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COMMISSION STAFF WORKING DOCUMENT

Report on the application of the "Orphan Works Directive" 2012/28/EU

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1. Introduction

Directive 2012/28/EU on certain permitted uses of orphan works (the ‘Orphan Works Directive’, ‘OWD’ or ‘Directive’)¹ aims to promote the digitisation of and lawful intra-EU online access to orphan works (i.e. works such as books, journals, illustrations, films or photographs whose rightsholder is unknown or cannot be located) contained in the collections of publicly accessible libraries, educational establishments, museums, as well as in the collections of archives, film and audio heritage institutions and in the archives of public service broadcasting organisations across the EU.

The Directive requires the Commission to keep under constant review the development of rights information sources and to report on whether to expand the Directive’s scope to include publishers and works or other protected subject-matter not currently included, and in particular stand-alone photographs and other images (Article 10, first paragraph). The Commission was to submit a report by 29 October 2015 on the application of the Directive, in light of the development of digital libraries (Article 10, second paragraph). The Directive also calls on the Commission to submit proposals to amend the Directive where necessary to support the functioning of the internal market (Article 10, third paragraph).

This staff working document (‘SWD’) responds to these requirements by issuing a first report on the application of the Directive. There are a number of factors that explain the late publication of this report. First, the Directive was implemented late in many Member States and more time was needed to fully understand its concrete impact, and that of the relevant supporting mechanisms, in particular the European Union Intellectual Property Office (EUIPO) orphan works database. Additionally, right at the time when the Directive’s legislative implementation was being concluded, the copyright debate shifted towards the broad copyright reform brought about by the DSM Directive, which contains additional provisions aiming at facilitating the mass digitisation of cultural heritage². For a long period, pending the negotiations and implementation of the DSM Directive, it was difficult to gather evidence and trigger discussions on the Orphan Works Directive.

In this context it is also worth noting that no Member State has exercised the option of raising the implementation of the Directive as a matter that hinders one of the national arrangements concerning the management of rights at national level, as provided for in Article 10, fourth paragraph of the Directive. This provision requires the Commission to take such evidence into account when drawing up its report. This has not been necessary because of the absence of any such communication from Member States.

¹ Directive 2012/28/EU of 25 October 2012 on certain permitted uses of orphan works, OJ L 299, 27.10.2012, p.5.

² See in particular Articles 8 to 11 (“out-of-commerce works and other subject matters”) of Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130, 17.5.2019, p. 92–125. The Commission proposal dates from 14 September 2016.

This SWD is based on information from various sources. The main source is the independent study (hereinafter ‘the study’) on the application of the Orphan Works Directive³, published alongside this SWD, which includes data collected through an online survey targeting all relevant stakeholders (beneficiary organisations, national competent authorities and rightsholder organisations). The study covers all the Member States of the European Union (EU), the countries of the European Economic Area (EEA), as well as the United Kingdom (as former EU Member State). In addition, the relevant Commission departments have regularly discussed the application of the Directive with stakeholders and Member States, in particular during its implementation phase.

The relevant Commission departments have also worked with the EUIPO, which is entrusted by the Directive with the task of setting up and maintaining a single publicly accessible online database of orphan works.

Note that the Orphan Works Directive was adopted and transposed into national laws when the United Kingdom was still part of the European Union. However, the orphan works recorded by British organisations have not been part of the mutual recognition system since the end of the Brexit transition period, i.e. on 31 December 2020, and have therefore been removed from the EUIPO database. As of that date, the Directive no longer applies to the United Kingdom⁴.

* * * *

The Directive was adopted on 25 October 2012 and, according to Article 9(1) had to be implemented by Member States by 29 October 2014.

The Directive covers three categories of works or subject matter that are protected by copyright and which are first published or first broadcast in a Member State. These are: (i) writings published in a certain form such as books, journals, newspapers and magazines; (ii) cinematographic or audiovisual works; and (iii) phonograms. These items must be included in the collections of certain institutions and/or produced by public broadcasters by a certain date and held in their archives. The Directive also applies to items that have never been published or broadcast but that have been made publicly accessible by the organisations, and to photographs, illustrations or other visual material embedded in a published work. A work or a phonogram will be considered an orphan work if none of the rightholders in that work or phonogram have been identified or, even if one or more of them have been identified, none have been located despite a diligent search having been carried out and recorded.

