

ANNEX I

Study on Diligent Search Requirement in countries implementing the EU Orphan Works Directive – Questionnaire

EnDOW (“*Enhancing access to 20th Century cultural heritage through Distributed Orphan Works clearance*”) is a collaborative project funded under Heritage Plus, a programme launched by agencies of 18 European countries and the European Commission as part of the Joint Programming Initiative in Cultural Heritage and Global Change. EnDOW is aimed at empowering cultural institutions to digitize collections by providing a diligent search platform for orphan works (more information on the project are available at the following address: <http://diligentsearch.eu>).

At European Union level, under the Orphan Works Directive (2012/28/EU),³⁸⁹ cultural institutions are allowed certain special uses of works contained in their collections if, after a diligent search, the rights holders cannot be identified or located. The requirement of “diligent search”, laid down by the Orphan Works Directive (hereinafter also the “Directive”), requires that a large number of sources are consulted, before considering a work as orphan.

Since the Directive has been implemented with a degree of variation across countries, and since the sources are different for each Member State, determining the legal requirement for diligent search in the various countries is essential for the development of the EnDOW platform. In fact, according to the Directive, a diligent search should be carried out in the Member State where the work or phonogram was first published or where it was first broadcast. The following questions are aimed at understanding how the Directive was implemented in the various countries, what are the legal requirements for diligent search and, in particular, what are the sources to be consulted pursuant to the national implementing legislation.

The questionnaire consists of three sections. The first section explores the legal implementation of the Orphan Works Directive and will help us understand if your country has simply replicated the text of the Directive or if it has introduced significant variations. The second section focuses on the sources to be consulted when conducting a diligent search, by asking questions on the sources identified by the national implementing legislation. This section ends asking complimentary information – divided for type of work – which are useful for the rights clearance and the elaboration of our platform’s flowcharts. The third and last section goes beyond the implementation of the Directive, asking information helping in the identification and location of rights holders and further questions with regard to the general copyright framework in place in the various countries.

³⁸⁹ Please refer to the official text of the Directive, available at: http://ec.europa.eu/internal_market/copyright/orphan_works/index_en.htm#maincontentSec1.

Section One: Implementation of the Orphan Works Directive

This section aims at understanding how the Directive was implemented in your country. By answering to the following questions about the legal implementation of the Orphan Works Directive you will help us understand if your country has simply replicated the Directive or if it has produced relevant innovations.

- 1.1 Has your country implemented the Orphan Works Directive?
- 1.2 Could you please provide (1) the exact reference to the national implementing legislation, (2) a link to its text and, if available, (3) an English translation of the relevant legal provisions?
- 1.3 According to the implementing legislation of your country what is the subjective scope of application of the orphan works exception? In other words, who are the organizations that can make use of the orphan works exception? Please explain if and how this provision differs from Article 1(1) of the Directive.
- 1.4 According to the implementing legislation of your country, what is the objective scope of application of the orphan work exception? In other words, what are the categories of work or material covered by the implementing legislation? Please explain if and how this provision differs from Article 1(2) of the Directive.
- 1.5 What are the permitted uses for orphan works under the implementing legislation of your country? Please explain if and how this differs from Article 6 of the Directive.
- 1.6 What are the diligent search reporting requirements established by your implementing legislation? Please explain if and how this differs from Article 3(5) of the Directive (requiring that records of diligent searches are kept by those who have undertaken them and are provided to the competent national authorities).
- 1.7 How does your legislation rule on the cross-border search, i.e. what does your country's implementing legislation require for when evidence arises that relevant information on rightholders could be found in other countries? Please explain if and how this differs from Article 3(4) of the Directive (stating that, in the case above, information available in the other countries should also be consulted).
- 1.8 Has your country adopted soft-law instruments (government guidelines, best practices, corporate policies, etc.) complementing the framework for diligent search?³⁹⁰ Please provide references to these soft-law instruments.
- 1.9 Does the legislation of your country require additional steps, beyond diligent search, to be taken, before the use of orphan works? (For example, publicity obligations on centralised database or newspapers, licensing, etc.). Please explain if and how this differs from to Article 2 of the Directive.

³⁹⁰ An example of such soft-law instruments are the guidelines issued by the UK Intellectual Property Office: <https://www.gov.uk/government/collections/orphan-works-guidance>.

1.10 Does your country have any other regulatory scheme in place dealing with orphan works (e.g. a licensing scheme)? Please provide references to these laws and briefly describe how they could interact with the implementation of the Directive.

Section Two: General and Specific Requirements for Diligent Search

This section focuses on the sources to be employed when conducting a diligent search and asks you to answer questions on the sources that are identified within your country's national implementing legislations. It also asks you to provide complimentary information – divided for type of work –which is relevant for rights clearance.

