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**i2010: Digital Libraries
High Level Expert Group – Copyright Subgroup**

**Final Report on Digital Preservation, Orphan Works, and
Out-of-Print Works**

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The present report follows an Interim Report on Digital Preservation, Orphan and Out-of-Print works, presented by the Copyright Subgroup at the second meeting of the High Level Expert Group on 17 October 2006 and the Report on Digital Preservation, Orphan Works, and Out-of-Print Works presented at the third meeting of 14 April 2007.

The Interim report is available at

http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg_minutes/copyright/interim_report_16_10_06.pdf

The second Report is available at http://ec.europa.eu/information_society/newsroom/cf/document.cfm?action=display&doc_id=295

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EXECUTIVE SUMMARY

The Final Report prepared by the Copyright Subgroup of the High Level Expert Group (HLG) on European Digital Libraries intends to respond to the Mandate entrusted to it. It identifies three areas which have to be dealt with as priorities, as far as IPR challenges encountered by the Digital Library initiative are concerned: digital preservation of content, including via web-harvesting and the facilitation of clearances concerning rights on orphan and out-of-print works. It indicates what actions and arrangements could, if properly implemented, reduce the difficulties currently encountered in these areas.

The solutions proposed by the Report are based on a set of high level principles, which should govern actions in the field. The recommendations put forward are underpinned by consultation with main stakeholders, particularly in connection with the issue of identification and use of orphan works.

In the area of digital preservation, the Report proposes several actions at the Member State level which are in conformity with current European legislation and would clear the ground from legal obstacles encountered in certain Member States by institutions engaged in digitisation. The measures envisaged encompass the possibility of creating multiple digital copies for preservation purposes and of providing for web-harvesting under national legal deposit legislation.

The approach recommended by the Subgroup in the area of orphan works builds on the specifically European concept of mechanisms in each Member State having a minimum common denominator and mutual recognition of national solutions concerning orphan works. Once common core principles are established, including in the area of due diligence guidelines for identifying and/or locating rightholders, material whose rightholders have been considered diligently searched for should also be considered accordingly in the other Member States.

It is also suggested that out-of-print works, once digitised, could be made available to a larger range of users than currently occurs on the basis of a licensing solution. To encourage this availability, the Copyright subgroup developed two Model Licences, one intended for use in secure networks, the other on line over open networks.

The Report describes a mechanism based on Data Bases and Rights Clearance Centre to facilitate lawful use both of orphan and out-of-print works. It also suggests a number of deployment issues, including the identification of test-beds for the measures, a specific e-content Plus Project (ARROW) and actions, including dissemination, by the European Community.

1. INTRODUCTION

The first meeting of the High Level Expert Group (HLG) on European Digital Libraries, held in Brussels, 27 March 2006, took up a number of issues highlighted by the Commission Communication “i2010: Digital Libraries”¹ and discussed various legal, technological and economic questions involved in the Digital Library Initiative. The agenda of the meeting listed a number of key IPR challenges: **“What are the key IPR challenges? What different actions and arrangements could be undertaken jointly by stakeholders to reduce tensions surrounding copyright? Is there a need to**

¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions “i2010: Digital Libraries” Brussels 30.9.05 COM (2005) 465 final.

harmonise at Community level exceptions and limitations that relate to libraries, archives, museums? What are possible ways for facilitating the clearance of rights for cultural institutions?”

At the end of the meeting, the HLG took the decision to appoint some members to work together as “the Copyright Subgroup” to analyse and discuss relevant IPR issues and to report to the plenary sessions of the HLG on available options. The following were appointed as members of the Copyright Subgroup: Dr. Arne J. Bach (President of FEP – Federation of European Publishers), Ms Lynne Brindley (Chief Executive of the British Library), Ms Claudia Dillman (Director of Deutsches Filminstitut and President of ACE – Association de Cinémathèques Européennes), Ms Tarja Koskinen-Olsson (Honorary President of IFRRO – International Federation of Reproduction Rights Organisations), Mr Emmanuel Hoog (President of INA– Institut National de l’Audiovisuel), and Prof. Marco Ricolfi (University of Torino) to act as the Chair of the group.

The Copyright Subgroup presented an Interim Report at the second meeting of the HLG, held in Brussels, 17 October 2006 concentrating on issues of digital preservation, orphan and out-of-print works. The Commissioner Viviane Reding and the other members of the HLG encouraged the Subgroup’s members to bring forward their work, with a view to presenting a report extending to implementation measures. At the next meeting of the HLG held in Brussels 18 April 2007 the Copyright Subgroup presented a second Report on selected implementation issues in the areas covered by the earlier report.

The Copyright subgroup has in the meantime completed its findings and presents them in this Final Report.² The Final Report in part presents new analysis, recommendations and proposals, with particular emphasis on implementing mechanisms and deployment; in part it consolidates the analysis and recommendations in the two previous reports.

2. OBJECT AND PURPOSE OF THE REPORT.

The Commission has made digital libraries a key aspect of i2010. In its Communication ‘i2010: digital libraries’ of 30 September 2005, it set out its strategy for digitisation, online accessibility and digital preservation of Europe’s collective memory. As indicated in recital 1 of the European Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation,³ this collective memory includes print (books, journals, newspapers), photographs, museum objects, archival documents, and audiovisual material. The Council endorsed the Digital Library Initiative in the Council Conclusion on the Digitisation and Online Accessibility of Cultural Material, and Digital Preservation.⁴

On this basis, the Copyright Subgroup has taken up the issues indicated in the mandate. It has identified three areas considered a priority in dealing with the IPR challenges faced by the Digital Library Initiative, namely digital preservation of cultural material, including web harvesting, the status of orphan works and possible actions and arrangements concerning their identification; finally, actions and arrangements concerning out of print works.

² Contributions to the different sections came from the Copyright Subgroup members and by outside contributors selected by the Subgroup, identified at the beginning of each section.

³ (2006/585/EC), in *OJ* 236 of 31 August 2006, 28 ff.

⁴ (2006/C 297/01), in *OJ* of 7 December 2006, 1 ff.

In this connection, the Copyright Subgroup used as a frame of reference a number of **high level principles**, intended to govern all work items of their work.

All proposals should be in full compliance with all international obligations of the European Union and of its Member States⁵ as well as respect the principle of subsidiarity as enshrined in the EU Treaty.⁶

For rightholders the governing principles are:

- Respect for copyright and related rights, including moral rights of creators and performers of copyrighted works;
- Digitisation and use within the premises of libraries should take place with rightholders' consent or be based on statutory exception;
- Online availability should take place with rightholders' consent;
- Rightholders' consent means in principle rights clearance, which should be based on individual or collective licensing or a combination thereof.

For libraries, archives and museums the governing principles are:

- For these institutions it is important to have legal certainty in their activities;
- Access means either within the premises of libraries, archives and museums or online availability;
- For born-digital works or works digitised by rightholders this means getting permissions for access to works;
- For analogue works this means getting permissions for large scale digitisation and access;
- Legal certainty presupposes a solution for so-called orphan works: unknown or non locatable rightholders and their works.

The proposals discussed and advanced by the Copyright Subgroup of the High Level Group on the European Digital Library should be read as practical solutions to be agreed by the different stakeholders to solve issues raised by digitisation, including the requests made by libraries and other cultural establishments. The proposals intend to take into account the national usages and best practices in the respective fields in each of the European Union Member States. Their main focus is on printed works and text; however, works in the audiovisual, visual photography and music/sound sectors are also, to the extent possible, taken into consideration.

In connection with the issue of works that are out of print, the Subgroup shares the concept advanced by item 6(b) of the European Commission Recommendation of 24 August 2006 whereby the mechanisms intended to facilitate the use of such works should in principle be established or promoted on a voluntary basis. Thus the proposals which follow should not be understood as a blueprint for future legislation.