³ Study on the application of the Orphan Works Directive (2012/28/EU), 2021, available at: <https://data.europa.eu/doi/10.2759/32123> (‘the study’). The study was conducted between April 2020 and February 2021, but its findings remain overall valid for the purposes of this SWD.

⁴ Recital 12 clarifies that the Directive only applies to works and phonograms that are first published in the territory of a Member State or, in the absence of publication, first broadcast in the territory of a Member State or, in the absence of publication or broadcast, made publicly accessible by the beneficiaries of this Directive with the consent of the rightholders.

The purpose of the Directive is to increase legal certainty across the EU by setting out a common approach to determining the orphan work status and the permitted uses of orphan works by certain organisations (also referred to as ‘beneficiary organisations’ or ‘beneficiaries’). To this end, the Directive provides for a mandatory copyright exception to the exclusive rights of rightholders to reproduce and make available their work (Article 2 and 3 of Directive 2001/29/EC⁵), with the aim of facilitating the digitisation and online display of so-called orphan works by certain organisations.

Before the Directive came into force, the lack of available information on the authors or other rightholders of certain works had often prevented institutions from digitising and displaying works held in their archives. Furthermore, copyright clearance was costly and time-consuming, and failure to clear the rights brought with it the risk of infringement of copyright, especially in the context of large-scale digitisation projects. As orphan works represent a substantial part of the collections currently held by European libraries, museums, archives, film and audio heritage institutions, and public service broadcasting organisations, different and fragmented approaches in Member States to the recognition of the orphan work status could have resulted in hindering the effective functioning of the internal market.

⁵ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.06.2001, p. 10-19

2. Transposition and implementation of the Directive in the Member States/EEA countries

Fourteen Member States transposed the Directive on time. In November 2014, the Commission opened infringement proceedings against 12 Member States for failing to transpose the Directive by the 29 October 2014 deadline⁶. This was followed by the sending of reasoned opinions in May 2015 against five Member States that had still not implemented the Directive⁷. By mid-2016, the Directive was transposed by all Member States.

The independent study gives an overview of the implementation of the Directive in the Member States, and its effectiveness. This section of the staff working document provides a quick overview of the main features of the implementing laws largely based on the study's findings. The purpose is purely informative. This staff working document does not aim to provide a legal assessment of the national laws nor does it seek to assess their compliance with the Directive.

As a general remark, the Commission departments have not found any evidence of past or ongoing litigation on this Directive at national level. In addition, they have not received any complaint about Member States' transposition or application of the Directive since its entry into force. Moreover, there has been no preliminary reference from any Member State on the scope of the Directive and hence there is no case law of the Court of Justice about the Directive.

In most Member States, the Directive was transposed literally, either through self-standing new acts or amending existing provisions with limited changes.

Guidelines or other informational material were adopted in some Member States alongside the legislative implementation⁸. This additional guidance seems to have had a positive impact on the operation of the orphan works system⁹.

2.1. Scope

The national laws' provisions on the notions of when a work is to be considered an orphan work, works with several rightholders and the list of beneficiaries of the orphan works exception are drafted identically to the Directive in most cases. When different wording has

⁶ The Commission sent letters of formal notice to the following EU Member States: Austria, Belgium, Bulgaria, Cyprus, France, Latvia, Lithuania, Luxembourg, Poland, Portugal, Romania and Slovenia.

⁷ The Commission sent reasoned opinions to Cyprus, Luxembourg, Poland, Romania and Slovenia.

⁸ See the study, pp. 30 – 34. Guidelines were issued by national authorities in Greece, Italy, Latvia and Lithuania (as well as in the United Kingdom). Informational material was published by, at least, the National Library of Hungary.

⁹ See the study, p. 20

been used¹⁰ this seems to be due to specific terminology under national legal frameworks and overall unproblematic.

2.2. Diligent search and mandatory list of sources

Article 3(1) of the Directive provides for a ‘diligent search’, which is a prerequisite in determining the status of a work and for being able to benefit from the exception. This search must be done in good faith and must involve consulting the appropriate sources for the category of works and other protected subject matter in question.

Article 3(2) requires Member States to determine, in consultation with rightholders and users, the sources that are appropriate for each category of works or phonograms in question. Such sources must include at least the relevant sources listed in the Annex, which sets out a mandatory, non-exhaustive list of sources to be consulted.

