

Report 1

Requirements for Diligent Search in the United Kingdom, the Netherlands, and Italy

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Enhancing access to 20th Century cultural heritage
through **D**istributed **O**rphan **W**orks clearance



EnDOW

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EXECUTIVE SUMMARY

The Object of the Analysis

This Working Paper provides an analysis of the conditions under which a Diligent Search can be carried out under the laws of Italy, the Netherlands and the UK. These pilot countries are both members of Heritage Plus and of the European Union. For each jurisdiction, the analysis has determined what are the requirements for Diligent Search to locate copyright holders and 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 will allow the researchers, in the subsequent stages of EnDOW, to design and populate the crowd-sourcing platform that will facilitate carrying out Diligent Search for mass digitisation.

The Sources for Diligent Search

All three examined countries have implemented the Orphan Works Directive.

A) The legislation allows others to carry out the Diligent Search on behalf of cultural heritage institutions; however, these will remain responsible for the Search. B) The examined national legislation provides both specific sources to be consulted in order to locate the rightholder of a potentially orphan work, and general indications on how to locate other sources (collecting societies, authors' guilds, unions and associations, national libraries, catalogues, agents, etc). C) Uses for orphans vary among countries. They include: preservation; public communication; educational purposed; personal use; 'digital' publication. Their relationship with the corresponding copyright exceptions is unclear.

Accessibility of the Sources

The Statistical analysis on the accessibility of the sources to be consulted to locate the rightholder of a work has revealed that a sizeable share of these is not freely accessible online. General Orphan Works' repositories and database are freely accessible, but authors' guilds and unions generally are not. Newspaper archives are often accessible for a fee. There is no hierarchical validity of sources by law.

Conclusion

The study suggests that individual users can carry out Diligent Search on behalf of Cultural Heritage institutions. However, in this sample little more than half of the sources for Diligent Search are freely accessible online. As a result, it is not clear how a cultural institution can clear the rights of its collections while fully complying with the requirements of the legislation. Legislative action, official guidelines or jurisprudence are needed to establish different legal value of sources for diligent search, with various degrees of optionality depending on data relevance and accessibility.

INTRODUCTION

Under the Orphan Works Directive,¹ a work or phonogram can be declared to be an ‘orphan’ only after a potential user has conducted a diligent search of the rightholders. Such a diligent search must be carried out in good faith by consulting the appropriate sources for the category of works concerned. The Directive specifies that “The sources that are appropriate for each category of works or phonogram in question shall be determined by each Member State”.²

This Working Paper provides an analysis of the conditions under which a Diligent Search can be carried out under the laws of Italy, the Netherlands and the UK. These pilot countries are both members of the Heritage Plus programme (under which this project is funded) and of the European Union. All of them have implemented the Orphan Works Directive in their legislation.³ Our analysis has determined what are the requirements established by these countries for Diligent Search to locate copyright holders. In particular the analysis has determined:

- a) Who can carry out a Diligent Search and on what conditions;
- b) What are the authoritative sources to be consulted and to what extent they are accessible to users;
- c) What use can be made of an orphan work.

The purpose of this analysis is twofold.

First, the analysis provides preliminary evidence as to the practical aspects of diligent search in the three pilot countries, and in particular it determines the scale and accessibility of the sources required by law. In this respect, the analysis will inform some policy recommendations as to the implementation of the diligent search requirement in EU member states.

¹ Directive 2012/28/EU on certain permitted uses of orphan works.

² Ibid., art. 3(2).

³ See Annex I.

Second, the analysis provides models and specifications that will be applied in the design of the Diligent Search Platform (EnDOW, Work Package 2). The platform will be initially modelled on the diligent search requirement of the three pilot countries object of this study.

DILIGENT SEARCH IN THE UNITED KINGDOM

Legal Background

The United Kingdom has implemented the Orphan Works Directive⁴ within the Enterprise and Regulatory Reform Act 2013, in force since 2014.⁵ Moreover, a national licensing scheme has been introduced through the Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014.⁶ While the orphan works exception only establishes a copyright exception to the benefit of public cultural institutions within their public interest mission, and it excludes stand-alone photographs from its remit, the UK orphan works licensing scheme allows for both commercial and non-commercial licensing of every type of work, for every type of use.

The UK orphan works licensing scheme runs in parallel with an Extended Collective Licensing system introduced under the new law.⁷ In addition, the scheme requires the establishment of a national orphan works register⁸ for licensing, maintained by the Intellectual Property Office (IPO), while cultural institution relying on the orphan works exception will register their works on the OHMI database. The IPO has set licensing fees depending on the use (commercial and non-commercial) and the type of work, and it will keep the revenues for 8 years, for prospective reappearing authors.

⁴Directive 2012/28/EU on certain permitted uses of orphan works.

⁵Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014, S.I. 2014/2861, amending Copyright, Designs and Patents Act 1988, sec. 116D (hereinafter: the orphan works exception). See Annex I.

⁶Enterprise and Regulatory Reform Act 2013, c. 24, § 77, amending CDPA 1988, sec. 116A (hereinafter: the UK orphan works licensing scheme). See Annex I.

⁷ Ref.

⁸<https://www.orphanworkslicensing.service.gov.uk/view-register>. At the time of writing this database contains 280 entries (accessed 011/09/15)

Both the exception and the licensing scheme are premised upon diligent search of the copyright holders. Diligent search requirement is met after the consultation of a number of “appropriate sources”, not further specified in the legislation. However, the IPO has compiled in its guidance for diligent search a “check list” for each type of work displaying a number of appropriated sources to be consulted.⁹In this section, the First Progress Report of the EnDOW project will illustrate the Diligent Search Requirement and, where applicable, the practices relating to diligent search for the purpose of orphan works right clearance in the UK. In particular, we will provide empirical evidence on the accessibility of the sources that are to be consulted during a search for copyright holders. We will see that many sources, such as orphan works databases, authors’ organizations and unions, archives and directories are accessible online. However, a sizeable share of the examined sources is not available online and can only be consulted by contacting the database owner, via email or by phone, and in a few cases databases can only be accessed upon payment. This would certainly have an impact on the practicability of diligent searches carried out by Cultural Heritage institutions within the framework of the two orphan works schemes (normally including digitisation and online communication of their own collections).

In the United Kingdom, according to the Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014¹⁰ “a diligent search must comprise a reasonable search of the relevant sources to identify and locate the right holder”. The relevant sources mentioned in Section 4 (3) of the Regulation (CDPA sec. ...) are : a) The orphan works register for the UK licensing scheme; b) The OHIM orphan works database; and c) The appropriate sources under Part 2 of Schedule ZA1 of the Copyright, Designs and Patents Act 1988.

Carrying out a diligent search is required both to Cultural Institutions willing to benefit from the exception and by any legal or physical person willing to licence a potentially orphan work. While there is not a minimum requirement established by law on what constitutes a “diligent” search, the IPO has

⁹See Orphan Works Diligent Search Guidance for Applicants, U.K. INTELL. PROP. OFFICE (Sept. 17, 2014), <https://www.gov.uk/government/publications/orphan-works-diligent-search-guidance-for-applicants>.

¹⁰ Available at <http://www.legislation.gov.uk/ukdsi/2014/9780111117644/contents> (accessed 25/01/16)

issued detailed guidelines on this complex matter. The guidelines can help both the prospective applicant of an orphan work's licence and the cultural institution seeking to benefit from the exception. They both in fact will need to search for potential rightholders of the work they intend to use. This may include literary works, films, sound recordings and still visual art (which for the purposes of the orphan works exception can only be embedded in other works).

How to Carry Out a Diligent Search

The diligent search needs to be carried out for each work in its country of origin.¹¹ Since EU Member states have to implement the Orphan Works Directive, diligent search requirement will apply to all works originating in the territory of the European Union. For works included in collections of UK institutions but originated on other countries, the foreign legislation applies. Every diligent search should start with the consultation of the OHIM database,¹² where ascertained orphan—or partially orphan—works are registered. Once a work is declared orphan in a member State of the European Union, no further search is required.¹³

Other crucial pieces of information to be found while carrying out a diligent search include the date of publication of the work and the date of death of the author. Copyright duration depends on these dates and varies between works. For example, copyright on computer-generated works lasts 50 years, as well as Crown or Parliamentary copyright, whereas copyright on human-generated works lasts 70 years (from the end of the year of the death of the author). However, special regulations apply to anonymous or posthumous works, which are generally granted copyright for 50 years from publication, with complex exceptions depending on the date of the subsequent publication (after the death of the

¹¹According to the directive, for literary or musical works the country of origin is the country of first publication, or, in the absence of publication the country of first broadcast, and in the absence of both publication and broadcast the country where the work was made publicly accessible by the relevant organization with the –presumable- consent of the rightholder. These arguably include unpublished works held by the cultural institutions which are beneficiaries of the exception established by the directive. For cinematographic or audio-visual works, the country of origin is the country of headquarter or habitual residence of the producer. See Article 3(3) of the Orphan Works Directive.

¹²<https://oami.europa.eu/orphanworks/> (accessed 04-12-15)

¹³The Orphan Works Directive, Article 4 states: 'Mutual recognition of orphan work status - A work or phonogram which is considered an orphan work according to Article 2 in a Member State shall be considered an orphan work in all Member States. That work or phonogram may be used and accessed in accordance with this Directive in all Member States.'

author) and depending on the date of the death. Also extremely complex regulations are in force in the United Kingdom for Crown unpublished works, whereby copyright can last between 50 and 125 years, or till the year 2039.

In November 2013 the UK implemented the EU Term Directive¹⁴ within a Regulation on the Copyright and Duration of Rights in Performances (2013),¹⁵ which extended the copyright in sound recordings from 50 to 70 years. With this regulation, the duration of copyright in sound recording is equated to the duration of copyright for the composition of the music or the authorship of the lyrics, which expires 70 years after the end of the year of the death of the author.

Diligent search on films needs to be carried out by trying to locate the producer, the author of the screenplay, the author of the music, the author of the dialogues. In addition, often some additional authors have to be located such as those of an original scenography or costumes. Special exceptions apply for film made before the year 1957 (which are not protected as an autonomous work) and unpublished works.¹⁶

Other important issues to be considered are multiple authorships or translations. In the case of multiple authors, a diligent search must be carried out for each author. When one or more rightholders (but not all) are located for a work, this is classified as partially orphan. If a work is a translation of another work, both the original creator and the translator hold some rights and both need to be

¹⁴DIRECTIVE 2011/77/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, Official Journal L 265/1, 11.10.2011, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:265:0001:0005:EN:PDF> (accessed 04-12-15)

¹⁵The Regulation is available at <http://www.legislation.gov.uk/ukxi/2013/1782/made> (accessed 04-12-2015)

¹⁶These exceptions are summarised in the IPO guidelines as follow: "Films made before 1 June 1957 were not recognised as a distinct work. They would have protection as an original dramatic work or individual frames treated as photographs. The soundtrack may also be protected as a sound recording, so copyright term would relate to these rights. --Crown and Parliamentary Copyright – Parliamentary copyright only exists in films made on or after 1 August 1989. Earlier films are attributed to the employee. --Unpublished works before 1989 – lasts until 31 December 2039 if the work was created but not published, performed in public or sold to the public, before 1 August 1989, and where the author is known and died before 1969, or in the case of unknown authors, where the work was created before 1969". See 'IPO : Orphan Works Diligent Search guidance for applicants : Film and Sound', available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/474399/orphan-works-film-and-sound.pdf (accessed 04-12-15) p. 5

located. A record needs to be kept for eight years on the actions carried out within the process of a diligent search.

