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**COMMISSION STAFF WORKING PAPER**  
**IMPACT ASSESSMENT ON**  
**THE CROSS-BORDER ONLINE ACCESS TO ORPHAN WORKS**

*Accompanying the document*

**Proposal for a**  
**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on certain permitted uses of orphan works**

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## 1. PROCEDURAL ISSUES AND CONSULTATION OF INTERESTED PARTIES

Orphan works are works whose rightholder or rightholders cannot be identified or found.

In 2005, the Commission launched the i2010 digital libraries initiative.<sup>1</sup> This initiative aims to make Europe's cultural heritage available online through the creation of a pan-European digital library and archive, notably *Europeana*. In 2006, the Commission adopted a Recommendation<sup>2</sup> ("2006 Recommendation") encouraging the Member States to create mechanisms to facilitate the online use of orphan works and to promote the availability of lists of known orphan works. Also in 2006, a High Level Expert Group on Digital Libraries was established bringing together stakeholders concerned with digitization and online accessibility of cultural material, including orphan works.<sup>3</sup> The Group adopted a "Final Report on Digital Preservation, Orphan Works and Out-of-Print Works"<sup>4</sup> and a "Memorandum of Understanding on Diligent Search Guidelines for Orphan Works" was signed by representatives of libraries, archives and rightholders.<sup>5</sup>

In 2006 an external study entitled "The recasting of copyright for the knowledge economy" included an analysis of the copyright implications of mass scale digitisation of orphan works in the context of digital libraries.<sup>6</sup>

In 2008 the Commission published the Green Paper on Copyright in the Knowledge Economy<sup>7</sup> which addressed, *inter alia*, the issue of orphan works. The public consultation launched in the context of the Green Paper solicited the views of stakeholders about the necessity of further action in relation to orphan works in the EU.<sup>8</sup> On 19 October 2009, the Commission adopted the follow-up Communication on Copyright in the Knowledge Economy.<sup>9</sup> The Communication took stock of the Green Paper consultation and announced that the Commission would carry out an Impact Assessment on how best to deal with orphan works in the EU.

On 26 October 2009, the Commission held a public hearing, inviting all interested parties to present their views on the issue of orphan works. On 10 November 2009, the Swedish Presidency and the European Parliament organised a joint hearing on orphan works and access to works for the visually impaired.

This impact assessment was discussed by the Commission services in the course of three steering group meetings held on 11 March, 16 and 27 April 2010. The impact assessment was

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<sup>1</sup> Communication from the Commission 'i2010: Digital Libraries', COM (2005) 465 final.

<sup>2</sup> Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural content and digital preservation, 2006/585/EC, OJ L 236, 31.8.2006, p. 28-30

<sup>3</sup> Commission Decision of 27 February 2006 on setting up a High Level Expert Group on Digital Libraries, OJ L 63, 4.3.2006, p. 25-27. The Group was subsequently renewed by Commission Decision of 25 March 2009, OJ 82, 28.3.2009, p. 9-11.

<sup>4</sup> [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/experts/hleg/index\\_en.htm](http://ec.europa.eu/information_society/activities/digital_libraries/experts/hleg/index_en.htm)

<sup>5</sup> [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/hleg/orphan/guidelines.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/guidelines.pdf)

<sup>6</sup> [http://ec.europa.eu/internal\\_market/copyright/docs/studies/etd2005imd195recast\\_report\\_2006.pdf](http://ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_report_2006.pdf)

<sup>7</sup> COM (2008) 466

<sup>8</sup> Responses to the consultation are available at [http://circa.europa.eu/Public/irc/market/market\\_consultations/library?l=/copyright\\_neighbouring/consultation\\_copyright&vm=detailed&sb=Title](http://circa.europa.eu/Public/irc/market/market_consultations/library?l=/copyright_neighbouring/consultation_copyright&vm=detailed&sb=Title). See Annex, Chapters 1 and 2 for the analysis of the responses.

<sup>9</sup> COM (2009) 532 final.

discussed before the Impact Assessment Board (IAB) on 16 June 2010. The IAB issued its opinion on 21 June 2010. Taking into account these discussions a series of amendments were made to the impact assessment. The section dealing with policy context was streamlined so as to clarify that the main impetus behind the initiative was to enhance text and data mining capacities in Europe so as to close an impending knowledge gap that is looming vis-à-vis the United States in this respect. The IAB asked for further clarification as to why the scope of the initiative was limited to the print sector. While the print sector demands the most urgent action, the scope of the IA includes all sectors where orphan works arise. The urgency of the initiative was further explained by pointing to the situation created by the Google Books Settlement (orphan works are automatically included in the scope of the Google Books Settlement), the need to obtain prior copyright permissions for the use of orphan works in Europe and the overall danger of a knowledge gap if orphan works could not become part of European Digital Library projects.

The section on "policy context" therefore points to the urgency to enhance the large scale digitisation, indexing and online use of text based materials which constitute the "raw material" for online search and text mining functionalities. The Google Books Settlement in the United States was also better placed within this broader context and the fact that this US Settlement would not cover online access to text materials for universities, libraries, archives and online users based in Europe was appropriately highlighted.

Further suggestions by the IAB led to the reformulation of the impact sections that deal with the cost and workability of a "diligent search" prior to the intended online uses. In the impact headings dealing with libraries' operating costs more detailed explanations are provided on how the establishment of common search guidelines and of Europe-wide databases containing information on right holders and the copyright and commercial status of print materials can facilitate a "diligent search". Administrative efficiencies and cost savings in diligent search resulting from the envisaged ARROW (Accessible Registries of rights Information and Orphan Works) database are also described in greater detail.

## **2. POLICY CONTEXT, PROBLEM DEFINITION, AND SUBSIDIARITY**

### **2.1. Policy context**

The creation of large online libraries should be seen against the backdrop of electronic search and discovery tools such as data mining and text mining. This involves researchers writing computer programs which can search across large volumes of data. Text-mining capabilities can scope out and analyze data and information across multiple digitized works. Electronic text search opens up infinite resources for discovery to researchers and academics that would otherwise have to content themselves with more traditional and analogue search methods. The potential for text mining and search engines is most promising in the print sector, as optical character recognition makes it possible to index and make all kind of text searchable online. For example, a researcher pursuing a specialist enquiry would be able to search the content of millions of books instead of relying on paper catalogues and cross-references. This opportunity to increase the accessibility of written information by making it searchable would be lost if legal obstacles would prevent the creation of comprehensive text based digital libraries.

Google's digital library project in the US<sup>10</sup> is the core example of how search engine operators seek to enhance their search and data processing capabilities by engaging in large scale digitisation of printed materials. Google's digital library focuses on the print sector, because printed works (unlike other media such as films or photographs) can be easily indexed by its search engine. The urgency of the current initiative on orphan works in the print sector stems from the fact that Google, by virtue of the proposed Google Books Settlement, will not require prior permission for the making available of text-based orphan works. This would allow Google to forge ahead and develop a sophisticated fully indexed and searchable online library. If this were to happen, Europe would struggle to fill in the emerging knowledge gap. Three factors are relevant in opting for an early approach focused on the print sector:

- First, under the proposed Google Books Settlement (the 'GBS'),<sup>11</sup> the permission to display out-of-print books online (including out-of-print orphan works) is deemed granted as long as rightholders have not 'opted out' of the GBS: by default authors and publishers automatically “stay in” the Settlement. No prior permission is necessary for the online access to their books, except if the books are still "commercially available".<sup>12</sup> Google can therefore, under the GBS, use orphan works without any prior permission and display them online in the US.<sup>13</sup>
- Second, as the geographical scope of the Settlement is limited to the United States, it would give US universities, libraries, scholars and citizens a competitive edge over their Europeans counterparts in terms of access to the information contained in the Google library. The GBS risks creating a trans-Atlantic knowledge gap with respect to online access to scientific or educational materials.
- Third, in Europe private "class action" settlements are not possible. The level playing field in respect of the requisite copyright permissions has therefore to be created by appropriate legislation.

Statistically, Europe is already lagging behind in the creation of text based digital libraries: whereas Google has already digitised 10 million books, up from the figure of 7 million that was widely quoted in 2009, by contrast there are presently approximately 2 million digitised books in EU libraries and cultural institutions. Of these, only around 13% are available through Europeana.<sup>14</sup> This situation, coupled with the fact that Member States have again

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<sup>10</sup> The US has yet to introduce legislation in relation to orphan works, but a draft bill is currently pending: see H.R. 5889, s. 2913, "Shawn Bentley Orphan Works Act of 2008".

<sup>11</sup> The Google Books Settlement (GBS) is a US class action agreement reached on 28 October 2008, amended in November 2009, between the Authors Guild and the Association of American Publishers and Google. It stems from a 2005 lawsuit brought against Google by US publishers and authors on the grounds that Google was infringing their copyright by digitising and showing snippets of books contained in US library collections without seeking their prior authorisation (Google Library Project). The aim of the settlement is to allow Google to make the materials contained in libraries searchable and available online within the US. The GBS contains rules on how money collected on behalf of unknown or unlocatable owners of orphan works is to be distributed. It sets up a Book Rights Registry, a function of which is to locate missing rightholders.

<sup>12</sup> Out-of-print works are those that are no longer commercially available. While many orphan works are out-of-print, not all out-of-print works are orphan works since their rightholders are known.

<sup>13</sup> The GBS is still being scrutinised by the Court of the Southern District of New York. Entry into force of the Settlement is therefore subject to judicial approval.

<sup>14</sup> <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/166&format=HTML&aged=0&language=EN&guiLanguage=en>

underlined the need for rapid progress to address the orphan works issue,<sup>15</sup> has spawned the need for the EU to adopt rules on the prior authorisation for the online access to orphan books and illustrations or photographs embedded in those books. The immediate need is thus to address simplified authorisations for books and embedded pictures.

The cross-border access to orphan works in the single market should also be viewed within the context of the Europe 2020 Strategy<sup>16</sup> which includes as one of its flagship initiatives the development of a Digital Agenda for Europe. The Digital Agenda identifies the simplification of copyright clearance, management and cross border licensing as a key action.<sup>17</sup> Creating a legal framework through a Directive to facilitate the digitisation and dissemination of orphan works is one project that forms part of this key action.

The audiovisual sector is characterised by a complex chain of ownership rights and copyright transfers which are not fully harmonised at European level.<sup>18</sup> National approaches have also varied in time not only as to whose contribution is protected<sup>19</sup> but also regarding the transfer of rights to the film producer.<sup>20</sup> Finally, the scope of the transfer of rights to the producer also varies in Member States.<sup>21</sup>

Music will not be specifically addressed in the IA since the orphan works problem is considered to be minimal, both in respect of musical compositions and with respect to sound recordings.<sup>22</sup>

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<sup>15</sup> Council conclusions on Europeana: next steps, dated 10 May 2010

<sup>16</sup> Europe 2020: A strategy for smart, sustainable and inclusive growth: [http://ec.europa.eu/eu2020/index\\_en.htm](http://ec.europa.eu/eu2020/index_en.htm)

<sup>17</sup> A Digital Agenda for Europe, COM (2010) 245 of 19.05.2010, p. 9

<sup>18</sup> For example, French law considers several contributors to an audiovisual work as authors: the author of the scenario, the author of the film adaptation, the author of the dialogue, the author of musical compositions specifically composed for the film and the director. In Germany, courts consider the director, the cameraman and the cutter as authors. In the UK, Ireland and Luxembourg the film producer is also a co-author of the audiovisual work. Contrast the print sector where the rightholders involved are generally authors (of text, articles, photographs, illustrations) and publishers.

<sup>19</sup> E.g. the related rights of actors were only recognised in France in 1985; Belgium, Greece and the Netherlands introduced rights for performers subsequent to the adoption of Directive on Rental and Lending rights (2006/115). While the Term Directive (2006/116) harmonised the term of protection retroactively, the ownership of "revived" rights was not harmonised and left to Member States. In addition, there is no harmonised definition of what a performer is.

<sup>20</sup> For example, the presumption of transfer of rights to the producer was introduced in France in 1957 for cinematographic exploitation rights and in 1985 for all modes of exploitation, in Germany in 1965, in Spain in 1966, in Belgium in 1994. In addition, national rules on transfers and assignments diverged as did those on legal succession. For example, the French law on audiovisual productions is based on the assumption that all economic rights in a film have been transferred to the producer, while in Austria or Italy, the producer is the original owner of all cinematographic exploitation rights. In the UK, the principal director is presumed as the film's original author and the rights are transferred to the producer under the "works for hire" doctrine, which presupposes that the director is employed by the producer.

<sup>21</sup> In France, all rights are transferred except certain adaptation rights (for the theatre, or for book publication); in Italy, Spain and Sweden the right to adapt the work is not transferred; in Poland or Romania, all economic rights are transferred to the film producer. In the UK, the producer is the initial owner of the copyright in the contributions of the authors who are employed under a contract of services.

<sup>22</sup> In the area of musical compositions essentially all forms of exploitation are managed collectively. In light of the collective management practice and the extensive network of reciprocal representation agreements between collecting societies active all over the world, the musical works registered with collecting societies can be considered to represent the global repertoire of the world. Therefore, the

Embedded works are covered by the scope given that in most cases publishers will hold information about the rightholders of photographs or other images used to illustrate a work. By contrast, it would be extremely difficult to identify the owners of entire collections of photographs whose provenance is unknown. The lack of attribution or other identifying information of any kind makes diligent search particularly difficult.

## 2.2. Problem definition

Orphan works pose a problem because libraries, which are legally obliged to obtain prior authorisation for making works available to the public online, are unable to locate and contact the relevant rightholders. In these circumstances, libraries that make material available online without prior authorisation from rightholders risk being sued for copyright infringement. The potential for infringement is more acute in cases of mass-digitisation projects given their large scale.

Orphan works<sup>23</sup> are works or other protected subject matter whose rightholders cannot be identified or traced after a diligent search to identify and locate the rightholders of a protected work has been carried out. In essence, a diligent search may be characterised by indicating the sources that a library or other digitisation project would need to consult prior to the online access to works that are potentially orphan works (see Table A2 in the Annex).

Orphan works exist because, over time, ownership of the copyright in a work becomes difficult to trace. First of all, in most cases the duration of authors' rights lasts for 70 years *post mortem auctoris*.<sup>24</sup> The term of protection of a work can therefore easily last an average of 120 years assuming a work was created by the author aged 25 and assuming an average life-span of 75 years. Secondly, ownership must be traced from the first owner of a work, which is in most cases the author,<sup>25</sup> to subsequent owners.<sup>26</sup> Consequently, in the absence of a central registry of ownership,<sup>27</sup> works can become orphan works for a number of reasons.<sup>28</sup>

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phenomenon of orphan works is extremely rare in the area of musical compositions. The French CSPLA, in its report on orphan works, investigated the matter and concluded that, e.g., the French collecting society SACEM had never come across a case in which a musical composition was not registered in its database (CSPLA, p. 13). The same is apparently true for phonogram producers and for musical performers (CSPLA, p. 13). In their submissions to the public consultation on the Green Paper in the Knowledge Economy, GESAC, PPL and UK Music stated that the question of orphan works in the music sector does not arise in practice. However, as shown in section 2.2.1., the archives of public service broadcasters do contain audio material which is orphan, such as interviews or recordings of political debates. As a consequence, audio material contained in the archives of public broadcasting organisations is included in the scope of the Impact Assessment.

<sup>23</sup> An orphan work is not the same as an anonymous or pseudonymous work. The author may decide to publish his work anonymously or under a pseudonym: here the publisher of the book is deemed to represent the author. A pseudonymous or anonymous work is thus an orphan only if it is not possible to identify the author from the work or pseudonym, or if it not possible to identify or locate the publisher of the book.

<sup>24</sup> Directive 2006/116/EC on the term of protection of copyright and certain related rights (codified version of Directive 93/98/EEC), OJ L 372, 27.12.2006, p. 12-18.

<sup>25</sup> Rules on authorship and first ownership of copyright are not harmonized (except to a very limited extent in the case of film directors) and vary from one Member State to another. In the UK, for example, certain works created by an employee will be owned by the employer. In France, the rights of the author contributing to a collective work will belong *ab initio* to the person taking the initiative of the collective work. In the book publishing sector, for example, the author will usually transfer his rights to a publisher who will undertake to print and publish the book and in return pay royalties or a fee to the author. The contractual transfer of rights to the publisher will not usually include all the rights of the

Books and other items held in library collections may be orphan works in whole or in part. They may be partly orphaned if only a particular copyright necessary for one form of exploitation (e.g., making available to the public online) is orphan. This arises, for instance, when the publisher is known but the owner of the interactive making available right (the author) cannot be located or identified.<sup>29</sup> Another instance is the "orphan rights" issue (one rightholder who contributed to an otherwise identifiable work cannot be located) and is distinguished from a situation where no rightholder in a work can be located ("orphan works").<sup>30</sup> A work may be partly orphaned in the sense that e.g., part of book, such as an illustration, or a poem in an anthology, or the contribution of the co-author of a work of joint-authorship, has no known or locatable rightholder.