The Google representative⁷ fully supported the objective of the subgroup, in particular with regard to the far reaching and long term benefits to the user and citizen that digitisation offers through better

⁵ These include TRIPs, the Berne Convention, WCT and WPPT as well as Article 17 of the European Charter of Fundamental Rights, Articles 6(1) and 10 of the European Human Rights Convention and Article 1 of the Protocol thereto, Article 6 of the EU Treaty, Article 27 of the Universal Declaration of Human Rights and Article 15 of the International Covenant on Economic, Social and Cultural Rights of 1966.

⁶ In particular some members of the Copyright Subgroup suggested that the proposals must take into account the national usages in each of the EU Member States.

⁷ Antoine Aubert, who took part in the meetings from the second part of 2007.

access to information. In this respect, he submitted comments and expressed reservations on some of the key principles for orphan works and out-of-print works, and without opposing the adoption of the copyright subgroup report was not in position to endorse it. It is in the interest of all concerned that the i2010 digital libraries initiative is allowed to progress and solutions developed by the Copyright Subgroup be tested out. There was a general agreement in the Copyright Subgroup that proposed solutions will have to be reviewed in the light of practice and best practices.

3. DIGITAL PRESERVATION⁸

The Copyright Subgroup acknowledges that in some cases digitisation may be the only means of ensuring that cultural material will be available for future generations and may therefore be essential to enable continued access to it. It notes that some Member States' laws allow libraries and other institutions to make one single copy for preservation purposes pursuant to Article 5(2)(c) of the Copyright in the Directive 2001/29/EC.⁹

The Copyright Subgroup notes however that this exception to the exclusive reproduction right conferred by copyright may prove insufficient with regard to digital preservation on account of the format-shifting that may be required for continued preservation due to technical obsolescence of recording media and the resulting need for recurrent "migration" from one format to the next. Moreover, in the audiovisual sector, not even current digitisation might always be a panacea for preservation, as current digital media might last a shorter time than analogue media. Hence, in this latter sector other complementary but equivalent solutions need to be envisaged.

In consequence it recommends that, where a Member State has implemented an exception to allow digital copies of a work and where copies are made for the sole purpose of preservation:

- rightholders should authorise certain institutions (namely: publicly accessible libraries, educational establishments, museums and archives) to make more than one copy (an open-ended number of copies), if this is necessary in order to ensure the preservation of the work. Successive copying should be allowed to take place if and when technological developments are seen to require such a measure, for preservation purposes only, subject to the safeguarding of the individual publication's identity and integrity;
- preservation should be justified only for works that are no longer commercially available in any format. If the work is available on the market, there is no need to preserve it except within national libraries' deposit schemes;
- coordination should take place amongst the various preservation initiatives at regional and national levels and across the European Union, to avoid duplication both among different initiatives and also with national 'legal deposit' libraries;
- in the case of national deposit libraries and concerning born-digital works which have an embedded protection device, it should be noted that publishers and national librarians have agreed that this device should be disabled in the deposit copy (i.e. for the purposes of the national library, but not for access by the end-users) so as to allow permanent and unhindered access to the document.

⁸ This section is based on a draft originally prepared by Mrs Anne Bergman-Tahon and Mr Toby Bainton.

⁹ Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, in *OJ L* 167 of 22 June 2001, 10 ff.

In the discussions concerning the Digital Library Initiative the formula “to digitise once, to disseminate widely” has frequently surfaced. The Copyright Subgroup notes in this connection that the effort to avoid duplication is important and should be encouraged. It also notes that the precept to “disseminate widely” does not by itself entail the liberty to disseminate *freely* under all circumstances, lest the opportunity for uncontrolled *secondary* dissemination destroy the incentives to create in the first place and to invest in the *primary* exploitation on works. Indeed, in many contexts creators and publishers may not be expected to engage in the difficult and risky task of creating a new work, if the initial digital copy were to be available without limits immediately after it is first made.

Therefore, the Copyright Subgroup wishes to underline that these recommendations deal with digital copying for the purpose of preservation only and are strictly limited to the purpose of preserving, for the long term, items of cultural and national heritage produced and distributed in different formats and editions. Any copies made in excess of that permitted by applicable law may not be used to increase the number of copies available for access to end users until the expiry of copyright, provided that access to any copy may occur only for onsite consultation.

The Copyright Subgroup also notes that in certain cases, national legislatures have implemented Article 5(3)(n) of the Directive 2001/29 allowing libraries to make use of communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in Article 5(2)(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections. The recommendations made in this document do not conflict with any such provision.

The Copyright Subgroup noted that archives and museums may face a number of problems in connection with digital preservation and access which are peculiar to them. The costs of digitisation tend to be higher in connection with multimedia and audiovisual works than for text; and the number of users accessing the premises of archives and museums may be substantially lower than in the case of libraries. Additionally, audiovisual works entail the need for clearances by vast numbers of rightholders, including holders of related rights. Issues of privacy and of right of publicity may also frequently arise. Typically these more complex situations should be dealt with in what sometimes is described as a “second basket” of measures, on the basis of experience accumulated in more traditional contexts, such as text. However, the Subgroup surmises that even in this area mechanisms intended to facilitate the use of works held in archives and museums can be established or promoted on a voluntary basis. Collective licensing may be actively encouraged; it may, depending on the context, concern digitisation, access, or, under given circumstances, even commercial uses to the extent that they do not compete with the primary exploitation of works.

4. PRESERVATION OF WEB-CONTENT AND WEB-HARVESTING¹⁰

4.1 BACKGROUND

The Commission Recommendation of 24 August 2006 describes web-harvesting¹¹ as follows:

¹⁰ Based on a draft originally prepared by Ms Tarja Koskinen-Olsson and Mr. Jean François Debarnot.

¹¹ Preamble 14 of the Recommendation.

“Web-harvesting is a new technique for collecting material from the Internet for preservation purposes. It involves mandated institutions actively collecting material instead of waiting for it to be deposited, thus minimizing the administrative burden on producers of digital material, and national legislation should therefore make provision for it.”

The Commission recommends¹² the Member States to:

“Make provisions in the legislation for the preservation of web-content by mandated institutions by using techniques for collecting material from the Internet such as web harvesting, in full respect of Community and international legislation on intellectual property rights¹³.”

4.2 RELEVANT COMMUNITY LEGISLATION

As for material on the Internet protected by intellectual property rights, it is important to assess the relevant Community legislation which, in this regard, is the Directive 2001/29. The most important provision in that Directive is Article 9 entitled “Continued application of other legal provisions”, which explicitly states that:

“This Directive shall be without prejudice to provisions concerning in particular ...legal deposit requirements...”

Article 5 includes two optional provisions on exceptions and limitations that concern libraries and other cultural institutions, as follows:

2. (c): in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;

3. (n): use by communication or making available, for research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2 (c) of works or other subject matter not subject to purchase or licensing terms which are contained in their collections.

The quantity of web-content is increasing in the new media and communication environment and with the development of the information society. As more and more content is only available online, preservation of web-content is becoming a matter of priority. The obligation to preserve web-content is a matter for legal deposit legislation.

The Copyright Subgroup has studied the legislative provisions in two Member States, France and Finland. In these two countries, current legislation supports long-term preservation of web-content. The Case Studies (Annexes 1 and 2) are enclosed for information.

4.3 RECOMMENDATION

Based on the considerations above, the Copyright Subgroup submits the following recommendation:

¹² Point 11 of the Recommendation.

¹³ Emphasis added.

- 1) It is essential that Member States address web harvesting as a priority issue, because an increasing amount of material is created and updated only in electronic form as web-content. The obligation to preserve web-content by specially mandated organisations is a matter for legal deposit legislation.
- 2) The current Community legislation on intellectual property rights, in particular the Directive 2001/29 and Articles 9 and 5.2 (c) therein, provides for the preservation of web-content.
- 3) The following issues concerning the preservation of web-content should be addressed in any legislation concerning copyright and related rights:
 - a) Whereas copyright legislation uses the term of “right of reproduction”, long-term preservation of web-content necessitates acts such as copying and migration of material, and this should be clarified in the terminology.
 - b) Web-content may have been harvested and deposited, either in the country or abroad, before an obligation arose for legal deposit, and in order to permit the use of such deposited material from the copyright point of view, the issue of retroactivity needs to be addressed, aiming at widest possible preservation of web-based cultural heritage.

