

# Survey on the Application of the Orphan Works Directive

Fields marked with \* are mandatory.

## ABOUT THIS SURVEY

---

This survey is part of the European Commission's "Study on the application of the Orphan Works Directive (2012/28/EU)", which is being carried out by Milieu Consulting SRL.

The Orphan Works Directive 2012/28/EU (OWD or Directive) was created to improve legal certainty across the EU for the digitisation and dissemination of orphan works, particularly in the context of large-scale EU digitisation projects. It was intended to fill the gap between the public-interest mission of cultural heritage institutions (e.g. publicly accessible libraries, educational establishments and museums, archives, film and audio heritage institutions and public-service broadcasting organisations) to share their works with the general public, and the practically impossible challenge of locating all rightholders to get their prior 'green light' to use their works.

The approach in the OWD is based on the instrument of mutual recognition of orphan work status, determined after a diligent search in the EU Member State or European Economic Area (EEA) country where the work was first published. Mutual recognition means that once a work is considered orphan in one Member State, it is considered orphan in all of them. The diligent search for rightholders must be conducted prior to the usage of works and in good faith, obliging the beneficiaries to consult the appropriate sources for the category of works at stake. In contrast to the approach taken by the OWD, the newly adopted Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market opted for a license-based solution to support the mass digitisation and dissemination of out-of-commerce works. Contrary to orphan works, these are works whose rightholders (known or unknown) no longer actively exploit their rights, as for some reason they have decided not to continue with their commercial exploitation.

This targeted survey aims to gather information and the views of stakeholders to conduct a qualitative assessment of the implementation of the OWD provisions and an evaluation of the overall efficiency and effectiveness of the OWD as an instrument to promote the digitisation and dissemination of orphan works. The results of this survey will help to provide assessment and justification for possible policy options to improve the application and effects of the OWD.

To this end the survey specifically considers the 'Effectiveness' (the extent to which the objective of mass digitisation and dissemination of orphan works has been achieved), as well as 'Coherence' and 'Alternative solutions' (how the Directive interacts with other relevant areas of EU copyright law and policy and how the system could be improved).

## Responding to the survey

As this survey covers many different aspects of the Directive and targets different types of stakeholders, the questionnaire is somewhat lengthy. We estimate that the completion of the survey should not take longer than 30 minutes. **Only questions marked with an asterisk are mandatory. In case of non-mandatory questions, you only need to answer those questions for which you feel you have the expertise or experience to enable an informed answer.**

It is also important that answers are substantiated to the extent possible. The open text fields provide the possibility to explain answers, and also to provide concrete evidence to support the answers. Wherever possible, we ask you to identify and describe real-life examples that can concretely illustrate the response. You can provide links and/or upload documents to support these examples.

You may interrupt your session at any time and continue answering at a later stage. **If you do so, please remember to save the link to your answers as this is the only way to access them.** Once you have submitted your answers online, you will be able to download a copy of the completed questionnaire.

We kindly ask you to fill in the questionnaire by **25 September 2020**.

## Privacy statement and confidentiality

When conducting this survey, you might want to share with us some of your personal data such as your name, contact details, position, organisation you work in, as well as your personal views and opinions. Please be reassured that any personal data you provide will be treated in conformity with the Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data and where applicable with the Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (GDPR).

Any personal data that you provide when answering this survey will only be used for the purpose of conducting the study.

For more information on the processing of your personal data, please see the specific [Privacy Statement](#). As to the confidentiality of your responses, please note that your answers will be treated as confidential and will be shared with the European Commission without information concerning the respondent (i.e. name of the organisation, name and position of the respondent). Moreover, your answers will be published anonymously. If you would nevertheless like to share with the European Commission your identifying information, please check the box below.

Please note that, whatever option chosen, your answers may always be subject to a request for public access to documents under [Regulation \(EC\) N 1049/2001](#). If you opted for anonymous answer, please be mindful of not including information that might allow the identification of your organisation or yourself in the open text questions.

Based on the information that you will provide to us in this survey, we might contact you for a potential follow-up interview on a need-to-have basis. The purpose of such an interview would be to obtain a more in-depth understanding of the information provided via the survey. If you would like to make yourself available for a possible follow-up interview, please make sure to fill out your contact information.

Should you have any queries on the project, please email Milieu's project team on [OWD@milieu.be](mailto:OWD@milieu.be) .

Thank you in advance for your cooperation.

Best wishes,

Milieu Project Team

By checking this box, I confirm that I have read the specific European Commission [Privacy Statement](#) and agree with the processing of my personal data for the purposes stated therein.

