




Basic information	
<b>2011/0136(COD)</b> COD - Ordinary legislative procedure (ex-codecision procedure) Directive	Procedure completed
Orphan works: permitted uses  <b>Subject</b>  2.40 Free movement of services, freedom to provide 3.30.01 Audiovisual industry and services 3.30.08 Press, media freedom and pluralism 3.30.25 International information networks and society, internet 3.50.15 Intellectual property, copyright 4.45.08 Cultural and artistic activities, books and reading, arts 4.45.10 Literary and artistic property	

Key players				
European Parliament	<b>Committee responsible</b>		<b>Rapporteur</b>	<b>Appointed</b>
	<b>JURI</b> Legal Affairs		GERINGER DE OEDENBERG Lidia Joanna (S&D)	11/07/2011
			Shadow rapporteur NIEBLER Angelika (PPE) THEIN Alexandra (ALDE) ENGSTRÖM Christian (Verts /ALE)	
	<b>Committee for opinion</b>		<b>Rapporteur for opinion</b>	<b>Appointed</b>
	<b>ITRE</b> Industry, Research and Energy		The committee decided not to give an opinion.	
	<b>IMCO</b> Internal Market and Consumer Protection		MANDERS Antonius (ALDE)	11/07/2011
	<b>CULT</b> Culture and Education		VERHEYEN Sabine (PPE)	13/07/2011
Council of the European Union	<b>Council configuration</b>		<b>Meetings</b>	<b>Date</b>
	Employment, Social Policy, Health and Consumer Affairs		3188	2012-10-04
	Competitiveness (Internal Market, Industry, Research and Space)		3133	2011-12-05

European Commission	<b>Commission DG</b>	<b>Commissioner</b>
	Financial Stability, Financial Services and Capital Markets Union	BARNIER Michel
European Economic and Social Committee		

Key events			
Date	Event	Reference	Summary
24/05/2011	Legislative proposal published	COM(2011)0289 	Summary
23/06/2011	Committee referral announced in Parliament, 1st reading		
05/12/2011	Debate in Council		Summary
01/03/2012	Vote in committee, 1st reading		
28/03/2012	Committee report tabled for plenary, 1st reading	A7-0055/2012	Summary
13/09/2012	Decision by Parliament, 1st reading	T7-0349/2012	Summary
13/09/2012	Results of vote in Parliament		
13/09/2012	Debate in Parliament		
04/10/2012	Act adopted by Council after Parliament's 1st reading		
25/10/2012	Final act signed		
25/10/2012	End of procedure in Parliament		
27/10/2012	Final act published in Official Journal		

Technical information	
Procedure reference	2011/0136(COD)
Procedure type	COD - Ordinary legislative procedure (ex-codecision procedure)
Procedure subtype	Legislation
Legislative instrument	Directive
Legal basis	Treaty on the Functioning of the European Union TFEU 114-p1 Treaty on the Functioning of the European Union TFEU 49 Treaty on the Functioning of the European Union TFEU 056-p2
Other legal basis	Rules of Procedure EP 165
Mandatory consultation of other institutions	<a href="#">European Economic and Social Committee</a>
Stage reached in procedure	Procedure completed
Committee dossier	JURI/7/06115




Documentation gateway			
<b>European Parliament</b>			

Document type	Committee	Reference	Date	Summary
Committee draft report		PE472.338	27/09/2011	
Amendments tabled in committee		PE475.839	28/10/2011	
Committee opinion	CULT	PE472.125	06/12/2011	
Committee opinion	IMCO	PE473.720	07/12/2011	
Committee report tabled for plenary, 1st reading/single reading		A7-0055/2012	28/03/2012	Summary
Text adopted by Parliament, 1st reading/single reading		T7-0349/2012	13/09/2012	Summary

#### Council of the EU

Document type	Reference	Date	Summary
Draft final act	00036/2012/LEX	25/10/2012	

#### European Commission

Document type	Reference	Date	Summary
Legislative proposal	COM(2011)0289 	24/05/2011	Summary
Document attached to the procedure	SEC(2011)0615 	24/05/2011	
Document attached to the procedure	SEC(2011)0616 	24/05/2011	
Commission response to text adopted in plenary	SP(2012)665	11/10/2012	
Follow-up document	SWD(2022)0412	06/12/2022	

#### National parliaments

Document type	Parliament /Chamber	Reference	Date	Summary
Contribution	IT_SENATE	COM(2011)0289	21/09/2011	
Contribution	PT_PARLIAMENT	COM(2011)0289	28/09/2011	

#### Additional information

Source	Document	Date
National parliaments	IPEX	
European Commission	EUR-Lex	

#### Final act

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## 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.