5. ORPHAN WORKS¹⁴

5.1 OVERVIEW

Clarification and transparency in the copyright status of a work is an essential element in the European Digital Library initiative. In some cases rightholders cannot be identified or, if they can be identified, they cannot be located, hence the term “orphan”. Comprehensive, large scale digitisation and online accessibility could be greatly hampered, if adequate solutions are not found to the problem of orphan works.

From the beginning, the Copyright Subgroup concluded that it is important to offer solutions to orphan works. It acknowledges that various voluntary and regulatory mechanisms to facilitate the use orphan works exist in different countries, and new proposals are pending. It also shares the view, expressed by the Commission Recommendation of 24 August 2006, that this is an area where Member States, in consultation with the stakeholders, need to formulate policies. Based on that approach, the Copyright Subgroup emphasised the need for interoperability and introduced the concept of mutual recognition of national solutions as a possible way forward.

Under all voluntary or regulatory measures, there needs to be guidance on what constitutes diligent search required before the use of a work. Stakeholders in different cultural sectors confirmed the view of the Copyright Subgroup that due diligence guidelines can best be established in collaboration with rightholders and cultural institutions. Based on that understanding, the Commission invited representatives of several stakeholders to discuss and agree upon due diligence guidelines for four creative sectors on European level. The European level guidelines including generic information resources can be linked to national resources (such as the name and contact details of a Collective

¹⁴ This section is based on a draft originally prepared by Ms Tarja Koskinen-Olsson on the basis of inputs, discussions and comments by Ms Lynne Brindley and Mr Toby Bainton, Mr J.F. Debarnot, Ms Claudia Dillmann and Mr Olav Stokkmo.

management organisation (CMO)), thereby establishing a map of available information resources across Europe.

The development of databases of information on orphan works can facilitate users in their search. The rationale of a database is to provide assistance to users in their search. The interlinking of national databases and registries is needed to achieve a common multilingual access point and a European-wide resource. In this, different cultural institutions, such as libraries, archives and museums, can contribute their varied resources (catalogues, bibliographies, filmographies etc.) and their specific expertise. Aiming to ensure interoperability, enhance coordination and facilitate a multilingual access point, the Copyright Subgroup has developed a set of Key Principles for Databases and Rights Clearance Centres for Orphan Works (see below Section 9). As a result of preliminary work in this area, it appears that this will be implemented as a test-base in a forthcoming project, called ARROW¹⁵, short listed by the Commission under the eContent Plus Programme. Several representatives of rightholders and cultural institutions are partners in the project.

Development of a rights clearance procedure and a Rights Clearance Centre (or centres) to grant licences to use orphan works is another proposal by the Copyright Subgroup. Rights clearance can take place where licences are offered by a mechanism set up by rightholders. This is an integral part of the ARROW Project.

At the same time, the Copyright Subgroup has advocated suitable measures to minimise the quantity of future orphan works, which occur basically as a result of missing or inadequate information. Improved inclusion of metadata (information on rightholders and rights) in the digital material will be one measure to eliminate or diminish future orphans.

CMOs or other intermediaries can play an active role in finding out the status of a work.

Good practices in the Member States - regulatory measures, voluntary mechanisms or combinations of both - are important. Some mechanisms already exist and more are forthcoming. The Copyright Subgroup also stresses the crucial role of the Commission as an information resource and recommends the publication of good practices and examples on its website.

Both the Directive 2001/29 and the Commission Recommendation of 24 August 2006 emphasize contractual solutions that can be negotiated between stakeholders. The Copyright Subgroup has used this as a point of departure and has listed a number of measures that greatly reduce the problem of orphan works. It thus offers a toolbox of possible contributions to a solution to the issue.

In the sections that follow, each of the elements and recommendations will be dealt with more in depth.

5.2 THE DIFFERENT SOLUTIONS TO THE ORPHAN WORKS ISSUE

Clarification and transparency in the copyright status of a work is an important element in the European Digital Library initiative. Cultural institutions need adequate certainty in dealing with orphan works, and this principle is also included in the high level principles that govern the work of the Copyright Subgroup.

¹⁵ Accessible Registries of Rights on Orphan Works (towards the European Digital Library (EDL)). For more detail see below, Section 10.3.

The following general prerequisites need to be fulfilled when considering the use of orphan works:

- A user wishes to make good faith use of a work with an unclear copyright status;
- Due diligence has been performed in trying to identify the rightholders and/or locate them;
- The user wishes to use the work in a clearly defined manner;
- The user has a duty to seek authority before exploiting the orphan work, unless a specific copyright exception applies.

Guidelines on “due diligence” need to be established, based on what is reasonable under the circumstances.

In some countries regulatory and voluntary mechanisms for orphan works have been established. These can be tailored for orphan works, or designed for more general purposes.

A short summary of these solutions is given below¹⁶.

THE CANADIAN REGIME FOR NON LOCATABLE COPYRIGHT OWNERS

Pursuant to section 77 of the Canadian Copyright Act, the Copyright Board of Canada¹⁷ may grant licenses authorising the use of published works, fixed performances, published sound recordings and fixed communication signals, if the copyright owners cannot be located. The copyright owner is entitled to collect royalties within a deadline of five years from the expiry of a licence. The Board has decided to involve CMOs in the process.

In general, the Canadian model allows works and other subject matter to be used where it is not possible to locate copyright owners. The fact that a licence is issued protects the licensee from subsequent prosecution.

OTHER REGIMES WHERE A PUBLIC BODY MAY ISSUE THE LICENSE

There are various regimes where a public body is empowered to issue a licence. In the following, some of them are briefly described:

- Copyright Tribunal: the UK (s. 190) and Fiji (s. 190) Acts provide that the Copyright Tribunal may consent to a person making a recording from a previous recording of a performance where the identity and whereabouts cannot be ascertained by reasonable inquiry.
- Government Body: The Japan Act (s.67) authorises the Commissioner of the Agency for Cultural Affairs to issue a compulsory license for the exploitation of a work that has been made publicly available if, after due diligence has been exercised, the copyright owner is unknown or cannot be found.
- Copyright Commission: In South Korea (s. 47 of the Act), the Minister of Culture, in practice the Copyright Commission for Deliberation and Conciliation, can issue a license for the exploitation of a work if, despite considerable efforts, the owner of the copyright cannot be located.

¹⁶ For a more extensive analysis see the 2006 Report.

¹⁷ <http://cb-cda.gc.ca/unlocatable/brochure-e.html>

THE FRENCH MODEL FOR AUDIOVISUAL WORKS

The French National Audiovisual Institute (INA) has the task of preserving and exploiting audiovisual archives produced or co-produced by public television companies. INA has concluded general and collective agreement with representatives of various categories of rightholders through their CMO¹⁸ or the trade unions.

Under this regime, there is a collective management of the relevant authors' rights; this solution only concerns authors who have contributed their royalties on the works involved to the societies of authors that are signatories of these agreements with INA. Regarding the artists-performers, the agreements concluded by INA with trade unions authorise INA to exploit the presentations of "all" the performers on its archives' fund (subject to possible restrictions appearing in some employment contracts) for all modes of exploitation (even the one which didn't exist when their employment contracts have been signed).

The French intellectual property code (Art. L122-9 and 211-12 for related rights) includes a provision for dealing with the risk of a blockage. The Act of 1 August 2006 also introduces a special provision connected to the exploitation by Ina of its archives including performances of artists-performers.¹⁹

POWER TO EXTEND THE APPLICATION OF A SCHEME OR LICENCE

The UK Act (s. 167 and 168) includes an implied indemnity in certain schemes and licences for reprographic copying which is valid "within the apparent scope of the licence". For reprographic copying in educational establishments in connection with teaching activities (s. 168), the Minister may by order provide that a licensing scheme or license shall extend also to works of such rightholders that the licence does not cover.

