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## AUDIOVISUAL ORPHAN WORKS: A LEGAL PERSPECTIVE OF THE PORTUGAL

### 1. INTRODUCTION

Audiovisual orphan works are copyrighted works (films, videos, TV programmes, etc.) whose rights holders cannot be identified or located, which makes it difficult to obtain proper permission for their use. Since 2012, the European Union has been concerned about how to regulate and legally treat this type of works. The aim is to ensure that, if the authors of hitherto orphaned works are located or voluntarily claim protection for their works, there is a regulation in place which could provide such protection.

### 2. EUROPEAN UNION LEGAL INITIATIVES

The literal transposition of Directive 2012/28/UE of the Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works (Orphan Works Directive) into the Portuguese legal system creates a problem with its practical application. This is because the European directive is only aimed at regulating the use of orphan works in certain situations, and the legislator, when incorporating such a directive into the Portuguese Copyright and Related Rights Code (CDADC), has left many orphan works and their legal framework unprotected. Such state of affairs should not continue since giving protection to certain orphan works while

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leaving others out creates considerable legal disparities. In such a delicate and important matter, given the huge number of orphan works present in all areas of intellectual property worldwide, legal issues should be given careful consideration.

The European Commission's Green Paper on Copyright in the Knowledge Economy of 2008 already drew attention to the need to protect users from being held liable for the infringement of copyright by attributing the responsibility for the search for authors of orphan works to Member States, which should promote the compilation of lists of known orphan works. The Green Book makes a special mention of audiovisual works, emphasising the fact that 'the lack of data on their ownership can constitute an obstacle to making these works available online to the public and can impede digital restoration efforts. This is particularly the case with orphan films' (para. 3.1.3).

The 2012 Orphan Works Directive was received with some surprise, as on 19 October 2009 the European Commission approved the Communication on Copyright in the Knowledge Economy. It was stated in that document that the Commission intended to regulate the issue of orphan works in its entirety. Among the ways of treating orphan works in the EU, several options were envisaged: not to interfere in the treatment of these works by national laws; to create a legal exception to copyright where the use of the said works would be allowed; to adopt an extended collective licence for these works; to introduce a specific licence for orphan works that should be issued by collective management bodies; to introduce a specific licence that would be issued by a state public body, and the mutual recognition of each country's projections for orphan works.

Looking at the scope of these solutions, it could never be foreseen whether the directive would regulate only the use of orphan works by public bodies, and if only for cultural and educational purposes, which leaves a considerable legal gap as regards other uses of this type of works and weakens the position of copyright holders<sup>1</sup>.

The 2019 Copyright Directive<sup>2</sup> introduced mechanisms to facilitate the licensing and use of orphan works, including audiovisual works. Cultural heritage institutions and other entities can obtain a licence for the use of orphan works from a designated EU-wide 'Single Point of Contact'. Once the licence is obtained, the orphan work can be used in certain specified ways without risk of legal repercussions. The EU allows extended collective licensing in some Member States, which enables collective management organizations to license orphan works on behalf of their members, including rights holders and users<sup>3</sup>.

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<sup>1</sup> M. Serrano Fernández *et al.*: *Propiedad intelectual en el siglo XXI: Nuevos continentes y su incidencia en el derecho de autor*, Colección de Propiedad Intelectual, Madrid: Reus 2014.

<sup>2</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market.

<sup>3</sup> M. Wachowicz: *Estudio sobre el contenido audiovisual en el dominio público y considerado como obra huérfana*, OMPI 2021, pp. 1–29.

### 3. PORTUGUESE PROVISIONS ON ORPHAN WORKS

The Portuguese Copyright and Related Rights Code defines orphan works as ‘protected intellectual works for which none of the rights holders is identified or, despite being identified, none of them has been located’ (Article 26.º-A CDADC).

