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**The Persistent Implementation Gap: A Critical Policy Analysis of Institutional Barriers in the EU Orphan Works Regime**

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# The Persistent Implementation Gap: A Critical Policy Analysis of Institutional Barriers in the EU Orphan Works Regime

## Abstract

### Purpose

The purpose of this paper is to provide a critical policy analysis of the systemic deficits in operationalizing the Directive (2012/28/EU), using Italy as a paradigm case of implementation deficits.

### Design/methodology/approach

Moving beyond a simple review, this analysis is grounded in a doctrinal and regulatory review approach, critically examining the bureaucratic complexity, lack of operational tools, and regulatory uncertainties that have limited the unlocking of this cultural heritage.

### Findings

Thirteen years after the Directive's adoption, the balance sheet appears highly disappointing, and the application of the legislation has proven largely ineffective, primarily due to persistent administrative deficits at the national level.

### Research limitations/implications

This study highlights the need for comprehensive reform of the Directive's national transposition and suggests implications for policy analysis concerning the implementation gap between EU legislation and Member State practice.

### Practical implications

The analysis concludes by reflecting on the need to simplify procedures, expand the scope for beneficiary institutions, and integrate orphan works with open licenses and Rights Statement tools, enabling effective digital access while respecting intellectual property rights.

### Originality/value of paper

This study's primary contribution is its critical policy analysis, which integrates legal-doctrinal review with institutional evidence (EUIPO data and administrative reports). It provides an in-depth focus on the systemic administrative barriers in the Italian context, offering a comparative case study for analyzing wider EU implementation challenges.

## 1 2 3 1. Introduction: Scope, Methodology and Definitions 4 5

6 This paper adopts the typology of a Critical Policy Analysis, grounded in a doctrinal and regulatory  
7 review approach. The core methodology involves a critical examination of the EU Directive  
8 2012/28/EU and its legal transposition into Italian national law (the legal framework), augmented by  
9 a synthesis of institutional evidence, including recent registration data from the European Union  
10 Intellectual Property Office (EUIPO) and relevant administrative reports. This analysis is designed to  
11 interpret the systemic implementation deficits and propose operational reforms needed to bridge the  
12 gap between European law and national practice.  
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14 The structure of the analysis follows a specific argumentative path: the paper first details the persistent  
15 administrative deficit within the Italian context (Section 4). It then proceeds to analyze the European  
16 operational mechanisms (Section 5: EUIPO; Section 6: The Rights Statement). This sequence is  
17 chosen to demonstrate that the limited results stem from fundamental national institutional barriers,  
18 rather than the unavailability of the European tools.  
19

20 The challenge of "orphan works"—items protected by copyright where the rights holder is unknown  
21 or untraceable—is a critical bottleneck for cultural heritage institutions across Europe and globally.  
22 This unresolved issue prevents the mass digitization and legal re-use of vast portions of 20th-century  
23 cultural output, severely limiting public access and research. Directive 2012/28/EU was designed to  
24 harmonize the process for identifying and using these works, but its success has been highly uneven  
25 across Member States  
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### 28 1.1. Definition of Orphan Work 29 30

31 Defining 'orphan works' is an inherently complex task, as the concept is subject to widely varying  
32 definitions based on national legal frameworks and policy objectives. However, at its core, the problem  
33 concerns '*copyrighted works whose owners are difficult or even impossible to locate*' (Lifshitz-Goldberg, 2010), a  
34 challenge recognized globally by international bodies. The transition to the digital environment has  
35 radically transformed the processes of knowledge creation and dissemination, making information  
36 management as complex as the underlying infrastructure itself (Borgman, 2007, p. 108). In this  
37 challenging context, the emergence of orphan works represents one of the most critical issues for cultural  
38 heritage institutions.  
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41 Given that this paper focuses on the European context and its legal response, we will primarily utilize  
42 the definition established by the Directive 2012/28/EU (European Parliament and Council of the  
43 European Union, 2012) (itself, which defines an orphan work as any work still protected by copyright  
44 whose *author or any other right holder is not known or cannot be located* following a mandatory diligent search.  
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47 In brief an orphan work is a copyrighted work for which the rights holder has not been identified or  
48 located, despite thorough research. This is a particularly common situation for older works, when  
49 information about the rights holders has been lost or has become obsolete over time. Orphan works can  
50 belong to different types: books, articles, photographs, audiovisual works, musical recordings and so on.  
51 What they have in common is the fact that they are still theoretically protected by copyright, but have an  
52 undefined legal status due to the unavailability of their creators or successors in title.  
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55 This paper examines the challenges in implementing the European Union's regulatory framework on  
56 orphan works, using Italy as a case study. The EU plays a crucial role in harmonizing intellectual property  
57 laws across member states through directives that must be transposed into national legislation. However,  
58 the practical application of these directives can face significant obstacles at the country level. By analyzing  
59 the Italian experience with the Orphan Works Directive (2012/28/EU), this study sheds light on the  
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3 difficulties encountered in unlocking the potential of cultural heritage materials that are still protected by  
4 copyright but whose rights holders are unidentifiable or untraceable.  
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6 The reasons can be many: an author who died without heirs, a publishing house or production company  
7 that has ceased activity, incomplete or missing copyright information on the works themselves. In all  
8 these cases, even if one wanted to comply with the law, it is materially impossible to obtain the rights for  
9 legal reuse.

10 Orphan works can come from very different contexts: modern publishing, audiovisual production,  
11 academic research, private historical archives. Just think of the many vintage photographs whose authors'  
12 personal details have been lost, or novels and screenplays whose authors or their legal successors (heirs)  
13 are no longer known or traceable are no longer known.

14 According to the American Library of Congress (U.S. Copyright Office, 2005), this category also includes  
15 all those works "*whose owners are difficult or even impossible to find*", a broad definition that encompasses the  
16 vast range of situations in which a work falls into legal orphanhood. Orphan works therefore represent  
17 a particular subcategory of that vast cultural heritage of "out of commerce", that is, no longer the object  
18 of economic exploitation by the rights holders, because they are out of the market: a legal limbo from  
19 which it is difficult to escape, condemning these works to potentially perpetual oblivion. It is precisely to  
20 remedy this paradoxical situation that legislators in various countries have begun to develop ad hoc  
21 regulatory exceptions, allowing reproduction and use aimed at the conservation and dissemination of this  
22 cultural heritage. This is a legal issue not without pitfalls, which has required a careful balancing of  
23 opposing interests.  
24

25 To fully understand the extent of the phenomenon of orphan works, it is useful to analyze specifically  
26 which types of works can fall into this category. The European Directive 2012/28/EU on certain  
27 permitted uses of orphan works, implemented by Legislative Decree no. 163 of 10 November 2014,  
28 introduced into Law no. 633/1941 a new "exception to copyright" in favour of certain organisations  
29 having purposes of public cultural interest. (Published in the Official Journal of the European Union on  
30 Saturday 27 October 2012, page 5 ff., Directive 2012/28/EU "on certain permitted uses of orphan  
31 works") has provided a rather exhaustive list:

- 34 • Printed works: books, magazines, newspapers, magazines, or other editorial publications. This is probably the largest  
35 and most emblematic category of orphan works.
- 36 • Cinematographic and audiovisual works: films, documentaries, television productions and any video content for  
37 which the rights holders are no longer known.
- 38 • Phonograms: discs, audio recordings, musical material whose authors/producers/performers cannot be found.
- 39 • Unpublished works: manuscripts, correspondence, diaries and other archival materials that have remained  
40 unpublished and orphaned.
- 41 • Embedded Works: Images, photographs, illustrations, or other multimedia content incorporated within larger  
42 publications.
- 43 • Partially Orphaned Works: Hybrid cases in which only some of the rights holders associated with the work have  
44 been traced.

45 The academic literature surrounding orphan works is vast and multidisciplinary, reflecting the issue's  
46 complex legal and practical dimensions. Early debates focused heavily on definitional issues and the need  
47 for legal intervention following large-scale digitization projects (Hansen, 2011; High Level Expert Group,  
48 2009). Subsequently, scholarly work has provided deep comparative analyses of the legislative  
49 frameworks and their limited impact across different jurisdictions (Borghi & Karapapa, 2021; Favale,  
50 2022; O'Sullivan, 2017). A major theme in the research focuses on the intrinsic procedural criticity of the  
51 system, particularly the complexity and cost of the required diligent search process (Bertoni, 2017;  
52 Montagnani & Zoboli, 2017; Schroff., 2017). Furthermore, recent studies have expanded the scope to  
53 theoretical analyses, the use of orphan works in derivative creations, and their application to specific  
54 cultural categories, such as photography and theatrical works (Cobo-Serrano, 2019; Gross, 2023; Mishra  
55 & Saxena, 2019; Sarid & Ben-Zvi, 2023). More recently, key organizations and working groups have  
56 provided practical guidance on rights management for cultural institutions (Arquero-Avilés 2018;  
57 Orlandi, 2021)

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3 As you can see, the spectrum is very broad and includes practically every form of published and recorded  
4 cultural and artistic expression protected by copyright law, provided it falls within the categories of the  
5 Directive. This is a transversal phenomenon that affects vast areas of cultural production held by  
6 beneficiary institutions. Every cultural institution, whether it is a library, an archive, a media library or a  
7 museum, has within it an unspecified number of orphan works mixed in with the rest of its collections.  
8 A submerged heritage of inestimable value, which lies in oblivion due to a legal impasse, and it is precisely  
9 to try to recover and enhance this hidden treasure that a specific regulation of orphan works was  
10 necessary. The European Directive was introduced with the explicit purpose of establishing a legal  
11 framework to facilitate the digitization and public dissemination of such works, which had been  
12 previously inaccessible due to rights clearance difficulties (Recital 3, Directive 2012/28/EU).  
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## 17 1.2 Orphan Works a subcategory of “Out of Commerce Works”

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19 Orphan works, as mentioned in the previous paragraph, can be considered a specific subcategory of that  
20 vast heritage represented by out-of-commerce works, that is, works protected by copyright but which are  
21 no longer the object of economic and commercial exploitation by the respective rights holders.

