

**EUROPEAN DIGITAL LIBRARY INITIATIVE**  
**High Level Expert Group (HLG) – Copyright Subgroup**  
**Interim Report**  
(16.10.06)

**1. Introduction.**

The first meeting of the High Level Group (HLG) on European Digital Libraries, held in Brussels on March 27<sup>th</sup> 2006, took up a number of the issues highlighted by the Commission Communication “i2010: Digital Libraries”<sup>1</sup> and discussed various legal, technological and economic questions involved in the Digital Libraries 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 copyrights? Is there a need to 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 of its members to work together as a special subgroup (“the Copyright Subgroup”) to analyze and discuss relevant IPR issues among those brought up during the initial meeting and to report to the plenary sessions of the HLG on the different options. As members of the Copyright Subgroup were appointed Dr. Arne J. Bach (President FEP – Federation of European Publishers), Ms Lynne Brindley (Executive Director of the British Library), Ms Claudia Dillman (Director Deutsches Filminstitut, President of ACE, Association des 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), who was asked to chair the Subgroup.

The Copyright Subgroup met in Milano on June 12-13, 2006 to discuss an agenda prepared by its chairman, Prof. Ricolfi, with a view to exploring the possibility of envisaging IPR rules capable of optimising the benefits of the new information technologies in the areas of digital preservation and dissemination of European cultural materials in accordance with the Digital Libraries Initiative while respecting the incentives currently provided by copyright and IPR protection and fully complying with the international obligations of the EU and of its Member States.<sup>2</sup>

After a wide ranging discussion of the various issues involved, the Copyright Subgroup agreed on a number of high level principles to govern its agenda and identified a list of IPR issues possessing a high priority in the field of the Digital Library Initiative. On the basis of the discussions held in Milano and of subsequent online exchanges the Copyright Subgroup prepared a preliminary report<sup>3</sup> on three interlinked groups of issues:

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<sup>1</sup> 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.

<sup>2</sup> At the meeting were present: Prof. Marco Ricolfi, chairman of the sub-group, Ms Claudia Dillman, Ms Tarja Koskinen-Olsson, Mr Olav Stokkmo (Secretary General IFRRO), Mrs Anne Bergman-Tahon (Director FEP – Federation of European Publishers), Mr Jean-François Debarnot (Directeur Juridique INA – Institut National de l’Audiovisuel), replacing Mr Emmanuel Hoog, President INA, and Mr Luis Ferrão, from the European Commission. Mr Arne Bach Jürgen, President FEP, justified his absence.

<sup>3</sup> 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.

- digital preservation;
- orphan works; and
- out-of-print works.

The findings of the Copyright Subgroup in each area and the proposals deriving therefrom are set forth in the following sections 2, 3, 4 and 5.

The Copyright Subgroup notes that at a later stage its analysis might extend to other IPR issues connected with the Digital Library Initiative. For the time being it was however held that a contribution in the three areas identified above should have priority and that subsequent analysis should be guided by the outcome of the plenary meeting of the HLG to be held October 17, 2006.

## **2. High Level Principles.**

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. This collective memory includes print (books, journals, newspapers), photographs, museum objects, archival documents, audiovisual material (as indicated in recital 1 of the European Commission Recommendation of 24<sup>th</sup> August 2006 on the digitisation and online accessibility of cultural material and digital preservation).<sup>4</sup>

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 preliminary report.

All proposals should be in full compliance with all international obligations of the European Union and of its Member States<sup>5</sup> as well as respect the principle of subsidiarity as enshrined in the EU Treaty.<sup>6</sup>

For rightholders the governing principles are:

- Respect for copyright and related rights, including moral right 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 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 borne 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;

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<sup>4</sup> (2006/585/EC), in *OJ* 236 of August 31, 2006, 28 ff.

<sup>5</sup> 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.

<sup>6</sup> 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.

- 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 sub-group on copyright for 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.

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

### 3. Digital preservation.<sup>7</sup>

The Copyright Subgroup acknowledges that digitisation may in some cases be the only means of ensuring that cultural material will be available for future generations and may therefore be essential to ensure 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 Information Society Directive 2001/29/EC (“Infosoc Directive”).<sup>8</sup>

The Copyright Subgroup notes however that this exception to the exclusive reproduction right conferred by copyright may prove insufficient in view of digital preservation as a consequence of the format-shifting requirements that may be required for continued preservation due to technical obsolescence of the 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, in case 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 (open-ended number of copies), if this is necessary in order to ensure the preservation of the work. Successive copying from one medium into another medium should be allowed to take place if and when technology 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 by the scarcity of the works in the market. If the work is widely available on the market, there is no need to preserve it except within national libraries deposit’s schemes;

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<sup>7</sup> This section is based on a draft originally prepared by Dr. Arne J. Bach, Mrs Anne Bergman-Tahon and Toby Bainton.