By checking this box, I confirm that my contribution may be shared with the European Commission and published with information concerning the respondent (i.e. name of the organisation, name and position of the respondent).

## ABOUT THE RESPONDENT

---

**\* Are you replying as:**

- National competent authority - institution in EU Member State or EEA country responsible for forwarding information about orphan works to the EUIPO Orphan Works Database
- Beneficiary organisation - organisation listed in Article 1(1) OWD such as publicly accessible library, educational establishment, museum, archive, film or audio heritage institution and public-service broadcasting organisation established in EU Member State or EEA country that uses orphan works
- Rightholders organisation - association or entity representing the interests of rightholders or a (potential) rightholder
- Other - other stakeholder such as cultural organisation, collective management society, civil society group / NGO, as well as individual respondent

**\* What is the territorial coverage of your organisation?**

- Regional
- National
- EU
- Worldwide
- Other

**\* In which country(ies) do you have experience with orphan works? Please mark all that apply**

- Austria
- Belgium
- Bulgaria
- Croatia
- Cyprus
- Czechia
- Denmark
- Estonia
- Finland
- France
- Germany
- Greece
- Hungary
- Ireland
- Italy
- Latvia

- Lithuania
- Luxembourg
- Malta
- Netherlands
- Poland
- Portugal
- Romania
- Slovak Republic
- Slovenia
- Spain
- Sweden
- United Kingdom
- Iceland
- Norway
- Lichtenstein
- Other

**\* Please specify additional countries:**

United States of America

**\* Which sector(s) is your organisation active in? Please mark all that apply**

- Print (books)
- Print (Publications such as newspapers, journals, magazines and periodicals)
- Print (Other)
- Audiovisual (Music/Sound)
- Audiovisual (Film)
- Audiovisual (Other)
- Visual arts (Works of fine arts)
- Visual arts (Photographs)
- Visual arts (Illustrations)
- Visual arts (Design)
- Visual arts (Architectural works)
- Visual arts (Other)
- Other

**Please provide the name of your organisation in the box below (where possible, please include a translation in English)**

Science Fiction and Fantasy Writer of America

Based on the information that you will provide to us in this survey, we might contact you for a potential follow-up interview on a need-to-have basis.

Please enter your contact details, if you would like to make yourself available for such a follow-up interview

**Name**

Michael Capobianco

**Position within organisation**

Legal Affairs Committee Co-chair

**E-mail address**

michaelvcapobianco@gmail.com

**Phone number**

+1-301-274-9489

## IS THE DIRECTIVE EFFECTIVE?

---

Assessing the effectiveness of the OWD means analysing the extent to which its objectives have been met and identifying any significant factors that may have contributed to or inhibited progress towards meeting those objectives.

### Overall effectiveness of the OWD

The OWD sets out common rules for the use of orphan works by the cultural heritage institutions. Orphan works are works protected by copyright or related rights for which either no rightholder is identified or even if identified, the rightholder is not located. The work in question needs to be published, and the first publication must take place on the territory of an EU Member State or an EEA country. As beneficiaries are not possible to obtain rightholders' consent to the use of their works, the Directive enables them to use such works after performing a diligent search of rightholders.

This section aims at analysing the extent to which the main objective of the Directive – promotion of the digitisation and dissemination of orphan works – has been met.

**\* In your experience, has there been improvement in the digitisation and dissemination of orphan works since 2014?**

- Yes
- No
- I do not know

**\* To what extent can this be attributed to the OWD?**

- This can be significantly attributed to the OWD
- This can be partly attributed to the OWD
- This cannot be attributed to the OWD
- I do not know

**Please explain your answer based on your experience, including examples (where possible).**

*750 character(s) maximum*

Without extensive improvements to the requirements for "diligent search" and the establishment of better ways for authors throughout the world of works mistakenly identified as "orphan" to find out that they have been misclassified, any orphan works directive will be a sham process.

## Scope of the OWD

The scope of the OWD is limited both to the types of institutions that can benefit from certain uses made of orphan works as well as to types of works that could be considered as orphan. Article 10(1) of the OWD suggests that this could be reviewed and possibly expanded to include additional beneficiaries such as publishers and additional types of works and/or materials. This section aims at assessing if the scope of the Directive is sufficiently broad.

- \* The provisions of the Directive apply to publicly accessible libraries, educational establishments and museums, as well as archives, film or audio heritage institutions and public-service broadcasting organisations established in the Member States.

