

City, University of London

Where are all the orphans? How effective is current legislation in enabling cultural heritage institutions to make orphan works available online?

Thomas Michael Ash

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**Supervisor** *Dr Lyn Robinson*

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## Dedication

I dedicate this to my two daughters Emily and Ruby, and hope that they might be inspired by my achievements.

## Abbreviations

ACE	Association of European Film Archives and Cinematheques
ACLS	Authors' Licensing and Collecting Society
ARROW	Accessible Registries of Rights Information and Orphan Works
BL	British Library
CHI	Cultural Heritage Institutions
CILIP	Chartered Institute for Library and Information Professionals
CJEU	Court of Justice of the European Union
CMO	Collective Management Organisation
ECL	Extended Collective Licensing
EEA	European Economic Area
EnDOW	Enhancing access to 20th Century cultural heritage through Distributed Orphan Works Clearance
EUIPO	European Union Intellectual Property Office
GLAM	Galleries, Libraries, Archives and Museums
HCA	Hungarian Copyright Act
HIPO	Hungarian Intellectual Property Office
HLEG	High Level Expert Group
IPO	Intellectual Property Office (UK)
IViR	Instituut Voor Informatierecht (Institute for Information Law University of Amsterdam)
LACA	Libraries, Archives and Copyright Alliance
NFPB	National Film Preservation Board (USA)
OHIM	Office for Harmonization in the Internal Market
OWD	Orphan Works Directive

OWLS	Orphan Works Licensing Scheme
PLS	Publishers Licensing Society
TRIPS	Trade Related Aspects of Intellectual Property
UCC	Universal Copyright Convention
WIPO	World Intellectual Property Organisation
WPPT	WIPO Performance and Phonograms Treaty
WATCH	Writers Artists and Their Copyright Holders database

## Key Terms

**20<sup>th</sup> Century Black hole** - The term used to describe effect that copyright has on the availability of cultural heritage available online.

**The 2039 Rule** - Refers to the duration of Copyright for unpublished works, which was set at 50 years from the date when the CPDA 1988 came in to force on 1 August 1989

**Copyright Exception** – a legal provision that allows the use of Copyrighted Work without permission or payment

**Copyright Term** – How long Copyright lasts. In the UK the standard term for published works is 70 years from the start of the calendar year following the death of the author.

**Diligent Search** – a search conducted to locate the right holder of a copyrighted work

**Exception** - a specific situation in which someone can make use of a copyrighted work without seeking permission from the owner.

**Infringement** – the act of using a copyrighted work without permission

**License** – a license is a means by which permission is granted for the use or exploit a copyrighted work

**Mass Digitization** – the process of converting analogue works into electronic format in order to be made available online

**Orphan Works** – A literary, dramatic or artistic works for which one or more rights holder cannot be identified or located.

**Public Domain** – refers to the body of works no longer covered by copyright, new works enter the public domain on the 1 January every year

## Abstract

The purpose of this study is to explore whether the current UK legislation on orphan works, in the form of an EU exception and an orphan works license scheme, is effective in enabling the mass digitization of orphan works by cultural heritage organisations. The research covers the barriers faced by cultural heritage organisations wishing to digitize orphan works, the scale of the orphan works problem, the approach taken to orphan works prior to the introduction of the legislation, and the nature of the diligent search requirements of the directive and license scheme. The project uses a mixed methods approach to conduct primary research that explores the extent of adoption of the orphan works schemes amongst cultural heritage organisations.

## Methodology

A survey was sent to UK cultural heritage institutions asking them to detail their experiences of digitising orphan works and use of the new legislation. It also sought to identify what barriers existed to the use of the orphan works schemes legislation and what aspects of the legislation cultural heritage organisations felt could be changed to help them digitise orphan works. The survey was supplemented with interviews with five survey respondents.

## Findings

The study shows that neither scheme has been widely adopted amongst UK cultural heritage organisations with the majority of organisations taking a risk managed approach to digitisation of orphan works. It finds that the requirements for diligent search are a key barrier to the adoption and use of the schemes. It also shows that the cost of clearing rights, diligent search and licensing are a significant obstacle, reflecting previous research in this area.

## Research limitations

The survey was limited to the UK Cultural Heritage Institutions, and the overall sample size was small. A future study could include views from the Intellectual Property Office and professional bodies such as CILIP.

## Originality

This is the first mixed methods study into orphan works, since the introduction of the current legislation. It presents a mix of qualitative and quantitative data, which could be built upon in future studies.

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## I: Introduction

This dissertation aims to explore the effectiveness of recent legislative solutions to the problem of orphan works defined as works for which the copyright holder cannot be found after a diligent search.

The rise of digital technology has made it possible for cultural heritage institutions, such as libraries, archives, museums and galleries to digitize and make available online works from their collections, that otherwise may have remained hidden away from view to anybody but the most intrepid researchers and scholars. However, for cultural heritage organisations engaged in the mass digitization and online dissemination of their collections orphan works constitute a major obstacle. Although such institutions own physical copies of protected works, to digitize and make them available online permission must be obtained from the right holder. However, if the right holder cannot be identified or located then the work cannot be digitized and made available online, without infringing copyright. Thus, cultural heritage institutions face an impossible choice of either making the works available without permission, thereby risking a damaging claim of copyright infringement, or not using those works, thus depriving users' access to culturally valuable works, which could inspire future creativity.

To address the problem faced by libraries, archives, museums and galleries wishing to digitize and make available online orphan works in their collection, two legal mechanisms have been devised and introduced into UK law in 2014. The first Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, allows publicly accessible cultural heritage institutions to digitise and make available online orphan works from their collections for non-commercial purposes. The second a UK Orphan Works Licensing scheme, allows users, including individuals, to purchase a license for commercial and non-commercial uses. Both schemes require the user to conduct a diligent search for the right holder.

This dissertation seeks to examine the problems faced by cultural heritage institutions (CHIs) in making orphan works from their collections available online, and whether the recent legislative changes have been effective in enabling UK cultural heritage institutions to digitize and make available. The recent nature of orphan works legislation and the uniqueness of the UK's twin track approach, presents an opportunity to contribute to a still developing area of research, and as Callaghan (2017, 254) notes in the conclusion to her study of the recent orphan works legislation:

“it would be recommended to undertake a more comprehensive and rigorous study in this area.”

## II: Research Aims and Objectives

The overall aim of this study is to assess whether the current UK legislative responses to the problem of orphan works have been effective in enabling the mass digitization of such works by UK Cultural Heritage institutions.

It will seek to answer the following questions:

1. How has the presence of orphan works in the collections of cultural heritage organisations impacted upon their digitisation plans?
2. How widespread is the adoption of the schemes by UK cultural heritage institutions?
3. Has the current legislation made it easier for UK cultural heritage institutions to digitise and make available online orphan works in their collections?
4. What are the biggest barriers to the use of either scheme by UK cultural heritage institutions?
5. If organisations have not used the directive or the license scheme how have they made orphan works in their collections available online?
6. What changes could be made to the current legislation to make it easier for cultural heritage institutions to digitise and make available online orphan works in their collections?

### III: Research Methods

This dissertation took a mixed methods approach to answer the research questions above. In order to gather information from a wide range of cultural heritage organisations use of orphan works and orphan works legislation an online survey was developed and delivered using Google forms. The results of the survey can be found in chapter four, and the appendix includes a copy of the questionnaire and full results spreadsheet. The survey was followed up with semi-structured interviews with five survey respondents. Interviewees were selected on the basis of proximity to the researcher's location, but also to provide a wide range of responses, by ensuring a mix of different organisational responses to orphan works.

### IV: Structure of this dissertation

This dissertation is divided in five chapters.

Chapter One: Provides background and an overview of copyright and the rights granted by copyright.

Chapter Two: Explains what orphan works are and why they are a problem for cultural heritage organisations engaged in digitisation of their collections

Chapter Three: Examines the background to and an analysis the orphan works directive. It then examines the orphan works license scheme, detailing the requirements of legislation and the literature on the subject. As diligent search is central to both schemes the final section of this chapter examines.

Chapter Four

Chapter Five: Presents conclusions and recommendations that arise out of this project.

The Appendices include the proposal, a copy of the questionnaire, interview transcripts and related supplementary material.

## 1: Literature review

### 1.1 Background - What is Copyright?

Copyright is one of five intellectual property rights, which include patents, trademarks, and registered designs. Copyright protects original literary, artistic and dramatic works, films and sound recordings. Copyright protects the expression of an idea, rather than the idea itself, in order to attract copyright, the work must in a fixed and reproducible form. Copyright can be bought and can be sold, assigned or bequeathed like any other property right, therefore the right holder may not be the original author or creator of the work. Where a rights holder is unknown or cannot be traced a work is known as an 'orphan work'. (Pedley 2015) The main piece of copyright legislation in the UK is the Copyright, Designs and Patents Act 1988 (hereafter CPDA 1988) In addition to national legislation, the UK Copyright Law is also subject to EU Legislation and Directives, including the Orphan Works Directive, which must be implemented into UK law. There are also international treaties and agreements which establish the basic norms of copyright such as the rights granted by copyright, minimum copyright terms and the principal of mutual recognition, which states that protection granted in one country must be acknowledged in other countries. The oldest and most significant treaty is the Berne Convention for the Protection of Literary and Artistic Works (hereafter Berne Convention), established in 1886 which has been signed by 174 of the 192 countries of the world. (Copyright House 2018)

### 1.2 Exclusive Rights

Copyright grants the creator of a work certain exclusive rights generally known as economic rights, these give the rightsholder the power to authorise certain acts in relation to a work. These include the right to authorise the reproduction, rental or lending, public performance, adaptation and communication to the public. Of these the two most relevant for CHIs wishing to make their collections available online are the Right of Reproduction, which covers the right to authorise copies of their work, including through scanning and the right of Communication to the public, which include the communication of a work to the public by electronic transmission, such a making a work available over the internet. Only, the right holder has the power to authorise such acts.

In addition to economic copyright grants a second set of rights known Moral Rights intended to "protect the idea that anything created contains an element of 'self' in it." Moral Rights include:

- **The right of paternity(attribution)** - to be identified as the creator of the work when copies are made available to the public
- **The right of integrity**- to object to the work being altered in a way that has negative effect on the creator's reputation
- **The right to object to false attribution** - to not have someone else's work falsely attributed to them. (IPO 2015)



### 1.3 Infringement

Undertaking any of the exclusive acts without permission constitutes infringement, and the copyright holder will be entitled to some form of relief and compensation from the infringer. Deazley (2017) notes that in general copyright in a work is still infringed even where the copy takes a different form to the original. For cultural heritage organisations this means that copying analogue (paper based) materials into digital format will still constitute infringement.

As Van Gompel (2013,1356) argues for cultural heritage institutions the prospect of being held liable for copyright infringement is very unnerving:

“...since these institutions are often nonprofit and funded by public money, they cannot tolerate getting a reputation of being large-scale infringers of copyright protected works.”

### 1.4 Authorship vs Ownership

Stobo (2013) states that the concept of the ‘Author’ is central to copyright law. The author of the work is the person who creates it, the CPDA1988 (s.9) defines the author for different types of work as follows:

- Literary, dramatic, musical and artistic works: the person who creates the work
- Sound recording: the producer
- Film: the producer and the principal director
- Broadcast: the person making the broadcast
- Typographical arrangement of a published edition: the publisher

As Cornish (2015) notes there is an important distinction to be made between authors and owners. While an author’s economic rights may be passed, through sale, transfer or inheritance, moral rights remain exclusive to the author. A work is classed as a work of ‘*unknown authorship*’ where the author is unknown or in the case of a work of joint ownership none of the authors are known and cannot be identified by means of ‘*reasonable enquiry*’.

### 1.5 Types of works protected

Category	Materials included
Literary works	Written works including lyrics, manuscripts, manuals, computer programs, commercial documents, leaflets, letters memoranda & articles etc.
Dramatic works	Plays, dance, etc.
Musical works	Musical score.
Artistic works	Photographs, painting, sculptures, architecture, technical drawings/diagrams, maps, logos.
Sound recording	may be recordings of other copyright works, e.g. musical and literary.
Film	Video footage, films, broadcasts and cable programmes.

Table 1-types of works protected by copyright

## 1.6 Duration of copyright

As Pedley (2015) how long copyright lasts is not as straightforward as may at first be thought. For published literary, dramatic, and artistic works, copyright generally lasts for 70 years from the end of the calendar year in which the author dies, this term is usually referred to as 'life plus 70'. For multi-author works the term is 70 years from the end of the calendar year in which the last author dies. For cinematographic works the term is 70 years after the death of the last to die of the following persons: principal director; author of the screenplay; author of the dialogue; composer of the music. In addition to this for published works such as books, there is copyright in the typographical arrangement of published editions of a work which lasts for 25 years.

As Callaghan (2017) notes that the rules for unpublished works are more complex and subject to the '2039 rule' which states that unpublished literary, dramatic and musical works which remained unpublished at the time that the CPDA1988 came into force on 1 August 1989, will remain in copyright until 31 December 2039.

## 2: Orphan Works

### 2.1 What are orphan works and why are they a problem?

Orphan works are creative works that are protected by copyright where one or more of the copyright holders are unknown or cannot be located despite a diligent search being carried out. The UK IPO defines orphan works as:

“creative works or performances that are subject to copyright – like a diary, photograph, film or piece of music – for which one or more of the right holders is either unknown or cannot be found.” (Intellectual Property Office 2016)

The term “orphan works” was coined by Fay Kanin Chair of the Library of Congress: National Film Preservation Board, during policy discussions surrounding the preservation of film (Schwartz: ND) For cultural heritage institutions, libraries, archives, museums and galleries, engaging in the digitisation of their collections, orphan works pose a major dilemma; either use the works without permission, risking a claim of infringement from a reappearing rights holder or not digitising the works, leaving them locked away from public view.

As Badrick (2012, 538-9) notes the problem of orphan works is threefold:

“...first, it stifles creativity by limiting the public's access to the piece; second, it defeats the economic incentive to create copyrightable works because no one can receive the potential royalty if the copyright owner cannot be found; and third, it undermines copyright law by forcing some orphan works users to violate infringement laws, despite efforts to comply.”

Borghi and Kappara (2013) describe the problem of orphan works as a paradox, arguing that even where a right holder is impossible to be found permission is still needed to use the work. As digitization involves both scanning and making a work available online doing so without permission of the rights holder would result in an infringement of their exclusive

rights. As Padfield (2015) writes, the exclusive rights of the right holder are unconditional, a right holder can therefore act against any infringing use, regardless of whether they intend to exploit the work themselves, and regardless of whether the infringing act has caused any harm or benefitted the infringer economically. As Van Gompel (2013,1354) states:

“...if a party engages in the large-scale digitization and communication to the public of the works held by libraries, museums, or archives, and, due to the orphan status of many works, is unable to secure prior authorization from the right owners concerned, it risks exposing itself to claims for financial damages.”

Deazley (2017) notes that in general copyright in a work is still infringed even where the copy takes a different form to the original. For cultural heritage organisations this means that copying analogue (paper based) materials into digital format will still constitute infringement. For cultural heritage organisations the risk of being held liable for infringement is serious, as Van Gompel (2013) states their reliance on public funding means they cannot tolerate being to infringe copyright on a large-scale. For cultural heritage organisations engaged in the digitization of hundreds and thousands of works an infringement claim, even on the basis of individual works, could be devastating, because as Van Eechoud (2009, 271) says:

“many small claims can add up to a considerable total for the large- scale projects, the risks become prohibitive, even though in Europe, unlike in the United States, the damages recoverable are compensatory and not punitive in nature.”

While it might be possible to set aside a portion of money to cover claims by reappearing right holders, for mass digitisations project it is difficult to accurately estimate the number of possible future claims. This makes it practically difficult to know how much money should be set aside, thereby creating a level of legal uncertainty that may be too high for organisations to risk using those works. (Van Eechoud 2009)

The uncertainty around the use of orphan works has often prevented CHIs from using orphan works. Hansen (2016, 2) observes that while librarians, archivists and others may wish to digitize and make available freely available online the orphan works in their collections they are prevented from doing so by the risks and uncertainty associated with legal action arising from copyright infringement claims.

This is echoed by Pallante (2015,38) who notes that the pervasiveness of the orphan works problem creates uncertainty. As a result, she argues:

“cautious libraries, archives and, museums may forgo socially beneficial use of orphan works, thereby excluding potentially important works from the public discourse and threatening to impoverish our national cultural heritage.”

## 2.2 The Scale and Impact of the Orphan Works Problem

Until recently it was difficult to put a precise figure on the number of Orphan Work contained in the collections of UK cultural heritage organisations, as Vuopala (2010,7) argues:

“It is hard to establish reliable figures on the amount of orphan works, because at the moment there is no easy way to establish that a work is orphan. Hence, very little systematic research has been done and hardly any empirical data has been available about problems related to orphan works.”

Pallante (2015) claims that part of the reason why it is hard to estimate the number of orphan works is that works are only deemed orphaned after going through a costly and unsuccessful search for the right holder, noting that as a result many orphan works digitisation projects do not go forward.

Despite this several studies have attempted to extrapolate a figure based on studies they have conducted. In 2009, a report prepared for the Strategic Content Alliance and Collections Trust, examined the scope of the Orphan works problem and its impact on the delivery of services to the public (Korn 2009). It estimated that the average proportion of orphan works in the collections of UK public sector organisations was measured at 5% to 10% with some sectors averaging much higher, stating that:

“Individual estimates suggest that there are single organisations in the survey sample that hold in excess of 7.5 million Orphan Works. If we include even a few of these extreme examples in our calculations, it appears likely that this sample of 503 organisations could represent volumes of Orphan Works well in excess of 50 million.” (p6)

A 2011 study of the rights clearance process, by the British Library (Stratton 2011) examined the ease of clearing a sample of 140 books published between 1876 and 2010. The study found that 43% of the total number of potentially in-copyright works equating to 31% of the total sample. Extrapolating this figure to the entirety of the British Library’s collections it is possible to argue that up to 43% of in-copyright works in the library’s collections could potentially be orphan works.

A briefing paper prepared by the National Museum Directors Council (2012) gives further insight into the scale of the orphan works problem. It cites figures from that the Natural History Museum which estimates 125,000 artworks and 200,000 books in their collection are orphan works, as are 1,304 metres of manuscripts. 20% of the archive film content and 375,000 books at the National Library of Scotland are orphans. The Imperial War Museums (IWM) estimates that there are 2 million orphan works in their photography collection alone and up to a quarter of their 7.9 million documents are orphans.

In a press release for the launch of the Orphan Works Licensing Scheme the Department for Business, Innovation and Skills (2014) claimed that scheme would:

“...give wider access to at least 91 million culturally valuable creative works - including diaries, photographs, oral history recordings and documentary films.”

This figure is also cited in a report on the launch of the scheme by the Independent Newspaper which also makes the claim that “Up to 50 per cent of archival records in the UK are orphan works.” (Sherwin 2014)

Prior to the enactment of the Orphan Works License Scheme, the Department of Business Innovation and skills conducted an impact assessment to investigate the benefits of a potential licensing scheme. During the course of the assessment, they collected data from a range of cultural heritage institutions on their collections and the estimated percentage of each collection that was orphaned, the data was summarised into rough categories of material as shown in Table 1, below:

*Table 2-UK cultural heritage holdings and estimated orphan works*

Media category	UK sample holdings	Orphan range
Artwork	548,000	20%-25%
Sound Recording (hrs) <sup>1</sup>	750,000	5%-10%
Commercial film (hrs) <sup>2</sup>	21,800,000	0%-7%
Archive Films (hrs)	513,000	5%-35%
Photo libraries	>100,000,000	~0%
Archive photos	28,280,000	5%-90%
Written material <sup>3</sup>	10,400,000	4%-30%
Mixed collections	38,000,000	8%-40%

*Source: Intellectual Property Office 2012*

### 2.3 Why do works become orphaned?

A major reason why there are so many orphan works is that there is no register of copyrights requiring creators to register their works. This is because copyright is automatic, the Berne Convention states that there should be no formalities to the granting of copyright. Article 5(2) of the Berne Convention states that:

“The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work.”

This has led some to describe the problem of orphan works as a structural inefficiency of copyright. Borghi and Karapapa (2013) note that until they were abolished at the beginning of 20<sup>th</sup> century formalities were a feature of international copyright. They note that when the first copyright Act, the Statute of Anne of Copyright was passed in 1710, protection was dependent upon registration at the Stationers Hall. The abolition of formalities has been linked to the development of the orphan works problem, as many works do not “bear a signature or other imprint of the author’s identity.” (Borghi and Karapapa 2013,74)

This point is echoed by Deazely and Patterson (2017) who argue that “reliable information about the rights owner cannot always be easily or readily acquired for copyright work, particularly in the case of unpublished works.” They highlight the fact that unlike other areas of intellectual property, protection is automatic one a work has been created it is protected

<sup>1</sup> Scaling the average IWM record to 90 minutes, or one standard cassette tape

<sup>2</sup> Treating an average film as 1.5hrs long, and including both UK and European film archives

<sup>3</sup> Not counting the 600,000 orphan texts at Oxford and the 195m<sup>3</sup> material at the national history museum

by copyright, thereby making it hard to maintain reliable data about the authorship and ownership of (the rights in) copyrighted works.

Beyond the abolition of formalities, a second structural feature of copyright, the increasing duration of protection, can be cited as a cause of orphan works. When, the Statute of Anne was enacted in 1610, the term of protection was limited to a term of “fourteen years to commence from the first publishing the same and no longer.” If the author was still alive at the end of this period, then they were granted an extension of another 14 years, while books published before the act came into force gained a 21-year term of protection. (Deazley 2017) However, over time the duration of copyright has slowly been extended by to its current duration of 70 years from the end of the year in which the author dies. As a Greenburg (2012) argues the rise in the number of orphan works is the result of the expansion of the scope and duration of copyright, a point echoed by Patry (2012, 109) who argues the length of copyright is damaging our cultural heritage saying:

“the longer the term, the more difficult it is to track down who owns rights in the work: authors move or die, their estates close, companies to whom rights are transferred go out of business or sell those rights, sometimes many times over”

He notes that if a rights owner can't be traced then it is not possible to use a work regardless of the benefits to society of such intended uses, and no matter the likelihood of the right owner having lost interest in exploitation of the work. Furthermore, he notes that the lack of accurate information about a right holder also leads to problems, he writes that:

“there is frequently bad data inputted at the beginning: songwriters, musical publishers, and record labels who don't register their data correctly the first time will cause endless problems for those who wish to license works where the basic data on ownership is wrong.”  
(p190)

This point is echoed by Deazley and Patterson (2017) who argue that “reliable information about the rights owner cannot always be easily or readily acquired for copyright work, particularly in the case of unpublished works.” They highlight the fact that unlike other areas of intellectual property, protection is automatic one a work has been created it is protected by copyright, thereby making it hard to maintain reliable data about the authorship and ownership of (the rights in) copyrighted works. Furthermore, they argue that the long duration of copyright combined with the absence of any form of compulsory registration, makes it very difficult to trace the ownership of rights, saying that

“the different economic rights provided by copyright might be separately assigned or licensed to third parties, or inherited by one or more heirs who may be unaware of their rights; they may have been assigned, licensed or inherited numerous times throughout the course of the copyright term. Alternatively, the corporate interests that own the rights might become bankrupt or simply go out of business. All of this can make identifying and locating the current copyright owner(s) extremely problematic.”

Korn (2009,9) states that the long duration of copyright combined with the low commercial value of many of the works held by cultural heritage institutions is significant reasons for the

occurrence of orphan works. In addition, she identifies six reasons why works may become orphaned these are:

- The work has no, or insufficient, information identifying the copyright owner and/or creator associated with it, which may be due to a number of reasons, such as format shifting
- The original owner of copyright can no longer be located at the original address and there are no records of any new address
- The copyright owner does not realise that they benefit from copyright ownership
- The copyright ownership has been assigned to a new owner, and there is insufficient information available about the new owner's name and/or location
- The copyright owner has died and information about what happened to rights on his death is impossible to find
- Where the copyright owner is a business, the business ceased to exist and it is impossible to find out what happened to the copyright which was one of the business assets"

As Baker (2016) notes the orphan works problem has led to calls for a system of copyright registration to be reintroduced (until the 1923 Copyrighted works had to be registered with the Stationers Company) however such a suggestion would be impractical in the current age of digital and social media. He argues that any return to a system of copyright registration would create a situation whereby creators such as bloggers, photographers would need to apply for copyright protection for their posts on a daily basis. As Greenburg (2012) argues any return to registration would lead to a situation, whereby due to the costs involved in a formal registration with the Copyright office, a creator such as a blogger would be unable to determine at the point of creation which of their works were likely to be commercially successful or not. Consequently, he argues they would likely not register any works.

Furthermore, in order to be of value to potential users of orphan works, to remain accurate any such register would require constant updating to in order to record any transfer of intellectual property rights. A voluntary system of registration exists in the United States whereby creators can submit their work for registration with the Copyright office. It does, however, provide a public record of the copyright claim, and is necessary prior to any infringement claims (U.S. Copyright Office 2012).

Korn's (2009) report on orphan works was the creation of an 'official national database' that should be:

"...on an 'opt-in' basis, so that copyright holders would be responsible for making sure that they put their works into the database if they want to benefit and that, otherwise, organisations could use works as they see fit."

A similar recommendation is made in Gowers' Review of Intellectual Property (Gov.uk 2006) which suggested the establishment of a voluntary register of Copyright, possibly in partnership with existing rights holder databases. However, there is a difference between a voluntary register and a formal register that would require rights holders to opt out if they

didn't wish their work to be used. Such a system would likely contravene the requirements of the Berne convention as it would represent a formality.

## 2.4 Mass Digitization and Digital Libraries

The term 'mass digitization' is used to refer to the actions taken by cultural heritage institutions including libraries and archives to digitise (e.g. scan) the whole or parts of their collections for the purposes of preservation and making them available to the public online. (Carr 2014) Borghi and Karapapa (2013,1) observe that "[m]ass digitization is commonly conceived of as the conversion of copyright works in digital format on an industrial scale" defining it as "the activity by which books, journals, photographs, sound recordings, and films are digitized in bulk to feature in the collections of online archives, repositories, digital libraries, search engines, and data aggregators."

At a European level digitisation and online access to cultural heritage collections is seen as, being:

"...essential to enable access for all to culture and knowledge in the digital era and to promote the richness and diversity of European cultural heritage." (Council Conclusions of the 10 May 2012)

Examples of mass digitization programmes include private commercial ventures such as Google Books, not-for-profit ventures like the Internet Archive and the Open Library, as well as collaborative projects such as the HathiTrust Digital Library. (Borghi and Karapapa 2013) In addition many national, educational and local libraries, archives and museums have digitised items in their collections and made them available online. In Europe, the publicly funded Europeana<sup>4</sup> was conceived as a platform to aggregate the content from the digital collections of European cultural heritage institutions, and today over brings together works from over 3500 institutions.

Papadopoulou (2012,27) gives two main reasons why libraries and other cultural heritage institutions engage in the digitisation of their collections:

"to preserve in the long-term their resources for future generations and to make their resources accessible to the public, using the possibilities offered by technology. Additionally, the digitization efforts appear to be driven by the public's desire to have access to knowledge and to occasionally rare and valuable collections of these institutions."

Ringnalda (2011) also notes that the problem of orphan works stands in the way of the successful creation of digital libraries noting that works cannot be digitised and made available online if the rights cannot be cleared.

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<sup>4</sup> <https://www.europeana.eu/portal/en>



## 2.5 Rights clearance and assessing copyright status in digitisation projects

As Vuopala (2010,9) states before a work can be deemed to be an “it is first necessary to establish whether they are protected by copyright or a related right. In order to establish this, you normally need to be able to identify the author or another right holder.”

Most studies in this area demonstrate that the costs of clearing rights are a major barrier to the digitization of collections. Deazley and Patterson (2017) outline four reasons why rights clearance is perceived as standing in the way of the successful digitisation and dissemination of library and archive collections:

- determining whether a work is in copyright or is public domain can be difficult
- the time and effort involved in identifying, locating and contacting known copyright owners can be prohibitive, especially when dealing with large numbers of works
- identifying and locating rights owners provides no guarantee of a response from that owner
- copyright owners cannot always be identified or located, leading to the so-called orphan works problem (the subject of this study)

Several studies (2008, Dickson 2010, Erickson & Stobo 2017, Vuopala 2010) have examined the cost of rights clearance for libraries, archives and other cultural heritage institutions. Akmon (2008) provides a case study of efforts involved in obtaining permission from rights holders as part of the Jon Cohen AIDS Research Collection digitization project at the University of Michigan Library. Akmon writes that 85% of the staff time on the project was spent on clearing rights, with an average of 1 hour 10 minutes per item. In addition to this the high rate of non-response from right holders led to the exclusion of 30% of the material from the online collection, leading the author to assert that:

“collections with a higher document to copyright holder ratio will probably cost less to usher through the rights process than collections with a low document to copyright holder ratio”  
(p.27)

Dickson’s (2010) study of the attempts to digitise the Thomas E. Watson Papers on the similarly points to the problems of non-responding right holders. After spending \$8000 and 450 hours over the course of 9 months researching and contacting rights holders the project team were only able to obtain permission for 4 letters, resulting in a cost per item of \$2000. Subsequently, they took the decision to discontinue any further efforts to contact right holders and make the entire collection available under a “fair-use” doctrine. In conclusion the author writes that she believes any future attempt to undertake rights research and clearance on archival collections would be “needlessly expensive and futile” and states that “[i]f we hope to make large-scale digitization an integral part of processing archival materials...we must develop a new definition of due diligence for this type of copyright exploration.” (2010, 636)

The high proportion of orphan works in the collections of cultural heritage institutions has had a major impact on digitization projects research conducted by the University of Glasgow (Stobo et al 2013) reported that institutions spent an average of 2.58 hours searching for

rights holders in books at a cost of £31 per work. For newspaper and magazine clippings the time spent searching for rights holders was 1.52 hours at a cost £23 per work. Similarly, the British Library estimated that based on a representative sample of 140 books it would take more than 1000 years for a single researcher to check the entire collection. (Stratton 2011)

## 2.6 Risk Management

Prior to the introduction of legislation to address the issue of orphan works, library, archives and other cultural heritage organisations were reliant on risk management. Stobo et al (2017) argue that despite guidance recommending that diligent search be undertaken, a lack of clear legal guidance meant “risk assessment had a key role to play.” And note that even since the introduction of orphan works legislation some organisations still favour a solely risk-based approach. Differing approaches to risk management and orphan works are highlighted by Favale, Schroff, and Bertoni (2015,2) who state that:

“Most risk-averse institutions do not digitize or do not publish orphan works whereas others take the risk to use the works without clearance. Others try their best to locate the rightholders of these works, to a different extent.”

Anderstotter (2016,22) defines the process of a risk managed approach as the sampling of parts of the collection to estimate the proportion of orphaned material. Based upon the estimate, say 70%, “the collection is digitised and made available and some of the objects deemed as high-risk might have their rights cleared separately.” The risk in this approach is of a rights holder coming forward with a claim of infringement against the organization, which even if not financially damaging could prove harmful to the reputation of organisation, making future cooperation with rights holders more difficult. The difficulty in taking a risk managed approach are highlighted by Borghi et al (2016, 153) who argue that in order to design a risk based (online) exhibition strategy collections must be “conceived in such a way at the beginning to permit later removal or alteration of individual works” , they argue that the way in which exhibitions are designed in terms of the software and graphical interface means the reappearance of right holder could present significant difficulties in complying with a takedown request. Furthermore, having to redact or remove material post digitisation is inefficient if the organisation has already engaged in clearance and digitisation at cost.

Henshaw (in Hamilton and Saunderson 2017, 150) discusses the risk management approach taken by the Wellcome:

“We treat different collections differently...However, all of our in-copyright digitised works are subject to our takedown policy. If any copyright holder requests that we remove an item, we will do so immediately and then proceed to investigate the request.”

She notes that they have only had a few such takedown requests and in such instances the material is no longer available online. In their study of the Wellcome library’s pilot digitisation project Codebreakers: Makers of Modern Genetics Stobo et al (2013,41) note that in addition to this takedown policy the Wellcome also included a disclaimer outlining

the approach taken to rights clearance which states that where they have been unable to locate or identify the right holder:

*“we have made all reasonable efforts to ensure copyright holders’ interests are respected and permission sought where it is feasible to do so. However, we cannot guarantee to have traced or contacted every potential rights-holder<sup>5</sup>.”*

Similarly, the Tate website<sup>6</sup> includes a page dealing specifically with orphan work. It states that despite efforts to locate and identify right holders, sometimes identity their identity or location cannot be discovered, resulting in orphan works.