22  
23 In most cases, in fact, when a work becomes an "orphan" due to the unavailability of its rights holders,  
24 this happens precisely because it no longer has a profitable market for the publisher or producer who  
25 stops renewing, reprinting or actively distributing them. These are often dated works, out of catalogue,  
26 abandoned by commercial collections but still technically covered by copyright. Or niche or experimental  
27 productions that have never met a large audience.

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29 In this immense body of works forgotten by the market, the orphaned ones represent the deepest legal  
30 limbo into which fall works that are not only out of commerce, but for which even the traces of the rights  
31 holders have been lost.

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33 Further regulatory interventions on the matter, such as the provisions on out-of-commerce works, are  
34 contained in the subsequent Directive 790/2019 (European Parliament and Council of the European  
35 Union, 2019) on the digital single market, which however is not the subject of this article (the matter  
36 requires specific analysis and will be the subject of a further article). The two cases, despite their  
37 specificities, are in fact closely related and partly overlapping, in fact they contain potential synergies that  
38 allow us to glimpse integrated regulatory and operational paths for the future recovery of this deposit of  
39 cultural resources that has so far remained largely legally constrained and unavailable for reuse (or:  
40 unavailable for digital use), and with this we also refer to non-orphan out-of-commerce works.

## 45 2. A Home for Orphans: The Google Books Case and the Situation Before the 2012 46 Directive

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48 But let's take a look at what happened internationally before the European regulatory intervention. It was  
49 the United States that took the first concrete steps to address the issue of orphan works. *Finding a Home*  
50 for *Orphans : Google Book Search and Orphan Works Law in the United States and Europe* is the telling title of a  
51 seminal article by Katharina de la Durantaye (de la Durantaye, 2011) that offers a discussion on the  
52 search for legal solutions for orphan works, exploring in particular the implications of *Google Book Search*  
53 in relation to legislative differences between the United States and Europe. The article addressed the  
54 issues related to copyright protection and the difficulties in tracking down rights holders, as well as  
55 regulatory proposals to resolve the issue of orphan works. The framework of de la Durantaye's paper  
56 begins with the famous *Google Books Project* in Italian known as Google Libri (De Robbio, 2009; De  
57 Robbio, 2010; Samuelson, 2011; De Robbio, 2011; De Robbio, 2012) launched in 2004 with the  
58 ambitious goal of digitizing millions of books owned by US academic libraries, mainly "out of print"  
59 ones, and making them accessible online for free. Google soon realized that many of the works to be  
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3 digitized were effectively orphan works, with copyright holders no longer identifiable or traceable. To  
4 address this problem, the *Google Books Settlement* (Samuelson, 2011) was proposed in 2008, a sort of  
5 "transactional" agreement to manage orphan works, but not only that. The system provided that Google  
6 could sell digital copies of these works and set aside a portion of the proceeds in a special fund. If rights  
7 holders came forward in the future, they could claim their share from the fund. This agreement could  
8 have unlocked millions of orphan works, making them available to the public again while protecting  
9 copyright. However, the agreement was rejected in 2011 by Judge Denny Chin (Illustrators Partnership,  
10 2011) who deemed it too unbalanced in favor of Google and problematic from a legal perspective. As a  
11 result, the Google Books project could no longer include orphan works systematically, leaving their legal  
12 status unresolved. A setback that fueled the debate on the need for organic regulation of the matter.  
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## 15 2.1. The HathiTrust Case

## 16

17 At that time, a high-profile legal case, linked to the *Google Books Project*, significantly influenced European  
18 decisions on the regulation of orphan works: the case against *HathiTrust* (HathiTrust, 2025)<sup>1</sup>. HathiTrust  
19 was born as a digital archive to collect and organize the digitizations produced by various American  
20 academic projects, including the digitizations carried out by the *Google Books Project* in academic library  
21 projects. Google's ambitious project dealt with the large-scale digitization of volumes from the most  
22 prestigious university libraries in the United States, a project that was strongly opposed in Europe. The  
23 agreement with Google allowed HathiTrust to preserve and manage the digital copies, guaranteeing  
24 access to the participating institutions and providing advanced research tools. However, over time,  
25 HathiTrust extended its scope of action, also including the orphans. This choice went beyond the terms  
26 of the agreement with Google and raised strong objections from authors and publishers, who contested  
27 the digitization and online distribution of these works, despite never having re-released them (as was the  
28 case for out-of-commerce works). HathiTrust defended its initiative by arguing that the digitization and  
29 accessibility of these works responded to a need to protect and enhance cultural heritage. However,  
30 protests from the publishing world resulted in a lawsuit, accusing it of copyright infringement.  
31  
32 The case against HathiTrust became one of the first international legal cases to focus attention on the  
33 complex issue of the mass digitization of orphan works. Although the litigation ended with an out-of-  
34 court settlement, the public and academic debate was deeply affected. The echo of this story also reached  
35 the European institutions, strengthening the awareness of a regulatory gap that must be filled to allow  
36 the valorization of this vast cultural heritage, often inaccessible due to copyright restrictions.  
37  
38 In parallel, in 2009 the Society of American Archivists developed a best practices statement on  
39 "reasonable efforts" to identify the rights holders of a work, laying the foundation for future diligent  
40 searches<sup>2</sup>.

41 2015 Report *Orphan Works and Mass Digitization* by the U.S. Copyright Office (U.S. Copyright Office,  
42 2015), an in-depth analysis that mapped the countries that had addressed the issue of orphan works at a  
43 regulatory level, with the economic and practical implications related to the mass digitization of orphan  
44 works.

45 These important American contributions inspired and prepared the ground for regulatory intervention  
46 at the European level, where the problem of orphan works was becoming increasingly pressing for  
47 libraries, archives and cultural institutions.

## 48 2.2 But how many orphans are there?

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56 <sup>1</sup> HathiTrust was founded in 2008 as a non-profit collaboration [of academic and research libraries](#), which holds over 18  
57 million digitized items in the HathiTrust Digital Library. It offers reading access to the full extent of U.S. and international  
58 copyright law, full-corpus data and text mining tools, and other emerging services based on the combined collection.

59 <sup>2</sup>In particular, the American archivists' document <https://www2.archivists.org/sites/all/files/OrphanWorks-June2009.pdf>  
60 takes up proposed US legislation on orphan works, such as the Orphan Works Act of 2008 (HR 5889) and the Shawn  
Bentley Orphan Works Act of 2008 (S.2913), which reduces penalties for infringement if an infringer "undertakes a diligent  
effort to locate the owner of the infringed copyright

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Estimating the exact number of orphan works in the collections of libraries, archives and cultural institutions around the world is a very difficult, if not impossible, task, there is a lack of reliable data and the estimates provided fluctuate in a rather wide range. Nonetheless, let's try to formulate some general assessments based on the elements available.

According to estimates by the British Library, one of the world's largest national libraries, around 40% of the copyrighted works in their holdings, or around 150 million volumes, could be considered orphans (European Commission, 2012). If this percentage were confirmed for other major libraries and cultural institutions, it would arrive at a staggering number of orphan works, in the hundreds of millions for the book and documentary sector alone.

The Italian Library Association (AIB) (AIB, 2014) estimated, in 2012, that approximately 10-20% of the out-of-commerce works in library archives were actually orphan works. Considering that it is estimated that 90% of the collections are made up of works that are no longer commercialized but are covered by rights, a further immense potential mass of orphan works is expected.

To this assessment, we should also consider the broader universe of copyright-protected materials not covered by the Directive's scope, such as many standalone photographs, unpublished manuscripts, and certain types of works of visual art. These materials are often orphaned to an even greater extent than printed publications, highlighting the limitations of the current legislative solution.

Finally, we must consider that many orphan works simply lie forgotten in archives and cultural deposits, unrecorded and unquantified. A submerged mass of which there are not even approximate estimates. Overall, even with all due caution, we can assume that the total number of orphan works worldwide is in the order of several million units, perhaps even several hundreds million, an inestimable treasure of knowledge and culture (Figure 1).

