire pour effectuer une recherche diligente sont un autre obstacle clef nuisant à l'utilisation de la Directive, notamment car les bénéficiaires manquent souvent de moyens de par leur nature non-commercial. De plus, une expertise juridique en propriété intellectuelle est souvent nécessaire pour évaluer les risques liés à l'utilisation des œuvres et pour déterminer si la recherche peut être considérée comme suffisamment diligente.

- **L'incertitude autour du concept de 'compensation équitable' pour les titulaires de droits**

Un autre obstacle clef à l'utilisation de la Directive est le risque financier lié à la possible réapparition des titulaires de droits, ainsi que l'incertitude concernant le montant de la compensation équitable.

- **Le manque de documentation/explications au niveau national pour faciliter la mise en œuvre pratique de la Directive**

Dans la majorité des pays, la Directive a été transposée mot pour mot sans prendre en compte les spécificités du cadre juridique national. L'étude montre que les bénéficiaires ayant utilisé la Directive avec le plus de succès proviennent de pays dans lesquels des explications supplémentaires, de la documentation, et des formations ont été fournies.

- **Des problèmes liés à la base de données de l'OUEIP**

Plusieurs parties intéressées considèrent que l'interface de la base de données de l'OUEIP est peu commode et difficile à consulter. Un problème clef est le manque de liens ou images des œuvres enregistrées, ce qui rend très difficile l'identification des œuvres, la plupart n'ayant pas de titre précis.

- **Le potentiel chevauchement entre le concept d'œuvres orphelines et œuvres indisponibles dans le commerce**

De nombreuses parties intéressées semblent considérer qu'il y a un chevauchement entre la définition d'œuvre orpheline et d'œuvre indisponible, car les œuvres orphelines sont souvent, sinon toujours, indisponibles dans le commerce. Ce chevauchement pourrait mener à un potentiel chevauchement entre la Directive sur les œuvres orphelines et la directive (UE) 2019/790 sur le droit d'auteur et les droits voisins dans le marché unique numérique (une fois que celle-ci sera transposée dans les Etats membres).

1. Introduction and methodology

This is the Final Report for the Study on the application of the Orphan Works Directive (2012/28/EU) (the Study).

1.1. Study objectives and scope

1.1.1. Objectives and scope

The Orphan Works Directive (OWD)¹ contains a review clause (Article 10) that requires ongoing monitoring and reporting on its application, as well as the sufficiency of its scope and functioning. More specifically, Article 10(1) of the OWD requires the European Commission to constantly review the development of rights information sources and to submit annual reports on the possible inclusion in the scope of application of OWD publishers and works not currently included, in particular stand-alone photographs and other images. Article 10(2) of the OWD requires the Commission to submit a report on the application of the OWD that considers the development of digital libraries. Article 10(3) of the OWD calls on the Commission to submit proposals for the amendment of the OWD where necessary to support the functioning of the internal market.

The aim of this Study is to support the Commission in carrying out these reporting and review duties. It provides an assessment and justification for possible policy options to improve the application and effects of the OWD. The project has three specific objectives:

- To collect factual information about the actual application of the OWD, in particular the implementation of Articles 1 to 7, in light of the development of digital libraries (Task 1);
- To provide an objective quantitative and qualitative assessment of the implementation of the OWD provisions and an evaluation of the overall effectiveness of the OWD in achieving its main objective (Task 2);
- To identify possible recommendations to improve the application and effects of the OWD, including possible amendments to the Directive (Task 3).

This Study covers all of the Member States of the European Union (EU) and European Economic Area (EEA), as well as the United Kingdom (UK). The study was conducted from April 2020 to March 2021.

1.1.2. Structure of this report

This report is comprised of four Chapters. Chapter 1 contains the introduction and methodology. Chapter 2 contains an overview of implementation and effectiveness of the OWD. Chapter 3 presents key conclusions of the study whereby Chapter 4 contains recommendations.

1.2. Background and context of the study

1.2.1. Legal and policy background

In 2005 the Commission launched the i2010 digital libraries initiative², which aims to preserve common cultural heritage and make it available now and to future

¹ Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, OJ L 299, 27.10.2012, pp. 5–12.

² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - i2010: digital libraries, COM/2005/0465 final, accessible at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52005DC0465>

generations by creating a pan-European digital library and archive, called Europeana³. As a result, museums, galleries, libraries and archives all across Europe started to digitise their collections and make them generally accessible online. Some years later, the Commission launched the Europe 2020 Strategy⁴, whose Digital Agenda for Europe⁵ was identified as one of the flagship initiatives. A need to push ahead with the creation, production and distribution of digital content was once again emphasised⁶.

One of the main challenges of every mass digitisation project is the digitisation of orphan works. These are works⁷ protected by copyright or related rights for which no rightholder is identified or even if identified, is not located. The issues pertaining to their digitisation relate primarily to the specifics of the copyright protection of works.

The main characteristic of a copyright status is that it is automatic⁸, meaning that no registration or other formalities are needed to protect an individual's idea. The rights are granted to authors (copyright or authors' rights) and to performers, producers and broadcasters (related rights). They include exclusive economic rights (e.g. the right to reproduce the work in various forms, distribution of copies, public performance, broadcasting or other communication, translation, adaptation) and moral rights. While the former enable rightholders to control the use of their works and be remunerated for their use, the moral rights entitle them to claim authorship of the work and the right to object to any derogatory treatment of the work. Due to the exclusiveness of the economic rights, the usage of copyright-protected works requires prior consent of rightholders. In the case of orphan works, it is impossible to obtain the prior consent of rightholders for digitisation or to make their protected work available to the public.

Orphan works also emerge as a result of the long duration of copyright protection (minimum 50 years after the rightholder's death under the Berne Convention and extended to 70 years in the EU, pursuant to Directive 2006/116/EC⁹). This makes it extremely difficult to determine if copyright protection is still applicable or if the work is already in the public domain and can be used freely. The older the work, the more difficult it may become to retrieve information about the rightholder and/or their death.

The orphan works problem thus affects relatively recent cultural heritage more significantly, namely works published in the 20th century. The problem is referred to as 'the 20th century black hole'¹⁰. Orphan works represent a substantial amount of works in the collections of Europe's cultural institutions. For example, the British Library estimates that 40 % of its copyrighted collections – 150 million in total - are orphan works¹¹. An estimation from 2001 shows that the total number of books and bound periodical (volumes) in the libraries of the EU-25 Member States exceeded 2.5

³ Europeana, accessible at: <https://pro.europeana.eu/>

⁴ EUROPE 2020: A strategy for smart, sustainable and inclusive growth, COM/2010/2020 final, accessible at: <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52010DC2020>.

⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Agenda for Europe, Brussels, 19.5.2010, COM(2010)245 final, accessible at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0245:FIN:EN:PDF>

⁶ Digital Agenda for Europe: key initiatives, accessible at: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_10_200

⁷ The concept of works used throughout this document shall be understood as encompassing all types of works and subject matter that (could) enjoy copyright protection.

⁸ This standard has been provided by Article 5(2) of the Berne Convention for the Protection of Literary and Artistic Works, accessible at: <https://www.wipo.int/treaties/en/ip/berne/>

⁹ Article 7(1) Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, OJ L 372, 27.12.2006, pp. 12–18, accessible at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32006L0116>

¹⁰ Europeana, accessible at: <https://pro.europeana.eu/post/the-missing-decades-the-20th-century-black-hole-in-europeana>

¹¹ Orphan works – Frequently asked questions, Brussels, 24 May 2011, MEMO/11/333, accessible at: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_11_333

billion¹². The inability to include such works in mass digitisation projects is likely to have a negative effect on the development of the knowledge economy. In order to address the orphan works problem, the Commission first opted for a soft law approach, hoping that it would prompt voluntary policy developments and practices in the Member States.

In 2006, the Commission issued a Recommendation on the digitisation and online accessibility of cultural content and digital preservation¹³, encouraging the EU Member States to develop national approaches to facilitate the use of orphan work status and to promote the availability of lists of known orphan works. The same year also saw the formation of a High-Level Expert Group on Digital Libraries, which was intended to bring together stakeholders concerned with digitisation and online accessibility of cultural material, including orphan works¹⁴. The group's Final Report on Digital Preservation, Orphan Works and Out-of-Print Works¹⁵ proposes that potential users of orphan works should be required to conduct a prior and thorough search in good faith to identify, locate and/or contact the rightholders.

The obligation to conduct due diligence searches was further developed in the Memorandum of Understanding (MoU) on Diligent Search Guidelines for Orphan Works¹⁶, another soft law instrument, which was signed by representatives of libraries, archives and rightholders. The MoU contained guidelines on diligent search, general principles concerning databases of orphan works, and rights clearance mechanisms that should be observed when classifying a work as an orphan work.

Despite the Commission's efforts, few Member States put in place licensing schemes to enable the use of orphan works (e.g. Hungary, France and the Nordic countries)¹⁷. As previous soft law approaches proved insufficient, and given that differing national approaches to the recognition of orphan work status might lead to restrictions on the free movement of goods and services¹⁸, on 24 May 2011, the Commission proposed the adoption of a new Directive regulating certain permitted uses of orphan works¹⁹. This proposal took stock of the Commission's Green Paper on Copyright in the Knowledge Economy²⁰ and the opinions of stakeholders expressed during a public hearing on 26 October 2009²¹.

¹² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - i2010: digital libraries, COM/2005/0465 final.

¹³ Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation (2006/585/EC), OJ L 236, 31.8.2006, pp. 28–30, accessible at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32006H0585>

¹⁴ Commission Decision of 27 February 2006 on setting up a High-Level Expert Group on Digital Libraries, OJ L 63, 4.3.2006, pp. 25–27, accessible at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006D0178&from=EN>; Commission Decision of 25 March 2009, OJ 82, 28.3.2009, pp. 9–11, accessible at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32009D0301&from=SL>

¹⁵ High-Level Expert Group – Copyright Subgroup, Report on Digital Preservation, Orphan Works, and Out-of-Print Works, Selected Implementation Issues, adopted on 18 April 2007, accessible at: http://www.ifro.org/sites/default/files/report_digital_preservationorphanworksandout-of-printworks.pdf

¹⁶ MoU on Diligent Search Guidelines for Orphan Works, accessible at:

http://www.ifro.org/sites/default/files/memorandum_of_understanding_on_diligent_search_guidelines_for_orphan_works.pdf

¹⁷ Impact Assessment on Cross-Border Online Access to Orphan Works; Commission Staff Working accompanying the document Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works, SEC(2011) 615 final, Brussels, 24.5.2011, accessible at: https://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2011/sec_2011_0615_en.pdf

¹⁸ Recital 8 of the OWD.

¹⁹ Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works, COM/2011/0289 final - COD 2011/0136, accessible at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52011PC0289>

²⁰ Green Paper - Copyright in the Knowledge Economy, COM/2008/0466, accessible at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52008DC0466>

²¹ Impact Assessment on Cross-Border Online Access to Orphan Works, 2011.

The proposal for a Directive came at a time when orphan works were a live issue at international level. At the World Intellectual Property Organisation (WIPO), the issue was being discussed by the Standing Committee on Copyright and Related Rights as having an important application to libraries and archives²². It also coincided with the US-based mass digitisation project 'Google Books'²³, as it was intended to boost the capacity of mass digitisation projects in the EU by providing a copyright exception allowing libraries to digitise orphan works after performing a diligent search²⁴.

The OWD was adopted by the European Parliament and the Council on 25 October 2012 and entered into force on the day following its publication, i.e. 28 October 2012. Since the Directive concerns an EEA matter, its provisions extend to the EEA Member States, notably Iceland, Lichtenstein and Norway.

The OWD was created to improve legal certainty across the EU for the digitisation and dissemination of orphan works, particularly in the context of large-scale EU digitisation projects²⁵. It was intended to close the gap between the public-interest mission of cultural heritage institutions (e.g. publicly accessible libraries, educational establishments and museums, archives, film and audio heritage institutions, and public service broadcasting organisations) to share their works with the general public, and the almost impossible challenge of locating all rightholders to get their prior approval to use their works²⁶.

1.2.2. Orphan Works Directive and its transposition

The OWD rests on three pillars:

- **Rules on how to identify orphan works – a diligent search** should be carried out prior to any use in good faith and in respect of each work, by consulting appropriate sources such as databases and registers²⁷;
- **Determination and mutual recognition of orphan work status** - if a diligent search does not yield the identity or location of the rightholder, the work shall be recognised as an orphan work and its status shall be valid across the EU by virtue of mutual recognition²⁸;
- **The uses that can be made of orphan works and the conditions for such use depend on their nature** – the OWD provides rules for beneficiaries on the extent of the permitted usage of orphan works and conditions for such usage, providing safeguards for rightholders whose works have been wrongly found to be orphans²⁹.

These material rules governing the use of orphan works are enshrined in the first six articles of the Directive (Article 1 - Subject-matter and scope; Article 2 – Orphan works; Article 3 – Diligent search; Article 4 – Mutual recognition of orphan work status; Article 5 – End of orphan work status and Article 6 – Permitted uses of orphan works), with Articles 7 to 12 serving as additional or final articles.

²² WIPO, Study on copyright limitations and exceptions for libraries and archives, 26 August 2008, accessible at: https://www.wipo.int/edocs/mdocs/copyright/en/sccr_17/sccr_17_2.pdf

²³ The Google Books project benefits from fair use under US law – 17 U.S. Code § 107. See: Authors Guild, Inc. v HathiTrust, 755 F.3d 87 (2d Cir. 2014) and Authors Guild, Inc. v Google, Inc., 804 F.3d 202 (2d Cir. 2015)

²⁴ Matulionyte, R., '10 years for Google Books and Europeana: copyright law lessons that the EU could learn from the USA', *International Journal of Law and Information Technology*, Vol. 24, 2016, pp. 44-71, accessible at: <http://teise.org/wp-content/uploads/2017/06/Int-J-Law-Info-Tech-2016-Matulionyte-44-71.pdf>

²⁵ Recitals (3) and (25) of the OWD.

²⁶ Article 1(1) of the OWD.

²⁷ Article 3(1) of the OWD.

²⁸ Article 4 of the OWD.

²⁹ Orphan works – Frequently asked questions, available at: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_11_333

Member States were given two years to transpose the OWD into their national legal systems, meaning that the Directive needed to be implemented by 29 October 2014. Since then, the Commission has published several reports on the implementation of the Directive. The OWD was included in the Commission's reports on Member States' progress in implementing the 2011 Recommendation on digitisation, online accessibility and digital preservation, and its predecessor³⁰. Although the rapid and correct transposition of the OWD was questioned in the 2011-2013 report³¹, two years later the vast majority of the EU Member States reported the relevant transposing measures. One year after the transposition deadline, 23 EU Member States³² had transposed the Directive while others were considered to be advancing their legislative process³³. As of the end of 2015, all EU Member States had transposed the Directive and most had also compiled the lists of sources to be consulted under the diligent search procedure and/or national guidelines on implementation³⁴.

Box 1: Article 9(1) of the OWD

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 29 October 2014. They shall forthwith communicate to the Commission the text of those provisions.

Overall, the OWD has been transposed and applied in all of the countries covered by the Study, with most amending their existing copyright legislation. In ES, FI, FR, LT, LU and SI, the legislation was amended in two phases. In AT, the amendments were enacted retrospectively. In LI, entry into force of the transposing measures was conditional to the entry into force of Decision of the EEA Joint Committee³⁵.

Table 1 presents the transposition and application deadlines set out in the national laws for the main legal acts for each country. A detailed list of the transposing measures per country can be found in Annex I.

Table 1: Overview of national transposition and application dates

Country	Date of transposition	Date of application
AT	13 January 2015	29 October 2014 ³⁶
BE	20 July 2015	30 July 2015
BG	20 February 2015	20 February 2015
CY	17 July 2015	17 July 2015
CZ	23 October 2014	7 November 2014
DE	1 October 2013	1 January 2013

³⁰ Digitisation and digital preservation, accessible at: <https://ec.europa.eu/digital-single-market/en/digitisation-digital-preservation>

³¹ The report states that more than one year after the adoption of the OWD, only Germany and Hungary had adopted legislation to transpose the Directive and only a few Member States had started the process. European Commission, Report on the Implementation of Commission Recommendation 2011/711/EU 2011-2013, accessible at: <https://ec.europa.eu/digital-single-market/en/news/european-commissions-report-digitisation-online-accessibility-and-digital-preservation-cultural>

³² AT, BE, BG, CZ, DE, EE, ES, FI, FR, HU, IT, LT, LV, LU, MT, NL, PL, PT, RO, SE, SI, SK and UK.

³³ European Commission, Implementation of Commission Recommendation on the digitisation and online accessibility of cultural material and digital preservation, Progress report 2013-2015, June 2016, accessible at: <https://ec.europa.eu/digital-single-market/en/news/european-commission-report-bringing-europes-cultural-heritage-online>

³⁴ European Commission, Report on cultural heritage: digitisation, online accessibility and digital preservation, Consolidated progress report on the implementation of Commission Recommendation (2011/711/EU) 2015-2017, accessible at: <https://ec.europa.eu/digital-single-market/en/news/european-commission-report-cultural-heritage-digitisation-online-accessibility-and-digital>

³⁵ EEA Joint Committee No 29/2015 of 25 February 2015 amending Annex XVII (Intellectual property) to the EEA Agreement [2016/517].

³⁶ Enacted retrospectively.

Country	Date of transposition	Date of application
DK	25 June 2014	29 October 2014
EE	15 October 2014	30 October 2014
EL	3 December 2013	3 December 2013
ES	4 November 2014 ³⁷ 27 May 2016 ³⁸	1 January 2015 12 June 2016
FI	8 November 2013 ³⁹ and 27 October 2014 ⁴⁰	29 October 2014 ⁴¹
FR	20 February 2015 ⁴² 6 May 2015 ⁴³	23 February 2015 7 May 2015
HR	24 October 2014	6 November 2014
HU	17 October 2014	29 October 2014
IE	31 October 2014	31 October 2014
IS	1 March 2016	5 March 2016
IT	10 November 2014	25 November 2014
LI	4 March 2015	23 April 2015 ⁴⁴
LT	28 January 2015 ⁴⁵ and 17 July 2015 ⁴⁶	3 February 2015 and 21 July 2015
LU	3 December 2015 ⁴⁷ 15 January 2016 ⁴⁸	11 December 2015 15 January 2016
LV	18 December 2014	31 December 2014
MT	7 November 2014	7 November 2014
NL	8 October 2014	28 October 2014
NO	1 July 2015	19 June 2015
PL	11 September 2015	20 November 2015
PT	24 April 2015	25 April 2015

³⁷ Law 21/2014 of 4 November modifying the consolidated text of the Intellectual Property Law, *Texto Refundido de la Ley de Propiedad Intelectual* (TRLPI).

³⁸ *Real Decreto 224/2016, de 27 de mayo, por el que se desarrolla el régimen jurídico de las obras huérfanas.*

³⁹ *Laki orpoteosten käyttämisestä* (764/2013).

⁴⁰ *Opetus- ja kulttuuriministeriön asetus orpoteosten käyttämisestä* (846/2014).

⁴¹ Both transposing acts entered into force on the same day.

⁴² *Loi n° 2015-195 du 20 février 2015 portant diverses dispositions d'adaptation au droit de l'Union européenne dans les domaines de la propriété littéraire et artistique et du patrimoine culturel.*

⁴³ *Décret n° 2015-506 du 6 mai 2015 pris pour l'application des articles L. 135-7, L. 212-3-1 et L. 212-3-3 du code de la propriété intellectuelle.*

⁴⁴ Entry into force is conditional - at the same time as the Decision of the EEA Joint Committee No 29/2015 of 25 February 2015 amending Annex XVII (Intellectual property) to the EEA Agreement [2016/517].

⁴⁵ *Lietuvos Respublikos Kultūros ministro įsakymas dėl nenustatytų teisių turėtojų kūrinų autorių teisių ir gretutinių teisių turėtojų paieškos šaltinių pavyzdinio sąrašo patvirtinimo 2015 m. sausio 28 d. Nr. ĮV-46 Vilnius.*

⁴⁶ *Lietuvos Respublikos kultūros ministro įsakymas už buvusių nenustatytų teisių turėtojų kūrinių naudojimą mokėjimo sąlygų ir tvarkos aprašo patvirtinimo 2015 m. liepos 17 d. Nr. ĮV-480.*

⁴⁷ *Loi du 3 décembre 2015 relative à certaines utilisations autorisées des oeuvres orphelines.*

⁴⁸ *Règlement grand-ducal du 15 janvier 2016 établissant les sources à consulter par les organismes bénéficiaires pour la détermination du statut d'oeuvre orpheline.*

Country	Date of transposition	Date of application
RO	21 July 2015	21 July 2015
SE	27 June 2013	29 October 2014
SI	15 July 2015 ⁴⁹	30 July 2015
	8 October 2015 ⁵⁰	10 October 2015
SK	5 August 2015	1 January 2016
UK	27 October 2014	29 October 2014

No further amendments have been made to the provisions transposing the OWD since the dates of transposition specified above for each country.

Several of the countries (BG, EL, HU, IE, IT, LV, and UK) adopted soft law, guidelines, and additional information relevant to the OWD (see Table 2).

Table 2: OWD soft law and guidelines

Country	Soft law, guidelines and additional information
BG	Information about orphan works and the list of minimum sources of information for diligent search and information on the access to the Orphan Works Database, <i>Осиротели произведения:</i> http://mc.government.bg/page.php?p=52&s=532&sp=0&t=0&z=0
EL	A set of guidelines issued by the Hellenic Copyright Organisation, Organismos Pneumatikis Idioktisias (OPI), explain the main points of the OWD: http://www.opi.gr/index.php/en/general-information-on-copyright/orphan-works
HU	The Library Monitor Journal <i>Könyvtári Figyelő</i> of the National Széchényi Library issued an article in Hungarian on 9 January 2015 related to the free use of orphan works in public service libraries http://ki2.oszk.hu/kf/2015/01/az-arva-muvek-szabad-felhasznalasa-a-nyilvanos-szolgaltatasokat-nyujto-konyvtarakban/
IE	A webpage of the national authority (Irish Patent Office) is dedicated to orphan works. It offers a summary of information and a form for organisations performing diligent search to record their search: https://www.patentoffice.ie/en/Copyright/Orphan-Works/Diligent-Search-Form-Orphan-Works.docx
IT	Further guidelines and support are provided directly from the website of the Directorate-General for Libraries and Cultural Institutes. <ul style="list-style-type: none"> Orphan works: guidelines for diligent research in Italy https://opereorfane.beniculturali.it/export/sites/opereorfane/.content/media/Opere-orfane-linee-guida.pdf https://opereorfane.beniculturali.it/organizzazioni-beneficiarie/ricerca-diligente/ Catalogue of the national library service: https://opac.sbn.it/opacsbn/opac/iccu/free.jsp Frequently asked questions (FAQ): https://opereorfane.beniculturali.it/faq/

⁴⁹ Act Amending the Copyright and Related Rights Act (*Zakon o spremembah in dopolnitvah Zakona o avtorski in sorodnih pravicah*).

⁵⁰ Government Decree determining the method of calculation and payment of fair compensation for the use of orphan works in the case of the end of orphan work status (*Uredba o določitvi načina izračunavanja in plačila pravičnega nadomestila za uporabo del, ki jim preneha status osirotelega dela – Decree*).

Country	Soft law, guidelines and additional information
LV	National Library of Latvia published the 'Guidelines for determining the status of orphan works: use of orphan works', <i>Vadlīnijas bāreņdarbu statusa noteikšanā: nenosakāmu autortiesību subjektu darbu izmantošana</i> : https://dom.lndb.lv/data/obj/68137.html
LT	Martynas Mažvydas National Library of Lithuania prepared and published Guidelines for the implementation and use of the Orphan Works Database in 2015 https://www.lnb.lt/paslaugos/bibliotekoms/nenustatytu-teisiu-turetoju-kuriniai/teises-aktai-ir-rekomendacijos
UK	Intellectual Property Office (IPO) of the UK has published several diligent search guidelines. Although these guidance documents are primarily intended for those wanting to use the UK's licensing scheme, they may also help in relation to the diligent search under the OWD https://www.gov.uk/government/publications/orphan-works-diligent-search-guidance-for-applicants

A number of important projects have been set up since the adoption of the Directive to facilitate implementation at EU level. Several have produced research outputs that will complement and form the basis of work to be undertaken for this Study.

The EnDOW⁵¹ project's main objective was to facilitate the process of rights clearance for European cultural institutions engaged in digitisation of the material contained in their collections. The project has developed an online platform that guides beneficiaries to carry out diligent searches. The project focused on the analysis of the legal requirement of 'diligent search' across the orphan works legislation of a selected number of Member States, analysis of best practices of orphan works clearance across cultural heritage sectors (libraries, archives and museums), the design, implementation and optimisation of an online platform for crowd-sourced diligent searching on works contained in the collections of European cultural institutions, as well as the study of potential applications and challenges of the crowd-based search method for texts, images, films, works of visual art and born-digital cultural heritage work.

The FORWARD project focused on providing technical solutions to support the diligent search requirement under the OWD only for audiovisual works. Initiated by the Association of European Film Archives and Cinematheques (ACE), FORWARD has aimed to create an EU-wide, standardised system to assess and register the rights status of audiovisual works and to support the diligent search for orphan works. Similarly, the ARROW⁵² project designed a tool to facilitate rights information management in digitisation projects involving text and image-based works.

Work under the MAPPING project⁵³ also touches on the implementation of the OWD. Under its 'policy watch' activity, the project aims to provide comparative policy overview tables on privacy, international property rights and internal governance, with the aim of allowing interested citizens to follow and compare public information on these key topics. In May 2017, the project published a comparative policy overview table on the implementation of the OWD in selected EU Member States.

⁵¹ Enhancing Access to 20th Century Cultural Heritage through Distributed Orphan Works clearance (EnDOW), accessible at: <http://diligentsearch.eu/>

⁵² Accessible Registry of Rights Information and Orphan Works (ARROW) project took place from 2008 to 2011 and continued up to 2013 with the ARROW Plus project.

⁵³ MAPPING project, accessible at: <https://observatory.mappingtheinternet.eu/page/eu-orphan-works-directive-implementation>

Table 3: Overview of relevant projects set up to facilitate implementation of the OWD

Project	Scope		Deliverables
	Geographical	Subject matter	
EnDOW	20 selected EU Member States (AT, BE, CY, CZ, DE, EE, EL, ES, FR, IE, IT, LT, LU, NL, PL, PT, RO, SE, SK, UK)	<ul style="list-style-type: none"> • Analysis of the legal requirement of 'diligent search' • Investigate best practices of orphan works clearance • To design, implement and optimise an online platform for crowd-sourced diligent search • To study the application of such a tool for cultural heritage work 	<ul style="list-style-type: none"> • Diligent search tool⁵⁴ • List of sources for diligent search in 20 EU Member States⁵⁵ • Requirements for diligent search in 20 Member States⁵⁶ • Study on best practices of cultural heritage institutions when dealing with orphan works⁵⁷
FORWARD	Selected number of EU Member States (e.g. AT, BE, CZ, DE, DK, ES, FI, FR, HU, IT, LU, NL, PL, SE, SK, UK)	<ul style="list-style-type: none"> • To build a pan-European system to assess the rights status of audiovisual works • To systematically record the diligent searches performed • Creation of a permanent register for audiovisual orphan works • Support the European film heritage institutions in the implementation of the OWD 	<ul style="list-style-type: none"> • FORWARD website⁵⁸ and several deliverables⁵⁹ • Survey on implementation of the OWD in the Member States⁶⁰ • Results of the survey on the transposition in the ACE members' countries⁶¹ • List of sources for diligent search⁶² • Implementation table in partner countries⁶³

⁵⁴ Diligent search tool, accessible at: <http://diligentsearch.eu/diligent-search-tool/>

⁵⁵ Diligent search tool, accessible at: <http://diligentsearch.eu/list-sources-diligent-search-20-european-countries/>

⁵⁶ EnDOW Report 2, accessible at: <http://diligentsearch.eu/wp-content/uploads/EnDOW%20Report%202.pdf>

⁵⁷ EnDOW Report 3, accessible at: <http://diligentsearch.eu/wp-content/uploads/2018/05/EnDOW-Report-3.pdf>

⁵⁸ FORWARD, accessible at: <http://project-forward.eu/wp-content/uploads/2014/09/FORWARD-D2.2-website.pdf>

⁵⁹ FORWARD, accessible at: <http://project-forward.eu/results/>

⁶⁰ FORWARD, accessible at: http://project-forward.eu/wp-content/uploads/2015/02/WP2_Implementation_OWD_MS_150129.pdf

⁶¹ FORWARD, accessible at: http://project-forward.eu/wp-content/uploads/2016/10/OWD_transposition_results_150127.pdf

⁶² FORWARD, accessible at: http://project-forward.eu/wp-content/uploads/2016/09/Forward_Diligent-Search_details_160928.pdf

⁶³ Implementation table in partner countries, accessible at:

https://docs.google.com/spreadsheets/d/1jAveL8AJvCRD6QJN9733PUtW0Hb3BI2Gvj6v_aNfWA/edit#gid=0

Project	Scope	Deliverables	
ARROW	DE, FR, UK and ES	<ul style="list-style-type: none"> To provide a practical technological solution to bridge the so-called “black hole of the twentieth century” in the European digital collections and to facilitate inclusion in the collections of recent works that, being still under copyright, cannot be digitised without permission from their right holders 	<ul style="list-style-type: none"> ARROW database⁶⁴
MAPPING Policy Observatory	11 EU Member States (AT, BG, CZ, DE, ES, FR, IT, MT, NL, RO, UK) + Switzerland	<ul style="list-style-type: none"> To indicate if the OWD has been implemented and the differences in implementation 	<ul style="list-style-type: none"> OWD implementation table

1.2.3. National legal and policy developments in view of the Digital single Market Directive

Unlike the approach taken by the OWD, the newly adopted Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (DSM Directive) provides for a licence-based solution for digitisation of out-of-commerce works and making them available online. Article 8 introduces a mechanism of extended collective licensing (ECL) or presumption of representation, which is a licensing scheme that allows for collective agreements between a representative collective management organisation (CMO) and a user to also apply in relation to authors who are not members of the organisation, on condition that the CMO is sufficiently representative of a given category of rightholders in a Member State. As a result, the representative CMO can issue licences for entire sets of out-of-commerce works even though they might only represent works from some of the affected rightholders.

If there is no sufficiently representative CMO in that Member State, the DSM Directive provides a fall-back option. Based on the exception in Article 8(2), cultural heritage institutions can make available out-of-commerce works that are permanently located in their collections for non-commercial purposes on non-commercial websites, on condition that ‘the name of the author or any other identifiable rightholder is indicated, unless this turns out to be impossible’.

Throughout the series of interviews conducted for this Study, several interviewees expressed the view that the OWD was the first attempt to solve orphan works, while the out-of-commerce provisions in the DSM Directive can be seen as the second such attempt. However, before full transposition and implementation of the DSM Directive by the Member States, it is difficult to make a fully substantiated comparison or draw conclusions on whether some elements set in the DSM Directive could be fully applied for orphan works and potentially provide further solutions for this phenomenon.

⁶⁴ The ARROW database, which facilitates rights information management in digitisation projects involving text and image-based works, was discontinued as of June 2017. Its software has been released as open source.

'Out-of-commerce works' is a broader category than 'orphan works'. Article 8 of the DSM Directive applies to all categories of works (photographs, works of visual art, works produced by broadcasting organisations after 31 December 2002), including those excluded by the OWD. The permitted uses set out in the DSM Directive include distribution, which is not part of the OWD.

The transposition date for the DSM Directive is set for 7 June 2021 and preliminary analysis in summer 2020 suggests that the process has not yet been initiated in AT, BE, CZ, EE, FI, IS, IE, IT, LI, LU, LV, MT, PL, PT and RO. As the transposition process is still ongoing, the legal implications of the resulting regulatory schemes on the national orphan works schemes remain unclear.

In summary, once the DSM Directive is transposed and implemented by the Member States, a thorough comparison of the 'out-of-commerce works' and 'orphan works' systems could be beneficial to establish some potential synergies between the two systems.

1.3. Methodology

1.3.1. Literature review

The available information was collated through desk research and then analysed. This information enabled a quantitative and qualitative analysis of the application of the OWD. A wide range of sources were covered, including policy documents, studies, research reports and academic literature. The information gained through the literature review was useful in preparing the subsequent steps of this Study. This literature list increased throughout the task – and the project overall – as additional sources were discovered by the research team, including national researchers (see References).

1.3.2. Country-level research

This task gathered information at country level. As the information already collected by EnDOW is closely linked to the information required for this Study, some elements of the EnDOW questionnaire were used as the basis for a country fiche to collect specific information here. The information requirements for the country fiche were discussed with copyright legislation experts and with the Commission. Once the fiche was approved, the national research team collected data for the countries covered by this study. For the 20 countries covered by the EnDOW report, national researchers were asked to check and update the information, as well as to answer any additional questions, with national researchers completing the fiches in full for the remaining 11 countries covered. The research team checked the fiches and sought follow-up information from the researchers where necessary. The information collected by the national researchers is analysed in Chapter 2 of this report and further summarised in the tables in Annex I.

1.3.3. Stakeholder consultation

In addition to extensive desk research, stakeholders were consulted through an online survey. The survey questions focused on two core aspects: i) the 'effectiveness' of the OWD, i.e. the extent to which it meets the objective of mass digitisation and dissemination of orphan works; and ii) the coherence of the OWD with other relevant areas of the EU copyright law and possible improvements to the system. The survey mixed closed and open questions to obtain both a quantitative and qualitative assessment of the situation.

The survey targeted all relevant stakeholders (beneficiary organisations, national competent authorities, rightholder organisations) in all of the countries covered by this Study. It was disseminated by email to around 350 organisations identified through preliminary desk research. EU-level organisations representing the interests of

beneficiaries and rightholders were also encouraged to disseminate the survey to their members. Given the broad range of aspects covered by the survey and the profile of respondents, the survey comprised both mandatory (mainly profiling) and non-mandatory questions, enabling respondents to answer only those on which they had experience/expertise. The survey was launched on 10 August 2020 and closed on 28 September 2020 following a two-week deadline extension and reminders sent to the organisations. The information collected through stakeholder consultation is analysed in Chapter 3 and the analysis of the survey results is presented in Annex II – Survey report.

The survey gathered a total of **87 responses** from organisations in 22 EU and three EEA Member States, along with responses from the UK, the United States of America (US), pan-European and international level organisations. Table 4 gives an overview of the responses by country.

Table 4: Responses by country

State	No.	State	No.	State	No.
AT	X	DE	7	FR	2
BE	8	DK	4	HR	3
BG	X	EE	1	HU	3
CH	1	EL	2	IE	X
CY	1	ES	5	IS	2
CZ	2	FI	4	IT	1

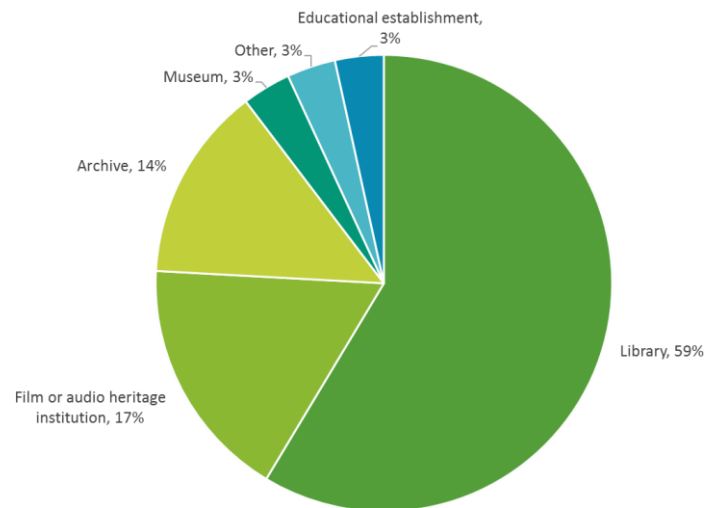
State	No.	State	No.	State	No.
LI	X	NO	1	SK	X
LT	5	PL	2	UK	3
LU	X	PT	4	EU	7
LV	1	RO	1	US	3
MT	1	SE	5	Int.	2
NL	5	SI	1		

The survey was disseminated to 208 beneficiaries and organisations representing the interests of beneficiaries, with a response rate of 18 %. Rightholder organisations had a response rate of 11 % from the 130 contacted. Nine other organisations were also contacted, with a response rate of 22 %.

The respondents cover different types of stakeholders: 33 % represent beneficiary organisations, 31 % other types of organisations (e.g. civil society/NGO, CMOs, interest group organisations, individual respondents), 28 % rightholder organisations, and 8 % national competent authorities, of which 71 % also consider themselves beneficiaries.

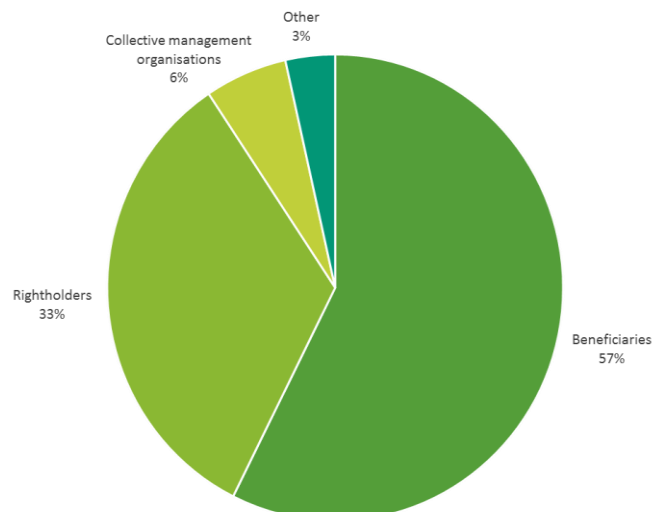
As shown in Figure 2 below, beneficiary organisation respondents mainly represent libraries (59 %), film or audio heritage institutions (17 %) and archives (14 %).

Figure 3: What type of beneficiary organisation do you represent? (N=29)



To facilitate analysis and enable a clearer differentiation of responses by stakeholder type, the respondents were categorised into four broad categories: beneficiaries, rightholders, CMOs, and others. The 'beneficiaries' group includes all beneficiary organisations, national competent authorities that also consider themselves beneficiaries, and EU/international organisations that represent the interests of cultural heritage organisations or seek to promote greater digitalisation and dissemination of European culture. The 'rightholders' group includes all rightholder organisations and EU/international organisations that represent the interests of rightholders or are active in the field of copyright protection. The 'others' group includes national competent authorities that do not consider themselves beneficiaries, individual respondents from academia, and other respondents that do not fit into the above categories. Based on this categorisation, beneficiary-oriented organisations represent 57 % of respondents, rightholder-oriented organisations 33 %, CMOs 6 %, and others 3 % (see Figure 3 below).

Figure 4: Respondents, by stakeholder type (N=87)



Looking at sectoral coverage of the respondents, 66 % are active in the print sector, primarily books (42 %) and publications (32 %); 56 % are active in the audiovisual sector (40 % in music/sound and 37 % in films); and 44 % are active in the visual arts sector (27 % in photographs). 24 % of respondents stated that they were active

in other sectors, including digital publications and archives, multimedia interactive entertainment works, cartographic materials, manuscripts, and personal archives.

Figure 5: Which sector(s) is your organisation active in? Multiple answers possible (N=87)

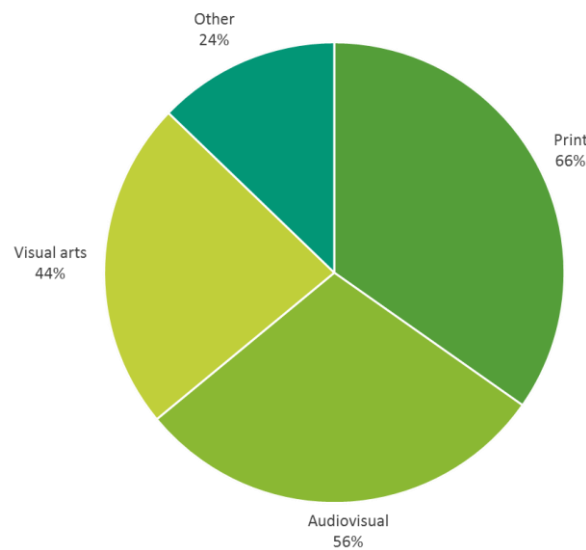
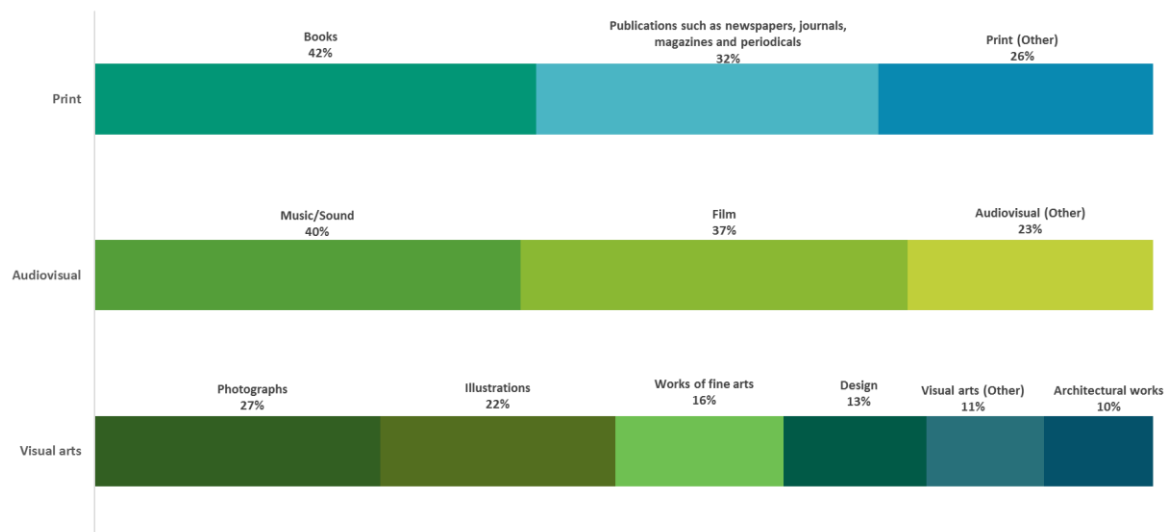


Figure 6: Breakdown of respondent sectors (N=87)



1.3.4. Stakeholder interviews

In order to supplement the desk research and clarify some data obtained through the survey, 13 interviews were carried out, covering nine countries and several pan-European organisations. One interview was carried out with the EUIPO, four with national competent authorities (some of which are also active as beneficiaries), four with beneficiaries, and four with other stakeholders (including rightholder organisations). The aim was to obtain an understanding of the main legal and administrative difficulties, and to identify best practices along with possible solutions and improvements.

Prior to the interviews, a pre-established interview guide was sent to the interviewees, including common themes and questions, which could be adapted for the specific interview context (e.g. type of stakeholder, specificities of a Member State). Interviewees were selected for geographical coverage (from north, south, east and west European countries), their size (combination of small and large countries), as

well as stakeholders from the 'old' EU Member States, the 'new' EU Member States and former EU Member State (UK). Coverage of the different categories of orphan works, best practices and different implementation approaches to the OWD were also taken into account.

2. Overview of implementation and effectiveness of the Orphan Works Directive

This Chapter describes the general approach to transposition of the OWD in all countries covered by the Study. The analysis is based on the desk research carried out by the national experts on the legislative provisions and their applications (through country fiches), supplemented with the information obtained through the stakeholder interviews.

2.1. Definitions and concepts

This Section defines the main concepts in the OWD. While the definition of some concepts, such as ‘orphan works’ and ‘orphan works with several rightholders’ is provided in the OWD, other definitions are not harmonised with the OWD (e.g. ‘anonymous and pseudonymous works’, ‘music works’, ‘phonograms’).

2.1.1. Orphan works

Box 2: Article 2(1) of the OWD

1. 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.

Most of the countries transposed a concept of ‘orphan works’ into their national legislation identical to that provided in the OWD (AT, BE, BG, DE, DK, CY, EE, EL, ES, FR, IS, IE, IT, LI, LU, LV, MT, NL, NO, PL, RO, SE, SK, SI and UK). CY and LU transposed the concept *ad verbatim*. Some nuances and specificities were observed in the legislation of CZ, FI, HR, HU and PT.

In CZ, the search should also seek to identify the author if their identity is not known, which follows from other provisions introduced. Compared to the OWD, the national law also contains a rebuttable presumption that all works of a designated author whose work has been identified as orphan are considered orphan, unless the contrary is proved. In FI, a work is considered an orphan work if all of its authors are not known, identified or located despite a diligent search for rightholders having been carried out and the result of the search recorded in the database of the EUIPO⁶⁵. In HR, the definition of orphan works corresponds to that of the OWD, with the exception that it does not explicitly refer to phonograms. In HU, the definition includes certain aspects of Article 3 of the OWD, such as ‘good faith’ in carrying out a diligent search and extending the meaning of works to ‘other protected subject matter’. PT makes no express mention of phonograms in the definition. However, phonograms would be covered under the concept of ‘protected intellectual works’.

2.1.2. Orphan works with several rightholders

Box 3: Article 2(2), (3) and (4) of the OWD

2. Where there is more than one rightholder in a work or phonogram, and not all of them have been identified or, even if identified, located after a diligent search has been carried out and recorded in accordance with Article 3, the work or phonogram may be used in accordance with this Directive provided that the rightholders that have been identified and located have, in relation to the rights they hold, authorised the organisations referred to in Article 1(1) to carry out the acts of reproduction and making available to the public covered respectively by Articles 2 and 3 of Directive 2001/29/EC.

⁶⁵ Finnish legislation still refers to the Office for Harmonisation in the Internal Market (OHIM).

3. Paragraph 2 shall be without prejudice to the rights in the work or phonogram of rightholders that have been identified and located.

4. Article 5 shall apply *mutatis mutandis* to the rightholders that have not been identified and located in the works referred to in paragraph 2.

The rules on orphan works with several rightholders were transposed by most countries in their national legislation very closely to the rules set out in the OWD (AT, BE, CY, CZ, DE, EE, EL, ES, FR, HR, IS, IT, IE, LI, LT, LU, LV, MT, NL, NO, PL, SK and SI). In PT, the relevant legislation does not contain such rules. Some nuances of the transposition were revealed in DK, FI, HU, RO, SE and the UK.

In DK, if a work or sound recording has more than one rightholder and not all have been identified, or, although identified, not located, the part of the work or sound recording for which the identified and located rightholder(s) holds the rights may be used with their permission. In FI, the implementing legislation refers to 'authors', but its preparatory work makes clear that other rightholders, such as heirs or assignees, can also give consent. In HU, the provisions on the use of orphan works under the national law shall not apply to cases where authorisation of use falls within the scope of the collective management of rights.

RO national law contains no provision equivalent to Article 2(4) of the OWD, which states that 'Article 5 shall apply *mutatis mutandis* to the rightholders that have not been identified and located in the works referred to in paragraph 2'⁶⁶. In SE, if a work has multiple copyright holders and only a few of these are unknown or impossible to identify, the part of the work which belongs to these copyright holders will be considered orphan. If copyright belongs to multiple people, permission is required from each person to make use of the work. Where works are not orphan, consent is required from all copyright holders. It is not considered necessary, therefore, to enshrine the OWD's requirement on consent from identified and localised copyright holders. In the UK, the national transposing legislation defines works where one or more of the rightholders has been identified and located but where other rightholders were not identified, as orphan works.

2.1.3. Anonymous and pseudonymous works

Box 4: Article 2(5) of the OWD

5. This Directive shall be without prejudice to national provisions on anonymous or pseudonymous works.

The legislation of most of the countries contains regulatory provisions extended to anonymous and pseudonymous works (AT, BE, BG, CY, CZ, DE, EE, EL, FR, HR, HU, IE, IT, LU, LV, LT, NL, PT, RO, SE, SK, SI and UK). Some nuances of transposition were revealed in DK, ES, FI, IS, LI, MT, NO and PL.

DK makes no mention of anonymous works. Only 'a rightholder's commonly known pseudonym' is considered to mark ownership of rights in the same way as a name would. There are no further stipulations on what qualifies as a commonly known pseudonym. In ES, the law does not clarify if the rules on orphan works apply to anonymous or pseudonymous works.

In FI, a work should not be considered an orphan work simply because the author does not want to reveal their real name and therefore uses a pen name or a pseudonym. For example, reliable information that the author is available through the publisher of the work or other representative would be sufficient to show that the work is not an orphan work. An author's notification that ends the orphan work status may also be made by the author's representative, who shall be able to prove in a reliable

⁶⁶ Article 2(4) of the OWD.

manner that they are authorised to make that notification. The preparatory work notes that power of attorney or a publishing contract that identifies the work in question would suffice to prove authorisation. The organisation receiving the notification communicates the author's pseudonym, together with their representative's contact information, to the EUIPO.

In IS, anonymous works are addressed but pseudonymous works are not. Copyright for a work that has legally become available to the public anonymously is in effect for 70 years from the time when it or its individual parts become available. If the rightholder is identified before the end of the 70-year period or it becomes clear that the author has died, the copyright follows the general rules. In LI, pseudonymous works are regulated and create the presumption of authorship. However, there is no clear relation to the OWD, which creates legal uncertainty. In MT, regulations shall be without prejudice to any other law on anonymous or pseudonymous works, but no such legislation was identified. In NO, anonymous works retain copyright for 70 years after the end of the year in which the work was first published. If the work consists of multiple parts, the copyright is calculated separately for the different parts. In PL, although there was no explicit transposition of this provision of the OWD, no provisions violating national regulations on anonymous or pseudonymous works were identified in the transposing legislation.

2.1.4. Musical works and phonograms

For 'musical works', no definition is present in most of the laws of the countries examined. The only countries whose legislation contains a precise definition of 'musical work' are CY, EE, IE, IT, NL, MT, PT and UK (see Table 13 in Annex I). The legislation in CY, EE, IT, NL and PT could cover accompanying lyrics within the definition of 'musical works'. IE, MT and the UK do not cover lyrics in their definitions of musical works.

For 'phonograms', no such definition is present in the laws of AT, BE, FI, FR, DE, EL, HU, IS, IT, LI, LT, MT, NO, SE and UK. The laws of the other countries do contain a definition and these are broadly similar. Phonograms are defined as fixations and/or recordings of the sounds of a performance, other sounds, or representation of sounds (see Table 14 in Annex I).

2.2. Scope of the Orphan Works Directive

2.2.1. Types of beneficiaries (subjective scope)

Box 5: Article 1(1) of the OWD

1. This Directive concerns certain uses made of orphan works by publicly accessible libraries, educational establishments and museums, as well as by archives, film or audio heritage institutions and public service broadcasting organisations, established in the Member States, in order to achieve aims related to their public interest missions.

Most of the countries implemented the subjective scope of the OWD in a manner identical to that in the OWD (BE, BG, CY, DK, EL, FI, FR, IS, IE, IT, LU, LV, MT, NL, NO, RO, SE, SI and UK). Some nuances and specificities were observed in the transpositions of AT, CZ, DE, EE, ES, FR, HR, HU, LI, LT, PL, PT and SK.

In AT, the law is more general in its definition of entitled institutions and avoids enumerating publicly accessible institutions by type. According to the background documents to the amendments transposing the OWD, the intention of the national legislator was to simplify the wording of the law, without any intention to derogate from the OWD. In CZ, implementation of the subjective scope differs from the OWD in that it does not mention 'film or audio heritage institutions'. In DE, public service broadcasters can only rely on a narrower scope of works, as their privilege does not extend to published books and magazines. In EE, the list of beneficiaries provides

more specific definitions of public memory institutions, i.e. public archives, museums, libraries, educational and research establishments, or film or audio heritage institutions. In ES, the transposing measures add an extra reference to 'newspaper libraries'⁶⁷ to retain coherence with the organisations that benefit from the limitations set in the law, which expressly lists newspaper libraries. In FR, there is a nuance on accessibility by the public of some of the institutions concerned. Under the French law, the 'public accessibility' criteria apply only to libraries, and museums and archives do not explicitly need to be publicly accessible in order to benefit from the OWD's provisions. There is nevertheless an ambiguity in the French law, as the expression 'publicly accessible' can be understood as relating to either libraries or collections. This list of beneficiaries can therefore be understood to exclude libraries that are not publicly accessible, or to mean that the provisions on orphan works only apply to publicly accessible collections of libraries, excluding their private collections.

In HR, the only difference is that the orphan works exception application is limited to beneficiaries established in its territory, whereas the beneficiaries under the OWD can be established in any EU Member State. HU has an additional provision that is not part of the implementation of the OWD as such: on request, the HIPO can grant a licence for the use of orphan works by other users. The licence shall be valid for a maximum term of five years, within the territory of the country and shall be non-exclusive and non-transferable. It shall not confer the right to grant further licences or to adapt the work. The use can aim or not, either directly or indirectly, to earn or increase an income. In LI, public service broadcasting organisations are not covered by the scope. In LT, research institutes and public service broadcasting organisations are added to the scope. In PL, the transposing legislation specifies that in the case of scientific and research institutes, only those that offer educational programmes are covered by the scope of the transposing legislation. In PT, the transposing measures are more detailed in respect of the aims pursued by the beneficiary institutions. The orphan works exception may be invoked by the relevant entities where they aim to facilitate, *inter alia*, the right to access information, education, and culture, including the enjoyment of intellectual products.

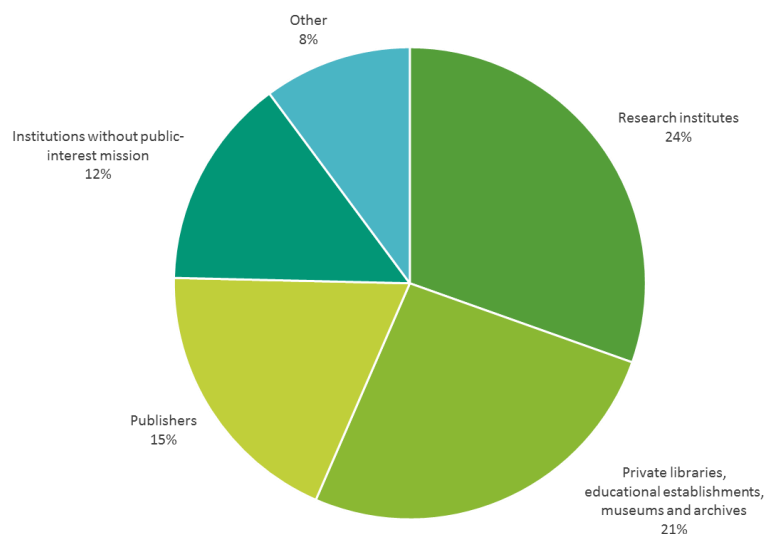
In SK, the subjective scope is too general and does not explicitly refer to libraries, archives, museums and schools.

In practice, the subjective scope of the OWD does not appear to be an issue. The majority of the stakeholders consulted both through the survey and interviews did not express a need to extend the scope of the OWD to additional types of organisations. It should be noted, however, that the stakeholders consulted represent either beneficiary organisations included under the scope of the Directive or rightholder organisations - had additional types of stakeholder been consulted, the results may have been different⁶⁸. Among the rightholder organisations that responded to the survey, 79 % were against extending the scope, often stating that it would increase the potential for misuse and risk violation of copyright. Many beneficiaries consulted highlighted that they already fall under the scope of the OWD and several argued that the problems with the current Directive should be addressed before extending the scope.