“Sometimes, despite carrying out due diligence in trying to trace rights holders, their identity or location remains unknown. This results in so-called ‘orphan works’. Tate believes that illustrating such orphan works online is one of the best ways to discover copyright holders.”

The page also includes the details of the “so-called ‘orphan works’” in the Tate’s archives and asks visitors (to the website) to contact the Tate if they have any knowledge of the works’ creators.

## 2.7 Territoriality and Cross-Border Access

Copyright is based upon the principle of territoriality, a principle of public international law that limits the extent of protections and exercise of rights to the borders of a sovereign state. Anderstotter (2017,8) writes that although the origins of the principle of territoriality lie in the cultural history of national copyright laws, it is still important to remember when discussing modern copyright, as these cultural and historical traditions “will be echoed in the arguments about the future of copyright.” Furthermore, she notes that these different legal and cultural traditions have also influenced the discussions on licensing and orphan works.

There are two legal rules that can be applied in to determine the applicable law for the cross-border dissemination of works in an online environment, the principle of *lex loci protectionis* & the principle of the country of reception. The first, derived from Article 5 of the Berne Convention, stipulates that the law of the state where the work is made available is applied. The principle of the country of reception applies the legislation of the state or country where the work is accessed. In practice, this means that in order to avoid infringement CHIs wishing to disseminate their works, must obtain a license from rights holders for each territory. (Axhamn & Guba 2011; Anderstotter 2017)

The Orphan Works Directive aims at overcoming this by ensuring mutual recognition of a works orphan status in all member states.

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<sup>5</sup> The full statement and takedown policy is available at: <http://wellcomelibrary.org/about-this-site/copyright-clearance-and-takedown/>

<sup>6</sup> <http://www.tate.org.uk/about-us/policies-and-procedures/copyright-orphan-work>



## 2.9-Orphan Works Legislation in other Jurisdictions

### 2.9.1 Canada

Act 77 of the Canadian Copyright Act allows anyone seeking to use in Copyright works where they are unable to locate the rights holder to apply for a license to the Canadian Copyright Board. The Board will evaluate if the efforts made to locate the rights holder are sufficient and may then grant a license. Licenses are non-exclusive but permit certain uses including reproduction, publication, performance, and distribution.

Licensees are required to pay royalties to the Collective societies, to be held as compensation for a reappearing rights owner. Collective societies were required to hold the royalties for up to 5 years after the expiry of the license after which they were entitled to *'dispose of the royalties as it sees fit for the general benefit of its members'*. However, this practice was abandoned, and the collective societies were able *'to use the unlocatable owners' royalties as they saw fit from the outset, as long as the collective undertook to compensate the owner if necessary.* (De Beer & Bouchard 2009)

The Canadian legislation appears to have had a limited effect as to date less than 300 licenses have been issued since (Copyright Board of Canada). The Report of the Register of Copyrights (Pallante 2015) notes that several studies have drawn attention to low usage and flaws in the Canadian system.

### 2.9.2 Germany

German legislation on orphan and out-of-commerce works was passed on 1/10/2013 and entered into force on 1/1/2014. The amendments to the Copyright Act represented Germany's implementation of the EU Orphan Works directive, permitting the digitisation and making available to the public, under certain conditions, of qualifying works from the collections of publicly accessible libraries, educational institutions, museums and archives. (VGWort.de 2014?)

The legislation establishes a presumption that a collecting society administering the rights in such works is also entitled to do so for the works of non-members provided that the usage is non-commercial, the works in question are recorded in the Register of Out-of-Commerce Works maintained by the German Patent and Trademark Office and the rights holder has not objected within six weeks of registration.

### 2.9.3 Hungary

The Hungarian Copyright Act (HCA) tackles orphan works in three distinct sections. The HCA was amended in 2003 by Act CII to include a free use provision that permits libraries, archives and other educational institutions, to provide limited onsite access to works in their collection, including orphan works, via dedicated terminals for educational and scholarly research purposes.

Specific legislation dealing with orphan works, came into effect 1 February 2009. The orphan works specific provisions of the HCA allow the Hungarian Intellectual Property Office (HIPO)

to grant licenses for both commercial and non-commercial uses of orphan works. Applicants must complete a documented diligent search and pay compensation for their use.

#### 2.9.4 Japan

Article 67 of the Japanese Copyright Law allows users who have been unable to locate or identify the rights holder of a work after due diligence to apply for a compulsory license. Applicants must deposit compensation for reappearing rightsholders, the sum of which must correspond to the normal royalty rate and is determined in conjunction with the Culture Council by the Agency of Cultural Affairs. Compulsory licensing is only available for works that have been:

*“Made public or those for which it is clear that they have been offered to or made available to the public for a considerable period of time.”* (United States Copyright Office 2015)

Under Japanese legislation it is possible to obtain a compulsory licence for works of a foreign author as long as the work will continue to be exploited within Japan. The terms conditions for diligent search for foreign works are the same as those that apply to domestic works. (Favale et al. 2013)

#### 2.9.5 Korea

Per Article 50 of the Korean Copyright Act users may apply to), users may apply to the Minister of Culture, Sports and Tourism for a compulsory license to allow use of certain types of orphan works. Applicants must demonstrate that they have taken "*considerable efforts*" to identify the rights holder or rights holder's place of residence and compensation must be paid at market rates, as determined by the Korea Copyright Commission.

#### 2.9.6 Switzerland

The Swiss Copyright Act contains provisions on orphan works which are limited to sound and audio-visual recordings. Art. 22b URG/CopA authorises users to seek authorisation for the exploitation of works from the licensed collective management organisations if the rights holder cannot be contacted, is unknown or cannot be located.<sup>7</sup>

#### 2.9.7 The Netherlands

The Netherlands implemented the Orphan Works Directive into their national Copyright Act ('Auteurswet') in 2014 with the law entitled: *Wet van 8 oktober 2014 tot wijziging van de Auteurswet en de Wet op de naburige rechten in verband met de implementatie van de*

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<sup>7</sup> <http://blog.suisa.ch/en/swiss-copyright-review-suisa-in-charge-of-a-working-group/>

*Richtlijn nr. 2012/28/EU inzake bepaalde toegestane gebruikswijzen van verweesde werken* (Act of 8 October 2014 amending the Copyright Act and the Related Rights Act with the implementation of Directive 2012/28 / EU on certain permitted uses of orphan works) this amended the Dutch Copyright Act and Neighbouring Rights Act (Favale et al 2016). Prior to this the Dutch had no specific orphan works legislation, instead relying on contractual agreements between heritage institutions and rights holder organisations. (KEA 2011)

A 2011 study by the IViR<sup>8</sup> proposed what it considered two viable solutions to improve rights clearance, a compulsory collective licensing model or an extended collective licensing model. The report concluded that in order to satisfy the need of rights holders to exercise their rights, certain restrictions would be required such as limiting licenses to cultural heritage institutions with a public mission. To ensure film producers don't suffer unfair competition, from CHIs in the exploitation of their digital rights they suggest the option of granting a license on audio-visual heritage material older than ten years.

### 2.9.8 USA

In the United States Orphan Works legislation was first introduced in 2008's Shaun Bentley Copyright Act, but the bill never made it into law before congress adjourned. The bill:

*“would have limited remedies where the infringer had performed and documented a good faith reasonably diligent search before using the work; the infringing use of the work provided attribution to the copyright owner, if known; and the infringing user included an appropriate symbol or notice in association with any public distribution, display, or use of the work.* (Pallante 2015, 12)

The 2015 report of The Register of Copyrights *"Orphan Works and Mass Digitization"* (Pallante 2015) examines subsequent legal developments such as the Google Books and Hathitrust litigation as well as the EU's Memorandum of Understanding on the Digitisation and Making Available of Out-of-commerce works,<sup>9</sup> which was intended to serve as a blueprint for collective licensing agreements negotiated between rightsholders, libraries and collecting societies.

The report proposes an Extended Collective Licensing system as the best solution to mass licensing required for mass digitization citing the voluntary agreement between parties in the Google books settlement as evidence that with government support such a system could be made to work, it states:

*“We believe that with government support and oversight to ensure that any legislation is developed transparently and in a way to benefit a wide array of stakeholders equally, ECL can be successful here.”* (, 2015)

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<sup>8</sup> Axhamn, J., Guibault, L. (2011) Cross-border extended collective licensing: a solution to online dissemination of Europe's cultural heritage? Final report prepared for EuropeananaConnect.. IViR University of Amsterdam

<sup>9</sup> [http://ec.europa.eu/internal\\_market/copyright/out-of-commerce/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/out-of-commerce/index_en.htm)

The report examines the application of fair-use as an alternative to legislation, noting that representatives of libraries and other groups had argued that legislation on mass digitization was unnecessary since the courts can use fair use doctrine to evaluate projects on a case-by-case basis. However, the report argues that reliance on fair use:

*“can only go so far in enabling the development of mass digitization [and therefore] should Congress wish to encourage or facilitate mass digitization projects providing substantial access to the expressive contents of copyrighted works, it would need to look beyond fair use to a licensing model, either voluntary or statutory.”* (US Pallante 2015)

In their study of orphan works legislation Favale et al (2013) analysed the proposed orphan works legislation and claimed that the US approach focused on limiting liability for users of orphan works *“in order to maximise the public access to these works and to foster the diffusion of public digital libraries.”* They proceed to argue that this reflects the market-driven approach to copyright in America and stated that for this reason:

*“...collective management of rights (either “extended” or not) do not find a viable place among the proposed solutions to the orphan works problem in the US.”*

However, as we have seen above the most recent approach of the US Copyright Office seeks to reconsider a collective rights management approach. In its comment on the proposals for an ECL system the Internet Archive criticised the US Copyright for basing its approach to heavily on Google Books arguing that such a project was a unique occurrence and would most likely not be repeated. They argued that an ECL system as proposed would be unsuited to the current decentralised approach to digitisation in the United States and instead propose strengthening of existing notice and takedown systems already in use such by many digitisation projects including their own.

### 3: Orphan Works Legislation

#### 3.1.1 The identification of a need for a solution and the draft orphan works Directive

The EU has been considering the issue of orphan works since 2006 when it established a High-Level Expert Group (HLEG) on Digital Libraries. As Sutherasanen and Frabboni (2014, 655) note it was around this time that the EU began to recognise the need for a legislative approach to orphan works, arguing that:

*“the EU accepted that ‘soft-law’ initiatives such as the 2006 Recommendation on the digitisation and online accessibility of cultural content and preservation were not sufficient to address the orphan works issue in an appropriate manner.”*

An interim report *“Report on Digital Preservation, Orphan Works and Out-of-Print Works”* adopted by the group in 2007(Ricolfi et al 2006) stated that a solution to orphan works was desirable for at least literary and audio-visual works. It proposed that non-legislative solutions to orphan works should include the creation of dedicated databases concerning information on orphan works, improvements to rights holder metadata in digital material,



and enhancements to contractual practices, particularly for audio-visual works. The Subgroup also recommended that Member states give appropriate support to contractual arrangements that take into account the role of cultural institutions.

In the UK the Gower's Review of Intellectual Property (2006) considered the problem of orphan works and made various recommendations on how to resolve the issue, including proposing an '*orphan works*' provision to the European Commission that would enable creative artists to reuse orphaned material. Anticipating future legislation to resolve the situation, it also recommended that once an exception is introduced, the Patent Office should, in consultation with rights holders, collecting societies and other bodies issue clear guidance regarding "the parameters of a 'reasonable search' for orphan works, in consultation with rights holders, collecting societies, rights owners and archives, when an orphan works exception comes into being." (Gowers 2006,6)

Lamentably, many of the recommendations made by the Gower's Review had failed to be implemented by the time of Sir Hargreaves Review of Intellectual Property and Growth (2011) which noted that only 25 of the 54 recommendations made by Gower's had been implemented. Hargreaves seems to imply that the reason for this was down to the effectiveness of groups acting on behalf of rights holders whose lobbying "has been more persuasive to Ministers than economic impact assessments." (p.6)

Hargreaves' report would also attempt to tackle the issue of orphan works, and in particular drew attention to the problems of mass digitization of these works, noting that while libraries and archives wish to digitise and make available these works, the risk of infringement prevents them from doing. To resolve this, he recommends that steps should be taken to establish a system for the individual licensing of orphan works. To guarantee the interests of right holders a diligent search would be required. Secondly, he recommended the use of Extended Collective Licensing as a means of achieving mass licensing of orphan works. Finally, he proposed the creation of a Digital Copyright Exchange to facilitate the sale of licenses by rights owners, claiming that automation would speed up and reduce the cost in the process, resulting in:

"...a UK market in digital copyright which is better informed and more readily capable of resolving disputes without costly litigation." (Hargreaves 2011,4)

The need for a legislative solution to the issue of orphan works is illustrated by Ringnalda (2011,3) who argues that given that infringement is a criminal offence in many European countries, allowing users to simply start using the works after an unsuccessful attempt to locate the rights holder would not be appropriate. He says:

"Inducing public libraries to wilfully violate criminal law by having them use orphaned works without permission would therefore clearly violate public order and policy. Self-regulation cannot suffice. A legal solution is required."

### 3.1.2 The influence of Google

While the i2010 strategy and the Europeana platform that it gave birth form the background to the adoption of the Orphan Works Directive in 2012, Janssens & Tryggvadóttir (2016)

note that particular attention to the preservation and making available of European cultural heritage was also driven by Google's book project, believing that this was the spur behind the European Digital Library initiative.

La Durantaye (2010) notes that the European commission were aware of the obstacle orphan works would pose to the realization of their European Digital Library from observing the outcomes of the Google's efforts in mass-digitization. Both Rosati (2013) and La Durantaye (2010) cite a 2009 speech by, then Commissioner for Telecoms and Media Digital Europe, Viviane Reding, in which she invokes Google as a call to action. She says:

“Important digitisation efforts have already started all around the globe. Europe should seize this opportunity to take the lead, and to ensure that books digitisation takes place on the basis of European copyright law, and in full respect of Europe's cultural diversity. Europe, with its rich cultural heritage, has most to offer and most to win from books digitisation. If we act swiftly, pro-competitive European solutions on books digitisation may well be sooner operational than the solutions presently envisaged under the Google Books Settlement in the United States.”<sup>10</sup> (European Commission 2009)

### 3.1.3 Possible solutions to the orphan works problem

Prior to arriving at a solution in the form of the current Orphan Works Directive, the European Commission considered various possible solutions to the issue of orphan works. Ringnalda (2011) notes that as most European countries class infringement as a criminal offence, a system of self-regulation, allowing mass digitizers to go ahead and use the works in the event that a search for a rights holder was unsuccessful, would not be possible.

Early efforts by the European Commission to tackle the issue of orphan works at the level of national legislature were unsuccessful. As Borghi and Karapapa (2013) observe a 2006 Recommendation inviting *Member States to improve conditions for digitizing and enhancing online accessibility to cultural materials* and create mechanisms to "facilitate the use of orphan works further to a consultation of interested parties and by 'promoting the availability of lists of known orphan works and works in the public domain'" failed to lead to the implementation of orphan works legislation in the majority of member states. As a result, a second Recommendation was introduced in 2011, "with a view to urging Member States to step up their efforts and involve private actors in digitizing cultural content and making it available through Europeana" (Borghi and Karapapa 2013) The recommendation also made reference to the prototype Orphan Works Directive calling for the 'rapid and correct transposition and implementation of the provisions of the Directive on orphan works, once it is adopted'.

Ringnalda (2011,4) cites five possible options for addressing orphan works 'in the context of a European Digital Library' outlined by the then head of the Commission's Copyright Unit Timan Lüder. Of these four "would prescribe modalities of either an exception or limitation,

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<sup>10</sup> Viviane Reding in European Commission (2009) European Commission puts challenges of books digitisation for authors, libraries and consumers on EU's agenda, Press Release Brussels, 19 October 2009 Available at: [http://europa.eu/rapid/press-release\\_IP-09-1544\\_en.htm](http://europa.eu/rapid/press-release_IP-09-1544_en.htm)

or of a statutory licensing scheme.”(p4) The fifth option, would have allowed member states to introduce their own legal technique to address the issue of orphan works, but would still require a system of mutual recognition of a works orphan status. According Ringnalda this would achieve two things; first it eliminates the need to undertake and verify a reasonable search in each country of use and secondly it ensures that a user does not need to comply with the divergent regulations on orphan works that would be adopted across different member states, meaning that the legality of a work made available in one country is recognised as such across all.

Of the potential legislative solutions considered by the European Commission Ringnalda (2011) states that they generally fell into two categories, licensing systems, and exceptions and limitations. He sets out the conditions for both, explaining that under a license system, a prospective user would have to obtain a license prior to the use of an orphan work, from a designated licensing body. Such a scheme would require evidence of “reasonably diligent efforts’ to locate the right holder and payment of a license fee would be required. Discussing the functioning of an exception or limitation, Ringnalda notes that works can be used without permission where right holder cannot be found following reasonable efforts to locate them, provided that “an equitable remuneration is paid to the copyright owner in case a claim is brought.” (2011, 4)

Rosati (2013, 305) writes that prior to deciding on the use of a directive, the European Commission considered various different approaches to the issue of orphan works including:

“the adoption of a legally binding standalone instrument on the clearance and mutual recognition of orphan works, a specific exception to be added to Directive 2001/29 (the ‘InfoSoc Directive’),<sup>16</sup> or guidance on cross-border mutual recognition of orphan works.”

Despite these considerations the Commission opted for the use of Directive as its proposed solution to the issue of cross-border access, announcing the decision in its 24 May 2011 Blueprint on IP Rights. Rosati (2013) says that the decision to use a Directive one strand of a dual approach towards the “making available of collections of European cultural institutions (libraries, museums and archives)”, with the other centred on the promotion of collective licensing scheme for out of commerce works. She notes that the completion of these two initiatives would have contributed, among the other things, to the development of Europeana.”

### 3.1.4 The Final Directive

The Orphan Works Directive required member states to introduce a new exception to copyright, that enable certain permitted use of orphan works. In the UK, the Directive was implemented through two pieces of legislation the Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014 (SI2014/2861) which inserted s.44B to the CDPA1988 (Permitted uses of orphan works) along with the accompanying Schedule ZA1.

The purpose of the directive was to implement a legal framework that ensured the lawful cross border online access to orphan works contained within the collections of institutions

such as libraries, museums, archives, educational establishments, film heritage and public broadcasters with a public as part of their public interest mission. A directive was necessary to ensure cross border access, reduce transaction costs and facilitate the identification of rights holders, in doing so it would advance the wider aim of building the knowledge economy. (Rosati 2013)

The final text incorporated minor amendments from the initial draft, these included articles 3, which states that a diligent search should be carried out in good faith, 5(1A) which states that a diligent search should be carried out in good faith and only prior to the use of the work, and provisions for the right to fair compensation for reappearing rights holders.

### 3.1.5 The scope of the Directive

Directive, states that it concerns the certain uses of orphan works in the collections of publicly accessible libraries, educational establishments and, as well as archives, film or audio heritage institutions and public-service broadcasting organizations. The Directive refers to these organisations as *'beneficiaries'*.

Janssens & Tryggvadóttir (2014) note that the restriction of the final Directive to organisations that can demonstrate a *'public-interest mission'* (as stated in Article 1) arose out of a desire to avoid a repeat of the litigation that ensnared Google's library project (the precursor of Google Books) the United States, they state:

"the European legislator, perfectly aware of the Google Books Saga performed at the other side of the Atlantic, has been keen to avoid that access to the cultural heritage could be controlled by entities pursuing a private (lucrative) goal."

Despite this there is little discussion or definition of the meaning of what is meant by public-interest mission other than a reference in recital 20 which states that member states should provide an exception or limitation to allow certain uses of orphan works:

"provided that such use fulfils their public interest missions, in particular the preservation of, the restoration of, and the provision of cultural and educational access to, their collections, including their digital collections" (Directive 2012/28/eu, s20)

Suthersanen and Frabboni (2014) also note that the Directive fails to address the meaning of publicly accessible, although they note the provenance of the phrase, stating that:

"There is no criterion as to the nature or constitution of the institution. Neither is the phrase *'publicly accessible'* defined although the genesis of the phrase can be traced back to Article 5(2)(c), Directive 2001/29/EC"<sup>11</sup>

The lack an explicit definition as to the meaning of *'publicly accessible'* institution or the phrase *'publicly accessible'* is raised by Baker (2016) who argues that the lack of clear

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<sup>11</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, also known as the InfoSoc Directive. Article 5(2)(c) refers to "*publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;*"

definitions results in a lack of legal certainty for the institutions using or wishing to use the directive.

### 3.1.6 Subject Matter

Article 1(2) sets out the types of work or materials that are covered under the Directive, these include books, journals, newspapers, magazines and other writings, as well as phonograms, cinematographic and audio-visual works. Crucially, it omits standalone artworks including photographs, which was removed during the consultation phase. In their analysis of the Directive Suthersanen and Frabboni (2014) state that the absence of standalone artworks from the final text was, largely due to the need to focus on the print sector they state:

*“This is further supported if one studies the Commission’s Impact Assessment report whereby it is urged that the Directive’s focus be on the print sector as opposed to the image and photography sectors. The urgent need was to address concerns in relation to current commercial digitisation operations (such as Google’s digital library) which tended to focus on the print sector, because printed works (unlike other media such as films or photographs) can be easily indexed by its search engine.”*

As Callaghan (2017) notes the absence of such material may present a barrier to organisations holding a wide range of materials, and *“may counter this may counter whatever protection such a scheme would offer.”* Although the Directive excludes standalone artworks, it includes artistic works, such as illustrations, photographs or painting that are embedded within the works covered under Directive, article 1(4) states that:

*“This Directive shall also apply to works and other protected subject-matter that are embedded or incorporated in, or constitute an integral part of, the works or phonograms referred to in paragraphs 2 and 3.”*

Suthersanen and Frabboni (2014) argue that the Directive could be said to cover other graphic works, such as *‘a photograph published as a postcard, or as part of a catalogue’* they refer to the wording of the Directive’s Annex which sets out the sources that should be used to conduct a diligent search. Article 3 of the Annex refers to visual works which include:

*“fine art, photography, illustration, design, architecture, sketches of the latter works and other such works that are contained in books, journals, newspapers and magazines or other work”*

Article 10 indicates that the inclusion of such material may be planned for a future revision of the Directive in stating that it shall submit a yearly report starting on 29 October 2015:

*“concerning the possible inclusion in the scope of application of this Directive of publishers and of works or other protected subject-matter not currently included in its scope, and in particular stand-alone photographs and other images.”*

However, to date the Directive has not been expanded further to incorporate such works, thereby continuing to exclude a significant amount of material in cultural heritage organisations.

### 3.1.7 The Meaning of an orphan

Article 2 of the Directive states that a work is considered an orphan work where the rights holder cannot be located or identified following the completion of a diligent search.

Article 2(2) states that where a work has multiple rights holders, and where some of those rights holders cannot be located, following a diligent search, then the work may be used in accordance with the terms of the Directive, provided those rights holders that have been identified located, give their permission (with respect to the rights that they hold in the work.) It is important to note that in both instances, the text of the Directive requires both the completion *and* recording of a diligent search, for a work to be considered orphaned. (See below)

In their analysis of the Directive Suthersanen and Frabboni (2014) claim that one alternative solution to the issue of orphaned works:

*“would have been to define works as public domain works, unless and until the right holders of the works are identified or located. This ‘opt-in’ approach would have recognised the inherent dilemma that the issue of orphan works raises, namely that the uncertainty regarding the identity of the author or his whereabouts influences the copyright term, which in many instances is dependent on the date of death of the author.”*

Such a solution however may have interfered with the treatment of pseudonymous and anonymous works which have their own national treatments. Furthermore, designating such a huge swathe, based on the estimated number of orphaned works, of material as out of copyright would have met with considerable resistance from right holder bodies.

### 3.1.8 Orphan Works and Unpublished works

Article 1.3 deals with the use of unpublished works. As Deazley et al (2017) note that “the extent to which the Directive applies to unpublished works is qualified in two ways that are very limiting.” This is because the Directive states that may be digitized if:

- 1) they have been made publicly accessible by a beneficiary organisation with the rightholders consent,
- 2) as long as it is reasonable to assume that the rightholder would not oppose the use of the work

Either one of these conditions may be hard to meet, as state the first condition raises problems with regard to the use of 3<sup>rd</sup> party rights in archival material. He uses an example of a collection of letters belonging to a well-known author, deposited in the collection of a library or archive, arguing that while it is reasonable to assume that the correspondence written by the author would have been deposited with the ‘*appropriate consent*’ required by Directive, the letters written to the author, are unlikely to have been deposited with level of consent required by the Directive to make them available.

On the subject of the 2<sup>nd</sup> clause, Deazely et al (2017) argue that it would allow beneficiary organisations to make unpublished works only in a situation where it is “reasonable to

assume the unknown or untraceable owner would not object.” Before asking “In practice, though, when will it be reasonable to make such an assumption?”

The difficulty in making such an assumption is also made clear by Callaghan (2017) who remarks that

“to fulfil this criterion of the Directive requires some educated guess work as to whether the original creator, who perhaps lived well before the introduction of electricity let alone the internet, would or would not oppose digitization of their work.”

The difficulties of making such a judgement are evident in the decision by curators of the British Library’s Digital Spare Rib<sup>12</sup> project to redact material from “around 1000 contributors for whom the legal copyright status of their works remain difficult to resolve.” (Russell 2016) This represents roughly 20% of the total number of works digitized.

### 3.1.9 Uses of orphan works

The uses of orphan allowed under the Directive, are normally exclusive to the right holder. Article 6 sets out the uses a beneficiary organisation can make of a work that has been determined to be an orphan. Article 6(1) permits beneficiary organisations to use works in their collection in the following ways:

- (a) Communicating the work to the public, including making it available online
- (b) Copying for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration.

Article 2 states that such uses are allowed in order for beneficiary organisations to achieve their ‘public-interest missions’, to provide educational and cultural access, preserve and restore works and phonograms in their collections. Organisations are allowed to generate revenue from such uses, sufficient to cover the cost of digitising and making them available to the public.

### 3.1.10 End of orphan work status

Article 5 states a right holder of an orphan work may put an end to its orphan status, however it provides no further details about how this should take place or what evidence of the right holders claim to the rights in the works should be provided. (Baker 2016) Janssens & Tryggvadóttir (2014) argue that unlike pre-existing exceptions, which are applicable for the full term of a works protection, the Directive may have only limited duration due to a right holder’s ability to put an end to the orphan works status, thereby removing the legal basis of the exception.

In the UK implementation of the Directive, Schedule ZA1(7) adds several conditions, including:

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<sup>12</sup> The Digital Spare Rib Digital Archive was a digitisation project that sought to make the entire run of the feminist magazine Spare Rib available online. Due to the grassroots nature of the original publication the project a high proportion of orphan works which were digitised under the exception.

“A right holder may put an end to a works orphan status by providing evidence of their ownership of rights to the Office for Harmonization in the Internal Market<sup>13</sup> or to the relevant body that carried out the diligent search. The beneficiary organisation must provide fair compensation to the right holder for use of the work within a reasonable time. If the amount of compensation cannot be agreed, then either party ask the Copyright Tribunal to determine the amount.” (ZA1 7(2-3))

According to Rosati (2013) the provisions on termination of a works orphan status by a reappearing right holder, were introduced at a later stage, with earlier drafts stating that a works orphan status would only cease upon identification of all right holders in a work. As she writes, it is hard to see how feasible it is for a works orphan status to cease only in relation to certain right holder, while remaining orphaned in respect of any other right holders who cannot be identified or located.

### 3.1.11 Recordation and the orphan works database

The Directive requires that the results and records of all diligent searches be transmitted from the competent national authorities, such as the IPO, to the OHIM (now the EUIPO). The records will then be stored in a central database. Article 3(6) of the Directive makes the EUIPO responsible for *“the establishment and management of a single publicly accessible online database on orphan works”* (European Union Intellectual Property Office 2013)

- The public interface of the database displays details for all works used under the exception, including:
- The Title of the work
- Description
- Category including Audio-visual, Cinematographic, Literary Work as well for embedded works Fine Art, Illustration, Map/Plan, Photography and Poster

### 3.1.12 Non-respondent right holders

The Directive makes no provision for dealing with the situation where a rights holder has been contacted but fails to respond.

### 3.1.13 Diligent Search

Article 3 of the Directive lays out the requirements for diligent search. As noted above, a work will be considered orphan if the right holder cannot be identified or located following the completion of a ‘diligent search’. The parameters for diligent search are set out as follows by the Directive:

- (a) a diligent search must be carried out in *‘good faith’*, out for each work prior to any use of the work or phonogram;
- (b) users must consult the *‘appropriate sources’* for the category of works in question;

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<sup>13</sup> The OHIM is now the European Intellectual Property Office



- (c) the ‘*appropriate sources*’ for each category of work are to be determined by individual member states;
- (d) beneficiary organisation must keep a record of all diligent searches and make them available to the ‘*competent national authorities*’ for transmission

Given that both the Directive and the Orphan Works License Scheme require a diligent search to be conducted, an initial discussion of the diligent search requirements here will be followed by an analysis of both schemes, following a discussion of the license scheme in the next section.

The remainder of this section will focus on the three aspects of the diligent search requirements of the Directive, an initial discussion of diligent search and ‘*good faith*’, an examination of the ‘*appropriate sources*’ for diligent search and recording and transmission.

### 3.1.14 Uptake

Data from the EUIPO Orphan works database shows that to a total of 462 main works have been made available by UK institutions, out of a total 5,313. As the table below shows the majority of works registered under the exception belong to two main organisations, the BFI and the British Library. The remaining organisations have only registered 23 three main works between them. In terms of embedded works, such as illustrations, photographs and drawing most of the registered works are from the British Library. While this suggests a low uptake, a comparison shows that a similar number of (main) works have been registered by the Hungarian Intellectual Property Office (the only other country to implement a licensing scheme for orphan works).

Table 3-Number of EU orphan works registered

Beneficiary Organisation	Main Work	Embedded or incorporated
BFI	271	5
British Library	168	5535
CREATe	5	2
Conway Hall Humanist Library	2	0
Imperial War Museum	1	0
King`s College, Cambridge	7	0
University of Kent	1	0
Northern Ireland Screen	3	0
Roman Roads Research Association	1	0
Stirling Council Archives	3	0
<b>Total</b>	<b>462</b>	<b>5542</b>
<b>Total Works in Database</b>	<b>5313</b>	<b>5647</b>

## 3.2 The Orphan Works Licensing Scheme

### 3.2.1 Background

In addition to its implementation of the EU orphan Works Directive, in 2013 the UK IPO brought forward legislation to allow the licensing of individual orphan works, an implementation of recommendations made in Professor Ian Hargreaves 2011 report, *Digital Opportunity: a Review of Intellectual Property and Growth*.

In an impact assessment conducted prior to the introduction of the scheme (IPO 2012) the Government stated that the rationale for the adoption of a legislative solution over a non-legislative one was due to the need to comply with the obligations set out in the Berne convention, that all exceptions and limitations must meet the three-step test. Non-legislative solutions such as an insurance or indemnity scheme minimising damages following a diligent search, they argued would “amount to Government condoning unlawful action.” (p.4)

Furthermore, the assessment states that any attempt by the Government to annul protection for orphan works, without regard for the exclusive rights of the author would create a situation in which users would make no effort to locate a rights holder, resulting in a loss of remuneration and loss of control of the works. Finally, they argued that if orphan works were available for use without a fee it could create a skewed market for known and commissioned works and leave orphan works open to misuse without compensation for the right holder.

The final legislation contained in the Enterprise and Regulatory Reform Act 2013 and Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014, authorized the UK IPO to issue licenses for both commercial and uncommercial purposes.