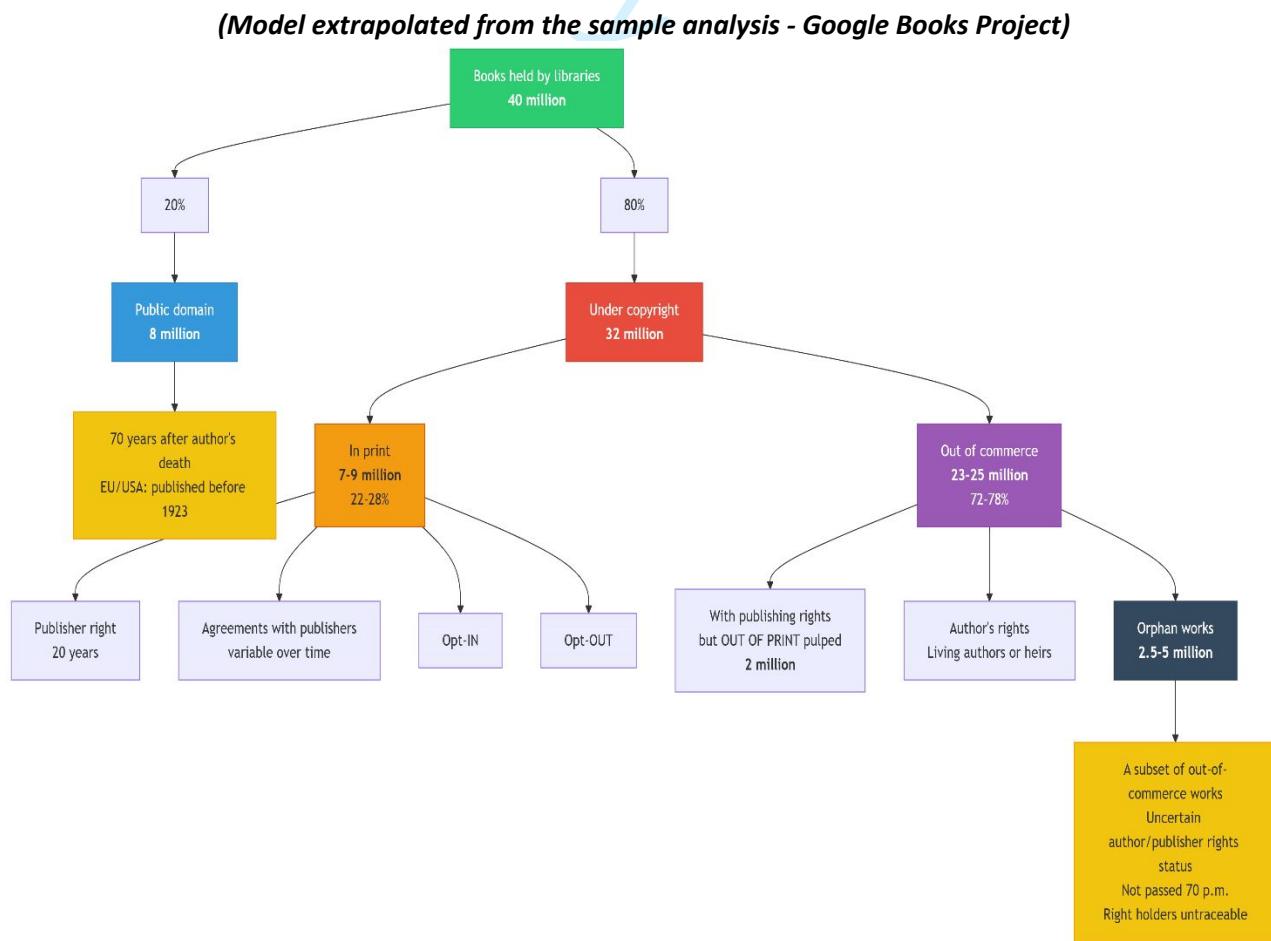


Figure 1: Conceptual framework of work status categories under Directive 2012/28/EU.

The map illustrates the categorization of monographic works within the library ecosystem. Approximately 20% of these works are in the public domain, though this percentage varies across jurisdictions due to differing national protection terms. The remaining 80% consists of works protected by copyright, including titles currently in print and those out-of-commerce. Within the 'in-print' segment, significant legal and administrative debates persist regarding ebook licensing models and the technical constraints of digital lending. The 'out-of-commerce' segment includes works where publishing rights may have lapsed or been pulled, alongside the specific subset of orphan works (estimated between 2.5 and 5 million units). These works represent a complex regulatory challenge, as they belong to a subset of out-of-commerce works where right holders are untraceable, making them the primary focus of the European Directive's implementation framework.

### 2.3. Orphan Works as an Exception to Italian Copyright Law

Directive 2012/28/EU (European Parliament and Council of the European Union, 2012) was transposed into national legislation by 29 October 2014 in all EU countries. The 27 EU countries (at the time 28 with Great Britain) transposed it more or less *ad verbatim*, within their own national regulations. Subsequently, each Member State has – some more, some less – operated with promotional and information tools within its own territory.

The legislation on orphan works introduced in Italy is essentially an exception to the general rules on copyright. In Italy, the legislation on orphan works was implemented with Legislative Decree 10 November 2014, n.163, which introduced a new "exception to copyright" in Law 633/1941 on copyright, aimed at allowing some specific uses of works that would otherwise be inaccessible. In particular, Articles 69-bis to 69-septies were added (Dirittodautore.it, 2025), which fully define the regime of orphan works in our legal system.

First of all, a precise definition of orphan work is provided as "*a work or phonogram for which none of the rights holders have been identified or, even if one or more of them have been identified, no one has been traced*". This category therefore includes not only works for which all trace of the rights holders has been completely lost, but also cases of "*partially orphan works*", in which only some of the rights holders are untraceable. The law also establishes which *beneficiary institutions* are authorized to use orphan works: publicly accessible libraries, educational establishments, museums, archives, film or audio heritage institutions, and public-service broadcasting organisations (Article 1(1)(b), Directive 2012/28/EU).

Article 69-bis of Law 633/1941 establishes that beneficiary institutions can reproduce and make orphan works available to the public, but exclusively for public interest objectives, which include conservation, restoration, digitization, and online use for cultural or educational purposes. It is therefore an exception with a very limited and specific purpose: to allow the valorization of a huge cultural heritage that would otherwise risk being lost due to the unavailability of its rights holders. Crucially, the exception does not legitimize an indiscriminate and unregulated use of orphan works; it only permits certain defined uses, such as reproduction for conservation or making them available online free of charge for non-commercial purposes, thereby excluding other paid economic exploitations. The procedure outlined, in addition to being rather stringent, provides for a series of mandatory obligations by the institutions involved. The key element is the preliminary *diligent search*, which represents the essential prerequisite for invoking the exception. Only after having made every reasonable attempt to trace the rights holders, can recognition of the orphan status be requested. This is therefore an exception with a rather cumbersome mechanism, which reflects the difficult balance between the public interest in the valorization of cultural heritage and the protection of private copyright. The process is not at all simple and is decidedly costly in terms of costs and benefits. When a beneficiary institutions has works in its collection that could be orphaned and wishes to digitize them within a digitization project, it must start the diligent search, a formal process that involves a series of well-defined steps.

## 3. The European Directive of 2012 and its implementation in EU countries in 2014

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3 It was the European Parliament, with Directive 2012/28/EU, known internationally as the *OWD Orphan*  
4 *Works Directive*, that introduced for the first time a comprehensive regulatory framework to address the  
5 issue of orphan works at Community level. A long-awaited intervention to unlock millions of cultural  
6 works that had until now remained unavailable for legitimate reuse due to unresolved copyright status.  
7 The scope of Directive 2012/28/EU is strictly limited to works published as books, periodicals, and  
8 newspapers, or fixed in cinematographic and audiovisual works and sound recordings. It is essential to  
9 clarify that the Directive does not apply to other works, such as works of visual art held by cultural  
10 heritage institutions, as these items fall outside the scope defined in Article 1(2). Furthermore, the  
11 Directive establishes a mandatory diligent search that must be conducted prior to the legal digital  
12 reproduction and cross-border use of any identified orphan works.  
13

14 The main objective of the Directive was to promote the digitization and legitimate online dissemination  
15 of orphan works present in the collections of cultural institutions, organizations that have the public  
16 interest mission of preserving, restoring and ensuring access to cultural heritage for educational and  
17 research purposes. The impossibility of tracking down copyright holders to request the necessary  
18 authorizations effectively prevented the digitization and online availability of millions of priceless cultural  
19 works. This created a substantial legal barrier that rendered this heritage unavailable for digital reuse. The  
20 intent of the European Directive was to try to remedy this situation by introducing a specific procedure  
21 to allow certain legitimate uses of orphan works by beneficiary institutions, under specific conditions.  
22 Unfortunately, the procedure designed did not solve the problem at all, which has remained unsolved  
23 after fifteen years. The greatest criticality was the procedure to be followed by beneficiary institutions,  
24 which before being able to reproduce and make the orphan work available to the public online had to  
25 (and still have to) carry out a "diligent search" on the rights holders, consulting a list of mandatory sources  
26 for that type of work. Only once this "diligent" search had been completed rigorously and the  
27 unavailability of the rights holders had been ascertained could the institution request recognition of the  
28 status of "orphan work" for that specific work. Only at that point are they authorized to digitize it and  
29 make it available online for non-commercial purposes.  
30

31 The Directive also established that the identifying information of all recognised orphan works should be  
32 collected in a centralised database at European level, managed by the EUIPO (European Union  
33 Intellectual Property Office) (EUIPO, 2025e)<sup>3</sup>. The database would have avoided duplicated location of  
34 effort by facilitating mutual recognition of orphan work status between Member States. At the same time,  
35 it would have allowed right holders to monitor the works and, if necessary, put an end to their orphan  
36 status by requesting fair compensation.  
37

