



## Research Article

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# The Legal Situation for Orphan Works Under the Republic of Albania's Copyright Regime

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### Abstract

The development of digital technology has revolutionized the public's access to and utilization of protected works. Pre-existing analog works can now be easily converted into digital formats, providing users with various reuse opportunities. Libraries, museums, archives, and other cultural heritage institutions have embraced the digital revolution by digitizing their cultural and scientific collections. In addition to preserving these invaluable assets, they also aim to provide online access to their materials. However, despite their valuable efforts, these institutions often face significant challenges in locating and identifying the copyright holders to obtain the necessary authorization. This can lead to uncertainties regarding the legality of making these works available online, as using copyrighted materials without prior consent can expose them to the risk of copyright infringement claims. In the Republic of Albania, where cultural heritage institutions are also grappling with these challenges, the potential for infringement underlines the urgent need for efficient mechanisms to handle copyright-related matters when undertaking such ambitious projects. This article aims to present and analyze legal solutions that can facilitate the use of orphan works without infringing on copyright. It also delves into the potential challenges that may arise in implementing such legislation. Additionally, this article outlines the procedure for termination of orphan work status and the requirements for a reasonable compensation calculation for reappearing authors/right holders. Finally, it recommends further improvements to copyright and related rights legislation.

**Keywords:** intellectual property, copyright, orphan works, legal framework, diligent research, fair compensation

## 1. Introduction

Copyright legislation is a powerful tool originally designed to promote creativity and innovation and is a cornerstone of our society's development. It is one of the many forms of intellectual property rights that are granted worldwide to protect original creations. (Dega, 2019) As one author puts it, Copyright is the body of law that regulates the ownership and utilization of works of literature, music, and art. Its profound aim is to enrich our society's prosperity of culture and information. (Gorman, 2006) In this context, Copyright law serves a dual purpose. On one hand, it safeguards the rights of authors and creators, allowing them to profit from their creations. On the other hand, it

ensures equitable access to society, fostering innovation, research, and creativity. Therefore, the essence of copyright is to strike a balance between the public interest of protecting exclusive rights for the owner of copyright and his or her efforts and the public interest of ensuring that people have access to knowledge, information, and cultural goods. This is in order to foster innovation and creativity. (Wright, 2009) As technology progresses and modifies various aspects of our social life, including copyright, the need to find a balance becomes even more crucial. This balance is necessary to protect authors' or rights holders' rights effectively and meet our digital society's evolving needs. As this evolution advances, specific creative works protected by copyright may become orphans, a term that refers to a work protected by copyright but for which the copyright owner cannot be identified or his whereabouts ascertained, even after conducting a diligent search. (Suthersanen & Frabboni, 2021) Therefore, obtaining permission to use these works remains quite impossible. This has affected cultural heritage institutions' work in digitizing their cultural and scientific collections and making these works available online (Schroff, 2015), raising the costs that these institutions incur and exposing them to the possibility of copyright infringement in the event that they use copyrighted materials without the previous authorization of the author or the right holders.

Works of creativity that are protected by copyright law may become orphans for various reasons. One reason can closely relate to the fact that the Bern Convention has removed the formalities and registers as a prerequisite for gaining copyright. Other reasons contributing to this issue include the absence of information about the author or the right holder on the available copies of the work. Furthermore, the location of the author or the right holder of the work may remain unknown due to a lack of information. Upon the right holder's death, his successors are unknown. Additionally, the rights holder of a work is a legal body that has been dissolved or merged with another business, but the necessary documentation for copyright transfer has gone missing. Furthermore, there are cases when the author or rights holder is unaware of their entitlements. This lack of knowledge is sometimes caused by acquiring rights through a larger transaction or via inheritance, especially when these rights have minimal commercial value. (European Commission, 2011) Another approach that extends the issues related to orphan works to the field of artificial intelligence provides other causes, including but not limited to the following: the creator is deceased, the work was purposefully abandoned; or the work was created automatically with little to no human involvement and without sufficient documentation, as is the case with computer-generated works. (Gaon, 2021) These factors may have increased the number of orphan works, which would have several effects.