Several stakeholders (32 % of survey respondents) were in favour of extending the scope of the Directive to additional organisations. As shown by Figure 6, for the majority, this should only include organisations performing a public interest mission (e.g. research, educational, cultural) or private libraries and museums. CMOs and publishers were the chief proponents for the inclusion of commercial organisations.

⁶⁷ *Hemerotecas*.

⁶⁸ For example, private libraries, research institutions and institutions without a public-interest mission which are not included within the scope of the OWD were not consulted for the purposes of this study. These types of organisations may however express an interest/need to be included within the scope of the Directive to digitise orphan works.

Figure 7: If yes, which other types of institutions should be included in the scope of the OWD?**Please mark all that apply. (N=28)**

It can be concluded that no particular issues could be detected in the national implementation of the subjective scope of the Directive. This is also reflected in practice, where only a fraction of the stakeholders are in favour of extending the scope to cover research institutes, private libraries, educational establishments, museums and archives, and publishers and institutions without a public interest mission.

2.2.2. Types of works and/or materials (objective scope)

Box 6: Article 1(2), (3) and (4) of the OWD

2. This Directive applies to:

- (a) 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;

which are protected by copyright or related rights and which are first published in a Member State or, in the absence of publication, first broadcast in a Member State.

3. This Directive also applies to works and phonograms referred to in paragraph 2 which have never been published or broadcast but which have been made publicly accessible by the organisations referred to in paragraph 1 with the consent of the rightholders, provided that it is reasonable to assume that the rightholders would not oppose the uses referred to in Article 6. Member States may limit the application of this paragraph to works and phonograms which have been deposited with those organisations before 29 October 2014.

4. This Directive shall also apply to works and other protected subject matter that are embedded or incorporated in, or constitute an integral part of, the works or phonograms referred to in paragraphs 2 and 3.

Most of the countries studied implemented the objective scope of the OWD in a manner identical to that set out in the OWD (BE, BG, CY, DE, DK, EE, EL, ES, FI, HR,

HU, IS, IE, LU, LV, MT, NL, RO, SE, SI and UK). Some nuances and specificities were observed in the transposition of AT, CZ, FR, LI, LT, NL and PT.

AT uses slightly different wording. The legislator assumed that 'cinematographic work' in the OWD refers to the way in which a work is watched by the public (perceived). In terms of content, the transposing measures do not differ from the OWD. In CZ, the law does not specifically mention 'journals'⁶⁹, instead using the more general term 'magazines'⁷⁰. The exception for orphan works shall apply, by analogy, to performers and their performances, phonogram producers and their phonograms, and producers of audiovisual fixation. As regards the rights of broadcasters, the provision only mentions the application of the orphan work definition analogy, without the exception to use orphan works.

FR expressly excludes independent photographs and fixed images. An important nuance is that the transposing law refers to the 'EU Member States' without any mention of the 'EEA Member States'. The beneficiaries are almost identical to the list set out in the OWD, except for photographs and still images existing as independent works.

In LI, the scope is extended to 'other objects of protection', but this term is not defined in the law. LT has a terminology difference – reference is made to 'audiovisual works', not 'cinematographic' works. Also, there is no limitation on the application of this provision to works and phonograms deposited with those organisations before 29 October 2014 but never published. In NL, the category of 'musical works' is included in the objective scope, which is broader than the category of 'phonograms' set out in the OWD. This can be explained by the fact that related rights on phonograms are governed by a separate piece of legislation – the Related Rights Act⁷¹. The transposing act therefore only refers to copyright protected works. This specificity could have certain peculiar effects, as the rights on most musical works will presumably be administered by the CMO *Vereniging Buma* and will not be considered orphan works. Only in cases where the author(s) had not joined the CMO *Vereniging Buma* can a musical work be classified as an orphan work⁷².

There are four main differences between the OWD and the national legislation in PT. Firstly, the national law refers to 'videograms', which are defined as 'the first fixation of a sequence of moving images, with or without sound, regardless of whether it is an audiovisual work'. Secondly, the national legislation does not refer to 'cinematographic works', but rather to 'audiovisual works', which cover cinematographic works. Thirdly, the national law bundles all categories together for the purposes of applying the location factor. Finally, the national law contains two additional points, namely the co-production of works by public broadcasters, and their purpose. In SK, the national law mentions 'musical works in written form', which are not explicitly referenced in the OWD.

The vast majority of beneficiary organisations consulted for this Study believe that additional works should be included under the scope of the Directive, notably stand-alone graphic works (such as photographs, posters, illustrations or postcards) and items of fine art. Many stated that cultural heritage institutions have numerous photographs (notably from WWI/II) and works of arts within their collections which cannot be digitised, highlighting that these types of works are by nature more likely to be orphan. Several other types of works to be included within the scope of the OWD were mentioned, including interactive entertainment works, manuscripts, letters,

⁶⁹ *Odborné časopisy*.

⁷⁰ *Časopisy*.

⁷¹ *Wet op de naburige rechten (Geldend van 11-10-2018 t/m heden)*, accessible at: <https://wetten.overheid.nl/BWBR0005921/2018-10-11>

⁷² Observation by Dr. Lucie Guibault.

video/computer games, databases and software⁷³. One beneficiary interviewee considered it incoherent that embedded visual works for which no rightholder can be found are covered by the OWD exception but not stand-alone visual art.

On the other hand, rightholder organisations active in the visual arts sector are strongly against applying the orphan work exception to stand-alone graphic works. They argue that photographs are particularly at risk of being misclassified as orphans because digitisation strips the metadata embedded in the work, making it more likely to lose trace of the rightholder.

2.2.3. Cut-off dates

The OWD sets out two cut-off dates:

- Cut-off date for cinematographic or audiovisual works and phonograms produced by public service broadcasting organisations and contained in their archives – the OWD only applies to those works that were produced up to and including 31 December 2002 (Article 1(2)(c) OWD);
- Optional cut-off date for unpublished works and phonograms – countries have the option to exclude from the scope of the OWD any unpublished works deposited after 29 October 2014 (Article 1(3) OWD).

Most of the countries do not envisage any cut-off date and do not anticipate any exclusions for a work or material from the national legislation (BE, BG, CZ, DE, DK, EE, EL, ES, FI, FR, HR, HU, IS, IE, IT, LU, LV, MT, NL, NO, PL, PT, RO, SE, SK, SI and UK). Some nuances in the transposition were observed in AT, LI and LT.

In AT, exceptions are not explicitly mentioned. However, the transposing law states that public radio broadcasters are only allowed to multiply works fixed on a sound carrier or in moving images that were produced on behalf of this or another broadcast cooperation before 2003 and included in their archive. In LI, the cinematographic and audiovisual works and phonograms produced by public service broadcasting organisations are excluded from the scope of the transposition. LT has chosen to refer in its legislation to 'audiovisual works', not 'cinematographic works'. There is no limitation of the application of this provision to works and phonograms deposited with those organisations before 29 October 2014.

As specified in the Explanatory Memorandum for the Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works, 'with regard to the archives of public service broadcasters and the special position of public service broadcasters as producers there is a need to limit the phenomena of orphan works by providing a cut-off date for works that are within the scope of the proposal'⁷⁴. Two optional cut-off dates are set out in the OWD – one for audiovisual works and another for phonograms.

As regards the cut-off date for cinematographic or audiovisual works and phonograms produced by public-service broadcasting organisations, there is no cut-off date in the national laws of ES, FI, FR, EL, IS, LV, RO, SK and SL. All other countries covered by this Study have the same cut-off date as that in the OWD. In CZ, the cut-off date is set expressly for phonograms (by analogy) that were produced by public service broadcasters or at their initiative before 31 December 2002 (i.e. not specifically 'up to and including'). It is unclear whether this includes phonograms produced on 31

⁷³ One beneficiary organisation also mentioned the issue of works published in third countries. The interviewee highlighted that many national authors immigrated to third countries (e.g., the USA) after the second world war. After performing a diligent search for rightholders, these works are found to be orphan but cannot be digitised and disseminated as the OWD is only applicable for works published in the EU. This beneficiary organisation therefore believes it would be important to reach agreements for the digitisation of works in third countries.

⁷⁴ Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works, Brussels, 24.5.2011, COM(2011) 289 final.

December 2002. In IS, the cut-off date is 1 January 2003, a day later than in the OWD.

As regards the optional cut-off date for unpublished works and phonograms, there is no cut-off date in the national laws of AT, ES, FI, DE, PT, RO, and SK. In SE, the cut-off date is before 1 January 2003, in line with Article 1(2) OWD. This is earlier than the Article 1(3) OWD cut-off date of 29 October 2014 for unpublished works. All other countries covered by this Study have the same cut-off date as the OWD.

No observations were shared in the stakeholder consultation or interviews on the approach to cut-off dates. In summary, all countries generally followed the scope of the OWD, with only minor nuances in transposition and a very limited number of exceptions.

2.3. Permitted uses

Box 7: Article 6(1) and (2) of the OWD

1. Member States shall provide for an exception or limitation to the right of reproduction and the right of making available to the public provided for respectively in Articles 2 and 3 of Directive 2001/29/EC to ensure that the organisations referred to in Article 1(1) are permitted to use orphan works contained in their collections in the following ways:

(a) by making the orphan work available to the public, within the meaning of Article 3 of Directive 2001/29/EC;

(b) by acts of reproduction, within the meaning of Article 2 of Directive 2001/29/EC, for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration.

2. The organisations referred to in Article 1(1) shall use an orphan work in accordance with paragraph 1 of this Article only 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. The organisations may generate revenue 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.

Overall, the legislation of most of the countries follows the rules set in Article 6(1) of the OWD (BE, BG, CY, CZ, DE, DK, EE, EL, ES, FI, HU, IS, IE, IT, LT, LU, LV, LI, MT, NL, NO, PL, PT, RO, SE, SK, SI and UK). Some nuances were observed in the legislation of AT and FR.

In AT, orphan works can be used if this serves to fulfil the institution's public interest duties, especially the conservation, restoration and provision of cultural and educational access to their work stock, and is free of charge or for a fee that covers only the costs of digitisation and making available to the public. In FR, the orphan works shall only be used within the scope of their cultural, educational and research missions.

The legislation of most of the countries follows the purposes set out in Article 6(2) of the OWD without any differences (AT, BE, BG, CY, CZ, DE, DK, ES, FI, FR, HR, IS, IE, IT, LI, LV, LU, MT, NL, PL, PT, RO, SE, SI, SK and UK), with DE and RO transposing the provision *ad verbatim*. Some nuances in the transposition were observed in EE, EL, HU, LT and NO.

In EE, public memory institutions and Estonian public broadcasting are permitted to use a work or phonogram contained in their collections which has been considered an orphan work and forwarded to the orphan works database, only in the public interest and provided that the names of all identified rightholders are indicated. The purposes (public interests) are defined in a general way, which nonetheless is not broader than set in the OWD. Beyond that, Estonian copyright law does not differ from the regulation in the OWD. In EL, organisations are allowed to use orphan works for the purposes of digitisation, making available to the public, indexing, cataloguing, preservation, or restoration. Those purposes are broader than those in the OWD, in

that the goal of registration and cataloguing of works is also promoted. In HU, the permitted uses do not differ from the list provided in the OWD. The exception refers to their use where the right of reproduction or making available online is licensed by CMOs.

In LT, orphan works may be used by non-rightholders in their fields of activity for non-commercial purposes. Such users (non-rightholders) can be only cultural, educational, and scientific institutions specified by the national law and by the public broadcaster. These non-rightholders can use orphan works during their normal activities in the public interest for cultural dissemination, heritage protection, education, science and in the sphere of public information. Users of orphan works have the right to enter into cooperation, joint activity (partnership), service and other agreements with other persons in accordance with the procedure established by law to achieve the public interest objectives specified in the national law in accordance with the use of orphan works.

In NO, the permitted institutions can use works to fulfil their public interest goals. No further definition is given, which seems to enlarge the scope set out in Article 6(2) of the OWD.

The legislation of most of the countries follows the rules on generating revenue set in Article 6(2) of the OWD, without any differences (AT, BE, BG, CY, CZ, DE, DK, EE, EL, ES, FI, HR, HU, IS, IE, IT, LI, LT, LU, LV, MT, NL, NO, PL, PT, RO and UK). Some nuances were observed in FR, NO, SE, SK and SI.

In FR, the collection of revenue covering the costs arising directly from the digitisation and making available to the public of orphan works may not exceed a period of seven years. This limitation is not foreseen in the OWD. The report of the *Comité des sages* (reflection group on taking Europe's cultural heritage online) states that the seven-year time span should be considered an adequate time limit to generate 'incentives for private funds' investment in mass digitisation of cultural assets, while allowing public institutions sufficient control of their digitised material'⁷⁵.

In NO, income from the use of orphan works shall only cover expenses relating to the production of copies and making available to the public in accordance with the conditions previously named. In SE, income is allowed to be used to cover the costs of digitalisation and making the works available to the public. In SK, a person may not use orphan works for the purpose of gaining direct or indirect economic benefit, but may claim compensation for reasonably incurred costs. In SI, the national transposing provision is slightly broader, as it allows beneficiaries to obtain revenue to cover different costs of reproduction, such as costs of digitisation, making available, indexing, cataloguing, preservation or restoration, whereas the OWD mentions only the costs of digitisation.

Box 8: Article 6(4) of the OWD

4. This 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.

Public-private partnerships allow revenue to be generated from the use of orphan works to cover the digitisation costs. No specific rules were found in AT, BE, BG, CY, CZ, DK, EE, FI, DE, EL, HU, IS, LI, LV, the NL, NO, PL, SE, SK and UK legislation. Nevertheless, the laws of these countries do not contain any provisions that would contradict this requirement of the OWD. Public-partnership rules are present in the legislation of ES, FR, HR, LU, RO, IE, IT, LT, MT, PT and SI.

⁷⁵ *Comité des sages*, Report on taking Europe's cultural heritage online, accessible at: <https://op.europa.eu/en/publication-detail/-/publication/79a38a23-e7d9-4452-b9b0-1f84502e68c5>, p. 48.

In ES, the rules are the same as those set out in the OWD. However, the national law clarifies that this freedom of contract does not imply that the agreements grant the commercial partner the right to use or control the use of the orphan work. In FR, partnerships between the public entities mentioned in the OWD and private operators are regulated without prejudice to the freedom of contract of organisations in the pursuit of their public interest missions, particularly in respect of public-private partnership agreements.

In HR, LU and RO, the transposition of the OWD requirement is *ad verbatim*. In IE, the national law is without prejudice to the freedom of contract of relevant bodies in pursuit of their public interest missions, particularly in respect of public-private partnership agreements. In IT, the public-private partnership for beneficiaries is regulated in line with the OWD. In LT, in order to achieve the public interest objectives related to the use of orphan works, users have the right to enter into cooperation, joint activity (partnership), service and other agreements with other persons in accordance with the procedure established by the law. Persons who have concluded contracts with users of orphan works shall not themselves acquire the right to use or control the use of orphan works.

In MT, the national legislation 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. No other details are provided on the public-private partnership for beneficiaries. In PT, the entities that make use of orphan works may enter into commercial agreements with public and private entities and obtain financing in order to exclusively cover the costs of digitisation, treatment, safeguarding and preservation of these assets. In SI, the law explicitly states that beneficiaries may transfer the performance of reproduction or making orphan works available to the public to a third party. The law thus explicitly stipulates the beneficiaries' right to the freedom of contract in the pursuit of their public interest missions.

The stakeholder consultation showed that **beneficiary organisations and rightholder organisations are divided on the question of extending the permitted uses of orphan works**. Over half of the rightholder survey respondents (55 %) believe that the permitted uses are sufficient, while half of the beneficiary organisations believe that they are too narrow.

Rightholder organisations argued that any other permitted uses would be a violation to authors' rights and lead to the financial exploitation of orphan works. Among the beneficiary organisations, **only a minority believe that commercial uses of orphan works should be permitted**. The majority believe that additional uses should be limited to non-commercial or public interest goals. Through both the survey and interviews, several beneficiaries expressed their belief that the following uses should be permitted:

- Non-online use of orphan works, such as public performance or broadcasting of dramatic and cinematographic works;
- Educational purposes;
- Non-commercial reuse of orphan works within new works (i.e. derivative use).

2.4. Diligent search

This Section provides an overview of how countries implemented the diligent search. First, the transposition of the diligent search definition is analysed (Sub-section 2.4.1). Thereafter, the requirement to prepare and consult a list of sources (Sub-section 2.4.2) and the procedural requirements (Sub-section 2.4.3) are analysed. Sub-section 2.4.3. focusses on diligent search procedure. Sub-section 2.4.4. – on diligent searches with cross-border elements, whereas national specifics such as presumptions are analysed in Sub-section 2.4.5.

2.4.1. Definition of a diligent search

Box 9: Article 3(1) of the OWD

1. For the purposes of establishing whether a work or phonogram is an orphan work, the organisations referred to in Article 1(1) shall ensure that a diligent search is carried out in good faith in respect of each work or other protected subject matter, by consulting the appropriate sources for the category of works and other protected subject matter in question. The diligent search shall be carried out prior to the use of the work or phonogram.

The OWD requires that **a diligent search for rightholders** is carried out **in good faith** with **respect to each work** by **consulting the appropriate sources**. The approach in the OWD is a **work-by-work approach**, meaning that a diligent search needs to be performed for every work separately, which also applies in the case of embedded works⁷⁶. Only after a beneficiary performs a diligent search can a work or a material be declared orphan and thus be used according to the terms of the OWD.

All countries covered by this study **transposed the definition of a diligent search** in Article 3(1) OWD almost ***ad verbatim* or in line with the OWD**.

The national transposing measures of several countries do not explicitly state that the diligent search shall be carried out before the use of the work or material (BE, CY, LI, LT, LU and NL). This is, however, implicit and evident from the national system of due diligence search in general. In DE, no reference is made to 'appropriate sources' and to 'good faith'. The same is true of LI, where the reference to 'good faith' and 'appropriate sources' has been omitted. However, these requirements are implied.

Some minor nuances in the transposition of the diligent search definition have been detected in IT, LV, NL and PL, although they do not seem to impose stringent rules on diligent search. In IT, diligent search is carried out according to the principles of good faith and professional fairness. In LV, the rules say that the search needs to be carried out with the utmost diligence. In NL, the rightholders shall be searched with diligence, and in PL, the beneficiaries need to conduct a diligent and good faith search.

The transposition of the diligent search definition at national level is thus in line with the Directive (see Table 11: Musical work definition)

Country	Musical work definition
CY	Section 2 of the Cypriot Law on Copyright defines musical work as 'any musical work, irrespective of musical quality'. The definition is very wide and also encompasses the accompanying lyrics. Due to the enlarged scope of the protection offered through this provision, case-law will clarify its content, although there is no such case-law to date.
EE	According to the Estonian Copyright Act, works are defined as 'any original results in the literary, artistic or scientific domain which are expressed in an objective form and can be perceived and reproduced in this form either directly or by means of technical devices. A work is original if it is the author's own intellectual creation' (§ 4 (2)). The Copyright Act has an illustrative list of protectable works, which also includes 'musical compositions with or without words' (§ 4 (3) clause 7). Musical works can be with or without words. The law does not define a musical work in a greater detail. The Estonian Copyright Act protects works. If words without music are original (the author's own creation), they are protectable.
IE	The definition of musical work is included in Section 2 of the Copyright and Related Rights Act, which states that musical work 'means a work consisting of music, but does not include any words, or action, intended to be sung, spoken or performed with the music'. The definition specifically excludes 'accompanying words'. These shall be included under the definition of 'literary work', which is defined in Section 2

⁷⁶ Article 1(4) and Recital 13 of the OWD.

	as well.
IT	Article 2 of Law 633/194 indirectly defines musical works by protecting 'musical works and compositions, with or without words, dramatic-musical works and musical variations constituting an original work in itself'. Copyright law therefore protects all forms of musical expression. The concept of composition applies instead to every kind of musical composition, from symphonic opera to song. Section I (Articles 33 to 37) specifically regulates 'Dramatic-musical works, musical compositions with words, choreographic and pantomime works'.
MT	Pursuant to Article 2(1) of the Copyright Act, musical work means any musical work irrespective of musical quality and includes works composed for musical accompaniment.
NL	The Copyright Act, Article 10(1) 5 ^o , stipulates that for the purposes of this Act, literary, scientific or artistic works are: musical works, with or without words.
PT	A musical work is defined as a 'musical composition, with or without words' (Article 2(e) of the Portuguese Copyright Code). According to Article 16(1) of the Portuguese Copyright Code, where several people are involved in the creation of a work (whether musical or not), this work may be qualified as a joint work (if divulged or published under the name of all contributors, independently of whether the authors' contributions from independent, detachable works or not), or a collective work (if organised under the initiative of a person or a legal entity and divulged or published under their name).
UK	A musical work is defined as a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music. The accompanying words are literary works under the Copyright, Designs and Patents Act 1988.

Table 12: Phonogram definition

Country	Phonogram definition
BG	The term 'phonogram' is defined in Additional provisions, paragraph 1, point 7 of the national law as fixing on a durable medium of a series of sounds in a way, allowing their perception, reproduction, wireless broadcasting or transmission by cable or other technical means. It can therefore be concluded that film soundtracks are covered by the national definition.
CY	The Cypriot Law on Copyright Defines orphan works as a work or a phonogram, for which none of the rightholders in the said 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 in accordance with the provisions of Section 7K.
CZ	According to Section 75 paragraph 1 of the Copyright Act a phonogram is defined as 'exclusively by hearing perceivable fixation of the sounds of the performer's performance or of other sounds, or the expression thereof.'
DK	Phonograms are defined as 'sound recordings' (<i>lydoptagelser</i>) and encompass any sound recording.
EE	The Estonian Copyright Act defines a producer of phonograms as follows: 'a producer of a phonogram (sound recording) is a natural or legal person on whose initiative or responsibility a first legal recoding of the sound arising from the performance or other sound occurs' (§ 69). It follows that a phonogram (sound recording) is a recording of the sound arising from the performance or other sound.
ES	A 'phonogram' means any fixation of the sounds of a performance of a work or of other sounds (Article 114(1)). This is a very broad definition which, in principle, may afford protection to the simple recording of sounds (of any kind, such as sounds of nature, animals, or city noises). Film soundtracks also qualify as phonograms.
HR	The term 'phonogram' is defined as any fixation of the sounds of a performance or of other sounds, or of a representation of sounds other than in the form of a fixation incorporated in an audio-visual work (Article 132(1)) of the Copyright law).

Country	Phonogram definition
IE	Phonogram (under national implementation, 'sound recording') is defined in Section 2 of SI 490 of 2014, European Union (Certain Permitted Uses of Orphan Works) Regulations 2014 as 'a fixation of sounds, or of the representations thereof, from which the sounds are capable of being reproduced, regardless of the medium on which the recording is made, or the method by which the sounds are reproduced'.
LU	The term 'phonogram' is defined as any fixation of sounds of a performance or of other sounds, or of a representation of sounds other than in the form of a fixation incorporated in a cinematographic or other audiovisual work (Article 41b) of the Framework Copyright Law).
LV	Pursuant to Article 1, point (7) of the Copyright Law, a phonogram is a fixation of the sounds of a performance, other sounds or representation of sounds.
NL	Pursuant to Article 1, point (c) of the Related Rights Act, a phonogram is a fixation of the sounds of a performance, other sounds or representation of sounds. As such, film soundtracks are also included.
PL	The term 'phonogram' has been defined in Article 94(1) of the Copyright Act as 'the first fixation of the sound stem of a performance or of other acoustic phenomena'.
PT	In line with Article 3 (b) of the Rome Convention, Article 176(4) of the Portuguese Copyright Code states that a phonogram is a fixation of sounds of a performance or of other sounds or of a representation of sound.
RO	The term 'phonogram' is defined by Article 104(1) of the Copyright Law as any fixation, exclusively of the sounds originating from the interpretation or the performance of a work or from other sounds, or digital representations of such sounds, other than under the form of a fixation incorporated in a cinematographic work or in any other audiovisual work. It should be noted that the terms used in the national legislation for this definition apply to a sound recording or a phonogram, thus the two terms are equivalent. However, Article 108(1) defines an audiovisual work (the terms used are an audio-video recording or a videogram) as any kind of fixation of an audio-video piece of work or any kind or fixation of a sequence of a moving images, accompanied or not by sound, whatever the method and the base used for this fixation may be. Given the definition of the audiovisual work, the soundtrack accompanying a movie will be considered to be part of the audiovisual work.
LU	The term 'phonogram' is defined as any fixation of sounds of a performance or of other sounds, or of a representation of sounds other than in the form of a fixation incorporated in a cinematographic or other audiovisual work (Article 41b of the Framework Copyright Law).
LV	Pursuant to Article 1, point (7) of the Copyright Law, a phonogram is a fixation of the sounds of a performance, other sounds or representation of sounds.
NL	Pursuant to Article 1, point (c) of the Related Rights Act, a phonogram is a fixation of the sounds of a performance, other sounds or representation of sounds. As such, film soundtracks are also included.
SK	A phonogram is defined in Section 107(1) of the Copyright Law as 'recording of sounds perceivable by hearing, regardless of the way and medium in which these sounds are recorded'. With regard to audiovisual work, the Section states that 'recording of sound components of an audiovisual work shall not be considered a phonogram'. As is evident, Slovak Copyright does not include film soundtracks under 'phonograms'. Therefore, film soundtracks should be considered to be protected as a part of audiovisual work, not phonogram.
SI	The term 'phonogram' is defined in Article 128(2) of the Act Amending the Copyright and Related Rights Act and means a recording of the sounds of a performance or other sounds, or a substitute for sounds, unless it is a recording included in an audiovisual work. Recording means fixation of sounds or their substitutes on a medium from which they can be perceived, reproduced or broadcast by means of a device, as stipulated in Article 128(3) of the Act Amending the Copyright and Related

Country	Phonogram definition
	Rights Act.

Table 13: Overview of in Annex I).

As will be shown in the following Sections, from the **stakeholders' perspectives, the diligent search is the most challenging element of the OWD**. The vast majority of stakeholders highlighted the complexity of the procedure, which requires time, trained personnel and financial resources, while still carrying financial risks in case of reappearing rightholders. Given the work-by-work approach of the diligent search, using the OWD exception in the context of large digitisation projects proves extremely challenging in practice, and only within the reach of organisations possessing sufficient know-how and resources. In fact, all but one of the beneficiary organisations consulted for this Study who had been relatively successful in using the OWD stated that they do not carry out mass digitisation projects.

2.4.2. List of sources

Box 10: Article 3(2) of the OWD

The sources that are appropriate for each category of works or phonogram in question shall be determined by each Member State, in consultation with rightholders and users, and shall include at least the relevant sources listed in the Annex.

Box 11: Annex to the OWD

The sources referred to in Article 3(2) include the following:

- (1) for published books: [...];
- (2) for newspapers, magazines, journals and periodicals: [...];
- (3) for visual works, including fine art, photography, illustration, design, architecture, sketches of the latter works and other such works that are contained in books, journals, newspapers and magazines or other works: [...];
- (4) for audiovisual works and phonograms: [...].

A diligent search should be carried out by **consulting the appropriate sources**⁷⁷. In order to provide for a harmonised approach to diligent search, the **Annex to the Directive** lists such sources for each category of works: (i) five for published books, (ii) five for newspapers, magazines, journals and periodicals, (iii) three for visual works, and (iv) seven for audiovisual works and phonograms. These sources are generic (e.g. existing databases and registers, indexes and catalogues from beneficiaries, legal deposit, rightholders' associations) and at times outdated (e.g. ARROW database).

The sources that are appropriate need to be **determined by each country in consultation with rightholders and users** and need to include **at least** the relevant **sources listed in the Annex**. As such, the list in the Annex is **mandatory** (all sources on the list need to be considered) and **non-exhaustive** (further national specific sources need to be added). When conducting a diligent search, therefore, rightholders need to review all sources in the Annex, as well as those national sources that are appropriate for the work in question.

Countries' approaches to the transposition of the obligation to prepare and consult a list of sources vary, as shown in Table 5 below.

Table 5: Overview of the national transposition of the list(s) of sources

Country	Existence of a national list of sources	List is country specific	National sources differ by type of work	Existence of further guidance	Regular updates	Number of sources to be reviewed	Works registered in the EUIPO database ⁷⁸	Active beneficiaries
	28/31	6/28	21/22	2/22	1/22			
AT	×	N/A	N/A	×	N/A	N/A	8 (0.04 %)	2
BE	✓	✓	✓	×	×	53	297 (2 %)	6
BG	✓	×	N/A	×	N/A	N/A	0	0
CY	×	N/A	N/A	×	N/A	N/A	0	0
CZ	✓	✓	✓	×	×	30	0	0
DE	✓	✓	✓	×	×	229	1 610 (9 %)	15
DK	✓	×	N/A	×	N/A	N/A	68 (0.36 %)	2
EE	✓	✓	✓	×	×	72	26 (0.14 %)	1

⁷⁷ Article 3(1) of the OWD.

⁷⁸ Data based on the number of orphan works contained in the EUIPO database as of June 2020. Since the end of the Brexit transition period (31 December 2020), the orphan works registered by UK organisations have been removed from the database. The number of works registered by the other countries have not changed significantly, however, the percentages correspond to pre-Brexit records.

Study on the application of the Orphan Works Directive –Final report

Country	Existence of a national list of sources	List is country specific	National sources differ by type of work	Existence of further guidance	Regular updates	Number of sources to be reviewed	Works registered in the EUIPO database ⁷⁸	Active beneficiaries
EL	✓	✓	✓	x	x	58	0	0
ES	✓	✓	✓	x	x	42	0	0
FI	✓	✓	✓	x	x	25	0	0
FR	✓	✓	✓	x	x	180	1 (0.01 %)	1
HR	✓	x	N/A	x	N/A	N/A	1 (0.01 %)	1
HU	✓	✓	✓	x	x	33	855 (5 %)	3
IE	✓	✓	✓	x	x	39	13 (0.07 %)	3
IS	x	N/A	N/A	x	N/A	N/A	0	0
IT	✓	✓	✓	x	x	44	0	0
LI	✓	x	N/A	x	N/A	N/A	0	0
LT	✓	✓	✓	✓	x	114	236 (1 %)	14
LU	✓	✓	✓	x	x	34	0	0
LV	✓	✓	✓	x	x	56	4 (0.02 %)	1
MT	✓	x	N/A	x	N/A	N/A	0	0
NL	✓	✓	✓	x	x	29	781 (4 %)	1
NO	✓	x	N/A	x	N/A	N/A	0	0
PL	✓	✓	✓	x	x	55	3 254 (17 %)	4
PT	✓	✓	x	x	x	34	32 (0.17 %)	1
RO	✓	✓	✓	x	x	85	0	0
SE	✓	✓	✓	x	x	39	16 (0.09 %)	2
SI	✓	✓	✓	x	x	46	0	0

Country	Existence of a national list of sources	List is country specific	National sources differ by type of work	Existence of further guidance	Regular updates	Number of sources to be reviewed	Works registered in the EUIPO database ⁷⁸	Active beneficiaries
SK	✓	✓	✓	✗	✗	37	4 (0.02 %)	0
UK	✓	✓	✓	✓	✓	N/A	11 443 (61 %)	14

Source: Milieu elaboration based on desk research and stakeholders' input.

More than half of the countries **adopted national lists of sources**. Only AT⁷⁹, CY and IS do not present a separate list of sources and use the list of sources in the Annex to the OWD as the basis for diligent search. Legislation in BG, DK, HR, LI, MT and NO claims to have a national list of sources, but their lists are identical to the Annex to the OWD, with no national-specific sources added⁸⁰. It is noteworthy that these countries have registered little or no orphan works in the EUIPO orphan works database. The existence of a national list of sources that goes beyond the Annex to the OWD appears important for beneficiaries to successfully use the OWD exception in practice.

Of the countries with national lists of sources, all but PT have **lists that vary according to the type of work**, following the logic in the Annex to the OWD. In PT, the law does not make an express distinction between the sources by type of work, although some of the sources are specific to certain types of work. **Some nuances were observed with respect to the composition of the lists of sources**. For instance, EL and PL have listed five instead of four categories of sources, typically separate sources for phonograms. In HR and PL, videograms are explicitly mentioned under the Section for audiovisual works. FI, HU and PL have six categories of sources in addition to those introduced in the OWD. FI has separate sources for any literary works contained in newspapers, magazines and journals, as well as for cinematographic works and phonograms. HU lists separate sources for architectural works and other works. FR, IE and SI have a separate list of sources for unpublished works⁸¹.

The **number of national sources** to be reviewed is not harmonised across countries and ranges from 25 (FI) to 229 (DE). While most countries' lists contain approximately 30 to 60 sources, more sources need to be reviewed in DE (229), FR (180), LT (114), RO (85), and EE (72). In the UK, the IPO issued **special guidance⁸² and checklists⁸³** detailing the sources that beneficiaries need to consult and those that could be consulted in addition. Such lists are prepared by type of work and may include between 10 and 100 sources.

Desk research did not reveal that the national lists of sources have been amended since their composition, except in the UK, where **lists are regularly updated**. This creates situations where organisations or databases recorded on such lists are outdated or no longer valid (e.g. ARROW).

In line with the Annex to the OWD, **all national lists of sources are presumed to be non-exhaustive/illustrative**, meaning that further sources may be consulted before declaring a work orphan. Legislation or explanatory documents in EE, EL, ES, FR, HU, LT, MT⁸⁴, NL, SE, and SK use words such as 'at least' or 'at minimum' when referring to the sources that need to be consulted, or use words such as 'minimal' or 'exemplary' to describe the list. In IT, the competent minister may, after consultation with the most representative associations of rightholders and beneficiaries, identify

⁷⁹ Apart from not having a national list of sources, bibliographic authority files do not contain rights information, many sources in the list are not pertinent for searches on older material (e.g. in Austria, the oldest CMO (for literary works) was established in 1959, ISBN and ISSN was introduced in 1975), sources sometimes merely provide a contact point for further searches (e.g. authors/publishers' associations), databases may not be consulted without a registration fee (e.g. ISSN) or may not be fully implemented and/or functional (e.g. ARROW).

⁸⁰ With the exception of HR, where 'biographical lexicons' were added as a source for newspapers, magazines, journals and periodicals.

⁸¹ FR has a list for unpublished writings, and IE and SI for relevant works that have not been published or broadcast.

⁸² Orphan works diligent search guidance, accessible at: <https://www.gov.uk/government/publications/orphan-works-diligent-search-guidance-for-applicants/orphan-works-diligent-search-guidance>

⁸³ See <https://www.gov.uk/government/publications/orphan-works-diligent-search-guidance-for-applicants>

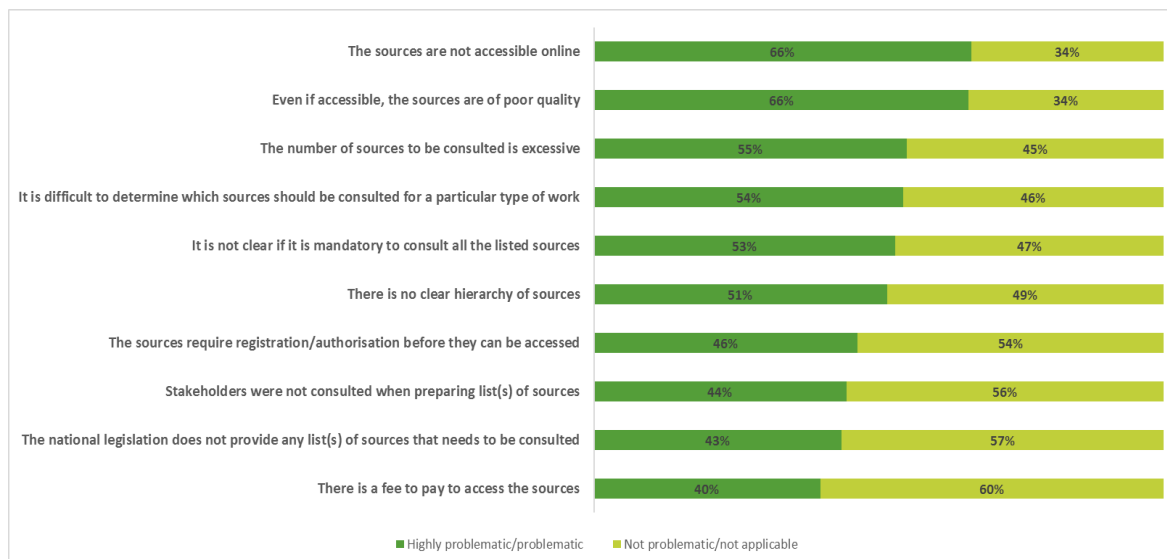
further sources of information to be consulted for each category of works or phonogram during the diligent search. The UK guidance specifically emphasises that the number of sources depends on what is appropriate for the work and that additional sources might need to be reviewed.

As a rule, appropriate sources relevant for the category of work or material are **never in a hierarchical relationship**, meaning that all sources are, in principle, equally relevant for the diligent search.

The number of sources is not in direct correlation with the strictness or leniency of the national diligent search procedure (i.e. fewer sources do not necessarily result in a more lenient search). **The leniency of the diligent search depends on the quality of national sources and provision of additional guidance.** Often, in countries with low numbers of sources, such sources are merely categories of sources and remain very general (e.g., reference to general databases and registers, school libraries, public libraries), while countries with high number of sources often list all possible national specific sources that could come into question. **Only UK and LT have issued special guidelines** that support diligent search. This is reflected in practice, as the countries where the most orphan works have been registered in the EUIPO database do not necessarily have the lowest number of sources to be consulted (e.g. DE).

Issues linked to the list of sources were mentioned by the majority of stakeholders both in the survey and in follow-up interviews. In the survey, stakeholders were asked to rate nine possible challenges related to the sources from highly problematic to not problematic or not applicable (see Figure 7). The results show that six of these nine challenges were rated as (highly) problematic by over 50 % of respondents. The most problematic challenges appear to be linked to the accessibility and quality of the sources, with 66 % of respondents rating these issues as (highly) problematic.

Figure 8: Based on your experience, how would you assess the following difficulties linked to the sources to be consulted for diligent searches?



Many beneficiaries highlighted that **the sources are often irrelevant or not accessible** and do not correspond to sources that a professional in the sector would consult, while relevant sources are omitted. One beneficiary interviewee highlighted that some of the mandatory sources included on the national list are not accessible online, meaning that employees conducting the diligent searches must physically travel to the location of the sources.

Several stakeholders emphasised that **diligent search is an inherent part of a rights clearance process for any digitisation project**, as some form of research is necessary to first determine the status of a work (e.g. whether the work is in the

public domain, out-of-commerce or orphan). By definition, this proves quite resource-intensive and requires time investment. However, in the context of the OWD, the process is made more burdensome due to inadequate mandatory lists of sources. The problem seems to lie both in the national implementation and in the Directive itself. Many countries have either i) created their own extensive lists of sources, many of which are irrelevant/inaccessible, or ii) remained very broad, not going further than the Annex of the OWD. On the other hand, the OWD itself sets the structural foundations of the system. The Directive requires a **mandatory** list of sources and includes a number of **minimum** sources (some of which are outdated). Many of the beneficiaries consulted believe that **more flexibility should be introduced, giving professionals in the sector more discretion in determining the sources to consult**. Key to this would be making the list non-mandatory and dissociating it from EU/national legislation. This would enable rapid updates of the sources without going through the legislative process.

2.4.3. Diligent search procedure

Box 12: Article 3(5) and (6) of the OWD

5. Member States shall ensure that the organisations referred to in Article 1(1) maintain records of their diligent searches and that those organisations provide the following information to the competent national authorities:

- (a) the results of the diligent searches that the organisations have 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 organisations make of orphan works in accordance with this Directive;
- (c) any change, pursuant to Article 5, of the orphan work status of works and phonograms that the organisations use;
- (d) the relevant contact information of the organisation concerned.

6. Member States shall take the necessary measures to ensure that the information referred to in paragraph 5 is recorded in a single publicly accessible online database established and managed by the Office for Harmonisation in the Internal Market (·the Office·) in accordance with Regulation (EU) No 386/2012. To that end, they shall forward that information to the Office without delay upon receiving it from the organisations referred to in Article 1(1).

The overview of national transposition of the diligent search procedure requirements is presented in Table 6. While almost all countries transposed the requirements in the OWD, few have further clarified the diligent search procedure.

Table 6: Overview of national transposition of the diligent search procedure

Country	Definition of a diligent search	Further qualification of a 'diligent search'	Documentation requirements	Reporting requirements	Other requirements / additional steps	Works registered in the EUIPO database ⁸⁵	Active beneficiaries
	31/31	10/31	30/31	30/31	4/31		
AT	✓	×	✓	✓	×	8 (0.04 %)	2
BE	✓	✓	✓	✓	×	297 (2 %)	6
BG	✓	×	✓	✓	×	0	0

⁸⁵ Data based on the number orphan works contained in the EUIPO database as of June 2020. Since the end of the Brexit transition period (31 December 2020), the orphan works registered by UK organisations have been removed from the database. The number of works registered by the other countries have not changed significantly, however, the percentages correspond to pre-Brexit records.

Country	Definition of a diligent search	Further qualification of a 'diligent search'	Documentation requirements	Reporting requirements	Other requirements / additional steps	Works registered in the EUIPO databases ^{e85}	Active beneficiaries
CY	✓	x	✓	✓	x	0	0
CZ	✓	x	✓	✓	x	0	0
DE	✓	x	✓	✓	x	1,610 (9 %)	15
DK	✓	x	✓	✓	x	68 (0.36 %)	2
EE	✓	x	✓	✓	x	26 (0.14 %)	1
EL	✓	✓	✓	✓	✓	0	0
ES	✓	✓	✓	✓	✓	0	0
FI	✓	x	✓	✓	x	0	0
FR	✓	x	✓	✓	x	1 (0.01 %)	1
HR	✓	x	✓	✓	x	1 (0.01 %)	1
HU	✓	✓	✓	✓	x	855 (5 %)	3
IE	✓	x	✓	✓	x	13 (0.07 %)	3
IS	✓	x	x	x	x	0	0
IT	✓	✓	✓	✓	✓	0	0
LI	✓	✓	✓	✓	x	0	0
LT	✓	✓	✓	✓	x	236 (1 %)	14
LU	✓	x	✓	✓	x	0	0
LV	✓	x	✓	✓	x	4 (0.02 %)	1
MT	✓	x	✓	✓	x	0	0
NL	✓	x	✓	✓	x	781 (4 %)	1
NO	✓	x	✓	✓	x	0	0
PL	✓	✓	✓	✓	✓	3 254 (17 %)	4
PT	✓	x	✓	✓	x	32 (0.17 %)	1
RO	✓	✓	✓	✓	x	0	0
SE	✓	✓	✓	✓	x	16 (0.09 %)	2
SI	✓	x	✓	✓	x	0	0
SK	✓	x	✓	✓	x	4 (0.02 %)	0
UK	✓	✓	✓	✓	x	11,443 (61 %)	14

Source: Milieu elaboration based on desk research and stakeholders' input.

Roughly one-third of countries provide further explanation of a 'diligent search' that goes beyond the Directive's provisions. Such additional explanation could be found either in national transposing laws or in soft law instruments, such as guidelines. National interpretations of the diligent search provision typically clarify the following aspects: (i) whether a search diligent if limited to the necessary sources on the list; and (ii) whether it is necessary to consult sources of information beyond those on the list.

Firstly, very few countries state that a search is diligent even if not all sources on the list are reviewed (BE, EL and LT). Diligent search requirements in these countries seemed to be less stringent. In BE, diligence is interpreted as a search in which suitable sources listed in the national legislation are consulted. In EL, diligent search covers the main sources on the list. The same is true for LT, where, according to the explanation from the Ministry of Culture, the search might be sufficiently diligent even if not all sources mentioned on the list are consulted. The number and type of sources consulted should be reasonable. Secondly, some countries state that a search is diligent only if the sources on the list are consulted as well as potential additional sources. In fact, such statements could be found in ES, HU, LI, PL, RO, SE, and UK, where the threshold for conducting a diligent search appears higher.

In the absence of an EU or national-level explanation of what constitutes a diligent search, **the legal standard of 'diligence' is often decided on a case-by-case basis**, making it the responsibility of national courts to assess if a certain search for rightholders could be considered diligent.

The consequences of not carrying out a diligent search or not conducting it properly are potentially serious. Where a work is wrongly found to be orphan, remedies are available in national legislation for copyright infringement⁸⁶. The OWD thus obliges beneficiaries to **keep records of their diligent searches** and to make such records **available to the public** by reporting them to the EUIPO database⁸⁷.

Apart from IS, all countries have transposed documentation and reporting requirements. Only some minor nuances were detected in the transposition.

Most countries covered by this study explicitly oblige beneficiaries to keep records of their diligent searches (AT, BE, BG, CY, EE, EL, ES, FI, FR, HR, HU, IT, LI, LT, LU, LV, MT, NL, PL, PT, RO, SE, SI, and UK), while the existence of such obligation is implied in several others (CZ, DE, DK, IE, NO and SK). Although the text in national legislation generally follows the wording in the OWD, some countries' legislation provides precise instructions on what must be recorded during the course of diligent search requirements or adds further requirements. For instance, in AT, EL and LT, a retention period is specified for such records. Several countries require beneficiaries to record the course of the diligent search, not just its result. In such cases, beneficiaries usually need to record search dates, the sources consulted and other documents proving that a diligent search was carried out in accordance with the legislative requirements. In BE, beneficiaries need to record the names of the identified and traced rightholders of a work or phonogram with more than one rightholder, where the identified and traced rightholder has given permission to use the work or phonogram.

The reporting requirement is twofold and constitutes (i) beneficiaries reporting the results of the diligent searches to the national competent authority; and (ii) forwarding such results to the EUIPO database. All countries apart from IS have transposed the first requirement. Only some countries (EL, ES, FI, LT) oblige beneficiaries to report additional information not listed in the OWD to the national competent authority. In FR, there is no reference to beneficiaries needing to report changes in orphan works' status. Countries vary in their approaches to the information

⁸⁶ Recital 19 of the OWD.

⁸⁷ Article 3(5) and (6) and Recital 16 of the OWD.

organisations need to pass to the EUIPO. While some specify beneficiaries, others state that national competent authorities are responsible. In PL, the reporting obligation is explicitly limited to organisations registered in the EUIPO database.

Few countries have introduced additional requirements/steps in the diligent search procedure (EL, ES, IT and PL). In EL, a special publicity obligation exists, specifying how the beneficiaries should label orphan works. In ES and IT, a certain time should elapse after the search before a work can be used as an orphan work. In PL, all records should be kept in electronic form and a protocol should be prepared and signed by the person managing the beneficiary conducting the diligent search.

The OWD provides for rules regarding the **procedure for consulting the sources of diligent search**. Firstly, the EUIPO Orphan Works database (EUIPO database) should be reviewed; secondly, appropriate sources relevant for the category of work of material should be checked; and thirdly, if there is evidence to suggest that relevant information on rightholders is to be found in other countries, sources of information available in those other countries should be consulted. Only a handful of countries provide such guidance. A common rule is that prior to conducting a diligent search, the EUIPO database shall be consulted (ES, EL, IE, LI and UK). If this consultation fails to produce any information, the diligent search will then be performed consulting national lists of sources and possibly other countries' lists.

An overview of all national specificities and requirements linked to the diligent search are presented in Table 16: Overview of national diligent search requirements in Annex I.

Stakeholders also highlighted several other practical challenges with the diligent search procedure: the time-consuming nature of the process; the costs associated with conducting diligent searches; and the lack of trained personnel.

Of the survey respondents, **67 % stated that the time required to perform a diligent search is (highly) problematic**. Given the work-by-work approach of the procedure, records of the diligent search must be produced for each work individually, including for embedded works. This proves extremely time consuming for heritage institutions. The beneficiaries consulted, however, stated very different estimations of the time required for diligent searches, ranging from as little as one hour to four hours per item, with one beneficiary indicating that it can take up to a year. More resourceful beneficiaries have been able to set up systemised searches to speed up the process, notably using decision trees or sending information requests on many works from a same collection to publishers and/or CMOs.

76 % of the survey respondents stated that the resources required to perform a diligent search are (highly) problematic. Diligent searches require significant resources, especially in the context of large-scale digitisation projects. These costs are indirect, linked to the costs of staff and IT/office supplies. One beneficiary stated that it is more expensive for cultural institutions to digitise an orphan work than a work with a rightholder, as the latter requires only the negotiation of a licensing fee. One of the beneficiary organisations that makes extensive use of the OWD exception stated that the institution relies on external philanthropic funders to pay for its digitisation projects. In the case of large-scale projects, the internal curatorial teams may not have the capacity to carry out all of the diligent searches. In these cases, the institution hires freelancers or specific staff for three to six months and incurs the costs associated. The possibility of attracting external funders is not within the reach of smaller institutions.

Finally, 58 % of the survey respondents rated the need for specialist knowledge for diligent searches as (highly) problematic. One beneficiary interviewee highlighted that professionals in the cultural heritage branch are often not trained in legal matters and are uncertain of the potential legal consequences of using the OWD following a diligent search. The diligent search does not remove the risks of using a work, as cultural institutions may still need to pay an undetermined

compensation to rightholders in case of a misclassified orphan work, acting as a major deterrent for many beneficiaries. It is up to the staff of the cultural heritage institutions to decide whether to take the risk of using an orphan work, based on their confidence that the search carried out was sufficiently diligent. A key commonality between the beneficiary organisations consulted here that make successful use of the OWD exception is the presence of in-house legal expertise.

In summary, beneficiaries highlighted that, in practice, the diligent search procedure is complex, resource-intensive, and not risk-free. At the same time, limited guidance is provided at national level for a sector that does not always possess legal expertise, with only one-third of countries providing further explanation of what constitutes a 'diligent search'.

2.4.4. Diligent search with cross-border element

Box 13: Article 3(3) and (4) of the OWD

3. A diligent search shall be carried out in the Member State of first publication or, in the absence of publication, first broadcast, except in the case of cinematographic or audiovisual works the producer of which has their headquarters or habitual residence in a Member State, in which case the diligent search shall be carried out in the Member State of their headquarters or habitual residence.

In the case referred to in Article 1(3), the diligent search shall be carried out in the Member State where the organisation that made the work or phonogram publicly accessible with the consent of the rightholder is established.

4. If there is evidence to suggest that relevant information on rightholders is to be found in other countries, sources of information available in those other countries shall also be consulted.

In order to avoid duplication of search efforts, Article 3(3) OWD provides for rules to determine the country in which a diligent search should be carried out⁸⁸. **Most countries have transposed the rules in Article 3(3) of the OWD in line with the Directive.** If not *ad verbatim*, the language in the national transposing laws is broadly similar.

The only exception is **the rule for phonograms**, where the diligent search shall be carried out in the country of establishment of the organisation that made the work or phonogram publicly accessible with the consent of the rightholder. This rule was **not transposed** in HR, CY, FI, FR, DE EL, HU, IE, LI, LT, PT, SE and UK.

Several countries have added further rules specifying the country in which a diligent search should be conducted:

- **Holdings (DE)** – in case of a holding, a diligent search must be carried out in the Member State in which the institution that made the item of the holding available to the public with the permission of the rightholder has its principal place of business;
- **Co-producers (ES, IT)** - diligent search must be carried out in every Member State concerned;
- **Public service broadcasting (HR)** - diligent search for cinematographic or other audiovisual works produced by public service broadcasting organisations shall be carried out in the Member State of their principal place of business;
- **Not published and not broadcasted works (EL, FR, PT)** - diligent search shall be carried out in the Member State of the EU where the beneficiary of the orphan is established;
- **Embedded works (ES)** - diligent search shall be made in the territory of the same Member State in which the search for the main work takes place.

⁸⁸ Recital 15 of the OWD.

Article 3(4) OWD suggests that sources in other countries might need to be consulted if the evidence suggests that relevant information on rightholders is to be found there. This provision was **transposed in all countries, apart from PT**. However, Article 26-A(4) of the Portuguese Copyright Code contains a non-exhaustive list of sources, meaning that it could be argued that if evidence suggests that relevant information regarding rightholders may be found in other countries, sources of information available in those other countries should also be consulted.

Very few countries provide an explanation of this Directive rule, meaning that neither the OWD nor the national transposing laws provide for procedures on how to conduct a diligent search in another country. In IT, if a diligent search is carried out by Italian entities in another Member State, that search shall be carried out following the procedures and consulting the sources of information prescribed by the national legislation of that other country. Similarly, the national rules in SI imply that the entire diligent search procedure shall be conducted in another Member State, rather than only consulting appropriate sources. According to the Ministry of Culture of LT, diligent searches in other countries will have to be conducted depending on the situation. For instance, if the work was created between the two World Wars, organisations might need to do a diligent search in the US, given that many Lithuanian authors left for the US during that period.

Further detailed information is presented in Table 14: Overview of national rules in cases with cross-border elements in Annex I.

The stakeholder consultation found that most of the beneficiary organisations consulted have not performed a cross-border diligent search. This tends to be confirmed by the contents of the EUIPO database, where the vast majority of diligent searches (99.75 %) are indicated as having been performed in a single country (the country of the organisation). It is important to note, however, that less than 50 % of the works contain information on the country in which the search took place. If the diligent searches for works without data took place in the same Member State as the contributor, the percentage increases to 99.9 %. One beneficiary organisation interviewed has performed cross-border searches and stated that searches in other Member States add additional complexity to the diligent search procedure, notably due to language barriers.

2.4.5. Presumptions and their relevance for diligent search

Two types of presumption exist in national law, namely presumption of authorship or rights ownership and presumption of rights transfer⁸⁹. Although they are not fully harmonised at European level, presumptions are always rebuttable, meaning that they render certain facts proven until there is evidence to the contrary.

At least three binding international documents entail rules on presumption of authorship: (i) Article 15 of the Berne Convention⁹⁰; (ii) Article 11 of the Rome Convention⁹¹; and Article 5(1) of the Enforcement Directive 2004/48/EC⁹². **All countries** appear to have transposed a presumption of authorship in their national copyright laws **at least for published works**. It is generally presumed that the author of a work is the person whose name or sign has been placed on a copy of the work or communicated to the public in another way in the course of making the work

⁸⁹ This Study focused only on the transfer of economic rights, as moral rights are inalienable. It did not gather information on the statutory transfer of copyright and related rights in case of marriage or inheritance following the death of an author or a rightholder.

⁹⁰ WIPO, Berne Convention for the Protection of Literary and Artistic Works, 1886, accessible at: https://www.wipo.int/treaties/en/text.jsp?file_id=283698#P192_37445

⁹¹ WIPO, International Convention of the Protection of Performers, Producers of Phonograms and Broadcasting Organisations 1961, available at: https://www.wipo.int/treaties/en/text.jsp?file_id=289757

⁹² Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30.4.2004)

available to the public. Only certain countries provide for presumptions of authorship for other types of work. In the case of **audiovisual works**, most countries provide for presumption that certain persons (usually the principal director, scriptwriter, editor, copywriter, cinematographer, graphic designer, author of the dialogue and composer of the music, cameraman) are (co-)authors of such a work. For **phonograms**, the rightholder is usually the producer of the phonogram, thus the one usually indicated as such on the phonogram. In AT, for instance, the owner of the company that produces a commercial phonogram is presumed to be its producer. Presumption of authorship could also arise due to registration of authorship/right ownership in a **special register**. In CZ, for instance, presumption of authorship in audiovisual works applies if such work is registered in the register of audiovisual works. SK has a special presumption for authorship of audiovisual work listed on the International Film Register.