According to international copyright principles, making a work available to the public online requires prior authorisation from the rightholder. Scanning for preservation purposes is generally permissible under current copyright exceptions.<sup>31</sup> However, these exceptions do not currently allow libraries to make the digitised works available online on the internet, even for non commercial purposes.<sup>32</sup> The act of making these works available online beyond the library premises is not possible without the risk of incurring liability for infringing copyright. This means that the collections of EU libraries, archives, museums and educational establishments which contain orphan works are cannot be made available to the public.

The definition of orphan works used in this impact assessment will cover copyright-protected works irrespective of whether they have been commercially published or not, provided that they are already lawfully available in a publicly accessible institution for on-the-spot reference use.<sup>33</sup> This approach would necessarily be without prejudice to the protection of moral rights, the right to privacy, etc.

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author. In addition, contracts concluded many years ago are not likely to explicitly mention the right of interactive making available (so-called digital rights). In such cases, the contract is interpreted under applicable national rules pertaining to the interpretation of contracts and/or copyright contracts. Finally, upon the death of the author, rights are devolved to his or her heirs according to national laws on succession.

<sup>26</sup> According to Article 15(1) of the Berne Convention an author of a literary and artistic work whose name appears on a work in the usual manner shall be presumed to own the copyright in that work.

<sup>27</sup> Article 5(2) of the Berne Convention prohibits any formalities for the "enjoyment and exercise" of copyright. This means that registration of copyright works cannot be made mandatory.

<sup>28</sup> There is no information on the author or rightholder of the work on available copies of the work; there is no up-to-date information available on where the author or rightholder of the work is located; after the death of the rightholder, successors to his estate are not known; the rightholder of a work is a legal person that has been dissolved or merged with another but the documents recording the transfer of copyright have been lost; the author or rightholder of the work is not aware of his rights, usually because he has acquired them in the case of a more general transaction or through inheritance and the rights are of little commercial value.

<sup>29</sup> The German collecting society VG Wort describes this situation as involving "half-orphan" works, see VG Wort submission to the public hearing, submission dated 23 October 2009.

<sup>30</sup> CSPLA *Commission sur les œuvres orphelines*, p. 10.

<sup>31</sup> Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (OJ L 167, 22.6.2001, p. 10-19) introduced an exhaustive list of 21 exceptions and limitations to copyright protection, only one of which is mandatory.

<sup>32</sup> Under Article 5(3)(n) of the 2001 Directive, libraries can only provide access to works contained in their collections on dedicated terminals on their premises for the purpose of research or private study.

<sup>33</sup> This would appear to broaden the orphan works definition in comparison to the definition proposed by the French Conseil Supérieur de la Propriété Littéraire et Artistique, which limits the ambit of its proposal to works which have been published: CSPLA, *Commission sur les œuvres orphelines*, pp. 8 and 16 <http://www.cspla.culture.gouv.fr/CONTENU/rapoeuvor08.pdf>. Restricting the definition of

### 2.2.1. Scale of the problem

Libraries and archives in Europe contain millions of books, documents, pamphlets, manuscripts and other material. Most interested parties agree and recognise that it is extremely difficult to quantify the number of orphan works contained in library collections. Europe's libraries estimate that a substantial share of their entire stock is 'orphaned'. Of the works that are still in copyright, some are presumed to be orphan works.

Estimates of the scale of the orphan works problem vary (see Annex, Table A4 for an overview and sources) not only because it depends on the sector involved but also because there is currently no standardised methodology that libraries, archives and museums can use to establish what an orphan work is. The study "In from the Cold" conducted by JISC, a think tank in the UK, found that 13 to 50 million orphan works exist in the UK, e.g. 5-10% of works in library collections. Some estimates are higher, e.g., the British Library estimates that 40% out of all creative works (including unpublished material) in its entire collection of 150 million manuscripts, maps, newspapers, magazines, prints and drawings, music scores, patents, sound recordings and stamps, are orphan works.

In light of the general policy considerations mentioned above (the imperative need to foster online search or text and data mining technologies), the orphan works issue requires an immediate response in relation to printed media held in libraries, archives and museums. The collections of these institutions contain a considerable amount of books, pamphlets, newspapers, prints, compilations of works, e.g. anthologies and translations, as well as works which may be included in a book such as illustrations, paintings, maps and photographs (so-called "embedded" works). In 2001 it was estimated that the total number of books and bound periodicals (volumes) in the libraries of the EU-25 exceeded 2.5 billion.<sup>34</sup> The most common and conservative estimate that European studies have put forward is that 5-10% of works included in library collections of print media are orphan. In some archives and libraries the figure rises to 50%. Some studies from the US show that approximately 20% of books are orphan.

Photographers are faced with a particular problem of poor crediting,<sup>35</sup> which increases the likelihood of orphan works. Some estimates suggest that as many as 90% of photographs contained in collections might be orphan works. In the case of unpublished photographs, some reports indicate that the rightholders are identified only for a tiny fraction (1%).

In the audio-visual field, a recent survey by the Association des Cinémathèques Européennes estimates that 12% of the films contained in the 24 film archives that responded to the survey are orphan works. The survey also seems to suggest that a majority of these works (around 60%) were created prior to 1950. However, the survey is based on some "rule of thumb" assumptions e.g. that a certain percentage of works with "rights neither researched nor known" are presumed to be orphan works.

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orphan works to published works in the narrow sense can result in locking up works contained in library collections. For example, most of the applications rejected by the Canadian Copyright Board were denied on the grounds that the applicant could not prove that the orphan works had been published.

<sup>34</sup> COM (2005) 465 on i2020: Digital Libraries, p. 5.

<sup>35</sup> For example, in the case of *Grisbrook v MGM Ltd* [2009] EWHC 2520 (Ch), it was reported that a photographer who obtained (under consent order) the authorisation to search the archives of a newspaper to identify his photographs claimed to have identified 6,000 of his photographs in the archives.

European public service broadcasters have estimated that their archives contain 28 million hours of archived material. It is difficult to quantify the number of orphan rights in archive material given the numerous contributors to a production and the equivalent number of contracts. For example, the German broadcaster ZDF handles around 70,000 contracts a year representing more than three million contracts since 1963. The Belgian broadcaster RTBF has 100,000 hours of TV in their archives.<sup>36</sup> The Netherlands Institute for Sound and Vision contain around 700,000 hours of film, radio, television and music, increasing at an annual rate of around 50,000 hours.<sup>37</sup> The BBC archive alone includes 2.5 million hours of film and video.<sup>38</sup>

In the music sector, the extensive role of collective licensing means that the problem of orphan works is minimal.<sup>39</sup> Most rightholders are members of collecting societies (either representing authors, producers or performing artists) that hold detailed and comprehensive records.<sup>40</sup>

### 2.2.2. *How would the problem evolve, all things being equal?*

Despite the 2006 Recommendation<sup>41</sup> encouraging the Member States to create mechanisms to facilitate the use of orphan works and to promote the availability of lists of known orphan works, the majority of the Member States have not yet developed a regulatory approach with respect to orphan works (see Table A3 in the Annex for an overview of Member States' legislation).<sup>42</sup> The reasons for this vary – but essentially soft law was not enough to compel Member States to take action in respect of orphan works. The few existing systems in place are moreover circumscribed by the fact that they are limited to the national territory and therefore do not allow for the cross border access to orphan works. The absence of regulations that authorise the "making available" of orphan works is a deterrent to libraries to digitise and make available orphan works. If they did so, they could face potentially numerous claims for infringing the copyright in those works.

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<sup>36</sup> Source: the European Broadcasters' Union (EBU), presentation at the European Commission's public hearing on audiovisual productions in the EU held on 13 December 2010.

<sup>37</sup> "Rights Management – An Example of Practical Experience" by Mieke Lauwers in "Digitisation and Online Exploitation of Broadcasters' Archives, European Audiovisual Observatory, 2010.

<sup>38</sup> See e.g., the BBC's response dated 5 January 2010 to the public consultation on the Reflection Document on Creative Content in a European Digital Single Market: Challenges for the Future.

<sup>39</sup> E.g., in their submissions to the public consultation on the Green Paper in the Knowledge Economy, GESAC, PPL and UK Music stated that the question of orphan works in the music sector does not arise in practice.

<sup>40</sup> These findings are corroborated by the CSPLA report on orphan works undertaken by the French Conseil Supérieur de la Propriété Littéraire et Artistique, *Commission sur les œuvres orphelines*, pp. 12 and 13 and <http://www.cspla.culture.gouv.fr/CONTENU/rapoeuvor08.pdf>

<sup>41</sup> Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural content and digital preservation, 2006/585/EC, OJ L 236, 31.8.2006, p. 28-30

<sup>42</sup> In France, any person may apply before the courts for appropriate measures if the owner of a work is not known (article L. 122-9 Code de la Propriété Intellectuelle). In the UK, a provision very limited in scope allows the Copyright Tribunal to grant certain licences in performances where the identity or whereabouts of the rightholder cannot be ascertained by reasonable inquiry, (S. 190 of the UK Copyright, Designs and Patents Act 1988). In the Nordic countries (i.e. in Denmark, Finland, Sweden, Norway and Iceland), the problem of orphan works is avoided by extending the mandate of collecting societies to represent rightholders that have not joined the collecting society. Denmark has put forward a proposal to amend the Copyright Act by introducing a general extended collective licence clause in the Act to enable collective agreements to be made on the use of orphan works. In Hungary (article 57/A of the Hungarian Copyright Act), licences to use orphan works can be obtained from a central authority which also checks that a diligent search for the owner has been carried out.

## 2.3. Does the EU have the right to act?

### 2.3.1. Treaty base

The right for the Union to act in this field is set out in Article 114 (ex Article 95 TEC) of the Treaty on the Functioning of the European Union which provides for the establishment and functioning of the Internal Market. In particular, the proposed actions seek to allow the freedom for libraries, educational establishments, museums and archives to provide services in the Internal Market which involve the display of orphan works online.

In addition, the right of the European Union to act derives from previous legislation harmonising certain aspects of copyright. The scope of copyright and related rights in the information society has been harmonised by Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society. In so far as the Union has exercised competence on these matters, it is not possible for Member States alone to adopt legislation which would modify the scope of rights and exceptions in a way which would contravene Directive 2001/29. To the extent that proposed solutions to the issue of orphan works may entail measures which affect the scope of copyright and related rights (e.g. exception or remuneration right instead of an exclusive right), action by the Union is necessary to safeguard the level of harmonisation achieved.

However, it should also be taken into account that the rules on authorship and first ownership of copyright and related rights have not been fully harmonised<sup>43</sup>. In so far as solutions to the issue of orphan works may involve rules on ownership of copyright, especially in the audiovisual sector, the Union has only exercised its competence to a limited extent.

Article 167(4) TFEU (ex Article 151(4) TEC) provides that the Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures. All proposed options take into account the implications of Union action for cultural diversity. In particular, the proposed actions seek to balance the protection of copyright,<sup>44</sup> the role of libraries, educational establishments, museums and archives in preserving and promoting access to cultural heritage, and access of citizens to cultural heritage wherever they are located in the EU

### 2.3.2. Subsidiarity test

Existing legislative national approaches generally do not provide a satisfactory solution. These solutions have not proved workable for large scale digitisation projects, and do not allow the use of the orphan works on a pan-European basis, such as in *Europeana*.

The proposed actions of the Union are justified according to the subsidiarity principle under Article 5 of the Treaty of the European Union, as EU intervention appears necessary and brings added value.

Under Commission Recommendation 2006/585/EC of 24 August 2006, Member States were encouraged to adopt legislation to address the issue of orphan works. Few Member States

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<sup>43</sup> Rules on authorship and first ownership have only been partially harmonised concerning the rights in computer programmes, databases, and regarding the rights of film directors in cinematographic works.

<sup>44</sup> Recital 12 of Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society.

have adopted legislation. In addition, certain issues could not be addressed by national legislation alone.

Firstly, the objectives of the proposed action would not be sufficiently achieved by Member States in the framework of their national constitutional system (necessity test). National legislation could not allow for the recognition of the orphan work status of works in other Member States. Option 2 (a statutory exception) would not be permitted without intervention of the European Union, since Member States may only implement exceptions permitted under Directive 2001/29. In addition, national legislation could not allow for the online access to orphan works beyond national borders, because copyright law is traditionally conceived as "territorial".

Secondly, the objectives of the proposed action are better achieved by action on the part of the Union (test of European value-added). In the first place, all envisaged options aim to avoid the expensive duplication of searches for owners of orphan works by laying down that the search for the rightholders of orphan works takes place in the country of first publication. It is unlikely that Member States would individually decide to recognise diligent searches carried out in other jurisdictions and give affect to such searches in their own jurisdiction. The more plausible alternative is that Member States would only recognise orphan works in accordance with their own legislation. Accordingly, additional searches and procedures would have to take place in each Member State. Existing national legislations do not provide for the recognition of diligent searches already carried out in other Member States.

Finally, all options aim to provide a simple solution for the online access to orphan works across the EU. The coexistence of different and uncoordinated national regulatory frameworks would make it difficult for a library to obtain an authorisation to display an orphan work in all EU Member States. In some Member States, e.g. France, preparatory work on a legislative solution expressly acknowledges that a European solution is required.<sup>45</sup> Consequently, intervention of the European Union has the advantage of providing a workable framework for libraries, educational establishments, museums and archives to display orphan works across the EU.

### **3. OBJECTIVES**

The Figure A1 in the Annex presents an overview of the general policy objectives, the specific objectives and the operational objectives.

#### **3.1. General objectives**

Contribute to the development of the knowledge economy by promoting the fifth freedom.

#### **3.2. Specific objectives**

Ensure lawful cross-border online access to orphan works contained in the collections of libraries, educational establishments, archives and museums across Europe. EU-wide online availability of orphan works promotes Europe's cultural diversity and increases sources of knowledge and learning. Create European-wide access to a comprehensive world-class digital

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<sup>45</sup> CSPLA, *Commission sur les œuvres orphelines*, p. 19

library so that every citizen can access the consolidated EU library collections from a computing device anywhere in the EU.

### **3.3. Operational objectives**

- (1) *Increase legal certainty for digital libraries:* by adopting a binding instrument clarifying the legal status of orphan works and the conditions under which libraries can display such works online and carry out preparatory acts such as reproductions for preservation or restoration purposes.
  - (1.1) *Protection against liability for infringement:* by ensuring that legislation contains provisions (i) to protect libraries against possible liability for copyright infringement for the use of orphan works after a diligent search and (ii) for redress to reappearing rightholders.
  - (1.2) *Ensure adequate protection for rightholders:* by ensuring that legislation contains provisions (i) for libraries to conduct a diligent search for rightholders prior to the online display of works and (ii) for redress to reappearing rightholders.
- (2) *Reduce transaction costs for the online use of orphan works by libraries, educational establishments, museums and archives.*
  - (2.1) *Establish common sector specific criteria to conduct diligent search:* uniform criteria need to be established and, at the appropriate stage, be made binding on all parties involved in conducting a diligent search.
  - (2.2) *Limit diligent search to one country i.e. of first publication or country of origin of the work:*<sup>46</sup> by limiting the diligent search to the country of first publication of a work, unnecessary duplication of searches and their inherent cost are avoided.
  - (2.3) *Enable mutual recognition of orphan work status:* by establishing a system of mutual recognition of a diligent search carried out according to predefined criteria, duplication of such searches is avoided.
  - (2.4) *Facilitate the identification of rightholders:* by providing transparent and comprehensive information on existing orphan works and reducing their occurrence in the future by better identifying works and their rightholders.
- (3) *Facilitate cross-border access to orphan works:* once libraries, educational establishments, museums and archives display orphan works online, these should be indexed and accessible from all Member States.

## **4. POLICY OPTIONS**

All policy options (except option 1) are premised on the adoption of an EU Directive that will require all Member States to enact specific "orphan works" legislation within a specified timeframe. All policy options, except for 1 and 3, rely on the development of a common set of

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<sup>46</sup> The country of first publication would also comprise, for the purposes of this impact assessment, the country of origin for non-published works.

diligent search criteria. These criteria can be based on the Diligent Search Guidelines developed by the representatives of libraries, archive and rightholders.<sup>47</sup> Once works have been classified as orphan works, they should be entered into a publicly accessible list which libraries, educational establishments, museums and archives can consult. Should a rightholder reappear, the list would be updated accordingly.

