

# **Assessment of the Orphan works issue and Costs for Rights Clearance**

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# 1. Executive summary

## *1. Purpose and Methodology*

In the context of the Digital Libraries initiative, the Commission has pointed out that the digitisation and online accessibility of cultural content require appropriate measures when dealing with orphan works i.e. material still in-copyright but whose right holders cannot be identified or located.

The first and fundamental challenge when dealing with the issue of orphan works is to quantify the extent of the problem, i.e. to establish reliable figures on the amount of orphan works within collections of cultural institutions in Europe. The reason for this is that digitisation projects carried out by cultural institutions have so far only been concentrated on public domain materials.

As a complement to the existing sources for information and in order to remedy the lack of data on the number of orphan works, the Commission carried out a fact finding exercise in November-December 2009.

This mission consisted of gathering facts and concrete data available from actual digitisation projects which would help to illustrate the scope of the problem of orphan works as well as the time and effort involved in rights clearance in different cultural institutions (e.g. libraries, archives, museums) as experienced within the different sectors (text, music/sound, audiovisual, visual/photography). The Commission sent requests for information to 17 representatives of cultural institutions that had previously been involved with digitisation of cultural material. The request was also distributed via mailing lists of associations such as LIBER (Association of European Research Libraries) and CENL (Foundation Conference of European National Librarians). 22 responses were altogether received.

## *2. Findings*

A large number of digitisation projects has been analysed for this report, and the findings indicate clearly that there are considerable amounts of orphan works in collections of cultural institutions around Europe. This assessment should not, however, be considered as a comprehensive analysis of the situation concerning orphan works because extensive research has not been carried out in this topic.

The figures in the report only illustrate the dimension of the problem without implying any particular policy decisions. However, the report is meant to provide solid and reliable raw material for a fully-fledged impact assessment of the issue of orphan works aimed at considering concrete solutions to remedy the issue in the digital environment, as announced in the Commission Communication on Copyright in the Knowledge Economy.

### **a. HIGH NUMBER OF ORPHAN WORKS**

Orphan works form a significant part of any digitisation project and the survey shows high percentages of orphan works for almost all categories of works, especially among photographs, and audiovisual materials.

- A **conservative estimate** of the number of orphan books as a percentage of in-copyright books across Europe puts the number at **3 million orphan books** (13 % of the total number of in-copyright books). The older the books the higher the percentage of orphan works.
- When handling requests for using older film material, **film archives from across Europe categorized after a search for right holders 129 000 film works as orphan** which could therefore not be used. Works that can be presumed to be orphan without actually searching for the right holders augments the figure to approximately 225 000 film works.
- A digitisation project in the UK found that **95 % of newspapers from before 1912 are orphan**. Also, a survey amongst museums in the UK found that the rights holders of 17 million photographs (that is **90% of the total collections of photographs** of the museums) could not be traced.

Vast numbers of items in the collections of the consulted cultural institutions have uncertain copyright status. Even when institutions are intentionally focusing their digitisation efforts on what they believe is public domain material, a lot of effort to establish the exact copyright status is required. Only material from as far as pre-1870 may relatively safely be assumed to be in the public domain, but it turns out that the oldest book still in copyright in the UK dates back to 1859.

- In the **collections of the Danish National Library** there are **around 160 000 works from the period 1880-1930 with uncertain copyright status**.

#### b. HIGH TRANSACTION COSTS

Important information was collected also about the experiences as well as concrete costs involved in the rights clearance processes of cultural institutions. This information shows that rights clearance is costly and cumbersome for these institutions. In fact, the amount of time and effort to obtain licenses to digitise works has overwhelmed many of them. Data shows that the older the work and the less economic value it has, the more it costs to clear rights to use it.

- The National Archive in the UK spent **£35 000** and 2 years on clearing copyright for the digitisation and **online accessibility of 1 114 old wills**. In **less than half of the cases the project managed to find the rights holders** and to obtain permission to make them available online.
- A university library in Austria **digitised 200 000 doctoral dissertations** from 1925 – 1988 based on a limitation. **The dissertations cannot be made accessible online** because of the disproportionately high **transaction costs involved** in clearing the rights for them. The cost of digitisation was 150 000 euro. The library estimates that the transaction cost would be **20 – 50 times higher than cost of digitisation**.

Nevertheless in some cases also the **digitisation of more recent material** can entail high transaction costs.

- A UK project digitising posters from the 1980's **spent £ 70 000 in transaction costs** for clearing the rights for just **1 400 posters**.
- As part of a **major digitisation project of (audio-) visual material** in the Netherlands (Beelden voor de Toekomst), the total cost of handling rights clearance for 500 000 photographs and 5000 films has been estimated to be **625 000 € - 3 people will be clearing rights for 4 years** in this project.

The cost of clearing rights may amount to several times the cost of digitising the material. As cultural institutions normally do not have the resources or expertise to conduct rights clearance for digitisation projects, specific funding is always necessary, in particular for large scale digitisation projects. In the absence of efficient sources of rights information to works (such as book rights registries), it can take from several months to several years to clear permissions for only a limited numbers of works. Sometimes it is impossible to clear the rights at all.

- In a Dutch project dealing with **the digitisation of 1 000 Dutch history handbooks**, **only 50 books were cleared in a period of 5 months**. At this speed, clearing the rights for the whole set of handbooks would take more than 8 years.

These examples show that there is a need for a more efficient way to clear rights, and a solution for the orphan works issue. The experiences of institutions indicate that a title by title rights clearance can be prohibitively costly and complex, especially in case of large scale digitisation projects.

## 2. Introduction

In the context of the digital libraries initiative, the Commission has pointed out that the digitisation and online accessibility of cultural content require appropriate measures when dealing with orphan works *i.e.* material still in-copyright but whose right holders cannot be identified or located. In the recently released Communications "Europeana – next steps"<sup>1</sup> and "Copyright in the knowledge economy"<sup>2</sup> the Commission indicates that it will examine the orphan works problem in an impact assessment, which will explore a variety of approaches to facilitate the digitisation and dissemination of such works.

It is hard to establish reliable figures on the amount of orphan works, because at the moment there is no easy way to establish that a work is orphan. Hence, very little systematic research has been done and hardly any empirical data has been available about problems related to orphan works. The orphan works issue has been extensively analysed by the Copyright Subgroup within the High Level Expert Group on Digital Libraries, appointed by the Commission in 2006. A consolidated Final Report was published in December 2009.

Therefore, as a complement to the past work and in order to gather as much empirical evidence as possible on orphan works in terms of 1) the dimension of the problem and 2) of the time and resources involved in efforts for clearing rights, the Commission carried out a fact finding mission in December 2009. A request for information was sent to 17 representatives of cultural institutions who had previously been involved with digitisation of cultural materials (such as British Library, Institut National de l'Audiovisuel and Deutsche Nationalbibliothek). The letter was also distributed via mailing lists of library organisations such as the LIBER and CENL. Attached to this assessment is a list of the recipients.

All together the Commission received 22 responses. Several of them included comprehensive tables and statistics about key issues reflecting the above questions and a description of concrete situations. Considering the difficulties in demonstrating the dimension of orphan works in concrete figures within digitisation projects around Europe, the received materials have been useful to illustrate the difficulties faced by cultural institutions when trying to clear the rights involved in the digitisation and online accessibility of protected content in their collections, particularly orphan works.

This analysis gathers the experiences of this fact finding mission as well as the figures included in other governmental fact finding initiatives, such as the US Report on Orphan Works and the Gower's Review, both of 2006, and the more recent Digital Britain, © The way ahead and In from the Cold reports, all of 2009. The results of the ACE Study (European Film Archives association) of 2010 about the amount of orphan works in film archives across Europe is also reflected in this paper.

The status of national initiatives regarding solutions to the orphan works issue in various Member States was examined in February 2008<sup>3</sup>. Some EU countries had already taken steps

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<sup>1</sup> COM(2009) 440 final, of 28.08.2009.

<sup>2</sup> COM(2009) 532 final, of 19.10.2009.

<sup>3</sup> Agnieszka Vetulani: The Problem of Orphan Works in the EU, An overview of legislative solutions and main actions in this field, European Commission, DG Information Society, February 2008.

to develop a specific solution for the orphan works issue. The most advanced in this area are Denmark and Hungary. Denmark had chosen to strengthen their system of extended collective licences widely applied also in the rest of the Nordic countries, while Hungary opted for a centrally-granted non-exclusive licence solution. In addition, several Member States such as the UK, Germany and France are considering solutions varying from limitations to the exclusive rights of the authors, to the use of mandatory collective licensing, or so called extended collective licensing.

In order to solve this issue in a coherent way for all the EU, steps to propose legislation in this field need to be taken urgently.

### 3. Background

#### 3.1 Digitisation and online accessibility subject to copyright legislation

In order to understand the scope of the orphan works issue, a brief description of the rights involved in the reproduction and making available of copyrighted content, both at national and EU level, will help in realising the complexity of the problems faced by cultural institutions when trying to clear the rights involved and why these problems hinder digitisation and wider use of their collections in the online environment.

The issue of digitisation and online accessibility of copyright protected content is indeed a complex issue to tackle, particularly at the EU level.

This is mainly because there are considerable differences in the national copyright legislations of Member States in spite of the quite extensive *acquis communautaire* in this area, based on seven copyright directives. Obtaining permission to use a large number of protected works is normally a complicated process often requiring expertise.

Sometimes the core activities of institutions, also called "cultural institutions" or "memory institutions" have been facilitated through exceptions and limitations to the exclusive rights of authors. Such limitations to the authors' exclusive rights are limited to those listed in article 5 of the directive harmonising certain aspects of copyright and related rights in the information society (2001/29/EC), hereinafter also referred to as 'the directive'.

The Commission Green Paper on Copyright in the Knowledge Economy<sup>4</sup> has found wide discrepancies in the extent to which exceptions and limitations allowed by the directive are actually transposed in Member States.

Based on information in the IVIR study<sup>5</sup> about the transposition and effects of the directive, it can be concluded that only some 18 out of 25 Member States have provided for limitations or exceptions in their laws about the activities of publicly accessible libraries, educational establishments or museums, or by archives, and in respect of "specific acts of reproduction",

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<sup>4</sup> COM(2008) 466, of 16.07.2008.

<sup>5</sup> Study on the implementation and effect in Member States' Laws of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, Institute for Information Law, University of Amsterdam, The Netherlands, February 2007.

"which are for not for direct or indirect economic or commercial advantage", as prescribed by article 5.2 (c).

As the directive does not allow wider uses in the context of online delivery, most Member States' provisions concern specific acts of reproduction mainly for preservation purposes. Only a small part of the Member States have also allowed for limitations in respect of the reproduction and making available of works in the collections of cultural institutions within the premises of the institutions for the purpose of research or private study, as provided for by article 5.3 (n). Hence, there are Member States without any limitations for the benefit of cultural institutions and Member States who have interpreted and transposed the directive to its fullest extent.

From the libraries point of view, the directive has not been considered carefully enough, mainly because all accessibility to the collections, from outside the institution or by making works available on the internet, would not be permitted without the consent of the right holders. And, even when such limitations would normally apply to the activities of cultural institutions, they may be overridden by right holders in contracts or licensing terms.

A solution for simple and effective rights clearance for digitisation and online accessibility of orphan works, especially to cover the mass scale digitisation of library collections is yet to be found at EU level.

Cultural institutions are treated comparably well in the Nordic countries, where they have in their laws, on top of extensive limitations, also a system that streamlines and facilitates rights clearance by cultural institutions, whereby the orphan works problem is considerably reduced. This system is called the extended collective licensing system and it is specifically mentioned in preamble 18 of the directive as an arrangement concerning the management of rights.