All Member States/EEA countries except Austria, Cyprus and Iceland adopted national lists of sources. In some cases (Bulgaria, Croatia, Denmark, Lichtenstein, Malta and Norway), national lists of sources are almost identical to the list of sources in the Annex to the Directive. The number of national sources ranges from 25 (Finland) to 229 (Germany)¹¹. Moreover, some Member States require that all the sources in their national list have to be consulted while others accept that a search may be diligent even if not all sources are consulted. The latter is the case, for example, in Belgium, Greece and Lithuania¹².

2.3. Mutual recognition

Article 4 of the Directive provides for the mutual recognition of the orphan work status throughout the EU/EEA, meaning that if a work has been considered an orphan work in one Member State it is automatically considered an orphan work in all Member States, and may be used and accessed accordingly.

The principle of mutual recognition has been explicitly spelled out in the law of all Member States but three (Germany, Poland and Portugal)¹³. The absence of a specific provision in the law of those three Member States raises some doubts from a legal standpoint, but it may be the result of the legal technique chosen by the national legislator rather than an intentional policy choice¹⁴. Importantly, this does not seem to have caused any specific practical problem to relevant stakeholders¹⁵.

¹⁰ See for example in Croatia and Portugal as regards the definition of orphan works, in Austria, Estonia, Poland, Portugal, Slovakia and Spain for the list of beneficiaries of the exception

¹¹ See the study, pp. 52 – 59 – Table 6: Overview of the national transposition of the list(s) of sources

¹² See the study, pp. 116 – 126 – Table 16: Overview of national diligent search requirements

¹³ See the study, p. 69

¹⁴ The evidence collected has not allowed identifying the reasons behind this. It is possible that the absence of a specific provision may be the result of a potential reluctance from relevant national legislators in those countries to regulate an extraterritorial matter, i.e. the use of their “national” orphan works in the territory of other Member States.

¹⁵ See the study, p. 67

In practice, it appears that beneficiaries have not made extensive use of the mutual recognition principle. The beneficiaries with experience with the use of the mutual recognition principle, while noting the importance of the principle as it provides legal certainty across the EU, identified no particular difficulties.

2.4. End of the orphan work status and fair compensation

Article 5 of the Directive stipulates that a rightholder in a work or phonogram considered to be an orphan work can, at any time, put an end to the orphan work status in so far as their rights are concerned. The opting out by the rightholder means that the rightholder has a right to put an end to the orphan works status of their works, that a fair compensation is due to rightholders for any use that has been made of their works (Article 6(5))¹⁶ and any future use of the work by beneficiaries may only continue with the authorisation of the rightholder.

A specific procedure to put an end to an orphan work status is set out in the laws of Estonia, Finland, France, Greece, Lithuania, Poland and Spain¹⁷.

All Member States provide for rightholders' compensation in their national legislation and most of them provide for detailed rules. Several Member States, including Cyprus, France, Greece, Ireland, Italy, Luxembourg, Malta, Slovenia and Spain stipulate that the conditions for the payment of the compensation should be determined by mutual agreement between the rightholder and the beneficiary in question, with courts or national authorities having the final say. A few Member States, including France, Hungary, Lithuania and Slovenia provide detailed rules on the calculation of fair compensation, for instance by precisely specifying the amount depending on the type of work or by setting ceilings for compensation¹⁸.

2.5. Permitted uses (exception)

Article 6 of the Directive requires Member States to provide for an exception or limitation to the right of reproduction and the right of making available to the public. This is to ensure that publicly accessible libraries, educational establishments, museums, archives, film or audio heritage institutions and public-service broadcasting organisations are permitted to use 'orphan works' contained in their collections by:

- (a) Making the orphan work available to the public;
- (b) Reproducing the work, but only for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration.