#### **4.1. Option 1 – do nothing**

Retaining the status quo would leave it open to Member States to implement ad hoc legislation governing the online use of orphan works.

#### **4.2. Option 2 – a statutory exception for libraries to provide online access<sup>48</sup> to orphan works**

Under this option, Member States shall be obliged to enact legislation to provide (i) a system to determine the legal status of orphan works, (ii) an exception allowing the non-commercial online access to orphan works across Europe by libraries, educational establishments, museums and archives and (iii) a suitable mechanism of redress for reappearing rightholders.

*The orphan work status:* once a diligent search for the rightholder has been conducted in the country of origin or first publication of the work,<sup>49</sup> the result of this search (the orphan works status) is mutually recognised in all EU Member States. Once the works have been confirmed as being orphans in their respective countries of first publication, they will be recognised as orphans in all other EU Member States.

The principle of mutual recognition would thus have the double advantage of identifying a single relevant jurisdiction where a diligent search is most conveniently conducted and of ensuring that the search would not have to be duplicated in all the other EU Member States when their libraries contain the same orphan works in their own collection or where the orphan work will ultimately be made available online.<sup>50</sup>

*Online access:* a carefully balanced and harmonised exception governing the online access to orphan works would be modelled on Articles 5(2)(c) and 5(3)(n) of Directive 2001/29. The exception would be limited to: (i) libraries and other institutions that can already avail themselves of existing exceptions for specific acts of reproduction and display of works on computers within library premises and (ii) works contained in their collections.<sup>51</sup> Thus, in

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<sup>47</sup> [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/hleg/orphan/guidelines.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/guidelines.pdf)

<sup>48</sup> In all of the options discussed in this impact assessment, the term "online access" is limited to the making available of an orphan work within the terms of Article 3(1) and 3(2) of Directive 2001/29 and does not comprise format shifts or additional reproductions subsequent to the online viewing. It should, however, allow for the indexing (e.g. for indexation in databases) of orphan works. This approach links into the non-commercial vocation of Europeana and the objective of ensuring the widest dissemination of knowledge.

<sup>49</sup> For example: the collection of a library in Hungary contains works first published in Hungary, Germany and France. Before the Hungarian library digitises them and makes them available online, a diligent search will be carried out in Hungary, Germany and France.

<sup>50</sup> Information about all orphan works identified as such in the relevant jurisdictions should be available online universally and at no cost. In the event that a rightholder comes forward to make a substantiated claim of ownership in the country of first publication, the authorities in that State would revoke the 'orphan works' status and this decision, in turn, would be valid in all other Member States.

<sup>51</sup> A possible text would be: "*Member States shall provide for exceptions and limitations to the reproduction and making available rights [as provided in Articles 2 and 3 of Directive 2001/29/EC] in*

addition to the option of Article 5(3)(n), libraries and other public interest institutions could display orphan works online beyond the confines of library terminals, as long as this is done for non-commercial (i.e. cultural) purposes.<sup>52</sup> Should the rightholder of the orphan work subsequently reappear, the beneficiary of a statutory exception will not be held liable for acts of digital dissemination that occurred prior to the appearance of the copyright owner.

*Redress*: a statutory exception would therefore mean that a library could use a work that has been mutually recognised as an orphan work in the EU after a diligent search without infringing copyright. Member States would also be obliged to put in place a suitable mechanism of redress in favour of the reappearing rightholders. The reappearing rightholder would thus be able to assert his or her rights over the work in question, e.g., by preventing or authorising the continued online access to his work (e.g., through a collecting society, for free or against payment). In order to increase the possibility for rightholders to identify their works, orphan works displayed online should be clearly identified as such and the results of the diligent search should be published.

### 4.3. Option 3 – extended collective online licensing

Extended collective management means that a collecting society is given a mandate to represent the interests of all rightholders of a certain category (e.g. authors, performers, producers, composers, etc.) even if they are not formally registered with that society.<sup>53</sup>

*The orphan work status*: Extended collective licensing implies that a diligent search for the right holder is *not* required before a licence can be granted because all rightholders of a certain category are automatically captured within the licence. Therefore, once a contract allowing a library, educational establishment, museum or archive to use certain books (e.g. out-of-print books) is negotiated with a collecting society, the applicable national law would extend its coverage to all copyright rightholders beyond the known and registered members of the collecting society (including foreign rightholders). This way, orphan works in the library collection are also included in the licence. The system also provides assurance to the library against liability for infringement.

Consequently, the principle of EU-wide mutual recognition of orphan works status cannot operate under this option because works are not classified as orphans prior to their online access.<sup>54</sup>

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*the following cases: the making available, by publicly accessible libraries, educational establishments or museums or by archives, of orphan works or other orphan subject matter which are contained in their collections, on condition that the making available is not for direct or indirect commercial advantage."*

<sup>52</sup> This option is not a blanket exception for all forms of online access ('making available') undertaken by any form of 'digital library' initiative. Such a broad exception might enter into conflict with the three-step-test as formulated in Article 5(5) of the relevant Directive 2001/29. In order to avoid conflict with the three-step-test, the exception must be drafted more narrowly and the list of beneficiaries needs to be curtailed, at a minimum excluding those that engage in digital displays for commercial gain.

<sup>53</sup> Extended collective licensing systems are permitted under Recital 18 of the 2001 Copyright in the Information Society Directive, which states: "This Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licences".

<sup>54</sup> Although this is not the case at present, it might still be conceivable to combine extended collective licensing with an *ex ante* diligent search.

*Online access:* once a library has negotiated a contract with a collecting society, it will be able to put all the works covered by the licence, including orphan works, online. Any remuneration<sup>55</sup> that may be collected for rightholders of orphan works under the terms of the licence is kept in an escrow account<sup>56</sup> on the assumption that the collecting society will do all it can to try to locate the rightholder of the orphan works it represents 'by extension' in order to repay the royalties collected on his or her behalf.

*Redress:* under extended collective licensing systems, rightholders have a right to opt-out of the scheme. Therefore, any reappearing rightholders of orphan works can also decide to be excluded from the licence agreement.

Currently, in the Nordic countries (Sweden, Denmark, Finland, Norway and Iceland), extended collective management addresses the issue of orphan works. For example, in Norway, an agreement between the National Library and the collecting society Kopinor allows the National Library to display all books published between the years 1790-1799, 1890-1899 and 1990-1999 online. This was possible because the Norwegian Copyright Act provides that libraries, archives and museums may make works available subject to an extended collective licence.<sup>57</sup> This pilot project will include approximately 50,000 in-copyright books (Norwegian books and Norwegian translation of foreign books), each 185 pages long on average. The Library shall pay a rate of 0.56 KRON (0.067€) per page per year. The books will only be available to users inside Norway.

#### **4.4. Option 4 – specific licence for libraries to provide online access to orphan works**

Under this option, Member States shall be obliged to enact legislation to provide (i) a system to determine the legal status of orphan works, (ii) a workable licensing system allowing for the online access to orphan works by libraries, educational establishments, museums and archives and (iii) a suitable mechanism of redress for reappearing rightholders.

*The orphan work status:* once a diligent search for the rightholder has been conducted in the country of origin or first publication of the work, the result of this search (the orphan works status) is published and is mutually recognised in all EU Member States.

As with Option 2, the principle of mutual recognition would thus have the double advantage of identifying a single relevant jurisdiction where a diligent search is most conveniently conducted and of ensuring that the search would not have to be duplicated in all the other EU Member States when their libraries contain the same orphan works in their own collection or where the orphan work will ultimately be displayed online.

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<sup>55</sup> The licence fee may be subject to relevant controls such as a special tribunal or competition authority, in order to ensure that the fee is not excessive with regard to the non-commercial and cultural missions of public libraries.

<sup>56</sup> The fees the users may be required to pay to use orphan works is put into an escrow account. Member States can provide for a minimum (or maximum) time period during which the royalties paid into the account must remain until the orphan works' owners reappears. Otherwise, a period of five years can be assumed to be a commonly accepted timeframe. If the owner becomes known during this period, he will be entitled to receive the money collected on his behalf. If not, the remuneration becomes part of "non-distributable" income that can be used for other purposes.

<sup>57</sup> Act No. 2 of 12 May 1961 Relating to Copyright in Literary, Scientific and Artistic Works, section 16(a): "Archives, libraries and museums as described in section 16 first paragraph can make copies of published works in the collections and make such works available to the public if the conditions of the extended collective licence pursuant to section 36 first paragraph are fulfilled".

*Online access:* once a diligent search in the country of first publication has established the mutually-recognised orphan status of a work across the EU, a collecting society representing the relevant category of rightholders (e.g., authors) in that country would then take care of the property interests of the unknown rightholder (they are deemed so-called 'foster parents' of orphan works first published in their territory).<sup>58</sup> The licensor society may then license the orphan works and either offer a tariff-free licence or charge a fee for the licence (one-off payment, annual payment, royalty, per use payment etc.).<sup>59</sup> If the collecting societies require payment, such payment should be kept in escrow (see option 3 above).

Currently, existing projects such as that developed by VG Wort in Germany operate on similar lines to those described above. Plans by the Börsenverein, VG Wort and the German National Library envisage a scheme allowing for the digitisation of all books published prior to 1965, including books whose owners cannot be found or located, with the aim of their inclusion in a Digital Online Library. The agreement covers all 413.000 rightholders registered with VG Wort. In order to extend the terms of the agreement to rightholders not represented by VG Wort (i.e., orphan works), national legislation on orphan works would, however, still be required. The scope of the scheme is, however, limited by the absence of legislation: for instance, the library remains liable under criminal law for infringement.

*Redress:* with this option, Member States would also be obliged to put in place a suitable mechanism whereby a reappearing rightholder can assert his rights. The reappearing rightholder would thus be able to assert his or her rights over the work in question, by, e.g., preventing or authorising the continued online access to his work (e.g., through a collecting society, for free or against payment). In order to increase the possibility for rightholders to identify their works, orphan works displayed online should be clearly identified as such and the results of the diligent search should be published.

#### **4.5. Option 5 – centrally granted State licence for libraries to provide online access to orphan works**

Under this option, Member States shall be obliged to enact legislation to provide (i) a system to determine the legal status of orphan works, (ii) a workable government authorisation allowing for the online access to orphan works and (iii) a suitable mechanism of redress for reappearing rightholders.

*The orphan work status:* Once a diligent search for the rightholder has been conducted in the country of origin or first publication of the work, the result of this search (the orphan works status) is published and is mutually recognised in all EU Member States. Member States would be obliged to designate a special national public body (e.g. a copyright tribunal) that would be (1) responsible for monitoring that libraries, educational establishments, museums and archives have conducted a diligent search in accordance with relevant criteria and (2) authorised to issue licences to digitise and display the orphan works online.

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<sup>58</sup> CSPLA, *Commission sur les œuvres orphelines*, <http://www.cspla.culture.gouv.fr/CONTENU/rapoeuvor08.pdf>. In order to ensure that the interests of owners of orphan works are aptly represented, Member States should ensure that a collecting society established in their territory has both the competence and the procedures in place to administer orphan works.

<sup>59</sup> The licence fee may be subject to relevant controls such as a special tribunal or competition authority, in order to ensure that the fee is not excessive with regard to the non-commercial and cultural missions of public libraries.

As with Options 2 and 4, the principle of mutual recognition would thus have the double advantage of identifying a single relevant jurisdiction where a diligent search is most conveniently conducted and of ensuring that the search would not have to be duplicated in all the other EU Member States when their libraries contain the same orphan works in their own collection or where the orphan work will ultimately be displayed online.

*Online access:* subsequent to a diligent search and the establishment of the orphan work status, the public body would issue a licence. The public body could choose to issue a licence for a limited duration and/or for limited uses and require that the licence expire in the event that a parent reappears before the licence terminates. Member States may choose to issue a tariff-free licence in particular given the non-commercial use that libraries will make of the orphan works. Should Member States choose to charge a fee this should be proportionate to the use. Any royalties would be kept in escrow for a limited period. Unclaimed funds could be reinvested in locating missing rightholders or to assist libraries in their digitisation efforts.

*Redress:* Member States would be obliged to set up a suitable mechanism for the reappearing rightholder to assert his rights. In order to increase the possibility for rightholders to identify their works, orphan works displayed online should be clearly identified as such and the results of the diligent search should be published.

This option is modelled on the Canadian Copyright Law.<sup>60</sup> However, as with the VG Wort example mentioned above, the licence is limited to the national (i.e. Canadian) territory.

#### **4.6. Option 6 – mutual recognition of national solutions enabling libraries to provide for online access to orphan works**

Under this option, Member States shall be obliged to enact legislation within a specified time frame to provide (i) a system to determine the legal status of orphan works, (ii) a system allowing for the lawful online access to orphan works by libraries, educational establishments, museums and archives; (iii) a system of mutual recognition of the online access executed in their respective territories; and (iv) a suitable mechanism of redress in favour of reappearing rightholders. This option relies on the twofold operation of the principle of mutual recognition.

*The orphan work status:* once a diligent search for the rightholder has been conducted in the country of origin or first publication of the work, the result of this search (the orphan works status) is published and is mutually recognised in all EU Member States. The principle of mutual recognition would thus have the double advantage of identifying a single relevant jurisdiction where a diligent search is most conveniently conducted and of ensuring that the search would not have to be duplicated in all the other EU Member States when their libraries contain the same orphan works in their own collection or where the orphan work will ultimately be displayed online.

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<sup>60</sup> Art 77-78 of the Canadian Copyright Act contains specific provisions that enable the use of orphan works. Once the Copyright Board has determined that the user has made a reasonable attempt to locate the rightholder, it will grant a non-exclusive licence for the proposed use, subject to specific terms and conditions including which uses are authorised, the fees to be paid (normally made to a collecting society) and the expiry date of the licence. Licences to use a work are granted only if the work has been published. The licence is limited to the territory of Canada. Rightholders can collect the royalties or take action to recover them not later than five years after the expiration of a licence. Otherwise, the collecting society is usually allowed to dispense of the royalties for its members' general benefit.

*Online access:* while each Member State may be free to regulate the conditions under which an identified orphan work can be made available by libraries in its territory (this leaves the choice to Member States to organise the instruments authorising the making available to the public of orphan works), all the other Member States would mutually recognise the legality of this act of making available and, in consequence, allow access to this work to all residents in their territories without any further formalities.

*Redress:* as with Options 2, 4 and 5, Member States would also be obliged to put in place a suitable mechanism allowing reappearing rightholders to assert their rights. The reappearing rightholder would still be able to assert his or her rights over the work in question such as by preventing or authorising the continued online access to his work (e.g., through a collecting society, for free or against payment) while the rightholder of the orphan work subsequently reappears, the library lawfully entitled to display the orphan work online will not be held liable for acts of digital dissemination that occurred prior to the appearance of the copyright rightholder. In order to increase the possibility for rightholders to identify their works, orphan works displayed online should be clearly identified as such and the results of the diligent search should be published.

## **5. ANALYSIS OF IMPACTS**

This section looks at the economic and social impacts resulting from the options presented above. Environmental impacts are not included since they are marginal.

### **5.1. Option 1 – do nothing**

#### *5.1.1. Functioning of the internal market*

Divergent regulatory approaches in relation to orphan works risk fragmentation of the legal rules governing the online access to orphan works. National rules would only allow the online access within the national territory, which would impede the emergence of European digital libraries such as Europeana. This would have detrimental repercussions on the free movement of information across the EU and on the creation of an integrated 'knowledge economy'.

#### *5.1.2. International knowledge gap*

Without a coordinated EU approach to the online access to orphan works, Google risks becoming a global leader in search, data and text mining technologies. Once Google, by having the most comprehensive digital library in place, will have built up a 'first mover' advantage, opportunities to 'catch-up' will be scarce and increasingly unrealistic. As mentioned above, the Google Books Settlement will allow Google to scan all books covered by it broad terms, including orphan works. If costs associated with searching and clearing copyright for orphan works were too high, Europe's libraries would be forced to focus only on works already in the 'public domain'. As Google would not be constrained in this respect, the knowledge disadvantage of European projects would deepen even further given the existence of a cut-off date in the US where works published prior to 1923 are considered to be in the public domain.

Data suggests that 60% of libraries adopt a "risk managed approach", e.g. they will make certain uses of an orphan work.<sup>61</sup> The risk managed approach is, however, not feasible in relation to large scale digitisation and online display even though it may be suitable to respond to individual requests or for internal uses. Online, the scale of the endeavour (e.g. 5% of several thousand works) and the fact that the infringement can easily be detected by a rightholder act as deterrents.

Moreover, in assessing their liability, it is fair to say that public institutions cannot publicly ignore the law. Public libraries often have a public mandate (deposit libraries) and are government funded so they are not in position to assume a risk of copyright infringement. As a matter of policy, they cannot willingly ignore the law on copyright even if that were economically feasible. The exclusion of orphan works from European large scale digitisation projects would essentially mean that a potentially substantial share of the holdings of libraries, archives, educational establishments and museums will not be available online to European consumers and researchers.