EXTENDED COLLECTIVE LICENCES

Since the early 1960s, Nordic Countries have applied a legislative technique to deal with certain complex usage situations. This legal technique, called "extended collective licence (ECL)"²⁰, is a support mechanism for freely negotiated licensing agreements. During the years 2002 and 2006, the Nordic countries extended the ECL to cover certain activities in libraries, museums and archives. Whereas an ECL is not tailored for orphan works, to a large extent it can eliminate the issue of unknown or non-locatable rightholders in the designated area.

In Denmark, a recent revision of the copyright law (January 2008) foresees an organisation to be appointed to issue licences for orphan works under an ECL stipulation. The provision will enter in force on 1 July 2008.

¹⁸ SCAM, SACD, SACEM, SDRM, SESAM.

¹⁹ See also the comprehensive Report on Orphan works issued in March 2008 and now available at <http://www.culture.gouv.fr/culture/cspla/rapoeuvor08.pdf>

²⁰ Extended collective license, leaflet prepared by the Ministry of Education and Culture, Finland, June 1991.

HUNGARIAN PENDING LEGISLATION

The Hungarian copyright system has several different rules which can help the users in searching and finding the rightholders of the works. There is a functioning extended licensing system managed by CMOs and on the basis of that system the users can get licenses for the use of orphan works as well.

The Hungarian Government has proposed an amendment of the Copyright Act that will give more solutions for the problem of orphan works. The proposed amendments are “to insert a new heading and Article 57A into the Copyright Act “Authorisation of use in case if the author or his/her location is unknown”. According to the proposal, a non-exclusive, non-transferable authorisation of use for at most 5 years at the request of the user could be given by the Hungarian Patent Office.

US PENDING LEGISLATION ON ORPHAN WORKS

In 2006, a draft bill was proposed by the Copyright Office, with a short title “The Orphan Works Act of 2006”. According to the bill, a user would be allowed to use an orphan work without an authorisation. The bill is based on the concept of limited liability (a “limits-on-remedy” system) whereby, once the threshold requirement of a reasonably diligent search to find a copyright owner is met, liability would be limited. – Legislation is pending. In April 2008, the US House and Senate versions of the Orphan Works Act of 2008 were made available. The proposal is based on the elements included in the 2006 draft bill, with enhanced proposals concerning identification of certain types of works with the help of databases among others.

5.3 THE EUROPEAN APPROACH: MUTUAL RECOGNITION OF NATIONAL SOLUTIONS

Taking into account that various alternative mechanisms exist to deal with the issue of orphan works, the Commission has recommended that Member States, in collaboration with stakeholders, establish mechanisms to facilitate the use of orphan works. Under this approach, interoperability and mutual recognition of existing solutions become an important issue, especially if the cross-border nature of the use is considered.

The Copyright Subgroup has suggested that in order to ascertain the interoperability between the Member States, common “diligent search” criteria for finding rightholders should be established. It has further recommended that Member States recognise solutions in other countries that fulfil “diligent search” criteria in order to achieve the cross-border effect. As a result, material whose rightholders are considered diligently searched for in one Member State would also be considered accordingly in another. The solution would be based on the concept of mutual recognition.

Thus it is a prerequisite that all Member States have solutions which are interoperable and agree to mutually recognise any mechanism that fulfils the generally accepted core principles.

5.4 DILIGENT SEARCH GUIDELINES

Solutions in different Member States may be different, but they need all to fulfil certain commonly accepted core principles, such as:

- Cover all orphan works (those with unidentified or non locatable rightholders), on the basis of a shared definition;
- Include guidance on diligent search;
- Include provision for withdrawal if the rightholder reappears;
- Offer cultural, not-profit establishments a special treatment when fulfilling their dissemination purposes, to be further discussed between stakeholders;
- Include requirement for general remuneration or remuneration if the rightholder reappears.

The Copyright Subgroup suggested that the notion and conditions of “diligent search” in the context of orphan works need to be elaborated. The work would be based on the following parameters:

- Any solution for orphan works should be applicable to all kinds of protected works.
- The potential user of orphan works should be required to conduct a thorough search in good faith in the country of publication/production if applicable, with a view to identifying, locating and contacting the copyright owner, prior to the use of the work.
- A flexible approach should be adopted to ensure an adequate solution in dealing with individual circumstances of each orphan work, taking into account various categories of works.
- Guidelines or best practices specific to different kinds of work can be worked out by stakeholders in different fields.
- Any regulatory initiative should refrain from prescribing minimum search steps or information sources to be consulted, due to rapidly changing information sources and search techniques.

At the recommendation of the Copyright Subgroup, the Commission organised a meeting called “Stakeholders’ Perspectives” on 14 September 2007. It was the wish of the Copyright Subgroup to include representatives of different cultural sectors in deliberations on due diligence guidelines for their respective sector.

The following is a summary of the findings of the meeting:

- All representatives of stakeholders confirmed that “orphans” exist;
- Representatives of cultural institutions gave examples of concrete cases;
- The necessity of addressing the issue separately in each creative sector was emphasised by rightholders;
- It was acknowledged that legal certainty is important for cultural institutions.

The spirit of cooperation was eminent at the meeting and representatives of cultural institutions and rightholders were willing to engage in a constructive dialogue in order to establish due diligence guidelines for their respective sector.

As a follow-up to the deliberations at the Stakeholders’ Perspectives meeting, the Commission set out a plan for facilitating the creation of sector specific diligent search criteria. Such criteria could be a voluntary measure in a form of Industry Guidelines or Best Practices that European representatives of relevant industries and cultural institutions endorse. The main creative sectors working in accordance with the plan are: text, audiovisual, visual/photography and music/sound; consequently, four different Working Groups (WGs) were nominated to decide on the guidelines for their sector. The work on diligent search guidelines took place from October/November 2007 and is at its final stage. Endorsement is foreseen to begin on 4 June 2008, after the work is concluded.

The Copyright Subgroup has initiated the work and encourages it, but is not a participant in the sector-specific groups. The work is thus a spin-off of the Copyright Subgroup. The WGs work independently and report on their work to the High Level Group and the Commission.

Diligent search guidelines on European level are by their nature generic (European). They will include a common understanding on information resources and the procedure to be followed. It will be important to “customise” the generic information resources locally and link national resources into a European-wide information pool. This will be particularly important as the country of origin of the work will normally be the place where the search will be initiated.

Spreading of good practices in the Member States, be they regulatory, voluntary or a combination of the two, is important for all dealing with orphan works. Some measures already exist and many more are under planning.

For instance, CMOs and other intermediaries can play an active role in finding out if the status of a work is orphan. They can for example search for missing authors by “advertising”; many CMOs already have such procedures. Other intermediaries, such as “Books in Print”, can play a similar role. This recommendation of the Copyright Subgroup finds practical implementations in the ARROW project and in national contractual arrangements between CMOs and cultural institutions.

5.5 DATABASES AND RIGHTS CLEARANCE MECHANISMS

While due diligence guidelines are an important feature in facilitating the use of orphan works, they need to be supplemented by practical tools to serve the users.

The Copyright Subgroup concluded that databases and Rights Clearance Centres will be a useful part of the overall solution of orphan works. Aiming to ensure interoperability, enhance coordination efforts and facilitate a multilingual access point incorporating national and local initiatives, the Copyright Subgroup decided to develop a set of Key Principles for Databases and Rights Clearance Centres for Orphan Works and Out-of-print Works (see below Section 9).

5.6. MEASURES TO PREVENT FUTURE ORPHANS

A work becomes orphan just for one reason: information about it is missing. The best way to ensure that works do not become orphan is to address the creation, maintenance and accessibility of relevant information.

Different measures to improve the availability of information on works, rightholders and rights have been mentioned, among them the following:

- Use of electronic and other identifiers;
- Creation, use and maintenance of metadata in the digital files;
- Recognition of the value of standard identifiers.

Preventative measures also include enhanced contractual practices, in particular in the audiovisual field.

Follow-up and implementation of preventative measures are to a large extent a matter of private sector stakeholders. It could be an area where representatives of rightholders and cultural institutions have a joint interest. Cooperative efforts can bring a win-win solution for the future.