Since these licensing systems are especially designed for the licensing of specific types of works for specified uses on a mass scale they minimise the transactions costs involved in rights clearance especially compared to individual rights clearance. The agreements negotiated between the parties are extended through legislation to cover also the use of works by right holders which are not represented by the collecting society, including orphan works, giving legal certainty to the user against any claims by right holders that might later turn up. Similar results are possible to obtain also through other types of mandatory collective licensing.

In the Norwegian project "The Bookshelf" digitisation was carried out partly on the basis of a limitation and an extended collective licensing scheme. The project contained works from 1890-1899 holding also works which are possibly orphan. In this case, the digitisation of the items was carried out based on a copyright limitation and additional permissions required for online uses, were obtained based on the extended collective licensing scheme. This case is presented below, in the section about transaction costs.

### **Assessing copyright status in digitisation projects**

In order to establish whether materials to be digitised are orphan, it is first necessary to establish whether they are protected by copyright or a related right. In order to establish this you normally need to be able to identify the author or another right holder.

Depending on the material, this may not be an easy task. Identification depends largely on the type of work. For books it is easier than for newspapers.

On the other hand, identification of right holders and hence establishing copyright protection can be particularly difficult for photographs.

The term of protection is relevant in establishing copyright protection. If more than 70 years have passed from the death of the [last surviving] author, the issue of orphan works is not relevant, because use of the work is not subject to permission, because it is in the public domain.

Extensive copyright status research is typically necessary for works from both the second half of the XIX<sup>th</sup> and the XX<sup>th</sup> century, because all these works are potentially in copyright and hardly any of them may safely be assumed not to be. Such materials are for the moment subject to several digitisation projects. Only works from before 1870s are normally assumed to be out-of-copyright, although the oldest work still in copyright in the UK dates back from 1859 and unpublished works which lie in the collections of archives in the UK are protected until 2039, unless a longer term applies under the normal rule (70 years after the death of the author).

Copyright protection is subject to the originality requirement. Only works that are considered to be original creations of the author are granted copyright protection. However, some Member States consider also other subject matter protected for shorter terms by a related or a *sui generis* right. Such protected subject matter are the non-original photographs.

Therefore, in the case of photographs, the need to obtain permission from the photographer or the right holders may depend on whether a photograph is considered to be original (author's own intellectual creation) and thus protected by copyright or just a simple photograph and, in this latter case, whether the photograph has been taken more than up to 50 years ago (depending on applicable law). It is usually very difficult for an institution to make this judgement, unless the date of photograph is available. Because the term of protection for non-original photographs, where applicable, is not harmonised at the EU-level, the term may vary from one Member State to another.

The act of "publishing" is from a copyright point of view considered to be one of the most relevant forms of exploitation of the exclusive right of the author. The author decides if and when a work shall be made available to the public. Therefore, works which have never been published with the consent of the author are particularly hard to deal with. They may not be used without the consent of the author, not even on the basis of a limitation, as most limitations and exceptions, and statutory or mandatory licensing systems usually concern only works which have been published or otherwise made available with the consent of the author.

It can be also very difficult for institutions to establish whether ordinary written materials, (such as personal letters, agreements, minutes, wills) found everywhere in the collections of archives are copyright protected or not. In the absence of clear carve out provisions of specific types of works not protected, or "free" of copyright, as usually provided for laws and decrees and other official documents, permission must be obtained from the right holder of the works.

Such materials might also be affected by legislation on privacy or data protection, which is not copyright related. Usually institutions have adopted different ways to tackle such

questions, for example by handing out documents revealing private issues or domestic relationships only after these persons have been dead for a number of years.

Considering the above, it seems that cultural institutions digitising works are more likely to assume that a work is protected than that it is not, just to avoid any possible claims from right holders and the negative implications such claims might bring.

This approach, however, requires a lot of work and resources, and causes frustration, since much of the time and effort spent will bring only a few licenses or that these licenses might not even be necessary to obtain at all. Furthermore, it is also likely that the right holder would not have objected to the use or asked for remuneration, especially where the materials are made available for educational, non-commercial purposes.

### **The term "orphan work"**

In order to present the results of the fact finding mission about the dimension of the orphan works issue, the term "orphan work" needs to be defined. The term is not harmonised at EU-level and only very few national legislations include a provision concerning orphan works.

The examples from different countries and from different sectors show that the level of orphan works also depends on how these works have been defined in a particular example, and on other circumstances as described above.

During the year 2008, a total of 27 institutions have signed a Memorandum of Understanding on due diligence guidelines for the search of right holders regarding orphan works. The guidelines cover all sectors, namely text, audiovisual, music/sound and visual/photography. The guidelines are not binding.

Only a few institutions referred in their responses to the guidelines. Only one wanted them to be made binding. In the examples of this fact finding mission none of the institutions indicated that they had followed the guidelines in their searches for right holders, which may be due to the fact that the searches often took place before the guidelines were adopted.

For the Copyright Subgroup of the High Level Expert Group on Digital Libraries, a work was considered "orphan" *with respect to right holders whose permission is required to use it and who can either not be identified or located based on diligent search on the basis of due diligence guidelines. This search must be both in good faith (subjectively) and reasonable in light of the right holder (objectively).* Here the term "work" covers also other subject matter such as performers' and producers' rights and other so called 'related rights'. As long as the terms are not properly defined there will be differences in the meaning of concepts such as "orphan work".

*For the purpose of this analysis there are two types of orphan works:*

#### ***A. Works whose right holders are unidentified or unclear***

The author needs to be identified in order to establish copyright status of the work. The right holder remains unidentified in cases where there is none or insufficient information about the author or another right holder. This means that for most works of the XXth century and many

of the XIXth century if the author cannot be identified, it can only be presumed that the work is protected, as no death date can be established.

The holder of copyright remains unclear in situations where the original right holder (author) is identified but there is uncertainty about the current right holder of the work. This is particularly true for books, because when a book has been out of print for a long time the rights for publishing might have based on the contract or law reverted back to the author, who might be dead. It is also likely that publishing contracts have never covered the digital use of the work.

Even though the provisions about term of protection have been harmonised on EU-level for the smooth operation of the internal market, sometimes provisions about the term of protection for older works make the establishing of copyright protection exceptionally difficult. For example the revisionary copyright provisions of the 1911 Copyright Act have caused vast amounts of works to have an uncertain copyright status in the UK. From a practical point of view this is equivalent to a work being "orphan", because the actual holder of copyright may not be accurately identified to obtain permission. The UK law contains also a specific provision giving unpublished materials copyright until 2039, unless the term would be longer counted 70 years from the death of the author.

#### ***B. Works whose right holders cannot be traced or located***

If the holder of copyright is identified and clear it may still be difficult to locate and reach the person, or company in order to obtain licence, because information about their whereabouts is not available or has become outdated. When the author has died, it is a question to identify and find the possibly multiple legal heirs to him.

When the rights have been assigned to a company, the company might have gone out of business, or gone bankrupt without clear assignment of assets. Even if the holders (authors' heirs, publishers) are located, some of them, especially if the works are no longer commercially available, might not be willing or able to respond to requests in a reasonable time frame.

#### **About the transaction costs involved in clearing of rights**

Transaction costs, *i.e.* the time and effort to clear the rights for a specific item and to obtain licence to use it, depend on many things.

As mentioned above, a considerable amount of costs and efforts is required by the institutions when attempting to establish whether or not permission for works and/or other subject matter needs to be obtained. This work is normally preceded by analysis whether some limitations or exceptions in national laws, usually either quite vaguely or very narrowly defined, apply to these particular institutions, and to which extent.

Such rights clearing activities include:

- identifying right holders of protected items
- verifying copyright and related rights status of the item, taking account of different layers of rights

- verifying copyright status for embedded works
- protection/ other implications of unpublished items

When these facts have been verified, further actions must be undertaken, in order to obtain the licence required, such as:

- locating right holders of protected items
- contacting right holders for obtaining permission
- negotiating about the extent and conditions for the use
- appropriately documenting all such work

Transaction costs of rights clearance do not contain the related costs for the digitisation of the material, nor for the development and maintenance of the infrastructure for providing access to the content or the cost of paying remuneration to right holders, which is tackled separately below.

This level of rights clearance is usually not part of the normal activities of publicly funded institutions (except perhaps public service broadcasting companies).

Transaction costs for published materials are reduced considerably if rights holder information is available within registries of collecting societies and publishers or databases kept by libraries.

If the right holder has assigned the right to a collecting society or a publisher, the licence may be obtained from the society or the publisher. This reduces costs even further. However, only few collecting societies have been able to grant licences on behalf of the authors for the uses envisaged by cultural institutions. Normally such licences have been available only on the music or visual sectors. Some reproduction rights organisations (RROs) have been developing rights clearance services for the purpose of distance education etc. and lately also for library uses.

Registries of collecting societies do not usually include right holder information for grey literature such as materials published by non-professional publishers, like corporate or governmental publications or unpublished materials such as amateur photographs, music or video content created by non-professionals. In these cases, the clearing of rights involve complex and time consuming processes of identifying authors, and their heirs, and locating them.

Obtaining licences to use such works is particularly cumbersome, whereas the author might not even be aware of being considered an author of the work nor intended the work for commercial purposes and most likely would not object to making it accessible for education purposes.

The number of orphan works tends to increase with the complexity of the rights clearance process. Even if all right holders could eventually be traced, the time and effort required is seldom available for the cultural institutions. Such actions would also not be in balance with the end result, because these institutions are based on non-commercial incentives and also the materials to be cleared are for the most part older or unique materials, no longer commercially or economically especially valuable, other than from an historical or educational point of view.

The level of transaction costs for rights clearance also depends on the extent of the project, *i.e.* whether the project is a small scale or a large scale digitisation project.

As demonstrated above, rights clearance requires copyright expertise, especially in large scale digitisation projects. Many institutions have not been able to do such extensive rights clearance in the absence of funding. Funding has, on the other hand, been dependant on sufficient legal certainty for the use of works to be digitised and what can be done with such digitised materials (books, films, photographs). Some institutions have, instead of carrying out digitisation projects themselves, offered an on-demand digitisation service for researchers. In these cases, it is the user who pays for the digitisation. It depends, however, on the type of the material, whether the digitisation fee covers any actual transaction costs of the rights clearance. Usually this is not the case.

Some institutions might, depending on their status in national laws, have some expertise in rights clearance, but most institutions do not have sufficient understanding of copyright issues and feel that they are very difficult to address.

Those institutions that have been granted specific funding for digitisation have sometimes been forced to take on board copyright specialists of their own, taking into consideration the difficulty in interpreting and applying copyright legislation in the digital environment. Copyright expertise is needed also for the drawing up of permission letters or for the negotiation of conditions for use of works.

However, as the examples below clearly show, the overall number of successfully cleared works (5-25 %) per digitisation project is so low that, for the moment, it is evident that too much public money is spent on clearing rights for works that either turn out to be orphan or which might not or no longer be protected at all.

The information retrieved through the work of the Commission also indicates that on top of the apparent numbers with orphan works within these institutions, the levels of transaction costs show that there is presently no efficient way available for these institutions to clear rights on a massive scale.

#### ***About paying remuneration for orphan works***

The ways in which the rights to different types of materials are managed vary considerably. Paying remuneration is a normal part of any rights clearance procedure, especially for books and other published materials (journals, newspapers, magazines, sheet music, maps etc.). Right-holders are entitled to receive compensation for the use of their works, especially when the use is commercial.

In the experience of institutions, the issue of paying remuneration has generally arisen only when dealing with copyright organisations, publishers of books and newspapers or collective management organisations representing such right holders. Sometimes payments have been negotiated between the user and the organisation for the "warranty" against claims from rights holders.

