Out-of-Commerce, Out of Mind: Widening Public Access to Out-of-Commerce Copyright Works in Film Archives through the DSM Directive

MELANIE WEDNESDAY ROSE STOCKTON-BROWN

A thesis submitted in partial fulfilment of the requirements of
Bournemouth University for the degree of

Doctor of Philosophy

Department of Humanities and Law, CIPPM
Faculty of Media and Communication
Bournemouth University

December 2020

Word count: 78,910 (excluding footnotes)

Abstract:

Art. 8 of the EU Copyright in the Digital Single Market Directive 2019 addresses the issue of out-of-commerce works, enabling cultural heritage institutions ("CHIs") to provide public access to these copyright works in certain circumstances. Art. 8 enables CHIs to obtain licences from collective management organisations ("CMOs"), avoiding the need to negotiate with each individual rightholder. Art. 8(2) expands this and enables CHIs to make out-of-commerce works available for non-commercial purposes without seeking the rightholder's permission where there is no representative CMO. This thesis addresses to what extent Art. 8 can successfully benefit film archives and the existing practices of film archivists in widening public access to film heritage.

This research has been conducted using an interdisciplinary mixed-methods approach, utilising doctrinal, comparative and ethnographic methodologies. A doctrinal and comparative legal analysis has been conducted to explore whether the new provisions are compatible with the existing EU copyright *acquis* and international copyright obligations. An ethnographic study of the national film archives of the UK and the Netherlands, as well as a regional film archive in the UK, was conducted to explore existing film archival practices and how Art. 8 might best be incorporated into these practices.

This research makes an original contribution to knowledge through the doctrinal and comparative holistic legal analysis of Art. 8 of the DSM Directive, including proposing a sampling mechanism for use by CHIs in determining if works are out-of-commerce. New empirical data is generated from the ethnographic studies concerning film archives and their copyright archival practices, and how likely they are to make use of Art. 8 within these existing practices. A copyright regime of archival practices is formulated in this thesis, which can be utilised in future research within film archives and CHIs more widely. This thesis makes a conceptual contribution to the existing literature through reframing making out-of-commerce works available as a mechanism to address the historic exclusion of certain communities from the archive, as well as the distortion of the digital skew. In addition, this thesis offers a

methodological contribution through the application of a mixed-methodology and practice theory to the field of copyright scholarship and out-of-commerce works.

It was found that there are a number of legal and practical issues to incorporation into archival practice. This stems from the meanings, competences and materials present within the film archives, using a practice theory lens. Overall, the doctrinal and comparative legal analysis found that there are issues of ambiguity within Art. 8 that will need to be addressed in the national implementations in order to be successful. The rightholder opt-out presents a fundamental departure from copyright doctrine; and is also incompatible with the desire from film archives to uphold rightholder relationships and avoid reputational harm.

However, it was also found that there are many films within the collections of the studied film archives that are likely to be out-of-commerce. If concerns relating to the incorporation of Art. 8 into archival practice can be addressed, this could be a significant step forward in widening public access to cultural heritage.

Table of Contents

Figures and Tables

Tables

Figures

Acknowledgements

To my supervisors, Professor Maurizio Borghi, Dr Claudy Op den Kamp and Dr Janice Denegri-Knott, I could not have done this without you. Your guidance and encouragement have been invaluable, and you have introduced me to new methods, concepts and academic work that have inspired me.

I am humbled to have received a full PhD Studentship from Bournemouth University to fund my doctoral research. This has allowed me to pursue postgraduate study, which otherwise I could not have done.

To all of the individuals, film archives and cultural heritage institutions who gave their time to participate in this research, I am deeply and sincerely grateful. I hope you will feel you gave your time for something meaningful.

To Alex and Amy, two brilliant fellow PhD researchers who have inspired me and supported me every step of the way. To my family, thank you for always letting me be who I am, and encouraging me to follow this dream. I'm sorry for talking about copyright law so much. To Dom, Harry, Jack, Luke and Sean: this is the story of how I quit smoking. To Lexy, who has always believed in me more than I ever have, thank you for being my best friend through all these years. To Ashley, now my husband, thank you for believing in me and pushing to me keep going. Gawr gariad.

And finally, I dedicate this thesis to my dear Grandad and Grandma, who I wish were still with us today. Wey aye, pet.

Author's Declaration

Some of the content of this thesis has been previously published or derived from the follow publications:

- "Exploring Article 8 of the Copyright Directive: Hope for Cultural Heritage" in Luigi Carlo Ubertazzi (ed.) AIDA Italian Annals of Copyright XXVIII, Giuffrè Francis Lefebvre, 2019. The content of this article is reproduced in Chapters 4, 5 and 6.
- "Exploring Article 8 of the Copyright Directive: Hope for Cultural Heritage" CIPPM Working Paper No. 04-2020, 2020 (this was the draft version of the AIDA article above).

Other publications

- "The Oral Contraceptive Pill" in Op den Kamp, C. and Hunter, D. (eds) *A History of Intellectual Property in 50 Objects*. Cambridge University Press, 2019.
- "Moral Copyright Law: An Opportunity to Review the Current Law after Brexit" in Sacco, Marcello (ed.) *Brexit and EU Law: A Way Forward* Vernon Press, 2019
- "Representing the Modified Body" in Ross, Karen (ed) *The International Encyclopedia of Gender, Media, and Communication,* 2020

Conference presentations

- **July 2021 (postponed from July 2020)** - *Mary Shelley and her Beloved Frankenstein*, Twelfth Annual International Society for the History and Theory of Intellectual Property Workshop
- **November 2020** –*Copyright regime of archival practices*, 4th Bournemouth University FMC PGR Conference
- **December 2019** - *A hopeful future: freeing out-of-commerce works,* FMC PGR Seminar Presentation at Bournemouth University
- **November 2019** - Freeing *the Archive*, 3rd FMC PGR Annual Conference 2018 at Bournemouth University

- **October 2019** - *An uncertain but hopeful future: freeing out-of-commerce works,* International Association of Sound and Audiovisual Archives 50th Conference
- **September 2019** – *Exploring Article 8 in the film archive,* "The new Copyright Directive: what opportunities for cultural heritage institutions?" short course aimed at academics and policy makers at Bournemouth University
- **September 2019**- *Reputational risk in the archive: a discussion*, "Digitization and access to cultural heritage collections: understanding the law and practice" short course aimed at CHIs at Bournemouth University
- **June 2019 –** *The EU Copyright Directive: Censorship, Fake News and the Creative Industries,* Stirling University Arts & Humanities PGR Conference 2019
- **December 2018 –** *Promise of the Pill*, Bournemouth University Postgraduate Conference
- **September 2018** – *Moral Copyright Law and Museum Exhibitions*, Eleventh International Conference on the Inclusive Museum 2018
- **July 2018** – *The Oral Contraceptive Pill,* "Histories of Intellectual Property in Numerous Objects—Interdisciplinary Insights" event at the International Society for the History and Theory of Intellectual Property Annual Workshop.
- **June 2018** - *Women in film: more than just pretty faces*, Bournemouth University Festival of Learning public event
- **June 2018 -** *My PhD experience: the copyright war raging in Europe*, Bournemouth University Festival of Learning public event
- **June 2018** – *How will Brexit affect copyright law: An opportunity for much-needed review?* Leeds University PGR Conference 2018
- **May 2018** – *The legal and ethical implications of reusing audiovisual records of social movements and dissent, and of reusing audiovisual records of everyday life in new social and political contexts,* EYE International Film Conference 2018

Chapter 1: Introduction

1.1 Introduction

Cultural heritage professionals and archivists, archival scholars and copyright scholars have collaborated on significant practice-based research into minimising the restrictive effect of copyright on cultural heritage institutions ("CHIs"). The areas addressed include orphan works;[1] and surrogate intellectual property rights and surrogate copyright.[2]

However, the problem of out-of-commerce works for CHIs remains unsolved. With the recent introduction of the Copyright in the Digital Single Market Directive 2019,[3] this brings the legislative change needed for CHIs to make use of these out-of-commerce works and is a change that scholars had wisely advocated for.[4] Nevertheless, this thesis concludes that the copyright legislation alone is insufficient, unless it is accompanied by working practices and knowledge within these institutions that can incorporate the legal reform.

This thesis addresses the problem of out-of-commerce works within the context of film archives. Within the cultural heritage sector, film archives are particularly impacted by the problem of out-of-commerce works. Within Europe, there are approximately 1.03 million hours of film material in cultural heritage institutions

[1] The literature astutely identifies the practical barriers of time, cost and skill that prevent wide-spread use of the Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works Text with EEA relevance (the Orphan Works Directive), and the need for legislative change. This will be discussed in depth in Chapter 3.

[2] Wallace has conducted insightful and fascinating research into "surrogate intellectual property rights" and "surrogate copyright". See Wallace, A. *Surrogate IP rights in the cultural sector* Doctoral thesis (University of Glasgow, 2018). CHIs often assert "surrogate" property rights in the digitised version of the artefact - see also Uma Suthersanen "Eyeing the Need for Licensing Using the Orphan Works Lens" in Jorgen Blomqvist (ed.) "Copyright, To Be or Not To Be" (Ex Tuto Publsihing, 2019) 247.

[3] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, referred to in this thesis as the "DSM Directive"

[4] For example, Guibault and Schroff have advocated for Extended Collective Licensing, see Lucie Guibault and Simone Schroff, Extended Collective Licensing for the Use of Out-of-Commerce Works in Europe: A Matter of Legitimacy Vis-à-Vis Rights Holders (2018) 49(8) *IIC*, pp. 916-939; Borghi and Karapapa have advocated for a copyright exemption when the work is no longer commercially exploited, see Maurizio Borghi and Stavroula Karapapa, *Copyright and Mass Digitization* (OUP, 2013); Dusollier has advocated for "re-aligning" economic rights with the actual exploitation of the work, see Severine Dusollier "Realigning Economic Rights With Exploitation of Works: The Control of Authors Over the Circulation of Works in the Public Sphere" in Bernt Hugenholtz (ed.) *Copyright Reconstructed: Rethinking Copyright's Economic Rights in a Time of Highly Dynamic Technological and Economic Change* (Kluwer Law International, 2018); see also Stef van Gompel and P. Bernt Hugenholtz The Orphan Works Problem: The Copyright Conundrum of Digitizing Large-Scale Audiovisual Archives, and How to Solve It (2010) 8(1) *Popular Communication*, pp. 61-7; and European Copyright Society "Answer to the EC Consultation on the review of the EU copyright rules" (European Copyright Society, 2014)

including film archives.[5] Film archives have estimated that 76% of the film works in their collections are under copyright, and that about 60% of the feature films under copyright are presumably orphan works or out-of-commerce.[6] This means that there is likely hundreds of thousands of hours of films held by these archives, and which have not been digitised or made available to the public.