5.7 CONCLUSION

Both the Directive 2001/29 and the Commission Recommendation of 24 August 2006 put emphasis on contractual solutions that can be negotiated between stakeholders. The Copyright Subgroup has had this as its point of departure and has listed a number of measures that greatly reduce the problem of orphan works. It thus offers a toolbox of contributions to a solution to the issue. It is thus important to foresee a combination of measures.

6. WORKS OUT OF PRINT

For out-of-print works²¹ the Copyright Subgroup proposes pragmatic solutions within the existing legal frameworks to meet specific requirements put forward by libraries and archives. It addresses mainly printed works and does not analyse in detail the extent to which the suggested solution could be adapted also to other categories of work.

6.1 DEFINITIONS AND BASIS FOR A SOLUTION

Definitions

A “work” means the work itself, e.g. a poem, a novel, an article, etc., as well as a physical copy of it, e.g. a book, a journal, etc.

A work which is “out-of-print” means that the rightholder concerned has declared it not to be commercially available.

- A work is not considered to be out-of-print albeit it may be out of stock and there may be no printed tangible copies available if:
 - it is still commercially available, typically by being offered for online access or for print on demand;
 - the rights have reverted²² to the author and the author offers the work in the market place directly, through an agent or a CMO, e.g. a Reproduction rights organisation (RRO);
 - the author or publisher directly, through an agent or through a RRO⁴ offers a permission to use the work, e.g. through a licence.

Withdrawal of the edition/Alternative editions

The work may have been withdrawn from the market deliberately, either by the publisher or by the author. In this context, providing online access to works which are no longer available might conflict with the normal exploitation of the newer version of the work or prejudice the economic interest and possibly also the moral rights of the rightholders.

²¹ For audiovisual works: out of distribution.

²² The rights may or may not revert to the author depending on the contracts.

Authorisation to digitise the work

Digitisation of works for preservation purposes is dealt with in part 4, “Digital preservation”.

6.2 PROPOSED SOLUTION – KEY ELEMENTS²³

The solution proposed by the Copyright Subgroup is based on four main elements:

- (1) Two Model Agreements – for (i) authorised users in closed networks only; and (ii) for online access to copyright out-of-print books
- (2) National DataBases (DB) of out-of-print works
- (3) National Rights Clearance Centres (RCC)
- (4) A defined procedure for the clearance of rights.

The elements of the proposed solution were presented in a report to and approved by the High Level Expert Group at its meeting on 17 October 2006. The Model Agreement for the digitisation and making available of out-of-print works by libraries to authorised users in closed networks was endorsed by the High Level Group on 18 April 2007. It is presented in Section 7 of the Report. The Model Agreement to allow libraries to provide online access over open networks to out-of-print books is presented in Section 8, whereas the Criteria for Databases and Rights Clearance Centres are dealt with in Section 9 of the Report together with the Criteria for Databases of and Rights Clearance Centres for Orphan Works.

6.3 THE LICENSING OF DIGITISATION AND THE MAKING AVAILABLE OF WORKS OUT-OF-PRINT. GENERAL LICENSING CRITERIA

In respect of copyright works that are out of print according to the definitions in this document, authorisation by the rightholder²⁴ through a licensing agreement is needed for the:

- ✚ digitisation beyond what is authorised by law;
- ✚ making available of the work on the library premises unless permitted through a statutory exception (as enabled by implementation of Article 5(3)(n) of the Directive 2001/29);
- ✚ making available to a user outside the library premises.

Although libraries and archives may be authorised by law to digitise a work, the communication to the public including making it available by way of interactive on-demand transmissions remains covered by an exclusive right. Such interactive on-demand transmissions are characterised by the public being offered access to the works from a place and at a time individually chosen by them. This requires permission from the rightholders concerned.²⁵

²³ Based on a draft originally prepared by Mr Olav Stokkmo (team leader) discussed with Mr Toby Bainton, also on behalf of Lynne Brindley, Ms Tarja Koskinen-Olsson, Dr Myriam Diocaretz and Mrs Anne Bergman-Tahon. In the work on the Model Agreements the group has also drawn on the expertise of IFRRO’s General Counsel Franziska Schulze.

²⁴ In this context, the author, the publisher or both may be considered rightholders, depending on the contractual arrangements between themselves.

²⁵ Recital 40 of the EC Directive 2001/29 states that Member States may provide for an exception or limitation for the benefit of certain non-profit making establishments, such as publicly accessible libraries and equivalent institutions, as well as archives. However, this should be limited to certain special cases covered by the reproduction right. Such an exception or limitation should not cover uses made in the context of online delivery of protected works or other subject-matter. The Directive is without prejudice to the Member States’ option to derogate from the exclusive public lending right in

National legislation and/or existing licensing arrangements already grant certain rights to libraries/archives, including the making available of works on the premises of these establishments on dedicated terminals. The proposed Model Agreements allow acts that are not already covered by law and by existing licensing arrangements. Licensing conditions observe established balances in the Intellectual Property framework and deliver conditions whereby rightholders are allowed to be rewarded for their creativity and investment while at the same time creating the climate for future inspiration through public access to the creative output.

The Copyright Subgroup considered proposals put forward in certain Member States, whereby it would be for copyright legislation to indicate the conditions and terms under which out-of-print works, once digitised, might be made available to the public at large.²⁶ It considers that a contract based solution is more in line with international obligations, including TRIPs.

General licensing criteria

The proposed licensing mechanism to facilitate the digitisation of such works by libraries and archives beyond what is generally authorised by law and their subsequent online accessibility builds on current national and community legislation. It does not propose new legislation or mandatory stipulations beyond those which already exist. In line with the European Commission Recommendation of 24 August 2006 it is based on voluntary solutions.

The following general licensing criteria apply:

- ✚ The Model Agreements recognise that the rightholder shall have the liberty to choose to digitise a work her/himself. Thus access to the work including that of the library/archive could then be obtained from the rightholder's database.
- ✚ The rightholder may at her / his sole discretion decide that a work shall be treated as a work in print if there are other editions commercially available and the making available of the out-of-print edition would conflict with the legitimate interest of the rightholder in the commercialising of the alternative edition.
- ✚ The Model Agreements grant legal certainty to the library / archive providing online access to works
 - The licensing agreement includes the right to digitise and provide online access to the work including the right to make the work available.
- ✚ Works the rightholders of which are not identified / located should be handled as orphan works (*see* above, Section 5 of the Report).

Some form of remuneration to the rightholders, which the rightholders will be at liberty to waive, is made possible for the digitisation and the making available of their works.

The use of the Model Agreements

There are two Model Agreements: (i) Model Agreement I that covers the digitisation and making available of copyright *material to authorised users in secure networks* only, presented in Section 7 of

accordance with Article 5 of Directive 92/100/EEC. Therefore, specific contracts or licences should be promoted which, without creating imbalances, favour such establishments and the disseminative purposes they serve.

²⁶ See F. STASSE, *Rapport au ministre de la culture et de la communication su l'accès aux œuvres numériques conservées par les bibliothèques publiques*, April 2005.

this Report; and (ii) Model Agreement II which encompasses online accessibility over open networks to *books in libraries*²⁷ which the rightholder has declared as no longer being commercialised as well as access to out-of-print works for authorised users in secure networks, presented in Section 8.

If the relevant agreement between the library and the rightholder is limited to providing access to authorised users in secure networks only, it is recommended to base the agreement on the Authorised User/Secure Network Model Agreement (Model Agreement I). The Online Accessibility Model Agreement (Model Agreement II) is intended as a basis for the negotiations of an agreement when the rightholders and the library agree that some or all of the digitised out-of-print books can also be made accessible online on the library's website.

A necessary incident to the functioning of the mechanism is that the library/archive wishing to digitise will be informed whether another institution has already proceeded to digitisation and whether such an institution is authorised to provide access also to other libraries and their users (see below Section 7).