Several presumptions of transfer of rights in favour of the employer, producer, or contracting party are evident in national laws. However, **no harmonisation of such rules could be found**. National approaches vary, not only as to whose contribution is protected, but also regarding the scope of such transfer. **Most countries** provide for presumption of transfer of rights in the relationship between authors or performers **and the producers in case of audiovisual (cinematic) works**. Unless otherwise agreed, creators of the audiovisual works and performers are presumed to assign to the producer all or some of their respective economic rights related to the work. In most countries, this presumption does not apply to the authors of musical compositions. Copyright laws in LV and SE do not provide for any presumptions in the relationship between performer, author and producer but this is customary practice in SE. A large number of countries provide for **presumptions in respect of works created in an employment relationship or commissioned works**, in particular with respect to computer programmes⁹³. National laws remain divided here: while some countries appear to have no presumptions, others use either a transfer of authorship/rights ownership or transfer of certain economic rights.

A detailed overview of all presumptions is presented in Table 15: Overview of national presumptions in Annex I.

The OWD does not provide any instructions on the interplay between national presumptions and the diligent search procedure. **The relevance of the presumptions on diligent search thus depends on the particularities of national copyright systems**. The importance of presumptions is two-fold. On the one hand, presumptions may increase the legal certainty for beneficiaries because at least one potential rightholder is known – the one to whom the presumption applies. For instance, where the name is stated on the work, beneficiaries can assume that the author of the work is deemed to be known. On the other hand, presumptions may create additional work, as there may be a need to look further than just the author/rightholder of the work due to potential national rules on the transfer of rights. In general, it appears that if a legal presumption points to a rightholder, a beneficiary cannot be required to look for other possible rightholders simply to verify that the presumption is correct. Rather, such action is demanded if concrete evidence comes to light that puts the presumption into doubt⁹⁴. In most countries, presumptions need to be rebutted in court and are thus enforceable towards third parties (beneficiaries) acting in good faith.

⁹³ Article 2(3) of the Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programmes.

⁹⁴ Most countries have no established legal practice on the required level of burden of proof to override the copyright presumptions.

2.5. The EUIPO database and national databases

This Section presents the types of orphan works databases at EU and national level and their interoperability (Sub-section 2.5.1), as well as the effectiveness of the EUIPO database (Sub-section 2.5.2.).

2.5.1. Orphan works databases and their interoperability

Box 14: Article 3(6) of the OWD

Member States shall take the necessary measures to ensure that the information referred to in paragraph 5 is recorded in a single publicly accessible online database established and managed by the Office for Harmonisation in the Internal Market (the Office) in accordance with Regulation (EU) No 386/2012. To that end, they shall forward that information to the Office without delay upon receiving it from the organisations referred to in Article 1(1).

Article 3(6) of the OWD makes the EUIPO responsible for the establishment and management of a single publicly accessible online database on orphan works. The **EUIPO Orphan Works database** has been available online since October 2014. The database enables beneficiaries in EU Member States, EEA countries and the UK to record works that have been identified as orphan (following a diligent search) in a **single EU-wide database**. The objective is to provide easily accessible information on the recorded works for other beneficiaries conducting digitisation projects and to enable rightholders to claim status change of a work recorded in the database.

Although not mentioned in the OWD, other databases compiling orphan works previously existed at EU level but have been discontinued⁹⁵.

At national level, **two types of national databases** have been detected:

- National databases that list orphan works for which diligent search has been conducted based on the OWD and thus overlap with EUIPO database;
- National databases established to record orphan works which are subject to a particular national regulatory regime, different from the diligent search regime introduced with the OWD.

As to the first type, **only IT currently holds a national database on orphan works**⁹⁶, which, although operational, does not include any orphan works. Works can be declared as orphan only after 90 days of publication on this online database. Several other countries are (LT) or were (SE, NL, and HU) considering the idea of establishing a national database. However, such ideas were mostly abolished when the single EUIPO database became operational. Several countries report some kind of internal database at the level of the national competent authority (EE, LV, PT and possibly ES). As those authorities are obliged to forward the input from the beneficiaries to the EUIPO database, they naturally have an overview of all works cleared as orphan in their country. However, the records only mirror the national elements of the EUIPO database and should not be understood as a separate national database.

The second type of national database for orphan works is conditioned upon a particular national regulatory regime for orphan works. CZ, DK and the UK report **keeping records of orphan works based on other regulatory regimes**. In CZ, CMOs need to keep records of works they manage, including orphan works. Typically,

⁹⁵ For example, ARROW database.

⁹⁶ Two databases are available online: (i) *Opere Orfane* database, available at: <https://opereorfane.beniculturali.it/opere/orfane/>, which lists works that the beneficiaries have registered as orphans in their records; and (ii) *Opere Proposte Orfane*, available from: <https://opereorfane.beniculturali.it/opere/proposte-orfane/>, which lists works for which the diligent search of the rightholders has given a negative outcome and are therefore presumed orphan. Both registers are currently empty.

these will concern works for which the CMO was unable to identify the heirs of the deceased author or the rightholders. In DK, Koda (the Danish association for music workers, both publishers and creators) maintains two registers of works with unknown, untraceable or uncertain rightholders - the Unidentified works or rightholders - Music⁹⁷ and the Unidentified works or rightholders - Audiovisual⁹⁸. In the UK, a national orphan works register records orphan works for which a licence has been issued. In FR, DE, PL and SK, a national **database exists for out-of-commerce** works but not for orphan works.

A more detailed overview of national orphan works databases is presented in Table 19: Overview of national orphan works databases in Annex I.

As to the interoperability of orphan works databases, IT is the only country whose operational national orphan works database records overlapping information with the EUIPO database⁹⁹. Although attempts have been made to increase the interoperability of these two databases¹⁰⁰, the interaction between the EUIPO database and the Italian national database is not automatic¹⁰¹. As no works have been recorded in the national database, this lack of interoperability between the two databases has little practical relevance.

The UK orphan works register, by contrast, stores information on orphan works under the UK licensing scheme and thus does not overlap with the information in the EUIPO database.

2.5.2. Contents of the EUIPO database

The contents of the EUIPO database suggest that large-scale digitisation and dissemination of orphan works has not been achieved either nationally or cross-border. In June 2020, **a total of 18,649 works were recorded in the EUIPO database**. However, only 6,903 works were publicly available via the online search tool. The EUIPO explained that many works are not available to the public as they have an 'edited status'. This means that the beneficiary organisations that have recorded these works have indicated that the information concerning the works might change. Although works with an 'edited status' are not available to the public, they are visible to registered users. The number of works recorded is low considering that the database was set up to accommodate large volumes of orphan works.

Beneficiary organisations from **17 countries** have contributed to the database (AT, BE, DE, DK, EE, FR, HR, HU, IE, LT, LV, NL, PL, PT, SE, SK and UK). However, organisations from certain countries are more active than others, with **61 % of the works in the database recorded by British organisations** (notably the British Library), followed by Poland (17 % of works), Germany (9 %) and Hungary (5 %). Only one work was recorded by a Croatian organisation and one by a French organisation. It is important to note that the orphan works recorded by British organisations no longer fall under the scope of the mutual recognition system since the end of the Brexit transition period (31 December 2020). As a consequence, 61 % of the works in the EUIPO database will no longer be usable in the EU. As of January 2021, a total of 5,480 main works and 1,406 embedded works are available to the public in the database.

⁹⁷ The Unidentified works or rightholders - Music: <https://www.koda.dk/music-creators/unidentified-works-or-rightsholders>.

⁹⁸ The Unidentified works or rightholders - Audiovisual: <https://www.koda.dk/music-creators/unidentified-audiovisual-productions>.

⁹⁹ Information that can be recorded in the national database includes start of the diligent search, results of the diligent search, identification details of orphan work, contacts of the beneficiary conducting the diligent search, uses of an orphan work, any change of the status of an orphan work.

¹⁰⁰ Interview with the representative of the EUIPO.

¹⁰¹ Stakeholder consultation.

For all Member States, **over 70 % of the works were recorded by a single key organisation** (e.g. 96 % of works registered by a UK organisation were recorded by the British Library). Belgium and Lithuania have the highest number of actively contributing organisations. During an interview in October 2020, the EUIPO mentioned that the higher number of active organisations in BE and LT could be due to training and promotion events in those countries.

More than half (60 %) of the recorded works in the database are literary works, 20 % are photographs, 10 % illustrations and 4 % audiovisual works. The Netherlands (mainly the Eye Film Institute) contributed 93 % of audiovisual works and Hungary 98 % of the phonograms in the database.

The majority of the works in the database have an 'orphan work status' (98 %), 1.5 % are partially orphan (i.e. several but not all rightholders were identified and gave permission to use the part of the work for which they hold rights), 0.4 % are not orphan, and 0.3 % have had a status change. For 49 % of the recorded works, the name of the rightholder is not known, for 47 % the name is known, and for 4 % the name is partially known (e.g. only one name or only initials). This confirms that rightholders rarely reappear to claim works.

2.5.3. Effectiveness of the EUIPO database

Most of the beneficiary organisations consulted for this Study have experience of using the EUIPO database and provided records. Four beneficiary organisations that responded to the survey, however, commented that they were unaware of its existence and one beneficiary stated that more communication is needed. In relation to the promotion of the database, the EUIPO mentioned that many information and training activities were organised in a number of Member States in years immediately following its launch. National competent authorities also used their networks to share experiences and best practices among beneficiary organisations. However, these promotional events stopped in the past two years, which may explain the lack of awareness of the database among certain respondents of the survey conducted within the context of this Study.

The consultation showed that the majority of stakeholders (both beneficiaries and rightholder organisations) believe that **an EU-level database recording orphan works is necessary for the system to work** - notably the mutual recognition principal and to enable rightholders to identify misclassified works. **Stakeholders associate the limited use of the EUIPO database to broader problems with the OWD system rather than to the functioning of the database itself.**

Stakeholder feedback on the functioning database centred on two aspects: i) submitting works to the database, and ii) searching for works in the database. Overall, **beneficiaries believe that the process of uploading and registering works to the database works well**, notably due to the bulk upload option. The beneficiaries stated that the process is smooth and EUIPO staff are readily available in case of issues. Some, however, experienced difficulties in getting works ratified by the national competent authority, as they cannot themselves work directly with the database. The role of the national competent authorities is foreseen in the OWD, which provides for them to act as intermediaries between beneficiaries and the EUIPO database. Their two main functions are to i) forward information about new national beneficiary organisations registered in the database, and ii) forward the records provided by beneficiaries to the Database. However, the OWD does not specify that the national competent authorities should verify the records provided by the beneficiaries - although one authority indicated that the diligent search records provided by beneficiaries are checked before being forwarded to the EUIPO. The EUIPO stated that the national competent authorities play an important role in confirming the validity of new users, as it does not have a comprehensive overview of all legitimate cultural heritage institutions. at national level.

By contrast, **mainly negative feedback was provided in respect of the ease of searching through the database to identify works.** Many stakeholders argued that the interface is cumbersome and difficult to navigate. A key issue is the lack of links or images of the recorded works, making it particularly difficult to identify the works, many of which do not have clear titles.

2.6. Mutual recognition

Box 15: Article 4 of the OWD – Mutual recognition of orphan work status

A work or phonogram which is considered an orphan work (according to Article 2) in a Member State shall be considered an orphan work in all Member States. That work or phonogram may be used and accessed in accordance with this Directive in all Member States. This also applies to works and phonograms referred to in Article 2(2) insofar as the rights of the non-identified or non-located rightholders are concerned.

In order to foster access to Europe’s cultural heritage, it is necessary that orphan works that have been digitised and made available to the public in one Member State can also be made available to the public in other Member States¹⁰².

In order to fulfil this objective, Article 4 of the OWD provides for a system of mutual recognition of orphan work status throughout the EU/EEA. This means that a work considered an orphan work in one EU/EEA Member State is automatically considered an orphan work in all Member States and may be used accordingly. Pursuant to Article 2(1) OWD, an orphan work is a work or a phonogram if none of its rightholders are identified, or even if identified, none of them are located despite a diligent search being carried out and recorded in accordance with Article 3 OWD. A system of mutual recognition only applies to those orphan works **recorded in the EUIPO database**, making registration a prerequisite for mutual recognition.

The mutual recognition principle has been implemented in almost all countries, with only three out of 31 not providing a definition of a mutual recognition mechanism (DE, PL and PT). In all 28 countries that transposed this Directive’s provision, the implementation is correct. Some nuances were observed in BG, FI, HU and SI, but these differences have no effect on the functioning of the mutual recognition mechanism. The stakeholder consultation (survey and interviews) found that, **in practice, beneficiaries have not made extensive use of the mutual recognition principle.** Most stakeholders were therefore unable to comment on the effectiveness of the system. The beneficiaries with experience of using the mutual recognition principle identified no particular difficulties. They noted that the principle is important, as it provides protection/legal certainty across the EU. The majority of stakeholders indicated that they have never needed to use the mutual recognition principle, as they typically focus on national works/works in their national language.

2.7. End of orphan work status

This Section focuses on the procedure to end an orphan work status (Sub-section 2.7.1) and the issue of fair compensation for reappeared rightholders (Sub-section 2.7.2).

An overview of the national transposition is presented in Table 7. Countries like CZ, EL, ES, FI, FR, HR, HU, LT, PL, and SI have done more than literally transpose the relevant EU provisions, by adopting further rules that increase the clarity and legal certainty for rightholders when trying to end an orphan status of works.

¹⁰² Recital 23 of the OWD.

Table 7: Overview of national transposition of the end of orphan work status

Country	Right to put an end to the orphan works status	Existence of national procedure	Right to receive fair compensation	Existence of national rules on the compensation	Existence of national rules on the duration to receive compensation	Works registered in the EUIPO database	Active beneficiaries
	31/31	7/31	31/31	21/31	8/31		
AT	✓	✗	✓	✗	✓	8 (0.04 %)	2
BE	✓	✗	✓	✗	✗	297 (2 %)	6
BG	✓	✗	✓	✗	✓	0	0
CY	✓	✗	✓	✓	✗	0	0
CZ	✓	✗	✓	✓	✓	0	0
DE	✓	✗	✓	✓	✗	1,610 (9 %)	15
DK	✓	✗	✓	✗	✗	68 (0.36 %)	2
EE	✓	✓	✓	✗	✗	26 (0.14 %)	1
EL	✓	✓	✓	✓	✗	0	0
ES	✓	✓	✓	✓	✓	0	0
FI	✓	✓	✓	✓	✓	0	0
FR	✓	✓	✓	✓✓*	✗	1 (0.01 %)	1
HR	✓	✗	✓	✓	✓	1 (0.01 %)	1
HU	✓	✗	✓	✓✓*	✗	855 (5 %)	3
IE	✓	✗	✓	✓	✗	13 (0.07 %)	3
IS	✓	✗	✓	✗	✗	0	0
IT	✓	✗	✓	✓	✗	0	0
LI	✓	✗	✓	✗	✗	0	0

Country	Right to put an end to the orphan works status	Existence of national procedure	Right to receive fair compensation	Existence of national rules on the compensation	Existence of national rules on the duration to receive compensation	Works registered in the EUIPO database	Active beneficiaries
LT	✓	✓	✓	✓✓*	✓	236 (1 %)	14
LU	✓	×	✓	✓	×	0	0
LV	✓	×	✓	✓	×	4 (0.02 %)	1
MT	✓	×	✓	✓	×	0	0
NL	✓	×	✓	×	×	781 (4 %)	1
NO	✓	×	✓	×	×	0	0
PL	✓	✓	✓	✓	×	3,254 (17 %)	4
PT	✓	×	✓	✓	×	32 (0.17 %)	1
RO	✓	×	✓	✓	×	0	0
SE	✓	×	✓	×	×	16 (0.09 %)	2
SI	✓	×	✓	✓✓*	✓	0	0
SK	✓	×	✓	✓	×	4 (0.02 %)	0
UK	✓	×	✓	✓	×	11,443 (61 %)	14

Source: Milieu elaboration based on desk research and stakeholders' input.

* These countries not only provide basic rules on compensation but also detailed rules on calculation of fair remuneration.

2.7.1. Procedure to put an end to an orphan work status

Box 16: Article 5 of the OWD – End of orphan work status

Member States shall ensure that a rightholder in a work or phonogram considered to be an orphan work has, at any time, the possibility of putting an end to the orphan work status insofar as their rights are concerned.

Article 5 of the Directive provides that a rightholder may end an orphan work status at any time. The reappearance of the rightholder in turn means that the work is no longer orphan and that any use of work by the beneficiaries may only continue with the authorisation of the rightholder in relation to the rights that they hold¹⁰³. All countries covered by this study foresee the right to put an end to the orphan work status in their national legislation.

The OWD remains very general when it comes to the procedure that rightholders must follow to put an end to unjustifiable use of their works. Consequently, the OWD leaves the Member States with a broad margin of discretion in implementing the rightholders' right to opt out of the orphan works exception.

Country-level desk research revealed that only some countries have established further rights and obligations flowing from the transposed provision. A procedure to put an end to an orphan work status is set out (at least to a certain extent) in the laws of EE, EL, ES, FI, FR, LT and PL. The procedure commonly requires making a formal application or request to the beneficiary. Such an application should be substantiated by sufficient evidence to show the existence and extent of the rightholder's copyright and/or related rights in a work. Further information on the national rules is provided in Table 19 of Annex I.

The stakeholder consultation showed that **in practice, rightholders rarely reappear and claim compensation**. The majority of stakeholders have no experience with this scenario and were unable to provide further information. In cases where this has occurred, the stakeholders did not indicate any particular difficulties, notably because once a claim is made, a normal rights-clearance procedure is initiated. Several rightholders' organisations, however, highlighted difficulties for rightholders to track all uses of their works and in some cases to provide justifications to their claims, particularly in the case of anonymous works. The beneficiaries that have faced this situation indicated that in most cases rightholders were happy that the work had been preserved and digitised and did not claim compensation. One interviewee noted, however, that the limited amount of reappearing rightholders could be linked to the limited amount of works digitised, and/or suggest that the diligent search is effective in correctly identifying truly orphan works.

2.7.2. Compensation for rightholders

Box 17: Article 6(5) of the OWD

Member States shall provide that a fair compensation is due to rightholders 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.

¹⁰³ Recital 17 of the OWD.

The reappearance of the rightholder means that the work is no longer orphan and that **fair compensation** has to be paid to the reappeared rightholder for the use that has been made of such a work by the beneficiaries¹⁰⁴. The text of the OWD remains very general and does not provide for any rules on how such compensation should be calculated. Instead, it gives explicit leeway to Member States to determine the circumstances and conditions under which the payment of such compensation may be organised, including the point in time at which the payment is due. Recital 18 of the OWD provides some guidance by saying that when determining the possible level of compensation, due account should be taken of Member States' cultural promotion objectives, of the non-commercial nature of the use made by the beneficiaries in order to achieve aims related to their public interest missions, and of the possible harm to rightholders¹⁰⁵.

All of the countries foresee in their national legislation that compensation should be paid to the rightholders. The vast majority (CY, CZ, DE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LU, LV, MT, PL, PT, RO, SI, SK, and the UK) have put in place rules on how fair compensation should be calculated. However, these rules often do not provide further clarity, as most countries only provide for **criteria/circumstances** that need to be respected when calculating the compensation, which are largely the same as the ones listed in recital 18 (CZ, DE, ES, FI, FR, HR, IE, IT, LU, LV, MT, PL, PT, RO, SI, and SK). Several countries make it clear that the conditions on the payment of compensation should be determined by mutual **agreement between the rightholder and the beneficiary in question** (CY, EL, ES, FR, IE, IT, LU, MT, SI and the UK), with the courts or another national body having a final say.

A handful of countries provide clear and detailed rules on the calculation of fair remuneration. Examples include FR, HU, LT, and SI. In FR, the compensation shall be determined by agreement between the beneficiary and the rightholder and shall be calculated on the basis of the loss actually suffered by the rightholder, taking into account the fact that the use was made on a non-commercial basis and in the public interest. There is no average amount which can be calculated *ex ante*, but the amount of compensation shall be calculated by reference to the tariffs or scales (where they exist) of the CMOs in the sector concerned, without disregarding the very particular nature of the use made of the work. In HU, the **amounts of compensation are precisely specified** as follows: (a) in case of literary works, Hungarian Forint (HUF) 3,000 per author's sheet; (b) in case of poetic works, HUF 10 per line; (c) in case of the editor of literary works qualifying as a collection work, HUF 600 per author's sheet; (d) in case of cinematographic creations and other audiovisual works, HUF 100 per minute; (e) in case of phonograms, HUF 100 per minute; (f) in case of phonograms, cinematographic creations and other audiovisual works produced by the public media service radio and television organisations before 31 December 2002 and contained in their archives, HUF 100 per minute; (g) in case of visual works contained in or being an integral part of the of another literary work, HUF 200 per work. The amount of the remuneration shall be increased by half of the amount of the remuneration due for the first year, after each year of use commenced. In LT, a decision on the payment and the amount of compensation shall be taken by the institution authorised by the government, with due consideration of the recommended findings of the panel of experts on compensation for the use of orphan works. Compensation for the use of an orphan work **must not exceed the amount of 10 base social benefits**¹⁰⁶. In SI, the method of calculating the amount of fair compensation and the method of its payment is determined in a by-law, the

¹⁰⁴ Article 6(5) of the OWD.

¹⁰⁵ Recital 18 of the OWD.

¹⁰⁶ In LT, the amount of base social benefit is calculated each year. For 2020, the amount is EUR 39 (information accessible at: <https://www.tagidas.lt/savadai/9007/>) therefore compensation for the use of an orphan work should not be more than EUR 390.

Government Decree¹⁰⁷. Among other rules, fair compensation shall be calculated in such a way that the costs incurred in carrying out a diligent search, the costs for technical preparation, digitisation, indexing, cataloguing, preservation, restoration and making available to the public, as well as the cost of providing a public service, are deducted from the compensation due. Any beneficiary that makes orphan works available to the public or reproduces them needs to adopt **a price list** determining the amount of costs for technical preparation, digitisation, indexing, cataloguing, preservation, restoration and making orphan works available to the public.

Few countries provide for rules regarding the **duration of the right to receive fair compensation** (AT, BG, CZ, ES, FI, HR, LT, and SI). Such rules include **rules regarding the point in time at which the payment is due**. In LT, for example, compensation shall be paid to the rightholders not later than by 31 March of the year following that in which the institution authorised by the government, taking into consideration the recommended findings of the panel of experts, took the decision concerning the payment and the amount of the compensation. Some countries provide for **rules on the maximum period for which the rightholder is entitled to receive compensation**. A 3-10 year period is usually set, calculated from the day of ending an orphan work status or calculated from the date the work obtained orphan work status. This is a *lex specialis* rule to national rules on the statutory limitation periods.

Several countries (BE¹⁰⁸, DK, EE, IS, LI, NL, NO, SE) do not specify how the compensation or duration of the right to receive fair compensation should be calculated. The legislation of AT and BG provide for rules on the duration but not on the procedure to calculate compensation.

More information on the national specificities can be found in Table 18: Rules on fair compensation in Annex I.

The question of **fair compensation was often stated as a key barrier for digitising orphan works by the beneficiary organisations** consulted for this Study. Although rightholders rarely reappear, the risk of having to pay compensation and the uncertainty around the amount of the compensation acts as a deterrent for using the OWD. It is noteworthy that **organisations from countries with clearer rules on fair compensation have been relatively more successful in using the OWD** (beneficiaries in DE, LT and UK). Beneficiary organisations argue that the notion of fair compensation should be made clearer at EU or national level, and that compensation should take into account the costs of preserving the work, with proof of the economic loss incurred by the rightholder. Based on the experience of the beneficiaries, orphan works are generally old works that have not been used in many years and may have disappeared if not preserved by the organisation, therefore compensation is difficult to justify. On the other hand, several rightholder organisations reiterated that rightholders should receive appropriate remuneration for use of their content, especially as once a work has been made available online it loses all future value.

2.8. Coherence and alternatives

This Section of the report analyses how national systems on orphan works function in conjunction with other areas of law (Sub-section 2.8.1), as well as other national

¹⁰⁷ Decree determining the method of calculation and payment of fair compensation for the use of orphan works in the case of the end of orphan work status (*Uredba o določitvi načina izračunavanja in plačila pravičnega nadomestila za uporabo del, ki jim preneha status osirotelega dela*), Official Gazette of the Republic of Slovenia, No. 76/15, accessible in Slovene at: <http://www.pisrs.si/Pis.web/pregledPredpisa?id=URED7102>

¹⁰⁸ Belgium should have enacted such rules by a Royal Decree, which has not been enacted to date.

regulatory schemes (Sub-section 2.8.2), including the regulation on out-of-commerce works (Sub-section 2.8.3).

2.8.1. Coherence with other areas of law

Box 18: Article 7 of the OWD - Continued application of other legal provisions

This Directive shall be without prejudice to provisions concerning, in particular, patent rights, trademarks, design rights, utility models, the topographies of semi-conductor products, typefaces, conditional access, access to cable of broadcasting services, the protection of national treasures, legal deposit requirements, laws on restrictive practices and unfair competition, trade secrets, security, confidentiality, data protection and privacy, access to public documents, the law of contract, and rules on the freedom of the press and freedom of expression in the media.

While the OWD explicitly states that orphan works provisions are without prejudice to other intellectual property rules (e.g. patent rights, trademarks) or to provisions in other areas of law (e.g. unfair competition, trade secrets, data protection), national transposing measures seldom include such explanation and only a handful of countries (BG, CY, EL, HR, IE, MT, and RO) transposed Article 7 of the OWD into their legal systems. This has been done *ad verbatim* or very close to the text of the OWD, without providing any further details on the relationship between the legislation of orphan works and the legislation of other similar legal areas.

No provisions or cross-references to other areas of law or to the relationship between the legislation on orphan works and the legislation on other similar areas of law were found for any of the countries. Despite this lack of cross-reference, the desk research did not reveal any issues of coherence, nor did the stakeholder consultation highlight particular practical issues due to inconsistencies between the OWD and other areas of law. Five rightholder organisations, however, highlighted that anonymous or pseudonymous works tend to be mistakenly considered orphan works because the rightholder cannot be identified and should thus be excluded from the scope of the OWD.

2.8.2. Coherence with other regulatory schemes

The OWD is without prejudice to the arrangements in the Member States concerning the management of rights such as ECL, legal presumptions of representation or transfer, collective management or similar arrangements, or a combination, including for mass digitisation¹⁰⁹.

Desk research revealed that **approximately two-thirds of countries** covered by this Study **have other types of regulatory schemes in place**, either general licensing schemes or ECL for the digitisation of works and materials.

Several types of **(collective) licensing schemes** exist in national legislation, which typically provide for the ability of a State body or a representative CMO to issue licences for the use of certain works and/or materials. It was **not always possible to see if such general licensing schemes could also cover orphan works** from the desk research alone. In IE, the Irish Copyright Act generally recognises licensing schemes and allows for their existence under the supervision of the national authority¹¹⁰. While these provisions do not deal with orphan works explicitly, the schemes may touch on the licensing of orphan works. In SE, orphan works could potentially be affected by the so-called 'collective contractual licences' which are multi-

¹⁰⁹ Recital 24 of the OWD.

¹¹⁰ Sections 151 to 156 (Chapter 16) of the Irish Copyright and Related Rights Act (2000).

party non-exclusive licences connected to the CMO¹¹¹. The Swedish understanding is that in view of Recital 24 and Article 1(5) OWD, the provisions on orphan works will not conflict with the regulation of collective contractual licences. In BE, on the other hand, licensing schemes set out in national law¹¹² do not apply to orphan works.

ECL schemes imply that a CMO is given a mandate to represent the interests of all rightholders of a certain category (e.g. authors, performers, producers, composers), even if they are not formally registered with that organisation¹¹³. After a contract is negotiated between the CMO and the beneficiaries, it is by law extended to cover all rightholders, meaning that the **beneficiaries will be able to digitise and disseminate all works in their collection, including orphan works**. As a result, diligent search of rightholders is unnecessary. Rights of rightholders are protected through the right to opt-out of the ECL and through the right to remuneration for the use of their work under the terms of the licence. Beneficiaries are obliged to pay royalties for the usage of works into the escrow account of the CMO. In most cases, CMOs are either private or public non-for-profit entities.

ECL schemes that can also cover orphan works are in place in the Nordic countries (DK, FI, IS, NO, and SE) as well as in CZ, FR, HU, IT, SK, and the UK¹¹⁴. In HU, the Copyright Act expressly foresees that the provisions on orphan works shall not apply to cases where authorisation of use falls within the scope of the collective management of rights. In SE, organisations undertaking collective licensing shall take reasonable action to identify those rightholders who are due compensation¹¹⁵. If a rightholder still cannot be identified after careful search, and three years have passed since the end of the year when the income was earned, the organisation may use the income for those works in accordance with their overall mission. In the survey, respondents from Nordic countries stated that in practice they use ECL schemes rather than the OWD system. According to these stakeholders, ECL schemes streamline procedures as they shift the burden of the rights clearance procedure from beneficiaries to CMOs, provide legal certainty for using a work, and ensure fair compensation for rightholders.

Only two countries have **special licensing schemes in place relevant to orphan works – HU and the UK**. In HU, a special licensing procedure exists for the use of orphan works by users that are not beneficiary institutions. Pursuant to the procedure described in the Orphan Works Decree, any user can submit an application to the HIPO for a licence to use an orphan work. Such a licence is valid for a maximum term of five years, is non-exclusive, non-transferable and shall not confer the right for granting further licences or for the adaptation of the work. The use can aim or not, either directly or indirectly, to earn or increase an income¹¹⁶. The UK has a special licensing scheme relevant to orphan works¹¹⁷. Such a licence is granted by the UK IPO. This orphan works licence is non-exclusive (not restricted to a single licensee) and can last up to seven years, with a possibility of renewal. Similar to the orphan works exception under the OWD, applicants need to carry out a diligent search for rightholders and document that search with the help of a checklist (one checklist for each rightholder)¹¹⁸. The diligent search needs to be updated on renewal of the licence. In practice, however, UK stakeholders consulted for the study stated that they

¹¹¹ Articles 42 a-g in the Swedish Copyright Act.

¹¹² Chapter 9 of Book XI, Articles XI. 245 and following of the *Code of Economic Law* (Wetboek Economisch Recht) (WER).

¹¹³ Impact assessment on the cross-border online access to orphan works, p. 17, https://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2011/sec_2011_0615_en.pdf

¹¹⁴ Although the legislation provides for this option, to date there is no CMO offering this licensing scheme.

¹¹⁵ Chapter 7 Article 6 of Law 2016:977.

¹¹⁶ Article 41/B of the Copyright Act.

¹¹⁷ Section 116A of the Copyright, Designs and Patents Act 1988.

¹¹⁸ Same checklists with sources apply both for the OWD exception and the national licensing scheme.

rarely make use of the special national licensing schemes for orphan works because they are only applicable at national level.

Table 8: Comparison of the OWD and the national licensing schemes for orphan works

Topics	Orphan works exception under OWD	Additional HU licence for orphan works	UK orphan works licence
Type of works (objective scope)	Books, journals, newspapers, magazines, other writings, cinematographic, audiovisual works, phonograms and embedded works (Article 1(2)-(4) OWD)	Any type of orphan work	Film, music and sound, literary works and still visual art (including standalone visual art such as photographs)
Type of beneficiaries (subjective scope)	Publicly accessible libraries, education establishments and museums, as well as by archives, film or audio heritage institutions and public service broadcasting organisations (Article 1(1) OWD)	Any other user	Any applicant
Permitted use	For public interest missions, such as the purposes of digitisation, dissemination, indexing, cataloguing, preservation or restoration (Article 6(1) OWD)	Could include commercial use	Commercial as well as non-commercial use
Diligent search requirement	A diligent search for rightholders is to be carried out in good faith with respect to each work by consulting the appropriate sources (Article 3 OWD)	User should perform search based on the list of sources from the Orphan Works Decree. HIPO could demand an additional search	Diligent search for rightholders needs to be performed in accordance with the guidance published by the UK IPO and a diligent search checklist shall be completed as part of the application process
Rightholders' right to opt-out	Right to end the orphan works status (Article 5 OWD)	If the identity or location of the rightholder becomes known after the licence has been granted, the HIPO shall revoke the licence at the request of the rightholder or the user. The right to use shall persist for the period remaining of the term of the licence, but not longer than one year from the date when the identity or location of the rightholder	If the rightholder comes forward before the licence is approved, the work cannot be licensed. If the rightholder comes forward after the licence has been granted, they are able to claim the licence fee. Once a rightholder has been identified, no further licences will be

Topics	Orphan works exception under OWD	Additional HU licence for orphan works	UK orphan works licence
		becomes known	issued
Redress for rightholders	Fair compensation is due to rightholders that put an end to the orphan work status (Article 6(5) OWD)	Licence fee/remuneration. The rightholder shall be entitled to claim the remuneration due to them from the user or from the HIPO for five years after the licence expired or after the date when the decision on revocation became final and binding	Licence fee
EU-wide usage	Mutual recognition of orphan works status (Article 4 OWD)	Limited to the territory of HU	Licence applies only for the use in the UK
Costs	Cost of performing diligent search	Costs of diligent search The applicant needs to pay the fee for the administrative procedure before the HIPO in the amount of HUF 92,500 (EUR 260 ¹¹⁹) or HUF 30,000 (EUR 85) in case of non-commercial use. This fee is the revenue of the HIPO ¹²⁰ A licence fee is calculated in accordance with the mode and extent of use. The fee shall be paid to the rightholder after the identity or location of the rightholder becomes known. In case of commercial use, the fee shall be deposited at the HIPO. Depositing the remuneration/licence fee is the condition for the commencement of use ¹²¹	Costs of diligent search The applicant needs to pay an application fee as well as a licence fee , which is calculated based on the type of work and the type of use (fee for non-commercial use is for instance lower than the fee for commercial use). The licence fee is held by the IPO on behalf of the absent rightholder

2.8.3. Coherence with regulations on out-of-commerce works

The Member States covered by this study have not yet transposed the DSM Directive and the analysis of this Sub-section focuses on the existing national mechanisms for out-of-commerce works. As such, findings in this Sub-section will need to be modified once the transposition of the DSM Directive is complete. However, legal scholars and stakeholders generally believe that **the schemes in the OWD and the new DSM Directive will overlap** due to the overlapping definitions of orphan works and out-of-commerce works.

¹¹⁹ Based on exchange rate in November 2020.

¹²⁰ Article 4(1) and (2) of the OWD.

¹²¹ Article 41/B (1) and (2) of the Copyright Act.

Out-of-commerce works at EU level are works that are still protected by copyright but whose rightholders (known or unknown) no longer actively exploit their rights, by choice or decision, making such works unavailable to the public through customary channels of commerce¹²². The definition of out-of-commerce works largely includes orphan works, as it also includes works whose rightholders are unknown, such as in the case of orphan works. As it is conceptually very difficult to imagine that someone is rightfully exploiting an orphan work, **most, if not all, orphan works are in fact out-of-commerce**. None of the stakeholders consulted could provide examples of works that are both orphan and in commerce.

Most countries' legislation does not provide for any **national definition of out-of-commerce works**, with the exception of FR, IT¹²³, PL, SK and SE. The definition of out-of-commerce works in national legislation overlaps to a certain extent with the definition of orphan works. Approximately **one-third of countries** have introduced schemes specifically for digitisation and dissemination of out-of-commerce works prior to the DSM Directive, such as¹²⁴:

- **(Collective) licensing schemes** found in HR, FR, DE, PL and SK;
- **ECL schemes** in some Nordic countries (DK, FI, IS, NO, and SE) and HU.

National systems that support large-scale digitisation of out-of-commerce works do not normally distinguish if such works also have orphan status¹²⁵. It is thus **possible that some orphan works have also been digitised through such schemes**. As an indication, significantly more works are indicated as orphan in Europeana (around 30,000) compared to the EUIPO database (18,649 before Brexit). As systems of orphan works and out-of-commerce works exist in parallel, the beneficiaries are, in principle, free to choose between them, unless national legislation prescribes otherwise. **Most** national systems (both collective licensing and ECL) do **not require a diligent search** to be performed in case of digitisation of out-of-commerce works.

In DE, the out-of-commerce scheme¹²⁶ covers magazines and published books which (i) were published prior to 1966, and (ii) are out-of-commerce. A list of works that are assumed to be out-of-commerce is sent to the rightholders, who can deny permission within six weeks of the work being entered in the publicly available register, managed by the German Patent and Trade Mark Office¹²⁷. Usage of such out-of-commerce works is available (by licence) to libraries, archives, and other institutions. Unlike the regime for orphan works, licensed usage of out-of-commerce works **does not require a diligent search**. As orphan works are generally out-of-commerce, the beneficiaries in Germany are **free to use either the orphan works exception** based on the transposition of the OWD, **or the national licensing scheme for out-of-commerce works**¹²⁸.

FR established a new regime for out-of-commerce works in 2012 (in force until 2017), with the aim of facilitating the making available in digital form those out-of-commerce

¹²² MoU, 'Key Principles on the Digitisation and making Available of Out-of-Commerce Works', 20 September 2011.

¹²³ In Italy, the expression '*opera fuori commercio*' only refers to an out-of-commerce book, intended as a book that the publisher has decided to withdraw from ordinary commerce in bookshops or, if the edition is sold out, not to reprint.

¹²⁴ European Commission, Cultural heritage, digitisation, online accessibility and digital preservation, Report on the Implementation of Commission Recommendation 2011/711/EU, 2013-2015, p. 37.

¹²⁵ European Commission, Cultural heritage, digitisation, online accessibility and digital preservation, Report on the Implementation of Commission Recommendation 2011/711/EU, 2013-2015, p. 37.

¹²⁶ Sections 51 and 52 of the Collecting Societies Act (*Verwertungsgesellschaftengesetz*), accessible at: https://www.gesetze-im-internet.de/englisch_vgg/englisch_vgg.html#p0254

¹²⁷ German Patent and Trademark Office, accessible at:

https://www.dpma.de/dpma/wir_ueber_uns/weitere_aufgaben/verwertungsges_urheberrecht/vergriffene_werke/recherche/index.html

¹²⁸ Explanation to Article 13d of the Act on the Use of Orphan and Unavailable Works and another Amendment of the Act on Copyright, accessible at: <https://dip21.bundestag.de/dip21/btd/17/134/1713423.pdf>

works that have not yet fallen into the public domain¹²⁹. The regime was based on a **collective licensing scheme** managed by Sofia (CMO). Out-of-commerce works were indexed on a public database called ReLIRE, which was managed by the National Library. Anyone could propose the addition of a book to the database. Starting from the registration of a work on the ReLIRE database, the editor or the author had the right to opt-out of the out-of-commerce works regime for six months, subject to certain conditions. **This regime also covered orphan works**. However, this system was sharply criticised and subject to important judicial debate both nationally and EU-wide due to violation of the principle of the author's prior consent. In Case C-301/15 *Soulier and Doke*, the Court of Justice of the European Union (CJEU) found the French Intellectual Property (IP) Code incompatible with Directive 2001/29/EC, stating that the consent to digitalise works could be implied but the author in question should be informed of the future use of their work by a third party and of the means placed at their disposal to prohibit such use. Arguably this discussion has an impact on all national legislation on out-of-commerce works. Following the CJEU case, the French Conseil d'État ultimately discontinued the regime in 2017. This decision, however, did not call into question the existing collective licences. The works that were under collective management before 2017 can still be used, but Sofia no longer issues any new licences since 2017. While the system for out-of-commerce books was more beneficial for operators, the system for orphan works is more advantageous for the public because of free access to the digitised work.

In PL, provisions on out-of-commerce works have been introduced in parallel with the transposition of the OWD. Archives, educational organisations, cultural institutions and scientific establishments are entitled to conclude **a contract with the CMO designated by the Minister of Culture, based on which they obtain a licence** to make reproductions of copies of out-of-commerce works contained in their collections and make such copies available to the public. The law has established the publicly accessible Register of Out-of-Commerce Works. The designated CMO may exercise copyright for an out-of-commerce work (i.e. contract with the organisations listed above) on the condition that the work has been entered into the register and the rightholders have not filed a written objection within 90 days of the entry being made public. The range of usage of out-of-commerce works is the same as for orphan works (preservation, restoration, making available for cultural and educational purposes), but **diligent search is not needed**. This is due to the fact that the regulation of out-of-commerce works serves a different purpose. It is perfectly possible that a work is an out-of-commerce work although the authors or other rightholders are known and can be easily located. The interests of rightholders are protected by granting them a right to object and the right to withdraw (implied) permission. An out-of-commerce work may, in certain circumstances, be an orphan work. The overlap may occur due to the fact that the definition of an out-of-commerce work does not specify why a work has become unavailable, thus it may include lack of contact with the rightholder. There is **no rule deciding which of the two regimes should have priority**. It seems reasonable to argue that if a work meets the criteria established for out-of-commerce works, the provisions on these works may be applied and no additional diligent search is required.

In SK, the copyright law contains **an out-of-commerce works licensing mechanism**, which is built on the basis of an MoU on key principles on the digitisation and making available of out-of-commerce work¹³⁰. Among other conditions, out-of-commerce work needs to be recorded in the publicly available **registry of out-of-commerce works**, which is administered by the Slovak National Library. The

¹²⁹ The regime for out-of-commerce works in France is specified in Book 1, Title I, Chapter IV of the IP Code, Articles L134-1 to L134-9, and is only applicable to books published before 1 January 2001.

¹³⁰ Memorandum of Understanding (MoU) on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works – Frequently Asked Questions accessible at: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_11_619.

application to include a work in the registry of out-of-commerce works can be filed by anyone and the Slovak National Library will then publish the proposal on its website. The Library will include the work in the registry if, three months following the filing of the application (i) the Slovak National Library ascertained that it is not possible to obtain a reproduction of the work by purchase, even with reasonable effort and under ordinary conditions; and (ii) the author did not object (in a written form) to listing the work in the registry. The author is entitled to request withdrawal of the work from the registry any time after the work has been listed. The requirement to ascertain that the work cannot be lawfully purchased **resembles diligent search**. However, unlike diligent search, the act does not detail how to ascertain the unavailability of the work, thus it depends primarily on the practice of the Slovak National Library. After the work is listed in the registry, it can be subject to a collective licensing scheme issued by a CMO for reproduction, making available or distribution of such out-of-commerce works.

In both the survey and interviews, many stakeholders highlighted the overlap between the concept of out-of-commerce works and orphan works, often arguing that orphan works cannot also be in commerce. Although the DSM Directive is currently in its transposition phase and out-of-commerce provisions have not yet been tested in practice, the majority of stakeholders believe that the out-of-commerce provisions may prove more beneficial for mass digitisation, including for orphan works. The survey results show that **59 % of respondents (62 % of beneficiary respondents and 45 % of rightholder respondents) stated that they believe the approach in the DSM Directive for out-of-commerce works should be extended to cover orphan works**. According to these stakeholders, the out-of-commerce approach would streamline the procedure for clearing the status of works and provide more legal clarity for beneficiaries. However, several stakeholders expressed concerns about the use of the out-of-commerce approach, particularly the licensing fees that beneficiaries would have to pay – some argued that these could become more expensive than the costs of the diligent search procedure. The lack of representativeness of CMOs in certain sectors was also a key point of concern for several rightholder organisations active in the audiovisual and visual sectors, as under the new DSM Directive, this triggers an exception whereby beneficiaries can digitise the out-of-commerce work even of their non-members and even if not representative, which they argue could easily lead to violations of rightholder rights. Overall, out-of-commerce licencing systems present the advantage of not requiring diligent searches, as CMOs can issue licenses after reasonable effort has been made to determine whether the work is available to the public but have the disadvantage of licensing costs for the beneficiaries. The system may therefore work very well for certain institutions but not for others, based on the trade-off between costs (licensing vs. diligent search) within an institution.

3. Key conclusions

This Chapter presents the key findings of the Study by drawing conclusions on the overall performance of the OWD. Section 3.1. analyses the extent of use of the OWD exception, while Sections 3.2. and 3.3. examine its key strengths and obstacles, respectively. The final Section 3.4. assesses the effectiveness of the OWD in facilitating mass digitisation and dissemination of orphan works.

The analysis here is based on both the legal research (EU and country level) and the stakeholder consultation (survey and interviews).

3.1. Use of the orphan works exception

A key criterion in assessing the effectiveness of the Directive is the extent to which cultural heritage institutions make use of the OWD exception to digitise and disseminate orphan works. The content of the EUIPO database gives some indication of the use of the OWD, as Article 3 of the OWD requires records of diligent searches to be forwarded to the EUIPO database by the competent national authorities, a requirement that has been transposed in almost all countries.

In June 2020, **only 18,649 orphan works were recorded in the EUIPO database across the entire EU/EEA**, 60 % of which were recorded by the British Library. This represents a tiny proportion of the estimated orphan works existing in the collections of cultural heritage institutions across the EU¹³¹. In addition, **only 72 institutions from 17 countries EU/EEA-wide have recorded works in the Database**, with **five of those 17 institutions contributing over 90 % of the works**. Since the end of the Brexit transition period (31 December 2020), the works recorded by British institutions have been removed from the database, meaning that as of January 2021 there are only 5,480 main works and 1,406 embedded works available to the public in the database.

For all countries, over 70 % of the works were recorded by a single key organisation (e.g. 98 % of works registered by a Polish organisation were recorded by the University of Warsaw). BE, DE and LT have the highest number of actively contributing organisations. **The OWD is used primarily for literary works**, which represent 60 % of the recorded works in the database, 20 % are photographs, 10 % illustrations and 4 % audiovisual works, with the Dutch Eye Film Institute having contributed 93 % of all audiovisual works.

The results of the survey show that **only a minority of the beneficiary respondents (24 %) believe that the OWD has led to significant improvements in the digitisation and dissemination of orphan works** since its entry into force. Meanwhile, half of the beneficiaries (50 %) believe that there have been no improvements. **Many stakeholders in the Nordic countries and Germany, stated that they do not use the OWD but instead rely on alternative systems, such as ECL schemes**. More orphan works than those recorded on the EUIPO database are therefore likely to have been digitised. As an indication, 30,000 works available on Europeana were indicated as orphan by cultural heritage institutions when sharing items on the platform¹³².

3.2. Key strengths of the OWD system

This Section presents the overall strengths of the OWD system. In doing so, it analyses its overall transposition and coherence (Sub-section 3.2.1.), overall costs compared to other licensing systems (Sub-section 3.2.2.), mutual recognition principle

¹³¹ An estimate from 2001 shows that there were more than 2.5 billion books and bound periodicals (volumes) in the libraries of the EU-25 Member States, while the proportion of orphan works in the case of print media can reach up to 50 %; European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - i2010: digital libraries, COM/2005/0465 final.

¹³² Information obtained throughout the interview.

(Sub-section 3.2.3.), circumstances concerning the change of orphan works status (Sub-sections 3.2.4. and 3.2.5.) and some best practices examples (Sub-section 3.2.6.).

3.2.1. Transposition and coherence with copyright and other rules

All countries have transposed the OWD by amendments to their existing copyright regulations. The desk research revealed no major issues regarding its transposition.

No major issues of coherence were detected with other areas of intellectual property rights, with the exception of the regulation on out-of-commerce works (see Section 3.3) and rules on anonymous and pseudonymous works¹³³. Overall, most stakeholders believe that the OWD is consistent and supportive of EU copyright rules¹³⁴. Half of the beneficiary respondents believe that the OWD is coherent with public domain rules because the two systems do not interact and cover different situations, i.e. works with no identifiable rightholders in the case of orphan works and works that are no longer protected by copyright in the case of public domain works.

Similarly, no major issues of coherence with other legal areas related to intellectual property law were detected (probably due to Article 7 OWD and its correct transposition).

3.2.2. No extra fees and no time limitations

The OWD system is based on an exception, meaning that once a diligent search is performed, beneficiaries are free to use the orphan work without any further restrictions or costs. This is different to licensing schemes, where, in addition to the costs of diligent search (if such search is required), beneficiaries also face the cost of an administrative procedure (application fee) and a licence fee. Stakeholders in HU and the UK – both of which have an alternative national licensing scheme for orphan works - confirmed that **beneficiaries regularly opt for the OWD solution as it avoids the cost of administration and the licence fee**. As such, national licensing schemes act as supplementary systems to cover types of uses or beneficiaries outside the scope of the OWD.

The diligent search procedure under the OWD is a one-off event, but **licenses are time-bound**. They need to be renewed at regular intervals (every five years in HU and every seven years in the UK), along with payment of a new licence fee, and the commonly incurring costs of a new diligent search. Even if licence fees are not substantial, these costs are not negligible when digitising several thousands of items that need to be verified and re-licensed regularly.

3.2.3. Mutual recognition

The OWD provides for a system of mutual recognition of orphan work status throughout the EU/EEA. This means that a work which is considered an orphan work in one EU/EEA Member State is considered an orphan work in all Member States and may be used accordingly.

Stakeholders with alternative national schemes for orphan works mentioned that this **extraterritorial validity of orphan works status beyond the national territory** is one of the key strengths of the OWD. As such, the mutual recognition is a useful **risk mitigation tool** as it provides broader security when offering orphan works in a digitised world. Two survey beneficiaries stated that they have successfully used

¹³³ While beneficiary respondents generally believe the rules on anonymous or pseudonymous works to be consistent with the OWD (the latter is without prejudice to national provisions on these types of work), rightholders' organisations noted that anonymous or pseudonymous works tend to be mistakenly considered orphan works because the rightholder cannot be identified.

¹³⁴ Stakeholders' answers to the survey question, 'In your opinion, is the OWD consistent with and supportive of the following EU copyright rules or do you see gaps, overlaps or inconsistencies?'

orphan works from other EU/EEA Member States and that the mutual recognition system enables orphan works to be available on European platforms, such as Europeana.

Nevertheless, **it does not seem that the mutual recognition principle has increased cross-border use of orphan works across the EU/EEA.** When asked whether they believe that the use of orphan works from different countries has increased across the EU/EEA since the entry into force of the OWD, the majority of survey respondents (71 %) did not know. Of the 25 respondents who gave an answer, 64 % believe that there has been no increase in the cross-border use of orphan works, with no strong differences between stakeholder groups. Of the respondents who believe that the cross-border use of orphan works has increased, 44 % believe that this can be significantly attributed to the OWD and 22 % that it can be only partially attributed to the OWD (33 % did not know).

3.2.4. Reliability of a diligent search

Overall, most stakeholders were unable to answer the questions related to ending an orphan work status, with many noting that they have not experienced this scenario. **The reappearance of rightholders of orphan works seems to be a rare occurrence.**

On the question of how often rightholders put an end to an orphan work status, **85 % of the 40 respondents that answered stated that rightholders never (53 %) or rarely (32 %) end an orphan work status.** Similarly, 70 % of respondents were unable to answer how frequently rightholders claim compensation in cases where an orphan work is claimed. Of the respondents that answered (26 in total), **73 % stated that rightholders rarely (38 %) or never (35 %) claim compensation.** Interviews with stakeholders confirmed that rightholders seldom reappear, and few of those who do claim their rights and demand compensation.

In addition, the very low percentage of works that have been claimed in the EUIPO database tends to confirm the stakeholder findings, that rightholders rarely reappear and claim works.

When a diligent search of rightholders is concluded in line with the OWD, it seems that such **search is credible and rarely leads to unexpected rightholders' reappearance.** While some stakeholders believe that this is due to the fact that rightholders are rarely aware of the use of their works, others argued that this actually proves that diligent search as a tool works and helps to correctly identify orphan works.

3.3.5. Ease of ending orphan work status

Overall, stakeholders believe that it is easy to put an end to an orphan work status, notably because once a claim is made, a normal rights-clearance procedure is initiated to determine the conditions in which the work can be used. Several rightholder organisations, however, highlighted difficulties for rightholders to track all uses of their works and, in some cases, to provide justifications to their claims.

When asked whether it is easy to put an end to an orphan work status, only 43 respondents were able to provide an answer. Of these, **67 % believe that it is easy to claim an orphan work**, while 33 % believe it is not. More than half of beneficiaries (72 %) and rightholders (59 %) believe that the procedure for claiming an orphan work is easy. However, a slightly higher proportion of rightholders believe that the procedure is not easy.

84 % of those who believe that the procedure is easy attribute that ease significantly or partly to the OWD.

Several stakeholders emphasised that it is very rare for rightholders to claim an orphan work. However, from stakeholders' responses, this depends on the 'claim culture' in a country. Some beneficiary organisations mentioned that when

rightholders have reappeared they have often simply thanked the beneficiary for disseminating the work.

3.2.6. Examples of best practice

Although the OWD does not seem to work for mass digitisation of orphan works (see discussion in Sub-section 3.3), there are examples of beneficiaries that rely heavily on the OWD exception to digitise orphan works.

Review of the EUIPO database shows that examples of such stakeholders are the British Library, the Dutch Eye Film Institute and the National Library of Lithuania. The stakeholder consultation revealed that the **successful beneficiaries in using the OWD are those with sufficient resources and in-house legal expertise in intellectual property law**. This expertise helps them to develop specific lists of sources and decision trees that direct their diligent searches. Such expertise also helps them to assess the risks of using an orphan work after a diligent search has been performed.

Many beneficiaries stated that they do not perform mass-digitisation of orphan works but, rather, use the exception for limited amounts of works. Some, like the Eye Film Institute, are in a somewhat advantageous position as they (i) only digitise one type of orphan work (audiovisual); (ii) can rely on national particularities such as presumptions of rights transfer that narrow the number of potential rightholders; and (iii) are in possession of the largest national archive of such types of works.

3.3. Key issues with the OWD system

This Section analyses the obstacles to the application of the OWD system. The stakeholder consultation highlighted **two major barriers hindering the use of the OWD**:

- Diligent search and the list of sources (Sub-section 3.3.2);
- Redress for rightholders (Sub-section 3.3.4).

Other issues include the scope of the Directive (Sub-section 3.3.1.), the EUIPO database (Sub-section 3.3.3.), national specificities including lack of resources and/or motivation for large-scale digitisation projects (Sub-section 3.3.5.) and overlaps between the OWD and other regulatory schemes (Sub-section 3.3.6.).

These **barriers appear to stem from both external factors independent of the OWD and issues within the OWD and its national implementation**.

The OWD is a **minimum harmonisation Directive**, meaning that it sets only the bare minimum thresholds that countries must meet and national laws may exceed those terms. The OWD was largely transposed *ad verbatim* and applies across the Member States with minor nuances and a very limited number of exceptions. It seems that the actual practical implementation of the OWD was often overlooked by the countries, with few providing additional guidance for stakeholders.

3.3.1. Issues with the scope and permitted uses of the Directive

Two issues with the scope and permitted use under the OWD appear to be an issue for certain beneficiaries:

- Stand-alone graphic works are not included

Over half of the beneficiary survey respondents (52 %) are in favour of **extending the scope** of the Directive, notably to stand-alone graphic works (such as photographs, posters, illustrations or postcards) and items of fine art. Several beneficiary respondents believe that the OWD should also be extended to include all organisations with a public interest mission. Those beneficiaries who argued against extending the scope of the OWD believe that the Directive is ineffective and extending

its scope would not improve its usability. The concept of **embedded works** appears particularly problematic for beneficiaries from a practical and resource point of view, although several held that the underlying logic is fair for rightholders.