Films allow people to understand the cultures, experiences, passions and struggles of others as well as their own. Within film archives, there are many thousands of hidden stories, ranging from those at the national level, to documenting life in local areas or regions. Some films are made for entertainment purposes, such as big-budget blockbusters and genres such as comedy. Some films are made to further a cause, such as powerful documentaries. These films are usually made with the intention of public distribution and access. Other films have been made without the original intention of a wider audience in mind, such as amateur films or home movie projects, as well as scientific or anthropology films.[7]

Unfortunately, due to copyright restrictions, many films held in the collection of film archives are not seen by the public. The majority of these films are those that are amateur or home movies, and often particularly of local events and places. There are also many films that were made with an original intention to be shared with the public but have fallen out of circulation. For example, commercial films for which the production company has gone out of business.[8]

Public access to these films is crucial from a cultural and social perspective. Cultural and social understandings of others can pave the way for wider social harmony, and hence is of the utmost importance. For this reason, there have been policy and legal

[5] Nick Poole "The Cost of Digitising Europe's Cultural Heritage: A Report for the Comité des Sages of the European Commission" (The Collections Trust, November 2010), 3
[6] Gilles Fontaine and Patrizia Simone (eds.), *The access to film works in the collections of Film Heritage Institutions in the context of education and research* (European Audiovisual Observatory, 2017), 32
[7] See for example Peter J. Koehler, Bregt Lameris and Eva Hielscher, Neurocinematography in Pre-World War II Netherlands: The Magnus-Rademaker Collection (2016) 25(1) *Journal of the History of the Neurosciences*, pp. 84-101
[8] See Claudy Op den Kamp, *The Greatest Films Never Seen: The Film Archive and the Copyright Smokescreen* (AUP, 2018) 73

measures[9] implemented aiming to assist cultural heritage institutions, including film archives, in making these works publicly available.

The EU has led the way internationally, with the DSM Directive, which aims in part to widen access to out-of-commerce works that are cultural heritage artefacts. These are works that are still subject to copyright protection and are not commercially exploited by the rightholder. This is a growing problem, as works subject to copyright often disappear from public view, and only reappear once more when they are no longer subject to copyright protection.[10]

Art. 8(1) of the DSM Directive aims to enable CHIs to make use of these out-of-commerce works, through the introduction of a licensing mechanism with collective management organisations ("CMOs"), avoiding the need to negotiate with each individual rightholder. Art. 8(1)(a) requires there to be a "sufficiently representative" CMO in operation. The non-exclusive licence may be extended or presumed to apply to out-of-commerce works of the same category as those covered by the licence who are not represented by the CMO, which could avoid unnecessary strains on time and money in carrying out individual negotiations.

Art. 8(2) expands this and enables CHIs to make out-of-commerce works available for non-commercial purposes without seeking the rightholder's permission where there is no representative CMO. This is known as the "fall-back" exception. Art. 8(4) mandates that rightholders may opt-out of the licensing in Art. 8(1) or the exception under Art. 8(2) at any time.

The DSM Directive, through Article 8, therefore aims to ensure that there are legal mechanisms implemented in each Member State that allow CMOs to license these out-of-commerce works to the CHIs.[11] This facilitates a "functioning copyright framework that works for all parties…"[12]

[9] Including the 2011 Memorandum of Understanding relating to books and journal articles only and the DSM Directive. The history of these measures will be discussed more in Chapter 3.
[10] "For example, more than twice as many new books originally published in the 1890's are for sale by Amazon than books from the 1950's, despite the fact that many fewer books were published in the 1890's." See Paul J. Heald, How Copyright Keeps Works Disappeared (2013) *Illinois Public Law Research Paper No. 13-54,* pg. 3
[11] Recital 31
[12] Recital 44

Understanding how law is experienced and understood by individuals within their everyday lives is therefore fundamental to any attempt to analyse whether specific legislation can achieve its intended purpose. Individuals experience, understand and interpret policies and laws in diverse ways; and some laws and policies are routinely enforced in practice, whilst others are not.[13] To be able to explore how these out-of-commerce film works can best be shared with the public, a thorough understanding of the everyday practices, challenges and policies within film archives is essential.

Meaningful and appropriate incorporation of Art. 8 into archival practice is necessary; and is the focus of this thesis. The term "archival practice" is used throughout this thesis as meaning the materials, competences and meanings that come together within film archives. The legal mechanisms will be largely ineffective if they are not incorporated into practice. The legal mechanisms will also be ineffective if it is evident that the DSM Directive does not address the challenges within film archives that hinder incorporation in practice.

A comparison will be made with the overly onerous Orphan Works Directive[14] and its subsequent lack of use by CHIs, due to its complexity. If similar issues apply to Art. 8, it is likely it achieves its intended purpose only in part. This would therefore result in Art. 8 not providing widespread public access to film cultural heritage held within CHIs.

1.2 Summary of the Research

This thesis addresses to what extent Art. 8 can successfully benefit film archives and the existing practices of film archivists in widening public access to film heritage. This research complements the existing literature, through conducting doctrinal and empirical research that generates the necessary understanding of how Art. 8 is likely to be understood and used by film archives. This research has found that there are terminology uncertainties, a lack of CHI funding, a lack of legal education and knowledge, and competing archival priorities that could hinder the use of Art. 8 in film archival practice.

[13] See particularly New Legal Realist scholars and their research, discussed further in Chapter 2.
[14] See Chapter 3

This research is interdisciplinary: combining copyright law; film archiving; and practice theory within sociology. Methodologies and theories from these disciplines will be combined dynamically to best address the research question. The reason for such an approach is to holistically understand whether (and how) Art. 8 of the DSM Directive can be incorporated into the existing practices of film archives, so that it achieves its intended purpose. Understanding this from the film archivist's perspective enables a more thorough examination of whether Art. 8 can be of practical significance to film archives, and whether it is likely to be incorporated into existing archival practices.

This thesis employs doctrinal, comparative and ethnographic research to address the research question and aims. Such an approach has been taken as it best addresses an in-depth understanding of the archiving practices that copyright interacts with, in a way that is not possible for only a doctrinal or comparative approach. Together these methodologies combine to generate new knowledge on the issues and benefits of Art. 8 within existing copyright law and doctrine, and on the practical barriers to incorporation within film archives.

A doctrinal methodology will be employed for the legal analysis of the text of the DSM Directive and its place within the EU copyright *acquis* and international copyright obligations. This will also include an examination of the practice of collective management organisations. Ethnographic studies were conducted to explore existing film archival practices and therefore how the out-of-commerce provisions might best be incorporated into these practices. The UK's national film archive the BFI, the Netherland's national film archive EYE, and a regional UK film archive MACE, were the chosen film archives.

MACE was chosen out of the nine[15] regional film archives of the UK. MACE has a large, unique collection of approximately 75,000 films, many of which are ITV Central regional programmes from 1956 to the 1990s, along with industrial, arthouse and

[15] The other regional film archives are: Yorkshire Film Archive; Wessex Film and Sound Archive; South West Film and Television Archive; Screen Archive South East; London's Screen Archives; North West Film Archive; North East Film Archive; and East Anglian Film Archive. There are other national film archives within the UK, being the National Screen and Sound Archive of Wales; the Scottish Screen Archive; and the Northern Ireland Screen Digital Film Archive. The Imperial War Museum also has a vast film archive. *For more information, see* BFI, "Regional and national archives" (BFI) Available at: < https://www2.bfi.org.uk/britain-on-film/regional-national-archives> Accessed on 16th January 2019

amateur films. It is therefore assumed that much of this collection is out-of-commerce, as it is unavailable elsewhere.[16] MACE was chosen due to this unique collection of ITV regional films that were originally made to be distributed to a wide audience and are no longer available to the public. This was to enable analysis of whether housing such a collection of films impacted on either the archival practices or on how out-of-commerce works could be made available.[17] There were also practicalities to consider when deciding which regional film archive should be included, as some of the archives were unable to accommodate a research visit.[18]

A comparative legal approach will compare the Netherlands and the UK throughout this research. As the DSM Directive is an EU legal instrument, this research will focus on film archives and out-of-commerce works within the EU. The UK is currently facing an unclear legal future, and the Netherlands is in the EU. These countries have been chosen as their respective national film archives are prominent within EU discussions concerning film archives and heritage.

From a theoretical perspective, this research will adopt a practice theory approach.[19] Practice theory provides a strong theoretical foundation for understanding the existing archival practices, and how these practices contribute to an overall copyright regime of archival practices that orchestrates archiving. Practice theory has been employed in relation to international law[20] and within human rights law.[21] It has been employed in intellectual property in relation to the practices within pharmaceutical companies.[22]

Practice theory encompasses a broad range of theoretical approaches, and this thesis is utilising practice theory to develop a copyright regime of archival practices,

[16] MACE, "The collection" Available at: <https://www.macearchive.org/about/collection> Accessed on 4th May 2019
[17] As will be discussed in Chapters 8, 9 and 10, MACE priorities revenue-generating activities such as commercial licensing of the collection; and many of its requests are for commercial licensing.
[18] In addition, London's Screen Archives is not a physical archive but rather a virtual one, which would make conducting ethnographic research there challenging.
[19] See Chapter 2 for a detailed discussion.
[20] See Jens Meierhenrich The practice of international law: a theoretical analysis (2013) 76(3-4) *Law & Contemporary Problems*, pp. 1-83; Nora Stappert "Practice theory and change in international law: theorizing the development of legal meaning through the interpretive practices of international criminal courts (2020) 12(1) *International Theory*, pp. 33–58; and Nicolas Lamp "The 'Practice Turn' in International Law: Insights from the Theory of Structuration" in Hirsch, M. and Lang, A. (eds.) *Research Handbook on the Sociology of International Law* (Edward Elgar, 2018)
[21] Joel R. Pruce (eds.) *The Social Practice of Human Rights* (Palgrave Macmillan, 2015)
[22] Elisabeth Eppinger and Gergana Vladova Intellectual property management practices at small and medium-sized enterprises (2013) 61(1) Int. *J. Technology Management*, pp. 64-81, 70

borrowing Foucault's concept. A number of legal scholars have utilised aspects of Foucault's work in their research on copyright, including Woodmansee,[23] Woodmansee and Jaszi,[24] Rose,[25] Chartier[26] and other scholars.[27] These existing uses of Foucault's work within copyright scholarship have not yet applied Foucault's concept of regimes of practices to copyright.