## Orphan works: permitted uses

2011/0136(COD) - 25/10/2012 - Final act

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

LEGISLATIVE ACT: Directive 2012/28/EU of the European Parliament and of the Council on certain permitted uses of orphan works.

CONTENT: following agreement at first reading, the European Parliament and Council adopted the Directive establishing a legal framework aimed at improving access to and digitisation of orphan works across the EU. Orphan works are works (such as books, newspapers, magazines, audio recordings, films, etc.) that are protected by copyright but whose owners cannot be identified or found.

The Directive facilitates the digitisation of and lawful cross-border online access to orphan works contained in the collections of libraries, educational establishments, museums, archives, audiovisual heritage institutions and public service broadcasting organisations. These beneficiary institutions will be able to use orphan works when fulfilling their public interest missions without the risk of infringing copyright. It is a major step for the creation and development of digital libraries, such as *Europeana*, which contribute to the preservation and dissemination of European cultural heritage.

The Directive will apply to works that are first published or broadcast in the territory of an EU Member State. A diligent search for right holders will be carried out in that Member State prior to granting the orphan work status. Material catalogued as having orphan status in a Member State will have the same status in all Member States. A single publicly accessible online database will contain the information related to orphan works, including the results of searches for right holders.

The Directive provides for a system of compensation in the event of reappearing right holders.

The main points of the Directive are as follows:

**Copyright as the basis of innovation:** as suggested by Parliament, the Directive stresses that copyright is the economic foundation for the creative industry, since it stimulates innovation, creation, investment and production. Mass digitisation and dissemination of works is therefore a means of protecting Europe's cultural heritage. It also recalls that copyright is an important tool for ensuring that the creative sector is rewarded for its work.

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

The Directive applies to:

- 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;
- 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
- 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.

### Orphan works:

- a work or a phonogram shall be considered an orphan work if none of the rightholders in that work or phonogram is identified or, even if one or more of them is identified, none is located despite a diligent search for the rightholders having been carried out and recorded;
- where there is more than one rightholder in a work or phonogram, and not all of them have been identified or, even if identified, located after a diligent search has been carried out and, the work or phonogram may be used in accordance with the Directive provided that the rightholders that have been identified and located have, in relation to the rights they hold, authorised the organisations referred to in the Directive to carry out the acts of reproduction and making available to the public covered Directive 2001/29/EC.

### Diligent search:

- a diligent search must be carried out in good faith prior to the use of the work or phonogram;

- it shall be carried out in the Member State of first publication or, in the absence of publication, first broadcast, except in the case of cinematographic or audiovisual works the producer of which has his headquarters or habitual residence in a Member State, in which case the diligent search shall be carried out in the Member State of his 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 shall also be consulted;
- the organisations referred to in the Directive must maintain records of their diligent searches and provide information to the competent national authorities showing that that a work or a phonogram is considered an orphan work;
- the information on the diligent searches must be recorded in a single publicly accessible online database established and managed by the Office for Harmonisation in the Internal Market.

**End of orphan work status:** a rightholder in a work or phonogram considered to be an orphan work must have, at any time, the possibility of putting an end to the orphan work status in so far as his rights are concerned.

**Permitted uses of orphan works:** Member States shall provide for an exception or limitation to the right of reproduction and the right of making available to the public provided for respectively in Directive 2001/29/EC to ensure that the organisations referred to above are permitted to use orphan works contained in their collections in the following ways:

- by making the orphan work available to the public;
- by acts of reproduction, for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration.

The organisations may 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. They 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 organisations shall indicate the name of identified authors and other rightholders in any use of an orphan work;

A **fair compensation** must be due to rightholders that put an end to the orphan work status of their works or other protected subject matter for the use that has been made of such works and other protected subject matter in accordance with the Directive. Member States shall be free to determine the circumstances under which the payment of such compensation may be organised. The level of the compensation shall be determined, within the limits imposed by Union law, by the law of the Member State in which the organisation that uses the orphan work in question is established.