<sup>8</sup> Directive 2001/29/EC of the European Parliament and the Council of May 22, 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, in *OJ L* 167 of June 22 2001, 10 ff..

- 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 case of national deposit libraries and concerning born-digital works which would 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.

It 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” cannot possibly entail the liberty to disseminate *freely* under all circumstances, lest the opportunity to uncontrolled *secondary* dissemination destroy the incentives to create in the first place and to invest in the *primary* exploitation on works. No creator and no publisher indeed may 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, cultural and national heritage produced and distributed in different formats and editions. Therefore these additional copies<sup>9</sup> made in this context cannot be further used to give access to end users until the expiry of copyright.

The Copyright Subgroup also notes that in certain cases, national legislation have implemented Article 5(3)(n) of the 2001 Copyright in the information society Directive allowing libraries to use by 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.

#### 4. Orphan works.<sup>10</sup>

Clarification and transparency in the copyright status of a work is an essential element in a number of areas including the European Digital Library Initiative. In some cases rightholders cannot be identified or located; as a result, works can be classified as “orphan”. Comprehensive, large scale digitisation and online accessibility, as well as other uses, are hampered by this phenomenon. As a result, libraries, museums, archives and other non-profit institutions may be prevented from fully exploiting the benefits of information technology to carry out their preservation and dissemination mandate. Both text-based and audiovisual materials include substantial amounts of works with unclear copyright status; this is so especially in connection with old materials.

**The Copyright Subgroup concludes unanimously that a solution to the issue of orphan works is desirable, at least for literary and audiovisual works.** Various mechanisms to facilitate the clearance of rights for orphan works and their use, including digitisation and use, exist in different

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<sup>9</sup> The ones made for preservation purposes rather than for access to the public to the extent permitted by applicable law.

<sup>10</sup> 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.

countries, and new proposals in the area are pending. These offer a rich source of alternatives to arrive at a preferred European solution. Any solution adopted in a Member States should be interoperable with those adopted in other Member States so that the mechanism fully supports the Digital Library Initiative.

The Copyright Subgroup recommends some non-legislative solutions that enhance transparency and/or prevent the further expansion of the phenomenon of orphan works, such as:

- Dedicated databases concerning information on orphan works;
- Improved inclusion of metadata (information on rightholders) in the digital material;
- Enhanced contractual practices, in particular for audiovisual works.

Both the Infosoc Directive and the Commission Recommendation of 24 August 2006 put emphasis on contractual solutions that can be negotiated between stakeholders.

A “soft law approach” can be achieved through contractual arrangements, combined with some support mechanism to voluntarily negotiated contracts. The European Commission could recommend that the Member States support contractual arrangements in a suitable manner, taking into account the role of cultural establishments. The adopted mechanism may be supported or complemented by an extension effect to collective license contracts, by a legal presumption and by other measures to the same effect.

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 (unidentified and non locatable), 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;
- Offer also for commercial users a possibility to use orphan works;
- Include requirement for general remuneration or remuneration if the rightholder reappears.

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. Mutual recognition is important with a view to the cross-border nature of the use.

A detailed proposal on orphan works is presented in Annex I

## **5. Works out of Print.<sup>11</sup>**

The Copyright Subgroup proposes pragmatic solutions for out-of-print works to meet specific requirements put forward by libraries and archives within the existing legal frameworks. It addresses printed works only. It does not analyse whether the suggested solution could be adapted also to other categories of work. After an initial period, the time may come to extend the mechanism to audiovisual works, on the basis of adaptations intended to take into account that these typically entail additional categories of rights (including neighbouring or related rights) and a larger

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<sup>11</sup> This section is based on a draft originally prepared by Mr Olav Stokkmo on the basis of inputs and discussion by Ms Lynne Brindley, Ms Claudia Dillmann, Ms Tarja Koskinen-Olsson and Mrs Anne Bergman-Tahon, and of comments by Toby Bainton.

number of rightholders (including publishers, holders of synchronization rights, performers) and that not always these rightholders are represented by CMOs.

The Copyright Subgroup defines an “out-of-print” work as one that is no longer commercially available regardless of the existence of tangible copies of the work in libraries and among the public. 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 August 24, 2006 it is based on voluntary solutions and includes proposals for:

- A Model license to be developed jointly by the rightholders, collective management organisations as their representatives and the libraries and archives community;
- National Joint Clearance Centres (JCC);
- A Recommended set of procedures for rights clearance and licensing.

The adequate licensing mechanisms should allow acts that are not already covered by law and existing licenses. Licensing conditions must observe established balances in the Intellectual Property framework, and deliver conditions whereby rightholders are rewarded for their creativity and investment while at the same time creating the climate for future inspiration through public access to the creative output. It is further assumed that a reasonable time limit be defined for the responding by rightholders or their representatives to requests for a permission by libraries/archives.

