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**Orphan Works and Diligent Search Procedures in
Europe**

**Rosario Arquero-Avilés
Professor
Complutense University of Madrid
Spain**

**Brenda Siso-Calvo
PhD Student
Complutense University of Madrid
Spain**

**Gonzalo Marco-Cuenca
Associate Professor
Complutense University of Madrid
Spain**

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Athens Institute for Education and Research
8 Valaoritou Street, Kolonaki, 10671 Athens, Greece
Tel: + 30 210 3634210 Fax: + 30 210 3634209 Email: info@atiner.gr URL:
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Orphan Works and Diligent Search Procedures in Europe

Rosario Arquero-Avilés

Brenda Siso-Calvo

Gonzalo Marco-Cuenca

Abstract

In the context of Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain uses of orphan works, a prospecting study is presented on the current status of the declaration of orphan works in Europe, focusing on aspects directly related to the "Library and Information Science" domain. The work is within the framework of a competitive research and development project financed by the Ministry of Economy, Industry and Competitiveness of the Government of Spain, on the digitisation of documentary heritage to develop methodological proposals to facilitate access to and the use of orphan works. The study has focused on finding and analysing good practices related to diligent search procedures which have to be carried out before a work can be declared orphan in the countries of the European Union in which Directive 2012/28/EU has been implemented. From the methodological point of view, the results of the study are based on the collection and analysis of information grouped in the following blocks: current state of implementation of Directive 2012/28/EU, analysis of the different beneficiaries and competent authorities in each country, procedures related to processes for the declaration of orphan works, location of national sources of information for diligent search, detection of the existence of national databases for the registration of orphan works and their relation to the EUIPO (European Union Intellectual Property Office) database.

Keywords: Directive 2012/28/EU; orphan works; diligent search; Europe; Library and Information Science.

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Introduction: Context and Objectives of Research

The digitisation of European cultural heritage was first identified as a matter of interest by the European Commission (1999) in the e-Europe initiative. Since then the European Union has published various documents which can be considered fundamental for the development of the digitisation of documentary heritage. They include the following: European Commission communication (2005) “*i2010: digital libraries*”, the European Council’s (2006) conclusions on digitisation and on-line access to cultural material and digital preservation and the European Commission Recommendation (2006a) on “*Digitisation and online accessibility of cultural material and digital preservation*”. As well as the documents mentioned, Checa (2017) also refers to certain significant milestones directly linked to the subject of our study (orphan works) including the following: the creation in 2006 of the High Level Expert Group on Digital Libraries (European Commission, 2006b), incorporating the Copyright Subgroup, which approved a report on digital preservation, orphan works and out-of-print works (Digital Libraries High Level Expert Group, 2008), the signing of the Memorandum on Diligent Search Guidelines for Orphan Works (2008), the approval in 2008 of the Green Paper on “Copyright in the Knowledge Economy” (which includes a consultation on the need to adopt measures regarding orphan works), the proposed Directive of the European Parliament and Council presented on 24 May 2011 on certain authorised uses of orphan works and the European Economic and Social Committee Opinion of 21 September 2011 in favour of the Commission’s proposal to encourage the development of digital libraries such as European (European Commission, 2011).

All these milestones were a prelude to the approval of European Directive 2012/28/EU on the authorised use of orphan works (European Parliament, 2012), which establishes a legal framework to facilitate the digitisation and dissemination of certain works protected by copyright or similar rights, not in the public domain, but for which it has not been possible by any means to identify or locate the rightholders. These are, therefore, works whose copyright owners have not been identified or who, even if they have, cannot be located, although a diligent search¹ for them has been conducted. The Directive also guarantees a regulatory framework for cross-border access to and use of orphan works, this also being applicable to cinematographic or audiovisual works, phonograms and works published as books, journals, newspapers, magazines or other printed material forming part of collections in educational centres, museums, libraries, archives as well as film or audio heritage institutions. It also includes cinematographic or audiovisual works and phonograms produced by public broadcasters, up to and including 31 December 2002, which are contained in their archives.

