Report 2

Requirements for Diligent Search in 20 European Countries

Authors:

Aura Bertoni, Flavia Guerrieri, Maria Lillà Montagnani

Principal Investigators:

Maurizio Borghi, Lucie Guibault, Maria Lillà Montagnani

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Enhancing access to 20th Century cultural heritage through Distributed Orphan Works clearance

EnDOW

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CONTENTS

EXECUTIVE SUMMARY

The Object of the Analysis

The Orphan Works Directive 2012 requires that a Diligent Search of rightholders is carried out before a work be declared an orphan, and thus falling within the relevant exception. This Report presents the analysis of the conditions under which a Diligent Search can be carried out under the laws of seventeen countries that are the object of the research (UK, Italy and the Netherlands being already analysed in Report 1). For each jurisdiction, a questionnaire has been answered by a local expert to determine the implementation of the Orphan Work Directive and what are the requirements for the Diligent Search. In particular: a) Who can carry out a Diligent Search and on what conditions; b) What are the authoritative sources and databases to be consulted and to what extent they are accessible on line; c) What use can be made of an orphan work. This has been done to allow the researchers, in the subsequent stages of EnDOW, to design and populate the crowd-sourcing platform that will facilitate carrying out the Diligent Search for mass digitisation.

The Requirement for Diligent Search

All the examined countries have implemented the Orphan Works Directive adopting a limited number of variations as to subjective and objective scopes and permitted uses. In regard to the appropriate sources to carry out the Diligent Search and the ways to document it, however, several discrepancies emerge. The Directive leaves to the Member Countries the choice about what sources should be consulted in order to meet the requirement of a Diligent Search, therefore all countries under scrutiny have issued or are in the process of issuing lists of sources to be consulted.

The evidence from the seventeen jurisdictions examined, combined with the three jurisdiction examined in Report 1, reveals that the majority of countries adopt illustrative lists, i.e.: “open-ended” tools that may require that sources beyond those listed are consulted. A minority of countries, on the other hand, merely reflects the general provision of the Directive without giving any additional information about the sources to be consulted. As a result the number of sources listed varies considerably among countries.

The Assessment of the implementation of the Orphan Works Directive

The assessment of the implementation of the OWD considers: (1) the level of harmonisation on the topic among Member States, (2) the level of legal certainty offered by the Directive and its national implementations to cultural institutions, and (3) the sustainability of the diligent search as a method to enable the use of orphan works.

In this context, it emerges that the effectiveness of the Directive in fostering harmonisation within the internal market and mass-digitisation processes is rather limited by, primarily, the unsustainability of the Diligent Search. The Diligent Search highly depends on the number of sources that need to be consulted and their accessibility. As long as there is no hierarchical validity of sources by law and not all sources are freely accessible online, it remains unclear how the clearing of rights will happen in order to fully comply with the requirements of each legislation.

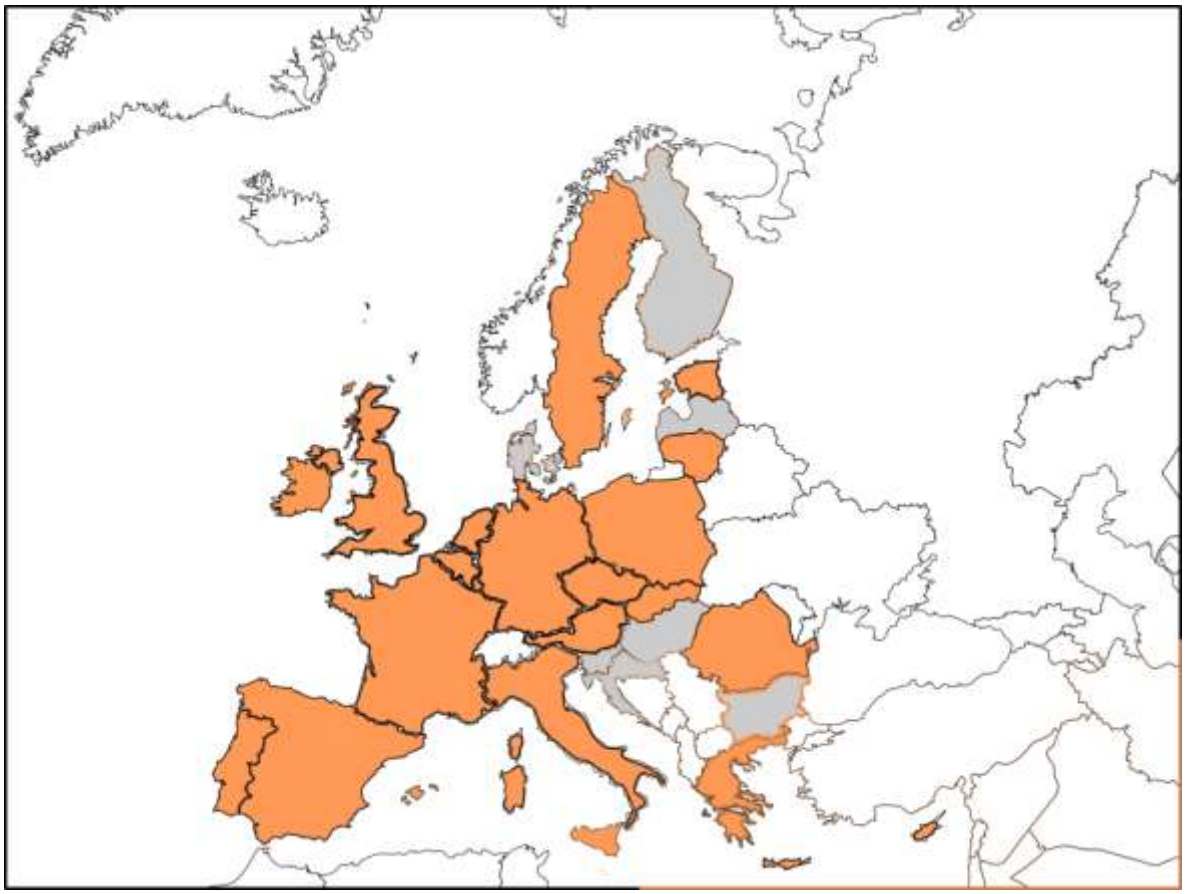
PART I

1. INTRODUCTION

The digitization of 20th Century cultural heritage is severely restricted due to potential subsistence of copyright and related rights. Under the new European laws on orphan works, a large amount of cultural heritage whose copyright status is uncertain could be lawfully digitized if a 'diligent search' of the right holders was performed.

EnDOW ("Enhancing access to 20th Century cultural heritage through Distributed Orphan Works clearance") is a 3-year project funded under *Heritage Plus*, a programme launched by eighteen European national agencies and the European Commission as part of the Joint Programming Initiative in Cultural Heritage and Global Change, aiming at easing the diligent search. The EnDOW project investigates the legal instruments of "diligent search" in the EU, with the aim to turn these into flowcharts of operations to be implemented in an online platform. The project will explore the potential of such online platform to enable European cultural institutions to source information from end-users and determine the orphan work status of items in their collections. Ultimately, the project will allow for an enhanced access to 20th Century cultural heritage that would otherwise remain unexploited.

There is a total of twenty countries covered by EnDOW. The list of these countries includes, in alphabetical order: Austria, Belgium, Cyprus, Czech Republic, Estonia, France, Germany, Greece, Ireland, Italy, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovakia, Spain, Sweden, and the United Kingdom.



The project is a partnership of four European research centres:

- CIPPM, Bournemouth University (project leader)
- CREATe, University of Glasgow
- IViR, University of Amsterdam
- ASK, Bocconi University, Milan

The objectives of the EnDOW project are:

- to analyse the legal requirement of "diligent search" set by the Directive 2012/28/EU on certain permitted uses of orphan works across the legislation of 20 European countries (known as 'Orphan Works Directive', hereafter also 'OWD');
- to investigate orphan works clearance best practices across the cultural heritage sector of 20 European countries;
- to design, implement and optimize an online platform for crowdsourced diligent searching on works in European cultural institutions' collections; and
- to study the potential applications and challenges of the crowd-based search method for texts, images, films, works of visual art and born-digital cultural heritage works.

1.1 The orphan works directive

Orphan works are works which are protected by copyright or related rights for which right-holders are unknown or not located. In order to create a legal framework facilitating the digitisation and dissemination of those works, Directive 2012/28/EU on certain permitted uses of orphan works (known as 'Orphan Works Directive', hereafter also 'OWD') entered into force on 28 October 2012.[1] The Directive is meant to contribute to the free movement of knowledge and innovation in the internal market as key component of the Europe 2020 Strategy, as set out in the Communication from the Commission entitled 'Europe 2020: A strategy for smart, sustainable and inclusive growth, which follows Lisbon Strategy for the period 2000–2010'.[2] In particular, the objectives of the Directive are twofold: (1) the legal determination of orphan work status, and (2) ensuring legal certainty with respect to the use of orphan works.

1.2. Structure of the report

The EnDOW project examines the orphan works legal framework in twenty European Member States. A first report was published in February 2016 (Report 1) for a sample of three examined countries: Italy, the Netherlands, and the United Kingdom. Based on the outcome of Report 1, this report (Report 2) considers how the other seventeen Member States covered by this project (Austria, Belgium, Cyprus, Czech Republic, Estonia, France, Germany, Greece, Ireland, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovakia, Spain, and Sweden) have implemented the OWD into national law. Report 2 addresses the relationship between the OWD and the national legislative frameworks for copyright and related rights and it provides further evidence as to the practical aspects of diligent search in the above mentioned seventeen countries by focusing on the scale and accessibility of the sources required by law to carry out the diligent search of orphan works. In this respect, the analysis will assess the role that the OWD has played in the rights clearance of works in the collections of cultural heritage institutions, and its impact on the transaction costs associated with the process. This will not only offer an insight in the evaluation of the OWD as response to challenges and costs involved for cultural heritage institutions in digitisation projects, but it also allows the EnDOW consortium, in the subsequent stages of the project, to design and populate the diligent search platform that will facilitate executing orphan works clearance across 20 EU Member States.

Finally, Report 2 identified for each piece of implementing legislation possible uses of orphan works. Directions can be found in the national law, or in the usage allowances of the licensing system, where in place. Uses for both private and public purpose are envisaged, for commercial as well as non-commercial purpose, through both digital and analogue means, and for large and small scale dissemination.

[1] OJ L 299, 27.10.2012, p. 5–12

[2] European Commission, *Europe 2020: A strategy for smart, sustainable and inclusive growth*, Brussels, 3.3.2010, COM(2010) 2020.

2. METHODOLOGY

2.1. Background: Report 1

The EnDOW project examines the orphan works legal framework in twenty European Member States. Report 1 has already examined three countries: Italy, the Netherlands, and the United Kingdom, and determined what are the requirements for diligent search to locate copyright holders, specifically: a) who can carry out a diligent search and on what conditions; b) what are the authoritative sources and databases to be consulted, and to what extent they are accessible online; and c) what use can be made of an orphan work. This second report (Report 2) integrates the evaluation carried out in Report 1 with the analysis of the other seventeen European countries. These countries are Austria, Belgium, Cyprus, Czech Republic, Estonia, France, Germany, Greece, Ireland, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovakia, Spain, and Sweden.

2.2. Questionnaire design

A questionnaire was designed to get insights from national experts on how the OWD has been implemented in each of the countries covered by EnDOW (a copy of the complete questionnaire can be found in the Annex).

The questionnaire was made up of 39 questions, which were divided into three main sections:

1) Implementation of the Orphan Works Directive;
2) General and Specific Requirements for Diligent Search;
3) Additional Information Useful for the Diligent Search.

2.2.1. Implementation of the orphan work directive

The first section concerns the legal implementation of the OWD and has been employed to understand whether a country has simply replicated the text of the Directive, or has introduced significant variations. This section is composed of ten questions.

The first question asked respondents if the OWD had been implemented in their country. Then, the second question asked respondents for the exact reference to the national implementing legislation, a link to its text and an English translation of the relevant legal provisions, if available.

The third question asked respondents for the subjective scope of application of the orphan works exception, i.e., the organizations that are beneficiaries of the orphan works exception.

The fourth question asked respondents for the objective scope of application of the orphan work exception, i.e., the categories of work or material covered by the implementing legislation.

The fifth question asked respondents for the permitted uses of orphan works under the implementing legislation of their country.

The sixth question asked respondents for the diligent search reporting requirements established by the implementing legislation of their country as well as the differences with the OWD.

The seventh question asked respondents for their country's implementing legislation rule on the cross-border search.

The eighth question asked respondents for any soft-law instruments (government guidelines, best practices, corporate policies, etc.) complementing the framework for diligent search.

The ninth question asked respondents for any additional step, beyond diligent search, to be taken before orphan works are legitimately used.

The tenth question asked respondents for any other regulatory scheme in place dealing with orphan works (e.g. licensing scheme).

2.2.2. General and specific requirements for diligent search

The second section focuses on the sources to be consulted when conducting a diligent search as identified by the national implementing legislation. This section also seeks additional information on how national copyright laws and prevailing market practices treat different types of work, and whether they establish presumptions of authorship, right ownership, rights transfer. All this information also provided the basis for the documentation of the national diligent search processes into flowcharts. Such flowcharts have been adopted by the EnDOW consortium for programming the online crowdsourcing platform where users can be guided through the required steps to perform a diligent search over items possessed by cultural institutions.

This section had 21 questions, which were subdivided into five subsections:

a) List of sources;
b) Presumptions;
c) Audio-visual works;
d) Music;
e) Phonograms.

3.2.2.a) List of Sources

The first subsection, 'List of sources', had five questions.

The eleventh question asked respondents whether the implementing legislation provided for a list of sources to be consulted when carrying out a diligent search.

The twelfth question asked respondents if the list, when provided, was exhaustive or illustrative.

The thirteenth question asked each respondent for the provision of a complete list of sources relevant for a search to be diligent in her/his country, based on a form template created by the EnDOW consortium, which divided the sources for type of works (i.e. Published Books; Newspapers, Journals, Magazines and Periodicals; Visual Works; Audio & Audiovisual Works), type of source (e.g. works register, orphan works register, legal deposit, collecting society/agency database, etc.), level of accessibility (i.e. freely accessible online, registration required, registration and payment required, accessible only on site, URL is not functioning, source is not locatable online, other), and

category of right-holder (e.g. author, publisher, phonogram producer, record label, composer, film producer, etc.).

The fourteenth question asked each respondent whether her/his country has established a national database for orphan works where beneficiary organisations are compelled to register the status of the work for which the diligent search has been carried out, and, if any, its details. Respondents were also asked to provide any connection and differences there might be with the online database established by the OWD and managed by the European Union Intellectual Property Office (EUIPO – the former OHIM, Office for Harmonization in the Internal Market).

This first subsection ends with the fifteenth question asking respondents for a legal deposit requirement, and, if any, a link to the catalogue of the institution/s in charge of it.

2.2.2.b) Presumptions

The second subsection, 'Presumptions', had three questions.

The sixteenth question asked respondents if the names of authors, contributors and those involved in the commercial exploitation of works that are commonly printed on the work are considered presumptions of authorship and/or right ownership under their national copyright law.

The seventeenth question asked respondents if there were presumptions on the transfer of rights for specific categories of works in their national copyright law. Accordingly, the eighteenth question asked respondents if the previous presumptions, if present, had value in the context of diligent search.

2.2.2.c) Audio-visual works

The third subsection, 'Audio-visual works', had four questions.

The nineteenth question asked respondents what was the cut-off date for audio-visual works made by public service broadcasters determined by the implementing legislation. Respondents were also asked to provide any differences there might be with the corresponding provision of the OWD.

The twentieth question asked respondents for any specific rules concerning the authorship or right ownership of audio-visual works under their national copyright law.

The twenty-first question asked respondents for any specific rules concerning the presumption on right transfers for audio-visual works under their national copyright law.

The twenty-second question asked respondents if there is in their country a market practice that contractually assigns the above rights to film distributors.

2.2.2.d) Music

The fourth subsection, 'Music', had three questions.

The twenty-third question asked respondents to define a musical work according to copyright law of their country; specify if the term also includes any 'accompanying words' intended to be

performed with the music; and if a work is 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) when more people are involved.

The twenty-fourth question asked respondents if there is a rule or presumption that determines by default which categories of contributors are vested with the related rights of performers and if there is a closed or open list of entities indicating who are the performers' rights holders.

The twenty-fifth question asked respondents if there are specific rules concerning the presumption of right transfers for musical works under their national copyright law.

2.2.2.e) Phonograms

The last subsection, 'Phonograms', had six questions.

The twenty-sixth question asked respondents to define the term phonogram in their country.

The twenty-seventh question asked respondents for the cut-off date determined by the implementing legislation of their country for phonograms to be covered by the OWD.

The twenty-eighth question asked respondents for any specific rules concerning the rights ownership of phonograms under their national copyright law.

The twenty-ninth question asked respondents for any specific rules concerning the presumption on right transfers for phonograms under their national copyright law.

The thirtieth question asked respondents if there was in their country a market practice that contractually assigns the rights for exploiting phonogram producer rights to music labels.

The thirty-first question asked respondents if it is common market practice in their country that the author of a novel assigns her or his copyright to a publisher, which then further licenses its use to make an audio-book.

2.2.3 Additional information useful for the diligent search

The third and last section goes beyond the implementation of the Directive and the national copyright framework by seeking information that might help in the identification and location of rights holders. In particular, this section had 8 questions focusing on systems of registration that may offer useful data in case of Diligent Search.

The thirty-second question asked respondents for a register for anonymous and/or pseudonymous works, and, if any, its details.

The thirty-third question asked respondents for a register for works that are subject to (successful) authorship or right ownership disputes and, if any, its details.

The thirty-fourth and the thirty-fifth questions addressed the business sector and asked respondents, respectively, for a national register for companies, and/or for a register which holds information on company mergers or bankruptcy arrangements, and, if any, its details.

The thirty-sixth question asked respondents for a register on the transfer of copyrights, for example by testament, etc., and, if any, its details.

The thirty-seventh question asked respondents for a register on the buying and selling of back-catalogues of copyright protected works and/or neighboring rights, and, if any, its details.

The thirty-eighth question asked respondents for the number of public service broadcasters (both TV and radio) operating in their country; if there is a register or an official list of public service broadcasters and their legal status across time, and, if any, its details.

Finally, the thirty-ninth question asked respondents for any other regulatory scheme in place dealing with other relevant subject matter of digitization (e.g. out-of-print or out-of-distribution works), references to these laws and brief description on how they operate.

3. MAIN FINDINGS AND ASSESSMENT OF THE IMPACT OF THE DILIGENT SEARCH IMPLEMENTATION

The aim of the orphan work directive was to contribute to the free movement of knowledge and innovation in the internal market by providing a well formulated legal framework for the digitisation and dissemination of orphan works.

Accordingly, both Report 1 and Report 2 assessed the implementation of the Directive to include: (1) the level of harmonisation on the topic among Member States, (2) the level of legal certainty offered by the OWD and its national implementations to cultural institutions, and (3) the sustainability of the diligent search as a method to enable the use of orphan works.

3.1 The level of harmonisation achieved by the Directive

Recital 8 of the Directive indicates that 'different approaches in the Member States to the recognition of orphan work status can present obstacles to the functioning of the internal market and the use of, and cross-border access to, orphan works. Such different approaches can also result in restrictions on the free movement of goods and services which incorporate cultural content. Therefore, ensuring the mutual recognition of such status is appropriate, since it will allow access to orphan works in all Member States'.

Although the OWD has been mostly transposed literally in all EU national legal systems, some variations can be traced between the EU members as to the following aspects.

3.1.1 Subjective scope

According to Article 1.1 of the Directive, its provisions apply to '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'.

All in all, across the EU, the subjective scope of the orphan work exception does not differ from Article 1.1 of the Directive as most of the Member States have adopted a literal transposition of the provision of the Directive (Austria, Belgium, Cyprus, Estonia, Ireland, Luxembourg, and Romania), or have amended the text with minor modifications (Greece, Spain, and Sweden). That said, while a couple of countries decided to clearly broaden the subjective scope (i.e. Lithuania and Poland, which extend the exception to research institutes too, and France where "not publicly accessible" museums and archives are also covered), others decided to narrow it by excluding a specific beneficiary category (i.e. film and audio heritage institutions in Czech Republic) or by referring to local definitions with a more restricted scope. This is the case of Slovakia where the implementing provision refers to the beneficiary category of "statutory depositary". This definition only includes public-service broadcasters and the Slovak Film Institute, and makes no reference to other film and audio heritage institutions.

In terms of public-interest mission, in most Member States it remains loosely defined. A number of countries, like Poland and Portugal, are more detailed than the OWD though, and provide for concrete examples of public-interest profiles for which cultural institutions can invoke the orphan work exception. These mainly include access to information, education and culture.

3.1.2 Objective scope

Article 1.2 of the Directive states that it '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'.

National variations are also detectable in respect of the objective scope set by the OWD. Austria and Czech Republic slightly changed the definition of 'cinematographic works' to make it consistent with their national laws, whereas other implementations unquestionably enlarge the objective scope of the Directive so as to comprise other specific categories of work – like 'flyers' in Portugal or 'musical works in written form' in Slovakia, as it occurred in Portugal. This last solution is typically adopted by considering the national list of works, unlike the list contained in the OWD, as non-exhaustive.

3.1.3 Permitted uses

Under Article 6.1 of the OWD, the beneficiary organisations may use orphan works by making them available to the public, and by acts of reproduction, for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration.

Almost all of the considered countries seem to allow these same uses, with the exception of Portugal. Here the list of permitted uses is merely exemplary, and other uses may be envisaged.

In addition, Article 6.2 of the Directive specifies that institutions can generate revenues 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. While this has been literally implemented in all considered countries, in France the 'non-commercial use' limitation is valid only for seven years.

3.1.4 List of sources and other requirements for the diligent search

All implementing legislation provide - or are in the process of providing – a list of appropriate sources among the diligent search shall be carried out. For almost all countries, the national experts underlined the uncertain value of such lists. In particular, there is no implementation that clearly specifies whether the list is exhaustive or illustrative (see infra § 4.2). Absent any indication in this sense at European level, the most common opinion is that may further information be needed, the diligent search must take into consideration also outside-the-list sources.

Beside the list of sources, seven countries (i.e. Belgium, Italy, Lithuania, the Netherlands, Romania, Sweden, and the UK) have also adopted national databases for orphan works but currently operational are only the Swedish (managed by the Swedish Patent, Trademarks and Copyright authority) and British (managed by the IPO) ones.

3.1.5 Presumptions

A vast majority of the analysed countries' copyright legislations include presumptions on authorship, ownership, or transfer of rights, which impact on the diligent search requirement.

While almost all copyright laws analysed provide for a general presumption on authorship in favour of those named as author on the work (or 'disclosed' as author under the Romanian copyright law), around half of them comprise a general presumption on ownership as well (this is not the case, for example, of Cyprus, Luxemburg, and Portugal) In France, this presumption is in favour of the person that commercialises a work according to case law. Conversely, few countries comprise a case-based presumptions on authorship (for example, Germany and Belgium), and ownership (for example Estonia), which means that they provide for a list of cases in which a presumption applies. A mixed system is adopted in Sweden, where a general presumption on neighbouring rights is then detailed for four cases (visual arts, sound recording, radio and television broadcast, catalogues and phonograms).

Beside the general presumptions, several national copyright laws also include specific presumptions for specific categories of works, which widely vary among countries in terms of subject matter,

subject beneficiary of the presumption, and width. For example, presumptions on authorship of audio-visual works are encompassed in Belgium and France, of collective works and computer programs in Greece.

Similarly, presumptions on right transfers are included in numerous jurisdictions and vary in terms of subject matter (mainly audio-visual, music, or phonograms), rights transferred (for example copyright legislation in Luxemburg states that performers' rental rights are presumed to transfer to producers when a contract is signed), or entitlement of transfer (by mere contract as in the case above, or by employment relationship as in Spain).

The only presumption on orphan works that has so far been adopted is encompassed in the Czech Republic implementing legislation. It states that when one of the works of an author is considered orphan, all of her or his works are presumed to be orphan as well.

3.1.6 Soft-law instruments

Besides investigating the implementation of the OWD, the questionnaire asked national experts for any soft-law instruments (government guidelines, best practices, corporate policies, etc.) complementing the framework for diligent search.

Apparently, as to November 2016 detailed guidelines on diligent search were available only in the UK. The Czech Republic, whose guidelines were 'in preparation', actually makes reference to the British guidelines as well. Partial guidelines have been provided by the Estonian Ministry of Justice and the Lithuanian Ministry of Culture with reference to the sources for diligent search.

3.1.7 Other regulatory schemes

Additionally, EnDOW project wanted to investigate on the presence of any other regulatory scheme in place touching upon orphan works. The UK remains the only country with a licensing scheme expressly dedicated to orphan works. Extended Collective Licensing schemes are in place, again, in the UK, and in Ireland, Slovakia and Sweden. Finally, legislations on out-of-commerce works (meaning, those works which are still copyrighted but are not anymore commercially available) have been adopted in France, Germany and Poland.

3.2. The level of legal certainty

Recital 9 of the Directive recognises that 'a common approach to determining the orphan work status and the permitted uses of orphan works is necessary in order to ensure legal certainty in the internal market with respect to the use 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'. Therefore, recital 14 requires 'a harmonised approach concerning such diligent search in order to ensure a high level of protection of copyright and related rights in the Union'.

Firstly, it is worth recalling that a search qualifies as 'diligent' if it has been carried out by consulting 'appropriate sources' for the category of works in question as indicated by Article 3 of the Directive. This does not specify though what constitutes an 'appropriate source'. Yet, its Annex I indicates the general types of sources that are considered relevant per category of work. The Directive leaves to the Member Countries the choice about what sources should be consulted in order to meet the requirement of a diligent search. No country provides legal requirements on what constitutes a diligent search, but all countries under scrutiny are willing to issue illustrative lists of sources to be consulted. Although Belgium and Cyprus are still in the process of finalizing their lists of sources, other countries have already taken positive steps to ease the task of cultural institutions.

In this respect, the principle of legal certainty is best served if the list of sources is as precise as possible. The evidence from the twenty examined jurisdictions reveals that only the UK Intellectual Property Office (IPO) has issued comprehensive guidelines with a 'check list' for each type of work thereby displaying the appropriated sources to be consulted for each category of works (detailed list of sources).

Other countries (i.e. Czech Republic, Estonia, France, Germany, Greece, Ireland, Poland, Romania, and Slovakia) seek to ensure legal certainty by offering detailed lists of sources to cultural institutions, which are however deemed 'illustrative'. This means that, on the one hand, these lists are 'open-ended' and there may be further sources where information is likely to be found; on the other hand, given their illustrative nature, a search can be diligent even though not all the sources mentioned in the list are consulted. As a general rule, in these countries, the number and type of sources consulted should be reasonable, and the search done in good faith to be deemed diligent (illustrative list of sources).

Conversely, both Report 1 and Report 2 show that some other legislations merely reflects the general provision of Annex I of the Directive without giving any additional information about the sources to be checked. In these cases, the list provide much more a starting point for a serious diligent search than an illustrative (as in the case above) or precise (as in the case above mentioned of the UK) means, since many of the sources that, as a common practice, are consulted by cultural institutions in the due course of a search for right holders are not mentioned. This means that in these cases cultural institutions only have an indicative advice from the law, falling short of legal certainty in respect of what sources need to be consulted for pursuing a diligent search (informative list of sources).

Secondly, to avoid legal uncertainty and duplication of efforts, Article 4 of the Directive sets the basis for the mutual recognition of the orphan work status. To this end, cultural institutions are asked to keep records of their diligent searches, and the result of such searches to be inserted in 'a single online database for the Union containing such information and for making it available to the public at large in a transparent manner' (Recital 16). However, each country is also free to create its own database in addition to the common one managed by the European Union Intellectual Property Office (EUIPO). At the moment, the legislation of seven countries provides for the establishment of a national database for orphan works (i.e. Belgium, Italy, Lithuania, the Netherlands, Romania, Sweden, and the UK), but national databases currently operational are only in Sweden (managed by the Swedish Patent, Trademarks and Copyright authority) and in the UK (managed by the IPO). As it

is not always clear whether, upon the creation of a national database, the national registration is a precondition for the European on, in certain countries the absence of a functioning national database currently acts as an obstacle to the direct registration of a national orphan work into the EU database (for example in Italy).

Moreover, it worth mentioning that the level of certainty that can be achieved by the OWD is significantly dependant on the degree of harmonisation that has already been established among the national copyright legislations of the Member States. For example, presumptions of authorship, ownership and transfer of rights play a fundamental role in the diligent search of cultural institutions because they determine the information that are to be sought. According to the country where the diligent search shall be carried out, this will take a direction that is shaped by the presumptions therein in force. To have an harmonised diligent search, thus, the presumptions on authorship, ownerships and transfer of rights should be consistent among Member States, while, it emerges from the research carried out, this is not the case.

3.3. The sustainability of the diligent search

While it is undeniable that the burden of the diligent search highly depends on the number of sources that needs to be consulted, the searchable nature of the relevant sources as well as their accessibility are also relevant.

As to the amount of appropriate sources among which to carry out the diligent search, this may vary according to the detailed, illustrative, or informative nature of the lists of sources that have been adopted within the national legislations (cfr. above § 4.2), although such a nature cannot always be elicited by the length of the list, rather from the wording adopted and the overall implementation of the Directive. In any case, though, the number of sources spans from a minimum of 10 (Cyprus) to a maximum of 357 (Italy)[3], with a total of 1444 for the 20 countries. In this scenario, the categories of works that count more sources are the audio and audio-visual works (1.412) as well as the visual works (1.114), whereas the categories of newspapers, journals, magazines, periodicals, and of books present around 800 sources each.[4]

[3] The sources indicated for each country and listed in Annex II are not those indicated in the national implementations. Italy, for example, has literally translated the European provision on the appropriate sources. For this same reason, given the huge number of Italian databases dedicated to cultural heritage, the national correspondent has identified a number of appropriate sources so high that national guidelines are needed to provide directions on the matter. On the other hand, although Cyprus has not yet finalized the process of indicating the appropriate sources, the national respondent has already identified at least 6 sources that will have to be consulted, depending on the category of works at hand, to qualify a search as diligent.

[4] As the same source may be indicated or to be consulted for more than one categories of works, the total of sources indicated for category of works does not equal the overall total of sources for the 20 countries.

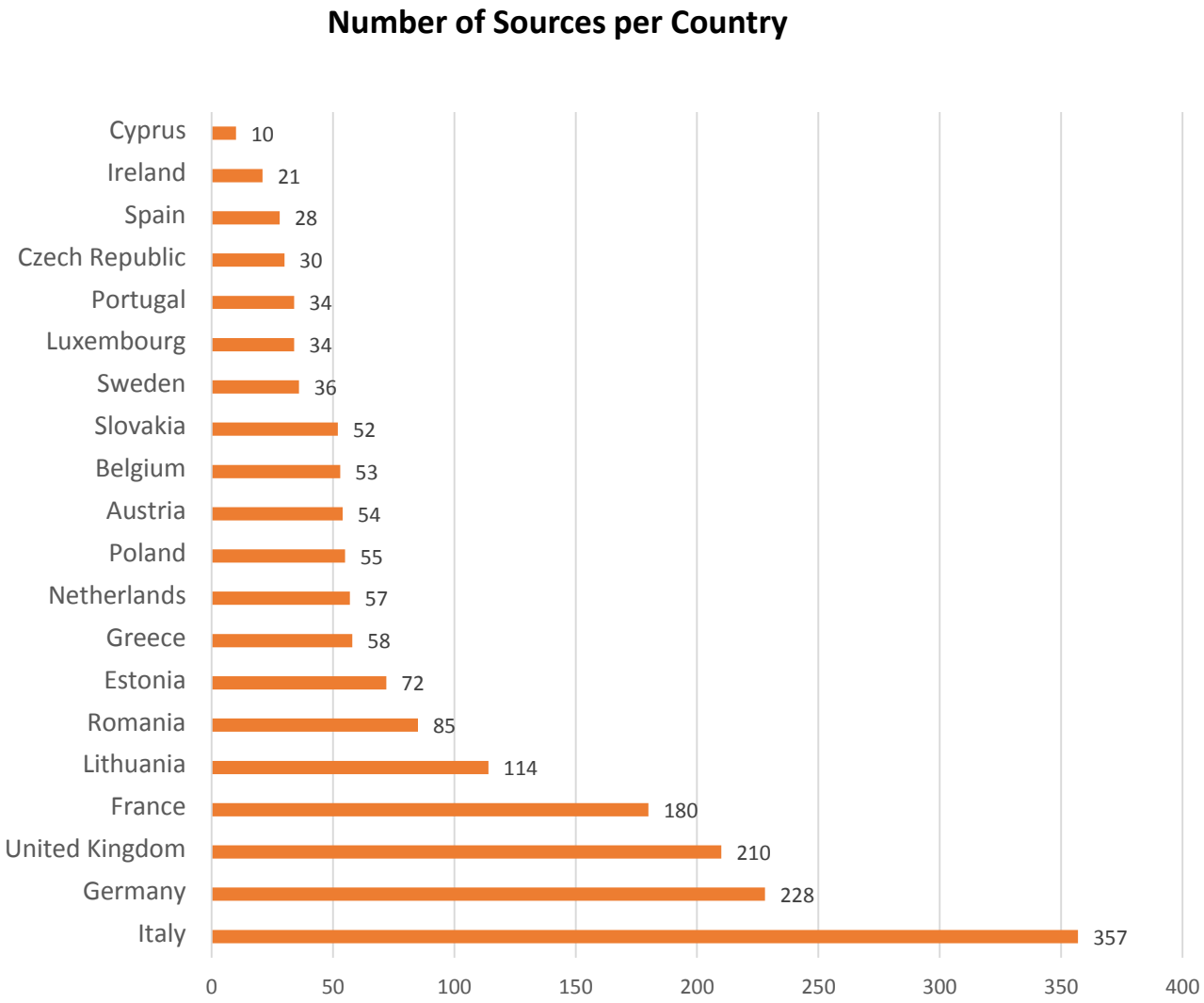


Figure 1: Number of sources by Country

As already revealed by Report 1, Report 2 confirms and provides further evidence that a sizeable share of the sources to be consulted to locate the right holder of a work is not freely accessible online.

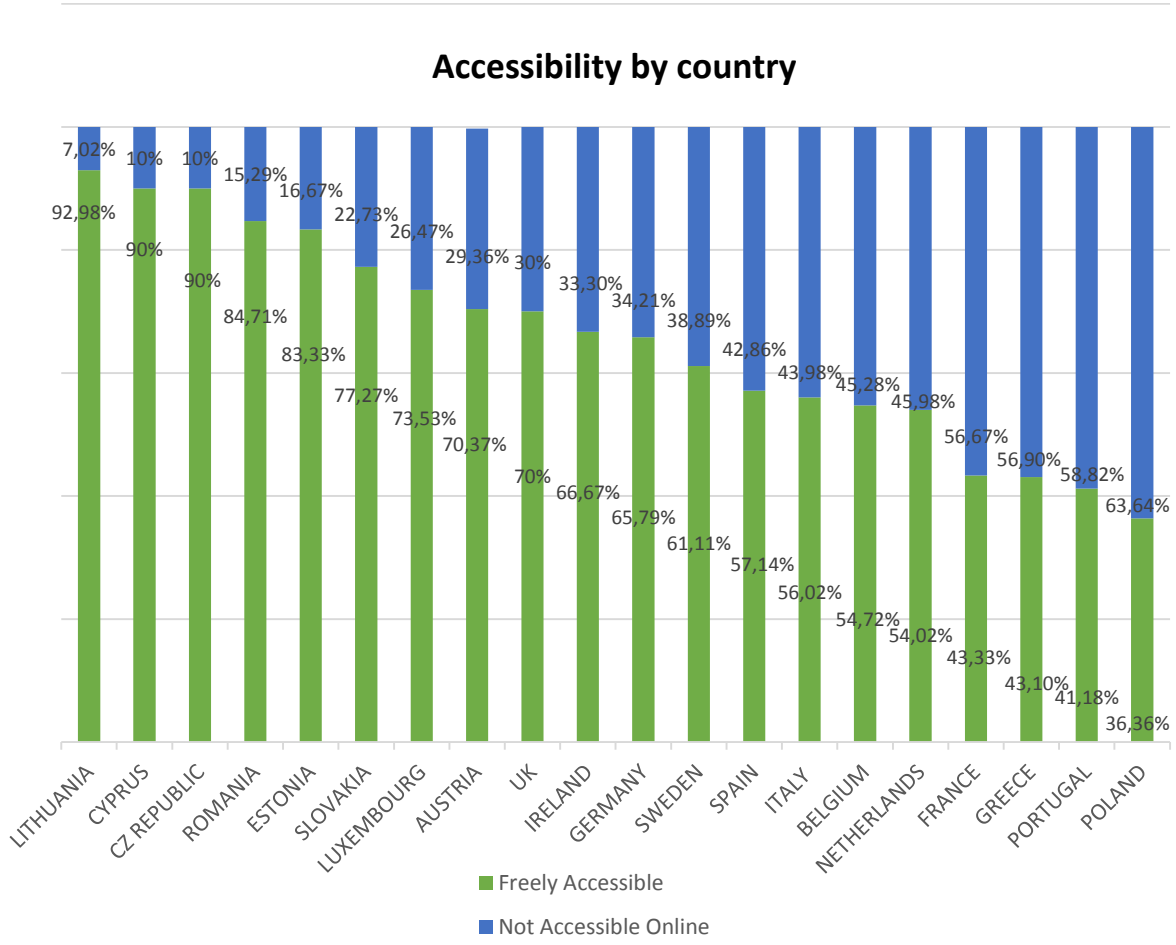


Figure 2: Accessibility by Country

Sources may not be freely accessible online for a number of reasons: some databases may require registration or payment of a subscription fee, or may be accessed only by members of the organization; other databases are simply not available on the internet and can only be consulted on site; finally, in some cases the URL is not functioning, or the source is not locatable online for other reasons. The analysis of the sources in 20 countries reveals that the ratio of freely online accessible sources vary significantly among implementing States, ranging from the 91% of Lithuania to the 29% of Portugal, with an average accessibility of 64%. As a matter of fact, while general orphan works' repositories and databases are freely accessible, authors' guilds and unions generally are not, and newspaper archives are often accessible for a fee. Moreover, among the online sources that are not freely accessible online there are also the sources that can only be consulted "on site", which may constitute a small number (for example 24 out of 357 in Italy), or make the diligent search much more resource-intensive (for example in Spain 10 out of 21 sources identified as appropriate are onsite sources, which means that half of the diligent search needs to be carried out by physically consulting local databases).

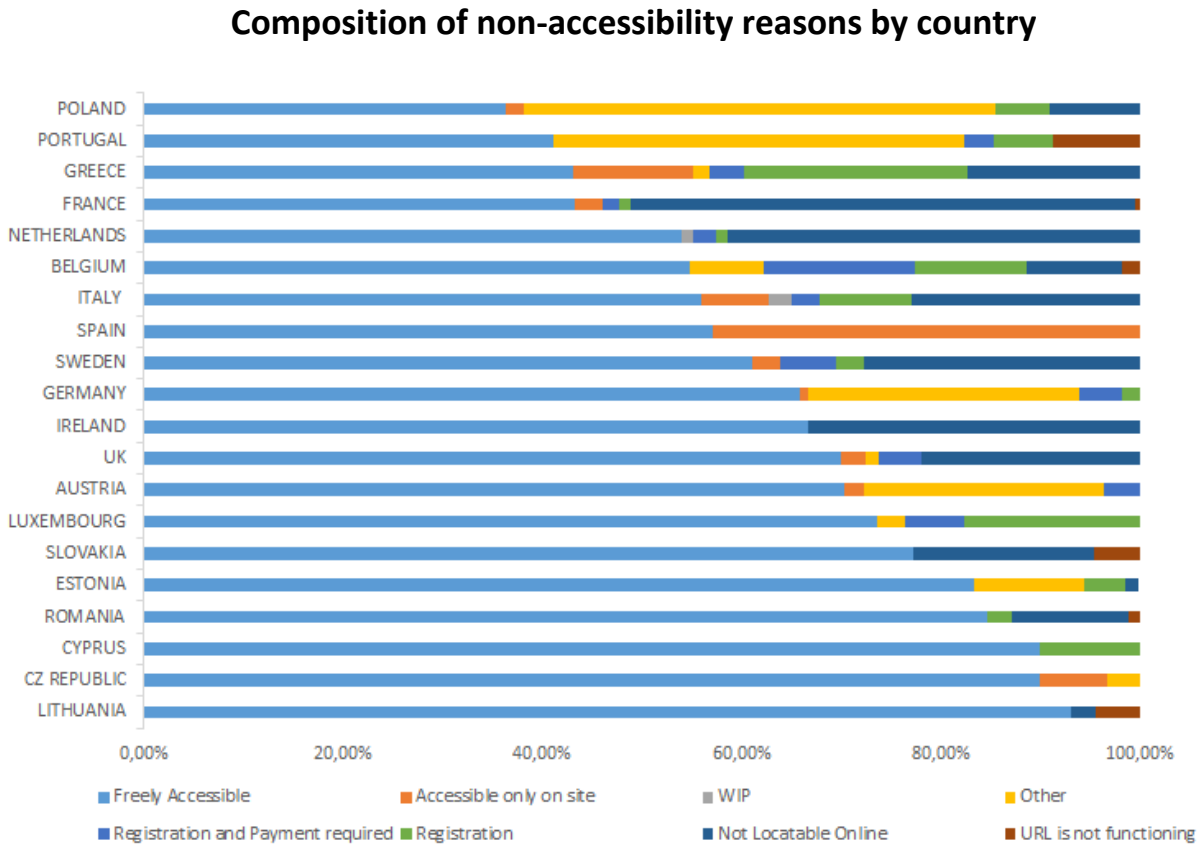


Figure 3: Non-accessible sources by Country

The above aspect affects the sustainability of diligent search as the means to enable the pan-European use of orphan works: as long as there is no hierarchical validity of sources by law and not all sources are freely accessible online, it remains unclear how the clearing of rights will happen in order to fully comply with the requirements of each legislation.

4. Recommendations

4.1 Appropriate sources

When implementing the OWD, none of the examined countries issued an exhaustive list of sources to be consulted for the search to be diligent. Since legal certainty must be balanced with flexibility, this solution seems appropriate to accommodate any future change within the cultural sector. However, memory institutions need some guidance on the sources to be checked as, on the one hand, they may be worried to find themselves guilty by failing to meet the diligence standard and, on the other hand, their search burden is largely determined by the number of sources to be accessed. In order to limit the likelihood of accidental infringement by cultural institutions and avoid transforming diligent search into an exhaustive search among a huge number of sources, the best option for each Member State appears to be:

- the provision of detailed non-exhaustive list of sources and
- the definition of internal hierarchies among the listed sources, with a diversification between compulsory and optional sources, depending on their relevance and accessibility.

4.2. Accessibility of sources

In all the jurisdictions examined in Report 1 and Report 2 there are sources that may need to be consulted in order to comply with the legal requirement of diligent search, but that are not freely accessible online. The difficulties in accessing the sources to be consulted in order to carry out a diligent search generates heavy consequences for projects of mass digitization of European cultural institutions, which the OWD is seeking to facilitate in the first place. The analysis showed that cultural institutions find – and will find – burdensome to clear the rights of their collections while at the same time complying with the requirements introduced by the OWD and its national implementing laws. Moreover, another specific issue in this context are sources that cannot be searched online. This poses the risk (higher in some countries, lower in others) that a search is doomed to be incomplete until when the cultural institution devotes investments in terms of time and resources to consult relevant catalogues onsite. To face these barriers, the legislature at EU and national level may consider to introduce:

- the principle according to which a search must be considered diligent if all relevant *freely accessible online* sources have been consulted.

