

Making sense of diligent search

EnDOW Workshop

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The Diligent Search requirement – Dir 2012/28/EU

Basic principles (Art. 1, 3, 4 and Rec. 13-15)

- Pre-requisite to consider a work or phonogram as an orphan
- Harmonized across Member States to ensure high level of protection of copyright and related rights
- Can be carried out by the eligible Institutions or by third parties on their behalf

The Diligent Search requirement – Dir 2012/28/EU

Art. 3(1)

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.

- “In good faith”
- “With respect to each work”
- “Prior to the use of the work”

The Diligent Search requirement – Dir 2012/28/EU

Art. 3(2)

2. 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.

- Appropriate sources to the determined by each MS

The Diligent Search requirement – Dir 2012/28/EU

Art. 3(3)-(4)

3. A diligent search shall be carried out in the Member State of first publication or, in the absence of publication [...]

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.

- “To be carried out in the MS of first publication” (unless evidence suggests information be available in other countries)

The Diligent Search requirement – Dir 2012/28/EU

Art. 3(5)-(6) – Recording obligations

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 Harmonization 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).

To summarize

Diligent search must be carried out

- “In good faith”
- “With respect to each work” by consulting appropriate sources
- “Prior to the use of the work”
- In the Member State of first publication (unless evidence suggest information be available elsewhere)

and its results must be recorded in EUIPO database

Appropriate sources

How many sources to be consulted?

	UK	NL	ITA
Published Books	86	32	131
Newspapers, magazines, journals and periodicals	75	37	61
Standalone Visual Art	86	48	91
Still visual art embedded in published books	87		
Unpublished still visual art	61		
Sound recordings – Music	66	45	71
Other Sound Recording	50		
Film (production company)	59		
Film (Author level)	56		
Stage Plays (music)	62		
Audio Books (Sound)	49		
Unpublished Film and Sound Recordings	37		