However, when the institutions have contacted the authors directly most of them have not claimed any remuneration "because they value the fact that their works would be accessible for teaching and educational purposes". Surprisingly, there is evidence of claims for payment

of remuneration in one instance that concerned the digitisation of very old wills in the "Moving Here" website project explained further below.

Cultural institutions feel that no remuneration should be paid up front for the use of orphan works, but only in the case that the right holder later turns up or that the need to pay remuneration would be subject to negotiations, or to the take down of the material. This is due to the fact that institutions that are funded by public money usually are not equipped to pay for the rights the same way that commercial users would.

Another reason is ideological: why should remuneration be paid when the right holders to the specific works cannot be identified or reached and when the money collected would not in fact benefit them personally, but only the collecting society and/or other authors through grants etc. awarded by these societies. It could be seen as indirect funding of creative activity by governments, as normally funding for digitisation is provided from public funds.

Institutions also feel that paying remuneration is not reasonable, when the use of the material is non-commercial and the material itself very old and no longer being exploited (out of print). The institutions see the digitisation of such materials as a possible new stream of revenue for the right holders, by allowing re-use of the works for various other purposes.

Sometimes funding may also be provided from private funds. There are already some examples of public-private partnerships among digitisation projects.

Here special attention needs to be paid on minimizing the emergence of new layers of protection of digitised works in particular those that are already (and should remain) in the public domain.

## **4. Results of the fact finding mission 2009**

### ***4.1 General comments***

The initial comments in the replies reveal that cultural institutions have for a long time wanted to take advantage of new technology in their internal as well as their external activities. They have adopted policies about trying to make items in their collections accessible to the public in ways that people expect them to in today's world. They believe that this is the expectation also of their funders as well as of other library professionals.

Past digitisation projects have concentrated on materials safely in the public domain, being several hundred years old. Now, more contemporary materials are increasingly being considered for digitisation by cultural institutions, which triggers the need to clear the rights for in-copyright works and thus to assess the problem of those that cannot be cleared due to their orphan status.

They want to digitise materials in their collections themselves, or to work with others to digitise the materials. They want to be able to use the material with the permission of the right holders, and if the right holders cannot be identified or located, through an efficient system that provides sufficient legal certainty to the institution against claims from right holders that later turn up.

Naturally, even in those Member States where extended collective licensing schemes are in place, orphan works do exist. In the context of libraries or museums, the use of such works is covered by the extended effect statutorily awarded to certain collective licensing agreements. The law provides also particular methods for non-represented right holders to claim remuneration for the use based on the agreements. However, as the extended collective licensing is normally not available to all types of cultural institutions, nor to all types of uses, it is clear that a solution for the orphan works is necessary also in these Member States.

The National Library of the Netherlands has indicated clearly that a title by title search is not feasible for large scale digitisation projects which normally include thousands of right holders to possibly hundreds of thousands works. This fact is evident when looking at the efforts of these institutions, even within smaller digitisation projects. The library states that although it has concluded collective agreements with right holders, the use of potential orphan works by the library remains infringing, because this collective solution lacks a legal basis. The Scandinavian extended collective licensing regime is seen as a promising solution to the problem.

The library advocates that the EU should introduce a Europe-wide, mandatory legal solution for both orphan works and mass-scale digitisation, which does not require a diligent search on a per-work basis.

#### ***4.2 Levels of orphan works in the different sectors***

As digitisation projects carried out by cultural institutions have until recently only been concentrated on clearly public domain materials, little experience and empirical information about orphan works have been available. Information about the issue has not been easy to obtain.

However, a large number of digitisation projects has been analysed for this report. The analysis indicates clearly that there are considerable amounts of orphan works in collections of cultural institutions. The results of this study also confirm the previously made estimates about the dimension of the orphan works problem. But because no extensive research has been carried out, the information presented below should not be considered to be the comprehensive analysis of the situation.

Concrete figures are presented below for specific cases. The examples are categorized on a sector by sector basis. Some of the examples come from the US, but the UK, the Netherlands and also Austria have been actively participating in the efforts of assessing the amount of orphan works in Europe.

The fact that European copyright legislation does not provide a common definition of an orphan work or what due diligent search requires makes comparability of these figures difficult, even within the same category of works from the same country.

The figures in the examples may neither be presented on a country by country basis, as circumstances in respect of legal status and other circumstances in the countries may vary considerably. For the same reason it is very difficult to extrapolate the figures to show numbers of orphan works for the EU as a whole, apart from one overall estimate about the level of orphan books in Europe.

Most figures in this analysis arise from specific examples submitted by cultural institutions. These figures, especially concerning smaller digitisation projects may be used as evidence as such or be extrapolated to the rest of the collections concerning similar types of materials in order to highlight the dimension of the problem for the institution or for the type of material in question.

## ***TEXT***

Within the European text sector covering books, newspapers, magazines, journals, sheet music, maps etc. there are some examples to establish the level of orphan works. The examples show that digitisation of newspapers and books are carried out by institutions around Europe. We have received information that the problem of orphan works in this sector is worse than expected, especially as concerns grey and unpublished materials.

Some very interesting and useful experiences relating to the mass scale digitisation of books can also be drawn from the US Report on Orphan works of 2006. One of these examples is presented in the context of transaction costs below, the Million Book study project.

Copyright protected materials are only now being digitised on a large scale in Europe. The extent of the problem of orphan works differs however from one category of works to another. The levels of orphan works, as sometimes shown in smaller sample projects, depend on what type of materials the institutions mostly hold in their collections.

Specific problems relating to published materials in the text sector are, for example, the fact that one title might correspond to several works, each to be cleared, for example in the case of embedded illustrations in literary works.

Unpublished and grey materials are interesting for researchers but very hard to clear, as right holders are typically not represented by any collecting societies and no professional publishers are involved.

## ***Books***

Books<sup>6</sup> are usually published by a professional publisher and the rights for digitisation and online access lie usually with the publisher. However, as the examples show, there are nonetheless great difficulties in clearing rights for old materials, particularly from the end of XIX<sup>th</sup> and the beginning of the XX<sup>th</sup> century.

In the absence of an easy way to establish copyright status such as a historical cut of date (like in the US), cultural institutions wanting to digitise their works are left with very time-consuming research about the death dates of authors for each item (possibly containing several works) separately.

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<sup>6</sup> Books are here defined as fiction or non-fiction print materials published by professional publishing companies, as compared to grey materials that lie between published and unpublished materials, usually published by a private person, a company or the government.

From the experience of the institutions it is very difficult and time consuming to identify current right holders to **books that are out-of-print** *i.e.* no longer commercially available.

Publishers have very different styles in recording what they have published in previous years. Sometimes the entire right to publish the book has reverted to the author when the work has gone out-of-print. It is also possible that "digital rights" to the book may still lie with the authors, because this form of use has not been included in the publishing contracts from before the digital age. A major part of books published a long time ago are in fact out of print.

**Example 7: Amount of Out-of-print works, US**

According to the American Library Annual and Book Trade Almanac for 1872-1957 it is estimated that only 2% of all works protected by copyright are commercially available.

For example in 1930, over 10.000 books were published in the USA, but in 2001 all but 174 were out of print.

Source: The Economic Structure of Intellectual property Law, Posner R. and Landes W. 2003

Sometimes it is very difficult to establish the status of each published work and who has the rights to the work. The publisher who is contacted to grant permission to a work might consider a book to be still commercially available, only because they have it in their catalogue, without copies being actually available for the public, and decline permission to digitise the work on this basis.

Publishers have also sometimes, instead of actually establishing its ownership to the work, just referred to the fact that the rights might have been reverted back to the author due to the fact that the editions have been sold out. Some institutions suspect that out-of-print books are just not considered economically interesting for the publishers who are therefore not willing to spend time in searching in their own registries (still in manual form) for the purpose of establishing ownership to such works.

In the US, Lavoie and Dempsey<sup>7</sup> have estimated, based on information on published books after 1923, that there are 1 million books or manifestations still in-copyright, without clear right holders, in the USA.

The British legal deposit library (the Bodleian Library in Oxford University) has presented figures on: (1) how many books published in the UK have live authors, (2) authors to works that are dead but which are still in-copyright and (3) authors to works that have died more than 70 years ago, which are in the public domain. According to the library, it is possible to estimate these figures with reasonable level of confidence. The estimate of published books in the collections of research libraries covers the period 1850 - 2009.

According to the figures in the example, there are approximately 600 000 orphan works in the UK. Based on the same key factors extrapolated to the rest of the Member States, the number of orphan books in EU would be about 3 million.

<sup>7</sup> Beyond 1923. Characteristics of Potentially In-Copyright Print Books in Library Collections, Brian Lavoie and Lorcan Dempsey, OCLC Online Computer Library Center, D-Lib Magazine November/December 2009.

#### **Example 11: Estimation of the amount of orphan books in Europe**

We know from the records of legal deposit at the Bodleian Library that roughly 4,756,746 books were published in the UK from 1900 until now.

The following estimation is based on the assumption that the **total of UK orphan books is equivalent to the total of UK books published in 1950 or earlier** which are still in copyright and whose authors are dead. It is also assumed that **authors of works are alive when the work is published**, and that they will die at a rate of 2% a year over the subsequent 50 year period. The **rate of orphan works would increase gradually and be around 627 688 books in the UK alone in 2009**. This is about 13% of the total (roughly 4,756,746) of UK books in copyright.

According to the further estimate made in the submission the number of orphan books in all **27 EU Member States taken together would be around 4 million**. This estimate has been made by assuming that Germany, Spain, France and Italy have similar publishing outputs to the UK, and that Austria, Ireland, The Netherlands, Poland, Portugal and Denmark, Finland and Sweden put together have outputs about 1/5 of the UK, and that the rest of the Member States put up for 1/10 of the publishing output of UK. To avoid any over-estimation the number may be reduced to **3 million books**. Bearing in mind that all EU countries have the same term of copyright, the proportion of orphans could be assumed to be the same for Europe-27, *i.e.* 13 % in lack of better evidence.

Source: Society of College, National and University Libraries, SCONUL, January 2010

Some estimates have also been made about the amounts of orphan books in the Google Book Settlement. Depending on various sources, Google has digitised 7 to 10 million titles for its Book Search Project. Based on this information, and in the absence of more specific estimations, it has been concluded that "millions" of them must be orphan.

Some have wanted to challenge this claim, by saying that even if it would be true that there are millions of orphan titles, it is the amount of orphan works that count, not the amount of titles being orphan. This is because titles are multiple of works, as titles may include the same work in multiple manifestations, like paperback, library version, large print, re-prints, etc.

Therefore, based on various key facts the number of orphan works within the US Google Book Search settlement is estimated to be circa 25 % of the books published in the US after 1923 *i.e.* 600 000 books.<sup>8</sup>

Regardless of the way works are counted, whether millions of orphan works or hundreds of thousands of orphan books, there is still a huge number of works for which permission cannot be obtained in accordance with the copyright system. This is very counterproductive to society and also for the right holders themselves.

The information shows that there is also a significant problem in finding right holders to books that are not commercially available, but important from the public interest and educational point of view.

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<sup>8</sup>An estimate (580,388) made by Michael Cairns, Persondata BLOG, December 2009.

Systematic data about the amount of orphan works are available in an example from University and Regional Library of Tyrol in Austria where 502 books were subject for digitisation in the context of a digitization service of books, mainly from the beginning of XX<sup>th</sup> century until 1988.