The IPO provides a list of actions that would normally be taken when carrying out a diligent search, although it is specified that concrete actions will vary, depending on the nature of the work and on the circumstances. The actions to be normally carried out are the following:

- Applicants **must** complete and submit the diligent search checklist with each application
- Applicants for an orphan works licence will need to maintain a record of the diligent search. If an applicant is successful in their application, this evidence should be retained by the licensee for a minimum of eight years. Other supporting evidence such as correspondence (letters, e-mail, telephone, etc.) should also be retained.
- If possible, in the first instance, an applicant should always contact the creator of the work. If the creator is not the right holder they might know who holds the rights.
- Where the creator cannot be found applicants should attempt to consult multiple sources to validate information.
- When consulting the most appropriate sources to search for a particular work, an applicant might uncover further information on the right holder. This new information could be used in other sources that were previously ruled out so an applicant should consider revisiting the suggested sources to see if these are now appropriate.¹⁷

An important caveat to keep into account when running a diligent search for a work originated in the UK is that within this jurisdiction the rightholders are not under obligation to respond to a request of permission of use. This means that if a rightholder is located and contacted in writings by the applicant of a licence (or a cultural institution) and he or she does not provide a response, a licence cannot be obtained and the work cannot be used. The licensing authority for orphan works is not a dispute resolution body and therefore cannot decide on potential disagreements between the applicant and the rightholder. In the event of a contention, appropriate mediation bodies or courts need to be solicited.

Accessibility of Sources for Diligent Search

¹⁷IPO: Orphan Works Diligent Search guidance for applicants: literary works', available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/474401/orphan-works-literary-works.pdf (accessed 04-12-2015), p. 10.

The Guidelines on Diligent Search issued by the IPO, in addition to the above-mentioned and summarised general guidelines, provide a detailed list of “appropriate sources” to be consulted in the process of locating the rightholder for each separate type of work. We have counted a total of 211¹⁸ sources which include orphan works registries, general authors registries (such as WATCH), collecting societies data banks, unions or associations of authors and publishers, Agents, Guilds, international unique identifiers, general, legal, and newspaper archives, etc. The number does not include general indications such as “general internet searches”, “databases and catalogues”, “art universities alumni”. We found that 70% of these sources are freely accessible on line, whereas 22% of the sources could not be accessed and needed a contact to be made with the source’s owner to pursue the inquiry. Some sources, although freely accessible, are only available on site (2%), in a bookshop or in a library (on dedicated terminals), whereas other sources only granted a partial (1%) or paying (4%) access online. Orphan Works databases, international standards, General repositories and national libraries, agents, catalogues and some guilds and authors’ associations are freely available online, whereas most authors’ guilds, unions, and associations are not. Most newspaper archives are available either partially or for a fee.

¹⁸See APPENDIX I

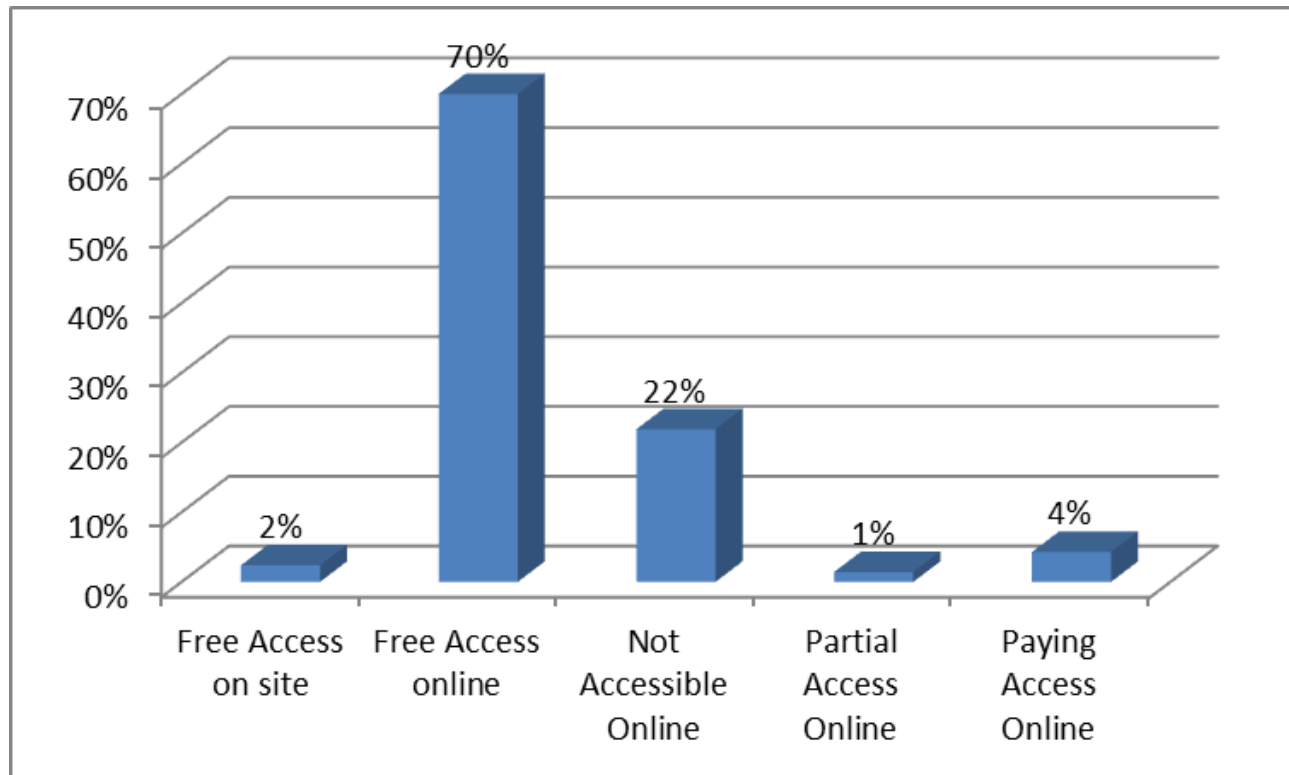


Figure 1 - Accessibility of Sources for Diligent Search in the UK

The analysis of the sources has been also broken down by individual type of work. Here we found that the highest figure for online accessibility (75%) is reserved to published books and published visual art (standalone visual art: 74% and still visual art embedded in published books : 73%) whereas music (sound recordings) has only 69% of online accessibility. Between 68% and 65% of the sources for Diligent Search on stage plays (literary works), newspapers, magazines and similar publications, unpublished still visual art, films, audiobooks and other sound recordings (apart from music) are accessible online. Other unpublished works such as films and sound recordings (61%) and literary works (62%) have even less accessibility online. The lowest accessibility (53%) is found for sources instrumental to identify the author of a film. Perhaps not surprisingly, the data shows that accessing sources in order to locate the author of an unpublished works is more cumbersome and expensive, as they display the highest percentage of paying access online (16%) and partial access online (5%).

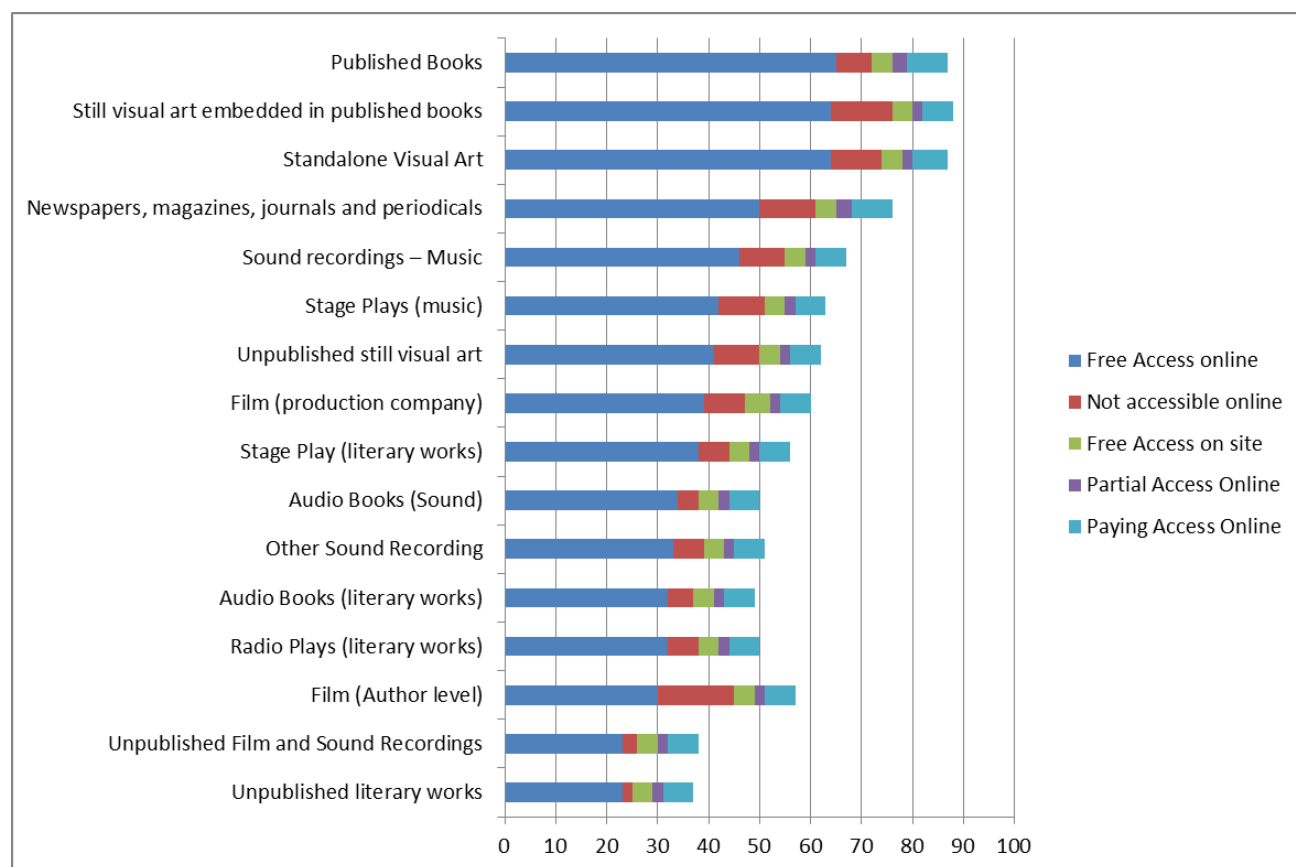


Figure 2- Accessibility of Sources for Diligent Search by Type of Work – absolute numbers (the categories are derived from the IPO guidelines)

Possible use of Orphans

At the time of writing,¹⁹ the UK Orphan works Register has received 301 licence applications. 42 of these have been withdrawn, while three are still pending. All the remaining applications have been granted. Uses allowed by a standard license under this scheme are the following:

- Free hand outs for live event, exhibition or similar
- Use in a live event, exhibition or similar
- In newsletter, bulletin, e-newsletter or e-bulletin
- In non-commercial promotional material – print and digital
- Digitise and make available on-line, including on social media

¹⁹ Last access to the UK Orphan Works Register: 25/01/16.