**In your opinion, should the OWD be applicable to other types of institutions?**

- Yes
- No
- I do not know

**Please explain your answer(s), based on your experience and including examples (where possible).**

*500 character(s) maximum*

Expanding the scope of the OWD without addressing the problems identified above would only exacerbate the situation.

- \* The OWD applies to the following types of works and/or materials: books, journals, newspapers, magazines, other writings, cinematographic, audiovisual works, phonograms and embedded works.

**In your opinion, should the OWD be applicable to other types of works and/or materials?**

- Yes
- No
- I do not know

**Please explain your answer(s), based on your experience and including examples (where possible).**

*500 character(s) maximum*

Expanding the types of works and/or materials in the OWD without addressing the problems identified above would only exacerbate the situation.

- \* The OWD also applies to embedded / incorporated works, which are visual works such as fine art, photography, illustration, design, architecture, sketches etc. that are contained in books, journals,

newspapers and magazines or other works. Embedded works may not be disregarded and must undergo a separate diligent search.

**Do you agree with this concept of embedded / incorporated works under the OWD?**

- Yes, fully
- Yes, partially
- No
- I do not know

**Please explain your answer, based on your experience and including examples (where possible).**

*750 character(s) maximum*

In practice, without a registry that includes all embedded/incorporated works, it would be impossible for authors to effectively identify and opt out of exploitation as "orphan works" of "embedded" works such as articles, short stories, etc.No such registry is proposed, let alone implemented.

## Permitted uses of orphan works

The OWD permits the use of orphan works for public-interest missions, such as, for the purposes of digitisation, dissemination to the public, indexing, cataloguing, preservation or restoration. It does not for instance allow for 'non-online' uses of works, such as public performance or broadcasting of dramatic and cinematographic works. Moreover, commercial use of orphan works is excluded.

This section thus aims at understanding if the range of permitted uses of orphan works in the OWD is sufficient.

- \* The OWD restricts the use of orphan works to digitisation, dissemination, indexing, cataloguing, preservation or restoration.

**In your opinion, is the range of permitted uses of orphan works in the OWD sufficient?**

- Yes
- No, the range of permitted uses is too broad
- No, the range of permitted uses is too narrow
- I do not know

**Please explain your answer, based on your experience and including examples (where possible).**

*500 character(s) maximum*

Any use of so-called "orphan works" without an extensive system to perform a genuine diligent search throughout the world and a registry of rightsholders that allows authors to proactively register their works at a single, universal portal will mistakenly identify many works as orphans and violate the rights of the rightsholders. Dissemination to the public under those circumstances is anathema..

## Effectiveness of the diligent search

The OWD requires that a diligent search for rightholders is to be carried out in good faith with respect to each work by consulting the appropriate sources. Only after a beneficiary organisation performs such a diligent search can a work and/or a material be declared to be orphan and thus be used according to the terms of the Directive.

**\* Have you ever performed a diligent search for rightholder(s) of a work based on the OWD?**

- Yes
- No
- Not applicable

For the diligent search procedure, Member States, in consultation with stakeholders, need to determine the sources which shall be reviewed for each category of works and/or materials. Such list or lists of sources must include at least those sources listed in the Annex to the Directive.

**Recent studies and reports have highlighted some difficulties linked to the list(s) of sources and/or accessibility of the sources that need to be consulted to perform a diligent search. Based on your experience how would you assess the following?**

	Highly problematic	Problematic	Not problematic	Not applicable
A) The national legislation does not provide any list(s) of sources that needs to be consulted	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
B) Stakeholders were not consulted when preparing list(s) of sources	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
C) It is not clear if it is mandatory to consult all the listed sources	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
D) There is no clear hierarchy of sources (i.e. no indication of whether some sources are more important than others)	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
E) It is difficult to determine which sources should be consulted for a particular type of work (i.e. sources are not categorised by type of work)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
F) The number of sources to be consulted is excessive	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
G) The sources are not accessible online	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
H) The sources require registration /authorisation before they can be accessed	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
I) There is a fee to pay to access the sources	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
J) Even if accessible, the sources are of poor quality (e.g. not up to date, not relevant for the work)	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
K) Other	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>



**Please list any additional factors for consideration regarding the list(s) of sources and/or accessibility of sources.**

*750 character(s) maximum*

A voluntary registry of authors is necessary for authors to indicate that their works are not "orphans".

**Would you like to add any further information regarding your experience with the list of sources?**

*750 character(s) maximum*

A genuinely diligent search is not limited to specific sources, but can be modified depending on the circumstances to include some sources and exclude others. In all cases, the search must begin with the author/creator/heirs.