The institution deemed books published before 1900 to be in the public domain without further search. Usually it has been considered that only works that date from before 1870s can be safely assumed to be out-of-copyright. Had they not been deemed to be in the public domain, many of them would most certainly have turned out to be orphan.

**Example 8. On demand digitisation service, AT**

From a total of 502 books, 195 books published before 1900 were assumed to be in the public domain, and digitised. From 135 books published between 1901 and 1939, around 30% were established to be in the public domain through searches in various databases.

Right holders could not be found in about 95% of the remaining items (= 57% of the books between 1901-1939) and were declared orphan, whereas the right holder's heirs were found for obtaining permission in less than 5%.

From 172 books published between 1940 and 1988, about 75 % were eventually considered orphan. However, when the right holders were identified (about 25 %) and contacted, the permission was granted without any remuneration requests.

Source: University and Regional Library of Tyrol, Austria, December 2009

This example also shows that from the requests concerning in-copyright books between 1900 and 1939, the right holders could not be reached in about 95 % of the cases. For the remaining requests, concerning books published between 1940 and 1988, the right holders were contacted in 25 % of the cases, leaving the majority (75 %) untraceable, and therefore orphan.

On the other hand almost 100% of the contacted right holders that replied were willing to grant permission to use the work, without demanding remuneration. This is a positive sign especially considering that the permission covered also the right to keep the digitised work in the library's collections for subsequent requests of the same book, and also to make the book accessible online.

When works are digitised at the request of the user, the time available for searching for right holders is crucial. In this Austrian case the time for receiving a positive response from the right holder varied from 1 to 3 months, which was too slow for the researchers needing the materials for their research. Sometimes, when already 3-4 months had passed without any response, the library had to cease the search for permission, and considered the works orphan.

The amount of orphan books in this example is striking: 70 % of titles from the XX<sup>th</sup> century requested for digitisation were not cleared with the time and effort available. This example shows that in the absence of efficient instruments for diligent search a great majority of request concerning works from the XX<sup>th</sup> century cannot be served within the time and resources available for such services.

The cultural institutions sometimes also dealt with requests for digitisation of works from the more recent years like the 1990s, particularly when the works were out of print. The problem encountered is the same as indicated above from experiences in the context of the Million Book study project. According to the library, authors and smaller publishers are so unsure about their rights situation, that if a publisher is contacted to get the permission for the digitisation of an out-of-print book, the publisher may indicate that the digital rights are with the author. And later if the author is found (which is not always the case), s/he then indicates that the publisher needs to be contacted, as the rights are most likely with the publisher. Thus, the biggest problem for out of print works is the effort of communication and the uncertainty about the presumable right holders.

Carrying out the rights clearance for a large scale project in such circumstances on a title by title basis would amount to high levels of orphan works and costs that are not in balance with the commercial value of the works, neither with their potential value for researchers. The transaction costs for books out-of-print are normally higher than the cost of digitisation<sup>9</sup> itself.

This project would have benefited greatly from the availability of coherent and updated registries of right holders to books. Such efficient registries in digital form normally lie with collective management organisations and national (legal deposit) libraries. Such registries of collecting societies do not necessarily contain detailed information about right holders of embedded works in these books, such as illustrations.

It has been suggested that legal deposit libraries should start entering death dates of authors in their registries in order to maintain information about a work at least as regards the establishing of copyright status of the work.

The ARROW project<sup>10</sup> aims to address the fundamental issue of rights information management, in order to underpin the European Digital Libraries. It is working on developing better databases on right holders of books. The system aims to offer tools for discovering right holders and models and procedures for clearing rights on current orphan and out of print works. A rights clearance study modelled on the Million Book study project (see below) covering 140 books, ten from each decade from 1870 to 2010, will be carried out in 2010.

### *Newspapers*

In the case of newspapers the situation differs considerably. Rights to works contained in newspapers are managed differently than for books. Right holders of newspapers are not easy to find.

The possibilities to locate individual right holders of newspapers' freelancers (photographers, journalists, illustrators, others) depend on if and to what extent they are credited in the newspaper. Some journalists have assigned their rights to the proprietor of the newspaper, or are represented by collecting societies when others are not.

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<sup>9</sup> Some figures about the cost of digitisation for different types of material are available, and will be described below in connection with transaction costs for rights clearance.

<sup>10</sup> Accessible Registries of Rights Information for Orphan Works towards Europeana, available at: <http://www.arrow-net.eu/>

Photojournalists have normally not been credited in newspapers which makes it very difficult, if not impossible to locate them at a later stage. As content in newspapers are otherwise very poorly credited, only with initials and pseudonyms, the prospect of finding all of them and clearing rights with them is not a promising job for the institutions. They cannot do the job without specific funding, and even then, most of the funding goes to rights clearance, excluding any remuneration that would be payable, especially for newer content, and exceeding the costs of digitisation itself.

There is an ongoing project in the Netherlands' national library "The Dutch Daily Newspaper project" covering the digitisation of vast amounts of copyright protected materials from 1618 -1995. Other large scale digitisation projects are carried out by the National Archive of Netherlands and Netherlands Institute for Sound and Vision.

The number of copyright protected pages in this project is 2.500.000 when all materials from the beginning of the XVIII<sup>th</sup> century include 8.000.000 pages. The manner in which the rights clearance has been carried out is revealing.

First, the publishing companies for all newspaper items are searched on a title by title basis. The Netherlands have a specific provision in their law making the newspaper publisher the right holder of all newspaper items created by persons employed by that newspaper company under an employment contract. This is the case also in the UK, where the newspaper publishers are the most likely holders of copyright. This is far from clear in most other Member States, where all rights are born with the authors, and transferred to the employer only by contract. Once a publisher is found, the negotiations start in order to sign a licence agreement for digitisation and publication on the Internet.

Also the Dutch collective management organisations are contacted to clear individual rights of the freelancer authors to articles in the newspapers. In this project 130 000€ is envisaged as remuneration for the necessary digital rights to be obtained both for represented freelancers and via warranty for non-members, so that potential orphans are also covered. The agreement, covering for the use of orphans through warranty, does not give legal certainty against claims from non represented right holders.

#### **Example 9. The Dutch Daily Newspaper, NL**

This work has been done on a title by title basis in co-operation with publishers and collecting societies that represent individual authors like freelancers of the newspapers. The library has had one person working on the rights in the project for 4 years nearly full time. The cost is around 268 000 euro.

The library has decided to pay 130.000 euro for the remuneration of these rights and as a warranty for non-members, so that potential orphan works are also covered.

Source: Koninklijke Bibliotheek, National Library of Netherlands, January 2010

Based on experiences of this project the national library clearly prefers a legally backed up Europe-wide mandatory legal solution for both orphan works and mass scale digitisation. Their preference would be an extended collective licensing which would not require a diligent search on a per-work basis.

This is because conducting such searches on this basis is simply not feasible for cultural institutions, as once more shown in the example below on history hand books in Dutch language.

**Example 10: Dutch history handbooks, NL**

In this example concerning Dutch history handbooks, the library had a dedicated individual working nearly full time with tasks ranging from searching, contacting and negotiating with the right holders, to waiting for the signed contracts to be returned.

Within this project **only 50 books** were cleared during a period of **5 months**.

Clearing 10 books a month, less than 2,5 a week **is clearly not sufficient speed for mass scale digitisation projects** that could entail hundreds of thousands of items. **At this speed, clearing the rights** for the whole set of handbooks would take more than **8 years**.

Source: Koninklijke Bibliotheek, NL, December 2009

***Grey and unpublished materials***

The problem of orphan works is considerably higher for so called grey materials *i.e.* materials that are published by individuals, a company, government etc. These materials lie between published and unpublished materials and the right holders are usually not represented by a collective management organisation. The fact that permission to use these materials would have to be obtained on a title-by-title basis was recognized as too complicated considering the economic value of the materials.

The economic value is usually even less for many kinds of unpublished materials. The provisions for obtaining a licence remain, however, the same. Manuscripts (with possibly even the title page missing) exist often in a single rare copy, which make them especially interesting for researchers. The time and effort it would take to clear the rights is seldom in balance with the advantage of online accessibility for users.

For materials like dissertations, rights clearance for online accessibility will most likely never be carried out on title-by-title basis. In an Austrian example the Library of University of Innsbruck has digitised more than 200 000 works of this type based on a specific limitation in the law, without obtaining permission from the right holders.

The limitation in the law allows copies to be made of this type of materials, but does not cover the making available of the material online, which is a serious problem.

The right holders to these dissertations or theses are not necessarily unknown but they are just very hard to locate for obtaining permission, because they have usually not published anything else in their lives and are seldom represented by a collecting society.

To obtain permissions from individual authors to make these works accessible would be disproportionately bothersome for all practical reasons, if at all possible.

#### **Example 12: German language dissertations, AT**

During 2, 5 years the Library of University of Innsbruck have digitised 216 000 dissertations published between 1925 and 1988. Digitisation was carried out based on a specific limitation in the law. The limitation does not cover other uses, such as online accessibility. The dissertations, coming mostly from Germany, make about 15-20% of all books and periodicals in the collections in Innsbruck.

It is one of the largest collections of digitised works in Austria but it **cannot be made available to the public** on the internet without authorization. The cost of digitisation was 150 000 euro. Efforts to locate right holders have not been taken or foreseen by the library, because of the disproportionate transaction costs likely to be involved. The library estimated that the costs would be **20 – 50 times the cost of digitisation**.

Source: University of Innsbruck Library, Austria, December 2009

The library suggests that these scientific treasures should be available online in the "days of open access and internet" especially because they already are available in many libraries on location.

There are several good reasons why materials like these should be freely available on the internet: The use is considered specific and it is non commercial by nature. The economic value of the dissertations is limited. The digitisation of such dissertations would be a major benefit for all students, professors and researchers of the university. The online accessibility would also serve the rest of the German speaking world as well as the whole world. It would increase the availability of scientific information within the EU.

In the absence of a solution for the online accessibility to them, these dissertations are most likely to remain inside the institution for only a limited use.

#### **Conclusions**

As a conclusion it can be said that in the text sector the amount of orphan works is high. It might, based on estimations made, climb up to 3 million books (ca 13 % of all books) throughout European libraries.

Most examples concern books and newspapers from the beginning of the XX<sup>th</sup> century. Concrete facts retrieved from the on demand digitisation case, show that, rates of orphan works in particular for books from 1901-1939 was in some cases almost close to 60%. The right holder's heirs were found for obtaining permission in less than 5 % concerning works from the first 30 years of the XX<sup>th</sup> century.

However, figures show that also newer books from before 1988 were to large parts orphan. The number of successfully cleared works augmented gradually for works published after 1940, being still only 25 % of the total. Usually they were books that were out of print and the right holders to the digital rights to the works were uncertain.

This is a very modest figure considering that this material was not particularly old and that the time awarded for successful rights clearance *i.e.* 3-4 months per item, should have been sufficient.

With such success rates and given that mass scale digitisation for books is increasingly envisaged and carried out also covering newer materials in this sector, a specific solution to enable mass scale projects for digitisation and EU-wide online accessibility in the field is definitely needed.

## **AUDIOVISUAL**

Digitising audiovisual material is time-consuming and expensive. Clearing rights for a specific use in the field is often complex because numerous people are generally involved with making any single audiovisual work. As rights to audiovisual works are usually grouped with the producer, the role of collective management organisations is less, although, important for these works.

In general, film archives have not had the financial or personnel capacity to clear rights. Archives have hence not been able to fund any large scale digitisation projects. One of the surveyed institutions mentioned that EU funding for the MOVIE digitisation project had been refused some time ago.