38 The Directive's aim was therefore to facilitate the mass digitization and cross-border online fruition of  
39 this huge cultural capital, freeing up its potential for knowledge, research, and collective enrichment for  
40 the benefit of all European citizens. At the same time, it aimed to balance the public interest with the  
41 protection of the legitimate patrimonial prerogatives of the rights holders. However, despite these clear  
42 and vital objectives, its implementation has proved highly problematic.  
43

44 However, the primary practical obstacle to the success of the Directive lies in the severe procedural  
45 burdens and liability risks imposed on the beneficiary institutions themselves.  
46

47 The responsibility for the entire procedure, including compliance with the diligent search and necessary  
48 documentation, falls entirely on the beneficiary institution. The organizations referred to in Article 69-  
49 bis, paragraph 1, shall retain documentation relating to their diligent searches for five years, so that it is  
50 available upon request by interested parties, which is essential for the purposes of a compensation request  
51 by any rights holders who may come forward once the work declared orphan is no longer such. The  
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60 <sup>3</sup> The EUIPO, in relation to orphan works, manages the European database by centralizing the information provided by the Member States, guarantees public access to data on works declared orphan and ensures compliance with the procedures set out in Directive 2012/28/EU

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3 institution must operate with the utmost professional diligence and good faith. Any negligence or  
4 omissions may result in sanctions and the revocation of the authorization to use the orphan works.  
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6 Liability and potential damages are affected by:  
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- 9 • The good faith of the institution in following procedures.
- 10 • The extent of the use made of the work.
- 11 • Time elapsed since the declaration of orphan work in the European database

12 It is important to note that:

13

- 14 • The law aims to protect institutions acting in good faith.
- 15 • The 90-day period placed in the EUIPO database serves as an additional safeguard for rights holders.
- 16 • The institution's liability should be proportionately reduced if all procedures have been followed  
17 correctly.

18 The Directive's aim was therefore to facilitate the mass digitization and cross-border online fruition of  
19 this huge cultural capital, freeing up its potential for knowledge, research, and collective enrichment for  
20 the benefit of all European citizens. At the same time, it aimed to balance the public interest with the  
21 protection of the legitimate patrimonial prerogatives of the rights holders. However, despite these clear  
22 and vital objectives, its implementation has proved highly problematic.  
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### 24 25 26 3.1. **Diligent research**

27 Diligent research is the essential prerequisite for declaring an orphan work. It is a complex procedural  
28 process that beneficiary institutions must follow scrupulously, otherwise the entire procedure will be  
29 invalid. "Diligent research" means research carried out with rigour, consulting all relevant sources and  
30 documenting each step in detail. An approximate or superficial search is not considered "diligent" for the  
31 purposes of the legislation.

32 The first step that a cultural institution must take to start the diligent search procedure is to check with  
33 the national database and obviously also with the European database EUIPO, whether the work has not  
34 already been registered as orphan or "orphan proposal". The national database should have been  
35 established and managed by the Ministry of Culture, in compliance with Legislative Decree 163/2014  
36 implementing the European Directive<sup>4</sup>. Unfortunately, in reality, this database is simply non-existent or  
37 inaccessible to date. Where the database were operational, it should serve as a national repertoire of all  
38 identified orphan works, divided into two sections:

39

- 40 • "Proposed orphan" works: from the moment of the beginning of the diligent search or in the  
41 case of a work that at the end of the diligent search is not found to be orphan due to lack of  
42 requirements
- 43 • Works "declared orphan", at the end of diligent research, to be transmitted to the European  
44 database

45 Following the check in the databases (national and European), the diligent search is started by consulting  
46 the mandatory sources provided for that specific type of work (books, audiovisuals, photographs, etc.).  
47 Furthermore, the search for the rights holders must be carried out in the European Union Member State  
48 of first publication or, in the event of non-publication, of first diffusion of the issue.  
49

50 The diligent search begins with a formal communication to the relevant Competent National Authority  
51 (National Authorization Center), which in Italy is the Ministry of Culture, which must be informed of  
52 the start date of the search and receive the metadata of the work. The work is registered in the national  
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55 <sup>4</sup> EU Directives require transposition into national laws by member states within a given timeframe.  
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3 database as an "*orphan work proposal*". According to the ministerial guidelines, at the end of the diligent  
4 search procedure, the beneficiary institution must send the Ministry of Culture a set of structured  
5 metadata for each work that it intends to register as an "orphan proposal", such as:  
6

- 7 • Type of work (book, magazine, audiovisual, etc.)
- 8 • Title of the work
- 9 • Author(s) (if known)
- 10 • Publisher/Producer (if known)
- 11 • Year of publication/production
- 12 • Identification codes (ISBN, ISSN, ISAN, etc. if available)
- 13 • Description of the work (synopsis, duration, etc.)
- 14 • Sources consulted for diligent research
- 15 • Diligent search completion date

16 Additionally, details of the beneficiary organization that conducted the research must be provided, such  
17 as:  
18

- 19 • Name of the institution
- 20 • Address
- 21 • Contact person with contact details

22  
23 The structure and nomenclature of the required metadata aims to ensure a standard of interoperability at  
24 national and European level, facilitating the exchange of information. Any inaccuracies or omissions in  
25 the provision of these metadata could result in the rejection of the work's registration by the competent  
26 authorities. Hence the importance of scrupulously following the specifications indicated in the ministerial  
27 guidelines for the correct compilation of the metadata, representing the "business card" for each orphan  
28 work registered.

29 If, after a thorough and diligent search by the cultural institution, it is not possible to identify the rights  
30 holder, the work is declared orphan (Table 1) and the enters the metadata of the work in the database of  
31 "declared orphan works". At this point, the Ministry of Culture as Competent National Authority for  
32 Italy deposits the metadata of the orphan works in the European database EUIPO (European Union  
33 Intellectual Property Office) (EUIPO, 2025a), declaring the work officially orphan at European level.  
34 From that moment, and after 90 days from registration in the EUIPO database (period during which any  
35 rights holders can emerge and come forward), the work is considered ready for digitization.

36 However, if someone were to come forward at any time, the rights holder could seek compensation for  
37 the use of the work, thus raising the issue of liability, which remains one of the main obstacles to the  
38 large-scale digitization of orphan works. The law also regulates the sanctions, should the rights holders  
39 re-emerge to claim ownership of the work, as well as the methods of fair remuneration for their use as  
40 an orphan work (Table 2).

41 It should also be noted that, at the Italian national level, although two separate databases are planned for  
42 "proposals for orphan works" and for "declared orphan works", these databases have not been created  
43 or are not accessible online. This effectively prevents any digitization of orphan works, as Italy has not  
44 deposited any metadata of the works in the European database EUIPO. Furthermore, there are web  
45 pages on the Ministry of Culture website created in 2012 (Ministry of Culture, 2025a), which are now  
46 fossils and refer to empty and no longer active links, making access to information and the effective  
47 management of orphan works at a national level even more difficult.

48 The flowchart (Flowchart 1) shows the various stages of the search. The first is to verify whether the work  
49 that is considered an orphan is protected or in the public domain. If it is in the public domain, it is not  
50 an orphan work. The scheme on the terms of copyright for the different types of works is useful for this  
51 purpose.

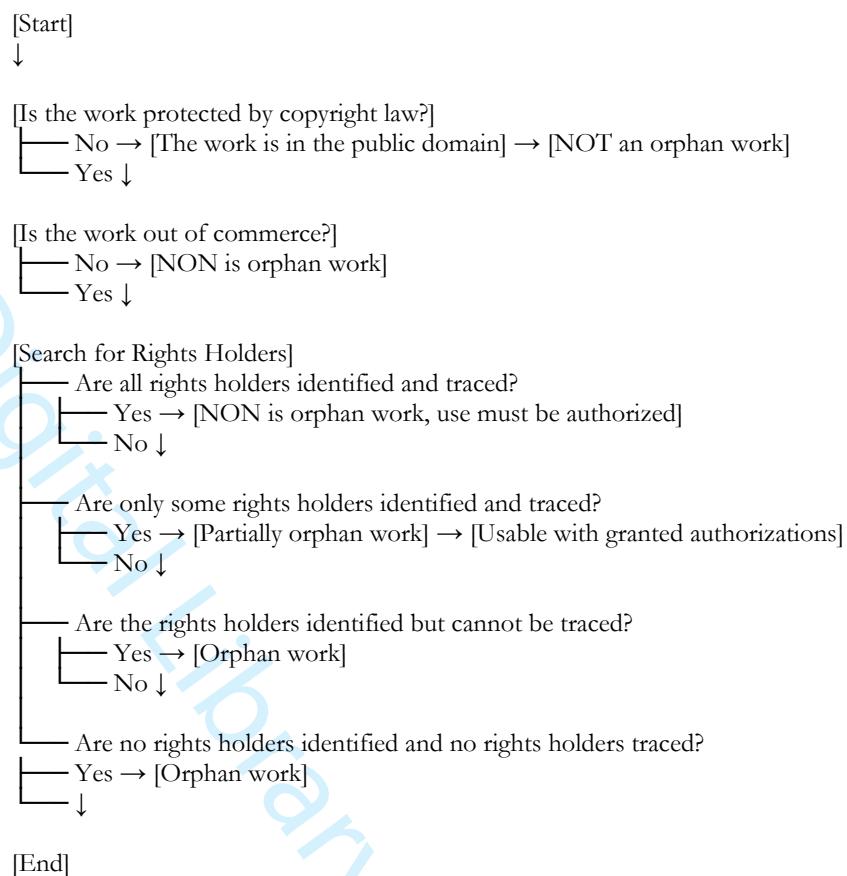
52  
53 *LdA – Italian Law on Author's Rights*

