

**SUBSIDIARY LEGISLATION 415.05****CERTAIN PERMITTED USES  
OF ORPHAN WORKS REGULATIONS**

7th November, 2014

*LEGAL NOTICE 394 of 2014.*

- 1.** The title of these regulations is Certain Permitted Uses of Orphan Works Regulations. Citation.
- 2.** These regulations transpose Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works. Purpose.
- 3.** In these regulations, unless the context otherwise requires - Interpretation.  
"the Act" means the Copyright Act; Cap. 415.  
"Member State" means Member State of the European Union;  
"rightholder" is a person who, according to the Act, owns the rights in relation to works and phonograms referred to in regulation 4, in respect of which works, use is permitted in accordance with regulation 9; and the term "rightholders" shall be construed accordingly;  
"orphan works" means orphan works in terms of regulation 5(1).  
All other words, terms and expressions used shall have the same meaning as is given to them in the Act.
- 4.** (1) These regulations concern certain uses made of orphan works by publicly accessible libraries, educational establishments and museums, as well as by archives, film or audio heritage institutions and public-service broadcasting organisations, established in Malta, in order to achieve aims related to their public-interest missions. Subject matter and scope.
- (2) These regulations apply to -
- (a) works published in the form of books, journals, newspapers, magazines or other writings contained in the collections of publicly accessible libraries, educational establishments or museums as well as in the collections of archives or of film or audio heritage institutions;
  - (b) cinematographic or audiovisual works and phonograms contained in the collections of publicly accessible libraries, educational establishments or museums as well as in the collections of archives or of film or audio heritage institutions; and
  - (c) cinematographic or audiovisual works and phonograms produced by public-service broadcasting organisations up to and including 31 December 2002 and contained in their archives,

which are protected by copyright or neighbouring rights and which are first published in a Member State or, in the absence of publication, first broadcast in a Member State.

(3) These regulations shall also apply to works and phonograms referred to in sub-regulation (2) which have never been published or broadcast but which have been made publicly accessible by the organisations referred to in sub-regulation (1) with the consent of the rightholders, provided that it is reasonable to assume that the rightholders would not oppose the uses referred to in regulation 9:

Provided that this sub-regulation only applies to works and phonograms which have been deposited with those organisations before 29 October 2014.

(4) These regulations shall also apply to works and other protected subject-matter that are embedded or incorporated in, or constitute an integral part of, the works or phonograms referred to in sub-regulations (2) and (3).

(5) These regulations do not interfere with any arrangements concerning the management of rights in Malta.

Orphan works.

**5.** (1) A work or a phonogram referred to in regulation 4(2) shall be considered an orphan work if none of the rightholders in that work or phonogram is identified or, even if one or more of them is identified, none is located despite a diligent search for the rightholders having been carried out and recorded in accordance with regulation 6.

(2) Where in a work or a phonogram referred to in regulation 4(2) there is more than one rightholder, and not all of them have been identified or, even if identified, located after a diligent search has been carried out and recorded in accordance with regulation 6, the work or phonogram may be used in accordance with these regulations provided that the rightholders that have been identified and located have, in relation to the rights they hold, authorised the organisations referred to in regulation 4(1) to carry out the acts of reproduction and making available to the public accorded by articles 7(1)(a) and 7(1)(e), as well as articles 13(a), 13(e), 15(a) and 15(d) of the Act.

(3) Sub-regulation (2) shall be without prejudice to the rights in the work or phonogram of rightholders that have been identified and located.

(4) Regulation 8 shall apply *mutatis mutandis* to the rightholders that have not been identified and located in the works referred to in sub-regulation (2).

(5) These regulations shall be without prejudice to any other law on anonymous or pseudonymous works.

Diligent search.

**6.** (1) For the purposes of establishing whether a work or phonogram is an orphan work, the organisations referred to in regulation 4(1) shall ensure that a diligent search is carried out in good faith in respect of each work or other protected subject-matter, by consulting the appropriate sources for the category of

works and other protected subject-matter in question. The diligent search shall be carried out prior to the use of the work or phonogram.