Part I: List of Sources

2.1 Does the implementing legislation of your country contain a list of sources to be consulted when carrying out a diligent search? Please provide us with the list of sources named by your national legislation.

2.2 Is this list exhaustive or illustrative? In other words, are cultural institutions sufficiently 'diligent' if they limit their search to the sources in the list, or are they expected to take into account other sources as well?

2.3 Please fill in the attached Excel file with the complete list of sources relevant for a search to be diligent, divided for type of works (e.g. audio-visual works, published books, visual works etc.). Please consider that repetitions are allowed: you can mention the same source for different type of works.

2.4 Does the implementing legislation of your country provide for the establishment of a national diligent search database where beneficiary organisations have to register the outcome of their diligent searches? Is this register already operational? Please provide details and a link to the database. Please consider that the creation of a database can be the way into which a Member State's implementing legislation meets the diligent search reporting requirements required by Article 3(4) of the Directive (see above question 1.6).

2.5 Does your country have a legal deposit requirement? Does the legal deposit receive a specific reference in the Directive implementation? Please provide a link to the catalogue of the institution in charge of the legal deposit.

Part II: Presumptions

2.6 The names of authors, contributors and those involved in the commercial exploitation of works are commonly printed on the work. For example, the name of an author and his/her publisher appear on a book while the names of musicians, composers, lyricists and producer can be commonly found in the booklet of a CD. Are these statements considered a presumption of authorship and/or

right ownership³⁹¹ under your national copyright law? Please list here the presumptions and those who benefit from them.

2.7 Similarly to the presumptions of authorship and/or right ownership, national copyright laws can comprise presumptions of transfer of rights. For example, there might be the presumption that the author(s) of a film transfer copyright to the film producer when entering into an agreement with him, regardless of this aspect being regulated by the agreement. Are there presumptions of transfer of rights for specific categories of works in your national copyright law? Please list the presumptions of transfer that are present in your national copyright law – if any – and illustrate who benefit from them.

2.8 If in your country there are the presumptions mentioned at numbers 2.6 and 2.7 above, what kind of value do they have in the context of diligent search? In particular, would they require a general search, for example via Google, to ensure that they have not been challenged?

Part III: Audio-Visual Works

2.9 In the case of audio-visual works made by public service broadcasters, what is the cut-off date determined by the implementing legislation for audio-visual works to be covered by the Orphan Works Directive? Does this differ from the date established in article 1(3) of the Directive?

2.10 Are there specific rules concerning the authorship or right ownership of audio-visual works under your national copyright law? I.e., is there a rule or a presumption that determines by default which categories of contributors are authors of the audio-visual work? I.e., is there a rule or presumption that determines by default which categories of contributors are vested with related rights on the audio-visual work? Is there a closed list of entities that are indicated as authors (eg: directors, music writers, etc) or right holders (eg: film producers, photography directors, etc)? If yes, please list them. Alternatively, is there an open list? If yes, please indicate those who are most commonly considered authors and right holders in practice.

2.11 Are there specific rules concerning the presumption of right transfers for audio-visual works under your national copyright law? I.e., is there a rule or a presumption that determines by default that copyrights or related rights are automatically transferred to the film producer or film distributor once the audio-visual work is completed? I.e. is there any rule or presumption that determines by default that copyrights or related rights are automatically transferred to the film producer when entering into an agreement with them, regardless of this aspect being regulated by the agreement (for the concept of “transfer of rights” see above 2.7).

2.12 In certain countries film distributors play a major role in the film industry. Even if they are not specifically mentioned in the national copyright law they become, in the end, the actual entity exploiting all economic rights and related rights on the film. Is there in your country a market practice that contractually assigns the above rights to film distributors?

³⁹¹ Presumptions of authorship are those that aim at identifying the author (as in the case of books), presumptions of right ownership are those that aim at identifying the related right holders (as in the case of phonograms in relation to both the phonogram producers and the performers).

Part IV: Music

2.13 How is a musical work defined in your country? Does this term also include any “accompanying words” intended to be performed with the music? If not, to what sort of copyright works amounts those “accompanying words”? In case there are several people involved in the creation of a musical work (e.g. different authors for lyrical and non-lyrical elements), is this work considered as a joint work (i.e. the authors' contributions do not form independent, detachable works) or rather as a collective work (i.e. each author's contribution forms an independent work)? In both cases, is there a rule or a presumption that determines by default which categories of contributors are authors of a musical work?