In sum, it is appropriate to conclude that the Orphan Work Directive has at best only partly achieved its main goal of facilitating the digitisation and dissemination of those works. As our analysis has revealed, the Directive deserves particularly low marks for its (lack of) legal certainty as to what constitute a valid diligent search and the sustainability of this requirement for would-be beneficiaries of the exception. While the somehow harmonized objective scope, subjective scope and permitted uses of the Directive should allow cultural institutions to carry out cross-border mass-digitisation projects, the Directive's rules on 'appropriate sources' obliges Member States to impose a very high burden on cultural institutions in terms of number and quality of sources to be consulted. In truth, the Directive's regime wants to reflect the EU principle of proportionality in the need for uniformity of the rules governing the use of orphan works and it does not go beyond what is necessary in order to achieve that objective (Recital 25). However, Member States seem to have avoided to adopt those measures expressly left to them and had more or less reproduced the European provisions almost literally, or at least in a way that generated several interpretative doubts and high burden on the beneficiaries.

PART II

AUSTRIA

Implementation of the Orphan Works Directive: Background

In Austria, the OWD was implemented by a change of copyright law through Federal Law BGBl I Nr. 11/2015 (hereinafter, the Implementing Law), which introduced Article 56e in the Austrian Copyright Act. It was published on 13 January 2015 and enacted retrospectively (which is quite an exception), taking effect by 29 October 2014, the date by which the Member States were supposed to implement the Directive.[5]

Subjective and Objective Scope

In regards of the **subjective scope** of the application of the orphan works exception, the Austrian law applies, on the one hand, to 'publicly accessible institutions that collect works' and, on the other hand, to 'public service broadcasting organisations', whereas Article 1.1 of the Directive applies to 'publicly accessible libraries, educational establishments and museums' and 'archives, film or audio heritage institutions and public-service broadcasting organisations'. The Austrian implementation is therefore more general in its definition of entitled institutions and avoids to enumerate the publicly accessible institutions by their type. However, the intention of the national legislator merely seems to simplify the wording, not to differ from the Directive.

In regards of the **objective scope** of the application of the orphan works exception, the categories of works to which Article 56e of the Implementing Law applies include:

1. works published in written form;
2. works or related subject matter embedded in such works published in written form; and
3. works fixed on a sound carrier or in moving images.

Another additional requirement is of course that the work in question has previously been included in the collection of the entitled institution.

[5] The exact reference to the national implementing legislation can be found in the implementing Federal Law is BGBl I Nr. 11/2015, of which the short title is "Copyright Revision 2014", the long title "Federal Act, by which the Copyright Act is changed – Copyright Revision 2014". The text of the Austrian implementation is available via the link https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=BgblAuth&Dokumentnummer=BGBLA_2015_I_11 (last visited, 15 June 2017). This page includes links to different formats of this Federal Law as well as links to the background documents (concerning the parliamentary decision making process). The Copyright Law act is available via the link: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001848 (there is no English translation available; last visited, 15 June 2017). *See* Article 56e for the actual provision on the orphan works exception *(Verwaiste Werke).*

Despite the slightly different wording, the implementing provision does not intend to differ from the Directive. This seems to be justified by the assumption that 'cinematographic work' in the Directive refers to the way in which a work is perceived, and not to the term "cinematographic works" as defined by copyright law.

Possible Use of Orphan Works

Under the Implementing Law, the **permitted uses** of orphan works are limited to copying and making available a digital reproduction of an orphan work by the entitled institutions, as long as the right-holder does not make himself known. The implementing legislation does not differ from Article 6 of the Directive. As in the OWD, the Austrian implementation also refers to the public interest missions of the entitled institutions as a precondition for permitted uses.[6]

In terms of **cross-border search**, the national legislation reproduces Article 3(4) of the Directive almost word for word. According to Article 56e(4), the search has to be performed within the Austrian territory if the work has first been published or broadcast in Austria. In the case of movies, the search must be performed in Austria when the producer is domiciled in Austria. If there are indications on relevant information on right-holders in other countries, the available sources in these other countries must also be consulted.

Among the **diligent search report requirements** established by the Austrian Implementing Law, it is clearly stated that the diligent search needs to be documented in a record which has to be kept for the time of use of the orphan work and for an additional period of seven years after the end of such use. Moreover, Article 56e(5), which is very much a reflection of Articles 3 and 5 of the Directive, requiries to inform the supervisory authority for collective management organisations (CMOs) on:

1. the exact designation of the work deemed orphan;
2. the type of use that the institution makes of the work;
3. the fact that a person entitled to allow copying or making available has been found;
4. and, contact details of the entitled institution.

Still, under Article 56e(5), the supervisory authority must promptly communicate this information to the European Union Intellectual Property Office (EUIPO) for publication in their orphan work database.

There are no **other requirements** beyond those of a diligent search, its documentation and the communication of this information to the supervisory authority on CMOs.

Austria has not adopted **soft-law instruments** complementing the framework for diligent search nor **other regulatory schemes** dealing with orphan works. There is also no licensing scheme (such as extended collective licensing), which might potentially include or affect also orphan works.

[6] In clarification of the Directive, the national law applies to the use of "partly" orphan works too.

How to Carry Out a Diligent Search: General and Specific Requirements for Diligent Search

List of Sources

In regards of the **list of sources** to be consulted when carrying a diligent search, the Implementing Law includes the option for the Minister of Justice to issue (without however being obliged) an implementing ordinance (*Verordnung*) for enumerating them. In fact, this option has not been exercised so far, nor is it to be expected. As a result, the Implementing Law itself refers to the sources named in the Annex of the Directive as a minimal precondition, without even repeating or detailing them in a separate list.[7]

According to the Austrian approach, the sources listed in the Annex of the Directive are considered to be only **illustrative** ("at least"). Specific circumstances may lead to a far wider search. In fact, the sources listed in the Annex of the Directive in many cases will not provide for much more than a starting point for a serious diligent search, also because many sources (that as a rule will be consulted in the course of a search for right-holders of archival material) are not mentioned, e.g. the biographical reference works, the companies registers, the phone and address registers, the registers of the central registration office, the genealogical databases, parish registries or suchlike. Ultimately, should the diligence of a search be contested, it is down to the competent court to decide whether a search may be qualified as "diligent". Although such a decision is given on a case-by-case basis, it is quite safe to assume that just checking the sources named in the Directive will in most cases not be sufficient, especially considering that most of these sources will not be adequate for solving the right-holder question.

Austria has not established a **national database** for orphan works. The information communicated to the supervisory authority for CMOs must be promptly reported by the supervisory authority for CMOs to EUIPO in order to be published in the EUIPO database.

As many countries, Austria has a general **legal deposit** requirement. The most important one is laid down in the Media Act, a Federal law.[8] There is not a specific reference to the legal deposit in the Austrian legislation that implements the OWD as the Media Act and the Copyright Act are traditionally considered to be separate subjects falling under different ministerial competences. The institutions in charge of the legal deposit are the Austrian National Library, the Regional University Library and the Regional County Library. The institutions and the number of copies that they are entitled to receive are determined by ordinance.[9] In addition, the Administrative Library of the

[7] In particular, Article 56e(3) of the Austrian Copyright Act states that "appropriate sources [to be consulted] are at least the ones named in the Annex to Directive 2012/28/EU".

[8] The legal deposit requirement is regulated by Article 43-45 (section 6) of the Austrian Media Act. This is available at https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1981_314/ERV_1981_314.html (German and English text) (last visited, 15 June 2017).

[9] Available at https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20006424 (there is no English translation available; last visited, 15 June 2017).

Federal States and the Parliamentary Library may request legal deposit copies. Legal deposit focuses on predominantly static works (print, offline and online), whereas there is no legal deposit for cinematographic works or audio-visual media.

Presumptions

The **presumption of authorship** is admitted by Article 12(1) of the Copyright Act. According to this provision, the person that is named 'in the usual way' as an author on a copy of a work may be presumed to be the author, as long as this presumption is not falsified. Provided that 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 his own name.

As to **presumptions on right transfer,** Article 38 of the Copyright Act used to have a presumption clause concerning cinematographic works known as the *cessio legis* because it contained an automatic transfer of right ownership, which however was ruled by the ECJ (C-277/10) to be incompatible with European law. In the latest revision of the Copyright Act, effective 1 October 2015, Article 38 was therefore changed to be a mere presumption on right transfer. According to this presumption, contributors to a cinematographic work have (when in doubt) transferred their rights to the producer. Concerning income from copyright levies, they are, insofar that they cannot be given up, by law halved between the producer and the author (director).

Having said that, the **value of the presumptions in the context of diligent search** is not much, if any. The author of a literary work, whether named or anonymous, will usually have assigned his reproduction right to the editor/publisher anyway, while at least the named author will usually remain the right holder for the making available right. Right clearance will therefore necessitate searches both for the editor and the author. Concerning anonymous works, although the editor/publisher is entitled to 'administer the copyright',[10] it is doubtful whether this presumption has any value at all in the context of a diligent search as it is prevailing opinion that the right of the editor/publisher 'to administer the copyright' does not include the right to grant substantial licences. This suggests that the editor/publisher may not be considered to be the right-holder in the meaning of the OWD. Finally, concerning searches on cinematographic works, although a presumption of right ownership might be helpful for bundling a group of right holders, this presumption does not pertain to related rights which will necessitate separate right clearance.[11]

As a general rule, a presumption will only be valid as long as there are no indications to the contrary either on a subjective or an objective level. If, in conjunction with a diligent search requirement, a general search (for example, via Google) already casts a doubt on the validity of a presumption, the validity of a presumption will probably already be contested on an objective level.

[10] Article 13 of the Austrian Copyright Act.
[11] Article 38 of the Austrian Copyright Act.

Audio-visual Works

According to Article 56e(2) of the Copyright Act, public service broadcasters may use audio-visual works as orphan works, on condition that they were produced before 1 January 2003, that they were commissioned by a public service broadcaster, and are part of the holdings of the archive of a public service broadcaster. This corresponds closely to the **cut-off date** set for audio-visual works by Article 1(2)c of the Directive.[12] As to the audio-visual works which have never been published or broadcast but which have been made publicly accessible by the beneficiaries of the orphan work exception with the consent of the right-holders, the Austrian implementation has not introduced any cut-off date.

In Austria, audio-visual works have **specific rules concerning the authorship and right ownership** in Austria. Firstly, according to Article 62 of the Copyright Act, the copyright duration ends 70 years after the death of either the director, the screen(play)writer (scriptwriter), the author of the dialogues, or the author of the music that has been especially created for the cinematographic work, whichever occurs last. While this provision concerns only the duration of copyright and has no direct influence on the authorship, it clarifies that the main director will always be considered to be the author of a cinematographic work. Moreover, 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).[13]

The copyright qualification of film soundtracks depends on the type of work and the genesis of the soundtrack. It may either be a dependent effort integrated in the film work which in turn may or may not constitute a joint ownership (e.g. the sound engineer who records speech or noises will not be eligible for joint ownership of the film work), or an independent work (e.g. musical work), which is combined with the film work. As a rule, the combination of different work categories will not constitute joint ownership.[14]

In addition, as outlined above, there is a general **presumption on the transfer of right** ownership from film contributors to the producer in case of cinematographic works.

Nationally produced films are not very numerous in Austria. Yet, the conditions producers agree on with the many different partners they need for the production of the work depend very much on the type of work they want to produce, their experience with the market and the financing opportunities, their reputation and standing as a producer, the market value of the work, and the viability of the work for television exploitation. The corresponding **market practice** can at best be described as heterogeneous. Still, most film authors have to find a financial partner first in order start to produce a work. Financing production through film distributors often take the form of rights

[12] The non-mandatory date determined in Article 1(3) of the Directive has not been implemented in the Austrian orphan works rules.

[13] As to performing artists, their moral rights are in general equivalent to those of an author (Article 67 of the Copyright Act). The exploitation rights of the performing artists of a cinematographic work are transferred by law to the producer (Article 69 of the Copyright Act).

[14] Article 11(3) of the Copyright Act.

presales or co-production. However, film rights presales and co-production are not limited to film distributors, but will usually include arrangements with television broadcasters.

Music

A **musical work** has no additional definition in the Austrian Copyright Act (contrary to literary, cinematographic or fine arts works). According to prevailing opinion, the subject under protection of a musical work is the tone structure (construction, rhythm, instrumentation) including the melody. Accompanying words will usually be regarded separately and may qualify as works of literature. There is no rule or presumption that determines by default which categories of contributors are authors of a musical work. Although co-authorship may be considered if different authors (even of different work categories) have created a work together as an inseparable unity, this co-authorship will be confined to the qualification as a joint work of the musical work on the one hand or the literary work on the other hand. The mere combination of a musical work with a work of literature by itself does not constitute a co-authorship.[15] Instead, the combination of both works might be considered a collective work**,** if the preconditions for a collective work are met. It worth mentioning that there is an accepted link between lyrics and music when the musical work is combined with a work of literature and both of them were created especially for this combined work. In this case the copyright term for both of this two works lasts until 70 years post mortem of the surviving author or co-author of the musical work or the work of literature.

According to the Austrian law, any person who declaims, recites, performs or features or presents a work, or is participating in doing so, is, regardless of the work being protected by copyright or not, a performing artist.[16] There is no open or closed list of entities indicating who the rights holders of the **performing rights** are. A performing artist has the exclusive right to record his performances on an image- or moving image- or sound-carrier, to copy and to disseminate them. In general, the moral rights of performing artists are not unlike to those of an author insofar as they can decide if and how they want to be named. So, for instance, performance must not be published when publication can be damaging to the performing artists reputation.[17]

In Austria, there are no **presumptions of right transfer** for musical works, with the only exception that the owner of the company producing commercial phonograms who is presumed to be the "producer". Indeed, in case of broadcasting or public performance of a lawfully produced sound-carrier, the producer has a mere remuneration claim against the user. In turn, the performing artists have a claim against the producer to receive at least half of this remuneration, in case the producer and the performing artists have not agreed on how to share this compensation in any other way.[18]

[15] Article 11 of the Copyright Act.
[16] Article 66 of the Copyright Act.
[17] Rights of performing artists participating e.g. in a choir, an orchestra or a theatre play can be exercised only by one representative person (Article 70 of the Copyright Act).
[18] These claims of the producer and of the performing artists can only be exercised by a collective management organization (Article 76 (3)).

Phonograms

In Austria, **phonogram** is translated with the term *Tonträger* ("sound-carrier"). Under Article 76 (1) of Austrian Copyright Act, a sound carrier producer is any person who records an acoustic process on a sound carrier for its repeatable reproduction. Under Article 56e (1) 2.b and Article 56e (2) of the Copyright Act, works recorded on a sound-carrier may be used as orphan works:

- by public institutions if these works are contained in their collections or
- by public service broadcasters when the works:
  - was produced before 1 January 2003;
  - was commissioned by any public service broadcaster, and
  - is part of the holdings of an archive of those public service broadcasters.

As to phonograms which have never been published or broadcast but which have been made publicly accessible by the beneficiaries of the orphan work exception with the consent of the rightholders, the Austrian implementation has not introduced any **cut-off date**.

There are specific rules concerning the **right ownership of phonograms.** Precisely, the owner of the company who produces a commercial phonogram will be presumed to be the producer (and therefore the right holder of the producer rights).[19] Moreover, phonogram producers, together with performing artists, are vested with the related rights on the phonogram.[20]

Vice versa, there is no **presumption of right transfer** to phonogram producers. The user has simply to remunerate the producer for the broadcast or public performance of a phonogram. This remuneration can only be collected by CMOs.[21] Performing artists are entitled to receive at least half of this remuneration (net amount) from the publisher, if they have not agreed otherwise.

In in Austria, music labels play a major role so much so that the terms "labels" and "phonogram-producers" are used synonymously. Like in many other countries, as **market practice,** it is known that the major labels reserve themselves almost all exploitation rights unless they are non-waivable in favour of the authors or performing artists.

Moreover, although ebooks and **audio-books** are developing markets, and they still only represent a very small percentage of the overall book production market, it is quite common contractual practice that such alternative publication forms are either included in model contracts (in the so-called "accessory rights clauses") or that they are negotiated at a later stage when the commercial viability of such a project is more obvious. Clearly, whether an author agrees to such clauses is a matter of individual negotiations, depending on the professionalism of the author and the publisher, the market value of the project, the "standing" of the author, and the publication sector (e.g. scientific/non-fictional/fictional publication).

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[19] Under the Austrian Copyright Act, phonogram producers and performing artists are vested with the related rights on the phonogram (Article 76 and Articles 66-70).

[20] Article 76 and Articles 66-70 of the Copyright Act.

[21] CMOs for performer and producer royalties are OESTIG http://www.oestig.at/ and LSG Interpretenhttp://www.lsg-interpreten.at/; CMOs for author royalties is AKM-austromechana http://www.akm.at.

Additional Information Useful for the Diligent Search

While it does not exist, nor has ever existed, a database for works subject to **authorship or right ownership disputes**, in Austria there used to be a **register for anonymous and/or pseudonymous works**, which was managed by the Austrian Ministry of Justice. As the register was rarely made use of, it is not working anymore since 1 October 2015.[22] Before this date, this register could be accessed publicly.

In regards of **register for companies**, in Austria official information on companies is found in the *Firmenbuch*, a register maintained and managed by the provincial (county) courts; in Vienna, the competent court is the Commercial Court of Vienna. The register used to be maintained in physical support, but nowadays it is available in form of an electronic database. It can be publicly accessed either at the courts or via a licensed service provider, who charges an individual service fee for processing the individual requests.[23] "Unofficial" information on companies may be found in other sources such as the Austrian economic chamber organization *(Wirtschaftskammer Österreich)* which also maintains a comprehensive register of Austrian companies based on their trading certificate.[24] The register entries are often supplemented by additional information (such as contact details, products, contact persons, logos, and websites) which are maintained by the companies themselves.

In Austria **company mergers** are supervised by the (Commercial) Courts which are the same responsible for the *Firmenbuch.* If a merger is approved, the company register will be updated accordingly. **Bankruptcy proceedings** are published in the Edicts Archive *(Ediktsdatei),* a database maintained by the courts and the Ministry of Justice on the one hand, and the Federal Data Processing Centre Ltd *(Bundesrechenzentrum GmbH)* as the technical partner on the other hand.[25]

There is no **register on the buying and selling of back-catalogues** of copyright protected works and/or neighbouring rights (with the exception of right holder registers maintained by the CMOs), nor **register on the transfer of copyrights**. To some extent, the CMOs databases will include right ownership information which will include information on the transfer of ownership by naming both the old and the new rightholder. Otherwise, there is no official information on such copyright transfers.

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[22] Meanwhile, the time limits for the protection of anonymous/pseudonymous works have slightly changed. Before the amendment of the copyright legislation leading to the abolishment of the "authors' register", anonymous/pseudonymous works were protected only for 70 years after creation or publication (if published within the 70-year period following their creation). They were protected for 70 years *post mortem auctoris* (pma) only if they were entered in the authors' register and the authorship was published in the official law journal. At present, anonymous/pseudonymous are still protected for 70 years after creation/publication, but for the 70 years pma rule to apply, the disclosure of the identity of the author within this time frame is sufficient.

[23] The technical partner for the central database is the ICT service provider and e-Government partner of Austria's federal administration which is called the Federal Data Processing Centre Ltd. *(Bundesrechenzentrum GmbH). See* https://www.firmenbuchgrundbuch.at/fbgb/ (last visited, 15 June 2017).

[24] *See* wko.at. The service is available at https://firmen.wko.at/Web/SearchSimple.aspx (last visited, 15 June 2017).

[25] *See* http://www.ediktsdatei.justiz.gv.at/ (last visited, 15 June 2017).

With respect to **public service broadcasting**, the dual broadcasting system (meaning public and private) has been introduced in Austria very late (2001)[26], the only public service broadcaster (both TV and radio) being the Austrian Broadcasting Corporation (*Österreichische Rundfunk* or in short: ORF).[27]

At present, there are no **other regulatory schemes** related to digitisation in Austria. Publishers are against the idea of a regulatory scheme for out-of-print works, and CMOs are not available to discuss and consider the issue with the opposition of the right holders. Therefore, the Ministry of Justice (who is the responsible for copyright matters) did not follow up on the project for updating the law, in the occasion of the last amendments of the copyright law in summer/fall 2015.[28]

Acknowledgments

The authors thank expert Christian Recht for his precious support and input in regards of the information on the implementation of the Orphan Works Directive in Austria as well as on the functioning of the diligent searchin the Country.

[26] A list of all Austrian radio broadcasters can be found at https://de.wikipedia.org/wiki/Liste_der_H%C3%B6rfunksender_in_%C3%96sterreich, a list of all TV broadcasters (public/private) at https://de.wikipedia.org/wiki/Liste_von_Fernsehsendern - .C3.96sterreich (last visited, 15 June 2017).

[27] *See* http://der.orf.at/unternehmen/orf-english100.html, all other broadcasters are private companies (last visited, 15 June 2017).

[28] In practical terms, there are only very few practical examples in Austria for diligent searches concerning literary works (as to 31 August 2016, seven, all non-anonymous) and none for searches concerning orphan audio-visual works.

BELGIUM

Implementation of the Orphan Works Directive: Background

In Belgium, the OWD was implemented by the law of 20th of July 2015, which is entitled: "Law 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" (hereinafter, the Implementing Law).[29] By this law, the OWD is implemented by creating new provisions for the *Wetboek van Economischrecht* (the Belgian Code of Economic Law, hereinafter "CEL") concerning the permitted uses of orphan works and the conditions under which these uses are permitted.[30]

Subjective and Objective Scope

With respect to the **subjective scope** of the application of the orphan works exception, the organisations that can make use of it are listed in Article XI. 218/1 CEL, which states that the subject matter concerns '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 order to achieve aims related to their public-interest missions'. This means that the subjective scope of application of the orphan work exception does not differ from Article 1.1 of the Directive.

Regarding the **objective scope** of the application of the orphan works exception, the categories of works and materials that are covered by the Belgian legislation are divided into three main categories. These three categories are:

1. 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;
2. cinematographic or audio-visual 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;
3. cinematographic or audio-visual works and phonograms produced by public-service broadcasting organisations up to and including 31 December 2002 and contained in their archives and 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.

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[29] *See* http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=2015072015&table_name=wet (last visited, 15 June 2017). The law was enacted on July 20, 2015. The national implementing legislation can be found in French and in Dutch. There is no English translation available.

[30] These new provisions can be consulted in Book XI CEL under Chapter 8/1 which provides for the articles in the CEL concerning Orphan works: http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=2013022819&table_name=wet (last visited, 15 June 2017). The Belgian Code of Economic law which contains the new provisions on certain permitted uses of orphan works can be found in French and in Dutch. There is no English translation available.

The objective scope of application of the orphan work exception does therefore not differ from Article 1.2 of the Directive.

Possible Use of Orphan Works

In respect of **permitted uses** for orphan works, the organisations referred within the subjective scope are permitted to use orphan works contained in their collections in two specific ways:

1. by making the orphan work available to the public within the meaning of Article XI. 165, §1, 4 CEL;
2. by acts of reproduction within the meaning of Article XI. 165, §1,1 CEL, for the purposes of digitalisation, making available, indexing, cataloguing, preservation or restoration.

In other words, there is no difference with Article 6 of the OWD.

In terms of ruling on **cross-border search**, similarly to Article 3.4 of the OWD, the diligent search shall be carried out in the Member State of first publication but if there is evidence to suggest that relevant information on right-holders is to be found in other countries, sources of information available in those other countries shall also be consulted.[31]

The **diligent search report requirements** established by the implementing legislation of Belgium can be found in Article XI. 245/4 §3 CEL. This provision states that the beneficiary organisations maintain records of their diligent searches, and that those organisations record the following information at the EUIPO database:

1. the results of the diligent searches that has been carried out and which have led to the conclusion that a work or a phonogram is considered an orphan work;
2. the use that the organisations or institutions make of an orphan work;
3. any change of the orphan work status of works or phonograms that the organisations use;
4. the relevant contact information of the organisation or institution concerned;
5. the name of the identified and traced right-holder of a work or phonogram with more than one right holder, in which case the identified and traced right holders gave their permission to use the work or phonogram in accordance with Article XI. 245/1, §2 CEL.

There is no significant difference with Article 3 of the OWD, besides the extra information that is required per the Belgian legislation in case of an identified and traced right-holder of a work/phonogram with more than one right holder.

The Belgian legislation has inserted **another requirement** beyond those of a diligent search, that is the registration of the work or phonogram as orphan by the institutions or organisations who carried out the diligent search. This requirement differs only slightly from Article 2 of the Directive, since the latter only mentions the diligent search and the recording of the findings of the result of the search.

[31] Article XI. 245/4 §2 CEL.

Belgium has not adopted neither **soft-law instruments** complementing the framework for diligent search, nor **other regulatory schemes** dealing with orphan works. Prior to the implementation of the OWD, institutions and organisations who wanted to use orphan works online, were advised to provide a disclaimer on their website in which the organisation stated not to be the owner of the orphan work, but that the legitimate rightholder could not be identified and/or found.

How to Carry Out a Diligent Search: General and Specific Requirements

List of Sources

Belgium has no official **list of sources** to be consulted when carrying out a diligent search. According to Article 14 of the Implementing Law, the King will first consult the representative organisations of rightholders and users, and afterwards determine the sources that are appropriate for each category of works or phonograms in question.

Since the deadline for the transposition of the Directive expired, and as no specific Belgian lists have yet been published, one can argue that, in conformity with the Directive, at the moment a diligent search needs to be performed on the basis on the list offered by the OWD. Of course, since the national list is not yet officially available, it is still unknown whether it will have an **exhaustive or illustrative** character.

The Belgian law foresees the establishment of a **national database** for orphan works in Article 14 of the implementing Law. This register is not operational yet since its details need to be elaborated in a Royal Decree.[32]

Belgium does foresee a **legal deposit** requirement. The Royal Library of Belgium is the institution in charge of the implementation of the legal deposit requirement.[33]

Presumptions

Presumptions of authorship are admitted by the Belgian law. In absence of proof to the contrary, the author shall be presumed to be the person shown on the work by the fact of his name, being mentioned or of a sign that enables him to be identified.[34] If no author is known and/or printed, the publisher of an anonymous or pseudonymous work will be presumed to be the author.[35] The general presumption of authorship applies to published books, newspapers, magazines, journals and periodicals, and visual works. There is a special presumption rule in Article XI. 179 CEL for the co-

[32] An implementing Royal Decree is currently in preparation. Meanwhile, the memorandum of understanding on diligent search guidelines for orphan works can be used as source of inspiration.
[33] Links to the deposit are available at http://opac.kbr.be/depot.php?lang=EN (last visited, 15 June 2017); and http://dgtl.kbr.be:8881/R/KPA5KNCC85N23F9CF332HTNUY7XT8CX1C3SGKSCJ2KBXX8YXUL-01599?&pds_handle=GUEST (last visited, 15 June 2017).
[34] Article XI. 170 §2 CEL.
[35] Article XI. 170, §3 CEL.

authorship of an audio-visual work since there is a non-rebuttable presumption of authorship for the principal director of an audio-visual work. Furthermore, there is a presumption of authorship for (1) the author of the screenplay, (2) the author of the adaptation (3) the text writer, (4) the graphic designer of animated works/animated sequences and (5) the author of the musical composition – with or without words- that has been made specifically for the audio-visual work. This second presumption is a rebuttable presumption and can be overturned by evidence to the contrary.

The **value of the presumptions in the context of diligent search** is that a name printed on a work serves as a legal presumption of authorship. This legal presumption can, however, be overturned by evidence to the contrary. Although such proof may be furnished by any legal means, the mere results from a general search, for example via Google, are not deemed sufficiently decisive to rebut the validity of the legal presumption. Yet, it will certainly be taken into account as an element.

Audio-Visual Works

If an audio-visual work has been produced by a public service broadcaster in Belgium, the **cut-off date** is up to and including 31 December 2002. This is the same cut-off date provided by the Directive at Article 1(2)c. The Belgian implementation has not introduced any cut-off date for those audio-visual works which, in absence of publication or broadcast, have been made publicly accessible by the beneficiaries of the OWD with the consent of the right-holders.

As for the **specific rules concerning the authorship and right ownership of audio-visual works** under Belgian copyright, there are a few ones which have to be taken into account:

1. the principal director is automatically by default assumed to be an author. Besides the principal director, the natural persons who have contributed to the work are also considered as authors of the audio-visual work;[36]
2. other categories are presumed to be authors of the audio-visual work, but this can be contradicted by evidence to the contrary; these categories are: the author of screenplay, the author of the adaptation, the text writer, the graphical designer of animated sequences and animated works in audio-visual works that are an important part of the work, and the author of a musical composition (with or without words) that is specially made for the audio-visual work. These categories benefit from a presumption of authorship of audio-visual works (until proof to the contrary). This is an open list.

As to the specific rules of right ownership, the holders of related rights on audio-visual works are:

1. Performers (e.g. actors) (article XI. 204 CEL).
2. Producers of the first fixations of films (article XI.209 CEL).
3. Broadcasting organizations (article XI.215 CEL).[37]

[36] Article XI.179 CEL.

[37] No definition of "performers", "producers of the first fixations of films" and "broadcasting organisations" is provided in the Belgian Code of Economic Law but the relevant international legislation fills in this gap.

There are specific rules concerning the **presumption on right transfer** for audio-visual works under Belgian copyright law. According to Article XI.182 CEL, the authors of an audio-visual work as well as the authors of a creative element legally integrated or utilised in an audio-visual work, except for the authors of musical works, transfer -unless otherwise agreed- the exclusive right of the audio-visual exploitation of the work to the producers. Furthermore, there is a presumption of transfer of related rights in favour of the producer: unless agreed otherwise, the performer transfers to the producer the exclusive right of audio-visual exploitation of his performance.[38]

There is no evidence of established **market practices** that assign the economic rights and related rights to a film to film distributors.

Music

There is no definition of **musical work** under Belgian copyright law. The lyrics are considered to be distinct from the musical part which may result in different copyright holders if the music and the lyrics are not composed and/or written by the same artist/writer. In case there are several people involved in the creation of a musical work (e.g. composer and songwriter of a song), this work is considered as a joint work.[39] This provision only applies to persons that have made an original contribution to the common work. Mere technical collaboration is not sufficient. A work of collaboration normally implies the simultaneous contribution of several persons with the intent to create a common work. Belgian copyright law does not recognize the legal concept of collective work. The people involved in the creation of the musical work are considered to be joint authors. There is no rule or presumption that determines by default which categories of contributors are authors of a musical work. The first owner of copyright in a musical work is the natural person who creates the work (general rule). As was said above, in order to be co-author of the musical work, an original contribution has to be made. In such case, they will all automatically become first owner of the copyright to the musical work.[40]

The term “performers” is not defined in Belgian law but variety artists and circus performers are explicitly mentioned as performer and are vested with the related **performing rights.**[41] Complementary artists are not considered as performers.[42]

[38] Article XI.206 § 1 CEL.
[39] Article XI. 169 CEL.
[40] According to Article XI. 166 CEL, unless otherwise agreed upon in a contract, all contributors jointly own the full copyright and have to exercise this right by mutual consent. In cases of disagreement, the court should decide. This provision only applies to persons that have made an original contribution to the common work. Mere technical collaboration is not sufficient. Article XI. 169 CEL deals with the situation of works of collaboration that are 'divisible' which means that the contribution(s) of each author can be identified from the common work. In such a case, each author is allowed to exploit his part separately insofar as such exploitation does not in any way harm the exploitation of the joint work.
[41] Article XI.205 §1CEL.
[42] Article XI.205 §1 CEL.

The authors of musical works are explicitly excluded from the **presumption of right transfer** for audio-visual works to the producer (Article XI.182 CEL). Thus, the authors of musical works are not presumed to have transferred his rights to the producer.

Phonograms

The term **phonogram** is not defined in Belgian law.[43] It is generally accepted to apply the internationally agreed definitions in this respect.

In case of phonograms made by Belgian public service broadcasters, the **cut-off date** is up to and including 31 December 2002. This is the same cut-off date as provided by the Directive. As to phonograms which have never been published or broadcast but which have been made publicly accessible by the beneficiaries of the orphan work exception with the consent of the rightholders, the Austrian implementation has not introduced any cut-off date.

There are specific rules concerning the **rights ownership of phonograms** under Belgian copyright law. The producer of a phonogram is the only one who has the right to reproduce or allow reproduction of the work according to Article XI 209 §1 CEL. The economic rights of the producer of phonograms are the rights of reproduction and of communication to the public (this means that no moral rights are granted). In absence of proof to the contrary, the person whose name or a sign by which the person is identifiable is mentioned on the work or a reproduction thereof, is presumed to be the producer of the phonogram.[44]

Conversely, there are no specific rules concerning a possible **presumption on right transfer** for phonograms under Belgian law.

There are no concrete data concerning established **market practices** that assign the phonogram producer rights to music labels, nor about practices which assign the rights of authors of a book to publishers to an extent that includes the making of an **audio book**. It is on the other hand common knowledge that publisher contracts tend to provide for broad assignments including all possible forms of exploitation and thus (very likely) also the making of an audio book. Even though Belgian

[43] It is generally accepted to apply the internationally agreed definition in this respect. According to Article 3 (b) of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, phonogram means any exclusively aural fixation of sounds of a performance or of other sounds. According to Article 2 b) of the WIPO Performances and Phonograms Treaty, phonogram means the 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 a cinematographic or other audio-visual work. The term phonogram can include film soundtracks. Film soundtracks which are exploited separately from the audio-visual work should be considered as phonograms.

[44] Article XI.209 § 2 CEL. There is no definition of who can be a producer in the CEL, but in compliance with EU norms in Belgium the producer is the natural person or organisation/label who takes the financial risk of the recording of the phonogram. Moreover, according to Article 3 (c) of the Rome Convention for the Protection of Performers, Producers and Broadcasting Organisations, "producer of phonograms" means the person who, or the legal entity which, first fixes the sounds of a performance or other sounds". According to Article 2 (d) of the WIPO Performances and Phonograms Treaty, "producer of a phonogram" means the person, or the legal entity, who or which takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representations of sounds.

copyright contract law imposes strict provisions on the validity of license and assignment contracts, contract practices have adapted in a way that meets such requirements.[45]

Additional Information Useful for the Diligent Search

As part of the additional information, in Belgium there is neither a **register for anonymous and/or pseudonymous works**, nor a general register for works that were subject to **authorship or right ownership disputes** with a recording of a possible change in status.It worth noting that not even exist a **register on the transfer of copyrights** in Belgium or a register on **the buying and selling of back-catalogues** of copyright protected works and/or neighbouring rights.

In Belgium, the official **register for companies** is the "Crossroads Bank for Enterprises" (CBE)[46] which also contains information on **company mergers or bankruptcy arrangements**.[47]

Public service broadcasting is a competence of the Communities in Belgium. Belgium has tree communities (i.e. the Flemish, French and German communities) with all three of them having their own broadcasting organisation for radio and television. The Flemish public service broadcasting is organised by the *Vlaamse Radio & Televisieomroeporganisatie (VRT),* the French public service broadcasting is organised by the *Radio- Télévision Belge de la Communauté française (RTBF),* and the German public service broadcasting by the *Belgischer Rundfunk (BRF).* There are 11 public service stations in Flanders (with 5 radios and 6 TV stations), 10 public service stations in the French Community (6 radios and 4 TV stations), and 3 in the German community (2 radios and 1 TV station).[48]

Belgium has no **other specific regulatory schemes** in place dealing with other relevant subject matters of digitalization.

[45] The validity of copyright contracts is regulated in Article 167 §§ 2 and 3 CEL. It includes the requirement that any contract with an author for a transfer or a license must be in writing and that they should be interpreted in a restrictive manner, i.e. in favour of the author. The law further requires that any agreement whereby copyrights are transferred must contain separate provisions specifying each mode of exploitation, the remuneration to be paid to the author for each mode, the (geographical) scope and the duration of the transfer. Furthermore, the Acts declares null and void any transfer of rights that would relate to future modes of exploitation. Furthermore, clauses transferring rights to future works are only valid if they are restricted to a limited period of time and provided that the types of works, to which the transfer applies, are specified. All these stringent rules only apply in the relationship with an author (physical person) and not with e.g. a company that has acquired the rights from the author. Finally, there exist specific rules for publishing contracts between the author and the publisher (Article XI.195 – XI.206 CEL).

[46] It has an online public search tool at http://kbopub.economie.fgov.be/kbopub/zoeknummerform.html?lang=en (last visited, 15 June 2017).

[47] This information can be also consulted online at the CBE public search tool at http://kbopub.economie.fgov.be/kbopub/zoeknummerform.html?lang=en (last visited, 15 June 2017).

[48] The register/official list of Flemish public service broadcasters can be found at the homepage of the VRT (www.vrt.be; last visited, 15 June 2017) and for the French community this information can be found at the homepage of RTBF (www.rtbf.be; last visited, 15 June 2017).

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CYPRUS

Implementation of the Orphan Works Directive: Background

In Cyprus, the OWD was implemented by a change of copyright law through Law 123(I)/2015[49], which was added in the law 59/1976 (hereinafter, "the Law").[50]

Subjective and Objective Scope

The paragraph regarding the **subjective scope** of the orphan works exception is implemented in Article 7I(1) of the Law: organisations that can make use of orphan works are publicly accessible libraries, educational establishments and museums as well as archives, film or audio heritage institutions and public service broadcasting organizations established in the Republic to achieve aims related to public interest. This provision is a literal transposition of Article 1(1) of the Directive.

The **objective scope** of Article 7I(2) of the Law is exactly the same as Article 1(2) of the Directive. More precisely, the categories of work or material covered by the implementing legislation are:

1. 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;
2. 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
3. cinematographic or audiovisual works and phonograms produced by public-service broadcasting organizations up to and including 31 December 2002, and contained in their archives.

Possible Use of Orphan Works

With reference to the **permitted uses** for, the beneficiary organisations are allowed to use orphan works that are in their collection by making them available to the public, within the meaning of Articles 7, 7ΣΤ and 9 of the Law (regarding the rights of recordings owners).[51] They are permitted to

[49]The link to its text is http://www.cylaw.org/nomoi/arith/2015_1_123.pdf (last visited, 15 June 2017).

[50] The title of the legislation is *Οι περίτουΔικαιώματοςΠνευματικήςΙδιοκτησίας Νόμοιτου 1976 μέχρι 1993* (59/1976). (Law on Intellectual Property Rights of 1976 to 1993) – as amended. There is no English translation of the law. The law was published and therefore came into force on 17 July 2015.

[51] Article 7 is about the scope of copyright, such as reproduction, communication to the public and distribution rights, and the exceptions to copyright. Article 7ΣΤ is, instead, about the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them: (a) for performers, of fixations of their performances; (b) for phonogram producers, of their phonograms; (c) for the producers of the first fixations of films, of the original and copies of their films; (d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

acts of reproduction, within the meaning of Article 7(1)(a)(i) of the Law, the right of reproduction for the purpose of digitization, distribution to the public, indexing, cataloging, preservation or restoration. This means, there is no difference with the Directive provision[52].

In terms of ruling on **cross-border search**, Article 7IA.-(5) of the Law, like Article 3(4) of the Directive, states that if there is evidence to suggest that relevant information on right-holders is to be found in other countries, then sources of information available in those other countries shall also be consulted by the organizations who have the right to make use of orphan works according to the law. No further direction is given in the Law regarding the steps that could be taken to consult information in other countries. Therefore, there is no direction regarding practical steps that someone could take if this occurs.

The **diligent search report requirements** established by the implementing legislation of Cyprus can be retrieved in Article 7IA.-(6) of the Law. The organisations referred to in Article 7I.-(1) maintain records of their diligent searches and those organizations provide the following information to the competent national authorities:

1. the results of the diligent searches that the organizations have carried out and have led to the conclusion that a work or a phonogram is considered an orphan work;
2. the use that the organizations make of orphan works in accordance with this Directive;
3. any change of the orphan work status and phonograms that the organizations use;
4. the relevant contact information of the organization concerned.

The implementing legislation of Cyprus has adopted all diligent search reporting requirements set out in Article 3(5) of the Directive, Article 7IA(6) of the Law does not differ from the Directive provision and has not added any other requirements. The Law simply requires that these records are provided to the competent national authorities (namely, the Registrar of Companies and the Official Receiver).

As for **other requirements** beyond those of a diligent search, the Cypriot legislation foresees additional steps to be taken before joint works can legitimately used as orphans. In particular, Article 7IΔ.-(1)(a) sets out that 'where there is more than one right-holder 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' beneficiary institutions can use the works only provided that the right-holders that have been identified and located have, in relation to the rights they hold, authorized these organisations to carry out the acts of reproduction and making available to the public.[53] It

[52] At the end of section 5(b) of the Law in case of dispute about fair compensation between the right-holder and the organization which used the work as orphan, the parties can resort to the competent authority as set out in subsection (2) of Article 15 of the Law.

[53] Article7IΔ.-(1) (b) specifies that this provision shall be without prejudice to the rights in the work or phonogram of right-holders that have been identified and located. Article 7I.-(1) provides that this shall be without prejudice to the provisions on anonymous or pseudonymous works. Article 7IΓ.-(2) states that right-holders who have not been identified and located in the works referred to in 7IΔ.-(1)(a) have, at any time, the possibility of putting an end to the orphan work status in so far as their rights are concerned (*cfr.* Article 2(4) of the Directive).

worth mentioning that Article 2(1) of the Directive is transposed in the Law by Article 2.-(1) under the general title "interpretation" rather than under the title "orphan works" of the Directive. It states that 'a work or a phonogram shall be considered an orphan work if none of the right-holders 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 7IA.' Therefore, it might be argued that the implementing legislation of Cyprus requires these additional steps not only to legitimately use any joint work, but also to consider it as orphan.

Cyprus has not adopted **soft-law instruments** complementing the framework for diligent search, but the competent authority is working on it. Yet, the competent authority has not given a date for the publishing of the said document.

How to Carry Out a Diligent Search: General and Specific Requirements

List of Sources

Until now there is no official **list of sources** to be consulted when carrying out a diligent search in Cyprus. The official list of sources was announced to be published at the beginning of 2017 by the Registrar of Companies, which is the competent authority for orphan works.

Cyprus has not yet established a **national database** for orphan works. There is some work underway but still nothing is published. The national database for orphan works is expected to come up together with the official list of sources for diligent search.

Article 27(1) of Law 145/1989 lays down the general **legal deposit** requirement. The books that are deposited pertains to the Cyprus National Library and the Ministry keeps a register (Book Archive) including all the deposited books by virtue of Article 27. There is also an obligation of the Ministry to publish to the Official Gazette of the Republic the editions of the books that are submitted to the Book Archive.[54]

Presumptions

Whereas the Law does not include any **presumption on right transfer,** under Article 11(3) of the Law, in case of publication, there is a **presumption of authorship** in favour of the one who has her/his name written on the published work until proof to the contrary. As a result, there is a common practice in Cyprus institutions to consider the name of the author appeared on the book or the booklet of a CD as presumption of authorship. A related point to consider is that Article (13)(3) of the Law explicitly places the burden of proof on the party who maintains to be the author.

[54] *See* http://www.cylaw.org/nomoi/enop/non-ind/1989_1_145/full.html (last visited, 15 June 2017).

That said, the presumption does not have any **value in the context of diligent search**. This legal presumption is helpful, but it can be overturned simply by evidence to the contrary.