**Review:** the Commission shall submit 3 years after entry into force of the Directive and at annual intervals thereafter, a report concerning the possible inclusion in the scope of application of this Directive of publishers and of works or other protected subject-matter not currently included in its scope.

ENTRY INTO FORCE: 28/10/2012

TRANSPOSITION: by 29/10/ 2014.

APPLICATION: the Directive shall apply in respect of all works and phonograms which are protected by Member States' legislation in the field of copyright on or after 29/10/ 2014, and shall apply without prejudice to any acts concluded and rights acquired before that date.

## Orphan works: permitted uses

2011/0136(COD) - 05/12/2011

Ministers took note of the progress made on three files under examination by the Council preparatory bodies in the field of intellectual property:

- **a draft directive on the protection of orphan works;**
- [a draft regulation for entrusting the Office for Harmonisation in the Internal Market with certain tasks related to the protection of intellectual property;](#) and
- [a draft regulation](#) concerning customs enforcement of intellectual property rights.

## Orphan works: permitted uses

2011/0136(COD) - 28/03/2012 - Committee report tabled for plenary, 1st reading/single reading

The Committee on Legal Affairs adopted the report by Lidia Joanna GERINGER de OEDENBERG (S&D, PL) on the proposal for a directive of the European Parliament and of the Council on certain permitted uses of orphan works.

The committee recommends that the European Parliament's position in first reading following the ordinary legislative procedure should amend the Commission proposal as follows:

**Copyright as the basis of innovation:** report stresses that copyright is the economic foundation for the creative industry, since it stimulates innovation, creation, investment and production. Mass digitisation and dissemination of works is therefore a means of protecting Europe's cultural heritage. Copyright is an important tool for ensuring that the creative sector is rewarded for its work.

**Purpose and scope:** the Directive concerns certain uses of orphan works undertaken by publicly accessible libraries, educational establishments or museums as well as by archives, film and audio heritage institutions, publishers and public service broadcasting organisations **established in the Member States**.

This Directive applies to works subject to copyright or related rights, which were first published or broadcast in the territory of a Member State, and which are contained in the own collection and archives of the organisations referred to in the text, and which are:

1. **Works in the form of books, journals, newspapers, magazines or other writings and printed materials, or**
2. **Phonograms, cinematographic or audiovisual works.**

The Directive shall also apply to works that constitute an integral or embedded part of works referred to above, including fine art, photographs, illustrations, designs, architecture, sketches of these works and other works.

The directive will not apply to cinematographic, audio or audiovisual works produced by public service broadcasting organisations before the 31 December 2002 and contained in their archives, as the Commission had proposed.

Orphan works: Members state that a work shall be considered an orphan work if one or more of the rightholders are not identified or, even if identified, are not located after a diligent search for the rightholder has been carried out and recorded in accordance with the directive.

**Diligent search for rightholders:** for the purposes of establishing whether a work is an orphan work, a diligent search must be carried out in good faith. In the event that the cinematographic and audiovisual work subject to a good faith diligent search is known to be a co-production, such a search must be carried out in each of the Member States involved in the coproduction.

The sources listed in the 'Due Diligence Guidelines' which are referred to in point 1 of the 'Memorandum of Understanding on Diligent Search Guidelines for Orphan Works' shall also be consulted.

In the event that the diligent search is carried out by an organisation other than an organisation referred to in the directive, the latter shall remain liable for the search performed.

Furthermore, Member States shall ensure that the results of diligent searches carried out in their territories are recorded in a publicly accessible database, designed and implemented so as to permit interlinkage with each other on a pan-European level.

**End of orphan status:** Members inserted a clause stating that a work shall cease to be an orphan work only if all the rightholders to that work are identified and located.

A rightholder who put an end to the orphan status of the work in respect of the rights to which he is entitled must receive an appropriate and fair remuneration for the use of the work.

**Permitted uses of orphan works:** an amendment states that if, in the case of an orphan work, one or more rightholders has been identified but not located, the name(s) of the rightholder(s) shall be indicated every time a work is used.

