

ORPHAN WORKS – A FIRST-TIME REGULATION IN BULGARIA

I. ORPHAN WORKS AND THE NEED OF REGULATION

Orphan works are works or phonograms first published in the European Union (EU) and protected by copyright or related rights where the proprietor cannot be identified or, if identified, cannot be located despite a diligent and duly documented search.

Orphan works were introduced and defined for the first time in Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted use of orphan works (the "Orphan Works Directive"/ the "Directive").

They are found in collections held by libraries and cultural institutions. According to a study carried out by the European Commission (in May 2010¹), 3 million books representing 13% of the total number of in-copyright books and approximately 225,000 film works across Europe are orphan works.

In recent years (following the advent of the Internet) non-profit institutions such as publicly accessible libraries, educational establishments, museums, archives as well as film or audio heritage institutions and public-service broadcasting organisations ("beneficiary organisations"/ "beneficiaries") are carrying out digitalisation of the works contained in their collections, thereby aiming to preserve the cultural heritage and to lawfully make it publicly available online in all Member States. According to both European and Bulgarian law, the use of such works requires the proprietor's consent even though in case of an orphan work a permission cannot be obtained.

II. REGULATION

α) EU LAW

In view of the above and in order to promote the free movement of knowledge and innovation in the internal market, a major component of the Europe 2020 Strategy, the EU adopted the Orphan Works Directive allowing beneficiaries to build online libraries without infringing any copyright or related rights. The Directive came into force on 28 October 2012 aiming to unify the protection and to regulate the use of orphan works throughout the EU by providing a legal framework that facilitates and legalizes cross-border access to our cultural heritage. By virtue of the Directive, if a work is an orphan

¹ Assessment of the orphan works issue and costs for rights clearance, *European Commission, DG Information Society and Media, May 2010*

work in one Member State, its status shall be recognized in all Member States. To become accessible, however, information about orphan works must be registered with the Office for Harmonisation in the Internal Market (OHIM), based in Alicante, which then takes care of cataloguing this information in a unified European database (the "Orphan Works Database"). The online Orphan Works Database was launched on 27 October 2014.

The Directive applies only to certain categories of works, amongst which the following:

- works in the print sector (books, journals, magazines and newspapers);
- cinematographic and audio-visual works;
- phonograms;
- works embedded or incorporated in other works or phonograms (e.g. pictures in a book).

Materials must first be published or broadcasted in a Member State, or in the absence of publication or broadcast, must be publicly accessible by the beneficiary organisation with the consent of the proprietor.

Beneficiaries can use an orphan work only to fulfil their public interest mission. Additionally, orphan works can only be digitized and published online, excluding any cinema screening, TV and DVD editions.

In case of collective works where not all authors are identified, beneficiaries will be required to seek permission from the known authors to assure availability in accordance with the Directive.

The rights of orphan work authors are guaranteed by a provision stipulating that they can identify themselves as authors at any time and, therefore, end the orphan work's status. In such cases, authors are entitled to a fair compensation by the beneficiary organisation.

Although all Member States must have had the Directive's provisions implemented at national level by 29 October 2014, according to publicly available sources only Denmark, Finland, Germany, Greece, the United Kingdom (UK), Hungary, Italy, Ireland and Sweden have done so. France has recently moved forward as well, drafting a bill that implements the Directive and adopting it on 20 February 2015.

The UK introduced a different system where the Intellectual Property Office manages a licensing scheme database applying to all works in the UK. Unlike other countries, in the UK the diligent search for the proprietor has to be conducted by the applicant and not by the beneficiary organisation and the licensing scheme is available everyone, not only to the beneficiaries.

b) BULGARIAN LAW

Bulgaria did not implement the Directive until February 2015. The bill amending and supplementing the Copyright and Related Rights Act (CRRA) entered into force on 20 February 2015 introducing the term *orphan works* in Bulgarian law for the first time.

As a result of the belated transposition, the European Commission initiated an infringement procedure against Bulgaria. To date there is no publicly accessible information whether the infringement procedure was terminated as a result of the amendments to the CRRA.

Although the Orphan Works Directive is transposed almost word for word and despite the Directive's provision that a Member State in which an orphan work has been used determines the fair compensation and the circumstances under which it is due to the author of a material mistakenly considered as an orphan work, the text of the Bulgarian law is vague and unclear about this matter.

III. IMPACT OF THE ORPHAN WORKS DIRECTIVE AND CASE LAW

The first meeting on the Orphan Works Database and the Orphan Works Directive was organized by OHIM and the European Commission and took place on 14 April 2015. Participants in the meeting were the national authorities of each EU Member State and the European Economic Area country responsible for sending the information about the Orphan Works to the Orphan Works Database. The main topic of the meeting was good practices and their implementation.

The European Commission shall review and evaluate the impact of the Orphan Works Directive in October 2015 considering the possible inclusion of publishers and works or other protected subject-matter not currently included in the scope of the Directive and, in particular, stand-alone photographs, paintings, etc.

There is no case law of European or Bulgarian courts to date on both implementation and interpretation of the Orphan Works Directive.

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For more information about our services, please contact:



Anna Rizova
Managing Partner
anna.rizova@wolftheiss.com
T: +359 2 86 13 700



Georgi Kanev
Associate
georgi.kanev@wolftheiss.com
T: +359 2 86 13 700

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Wolf Theiss
Rainbow Centre
29 Atanas Dukov Street
BG – Sofia 1407

www.wolftheiss.com