A detailed proposal on out-of-print works is presented in Annex II

## Annex I

### Detailed proposal on orphan works

#### **1. What is the issue at stake**

Clarification and transparency in the copyright status of a work is an essential element in the European Digital Library Initiative. Libraries need to know the copyright status of works they are going to digitise and use, in order to ask for the required rights clearance.

In some cases rightholders cannot be identified or located. When rightholders are unknown, the copyright status of the work may remain unclear. When rightholders are non locatable, permissions cannot be acquired. Works are thus “orphan”.

In both cases, such works currently cannot be used with legal certainty. As a consequence, comprehensive, large scale digitisation and subsequent online accessibility are hampered by the phenomenon of orphan works. Moreover, orphan works do not only prevent digitisation, but also deny access to and use of such works in general.

#### **2. Criteria for a possible use of orphan works**

The following general prerequisites need to be fulfilled when considering the possibility to use 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 find out who the rightholders are and/or locate them.
- The user wishes to use the work in a clearly defined manner.
- It is up to the user to clear the rights with an appropriate body.

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

The aim is to set a standard for dealing with material having an unclear copyright status.

#### **3. Specificities of different types of copyrighted materials**

The Digital Libraries Initiative addresses at first instance Europe’s cultural heritage, the second area being scientific information. Among cultural heritage, text-based materials, primarily books, are targeted first. Audiovisual works are mentioned as the second target. Even though all types of copyright protected materials can include orphan works, the factual situation varies with different types of material.

Text-based materials, primarily books, have a long tradition with international identifiers, covering the last 30 or 40 years. An ISBN (International Standard Book Number) can be successfully used for the purpose of identifying rightholders. The same applies to journals and serials that have an ISSN (International Standard Serial Number).

However, the British Library (BL) estimates that more than 40 % of all types of works in their collections are orphan works.<sup>12</sup> Also very old text-based materials in archives, such as periodicals, pose challenges for rights clearance.

A survey carried out by ACE (the Association of European Cinémathèques) concludes that approximately 50.000 titles classify as orphan works in European Archives, consisting mainly of non-fiction films before 1950. Indeed, movies created before the war or in the years immediately subsequent to it are sometimes referred to as “the Twentieth Century black hole”.<sup>13</sup>

For audiovisual works, unclear contractual relationships between different rightholders pose an additional challenge. Even though the producer of an audiovisual work may be identified and located, he may not be in a position to grant the necessary permission with legal certainty. It has been assessed that large amounts of audiovisual works cannot be used due to their unclear copyright status. For audiovisual works, numbering in the form of an ISAN (International Standard Audiovisual Number) is a relatively new phenomenon.

For all types of material, measures that enhance and improve future identification should be recommended. Such measures prevent a further extension of the orphan works problem. For born-digital material this may imply embedding/tagging information on rightholders and licensing conditions into the object itself. An additional way to eliminate the expansion in future of the phenomenon of orphan works is to improve individual or collective contractual practices, in particular for audiovisual works.

#### **4. Existing solutions for orphan works**

In some countries, legislative solutions for orphan works have been established. In the following, the rationale and main function of some mechanisms adopted for the purpose are described. They represent basically two different approaches to the issue at stake:

- Orphan works-tailored solutions (sections 4.1 – 4.3), and
- Solutions that are not tailored for orphan works, but can have an effect to that extent (sections 4.4 – 4.5).

##### **4.1 The Canadian regime for non locatable copyright owners**

Pursuant to section 77 of the Canadian Copyright Act, the *Copyright Board* of Canada may grant licenses authorizing 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 license.

The Act itself gives little guidance on how the Board ought to exercise its licensing power. The Board may issue the licence if the Board is satisfied that the applicant has made reasonable efforts to locate the owner of the copyright and that the owner cannot be located. The licence is subject to such terms and conditions as the Board may establish.

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<sup>12</sup> The figure does not only refer to books, but includes among others audio recordings.

<sup>13</sup> See also V. REDING, *The role of libraries in the information society*, Luxemburg, 29 September 2005.



The Board has developed a number of principles that are generally applied<sup>14</sup> in the determination, such as:

- Licenses granted by the Board are non-exclusive and valid only in Canada;
- The Board has decided to involve collective management organisations (CMOs) in the process. They are asked to cooperate in the search for the copyright owner. Access Copyright and Copibec<sup>15</sup> have signed a formal memorandum of understanding concerning their involvement.
- The Board often asks licensees to pay the royalties to the CMO that deals with the category of acts that are allowed by the licence. This is done in the event that the Board thinks that royalties should be paid. The CMO then undertakes to pay the copyright owner who shows up within five years of the expiration of the licence.
- When the use is small, or where it is quite possible that the work is in the public domain, the Board may ask the licensee only to undertake to pay the royalties if the copyright owner shows up within five years from the expiry of the licence.
- In appropriate circumstances, the Board will issue licences that expire when the licensed work joins the public domain.
- The Board has also developed a multiple work protocol for unlocatable copyright owners in eleven non-exclusive licences issued to the Canadian Institute for Historical Microreproductions (CIHM) authorising the reproduction of 6,675 works.<sup>16</sup>

In general, the Canadian regime allows works and other subject matter to be used where it is not possible to locate the copyright owner. The fact that a licence is issued protects the licensee from subsequent prosecutions. The fact that the Board is involved in each case means that the quality of the research is controlled.