¹ In this context, diligent search is understood to refer to a search procedure whose aim is to identify and locate the copyright holder(s) of a possible orphan work. This procedure is compulsory and must be carried out before an item is declared an orphan work (Arquero y Marco, 2016).

European Directive 2012/28/EU on the authorised use of orphan works (European Parliament, 2012) is part of the *Europe 2020* strategy (European Commission, 2010a), which aims to promote smart, sustainable and inclusive growth in the European Union, improving the competitiveness of the Union's member countries, maintaining its market-based social economy and using resources much more efficiently. In this respect, orphan works are of special interest for the 2020 strategy and are the subject of one of its flagship initiatives, the development of a *Digital Agenda for Europe* (European Commission, 2010b), which aims to promote the free circulation of knowledge and innovation, creating a single, dynamic digital market for intellectual property.

For this scenario to be possible, Section 6 of Article 3 in European Directive 2012/28/EU promotes the adoption by member states of the measures necessary to ensure that information about orphan works is recorded in a single publicly accessible online database established and managed by the *Office for Harmonization in the Internal Market (OHMI)*. As the Directive makes clear, the database is meant to play a major role in preventing and eliminating possible breaches of copyright, especially in cases where there are changes to the status of a work as orphan.

The OHMI, currently the *European Union Intellectual Property Office (EUIPO)*², published an orphan works database in October 2014. According to the EUIPO “*There are millions of orphan works in libraries, museums, public broadcasters' archives and other public institutions in the EU. The British Library, for example, which holds over 150 million items, estimates that up to 40% of creative works in its collections could be orphan works.*” (EUIPO, 2014)³.

Similarly, a report prepared for the European Commission on the assessment of the situation of orphan works and the cost of authorising rights (Vuopala, 2010) indicates the existence of a large number of orphan works in Europe, with a conservative estimate of 3 million books subject to copyright which could be orphan works, accounting for 13% of books with copyright in the European Union. With regard to other types of material, the report estimates the existence of about 225,000 cinematographic works that could be considered orphan works and mentions the results of a survey of museums in the United Kingdom, in which it was observed that the rightholders of 17 million photographs (90% of the photographs in the country's museums) were unknown or could not be traced.

For all these reasons, the *Orphan Works Database* may come to play a very significant role as a central European repository for information on orphan works, as the database aims to compile all the information on this type of work

² The EUIPO, known as the OHMI until 23 March 2016, was created as a decentralised agency of the European Union to provide protection regarding intellectual property for innovative companies and agents in the European Union and other countries (EUIPO, 2016). The EUIPO is based in Alicante (Spain). For further information please see: <https://euipo.europa.eu/>

³ This information, which is also referred to by the EUIPO, comes from the study of digitisation carried out for the British Library, which states in its conclusions that 43% of the works (31% of the sample analysed) were orphan works (Stratton, 2011).

held by European cultural institutions, providing a single, harmonised, transparent point of access for the declaration of orphan works.

In the context of these developments, we have proposed and conducted a study, carried out within the framework of the Orphan Works and Diligent Search Observatory. The Observatory was set up with the mission of providing guidelines and standard procedures for Spanish documentary institutions which propose to undertake diligent searches with a view to identifying orphan works. The Observatory's members are from different Spanish universities (Complutense University of Madrid, Carlos III University, Madrid, University of Extremadura and University of Zaragoza) and leading documentary institutions in Spain, such as the National Film Library, Radio Televisión Española, the Complutense University of Madrid Library and the Rey Juan Carlos University Library, while it has the support of institutions such as the Biblioteca Nacional (Digital Library and Information Systems Department), the Spanish Film Library (Conservation and Restoration Centre), Joaquín Leguina Regional Library and the Community of Madrid's Subdirectorate-General for Books and Libraries.