Audio-Visual Works

Cyprus provides the same **cut-off date** as provided by the Directive at Article 1(2)c. Besides, Article 7I (3) of the Law insertes the non-mandatory cut-off date of 29 October 2014 for those audio-visual works which have been made publicly accessible by beneficiary organisations with the consent of the rightholders. Although this is complying with the date set out in Article 1(3) of the OWD, the Cyprus provision not only applies to audio-visual works but to all works that are covered by the Law.

Audio-visual works have **specific rules concerning the authorship and right ownership** in Cyprus. Article 11.-(2)(a) of the Law states that the status of producer also implies the one of author. Furthermore, as to films that are produced after 1 July 1994, the main director is always considered to be author as well (Article 11.-(2)(b)).

Conversely, there are not any specific rules concerning the **presumption on the transfer of right** ownership for audio-visual works under the Law. This should be regulated under the contract law on the basis of an agreement.

Cyprus is a small market for the film industry and basically the market is shaped by TV channels who are also film producers. In this context, there is not any **market practice** that contractually assigns the economic rights to film distributors.

Music

In Article 2 of the Law, a **musical work** is defined as 'every musical creation regardless of sound quality'. This provision is short and pretty vague, and there is no case-law giving more precise boundaries to this term. This should include the "accompanying words" intended to be performed with the music too, but it may actually include everything that is related to a musical work regardless of its value as a work. If several people are involved in the creation of a work and there is no possibility to separate the work of each person this work is considered as a joint work.[55] Cyprus legislation does not have any rule or presumption that determines by default which categories of contributors are authors of a musical work. Thus, all the contributors of the musical work are authors and their copyright ends in 70 years after the death of the last creator of the joint work.[56]

Article 3 of the Law protects **performing rights.** The term "performers" in the Law includes all the people who perform or interpret in any way an intellectual work, such as actors, musicians, singers, dancers, puppetry artists, and so on. There is no list of entities indicating who the performing rights holders are, but it is stated that if an entity ordered the performance of a musical work the performance right is transferred to that entity.

[55] Article 2.-(1) of the Law.
[56] Article 5(2) of the Law.

There are no specific rules concerning the **presumption of right transfer** for musical works under Cyprus copyright legislation. Article 12.-(1) of the Law generally states that an intellectual property right can be transferred by contract as movable property. The creator is also the right-owner, and the Law does not give any other presumptions.

Phonograms

The term **phonogram** is not defined by Cyprus Law. It is generally accepted to apply the internationally agreed definitions in this respect.

In case of phonograms made by Cypriot public service broadcasters, the **cut-off date** is up to and including 31 December 2002. It worth recalling that, according to Article 7I (3) of the Law, the orphan works exception does not affect phonograms (together with other works) which have been deposited with beneficiary organizations before 29 October 2014. This is the cut-off date that Article 1(3) of the OWD gives the possibility to include as for works which, in absence of publication or broadcast, have been made publicly accessible with the consent of the rightholders.

There specific rules concerning the **right ownership of phonograms.** Law 14(III)/1999 and Law 21(III)/1992 state that the term 'producer of phonograms' means the person who, or the legal entity which, first fixes the sounds of a performance or other sounds. The copyright legislation states that the phonogram producers have the exclusive right to allow or prohibit the communication to the public to their work, by transmission or broadcasting and only they can choose to allow if anyone can have access to their works.

There are not any specific rules concerning the **presumption of right transfer** for phonograms under the law. Moreover, it does not provide for any presumptions that determine by default that related rights are automatically transferred to the phonogram producer once the sound is recorded. There is not 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. Whereas authorisation can be implicit, the Law states that each transfer must be explicitly written.[57]

There is no evidence concerning established **market practices** that assign the phonogram producer rights to music labels, nor about practices which assign the rights of authors of a book to publishers to an extent that inclueds the making of an **audio book.** In this last case, there is indeed a "sound recording" in the sense of the Cypriot law, and the right of the publisher to assign author's copyright should be written.

Additional Information Useful for the Diligent Search

As there is not much activity and disputes on copyrightable works in Cyprus, there is not any **register for anonymous and/or pseudonymous works** and not even a register for works that were subject to **authorship or right ownership disputes.**

[57] Article 12 (5) of the Law.

However, Cyprus has a **register for companies** called Department of Registrar of Companies and Official Receiver (DRCOR). It is managed by the Ministry of Energy, Commerce, Industry and Tourism, and the offices are in Nicosia.[58] DRCOR is also responsible for holding information on **company mergers or bankruptcy arrangements**.

Cyprus has not a **register on the transfer of copyrights** yet. This matter is currently regulated by private agreements, and there has never been a **register on the buying and selling of back-catalogues** of copyright protected works and/or neighbouring rights.

Cyprus has 6 **public service broadcasters**. Two of them for the TV and four for the radio. Cyprus has the Cyprus Radio Television Authority which is an independent regulatory body with wide powers and responsibilities to regulate and control radio-television matters in an effective manner. This authority has the responsibility to govern the official list of public service broadcasters and their legal status across time.[59]

Cyprus has not taken the initiative to regulate any **other regulatory schemes** on the subject matter of digitization.

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[58] Information for the Register of Companies can be found in its official website which is found in the link: http://www.mcit.gov.cy/mcit/drcor/drcor.nsf/index_en/index_en?OpenDocument (last visited, 15 June 2017).

[59] Information about the lists can be found in the webpage of the Cyprus Radio Television Authority http://www.crta.org.cy/default.asp?id=280 (last visited, 15 June 2017).

CZECH REPUBLIC

Implementation of the Orphan Works Directive: Background

In Czech Republic, the OWD was implemented by a change of copyright law through the national implementing legislation. It was published as Act No. 228/2014 Coll. of 23. September 2014, amending the act Act No. 121/2000 Coll. on Copyright and Rights Related to Copyright and on Amendment of Certain Acts (hereinafter, CA), as amended, and Act No. 151/1997 Coll. on Valuation of Assets and on Amendment of Certain Acts (Assets Valuation Act). This act was promulgated on 23th September 2014 and became effective on 7th November 2014. Therefore, the Czech Republic missed the transposition deadline date falling on 29th October 2014.[60]

Subjective and Objective Scope

Regarding the **subjective scope** of the application of the orphan works exception, the Czech implementation covers two groups of subjects: (1) libraries and similar subjects and (2) public-service broadcasting organisations. For the first group, the subjective scope of application of the orphan works exception is codified in sec. 37a para. 1 CA and it overlaps with the subjective scope of the so-called "Library Licence" codified in sec. 37 paragraph 1 CA. Therefore, the following organisations are deemed as beneficiaries of the orphan works exception: libraries, archives, museums, galleries, schools, universities and other non-profit school-related and educational establishments. However, as stated also in Directive, these institutions can use the orphan works only in order to achieve aims related to their public-interest missions. Pursuant to the sec. 37a para. 2 CA the second group of users covers the public-service broadcasting organisations, specifically *Českýrozhlas* (Czech Radio) and *Českátelevize* (Czech Television). Also, these institutions can use orphan works only in order to achieve aims related to their public-interest missions. As to the subjective scope, there's a final aspect of the Czech implementation to consider. It actually appears to differ from the Directive as it does not mention the "film or audio heritage institutions".

In regards of the **objective scope** of the application of the orphan works exception, the categories of works covered by the implementing legislation covers the following:

1. works published in the form of book, magazines, newspapers or other writings;[61]
2. cinematographic or audiovisual works.[62]

[60] The Czech Republic does not publish its laws officially online. An unofficial version of the Act amending the CA is available in non-authoritative version from the database of legislation run by the Ministry of Interior (http://aplikace.mvcr.cz/sbirka-zakonu/ViewFile.aspx?type=z&id=27278; last visited, 15 June 2017) or in the privately-run, but publicly accessible database Zakonyprolidi.cz (http://www.zakonyprolidi.cz/cs/2014-228; last visited, 15 June 2017).

[61] Article 37a CA. In this respect, the Copyright Act specifically does not mention "journals" *(odborněčasopisy)* and uses the more general term "magazines" *(časopisy) that* includes also journals.

[62] In order to follow the Directive as much as possible, the national legislator deviated from the traditional conception of classification of works. Namely, in sec. 2 para. 1, the cinematographic work is a subspecies of

Due to the referral provisions (sec. 74, 78 and 82 CA), the exception for orphan works shall apply, by analogy, to the performer and his performances (sec. 74 CA), to the phonogram producer and his phonogram (§ 78 CA) and to the producer of audiovisual fixation and to her/his fixation (sec. 80 CA). As regards to the right of broadcaster, the referral provision (sec. 86 CA, respectively sec. 94 CA) only mentions the application of sec. 27a CA (the definition of orphan work) by analogy but not the sec. 37a CA (the exception to use orphan works). This reference might be understood, that a broadcasting work could well become an orphan work, however no special exception for use of this protected subject matter (sec. 37a CA) for the beneficiaries is available.

Possible Use of Orphan Works

The **permitted uses** enabled by the implementing legislation of Czech Republic, they cover reproducing the orphan work for the purposes of digitisation, making available online, indexing, cataloguing, preservation and restoration and for making the orphan work available online. Therefore, the implementing legislation in effect copies the wording of the Directive in order to fulfil the basic purpose of the Directive.

In terms of ruling on **cross-border search**, the Czech provision prescribes, that in case evidence suggests, that important information on an author is to be found in other countries, sources of information available in those countries shall also be consulted. This is almost a literal copy of the Article 3.4 of the Directive.

As for the **diligent search report requirements** established by the implementing legislation of Czech Republic, the beneficiary belonging to one of the two groups from mentioned in the subjective scope is obliged to promptly provide in writing to the Ministry of Culture the information regarding the search. This information contains the results of the diligent search that the organisation has carried out and which have led to the conclusion that a work is to be considered an orphan work; information about the intended use of such orphan work; information about any change of the status of an orphan work that the beneficiary uses or has used; and contact details.[63]

All this information provided by the beneficiary shall then be submitted without undue delay to EUIPO. The Explanatory Report attached to the implementing legislation explicitly mentions the vagueness of prescribed reporting ("promptly", "without undue delay") as intentional.[64] It reasons that the specific processes of data submission to the EUIPO were not sufficiently clear and agreed upon at the time of the government proposal for the implementing legislation.

There are no **other requirements** beyond those of a diligent search, its documentation and the communication of this information to the supervisory authority.

audio-visual work. However, in sec. 37a CA these two categories of works are treated equally without any explanation.

[63] As a side note, the Czech implementation also mention the works that have been used by the beneficiary in the past, which is different from the Directive.

[64] Explanatory Report to the Act No. 228/2014 Coll. implementing the Directive.

Czech Republic has not adopted **soft-law instruments** complementing the framework for diligent search, and no other soft-law instruments that would guide us through the diligent search process could be found. However, when the Czech Ministry of Culture was consulted, while it confirmed that there are no soft-law instruments sanctioned by the Ministry of Culture, users are generally referred to the existence of UK IPO guidelines.[65]

Czech Republic has not adopted **other regulatory schemes** complementing the framework for diligent search. However, the CA is in the process of being amended. The amendment presupposes the licensing of orphan works for further uses than specified in the Directive, and sec. 27a and 37a CA for other subjects than foreseen therein (i.e. extended collective licensing). The collective management organisations (CMOs) shall be entitled to license orphan works to any subject that has carried out diligent search, for five years (repeatedly), for the territory of the Czech Republic, for any use. The respective fee shall be kept by the CMO for three years. If the status of orphan work is not put to an end during those years, the fees shall be transferred to the State Cultural Fund or State Cinematography Fund. The identification or location of the author shall not terminate the license.

How to Carry Out a Diligent Search: General and Specific Requirements

List of Sources

The **list of sources** to be consulted in order to conduct diligent search is described in Annex 2 to the CA. The Annex itself clusters sources into 4 groups: (1) non-periodical publications, (2) periodical publications, (3) artistic works, and (4) audio-visual works. The list is referred to in the CA as 'the list of sources of information, that has to be consulted'. Due to the wording used, it is unclear, whether these sources have an **exhaustive or illustrative character.** The list includes both the information sources mentioned in the Directive, as well as information source specific for Czech Republic. Rather than specific databases these are described generally, and the Czech implementation explicitly states that "the Ministry of Culture assumes that examples of recommended professional or interest associations and other specific information sources appropriate for diligent search for right-holders will be listed and continuously updated on its website."

Czech Republic has not established a **national database** for orphan works. According to the CA the CMOs have a legal obligation to keep a register of such orphan works to which they collectively manage rights, if such protected subject matter is known.[66] Actually, this obligation goes beyond the text of the Directive. These registers are one of the mandatory sources that have to be consulted before a work could be deemed as an orphan work (Sec. 100 para. 1 let. f) and Annex 2 of the CA). However, these registers only contain info about the works that are managed by the respective CMO and thus known to CMOs from their own activities. Typically, these will concern works to

[65] As to the guidelines issued by the UK Intellectual Property Office, *see* https://www.gov.uk/government/collections/orphan-works-guidance (last visited, 15 June 2017).
[66] Sec. 100 para. 1 let. f CA.

whom the CMO was unable to identify the heirs of the deceased author or the right holders. At the moment, the CMOs (that have responded, namely OSA[67], DILIA[68] and OOA-S[69]) do not indicate an existence of publicly available and searchable database of orphan works.[70]

The Law of the Czech Republic prescribes a general **legal deposit** requirement. According to sec. 3 of the Act on Non-Periodical Publications No. 37/1995 Coll., as amended, the publisher of a non-periodical publication has the duty to provide to specific libraries a specific number of copies thereof. The Sec. Art 4 of the Act regulates the duty of the publisher to offer in writing the purchase of a copy to a number of libraries specified in the Decrees of the Ministry of Culture (No. 252/1995, 156/2003). As regards the periodical publications the Act No. 46/2000 on rights and duties related to publishing periodical press and on amendment to several other acts (Press Act). The legal deposit receives a specific reference in Czech orphan works legislation, as it is explicitly mentioned as one of the sources for diligent search in Annex 2 CA.[71]

Presumptions

As regards to the implementation of the OWD, the Czech law adds a very important rebuttable presumption. Specifically, when the work of an author (and/or rightholder) has been identified as orphan, all the other works of the same author are presumed to be also orphan unless proven otherwise.[72] This presumption stems from the initial proposal for an amendment of the Copyright Act, that also included the possibility to license the orphan works in the regime of extended collective licensing beyond the OWD. Per the Czech Ministry of Culture, this presumption is valid since the diligent search and the entry into any database is not decisive. Moreover, it could be argued that Section 101 paragraph 9 of the Czech Copyright Act regulating extended collective licensing theoretically covers also orphan works. Namely, the provision stipulates that the authors not represented by the CMO are represented by the virtue of law.

The statutory **presumption of authorship** deems author to be the natural person whose real name or pseudonym is indicated on the work in a usual manner or is indicated in the register administered by CMOs.**[73]** For a pseudonym to be relevant for this presumption, it must be used by author and evoke no doubt as to the author's identity. The presumption of authorship (more correctly right

[67] *See* http://www.osa.cz/ (last visited, 15 June 2017).
[68] *See* http://www.dilia.cz/ (last visited, 15 June 2017).
[69] *See* http://www.ooas.cz/ (last visited, 15 June 2017).
[70] For instance, DILIA stated, that they have not yet been contacted to perform diligent search and therefore the register is empty and no data were transferred to the Ministry. However, upon request the CMOs are able check whether the respected author is represented by the CMO.
[71] The list of libraries for a legal deposit of both periodicals and non-periodicals is available at https://www.nkp.cz/ (last visited, 15 June 2017) and is periodically updated in case of change of address of contact phone number. These legal deposit libraries could be regarded as on-site sources for diligent search. Legal deposit requirement *sui generis* exists for cinematography works as maker of the Czech cinematography work or its co-producer based in the Czech Republic is required to offer two copies of work to the National Film Archives.
[72] Section 27a paragraph 3 CA.
[73] Presumptions of authorship are those that aim at identifying authors (as in the case of books where the author is presumed to be the name indicated on the cover).

ownership as no moral rights are vested in the following categories of right holders) is also due to reference in section 78 Czech Copyright Act for the producer of phonogram, producer of audiovisual fixation (reference in section 82 Czech Copyright Act), broadcaster (reference in section 86 Czech Copyright Act) and with necessary modifications for the database maker (reference in section 94 Czech Copyright Act). With regard to the right ownership, the rights are vested in author, i.e. the natural person that has created the work.[74], Due to the referral provision of section 74 Czech Copyright Act this presumption of authorship (sec. 6 CA) is applicable by analogy on rights of performer.

Generally, there is no **presumption on right transfer** in the Czech law. Both the moral and economic rights to a copyrighted work are not transferrable under the Czech Law.[75] On the other hand, the purely economic rights of the producer of the phonogram, producer of the audiovisual fixation, broadcaster and database maker are transferable.[76] Some modifications on exercising of copyright in specific types of works refer to works made in the course of employment,[77] audiovisual works, and works used in audiovisual works and producers of fixations thereof,[78] and work for hire.[79]

The **value of the presumptions in the context of diligent search** is not apparent as there are no information indicating any clear solution in the Czech law and jurisprudence. However, it seems that results from a general search would not be sufficient per se to put the validity of these presumptions in doubt. Mere existence of the contrary general search is not sufficient, it has to be sanctioned by the court that the general search result identifies the real author, i.e. disprove the authorship of natural person originally thought to be author (evidence to the contrary).

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[74] Precisely, the section 63 paragraph 2 Czech Copyright Act regulates the presumptions as follows: 'the statement concerning the audiovisual work and the rights to such work, including the rights relating to its utilisation, which statement is registered in the register of audiovisual works maintained in compliance with the international convention, shall be deemed true, unless the contrary is proved; this shall not apply in cases where a statement cannot be valid according to this Act or where it is contradicted by another statement in such a register.'

[75] Sec. 11 para. 4 and 26 para 1 CA.

[76] Sec. 76 para 5, sec. 80 para. 4, sec. 84 para. 3, sec. 90 para. 3 CA.

[77] Sec. 58 CA para. 1 stipulates that the economic rights to such work shall be exercised by the employer in his own name and on his own account. Further: 'the employer may only assign the exercise of the right pursuant to this paragraph to a third party with the author's consent, unless this occurs when an undertaking or any part thereof is being sold'. Currently, there is an amendment to CA under discussion in the Parliament that will change the abovementioned *modus operandi* and add a rebuttable presumption that the consent of the author is non-revocable and applies also to further assignments. The third party should be then further considered as the employer.

[78] Sec. 63 para. 3 let. a) CA regulates a rebuttable presumption of a license grant to the producer of the first fixation of an audiovisual work. The parties are however free to regulate the situation differently in contract. No original rights as regards to the audiovisual work are vested in the person of the first producer - only a license grant is presumed. This applies *mutatis mutandis* also for the authors or the works used in audiovisual works. These presumptions also do apply if the performance of the performer is used in audiovisual work.

[79] Pursuant to the sec. 61 para. 1 CA: 'if a work is created by the author on the basis of a contract for work (a work created to order), then, unless otherwise agreed, it shall be deemed that the author has granted a license for the purpose following from the contract. Unless otherwise provided in this Act [CA], the customer may only use the work beyond such a purpose on the basis of a license agreement.'

Audio-visual Works

The **cut-off date** is set expressly for audiovisual works that were produced by public service broadcasters before 31. 12. 2002 (i.e not specifically "up until and including") and included in their archives.[80]

Audio-visual works have **specific rules concerning the authorship and right ownership** in Czech Republic. Generally, the Czech copyright law follows the "principle of objective truthfulness of authorship", i.e. it does not construct fiction of authorship for legal persons.[81] As regards to the authorship of audiovisual works, however it stipulates that 'the author of an audiovisual work is the director of that work. This is without prejudice to the rights of the authors of the works used audiovisually.'[82] Sec. 59 para. 3 CA expressly regulates that audiovisual works and works used in audiovisual works are not collective works, even if it would otherwise fulfil the legal conditions to be treated so. This exemption should ensure legal certainty of persons involved in creation of audiovisual works.

There are specific rules concerning the **presumption on the transfer of right** ownership under Czech law. Sec. 63 para. 3 let. a) CA regulates a rebuttable presumption of a license grant to the producer of the first fixation of an audiovisual work: '[i]f the author of an audiovisual work has granted the producer of the first fixation of the audiovisual work a permission in writing to make a first fixation of the work, then, unless otherwise agreed, it shall be understood that [the author] also granted that producer an exclusive and unlimited licence to use the audiovisual work in the original, dubbed and captioned versions as well as to use the photos created in connection with the making of the first fixation, including also the option of granting an authorisation, which is part of such a licence, in entirety or in part to a third party'. Furthermore, the sec. 63 para. 3 let. b) CA further presumes that the author agreed with the first producer on remuneration that is customary at the time of conclusion of the contract under terms and conditions similar to the contents of this contract for such a type of work. The contract parties are however free to regulate the situation differently in contract. The above mentioned applies *mutatis mutandis* also for the authors or the works used in audiovisual works (however not any work in the work, but only the works utilised audiovisually, e.g. screenplay, editing, photography, however excluding musical works.[83] As in the case of audiovisual

[80] It thus remains questionable, whether this also includes phonograms produced on 31.12.2002.

[81] Sec. 5 CA.

[82] *See* sec. 63 para 1 CA. The doctrine is split whether this provision should be treated as a legal fiction or non-rebuttable presumption. However, the authors of works utilised audio-visually are not treated and indicated as co-authors (in the sense of joint ownership) of the audiovisual work. They are only authors of the works utilised audio-visually. The CMO OOA-S is managing the rights of the as authors of the visual works utilised audio-visually in audiovisual works, i.e. directors of photography, stage designers, costume designers and other authors of the visual part of audiovisual works). The CMO DILIA is, instead, managing the rights to audiovisual works (rights of the director) and the rights of dubbing directors who are the authors of the spoken component of audiovisual works in another language (provided, that they have creatively adapted the dialogs – so called "director's edits"; - *režijní úprava*).

[83] Sec. 64 para. 1 reads as follows: 'If the author of a work utilised audio-visually, with the exception of a musical work, has granted the producer of the first fixation of the audiovisual work a written permission to include the work in an audiovisual work, then, unless otherwise agreed, it shall be understood that he has: a) granted that producer an authorisation to include the work without alteration or after adaptation or other

works the sec. 64 para. 1 let. c) further stipulates a presumption that the producer and author have agreed on remuneration that is customary at the time of conclusion of the contract under terms and conditions similar to the contents of this contract for such a type of work. It must be also noted that sec. 64 para. 2 stipulates, that 'unless otherwise agreed, the author of a work utilised audiovisually may grant permission for the inclusion of his work in another audiovisual work, or may include it in such a work himself, after expiry of a ten-year period from the granting of the permission' as elucidated above. These also do apply if the performance of the performer is used in audiovisual work.

Market practices that contractually assign these rights to film distributors are also legally possible: the authors, performers and producer of first fixation are able to license their rights in such a way that the distributor factually exercises all the rights.

Music

A **musical work** does not have a special legal definition as it is considered as 'other work of art'. The "accompanying words" are not defined separately and amount to a separate standard literary work. The fact that these two works are used in connection together in economic unity however does not give rise to specific copyright protection over this joining. Consequently, the 'works used in connection' must be treated separately and consent of all authors is needed for exercising the respective rights. Joint authorship only arises, when the two natural persons are creating the work together.[84] There is no specific rule or presumption that determines by default which categories of contributions are considered as establishing authorship of a musical work. In order to be considered author, the person must create (or jointly create) the work, i.e. to create 'a literary work or any other work of art or a scientific work, which is a unique outcome of the creative activity of the author and is expressed in any objectively perceivable manner.'[85]

Variety of artists are vested with **performing rights.** According to the sec. 67 CA 'an artistic performance is the performance of an actor, singer, musician, dancer, conductor, choirmaster, director or any other person who acts, sings, recites, presents or otherwise performs an artistic work, including works of traditional folk culture.'[86] Further, the 'natural person who created the artistic performance' is considered to be the performer.[87] In the case of jointly created performances of the same work (i.e. by members of an orchestra, choir, dance troupe or other artistic corps the performers) are, if not agreed otherwise in writing, represented by the artistic

change into an audiovisual work, and also to make a first fixation of such an audiovisual work, and to dub it and add captions to it; b) also granted the producer the exclusive and unrestricted license to use the work within the utilisation of an audiovisual work, and also to use the photographs created in connection with the making of a first fixation, including also the option of granting an authorisation, which is part of such a license, in entirety or in part to a third party."

[84] Sec. 8 CA.

[85] Sec. 2 CA. It must be however noted, that the copyright of the sound designers is acknowledged, in as much as their rights are collectively managed by the specific CMO OAZA *(Ochranná asociace zvukařů – autorů).*

[86] The list is considered to be open.

[87] Sec. 67 para. 1 CA.

leader of the ensemble who represents the others on their behalf and on their account. This presumption is however not applicable to soloist, conductor and director of theatrical performance.[88]

As already stated, in Czech Republic there are no **presumptions of right transfer** for musical work. However, as a performance of a performer could be created under employment, the economic rights are, if not stipulated otherwise, exercised by the employer and the performer agrees with specific acts that would normally be considered as infringement of moral rights. Furthermore, the statutory rebuttable presumption of granting license to the producer of the first fixation of the audiovisual work applies.[89]

Phonograms

According to the sec. 75 para. 1 CA 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."[90]

In case of phonograms made by Czech public service broadcasters, the **cut-off date** is set expressly 'before 31.12.2002'. It thus remains questionable, whether this also includes phonograms produced on 31.12.2002. As to phonograms which have never been published or broadcast but which have been made publicly accessible by the beneficiaries of the orphan work exception with the consent of the rightholders, the Czech implementation has not introduced any the cut-off date.

There are specific rules concerning the **right ownership of phonograms.** According to the Sec. 75 para. 2 CA a phonogram producer is a natural or legal person who, on his own responsibility, fixes for the first time the sounds of the performer's performance or other sounds, or their expression, or on whose initiative such a fixation is made by a third party. Other parties involved may be, when fulfilling the needed conditions considered as authors of the respective works. Conversely, there is no **presumption of right transfer** to phonogram producers.[91]

In Czech Republic, the rights to a phonogram are fully transferable therefore, as **market practice**, the label may legally in the end become the actual entity exploring the phonogram producer rights. Regarding the rights of the musicians (performers), if the label has concluded an exclusive license agreement that is without limitation as to the ways of use of the protected subject matter and for the duration of economic rights with the right to sublicense at least for the territory of Czech

[88] Sec. 68 CA.

[89] *See* sec. 74 CA referring to, respectively, sec. 58 CA and sec. 63 para. 1 and 3 CA.

[90] A "soundtrack" is not specifically or separately treated by the CA. The interpretation of the term "soundtrack" is provided in doctrine. Accordingly, the "soundtrack" is one part of the audiovisual fixation (namely the audio part). This could be recorded directly when producing the fixation of the audiovisual work or added separately later (synchronization with a pre-existing phonogram). Soundtrack thus could be also a separate phonogram that might or might not contain a musical work.

[91] The provisions regulating work made in the course of employment, collective work and work for hire do not apply neither similarly *(per analogiam),* nor with necessary modifications for the rights of phonogram producers. These specific modifications however do apply for the performers rights.

Republic, the label is then, for the purposes of collective management of rights considered as the right holder, i.e. the person that is represented by CMO (sec. 95 para. 2 let. c) CA).[92]

Also solutions that assign the rights of authors of a book to publishers to an extent that includes the making of an **audio book** are legally possible. There are though no concrete data concerning this practice.

Additional Information Useful for the Diligent Search

In Czech Republic, there is no official **register for anonymous and/or pseudonymous works**, nor a database for works that had been subject to **authorship or rights ownership disputes**.

Act No. 304/2013 Sb., on the Public Registers of Legal Entities and Natural Persons Register regulates the existence and functioning of the public **register for companies**. This register is called *Obchodní Rejstřík* (Commercial Register) and is run electronically by the *Krajskýsoud* (the respective Regional Court).[93] Overarching database provided by Ministry of Finance is called ARES.[94] This database serves statistical purposes of the Ministry of Finance, but also publishes data from other public registers, such as abovementioned Commercial register.

Register for **bankruptcy arrangements** is called *Insolvenčnírejstřík*.[95] There is no register with publicly available information on **company mergers**, however some information can be obtained via the Commercial Register by manually searching for changes or using a privately-run change tracker like DATY.[96]

Whereas there is no **register on the buying and selling of back-catalogues** of copyright protected works and/or neighbouring rights, there is a **register on the transfer of copyrights**. More precisely, the Notarial Chamber of the Czech Republic operates a non-public register of dispositions *mortis causa*[97] Additionally, for copyrights inherited by the State, State Cinematography Fund is able to require certain information from the Registry of Inhabitants from the Ministry of Interior.

The Czech Republic has two **public service broadcasters**: one for television and one for radio. An additional third public service provider exists in the Czech Republic, specifically *Českátiskovákancelář (*ČTK), established based on the Act no. 517/1992 Sb., on the Czech News Agency.*Českátelevize*(ČT) was established based on the Act no. 483/1991 Sb., on the Czech Television, is the public service broadcaster for television. ČT currently operates six TV stations: ČT1 (full-formate), ČT2 (full-formate), ČT24 (news), ČT Sport (sport), ČT:D (TV station for children) and ČT Art (culture). *Českýrozhlas* (ČRo) instead was established based on the Act no. 484/1991 Sb., on

[92] However, there is no general presumption of transfer of exercising the rights or explicit license to the maker of the phonogram or the label.

[93] It is publicly available at https://or.justice.cz/ias/ui/rejstrik (last visited, 15 June 2017). This service is provided by the Ministry of Justice's owned API. Regional Courts are located in Praha, České Budějovice, Ústínad Labem, Brno, Plzeň, Hradec Králové, Ostrava. Ministry of Justice is in Praha.

[94] ARES It is available at http://wwwinfo.mfcr.cz/ares/ares_es.html.cz (last visited, 15 June 2017).

[95] Publicly available at https://isir.justice.cz/isir/common/index.do (last visited, 15 June 2017).

[96] Available at http://daty.cz (last visited, 15 June 2017).

[97] Evidence of Dispositions Mortis Causa - Evidence *právníchjednání pro případsmrti:* Sec. 35b, sec. 35c Act No. 358/1992 Coll., on notaries and their activities (Notarial Code), as amended.

the Czech Radio. ČRo currently operates four national stations: *Radiožurnál* (full-formate), *Dvojka* (full-formate), *Vltava* (culture) and *Plus* (spoken word). Moreover, ČRo currently operates multiple regional and online stations.[98]

In regards of **other regulatory scheme** in place dealing with other relevant subject matter of digitization in Czech Republic, in the currently debated amendment of the CA, the extended collective licensing scheme for commercially unavailable works (i.e. out-of-print and out-of-distribution works) is proposed. Under this regime of the suggested amendment), the respective CMOs shall grant the libraries registered under the Library Act a license that shall cover making copies of works included in the list of unavailable works on the market, and making available a copy of such work in accordance with § 18 par. 2 CA (i.e. also digitization is covered) for a period not exceeding five calendar years (this license could be granted even repeatedly). Only the literary works (and the works included therein) might be enlisted. Per the newly suggested Sec. 97f CA, the list of commercially unavailable works shall be administered by the National Library, which shall also receive suggestion for listing from the libraries, CMOs or right holders. Such a suggestion shall be made online immediately. The work shall be enlisted if it was not possible (with reasonable effort) to obtain an adequate copy on the market within six months since the receipt of the suggestion and provided that the work is clearly not subject to terms and conditions or licensing terms which preclude inclusion in the list. Periodicals published ten or more years ago, in Czech Republic could be enlisted in a simplified procedure without the acquiring effort, provided that it is clearly not subject to terms and conditions or licensing terms which preclude inclusion in the list. The works included in the periodicals are enlisted only as a part of such edition. The respective right holder is entitled to require the exclusion of the work from the list, however such the crossing off the list does not invalidate the already granted license. However, currently, only the "standard" library statutory license does apply. Accordingly, a beneficiary organisation may make a 'reproduction of a work whose reproduction has been damaged or lost, provided that it is possible to verify with the exertion of reasonable effort that it is not being offered for sale, or a print reproduction of a minor part of the work, if such part has been damaged or lost.' However, no further regulation as to what constitutes reasonable effort in finding the out-of-distribution is set. It could be assumed that this would concern contacting the booksellers or even secondhand bookshops.[99]

[98] Regional analogues are: *ČRo Brno, ČRo České Budějovice, ČRo Hradec Králové, ČRo Liberec, ČRo Olomouc, ČRo Ostrava, ČRo Pardubice, ČRoPlzeň, ČRo Region-Středočeskýkraj, ČRo Region-Vysočina, ČRo Sever.* Regional digital ones are: *ČRoRegina* and *DAB Praha.* Digital and Online ones: *Rádio Junior* (radio station for children), *ČRo Radio Wave* (radio station for "progressive youth"), *ČRo D-dur* (classical music), *ČRo Jazz* (jazz music), *ČRo Sport* (live stream from sport events).

[99] It worth mentioning that further digitalization projects deal mainly with out-of-copyright works though. For instance, the Project National Digital Library, available at http://www.ndk.cz. The overview on the state of digitalization is available from: http://www.registrdigitalizace.cz/rdcz/ (last visited, 15 June 2017).

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ESTONIA

Implementation of the Orphan Works Directive: Background

In Estonia, the OWD has been implemented by a change of copyright law through the act on amendments to the Copyright Act (*Autoriõiguse seaduse muutmise seadus;* hereinafter, the Implementing Law), which entered into force on October 30 2014.[100] All changes are incorporated into the Estonian Copyright Act.[101]

Subjective and Objective Scope

In regards of the **subjective scope**, the Estonian implementing rules do not differ from the Directive, a part form the mention of a solo public broadcasting (the 'Estonian public broadcasting'), and refer to:

1. books, journals, newspapers or other works published in the form of writings that are stored in the collections of public archives, museums, libraries, educational and research establishments or of film or audio heritage institutions (hereinafter 'public memory institutions');
2. audiovisual works or phonograms stored in the collections of public memory institutions;
3. audiovisual works or phonograms produced by Estonian public broadcasting up to 31 December 2002 (included) and stored in the archives of the Estonian public broadcasting;
4. objects of rights that are contained in the works or phonograms above mentioned or constitute an integral part thereof.

Also in regard to the **objective scope**, the Estonian implementation does not differ form the Directive and it include:

1. books, journals, newspapers or other works published in the form of writings that are stored in the collections of public archives, museums, libraries, educational and research establishments or of film or audio heritage institutions;
2. audiovisual works or phonograms stored in the collections of public memory institutions;
3. audiovisual works or phonograms produced by Estonian Public Broadcasting up to 31 December 2002 (included) and stored in the archives of Estonian Public Broadcasting;

[100] *Autoriõiguse seaduse muutmise seadus* (Act on Amendments to the Copyright Act) of 30.10.2014, available at https://www.riigiteataja.ee/akt/129102014002 (last visited, 15 June 2017). English translation at https://www.riigiteataja.ee/en/eli/506042016003/consolide (last visited, 15 June 2017).

[101] *Autoriõiguse seadus* (Commercial Code). RT I 1992, 49, 615 RT I, 01.04.2016, 2. Official text available at https://www.riigiteataja.ee/akt/101042016004 (last visited, 15 June 2017). Unofficial English translation available at https://www.riigiteataja.ee/en/eli/506042016003/consolide (last visited, 15 June 2017).

4. objects of rights that are contained in the works or phonograms above mentioned or constitute an integral part thereof.

Possible Use of Orphan Works

The Estonian copyright law does not differ from the regulation in the Directive as to the permitted uses for orphan works, cross-border search, and diligent search report requirements.

Following then the wording of the OWD, the Estonian implementation enumerated as **permitted uses:**

1. making available to the public for cultural and educational purposes;
2. reproduction for the purpose of digitising, making available to the public, indexation, cataloguing, preservation or restoration.

Similarly, the Estonian Copyrigt Act recites, under Article 27(3) that a **cross-border search** needs to be carried out '[i]f there is evidence to suggest that relevant information on the rightholder is to be found in other countries that have not acceded to the European Union and that are not contracting parties to the EEA Agreement'.

The **diligent search report requirements** are the same as those adopted by the OWD and the comptent auhtority identified as the recepient and maintener of records of diligent searches and all information is the Ministry of Justice.[102]

In the Estonian copyright law, there are no **other requirements** beyond those of a diligent search, its documentation and the communication of this information to the supervisory authority.

Estonia has not adopted **soft-law instruments** complementing the framework for diligent search. However, in addition to the amendment of the Copyright Act, the Ministry of Justice adopted a regulation on the sources for carrying out a diligent search prior to considering a work or phonogram as an orphan work (*Orbteoseks tunnistamisele eelneva hoolika otsingu allikad*).[103]

Estonia has not adopted **other regulatory schemes** complementing the framework for diligent search. In this respect, the national legislator is undertaing reform of the national copyrght rule which should also include the adoption of an extended collective licensing scheme, which – once adopted – could be relevant to the topic at hand.

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[102] Article 27(4).

[103] *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. Official text (in Estonian) available at https://www.riigiteataja.ee/akt/127012015010 (last visited, 15 June 2017). The English translation is not available.

List of Sources

A **list of sources** to be used to perform a diligent search is available in the regulation adopted by the Ministry of Justice (hereinafter, 'Regulation on sources')[104], organised according to the categories of 1) published books; 2) newspapers, magazines, journals and periodicals; 3) visual works; and 4) audio-visual works and phonograms. According to the Regulation on sources, the list is not exhaustive, rather **illustrative**, since other sources may be used as well. Moreover, it is clearly stated that the lists of appropriate sources for specific works are open lists.

Presumptions

The Estonian Copyright Act includes several **presumptions on authorship**, among which the following are relevant for the diligent search:

1. The authorship of a person who publishes a work under his or her name, a generally recognised pseudonym or the identifying mark of the author, shall be presumed to be the author until the contrary is proved. The burden of proof lies on the person who challenges the authorship;[105]
2. The fact that the person whose name is indicated in an audiovisual work is the producer shall be presumed until the contrary is proved. The burden of proof lies on the person who challenges the fact that this person is the producer;[106]
3. The protection of the object of related rights is presumed, except if, based on the Copyright Act or other copyright legislation, there are apparent circumstances which preclude this. The burden of proof lies on the person who contests the protection of the object of related rights;[107]
4. It is presumed that the person whose name is indicated on a related right subject matter as rightholder has rights regarding the specified subject matter until the contrary is proved. The burden of proof lies on the person who contests the fact that this person holds the related rights;[108]
5. If a related rights subject matter or its packaging is marked with a symbol that can be directly related with the holder of related rights or her or his legal successor, or such symbol is used in other relation with the corresponding related rights subject matter, the holder of the related rights who is associated with the symbol is presumed to have the rights regarding the corresponding subject matter;[109]

[104] *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. Official text (in Estonian) available at https://www.riigiteataja.ee/akt/127012015010 (last visited, 15 June 2017). The English translation is not available.
[105] Artice 29 (1).
[106] Article 33 (4).
[107] Article 62^1 (1).
[108] Article 62 (1)(2).
[109] Article 62(1)(3).

6. 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.[110]

The above presumptions are beneficial to the author and the owner of related rights. In principle, the burden of proof is shifted to the person who is contesting the protectability of a work or a related rights subject matter and authorship or ownership.

The Estonian Copyright Act also provides **presumptions on right transfer,** among which the following are relevant for the diligent search:

1. The author of a work created under an employment contract or in the public service in the execution of his or her 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 the employer unless otherwise prescribed by contract;[111]
2. Copyright in an audiovisual work shall belong to its author or joint or co-authors (director, script writer, author of dialogue, author of the musical work specifically created for use in the audiovisual work, cameraman and designer). The economic rights of director, script writer, author of dialogue, cameraman and designer shall transfer to the producer of the work unless otherwise prescribed by contract. The economic rights of the author of the musical work used in the audiovisual work shall not transfer to the producer regardless of the fact whether or not the work was specifically created for use in the audiovisual work;[112]
3. If an author's contract on the use of a literary or artistic work for the creation of an audiovisual work is concluded, 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. The author has the right to obtain equitable remuneration for the rental of the work. The provisions of this subsection do not apply to musical works;[113]
4. 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.[114]

There is value of the **presumptions in the context of diligent search** but there is no established legal practice on the required level of burden of proof to override the copyright presumptions. Still, it is highly unlikely that mere Google search is sufficient.

[110] Article 31 (2).
[111] Article 32 (1).
[112] Article 33 (2).
[113] Article 57 (5).
[114] Article 67 (5).

Audio-Visual Works

The Estonian implementation of the OWD provides a **cut-off date** as to the use of a phonogram as an orphan work since the exception only applies to 'audiovisual works or phonograms produced by Estonian Public Broadcasting up to 31 December 2002 (included) and stored in the archives of Estonian Public Broadcasting'.[115]

Audio-visual works are highly regulated under the Estonian Copyright Act. There are specific rules concerning the **authorship and right ownership** providing that copyright in an audio-visual work belongs to its author or joint or co-authors (i.e.: director, script writer, author of dialogue, author of the musical work specifically created for use in the audio-visual work, cameraman and designer.[116] Specific rules also regulate the **transfers of rights** by providing that while the economic rights of director, script writer, author of dialogue, cameraman and designer transfer to the producer of the work, unless otherwise prescribed by contract, the economic rights of the author of the musical work used in the audio-visual work do not transfer to the producer regardless of the fact whether or not the work was specifically created for use in the audio-visual work.

Moreover, the producer of the work is subject to a **presumption of ownership** as detailed above.

Distributors, on the other hand, are usually entitled to exercise the right to distribute the audio-visual work on the basis of a license (which could even entail certain exclusivity) from film producers, who then maintain their rights, as no **market practice** on this has been detected.

Music

The Estonian Copyright Act has an illustrative list of protectable works which also includes 'musical compositions with or without words',[117] but does not provide a definition of **musical work** in a greater detail. Musical works can be works of joint authorship or co-authorship according to the contributions being an indivisible whole (in the former case) or having an independent meaning of their own (in the latter case).[118] The question here is whether different contributions are separable. In case they form an indivisible whole, then the rights have to be exercised jointly unless otherwise agreed, in the case that each contribution has its own independence each co-author enjoys copyright in it and uses that part of the work independently, without prejudice for the interests of other co-authors.

As to the performers of musical works, the Estonian Copyright Act is likely to provide an open list by defining performer 'an actor, singer, musician, dancer or another person or groups of persons who acts, sings, declaims, plays on an instrument or in any other manner performs literary or artistic works or works of folklore or supervises other persons upon the performance of works, or a person who performs in variety shows, circuses, puppet theatres, etc.'[119] In principle, the performers keep their **performing rights** even when performing in the execution of direct duties since, according to

[115] Article 27(2)(3).
[116] Article 33.
[117] Article 4 (3) clause 7.
[118] Article 4 (3) clause 7.
[119] Article 64.

§ 67(5) of the Estonian Copyright Act, the economic rights of the performer are transferred to the employer only on the basis of a written agreement of the parties. The **presumptions of right transfer** that apply to musical works are then the general ones above illustrated.

Phonograms

The Estonian Copyright Act does not directly define a **phonogram**, rather a producer of phonograms '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'.[120] From this definition a phonogram (or sound recording) can be defined as the recoding of the sound arising from the performance or other sound occurs. Soundtrack, on the other hand, is the musical composition (protectable as any other work) which can be performed and recorded.