#### 4.2 Other regimes where a public body may issue a license

There are different regimes where a public body, which may vary from country to country, is empowered to issue a license. All these regimes are based on a case by case analysis of the situation.

##### *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 of a performer cannot be ascertained by reasonable inquiry.

##### *Copyright Board*

The *Indian Act* (s. 31A) provides that the Copyright Board can issue a license to publish an unpublished Indian work if the author is unknown or cannot be traced, or the owner of the copyright cannot be found.

##### *Government Body*

The *Japan Act* (s. 67) authorizes the Commissioner of the Agency for Cultural Affairs to issue a compulsory licence for the exploitation of a work that was made publicly available beforehand if, after exercising due diligence, the copyright owner is unknown or cannot be found.

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<sup>14</sup> Information is provided by Mario Bouchard from the Canadian Copyright Board; a brochure that explains the regime can be found at <http://cb-cda.gc.ca/unlocatable/brochure-e.html>.

<sup>15</sup> Canadian Reproduction Rights Organisations, Members of IFRRO.

<sup>16</sup> Eleven decisions; information over the first decision can be found at <http://www.cb-cda.gc.ca/unlocatable/27-b.pdf>.

In *South Korea* (s. 47 of the Act), the Minister of Culture, in practise the Copyright Commission for Deliberation and Conciliation, can issue a licence for the exploitation of a work if, despite considerable efforts, the owner of the copyright cannot be located.

What is common to the above regimes is that a license is issued authorizing the exploitation of the work. In Japan, the authorization is deemed to be based on a compulsory licence.

#### 4.3 The French model for audiovisual orphan 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 reached a general agreement with representatives of various categories of rightholders, for example the authors, through their CMO.<sup>17</sup> Under the agreement, INA has a general exploitation authorization covering all its archives.

However, the works of some rightholder may not be represented by a CMO, some rightholders may prefer not to be represented by a CMO, as the licensing mechanism is voluntary and finally some contributions (such as the right of publicity) may not be managed by a CMO even for rightholders who are its members. Therefore the French intellectual property code (Article L122-9 and 211-2 for neighbouring rights) includes a provision for dealing with the risks of blockage by allowing the judge to make various arrangements in view of the purpose of exploiting the work.

#### 4.4 Power to extend the application of a scheme or license

The UK Copyright Act (s. 167) includes an implied indemnity in certain schemes and licenses for reprographic copying which is valid “within the apparent scope of the license”. Thus, when a Reproduction Rights Organisation (a CMO in this field) grants a license for reprographic copying, it is implied that the licensor indemnifies the person obtaining the license.

The UK Act (s. 168) concerns licenses for educational establishments for the purpose of reprographic copying in connection with teaching activities. The Minister may by order provide that the licensing scheme or license shall extend also to works of such rightholders that the license does not cover. When the Minister proposes to make such an order, he or she shall give notice of the proposal to:

- a) The owner of the copyright;
- b) The licensing body concerned;
- c) Such persons or organisations representatives of educational establishments, and
- d) Such other persons or organisations, as the Minister thinks fit.

Under this regime, there exists an extension effect to a licensing scheme, but not automatically. In respect of the Digital Library Initiative, a licensee or a licensor could ask for a general license to be extended to cover orphan works.

#### 4.5 Extended collective licenses

Since early 1960s, Nordic countries have applied a special legislative technique to complex mass use situations of copyrighted works. This legal technique, called “extended collective

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<sup>17</sup> SCAM, SACD, SACEM, SDRM, SESAM.

licence” (ECL), is a support mechanism for freely negotiated licensing agreements. CMOs represent rightholders and negotiate on their behalf. Once an agreement is reached between a representative CMO and a user, an ECL mechanism comes into effect. For a user it means that the license is fully covering. This legal technique addresses the issue of non-represented rightholders in cases of mass use, and in so doing eliminates the problem with orphan works.

The basic elements of an ECL are <sup>18</sup>:

- The organisation and the user conclude an agreement on the basis of free negotiations;
- The organisation has to be nationally representative;<sup>19</sup>
- The agreement is made legally binding on non-represented rightholders;
- The user may legally use all materials without needing to meet individual claims by outsiders and criminal sanctions;
- Non-represented rightholders have a right to individual remuneration;
- Non-represented rightholders have in most cases a right to prohibit the use of their works.