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60 *Table 1 – Terms of Copyright (Author's Rights) - Italian Law*

Article	Type of Work	Term of Protection
Art. 26(1) LdA	Joint works	70 years after the death of the last surviving co-author
Art. 26(2) LdA	Dramatic-musical, choreographic, and pantomime works	70 years after the death of the last surviving co-author
Art. 26(2), Art. 7 LdA	Collective works	70 years from the death of each contributor. However, the term of economic rights of the whole work is 70 years from its first publication, regardless of the form of publication.
Art. 27 LdA	Anonymous or pseudonymous works	70 years from the first lawful publication. If the identity of the author is revealed, 70 years from the author's death.
Art. 29 LdA	Works by State administrations, provinces, municipalities, academies, and public cultural entities not pursuing profit	20 years from first publication. For communications and records published by academies or other public cultural entities, the term is reduced to 2 years.
Art. 30 LdA	Periodical collective works	The term is calculated from the end of the year of publication of each single issue or volume.
Art. 31(1) LdA	Works published for the first time after the author's death	70 years from the author's death
Art. 32 LdA	Cinematographic works	70 years after the death of the last surviving co-author
Art. 32-bis LdA	Photographic works	70 years from the author's death

Table 2 – Terms of Related Rights (Neighbouring Rights) – Italian Law

Article	Right Holder	Term of Protection
Art. 75 LdA	Phonogram producers	50 years from the fixation of the sound recording. If lawfully published or communicated to the public within that period, 70 years from that date.
Art. 78-ter LdA	Producers of cinematographic or audiovisual works or moving image sequences	50 years from the date of fixation. If lawfully published or communicated within that period, 50 years from that date.
Art. 79 LdA	Radio and television broadcasters	50 years from the first transmission of a broadcast
Art. 85-bis LdA	Performing artists	50 years from the performance or recital. But: a) if a fixation is lawfully published or communicated to the public, 50 years from that date; b) if the fixation is in a medium other than a phonogram and is lawfully published or communicated, 70 years from that date.
Art. 85-ter LdA	Works published for the first time after the expiration of copyright	25 years from the first lawful publication or communication
Art. 87-bis LdA	Critical or scientific editions of public domain works	20 years from the first lawful publication, in any form or by any means



Flowchart 1. Flowchart for Determining the Status of an Orphan Work  
Flowchart created with AI technology - GPT

### 3.2. Sources that must be consulted

This is perhaps the most critical and costly aspect of the entire procedure. In fact, Italian law lists a very high number of sources that must be consulted for each type of work, under penalty of invalidating the diligent search. For Italy, the sources indicated by the law are forty-four! The ministerial guidelines report the list of these sources, which include dozens of databases, registers, lists of different trade associations for books, audiovisuals, photographs, phonograms, etc. This is such a large and diversified number of sources that diligent research becomes a real obstacle course for beneficiary institutions, in terms of costs, time and human resources to be dedicated. Often, sources are not free, difficult to find or not updated (EUIPO, 2018)<sup>5</sup>.

This plethora of constraints has ended up representing the main cause of ineffectiveness of the entire legislation, making the procedure prohibitive for the majority of cultural institutions. One of the major criticisms leveled at the discipline on orphan works concerns the excessive cost of the diligent search required. Any simplifications or rationalizations of this aspect could prove decisive for an effective application of the legislation, which has so far remained largely ignored precisely because of this preliminary impasse.

The detailed list of sources is contained in article 69-septies of Law 633/1941 on copyright, as amended by Legislative Decree 163/2014 implementing the European Directive. Let's see it in detail:

<sup>5</sup> In the *Guidelines for diligent research in Italy of the Directorate-General for Libraries and Cultural Institutes - Orphan Works*, there are the Sources from pages 7 to 18. The guidelines can only be retrieved from the document deposited in EUIPO *Information on diligent searches for orphan works in EU Member States and EEA countries*

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2  
3 a) For all categories of works, the *General Public Register of Protected Works at the Italian Ministry of Culture*  
4 *must be consulted first* (Ministry of Culture, 2025b). The General Public Register of Protected Works (RPG)  
5 is not a reliable or comprehensive source for the identification of orphan works, mainly due to its  
6 peculiarities. Since the registration of works in the RPG is not mandatory, many authors and rights  
7 holders choose not to register their works, thus creating an incomplete register. This non-mandatory  
8 nature limits the ability of the register to fully reflect the panorama of works protected by copyright in  
9 Italy, reducing its reliability in identifying orphan works. Furthermore, not all registered works are  
10 necessarily orphans, since the absence of an identified owner or the difficulty in locating him is not always  
11 indicated in the register. A particularity to be highlighted is the difference between *Legal Deposit* and  
12 deposit in the *General Public Register of protected works*. Legal deposit is regulated by Law 15 April 2004, n.  
13 106 "Rules relating to the legal deposit of documents of cultural interest intended for public use" and by  
14 Presidential Decree 3 May 2006, n. 352. Legal deposit is aimed at establishing the national and regional  
15 archive of editorial production, represented by the types of documents referred to in Article 4, Law 15  
16 April 2004, n. 106, and at the creation of national bibliographic services for information and access to  
17 documents subject to legal deposit.  
18  
19

20 b) For published books, the mandatory sources are:

- 21 • National Library System and Author Authority Registers
- 22 • Publishers, authors, literary agents associations
- 23 • Legal deposit
- 24 • ISBN database and publisher database
- 25 • WATCH database
- 26 • Cleared databases
- 27 • Databases of books on sale ALICE and ESAIE
- 28 • Register of Professors and Scientific Publications

29 c) For newspapers, magazines and periodicals:

- 30 • ISSN for periodicals
- 31 • Indexes and catalogues of historical library collections
- 32 • Legal deposit
- 33 • Publishers, Authors and Journalists Associations
- 34 • Collective rights management society databases

35 d) For visual works, photographs, illustrations, etc .:

- 36 • All previous sources
- 37 • Databases of visual rights management companies
- 38 • Photographic agency databases

39 e) For audiovisual and phonograms:

- 40 • Legal deposit
- 41 • Producers' Associations
- 42 • Film/sound heritage institute databases
- 43 • Standards such as ISAN, ISWC, ISRC
- 44 • Databases of rights management companies
- 45 • Credits and data on packaging/media
- 46 • Databases of other trade associations

47 As can be seen, this is a complex mass of heterogeneous sources to be consulted for each individual  
48 work, many of which are paid or difficult to find for cultural institutions. The ministerial guidelines try  
49 to provide some addresses and references to access these sources, but the complexity of the research  
50 remains very high and costly in terms of economic resources and specialized personnel to be dedicated.  
51 So much so that in practice, as complained by many, this preliminary phase of diligent research has turned  
52 out to be a real obstacle that has blocked the application of the entire regulation by the majority of  
53 beneficiary institutions at birth. Over the years, several proposals for simplification and rationalization  
54 have been put forward, but have remained unheard, such as greater use of unified databases, facilitated  
55 and free access to sources, a reduction in the number of mandatory sources.  
56  
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### 58 3.3. Competent National Authority (CNA)

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3 Each Member State of the European Union is required to designate a Competent National Authority  
4 (CNA) (EUIPO, 2025d) with a supervisory and coordination role on the issue of orphan works. In Italy,  
5 this role is carried out by the Directorate-General for Libraries and Copyright of the Ministry of Culture  
6 (formerly the Ministry for Cultural Heritage and Activities).  
7

8 The main functions of the Competent National Authority are:

- 9 • Collect and transmit to the EUIPO the data and information relating to orphan works identified  
10 by the beneficiary institutions present on the national territory, after having verified the  
11 correctness of the procedures followed.
- 12 • Carry out control and monitoring activities on the effective application of the legislation by the  
13 authorised bodies.
- 14 • Provide guidance, guidelines and assistance to beneficiary institutions on how to conduct diligent  
15 research and register orphan works.
- 16 • Promote training and awareness-raising activities on the topic aimed at cultural operators.
- 17 • Represent the interface and liaison point at national level with the EUIPO and other European  
18 Competent Authorities for the mutual exchange of information and best practices.

19 The Competent National Authority (CNA) therefore plays a fundamental institutional coordination role  
20 in ensuring uniform and effective application of the discipline on orphan works throughout the national  
21 territory, harmonising it with the guidelines and operational tools shared at European level.

22 In other words, CNAs play a crucial role in the process of managing orphan works within the European  
23 Union (EU) and the European Economic Area (EEA) as their main function is to act as an intermediary  
24 between the institutions holding orphan works and the European database managed by the EUIPO  
25 (European Union Intellectual Property Office):

- 26 • Information transmission role :
  - 27 – The competent national authorities are responsible for collecting information on orphan  
28 works from the institutions holding them and transmitting it to the EUIPO database.
  - 29 – This process ensures that the information is accurate, complete and compliant with the  
30 requirements of the European directive.
- 31 • Ensure the correct application of the Directive :
  - 32 – The competent national authorities play a control and supervisory role to ensure that  
33 institutions comply with the procedures established by the European Orphan Works  
34 Directive.
  - 35 – This includes verifying that institutions have conducted a “diligent search” to identify rights  
36 holders.