¹⁶In line with the Directive, Member States are free to determine the circumstances under which the payment of such compensation may be organised. Recital 18 provides guidance in this respect

¹⁷ See the study p. 70

¹⁸ The methodology for the calculation of the compensation and the elements to be taken into account vary among Member States. For example, in some Member States (France, Hungary) it is determined based either on a calculation of the loss actually suffered by the rightholder or taking into account the uses made, the duration of such use and the type of works affected. In Lithuania, the institution authorised by the government decides on the amount of the fair compensation, while in Slovenia the method of calculating the amount of fair compensation and the method of its payment is determined by Government Decree. See the study, pp. 151 – 162

When transposing the provisions on ‘permitted uses’, most national provisions followed the text of the Directive literally, with the notion of ‘public interest missions’ defined in more detail by the law of some Member States (e.g. Austria, France, Greece) or more generally by that of others (e.g. Estonia)¹⁹. This appears to reflect the margin of discretion that the Directive grants to Member States.

2.6. EUIPO database

Under Article 3(6) of the Directive, the EUIPO is responsible for setting up and managing a single publicly accessible online database on orphan works. The EUIPO database²⁰ has been available online since October 2014. It is designed to (i) provide easily accessible information on recorded works for the benefit of other beneficiaries conducting digitisation projects; and (ii) to enable rightholders to claim a change in status of a work recorded therein. It appears that the beneficiary organisations have had a rather positive experience²¹ of using the EUIPO database.

However, the EUIPO database has not been as widely used as expected²². According to the latest information provided by the EUIPO to the Commission, as of 5 October 2022 there are 122 active registered users in the database and 7 597 works (6 128 main + 1 469 embedded). It is worth noting that the withdrawal of the orphan works entries by British organisations following the United Kingdom leaving the EU led to a significant decrease in the number of works registered in the database²³.

According to stakeholders, the limited use of the database is a result of the burdensome nature of the Directive rather than due to issues with the functioning of the database itself. In some cases, however, a few stakeholders suggested that there is room for improvement, e.g. the EUIPO database could be more user-friendly for searching through the recorded works, using Europeana as a model for best practice. Additionally, a few stakeholders asked to issue an annual report on the database content in order to improve its transparency²⁴.

¹⁹ See the study, pp. 49 – 51

²⁰ <https://euiipo.europa.eu/orphanworks/>

²¹ Out of 34 beneficiaries that had experience with the EUIPO database and who replied to the question: “In your experience, is the information provided by the EUIPO database effective in facilitating the inclusion of orphan works in large-scale digitisation and dissemination projects?”, 15% said “yes, fully”, 38% replied “yes, partially”. See the study, pp. 191 – 195

²² Answering to the question: “Does your organisation have any experience in using the EUIPO Orphan Works Database?”, 39% of the respondents said “yes”, 37% said “no” and in 24% of cases it was not applicable. For further reference, see the study, pp. 191 – 195

²³ Note that the figures presented in the study refer to the pre-Brexit period and are therefore significantly higher than the ones reported in this SWD. The study reports that in June 2020, a total of 18,649 works were recorded in the EUIPO database (only 6,903 works were publicly available via the online search tool, the rest being visible to registered users only because they are in ‘edited status’, which means that the beneficiary organisations that have recorded these works have indicated that the information on the works might change). Beneficiary organisations from 17 countries had contributed to the database, with 61% of the works in the database recorded by British organisations (notably the British Library).

²⁴ See the study, pp. 191 – 195

Finally, it should be noted that some Member States have established national databases. In most cases their purpose appears to be to collect information at national level and transfer it to the EUIPO database. No specific problems have been identified in this respect²⁵.

²⁵ See the study, pp. 66 – 67 and Table 21: Overview of national orphan works databases, pp. 162 – 165.

3. Assessment of the practical application of the Orphan Works Directive and of the possible need for amendments

3.1. Assessment of the practical application of the Directive in light of the development of digital libraries

As mentioned in the previous section, orphan works make up a large share of the collections of cultural heritage institutions²⁶. However, 8 years after the transposition deadline, the Directive has been rarely applied in practice. Stakeholders are divided on whether the Directive has led to improvements in the digitisation and dissemination of orphan works²⁷. The use of the exception provided by the Directive to digitise and disseminate orphan works seems to be very limited if the low number of recorded works in the EUIPO database is taken as the benchmark.