During the years 2002 and 2006, the Nordic countries implemented the Infosoc Directive into their national laws. New ECL provisions were introduced to cover certain activities in libraries, museums and archives. The aim is to facilitate copyright clearance of cultural institutions, such as public libraries, in relation to digital reproductions and online accessibility. The Infosoc Directive states in Preamble 18 that the Infosoc Directive is “without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licenses”.

Whereas an ECL is not an orphan works-tailored stipulation, it could to a large extent eliminate the issue of unknown or non locatable rightholders in areas where this legal technique is introduced. It guarantees remuneration to an unknown or non locatable rightholder who reappears during a prescribed period, mostly three years.

The National Library of *Norway* announced in March 2006 an extensive plan concerning the digitisation on a massive scale of Norwegian cultural heritage and knowledge. Discussions with rightholders’ representatives are at the moment pending.

## **5. Solutions under preparation**

### **5.1 US pending legislation on orphan works**

In 2005, the US Copyright Office studied issues raised by orphan works. The reason for the work was stated as follows: “The uncertainty surrounding ownership of these works might needlessly discourage subsequent creators and users from incorporating such works in new creative efforts, or from making such works available to the public”.<sup>20</sup> The Copyright Office hosted public roundtable discussions and informal meeting on the subject matter.<sup>21</sup>

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<sup>18</sup> J. LIEDES, H. WAGER, T. KOSKINEN and S. LAHTINEN, *Extended Collective License*, leaflet prepared by the Ministry of Education, Finland (June 1991).

<sup>19</sup> As further detailed in law amendments in Denmark, Finland and Norway.

<sup>20</sup> Register of Copyrights, Report on Orphan Works, A Report on the Registrar of Copyrights, Washington, January 2006.

<sup>21</sup> <http://www.copyright.gov/orphan>.

A draft bill was proposed by the Copyright Office in February 2006. In May 2006, a Bill with a proposed short title “The Orphan Works Act of 2006”, was introduced.<sup>22</sup> According to the bill, a user would be allowed to use an orphan work without seeking the authorization of a government authority. 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 “to only reasonable compensation for the use, with an elimination of any monetary relief where the use was non-commercial”, as it typically is in the case of non profit establishment, such as libraries, archives, museum, which are large scale users of orphan works, “and the user ceases the infringement expeditiously upon notice”. Further, “the bill would limit the ability of the copyright owner to obtain full injunctive relief in cases where the user has transformed the orphan work into a derivative work like a motion picture or book, preserving the user’s ability to continue to exploit that derivative work”. In the latter case, the owner of copyright would also have the burden of establishing the amount that a willing buyer and willing seller would have agreed to.

Since the user would not need to apply for a license, she/he would need to take a chance, at least until a sufficient number of court cases has dealt with the issue. The Copyright Office would make available information and guidelines to help users to understand what might constitute a reasonably diligent search.

## 5.2 Initiatives in other countries

As a part of the current *Australian* copyright reform agenda, the Australian government has stated its intention to conduct a review into orphan works. The terms and references of the review have not been announced. The government has stated that, to some degree at least, some of the concerns around orphan works will be addressed by proposing legislative reform i.e. a review of Australian rules in the area of exceptions and limitations to copyright, including fair dealing. At this stage, however, we do not know which option will be chosen.

In *Finland*, a Draft Bill<sup>23</sup> concerning the implementation of the Infosoc Directive, issued in 2002, included an orphan works-tailored proposal. The proposal was based on a depository regime where a CMO approved by a government body would have the possibility to grant a non-exclusive license to use works of unknown or non locatable rightholders. The draft further specified that the government body could appoint one or several CMOs to perform this task. However, this proposal was not included in the Government Bill of 2004, and thus is not part of the present legislation. The matter is pending and further work on this issue is foreseen.

## 6. Is there a need for a European solution for orphan works?

The Digital Library Initiative of the European Commission and various submissions to the online consultation highlight the need to find a workable solution or solutions for the phenomenon of orphan works. The problem seems to be particularly evident in the case of moving images, i.e. audiovisual works. Outside the scope of featured fiction films there is a lot of documentaries, newsreels and other non-fiction films. Moving image archives and libraries will not be able to provide larger access to their collections unless a solution for orphan works is established.

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<sup>22</sup> More specifically, on May 22, 2006, Mr. Lamar Smith of Texas, Chair of the House Subcommittee on Court, Internet and Intellectual Property, introduced HR 5439 (the Orphan Works Act), which was referred to the Committee on the Judiciary but eventually taken from the agenda on the following September 28.

<sup>23</sup> Report of the Copyright Commission: “Copyright in the Information Society”, 2002:5.