#### 43 4. Role of the Ministry of Culture for Italy: between fossil sites and non-existent 44 national databases

45 As mentioned above, in Italy the Competent National Authority for orphan works is represented by the  
46 General Directorate of Libraries and Copyright of the Ministry of Culture.

47 As CNA, the Ministry of Culture should represent the point of connection and interface with the EUIPO  
48 for everything concerning orphan works at national level. A crucial hub role to ensure uniform and  
49 effective application of the legislation. In theory, the Ministry of Culture should have performed a series  
50 of key functions such as:

- 51 • Provide detailed operational guidelines to beneficiary institutions
- 52 • Establish and manage the national database of orphan works
- 53 • Collect and transmit to the EUIPO the data of the registered works by depositing their metadata
- 54 • Promote training and awareness-raising activities

55 In practice, the implementation of these tasks has revealed numerous critical issues starting from the  
56 ministerial guidelines themselves, which have proven to be incomplete and difficult to apply for cultural  
57 institutions. But the most serious problem concerns the Italian national database on orphan works, which  
58 should have been an essential reference. Despite being mandated by law, this database has not been  
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3 established to date, thus resulting in a critical obstacle to the national diligent search process. The links  
4 in the ministerial guidelines refer to websites that are no longer active or incomplete pages. A situation  
5 that can only be defined as a true "fossil site" of digital bureaucracy. Without a fundamental operational  
6 tool such as this, it becomes de facto impossible for beneficiary institutions to start the required  
7 procedures of diligent research and preliminary census of orphan works in their collections.  
8

9  
10 At the end of the diligent search by the cultural institution, the Competent National Authority (for Italy  
11 the Ministry of Culture) has the obligation to deposit in the EUIPO database the complete metadata of  
12 all the works definitively "declared orphan". The CNA, being in communication with EUIPO, receives  
13 notifications of any claims of orphan works by rights holders and, if necessary, communicates them to  
14 the beneficiary institutions involved. However, a lack of coordination and investment has ended up  
15 nullifying the regulatory efforts, leaving the regulation on orphan works unapplied in Italy, but not only  
16 in our country, with an enormous waste of the potential for valorization of this segment of the national  
17 cultural heritage. The two-way information flow between the national Competent National Authority and  
18 EUIPO is fundamental for the mutual exchange of data and information, avoiding duplication of efforts  
19 and ensuring a homogeneous and continuously updated census. Precisely to facilitate this exchange, the  
20 legislation requires that beneficiary institutions provide metadata structured according to defined  
21 standards, including information such as title, author(s) where known, year of publication, identification  
22 codes, description of the work, etc. In the Italian reality, unfortunately, this flow has already stalled at the  
23 source due to the inoperability to establish an operational national database by the MIC. As we will see  
24 later, of the 27 EU countries only 16 have actually registered works declared as orphan by the beneficiary  
25 institutions of the various Member States and in a number for the majority of the 16 participants, very  
26 small.  
27

## 28 29 30 31 5. EUIPO: portal and database 32

33 The European Union Intellectual Property Office (EUIPO) is the main agency of the European Union  
34 dealing exclusively with intellectual property matters, such as the management of EU trademarks and  
35 designs. Since 2012, the EUIPO has also been entrusted with the European Observatory (EUIPO 2025c)  
36 on Infringements of Intellectual Property Rights. The Observatory, although without direct enforcement  
37 powers, plays a crucial role in monitoring infringements, raising awareness of intellectual property and  
38 addressing issues related to the use of intellectual property in the digital world, including copyright issues.  
39 To achieve these objectives, the Observatory brings together various actors, both from the public and  
40 private sectors, to create a dialogue and jointly address emerging issues.  
41

42 The EUIPO provides a specific web portal to access the database, with a reserved area for beneficiary  
43 institutions authorized to perform the operations of entering and updating records of orphan works. Also  
44 available are:

- 45 • A public search area to allow owners to track down works
- 46 • Reporting tools and dataset downloads for statistical analysis
- 47 • Guidelines, FAQs and training resources for using the database
- 48 • Forms for claims of ownership by right holders

49 A key aspect of the EUIPO's activity is the filing of information on orphan works in its database (EUIPO  
50 2025e). This process makes it possible to make public and searchable at European level the fact that a  
51 work has been declared orphan in a Member State, following the necessary procedures established by  
52 each of the 27 EU countries. The registration of this information has several advantages: first of all, it  
53 avoids duplication of research efforts, preventing the same work from being subjected to investigations  
54 again in other countries; secondly, it allows the mutual recognition of the status of orphan work between  
55 Member States, promoting a harmonization of practices and facilitating the monitoring of works declared  
56 orphan by potential rights holders. The latter, in fact, as previously mentioned, can claim ownership of  
57 the work. The 90-day period that elapses from the moment the Competent National Authority (CNA)  
58 deposits the record of a work in the EUIPO database is a time window that has the function of making  
59

60

1  
2  
3 the record of the work public and accessible, so that any rights holders can view it and claim ownership,  
4 should they become known.  
5

6 The database therefore formally authorizes beneficiary institutions to proceed with the reproduction,  
7 digitization and making available of orphan works.  
8

9 Furthermore, the database allows beneficiary institutions and competent national authorities to access  
10 reports and statistical data, thus providing a clearer overview of orphan works and copyright management  
11 practices in the European Union.  
12

13 The main purpose of filing the record in the EUIPO database (EUIPO 2025e)<sup>6</sup> is to make public and  
14 searchable at European level the information that that specific work has been declared orphan in a  
15 Member State, after completing all the required procedures. This step is essential for several reasons:  
16

- 17 • Avoid duplication of effort by preventing the same work from being subjected to diligent research  
18 again in other countries
- 19 • Allow for mutual recognition of orphan status between Member States, with a view to  
20 harmonisation
- 21 • Allow potential rights holders to monitor works listed as orphan and possibly claim ownership  
22 of them
- 23 • Collect data and statistics on orphan works for reporting purposes

24 The EUIPO database is structured to accommodate the identification metadata of orphan works  
25 transmitted by the Competent National Authorities at the end of the diligent search process. The main  
26 metadata requested are:  
27

- 28 • Title of the work
- 29 • Type (book, film, recording, etc.)
- 30 • Author(s) name (if known)
- 31 • Year of publication
- 32 • Identification codes (ISBN, ISSN etc.)
- 33 • Description of the work
- 34 • Source of origin (library, archive, etc.)
- 35 • Status (orphan proposal/declared orphan)

36 The database also distinguishes between "main" works and "embodied works" (e.g. photographs or  
37 illustrations contained in a book or magazine).  
38

39 Criticisms have also been leveled at the actual usability and accessibility of the EUIPO database, starting  
40 from an interface deemed cumbersome and not very user-friendly by operators. Furthermore, in many  
41 countries, a lack of coordination, training and support has been found by the competent national  
42 authorities in charge of supervising the application of the Directive.  
43

44 These multiple obstacles and difficulties have ended up largely nullifying the potential of the Directive,  
45 requiring a complete rethinking of the discipline to make it effectively implementable and effective.  
46

47 It is important to note that the EUIPO database does not contain the digitized works, but only  
48 information about them. The digitization and actual preservation of the works take place at the  
49 institutions that have conducted the diligent research, such as libraries, archives and museums. Many  
50 have complained about the lack of a direct link between the metadata of the works listed and any digital  
51 copies produced, making it impossible to access and use the digitized orphan works. Not only that, but  
52 it is also impossible to identify how many orphan works have been digitized in European digitization  
53 projects collected within Europeana, despite the important *Rights tool Statements* that promote open and  
54 legal access to Europe's cultural heritage, while ensuring respect for intellectual property rights.  
55

## 56 6. The Rights Statement to describe the legal status of a work 57 58

59  
60 <sup>6</sup> As provided for by art. 3 of Directive 2012/28/EU

1  
2  
3 The *Rights Statements* (RightsStatements.org 2016) are standardized declarations that describe the legal  
4 status of a digital work, providing clear information on the conditions under which it can be used. They  
5 are not licenses, but tools that identify the legal status of the work in relation not only to copyright, but  
6 also to other legal regimes, such as copyright in common law systems or specific rights under national  
7 laws, and that provide end-users with high-level, easy-to-understand information on the copyright and  
8 reuse status of digital objects.  
9

10 Only after determining the legal status of a work can any appropriate licenses be applied for its use. The  
11 *Rights Statements* were developed by RightsStatements.org, a collaborative initiative between Europeana, the  
12 Digital Public Library of America (DPLA), Creative Commons and other partners, with the aim of providing  
13 uniform and interoperable terminology for rights management in digital collections internationally. The  
14 Italian translation of the statements (RightsStatements.org, 2016) was carried out by the *Study Group on*  
15 *Open Access and Public Domain (GOAPD)* of the *Italian Library Association (AIB)* (Gruppo di studio Open  
16 Access e Dominio Pubblico dell'AIB (2025)<sup>7</sup>).

17 The 12 rights statements identified were developed specifically for the needs of cultural heritage  
18 institutions and online cultural heritage aggregation platforms and are not intended to be used by  
19 individuals to license their creations, but have been designed with both human and machine users (such  
20 as search engines) in mind.

21 The RightsStatements.org tool offers a standardized system for indicating the legal status of digital works,  
22 through 12 rights statements that fall into three categories:

23  
24  
25 A Statements for works that are protected by copyright.  
26 B Statements for works that are not protected by copyright.  
27 C Statements for works where the copyright status is unclear.