At the same time, a substantial collection of digitised books including US and UK orphan works would be available online in the US to users of Google Books and to researchers in US universities. This would possibly increase the knowledge gap between the EU and the US, to the detriment of the EU. The development of the knowledge-based economy as announced in the Europe 2020 Strategy may also be hampered.

### *5.1.3. Operating costs and risks for digital libraries*

Diligent searches would have to be carried out in each Member State where an orphan work is digitised and displayed online. This risks expensive and time-consuming duplication of diligent searches. Results obtained in the Member State of first publication, albeit the most reliable of sources, would be ignored.

Costly duplicate searches will lead to less orphan works being digitised and displayed online than in the scenario where one search (in the country of first publication) suffices. The absence of reliable information as to the orphan work status will make it difficult to operate digital libraries on an EU-wide basis. High costs of searching and tracing unlocatable copyright owners is also likely to contribute to the creation of a "20<sup>th</sup> century black hole"<sup>62</sup> by forcing libraries to focus only on works already in the 'public domain'. This imperils the scope of their digital collections.

The risk undertaken in the case of mass digitisation is a function of the risk of infringement (e.g. the proportion of orphan works); the likelihood of detection which is increased when works are displayed online; and the risk of action being taken - this risk is high in countries where collecting societies have an extended mandated or the right to sue "in the professional interests of authors as a class of persons (e.g. France). It is reported that users who are aware of copyright issues avoid using orphans in a way which would raise liability.<sup>63</sup>

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<sup>61</sup> JISC: In from the Cold, p. 20

<sup>62</sup> COM (2009) 440 final of 28.8.2009

<sup>63</sup> The US Report on Orphan Works cites a survey by the Authors Guild of America data (R135) at Appendix, p. 13. It is said that 47% of the time the user "made use of the work in a way that [she] believed was consistent with fair use rules,"; 21% of the time the user "paraphrased the text", 36% of the time the user "altered [her] work to avoid the copyrighted work entirely," found a different work to use, or a combination of these choices.

Acts of unauthorised digitisation and online display attract civil and criminal liability in several Member States.<sup>64</sup>

Libraries would above all not have any incentive to assume copyright liabilities beyond their national borders - the risks and liabilities incurred vary from one Member State to another and the dissemination of a work online would attract liability in 27 Member States, under 27 territorial copyright laws. Should libraries assume a risk at national level, they would be extremely unlikely to make works available across the EU to avoid running the risk of law suits in multiple jurisdictions, under different national laws, and carrying different civil and criminal liabilities.

#### *5.1.4. Public authorities*

The administrative burdens are contingent on the choices, if any, that each Member State pursues. The aim to guarantee EU wide access to such works, independent of their country of publication, would still not be met.

#### *5.1.5. Property rights*

Regulatory fragmentation as to orphan work status would lead to legal uncertainty as to whether a particular work is an orphan work or not. There might even be a risk of divergent decisions as to the status of any particular work. This would be detrimental to the property rights of those that own orphan works. Their works would be considered orphan works in some Member States and not in others. Reappearing rightholders would have to follow different rules to assert their rights independently in each Member State.

#### *5.1.6. Researchers and consumers*

Consumers' ability to remotely access digital libraries from anywhere in the EU would not develop. In many cases, consumers would only be able to access orphan works at library premises.<sup>65</sup> In the best-case scenario, consumers would only be able to access the orphan works displayed online by libraries located in their national territory.

#### *5.1.7. Cultural diversity*

The opportunity to access works of little commercial value, but of high value for cultural or linguistic minorities and local communities would be lost; works would remain locked-up in national territories. Opportunities to create cross-cultural awareness and cohesion would be foregone.

#### *5.1.8. Impact on the EU budget*

As far as the possible impact on the EU budget is concerned, currently EU financing is limited to funding for Europeana and ARROW under the e-Contentplus project).<sup>66</sup> This funding is

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<sup>64</sup> For instance, in France, regardless of whether there is wilful intent and of whether the infringement is for commercial purposes, copyright infringement attracts a fine of up to € 300,000 and up to three years in prison (articles L. 335-2 et 3 CPI). In other Member States, penalties for copyright infringement range between three months to three years imprisonment and/or fines between € 10 000 and €300 000.

<sup>65</sup> Under the existing exception provided under Article 5(3) (n) of Directive 2001/29.

<sup>66</sup> € 60 million were made available for digital libraries under the eContentplus programme from 2005 to 2008. After 2008, the co-funding of digital libraries was taken up by the Information and

independent of this initiative and options 2 to 6 are not expected to have any additional impact on the EU budget as they do not envisage the creation of new structures or programmes at EU level. This aspect will therefore not be addressed in the description of the impacts below.

## **5.2. Option 2 – a statutory exception for libraries providing online access to orphan works**

### *5.2.1. Functioning of the internal market*

A harmonised statutory exception would avoid regulatory fragmentation and ensure EU-wide online access to orphan works. As the exception produces its effect automatically, the EU wide online access will not engender additional costs and complications inherent in the contractual licensing of orphan works.

### *5.2.2. International knowledge gap*

A coordinated EU approach to online access to orphan works would allow alternative digital library projects to emerge in Europe. These projects will then be consolidated in the Europeana portal. As Google would not be the only digital library with access to orphan works, European projects can 'catch-up' and avoid being forced into pure 'public domain' libraries.

### *5.2.3. Operating costs and risks for digital libraries*

Although a library would still have to incur the cost of a diligent search, they would avoid the cost of overlapping searches and licensing. This would create a level playing field between large and smaller institutions. Duplicate searches will be avoided, freeing up the potential of a greater number of orphan works being digitised and made available online. The risk of creation of a "20<sup>th</sup> century black hole" will be mitigated.

This option is mostly advocated by libraries. Libraries believe that they should not have to conduct a diligent search and also incur the additional cost of copyright licensing. They also believe that licensing negotiations might not always yield a tariff that is sustainable for a digital library project.

On the other hand, the main disadvantage of this option is that the library would still remain open to litigation by a reappearing rightholder who alleges that the search conducted by the library was not sufficiently diligent. As the search is neither certified by a public authority, nor guaranteed by a licensor, libraries would not enjoy absolute legal certainty. Since the diligent search is "self certified" by the library, it could still be challenged in the course of litigation.

However, the development of a core set of diligent search guidelines at EU level as part of the legislative proposal would provide libraries with a higher degree of legal certainty than if nothing were done even though it would still be up to them to prove they have carried out a

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Communications Technologies (ICT) Policy Support Programme. From 2007 to 2008, some € 40 million were invested in technology projects related to digital libraries, including a network of centres of competence for digitization under the Seventh framework programme for research and technological development (FP7).

diligent search in fact and deed according to the specified guidelines. A public registry containing a list of all orphan works identified after diligent searches in the Member States of first publication would further mitigate the risk of litigation over online access to orphan works.

While searching for rightholders can be a lengthy, cumbersome and expensive process (see Table A6 in the Annex for some examples of diligent search costs),<sup>67</sup> these costs are a part of the overall costs of the digitisation programme.<sup>68</sup> This is because a search to clarify the ownership situation in any given work will have to be conducted prior to the making available of a work to the public, irrespective of whether the work is an orphan work or whether it is a work whose owner is known. Therefore, the search costs are not orphan-specific but are sunk costs since they are incurred as part of any comprehensive digitisation project. The advantage of a one-stop shop like ARROW is that it alleviates the costs to libraries.

In addition, the diligent search requirement should not be perceived solely in terms of cost but also from the corresponding benefits. On the one hand, should a diligent search positively identify the rightholders, a library will be able to contact them directly to request permission to put their works online. On the other hand, if a diligent search comes up with no results to classify a work as an orphan, the fact of having carried out a diligent search provides the library with a 'safe harbour' against possible future liability. An *a priori* diligent search also provides assurance to commercial companies engaged in public-private-partnership agreements with libraries that they are not themselves infringing copyright. The assurance that a diligent search provides, especially if this is legally binding, will incentivise libraries to continue with their digital projects.

Compared to other sectors, the tools for conducting a diligent search in the text and print sector are rather developed. Besides having a greater variety of sources to search for the rightholders in say books compared to photos, the development of ARROW (Accessible Registries of Rights Information and Orphan Works) is an important factor in enabling diligent searches to be carried out. ARROW<sup>69</sup> is a right-holder identification system to identify right holders and to clarify the copyright status of a work – e.g. if it is commercially available, simply out of print or indeed an orphan. It will provide information on who owns and administers the rights of a work and where users can seek permission to digitise and/or make it available to user groups. It will create a European registry and a network of rights clearance centres.

ARROW is itself a practical application of the Sector-Specific Guidelines on Diligent Search<sup>70</sup> developed by representatives of libraries, archives and rightholders. While the cost of using ARROW cannot be determined with any accuracy given that this is still a project in

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<sup>67</sup> The costs vary depending on a variety of factors - the age of the work, the human and financial resources at a library's disposal, accessibility to databases and so on. Table A5 in the Annex provides some examples of digitisation costs.

<sup>68</sup> These include the scanning of the material, the management of metadata, and the provision of the online service as well as any licence fees that a library may already be paying on the basis of an agreement with rightholders.

<sup>69</sup> ARROW is being developed by a consortium of European national libraries, publishers and collective management organisations, also representing writers. It is a €5.1 million project co-funded by the EU budget under the eContentplus Programme (€2.5 million). This is the same programme that also partly finances Europeana. ARROW is coordinated by the Italian Publishers Association.

<sup>70</sup> [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/hleg/orphan/guidelines.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/guidelines.pdf)

development, the usefulness of this system is that it will provide a one-stop-shop to conduct a diligent search.

#### 5.2.4. *Public authorities*

Member States would have to adopt transposition measures. However, the introduction of a new exception under national law is a simple amendment to existing legislation and does not require further implementation measures. For instance, there would be no need to put in place an elaborate licensing or supervising infrastructure (such as that necessary for any of the licensing options discussed below).

#### 5.2.5. *Property rights*

A statutory exception has repercussions on property rights. Orphan works, although not strictly speaking 'ownerless', could be displayed online without prior permission. These repercussions are mitigated, however, by the diligent search requirement and the fact that any reappearing rightholder would be able to claim his rights and thus terminate the 'orphan status'.

#### 5.2.6. *Researchers and consumers*

Results obtained in the Member State of first publication, the most reliable source, would be recognised as valid in other jurisdictions. This would facilitate EU-wide online access to orphan works. Consumers' ability to remotely access digital libraries from anywhere in the EU would develop its full potential.

#### 5.2.7. *Cultural diversity*

This option acknowledges that there is little commercial value in individual orphan works and that their online access is undertaken in the interest of cultural preservation and accessibility only. This option is consistent with the so-called "orphan works paradox".<sup>71</sup>

In this respect, option 2 openly acknowledges that online access of orphan works is done with a cultural or educational purpose alone. It would provide an opportunity to make available works that have not been deemed commercially attractive enough to be made available for commercial purposes. This would be taken up by libraries and archives (including smaller institutions) that, as custodians of cultural heritage, do not pursue a commercial purpose. It would also cater to the interests and tastes of cultural and linguistic minorities or local historians. As orphan works would be available to consumers anywhere in Europe, opportunities to create cross-cultural awareness and cohesion would also be seized.

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<sup>71</sup> The "orphan works paradox" essentially refers to the situation where the lower the commercial value of a work, the less likely it is that the owner can be found to grant permission. This means that the least valuable works create the biggest search costs. Therefore, all things being equal, there is no incentive to incur the cost of a search for orphan works which will therefore remain locked up.

### 5.3. Option 3 – extended collective online licensing

#### 5.3.1. *Functioning of the internal market*

As extended collective licensing does not require an upfront diligent search, this option does not allow for the positive determination of an orphan works status or the mutual recognition thereof across Europe.

The Nordic model is mostly promoted by the Nordic collecting societies, although the latter acknowledge that the absence of a diligent search makes this model less suitable as a European default option. It is also acknowledged that the absence of a diligent search makes this model unsuitable for an approach based on mutual recognition of a work's orphan status.

Collecting societies operating extended collective licensing schemes have not yet found the means of broadening this type of licence to other territories not covered by the national law that prescribes the 'extension effect'.

#### 5.3.2. *International knowledge gap*

The extended licence potentially allows libraries to clear rights for a large category of works (e.g. out-of-print books, including orphan works) in a single transaction. In theory, online repositories of the entire collections of European libraries could rapidly be authorised. However, this prospect is unlikely to materialise. First, it would be extremely costly for the libraries to purchase such a licence. Second, because the legal presumptions that a representative collecting societies also represents orphan works only applies in the national territories that introduce such a presumption, this option only allows the display of orphan works within the territory of a Member State. Digital libraries operating with an extended collective license would therefore only be accessible at national level. For these reasons, this option would not be a credible basis for European projects such as Europeana to 'catch-up' with Google.

#### 5.3.3. *Operating costs and risks for digital libraries*

Extended collective licensing would be complex for libraries. The library would have to seek an arrangement covering the online access of a variety of works. Only if such a framework agreement were in place, could orphan works be added to its scope ("extension effect"). On the other hand, libraries would be immune from any possible infringement claims from any rightholder (known or unknown).

The main drawback of extended collective licensing is the lack of differentiation between usage tariff for orphan works and those tariffs that apply to the rest of the works subject to the licence. This becomes evident when analysing the Norwegian "Bokylla" library project, which includes 50,000 in copyright books. All books comprised in this project are licensed at the same rate of €0.067 per page per year. The level of payment due for an orphan work is identical to that due for a work of a known rightholder. Consequently, it appears that all orphan works attract full rates for all past and future uses. According to the Norwegian model, an average orphan work comprising 185 pages would generate annual display costs of around € 13.<sup>72</sup> Should a library wish to display 1,000 orphan books, it will incur annual licensing

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<sup>72</sup> 185 pages\*7 cents (rounded) = cca. €13

costs of € 13,000. If one or several libraries display a million orphan books, the annual cost of doing so would amount to € 13 million.

If, for example, the estimated 50 million orphan works that exist in the United Kingdom were licensed under the terms of an extended collective licensing scheme, this would create an annual licensing cost to British libraries amounting to € 650 million. As an indicator of the magnitude of such a sum, for the year 2008/2009, the total domestic reprography income of the Copyright Licensing Agency<sup>73</sup> in the UK amounted to € 63.5 million and the budget of British Library amounted to € 140 million.<sup>74</sup>

According to 2001 estimates,<sup>75</sup> the total number of books and bound periodicals (volumes) in the libraries of the EU-25 was 2.5 billion. Making available 2.5 billion books/periodicals at the Bokylla library rate would equate to an annual cost to the libraries of € 32.5 billion<sup>76</sup> (assuming that each bound periodical is also on average 185 pages long). Taking a conservative estimate that 5% of all books and journals are orphan works, this would translate into € 1.625 billion of licensing cost per annum that are attributable to the display of orphan works alone in the EU.

#### 5.3.4. *Public authorities*

Considerable time and effort would be required to introduce extended collective licensing schemes in jurisdictions that did not hitherto operate such schemes. Regulatory oversight for tariff setting and dispute resolution would have to be created to administer the smooth functioning of the new schemes.

#### 5.3.5. *Property rights*

The extended collective licensing scheme has repercussions on property rights. Orphan works would be incorporated into a licence for digital display without prior permission from the unknown rightholder. These repercussions are mitigated, however, by the fact that the collecting society that administers the licence would keep funds in escrow in case the rightholder appears.

Nevertheless, as there is no prior permission necessary to include orphan works in an extended licence and since no diligent search takes place - somewhat akin to the Google Book Settlement's default condition of inclusion in the Settlement unless a rightholder actively opts-out - collecting societies do not have sufficient incentives to engage in a robust search for un-locatable rightholders. The fewer rightholders that are identified, the more money is left over to disburse to identified members of a collecting society. Such payments benefit identified members thereby engendering loyalty among this group toward the collecting society. This generates a potential conflict of interest between identified and non-identified rightholders.

In relation to the respect of property rights, the main disadvantage of extended collective licensing is that, absent a diligent search, there is no legal certainty at any given stage as to how many works in a given licensing arrangement are actually orphan works. This uncertainty coupled with the fact that the system would not allow for the positive

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<sup>73</sup> The CLA licences the reprographic copying of books in libraries.

<sup>74</sup> <http://www.bl.uk/aboutus/foi/pubsch/pubscheme2/Financial%20Summary%20200809.pdf>

<sup>75</sup> COM (2005) 465 on i2020: Digital Libraries, p. 5.