In Bradrick's words, the problem extends in three ways:

*"First, it stifles creativity by limiting the public's access to the piece; second, it defeats the economic incentive to create copyrightable works because no one can receive the potential royalty if the copyright owner cannot be found; and third, it undermines copyright law by forcing some orphan works users to violate infringement laws despite efforts to comply." (Bradrick, 2012)*

This might, on a broad scale, impede the digitalization process held by cultural organizations, making it difficult for the public to utilize the work for various reasons. (Vetulani, 2008) These scenarios present a significant challenge, more specifically for institutions that preserve cultural heritage, as they necessitate potential users to expend substantial effort and resources in identifying the copyright holders before utilizing the work. As one commentator pointed out, initiatives in the EU and other countries have either adopted or are under discussion to facilitate the use of "orphan works" or "unavailable works." (Ginsburg, 2018) Global policymakers widely acknowledge these challenges in this realm, which were also presented in the earliest cases brought by authors and publishers against Google. (Authors Guild, Inc. v. Google, Inc.; McGraw-Hill Cos. v. Google, Inc, 2005) Therefore, they have pursued diverse approaches to address this matter over several years.

In the EU context, creating a legal framework to simplify the digitization and exploitation of orphan works was a fundamental component of Europe's digital strategy. (EC Communication, 2010)

The EU Commission released a proposal for a "Directive of the European Parliament and Council in 2011, which asked for a *"uniform, diligent search and mutual recognition of the search imputes and orphan status in all Member States."* (Ahmed, 2021) Following multiple revisions to the proposal, on October 25, 2012, the European Union finally enacted Directive 2012/28/EU, a joint effort between the European Parliament and the Council, concerning some permissible uses of orphan works. (Orphan Works Directive, 2012) This directive (hereafter the "Orphan Works Directive," "OWD," or "Directive") regulates the specific legal status, relevant consequences for users, and permitted uses of orphan works. To some degree, it seeks to harmonize the norms governing the digitization and online display of orphan works by specific institutions. (Suthersanen & Frabboni, 2021)

The Republic of Albania faces similar challenges in light of this worldwide issue. This article aims to delve into recent approaches taken by copyright legislation regarding orphan works solutions, taking an extensive analysis of the current legal framework and its implementation, encompassing orphan works status, possible uses and mechanisms for terminating this status, and the criteria for determining adequate compensation for authors or right holders who resurface.

## 2. Recent Developments in Albanian Copyright and Related Rights Law Addressing Orphan Works

Protecting and enforcing IP rights in the Republic of Albania (copyright included) remains a top strategic priority. (National Strategy for Intellectual Property 2022–2025) This commitment to IP has continuously evolved to meet the demands of the times, aiming for continuous improvements and balancing the public interest. (Torremas, Tutulani, & Dedi, 2005) Furthermore, the Stabilization and Association Agreement, which was ratified in 2006 (Stabilization and Association Agreement, 2006), required Albania to align its laws with the European Union's. This led to significant legal changes in copyright and related rights in 2016, while Law 35/2016, "On copyright and related rights," replaced the outdated copyright law 9380/2005 (as amended). Despite the important changes, which helped to improve legal protection and to foster the competencies of institutions that have the legal duty to guarantee and enforce the copyright and related rights, further revisions were deemed necessary to better align copyright and related rights legislation with *acquis communautaire* in the face of digital technology advances.

One issue that required further attention was making works accessible to the blind, visually impaired, or those with restricted access to printed materials. This clarification was intended to guarantee further compliance with international agreements and EU legal standards and regulations on accessibility. Furthermore, improvements were required for the Collective Management System (CMAs), which administers collective rights on behalf of copyright holders or authors. The implementation of the existing legal framework for CMAs presented a number of issues, demanding solutions to improve their operations and remove any legal ambiguity.

Moreover, one substantial area of focus was the issue of orphan works. Despite evidence that orphan works exist in practice, the Law 35/2016 legal system lacked particular measures to address them. Therefore, additional provisions needed to be introduced to govern situations where permission to utilize the works cannot be demanded due to the inability to trace or identify the author or the right holder. Reports provide information about orphan works being part of the collections currently held by Albanian cultural heritage institutions, but precise statistics are missing. (Impact Assessment Report, 2021) The lack of legal regulation concerning orphan works, the need to prevent potential copyright infringement for these works, and the necessity of digitizing them created a legal gap that needed to be filled.

To address the identified gap while also providing solutions for the mentioned necessities, the government considered a variety of options: Option 0: continuing with the current regulatory framework; Option 1: governing the status of orphan works with sub-legal acts; Option 2: governing the legal basis through changes and amendments to existing law; and Option 3: drafting a new law. Among these options, option number 2 gained more preference. (Impact Assessment Report, 2021) As

a result, in 2022, the government amended Law 35/2016, "On copyright and related rights," hereafter referred to as Law 35/2016 (as amended) or ACL (Law on copyright and other related rights, 2022). This amendment introduced 16 provisions, bringing it closer to Directive 2012/28/EC, Directive (EU) 2017/1564, and Directive 2001/29/EEC as amended. These changes aimed to widen the scope of the legislation to improve its stability and inclusiveness, especially when it comes to orphan work enforcement.