Licenses are non-exclusive and last for 7 years, usage can be both commercial and non-commercial, and sufficient acknowledgement must be given to the creator or right holder. All prospective licensees must conduct a diligent search for the rights owner prior to making an application and are required to record the details of their search in the UK orphan works register. The IPO provides guidance on how to undertake diligent search for different types of works. These are split into three categories or sectors and cover:

- film and sound – includes films, TV programmes, amateur film footage, music, and non-music sound recordings, such as interviews;
- literary works – includes fiction books, non-fiction books, manuscripts, essays, letters, diaries, short stories, notes, poems and dramatic works such as scripts, plays and screenplays; and

- still visual art – includes photographs, pictures, paintings, posters, sketches, drawings, etchings, cartoons and sculptures.<sup>14</sup>

The register includes details of all license applications and for each application includes:

- applicant or licensee name<sup>15</sup>
- applicant or licensee country
- application number
- application date
- use
- status of application
- category (e.g. Moving images, Music notation, Script and choreography, Sound recordings, Still visual art, Written work)
- title or short description
- full description

The register includes details of all applications including those that have been withdrawn or were unsuccessful. Although no details are given for rejection or withdrawal in the database, the IPO website states that applications may be rejected if:

- a proper diligent search hasn't been conducted the proposed treatment
- adaption or alteration is derogatory
- it wouldn't be in the public interest to issue a license

In addition to this the IPO may consider more broadly whether the proposed usage is inappropriate.

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<sup>14</sup>IPO (2015) Orphan Works Licensing Scheme Overview for Applicants  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/518251/Orphan\\_Works\\_Licensing\\_Scheme\\_Overview\\_for\\_Applicants.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/518251/Orphan_Works_Licensing_Scheme_Overview_for_Applicants.pdf)

<sup>15</sup> This was redacted in late November 2017 after I pointed out to the IPO that applicants email address were visible when searching by licensee name.

Figure 1-Screenshot from the IP's Orphan Works Register

The screenshot displays the 'View the orphan works register' page on GOV.UK. It features a search bar at the top with 665 results. A list of search results is shown, each with a title, category, and status. To the right, the 'Details of this orphan work' section provides specific information for the selected work, including its title, application number, date, and a list of permitted uses.

**Category:** 665 results

**Free Dessie Ellis. No more extraditions. March on the Fi...**  
 Known creators or right holders: None  
 Known identifiers: None  
 Category: Still visual art  
 Licensee name: [Linen Hall Library](#)  
 Status: Application Received (OVL5000113-30)

**Toxic waste no thanks.**  
 Known creators or right holders: None  
 Known identifiers: None  
 Category: Still visual art  
 Licensee name: [Linen Hall Library](#)  
 Status: Application Received (OVL5000113-29)

**Gerry and the Peacemakers. The sell out tour of Ireland.**  
 Known creators or right holders: None  
 Known identifiers: None  
 Category: Still visual art  
 Licensee name: [Linen Hall Library](#)  
 Status: Application Received (OVL5000113-28)

**Robin Eames: public servant of Satan; secret servant of ...**  
 Known creators or right holders: None  
 Known identifiers: None  
 Category: Still visual art  
 Licensee name: [Linen Hall Library](#)  
 Status: Application Received (OVL5000113-27)

**David Trimnochio.**  
 Known creators or right holders: None  
 Known identifiers: None  
 Category: Still visual art  
 Licensee name: [Linen Hall Library](#)  
 Status: Application Received (OVL5000113-26)

**Would you buy a used car from these men?... if not , then...**  
 Known creators or right holders: None  
 Known identifiers: None  
 Category: Still visual art  
 Licensee name: [Linen Hall Library](#)  
 Status: Application Received (OVL5000113-25)

**Wanted for treachery. Boycott Stormont elections.**  
 Known creators or right holders: None

**Details of this orphan work**  
 These are the known details of this orphan work. If you know who the right holder is for this work, please [contact us](#).

**Work details**

**Thumbnail of still image:**

**Applicant or licensee name:** Divided Society  
**Applicant or licensee country:** United Kingdom  
**Application number:** OVL5000111-15  
**Application date:** 24/10/2017  
**Status of application:** Licence Granted  
**Title or short description:** Go on school Leave us in peace.  
**Full description:** a4 colour poster  
**Category:** Still visual art  
**Type of work:** Poster  
**Museum, gallery, library or archive holding the work:** Linen Hall Library, Belfast, Northern Ireland  
**Details and dates of publication, broadcast and/or distribution:** According to the library records it was published in 1994 in Belfast, Northern Ireland

**Uses**

Free hand outs for live event, exhibition or similar

Use in a live event, exhibition or similar

In newsletter, bulletin, e-newsletter or e-bulletin

In non-commercial promotional material - print and digital

Digitise and make available on-line, including on social media

Preservation purposes

Use on stage or in performance

Educational purposes - use in learning/ training materials, including e-learning

Use in thesis/dissertation

Personal use

**Known creators or right holders**

Unknown

**Known identifiers**  
 eg International Standard Book Number (ISBN)

Unknown

### 3.2.2 Commercial and Non-Commercial Uses

The IPO's Guidance (IPO 2016) states that a Non-Commercial license allows use orphaned works in:

- free hand outs for live event, exhibition or similar
- use in a live event, exhibition or similar
- in newsletter, bulletin, e-newsletter or e-bulletin
- in non-commercial promotional material - print and digital
- digitise and make available online, including on social media
- preservation purposes
- use on stage or in performance
- educational purposes - use in learning/training materials, including e-learning
- use in thesis/dissertation
- personal use

An example of non-commercial use would be to promote a free exhibition of which the work was part. (Pedley 2015) Whereas commercial usage includes any usage of the work that makes money, regardless of whether it is for profit or to cover the costs of making it available. Pedley (2015:141) gives an example of commercial usage as stating that “where the use of an orphan work, such as a photograph on a poster, to promote or market an exhibition where there was a charge, would be commercial.”

### 3.2.3 Costs

The cost of license includes an administration fee, which ranges from £20 for one work to £80 for 30 works. The License fee itself starts from 10p plus VAT, for anon commercial license, the final license fee varies depending upon the intended usage. (IPO 2015) The license fee is set aside as fair compensation in the event of the rights-holder reappearing. Under the scheme, applicants can license up to 30 works per application, with license fees ranging from £20 for a single work to £80 for 30 works. (IPO 2015) Application fees are non-refundable regardless of whether an application is approved, and the IPOs specifies credit or debit card as the method of payment. The IPO states that sublicensing is not-permitted under the terms of the orphan works license. Renewals can be made after the end of the initial seven year period, but require another diligent search. Table (1) below summarizes payments to be made in relation to an orphan works license.

*Table 4-Summary of payments relating to the Orphan Works License Scheme*

	<b>Application Fee</b>	<b>License Fee</b>
<b>Method of payment</b>	Credit or debit card using a secure payment process.	Credit or debit card using a secure payment process.
<b>When payment is made</b>	At the time of submitting the licence application	Once the licence application has been approved, prior to the issuing of the licence.
<b>Amount</b>	The fee structure is tiered, charge starts at £20 for 1 work and rises to £80 for 30 works per application	Dependent upon the usage being licensed. The cost for a single image for non-commercial starts at £0.10.

### 3.2.4 Rights holders

If right holders believe their work is the subject of an application for a licence or has already been licensed they may contact the IPO to:

- stop the application if a licence has not yet been issued
- claim the licence fee that has been paid

A reappearing rights holder may claim for any of their works appearing on the register, at any time. In order for their claim to be allocated to the correct work, they are encouraged to use the contact form on the register. In order for the IPO to be satisfied that a reappearing rights holder has a genuine claim to a work or works, it is recommended they provide any evidence they have in support of their claim, this can include:

- contracts
- wills
- copies of any other relevant correspondence that shows they are the rights holder

Once a claim has been submitted, the IPO will evaluate it and if approved the rights holder will then be entitled to any license fee(s) paid for use of their work(s), or in circumstances where a work has multiple right holders their portion of the licence fee.

### 3.2.5 Non-respondent right holders

The guidance for diligent search issued by the IPO states that where a right holder has been located but fails to respond to a request for permission, a work cannot be declared orphan. (IPO 2014)

### 3.2.6 Complaints and Appeals

Both applicants and right holders have the right of appeal. Applicants may appeal if an application has been refused, or they are dissatisfied about license conditions or fees charged. In the first instance they may appeal to the IPO, if they wish to appeal further about the licence condition or licence fee they may appeal to an IPO official not involved in the original decision. In the event that the appeal is unresolved applicants may appeal to the Copyright Tribunal. (IPO 2015a)

Right holders unhappy with the actions of the IPO may in the first instance appeal directly to the IPO. Should they wish to appeal further they have the right to appeal to an IPO official not involved in the original decision. In the event that the matter is still unresolved they may appeal to the First Tier Tribunal (General Regulatory Chamber) one of seven regulatory chambers which handle appeals against decisions made by government regulatory bodies. The IPO's (IPO2015a) guidance states that the tribunal can only consider complaints that IPO has acted improperly or failed to meet its obligations under Regulation 14 of SI 2014/2863 which states:

**14. (1)** A right holder who has identified themselves to the authorising body under regulation 12, may appeal to the First-tier Tribunal on the grounds that the authorising body has either acted improperly or failed to comply with its obligations under these Regulations.

(2) An orphan licensee may appeal to the Copyright Tribunal concerning—

(a) the refusal by the authorising body to grant an orphan licence to the orphan licensee;

(b) any condition imposed by the authorising body in connection with the grant of the orphan licence; or

(c) any amount described in regulation 10(1) which the authorising body requires it to pay.

(3) On an application under paragraph (2) the Copyright Tribunal shall consider the matter and may make such order as it considers to be reasonable in the circumstances.<sup>16</sup>

If someone is unhappy with the final response to their complaint, and it is something that cannot be appealed to either the Copyright Tribunal or the First Tier Tribunal, they can refer their complaint to the Parliamentary and Health Service Ombudsman. (IPO 2015a)

Category	Moving Images	Music Notations	Script & Choreography	Sound Recordings	Still Visual Art	Written Works	Total
<b>Granted</b>	4	3	0	14	452	153	626
<b>Withdrawn</b>	2	2	1	4	38	24	70
<b>Expired</b>	0	0	0	0	4	0	4
<b>Received</b>	NA	1	0	0	6	1	8
<b>Total</b>	<b>6</b>	<b>6</b>	<b>1</b>	<b>18</b>	<b>495</b>	<b>178</b>	<b>704</b>

Table 5 – Breakdown of IPO Orphan Works License Applications December 2017

### 3.2.7 Impact and reception of the OWLS Scheme

At its launch, the scheme was described as ‘trailblazing’ by Baroness Neville-Rolfe then Minister for Intellectual Property (Department for Business, Innovation & Skills et al 2014), while the impact assessment estimated that the scheme would

A report by the IPO (IPO 2015d) into the first years of operation of the OWLS Scheme stated that by the end of the first year of operation the IPO had issued 27 licenses worth £8,001.97 (20 Non-Commercial and 7 Commercial). An analysis of the IPO Orphan Works database (table 2) shows that as of December 2017, a total of 626 applications for a license have been granted, with a further 8 having been received. No applications have been rejected. Of these largest number of licenses issued fall under the category still visual art, for which 452 licenses have been granted showing that the license is at least effective in enabling the use of works not covered by the license. Despite, this the overall number of works licensed is tiny compared to the total number of works estimated to be orphaned.

Perhaps, due to its newness there have only been a few studies conducted into the Orphan Works License Scheme, these are summarized below.

Terras (2014) writes about her experience of licensing a single image work, from National Library of Scotland’s Scottish Screen Archive, a mid-1960s “lantern” interval slide tempting patron to buy an ice lolly, used at the Odeon Cinema, Eglinton Toll, Glasgow. The slide was part of a collection of lantern slides with no individual records and having contacted the Odeon, they state their records for designs do not go that far back and are unable to prove

<sup>16</sup> Source: [www.legislation.gov.uk/uksi/2014/2863/regulation/14/made](http://www.legislation.gov.uk/uksi/2014/2863/regulation/14/made)

they hold the copyright, they give their permission for use of the image, “with the caveat that a copyright owner, whom they cannot speak for, may come forward at some future date. It's an orphan.” (Terras 2014) With the intention of licensing the work for commercial usage she states: “I want to adopt it, so I can use it widely, but also, to investigate how easy? hard? costly? problematic? easy? it is to get a license for orphan works under this new scheme.” (Terras 2014)

Although Terras’ blog provides a detailed step by step examination of the licensing process, her intended usage was commercial, and for a single image and therefore, much of her experience may not be directly relevant to the experiences of cultural heritage digitisation. A paper by Callaghan (2017) documents her, experiences engaging with both the exception and the licensing scheme in the course of a digitisation project for Conway Hall, the Ethical Society of Great Britain. Callaghan’s paper set out “to determine whether the introduction of orphan work licensing schemes has adequately addressed the barriers orphan works offer to digitization projects undertaken within the United Kingdom.” (Callaghan 2017,1) using the Architecture and Place digitisation project as a case study. The scale of the project reflects the small scale of the organization, involving only 179 objects from the archives of The Ethical Society. Despite the small scale in comparison to mass digitisation projects Callaghan (2017, 6) describes the material as a significant challenge in terms of copyright as a:

“great deal of it was covered under the copyright duration provisions, especially as it relates to unpublished works, and there was “little we had produced ourselves. There was a mix of material; graphic, textual and aural which required different approaches with respect to due diligence.”

In her discussion of her experiences using the license scheme, Callaghan notes that the level of diligence required under the scheme for these types of works is greater than that for others, stating that: “under the UK scheme you may license standalone art work and photographs but the due diligence checklist that is required to be filled in is much longer than the checklists for other media.” (Callaghan 2017,5) Similarly Terras (2014) discusses the length of the checklists that are required to be completed by the IPO as part of the application process noting that there are 55 places she is required to check. Discussing, the inclusion of the websites for various societies such as the Professional Cartoonist's Association, she notes that it isn’t clear from the guidance what the user is expected to look for saying:

“a lot of the places are societies, and I'm not sure what they thought you could do there, or what they have that is relevant... its much more a membership organisation than a repository for content. So, I'm not sure what I'm being asked to check: that I had a quick look at the website? that there was nothing of relevance because they don't have a repository? that I was supposed to email them and ask? Guidance on that would be super useful.”

Callaghan (2017,5) also points out that while the guidance provided by the IPO is extensive, it can be out of date: “so websites that are provided as sources of information to be checked



may no longer exist.” This highlights the need for any such guidance to be regularly updated to reflect the changing nature of web resource and to reflect the availability of new sources. An examination of the Guidance shows that they were last updated in 2015, and it’s not clear how often they are updated, meaning that further sources could become unavailable.

Further highlighting the difficulty of conducting a diligent search, even for a limited number of items, Callaghan notes that the length of time it took to complete due diligence was beyond her initial expectation stating that “[e]ven with volunteer assistance this process took far longer than the two-month period that was estimated. Approximately 60 staff days, some partially and some totally, were devoted to copyright due diligence and eight volunteer days.” She notes that although the volunteer, employed for one day, was expected to divide their time between the diligence, and other tasks related to the digitisation project. Callaghan (2017,7) notes that the time required to complete due diligence varies and is dependent on:

“the item type, the information already available, the information you discover when undertaking the required research and how long it takes to receive replies to queries”.

A comparative analysis conducted in 2016 (Favale, Schroff and Bertoni) of diligent search requirements across different EU jurisdictions counted a total of 211 sources for diligent search listed in the IPO’s guidance including:

“orphan works registries, general authors registries (such as WATCH), collecting societies data banks, unions or associations of authors and publishers, agents, guilds, international unique identifiers, general, legal, and newspaper archives, in addition to directions to check against generic sources such ‘databases and catalogues’, ‘art universities alumni’ and performing a general internet search.”

Their assessment while 70% of those sources were freely accessible online, the remaining 30% still require some form of additional effort, with 22% requiring some form of direct contact either by email or mail. In addition, their data shows that only 2% offer free on-site access, something that Callaghan (2017) refers to when she states that, for some items, the diligent search required visit to other London archives in order to locate the current copyright holders, thus representing additional time costs. In her conclusion Callaghan also refers to the high level of time costs involved in conducting diligent search, noting that:

“Given the time requirement to undertake the due diligence required it was not recommended to undertake another digitization project containing a high proportion of orphan works from diverse creators. The library’s next digitization project will focus on works that are predominantly in the public domain to minimize copyright due diligence requirements.” (p11.)

Moreover, she states that the fact that “medium to larger scale digitization projects including orphan works have continued to be to be produced across the country” since the introduction of both the directive and license scheme, suggests that risk management continues to be “the preferred method for addressing the problem of orphan works.”

In a consultation on the orphan works license scheme prior to its introduction the British Library (2013) responded to a number of questions surrounding orphan works and in the process identified several limitations with the scheme.

In its review of the first year of the schemes operation, (IPO 2015c) the IPO published feedback they had received from applicants and potential applicants to the scheme. Citing data obtained from roughly 20 respondents, the survey included data from respondents who had yet to use the scheme or decided against using it. The results showed that organizations were not using the license scheme for a variety of reasons including one respondent who found right holder using the guidance, 3 respondents cited the cost of licensing was too high, other reasons given for not using the scheme included comments about the schemes unsuitability for mass digitisation, cost of the license, the length of license, and the time and administrative costs. While, it is not clear how many respondents were from cultural heritage organisations, suggestions from users for improving the scheme included longer licenses, the facility for bulk licensing and reduced administrative and licensing costs.

Baker (2016,14) notes that although the Orphan Works License is available to both commercial and non-commercial users, the requirement to conduct a diligent search on a work by work basis “renders it similarly unsuited to facilitating the use of orphan works in mass digitisation initiatives.” Referring to the fact that the license only permits use within the UK, she argues that online dissemination of licensed works could result in the breach of the terms of the license (were a work to accessed by users outside the UK), “even when existing ambiguities as to the correct 'place of infringement' are accounted for.” (p14) She proceeds to note that although the use of technological prevention measures(TPM) such as geo-blocking could restrict use of those works by users outside the UK, such technologies undermine the purpose of mass digitisation projects as large-scale disseminators of information. as she says:

“It is highly improbable that the goal shared by both Europeana and the Google Books Library to 'democratize' access to the world's collective knowledge' could be achieved through disseminating materials online in only one country.” (Baker 2016,14)

Finally, she notes that the need to pay a license fee reduces the money available to CHIs to make works available, arguing that the more licenses to be paid, the fewer the number of orphan works that can be made available. She argues that the license fee could only be paid in the event of the right holder reappearing, allowing CHIs to retain the money to fund further uses of orphan works. While, the number of reappearing right holders is low, CHIs might still wish to put money aside, leading to a situation where organisations may choose not to digitise orphan works due to the uncertainty of a claim.

Overall the UK Orphan Works License Scheme does not appear to be intended or geared towards mass digitization of orphan works, but instead appears to be intended to enable the use of individual works or small quantities for commercial as well as non-commercial usage. As Callaghan (2017) notes uptake of the scheme has been limited amongst cultural heritage organisations, with the Museum of the Order of St. John having registered the

largest number of works (179), followed The Architecture and Place project is next with 60 items.<sup>17</sup>

While the requirement for a diligent search is intended to protect right holders (see IPO 2015d, 1), for cultural heritage organisations the need to undertake diligent search on a work by work basis is likely to prove as problematic as with the EU Directive. Furthermore, the fact the scheme requires payment of license fee and application fee will likely make it less attractive to cultural heritage organisations who already stretched budgets wish to be seen to be making the best use of their public funding.

Furthermore, as we have seen the license provides less coverage than the Directive. The main reasons a cultural heritage organisation would have for using the license scheme would be to make material not covered by the Directive, such as standalone images, photographs or artwork available, which can be seen in Table 2 above. In this respect it appears to be used primarily for this purpose, picking up where the Directive leaves off.

### 3.3 What is a diligent search and what is meant by ‘good faith’?

One of the defining features of the Directive is the requirement for diligent search. Without completion of such a search an organisation cannot legally use an orphan work within the scope of the Directive.

In terms of the actual steps to be taken to complete a diligent search, the text of the Directive does not provide a lot of detail (Suthersanen & Frabboni 2014). Nowhere in the text of the Directive is the meaning of the ‘good faith’ established. Recital 14 states that a: *‘diligent search should involve the consultation of sources that supply information on the works and other protected subject-matter as determined, in accordance with this Directive, by the Member State where the diligent search has to be carried out.’* (Directive 2012/28/eu) but doesn’t elaborate further.

The recital OWD states that Member States can refer to guidelines on diligent search: *“agreed in the context of the High-Level Working Group on Digital Libraries established as part of the i2010 digital library initiative.”* (2012/28eu .14) These guidelines are elaborated in the *Memorandum of Understanding on Diligent Search Guidelines for Orphan Works* which established some general criteria that form the basis for diligent search as well as sector specific guidelines agreed with stakeholders from cultural institutions and the creative sectors. (The European Digital Libraries Initiative) As part of the guidelines a definition of orphan works was given which stated that:

“A work is “orphan” with respect to rightholders whose permission is required to use it and who can either not be identified, or located based on diligent search on the basis of due

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<sup>17</sup> These figures are taken from Callaghan (2017), due to the IPO’s decision to redact the licensee name it’s not currently possible to get up-to-date figures on works per licensee.

diligence guidelines. This search must be both in **good faith** (subjectively) and **reasonable** in light of the type of rightholder (objectively).” [emphasis added]

This definition retains the phrase ‘good faith’ and adds the term reasonable which may have been drawn from the United States proposed 2008 orphan works legislation, which would have provided users of orphan works a limitation on remedies, for infringement, following a diligent search for the work's copyright owner. (Durantaye 2010)

Elsewhere Deazley et al (2017) note the difference between the wording in the Directive and for the OWLS scheme, the latter of which requires a ‘reasonable search’ leading them to ask whether the different wording establishes a different standard saying “[s]hould we read these different standards – reasonableness and good faith – as synonyms within this regulatory landscape? It is not entirely clear.”

They argue that whereas: “what constitutes a reasonable condition, amount, time or payment will depend on the facts at hand” good faith may be interpreted as being either synonymous to reasonableness or merely to indicate “the absence of bad faith or improper conduct on the part of the person carrying out the diligent search.” (Deazley et al 2017) Finally, they note that to some extent the change may have been made due to the lack of certainty provided by the concept of ‘good faith’ noting that for lawyers trained in the UK’s common law system it “has a vagueness, which from a legal perspective, can seem unsettling.” (Deazley et al 2017)

It is possible to interpret ‘good faith’ to mean making an honest attempt to try and locate the right owner(s). Such an interpretation is favoured by Deazley et al (2017) who remark that as long as a researcher genuinely believes they have conducted the search sufficiently, without knowingly or deliberately omitting any relevant sources. This is also the thinking of Schroff et al who argue that ‘good faith’ means making an “honest effort” to locate the right holder of a work, however, the problem with this is that it creates an entirely subjective standard for diligent search. What one person or organisation considers an honest effort may be different to that of another.

### 3.3.1 Relevant and Appropriate Sources

“The OWD is only an effective instrument if its requirements can be met by CHIs in practice. In the context of the diligent search, this refers mainly to the resources needed to carry out the search, in particular the number of sources that needs to be consulted and the extent to which they are easily accessible” (Schroff et al 2017)

Article 3(3) of the Directive states that diligent searches should be carried out in the country where the work was first published or broadcast, or made publicly accessible. For cinematographic or audio-visual works the search should be carried out in the member state where the producer of the work is headquartered or resides.

In performing a diligent search, the Directive states that a user must refer to: “the appropriate sources for the category of works and other protected subject-matter in question” (s3.1) and that any diligent search as a must refer to the sources listed in the Annex. Beyond this however member states are free to determine the appropriate sources

for their jurisdiction, it states “The sources that are for each category of works or phonogram in question shall be determined by the Member State, in consultation with rightholders and users.” (s3.2)

This has led to a range of differing implementations of the Directive across member states, with some countries such as the Netherlands transposing the Annex of Directive directly into national legislation, while others like Germany have supplemented the basic text of the Annex with their own directions. (Deazely 2017) In the UK the Annex is replicated in schedule ZA1 part 2 of the CPDA 1988 and includes additional guidance on unpublished works. The Annex therefore establishes a minimum standard for diligent search in defining certain categories of sources for each category of works. Schroff et al (2017) determine that the sources can be divided into two groups, first, catalogues and registries and second, sources for identifying the right holder, arguing that such an approach is essentially a combination of copyright law and industry practice.

However, in leaving it to member states to determine the relevant sources, the Directive’s approach to prescribing relevant sources is clearly the result of an attempt balance a desire for a common framework with the territorialized nature of European national copyright laws, which as Schroff et al (2017) remark have yet to be fully harmonized. They maintain that it would have been too complex to try and list all sources at the EU, noting that in addition to the territorial differences in copyright and neighbouring rights, there is considerable variation at the organisational level such as authors associations and collective management organisations.

In the UK, the IPO produced its own diligent search guidance that was primarily intended for those wanting to apply to the license scheme, although it states that it may also be of help to those conducting a diligent search under the EU Directive. (IPO 2016) The IPO’s guidance, updated in 2016, covers three categories of works Film, Music and Sound, Literary works and Still Visual Art.

*Table 6- Sources to be searched during diligent search*

1. Published books	<ul style="list-style-type: none"> <li>(a) legal deposit, library catalogues and authority files maintained by libraries and other institutions;</li> <li>(b) the publishers' and authors' associations in the respective country;</li> <li>(c) existing databases and registries, WATCH (Writers, Artists and their Copyright Holders), the ISBN (International Standard Book Number) and databases listing books in print;</li> <li>(d) the databases of the relevant collecting societies, in particular reproduction rights organisations;</li> <li>(e) sources that integrate multiple databases and registries, including VIAF (Virtual International Authority Files) and ARROW (Accessible Registries of Rights Information and Orphan Works);</li> </ul>
2. Newspapers, magazines, journals	<ul style="list-style-type: none"> <li>(a) the ISSN (International Standard Serial Number) for periodical publications;</li> </ul>

and periodicals	<ul style="list-style-type: none"> <li>(b) indexes and catalogues from library holdings and collections;</li> <li>(c) legal deposit;</li> <li>(d) the publishers' associations and the authors' and journalists' associations in the respective country;</li> <li>(e) the databases of relevant collecting societies including reproduction rights organisations;</li> </ul>
3. Visual works, including fine art, photography, illustration, design, architecture, sketches of the latter works and other such works that are contained in books, journals, newspapers and magazines or other works	<ul style="list-style-type: none"> <li>(a) the sources referred to in points (1) and (2);</li> <li>(b) the databases of the relevant collecting societies, in particular for visual arts, and including reproduction rights organisations;</li> <li>(c) the databases of picture agencies, where applicable;</li> </ul>
4. Audiovisual works and phonograms:	<ul style="list-style-type: none"> <li>(d) legal deposit;</li> <li>(e) the producers' associations in the respective country;</li> <li>(f) databases of film or audio heritage institutions and national libraries;</li> <li>(g) databases with relevant standards and identifiers such as ISAN (International Standard Audiovisual Number) for audiovisual material, ISWC (International Standard Music Work Code) for musical works and ISRC (International Standard Recording Code) for phonograms;</li> <li>(h) the databases of the relevant collecting societies, in particular for authors, performers, phonogram producers and audiovisual producers;</li> <li>(i) credits and other information appearing on the work's packaging;</li> <li>(j) databases of other relevant associations representing a specific category of rightholders.</li> </ul>
5. Relevant works which have not been published or broadcast	<ul style="list-style-type: none"> <li>(k) Those sources that are listed in paragraphs 1 to 4 above which are appropriate to a relevant work which is unpublished.</li> </ul>

Source: Schedule ZA1 part 2

### 3.3.2 An exhaustive search?

As mentioned above the directive states that a diligent search should be carried out by consulting the appropriate sources, as determined by the member state, but including at least the relevant sources listed in the Annex. However, there is no indication as to whether it is appropriate or necessary to check all sources for a search to be diligent or whether as Deazeley et al (2017) ask, “an archivist or librarian decide that certain of the relevant sources are in fact irrelevant in the circumstances and still be acting in good faith?” They

consider the question of whether it is necessary to consult sources that have no evident relevance to the search

The IPO's guidance also includes a separate checklist for each category of work, described by Schroff et al (2017) as extensive. They highlight the fact that there is no weighting or indication of importance attached to the sources listed, arguing that "it reflects an understanding of "diligent" as searching any kind of source that may contain information." Schroff et al (2017) claim that the UK's provision of a wide range of sources to search can be seen as useful, in that it provides, "a high degree of legal certainty" however, it can be argued that the lack of any kind of hierarchy amongst the sources proves to be major hindrance to organisations undertaking diligent search.

In a comparative study of the requirements and sources for diligent search Favale et al (2016) counted a total of 211 sources for diligent search in the UK. These included "orphan works registries, general authors registries (such as WATCH), collecting societies data banks, unions or associations of authors and publishers, Agents, Guilds, international unique identifiers, general, legal, and newspaper archives, etc", not including "general indications such as 'general internet searches', 'databases and catalogues'. 'art universities alumni'." Their analysis showed that of those 70% were freely accessible online, the remainder either had to be a visited in person or were only partially or fully accessible online for a fee. The study reveals that a high percentage of sources needed to locate the author of unpublished works were more likely to be amongst the pay to access online and partial access online categories, thereby making it much harder and costlier to undertake the necessary diligence on such works. Given that archival collections hold a significant number of such works, the current diligent search requirements would likely impose additional costs onto archives that could prove to be a significant obstacle, especially for smaller archives, thereby limiting the uptake of either scheme.

In their assessment of diligent search under both schemes Deazely et al (2017) note that one unintended consequence of the schemes lack of clarity, is that it may encourage further distortion of the digital public record. They note that for a single black and white photograph, a diligent search of only six sources, taking less than an hour was accepted. This they argue gives rise to a situation whereby the less is known about a work the easier and cheaper the diligent search is more likely to be, which in turn encourages institutions to favour such material in the same way they have previously focused on public domain material. As the authors say:

"just as institutions tend to privilege public domain material when making selections for digitisation, so too institutions might be tempted to select the low-hanging fruit in the copyright garden: material that is in copyright but that lacks any contextual metadata and so minimising the search burden. Put simply, items may be selected for digitisation on the basis that little to nothing is known about them."

Reviewing the criticisms surrounding the issue of diligent search, it becomes clear that there is a need for further guidance as to what constitutes a 'good faith' diligent search, as noted above.

Even if CHI's were to adopt the recommendation of Favale et al (2016) that a diligent search should be considered to have been conducted in good faith following a search of all freely available sources, there are still issues of exhaustiveness surrounding the conduct of a diligent search. Firstly, even conducting a search of all freely available sources, could be considered time/resource intensive, especially at scale. Secondly as Deazely et al (2017) note that there is a concern that where a member state has provided guidance containing a list of sources then all sources should be consulted in order for a search to be diligent. In assessing the availability and accessibility of sources Favale et al (2016) that the number of sources included in the IPO's guidance as:

"being essentially a list of all organisations in the sector rather than a selection of those sources most likely to yield information. This list is essentially over-inclusive to the point where 'diligent search' is a synonym for 'exhaustive search'".

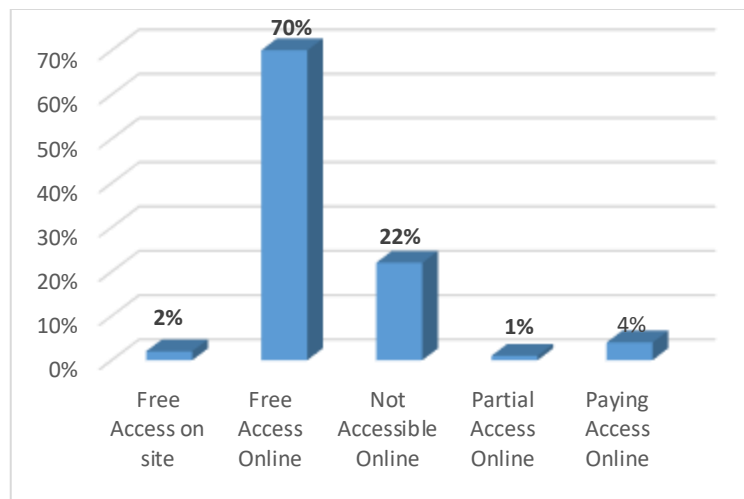
In other words, organisations engaging in a diligent search are faced with a choice of exhaustively checking all sources listed or attempting to determine for themselves which sources are most likely to yield the information needed or be considered appropriate for a search to be considered in 'good faith' and diligent.

Such an issue is addressed by Deazely et al (2017) who argue that a diligent search should not be regarded as an exhaustive search and stating that in their opinion searching sources that have no relevance, such as ISBN search for a book published prior to the introduction of the ISBN standard in 1967, would in their words be 'the antithesis of diligence'. Further to this they note that the Directive sets out sources that are "appropriate to be consulted when conducting a diligent search, rather than required to be consulted in every instance." However, for small institutions inexperienced in the practices of rights clearance, this may still prove a daunting task of attempting to determine from the list which sources are appropriate or relevant.

