

# Orphan works: permitted uses

2011/0136(COD) - 24/05/2011 - Legislative proposal

**PURPOSE:** to create a legal framework to ensure the lawful, cross-border online access to orphan works.

**PROPOSED ACT:** Directive of the European Parliament and of the Council.

**BACKGROUND:** libraries, museums, archives, educational establishments, film heritage institutions and public service broadcasting organisations are engaged in large-scale digitisation of their collections or archives in order to create European Digital Libraries. In so doing, they contribute to the preservation and dissemination of European cultural heritage, which is also important for the creation of European Digital Libraries, such as Europeana.

Prior authorisations are necessary to make works protected by copyright available to the public in an online digital library or archive. When the relevant copyright owner cannot be identified or found the works in question are known as orphan works. Libraries or other institutions that make works available online to the public without prior authorisation risk infringing copyright.

This initiative builds on the Commission's 2006 Recommendation on the digitisation and online accessibility of cultural content and digital preservation. Despite the Recommendation, only a handful of Member States have implemented orphan works legislation. The few existing national solutions are circumscribed by the fact that they limit online access to citizens resident in their national territories.

The creation of a legal framework to facilitate the cross-border digitisation and dissemination of orphan works in the single market is also one of the key actions identified in the [Digital Agenda for Europe](#) which is part of the Europe 2020 Strategy.

**IMPACT ASSESSMENT:** the impact assessment analyses **six options**:

- **Option 1:** do nothing,
- **Option 2:** a statutory exception to copyright,
- **Option 3:** extended collective licensing,
- **Option 4:** an orphan-specific licence granted by collecting societies,
- **Option 5:** an orphan-specific licence granted by a public body, and
- **Option 6:** the mutual recognition of national solutions regarding orphan works.

All policy options (except Option 1) are premised on the adoption of a directive that will require all Member States to enact specific orphan works legislation within a specified timeframe. All policy options, except Option 3, are premised on the requirement that a diligent search is necessary prior to the making available of an orphan work in an online digital library.

The Commission considers that an approach based on **mutual recognition of the orphan status (Option 6)** allows libraries and other beneficiaries to enjoy legal certainty as to the "orphan status" of a particular work. Mutual recognition ensures that the orphan works contained in a digital library would be available to citizens across Europe.

**LEGAL BASIS:** Article 114 of the Treaty on the Functioning of the European Union (TFEU).

**CONTENT:** the main objective of this proposal is to **create a legal framework to ensure the lawful, crossborder online access to orphan works** contained in online digital libraries or archives operated by a

variety of institutions that are specified in the proposal when such orphan works are used in the pursuance of the public interest mission of such institutions.

Such works include:

- works published in the form of books, journals, newspapers, magazines or other writings, and which are contained in the collections of publicly accessible libraries, educational establishments, museums or archives, or
- cinematographic or audiovisual works contained in the collections of film heritage institutions, or
- cinematographic, audio or audiovisual works produced by public service broadcasting organisations before the 31 December 2002 and contained in their archives.

The proposal deals with the **diligent search** necessary to identify whether a particular work is an orphan work and, once this has been established, to make it legal to make this work available to the public online under certain conditions and for specific purposes. The proposal also clarifies the application of extended collective licences to works which are potentially orphan works.

More specifically, the proposal:

- contains the definition of an orphan work. The definition of an orphan work incorporates the requirement of a diligent search;
- explains how the diligent search is to be carried out by those who are permitted to use orphan works. It also clarifies that a diligent search need only be carried out in the Member State of first publication of the work;
- establishes the principle of mutual recognition whereby a work deemed to be an orphan work after a diligent search shall be considered an orphan work in all Member States;
- concerns the possibility to put an end to the orphan work status;
- enumerates the uses that the named beneficiaries are permitted to undertake with respect to orphan works (to make them available to the public, within the meaning of Directive 2001/29/EC, and to reproduce such works, within the meaning of Directive 2001/29/EC, for the purposes of achieving their public interest mission);
- specifies how Member States may permit certain additional uses under specific conditions.

**BUDGETARY IMPLICATIONS:** the proposal has no implication for the Union budget.