In turn, book publishers<sup>24</sup> have in their submission to the Commission confirmed that they also often face the problem of orphan works when they want to use a work the creator of which they cannot identify in their publishing activities. Book publishers' interest in addressing the orphan works issue lies primarily in finding a workable mechanism to facilitate the possibility for authors and publishers to use third-party copyrighted works, such as photographs and other graphic images, personal correspondence and other typically unpublished works, for inclusion in subsequently published books. Therefore, orphan works constitute an obstacle to access to important cultural material which is felt well beyond the digitisation

**It is a unanimous conclusion of all Members of the Copyright Subgroup that a Europe-wide solution to address the issue of orphan works is desirable, at least concerning literary and audiovisual works.**

## **7. Building blocks of a possible European solution**

The Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation lays down the general framework for solutions. It states<sup>25</sup> that

- "Europe's cultural material should be digitised, made available and preserved in full respect of copyright and related rights".
- "Licensing mechanisms in areas such as orphan works and works that are out of print or distribution (audiovisual) can facilitate rights clearance and consequently digitisation efforts and subsequent online accessibility. Such mechanism should therefore be encouraged in close cooperation with rightholders".

In line with the Recommendation, all the members of the Copyright Subgroup support mechanisms to facilitate digitisation and use of orphan works based on contractual arrangements. Some members of the Copyright Subgroup, including, Ms Lynne Brindley's replacement representing the views of the British Library and Ms Claudia Dillman representing the views of the Deutsches Filminstitut, also suggest that contractual arrangements should be complemented by a legislative solution which, in certain special cases, allows the use of orphan works with limited liability, as proposed by the pending US solution (point 5.1).<sup>26</sup>

It is in any event agreed that any solution or solutions adopted in a Member States should be interoperable with those adopted in other Member States so that the mechanism may have at least a European coverage, to support the Digital Library Initiative. Users outside the European territory need to be addressed.

### **7.1 Non-legislative solutions**

#### *Criteria for defining orphan works and guidelines for "due diligence" search*

Orphan works are works whose rightholders are impossible to identify or locate. Guidelines need to be established for due diligence, combined with the user being in good faith and wanting to use the work for clearly defined purposes. Such guidelines, which could also be

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<sup>24</sup> Federation of European Publishers: FEP response to Communication from the European Commission "i2010: Digital Libraries".

<sup>25</sup> Preamble (10).

<sup>26</sup> This is the solution that the BL has proposed in the UK.

sector specific, would give guidance for libraries and archives in performing their duties. Some cultural institutions, in particular archives and CMOs have both knowledge and experience in tracing chains of rights. This expertise would be helpful in proposing and establishing acceptable “due diligence” standards.

#### *Collective management organizations’ or other intermediaries’ role*

CMOs can play an active role in finding out if the status of a work is unclear. CMOs can “advertise” works with an unclear copyright status on their websites, urging rightholders and the public to cooperate with active search. Many CMOs already search for unknown rightholders, especially in cases where they have received remuneration allocated to them from non voluntary licensing schemes. Other intermediaries, such as the “Books in Print” organisations may perform the same tasks. Europe-wide integration of these efforts, via organisational arrangements among CMOs, interoperability and links should be encouraged.

#### *Dedicated databases*

For rightholders it is important to have a clear picture over the use of their works. For users it is important to know whether works have already been identified as orphan and still remain in that category.

A dedicated database or connected database containing information over orphan works (metadata) would enable active search on both sides, by rightholders and cultural institutions. National repositories can be interlinked with similar databases in the Member States of the European Union. This information might also be resorted to prevent duplication of digitisation.

#### *Summary of non-legislative measures*

Transparency and clarity in the status of works with an unclear copyright status can be greatly enhanced through voluntary measures.

To prevent future expansion of the problem of orphan works, the following recommendations should be considered:

- Improved metadata tagging in the digital/digitized material, and
- Enhanced contractual practices, in particular for audiovisual works.

Such measures should in any case be considered only as a partial solution to orphan works.

### 7.2 Solutions where some legal instrument may be needed

Without a clear legislative framework no CMO or other body can issue a license on behalf of a rightholder who is either unknown or non locatable. Consequently, legal certainty for libraries and archives presupposes some additional measure that safeguards the position of users.

In the following, two types of possible solutions are described. The first outline is an orphan works-generic legislative solution and the second is a solution that specifically covers the activities of cultural institutions. A generic solution and a solution that covers the needs of cultural institutions can be combined, leading to a hybrid solution as proposed by Ms Claudia Dillman representing the views of the Deutsches Filminstitut.

#### *A generic solution: licence to use an orphan work*

An express permission to use an orphan work constitutes a clear and safe framework for users of works with an unclear copyright status. A public body, or a private body authorized by a public body, can grant a permission to use an orphan work and, if appropriate, function as a repository for funds received thereof. A public body could designate CMOs or other intermediaries to function as “repositories”. It can be a hybrid of different bodies, each working in their area. It should be recommended that the body needs to use active measures to reach rightholders.