The organisations using an orphan work shall:

- maintain records of their diligent searches;
- maintain publicly accessible records of their use of orphan works;
- indicate, in any use of an orphan work where one or more rightholder has been identified but not located, the name of such rightholder.

Member States shall communicate to the Commission **the list and the online location of the databases in their territory**, and any subsequent modification thereof, where the organisations referred to in the directive maintain records of their diligent searches and of the use they make of orphan works. The Commission shall transmit this information to all Member States.

In order to avoid duplication of costly digitisation, Member States shall permit the organisations to interlink for the purpose of making available to each other the orphan works contained in their respective collections.

**Arrangements concerning rights' management systems:** the Directive shall be without prejudice to arrangements in the Member States concerning any form of rights' management systems, such as extended collective licences.

**Preventive measures:** in coordination with the parties concerned, Member States shall promote all preventive measures likely to limit the occurrence of orphan works in the future and to reduce their number.

**Retention of other provisions:** Members state that the Directive shall be without prejudice to the Member States' arrangements concerning mass-scale digitisation of works, such as those relating to out-of-commerce works.

# Orphan works: permitted uses

2011/0136(COD) - 13/09/2012 - Text adopted by Parliament, 1st reading/single reading

The European Parliament adopted by 531 votes to 11 with 65 abstentions, a legislative resolution on the proposal for a directive of the European Parliament and of the Council on certain permitted uses of orphan works.

Parliament adopted its position in first reading following the ordinary legislative procedure. The amendments adopted in plenary are the result of a compromise negotiated between Parliament and Council. They amend the Commission proposal as follows:

**Copyright as the basis of innovation:** as suggested by Parliament, the amended text stresses that copyright is the economic foundation for the creative industry, since it stimulates innovation, creation, investment and production. Mass digitisation and dissemination of works is therefore a means of protecting Europe's cultural heritage. It also recalls that copyright is an important tool for ensuring that the creative sector is rewarded for its work.

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

The Directive applies to:

- 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;
- 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
- 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.

**Orphan works:**

- a work or a phonogram shall be considered an orphan work **if none of the rightholders** in that work or phonogram is identified or, even if one or more of them is identified, none is located despite a diligent search for the rightholders having been carried out and recorded;
- **where there is more than one rightholder** in a work or phonogram, and not all of them have been identified or, even if identified, located after a diligent search has been carried out and, the work or phonogram may be used in accordance with the Directive provided that the rightholders that have been identified and located have, in relation to the rights they hold, authorised the organisations referred to in the Directive to carry out the acts of reproduction and making available to the public covered Directive 2001/29/EC.

**Diligent search:**

- a diligent search must be carried out **in good faith prior to the use of the work or phonogram;**
- a diligent search shall be carried out in the Member State of first publication or, in the absence of publication, first broadcast, except in the case of cinematographic or audiovisual works the producer of which has his headquarters or habitual residence in a Member State, in which case the diligent search shall be carried out in the Member State of his 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 shall also be consulted;
- the organisations referred to in the Directive must **maintain records** of their diligent searches and provide information to the competent national authorities showing that that a work or a phonogram is considered an orphan work;
- the information on the diligent searches must be recorded in a single **publicly accessible online database** established and managed by the Office for Harmonisation in the Internal Market.

**End of orphan work status:** a rightholder in a work or phonogram considered to be an orphan work must have, at any time, the possibility of putting an end to the orphan work status in so far as his rights are concerned.

**Permitted uses of orphan works:**

- 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 organisations shall indicate the name of identified authors and other rightholders in any use of an orphan work;
- a **fair compensation** must be due to rightholders that put an end to the orphan work status of their works or other protected subject matter for the use that has been made of such works and other protected subject matter in accordance with the Directive. Member States shall be free to determine the circumstances under which the payment of such compensation may be organised. The level of the compensation shall be determined, within the limits imposed by Union law, by the law of the Member State in which the organisation that uses the orphan work in question is established.

**Review:** the Commission shall submit 3 years after entry into force of the Directive and at annual intervals thereafter, a report concerning the possible inclusion in the scope of application of this Directive of publishers and of works or other protected subject-matter not currently included in its scope.