- Preservation purposes
- Use on stage or in performance
- Educational purposes – use in learning/ training materials, including e-learning
- Use in thesis/dissertation
- Personal use
- Digital publication

In the UK, cultural institutions intending to benefit from the exception of the Orphan Works Directive are in the process of clearing the rights of their collection by accessing the sources recommended by the IPO, when allowed by their budget and their human resources.²⁰ At the time of writing²¹ the OHIM Orphan Works Database contains 1420 entries. 53 works have been uploaded by British Institutions (42 by the British Library). These are mostly literary works (49 literary works and 4 cinematographic works).

Conclusion - UK

Overall, our preliminary findings suggest a scarce accessibility of the sources that have to be consulted in order to carry out a Diligent Search such as the one mandated by Regulation. This might have a relevant impact on the viability of large scale digitisation projects carried out by cultural institutions that do not opt for Extended Collective Licensing schemes.

DILIGENT SEARCH IN THE NETHERLANDS

Background

The 2012 Orphan Works Directive (OWD) was implemented in the Netherlands by the law entitled ‘Wet van 8 oktober 2014 tot wijziging van de Auteurswet en de Wet op de naburige rechten in verband met de implementatie van de Richtlijn nr. 2012/28/EU inzake bepaalde toegestane gebruikswijzen van verweesde werken’.²² It adds the articles 16o-16r and article 17 to the Copyright Act (‘Auteurswet’ or

²⁰ This information is retrieved by the cultural institutions that are EnDOW Associated Partners. More detailed information will be retrieved during a subsequent stage of the project, exploring Diligent Search best practices.

²¹ 25/01/2016.

²² chapter 6: ‘Exceptions to Copyright’.

Aw). The same rules are implemented in the Neighbouring Rights Act ('Wet Naburige Rechten' or WNR) by adding article 10I, which in turn refers back to the relevant articles in the Copyright Act.²³ Overall, the amendments define the scope of the exception in terms of works covered; institutions which can rely on it; as well as the diligent search and its reporting requirements. The details of the diligent search were published later the same year in the 'Besluit van 16 oktober 2014 houdende nadere regels over het uitvoeren van een zorgvuldig onderzoek in verband met de Richtlijn nr. 2012/28/EU inzake bepaalde toegestane gebruikswijzen van verweesde werken (Decree zorgvuldig onderzoek verweesde werken)'. Overall, the implementation is in conformity with the Directive.

Implementation of the Orphan Work Exception

As the Neighbouring Rights Act refers back to the substantive rules of the Copyright Act, this report will focus on the Copyright Act. In article 16o Aw, the scope of the orphan works exception is defined. It allows specific institutions to reproduce and make literary, musical and film works available online,²⁴ if these are orphan.²⁵ The amendments to the WNR expand this coverage to the first fixation of films, phonograms and performances.²⁶ A work is considered orphan if the right holder is unknown and/ or cannot be located after a diligent search for the right holder has been carried out.

The exception is designed to facilitate the activities of cultural heritage institutions. It is available to publicly accessible libraries, educational institutions and museums; as well as archives and cinematographic or audio- visual cultural heritage institutions which do not have a direct or indirect economic or commercial goal.²⁷ Its scope is limited to those activities which form part of the

²³ Art. 16o- art. 16q and art. 17 Aw

²⁴ It is clarified in art. 16r Aw that this *beschikbaarstellen* refers to online use, by using the definition of the making available right. Art. 10I does not refer back to art 16r and therefore the usual definition in the WNR (found in art. 1(m)) applies which however also includes online use.

²⁵ Art. 16o(1) Aw

²⁶ 10I WNR

²⁷ Art 16o(1) Aw, art. 10I WNR

institution's public mission, especially archiving, restoration and cultural or educational purposes.²⁸ In line with this, the work has to be part of the institution's own collection.²⁹

The scope of the exception is further narrowed by rules on the nature of the work. On one hand, if a work has already been communicated to the public, the first communication must have occurred within the EU or EEA.³⁰ In the special case of works which are part of a broadcast by a public service broadcaster,³¹ the work must have additionally been communicated to the public before 1/1/2003.³² On the other hand, if a work has not been communicated to the public, then the exception is only applicable if the right holder had authorised the inclusion of his work in the institution's collection. It should also be reasonably assumed that the right holder would not object to the activities.³³

Even if an institution as well as the work meets all of the formal requirements, the exception is only effective after a diligent search for the right holder has been carried out.³⁴ It should be noted here that it is the institution relying on the exception which has to carry out the search. Recital 13 of the OWD was not transposed into law.³⁵ The search has to be carried out for every work as a whole as well as for works which are embedded in it, by consulting the relevant sources.³⁶ These sources vary according to the type of work in question as well as by jurisdiction. In general, the diligent search has to be carried out in the member state where the first communication to the public has occurred.³⁷ If the work has not been communicated to the public yet, then the jurisdiction of the institution in whose collection

²⁸ Art. 16o(1)(c) Aw

²⁹ Art. 16o(1)(a) Aw

³⁰ Art. 16o(1) Aw

³¹ The term public service broadcaster follows the definition of the chapter 2 in the 2008 Media Act (10I WNR).

³² Art. 17 Aw

³³ Art. 16o(3) Aw. The further limitation of limiting the applicability of this provision to works deposited by 29 October 2014 under art 1(3) OWD has not been implemented in the Netherlands. *Memorie van Toelichting Kamerstukken II 2013/14, 33982, 3, p. 4.*

³⁴ Art. 16o(1)(b) Aw

³⁵ According to the OWD, the search may also be carried out by other organisations (recital 13 OWD), but this has not been implemented in the Netherlands. The issue is not further discussed in the *Memorie van Toelichting*.

³⁶ These sources are not defined in the implementation law itself but rather the *Besluit van 16 oktober 2014 houdende nadere regels over het uitvoeren van een zorgvuldig onderzoek in verband met de Richtlijn nr. 2012/28/EU inzake bepaalde toegestane gebruikswijzen van verweesde werken*. For a more detailed discussion of these, see section *Diligent Search*.

³⁷ Art. 16p(2) Aw

the work is held is relevant.³⁸ Finally, for audio-visual works, it is the member state where the producer has his usual residence.³⁹ It should be noted though that these jurisdictional lines are not absolute. In particular, if there is evidence that right holders can be identified by searching sources in another member state, then these sources have to be consulted as well.⁴⁰

The results of a diligent search have to be reported by the cultural heritage institution to the Dutch government, in particular the Minister of Education, Culture and Science. The report on the diligent search has to identify the methodology used, the institution's contact information, as well as (if relevant) any change in the work's status as orphan.⁴¹ The Dutch orphan works database is to be maintained by the Rijksdienst Cultureel Erfgoed but it is not functioning yet. The government will also transmit the information to OHIM.⁴² Once a work has been included in the OHIM database, its orphan works status is mutually recognised, making an additional diligent search unnecessary.⁴³

The Diligent Search

The details of the diligent search were published in the Besluit zorgvuldig onderzoek verweesde werken. The decree is essentially a translation of the OWD annex as it follows the same structure and content. The sources to be consulted are divided according to the type of work for which a diligent search is carried out. In particular, it distinguishes between published books, newspapers and other magazines, visual works, audio-visual works and phonograms. For each one of these groups, categories of databases which are to be searched are named.

For written or printed works, the lists are essentially cumulative, in the sense that they are based on each other. Starting with the sources for published books, the decree lists the following categories:

1) Royal Library catalogue

³⁸ Art. 16p(3) Aw

³⁹ Art. 16p(2) Aw

⁴⁰ Art. 16p(4) Aw

⁴¹ Art. 16p (5) Aw. Although the decree does allow for further rules to be made by the Minister, this provision has not been used yet. Art 3(2) Besluit zorgvuldig onderzoek verweesde werken.

⁴² Art. 16p(5) Aw

⁴³ Art. 16p(6) Aw

- 2) databases of publishers' and authors' associations
- 3) databases and registers of authors, artists and copyright holders
- 4) ISBN databases and other databases covering published books
- 5) CMO databases, especially those CMOs handling reproduction rights
- 6) databases and registers on international keyword lists as well as accessible registers Orphan Works rights

As the list demonstrates, the terminology used is unspecific and open-ended, for example it refers to the 'databases of publishers and authors' without naming the institutions this would entail. There is also not any official guidance available.⁴⁴ This means in practice that a list has to be compiled by the searching institutions. They have to identify all relevant databases which fall into a certain category by searching for organisations which represent certain types of right holders.

An extensive search by the EnDOW project identified 32 databases which should be consulted. Of these, only 69% are directly accessible online. In other words, for 31% of the sources an online search is not possible. Most notably, it tends to be smaller organisation with more limited membership which make their membership public. In particular the large organisations with the broadest membership such as the Nederlandse Uitgeversbond and LIRA, the main CMO in the field, are not among the group that provides online access to its databases. In other words, the most essential databases cannot be directly searched. For these, direct contact is required- either by email or mail, making the process more time and resource consuming. It should be noted that the main orphan work registers are also not available yet in the Netherlands.

The search for magazines and newspapers draws on the sources for published books but adds more sources:

⁴⁴ The parliamentary debate does mention a homepage to this end but this has not been implemented yet. Nota naar aanleiding van het verslag *Kamerstukken II 2013/14, 33892, 6, p. 7.*

- 1) Source 1 through 5 named above
- 2) database of the international standard number for serial publications (ISSN)
- 3) databases by publishers, authors and journalists associations.

While the categories of databases covered are the same, the list reflects the fact that the newspaper and magazine sector has its own associations covering the key right holders. However, the boundary between publishing newspapers or magazines and books is fluent in practice, explaining the cumulative nature of the list. Overall, the number of relevant databases increases to 39. Of these, 24 (59%) are directly accessible online and therefore less than for published books. In particular, the Nederlandse Vereniging van Journalisten and the ISSN databases are the only sector specific databases which can be searched online. CMO databases are again not accessible.