The aims of our research were as follows:

- To characterise and identify the features related to orphan works directly linked to the field of Library and Information Science, i.e. those related to the existence of guidelines and procedures for the proposal, conduct and recording of diligent search operations in databases as defined by the 28-member states considered in our study.
- To analyse the current situation in the declaration of orphan works by the 28-member states, based on the use of public information recorded in the European Union Intellectual Property Office database of orphan works.

Methodology

Our research is based on the following key elements:

Scope (population studied): the 28-member countries of the European Union: Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom.

Chronology: The research summarised in this paper was carried out between 15 December 2016 and 7 June 2017.

Sources of information: The primary sources of information for our analysis were each member state's official bulletin, journal or gazette, the website of the respective national authority and the EUIPO database.

Extracting and compiling data: Based on the above primary sources, we searched for and recorded information for our analysis using a database with records divided into seven sections, as detailed below:

Section 1. Country

The following variables were entered: the name of the country and the date on which it joined the European Union.

Section 2. Transposition of Directive 2012/28/EU of the European Parliament and Council of 25 October 2012, on certain authorised uses of orphan works

This section details the information sources considered key documentary evidence of the process of transposing the Directive in the 28 countries analysed, i.e. the legal provisions dealing with orphan works enacted in each country and the law governing copyright in each case.

The variables used to describe these sources of information were as follows: the full title of the decree/legal provision transposing Directive 2012/28/EU in the legal framework of each country, the date of publication and date on which it came into force, the full reference of its publication in the official bulletin, journal or gazette of each country, a link to the complete text in electronic form (if available) and the title of the law governing copyright in each member state and its date of publication.

Section 3. Beneficiaries and Categories of Works/Materials

Beneficiary organisations or institutions (many of them dealing with documentary material) are understood to be those such as publicly accessible libraries, educational establishments and museums, as well as archives, film or audio heritage institutions and public-service broadcasting organisations, established in the member states, as referred to in Article 1 of Directive 2012/28/EU, which could make use of orphan works in certain cases when pursuing objectives related to their public interest missions. The categories of works/materials are the types of document or categories of work (printed works, such as books or periodicals, cinematographic and audiovisual works, phonograms, works inserted or included in another work or a sound recording, such as images or photographs) to which Article 1.2 of Directive 2012/28/EU applies.

In this section an analysis was carried out of the sources we have referred to in Section 2 with a view to characterising each case (each member state analysed) and proceeding to identify and specifically name the types of beneficiary institution in each member state and the categories of works and materials considered to be orphan works, included in the scope of application of the provisions implementing legislation on orphan works in each country studied.

Section 4. National Authority

We define the national authority as the organisation designated by each member country for the transmission of information received from beneficiary organisations or institutions about works identified as orphan works as a result of diligent searches, with a view to entering such information in the EUIPO database. We identified the official website of each national authority, which, together with the sources referred to in Section 2, was a primary source of information for our analysis. As a result of our search, we have provided the

following variables for each member state: the national authority, a link to the official website, the complete postal address and e-mail address or contact page and, if applicable, the organisation, institution or unit to which it reports.

Section 5. Diligent Search

As mentioned in the introduction to our study, by diligent search we understand a procedure intended to identify and locate the rightholder(s) of a possible orphan work, bearing in mind that this process is compulsory and must be carried out before a work is classified as orphan. Consequently, this section focuses on providing information to determine the degree of implementation of different elements related to the standards and guidelines defined in each member state for the planning and conduct of diligent searches before works are declared to be orphans. We tried to identify good practice in procedures to deal with diligent searches in the member states analysed, beyond the existence of general guidelines that merely constitute a reproduction or translation of the contents of the Directive. Our research into the existence of flow charts to track diligent searches and links to the same when available proved especially significant. Another element of special importance, given its relevance to Library and Information Science, was our study of lists of information sources with a view to assessing the degree to which they correspond to the list of source types included in the Appendix to the Directive. If such lists existed for the country, we could then detect the specific level of contributions from each member state. In these cases, we verified whether there was a link to such lists of sources, whether the lists included a classification of works/materials by category, what data were included for the bibliographical description and identification of the sources and whether a sequence or order of priority was established for consulting sources of information to undertake a diligent search. These variables were entered in each record if the information was found.