It is clear that in failing to provide an adequate definition of diligent search, the Directive seems to achieve the opposite of what was intended to do, achieve a harmonized approach to the legal use of orphan works. This is because as Guibault (2012) argues, that without a clear definition of diligent search cultural heritage institutions has been left in a position of having to lobby: "their own lawmakers and partner-stakeholders to determine what constitutes a 'diligent search' at national level, following the criteria they may establish pursuant to article 3(2) of the directive."



Figure 2- Accessibility of Sources for Diligent Search in the UK



Source: Favale et al (2016) Figure 1.

### 3.3.3 Not conducive to Mass Digitization

Despite the stated aims of the directive to create a legal framework to allow the digitisation and dissemination mass digitization of orphan works, several aspects of the final directive Janssens & Tryggvadóttir (in Stamoudi 2016) highlight the fact that in addition to the lengthy lists of sources to be consulted for a search to be diligent, a separate search is also required for embedded works. This means that for works such as newspaper, magazines or books containing artworks, photographs or collections of works featuring multiple authors, such as anthologies of poetry the directive requires a diligent search is required for each of those individual works, thereby multiplying the burden of diligence exponentially.

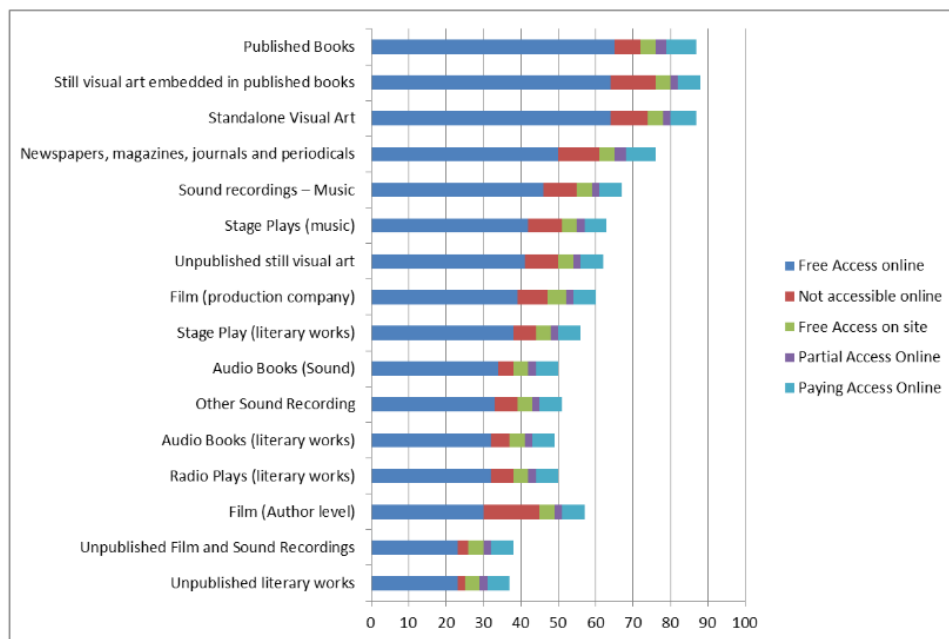
Such a requirement is also cited as a major obstacle to the use of both the directive and license schemes, in Libraries and Archives Copyright Alliance (LACA) response to an IPO consultation (CILIP 2014). The response states given that requirement of both schemes for each embedded orphan work (including photographs and other artistic works) to be dealt with individually in terms of due diligence, renders both solutions unworkable for mass digitisation projects for libraries and archives. The point about the diligent search requirement acting as an impediment for mass digitization is echoed by Guibault (2012) who notes that despite compromises made in the drafting of the final directive: “the main point of contention remains: how can a cultural heritage institution with millions of items in its collection proceed with digitization if it must conduct prior to use a diligent search for each item?”

Similarly, Borghi and Karapapa (2013) note that despite the system of mutual recognition embedded into the directive being intended to simplify the diligent search process, the requirement to conduct diligent search for each individual work “is an impediment to digitization in bulk.”

As further evidence of the Directive’s failure to adequately enable mass digitization Montagnani et al (2017) call the Directive partly toothless, noting that despite the

references to large-scale digitisation processes in the recital and elsewhere, the text of the directive leaves such processes “relegated to the background.” They proceed to examine the Directives rules on funding noting these also constitute an obstacle to mass digitization. First, they note that Article 6(2) states that beneficiary organisations may generate revenues in their uses of orphan works to cover the cost of digitising and making works available orphan. This provision means that as long as they reinvest any monies raised into further digitisation thus not ruling out the option for beneficiary organisations.

Figure 3- Accessibility of Sources for Diligent Search in the UK



Source: Favale et al (2016) Figure 1

More troubling they argue are the provisions for public private partnership (PPP) arrangements, set out in Article 6(4) and paragraph 22 of the recital, which they argue fail:

“to take into account both the way in which individual or large-scale digitization projects are conducted and the motivations that drive commercial partners to take part in them.”

They note that despite its declarations to the contrary the Directive effectively limits the scope of PPP that beneficiary organisations. Because, while Article 6(4) states that “This Directive is without prejudice to the freedom of contract of such organisations in the pursuit of their public-interest missions, particularly in respect of public-private partnership agreements”, paragraph 22 of the recital states that any such agreements should not: “impose any restrictions on the beneficiaries of this Directive as to their use of orphan works and should not grant the commercial partner any rights to use, or control the use of, the orphan works.”

Such a restriction the authors is contrary to the normal conduct of commercial digitisation projects, in which the ‘private parties’ usually prefer to undertake the digitization. Furthermore, they state that even where financial gain is not the aim of partnership, these

commercial partners often seek to create large data sets for the purposes of Text and Data Mining and will normally conclude by either providing a digitized copy or access to the digitized version to partner institutions. Consequently, they argue the Directive fails to:

“fully foster a digitization of European cultural heritage that would be the European response to the digitization processes occurring overseas.” (p204)

It is clear that in failing to provide an adequate definition of diligent search, the Directive seems to achieve the opposite of what was intended to do, achieve a harmonized approach to the legal use of orphan works. This is because as Guibault (2012) argues, that without a clear definition of diligent search cultural heritage institutions has been left in a position of having to lobby: “their own lawmakers and partner-stakeholders to determine what constitutes a ‘diligent search’ at national level, following the criteria they may establish pursuant to article 3(2) of the directive.” However, as we have seen the failure of the directive and the license scheme as to specify clearly what constitutes a diligent search, is only one aspect of the larger issue with both schemes which is the need to clear works on an individual level and the associated costs.

### 3.4 Brexit

The UK’s decision to leave the EU in 2016 may have significant implications for UK law and copyright law; although time of writing these implications have yet to be made clear. A brief guide published by the IPO IP and BREXIT: The facts <sup>18</sup>(IPO 2016) notes that while the UK remains a member of the EU, our copyright law will continue to comply with all EU Directives and Regulations. Following our exit from the EU it states that the continued effect of EU Directives and Regulations will depend on the terms of our future relationship.

Rosati (2016) outlines two scenarios for our departure in terms of copyright law:

“If the UK leaves the EU but remains in the European Economic Area (possibly the most optimistic outlook in the very aftermath of the referendum), then the relevant body of EU copyright legislation will continue to apply in this country.”

She argues that alternately if the UK pursues what is known as “hard Brexit” then things become harder to foresee stating that:

“in any other scenario, the future relevance of EU copyright legislation and CJEU case law in the UK is extremely uncertain. Possibly bound to international copyright instruments only, the UK might decide to pursue routes that – so far – have appeared extremely unlikely to be followed at the EU level. For instance, it could decide to abandon a closed system of copyright defences and adopt an open norm instead, possibly modelled on US fair use.”

In terms of orphan works, it is not known whether UK CHIs will still be able to avail themselves of the EU exception if EU Directives no longer apply to UK laws.

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<sup>18</sup> Updated November 2017

### 3.5 Alternatives and remedies

In light of the limitations of the Orphan Works Directive two types of solution have been proposed, the first is a system for crowdsourcing efforts around diligent search, the second is the adoption of a system of extended collective licensing.

#### 3.5.1 Extended Collective Licensing

Guibault (2016) notes that considering the “cumbersome” nature of the diligent search requirements of the Orphan Works Directive some member states have begun to consider the use of alternative solutions. One such solution is the use of Extended Collective Licensing (ECL) defined by Guibault (2015,174) as:

“a form of collective rights management whereby the application of freely negotiated copyright licensing agreements between a user and a collective management organisation (“CMO”), is extended by law to non-members of the organisation.”

As Axhamn and Guibault (2011a) and Guibault (2016) note that within the Nordic territories of Denmark, Norway, Sweden and Finland there is a longstanding tradition of using ECL for purposes of mass digitization and making available of works within the collections of CHIs. In the UK legislation on the provision of extended collective licensing was introduced alongside legislation on orphan works,<sup>19</sup> although to date only one organisation has applied operate an Extended Collective Licensing Scheme.<sup>20</sup>

The benefits of such an arrangement are set out by Axhamn & Guibault (2011a) who note that once an ECL agreement is concluded a user may use any work covered under the agreement without the risk of a non-represented right holder (often deemed “outsiders”) making either a legal or financial claim of infringement, stating that:

A user who enters into an ECL agreement with a representative organization is thus assured that the organization will meet all claims from those affected by the extension. (2011a, vii)

This point is echoed by Anderstotter (2016,18) who writes that an ECL agreement will protect CHIs from liability for copyright infringement since the CMO “answers to the authors (both members and non-members) and administers remuneration for the rightsholders.”

The main benefits of ECL over other orphan works legislation is that there is no requirement to conduct a diligent search prior to the use of work thus eliminating the high transaction costs faced by CHIs in the process of clearing rights. As Van Gompel (2012,1363) argues ECL is of great benefit in terms facilitating rights clearance, particularly with regard to mass use, that:

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<sup>19</sup> Enterprise and Regulatory Reform Act 2013, and c. 24, art. 77; Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014, SI 2588,

<sup>20</sup> On 7<sup>th</sup> December 2017, the Copyright Licensing Agency announced that it had applied to operate an ECL scheme, the application will be subject to a public consultation run by the Intellectual Property Office, prior to a final decision at the end of the 2017/18 financial year:

<https://www.gov.uk/government/consultations/application-to-operate-an-ecl-scheme>

“...a user may obtain a license to use all works covered by the license without the risk of infringing the rights of right owners who otherwise would not be represented. In fact, the rationale of the system of ECL has always been to facilitate the licensing in case of massive uses for which it would be impossible for users to clear all the necessary rights.”

One potential drawback of ECL over the orphan works directive, is that it requires the payment of freely negotiated license fee, which as Van Gompel (2012,1363) observes “is said to come at a high price”. The cost of ECL is raised by Janssens & Tryggvadóttir (2014,5) who note that libraries as well as internet search engines and archiving companies, such as Google and the Internet archive had: “challenged the fairness of a fee to be paid upfront to a collecting society for the digital use of an orphan who might never show up.” Moreover, they note that concerns were expressed as to whether a CMO would make any effort to locate a rights holder once it was in receipt of a license fee, although they note that these concerns are addressed in the Collective Management Directive:<sup>21</sup>

“For mass-digitization projects, however, it seems that the additional costs of a license that covers orphan works do not outweigh the benefits that collective licensing has over individual rights clearance.”

In their consultation document for the implementation of UK legislation on orphan works (IPO 2014c, 42) the Government appears to rule out the use of ECL as solution for orphan works stating that it is not intended to be the ‘default’ and arguing that:

“Any collecting society wishing to run an ECL scheme must have a rights holder mandate. This requirement will not be met if the number of rights holders that are not known or cannot be located reaches such a level that the collecting society cannot be said to be significantly representative of rights holders affected by the ECL scheme, or works covered by it.”

Baker (2016,15), however, argues against this noting that there is no clear indication of what is meant by 'a significant number' and observing that “[e]ven if 'a significant number' simply intended to mean a number of rightholders that is not insignificant, relevant licensing bodies will still be able to show that they are sufficiently representative without involving orphan rightholders. This task would, in fact, be easier than if 'significant' was intended to refer to a majority.”

### 3.5.2 EnDOW and Diligent Search

One potential solution to the problem of diligent search costs could be through the use of crowdsourcing, defined by Borghi et al (2016,155) as “the practice of seeking inputs (either in terms of labour, information or resources) from a large number of contributors, typically from an undifferentiated public.” In explaining how crowdsourcing may benefit organisations they describe of types of savings. The first, economies of scope, is “obtained

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<sup>21</sup> Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market

through access to many different perspectives and solutions to a given problem". Whilst the second, economies of scale, offers savings through the distribution of a task among many contributors. (Borghi et al 2016,156) Furthermore, they note that there may be an overlap between these two in the design of crowdsourcing initiatives. Examples Crowdsourcing is already used by cultural heritage organisations, such as the British Library, for tasks relating to the digitisation such as transcription of playbills and catalogue cards.<sup>22</sup> Outside of cultural heritage, the use of crowds has seen the development of so called 'citizen science' programmes such as Zooniverse.org, which uses crowds to help classify the features of different types of galaxies, using images taken from space telescopes.

Borghi et al (2016) argue that crowdsourcing could be applied to diligent search and could offer up both economies of scale, in terms of reducing costs for organisations by spreading the task of "diligently searching for rightsholders across a crowd of contributors" and economies of scope, in terms of what the authors describe as 'niche communities', which: "may possess knowledge about the provenance or likely ownership of works unavailable to the host institution." (p.159)

Launched in 2015, EnDOW ("Enhancing access to 20th Century cultural heritage through Distributed Orphan Works clearance"), is a collaborative partnership between four European research centres<sup>23</sup>, with the aim of researching:

"the legal instruments of "diligent search" in the EU, to turn these into an online platform that allows crowdsourced diligent search processes in order to investigate the potential application and challenges of such a platform."

In a (2016) Borghi et al propose such a dedicated platform "with specific characteristics intended to facilitate uptake, lower costs to institutions and provide legal clarity while being accessible to non-lawyer contributors." (p.161) Noting that the Directive states that CHI's must ensure the legal compliance of all searches, they argue that platform must enable the crowd to for users to be guided through the diligent search process in such a way as to produce a "legally valid search, according to the national requirements." Highlighting the complexity of the diligent search process, particularly the need to comply with the diligent search requirements of different jurisdictions, they note that any search conducted would still require:

"review and approval by the cultural institution holding the item, ensuring that the requirements of national legislation and the best practices of the specific sector are met, but also increasing costs relative to a purely automated system."

A prototype version of the system with limited functionality is currently live on the website <http://diligentsearch.eu/calculator/> and is intended to guide a person through the steps of diligent search by asking various questions about the work and its creator (if known). Once

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<sup>22</sup> See <https://www.libcrowds.com/>

<sup>23</sup> CIPPM, Bournemouth University (Coordinator), CREATE, University of Glasgow, IViR, University of Amsterdam, ASK, Bocconi University, Milan

the process is concluded a user can download their search as a pdf, which can then be given to the institution using the work.

Overall, the benefits of the system are dependent upon the level of savings, the system can provide to cultural heritage organisations. In its present form the system may prove useful in guiding someone with no limited experience of diligent search through the process, in terms of highlighting the information they need to look for, however, it cannot tell them how or where to find that information, meaning users are still reliant on the sources and guidance specified by their national authority. Furthermore, if organisations need to verify the report before they can sign off a work's orphan status, then as acknowledged by the Borghi et al (2016) the savings achieved will be reduced. It remains to be seen if organisations are willing to entrust the crowd with work, which is already conducted in house by experienced curators and other staff.

Figure 4-Screenshot of diligent search report from <http://diligentsearch.eu/calculator/#>

Search-report not saved yet

Select the jurisdiction you want to determine an orphan work in:  
The United Kingdom

Language:  
English

Of what type of work do you want to determine the orphan work status?  
Written works

Has the work been published?  
No or unknown

Is the name of the author known?  
Yes

Please fill in the details below. Use the 'add another answer' button below to add multiple authors.

What is the name of the author?  
Fav, William johnson

Is there any evidence that the work was not created by this author?  
No

Is the author still alive?  
No

If the author is no longer alive, are the author's heirs known?  
No

What are the author's or his heirs' contact details?

Add another answer

Did you add any of the author(s)'s contact details above?  
No - I haven't found any contact details

Does the work contain images or art work?  
No

Result

Your diligent search is completed! The work can be registered in the EUIPO Orphan Works Database <https://euipo.europa.eu/orphanworks>. You can also apply for an Orphan Works Licence at the UK Intellectual Property Office <http://tinyurl.com/yd5soofz>

### 3.5.3 Limited liability

One alternative to the current systems would involve a limitation on liability, which “limits monetary relief to ‘reasonable compensation’ for the use made.” (Van Gompel 2012, 1366) Such a system was part of a proposed 2006 Orphan Works Act in the United States, although the legislation never made it past Congress. To qualify for limited liability a user must still conduct or provide proof of having conducted a “reasonably diligent search” for the right holder and provide attribution where possible. Furthermore, as Van Gompel (2012) such a system imposes several costs on users, including, the costs of maintaining records of any diligent searches conducted, the costs of assessing the likelihood of rights owner reappearing and finally, the costs of litigation and reasonable compensation, in cases where a reappearing right holder is successful in making a claim. Furthermore, Van Gompel (2012) argues that such a system makes inefficient use of the justice system, since it still requires right holders to file law suits against infringers. Favale et al (2013) found that the United States approach to orphan works focused on limiting liability for users “in order to maximise the public access to these works and to foster the diffusion of public digital libraries.” They

proceed to argue that this reflects the market-driven approach to copyright in America and stated that for this reason: "...collective management of rights (either "extended" or not) do not find a viable place among the proposed solutions to the orphan works problem in the US."



## 4: Research Design

### 4.1 Methodology

A survey was chosen, as the primary research method as it allowed the collection of both qualitative and quantitative data from a wide range of cultural heritage organisations throughout the UK. To achieve this an online questionnaire was chosen as the most data collection instrument, as it represented the most efficient means of gathering data from a wide number of respondents with knowledge of copyright and orphan works working in the cultural heritage institutions such as libraries, museums, archives and film and audio heritage institutions. The main drawbacks of using the survey data collection technique are low response rates, and confusion or ambiguity in interpreting questions. Therefore, in order to obtain a richer and more in-depth data sample it was decided to take a mixed methods approach by undertaking a series of semi-structured interviews from willing survey respondents.

### 4.2 Survey

As there was no existing survey that met the needs of the research, an original survey was developed, in the form of an online questionnaire. During the development of the questions reference was made to existing studies on the problem of orphan works such as Naomi Korn's (2009) *In from the Cold* as well as the IPO's (2015) 'Annual report' into the UK's orphan works legislation *Orphan works: Review of the first twelve months*. The survey consisted of 19 questions across 4 sections, questions 1 to 18 focussed on building a profile of the organisation and the respondent included a combination of quantitative and qualitative questions. The questions were a mix of dichotomous and multiple choice.

Question 1 asked about the sector in which the respondent worked.

Questions 2 and 3 asked about the respondents' organisation size and collection size, the latter included a don't know option.

Question 4 a multi-answer question asked respondents to indicate what types of material they digitize.

Question 5 asked respondents to estimate or state the percentage of orphan works in their collection, in order to estimate the scale of the problem.

Questions 6 to 8 explored whether the level of copyright knowledge and experience impacted upon use of the orphan works schemes:

Question 6 asked whether the respondents' organisation had any formal copyright policies or regulations.

Question 7 asked whether the respondents' organisation had a specific person in charge of digitisation.

Question 8 included a series of 4 scale likert-scale questions, with respondents asked to gauge their knowledge of five aspects of copyright; copyright law in general, digitisation, copyright exceptions, and rights clearance.

Questions 9 and 10, multiple answer questions asked about the impact of copyrighted material on the selection and digitisation of material,

Question 9 examined the impact of copyrighted works including orphan works on digitisation projects undertaken by respondents' organisations.

Question 10 explored approaches to digitisation and risk, by asking about the approach to digitisation of copyrighted material.

Questions 11-17 asked about the use of the orphan works schemes and explored what other methods by which respondents' organisations made orphan works material available if not using the exception or license scheme.

Question 11 a multiple answer question asked about the barriers to digitisation of orphan works.

Question 12 a dichotomous yes/no asked respondents if they had used the orphan works exception, a third option allowed them to state if they were unaware of the exception.

Question 18 third section focused on collecting quantitative data about a recent digitization project to develop an insight into the range and scope digitization projects involving orphan works, as well as an estimation of the costs of said projects.

Finally, respondents were asked about what they thought would make it easier for their organisation to digitize and make available online orphan works from their collections. Although the survey responses were saved to a Google Sheets spreadsheet it was easier to use Microsoft Excel to analyse the results as this provided greater functionality. Some analysis was undertaken in SPSS Statistics, but it was felt that the qualitative nature of most of the responses as well my inexperience in using the software did not lend itself to analysis and therefore Excel was predominantly used. As a result, the statistics obtained are mostly descriptive in nature.

The survey was anonymised for data protection reasons.

### 4.3 Pilot and distribution

After developing a list of questions with feedback from supervisor, Lyn Robinson, the survey was launched during the middle of August. It was piloted through deployment to the Jiscmail LIS- COPYSEEK group a closed discussion list for copyright and property professionals in organisations around the UK and beyond. After reviewing the initial responses, the survey was shared to other Jiscmail lists for GLAM organisations including, ARCHIVES-NRA, the UK discussion list for archivists, conservators and records managers, the Museums Computer Group(MCG) and JISC DIGITAL-CULTURE.

After receiving around 16 responses, the remaining respondents were selected through purposive sampling, having identified organisations using the orphan works licensing scheme or the directive from the relevant databases and the literature review. Emails asking for participation were sent to the person responsible for copyright, digitisation or licensing at those organisations. Additionally, well known libraries and archives were invited to participate, including national libraries and archives. Organisational webpages and in some cases LinkedIn were used to help identify a relevant contact, such as Intellectual Property Officer, for some organisations. Using a form of snowball sampling the survey and email also asked respondents for information about people they thought would be willing to conduct the survey. At least one respondent who was approached was able to put me in touch with the relevant person from their organisation.

Some contacts did not respond to the first email, so a follow up email was sent after a few weeks. And a final push to try and get thirty responses was made in late November, with the last response received in early December.

## 4.4 Interviews

It was decided to use semi structured interviews to supplement the survey. This would provide the opportunity to explore the experiences and approach to orphan works digitisation of respondents in depth. It was recommended to conduct five interviews.

### 4.4.1 Selection

16 survey respondents indicated they would be willing to participate in a follow up interview, of these five were selected based on two requirements. Firstly, convenience, interviewees had to be based in or close to London in order to be able to conduct interviews on a face to face basis. This was selected because as Pickard (2013, 198) says “interviewing depends very much upon the rapport built between the interviewer and the interviewee” and it was felt that this could be better achieved on face to face basis rather than in a phone or online interview. Furthermore, since the intention was to record and transcribe the interviews this would be more easily accomplished through face to face interviews. Secondly, the choice of respondents included a mix of organisations using exception, the license scheme or a combination of both, as well as those that had not used either choosing instead to take a risk managed approach.

### 4.4.2 Transcription and Analysis

Transcription proved to be a lengthy process and other aspects of the project meant some took a long time to finish. Transcription was done mostly by hand as text to speech software that was tried didn't produce the intended result. The interviews varied from 35 minutes to an hour depending upon the interviewee.

A thematic approach was used to analyse the data from the transcripts. In keeping with the guidance on qualitative data analysis by Cresswell 2013 (in Cresswell 2014) it is recommended that data be aggregated into a between five and seven themes. An initial read through of transcripts gave an overview of responses and the themes identified

included Approach to Selection, Diligent Search, Use of the Exception, Use of License. A further two categories Brexit and Finance, were added after a second reading. As can be seen below the subject of diligence was touched on heavily. Hand coding in word was found to be the easiest approach, although it took longer.

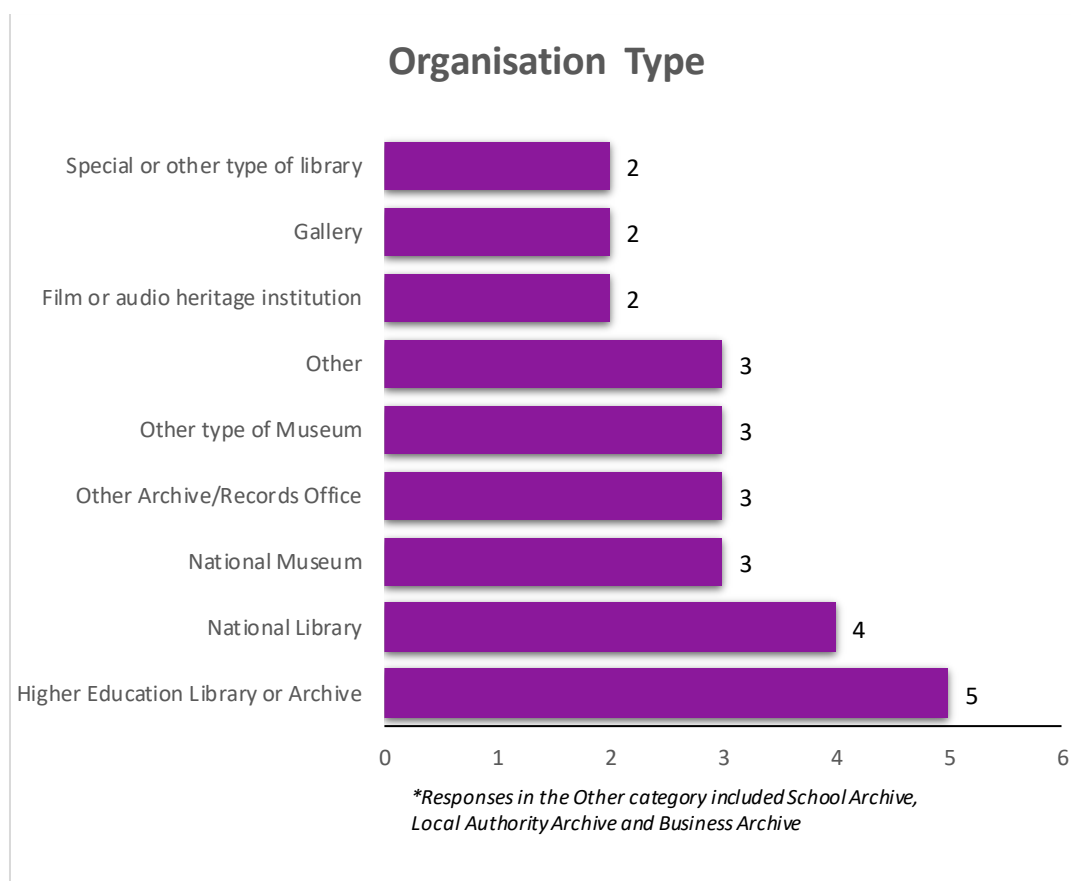
## 5: Research Findings

### 5.1 Survey Results

#### Question 1: What type of organisation do you represent?

The survey received a total of 29 responses, of these two were discounted on the grounds that they were not based in the UK. The first was from a National museum in Spain and therefore outside the scope of the study, which was restricted to the UK. The second was from a member of the National Writers Union, an American trade union for freelance writers. The responses from the remaining 27 respondents are reported here.

Figure 5-Question 1: What type of organisation do you represent?



Base 27

As can be seen in Figure 1, the highest number of respondents, 19%, were employed in Higher Education Libraries or Archives with 5 responses. The second largest category of respondents was National Library, with four responses. National Museum, Other Archive/Records Office, Other type of Museum and Special or other type of Library all received 3 responses each. The categories of Film or audio heritage institution and Gallery each received 2 responses. An 'Other' category was included to allow any participants that

felt their organisation didn't fit into the main categories to add their own organisation type, this category received 3 responses, 1 School Archive, 1 Business Archive, 1 Local Authority Archive. A final category, National Archive was included, but received no responses. A representative from the UK National Archives, was invited to participate, however they declined on the basis that orphan works is not an issue for them, because the works in their collection are protected under Crown Copyright.

#### Sample Size:

As seen in figure 1, responses between different organisation types were spread fairly evenly between the majority of categories, suggesting this could be fairly representative of each sector. The final sample size of 27 is small (6%) compared to the 450 UK organisations surveyed in Naomi Korn's (2009) investigation into orphan works. In terms of the overall size of the cultural heritage sector the sector size is likely to be in excess of the 2500 institutions and could be in excess of 5000 institutions<sup>24</sup>.

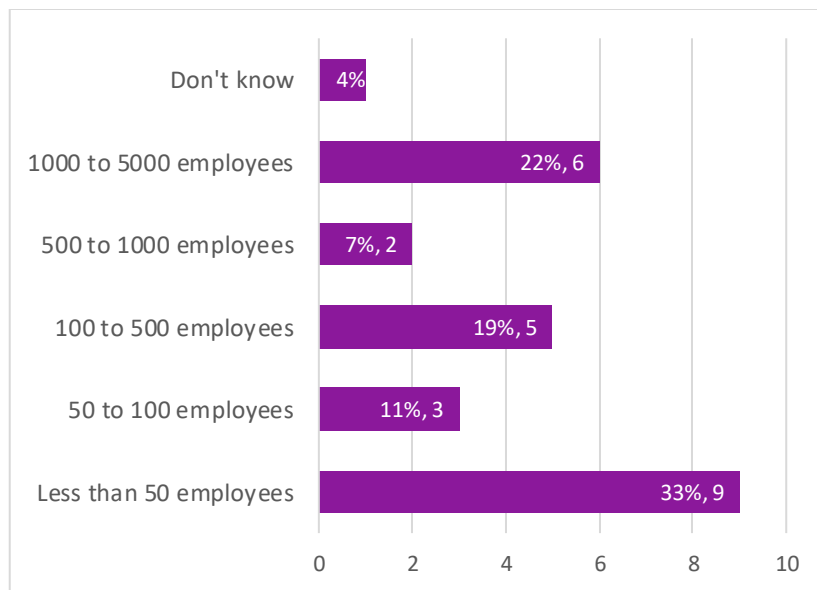
#### Question 2: What is the size of your organisation?

The second question asked respondents to identify the size of their organisation, as shown in figure two, 9 (33%) respondents worked for organisations with less than 50 employees, there were 6 (22 %) organisations with between 101 and 500 employees and 6 (22%) organisations with between 1001 and 5000 employees, 3 (11%) respondents worked for organisations with between 51 to 100 employees, and 2 (7 %) respondents worked for organisations with between 501 and 100 employees. One participant answered that they did not know the size of their organisation. The average organisation size was 100 to 500 employees.

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<sup>24</sup> The Museums the UK 2017 Report (Museums Association 2017) states that '[e]stimates suggest that the total number of museums in the UK is around 2,500, depending on how they are defined and counted'. Of these 2,500 this includes 27 National Museums. A report from Archives Hub, the 'landscape of archives in the UK' reports that there are around 2,500 'national institutions; special repositories such as university libraries, Oxbridge colleges and learned institutions; a network of county and local archive services which developed during the 20th century...museums which hold archives among or alongside their principal collections; business archives, and 'special interest' collections that have been actively developed on particular themes.' (Archives Hub, 2012)

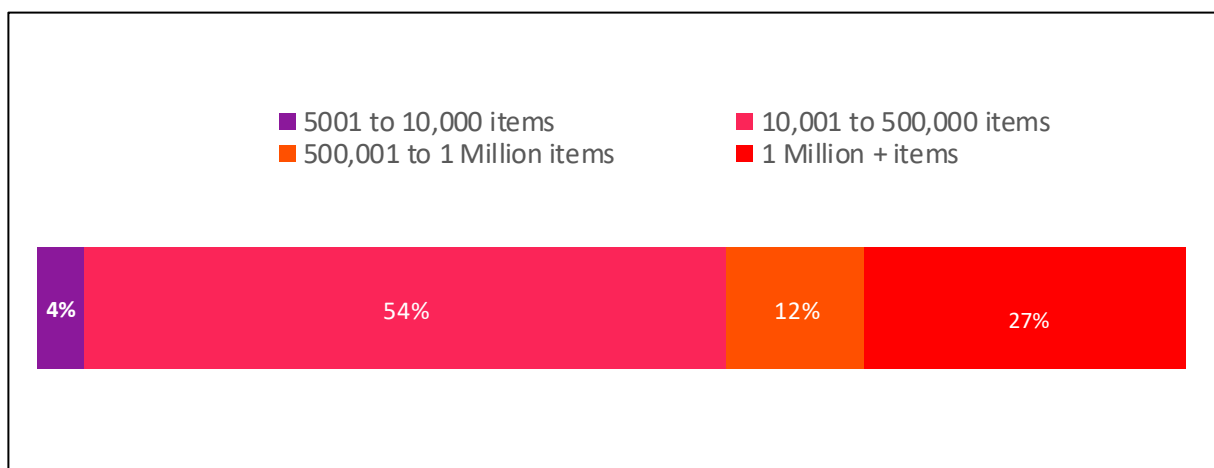
Figure 6-Organisation Size



### Question 3: What is the size of your collection?

Figure 3 shows the breakdown of collection size for all respondents. 54% (14) of respondents stated that their collection size ranged from 10,001 to 500,000 items, 27%(6) estimated that their collection size contains 1 Million + items, 12%(3) answered that their collection contained between 500,001 and 1 Million items, finally one (4%) respondent whose collections contained between 1001 and 5000 items. In addition to this one respondent stated they did not know the size of their collection. For context, the British

Figure 7-Collection Size



*iUsing a banded scale*

Museum has over eight million objects in its collection.<sup>25</sup> The average collection size was between 10,001 and 500,000 items.