This copyright regime of practice draws on Foucault's concept, and provides a theoretical framework for analysing and understanding the existing regime of archival practices within the film archives, consisting of the materials, meanings and competences present. This regime facilitates a deeper analysis of the likelihood of successful incorporation of out-of-commerce works into existing archival practices. This copyright regime is conceptualised as a discursive system that brings together the different elements of archiving practices: meanings, materials and competences.

The value in understanding the existing copyright regime of archival practices is in identifying the elements that need altering so that film archives can make out-of-commerce works available to the public. Some of these elements demonstrate inconsistency between the archival practices and the mechanisms of Art. 8, and thus may require further legislative change and policy guidance for CHIs at the national level.

1.3 Copyright Context

Copyright exists within a complex web of legal, economic, social, cultural heritage and political issues. Copyright law has been challenged by the increased advance of the Internet more than most areas of law,[28] through activities such as the mass-digitisation of works within CHIs, instant downloading and file-sharing. Audiovisual works have been problematic for copyright and for authors' rights for a long time, as

[23] Martha Woodmansee On the Author Effect: Recovering Collectivity (1992) 10 *Cardozo Arts & Ent. L*.J., pp. 279-292
[24] Martha Woodmansee and Peter Jaszi (eds.) *The Construction of Authorship: Textual Appropriation in Law and Literature* (Durham University Press, 1994)
[25] Mark Rose *Authors and Owners: The Invention of Copyright* (Harvard University Press, 1993)
[26] Roger Chartier "Figures of the Author" in Brad Sherman and Alain Strowel (eds.) *Of Authors and Origins: Essays in Copyright Laws* (Clarendon Press, 1994)
[27] See for further examples and discussion, Maurizio Borghi Copyright and the Commodification of Authorship in 18th- and 19th-Century Europe *Oxford Research Encyclopedia of Literature* (Oxford University Press, 2018); and Lionel Bently Copyright and the Death of the Author in Literature and Law (1994) 57(6) *The Modern Law Review*, pp. 973–986
[28] However, the digital age could also help to better assert moral copyrights. See Peter K. Yu Moral copyrights 2.0 (2014) 1(4) *Tex. A&M L. Rev.*, pp. 873-900, 880

joint copyright works sit at odds with a right originally intended to be controlled by a single individual.[29]

The copyright status of the works is therefore a significant issue for the CHIs. For many CHIs, the cost and complexity involved with determining the copyright status of a work and its copyright holder, and then locating that copyright holder and negotiating with them, has proven to be burdensome. This is due to the large numbers of works to be licensed, and the complexity and cost involved with licensing each one.[30]

Using film from an archive for activities such as screening it, digitising it and making it available online, or incorporating into new copyright works, requires archivists to engage with copyright law. This is especially problematic for non-profit public film archives, as they usually own the copyright to an extremely small proportion of their films.[31] This is further complicated by the fact that many films within film archives are still protected by copyright.[32]

As an example, for the Dutch *Images of the Future* project that EYE was involved in, copyright fundamentally shaped its outcome, as only approximately 2% "of the overall digitized content…could be made available online for the general public."[33] This illustrates that copyright substantially impacts upon film archival practice: after a considerable amount of time, money and expertise has been given to projects such as *Images of the Future*, almost all of these film works were unable to be accessed by the public.

Consequently, an issue that arises for archival collections in relation to copyright is that the historical narratives and culture that they make available to the public is only a small part of the overall collection, which has been "curated through the random prism of copyright".[34] Many films are not made available and become forgotten. This

[29] Baldwin notes that film has "gnawed away" at the concept of copyright, as it involves many different people, and immediate proceeds are expected from the film. See Peter Baldwin *The Copyright Wars: Three Centuries of Trans-Atlantic Battle* (Princeton University Press, 2014), pp. 220-221
[30] Marie-Christine Janssens and Ran Tryggvadottir, 'Facilitating Access to Orphan and Out-of-commerce Works to Make Europe's Cultural Resources Available to the Broader Public' (2014), 30
[31] Op den Kamp (2018) (n.8) 26
[32] Op den Kamp (2018) (n.8) 52
[33] Giovanna Fossati *From Grain to Pixel: The Archival Life of Film in Transition* (AUP, 2009) 137
[34] Sally McCausland Getting Public Broadcaster Archives Online (2009) 14(2) *Media and Arts Law Review*, pp. 142-165, 160

leads to what McCausland refers to as a "digital skew", in that the "publicly available cultural history" becomes skewed, as many works are forgotten. This digital skew is thus attributed to a "gridlock" caused by copyright protection, impacting on which works are digitised and made available to the public.[3536]

Op den Kamp asserts that the "digital skew" within audiovisual archives therefore refers to the "asymmetry between analogue and digitized collections"[37], as the digitised collections within film archives are not an accurate representation of the analogue collections. That is to say, the digitised collection has become skewed or distorted by copyright, and now reflects only a partial narrative or cultural history.

Certain communities of people and individuals have historically been excluded from the records and databases within archival collections, whilst other communities or individuals have been prioritised within archival collections.[38] This historic exclusion is further compounded by the effects of the digital skew within archives, meaning that many voices have not been heard.

The impact on the historical narrative of these historic exclusions and of the digital skew is significant as Art. 8 could be utilised to begin to remedy this distortion of the historical narrative. In facilitating out-of-commerce works within CHIs being made available to the public, there is an opportunity for film archives to promote the marginalised films within their collections, and to encourage public enthusiasm for engaging with these films. This can be combined with crowd curatorship, encouraging volunteers to help identify and correctly catalogue films in the collections which have been ignored.[39]

1.4 Research Question

The research question of this thesis can be summarised as follows: *"To what extent can "out-of-commerce works" in the DSM Directive successfully benefit film archives*

[35] McCausland (n.34) 160
[36] Claudy Op den Kamp "Audiovisual Archives and the Public Domain: Economics of Access, Exclusive Control and the Digital Skew" in Virgina Crisp and Gabriel Menotti Gonring (eds.) *Besides the Screen: Moving Images through Distribution, Promotion and Curation* (Palgrave Macmillan, 2015), pg. 147
[37] Op den Kamp (2015) (n.36)147
[38] See 3.2.1 for further discussion.
[39] See 8.2.1 on crowd curatorship.

and the existing practices of film archivists in widening public access to film heritage?"

Issues with implementation and enforcement of EU law in member states are widely acknowledged by legal scholars and the EU.[40] As a direct result, the EU Commission has developed an EU policy on implementation and enforcement of EU law.[41] The imperative on successful and harmonised implementation of EU law at the national level derives from the fact that delays in implementation or incorrect implementation "weakens the system itself, reduces the chance to fully achieve policy goals and deprives citizens and businesses of potential benefits."[42] This evidences the need for an understanding of whether the DSM Directive is likely to be incorporated in practice, as national implementation alone will not address the aims of the DSM Directive.

Mousmouti has extensively written on the effectiveness of legal implementation, and argues that effectiveness comprises: "objectives, content, context and results…Because they explain *the why, the how and the what* in relation to legislation".[43] She regards "effectiveness" as an attempt "to measure the causal relations between the law and its effects".[44] She asserts that the "effectiveness" of legislation "lies at the intersection of theory and legislative practice…"[45]

She further comments that "effectiveness is not a measure of perfection", and instead the focus must be on realistic implementation with the resources available.[46] This thesis will focus on the existing materials, competences and meanings present within the film archives when examining whether Art. 8 is likely to be incorporated and utilised within archival practices.

1.4.1 Aims

1 To examine the text of Art. 8 and the licensing mechanism to determine its compatibility with existing EU and international copyright law.

[40] Marta Ballesteros, Rostane Mehdi, Mariolina Eliantonio and Damir Petrovic "Tools for Ensuring Implementation and Application of EU Law and Evaluation of their Effectiveness" (European Parliament, 2013) 15
[41] Ballesteros, Mehdi, Eliantonio and Petrovic (n.40) 15
[42] Ballesteros, Mehdi, Eliantonio and Petrovic (n.40) 16 Emphasis added to quotation
[43] Maria Mousmouti "Designing Effective Legislation" (Edward Elgar Publishing Ltd, 2019) xiii
[44] Maria Mousmouti Operationalising Quality of Legislation Through The Effectiveness Test (2012) 6(2) *Legisprudence*, pp. 191-205, 202
[45] Mousmouti (2019) (n.43) xiiv
[46] Mousmouti (2019) (n.43) xii

2 To compare the compatibility of Art. 8 with the existing copyright laws and collective management of copyright of the UK and the Netherlands.

3 To propose a copyright regime of archival practices that provides a theoretical framework for understanding how copyright is understood and adhered to within film archives.

4 To examine whether the new provisions on out-of-commerce works are likely to be incorporated into existing archival practices, so that film archives can widen public access to these works.

1.5 Scope of the Research

From a jurisdictional perspective, the focus is on EU copyright law; and the laws and film archives of the UK and the Netherlands will be the primary focus of the research. These countries have been chosen as their respective national film archives are prominent within EU discussions concerning film archives and heritage.

France was considered for inclusion in this thesis, given that it also has prominent national and regional film archives, and the fact that the *Soulier* case[47] was based on a dispute of the French law on out-of-print books,[48] which is the same concept as out-of-commerce works. The ability to conduct meaningful legal ethnographic research relies on fluency in the spoken and written language of the institution or community being studied.[49] As the researcher lacks this fluency, meaningful ethnographic research could not have taken place within the French film archives. Continuing the research in the future would involve working with interdisciplinary collaborators within the French film archives, to further this research by testing the copyright regimes of archival practices proposed here.

The focus on the practical implementation will be limited to film archives, excluding other CHIs. Film archives have been focused on specifically in this research as a significant number of films within the EU are out-of-commerce works[50] and films are

[47] *Soulier v Doke* [2016] C-301/15
[48] See Chapter 3 for a detailed discussion.
[49] See 2.2.2.2 in this thesis
[50] Fontaine and Simone (n.6) 32

especially vulnerable to becoming lost.[51] Without the benefit of the new Art. 8, much of the EU's film heritage will be 'lost' or inaccessible to the public.

Additionally, Art. 8 requires a distinction to be made between commercial and non-commercial uses, and film archives are well-placed as institutions to examine how the distinction between commercial and non-commercial uses could (and is) being made. This is due to the varied reuses of film material in both commercial (for-profit) and non-commercial (non-profit) settings, such as the creation of video essays and for reuse within documentaries. Film archives usually generate revenue from their archive collections to some extent to recoup the digitisation and archival costs. Consequently, they have internal organisational views on which uses are considered to be "commercial" and which are "non-commercial", more so than other CHIs.

This research will focus on non-profit or "non-commercial" archives. Art. 8 applies only to CHIs and to non-commercial uses, and therefore Art. 8 is not applicable to commercial film archives.