### 3. Selected Issues Regarding Orphan Work Status Under the Albanian Copyright Regime

Albania has launched its regulatory framework, partially transposing the Orphan Works Directive to address potential solutions to these challenges. The national framework included an exception scheme allowing cultural institutions to utilize orphan works to pursue their public interest missions. The Albanian Copyright and Related Rights Act incorporates OWD provisions within Part II (Copyright). Specifically, Chapter II (Authorship), following Article 16, encompasses the definition of orphan works, several categories of works, mutual recognition, exhaustive search requirements, documentation of information, and the list of appropriate sources. Meanwhile, Chapter VII (Restrictions on the Exercise of Copyright) amends and supplements Article 75 by introducing beneficiary institutions, permissible uses of such works, terminating orphan works status, and compensation for their usage.

As per the definition of "orphan works," one approach is that:

*"orphan works are copyrighted works whose owners are difficult, if not impossible, to locate." (European Commission Communication, 2008) Another viewpoint encompasses orphan works as "copyrighted works for which the right holders cannot be identified or located. Protected works can become orphaned if data on the author and/or other relevant rights holders (such as publishers, photographers, or film producers) is missing or outdated". (European Commission Communication, 2009)*

According to Article 16/1 of Albanian law, orphan works are defined as works that do not have an author or lack an author. In Albanian, this is referred to as *"vepra pa autor"*. We believe this phrase may not be the most appropriate one. It may be vague and accessible to different interpretations, which might lead to misunderstanding regarding the implication of authorship, the possibility of ambiguities involving ownership, or the term of protection. However, a mere literal interpretation of this phrase should not be sufficient, and the preconditions to be met should also play an important role. Moreover, this term should be interpreted in light of the Orphan Works Directive scope, which takes the "opt-out" path where all works with unidentified or unlocated right holders are considered to be within the term of copyright protection but can be used for specific purposes subject to the search and recordation conditions. (Suthersanen & Frabboni, 2021)

Categories of copyrighted works for which the author or coauthor is impossible to identify or locate are provided in Article 16/1 (3) of the law, covering various types of published works, such as books, newspapers, magazines, and other written materials contained in the collections of publicly accessible libraries, institutions for education, museums, or other legal bodies that engage in museum activities, also in the compilations of archives or film/audiovisual archival institutions. It also comprises cinematographic or other audiovisual works included in the collections of institutions accessible to the public, such as public educational institutions and museums or other legal bodies that engage in museum activities, as well as in collections of archives or film or audiovisual archives institutions. Cinematographic or other audiovisual works produced by public broadcasters up to December 31, 2002, protected by copyright and contained in their archives, which are published for the first time in the Republic of Albania or, in the absence of first publication, are broadcast for the first time in the Republic of Albania are included as well. The abovementioned works, which have never been published or broadcasted but which have been made publicly known for the first time by the abovementioned institutions only with the approval of the authors, provided that it is reasonable

to assume that the authors of these works would not oppose the permitted uses, are covered. Furthermore, works incorporated into or form an integral part of the aforementioned works are also provided. (Law on copyright and other related rights, 2022) As it appears, only restricted cultural heritage items, including text-based, audiovisual, and embedded creative works, may be considered orphans. Furthermore, phonograms are not explicitly included in these categories, even though they are cited in the list of adequate sources to consider for conducting a comprehensive search for the category of audiovisual works, performances, and works recorded on phonograms and videograms, as specified in paragraphs 16/3 (1) (ç) and 16/3 (4) of the law. In this realm, broadening the scope of application to cover more types of content in the collections of cultural heritage organizations, particularly phonograms, may be appropriate. However, as previously stated, the law's conformance with the Orphan Works Directive is only partial, demanding particular legal text revisions for a more accurate alignment with EU secondary legislation.

Orphan works may only be utilized once the beneficiary institutions have conducted a thorough search for each work. Such a search should be performed before using the work by checking the necessary sources for the work's relevant category in good faith. ACL describes the list of sources to consult for conducting a diligent search, divided into four categories according to the types of work for which a thorough search is carried out. These categories include (a) published books; (b) newspapers, magazines, diaries, and periodicals; (c) works of visual art, including fine arts, photography, illustration, design, architecture, sketches, and cartographic creations; and (d) audiovisual works, performances, works integrated on phonograms and videograms. Each category specifies the sources and databases to be consulted. This approach aligns with the discretion granted by Article 3(2) of the Orphan Directive to member states in determining appropriate sources for diligent research criteria for each type of work. The national list encompasses the information sources mentioned in the Annex of the Orphan Directive and those specific to the Republic of Albania. To facilitate the diligent search, it is necessary for all sources to be available online, of excellent quality, and free of cost.