<sup>25</sup> Source [https://www.nesta.org.uk/sites/default/files/dc2017\\_museums\\_factsheet.pdf](https://www.nesta.org.uk/sites/default/files/dc2017_museums_factsheet.pdf)

Analysis of the survey results gives an average organisation of between 100 and 500 employees, with an average collection size of between 10,000 and 500,000 thousand items.

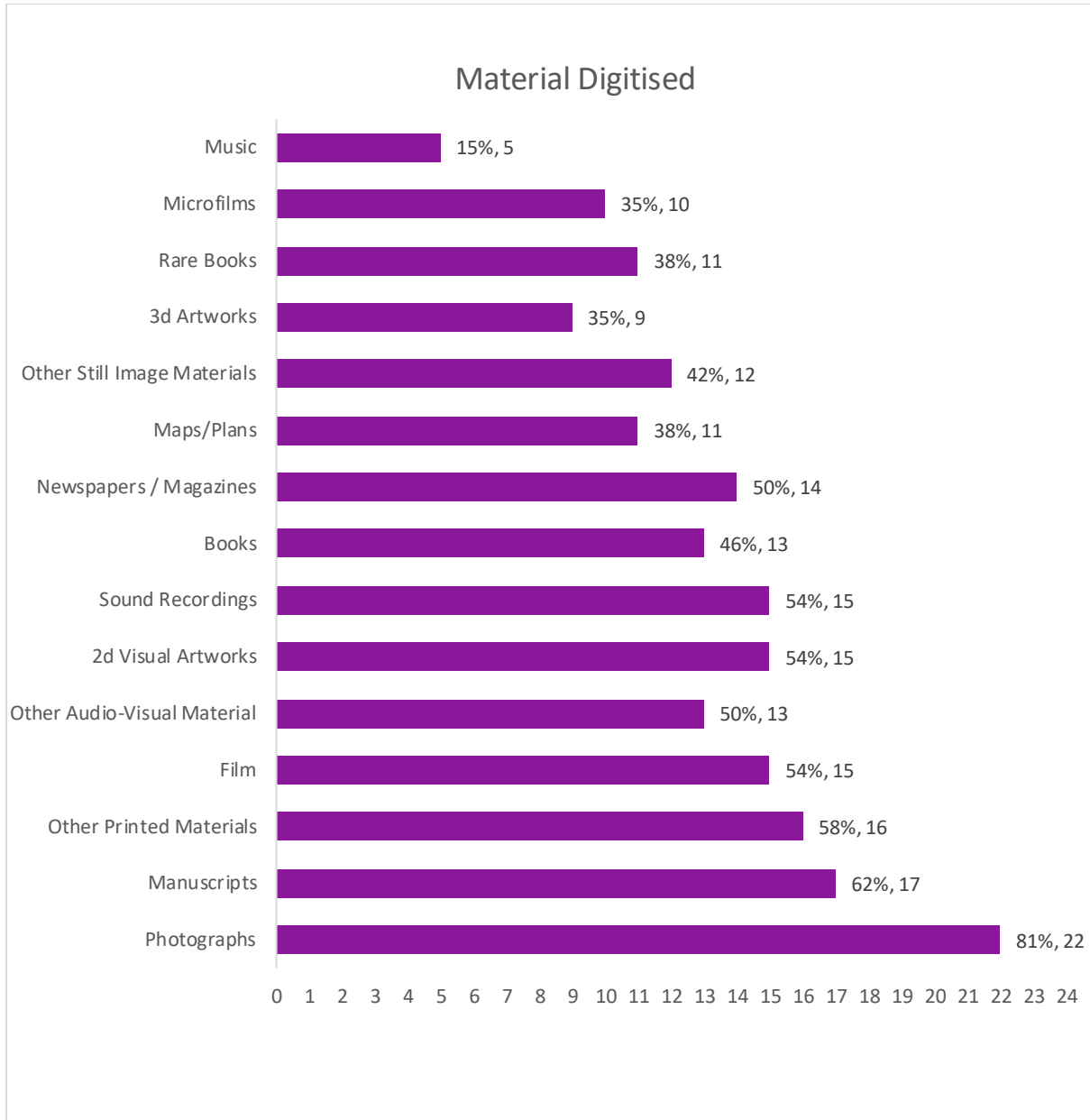
#### Question 4: What types of material has your organisation digitised or is planning to digitise?

Question 4 asked participants about the types of material that they digitise or planned to digitise. Respondents were asked to select all that applied from a list of materials, the results are summarized in figure 4 below.

Surprisingly the most commonly digitised type of material was Photographs, which was selected by 81% (22) of the 27 respondents, this is significant since the orphan works directive does not cover still visual images such as photographs, meaning organisations wishing to digitise orphan photographs would have to rely on the license scheme or a risk managed approach. Similarly, 2D visual artworks, another category of material that is not covered by the directive, was selected by 54% (15) of respondents, and the category of 'Other still image material' was selected by 42% (12) of respondents, while another category of visual material not covered by the exception, maps and plans were digitized by 38% (10) of all organizations. Of the works covered by the directive, 58% (16) of respondents indicated they digitise or plan to digitise 'Other Printed Materials' such as pamphlets, reports, or printed ephemera. Sound recordings (phonograms) were selected by 54% (15) of respondents as was Film. Newspapers and magazines were digitized by 50% of all organizations. Perhaps reflecting the fact that many respondents were from archives and non-library based organisations books and rare books featured less prominently amongst the materials selected for digitization by organisations, with 46% (13) and 38% (11). Microfilms were digitized by just over a third (35%) of all organizations and music was the least commonly digitized material, selected by only 5 (15%) organisations. On average respondents digitized seven different types, with some organisations digitizing as many as fifteen different types of material from their collections. The organizations digitizing the most types of material tended to be from the categories of National Library and National Museum, which is expected given their responsibility for collecting and preserving the nation's heritage and culture.



Figure 4- Question 4: What types of material has your organisation digitised or is planning to digitise?



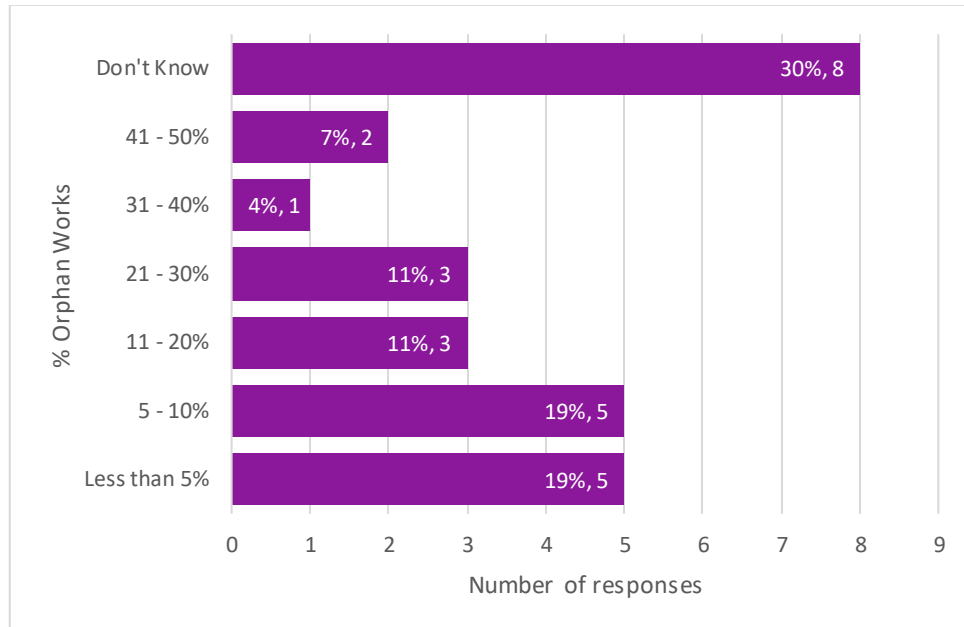
Base 27

**Question 5: Please indicate what percentage of your collection you know or estimate to be Orphan Works?**

Respondents were asked to give an estimate of what percentage of their collections are orphan works. 19% (5) of respondents stated that less than 5% of their collection comprised orphan works, 19% (5) of respondents claimed that between 5 and 10% of their collections consisted of orphans. 11% (3) respondents estimated that between 11 and 20% of their collections to be orphan works, and 11% (3) estimated that between 21 and 30% of their collections are likely orphaned. 7% (2) of respondents replied that between 41 and 50% of their collection is likely to be comprised of orphan works. One respondent estimated that between 31 and 40% of their collection is orphaned. Finally, 30% (8) of respondents stated

that they didn't know or were unable to provide an estimate as to what percentage of their collections are orphan works. The average percentage of orphan works in the collections was between 5-10% which matches the estimates made in Korn's 2009 study of orphan works.

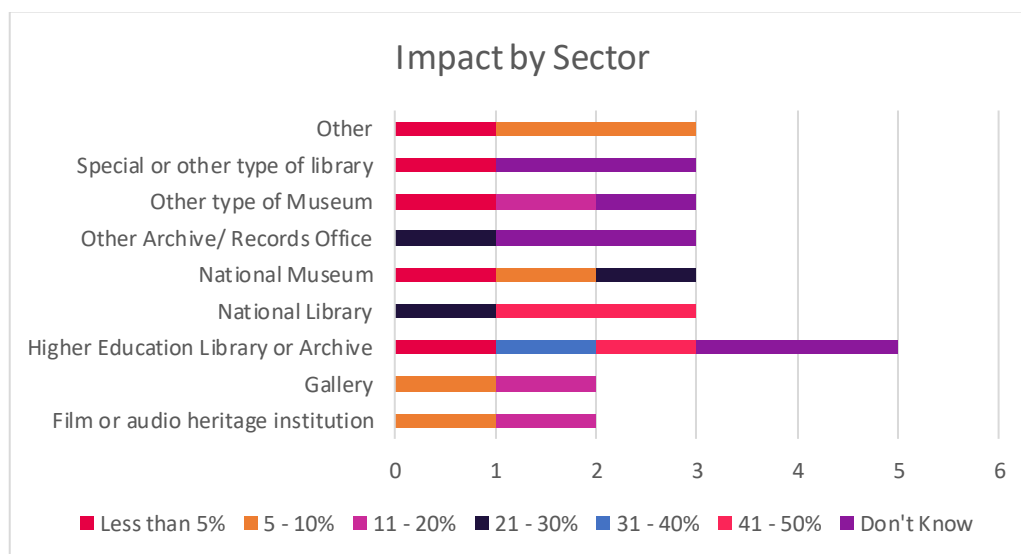
Figure 8-What percentage of your collection do you know to be orphaned?



Responses were provided using a banded scale (ie <5%, 5–10%, 11–20% etc).

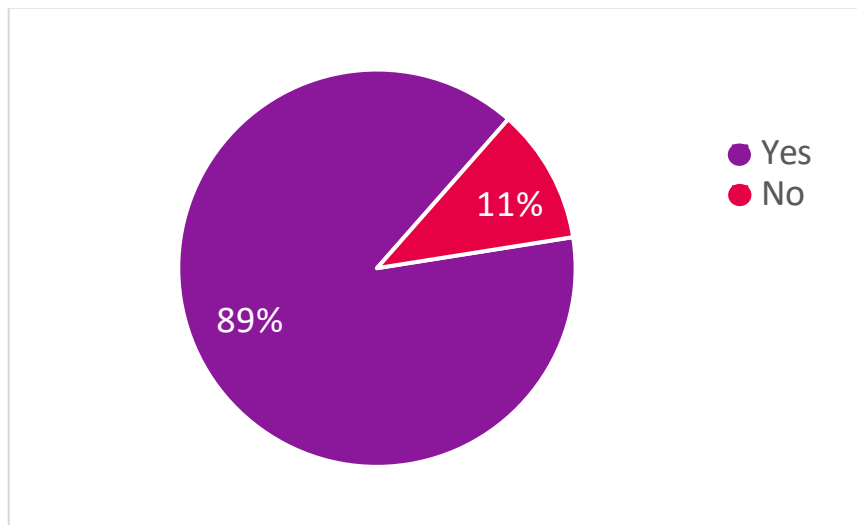
Analysis of the impact by sector shows that the organisations with the highest proportion of orphan works, are the national library and higher education libraries/archives.

Figure 9-Analysis by sector of % orphan works



## Question 6: Does your organisation have a Copyright policy or internal regulation related to copyright?

Figure 10-Question 6: Does your organisation have a Copyright policy?

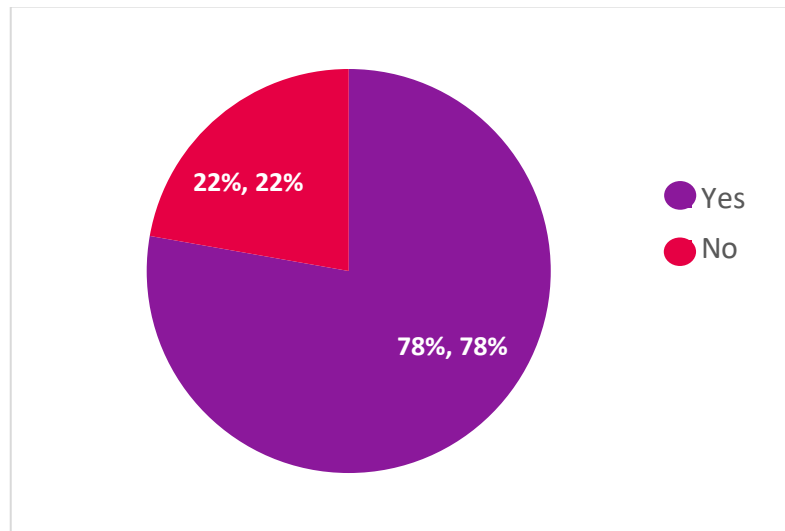


Base 27

Question 6 asked respondents if their organisation has a copyright policy or internal regulations related to copyright. 89% (24) of respondents stated that their organisation has a Copyright policy, whilst 12% (3) stated that their organisation didn't have any form of policy or internal regulations related to copyright. Further analysis shows that the lack of formal organisational policies or regulations on copyright does not affect the usage of the orphan works schemes, off the three respondents who stated their organisations did not have a copyright policy two had made use of the orphan works directive and one respondent in the Special or other type of library category had used both.

## Question 7: Does your organisation have a specific person in charge of dealing with copyright issues in particular?

Figure 11-Question 7 Does your organisation have a specific person in charge of dealing with copyright issues?



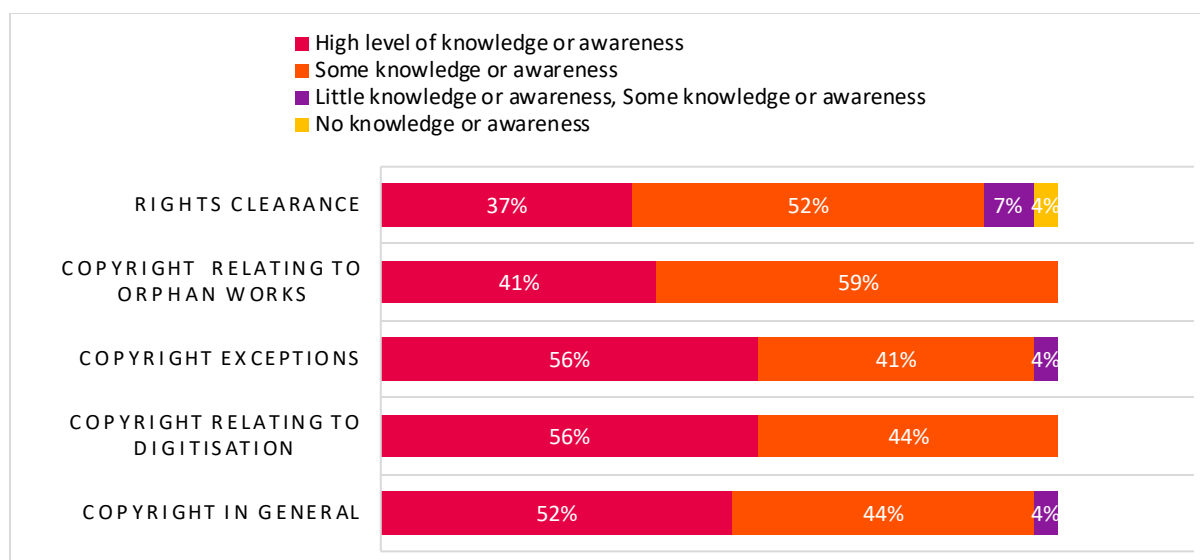
Base 28

Closely related to the previous question, question 6 sought to further understand the role of copyright in respondent organisations, asking whether participants had a specific person with specific responsibility for handling copyright issues within the organisations. Of the 28 respondents to the question 88% (22) that their organisation has a Copyright policy, whilst 22% (6) stated that their organisation didn't have any form of policy or internal regulations related to copyright.

## Question 8: Please indicate your degree of familiarity with the following aspects of copyright?

Question 8 used a series of 4 scale Likert questions to ask respondents to describe their level of knowledge of five aspects of Copyright: Copyright in General, Copyright Relating to Digitisation, Copyright Exceptions, Copyright Relating to Orphan Works and Copyright Relating to Rights Clearance. In doing so it sought to explore whether there was any link between the level of knowledge in relation to copyright and use of the orphan works scheme. The responses are summarised in figure 9 below.

Figure 12-Question 8: Please indicate your degree of familiarity with the following aspects related to copyright



Base 27

### Copyright in General

As figure 9 shows, roughly half of all respondents, 52% (14), claimed to have a high level of knowledge of copyright law in general, while 44% (12) stated they had some knowledge or awareness of copyright law and one respondent (4%) said they had Little knowledge or awareness of copyright in general". As would be expected those that stated they had a High level of awareness included representatives from National Libraries or National Museums but also included a respondent from a school archive. The one respondent who stated they had little knowledge of copyright law in general was from business archive.

### Copyright relating to digitisation

There was a fairly even split between respondents who stated they had a high level of knowledge of copyright relating to digitisation 56% (15) and respondents who stated they has stated that they had some knowledge or awareness 44% (12).

### Knowledge of Copyright Exceptions

On the question of knowledge about Copyright Exceptions 56% (15) of respondents answered that they had a High-level of knowledge or awareness of exceptions to copyright, whilst 37% (11) answered that they had Some knowledge or awareness, finally 1 (7%) respondents claimed they had Little knowledge or awareness of copyright exceptions.

### Knowledge of Copyright relating to Orphan Works

On the question of knowledge of copyright relating to orphan works 59% (16) of respondents stated that they 'Some knowledge or awareness' of copyright issues and legislation relating to orphan works, while 41% (11) had a 'High-level of knowledge or awareness'.

### Knowledge of Rights Clearance

As we have seen rights clearance is a significant part of the digitisation process and it's during this process that orphan works will be identified therefore it is important to

understand the level of knowledge respondents have about this process. Of the 27 qualified respondents only 37% (10) stated they had a high level of knowledge of rights clearance.

Finally, 41% (11) of respondents stated that they had 'Some knowledge or awareness' of rights clearance, 48% (13) had a 'High-level of knowledge or awareness' 2 (7%) respondents stated that they 'Little knowledge or awareness', and 1 (4%) respondent claimed to have 'No knowledge or awareness' of rights clearance. It was speculated that lack of copyright knowledge may be a reason for not using the schemes, however analysis shows that the majority of those who had not used the Directive had a high level of knowledge or orphan works legislation. In terms of knowledge of rights clearance, the majority of respondents who had low or some knowledge of copyright surrounding rights clearance had not used the Directive or the license, suggesting this could have been a barrier. Of these there was a mix of responses to the question about organisational approaches to digitization, suggesting that that the individual's knowledge of copyright has significant impacts much on digitisation. (see Q10)

### Question 9: Has the presence of in-Copyright material in your collections ever impacted upon a planned digitisation project? (Including orphan works)

Question 9 a multiple-choice question asked about what impact the presence of in-copyright material had on planned digitisation projects, respondents could select all that applied. The question clearly illustrates that need to obtain permission for the digitisation and making available of works can significantly impact upon the material that eventually is made available, highlighting that in many instances material remains unavailable as a result of lack of permission or the need to obtain permission. Responses are summarised in figures 10 & 11.

59% (16) of respondents stated that they would only make cleared material available after undertaking rights clearance. 52 % (14) indicated that in-copyright material would be digitised but not made available; suggesting that any un-cleared material was redacted or removed after digitisation. Just over a third of respondents, 41% (11), said they had made all material available able using a risk management and takedown strategy, whereas 26% (7) respondents stated that the in-copyright material was removed, and only public domain material was digitised. Two, respondents stated that they had to abandon a project due to the presence of in-copyright material. Finally, there was one response stating that there was no impact and one response stating a mix of the other choices.

Figure 13- Has the presence of in-Copyright material in your collections ever impacted upon a planned digitisation project?

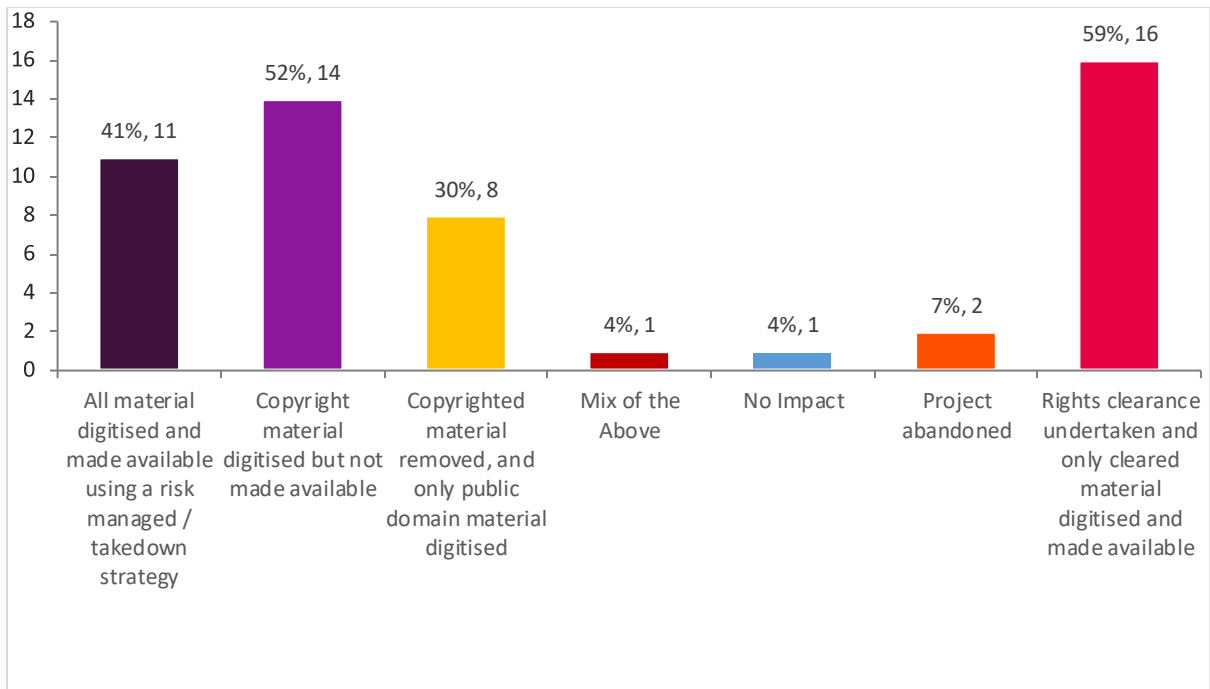
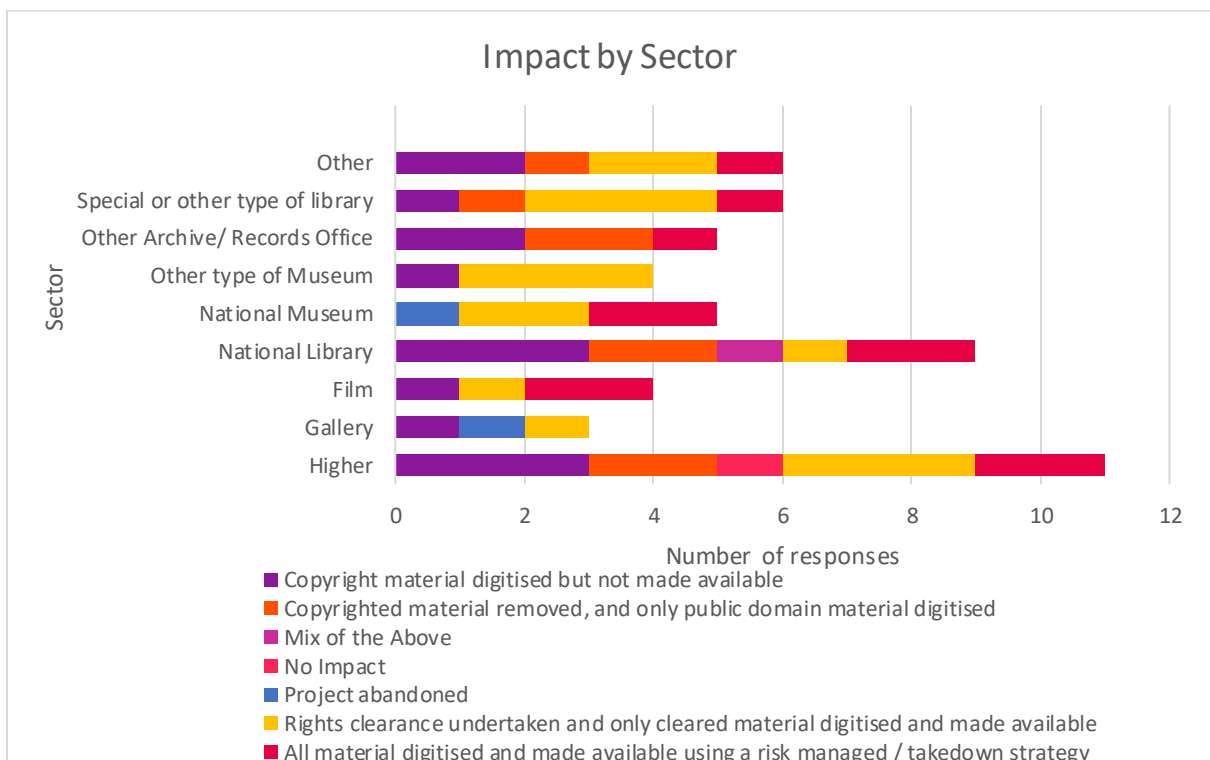


Figure 11 below shows the responses by sector; the Higher Education sector shows the widest range of impacts due the high number of respondents in that category. Of the two respondents who had abandoned projects due the presence of in copyright material, one was from the National Museum sector and the other the Gallery sector.

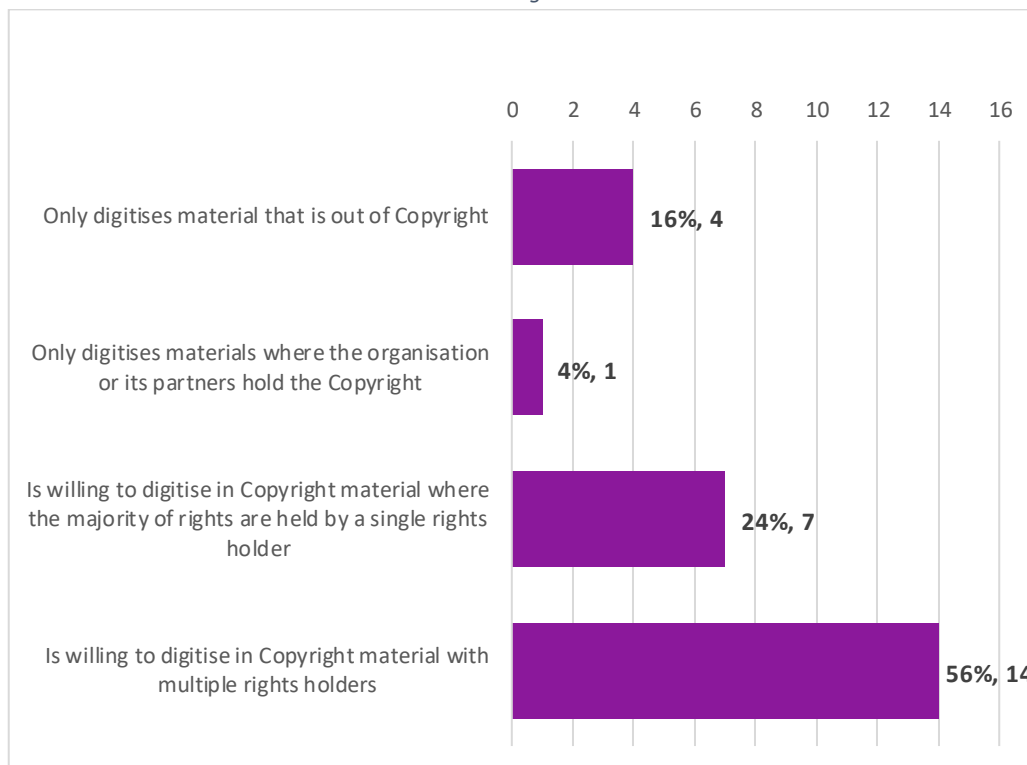
Figure 14-Impact of in Copyright material on digitization projects by sector



## Question 10: Which of the following approaches best describes your organisations approach to digitisation?

Question ten asked respondents about their organisations approach to digitisation in terms of the level of rights clearance they were willing to undertake. There were 26 responses to this question, with one respondent not providing any answer. The responses summarized in figure 12, show that just over half, 56 % (14) of respondents are willing to digitise in-copyright material with multiple right holders, whereas only 22% (6) of respondents stated they were only willing to digitise in-copyright material where a single rights holder holds the majority of rights in the material. One respondent replied that their organisation only digitises material where the organisation or its partners hold the copyright. Finally, 16% of respondents stated they only digitise out-of-copyright /public domain material. Of these 4 respondents all stated in response to question 11(see below) that lack of staffing for rights clearance and the length of time it takes for right holders to respond as barriers to digitisation.