The Estonian implementation of the OWD provides a **cut-off date** as to the use of a phonogram as an orphan work since the exception only applies to 'audiovisual works or phonograms produced by Estonian Public Broadcasting up to 31 December 2002 (included) and stored in the archives of Estonian Public Broadcasting' (§ 27(2)(3)). As to phonograms which have never been published or broadcast but which have been made publicly accessible by the beneficiaries of the orphan work exception with the consent of the rightholders, the Estonian implementation has not introduced any the cut-off date.

There are **specific rules concerning the right ownership of phonograms.** Right ownership in the phonograms stays with the producer, i.e.: the person on whose initiative sound is recorded, while performers and authors rights are not affected unless there is a separate agreement. As to the copyright regime of phonograms, thus, under Estonian copyright law there are no presumptions on the transfer of the rights vested in performers and authors of the phonogram producers. They needs to conclude separate agreements (e.g. employment contract, transfer agreement, etc.) to acquire these rights. The phonogram producer only acquire the rights related to the produced phonogram.[121] According to the Estonian Copyright Act, as already mentioned, even 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.[122]

As for the role of music label in Estonia, they do not seem to be significantly relevant to having established the **market practice** of having transferred all economic rights to them. Based on very general observation, authors (in different fields, musical included) have acquired sufficient awareness regarding copyright, they tend to keep their rights. However, there is no available data to confirm such assumption.

The same observation holds true for the e-book and **audio-book** sector too. While in the nineties it was more widespread that all rights were transferred to publishers, the trend has currently changed.

[120] Article 69.
[121] Article 70.
[122] Article 67 (5).

Additional Information Useful for the Diligent Search

In Estonia there is no official **register for anonymous and/or pseudonymous works**. Some libraries might have some internal documents (e.g. excel worksheet) containing the referred information. Most likely this kind of data is collected and processed during the process of declaring works orphan.

Similarly, there is no official database for works that had been subject to **authorship or right ownership disputes**. This kind of information must be searched in databases containing case law (for example the database of the Supreme Court of Estonia's decisions,[123] or of county and administrative courts' decisions and of circuit courts's decisions).[124]

However, Estonia has a **register for companies** which contains various company-related information, which is maintained by the registration department of Tartu County Court. The commercial register also holds information on **company mergers or bankruptcy arrangements**. In particular, the management board of partners entitled to represent a merging company shall submit, nor earlier than after one month from the approval of the merger resolution, a petition to enter the merger into the commercial register. According to the Estonian Bankruptcy Act,[125] instead, if a debtor is entered in the commercial register, the court which declares bankruptcy shall immediately forward copies of the decisions made by the court or a higher court to the registration department of Tartu County Court. An entry is made in the register immediately after a ruling is forwarded to the registration department.

On the other hand, Estonia does not have a **register on the transfer of copyrights** nor a **register on the buying and selling of back-catalogues**,[126] as the Copyright Act explicitly provides that 'the registration or deposit of a work or completion of other formalities is not required for the creation or exercise of copyright'.[127]

Although there is not a register for **public service broadcasters,** there is a list of media service providers[128] as the Media Services Act requires that television or radio services can only be provided on the basis of the activity licence for provision of television or radio service and the application for and activity licence shall be settled by the Technical Surveillance Authority.[129] At the moment, then, the Estonian Public Broadcasting (*Eesti Rahvusringhääling*, ERR), which is a legal person in public law and legal successor of the *Eesti Televisioon and the Eesti Raadio* (TV and Radio organizations), is

[123] http://www.nc.ee/?lang=en (last visited, 15 June 2017).
[124] https://www.riigiteataja.ee/kohtulahendid/koik_menetlused.html (last visited, 15 June 2017).
[125] *Pankrotiseadus* (Bankruptcy Act).RT I 2003, 17, 95 ... RT I, 22.06.2016, 21. Official text available at https://www.riigiteataja.ee/akt/122062016025 (last visited, 9 June 2017). Unofficial English translation available at https://www.riigiteataja.ee/en/eli/504072016002/consolide (last visited, 15 June 2017).
[126] These activities may be inferred by the list of members held by each CMOs, e.g. the list of members of the Estonian Authors' Society, available at http://www.eau.org/liikmed/ (last visited, 15 June 2017).
[127] Article 7(3).
[128] The list of media services providers is accessible at http://www.tja.ee/meediateenuste-load-3/?highlight=meediateenuse,tegevusluba (last visited, 15 June 2017).
[129] *Meediateenusteseadus* ('Media Services Act') RT I, 06.01.2011, 1 ... RT I, 04.03.2015, 3. Official text available at https://www.riigiteataja.ee/akt/104032015014 (last visited, 15 June 2017). Unofficial English translation available at https://www.riigiteataja.ee/en/eli/511052015002/consolide (last visited, 15 June 2017).

the only founded by the Estonian Public Broadcasting Act (PBA).[130] It is also the only broadcasting not in need of any activity licence for provision of television or radio service or registration for provision of on-demand audiovisual media service in the register of economic activity.[131]

In regards of **other regulatory scheme** in place dealing with other relevant subject matters of digitization in Estonia, the Copyright Act regulates only the copying done by libraries. According to the Estonian Copyright Act a public archive, museum or library has the right to reproduce a work included in the collection thereof without the authorisation of its author and without payment of remuneration, in order to: 1) replace a work which has been lost, destroyed or rendered unusable; 2) make a copy to ensure the preservation of the work; 3) replace a work which belonged to the permanent collection of another library, archives or museum if the work is lost, destroyed or rendered unusable; 4) digitise a collection for the purposes of preservation.[132]

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[130] *Eesti Rahvusringhäälingu seadus* ('Estonian Public Broadcasting Act'), RT I 2007, 10, 46 ... RT I, 29.06.2014, 109. Official text available at https://www.riigiteataja.ee/akt/113032014020?leiaKehtiv (last visited, 15 June 2017). Unofficial English translation available at https://www.riigiteataja.ee/en/eli/527062014005/consolide (last visited, 15 June 2017).

[131] Additional information on the Estonian Public Broadcasting is available at http://news.err.ee/l/about_us (last visited, 15 June 2017).

[132] Article 20 (1).

FRANCE

Implementation of the Orphan Works Directive: Background

In France, the OWD was implemented by a change of copyright law through the *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* (TITRE II, hereinafter the Implementing Law).[133]

Subjective and Objective Scope

In regards of the **subjective scope** of the application of the orphan works exception, French Law includes publicly accessible libraries, museums, archives, depositories of the cinematographic or sound heritage, educational institutions, with the exception of photographs and still images that exist as independent works, and public service broadcasting organizations. Interestingly, the only difference seems to concern the accessibility from the public of some of the concerned institutions. Within the French law, only the libraries are defined as publicly accessible, whereas museums and archives are not. Conversely, under the OWD the three of them are defined as publicly accessible.

In regards of the **objective scope** of the application of the orphan works exception, the French implementation has no substantial difference from Article 1(2) of the Directive, and it includes:

1. Works published in the form of books, journals, newspapers, magazines or other writings forming part of the collections of publicly accessible libraries, museums, archives, depositories of the cinematographic or sound heritage, or educational institutions, with the exception of photographs and still images that exist as independent works;
2. Audiovisual or sound works forming part of such collections or produced by public service broadcasting organizations before 1 January 2003 and forming part of their archives.

Possible Use of Orphan Works

Among the **permitted uses** of orphan works under the French Implementing Law, Article L. 135-2 allow such uses only in the framework of the cultural, educational and research missions of the institutions, provided they do not pursue any profit, and for a period not exceeding seven years. Such use shall be made in accordance with a defined procedure. As to the making available to the

[133] *JORF n°0045 du 22 février 2015,* p. 3294, available at https://www.legifrance.gouv.fr/affichTexte.do;jsessionid=D3248D7C926A76F2BD720C95E3D56DAB.tpdila19v_3?cidTexte=JORFTEXT000030262934&categorieLien=id (last visited, 15 June 2017). Also very useful the explanatory memorandum available at https://www.legifrance.gouv.fr/affichLoiPubliee.do;jsessionid=ABB7C9F0EC17AFBD0C18DDF3D68C1A4C.tpdila19v_3?idDocument=JORFDOLE000029620502&type=expose&typeLoi=&legislature=14 (last visited, 15 June 2017). The English translation is not provided.

public of an orphan work, use shall be in such a way that everyone can access it on its own initiative. As to the reproduction of an orphan work, the use is for the purpose of digitising, making available, indexing, cataloging, preserving or restoring. While the uses allowed seem to be overall like those indicated by the Directive, the commercial boundaries in the French law are limited to seven years.

In terms of ruling on **cross-border search**, no reference is made in the French law to the extension of the search to other countries. However, Article 3(4) of the Directive is implemented in the State Council Decree which details diligent search procedure.

Among the **diligent search report requirements** established by the Implementing Law of France, Article L. 135-3 requires a procedure for diligent, proven and serious research by the right holders in the Member State of the European Union where the first publication took place or, failing that, the first broadcast of the work. This research involves consulting appropriate sources for each category of work. Where the work has not been subject of a publication or of a broadcast, but has been made available to the public under the conditions defined in the last paragraph of Article L. 135-1, this research shall be carried out in the Member State in which the body which made the work available to the public is established. For audiovisual works, research shall be carried out in the Member State in which the producer has his seat or habitual residence. Then, it mandates the communication of the results of the research, and the intended use of the orphan work to the Ministry of Culture or to the body designated for that purpose by the latter, who shall transmit it without delay to the EUIPO for recording such information in the database established by that office for that purpose.

Whereas there are no **other requirements** beyond those of a diligent search and France has not adopted **soft-law instruments** complementing the framework for diligent search, there are **other regulatory schemes**. More precisely, books that are no longer commercially exploited are regulated by a specific law since September 2012 and by a State Council decree since February 2013. While the law dictates the general framework, the decree details the licensing system. The French law mandates the establishment of a database of unavailable books (called ReLire) managed by the *Bibliothèque Nationale de France.*[134] The licensing is handled by an appointed collecting society (SOFIA) which keeps the revenues for prospective reappearing authors for a period of ten years, after which the works can be used freely by public libraries.[135] Rights holders can however opt out from the system within six months from the inscription of the work in the database.

However, a preliminary reference about the consistency of these rules with the OWD was lodged before the Court of Justice of the European Union to ask whether the Directive is in fact incompatible with giving a collecting society the right to allow the publication of out-of-print works while allowing the authors to oppose to such practice.[136].

[134] Available at https://relire.bnf.fr (last visited, 15 June 2017).
[135] *See* at http://www.la-sofia.org (last visited, 15 June 2017).
[136] At the time of writing, on the above case before the CJEU (C-301/15 Soulier) the opinion of the Advocate General Wathelet suggested that the French law on the out-of-print works is inconsistent with the OWD.

How to Carry Out a Diligent Search: General and Specific Requirements

List of sources

The French legislator has adopted an **illustrative list of sources** through the *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*.[137] Some of these sources are specific, but they are mostly general (such as, for example, collecting societies). The Decree mentions all the sources listed by the OWD in the Annex, with the addition that also the information available on the work (cover, film titles, etc.) is to be regarded. This provision is similar to the relevant part of the UK IPO guidelines; but in the case of France, this provision is established by the legislative decree, not entrusted to soft-law. Another addition of the French legislation is the reference to unpublished written works, among the categories considered for diligent search. This category is not mentioned by the OWD.

While no **national database** is envisaged by the law implementing the OWD, a database is already existing and operational for out-of-print works. Unlike in the OWD, there is no mention in the French legislation of a register that must be kept by the beneficiary institutions, in which the results of the diligent search are recorded. Only the communication of the information to the competent national authority, which must transmit it to the EUIPO is mentioned. Also, 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 thechanges in status or to the contact details of the concerned institution.However, the State Council Decree that lists the sources to be consulted in the case of a diligent search, mentions the duty to keep a record and to communicate the contact details of the person carrying out the search to the competent authority.

As many countries, France has a general **legal deposit** requirement. The institution in charge of the legal deposit is the *Bibliothèque Nationale de France* (BNF). It worth noting that the specific database of the legal deposit is not accessible online. However, if we assume that each work legally deposited become part of the catalogue of the BNF, catalogues are mostly freely accessible online.

[137] *JORF n°0106 du 7 mai 2015* page 7848 texte n° 28, available at https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000030555935 (last visited, 15 June 2017).

Presumptions

In France, there is a **presumption of authorship** of the person indicated as such on the work.[138] Similarly there is a presumption of ownership in favour of the person that commercializes the work, according to case-law.[139]

There is value of the **presumptions in the context of diligent search** but there is no established legal practice on the required level of burden of proof to override the copyright presumptions.

Audio-Visual Works

In the case of audio-visual works made by public service broadcasters the **cut-off date** determined by the implementing legislation for audio-visual works to be covered by the implementing legislation does not differ substantially from the OWD. The French law says *'avant le 1er janvier 2003'* (before 1st January 2003) whereas the OWD says 'jusqu'au 31 décembre inclus' (up and including 31st December 2002).

The audiovisual works are subject to **specific rules concerning the authorship and right ownership**. Presumed co-authors of an audio-visual works are: the scenario author; the author of the adaptation; the author of the dialogue; 4the author of the musical compositions with or without words, especially composed for the work; and the director.

Moreover, there are **specific rules concerning the transfer of right ownership of audio-visual works.** The producer of an audio-visual work is presumed (safe contrary clauses) cessionary of the economic exclusive rights, except for music composition with or without words; graphic rights; and theatrical rights.

In France, as **market practice**, the distributor normally enters into agreements with the producer of a film. He remains mandatory (not titular) of exploitation rights, with geographical (distribution areas) and temporal (two to fifteen years) boundaries.

Music

In France, a **musical work** is considered a collective work or a joint work, case by case. The classic case of a song, with music and lyrics authored by two different persons is a collective work. Each author can exploit his/her creation separately as long as this dos not brings prejudice to the collective work (principle established by case law). In some cases, though, when there are different authors for different parts of the work in a way that they are not separable, this is considered a joint work, and ownership is presumed on the person that took the initiative of the publication of the work.[140]

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[138] *'La présomption de titularité des droits d'auteur est instituée par les articles L. 113-1 et suivants du Code de la propriété intellectuelle : « la qualité d'auteur appartient, sauf preuve contraire, à celui ou à ceux sous le nom de qui l'œuvre est divulguée » dispose l'article L. 113-1'.*

[139] See: http://www.village-justice.com/articles/presomption-titularite-droits,9386.html#LiwLpi6ABT4EZlfQ.99 (last visited, 15 June 2017).

[140] Article L113-2 du CPI.

All performers, except 'collaterals' (for example, walk-ons in a film) have **performing rights** and there is no hierarchical preference for performing rights. However, these (the economic rights, not the moral rights) are normally transferred to the producer.

There is no legal **presumption of right transfer** regarding musical works, except for the musical works realized under commission. For example, the music track realized specifically for a film will be presumed transferred to the film producer. However, musical works as literary works are normally subject to a *'contrat d'edition'.* In this case, a substantial part of the economic rights is normally transferred to the publisher *(maison d'edition).* This impact on the diligent search or any clearing of rights as the publisher is the first place to look for.

Phonograms

The French law does not give a direct definition of a **phonogram.** It is generally accepted to apply the international agreed definitions in this respect. A phonogram is therefore 'any exclusively sound fixation of sounds of a performance or of other sounds' (Treaty of Rome),[141] thereby film soundtracks (in French, '*bande son'*) are also to be considered phonograms.

Phonograms are subject to the same **cut-off date** determined for audio-visual works, which derives directly from the OWD. The French law says *'avant le 1er janvier 2003'* (before 1st January 2003) whereas the OWD says '*jusqu'au 31 décembre inclus'* (up and including 31st December 2002). As to phonograms which have never been published or broadcast but which have been made publicly accessible by the beneficiaries of the orphan work exception with the consent of the rightholders, the French implementation has not introduced any the cut-off date.

According to Article L213-1 du CPI, there is a **specific rule concerning the right ownership of phonograms.** The Producer of a phonogram is presumed to have the exploitation rights on the work. The economic performance rights of the artists/interpreters are normally reversed to the producer.

Music labels, or more precisely music publishers, are specifically mentioned in the French national copyright law as the 'ultimate owner' of musical works, by law and by **market practice**. In France, it is a common business practice for the author of a novel to assign her or his copyright to a publisher which then further licenses its use to make the **audio book.**

Additional Information Useful for the Diligent Search

As part of the additional information, in terms of a **register for anonymous and/or pseudonymous works**, in France there is no official register for such works. However, there are privately compiled collections, although these are print publications that cannot be consulted online.[142]

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[141] International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Treaty of Rome), Article 38(b).

[142] These include: Manne, *Nouveau dictionnaire des ouvrages anonymes et pseudonymes. 3ème édition*. Lyon: N. Scheuring, 1868; Querard, *Les Supercheries littéraires dévoilées. Paris:Daffis, 1869-1870. 3 vol.* (Réimpr. Paris: Maisonneuve et Larose, 1964). *Comprend un «Dictionnaire des ouvrages anonymes»;* Barbier,

There is no centralised database for works that had been subject to **authorship or rights ownership disputes** in France. The Registry of Tribunals *(Greffe)* needs to be accessed in order to find information on copyright litigation. In France, there are chambers of the Civil Tribunal that are consistently invested with intellectual property cases (for example, the 2nd Chamber of the *Tribunal de Grande Instance de Paris*). However, changes in ownership can be traced through CMOs.

In regards of a **register for companies**, *Le Registre du Commerce et des Sociétés (Infogreffe)*[143] is the central database managed and updated by the National Council of the Legal Registries of the Tribunals of Commerce. The name and the address of a company can be freely accessed on the database. However, if one needs specific information on partners, date of incorporation, dissolution, etc. he/she needs to request a specific document (Extrat Kbis) subject to the payment of a fee. It also includes information on **company mergers or bankruptcy arrangements**, but there also specific databases online.[144]

On the opposite, France does not have neither a **register on the transfer of copyrights**, nor a **register on the on the buying and selling of back-catalogues** of copyright protected works and/or neighbouring rights.

There is not an official list as for the number of **public service broadcasters** that exist in France.The Public service broadcasters are divided into TV broadcasters (France 2, France 3, France 4, France 5, France Ô, France 24 international, managed by France Televisions)[145] and Radio Broadcasters (Radio France includes: France Inter, France Musique, France Culture, France Info, France Bleu, FIP and Mouv, managed by Radio France).[146]

At present, as already mentioned, there are **other regulatory schemes** related to digitisation in France. The French law requires the creation of a database of unavailable books (ReLire) managed by the *Bibliothèque Nationale de France.* Rights-holders can opt out from the system within six month from the inscription of the work in the database. The licensing is handled by SOFIA, a CMO which keeps the revenues for prospective reappearing authors. The Court of Justice of the European Union considered this law inconsistent with the OWD because, first, the requirements imposed on the use of an orphan work are far more stringent than those applicable to 'out-of-print' books, and second, whilst the orphan works exception "expressly precludes any exploitation of an orphan work for commercial purposes" this scheme at issue foresaw only the commercial exploitation of 'out-of-print' books.[147]

Dictionnaire des ouvrages anonymes. Paris: Daffis, 1872-1879. 4 vol. (Réimpr. Hildesheim-Paris-New York: G. Olms, 1963-1986).

[143] Available at https://www.infogreffe.fr/societes/ (last visited, 15 June 2016).

[144] These are: http://www.cessiongreffe.com/ ; https://www.score3.fr/liste-defaillances-entreprises.shtml; http://www.societe.com/ (last visited, 15 June 2017).

[145] *See* France Télévisions, http://www.francetelevisions.fr/ (the other 50% belongs to Germany) (last visited, 15 June 2017).

[146] *See* http://www.radiofrance.fr/ (last visited, 15 June 2017).

[147] Judgment of the Court (Third Chamber) of 16 November 2016 (request for a preliminary ruling from the Conseil d'État — France) — Marc Soulier, Sara Doke v Premier ministre, Ministre de la Culture et de la Communication (Case C-301/15).

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GERMANY

Implementation of the Orphan Works Directive: Background

In Germany, the OWD was implemented by a change of national copyright law (Articles 61, 61a, 61b, 61c) through *Gesetzes zur Nutzungverwaister und vergriffener Werke und einerweiteren Änderung des Urheberrechtsgesetzes v. 1.10.2013* (BGBl I, S. 3728; hereinafter, the Implementing Law). These provisions are entered into force on 1 January 2014.[148]

Subjective and Objective Scope

In regards of the **subjective scope** of the application of the orphan works exception, the exemption permits publicly accessible libraries, educational institutions, museums and archives as well as cultural heritage institutions in the audio-visual and sound fields.

Publicly accessible in this context refers to both public and private institutions which permit unrestricted access to the public at large under their rules. However, it excludes those whose institutions are only accessible to a limited circle of users, for example researchers. Having said this, restrictions that are required under considerations of collection and preservation are not detrimental. Heritage institutions in this context refers to institutions tasked with collecting, cataloguing and restoring materials containing film works or phonograms.[149] These do not have to be publicly accessible, though.

The exemption is furthermore applied to public service broadcasters, but not private ones. However, they can only rely on a narrower scope of works: their privileges do not extend to published books and magazines (including the accompanying neighbouring rights).

In regards of the **objective scope** of the application of the orphan works exception, all works have to form part of the institution's own collection and need to have been published. If they were not published or broadcast, they must have been added to the collection before 29 October 2014 and it can be reasonably assumed that the right-holder would not oppose the making publicly available. This can be in practice assumed if the right-holder gave the material to the institution. However, it less clear when third parties did. This does not deviate from the Directive but does implement the optional transitional provision. Under Article 61, the exemption covers copyright and neighbouring rights in published books and magazines, film works and their related fixation medium, and phonograms. The coverage is extended in comparison to the Directive as it covers non-harmonised neighbouring rights that Germany provides in relation to published literary works, in particular scientific and post-humus editions as well the *Leistungsschutzrecht* for news publishers. In practice,

[148] An official English translation of the text is published by the Ministry of Justice and Consumer Protection. It is available at https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html (last visited, 15 June 2017).
[149] *See* BT-Drucks 17/13423, p. 15.

however, the scope is the same as under the Directive. The extended provisions only work to ensure that the scope of the German implementation is not narrower than the Directive.

Similarly, the rules also apply to neighbouring rights relating to performances which form part of film works. However, the provision explicitly refers to film works which under German law excludes unoriginal works *(Laufbilder)* and therefore the non-original films. Furthermore, the copyright exemptions are applicable under Article 94(4) as well, which does include the orphan works provisions. As also stated in the Directive, if a film work or phonogram was made by a public service broadcaster, then the scope is limited to works made prior to 1 January 2003.

Possible Use of Orphan Works

Among the **permitted uses** for orphan works under the implementing legislation of Germany, it permits the reproduction as defined in Article 16 and therefore covers both permanent and temporary reproductions. In addition, it permits the availability of orphan works as defined by Article 19 and, therefore, by wired and wireless means in such a way that the public choses the time and place of access. This essentially refers to making works available online (although not exclusively). Overall, it is generally similar to the text of the Directive.

In terms of ruling on **cross-border search**, the search is to be carried out in the Member State of first publication (if the work has been published) or where the cultural heritage institution is located (in case of unpublished works). In the case of film works, the usual residence or headquarters of the producer is decisive. If there is evidence pointing to another Member State, then these sources have to be consulted in addition. These provisions do not deviate from the Directive.

The **diligent search report requirements** established by the Implementing Law requires institutions to carry out the diligent search for every work, or component of the work and the relevant neighbouring right by consulting at least the sources as defined in the annex.[150] The results are then to be reported to the Patent and Trademark Office *(Patentamt)* in Munich. The information has to include a description of the work, the use that the institution intends to make of it, the changes in status as well as the contact information of the institution. Then, the *Patentamt* relays the information to the EUIPO. In particular, it states that these sources need to be consulted at least. The leeway is therefore reduced. In addition, in the German transposing text there is no reference to the good faith requirement. Finally, additional parts have to be consulted as neighbouring rights applying to published books and magazines are not fully harmonised at EU level.

There are no **other requirements** beyond those of a diligent search, its documentation, and the communication of this information to the supervisory authority.

Germany has not adopted neither **soft-law instruments** complementing the framework for diligent search, nor **other regulatory schemes** dealing with orphan works.

[150] Article 61 of the Copyright Act.

How to Carry Out a Diligent Search: General and Specific Requirements

List of sources

As in the other jurisdictions, in Germany a **list of sources** has been adopted with a strictly speaking **illustrative** purpose. It is then legally sufficient for a diligent search as long as no new major databases have emerged.

The German implementing legislation does not provide for a **national database** to e adopted. Although information has to be reported to the German Patent and Trademark Office, all information is to be entered via the EUIPO database, then permission for publication of results is, without further checking, granted by the German Patent Office to the EUIPO.[151]

German, on the other hand, has made clear the reference to the **legal deposit**. There is a two-tier system in place. The main deposit library is the German National Library *(Deutsche Nationalbibliothek)* in Frankfurt and Leipzig at the federal level: one copy of every publication has to be deposited there. In addition, states also have deposit requirements which vary state by state. As a general rule, the *Landesbibliotheken* (State libraries) will be the beneficiaries. However, as the national rules do cover all works covered in Germany at least, the coverage overlaps. It covers all relevant works except for film works (unless the music is the dominant component) and works which have been exclusively broadcast (Article 3(4)).[152]

Presumptions

The presumption of authorship is admitted by Articke 10(1) of the German Copyright Act. According to this provision, **presumptions of authorship** exist for all works, except for unoriginal films (*Laufbilder*), and apply to: authors of copyright works, including pseudonyms and symbols;[153] editor (if there is no author), or publisher if there is no editor;[154] editor for formerly unpublished works/ editions;[155] editor of scientific editions;[156] maker of unoriginal photographs *(Lichtbild)*;[157]

[151] http://presse.dpma.de/presseservice/pressemitteilungen/aktuellepressemitteilungen/05122014/index.html (last visited, 15 June 2017).

[152] The relevant legislation is the *Gesetz über die Deutsche Nationalbibliothek* (DNBG): *see* http://www.gesetze-im-internet.de/dnbg/ (last visited, 15 June 2017). Further limitation are stated in the implementing regulations: *Verordnung über die Pflichtablieferung von Medienwerken an die Deutsche Nationalbibliothek (Pflichtablieferungsverordnung - PflAV),* §*4 Einschränkung der Ablieferungspflicht für bestimmte Gattungen von körperlichen Medienwerken.* The regulation is available at: http://www.gesetze-im-internet.de/pflav/BJNR201300008.html (last visited, 15 June 2017).

[153] Article 10(1) of the Copyright Act.

[154] Article 10(2) of the Copyright Act.

[155] Article 71(1) of the Copyright Act.

[156] Article 70(1) of the Copyright Act.

[157] Article 72(1) of the Copyright Act.

performer;[158] organiser of a performance;[159] phonogram producer;[160] broadcaster;[161] producer of the first fixation of a film.[162]

In the case of musical works, it should be noted that State-authorized collecting society and performance rights organization GEMA (*Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte*) is presumed to manage the rights.

There are also **presumptions on right transfer.** Specifically, if several performers have participated, the elected group leader or, if none is elected, the leader alone can exercise the right;[163] any film work includes permission to use underlying, pre-existing work;[164] economic rights in contributions made for film work can be exercised by producer;[165]and this includes photos, both original and unoriginal;[166] editor can exercise economic rights in contributions to collective work in the context of collective work to the extent that he himself had permission from the contributors;[167] and, finally, economic rights in performances made for film work can be exercised by producer.[168]

As to the **value of the presumptions in the context of diligent search,** it seems to be very strong and requires a chain of proof to be invalidated.

Audio-visual works

In the case of audio-visual works made by public service broadcasters, the **cut-off date** determined by the implementing legislation for audio-visual works to be covered by the Orphan Works Directive does not differ from the date determined in article 1(3) of the Directive and is the 1.1.2003. As to audio-visual works which have never been published or broadcast but which have been made publicly accessible by the beneficiaries of the orphan work exception with the consent of the right-holders, the German implementation has not introduced any cut-off date.

In Germany, there are not **specific rules concerning the authorship or right ownership** of audio-visual works, lacking a list of those considered as authors. Film works belong to the category of joint works and everyone who makes a creative contribution is considered an author. In practice, this always refers to the director but also camera-man, cutter and in most cases the production designer *(Szenenbildner),* film architect *(Filmarchitekt),* and costume designer. Less likely but possible is the sound-technician and others.

Similarly, even in terms of **presumption on right transfers** for audio-visual works, some of those mentioned above apply, namely: Article 88(1), according to which film work includes permission to

[158] Article 74(3) of the Copyright Act.
[159] Article 81(1) of the Copyright Act.
[160] Article 85(4) of the Copyright Act.
[161] Article 87(4) of the Copyright Act.
[162] Article 94(4) of the Copyright Act.
[163] Article 74(2) of the Copyright Act.
[164] Article 88(1) of the Copyright Act.
[165] Article 89(1) of the Copyright Act.
[166] Article 89(4) of the Copyright Act.
[167] Article 34(2) of the Copyright Act.
[168] Article 92(1) of the Copyright Act.

use the underlying, pre-existing work; Article 89(1) for which economic rights on contributions made for film works can be exercised by the producer; and Article 92(1) for which economic rights in performances made for film works can be exercised by the producer.

There is no evidence concerning established **market practices** that assign the economic rights and related rights to film distributors. More generally, this depends on the timeframe discussed. Today, most German productions do not have an independent film distributor who owns rights. However, older works may. One major example is *Universum Film AG* (UFA).

Music

Musical works are not subject of specific rules under German law. While the composition is protected as a musical work, the lyrics fall under literary works. The combination of the two amounts to a *Verbundwerk*, which means that the authors of several (potentially different categories of works) combine their works together, but the contributions remain distinguishable. In general, all involved authors have to agree together, subject to the restriction that they need to act in good faith. In case there are several people involved in the creation of a musical work, there is no rule or presumption affecting musical or literary works except the standard authorship rule applicable to all copyright works.

In Germany, there is no open or closed list of entities indicating who the right-holders of the **performing rights** are, and there are no **presumptions of right transfer** for musical works.

Phonograms

In the German copyright law the term **phonogram** is defined is defined as the fixation of sound on any medium capable of reproducing the sound. The focus is on protecting the organisational and financial contribution and therefore it is the fixation in the abstract that is protection. In general, the sound track pertains to the visual work is included within it, they form a unity. This is even the case if the two are recorded on separate mediums. This includes music made beforehand or for the purpose of the film via an exclusive license if in doubt.[169]

In the case of phonograms made by public service broadcasters the **cut-off date** determined by the German implementing legislation for phonograms to be covered by the OWD is the same as for audio-visual works: 1.1.2003.

Within the German jurisdiction, specific rules concerning the **right ownership of phonograms** exist. They provide that the right is owned by the maker of the phonogram and that, if it is made within a company, it is owned by the company. Conversely, specific rules concerning the **presumption of right transfer** for phonograms are missing. As a consequence, the phonogram producer has the right to remuneration against the performer if the phonogram is produced in public.[170]

[169] Article 88 of the Copyright Act.
[170] Article 86 of the Copyright Act.

In Germany, music labels also play a major role in the music industry, as they tend to own the rights in the phonogram and performance. As **market practice,** the musical work is owned by the music publisher in most cases.

Moreover, it is a common business practice for the author of a novel to assign his or her copyright to a publisher which then further licenses its use to make an **audio-book.** Most rights are held by a specific sub-label of one of the major record companies which is a different one that the publisher who holds the rights in the pre-existing work. However, some book publishers do have their own audio-book divisions (for example, Lübbe). As they are distinct from the label, the content publisher is therefore a relevant right holder.

Additional Information Useful for the Diligent Search

As part of the additional information, in terms of a **register for anonymous and/or pseudonymous works**, in Germany there is an optional register, which is maintained at the *Patentamt* in Munich. In theory, the register is available for all copyright works, scientific editions and *Lichtbilder* (photographs). In practice, this option is not used often though.[171] Conversely, a database for works that had been subject to **authorship or rights ownership disputes**, has not been established.

In regards of a **register for companies**, in Germany companies have to be registered in a number of places, namely: the *Gewerbeamt*, i.e. administration office for commerce; the professional association, e.g. DIHK (German Chambers of Commerce and Industry); the Magistrate's Court; and the Trade Association. That said, a central, federal, register is available and called *Handelsregister*.[172] Companies that were unregistered can still be searched via the *Handelsregister* and the *Bundesregister* in order to have information on **company mergers or bankruptcy arrangements**.[173]

In Germany, there is neither a **register on the transfer of copyrights** nor a **register on the on the buying and selling of back-catalogues** of works protected by copyright and/or by neighbouring rights.

As for the **number of public service broadcasters** that exist in Germany, there are two national TV PSBs (ARD and ZDF) as well as a series of regional TV+ Radio PSBs: *Bayerischer Rundfunk (BR),* München; *Hessischer Rundfunk (HR),* Frankfurt; *Mitteldeutscher Rundfunk (MDR),* Leipzig; *Norddeutscher Rundfunk (NDR),* Hamburg; *Radio Bremen* (RB); *Rundfunk Berlin-Brandenburg (RBB),* Berlin und Potsdam; *Saarländischer Rundfunk (SR),* Saarbrücken; *Südwestrundfunk (SWR),* Stuttgart;

[171] The register is not accessible online.

[172] It can be accessed via https://www.handelsregister.de/rp_web/mask.do;jsessionid=358112DC0BCA4C95FACE6D4E7EECCDF9.tc05n02?Typ=n (last visited, 15 June 2017). It does not cover freelancers though. Moreover, a central register maintained by the federal government is also available: https://www.unternehmensregister.de/ureg/ (last visited, 15 June 2017).

[173] Bankruptcy notifications are made public via https://www.insolvenzbekanntmachungen.de/cgi-bin/bl_suche.pl (last visited, 15 June 2017). It is limited in that it only included cases since 2001 and not all German states are fully sharing their information yet.

Westdeutscher Rundfunk (WDR), Köln; *Deutsche Welle (Auslandsrundfunk),* Bonn und Berlin*,* and *Deutschlandradio,* Berlin und Köln (the one only which does radio broadcasts).

In regards of **other regulatory scheme** in place dealing with other relevant subject matter of digitisation, German permits the copying of out-of-print works in full by a natural person for personal use if the work has been out of commerce for at least two years.[174] Germany also has an out-of-commerce extended collective licensing style arrangement covering magazines and published books which: 1) have been published prior to 1966, and ; 2) are out of commerce. It is only available for libraries and archives, following the same definitional lines as the OWD and other library specific exemptions. It does not require a diligent search. Instead, a list of works that the cultural heritage institutions suspects is out of commerce is sent to the publishers who can deny permission within six weeks.

The scheme is based on Articles 51 and 52 *Verwertungsgesellschaftengesetz*, regulating the exercise of copyright and related rights by collecting societies and implementing Directive 2014/26/EU, which harmonises the legal framework for the regulation of the activities of collecting societies. These scheme permits the reproduction and making available online. It also includes a register, to be managed by the *Patentamt.* The register will be made publicly accessible[175].

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[174] Article 53(2)(4)(b).

[175] The framework agreement is available at http://www.bibliotheksverband.de/fileadmin/user_upload/DBV/vereinbarungen/2015_01_RV_vergriffene_Werke.pdf (last visited, 15 June 2017).

GREECE

Implementation of the Orphan Works Directive: Background

In Greece, the OWD was implemented by a change of copyright law through Law 4212/2013, which incorporates the new provisions into a new article 27A of Law 2121/1993 (hereinafter, the Copyright Act). The law was published on 03.12.2013 and enacted from the day of its publication, therefore, on the same date.[176]

Subjective and Objective Scope

In regards of the **subjective scope** of the application of the orphan works exception, Article 27A par. 1 of the Copyright Act states that the organisations that can make use of the orphan works exception are: 'publicly accessible libraries, educational establishments or museums, archives or film or audio heritage institutions, as well as public-service broadcasting organisations established in a Member State of the European Union (beneficiaries of orphan works)'. This provision is very similar to Article 1(1) of the Directive, with the wording 'as well as by archives' of the Directive having been changed to 'archives or film or audio heritage institutions'.

In regards of the **objective scope** of the application of the orphan works exception, Article 27A par. 1 of the Copyright Act, the exception 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;
c. cinematographic or audiovisual works and phonograms produced by public-service broadcasting organisations up to 31 December 2002 and contained in their archives;
d. works and other protected subject-matter that are embedded or incorporated in, or constitute an integral part of, the above-mentioned works or phonograms, to the extent that those works (of cases a, b, c, d) are protected by copyright or related rights and are first published in a Member State of the European Union or, if not published, are first broadcast in a Member State of the European Union. If these works are not published or broadcast, they can be used by the beneficiaries of orphan works only if: i) they have been made publicly accessible by anyone of the beneficiaries of orphan works (even in the form of a lending) with the consent of the rightholders, and ii) it is

[176] Link to the Greek text: http://www.eebep.gr/wp-content/uploads/%CE%9D.4212_2013.pdf. There is an official translation of the implementing legislation here: http://www.opi.gr/images/library/nomothesia/ethniki/nomoi/4212_2013_en.pdf (last visited, 15 June 2017).

reasonable to assume that the rightholders would not oppose the permitted uses referred to in this article.

The provisions does not deviate from the Directive, but the Greek provision adds the category d. (i.e. works and other protected subject-matter that are embedded or incorporated in, or constitute an integral part of, works or phonograms) which does not appear in the Directive.

Possible Use of Orphan Works

The **permitted uses** for orphan works are enumerated by Article 27A par.1 of the Copyright Act which states that a work may be available to the public and reproduced for purposes of digitization, making available to the public, indexing, cataloging, preservation or restoration (permitted uses). The use of orphan works is permitted by the beneficiaries of orphan works 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 collections. The wording of these provisions is similar to those of Article 6 of the Directive, although a different outline has been followed.

As for the rule on the **cross-border search**, according to Article 27A par. 6 of the Copyright Act 'the diligent and in good faith search shall be carried out by the beneficiaries of orphan works or by third parties on behalf of the beneficiaries of orphan works, in the European Union Member State of the first publication, or in the absence of publication, of the first broadcast. In respect of cinematographic or audiovisual works the producer of which has his headquarters or habitual residence in a Member State of the European Union the diligent search should be carried out in the Member State of his headquarters or habitual residence. If the works have neither been published nor broadcast […], the diligent search shall be carried out in the Member State of the European Union where the beneficiary of orphan works use that made the work publicly accessible is established. If there is evidence to suggest that a search in sources of information of other countries is to be carried out, the search in those other countries should be carried out also'. Therefore, Article 3(4) of the Directive has been incorporated into a more extensive paragraph on diligent search in the Greek legislation.

The same provision of Article 27A par. 6 of the Copyright Act refers to the **diligent search report requirements**. Pursuant to paragraph 7, 'beneficiaries of orphan works that carry out a diligent search 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. They shall also provide concrete information to the Hellenic Copyright Organization, that will immediately forward this information to the EUIPO. Such information shall contain:

1. a full description of the orphan work and the names of the identified authors or rightholders;
2. the results of the diligent search carried out by the beneficiaries of orphan works, which led to the conclusion that a work or a phonogram is considered an orphan work;
3. a statement from the beneficiaries of orphan works for the permitted uses that they intend to make;

4. a possible change to the orphan work status of a work (notification of new information that they have been informed of);
5. contact information of the beneficiaries of the orphan work;
6. any other information as specified by a decision of the Hellenic Copyright Organization Board of Directors and posted on the Hellenic Copyright Organization's website, according to the procedure determined by EUIPO regarding the Database.

Therefore, it is required by the Greek legislation that records of diligent searches are kept by those who have undertaken them and are provided to the competent national authorities. It worth noting that the Greek legislation has added requirements 1. and 6. in the list, two further elements that are not specifically contained in Article 3(5) of the Directive.

As the wording of Article 2(1) and 2(2) of the Directive has been simply incorporated in Article 27A par.1 and par.3 of the Greek law, no further steps beyond diligent search have been introduced. While there are no **other requirements,** there is a publicity obligation under Article 27A par.5 of the Copyright Act, which states that in any use of the orphan work, the name of the identified creators and right holders shall be indicated with the labelling: "orphan work: […] [no of entry in the Single Online Database of the EUIPO]", in order for the orphan work to be legitimately used.

In terms of ruling on **soft-law instruments**, there are guidelines provided by *Organismos Pneumatikis Idioktisias* (Hellenic Copyright Organization). They are general and explain the requirements provided into the OWD.

Greece has not adopted **other regulatory schemes** complementing the framework for diligent search.

How to Carry Out a Diligent Search: General and Specific Requirements

List of sources

Article 27A par.6 of the Copyright Act states that the Board of the Hellenic Copyright Organisation will determine the appropriate sources for a diligent and in good faith search to be carried out by the beneficiaries of orphan works to identify and locate the right-holders in a work or phonogram, including works and protected subject matter contained in them prior to their use. The **list of sources** has been formed by the Hellenic Copyright Organization, after consultation with stakeholders and in accordance with the provisions of the Directive, and it has a mere **illustrative** purpose.[177] The Greek implementing legislation does not provide for the establishment of a **national database** for orphan works.

As many countries, Greece does foresee a **legal deposit** system. According to Law 3149/2003, material can be deposited in the National Library. This can be any object that is created in order to

[177] The list of sources can be found here: http://www.opi.gr/images/orphans/orphan_sources_en.pdf (last visited, 15 June 2017)

store or transfer, by any means, information in a handwritten, printed, graphic, digital, visual, auditory or any other possible form. However, there is no specific reference to legal deposit in the implementing legislation.[178]

Presumptions

Presumptions of authorship are admitted by the Greek Law. Article 10 of the Copyright Act states that 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. The same presumption shall apply when the name that appears is a pseudonym, if the pseudonymleaves no doubt as to the person's identity. In the case of collective works, computer programs or audiovisual works, the natural or legal person whose name or title appears on a copy of the work in the manner usually employed to indicate the right holder shall be presumed to be the right holder of the copyright in the particular work. This shall apply *mutatis mutandis* to the holders of rights related to copyright about their protected subject matter, as well as to database creators for the special right, with just one difference. This last presumption may not be rebutted by evidence to the contrary. Finally, according to Article of the Copyright Act, 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 real author of the work reveals his identity.

There are some **presumptions on right transfer** in Greece. For example, the producer of the audio-visual work usually acquires secondary rights on the work through the audio-visual production contract.[179] Also, according to Article 8 of the Copyright Act, where a work is created by an employee in the execution of an employment contract the initial holder of the economic and moral rights in the work shall be the author of the work. Unless provided otherwise by contract, only such economic rights as are necessary for the fulfilment of the purpose of the contract shall be transferred exclusively to the employer. The economic right on works created by employees under any work relation of the public sector or a legal entity of public law in execution of their duties is ipso jure transferred to the employer, unless provided otherwise by contract. Another, last, presumption is that of Article 40 of the Copyright Act. Under this provision, the economic rights on a computer program that was created by an employee during an employment relationship or under the instructions of the employer are automatically transferred to the employer.[180]

Apparently, these presumptions do not have any **value in the context of diligent search.** Presumptions are deemed helpful to understand who acquires ownership of the work, but not in the context of diligent search as it is defined in the Law and the Directive.

[178] Catalogues of works can be found here: http://www.nlg.gr/el/node/15 (last visited, 15 June 2017).
[179] Article 34 of the Copyright Act. S*ee* http://www.opi.gr/index.php/en/library/law-2121-1993#a34 (last visited, 15 June 2017).
[180] http://www.opi.gr/index.php/en/library/law-2121-1993#a40 (last visited, 15 June 2017).

Audio-Visual Works

The **cut-off date** for all works referred to in Article 27A of the Copyright Act also applies to audio-visual works. This can be found in Article 8 of the implementing law 4212/2013 which added a new paragraph 3 to Article 68A of the Copyright Act. As to the audio-visual works which have never been published or broadcast but which have been made publicly accessible by the beneficiaries of the orphan work exception with the consent of the right-holders, the Greek implementation has not introduced any cut-off date.