The burdensome nature of the diligent search mechanism is widely perceived as a significant barrier hindering the use of the mechanism of the Orphan Works Directive and the main reason for its ineffectiveness as reported by the cultural heritage organisations/beneficiaries of the Directive. The mandatory nature of the list of sources mentioned in the Annex to the Directive as well as occurrences where Member States have extended this list at national level (which is allowed by the Directive²⁸) appears to have created a significant burden for beneficiary organisations. Moreover it has sometimes been reported that some sources are inaccessible and/or irrelevant, and do not correspond to sources that a professional in the sector would consult. The main factors which may affect the diligent search in practice are the reliability and accessibility of the sources and the provision of additional guidance by national authorities²⁹.

Despite the concrete challenges with the diligent search, it should also be highlighted that from a legal standpoint, the introduction of a mandatory exception – of which the diligent search is a key element – for the digitisation and dissemination of orphan works has removed the problems related to rights clearance, which before the adoption of the Directive

²⁶ Estimates of the share of orphan works vary based on the sector involved and on the methodology used to calculate it. For further details see Table 4 of the Impact Assessment on the cross-border online access to orphan works accompanying the proposal for a Directive on certain permitted uses of orphan works - SEC(2011) 615 - https://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2011/sec_2011_0615_en.pdf

²⁷ Based on the results of the survey carried out for the study, overall, 37% of respondents replied “yes” and 37% replied “no” to the question on whether there had been improvement in the digitisation and dissemination of orphan works since 2014. Replies differ between types of stakeholder: 40% of beneficiaries and 31% of rightholders replied “yes”, zero CMOs and 100% of “other” respondents replied “yes”. 44% of beneficiaries, 41% of rightholders and 40% of CMOs replied “no”. More than 65% of respondents who indicated that there were improvements in the digitisation of orphan works stated that these could be at least partially attributed to the Directive. For further reference, see the study pp. 171 – 173.

²⁸ Article 3(2).

²⁹ See the study, p. 58 and Figure 7: ‘Based on your experience, how would you assess the following difficulties linked to the sources to be consulted for diligent searches?’. See also p. 181. The biggest challenges faced by beneficiaries as regards the diligent search appear to be linked to the accessibility and quality of the sources, with 66% of respondents rating these issues as (highly) problematic. The excessive number of sources to be consulted is also rated as (highly) problematic by over half of the respondents (55%), followed by difficulties in determining the sources that should be consulted for a particular type of work (54%).

constituted the main legal obstacle preventing the digitisation of orphan works. The diligent search requirement, even if burdensome, is a one-off event which provides legal certainty for beneficiaries and after which beneficiaries can use the orphan work without facing additional costs and burden related to right clearance from rightholders that cannot be found and from whom they are unable to obtain the necessary authorisation.

Moreover, it appears that overall the diligent search process rarely leads to rightholders reappearing unexpectedly, nor does the termination of the orphan work status seem to pose any practical difficulties. Rightholders seldom reappear and, of those that do, few claim their rights and demand compensation. The very low percentage of works that have been claimed in the EUIPO database confirms this. When a diligent search of rightholders is concluded in line with the Directive, it seems that the search is indeed thorough and supports the objective of the Directive and rarely leads to the unexpected reappearance of a rightholder. While some stakeholders believe that this is because rightholders are rarely aware of the use of their works, others argue that it proves that the diligent search process is an effective tool to correctly identify orphan works³⁰.

The application of fair compensation is also perceived as a barrier to the digitisation of orphan works by stakeholders representing the beneficiary organisations. Rightholders rarely reappear, but the risk of having to pay compensation as well as unclarity as to the amounts to be paid may work as a deterrent to them using the exception. In the Member States where more detailed rules on fair compensation have been enacted, beneficiaries may have been comparatively more successful in using the Directive's mechanism³¹. On the other hand, compensation is a key element of the balance between exception and copyright protection: rightholders organisations argued that an effective compensation system is needed considering that once a work has been made available online it loses all its future value.

Another objective of the Directive is to help digital libraries by enabling the orphan work status to be recognised across borders. Despite the relatively limited experience with the mutual recognition system, stakeholders have a rather negative opinion about the Directive's ability to improve the cross-border use of orphan works, mainly pointing at the overall ineffectiveness of the Directive as the main reason for that³². The scope of the Directive, the EUIPO database, specific national challenges – including a lack of resources and/or motivation for large-scale digitisation projects and overlaps between the Directive and other regulatory schemes are other concerns identified by the stakeholders.