(2) The sources to be referred to in the course of the diligent search referred to in sub-regulation (1), which are appropriate for each category of works or phonogram, shall include at least the relevant sources listed in the Schedule:

Provided that the Minister responsible for intellectual property in Malta may prescribe other appropriate sources following consultation with rightholders and users.

(3) In the case of the works referred to in regulation 4(2)(a) and phonograms referred to in regulations 4(2)(b) and 4(2)(c), a diligent search shall be carried out in the Member State of first publication or, in the absence of publication, first broadcast as appropriate.

(4) In the case of cinematographic or audiovisual works referred to in regulations 4(2)(b) and 4(2)(c), the diligent search must be carried out in the Member State where the producer has his headquarters or habitual residence.

(5) In the cases referred to in regulation 4(3), the diligent search shall be carried out in the Member State where the organisation that made the work or phonogram publicly accessible with the consent of the rightholder is established.

(6) If there is evidence to suggest that relevant information on rightholders is to be found in other countries, sources of information available in those other countries shall also be consulted.

(7) The organisations referred to in regulation 4(1) shall maintain records of their diligent searches and these organisations shall provide the following information to the Department responsible for intellectual property in Malta:

- (a) the results of the diligent searches that the organisations have carried out and which have led to the conclusion that a work or a phonogram is considered an orphan work;
- (b) the use that the organisations make of orphan works in accordance with these regulations;
- (c) any change, pursuant to regulation 8, of the orphan work status of works and phonograms that the organisations use;
- (d) the relevant contact information of the organisation concerned.

(8) Upon receiving the information from the organisations referred to in regulation 4(1), the Department responsible for intellectual property in Malta shall forward the said information to the Office for Harmonization in the Internal Market.

7. (1) A work or phonogram which is considered an orphan work in Malta according to regulation 5 shall be considered an

Mutual recognition  
of orphan work  
status.

orphan work in all Member States and a work or phonogram which is considered an orphan work in another Member State shall be considered an orphan work in Malta.

(2) The work or phonogram referred to in sub-regulation (1) may be used and accessed in accordance with these regulations and in terms of Directive 2012/28/EU may be used and accessed in all Member States. This also applies to works and phonograms referred to in regulation 5(2) in so far as the rights of the non-identified or non-located rightholders are concerned.

End of orphan work status.

**8.** A rightholder in a work or phonogram considered to be an orphan work may, at any time, put an end to the orphan work status, only in so far as his rights are concerned.

Permitted uses of orphan works.

**9.** (1) Notwithstanding the provisions of articles 7(1)(a) and 7(1)(e), as well as articles 13(a), 13(e), 15(a) and 15(d) of the Act, the organisations referred to in regulation 4(1) shall be permitted to use orphan works contained in their collections in the following ways:

- (a) by making the orphan work available to the public, within the meaning of articles 7(1)(e), 13(e) and 15(d) of the Act;
- (b) by acts of reproduction, within the meaning of articles 7(1)(a), 13(b) and 15(a) of the Act, for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration.

(2) The organisations referred to in regulation 4(1) shall use an orphan work in accordance with sub-regulation (1) only in order to achieve aims related to their public-interest missions, in particular the preservation of, the restoration of, and the provision of cultural and educational access to, works and phonograms contained in their collection. The organisations may generate revenues in the course of such uses, for the exclusive purpose of covering their costs of digitising orphan works and making them available to the public.

(3) The organisations referred to in regulation 4(1) shall indicate the name of identified authors and other rightholders in any use of an orphan work.

(4) These regulations are without prejudice to the freedom of contract of such organisations in the pursuit of their public-interest missions, particularly in respect of public-private partnership agreements.