Art works are only covered to the extent that they are included in a book or a magazine. Following the same cumulative approach as magazines, the diligent search here requires a search of all sources relevant to the book (part a) and the magazine (part b). In addition, databases on artists have to be consulted:

- 1) the sources named in a and b
- 2) databases by artists' associations
- 3) CMO databases for artists, especially those handling reproduction right
- 4) where applicable, databases of image and photography agencies

The list of relevant sources now increases to 48, of which 30 (62%) are directly accessible online. The average is therefore higher than for magazines but still significantly lower than for books. However, the real difference here is that the CMO Pictoright provides access to its database. As a result, the coverage of an online search is significantly larger than for the other right holder groups.

The Dutch decree provides the sources for phonograms and audio-visual works together in one list, without referring back to the sources of other categories of works in the same way.

- 1) media archive (as maintained by Media Law 2008, in practice Beeld en Geluid)
- 2) databases of producer associations or other associations which represent a specific category of right holder in these works
- 3) databases of institutions for cinematographic or audio-visual heritage and public libraries
- 4) databases with standard and identification codes, e.g. international standard number for audio-visual works, international standard work for musical works and international standard code for sound recordings
- 5) CMO databases, especially those of authors, performing artists, producers of phonograms and audio-visual producers
- 6) information on the work, including the credit list of participators

Overall, 45 sources were identified. Of these, only 42% (19) are directly accessible online. This is less than half of the sources which are deemed relevant to a diligent search. Most notably, BUMA/STEMRA is the only CMO providing access to its database, in an environment which is highly fragmented and includes an unusually high number of relevant CMOs (at least 12 have some connection). In addition, the percentage of directly accessible sources is significantly lower than for the other categories covered by the orphan works exception. This leads to the conclusion that clearing audio-visual works and phonograms is more onerous in practice.

Conclusion - NL

To summarise the diligent search in the Netherlands, overall 52% of the sources are directly accessible online. In addition, a very small number are either partially accessible or will be available in the future. Furthermore, some are accessible via subscription. However, the overall of percentage of these alternatives is too small to have a noticeable effect. 44% of all databases are not directly accessible online and instead require direct contact with the organisation.

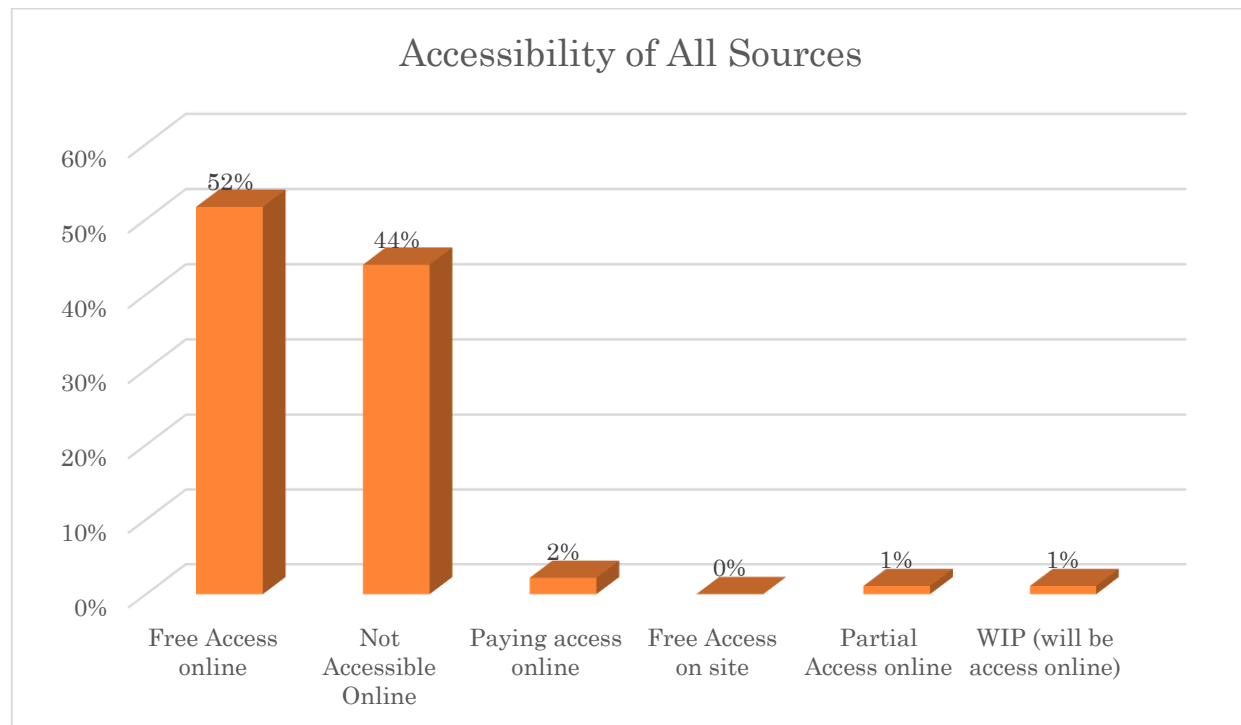


Figure 3 – Accessibility of Sources in the Netherlands

In addition, the accessibility varies significantly between work types. The percentage of directly accessible databases is highest for published books, followed by visual works and newspapers. This is not surprising, given the cumulative nature of the source lists for these three categories. Databases on audio- visual works on the other hand tend to be not directly accessible online.

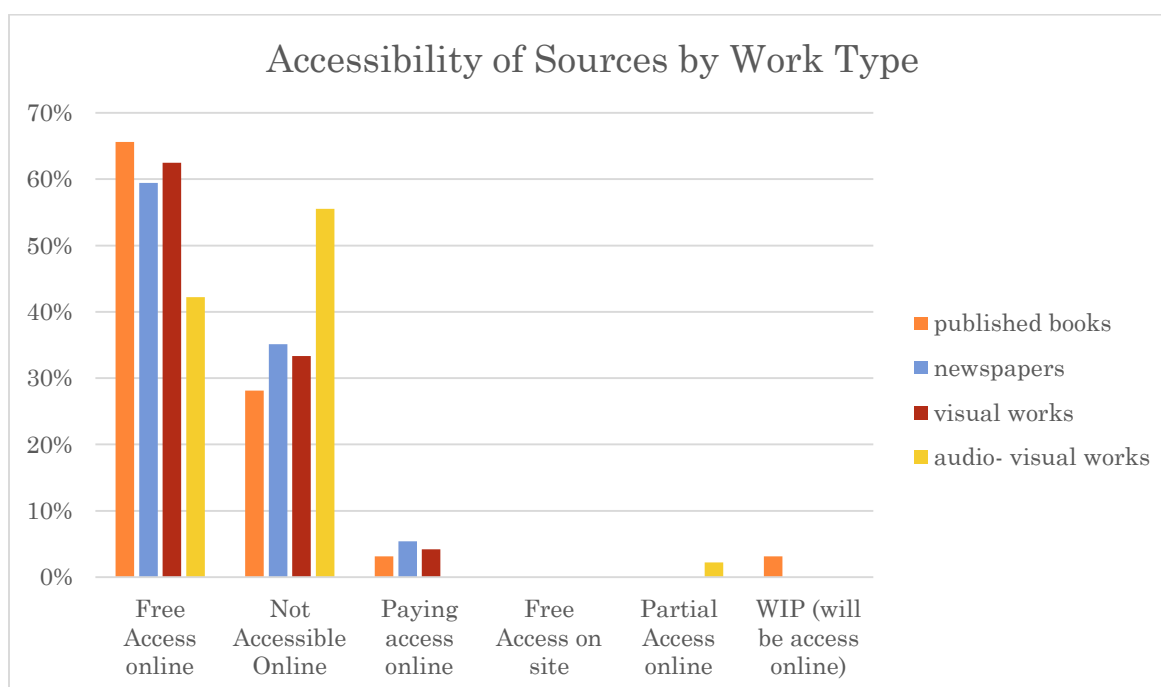


Figure 4 – Accessibility of Sources by Work Type - The Netherlands

A number of additional findings need to be highlighted. First, the structure of the sources ensures that a right holder is searched from all possible angles. The sources cover the largest catalogue in the area (Royal Library for printed works, Media Archive for Audio- Visual Material and Phonograms); the right holder as such (CMOs, representative associations, etc) and the work as such (general work identifiers such as ISBN/ ISSN, standard code for phonograms among others). By combining both law and industry practice,⁴⁵ the structure aids non- specialists as it ensures that at least the relevant groups of right holders are always covered.

Having said this, the only specific source mentioned is the catalogue of the Royal Library while further guidance from the government is not available. A homepage with further information has been

⁴⁵ For example, the list requires the institution to search for publishers which hold rights as a result of transfers rather than by the operation of copyright law as such.

mentioned in the parliamentary debate, but this has not materialised yet.⁴⁶ In fact, it was always intended that the institution itself needs to decide which sources are relevant to a particular work.⁴⁷

This open-ended approach has both advantages and disadvantages. While it limits the need for future amendments in the light of industry changes, it also carries the pronounced risk that important institutions are missed. In this case, the institution could be exposed to significant risks as the whole diligent search may be deemed void, exposing it to infringement claims. It also has the potential to increase the cost of the diligent search unnecessarily as minor organisations may be consulted which are unlikely in practice to hold relevant information.

Secondly, key databases are not publicly accessible. As a result, these organisations have to be contacted by email or mail, raising the cost of the diligent search in terms of man power, time and other resources significantly. It is at this stage doubtful if a phone call to the organisation would be sufficient as the guidelines for the diligent search report have not been published yet. The lack of paper trail proving the search result may negate this option in practice. The impact is amplified as not even those organisations tasked with licensing provide the necessary information online, with the exception of Pictoright and BUMA/ STEMRA. Having said this, CMOs have agreed in principle to provide membership lists in the context of ECL schemes.⁴⁸ This may serve to alleviate the pressure in the future.

Finally, it should be remembered that the jurisdictional boundaries are not absolute. If there is evidence that right holders can be identified by searching sources in another member state, then these sources have to be consulted as well. This means if right holders can be found in more than one member state, the sources for several member states have to be searched. The result is a significant increase in the cost of the search. Not only does the number of sources increase, practical issues such as the language barrier may add difficulty to the search. Furthermore, even if a work has been

⁴⁶ Nota naar aanleiding van het verslag *Kamerstukken II 2013/14, 33892, 6, p. 7.*

⁴⁷ *Ibid.*

⁴⁸ Kenniscentrum Digitaal Erfgoed, '*Uitgangspunten voor collectieve overeenkomsten voor online toegang tot erfgoedcollecties*' (available at: http://www.den.nl/art/uploads/files/130910Uitgangspunten_def.pdf, last accessed 12/1/16).

identified as orphan, this status can change if a right holder identifies himself. In this case, the use ends and reasonable compensation has to be paid by the institution to this right holder according to the uses made of the work.⁴⁹ In the light of the high diligent search cost, these provisions may rise to prominence when institutions decide what to digitise and make available and what not. Either way, the cost of the uncertainty is borne alone by the institution.