#### 33 A. Works in the Public Domain

34  
35 • Public Domain Mark (PDM) – The work is in the public domain globally.  
36 • No Copyright – United States – The work is in the public domain in the USA.  
37 • No Copyright – Other Known Legal Status – The work is in the public domain in a specific  
38 jurisdiction.  
39

#### 41 B. Copyrighted Works with Restrictions on Use

42  
43 • In Copyright – The work is protected by copyright.  
44 • In Copyright – Rights-holder (s) Unlocatable or Unidentifiable – The work is protected, but the  
45 rights holders are not identifiable (orphan works).  
46 • In Copyright – Educational Use Permitted – The work is protected, but can be used for  
47 educational purposes.  
48 • In Copyright – Non-Commercial Use Permitted – The work is protected, but can only be used  
49 for non-commercial purposes.  
50 • In Copyright – Rights-Holder (s) Unlocatable or Unidentifiable (EU Orphan Work) – Specific to  
51 orphan works in the European Union.  
52

#### 54 C. Rights Undetermined or Subject to Specific Restrictions

55  
56 • No Known Copyright – No evidence that the work is protected by copyright.  
57

58  
59  
60 <sup>7</sup> The Group, coordinated by Antonella De Robbio, was operational until 2024 and later merged into the Information Policies Group (GPOLINFO)

- Copyright Not Evaluated – The copyright status has not been verified.
- Copyright Undetermined – The copyright status is unclear.
- Other Rights – The work is subject to non-copyright restrictions (e.g., privacy, contractually limited access).

Orphan works are a relevant category in the context of the Declaration, as they have a specific designation within the Rights Statement that highlights their particular legal status.

Despite the usefulness of this tool, their use on Europeana presents some critical issues related to the accessibility of works based on their legal status. Europeana uses a slightly different declaration system, it uses 14 standardized rights declarations and precisely

- Six Creative Commons licenses
- Commons tools
- Six of the twelve Declarations of Rights of the *Rights Statements Consortium* including the specific one for orphan works in the European Union *In Copyright – Rights-Holder (s) Unlocatable or Unidentifiable (EU Orphan Work)*

Although each record may contain a field specifying the rights status, the platform does not allow a search or browsing based on these categories. Being made available as linked data, each rights statement is located in a unique URI. Consequently, it is not possible to directly retrieve all works belonging to a specific legal status, for example orphan works, access to which should be facilitated given the existence of an official database managed by the EUIPO. This limitation reduces the effectiveness of the classification in 12 states, making the *Rights Statements* visible only after the retrieval of a single item, instead of constituting a structured criterion for search and exploration, for example through browsing. In the absence of a more advanced integration in search systems, the practical value of these statements for scholars and users is weak.

## 7. Data from the 2021 Orphan Works Study and EUIPO database's increase 2021-2025

A study was published in 2022 (European Commission, 2022)<sup>8</sup>, conducted in 2020 via an online survey involving all relevant stakeholders (beneficiary institutions, national competent authorities and rightholder organisations) in all 27 countries plus 4 extra-EU countries. It collected a total of 87 responses from organisations in 22 EU Member States and 3 European Economic Area Member States, together with responses from the United Kingdom, the United States of America, as well as pan-European and international organisations. In order to clarify some of the data obtained through the survey, 13 interviews were conducted, with the aim of understanding the main legal and administrative difficulties encountered, identifying best practices and possible solutions, as well as improvements. The results of the consultation show that the Directive has not led to significant improvements in the digitisation and dissemination of orphan works since its entry into force.

In January 2021, the EUIPO Orphan Works database recorded 5,480 major works and 1,406 integrated or incorporated works, following the removal of works registered by British institutions after the end of the Brexit transition period.

<sup>8</sup> A Report was published in 2021 *Study on the application of the Orphan Works Directive (2012/28/EU) Final report* [there is also an Italian Maurizio Borghi, professor at the University of Turin]

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2  
3 Crucially, the Directive's scope is strictly defined in Article 1 to cover only works first published or  
4 broadcast in a Member State: (i) works fixed in graphic or pictoric form such as books, journals,  
5 newspapers and magazines, (ii) cinematographic or audiovisual works, and (iii) phonograms.  
6  
7

8 However, the actual implementation has allowed for greater practical inclusion. The EUIPO database,  
9 used by Member States to comply with the Directive, currently hosts registrations in categories that  
10 exceed this narrow scope. Our data analysis (Figure 2 and Figure 3) demonstrates the presence of  
11 over one thousand works categorized as 'Other,' including standalone correspondence, manuscripts,  
12 musical scores, and certain types of fine art, highlighting an inconsistency between the Directive's  
13 narrow legal definition and its operational reality.  
14  
15

16 These works represented a small portion of the total of 18,649 orphan works in the database in June  
17 2020, of which 60% were from the British Library. The database contained works registered by 72  
18 institutions from 17 EU/EEA countries, with the majority of registrations concentrated in a few  
19 countries such as Poland, Germany, Hungary and the Netherlands, which contributed over 90% of the  
20 works. Literary works dominated the registration, making up 60% of the total, followed by photographs  
21 (20%), illustrations (10%) and audiovisual works (4%). Audiovisual works were mainly registered by the  
22 Netherlands, in particular by the Eye Film Institute, and phonograms were dominated by Hungary. More  
23 than half of the registered works were completely orphaned (98%), while only 1.5% were partially  
24 orphaned.  
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26 As of March 2025, the EUIPO Orphan Works database has seen a modest increase in registrations  
27 (Figure 2), reaching a total of 6,997 major works and 1,657 integrated or incorporated works<sup>9</sup>. On a rough  
28 average, this equates to around 380 new registrations per year at European level. This is frankly a paltry  
29 figure, corresponding to an average of only 22 registrations per year for each individual Member State.  
30 Literary works remain predominant, with 4,345 major works registered (1,067 integrated or incorporated),  
31 but registrations of other types of works such as photographs, illustrations and audiovisual works remain  
32 limited. Photographs amount to 455 major registrations (54 incorporated), illustrations to 120 major  
33 registrations (15 incorporated), and audiovisual works are still represented by only 1,007 major  
34 registrations with no integrated or incorporated works. Cinematographic works, fine art, and maps remain  
35 marginal categories, with few registrations. Geographically, the database remains concentrated in a few  
36 countries, with Hungary and the Netherlands still among the main contributors. Seventy percent of the  
37 works have been registered by single key institutions, and the difficulty in locating rights holders persists,  
38 with over 70% of the works having no known rights holder. However, there is a certain inhomogeneity  
39 in the database where the works have been labelled with inappropriate typologies  
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60 <sup>9</sup> Data derived from the Author's original search conducted on the EUIPO Orphan Works Database on March 1, 2025. The analysis includes a count of all registered works (major and integrated) as of that date, categorized and cross-referenced by type and registering country.

## Orphan Works Registrations in the EUIPO Database by Category – March 2025

- **6,997 Major Work Registrations (1,657 integrated or incorporated works)**
  - **Literary Works:** 4,345 major work registrations (1,067 integrated or incorporated works)
  - **Audiovisual Works:** 1,007 major work registrations (0 integrated or incorporated works)
  - **Photographs:** 455 major work registrations (54 integrated or incorporated works)
  - **Phonograms:** 342 major work registrations (0 integrated or incorporated works)
  - **Posters:** 0
- **Illustrations:** 120 major work registrations (15 integrated or incorporated works)
- **Cinematographic Works:** 237 major work registrations (0 integrated or incorporated works)
- **Fine Art:** 4 major work registrations (0 integrated or incorporated works – Austrian postcards)
- **Maps:** 70 major work registrations (52 integrated or incorporated works)
- **Other:** 1,052 major work registrations (Correspondence and letters, musical scores, songs, pamphlets, photoromances, postcards, business plans, guides and manuals, photographs, illustrations, maps): (9 integrated or incorporated works)

Figure 2. Statistical breakdown of Orphan Works by category (EUIPO Database, March 2025). Note: The color-coding in the figure is used exclusively for the visual differentiation of work categories. Data sourced from original authors' search on the EUIPO portal. This figure quantifies the total volume and breakdown of orphan works registered in the EUIPO database as of March 2025 (Source: Authors' elaboration based on EUIPO Orphan Works Database data, 2025).

A rather disappointing picture emerges on the trend of registrations of orphan works in the EUIPO database in recent years. The data highlights an extremely slow and limited progress in the application of the Directive at European level. Overall, the data as of March 2025 confirm the absence of tangible results against the Directive's primary objective, which envisioned a comprehensive strategy to digitize and disseminate the hidden cultural heritage of orphan works.

The growth in registrations confirms this structural implementation barriers: between January 2021 and March 2025, the database saw an increase of only **1,517 major works**, averaging just **380 new registrations annually** at the European level. Figure 3, corresponding to a negligible average of **22 annual registrations per participating country**, strongly suggests that large-scale digital dissemination has not been realized.

## Registrations in the Database Over Four Years

### January 2021

#### 5,480 Major Works

– 1,406 integrated or incorporated works

### March 2025

#### 6,997 Major Works

– 1,657 integrated or incorporated works

**Difference: 1,517**

**An average of 380 annual registrations**

**17 participating Countries out of 27**

**22 annual registrations per Country**

Figure 3: Comparison of Orphan Works Registrations (January 2021 vs. March 2025): This comparative figure highlights the minimal growth of registered major works over a four-year period, confirming

(Source: Authors' elaboration based on EUIPO Orphan Works Database data, 2025).