This definition makes it clear that orphan works are a broader concept than the literal meaning of the word ‘orphan’, since works whose rights holders cannot be located also have this status. Hence, an orphan work is one in which the author is unknown or the author is known, but the holder(s) of rights to the work cannot be located; the latter often will not even be the author but his/her heirs or, for example, an institution<sup>4</sup>. It should be noted that if there are several authors or several holders of rights over a work and if only one or some of them are identified or located, the work must be considered partially orphaned<sup>5</sup>. However, some authors believe that these works are no longer orphan works<sup>6</sup>. This viewpoint cannot be accepted because the identified authors of a partially orphaned work are not able to decide for authors who are not locatable<sup>7</sup>.

Article 26.º-A(2) CDADC provides an illustrative list of works that may be considered orphan works, referring in its subparagraph (b) to ‘cinematographic or audiovisual works produced by public service broadcasting organizations before 31 December 2002 and kept in their archives’.<sup>8</sup> It is not clear why this paragraph mentions only cinematographic works or audiovisual works produced by public service broadcasters instead of audiovisual works in general, as orphan works could be any and all audiovisual works irrespective of the your origin.

Article 26.º-A(d) CDADC is based on a reasonable presumption that rights holders do not oppose to the use works that have never been published, distributed or made available to the public by public broadcasting organizations, which in my view should apply to all works. However, this presumption should be interpreted in the light of Recital (11) of the 2012 Orphan Works Directive, which stipulates that ‘[...] Cinematographic and audiovisual works and phonograms contained in the archives of public-service broadcasting organizations which have not been produced or commissioned by such organizations, but which those organizations have been

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<sup>4</sup> I. Navarro Mendizábal: *Autores ausentes y obras huérfanas* (in:) *Estados civiles y derechos de autor*, eds T. Carrancho Herrero, E. Vicente Domingo, Colección de Propiedad Intelectual, Madrid: Reus 2015.

<sup>5</sup> *Ibidem*.

<sup>6</sup> M. Serrano Fernández *et al.*: *Propiedad intelectual...*, *op. cit.*

<sup>7</sup> This means that if someone intends to use a partially orphaned work and has the authorization for the use of the work from the identified and located authors, these will not be able to decide for the absent authors, and a judicial consent must be requested and supplied either by the located authors of the partially orphaned work or by a collective rights management entity. However, one may have a problem when the identified and located authors refuse the authorization to use the work. In such cases, the question may arise as to whether collective management entities may request the judicial consent for the use of the work of authors who have not been located. At first sight, such a request would not have any practical effect, but if the non-located rights holders turn up nevertheless, collective management organizations could run the risk of being accused of mismanagement.

<sup>8</sup> This period results from the provisions of Article 1(2)(c) of the 2012 Orphan Works Directive.

authorized to use under a licensing agreement, should not fall within the scope of this Directive'. However, as already mentioned, the said Directive refers only to some uses of orphan works, with the Portuguese legislator confusing 'the part with the whole' by covering rules that serve only some of these works by a rule that should concern all orphan works.

Article 26.º-A(3) CDADC stipulates that in order to establish whether works can be considered orphan works, a diligent search must be conducted in good faith and registered by public broadcasting organizations or by libraries. I believe that the search should be carried out under these terms also by anyone who intends to use a work in question, which should be registered with the National Library of Portugal in accordance with the provisions of Article 26.º-A(7) CDADC. The search, as long as it complies with the legally established requirements, can be conducted by any entity or person without an increased risk for legal transactions, hence the limitation contained in Article 26.º-A(3) CDADC is not understandable. Paragraph (4) of the latter article clarifies what is meant by the diligent and good faith search and indicates, by way of example, entities that should be consulted. As regards particular audiovisual works, the sources that are considered appropriate for the search include the records of the Inspectorate-General for Cultural Activities (*Inspecção-Geral das Atividades Culturais*, IGAC) and the records of *Cinemateca Portuguesa-Museu do Cinema, I.P.*, namely the National Archives of Moving Images and the Portuguese Photography Centre (see Article 26.º-A(4) (e) and (f) CDADC).