It should be noted though that the prohibitive effect of the high search costs have always been recognised. This is most clearly seen in Dutch cultural heritage institutions pushing for and relying on ECL-style solutions rather than the OWD.⁵⁰ From this point of view, the very general list could be read as meeting the cultural heritage institutions' preference of *redelijkheid* (reasonableness) and *billijkheid* (equity) that they have requested in the consultation process.⁵¹

DILIGENT SEARCH IN ITALY

The Italian Framework

Directive 2012/28/EU providing for permissible uses of orphan works (hereinafter also the “**Directive**”) was implemented in Italy with Legislative Decree No. 163 of 10 November 2014.⁵² The Decree introduced new articles 69-bis to 69-septies in the Title I, Chapter V of the “Italian Law on the

⁴⁹ Art. 16q Aw

⁵⁰ Nota naar aanleiding van het verslag *Kamerstukken II* 2013/14, 33892, 6, p. 12. The Royal Library for example relies on ECL schemes rather than the Orphan Works exception.

⁵¹ See for example: A. Beunen, 2011, ‘*Gezamenlijke reactie van Nederlandse erfgoedinstellingen op de consultatie over het Europese Richtlijnvoorstel Verweesde Werken*’ (available at https://www.internetconsultatie.nl/verweesde_werken/reactie/6098/bestand, last accessed 11/1/16), p. 2 and pp. 5-6; H.G. Kraai, 2011, ‘*Reactie van het Nationaal Archief t.b.v internetconsultatie Richtlijnvoorstel Verweesde Werken*’ (available at: https://www.internetconsultatie.nl/verweesde_werken/reactie/6084/bestand, last accessed 11/1/16), p. 1; AGCM van Nispen, 2011, ‘*Reactie NL Internetconsultatie verweesde werken-Stichting DEN en de richtlijn*’ (available at: https://www.internetconsultatie.nl/verweesde_werken/reactie/6094/bestand, last accessed 11/1/16), p. 2.

⁵² The text of the Decree can be consulted at: <http://www.gazzettaufficiale.it/eli/id/2014/11/10/14G00179/sg>

Protection of Copyright and Neighbouring Rights” (Law No. 633 of April 22, 1941, hereinafter also the “**Italian Law**”).⁵³

Therefore, Italian Law has introduced a special regime for orphan works within its list of exceptions and limitations to copyright – instances where an in-copyright work can be used even without authorization of the legitimate right-holders.

From a general point of view, Italian Law is extremely faithful to the text of the Directive.

According to the Italian Law (Article 69-*quater*), a work or a phonogram can be considered “**orphan**” if, after a diligent search performed and registered according to the law (see *infra*), none of the right-holders can be identified or, even if they are identified, it is not possible to find or contact them. In the case of a work with multiple right-holders – if only some of them are identified and found – the work is considered partially orphan.

Pursuant to Article 69-*bis* of the Italian Law, the **beneficiary organizations** are: libraries, educational institutions and museums accessible to the public, as well as archives, institutes for film and sound heritage and public service broadcasters.

Not all orphan works are susceptible of use under the conditions provided for by the new special regime. Art. 69-*ter* of Law no. 633/1941 limits its application to some **categories of work or material**, which are: books, journals, newspapers, magazines or other publications, film or audio-visual works, and phonograms held in the collections of libraries, educational institutions and museums accessible to the public, as well as the collections of archives and institutes for Film and Sound heritage; film, audio-visual works and phonograms produced by public service broadcasters up until 31 December 2002 as they are part of their archives (art. 69-*bis*, comma 1 of Law 633/1941); works and other copyrighted contents that are included by, incorporated in, or form integral part of the abovementioned works and phonograms.

⁵³ The text of the Law can be consulted at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1941-04-22:633!vig=>

The Legal Requirements for Diligent Search

With the Directive, the legal requirement to consider the work an “orphan” under the Italian Law is the “diligent search” to be performed in order to identify the legitimate right-holders. The search must be conducted before making any use of the work. It requires consultation of “appropriate sources” to identify and locate the right-holder.

Art. 69-septies of the Italian Law provides for a non-exhaustive, **illustrative list of these sources**. Then, in Italy, research on a work to determine whether it qualifies as an orphan must be conducted at the *Registro Pubblico Generale delle Opere Protette presso il Ministero dei beni e delle attività culturali e del turismo* for all works (Art. 69-septies (1)(a)). The Italian legislator also lists specific sources, depending on different categories of works, which are: (i) published books, (ii) newspapers, magazines and journals, (iii) visual works, including art objects, photography, illustration, design, architecture, sketches of these works and other materials reproduced in books, magazines, newspapers and magazines or other works; and (iv) audio-visual works. In particular, for published books, the search must be conducted using the following resources (See Article 69-septies (1)(b)): *Sistema Bibliotecario Nazionale* (the National Library System), national associations of publishers and authors, if known, and literary agents operating in Italy; the legal deposit registry; the database of the Italian ISBN agency for published books and publishers; the WATCH (Writers, Artists and Their Copyright Holders) database; the SIAE database (*Società Italiana degli Autori e degli Editori*); the CLEARedi service (*Centro Licenze e Autorizzazioni per le Riproduzioni Editoriali*); and the *Anagrafe Nazionale Nominativa dei Professori e dei Ricercatori e delle Pubblicazioni Scientifiche* (National Register of Registered Professors and Researchers and Scientific Publications).

These sources may be accessed directly or through integrated research via VIAF - Virtual International Authority Files or ARROW - Accessible Registries of Rights Information and Orphan Works (see art. 69-septies (1)(b)(8) of the Italian Law). For material published in newspapers, magazines and journals, the search must be conducted using the following resources (see art. 69-septies (1)(c)): the ISSN (International Standard Serial Number) for periodicals, indexes and catalogues of historical

collections and library collections, the legal deposit registry, national associations of authors and journalists, databases of collecting societies.

For visual works the search must be conducted using the following resources (see art. 69-septies (1)(d)): published books, newspapers, magazines and journals, databases of collecting societies and, if appropriate, databases of photographic agencies. For audio-visual works, the search must be conducted using the following resources (see art. 69-septies (1)(e)): the legal deposit registry, national associations of producers, databases of film and audio heritage institutions or national libraries, databases with relevant standards and identifiers such as ISAN (International Standard Audio-visual Number) for audio-visual materials, ISWC (International Standard Music Work Code) for musical compositions and ISRC (International Standard Recording Code) for phonograms; databases of collecting societies, the list of those involved in the production and other information on the product packaging, databases of other relevant associations which represent specific categories of rights-holders. Please note that a list of web-links to some of the sources listed by art. 69-septies of the Italian Law is available on the Ministry of Culture’s website.⁵⁴

It is important to stress that, pursuant to the Directive and accordingly the Italian Law, the search will have to be conducted in the Member **State of first publication** or – in case of unpublished works – in the state of first release of the work. This implies that the search will be considered “diligent” only when it meets the diligent search requirements established by the law of the state of first publication. For film and audio-visuals, the search is conducted in the country where the production house has its legal seat or habitual residence.

For what concerns the **subjects who can perform the diligent search**, the Italian Law (Article 69-*quater*) identifies two categories: the beneficiary organizations themselves or other subjects previously identified by them according to principles of good faith and professional correctness.

⁵⁴ http://www.librari.beniculturali.it/opencms/opencms/it/Opere_Orfane/pagina_0001.html

Under the Directive, at OHIM (Office for the Harmonization of the Internal Market) is established a **publicly accessible online database**⁵⁵ registering: (i) the diligent searches that have resulted in a declaration of “orphan work” status; (ii) the use that beneficiary organizations make of the work; (iii) any change in the status of the work used by the organization and (iv) the contact information of the involved associations. In addition, Italy has provided for the establishment of a **diligent search database** to be established within the Ministry of Culture. The database is currently under construction. The national database will be the national authority in charge of transmitting the results of diligent searches to OHIM.⁵⁶

Please consider that the diligent search - to be performed in order to recognize a work as “orphan” - need to be carried out by the organizations identified by the Italian legislator, in the timing and with the modalities identified by the Italian legislator, using the sources identified by the Italian legislator or other relevant sources identified with Decree of the Ministry of Culture (see Article *69-quater*). The law probably exceeds in the level of protection granted to right-holders by providing for a detailed list of activities that need to be carried out before the search can be considered diligent. In any case, if the **legitimate right-holder** reappears he/she will always be able to claim – also before a judge – the paternity of the work and to obtain damages for the unauthorized uses of the work that have been made before his reappearance.

The lack of courage of the Italian implementing legislation can however be seen as a mere reflection of the lack of courage of the Directive. As with the Directive, the Italian implementing legislation provides very limited opportunities for the involvement of private partners in the activities of digitization and commercial exploitation of the digitized works and generates excessive uncertainties with regard to the orphan works status as libraries always run the risk of having to compensate re-emerging right-holders. As already mentioned, in fact, the right-holders can at any time (also after a diligent search has been conducted and the work digitized) claim his/her rights on the work and be

⁵⁵ Accessible via the OHIM website (<https://oami.europa.eu/orphanworks/>).

⁵⁶ See DGBIC (*Direzione Generale Biblioteche e Istituti Culturali*) report at: http://www.librari.beniculturali.it/opencms/opencms/it/Opere_Orfane/

entitled to **compensation**. Pursuant to the Italian Legislation (see Article 69-*quinquies*), the amount and the modalities of the compensation shall be agreed between the representative associations of the right-holders and the representative associations of the beneficiary organizations mentioned in paragraph A) above.

The dissuasive effect that this provision might take on cannot be underestimated, especially in the absence of possibilities for the commercial “exploitation” of digitized works. Pursuant to Article 69-*bis*, **any revenues** generated through the use of the orphan works shall be used only to cover the costs for digitizing the works and for making them available to the public. As such, the Italian legislation does not seem to provide for an adequate regulatory scheme to favour mass digitization, running the risk of excessively burdening the potential users of orphan works.

Possible Uses of "orphaned" Works

With particular regard to **possible uses** of orphan works, the new special regime provided for by art. 69-*bis* of Law 633/1941 allows libraries and other abovementioned beneficiary organizations to use the orphan works by:

copying them for digitization, indexing, cataloguing, preservation or restoration purposes;

making them available to the public to enhance public access to the works.

These two permitted uses must in any case be functional to the public interest purposes pursued by the “digitizing” organizations and potential revenues generated through the use of orphans must be devoted to covering costs undergone for the digitization and diffusion of the same works.

The Italian Law, as the Directive did, says nothing about the possible “**business models**” behind mass digitization. It does not provide incentives for libraries to generate funds, nor for private partners to participate. Hence, it seems to assume that digitization must be financed through public resources.