The OWD requires that a diligent search for rightholders is to be carried out in good faith with respect to each work in question by consulting appropriate sources for the relevant category of works.

**Recent studies and reports have highlighted some difficulties linked to the diligent search procedure. Based on your experience how would you assess the following?**

	Highly problematic	Problematic	Not problematic	Not applicable
A) Time required to complete the diligent search procedure	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
B) Specialised knowledge required to complete the diligent search procedure (i.e. qualified human resources)	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
C) Resources required to perform the diligent search procedure (e.g. monetary, human)	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
D) A diligent search must be performed for each work individually, even in cases of works within the same collection	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
E) Complexity of diligent search procedure for works with several rightholders	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
F) Completed diligent search does not provide a guarantee that an organisation can lawfully use the orphan work	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
G) The need to take into consideration national legislation on presumptions of right ownership and right transfers	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
H) Complexity of the diligent search procedure in cross-border cases (i.e. where the work is first published and broadcasted in another Member State)	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

I) Other	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
----------	-----------------------	-----------------------	-----------------------	-----------------------

### Would you like to add any further information regarding your experience with the diligent search procedure

*750 character(s) maximum*

Genuine diligent searches are time-consuming and may require extraordinary work, following a trail that has almost gone cold to find a rightholder. No single set of parameters can be applied to any and all diligent searches.

### Do you have any suggestions to improve the diligent search procedure?

*750 character(s) maximum*

Diligent means diligent, having or showing care and conscientiousness in one's work or duties. No single set of parameters can be applied to any and all diligent searches.

## Effectiveness of putting an end to the orphan work status

Article 5 of the Directive provides that a rightholder may end the orphan work status at any time. The reappearance of the rightholder in turn means that the work is no longer orphaned and that a fair compensation has to be paid to the reappeared rightholder.

### \* In your experience, how often do rightholders put an end to the orphan works status of their works and/or materials?

- Often (in roughly 60% to 100% of cases of orphan works)
- Sometimes (in roughly 20% to 60% of cases of orphan works)
- Rarely (in less than 20% of cases of orphan works)
- Never
- I do not know

### \* In cases where orphan works are claimed by rightholders, how frequently do they claim compensation?

- Always
- Almost always (in roughly 80% of cases of orphan works)
- Often (in roughly 60% to 100% of cases of orphan works)
- Sometimes (in roughly 20% to 60% of cases of orphan works)
- Rarely (in less than 20% of cases of orphan works)
- Never
- I do not know

### \* In your opinion, is it easy to end an orphan works status?

- Yes
- No
- I do not know

**Please explain your answers based on your experience, including examples (where possible), and information supporting the contribution of the OWD to the possibility of putting an end to the orphan work status.**

*750 character(s) maximum*

As Advisor to SFWA's Estate Project, I have been involved in many searches for the heirs of deceased authors. Without a long-term system that incorporates a worldwide author registry as well as a set of parameters for a fully diligent search as outlined above, orphan works will still exist, but, more importantly, there will be a new, widespread status of works mistakenly identified as orphan works.

**\* Do you think that the Directive provides sufficient legal clarity regarding the level of compensation for the rightholder(s)?**

- Yes, fully
- Yes, partially
- No
- I do not know

**Please explain your answer, based on your experience and including examples (where possible).**

*750 character(s) maximum*

Public dissemination of a work effectively destroys all future value and the author should be compensated appropriately.

**Do you have any suggestions to improve the procedure to end the orphan work status?**

*750 character(s) maximum*

(1) Enact legislation throughout the EU to automatically revert rights to the author/creator from the publisher if, after 10 years, the work, or any subset of rights, has not been exploited by the publisher. (2) Fully integrate it with the out-of-commerce-works system, so that a single pre-emptive opt-out can be used for all uses of a work or all work by an author, EU-wide, (3) In any registry, fully index each work (written or visual) in an edition, including any embedded/incorporated works, not just the overall title of the compilation, (4) exclude anonymous works

## Effectiveness of the mutual recognition system

In Article 4, the OWD provides for a system of a mutual recognition of orphan work status throughout the EU /EEA. This means that a work which has been considered an orphan work in one EU Member State and/or EEA country is considered an orphan work in all such countries and may be used accordingly.