The issue of the UK withdrawing from EU membership is significant. The UK left the EU on 31 January 2020 and has chosen not to implement the DSM Directive in its national legislation. However, there is no barrier to the UK choosing to implement domestic legislation that mirrors the provisions of the DSM Directive. Therefore, the legal and ethnographic empirical analysis of whether and how the text of Art. 8 could be incorporated in film archives remains relevant. Indeed, the UK will have the freedom to adopt any legislation it chooses, and thus could choose to draft similar legislation to Art. 8 which also addresses the challenges set out in this thesis.

Whilst it is not yet clear what the legal and social relationship between the EU and the UK will be after the end of the transition period,[52] the UK will depart from strict adherence to EU law. This is an issue that has been given much thought, particularly whether it was still appropriate to include the UK as one of the countries to analyse.

---

[51] See for example, Silvia Calamai, Veronique Ginouvès, Pier Marco Bertinetto, 'Sound Archives Accessibility' in Karol Jan Borowiecki, Neil Forbes and Antonella Forbes (eds.), *Cultural Heritage in a Changing World* (Springer Open, 2016); and Nicola Mazzanti "The Twin Black Hole: Key findings and proposals from the EU-commissioned Study "Digital Agenda for European Film Heritage" European Film Gateway Conference Presentation, Bologona, June 2011. Available at: < https://www.efgproject.eu/downloads/EFG_Mazzanti.pdf> Accessed on 7th December 2020 *See also* Nicola Mazzanti (ed.) Digital Agenda For The European Film Heritage: Challenges of the Digital Era for Film Heritage Institutions (European Commission, 2012) pg. 12.

[52] European Union (Withdrawal) Act 2018

The prominence of the film industries and film heritage programmes within the UK and the Netherlands, and the interesting contrast they provide as common law and civil law jurisdictions, overcame concerns regarding the UK leaving the EU.

Out-of-commerce works will continue to be a problem for UK archives and CHIs. They will be disadvantaged if the UK does not implement legislation similar to the DSM Directive, as they will be unable to make out-of-commerce works available. If such measures were implemented, it is likely that the UK's film archives would continue to share knowledge and working practices with EU colleagues, including in relation to out-of-commerce works. This is a result of the strong archival working relationships and programmes have been built up in the EU that includes the UK as a contributor.

1.6 Contribution to Knowledge

This thesis makes the following original contributions to knowledge:

Formulation of the copyright regimes of archival practices: this research has formulated a copyright regime of archival practices, drawing on Foucault's concept. A Foucauldian approach to copyright has been utilised extensively by scholars such as Woodmansee,[53] Woodmansee and Jaszi,[54] Rose,[55] Chartier[56] and by other scholars,[57] but has not utilised the Foucauldian concept of a regime of practices within film archives.

This copyright regime of practice provides a theoretical framework for analysing and understanding the existing regime of archival practices within the film archives, consisting of the materials, meanings and competences present, in relation to copyright law. It facilitates an understanding of how existing practices, and elements of these practices, can be modified to adapt to the new proto-practice of making out-of-commerce works available to the public. This copyright regime of archival practices can be utilised by future research in relation to many other film archives,

[53] Woodmansee (n.23)
[54] Woodmansee and Jaszi (n.24)
[55] Rose (n.25)
[56] Chartier (n.26)
[57] See for further examples and discussion, Borghi (2018) (n.27); and Bently (n.27)

and new sub-regimes potentially formulated. It is therefore an interdisciplinary contribution to the fields of copyright law, film archiving and practice theory.

Proposal of a representative, non-probability sampling approach with a 95% confidence level to determine if a collection of works held by the film archives are out-of-commerce: this contribution could alleviate the significant cost, time and effort required to research the commercial availability of the works. This builds on the empirical research undertaken by scholars including Stobo, Erickson, Patterson and Deazley[58] and the EnDOW project,[59] in relation to the difficulty for CHIs determining if a work is an orphan work. This research contributes to this existing scholarship through proposing a sampling mechanism to be utilised for making out-of-commerce works available, in order to avoid CHIs facing the same logistical burdens they have faced regarding the Orphan Works Directive. This sampling approach contributes a potential new proto-practice for film archives, as well as CHIs more generally. The sampling approach can be tested in future research, to gauge its impact.

Methodological and theoretical contribution: this research has utilised doctrinal, comparative and ethnographic research, combined with a practice theory lens, in analysing copyright practices within film archives. This methodological and theoretical combination has enabled the research question and aims to be successfully addressed. Therefore, this approach could be utilised by film archival scholars and copyright scholars in future research.[60] It is likely to also be of benefit to research exploring copyright practices within CHIs more widely, as the methodology could be applied in the same way. The theoretical approach utilises the components of practice theory formulated by Shove, Pantzar and Watson[61] and utilises the

[58] Victoria Stobo, Kerry Patterson, Kristofer Erickson, and Ronan Deazley, '"I should like you to see them some time": an empirical study of copyright clearance costs in the digitisation of Edwin Morgan's scrapbooks.' (2018) 74(3) *Journal of Documentation*, pp. 641-667

[59] "Enhancing access to 20th Century cultural heritage through Distributed Orphan Works clearance". Works stemming from this project will be discussed further in Chapter 3 and 7 in particular.

[60] Detailed discussion of how this research was conducted is given in Chapter 2 and the Appendices detail the coding themes identified and indicative questions asked. This detail would enable scholars interested in conducting similar research to do so. Chapter 9 provides a detailed analysis of the copyright regime of archival practices formulated using practice theory, and Chapter 10 demonstrates how this has been applied to the focus on out-of-commerce works. It is intended that this detail be included as part of a publication focusing on the methodological and theoretical approach utilised in this thesis.

[61] Elizabeth Shove, Mike Pantzar and Matt Watson *The Dynamics of Social Practice: Everyday Life and how it Changes* (SAGE Publications, 2012),

concept of a regime of practices, which builds on Foucault's work.[62] This thesis applies these theoretical concepts to copyright practices within film archives, to create new knowledge.

This is the first ethnographic study to be undertaken within film archives concerning making out-of-commerce works available. It has been found throughout conducting this research that the combination of ethnographic research and of practice theory has enabled a deeper, and nuanced, understanding of how copyright impacts on film archival practices.

Contribution to copyright law and film archiving through the doctrinal, comparative and ethnographic legal analysis of Art. 8 of the DSM Directive: production of a mixed-methodology analysis of Art. 8 and its interaction with the existing EU *acquis* and international obligations, with a focus on film archives specifically. The ECL mechanism envisioned in Art. 8 has been explored by scholars including Schroff; Street; Guibault; Towse; and Ginsburg, which provides an excellent body of work to draw on in this research.[63] Scholars such as Geiger, Frosio, Bulayenko; Sganga; and Dusollier have provided detailed analysis of out-of-commerce works.[64] However, what has not been addressed in the existing literature is practice-based empirical analysis of how Art. 8 is likely to be incorporated into archival practice. This thesis addresses this gap, through conducting empirical ethnographic research, which examines the potential barriers to implementation and incorporation from both a legal and practical perspective, informed by the data gathered during the ethnographic research.

[62] See "Questions of Method" in James D. Faubian (ed.) Power: The Essential Works of Michel Foucault 1954-1984: Essential Works of Michel Foucault 1954-1984 v. 3 (Essential Works of Foucault 3) (Penguin, 2002)
[63] See for example Guibault and Street (n.4); Simone Schroff and John Street The politics of the Digital Single Market: culture vs. competition vs. copyright (2018) 21(10) *Information, Communication & Society*, pp. 1305-1321; Ruth Towse 'Economics of Copyright Collecting Societies and Digital Rights: Is There a Case for a Centralised Digital Copyright Exchange?' (2012) *Review of Economic Research in Copyright Issues*, 9(2) 3; and Jane C. Ginsburg, 'Extended Collective Licenses in International Treaty Perspective: Issues and Statutory Implementation' (2017) 14 *Columbia Public Law Research Paper*, pp.564.
[64] See for example, Christophe Geiger, Giancarlo Frosio and Oleksandr Bulayenko Facilitating Access to Out-of-Commerce Works in the Digital Single Market – How to Make Pico della Mirandola's Dream a Reality in the European Union 9 (2019) *JIPITEC*, 240; Caterina Sganga From Soulier to the EU Copyright Law Reform: What Future for Non-Voluntary Collective Management Schemes? (2018) 19(1) *ERA Forum;* and Severine Dusollier The 2019 Directive on Copyright in the Digital Single Market: Some Progress, a Few Bad Choices, and an Overall Failed Ambition (2020) 57(4) *Common Market Law Review*, pp.979-1030

From film archival scholarship, Fossati's and Op den Kamp's research provide detailed analyses of the impact of copyright law on archival practices.[65] This thesis continues this existing research with a specific focus on out-of-commerce works. These scholars conduct research that bridges copyright law and cultural heritage/ film archival practice.

This thesis contributes a holistic legal analysis that considers the key terms of the text, the licensing mechanism and CMO operation, the fall-back exception, and whether the opt-out constitutes a fundamental shift within copyright law. This research contributes to this scholarship in particular through a comparative analysis of collective management of copyright in the UK and the Netherlands, and the likeliness of either country to implement the DSM Directive. The impact of the UK's withdrawal from EU membership on the UK CHIs making use of out-of-commerce works is considered.

Conceptual contribution that reshapes the focus of out-of-commerce works: in addressing the existing distortion of the historical narrative and digital skew within film archives. This thesis recommends that making out-of-commerce works available can be reframed through the lens of addressing this historic silencing and exclusion, as much as is possible. This builds upon the concept of the digital skew and the distortion of history within archives, discussed in detail by scholars including Op den Kamp;[66] McCausaland;[67] and Brunow.[68] This thesis extends this discussion to out-of-commerce works. Dusollier has proposed that orphan works can also be out-of-commerce works,[69] and this thesis supports this assertion, in finding that much of the collections of the film archives are both orphan works and out-of-commerce

In addition, this thesis recommends that the concept of out-of-commerce works be envisioned as part of the archive's ongoing collection and accessioning policies of new film works, as well as to address the existing backlog.[70] This thesis therefore contributes to the existing academic, legislative and CHI discussion on out-of-

[65] See Op den Kamp (2018) (n.8); and Fossati (n.33)
[66] Op den Kamp (2018) (n.8) 26
[67] McCausland (n.34)
[68] Dagmar Brunow Curating Access to Audiovisual Heritage: Cultural Memory and Diversity in European Film Archives (2017) 18(1) *Image [&] Narrative*, pp. 97-110
[69] Dusollier (2020) (n.64)
[70] Of course, this will subject to any cut-off date restrictions in individual Member States concerning when a work can be deemed out-of-commerce.

commerce works and advances the understanding of both the impact of these works not being made available, and the profound impact that making them available could have.