2.14 Since musicians or groups often perform musical works that they have not authored, is there a rule or a presumption that determines by default which categories of contributors are vested with the related rights of performers? Is there a closed or an open list of entities indicating who are the performing rights holders? In both cases, please list them (e.g. singers, musicians).

2.15 Are there specific rules concerning the presumption of right transfers for musical works under your national copyright law? I.e., is there a rule or a presumption that determines by default that copyrights or related rights are automatically transferred to the music producer (e.g. music agency) once the musical work is completed? I.e. is there any rule or presumption that determines by default that copyrights or related rights are automatically transferred to the music producer when entering into an agreement with them, regardless of this aspect being regulated by the agreement (for the concept of “transfer or rights” see above 2.7)?

Part V: Phonograms

2.16 How is the term of phonogram defined in your country? For instance, does this term include film soundtracks? If not, what sort of copyright works are film soundtracks?

2.17 In the case of phonograms made by public service broadcasters, what is the cut-off date determined by the implementing legislation of your country for phonograms to be covered by the Orphan Works Directive? Does this differ from the Directive?

2.18 Are there specific rules concerning the rights ownership of phonograms under your national copyright law? I.e., is there a rule or presumption that determines by default which categories of contributors are vested with related rights on the phonogram (phonogram producer, sound director, etc)?

2.19 Are there specific rules concerning the presumption of right transfers for phonograms under your national copyright law? I.e., is there a rule or a presumption that determines by default that related rights are automatically transferred to the phonogram producer once the sound is recorded? I.e. is there any rule or presumption that determines by default that related rights are automatically transferred to the phonogram producer when entering into an agreement with him, regardless of this aspect being regulated by the agreement (for the concept of “transfer or rights” see above 2.7)? (Please also consider in answering the above question the relevance of commissioned works and works made in the course of employment in this part).

2.20 In certain countries labels play a major role in the music industry. Even if they are not specifically mentioned in the national copyright law they become, in the end, the actual entity exploiting phonogram producer's rights. Is there in your country a market practice that contractually assigns the above rights to music labels?

2.21 In some cases, phonograms are recordings of underlying copyright works other than music. For example, audio books are essentially a reproduction of the underlying literary work including the text and the novel. Is there in your country a market practice that contractually assigns the rights of authors' in these underlying works to a content publisher (as distinct from the phonogram producer)? In other words, is it common market practice in your Country that the author of a novel assigns his copyright to a publisher which then licenses its use further to make the audio book?

Section Three: Additional Information Useful for the Diligent Search

This section goes beyond the implementation of the Directive and asks information helping in the identification and location of rights holders as well as further questions regarding the general copyright framework in place in your country. Particular attention is put on the existence of the registries that are held by collective management authorities or public authorities.

3.1 Is there or was there, in your Country, a register for anonymous and/or pseudonymous works? If this register exists/existed, please list which organisation manages/managed it, where it is/was located and how it can/could be accessed.

3.2 Is there or was there, in your Country, a register or a database for works that were subject to (successful) authorship or right ownership disputes which records the changes in status? If this register exists/existed, please list which organisation manages/managed it, where it is/was located and how it can/could be accessed.

3.3 Is there, in your Country, a register for companies? If this register exists, please list which organisation manages it, where it is located and how it can be accessed.

3.4 Is there or was there, in your Country, a register or authority which holds information on company mergers or bankruptcy arrangements? If this register exists/existed, please list which organisation manages/managed it, where it is/was located and how it can/could be accessed.

3.5 Is there or was there, in your Country, a register on the transfer of copyrights, for example by testament, etc.? If this register exists/existed, please list which organisation manages/managed it, where it is/was located and how it can/could be accessed.

3.6 Is there or was there, in your Country, a register on the buying and selling of back-catalogues of copyright protected works and/or neighbouring rights (for example, in the case of a music publisher A who buys the back catalogue from publisher B, covering all the songs from a specific band)? If this register exists/existed, please list which organisation manages/managed it, where it is/was located and how it can/could be accessed.

3.7 How many public service broadcasters (both TV and radio) exist in your country? Is there a register or an official list of public service broadcasters and their legal status across time? If this

register exists, please list which organisation manages it, where it is located and how it can be accessed.

3.8 Does your country have any other regulatory scheme in place dealing with other relevant subject matter of digitization (e.g. out-of-print or out-of-distribution works)?³⁹² Please provide references to these laws and briefly describe how they operate. In particular, please give details on whether a diligent search requirement is included, and how it differs from the diligent search requirement for orphan works.

³⁹² An example of such legislation is the French Law on the Digital Exploitation of 20th Century Unavailable Books (*Loi n. 2012-287 du 1er mars 2012 relative à l'exploitation numérique des livres indisponibles du XXème siècle*).