It is worth noting that with Directorial Decree 17 November 2015,⁵⁷ the Italian Ministry of Culture has established, within its General Direction on Libraries and Cultural Institutions, a **technical negotiation unit on orphan works**.⁵⁸ The unit is in charge of promoting initiatives to inform and spread awareness about the Directive, the operation of the National database and the European database at OHIM. More specifically, the Unit will: produce guidelines on diligent search for the different categories of work; promote initiatives for the identification of orphans within the collection of beneficiary organizations; identify the responsible subjects for each relevant sector.

The Accessibility of the Sources

The mapping of the Diligent Search sources for the purpose of developing an online diligent search clearing platform within EnDOW has been completed in **two steps**:

- In a first phase, the focus has been on the sources identified by art. 69-septies of the Italian Law and re-published on the Ministry of Culture’s website (see note 3 below).
- In a second phase, the mapping has been expanded on the model of the British matrix as to include authors associations, literature agencies, guilds, ghost-writing agencies and genealogy websites, and a listing of major Italian libraries, museums, academies, and cultural institutions.

As already mentioned, the Italian Law identifies several sources, divided among four macro-categories: Published Books, Newspapers Magazines and Periodicals, Visual Works, and Audio-visual Material. The Ministry of Culture also indicates that a Register of all the Orphan Works in Italy will be soon available. The first source identified by the Law is the *Registro Pubblico Generale delle Opere Protette* (General Public Registry of Protected Works) established within the Ministry, whose consultation is recommended for each category of work, but which is only accessible on site. The study

⁵⁷ The text of the Decree can be consulted at: <http://www.librari.beniculturali.it/opencms/export/sites/dgbid/it/documenti/Normativa/DecretoTavolotecnicoConcertazione17-11-2015.pdf>

⁵⁸ See DGBIC (Direzione Generale Biblioteche e Istituti Culturali) report at: http://www.librari.beniculturali.it/opencms/opencms/it/Opere_Orfane/

has further showed that a few sources indicated by the Law were not functioning. The most notable example appears to be the SACT (*Scrittori Associati di Cinema e Televisione*), as the association was dissolved in 2013.

Another problem encountered during the mapping is the incomplete information about the stage of digitization of catalogues in Italy. For instance, the two Legal Deposit libraries – *Biblioteca Nazionale di Firenze* and *Biblioteca Nazionale di Roma* – have not been able to digitize their catalogues in full. To overcome this issue, two values were introduced: “Partial Access online” and “Partial Access on site”.

The second phase of the mapping – expanding beyond the sources identified by the Law – has privileged sources as “institutionalized” as possible (i.e. official websites of libraries and museums, etc.). Furthermore, these sources often contained links to further databases, cultural institutions, and archives that have also been included in the list. For example, the official website of the *Biblioteca Nazionale di Napoli* listed several links to national and international institutions with archives and search tools which were considered useful for the Diligent Search. This further expansion of the original database was as broad as possible, trying to include as many sources as possible even if potentially redundant with existing ones. For example, catalogues and search tools of scientific libraries were included, even if – at least regarding books and articles published in Italy – the works were already included in the Legal Deposits’ archives. This choice is justified by the abovementioned uncertainties with regard to the completeness of the Legal Deposits’ catalogues.

During this second phase of the research, it emerged that several sources required an online registration; as a consequence the value “Registration online” was included. For sources which were completely non accessible, two values were introduced: “Non-functioning” and “Non-locatable online”. When assigning these values, I have also indicated the date of the last attempted access. This is relevant because depending on the date of attempted access, results varied considerably. For example, the *Fondazione per le scienze religiose Giovanni XXIII* is now freely accessible online, while previous attempts had brought me to label the source as “Not functioning” due to website maintenance. Moreover, in order to simplify the coding and the subsequent analysis, the date of last check was included also for those sources that are very unlikely to change status in the future. For instance, SACT

is now coded “Non-locatable online last check 1/2016”, even if the association was dissolved in 2013. The same reasoning goes for *Luigi Bernabò Associati* as this literary agency was merged with other two agencies.

As a way of example of the difficulties encountered when evaluating accessibility, three sources are worth considering:

- Holmes Biblioteca Digitale at IULM (Libera università di lingue e comunicazione) is a source indicated by Biblioteca Nazionale di Napoli and therefore included in the matrix. At first it was coded as N/A, as the site was under maintenance during the first mapping. After further attempts in January 2016 it results accessible only through registration; being IULM a private university it is unlikely that the final user will be able to register.
- IPAA Diritti Artisti (Associazione Autori e Artisti) was re-coded “Non-locatable online”; there is an active Facebook page, but there is not as to date an official website that can be considered as reliable source.
- Istituto Italiano per l’Africa e l’Oriente is a source indicated by AICI (Associazione Istituti di Cultura Italiana). The website is actually functioning, but no content has been added yet; still, there has not been any announcement that the site will be working anytime soon. Therefore, the source is considered “Non-locatable online”.

Furthermore, four sources are coded *In Progress* as their establishment has been announced but they are not yet in operation: the Italian Orphan Works register; *Emeroteca Italiana*; *Anagrafe nominativa dei professori e dei ricercatori* and *Biblioteca degli Inediti*⁵⁹.

In conclusion, 301 individual sources were identified and analysed. The data shows that 56% of the sources are freely accessible online. While only 10% of the sources are “Partially accessible online”, the

⁵⁹ Respectively, Ministry of Education: <http://hubmiur.pubblica.istruzione.it/web/istruzione/dettaglio-news/-/dettaglioNews/viewDettaglio/25984/11210> and Minister Dario Franceschini: http://www.huffingtonpost.it/2015/06/05/franceschini-biblioteca-inedito_n_7518172.html

relative weight of these sources is particularly high, as they are mostly official or institutional sources: as already mentioned, all legal deposits and the major Italian libraries have not finished to digitize their catalogues.

Sources only accessible on site (initially sub-divided into “Free Access on site” and “Partial Access on site”) account for about the 7% of total sources. The variables “Non-locatable online” and “Non-functioning” account together for about the 5% of total sources. “Paying access online” and “Registration online” account for about 8% of total sources; it is likely that the percentage of “Paying Access online” sources will increase, as some of the sources requiring registration will also require payment of a fee.

The graph below represents the accessibility of sources in Italy. It is derived from a matrix polished from all repetitions so that each source is only counted once.

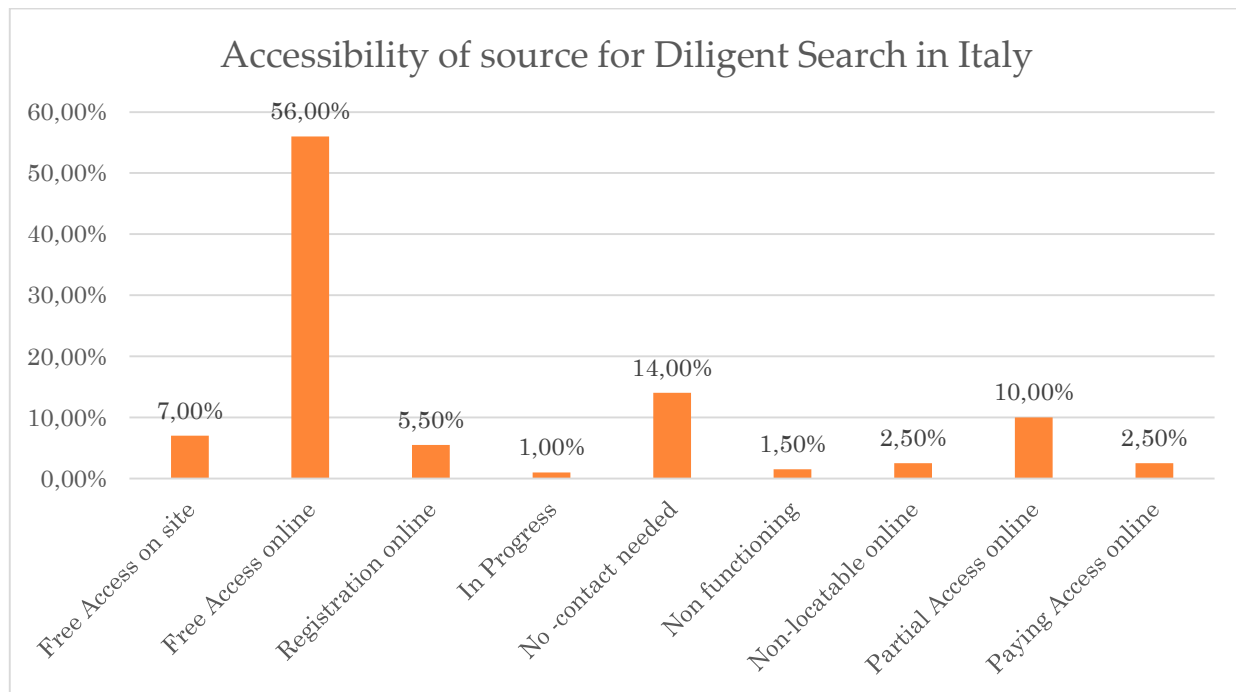


Figure 5 – Accessibility of Sources for Diligent Search in Italy

The statistics as above, by work

The table below shows in **absolute numbers** the allocation and accessibility of sources by type of work.

A total of **357** items were included, considering all repetitions.