Regarding audiovisual works, it is not clear why the national legislator did not take into account paragraph (4) of the Annex to the 2012 Orphan Works Directive, which provides that, for these works, a more extensive search is necessary of the following sources: '(a) legal deposit; (b) producers' associations in the respective country; (c) databases of film and audio heritage institutions and national libraries; (d) databases with relevant standards and identifiers such as ISAN (International Standard Audiovisual Number) for audiovisual material ...; (e) the databases of the relevant collecting societies, in particular for authors, performers ... and audiovisual producers; (f) credits and other information appearing on the work's packaging; and (g) databases of other relevant associations representing a specific category of rights holders'.

However, Article 26.º-A(5) CDADC has an important exception that benefits audiovisual works providing that 'if a work was first published or broadcast in Portugal, the search must be carried out diligently and in good faith in this territory, with the exception of cinematographic or audiovisual works and those made into phonograms that are produced or co-produced by producers having their registered office or habitual residence in a Member State of the European Union, in which case the search shall be carried out in the Member State of their registered office or habitual residence'. This exception makes it possible to safeguard the rights of a large number of orphan audiovisual works, since in majority their origin is not national. In addition to this provision, Article 4 of the 2012 Orphan Works Directive provides

for the mutual recognition of an orphan work status, therefore a work considered an orphan work in an EU Member State must be recognized as such in the other countries of the Union, which gives greater protection to this type of works. With regard to the registration of diligent searches for rights holders, one must point out that the Portuguese legislator lays down in Article 26.º-A CDADC the need to keep records of diligent searches updated and make them available regularly so that they appear in the central and publicly accessible online database managed by the National Library of Portugal. Article 26.º-A(8) CDADC also stipulates that these records must be transmitted regularly and immediately to the Office for Harmonization of the Internal Market<sup>9</sup>, together with information on: the results of diligent searches that allow granting a work the status of an orphan work, the ways in which the said work is used, any changes made to the orphan work status<sup>10</sup>, and contact details and information about the work or the holders of rights over it<sup>11</sup>. These databases are particularly relevant in that they help to reduce infringements of copyright in relation to orphan works. This is of special importance in the cases where orphan works no longer have this status, and thus the already identified or located authors should be entitled to appropriate remuneration for the use made of their work, provided it has not yet found a place in the public domain<sup>12</sup>.

Article 26.º-B CDADC, entitled ‘Termination of the orphan work status’, under paragraph (1) provides that holders of rights over a work may at any time claim their rights over the work thus terminating the orphan work status. In these cases, the work may continue to be used if the rights holders authorize it. However, the rights holders will always be entitled to fair compensation for the use of their work under the terms of paragraph (2) of the same article, and this compensation must be calculated in accordance with the requirements set out in paragraph (3), that is, taking ‘... into account the non-commercial nature of the use made, the possible gratuitousness of the act, the public interest objectives involved, namely access to information, education and culture, as well as any unjustified property damage suffered by the rights holders’.

#### 4. POSSIBLE GENERAL LEGAL REGULATION OF AUDIOVISUAL ORPHAN WORKS

It should be noted that the legal regulation of orphan works, which is imperative to recognise this type of works, refers to works that are in the private domain,

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<sup>9</sup> In order to comply with the provisions of Article 3(6) of the 2012 Orphan Works Directive.

<sup>10</sup> If it ceases to be recognized as such because the rights holders have been found or because they have voluntarily disclosed themselves.

<sup>11</sup> N. Gonçalves: *A proposta de diretiva sobre as obras órfãs*, Direito da Sociedade de Informação, Vol. 10, Coimbra: APDI/Coimbra Editora 2012.

<sup>12</sup> M. Serrano Fernández *et al.*: *Propiedad intelectual...*, *op. cit.*

subject to copyright protection<sup>13</sup>. Orphan works are not works that can be used freely and free of charge; the problem is it is not known who or where should be paid for their use. Therefore, such work is not at free disposal of whoever finds it, it belongs to someone, and the intellectual right to the work must be respected, similarly to the right that most people have to tangible assets. Nevertheless, one must not forget that authors share some responsibility for the fact that their works have become orphan works, since they either have not properly identified their works or they are not easily located for reasons known to them<sup>14</sup>.