The question of orphan works within this field has, however, been acknowledged as a problem for a long time. The experiences relating to rights clearance and identification of orphan works in these institutions refer mainly to situations where an internal or external request for a work has been made and not to collections as such. Especially documentary or film producers are interested in using materials of film and TV archives.

In this field orphan works are often films from the early years of film production from the 1920's and pre- and post Second World War, mostly non-fiction ones. However, also commercially produced films from the same period, by companies that have gone out of business or that have transferred their rights to another entity as well as various amateur productions, could well be orphan works.

### **Films**

#### **Example 13: Orphan films in European Film archives**

The ACE (Association des Cinémathèques Européennes) survey from March 2010 shows that 1/3 of films (1.064.000) held in European film archives are films with unknown rights.

**21%** , *i.e.* 225 000 works of the works in European film archives are presumed to be orphan. The sector considers this as a huge figure. According to ACE, the orphan works problems affects both feature films (30%) and non-fiction (34%). Around 65.000 feature films in European film archives are orphans.

Source: Association des Cinémathèques Européennes (ACE), March 2010

In each case the archives have had to decide how to react to requests and what to do with materials when right holders cannot be identified and located. Policies have been developed in various institutions also depending on national legislation. Re-use of such materials would be very beneficial, not only for educational but also for commercial purposes. It is estimated that 45% of the presumed orphan works (around 100.000 works) in film archives could be available via the European Film Gateway (<http://www.europeanfilmgateway.eu>) and Europeana if a pragmatic or a legal solution for rights clearing would exist.

A digitisation project partly carried out by Film Institute Netherlands covers 500 000 photographs and 5 000 hours of film. The rate of works considered orphan is estimated to be around 20 %.

**Example 13a: "Images for the future", NL**

The Film Institute Netherlands has estimated that at this stage the amount of cleared works are 3,5 % of the total included in the project. The figure is established by extrapolating the results of rights clearing of a representative sample of items to the whole of the project.

Already based on the experiences in the beginning of the project it is possible to extrapolate that some 20 % of the items in the project are orphan. The project will run until 2014 and final numbers will be available at the end of the project.

Source: Association des Cinémathèques Européennes (ACE), December 2009

***TV and radio programmes***

The University of California in Los Angeles (UCLA) Film and Television Archives assessed in 2006 that around 10% of 25 000 films and television programs in the collections of the UCLA, *i.e.* 2 500 were orphan.

A film or a TV program can become orphan for a variety of reasons: the original production company may have gone out of business, partnerships have dissolved without clear division of assets, owners may have moved without leaving forwarding addresses, died without their heirs knowledge about the materials, or the work may have been out of distribution for so long that it is impossible to identify or locate the current right holders.

There are also hundreds of feature films titles that were not produced by major studios which have since gone out of business, leaving ownership uncertain or unknown. Production elements that have been donated to UCLA may be of research interest, or be used as stock footage. However, use of the material without permission could expose the archive to costly liability claims.

**Example 14: Fiction films and TV programmes in archives, US**

Approximately 10% out of 25 000 fiction films and television programs in the collections of UCLA contain orphan works whose ownership status is uncertain or unknown.

UCLA's percentage of orphan films and programs is high considering that these works are produced by commercial entertainment industry and not by non-professionals. Other archives that specialize in collecting non-theatrical media such as home movies and videos, educational films and documentaries, independent films, avant-garde and industrial films with much less economical value hold a much higher percentage of orphans.

Source: UCLA Film and Television Archives submission, The US Report on Orphan Works, January 2006

The situation of orphan works in the audiovisual field is best demonstrated by some considerable digitisation projects concerning archived TV and radio programmes within public service broadcasting companies.

Many public service broadcasters who are (depending on national legislation) either entirely or partly funded by public money have been envisaging massive digitisation of the cultural heritage contained in their archived program content and making it available online, as a part of their public service tasks.

Even though the broadcasting companies own rights to the programmes they do not necessarily have rights to the content of the programmes, or those rights do not include online accessibility. Additional licences need to be obtained for many of the programs in order to digitise them and make them accessible online. Right holders are very hard to locate for obtaining permission and one single missing right holder is sufficient to block the digitisation or further use of the entire programme.

Therefore it is not necessarily the fact that the right holders cannot be identified that is the reason why works are not digitised and made available on line in this field. It is simply because all the right holders cannot be located for obtaining permission because identifying and subsequently acquiring permission from possibly dozens or hundreds of right holders per work in many cases may be impossible after a long time has passed.

The BBC has also wanted to make its archived programs available online. The archives of the BBC include at this point 4 million physical items for TV and radio. This is equivalent to 600 000 hours of TV content and about 350 000 hours of radio content, all together entailing around one million hours of material.

**Example 15: The BBC, UK**

The BBC estimates that around 1 million hours of programmes sits in its archives, because the right holders to the materials are unknown and can't be cleared for a specific use.

Source: Digital Britain report, 2009

In the absence of a solution to facilitate the rights clearance, such as an extended collective licence, thousands of hours of historically interesting materials may not be accessed.<sup>11</sup>

These institutions have already established relationships with collecting societies which make negotiating and rights clearance much easier compared with libraries and other cultural institutions who normally lack sufficient expertise to solve all problems relating to copyright clearance.

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<sup>11</sup> According to information available on the BBC website it has been decided that if after a detailed process the right holders cannot be identified or located the programmes might anyway be used and some money would be put aside in case the right holders appear and claim for remuneration, i.e. a "await claim" procedure.

## ***Conclusions***

The amount of orphan works is generally high in the audiovisual field, especially for materials of less economical value such as home movies, videos, educational films and documentaries, independent films, avant-garde and industrial films. But even within commercial productions the number of orphan works can be almost 10 % for films and TV programmes.

In 2005 the ACE Study "Rights issue" identified 50.000 orphan works across its member archives in Europe. The update of this study from 2010 gives the best and most concrete example of the dimension of orphan works in this sector and establishes that at least 129 000 film works may be categorized as orphan. It also indicates that the numbers are increasing by each year that goes by. It is evident that several thousands of requests, and hence several thousands of re-uses of audiovisual materials in this field cannot not be served because it was not possible to locate the right holders to clear the rights.

Mass scale digitisation of these materials has not yet been envisaged, except by the public service broadcasters. The fact that millions of hours of programs cannot be used in a way that offers legal certainty, and which would clearly benefit the society from a public interest and research point-of-view is regrettable. It shows that a specific solution would be necessary.

Digitisation of these materials is important from a preservation point of view, not only because film material is gradually decaying, but also because a lot of this forgotten material could in this way be put back onto the cultural map, and be re-used for all kinds of purposes. Archives could serve the whole world instead of just clients entering their premises. This would eventually benefit also the right holders themselves.

## ***VISUAL/PHOTOGRAPHY***

The information received by the Commission shows that there are millions of items in this field with orphan works status in collections around Europe. Most of these items are photographs, whose right holders cannot be identified.

The authors for works of fine art are mostly known and traceable and possibly also represented by authors' or collective management organisations, which is why the problem of orphan works is likely to be more limited in the field of fine art. However, the British © The way ahead report<sup>12</sup> indicates, that there could be some 25 million orphan works also across UK museums and galleries which are typical holders of fine art.

The way in which creators are accredited in copies of works and how the creators are represented by copyright or collecting societies varies significantly from one sector to another.

In the music field rights' holder information is usually well maintained, but in the area of books, the names of illustrators enclosed in the book are often left out from registries

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<sup>12</sup> © the way ahead: A Copyright Strategy for the Digital Age 2009.

concerning writers. Some registries with listings of right holders of visual works are also available<sup>13</sup>.

In the visual sector it is normal that visual works are published together with or embedded in other works. Publishers of art books, newspapers, scientific, and fiction books with illustrations are important (re)users of visual works.

The copyright status of embedded illustrations needs to be established and subsequently cleared separately. This could in many cases make the already complicated rights clearance process even more challenging. In the event that the right holders to images are not properly documented in the underlying work, analysing visual material is in many cases overwhelmingly difficult. Right holders in the visual field have expressed clearly that identified rights holders to visual works embedded in written works, which themselves might be orphan, need to be cleared if the work is to be digitised and made accessible online.

For this reason, even if you could establish the identity of the writer of the book itself, just one image in the book, whose right holder is not identified and found, could potentially hinder the digitisation of the entire book.

### ***Photographs***

Establishing copyright status and subsequently orphan status is quite an intricate matter for photographs. This is partly due to the fact that there are two types of protected photographs - those that are considered original, and whose term of protection is counted 70 years from the death of the author, and those that are simple photographs may be protected for up to 50 years from their making, depending on the applicable national law.

While sufficient right holder information about photojournalists may be lacking due to poor crediting of photographs published in newspapers, hardly any identification information is available for entire collections of unpublished photographs created by non-professionals. These materials are typically photographs of local views, or family and daily-life situations.

Without such information, the copyright or related rights status may in fact be impossible to assess with legal certainty.

Examples show that there are significant amounts of photographs in the archives around Europe. The institutions have usually not acquired any rights to use them when accepting a collection as a donation. It is virtually impossible to obtain licenses for the use of them later. If the photographs are unpublished their use may not be possible even based on a limitation.

#### **Example 16: Photographs in collections of museums, UK**

Museums are typical holders of photographs. A survey amongst museums in UK found that the rights holders of 17 million photographs (that is 90% of the total collections of photographs of the museums) could not be identified. The right holders could be identified only in 10 % of the cases.

Source: The Gower's Review, 2006

<sup>13</sup> The WATCH File is a database of copyright contacts for writers, artists, and prominent figures in other creative fields. WATCH should be the first step in your search for a copyright holder.

<http://tyler.hrc.utexas.edu/>

This case below concerns very old materials within the visual sector. The image library of the National Archives provides print and digital copies of documents among the records for both non-commercial and commercial uses. One series of records is particularly popular and has created problems. The material covers photographs attached to application forms for copyright registration regarding the said photographs from the XIX<sup>th</sup> century.

**Example 17: Image Library, UK National Archives, UK**

In registration forms for copyright protection for photographs between 1883 and 1912, 95% of the right holders to 80 000 images still in copyright were untraceable.

These images were non-the-less given to researchers, but with a notification that no license to publish was given and that the researchers are themselves responsible for obtaining permission from the right holders.

Source: The National Archives, UK, December 2009

This rare example shows that, even when the name of the right holder for the material and contact information is available, the holders cannot be traced because the information is out dated. In spite of the "orphan works" exception in the UK law<sup>14</sup> for unpublished materials over a hundred years old whose authors have died more than 50 years ago, permission from the right holders is required, as arguably it does not cover digitisation and online accessibility of the material.

Even though it is very unlikely that any right holders would show up to claim their rights to materials from the late XIX<sup>th</sup> century, it is a question of principle for the institution to follow the rules and have sufficient legal certainty about the status of their activities.

Libraries, archives and museums are seldom in a position to evaluate photographs in their collections as regards whether the originality requirement is fulfilled or not and hence decide whether or not they have become public domain. Therefore, the institutions are likely to take the position providing the most legal certainty that is to consider them all protected, in the absence of evidence to the contrary. Some cultural institutions really fear getting negative publicity from claims that they have infringed copyright.

### **Posters**

In the area of graphic design, establishing copyright status should not be especially difficult. In the case below concerning some campaign posters, the copyright status is not uncertain because the subject of the posters, the AIDS disease, has been widely known thanks to these campaign posters only from the beginning of 1980's.

However, from the experiences of the Wellcome Library's ongoing project to catalogue and digitise 2 900 such posters, it can be gathered that there may be considerable difficulties also in identifying right holders of, and obtaining licenses to fairly recent visual materials.

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<sup>14</sup> Article 7(6) of the 1956 Copyright Act, continued in the 1988 Copyright Act.