Rightholder organisations have a relatively harmonised position **against extending the scope** of the Directive to additional types of organisations or works, on the grounds of avoiding increased misuse and violations to the rights of authors. The majority of rightholders also agreed that embedded works should be treated as independent works for the purposes of diligent search.

- Permitted uses are too narrow

The survey revealed that **half of the beneficiary respondents** also believe that the permitted uses covered by the OWD are too narrow and that **non-commercial offline uses should be permitted** (much like the out of-commerce scheme in the DSM Directive). Several beneficiaries expressed their belief that the following uses should be permitted: (i) non-online use of orphan works, such as public performance or broadcasting of dramatic and cinematographic works; (ii) educational purposes; and (iii) non-commercial reuse of orphan works within new works (derivative use). Similar to the question of extending the scope of the Directive, rightholders and beneficiaries appear divided on the question of permitting additional uses of orphan works. In particular, rightholders in the visual sector opposed this extension due to difficulties in preserving the metadata associated with photos.

Overall, however, only a minority of all types of stakeholders believe that **commercial uses** of orphan works should be permitted. As the stakeholders consulted were organisations with public and not commercial aim, the issue of extending the use for commercial purposes might need to be further researched, particularly in light of the new DSM Directive.

3.3.2. Issues with diligent search and the list of sources

The vast majority of beneficiary organisations argued that **the diligent search procedure is a key reason behind the ineffectiveness of the OWD**. Many rightholder organisations also believe that the diligent search procedure does not work and that the complexity of the procedure creates risks of copyright violation. Key difficulties encountered during diligent searches are linked to the **list of sources** that must be consulted during such search.

Stakeholder consultation revealed the following issues:

- Lack of clarity on when a search is considered 'diligent'

Many stakeholders from different stakeholder groups pointed to the **lack of legal clarity** with the orphan works system. Almost half of the survey respondents claimed to experience difficulties in determining which sources should be consulted for a particular type of work. This problem lies in the Directive itself, which states that the list of sources is illustrative, providing a minimum number of sources that must be consulted, and also in the national transposition, as national legal systems rarely provide an explanation of what is considered 'diligent', whether the search can be limited to the relevant sources on the list, or whether the beneficiaries need to consult sources beyond those on the list. Consequently, what is 'diligent' is often decided on a case-by-case basis, making it ultimately the responsibility of national courts to determine if a certain search of rightholders can actually be considered diligent.

- The number of sources to be consulted is excessive

The excessive number of sources to be consulted is rated as (highly) problematic by over half of the respondents to the survey. This is not surprising as both the Annex to the OWD and the national lists provide a large number of sources that need to be reviewed (the number of sources varies substantially between countries and can range from as low as 10 (CY) to as high as 229 (DE)). As such lists are non-exhaustive, further sources might need to be consulted on a case-by-case basis.

- The sources are outdated and often irrelevant

The most problematic challenges linked to the list of sources are the accessibility and quality of the sources, with 66 % of survey respondents rating these issues as (highly) problematic.

Several stakeholders argued that the **list of sources to be consulted is inadequate and not useful for beneficiaries**, notably because irrelevant/non-accessible sources are often included on the list (e.g. ARROW database) while relevant sources are omitted. The sources on the lists are often generic, meaning that further research is needed to determine the relevant sources. This problem stems from the fact that national lists often literally follow the list in the Annex to the OWD, and **neither list is ever updated**.

Some beneficiaries suggested that the sources should be given as guidance rather than being mandatory. Another three believe that the diligent search should not be limited to a list of sources but should, rather, be flexible and adapted to the type of work and circumstances. One beneficiary organisation added that cultural heritage institutions often have most information about their collections, including understanding which sources are relevant to a diligent search.

- The sources are not accessible

Another problem linked to the list of sources is their accessibility, as **not all sources are available online** and some are only available for payment. One beneficiary interviewee highlighted that employees conducting the diligent searches must physically travel to the location of the sources, which is time-consuming and costly.

- Diligent search is resource intensive

Another key issue is the **resource-intensive nature of the diligent search procedure**, in terms of finance, time and manpower, in particular for underbudgeted beneficiaries. The vast majority of survey respondents claimed that the level of resources required to perform a diligent search (76 %) and the time required to complete a search (67 %) are (highly) problematic issues. For example, the time estimated by one institution for a sample collection of 432 items (mainly written works and embedded photographs) was 138 minutes per work, plus 31.6 minutes to record each work on the EUIPO database¹³⁵. This is unsurprising, given that national legislation typically requires 30-60 sources to be reviewed, and even this is sometimes only considered 'illustrative', meaning that further investigation may be required before the search can be considered diligent. Some beneficiary organisations reported abandoning diligent searches due to the time and resources necessary, while others never even started.

The resource intensity seems to stem from the way diligent search is structured in the OWD, but a lack of resources and trained personnel in cultural heritage institutions also contributes to the issue. To improve the procedure and facilitate the work of beneficiaries, several stakeholders suggested increasing the information provided to beneficiaries and developing practical IT tools, notably databases, to speed-up the procedure.

- Diligent search is based on a work-by-work approach;
- Diligent search must be performed for each embedded work;
- Complexity of diligent search procedure for works with several rightholders;
- Complexity of diligent search procedure in cross-border cases.

Although some beneficiaries explained that they have been able to set up systemised searches to speed up the process (e.g. using decision trees or sending information requests on many works from the same collection in batches), the challenge of conducting diligent search for every individual work remains. Diligent searches thus appear better suited to small collections but **not large-scale digitisation projects**.

¹³⁵ Stobo et al., 2018.

Given the work-by-work approach of the procedure, records of the diligent search must be produced for each work individually, including for **embedded works**. This proves extremely time-consuming for cultural heritage institutions. Similarly, performing diligent searches for **works with several rightholders** was also rated as (highly) problematic by over 70 % of survey respondents.

Overall, most stakeholders either do not know or do not believe that there has been an increase in the cross-border use of orphan works across the EU/EEA. Few claimed to have experience with performing cross-border searches, pointing to the additional complexity of **language barriers**. Stakeholders highlighted the broader difficulties in using the OWD to digitise works in the first place and the limited demand for cross-border works.

3.3.3. Issues with the EUIPO database

Two issues were identified in respect of the EUIPO database:

- Under-utilisation;
- Difficulties in identifying works in the database.

In June 2020, a total of 18,649 works were recorded in the EUIPO database, but that number fell to **6,903 on 1 January 2021**, in the wake of Brexit. Many stakeholders believe that the EUIPO database has been partially or not all effective in facilitating large-scale digitisation projects, but key difficulties appear to be linked to broader issues with the OWD system at EU level rather than the database itself.

Several stakeholders believe that the EUIPO database interface should be improved and made more user-friendly. These respondents argued that the interface is cumbersome and difficult to navigate. A key issue is **the lack of links or images of the recorded works**, making it particularly difficult to identify the works, many of which do not have clear titles (the use of images was excluded from the scope of the database from its inception).

3.3.4. Issues with redress for rightholders

The Study identified challenges linked to **financial risks for beneficiaries** due to the potential reappearance of a rightholder and the **uncertainty surrounding the level of compensation**. The issues linked to redress for rightholders include:

- Lack of clarity in the OWD on the concept and calculation of fair compensation;
- Lack of clarity in national legislation on the procedure to claim compensation and the amount of that compensation;
- Lack of clarity on whether redress should even be paid, as digitisation usually prolongs the duration of works and the use is always non-commercial;
- Rightholders rarely know that their work is being used or their entitlement to compensation.

Assessing the extent to which the OWD has provided sufficient protection for rightholders is more difficult, as **rightholders rarely reappear and claim compensation**. Less than 1 % of the recorded works in the EUIPO database have had a status change claim.

According to certain rightholder organisations, it is particularly difficult for rightholders to put an end to orphan work status, as **they are unaware of the use being made of their works**, especially where there are no clear titles associated with the works. Unlike other systems, such as ECL schemes, there is no clear channel for rightholders to obtain information on the use of orphan works and no system for rightholders to pre-emptively opt-out.

The **lack of clarity** surrounding the **notion of fair compensation** in the OWD is a drawback for both beneficiaries and rightholders. The national legislation in most countries is similarly vague in setting the rules and/or amounts to be paid in case of

unlawful determination of orphan works status, with some notable exceptions (e.g. FR, HU, LT, SI).

However, both groups of stakeholders provided different reasons to support their answer. **Beneficiary organisations** stated that it is difficult to assess the risk of digitising orphan works, as they do not know how much a reappearing rightholder will cost. Several beneficiaries thus argued that the compensation should be limited and proof of economic loss should be provided. On the other hand, **rightholder organisations** argued that the OWD is a means of using works without remunerating rightholders. They pointed to the need for clearer and better compensation, especially because once a work has been made available online it loses all future value. Furthermore, the procedure for rightholders to opt-out of certain uses of their works and to receive adequate compensation should be simplified.

3.3.5. National specificities

The analysis revealed the following issues emerging due to different political and legal circumstances in the relevant countries:

- The OWD was transposed literally **without any accompanying guidelines**: only UK and LT have issued special guidelines that support diligent search;
- **Different rules on presumption** of rights ownership and rights transfer: the rules on presumption of rights ownership and rights transfer vary from country to country. Good knowledge of the copyright system of a particular country is essential in order to know which rights are presumed to be transferred when conducting a diligent search;
- **Lack** of resources and/or motivation for **large-scale digitisation projects**: stakeholder consultation revealed that beneficiaries must resort to external funding or crowd-sourcing for conducting large-scale digitisation projects. Even when funding is secured, the resources are not unlimited, forcing beneficiaries to make compromises, e.g. digitising only works of known authors or those in the public domain. Some stakeholders even suggested that the limited use of the OWD may be linked more broadly to the limited number of large-scale digitisation projects across the EU/EEA.

3.3.6. Overlaps between the OWD and other regulatory schemes

Issues linked to the diligent search procedure led several stakeholders to argue for the **use of alternative systems** for digitising and disseminating orphan works.

The most common alternatives include:

- **National ECL schemes**

Half of the survey respondents (51 %) believe that ECL schemes should be considered for the digitisation and dissemination of orphan works (46 % of beneficiaries, 52 % of rightholders and 100 % of CMOs). In particular stakeholders from countries with functioning ECL schemes (e.g. the Nordic countries) frequently stated that they **use such alternative systems rather than the OWD**. In this regard, it is noteworthy that beneficiaries from Nordic countries are largely absent from the EUIPO database.

Stakeholders argued that the use of ECL schemes would streamline procedures (the burden of the rights clearance procedure is shifted from beneficiaries to CMOs), provide legal certainty for beneficiaries, and ensure fair compensation for rightholders. In addition, two stakeholders (from Nordic Member States) argued that ECL schemes ensure dialogue and cooperation between all stakeholders, none of which is possible under the OWD.

Concerns about ECL schemes revolved around licensing fees for beneficiaries and the representativeness of CMOs, notably in the audiovisual and visual sectors. A key additional issue highlighted by stakeholders is that **ECL schemes are only applicable nationally in the country in which they were negotiated**. ECL

schemes would therefore not be a solution to enable access to collections of beneficiaries EU/EEA-wide.

- **Out-of-commerce provisions of the DSM Directive**

Many stakeholders believe that there is an overlap between the out-of-commerce provisions of the DSM Directive and the OWD (42 % in total, with 28 % stating that they do not know)¹³⁶. This trend is confirmed when looking within the different stakeholder groups: 42 % of beneficiaries, 42 % of rightholders and 50 % of CMOs believe that the OWD has gaps, overlaps or inconsistencies with out-of-commerce rules. A common argument put forward by stakeholders from different groups was the **overlap between the concept of out-of-commerce works and orphan works**.

The survey results showed that 59 % of respondents (62 % of beneficiary respondents and 45 % of rightholder respondents) believe the approach in the DSM Directive for out-of-commerce works should be extended to cover orphan works, largely because orphan works are often, in fact, also out-of-commerce. Consequently, several stakeholders expected that, in practice, they would have **two possible options for dealing with orphan works** - the use of the OWD exception or the use of the out-of-commerce ECL scheme under the DSM Directive. It should be noted, however, that the DSM Directive is still being transposed by the Member States and its out-of-commerce provisions remain untested.

Stakeholder positive and negative views of the out-of-commerce scheme under the new DSM Directive generally echoed those for the ECL schemes. **Advantages** put forward included larger scope, offline use, transfer of the rights clearance procedure to a dedicated organisation (i.e. a CMO) other than the beneficiary, increased legal certainty for both beneficiaries and rightholders on the level of fair compensation in case of a reappearing rightholder, increased transparency and a clearer system for opting out. **Concerns** pertained to the question of whether and how CMOs would be expected to conduct diligent searches for rightholders of orphan works (reasonable effort is required under the DSM Directive), lack of CMOs at national level for certain sectors (audiovisual, visual) and representativeness of CMOs, lack of the tradition of collective management and dialogue between stakeholders, licensing fees, and existence of two separate databases (one for orphan works and one for out-of-commerce works).

3.4. Key conclusions

A form of diligent search is an inherent part of the rights clearance process for any digitisation project to determine the status of a work (e.g. whether the work is in the public domain, out-of-commerce or orphan). The process is, by definition, time-consuming and requires human and financial resources. Cultural heritage institutions frequently resort to external funding or crowd-sourcing for conducting large-scale digitisation projects. The stakeholder consultation shows that **beneficiaries that are successful in using the OWD are those with sufficient resources and in-house legal expertise**. Many, however, stated that they do not perform mass-digitisation of orphan works but use the exception for limited amount of works.

A key trend that emerged from both the survey and interviews is that cultural heritage institutions tend to concentrate on digitising works in the public domain, due to **lack of resources (both human and financial)**, as these works can be used freely, with no compensation/licencing fee necessary. Several stakeholders, for example, stated that they are waiting for orphan works to fall within the public domain before including them in their online libraries.

At the same time, **issues linked both to the OWD itself and to the implementation of the Directive create additional burden for cultural heritage institutions**. A key issue within the Directive is the mandatory requirement to consult

¹³⁶ Stakeholders' answers to the survey question 'In your opinion, is the OWD consistent with and supportive of the following EU copyright rules or do you see gaps, overlaps or inconsistencies?'

at a **minimum** the list of sources in the Annex, whereby some sources are outdated. The Directive also provides limited explanations of key concepts such as 'diligent' or 'fair compensation', with discretion given to national legislators. However, the **national legislation rarely provides additional clarifications** of these concepts. All of the countries generally followed the provisions in the OWD, with only minor nuances in transposition and a very limited number of exceptions. In addition, non-legislative guidance to facilitate the use of the OWD for beneficiaries is seldom provided.

Some countries (BE, DE, LT and UK) have been more successful in using the OWD, based on the number of works they have recorded in the EUIPO database (over 200) and the number of beneficiaries that have uploaded works to the EUIPO database (six or more organisations per country). **A key commonality is that all four countries have gone further than simple transposition in their implementation of the Directive, yet without introducing additional requirements than those in the OWD.**

All of these countries have established a **list of sources for diligent searches that goes beyond the Annex of the OWD and is differentiated by type of work**. In addition, the competent authorities in LT and the UK provided **additional guidelines** for conducting diligent searches. In LT, for example, cultural institutions were consulted and active in the transposition of the Directive, guidelines for performing diligent searches were developed, and training/seminar events were organised for cultural heritage institutions. The Lithuanian Ministry of Culture also provides legal and financial support. The UK IPO has developed several guidelines for different types of works that operate both as checklists to guide beneficiaries in diligent search and as records of such searches.

There is no direct correlation between the number of sources included on the list, as countries with the lowest number of sources are not necessarily the most successful. Among the four successful countries, for example, the number of sources ranges from 53 (BE) to 229 (DE). **The most important factor is the quality of the sources, i.e. their accessibility and relevance**. Often, in countries with low numbers of sources, the sources are merely categories of sources and remain very general, while in countries with more sources, these are more specific and useful for beneficiaries.

Of the four successful countries, three provide **further qualification of what is meant by 'diligent search'**. For example, in LT, the search may be sufficiently diligent even if not all sources mentioned on the list are consulted. In addition, all except BE have **clear rules on the compensation of rightholders**, with LT also having detailed rules on the calculation of fair compensation. Additional clarity on the notion of fair compensation appears crucial for cultural heritage institutions, as it enables a better cost-benefit calculation before investing resources in a diligent search versus using alternative systems such as ECL schemes.

Table 9: Overview of national implementation in relation to the use of the OWD

Country	National list of sources	Sources by type of work	Further guidance	Number of sources	Further qualification of diligent search'	Additional requirements other than those in OWD	Existence of national rules on compensation	Existence of national rules on duration to receive compensation	Works registered in EUIPO database ¹³⁷	Active cultural heritage institutions
	28/31	21/22	2/22		10/31	4/31	21/31	8/31		
AT	×	N/A	N/A	N/A	×	×	×	✓	8	2
BE	✓	✓	×	53	✓	×	×	×	297	6
BG	✓	N/A	N/A	N/A	×	×	×	✓	0	0

¹³⁷ Data based on the number of orphan works contained in the EUIPO database as of June 2020. Since the end of the Brexit transition period (31 December 2020), the orphan works registered by UK organisations have been removed from the database. The number of works registered by the other countries, however, has not changed significantly.

Study on the application of the Orphan Works Directive – Final report

Country	National list of sources	Sources by type of work	Further guidance	Number of sources	Further qualification of diligent search'	Additional requirements other than those in OWD	Existence of national rules on compensation	Existence of national rules on duration to receive compensation	Works registered in EUIPO database ¹³⁷	Active cultural heritage institutions
CY	*	N/A	N/A	N/A	*	*	✓	*	0	0
CZ	✓	✓	*	30	*	*	✓	✓	0	0
DE	✓	✓	*	229	*	*	✓	*	1,610	15
DK	✓	N/A	N/A	N/A	*	*	*	*	68	2
EE	✓	✓	*	72	*	*	*	*	26	1
EL	✓	✓	*	58	✓	✓	✓	*	0	0
ES	✓	✓	*	42	✓	✓	✓	✓	0	0
FI	✓	✓	*	25	*	*	✓	✓	0	0
FR	✓	✓	*	180	*	*	✓✓*	*	1	1
HR	✓	N/A	N/A	N/A	*	*	✓	✓	1	1
HU	✓	✓	*	33	✓	*	✓✓*	*	855	3
IE	✓	✓	*	39	*	*	✓	*	13	3
IS	*	N/A	N/A	N/A	*	*	*	*	0	0
IT	✓	✓	*	44	✓	✓	✓	*	0	0
LI	✓	N/A	N/A	N/A	✓	*	*	*	0	0
LT	✓	✓	✓	114	✓	*	✓✓*	✓	236	14
LU	✓	✓	*	34	*	*	✓	*	0	0
LV	✓	✓	*	56	*	*	✓	*	4	1
MT	✓	N/A	N/A	N/A	*	*	✓	*	0	0

Country	National list of sources	Sources by type of work	Further guidance	Number of sources	Further qualification of diligent search'	Additional requirements other than those in OWD	Existence of national rules on compensation	Existence of national rules on duration to receive compensation	Works registered in EUIPO database ¹³⁷	Active cultural heritage institutions
NL	✓	✓	×	29	×	×	×	×	781	1
NO	✓	N/A	N/A	N/A	×	×	×	×	0	0
PL	✓	✓	×	55	✓	✓	✓	×	3,254	4
PT	✓	×	×	34	×	×	✓	×	32	1
RO	✓	✓	×	85	✓	×	✓	×	0	0
SE	✓	✓	×	39	✓	×	×	×	16	2
SI	✓	✓	×	46	×	×	✓✓*	✓	0	0
SK	✓	✓	×	37	×	×	✓	×	4	0
UK	✓	✓	✓	N/A	✓	×	✓	×	11,443	14

Source: Milieu elaboration based on desk research and stakeholders' input

*These countries not only provide basic rules on compensation but also detailed rules on calculation of fair remuneration.

Overall, six years after the entry into force of the OWD, the current situation is far from the large-scale digitisation that was expected. Only a limited number of works from a limited number of institutions have been made available through the orphan works exception. The resource-intensive nature of the diligent search - which does not provide for risk-free use of the work - is the major barrier hindering use of the OWD. The individual characteristics (notably in terms of resources) of cultural heritage institutions appear to be a key determining factor in the successful use of the OWD. However, the OWD itself and its national implementation do not facilitate the use of the orphan works system and in some cases create a considerable burden.

4. Recommendations

Orphan works represent a substantial share of the collections of cultural heritage institutions across the EU/EEA, but only a limited number of these works have been digitised since the entry into force of the OWD. The report finds that the OWD has been an important tool for certain beneficiaries to digitise and make available orphan works, as it has the key advantage of not requiring licensing fees nor introducing time limitations for using orphan works. However, as outlined in Table 11, there are a number of obstacles which could be addressed both at EU and national level to facilitate its wider use.

The recently adopted DSM Directive and its provisions on out-of-commerce works could potentially offer additional solutions for digitising orphan works in the future, as practically all orphan works can also be considered out-of-commerce. That would depend on the approach taken by each Member State in the transposition of the DSM Directive, however. Under the new DSM Directive, CMOs that are sufficiently representative of a category of rightholders may grant licensing rights to works for which the rightholders are not their members. That would potentially enable CMOs to cover those works that are no longer in commerce. In practice, this could lead to two possible options for dealing with orphan works: the use of the OWD exception, or the use of the out-of-commerce provisions, with beneficiaries having the flexibility to choose between both options. This scenario could be beneficial both to beneficiaries and rightholders. Many stakeholders seem to believe that the out-of-commerce system could be more effective and could overtake the OWD exception, although it should be noted that the out-of-commerce provisions of the DSM Directive present both advantages and disadvantages when compared to the OWD exception and have yet to be tested. Benefits of the out-of-commerce system include the streamlining of the procedure for clearing rights, increased legal certainty for beneficiaries, and more transparency for rightholders. However, there are also a number of concerns about the licensing fees implied by the out-of-commerce system and the lack of representative CMOs in certain sectors and countries. Licensing mechanisms bring their own requirements and there is a need for agreements from all parties involved. Overall, synergies may potentially appear between the two pieces of legislation, as many of the issues that the out-of-commerce provisions of the DSM Directive seek to address apply equally to orphan works.

In theory, the potential solution introduced by the DSM Directive for out-of-commerce works could provide a sign-post for national-level legislators when regulating digitisation of orphan works. With the transposition process of the DSM still in the initial phase in most countries, the legal implications of new national regulatory schemes for national orphan works schemes remain uncertain. To explore whether such solutions could be applied in practice, an in-depth analysis and comparison of the key terms and their consequences for the functioning of the DSM and the OWD systems could be useful, such as a comparison of work-by-work diligent search with the reasonable effort required to ascertain if a work is out-of-commerce.

The survey responses of certain stakeholders questioned whether copyright-related obstacles remain the primary barrier to widespread digitisation of orphan works. A fundamental issue appears to be the lack of resources (financial and human) and technical capabilities within cultural heritage institutions to carry out large-scale digitisation projects in the first place. The limited number of digitised orphan works may be explained by the low numbers of digitisation projects, itself due to the limited means of the beneficiaries. EU programmes that provide funding and technical know-how could play a greater role in increasing the digitisation and dissemination of orphan works.

There is no shortage of potential solutions and improvements on the horizon. These include a number of legislative changes at EU and national level, improvements and development of practical tools, and the potential application of alternative systems. From a political perspective, further digitisation is a continuous source of additional change for orphan works, with challenges likely to continue despite the solutions

provided by the OWD. The numerous suggestions and further legislative changes provided here point to the possibility for various improvements to develop the practical utility of the OWD.

At **EU level**, a number of further improvements could be considered, such as an extension of the scope of the OWD to other types of works, notably visual works (a cut-off date for more recent visual works could be introduced to protect the livelihood of rightholders which are particularly vulnerable in this sector). Furthermore, the permitted uses of orphan works could be extended to include offline use, such as public performance or broadcasting of dramatic and cinematographic works and (potentially) derivative use. An introduction of a 'lighter' version of a diligent search for embedded works could be achieved by reducing the number of mandatory sources to be consulted or making the list of sources non-mandatory.

Minimising the number of sources which must be consulted throughout the diligent search could be considered, notably by removing the word 'at least' from the Directive, as well as making the list of sources non-mandatory. The notion of fair compensation could also be made clearer with an EU-wide system established in the OWD.

At **national level**, in case of a mandatory list of sources, the sources could be kept to a strict minimum. Ideally, however, the list of sources would be non-mandatory and not embedded within the national legislation to enable more flexibility.

It is recommended that Member States do not simply copy the list of sources in the Annex to the OWD, but establish a tailored national list which can be regularly updated and includes more relevant sources. Alternatively, it could be made explicit that outdated sources can be omitted. Member States could also ensure that all sources are accessible online, of good quality and free of charge. The notion of fair compensation should be clear at national level in the implementing national laws.

In addition, the provisions in the OWD (diligent search, redress for rightholders) could be developed further, either in national laws or through soft law instruments such as guidelines and recommendations tailored to the national system. Training should be provided at national level on the diligent search procedure.

An increasing online access to cultural content is a well-established long-term EU goal. The need for a solution to address the orphan works issue thus continues to be relevant in achieving broader accessibility to European culture. Given the new legislative developments and wider issues faced by culture heritage institutions, some stakeholders question whether orphan works need a specific solution or whether they could be more effectively addressed through synergies with other legislation and EU funding programmes for beneficiaries.

Table 11 looks at the root causes of the key issues or problems and proposes some recommendations and associated legal, policy and practical considerations which could address certain of those issues.

Table 10: Recommendations

Issue(s)	Recommendation	Legal, policy and practical considerations
Legislative changes – EU level		
Stand-alone graphic works (such as photographs, posters, illustrations, or postcards) are not included.	Extend the scope of the Directive to other types of works, notably stand-alone graphic works. At the same time introduce a cut-off date for visual works to ensure that more recent works are not included.	Amendment to the scope of the OWD (Article 1) and provide a cut-off date. This solution balances the interests of beneficiaries to enlarge the scope of the OWD and the concerns of the rightholders in the visual sector which are opposing extending the OWD scope to graphic works, arguing that digitisation strips the metadata associated with pictures.

Issue(s)	Recommendation	Legal, policy and practical considerations
The permitted uses of orphan works are limited	Extend the permitted uses of orphan works, notably to include offline use, such as public performance or broadcasting of dramatic and cinematographic works and (potentially) derivative use.	Amendment to the permitted uses of the OWD (Article 6) ¹³⁸
A diligent search must be performed for each embedded work	Introduce a 'lighter' version of a diligent search for embedded works – this could be achieved by reducing the number of mandatory sources to be consulted or making the list of sources non-mandatory.	Amendment to the diligent search requirements set out in the OWD (Article 3)
Excessive number of sources to consult for diligent search	Remove the wording 'at least' from Article 3(2) and in the Annex to the OWD, as it obliges Member States to include a minimum number of sources, some of which are outdated.	Amendment of the Annex and Article 3(2) to the OWD
The sources to consult for diligent search are inaccessible/irrelevant	Make the list of sources non-mandatory and/or remove outdated sources from the OWD Annex.	Flexibility should be provided to professionals in the sector in choosing which sources are relevant for the work in question. A list of sources should be provided as a starting point for beneficiaries, but it should not be mandatory to consult all of the sources. It may also prove beneficial to disassociate the list of sources from the OWD Annex and national legislation to ensure that these can be updated without requiring legal amendment. The list of sources could be provided in additional soft law or explanatory documents.
The notion of 'fair compensation'	Make the notion of fair compensation clearer with an EU-wide system established in the OWD.	One potential EU-level avenue could be to fix a time limit in all Member States for claiming compensation.
Legislative changes – EU and/or national level		
Issues with the list of sources for diligent search (excessive)	In case of a mandatory list of sources, the sources should be kept to a strict minimum.	To minimise the mandatory list of sources.
Issues with the list of sources for diligent search (mandatory)	Ideally, the list of sources would be non-mandatory and not embedded within the legislation.	Make the list of sources non-mandatory, providing beneficiaries with the flexibility to choose the most appropriate sources.
Issues with the list of sources for diligent	Member States should not simply copy the Annex to	Without a list of sources there would be no harmonisation across countries.

¹³⁸ Although desk research points to adding commercial use, the stakeholders that were consulted for the Study were non-commercial entities and thus did not support this option. This should be further explored.

Issue(s)	Recommendation	Legal, policy and practical considerations
search (inaccessible, irrelevant)	<p>the OWD.</p> <p>The list of sources should be established so as to ensure that it can be regularly updated to remove outdated sources and include more relevant sources. Alternatively, it should be made explicit that outdated sources can be omitted.</p> <p>Member States should ensure that all sources are accessible online, of good quality and free of charge.</p> <p>The list of sources should be established in consultation with stakeholders.</p>	<p>The list of sources should be provided as guidance and be comprehensive, by sector and country. The aim should be to provide beneficiaries with flexibility in choosing the most relevant sources and enough sources to act as a starting point for a diligent search. The recommendation that the lists of sources are available online and in good quality is difficult, as it entails substantial resources to first digitise some of the databases that need to be reviewed when making the diligent search. Also, some databases are not free of charge.</p>
The notion of 'fair compensation'	<p>Make the notion of fair compensation clearer at national level in the implementing national laws. This would enable beneficiaries to assess the cost of a potential reappearing rightholder.</p>	<p>Several avenues could be considered for the level of fair compensation, from a cap or time limit on claiming compensation to a more transparent and clearly defined method for calculating economic loss for rightholders, or compensation brackets depending on the type of work and costs involved in its preservation.</p> <p>It is very difficult to determine upfront all potential circumstances that could play a role in determining the amount of compensation.</p>
Provisions of the OWD were transposed by many countries <i>ad verbatim</i> without tailored solutions for the national system	<p>Provisions in the OWD (diligent search, redress for rightholders) should be developed further, either in national laws or through soft law instruments such as guidelines and recommendations tailored to the national system.</p> <p>Training should be provided at national level on the diligent search procedure.</p>	<p>This recommendation entails engagement at a national level, which often depends on the available resources and priorities.</p> <p>Different national approaches might lead to diverging solutions at country level and impact cross-border use of orphan works.</p>
Practical tools		
Lack of resources and/or motivation for large-scale digitisation projects	<p>Improve promotion of large-scale digitisation projects.</p> <p>Provide for funding of digitisation projects.</p>	<p>Practical considerations: ensure more funding opportunities for digitisation projects.</p>
Improving search tools	<p>Develop/provide funding for tools similar to the ARROW project to help the clearance process and make searches semi-automated.</p>	<p>Funding for projects could facilitate the diligent search process. In order to optimise the use of funding/resources, these projects could focus on creating systems that facilitate the overall rights clearance procedure (not only for orphan works but also for out-of-commerce works).</p>
Improving search	<p>Develop/provide funding for</p>	<p>In order to optimise the use of</p>

Issue(s)	Recommendation	Legal, policy and practical considerations
tools	new technologies, notably artificial intelligence (AI)-based archiving systems.	funding/resources, the tools could focus on the creation of a semi-automated system, which would also work for out-of-commerce works. This search system could help general clearance processes by determining whether a work has a known author, is out-of-commerce, or in the public domain.
Improving search tools	Create a central website (either at EU or national level) that compiles links to all sources for each type of work in each country (one-stop-shop). The sources should be both broad and specific, non-mandatory, providing beneficiary organisations with sufficient information to feel confident that the search was diligent and enabling them to skip irrelevant sources.	A one-stop-shop at EU or national level could provide incentives for rightholders to make their databases accessible online for search engines.
Improve the EUIPO database	Remove the need for national competent authorities to act as intermediaries for inputting works	This would entail changes to the functioning of the EUIPO database and potentially change Article 3(6) OWD.
Replace the EUIPO database/improve the user interface for searching through recorded works	EUIPO database should be more user-friendly for searching through the recorded works, notably by including thumbnails, using Europeana as a model for best practice.	Registering the work on the EUIPO database is a key condition for legality of using the orphan work. If thumbnails are used when listing the works, this might constitute unlawful use.
Synergies between the out-of-commerce works and orphan works databases	Analyse synergies between EUIPO database on out-of-commerce works to the EUIPO Orphan Works Database.	Apart from technical considerations, legal considerations also exist. While an out-of-commerce database is informative, an orphan works database plays an important role in the mutual recognition principle.
Use of alternative systems		
Further analysis might be useful following the transposition of the DSM Directive	Potential overlap between the definition of orphan works and out-of-commerce works and consequently between systems in the OWD and the DSM Directive.	After the transposition of the DSM, further analysis might be useful to assess the interplay between the rules on orphan works and out-of-commerce works. Both systems could run in parallel, with beneficiaries having the flexibility to choose between both options. However, further research is welcomed to explain the circumstances in which each of the systems could be used.
Overlap between orphan works system in the OWD and other national regulatory schemes	Potential overlap with co-existing national schemes.	Both systems could run in parallel and beneficiaries could flexibly choose between them. Further research might be needed to explain the circumstances in which each of the systems could be used.

References

EU and national legal documents

EU

- Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society
- Directive 2006/116/EC of the European Parliament and of the Council on the term of protection of copyright and certain related rights
- Directive 2012/28/EU of the European Parliament and of the Council on certain permitted uses of orphan works
- Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC
- Directive 2019/790/EU of the European Parliament and of the Council on copyright in the Digital Single Market
- Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works

International

- Berne Convention for the Protection of Literary and Artistic Works

Austria

- Bundesgesetz, mit dem das Urheberrechtsgesetz geändert wird (Urheberrechtsgesetz-Novelle 2014 – UrhG-Nov 2014) (Copyright Revision Act 2014), BGBl I Nr. 11/2015
- Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte – Urheberrechtsgesetz
- Bundesrecht konsolidiert: Gesamte Rechtsvorschrift für Urheberrechtsgesetz
- Bundesrecht konsolidiert: Gesamte Rechtsvorschrift für Mediengesetz
- Bundesgesetz vom 12. Juni 1981 über die Presse und andere publizistische Medien (Mediengesetz – MedienG)/ Federal Act dated 12th June 1981 on the Press and other Publication Media (Media Act – MedienG)
- Bundesrecht konsolidiert: Gesamte Rechtsvorschrift für Pflichtablieferungsverordnung
- Law on Protection of Brands from 1970 (Markenschutzgesetz)

Belgium

- Code of Economic Law (Wetboek Economisch Recht), Book XI includes the rules on copyright law
- Law of 8 April 1965 establishing the legal deposit at the Royal Library of Belgium (Published in the Official Journal, Belgisch Staatsblad of 18 June 1965), Wet van 8 april 1965 tot instelling van het wettelijk depot bij de Koninklijke Bibliotheek van België
- Law of 20 of July 2015 on the Conversion of the Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on Certain Permitted Uses of Orphan Works (Wet van 20 juli 2015 houdende de omzetting van de richtlijn 2012/28/EU van het Europees Parlement en de Raad van 25 oktober 2012 inzake bepaalde toegestane gebruikswijzen van verweesde werken)
- Royal Decree of 17 October 2016 Determining the Sources Suitable for carrying out the Diligent Search of Rightholders in order to Determine whether a Work or Phonogram is Orphan (Koninklijk besluit tot bepaling van de bronnen die geschikt zijn om het zorgvuldig onderzoek naar de rechthebbenden uit te voeren om uit te maken of een werk of fonogram al dan niet verweesd is)

Bulgaria

- Bulgarian Copyright and Related Rights Act (CRRA), State Gazette, issue 14/20.02.2015
- Bulgarian Law on Cultural Heritage

Croatia

- Act on Amendments to the Copyright and Related Rights Act (*Zakon o izmjenama i dopunama Zakona o autorskom pravu i srodnim pravima*), Official Gazette of the Republic of Croatia, No. 127/14
- Law on Libraries and Library Activity (*Zakon o knjižnicama i knjižničnoj djelatnosti*)

Cyprus

- Cypriot Law 123(I)/2015 introducing amendments to the Law 59/1976 on Copyright and Related Rights
- Law 51/1987 regulating the function of the Cypriot Library
- Law 14(III)/1999 "Ratifying the Rome convention for the protection of performers, producers of phonograms and broadcasting organizations"
- Law 21(III)/1992 'Ratifying the Geneva convention on the protection of producers of phonograms against unauthorized duplication of their phonograms'

Czechia

- Act No. 228/2014 Coll. of 23. September 2014, amending Act No. 121/2000 Coll. on Copyright and Rights Related to Copyright and on Amendment of Certain Acts (the Copyright Act, hereinafter referred to as CA), as amended, and Act No. 151/1997 Coll. on Valuation of Assets and on Amendment of Certain Acts (Assets Valuation Act) (Zákon č. 228/2014 Sb. ze dne 23. září 2014, kterým se mění zákon č. 121/2000 Sb., o právu autorském, o právech souvisejících s právem autorským a o změně některých zákonů (Autorský zákon), ve znění pozdějších předpisů, a zákon č. 151/1997 Sb., o oceňování majetku a o změně některých zákonů (zákon o oceňování majetku), ve znění pozdějších předpisů).
- Act No. 102/2017 Coll. amending Act No. 121/2000 Coll. on Copyright and Rights Related to Copyright and on Amendment of Certain Acts (the Copyright Act) as amended (Zákon č. 102/2017 Sb., kterým se mění zákon č. 121/2000 Sb., o právu autorském, o právech souvisejících s právem autorským a o změně některých zákonů (Autorský zákon), ve znění pozdějších předpisů)
- Act No. 496/2012 on Audiovisual Works and Support for Cinematography and on Amendment to Certain Acts, as amended (Zákon č. 496/2012 Sb. o audiovizuálních dílech a podpoře kinematografie a o změně některých zákonů (zákon o audiovizu), ve znění pozdějších předpisů.)
- Commercial Code of Czech Republic
- Act on Non-Periodical Publications No. 37/1995 Coll., as amended (Zákon č. 37/1995 Sb., o neperiodických publikacích, ve znění pozdějších předpisů)
- Act No. 46/2000 on rights and duties related to publishing periodical press and on amendment to several other acts (Press Act) (Zákon ze dne 22. února 2000 o právech a povinnostech při vydávání periodického tisku a o změně některých dalších zákonů (tiskový zákon))
- Decree No. 252/1995 of the Ministry of Culture
- Decree No. 156/2003 of the Ministry of Culture
- Explanatory Report to Act 228/2014 (ER) HR

Denmark

- Bekendtgørelse af lov om ophavsret, LBK nr 1144 af 23/10/2014
- Extended Collective Licensing regulated via Law nr. 321 of 05/04/2016 on the collective management of copyright Lov om ændring af lov om ophavsret, LBK nr 741 af 25/06/2014
- Lov om kollektiv forvaltning af ophavsret, LOV nr 231 af 05/04/2016
- Lov om ændring af lov om ophavsret, LOV nr 719 af 08/06/2018

Estonia

- Autoriõiguse seaduse muutmise seadus (The Act on Amendments to the Copyright Act) Entry into force 30.10.2014.
- Autoriõiguse seadus (Copyright Act). RT I 1992, 49, 615 - RT I, 19.03.2019, 55.
- Autoriõiguse seaduse muutmise seadus (The Act on Amendments to the Copyright Act)
- Eesti Rahvusringhäälingu seadus (Estonian Public Broadcasting Act). RT I 2007, 10, 46 ... RT I, 29.06.2014, 109
- Meediateenuste seadus (Media Services Act). RT I, 06.01.2011, 1 ... RT I, 04.03.2015, 3
- Orbteoseks tunnistamisele eelneva hoolika otsingu allikad (The sources for carrying out a diligent search prior to considering a work or phonogram as an orphan work). – Adopted on 23.01.2015 by the Minister of Justice.

Finland

- Decree of the Ministry of Education and Culture on the Use of Orphan Works (*Opetus- ja kulttuuriministeriön asetus orpoteosten käyttämisestä*, 846/2014)
- Finnish Law 1433/2007
- Laki orpoteosten käyttämisestä (764/2013), Act on the Use of Orphan Works (764/2013)

France

- Décret n° 2015-506 du 6 mai 2015 pris pour l'application des articles L. 135-7, L. 212-3-1 et L. 212-3-3 du code de la propriété intellectuelle
- French Patrimony Code (Articles L131-1 to L133-1 and R131-1 to R133-1), supplemented by decrees of 1995, 1996 and 2006
- LOI n° 2015-195 du 20 février 2015 portant diverses dispositions d'adaptation au droit de l'Union européenne dans les domaines de la propriété littéraire et artistique et du patrimoine culturel
- LOI n° 2019-775 du 24 juillet 2019 tendant à créer un droit voisin au profit des agences de presse et des éditeurs de presse (1)
- Projet de loi n° 2488 relatif à la communication audiovisuelle et à la souveraineté culturelle à l'ère numérique

Germany

- Act on the German National Library (Gesetz über die Deutsche Nationalbibliothek (DNBG))
- Dreier in Dreier/Schulze, Urheberrechtsgesetz (commentary on the Act on Copyright), 6th edition, 2018
- Gesetz zur Nutzung verwaister und vergriffener Werke und einer weiteren Änderung des Urheberrechtsgesetzes
- Patent law from 1970 (Patentgesetz)

Greece

- Greek Law 2121/1993
- Greek Law 3149/2003
- Law 4212/2013 Ενσωμάτωση της Οδηγίας 2011/77/ΕΕ του Ευρωπαϊκού Κοινοβουλίου και του Συμβουλίου της 27ης Σεπτεμβρίου 2011 και της Οδηγίας 2012/28/ΕΕ του Ευρωπαϊκού Κοινοβουλίου και του Συμβουλίου της 25ης Οκτωβρίου 2012 στο ελληνικό δίκαιο και τροποποίηση του ν. 2121/1993 «Πνευματική ιδιοκτησία, συγγενικά δικαιώματα και πολιτιστικά θέματα», which introduced amendments in Law 2121/1993

Hungary

- Act XCIII of 2016 on the collective management of copyright and related rights (2016. évi XCIII. Törvény a szerzői jogok és a szerzői joghoz kapcsolódó jogok közös kezeléséről)
- Act XCIII of 2016 on the collective management of copyright and related rights (CMR Act)

- Copyright Act (A szerzői jogról szóló 1999. évi LXXVI. törvény - Sztj)
- Decree 26/2010 (XII.28.) KIM on the detailed rules on the voluntary register of works
- Government Decree No. 138/2014. (IV.30.) on the detailed provisions of the use of orphan works (138/2014. (IV. 30.) Korm. Rendelet az árva mű felhasználásának részletes szabályairól)
- Government Decree 195/2019. (VIII.1.) on the provision, preservation and use of legal deposit copies of publications
- Law CLIX of 2013, adding Chapter IV/A to the Copyright Law (2013. évi CLIX. Törvény a szellemi tulajdonra vonatkozó egyes törvények módosításáról)
- 195/2019. (VIII. 1.) Korm. Rendelet a kiadványok kötelességteljesítésének szolgáltatásáról, megőrzéséről és használatáról

Iceland

- Act No. 10 of 1 March 2016, which amended the Copyright Act No. 73 of 29 May 1972
- Act on Legal Deposit to Museums No. 20 of 20 March 2002

Ireland

- Copyright and Related Rights Act 2000 in Ireland
- S.I. No. 490/2014 - European Union (Certain Permitted Uses of Orphan Works) Regulations 2014

Italy

- D. Lgs. 163/2014 complements the Law of the 22nd April 1941, no. 633 (Law 633/1941), Protezione del diritto d'autore e di altri diritti connessi al suo esercizio, Protection of copyright and other rights related to its exercise.
- Law 220/2016, Economic incentives on planning and distribution
- Legislative Decree on the 10th of November 2014, No 163 (D. Lgs. 163/2014), Attuazione della direttiva europea 2012/28/UE su taluni utilizzi consentiti di opere orfane. (14G00179) (GU Serie Generale n.261 del 10-11-2014)
- Legislative Decree no 35 of 15 March 2017 (D.Lgs. 35/2017)

Latvia

- Latvijas Vēstnesis, 148/150, 27.04.2000.; Latvijas Republikas Saeimas un Ministru Kabineta Ziņotājs, 11, 01.06.2000 (Copyright Law)
- Latvijas Vēstnesis, 257, 30.12.2014. OP numurs: 2014/257.5 (amendments brought into the Copyright Law)
- Subsidiary Legislation 415.05 on Certain Permitted Uses of Orphan Works Regulations (S.L. 415.05), promulgated through Legal Notice 394 of 2014

Liechtenstein

- Law of 4 March 2015 on the modification of Copyright Law (Gesetz vom 4. März 2015 über die Abänderung des Urheberrechtsgesetzes)
- Regulation of 14th December 1999 on Copyright and related property rights (Verordnung vom 14. Dezember 1999 über das Urheberrecht und verwandte Schutzrechte (Urheberrechtsverordnung, URV))
- Regulation of 17 April 2018 on the administration of copyright and related rights by collective management organisation [Verordnung vom 17. April 2018 über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten durch Verwertungsgesellschaften]

Lithuania

- Law of Authors Rights and Related Rights (LT: Lietuvos Respublikos autorių teisių ir gretutinių teisių įstatymas)
- Lietuvos Respublikos autorių teisių ir gretutinių teisių įstatymo Nr. VIII-1185 2, 17 straipsnių ir 3 priedo pakeitimo ir įstatymo papildymo VII skyriumi įstatymas, 2014 m. gruodžio 16 d. Nr. XII-1460 Vilnius

- Lietuvos Respublikos Kultūros ministro įsakymas dėl nenustatytų teisių turėtojų kūrybinių autorių teisių ir gretutinių teisių turėtojų paieškos šaltinių pavyzdinio sąrašo patvirtinimo 2015 m. sausio 28 d. Nr. ĮV-46 Vilnius (Order of the Minister of Culture of the Republic of Lithuania of 28 January 2015 No ĮV-46 concerning the sample list of sources for the diligent search of right holders of orphan works)
- Lietuvos Respublikos kultūros ministro įsakymas dėl kompensacijos už buvusių nenustatytų teisių turėtojų kūrybinių naudojimą mokėjimo sąlygų ir tvarkos aprašo patvirtinimo 2015 m. liepos 17 d. Nr. ĮV-480 (Order of the Minister of Culture of the Republic of Lithuania of 17 July 2015 No ĮV-480 concerning the compensation conditions for the former orphan works)
- Order of the Minister of Culture of the Republic of Lithuania of 28 January 2015 No ĮV-46
- Law on Patents of the Republic of Lithuania (Lietuvos Respublikos patentų įstatymas)
- Law on Trademarks of the Republic of Lithuania (Lietuvos Respublikos prekių ženklų įstatymas)
- Civil Code of Republic of Lithuania (Lietuvos Respublikos civilinio kodekso patvirtinimo, įsigaliojimo ir įgyvendinimo įstatymas. Civilinis kodeksas)

Luxembourg

- Grand-Ducal Regulation of 15 January 2016 establishing the sources to be consulted by beneficiary organisations for the determination of orphan status
- Law of 3 December 2015 on certain permitted uses of orphan works

Netherlands

- Dutch Copyright Act (NL: Auteurswet 1912)
- Related Rights Act (NL: Wet op de naburige rechten)
- "Wet van 8 oktober 2014 tot wijziging van de Auteurswet en de Wet op de naburige rechten in verband met de implementatie van de Richtlijn nr. 2012/28/EU inzake bepaalde toegestane gebruikswijzen van verweesde werken"
- Royal Decree (NL: Koninklijk Besluit), titled: "Besluit van 16 oktober 2014 houdende nadere regels over het uitvoeren van een zorgvuldig onderzoek in verband met de Richtlijn nr. 2012/28/EU inzake bepaalde toegestane gebruikswijzen van verweesde werken (Besluit zorgvuldig onderzoek verweesde werken)"

Norway

- The Copyright Act: Lov om opphavsrett til åndsverk mv. (åndsverkloven), LOV-2018-06-15 nr 40
- Law on changes to the Copyright Act: Lov om endringer i åndsverkloven (gjennomføring av EUs hitteverkdirektiv og innføring av generell avtalelisens mv.), LOV-2015-06-19 nr 73
- Implementation of the updated Act: Ikraftsetting av lov 15. juni 2018 nr. 40 om opphavsrett til åndsverk mv. (åndsverkloven), FOR-2018-06-15 nr 879
- Regulations pertaining to the copyright act: Forskrift til åndsverkloven (lov av 12. mai 1961 nr. 2 om opphavsrett til åndsverk m.v.), FOR-2001-12-21-1563

Poland

- Amending Act of 11 September 2015 on copyright and related rights and the act on gambling (Journal of Laws 2015, item 1639), which entered into force on 20 November 2015 (Ustawa z dnia 11 września 2015 r. o zmianie ustawy o prawie autorskim i prawach pokrewnych oraz ustawy o grach hazardowych (Dz.U. 2015, p. 1639)
- Law on obligatory library copies of November 7, 1996 (Journal of Laws 1996, no. 152, item 722, with amendments)
- Regulation of the Minister of Culture and National Heritage of October 23, 2015 on the list of sources that must be checked as part of a diligent search for the persons entitled to works and related rights subjects that may be considered

orphaned, and how to document information on the results of diligent search (Journal of Law 2015, item 1853)

Portugal

- Decree-Law 332/97 of 27 November
- Decree-Law 74/82 of 3 March, Legal deposit requirement in Portugal
- Law 32/2015 of 24 April, which transposes Directive 2012/28/EU, of the European Parliament and of the Council, of 25 October, on certain uses orphan works, and makes the tenth amendment to the Code of Copyright and Related Rights, approved by Decree-Law 63/85, of 14 March, Portuguese Copyright Code

Romania

- Copyright Law No 210/ July 21st 2015, which added Articles 1122-1128 to the Law No. 8/1996 on copyright and neighbouring rights
- Law No 111/1995 on the legal deposit of documents

Slovakia

- Act Nr. 185/2015 Coll. of 1st July 2015, Copyright Act (Zákon č. 185/2015 Zb. z 1. júla 2015, Autorský zákon)
- Act. 40/2015 Coll, Audiovisual Act.
- Act Nr. 212/1997 Coll, Act on mandatory deposit of copies of periodical publications, non-periodical publications and audiovisual works

Slovenia

- The Act Amending the Copyright and Related Rights Act (*Zakon o spremembah in dopolnitvah Zakona o avtorski in sorodnih pravicah – ZASP-G*), Official Gazette of the Republic of Slovenia, No. 56/15
- Collective Management of Copyright and Related Rights Act Act (*Zakon o kolektivnem upravljanju avtorske in sorodnih pravic – ZKUASP*), Official Gazette of the Republic of Slovenia, No. 63/16
- The Government Decree determining the method of calculation and payment of fair compensation for the use of orphan works in the case of the end of orphan work status (*Uredba o določitvi načina izračunavanja in plačila pravičnega nadomestila za uporabo del, ki jim preneha status osirotelega dela – Decree*), Official Gazette of the Republic of Slovenia, No. 76/15

Spain

- Act 23/2006 for the implementation of the InfoSoc Directive
- Act 17/1966 of May 31, on the protection of cinematographic works
- Act 34/1988 of November 11 on Advertising
- Act 21/2014 implementing the Directive 2011/77/EU
- Act 23/2011, Law that regulates the legal deposit in Spain
- Law 21/2014 of 4 November modifying the Consolidated Text of the Intellectual Property Law, Texto Refundido de la Ley de Propiedad Intelectual (TRLPI)
- Real Decreto 224/2016, de 27 de mayo, por el que se desarrolla el régimen jurídico de las obras huérfanas (Royal Decree 224/2016, of 27 May, by which the legal regime of orphan works is developed)
- Royal Decree 1657/2012

Sweden

- Amendment to the Swedish Copyright Act: SFS 2014:884 – Specifically re: orphan works
- Amendment to the Swedish Copyright Act: SFS 2013:691: Changes to duration of copyright
- Law 2016:977 'om kollektiv förvaltning av upphovsrätt'
- Swedish Copyright Act (Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk
- SFS (1991:1469) 'Yttrandefrihetsgrundlag'
- SFS (1949:105) 'Tryckfrihetsförordning'

- Swedish Act on Legal Deposits (Lag (1993:1392) om pliktexemplar av document)

Switzerland

- Swiss Federal Act on Copyright and Related Rights

United Kingdom

- SI No. 2861 of 2014, The Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014
- The Copyright, Designs and Patents Act 1988
- Legal Deposit Library Act 2003 sets out the legal deposit requirements

Case-law

EU

- Jugement of the Court of 16 November 2016, Marc Soulier and Sara Doke v Ministre de la Culture et de la Communication, Premier ministre, C-301/15
- Opinion of Advocate General Wathelet delivered on 7 July 2016, Case C-301/15
- Soulier and Doke case, 16 November 2016, (Reference for a preliminary ruling – Intellectual and industrial property rights – Directive 2001/29/EC – Copyright and related rights – Articles 2 and 3 – Rights of reproduction and communication to the public – Scope – ‘Out-of-print’ books which are not or no longer published – National legislation giving a collecting society rights to exploit out-of-print books for commercial purposes – Legal presumption of the authors’ consent – Lack of a mechanism ensuring authors are actually and individually informed)

Bulgaria

- Decision No 136/13.12.2018 of Vratza District Court/Commerce division (case 56/2018)

Finland

- Market Court decision (MOU 155/17, paragraphs 46 et seq)
- Market Court’s decision MAO 24.3.2017 2016/99, point 35

France

- Case-law: Civ. 1e, 24 mars 1993, pourvoi n° 91-16.543: Bull. civ. I, n° 126; GAPI, 1e éd., n° 10 ; RTD Com. 1995, p. 418, obs. Françon ; JCP 1993.II.22085, note Greffe ; voir aussi : Civ. 1e, 28 octobre 2003 : Bull. civ. I, n° 217
- Constitutional Council in 2014 (Cons. Const. 28 February 2014, no 2013-370 QPC)

Netherlands

- Case law from the Hague Court of Appeals of 19th of May 2020
- Case law of: Amsterdam Court of Appeals, 14 March 2017, ECLI:NL:GHAMS:2017:523

Portugal

- Supreme Court, Case 593/08.4TVLSB.L1S1

Slovenia

- Case law (e.g. Judgements of the High Court in Ljubljana, No. V Cpg 828/2017 and V Cpg 744/2018)

Spain

- AP Madrid (sec.10) December 13, 2004 [Canciones y Recursos Musicales] Westlaw.ES JUR2005/47867
- AP Madrid (sec.13) September 12, 2000 [Signos zodiacal] Westlaw.ES JUR2001/16594.