1.7 Overview of Thesis Structure

This thesis will be structured as follows:

Chapter 2 – Methodology and Theoretical Underpinning

This chapter will detail the methodological approach adopted in this research, and the methods used. It will also provide a review of the literature relating to practice theory. It sets out the mixed-methodology approach of combining doctrinal, comparative and ethnographic research.

Chapter 3 – (The Problem with) Copyright and the Digitisation of Out-of-Commerce Works: Cultural Heritage, Legal and Policy Background

This chapter will provide an overview of the history of out-of-commerce copyright works and their cultural heritage, legislative and policy development at the international and EU level. The chapter sets out the current distortions in the historical narrative of archives that excludes certain groups, which is further distorted by the digital skew. Out-of-commerce works can be used to remedy this distortion.

Chapter 4 –Analysis of the Text of Art. 8.

This chapter will provide a doctrinal legal analysis of the text of Art. 8, concerning current uncertainties of some key terms within Art. 8, which could hinder implementation of the DSM Directive. The chapter contributes a sampling mechanism for CHIs to determine if a collection of works is out-of-commerce.

Chapter 5 – Possible Fundamental Change to Copyright

This chapter will provide a doctrinal legal analysis concerning whether Art. 8 is compatible with existing EU and international copyright law, or if it signals a fundamental change to copyright law. It will be discussed that the opt-out mechanism is compatible with the Berne Convention and Art. 17(2) of the EU Charter.

Chapter 6 - Collective Management Organisations and Extended Collective Licensing

This chapter will provide a doctrinal and comparative legal analysis of the functioning of CMOs and extended collective licensing, in accordance with Art. 8(1). Issues of trust and transparency of the CMOs will be considered, as well as discussion of the meaning of a CMO being "sufficiently representative" of rightholders.

Chapter 7 – British and Dutch Perspectives on Implementation

This chapter will provide a comparative analysis of the UK and the Netherlands in relation to copyright law and attitudes towards legal compliance. There will be a consideration of the issue of the UK leaving the EU in relation to the UK's implementation of the DSM Directive, as well as the fact that both the UK and the Netherlands lack a CMO for film.

Chapter 8 – Case Studies

This chapter will provide a review of the literature in relation to film archiving, and how copyright impacts on archival practice. This chapter will then provide a contextual overview of the three film archive case studies, in order for a copyright regime of archival practices to be formulated in the following chapter.

Chapter 9 – Copyright Regime of Archival Practices

This chapter will propose a copyright regime of archival practices from the practices observed during the ethnographic study at the film archives. Foucault's concept will be drawn on in proposing this regime. Three sub-regimes will be proposed: the Oppressive regime; the Pragmatic Compliance regime; and the Active Agency regime.

Chapter 10- Applying the Copyright Regime of Archival Practices to Out-of-Commerce Works

This chapter will apply the copyright regime of archival practices outlined in Chapter 9 to out-of-commerce works. The existing meanings, competences and materials within the regime of practices will be considered, and it will be analysed how

accommodating these existing elements will likely be in incorporating a new practice of making out-of-commerce works available.

Chapter 11 – Conclusion

This chapter will draw on the findings from each of the previous chapters to address the research question: *"To what extent can "out-of-commerce works" in the DSM Directive successfully benefit film archives and the existing practices of film archivists in widening public access to film heritage?"* It is concluded in this thesis that the "out-of-commerce works" provisions in the DSM Directive *are capable of* successfully benefitting film archives and the existing practices of film archivists in widening public access to film heritage. However, this legislative change alone is insufficient for successful incorporation into existing archival practices. Further guidance for CHIs and the use of a sampling mechanism will alleviate CHI concerns, hopefully increasing their confidence to make use of Art. 8. The risk tolerances of film archives and CHIs will influence how comfortable they are with making use of sampling mechanism, to avoid reputational harm.

Chapter 2: Methodology and Theoretical Underpinning

2.1 Introduction

Copyright research is well suited to interdisciplinary research. Law and economic interdisciplinary research is well accepted and cited by legal scholars, and copyright law tends to draw heavily from this research when assessing the economic incentive rationale for copyright law.[71] Likewise, history and philosophy are often drawn from in legal scholarship;[72] and are especially relevant to discussions on the rationale of copyright protection and the creation of the author. This interdisciplinary research can enable a deeper and more contextual understanding than is possible from only studying the law as written.[73] Additionally, interdisciplinary research can contribute to the methodologies available to the researcher.[74]

This research is interdisciplinary, being situated on an intersection between film archiving practice and copyright law, building on the work of scholars such as Fossati, Op den Kamp and the EnDOW project. This research draws on literature and methodology from each. The existing literature notes the role of copyright in shaping archiving practices; however, an understanding of their operation has not yet been provided as a copyright regime of archival practices, which will be set out in Chapter 9.

This chapter will set out the methodological design of this research, and the methods chosen. This research combines doctrinal, comparative and ethnographic research to address the research question and aims.

This chapter goes on to review the literature in relation to practice theory, which underpins this research. Applying this theoretical foundation is beneficial as this thesis seeks to understand how out-of-commerce works may be successfully incorporated into existing archival practices. To do this, practice theory enables a framework of the existing archival practices to be formulated. Practice theory

[71] See on this notion of intellectual property law being particularly suited to interdisciplinary research and accompanying examples Teresa Scassa, Mistrale Goudreau, B Courtney Doagoo and Madelaine Saginur "Intellectual Property for the 21st Century: Interdisciplinary Approaches" (Irwin Law, 2014) 9
[72] Scassa, Goudreau, Doagoo and Saginur (n. 68) 12
[73] Mathias M. Siems The Taxonomy Of Interdisciplinary Legal Research: Finding The Way Out Of The Desert (2009) 7(1) *Journal of Commonwealth Law and Legal Education*, pp. 5-17, 12
[74] Siems (n.73) 12

enables empirical research that focuses on how copyright law is experienced by archivists, and how copyright shapes their existing archival practices. It does not appear from the literature that applying practice theory to copyright law has yet been attempted. Therefore, this thesis offers a conceptual and methodological contribution to the field.

2.2 Methodology

This chapter will set out the ontological, epistemological and methodological positions of the research. This research adopts an interpretivist research paradigm, which guides the selection of appropriate theoretical and methodological decisions. This research will utilise a mixed-methodology of doctrinal research, comparative law and ethnographic research.

2.2.1 Ontology and Epistemology

Research paradigms shape the worldview of the researcher and the theories and methodologies that will be chosen. These paradigms are made up of the following: ontology, epistemology, methodology, and methods.[75] The differing ontological and epistemological views of the research paradigms lead to differing methodology and methods.[76]

This research utilises an interpretive paradigm. Interpretivism "looks for culturally derived and historically situated interpretations of the social life-world."[77] Interpretivists acknowledge that the researcher's own beliefs and worldview guide their approaches to research and that there are "multiple meanings and ways of knowing".[78] Scotland notes that examples of interpretivist methodologies include case studies and ethnography; interpretivist methods usually generate qualitative data and focus on the individual's views.[79] Scotland further comments that the

[75] James Scotland Exploring the Philosophical Underpinnings of Research: Relating Ontology and Epistemology to the Methodology and Methods of the Scientific, Interpretive, and Critical Research Paradigms (2012) 5(9) *English Language Teaching*, pp. 9-16, 9
[76] Scotland (n.75) 9
[77] Michael Crotty *The Foundations of Social Research: Meaning and Perspective in the Research Process* (SAGE Publications Ltd. 1998), 67
[78] Merry-Jo D. Levers Philosophical Paradigms, Grounded Theory, and Perspectives on Emergence' (2013) *SAGE Open*., 3
[79] Scotland (n.75) 12-13

ontological position of interpretivism is relativism; and the epistemological position of interpretivism is subjectivism.[80]

Ontology asks: "What is the form and nature of reality and, therefore, what is there that can be known about it?"[81] Interpretivism adopts a relativist ontology. Relativist ontology is the belief that "there are as many different realities as there are people."[82] Therefore, the purpose of research from such a perspective is to "understand the subjective experience of reality and multiple truths", as opposed to seeking one objective truth.[83]

Epistemology asks, "how knowledge can be created, acquired and communicated, in other words what it means to know."[84] It is concerned with the forms of knowledge that exist, and how to assess the legitimacy of this knowledge. Two primary strands emerge: objectivist and subjectivist epistemologies. A subjectivist epistemology focuses on how different meanings of objects and phenomena are shaped by different individuals, as this type of epistemology rejects the notion that research can ever be fully objective. It also believes that knowledge is "always filtered through the lenses of language, gender, social class, race, and ethnicity".[85] Therefore, "knowledge has the trait of being culturally derived and historically situated".[86] The methodology adopted to conduct this research needed to be one that enabled the individual and the context to be fully embraced as part of the analysis, in order to obtain meaningful data.

2.2.2 Mixed-Methodology

As a result of these ontological and epistemological beliefs about the nature of reality and how knowledge is generated, it is clear that the methodology chosen will need to consider the individual's perspective, and the wider context of their experience.

---

[80] Levers also states that "…interpretivist paradigm, which is conceptualized as having a relativist ontology with a subjectivist epistemology", see Levers (n.78) 3
[81] Guba, E. G. and Lincoln, Y. S. "Competing paradigms in qualitative research" in Denzin, N. K. and Lincoln, Y. S. (eds.) *Handbook of qualitative research* (Sage, 1994), 108
[82] Levers (n.78) 2
[83] Levers (n.78) 2
[84] Scotland (n.75) 9
[85] Denzin and Lincoln (n.81) 21, *Quoted in* Scotland (n.75) 11-12
[86] Scotland (n.75) 11-12

Corbin and Strauss support the fact that methodology must align with the epistemological and ontological beliefs.[87]

The field of intellectual property research has often employed mixed methods or combined research methodology. For example, research into copyright and access to knowledge in eight African countries combined doctrinal analysis, qualitative impact assessments and a comparative review;[88] and another study on patent law in developing countries combines doctrinal analysis, a comparative review and a case study comprising of field research and surveys.[89]

The three methodologies used in this thesis complement one another and combine to produce contextual data relating to the law as text and the law as experienced in practice. Each of the methodologies used contributes knowledge and understanding that the other two could not; the analysis in this thesis embraces the data gathered holistically to address the research question and aims.

Doctrinal research was conducted first, alongside comparative legal research. Once there was sufficient doctrinal analysis conducted to guide the focus of the ethnographic research, this was then conducted. The research process was also cyclical, in that comments made, and observations noted during the ethnographic research prompted further research into the literature.