(5) A fair compensation shall be due to rightholders that put an end to the orphan work status of their works or other protected subject-matter, for the use that has been made by the organisations referred to in regulation 4(1) of such works and other protected subject-matter in accordance with sub-regulation (1). The level of compensation shall be agreed upon by the organisation making use of the work or protected subject matter and the re-appearing rightholder after having taken into consideration the following circumstances:

- (a) the non-commercial nature of the use made by the organisation,
- (b) the public-interest mission of the organisation using the work or the protected subject matter to which the re-appearing rightholder is claiming a right;
- (c) the possible harm made to the re-appearing rightholder by the use of the work or the protected subject matter:

Provided that in circumstances where prejudice to the rightholder is minimal, such as in those cases where there has not been economic use of the work or protected subject matter for a reasonable period of time, no compensation shall be due:

Provided further that a fair and reasonable compensation is only due if re-appearing rightholders are able to demonstrate their right to the work, and the extent of their right.

(6) Where the organisation making use of the work or protected subject matter and the re-appearing rightholder cannot reach an agreement as to the level of compensation due by the organisation to the rightholder, then either party can refer the matter to the Copyright Board which shall determine the amount of fair compensation due to the rightholder and order that such amount be paid after taking in consideration the circumstances referred to in sub-regulation (5)(a), (b) and (c).

**10.** These regulations shall be without prejudice to provisions concerning, in particular, patent rights, trade marks, design rights, utility models, the topographies of semi-conductor products, type faces, conditional access, access to cable of broadcasting services, the protection of national treasures, legal deposit requirements, laws on restrictive practices and unfair competition, trade secrets, security, confidentiality, data protection and privacy, access to public documents, the law of contract, and rules on the freedom of the press and freedom of expression in the media.

Continued application of other legal provisions.

**11.** (1) These regulations shall apply in respect of all works and phonograms referred to in regulation 4 which are protected by national legislation in the field of copyright on or after 29 October 2014.

Application in time.

(2) These regulations shall apply without prejudice to any acts concluded and rights acquired before 29 October 2014.

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## SCHEDULE

[Regulation 6(2)]

The sources referred to in Regulation 6(2) include the following:

- (1) for published books:
  - (a) legal deposit, library catalogues and authority files maintained by libraries and other institutions;
  - (b) the publishers' and authors' associations in the respective country;

- (c) existing databases and registries, WATCH (Writers, Artists and their Copyright Holders), the ISBN (International Standard Book Number) and databases listing books in print;
  - (d) the databases of the relevant collecting societies, in particular reproduction rights organisations;
  - (e) sources that integrate multiple databases and registries, including VIAF (Virtual International Authority Files) and ARROW (Accessible Registries of Rights Information and Orphan Works);
- (2) for newspapers, magazines, journals and periodicals:
- (a) the ISSN (International Standard Serial Number) for periodical publications;
  - (b) indexes and catalogues from library holdings and collections;
  - (c) legal deposit;
  - (d) the publishers' associations and the authors' and journalists' associations in the respective country;
  - (e) the databases of relevant collecting societies including reproduction rights organisations;
- (3) for visual works, including fine art, photography, illustration, design, architecture, sketches of the latter works and other such works that are contained in books, journals, newspapers and magazines or other works:
- (a) the sources referred to in points (1) and (2);
  - (b) the databases of the relevant collecting societies, in particular for visual arts, and including reproduction rights organisations;
  - (c) the databases of picture agencies, where applicable;
- (4) for audiovisual works and phonograms:
- (a) legal deposit;
  - (b) the producers' associations in the respective country;
  - (c) databases of film or audio heritage institutions and national libraries;
  - (d) databases with relevant standards and identifiers such as ISAN (International Standard Audiovisual Number) for audiovisual material, ISWC (International Standard Music Work Code) for musical works and ISRC (International Standard Recording Code) for phonograms;
  - (e) the databases of the relevant collecting societies, in particular for authors, performers, phonogram producers and audiovisual producers;
  - (f) credits and other information appearing on the work's packaging;
  - (g) databases of other relevant associations representing a

specific category of rightholders.

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