**\* In your opinion, has the use of orphan works from different countries increased across the EU/EEA?**

- Yes
- No
- I do not know

**Please explain your answer based on your experience, including examples (where possible), and information supporting the contribution of the mutual recognition of orphan work status to the usage of orphan works.**

750 character(s) maximum

It is impossible for authors or authors groups to track the use of orphan works, especially from the USA.

**Do you have any suggestions to improve the mutual recognition of orphan work status?**

750 character(s) maximum

## Effectiveness of the EUIPO database

Under Article 3(6) of the OWD, the European Union Intellectual Property Office (EUIPO) was made responsible for the establishment and management of a single publicly accessible online database on orphan works. The EUIPO Orphan Works Database provides information on works contained in the collection of beneficiaries in EU Member States and EEA countries. However, this is not the only database that compiles orphan works. Apart from the discontinued ARROW database, several countries have set up national databases of orphan works.

**\* Does your organisation have any experience in using the EUIPO Orphan Works Database?**

- Yes
- No
- Not applicable

**\* What is your experience with the EUIPO Database? Please mark all that apply.**

- My organisation has provided records to the EUIPO database
- My organisation has used the EUIPO database to search through registered orphan works
- My organisation has used the EUIPO database to claim a change of status to the orphan works
- Other
- Not applicable

**Please explain your answer, based on your experience and including examples (where possible).**

750 character(s) maximum

We have attempted to determine when our members' works have been incorporated in the database

**\* 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?**

- Yes, fully
- Yes, partially
- No
- I do not know

**Please explain your answer, based on your experience and including examples (where possible).**

750 character(s) maximum

**\* Do you think the EUIPO database is sufficiently compatible and interoperable with other orphan works databases?**

- Yes, fully
- Yes, partially
- No
- I do not know

**Please explain your answer, based on your experience and including examples (where possible).**

*750 character(s) maximum*

It urgently needs to be integrated with the out-of-commerce works database and system. An author who doesn't want a work made available as an "orphan work" almost certainly won't want that work copied made available as an "out-of-commerce work". And vice-versa. An author will not be able to easily identify which works might have been classified as "orphan works" and which classified "out of commerce".

**Do you have any suggestions to improve the functioning of the EUIPO database?**

*750 character(s) maximum*

(1) Fully integrate it with the out-of-commerce-works system, so that a single preemptive opt-out can be used for all uses of a work or all work by an author, EU-wide, (2) In any registry, fully index each work (written or visual) in an edition, including any embedded/incorporated works, not just the overall title of the compilation, and (3) exclude anonymous works,

## Coherence and alternatives to the approach in the OWD

---

This last part of the survey aims at assessing how well the OWD works in conjunction with other relevant EU copyright laws and policies, in particular the recently and related rights in the Digital Single Market (Copyright Directive), which still needs to be transposed into national legal system.

Moreover, this part aims to understand if there are alternative approaches that could more effectively enable mass digitisation and dissemination of orphan works, such as the extended collective licensing (ECL) mechanisms proposed for out-of-commerce works by the newly adopted Copyright Directive.

**In your opinion, is the OWD consistent with and supportive of the following EU copyright rules or do you see gaps, overlaps or inconsistencies?**

	Consistent and/or supportive	Gaps, overlaps or inconsistencies	I do not know
<b>A) Rules on anonymous or pseudonymous works.</b> These are works protected by copyright that were published anonymously or under a pseudonym (i.e. assumed name).	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

<p>B) <b>Rules on out-of-commerce works</b> (out-of-print or out-of-distribution works). Contrary to orphan works, these are works whose rightholders (known or unknown) no longer actively exploit their rights, as for some reason they have decided not to continue with their commercial exploitation. In particular, the <b>ability for representative collective management organisations (CMO) to issue licenses</b> for the use of out-of-commerce works by cultural heritage institutions. The CMOs facilitate rights clearance in the interest of both beneficiaries and rightholders as well as economic reward for rightholders through licensing schemes. In most cases, CMOs are either private or public non-for-profit entities.</p>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
<p>C) The ability of Member States to introduce <b>extended collective licensing (ECL)</b> schemes. This means that a CMO, on behalf of its members, grants a licence (authorisation for use), which is extended by law to cover also all non-member rightholders of the same category.</p>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
<p>D) <b>Rules on works in the public domain</b>, in particular the fact that beneficiaries can no longer claim copyright over (digital) reproduction of public domain works in their collections.</p>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
<p>E) <b>The ability of beneficiaries to make copies</b> of any works that are permanently in their collection <b>for the purpose of preserving such work</b>.</p>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
<p>F) <b>The ability of beneficiaries to carry out text and data mining (TDM)</b> for the purpose of scientific research. TDM applies to the process of deriving information from machine-readable material using computer-based analysis. It works by copying large quantities of material and data in order to gain knowledge.</p>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

In the previous question, you stated that the OWD has gaps, overlaps or inconsistencies with **rules on anonymous or pseudonymous works**.