<sup>76</sup> 2.5 billion\* €13

determination of an orphan works status or the mutual recognition thereof across Europe and, consequently neither a European registry on orphan works, is why this option does not score high in respecting property rights.

#### 5.3.6. *Researchers and consumers*

Consumers' ability to remotely access digital libraries from anywhere in the EU would not develop under this purely national model. Digital libraries would only be accessible on a national basis.

#### 5.3.7. *Cultural diversity*

Being national in scope, the extended collective licensing scheme would not present an opportunity to develop European niche markets for orphan works. The known licensing rates (see Bokylla rates discussed above) might put significant strain on libraries that wish to display orphan works, even in one national territory. These rates would also discourage smaller digitisation projects.

### 5.4. **Option 4 – specific licence for libraries for online access to orphan works**

#### 5.4.1. *Functioning of the internal market*

Divergent regulatory approaches in relation to orphan works would be avoided to some extent. The orphan status identified in the country of first publication would be recognised across all other EU Member States.

Nevertheless, a licence for online access to a recognised orphan work would have to be obtained with *each* collecting society operating in the country of first publication. If a library collection comprises works published in several jurisdictions (or translations of foreign orphans, book illustrations first published abroad, etc.), this would introduce the need to obtain multiple licences (repertoire fragmentation). Several licences covering orphan works from several jurisdictions would become necessary to provide EU-wide access to orphan works in a library's collection. This complexity would have detrimental repercussions on the free movement of information across the EU.

On the other hand, this option would at least allow EU-wide access to orphan works centrally licensed by the collecting societies of the country of first publication.

#### 5.4.2. *International knowledge gap*

The risk of expensive and time-consuming duplication of diligent searches would be avoided: results obtained in the Member State of first publication would be recognised.

Nevertheless, the need to obtain a separate licence for orphan works first published in different countries would re-introduce a certain level of complexity in providing pan-European access to all orphan works within a library collection (and to translations of foreign orphans, to illustrations, etc.). It would still allow Google (which will not face this complexity under the US Settlement) to become a global leader in the online access to orphan works.

#### 5.4.3. *Operating costs and risks for digital libraries*

The multiple licensing for the orphan works first published in different jurisdictions will be more complex than in a scenario that does not require licensing or multiple licensing (e.g., a statutory exception).

A specific license allowing the making available of orphan works after they are positively identified, on the other hand, provides libraries or other cultural institutions with a high level of legal certainty against legal action by reappearing owners of the relevant copyrights.

But this option is rather cumbersome to administer because not only do libraries have to conduct a diligent search to determine the orphan status of a work, they also have to conclude a specific licensing arrangement that would cover exclusively such orphan works. In these circumstances, there remains some doubt as to whether a price for the making available of an orphan work could be agreed on within a timeframe that is still interesting for the digital library project.

This licensing option was mostly promoted by collecting societies, especially those active in larger Member States. They believe that this option reconciles the need for absolute legal certainty with the need to find an adequate legal representative for orphan works. On the other hand, it is increasingly acknowledged that the need to conclude a specific license for the use of orphan works might prove to be unnecessarily cumbersome. It might be more efficient to include such works in a more general license granted to a digital library project, but – contrary to the Nordic model – only after a diligent search has been conducted.

In addition, orphan-specific licenses will be costly for libraries, as many of the uncertainties relating to the licensing rates that were described in the extended collective licensing scheme would apply to specific orphan licences as well (although rates may be adapted to reflect the lower commercial value of orphan works).

However, the mutual recognition of diligent searches would present the opportunity for reliable information as to the orphan work status of works in the EU to be published and made available to libraries. A public registry containing a list of all orphan works identified after diligent searches in the Member States of first publication would further mitigate the risk of litigation over the online access to orphan works. The benefits of the development of a one-stop shop for diligent searches like ARROW and the adoption of a common set of EU diligent search guidelines are also similar to those described in Section 5.2.3.

#### 5.4.4. *Public authorities*

While the mutual recognition of orphan works status would avoid needless duplication in supervising diligent searches, the complex licensing requirements associated with this option would still imply administrative burdens linked to regulatory oversight on licensing contracts and dispute resolution in case parties do not agree on licensing conditions.

#### 5.4.5. *Property rights*

Orphan works licences would affect property rights in much the same way as the extended collective licences do. While rightholders of orphan works would not be granting prior permission for the digital display of their works, the licensing society would, to the extent described previously, be seen as taking care of the absent rightholders' rights. If revenue

generated by the licensing of orphan works is ultimately attributed to the registered members of the licensor collecting society, the inherent conflict of interest between known and unknown rightholders would arise again.<sup>77</sup>

On the other hand, if collecting societies that license the orphan works are held liable in case the search is not carried out diligently, the interests of rightholders of orphan works would thus be better represented and the potential conflict of interest reduced.

Nonetheless, these repercussions are mitigated by the diligent search requirement and the fact that any reappearing right holder would be able to claim his rights and thus terminate the 'orphan status'.

#### 5.4.6. *Researchers and consumers*

Consumers' ability to remotely access digital libraries from anywhere in the EU would develop. Once the EU licence is available for a certain repertoire of works, they can be accessed across the EU. The disadvantage might be that the cost and complexity of orphan works licensing might dissuade a library from displaying orphans from several jurisdictions. This might lessen the online offer available on any particular digital library website.

#### 5.4.7. *Cultural diversity*

The development of European niche markets for orphan works would be lost; the complexity of orphan specific licensing would dissuade many, especially smaller scale, initiatives from engaging in EU-wide display of orphan works. Opportunities to create cross-cultural awareness and cohesion would be foregone, especially regarding translations or books containing orphans from different countries.

### 5.5. **Option 5 – centrally granted licence for libraries for online access to orphan works**

#### 5.5.1. *Functioning of the internal market*

National governmental licences for the exploitation of orphan works (the Canadian model) would not avoid regulatory fragmentation and would fail to ensure EU-wide online access to orphan works. Quite to the contrary, such domestic licences would reinforce fragmentation as the decision on orphan status and the licence to exploit the work is valid only for the respective national territory.

#### 5.5.2. *International knowledge gap*

State licences would not address the issue of diligent searches and their duplication. The licence reflects a diligent search in the granting State and the right to exploit is limited to the territory of that State. The Member State licence would thus not create any legal certainty as to the orphan works status of the works covered outside the territory of the granting State. National government licensing would not allow for a coordinated EU approach to online

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<sup>77</sup> For instance in France, some argue that collecting societies are under no legal obligation to extensively search for the owners of a work: see Fabrice Siiriainen, "Dimension d'intérêt général et régulation de la gestion collective", *JurisClasseur PLA Fasc. 1552* para 14.

access to orphan works, as works are licensed on a national level. The option would not be a basis for European projects to 'catch-up' with Google.

In addition, checking the diligent search and granting a licence could prove an "administrative bottleneck": the time and expense involved would slow down digitisation efforts in the EU.

#### *5.5.3. Operating costs and risks for digital libraries*

National government licences would be complex for libraries. The library would have to seek an arrangement covering each work separately; as the Canadian model shows, this work-by-work or title-by-title searches are cumbersome, time consuming (two months on average) and yields a few licences per year only (see Table A7 in the Annex). From 1990 to 2009, there were only 243 approved uses of orphan works. Such a work-by-work clearance process is not conducive to stimulate large-scale digitisation projects.

In the absence of any clarity as to what Member State licensing rates would be, no legal certainty can be gathered as to the cost of such schemes.

On the other hand, this option grants a high level of legal certainty to the operator of the digital library. But, as with Option 4, this certainty comes at a price. In theory, individual licenses would have to be obtained for each orphan work. As mentioned above, the administrative burden inherent in such a system becomes obvious. This is why earlier incarnations of this system (e.g. the Canadian Copyright Board) have had limited impact and are certainly not used in relation to large scale digital library projects where individualised clearances appear inappropriate. No major stakeholder group has spoken in favour of this option, notably due to its high cost.

At the same time, the benefits of the development of a one-stop shop for diligent searches like ARROW and the adoption of a common set of EU diligent search guidelines are also similar to those described in Section 5.2.3.

#### *5.5.4. Public authorities*

Each Member State would have to establish, from scratch, complex and costly search and licensing authorities to carry out the detailed work of validating diligent searches and granting licences.

#### *5.5.5. Property rights*

The government licence scheme has repercussions on property rights. Orphan works, although not strictly speaking 'ownerless', would be licensed by a State body without prior permission from the unknown rightholder. These repercussions are mitigated, however, by the diligent search requirement and the fact that any reappearing rightholder would be able to claim his rights and thus terminate the 'orphan status'. The State body that administers the licence would keep funds in escrow in case the rightholder appears.

#### *5.5.6. Researchers and consumers*

Consumers' ability to remotely access digital libraries from anywhere in the EU would not develop under this purely national model.

### 5.5.7. *Cultural diversity*

Being national in scope, the Member State licences would not present an opportunity to develop European niche markets for orphan works. In the absence of any clarity what Member State licensing rates would be, it is not possible to draw up estimates of the costs of such a scheme.

## 5.6. **Option 6 – mutual recognition of orphan works made available by libraries**

### 5.6.1. *Functioning of the internal market*

Mutual recognition of both the orphan works status and the lawful use made of an orphan in the country where the library uploads the work ensures the EU-wide dissemination of orphan works.

National rules would determine the conditions governing the online access to all recognised orphan works. These conditions would, in turn, be recognised beyond the national territory in which the library resides. For example, a library in Hungary would be able to make available all orphan works in its collection, be they Hungarian, German or French works, available for viewing in Hungary according to the rules on 'orphan works' that prevail in Hungary. But access to these works would not be barred for viewers outside Hungary since all other Member States would recognise that the initial online access in Hungary was a lawful act.

This option would allow the emergence of European digital libraries such as Europeana. It would also ensure the free movement of information across the EU and the creation of an integrated 'knowledge economy'.

### 5.6.2. *International knowledge gap*

A coordinated EU approach based on the principle of mutual recognition of orphan work status and the legality of online access of orphan works that occur in other Member States may create the legal conditions for the widest possible dissemination of orphan works. This might be the best approach to prevent a single company from becoming the global leader in online access to such works.

### 5.6.3. *Operating costs and risks for digital libraries*

The advantage of this option is that libraries would have legal certainty as to the "orphan status" of all works that have been identified as such after a diligent search, while remaining at liberty to organise the making available of these works to the public in line with their legal and cultural traditions. For example, those Member State who deem that legal certainty requires a copyright licensing scheme can provide for such a scheme. Other Member States who believe that the conduct of a diligent search alone would provide the necessary level of legal certainty and immunity against litigation by reappearing right holders would be able to allow for a statutory exception. The advantage of Option 6 would be that, irrespective of the chosen approach, the legality of the making available of an orphan work that occurred legally in one Member State would be recognised in all other Member States of the European Union.

The mutual recognition option is mostly advocated by the publishing community and the Member States. The publishers believe that no system that provides for the authorisation to make orphan works available online can dispense with an a priori diligent search to identify the orphan status of the work. Member States believe that mutual recognition provides a high

level of legal certainty for the library community while respecting different legal and cultural traditions. Some Member States also advocate this option because it would allow them to introduce a statutory license for the making available of orphan works subsequent to a diligent search. To increase the workability of this option, the Member States appear willing to certify the diligence of such a search.

Although a library would still have to incur the cost of a diligent search in the country of first publication, costly duplicate searches would be avoided. In relying on the lawfulness of the display that any given library undertakes in the country of its domiciliation, needless licensing duplication would be avoided as well. Costs might still be somewhat higher than under the statutory exception because libraries will have to comply with the different rules adopted by the Member State where they and the collections to be displayed are based. Some Member States may opt for solutions that require libraries to pay.

Finally, the mutual recognition of orphan work status, as determined in the country of first publication, entails that information as to the orphan status of works is made publicly available. A public registry containing a list of all orphan works identified after diligent searches in the Member States of first publication would further mitigate the risk of litigation over the online access to orphan works. This registry also minimises libraries' costs of searching and tracing orphan works.

The benefits of the development of a one-stop shop for diligent searches like ARROW and the adoption of a common set of EU diligent search guidelines are also similar to those described in Section 5.2.3.

#### *5.6.4. Public authorities*

Significant expenditure of resources would be avoided by applying the principle of mutual recognition both to the identification of orphan works and to the legality of libraries' digital displays. Member States would be free to apply their national conditions governing the exploitation of orphan works by their national libraries but would accept the legality of displays that occur by libraries in other Member States in compliance with the rules that prevail in these jurisdictions. This means that Member States that already implement orphan works legislation or are in the process of drafting such legislation would not have to overhaul their approach.

As a "one size fits all" solution is avoided, Member States can be expected to balance the specific needs and resources of their libraries with the interests of rightholders in adopting legislation most suited to their national situation. Some of the existing systems might therefore need to be modified.

#### *5.6.5. Property rights*

The impact of this option on property rights would vary with the solution chosen by each Member State: Member States may continue to apply their respective national rules governing the obligations vis-à-vis reappearing rightholders of orphan works (redress for reappearing rightholders, frequency of distribution of such accounts). The impacts would thus be, at national level, the same as those identified in the previous options.

These repercussions are mitigated, however, by the diligent search requirement and the fact that any reappearing rightholder would be able to claim his rights and thus terminate the 'orphan status'.

#### 5.6.6. *Researchers and consumers*

Consumers' ability to remotely access digital libraries from anywhere in the EU would develop. Consumers could access the collections of their own national libraries and also those made available by libraries in other Member States.

#### 5.6.7. *Cultural diversity*

All orphan works identified as such would be available for viewers across the EU. This would allow the dissemination of works for "niche" users and of limited commercial value.

As Member States are allowed flexibility in adopting orphan works legislation, it can be expected that the national solutions will take into account the specificities of the preservation of cultural heritage at national level. This should allow solutions to be tailored to the mission of libraries and archives (whether public entities, charities, public services, etc.) as custodians of cultural heritage at national and local level. This approach is most respectful of cultural traditions that prevail in the different Member States.

### 5.7. Summary of options

Table 1 presents a concise summary of the five options analysed in Chapter 4.

<b>Policy Options ▼</b>	Prior diligent search	Cross-border mutual recognition of OW status	Redress for RH	Pan-EU accessibility	Workability
Statutory exception for online access	YES	YES	YES	YES	SIMPLE
Extended collective licensing	NO	NO	YES	NO	SIMPLE
Orphan works licence	YES	YES	YES	YES	COMPLEX
Member State licence for orphan works	YES	YES	YES	NO	COMPLEX
Mutual recognition of national rules governing online access	YES	YES	YES	YES	DEPENDS ON MS SYSTEM

Table 1: Summary of options

All options, except extended collective licensing, require an upfront diligent search. Although some effort will be required, the benefit of making available orphan works only after a diligent search is that there is greater legal certainty against later infringement action. All options based on a prior diligent search also have the advantage that the results of this search can be recognized across the EU.

All options, on the other hand, have mechanisms for providing redress for reappearing rightholders - a feature deemed essential to safeguard the latter's property rights. The extended collective licensing option and the option involving a government license have the disadvantage that these schemes are limited to national territories and can therefore not provide Europe-wide access to the orphan works.

Finally, with respect to the practical "workability" of options, it should be pointed out that this notion refers to the organizational aspects of each option, i.e., whether Member States must put new administrative licensing structures in place. The option based on a statutory exception would only require putting into place an infrastructure to facilitate "diligent search", a cost and effort largely already borne by ARROW. Beyond that, this option does not require the establishment of any new licensing infrastructures.

The license-based options (options 3 and 4) require additional efforts by national collecting societies. On the other hand, these efforts would be incremental to existing licensing activities, especially with option 3 where orphans are merely added in pre-existing licensing arrangements. There might be incremental impacts on Member State's regulatory oversight functions, as the inclusion of orphans in licensing arrangement requires particular vigilance for the respect of property rights. Option 5 is the most onerous alternative as it would require Member States to set up a governmental body that supervises diligent searches and issues individual licenses for the use of orphan works. The workability of the mutual recognition option is a 'mixture ' of the above, as some of its parameters depends on the individual national approaches chosen to organize the making available of orphan works.

## 5.8. Summary of impacts

Table 2 summarises the economic and social impacts of the various policy options.

<b>Effects on: ► Policy Options ▼</b>	Internal Market	Int'l knowledge gap	Operating cost	Public authorities	Property rights	Researchers and consumers	Cultural diversity
No policy change	O	O	O	O	O	O	O
Statutory exception for online access	++	++	++	-	-	++	++
Extended collective licensing	--	--	-	--	--	--	--
Orphan works licence	+	+	-	-	-	O	O
Member State licence for orphan works	--	--	-	--	+	--	--
Mutual recognition of online access	++	++	+	-	O	++	++
Magnitude of impact as compared to the baseline scenario: O no change; ++ strongly positive; + positive; -- strongly negative; - negative							

Table 2: Summary of impacts

Option 2, the statutory exception for online access, and option 6, the mutual recognition of online access, score the highest in terms of cross-border online access, bridging the knowledge gap and workability.