- AP Madrid (sec.25) May 25 2004 [Español para Extranjeros] Westlaw.ES AC2004/1809
- AP Madrid (sec.12) January 26, 2005 [Monet] Westlaw.ES AC2005/879
- AP Madrid (sec.28), Sent. 160/2013, 28 May 2013 [Chesterton] Westlaw.ES JUR2013/207279
- TS (Administrative ch.) June 5, 1987 [H.A.B.E.]. Westlaw.ES RJ1987/4006
- TS (Administrative chamber) March 1, 2001 [AFYVE v. RDL1/1996], Westlaw.ES RJ2001/3071
- TS (Civil chamber) December 18, 2008 [El Diario Vasco] Westlaw.ES RJ2009/534

Soft law instruments and 'grey' literature

EU/EEA/international

- A. Vuopala (EC, DG Information Society and Media), Assessment of the Orphan Works Issue and Costs for Rights Clearance
- Commission Decision on setting up a High Level Expert Group on Digital Libraries and the decision on the renewal of the group
- Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation (2006/585/EC)
- Commission Recommendation of 27 October 2011 on the digitisation and online accessibility of cultural material and digital preservation (2011/711/EU)
- Commission Staff Working Document – Impact Assessment on the modernisation of EU copyright rules
- Communication from the Commission: 'i2010: Digital Libraries' (COM (2005) 465 final)
- Communication from the Commission: A Digital Agenda for Europe (COM(2010)245 final)
- Decision No. 21/2016 regarding the appropriate sources to be consulted for each category of works or phonograms for determining the orphan work status
- EFTA, Joint Committee Decision No 29/2015 of 25 February 2015 amending Annex XVII (Intellectual property) to the EEA Agreement [2016/517]
- EUROPE 2020 – A strategy for smart, sustainable and inclusive growth (COM/2010/2020 final)
- European Commission: Frequently Asked Questions on Copyright Reform
- European Commission: Press release, Commission sets out "blueprint" for Intellectual Property Rights to boost creativity and innovation
- European Commission: Press release, Digital Agenda: Commission outlines action plan to boost Europe's prosperity and well-being
- Impact Assessment on the Cross-Border Online Access to Orphan Works
- The European Union explained – Digital agenda for Europe
- EIFL, 'The European Orphan Works Directive – an EIFL guide', 2014
- Legislative history of the Orphan Works Directive
- Memorandum of Understanding (MoU) on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works
- Memorandum of Understanding on Diligent Search Guidelines for Orphan Works
- Memorandum of Understanding on Key Principles on the Digitisation and Making Available of Out-of-Commerce Work
- M. Zeinstra, 'Research: Orphan Works Directive does not work for mass digitalisation', 2016, COMMUNIA
- The list of sources that each Member State has drawn up in accordance with Article 3(2) of the OWD
- WIPO Performances and Phonograms Treaty 1996

Belgium

- Flemish archive institute has an information website for heritage institutions with guidelines on copyright issues (Cultureel Erfgoed Standaarden Toolbox - CEST). Guideline on orphan works (Handboek rechten klaren: Wanneer? - Verweesde werken)

Bulgaria

- Consultation document on Directive (EU) 2019/789 (26 June 2020) (Консултационен документ по Директива (ЕС) 2019/789 (26 юни 2020))

Czechia

- Preparation of the proposal of Amending Act to the Copyright Act transposing of two new EU copyright directives - Directive (EU) 2019/790 on copyright in the digital single market and Directive (EU) 2019/789 is included in the Government legislative work plan for the year 2020 in Czech Republic

Denmark

- Proposal before the Parliament to change the law: L 123 Forslag til lov om ændring af lov om ophavsret, 29 January 2014

Estonia

- Estonian Ministry of Justice Explanation letter to the draft of the Act amending the Copyright Act of 26 March 2020 (Autoriõiguse seaduse muutmise seaduse eelnõu seletuskiri, p. 12)

France

- Séance du 3 juillet 2019 (compte rendu intégral des débats)
- Mission report on the transposition of Directive 2012/28/EU on orphan works, Superior Council of literary and artistic property, 17 July 2014

Germany

- Collecting Societies Act (Verwertungsgesellschaftengesetz)

Greece

- Ministerial Decision ΥΠΠΟΑ/ΓΔΔΥΗΔ/ΔΔΑΔ/ΤΔΜΠ/489567/37656/36731/12521 of the Ministry for Sports and Culture issued on the 19th of September 2019

Hungary

- Proposal on the implementation of the new Copyright Directive as well as Directive (EU) 2019/789 drafted by the Ministry of Justice and HIPO and published for public consultation in May 2020

Italy

- Orphan works: guidelines for diligent research in Italy

Liechtenstein

- Liechtenstein government, Report and proposal on the reform of the Copyright Law

Lithuania

- Resolution of the Government of the Republic of Lithuania on the number of copies of mandatory documents and transmission to libraries
- The plan for updating and preserving the digital cultural heritage 2015-2020 years program implementation action plan for 2020

Netherlands

- Proposal on the Implementing Law for the new Copyright Directive, Lower House of the Dutch Parliament

Norway

- Consultation on changes in the Copyright Act – agreement license and implementation of the Orphan Works Directive
- Proposition 69 L (2014-2015): changes in the copyright law (implementation of the EU orphan works directive, etc.)

- Proposition 125 S (2014-2015): consent to approve the decision of the EEA Committee No 29/2015 of 25 February 2015 on the incorporation into EEA Agreement of Directive 2012/28/EU on certain permitted uses of orphan works

Romania

- Government Decision no. 1676/2008 approving the national program for digitizing national cultural resources and creating the Digital Library of Romania
- Government Decision no. 593/2011 on the organization and functioning of the National Institute for Heritage

Slovenia

- Legal Deposit Act (Zakon o obveznem izvodu publikacij – ZOIPub), Official Gazette of the Republic of Slovenia, No. 69/06 and 86/09

Sweden

- Communication Ds 2013:63. 'Herrelösa verk i kulturarvsinstitutionernas samlingar', Stockholm: Justitiedepartementet, p. 42-44

United Kingdom

- Diligent search guidelines from the Intellectual Property Office of the UK
- Draft bill of 24 June 2020 for an Act that will amend the Act on Copyright transposing Directive (EU) 2019/790
- Draft copyright law to address Brexit in 2018
- NHS Scotland, 'Factsheet: Tracing Rights Holders, Managing Orphan Works and Risk Management', 2016
- UK Intellectual Property Office, Orphan works: Review of the first twelve months (2015)
- https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/487209/orphan-works-annual-report.pdf

Research projects and study reports

- Berkeley Digital Library Copyright Project, White Paper #5 – What Constitutes a Diligent Search Under Present and Proposed Orphan Work Regimes?
- Berkeley Digital Library Copyright Project, White Paper #4 – Orphan Works and the Search for Rightholders: Who Participates in a 'Diligent Search' Under Present and Proposed Regimes?
- EnDOW, Report 2 Requirements for Diligent Search in 20 European Countries, 2017
- EnDOW, Report 3: Current Best Practices among Cultural Heritage Institutions when Dealing with Copyright Orphan Works and Analysis of Crowdsourcing Options, 2018
- European Commission, Consolidated Progress Report 2015-2017 on the implementation of Commission Recommendation (2011/711/EU), together with national reports, 2019
- European Commission, Progress report 2013-2015 on the Recommendation 2011/711/EU, together with national reports, 2016
- European Commission, Report 2011-2013 on the Implementation of Commission recommendation 2011/711/EU, together with national reports
- European Commission, Progress report 2013-2015 on the Implementation of Commission Recommendation on the digitisation and online accessibility of cultural material and digital preservation, June 2016
- EU Intellectual Property Office Survey on Orphan Works
- Europeana publications (annual reports, white papers, frameworks and guides)
- FORWARD project publications and deliverables
- French Counsel of literary and artistic property, Report of 17 July 2014 (*Rapport de la mission sur la transposition de la directive 2012/28/UE sur les oeuvres orphelines du Conseil Supérieur de la propriété littéraire et artistique*)
- High Level Expert Group – Copyright Subgroup Report on Digital Preservation, Orphan Works, and Out-of-Print Works, Selected Implementation Issues

- i2010 European Digital Libraries Initiative, Final Report on Public Private Partnerships for the Digitisation and Online Accessibility of Europe’s Cultural Heritage
- Stobo, V., Patterson, K., Erickson, K. and Deazley, R., “I should like you to see them some time”: An empirical study of copyright clearance costs in the digitisation of Edwin Morgan’s scrapbooks’, *Journal of Documentation*, Vol. 74, No. 3, 2018, pp. 641-667 (http://eprints.whiterose.ac.uk/124916/7/Stobo_Patterson_Erickson_Submitted_Ver.pdf)
- Sullivan, K.T.O., ‘Reforming Irish Copyright Law: The Question of Orphan Works’, 2017
- UK IPO, Report: Copyright and the Regulation of Orphan Works: A Comparative Review of Seven Jurisdictions and a Rights Clearance Simulation, 2013

Academic literature

- Arquero-Avilés, R., Siso-Calvo, B. and Marco-Cuenca, G., Orphan Works and Diligent Search Procedures in Europe, 2018.
- Bensamoun, A., ‘The French Out-of-Commerce Books Law in the Light of the European Orphan Works Directive’, *Queen Mary Journal of Intellectual Property*, Vol. 4, No. 3, 2014, pp. 213–225.
- Borghi, M. and Karapapa, S., Copyright and Mass Digitisation, 2013.
- Borghi, M., Erickson, K. and Favale, M., With Enough Eyeballs All Searches are Diligent: Mobilising the Crowd in Copyright Clearance for Mass Digitisation, 2016.
- Comité des Sages, ‘Bringing Europe’s cultural heritage online: The new renaissance’, EU Publications, 2011.
- Ficsor, M., How to deal with orphan works in the digital world? An introduction to the new Hungarian legislation on orphan works, Director General for internal Policies, European Parliament, 2009, p.12.
- Goldenfein, J., Hunter, D., Brennan, D., Dyball, A., Hawthorn, R., Kingsley, J., Liljeblad, J., Scardamaglia, A. and Wan, A., ‘Blockchains, Orphan Works, and the Public Domain’, *Colum. J.L. & Arts*, Vol. 1, 2017.
- Hugenholtz et al., ‘Extended collective licensing: panacee voor massadigitalisering? Onderzoek in opdracht van het Ministerie van OCW’, 2014, p. 57.
- Janssens, M-C. and Tryggvadottir, R., Facilitating access to orphan and out of commerce works to make Europe’s cultural resources available to the broader public, 2014.
- Kelli, A., ‘The conceptual bases for codifying Estonia’s IP law and the main legislative changes: from the comparative approach to embedding drafted law into the socio-economic context’, *International Comparative Jurisprudence*, Vol. 1, 2015, pp. 44–54.
- Kerremans, R., ‘A Critical View on the European Draft Directive for Orphan Works’, *Queen Mary Journal of Intellectual Property*, Vol. 2, No. 1, 2012, pp. 38–60.
- Kiss, Z. and Szivi, G., A közszolgálati médiaszolgáltatás és a szellemi tulajdonjogok kapcsolódási pontjai és szabályozási környezete (Interfaces and regulatory environment between public media service and intellectual property rights), *In Medias Res*, Vol. 2, 2015, pp. 364–391.
- Latreille, A., ‘Société de l’information, l’écrivain saisi par la numérisation : regard croisé sur le régime du contrat d’édition, des œuvres orphelines et des livres indisponibles’, *Cahiers Droit, Sciences et Technologies*, Vol. 5, 2015.
- Lill Montagnani, M. and Zoboli, L., ‘The Making of an ‘Orphan’: Cultural Heritage Digitisation in the EU’, *International Journal of Law and Information Technology*, Vol. 25, 2017, pp. 196–212 (doi: 10.1093/ijlit/eax007).
- List, R.M., The EU Orphan Works Directive and its implementation in Austria (*Die EU-Richtlinie über verwaiste Werke und ihre Umsetzung in Österreich*), Master Thesis, Karl-Franzens University Graz, 2014.
- Maier, H., ‘Games as Cultural Heritage: Copyright Challenges for Preserving (Orphan) Video Games in the EU’, *Jipitec*, Vol. 6, No. 2, 2015.

- Matulionyte, R., 10 years for Google Books and Europeana: copyright law lessons the EU could learn from the USA, 2016.
- Michalak, A., Copyright Law, Commentary, Article 356, C.H. Beck, Warsaw, 2019.
- Patterson, K., Deazley, R. and Stobo, V., Diligent Search in Context and Practice, 2016.
- Rachinger, J., The Austrian National Library and its vision 2015 (*Die österreichische Nationalbibliothek und ihre Vision 2025*), *Bibliothek Forschung und Praxis*, Vol. 37, No. 3, 2013.
- Rosati, E., 'The Orphan Works Directive, or Throwing a Stone and Hiding the Hand', *Journal of Intellectual Property Law & Practice*, Vol. 8, No. 4, 2013.
- Schroff, S., Favale, M. and Bertoni, A., The Impossible Quest – Problems with Diligent Search for Orphan Works, 2017.
- Serrano, S.C., Avilés, R.A., Cuenca, G.M. and Calvo, B.S., 'Orphan Works at Theatre Library and Information Centres: Assessing Librarians' Perceptions and Management in Spain', *Journal of Academic Librarianship*, Vol. 45, No. 1, 2019, pp. 58–65.
- Siso-Calvo, B., Arquero-Avilés, R., Marco-Cuenca, G. and Cobo-Serrano, S., 'Is There a Solution to the Orphan Works Problem? Exploring the International Models', *Lecture Notes in Computer Science*, Vol. 10766, 2018, pp. 638–644.
- Smith, D., 'Finding Parents for Orphan Works: Using Genealogical Methods to Locate Heirs for Obtaining Copyright Permissions', *Journal of Academic Librarianship*, Vol. 41, No. 3, 2015, pp. 280–284.
- Stobo, V., Patterson, K., Erickson, K. and Deazley, R., "'I should like you to see them some time": An empirical study of copyright clearance costs in the digitisation of Edwin Morgan's scrapbooks', *Journal of Documentation*, Vol. 74, No. 3, 2018, pp. 641-667 (http://eprints.whiterose.ac.uk/124916/7/Stobo_Patterson_Erickson_Submitted_Ver.pdf).

Annex I: Detailed analysis of national implementation

Table 11: Musical work definition

Country	Musical work definition
CY	Section 2 of the Cypriot Law on Copyright defines musical work as 'any musical work, irrespective of musical quality'. The definition is very wide and also encompasses the accompanying lyrics. Due to the enlarged scope of the protection offered through this provision, case-law will clarify its content, although there is no such case-law to date.
EE	According to the Estonian Copyright Act, works are defined as 'any original results in the literary, artistic or scientific domain which are expressed in an objective form and can be perceived and reproduced in this form either directly or by means of technical devices. A work is original if it is the author's own intellectual creation' (§ 4 (2)). The Copyright Act has an illustrative list of protectable works, which also includes 'musical compositions with or without words' (§ 4 (3) clause 7). Musical works can be with or without words. The law does not define a musical work in a greater detail. The Estonian Copyright Act protects works. If words without music are original (the author's own creation), they are protectable.
IE	The definition of musical work is included in Section 2 of the Copyright and Related Rights Act, which states that musical work 'means a work consisting of music, but does not include any words, or action, intended to be sung, spoken or performed with the music'. The definition specifically excludes 'accompanying words'. These shall be included under the definition of 'literary work', which is defined in Section 2 as well.
IT	Article 2 of Law 633/194 indirectly defines musical works by protecting 'musical works and compositions, with or without words, dramatic-musical works and musical variations constituting an original work in itself'. Copyright law therefore protects all forms of musical expression. The concept of composition applies instead to every kind of musical composition, from symphonic opera to song. Section I (Articles 33 to 37) specifically regulates 'Dramatic-musical works, musical compositions with words, choreographic and pantomime works'.
MT	Pursuant to Article 2(1) of the Copyright Act, musical work means any musical work irrespective of musical quality and includes works composed for musical accompaniment.
NL	The Copyright Act, Article 10(1) 5°, stipulates that for the purposes of this Act, literary, scientific or artistic works are: musical works, with or without words.
PT	A musical work is defined as a 'musical composition, with or without words' (Article 2(e) of the Portuguese Copyright Code). According to Article 16(1) of the Portuguese Copyright Code, where several people are involved in the creation of a work (whether musical or not), this work may be qualified as a joint work (if divulged or published under the name of all contributors, independently of whether the authors' contributions from independent, detachable works or not), or a collective work (if organised under the initiative of a person or a legal entity and divulged or published under their name).
UK	A musical work is defined as a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music. The accompanying words are literary works under the Copyright, Designs and Patents Act 1988.

Table 12: Phonogram definition

Country	Phonogram definition
BG	The term 'phonogram' is defined in Additional provisions, paragraph 1, point 7 of the national law as fixing on a durable medium of a series of sounds in a way, allowing their perception, reproduction, wireless broadcasting or transmission by cable or other technical means. It can therefore be concluded that film soundtracks are covered by the national definition.
CY	The Cypriot Law on Copyright Defines orphan works as a work or a phonogram, for which none of the rightholders in the said work or phonogram is identified or, even if

Country	Phonogram definition
	one or more of them is identified, none is located despite a diligent search for the rightholders having been carried out in accordance with the provisions of Section 7K.
CZ	According to Section 75 paragraph 1 of the Copyright Act a phonogram is defined as 'exclusively by hearing perceivable fixation of the sounds of the performer's performance or of other sounds, or the expression thereof.'
DK	Phonograms are defined as 'sound recordings' (<i>lydoptagelser</i>) and encompass any sound recording.
EE	The Estonian Copyright Act defines a producer of phonograms as follows: 'a producer of a phonogram (sound recording) is a natural or legal person on whose initiative or responsibility a first legal recoding of the sound arising from the performance or other sound occurs' (§ 69). It follows that a phonogram (sound recording) is a recording of the sound arising from the performance or other sound.
ES	A 'phonogram' means any fixation of the sounds of a performance of a work or of other sounds (Article 114(1)). This is a very broad definition which, in principle, may afford protection to the simple recording of sounds (of any kind, such as sounds of nature, animals, or city noises). Film soundtracks also qualify as phonograms.
HR	The term 'phonogram' is defined as any fixation of the sounds of a performance or of other sounds, or of a representation of sounds other than in the form of a fixation incorporated in an audio-visual work (Article 132(1)) of the Copyright law).
IE	Phonogram (under national implementation, 'sound recording') is defined in Section 2 of SI 490 of 2014, European Union (Certain Permitted Uses of Orphan Works) Regulations 2014 as 'a fixation of sounds, or of the representations thereof, from which the sounds are capable of being reproduced, regardless of the medium on which the recording is made, or the method by which the sounds are reproduced'.
LU	The term 'phonogram' is defined as any fixation of sounds of a performance or of other sounds, or of a representation of sounds other than in the form of a fixation incorporated in a cinematographic or other audiovisual work (Article 41b) of the Framework Copyright Law).
LV	Pursuant to Article 1, point (7) of the Copyright Law, a phonogram is a fixation of the sounds of a performance, other sounds or representation of sounds.
NL	Pursuant to Article 1, point (c) of the Related Rights Act, a phonogram is a fixation of the sounds of a performance, other sounds or representation of sounds. As such, film soundtracks are also included.
PL	The term 'phonogram' has been defined in Article 94(1) of the Copyright Act as 'the first fixation of the sound stem of a performance or of other acoustic phenomena'.
PT	In line with Article 3 (b) of the Rome Convention, Article 176(4) of the Portuguese Copyright Code states that a phonogram is a fixation of sounds of a performance or of other sounds or of a representation of sound.
RO	The term 'phonogram' is defined by Article 104(1) of the Copyright Law as any fixation, exclusively of the sounds originating from the interpretation or the performance of a work or from other sounds, or digital representations of such sounds, other than under the form of a fixation incorporated in a cinematographic work or in any other audiovisual work. It should be noted that the terms used in the national legislation for this definition apply to a sound recording or a phonogram, thus the two terms are equivalent. However, Article 108(1) defines an audiovisual work (the terms used are an audio-video recording or a videogram) as any kind of fixation of an audio-video piece of work or any kind or fixation of a sequence of a moving images, accompanied or not by sound, whatever the method and the base used for this fixation may be. Given the definition of the audiovisual work, the soundtrack accompanying a movie will be considered to be part of the audiovisual work.
LU	The term 'phonogram' is defined as any fixation of sounds of a performance or of other sounds, or of a representation of sounds other than in the form of a fixation incorporated in a cinematographic or other audiovisual work (Article 41b) of the

Country	Phonogram definition
	Framework Copyright Law).
LV	Pursuant to Article 1, point (7) of the Copyright Law, a phonogram is a fixation of the sounds of a performance, other sounds or representation of sounds.
NL	Pursuant to Article 1, point (c) of the Related Rights Act, a phonogram is a fixation of the sounds of a performance, other sounds or representation of sounds. As such, film soundtracks are also included.
SK	A phonogram is defined in Section 107(1) of the Copyright Law as 'recording of sounds perceivable by hearing, regardless of the way and medium in which these sounds are recorded'. With regard to audiovisual work, the Section states that 'recording of sound components of an audiovisual work shall not be considered a phonogram'. As is evident, Slovak Copyright does not include film soundtracks under 'phonograms'. Therefore, film soundtracks should be considered to be protected as a part of audiovisual work, not phonogram.
SI	The term 'phonogram' is defined in Article 128(2) of the Act Amending the Copyright and Related Rights Act and means a recording of the sounds of a performance or other sounds, or a substitute for sounds, unless it is a recording included in an audiovisual work. Recording means fixation of sounds or their substitutes on a medium from which they can be perceived, reproduced or broadcast by means of a device, as stipulated in Article 128(3) of the Act Amending the Copyright and Related Rights Act.

Table 13: Overview of national definitions of diligent search

Country	Definition of a diligent search
AT	In line with Article 3(1) OWD.
BE	In line with Article 3(1) OWD. Contrary to the Directive's provision, Article XI.245/4 <i>Wetboek Economisch Recht</i> of, the law does not explicitly stipulate that the diligent search shall be carried out prior to the use of the work or phonogram. This is evident from the context, however.
BG	In line with Article 3(1) OWD.
CY	In line with Article 3(1) OWD. No specific mention of the timing of such search.
CZ	In line with Article 3(1) OWD.
DE	In line with Article 3(1) OWD. The Directive provision has been transposed almost literally. No reference is made to 'appropriate sources' and to 'good faith', which are, however, implied.
DK	In line with Article 3(1) OWD.
EE	In line with Article 3(1) OWD.
EL	In line with Article 3(1) OWD.
ES	In line with Article 3(1) OWD.
FI	In line with Article 3(1) OWD.
FR	In line with Article 3(1) OWD.
HR	In line with Article 3(1) OWD.
HU	In line with Article 3(1) OWD.
IE	In line with Article 3(1) OWD.
IS	In line with Article 3(1) OWD.
IT	In line with Article 3(1) OWD.

Country	Definition of a diligent search
	Italian legislation adds another condition, stating that diligent research is carried out prior to use and according to the principles of good faith and professional fairness .
LI	In line with Article 3(1) OWD. Three elements from Article 3(1) differ in the transposition: (i) the obligation to conduct the search in good faith is not explicitly mentioned; (ii) the search is limited to the sources in the annex, not mentioning all appropriate sources ; and (iii) the fact that the search must be conducted prior to use has been omitted in the transposition of the article on diligent search, although this is implied.
LT	In line with Article 3(1) OWD. No specific mention of the timing of such search.
LU	In line with Article 3(1) OWD. No specific mention of the timing of such search.
LV	In line with Article 3(1) OWD. Pursuant to Article 62(2), points (1) and (4) of the Copyright Law, the rightholders of each work and related rights object shall be searched with the utmost diligence in order to determine whether it is an orphan work.
MT	In line with Article 3(1) OWD.
NL	In line with Article 3(1) OWD. No specific mention of the timing of such search. Pursuant to Article 16p of the Copyright Act, the rightholders shall be searched with diligence .
NO	In principle, the guidelines are in line with Article 3(1) OWD.
PL	In line with Article 3(1) OWD. According to Article 356(1) of the Copyright Act, the beneficiaries shall conduct a diligent and good faith search.
PT	In line with Article 3(1) OWD.
RO	In line with Article 3(1) OWD.
SE	In line with Article 3(1) OWD.
SI	In line with Article 3(1) OWD.
SK	In line with Article 3(1) OWD.
UK	In line with Article 3(1) OWD.

Table 14: Overview of national diligent search requirements

Country	Further explanation of a 'diligent search'	Documentation requirements	Reporting requirements	Other requirements / additional steps
AT	No	Yes The diligent search has to be documented and a record kept for the duration of use of the orphan work and for an additional seven years after the end of such use.	Yes The requirements are in line with the OWD.	No
BE	Yes Diligence is interpreted as a search in which the suitable sources are consulted. These are the sources listed in the Royal Decree.	Yes Pursuant to XI. 245/4(3) Wetboek Economisch Recht, the beneficiaries are required to maintain records of their diligent searches. Additional information to be recorded is 'the names of the identified and traced rightholders of a work or phonogram with more than one rightholder, where the identified and traced rightholder has given permission to use the work or phonogram'.	Yes The requirements are in line with the OWD. Pursuant to Article XI.245/3(1) Wetboek Economisch Recht, the orphan work needs to be registered.	No
BG	No	Yes Pursuant to Article 71d(5) of the Copyright and Related Rights Act, beneficiaries need to maintain records of their diligent searches.	Yes The beneficiaries themselves are not required to register the orphan works. The Minister of Culture or an authorised Deputy Minister is obliged to forward that information to the EUIPO database.	No
CY	No	Yes The Law on Copyright mentions in Article 7K(6) that the beneficiaries should maintain records of their diligent searches.	Yes The requirements are in line with the OWD.	No
CZ	No	Not specified, but implied.	Yes	No

Country	Further explanation of a 'diligent search'	Documentation requirements	Reporting requirements	Other requirements / additional steps
		The law only says that beneficiaries are obliged to promptly provide information on the search, in writing, to the Ministry of Culture of the Czech Republic, which implies that records need to be kept.	All of this information provided by the beneficiaries to the national competent authority shall be submitted without undue delay to the EUIPO. The Explanatory Report to Act 228/2014 explicitly mentions the vagueness of prescribed reporting ('promptly', 'without undue delay') as intentional. The report reasons that the specific processes of data submission to the EUIPO were not sufficiently clear and agreed at the time of the government proposal for the implementing legislation.	
DE	No	Not specified, but implied.	Yes The results of diligent search are to be reported to the national competent authority, which relays the information to the EUIPO.	No
DK	No	Not specified, but implied.	Yes Following the diligent search, the organisation is required to report the information listed in the OWD to the national competent authority, which acts as an intermediary for beneficiaries and the EUIPO Orphan Works Database, passing details of searches along and encouraging search in the database to find out whether a certain work has been registered as orphan.	No
EE	No	Yes According to Article 27(2) ² of the	Yes The Ministry of Justice shall	No

Country	Further explanation of a 'diligent search'	Documentation requirements	Reporting requirements	Other requirements / additional steps
		Copyright Act, beneficiaries shall maintain records of diligent searches.	immediately forward the information collected by the beneficiaries to the EUIPO database.	
EL	Yes According to the FAQ published by the Hellenic Copyright Organisation, a diligent search covers the main sources on the list. If the rightholder is known but not located, then a search of the general population registries must be conducted.	Yes Article 27A(7) of Law 2121/1993 also provides that beneficiaries of orphan works shall keep a search record on file throughout the term of use of the orphan work and for seven years after the termination of such use.	Yes The Greek transposition adds two more elements that need to be reported, namely: a description of the orphan work and any other information deemed necessary). Pursuant to Article 27A(7) of Law 2121/1993, concrete information shall be provided to the national competent authority, which shall forward them to the EUIPO.	Yes Article 27A(5) of Law 2121/1993 provides for a publicity obligation addressed to the beneficiaries of orphan works. The provision reads: 'The beneficiaries of orphan works indicate the name of identified authors and other rightholders in any use of an orphan work with the following labelling: Orphan work: [...] [no of entry in the Single Online Database of the Office for Harmonisation in the Internal Market]'
ES	Yes According to Article 4(6) RD224/2016, all sources need to be consulted.	Yes Beneficiaries must keep records of all diligent searches conducted. RD224/2016 establishes that the records kept will include at least the following information: search dates and sources consulted, as well as the certificates issued by the consulted sources identifying the searches conducted (Article 5 RD224/2016).	Yes Article 4(7) RD 224/2016 requires more information to be forwarded to the national competent authority, such information are: the name of the work, and search dates and sources of information consulted. The beneficiary must also register this information with the EUIPO database (Article 4(8) RD224/2016), which confirms/validates the orphan work registration at the EUIPO database (Article 4(9) RD224/2016).	Yes According to Article 4(6) RD224/2016, the beneficiaries must wait for at least three months before deeming the search complete: 'The diligent search procedure will conclude at the time that the beneficiary records the last response to enquiries sent to the sources provided in the Annex. In the case of no response from a source within three months, consultation shall be understood to be complete.'
FI	No	Yes	Yes	No

Country	Further explanation of a 'diligent search'	Documentation requirements	Reporting requirements	Other requirements / additional steps
		According to §6 of the Orphan Works Act, organisations shall keep records of their diligent searches and of the results of such searches.	The Decree of the Ministry of Education and Culture on the Use of Orphan Works (846/2014) requires outcomes of diligent search to be registered with EUIPO (Article 3) either directly or via the national competent authority. According to the national legislation, several additional pieces of information need to be recorded.	
FR	No	Yes Article R135-2 of the State Council Decree mentions the duty for the beneficiary to keep a record specifying the date and the results of the consultation of all the sources mentioned in Article R. 135-1.	Yes Communication of the results of the research and the intended use of the orphan work to the national competent authority is a prerequisite to use orphan works. The authority is then in charge of transmitting the information to the EUIPO. The information that needs to be communicated includes only the results of the diligent search and the envisaged use, whereas no reference is made to the change in status or contact details of the institution concerned. However, this was amended by the State Council Decree, which says that beneficiaries need to communicate the contact details of the person or service to which the rightholders must apply in order to end use of the work in question.	No
HR	No	Yes The beneficiaries must maintain records	Yes The beneficiaries shall communicate	No

Country	Further explanation of a 'diligent search'	Documentation requirements	Reporting requirements	Other requirements / additional steps
		of the diligent search that they have carried out (Article 12.b(4) of the Act on Amendments to the Copyright and Related Rights Act). To this end, the records shall include the information specified in Article 3(5) OWD.	the information contained in their records to the national competent authority, which shall without delay forward the information to the EUIPO for the purpose of being recorded in the Orphan Works Database (Article 12.b(4) ZAPSP).	
HU	Yes According to the HIPO's website, 'The requested search for the rightholder shall be carried out taking all necessary measures that can be expected in the given situation in good faith, thus in case the beneficiary organisation has certain knowledge on the rightholder(s) identity or location, which could certainly be found by using a source of information not listed in the Orphan Work Decree, the work shall not be used as an orphan work, either.'	Yes Pursuant to Section 41/G, beneficiary institutions shall be bound to record the result of their diligent search, taking all necessary measures that can be expected in the given situation in good faith.	Yes Pursuant to Section 41/G, beneficiary institutions shall notify the national competent authority electronically, which shall forward the above data without delay to the EUIPO for registration. Commencement of use shall be subject to registration in the EUIPO database. In practice, beneficiaries submit the data of the work intended to be used to the national competent authority via the electronic register of the EUIPO.	No
IE	No	Not specified, but implied	Yes Diligent search reporting requirements are stated in Regulation 5(3) of SI 490 of 2014, European Union (Certain Permitted Uses of Orphan Works) Regulations 2014 and are in line with the OWD. It is the national competent authority that	No

Country	Further explanation of a 'diligent search'	Documentation requirements	Reporting requirements	Other requirements / additional steps
			needs to forward the information as soon as practicable to the EUIPO.	
IS	No	No	No Pursuant to Article 12c of the Copyright Act, for the purposes of establishing whether a work or phonogram is an orphan work, a diligent search shall be carried out and registered. The article provides that the Minister may further define the sources, search and registration requirements through a regulation, but this has not been done yet.	No
IT	No	Yes The organisations referred to in Article 69-bis(1) D. Lgs. 163/2014 shall keep records of their diligent searches so that they are available at the request of those concerned.	Yes Article 69-quater(14) and (15) of D. Lgs. 163/2014 foresees the obligation to register the status of works included in the diligent search in the EUIPO database in line with the OWD. Article 69-quater(6) stipulates that the organisations referred to in Article 69-bis(1), shall notify the national competent authority of the uses of orphan works, even where the research has been carried out by others.	Yes Pursuant to Article 69-quater(5), the works and phonograms are considered orphan and the diligent search is concluded 90 days after the date of publication in the national orphan works database. The Ministry of Cultural Heritage and Activities communicates to the organisation that carried out the research the possible claim of the work by one or more rightholders.
LI	Yes The diligence results from verifying at least the sources provided in the Annex to the transposing	Yes Article 31b(4) of the Copyright Law provides that the institution using the works shall document its diligent search.	Yes Reporting obligations are transposed through Article 31b(4) to (6) of the Copyright Law.	No

Country	Further explanation of a 'diligent search'	Documentation requirements	Reporting requirements	Other requirements / additional steps
	law and additionally where appropriate, to verify sources in other EEA Member States.			
LT	Yes The concept of diligence in Lithuanian jurisdiction is understood as the performance of an action as accurately and proportionately as possible, taking into account as many details as possible. According to the explanation from the Ministry of Culture, the search might be sufficiently diligent even if not all sources mentioned on the list are consulted. The number and type of sources consulted should be reasonable.	Yes Users of orphan works shall keep all search records on file until the expiration of the copyright or related rights in those works or phonograms (Article 92 (1) of the Law of Authors Rights and Related Rights).	Yes Under Article 93 ATGTI, after carrying out a diligent search and making a conclusion that a work or a phonogram is an orphan work, beneficiaries provide the information on diligent search to the national competent authority that is responsible for the collection of information on accomplished diligent searches and submission of such information to EUIPO. National legislation stipulates several other pieces of information that need to be provided. The organisations can use the orphan work after its orphan work status has been registered with the competent organisation.	No
LU	No	Yes The beneficiaries must maintain records of their diligent searches including at least the following information: (i) the sources consulted and the results obtained; and (ii) the date on which the consultation was done.	Yes The procedure is in line with the OWD. The beneficiaries must notify the national competent authority, which must provide such information to the EUIPO without delay.	No
LV	No	Yes Pursuant to Article Section 62.2(5) of the	Yes Pursuant to Article 62.2(6) of the	No

Country	Further explanation of a 'diligent search'	Documentation requirements	Reporting requirements	Other requirements / additional steps
		Copyright Law, the entity which performs diligent search for rightholders or has authorised a third party for this purpose shall document the course and results of the search in order to justify that the rightholder has been searched for diligently.	Copyright Law, after receiving the information on documented search relevant to orphan works identification, the National Library of Latvia shall forward it to the EUIPO.	
MT	No	Yes Pursuant to Regulation 6(7) of S.L. 415.05, the organisations shall maintain records of their diligent searches.	Yes National rules are enshrined in Regulation 6(7) and (8) of S.L. 415.05 and are in line with the OWD. The beneficiaries need to provide certain information to the national competent authority, which then forwards the information to the EUIPO.	No
NL	No	Yes Pursuant to Article 16p of the Copyright Act, the entity which performs diligent search for rightholders shall document the course and results of the search in order to justify that the rightholder has been searched for diligently.	Yes National rules (Article 16p of the Copyright Act) are in line with the OWD. The entity which performs diligent search shall send certain information to the national competent authority for the purpose of sending the information to the EUIPO.	No
NO	No	Not specified, but implied	Yes The results and procedure of the search must be reported to the national competent authority, which coordinates the registration of orphan works into the EUIPO.	No
PL	Yes	Yes	Yes	Yes

Country	Further explanation of a 'diligent search'	Documentation requirements	Reporting requirements	Other requirements / additional steps
	<p>According to the rationale for the amending Act, 'diligent searches [...] should be carried out in good faith. This means that if there are - in a specific case and to the knowledge of the beneficiary institution - additional sources that may contain information about rightholders, the conditions of diligence and good faith will be met only after checking all sources - both mandatory, which is specified in the Regulation, as well as additional ones.' Otherwise, the beneficiary institution may run the risk of exceeding the limits of fair use, i.e. violation of exclusive rights.</p>	<p>Article 356(8) of the Copyright Act provides that organisations entitled to use orphan works are obliged to maintain records on their diligent searches. Details of these records are set out in the Implementing Regulation.</p>		<p>As regards documenting and reporting the searches, the Implementing Regulation states that records should be kept in an electronic form. This applies to obtained files, documents, correspondence, search results in databases and any other materials of significance as a source of information about the entitled persons who have the proprietary rights to works which may be considered orphan, or about their usual place of residence. After completing the search, a protocol should be prepared and signed by the person managing the organisation conducting the diligent search.</p>
PT	No	<p>Yes</p> <p>Diligent search needs to be recorded. Article 26 – A(7) of the Portuguese Copyright Code adds that the relevant entities must maintain updated records of their diligent searches.</p>	<p>Yes</p> <p>Beneficiaries must regularly provide the information in question to the national competent authority, which is to manage a central database containing that data. Article 26 – A(8) then specifies that the above referred records of diligent searches must be regularly and immediately supplied to the EUIPO.</p> <p>Article 26 – A(3) declares that a work may only be considered an orphan</p>	No

Country	Further explanation of a 'diligent search'	Documentation requirements	Reporting requirements	Other requirements / additional steps
			work and used to achieve aims related to the public interest missions of the relevant entities where a prior diligent search has been carried out and recorded, all in good faith, by those entities.	
RO	Yes The cultural institutions are deemed to be sufficiently diligent if they search all the sources in the list, However, this does not exclude the possibility of searching other sources as well.	Yes Pursuant to Article 124(10) of the Copyright Law, the organisations maintain records of their diligent searches.	Yes Article 3(5) and 3(6) OWD have been transposed through Article 124(10) and Article 125 of the Copyright Law, respectively.	No
SE	Yes It is expressly noted that what is deemed a diligent search should be decided on a-case-by-case basis and that additional sources may be consulted if necessary.	Yes	Yes The requirements for digital search reporting do not differ from Article 3(5) in the Directive.	No However, the Swedish government can issue further guidelines describing any additional steps that may be taken.
SI	No	Yes Pursuant to Article 50.č ZASP, beneficiaries need to record the results of their diligent searches. Such 'diligent search record' shall include documents proving that a diligent search was carried out in accordance with the legislative requirements.	Yes The beneficiaries are obliged to send the data from their records of diligent searches together with their contact details to the national competent authority, without delay. As soon as the authority receives this information, it shall forward it to the EUIPO database, using a dedicated	No

Country	Further explanation of a 'diligent search'	Documentation requirements	Reporting requirements	Other requirements / additional steps
			application (Article 50.č(2) ZASP).	
SK	No	Not specified, but implied The beneficiaries are obliged to provide the national competent authority with the information as specified in the OWD.	Yes The definition is broadly in line with the OWD.	No
UK	Yes Special diligent search guidance has been issued per type of work ¹³⁹ .	Yes A relevant body that makes use of orphan works must maintain records of its diligent searches.	Yes The definition is broadly in line with the OWD.	No

¹³⁹ <https://www.gov.uk/government/publications/orphan-works-diligent-search-guidance-for-applicants/orphan-works-diligent-search-guidance>.

Table 15: Overview of national rules in cases with cross-border elements

Country	National rules in cases with cross-border elements
AT	Yes - in line with Article 3(3) and (4) OWD
BE	Yes - in line with Article 3(3) and (4) OWD
BG	Yes - in line with Article 3(3) and (4) OWD
CY	Yes - broadly in line with Article 3(3) and (4) OWD Rules for phonograms are not explicitly mentioned
CZ	Yes - in line with Article 3(3) and (4) OWD
DE	Yes - broadly in line with Article 3(3) and (4) OWD Rules for phonograms are not explicitly mentioned German law adds that in the case of certain holdings, a diligent search must be carried out in the Member States in which the institution that made the item of the holding available to the public with the permission of the rightholder has its principal place of business
DK	Yes - in line with Article 3(3) and (4) OWD
EE	Yes - in line with Article 3(3) and (4) OWD
EL	Yes - broadly in line with Article 3(3) and (4) OWD Rules for phonograms are not explicitly mentioned Greek law adds that if the works have neither been published nor broadcast, the diligent search shall be carried out in the Member State where the beneficiary of orphan works is established
ES	Yes - in line with Article 3(3) and (4) OWD Article 4(2) RD224/2016, which formally transposes Article 3(3) OWD, adds some specific clauses that may have an effect on cross-border searches: <ul style="list-style-type: none"> • In the event that cinematographic or audiovisual works have been co-produced by producers established in different Member States, the diligent search should be conducted in each of those Member States • In the case of works embedded or incorporated, the diligent search shall be made in the territory of the Member State in which the search for those works in which they are embedded or incorporated is made
FI	Yes - broadly in line with Article 3(3) and (4) OWD Rules for phonograms are not explicitly mentioned
FR	Yes - broadly in line with Article 3(3) and (4) OWD Rules for phonograms are not explicitly mentioned
HR	Yes - broadly in line with Article 3(3) and (4) OWD Rules for phonograms are not explicitly mentioned A diligent search for the works referred to in Article 12.a(3) subparagraph 3 ZAPSP (cinematographic or other audiovisual works produced by public service broadcasting organisation) shall be carried out in Croatia if the broadcasting organisation that made them publicly accessible with the consent of the author or other rightholder has its principal place of business in Croatia
HU	Yes - broadly in line with Article 3(3) and (4) OWD Rules for phonograms are not explicitly mentioned Pursuant to Section 41/A(5), in case of orphan works not published or broadcast but that were deposited with the consent of the rightholder at beneficiary institutions before 29 October 2014, the search shall be carried out in the territory of Hungary
IE	Yes - broadly in line with Article 3(3) and (4) OWD

Country	National rules in cases with cross-border elements
	Rules for phonograms are not explicitly mentioned
IS	Yes - in line with Article 3(3) and (4) OWD
IT	<p>Yes - in line with Article 3(3) and (4) OWD</p> <p>Additional national rules exist:</p> <ul style="list-style-type: none"> • In the case of cinematographic or audiovisual works with co-producers established in different Member States, the diligent search must be carried out in each of the Member States concerned • Where the search is carried out by Italian entities in another Member State, the diligent search shall be carried out following the procedures and consulting the sources of information prescribed by the national legislation of that Member State
LI	<p>Yes - broadly in line with Article 3(3) and (4) OWD</p> <p>Rules for phonograms are not explicitly mentioned</p>
LT	<p>Yes - broadly in line with Article 3(3) and (4) OWD</p> <p>The national law does not explicitly state that a diligent search shall be carried out in the Member State of first publication or, in the absence of publication, first broadcast. Rules for phonograms are not expressly mentioned</p> <p>According to the Ministry of Culture, the diligent search in other countries will be conducted depending on the situation. For instance, if the work was created between the two World Wars, organisations might need to do a diligent search in the US, as many Lithuanian authors emigrated to the US during that period</p>
LU	Yes - in line with Article 3(3) and (4) OWD
LV	Yes - in line with Article 3(3) and (4) OWD
MT	Yes - in line with Article 3(3) and (4) OWD
NL	<p>Yes - broadly in line with Article 3(3) and (4) OWD</p> <p>Rules for phonograms are not explicitly mentioned</p> <p>Article 16p(3) of the Copyright Act stipulates an additional rule for works that have not been communicated to the public yet. In such cases, the jurisdiction of the institution in whose collection the work is held is relevant</p>
NO	Yes - in line with Article 3(3) and (4) OWD
PL	<p>Yes - in line with Article 3(3) and (4) OWD</p> <p>Article 356 (5) of the Copyright Act faithfully transposes Article 3(4) of the Directive. The only difference is that the Polish Act uses 'If in the course of a search it has become likely that' in place of 'If there is evidence to suggest'</p>
PT	<p>Not all requirements are transposed</p> <p>Rules for phonograms are not explicitly mentioned</p> <p>Special rules exist for works that have not been published or distributed but have been made available to the public with the consent of their copyright owners. A diligent search carried out in good faith will take place in Portugal if the entity that made the work available the public has its establishment in the country</p> <p>Article 3(4) OWD is not explicitly transposed - the Portuguese provisions do not say that '[s]ources of information available in other countries should also be consulted if there is evidence to suggest that relevant information on rightsholders is to be found in those other countries.' However, Article 26-A(4) of the Portuguese Copyright Code contains a non-exhaustive list of sources, so it could be argued that, in harmony with Article 3(4) of the OWD, should there be evidence to suggest that relevant information regarding copyright owners may be found in other countries, the sources of information available in those other countries should also be consulted</p>
RO	Yes - in line with Article 3(3) and (4) OWD

Country	National rules in cases with cross-border elements
SE	<p>Yes - broadly in line with Article 3(3) and (4) OWD</p> <p>Rules for audiovisual works and phonograms are not explicitly mentioned</p>
SI	<p>Yes - in line with Article 3(3) and (4) OWD</p> <p>The transposing provision refers to permanent residence, which could differ from the habitual residence stated in Article 3(3) OWD</p>
SK	<p>No - not all requirements are transposed</p> <p>A different approach has been taken to the transposition of Article 3(4) OWD. While the OWD requires the organisation to consult sources of information available in other countries, the national transposition broadens the consequences of evidence suggesting that relevant information on rightholders is to be found in other countries. According to Section 10(2)(d) of the Copyright Act, if such evidence exists, the diligent search is supposed to be carried out in countries where such information is to be found. Therefore, while the OWD only stipulates consulting sources from other countries, the Slovak transposition requires diligent search to be carried out in those other countries</p>
UK	<p>Yes – broadly in line with Article 3(3) and (4) OWD</p> <p>Rules for phonograms are not explicitly mentioned</p>

Table 16: Overview of national presumptions

Country	Presumption of authorship and/or right ownership	Presumptions of transfer of rights
AT	<p>Yes</p> <ul style="list-style-type: none"> As long as the author of a published work has not been named in this way, the editor or – if there is no one named as such on the copy of the work – the publisher is entitled to administer the copyright, including the right to pursue infringement claims in their own name. A person participating in the creation of a commercial cinematographic work in such a way that the whole and overall design or form of the work is attributed to be a singular creation can insist on being named as author in the credits of the cinematographic work (Article 39 Copyright Act). The owner of the company who produces a commercial phonogram will be presumed to be the producer (and therefore the rightholder of the producer rights). 	<p>Yes</p> <ul style="list-style-type: none"> In case of cinematographic works, contributors to a cinematographic work have in doubt transferred their rights to the producer (Article 38 Copyright Act). Exploitation rights of the performing artists of a cinematographic work are transferred by law to the producer (Article 69 Copyright Act).
BE	<p>Yes</p> <ul style="list-style-type: none"> Presumption of authorship exists for published literary works, press articles in newspapers, magazines, journals and periodicals, and visual works (Article XI. 170 WER). A specific irrebuttable presumption exists for audiovisual works. In addition to the principal director, the natural persons who contributed to the work are also considered the authors of an audiovisual work. The law also provides a rebuttable presumption of authorship of audiovisual works for the following persons: the scriptwriter, the editor, the copywriter, the graphic designer of animated work or of animation sequences in an audiovisual work, which constitute an important part of that work, the author of musical works with or without words specifically created for the audiovisual work (Article XI. 179 WER). 	<p>Yes</p> <ul style="list-style-type: none"> The authors of an audiovisual work, as well as the authors of any creative element incorporated in an audiovisual work (except for musical works), shall, unless otherwise agreed, transfer to the producers the exclusive right to the audiovisual exploitation of the work, including the rights necessary for such exploitation (Article XI. 182 WER). Unless agreed differently, a performer of an audiovisual work transfers by default their exclusive right of exploitation of their performance to the producer (Article XI. 206 WER). Exclusive rights on the phonogram are granted to the producers of phonograms and the producers of the first fixations of films. These exclusive rights include the right to reproduce the phonogram or to authorise the reproduction of the phonogram (Articles XI. 209 and XI. 210 WER).
BG	<p>Yes</p> <ul style="list-style-type: none"> Presumption of authorship applies for periodicals and 	<p>Yes</p> <ul style="list-style-type: none"> The authors of an audiovisual work need to conclude written contracts

Country	Presumption of authorship and/or right ownership	Presumptions of transfer of rights
	<p>encyclopaedias, collections, anthologies, bibliographies and databases, and copyright on computer programmes and databases created in the framework of an employment relationship (Article 6 CRRA).</p> <ul style="list-style-type: none"> • The copyright on computer programmes and databases created in the framework of an employment relationship belongs to the employer (Article 14 CRRA). • Presumption of rightholder in case of related rights (based on Article 72b CRRA) – rightholder is a person whose name, title or other identifying mark is indicated or mentioned in the usual way on the respective record, copies or copies thereof and/or their packaging, or in the course of showing the programme. • Copyright on a film or other audiovisual work belongs to the director, the screenwriter and the cinematographer. In the case of animated films, the art director also has copyright. The authors of the music, the dialogue, already existing literary work, on which the audiovisual work has been created, the scenography, the costumes, as well as other works included in it, shall retain their copyright on their works (Article 62 CRRA). 	<p>with the producer, with which it is considered that they grant to the producer, both within the country and abroad, the exclusive right to reproduce the work, its public screening, its broadcasting on wireless transmission or transmission and retransmission by cable, its reproduction on video media and their distribution, the provision by wireless or cable, the access to an unlimited number of persons to such work, as well as the right to authorise the translation, duplication and subtitling of the text (Article 63 CRRA).</p>
CY	<p>Yes</p> <ul style="list-style-type: none"> • Presumption of authorship on the published works (Section 11(3) Copyright Law). • Relating to audiovisual works, Section 11(2)(a) provides that the first creator of a film is the producer of the film. This provision is only applicable to works produced after 1 July 1994. 	<p>Yes</p> <ul style="list-style-type: none"> • Presumption of transfer of rights from a rightholder of a literary or artistic work or related right in the interpretation or performance (apart from in cases of musical works) to a producer of a film (Section 8) • Transfer of rights in case of a contract of service or apprenticeship, or a contract of employment (Section 11(1)). This does not apply to phonograms.

Country	Presumption of authorship and/or right ownership	Presumptions of transfer of rights
CZ	Yes <ul style="list-style-type: none"> • Presumption of authorship (either indicated on the work in a usual manner or indicated in the register administered by CMO). • Presumption of rights relating to audiovisual works (if registered in the register of audiovisual works, which is maintained in compliance with the (now suspended) Treaty on the International Registration of Audiovisual Works). • Presumption of authorship is applicable by analogy to rights of performers, producers of phonograms, producers of audiovisual fixation, broadcasters and, with necessary modifications, database makers. 	Yes <ul style="list-style-type: none"> • In case of audiovisual works and works used in audiovisual works (e.g. screenplay, editing, photography), except of musical works, a presumption of (economic) rights transfer exists. Such rights are transferred to the producer of the first fixation of an audiovisual work (Section 63(3)(a) CA for audiovisual works and Section 64(1)(c) CA for other works used in audiovisual work). • Certain presumptions exist for works made in the course of employment (Sections 58 and 59 CA). • Presumptions exist in case of a contract for work (Section 61(1) CA).
DE	Yes <ul style="list-style-type: none"> • Section 10(1) of the Act on Copyright provides for a presumption of authorship of copyright works, including pseudonyms and symbols. • Section 10(2) regulates a presumption in favour of an editor (if there is no author), or publisher if there is no editor. • Section 71(1) provides for a presumption in favour of an editor for formerly unpublished works/editions. • Section 70(1) provides for a presumption in favour of an editor of scientific editions. • Section 72(1) provides for a presumption in favour of a maker of unoriginal photographs (<i>Lichtbild</i>). • Section 74(3) provides for a presumption in favour of a performer. • Section 81(1) provides for a presumption in favour of an organiser of a performance. • Section 85(4) provides for a presumption in favour of a phonogram producer. A producer of an audio recording has an exclusive right to reproduce, distribute and make 	Yes <ul style="list-style-type: none"> • Section 74 (2) states that if several performers have participated, the elected group leader or, if none is elected, the leader alone can exercise the right. • Section 88(1) states that a film work includes permission to use an underlying pre-existing work. • Section 89(1) states that exploitation right in contributions made for film work can be exercised by the producer. Section 89(4) includes photos, both original and unoriginal. • Section 34(2) states that the editor can exercise exploitation right in contributions to collective work to the extent that they have permission from the contributors. • Section 92(1) states that exploitation right in performances made for film work can be exercised by the producer.

Country	Presumption of authorship and/or right ownership	Presumptions of transfer of rights
	available to the public that audio recording. <ul style="list-style-type: none"> Section 87(4) provides for a presumption in favour of a broadcaster. Section 94(4) provides for a presumption in favour of a producer of the first fixation of a film 	
DK	Yes <ul style="list-style-type: none"> Presumption of authorship for printed works or works made available to the public. 	Yes <ul style="list-style-type: none"> Certain presumptions regarding transfer of rights (Kapitel 3, Article 53 Copyright Act).
EE	Yes <ul style="list-style-type: none"> Presumption of authorship for published works. Presumption of rights of producers for audiovisual work (if named on such work). Presumption of right ownership for persons whose names are indicated on an object of related rights. Presumption of right ownership for holders of related rights or their legal successors if an object of related rights or its packaging is marked with a symbol. Copyright in an audiovisual work shall belong to its author or co-authors - the director, the script writer, the author of dialogue, the author of the musical work specifically created for use in the audiovisual work, the cameraman and the designer, however, their economic rights shall be transferred to the producer of the work (with the exception of the economic rights of the author of the musical work used in the audiovisual work) unless otherwise prescribed by contract (Article 33(2) Copyright Act). Copyright in a collective work shall belong to the person on whose initiative and under whose management the work was created and under whose name it was published unless otherwise prescribed by contract (Article 31(2) Copyright Act). 	Yes <ul style="list-style-type: none"> If an author's contract is concluded on the use of a literary or artistic work (but not musical work) for the creation of an audiovisual work, the user of the work has the right to display the work to the public at the cinema, on television, by cable or by other technical means, to dub the work into other languages, to provide it with subtitles and to reproduce and distribute the work, unless otherwise prescribed by the contract (Article 57(5) Copyright Act). Upon performance of a work in the execution of direct duties, the economic rights of the performer are transferred to the employer only on the basis of a written agreement of the parties (Article 67(5) Copyright Act). The author of a work created under an employment contract or in the public service in the execution of their direct duties shall enjoy copyright in the work but the economic rights of the author to use the work for the purpose and to the extent prescribed by the duties shall be transferred to their employer unless otherwise prescribed by contract (Article 32(1) Copyright Act).

Country	Presumption of authorship and/or right ownership	Presumptions of transfer of rights
EL	Yes <ul style="list-style-type: none"> • Article 9 of Law 2121/1993 provides for a presumption that the director of an audiovisual work is considered its creator. • The person whose name appears on a copy of a work in the manner usually employed to indicate authorship shall be presumed to be the author of that work (Article 10). • The same applies for the creators of collective works, computer programmes, databases and audiovisual works, for all related rights according to Directive 2004/48. • Article 11 of Law 2121/1993 provides that the person who lawfully makes available to the public an anonymous or pseudonymous work is deemed as the initial holder of the economic and moral rights (fictitious initial right holder), until the true author of the work reveals their identity. 	Yes <ul style="list-style-type: none"> • The producer of an audiovisual work acquires secondary (economic) rights to the work through the audiovisual production contract needed to exploit the work, while the creator of audiovisual work retains all other rights (Article 34 of Law 2121/1993). • In case an employment contract, economic rights shall be transferred exclusively to the employer. • Economic rights to a computer programme that was created by an employee during an employment relationship or under the instructions of the employer are automatically transferred to the employer (Article 40 of Law 2121/1993).
ES	Yes <ul style="list-style-type: none"> • Presumption of authorship (Article 6(1) TRLPI) for disclosed and undisclosed works. • In the case of anonymous works or works disclosed under a pseudonym or sign, Article 6(2) TRLPI provides that the natural person or legal entity who discloses it with the author's consent, will be entitled to exercise all of their rights. • Presumption of authorship applies also to works of collaboration, but a different rule applies to collective works. Article 97(2) TRLPI provides for a specific presumption for computer programmes. • Specific presumptions of transfer of ownership of rights in the case of audiovisual works (Article 87 TRLPI), computer programmes under employment (Article 97(4) TRLPI), and in general, for any works created under employment (Article 51 TRLPI) exist. 	Yes <ul style="list-style-type: none"> • In case of an employment relationship (Article 51 TRLPI) - in the absence of an agreement in writing, a presumption of transfer of the exploitation rights to the employer applies. • For a computer programme created by an author under employment (Article 97(4) TRLPI). • By signing the audiovisual production contract, the co-authors of an audiovisual work are presumed to have transferred to the producer the exclusive rights of reproduction, distribution, and communication to the public, as well as the rights to dub and subtitle the work (Article 88 TRLPI). • A wider presumption of transfer applies to advertising works (Article 23(2) of the Act 34/1988 of November 11 on Advertising). • For commissioned works - the case-law is not decisive, however the commissioning party does acquire, at least and despite contractual silence, the right to use the work for the purposes it was commissioned for - in case of performances done under employment or commissioned (Article 110 TRLPI).