The Greek copyright law defines an articulated set of **specific rules concerning both the authorship or right ownership** and **presumptions of right transfer**. Article 9 provides that the principal director of an audio-visual work shall be considered as its author. Also, Article 10 states that in the case of audio-visual works, the natural or legal person whose name or title appears on a copy of the work in the manner usually employed to indicate the right holder shall be presumed to be the right holder of the copyright in the particular work. In addition, according to Article 34 par. 2, authors of audio-visual contributions are considered to be the author of the screenplay, the author of the dialogue, the composer of music, the director of photography, the stage designer, the costume designer, the sound engineer, and the final prosecutor (editor). This is an open list. These other contributors, apart from the director, may be entitled to a proportionate fee as per Article 34 par.3. As Article 34 par. 3 refers to "author" in a wider sense, it includes all major contributors of the work to be entitled to the particular fee. Last but not least, the producers of audio-visual works (producers of visual or sound and visual recordings) are vested with related rights as per Article 47 par.2.[181]. Finally, there is the rule that the producer of the audio-visual work usually acquires rights only secondarily through the audio-visual production contract with the transfer of the rights by the creator, as defined in Article 34 of the Copyright Act. The contract dealing with the creation of an audio-visual work between a producer and an author shall specify the economic rights which are to be transferred to the producer. If this is not met, the contract shall be deemed to transfer to the producer all the economic rights which are necessary for the exploitation of the audio-visual work, pursuant to the purpose of the contract.

In Greece, there are **market practices** that contractually assigns audio-visual rights to film distributors. One example of such a market practice that could be mentioned is "Village Roadshow Films Distributors Hellas SA" (Village Films) which is one of the largest distribution companies in Greece distributing film titles for viewing in cinemas and TV (Video on Demand, Pay Per View, Pay TV, Free TV, hotel, ship and airline rights), and purchase/rental DVD, BLU-RAY, BLU-RAY 3D. The company distributes exclusively in Greece the Warner Bros. releases and the co-productions of Warner Bros. and Village Roadshow. It also has long-term relationships with other important independent film studios in the US and Europe. Village Films operations include not only film distribution but also film production, and, what is more, Village Films manages all film rights (DVD,

[181] The term producer of visual or sound and visual recordings shall designate any natural or legal person who initiates and bears responsibility for the realization of a first fixation of a series of images with or without sound.

digital and cable TV, free to air networks, Video on Demand, Pay Per View etc.) in all independent film acquisitions.

Music

In Greece, a **musical work** and a musical composition may be regarded synonymous terms. The national copyright law does not offer a definition, but it does protect musical compositions both with accompanying words (lyrics) and without. The accompanying words may be protected independently as well.[182] In cases where there are several people involved in the creation of a musical work, such as musical compositions with lyrics, Article 30 of the Copyright Act protects them as works of joint-authorship, where both the contributions of the composer and the author of the lyrics were specifically created for the respective musical composition with lyrics.

Moreover, performers of a musical work are vested with related **performing rights,** and have the right to authorize or prohibit certain acts/uses of their works.[183] According to Article 46 par. 1 L. 2121/1993, the term performers shall designate persons who in any way whatsoever act or perform works, such as actors, musicians, singers, chorus singers, dancers, puppeteers, shadow theatre artists, variety performers or circus artists. The list is indicative and other people who in any way whatsoever act or perform works may be regarded as performers.

As to the management of rights on musical works, Article 13 of the Copyright Act introduces a **presumption of right transfer** for musical works. According to this provision, the transfer of rights occurs through exploitation contracts, by which the author entrusts economic rights to the other contracting party, or through exploitation licenses where the author of the work may authorize another person to exercise their economic rights.[184] Conversely, there is no rule or presumption, that determines by default that copyrights or related rights are automatically transferred to the music producer. This can only happen through the express agreement between the parties.

Phonograms

In Greece, a **phonogram** is defined as any audio recording of sounds of a performance or of other sounds.[185]

The **cut-off date** for all works referred to in Article 27A of the Copyright Act also applies to phonograms. As to phonograms which have never been published or broadcast but which have been made publicly accessible by the beneficiaries of the orphan work exception with the consent of the right-holders, the Greek implementation has not introduced any cut-off date.

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[183] *See* http://www.opi.gr/index.php/en/library/law-2121-1993#a46 (last visited, 15 June 2017).
[184] http://www.opi.gr/index.php/en/library/law-2121-1993#a13 (last visited, 15 June 2017).
[185] In theory, this should include film soundtracks. However, there is a provision in the Greek law on the Musical Accompaniment of Films (Article 37 L.2121/1993) which states that there must be a minimum fee payable to the composers of musical and song accompaniment of films, shown to the public in cinema halls or other spaces. Therefore, the creator of the song accompaniment of films may be copyright protected as a musical work and the producer, for example, of its phonogram is protected with related rights.

As to the **rights ownership** of phonograms, Article 47 par.1 of the Copyright Act vests related rights upon phonogram producers (producers of sound recordings) and gives them the right to authorize or prohibit certain acts/uses of their phonograms.[186] The term producer of sound recordings shall designate any natural or legal person who initiates and bears the responsibility for the realization of a first fixation of a series of sounds only.

Conversely, the transfer of related rights on phonograms is regulated contractually, with the agreement between the phonogram producer and the musician. It is not usually determined by default that related rights are automatically transferred to the phonogram producer when entering into an agreement with him, absent a **presumption of right transfer**. The agreement can determine the fee from the exploitation of the material media (i.e. CDs) and may include an exclusivity clause not to record the same song with another phonogram producer. For works made in the course of employment, for example, the employment contract will specify the terms of the transfer of the economic rights of the employee to his/her employer.

In Greece, it is common **market practice** to contractually assign phonogram producer rights to music labels. Record companies are involved in the production, distribution and promotion of the artists' songs with whom they have contracted. So, apart from the right-holders of the song as a composition, music labels are the right holders of the master (first) recording of the song.

It is also typical that the author of a book assigns all her/his rights to the publisher. However, it has to be specified in writing within the publishing agreement which rights are assigned, for example - among other rights - the creation of an **audio book.** Then, it is possible that the publisher may further license the book's use to a content publisher to make an audio book, but there is no specific evidence that this is a business practice.[187]

Additional Information Useful for the Diligent Search

In Greece, there is no **register for anonymous and/or pseudonymous works**.The only catalogue that can be found is for members who are represented by AEPI (the Hellenic Society for the Protection of Intellectual Property).[188]

A register or database of works that had been subject to **authorship or rights ownership disputes** does not exist.

[186] http://www.opi.gr/index.php/en/library/law-2121-1993#a47 (last visited, 15 June 2017).

[187] Information provided by legal consultant of OPI (Hellenic Copyright Organization)

[188] AEPI is a Collective Administration Organisation on the basis of the regulations of the Copyright Act. The purpose of AEPI is the administration and protection of all works composed and/or written in the past and of all works to be written in the future by the creators of musical works who have entered into an agreement with AEPI. AEPI represents more than 14,430 Greek and foreign creators/intellectual property owners of musical works through direct membership agreements, as well as more than 2,200,000 foreign creators/intellectual property owners through representation agreements with the corresponding Collective Management Organisations worldwide. The access to the catalogue/list is available at http://www.aepi.gr/images/pdf_aepi/meli%20site%20aepi%205%207%202016.pdf (last visited, 15 June 2017).

In regards of **register for companies**, in Greece the general register providing information on companies is the GEMI (Geniko Emboriko Mitroo), which has as basic scope the computerization and automation of the procedures to register and monitor commercial enterprises.[189] Information about **company mergers or bankruptcy arrangements**, can only be given after application of the party concerned to the Secretary of the Court of First Instance, as the information is not retrievable in a registry or otherwise accessable online.

As for other registers, such as the **register on the transfer of copyrights** and the **register on the buying and selling of back-catalogues** of copyright protected works and/or neighbouring rights, these entitities do not exist in Greece.

ERT SA is the sole Greek **public service broadcaster,** which operates 4 public TV channels and 10 public radio stations. It is a public company owned by the government and supervised by the State and it has administrative and financial independence. ERT SA is controlled by the National Radio and Television Council in terms of its programs and content. It is the National Broadcasting Council to control ERT SA with regard to the fulfilment of its public service obligations and its compliance with EU law.

At present, there are no **other regulatory schemes** related to digitisation in Greece. Although there has been an attempt to regulate the out-of-commerce works, yet no legislative initiative has been initiated yet.

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[189] The register, which was an undertaking of the Greek Ministry of Development and Competition, can be accessed online at the URL http://www.businessportal.gr/dynamic.php (last visited, 15 June 2016). However, username and password are necessary to access the system and the relevant information on companies.

IRELAND

Implementation of the Orphan Works Directive: Background

In Ireland, the OWD was implemented by amending copyright law through the Regulation S.I. No. 490/2014 - European Union (Certain Permitted Uses of Orphan Works) (hereafter, the Regulation). The law was enacted on the 29th of October 2014 and published on 31st of October 2014.[190]

Subjective and Objective Scope

In regards of the **subjective scope** of the application of the orphan works exception, categories of organizations are enumerated in a closed list in Article 2(1) of the Regulation. Accordingly, the list of organizations ("relevant bodies" in the language of the Regulation) includes: publicly accessible libraries, educational establishments, museums, archives, film or audio heritage institutions, and public service broadcasters. Apart from public broadcasters, which shall be defined in accordance with the Broadcasting Act of 2009, there is no definition of the other organizations above mentioned. Essentially, the list covers the organizations enumerated in Article 1(1) of the OWD.

Regarding the **objective scope** of the application of the orphan works exception, this is included in Article 3(2) of the the Regulation, where it is stated that a diligent search can be carried out to acquire the status of orphan works in relation to:

- works which are published in the form of a book, journal, newspaper, magazine or other writing 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;
- cinematographic or audiovisual works or sound recordings in the collections of publicly accessible libraries, educational establishments or museums and in the collections of archives or of film or audio heritage institutions;or
- cinematographic or audiovisual works or sound recordings produced by public service broadcasting organisations up to the 31st of December 2002 included, which are contained in their archives.

As the subjective scope, also the objective scope of the orphan work exception in the Irish Regulation is identical to what stated under Article 1(2) of the OWD.

[190] It is available at: http://www.irishstatutebook.ie/eli/2014/si/490/made/en/print (last visited, 15 June 2017). As for Ireland, please note that where the word "Regulation" is used, it is referring to the implementing legislation - S.I. No. 490/2014 - European Union (Certain Permitted Uses of Orphan Works) Regulations 2014; where the words "Copyright Act" or "Section" are used, these refer to general copyright act - Copyright and Related Rights Act (2000))

Possible Use of Orphan Works

The **permitted uses** for orphan works under the implementing legislation of Ireland are regulated by Article 8 of the Regulation. Accordingly, an organization is not infringing copyright, if it is making the orphan work available to the public, and reproducing for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration. Clearly, these uses correspond to the permitted uses enumerated in Article 6 of the OWD.

In terms of ruling on **cross-border search**, Article 3(4) of the Directive is implemented in Article 5(1)(c) of the Regulation, which, again, reproduces the OWD in a nearly identical way, i.e. 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 be consulted for the purpose of the diligent search.

The **diligent search report requirements** established by the Irish implementing legislation are stated in Article 5(3) of the Regulation, which states that the organization is obliged to provide the following information to the Controller (i.e. the competent national authority):

1. the results of the diligent searches carried out, which have led to the conclusion that the relevant work can be considered an orphan work;
2. the use that the relevant body makes of the orphan work concerned;
3. any change of the orphan work status of any relevant work used by the relevant body; and
4. the relevant contact information of the relevant body.

There are slight textual differences between the wording in Article 3(5) of the Directive and the national implementation, these are however negligible and the meaning of such provisions are almost identical. The national provision therefore does not differ from Article 3(5) of the OWD.

There are no **other requirements** beyond the carrying out of the diligent search, the production of its documentation and the communication of this information to the supervisory authority.

Likewise, there are no **soft-law instruments** dealing with the orphan work matters, beside a web page of the national authority (the Irish Patent Office) that is dedicated to orphan works and offers a summary of information as well as a form for organizations performing diligent search to record their search.[191]

In regards of **other regulatory schemes**, the Irish Copyright Act recognizes the existence of licensing schemes and allows them under the supervision of the national authority (Controller). These schemes are regulated by Sections 151 to 156 (Chapter 16) of the Copyright and Related Rights Act (2000), which sets rules for allowing and approving them. In general, a licensing scheme can be referenced to the Controller by organizations representing right holders and are approved by the Controller if they meet the conditions. While the schemes so far approved do not deal with orphan

[191] https://www.patentsoffice.ie/en/Copyright/Orphan-Works/Diligent-Search-Form-Orphan-Works.docx) (last visited, 15 June 2017).

works directly, it cannot be excluded that they could also cover orphan works in some specific cases. All approved licensing schemes are recorded in the Register of Copyright Licensing Bodies.[192]

How to Carry Out a Diligent Search: General and Specific Requirements

List of sources

The Irish implementation of the OWD does not offer a **list of sources,** but only the categories of sources, which are directly copied from the Annex to the Directive. While categories of sources to check are listed exhaustively, the sources themselves are not listed and could thus include different sources depending on particular diligent search. The only addition in comparison to the Directive is addition of fifth category 'Relevant works which have not been published or broadcasted'. In case of this category, the schedule simply states that sources in previous categories should be consulted, as is appropriate to the particular work. A telephonic consultation with Irish Patent Office (national authority) confirmed that this is the case: the onus of looking into appropriate sources and providing as comprehensive search as is deemed necessary lies with the organizations performing diligent search.[193]

Similarly, the Irish implementing legislation does not provide for establishment of a **national database** for orphan works either, yet a **legal deposit** system is in force and is mentioned as one of the categories of sources that should be consulted during the diligent search. The legal deposit for books is required by Section 198 of the Copyright and Related Rights Act (2000). Accordingly, the publisher of book first publisher in Ireland is obliged to provide one copy for a number of libraries (i.e. National Library of Ireland, Trinity College in Dublin, University of Limerick, Dublin City University, the British Library, and few others, but only upon a request of the institution) at his/her own expense. There is a number of institutions that are beneficiaries of the legal deposit obligations, but there is no "single" legal deposit. The works provided under the legal deposit obligations then will be, presumably, included in the catalogue of these institutions.[194]

Presumptions

In Ireland, **presumptions of authorship** are regulated by Chapter 12 of the Copyright and Related Rights Act (2000). Section 139(4) deals with a number of presumptions of authorship, clarifying how

[192] https://www.patentsoffice.ie/en/Copyright/Register-of-Copyright-Licensing-Bodies/ (last visited, 15 June 2017).

[193] A telephonic consultation with Irish Patent Office (national authority) confirmed that this is the case: the onus of looking into appropriate sources and providing as comprehensive search as is deemed necessary lies with the organizations performing diligent search. *See* http://www.irishstatutebook.ie/eli/2014/si/490/made/en/pdf, 17 (last visited, 9 June 2017).

[194] For example, National Library of Ireland is one of the beneficiaries and its catalogue is accessible here http://catalogue.nli.ie/ (last visited, 9 June 2017).

to apply the presumptions. Firstly, the plaintiff shall be presumed to be the owner or the exclusive licensee of the copyright, until the contrary is proved.[195] Secondly, where a name purporting to be that of the author of a work or of the owner or of the exclusive licensee of the copyright, as the case may be, appears on copies of a work, or a copy of a work bears or incorporates a statement, label or other mark indicating that a person is the author of the work, or the owner or the exclusive licensee of the copyright, as the case may be, that name, statement, label or mark shall be admissible as evidence of the fact stated or indicated which shall be presumed to be correct, unless the contrary is proved.[196] Thirdly, the person shall be presumed not to have made the work during employment[197]. Fourtly, presumptions apply also to joint authorship, in relation to each person.[198] Finally, there is no indication of the 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 be the author of the work, or the owner or the exclusive licensee of the copyright.[199]

Irish Copyright Act contains a number of **presumptions of right transfer.** There is a presumption for the 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 presumed that rental rights are transferred to the film producer.[200] Similarly, the same presumpttion applies to performers and presumption about transfer of rental rights to film producer with regards to their performance.[201]

These presumption can have a **value in the context of diligent search.** Mainly, they can increase the legal certainty of the organizations exercising the diligent search, because they are protected in case the name stated on the work would not correspond to the name of the author. Nonetheless, it would be hard to make a generalisation about general searches and rebutability of the presumptions. The Copyright Act clearly states the required level needed to rebut the presumption is 'unless the contrary is proved.' This means that the possibility of rebutting the presumption via a general internet search cannot be entirely excluded, however it is debatable how much weight can Google searches have in rebutting the presumption. At the end, this should be considered on a case-by-case basis.

Audio-Visual Works

The **cut-off date** determined by the implementing legislation for audio-visual works to be covered by the OWD is stated in Article 3(2)(c) of the Regulation and is set to 31 December 2002, thereby coinciding with the cut-off date in the Directive. As to audio-visual works which have never been published or broadcast but which have been made publicly accessible by the beneficiaries of the

[195] Section 39(3) of the Copyright Act.
[196] Section 139(4) of the Copyright Act.
[197] Section 139(5) of the Copyright Act.
[198] Section 139(6) of the Copyright Act.
[199] Section 139(7) of the Copyright Act.
[200] Section 124 of the Copyright Act.
[201] Section 297 of the Copyright Act.

orphan work exception with the consent of the right-holders, the Irish implementation has not introduced any cut-off date.

The Irish copyright law includes **specific rules concerning the authorship or right ownership** of audio-visual works. Section 21(b) determines the authors of films by stating that author is 'the person who creates a work and includes: in the case of a film, the producer and the principal director'. Therefore, the national legislation contains a closed list, which considers authors of film to be the producer and the principal director. Furthermore, Section 22(2) clarifies, that 'film shall be treated as a work of joint authorship unless the producer and the principal director are the same person'. The copyright ownership, instead, is generally held by the production studio or the distributor. This should be assessed on a case-by-case basis.

On the matter of **presumption of right transfer,** instead, there are not presumption other than the above-mentioned 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 presumed that rental rights are transferred to the film producer.[202] (Section 124).

Music

The **definition of musical work** is included in Section 2, 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 defined in Section 2 as well. Because the Copyright Act clearly delineates the difference between musical work and accompanying words (which are literary work), these should be considered separate works and each work is independent for copyright purposes.

The Copyright Act does not state any specific rules with regards to authorship of musical works. This means that the general rule will apply, i.e. Section 21 ('author means the person who creates a work'), whereas the **performing rights** holders are indirectly included in the definition of 'performance' (Section 202), which is based on an open list. Accordingly, performers include actors, singers, musicians, dancers or other persons who act, sing, deliver, declaim, play in, interpret or otherwise perform literary, dramatic, musical or artistic works or expressions of works of folklore.

In the case of musical works, there is not any **presumption of right transfer**.

Phonograms

Phonogram (under national implementation that is "sound recording") is defined in Section 2 as 'a fixation of sounds, or of the representations thereof, from which the sounds are capable of being

[202] Section 124 of the Copyright Act.

reproduced, regardless of the medium on which the recording is made, or the method by which the sounds are reproduced'..[203] [204]

The **cut-off date** determined by the Irish implementing legislation for phonograms to be covered by the Orphan Works Directive is stated in Regulation 3(2)(c) and it is set to 31 December 2002. This coincides with the cut-off date in the Directive. As to phonograms which have never been published or broadcast but which have been made publicly accessible by the beneficiaries of the orphan work exception with the consent of the right-holders, the Irish implementation has not introduced any cut-off date.

A **specific rule concerning the right ownership of phonograms** is contained within Section 21(a), which states that the authorship of sound recording shall be vested with the producer by default (producer being 'the person by whom the arrangements necessary for the making of the [..] sound recording, as the case may be, are undertaken')[205], while there is not **presumption on right transfer** for phonograms. A kind of presumption applicable, though, can be found in the regulation of works made in the course of employment. The Section 23(1) states that if a work (in this case, the definition of "work" also includes sound recording, see Section 2 of the Copyright Act) is made by an employee in the course of employment, the employer will be the first owner of copyright (subject to agreement to contrary).

As to music labels, it is not possible to affirm that a **market practice** under which they become the actual entity exploiting phonogram producer rights, this is not an uncommon way of dealing with phonogram rights among professional artists in Ireland. However, this assessment should be done on a case-by-case basis.

Similarly, in the case in which phonograms are recordings of underlying copyright works other than music (e.g. **audio-books**) it not an uncommon business practice to contractually assign the rights of authors in these underlying works to a content publisher (as distinct from the phonogram producer) in Ireland. However, this assessment should be done on a case-by-case basis.

Additional Information Useful for the Diligent Search

As part of the additional information, In Ireland there are not **registers for anonymous and/or pseudonymous works** or database for works that had been subject to **authorship or right ownership disputes**, while there is a **register for companies**, which is handled by official body - Companies Registration Office.[206]

[203] See also transitional provisions in the First Schedule to the Copyright Act, namely 6(1), which explicitly states that what was considered a film soundtrack pre-1963 shall be considered a sound recording for the purpose of present act.

[204] Since the definition of film does not imply that it should include also the soundtrack to the film, film's soundtrack should be considered to be protected as a sound recording and not as a part of the film's copyright. *See* Section 2 of the Copyright Act.

[205] Section 2 of the Copyright Act.

[206] Available at the URL: https://search.cro.ie/company/ (last visited, 15 June 2017).

On the opposite, Ireland does not have a register holding information on **company mergers or bankruptcy arrangements,** nor a **register on the transfer of copyrights** or a **register on the on the buying and selling of back-catalogues** of copyright protected works and/or neighbouring rights.

The number of **public service broadcasters** that exist in Ireland is officially listed the web page of the Broadcasting Authority of Ireland.[207] There were and still are three public service broadcasters: RTÉ Radio, RTE TV and TG4.

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The authors thank expert Matej Gera for his precious support and input in regards of the information on how the Orphan Works Directive was implemented in Ireland and how diligent search works in this country.

[207] It can be accessed at the URL http://www.bai.ie/en/broadcasters/ (last visited, 15 June 2017).

LITHUANIA

Implementation of the Orphan Works Directive: Background

In Lithuania, the OWD was implemented by amending the national copyright law through three legal acts. The general exception for orphan works has been introduced by the Parliament in the Law of Authors Rights and Related Rights (hereinafter, ATGTI).[208] The Minister of Culture has adopted two orders regulating the details for the use of orphan works, namely, the order listing the sources for diligent search,[209] and the order regulating the compensation that is paid when the work loses its orphan status.[210] The latter two were adopted in the form of Minister orders so to make easier ans quicker further amendments.

Subjective and Objective Scope

In regards of the **subjective scope**, orphan works can be used by publicly accessible libraries, educational establishments, museums, archives, and film or audio heritage institutions, as well as by research institutes, if the work is in their availability. By adding research institutes to the list, the ATGTI provides a broader subjective scope than the OWD.[211] According to the ATGTI, orphan works can be used by the above mentioned organisations only for non-commercial purposes in order to achieve the aims related to the public-interest missions, namely, the dissemination of culture, the safeguarding of cultural heritage, education, research and information purposes. This given, the ATGTI specifies the content of the public interest by providing an exhaustive list of goals that should guide the activity of the libraries.

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[208] *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*. Unofficial translation of the title: Law of 16 December 2014 No XII-1460 regarding the amendment of the Law of Authors Rights and Related Rights No VIII-1185 article 2, 17 and annex 3, as well as adding chapter VII; published on 31 December 2014, TAR No 21223. *See* https://www.e-tar.lt/portal/legalAct.html?documentId=3ca2fc4090cc11e4bb408baba2bdddf3 (last visited, 15 June 2017). There is no official English translation of the abovementioned act

[209] *Lietuvos Respublikos Kultūros ministro įsakymas dėl nenustatytų teisių turėtojų kūrinių autorių teisių ir gretutinių teisių turėtojų paieškos šaltinių pavyzdinio sąrašo patvirtinimo 2015 m. sausio 28 d. Nr. ĮV-46 Vilnius.* Unofficial translation: 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; Published on 2 February 2015, TAR No 1450. See https://www.e-tar.lt/portal/lt/legalAct/9e424dc0aab711e48ebccd46991dfff9 (no English translation available, last visited 15 June 2017).

[210] *Lietuvos Respublikos kultūros ministro įsakymas dėl kompensacijos už buvusių nenustatytų teisių turėtojų kūrinių naudojimą mokėjimo sąlygų ir tvarkos aprašo patvirtinimo 2015 m. liepos 17 d. Nr. ĮV-480.* Unofficial translation: 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; Published on 20 July 2015, TAR No 11498. *See* https://www.e-tar.lt/portal/lt/legalAct/c84237902ed611e5b1be8e104a145478 (no English translation available, last visited 15 June 2017).

[211] Article 91(1) of the ATGTI.

In regards of the **objective scope** of the orphan works exception, the categories covered by the ATGTI are the same as in the OWD, namely:

- works published in the form of books, journals, newspapers, magazines or other writings; audiovisual works and phonograms,[212] which are 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 research institutes;
- audiovisual works and phonograms produced by public-service broadcasting organisations up to and including 31 December 2002 and contained in their archives;
- the ATGTI also applies to the works and phonograms above that have never been published or broadcast, yet have been made publicly accessible by the organisations 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 94 of the ATGTI;
- the ATGTI also applies 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 above.

Possible Use of Orphan Works

Among the **permitted uses** for orphan works under the implementing legislation of Lithuania, the ATGTI allows the same uses as under Article 6 of the Directive. Under Article 94(1) of the ATGTI, the organisations can (1) reproduce orphan works for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration, and (2) make orphan works available to the public in such a way that members of the public may access them from a place and at a time individually chosen by them. According to Article 94(2) of the ATGTI, the organisations may generate revenues in the course of uses above referred for the exclusive purpose of covering their costs of digitising orphan works and making them available to the public. Also, the organisations are required to indicate the name of the identified authors and other rightholders in any use of an orphan work.[213] In addition, provisions of Article 91(2)(3) ATGTI takes the opportunity given by Recital 22 of the Directive. They state that publicly accessible libraries, educational and research establishments and museums, as well as archives, film or audio heritage institutions and public-service broadcasting organisations, are allowed, with a view to undertaking the uses permitted under this Directive, to conclude agreements with commercial partners. Said that, such commercial partners do not receive any rights to use, or control the use of, the orphan works.

In terms of ruling on **cross-border search**, Article 92(3) of the ATGTI merely overtakes the wording of Article3(4) of the OWD by stating that 'if there is evidence to suggest that relevant information on right holders is to be found in other countries, or it becomes clear that the producer of an audiovisual work has no place of establishment orplace of residence in any of the Member States, sources of information available in other countries shall also be consulted'. No further clarification

[212] Lithuania chose to consider 'audiovisual works' instead if 'cinematographic works'.
[213] Article 94(3), ATGTI.

is provided in the law on this point. However, according to the Ministry of Culture, the diligent search in other countries will have to be conducted depending on the situation.[214]

The **diligent search report requirements** established by the implementing legislation of Lithuania are set in Article 93 of the ATGTI. They closely follow the requirements under Article 3(5) of the OWD. This, according to Article 93 of the ATGTI, after having carried out a diligent search and having concluded that a work or a phonogram is an orphan work, organizations shall provide for the information about the outcome of the diligent search to the National *Martynas Mazvydas* Library, which is responsible for the collection of information on accomplished diligent searches and for the submission of such information to the EUIPO. The information to be provided is:

1. the name and contact information of the organization;
2. the result of the diligent searche that the organisationhascarried out, specifically, what led to the conclusion that a work or a phonogram is to be considered an orphan work;
3. the orphan work title, or in alternative (if the title is not provided) a short description, and the form of the work (should it be written, audiovisual work or phonogram);
4. author (co-authors), performer (a group of performers), producer of an audiovisual work or phonogram, publisher (if such an information is indicated in a work or phonogram);
5. the name and contact details of the organization using the work;
6. the use that the organisation makes of orphan work;
7. any information about the cancelation of an orphan work status.

There are no **other requirements** beyond those required for the diligent search, its documentation and the communication of this information to the supervisory authority.

Regarding **soft-law instruments**, Lithuania has, as mentioned above, a by-law on this matter: the 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.

There are no **other regulatory schemes** that may complement the framework for diligent search.

How to Carry Out a Diligent Search: General and Specific Requirements

List of sources

Lithuania has an official **list of sources** set by the Minister of Culture. This explicitly includes: *(i)* sources for diligent search of authors and related right holders, *(ii)* sources for the diligent search of right holders of newspapers, journals and other periodicals; *(iii)* sources for the diligent search of right holders of visual art (photographs, illustrations, design, architectural works and others)

[214] For instance, if the work was created between the two World Wars, organizations might need to do a diligent search in the US since during that period many Lithuanian authors left to the US.

published in newspapers, journals and other periodicals, and *(iv)* sources for diligent search of right holders of audio-visual works and phonograms.

Both the ATGTI and the respective Order of the Minister of Culture that approves the list of diligent search sources indicate that the list is **illustrative.** Furthermore, according to the explanation from the Ministry of Culture, the search might be sufficiently diligent even if not all sources mentioned in the list are consulted. The number and type of sources consulted should be reasonable.

According to Article 93 ATGTI, the National *Martynas Mazvydas* Library is collecting all information from the cultural organizations about the accomplished diligent searches, and registers this information in the EUIPO orphan works database. According to the Ministry of Culture, in the foreseeable future, the National *Martynas Mazvydas* Library is intending to create a **national database** of orphan works. It would contain information both about orphan works and works which right holders 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 organizations and save the costs of diligent search.

Lithuania has a **legal deposit requirement.** The legal deposit requirement is not referred to in the implementing legislation of the OWD. According to the explanation received from the Ministry of Culture, since the diligent search list includes all collections and databases of the National *Martynas Mažvydas* Library and it is one of the recipients of the legal deposit, there was no need to separately mention the legal deposit organizations in the list of sources.[215]

Presumptions

In Lithuania, **presumptions of authorship** exist within the ATGTI and all authors and related right-holders benefit from them. Article 6(2) of the ATGTI contains the legal presumption of authorship by stating that the natural person who is an usual way indicated on the work is considered to be the its author, unless it is proven otherwise. This applies also if a pseudonym is used instead of the name, when the pseudonym does not cause doubts as to the real name of the author.[216]

As to **presumptions of right transfer,** 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, unless otherwise provided for by an

[215] It is regulated by the following order of the Government: *Lietuvos Respublikos vyriausybės nutarimas dėl Lietuvos Respublikos Vyriausybės 1996 m. Lapkričio 22 d. Nutarimo nr. 1389 „dėl spaudinių ir kitų dokumentų privalomųjų egzempliorių siuntimo bibliotekoms tvarkos“ pakeitimo 2006 m. Gruodžio 11 d. Nr. 1240.* This legal document lists the following organizations that receive a legal deposit: National *Martynas Mažvydas* Library, Kaunas County Public Library; Vilnius University Library; Library of the Lithuanian Academy of Sciences; the Lithuanian Library for the Blind; and Lithuanian Technical Library.

[216] Article 51(3) of the ATGTI indicates that the abovementioned legal presumption applies *mutatis mutandis* to owners of related rights, namely, performers, phonogram producers, broadcasting organizations and producers of audiovisual works.

agreement.[217] A similar presumption exists with regard to performers and audiovisual work producers. According to Article 53(4) ATGTI, when a performer enters in a contract with a producer of an audiovisual work, the performer transfers his/her economic rights to the producer, unless the contract indicates otherwise.[218]

These presumptions do not have much **value in the context of diligent search**. As a result of these presumptions, the organizations have to search for a respective author/performer/producer as indicated on a work/phonogram. However, the names indicate the initial right holders and do not tell whether and to whom the rights were subsequently transferred.

Audio-Visual Works

Lithuania has implemented the **cut-off date** indicated in art 1(2)(c) of the Directive, which is 31 December 2002. Lithuania has not made use of an option in article 1(3) to introduce another cut-off date for works that were never published or broadcasted.

Audio-visual works have **specific rules concerning the authorship and right ownership** in Lithuania. According to Article 11(1) 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. Related rights belong to the producer of the first recording of the audiovisual work. This list of right-holders is closed.

As mentioned above, there are specific rules concerning the **presumption of right transfer** for audio-visual works under Lithuanian copyright law. According to Article 11(2), authors of an audiovisual work (except the 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 provided for in the Law, as well as the right to subtitle or dub the text of the audiovisual work to the producer, unless otherwise provided for by an agreement.

There are not **market practices** that assign the economic rights and related rights to film distributors. They normally only get licenses to distribute films and publicly show them.

Music

There is no legal definition of a **musical work** under the ATGTI. From general reading of the ATGTI, it appears that musical work includes accompanying words.[219] In case there are several people

[217] Article 11(2) ATGTI.

[218] Although they might be of limited relevance to this study, it worth mentioning that ATGTI also contains presumptions with regard to works created by the employee (Article 9(2)) and with regard to the computer programs created by the employee (Article 10(2)).

[219] *See* Article 4(2)(5) ATGTI.

involved in the creation of a musical work, it is considered a joint work.[220] There is no presumption as to authorship in a musical work. However, the author should have contributed with a creative endeavor. A person who has rendered material, technical or organisational assistance in the process of the creation of a work shall not be considered to be its co-author (Article 7(4) ATGTI). Article 2(2) ATGTI provides a list of entities who are **performing rights** holders: Performer means an actor, singer, musician, dancer or another person who plays in, sings, reads, recites, or otherwise performs literary, artistic, folkloric works or circus acts. For the purpose of copyright law, a performer shall also include a leader and conductor of an orchestra, ensemble or choir. Thus, the list of contributors to the performance is open. In case of a musical performance, performing rights normally belong to singers and musicians.

In Lithuania, there are no **presumption of right transfer** for musical works.

Phonograms

According to Article 2(8) ATGTI, **phonogram** means the fixation of the sounds of a performance, or of other sounds, or of the representation of sounds, by technical devices in any material sound-recording medium.[221]

In the case of phonograms made by Lithuanian public service broadcasters, the **cut-off date** is 31 December 2002, the same as in Article 1(2)(c) of the Directive. As to phonograms which hae never been published or broadcast but which have been made publicly accessible by the beneficiaries of the orphan work exception with the consent of the right-holders, the Lithuanian implementation has not introduced any cut-off date.

There are **specific rules concerning the right ownership of phonograms** under Lithuanian copyright law. Under ATGTI, the related rights holder in a phonogram is a producer of a phonogram. Under Article 2(9) ATGTI, 'producer of a phonogram' means a natural or legal person on the initiative and responsibility of which the first fixation of the sounds of a performance or other sounds, or the representation of sounds is made.

Related rights into a phonogram are vested initially into a phonogram producer. There are no other presumptions concerning the transfer of the rights.

There are not **market practices** that assign the phonogram producer rights to music labels. Apparently, music labels are very small in Lithuania and have little power.

Instead, according to the Ministry of Culture, in Lithuania there is the common business practice to transfer all authors' rights to the publisher. Publishers, however, are often not willing to license

[220] Under art 7(1) ATGTI joint authorship is defined as follows: "When a work is created by two or more natural persons in joint creative endeavor, they shall be regarded as co-authors, irrespective of whether such a work constitutes a single unitary whole, or consists of parts, each of which has an autonomous meaning. A part of a joint work shall be considered as having an autonomous meaning if it may be used independently of the other parts of that work".

[221] This definition may seem broad enough to cover soundtracks recorded in any material sound-recording medium. On the other hand, according to the explanation from the Ministry of Culture, sound tracks do not fall in the definition of sound recordings. Rather, they are a part of an audiovisual work.

rights to **audio book** producers since publishers are afraid that audio books will threaten the print book sales.

Additional Information Useful for the Diligent Search

While a **register for anonymous and/or pseudonymous works** does not exists in Lithuania, certain information about pseudonyms can though be found in publications on the use of pseudonyms in the country.[222]

As to the presence of databases containing other information useful to carry out the diligent search, Lithuania has not set a register for works that have been subject to **authorship or rights ownership disputes**, nor a **register on the transfer of copyrights**, neither **register on the on the buying and selling of back-catalogues** of works protected by copyright and/or related rights.

In regards of a **register for companies**, there is the Register of Legal entities managed by the Centre of Registers in Vilnius.[223] The information on **company mergers or bankruptcy arrangements** is, instead, collected by the Authority of Audit, Accounting, Property Valuation and Insolvency Management under the Ministry of Finance of the Republic of Lithuania.[224]

There is just one **public service broadcaster:** the Lithuanian National Radio and Television[225]. Quite obviously, no databases of public service providers exist.

At present, thre are no **other regulatory scheme** in place to deal with other relevant subject matters of digitization in Lithuania.

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[222] For instance, *Lietuviškieji slapyvardžiai: lietuviškos spaudos iki 1990 m. slapyvardžių sąvadas (sud. J. Mačiulis). Vilnius: Lietuvos nacionalinė Martyno Mažvydo biblioteka, 2004 m.*– ISBN 9955-541-28-8; and *Apie lietuviškuosius slapyvardžius: straipsnių rinkinys (sud. Jonas Mačiulis). Vilnius: Lietuvos nacionalinė Martyno Mažvydo biblioteka, 2008*. – ISBN 978-9955-541-96-7.
[223] *See* http://www.registrucentras.lt/jar/index_en.php (last visited, 15 June 2017).
[224] *See* www.bankrotodep.lt (last visited, 15 June 2017).
[225] *See* http://www.lrt.lt/en/news_in_english (last visited, 15 June 2017).

LUXEMBOURG

Implementation of the Orphan Works Directive: Background

In Luxembourg, the OWD was implemented by amending the national copyright law through the law of 3 December 2015 on certain permitted uses of orphan works (hereinafter, the Law).[226] At the same time, a list of sources to be consulted to carry out the diligent search is provided by the *Règlement grand-ducal du 15 janvier 2016 établissant les sources à consulter par les organismes bénéficiaires pour la détermination du statut d'oeuvre orpheline.*[227]

Subjective and Objective Scope

In regards of the **subjective scope** of the application of the orphan works exception, in the Luxembourg law there is no deviation from Article 1(1) of the OWD regarding the subjective scope of application. The Law on orphan works applies to publicly accessible libraries, educational establishments, and museums, as well as archives, film or audio heritage institutions and public-service broadcasting organisations (collectively named the "Organisations").

In regards of the **objective scope** of the application of the orphan works exception, the Luxembourg law on orphan works reproduces Article 1(1) of OWD as it applies to works which are first published or broadcast in a Member State and which belong to the following categories of subject matter:

1. 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;
2. cinematographic or audio-visual works and phonograms contained in the above collections or produced by public-service broadcasting organisations before 1st January 2003 and contained in their archives.

The Law on orphan works also applies to the above categories of works that have never been published or broadcast but have been made publicly accessible by the Organisations with the consent of the rightholders, if it is reasonable to assume that the rightholders would not oppose the uses referred to in Article 6 of the OWD. Likewise, this law also applies to works and other protected subject-matter that are embedded, incorporated in, or constitute an integral part of, the works or phonograms referred above.

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[226] *Loi du 3 décembre 2015 relative à certaines utilisation sautorisées des œuvres orphelines, Mémorial A, n°227 du 7 décembre 2015, p.4860,* available at http://www.legilux.public.lu/leg/a/archives/2015/0227/2015A4860A.html. (no English translation is available, last visited 15 June 2017).

[227] *See* http://www.legilux.public.lu/leg/a/archives/2016/0005/2016A0208A.html (last visited, 15 June 2017).

Possible Use of Orphan Works

Among the **permitted uses** for orphan works under the implementing legislation of Luxembourg, Organisations are permitted:

- to make orphan works available to the public, without having obtained the consent of authors, performers, phonogram producers, producers of first fixation of a film, and/or broadcasting organisations (i.e. without having to comply with Articles 4, 44 and 53 of the "Luxembourg Law on copyrights")[228];
- to reproduce the orphan works contained in their collections for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration without having to obtain the consent of authors, performers, phonogram producers, producers of first fixation of a film and/or broadcasting organisations (i.e. without having to comply with Article 3, 43 and 53 of the Luxembourg Law on copyrights).

Moreover, the Luxembourg law on orphan works expressly states that Organisations are only permitted to use orphan works 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 revenues 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. However, in any use of orphan works, Organisationsare required to indicate the name of identified authors and other rightholders.

The Law on orphan works also maintaints that, consistently with Article 6 of the OWD, the above shall be carried out without prejudice to the freedom of contract of Organisations in the pursuit of their public-interest missions, particularly in respect to public-private partnership agreements, and extended collective licensing schemes.

In addition, the Law provides that, when a rightholder proves its rights on an orphan work, an Organisation can no longer it without the consent of the rightholder. The rightholder can make himself/herself known at any time, unless otherwise agreed. Also, the Organisation at hand must provide a fair compensation to the rightholder to compensate the loss it has suffered from the use of his/her work by the Organisation.[229]

In terms of ruling on **cross-border search**, if there is evidence to suggest that relevant information on right-holders is to be found in other countries, the Law requires, following Article 3(4) of the OWD, that the sources of information available in those other countries must also be consulted. At the same time, a work or a phonogram considered an orphan work in a Member State must be considered an orphan work in Luxembourg too. In such cases, though, Organisations must provide the Minister in charge of copyrights with the following information: (a) the use that the Organisation makes of the orphan work in accordance with the Law; (b) any change of the orphan work status of

[228] The Luxembourg law of 18 April 2001 on copyrights, neighbour rights and databases.

[229] The fair compensation is set by mutual agreement between the right-holder and the Organisation and must take into account: (a) the objectives of cultural promotion at hand; (b) the non-commercial character of the use made; (c) the objectives of public-interest missions at hand; (d) the real loss suffered by the right-holder; and, (e) if applicable, the financial agreements or tariffs in force in the industry concerned.

the work or phonogram that the Organisation uses; (c) the official name, address, phone and fax numbers, and email address of the Organisation.

Among the **diligent search report requirements** established by the implementing legislation of Luxembourg, first of all, Organisations must carry out a diligent search in good faith. This diligent search must be performed in the Member State of first publication or, in the absence of publication, first broadcast. Where the work has never been published or broadcast, the diligent search must be carried out in the Member State where the Organisation that made the work publicly accessible is established. As an exception to the above, for cinematographic or audiovisual works of which the producer's headquarters or habitual residence is in a Member State, the diligent search must be carried out in the Member State of such headquarters or habitual residence. 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 must also be consulted. The Organisations must maintain records of their diligent searches including at least the following information:

1. the sources consulted and the results obtained; and
2. the date on which the consultation has been carried out.

They must also notify to the Minister in charge of copyrights the following information:

3. the results of the diligent searche that the Organisation has carried out and which has led to the conclusion that a work or a phonogram is considered an orphan work;
4. the use that the Organisation makes of the orphan work in accordance with the Law on orphan works;
5. any change of the orphan work status of thework or phonogram that the Organisation uses;
6. the official name, address, phone and fax numbers, and email address of the Organisation.

The Minister in charge of copyrights must provide such information to the EUIPO without delay.

There are no **other requirements** beyond those of a diligent search, its documentation and the communication of this information to the supervisory authority.

Luxembourg has not adopted **soft-law instruments** complementing the framework for diligent search, nor **other regulatory schemes** dealing with orphan works.

How to Carry Out a Diligent Search: General and Specific Requirements

List of Sources

The **list of sources** for each category of works and other protected subject-matter in question is specified by the Luxembourg Grand-Ducal Regulation establishing the sources to be consulted by the organisation to determine the orphan work status of 15 January 2016 (hereinafter, the "Regulation on orphan work sources").