Both options achieve the most positive impacts in relation to five out of seven impact categories. The differences arise in relation to operating costs and property rights. In terms of

operating costs, the statutory exception appears to be the most efficient and least onerous for libraries as this option is limited to requiring a diligent search but no subsequent licensing. The option based on mutual recognition, on the other hand, could result in slightly higher operating costs for libraries, depending on whether Member States choose complex and costly licensing systems to authorise the lawful display of orphan works. Nevertheless, the additional license substitutes for the requisite "permission to use" and would thus provide additional safeguards against subsequent infringement claims. Also, Member States, as long as a diligent search has been conducted, can reduce operating costs by adopting rules that orphan works can be integrated into existing licensing schemes covering digital libraries.

Property rights are affected in the same manner by both options. Notwithstanding a prior diligent search, the orphan work is being used without the rightholders' express authorisation. However, since the mutual recognition option grants Member States the possibility to establish suitable instruments to substitute for an express authorisation, Option 6 is better suited to allow Member States to provide a higher level of protection for property rights.

## 6. COMPARISON AND RANKING OF OPTIONS

Table 3 compares how the different policy options achieve the operational objectives.

<b>Objectives ►</b> <b>Policy Options ▼</b>	Legal certainty for digital libraries	Reduce transaction costs	Cross border access to OW	Protection against liability for infringement	Facilitate 'diligent search'	Diligent search only in country of first publication	Avoid duplication of diligent searches	Facilitate the identification of rightholders
No policy change	O	O	O	O	O	O	O	O
Statutory exception for online access	+	++	++	+	++	++	++	+
Extended collective licensing	+	--	--	+	-	--	--	--
Orphan works licence	+	+	+	+	++	++	++	+
Member State licence for orphan works	++	-	-	++	-	-	-	+
Mutual recognition of online access	+	++	++	++	++	++	++	+
<i>Magnitude of impact as compared to the baseline scenario: O no change; ++ strongly positive; + positive; -- strongly negative; - negative</i>								

Table 3: Comparison and ranking of options

Option 2, the statutory exception for online access, and option 6, the mutual recognition of online access, score the highest in terms of cross-border online access, avoiding the cost of duplicate diligent searches, reduction of transaction costs and facilitating the identification of right holders.

Both options achieve the most positive impacts in relation to the objectives linked to "access" and administrative simplicity. Subtle differences arise, however, in relation to operating costs for libraries and the securing of property rights.

In terms of operating costs, the statutory exception appears to be the most efficient and least onerous for libraries as this option is limited to requiring a diligent search with no subsequent transactional cost linked to licensing. The absence of a secure licensing framework is, however, a slight disadvantage with this option as far as legal certainty is concerned.

The option based on mutual recognition, on the other hand, could result in slightly higher operating costs for libraries, depending on whether Member States choose costly licensing systems to authorise the lawful display of orphan works. Nevertheless, the additional license substitutes for the requisite "permission to use" and would thus provide additional safeguards against subsequent infringement claims. Also, as long as a diligent search has been conducted, Member States can reduce operating costs by adopting rules that orphan works can be integrated into existing licensing schemes covering digital libraries.

Property rights are affected in the same manner by both options. Notwithstanding a prior diligent search, the orphan work is being used without the right holders' express authorisation. However, since the mutual recognition option grants Member States the possibility to establish suitable instruments to substitute for an express authorisation, Option 6 is better suited to allow Member States to provide a higher level of protection for property rights.

Option 6, therefore, seems on balance, the safer choice.

The chosen approach is therefore based on the mutual recognition of the orphan work status determined after a diligent search in the Member State where the work was first published. In addition, all licenses permitting the making available of orphan works will also, by virtue of mutual recognition, be valid throughout the European Union. In this manner the principal goal of the initiative, to promote the knowledge economy and grant Europe wide access to orphan works contained in digital library projects, is best achieved.

## **7. IMPLEMENTATION, MONITORING AND EVALUATION**

*Implementation* of the options will be conducted in line with the policy objectives and international copyright law. In that context, issues of legal drafting will require careful consideration. This proposal's key aim is to allow libraries and similar bodies which have public interest aims like education or the preservation and diffusion of cultural heritage to lawfully make available and reproduce orphan works. However, bodies with a public interest mission sometimes work in partnership with private firms on digitisation projects (public-private partnerships). They also sometimes may get income from their online services, such as payments for placing adverts on their websites. Some stakeholders have expressed concerns that in such circumstances use of orphan works should be allowed, while others have drawn attention to the need to narrowly circumscribe such uses in order to comply with copyright law. These concerns are not mutually exclusive but need to be addressed by careful legal drafting.

Accordingly, in defining the uses of orphan works which should be permitted in light of the above, the legal drafting should safeguard the legitimate interests of rightholders. Such legitimate interests may be protected, as discussed earlier, through a diligent search and/or compensatory mechanisms. Additional safeguards should also include steps to ensure that orphan works are prominently labelled as such and can be quickly "reclaimed" by their rightholder.

Monitoring and evaluation will be conducted in line with the policy objectives as identified above. As a policy option has not yet been chosen, the details of monitoring and evaluation will be more specifically defined at a later stage.

The *monitoring process* could develop along three models:

- (i) The first concentrates on the short-term, starting right after the adoption of the proposal. It focuses on the sheer implementation of the proposal, i.e. amendments of national rules.
- (ii) The second would be mid-term and would focus on direct effects such as the ease to digitise library material and the ease of obtain licensing. A survey on the scale of the orphan works problem, which should be appropriately reduced, could be performed.
- (iii) Finally, in the mid- to long-term, monitoring of the overall economic and social impacts of the proposal “on the ground” could be set up. It should be reflected in the scale of digitisation of European libraries and the amount of the material that is put online.

More detailed monitoring indicators are presented in the Annex, Table A8.

A first comprehensive *evaluation* could therefore take place 5 years after the entry into force of the proposal.

ANNEX

## 1. PUBLIC CONSULTATION ON THE REVIEW OF THE EC LEGAL FRAMEWORK ON COPYRIGHT AND RELATED RIGHTS

The Green Paper dealt with general issues on exceptions to exclusive rights harmonised in Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society. It examined whether exceptions that are most relevant for the dissemination of knowledge should be developed. It also looked into the issue of contractual agreements and licensing models. It further enquired whether exceptions and limitations relating notably to libraries and archives, teaching and research, and persons with disabilities should evolve in the era of digital dissemination. It raised questions concerning orphan works as well as consumer issues such as user-created content.

Broadly speaking two divergent views emerged. Libraries, archives and universities favoured the "public interest" by advocating a more permissive copyright system. Publishers, collecting societies and other rightholders argued that the best way to improve the dissemination of knowledge and provide users with increased and effective access to works is through licensing agreements.

Libraries and academics state that certain exceptions are more important for the knowledge economy than others. They plead for a mandatory set of core "public interest" exceptions to facilitate "access to knowledge".<sup>78</sup> They also expect that these exceptions are not rendered moot by technological protection measures (TPM). Contractual licensing, reinforced by TPM, is perceived as allowing publishers to "create their own copyright law". It should be the legislator that defines the confines of copyright.

Publishers, collecting societies and other rightholders consider that an equally satisfactory result can be achieved without rendering certain exceptions mandatory. They maintain that knowledge travels faster when dissemination is governed by contracts, often tailor-made to cater to new technologies. Publishers state that mandatory exceptions could undermine economic rewards and encourage so-called "free-riding" on their investments and business models.

While the public consultation on the Green Paper was carried out before the various options were developed in this Impact Assessment, the Commission consulted with all interested stakeholders on the different options. The outcome was broadly similar to that expressed in the public consultation namely that the statutory exception is the preferred option of the library and archive community while publishers, collecting societies and other rightholders preferred some variation of a licensing scheme.

The dawn of the online culture of sharing and swapping, data mining and interactive learning, has exposed a difference of views between those who wish to move towards a more permissive system of copyright and those who wish to preserve the status quo. The challenge is to reconcile these interests.

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<sup>78</sup> Suggestions for possible mandatory exceptions of Directive 2001/29/EC include among others: (i) private copying (Article 5(2)(b)); (ii) reproductions by libraries, archives and museums (Article 5(2)(c)); (iii) use for educational and scientific purposes (Article 5(3)(a)); (iv) use by disabled persons (Article 5(3)(b)); (v) use for news reporting and press reviews (Article 5(3)(c)); and (vi) use for quotations for purposes such as criticism and review (Article 5(3)(d)).

## 2. STAKEHOLDER CONSULTATION ON GREEN PAPER; A STATISTICAL ANALYSIS

The Commission analysed 367 responses received in response to the call for comments of July 2008 on the Green Paper "Copyright in the Knowledge Economy".

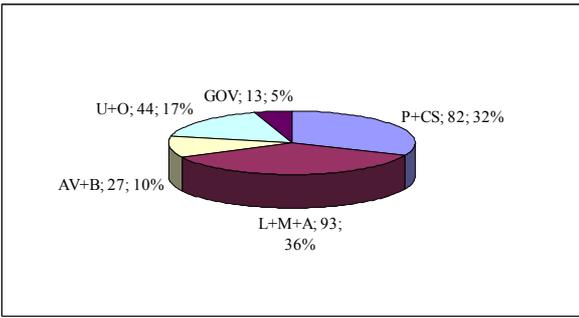
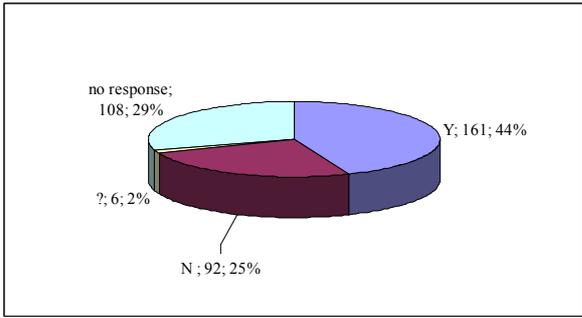
Questions 10-12 related to the topic of orphan works:

- (10) Is a further Community statutory instrument required to deal with the problem of orphan works, which goes beyond the Commission Recommendation 2006/585/EC of 24 August 2006?
- (11) If so, should this be done by amending the 2001 Directive on Copyright in the information society or through a stand-alone instrument?
- (12) How should the cross-border aspects of the orphan works issue be tackled to ensure EU-wide recognition of the solutions adopted in different Member States?

Table A1: Summary of responses to the Green Paper public consultation

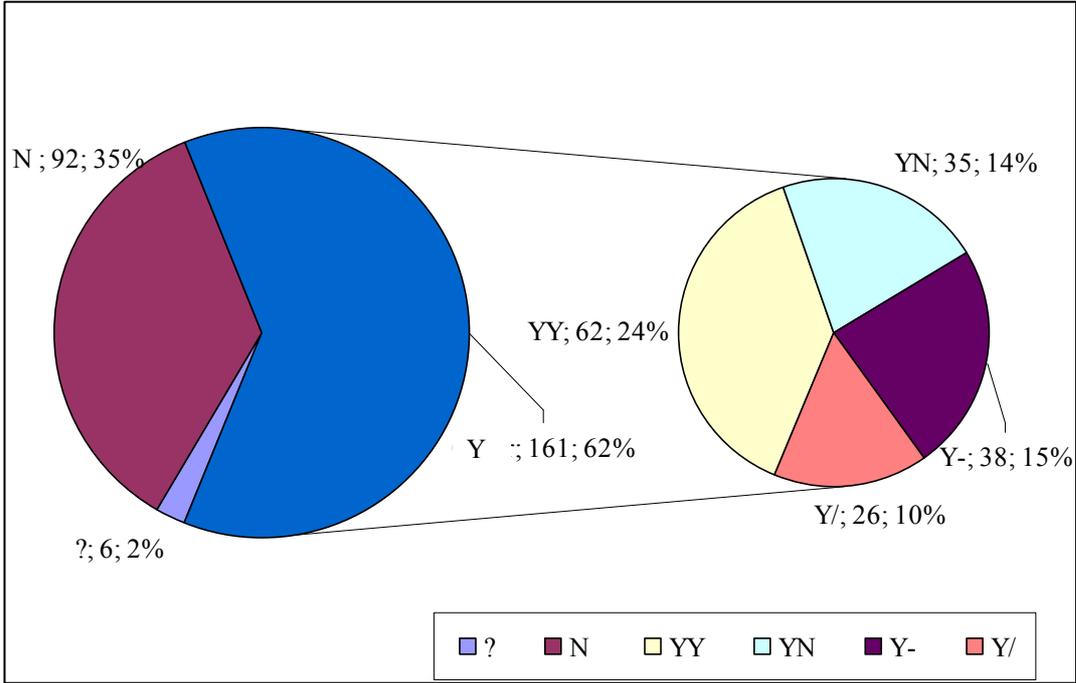
	A	AV	B	CS	GOV	L	M	O	P	U	Sum
<b>no response</b>	0	15	3	3	1	9	1	34	11	31	108
<b>?</b>	0	0	0	3	1	0	0	0	2	0	6
<b>N</b>	0	5	1	22	4	2	0	8	46	4	92
<b>Y</b>	6	19	2	8	8	62	23	28	1	4	161
<b>YY</b>	2	0	0	0	2	44	7	5	0	2	62
<b>YN</b>	1	15	1	3	5	2	0	8	0	0	35
<b>Y-</b>	2	1	1	2	1	5	15	10	1	0	38
<b>Y/</b>	1	3	0	3	0	11	1	5	0	2	26
<b>Sum</b>	6	39	6	36	14	73	24	70	60	39	367
no response –	No response on orphan works questions of the questionnaire (questions 10, 11, 12)										
? –	Ambiguous response										
N –	No										
Y –	Yes										
YY –	Yes; Amend the 2001 Directive										
YN –	Yes; Prepare a standalone instrument										
Y- –	Yes; the preferred form of a further Community instrument not mentioned										
Y/ –	Yes; the respondent is indifferent to the form of a further Community instrument										
A –	Archive										
AV –	Audiovisual sector (mostly independent documentary filmmakers)										
B –	Broadcasters										
CS –	Collecting societies, trade associations and other representatives of rightholders										
GOV –	Government										
L –	Libraries										
M –	Museums										
O –	Other										
P –	Publishers										
U –	Universities										

Out of 367 responses received on the Green Paper, 259 answered the orphan works questions, a large majority of respondents (64%) answered affirmatively to question 10. A number of answers were ambiguous and therefore it was not possible to classify these into a clear yes or no category.



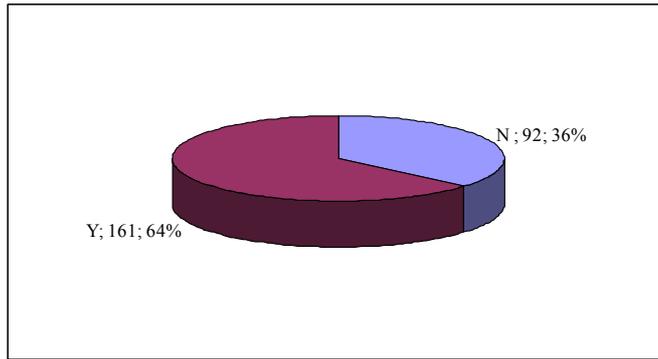
The respondents represented the total spectrum of interested parties. One third of replies came from universities, libraries, archives and museums. Another third came from publishers, collecting societies, trade associations and other representatives of rightholders. 13 replies came from governments of various European countries. The classification was done sometimes in a relatively subjective way, therefore different classifications are possible. Nevertheless, the marginal differences do not change the general picture.

Out of two thirds of respondents who positively replied to question 10, i.e. whether there is a need for a further community instrument, most of them (almost 40%) answered positively also on question 11, i.e. that this should be done through amending the 2001 Directive. Over 20% of those who positively answered to the need of further Community action prefer to do this through a standalone instrument; many of them are fiercely opposed to reopening of the Directive. The rest of these respondents are indifferent on the choice of the instrument (either explicitly or implicitly).