2.2.2.1 Doctrinal Methodology

Doctrinal research is “pure theoretical” research and is the most common methodology used by legal scholars.[90] It is the textual study of statute and law, and subsequent case law from court cases. It is often referred to as the study of “black letter law”. It is concerned with the laws as they are written and with the decisions in

[87] Juliet Corbin and Anselm Strauss *Basics of qualitative research techniques and procedures for developing grounded theory* 3rd ed. (SAGE Publications, 2008), 1
[88] Chris Armstrong, Jeremy de Beer, Dick Kawooys, Achal Prabhala and Tobias Schonwetter *Access to Knowledge in Africa: The Role of Copyright* (Double Storey Publishers, 2011)
[89] Monirul Azam, *Intellectual Property and Public Health in the Developing World* (Open Book Publishers, 2016), 30
[90] Ashish Kumar Singhal and Ikramuddin Malik Doctrinal and socio-legal methods of research: merits and demerits (2012) 2(7) *Educational Research Journal*, pp. 252-256, 252

case law and does not focus on wider contextual factors. It is normative, in that it seeks to address how law ought to be interpreted.[91]

Doctrinal legal research was utilised in this research, particularly in Chapters 3, 4, 5 and 6. This research involved a historical overview of how out-of-commerce works have been managed by CHIs and copyright law, such as the 2011 Memorandum of Understanding. In particular, the Orphan Works Directive is used in this thesis to provide a close comparison, as a way of analysing why the Orphan Works Directive remains under-used by CHIs. This enables a richer understanding of what the challenges to successfully incorporating Art. 8 in practice will be.

2.2.2.2 Comparative Methodology

As this research examines both the UK and the Netherlands, by its nature this research is comparative. Comparative law compares the law of one country against another.[92] Understanding the differences and similarities between the laws and the legal systems as they operate is fundamental to comparative law.[93] Eberle stresses that law "sits within a culture", and therefore the legal scholar must go beyond an examination of the legal text only, to move towards an understanding as to "how law operates within a culture."[94] This must form part of the comparative legal analysis.

Valcke states that when determining the methodological framework to be used for comparative law, the researcher is an "outside observer", akin to a scientist in the natural sciences.[95] The researcher must attempt to understand the laws as they are experienced and interpreted in that specific culture. Husa agrees with this sentiment, likening comparative law to anthropology and ethnography on the basis that texts, materials and observations must be interpreted and that in practice the "power of deduction, imaginative thinking and legal literature are more essential than statistics, formal legal texts or the national doctrinal study of law."[96]

---

[91] Jaakko Husa *New Introduction to Comparative Law* (Bloomsbury, 2015), 31
[92] Edward J. Eberle The Methodology of Comparative Law (2011) 16(1) *Roger Williams University Law Review,* pp.52- 71, 52
[93] Maurice Adams and Jacco Bomhoff *Practice and Theory in Comparative Law* (Cambridge University Press, 2012), 15
[94] Eberle (n.92) 52
[95] Catherine Valcke "Reflections on comparative law methodology – getting inside contract law" in Adams and Bomhoff (n.93) 28
[96] Husa (n.91) 154

Comparative law often involves comparing two or more legal texts that are in different languages, and these languages may well be unfamiliar to the researcher. Legal translation is an issue that some scholars including Glanert[97] assert is not adequately considered within comparative law. Considering this and the researcher's fluency only in English, it was therefore concluded that this research should be conducted in English-speaking environments.

The UK and the Netherlands were therefore suitable countries to focus on in this research. Within the Dutch film archives, the individuals spoken to were all bilingual and many documents were also available in English. Likewise, Dutch scholars often write in both English and Dutch, minimising the impact of the language barrier to the researcher's understanding.[98] Furthermore, there are unofficial English translations of the Dutch copyright laws by bilingual Dutch scholars.[99]

These chosen jurisdictions are suitable countries for legal comparison for a number of reasons, including that they share similar cultures and attitudes towards cultural heritage.[100] Crucially, neither country has a sufficiently representative CMO for film works, which enables a critical comparison of how the fall-back exception may be utilised in these countries, and whether there is sufficient appetite for a CMO to emerge for film in these jurisdictions.

2.2.2.3 Ethnographic Methodology

Ethnographic research was conducted alongside the doctrinal and comparative research. Ethnography was conducted in the film archives as this enables a richer understanding of existing practices, challenges and knowledge. This in turn compliments the doctrinal and comparative research in this thesis to address the research question and aims.

Ethnographic research is

[97] Simone Glanert (ed.) *Comparative Law - Engaging Translation* (Routledge, 2014)
[98] Including scholars such as Op den Kamp (2018) (n.8); Fossati (n.33); and a number of the scholars referred to in Chapter 8.
[99] For example, see Mireille van Eechoud "Copyright Act – *Auteurswet* Unofficial Translation" in Bernt Hugenholtz, Antoon Quaedvlieg and Dirk Visser (eds.) *A Century of Dutch Copyright Law: Auteurswet 1912-2012* (deLex B.V., 2012)
[100] See Chapter 7 for a comparison of the UK and the Netherlands.

> exploratory: it does not begin with a firm hypothesis which is to be tested, and neither does it set out to confirm or dismantle some general overarching theory.[101]

It involves spending time with the group being studied, and observing the behaviour, interactions, rituals, and comments. Ethnographic research was conducted at three film archives: the BFI, EYE and MACE. During the ethnographic studies, observations about behaviours were recorded, semi-structured interviews were conducted, observations were made on written documents, and on the codes and rules of the archive (both implicit and explicit).

Ethnographic research has been employed in a variety of areas within legal research including: asylum applicants and how they communicate multi-culturally and linguistically within legal advice meetings as part of the asylum process;[102] anti-terror legislation in Turkey;[103] and legal processing of rape cases in Norway.[104] Within some legal sub-disciplines it is a routinely employed methodology, such as in legal anthropology.[105] Within intellectual property research, it is not a commonly adopted methodology. Silbey[106] has persuasively argued for ethnography within intellectual property research, commenting:

> [l]aw is a social system made largely of language and behavior. As such, deeply relevant to understanding what law is and how it works is the study of language and behavior from the perspective of those enacting and responding to it.[107]

---

[101] Satnam Choongh "Doing Ethnographic Research: Lessons from a Case Study" in Mike McConville (ed.) *Research Methods for Law"* (Edinburgh University Press, 2017), pg. 73
[102] Judith Theresa Reynolds *Multilingual and intercultural communication in and beyond the UK asylum process: a linguistic ethnographic case study of legal advice-giving across cultural and linguistic borders.* Doctoral thesis (Durham University, 2018)
[103] Deniz Yonucu The Absent Present Law: An Ethnographic Study of Legal Violence in Turkey (2018) 27(6) *Social & Legal Studies*, pp.716–733.
[104] Anne Bitsch The micro-politics of emotions in legal space: an autoethnography about sexual violence and displacement in Norway (2018) 25(10) *Gender, Place & Culture*, pp. 1514-1532
[105] See for an interesting discussion on modern legal anthropology, Paul Burke *Law's Anthropology: From ethnography to expert testimony in native title* (ANU Press, 2011)
[106] Jessica M. Silbey "IP and Ethnography: A Qualitative Research Approach" in Calboli, I. and Montagnani, L. (eds.) *Oxford Handbook on Intellectual Property Research* (Oxford University Press, 2019)
[107] Silbey (n.106) 2

Before the on-site ethnographic studies were started, a historical analysis of the site was first undertaken, to examine the socio-historical context of the site, which is set out in Chapter 8.

Fundamental to ethnography is the method of participant observation by the researcher of the chosen group or site.[108] This method involves observing the people or setting, in an open way that acknowledges the role and intention of the researcher. Ethnography also requires notetaking of observations, of comments overheard, of the researcher's own thoughts, of things to follow up on, etc.

2.3 Data Collection

The ethnographic research was conducted between March 2019 and May 2019. In total, just under 6 weeks was spent across the three film archives. The length of time at each archive varied according to what the film archive was able to accommodate logistically. A month was spent at the BFI, of which the majority of this time was spent at the Head Office. A week was spent at EYE, at which time was spent between the EYE museum building and the Collection Centre. Two days were spent at MACE, all at one site.

Interviews were conducted in a semi-structured manner, with set questions to ask each participant. The participant's answers then shaped the flow and content of the interview. Please see Appendix A for examples of the interview questions asked. In total, 20 hours of interview data was recorded from the formal interviews. A further 32 hours of informal conversation data was recorded as notes (observing team meetings, staff training sessions, etc.). On average, interviews lasted 57 minutes, with the longest being 97 minutes long. In total, more than 200 pages of notes were kept. Many hours were spent in the six weeks on site reading policy documents, touring the sites, viewing the collections, informally speaking with employees of the archive and observing the daily practices of the archives. Notes were made on these activities in the notebooks, and this time is in addition to the interview and conversation hours noted.

[108] Dan Welch 'Ethnography', in Dale Southerton (ed.), *Encyclopedia of consumer culture* (SAGE Publications, 2011) p 553

This table sets out the number of interviews conducted at each archive, as well as the number of physical sites visited. It also sets out the number of notebooks of observations and notes kept. A longer period of time was spent at the BFI and so there are more notebooks from this archive.

Table 2.1 Interviews

Archive	Participants interviewed	Sites visited	Notebooks of notes and observations kept
BFI	13 participants in formal interviews (some individuals on multiple occasions and in a less formal capacity). A number of staff were encountered in an informal capacity.	4	3
MACE	5 participants. 2 formal interviews, and 3 informal interview discussions whilst staff members demonstrated their work processes	1	1
EYE	5 formal interviews	2	1

The table below sets out the number and nature of the documents viewed at the archives. It also sets out the teams encountered during the visits, to provide a contextual basis for the breadth of the staff spoken to. At the BFI, three staff training events were attended, but not at the other two archives.

Table 2.2 Data Gathered

Archive	No. of documents viewed	No. of team meetings/ training events attended	No. of teams/ departments encountered whilst at the site
BFI	28 documents and spreadsheets, including project workflows and draft policies Various emails BFI's website and publically available documents and annual reports BFI's social media accounts (for context only)	Systems training for the Rights team; IP Clinic with Archive Sales Team X2.	(IP) Rights team; Curatorial; Special Collections; Commercial Sales; Archival Sales; Collections Management; Archive Bookings; Library Services;
MACE	4 policy documents (available on MACE's website) Film workflow spreadsheets MACE's website MACE's social media accounts and blog (for context only)	0	Met and spoke to all staff there during the two-day visit (however two staff members were not present) The Director of MACE; Archive Access; Curatorial; Digital Processing; and Scanning/ Film Technical processes
EYE	5 documents (related to distribution/ contracts) EYE's website EYE's social media accounts (for context only)	0	5 departments: Programming and Distribution; Sales Collection; Curatorial; Copyright; and Collections

As ethnographic research is subjective, its validity and reliability cannot be measured using the approaches utilised in objective research. For this reason, a method for ensuring the consistency of this research is to include 'triangulation'. This method has been defined as the following:

> [t]riangulation is often advocated in which a range of different methods are systematically used to avoid the threats to validity which may be embodied in

> any one method – thus interview, unobtrusive measures, documentary sources and, even, a survey may be employed.[109]

A process of 'triangulation' is often used in ethnographic writings combining a number of sources,[110] such as observation data from the field, interviews, surveys, official documents and internal documents. This enables the researcher to see "the disjuncture between formal, written rules and practice, demonstrating the theoretical importance of viewing an organization from multiple angles". [111] Observations and data can be compared across sources, to move closer to a comprehensive understanding of the group or organisational practices.