The Model Agreements are intended to be used as a basis for negotiations. They will have to be adapted to the situation in the library and Member State concerned. Although they are directed mainly towards libraries, they may also be used by archives and others who wish or need to agree with rightholders on the use of works which are out of print/distribution/commerce. The definition of out-of-print works allows the scope of the licence to be generic and thus not limited to print material. At least the Authorised User/Secure Network Model Agreement may also be adopted by other copyright sectors.

Moreover, the Model Agreements have been drafted with a view to being used on national as well as on a multinational and European level. They may be used by libraries and individual rightholders, their agents and representatives including Collective Management Organisations such as Reproduction Rights Organisations (RROs).

The Copyright Subgroup also notes that no dispute settlement mechanism is in place on the European level. The Model Agreements therefore turned to the World Intellectual Property Organisation (WIPO) for a solution.

6.4 DATABASES OF AND RIGHTS CLEARANCE CENTRES FOR OUT-OF-PRINT WORKS

Right Clearance Centres (RCC)

With the aim of facilitating the licensing of out-of-print works, it is recommended that each Member State considers encouraging the establishment of national Rights Clearance Centres (RCC). These clearance centres could act as national portals for clearance of rights in respect of out-of-print works unless the proposed user finds it simpler to contact the rightholder directly. Existing CMOs such as RROs could run the portals. The rightholders may also opt for other solutions. Subject to the mandate from the rightholder, the RCC may:

- a. Grant the permission and offer a licensing agreement;

²⁷ Whereas the remit and the competence of the team was limited to out-of-print "books in libraries" the stipulations in the Model Agreement may well be applicable beyond this. This is left to be decided by the negotiating parties in each case through adapting the Model Agreement and taking into account, if necessary, specific national and local requirements.

- b. Redirect the request to the pertinent rightholder;
- c. Refuse permission (which may e.g. be the case if the CMO does not have the mandate to grant the permission).

The RCC will not encompass all rightholders and all works. It would, however, be expected to represent a substantial portion of them.

Databases (DBs) of out-of-print works

The Rights Clearance Centre should also consider building a register of works for which permission has been granted *inter alia* to avoid duplication of efforts. The data would provide information and metadata about what has been digitised; by whom; where the digitised work is preserved; and how and by whom access to the work is provided. The solution would take the form of a portal. The national portals need to be interlinked to offer a pan-European register.

6.5 GRANTING OF AUTHORISATION TO DIGITISE AND MAKE THE WORK AVAILABLE

Authorisation to digitise and make an out-of-print work available can be granted

- (a) Directly by individual rightholders;
- (b) Through a joint administration, i.e. joint licensing through an intermediary e.g. in the form of redirection from a joint portal for rights clearance to the individual rightholder concerned for the granting of the permission and the licence;
- (c) Collectively via Rights Clearance Centre administered by a CMO such as a RRO. Depending on the mandate, the license offered by the CMO may either be offered on a transactional basis (i.e. case by case) or offered as a repertoire licence. A “repertoire licence” means that the library/archive through the licence is (a) granted preauthorisation to digitise and make available the works that the Rights Clearance Centre has in its repertoire (b) normally at a standardised set of conditions.

Procedure for clearance of rights and obtaining a license

The following procedure for clearance of rights is proposed:

1. The library/archive that wishes to digitise in order to provide online access to an out-of-print work makes a request to the rightholders [give a (list of) work(s) for which it seeks permission]. The request can either be made to:
 - i. The rightholder directly which will often be the case if there is only one rightholder involved and the rightholder’s contact details are known or easily available
 - ii. The Rights Clearance Centre (RCC)
 - iii. The CMO where the CMO is not the RCC
2. Depending on the mandate, the rightholder or the CMO / RCC will
 - i. Grant the permission
 - ii. Refuse to grant permission, with or without justification
 - iii. Redirect to the pertinent rightholder

In case of transactional licensing by CMOs, individual direct licensing and licensing through joint administration, a reasonable time must be defined to respond to the library's/archive's request for permission. This is addressed in the Criteria for Rights Clearance Centres (See Section 9)²⁸

7. THE MODEL AGREEMENT FOR THE DIGITISATION AND MAKING AVAILABLE OF OUT-OF-PRINT WORKS TO AUTHORISED USERS IN CLOSED NETWORKS

The scope of the licence

The Model Agreement I annexed as Annex 3 offers a practical solution to specific needs as defined by libraries and will assist them in satisfying user requirements for access to information and content once printed and published. It has been designed to be adaptable to the different legal regimes and models for administration of rights in force throughout the European Union Member States.

Access should be offered in a way that does not interfere with the copyright holders' legitimate interest in controlling the commercialisation of their works. The Model Agreement allows the library to digitise and provide access to out-of-print works to authorised users through closed networks. It is not limited in respect of territory, but access may not be offered through open networks.

The content of the Model Agreement

The Model Agreement grants the library a non-exclusive and non-transferable right to digitise and make the licensed work available to users in closed networks. The rightholder is entitled to payment which (s)he is at liberty to waive. The pertinent author/publisher retains copyright in the work and in the digitised version and may at any time revoke the licence, *inter alia* to re-commercialise the work in question. The author / publisher may require information from the library on the use of the work to better assess its commercial potential. If the licensor withdraws from the library any part of the licensed material and the material withdrawn represents more than 10% of a title, the library is entitled to a reimbursement of its actual costs.

Under the licence the library may digitise, access the digitised version, store it in a systematic way to facilitate search and retrieval, provide access to it to authorised users through secure networks, and reproduce it electronically or on paper for internal back-up or preservation purposes.

Subject to a separate agreement with the rightholder or his/her representative the library may provide other libraries with online access to the digitised work in order for them to make it available in closed networks to their respective authorised users. Also, subject to a separate licence the library may provide on-line access to a third party such as an enterprise or a university.

The authorised user is allowed to search, view, retrieve and display the digitised work. The library may also agree with the author or publisher who holds the right that the authorised user may electronically save and make single copies of parts of the work.

²⁸ In certain specific cases, also the new Nordic "library-specific" Extended Collective Licensing scheme might be a good way forward; yet, as negotiation of the required agreements with the stakeholders is still underway, it is suggested that the adaptability of the mechanism to out-of-print works needs to be further scrutinized.

8. THE MODEL AGREEMENT AUTHORISING LIBRARIES TO ALLOW ONLINE ACCESS TO OUT-OF-PRINT BOOKS²⁹

8.1. THE SCOPE OF THE AGREEMENT

In line with the Copyright Subgroup's intention to work out practical solutions to specific needs and expectations indicated by the cultural institutions in the digitisation and making available process of copyright works, a team was established tasked with the development of a solution to enable online access to books which are out of print³⁰. As with other solutions proposed by the copyright subgroup under the i2010 Digital libraries initiative the stakeholder representatives agreed that this should be done in a way that does not interfere with the copyright holders' legitimate interest in commercialising their works.

The Copyright Subgroup including the online accessibility team has limited its considerations to the digitisation and providing access online to out-of-print *books* by *libraries*. It concluded that the most appropriate solution would be to offer a Model Agreement, hereafter referred to as the Model Agreement II annexed as Annex 4. It is further assumed that a library that offers online access to out-of-print books will also grant access to the same categories of works to authorised users in closed networks. Therefore, the Model Agreement that has been worked out therefore comprises both options.

It has not been assessed whether Model Agreement II may also be applied to other types of works than books, to other sectors such as the music and/or visual and/or audiovisual sectors, or other institutions than libraries. However, the terms that are used are generic and the Model Agreement II's applicability should be possible beyond out-of-print books in libraries.

The content of the Model Agreement II

The agreement grants the library a non-exclusive and non-transferable right to digitise and make the relevant out-of-print books covered by the agreement available to users on line over open networks. In addition it may offer authorised users access through secure networks to works which are not otherwise accessible online on the same conditions as granted by the Authorised User/Secure Network Model Agreement I for out-of-print works described in Section 7 of this Report.

For out-of-print books that may be accessed online over open networks the Model Agreement grants the library the right to digitise the book and make the digitised version either freely available on its website to anyone who accesses the website or subject to registration, depending on the option agreed with the rightholder or her/his representative. The library may index the digitised copy in its system. Only the Licensee is authorised by the Agreement to offer the content on its web-site.