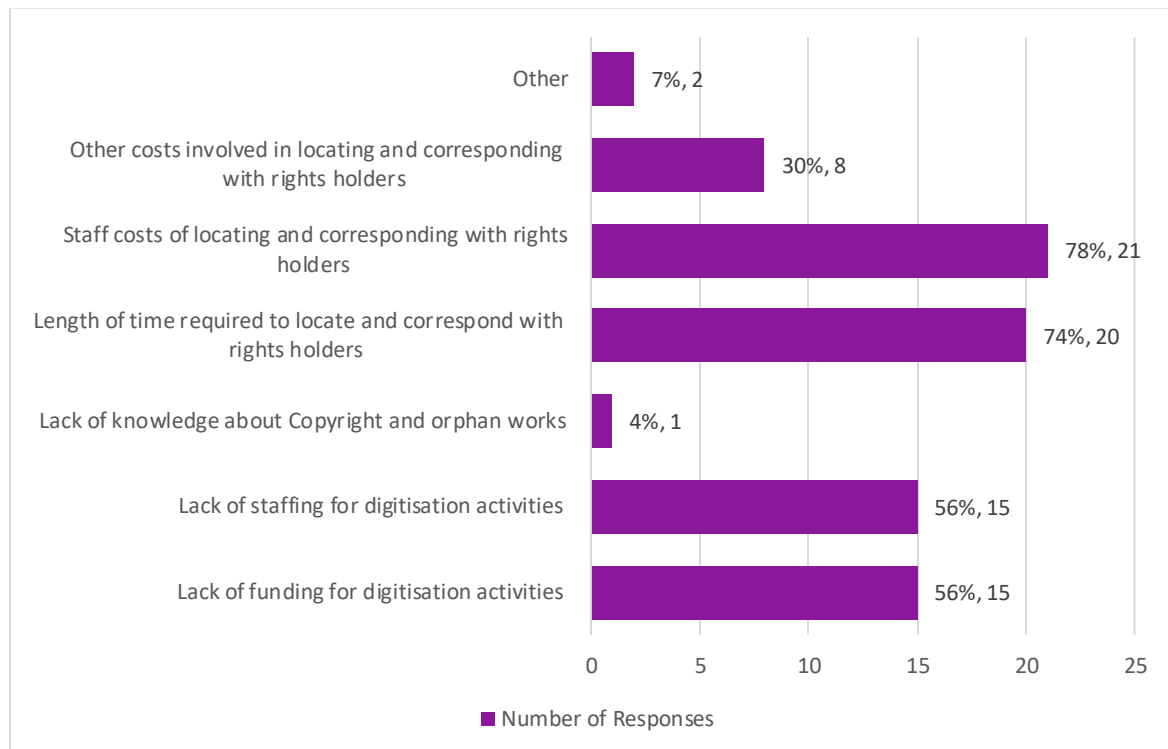
Figure 15- Question 10: Which of the following approaches best describes your organisations approach to digitisation?





## Question 11: What are the main reasons that prevent your organisation from digitising orphaned and other material in your collections?

Figure 16-Question 11 Barriers to digitation of orphan works



Base 27

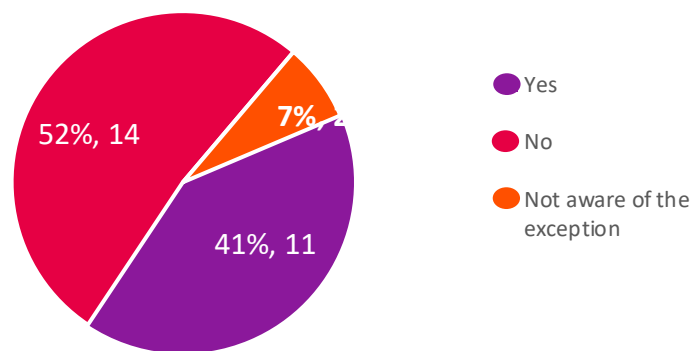
Question 11 used a multiple-choice question to ask respondents about the barriers they faced to the digitisation of orphan and other works. Respondents were given a choice of six potential barriers, identified through the literature review, a seventh option allowed participants to add their own reasons and respondents could select all that apply. The responses clearly show that transaction costs, the cost of locating and corresponding with right holders, are the main obstacle to the digitisation of in-copyright materials, including orphan works. 78%(21) of respondents cited staff costs of locating and corresponding with right holders as a barrier and 74% (20) stated that the length of time required to locate and correspond with right holders was a barrier. Over half of all respondents 56% (15) stated that lack of staffing and lack funding for digitisation were a major barrier, while 30% (8) of respondents cited Other costs involved in locating and corresponding with right holders as a major barrier to the digitisation of orphan works and other in copyright material. Finally, respondent, from a Business Archive, cited lack of knowledge about copyright and orphan works as a barrier to digitisation and two respondents indicated 'Other' reasons, although the survey did not provide a means for stating what these were.

## Question 12: Has your organisation ever digitised orphan works material under the Orphan Works exception?

Question 12 asked respondents whether they had used the orphan works exception to make orphaned material available online. 14 (48%) respondents said they hadn't used the exception to digitise material, 11 (41%) had used the exception. Two respondents, one from higher education and one a County Council Museum stated they were not aware of the exception.

The organisations that had used the exception included a National Library

Figure 17-Question 12 Has your organisation digitised orphan material under the orphan works exception?



## Question 12A: Name of orphan works digitization project:

Table 7-Project Name

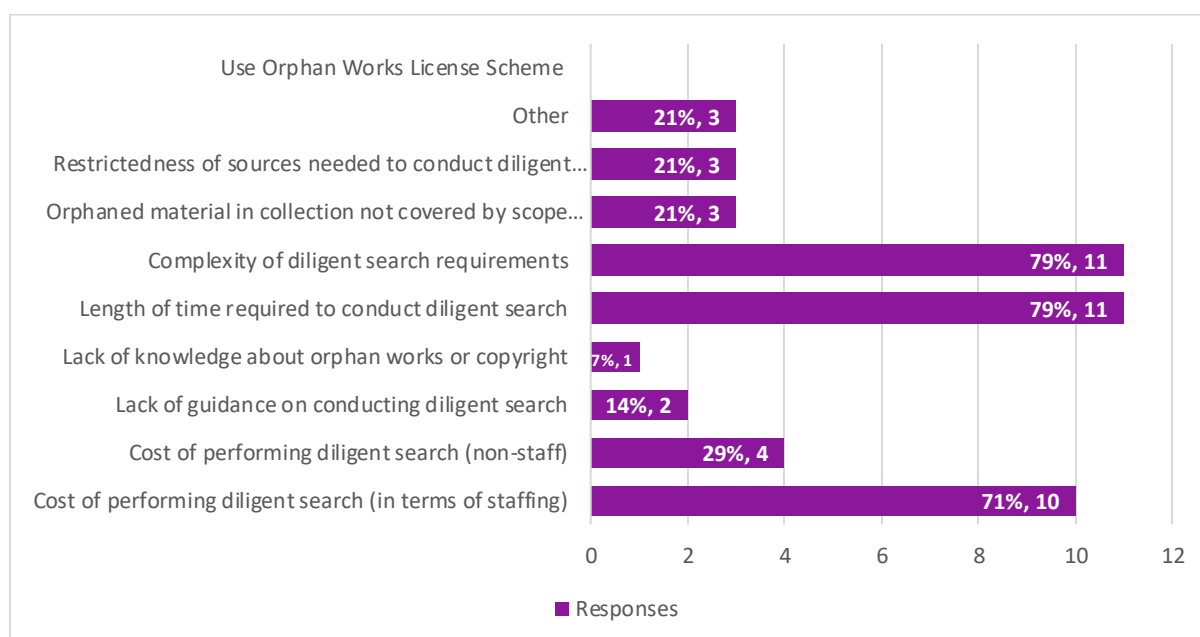
Project
Jeremiah Horrocks Institute Astronomy Collection
Architecture and Place
Archives & Access project
Unlocking Film Heritage
Two contact sheet prints of photographic portraits of the art critic Brian Sewell
Europeana WW 1, Spare Rib
Divided Society
Veronica Nisbet's WWI scrapbook

### Question 13: If you have not digitised Orphan Works using the exception, please indicate the reasons why.

Question 13 asked respondents who had answered the previous reasons for not using the Orphan Works exception; the results are shown in figure 14. The responses clearly show that the Directive’s diligent search requirements are a barrier to its uptake. 79% (11) of respondents cited the complexity of diligent search requirements and the length of time required to undertake diligent search as the main reasons for why they hadn’t used the exception. 71% (10) stated that staff costs relating to diligent search were an obstacle, perhaps illustrating why many organisations often rely on voluntary staff to undertake such work. 29% (4) of respondents cited non-staff costs, such as subscriptions to services like Ancestry.com, as barrier. 21% (3) cited the lack of availability of sources for diligent search as obstacle, as identified earlier some sources may require a subscription, and some sources may only be accessible in person. 21% (3) of respondents also stated that the material they wished to digitise was outside of the scope of the exception. A further three respondents provided responses in the Other category:

Question 13: Other Responses.	
No call as yet for such digitisation	
Conducted our own due diligence and took risk managed approach internally without the need to use any existing schemes.	
Practically all of the orphan works in our collection originate outside the UK - mainly in countries in the former Soviet Union. They were created in the period between the two world wars and searching for creators is virtually impossible.	

Figure 18: Question 13 reasons for not using the orphan works exception

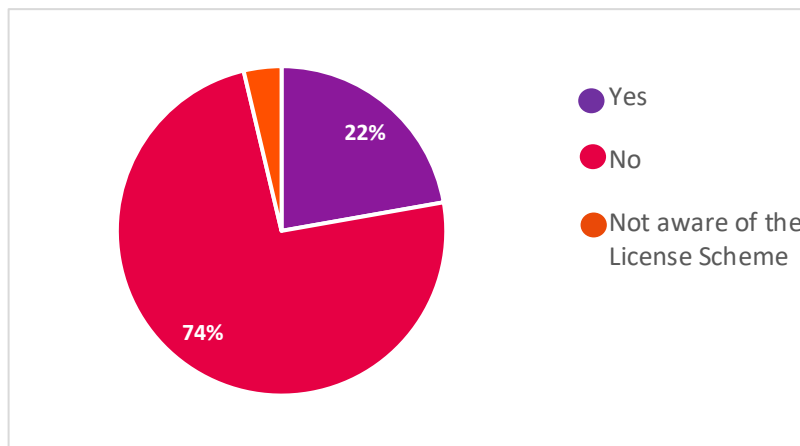


Base ii

## Question 14: Have you ever made orphan material in your collection available using the IPO Orphan Works Licensing scheme?

Question 14, figure asked about respondents if they have made use of IPO’s Orphan Works Licensing Scheme (OWLS). Of the 27 respondents only 22% (6) stated they had used the scheme, with 74% (20) of respondents stating they hadn’t used the scheme and one respondent (D) stated they were not aware of the scheme. Clearly, the scheme has had a low adoption rate amongst cultural heritage institutions as evidenced from the usage statistics stated in the previous section.

Figure 19- -Question 14- Have you used the IPO Orphan Works License scheme?

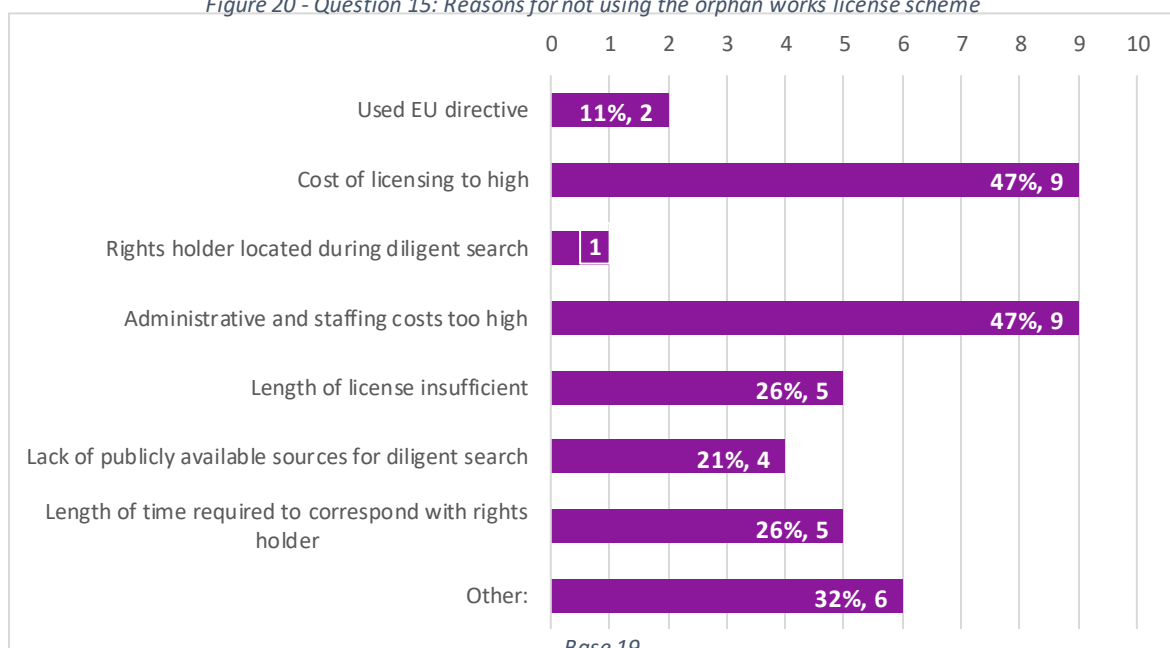


Base 27

## Question 15: If you have not used the Orphan Works License scheme to digitise orphaned material in your collections, please indicate the reasons why:

Following on from the last question about use of the Orphan Works License Scheme, question 15 asked respondents about their reasons for not using the license scheme.

Figure 20 - Question 15: Reasons for not using the orphan works license scheme



Base 19

Respondents could select up to ten reasons, with the option of specifying their own reasons via an 'Other' category. There were 19 responses to this question. As figure 17, shows the main reasons why the surveyed organisations have not used the license scheme is due to the cost of licensing and associated administrative costs, such as registering for a license are too high. A total of 47% (9) of respondents stated that the cost of licensing was too high; the same number stated the administrative and staffing costs were too high. Interestingly, only 28% (5) of respondents stated the length of license was insufficient and the same number stated length of time required to correspond with rights holders. 22% (4) stated the lack of publicly available sources for diligent search was a reason for not using the license. Finally, there were 8 comments in the 'Other' category' summarised below.

*Table 8-Question 15 Responses in the Other Category*

Comment
No call for digitisation as yet
Isn't the licence only applicable on a local level, so globally publishing the work online is not covered which is what we want to do. Easier to follow our on approach.
Relevance to non-UK/non-EU material
We decided the items must be out of copyright (WW1 photos)
We prefer to take a risk-managed approach, as it's a more cost-effective use of public funds.
Restricted in terms of global publishing
The licensing platform only allows applications for up to 30 works at a time, which is incompatible with the scale of digitisation that we operate at.

### Question 16: What would make you more likely to use the license scheme?

Question 16 asked respondents, to say what would make them more likely to use the OWLS scheme. A free text question was used to attract the widest range of responses. In total, there were 15 responses to this question, table 3, below displays the comments grouped by theme. As the table shows the majority of comments surrounded three main themes; the application process, the cost of licensing, diligent search requirements, showing that institutions clearly consider these the main barriers to use of the license scheme.

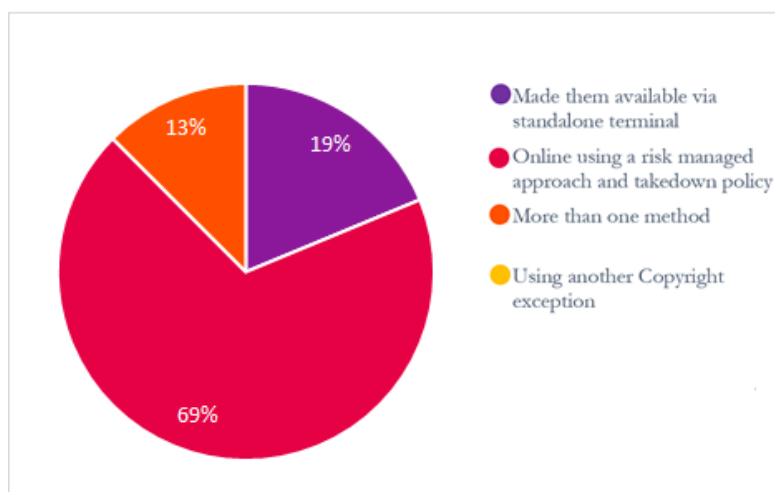
Table 9 -Summary of responses to Question 16: What would make you more likely to use the orphan works licensing scheme

<b>Application Process</b>
Less bother to use it. I did start on it, but found the questions too onerous (for dozens of photos)
Clearer guidance
For it to be made easier
Ability to bulk upload data
Bulk upload facility
<b>Length of License</b>
International coverage combined with long-term licenses for large groups of photos
The 7-year period much too short (infinite wanted)
Longer licence
<b>Scope of License</b>
International coverage combined with long-term licenses for large groups of photos
The licence (to be made) more reaching
<b>Costs</b>
Reduced costs
Small funding grants
Lowering costs of applications (for cultural heritage institutions); reduction of licensing rates for certain uses
Zero-cost licences for non-commercial online publication of works,
Lower/no cost of licensing
<b>Diligence</b>
Lower bar for diligent search
Ease of finding rights holders
Fewer requirements for diligent search, including distinguishing based on age of works.
If we suddenly got lots of claims from reventant creators / estates, we might think about using the licensing scheme. But because of the diligence of our research, and the thoroughness of our protocols, we have not so far had such a claim.
Simpler diligent search requirements
<b>Other</b>
More likely to use the exception
More suitable to web publishing

If we had a general library exemption, such that a simple and efficient take-down policy would protect us from substantial infringement claims

### Question 17: If you have digitised orphaned material but haven't used either the EU exception or the UK licensing scheme how have you made them available:

Figure 21- Question 17: If you have digitised orphaned material but haven't used either the EU exception or the UK licensing scheme how have you made them available:



Question 17 asked respondents a multiple-answer question about what methods they have used to make orphaned material available to patrons, if not using the EU exception used or OWLS scheme. Of the 15 responses to this question, 69% (11) of respondent said they used a risk management and takedown policy, 20% (3) of respondents stated they made them available via standalone terminals on the premises and one respondent used a combination of both methods. No respondents stated they had made orphan works available using another copyright exception.

One respondent, a film heritage institution, provided further comment stating:

“Since introduction of EU and UK schemes we've only really been focused on clearances for Unlocking Film Heritage (using the EU exception). We have titles that we've treated as "orphan" prior to 2014 changes. We do still use risk managed approach for some titles (where they do not fit as Orphans) and some underlying rights.”

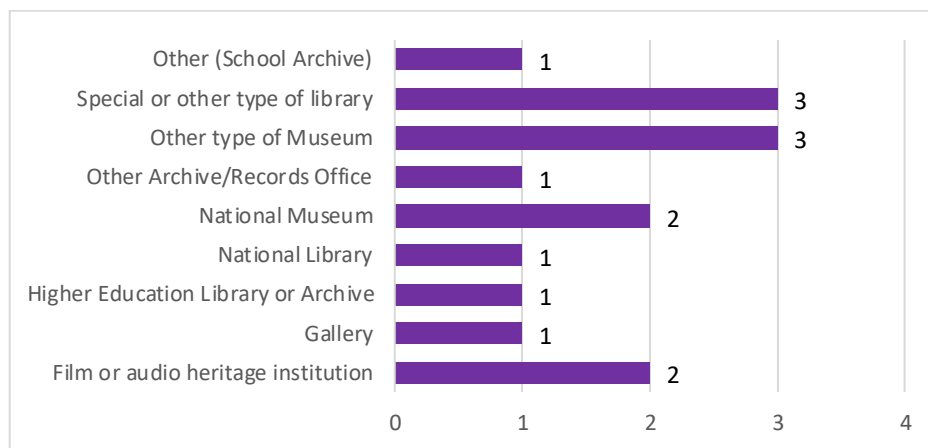
### Question 18 a-l: Project details and costs

Question 18 asked respondents to provide details of a recent orphan works digitisation project, this was requested in order to try and compare the time, cost and number of works digitised under the exception or license scheme. Respondents were asked to provide the number of items selected or included in the project, an estimate of the staff time spent

undertaking due diligence, an estimate of non-staff costs involved rights clearance, including fees paid for non-public databases required for diligence search (e.g. Ancestry.com subscription fees), the percentage of orphaned works following diligent search, percentage of works found to be in the public domain after diligent search, the percentage of works registered under IPO licensing scheme, the number of number of takedown requests, the number of non-orphaned works where permission to digitise was denied by the right holder and the overall project cost(estimated), there was also an option for respondents to leave further comments.

In total fourteen respondents (52%) provided details, due to the varying nature of organisations responses varied considerably depending upon the question and the nature of the project. Due to the way some respondents answered the questions it is difficult to provide a precise comparison, furthermore the range of works digitised, enormously from single works to over than a million works.

Figure 22 -Responses to question 18 grouped by sector



Base:14

#### Question 18b: Total number of items included in the project

13 respondents were able to provide the number of items included in the project they specified, the number of items ranged between one and 1.5 million, with the average number of items digitised totalling 121,382 (Median 300). The percentage of works found to be orphaned after diligent search/rights clearance varied from 0/1% to 100% with the average percentage estimated to be 8% (median 0.1%).

#### Question 18c: Estimated time (staff hours) spent searching for rights holders:

13 respondents answered, although one replied they were unable to provide an estimate. The time spent ranged from 16 hours for two items to 3000 hours for 53,000 items with an average 25 items per hour time spent per item ranging from to a maximum of 48 hours for one item. One respondent said they spent

“Maybe an hour a month on average. Spend little time actively searching.”

Another simply replied “Lots”.



Question 18d: Estimated cost (non-staff) of obtaining rights clearance (including any fees paid for access to non-public databases/ sources whilst searching for rights holders)

Several respondents stated they have zero non-staff costs for rights clearance. With the exception of one respondent that stated costs of £40,000 (for 53,000 items) the average cost ranged from £300 to £500.

Other non-specific responses included:

“Quite a lot as well - I had one volunteer one day a week to help.”

“Nothing worth mentioning”

“Volunteer conducted search”

“Average is 4 hours per item with an expert.”

“HLF funded”

Question 18e: Percentage of works found to be orphaned after diligent search/rights clearance

The percentages given ranged from 100% to less than 1%. Some respondents stated the actual number of orphan works rather than the percentage. One respondent referred to an article they had written about their organisation's orphan works digitisation project, based upon the data in that article, the percentage of orphan works for that project was 45%<sup>26</sup>

Question 18f: Percentage of works found to be in public domain after diligent search/rights clearance

The percentages given ranged from 0% to 100%.

Question 18g: Percentage of works registered under UK IPO Orphan Works licensing scheme.

54% of the 13 respondents who replied to this question stated they had not licensed any works using the IPO Orphan Works license scheme. Overall 81% of all respondents (22) had not used the license scheme. Of these one stated that it didn't exist at the time they undertook digitisation. Of those that had used the license scheme, the largest number of works licensed was 294 (98% of 300 works). One respondent reported they were still in the process of applying for a license.

Question 18h: The number of takedown requests

Ten out of the 12 respondents stated they had zero takedown requests; the remaining two respondents had received one takedown request each.

Question 18i: The number of works where permission to digitise was denied following correspondence with the rights holder

The highest figure given by respondents was 60 works (2% of 3000) closely followed by 51 works (out of a total of 10,510 (representing 0.5% of the total number of works digitised). 5 respondents reported 0 works where permission was denied. One respondent stated the

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<sup>26</sup> Callaghan (2017, 8)

project was still in progress and one respondent stated that: “We've never asked for permission to digitise, only to publish online.”

#### Question 18j: Overall cost of the project (actual or estimated)

Costs varied significantly depending upon the size of the project. Costs ranged from £20.24 for two items to £2 Million for (1.5 Million items). Depending upon how the costs are reported we can estimate the average cost per item to be between £178 and £1.33. The figures show that the greater the number of items digitised the lower the cost per item.

#### Question 18k: Any further comments

A number of respondents provided comments which are given below:

“Copyright was one of the considerations when selecting material for inclusion in the project. Consequently, those items that were considered to have a high risk were not included meaning that the copyright clearance stage was simpler. Ultimately it meant that the likelihood of IP owners responding negatively to our request to use their material was minimal and only low risk orphaned works were considered.”

“Digitisation has not been project-led, but collection-based”

“This is just one example, where we tried to locate each and every copyright holder we could identify. It's unusual for us to do that.”

“The image digitised was from the Imperial War Museum, but as far as they were concerned it was an orphan work. 2 days after paying the licence fee I heard from a nephew in Australia.”

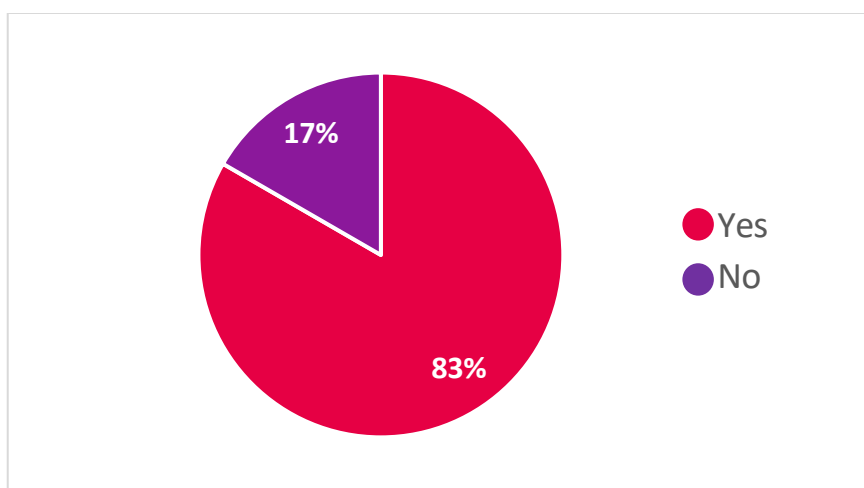
“We haven't done any digitization of orphan works, so it was difficult to provide a useful example!”

“The rules are still being written in this whole area and it feels like there's still no definitive way to present material with no obvious copyright holder to the public.”

#### Question 18l: Does your organisation have a takedown policy for orphan material?

Out the 18 responses to this question 83% (15) said they used a takedown policy for orphan material, and 28% (3) said they did not. The remaining 9 did not provide any response.

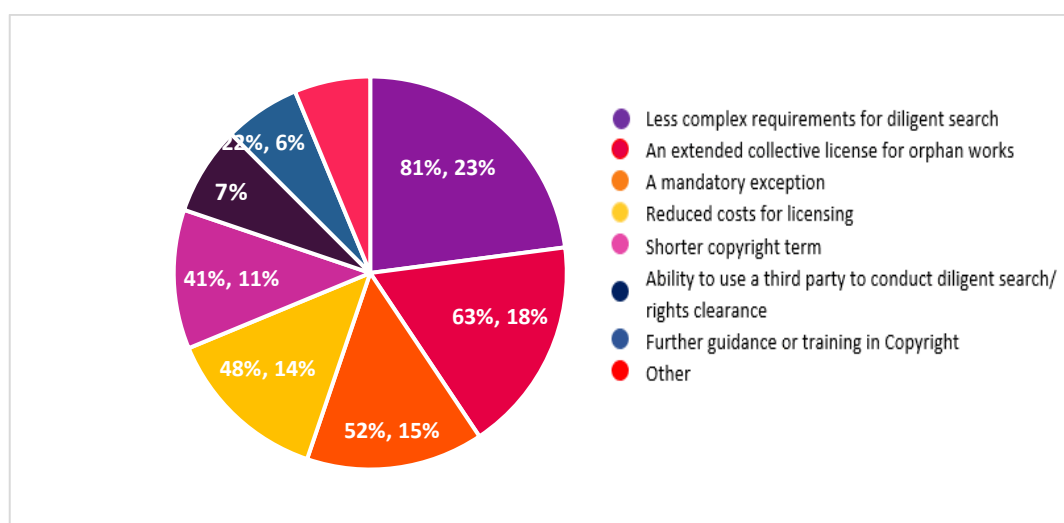
Figure 23-Question 18m: Does your organisation have a takedown policy for orphan material?



Base 18

### Question 19: Which of the following would make it easier for your organisation to digitise orphan works in your collection?

Figure 24-Question 19: Which of the following would make it easier for your organisation to digitise orphan works in your collection?



Base-27

Question 19, a multi-answer question asked respondents about what would make digitisation of orphan works easier. Respondents were provided with seven options, as well the option to specify their own via an 'Other' category. The majority of respondents, 81% (22), said that less complex requirements for diligent search would aid the digitisation of orphan works. An extended collective licensing scheme for orphan works was the second most favoured option, chosen by 63% (17) respondents. Roughly half of all respondents, 52% (14), indicated that a mandatory exception, for orphan works or general cultural heritage digitisation, would make it easier to digitise orphan works. 48% (13) were in favour of reduced licensing costs would help them to digitise more orphan works. 41% (11) of respondents were in favour of a reduced copyright term, additionally there were two comments from respondents stating they were in favour of aligning the copyright term in

unpublished works and audio-visual works. 6 respondents (22%) said the option to employ a third-party to conduct rights clearance and/or diligent search would be of benefit. 19% (5) of respondents said further guidance or training on copyright would make it easier to digitise orphan works.

There were seven comments in the 'Other' category, covering a range of topics. Two respondents mentioned changes to legislation:

"There should be an orphan works exception, pure and simple."

"Legislative changes to reduce the burden on archive services and give people access to material which is locked away. We shouldn't have to rely on the risk appetite of individual organisations to access heritage."

Two further respondents mentioned changes to copyright legislation, specifically mentioning the duration of copyright in certain categories of work:

"Simplified duration rules for audio-visual works"

"Aligning term of copyright for unpublished works with published works (abolishing the 2039 rule)"

One respondent mentioned extended collective licensing, saying

"Extended collective licence for out of commerce works"

Finally, there were two comments regarding the Orphan Works License Scheme:

"A less rigid template from the IPO"

"Seven years is no use for a book or website - it imposes more work in 2024. Many questions (e.g. the first, "Is there more than one right holder in the work?") are unanswerable, particularly as if it is an orphan work we think there are no rights holders and zero cannot fit in 'more than one'."

## 5.2 Analysis

### 5.2.1 Extent of the orphan works problem

The average percentage of orphan works in respondents' collections was estimated to be between 5 and 10%. Based upon the average collection size of between 10,001 and 500,000 items, we can estimate the average number of orphan works in the collections of respondents as being between 500 and 50000 items, a median average of these figures gives a total of 25250 orphan works. However, we know that the overall figure is likely to be far higher, considering that organisations such as the British Library holds over 150,000,000<sup>27</sup> items and estimates that the number of orphan works in their collections to be between 41 and 50%. Based upon information collected about the collection size of

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<sup>27</sup> Source: British Library: About Us: Facts and Figures. <http://www.bl.uk/aboutus/quickinfo/facts/>

respondents’ organisations the total number of items contain in their collection could be round 208.5 million, which would give an average number of orphan works of between 10.4 million and 20.8 million items, if we take the highest estimate percentage of orphan works provided by respondents (41-50%) then the number of orphan works could be between 85.5 million and 104.2 million. The latter figure is closer to the number of orphan works estimated by the IPO, stated in its press release for the launch of the Orphan Works License Scheme<sup>28</sup>.

*Table 10-Average percentage of orphan works based upon average collection size*

Collection Size		Median
Total number of items	208,552,000	250,000
5% Orphan works	10,427,600	12,5000
10% Orphan works	20,855,200	25,000

### 5.2.2 How has the presence of orphan works in the collections of cultural heritage organisations impacted upon their digitisation plans?

Based upon the survey respondents we know that 18% of respondents would not engage in digitisation of any copyrighted material, where rights clearance is required, while 30% are only willing to digitise public domain. Therefore, we can say that orphan works pose a problem to at least 30% of respondents; furthermore, we know that two respondents have abandoned projects due to the presence of copyrighted material (including orphan works).

### 5.2.3 How widespread is the adoption of the schemes by UK cultural heritage institutions?

#### Use of the exception:

The survey data shows that 11 of the 27 (40%) organisations that responded to the survey had used the exception, however an analysis of the EUIPO Orphan Works Database, shows only ten UK organisations listed, as shown in table 2. Looking further at the responses to subsequent questions, we can see that several of the organisations who answered yes have made works available using a risk managed strategy. Therefore, we can adjust the total number of survey respondents who have made orphan works available using the exception to three, representing 11% of all survey respondents. Overall the usage of the exception by UK Cultural Heritage Institutions amongst respondents

<sup>28</sup> <https://www.gov.uk/government/news/uk-opens-access-to-91-million-orphan-works>

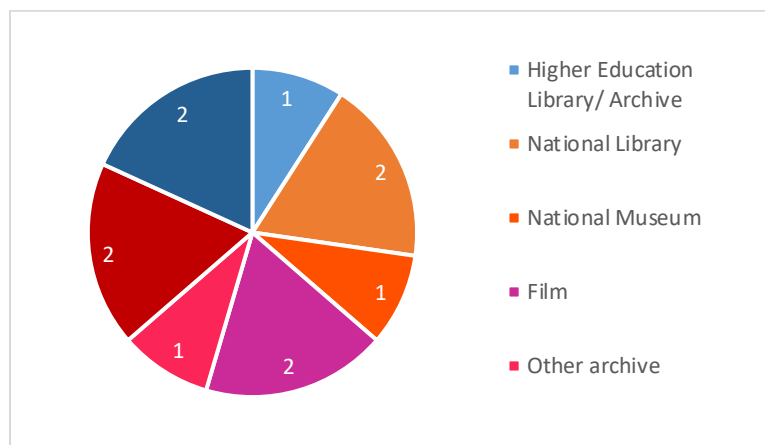
### Use of the License Scheme:

Similarly, the Orphan Works License Scheme has had limited adoption amongst survey respondents with only 6 having applied for a license, and of these one stated that their application was still in progress. In terms of what types of material licensed, the majority of the material described by respondents who had used the license scheme can be classed as still visual art, including photographs and drawings, which are not covered under the exception. As noted earlier an examination of IPO Orphan Works Register shows that about 72% of licenses granted by the IPO<sup>29</sup> are in the category of Still Visual Art. This suggests that even if not widely facilitating mass digitisation, the license scheme is at least filling a gap left by the Orphan Works Directive.