The specifics of orphan works is linked to the fact that it is sometimes very difficult to use them legally. There are millions of works that are not used because their authors are not known or because their authorship is uncertain. Orphan works in the public domain do not raise major legal issues, but the cases of orphan works in which their authors still hold enforceable rights over them are much more complex<sup>15</sup>. It should be noted that in the case where there are more than one rights holders, e.g. co-authors of an audiovisual work, and one of them is located, the work cannot be called an orphan work<sup>16</sup>.

In order to have a better view of the problem of orphan works and the difficulties they present in legal terms, a study was carried out in the United Kingdom in 2009 by the British Library, which resulted in important reports. Based on the findings, 40% of works are orphan and the location of titleholders' rights to the works takes about 150 hours. According to the same study, 22% of rights holders could not be located and 36% did not respond to requests for assignment of rights. Among users of this type of works, 60% of people use the works at the risk of breaking the law, 14% use them for academic purposes, 10% for internal purposes and 9% do not use the works.<sup>17</sup> In order to improve these alarming statistics and safeguard the rights holders of works with orphan works status, and to reduce the number of works categorised as such, the European Union launched the ARROW project (Accessible Registries of Rights Information and Orphan Works) in September 2008, involving Member States and international organizations. Its aim is to help determine the rights status of orphan works, initially only for literary works. The service scope was extended to the audiovisual domain in April 2011, also having a considerable register of orphan works, which should also be consulted during the diligent search for their authors<sup>18</sup>.

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<sup>13</sup> V. Palmela Fidalgo: *A Diretiva 2012/28/EU e a problemática das obras órfãs*, Actas de Derecho Industrial y Derecho de Autor 2014–2015, Vol. 35, pp. 193–210.

<sup>14</sup> I. Navarro Mendizábal: *Autores ausentes...*, *op. cit.*

<sup>15</sup> J. Liu: *An Empirical Study of Transformative Use in Copyright Law*, Stanford Technology Law Review 2019, Vol. 22, No. 1, pp. 163–241, at pp. 210–218.

<sup>16</sup> P. Barberán Molina: *Temas de actualidad en derechos de autor*, Madrid: ACTA 2011.

<sup>17</sup> *Ibidem*.

<sup>18</sup> I. Espín Alba, *Um desafio para os direitos de autor no Mercado Único Digital: a edição de obras que deixaram de ser comercializadas*, UNIO — EU Law Journal, Centro de Estudos em Direito da União Europeia Escola de Direito — Universidade do Minho, July 2018, Vol. 4, No. 2, pp. 90–102.



Orphan works are a worrying reality, as proved by a study carried out in the United States, which found that 98% of works are orphaned 55 years after their publication/dissemination<sup>19</sup>.

Orphan works oscillate between two distinct but equally important interests: on the one hand, there is the protection of copyright, and on the other, the social right to access culture<sup>20</sup>.

According to Juan Mendoza Díaz<sup>21</sup>, there is a paradox associated with orphan works: the lower the commercial value of a work, the less likely it is to find the owner and obtain his/her authorization to use the work. Therefore, the works of residual commercial value are those that involve greater costs in the search for rights holders.

## 5. POSSIBLE GENERAL SOLUTIONS FOR LEGAL REGULATION OF ORPHAN WORKS

Bearing in mind that the concept of orphan works originated in the middle of the 20th century, one could ask why this phenomenon was not known in the previous centuries<sup>22</sup>. The only reasoning that can be offered relates to the period of copyright protection of works. In Europe, in general, the period of protection for rights over works before the 20th century was only 14 years. One can suspect that this time limit was too short.

Currently, the period is 70 years, counted from the death of the last of the creators of a work or since the time when the work became known or lawfully disclosed. However, there are authors who argue that the most suitable period should be 50 years so that works could reach the public domain more quickly, and thereby new uses of the works or also their archiving and preservation be possible<sup>23</sup>. There is even a line of thought developed by various academics and institutions, mostly in North America, called the ‘commons theory’, which advocates shortening of protection periods and non-expanding the range of works protected by copyright. The reason given is the fact that the longer the protection period, the greater the possibility that the commercial exploitation of works will be given up and the more difficult it will be to locate/identify successors of rights holders for the works<sup>24</sup>.