In this project some 980 right holders of the posters had been identified by December 2009 in a process entailing 88 days (2,5 months). Those right holders who were identified along with contact information were sent permissions forms to sign, asking for permission to publish the digitised posters online using the Creative Commons license CC-BY-NC 2.0. This licence covers non-commercial uses if credits are attached.

**Example 18: Digitisation of posters, UK**

Out of the 2900 posters **1400 posters** have now been through the full process of rights clearance entailing 88 working days. A total of 980 copyright holders were identified (0,7 identifiable contact on average per poster), almost half of them with contact details. There was a 16, 5 % return on the correspondence.

By that time, 270 posters were cleared for publishing (19% of all digitised posters). On average 78 % of 1400 posters *i.e.* **1095 posters** were considered orphan. Transaction costs involved reached 70 000 euro.

Source: Wellcome Library, UK, December 2009

This example entails some quite interesting features. The figures show that after going through the process developed by the institution, only about half of the identified right holders, had been contacted. And even then the return rate *i.e.* the percentage of right holders that responded to the request for permission was only 16,5 % which is less than one out of five.

In the field of advertising or information campaigns, most materials are designed as a part of a professional relationship. In many countries employed designers' rights to advertising posters are (on the basis of law, interpretation of contracts or standard practise) transferred to the employing company or the company is seen as the first owner of copyright to such works. When rights are with a company, the right holder should be comparably easy to identify and located.

If, however, a poster has been designed by a freelance artist on the basis of a contract with the company that has ordered the designing of the poster, it may be very difficult to identify the author when such information may not be obtained from the work itself. Whether or not the right holders can be identified, will depend on the practice and how systematically the contracts and other documentation have been preserved. Compared to photographs, it is in any case more likely that posters include the name of the right holder. Photographs have not had the same possibilities in earlier years (for technical reasons), and even now, in the digital age, it seems difficult for rights information to be securely attached with digital photographs.

The amount of successfully cleared posters was only 19% which is very low considering that there should not be any major difficulties in finding the authors for these works. The amount of orphan works is estimated to be around 78 % in this case. This is a very high figure considering that the material is not so old. A reason for this figure could be that the institution had indicated in the permission letter that if the right holders would not respond within 2 months the work would be considered an orphan work and be made available until such time when the contact responds.

This way the library was able to use the protected work also in cases where permission has not been obtained because the right holder has not responded. However, it should be noted that the fact that a right holder does not reply to a letter does not mean that he cannot be located. Neither does this method avoid future infringement claims from the right holders, as the prior consent required cannot be implied from his absence of reply. Therefore this figure has to be taken with precaution.

Many orphan works can be found in [commercial] picture libraries across Europe. As in the case of audiovisual archives, the items in collections of picture libraries interest various re-users of images, such as the creative media (including books, newspapers, films, advertising, packaging etc.) These libraries are frequently receiving requests to provide digital copies of works in their collections. The images for which right holders cannot be found may not be used because clients are often reluctant to adopt the legal liability for the use of an image.

According to information obtained from the MILE Project<sup>15</sup> this affects sometimes the potential income for institutions offering such services. For example the Bridgeman Art Library experienced over 300 requests for orphan images during 2004 alone. Each request could have generated between €145 and €583 to the institution. This totals a potential loss of between €43 500 and €175 000 in 2004. If these figures are extended to the 949 member picture libraries of the CEPIC (Centre of the Picture Industry) membership, the potential loss to the EU could be up to €166 million.

Within the same project items have been placed in small size on the internet in order to receive information about the right holders and subsequent possible orphan status. However, for the same reason as stated above, in the absence of permission from the right holder this activity may in fact be an infringement of copyright. For photographs and other images with unknown right holders this is, on the other hand virtually the only way to collect information about the works in question.

## ***Conclusions***

As a conclusion it can be said that in the visual/photography sector the amount of orphan works is particularly high, especially for unpublished photographs and old photographs, in some cases up to almost 90 to 95 %. The figures may also be as high as 78 % for some materials from only a couple of decades ago.

The reason for huge numbers of orphans among photographs is because in some Member States all photographs are protected, whether original or not. Consequently, institutions regard such works automatically to be orphan, and are (depending on the purpose) either using them in digitisation and web access projects, with a specific notice for right holders to come forward, or handing them out to users who requested them leaving the right clearance to be done by them instead.

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<sup>15</sup> MILE (Metadata Image Library Exploitation) aims to promote European cultural heritage and make digital art more accessible by improving metadata. MILE has set up an 'Orphan Database' which acts as a repository for all Orphan Works and invites you to offer information about these works. This database also serves to collate all search efforts for associated works of art so that Europe is provided with a centralised source for Orphan Works discussions, search history and potential repatriation.  
<http://orphanworks.ssl.co.uk/indexplus/page/Information.html?s=TeQYDoCF7mq>

All unpublished literary, musical and artistic works within archives in the UK are protected until 2039. For this and the other reasons stated above it can be concluded that the only possibility for archives that hold many millions of such unpublished photographs in their collections, and who want them to be digitised, is that a specific solution is developed. Individual rights clearance is not possible for most of these materials.

Some mass scale projects have been launched in this field in the NL. It is probable, even if not yet certain, that a great majority of the photographs in this project are orphan works which will never be cleared on a title-by-title basis, due to the time and effort it takes and the impossibility to ask for permission from untraceable right holders. Therefore, a specific solution for EU-wide online accessibility of orphan works of this type needs to be considered.

## ***MUSIC/SOUND***

Typical orphan works' categories in sound recordings are recordings that include traditional music, oral histories from traditional communities, or vox pop interviews etc. These lie within sound archives all over Europe.

The digitisation that is taking place on behalf of the broadcasting companies, especially as regards radio programmes, has also its effects on the levels of orphan works in the sound/music sector.

The problem of orphan works is seen to be limited for commercial music, like it was in the area of fine arts within the visual sector as well. The right holders within the music business, especially the composers' and lyricists' rights are normally easier to locate as these rights are well managed by collecting societies. In this field the oldest collective management organisations have been in place for almost a hundred years and in the visual sector also for quite some time.

As there are no coherent and continuously updated and available registries about right holders to any types of copyright protected content, and based on the experiences from the text and audiovisual sectors, problems of locating the right holders for some musical productions would most likely emerge here as well. This is a presumption that could be made in the absence of information to the contrary.

This may be particularly true for older productions, or musical productions of small, unknown (non-professional/amateur) production companies, whose recordings are no longer commercially available. One example of this type of orphan works would be musical compositions published under a pseudonym, and where the composer is not a member of any copyright or collecting society.

### ***Sound recordings***

In the Gower's review from 2006, the British Library estimated, through a feasibility study to digitise 200 sound recordings, that they would be unable to identify the rights holders for almost 50 % of the recordings.

In a digitisation project within the same institution called "Archival Sound Recording Project" funded by JISC circa 45 000 recordings (ASR1&2) were digitised with a view to making them available to students in higher and further education.

**Example 19: Sound recordings containing social and political debates, UK**

The sound recordings were selected as a cross-section of the material held in the British Library Sound Archive ranging throughout the XX<sup>th</sup> century. Part of the recordings contained for example social and political debates relating to independence movements in Africa.

All written documents relating to the collection of recordings such as their labels was sometimes missing or insufficient. When the recordings had been made in another country, even the language and other similar aspects might have made the identification even more difficult.

The material was sometimes unpublished as a recording but containing previously published works such as poems and music interspersed in the dialogues.

According to the British Library 64 % of the literary rights holders and 85 % of the performance rights holders were not traced, identified or contacted across the whole of the project.

Source: The British Library, UK, December 2009

The recordings were made by the British Library itself so it already owned rights to the recordings, but needed for the most part additional permissions from performers as well as embedded works in the recordings.

The rights clearance process for these recordings turned out to be very problematic and caused many types of difficulties.

This case shows that sometimes published works (for example songs or poems) can be interspersed within unpublished works in the recordings. In order to know for which embedded musical works among the main content of sound recordings, and for which fixed performances, permission was needed, a librarian needed commonly to listen to each tape. This was necessary because the contents was often improvised and not sufficiently or at all documented among the accompanying material.

The work required therefore tremendous knowledge about different genres of works to be able to sort out which of those contained in the recording are protected, still in-copyright, and who would be the corresponding right holders to them. A collecting society was able to help with the identification of the underlying works, although only for a very small piece, mainly those of which were registered with the society.

On top of it all, the sound recordings included in this case also covered culturally sensitive materials such as expressions of traditional culture by local or indigenous communities, which had been collected by researchers. Local or indigenous traditional cultural expressions or expressions of folklore have normally been considered to be in the public domain.

Performers of expressions of folklore are however protected by the WIPO Phonograms and performances Treaty of 1996 as well as in many national laws of EU Member States.

For this reason the British Library felt it had a moral and cultural responsibility to make the recordings available not just to researchers but to all web users, and especially to the people from where the material originated.

Only after all this analysis, the actual clearing of rights could begin. In the experience of the institution it was frustrating to have to decide all these complicated issues before knowing what they could and could not do with the material.

The British Library estimated that all together around 64 % of the literary right holders and 85 % of the performance right holders were not traced, contacted or located. These levels show the number of possible orphan works in the broadest sense as many of the right holders for these recordings do not consider themselves as right holders, which is why part of them were not contacted following a risk assessment.

In the end, after all the work explained above, around 80 % of the sound recordings in the project were put online, either as cleared materials, or as orphan, awaiting claim at the end of 2009. Those institutions that are able to take this legal risk, have documented their searches in case of a possible infringement lawsuit.

## ***Conclusions***

The experience gathered from this sector shows that the amount of orphan works are likely to be high also in the music/sound sector, leaving in the case presented above well over 50 % of the right holders in the projects unidentifiable. The materials in this sector to be digitised are likely to be older commercial materials or materials with little commercial value. Mass scale digitisation of these materials has been carried out only in the UK.

As sound archives in other Member States potentially lie in the same situation as film archives, *i.e.* they are not able to do rights clearance for lack of resources, the digitisation and EU-wide online accessibility of materials in these archives requires a specific solution on EU-level. On the other hand, some large public service broadcasters have had the interest and the funding to make their archives available online.

### ***4.3 Time and effort of rights clearance for orphan works***

The information gathered shows that on nearly every sector too much time and effort have been spent on clearing of rights for the digitisation and online accessibility of works in collections of cultural institutions.

This information should primarily be used for establishing the time, effort and costs that are wasted, when a significant part of the works or the specific right needed turn later out to be orphan, regardless of the dedicated searches carried out.

The figures can be used as an estimate of what the size of the problem would be, when extrapolated to large digitisation projects.

## **TEXT**

### **Books**

Broadly speaking, based on an Austrian example tackled in the context of the experiences of the text sector, the time from verifying copyright status to the time when permission from the right holder has been obtained may range from 10-15 minutes to 4, or even 7 months per item.

The case below from the US shows that extremely high costs may have been involved in the rights clearance of very small amounts of materials with usually only one right holder.

#### **Example 1: Monographs, US**

After spending over \$50 000 i.e. 36 000€ in staff time working on the copyright issues concerning 343 monographs the current owner of the copyright could not be determined in 58% of the cases.

Source: Cornell University submission (569), US Orphan Works Report, January 2006

In the US studies about the transaction costs to clear rights have been done in a series of investigations. In a feasibility study to estimate the cost for a small sample of works the cost per title turned out to be high, around \$78 or 56 €, especially considering that this did not include all costs of supporting elements or any remuneration that might have been requested by the right holder.