The User may search, retrieve and display the digitised version of the book, store it electronically on a hard-drive or other storage and, subject to it being specified in the agreement or other agreement, or authorised by law, make single copies of parts of it. The Model Agreement II also allows the library and the rightholder / rightholder representative to specify allowed uses.

²⁹ The Online accessibility Model Agreement has been developed by a Team made up of Mr Olav Stokkmo (team leader), Ms. Anne Bergman-Tahon, Mr. Vianney de la Boulaye, Dr. Myriam Diocaretz, Ms. Mette Møller, Mr Toby Bainton, Dr. Elisabeth Niggemann, Mr. Ben White and Ms Tarja Koskinen-Olsson. In drafting Model Agreement II the team has also drawn on the expertise of IFRRO's General Counsel Ms. Franziska Schulze.

³⁰ For the definition of an out-of-print work see 6.1

The agreement does not allow the library or the user to make systematic print or electronic copies of multiple extracts of the book, or alter, abridge, adapt or modify it in any way. Moral rights have to be respected.

As with the Authorised User/Secure Network Model Agreement (Model Agreement I) the rightholder is entitled to payment which (s)he is at liberty to waive. The pertinent author / publisher retains copyright in the work and in the digitised version and may at any time revoke the licence, *inter alia* to re-commercialise the book; the author / publisher may require information from the library on the use of the work to better assess its commercial potential; and the withdrawal from the library of the book – partly or in total – may cause reimbursement by the rightholder of the library’s costs.

9. KEY PRINCIPLES FOR ORPHAN WORKS AND OUT-OF-PRINT WORKS DATABASES (DB) AND RIGHTS CLEARANCE CENTRES (RCC)

9.1. BACKGROUND

The Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation noted the strong roots of the European digital libraries in national and local efforts to digitise and preserve the cultural heritage. Creating the European dimension through a common multilingual access point requires thus a high degree of interoperability.

The Recommendation further noted that “Licensing mechanisms in areas such as orphan works [] and works that are out of print or distribution (audiovisual) can facilitate rights clearance” and “should therefore be encouraged in close cooperation with rightholders.”

Concurrent with the Commission Recommendation, the Report of the Copyright Subgroup of 18 April 2007 stressed the voluntary aspect of solutions to be implemented within the framework of the i2010 digital libraries initiative. The Report further affirmed that among the governing principles for rights holders are (i) “digitisation and use within the premises of libraries should take place with rightholders’ consent or be based on statutory exception”; and (ii) “Rightholders’ consent means in principle rights clearance, which should be based on individual or collective licensing or a combination thereof.” One of the governing principles for the cultural institutions is that “Access means either within the premises of the libraries, archives and museums or online availability.”

Inter alia on this basis the Copyright Subgroup Report of 18 April 2007 concluded that Databases and Rights Clearance Centres must be a part of the solution both for orphan works and out-of-print works. Aiming to ensure interoperability, enhance co-ordination efforts and facilitate the multilingual access points incorporating national and local initiatives, the Copyright Subgroup decided to develop a set of Key Principles for Databases and Rights Clearance Centres for Orphan Works and Out-of-Print Works. A team³¹ was established to draft the Key Principles presented by the Copyright Subgroup and incorporated in this Report.

³¹ Team led by Mr. *Olav Stokkmo* (IFRRO) and otherwise made up of Mr. *Toby Bainton* (SCONUL and EBLIDA), Ms. *Claudia Dillman* (Association des Cinémathèques Européennes), Ms. *Anne Bergman-Tahon* (FEP), Dr. *Myriam Diocaretz* (EWC), Ms. *Sophie Scrive* (ENPA) and Ms. *Tarja Koskinen-Olsson* (IFRRO). Members of the Copyright Subgroup who

9.2. ORPHAN WORKS

General point of departure

The overall solution for orphan works consists of:

- i. Diligent search criteria that a user needs to fulfil prior to the use of the work. (Diligent search for rightholders to the work, and clearance of rights, will normally be carried out in the country of origin of the work when identifiable) (see above, Section 5.4);
- ii. Database(s) (DB) of orphan works to facilitate users in their search, which is needed irrespective of any legislative solution;
- iii. A rights clearance procedure and (a) Rights Clearance Centre(s) (RCC) to grant licences when they can be offered by a mechanism set up by rightholders;
- iv. National solutions which may include legislative/regulatory support and mutual recognition of different solutions in various Member States to achieve the cross-border effect needed for the European Digital Libraries (EDL) (see above Section 5.4).

The Key Principles proposed by the Copyright Subgroup with this Report concentrate on three implementation issues, which are not dependent on each other, and are needed in an overall solution to find a workable mechanism to use orphan works, primarily by cultural institutions but also by other users:

- Sector specific criteria for diligent search for rightholders to copyright works
- databases of orphan works; and
- a mechanism to clear the rights to use an orphan work.

Database and Rights Clearance Centre

The rationale of a Database (DB) is to provide assistance to users in their search endeavours. Interlinking national databases and registries is needed to enable a European common multilingual access point and a European wide resource possible. It should take account of the variety of existing and future information resources.

The national Rights Clearance Centres (RCCs) could act as portals and common access points for clearance of rights and be accessible across borders. The user, defined as the one who requires a licence to digitise and/or make available the work and/or make other use of it, has the full responsibility for carrying out a diligent search for rightholders to the orphan works. The diligent search must be carried out and documented prior to the granting of a licence. The process could typically be:

- The institution or individual wishing to digitise, make available or otherwise make use of a work states the interest and includes a description of the required use with a declaration that the user has been unsuccessful in identifying or locating the rightholder and that the work may be an orphan work
- The potential orphan work is described with whatever metadata (name of the author, producer, etc.; title of the work, etc.) is available, and, in the absence of metadata, makes use of other means to describe the work such as snapshots, a facsimile, photo, video clip, excerpt of a piece of music

were not on the team have been copied in. Ms. *Patricia Moll* (Google) commented on the OPW Key Principles, Mr. *Jean François Debarnot* (INA) on the OW Key Principles.

- The licensing conditions of the work if it remains orphan following a diligent search for the rightholder should be available prior to the start of the diligent search
- Diligent search for the rightholder(s) is carried out according to established search criteria and guidelines for the sector concerned
- Evidence that a diligent search has duly taken place according to the sector specific criteria and guidelines are presented
- The intention to make use of the work and by whom as well as the evidence of the diligent search for the rightholder(s) are registered in and publicised in the Orphan Works DB
- The RCC assesses whether the search is diligent, and, if so, informs about licensing criteria for the work in question and grants/refuses to grant a licence within a defined period of time
- The RCC may wish to take up an insurance to limit financial risks in respect of future claims that may be raised
- The required fees, i.e. transaction costs and, when applicable, the licence fee are paid to the RCC by the user
- The information on the granting of the licence and the licensing conditions including the further use of the work are publicised in the DB
- If the rightholder, or his/her representative reappears the RCC examines the claim and certifies that the claimant is the correct rightholder and pays out, when applicable, the collected fees
- Upon certifying the right claimant, the information on the rightholder and the consequences, etc. for the licence is published in the Orphan Works DB.

The Key Principles

The Database foreseen to be interlinked in the European Digital Libraries initiative is a register of metadata rather than a works database. In order to facilitate interoperability also with existing resources a general principle is that it should, as a starting point, be based on existing standards rather than developing new ones. The Key Principles encompass

1. Policy of the Database
2. The Database structure and content
3. Metadata to be contained as a minimum and how to address the absence of metadata
4. Standards and how to address issues of standards
5. Interoperability criteria, including a registry of works which have been digitised and for which authorisation has been granted.

The Rights Clearance Centre Key Principles include

1. Policy of the Rights Clearance Centre
2. Licensing policy and issues
3. Licensing conditions and how to address them
4. Remuneration policy
5. Interoperability issues
6. Transparency issues.