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<sup>19</sup> A.C. Mota Machado: *Direitos autorais e as obras órfãs*, available at: [www.conteudojuridico.com.br/artigo,direitos-autorais-e-as-obras-orfas,51101.html](http://www.conteudojuridico.com.br/artigo,direitos-autorais-e-as-obras-orfas,51101.html) (accessed: February 3, 2017).

<sup>20</sup> J. Mendoza Díaz: *Notas cubanas a las obras huérfanas* (in:) *Obras inéditas, anónimas, seudónimas, póstumas y huérfanas*, ed. E. Serrano Gómez, Colección de Propiedad Intelectual, Madrid: Reus 2014.

<sup>21</sup> *Ibidem*, p. 116.

<sup>22</sup> A. Inesi: *A Theory of De Minimis and a Proposal for its Application in Copyright*, Berkeley Technology Law Journal 2006, Vol. 21, No. 2. Pp. 945–995.

<sup>23</sup> A.C. Mota Machado: *Direitos autorais...*, *op. cit.*

<sup>24</sup> I. Espín Alba: *Obras huérfanas y derecho de autor*, Navarra: Aranzadi 2014.

Although the reason is understandable, it cannot be accepted because one has to bear in mind that the 70-year protection period is an important achievement for authors. It would be preferable for orphan works to continue to exist as such, rather than to deny the authors' rights by excessive shortening of the protection period<sup>25</sup>. In addition to restricting the range of works protected by copyright at the time when new forms of art and original expression are created every day, it would be a true attack on the essence of intellectual property<sup>26</sup>. The solution would not be shorter protection periods for the rights over works, nor restriction on the range of protected works, but rather seeking diligent ways to find their authors in good time, allowing greater use of the works, as well as creating legal mechanisms of recourse in cases when rights holders do not respond to requests made by those who intend to legitimately use their works. The mechanisms could be a result of adopting the Landes and Posner theory<sup>27</sup>, according to which a very long copyright period entails the risk that many years after the first public communication of works it will be impossible to identify and/or locate the rights holders. Therefore, it is proposed that there should be an initial registration of copyright, which should be periodically renewed by the rights holders and in theory could be perpetual. However, this registration and renewal of rights would oblige their holders to effectively exploit the works, as the renewal of rights would imply payment of a fee that would progressively increase over time<sup>28</sup>.

Thus, only the works effectively exploited by the rights holders would remain under copyright exclusivity, with all others passing into the public domain<sup>29</sup>.

Another of the mechanisms that could be used would involve obtaining a judicial consent for a lawful use of a work under copyright by those interested in the use (supervised by a collective management entity) or by a collective management entity. This way the authors of the work would receive a just and equitable compensation defined in court<sup>30</sup>.

## 6. CONCLUSIONS

It seems that an optimum solution would be to treat orphan works in line with the specific legal regime used to protect the assets of persons who have disappeared

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<sup>25</sup> A. Tobío Rivas: *Las obras huérfanas*, Revista de Derecho Mercantil 2017, No. 303, pp. 35–66.

<sup>26</sup> J. Brito, B. Dooling: *An Orphan Works Affirmative Defense to Copyright Infringement Actions*, Michigan Telecommunications and Technology Law Review 2005, Vol. 12, Issue 1, pp. 75–113.

<sup>27</sup> I. Espín Alba: *Obras huérfanas...*, *op. cit.*

<sup>28</sup> T. Rendas: *Copyright, Technology and the CJEU: An Empirical Study*, IIC — International Review of Intellectual Property and Competition Law 2018, Vol. 49, No. 2, pp. 153–184, at pp. 161–173.