#### **Example 2: Transaction cost for obtaining permission per title, US**

A systematic study for obtaining permission to digitise and provide access to books the transaction cost for permission to access to 278 fine and rare books, was \$78 (56 €) per title regarding books for which permission was granted.

This sum does not include costs of legal expertise used or other supporting elements. A rough estimate is that the total cost of a search per title was \$200 or 145 €.

Source: Carnegie Mellon University Library submission (537), US Orphan Works Report, January 2006

All collective rights clearance methods reduce the transaction cost for each title to be cleared. In order to find out a way to reduce the transaction cost a per-publisher approach was chosen in the "**Million Book study project**" instead of the per-title approach. This study included 200 000 indigenous works from partner institutions in India and China, 700 000 public domain works, and 100 000 copyrighted works.

In this case selected publishers of works which were considered recommendable for university libraries were contacted. The contacted publishers were presented with alternative ways to grant permission to digitise works in their catalogue. The options were: 1) all out-of-print books, 2) all titles published prior to certain date, 3) all titles published N or more years ago or 4) a list of selected books by that particular publisher.

This way, the cost per each title was reduced to only \$0,69 per title. A per-publisher approach was much more cost efficient than a per-title approach. However, at a later stage it was concluded that a per-title approach would be more in line with the usual way libraries select works of interest to them and their researchers for digitisation projects.

Furthermore, some Member States have collective licensing schemes in place that in some cases allow for collective rights clearance without diligent search of the right holders on a title by title basis. Such systems reduce transaction costs significantly because they do not require works to be cleared on per-work basis. Such agreements include also the use of works in the same field by authors who are not represented by the collective management organisation.

The National Library of Norway has in April 2009 concluded a licensing agreement for their digitisation project called "the Bookshelf". It has been collaborating with the Norwegian collective management organisations on making agreements on online accessibility of books published in Norway, in accordance with their strategy for the digital library. Agreements based on the extended collective licensing system treat orphan works in the same way as other works. Consequently the Norwegian National library has not used any resources to identify right holders to orphan works.

**Example 3: The "Bookshelf" case, Norway**

The case concerns the online accessibility of 50 000 copyright protected works published in Norway, including translated literature. The books range from periods 1890-1899, and 1990-1999.

The agreement states that published materials created by right holders that the collecting society Kopinor does not represent are also covered by the contract. The National Library of Norway is not obliged to pay any claims by outsiders for example foreigners and Kopinor shall indemnify the National Library of Norway for any claims regarding costs incurred by the National Library of Norway in connection with such a claim.

A yearly amount of 0.56 NOK (in 2009) is paid per page that is made accessible to the public. One book has on average 185 pages, making the total remuneration paid 103 Norwegian crowns i.e. around 13 euro per book. This cost covers also the use of works that might be orphan, likely to exist among works from 1890-1899. Although the agreement provides for online accessibility of copyright protected works, a significant downside to it is that access may only be provided from Norwegian IP-addresses. Moreover, the contract does not allow for downloading or printing the material until the copyright-protected period has expired.

Source: The National Library of Norway, December 2009

Even though the availability of an extended collective licensing system is facilitating the use of works in collections of cultural institutions, it has also certain restrictions.

One restriction is the types of uses (for example wider or more restricted online accessibility) it applies to, another is the types of institutions it covers. Unless it is a general extended collective license system, like in Denmark, the system is usually available only to institutions specifically designated [in the law].

The extended collective licensing system does not cover all types of works held in these institutions. This is because the functioning of the system requires the existence of an

organisation that represents the authors in that specific field. For example, an extended collective licensing scheme does not cover the use of grey materials, and not at all unpublished photographs, except perhaps for narrow uses within photocopying, in schools, or other establishments for example.

And finally, regardless of the availability of an extended collective licensing (ECL) system in the Member State, the library is obliged to use resources to find out whether works are in the public domain or not, *i.e.* establishing copyright status – in order to proceed with selecting items to be licensed via the ECL. In Norway the library has had one person working ca 40 % of his time on investigating the copyright status of works. There is a significant number of orphan works even in these countries, although partly covered by the extended effect of the collective licensing agreements.

### *Newspapers*

A British case concerning digitisation of newspapers from before 1912 shows, that it took an equivalent to one and a half month of a full-time staff to clear rights of some 60 items. This is a very long time to clear just a handful of items.

#### **Example 4: Old newspapers, UK**

A digitisation project in the UK found that 95 % of newspapers from before 1912 are orphan.

Figures of this project show that out of just above 60 titles, the right holder was identified in almost 40 cases but was eventually contacted in only 1 (one) case, leaving the titles orphan in the grand majority of cases. Sources that were used in trying to locate the right holders included National Archives, Companies House, National Census, newspaper directories, historical newspapers, press guides, encyclopaedias etc.

Counting together the work of internal staff and external rights clearance agencies all together 235 man/hours were spent in rights clearance.

Source: The British Library, UK, December 2009

The newspapers themselves contained very little information about the authors whether employees or freelancers, making it impossible to locate them after a long time had passed. Therefore the proprietors of the newspapers were targeted to obtain permission, because they were - in the absence of proof of a reversion of the copyright to the author according to the 1911 Copyright provisions - the most likely holders of copyright. But as the material was so old, even locating them turned out to be very difficult.

However slow, this might be seen as a comparatively fast rights clearance, since in the Dutch history handbooks' case only 10 books per month one were cleared, although books are generally easier to clear than newspapers.

Finally, in this specific case, while the institution was doing the detective work of finding the right holders to the titles, this was done in constant uncertainty whether the materials might have already had become public domain and all the work would have been for nothing.

In the Dutch Newspaper example presented in more detail below, the work of rights clearance was done on a title by title basis in co-operation with publishers and collecting societies who represent individual authors like freelancers of the newspapers. The library has had one person working on the rights in the project for 4 years nearly full time. The cost is around 268 000 euro.

### ***Unpublished materials***

Many EU countries consider it relatively safe to assume that wills, whether drawn up by lawyers, notaries or by private individuals, are not considered by their authors as potential copyright protected works. This is because they are documents that usually follow specific formulas, and otherwise normally refer only to ways in which the actual belongings of the person shall be divided post mortem.

Some laws have provisions about documents free of copyright. Therefore permission to digitise them would not be necessary. Other reasons for the need to obtain permission to publish these documents such as privacy issues etc. could exist but they are not copyright related and do not raise the issue of orphan works status.

However, the exceptional circumstance that unpublished literary, dramatic and musical works (including wills), no matter how old, are protected until 2039 in the UK, makes rights for digitisation and online accessibility of unpublished materials very difficult to clear.

The case below, concerning the building up of a website on immigration to the UK called "Moving Here", demonstrates the amount of time and effort that has been spent also in connection with documents with official relevance such as wills.

#### **Example 5: Making wills accessible online, UK**

The **Moving Here** – project was partly funded by the National Lottery through the New Opportunities Fund by an amount of £270 000. The archive employed an individual at a salary of about £35 000 full time for two years to seek permissions for digitisation and online accessibility of 1 114 documents.

Approval was granted for 597 documents. Permission was rejected for 45 documents and laid conditional on a payment in 77 cases. **Right holders for 385 documents were not identified.**

It was decided that no remuneration would be paid if claimed. The works that were conditional to payment were hence not used. The institution decided to use 10 documents for which it hadn't found the right holders **with the notice appealing for the right holders to come forward.**

Source: The National Archives, UK, December 2009.

Furthermore, when considering that the items to be cleared were completely non-commercial and that the amount of orphan works were about 40 %, the salary cost of £35 000 and the 2 years spent on clearing of rights seem to be quite disproportionate to the value of the work. Even in a very unlikely case of copyright protection such as this, remuneration was claimed by some of the right holders to the wills.

In the absence of evidence to the contrary, it seems, even in this case, that institutions feel safer in assuming that material is copyright protected than that it is not, just to avoid any legal uncertainty about their activity.

In the light of this example it is clear that the copyright system sometimes leads to results that are very difficult to support, which also make the system counterproductive even to right holders themselves. Also, when public institutions are generally funded by public funds, they cannot afford to lose considerable amounts of money for nothing in the long run.

### **AUDIOVISUAL**

Usually numerous right holders are involved in a film such as the director, producers, actors, screenplay etc. The role of collecting societies is not as important, although they are involved for instance for the use of the soundtrack of the film. Films often involve contributions of many individuals who may also be of different nationalities.

In the audiovisual field clearing rights is very difficult, if rights have not been transferred to the producer. Rights clearance becomes somewhat easier if some rights are presumed to have been transferred to the film producer, at least for some central purposes of the film. These might not include the online accessibility of the film, which would require additional permissions to be obtained..

The large scale digitisation project launched in 2007 in the Netherlands called the "Images for the Future" – project covers 500 000 photographs and 5 000 hours of film. Spread over a period of seven years. The FES (Fund for the reinforcement of Economic Structure) is providing a budget of 154 million euro for the digitization of the Netherlands' audiovisual memory.

Out of 154 million euro, 35 million have been allocated to the Dutch film museum (Film Institute Netherlands). The museum has employed three individuals to take care of rights clearance of the project. In this case, also covering half a million photographs, the costs are estimated to be over 600.000 euro for a period of 4 years. This is a very high cost taking into account that clearing rights to visual material is very difficult or even impossible when insufficient information about the right holders is accompanying the material.

#### **Example 6: Large scale digitisation of (audio-) visual materials, NL**

In the audiovisual field there is an ongoing digitisation project called "Images for the Future" that covers 500 000 photographs and 5000 hours of film.

The most important goal is maximum availability of the audiovisual material to everyone. In practise, payment will depend on user backgrounds: for example, the project must provide educational content against restricted costs; while for private parties it can demand a market-oriented fee. The estimated total cost for the salary and other expenses for rights clearance is 625 000 euro covering the work of 3 people for 4 years. This amounts to a monthly salary of 4300 euro. The project will end in 2014.

Source: Association des Cinémathèques Européennes (ACE), December 2009

Another project carried out by the British Film Institute will benefit from the UK Screen Heritage Programme. The UK government invested £ 25 million equalling almost 29 000 000 euro in regional and national archives to preserve and digitise the visual memory held by them.

In 2007 the BBC estimated that for 1 000 hours of non-fiction archive material 6 500 man/hours were needed to check rights implications and subsequently obtain permission for limited online use for 300 individual or collective right holders.

To extrapolate this to the entire TV archives of 400 000 hours would require 800 people working for 3 years just to go through the process of rights clearance. Costs would amount to £72 million excluding possible claims for remuneration.

In France the example of INA (Institute National de l'Audiovisuel), the Ina MEDIAPRO webtool – [www.inamediapro.com](http://www.inamediapro.com) – provides customers with a free and immediate access to over 350 000 hours of digitized footage and programmes spanning more than 60 years of modern and international history. Day by day, every document added to the Inamediapro site becomes accessible as part of the current collection of more than 400 000 hours of image and sound archives, complete with over 3,5 million documentary notes. Such investments require legal certainty as well as effectiveness of rights clearance.

## ***VISUAL/PHOTOGRAPHY***

Within the Wellcome Library's digitisation project described in detail above, it was estimated that it took around 20 minutes to identify the right holder and had after 88 working days resulted in 270 posters being cleared.

The amount of transaction costs was around 50 euro per poster for posters from the 1980's, totalling 70 000 euro for just 1 400 posters. This is a very high cost for right clearance of relatively recent material.

The project had also an associated cost<sup>16</sup> (infrastructure and other overheads) of £ 13 000. No remuneration was paid to the contacted right holders.

## ***MUSIC/SOUND***

The cost and budget of the digitisation project concerning 45 000 sound recordings in the "Sound Archive project" at the British Library described in more detail above was also considerable.