³⁰ On the question of how often rightholders put an end to an orphan work status, 85% of the 40 respondents that answered stated that rightholders never (53%) or rarely (32%) end an orphan work status. Similarly, 70% of respondents were unable to answer how frequently rightholders claim compensation in cases where an orphan work is claimed. Of the respondents that answered (26 in total), 73% stated that rightholders rarely (38%) or never (35%) claim compensation.

³¹ Based on the survey carried out in the framework of the study, beneficiaries in Germany, Lithuania and the United Kingdom seem to have been relatively more successful in using the mechanism of the Directive. See the study, p. 74 and Table 20: Rules on fair compensation, pp. 151 – 162

³² Stakeholders were asked whether they believe that the use of orphan works from different countries has increased across the EU/EEA since the entry into force of the OWD. The majority (71%) did not know. Of the 25 respondents who gave another answer, 64% believe that there has not been an increase in the cross-border use of orphan works, with no strong differences between stakeholder groups. The majority of those citing no increase in cross-border use of orphan works argued that this is due to the overall ineffectiveness of the OWD.

In this context, it should however be noted that the application of the Orphan Works Directive is only one of many relevant factors in the digitisation activities of cultural heritage institutions. The evidence collected for the preparation of this SWD indicates that challenges faced by beneficiary organisations also include external factors, such as lack of resources (financial and human), lack of technical capabilities to carry out large-scale digitisation projects³³. The analysis performed by the Commission departments also shows that despite the shortcomings, the Directive has a positive (even if limited) impact on the digitisation and online availability of the European cultural heritage and can still be considered as a useful tool for some digitisation projects.

3.2. Assessment of possible amendments to the Directive

According to Article 10, first paragraph of the Directive the Commission must report on whether to include publishers and works or other protected subject-matter within the scope of the Orphan Works Directive, in particular stand-alone photographs and other images.

The Commission departments have not experienced any significant debate about a potential extension of the scope of the Directive since its adoption. This is likely to be related to the limited practical use of this instrument as well as to the adoption of more recent rules in the DSM Directive which have a broader scope and may largely cater for the situations excluded from the scope of the Orphan Works Directive.

In the context of the independent study, a quantitative survey was carried out asking stakeholders to express their preferences as to a potential extension of the scope, both as regards works and subject matters currently not covered and beneficiaries (in particular publishers). The results shows that, although stakeholders views differ, overall changes to the scope gathered a relatively low support on both matters.³⁴

It should also be noted that the extension of the Directive to stand-alone graphic works and photographs would likely face a strong resistance from the image sector, which has traditionally been concerned about the risk that photographs may be wrongly classified as “orphans” because of the removal of metadata. The extension of the scope to private entities, such as publishers, would significantly depart from the rationale behind the Directive which is to facilitate the digitisation activities of organisations acting in the public interest³⁵.

Taking into account the limited application of the Directive as highlighted in this SWD, the views expressed by the stakeholders and the new solutions for the digitisation of cultural

³³ See study, p. 183 – 188

³⁴ See the study, pp. 174 – 177. The study highlights that extending the scope of the Directive to include other types of works, notably stand-alone graphic works, would be supported by around 35% of all the stakeholders consulted. In fact, 37% of stakeholders are in favour of extending the scope to other types of works and/or materials and almost all of them indicated that stand-alone graphic works such as drawings, sketches, postcards, illustrations and photographs should be included. Amending the Directive to extend its scope to other types of institutions would be supported by less than one third (32%) of the stakeholders interviewed; only 15% would support the inclusion of publishers as potential beneficiaries of the exception.

³⁵ The study reports that most respondents in favour of extending the scope of the Directive to other institutions believe that it should only be extended to organisations with a public interest mission, such as research, educational and cultural organisations (which are however already largely covered). 24% of stakeholders in favour of extending the scope of the OWD indicated research institutes, and 21% indicated private libraries, educational establishments, museums and archives.

heritage provided by the DSM Directive, the Commission departments consider that an extension of the scope of the Orphan Works Directive would not be proportionate at this stage and would most likely not significantly contribute to increase the use of the mechanism of the Directive.

Similarly to a possible extension to the scope, proposing other legislative measures³⁶ may also not be a proportionate way forward at present considering that the identified problems relate mostly to practical implementing aspects, that stakeholders' interest is relatively limited and that the Directive's mechanism is rarely used in practice. Moreover, proposing legislative changes could be premature in light of the recent changes introduced by the DSM Directive that modernise various aspects of the copyright framework governing how cultural heritage institutions operate in the digital environment, including digitisation and online display of their collections.