<sup>29</sup> I. Espín Alba: *Obras huérfanas...*, *op. cit.*

<sup>30</sup> S. van Gompel: *The Orphan Works Chimera and How to Defeat it: A View from Across the Atlantic*, Berkley Technology Law Journal 2012, Vol. 27, No. 3, pp. 1347–1378.



(absentees), as provided for in Article 89.º and the following of the Portuguese Civil Code, which should apply by analogy to orphan works. Article 89.º stipulates that an absentee is '[...] one who has disappeared without anyone knowing who he or she is and without having left a legal representative or attorney [...]'. Therefore, the authors of orphan works may be covered by the definition of absentees. Consequently, a special curator should be appointed to administer orphan works; it could be a collective rights management entity, interested in the protection of the works and related rights, under the provisions of Articles 89.º(1), 92.º(1) and 99.º of the Civil Code<sup>31</sup>. The collective management entity must be remunerated for the curatorship in accordance with Article 96.º of the Civil Code<sup>32</sup>.

This curatorship by collective management entities should cease if the authors of orphan works are located, and thus the remuneration obtained in relation to their works should be returned to the authors under the provisions of Articles 112.º and 119.º of the Civil Code applied by analogy<sup>33</sup>.

In the specific case of orphan audiovisual works, this remuneration would have to be distributed between co-authors of the works or by their heirs in the event of death of one or all of the co-authors, and if any of them could not be located, the amount would be kept by a collective management entity, and may be claimed by them as long as the works do not enter the public domain<sup>34</sup>.

Another solution is used in the Nordic and Eastern European countries, e.g. Norway or the Czech Republic, namely collective rights management entities grant extended collective licences to use orphan works, based on which licensees pay for using such works, while the said entities are responsible for carrying out a diligent search for rights holders<sup>35</sup>. If the rights holders are found or voluntarily claim their rights to the works, they will be remunerated for any use of their works. Otherwise the amounts will be allocated to digitization of other orphan works<sup>36</sup>. The remuneration that may be claimed by the authors of a work previously considered orphan

<sup>31</sup> Initially, this curatorship would be provisional to later become definitive if two years have passed for absentees who do not have a legal representative or attorney, or if five years have elapsed in cases where there is a legal representative or attorney, under Article 99.º of the Civil Code, providing a justification for the absence. However, in the case of orphan works, instead of the management of rights over the works passing to the heirs, for reasons of transparency and fairness in the distribution of remuneration arising from the use of the works, such management should continue to be entrusted to the collective management entity which must transfer a remuneration, or to the authors of the works if they are identified and claim their rights before the works become available in the public domain, or to those who prove that they are the authors' heirs and who provide evidence of the authors' death to the collective management entity, having the right to the remuneration under the same conditions.

<sup>32</sup> M.L. Lacruz Mantecón: *Las obras huérfanas encuentran madrastra*, Anuário de Propriedade Intelectual 2013, Madrid: 2014, pp. 271–298.

<sup>33</sup> M.V. Rocha: *Portugal* (in:) *International Encyclopaedia of Laws: Intellectual Property* (p. 104), ed. H. Vanhees, Alphen aan den Rijn: Kluwer Law International 2017.

<sup>34</sup> I. Navarro Mendizábal: *Autores ausentes...*, *op. cit.*

<sup>35</sup> K. Grau-Kuntz: *Domínio público e direito de autor: do requisito da originalidade como contribuição reflexivo-transformadora*, Revista Eletrônica do IBPI, No. 6, pp. 5–67.

<sup>36</sup> J. Mendoza Díaz: *Notas...*, *op. cit.*

is crucial in order to resolve any issues related to interest in the work from institutions that would allow its use for certain purposes<sup>37</sup>.

A general and multidisciplinary management body for orphan works could also be formed to grant specific use authorizations or allow the general use of some works, depending on particular cases<sup>38</sup>.