	Audio-visual Works	Material published in newspapers, magazines and journals	Published Books	Visual Works	TOTAL
Free Access on site	8	2	11	3	24
Free Access online	39	37	75	49	200
Registration online	1	4	6	9	20
In Progress	2	2	2	2	8
No -contact needed	20	8	13	8	49
Non-functioning	1	1	2	1	5
Non-locatable online	2	0	5	1	8
Partial Access online	2	5	14	12	33
Paying Access online	0	3	3	4	10
TOTAL	75	62	131	89	357

Table 1 - Accessibility of Sources in Italy by Type of Work

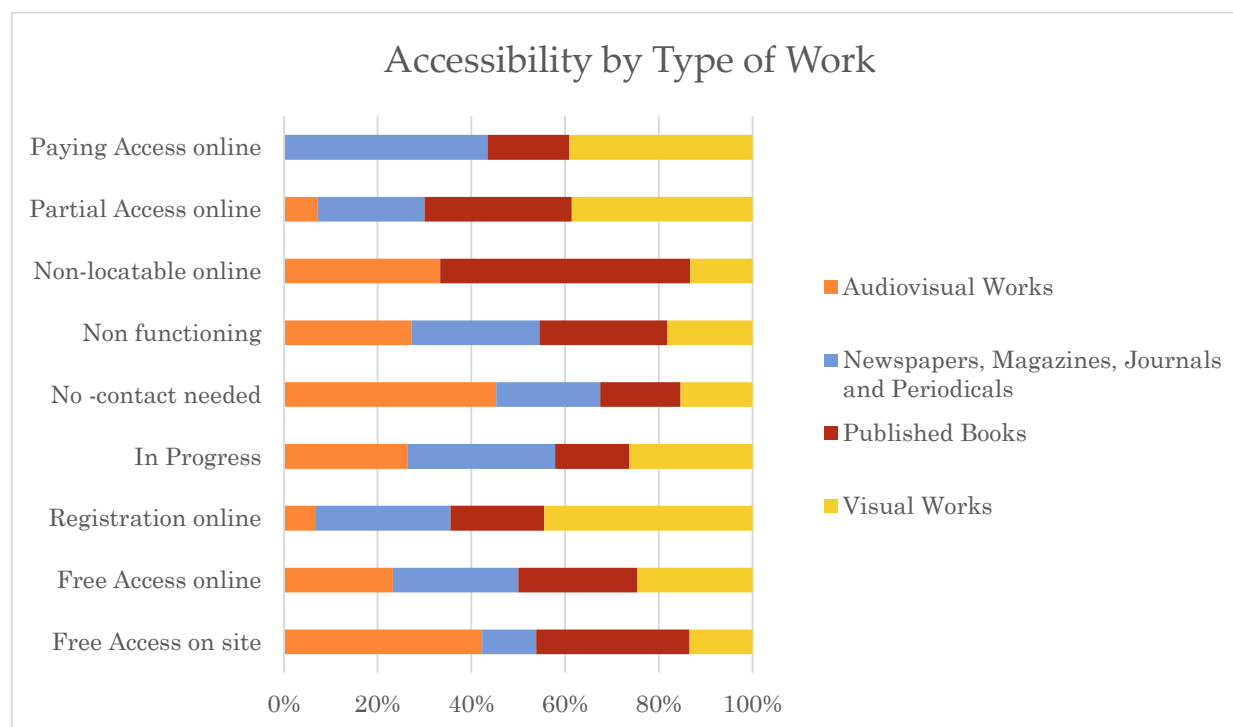


Figure 6 – Accessibility by Type of Work – Italy

As showed, Audio-visual works show the highest percentage of accessibility on site, but the lowest accessibility online.

The category with the highest percentage (60%) of sources freely available online is Newspapers, Magazines, Journals and Periodicals. However, all types of work show similar percentages of accessibility with an average of 56%, making the results pretty even for each category.

Visual Works account for the highest percentage of sources available only through registration; a predictable result considering that during the second phase of the research, a few private photographic archives and agencies were included as sources and these institutions usually tend to protect their works in order to prevent users from simply downloading the pictures from their websites without authorization or payment. Indeed, of the 24 private agencies and archives included, six required registration.

Regarding the variable “In Progress”, each category had two sources noted as such; Orphan Works Register is a common source to all the types of work. The difference in percentage is due to the different absolute numbers and to the subsequent rounding.

As expected, the percentage of “Non-functioning” links is evenly distributed among all the categories; those sources will have to be controlled periodically (last check: January 2016). Indeed, as explained before, some sources initially marked as “Non functioning” were changed into “Free Access online” as the website were found functioning.

	Audiovisual Works	Newspapers, Magazines, Journals and Periodicals	Published Books	Visual Works	Average
Free Access on site	11,00%	3,00%	8,50%	3,50%	6,50%
Free Access online	52%	60,00%	57,00%	55,00%	56%
Registration online	1,50%	6,50%	4,50%	10,00%	5,63%
In Progress	2,50%	3,00%	1,50%	2,50%	2,38%
No -contact needed	26,50%	13,00%	10,00%	9%	14,63%
Non-functioning	1,50%	1,50%	1,50%	1,00%	1,38%
Non-locatable online	2,50%	0%	4,00%	1,00%	1,88%
Partial Access online	2,50%	8,00%	11,00%	13,50%	8,75%
Paying Access online	0%	5,00%	2,00%	4,50%	3%




REPORT CONCLUSIONS AND FINDINGS

This Report has analysed the legal requirements for carrying out a Diligent Search in three pilot countries: The United Kingdom, Italy and The Netherlands. The study examined the legal background provided by the national legislation implementing the Orphan Works Directive. First, we explored the possibility for cultural institutions to 'outsource' the task of carrying out a diligent search, which is instrumental to the EnDOW project.⁶⁰ We found that, in line with the wording of the Directive, in all three countries cultural institutions can mandate their task to 'other subjects', but they remain ultimately responsible for the correct execution of the Search.

Second, the study has examined the procedure to carry out and register a Diligent Search to locate potential rightholders of possibly orphan works. This is specifically required by the Orphan Works Directive and it has been incorporated in the examined national legislation. A crucial part of the procedure is the consultation of a number of "Sources" that are indicated in the ANNEX to the Directive. This ANNEX provides both specific and general indications. Specific indications point at centralised cross-national database such as the OHIM Orphan Works Database, National orphan works registry, WATCH, VIAF, ARROW, ISSN, etc. However, other directions of the ANNEX generally refer to collecting societies, authors' guilds, unions and associations, national libraries, catalogues, agents, etc. As specified in Rec. 14, Member States where the diligent search has to be carried out should determine, in accordance with the Directive, the sources to be consulted. However, while in the United Kingdom the Intellectual Property Office has released detailed guidelines including a specific list of the sources to be consulted, in Italy and in the Netherlands such guidelines are not – or not yet – available. For these two countries this study has compiled two data sets with sources useful to locate the rightholder of a work, in accordance to the Directive and after the model of the UK IPO.

⁶⁰ The Diligent Search Platform will enable crowd-sourcing certain phases of the diligent search process. See Kris Erickson 'How crowdsourcing might solve the astronomical challenge of copyright clearance', *CREATE Blog*, 8 January 2016 <http://www.create.ac.uk/blog>.

Findings of this study reveal that in the examined countries together little more than half of the sources for Diligent Search are freely accessible online.

							
Sources from	IPO guidelines		EnDOW RA		EnDOW RA		
N. Sources	210	%	357	%	87	%	
Free Access online (incl Reg)	147	70%	200	56%	47	54%	
Not Freely Accessible Online (incl. all below)	63	30%	157	44%	40	46%	
DB Not Accessible online	46	22%	82	23%	36	41%	
Paying access online	9	4%	10	3%	2	2%	
Free Access on site	5	2%	24	7%	0	0%	
Partial Access online	3	1%	33	9%	1	1%	
WIP (will be access online)	0	0%	8	2%	1	1%	

This might have heavy consequences for projects of mass digitization of European cultural institutions, which the Orphan Works Directive is seeking to facilitate in the first place. Our data show that these institutions will find difficult to clear the rights of their collections while at the same time complying with the requirements of the legislation. A possible solution to this problem might involve legislative action, official guidelines or jurisprudence to establish hierarchies among Sources for Diligent Search, with a diversification between compulsory and optional sources, depending on their relevance and accessibility. In practice, when a source recommended by legislation is not freely accessible online, even a Diligent Search not including the consultation of such source must be considered exhaustive and compliant with the law. In other words, a Diligent Search must be considered as carried out in good faith if all relevant freely and easily accessible sources have been consulted. In this respect, government bodies dealing with the orphan works legislation (in the UK, the Intellectual Property Office) should issue best practices addressed to rightholders organizations, requesting that databases are made freely accessible for purpose of carrying out Diligent Searches.

Finally, the study has identified for each piece of legislation possible uses of orphan works. Directions are found in the legislation or in the usage allowances of the licensing system, where in place (the UK). Uses for both private and public purpose are envisaged, for commercial and non-commercial purpose, through both digital and analogue means, and for large and small scale dissemination.

APPENDIXES

APPENDIX I - UK Exceptions to Copyright Duration

(Source: IPO guidance of diligent search for applicants)

Literary Works

Rule: copyright expires 70 years from the end of the year of the death of the author

Exceptions:

- Computer generated works: Protection lasts for 50 years from the end of the calendar year when the work was made.
- Crown Copyright
 - Unpublished created before 1 January 1915, copyright expires on 31 December 2039
 - Unpublished created on or after 1 January 1915, copyright expires 125 years from the end of the calendar year in which it was created
 - Created and published before 1 August 1989, copyright expires 50 years from the end of the year of first publication
 - Created before 1 August 1989 but first published after that date commercially and it is less than 75 years from the end of the calendar year in which the work was created, copyright expires 50 years from the end of the calendar year of first publication
 - Created before 1 August 1989 but first published after that date, where they are published non-commercially and is less than 75 years from the end of the calendar year in which the work was created, copyright expires 125 years from the end of the calendar year of creation or on 31 December 2039, whichever is later.
 - Created before, but first published on or after 1 August 1989, at a date more than 75 years from the end of the calendar year in which the work was created, copyright expires 125 years from the end of the calendar year of creation or on 31 December 2039, whichever is later.
 - Created on or after 1 August 1989 and published commercially less than 75 years from the end of the calendar year in which the work was created, copyright expires 50 years from the end of the calendar year of first commercial publication.
 - Created on or after 1 August 1989 and published non-commercially less than 75 years from the end of the calendar year in which the work was created copyright expires 125 years from the end of the calendar year of creation
 - Created on or after 1 August 1989 and published more than 75 years from the end of the calendar year in which the work was created, copyright expires 125 years from the end of the calendar year in which the work was created.
 - Open Government Licence — copyright and database right material expressly made available under this licence is free to use.
- Parliamentary copyright – lasts for 50 years from the end of the calendar year in which the work was made. Where an international organisation is the first owner, copyright also lasts for 50 years from the end of the calendar year when the work was made.

- Work of unknown authorship – lasts for 70 years after the end of the calendar year in which the work was made, or, it is made available to the public during that period, 70 years after the end of the year in which the work was first made available. If the identity of the author becomes known before the expiry of this copyright, the provisions for known authors will apply (life plus 70 years)
- Unpublished works before 1989 – lasts until 31 December 2039 if the work was created but not published, performed in public or sold to the public, before 1 August 1989, and where the author is known and died before 1969, or in the case

Films and Music

Rule: copyright expires 70 years from the end of the year of the death of the author.

Exceptions:

- Films made before 1 June 1957 were not recognised as a distinct work. They would have protection as an original dramatic work or individual frames treated as photographs. The soundtrack may also be protected as a sound recording, so copyright term would relate to these rights.
- Crown and Parliamentary Copyright – Parliamentary copyright only exists in films made on or after 1 August 1989. Earlier films are attributed to the employee.
- Unpublished works before 1989 – lasts until 31 December 2039 if the work was created but not published, performed in public or sold to the public, before 1 August 1989, and where the author is known and died before 1969, or in the case of unknown authors, where the work was created before 1969

Still Visual Art

Rule: copyright expires 70 years from the end of the year of the death of the author

Exceptions:

- Creator known and work created before 1 June 1957 then copyright expires 50 years from being made available or 70 years after the death of the author.
- Creator known and work created on or after 1 June 1957 and before 1 August 1989 and the creator died more than 20 years before publication then copyright expires 50 years after the end of the year of first publication.
- Creator known and work is unpublished and creator died before 1 January 1969 copyright expires on 31 December 2039.
- Crown copyright applies to work which has been published copyright expires 50 years from the end of the year in which the work was published. For unpublished works copyright expires 125 years from the end of the year in which the work was made or until 31 December 2039.