The project entailed altogether 4 300 man/hours *i.e.* over two years of in staff work force dedicated to rights clearance or related issues. External costs of copyright consulting amounted to approximately £ 69 300. This work was equivalent to 126 days, as the estimated daily rate of the contractors was £ 550.<sup>17</sup>

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<sup>16</sup> An associated cost is "a cost whose incurrence depends on the incurrence of another cost, and which would not have been incurred had the other cost not been incurred."

<sup>17</sup> As this specific case included also expressions of traditional culture from Africa, what is interesting, is that a donation was made to the Musicians Union in South Africa.

The project also entailed some remuneration, as there was some musical works that could be identified among the materials, for which licences were obtained on a transactional or a per annum basis.

### *Conclusions*

The results of this fact finding mission proves that the problem of orphan works is indeed huge and does require an overall solution on the EU level, as has been foreseen in the Commission communication mentioned above.

The empirical data received shows clearly that transaction costs for rights clearance are significant at the moment and exceed often the cost of the digitisation itself.

According to information received the cost of digitisation of film is circa £1000 - £1500 per hour depending on original condition / format<sup>18</sup>. In 2007 the ACE estimated that digitisation of audiovisual material would be much more labour intensive and costly than the digitisation of books. The cost is 200.000 € for digitising 100 hours of film in high definition and about 700.000 € for the same 100 hours if the digitisation is done on a 2 kB per frame, 24 times per second. For sound the cost varies greatly depending on the media (more expensive the older it gets) and the quality. Hence, depending on condition and format, the audio digitisation costs of the British Library range between £4 and £72 per physical item (or £2 - £132 per hour of recording).<sup>19</sup>

For literary works, the British Library estimates that the cost of mass scale digitisation<sup>20</sup> is £1 or 1,4 euro per newspaper page, £0.14p or 0,2 eurocent for books per page when a non mass digitisation would run circa £0.50p, that is 0,70 eurocent per page). Finally manuscripts would cost £4.80, or 5,5 euro to digitise<sup>21</sup>.

The information shows clearly that the older and less economically valuable the material is, the more transaction costs are needed to clear rights to use it. Sometimes the costs exceed also the expected benefit the materials would have to the researchers.

The digitisation is the most essential element of the preservation of the works – it must be done in high quality - but the quality of the digitisation plays also a very important role in the future use of the work within portals like Europeana. It is therefore counterproductive to spend the major part of a grant for digitisation of works to the clearing works, whose right holders cannot be found or who are very hard to find, especially when the economic value of the works are small, or even non-existent. With the help of an efficient solution to facilitate the rights clearance efforts of cultural institutions, especially concerning orphan works, more money would be left for remunerating those right holders who can be identified and located.

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<sup>18</sup> British Library, providing information by British Film Institute, February 2010.

<sup>19</sup> British Library, February 2010.

<sup>20</sup> Mass scale digitisation is defined here to cover at least for runs of millions of pages otherwise costs will result in much higher figures.

<sup>21</sup> It should be noted that these are full mass digitisation project costs including staffing, selection & retrieval, capture & post processing, metadata, project management, data storage, etc. This is important if any comparisons are being made with other figures.

## 5. OVERALL CONCLUSIONS

A large number of digitisation projects has been gathered and assessed for this report. The information and figures in the report only illustrate the dimension of the problem without implying any particular policy decisions. The findings indicate clearly that there are considerable amounts of orphan works in collections of cultural institutions around Europe.

This assessment should not be considered as a comprehensive analysis of the situation concerning orphan works in Europe because extensive research has not been carried out in this topic. However, the report is meant to provide solid and reliable raw material for a fully-fledged impact assessment of the issue of the orphan works aimed at considering concrete solutions to remedy the issue in the digital environment, as announced in the communication on Copyright in the Knowledge Economy.

Based on the analysis of the cases gathered, orphan works form a significant part of any digitisation project and the survey shows high percentages of orphan works for almost all categories of works, especially among photographs, and audiovisual materials.

A conservative estimate of the number of orphan books as a percentage of in-copyright books across Europe puts the number at 3 million orphan books (13 % of the total number of in-copyright books). The older the books the higher the percentage of orphan works.

When handling requests for using older film material, **film archives from across Europe categorized after search for right holders 129 000 film works as orphan** which could therefore not be used. Works that can be presumed to be orphan without actually searching for the right holders augments the figure to approximately 225 000 film works.

A digitisation project in the UK found that 95 % of newspapers from before 1912 are orphan. Also, a survey amongst museums in the UK found that the rights holders of 17 million photographs (that is 90% of the total collections of photographs of the museums) could not be traced.

Vast numbers of items in the collections of the consulted cultural institutions have uncertain copyright status. Even when institutions are intentionally focusing their digitisation efforts on what they believe is public domain material, a lot of effort to establish the exact copyright status is required. Only material from as far as pre-1870 may relatively safely be assumed to be in the public domain, but actually the oldest book still in copyright in the UK dates back to 1859. In the collections of the Danish National Library there are around 160 000 works from the period 1880-1930, requiring extensive research to establish copyright status.

Important information was collected also about the experiences as well as concrete costs involved in the rights clearance processes of cultural institutions. This information shows that rights clearance is costly and cumbersome for these institutions. In fact, the amount of time and effort to obtain licenses to digitise works has overwhelmed many of them. Data shows that the older the work and the less economic value it has, the more it costs to clear rights to use it.

The National Archive in the UK spent £35 000 and 2 years on clearing copyright for the digitisation and online accessibility of 1 114 old wills. In less than half of the cases the project managed to find the rights holders and to obtain permission make them available online.

Nevertheless in some cases also the digitisation of more recent material can entail high transaction costs.

In Austria, 200 000 digitised German dissertations from 1925 – 1988 in the collections of a university library cannot be made accessible online because of the disproportionately high transaction costs involved in clearing the rights for them. The transaction cost would be 20-50 times higher than cost of digitisation.

A UK project digitising posters from the 1980's spent £ 70 000 in transaction costs for clearing the rights for just 1 400 posters.

As part of a major digitisation project of (audio-) visual material in the Netherlands (Beelden voor de Toekomst), the total cost of handling rights clearance for 500 000 photographs and 5 000 films has been estimated to be 625 000 € - 3 people will be clearing rights for 4 years in this project.

The cost of clearing rights may amount to several times the cost of digitising the material. As cultural institutions normally do not have the resources or expertise to conduct rights clearance for digitisation projects, specific funding is always necessary, in particular for large scale digitisation projects. In the absence of efficient sources of rights information to works (such as book rights registries), it can take from several months to several years to clear permissions for only a limited numbers of works. Sometimes it is impossible to clear the rights at all.

In a Dutch project dealing with the digitisation of 1 000 Dutch history handbooks, only 50 books were cleared in a period of 5 months. At this speed, clearing the rights for the whole set of handbooks could take more than 8 years.

These examples show that there is a need for a more efficient way to clear rights, and a solution for the orphan works issue. The experiences of institutions indicate that a title by title rights clearance can be prohibitively costly and complex, especially in case of mass scale digitisation projects.

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## APPENDIX 1

### List of sources for the examples

1. Cornell University submission (569), US Orphan Works Report, January 2006
2. Carnegie Mellon University Library submission (537), US Orphan Works Report, January 2006
3. The National Library of Norway, December 2009
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5. The National Archives, UK, December 2009
6. Association des Cinémathèques Européennes (ACE), December 2009
7. The Economic Structure of Intellectual property Law, Posner R. and Landes W. 2003  
According to the American Library Annual and Book Trade Almanac for 1872-1957
8. University and Regional Library of Tyrol, Austria, December 2009
9. Koninklijke Bibliotheek, National Library of Netherlands, January 2010
10. Koninklijke Bibliotheek, National Library of Netherlands, January 2010
11. Society of College, National and University Libraries, SCONUL, UK, December 2009
12. University of Innsbruck Library, Austria, December 2009
13. Deutsches Filminstitut –DIF, Germany, March 2010
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14. UCLA Film and Television Archives submission, The US Report on Orphan Works, January 2006
15. Digital Britain report, 2009
16. The Gower's Review, 2006
17. The National Archives, UK, December 2009
18. Wellcome Library, UK, December 2009
19. The British Library, UK, December 2009

## APPENDIX 2

### List of contacted institutions

*Claudia Dillmann*, Deutsches Filminstitut, Association Cinématique Européenne, Germany

*Jean Francois Debarnot and Daniel Teruggi*, INA, France

*Thomas Jaeger and Elisabeth Niggemann*, DNB, Germany

*Silvia Gstrein*, University of Innsbruck, Austria

*Ben White*, British Library, the UK

*Bruno Racine*, Bibliothèque Nationale de France (BNF), France

*Tim Padfield*, Library and Archives Copyright Alliance LACA, UK

*Wilma Mossink*, SURF Foundation, the Netherlands

*Joanne Yeomans*, EBLIDA (LIBER contacts via mailing list)

*Dr. Britta Woldering*, CENL(CENL members via mailing list)

*Aniko Gyenge*, Ministry of Justice and Law Enforcement, Hungary

*Vigdis Moe Skarstein*, Norwegian National Library, Norway

*Nikodem Bończa-Tomaszewski*, the Director of National Digital Archives, Poland

*Krzysztof Pątek*, Deputy Director responsible for the digitization, Poland

*Dr Tomasz Makowski*, Director of the Polish National Library, Poland

*María Belén Llera Cermeño*, National Library of Spain

*Ralf Stockmann*, Digitisation Centre in Goettingen, Germany

*Gabriele Popp*, British Film Institute (BFI), UK

## APPENDIX 3

### The request of information sent to the institutions

INFSO/E4 AV/mm (2009)D/148951

Dear N.N,

In the context of the digital libraries initiative, the Commission has pointed out that the digitisation and online accessibility of cultural content require appropriate measures when dealing with orphan works *i.e.* material still in copyright but whose right holders cannot be identified or located. In the recently released communications "Europeana – next steps" and "Copyright in the knowledge economy" the Commission indicates that it will examine the orphan works problem in an impact assessment, which will explore a variety of approaches to facilitate the digitisation and dissemination of such works. Any empirical evidence on the question is therefore of great interest to us at this stage.

In order to gather as much information as possible on orphan works in terms of 1) the dimension of the problem and 2) of the time and resources involved in efforts for clearing the corresponding rights, we would like to invite you to submit **by X December** any facts and concrete data that you might have available from your own experience as a cultural institution involved in digitisation projects, which may help in illustrating the scope of the problem in different institutions (e.g. libraries, archives) and sectors (e.g. text, music/sound, audiovisual, visual/photography).

The data could include:

- number of items (works/other protected material) included in a digitisation project launched/carried out by your organization;
- overall budget of such a project;
- time and effort involved in searching for right holders (authors and publishers) *i.e.* man/hours involved in clearance of rights including facts about direct/indirect costs (salary/expenses);
- rate of successfully cleared works as a percentage of the total
- amount of remuneration/paid for the rights acquired and
- rate of works considered orphan as a percentage of the total within the project
- any other concrete information at your disposal

In submitting your reply please indicate if your institution has resorted to any sampling techniques *e.g.* trying to extrapolate to a whole collection of similar features the results of the rights clearance efforts on a representative sample of items thereof. Please let us also know about any institutions that are to your knowledge carrying out mass-scale digitisation projects so that we can include their experiences into our assessment.

Your contribution will be made public and used in the impact assessment and other publications on this issue, unless you explicitly request that we keep it confidential.

Please do not hesitate to contact Mrs Anna Vuopala ([anna.vuopala@ec.europa.eu](mailto:anna.vuopala@ec.europa.eu)) in case of any clarifications needed.

Yours sincerely,

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