Country	Presumption of authorship and/or right ownership	Presumptions of transfer of rights
FI	Yes <ul style="list-style-type: none"> General presumption of authorship if the work is made available to the public (Section 7.1 of the Copyright Act). 	Yes <ul style="list-style-type: none"> Chapter 3 of the Copyright Law provides standard presumptions of transfer (Articles 27- 40b). For example, in case of audiovisual works, the rights also expand to other works (e.g. literary works), with the exception of musical works (39(2)). Software and databases created by employees or public servants are also subject to presumptions in favour of the employer (Article 40b).
FR	Yes <ul style="list-style-type: none"> Legal presumption of authorship of the person indicated as such on the work (general presumption - Article L113-1 IP Code). Presumption in case of collective works (Article L113-5). Presumptions in case of audiovisual work (Article L113-7) - the author of the screenplay, the author of the adaptation, the author of the spoken text, the author of musical composition and the director are presumed to be co-authors of an audiovisual work produced in collaboration. The following contributors are vested with exclusive related rights on phonograms or videograms: the performing artists, the producers, the audiovisual communication companies (Article L211-4). The presumption of ownership of rights for the benefit of legal persons exploiting a work exists. This was established by case-law and applies beyond photographs and visual works. 	Yes <ul style="list-style-type: none"> The presumption of rights is in favour of the person who commercialises the work, according to case-law. Presumption of transfer of exclusive exploitation rights from the author to the producer when entering into an agreement for audiovisual works (without the need for the contract to specify this transfer, except where anything else is agreed). This does not apply to the author of a musical composition with or without words (Article L132-24). The producer of a phonogram is presumed to have the exploitation rights to the work. The economic performance rights of the artists/interpreters are normally reversed to the producer.
HR	Yes <ul style="list-style-type: none"> Rules on presumption of authorship and the exercise of copyright where the author is anonymous are enshrined in Article 12 of the ZAPSP (different rules apply for published works and for unpublished but disclosed works). Presumptions for audiovisual works are listed in Articles 116 	Yes <ul style="list-style-type: none"> Publishing contract – it shall be presumed that the publisher has the exclusive right to publish such a work (Article 56(1) and (2) ZAPSP). Contract on audiovisual production - the film producer acquires all economic rights of the authors to the extent necessary to fulfil the purpose of the contract. Notwithstanding this provision, the authors of

Country	Presumption of authorship and/or right ownership	Presumptions of transfer of rights
	<p>and 117 ZAPSP.</p> <ul style="list-style-type: none"> A performer shall be deemed a person whose name, pseudonym, artist's mark or code is regularly indicated on the copies of a performance or at its disclosure, until proven to the contrary (Article 124(3) ZAPSP). The producer of a phonogram is the person whose name or company name is regularly indicated as the holder of the rights of phonogram producers on the phonogram, until proven to the contrary (Article 132(2) ZAPSP). 	<p>contributions shall retain the right to individually use their contributions to an audiovisual work, provided that the rights of film producers are not prejudiced thereby (Article 118(2) and (4) ZAPSP).</p> <ul style="list-style-type: none"> Computer programme (but not other copyright works) - if a computer programme is created by an employee in the execution of their duties or following the instructions given by their employer, the employer shall be exclusively entitled to exercise all economic rights in the programme so created, unless otherwise provided by a contract (Article 108 ZAPSP). A different rule however applies in case another copyright work is created in the course of employment (Article 76 ZAPSP) and in case of a performance given in the course of an employment (Article 130(2) ZAPSP).
HU	<p>Yes</p> <ul style="list-style-type: none"> General presumption of authorship applies according to Section 94/B(1) Copyright Act, subsequent paragraphs foresee a hierarchy of presumptions (e.g. paragraph (2) foresees that the author is the person who had the work registered under their own name in the voluntary register of works qualifying as a publicly certified register held by the HIPO, and proves it with a public deed; paragraph (3) foresees that the person who holds a private deed of full probative value, issued by a CMO shall be regarded as the author; and if this cannot apply, that the person who first published the work shall be regarded as the author). Pursuant to Chapter IX of the Copyright Act on cinematographic creations and other audiovisual works, the authors of the literary and musical works created for a film, the director of the film and all other persons creatively contributing to the creation of the entire film shall qualify as authors of the cinematographic creation. 	<p>Yes</p> <ul style="list-style-type: none"> For cinematographic creations and other audiovisual works, except for the composer of a musical work with or without lyrics, the rights shall be transferred to the producer (with the exception of certain rights that the director can exercise) based on Chapter IX of the Copyright Act on cinematographic creations and other audiovisual works. Regarding adaptations for screen, the same chapter foresees that the author, except for the composer of a musical work with or without lyrics, shall transfer the right to use the cinematographic creation and licence its use to the producer. The transfer of the right to use shall not extend to certain economic rights regulated in the Copyright Act. The employer, as the legal successor of the author, shall acquire the economic rights upon delivery of the work, if the creation of the work is the duty of the author under their contract of employment (Section 30). A similar rule applies where software (Section 58(4)) or a database is created by an employee (Section 61(3)).
IE	<p>Yes</p> <ul style="list-style-type: none"> A general presumption of authorship applies in case the name appears on copies of the work, or a copy of a work bears or incorporates a statement, label or other mark 	<p>Yes</p> <ul style="list-style-type: none"> Presumption of transfer of rental right in case of film production agreement – where an agreement is concluded by (prospective) author and film producer, unless the agreement states otherwise, it is

Country	Presumption of authorship and/or right ownership	Presumptions of transfer of rights
	<p>indicating that a person is the author of the work or the owner or exclusive licensee of the copyright (Section 139(4) of the Copyright and Related Rights Act).</p> <ul style="list-style-type: none"> In addition to presumption, the person shall be presumed not to have made the work in the course of employment (Section 139(5)). The presumption applies to joint authorship, in relation to each person (Section 139(6)). If there is no indication of author and there is a name purporting to be the name of the person who first lawfully made such work available, this person shall be presumed to have been the author of the work or the owner or exclusive licensee of the copyright (Section 139(7)). For audiovisual works, the national legislation contains a closed list, which considers authors of film to be the producer and the principal director. 	<p>presumed that rental rights are transferred to the film producer (Section 124).</p> <ul style="list-style-type: none"> The same applies to performers and the presumption about the transfer of rental rights to the film producer with regard to their performance (Section 297).
IS	<p>Yes</p> <ul style="list-style-type: none"> General presumption of authorship (Article 8 Copyright Act), including to a producer of a cinematographic work. In cases where major or continuous performance of works or extensive reproduction or rental has taken place, it shall be assumed that the works performed, rented or reproduced are protected by copyright laws unless evidence is produced to the contrary. Should any type of work be published without indication of the name of the author as referred to in the first paragraph, the publisher shall act on their behalf until such time as their name is indicated in a new publication or by notification to the Minister of Education, Science and Culture. Employees developing computer programmes as part of their duties in an employment relationship are not the 	<p>Yes</p> <ul style="list-style-type: none"> Transfer of rights exists in relation to cinematography, except for the score, film script, dialogue or the work of the director (Article 41).

Country	Presumption of authorship and/or right ownership	Presumptions of transfer of rights
	rightholders unless specially negotiated (Article 42.b).	
IT	Yes <ul style="list-style-type: none"> • Presumption of authorship and/or rights ownership exists based on Article 6 (general), 7 (collective work) and 8 (in case of acting, performance, representation or broadcasting of the work) of Law 633/1941 (Protection of copyright and other rights related to its exercise). • Pursuant to Article 44 Law 633/1941, the co-authors of the cinematographic work are considered to be the author of the subject, the author of the screenplay, the author of the music and the artistic director. 	Yes <ul style="list-style-type: none"> • The rights of economic use of a collective work are attributed <i>ex lege</i> to the publisher (Article 38), and in case of cinematographic work, to the person who has organised the production of the work (Articles 45 and 46). • According to Article 12-bis, the employer shall be exclusively entitled to exercise all economic rights in the computer programme or database created by an employee in the execution of their duties or following the instructions given by their employer. A similar rule exists for work of industrial design (Article 12-ter).
LI	Yes <ul style="list-style-type: none"> • Presumption of authorship is regulated in Article 8 Copyright Law. • When the author cannot be identified because the work is under a pseudonym or label, the publisher can exercise copyright. 	Yes <ul style="list-style-type: none"> • If a rightholder concludes a contract with a film producer, it is presumed that the rightholder has surrendered its rental right under this contract (Article 20). • The same provision exists for performers/artists concluding a contract with a film producer (Article 37(4)).
LT	Yes <ul style="list-style-type: none"> • Such presumptions exist for authors (Article 6(2) ATGTI) and related rightholders such as performers, phonogram producers, broadcasting organisations and producers of audiovisual works (Article 51(3) ATGTI). • Author rights to an audiovisual work belong to the director, author of the screenplay, author of the dialogue, art director, cameraman and composer of music (with or without lyrics), specifically created for use in this audiovisual work. Authors of the pre-existing works included in, or adapted for, the audiovisual work shall enjoy copyright in their works (Article 11(1) ATGTI). • Related rights to a phonogram are vested initially in the phonogram producer (Article 2(9) ATGTI). 	Yes <ul style="list-style-type: none"> • Authors of an audiovisual work (except for authors of musical works specifically created for an audiovisual work or included in an audiovisual work) who have entered into an agreement with a producer for the creation (production) of an audiovisual work, as well as authors of the pre-existing works who have given their authorisation to adapt or incorporate their works in an audiovisual work, shall transfer their economic rights as well as the right to subtitle or dub the text of the audiovisual work to the producer (Article 11(2) ATGTI). • A similar presumption exists with regard to performers and audiovisual work producers (Article 53(4) ATGTI). • Presumptions with regard to works created by the employee (Article 9(2)) and with regard to the computer programmes created by the employee (Article 10(2)).

Country	Presumption of authorship and/or right ownership	Presumptions of transfer of rights
LU	Yes <ul style="list-style-type: none"> • Presumption of authorship applies (for authors as well as for performers and producers - Article 43 Framework Copyrights Law). • The publisher of an anonymous or pseudonymous work is presumed to represent the author against third parties (Article 7). • By default, according to Article 21 of the Framework Copyrights Law, the authors of an audiovisual work are the producer and the principal director. This list is not exhaustive and other authors (such as the author of the music used in an audiovisual work, the author of the dubbing, the author of subtitles, etc.) may have rights over an audiovisual work. 	Yes <ul style="list-style-type: none"> • Authors and other creators of the audiovisual work are presumed to assign to the producer all of their respective rights related to the work (including the exploitation rights and the subtitling and dubbing rights). This presumption does not apply to the authors of musical compositions, and to the adaptation, arrangement or use of pre-existing work (Article 24 of the Framework copyrights law). Similar rule applies for performers (Article 51(1) Framework Copyrights Law). • Artists forming a group are presumed to have transferred to the directors or managers of the group, the power to authorise on their behalf the representation of live shows in which they participate, and the reproduction rights thereof (Article 50 Framework Copyrights Law). • The performers are presumed to assign to the phonogram producer and to the producer of the first fixation of a film their rental right provided that a contract between the producer and the performer provides for a fair compensation for such right (Article 52 Framework Copyrights Law).
LV	Yes <ul style="list-style-type: none"> • Pursuant to Article 8 Copyright Law, the person whose name or generally recognised pseudonym appears on a work communicated to the public or a published or a reproduced work shall be considered to be the author of the work, if it is not proven otherwise. If a work is communicated to the public or published without reference to the author, the editor shall act in the name and interests of the author, but if the editor is also not identified, then the publisher or the authorised representative of the author. This condition shall be in effect until the author of a work reveals their identity and claims authorship. • The authors of an audiovisual work shall be the director, the author of the script, the author of the dialogue, the author of a musical work (with or without lyrics) created for the audiovisual work, as well as other persons who, as a result of their creative activity, have contributed to the making of the work. 	Yes <ul style="list-style-type: none"> • Latvian law does not provide for any presumptions in the relationship between performer, author and producer. • If a computer programme has been created by an employee while performing a work assignment, all economic rights to the computer programme so created shall belong to the employer (Article 12 of the Copyright Law).

Country	Presumption of authorship and/or right ownership	Presumptions of transfer of rights
MT	Yes <ul style="list-style-type: none"> • Presumption of authorship exists. • In the case of an anonymous or pseudonymous work, the publisher whose name is indicated in the work shall be deemed to be the legal representative of the anonymous or pseudonymous author, unless the contrary is proven. 	Yes <ul style="list-style-type: none"> • If a contract is concluded between a performer and a producer of audiovisual works concerning the production of an audiovisual work, the performer shall be deemed to have assigned to the producer their exclusive rights on the fixation of their performance (first provision of Article 24(4) Copyright Act). • If a contract is concluded between the author of an audiovisual work or the authors of the underlying works used as the basis for the audiovisual work and the producer of the audiovisual work concerning the production of that audiovisual work, such authors shall be deemed to have assigned to the producer the exclusive rights to their copyright works (second provision of Article 24(4) of the Copyright Act).
NL	Yes <ul style="list-style-type: none"> • General presumption of authorship (Article 4 Copyright Act) and the presumptions applies for the name of the publisher or printer mentioned on the print of a work (Article 9 Copyright Act). • Presumption of related rights (Article 1a Related Rights Act). • In case of works performed under the direction and supervision of another person (Article 6 Copyright Act), in an employment relationship (Articles 7 Copyright Act), or when it concerns works made available by a public institution, association, non-profit foundation or firm without mentioning the name of any natural person (Article 8 Copyright Act), the supervisor, employer or the other entities mentioned are presumed to be the author of a particular work. 	Yes <ul style="list-style-type: none"> • The producer of film works receives the transferrable rights, except for those related to the musical works contained in the film work (Article 45d Copyright Act).
NO	Yes <ul style="list-style-type: none"> • Presumption of authorship applies. • For joint work (as per Article 8, Chapter I Copyright Act), where it is the result of creative, intellectual efforts of 	Yes <ul style="list-style-type: none"> • As per Article 20, Chapter II, a producer of sound recordings and films has the exclusive right to dispose of the recording by producing a permanent or temporary copy and make it available to the public. Where an audio recording or performance is being transmitted to the public,

Country	Presumption of authorship and/or right ownership	Presumptions of transfer of rights
	different authors, copyright is given jointly.	both the producer and the performers are entitled to remuneration.
PL	Yes <ul style="list-style-type: none"> • A general presumption of authorship resulting from Article 8(2) Copyright Act. • Presumption for producers and publishers (Article 15 and Article 94(3) Copyright Act). • Rights in phonograms have been vested with producers (Article 94(4) Act). • Presumptions of holders of related rights applies to performances, phonograms, videograms, broadcasts, first editions and scientific and critical editions (Article 101). • Co-authors of an audiovisual work are persons who have made a creative contribution to the creation of the work, in particular: the director, director of photography, author of an adaptation of a literary work, author of a musical work with or without words created for an audiovisual work, and the author of a screenplay (Article 69 Copyright Act). 	Yes <ul style="list-style-type: none"> • The right to a title of a collective work (Article 11 Copyright Act). • Presumption that the producer of an audiovisual work acquires exclusive right to use such works in the audiovisual work as a whole. The presumption only covers exploitation in the audiovisual work as such and does not extend to other uses of the work in question (Article 70(1) Copyright Act). Equivalent rule for performances is provided in Article 87. • An implied transfer of rights happens if an employee creates a work in the course of employment duties, copyright in this work will be usually acquired by the employer (Article 12).
PT	Yes <ul style="list-style-type: none"> • A presumption of authorship exists (Article 27(2) Portuguese Copyright Code). The author may be identified by name, pseudonym, or in another usual manner (Article 28 Portuguese Copyright Code). • Where the name of the author of a commissioned work does not appear on the work in the usual manner, there is a presumption that copyright is vested in the commissioner of the work (Article 14 (3) Portuguese Copyright Code). • Article 184 of the Portuguese Copyright Code vests the phonogram producers with certain related rights in phonograms (reproduction, distribution, communication to the public, making available). • Article 22 of the Portuguese Copyright Code designates as 	Yes <ul style="list-style-type: none"> • Where an author authorises the cinematographic production, this implies, unless agreed otherwise, that the producer may produce, distribute and show the film in cinema theatres, as well as subtitle or dub the relevant texts (where the film is not Portuguese and in the absence of an express agreement to the contrary). Where the producer is a broadcaster, it may also broadcast the film through its own channels. Otherwise, the use of a cinematographic work requires the authorisation of the relevant authors (Articles 68(4), 125(2), 127 (3)-(5), 129 Portuguese Copyright Code). • Where a performer authorises the fixation of their performances for broadcasting purposes, to a producer of cinematographic works or to a broadcasting organisation, their rights of broadcasting and communication to the public are presumed to be transferred to those entities, with a non-waivable, single and equitable remuneration being paid to the performer, except for purposes of making available to the

Country	Presumption of authorship and/or right ownership	Presumptions of transfer of rights
	co-authors of a cinematographic work: the director, the author of the screenplay, the author of the dialogue and the composer of the soundtrack, as well as the authors of the adaptation and dialogue where the original work is not expressly created for cinematographic purposes.	public (Article 178(2) Portuguese Copyright Code). <ul style="list-style-type: none"> In case of contracts concerning film production, the performers are presumed, in the absence of any agreement to the contrary, to have transferred their rental right to the producer, without prejudice to their right to obtain an equitable remuneration for that rental (Article 8 Decree-Law 332/97of 27 November).
RO	Yes <ul style="list-style-type: none"> Presumption of authorship for work that has been disclosed to the public (Article 4(1) Copyright Law). Presumption of the rights ownership (Article 204(5) Copyright Law) - until proven otherwise, it shall be presumed that the exclusive rights signalled, according to the usage, exist and belong to the persons who have used them. Article 67 Copyright Law stipulates that the authors of an audiovisual work are the director or maker, the author of the adaptation, the author of the screenplay, the author of the dialogue, the author of the musical score specially composed for the audiovisual work, and the author of the graphic material of animated works or animated sequences, where these represent a substantial part of the work. 	Yes <ul style="list-style-type: none"> In the case of transfer of the right of reproduction of a work, it is presumed that the right of distribution of copies of that work has also been assigned, with the exception of the right of importation (Article 41 Copyright Law). It is presumed that authors of the audiovisual work assign to the producer, with the exception of the authors of specially composed music, the exclusive rights with respect to the use of the work as a whole, as well as the right to authorise dubbing and subtitling, in exchange of an equitable remuneration (Article 71(1) Copyright Law). A similar rule applies to performers taking part in the making of an audiovisual work (Article 101 Copyright Law). The economic rights in a photographic work created under an individual employment contract or commission contract are presumed to belong to the employer or commissioning party for a period of three years, unless otherwise provided in the contract (Article 87(2) Copyright Law).
SE	Yes <ul style="list-style-type: none"> Presumption of authorship exists (Article 7 Swedish Copyright Act). Where there is a name, pseudonym or signature on the copy, the person who is indicated there is presumed to be the author. Presumptions for holders of related rights also exist - visual arts (Article 45), sound recordings (Article 46), radio and television broadcasts (Article 48), catalogues (Article 49), and photographs (Article 49a(4)). The producer of the sound recording is presumed to be the owner of the sound recording (neighbouring right) (Article 	Yes <ul style="list-style-type: none"> Although such assumptions are not directly expressed in the Swedish Copyright Act, they exist in practice. In the case of a movie, the director, scriptwriter, choreographer, composer, etc. can all be copyright holders together – but the actors also have rights to ‘their’ part of the work. To ensure that distribution is possible, ECL is increasingly important. The most extensive of these deals is that between <i>Teaterförbundet</i> (for actors and performers) and <i>Medieföretagen</i> (the broadcasting entities). A separate deal is in place between <i>Teaterförbundet</i> and public broadcasters.

Country	Presumption of authorship and/or right ownership	Presumptions of transfer of rights
	46 Swedish Copyright Act).	
SI	Yes <ul style="list-style-type: none"> • General presumption of authorship applies (Article 11 ZASP). A hierarchy of presumptions exists, meaning that if the author cannot be determined based on the first presumption, the person who issued the work shall be deemed to be entitled to exercise copyright. If such a person is not listed, then the person who published the work is entitled. • Presumption of exclusive rights exist if a work has a sign '©' (Article 175 ZASP) or 'P' . 	Yes <ul style="list-style-type: none"> • Collective copyright work - material copyright and other rights of authors in a collective work shall be deemed to be exclusively and unrestrictedly transferred to the client, unless otherwise stipulated in the contract (Article 100(3) ZASP). • The author in case of audiovisual adaptation contract is deemed to have exclusively and unrestrictedly transferred to the film producer (i) the right to process and include the original work in the audiovisual work, (ii) the economic rights and (iii) other author's rights on this audiovisual work, its translation, its audiovisual adaptations or on photographs taken in connection with the production of the audiovisual work, unless otherwise specified in the contract (Article 104(2) ZASP). • Several presumptions refer to film producers in case of co-authors (Article 107(2) ZASP), authors of the contributions (Article 107(3) ZASP), and performers (Article 124(1) ZASP). • In case of copyright work from an employment relationship, the economic rights of the author shall be deemed to have been exclusively transferred to the employer for 10 years, unless the contract provides otherwise (Article 101(1) ZASP). Specific rules exist for computer programmes (Article 112 ZASP) and database manufacturers (Article 141.e ZASP).
SK	Yes <ul style="list-style-type: none"> • Presumption of authorship exists (Article 13(2) Copyright Act). • A specific presumption exists regarding authorship of audiovisual work (Article 83(1) and (2)), if a work is listed in the International Film Register. • Article 105 ZASP lists person who are considered co-authors of an audiovisual work. 	Yes <ul style="list-style-type: none"> • If certain conditions are met, a rebuttable presumption that the economic rights of authors of audiovisual works are to be executed by the producer of the original of the audiovisual work (Section 86(1) Copyright Act) applies.
UK	Yes	Yes

Country	Presumption of authorship and/or right ownership	Presumptions of transfer of rights
	<ul style="list-style-type: none"> • Presumption of authorship exists pursuant to the Copyright, Designs and Patents Act 1988. 	<ul style="list-style-type: none"> • Presumption of a transfer of rental rights from an author to a film producer where they have an agreement relating to film production, unless the agreement provides the contrary. • For phonograms, it is presumed that the person named on the label at the time of issue to the public as the owner of the copyright is the owner of the copyright. In general, the producer is the author of a sound recording.

Table 17: Rules on the right to put an end to an orphan work status

Country	Right to put an end to the orphan works status by a rightholder	Procedure to put an end to the orphan works status by a rightholder
AT	Yes Rightholder has a right to put an end to the orphan works status.	No Austrian law does not provide rules for the procedure that needs to be followed by rightholders in this case.
BE	Yes Rightholder has a right to put an end to the orphan works status.	No Belgian law does not provide rules for the procedure that needs to be followed by rightholders in this case.
BG	Yes Rightholder in a work or phonogram considered to be an orphan work has, at any time, the possibility of putting an end to the orphan work status insofar as their rights are concerned. This provision also applies to cases where the beneficiaries use a work or phonogram of which one or more of the rightholders are not identified or not located, if they are authorised to carry out the acts of reproduction and of making available to the public by those rightholders that have been identified and located.	No Bulgarian law does not provide rules for the procedure that needs to be followed by rightholders in this case.
CY	Yes Rightholder of a work or phonogram considered to be an orphan work has, at any time, the possibility of putting an end to the orphan work status insofar as their rights are concerned. This rule applies if the work is attributed to more than one rightholder as well.	No The Cypriot Law on Copyright does not provide for any other details on how this will be achieved.
CZ	Yes The rightholder may terminate the orphan status by notifying the beneficiary of the orphan work or, if the statutory exemption has not yet taken place, by notifying the collective administrator who maintains the list of orphan works. Of course, the status of an orphan work may also expire if the conditions for obtaining the status of an orphan work cease to exist, for example, the rightholder is found, other than by notification by the rightholder themselves.	No Czech law does not provide rules for the procedure that needs to be followed by rightholders in this case.
DE	Yes A rightholder does not need to become active. Where a rightholder of a work is subsequently established or traced,	No German law does not provide rules for the procedure that needs to be followed by rightholders in this case.

Country	Right to put an end to the orphan works status by a rightholder	Procedure to put an end to the orphan works status by a rightholder
	the beneficiary must cease the acts of use without delay.	
DK	Yes If a rightholder contacts the beneficiary, the status of an orphan work ceases to exist.	No Danish law does not provide rules for the procedure that needs to be followed by rightholders in this case.
EE	Yes A rightholder has a right to put an end to the orphan works status.	Yes Rightholders of orphan works may at any time address the institution that deemed the work or phonogram an orphan work and claim invalidation of the orphan work status to the extent of their copyright or related rights. For the purpose of partial or full invalidation of orphan work status, the rightholders shall provide the institution that deemed the work or phonogram an orphan work with sufficient evidence to show the existence and extent of their copyright or related rights. If the holding of copyright or related rights in a work or phonogram considered an orphan work has been confirmed on the basis of the evidence submitted, the institution that deemed the work or phonogram an orphan work shall immediately forward the information regarding partial or full invalidation of the orphan work status to the Ministry of Justice. The Ministry of Justice shall immediately forward the information regarding partial or full invalidation of the orphan work status to the EUIPO database. The Ministry of Justice shall gather the information received in a calendar year and forward it to the committee established by 15 January of the subsequent calendar year. A committee consisting of representatives of organisations representing authors, performers, producers of phonograms and producers of audiovisual works, representatives of the Ministry of Culture and of the Ministry of Justice shall be established to determine the amount of the remuneration payable to the author or producer of a phonogram.
EL	Yes A rightholder of orphan works has the right to put an end to the orphan work status of the work in so far as their rights are concerned and ask for the end of use of the work by the beneficiary of orphan works.	Yes The rightholder can claim ownership of their work through a petition to the beneficiary of the orphan works, along with evidence that will establish them as a rightholder for this specific orphan work. The rightholder has 20 working days, calculated from the day following the date of the application, to make a decision and characterise the work as 'non-orphan' or reject the application. If the beneficiary of orphan works does not decide on the application within the abovementioned period or if, despite having approved the application, continues to make use of the work, then the law provides protection to the rightholder. However, Greek law does not provide rules for the procedure

Country	Right to put an end to the orphan works status by a rightholder	Procedure to put an end to the orphan works status by a rightholder
		that needs to be followed by rightholders in that case.
ES	Yes The holders of intellectual property rights to a work considered an orphan work may request the end of that condition at any time before the national competent authority or the beneficiary entity, in what refers to their rights, presenting proof enough that they hold such ownership.	Yes If the request has been addressed to the national competent authority, it must immediately notify the beneficiary entity of the end of the orphan status. The beneficiary entity must abstain in any case, from the moment of notification of the request of the rights holders or of the communication of the authority, of any act of exploitation of the work. The beneficiary entity shall immediately notify the EUIPO Orphan Works Database of a change in the status of the work, in order to prevent any use of the work from that moment. The national competent authority will proceed to validate said change in the EUIPO database. The determination of the ownership of the intellectual property rights over the work will be carried out, where appropriate, in accordance with the provisions of the revised text of the Intellectual Property Law.
FI	Yes A rightholder has a right to put an end to the orphan works status.	Yes An author of an orphan work may inform an organisation using the orphan work that they are the author of the work and provide their contact information. Such notification may also be made by the author's representative. The organisation communicates the information to the EUIPO, and once the information on the author has been entered in the database of the Office, the work ceases to be an orphan work in respect of the identified author.
FR	Yes A rightholder who was not identified at first during the diligent research may make themselves known at any time, notwithstanding any contrary clause. In this case, the beneficiary may no longer exploit the work without the agreement of the owner of the rights and must pay them fair compensation for the prejudice they suffered as a result of such utilisation.	Yes The rightholders shall contact the beneficiary organisation by registered letter or by email with acknowledgement of receipt. The issue of the proof of the copyright or related rights is organised by a system of presumption established in several provisions of the IP Code and by case-law. In support of their application, the rightholder shall produce a copy of an identity document and a declaration of honour attesting to their status. Any assignees shall also send a notarised statement attesting to their status. The other rightholders shall produce any document proving their rights, in addition to a copy of an identity document.
HR	Yes The rightholders have a right to put an end to the orphan work status. The author or the co-author of an orphan work may at any time put an end to the application of the mentioned provisions in relation to	No Croatian law does not specify any particular procedure for the rightholder to make themselves known, the common law of intellectual property thus applies.

Country	Right to put an end to the orphan works status by a rightholder	Procedure to put an end to the orphan works status by a rightholder
	their rights.	
HU	Yes The rightholder of the work or subject matter considered to be an orphan work shall be entitled to end, regarding their own rights, the orphan status of the work or subject matter at any time and to assert their rights in relation to the use of the work.	No Hungarian law does not provide rules for the procedure that needs to be followed by rightholders in this case.
IE	Yes A rightholder of a work that is considered an orphan work may, at any time, put an end to the orphan work status of the relevant work insofar as their rights are concerned.	No Rightholders can search the database of orphan works, contact the organisations using the works, and put an end to their orphan works status. However, Irish law does not provide rules for the procedure that needs to be followed by rightholders in this case.
IS	Yes A rightholder can put an end to the orphan works status. If a rightholder who has not been previously found addresses a beneficiary using an orphan work, the work in question will no longer be considered an orphan work and its use is no longer permitted without the authorisation of the rightholder.	No The organisation shall report the changed status of the work to the relevant authority. However, Icelandic law does not provide rules for the procedure that needs to be followed by rightholders in this case.
IT	Yes The rightholders may apply to terminate the orphan status in relation to the rights to which they are entitled by claiming ownership from the beneficiaries.	No In the event of a dispute over the ownership of the rights, the mandatory attempt at conciliation provided for in the law shall apply. The Ministry of Cultural Heritage and Activities and Tourism shall promptly notify the EUIPO of any change in orphan status. However, Italian law does not provide rules for the procedure that needs to be followed by rightholders in this case.
LI	Yes If a rightholder is later identified or located, the beneficiary must stop using the works as soon as it becomes aware thereof.	No If a rightholder is later identified or located, the beneficiary must stop using the works as soon as it becomes aware thereof. No further details about the procedure are set in the law. In that case, the rightholder retrieves and can continue to exercise their copyright. The competent authority is the Office of National Economy (<i>Amt für Volkswirtschaft</i>) of the Ministry for Infrastructure, Economy and Sport. However, the laws of Liechtenstein do not provide rules for the procedure that needs to be followed by rightholders in this case.
LT	Yes The orphan work status may, at any time, be put to an end at the	Yes The rightholder shall submit to the beneficiary a free-format request to put the orphan work

Country	Right to put an end to the orphan works status by a rightholder	Procedure to put an end to the orphan works status by a rightholder
	initiative of the rightholder.	status to an end, where such status is related to copyright and/or related rights. The request shall be accompanied by the documents proving the entitlement to copyright and/or related rights in the orphan work (copyright agreements for the commissioning of a work, contracts on transfer or assignment of copyright or related rights, publishing agreements, certificates of the right of inheritance of copyright or related rights, certificates of collective administration associations and other documents containing information about the management of copyright or related rights). Having evaluated the request and the documents submitted by the rightholders proving the entitlement to copyright and/or related rights in the work or phonogram, and having reached the conclusion to put an end to the orphan work status, the beneficiaries shall furnish the competent national authority with such information to be recorded. The users of the orphan works shall retain copies of the documents submitted by the rightholders, on the basis of which the conclusion has been reached to put an end to the orphan work status, until the expiration of the duration of copyright and/or related rights in the said works or phonograms.
LU	Yes A rightholder has a right to put an end to the orphan works status.	No The Orphan Work Law does not specify any particular procedure for the rightholder to make themselves known, the common law of intellectual property thus applies.
LV	Yes A rightholder has a right to put an end to the orphan works status. If an entity that carried out a diligent search for rightholders no longer exists, the rightholders who could not be identified or found after diligent search and whose works or related rights objects have been recognised as orphan works or made equivalent thereto, have the right to request that the Latvian National Library terminates the status of an orphan work in relation to the specific work or related rights object.	No The rightholders are entitled to receive fair compensation for the use of the work or related rights object from an entity which used the respective work or related rights object. However, Latvian law does not provide rules for the procedure that needs to be followed by rightholders in this case.
MT	Yes A rightholder of a work or phonogram considered an orphan work may at any time put an end to the orphan work status, only insofar as their rights are concerned.	No No further details are provided as to the procedure to be followed to end the orphan work status.
NL	Yes	No

Country	Right to put an end to the orphan works status by a rightholder	Procedure to put an end to the orphan works status by a rightholder
	A rightholder has a right to put an end to the orphan works status.	Dutch law does not provide rules for the procedure that needs to be followed by rightholders in this case.
NO	Yes The work's status as an orphan work ceases at the time when a rightholder makes themselves known to one of the beneficiaries. If the work is in use as an orphan work, this use must cease.	No Norwegian law does not provide rules for the procedure that needs to be followed by rightholders in such a case. A change in its status as an orphan work shall be reported by the notified institution to the National Library, and from there to EUIPO. No further information is reported on the National Library's site on orphan works.
PL	Yes A rightholder of a work found to be orphan may request the beneficiary that entered the work in the database to declare the termination of the status of an orphan work to the extent to which that rightholder demonstrates their right to this work.	Yes If the request of a rightholder who has demonstrated their right to the orphan work is not taken into account within a month of its submission, the admissibility of the use of that orphan work by the beneficiary to which the request was made ceases on the date of expiry of the one-month period. If the beneficiary that entered the work in the database does not exist and there is no legal successor, the rightholder may request that the status of an orphan work is terminated (to the extent that they demonstrate their right to that work) by the Minister for Culture and Protection of National Heritage. Refusal to declare the status of an orphan work terminated is communicated by way of an administrative decision. Polish law does not provide any further rules for the procedure that needs to be followed by rightholders in this case.
PT	Yes A rightholder not previously identified or located may at any time claim their rights over the work or other protected material, terminating the status of orphan work, without prejudice to the possibility of maintaining the use of those works, if the authorisation of the rightholder is verified.	No Portuguese law does not provide rules for the procedure that needs to be followed by rightholders in this case.
RO	Yes The rightholder of a work or phonogram considered to be an orphan work has, at any time, the possibility to terminate the status of an orphan work.	No The national legislation does not provide further details on the procedure to be followed in this case.
SE	Yes If a rightholder makes themselves known, a work shall no longer be considered an orphan work.	No Swedish law does not provide rules for the procedure that needs to be followed by rightholders in this case.
SI	Yes Beneficiaries shall cease to use an	No Slovene law does not provide rules for the

Country	Right to put an end to the orphan works status by a rightholder	Procedure to put an end to the orphan works status by a rightholder
	orphan work as soon as they become aware that an author of such a work has been found or identified.	procedure that needs to be followed by rightholders in this case.
SK	Yes A rightholder may at any time put an end to the status of the orphan work by notification sent to Slovak National Library in writing, which informs the person using the orphan work, without undue delay.	No Slovak law does not provide rules for the procedure that needs to be followed by rightholders in this case.
UK	Yes A rightholder may put an end to the orphan work status of a relevant work by providing evidence of their ownership of the rights to the EUIPO or to the relevant body that carried out the diligent search and established that the relevant work was an orphan work.	No UK law does not provide rules for the procedure that needs to be followed by rightholders in this case.

Table 18: Rules on fair compensation

Country	Right to receive fair compensation	Rules on the calculation of the amount of fair compensation	Rules on the duration of the right to receive fair compensation
AT	Yes At the request of the rightholder, the beneficiary must pay appropriate remuneration for the previous use.	No When determining the amount of the remuneration, it can be assumed that the work has been used in a Member State of the EU or contracting state of the EEA in which the beneficiary using the work is located.	Yes Entitlement to remuneration expires 10 years after the work is used.
BE	Yes Rightholders have a right to compensation after they put an end to the orphan works status.	No The implementing rules on how to calculate and divide this compensation shall be established by a Royal Decree. As of October 2020, however, no such implementing measures were enacted.	No The implementing rules on how to calculate and divide this compensation shall be established by a Royal Decree. As of October 2020, no such implementing measures were enacted.
BG	Yes The rightholders have the right to fair remuneration for the permitted use of the orphan work from beneficiaries with a seat in the territory of	No No average amount of compensation is provided in the national law. Also, there is no relevant case-law or other explanatory documents that would determine the amount.	Yes The remuneration is due for uses made in the five-year period preceding the termination of the status of an orphan work or other object of copyright or related rights.

Country	Right to receive fair compensation	Rules on the calculation of the amount of fair compensation	Rules on the duration of the right to receive fair compensation
	Republic of Bulgaria.		
CY	Yes The beneficiaries of orphan works are obliged to pay fair compensation to rightholders that put an end to the orphan work status of their works or other protected subject matter.	Yes The amount of compensation should be agreed between the organisation and the rightholder and, in the event of a disagreement, the parties shall have recourse to the Copyright and Related Rights Authority of the Cypriot Ministry. There are no other details on the calculation method of fair compensation or on the average amount that has been determined.	No
CZ	Yes The right to use an orphan work is accompanied by the beneficiary's obligation as a user to pay a fee for the use.	Yes In relation to the amount of remuneration, the cited provision outlines the criteria for its determination, namely the purpose and circumstances of the use of the work and the extent of the damage caused to the author by that use.	Yes The maturity of the compensation is associated with the moment of termination of the orphan status. The Ministry of Culture has decided that the compensation will be paid retrospectively after the rightholder has made the request.
DE	Yes The rightholder shall be entitled to payment of equitable remuneration for the use already made of the work by the beneficiary using it.	Yes The relation between 'fair compensation' and 'equitable remuneration', as set out in the German transposing provision, has not been clarified yet. The reasoning in the German law refers to criteria in Recital 18 OWD, which provides 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. The remuneration may therefore at times be almost zero.	No
DK	Yes If the status of an orphan work is terminated, the rightholder is entitled to receive reasonable compensation for the use of their work by the beneficiary.	No No further details on the calculation of remuneration are given.	No

Country	Right to receive fair compensation	Rules on the calculation of the amount of fair compensation	Rules on the duration of the right to receive fair compensation
EE	Yes The rule on fair compensation is provided.	No No average amount is provided. There is no relevant case-law or explanatory articles that would allow determining such amount.	No
EL	Yes	Yes The compensation shall amount to half of the remuneration that is usually or according to law paid for the kind of use that has been made by the beneficiary of orphan works. The determination of that amount is done through an agreement of the two parties (the rightholder and the beneficiary of the orphan works). If the parties do not reach an agreement, then the terms, the period, and the level of compensation shall be determined by the Court of First Instance of Athens by interim measures.	No
ES	Yes The rightholders may request from the corresponding beneficiary equitable compensation for the use that the latter has made of the orphan work.	Yes For the determination of said compensation, the following criteria shall be considered: the actual use made of the orphan work, the non-commercial nature of the use made by the beneficiary entities in order to achieve the objectives related to their mission of public interest, such as promoting the study or dissemination of culture, as well as the possible damage caused to the rightholders. The specific amount of the equitable compensation will be determined by agreement between the rightholder and the beneficiary. In the event that said agreement is not reached, and once this point has been confirmed, the national competent authority, at the request of a party, shall consult the First Section of the Commission on Intellectual Property, and shall determine, on the report issued by it, the amount of equitable compensation.	Yes The rightholders may request equitable compensation from the moment the work acquires the status of an orphan work until the presentation of the request for the end of the condition of orphan work.
FI	Yes The beneficiary needs to pay compensation for the use of the orphan work to a rightholder who has identified themselves or has been identified as the author of the	Yes When determining the amount of the compensation, due account should be paid to the following criteria : the nature and extent of the use of the work, the market value of the work, and the possible harm caused to the rightholder by the use of the work. The information on the beneficiary's use of the orphan work could be obtained by the rightholders through the EUIPO database or, for example,	Yes The preparatory work notes that the determination of the amount of compensation and its payment takes place after the rightholder has contacted the beneficiary which has used the orphan work.

Country	Right to receive fair compensation	Rules on the calculation of the amount of fair compensation	Rules on the duration of the right to receive fair compensation
	work.	by noticing the use themselves. A beneficiary that has carried out a diligent search needs to store the material concerning a work that has turned out to be an orphan work produced in the course of the search and the results of the search until the rightholder of the orphan work identifies themselves or is identified or it is established that the rightholder can be located. Information on the use of an orphan work is stored until the compensation has been paid.	
FR	Yes	Yes Such compensation shall be determined by agreement between the beneficiary and the rightholder. The compensation must therefore be calculated on the basis of the loss actually suffered by the rightholder, taking into account the fact that the use was made on a non-commercial basis and in the public interest. There is no average amount which can be calculated <i>ex ante</i> , but the legislative approach taken by France, as seen in the preparatory works, is to objectify at least the criteria for setting compensation in order to limit the risk of blockages. The amount of compensation shall be calculated by reference to the tariffs or scales of the collecting and distribution societies in the sector concerned (where they exist), without disregarding the very particular nature of the use made of the work. It may take account of agreements or tariffs in force in the professional sectors concerned (where they exist). No average amount is provided. In the absence of agreement, the rightholder may bring the matter before the competent court after the parties have attempted conciliation, where appropriate.	No
HR	Yes A rightholder that puts an end to the orphan work has a right to fair compensation for the use that has been made of their work by the beneficiaries.	Yes The compensation shall be paid by the beneficiary that used such work. The amount of the compensation shall be determined according to the category of orphan works, taking into account the following criteria : the aims of the Republic of Croatia in the field of cultural promotion; the non-commercial nature of the use made by the beneficiaries in order to achieve aims related to their public	Yes Fair compensation shall be paid retroactively for not more than three years , counting from the day of putting an end to the orphan work status. A request for the payment of fair compensation may be filed by the rightholder or the respective CMO

Country	Right to receive fair compensation	Rules on the calculation of the amount of fair compensation	Rules on the duration of the right to receive fair compensation
		interest missions, such as promoting learning and disseminating culture; possible harm incurred by the rightholder. A request for the payment of fair compensation may be filed by the rightholder or the respective CMO authorised by the rightholder for filing such a request. No case-law could be found on the matter of calculation of fair compensation and its average amount.	authorised by the rightholder for filing such a request. A request for the payment of fair compensation shall be subject to the statute of limitations, counted from the day of putting an end to the orphan work status.
HU	Yes If the rightholders put an end to the orphan work status of their works, they shall be entitled to a remuneration for the use of the orphan work by beneficiaries performing their tasks of public interest.	Yes Hungarian law provides for detailed rules on calculation of remuneration. The rules on calculation of compensation are as follows: (a) in case of literary works, HUF 3,000 per author's sheet; (b) in case of poetic works, HUF 10 per line; (c) in case of the editor of literary works qualifying as a collection work, HUF 600 per author's sheet; (d) in case of cinematographic creations and other audiovisual works, HUF 100 per minute; (e) in case of phonograms, HUF 100 per minute; (f) in case of phonograms, cinematographic creations and other audiovisual works produced by the public media service radio and television organisations before 31 December 2002 and contained in their archives, HUF 100 per minute; (g) in case of visual works contained in or being an integral part of the of another literary work, HUF 200 per work. The amount of the remuneration shall be increased by half of the amount of the remuneration due for the first year, after each year of use commenced. If the beneficiaries used the work only for the purposes of one of the permitted uses, the rightholder of the work or subject matter shall be entitled to an amount equal to half of the remuneration as set. If the work or subject matter has several rightholders, the remuneration shall be paid to the rightholders jointly and, in case of doubt, in equal proportions. The fees set in the regulation shall not affect the fees and claims of rightholders in the joint management of copyright and related rights.	No
IE	Yes Where a rightholder puts	Yes Fair compensation shall be paid by the relevant body which used the	No

Country	Right to receive fair compensation	Rules on the calculation of the amount of fair compensation	Rules on the duration of the right to receive fair compensation
	<p>an end to the orphan work status of a relevant work, fair compensation is due to that rightholder for the use that has been made of the orphan work concerned.</p>	<p>work. Where the beneficiary and the rightholder cannot agree an amount of fair compensation due to a rightholder, either party may refer the matter to the national competent authority for determination of the amount of such fair compensation for the use made by the relevant body of the orphan work concerned. The authority shall, when determining the amount of fair compensation, have regard to the use of the orphan work made and make an order as to the amount of fair compensation payable to the rightholder in respect of such use as it considers to be reasonable. When considering the amount, if any, of fair compensation to be paid, the authority shall have regard to the following criteria: the use of the orphan work made by the relevant body, the cultural promotion objectives of the State, the non-commercial nature of the use made by the relevant body in order to achieve aims related to its public interest mission, including promoting learning and disseminating culture, and the possible harm to the rightholder concerned. The legislation does not specify how the compensation should be calculated, but rather sets out the factors that the national competent authority must consider in deciding on the amount of compensation to be paid.</p>	
IS	<p>Yes</p> <p>The right to fair compensation is provided.</p>	<p>No</p> <p>No average amount of compensation is provided. There is no relevant case-law or explanatory articles that would determine the amount.</p>	<p>No</p>
IT	<p>Yes</p> <p>Pursuant to the national law, rightholders terminating the orphan work status shall receive fair compensation.</p>	<p>Yes</p> <p>The measure and methods for determining and paying fair compensation shall be established by means of agreements entered into between the trade associations most representative of the rightholders and the associations of the categories concerned. In entering into such agreements, the parties shall take due account of criteria such as the cultural promotion objectives related to the use made of the work, the non-commercial nature of the use made by the beneficiaries to achieve the objectives related to their public interest mission, such as the promotion of learning and the</p>	<p>No</p>

Country	Right to receive fair compensation	Rules on the calculation of the amount of fair compensation	Rules on the duration of the right to receive fair compensation
		dissemination of culture, and any harm caused to rightholders. The rightholders or the beneficiaries, in the event that there is no agreement or in the event that they do not believe they are adhering to it, may make an attempt at conciliation, in order to determine the extent of fair compensation. In the absence of an agreement, the parties may bring the matter before the competent judicial authority, so that, in accordance with the criteria set, it may determine the extent and method of determining fair compensation. The remuneration shall be payable by the beneficiaries that have used the work or phonogram.	
LI	Yes The rightholder has a right to the payment of appropriate compensation for the use that has been made of the works.	No	No
LT	Yes	Yes Lithuania has put in place detailed rules on the calculation of fair compensation. The rightholders shall submit applications for the payment of such compensation to an institution authorised by the government. A decision of the payment and the amount of compensation shall be taken by that institution with due consideration of the recommended findings of the panel of experts on compensation for the use of orphan works. Compensation for the use of an orphan work must not exceed the amount of 10 base social benefits . Such amount shall be distributed and paid proportionately to the rightholders. Other conditions and procedure for paying compensation for the use of an orphan work shall be laid down by the institution authorised by the government. Compensation for the use of an orphan work shall be paid with the funds provided for such purpose in the Law on the Approval of Financial Indicators of the State Budget and Municipal Budget, where the level of funding required shall be determined by having regard to the decisions concerning the payment and the amount of the compensation	Yes Compensation shall be paid to the rightholders not later than 31 March of the year following that in which the institution authorised by the government, taking into consideration the recommended findings of the panel of experts, took the decision concerning the payment and the amount of the compensation.

Country	Right to receive fair compensation	Rules on the calculation of the amount of fair compensation	Rules on the duration of the right to receive fair compensation
		taken in accordance with the procedure.	
LU	Yes	<p>Yes</p> <p>The compensation is fixed by agreement between the beneficiary and the rightholder, taking into account criteria such as the objectives of cultural promotion of the use of the work, the non-commercial nature of such use and the public interest objectives pursued, the actual damage to rightholders and, where they exist, the agreements or tariffs in force in the professional sectors concerned. No such agreements or tariffs available to the public could be identified, nor case-law on the topic. The Grand-ducal Regulation of 8 January 2007 on fair compensation for public lending provides for an example of the amount which could be determined for compensation of rightholders of a work previously exploited under the orphan works regime. The compensation of rightholders for public lending of their work for a limited time and without direct or indirect economic or commercial advantage to the lending public institution, shall be a flat-rate amount of EUR 2 per registered user during the past calendar year who has borrowed from the public institution at least once during the same period.</p>	No
LV	Yes	<p>Yes</p> <p>Upon determining the amount of the compensation, the following criteria shall be taken into account: (a) the amount and purpose of the use of the work or related rights object; (b) the tasks performed in public interests and significance of the use in the performance of such tasks; (c) the non-commercial nature of the use; (d) the potential harm caused by the use of the work or related rights object to the rightholder. No average amount of compensation is set. There is no relevant case-law or explanatory articles that would determine the amount.</p>	No
MT	Yes	<p>Yes</p> <p>With regard to the level of compensation, it shall be agreed by the beneficiary making use of the work or protected subject matter and the reappearing rightholder after</p>	No

Country	Right to receive fair compensation	Rules on the calculation of the amount of fair compensation	Rules on the duration of the right to receive fair compensation
		having taken into consideration the following criteria /circumstances: (a) the non-commercial nature of the use made by the beneficiary; (b) the public interest mission of the beneficiary using the work or the protected subject matter to which the reappearing rightholder is claiming a right; (c) the possible harm to the reappearing rightholder by the use of the work or the protected subject matter. Where prejudice to the rightholder is minimal, such as in those cases where there has not been economic use of the work or protected subject matter for a reasonable period of time, no compensation shall be due, provided that fair and reasonable compensation is only due if reappearing rightholders are able to demonstrate their right to the work, and the extent of their right. Where the beneficiary making use of the work or protected subject matter and the reappearing rightholder cannot reach an agreement on the level of compensation due by the organisation to the rightholder, then either party can refer the matter to the Copyright Board, which shall determine the amount of fair compensation due to the rightholder and order that such amount be paid after taking the circumstances into consideration.	
NL	Yes A rightholder has a right to put an end to the orphan works status.	No No average amount or rules/guidelines for determining the amount of the compensation are provided by the national implementation legislation or similar rules. No relevant case-law could be found.	No
NO	Yes A found rightholder has the right to 'reasonable compensation' from those who have used the work.	No Further specification is not made as to what level of remuneration is deemed reasonable.	No
PL	Yes The rightholder may demand from the beneficiary that entered the work	Yes The amount of compensation must take into account the following criteria : the nature and extent of use of this work, the amount of revenue obtained from that use, and damage	No

Country	Right to receive fair compensation	Rules on the calculation of the amount of fair compensation	Rules on the duration of the right to receive fair compensation
	in the database, payment of fair compensation for the use of their work as an orphan work.	caused to the rightholder in connection with that use.	
PT	Yes Rightholders who terminate the orphan status are entitled to receive equitable compensation for the use made of their works or protected material, under the responsibility of the relevant entities.	Yes In addition, when establishing equitable compensation, account is taken of certain criteria , such as the non-commercial nature of the use made, the possible gratuity of the act, the public interest objectives involved, namely access to information, education and culture, as well as any unjustified property damage suffered by the rightholders.	No
RO	Yes The rightholders who end the orphan status of their works or phonograms shall benefit from fair compensation.	Yes The equitable compensation is established according to the criteria of the number of copies/reproductions made after the respective work or phonogram. No information has been identified on the average compensation amount.	No
SE	Yes The rightholder is due compensation from those who have used the work.	No If there is a dispute on the level of remuneration, this should be decided by the Stockholm County Court. The responsible institution for the registration of works – the Swedish Intellectual Property Office – states that the common register maintained by EUIPO enables rightholders to make themselves known and demand compensation, but no further information is given on the exact procedure.	No
SI	Yes The rightholders are entitled to claim fair compensation for the previous use of their works by the beneficiaries.	Yes The circumstances/ criteria that need to be taken into consideration when determining the amount of fair compensation are: the costs of carrying out a diligent search; the costs and revenues related to making the orphan work available to the public; the costs of reproduction; the costs of possible damage to rightholders; the public interest in the field of culture, as determined by the Law governing the realisation of the public interest in culture; and the mission of an individual beneficiary,	Yes The rightholder is entitled to fair compensation for the time when the orphan work was in use, for a maximum period of five years .