### 5.2.4 Has the current legislation made it easier for UK cultural heritage institutions to digitise and make available online orphan works in their collections?

The survey data shows that only 11 respondents stated they had used the exception, whereas 14 respondents stated they had not and 2 further respondents were unaware of the exception, meaning that in total 16 organisations had not used the directive. The survey does not tell us whether those that have used would have proceeded with their digitisation of orphan works without recourse to either scheme, this will be examined in the follow interviews. However, it is clear that the majority of respondents prefer to rely on a risk managed strategy, suggesting that this method is more cost effective and efficient. The sector analysis shows that no one sector dominated the usage, with four sectors replying that they had used the exception.

Figure 25- Sector analysis of respondents who used the exception



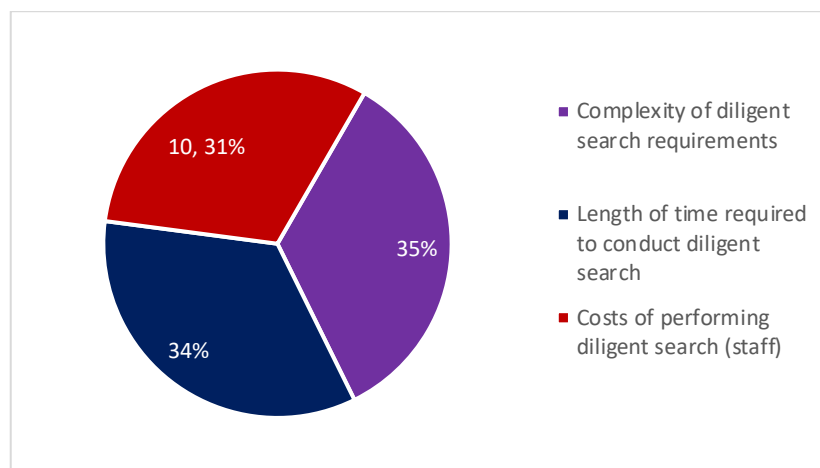
### 5.2.5 What are the biggest barriers to the use of either scheme by UK cultural heritage institution?

The survey results show clearly that the required to identify and locate rights holders are a significant barrier to the digitisation of orphan works. Respondents clearly stated that the

<sup>29</sup> As of December 2017, the IPO had issued 456 licenses in the category of Still Visual Art, out of a total of

diligent requirements were a major barrier to the use of the Orphan Works Exception, with 79% of respondents who had not used the exception citing that the complexity of diligent search requirements and time required to undertake a diligent search as the main barrier to diligent search. Closely related to this, respondents cited staff costs of performing diligent search as a significant barrier. Less significant was the availability of sources, which had been raised as possible barrier in the literature review.

Figure 26- Barriers to use of the Orphan Works Directive



For the Orphan Works License Scheme the main barriers were the costs of licensing and associated administrative costs that came from applying for a license, which included the application fee. In addition, respondents raised the issue of level of diligence required by the license scheme, indicating that this too was a significant barrier to the usage of the scheme. Length of the license wasn't the most significant barrier to adoption, but was cited by several respondents. Given that a license could be renewed this may be less of an issue, although the renewal would require a new diligent search, which takes us back to the issue of the diligent search requirements. Several respondents mentioned that the restriction of the license to UK meant it was not suitable, indicating that when organisations digitise they intend to make their collections available globally without restriction. Furthermore, several responses indicated that the IPO's limit to 30 works at a time was an issue and favoured a bulk upload tool similar to that of the EU database.

### 5.2.6 If organisations have not used the directive or the license scheme how have they made orphan works in their collections available online?

Respondents indicated that where they had not used the directive or the license scheme, their preferred method for digitising orphan works was the use of a risk managed strategy and takedown policy. The reasons for this are clearly the diligent search requirements of the directive and the license scheme, are not suited to the mass digitisation. Several respondents commented that it was easier to conduct their own diligence. A few respondents made use of the copyright exception allowing material to be displayed on the premises using standalone or dedicated terminals.

### 5.2.7 What changes could be made to the current legislation to make it easier for cultural heritage institutions to digitise and make available online orphan works in their collections?

It's clear from survey responses that the main changes required are around the diligent search, with the majority of respondents stating the need for less complex requirements. The next most favoured change an extended collective license for orphan works suggests that many organisations do not see the current legislation as the most effective solution to the mass digitisation of orphan works. This is almost certainly due to the burden of diligent search, which as has been shown is an issue in terms of staff costs. Secondly, it is clear that respondents would be more likely to digitise orphan works if the cost of licensing was revised. Whether, they can offer bulk licensing remains to be seen, but it appears to be something that many of the respondents would be interested in.

## 5.3 Interviews

### 5.3.1 Institutions included in the study

16 survey respondents indicated they would be willing to participate in a follow up interview, of these five were selected based on two requirements. Firstly, convenience, interviewees had to be based in or close to London in order to be able to conduct interviews on a face to face basis. This was selected because as Pickard (2013, 198) says "interviewing depends very much upon the rapport built between the interviewer and the interviewee" and it was felt that this could be better achieved on face to face basis rather than in a phone or online interview. Furthermore, since the intention was to record and transcribe the interviews this would be more easily accomplished through face to face interviews. Secondly, the choice of respondents included a mix of organisations using exception, the license scheme or a combination of both, as well as those that had not used either choosing instead to take a risk managed approach.

### 5.3.2 Ethical considerations

All interviewees were asked to complete a consent form, agreeing to participate in the study and were given the option of remaining anonymous. Of the five interviewees, only one chose to remain anonymous and is hereafter referred to as B. Following the completion of each interview, the recording of the interview was transcribed by hand and a copy of the transcript was sent to the interviewee for checking. This provided them with the option to make any correct anything they that had been misinterpreted, redact any passages that they felt were not appropriate for inclusion or provide further clarification on any points. Finally, all original audio files deleted following completion of the dissertation.

### 5.3.3 Interviewee Profiles

All but one of the interviewees agreed to be identified, the fifth interviewee from a National Library asked to remain anonymous. With the exception of one, all interviews took place at the interviewees' place of work. The four interviewees were:



Samantha Callaghan, Library, Archives, and Digitization Assistant at the Humanist Library and Archives, was responsible for overseeing the Architecture and Place Digitisation. The library based at Conway Hall in London, is part of the Ethical Society of Great Britain, the project digitised material using the both the EU exception and orphan works license scheme.

Christy Henshaw, Digital Production Manager at the Wellcome Trust, is responsible for the digitization programme which consists of the strategic digitization of the historical and archive collections as well as the commercial digitization service allowing people to order prints. In 2013 the Wellcome undertook a large digitisation project from their archives, which included a high proportion of unpublished and probably orphaned.

Bernard Horrocks, Intellectual Property Manager for the Tate, Bernard's main responsibilities surround copyright including, the collection, the exhibition programme, the archive, Tate Enterprises (the commercial division of the Tate, and finally dealing with a wide range of enquiries from artists, their estates and other museums and galleries. In September 2017 the Tate concluded a Heritage Lottery Funded project called Archives and Access which digitized and made available online 52,000 items from the Tate's Archive.

Annabelle Shaw is Rights Database Manager at the BFI. Annabelle has responsibility for the management of the BFI's rights and royalty's system, as well as various BFI collections. Her role includes involvement with acquisitions and sales, contracts and the BFI's back catalogue. Since 2013 she has been leading on rights clearance for the BFI's Unlocking Film Heritage digitization project.

## 5.4 Analysis

### Theme 1: Material and approach

Henshaw described the range of the material that the Wellcome have digitized, saying that while the vast majority dates from the 19<sup>th</sup> century or earlier, they have digitized a small number of 20<sup>th</sup> century books, after undertaking rights clearance. She describes the approach taken to a range of material saying:

"We've done things where we've analysed the data and figured out which books are out of copyright, we have our own published stuff, artworks, archives and ephemera we have digitised a lot of published stuff, because we feel we were willing to take more of a risk on that stuff and grey literature, public sector type grey literature."

For Horrocks and Tate much of the material that he refers to is from the archives, he discusses collections of archival material which include letters belonging to artists such as Barbara Hepworth, noting that the main issue is clearing the rights in letters received by artists saying:

"the copyright in those letters will of course rest with the author and in some of those cases when she was being written to by somebody relatively obscure we just don't know who the copyright would belong to, we don't necessarily know whether than author is alive or dead, if that's somebody slightly obscure."

## Theme 2: Selection

The approach taken by each organisation to selecting material for digitisation was something I was keen to know more about; specifically I wanted to know whether copyright status influenced decisions around the selecting material for digitisation, as had been highlighted during the interview. Each interviewee was asked about how they selected material or inclusion in a digitisation project, and whether having identified a work as orphaned that changed their decision to include it.

Henshaw tells me that at the Wellcome copyright is: “only element of what we need to look at, that influences whether we can make this stuff available online or not.” In discussing the Wellcome’s approach she mentions that sensitivity plays a key part in deciding whether to make material available online, saying:

“it depends upon the collection, so when it comes to archives which tend to be unpublished works, personal papers and things, sensitivity is by far and away the biggest concern and it’s the most likely reason that we won’t digitise something.”

In terms of whether the rights status of a work an impact on selection, she states that in some sense copyright does have an influence noting that there a certain are certain ‘no go’ areas such as late 20<sup>th</sup> century works that are still in-commerce. In terms of the impact of orphan works she states that as a specific category of material it doesn’t have any further influence than whether a work is in copyright or not, although, she also notes that there are certain types of works, what Borghi & Karapapa (2013) term ‘contextual orphans’, which while not technically orphaned they avoid digitizing largely because it’s:

“going to be really time consuming to try to find and trace all these rightsholders and... a lot of it isn’t really orphaned, it’s just stuff that’s going to take time to track down the copyright holder.”

For Annabelle Shaw and the BFI, selection was led by the curatorial team criteria upon a series of 56 curatorial themes such as the Suffragettes, or the First World War. From these the curators would select films from the last 100 years relating to those themes, those selected would then undergo initial rights checking by Shaw’s team, she describes this approach as from a rights management point of view because:

“you’re not going by collection in terms of these are all the films that we’ve got from a particular donor or something, and so you were looking in one particular collection you would have films potentially from every single decade of film making, numerous different rightsholders in each collection.”

The undertaking the preliminary rights checking Shaws’ team were able to identify the works that needed rights clearance as well as potential orphans, she also describes discovering some works that were unexpectedly orphaned:

“there were also some where we thought we knew...who the rightsholder was and then it would turn out, not so much.”

Asked about whether the presence of orphan works had affected plans for their inclusion in the project Shaw stated that she was aware of the introduction of the new legislation (relating to orphan works) which she believed would enable them to make use of the orphaned material:

“I mean for us it was, bear in mind we were starting this work in earnest in early 2014, so we knew something was going to happen with Orphan Works and so we were all keeping sort of an eye out, well I was keeping an eye out on what’s it going to be what’s it going to look like, what is it going to mean for us in terms of what we currently do and how can we kind of make sure we’re in a good place to deal with it.”

Callaghan also states that her awareness of the recently introduced orphan works legislation, meant that copyright wasn’t a major concern in the selection of material for digitization, saying:

“I was aware that Copyright would be an issue, I knew that I would have to put some time aside when we were planning our time to look at Copyright clearance, but from my general awareness of the legislation at the time I thought, oh, we’ve got a method by which we can approach this.”

For the Tate, Bernard Horrocks describes their use of a risk managed approach to making orphaned material available, having undertaken due diligence to the level where they were satisfied that the rights holder could not be found, they would still make the material available:

“once we were certain, as one can be, that we couldn't trace a copyright holder rather than not publishing network we decided to the opposite, which was to publish it, with a disclaimer, which you can see on our website and have quite a bold approach.”

Finally, for B their approach to including copyrighted material in a digitization project is dependent upon whether there is funding for rights clearance work, saying:

“if the project doesn’t have money then material that is in copyright is probably off the table regardless of orphan works exception or anything else.”

For most interviewees it seems that, while copyright does not directly influence selection it clearly has an impact. It is clear that the main method for selecting works by all interviewees was content, or subject. It is also apparent that orphans were only identified during the clearance/diligent search process, although some interviewees mention they were aware that they might be dealing with orphan works.

### Theme 3: The Orphan Works Directive

Understandably the EU Orphan Works Directive was a key subject in the interviews, with respondents asked about their use or non-use of the directive.

B mentions that using the directive is resource intensive, referring to the need to conduct diligence and then undergo registration on the EUIPO website, suggesting this adds

significant time and resource costs. He suggests that the use of the exception is not their primary vehicle for clearance:

“But as I said the exceptions are, they’re not a primary way of dealing with rights, they’re a fall-back for when everything else has failed.”

Horrocks states that they Tate doesn’t use the Directive, noting that the circumstances in which it can be used are limited; he also notes that it excludes standalone artwork, which for his organisation is clearly a barrier. On the issue of the absence of standalone artworks Callaghan notes how pressure from lobby groups led to their removal from the scope of the final directive and how it unfairly impacts on cultural organisations:

“when they were putting that exception together there was a real big push back again from photographers and photographers’ lobby groups, I mean all power to them, if you put in the graft then you should get paid for it and they do tend to get their stuff nicked and spread all over the net for all sorts of reason, but if you’re a library doing this as a public service, I think it is a bit rich to say, you know, ‘No, No No, you can’t touch any photography’, even if it’s a hundred years old kind of thing. It makes it, it makes it more difficult”

For Shaw using the directive was a positive clearly a positive experience, noting that when they were planning the project she was aware of the upcoming changes

“so we knew something was going to happen with Orphan Works and so we were all keeping sort of an eye out, well I was keeping an eye out on what’s it going to be what’s it going to look like, what is it going to mean for us in terms of what we currently do and how can we kind of make sure we’re in a good place to deal with it Because institutions will have a choice to actually engage with the exception or the licensing scheme, and obviously we used the EU Exception for this project.”

#### Theme 4: The Orphan Works License Scheme

All respondents were asked about, whether they had considered using or used the orphan works license scheme.

Callaghan suggests that the license scheme was developed in part to pre-empt the introduction of the EU Directive, saying it was “something that was sort of cobbled, thrown together within a certain period of the enactment of the EU so that the UK could protect itself in a way prior to that material, or prior to that legislation being pushed across.”

Several interviewees mentioned that the cost of the license was part of the reasons for not using it, with

B mentioning that additional cost and more restrictive nature of the license scheme make it less attractive saying:

“the orphan work licenses that’s something we don’t really use, they only provide in the UK and only for a limited time and there’s a cost associated with it...the license scheme doesn’t really give you any more coverage in fact it gives you less coverage than the exceptions do.

The only really addition that the license gives you is that you're able to use the material for commercial purposes. But we don't do that it doesn't really help us in any way."

Henshaw refers to the additional costs imposed by the license scheme arguing this makes it unsuited to mass digitization, saying:

"the orphan works license is limited and there's a lot of admin and there's a cost to it over and above the work you do for the due diligence, so what we found was that actually we weren't able to achieve that level of due diligence for mass digitisation, of course we could for small numbers of works, but then it's not really worth it to us because we're digitising on such a scale"

Referring to the license scheme Horrocks argues that:

"the licensing scheme is not that helpful for bigger digitisation projects ", although he mentions that the IPO are looking at developing the scheme, he says: "they are expanding the system's capabilities, so it can cope with higher numbers of works all in one go "

The cost of licensing was raised by Callaghan, as impacting on her plans, she explains that some of the items she had selected for inclusion in the project that didn't get licensed:

"because of the mechanism by which the UK orphan works licensing Scheme operates where you have a maxim of thirty and you pay a certain amount for the licensing and a certain amount for administration it...Conway Hall is a charity we didn't have funding at all, which means it was internally funded which means if I wanted to digitize some of these things post the project launch, just one or two items it would have actually been, I mean it's not a problem for some people but for us for a charity.. It wasn't seen as being of use to be spending that money on one or two items."

For Shaw and the BFI, the pricing of the OWLS scheme is also a potential barrier to releasing material online she states that:

"I think in terms of, for cultural heritage it's quite hard, I mean I would hope that we would put some films through on the OWLS scheme for online publication, things like DVD, that's another question because the pricing at the moment it would be quite difficult for us to deal with."

A second issue for Shaw with the OWLS scheme is the length of the license; I asked her if it would be problematic, she suggested it would be depending upon what the use was:

"I think it would depend upon what we wanted to do with it...so generally speaking if we're looking to provide access to archive materials, we would want to do it in perpetuity, so there would be an issue if it was on that side"

Henshaw mentions the also mentions that the additional costs of the license scheme in terms of time and money stating that:

"there's a lot of admin and there's a cost to it over and above the work you do for the due diligence."

It's clear from most the interviewees that the use of the license is limited is not considered relevant to the types of digitisation they are involved in. The restrictions of the license and the additional costs are obviously a big part of that barrier. The other issue is the cost of licensing, with interviewees suggesting that the additional cost as a reason for not using the license scheme. This ties up with the findings of the survey which also noted that cost of licensing was a major disincentive.

## Theme 5: Diligence

Another topic discussed with then interviewees was their approach to rights clearance, in the process it became clear that they employ highly targeted searches, in contrast to the very general requirements of orphan works scheme. B states:

“we make sure that the research we do is much focussed and very efficient, whereas the diligent searches, as defined in the exception, are very broad and check a lot of places that we probably wouldn't” He believes that clearer guidance on what makes a search diligent could help resolve this issue.

Horrocks also shared some insights into the Tate's approach to diligent search, showing me a due diligence checklist, for an orphan work that had been completed by a colleague:

“So, we've got the artists dates, expiry date for any artistic works and this is essentially the checklist, so a list of twenty or so organisations, as you can see we wouldn't sleepwalk into checking every single organisation, because one develops a good gut instinct for these things and some good working knowledge of where it's worth trying and where quite frankly it wouldn't be worth asking, we wouldn't just go through the motions of asking, knowing that they'll just come back to us and say 'we don't know'.

He talks about how in some cases the Tate will reach out to organisations outside of the UK to try and find information about a right holder, he describes how:

“in certain situations, again where curator or author of a catalogue feels very strongly that we need to use something and if I think 'ah ok' that artist was American or Australian or from New Zealand and I have somebody in the Te Papa Museum in New Zealand example or Art Gallery of New South Wales. If I know that I know somebody that could possibly help, then I will certainly ask them outside the UK.”

What becomes clear from these discussions is that for organisations that regularly engage in diligence is that they have bodies of professional knowledge and experience; they know the places to search and who to contact in order to find relevant information. The question that arises is whether the directive's 'appropriate sources' means the same as the appropriate sources that are the subject of this expert knowledge. B suggests not, when asked about the nature of the diligent search required for the directive, and also license scheme, he describes a situation where they are carrying out an exhaustive search, he says:

“So, it might be that we're clearing articles in a magazine, that were written by non-professional writers, but still we have to contact the Society of Authors, the CLA and the ALCS and so on, knowing that there is no chance that we will find anything there...We have

to jump through those hoops... So, we are very thorough with our diligent search, even to the point of where we're checking with people, who will almost certainly not be able to help, but we kind of have to tick that box."

The reason for this he says is the lack of guidance or definition around the meaning of diligent search:

"So, they don't really define where you have to search in order for you to have the diligent search, in order for you to get the protection. So, we always err on the side of caution"

He argues that because of this a diligent search is more "resource intensive" due to the need to check sources that are unlikely to yield any result, simply to be sure that they have complied with the diligent search requirement of the Directive.

Henshaw also found that the level of diligence required by the orphan works schemes, was a lot more than the Wellcome was able to undertake, in addition she notes that the license imposes further costs and administration, noting that:

"the level of effort that we were comfortable putting in to copyright clearance is a lot lower than the obligations you would need to do in order to get an orphan works license ...so what we found was that actually we weren't able to achieve that level of due diligence for mass digitisation, of course we could for small numbers of works, but then it's not really worth it to us because we're digitising on such a scale."

Further highlighting the difficulties of conducting mass rights clearance, Henshaw argues that a lack of metadata makes the clearance of archival material, particularly problematic. She notes that while it might be possible to automate the checking of rights holders for publisher material, when it comes to archival material and unpublished works:

"the collections are so vast even in a relatively small library like ourselves, there's no structure to it you can't just pull that that data out and say here's a list of the 5000 names that are potentially creators but we're not too sure, from this archive of 300 boxes of stuff, you know it's just not possible."

Further exemplifying the difficulty of locating right holders at scale, Henshaw mentions a project conducted by the Wellcome in partnership with the Authors Licensing Society (ALS) and Publishers Licensing Society (PLS), in which they attempted to trace all the rights holders, something that she describes as "kind of a wasted effort." Referring again to the level of the metadata in the catalogue she notes that the ALS and PLS:

"...conceded that it was impossible to try and trace every single one, because not every single one was clear to us who that was. Because it wasn't in the metadata and we published all the names and all the titles, so basically all the catalogue data we had to identify the title and the person, dates and things like that, we published all that online and we never had a single response, from anyone about it."

I asked B whether he thought that relying on the expert knowledge of curators would be enough to meet the diligent search requirements for the orphan works schemes, he indicated that:

“Well, we could do that, but the legislation isn’t well defined, and we want to absolutely make sure that we come within the diligent search threshold, without any more detail or guidance we’re sort of left with no options.”

Shaw on the hand seemed to have less issues with the diligent search requirements, she describes how the single member of staff she had working on diligence surpassed the requirements saying:

“the thing is that we probably went above and beyond. In fact, we did go above and beyond what is really required by the directive in terms of diligent search.”

She mentions that they were aware of the potentially burdensome nature of the diligent search requirements at the outset of the project, but say they saw it as challenge, talking about a determination to ‘win’ in completing 5000 diligent searches, saying:

“I think it comes down to that, this is massive challenge can we, do it? You know without that resolve we wouldn’t have been able to do the level of, you know, diligent search that went on...you know when we were first told about this project it was sort of gulp, it was how on earth are we going to manage this?”

For Callaghan, even with the help of a volunteer, the diligent searching took longer than expected

“I didn’t realize just how much [time it would take], and I mean by the time we got to the end of it the amount of time estimated we need for it was quite inadequate. And what I realized is because I wasn’t able to get everything done”

The impression gained from interviewees is that the diligent search requirements of the license scheme and Directive are highly resource intensive and time consuming. The larger organisations interviewed obviously have more experience and forehand knowledge of the requirements of diligent searches in general as part of their digitisation activities, for smaller organisations such as Callaghan’s the diligent search requirements are clearly challenging. But we also see that for larger organisations, the need to undertake diligence on a large number of works is not practical, and sometimes a futile effort, as they know there is little chance of locating the right holder, but they still have to go through the motions to meet the requirements of the directive, reducing it to a box ticking exercise. As a result, organisations are relying on a risk managed approach, and feel assured in doing so by the lack of response rate. However, this may not be an appropriate approach for some organisations as Callaghan highlights. Also, it seems problematic that the requirements for the directive are also more stringent than the level of diligence that cultural heritage organisations would conduct for their own purposes, when digitising material. The issue of diligence was also major factor raised in the survey and the findings from that regarding the lack of clarity over what constitutes a diligent search reflected in interviewees responses. The interviewees make clear that diligence is a costly and time consuming and sometimes futile exercise that impacts heavily on organisations ability to make material available.



## Theme 6: Use of a third party and crowdsourcing

Interviewees were asked whether they would consider using a crowdsourcing platform such as EnDOW, to assist in the completion of diligent search.

Callaghan notes that the main issue with using an organisation such as the ACLS is the cost, an issue also raised by B who states that for his organisation it wouldn't be cost effective unless dealt with all material rather than just orphan works:

"So, I like the idea of a third-party being able to do it, we wouldn't be able to justify the money, if it was only doing the diligent searches from an orphan works exception perspective"

In terms of using crowdsourcing projects such as EnDOW, he expresses concern about issues of legal, he says:

"The problem to an extent I have with EnDOW is the crowdsourcing volunteer nature and... crowdsourcing can be fantastic for a lot of things, but where there is a certain amount of legal liability I and certainly other people in the library have concerns that where our legal liabilities and obligations are being dealt with by volunteers and in a crowdsourced manner, they might not be done with the kind of rigour we would need."

Shaw mentions that the BFI are an associate partner on EnDOW the project and she is on the advisory panel. Describing the idea behind the project she states that: "the main ambition for this platform is that cultural heritage institutions across the EU can use it to do diligent search". Noting that the project is now in the Beta stage she says that she is keen to use it on the BFIs next digitisation project but notes that her main concern is how to harness and engage with the 'crowd', with Shaw saying, she mentions that there are plenty of potential enthusiasts who might be willing to engage:

"and it's one of the things that one of my colleagues was doing, whilst diligent searching, she came across loads of blogs sites and specialist forums, she would join in and ask things, so there is definitely you know, there are existing crowds out there, it's just a question of how to get in touch with them."

In terms of crowdsourcing and third parties Horrocks talks of using the Museums Copyright Group Forum as source for further information saying:

"it's very very good sometimes the queries are very simple, others a quite complex and spark off a whole debate, but it's a very very good forum and there are certainly international members on there and Hong Kong, certainly Sidney, parts of America, so we feel as though we've got international reach out there."

The use of a third party, such as ACLS, company to conduct diligent search, would clearly be a question of money and resources as noted by B and Callaghan. On the other hand, it is also clear that CHIs can use informal or semi-formal means in terms of professional networks, such as the ones mentioned by Horrocks to try and trace rights holders. Such a practice would obviously only be helpful for limited works and in circumstances when other options have been exhausted. Most respondents seemed open to the use of crowdsourcing, but

some were understandably cautious, and one raised the question of ensuring searches were legal. The other drawbacks identified were the recruitment or selection of the crowd and the need to verify the searches raising the question of whether it is more efficient to keep the work in house.

He also refers to the impact Brexit is having and will have at an individual level:

“with Brexit, we have lots of colleagues here from Europe, lots of artists we work with of course, a lot of courier stuff we need free passage of artworks and people, there are lots of very pressing questions.”

For Callaghan, one knock on effect of Brexit was felt in terms of the devaluation of the pound impacting on the funding available for her project she notes that when she joined Conway Hall:

“there was a certain amount of money for the year that was put aside for digitisation, but because of the Brexit vote and the value of the pound dropped which had an effect on our ability to pay for certain other things, so, because of that our funding was halved.”

Asked about the impact on use of the Directive Henshaw thinks that the schemes will likely remain as they are saying:

“And the other thing obviously is, with us almost definitely pulling out of the EU, I assume that all these schemes will want to still be compatible with the rest of Europe, so whatever the EU Orphan Works Directive says it's still going to influence what we can do. So, I don't see any of that changing.”

Obviously, with Brexit it is hard to know what is going happen, but clearly it poses massive uncertainty for the cultural heritage sector and a hard Brexit could potentially.

## Theme 7: Finance

Finance was clearly an issue to all interviewees. Horrocks stated that he believes finance is a bigger barrier than copyright. Callaghan spoke about how currency fluctuations affected her project. What is clear is that money is an issue for all organisations regardless of their size. For most of the respondents the use of the costlier license scheme represents less value for money and return in investment meaning its less likely to be adopted by most organisations. As Henshaw say's:

“what we don't want to do is invest the money into digitising, mass digitisation based on a short-term licence that you don't have confidence will last and then it will have to take down.”

And as illustrated by comments from all respondents funding clearly impacts upon an organisations' ability to make material available regardless of copyright status. However, it is also clear that the need to undertake clearance and diligence are costly activities. I would suggest that these two factors are closely linked.

## Conclusions and Recommendations

### 6.1: Conclusions

This is one of the few studies to date to consider the effectiveness of the current orphan works legislation of the UK. It set out to determine how effective the UK's implementation of the EU Orphan Works Directive and the IPOs orphan works license scheme have been in enabling the mass digitization of orphan works, by UK cultural heritage. As it has demonstrated the current legislation is ineffective at enabling the mass digitization of orphan works. Although the Directive has been adopted by several cultural heritage institutions in the UK, to date only a fraction of the estimated 50 million orphan works in the collections of UK cultural heritage organisations have been made available. It has also demonstrated that while orphan works are a significant issue for many cultural heritage institutions, they are part of the wider issue of the costs of rights clearance and funding for digitisation.

While the Orphan Works Directive succeeds in its aim of providing a mechanism for cultural heritage institutions to make orphan works legally available online the costs involved in conducting due diligence are clearly a barrier to its adoption. As this research shows the need to conduct a diligent search for each individual work, imposes a significant burden on cultural heritage institutions in terms of material and labour costs, which hinders the ability of organisations to make works in their collections available. Reducing or clarifying the requirements of diligent search would make it easier for chis to make orphan works available under both schemes.

Similarly, the IPO orphan works license scheme, suffers from the same difficulty in its requirement that users undertake a diligent search for each work, while also imposing additional costs, in terms of license and administration fees. Furthermore, as has been shown, the license scheme offers less coverage for greater cost than the directive, making it less attractive to cultural heritage organisations seeking to ensure they are seen to be making the best use of their public funds. Additionally, the length of the license can be seen as a deterrent to many cultural heritage organisations, wishing to make their collections available online in perpetuity. As has been seen the directive contains numerous provisions that are either not clearly defined, or do not provide further guidance, leaving cultural heritage institutions to attempt to grapple with questions of legal certainty, unsure of where to turn for advice. Unsurprisingly, due the more limited nature and added the uptake of the license scheme amongst cultural heritage organisations is equally low.

While the use of crowdsourcing to conduct diligent search has potential for reducing costs and making diligent search for orphan works more sustainable, although there are still questions about how to ensure the legality of such searches that need to be resolved. The Directive makes clear that CHI's are responsible for ensuring that all searches conducted are legally compliant, any system such as EnDOW's diligent search platform needs to address the question of how to ensure all searches are legal without creating more or duplicate work for organisations making use of this approach. Furthermore, it is not clear how the

system will operate in terms of the recruitment of crowds and verification of the accuracy of the searches completed by members of the crowd. There is also a question of whether members of the crowd will have the necessary skills and access to specialized sources necessary to conduct a suitably diligent search.

Finally, the interface to the IPO orphan works license scheme, been cited as a further barrier to effective use of the scheme, by several of the organisations surveyed. In particular the language used in the application process and the lack of a facility to license more than 30 works are seen as a hindrance by potential users. After three years of operation the schemes usage is far below its stated aims with only 735 works being licensed to date. Overall the scheme appears geared more towards individual and small-scale users, rather than mass digitisation and barring a major shift in the way it operates is likely to remain unused by the majority of cultural heritage organisations seeking to undertake mass digitization of orphan works, in its present configuration. Despite, this the scheme should still be commended for providing an alternative means of utilizing works that would otherwise remain locked away unseen. More flexible licensing options for non-commercial mass use by cultural heritage organisations could be a means of increasing the uptake, but it is unlikely this could provide greater benefit than the directive already provides.

The use of a risk managed approach has proven to be a more effective means of providing greater access to orphan works and other materials that would prove too costly to clear rights for. While it may prove suitable for many organisations it has been shown that it is not appropriate for all, therefore a range of solutions should continue to be made available. Those organisations that use such an approach should seek to share their experiences through existing forums and offer guidance to other organisations seeking to embark on such an approach. And even where organisations adopt such an approach, as we have seen, it may only be appropriate for certain collections, therefore highlighting the need for a range of solutions.

One such solution may be the use of Extended Collective Licensing, which was the second most solution among surveyed organisations after reducing the requirements of diligent search. However, to date the use of Extended Collective Licensing in the UK is untested, with only one application, from the CLA, to run an extended collective licensing scheme to date. If the CLA's application is successful then it may prove to be a useful test case, and encourage further applications. Furthermore, there is still a question of whether ECL can provide significant savings over the current schemes. For while it may eliminate the costs of diligent search, there is still the question of the cost of licensing, it remains to be seen whether the costs of licensing, especially for low value out of commerce works, represents better value than the cost of diligent search.