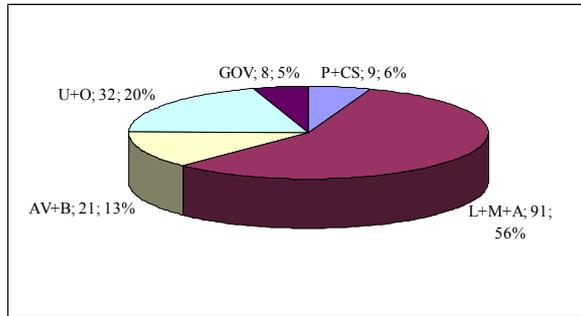
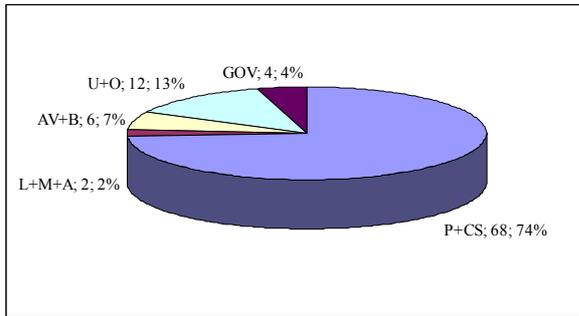


Most (74%) of the Yes answers were submitted by libraries, archives and museums. The No answers by this group of stakeholders were marginal.

Most (56%) of the No answers were submitted by publishers, collecting societies, trade associations and other representatives of rightholders. The Yes answers by this group of stakeholders were marginal.

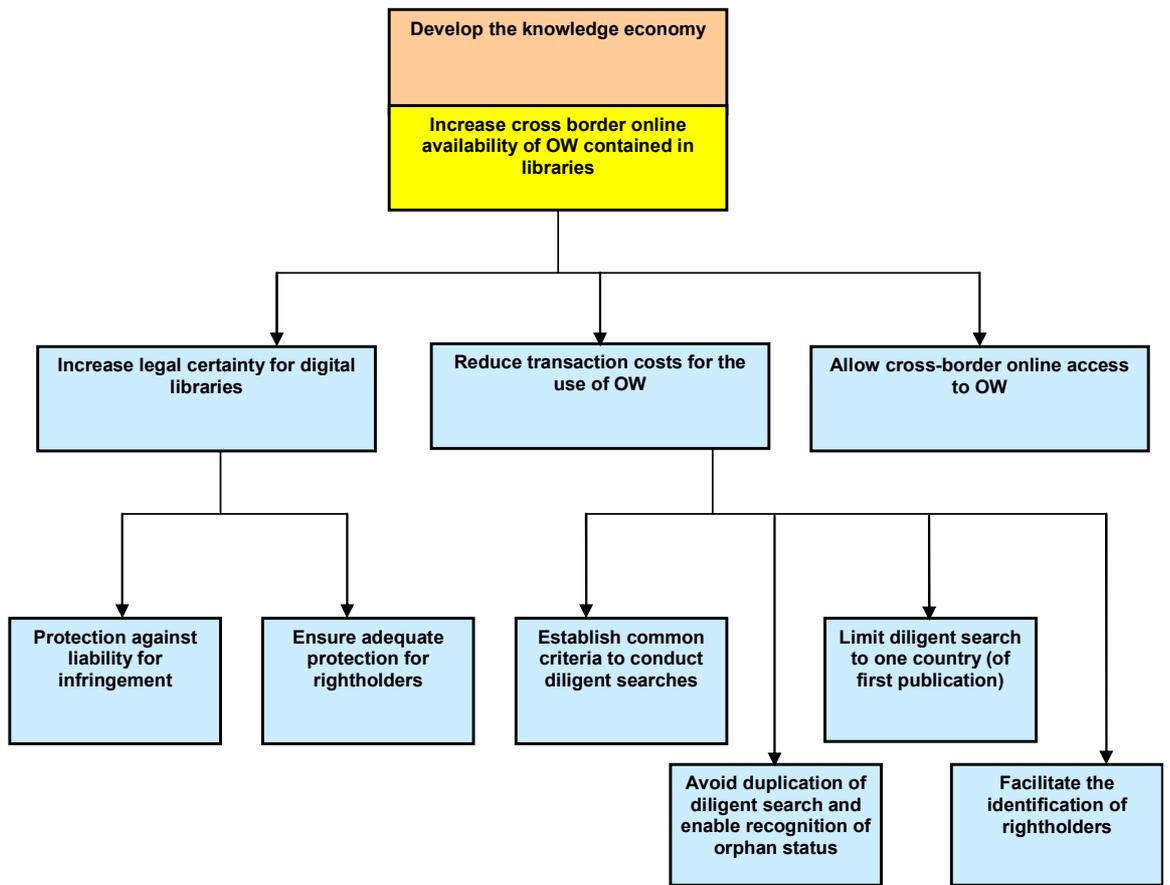


NO YES



Question 12 was rarely answered and since it was a descriptive question, the statistical analysis was not possible on this question.

3. **FIGURE A1: OBJECTIVES TREE**



#### 4. TABLE A2: DILIGENT SEARCH

A reasonable and good faith diligent search for the rightholder of a protected work needs to be carried out prior to establishing that a work is an orphan. A diligent search should meet a minimum set of criteria and generally aim to identify the rightholder in the country of origin or first publication of the work, assuming this is known.

In an attempt to harmonise some commonly accepted criteria, in June 2008 stakeholders representing all sectors (text, audio-visual, photography, music etc.) and the main European cultural institutions signed a "Memorandum of Understanding on Diligent Search Guidelines for Orphan Works".<sup>79</sup> The Memorandum contains a set of voluntary sector-specific guidelines on diligent search for rightholders together with general principles concerning databases of orphan works and rights clearance mechanisms.

In essence, a diligent search may be characterised by indicating the sources that a library or other digitisation project would need to consult prior to the online access to works that are potentially orphan works. There are a number of resources available. These include reference catalogues or publisher databases. In the book sector, publishers, libraries and collecting societies are currently developing the ARROW project, the Accessible Registries of Rights Information and Orphan Works.<sup>80</sup> However, the conditions for the use of ARROW still need to be determined and it is not clear whether there will be charges for its use or whether it will be accessible for free. For visual arts, the Metadata Image Library Exploitation Project (MILE)<sup>81</sup> has set up an orphan works database or repository that also serves to create a centralised location for all search efforts for associated works. MILE aims to promote European cultural heritage and make digital art more accessible by improving metadata.

In view of developing technologies, diligent search guidelines are not static and can be subject to change. Moreover, there are different thresholds of diligent search that have to be considered, particularly in relation to their costs. Excessively stringent requirements would be impractical for large scale digitisation projects. The possibility to introduce "scalable" or modified guidelines for diligent search for at least some sectors that tend not to be represented by professional organisations was recognised in the above-mentioned sector specific guidelines. For instance, it would be practical to take into account the type of work, the age of the work (e.g. when it may be reasonable to assume that the author had been deceased for 70 years), and whether the work is part of an entire batch of material from one source (e.g. collection of old family photographs with historical value).

As far as diligent search is concerned, the aim is to ensure proper protection of rightholders but without entailing prohibitive costs. In order to achieve the objective of the mutual recognition of diligent searches conducted in different Member States, a common set of diligent search criteria should be established. These can be based on the

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<sup>79</sup> [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/hleg/orphan/memorandum.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/memorandum.pdf)

<sup>80</sup> <http://www.arrow-net.eu>

<sup>81</sup> <http://www.mileproject.eu>

Diligent Search Guidelines developed by the representatives of libraries, archive and rightholders.<sup>82</sup> Once works have been classified as orphan works, they should be entered into a publicly accessible list (e.g. ARROW) which libraries, educational establishments, museums and archives can consult. Should a rightholder reappear, the list would be updated accordingly.

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<sup>82</sup> [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/hleg/orphan/guidelines.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/guidelines.pdf)

## 5. TABLE A3: OVERVIEW OF MEMBER STATES LEGISLATION ON ORPHAN WORKS

Member State	Legislation	Remark
Austria	NO	OW considered as OOP works
Belgium	NO	Avis du 21 septembre 2009 du Conseil de la Propriété intellectuelle concernant les pistes de réflexion relatives aux « Bibliothèques numériques » dans trois cas de figure <sup>83</sup>
Bulgaria	NO	
Cyprus	NO	
Czech Republic	NO	
Denmark	ECL	Danish Copyright Act section 50
Estonia	NO	
Finland	ECL	
France	some	CONSEIL SUPÉRIEUR DE LA PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE, Commission sur les oeuvres orphelines <sup>84</sup> French IP law includes a safeguard clause to support collective licensing agreements (provisions L122-9 and 211-2)
Germany	NO	Practical solution (Deutsche Nationalbibliothek / Börsenverein des deutschen Buchhandels / VG WORT)
Greece	NO	
Hungary	ECL	Act CXII on December 28 2008, introducing a new article 57/A of the Hungarian Copyright Act
Ireland	NO	
Italy	NO	
Latvia	NO	
Lithuania	NO	
Luxembourg	NO	
Malta	NO	
The Netherlands	NO	
Poland	NO	
Portugal	NO	
Romania	NO	
Slovakia	NO	
Slovenia	NO	
Spain	NO	
Sweden	ECL	
United Kingdom	some	IPO © the way ahead: A copyright strategy for the digital age <sup>85</sup> UK © act (sections 167 and 168) includes an implied indemnity in certain schemes and licences; Section 190 deals with the © Tribunal. In 2009, the UK proposed changes to its copyright legislation to deal with orphan works in the Digital Economy bill but these were ultimately not incorporated in the version of the bill that was voted on in Spring 2010.

<sup>83</sup> [http://economie.fgov.be/fr/entreprises/propriete\\_intellectuelle/Aspects\\_institutionnels\\_et\\_pratiques/Conseil\\_Propriete\\_intellectuelle/avis/avis\\_21\\_09\\_2009/index.jsp](http://economie.fgov.be/fr/entreprises/propriete_intellectuelle/Aspects_institutionnels_et_pratiques/Conseil_Propriete_intellectuelle/avis/avis_21_09_2009/index.jsp)

<sup>84</sup> <http://www.cspla.culture.gouv.fr/CONTENU/rapoeuvor08.pdf>

<sup>85</sup> <http://www.ipo.gov.uk/c-strategy-digitalage.pdf>

**6. TABLE A4: LITERATURE REVIEW - OVERVIEW OF THE EVIDENCE ON THE SCALE OF THE OW PROBLEM**

<b>STUDY</b>	<b>SECTOR</b>	<b>METHODOLOGY / SAMPLE</b>	<b>OW ESTIMATE</b>
British Library <sup>86</sup>	All creative works (manuscripts, maps, newspapers, magazines, prints and drawings, music scores, and patents; sound recordings; stamps)	Estimate of all works, published and unpublished; Whole collection (150 million items)	- 40% OW
Carnegie Mellon University Libraries (2004) <sup>87</sup>	Books	1999-2001; Statistically valid random sample of the library books	- 22% of publishers not found; - 36% of publishers located did not respond to queries; - 79% of books for which publishers did not respond were OOP
Museums Copyright Group <sup>88</sup>	Fine art; Documentary Photographs		- Fine art >50%; - Documentary Photographs < 50%
British Library Archival Sound Project 2004 <sup>89</sup>	Sound (story of jazz, interviews, public debates, etc)	- recordings including music and singing were eliminated;	- example of one collection: out of 299 RH whose permission was required, 302 hours were spent searching for RH, 8 permissions were received
British Library 19 <sup>th</sup> Century Newspapers 2004 <sup>90</sup>	Newspapers British Newspapers 1800-1900	2 million pages digitised; user panel of experts selected newspapers; 48 newspapers selected; Publishers contacted – little response; Cut-off date 1865	- 1 title OO©; - 13 – ceased publication before 1865 (cut-off date) - 27 titles ?
ACE <sup>91</sup>	Audio visual sector	14 of 34 ACE members responded	- 10% (=50.000) works OW; - non-fiction pre-1945/50 material
ACE 2009, updated survey	Audio visual sector	24 of 34 ACE members responded	- 12% (=129.000) works OW; <sup>92</sup> - fiction and non-fiction pre-1930 material

<sup>86</sup> <http://www.bl.uk/news/pdf/ipmanifesto.pdf>

<sup>87</sup> <http://www.copyright.gov/orphan/comments/OW0537-CarnegieMellon.pdf>

<sup>88</sup> <http://www.farrer.co.uk/Default.aspx?sID=874&cID=814&ctID=11&PRN=1>

<sup>89</sup> <http://www.ifla.org/IV/ifla74/papers/139-King-en.pdf>

<sup>90</sup> <http://www.ifla.org/IV/ifla74/papers/139-King-en.pdf>

<sup>91</sup> [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/seminar\\_14\\_september\\_2007/ace\\_perspective.ppt](http://ec.europa.eu/information_society/activities/digital_libraries/doc/seminar_14_september_2007/ace_perspective.ppt)

Table A4: continued

STUDY	SECTOR	METHODOLOGY / SAMPLE	OW ESTIMATE
JISC In from the Cold <sup>93</sup>	Typical orphans: - documentary photographs, - sound recordings, - letters, diaries, unpublished texts, - amateur-made films		- Average 5-10% of collection works are OW; - some archives and libraries – up to 50% of OW; - BBC – 1m hours of broadcast (i.e. 114 years) are OW; -> 13-50m OW in the UK alone; - 6.5m days to clear OW - risk adverse – access locked up to 5m OW
LCA <sup>94</sup> survey	all	LCA members providing examples of OW - some examples presented here	- Cornell Library (core historical literature of agriculture) – out of 1000 titles -> 397 in ©; out of 343 titles in © and OOP -> 98 permission obtained; 47 – permission denied; 198 – OW - Cornell Center for Labor-Management Relations – out of 350000 unpublished photographs -> 99% no indication of author - University of Georgia - out of 185 visual images -> 64 OW
Gowers report <sup>95</sup>	all	Literature survey	- photographs: 90% OW (Museum Copyright Group); - sound: 50% OW (Museum Copyright Group); - books – 40% OW (BL)

<sup>92</sup> The study mentions also that there are 21% (225.000) of *presumed* orphan works. There is however no clear definition provided what presumed orphans are.

<sup>93</sup> <http://sca.jiscinvolve.org/ipr-publications/>

<sup>94</sup> <http://www.copyright.gov/orphan/comments/OW0658-LCA.pdf>

<sup>95</sup> [http://www.hm-treasury.gov.uk/d/pbr06\\_gowers\\_report\\_755.pdf](http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf)

Table A4: continued

Bodleian Library in Oxford University, UK, January 2010 <sup>96</sup>	Text (books)		UK: 13% of the total of UK books in copyright; EU27: 13% of the total of EU27 books in copyright.
University and Regional Library of Tyrol, AT, December 2009 <sup>97</sup>	Text (books)	Systematic data about the amount of orphan works are available in an example from University and Regional Library of Tyrol in Austria where 502 books were subject for digitisation in the context of a digitization service of books, mainly from the beginning of XXth century until 1988.	From a total of 502 books, 195 books published before 1900 were assumed to be in the public domain, and digitised. From 135 books published between 1901 and 1939, around 30% were established to be in the public domain through searches in various databases. Rightholders could not be found in about 95% of the remaining items and were declared orphan, whereas the rightholder's heirs were found for obtaining permission in less than 5 %. From 172 books published between 1940 and 1988, about 75 % were eventually considered orphan. However, when the rightholders were identified (about 25 %) and contacted, the permission was granted without any remuneration requests.
"Images for the future", NL, December 2009 <sup>98</sup>	Audiovisual (film)	A digitisation project "Images for the future" partly carried out by Netherlands Film museum covers 500 000 photographs and 5 000 hours of film. The figure on OW is established by extrapolating the results of rights clearing of a representative sample of items to the whole of the project.	The museum has estimated that at this stage the amount of cleared works are 3.5 % of the total included in the project. The rate of works considered orphan is estimated to be around 20 %.

<sup>96</sup> Anna Vuopala: Assessment of the Orphan works issue and Costs for Rights Clearance (European Commission, DG INFSO, February 2010).

<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

Table A4: continued

<p>UCLA Film and Television Archives, US, January 2006<sup>99</sup></p>	<p>Audiovisual (TV and radio programmes)</p>		<p>Approximately 10% out of 25 000 fiction films and television programs in the collections of UCLA contain orphan works whose ownership status is uncertain or unknown. UCLA's percentage of orphan films and programs is high considering that these works are produced by commercial entertainment industry and not by non-professionals. Other archives that specialize in collecting non-theatrical media such as home movies and videos, educational films and documentaries, independent films, avant-garde and industrial films with much less economical value hold a much higher percentage of orphans.</p>
<p>Image Library, UK National Archives, UK, December 2009<sup>100</sup></p>	<p>Visual/photography (photographs)</p>		<p>In registration forms for copyright protection for photographs between 1883 and 1912, 95% of the rightholders to 80 000 images still in copyright were untraceable. These images were non-the-less given to researchers, but with a notification that no license to publish was given and that the researchers are themselves responsible for obtaining permission from the right holders.</p>

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<sup>99</sup> Ibid.  
<sup>100</sup> Ibid.