Country	Right to receive fair compensation	Rules on the calculation of the amount of fair compensation	Rules on the duration of the right to receive fair compensation
		<p>as specified in its founding act. The method of calculating the amount of fair compensation and the method of its payment is determined in the by-law, Government Decree determining the method of calculation and payment of fair compensation for the use of orphan works in the case of the end of orphan work status. This Decree was adopted only three months after the changes have been made to the national copyright law. The Decree sets forth the following detailed rules on the determination of fair compensation: the basis for the calculation of fair compensation for the use of orphan work is the average amount of compensation for reproduction and making available to the public, which was paid in the last five years by a beneficiary who had used such an individual work; if the above rule does not enable the determination of the basis, the average amount of funds paid by the beneficiary in the last five years for services comparable to reproduction and making available to the public shall be taken into account when determining the basis; fair compensation shall be calculated in such a way that the costs incurred in carrying out a diligent search, the costs for technical preparation, digitisation, indexing, cataloguing, preservation, restoration and making available to public, as well as the cost of providing a public service, are deducted from the basis; the rightholder is entitled to fair compensation for the time when the orphan work was in use, but for a maximum period of five years; any beneficiary that makes orphan works available to the public or reproduces them shall adopt a price list determining the amount of costs for technical preparation, digitisation, indexing, cataloguing, preservation, restoration and making orphan works available to the public; the basis for determining the payment of a fair compensation is the rightholder's request for compensation for their work whose orphan status has ceased; on the basis of such a request and on the basis of confirmation of entitlement to fair compensation, the rightholder and the beneficiary who used the orphan work need to conclude an agreement defining the dynamics of payment and</p>	

Country	Right to receive fair compensation	Rules on the calculation of the amount of fair compensation	Rules on the duration of the right to receive fair compensation
		the amount of fair compensation (taking into account rules in the Decree and the beneficiary's price list); if the fair compensation exceeds the amount of funds that the beneficiary has reserved in its financial plan, the parties shall agree to pay the compensation in instalments or to a deferral of payment.	
SK	Yes A rightholder who has put an end to the status of an orphan work has a right to fair compensation from the beneficiary who has used the work.	Yes In determining the amount of fair compensation, regard is to be made to certain conditions/ criteria as similarly regulated in cases of usage of works based on the licensing agreement.	No
UK	Yes	Yes The national legislation provides that a relevant body that is using or has used the orphan work must within a reasonable period provide the rightholder with fair compensation for the use of the work, together with information on how the fair compensation is calculated. If the rightholder and the relevant body cannot agree on the amount of fair compensation, either can apply to the Copyright Tribunal to determine the amount. The legislation does not specify how fair compensation is to be calculated.	No

Table 19: Overview of national orphan works databases

Country	Existence of national databases on orphan works	Is this database operational?
AT	No	N/A
BE	No	N/A
BG	No	N/A
CY	No	N/A
CZ	Yes CMOs have a legal obligation to keep a register of orphan works for which they collectively manage rights, if such protected subject matter is known (Article 100(1)(f) CA). However, these registers only contain information about the works that are managed by a respective CMO and thus known to the CMO from its own activities. Typically, these will concern works for which the CMO was unable to identify the heirs of the	Yes

Country	Existence of national databases on orphan works	Is this database operational?
	deceased author or the rightholders.	
DE	No DE has a database for out-of-commerce works which is maintained by the German Patent and Trademark Office ¹⁴⁰ .	N/A
DK	Yes Koda, the Danish association for music workers (both publishers and creators) maintains two registers of works with either unknown, untraceable or uncertain rightholders, namely the Unidentified works or rightholders – Music ¹⁴¹ and the Unidentified works or rightholders – Audiovisual ¹⁴² .	Yes
EE	No The database of Estonian National Bibliography ¹⁴³ covers only a fraction of orphan works. Digitised orphan works are made available in DIGAR – the Digital Archive of the National Library of Estonia. Non-commercial use of orphan works is permitted for all.	N/A
EL	No	N/A
ES	No Spain has not formally established a national database for orphan works. However, as the Ministry of Culture needs to validate the information registered (by the beneficiaries) with the EUIPO database, it is expected that records regarding diligent searches of orphan works conducted in Spain are kept.	N/A
FI	No	N/A
FR	No No national database is envisaged by the law transposing the OWD nor has been set out in practice. However, a database exists and is operational for out-of-commerce works. The database (RELIRE ¹⁴⁴) is maintained by the <i>Bibliothèque nationale de France</i> and lists all works under collective management and makes it possible, in particular, to identify the works that are the subject of exploitation licences issued by Sofia ¹⁴⁵ .	N/A
HR	No	N/A
HU	No According to the HIPO, having regard to the new unified European regulation, beneficiaries of all Member States shall use the same database, therefore the HIPO does	N/A

¹⁴⁰ Database for out-of-commerce works:

https://www.dpma.de/dpma/wir_ueber_uns/weitere_aufgaben/verwertungsges_urheberrecht/vergriffene_werke/index.html

¹⁴¹ Unidentified works or rightholders – Music: <https://www.koda.dk/music-creators/unidentified-works-or-rightholders>.

¹⁴² Unidentified works or rightholders – Audiovisual: <https://www.koda.dk/music-creators/unidentified-audiovisual-productions>.

¹⁴³ Estonian National Bibliography <http://erb.nlib.ee/?orb>.

¹⁴⁴ The database RELIRE: <https://relire.bnf.fr/registre-gestion-collective>.

¹⁴⁵ Sofia is the body authorised by the Ministry of Culture for the collective management of library lending rights, for remuneration for digital private copying in respect of the text and images of books, and for the digital rights management of unavailable 20th century books.

Country	Existence of national databases on orphan works	Is this database operational?
	not maintain another online reporting platform.	
IE	No	N/A
IS	No	N/A
IT	Yes According to Article 69-quater(15)(a) of Legislative Decree No 163, a national orphan works database has been established. More specifically, two databases are available online: (i) <i>Opere Orfane</i> database ¹⁴⁶ , which lists works that the beneficiaries have registered as orphans in their records; and (ii) <i>Opere Proposte Orfane</i> ¹⁴⁷ , which lists works for which the diligent search of the rightholders has given a negative outcome and are therefore presumed orphan.	The database is currently kept by the Ministry of Cultural Heritage and Activities - General Directorate Libraries and Cultural Institutes (<i>Direzione generale biblioteche e istituti culturali</i>), whose office is located in Rome. No orphan works have so far been listed in this database.
LI	No	N/A
LT	No According to the Ministry of Culture, in the foreseeable future, the National <i>Martynas Mazvydas</i> Library (national competent authority) intends to create a national database of orphan works. It would contain information about orphan works and works whose rightholders have been identified or for which the diligent search has been stopped. The purpose of this database is to avoid the duplication of functions of organisations and save the costs of diligent search.	N/A
LU	No	N/A
LV	No The Latvian National Library keeps an internal database of diligent searches that have been forwarded to EUIPO ¹⁴⁸ .	N/A
MT	No	N/A
NL	No While such a database was previously envisioned by the national competent authority, it is not set-up nor is it being discussed.	N/A
NO	No	N/A
PL	No A national publicly accessible Register of Out-of-Commerce Works exists.	N/A
PT	No Article 26 – A(7) of the Portuguese Copyright Code states that beneficiaries must maintain updated records of their diligent searches and regularly provide the information to the National Library (national competent authority), which is to manage a central database	N/A

¹⁴⁶ <https://opereorfane.beniculturali.it/opere/orfane/>.

¹⁴⁷ *Opere Orfane* database: <https://opereorfane.beniculturali.it/opere/proposte-orfane/>.

¹⁴⁸ According to the Guidelines of Latvian National Library: <https://dom.lndb.lv/data/obj/68137.html>.

Country	Existence of national databases on orphan works	Is this database operational?
	containing that data. Since the law refers to a 'central database' rather than to a 'national database', the National Library decided not to create its own database but to manage the Portuguese elements of the EUIPO database.	
RO	No	N/A
SE	No A national database was handled by the Swedish Intellectual Property Office (PRV), which is also responsible for forwarding the Swedish registrations to EUIPO. However, the database has been discontinued and reference is made only to the common EUIPO database.	N/A
SI	No	N/A
SK	No Only out-of-commerce works are recorded in the publicly available registry of out-of-commerce works, which is administered by the Slovak National Library.	N/A
UK	Yes However, such database only records orphan works for which a license has been issued. The data gathered for each entry is: (i) applicant or licensee name, (ii) applicant or licensee country, (iii) application number, (iv) status of application, (v) title or short description, (vi) full description, (vii) category, (viii) type of work, (ix) museum, gallery, library or archive holding the work, (x) details and date of publication, (xi) uses, (xii) known creators or rightholders, and (xiii) known identifiers.	The database is operational and available online ¹⁴⁹ .

¹⁴⁹ The Orphan Works Register: <https://www.orphanworkslicensing.service.gov.uk/view-register>.

Annex II: Survey report

This annex presents the results of the survey that asked stakeholders about their experience with the OWD and their overall assessment of its performance.

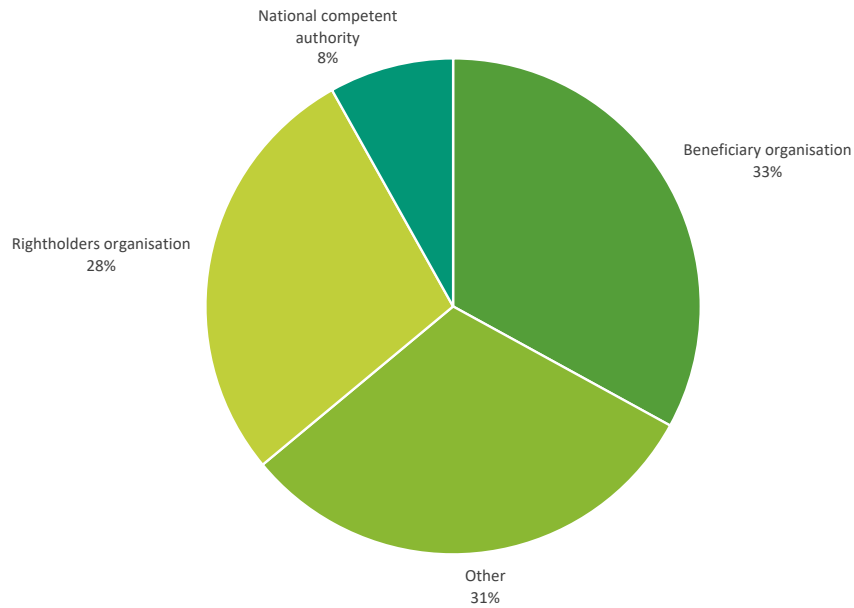
Main findings

- There are no stark country-level differences in the responses provided by stakeholders. This was expected, given that no major differences were observed in the national transposition of the OWD. All countries generally followed the provisions in the OWD, with only minor nuances in transposition and a very limited number of exceptions. Respondents from countries with alternative systems in place (e.g. ECL), frequently stated that they use that alternative system rather than the OWD, with the exception of UK respondents.
- Many stakeholders from different groups pointed to the lack of legal clarity in the orphan works system. This was expected, as the national legal systems only rarely provide for interpretation of the diligent search requirements and the notion of fair compensation. Most of the countries do not provide any explanation of what is considered 'diligent', whether the search can be limited to the necessary sources on the list, or whether the beneficiaries need to consult sources of information beyond those listed.
- Many stakeholders highlighted the overlap between the out-of-commerce provisions of the DSM Directive and the OWD.

The following Sections present the detailed analysis of the survey results, along with the various suggestions from stakeholders to improve the OWD system overall.

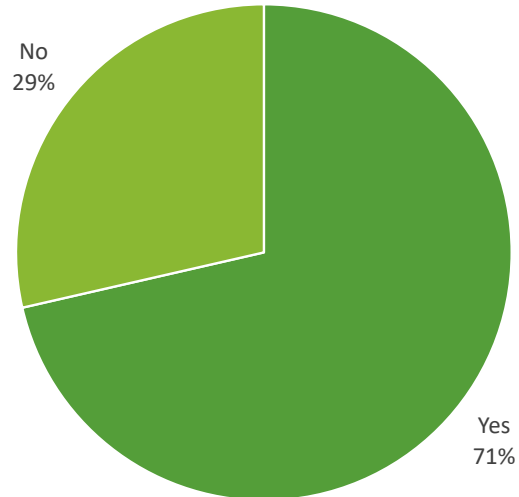
I – About the respondent

1- Are you replying as: (N=87)



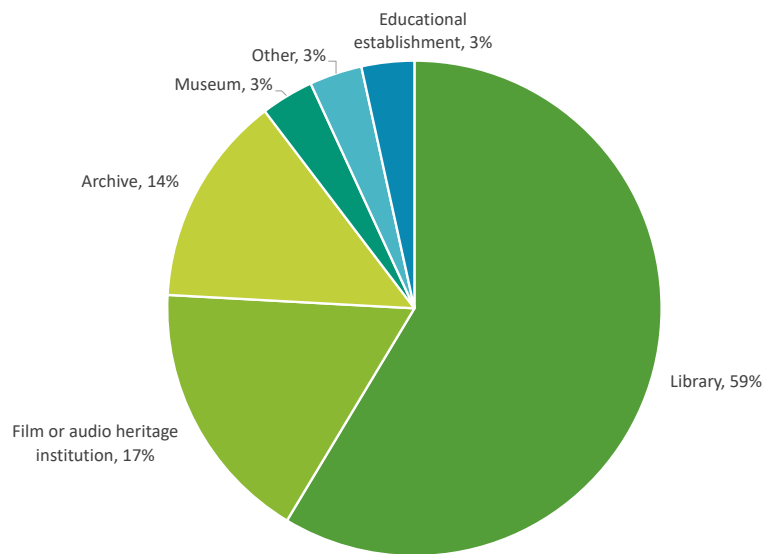
2- If answer to question 1 is 'national competent authority':

Do you also consider yourself a beneficiary organisation? (N=7)



3- If answer to question 1 is 'beneficiary organisation':

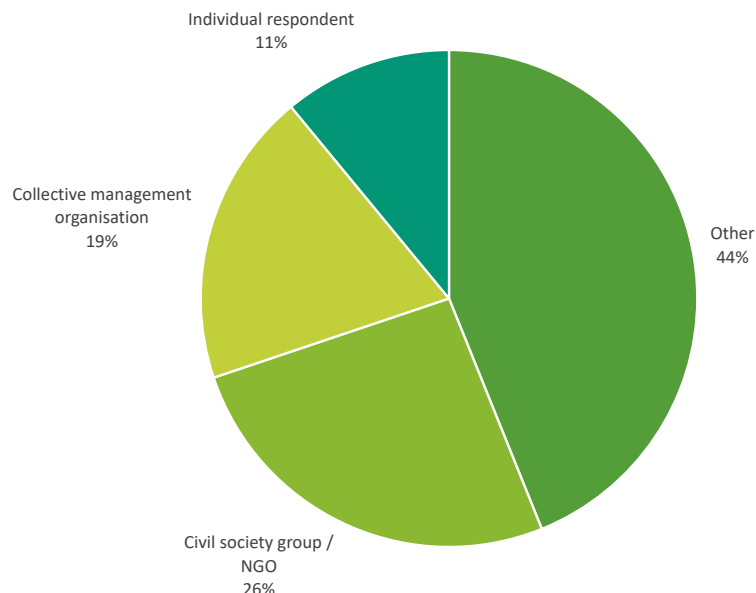
What type of beneficiary organisation do you represent? (N=29)



'Other': all of the above

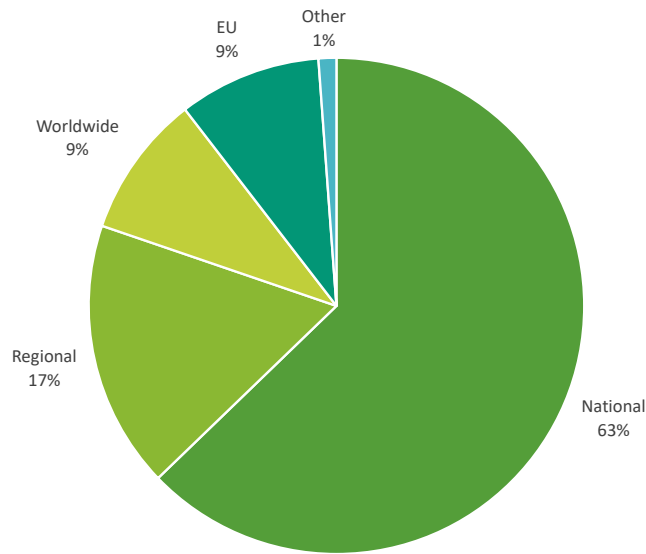
4 – If answer to question 1 is 'other':

Please specify which type of organisation you represent: (N=27)



'Other' includes: *academic/university; literary and criticism association; national broadcasting service; association for the protection of intellectual property; coordinator of several public authorities and organisations; heritage organisation; digital library aggregating digital cultural heritage from across Europe; association of libraries; library of science and technology; authority responsible for maintaining the functioning of information systems for cultural institutions.*

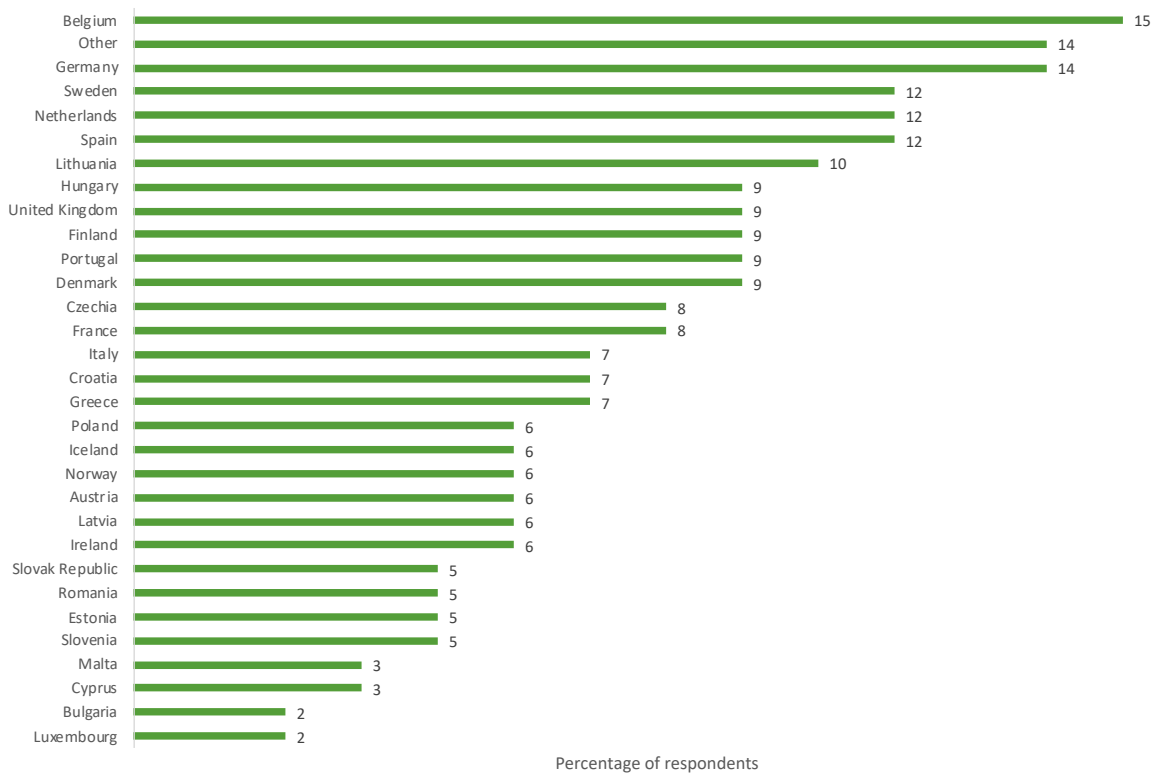
5- What is the territorial coverage of your organisation? (N=87)



'Other': *national and worldwide*

6- In which country(ies) do you have experience with orphan works? (N=87)

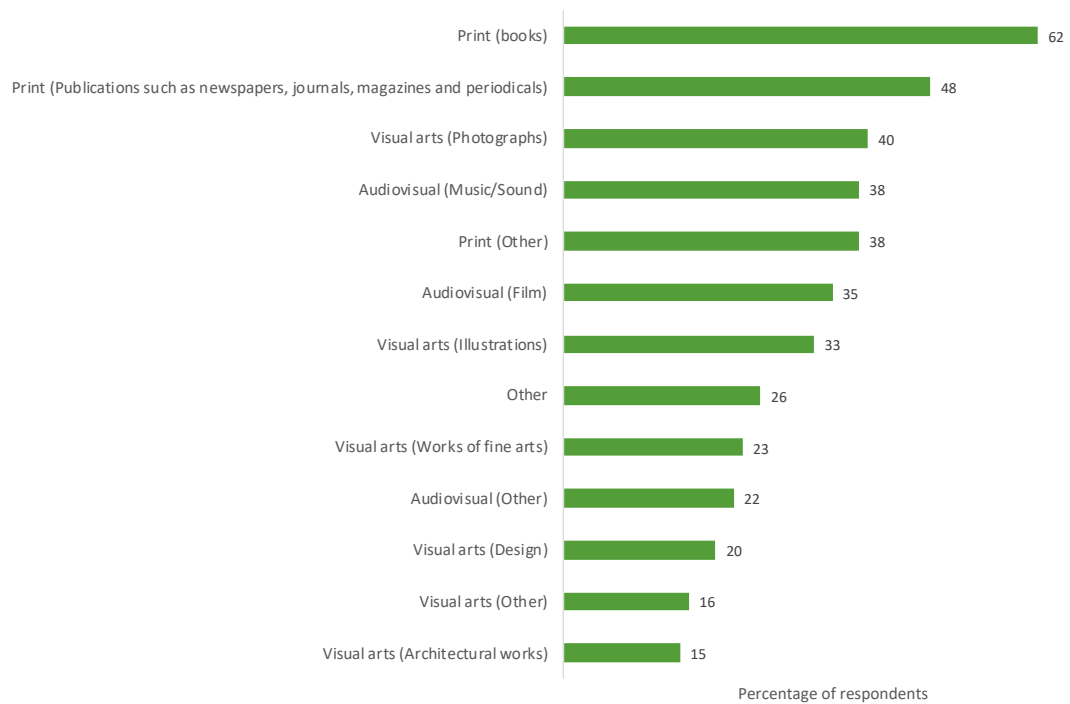
Multiple choices possible



'Other' includes: *no specific country, Russia, Brazil, US, worldwide, throughout Europe, Switzerland.*

7- Which sector(s) is your organisation active in? (N=87)

Multiple choices possible



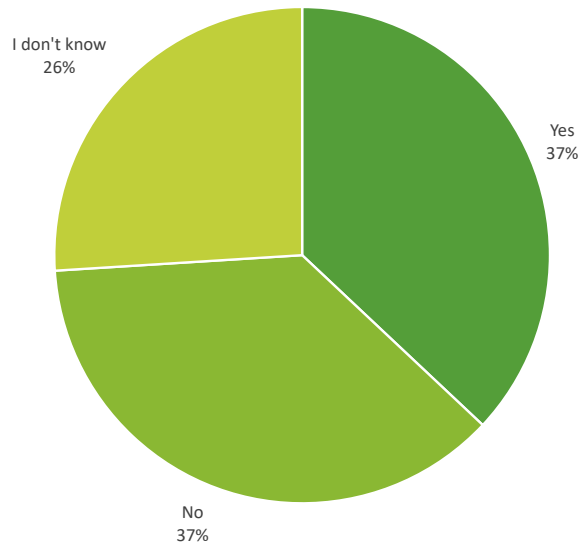
'Other' includes: *all sectors; multimedia interactive entertainment works; electronic archives and publications; cartographic materials; manuscripts and personal archives.*

II – Is the Directive effective?

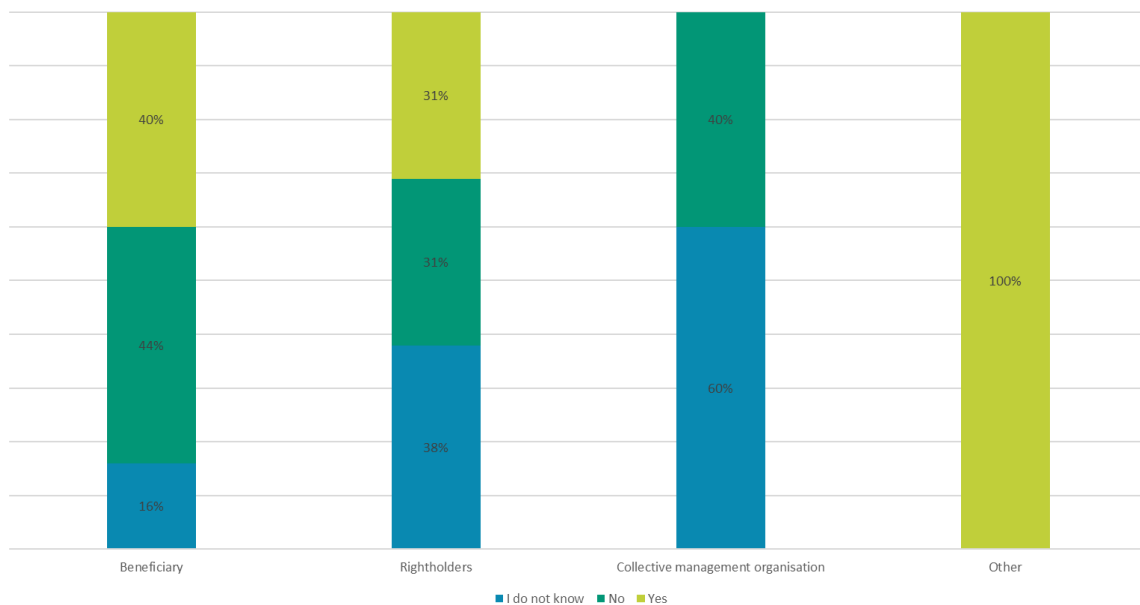
Overall effectiveness of the OWD

Stakeholders are divided on the question of the overall effectiveness of the OWD in improving the digitisation and dissemination of orphan works since 2014. Views were similarly divided within the main stakeholder groups.

8- In your experience, has there been improvement in the digitisation and dissemination of orphan works since 2014? (N=87)

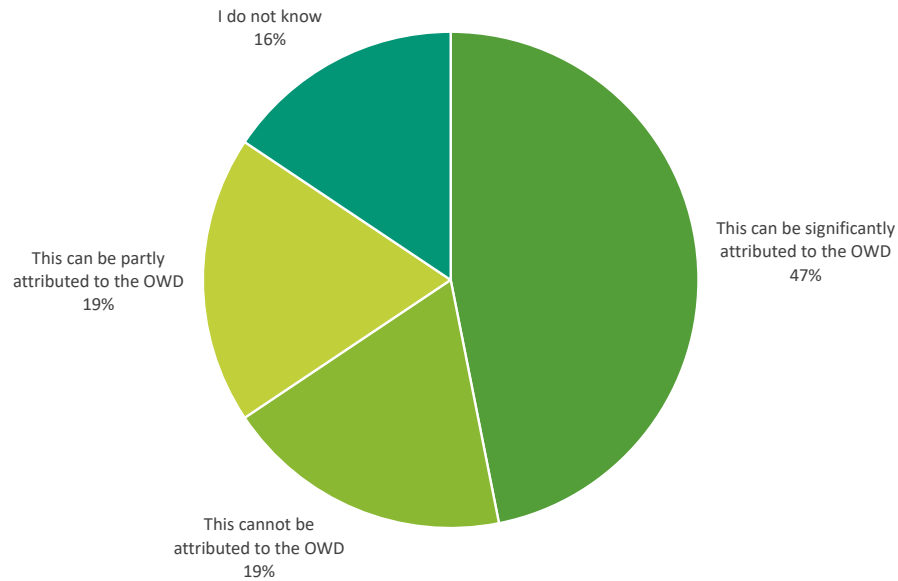


Q8 – by stakeholder type (N=87)



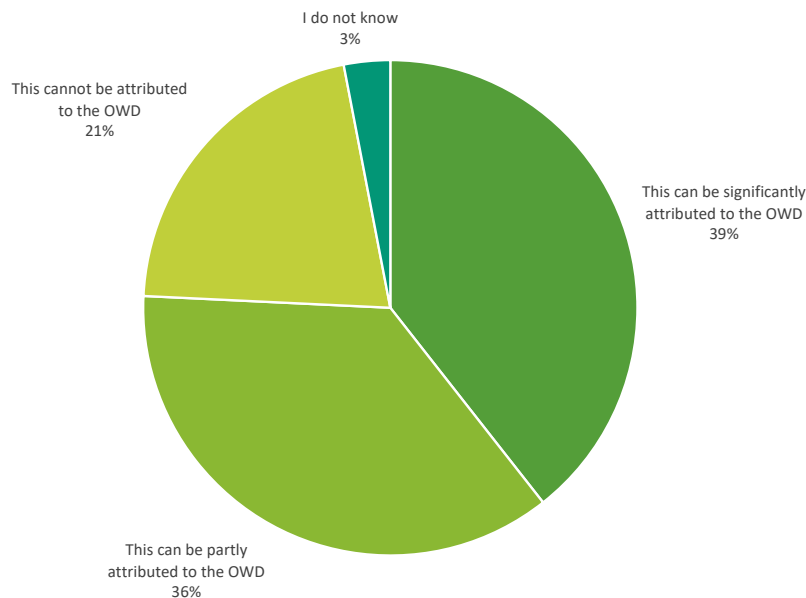
9- If answer to question 8 is 'yes':

To what extent can this be attributed to the OWD? (N=32)



10- If answer to question 8 is 'no':

To what extent can this be attributed to the OWD? (N=33)



Just under half of the respondents (47 %) who felt there were improvements to the digitisation of orphan works stated that these could be attributed to the OWD - 80% of these were beneficiaries. However, beneficiaries also stated that a lack of improvement for orphan works could be significantly attributed to the OWD (77 % of the 39 % of negative responses, or 10 beneficiaries in total). Among the stakeholders that believe that the OWD led to improvements, eight gave examples of their own use of the OWD, highlighting the legal clarity, the importance of having a central database, and a preference for using the OWD exception over a national licensing scheme.

By contrast, 38 % of respondents who believe there have been improvements to the digitisation of orphan works stated that this cannot (19 %) or can only partly (19 %) be attributed to the OWD. Six of these stakeholders (mainly in Nordic Member States) stated that the use of orphan works increased mainly due to alternative national

systems in place (e.g. ECL schemes). Four mentioned that the OWD has somewhat facilitated the dissemination of orphan works but that a number of problems – chiefly linked to the diligent search process – limit the effectiveness of the Directive. Another four stakeholders argued that the OWD works well for small collections or individual works, but is not suitable for large-scale digitisation projects.



The OWD helped to improve the effectiveness of the digitisation of the orphan works as the beneficiary organisations have a legal possibility to use the orphan works across the EU. On the other hand, the system has a lot of weaknesses, mainly that the beneficiary organisations do not have sufficient human resource to use the system properly, the digitisation itself is very time-consuming, but performing the diligent search for the rightholders one by one makes the system not worth using at a given point. [Comment from a national competent authority](#)

These arguments largely echo those of respondents who have not perceived any improvement in the digitisation of orphan works. An additional seven stakeholders argued that other systems work better: 19 pointed to problems with the diligent search and lack of legal clarity; three argued that the scope of works and permitted uses covered are too narrow; and one stakeholder questioned whether there was really a strong demand for digitisation and dissemination of orphan works by cultural heritage institutions.

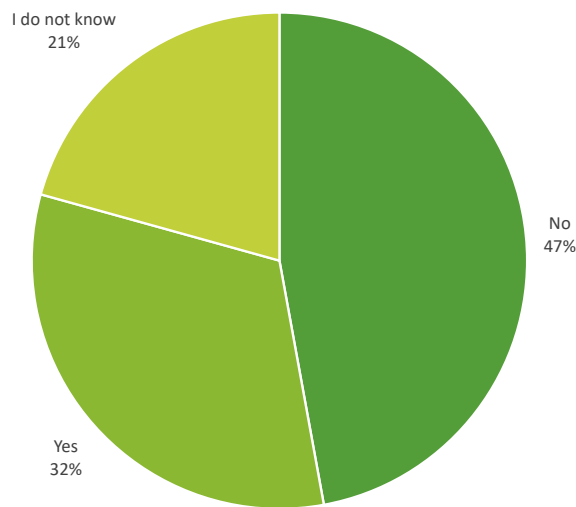
Key findings:

- Overall, the answers to the closed questions show divided perceptions of the effectiveness of the OWD. However, the open questions suggest that all types of stakeholders generally agree that the OWD has weaknesses and that there is scope for improvement.
- The main points of divide appear to be the extent to which the system should be reformed – making amendments to the current system vs. using an alternative approach – and the direction that reform should take. The following Sections describe the polarisation between beneficiary organisations and rightholder groups, although differences also exist within these categories.

Scope of the OWD

This part of the survey sought to understanding whether stakeholders are satisfied with the scope of the OWD, given that its provisions only apply to certain types of organisations and certain types of works. When asked whether the scope of the OWD should be extended to additional types of organisations or types of works, responses were split by stakeholder type - beneficiary organisations are broadly in favour of extending the scope of the OWD, while rightholder groups are against such extension.

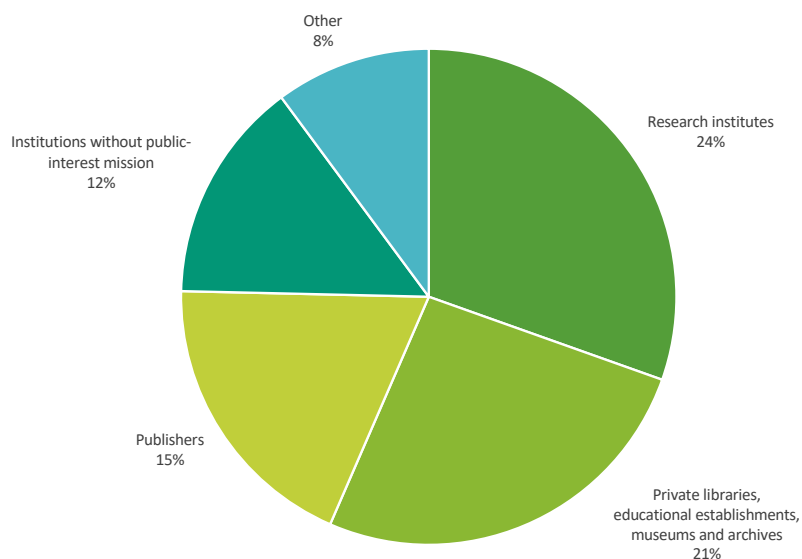
11- The provisions of the Directive apply to publicly accessible libraries, educational establishments and museums, as well as archives, film or audio heritage institutions and public service broadcasting organisations established in the Member States. In your opinion, should the OWD be applicable to other types of institutions? (N=87)



12- If answer to question 11 is 'yes':

Which other types of institutions should be included in the scope of the OWD? (N=28)

Multiple choices possible

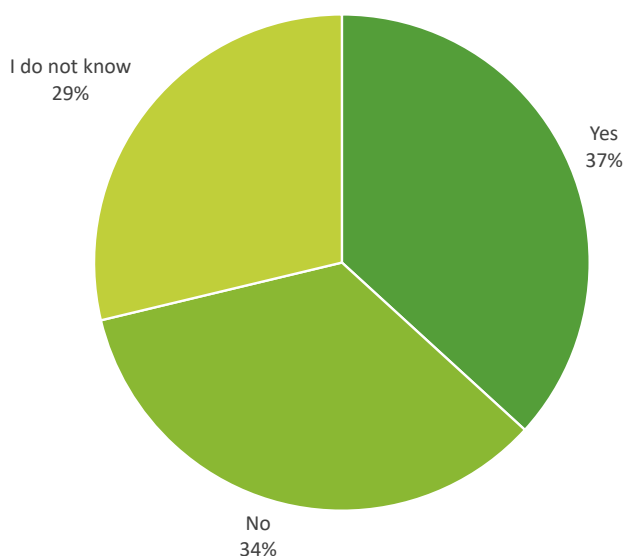


'Other' includes: *distribution companies; multimedia interactive entertainment works repositories and disseminators; as many institutions as possible; private collectors; non-governmental, non-profit institutions; state public institutions.*

79 % of rightholder respondents are against extending the scope of the Directive, compared to 30 % of beneficiary organisations. In their answers to the open questions, rightholders most commonly argued that a wider scope of the OWD would increase the potential for misuse and the risk of copyright violations. The beneficiaries that argued against an extension of scope most often stated that the problems with the current Directive should be addressed before extending the scope. Two beneficiaries feared that if publishers are permitted to use the OWD exception, rights will be reapplied to the works, thus preventing cultural heritage institutions from freely using them.

The vast majority (82 %) of those in favour of extending the scope of the OWD to other institutions are beneficiary organisations, with 46 % of all beneficiary respondents holding that view. The answers to both the closed and open questions show that most respondents in favour of extending the OWD believe that it should only be extended to organisations with a public interest mission (e.g. research, educational, cultural). Two stakeholders argued that the definition of eligible institutions should be aligned with the DSM Directive, which provides exceptions for all research, education, and cultural heritage institutions. Those in favour of extending the OWD to organisations without a public interest mission often noted that to do so would increase the dissemination of orphan works to the benefit of EU citizens. An organisation representing publishers highlighted that publishers already make use of orphan works after performing diligent searches but face legal uncertainty as they are currently excluded from the scope of the OWD. Finally, a CMO argued that commercial organisations using ECL schemes should be included.

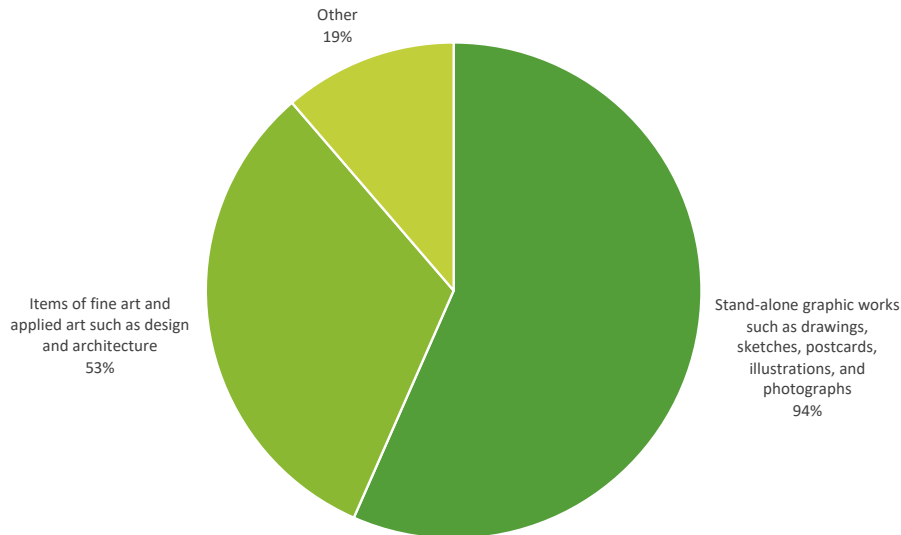
13- The OWD applies to the following types of works and/or materials: books, journals, newspapers, magazines, other writings, cinematographic, audiovisual works, phonograms and embedded works. In your opinion, should the OWD be applicable to other types of works and/or materials? (N=87)



14- If answer to question 13 is 'yes':

Which other types of works and/or materials should be included in the scope of the OWD? (N=32)

Multiple choices possible

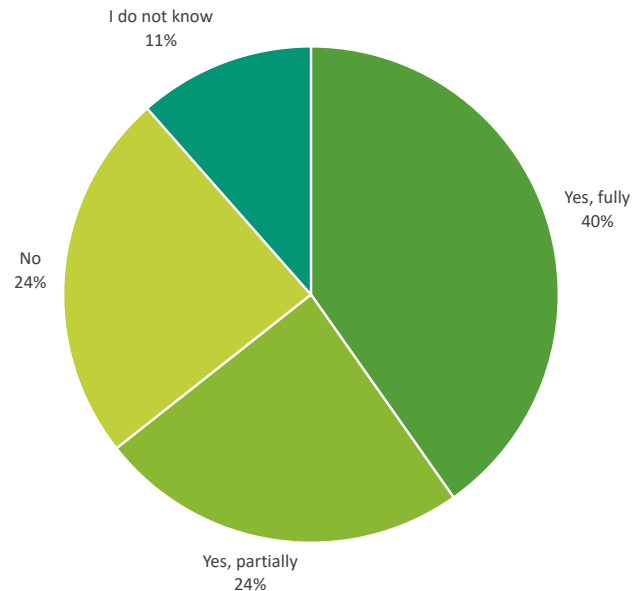


52 % of beneficiary organisations are in favour of extending the OWD to other types of works, while 66 % of rightholder groups are against such an extension.

In answering the open question, several of those in favour of extending the OWD to other types of works stated that including graphic works would be particularly useful for historical photographs (e.g. WWI/II photos) and highlighted that photographs/postcards/illustrations are by nature more likely to be orphan. Several other types of works mentioned that could usefully be included within the scope of the Directive were interactive entertainment works, manuscripts, letters, video/computer games, databases and software.

Of the stakeholders that are against applying the OWD to other works, six reiterated that the overall issues with OWD system should be addressed before extending the scope. Four rightholders (mainly active in the visual arts sector) are strongly against applying the orphan works exception to stand-alone graphic works, arguing that photographs are at particular risk of being misclassified as orphan because digitisation strips the metadata embedded in the work, making it more likely to lose the rightholder traceability.

15- The OWD also applies to embedded/incorporated works, which are visual works such as fine art, photography, illustration, design, architecture, sketches etc. that are contained in books, journals, newspapers and magazines or other works. Embedded works may not be disregarded and must undergo a separate diligent search. Do you agree with this concept of embedded/incorporated works under the OWD? (N=87)



55 % of rightholders fully agreed with this concept, compared to 30 % of beneficiaries.

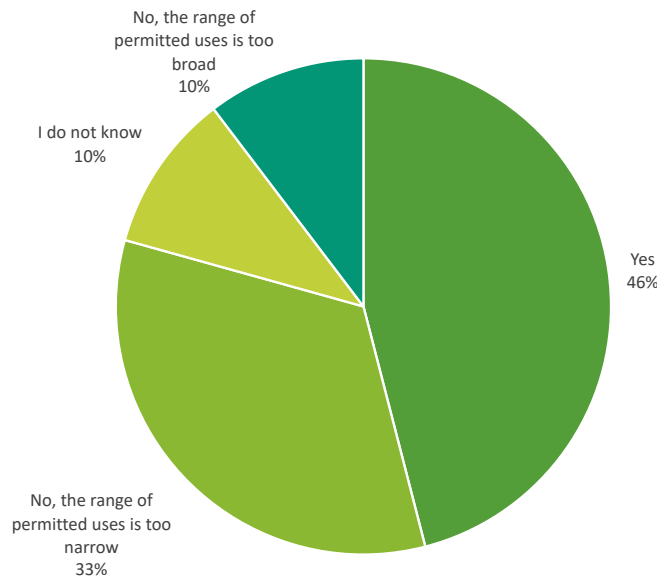
To support their responses, five stakeholders who agree with the OWD concept of embedded works emphasised the necessity of performing a separate diligent search for embedded works to limit the risk of indirectly publishing the work of a known rightholder. One CMO highlighted that embedded works have an independent existence from the work in which they are contained, while another gave a real-life example of a beneficiary making illustrated books available online without the permission of known illustrators, resulting in economic losses for the latter.

Several beneficiaries partly agree with concept of embedded works. Three commented that separate treatment of embedded works is logical and fair, although the diligent searches are time-consuming and act as a disincentive to mass-digitisation of orphan works. Two broadly agree with the concept but noted that it should not always be applicable to journals, newspapers, encyclopaedias, and dictionaries, for which individual searches prove almost impossible. One beneficiary organisation argued that the issue should be dealt with practically and that a 'lighter' version of a diligent search should apply to embedded works.

Finally, all beneficiaries that disagree with the concept of embedded works and provided an open answer (15) argued that it proves practically impossible to conduct a separate diligent search for each embedded work, particularly in publications containing several hundred pages. They noted that this is a barrier for large-scale digitisation projects and is one of the main issues with the current OWD. Two stakeholders mentioned that it is particularly difficult to search for rightholders of embedded works (notably photographs), as references are often not available (e.g. stock photo agencies) or coherent and information such as the date of first publishing is missing.

Permitted uses of orphan works

16- The OWD restricts the use of orphan works to digitisation, dissemination, indexing, cataloguing, preservation or restoration. In your opinion, is the range of permitted uses of orphan works in the OWD sufficient? (N=87)

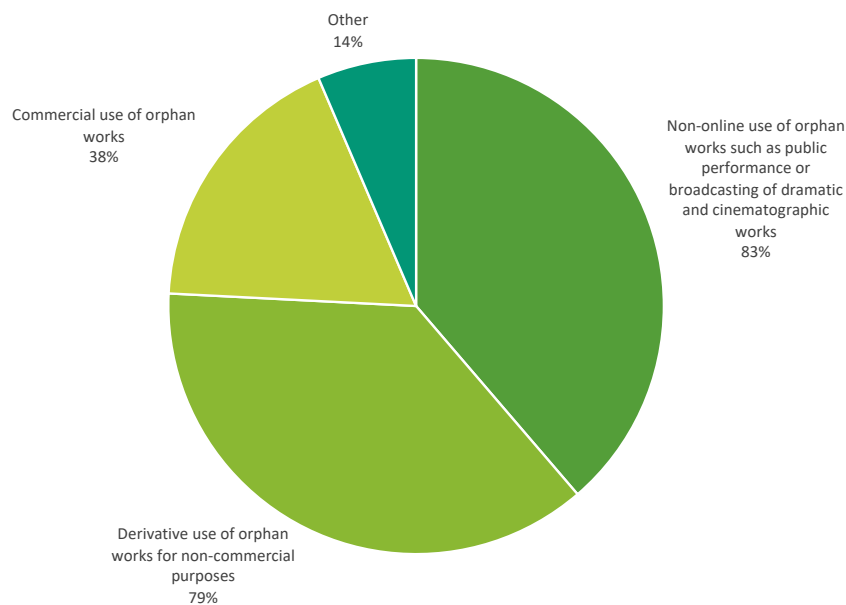


Over half of the rightholder respondents (55 %) believe the permitted uses are sufficient, while half of the beneficiary respondents believe the permitted uses are too narrow.

17- If answer to question 16 is 'no, the range of permitted uses is too narrow':

Which additional uses of orphan works should be permitted under the scope of the OWD? (N=29)

Multiple choices possible



'Other' includes: reuse for education and research; embedding orphan works in other new works.

Several stakeholders provided comments to substantiate their responses. Of those who believe the permitted uses are sufficient, six (a mix of stakeholder types) mentioned that the permitted uses cover the needs of cultural heritage institutions.

Three reiterated that that the OWD should be not extended, as it is currently ineffective. An organisation representing publishers highlighted the difficulties of basing a business model on exceptions, which precludes the extension of the Directive to commercial uses. Five stakeholders who believe the permitted uses are too broad argued that any other permitted use would violate authors' rights and lead to the financial exploitation of orphan works. Three argued that no additional uses should be integrated into the OWD system and that any additional use should instead be covered through ECL schemes.

Of the stakeholders who believe the scope of the OWD to be too narrow, 10 beneficiaries argued that all uses with a public interest goal should be permitted (e.g. education, research). One CMO stated that additional uses should be permitted but only under a condition of payment, even if symbolic.

Those stakeholders in favour of permitting commercial uses of orphan works believe that to do so would broaden access to these works in the interest of EU citizens. Three beneficiaries believe that orphan works should be public by default and accessible to all. An additional three beneficiaries argued that fair compensation for rightholders would be ensured through rules that allow reappearing rightholders (who justify their claim) to withdraw permission and claim a reasonable share of the revenue. These beneficiaries stated that any such revenue generated should be set aside in case the rightholder reappears. One CMO argued that these transactions should be managed through ECL schemes, while one beneficiary organisation expressed concerns about collective licensing, noting the small chance of royalties ending up with the true rightholder.

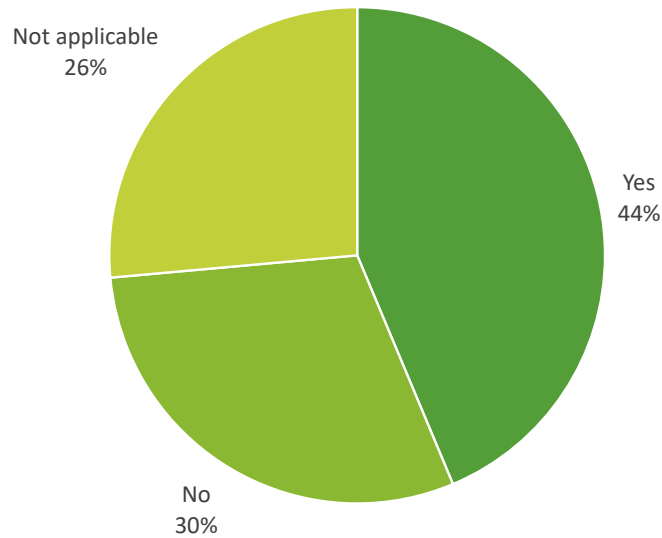
Effectiveness of the diligent search

The survey included several questions that sought to better understand respondents' experiences with diligent searches and the most common challenges encountered in performing a search.

More than half (58 %) of beneficiary respondents and 28 % of rightholder respondents have performed a diligent search, bringing the total number of respondents with experience of the diligent search procedure to 38.

Most respondents that have performed a diligent search (68 %) had conducted searches in relation to books, 24 % for newspapers, journals and periodicals, 24 % for photographs, and 21 % for films. Less than 10 % of respondents have performed diligent searches for architectural works, phonographs and design works. These findings are in line with the contents of the EUIPO Orphan Works Database, where 60 % of the recorded works are literary works.

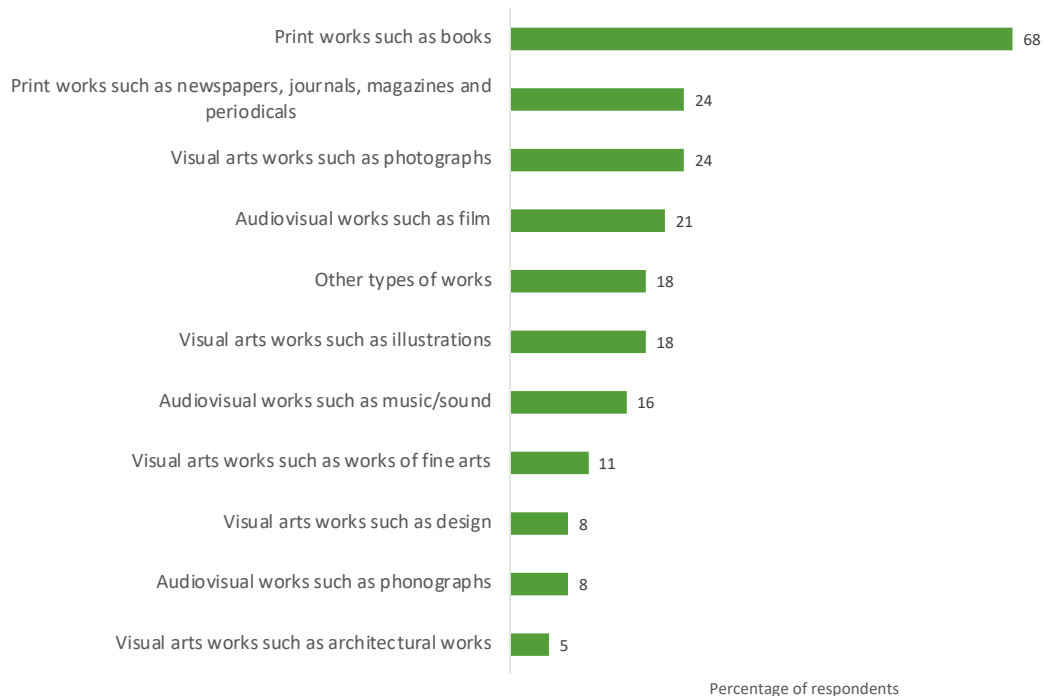
18- Have you ever performed a diligent search for rightholder(s) of a work based on the OWD? (N=87)



19- If answer to question 18 is 'yes':

For what types of works and/or materials have you performed a diligent search? (N=38)

Multiple choices possible



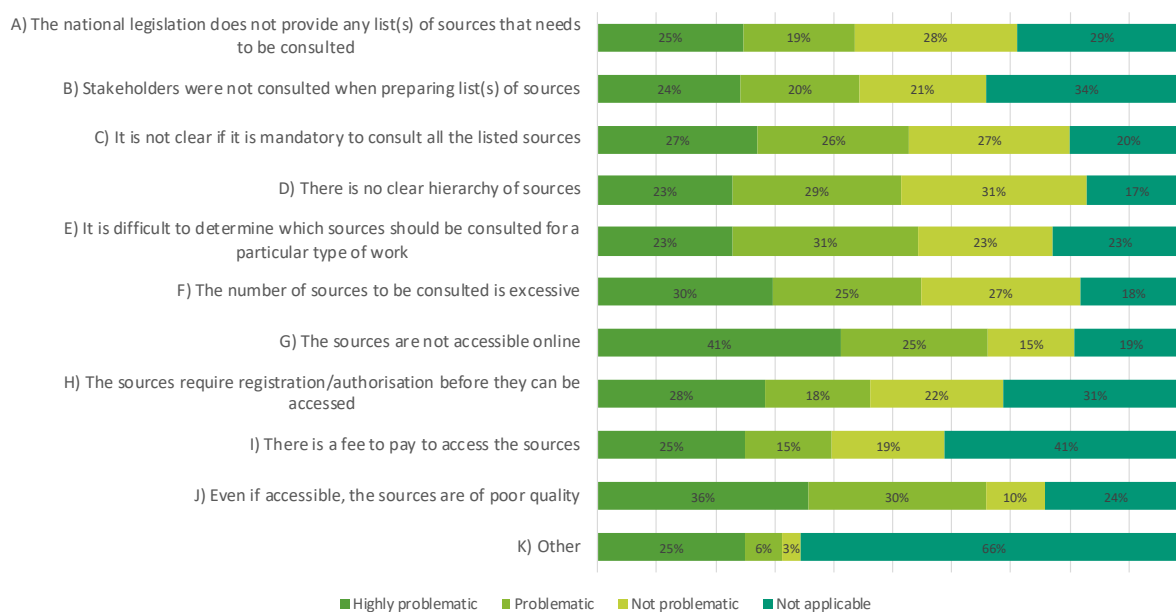
Difficulties linked to the sources that must be consulted

Desk research prior to launching the survey highlighted that the sources which need to be consulted to perform a diligent search present a number of challenges for

beneficiaries¹⁵⁰.

In order to verify these findings, stakeholders were asked to rate nine possible challenges related to the sources, from highly problematic to not problematic or not applicable (see figure for Q.20 below). **The results show that six of these nine challenges were rated as (highly) problematic by over 50 % of respondents.**

20- Recent studies and reports have highlighted some difficulties linked to the list(s) of sources and/or accessibility of the sources that need to be consulted to perform a diligent search. Based on your experience, how would you assess the following?



The worst challenges appear to be linked to the accessibility and quality of the sources, with 66 % of respondents rating these issues as (highly) problematic. The excessive number of sources to be consulted is also rated as (highly) problematic by over half of the respondents (55 %), followed by difficulties in determining the sources that should be consulted for a particular type of work (54 %). Looking at geographical differences, respondents from **EE, DK, FR** and **PL** rated issues linked to the clarity of the legislation/procedure as not problematic or not applicable, but rated the more practical issues linked to the accessibility and quality of sources as (highly) problematic. This is best exemplified in the comment provided by a Polish respondent: ‘the procedure is clearly defined but there are problems related to lack of online access which results in a large amount of clerical work and excessive workload in a diligent search’. No clear trends were identified for respondents in other countries, with respondents from the same country providing different answers. One Belgian respondent explained that the national legislation is unclear on the question on whether it is mandatory to consult all sources. One Latvian respondent stated that the national legislation does not provide sources for all types of work.

¹⁵⁰ For example, EnDOW Report 2, Commission’s Consolidated Progress Report 2015-2017, 2017; Schroff, S., Favale, M. and Bertoni, A., The Impossible Quest – Problems with Diligent Search for Orphan Works, 2017.