When it comes to non-legislative measures, the independent study suggests some possible actions either at EU or national level³⁷ as well as potential improvements to the EUIPO database³⁸. These suggestions are just sketched out and not all of them are necessarily realistic or justified. The Commission departments are however keen to hear from stakeholders and to continue the discussion on how to improve the functioning of the Directive.

³⁶ The study (pp. 96 – 99) identifies further possible legislative changes (besides the scope) that could be considered without however assessing them in detail. These include extending the permitted uses of the Orphan Works Directive, or amending the 'diligent search' requirements to make them lighter, for example by: (i) introducing a "lighter" version of a diligent search for embedded works; (ii) removing the wording 'at least' from the mandatory list of sources to be consulted; and (iii) making the list of sources non-mandatory and/or remove sources from the Annex to the Directive.

³⁷ The study (pp. 96 – 99) mentions: (i) issuing guidance, recommendations or other soft law instruments at national level, notably on the diligent search; (ii) training provided at national level on the diligent search procedure; (iii) making the criteria for fair compensation clearer, either at EU or national level; (iv) creating a central website (either at EU or national level) that compiles links to all sources for each type of work in each country (one-stop-shop)

³⁸ See the study, as above: (i) removing the need for national competent authorities to act as intermediaries for inputting works in the EUIPO database (note, however, that this is a requirement in the Directive justified by the legal basis on the role and competencies of the EUIPO); (ii) making the database more user-friendly, using Europeana as a model for best practice; and (iii) linking the new EUIPO portal on out-of-commerce works to the EUIPO Orphan Works Database, going beyond the synergies that have already been considered when designing the out-of-commerce works portal.

4. Conclusions

Overall, it is clear that the Directive has only partially fulfilled the goal of facilitating the mass digitisation of orphan works by certain institutions. The Directive's mechanism has been rarely used in practice and its relevance as a potential tool for the mass digitisation of cultural heritage has therefore proven to be limited. On the positive side, the Directive has introduced a specific legal mechanism into EU law, based on a new mandatory exception or limitation that allows cultural heritage institutions to digitise and use orphan works legally, something that would not have been possible before.

The Directive provides a solution based on an exception, with a system of safeguards (notably the diligent search) to take into account the legitimate interests of rightholders, while ensuring legal certainty and clarity for the benefit of cultural heritage institutions engaged in digitisation and dissemination of orphan works. At the time of its adoption, the mechanism introduced by the Directive represented a significant step towards solving the problem faced by the European cultural heritage institutions holding orphan works in their collections. Today, after the adoption of the DSM Directive, the Orphan Works Directive remains part of the legal toolkit of measures to make digitisation and online display of cultural material legally possible.

The evidence gathered to prepare this SWD shows that there are practical difficulties affecting the Directive's efficiency, especially regarding specific requirements for the diligent search. The Commission is keen to continue the dialogue with all interested parties on how to make sure that these difficulties are properly mitigated in the future.

The Commission departments will continue to monitor the application of the Orphan Works Directive and of the DSM Directive and the interplay between the orphan works exception and the out-of-commerce works mechanism. They will assess the impact of the out-of-commerce provision on the digitisation and dissemination of orphan works when reviewing the DSM Directive, which is due no sooner than 7 June 2026 and which will provide for an important opportunity to take stock of the provisions for the digitisation of cultural heritage as a whole. The role of the general extended collective licensing (ECL) mechanism set out in Article 12 of the DSM Directive in relation to the digitisation and dissemination of cultural heritage will also be further³⁹ taken into account in this context.

Moreover, the Commission departments will explore together with EUIPO possible improvements to the EUIPO database to make it more user-friendly. This could include potential synergies between the orphan works database and the newly set-up out-of-commerce works portal, which is also managed by the EUIPO.

³⁹ In compliance with Article 12(6) of the DSM Directive, the Commission issued a report on the use of extended collective licensing mechanisms in the EU in November 2021 (SWD(2021) 337 final), which gives a general and preliminary overview on the use of these mechanisms as provided in the national laws before the transposition of the DSM Directive.