Section 6. National Databases of Orphan Works

Under this section, we attempted to identify member states which have developed or are in the process of developing their own database to record or monitor diligent searches for orphan works, regardless of whether the member state in question entered the end results of such diligent searches in the EUIPO database. In those cases, where we have detected the de facto existence of a database or a project for the creation of a database to record searches and/or an administrative register of licences granted for the use of orphan works in a particular member state, this has been recorded, together with its name, the link to access it, and the institution or organisation responsible for it.

Section 7. Registration Data for Orphan Works

The information referred to in the previous sections has been completed with data reflecting the current situation in the declaration of orphan works by member states, taking the public information recorded in the EUIPO orphan works database as a starting point. The following variables are given in this

section: the date on which the EUIPO orphan works database was consulted, the number of records declared by the member state analysed on the date in the previous field, the beneficiary institutions and organisations in the member state, the number of records declared by the member state according to item type, and the number of records declared by beneficiaries. All these data were combined to produce a comparative study of the current situation in those member states that have declared orphan works in the EUIPO database.

Results and Discussion

We have obtained substantial documentary evidence allowing us to track the transposition of the Directive in the 28-member states of the EU studied.

We determined the existence of elements related to diligent searches about orphan works, such as the formulation of guidelines and procedures for the proposal, conduct and recording of diligent searches defined by the 28-member states studied, together with the status of the declaration of orphan works by member states in the EUIPO database.

With regard to the formulation of guidelines and procedures, we can infer the existence of two categories of member state:

The first group have detailed procedures for diligent searches regarding orphan works, generally linked to the country's own scheme of regulation, developed parallel to the model specified in the Directive (this is the case of the United Kingdom, which has the most detailed regulations, and Hungary).

The second group comprises the remaining member states, where general guidelines have been defined, described briefly in the provisions implementing the Directive and/or in the website of the country's national authority and basically constituting a literal reproduction/translation of Article 3 of European Directive 2012/28/EU of the European Parliament and Council, of 25 October 2012, on certain authorised uses of orphan works (European Parliament, 2012).

Another aspect of special interest is the existence of satisfactory lists of sources for each category of work which, according to European Directive 2012/28/EU, must be drawn up by each member state including "at least the relevant sources listed in the Annex" (Article 3.2 of the Directive). In our research, we have determined the existence of two different situations:

Firstly, we have identified a group of member states which, based on the guidelines and the list of source types in the Annex to the Directive, have contributed additional sources of information to facilitate the process of diligent search. This is the case of the following members: Belgium, Croatia, Cyprus, the Czech Republic, Estonia, France, Germany, Greece, Hungary, Italy, Luxembourg, the Netherlands, Portugal and the United Kingdom. We should point out, however, that the situation in this first group is not uniform, as we find widely differing levels of implementation, both regarding the number of sources defined and the specific data provided for the description and identification of these sources. We have thus been able to detect cases ranging from member states in which the list of specific sources involves the addition

of a very small number of the country's own sources (this is the case of Spain, for example, which adds as a specific reference source the General Register of Intellectual Property in the Annex of sources to be consulted as part of the procedure for diligent search specified in Royal Decree 224/2016 of 27 May (Real Decreto, 2016), which implements legislation regarding orphan works), to countries in which a very extensive list of sources has been specified, by type, including the title and a link to access each of the sources (this is the case of Italy, for example).

We then find a second group (the rest of those analysed) in which the list of sources is limited to a reproduction of the aforementioned Annex to the Directive and where there has not been any additional contribution to the identification of sources during the period covered by our study.

Regarding the de facto existence of a database or a project for the creation of a database to record searches and/or an administrative register of licences granted for the use of orphan works in a particular member state, we have also identified two cases:

Member states in which we have only detected a reference to the register declaring orphan works in the EUIPO database.