Neither the Law nor the Regulation on orphan work sources clearly specify whether the list of sources is exhaustive or illustrative, and there is also no conclusive Luxembourg case law on this issue. Nonetheless, several arguments plead in favour of the **illustrative** character of this list.[230] As a result, we may assume that diligent character of the search carried out by the Organisations will be assessed on a case-by-case basis by Courts and that the consultation of the whole sources mentioned is the list will be considered as a proof of their good faith but would not exclude any liability if it appears that they should have consulted other sources, especially if they have reason to think that relevant information on right-holders is to be found in other countries.

Luxembourg Law did not create a **national database** for orphan works. The Ministry on charge of copyrights must provide the information related to the diligent search to the EUIPO.

As many countries, Luxembourg has **legal deposit** requirement and the Regulation on orphan work sources explicitly refers to it. Legal deposit is split between the National Library and the National Audio-visual Centre.[231]

Presumptions

In Luxembourg, there is a **presumption of authorship** according to which copyright belongs to the person or persons under whose name the work is disclosed, unless it is proved otherwise. The publisher of an anonymous or pseudonymous work is presumed to represent the author against third parties.[232] There is however no similar legal presumption for performers, phonogram producers and producers of first fixation of a film.

The Luxembourg Law on copyrights also contain the following **presumptions of right transfer:**

a) Unless otherwise agreed, authors and other creators of an audio-visual work are presumed to assign to the producer all 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 musical compositions, and to the adaptation, arrangement or use a pre-existing work;[233]

[230] Firstly, the Law only imposes to the Organisations to consult other sources available in other countries if there is evidence to suggest that relevant information on right-holders is to be found in other countries; secondly, when a work can no longer be considered as orphan, a fair compensation is due to the right-holders even if the Organizations have consulted all the sources mentioned in the lists; finally, the Law was inspired by Article L.113-10 of the French Intellectual Property Code which implements the Directive and where the list of sources is considered as a minimum (cfr. the report of the French Counsel of literary and artistic property 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* available at http://www.culturecommunication.gouv.fr/content/download/104572/1228894/version/1/file/Rapport%20sur%20les%20oeuvres%20orphelines%20-%20CSPLA%20-%20juillet%202014.pdf (last visited, 15 June 2017).

[231] The National Library's database contains printed music and to some extend audio and audio-visual works (accessible via http://www.a-z.lu, last visited 15 June 2017); the *Centre National de l'Audiovisuel* does not have an online database; the institutional website is available at www.cna.public.lu (last visited, 15 June 2017).

[232] Article 7 of the Luxembourg Law on copyrights.

[233] Article 24 of the Luxembourg Law on copyrights.

b) Unless otherwise agreed, artists forming a group are presumed to have transferred the conductors directors or managers of the group, the power to authorize on their behalf the representation of live shows in which they participate, and the reproduction rights thereof;[234]

c) Unless otherwise agreed, the performers of an audio-visual work are presumed to have assigned to the producer all the exploitation rights (including the subtitling and dubbing rights) of their works;[235]

d) Unless otherwise agreed, performers are presumed to assign to the phonogram producer and to the producer of the first fixation of a film his/her rental right provided that a contract between the producer and the performer provides for a fair compensation for such right.[236] (Article 52 of the Luxembourg Law on copyrights).

The Luxembourg Law on orphan works does not indicate whether the presumptions have **value in the context of diligent search.** However, Luxembourg case law generally admits that these presumptions can only be challenged by the authors, artists, or performers (where applicable). They are enforceable towards third parties acting in good faith. As a result, the Organisations should be entitled to rely on the presumptions mentioned above when conducting a diligent search and a general Internet research would not in principle be sufficient to put the validity of these presumptions in doubt. The solution should however be different if the Organisation comes across a final and binding Court decision that admits the validity of a claim from an author, artist or performer (where applicable) against the producer, manager of the group, phonogram producer (where applicable).

Audio-Visual Works

If an audio-visual work has been produced by a public broadcaster in Luxembourg, the **cut-off date** is before 1st January 2003, in line with Article 1(3) of the Directive. The Law has not introduced any cut-off date for those audio-visual works which, in absence of publication or broadcast, have been made publicly accessible by the beneficiaries of the OWD with the consent of the rightholders.

As for the **authorship and right ownership** of audio-visual works, there is no exhaustive list of authors. By default, according to Article 21 of the Luxembourg Law on copyrights, the authors of an audio-visual work are the producer and the principal director. This list is not exhaustive and others authors (such as the author of the music used in an audio-visual work, the author of the dubbing, the author of subtitles, etc.) may have rights over an audio-visual work.

There are specific rules concerning the **presumption of right transfer** for audio-visual work in Luxembourg. Firstly, authors and other creators of the audio-visual work are presumed to assign to the producer all 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 musical

[234] Article 50 of the Luxembourg Law on copyrights.
[235] Article 51(1) of the Luxembourg Law on copyrights.
[236] Article 52 of the Luxembourg Law on copyrights.

compositions, and to the adaptation, arrangement or use a pre-existing work.[237] Secondly, the performers of an audio-visual work are presumed to have assigned to the producer all the exploitation rights (including the subtitling and dubbing rights) of their works.[238] Finally, performers are presumed to assign to the producer of the first fixation of a film his/her rental right provided that a contract between the producer and the performers provides for a fair compensation for such right.[239]

There is no specific evidence concerning established **market practices** that assign economic rights to film distributors.

Music

The Luxembourg Law on copyrights does not contain any definition of **musical work.** It is generally admitted in practice that both the musical composition and the lyrics (if any) are protected by copyrights. Where the author of the music is different from the author of the lyrics, the musical work is considered as a collective work and each author can, as a rule, exploit separately his/her contribution to the musical work, unless otherwise agreed. The author(s) of a musical work are presumed to be the person(s) under the name the musical work is communicated to the public. Only the individual who claims being the "real" author is entitled to challenge such presumption.

The Luxembourg Law on copyrights, instead, defines performers as 'actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works' and excludes from this definition ancillary performers, such as extras, recognized as such by the practice of the profession.[240] Singers and musicians are thus regarded by default to be vested with the related **performing rights** over musical works.

While there is no **presumption of right transfer** for copyright on musical works, there is a presumption of transfer of the performer's rental right to the phonogram producer, provided that a contract between the producer and the performer provides for a fair compensation for such right and provided it is not otherwise agreed.

[237] Article 24 of the Luxembourg Law on copyrights.
[238] Article 51(1) of the Luxembourg Law on copyrights.
[239] Article 52 of the Luxembourg Law on copyrights.
[240] Article 41 a) of the Luxembourg Law on copyrights : *artistes interprètes ou exécutants': les acteurs, chanteurs, musiciens, danseurs et autres personnes qui représentent, chantent, récitent, déclament, jouent, interprètent ou exécutent de toute autre manière des œuvres littéraires ou artistiques ou des expressions du folklore, y compris les artistes de variété, de cirque et les marionnettistes. Ne sont pas des artistes interprètes les artistes de complément, comme les figurants, reconnus comme tels par les usages de la profession*".

Phonograms

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 audio-visual work.[241]

In case of phonograms made Luxembourg public service broadcasters, the **cut-off date** is before 1st January 2003, in line with Article 1(3) of the Directive. As to phonograms which have never been published or broadcast but which have been made publicly accessible by the beneficiaries of the orphan work exception with the consent of the right-holder, the Luxembourg implementation has not introduced any cut-off date.

There are specific rules concerning the **right ownership of phonograms** as the phonogram producer is vested with related rights on the phonogram by Luxembourg Law on copyrights. The phonogram producer is defined as the person who, or the legal entity which, takes the initiative and responsibility of the first fixation of sounds of a performance or of other sounds, or of a representation of sounds.[242]

Not only this, there is also a **presumption of right transfer** for phonograms under Luxembourg law. Unless otherwise agreed, performers are presumed to assign to the phonogram producer their rental right provided that a contract between the producer and performers provides for a fair compensation for such right.[243]

There is no evidence concerning established **market practices** that assign the phonogram producer rights to music labels, nor on practices which assign the rights of authors of a book to publishers to an extent that includes the making of an **audio book.**

Additional Information Useful for the Diligent Search

Luxembourg has not adopted any **register for anonymous and/or pseudonymous works**, nor a database for works that had been subject to **authorship or rights ownership disputes**. Moreover, there is no **register on the buying and selling of back-catalogues** of copyright protected works and/or neighbouring rights, neither a **register on the transfer of copyrights**. However, as to the transfer of copyrights, relevant information may be found before the collective management societies concerned, provided that the assignee has notified the transfer accordingly.

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[241] See '*Phonogramme: la fixation de sons provenant d'une interprétation ou exécution ou d'autres sons, ou d'une représentation de sons autre que sous la forme d'une fixation incorporée dans une oeuvre cinématographique ou une autre oeuvre audiovisuelle*': Article 21 b) of the Luxembourg Law on copyrights . Film soundtracks are excluded from the definition of the phonogram insofar as they are incorporated in the fixation of an audio-visual work. When film soundtracks are fixed separately from audio-visual works, they fall under the definition of phonogram and the producer of a phonogram reproducing a film soundtrack is granted with related rights in this respect. Otherwise, they are included in the scope of the related rights of the producer of first fixation of a film.

[242] '*Producteur d'un phonogramme: la personne physique ou morale qui prend l'initiative et assume la responsabilité de la première fixation des sons provenant d'une interprétation ou exécution ou d'autres sons, ou des représentations de sons*': Article 41 d) of the Luxembourg Law on copyrights.

[243] Article 52 of the Luxembourg Law on copyrights.

Concerning the existence of a **register for companies**, it can be mentioned the Luxembourg Trade and Companies Register[244].

About the availability of **company mergers or bankruptcy arrangements**, again, the Luxembourg Trade and Companies Register for company mergers and bankruptcy status can be consulted.[245]

As for **public service broadcasters** that exist in Luxembourg, there isn't any register or an official list of public service broadcasters. There is only a public service radio broadcaster (Radio 100,7) and only one public service TV broadcaster (Chamber TV) in Luxembourg.

Luxembourg has no **other regulatory scheme** in place dealing with other relevant subject matter of digitization.

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[244] https://www.rcsl.lu/ (last visited, 15 June 2017).
[245] https://www.rcsl.lu/ (last visited, 15 June 2017).

POLAND

Implementation of the Orphan Works Directive: Background

In Poland, the OWD was implemented by a change of copyright law through the Act of September 11, 2015 which amended the "Act on Copyright and Related Rights and the Act on Gambling" (hereinafter, Copyright Act).[246] It entered into force on November 20, 2015.[247] The implementation has added a new section to Chapter 3 of the Copyright Act (called 'substance of copyright'). The new Section 5, entitled 'permitted use of orphan works', includes Articles 355 to Articles 359. The implementing law has also added another section, Section 6, devoted to 'some ways of using out-of-commerce works' (art. 3510 – art. 3512 of the Copyright Act).

Subjective and Objective Scope

In regards of the **subjective scope** of the application of the orphan works exception, this has been established in Article 355 (2) of the Copyright Act. Article 355 (2) names entities/organisations that have been authorised to make use of the orphan works exception: archives, educational institutions, universities, research institutes carrying out activities referred to in Article 2(3) of the Law of April 30, 2010 on research institutes,[248] scientific institutes carrying out the activities referred to in Article 50(4) of the law of April 30, 2010 on the Polish Academy of Science,[249] libraries and museums,[250] cultural institutions, whose statutory task is to collect, protect and propagate the collections of film or phonogram heritage, as well as public broadcasting radio and TV organisations. Compared with Article 1(1) of the OWD, the catalogue of organisations introduced by the Polish legislation seems to be consistent with the EU template. However, while the Directive is more general in that it uses broad terms such as 'educational establishment', the Polish implementing provision is more specific, trying to identify the types of scientific establishments recognised under Polish law. Hence, for example, the inclusion of scientific/research institutes but only those that offer educational programmes.

In regards of the **objective scope** of the application of the orphan works exception, this has been established in Article 355 (1) of the Copyright Act. The provision lists the following types of works:

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[246] *See* http://www.dziennikustaw.gov.pl/DU/2015/1639/1 (last visited, 15 June 2017).

[247] The original Polish title is *Ustawa z dnia 11 września 2015 r. o zmianieustawy o prawieautorskimiprawachpokrewnychorazustawy o grachhazardowych* (Dz.U. 2015, p. 1639).

[248] Article 2(3) of the law on research institutes states that these institutes may also (i.e. apart from their main goals) offer PhD or postgraduate courses related to the institutes' research, provided that the institute is authorised to grant scientific titles/degrees and has adequate resources. They are furthermore allowed to provide other forms of educational training.

[249] Article 50 (4) of the law on the Polish Academy of Science states that an institute of the Polish Academy of Science may provide PhD courses, postgraduate courses or engage in other educational activities.

[250] Article 355 (2) of the Copyright Act does not explicitly refer to 'publicly accessible' libraries or museums. Libraries and museums are subject to their own statutory requirements in Poland (there is an Act on Libraries and an Act on Museums), and these acts do require that libraries and museums should be publically accessible.

1. works published in books, journals, magazines or other printed types of publications;
2. audio-visual works and works commissioned or incorporated for/into audio-visual works or fixed in a videogram, with regard to using the audio-visual work or a videogram as a whole;
3. works fixed in phonograms contained in the collections of beneficiary entities, provided that the right holders in these works with regard to the right of reproduction and the right of communication to the public in such a way that the member of the public may access them at a time and from a place chosen by him/her.

Works that have not been published or broadcast may be regarded as orphan if they have been made publicly available in the institution covered by the subjective scope of the Polish law with the consent of the right holder or it would be reasonable to assume that the right holder would not oppose digitisation and making available online.

All in all, the very categories of works specified in the Polish implementing law seem to coincide with what the Directive requires, and the minor stylistic differences should not have any effect on the actual scope of the regulation. Hence, the fact that Polish law does not repeat the term "cinematographic work" seems to be not relevant. In Poland, indeed, cinematographic works are a subcategory of audio-visual works, and the Copyright Act uses only the latter term too. Similarly, whereas the provisions cited above do not repeat the terms "phonogram" and "videogram", this is due to the general referring provision of Article 101 of the Act, per which Articles 355-359 must be accordingly applied to phonograms and videograms. There are, however, two tangible differences. First, the Polish law explicitly mentions videograms, whereas the Directive only names phonograms. Second, a slightly different legislative concept may be responsible for extending the objective scope of the exception. The Directive (Article 1(2)) not only names the categories of works, but for each category refers further to where (in whose collection) a work is contained. This means that the objective scope is defined by two factors: the abstract type of a work (e.g. a work published in a journal) and by its "location". In the Directive, this is done for each "abstract" type of works independently. The Polish Act has them all bundled together for the purposes of applying the second factor and there is an extra provision added for public-service broadcasters that limits the scope of application of the Law to audiovisual works created by or for these organisations or in co-production with them before January 1, 2003 'with the aim of acquiring exclusive rights by the broadcasters'. This seems indeed very close to the Directive, the only difference being that the Directive does not explicitly require that works and phonograms must have been produced for the organisation to acquire exclusive rights in such a work.

Possible Use of Orphan Works

As to **permitted uses**, the Directive uses several criteria to determine the scope of permitted uses of works. The first is the technical way of using a work – what in Polish law is somehow defined as "field of use/exploitation". These are making available and reproduction, but the latter is restricted by a set of allowed purposes. The second criterion is the general aim of using the work (Article 6 (2)), and the third one is the indication of the names of authors and rightholders (Article 6(3)). As to

the first criterion, the ways of exploitation in the Polish Act are restricted to reproduction and making available to the public as is required by the Directive.[251] As to the second one, using orphan works is only allowed to achieve aims corresponding to public interest statutory aims of the relevant organisations and in particular the preservation of, the restoration of, and the making available for educational and cultural purposes of works contained in their collection. The organisations may generate revenues 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. Finally, as to the third one, the requirement of identification is supposed to have been met by referral to Article 34 of the Copyright Act. This provision only demands that the name of the author and the source to be indicated (like, for example, when invoking the quotation exception). It does not require any indication of the right holder, if the right holder is not the same person as the author. It also includes a referral to Article 35 of the Act – a provision containing two of three elements of the three step tests (i.e. no conflict with a normal exploitation of the work and no unreasonable prejudice to the legitimate interests of the author). The Polish implementation does therefore differ from the Directive in some, though probably minor, aspects.

In terms of ruling on **cross-border search**, Article 356(5) of the Copyright Act faithfully implements Article 3(4) of the Directive. The only difference in wording is that instead of the expression 'if there is evidence to suggest …', the Polish implementation uses "if in the course of a search it has become likely that …'.

Among the **diligent search report requirements** established by the implementing legislation of Poland, the Copyright Act provides for a general rule, according to which organisations entitled to use orphan works are obligated to maintain records on their diligent searches. Details of these records have been left to an implementing regulation. In this regard, Article 356(9) of the Act provides for a legal ground for the Minister of Culture to issue such a regulation.[252] Its most prominent part is the appendix comprising the list of sources for the diligent search procedure. As to documenting and reporting the searches, the regulation states that records should be kept in an electronic form and that after completing the search a protocol should be prepared and signed by the person managing the organisation conducting the diligent search.The reporting obligation stems from Article 357(3) of the Act., which is practically a copy of Article 3(5) of the Directive. The reporting obligation has been, however, explicitly limited to organisations that have been registered in the EUIPO Orphan Works Database.

There are no **other requirements** beyond those of a diligent search, its documentation and the communication of this information to the supervisory authority on CMO's or the publication of the results of an unsuccessful search concerning the same work in the EUIPO orphan work database.

[251] However, the Polish implementing provision does not include the further "limitating" purposes listed in Article 6(1)(b) of the Directive (i.e. for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration). Instead, some of these purposes have been introduced in Article 355(3) of the Copyright Act, which has been meant to implement Article 6(2) of the Directive but indirectly may also limit the scope of making available and reproduction. The explicitly named purposes are preservation, restoration, making available, but these are preceded by the expression "in particular". Strangely, digitisation is missing.
[252] The implementing regulation was issued on October 23, 2015 (Journal of Laws, 2015, item 1823).

Poland has not adopted **soft-law instruments** complementing the framework for diligent search. No plans to draft them have been communicated, either. There are of course written grounds to the draft law implementing the Directive (as any statute should be accompanied by such an explanation), but while they may reveal the intentions of the legislator, they cannot be called proper guidelines.

Poland has not adopted **other regulatory schemes** complementing the framework for diligent search either. There is no overlapping regulatory scheme applicable to orphan works as such. An out-of-commerce work may be, in certain circumstances, an orphan work. Provisions on out-of-commerce works have been introduced as Section 6 of Chapter 3 of the Copyright Act, together with the implementation of the OWD. 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, and it is certainly possible the reason has been the lack of contact with the right-holder.There is no rule deciding which of the two regimes should have priority. It would, however, seem reasonable to argue that if a works meets the criteria established for out-of-commerce works, the provisions on these works may be applied.

How to Carry Out a Diligent Search: General and Specific Requirements

List of Sources

The **list of sources** is provided in the appendix to the implementing law issued by the Minister of Culture and National Heritage.[253] Article 35^6(1) of the implementing law states that a search must be diligent and done in good faith. It also explains that diligent search must cover sources appropriate for specific categories of works. As a result, limiting a search to the sources listed in the Annex would be as a rule sufficient to consider that search diligent. However, if an organisation knows or should have known that there are other sources where information is likely to be found, such a search could not be considered to have been done in good faith and therefore does not meet the requirements set forth in Article 35^6(1) of the Copyright Act.[254] The list of sources can thus be deemed just **illustrative.**

Poland has not established a **national database** for orphan works.

Poland has a general **legal deposit** requirement, though the legislation implementing the OWD does not make any reference to it. There is a law on obligatory library copies of November 7, 1996.[255] There are two libraries always entitled to a legal deposit: the National Library in Warsaw and the *Jagiellonian* Library in Krakow. Additionally, the implementing regulation of 1997 specifies other

[253] *See* Article 35^6 (9) of the law implementing the OWD (Journal of Laws, 2015, item 1823) available at http://www.dziennikustaw.gov.pl/DU/2015/1823/1 (no English translation, last visited 15 June 2017).
[254] This interpretation should be also supported by the implementation of art. 3(4) of the Directive since the list of sources in the implementing regulation cannot cover all available foreign databases or other sources.
[255] Journal of Laws 1996, no. 152, item 722, with amendments.

libraries entitled to receive obligatory copies, as the Polish law calls them. Neither of these can be described as "in charge" of the legal deposit.

Presumptions

In Poland, there is a general **presumption of authorship** resulting from Article 8(2) of the Copyright Act. It is presumed that the author of a work is the person whose name has been placed on a copy of the work or communicated to the public in other way in the course of making the work available to the public. The person whose name has been communicated to the public in connection with the work (either through distribution of copies or through other forms of communication, e.g. credits in an audio-visual work broadcast on TV) is deemed to be the author of the work (or a co-author, if more names are provided) and consequently the holder of moral rights, such as the right of authorship. Since copyright may be assigned, the author must not necessarily be the right holder. However, indirectly the presumption established in Article 8(2) may be relevant for the economic part of copyright. As a rule, copyright originally belongs to the author – if so, then a presumption of authorship may also create an "indirect presumption" of ownership. The broad character of the presumption ensures that it may be applicable not only to works traditionally distributed as physical copies. Article 101 extends the application of Article 8 (2) to performances, phonograms, videograms, broadcasts, first editions and scientific and critical editions,in other words, to all related rights' subject-matters. Furthermore, Article 15 introduces a presumption for producers and publishers. Finally, Article 94(3) states that the person under whose name a phonogram or videogram has been made for the first time is presumed to be the producer.

Presumptions on the transfer of rights have been provided, firstly, for the right to a title of a collective work.[256] Secondly, it is presumed that the producer of an audio-visual work, who concludes a contract the purpose of which is the creation for or use of a work within an audiovisual work, acquires exclusive rights to use such works in the audiovisual-work as a whole.[257] The presumption only covers exploitation of the audiovisual work as such. It does not extend to other uses of the work in question For example, if a song is commissioned for a movie, the song may be used in the movie, but cannot be distributed on its own as a music download or broadcast on the radio. More generally, a presumption of transfer is rebuttable and always requires an analysis of the circumstances of the case. A similar role can be played by a different legal instrument that we may call an "implied transfer". For example, if an employee creates a work in the course of employment duties, copyright in this work will be usually acquired by the employer.[258] The transfer is strictly speaking not presumed. Either it happens as the law provides, or the parties have decided

[256] *See* Article 11 of the Copyright Act. This is however a very controversial provision, the meaning of which is obscure, as most titles are not copyright works.

[257] *See* Article 70 (1) of the Copyright Act. The interpretation of this provision has generated a lot of controversies. It should be stressed that because of it some very formal provisions on copyright contracts will not apply, but the producer must still have at least an oral agreement with the owner of a work to be incorporated into the audio-visual work.

[258] Although the scope of transfer is not full, but limited to the types of use that are determined by the purpose of the employment contract and the mutual intent of the parties. *See* Article 12 of the Copyright Act.

otherwise. A transfer according to this model can be only prevented by an express agreement of the parties.[259]

So far, the **value of presumptions in the context of diligent search** has not been discussed in the Polish legal literature, and there are no court decisions either. In circumstances when presumptions would really matter, the standard of evidence should be the same and for the "normal" rebuttal. Otherwise a presumption would be devoid of legal significance. A simple rumour or uncertainty as to the presumption's accuracy is not sufficient to rebut it. A hint resulting from an Internet search will most likely not be enough but, for instance, if a Google search provides a number of reliable sources disproving the presumption, a diligent search would have to go beyond the legal presumption. I would also argue that if a legal presumption points at X as the owner of copyright, an organisation performing a search cannot be required to look for other possible right holders, just in case the presumption is wrong. Only if concrete evidence comes to light, putting the presumption into doubt, can such further actions be demanded.

Audio-Visual Works

If an audio-visual work has been produced by a public service broadcaster in Poland, the **cut-off date i**s before January 1, 2003, which is the same provided by Article 1(2)c of the Directive, just expressed differently.

The issue of **authorship and right ownership** of audio-visual works used to raise enormous controversies in Poland, but some of them can be no longer maintained under the current wording of the relevant provisions. Generally, Polish copyright law does not define co-ownership with regard to different types of works, relying instead on the general criteria. Under this provision any person who has made a creative contribution to a work is its co-author.[260] Until 2007 the situation of audio-visual work was different as Article 70(2) had the so-called "additional remuneration" for co-authors of audio-visual works and named the categories of co-authors entitled to participate in this additional remuneration (for screening, rental, communication to the public, levies for private use). The list was exhaustive. Today, Article 70(2^1) of the Act (replacing Article 70(2)) only refers to co-authors and performing artists, and Article 69 provides for an open list of "typical" co-authors of works of this kind. According to this last provision co-authors of an audio-visual work are persons who have made a creative contribution to the creation of the work, in particular: director, director of photography, author of an adaptation of a literary work, author of a musical work with or without words created for the audio-visual work and the author of a screenplay.[261]

[259] As regards computer programs, yet another solution has been used. An employee's creation is originally owned by the employer. The employer is thus the original owner of copyright.

[260] Provided that the creation by more than one person followed at least a general understanding between co-authors that they were creating jointly; therefore, incorporating a work created independently into another work does not make the latter a work of co-authorship. These general criteria are established in Article 9 of the Copyright Act.

[261] Article 69 clearly refers to the general conditions of co-authorship (Article 9 of the Act) and requires a creative contribution. Since the additional remuneration for co-authors must be handled by collecting societies, their practice is instrumental in shaping the understanding of co-authorship in this field.

A **presumption of right transfer** is provided in Article 70(1) of the Copyright Act. According to this provision, it is presumed that the producer of an audio-visual work acquires, under a contract concerning the creation of a work or a contract concerning the use of an existing work, exclusive author's economic rights to exploit those works as part of an audio-visual work as a whole. This presumption does not result in the default rule that all copyrights or related rights belong to the producer. The scope of application is narrower and limited to contracts for the creation of a work to be used in an audio-visual work or for the use of an already existing work in an audio-visual work. The practical significance of this solution lies in the fact that Polish copyright contract law is very formal. It requires that transfers and exclusive licenses be made in writing and that these contracts expressly name all the fields of use that a transfer or license should encompass. If Article 70(1) of the Act applies, no such formalities will be necessary. It must be also stressed that the acquisition of rights is restricted to the use of a work in an audio-visual works and does not extend to other uses.[262]

Data concerning established **market practices** that assign the economic rights and related rights to film distributors are not available. There are certainly cases when distributors of Polish audio-visual works can become copyright owners, but it cannot be described as a market practice, by which we would understand a typical, most common solution.

Music

Polish copyright law does not define specific types of works and only provides for and open-ended catalogue of works. As any definition of a **musical work** would be therefore doctrinal and there are generally no special provisions for musical works (unlike e.g. audio-visual works or software) such a definition would be of limited practical importance. It is not contested that a musical work does not include lyrical elements. Lyrics, libretto or the like can be copyright works, provided that the general criteria of copyright protection have been met. Such works would be literary works, but again because of the open-ended catalogue of works such classification is not crucial. If words are combined with music this can be theoretically solved in two ways. Usually, these two works would be treated as the so-called "combined works". The Copyright Act includes a special provision concerning such works.[263] Combined works are therefore treated as separate works, but some provisions on joint works apply *mutatis mutandis*. If words and music are created by two or more authors according to a general understanding that a work is to be jointly created, and there is some interplay between these authors with both components being adjusted to each other in the process of creation, the result of such collaboration can be a work of co-authorship. Polish copyright law does not require that creative inputs in a work of co-authorship must belong to the same category of works. The first classification (combined works) is, however, much more common in practice.

[262] Even though the commented provision seems to be reasonably clear, it is still a source of controversies in the Polish legal doctrine, the major being the theory of a "work in work".

[263] 'If authors combine their separate works for the purpose of joint distribution, each of them may request permission from the other authors to distribute the whole work so created unless there are reasonable grounds to refuse permission and a contract does not provide otherwise': Article 10 of the Copyright Act.

There is an open list of legally relevant performers. Article 85 (2) of the Copyright Act provides that the protected performances (and the related **performing rights**) are in particular 'performances of actors, reciters, conductors, instrumentalists, vocalists, dancers and mimes and other persons making a creative contribution to a performance'.

As mentioned before, there are no special rules for musical works in the Polish Copyright Act[264]. A musical work can be however 'caught' by other **presumptions of right transfer.** For instance, a musical work may be used in an audio-visual work and then the presumption of Article 70 (1) (or Article 87, its equivalent for performances) can apply.

Phonograms

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." This term may include a film soundtrack, when performed for its first recording. However, if the soundtrack has been already incorporated into the film the term 'videogram' becomes relevant (defined as the first fixation of a sequence of moving images, whether or not accompanied by sound and whether or not it is an audio-visual work). The term 'phonogram' has no bearing on the definition of a soundtrack as a type of a copyright work. A film soundtrack may be, when assessed from this perspective, either a standalone musical work, or a creative contribution to a work of co-authorship (the audio-visual work for which it was created).

Under Article 35^5(6) of the implementing law of the OWD, phonograms may be used as orphan works by public service broadcasters with the **cut-off date** of 31 December 2002.

There is a **specific rule concerning the right ownership of phonograms.** Rights in phonograms have been vested with producers. This rule is not a presumption – it results in the original ownership of rights by producers of phonograms (and videograms). An express contractual arrangement to the contrary would be required to change it.[265]

Conversely, there is no **presumption of right transfer** to phonogram producers. The rule referred above, vesting original ownership of the rights in phonograms in producers, goes further than a legal presumption. Strictly speaking there is no transfer of rights in this scenario: the producer will be the first, original owner. As regards the relation of this rule to any rules on commissioned works or works made in the course of employment, there are no special rules for commissioned works in Poland. Transfer of rights in such works must follow the general standards of copyright contract law.

Poland is a country in which **market practices** are sometimes difficult to establish because of the lack of any collective agreement and soft-law instruments. That said, it worth mentioning that often music labels may be producers in the first place. A producer is an entity that takes the initiative of recording, bears the risk and provides investment, as well as organisational, technical and financial

[264] With minor exceptions, e.g. Article 19^1 introducing *droit de suite* for musical manuscripts (strictly speaking this is not really a musical work), Article 21 (broadcasting of minor musical works), Article 36(6) (calculation of the term of copyright).
[265] Article 94(4) of the Copyright Act.

support. If an artist records for a music label, then the label will be typically the producer of the phonogram. Moreover, there is a market practice in the publishing business to secure the transfer of copyright to the maximum extent allowed by the law. If such a transfer occurs, the scope of the acquired rights will be usually sufficient for the publisher to undertake (or license) all steps necessary to create and market an **audio-book.**

Additional Information Useful for the Diligent Search

In Poland, there is not any **register for anonymous and/or pseudonymous works**, nor a database for works that had been subject to **authorship or rights ownership disputes**. Likewise, it does not exist any **register on the transfer of copyrights**, nor a **register on the buying and selling of back-catalogues** of copyright protected works and/or neighbouring rights.

The National Court Register *(KrajowyRejestrSądowy – KRS)* is the **register for companies**. The register is managed by district courts (concerning the entries)[266] but the database is central and freely available to all.[267] The national court register is essentially an electronic database. It does not have an official "seat" and it may be accessed online.

There is no specific register managing **company mergers or bankruptcy arrangements** but such information can be found in the National Court Register. Actually, mergers must be provided in the KRS register as this is required by the relevant provisions of the Polish company law. Information on bankruptcy can also be found in the National Court Register or in the National Register of Insolvent Debtors, which is part of the National Court Register.[268] More precisely, information on bankruptcy of a company will be entered in the National Court Register in the section for entrepreneurs, whereas information on bankruptcy of a natural person will be entered in the Register of Insolvent Debtors.

In Poland, the status of **public service broadcasters** is governed by Article 26 and Article 30 of the Act on Radio and Television Broadcasting of 29 December 1992.[269] According to these provisions, public radio and television broadcasters operate exclusively as wholly-owned State Treasury joint-stock companies. A public broadcaster is therefore a company established in line with the above cited provisions. There are currently two national companies of this kind: *TelewizjaPolska – SpółkaAkcyjna* with its registered office in Warsaw, and its regional divisions, and *Polskie Radio – SpółkaAkcyjna* with its registered office in Warsaw. There also exist regional radio broadcasting companies with their offices in Białystok, Bydgoszcz, Gdańsk, Katowice, Kielce, Krakow, Koszalin, Lublin, Łódź, Opole, Olsztyn, Poznań, Rzeszów, Szczecin, Warsaw, Wrocław and Zielona Góra.

[266] Please note that this register is a public register, and the entries have legal consequences. This is therefore not simply a source of information, but also a legal instrument, creating, *inter alia*, several legal presumptions.
[267] It can be also accessed online, free of charge, athttps://ems.ms.gov.pl/krs/wyszukiwaniepodmiotu (last visited, 15 June 2016).
[268] The National Court Register has three parts: The Register of Entrepreneurs, where information on companies is stored, the Register of Associations and the Register of Insolvent Debtors. The Register of Insolvent Debtors is accessible at https://ems.ms.gov.pl/krs/wyszukiwaniedluznika (last visited, 15 June 2017).
[269] Journal of Laws of 2004 No. 253, item 2531 as amended.

Whereas with regard to TV there is one national broadcaster with regional divisions, the latter not being separate companies, radio broadcasters have been split into the national radio company *(Polskie Radio – SpółkaAkcyjna)* and the regional radio companies, each being technically a "broadcaster".[270] Because of the way public-service broadcasters are set up, there is no need for a register of public-service broadcasters, as their status can never be open to doubt.

Regarding **other regulatory scheme** in place, dealing with other relevant subject matter of digitization in Poland, as already mentioned, new rules on out-of-commerce works were introduced parallelly to the implementation of the OWD. The out-of-commerce works have been defined as works published in books, journals, magazines or in other types of printed publications, that

- are not available in commerce with the permission of right holders who own the rights of reproduction or the right of making available, and;
- are not available in commerce in a number of copies sufficient to meet reasonable needs of users, and;
- are not made available to members of the public for access from a place and at a time chosen by them.

When assessing the out-of-commerce status of a work, the copies that have been subject to the exhaustion of rights are not considered. A significant limitation of the objective scope results from Article 3510(5) of the Copyright Act, pursuant to which the provisions on out-of-commerce works are not applicable to translations of works expressed in words that were originally created in a foreign language. The objective scope is nevertheless like one of the categories of orphan works (works published in print). The subjective scope includes archives, educational organisations, cultural institutions, and scientific establishments. These organisations are entitled to conclude a contract with the collecting society designated by the Minister of Culture, and under this contract they are allowed to make reproductions of copies of out-of-commerce works contained in their collections, provided these works were published for the first time in Poland before 24 May 1994, and make such copies available to the public. This is however only allowed for the same set of purposes as provided by Article 355 (3) of the Act for orphan works (preservation, restoration, making available for cultural and educational purposes). Besides, the law has established the publicly accessible Register of Out-of-Commerce Works. The designated collecting society may exercise copyright in 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 right holders have not filed a written objection within 90 days since the entry was made public.[271]

[270] Both the national radio company and the national TV company operate a number of programs/channels. For example, *TelewizjaPolska – SpółkaAkcyjna* operates the national Program I and II, TV Polonia satellite channel and regional TV channels. *Polskie Radio – SpółkaAkcyjna* has the following programs: Radio I, Radio II, Radio III, Radio IV, Radio Poland, and Polish Radio 24.

[271]There are no diligent search requirements, but one must bear in mind 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 right holders are known and can be easily located. The interests of right holders are protected by granting them a right to object and the right to withdraw (implied) permission.

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PORTUGAL

Implementation of the Orphan Works Directive: Background

In Portugal, the OWD was implemented by a change of copyright law through *Lei nº 32/2015 de 24 de Abril* (hereinafter, "Law 32/2015, 24th April") and *Transpõe a Diretiva n.º 2012/28/UE, do Parlamento Europeu e do Conselho, de 25 de Outubro, relativa a determinadas utilizações permitidas de obras órfãs, e procede à décima alteração ao Código do Direito de Autor e dos Direitos Conexos, aprovado pelo Decreto-Lei n.º 63/85, de 14 de Março* (hereinafter "Portuguese Copyright Code"). It was published on 24th April 2015.[272] Article 3 of Law 32/2015, 24th April, which respectively added Articles 26-A and 26-B to the Portuguese Copyright Code, implements Article 2 of the OWD. Article 26-A (1) and (3) states that a work shall be considered an orphan work if none of the copyright owners in that work is identified or, even if one or more of them is identified, none is located despite a diligent search for the right-holders having been carried out in good faith. Remarkably, unlike whereas (17) and Article 2(2) of the OWD, the Portuguese provision does not clarify that where there is more than one copyright owner, and not all copyright owners have been identified or, even if identified, located after a diligent search has been carried out, the work may only be used provided that the copyright owners that have been identified and located, have, in relation to the rights they hold, authorised the relevant entities to resort to the orphan works exception.[273]

Subjective and Objective Scope

In regards of the **subjective scope** of the application of the orphan works exception, Article 1(1) of the OWD was implemented by Article 2 of Law 32/2015, 24th April which modified Article 75 of the Portuguese Copyright Code. Article 75 of the Portuguese Copyright Code now states that libraries, educational establishments, museums, archives, film or audio heritage institutions and public service broadcasting institutions (hereinafter, "relevant entities") can make use of the orphan works exception, in the context of their public interest goals, such as, 'the right to access information, education and culture, including the enjoyment of intellectual products'. The Portuguese provision is more detailed, in this context, than the OWD as it provides concrete examples of public interest aims. It specifies that the orphan works exception may be invoked by the relevant entities where

[272] A link to its text is available at https://dre.pt/application/conteudo/67072250 (No English translation available; last visited, 15 June 2017).

[273] The Portuguese provision does not clarify that national provisions on anonymous or pseudonymous works are not affected by the implementation of the OWD. It could be argued that such clarification was unnecessary. The paternity right entitles the author to demand that their name appears on all copies of the work and whenever the work is performed (Articles 9 (3) and 56 (1) of the Portuguese Copyright Code) or to demand that their name is not mentioned, that is, to remain anonymous (Article 30 (1) of the Portuguese Copyright Code). Furthermore, since the paternity right is inalienable and non-waivable, where an author chooses to remain anonymous they do not relinquish such right, but rather choose not to exercise it. They may, at any time, reveal their identity and establish their claim to authorship of the work, in line with Article 15 (3) of the Berne Convention (Article 30 (2) of the Portuguese Copyright Code).

they aim to facilitate, inter alia, 'the right to access information, education and culture, including the enjoyment of intellectual products'.

Concerning the **objective scope** of the application of the orphan works exception, Article 1(2) of the OWD was implemented by Article 3 of Law 32/2015, 24th April which added Article 26-A to the Portuguese Copyright Code. Article 26-A(2) covers the following categories of works in connection to the orphan works exception: (i) books, flyers, newspapers, journals, magazines or other writings, contained in the collections of libraries, educational establishments or museums, publicly accessible, as well as in the collections of institutions in charge of film or audio heritage; (ii) cinematographic or audiovisual works and phonograms contained in the collections of libraries, educational establishments or museums, publicly accessible, as well as in the collections of institutions in charge of film or audio heritag; (iii) cinematographic or audiovisual works and phonograms produced by public-service broadcasting organisations up to 31 December 2002 and contained in their archives. Actually, this provision differs from Article 1(2) of the OWD in four elements. Firstly, unlike the list contained in the Directive, the Portuguese list is not exhaustive. It only provides examples of works that may be covered by the orphan works exception. Secondly, it expressly includes 'flyers' as category of works, which is not mentioned in the OWD. Thirdly, unlike the Directive, the Portuguese provision does not refer to works 'first published in a Member State or, in the absence of publication, first broadcast in a Member State' but to works 'published or distributed in a Member States'. That is, the Portuguese formula does not encompass broadcasting. This view is corroborated by Article 6(1) of the Portuguese Copyright Code which contains a clear definition of 'published work'. Finally, unlike the OWD, the Portuguese provision does not require the work to be subject to a certain act for the first time in a Member State. This does not accord with the spirit of Whereas(12) of the Directive which invokes 'reasons of international comity' to justify that requirement.

Possible Use of Orphan Works

Article 6 of the OWD was implemented by Article 3 of Law 32/2015, 24th April which modified Article 75 of the Portuguese Copyright Code. As to the **permitted uses** for orphan works under the implementing legislation of Portugal, Article 75(2)(u) permits the reproduction and making available to the public of orphan works, for purposes of digitising, indexing, cataloguing, preservation or restauration, as well as acts functionally connected thereto. As a matter of fact, the Portuguese provision is more specific than the Directive as, on the one hand, it provides a list of preliminary acts that may be executed in order to facilitate the full operation of the orphan works exception, and, on the other hand, it provides examples of aims that are deemed of public interest by stating that the orphan works exception can be invoked where the relevant entities facilitate, *inter alia,* 'the right to access information, education and culture, including the enjoyment of intellectual products'.

The **cross-border search** was ruled by the provision of Article 3 of Law 32/2015,24th April which added Article 26-A to the Portuguese Copyright Code. In line with Whereas(15) of the Directive, to avoid duplication of search efforts, Article 26-A(5)-(6) of the Portuguese Copyright Code sets out that: (i) where the first publication or dissemination of a work is carried out in Portugual, a diligent

search carried out in good faith must take place in Portugal; (ii) where cinematographic or audiovisual works as well as phonograms produced or co-produced by producers with headquarters or habitual residence in a European Union Member State, a diligent search carried out in good faith must take place in that Member State, and (iii) where works that have not been published or distributed but have 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. Unlike Whereas(15) of the Directive, the Portuguese provisions does not go on to say that '[s]ources of information available in other countries should also be consulted if there is evidence to suggest that relevant information on rightholders 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 that 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, sources of information available in those other countries should also be consulted.

Among the **diligent search report requirements** established by the implementing legislation of Portugal, Article 3(5) of the OWD was implemented by Article 3 of Law 32/2015, 24th April which added Article 26-A to the Portuguese Copyright Code. By and large, the Portuguese provisions do not stray from Article 3 of the Orphan Works Directive. More precisely:

1. a work may only be considered an orphan 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;[274]
2. relevant entities must maintain updated records of their diligent searches and regularly provide the information in question to the National Library which is to manage a central database containing that data;[275]
3. above referred records of diligent searches must be regularly and immediately supplied to the EUIPO, including the following information: (a) the results of the diligent searches that the relevant entities have carried out and which have led to the conclusion that a work is considered an orphan work; (b) the use that the relevant entities make of orphan works; (c) any change of the orphan work status of works; and (d) relevant contact information and any other appropriate information.[276]

There are no **other requirements** beyond a diligent search carried out and recorded in good faith by the relevant entities.

[274] Article 26 – A (3) of the Portuguese Copyright Code.

[275] Article 26 – A (7) of the Portuguese Copyright Code. Article 3 (5) of the Directive mentions a «competent national authority» which is, as per the Portuguese provisions, the Portuguese National Library.

[276] Article 26 – A (8) then specifies that the reference to the supply of information to the EUIPO stems from Article 3 (6) of the OWD. And the demand for regular and immediate updates can be found in Article 3 (6) of the Directive too, which requires forwarding of the relevant information 'without delay'.

Portugal has not adopted neither **soft-law instruments**[277] complementing the framework for diligent search, nor **other regulatory schemes** dealing with orphan works.

How to Carry Out a Diligent Search: General and Specific Requirements

List of Sources

Article 26-A (4) of the Portuguese Copyright Code, which was added to the Code by Article 3 of Law 32/2015, 24th April, contains a **list of sources** to be consulted when carrying out a diligent search.

