



The Orphan Works Directive: A Missed Opportunity and the Educational Context **Kevin O'Sullivan, (NUI Galway)**

An over-arching thorn in the side of those engaged in digitisation projects, the risk of using orphan works, and being subjected to infringement proceedings, has had a chilling effect on the digitisation of works qualifying within national, and supra-national spheres as “cultural heritage”. In light of the ‘digitising revolution’, and the opportunity it offers to sovereign states to protect their national, and in the case of the EU, their collective “cultural heritage”; policymakers have sought to remove, or at the very least, blunt the thorn. The 2014 implementation of the 2012 Orphan Works Directive, in Ireland and the UK, should therefore have heralded a new opportunity for those seeking to use such works for digitisation purposes in both countries as a result of European policy objectives.

Focusing entirely on the notion of European ‘cultural heritage’, and invoking the Digital Agenda for Europe, the Directive and its commensurate implementation in both Ireland, and the EU take the narrow view, both as to the scope of “cultural heritage”, and who has the right to digitise it. To this end, the scope of the Directive is to provide cover for named institutions such as publicly accessible libraries, educational establishments and museums, as well as archives, film or audio heritage institutions, and public-service broadcasting organisations, to digitise works *in their collections*. Lost in this mix is the individual, outside these organisations, seeking to use an orphan work for digitisation purposes, or to put it more succinctly- the general public.

The impact is such that the “cultural heritage” the Directive speaks of, is framed in elitist terms, with a considerable scope of material that would qualify as relevant to national, local or indeed European ‘cultural heritage’ cast outside the scope of protection for would-be users. Understandable to a certain extent given the resources required to determine if a work is indeed orphaned, e.g. via costly searches, the fact remains that the Directive is yet another unimaginative reform of European copyright law. Seeking to counter this, Member States- including the UK- have adopted parallel licensing schemes to facilitate individual use of orphan works under schemes criticised for expense, and lack of balance with the public interest.

This paper argues that this public interest dynamic continues to cast a pall over both the national, and supra-national schemes within the EU, and as such continues to provide a justificatory base for further reform. The paper will focus on one aspect of potential reform in this area; creating a workable scheme for the use, and publication of such works by those engaged in digital arts and humanities (DAH) courses within third level institutions throughout the EU. Seeking to capitalise on the role played by such institutions in the digitising revolution, it will be argued that such a scheme is possible, not only using the existing infrastructure provided by these institutions as part of their course delivery, but also existing online copyright enforcement law within the EU.