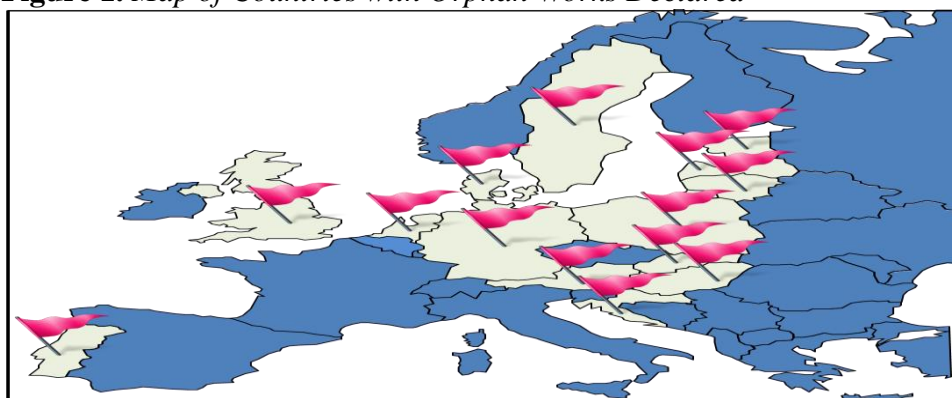
Member states in which it is not only compulsory to record a declaration of orphan works in the EUIPO database but where there is also a reference (either in the implementation of provisions regarding orphan works or in the website of the relevant national authority) to the existence and/or development of a database in the country to record orphan works (this is the case in Belgium, Italy, Lithuania, the Netherlands, Romania, Sweden and the United Kingdom) or to the existence of an administrative register for the granting of licences (this is the case of the regulatory scheme applied in Hungary).

To the above results, we have to add conclusions drawn from the additional information provided in Section 7 of the record described in "Methodology", obtained by making use of public information recorded in the EUIPO orphan works database during the period of our study (15 December 2016 to 7 June 2017).

The most significant results obtained from this comparative study have allowed us to develop a picture of the current situation regarding the declaration of orphan works by member states.

We can thus see that there are 14-member states with orphan works declared: Austria, Croatia, Denmark, Estonia, Germany, Hungary, Latvia, Lithuania, the Netherlands, Poland, Portugal, Slovakia, Sweden, and the United Kingdom (Image 1) with a total of 5,142 records of orphan works declared, according to the following breakdown (Table 1; Image 2). Poland is the country with the largest number of works declared (3,188), accounting for 62% of the total. The Netherlands occupies second place with 801 (15%) Hungary is third with 525 (10%), the United Kingdom is fourth with 405 (8%), Germany is fifth with 91 (2%), Lithuania (45) and Denmark (36) are sixth and seventh respectively with 1%, while the remaining countries total 51 (1%).

Figure 1. *Map of Countries with Orphan Works Declared*



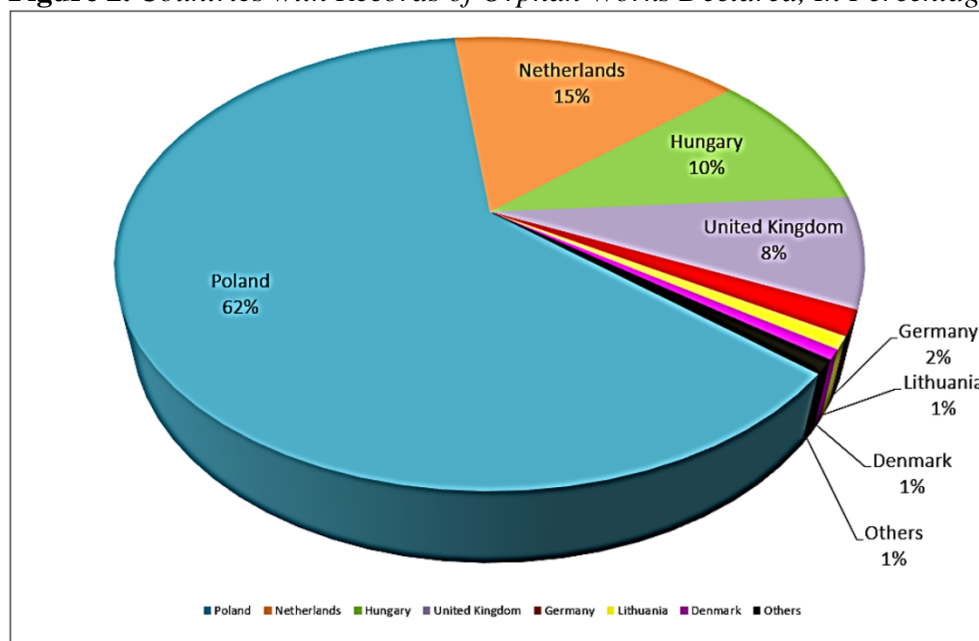
Source: Own figures based on information from the EUIPO orphan works database (Accessed: 07/06/2017).