Table A4: continued

Wellcome Library, UK, December 2009 <sup>101</sup>	Visual/photography (posters)	Out of the 2900 posters 1400 posters have now been through the full process of rights clearance entailing 88 working days. A total of 980 copyright holders were identified (0.7 identifiable contact on average per poster), almost half of them with contact details. There was a 16.5 % return on the correspondence.	By that time, 270 posters were cleared for publishing (19% of all digitised posters). On average 78 % of 1400 posters i.e. 1095 posters were considered orphan. Transaction costs involved reached 70 000 euro.
The British Library, Sound recordings containing social and political debates, UK, December 2009 <sup>102</sup>	Music/sound (sound recordings)	<p>The sound recordings were selected as a cross-section of the material held in the British Library Sound Archive ranging throughout the XXth century. Part of the recordings contained for example social and political debates relating to independence movements in Africa.</p> <p>All written documents relating to the collection of recordings such as their labels was sometimes missing or insufficient. When the recordings had been made in another country, even the language and other similar aspects might had made the identification even more difficult.</p> <p>The material was sometimes unpublished as a recording but containing previously published works such as poems and music interspersed in the dialogues.</p>	According to the British Library 64 % of the literary rights holders and 85 % of the performance rights holders were not traced, identified or contacted across the whole of the project.
OW – orphan works; OOP – out of print; OOC – out of copyright; RH – rightholder			

<sup>101</sup> Ibid.  
<sup>102</sup> Ibid.

7. TABLE A5: LITERATURE REVIEW – ESTIMATED COSTS OF DIGITISATION

Study	Costs	Other
EBLIDA <sup>103</sup>	<ul style="list-style-type: none"> <li>- Slovak National Library: € 0.15 per page;</li> <li>- University Library in Bratislava: € 0.60</li> <li>- Biblioteca de Catalunya: € 0.60</li> <li>- Cork Public Library: € 0.50;</li> <li>- Lithuanian Academy of Science: € 1.50;</li> <li>- Universitat Politecnica de Catalunya: € 0.27 (B&amp;W); € 0.31 (colour);</li> <li>- London School of Economics: € 0.41;</li> <li>- National Library of Wales: € 0.72;</li> <li>- Queen's University Belfast: € 0.57;</li> <li>- UK Royal Academy of Music: € 0.40</li> </ul>	Costs for technical digitisation – digitisation of one page of simple library material. Costs do not cover staffing or overhead costs.
British library <sup>104</sup>	<p>Print media:</p> <ul style="list-style-type: none"> <li>- Newspapers = £1;</li> <li>- Books = £0.14p (with non mass digitisation circa £0.50p per page);</li> <li>- Manuscripts = £4.80;</li> </ul> <p>Sound: (depending on condition and format)</p> <ul style="list-style-type: none"> <li>- between £4-£72 per physical item</li> <li>- between £2-£132 per hour of recording</li> </ul> <p>Film (British Film Institute)</p> <ul style="list-style-type: none"> <li>- £1000 - £1500 per hour (depending on original condition / format etc.)</li> </ul>	These are full mass digitisation project costs including staffing, selection & retrieval, capture & post processing, metadata, project management, data storage, etc.
NL royal library <sup>105</sup>	€ 1.30 per page	Average library project; Includes digitisation, the addition of metadata, optical character recognition (OCR), person months for selection, preparation of materials and quality assurance, overhead costs and hardware and software.
Numeric study <sup>106</sup>	€ 0.45 per page	Journals (€ 0.30); Sheet music (€ 0.68); Archived records of government / administration (€ 0.74); Archived records of historic importance (€ 0.80); Newspapers (€ 0.91); Government publications (€ 3.72); Manuscripts (€ 8.74)
Million Books Projects China <sup>107</sup>	\$ 6 / book	March 2009: 1.4 million books scanned so far
Google's library project <sup>108</sup>	< \$ 10 / book	March 2009: 7 million books scanned so

<sup>103</sup> estimates provided by EBLIDA by email

<sup>104</sup> estimates provided by the BL by email

<sup>105</sup> <http://liber.library.uu.nl/publish/articles/000225/article.pdf>

<sup>106</sup> <http://digipat.stis.fgov.be/docs/Announcements/Minerva2008/numeric.pdf>

<sup>107</sup> <http://www.opencontentalliance.org/2009/03/22/economics-of-book-digitization/>

	(estimate ~ \$ 5 / book)	far
Internet Archive <sup>109</sup>	\$ 10 cents per page / \$ 30 per book	Higher quality; Highest quality books digitization costs \$ 3000 <sup>110</sup> . Digitisation of difficult-to-scan old books costs around € 2000 <sup>111</sup> per book.
Computers in libraries <sup>112</sup>	> \$ 0.18 per page; All costs of entire digitization project 3 times a much > \$ 0.54	Real costs of entire digitization project: assembling the source material, clearing copyright, setting up the machines, checking the quality of the output, post-editing, cataloguing the item, delivering the item, managing the project, and so on
Council on library and information resources <sup>113</sup>	\$ 5.32 per page; Enhanced digitisation \$ 8.25 per page	Projects: - \$ 20.13 per image; - \$ 0.14 per page per image; - \$ 18.51 per image;  Costs: - Digital conversion = 32% of costs; - Metadata creation (cataloguing, description, indexing) = 29%; - other (administration, quality control) = 39%
Commercial scanning services <sup>114</sup>	> £ 0.18 (A5) per page; from £ 0.24 (A4) per page	

<sup>108</sup> <http://www.opencontentalliance.org/2009/03/22/economics-of-book-digitization/>

<sup>109</sup> <http://www.opencontentalliance.org/2009/03/22/economics-of-book-digitization/>

<sup>110</sup> <http://www.infoday.com/cilmag/may01/lee.htm>

<sup>111</sup> <http://www.goethe.de/wis/bib/dib/en3714867.htm>

<sup>112</sup> <http://www.infoday.com/cilmag/may01/lee.htm>

<sup>113</sup> <http://www.clir.org/pubs/reports/pub103/contents.html>

<sup>114</sup> <http://www.digitise-it.com/services/prices.html>

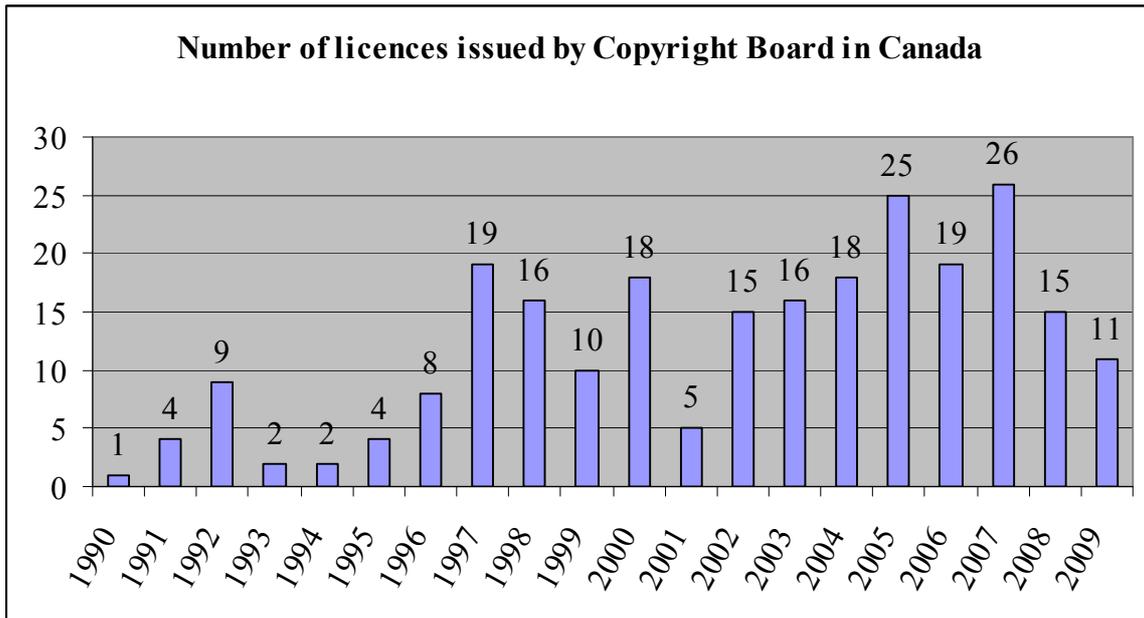
**8. TABLE A6: COST OF DILIGENT SEARCH: SOME EXAMPLES<sup>115</sup>**

<b>STUDY</b>	<b>SECTOR</b>	<b>COSTS ESTIMATE</b>
Cornell University submission (569), US Orphan Works Report, January 2006	Books (manuscripts)	After spending over \$50 000 i.e. 36 000€ in staff time working on the copyright issues concerning 343 monographs the current owner of the copyright could not be determined in 58% of the cases.
Carnegie Mellon University Library submission (537), US Orphan Works Report, January 2006	Books	A systematic study for obtaining permission to digitise and provide access to books the transaction cost for permission to access to 278 fine and rare books, was \$78 (56 €) per title regarding books for which permission was granted. This sum does not include costs of legal expertise used or other supporting elements. A rough estimate is that the total cost of a search per title was \$200 or 145 €.
The British Library, UK, December 2009	Newspapers	A digitisation project in the UK found that 95 % of newspapers from before 1912 are orphan. Figures of this project show that out of just above 60 titles, the rightholder was identified in almost 40 cases but was eventually contacted in only 1 (one) case, leaving the titles orphan in the grand majority of cases. Sources that were used in trying to locate the rightholders included National Archives, Companies House, National Census, newspaper directories, historical newspapers, press guides, encyclopaedias etc. Counting together the work of internal staff and external rights clearance agencies all together 235 man/hours were spent in rights clearance.
The National Archives, UK, December 2009	Unpublished materials	Making wills accessible online, UK : The Moving Here – project was partly funded by the National Lottery through the New Opportunities Fund by an amount of £270 000. The archive employed an individual at a salary of about £35 000 full time for two years to seek permissions for digitisation and online accessibility of 1 114 documents. Approval was granted for 597 documents. Permission was rejected for 45 documents and laid conditional on a payment in 77 cases. Rightholders for 385 documents were not identified. It was decided that no remuneration would be paid if claimed. The works that were conditional to payment were hence not used. The institution decided to use 10 documents for which it hadn't found the rightholders with the notice appealing for the rightholders to come forward.
Deutsches Filminstitut –DIF, December 2009	Audio-visual	In the audiovisual field there is an ongoing digitisation project in the Netherlands called "Images for the Future" that covers 500 000 photographs and 5000 hours of film. The most important goal is maximum availability of the audiovisual material to everyone. In practise, payment will depend on user backgrounds: for example, the project must provide educational content against restricted costs; while for private parties it can demand a market-oriented fee. The estimated total cost for the salary and other expenses for rights clearance is 625 000 euro covering the work of 3 people for 4 years. This

<sup>115</sup> Anna Vuopala: Assessment of the Orphan works issue and Costs for Rights Clearance (European Commission, DG INFSO, February 2010).

		amounts to a monthly salary of 4300 euro. The project will end in 2014.
Koninklijke Bibliotheek, National Library of Netherlands, January 2010	Books	The Dutch Daily Newspaper, NL: This work has been done on a title by title basis in co-operation with publishers and collecting societies that represent individual authors like freelancers of the newspapers. The library has had one person working on the rights in the project for 4 years nearly full time. The cost is around 268 000 euro. The library has decided to pay 130 000 euro for the remuneration of these rights and as a warranty for non-members, so that potential orphan works are also covered.
Koninklijke Bibliotheek, NL, December 2009	Newspapers	Dutch history handbooks, NL: In this example concerning Dutch history handbooks, the library had a dedicated individual working nearly full time with tasks ranging from searching, contacting and negotiating with the rightholders, to waiting for the signed contracts to be returned. Within this project only 50 books were cleared during a period of 5 months. Clearing 10 books a month, less than 2,5 a week is clearly not sufficient speed for mass scale digitisation projects that could entail hundreds of thousands of items. At this speed, clearing the rights for the whole set of handbooks would take more than 8 years.
University of Innsbruck Library, Austria, December 2009	Grey and unpublished materials	German language dissertations, AT: During 2, 5 years the Library of University of Innsbruck have digitised 216 000 dissertations published between 1925 and 1988. Digitisation was carried out based on a specific limitation in the law. The limitation does not cover other uses, such as online accessibility. The dissertations, coming mostly from Germany, make about 15-20% of all books and periodicals in the collections in Innsbruck. It is one of the largest collections of digitised works in Austria but it cannot be made available to the public on the internet without authorization. The cost of digitisation was 150 000 euro. Efforts to locate rightholders have not been taken or foreseen by the library, because of the disproportionate transaction costs likely to be involved. The library estimated that the costs would be 20 – 50 times the cost of digitisation.

9. TABLE A7: NUMBER OF LICENCES ISSUED BY COPYRIGHT BOARD IN CANADA<sup>116</sup>



<sup>116</sup> <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences-e.html>

## 10. TABLE A8: MONITORING INDICATORS

### 10.1. Increase legal certainty for digital libraries

The protection of libraries, educational establishments, museums and archives from liability for copyright infringement can be monitored using the following indicators:

- The existence and effectiveness of implementing legislation of Member States: whether the national implementing framework protects libraries from infringement actions and provides compensation for reappearing rightholders. This information can be gathered from a screening of national legislation.
- The existence and effectiveness of redress for reappearing rightholders under implementing legislation of Member States. This information can be provided by Member States, libraries, collecting societies and other stakeholders.
- The occurrence of infringement proceedings (i.e. case law) against libraries in Member States for the alleged use of orphan works by those libraries, the number of orphan works involved and the quantum of damages sought. This information can be provided by Member States, libraries, collecting societies and other stakeholders.
- The extent to which libraries have digitised and displayed orphan works online is an indirect indicator of whether the legal framework gives libraries a level of legal certainty with which they are comfortable. This data can be collected from libraries, educational establishments, museums and archives.

### 10.2. Reduce transaction costs for the use of orphan works

Whether diligent search and its attendant costs have been facilitated by common criteria can be monitored using the following indicators:

- The extent to which libraries, educational establishments, museums and archives have carried out diligent searches for orphan works held in their collections. This indicator might contain the number of diligent searches carried out by sector. This information can be gathered from libraries, educational establishments, museums and archives.
- The procedures carried out by libraries, educational establishments, museums and archives to search for the rightholders of orphan works, compared to the diligent search criteria enshrined in legislation.
- The costs incurred to carry out a diligent search and the costs of using diligent search services (including services such as ARROW) including the extent to which they are used. This information can be gathered from collecting societies, publishers and libraries, educational establishments, archives and museums.

Whether diligent searches are limited to the country of first publication and whether duplication of searches is avoided can be monitored using the following indicators:

- The implementing legislation in Member States: whether implementing measures provide for the recognition of the orphan status of works first published in another Member State where a diligent search has been carried out.
- Whether in practice libraries, educational establishments, museums and archives conduct duplicate searches for the use of an orphan work that was already identified as an orphan work in another Member State. This information can be gathered from libraries, educational establishments, museums and archives.
- Whether the identification of rightholders is facilitated can be monitored using the following criteria:
  - The implementing legislation in Member States: whether a legal obligation exists requiring the identification of orphan works as such and the publication of the results of diligent searches, including, e.g., whether there are incentives or sanctions accompanying this requirement. This information can be obtained from a screening of Member States' legislation.
  - The number of presumed orphan works in libraries, educational establishments, museums and archives for which a rightholder has been identified and traced. This information can be gathered from bodies that provide diligent search services and from libraries (through update of surveys of their collections).
  - Monitoring whether in practice the results of diligent searches are published and freely available, and whether orphan works are clearly identified as such when they are displayed online. This information can be obtained from collecting societies or organisations that perform diligent searches and from libraries, educational establishments, museums and archives that display orphan works online.
  - The number of reappearing rightholders can provide an indication of whether the proper identification allows rightholders to come forward. This information can be provided by the entity that is responsible for providing the compensation to reappearing rightholders (e.g. libraries or collecting societies).
  - The creation of central open registries of orphan works can provide an indication of whether the publicly available information is adequate and useful. This information can be provided by the parties setting up or using such registries, e.g. libraries or rightholders.

### **10.3. Ensure the cross-border display of orphan works online**

Whether orphan works are displayed online across borders can be monitored using the following indicators:

- The availability of national digital library websites which display orphan works online to users located in other Member States: e.g. whether a researcher in Malta can access the orphan works from the webpage of the French national library. This information can be gathered from libraries, educational establishments, museums and archives, from Member States and from users.

- The inclusion of orphan works contained in national libraries, educational establishments, museums and archives into the Europeana portal: this data can be gathered from Europeana.