The language used in Articles 16/2 and 16/3 of the law, referring to exhaustive search in Albanian wording "*kerkim shterues*", leaves ambiguity about whether these sources should be interpreted as exhaustive or merely illustrative. Since there is no clear European-level implementation specifying the list's nature, the most favored opinion in the EnDow report suggests that, although more information may be required, a thorough search must also explore sources that are not on the list of the sources. (Bertoni, Guerrieri, & Montagnani, 2017) In this context, despite the wording of the abovementioned law provision, we suggest this approach should be considered when interpreting Albanian legislation. Furthermore, Article 16/3 (2) of the Law emphasizes that the exhaustive search shall be performed in Albania if the work is initially published or, in the lack of the first publication, is initially broadcasted in Albania. Meanwhile, for cinematographic or other audiovisual works, a thorough search shall be conducted in Albania if the producer has its main business headquarters or permanent residence in the Republic of Albania. For cinematographic or other audiovisual works produced by public broadcasters up to December 31, 2002, and contained in their archives, the exhaustive search shall be performed in Albania if the public broadcaster that enabled the work to be publicly accessible with the consent of the author/s or right holders has its headquarter in Albania. (Law on copyright and other related rights, 2022) Regarding cross-border searches, the Albanian copyright and related act closely mirrors Article 3 (4) of the Orphan Works Directive. (Kur, Dreier, & Lugnbuehl, 2019) Furthermore, despite not being an EU member, Albanian copyright legislation includes a reciprocity provision, which stipulates that if a work is deemed an orphan under any EU Member State law, it will also be regarded as an orphan in the Republic of Albania without the need to conduct the exhaustive search procedure. The solution would be based on the concept of mutual recognition. (Ricolfi, et al., 2008)

Finally, beneficial institutions should conduct an exhaustive search for each work before using orphan works and keep their search records. The information included in the records should be transmitted to the Copyright Directorate (CD). These records include, at least, the results of

exhaustive searches conducted by the beneficiary institutions that conclude that the work fits the requirements for classification as an orphan; the permitted utilization of this work undertaken by the institutions (as defined by the law); any update regarding the end of orphan work status; and the required contact information of the institution concerned in conformity with articles 16/3 (3) and (4) of ACL. Recently, a national public, documentary, and electronic copyright database has been established to preserve copyright and orphan works records. (Decision of Council of Ministers, 2023) This came as a necessity under copyright law and a request for the political objectives outlined in the National Strategy for Intellectual Property. (National Strategy for Intellectual Property 2022–2025) Creating databases about orphan works might help address related issues. The Copyright Subgroup of the HLEG has advocated such databases on Digital Libraries. (Ricolfi, et al., 2008)

#### **4. Permissible Uses of Orphan Works, the Termination of Orphan Work Status, and Fair Compensation**

Beneficial institutions engage in limited activities with the orphan works that are part of their collections, including digitization, public access, indexing, cataloging, preservation, and restoration. The institutions mentioned above are permitted to copy these works part of their collections and to make them accessible to the general public exclusively to meet public interest goals, such as preserving, restoring, and providing cultural and educational access to orphan works. However, beneficial institutions may generate revenue from these activities to pay the expenses of digitizing and making them accessible to the public. The law does not limit the institution's freedom to enter into contracts to pursue their purpose aligned with the public interest, notably in public-private partnership agreements. However, it excludes any direct or indirect economic profit. So, the permitted uses of orphan works do not have direct or indirect economic purposes. They are outlined in Article 75/1 of Law 35/2016 (as amended), which partially reflects those stipulated in Article 6 of the Orphan Work Directive, preferring unlimited use of works without author wording.

Furthermore, Albanian copyright law, Article 16/1(6), provides for the author or coauthor the right to terminate the status of orphan works at any time and for the right to equitable compensation for the usage of orphan works in Article 75/2 in the same manner as Articles 5 and 6(5) of the Orphan Works Directive. The author's or rightsholder's reappearance suggests that the work has ceased to be considered orphan work, and the beneficiary institution is no longer permitted to use works that do not have orphan work status without the copyright holder's permission concerning the rights they hold. (Sheqj, 2021) However, the Orphan Works Directive remains quite general about the procedure that right holders should follow to terminate an orphan work's status and determine fair compensation, leading to broad discretions of Member States in implementing the rules for right holders to terminate this status. (McGuinn, et al., 2021)