## BIBLIOGRAPHY

- Barberán Molina P.: *Temas de actualidad en derechos de autor*, Madrid: ACTA 2011.
- Brito J., Dooling B.: *An Orphan Works Affirmative Defense to Copyright Infringement Actions*, Michigan Telecommunications and Technology Law Review 2005, Vol. 12, Issue 1, pp. 75–113.
- Espín Alba I.: *Obras huérfanas y derecho de autor*, Navarra: Aranzadi 2014.
- Espín Alba I.: *Um desafio para os direitos de autor no Mercado Único Digital: a edição de obras que deixaram de ser comercializadas*, UNIO — EU Law Journal, Centro de Estudos em Direito da União Europeia Escola de Direito — Universidade do Minho, July 2018, Vol. 4, No. 2, pp. 90–102.
- EU Commission: Communication from the Commission of 19 October 2009 — Copyright in the Knowledge Economy, COM(2009) 532 final.
- EU Commission: Green Paper — Copyright in the Knowledge Economy of 16 July 2008, COM(2008) 0466 final.
- Gompel, S. van: *The Orphan Works Chimera and How to Defeat it: A View from Across the Atlantic*, Berkley Technology Law Journal 2012, Vol. 27, No. 3, pp. 1347–1378.
- Gonçalves N.: *A proposta de diretiva sobre as obras órfãs*, Direito da Sociedade de Informação, Vol. 10, Coimbra: APDI/Coimbra Editora 2012.
- Grau-Kuntz K.: *Domínio público e direito de autor: do requisito da originalidade como contribuição reflexivo-transformadora*, Revista Eletrônica do IBPI, No. 6, pp. 5–67.
- Inesi A.: *A Theory of De Minimis and a Proposal for its Application in Copyright*, Berkeley Technology Law Journal 2006, Vol. 21, No. 2.
- Lacruz Mantecón M.L.: *Las obras huérfanas encuentran madrastra*, Anuário de Propriedade Intelectual 2013, Madrid: 2014.
- Liu J.: *An Empirical Study of Transformative Use in Copyright Law*, Stanford Technology Law Review 2019, Vol. 22, No. 1, pp. 163–241.

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<sup>37</sup> I. Navarro Mendizábal: *Autores ausentes...*, *op. cit.*

<sup>38</sup> A.C. Mota Machado: *Direitos autorais...*, *op. cit.*

- Mendoza Díaz J.: *Notas cubanas a las obras huérfanas* (in:) *Obras inéditas, anónimas, seudónimas, póstumas y huérfanas*, ed. E. Serrano Gómez, Colección de Propiedad Intelectual, Madrid: Reus, 2014.
- Navarro Mendizábal I.: *Autores ausentes y obras huérfanas* (in:) *Estados civiles y derechos de autor*, eds. T. Carrancho Herrero, E. Vicente Domingo, Colección de Propiedad Intelectual, Madrid: Reus 2015.
- Palmela Fidalgo V.: *A Diretiva 2012/28/EU e a problemática das obras órfãs*, Actas de Derecho Industrial y Derecho de Autor 2014–2015, Vol. 35.
- Rendas T.: *Copyright, Technology and the CJEU: An Empirical Study*, IIC — International Review of Intellectual Property and Competition Law 2018, Vol. 49, No. 2, 153–184.
- Rocha M.V.: *Portugal* (in:) *International Encyclopaedia of Laws: Intellectual Property* (p. 104), ed. H. Vanhees, Alphen aan den Rijn: Kluwer Law International, 2017.
- Serrano Fernández M.: *Los Derechos de explotación de las obras huérfanas en el torno Digital: las dificultades de transposición de la Directiva 2012/28/EU al ordenamiento español* (in:) *Anuário de Propriedade Intelectual* 2013, Madrid 2014.
- Serrano Fernández M. et al.: *Propiedad intelectual en el siglo XXI: Nuevos continentes y su incidencia en el derecho de autor*, Colección de Propiedad Intelectual, Madrid: Reus 2014.
- Tobío Rivas A.: *Las obras huérfanas*, Revista de Derecho Mercantil 2017, No. 303, pp. 35–66.
- Valdés Díaz C.D.C.: *Obras inéditas, anónimas, seudónimas, póstumas y huérfanas*, Colección de Propiedad Intelectual, Madrid: Reus 2014.
- Wachowicz M.: *Estudio sobre el contenido audiovisual en el dominio público y considerado como obra huérfana*, OMPI 2021.