**What are the gaps, overlaps or inconsistencies and how do they impact the achievement of the OWD's objectives on the one hand and the achievement of the objectives of the rules on anonymous or pseudonymous works on the other hand? Do gaps, overlaps or inconsistencies result in delays, uncertainties and/or additional administrative burden? What would be your suggestion to resolve these problems?** Please elaborate and provide practical examples to justify your answer.

All anonymously published works are, by definition, orphan works, whether or not they are being exploited. They will be included as orphan works, but should not.

In the previous question, you stated that the OWD has gaps, overlaps or inconsistencies with **rules on out-of-commerce works**.

**What are the gaps, overlaps or inconsistencies and how do they impact the achievement of the**

**OWD's objectives on the one hand and the achievement of the objectives of the rules on out-of-commerce works on the other hand? Do gaps, overlaps or inconsistencies result in delays, uncertainties and/or additional administrative burden? What would be your suggestion to resolve these problems?**

Please elaborate and provide practical examples to justify your answer.

The two categories overlap but they should not. Out-of-commerce works will include many works that are in fact in commerce, either through the author or another entity publishing the work in a way that does not show up in the standard references, or putting the work into commerce in other ways, such as putting excerpts on a web page with advertising. In fact, unless you find a rightsholder, there is no way to tell if a work is out-of-commerce.

- \* The new Copyright Directive provides for an extended collective licensing (ECL) mechanism, which allows for collective agreements between a representative collective management organisation (CMO) and a user to be effective also in relation to authors who are not members of the organisation, with a fall-back option in case there is no sufficiently representative CMO.

**In your view, should the approach in the Copyright Directive for out-of-commerce works be extended to also cover orphan works?**

- Yes  
 No  
 I do not know

**Please explain your answer, based on your experience and including examples (where possible).**

*750 character(s) maximum*

Extending a flawed system for ECL of out-of-commerce works to orphan works introduces two factors of uncertainty, and in both instances there is considerable room for error. We feel that ECL is inappropriate for both.

- \* **What other system(s), in your view, is to be considered for mass digitisation and dissemination of orphan works?** Please mark all that apply.

None of the above can not be selected together with other options.

- Licensing scheme  
 Extended collective licensing (ECL)  
 Public domain exception  
 Other  
 None of the above  
 I do not know

**Are any of the above listed systems in place in your country? If so, please explain which ones and whether they also cover orphan works.**

*250 character(s) maximum*

Public domain exception is in place in the USA. It covers orphan works and out of commerce works published prior to 1924.

**What would you say are the main advantages of using such an alternative system as oppose to the orphan works system in the OWD? Please explain the advantages and disadvantages of such an alternative system, based on your experience and including examples (where possible).**

*750 character(s) maximum*

Works which are still covered under copyright laws are not infringed. Works which have entered the public domain are freely available for any and all purposes. No works are infringed because of erroneous categorization.

**Please list any further system for consideration regarding the mass digitisation and dissemination of orphan works. What would you say are the main advantages of using such an alternative system as oppose to the orphan works system in the OWD? Please explain the advantages and disadvantages of such an alternative system, based on your experience and including examples (where possible).**

The main advantage of only disseminating and digitizing works that are in the public domain is obvious. It respects the Berne Convention.

**Please let us know if you have any final remarks or suggestions on how to improve the functioning of the OWD.**

Our primary suggestion is that, if the problem of orphan works is that the authors or rightholders can not be found, the EU should set up a system for finding them, including a voluntary registry and an extensive outreach effort to authors and authors groups throughout the world to notify them how to register. In addition, as stated above, the WU should create a law to make sure authors or their heirs are regarded as the primary rightsholders, and rights should be returned to them automatically if their works are out of commerce.

**If you wish to submit additional documentation in support of your responses, please upload your files here. Please note that all uploaded documents will be published together with your contribution, and that you should not include personal data in the document(s), if you would like that your answers remain anonymous.**

The maximum file size is 1 MB

**19534ff0-eff1-47dd-b4f5-25a18049e9b7/SFWA\_Orphan\_Works\_Comments.pdf**

**Thank you for participating in this survey!**

## **Contact**

OWD@milieu.be