## 8. Towards effective implementation: a proposal for systemic reform

The main challenges concern several aspects of the Orphan Works (OWD) management system and the EUIPO database, which are significant obstacles to the effective use of these resources.

From a regulatory perspective, there is also uncertainty surrounding the concept of "fair compensation", which may entail financial risks in the event that a rights holder reappears after the use of an orphan work. Furthermore, limited national guidance in the practical transposition of the Directive has led to less than personalized interpretations (Table 3), of the legal principles, with some countries not providing additional guidance to facilitate implementation.

One of the most serious challenges is the under-use of the database, which, despite the increase in registrations, remains difficult to navigate due to a cumbersome and unuser-friendly interface (Table 4). The difficulty in identifying works is accentuated by the lack of images or direct links to the registered works, which makes it difficult to recognize many of them, many of which do not have clear titles. This lack of visual information and the limited organization of the database limit the effectiveness of the system. Furthermore, the diligent search procedure is judged ineffective by many beneficiaries, as the mandatory list of sources to be consulted is too long, often out of date or unreachable. The cost and complexity of diligent searching, which requires financial resources and specialized legal expertise, is another obstacle, especially for organizations with limited budgets.

Last but not least, the overlap between the concept of orphan works and out-of-commerce works could create confusion in the application of the DSM Directive. While the DSM Directive potentially offers solutions for the digitization of orphan works, its actual impact will depend on the transposition of the Directive at the national level and the creation of common guidelines that can harmonize the two systems, avoiding conflicts and overlaps in the management of orphan and out-of-commerce works.

One of the most pressing issues concerns the preliminary diligent research procedure that organizations must conduct to register a work as orphan. There are many critical issues:

- National lists of sources to consult are too long and excessive, with dozens of databases and bodies to check for each work
- Many sources are obsolete, paid or difficult to access
- Non-uniform procedures and unclear guidelines across Member States
- Need for specialized personnel with legal and research skills
- Long and expensive bureaucratic process in terms of time and economic resources

This procedural complexity has been a real deterrent, pushing many institutions to immediately give up on starting the procedures.

Another strong deterrent is the financial risk that institutions face in the event of any compensation requests from rights holders that may resurface later. The legislation does not clearly define the criteria for determining the amount of this "fair compensation", leaving too much uncertainty about potential future disbursements for beneficiary institutions.

Table 3: Overview of national implementation regarding the use of the OWD

Rank	Country	Status	Major Work Registrations
1	United Kingdom	Extra-EU	11,443
2	Poland	EU	3,254
3	Germany	EU	1,610
4	Hungary	EU	855
5	Netherlands	EU	781
6	Belgium	EU	297
7	Lithuania	EU	236
8	Denmark	EU	68
9	Portugal	EU	32
10	Estonia	EU	26
11	Sweden	EU	16
12	Ireland	EU	13
13	Austria	EU	8
14	Latvia	EU	4
15	Slovakia	EU	4
16	France	EU	1
17	Croatia	EU	1
-	Other 14 Countries*	EU	0
<b>Total</b>	<b>31 Countries</b>	<b>27 EU / 4 Extra-EU</b>	<b>18,650 (Approx.)</b>

**Source:** Authors' elaboration based on EUIPO Orphan Works Database (March 2025).

(\* **Other 14 Countries with 0 registrations include:** Bulgaria, Cyprus, Czech Republic, Finland, Greece, Italy, Luxembourg, Malta, Romania, Slovenia, Spain, and the Extra-EU states Iceland, Liechtenstein, Norway. **Note:** The United Kingdom, although no longer a member of the EU since 2020, is included for comparative purposes regarding historical implementation and fair remuneration models.

Table 4: Detailed overview of national implementation and registrations (EUIPO OWD)

(Source: Authors' elaboration based on EUIPO data (March 2025).)

**Key:** Yes/No indicates the presence or absence of specific national provisions; N/A indicates data not applicable or not available for that jurisdiction.

(\*) Asterisks indicate countries that provide detailed rules on calculating fair remuneration rather than just basic rules on compensation.

Country	National list of sources	Sources by type of work	Further guidance	Number of sources	Further qualif. of diligent search	Additional requirements other than OWD	Exist. of nat. rules on compensation	Exist. of nat. rules on duration to receive comp.	Works registered in EUIPO database	Active cultural heritage inst.
	28/31	21/22	2/22		10/31	4/31	21/31	8/31		
AT	*	N/A	N/A	N/A	*	*	*	✓	8	2
BE	✓	✓	N/A	53	✓	*	*	✓	297	6
BG	✓	N/A	N/A	N/A	*	*	*	*	0	0
CY	*	N/A	N/A	N/A	*	*	✓	*	0	0
CZ	✓	✓	*	30	*	*	✓	✓	0	0
DE	✓	✓	*	229	*	*	*	*	1,610	15
DK	✓	✓	N/A	N/A	*	*	*	*	68	2
EE	✓	✓	*	72	*	*	✓	✓	26	1
EL	✓	✓	*	58	✓	*	✓	*	0	0
ES	✓	✓	*	42	✓	✓	✓	✓	0	0
FI	✓	✓	*	25	*	*	✓	✓	0	0
FR	✓	✓	*	180	*	*	✓✓*	*	1	1
HR	✓	N/A	N/A	N/A	*	*	✓	✓	1	1
HU	✓	✓	*	33	✓	*	✓✓*	*	855	3
IE	✓	✓	*	39	*	*	✓	✓	13	3
IS	✓	N/A	N/A	N/A	*	*	✓	*	0	0
IT	✓	✓	*	44	✓	*	*	*	0	0
LI	✓	N/A	N/A	N/A	*	*	*	*	0	0

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60	Country	National list of sources	Sources by type of work	Further guidance	Number of sources	Further qualification of diligent search	Additional requirements other than OWD	Exist. of nat. rules on compensation	Exist. of nat. rules on duration to receive comp.	Works registered in EUIPO database	Active cultural heritage inst.
		28/31	21/22	2/22		10/31	4/31	21/31	8/31		
LT	✓	✓	✓	✓	114	✓	*	✓✓*	✓	236	14
LU	✓	✓	*	*	34	*	*	*	*	0	0
LV	✓	✓	*	*	56	*	*	*	*	4	1
MT	✓	N/A	N/A	N/A	N/A	*	*	*	*	0	0
NL	✓	✓	*	*	29	*	*	*	*	781	1
NO	✓	N/A	N/A	N/A	N/A	*	*	*	*	0	0
PL	✓	✓	*	*	55	*	✓	*	*	3,254	4
PT	✓	*	*	*	34	✓	*	*	*	32	1
RO	✓	✓	*	*	85	*	*	*	*	0	0
SE	✓	✓	*	*	39	✓	*	*	*	16	2
SI	✓	✓	*	*	46	✓	*	✓✓*	✓	0	0
SK	✓	✓	*	*	37	*	*	*	*	4	0
UK	✓	✓	✓	✓	N/A	✓	*	✓	✓	11,443	14

The legislative history of Directive 2012/28/EU on orphan works appears, after thirteen years, as an emblematic case of misalignment between legislative intentions and actual impact. Designed to fill a legal void that hindered the digitization and dissemination of works protected by copyright but without identifiable owners, the Directive immediately encountered a series of structural obstacles: the extreme complexity of the diligent search procedure, the heterogeneity in implementation by Member States, the lack of effective supranational coordination, the poor usability of the EUIPO database and, above all, the bureaucratic burden that discouraged most cultural institutions. The Italian case is paradigmatic: in the face of a formally implemented legislative provision, the serious infrastructural gaps - from the delay to establish a national database to the inoperability of the competent authority - have effectively neutralized any possibility of concrete application, generating an effect of a significant application deficit.

In the meantime, the issue of orphan works has become even more urgent, in a context in which the digital transition of cultural collections represents a strategic priority at European level. The potential synergies with the discipline of out-of-commerce works introduced by Directive 2019/790/EU remain on paper, while orphan works continue to lie inaccessible, excluded from large digitization projects such as Europeana, even where formally registered. The recent reflections that have emerged at European

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3 level, combined with the discouraging data on the actual use of the directive, require a radical rethinking  
4 of the exception on orphan works, in the direction of greater procedural simplification, an expansion of  
5 the margins of discretion for beneficiary institutions and a more effective integration with interoperable  
6 tools such as Rights Statements and open licenses. Only by overcoming the current impasse will it be  
7 possible to restore visibility and accessibility to a fundamental segment of European cultural heritage,  
8 today relegated to the margins of collective memory and public enjoyment.  
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11 While this study focuses on the European context, the issue of orphan works and the need to unlock  
12 inaccessible cultural heritage is a global challenge. Many countries outside the EU also grapple with similar  
13 legal and practical obstacles in mass digitization efforts. By learning from the shortcomings of the EU  
14 Orphan Works Directive and its implementation difficulties, policymakers worldwide can work towards  
15 more effective regulatory frameworks that balance copyright protection with the preservation and  
16 dissemination of our shared cultural legacy in the digital age. A coordinated international approach,  
17 coupled with simplified procedures and interoperable standards, could pave the way for unlocking  
18 millions of orphan works that currently remain trapped in legal limbo.  
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