## WEBGRAPHY

- Mota Machado A.C.: *Direitos autorais e as obras órfãs*, [www.conteudojuridico.com.br/artigo,direitos-autorais-e-as-obras-orfas,51101.html](http://www.conteudojuridico.com.br/artigo,direitos-autorais-e-as-obras-orfas,51101.html) (accessed: February 3, 2017).
- Sousa Alves M.A., Marconi Rodrigues M.: *O projeto Google Books e o direito de autor: uma análise do caso Authors Guild et al. v. Google* (in:) XIX Encontro Nacional do CONPEDI, Fortaleza 2010. Anais do XIX Encontro Nacional do CONPEDI, Florianópolis/SC: Fundação Boiteux, 2010, pp. 7915–7927, [http://www.academia.edu/482222/O\\_projeto\\_Google\\_Books\\_e\\_o\\_direito\\_de\\_autor\\_uma\\_an%C3%A1lise\\_do\\_caso\\_Authors\\_Guild\\_et\\_al.\\_v.\\_Google](http://www.academia.edu/482222/O_projeto_Google_Books_e_o_direito_de_autor_uma_an%C3%A1lise_do_caso_Authors_Guild_et_al._v._Google) 59 (accessed: 14.09.2023).

- Springman C.: *Reform(aliz)ing Copyright*, Stanford Law Review 2004, Vol. 57, pp. 485–568, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=578502](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=578502) (accessed: 14.09.2023).
- Vuopala A.: *Assessment of the Orphan Works Issue and Costs for Rights Clearance*, European Commission, DG Information Society and Media, Unit E4 Access to Information, May 2010, [http://cultivate-cier.nl/wp-content/uploads/2012/03/vuopala\\_report.pdf](http://cultivate-cier.nl/wp-content/uploads/2012/03/vuopala_report.pdf) (accessed: 14.09.2023).
- Walker Echenique E.: *Uso de obras huérfanas: Estudio de diversas regulaciones en el derecho comparado como referencia para modernizar la regulación chilena sobre propiedad intelectual*, Revista Chilena de Derecho 2014, Vol. 41, No. 3, pp. 845–870, <https://dialnet.unirioja.es/revista/10893/A/2014> (accessed: 14.09.2023).

**Słowa kluczowe:** utwory osierocone, autorzy, ochrona, utwory audiowizualne, dziedzictwo nieobecnych.

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## AUDIOVISUAL ORPHAN WORKS: A LEGAL PERSPECTIVE OF THE PORTUGAL

### S u m m a r y

When we speak of orphan works, we must bear in mind that the concepts of ‘author’ and ‘work’ are essential. Despite how well it is argued (e.g. by Caridad Del Carmen Valdéz Díaz, 2014) that there is neither a work without an author nor an author without a work, the work can have an autonomous life without the author, and it is in this context that the problem of orphan works can be examined. This issue has gained a greater significance with the current possibilities of digitization and placement of works on the Internet, by which they become available globally. In fact, digitizing a work implies its copying, which in itself immediately poses intellectual property problems. Orphan works and their status are described in the Portuguese Copyright and Related Rights Code (CDADC), which was adopted due to the transposition of Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works. The directive provides for the use of orphan works only by public entities, as stipulated under Article 1, and the use of those works is allowed only for cultural and educational purposes in accordance with Article 6(2). National legislators have discretion to frame other situations when orphan works may be used, provided that those do not contravene the provisions of the directive. The EU has been carrying out a copyright reform to adapt to the digital age and address such issues

as orphan works. As part of the Digital Single Market Strategy, the EU adopted Directive (EU) 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market. This directive aims to harmonize copyright regulations in the digital market, ensuring fair remuneration for authors and creators. It introduces new provisions for the use of orphan works yet not specifically for audiovisual orphan works.

**Key words:** orphan works, authors, protection, audiovisual works, heritage of the absent.