Legislation needs to include provisions among others on the following:

- Criteria for defining under which circumstances work may be deemed orphan;
- Designated body and its function;
- Validity of the licence and what happens if the rightholder reappears;
- How long will the body reserve possible remuneration;
- What happens with the remuneration after the designated period?

This solution relies in the main on the Canadian regime (section 5.1). Some elements have been added from the draft Finnish legislation (section 5.2), especially the role of CMOs in the statute itself.

#### *General solution for cultural institutions, based on the Infosoc Directive*

Contractual relationships between cultural institutions and rightholders should be promoted as a part of the solution for orphan works. In some countries, contractual arrangements already exist between cultural institutions and CMOs (France) or discussions are going on to embark upon contractual arrangements (Norway).

For the Digital Library Initiative, the targeted usage area needs to be clarified at the outset. Representatives of rightholders and libraries need to agree on the scope of digitisation and online accessibility.

The Infosoc Directive includes provisions that deal with the activities of cultural institutions in Article 5 (Exceptions and limitations): *see* paragraphs 2(c) and 3(n). Such an exception or limitation does not cover however uses made in the context of online delivery of protected works or other subject matter outside of the premises of said cultural institutions.

Based on the existing provisions in the Infosoc Directive, the European Commission could recommend that the Member States support contractual arrangements in a suitable manner. The adopted mechanism may be supported or complemented by an extension effect to license contracts, by a legal presumption on representation or by some other measure to the same effect.

Under such a solution, remuneration would be paid for all or some uses of orphan works. There needs to be a period during which remuneration is held in custody for reappearing rightholders. This period would preferably be the same for all Member States. After the expiration of this period, mutual understanding between rightholders and cultural institutions would be enhanced, if unallocated remuneration would be used for their joint purposes.

As earlier indicated, some members of the Copyright Subgroup, including Ms Lynne Brindley’s replacement representing the views of the British Library and Ms Claudia Dillman representing the views of the Deutsches Filminstitut, also suggest that contractual arrangements should be complemented by a legislative solution which, in certain special cases and on the basis of

appropriate searches, including consultation with rightholders' organisations, allows the use of orphan works at the initiative of the user, as proposed by the pending US solution, based on limitation-on-remedy and on the elimination of monetary relief where the use was non-commercial and by a cultural institution and the user ceases expeditiously the infringing use upon notice (point 5.1).<sup>27</sup>

### 7.3. Agreed solutions in the Member States

The Infosoc Directive and the Commission Recommendation put emphasis on contractual solutions that can be negotiated between stakeholders. Recital 40 of the Infosoc Directive addresses directly the situation of non-profit establishments and states that "specific contracts and licenses should be promoted which, without creating imbalances, favour such establishments and the dissemination purposes they serve". Solutions in different Member States may differ. Many components of the mechanism proposed by the Copyright Subgroup can be achieved through contractual arrangements.

It is important to list the core principles that any solution needs to fulfil, in order to qualify as an accepted solution for orphan works. Any solution in the Member States would need to fulfil the following commonly accepted core principles:

- Cover all orphan works (unidentified and non locatable);
- Include guidance on diligent search, including consultation with rightholders' organisations;
- Include provision for withdrawal when the rightholder reappears;
- Offer cultural, not-for-profit establishments a special treatment when fulfilling their dissemination purposes, to be further discussed between stakeholders;
- Offer possibilities also for commercial users to use orphan works;
- Include provision on general remuneration or remuneration when the unidentified/non locatable rightsholder appears.

This kind of a "soft law approach" may be achieved through contractual arrangements with indemnity clauses, combined with some support mechanisms to voluntarily negotiated contracts. The prerequisite is that all Member States have solutions which are interoperable and agree to mutually recognise any solution that fulfils the generally agreed core principles.

Mutual recognition is necessary with a view to the trans-border nature of the use. If the use in the country where digitisation is made/making available is initiated is a permitted use, the further use in any EU or EEA country would be recognised as a permitted use.

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<sup>27</sup> This is the solution that the BL has proposed in the UK.



## Annex II

### WORKS “OUT-OF-PRINT”

#### A) WORKS “OUT-OF-PRINT”

##### Definitions

- ✚ In this document, 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
  - it is no longer commercially available.
- ✚ A work is not considered 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 reverted<sup>28</sup> to the author and the author offers the work in the market place directly, through an agent or a CMO, e.g. a RRO;<sup>29</sup>
  - the author or publisher directly, through an agent or through a RRO<sup>4</sup> offers a permission to use the work, e.g. through a license.

##### Withdrawal of the edition/Alternative editions

In relation to “out-of-print” works 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 would conflict with the normal exploitation of the newer version of the work or prejudice the interest, economic and possibly even moral, of the rightholders.