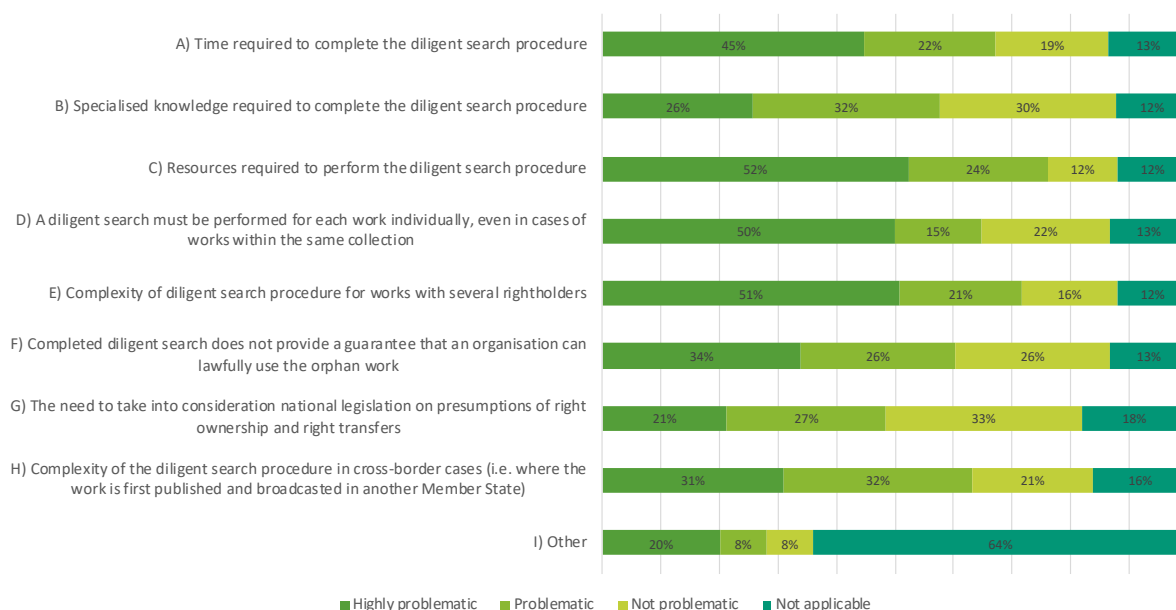
A diligent search performed for only one book from our collection took six hours during the course of two weeks (online search, emails, phone calls). The sources listed in our national legislation that needed to be consulted did not provide any usable information, which was expected since the book in question was published in 1917 and most of the sources have no data on old books (or any old material). Example provided by a beneficiary organisation

To support their responses, six stakeholders argued that the **list of sources to be consulted is inadequate and not useful for beneficiaries**, notably because irrelevant/non-accessible sources are often included on the list, while relevant sources are omitted. Three beneficiaries argued that the sources should be guidance rather than mandatory. Another three believe that the diligent search should not be limited to a list of sources but, rather, should be flexible and adapted to the type of work and circumstances. One beneficiary organisation added that cultural heritage institutions often have the most information about their collections, including which sources are relevant to a diligent search.

Other difficulties with the diligent search procedure

Another survey question asked respondents to rate eight broader challenges linked to the diligent search procedure from highly problematic to not problematic or not applicable. **Seven of the eight challenges were rated as (highly) problematic by over 55 % of respondents** (see figure for Q.21 below).

21- The OWD requires that a diligent search for rightholders is to be carried out in good faith with respect to each work in question by consulting appropriate sources for the relevant category of works. Recent studies and reports have highlighted some difficulties linked to the diligent search procedure. Based on your experience, how would you assess the following?



The most problematic challenge for respondents is the **level of resources required to perform a diligent search** - 52 % of respondents stated that this is highly problematic and 24 % stated that it is problematic. **Performing diligent searches for works with several rightholders** was also rated as (highly) problematic by over 70% of respondents, and **the time required to complete a search** was considered

problematic by 67 % of respondents.

In their open text answers, many respondents reiterated the issues raised in the closed question: lack of resources and trained personnel; time-consuming nature of the diligent search procedure; lack of certainty and fear of the consequences in case of errors/reappearance of rightholders. One beneficiary organisation mentioned that it has abandoned diligent searches due to the time and resources necessary. Rightholder respondents also believe that the diligent search procedure is ineffective for both beneficiaries and rightholders. Two rightholders argued that the complexity of the procedure 'inevitably leads to violations of authors' rights'. Another stakeholder mentioned that the diligent search procedure foreseen by the OWD only works on a small scale and is not suitable for large scale projects.



Genuine diligent searches are time-consuming and may require extraordinary work, following a trail that has almost gone cold to find a rightholder. No single set of parameters can be applied to any and all diligent searches. [Comment from rightholder organisation](#)

Three beneficiary organisations provided more nuanced comments: one has not encountered any specific issues linked to the diligent search procedure, another mentioned that although the procedure is time-consuming it provides legal certainty for beneficiaries, and a third argued that diligent searches are part of the normal film clearing process.

Suggestions for improving the diligent search

Stakeholders were given the opportunity to provide suggestions for improving the diligent search procedure. Their answers can broadly be divided into three categories: i) improving the list of sources and information provided to beneficiaries, ii) developing practical tools and databases to facilitate searches, iii) using alternative systems to the OWD.

Eight answers address issues linked to the list of sources to be consulted and the need for more information for beneficiaries:

- Six beneficiaries suggested making the **list of sources to be consulted non-mandatory** or limiting the number of mandatory sources to a strict minimum. They believed that the list of sources should not be too comprehensive, as it cannot then be kept up to date and risks including many obsolete or non-publicly accessible sources. Ideally, **the list should be updated regularly to include more recent and more relevant sources.**
- Two beneficiaries argued that **more information on adequately conducting a diligent search is needed at national level for cultural heritage institutions.** They suggested creating information packages with examples of best practice and completed diligent searches, along with an FAQ webpage.

Eight answers focused on practical tools and databases that would facilitate diligent search:

- The **ARROW project** was mentioned by three stakeholders (of different types) as a good tool for improving and speeding up diligent searches. ARROW (2008-2013) was a consortium of cultural heritage institutions, rightholders, publishers and European-level organisations that worked to compile and organise different sources of data (books in print, library catalogues, CMO repertoires, etc.) to facilitate the search for rightholders of orphan works. One stakeholder stated that such tools greatly reduced the hours spent on diligent searches (giving an example of a reduction from 184 hours of manual search for 102 records to 4.5 hours). The same stakeholder, however, highlighted that the sophisticated tools developed by ARROW were rarely used by cultural heritage institutions, which 'showed a lack of interest in practical solutions.'

- Two stakeholders (one rightholder, one beneficiary) argued for a **database of rightholders** in each sector. This database would contain the contact information of rightholders and a registry of works that should not be considered orphan. One of these stakeholders argued that the 'rightholder database' should be mandatory, whereas the other thought it should be voluntary. One academic stakeholder suggested creating **databases of individual works** (which are not contrary to the Berne Convention's prohibition of formalities) and applying solutions such as Digital objective identifier (DOI) numbering for written papers to other types of works.
- Two beneficiaries argued for **improving the EUIPO Orphan Works Database**, notably by ensuring that it becomes the central/sole registry for orphan works. A potential solution would be to remove additional national authorities/national databases to which the works need to be declared.
- Eight answers argued for **alternative systems to the OWD**. Five respondents (a mix of stakeholder types) believe that orphan works should be covered by the **out-of-commerce system** foreseen in the newly adopted Copyright Directive (EU) 2019/790. Two respondents (one rightholder, one beneficiary) argued that the **OWD should be repealed**. One rightholder organisation argued for creating an EU-wide **ECL** structure.

Key findings:

- The vast majority of beneficiary organisations pointed to the diligent search procedure as a key weakness in the effectiveness of the OWD.
- Difficulties encountered during diligent searches are linked to the list of sources that must be consulted during a search. In many cases, these sources are either not publicly accessible or do not contain relevant information, leading several stakeholders to argue that the list of sources should not be mandatory but, rather, given as guidance.
- Other difficulties linked to the diligent search include: lack of resources and trained personnel in cultural heritage institutions; time-consuming nature of the procedure; and lack of legal certainty/clarity about when a search can be considered diligent. To improve the procedure and facilitate the work of beneficiaries, several stakeholders suggested increasing the information provided to beneficiaries and developing practical tools (notably databases) to speed-up the procedure.
- Many rightholder organisations believe that the diligent search procedure does not work and that the complexity of the procedure creates risks of copyright violations.
- Issues linked to the diligent search procedure led several stakeholders to argue for the use of alternative systems for digitising and disseminating orphan works.

Effectiveness of putting an end to the orphan work status

Another Section of the survey focused on the procedure to end an orphan work status and the issue of fair compensation for reappeared rightholders. The results show that most respondents were unable to answer questions on this topic. The 'I do not know' option was chosen by more than half of respondents for most of the questions in this Section.

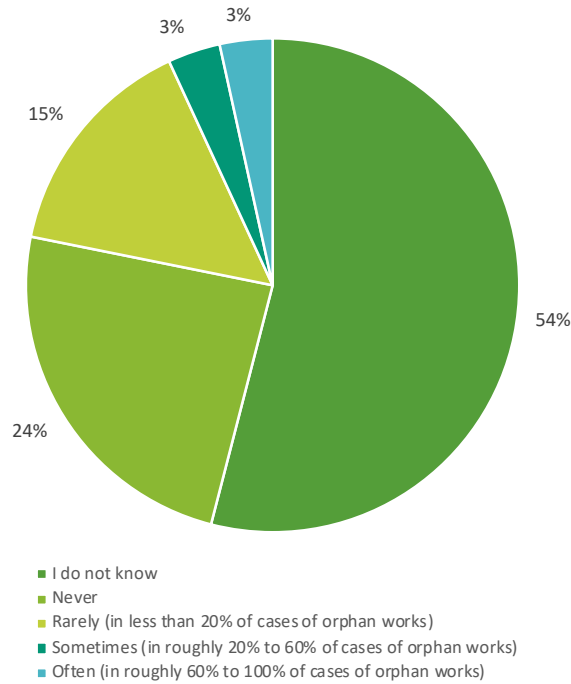
Frequency of status changes

On the question of how often rightholders put an end to an orphan work status, 54 % of respondents were unable to answer. Of those that answered (40 in total), **85 % stated that rightholders never or rarely end an orphan work status** (53 % never, 32 % rarely), 8 % responded sometimes and 8 % often. The respondents who answered 'often' were based in the UK and Iceland and active only in the visual arts sector.

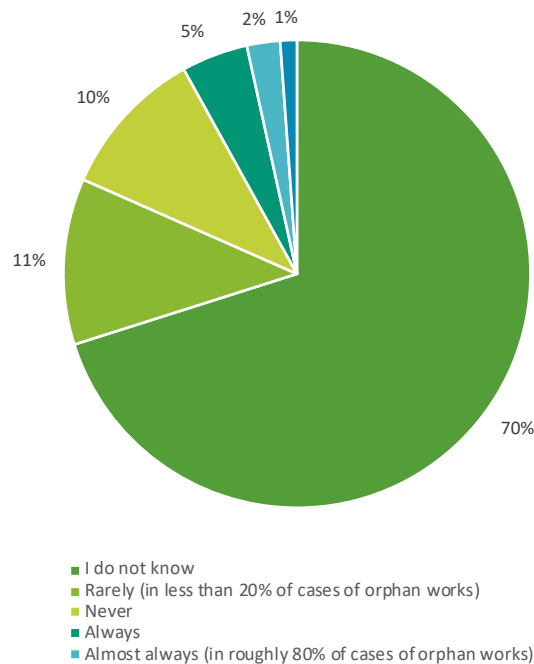
Similarly, 70 % of respondents were unable to answer how frequently rightholders claim compensation in cases where an orphan work is later claimed. Of the

respondents that did provide an answer (26 in total), **73 % stated that rightholders rarely or never claim compensation** (38 % rarely, 35 % never), 15 % stated that rightholders always claim compensation (75 % were rightholders, with one Islandic beneficiary).

22- In your experience, how often do rightholders put an end to the orphan works status of their works and/or materials? (N=87)



23- In cases where orphan works are claimed by rightholders, how frequently do they claim compensation? (N=87)

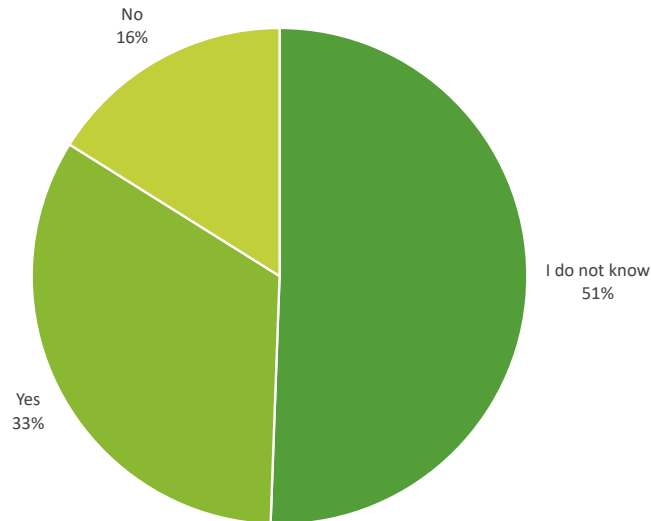


Ease of ending an orphan work status

When asked whether it is easy to put an end to an orphan work status, only 43 respondents provided an answer. Of those, **67 % believe it is easy to claim an**

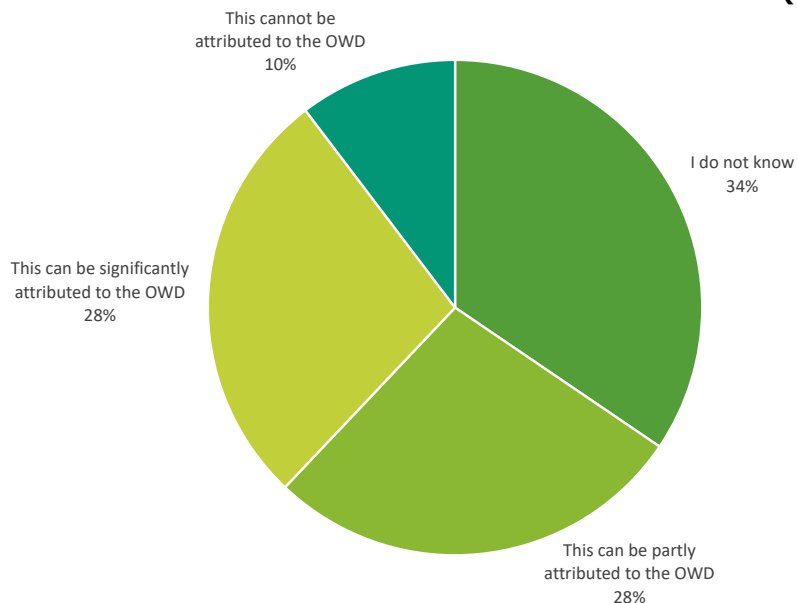
orphan work, while 33 % believe it is not. More than half of beneficiaries (72 %) and rightholders (59 %) believe that the procedure for claiming an orphan work is easy. However, a slightly higher proportion of rightholders believe the procedure is not easy.

24- In your opinion, is it easy to end an orphan works status? (N=87)



25- If answer to question 24 is 'yes':

To what extent can this be attributed to the OWD? (N=29)



Of those who believe the procedure is easy, 84 % stated that this can be significantly or partly attributed to the OWD. Several stakeholders emphasised that it is very rare for rightholders to claim an orphan work. Three beneficiary organisations mentioned that when rightholders have reappeared they have often simply thanked the beneficiary for disseminating the work. Another three stakeholders stated that once a rightholder has been identified or comes forward, this essentially ends the orphan work status (after investigation of the claim). A normal rights-clearance procedure is then initiated to determine the conditions in which the work can be used.



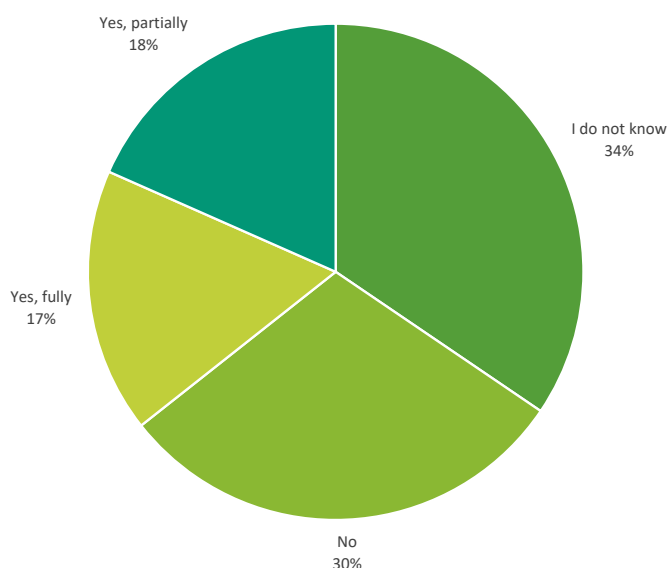
Anyone can make a claim and the orphan status is put on standby, which, for practical purposes, is the same as the end of said status, since it cannot be digitised and disseminated while the claim is investigated. *Comment from a beneficiary organisation*

Several rightholders provided explanations for their belief that it is not easy to end an orphan work status. One respondent stated that **rightholders generally do not know that their work is being used, or under what title**. The same respondent highlighted issues linked specifically to anonymous works, which are the most likely to be misclassified as orphan. They stated that it is impossible to search for anonymous works or to claim the work without 'outing' oneself as the author, forcing authors to choose between anonymity and their rights. This respondent argued that there should be a single solution for dealing with orphan, anonymous and out-of-commerce works that would enable rightholders to make a 'one-time permanent pre-emptive opt-out request'. Another rightholder organisation argued that it is particularly difficult for rightholders in the music sector to claim an orphan work, as producers do not keep proper records on all performers who contributed to the work, rendering it very difficult to justify a later claim to the work.

Legal clarity on the level of compensation for rightholders

A total of 57 respondents answered the question of whether the OWD provides sufficient legal clarity on the level of compensation for rightholders. Of these, **46 % believe that the Directive does not provide sufficient legal clarity, 28 % believe it provides partial clarity, and 26 % believe it provides full clarity.**

26- Do you think that the Directive provides sufficient legal clarity regarding the level of compensation for the rightholder(s)? (N=87)



Most of the respondents who believe that the OWD provides full legal clarity on the level of compensation for rightholders did not provide comments. Three beneficiaries simply mentioned that the Directive is very clear in its wording, while one beneficiary noted that the Directive is clear but that the level of compensation is too high. They went on to say that the word 'compensation' implies that the use of the work caused harm to the rightholder, although there is no evidence of such harm.

Of the respondents who believe that the OWD provides partial legal clarity, two highlighted that it gives leeway to countries, meaning that the level of clarity in respect of compensation differs from one country to another. In addition, one beneficiary organisation argued that the Directive should make clear that the

rightholder must show evidence of economic loss and the compensation should not surpass the costs of digitisation and preservation.



What is fair compensation is always difficult. [...] We expect the loss of income to be extremely small because these are films that have not been screened for more than 70 years or have never been published, for example in the case of amateur films. In order to allay the fear of claims among the archives, it would be good to make it clearer that the copyright owner must show with hard evidence that revenue has been lost. It could also be added that if the costs of digitisation and preservation of the collection are higher than the lost income, nothing needs to be compensated. [Comment from a beneficiary organisation](#)

43 % of beneficiaries and 43 % of rightholders that answered this question believe that the OWD does not provide sufficient legal clarity on the level of compensation for rightholders. However, both groups of stakeholders gave different reasons to support their answer.

Three beneficiary organisations argued that the Directive is unclear about the level of compensation, which creates **legal uncertainty for cultural heritage institutions** and disincentivises digitising works. They emphasised that it is **unclear what losses could be incurred in case of an honest mistake**. Six rightholder organisations argued that the OWD is a means of using works without remunerating rightholders. They pointed to the need for clearer and better compensation, given that once a work has been made available online it loses all future value. Two CMOs noted that the **wording and criteria for compensation set out in the Directive tend towards lower compensation**, while rightholders should be receiving appropriate remuneration for use of their content, irrespective of whether this has caused 'harm' or is commercial.

Suggestions to improve the procedure to end an orphan work status

Suggestions provided by the respondents on how to improve the procedure for ending an orphan work status differed by type of stakeholder.

Beneficiary organisations made the following suggestions:

- Three argued that there should be **little or no compensation for rightholders**, as beneficiaries perform public interest missions. If a work is orphan it is most likely because the work is no longer commercially viable or the author has no interest in commercialising the work.
- Two believe that **the compensation should be capped** to a set maximum.
- Two suggested **a database in which authors register their works** (the same stakeholders also proposed this solution to improve the diligent search procedure).
- One argued that there should be **a time-limit after which rightholders can no longer claim compensation**.
- One stated that **diligent search should be renewed** after a certain period.

Rightholder organisations made the following suggestions:

- Two (which largely coordinated their survey responses) argued that orphan works should be dealt with under the **out-of-commerce system** to enable rightholders to opt-out of all uses of a work EU-wide. They also suggested **that each work within an edition should be fully indexed** and that **anonymous works should be excluded** from the scope of the OWD.
- One argued for **more information for rightholders** on how to claim compensation.
- One noted that the **process for claiming compensation should be differentiated by sector**.
- One suggested that beneficiaries **periodically send notices to prominent rightholder organisations/publications/newsletters** to discover rightholders.

- One noted that **record producers should be legally obliged to keep records of the participation of all performers.**

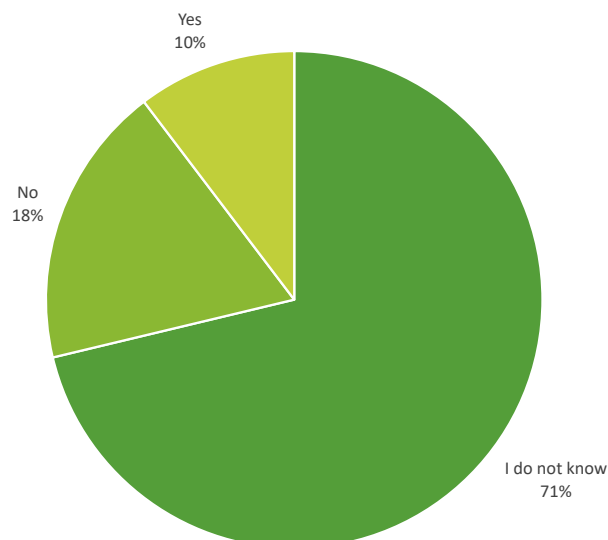
Key findings:

- Overall, most respondents were unable to answer the questions related to ending an orphan work status, often because they have no experience of this scenario. The reappearance of rightholders of orphan works seems to be a rare occurrence, and when rightholders do reappear, few seem to claim compensation.
- Most respondents believe that it is easy to put an end to an orphan work status because once a claim is made, a normal rights-clearance procedure is initiated. Several rightholder organisations, however, highlighted difficulties for rightholders to track all uses of their works and in some cases to provide justifications for their claims.
- There is a clear divide between beneficiaries and rightholders in relation to the notion of fair compensation. Several beneficiaries argued that compensation should be limited and proof of economic loss should be provided. By contrast, rightholder organisations argued for a simplified procedure to opt-out of certain uses of their works and to receive adequate compensation.

Effectiveness of the mutual recognition system

The OWD provides for a system of mutual recognition of an orphan work status throughout the EU/EEA. This means that a work which is considered an orphan work in one EU/EEA Member State is considered an orphan work in all Member States and may be used accordingly. Stakeholders were asked whether they believe that the use of orphan works from different countries has increased across the EU/EEA since the entry into force of the OWD. The majority (71 %) did not know. Of the 25 respondents who gave another answer, **64 % believe that there has not been an increase in the cross-border use of orphan works, with no strong differences between stakeholder groups.**

27- In your opinion, has the use of orphan works from different countries increased across the EU/EEA? (N=87)



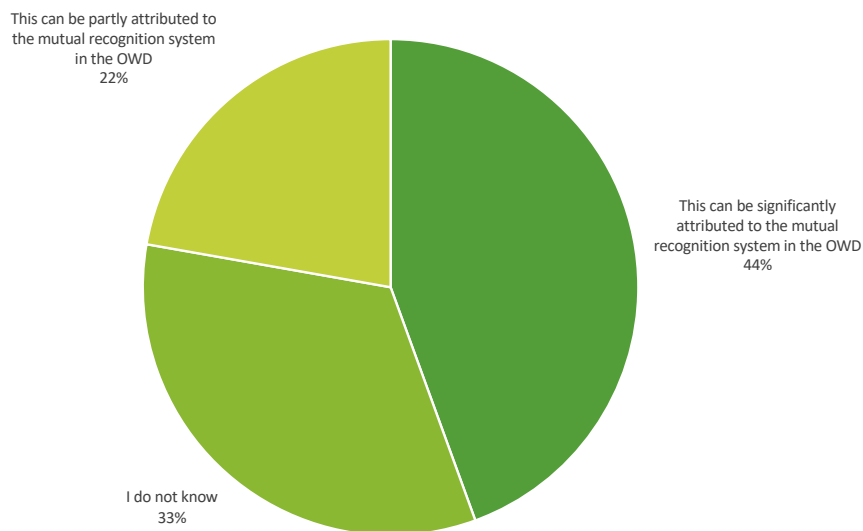
Of the respondents who believe that the cross-border use of orphan works has increased, 44 % believe that this can be significantly attributed to the OWD and 22 % that it can be only partially attributed to the OWD (33 % did not know). Two beneficiaries stated that they have successfully used orphan works from other EU/EEA Member States and that the mutual recognition system enables orphan works to be available on European platforms such as Europeana.

The majority of those citing no increase in cross-border use of orphan works argued that this is due to the overall ineffectiveness of the OWD. They observed that diligent search is cumbersome and limits the amount of orphan works digitised at national level and, by extension, cross-border. Three beneficiaries have never needed to use the mutual recognition system, as most of their works are national and in the national language.

Three stakeholders believe that the EUIPO Orphan Works Database should be improved, with annual publication of its content, for transparency. As with previous questions, other stakeholders argued for the use of alternative systems.

28- If answer to question 27 is 'yes':

To what extent can this be attributed to the mutual recognition system in the OWD? (N=9)

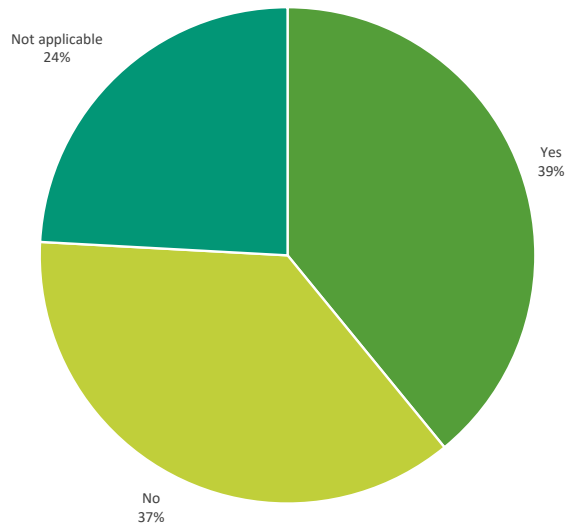


Overall, most stakeholders either do not know or do not believe that there has been an increase in the cross-border use of orphan works across the EU/EEA. Stakeholders highlighted the broader difficulties in using the OWD to digitise works in the first place and the limited demand for cross-border works.

Effectiveness of the EUIPO database

Over half of the beneficiary survey respondents (54 %) have experience of using the EUIPO Orphan Works Database, of which 74 % provided records (20 in total). Only 17 % of rightholder organisations have experience with the EUIPO database (five in total), with those rightholder organisations using the database to search through the recorded orphan works.

29- Does your organisation have any experience in using the EUIPO Orphan Works Database? (N=87)

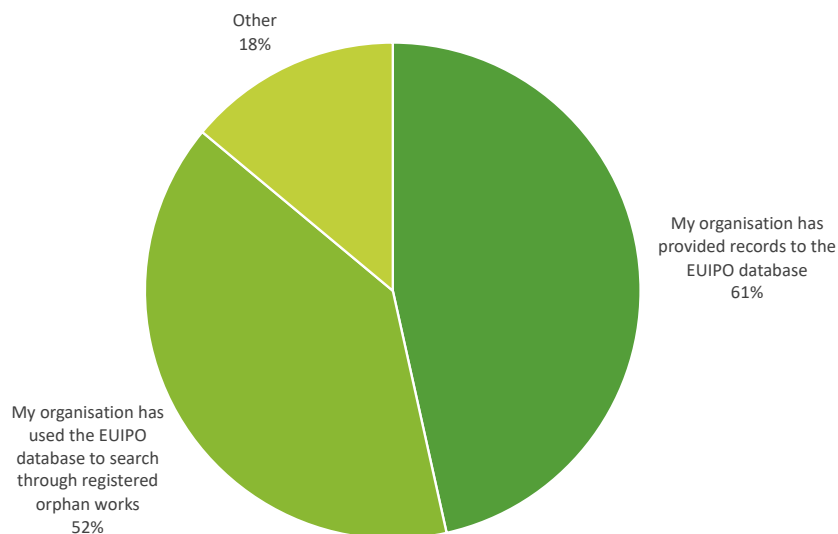


Four beneficiary organisations with no experience of the EUIPO database **were unaware of its existence, with one noting that more communication is needed**. Another beneficiary argued that the EUIPO Orphan Works Database contains no relevant information. In relation to the promotion of the Database, the EUIPO mentioned during an interview that many informational and training activities were organised in a number of Member States in the years immediately following its launch. National competent authorities also used their networks to share experiences and best practices among beneficiary organisations. However, these promotional events stopped in the past two years, which may explain the lack of awareness of the Database among certain survey respondents.

30- *If answer to question 29 is 'yes':*

What is your experience with the EUIPO database? (N=34)

Multiple choices possible



Only two stakeholders who believe the Database to be fully effective in facilitating the use and large-scale digitisation of orphan works provided comments to support their answer: one stated that the Database is a good tool to record works, while the other

observed that it is helpful to exclude works without a clear status.

The comments provided by stakeholders who believe that the Database is only partially or not effective can be divided into two categories: the first category (eight answers) mentioned **difficulties linked to the OWD system in general**, particularly the diligent search procedure (see Sub-section 2.4.3.), rather than difficulties linked to the EUIPO database itself. Three highlighted that only a small number of works have been recorded in the database, which is a further indication **that the OWD has not been effective**.



The EUIPO database is very well organised, but as the OWD has not been effective in making more orphan works available online, the data provided to the database is a reflection of the small number of orphan works digitised by beneficiary organisations. [Comment from beneficiary organisation](#)

The second category (five answers) highlighted **difficulties directly linked to the EUIPO database itself**. These respondents argued that the interface is cumbersome and difficult to navigate. A key issue is the **lack of links or images of the recorded works**, making it extremely difficult to identify the works, many of which do not have clear titles (the use of images was excluded from the scope of the database from its inception). The EUIPO highlighted that beneficiary organisations have the possibility to provide a link to a work when it is digitised and are encouraged to do so. The EUIPO can provide the technical means and support for beneficiaries, but the content depends on user input.

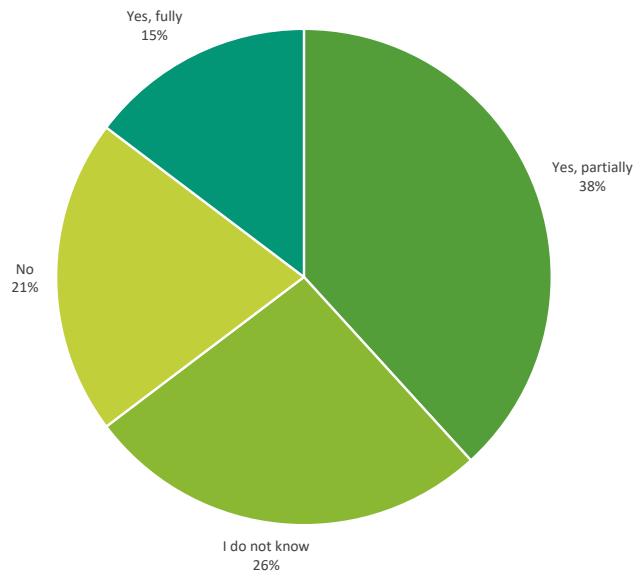
Two stakeholders noted that **beneficiaries must go through national competent authorities to upload records** and cannot work directly with the EUIPO database, with one beneficiary experiencing difficulties in getting works ratified by the national competent authority. The role of the national competent authorities is foreseen in the OWD, which provides for them to act as intermediaries between the beneficiaries and the EUIPO database. Their two main functions are to i) forward information about new national beneficiary organisations registered in the database, and ii) forward the records provided by beneficiaries to the database. However, the OWD does not specify that the national competent authorities should verify the records provided by the beneficiaries. The EUIPO believes that the most important role played by the national competent authorities is to confirm the validity of new users, as the EUIPO does not have a comprehensive overview of all legitimate cultural heritage institutions at national level.



The information in the database does not link to the works in the cultural heritage institutions' repositories, the interface is slightly cumbersome, and there are no Application Programming Interfaces (APIs). It does not seem to be designed with the idea of managing large numbers of works that are part of a same digitisation project. [Comment from beneficiary organisation](#)

31- *If respondents have experience with the database:*

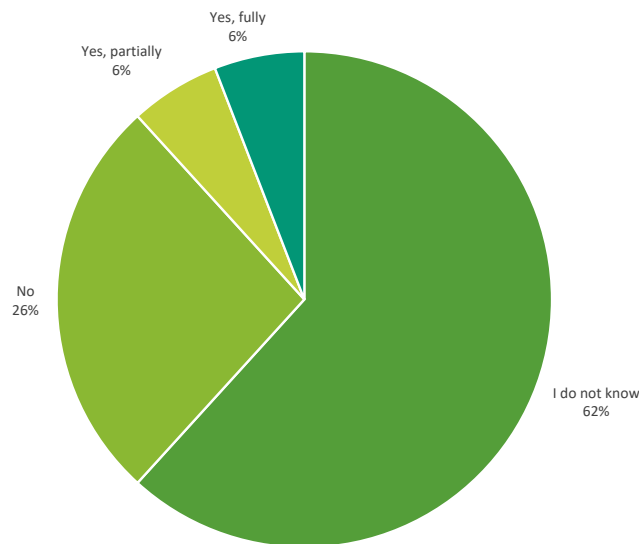
In your experience, is the information provided by the EUIPO database effective in facilitating the inclusion of orphan works in large-scale digitisation and dissemination projects? (N=34)



Interoperability with other orphan works databases

32- *If respondents have experience with the database:*

Do you think the EUIPO database is sufficiently compatible and interoperable with other orphan works databases? (N=34)



Stakeholders were asked whether they believe the EUIPO database is sufficiently compatible and interoperable with databases containing orphan works data (e.g. databases introduced at national level). The majority of respondents (75 %) do not know, 15% believe it is not sufficiently interoperable, 6 % that it is partially interoperable, and 5 % that it is fully interoperable with other databases.

Few respondents provided comments to support their answers. Those that were unable to answer the question stated that they did not know of other databases on orphan works. Among those that believe the database is fully or partially interoperable with other databases, two mentioned that the EUIPO database works well but they do

not have direct experience with other databases. One UK stakeholder stated that it is important for close cooperation to continue following Brexit. Among the respondents who believe the database is not sufficiently interoperable, one argued that the use of metadata would facilitate database compatibility, while another believes that the database should be subject to protocol requirements to improve interoperability.

The EUIPO stated that it has worked with Member States – particularly Italy – to increase compatibility between the national and EUIPO databases. However, in the case of Italy, no records were received.

Suggestions for improvements

The suggestions for improving the EUIPO Orphan Works Database provided by the respondents can be divided into three groups:

Improve the interface of the database and the accuracy of its contents (six responses):

- Include **thumbnails and visual aids** to help identify the works within the database (two responses);
- Enable **CMOs** to record the orphan works included under ECL schemes and the works for which they have been unable to identify rightholders (two responses);
- Introduce controls over data input to ensure accuracy of records (one response);
- Connect the EUIPO database to national databases (one response).

The second group (four responses) argue that the **Orphan Works Database should be fully integrated with the new Out-of-Commerce Database**. Several stakeholders observed that all orphan works can also be considered out-of-commerce. They argued that a single database covering both types of works would help beneficiaries to easily identify the works that should be removed from digitisation projects and enable rightholders to opt-out of a single system¹⁵¹.

The third group (three responses) argued that **no further time should be invested in improving the database, as the OWD is ineffective and the basic concept of the orphan works system does not work**. Two of these stakeholders also believe that the database should be retired.

The EUIPO explained that **further improvements to the database were put on hold following a stakeholder consultation in 2017**¹⁵², although it continues to maintain the database and provide user support when required. Based on the feedback at the time, **the EUIPO found that only a limited number of organisations were planning on carrying out large digitisation projects and there is no real need to implement substantial technical improvements that would generate only limited results**. The survey conducted by the EUIPO found a variety of reasons for the limited engagement of beneficiaries, which largely echo the findings of the survey conducted for this study. These include the lack of information on the database, lack of resources to perform digitisation activities, limited demand for orphan works, and the complexity and time-consuming nature of the diligent search procedure. The EUIPO emphasised that there are no technical limitations to the database and that they are ready to support beneficiaries and increase automation of the system if there is demand. For now, a key priority for the EUIPO is to develop the Out-of-Commerce Database foreseen by the DSM Directive. This new database is currently being developed as a stand-alone portal; however, the EUIPO does not exclude further integration of the two databases in future, depending on the performance of the Out-of-Commerce Database and legislative developments.

¹⁵¹ While the Out-Of-Commerce Database is to be purely informative, the Orphan Work Database plays an important role in the mutual recognition principle.

¹⁵² EUIPO, Orphan Works Survey 2017 Summary Report, 2018, accessible at:

<https://euiipo.europa.eu/tunnel->

[web/secure/webdav/guest/document_library/observatory/documents/reports/Orphan_Works_Survey_Summary_Report/Orphan_Works_Survey_Summary_Report.pdf](https://euiipo.europa.eu/tunnel-secure/webdav/guest/document_library/observatory/documents/reports/Orphan_Works_Survey_Summary_Report/Orphan_Works_Survey_Summary_Report.pdf)

In conclusion, **the number of recorded works in the EUIPO database (18,649¹⁵³) is low and reflects broader issues with the OWD system.** Most beneficiary respondents have experience of using the database, although several were unaware of its existence. Very few rightholders have made use of the database. **Many stakeholders believe the database to be only partially or not all effective in facilitating large-scale digitisation projects,** but key difficulties appear to be linked to broader issues with the OWD system rather than with the database itself. Several stakeholders believe the interface should be improved and made more user-friendly, while others believe it should be fully integrated with the new Out-of-Commerce Database, or, indeed, fully retired.

¹⁵³ Data available in June 2020. Since the end of the Brexit transition period (31 December 2020), the works recorded by British institutions have been removed from the database. Consequently, in January 2021 there were only 5,480 main works and 1,406 embedded works available to the public in the database.

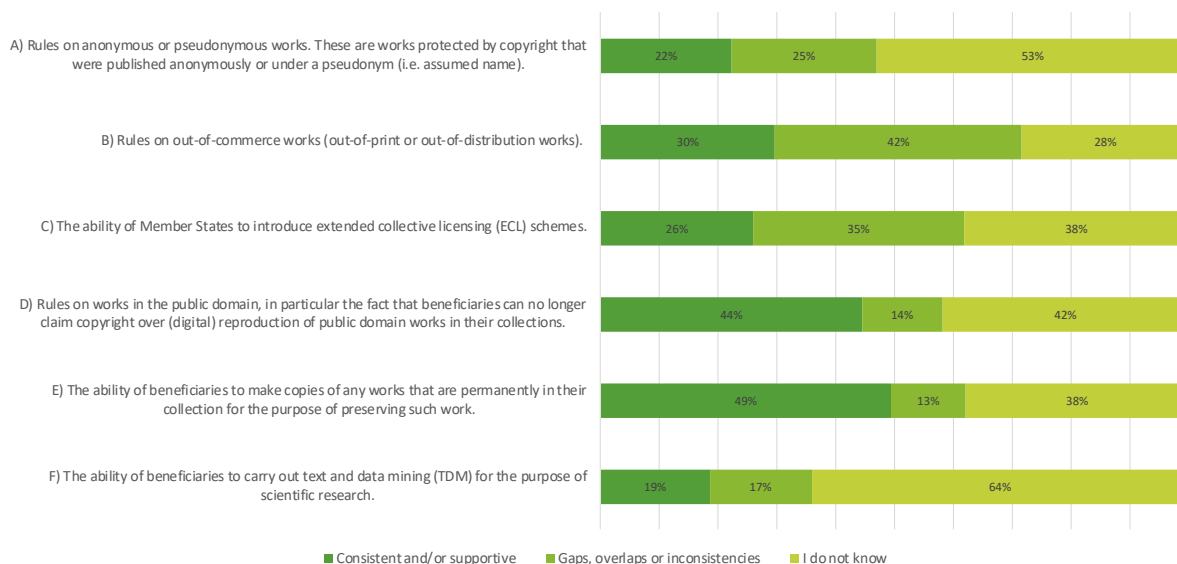
III – Coherence and alternatives in the approach to the OWD

The final part of the survey gathered stakeholder views on the coherence of the OWD with other relevant EU copyright laws and policies and on alternative approaches that could more effectively enable mass digitisation and dissemination of orphan works.

Overview of stakeholder’s assessment

Stakeholders were asked whether they believe the OWD is consistent with and supportive of several EU copyright rules, or whether they believe there are gaps, overlaps or inconsistencies. Overall, most stakeholders believe the OWD is consistent and supportive of beneficiaries’ ability to make copies of works for preservation or restoration (49 %) and rules on works in the public domain (44 %). This was the case for 50 % of beneficiaries. Many, however, believe that the OWD has gaps, overlaps or inconsistencies with rules on out-of-commerce works and with Member States’ ability to introduce ECL schemes. Over half of the respondents were not able to respond to the question on rules on anonymous or pseudonymous works and the ability to carry out text and data mining research.

33- In your opinion, is the OWD consistent with and supportive of the following EU copyright rules or do you see gaps, overlaps or inconsistencies?



There are no stark differences between stakeholder groups for most of the questions. For example, the different stakeholder groups appear to broadly agree on the OWD in relation to rules on out-of-commerce works: 42 % of beneficiaries, 42 % of rightholders and 50 % of CMOs believe that it has gaps, overlaps or inconsistencies with out-of-commerce rules. However, a higher proportion (50 %) of CMOs believe that the OWD is inconsistent with ECL schemes, compared to 37 % of beneficiaries and rightholders. Similarly, more rightholder organisations believe the OWD is inconsistent with rules on anonymous or pseudonymous works (44 %) than beneficiaries (17 %).

Several open questions asked stakeholders to support their responses and express their opinions on possible alternative systems for digitising and disseminating orphan works. The following Sections summarise stakeholders’ responses for each of the following systems: rules on anonymous or pseudonymous works; rules on out-of-commerce works; ECL schemes; and works in the public domain.

Stakeholder views on rules on anonymous or pseudonymous works

Most beneficiary respondents did not express an opinion on rules on anonymous or pseudonymous works. The beneficiary organisations that did provide an answer

generally believe the rules are consistent with the OWD, as it is without prejudice to national provisions on these types of work. Two beneficiaries added that the rules on orphan works and anonymous works are supplementary, as beneficiaries must first consider whether a work is anonymous before starting a diligent search.

By contrast, five rightholder organisations highlighted that **anonymous or pseudonymous works tend to be mistakenly considered orphan because the rightholder cannot be identified**. They argued that this may lead to the unauthorised use of a protected work - until the rightholder notices the mistake - and is a violation of the Berne Convention. These rightholder organisations **believe that anonymous and pseudonymous works should be excluded from the scope of the OWD**. One stakeholder argued that a new approach should be adopted for anonymous works, such as the development of anonymous online pay-per-download self-publication platforms. Two suggested that a database enabling rightholders to anonymously register their works is necessary to ensure that anonymous works are not wrongly considered orphan works.

Stakeholder views on rules on out-of-commerce works

Most stakeholders that expressed an opinion on rules on out-of-commerce works observed overlaps and inconsistencies with the OWD. Six stakeholders, however, argued that they are consistent, as the OWD is without prejudice to out-of-commerce regulations and each regulate their own subject matter.

A common argument put forward (13 stakeholders from different groups) was the **overlap between the concept of out-of-commerce works and orphan works**. Stakeholders argued that orphan works are frequently also out-of-commerce. One beneficiary organisation explained:



Orphan works are those for which rightholders cannot be identified or located, while out-of-commerce works are those that are not available to the public through customary channels of commerce. While this distinction seems to be clear, in practice both regulations seem to overlap, as it is sometimes difficult to determine if the work from an institution's collection should be considered as orphan or out-of-commerce, as the criteria of both legal definitions are met. Many works that fall within the scope of the out-of-commerce definition were published a long time ago, so the identification or location of current rightholders may be impossible, which makes them fall under the scope of the OWD. [Comment from a beneficiary organisation](#)

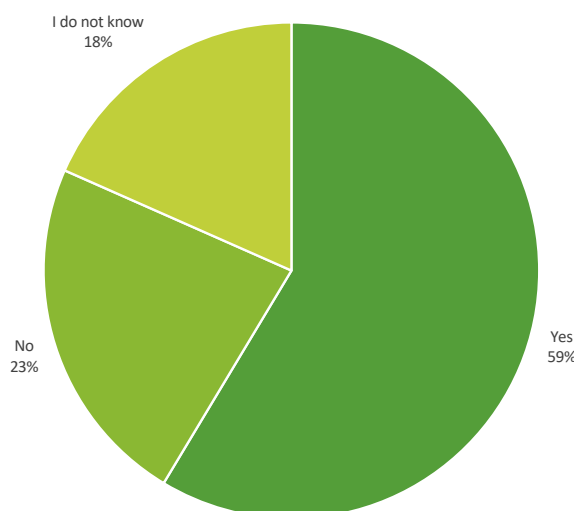
Stakeholders argued that the overlap between the definition of orphan works and out-of-commerce works creates **confusion for cultural heritage institutions and inconsistencies with the out-of-commerce provisions of the new DSM Directive**. Under that Directive, CMOs are allowed to grant licensing rights to works for which the rightholders are not their members, which would enable them to cover those works that meet both the OWD and out-of-commerce criteria. In practice, this will lead to two possible options for dealing with orphan works - the use of the OWD exception or the use of the out-of-commerce ECL scheme. Although both the orphan works and the out-of-commerce instruments regulate different situations, many stakeholders argued that **orphan works and out-of-commerce works should be dealt with under a single regime**. At the time of this study, the DSM Directive is still being transposed by the Member States and the out-of-commerce provisions have not yet been tested in practice.



[...] Having these two possibilities is likely to raise a lot of uncertainties for cultural heritage professionals. First, it can make it complex for them to assess which of the two options they should rely on, and second, the provisions from one or the other might be confused and applied incorrectly. We consider that only one of the two options (the one that works the best in practice) should remain. This will allow cultural heritage professionals to invest their efforts into making it more usable. [Comment from a pan-European organisation](#)

In a subsequent closed question (see figure for Q.34 below), **59 % of respondents (62 % of beneficiary respondents and 45 % of rightholder respondents) stated that they believe the approach in the DSM Directive for out-of-commerce works should be extended to cover orphan works.**

34- The new Copyright Directive provides for an extended collective licensing (ECL) mechanism, which allows for collective agreements between a representative collective management organisation (CMO) and a user to be effective also in relation to authors who are not members of the organisation, with a fall-back option in case there is no sufficiently representative CMO. In your view, should the approach in the Copyright Directive for out-of-commerce works be extended to also cover orphan works? (N=87)



Three key arguments emerged with respect to applying the out-of-commerce approach to orphan works:

- 13 stakeholders (mixed stakeholder groups) believe that it would **streamline the procedure and increase legal clarity for beneficiary organisations**. They stated that a key advantage of the out-of-commerce approach is that it does not foresee a diligent search for the beneficiary organisation. It removes the uncertainty surrounding the level of fair compensation in case of a reappearing rightholder and covers a larger scope of materials.
- Two CMOs argued that the out-of-commerce approach would be **beneficial for rightholders, as it would facilitate the procedure for receiving fair compensation**. CMOs are obliged to publish information on the works included under the licences, as well as information on the rightholders they are unable to locate. This increased transparency would make it easier for rightholders to obtain information on the use of their works and provide a clearer system for opting out of certain uses of their works.

- One beneficiary organisation argued that it would **enable orphan works to be used offline**, as the OWD only enables online use of orphan works.

Two stakeholders highlighted **some clarifications needed before the out-of-commerce approach could be extended to orphan works**. These include: i) the question of whether and how CMOs would be expected to conduct diligent searches for rightholders of orphan works; ii) how and where the list of orphan works included under licensing schemes would be published; and iii) how to ensure that the licensing fees paid by cultural heritage institutions, which cannot be redistributed to unidentifiable rightholders, revert back to public interest causes.

Several stakeholders were more sceptical and argued against extending the out-of-commerce approach to orphan works, expressing concerns about **licensing fees** and the **representativeness of CMOs**.

Three beneficiary organisations believe that the licensing fees requested by CMOs would be more than the costs related to the diligent search, making orphan works inaccessible to under-funded cultural institutions. The orphan works exception should therefore be maintained and **beneficiary organisations should have the flexibility to choose between the two options**.

Three stakeholders **expressed concerns about the lack of CMOs at national level, especially for the audiovisual and visual sectors**. In countries without a strong tradition of collective management and dialogue between stakeholders, negotiations on licensing schemes may prove difficult. In addition, there are concerns for rightholders, notably in the photography industry, where few are affiliated to CMOs. Rightholders in these sectors are more likely to be unaware of licensing scheme procedures, placing them in an unfair position for negotiating fair compensation.

Stakeholder views on extended collective licensing (ECL) schemes

Stakeholder views on ECL schemes generally echoed those for out-of-commerce works, in both the advantages and concerns put forward.

Overall, half of the respondents (51 %) believe that ECL schemes should be considered for the digitisation and dissemination of orphan works. This represents 46 % of beneficiaries, 52 % of rightholders and 100 % of CMOs.

The arguments in favour of ECL schemes were the same as those for out-of-commerce works. Stakeholders argued that it would streamline procedures, provide legal certainty for beneficiaries, and ensure fair compensation for rightholders. Two stakeholders (from Nordic Member States) argued that ECL schemes **ensure dialogue and cooperation between all stakeholders**, which is not possible under the OWD.

Similar to out-of-commerce works, concerns about ECL schemes revolved around licensing fees for beneficiaries and the representativeness of CMOs, notably in the audiovisual and visual sectors (see quote below). A key additional issue highlighted by stakeholders is that **ECL schemes are only applicable nationally in the country in which they were negotiated** and are not a solution to enable access to collections EU-wide.



[...] Careful consideration about the use of schemes like ECL for rightholders that are underrepresented – where there are more non-members than members within a particular sector, means that extra due diligence and care must be prioritised. In addition, renewals or modifications of granted ECL applications should also be thoroughly reviewed to ensure that it meets with the criteria originally granted, so that rightholders are not adversely affected. National ECL provisions should not set precedence for a 'one size fits all' approach for other types of ECL applications, ECL schemes should be based on the merits and qualification of each case. [Comment from a collective management organisation](#)

Stakeholder views on the rules on works in the public domain

Public domain works are works that are no longer protected by copyright. Rules on the public domain vary between countries but it usually occurs around 70 years following the death of the rightholder. In the case of orphan works, as the rightholder is unknown, it is not possible to know whether and when the rightholder has passed away. It is therefore possible that certain orphan works already fall under the public domain and can be used without the requirement for a diligent search.

When asked whether the OWD is coherent with rules on the public domain, **half of the beneficiary respondents believe that the OWD is coherent with public domain rules because the two systems do not interact and cover different situations**, i.e. works with no identifiable rightholders in the case of orphan works and works that are no longer protected by copyright in the case of public domain works. Those that noted inconsistencies mainly argued that there are **differences in national legislation as to what constitutes public domain**. This creates difficulties for beneficiaries in identifying which systems can be used for the different works within their collections.

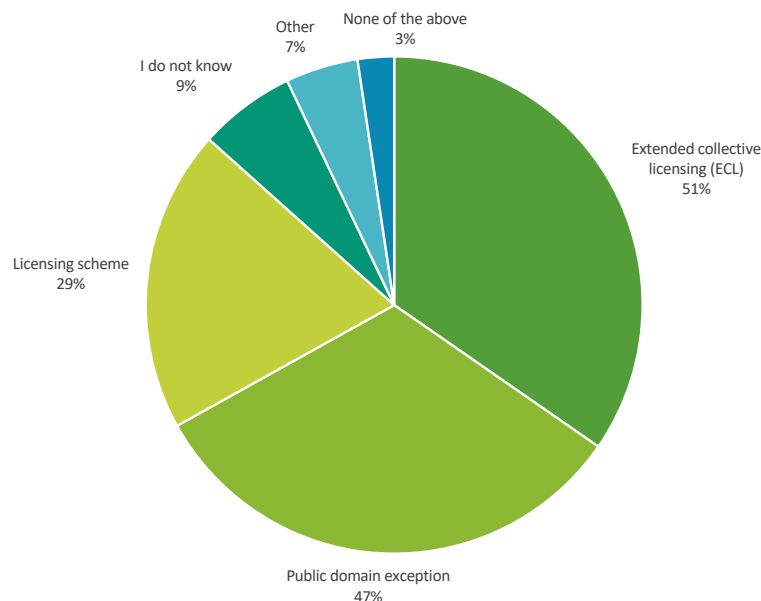
64 % of beneficiary respondents (but only 20 % of rightholder respondents) believe that a **public domain exception should be considered for orphan works**. Of these beneficiaries, five argued that an exception to copyright would be more straightforward for cultural heritage institutions and would be in line with the nature of orphan works, which are likely to be older, non-commercialised works. Two other beneficiaries argued that the public domain exception would enable cultural heritage institutions to make the works more widely accessible.



A public domain exception for out-of-commerce works (say, up to 1950), would remove a lot of complexity and allow organisations to make works more widely available much more easily, including for orphan works, and allow ECL and OWD to focus on more recent works which are more likely to need greater protections. [Comment from a beneficiary organisation](#)

35- What other system(s), in your view, is to be considered for mass digitisation and dissemination of orphan works? (N=87)

Multiple choices possible



Key findings:

- 59 % of respondents believe that the new DSM Directive approach to out-of-commerce works should be extended to cover orphan works. Stakeholders argued that most orphan works are also out-of-commerce works and should therefore be covered under the same regime. According to these stakeholders, the out-of-commerce approach would streamline the procedure for clearing the status of works and provide more legal clarity for beneficiaries. They also argued that it would provide more transparency and better compensation for rightholders. However, several stakeholders expressed concerns about the use of the out-of-commerce approach, particularly the licensing fees that beneficiaries would have to pay. The lack of representativeness of CMOs in certain sectors was also a key point of concern for several stakeholders active in the audiovisual and visual sectors, who argued that rightholders in these sectors would be in an unfair negotiation position.
- 51 % of respondents believe that ECL schemes could be a solution to facilitate the digitisation and dissemination of orphan works. The advantages and disadvantages put forward by stakeholders were broadly the same as those for out-of-commerce works. However, stakeholders also highlighted that ECL schemes are only applicable at national level and would not enable beneficiaries to provide access to their collections EU/EEA-wide¹⁵⁴.
- **64 % of beneficiary organisations believe that a public domain exception should be considered for orphan works.** They argued that this would simplify procedures and enable greater dissemination of orphan works. Only 20 % of rightholders favoured this option, however.
- Several rightholder organisations believe that anonymous and pseudonymous works should be excluded from the scope of the OWD, arguing that these types of work are at risk of being mistakenly classified as orphan works¹⁵⁵.

¹⁵⁴ It is likely that stakeholders do not have full information on cross-border uses, pursuant to Article 9 of Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130, 17.5.2019, pp. 92–125.

¹⁵⁵ Rightholder organisations did not suggest a clear-cut approach to distinguishing between these types of work.