As Chan comments, triangulation does not aim to demonstrate that various research methods concluded the same things; rather it is to test for consistency, as different research methods are "sensitive to different real-world nuances."[112] Semi-structured interviews, observations, policy documents, informal discussions, internal emails, etc. were all research methods used in this research to gather a range of data. Triangulation enabled an understanding of differences between the 'official' policy, and the actual practices performed day-to-day. Please see Appendix F for further comments on the process of triangulation used in this research and on the progressive focusing used. Please see Appendix E for examples of notes taken during the studies.

2.4 Research Analysis

The interviews were transcribed verbatim where this was possible, if a recording device was used. Each interview participant was given the choice as to whether they wished an audio recorder to be used and most of them asked that they not be recorded. In these cases, detailed notes where taken during the interview and these notes clarify what are exact quotations and what has been paraphrased. Please see Appendix B for example interview transcription and notes.

---

[109] Ron Iphofen, "Research Ethics in Ethnography/Anthropology" (European Commission, 2015), 9

[110] Japonica Brown-Saracino, Jessica Thurk, J. and Gary A. Fine 'Beyond groups: seven pillars of peopled ethnography in organizations', in Atkinson, P. and Delamont, S. (eds.), *Sage qualitative research methods* (SAGE Publications, 2010), pg. 561

[111] Brown-Saracino, Thurk and Fine (n.110) 561

[112] Janet Chan Ethnography as Practice: Is Validity an Issue? (2013) 25(1) *Current Issues In Criminal Justice*, pp.503-516, 513-514

An inductive approach was utilised in conducting the interviews and observations, in that subsequent questions were shaped by the participant's responses. A prior hypothesis was not being corroborated; rather the theoretical copyright regime of archival practices discussed in Chapter 9 was arrived at organically, through analysing the data.

The data gathered during the ethnographic research was analysed using discourse analysis. Discourse analysis covers a variety of analytical methods in relation to written and spoken language; and it emphasises "the use of language in social context."[113] Law is reliant on language in both written and spoken discourses, according to Shuy, and is therefore a "fertile field" for discourse analysis.[114] Likewise, Van den Hoven comments that legal research engages with discursive practices, as it analyses the way in which in laws are interpreted.[115]

Discourse analysis involves coding the texts, to identify emergent themes. The interviews were individually coded; see Appendix B for example coded transcripts. They were coded to initially identify emergent themes and discourses (or meanings) of copyright, and other topics. There is subjectivity in this coding as the researcher is interpreting the meaning and significance of what was said or observed. The coding themes used, as set out in Appendix C, were chosen with the specific focus on out-of-commerce works.

An iterative process was employed when open coding the interview transcripts and notes, in that the codes emerging in each transcript where continuously reviewed against one another. This was to identify overlap or replication of code themes, as well as to identify content most relevant to out-of-commerce works.

There are a number of types of discourse analysis that could have been used. The analysis employed in this thesis was critical discourse analysis. Fairclough's work on this form of analysis is very influential. He notes that the purpose of this form of analysis is to:

[113] Neil J. Salkind *Encyclopedia of research design* (SAGE Publications, 2010)
[114] Roger W. Shuy "Discourse Analysis in the Legal Context" in Deborah Tannen, et al. *The Handbook of Discourse Analysis* (John Wiley & Sons, 2015), 822
[115] Paul van den Hoven Analysing Discursive Practices in Legal Research: How a Single Remark Implies a Paradigm (2017) 13(3) *Utrecht Law Review*, pp.56–64, 56

> systematically explore often opaque relationships of causality and determination between (a) discursive practices, events and texts, and (b) wider social and cultural structures, relations and processes; to investigate how such practices, events and texts arise out of and are ideologically shaped by relations of power and struggles over power.[116]

Locke notes that Fairclough's understanding of discourse also includes the concept of discourse as a practice. As Locke comments, "discourse implies ways of being and doing as well as ways of signifying."[117] This conception of a discourse as a practice means that it is particularly relevant to this research.

The critical discourse analysis of written documents, observation notes, and of the interview transcripts and notes were all analysed in the same way. This analysis enabled power relations to be noted, through either overt comments or through a hesitancy to speak on a certain topic, or a keenness to defer this topic to someone else within the archive. This approach crosses over with Foucauldian discourse analysis, particularly in its emphasis on power relations and how this power is performed.[118]

2.5 Ethics

It is crucial to adequately consider ethics within legal research and education.[119] The importance of proper ethical considerations is further increased when conducting empirical research with participants. Before conducting the interviews, the nature of the research and its implications were explained to the participants. A research information form and a research consent form (see Appendix D) were given to the interviewees to clarify the purpose of the research and how the information gathered would be used. All participants have been anonymised in this research. Some participants were spoken to informally numerous times during the study, and others only once during the interview.

---

[116] Norman Fairclough *Critical Discourse Analysis* (Longman, 1995), 132
[117] Terry Locke *Critical Discourse Analysis: Critical Discourse Analysis As Research* (Bloomsbury Publishing, 2004), 7
[118] See for example Michel Foucault 'Politics and the study of discourse', in Graham Burchell, Colin Gordon and Peter Miller (eds.) The Foucault Effect: Studies in Governmentality (Harvester, 1991)
[119] See for a discussion on ethics within legal education, Roger Brownsword Ethics in legal education: High roads and low roads, mazes and motorways (1999) 33(3) *The Law Teacher*, pp. 269-283

Goffman states that there is a “freshness cycle” in a new field in which the researcher encounters more new things than they will later in the study, and therefore researchers must take thorough notes on all of these things.[120] Detailed notes were taken throughout the study, especially at the beginning during the “freshness cycle”. This was to enable a contextual understanding for the researcher, as well as ensuring the accuracy of observations made, to portray this as truthfully as possible in this thesis.

2.6 Theoretical Underpinning

Applying practice theory to the thesis is beneficial as this thesis seeks to understand how out-of-commerce works may be incorporated successfully into existing archival practices. To do this, practice theory enables a framework to be proposed that explains how copyright law is experienced by individuals, and how copyright shapes their existing archival practices.

To illustrate, Sarfaty notes in her ethnographic research in human rights law and the World Bank that:

> I have found that the ways norms become adopted and ultimately internalized in an institution largely depend on their fit with the organizational culture… Thus, to bring about internalization, actors must adapt norms to local meanings and existing cultural values and practices…[121]

This demonstrates the importance of understanding the “organisational culture” of the institution, as it is this culture that will impact on whether norms, such as the introduction of new copyright reform, will be successfully internalised. Practice theory enables this organisational culture to be analysed.

New Legal Realism (“NLR”) was considered as a potential theoretical basis for this thesis, to sit in tandem with practice theory. NLR theory is a strand of legal realism, and is grounded in the belief that legal research should focus on the role of actors, norms, and power in relation to legal processes, drawing on empirical research, to

[120] Erving Goffman 'On fieldwork', in Paul Atkinson and Sara Delamont (eds.) *Sage qualitative research methods* (SAGE Publications, 2010), pg. 131
[121] Galit Sarfaty “Values in Translation: Human Rights and the Culture of the World Bank” (Stanford University Press, 2012), 649 cited in Meierhenrich (n.20) 64

understand “the interaction of internal ‘legal’ and external ‘extra-legal’ aspects in law’s development and application”.[122] NLR theory has been described as a “bottom-up as well as top down” approach to empirical research, as legal research can often focus on the top level institutions whilst neglecting the real life impact on the “ground”. [123] Erlanger et al. have advocated for the bottom-up approach as taking “an expansive and open-minded view of the impact of law…”[124]

Dagan and Kreitner note five clear features of NLR research: that it is “law-centred” addressing both legal doctrine and legal institutions; that it aims to incorporate social science into law; that it focuses bottom-up, examining “law on the ground”; that NLR is “committed to constructive legal action”; and it is acutely aware of the risks of a narrow-minded focus and the “proliferation of legal forms in an increasingly globalized environment.”[125]

These five features are present in this research. It is “law-centred”, as it is focused on Art. 8 and its interaction with existing copyright laws and doctrine. This thesis incorporates practice theory and an ethnographic methodology into the research design, which are borrowed from the social sciences. This research includes ethnographic research within film archives, to understand the law as experienced from a bottom-up or “on the ground” approach. This research is “committed to constructive legal action”, in that it advocates for more successful legal implementation and incorporation of Art. 8, through contextualised understanding of the archival sector. Finally, this research is aware of the risks of a narrow-minded focus, which is avoided through conducting empirical research to understand the range of views and experiences of film archivists, as opposed to making assumptions about what these experiences might be.

NLR has been used in intellectual property research: Banarjee has applied it in their research into copyright piracy of the Indian film industry.[126] It has not been applied to

[122] Gregory Shaffer “Legal Realism and International Law” in Jeffrey L. Dunoff and Mark A. Pollack (eds.) *International Legal Theory: Foundations and Frontiers* (Cambridge University Press, 2019), 2
[123] Howard Erlanger, Bryant Garth, Jane Larson, Elizabeth Mertz, Victoria Nourse and David Wilkins, D. B. Is it Time for a New Legal Realism? (2005) 2 *Wisconsin Law Review*, pp. 335-363, 339
[124] Erlanger et al. (n.123) 339
[125] Hanoch Dagan and Roy Kreitner The New Legal Realism and the Realist View of Law (2018) 43(2) *Law and Social Inquiry*, pp. 528-553
[126] Arpan Banerjee Copyright Piracy and the Indian Film Industry: A “Realist” Assessment (2016) 34 *Cardozo Arts and Entertainment Law Journal*, pp. 609-698

out-of-commerce works. This research builds on this body of NLR scholarship and contributes a methodological approach to it.

NLR is not focused on in this thesis in-depth, as it does not contribute any theoretical or analytical tools to this thesis that practice theory could not. NLR alone would not have provided a basis for proposing the copyright regime of practice in Chapter 9, which is one of the original contributions to knowledge of this thesis. However, the joint empirical and doctrinal approach used in this thesis builds on how this approach has been successfully employed within NLR.