Table 1. *Country Ranking Of Records Of Orphan Works Declared*

Ranking	Country	Orphan works declared
1	Poland	3,188
2	Netherlands	801
3	Hungary	525
4	United Kingdom	405
5	Germany	91
6	Lithuania	45
7	Denmark	36
8	Estonia	25
9	Portugal	12
10	Austria	7
11	Slovakia	4
12	Croatia	1
13	Latvia	1
14	Sweden	1
15	Belgium	0
16	Bulgaria	0
17	Cyprus	0
18	Slovenia	0
19	Spain	0
20	Finland	0
21	France	0
22	Greece	0
23	Ireland	0
24	Italy	0
25	Luxembourg	0
26	Malta	0
27	Czech Republic	0
28	Romania	0
Overall total		5,142

Source: Own figures based on information from the EUIPO orphan works database (Accessed: 07/06/2017).

Figure 2. Countries with Records of Orphan Works Declared, In Percentages



Source: Own figures based on information from the EUIPO orphan works database (Accessed: 07/06/2017).

By type, the ranking of orphan works is as follows: the largest number corresponds to printed works, with 3,710 records, the majority of them from Poland, followed by the 1,082 records for audio-visual and cinematographic items, most of which have been recorded as part of the FORWARD project and by the Eye Film Institute in the Netherlands. Third place is occupied by phonograms (340 items), mostly from Hungary and in particular via the gramofononline.hu project. Finally, there are much smaller numbers of musical scores, photographs and illustrations.

Table 3. Orphan Works Declared By Type

Type of item	Orphan works declared
Printed works	3,710
Audiovisual and/or cinematographic	1,082
Phonograms	340
Other	10
Total	5,142

Source: Own figures based on information from the EUIPO orphan works database (Accessed: 07/06/2017).

34 organisations in 14 countries have declared orphan works in the EUIPO database (Table 4). Poland is the country with the largest number of public records of orphan works declared, with 3,188 records of printed works entered by the University of Warsaw Faculty of Polish Studies (Wydział Polonistyki Uniwersytetu Warszawskiego). The Eye Film Institute in the Netherlands accounts for 780 records, the second largest number, while the Hungarian National Film

Library has 342. The British Film Institute is in fourth place with 217 records, Hungary's Széchényi National Library is fifth with 183 records, and the British Library is sixth with 174. The total for other organisations is 258.