In this scenario, Albania's legal system provides a straightforward procedure, implementing additional measures that increase clarity for rights holders aiming to end the orphan works status. The procedure begins with submitting a formal written request by the author, co-author, or the Collective Management Agency (CMA) duly authorized by the author or co-author to the beneficiary institution that used the work. The goal is to terminate orphan work status and calculate fair compensation. Along with the written request, certain supporting documents are required. These typically include the author's or co-author's identification documents and documentation verifying the existence and extent of the right holder's copyright and/or related rights in the work. If such proof is missing, a court order may be required to affirm the applicant's ownership of the rights. In addition, the author's or co-author's information on the present location should be included. Meanwhile, in cases where a legal representative submits the request on behalf of the author or co-author, a notarized act of representation is essential to demonstrate their legal authority to act on their behalf. Ensuring the relevant documentation is crucial for the success of the request since the lack of any of these required documents may lead to a refusal of such a request.

While following confirmation of the termination of orphan work status and eligibility for fair



remuneration, the institution that used the orphan work sets the amount and manner of compensation in collaboration with the author or co-author. In this context, it is suggested that this collaboration between the rights holder and the beneficiary institution should take priority since they are the parties that understand the proper use of the work and its worth based on the criteria provided by the legal framework. The calculation of fair compensation involves considering various factors, such as the goals of cultural advancement, the non-commercial character of the institution's utilization, education and cultural dissemination, and the potential damages to authors, all of which are also listed in recital 18 of the Directive. The beneficiary institution who utilized the work shall pay the compensation. In case the details and amount of compensation are not determined after consultations with the author or co-author. They will be determined based on the methodology and the compensation tariffs for utilizing copyrighted works in the collective administration system, referring to the same category of works. In order to guarantee transparency and update information, the beneficiary institution shall immediately notify the Copyright Directory (CD) of the termination of orphan work status and whether or not fair compensation procedures have been initiated. The Copyright Directorate (CD) updates such information in the copyright database. Fair compensation is paid retroactively, no later than three years from the end of orphan work status. (Council of Minister Decision, 2023) While there may not be official data on ACL's success concerning orphan works, this approach is expected to improve the public's access to cultural heritage. It also seeks to protect creators effectively by ensuring that they are fairly compensated for the use of their work.

## 5. Conclusions

The increase in the number of orphan works presents a serious problem, particularly for the institutions responsible for cultural heritage, which may be exposed to copyright infringement while performing their objectives and goals. Because of this, the public's access to these works is restricted, which reduces creativity and deprives the reappeared rightsholders of the opportunity to earn their revenues. For several years, policymakers worldwide have pursued diverse approaches to address orphan works issues. The Republic of Albania, impacted by similar challenges regarding orphan works, amended the copyright legislation, including an exception scheme allowing cultural heritage institutions to utilize orphan works to pursue their public interest missions following the Orphan Works Directive approach. The legislation provisions relating to orphan works aim to enhance legal clarity concerning digitizing and distributing works covered by copyright whose rightsholders cannot be found or identified. In particular, they intend to bridge the gap between the cultural institutions' public-interest mission to disseminate works with the broader public and the need to protect the rights holders. However, the provisions of the copyright and related rights law regarding orphan works, are limited to specific types of works, forms of use, and certain beneficial organizations. Moreover as the Directive is partly transposed in the national legislation, it may hinder the effective use of orphan works. As we argued, the law does not provide several categories of works (like phonograms). Furthermore, the Albanian terminology used in several provisions may lead to misinterpretation. In this realm, we suggest legal text revisions for a more accurate alignment with the Orphan Work Directive to provide a better safeguard for creators and copyright holders and establish an environment that promotes respect for and protection of these rights.

Nonetheless, it is essential to note that this sector is still evolving, necessitating a thorough understanding, respect, and effective enforcement of these rights. In this context, a comprehensive analysis should be done, and practical statistics should be collected from the beneficiary institutions about the actual presence of orphan works in their collections and their use. Furthermore, efforts should be directed toward putting the copyright database into practical effect and offering accurate information to various participants in the copyright and related rights sectors. Moreover, awareness campaigns should be launched, focusing on all participants in the industry, notably writers and right holders. While providing them with awareness about their rights, they must also comprehend their rights to terminate orphan work status and seek compensation without violating legal rules.

Finally, although Law 35/2016 (as modified) is relatively new and in accordance with international agreements and EU standards, further improvement is required. This involves transposing directives such as the DSM, which includes further measures to make the mass digitalization of cultural heritage activities easier to achieve, and the new SatCab Directive. Both of which provide improved protection, particularly on online platforms.

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