- Creator is unknown and work created after 1 January 1969 copyright expires 70 years after the creation or 70 years after the work was made available to the public if within 70 years of creation.

APPENDIX II - The United Kingdom - Legislation

[The Copyright and Rights in Performances \(Licensing of Orphan Works\) Regulations 2014 No. 2863](#)

Diligent search

4.—(1) An orphan licensee shall, before applying for an orphan licence, carry out a diligent search or refer to an existing diligent search which is valid and, in either case, is appropriate to the orphan work which is the proposed subject matter of the orphan licence and relates to the rights in the relevant work which the orphan licensee proposes to use.

(2) A diligent search must comprise a reasonable search of the relevant sources to identify and locate the right holders of the relevant work.

(3) The sources that are relevant for the relevant work must, as a minimum, include—

(a) the relevant register maintained by the authorising body and the relevant databases maintained by the Office for Harmonization in the Internal Market; and

(b) where there is no record that the relevant work is an orphan work in the register or databases referred to in paragraph (a), any relevant sources listed for that category of work in Part 2 of Schedule ZA1 to the Act⁽¹⁾.

(4) The authorising body may issue guidance on what sources may additionally be relevant in the case of different relevant works.

(5) A diligent search is valid, for the purposes of paragraph (1), for seven years from the earlier of the date—

(a) on which an orphan licence of the orphan work was first granted by the authorising body; or

(b) that the record of a diligent search undertaken in respect of a relevant work was first made public by the Office for Harmonization in the Internal Market.

(6) An orphan licensee shall provide the authorising body with such information concerning—

(a) the diligent search; and

(b) the use that the orphan licensee proposes to make of the orphan work,

as the authorising body may require in connection with the application for an orphan licence.

(7) The orphan licensee shall, when applying for an orphan licence, provide the authorising body with an application in the form required by the authorising body, including in electronic form, and the application shall—

(a) demonstrate that a diligent search has been carried out; and

(b) contain a declaration in writing by the orphan licensee stating that the information provided in the application is correct.

(8) Where an orphan licensee makes a declaration under sub-paragraph (7)(b) that the orphan licensee knows or has reason to believe is false and the orphan licensee is granted an orphan licence and carries out any of the acts restricted by copyright or the restricted acts, the orphan licensee is liable for infringement of copyright or sections 182, 182A, 182B, 182C, 182CA, 183 or 184 of the Act as appropriate.

(9) The authorising body shall take reasonable steps to ensure that the search relied upon by the orphan licensee satisfies the requirements for a diligent search.

APPENDIX III - The Netherlands - Legislation

Copyright Act (Auteurswet)

Articles 16o [Orphan Works]

1. Not regarded as copyright infringement of a literary, scientific or artistic work, as defined in article 10(1) under 1, 5, or 10, is considered the reproduction or making available of a work which has been first communicated to the public in a member state of the EU or EEA, through publicly accessible libraries, educational institutions and museums, as well as archives and institutions for cinematographic or audio-visual heritage which do not have a direct or indirect economic or commercial objective, if:

a) the work is part of the institution's own collection;

b) the right holder has not been identified and located after a diligent search, as defined in article 16p, has been carried out; and

c) the reproduction and making available forms part of the institution's public interest mission, in particular the preservation and restauration of works and providing access to an institution's collection for cultural and educational purposes.

[...]

Article 16p [Search for right holders]

1. The diligent search for right holders, as defined in article 16o(1)(b), is to be carried out for each work, as defined in article 16o(1), and for every literary, scientific or artistic work included within it, by consulting the appropriate sources for tracing right holders. Details on the sources which are to be consulted as part of this search are to be issued by the Minister for Education, Culture and Science in an implementation order.

2. The diligent search is to be carried out in the member state where the work has been first communicated to the public. In the case of film works, the search is carried out in the member state where the producer has his headquarter or his habitual residence.

3. In the case of works as defined in article 16o(3), the search is carried out in the member state where the institution, which has included the work into its own collection with the permission of the right holder, is located.

4. If there are indications that information about the right holder is located in another member state, then the sources that are prescribed in this member state as part of the diligent search are to be consulted as well.

5. The organisations defined in article 16o(1) are to keep the information about which sources were consulted as part of the diligent search and its results. The institution is to transmit the following information to an institution named in an implementing order from the Minister for Education, Culture and Science for the purpose of further transmission to the Office for Harmonization in the Internal Market:

- a) the results of the diligent search which the institution has carried out and which have led to the conclusion that the work is orphan;
- b) the way the work is to be used;
- c) the contact information of the institution;
- d) if applicable, any change in the status of the work.

5. Details on the information to be provided and the relevant process are to be issued by the Minister for Education, Culture and Science in an implementation order.

6. The reproduction and making available of orphan works which have been included in the database of the Office for Harmonization as mention in 5) does not require a diligent search as defined in article 16o(b).

Law on Neighbouring Rights (Wet op de Naburige Rechten)

Article 10

It is not considered infringement on the rights defined in articles 2, 6, 7a and 8:

[...]

l. the reproduction and making available to the public of a performance, phonogram or first fixation of a film, or a reproduction thereof, which has been first brought into circulation in a member state of the EU or EEA, which form part of the collection of publicly accessible libraries, educational institutions and museums, as well as archives, and institutions for cinematographic or audio-visual heritage which do not have a direct or indirect economic or commercial objective and public media institutions, as defined in chapter 2 Media Law 2008, if the right holders could not be identified and located following a diligent search. The article 16o to and including 16q and 17 of the Copyright Act apply.

Decree on the Diligent Search for Orphan Works

Article 2

The following sources are to be consulted in carrying out a diligent search:

a) in the case of published books:

- 1) royal library catalogue
- 2) databases of publishers' and authors' associations
- 3) databases and registers of authors, artists and copyright holders
- 4) database of the ISBN and other databases covering published books
- 5) collective management organisations' databases, especially those collective management organisations handling reproduction rights
- 6) databases and registers on international keyword lists and accessible registers on rights and orphan works

b) in the case of newspapers, magazines, dailies and journals:

- 1) Sources 1 and 5 named above under part a)
- 2) databases of the international standard number for serial publications
- 3) databases by publishers, authors and journalists associations

c) in the case of visual works (including works of art, photographs, illustrations, designs, architecture, sketches of works of the latter and other similar works) which are included in books, dailies, newspapers and magazines or other works:

- 1) the sources named in a and b
- 2) databases by artists' associations
- 3) collective management organisations' databases for artists, especially those handling the reproduction right
- 3) where applicable, databases of image and photography agencies

d) in the case of audio- visual works and phonograms:

- 1) media archive (as maintained by the Media Law 2008)
- 2) databases of producer associations or other associations which represent a specific category of right holder in these works
- 3) databases of institutions for cinematographic or audio- visual heritage and public libraries
- 4) databases with standard and identification codes, especially the international standard number for audio- visual works, international standard code for musical works and international standard code for sound recordings
- 5) collective management organisations' databases, especially those of authors, performing artists, producers of phonograms and audio- visual producers
- 6) information on the work, including the credit list of participators

Article 3

- 1) After the diligent search has been carried out, the institution is to transmit the information, as defined in article 16p(5) Copyright Act, to the Minister.
- 2) Minister can issue additional rules on the information to be provided and the relevant procedures.

Law 22 April 1941, n. 633 as amended by legislative decree 10 november 2014, n. 163

Art 69 bis: “ (1) Libraries, educational establishments and museums accessible to the public, as well as archives, film and audio heritage institutions and public-service broadcasting institutions may use orphan works –as defined by art. 69 quarter – hold in their collections:

- (a) by reproducing the orphan work for digitization, indexing, cataloguing, conservation and restoration purposes.
- (b) 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.

...”

Art 69 quarter: “ (1) A work or a phonogram shall be considered an orphan work if none of the rightholders is identified or, even if one or more of them is identified, none is located, after a diligent search carried out and registered according to the present article.

(2) Prior to any use of the work or phonogram, a diligent search shall be carried out by one of the organizations identified by article 69-bis (1) or by other subjects designated by the same organizations, according to principles of good faith and professional correctness. The search is carried out through consultation of the appropriate sources including those identified for each type of work or phonogram by art. 69-septies. New sources to be consulted for the diligent search may be identified through ministerial decree of the Ministry of Cultural Heritage and Activities and Tourism, in consultation with the most representative right-holders and users associations.”

Art. 69 septies: “ The Sources identified according to art 69-quarter (2) comprise the following:

- a) for all categories of work: the General Public Registry of Protected Works established within the Ministry of Cultural Heritage and Activities and Tourism;
- b) for published books:
 1. the National Library System, including the authority registers for authors;
 2. national associations of publishers and authors, the publishers of the work if known, and literary agencies operating in Italy;
 3. the legal deposit;
 4. the ISBN database, for published books and publishers;
 5. the WATCH (Writers, Artists and their Copyright Holders) databases;
 6. the SIAE databases and the database of the Clearedi system;
 7. the databases of books in commerce ALICE and ESAIE (for school books);

8. the National Registry of Names of Professors and Researchers and of Scientific Publications (ANPrePS);

The abovementioned sources may be consulted either directly or through systems allowing integrated searches such as as VIAF (Virtual International Authority Files) and ARROW (Accessible Registries of Rights Information and Orphan Works)

c) for daily newspapers, magazines and journals:

1. the ISSN (International Standard Serila Number) for periodicals;
2. indexes and catalogues of historic collections and library collesctions;
3. the legal deposit;
4. Italian associastions of publishers, authors and journalists;
5. the databases of collective management societies, including the bodies managing reproduction rights.

d) for visual works, including arts object, photography, illustrations, design, architecture, as well as drafts of the works thereof and other material reproduced in books, magazines, journals or other works:

1. the sources identified under a, b and c.
2. the databasess of collective management societies, in particular those managing visual arts and their reproduction rights.
3. if necessary, databases of photo agencies.

e) for audiovisual works and phonograms:

1. the legal deposit;
2. the Italian associations of producers;
3. the databases of film and audio heritage insitutions and national libraries;
4. databases with the respective standards and identification numbers, like ISAN (International Standard Audiovisual Number) for audiovisual works, ISWC (international Standard Music Work Code) for music tracks amd ISRC (International Standard Recording Code) for phongrams;
5. the databases of collective managing societies, and in particular those for authors, interpreters, producers of phonograms and producers of audiovisual works;;
6. the list of those taking part in the realization of the work and other information available on the packaging of the work;
7. the databases of other relevant associations representing specific categories of right-holders.”