9.3. Out-of-Print Works

General point of departure

The solution for out-of-print works is based on

- (i) Model Licence;
- (ii) Database registers on works declared to be out of print/distribution/commerce; and
- (iii) National Rights Clearance Centres to be used by rightholders on a voluntary basis to complement individual direct licensing by rightholders.

The Model Licence has already been approved by the Copyright Subgroup and the HLG and is posted on the European Commission's website. With this Report the Copyright Subgroup presents the Recommended Key Principles for the establishment of Databases and Rights Clearance Centres in connection with the i2010 Digital Libraries initiative.

The Key Principles build on previous conclusions taken by the Copyright Subgroup as approved by the HLG, including the definition of works out of print/distribution being those declared by the pertinent rightholder(s) to be no longer actively commercialised. Moreover, the Rights Clearance Centres are foreseen to be used on a voluntary basis by rightholders who often will be in a position to enter themselves into direct licensing agreements with libraries, museums and archives. It is, however, necessary to consider clearance centres which can act in a complementary fashion to individual, direct licensing.

The Database

The Database foreseen to be interlinked in the European Digital Libraries initiative is a register of metadata and not a works database. The rationale is to provide assistance to cultural institutions on works that are no longer being commercialised by the rightholder(s). Users may be offered access to such works on conditions that may be different from those which apply for works in print. The Key Principles aim to provide information on such works to be available across border and thus to facilitate a European wide solution through interoperable national databases.

The optional use of the database is recognised. The result of this is that the registry will not be complete. It is, however, assumed that it will be in the interest of all stakeholders that a high quality registry of out-of-print works be established. Its quality depends largely on the use of the opportunity that such a database provides. It is assumed that institutions will present to rightholders and/or their representatives a request to digitise a work. The out-of-print works register will typically be built up through registering the work upon a declaration by the rights holders of their lack of intention to commercialise it further. The rightholders may also wish to register a work with the database as being out-of-print regardless of a request for digitisation or other use of it.

In order to facilitate interoperability with existing resources a general principle is that it should, as a starting point, be based on existing standards rather than developing new ones. The Database Key Principles further address

1. Policy of the Database
2. The Database structure and content

3. Metadata to be contained as a minimum and how to address the absence of metadata
4. Standards and how to address issues of standards
5. Interoperability criteria, including a registry of works which have been digitised and for which authorisation e.g. under the Model Licence has been granted

The Rights Clearance Centres

The Rights Clearance Centre can, subject to the mandate, both grant licences to digitise and make available works and redirect to the pertinent rights holder for possible direct licensing. The Key Principles address

1. Policy of the Rights Clearance Centre
2. Mandating by rightholders
3. Licensing policy and issues
4. Licensing conditions and how to address them
5. Remuneration policy
6. Interoperability issues
7. Transparency issues

9.4. POSSIBLE COMMUNITY MEASURES FOR ORPHAN WORKS AND OUT-OF-PRINT WORKS

The European Commission could

- A. Based on the Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation
 - i. Recommend to the Member States that they encourage rightholders to establish Rights Clearance Centres for orphan works
 - ii. Publish the Key Principles for Orphan Works Databases and Rights Clearance Centres on its website and recommend that they be used when such databases and rights clearance centres are established
 - iii. Publish the Key Principles for Out-of-Print Databases and Rights Clearance Centre on its website and recommend that they be used when such databases and rights clearance centres are established
- B. As a prerequisite for establishing the suggested measure A. above, provide financial assistance to the development of technical standards and test beds for orphan works and out-of-print works Databases and Rights Clearance Centres, such development to take place in collaboration with rightholders, cultural institutions and other stakeholders.

10. IMPLEMENTATION OF THE PROPOSED SOLUTIONS

10.1 IMPLEMENTATION OF THE MODEL AGREEMENTS

The actual impact of the Model Agreements (MAs) shall depend on their implementation. A prospective deployment plan has been formulated through a process of consultations with libraries representatives and other stakeholders; therefore, a number of actions are recommended for full dissemination, promotion and implementation.

The European Commission might wish to promote the adoption of the MAs, post them on the digital libraries home page and encourage their use.

They should be disseminated and brought to the attention of potential users through relevant channels in the EU Member States which should include: pertinent ministries; national libraries and library organisations; authors' associations, publishers' associations and RROs. The model agreements should be available through relevant portals and web sites on a national and Community level including those of the Member States ministries, rightholder associations, library associations and Collective Management Organisations.

The voluntary use of the MAs can be effectively deployed through the establishment of test-beds. For this purpose, national libraries and other digitising institutions should be encouraged by the EC to use either of the MAs as a solution to digitise and make available out-of-print works. Cultural institutions can thus build examples of "effective practices" as a result of their voluntary institutional actions.

The multiplier effect is a key factor for implementation. The test-beds deployment will be enhanced if the Commission invites current relevant initiatives such as EUROPEANA project and additional EU digitising initiatives to consider implementing the MA. Moreover, the Commission could encourage the adoption of the MA through a selection of "Champion Projects" to promote best practices.

Moreover, the Commission could contribute to identifying and publishing best practices on the use of the MAs. The text of the MAs may be set in a national context to be in line with the respective laws, economic models and related factors. This information needs to be gathered. Furthermore, cultural institutions need to have information about already existing model agreements at national level in other Member States; it would be beneficial for all to have a collection of these examples.

For the above strategic approach, the Commission's support and endorsement is essential.

10.2. POSSIBLE COMMISSION MEASURES

The Model agreement for a licence on digitisation of out of print works for closed networks exists in the following languages: English, German, Spanish, French, Italian, Dutch, Polish and Romanian. The Commission may contribute to its dissemination by helping to make the Model Agreements known and

available throughout the EU, in all main EU languages and by resorting to its legal and linguistic expertise to review the Model Agreements both in the original version (English) and in the translations. The deployment potential for MA test-beds largely depends on the communication to and engagement of the Member States. The Commission is advised to give prominence to the potential use of the MA from the very beginning of its adoption by the HLG, to ensure that it is acknowledged in all Member States for national and/or cross-border contracts. An important support and involvement in this direction needs to emerge from **Member States' Expert Group on Digitisation and Digital Preservation**. Both the mandate and the strategic role of this Expert Group within policy making and major ongoing initiatives in digitisation and digital preservation³² ensures a coordinated approach which can help to avoid duplication of efforts. Thus, they are the most appropriate body to support the further adoption of the MA for additional test-beds. The Commission is advised to announce and promote the solutions proposed by the Copyright Subgroup in the MS Expert Group meetings and to invite further dissemination in each MS for a prospective endorsement at national level that would facilitate a widespread voluntary adoption by cultural institutions.

The implementation process will require **coordination** to gather best practices, to promote the exchange of experience and knowledge, as well as to collect the different national views and procedures existing in the MS. There is an increasing interest amongst libraries and other digitising cultural institutions in finding out about the situation and procedures for out-of-print works in other European countries. Parallel to the test-beds, it will be important to gather information and feedback from currently existing digitising practices, business models within private-public partnerships, national and regional initiatives (Norway, France, Germany, among others). The implementation requires EU-wide research on a country-by-country basis, concerted analysis, follow-up, dissemination, and discussion. Such coordination should aim at providing the driving force for a much needed cross-fertilisation. If no such coordinating body exists, it will be important to consider these identified needs for a future EC Call (FP7).

The Commission is advised to identify initiatives within the Seventh Framework Programme (FP7), of community funded EU digital libraries projects, such as *eContentplus* programme, in order to select Champion Projects that would be willing and ready to start the implementation. The new *eContentplus* project ARROW (see Annex 5 to this Report) is a good example of a concrete beginning of deployment.

³² Established by the Commission on 22 March 2007, the group's mandate includes: "To monitor progress and assess the impact of the implementation of the [Commission Recommendation of 24 August 2006](#) on the digitisation and online accessibility of cultural material and digital preservation.[...] To provide a forum for cooperation between Member State bodies and the Commission at European level and to exchange information and good practices of Member States' policies and strategies on the digitisation and online accessibility of cultural material and digital preservation."