The impact of Brexit has yet to be fully revealed, although as we have seen in some cases it has already impacted upon the activities of cultural heritage organisations. Although, Britain leaving the EU may provide an opportunity for Copyright reform, it is likely at present that the UK will be required to maintain some form of 'regulatory-alignment', meaning the majority of our laws are likely to mirror those of the EU. Therefore, it appears that we are unlikely to see any substantial copyright reform within the next couple of years.

## 6.2 Recommendations

Although it is unlikely that the burden of diligent search will be relaxed by the EU, there is an opportunity to clarify what is the meaning of diligent search. As this research has highlighted the lack of a precise definition is a major impediment to the adoption of the EU exception. Therefore, it is recommended that the issue be addressed to either a more precise definition of what constitutes a diligent search. Failing that, clear examples of successful and valid diligent search should be provided as exemplars. The guidelines should also be clarified to make clear to what extent organisations are required to pursue a line of enquiry, when faced with sources that are difficult to access, especially with regard to offline sources and subscription only resources.

While Brexit may mean we continue to adhere to EU rules for the purposes of securing, the IPO should take the opportunity of investigating what changes can be implemented to current orphan works and copyright legislation to free up the blockage on the digitisation of orphan works

It is also recommended that a forum be setup to allow for CHI's to share best practice and other information regarding diligent searches for either the directive or license scheme. Although such structures already exist in the form of JISC-Mail lists, this could be expanded or built upon to provide a more formal forum, run in partnership with the IPO or EnDOW.

With regard to unpublished works it is clear that the current rules on duration are hampering the ability of cultural heritage organisations to make such works available, thereby creating another 'black-hole'. Therefore, it is recommended that the duration of copyright be harmonized for all works and the 2039 rule be abolished, thereby providing CHIs more freedom to digitize such works, whether orphaned or not.

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## Reflection

The topic of this dissertation was not my original idea, when I first started thinking about possible dissertation topics at the end of the first year; I had an idea for doing something on the history of printing, a topic I had been interested in after writing about it for one of my first assignments. I even spent time exploring the book history section at Senate House Library, exploring the various books on print history. As history undergraduate I was clearly drawn to the historical aspects of the course. So how did I end up writing about orphan works?

Well the genesis of this project stems from an assignment written for the module Information Law and Policy which examined how fit for purpose current UK Copyright law was from the perspective of a Library and Information Professional. Whilst researching that assignment I learnt about orphan works and the problems they pose to libraries and archives and thought it would make a better research topic for a dissertation. The study would provide me an opportunity to conduct a mix of qualitative and quantitative research and the recent nature of orphan works legislation and the uniqueness of the UK's twin track approach, presents an opportunity to contribute to a still developing area of research. I immediately thought of doing a survey and after discussing with a friend decided that these could be supplemented with interviews. After, talking to my tutor and supervisor Dr Lyn Robinson I felt confident that this would make a suitable topic for a dissertation.

Unfortunately, I came down with a virus just prior to finishing my proposal and didn't get the chance to complete an initial literature review. Fortunately, my topic was approved, and my tutor advised me to continue with my literature review, which I published as a series of blogs. I found blogging about the topic helpful as means of focussing on the topic and was spurred on by some excellent blogs by fellow classmates about their dissertation. When I first started on this topic I thought that there was a limited amount of research on the subject of orphan works, however over time I discovered there was considerable amounts of literature, more than can be done justice too in the space available. And I probably have enough material for at least another chapter. For reasons of space and time I tried to restrict myself to focussing on UK and EU orphan works, and largely left out material on American approaches to orphan works. As with any project it can be easy to get

In particular, research by CREATE, University of Glasgow and the EnDOW project have produced a considerable body of work surrounding diligent search, and I ended up attending a one-day symposium on orphan works in June, which led me to meet Annabelle Shaw, who I went on to interview for this project. In terms of challenges, motivation has been a challenge at times, particularly in the run up to Christmas, and the combination of ADHD and anxiety proved both helpful and detrimental to my concentration levels at times. Also, my time management skills clashed with my desire to produce a more thorough literature review, which I decided I needed to beef up late into the last month of the project, meant everything came down to the wire.

In terms of interesting aspects, I found the interviews quite enjoyable and not as nerve racking once I got going. Overall it was a valuable experience, although having said that the process of transcribing by hand was long and tedious, especially as I discovered we had talked for quite long. In terms of reflecting on aspects that could have been improved, in writing up my survey results I found myself thinking of better or alternative questions. I attempted to use SPSS but found it easier to use Excel.

The topic has definitely expanded my knowledge of copyright and the process of digitisation. And as I mentioned there were plenty of aspects that could easily form an entirely different dissertation. I enjoyed exploring the topic and maybe it will lead to some interesting jobs in the future.

## List of legislation referred to:

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Copyright Act R.S.C., 1985, c. C-42 <http://laws-lois.justice.gc.ca/eng/acts/C-42/FullText.html>

### France

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### Germany

Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz, geändert durch Gesetzes vom 4. April 2016) Act on Copyright and Related Rights (Copyright Act, as amended up to Act of April 4, 2016) [https://www.gesetze-im-internet.de/englisch\\_urhg/index.html](https://www.gesetze-im-internet.de/englisch_urhg/index.html)

### Hungary

Act No. LXXVI of 1999 on Copyright (consolidated text of January 1, 2007) <http://www.wipo.int/wipolex/en/details.jsp?id=11840>

### Netherlands

*Auteurswet* (Copyright Act 1912) <http://wetten.overheid.nl/BWBR0001886/2017-09-01>

### Japan

著作権法（昭和45年5月6日法律第48号。最終改正平成26年4月5日法律第72号）  
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### Republic of Korea

저작권법 -Copyright Act (Act No. 432 of January 28, 1957, as amended up to Act No. 14634 of March 21, 2017) <http://www.wipo.int/wipolex/en/details.jsp?id=16953>

### Switzerland

CC 231.1 Federal Act of 9 October 1992 on Copyright and Related Rights <https://www.admin.ch/opc/en/classified-compilation/19920251/index.html>

### United States

Title 17 of the United States Code - <https://www.copyright.gov/title17>

S.2913 - Shawn Bentley Orphan Works Act of 2008 - <https://www.congress.gov/bill/110th-congress/senate-bill/2913>

### UK Legislation

Copyright, Designs and Patents Act 1988 <https://www.legislation.gov.uk/ukpga/1988/48/>

Enterprise and Regulatory Reform Act 2013

<https://www.legislation.gov.uk/ukpga/2013/24/contents>

The Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014 <https://www.legislation.gov.uk/uksi/2014/2861/>

The Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014 <https://www.legislation.gov.uk/uksi/2014/2588/>

The Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014 <https://www.legislation.gov.uk/uksi/2014/2863/>

#### EU Legislation and Directives

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society - <http://eur-lex.europa.eu/legal-content/EN/LSU/?uri=celex:32001L0029>

Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market - <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32006L0123>

Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works - <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32012L0028>

#### International Treaties and Agreements

Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886 - [http://www.wipo.int/treaties/en/text.jsp?file\\_id=283698](http://www.wipo.int/treaties/en/text.jsp?file_id=283698)

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WIPO Performances and Phonograms Treaty - <http://www.wipo.int/treaties/en/ip/wppt/>

## Appendix One: Proposal

## Working Title

# Abandoned and forsaken: An analysis of the impact of current orphan works legislation on UK Cultural Heritage Institutions

A dissertation proposal by Thomas Ash

## Introduction

Since the 1990s Libraries have been undertaking digitisation projects with the intention of preserving and making available materials in their collections. Astle & Muir, (2002) define digitization as

*“the conversion of any type of original, be it paper, photographic prints or slides, three dimensional objects or moving images into a digital format.”*

“Of a representative sample of 140 books published between 1870 and 2010, the British Library found 31 per cent were orphan works. Many of them have no commercial value, and possibly never had, so their owners had no incentive to keep track of their rights. Nevertheless, many obscure, out-of-print tomes cannot legally be digitised without the permission of the long-lost copyright owners.” (Lauriat 2011)

Mass digitization is commonly conceived of as the conversion of copyright works in digital format on an industrial scale. It has recently become prominent as the activity by which books, journals, photographs, sound recordings, and films are digitized in bulk to feature in the collections of online archives, repositories, digital libraries, search engines, and data aggregators.

(Borghi & Karapapa, 2013)

## Aims and Objectives

The aim of this project is to determine whether the current orphan works UK legislation scheme, has helped or hindered UK Cultural Heritage Institutions in their use of orphan works and how it could be improved.

It will seek to answer the following questions,

- What difficulties have institutions experienced the in determining the rights of items in their collection?
- What are the difficulties in determining the rights status of works?
- Has the current legislation made it easier for libraries to use orphan works in their collections?
- What works well about the current legislation and licensing scheme?
- What doesn't work well?
- How could the current legislation be improved to make it easier for CHI's to use and provide access to orphan works in their collections?

## Scope and Definition

This study is restricted to the impact of UK legislation, including the implementation of the EU Directive 2012/28/EU the orphan works directive and the IPO orphan works license scheme.

## Context / Literature Review

“Digitisation expands the horizon of creative possibilities and in doing so puts pressure on the viability of and applicability of legal regimes that were constructed for an analogue world.” (Porsdam, 2015)

Nowhere is the problem of Copyright more evident than in the problem of orphan works. Digital technology has enabled cultural heritage institutions to begin realizing the dream of the universal library, by allowing them to digitize their collections and make available online. Mass digitization, rapid improvements in technology mean that, libraries and other heritage institutions can create high resolution digital facsimiles of works in their collections at low costs, giving new life to many works which would otherwise have remained confined to the shelves of temperature controlled vaults in national libraries and memory institutions. However, one category of works, has proved to be a large obstacle to the realization of such projects, causing what Librarians to call a '20th-century black hole'. (Boyle 2009) Orphan works are “*creative works or performances that are subject to copyright - like a diary, photograph, film or piece of music - for which one or more of the right holders is either unknown or cannot be found.*” (Intellectual Property Office, no date)



As these are works that are still within copyright, libraries are unable to digitize them as they have been unable to obtain clearance. As Moody (2015) puts it:

*"...millions of minor but interesting works are copyright zombies: even though they are no longer available commercially, and may not even have an obvious owner, it is not possible to give new life by putting them online because that would represent a copyright infringement."*

Highlighting the scale of the problem, the British Library estimated that of a representative sample of 140 books published between 1870 and 2010, 31 per cent were orphan works.

"Many of them have no commercial value, and possibly never had, so their owners had no incentive to keep track of their rights. Nevertheless, many obscure, out-of-print tomes cannot legally be digitised without the permission of the long-lost copyright owners." (Lauriat, 2011)

In the UK and the EU, the problem of orphan works has been tackled to mixed results through legislation, in the form of the EU Orphan Works Directive (OWD) and the UK Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014. These provide a narrow exception to allow cultural heritage institutions the digitize and publication of orphan works. In the UK, the Government has also introduced an orphan works licensing, administered, by the UK's Intellectual Property Office, which enables users of orphan works to apply for a license to use said works.

Rosati (2013b,732) found that UK Libraries that wish to digitise an orphan book and make it available for download by users would need to apply for a license to cover the download:

*"In such instances (as will be in most situations) it is likely that this institution would be advised to seek and obtain a licence prior to the use of the orphan works. Although strictly speaking a licence would be only needed to cover the distribution of the works (downloading), this might be sought also for the making available of the work, so to reduce the risk of infringing third parties' rights."*

In both instances, whether applying for license or relying on the exception users are required to complete of a diligent search for an author or rights owner. The main problem posed by this is the requirements it places on institutions for checking for existing rightsholders, which must be carried out before the exception can be applied. Searches must be carried out by consulting a list of prescribed sources, starting with the Orphan Works Register. In practice, it is not clear what is the minimum requirement for a diligent search and search entails something more akin to an exhaustive search. As Favale, Schroff and Bertoni (2015,19) write:

*"In practice, when a source recommended by legislation is not freely accessible online, even a Diligent Search not including the consultation of such source must be considered exhaustive and compliant with the law. In other words, a Diligent Search must be considered as carried out in good faith if all relevant freely and easily accessible sources have been consulted"*

This makes the process of completing the search more laborious, time consuming and costly for the user and is more likely to deter a potential user. Secondly as Rivers (2014,6) writes that while the UK legislation states that a diligent search must comprise a reasonable search it is:

*“...uncertain to what extent diligence is qualified by reasonableness. If there is an obvious unresolved question about whether a given work is in fact orphan but settling the issue would or might involve going beyond the IPO’s guidance, would the IPO be within the scope of its power if it granted a licence to a prospective user who claimed it would be unreasonable to have to investigate further?”*

A further issue with diligent search is that many of the prescribed sources listed as required to be searched in OWD are not publicly accessible. Research into the availability of sources for diligent search across three jurisdictions conducted by Favale, Schroff and Bertoni, (2015) found that just over half of all the sources for diligent search were freely accessible online. They found while sources for books and images were the most readily accessible, whereas unpublished works were much harder to trace, raising implications for the ability of CHI’s to clear orphaned works, if they are required to check against sources that are not readily accessible online. Furthermore, the difficulty in accessing sources for researching unpublished works could disproportionately affect the abilities of CHIs to make archival works available, which by their nature contain a high proportion of unpublished works.

## Methodology

Background research/ literature review – background to current legislation, establish opinions/criticisms of current

An initial literature review will be conducted to establish the background to the current issues surrounding the use of orphan works

### Survey and interviews

Based upon the findings of the literature review a survey will be compiled with the aim of determining the impact of the current legislation upon CHI’s, the survey will consist primarily of quantitative questions but will also include open ended questions to gather qualitative data on the opinions of interviewees with regards to the suitability of the current legislation.

These responses will then be followed up in interviews with willing respondents, to further discuss points raised from the questionnaire in more depth. Interviews will be conducted either in person, by phone or via Skype. All interviews will be recorded and transcribed. Survey responses will provide quantitative data, whilst interviews will give qualitative. By combining these two datasets I hope to be able to draw conclusions that will enable me to determine the impact of current legislation and possibly propose potential improvements.

## Work plan

May	June	July	August	September	October	November	December
Literature review	Literature review						
	Questionnaire design and planning	Questionnaire design and planning					
		Questionnaire delivery					
			Analyse results				
			Follow up interview planning	Follow up interview planning			
				Conduct interviews	Conduct interviews		
				Analysis of results	Analysis of results		
					Writing up	Writing up (1 <sup>st</sup> Draft)	Writing up , editing and proofing

## Resources

The main resources I will require will be a laptop and recording device both of which I own. For the background research, I will rely upon access to online journal literature and material provided by the University library. Since the topic, I am studying focusses on aspects of UK Copyright I will most likely make use of the Universities subscriptions to legal databases such as Hein Online and Lexis Nexis for

## Ethics

Since the questionnaire and interviews will be conducted with library professionals and project managers, I don't anticipate there being any ethical issues surrounding vulnerable adults. I do not anticipate collecting any sensitive personal information from the participants and the survey and interviews will not be conducted with persons under the age of 18. Attached is the ethics review check list for LIS Masters dissertation projects

### Ethics Review Form: LIS Masters projects

In order to ensure that proper consideration is given to ethical issues, all students undertaking the LIS dissertation project must complete this form and attach it to their dissertation proposal. Consult your supervisor if anything in this form is unclear or problematic. There are two parts:

*Part A: Ethics Checklist.* All students must complete this part. The checklist identifies whether the project requires ethical approval and, if so, where to apply for approval. Students who answer 'yes' to any of questions 1-18 should consult their supervisor, as they may need approval from the ethics committee.

*Part B: Ethics Proportionate Review Form.* This part is an application for ethical approval of low-risk research. Students who have answered "no" to questions 1 – 18 and "yes" to question 19 in the checklist must complete this part; students who have answered 'no' to all the questions 1-19 may ignore this part. The supervisor has authority to approve this application.

### Part A: Ethics Checklist

<b>If your answer to any of the following questions (1 – 3) is YES, you must apply to an appropriate external ethics committee for approval:</b>		<i>Delete as appropriate</i>
1.	Does your project require approval from the National Research Ethics Service (NRES)? (E.g. because you are recruiting current NHS patients or staff? If you are unsure, please check at <a href="http://www.hra.nhs.uk/research-community/before-you-">http://www.hra.nhs.uk/research-community/before-you-</a>	<b>No</b>

	apply/determine-which-review-body-approvals-are-required/)	
2. vc	Will you recruit any participants who fall under the auspices of the Mental Capacity Act? (Such research needs to be approved by an external ethics committee such as NRES or the Social Care Research Ethics Committee <a href="http://www.scie.org.uk/research/ethics-committee/">http://www.scie.org.uk/research/ethics-committee/</a> )	<b>No</b>
3.	Will you recruit any participants who are currently under the auspices of the Criminal Justice System, for example, but not limited to, people on remand, prisoners and those on probation? (Such research needs to be authorised by the ethics approval system of the National Offender Management Service.)	<b>No</b>

<b>If your answer to any of the following questions (12 – 18) is YES, you should consult your supervisor, as you may need to apply to an ethics committee for approval.</b>		<i>Delete as appropriate</i>
12.	Does your project involve participants who are under the age of 18?	<b>No</b>
13.	Does your project involve adults who are vulnerable because of their social, psychological or medical circumstances (vulnerable adults)? This includes adults with cognitive and / or learning disabilities, adults with physical disabilities and older people.	<b>No</b>
14.	Does your project involve participants who are recruited because they are staff or students of City University London? For example, students studying on a particular course or module. (If yes, approval is also required from the Project Tutor.)	<b>No</b>
15.	Does your project involve intentional deception of participants?	<b>No</b>
16.	Does your project involve identifiable participants taking part without their informed consent?	<b>Yes/No</b>
17.	Does your project pose a risk to participants or other individuals greater than that in normal working life?	<b>Yes/No</b>
18.	Does your project pose a risk to you, the researcher, greater than that in normal working life?	<b>Yes/No</b>

**If your answer to the following question (19) is YES and your answer to all questions 1 – 18 is NO, you must complete part B of this form.**

19.	Does your project involve human participants? For example, as interviewees, respondents to a questionnaire or participants in evaluation or testing.	<b>Yes</b>
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**Part B: Ethics Proportionate Review Form**

If you answered YES to question 19 and NO to all questions 1 – 18, you may use this part of the form to submit an application for a proportionate ethics review of your project. Your dissertation project supervisor will review and approve this application.

**The following questions (20 – 24) must be answered fully.**

*Delete as appropriate*

20.	Will you ensure that participants taking part in your project are fully informed about the purpose of the research?	<b>Yes</b>
21.	Will you ensure that participants taking part in your project are fully informed about the procedures affecting them or affecting any information collected about them, including information about how the data will be used, to whom it will be disclosed, and how long it will be kept?	<b>Yes</b>
22.	When people agree to participate in your project, will it be made clear to them that they may withdraw (i.e. not participate) at any time without any penalty?	<b>Yes</b>
23.	<p>Will consent be obtained from the participants in your project, if necessary?</p> <p>Consent from participants will only be necessary if you plan to gather personal data. “Personal data” means data relating to an identifiable living person, e.g. data you collect using questionnaires, observations, interviews, computer logs. The person might be identifiable if you record their name, username, student id, DNA, fingerprint, etc.</p> <p><i>If YES, attach the participant information sheet(s) and consent request form(s) that you will use. You must retain these for subsequent inspection. Failure to provide the filled consent request forms will</i></p>	<b>Yes</b>

	<p><i>automatically result in withdrawal of any earlier ethical approval of your project.</i></p> <p><b>To be provided later</b></p>	
24.	<p>Have you made arrangements to ensure that material and/or private information obtained from or about the participating individuals will remain confidential?</p> <p>Provide details:</p> <p><b>To be confirmed</b></p>	<b>Yes</b>

<b>If the answer to the following question (25) is YES, you must provide details</b>		<i>Delete as appropriate</i>
25.	<p>Will the research involving participants be conducted in the participant's home or other non-University location?</p> <p><i>If YES, provide details of how your safety will be ensured:</i></p> <p><b>Details to be confirmed</b></p>	<b>Possibly</b>

## Appendix Two: Questionnaire

Sample email:

**Subject:** Orphan works survey

Dear

My name is Thomas Ash I am currently studying for a MSc in Library Science at City, University of London.

As part of my studies I am undertaking a study on the impact of Orphan Works legislation for my dissertation.

As someone who has experience of using the UK's IPO orphan works scheme I would like to invite you to participate in a short survey about your experiences. I anticipate that it should take no more than 10-15 minutes of your time so if you are willing to participate I'd be most grateful.

The link to the survey is here: <https://goo.gl/forms/ktBCwPBcLSIYI8CS2>

If you would like to view the questions beforehand then they can be seen here: <https://thomasash.files.wordpress.com/2017/08/orphan-works-survey-google-forms.pdf> and a summary of my initial findings from my research can also be found on my blog: <https://thomasash.wordpress.com/>

If you have any questions, please let me know.

Many Thanks and Kind Regards

Thomas  
Msc Library Science  
City, University of London



## Survey Questions

Completed for Thomas Ash in aid of Dissertation Research for the City, University of London

**\*Required**

**Email address \***

### Consent Form

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I understand that Thomas Ash is collecting data in the form of an online survey for use in an academic research project as part of his MSc City, University of London. The survey will assist in determining the extent to which the current UK Orphan Works (works whose owner/s cannot be identified or located) legislation is effective in enabling mass digitisation of orphan works. As part of this it will seek to understand the impact the presence orphan works have on digitisation practices and activities within cultural heritage organisations.

The survey consists of 39 questions and will take around 30 minutes to complete.

I give my consent to the use of data for this purpose on the understanding that:

- All names and other material likely to identify individuals will be anonymised. The material will be kept in secure storage at all times.
- The material may be used in future publications, both print and online.
- I know that I can at any point contact Thomas at [thomas.ash@city.ac.uk](mailto:thomas.ash@city.ac.uk) using the email address I have entered above to ask any questions and withdraw my consent at any point after completing the survey.

Point of contact: Researcher's name and email: Thomas Ash, [thomas.ash@city.ac.uk](mailto:thomas.ash@city.ac.uk)

Supervisor's name and email: Dr Lyn Robinson, [L.Robinson@city.ac.uk](mailto:L.Robinson@city.ac.uk)

Department address: School of Mathematics, Computer Science & Engineering, City, University London, Northampton, Square London, EC1V 0HB

2) I agree with the above consent form and am happy to continue with the survey \*

*Tick all that apply.*

- I AGREE
- 

### Information about the organization you work for:

**1) What type of organisation do you represent? \***

*Mark only one oval.*

- National Archive
- Other Archive/Records Office
- Film or audio heritage institution
- Gallery
- National Museum

- Other type of Museum
- National Library
- Higher Education Library or Archive
- Special or other type of library
- Other:

**2) What is the size of your organisation?** *Mark only one oval.*

- Less than 50 employees
- 50 to 100 employees
- 100 to 500 employees
- 500 to 1000 employees
- 1000 to 5000 employees
- Don't know

**About your collection(s)**

**3) What is the size of your collection?** *Mark only one oval.*

- Less than 1000 items
- 1001 to 5000 items
- 5001 to 10,000 items
- 10,001 to 500,000 items
- 500,001 to 1 Million items
- 1 Million + items
- Not sure

**4) What types of material has your organisation digitised or is planning to digitise?**

*Tick all that apply.*

- Books
- Rare Books
- Manuscripts
- Newspapers/Magazines
- Other printed materials
- Microfilms
- Maps/Plans
- Photographs
- Other still image materials
- 2D Visual artworks
- 3D Artworks
- Music
- Sound recordings
- Film
- Other Audio-Visual material

**Copyright and your organization**

**5) Please indicate what percentage of your collection you know or estimate to be Orphan**

**Works?** *Mark only one oval.*

- Less than 5%
- 5 - 10%
- 11 - 20%
- 21 - 30%
- 31 - 40%
- 41 - 50%
- 51 - 60%
- 61 - 70%
- 71 - 80%
- 81 - 90%
- 91 - 100%
- Don't Know

**6) Does your organisation have a Copyright policy or internal regulation related to**

**Copyright?** *Mark only one oval.*

- Yes
- No
- Not sure

**7) Does your organisation have a specific person in charge of dealing with copyright issues in particular? Mark only one oval.**

- Yes
- No
- Not sure

**8) Please indicate your degree of familiarity with the following aspects of Copyright?**

*Tick all that apply.*

	Copyright law in general	Copyright issues relating to digitisation	Copyright exceptions	Copyright issues and legislation relating to orphan works	Rights clearance
No knowledge or awareness	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Little knowledge or awareness	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Some knowledge or awareness	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
High level of knowledge or awareness	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

**9) Has the presence of in-Copyright material in your collections ever impacted upon a planned digitisation project? If so, please indicate in what way: Tick all that apply.**

- Project abandoned
- Copyrighted material removed, and only public domain material digitised
- Copyright material digitised but not made available
- Rights clearance undertaken and only cleared material digitised and made available
- All material digitised and made available using a risk managed / takedown strategy
- No Impact
- Other:

**Barriers to digitisation**

**10) Which of the following approaches best describes your organisations approach to digitisation: Mark only one oval.**

- Only digitises material that is out of Copyright
- Only digitises materials where the organisation or its partners hold the Copyright

- Is willing to digitise in Copyright material where the majority of rights are held by a single rights holder
- Is willing to digitise in Copyright material with multiple rights holders

**11) What are the main reasons that prevent your organisation from digitising orphaned and other material in your collections? Tick all that apply.**

- Lack of funding for digitisation activities
- Lack of staffing for digitisation activities
- Lack of knowledge about Copyright and orphan works
- Length of time required to locate and correspond with rights holders
- Staff costs of locating and corresponding with rights holders
- Other costs involved in locating and corresponding with rights holders
- Other

### *The Orphan Works Directive*

**12) Has your organisation ever digitised orphan works material under the Orphan Works exception? Mark only one oval.**

- Yes
- No
- Not aware of the exception

**13) If yes please provide a brief description of the project and a url if available:**

---

### *Reasons for not using the EU Exception*

**14) If you have not digitised Orphan Works using the exception, please indicate the reasons why: Tick all that apply.**

- Used the Orphan Works License Scheme instead
  - Complexity of diligent search requirements
  - Lack of guidance on conducting diligent search
  - Cost of performing diligent search (in terms of staffing)
  - Cost of performing diligent search (non-staff)
  - Length of time required to conduct diligent search
  - Restrictedness of sources needed to conduct diligent search
  - Lack of knowledge about orphan works or copyright
  - Orphaned material in collection not covered by scope of exception (e.g. stand-alone images)
  - Other:
- 

### *Orphan Works Licensing Scheme*

**15) Have you ever made orphan material in your collection available using the IPO Orphan Works Licensing scheme? Mark only one oval.**

- Yes
- No
- Not aware of the license scheme
- Other

*Reasons for not using the Orphan Works Licensing Scheme*

**16) If you have not used the Orphan Works License scheme to digitise orphaned material in your collections, please indicate the reasons why: Tick all that apply.**

- Used the Orphan Works exception instead
- Complexity of diligent search requirements
- Cost of licensing too high
- Length of license insufficient
- Length of time required to conduct diligent search
- Administrative and staffing costs too high
- Lack of knowledge about orphan works or copyright
- Unsuitability of scheme for mass digitisation
- Rights holder located during diligent search
- Scope of license insufficient (i.e.
- Other:

**17) If yes please explain the reasons why you chose to do so:**

---

*Reasons for not using the License Scheme*

**18) If you are aware of the Orphan Works License Scheme but haven't made use of it please indicate why: Tick all that apply.**

- Used EU directive
- Cost of licensing too high
- Rights holder located during diligent search
- Administrative and staffing costs too high
- Length of license insufficient
- Lack of publicly available sources for diligent search
- Length of time required to correspond with rights holder
- Other:

**19) What would make you more likely to use the license scheme?**

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*For organisations not using the exception or the license*

**20) If you have digitised orphaned material but haven't used either the EU exception or the UK licensing scheme how have you made them available? Tick all that apply.**

- Online using a risk managed approach and takedown policy
- Made them available via standalone terminal
- Using another Copyright exception (please say which)
- Other:

**Further comments:**

---

*Estimated costs*

**For a recent digitisation project please indicate:**

**21) Name of the project**

---

**22) Total number of items included in the project**

---

**23) Estimated time (staff hours) spent searching for rights holders**

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**24) Estimated cost (non-staff) of obtaining rights clearance (including any fees paid for access to non-public databases/ sources whilst searching for rights holders)**

---

**25) Percentage of works found to be orphaned after diligent search/rights clearance**

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**26) Percentage of works found to be in public domain after diligent search/rights clearance**

---

**27) Percentage of works registered under UK IPO Orphan Works licensing scheme**

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**28) The number of takedown requests**

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**29) The number of works where permission to digitise was denied following correspondence with the rights holder**

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**30) Overall cost of the project (if not known please estimate)**

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**31) Any further comments**

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**32) Does your organisation have a takedown policy for orphan material?**

- Yes
- No

**Solutions**

**33) Which of the following would make it easier for your organisation to digitise orphan works in your collection. Tick all that apply.**

- Reduced costs for licensing
- Less complex requirements for diligent search
- Ability to use employ a third party to conduct diligent search / rights clearance
- A mandatory exception
- Shorter copyright term
- An extended collective license for orphan works
- Further guidance or training in Copyright
- Other:

Follow up and further contacts

**37) Would you be willing to take part in a follow up interview to discuss your answers?**

*Mark only one oval.*

- Yes
- No

**38) Please provide any alternative contact details if needed:**

**39) Do you know of anyone else who would be willing to take part in this survey (please provide details)**



## Appendix Four Interview Questions

Thomas Ash City University

Title of Study: How effective is current orphan works legislation in enabling the mass digitization of such works by UK Cultural Heritage institutions?

Interviewee Name	
Job Title/Position	
Organization	
Date and Time of Interview	
Consent Form Completed	

The questions are intended as a guide for a semi-structured interview, not all questions may be relevant to the interviewee and follow up questions may be asked where appropriate.

[1]: Please introduce yourself and give a brief description of your role

[2]: The term “20th century black hole” has been used to describe the absence material, particularly orphan works, from the 20th century in online collections. Are you familiar with that term and how has it manifested itself in relation to your online collections?

[3]: How does your organisation go about selecting material for digitization?

[4]: How do you determine the rights status of the material that you select for digitization? Does the rights status of materials play a part in the selection?

[5]: Has the presence of orphan works affected your plans for digitization, for example have you removed them? Or made them available through

### Questions relating to the Orphan Works Directive

[6]: The UK introduced the EU orphan works exception in 2014 has this made any difference to your approach to making orphan works available?

[7]: What has been experience of using the Orphan Works Directive?

What aspects of the process work well and what areas could be improved?

[8]: What is your opinion on the suitability of the EU OW Directive for enabling mass digitization?

### Questions relating to the Orphan Works Licensing Scheme

[9]: What is your opinion of the value of IPO orphan works licensing scheme?

[10]: Have you used the scheme and if so what was your experience of it?

What aspects of the process work well and what areas could be improved

[11]: Why do you think there has been such limited uptake of the IPO License scheme, what changes could be made to increase the uptake?

## **Risk Management**

[12]: How would you describe your organisations appetite for risk in relation to the use of orphan works?

[13]: Have you used a risk managed approach for making orphan works available online? Do you consider this approach more suitable to your needs?

[14]: Do you consider works for which no response is received from the rights-holder orphaned?

## **Diligent Search**

[15]: Do you agree that the burden of diligent search is too high?

What are the main issues for you surrounding the diligent search process?

For example, costs (staff/non-staff), time, lack of guidance

[16]: Would the use of a third party or independent body to conduct diligent search for identified orphan works be a viable solution to the reducing the burden of diligent search?

## **Alternatives solutions**

[17]: What is your opinion of Extended Collective Licensing as a viable solution to the issue of orphan works?

[18]: Do you agree that, the orphan works issue, is a symptom of the wider issue of an efficient mechanism for clearing rights for cultural heritage digitization?

[19]: Would you be in favour of a revised or new exception enabling the mass digitization and communication to the public of library and archive held content

[20]: Do you think that Brexit will make it harder to achieve an effective cross-border solution to the mass digitization of cultural heritage collections?

[21]: Do you have any further comments or is there anything you would like to ask me?

Thank you for your time, once the interview has been transcribed I will send you a copy for approval