This list is not exhaustive but **illustrative.** Since the list is not exhaustive it could be argued that additional sources should be taken into account before an assessment is made, but which ones cannot be determined with certainty. In Portugal, a fair amount of the listed sources is not available online and there is no guarantee that access will be provided to such sources by the entities that manage the relevant records. Hence, it is not clear what a 'diligent' search amounts too in practical terms.

Portuguese law foresees that the relevant entities must maintain updated records of their diligent searches and regularly provide the information at stake to the National Library which is to manage a central database containing that data.[278] Since the law refers to a 'central database' rather than to a '**national database**', the National Library decided to not create its own database but to manage the Portuguese elements of the EU Database. According to representatives of the National Library, anything else would have amounted to an illogical duplication of efforts.

There is a **legal deposit** requirement in Portugal, stemming from *Decreto-Lei n.º 74/82 de 3 de Março.*[279] According to Article 26-A (4) of the Portuguese Copyright Code, which was added to the Code by Article 3 of Law 32/2015, 24th April, legal deposit is one of the sources to be consulted when carrying out a diligent search in good faith. The National Library is in charge of the legal deposit system.[280]

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[277] The Society of Portuguese Authors (hereinafter «SPA»), the largest collective management entity in Portugal, advised its members, prior to the emergence of the OWD, to announce their intention to use an orphan work and their willingness to pay for such use. This was meant to evidence diligence and good faith. No complaints were ever filed with SPA regarding misuse of an orphan work.

[278] Article 26 – A(7) was added to the Portuguese Copyright Code by Article 3 of Law 32/2015, 24th April.

[279] *See* http://www.bnportugal.pt/images/stories/servicos/documentos/dl7482.pdf (last visited, 15 June 2017).

[280] The relevant information can be found at: http://www.bnportugal.pt/index.php?option=com_content&view=article&id=153&Itemid=6 3&lang=en (last visited, 15 June 2017).

Presumptions

Presumptions of authorship are admitted by the Portuguese Copyright Code. In Portugal, the principle is that copyright vests in the creator. In the absence of an agreement to the contrary, the author is the creator of the work and copyright vests in the creator of a work upon the act of creation.[281] In line with Article 15 (1) of the Berne Convention, there is a presumption that the author is the person whose name appears on the work in the usual manner.[282] The author may be identified by name, pseudonym, or in another usual manner.[283] 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 vests in the commissioner of the work.[284]

As to **presumptions of right transfer,** it worth mentioning that a film production requires the authorisation of the co-authors of the cinematographic work and the authors of other works used in the course of production.[285] Where an author authorises, in an implied or express manner, the producer to show the film in cinema theatres, there follows a presumption 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.[286] Where an author authorises her/his work to be used for cinematographic purposes that triggers a presumption, in the absence of any agreement to the contrary, that such authorisation amounts to an exclusive one, which is presumed to last 25 years.[287] In addition, where a contract concerning film production is concluded between performers and a film producer, the performers are presumed, in the absence of any agreement to the contrary, to have transferred their rental right, without prejudice to their right to obtain an equitable remuneration for the rental.[288]

The **value of these presumptions in the context of diligent search** is not apparent. Such presumptions are not excluded by Law 32/2015, 24th April, which implemented the OWD The silence of the Portuguese implementing legislation on the subject, in addition to the fact that the search required by the OWD must be both «diligent» and carried out in «good faith» may point to possible relevance of such information.

Audio-Visual Works

Article 3 of Law 32/2015, 24th April added Article 26-A (2) (d) which covers works and phonograms that have never been published or broadcast but have been made publicly accessible by the relevant

[281] Articles 11 and 27(1) of the Portuguese Copyright Code.
[282] Article 27(2) of the Portuguese Copyright Code.
[283] Article 28 of the Portuguese Copyright Code.
[284] Article 14 (3) of the Portuguese Copyright Code.
[285] Article 124 of the Portuguese Copyright Code.
[286] Articles 68 (4), 125 (2), 127 (3)-(5), 129 of the Portuguese Copyright Code. The scope of this presumption is thus more restrictive than that of Article 14 bis (2) (b) of the Berne Convention.
[287] Article 129 of the Portuguese Copyright Code.
[288] Article 8 of *Decreto-Lei n.º 332/97de 27 de Novembro.*

entities with the consent of the copyright owners, provides that it is reasonable to assume that they would not oppose the public interest uses carried out by such entities. There is no **cut-off date** for these works.

Audio-visual works have **specific rules concerning the authorship and right ownership** in Portugal. Article 22 of the Portuguese Copyright Code designates as 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.[289]

In addition, as outlined above, there are general **presumptions on the transfer of right** ownership in the case of cinematographic works.

There is a **market practice** in Portugal according to which such rights are contractually assigned to the producer. The Society of Portuguese Authors (SPA) is trying to change this practice so that rights are licensed rather than assigned, and successfully took a case to the Supreme Court in this context. The Supreme Court clarified that permission should be obtained from the author for the various types of uses and the author should establish the boundaries of such uses.[290]

Music

Article 2(e) of the Portuguese Copyright Code defines a **musical work** as a 'musical composition, with or without words'. According to Article 16(1) of the Portuguese Copyright Code, where several people are involved in the creation of a work (whether or not musical), 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 form 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).

Performers are defined in an open way, including actors, singers, musicians, ballet dancers and others that perform literary or artistic works in any manner.[291] Article 178 (1) of the Portuguese Copyright Code grants certain **performing rights:** broadcasting, communication to the public, fixation, reproduction and making available. However, 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 public.[292] Where a work, such as musical work, is subject to improvisation by a performer, spontaneously,

[289] Article 22 does follows article 2 (2) of the Rental and Lending Rights Directive, which states that (i) the principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors and (ii) Member States may provide for others to be considered as its co-authors. It seems to establish a closed list of beneficiaries.
[290] Supreme Court, Case 593/08.4TVLSB.L1S1, 24th February 2011.
[291] Article 176 of the Portuguese Copyright Code.
[292] Article 178 (2) of the Portuguese Copyright Code.

without preparation (example, free-form jazz improvisations), but with authorisation of the relevant authors, the resulting adaptation is qualified as a joint work.[293]

In Portugal there aro no **presumptions of right transfer** for musical works.

Phonograms

In line with Article 3 (b) of the Rome Convention, Article 176 (4) of the Portoguese Copyright Code states that a **phonogram** is a fixation of sounds of a performance or of other sounds. A phonogram may be a recording of a musical work specifically created for a film.

Article 3 of Law 32/2015, 24th April added Article 26-A (2) (d) which covers works and phonograms that have never been published or broadcast but have been made publicly accessible by the relevant entities with the consent of the copyright owners, provided that it is reasonable to assume that they would not oppose the public interest uses carried out by such entities. There is no **cut-off date.**

There is a specific rule concerning the **right ownership of phonograms.** Article 176 (3) of the Portuguese Copyright Code defines a producer of phonograms as the person or legal entity who first fixes the sounds of a performance or other sounds. Phonogram producers are vested with certain related rights on phonograms (reproduction, distribution, communication to the public, making available) by Article 184 of the Portuguese Copyright Code

There is no specific **presumption of right transfer** to phonogram producers. As to commissioned works and works made in the course of employment, in the absence of a specific provision,[294] a general rule can be found in Article 14 (1) of the Portuguese Copyright Code. Article 14 (1) of the Portuguese Copyright Code gives prevalence to contract, stating that where a work is commissioned or made in the course of employment, copyright ownership is dictated by the relevant agreement. In the absence of a contract, Article 14 (2) of the Portuguese Copyright Code, presumes that copyright ownership vests on the creator. This is a *iuris et de iure* presumption, that is, conclusive or irrebuttable. Article 14 (3) of the Portuguese Copyright Code adds that such presumption does not apply where the name of the creator does not appear on the work in the usual manner, in which case one has to presume that copyright vests on the commissioner or employer. However, given that Article 30 of the Portuguese Copyright Code grants the author a non-waivable right to reveal their identity at any point in time, one has to conclude that the presumption contained in Article 14 (3) of the Portuguese Copyright Code is rebuttable.

Big music labels produce phonograms in accordance to standard contracts and report back on sales to the Society of Portoguese Authors (SPA) every 6 months. A **market practice** in Portugal dictates that big labels are not assigned more than 50% of execution rights but may get far more in the context of mechanical rights. Small labels are licensed on a case by case basis and have to pay in advance for phonogram production.

[293] Article 16 (2) of the Portuguese Copyright Code.

[294] Such as Article 174 regarding reporters or Article 165 (2) in connection to photographic works commissioned or made in the course of employment.

Instead, it is it not a common market practice in Portugal that the author of a novel assigns their copyright to a publisher which then further licenses its use to make the **audio-book**.

Additional Information Useful for the Diligent Search

As part of the additional information, in terms of a **register for anonymous and/or pseudonymous works**, SPA maintains a register for such works but it only pertains to its members. Very few of its members have ever requested anonymity. The National Library has its own register of authors, where connections can be made, where available, to pseudonyms.

Whereas there is no database for works that had been subject to **authorship or rights ownership disputes**, SPA maintains a register of works that were subject to authorship or right ownership disputes and of changes in their status, where applicable. Where there is a dispute SPA suspends the attribution of royalties until the issue is resolved. When both parties are SPA members, SPA tries to settle the dispute through mediation.

In regards of the **register for companies**, such records are kept by *Registo Comercial* which is run by *Instituto dos Registos e do Notariado*.[295] This is a public-sector entity, endowed with administrative autonomy, which executes and supervises compliance with state policy regarding registration and notary services.[296] It also contains information on **company mergers or bankruptcy arrangements**.

As for a **register on the transfer of copyrights**, *Inspecção-Geral das Actividades Culturais* keeps a register of (i) titles of works, (ii) facts leading to the creation, transfer, encumbrance, sale, alteration or extinction of copyright, (iii) literary or artistic names, (iv) titles of unpublished works, (v) encumbrances on copyrights, (vi) copyright-related mandates, (vii) lawsuits aiming to create, acknowledge, modify or terminate a copyright, (viii) lawsuits aiming to change, annul or cancel a copyright-related record, (ix) court decisions pertaining to (vii) and (viii). *Inspecção-Geral das Actividades Culturais* takes the view that copyright owners must create, submit and amend, when required, the above referred records.[297] In practice, most copyright owners tend to not comply with the above requirement. SPA maintains a register on the transfer of copyrights as regards its authors.

There is not a general **register on the on the buying and selling of back-catalogues** of copyright protected works and/or neighbouring rights in Portugal. However, SPA maintains a register on the buying and selling of back-catalogues in connection to its members.

As for the **public service broadcasters** that exist in Portugal, public broadcasting is based on a concession system, rather than a register or licensing one. At the moment, there is one single entity *(Radio e Televisão de Portugal SA)* in charge of both TV and radio public broadcasting.[298] In terms of collective management, SPA enters a contract with broadcasters every year which covers their full repertoire in connection to musical works. Literary, dramatic and cinematographic works are not,

[295] *See* http://www.irn.mj.pt/sections/irn/a_registral/registo-comercial/index/ (last visited, 15 June 2017).
[296] Data may be accessed on PORDATA at: http://www.pordata.pt/Subtema/Portugal/Empresas- 374 (last visited, 15 June 2017).
[297] Information may be found at https://www.igac.pt/formularios (last visited, 15 June 2017).
[298] The relevant legislation may be found at http://www.gmcs.pt/pt/servico-publico (last visited, 15 June 2017).

inter alia, covered by such contract. The amount to be paid by broadcasters is set yearly and may thus vary. Payment occurs every 3 months. Note that public service broadcasters are not given better treatment than commercial ones.

Portugal has no **other regulatory scheme** in place dealing with other relevant subject matter of digitization.

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ROMANIA

Implementation of the Orphan Works Directive: Background

In Romania, the OWD was implemented by amending national copyright law through Law No 210 adopted on July 21 2015 (hereinafter, the "Implementing Law"),[299] which added Articles 1122-1128 to the Law No. 8/1996 on copyright and neighbouring rights (hereinafter, the "Copyright Law").

Subjective and Objective Scope

According to Article 1123 Paragraph 1 of the Copyright Law as supplemented by the Implementing Law, the organizations that can make use of the orphan works exception are: publicly available libraries, educational establishments and museums, as well as archives, film or audio heritage institutions and public-service broadcasting organizations. This means that the **subjective scope** of application of the Implementing Law and the subjective scope of application of the OWD are the same.

Concerning the **objective scope** of the application of the orphan works exception, according to Article 1122 Paragraph 2 of the Copyright Law as supplemented by the Implementing Law: "[t]he orphan work status is attributed to the following works and phonograms which are protected by copyright and which have been published for the first time in a Member State or, in the absence of publication, first broadcast in a Member State:

1. 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;
2. cinematographic or audio visual 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;
3. cinematographic or audio-visual works and phonograms produced by public-service broadcasting organisations up to December 31st 2002 and contained in their archives;
4. works and phonograms mentioned under paragraphs 1. – 3. above, which have never been published or broadcast, but which have been made publicly accessible by the organizations referred to in Article 1123 Paragraph 1 with the consent of the right holders, provided that it is reasonable to assume that the right holders would not oppose the uses referred to in Article 1123 Paragraph 1;
5. works and other protected subject-matter that are embedded or incorporated in, or constitute and integral part of, the works or phonograms referred to in paragraphs 1.-4. above.

[299] The Implementing Law is available, in Romanian, athttp://www.orda.ro/fisiere/2015/Legislatie/Lege_8_1996_ultima_modificare_9%20nov_2015.pdf (last visited, 15 June 2017). There is no official English translation of the Implementing Law.

As such, the objective scope of application of the Implementing Law and the objective scope of application of the OWD are the same.

Possible Use of Orphan Works

The **permitted uses** recognised by Article 1123 of the Copyright Law do not differ from those contained in Article 6 of the OWD. According to Article 1123 of the Copyright Law, as amended by the Implementing Law, the use of the orphan works or phonograms by publicly accessible libraries, educational establishments or museums, as well as by archives, film or audio heritage institutions and public-service broadcasting organizations, to achieve aims related to their public interest missions, is permitted:

- to make the orphan work or phonogram available to the public;
- to reproduce, for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration.

These organisations use an orphan work 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 revenues 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. The law 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. The right holders that put an end to the orphan work status of their works or phonograms are entitled to a fair compensation for the use that has been made by the organizations of these works or phonograms. The fair compensation is determined by taking into account the number of copies/ replicas of the respective work or phonogram.

In terms of ruling on **cross-border search**, under Article 1124 Paragraph 3 of the Copyright Law, as supplemented by the Implementing Law, if 'there are any clues that relevant information regarding the right holders may be found in other countries, the available sources from those countries shall also be verified.' This provision does not differ from Article 3 Paragraph 4 of the OWD.

As for **diligent search report requirements** established by the implementing legislation of Romania, Article 1124 of the Copyright Law, as supplemented by the Implementing Law, states that for establishing the orphan work status, the beneficiaries make sure that for each individual work or phonogram a good faith and diligent search is undertaken, by searching the appropriate sources for each works or phonograms categories. The diligent search is mandatorily made prior to the use of the work or phonogram. Furthermore, pursuant to Article 1124 Paragraph 10 of the Copyright Law as supplemented by the Implementing Law, the organisations maintain records of their diligent searches and provide to ORDA *(Oficiul Român pentru Drepturile de Autor,* the Romanian Copyright Office):

1. 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;

2. the use that the organisations make of orphan works;
3. any change of the orphan work status;
4. the relevant contact information of the organisation concerned.

Article 1124 Paragraph 10 of the Copyright Law, thus, does not differ from Article 3(5) of the OWD.

There are no **other requirements** beyond those of a diligent search, its documentation and the communication of this information to the supervisory authority.

Romania has not adopted **soft-law instruments** complementing the framework for diligent search, nor **other regulatory schemes** dealing with orphan works.

How to Carry Out a Diligent Search: General and Specific Requirements

List of Sources

The Implementing Law provides a **list of sources** similar to the list provided in the Annex to the OWD. However, the General Director of ORDA has adopted Decision No. 21/2016 regarding the appropriate sources to be consulted for each category of works or phonograms for determining the orphan work status. This decision provides the following: that 'in order to determine the orphan work or phonogram status, the beneficiary institutions have the obligation to undertake a diligent search in good faith, by consulting the appropriate sources for each category of work or phonogram, in order to obtain information leading to the identification and localization of the author or authors'. The cultural institutions are deemed to be sufficiently diligent if they search all the sources in the **exhaustive** list. Nevertheless, the above-mentioned decision does not exclude the possibility of searching other sources as well.

Romania foresees the establishment of a **national database** but is not operational yet.

Pursuant to Article 1 Paragraph 1 of the Law No 111/1995 on the **legal deposit** of documents, 'the legal deposit represents the intangible fund of the national movable cultural heritage.' These documents are subject to a legal requirement for transmission, in case they are produced in Romania, or, if those documents are produced in third countries by Romanian legal persons or done for such legal persons, irrespective of the fact that such documents are to be broadcast in Romania or abroad. The legal deposit does not receive specific references in the implementation of the OWD save for the ones concerning the sources to be consulted during the diligent search. The Romanian institution in charge of the legal deposit is the National Library of Romania.[300]

[300] The National Library Catalogue is available at: http://alephnew.bibnat.ro:8991/F (last visited, 15 June 2017).

Presumptions

In Romania, **presumptions of authorship** are contained in Article 4 Paragraph 1 of the Copyright Law, which states that: '[u]ntil proven otherwise, the person under whose name the work was first disclosed to the public shall be presumed to be the author thereof.' As concerns the presumption of right ownership, Article 148 Paragraph 5 of the Copyright Law states that: '[u]ntil proven otherwise, it shall be presumed that the exclusive rights signaled, according to the usages, by the symbols mentioned in paragraph (3)[301] and (4)[302] or by the notices provided for in Article 104[303] and Article 1062[304], exist and belong to the persons who have used them.'

As to **presumptions of right transfer,** the Romanian Copyright Law provides the following:

1. '[i]n the case of transfer of the right of reproduction of a work, it shall be presumed that the right of distribution of copies of that work has also been assigned, with the exception of the right of importation, unless otherwise provided by contract';[305]
2. '[t]hrough the contracts concluded between the authors of the audio visual work and the producer, unless otherwise provided, it shall be presumed that they assign to the producer, with the exception of the authors of the specially composed music, the exclusive rights with respect to the use of the work as a whole, provided for in Article 13[306], as well as the right to authorize dubbing and subtitling, in exchange of an equitable remuneration';[307]

[301] 'The authors and other owners of rights or owners of authors' exclusive rights referred to in this law shall have the right to register on the originals or authorized copies of the works a notice of reserved exploitation, signaled according to the usages, rights consisting of a symbol represented by the letter C, in the middle of a circle, accompanied by their name and the place and year of first publication.'

[302] 'Producers of sound recordings, performers and other owners of the exclusive rights of producers or performers referred to in this law shall have the right to register on the originals or authorized copies of the sound or audio-visual recordings or on the box or sleeve containing them, a notice of reserved exploitation, signalled according to the usages, rights consisting of a symbol represented by the letter P, in the middle of a circle, accompanied by their name and the place and year of first publication.'

[303] 'In the case of the reproduction and distribution of sound recordings, the producer shall be entitled to specify on their physical medium including on covers, boxes and other physical packaging material, in addition to the mentions on the author and performer, the titles of the works, the year of the first publication, the trademark as well as the name and denomination of the producer.'

[304] 'In the case of the reproduction and distribution of his own audio-visual recordings, the producer shall be entitled to specify on their physical medium including on covers, boxes and other physical packaging material, in addition to the mentions on the author and performer, the titles of the works, the year of the first publication, the trademark as well as the name and denomination of the producer.'

[305] Article 40 of the Romanian Copyright Law.

[306] 'The use of a work gives rise to distinct and exclusive economic rights of the author to authorize or to prohibit: (a) reproduction of the work; (b) distribution of the work; (c) import for trading on the domestic market, of copies of the work made with the author's consent; (d) rental of the work; (e) lending of the work; (f) communication to the public, directly or indirectly, of the work, by any means, including by making the work available to the public, in such a way that members of the public may access them from a place and at a time individually chosen by them; (g) broadcasting of the work; (h) cable retransmission of the work; (i) making of derivative works.'

[307] Article 70 of the Romanian Copyright Law.

3. '[u]nless otherwise agreed, a contract for the use of a computer program shall assume that: (a) the user has been granted the non-exclusive right to use the program; (b) the user may not transfer the right to use the program to another person.[308] Transfer of the right to use a computer program shall not imply transfer also of the copyright in it';
4. '[t]he economic rights in a photographic work created under an individual employment contract or commission contract shall be presumed to belong to the employer or commissioning party for a period of three years, unless otherwise provided in the contract'[309];
5. '[u]nless otherwise provided, the performer who has taken part in the making of an audiovisual work, of an audiovisual recording or of a sound recording, shall be presumed to have assigned to the producer thereof, for an equitable remuneration, the exclusive right to use his performance thus fixed, by reproduction, distribution, import, rental and lending.'[310]

The presumption of authorship may have a **value in the context of the diligent search** in case the person under whose name the work was first made available to the public is known. In such case, until the contrary is proven, the author of the work is deemed to be known. These presumptions are deemed to be legal and relative, meaning that the contrary proof is allowed but such proof must be made in court. As such, both the proof of the fact supporting the presumption and the contrary proof must be made in accordance with Civil Procedure Code requirements on proving one's claims in court. A search via Google would not suffice as proof for inverting the legal presumption in court.

Audio-Visual Works

The Implementing Law does not stipulate any **cut-off date** for audio-visual works, regardless of the fact that OWD allows such possibility for each Member State.

Audio-visual works have **specific rules concerning the authorship and right ownership** in Romania. Firstly, according to Article 66 of the Copyright Law, [t]he authors of an audio-visual 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 audio-visual work and the author of the graphic material of animated works or animated sequences, where these represent a substantial part of the work. Still, in the contract between the producer and the director or maker of the audio-visual work, the parties may agree to include other creators who have contributed substantially to the creation of the work as authors. Moreover, under Article 94 of the Copyright Law, '[r]ecognition and protection as owners of neighbouring rights shall be accorded to performers in respect of their own performances, to producers of sound recordings in respect of their own recordings and to radio and television broadcasting organizations in respect of their own broadcasts.'

[308] Transfer of the right to use a computer program shall not imply transfer also of the copyright in it. Article 75 of the Romanian Copyright Law.
[309] Article 86 Paragraph 2 of the Romanian Copyright Law.
[310] Article 101 of the Romanian Copyright Law.

In addition, pursuant to Article 70 of the Copyright Law, there are also general **presumptions on the transfer of right ownership** in case of audio-visual works. Firstly, [b]y the contracts concluded between the authors of the audio visual work and the producer, it shall be presumed that they assign to the producer, with the exception of the authors of the specially composed music, the exclusive rights with respect to the use of the work as a whole, as well as the right to authorize dubbing and subtitling, against an equitable remuneration. Moreover, the authors of the audio visual work as well as other authors of certain contributions to it shall retain all rights in the separate utilization of their own contributions, as well as the right to authorize and/or to prohibit utilizations other than that specific of the work, in whole or in part, like the use of excerpts from the cinematographic work for advertising, other than for the promotion of the work, subject to conditions of the present law."

Data concerning established **market practices** that assign the economic rights and related rights to film distributors are not available. Yet, national Copyright Law itself establishes a set of rules governing the distribution of copyright works.'[311]

Music

The Copyright Law does not provide an extensive definition of the **musical work.** However, pursuant to Article 7 of the Copyright Law: '[t]he subject matter of copyright shall be original works of intellectual creation in the literary, artistic or scientific field, regardless of their manner of creation, specific form or mode of expression and independently of their merit and purpose, such as (…): (c) musical compositions with or without words.' Hence, under Romanian law, the musical works may or may not include the accompanying words intended to be performed with the music. In case there are several people involved in the creation of a musical work, this work is considered as work of joint authorship under Article 5 Paragraph 1 of the Copyright Law, whereas, pursuant to Article 6 Paragraph 1 of the Copyright Law: '[a] collective work shall be a work in which the personal contributions of the co-authors form a whole, without it being possible, in view of the nature of the work, to ascribe a distinct right to any one of the co-authors in the whole work so created.' Having regard to these two definitions, the Romanian legal literature[312] considers that a musical work comprising both music and lyrics, is deemed to be a joint work. As far as the authors of the joint work are concerned, the copyright in a work of joint authorship shall belong to the co-authors, one of whom may be the main author as provided in this Law". As far as the authors of a collective work are concerned, the copyright in a collective work shall belong to the person, whether natural person or legal entity, on whose initiative and responsibility and under whose name the work was created.

According to the Romanian copyright law, performers are actors, singers, musicians, dancers and other persons who present, sing, dance, recite, declaim, act, interpret, direct, conduct or in any other way execute a literary or artistic work, a performance of any kind, including performances of

[311] Article 14^1 of the Copyright Law.

[312] For this purpose, 'distribution means the sale or any other manner of transmittal, for a consideration or free of charge, of the original or of copies of a work, as well as their offering to the public. Distribution right is subject to exhaustion upon first sale or with the first transfer of ownership of the original or of the copies of a work, on domestic market, by the right holder or with his consent.

folklore, variety or circus performances or puppet shows. Given the use of the phrase "other persons", the list comprising the holders of the **performing rights** provided in the legal provision is open.

The Romanian Copyright Law does not provide any rule or **presumption of right transfer** to the music producer once the musical work is completed, nor that copyrights/related rights are automatically transferred to music producers when entering into an agreement with them.

Phonograms

The term **phonogram** is defined 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 audio visual work.'[313] It is interesting to note that it is considered to be an audio-video recording or a videogram 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, whichever the method and the base used for this fixation may be.'[314] Given this definition of the audio visual work, the soundtrack accompanying a movie will be considered to be part of the audio visual work.

The Implementing Law does not stipulate any **cut-off date** for phonograms to be covered by the orphan work exception, regardless of the fact that the OWD allows such possibility for each member state.

Article 103 Paragraph 2 of the Copyright Law introduces a **specific rule concerning the right ownership of phonograms.** Specifically, the producer of a sound recording that has the initiative and undertakes the responsibility for the organisation and financing of the first fixation of the sounds, is presumed to be vested by the default of the related rights on the phonogram.[315]

Even without concrete evidence, Romania appears to have **market practices** that contractually assigns the above rights to music labels. Conversely, pursuant to the information provided by the Association of Romanian Editors, the market practice that assign the rights of authors of a book to publishers to an extent that includes the making of an **audio-book** is not commonly met in Romania due to the fact that the audio book production in Romania is very low.

[313] Article 103 Paragraph 1 of the Copyright Law.
[314] Article 106 Paragraph 1 of the Copyright Law.
[315] Under Article 92 Paragraph (1) the producer of sound recordings shall have the exclusive economic right to authorize and prohibit: a) the reproduction by any means and in any form of his own sound recordings; b) the distribution of his own sound recordings; c) the rental of his own sound recordings; d) the lending of his own sound recordings; e) the import for trading on the domestic market, of legally made copies of the work of his own sound recordings. f) the broadcasting and communication to the public of his own sound recordings, except those published for commercial purpose, case in which he is entitled to an equitable remuneration; g) the making available to the public of his own sound recordings in such a way that members of the public may access them from a place and at a time individually chosen by them, h) the cable retransmission of his own sound recordings.

Additional Information Useful for the Diligent Search

As part of the additional information, absent a **register for anonymous and/or pseudonymous works**, ORDA operates, pursuant to Article 107 Paragraph 3 and Article 148 Paragraph 1 of the Copyright Law, the national registry for private copies and, respectively, the national registry for works.

Furthermore, pursuant to Article 3 of the Government Ordinance No. 25/ January 26th 2006 on the strengthening of the administrative powers of the Romanian Copyright Office, ORDA also maintains and operates the national registry for phonograms, the national registry for computer programs, the national registry for videograms, and the national registry for multipliers. However, there is not a database for works that had been subject to **authorship or rights ownership disputes**, nor a **register on the transfer of copyrights,** nor a **register on the buying and selling of back-catalogues** of copyright protected works and/or neighbouring rights.

The **register for companies** is managed by the Trade Registry National Office, which is a public institution, having legal personality, subordinated to the Romanian Ministry of Justice.[316] The Trade Registry National Office uses a portal where various information on the legal status of the Romanian companies may be accessed online.[317] Information on company **mergers or bankruptcy arrangements** is also available on the online portal operated by the Trade Register National Office.

The public institution that manages **public service broadcasters** in Romania is the National Audio Visual Council (CNA).[318] Pursuant to the latest statistics available, as of May 26th 2016, the number of public broadcasters (i.e. companies licensed for TV and radio broadcasting) rises up to 288 TV broadcasters and 179 radio broadcasters.[319]

Other regulatory scheme are put in place to deal with other relevant subject matter of digitization in Romania. Firstly, it appears the Government Decision no. 1676 of December 10th 2008, approving the national program for digitizing national cultural resources and creating the Digital Library of Romania. Pursuant to the information provided by the representatives of the National Library of Romania, the national program for digitizing national cultural resources and creating the Digital Library of Romania has not been implemented due to lack of funds. However, the representatives of the National Library of Romania managed to create the National Digital Library comprising works that are no longer subject to copyright. Moreover, the Government Decision no. 593 of June 8th 2011 on the organization and functioning of the National Institute for Heritage. The duties of the Institute include acting as a national aggregator in the implementation of the National Program for digitizing national cultural resources and creating the Digital Library of Romania – as part of the European digital library called Europeana, maintaining the interface between content providers – namely public institutions or other organizations holding cultural resources and technical services managing the program at European level.

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[316] *See* http://www.onrc.ro/index.php/ro (last visited, 15 June 2017).
[317] *See* https://portal.onrc.ro/ (last visited, 15 June 2017).
[318] The official website of CNA is available at: http://www.cna.ro/ (last visited, 15 June 2017).
[319] *See* http://www.cna.ro/Situa-ii-privind-licen-ele,6771.html (last visited, 15 June 2017).

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SLOVAKIA

Implementation of the Orphan Works Directive: Background

In Slovakia, the OWD was implemented by amending the national copyright law through the Act Nr. 185/2015 (hereinafter, the Copyright Act). The law was enacted on 1st July 2015 and published on 5th August 2015.[320].

Subjective and Objective Scope

Concerning the **subjective scope** of the application of the orphan works exception, the organizations that are beneficiaries of the exception are enumerated in a closed list in Section 51(1) of the Copyright Act and are 'libraries, archives, museums, schools or by statutorily defined depositary'. The provision contains a footnote that links to the definition of "statutory depositary" which is defined in Section 35 of Act. 40/2015 Coll (Audiovisual Act). The referred provision defines "statutory depositary" either public-service broadcasters (this includes the only public-service broadcaster in Slovakia: RTVS) and the Slovak Film Institute. Other institutions (i.e. libraries, archives, museums, schools) are not specified more closely in the provision, leaving doubts as to the interpretation of the beneficiaries that do not coincide with those considered under Article 1(1) of the OWD. The subjective scope of the orphan works legislation is thus definitely less clear and less open than the provision in Article 1(1) of the Directive. While the Directive includes 'publicly accessible libraries, educational establishments and museums, as well [by] archives, film or audio heritage institutions and public-service organisations', the Slovak legislation limits the application only to institutions, and in case of film/audio heritage institutions, this is limited to only one institution, the Slovak Film Institute.

In regards of the **objective scope** of the application of the orphan works exception, the objective scope of Slovak legislation is specified in Section 10 of the Copyright Act. The Section states that "literary works expressed in written form, particularly books, magazines, newspapers, musical works expressed in written form and audiovisual works, which are deposited with beneficiary organizations falls under the category of orphan works. In comparison with the Article 1(2) of the Directive, the Slovak provision mentions 'musical works in written form', while these are not explicitly stated in the Directive. With regards to works embedded or incorporated into orphan works, these also are to be regarded as orphan works according to Section 11 of the Implementing Act, in line with Article 1(4) of the OWD. Phonograms are also included and can be used in compliance with the orphan works provisions. Although phonograms are not mentioned explicitly in the Section 10, a later provision (Section 115) states that Section 10 also applies to phonogram, in line with the OWD.

[320] Zákon č. 185/2015 Zb. z 1.júla 2015, Autorskýzákon: *see* https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2015/185/ (No English translation, last visited, 15 June 2017).

Possible Use of Orphan Works

In Slovakia, the **permitted uses** for orphan works are incorporated as an exception in Section 51 of the Copyright Act. Permitted uses include making available and reproduction for the purposes of digitisation, indexing, cataloguing, preservation, restoration or making available. These uses correspond to the permitted uses enumerated in Article 6 of the OWD.

In terms of ruling on **cross-border search**, the provision of Article 3(4) of the Directive has been implemented by introducing Section 10(2)(d) of the Copyright Act. However, the Slovak implementation appears to be different from the Directive in a significant manner. While the OWD requires the organization to consult sources of information available in other countries, the national implementation broadens the consequences of evidence suggesting that relevant information on rightholders is to be found in other countries. Under the Slovak provision, if such evidence exists, the diligent search is supposed to be carried in countries where such information are to be found. In other terms, while the OWD only requires consulting source from other countries when there are clues that relevant information regarding the right-holders may be found in other countries, the Slovak implementation requires carrying out diligent search in the other countries. This is another point where the national implementation differs from the OWD.

The Slovak **diligent search report requirements** are enumerated in Section 51(5) of the Copyright Act. In particular, beneficiary organizations are obliged to provide to the Slovak National Library, as the competent national authority:

1. the results of the diligent searches which have led to the conclusion that a work or a phonogram is considered an orphan work;
2. the information about how the orphan works has been used;
3. any information concerning the status of used orphan works;
4. organization's contact information.

Whereas there are slight textual differences between the wording in this Section and Article 3(5) of the OWD, these are however negligible and meanings of both provisions are comparable. The national provision therefore does not differ from the Article 3(5) of the OWD.

There are no **other requirements** beyond those of a diligent search, its documentation and the communication of this information to the supervisory authority.

Slovakia has not adopted **soft-law instruments** complementing the framework for diligent search, while it does have **other regulatory schemes** since the Slovak Copyright Act contains an extended collective licensing mechanism. According to Section 80 of the Copyright Act, certain collective management organisations are permitted to offer licenses to use works (e.g. the organizations are permitted to issue licenses for jukeboxes, live performance of literary works, broadcasting, lending and renting, making available and retransmission) even if the right-holder is not their member or is not contractually represented by them. In theory, this scheme does not exclude orphan works from its application. However, it is not certain how the use of Section 80 to license orphan works would work in practice.

How to Carry Out a Diligent Search: General and Specific Requirements

List of Sources

In Slovakia, the **list of sources** has been included as an annex (Appendix Nr. 1) to the Copyright Act. The Appendix is titled "List of information source for diligent source" and it is supposed to represent a minimal range of source which should be consulted. Actually, the list is an identical copy of the Annex inserted within the OWD. This means that the implementing legislation contains only categories of sources that should be consulted, but particular sources are not listed. This leaves doubts with regards to range of particular sources which should be consulted for a specific diligent search.

Quite obviously, as no list of specific sources exists, the list of categories of sources is intended to be **illustrative.** Not only, the explanatory note to the Copyright Act affirms that the list 'is only a minimal enumeration of mandatory sources. If a source refuses to provide information or requires a reimbursement of reasonable costs in amount which the organization is not able to provide, this is not considered a failure to adhere to the conditions of diligent search, if the organization acts so in a good faith'. Likewise, the explanation note to the Appendix also states that the list is only "minimal". Therefore, if needed, sources (or, more precisely, categories of sources) beyond those stated in the Appendix should be consulted. The list of sources is intended to be illustrative and the diligent search procedure in Slovakia puts more emphasis on the good faith aspect.[321]

Slovakia does not provide for establishment of a **national database** for orphan works. The information communicated to the Slovak National Library must be promptly reported by the supervisory authority to EUIPO in order to be published in the European Database.

Legal deposit requirements are stated in Act Nr. 212/1997 Coll, Act on mandatory deposit of copies of periodical publications, non-periodical publications[322] and audio-visual works.[323] Other than being mentioned as one of the sources for diligent search, the legal deposit does not receive any other specific reference within the orphan work legislation.

Presumptions

In Slovakia, a **presumption of authorship** is declared in Section 13(2) of the Copyright Act. The provision states that any 'natural person, whose name or surname (or both) are stated on the work

[321] In general, the recommendation of the Slovak National Library is to consult more relevant and important sources first (e.g. legal deposit register of Slovak National Library) and then other sources according to the specifics of a particular search.

[322] With regards to literary works, both periodical and non-periodical publications are subject to mandatory deposit of a copy. Depending on the type of publication, these have to be deposited with Slovak National Library and number of other major Slovak libraries.

[323] Copies of audio-visual works have to deposited with Slovak National Library, University Library Bratislava, Slovak Film Institute and Slovak Library of Matej Hrebenda for Visually Impaired in Levoča.

or in relation to work in a way in which authorship is usually indicated, is presumed to be the author of the work, unless such presumption is rebutted. The same applies also to situations where the authorship is indicated by pseudonym, if there are no doubts about the identity of the author'. The presumption therefore benefits natural persons – either identified by their real name or pseudonym – which are inscribed somewhere on the work (e.g. book cover) or in a relation to the work in a way which makes it clear that the inscription is meant to identify the author.

The presumption of authorship can have **value in the context of diligent search** as it increases the legal certainty of the organizations exercising the diligent search, because they are protected in case the name stated on the work / in relation to the work would not correspond to the name of the author. Looking at Slovak law, it is hard to make a generalisation about general searches and rebutability of the presumptions. The Copyright Act clearly states the required level needed to rebut the presumption is 'unless the opposite [of the presumption] can be demonstrated'. This means that the possibility of rebutting the presumption via a general internet search cannot be entirely excluded, however it is debatable how much weight can Google search have in rebutting the presumption. At the end, this should be considered on a case-by-case basis.

Audio-Visual Works

The Slovak implementation of the Directive does not contain a **cut-off date** for the audiovisual works. Therefore, it seems this part of the Article 1(2)(c) has not been implemented properly into Slovak law meaning that the orphan works regime could apply also to post-2002 audiovisual works.

Beside general authorship presumptions, Sections 83(1) and (2) of the Copyright Act introduces **specific rules concerning authorship and right ownership** of audiovisual work**.** The first presumption states that if a work is listed in the International Film Register,[324] the author is presumed to be the person recorded in the register as an author, unless such presumption is rebutted.[325] The second presumption, instead, states that authors of audiovisual work are considered to be the director, author of the script, author of dialogues and author of original score (if the music was created specifically for the audiovisual work) and any other person, under the condition that this person has contributed to the creation of the work with its intellectual creative activity. The provision does not state that this presumption can be refuted, therefore it should be considered to be an irrebuttable presumption.[326]

In addition, there is a rebuttable **presumption on the transfer of right ownership** from film contributors to the producer in the case of cinematographic works. Pursuant to Section 86(1) of the Copyright Act, the economic rights of authors of audiovisual works are to be executed by the producer of the original of the audiovisual work only if two conditions are satisfied. First, the producer has obtained a written confirmation to produce the original of the work from the authors, and second, the producer and the authors have agreed upon a remuneration for the creation of the

[324] The Copyright Act here refers to the Treaty on the International Registration of Audiovisual Works.
[325] Section 83(1) of the Copyright Act. The presumption does not apply, if the record in the register is contrary to the Section 83(2).
[326] Section 83(2) of the Copyright Act.

audiovisual work and remuneration or the method of stipulating the amount of remuneration for each particular use of the audiovisual work. If the presumption is valid, the producer is considered to have exclusive, unlimited license during the whole duration of the copyright to use the audiovisual work or its parts in original version, dubbed version or with subtitles. This license also includes possibility to sub-license or to assign the license to a third party.

There is not a proper **market practice** that contractually assigns the economic rights and related rights to film distributors. In most cases, film distributor will be the entity actually exploiting some rights to a given film, but at the same time the distributor might not hold all the economic rights, only those relevant to his activity. This issue should be assessed on a case-by-case basis.

Music

There is no legal definition of **musical work** in the Slovakian Copyright Act. According to the leading Slovak copyright scholarship, a musical work with accompanying works should be considered a collective work, i.e. the music and the text are two separate works which are intended to be used together. As there is no specific presumption with regards to authorship, the general rule applies here.[327]

As for **performing rights,** the Copyright Act defines performer as 'a natural person, who personally performs an artistic performance by signing, acting, interpreting, reading or otherwise performing an artistic work or traditional folk work, mainly singer, musician, conductor, actor, dancer or artist.'[328] From the wording of the provision it is clear this is an open list not limited to listed categories of artists and in general any artist performing a work (even folklore work out of copyright) is endowed with performing rights.

While there is no **presumption of right transfer,** there is a presumption about management of rights. Section 97(4) states that, if there is no explicit agreement among performers of collectively created performance (e.g. performances of orchestra, chorus, dance group etc.), the Copyright Act presumes there is a joint agent acting on behalf of the group and managing performing rights of the whole group, usually orchestra's conductor or the supervisor of the artistic group.

Phonograms

A **phonogram** is defined in as 'recording of sounds perceivable by hearing, regardless of way and medium in which these sounds are recorded.'[329] With regards to audiovisual work, the Copyright Act states that 'recording of sound component of an audiovisual work shall not be considered a phonogram'. As a result, Slovak copyright does not include film soundtracks under 'phonograms'.

[327] Under Section 13 of the Copyright Act, 'author is the natural person who created the work'.
[328] Section 94(2) of the Copyright Act.
[329] Section 107(1) of the Copyright Act.

Therefore, film soundtracks should be considered to be protected as a part of audiovisual work, not phonogram.[330]

The Slovak implementation of the Directive does not contain a **cut-off date** for phonograms. Therefore, it seems this part of the Article 1(2)(c) has not been implemented properly into Slovak law meaning that the orphan work regime could apply also to post-2002 phonograms**.**

Although there is no **presumption of right transfer** to phonogram producers, there are **specific rules concerning the right ownership of phonograms** under Slovak copyright law. Phonogram rights are, indeed, initially vested with the producer of phonogram.[331]

In Slovakia, **market practices** assigning producer rights to music labels, or transferring the economic rights of writers to publishers to also embrace the making of **audio-books** are not an uncommon way of dealing with phonogram rights among artists, but this assessment should be done on a case-by-case basis.

Additional Information Useful for the Diligent

As part of the additional information, in Slovakia there are not databases containing copyright information. This means that there is not a **register for anonymous and/or pseudonymous works**, nor a database for works that had been subject to **authorship or rights ownership disputes**, nor a **register on the transfer of copyrights**, nor a **register on the on the buying and selling of back-catalogues** of copyright protected works and/or neighbouring rights.

In regards of the **register for companies**, in Slovakia companies are listed in the Business Register, which is managed by the Ministry of Justice.[332] As there is no single physical facility for the register, it is administered by district courts on the local level and on the highest level it is administered by the Ministry of Justice. It also holds information on **company mergers or bankruptcy arrangements**.

As for **public service broadcasters**, there is only one public broadcaster in Slovakia – RTVS (Radio and Television of Slovakia). TV and radio broadcasting were provided by separate entities (Slovak Television and Slovak Radio) until they merged in 2011 and formed RTVS.[333]

There are **other regulatory schemes** in place to deal with other relevant subject matter of digitization in Slovakia. The Copyright Act contains an out-of-commerce works licensing mechanism.[334] The mechanism is built on the basis of a 'Memorandum of Understanding on Key

[330] Musical score will not be considered a part of the film soundtrack but rather a standalone work, and thus also protected under phonogram protection as a sound recording of musical work.
[331] Producer is defined in Section 107(2) of the Copyright Act as 'person, who initiated or secured the final production of the phonogram'.
[332] It is accessible online to anyone (also in English) at http://www.orsr.sk/Default.asp?lan=en (last visited, 15 June 2017).
[333] The legal status of RTVS is governed by a separate legal act – Act Nr. 532/2010 Coll., Radio and Television of Slovakia Act. Before the merger, there were separate acts for Slovak Television and Slovak Radio (Act Nr. 16/2004 Coll., Slovak Television Act and Act Nr. 619/2003 Coll., Slovak Radio Act, respectively).
[334] The details are stated in Section 12, under the title "Commercially unavailable works".