Table 4. Ranking of Organisations With Orphan Works Declared

Rank	Organisation	Records	Country
1	Wydział Polonistyki Uniwersytet Warszawski	3.188	Poland
2	Eye Film Institute	780	Netherlands
3	Magyar Nemzeti Digitális Archívum és Filmintézet Hungarian National Digital Archives and Film Institute	342	Hungary
4	BRITISH FILM INSTITUTE	217	United Kingdom
5	National Széchényi Library of Hungary	183	Hungary
6	The British Library	174	United Kingdom
7	Technische Informationsbibliothek	39	Germany
8	Danish Film Institute	36	Denmark
9	Institut für Ost- und Südosteuropaforschung (Bibliothek)	29	Germany
10	Martynas Mažvydas National Library of Lithuania	29	Lithuania
11	National Library of Estonia	25	Estonia
12	Koninklijke Bibliotheek	21	Netherlands
13	Biblioteca Nacional de Portugal	12	Portugal
14	Universitätsbibliothek der Humboldt-Universität zu Berlin	11	Germany
15	King's College, Cambridge	7	United Kingdom
16	University of Innsbruck	7	Austria
17	CREATE	5	United Kingdom
18	Dominikánský knižný inštitút	4	Slovakia
19	Gabrielė Petkevičaitė-Bitė Panevėžys County Public Library	4	Lithuania
20	„Aušros“ muziejus	4	Lithuania
21	Deutsche Nationalbibliothek	3	Germany
22	Stiftung Haus der Geschichte der Bundesrepublik Deutschland	3	Germany
23	National M. K. Čiurlionis Museum of Art	3	Lithuania
24	Deutsche Kinemathek - Museum für Film und Fernsehen	3	Germany
25	Rokiškio rajono savivaldybės Juozo Keliuočio viešoji biblioteka	2	Lithuania
26	Povilas Visinskis Siauliai County Library	2	Lithuania
27	Deutsches Filminstitut - DIF e.V.	2	Germany
28	Northern Ireland Screen	1	United Kingdom
29	National Library of Latvia	1	Latvia
30	Roman Roads Research Association	1	United Kingdom
31	Bauhaus-Archiv Berlin	1	Germany
32	National and University Library in Zagreb	1	Croatia
33	Swedish National Heritage Board	1	Sweden
34	Kaunas county public library	1	Lithuania
Total general		5.142	

Source: Own figures based on information from the EUIPO orphan works database (Accessed: 07/06/2017).

Conclusions

Our study has allowed us to identify good practice in various aspects related to proposals for and the conduct of search procedures for orphan works in the 28-member states analysed.

Regarding the formulation of diligent search procedures, the cases of the United Kingdom and Hungary stand out for the way in which such procedures are linked to the country's own regulatory schemes. We can thus see that there is still much work to be done to develop such procedures so that they conform fully to the model specified in European Directive 2012/28/EU.

Concerning the existence of lists of sources as an element of special importance when beginning a diligent search, we can point to advanced practices in those member states which, basing their work on the list of source types included in the Annex to the Directive, have identified and contributed additional sources of information specific to their own country (although, as we have pointed out in the Results section, levels of implementation vary).

In terms of the existence of the country's own database or a project for creating one and/or an administrative register for the granting of licences for the use of orphan works, the following countries are at the forefront: Belgium, Italy, Lithuania, the Netherlands, the United Kingdom, Romania and Sweden.

This conclusion, together with those detailed above, suggests the existence of a "two-speed Europe" in the development of initiatives, guidelines and procedures related to proposals for and the conduct of diligent searches in connection with orphan works.

The situation of the orphan works declared in the EUIPO database has changed recently⁴, following the inclusion between May and June 2017 of 3,188 records from Poland. We can thus see that there is a direct relationship between the development of digitisation projects that reveal the existence of orphan works and the increased number of declarations associated with such projects.

Finally, as significant aspects of this comparative study based on the public information in the EUIPO orphan works database, we would mention the following:

Of the 28-member states examined in the second part of our study, only 14 have declared orphan works in the EUIPO database.

The types of item accounting for the largest numbers of declarations are (in this order) printed works, audiovisual and/or cinematographic items and phonograms.

The organisation declaring the largest number of orphan works is the University of Warsaw Faculty of Polish Studies (Wydział Polonistyki Uniwersytet Warszawski), followed by the Eye Film Institute in the Netherlands. The Hungarian National Film Library has the third largest number and the British Film Institute is in fourth place. Hungary's Széchényi National Library is fifth and the British National Library is sixth.

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⁴ A comparison of these figures and those given by Arquero and Marco (2016) shows how the situation has evolved.

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