#### B) AUTHORISATION TO DIGITISE WORKS

Digitisation of works for preservation purposes is dealt with in part 2, “Digital preservation”.

#### C) LICENSING OF DIGITISATION AND THE MAKING AVAILABLE OF WORKS OUT-OF-PRINT. GENERAL LICENSING CRITERIA

In respect of copyrighted works that are out of print according to the definitions in this document, authorisation by rightholders through a license is needed for the:

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

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<sup>28</sup> The rights may or may not revert to the author depending on the contracts.

<sup>29</sup> Reproduction Rights Organisation

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

Even though libraries and archives may be authorised by law to digitise a work, the communication to the public including the making of 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.<sup>30</sup> National legislation and/or existing licensing arrangements already grant certain rights to libraries/archives, including the making available on the premises of these establishments on dedicated terminals. The out-of-print license should allow acts that are not already covered by statutory or licensing arrangements.

The Copyright Subgroup considered in this connections proposals made 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.<sup>31</sup> The Copyright Subgroup considers that a contract based solution is preferable and more in line with international obligations, including TRIPs.

### **General licensing criteria**

The following general licensing criteria would apply:

- ✚ The license should 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 license shall grant legal certainty to the library/archive providing online access to works
  - The license must include 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, 4*).

Some form of remuneration, which the rightholders will be at liberty to waive, should be granted to rightholders for the digitisation and the making available of their works in libraries and archives.

### **Registration of libraries and archives**

*See the part "On digital preservation", above 3.*

## **D) LICENSING OF OUT-OF-PRINT WORKS**

A solution for the licensing of out-of-print works could be build on a

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<sup>30</sup> Recital 40 of the Infosoc Directive 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 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.

<sup>31</sup> *See F. STASSE, Rapport au ministre de la culture et de la communication su l'accès aux œuvres numériques conservées par le bibliothèques publiques, April 2005.*

- (a) Joint Clearance Centre (JCC)
- (b) Model licence
- (c) Suggested set of procedures for the clearance of rights and the obtaining of a license

### **Joint Clearance Centres (JCC)**

With the aim of facilitating the licensing of out-of-print works, national Joint Clearance Centres (JCC) could be established in each of the European Union Member States. 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 directly the rightholder. 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 JCC may:

- a. Grant the permission and offer a license;
- b. Redirect the request to the pertinent rightholder;
- c. Refuse permission (which will be the case e.g. if the CMO does not have the mandate to grant the permission).

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

Moreover, the JCC should consider building a register of works for which permission has been granted to avoid duplication of efforts. The information would be available to all participating libraries and archives and 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 could be interlinked to offer a pan European register.

Licensing could 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 license;
- (c) Collectively via a CMO such as a RRO. Depending on the mandate, the license offered by the CMO may be either offered on a transactional basis (i.e. case by case) or offered as a bulk license. A “bulk license” means that the library/archive through the license is (a) granted preauthorisation to digitise and make available the work at (b) a standardised set of conditions.

In case of transactional licensing by CMOs, individual direct licensing and licensing through joint administration, a reasonable period within which the library’s/archive’s request for permission should be answered will have to be defined.

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.

### **Model license(s)**

To facilitate the lawful digitisation of out-of-print works by libraries and archives that participate in the Digital Libraries Initiative and their subsequent accessibility, solutions should be offered. This could take the form of general agreements on the national level or (a) model license(s). The model

license(s) could be developed by the rightholders through a co-operation between the European Writers Congress (EWC), the Federation of European Publishers (FEP), European Visual Artists (EVA), the European Federation of Journalists (EFJ), the European Newspaper Publishers Association (ENPA) and the International Federation of Reproduction Rights Organisations (IFRRO) on the rightholder side, and EBLIDA and CENL on behalf of the libraries and archives, to be adapted on a national level.

The Model License should establish whether and, if so, at which intervals the library/archive shall report to the rightholders on the number of hits on the work with the aim to enable the rightholder to assess the possibility of commercialising of it. If the rightholder decides to withdraw the license to the library/archive in order to commercialise the work, the model agreement should establish on what basis compensation shall be paid to the library/archive for the digitisation of the work when carried out by the library/archive.

The model license(s), which should deal with digitisation beyond what is authorised by legislation and the making available of out-of-print work from participating libraries, would be made available from the Joint Clearance Centre (JCC). It would have to take into consideration a pan European aspect, e.g. incorporating a feature of Community-wide licensing.

### **Procedure for clearance of rights and obtaining a license**

The following procedure 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 the
  - i. 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. Joint Clearing Centre (JCC)
  - iii. CMO
2. The rightholder or the CMO / JCC depending on the mandate will
  - i. Grant the permission
  - ii. Refuse to grant permission, with or without justification
  - iii. Redirect to the pertinent rightholder