Principles on the Digitisation and Making Available of Out-of-Commerce Work'.[335] Commercially unavailable work is a published literary work, mainly books, magazines and newspapers, that:

1. work's reproduction cannot be lawfully purchased (notwithstanding second-hand buying);
2. the work is deposited in library, archive or museum;
3. the work is recorded in the publicly available registry of commercially unavailable works, which is administered by the Slovak National Library.

The mechanism is also applicable to graphic works or other artistic works, if they are embodied within a literary work. The proposition to include a work in the registry of commercially unavailable works can be filed by anyone. Slovak National Library will then publish the proposition on its website. Slovak National Library will include the work in the registry, if, in the three months following the filling of proposition the Slovak National Library ascertaines that it is not possible to obtain a reproduction of the work by purchase even with reasonable effort and under ordinary conditions; and the author did not object (in a written form) to listing the work in the registry. The author is entitled to request the withdrawal of the work from the registry any time after the work has been listed in the registry. It worth noting that the requirement to ascertain that the work cannot be lawfully purchased resembles the diligent search. However, unlike the diligent search, there is no specification of how to proceed in ascertaining the unavailability of the work, which therefore mostly depend on the practice of the Slovak National Library.[336]

Acknowledgments

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[335] Available at: http://ec.europa.eu/internal_market/copyright/out-of-commerce/index_en.htm

[336] After the work is listed in the registry, it can be subjected to the Extended Collective Licensing (ECL) scheme (regulated by Section 79 and 80). Under Section 80(b), which means that the CollectiveManagement Organization (CMO) entitled to issue ECL licenses can provide a license to use commercially unavailable work in following ways – reproduction, making available or distribution.

SPAIN

Implementation of the Orphan Works Directive: Background

In Spain, the OWD was implemented by amending the national copyright Law (*Texto Refundido de la Ley de propiedad intellectual* – hereinafter, TRPLI). Through Act 21/2014 of November 4, later amended by the Royal Decree 224/2016 of May 27 (hereafeter "Implementing Legislation"), the original text of TRPLI was amended by the introduction of Article 37 bis, Additional provision n. 6 and Transitory Provision n. 21(2).[337]

Subjective and Objective Scope

In regards of the **subjective scope** of the application of the orphan works exception, Article 37bis of the TRPLI refers to 'publicly accessible educational establishments, museums, libraries and newspaper libraries ("hemerotecas"), as well as public service broadcasting institutions, archives, record libraries and film libraries'. The variation with the OWD is minimal (e.g., newspaper libraries) and can be explained to keep some coherence with the organisations which benefit from the limitations under Article37 TRLPI – where "hemerotecas" are expressly listed. In any case, to the extent that they can be considered "libraries" in the sense of the OWD, meaning that such newspaper libraries are publicly accessible, their formal inclusion will hardly have any practical difference.

Conversely, in regards of the **objective scope** of the application of the orphan works exception, there is no difference with the OWD. The scope of Article 1(2) of the OWD has been literally reproduced within the Spanish legal system.

Possible Use of Orphan Works

As for the **permitted uses** for orphan works, Article 37bis 4) TRLPI refers to two permitted uses:

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

In terms of ruling on **cross-border search**, Article 37bis TRLPI does not depart from Article 3(4) of the OWD. The language of the Directive is closely implemented at the end of paragraph 5 of Article 37bis as an obligation.[338] Moreover, Article 4(2) RD224/2016 formally implements Article 3(3) of the OWD, but it adds a couple of specific clauses that may have an effect on cross-border searches:

[337] A fully updated version of the TRLPI is available at http://www.boe.es/buscar/pdf/1996/BOE-A-1996-8930-consolidado.pdf (no English translation available; last visited, 15 June 2017).

[338] Precisely, it states that 'without prejudice to the obligation to consult additional sources available in other countries where there is evidence regarding the existence of relevant information on rightholders.'

1. the diligent search will be carried out in the territory of the Member State of the European Union of first publication or, failing publication, of first broadcast, except in the case of cinematographic or audiovisual works whose producer has his headquarters or habitual residence in a Member State, in which case the diligent search should be conducted in the Member State of its headquarters or habitual residence;
2. in the event that such 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;
3. 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 being made.

Among the **diligent search report requirements** established in Spain, the record-keeping of the diligent searches is prescribed in Article 37bis 6) which follows the language of Article 3(5) of the OWD. In accordance with the Directive, the records of orphan works will be kept at three different levels: the EUIPO database, the National Authority and the beneficiary institution itself. In addition, Article 4(7) RD 224/2016 requires that beneficiary institutions, after completing the corresponding diligent search, submit to the the Ministry of Culture, *Subdirección General de la Propiedad Intelectual* (the Spanish National Authority) the following information:

a) Name of the work;

b) Search dates and sources of information consulted;

c) The information provided for in the TRLPI which includes:

1. the results of diligent searches that have been carried out and have led to the conclusion that a work or a phonogram must be considered an orphan work;
2. the use that the beneficiary entity will make of the orphan works, in accordance with what has been provided for in the TRLPI;
3. any change in the orphan status of the works and phonograms used by them;
4. the relevant contact information of the beneficiary entity.

The Spanish legislation has inserted **another requirement** beyond those stricly inherent to the diligent search. In particular, the beneficiary entities must keep records of all diligent searches conducted. RD224/2016 establishes that the records kept by the institutions 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.[339]

No **soft-law instruments** has been being developed in Spain to complement the framework for diligent search. Nonetheless, the Spanish legislator directly deferred to the government to establish regulations regarding the permitted uses of orphan works. Regulations were passed through the *Real Decreto 224/2016, de 27 de mayo, por el que se desarrolla el régimen jurídico de las obras huérfanas.* RD224/2016 regulates the procedure and sources to carry out the diligent search by Spanish institutions before declaring a work as "orphan", the procedure and competent authority

[339] Article 5 RD224/2016.

to terminate that status, as well as to set the equitable remuneration upon termination of the permitted use.

No licensing schemes are in place for the use of orphan works. However, RD 224/2016 establishes **other regulatory schemes,** beyond the terms in the Directive:

1. As allowed by Article 6(5) of the Directive, Article 7 RD 224/2016 specifies that the equitable compensation will be requested from the beneficiary institution by the copyright holders and that the amount will be calculated based on the following criteria: (a) the use effectively done of the orphan work, (b) the non-commercial nature of the use done by the institution in order to achieve the goals related to its public interest mission, (c) and the eventual prejudice that it may have caused to the copyright owners.
2. When defining the scope of uses permitted, Article 37bis(4) TRLPI requires 'that such acts are carried out without a lucrative intent'. The same requirement is included in Article 3(2) RD224/2016. Despite being implicit in the public interest mission carried out by the beneficiary institutions, this requirement is not expressly set by the Directive. In addition, Art.3(3) RD224/2016 adds 'income may be earned for those uses, for the sole purpose of covering the costs of the activities leading to the digitization and making available of orphan works by the beneficiary entities, provided that such costs are not covered entirely by another institution […]. Also, the reproduction or the obtaining of copies of orphan works may be subject to payment of a fee determined for each case'.[340]
3. Article 5 RD224/2016 regulates the procedure to put an end to the orphan work status. This provision offers a double possibility: the rightholder may apply to either the National Authority (Ministry of Culture) or to the beneficiary institution to put an end to that status, as far as her/his rights are concerned, by providing "sufficient evidence" of his or her ownership status. This is apparently offered as alternative, because Article 5(1) RD224/2016 adds that 'if the application is submitted to the National Authority, this one must notify the end of the orphan status to the beneficiary institution.' In short, either one is competent to receive the request and put an end to the orphan status. No appeal procedure is in place.[341]

[340] This means that the costs of digitization may be covered by a private agreement or in some other manner (that generates income) and that the beneficiary entities may charge the users for the copying of an orphan work. Taking into account that the 'certain permitted uses' allowed under the Directive are only those conducted by the beneficiary institutions, not by third parties (such as producers, publishers or others) the fee charged for 'reproduction or the obtaining of copies' makes very little sense because these copies should be only allowed under other limitations (such as private copying, studying or research purposes). It seems that the Spanish government had in mind the practice usually being followed by libraries and archives of charging a fee to obtain a high-quality file of the digitized work in their collections; but this has (or should have) nothing to do with copyright, let alone with the 'permitted uses of orphan works' and may lead to confusion as to third party uses being "authorized" by the beneficiary institution (a possibility that was expressly discarded during the parliamentary debate of the proposal of Directive).

[341] If the request is done to the National Authority, its resolution may be appealed according to general administrative rules; It the request is submitted to the beneficiary institution, it would have been wise to provide for a possibility of appeal against its resolution in front of the National Authority, so as to avoid any uncertainty (which competent jurisdiction: civil or administrative law) and secure equal access to means of redress regardless of whether the beneficiary institution is public-owned or a private entity.

4. Article 1(2) RD225/2016 expressly acknowledges that in addition to the permitted uses under the implementation of the Directive, orphan works may also be used 'as allowed by any of the limitations provided for in Chapter II of Title III of Book I of TRLPI", which includes the whole *corpus* of limitations and exceptions provided for under Spanish law and applicable to both works and other protected subject matter.

How to Carry Out a Diligent Search: General and Specific Requirements

List of Souces

Article 37bis TRLPI does not refer to any **list of sources,** but RD 224/2016 does. Article 4(3) RD 224/2016 requires that the EUIPO database be always consulted first.[342] If this consultation fails to produce any information, the diligent search will then be performed consulting "at least" the sources of information indicated in the Annex, arranged for different kind of works: (1) books, (2) newspapers, journals and periodical publications, (3) works of art and (4) audiovisual works and phonograms. These lists closely follow those in the Annex of Directive 2012/28/EU.[343]

According to Article 4.4 RD 224/2016, the sources listed in the Annex must be consulted "at least"; that is, this is "a minimum" list of sources that must be consulted. In addition, any other sources available in other countries (where there is evidence to suggest that relevant information may be found there) should also be consulted. Article 4.4 remains silent as to an obligation to consult other sources available in Spain. The reference to "at least" makes clear that the list has **illustrative** nature, however, as far as Spanish sources, consulting the listed ones would seem to suffice for a diligent search, unless, of course, there were clear evidence that other sources contain information regarding the work. [344]

Spain is not formally establishing a **national database** for orphan works. However, in addition to registering the relevant information at the EUIPO Orphan works database, the beneficiary institutions must also submit the same information to the Ministry of Culture, which will afterwards "validate" the information registered (by the organisation) with the EUIPO database.[345] Thus, indirectly, it is expected that the Ministry of Culture will somehow record (or keep) all the

[342] In particular, Article 4(3) RD 224/2016 foresees that 'prior to conducting a diligent search, the database of orphan works created and administered by (EUIPO) will be consulted in all cases'.

[343] Notice that, in addition to the Legal Deposit and usual professional sources (depending on the kind of work), such as collective management societies and existing professional databases, all four lists include the Registry of Intellectual Property.

[344] According to Article 4(6) RD 224/2016, the beneficiary entity must wait for at least three months without any answer from the consulted source, before deeming it completed: 'The diligent search procedure will conclude at the time that the beneficiary records the last response to inquiries sent to the sources provided in the Annex. In the case of no response from a source within three months, consultation shall be understood completed.'

[345] *See* Article.4.7 and Article 4.9 RD 224/2016.

information regarding diligent searches of orphan works conducted in Spain, if only for purposes of validating the registrations at the EUIPO.

All publications (of any kind) in Spain must obtain a **legal deposit** number and submit a minimum of copies for preservation at the *Biblioteca Nacional de España (*BNE).[346] The BNE is the primary preservation center. In addition, depending on the place of publication, copies are also preserved in other territorial libraries, such as, the *Biblioteca de Catalunya.* The legal deposit is managed by the territorial offices from all the Autonomic Communities.[347] RD 224/2016 specifically includes the legal deposit as a primary source of information (usually listed within the first three sources) for diligent search, for all categories of works.

Presumptions

In Spain, Article 6(1) TRLPI provides for a regular **presumption of authorship** when states that 'in the absence of proof to the contrary, that person shall be presumed the author who is identified as such on the work by the inclusion of his name, signature or identification mark.' Since nothing in this article restricts it to disclosed works, this presumption must be read to apply also to nondisclosed works.[348] 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 his rights 'for as long as the latter does not reveal his identity.'[349] The same presumption of authorship will apply to works of collaboration: unless the contrary is proved, the persons who are identified as such on the work will be presumed its coauthors. Instead, a different rule applies to collective works. What is decisive here is that the several contributions have not only been conceived and created to be part of the collective work, but also that they have been so 'on the initiative and under the coordination' of somebody other

[346] For a general explanation, *see* http://www.bne.es/es/Colecciones/Adquisiciones/DepositoLegal/ (last visited, 15 June 2017). The Law that regulates the legal deposit is Act 23/2011: *see* http://www.bne.es/opencms/es/Colecciones/Adquisiciones/DepositoLegal/docs/LEY_DL.pdf (last visited, 15 June 2017).

[347] They are 17, plus the cities of Ceuta and Melilla. A list of territorial offices of the Legal Deposit can be found at http://www.bne.es/es/Colecciones/Adquisiciones/DepositoLegal/Oficinas/index.html (last visted, 15 June 2017).

[348] The author should be identified depending on the nature of the work. Literary works will normally show the author on the front cover or in the list of credit (but the mere inclusion of the name in the list of "acknowledgements" would not suffice to trigger the presumption of authorship). Graphic works (photographs, maps, plans, etc) and works of three-dimensional art will usually show the author on the margin or somewhere on the work. Audiovisual works do so at the beginning and/or ending credits. This presumption does not only have procedural effects, but it is intended to be all-encompassing, unless the contrary is proved (e.g. with proof of registration under somebody else's name).

[349] Accordingly, the unauthorized disclosure of the authorship status of an anonymous work would amount to a moral right infringement. This presumption covers both the standing to sue as well as the power of attorney to exercise all exploitation rights and remuneration rights (compensation for private copy, resale right on works of art, compensation for public lending, compensation for communication to the public of audiovisual works, etc), as well as the exercise of, at least, the moral rights of integrity and recognition of authorship (while the moral rights of divulgation, to decide whether the work will remain anonymous or not, and the remaining ones can only be exercised by the author).

than the authors. As an exception to the general rule (work of collaboration), the category of collective work should be always applied with caution and restrictively; its existence can only result from the factual circumstances involving the creation of the work. In the absence of agreement to the contrary, all rights in the collective work shall vest in the person who publishes it and discloses it in his name (Article 8(2) TRLPI).[350] Authors of contributions to the collective work have no right in it as a whole, but they do have moral and economic rights in their contributions if these qualify as works. Authors of contributions to a collective work must be credited as such, in the customary manner, but have no moral right of to be recognized as authors of the collective work as a whole. A specific presumption of authorship is provided for computer programs created as collective works.[351]

No other presumptions of authorship or of initial ownership are to be found in the Spanish law. However, the TRLPI provides for specific **presumptions of the transfer of right** ownership in the case of audiovisual works (Article 87 TRLPI), computer programs under employment (Article 97(4) TRLPI), and in general, for any works created under employment (Article 51 TRLPI).

Audio-Visual Works

The **cut-off date** of Article 1(3) Directive has not been implemented by the Spanish legislator. According to Transitory Provision #21(2) TRLPI, Art. 37bis TRLPI applies to any works and phonograms which are protected within the EU as of 29 October 2014 (and onwards), but no distinction is made regarding undisclosed works (that have never been published or broadcast) contained in the collections of the beneficiary establishments. Accordingly, in Spain, the orphan works status will apply equally to disclosed and non-disclosed works in the collections of the beneficiary institutions and regardless of the time when they were deposited with them.

The Spanish TRLPI provides for **specific rules concerning the authorship and right ownership** of audio-visual works. There is an imperative qualification of audiovisual works as works of collaboration (regardless of the circumstances of their creation), as well as an imperative and exhaustive list of co-authors. According to Article 87(1) TRLPI, the authors of an audiovisual work are the director; the authors of the plot, the adaptation, and the authors of the script or the dialogues; and the authors of the musical compositions, with or without lyrics, specially created for this work. Such an imperative and exhaustive list of coauthors (mainly drafted with cinematographic works in mind) hardly matches the wide and flexible definition of audiovisual work under Article 86 TRLPI. In practice, these categories of authors are being generously interpreted so as to avoid that,

[350] Doctrinal debate continues as to whether this amounts to a vesting of authorship or only first ownership of all moral and exploitation rights. The impact is largely theoretical, but even if only first ownership is vested in the publisher, it remains a relevant (and exceptional) provision in Spanish law since it clearly allows granting moral rights to a legal entity. In any case, it is only a *iuris tantum* presumption, subject to agreement to the contrary: it could be agreed that despite being a collective work, some of the contributors (together or instead of the publisher) will be considered co-owners (not authors) of the collective work.

[351] 'Unless otherwise agreed, the person, whether a natural person or a legal entity, who edits and discloses it under his name shall have the status of author' (Article 97(2) TRLPI). This article has been criticized by scholars although it is perfectly aligned with Article 21 of Directive 91/250/EEC on computer programs, which allows for a legal entity to be deemed the author of a computer program.

in specific audiovisual works, other creators (such as conceptual artists, animators, art producers, directors of photography, etc.) are unfairly excluded from coauthorship in them. [352]

In addition, there is are a number of **presumptions of right transfer**. According to Article 88 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. This presumption does not apply if the parties (authors and producer) have agreed otherwise.[353] The same presumption of transfer of exploitation rights with the same scope applies to the authors of any preexisting works incorporated in the audiovisual work. Unless otherwise agreed, coauthors of the audiovisual work (as well as authors of contributions to it) may use their individual contributions separately, as long as such use does not prejudice the normal exploitation of the audiovisual work.

A wider presumption of transfer applies to advertising works.[354] The exploitation rights in works created for advertising purposes are presumed to be transferred on an exclusive basis to the advertiser or to the agency,[355] unless agreed otherwise by contract, 'for the purposes agreed in the contract.'[356]

As for the **market practices** in relation to film distribution, what is relevant in a Spanish context is the "accumulation" of exclusive rights in the hands of the producer: as derivative owner of the exploitation rights in the audiovisual work (presumption of transfer from the audiovisual work's co-authors) and as original owner of all exploitation rights in the audiovisual recording. This double status (since it is impossible to separate work and recording) confers him a strong position both in the negotiation of the transfer of exclusive rights from the coauthors and in the exploitation of the

[352] It also contrasts with the open co-authorship status allowed under the Act 17/1966 of May 31, on the protection of cinematographic works. Article 3 Act 17/1966 listed the same categories of authors as co-authors of a cinematographic work as well as 'any other natural persons who participate in its making with a creative intellectual activity.' In addition, Article 1 enshrined a *cessio legis* of all exploitation rights in favour of its producer: 'the exercise in exclusive of the rights of economic exploitation of the cinematographic work belongs to the producer or to its assignees or successors in title.'

[353] In the case of a cinematographic work (that is, an audiovisual works initially intended for theatrical exploitation), this presumption of transfer does not cover its distribution to the public by means of copies in any format intended for use within a domestic environment nor its communication to the public by means of broadcasting. Coauthors must expressly authorize these acts of exploitation, although nothing forbids that such authorization is granted expressly in the production contract. For other (non-cinematographic) audiovisual works, such as TV films or musical video-clips, the presumption of transfer of exploitation rights will cover these means of exploitation.

[354] Act 34/1988 of November 11 on Advertising provides for a broad presumption of transfer of rights in works created for advertising purposes, which prevail over the general rules of the TRLPI. *See* Article 23(2).

[355] Which one will depend on the nature of the relationship between the creator and the agency (commission, employment, collective work, etc.) as well as on what has been agreed between the agency and the advertiser that commissions the work. Note that in some cases, the advertiser may directly contact the creator (without any agency in between).

[356] Thus, the allocation and/or transfer of the exploitation rights in the advertising work will be regulated by the contract between the agency (or creator) and the advertiser, and it is not unusual that they are only granted to the advertiser for a limited time (as long as the advertising campaign goes on), while the agency (or the creator) retains exploitation rights for the other "non-advertising" purposes. Both the advertiser and the agency (or creator) may be jointly liable for any infringement committed by or in the advertising work.

audiovisual production (and even regardless of the scope of the assignment of rights in the audiovisual work).

Music

Musical works are simply referred to as 'musical compositions, with or without lyrics'.[357] No specific closed-list or presumption of authorship exists for musical works: authors are presumed to be the ones that appear as so in the work, as with any work. According to Article 7 TRLPI, a work of collaboration is "the unitary result of the collaboration of two or more authors". Joint works are created by two or more authors collaborating to conceive and create the work on an equal ground. Since the regime of a work of collaboration is the general rule to be applied to works created by a plurality of authors, the concept of collaboration has been stretched accordingly. If these requirements are met, the musical work could be deemed a "collective work," but this will hardly be the case for musical works. All the authors (natural persons) who collaborate in the creation of a joint-work are deemed its coauthors. It is necessary that the contributions be original creations in order to confer co-authorship status; simple mechanical execution or support (no matter how important) does not suffice. So, simple musical arrangements (or technical contributions – no matter how perfect and difficult they'd be) will not suffice to obtain co-authorship status in the musical work.

No statutory list of performers exists in Spain. A performance is indirectly defined as the act of presenting, singing, reading, reciting, interpreting, or executing a work "in any form;" this list is not exhaustive.[358] An artist, the person who presents, sings, reads, recites, interprets or executes a work in any form[359], is granted the **performing rights** to authorize fixation of their performances, as well as the exclusive rights of reproduction, distribution (including rental and lending) and communication to the public (including the making available online). All these exclusive rights may be transferred or licensed (authorized) by written contract. According to Article 113 TRLPI, performers are granted the inalienable and unwaivable moral rights of attribution (except where the means of exploitation make it impossible) and integrity (to object to any distortion, mutilation, or any other act in relation to the performance that might adversely affect the performer's standing or reputation). While alive, the performer must expressly authorize the dubbing of his performance in his own language.

According to Article 110 TRLPI, when the performance is done under an employment or a commission contract, it shall be understood, unless otherwise specified, that the employer or commissioning party acquires the exclusive rights of reproduction, distribution, and communication to the public, "as may be deduced from the nature and subject of the contract." It should be noted that this **presumption of right transfer** is wider than the one provided in Article 51 TRLPI for works, which does not cover works made under commission. This presumption is *iuris tantum* and can be deactivated by contrary agreement. However, as it happened with audiovisual productions, the

[357] Article 10(1)(b) TRLPI.
[358] Article 105 TRLPI.
[359] Article 105 TRLPI.

producers of phonograms are also granted *ab initio* exclusive rights in the recording (phonogram) and this confers them a stronger negotiating power in front of authors of musical works and performers.

Phonograms

A **phonogram** means any fixation of the sounds of a performance of a work or of other sounds.[360] 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.

The only **cut-off date** for phonograms produced by public service broadcasters is the one set in the Directive: i.e. produced up until 31 December 2002.

There are **specific rules concerning the right ownership of phonograms.** According to Article 114(2) TRLPI, the producer of a phonogram is the natural person or legal entity on whose initiative and responsibility the phonogram is first made.[361] Phonogram producers enjoy the exclusive rights of reproduction, distribution (including rental and lending) and communication to the public (including the making available on-line) of the phonograms, as well as the right to authorize imports and exports of commercial phonograms. [362] In addition, phonogram producers also enjoy a right to a single and equitable remuneration for the communication to the public of their commercial phonograms in any form.[363]

The same **presumption of right transfer** applied to musical works by Article 110 TRLPI is also valid for phonograms. This means that when the performance is done under an employment or a commission contract, the employer or commissioning party acquires the exclusive rights.

As **market practice**, music editors do obtain, by contract, authors' rights in their musical works. Music editors are different from phonogram producers. Music editors deal with musical works and authors, offering services as manager, producer and publisher, but the music editor, as such, is not always the phonogram producer.[364] The author transfers to the editor all the exploitation rights in the musical work (reproduction, distribution and communication to the public as well as transformation), usually worldwide and for all the term of copyright protection. In exchange, the editor is obliged to exploit the work and share with the author the profits. According to the SGAE Regulations the editor's share cannot be more than 50% (33,33% for symphonic music).

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[360] Article 114(1) TRLPI.

[361] This means that if the operation takes place within an enterprise, its owner shall be considered the producer of the phonogram. Nothing is said regarding other participants in the production of a phonogram.

[362] The Spanish Supreme Court "restored" a general exclusive right of communication to the public granted to all phonogram producers by Article 109(1) LPI of 1987, which had somehow "disappeared" in the TRLPI of 1996. *See* TS (Administrative chamber) March 1, 2001 [AFYVE v. RDL1/1996], Westlaw.ES RJ2001/3071.

[363] Article 116(2) TRLP, parallel to the one granted to performers and shared with them.

[364] In Spain, AEDEM – *Asociación Española de Editores de Música* http://www.aedem.es/ (last visited, 15 June 2017) is the one in charge of associating the "music editors." AEDEM and music editors are also members of SGAE, together with the authors of musical works (and audiovisual works).

In order for the publisher to be in a position to make a sound recording of the literary work (i.e. **audio-book**) the right of communication to the public, and for this means of exploitation, must have been expressly assigned to him. Apparently, new contractual models seem to be contemplating this possibility. Current publishing contracts already cover the transfer of the exclusive right of communication to the public, especially, the making available online. Depending on how the transfer of this right is designed in the contract, it may also include the performance of the literary work and the making of a phonogram.[365] For instance, the standard publishing contract posted on the website of the Association of Writers of Catalunya includes the transfer of the right of communication to the public and expressly refers to the making of 'sound recordings, radio broadcasting, etc. as long as it does not involve a transformation of the work.'[366]

Additional Information Useful for the Diligent Search

Despite no formalities exist under current Spanish Law for the protection of copyright, registration was a requirement for protection until December 7th 1987 (under Article 36 Law of Intellectual Property of 1879). In 1987, it was decided to maintain registration on a voluntary basis. Any works and protected subject matter may now be registered at the General Intellectual Property Registry.[367] Any instruments and contracts concerning intellectual property rights may also be registered. The Registrar qualifies the originality of the work and the authorship status of the application and assesses the lawfulness of any instruments and contracts submitted for registration before deciding whether (or not) to register them.[368] Registration offers a rebuttable presumption of the existence of copyright (hence, of originality) and of authorship/ownership.[369] Anyone can claim and prove (at court) that the registered work is not an original creation[370] or that the registered author (or owner) is not so.[371]

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[365] It must be taken into account that Spanish law abides to a principle of restrictive interpretation of the assignment of rights which the exploitation rights transferred by contract will be limited to the right or rights expressly transferred to the means of exploitation expressly provided for and to the time and territorial scope specified in the contract (Article 43(1) TRLPI). Furthermore, according to Article 43(2) TRLPI, where the means of exploitation are not mentioned specifically and precisely in the contract, the transfer will be limited to the means of exploitation that necessarily derive from the contract and are essential to fulfill the purpose of the contract. In addition, a transfer of exploitation rights shall never cover means of use or exploitation that do not exist or are unknown at the time of the transfer (Article 43(5) TRLPI) and any contractual clause granting rights for unknown or inexistent means of exploitation will be will be ineffective.

[366] *See* http://www.acec-web.org/SPA/2/CE.pdf (last visited, 15 June 2017).

[367] Article 144 et seq. TRLPI.

[368] Article 145(2) TRLPI.

[369] Article 145(3) TRLPI.

[370] As an example, see AP Madrid (sec.11) April 20, 1998 [Juego de la Rifa] Westlaw.ES AC1998/4773: the registration of a lottery game was annulled because the court found it did not qualify as an original creation under art.10 TRLPI. On appeal, this ruling was later reversed by the Supreme Court (Civil ch.) June 24th, 2004 Westlaw.ES RJ2004/4318.

[371] Registration is not necessary to initiate any judicial proceedings or claims, although it can certainly afford a prevailing position since the burden of proof will be on the nonregistered party. Denials of registration, as well as registrations accepted, may be contested in front of the civil courts (Article 145(2) TRLPI and Articles 24-25 RD 281/2003).

Whereas no **register for anonymous and/or pseudonymous works** exists in Spain, these works can be registered in the General Registry of Intellectual Property. According to the Regulation of the Intellectual Property Registry, the name of the person (physical or legal person) who will be exercising the copyright in the anonymous work or work disclosed under a pseudonym, must be identified at the time of registration.[372]

Likewise, in Spain there is not a database for works that had been subject to **authorship or rights ownership disputes,** nor a **register on the transfer of copyrights**, but transfers of ownership may be registered at the General Registry of Intellectual Property. Instead, there is no **register on the buying and selling of back-catalogues** of copyright protected works and/or neighbouring rights since this information do not need to be registered at the Registry of Intellectual Property.

In regards of the **register for companies**, in Spain all businesses (individual businesses and legal companies) are registered in the *Registro Mercantil,* which records any act regarding companies: constitution, shareholders, board of directors, mergers, bankruptcy, etc.[373] The information in the *Registro Mercantil* may be accessed by the public, upon request. The *Registro Mercantil* also includes information on **company mergers or bankruptcy arrangements**. Moreover, it informs the Intellectual Property Registrar about any works that may be affected by a merger or a bankruptcy procedure.

As for the Spanish **public service broadcasters**, historically, there has been only one public service broadcaster: the *Radio y Television Española* (RTVE). In more recent times, though, Autonomous Communities have been opening their own radio and/or TV broadcasting services: for instance, TV3 in Catalunya, or Canal Surin Andalucia.[374] Radio and TV operators need to be licensed by the Spanish Government and registered at the *Registro Estatal de prestadores de servicios de Comunicación Audiovisual,* which is public and can be freely consulted.[375]

Spain has no **other regulatory scheme** in place dealing with other relevant subject matter of digitization.

Acknowledgments

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[372] RD 281/2003, Article 13(c).

[373] It is a public institution, under the Ministry of Justice: http://www.mjusticia.gob.es/cs/Satellite/Portal/es/areas-tematicas/registros/registro-mercantil (last visited, 15 June 2017).

[374] A list of radio and TV operators in Spain is available at http://www.minetur.gob.es/telecomunicaciones/mediosaudiovisuales/Television/Paginas/operadores.aspx (last visted, 15 June 2017).

[375] *See* https://sedeaplicaciones.minetur.gob.es/RuecaListadosPublicos/ (last visited, 15 June 2017).

SWEDEN

Implementation of the Orphan Works Directive: Background

In Sweden, the Orphan Works Directive was implemented by amending the Swedish Copyright Acton of 29 October 2014 through legislation Lag (1960:729) *omupphovsrätt till litteräraochkonstnärligaverk* (hereafter "Implementing Legislation"). The amended articles in the Swedish Copyright Act following the implementation of the directive are: §§ 45, 46, 48, 49, 49 a, and 58. Four new articles have also been added, namely from §§ 16a to 16d.[376]

Subjective and Objective Scope

In regards of the **subjective scope** of the application of the orphan works exception, beneficiaries of the exception are: publically accessible libraries, educational establishments, museums, as well as archives and film or audio heritage institutions. Altough the provision does not differ in content, there are some minor structural differences. For instance: "public service" is not expressly mentioned when the organisations are listed, but only in the fifth paragraph of Article 16a, where it is stated that radio and film corporations can only use the orphan works in the designated manner provided that they are operated under public service remits.

In regards of the **objective scope** of the application of the orphan works exception, the Swedish legislation includes:

- literary works *(litteräraverkiskrifter),* with the exclusion of maps and databases, which in principle are literary works within the scope of the Swedish Copyright Act, but in the case of orhan works the definition is confined to *narrative based* literary works;

- cinematographic works *(filmverk),* term that also covers the "visual" in the audiovisual works referred to in the OW Directive;

- sound recordings *(ljudupptagningar),* terms that are deemed to cover both the "audio" in audiovisual works as well as "phonograms".

The Swedish implementing legislation also includes the limitation that the works must be contained in the collections of publicly accessible libraries, educational establishments or museums as well as in the collections of archives or film or audio heritage institutions as referred to in Article 1(2) of the OWD. However it is important to note that Article 16a in the Swedish legislation only refers to literary works and cinematographic works and that the "sound recordings" are regulated in Article 46. This has been done in order to distinguish between the two first rights that are copyrights and the sound recording right that is a neighbouring right in the Swedish legislation. Hence, in order to understand the full objective scope of the works covered by the directive the two articles (16a and 46) must be read together.

[376] The Swedish Copyright Act (full text in Swedish) is available here: https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-1960729-om-upphovsratt-till-litterara-och_sfs-1960-729 (last visited, 15 June 2017).

Regarding the works produced in the process of public service broadcasting, the Swedish cut off date is the same as the one stipulated in the OWD, namely 31 December 2002.

The Swedish implementing legislation does not differ from the directive in terms of content, however structurally it is important to note that the works covered by copyright and the works covered by neighbouring rights have been dealt with separately.

Possible Use of Orphan Works

Among the **permitted uses** for orphan works under the implementing legislation of Sweden, there are:

- the right to produce/make copies *(framställa exemplar);* and
- the right to make available to the public *(överföra till allmänheten).*

The permitted uses are defined in article §16a of the Swedish Copyright Act, which does not differ from the OWD.

In terms of ruling on **cross-border search**, the Swedish implementing legislation does not differ from Article 3(4) in the OWD. It states that the diligent search shall be conduced in the country where the work was first published or broadcast. If there are any indications that a work stems from another EU country, then sources in that country ought to be consulted as well.

As to the **diligent search report requirements** established by the implementing legislation of Sweden, they are described in Article 16b of the Swedish Copyright Act and do not differ from Article 3(5) in the OWD.

There are no **other requirements** beyond those of a diligent search, its documentation and the communication of this information to the supervisory authority. However, the diligent search ought to be evaluated on a case by case basis. In cases where there is a need to consult any additional sources than those listed in the OWD, it is stipulated that these too can be consulted. The list of sources in the Swedish implementation is not exclusive (Article 16c). The Swedish government can issue further guidelines describing any additional steps that may be taken.

In regards of **soft-law instruments**, there are two "preparatory works" (that can be described as soft law instruments) that might be consulted and that provide some additional details regarding the diligent search. They are:

1) the so called promemoria within the governmental department series Ds. 2013:63;

2) the parliamentary proposal for amendment of the copyright legislation in accordance with the orphan works directive prop 2013/14:93.

In regards of **other regulatory schemes,** the orphan works could potentially be affected by the so called "collective contractual licenses", which are multi-party non-exclusive licenses connected to collecting societies and to the use of works, e.g. in broadcasting. The Swedish understanding is that in view of the preamble (24) and Article 1(5) in the OW Directive, the provisions regarding orphan works would not conflict with the regulation surrounding collective contractual licenses in Articles 42 a-g of the Swedish Copyright Act.

How to Carry Out a Diligent Search: General and Specific Requirements

List of Sources

As to the appropriate sources to be consulted to carry out a diligent search, the Swedish implementing legislation makes a reference in Article 16c to the Annex of the Directive. The preparatory works also expressly state that the list of sources provided in the directive are seen as adequate and that other sources may be consulted if relevant (but it is not required). The Swedish **list of sources** is thus **illustrative** as it is expressly noted that what is deemed to be a diligent search should be decided on a case by case basis and that additional sources may be consulted if necessary.

Like other few jurisdictions, in Sweden a **national database** for orphan works has been established.[377] It is handled by the Swedish Patent, Trademarks and Copyright authority ('PVR').[378] PRV is also responsible for forwarding the Swedish registrations to EUIPO.

At the same time, the **legal deposit** is also in force, in accordance with the Swedish Act on Legal Deposits *(Lag (1993:1392) om pliktexemplar av document*). Institutions in charge of the legal deposit are six university libraries in Sweden: National Library of Sweden *(Kungliga Biblioteket)*;[379] Lund University;[380] Stockholm University;[381] Uppsala University;[382] Linköping University;[383] Gothenburg University;[384] Umeå University.[385]

Presumptions

As for **presumptions of authorship**, the physical person whose name, pseudonym or signature, has been placed on a copy of the work is presumed to be the author according to Article 7 of the Swedish Copyright Act. Where there is a name, pseudonym or signature on the copy, the person who is indicated is presumed to be the author. The same presumptions are applied to the neighbouring rights according to the third paragraphs in Articles 45 (visual arts), 46 (sound recordings), 48 (radio and television broadcasts), 49 (catalogues), and forth paragraph in 49a (photographs).

Conversely, **presumptions on right transfer** are not directly expressed in Swedish Copyright Law, yet they are present in customary law.

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[377] https://www.prv.se/sv/upphovsratt/herrelosa-verk/ (last visited, 15 June 2017).
[378] PRV, https://www.prv.se/en/ (last visited, 15 June 2017).
[379] http://www.kb.se/plikt/tryck/pliktexemplar/ (last visited, 15 June 2017).
[380] http://www.ub.lu.se/en/collections/swedish-print (last visited, 15 June 2017).
[381] As no direct link for the legal deposit is available *see* http://su.se/biblioteket/ (last visited, 15 June 2017).
[382] http://www.ub.uu.se/finding-your-way-in-the-collections/Deliveries+of+legal+deposits/ (last visited, 15 June 2017).
[383] https://www.bibl.liu.se/lana-och-bestalla?l=en&sc=true (last visited, 15 June 2017).
[384] http://digit.ub.gu.se/wiki/index.php/Humanistiska_biblioteket/Informationen/Pliktleverans (last visited, 15 June 2017).
[385] As no direct link for the legal deposit is available, see http://www.ub.umu.se/ (last visited, 15 June 2017).

In any case, all the presumptions above, if relevant, have not been discussed in any of the preparatory works of the implementing legislation. As there have not yet been any legal cases in this particular matter it is difficult to predict what the customary law will be in the future.

Audio-visual Work

In the case of audio-visual works made by public service broadcasters, the **cut-off date** determined by the implementing legislation for audio-visual works to be covered by the Orphan Works Directive is 1 January 2003.

The Swedish copyright law includes **special rules concerning the authorship and right ownership** of audio-visual works according to which whoever claims to be the author has the burden of proof to prove that they in fact are the author. The physical person whose name, pseudonym or signature, has been placed on a copy of the work is presumed to be the author (Article 7). Where there is a name, pseudonym or signature on the copy, the person who is indicated on there, is presumed to be the author. The same presumptions are applied to the neighbouring rights according to the third paragraphs in articles §§45 (visual arts), 46 (sound recordings), 48 (radio and television broadcasts), 49 (catalogues), and forth paragraph in 49a (photographs).

Conversely, the same law does not include **presumption on right transfer** for audio-visual works. The transfer of audio-visual works is regulated in Articles 39 and 40. The transfer of rights rule states that when copyright in a work is transferred the purchaser may not alter the work (28). If film rights have been sold, the author also has a statutory royalty right in any further uses e.g. when the purchaser exploits the work after the purchase in the form of, for example, lending. All this taken together points to the fact that there are no presumptions in favour of the producers. On the contrary, the author of the audio-visual work retains certain statutory rights even after the copyright has been transferred in its entirety.

Similarly, there is no presumption that film distributors are owners of the work, however as they do play a major role in the Swedish film industry, by **market practice** they are the actual entity exploiting all economic rights and related rights on the film.

Music

There is no statutory definition of **musical work** in the Swedish Copyright Act. From preparatory works and case law it can be discerned that this is a wide concept incorporating anything that the author may consider to be a musical work. However, this is limited to sound and any accompanying words are always deemed to be literary works in Swedish Copyright Law.

Whether a work with several authors is a joint or a collective work must be decided on a case by case basis (see Article 6 of the Swedish Copyright Act). If the works can be easily separated – e.g. music from lyrics, then it is considered to be a collective work. If the works cannot be easily separated – in the case where, for example, band members work on a song together both in terms of music and lyrics – then it is considered to be a joint work.

However, there is not a rule or presumption that determines by default which categories of contributors are authors of a musical work. Similarly, even in the case of performers, there is not a rule or presumption that determines by default which categories of contributors are vested with the **performing rights.** The Swedish Copyright Act only refers to "performing artists", both singers and musicians (e.g. session musicians) are included in these categories as the category of "performing artists" is considered to be broad.

The transfer of rights on musical works is not subject to a **presumption of right transfer** for musical works but is regulated in Article 29. The law states that when copyright in a work is transferred the purchaser may not alter the work (Article 28). If musical rights have been sold the author has a royalty right concerning further uses, for example when the purchaser exploits the work in the form of lending. All this taken together points to that there are no presumptions in favour of the music producers. On the contrary, the author of the musical work retains certain rights even after the copyright has been transferred in its entirety.

Phonograms

The Swedish legislation does not use the term **phonogram,** rather "sound recording" and refers to any and all sounds recorded. A film soundtrack will have both a musical and lyrical right as well as the neighbouring right in the sound recording.

In the case of phonograms made by public service broadcasters, the **cut-off date** determined by the implementing legislation for phonograms to be covered by the OWD is 1 January 2003.

As to **presumptions on rights ownership of phonograms**, the producer of the sound recording is presumed to be the owner of the sound recording (neighbouring right) according the article § 46 of the Swedish Copyright Act. On the other hand, more than a **presumption of right transfer for phonograms**, these rights are directly vested in the producer. The same is true when it comes to sound recordings that are commissioned as well as made in the course of employment.

In Sweden labels play a major role in the music industry, even if they are not directly mentioned in the Swedish Copyright Act, there is a **market practice,** that has become the standard and custom practice, which makes them the actual entity exploiting phonogram producer rights.

Similarly, in the case of phonograms that are recordings of underlying copyright works other than music, there is a **market practice** that contractually assigns the rights of authors in these underlying works to the content publisher (as distinct from the phonogram producer).

Additional Information Useful for the Diligent Search

A **register for anonymous and/or pseudonymous works** has been set up since the implementation of the OWD. It is PRV that handles the registration.

A database for works that have been subject to **authorship or rights ownership disputes** does not exist, nor does a **register on the transfer of copyrights**, or a **register on the buying and selling of back-catalogues** of copyright protected works and/or neighbouring rights.

In regards of a **register for companies**, this is managed by Bolagsverket (e.g., the Swedish Companies Registrations Office),[386] which also holds information on **company mergers or bankruptcy arrangements**.[387]

There are three **number of public service broadcasters** in Sweden: *Sveriges Television* (SVT), *Sveriges Radio* (SR), *Utbildnings Radio* (UR), to which the Swedish government provides a so-called "broadcasting remit", and which regulated by a government regulatory document.[388]

There are no **other regulatory scheme** in place dealing with other relevant subject matter of digitization in Sweden.

Acknowledgments

The authors thank expert Merima Bruncevic for her precious support and input in regards of the information on how the Orphan Works Directive was implemented in Sweden and and how diligent search works in this country.

[386] http://www.bolagsverket.se/en (last visited, 15 June 2017).

[387] http://www.bolagsverket.se/en (last visited, 15 June 2017).

[388] See e.g. http://www.svt.se/omsvt/fakta/public-service/article1713807.svt/binary/S%C3%A4ndningstillst%C3%A5nd%202014%20-%202019 (last visited, 15 June 2017) for the regulatory document regarding the broadcasting permit of Sveriges Television for the years 2014-2019.