2.6.1 Practice Theory in Law

The thesis is grounded in practice theory. Practice theory shapes the focus of the ethnographic research to be on the *film archivists* and their practices as well as the *film archive* itself as an organisation. Ethnomethodology and practice theory are highly complementary to one another, as they both concern themselves with studying "the principles or procedures of a practice."[127]

'Practice theory' encompasses a broad range of works and ontologies that focus on the practice of a task. The notion of what constitutes a "practice" differs amongst scholars in the field, leading some scholars to assert that practice theory is not one single theory. The works of scholars such as Shatzki, Warde, Foucault and Giddens are all influential within the field. Fundamental within practice theories is the relationship between "specific instances of situated action and the social world in which the action takes place".[128]

Practice theory is a theoretical framework employed by a variety of disciplines. It has been utilised in legal studies, including Chan's ethnographic research in criminal law.[129] Practice theory has also been applied to international law[130] and within human rights law.[131] Stappert notes the "growing interest" of practice theory in

[127] Micheal Lynch "Ethnomethodology and the logic of practice" in Theodore Schatzki, Karin Knorr-Cetina and Eike von Savigny (eds.) *The Practice Turn in Contemporary Theory* (Routledge, 2001), pg. 141
[128] Martha Feldman and Wanda J. Orlikowski Theorizing Practice and Practicing Theory (2011) 22(5) *Organization Science*, pp. 1240-253, 1241
[129] Chan (n.112)
[130] Lamp (n.20)
[131] Pruce (n.21)

international law and international relations.[132] Meierhenrich in their research on practice theory within international law understands practices as:

> recurrent and meaningful work activities – social or materials – that are performed in a regularized fashion and which have a bearing, whether large or small, on a social phenomenon.[133]

Practice theory is not commonly utilised within the literature on intellectual property law. Where it has been employed, it has proven very beneficial. In relation to a study into intellectual property management practices within pharmaceutical companies, employing practice theory helped "to analyse why some practices seem more firmly anchored and influential than others, and how the latter could be improved".[134]

2.6.2 Elements of Practice

Welch and Warde have suggested that a practice could be understood as an

> organized, and recognizable, socially shared bundle of activities that involves the integration of a complex array of components: material, embodied, ideational and affective.[135]

Warde has defined practices as sets of "doings and sayings", and therefore the subsequent analysis must include both "practical activity and its representations".[136] He goes on to state that a nexus is the "means through which doings and sayings hang together and can be said to be coordinated" and refers to these three components as understandings; procedures; and engagements.[137] He therefore asserts that practices are "coordinated entities but also require performance for their existence. A performance presupposes a practice."[138]

Nicolini comments that practices can become "associated" for the following reasons:

---

[132] Stappert (n.20)
[133] Meierhenrich (n.20) 19
[134] Eppinger and Vladova (n.22) 70
[135] Daniel Welch and Alan Warde "Theories of practice and sustainable consumption" in Thøgersen, J. and Reisch, L. A. *"Handbook of Research on Sustainable Consumption"* (Edward Elgar Publishing, 2015) 85
[136] Warde, A. (2005) 'Consumption and Theories of Practice (2005) 5(2) *Journal of Consumer Culture*, pp.131–153, 134
[137] Warde (n.136) 134
[138] Warde (n.136) 134

> they (1) depend on the same material arrangement (e.g. space), (2) are oriented towards the same end or object, (3) keep together different interests or (4) have been intentionality orchestrated.[139]

Hand and Shove explain this notion of "orchestrating", or "shaping", in an example of a household food freezer:

> [w]e therefore suggest that the freezer is necessary not in its own right, but as an orchestrating node in many household systems, each of which intersect with changing societal systems of provisioning.[140]

That is to say, that certain practices or elements of a practice shape and direct other practices. In the context of this thesis, it will be discussed in Chapters 8, 9 and 10 how copyright law orchestrates archival practices.

Practices involve the integration of a complex array of components, and in this thesis these components are borrowed from Shove et al. Shove et al. describe practices as "interdependent relations between materials, competences and meanings".[141] Shove et al. further define these terms as:

> materials – including things, technologies, tangible physical entities, and the stuff of which objects are made; competences – which encompasses skill, know-how and technique; and meanings – in which we include symbolic meanings, ideas and aspirations.[142]

Links are made and proven between the elements that constitute a practice, as well as between the multiple practices that individual elements form parts of. [143] For example, the competence of scanning film material forms part of the practice of digitising material to make it available for the public, and of the practice of scanning material to provide to commercial clients. Another example is the specialist copyright

[139] Davide Nicolini, "Practice Theory as a Package of Theory, Method and Vocabulary: Affordances and Limitations" in M. Jonas et al. (eds.) *Methodological Reflections on Practice Oriented Theories* (Springer International Publishing, 2017), 23
[140] Martin Hand and Elizabeth Shove Condensing Practices: Ways of living with a freezer (2007) 7(1) *Journal of Consumer Culture*, pp. 79–104, 95
[141] Shove, Pantzar and Watson (n.61) 24
[142] Shove, Pantzar and Watson (n.61) 14
[143] Shove, Pantzar and Watson (n.61) 36-37

knowledge of some individuals within the archives forms part of the practice of researching the copyright status of a film to determine whether it can be made available to the public or commercial parties, to researching if a work can be declared orphan, to informally advising fellow colleagues on copyright matters and to running specific copyright training workshops.

Shove et al. introduce the concept of the "proto-practice",[144] meaning a potential new practice in which the links between the meanings, materials and competences has not yet taken place. That is, a reproduced practice has not yet been formed from these constituent parts. New practices "exploit" the connections made by practices that already exist.[145] In addition, these new interactions are "transformative", in that the materials, competences and meanings are "mutually shaping" and impact on one another.[146]

This has direct applicability to this research, as film archives making out-of-commerce works available can be viewed as a proto-practice. As will be discussed in more depth in Chapters 8, 9 and 10: there is a desire from the film archives to make these works available; there are many out-of-commerce works in the film collections and the materials to digitise them and place them online; and there are individuals with specialist knowledge concerning copyright law and out-of-commerce works.

In this sense, the needed constituent parts to form a practice of making these works available to the public are present. However, it is not as simple as willing the practice into being. [147] Practices need to recruit carriers to continue,[148] consequently there need to be individuals who are personally interested and committed to performing the practice, and engaging others in doing the same. As will be discussed in Chapters 9 and 10, there are individuals in the film archives who are keen to make these works available to the public.

Of crucial importance is how the new practice interacts with existing practices. If a new practice demands too much time that is allocated for existing practices or uses too many resources currently allocated to other practices, it is unlikely to be taken up

[144] Shove, Pantzar and Watson (n.61) 24, 25
[145] Shove, Pantzar and Watson (n.61) 67
[146] Shove, Pantzar and Watson (n.61) 32
[147] Shove, Pantzar and Watson (n.61) 68
[148] Shove, Pantzar and Watson (n.61) see Chapter 4

by many practitioners. There are demands on time, resources and staff at the archives, with significant backlogs of processing, cataloguing films and tasks.[149] For this reason, the new practice of making out-of-commerce works available needs to fit within the current practices and demands, or it will not be performed.

This thesis makes recommendations to alleviate some of this drain on time, resources and staff. For example, in Chapter 4 a proposed sampling approach is recommended that would reduce the number of works needing to be researched down from millions to hundreds. Building on the excellent work of the EnDOW Community,[150] this research could be crowd-sourced. This approach would save substantial time and cost.

Furthermore, it is discussed in Chapters 9 and 10 that individuals within the archives have specialist roles, including those with copyright knowledge. For this reason, it is not essential to train all members of staff on out-of-commerce works as the specialist individual (if there is one) is likely to conduct the majority of the research practices into out-of-commerce works themselves.

Using practice theory in this thesis and formulating a copyright regime of archival practices enables a framework for adapting existing archival practices to incorporate making out-of-commerce works available. This is a significant contribution to film archives and CHIs more widely, as well as to copyright and practice theory scholarship.

2.6.3 Regime of Practices

Practices and practice theory are intertwined with the concept of power. Law "is an element in the expansion of power", in that it facilitates social control.[151] As Watson notes, practice theory must account for power to "meaningfully inform future change".[152] He goes on to comment that:

[149] See Chapter 9 and 10 for more information
[150] Which will be discussed further in Chapter 3
[151] Gerald Turkel Michel Foucault: Law, Power and Knowledge (1990) 17(2) *Journal of Law and Society,* pp.170-193, 170
[152] Matt Watson "Placing Power in Practice Theory" in Alison Hui, Theodore Schatzki and Elizabeth Shove *The Nexus of Practices: Connections, constellations,* practitioners (Routledge, 2016), see Chapter 12

> [c]hange is likely to entail and come through changes in power relations and purposive change will involve engaging in and with existing dominant power relations.[153]

Utilising practice theory within a film archive is to enable understanding of the dynamics within the institution itself. The mixed vested interests it has as both a resource for the public to engage with cultural heritage and as an institution with a funding structure and business model to ensure its continuing success will be examined in Chapter 10 in particular. As Op den Kamp articulated, the archive as an institution can be viewed as a 'vehicle of power', which means that it is "an active site of agency and resistance".[154] These power dynamics and individual agency impact on the existing archival practices; and also, on how successfully Art. 8 can be incorporated.

Understanding what constitutes an individual practice enables a regime of practices to be formulated. Formulating copyright practices as a regime of practice provides a theoretical framework for exploring and understanding the diverse copyright practices evidenced in the ethnographic research conducted.

Foucault established a regime of practices that encompasses this, and it will be applied in this thesis. Applying Foucault's concept of "regimes of practice" offers the ability to propose an organised copyright regime of practice within film archives from the case studies. He comments that "practices" can be defined as "places where what is said and what is done, rules imposed and reasons given, the planned and the taken-for-granted meet and interconnect."[155] Foucault's concepts of regimes of practice enable an understanding of how power-knowledge or knowledge-power[156] governs the various ways in which different elements, such as people, knowledge, discourses, rules, material artefacts and competencies, come together in practices.

The regime of practices can be similarly applied to film archives, to understand this underlying "code" and what actions and beliefs are accepted. A more thorough

[153] Watson (n.152)
[154] Op den Kamp (2018) (n.8) 59
[155] Faubian (n.62) 225
[156] This is a Foucauldian concept, which he discusses in a number of his works. "…behind all knowledge [*savoir*], behind all attainment of knowledge [*connaissance*], what is involved is a struggle for power. Political power is not absent from knowledge, it is woven together with it." "Truth and Juridical Forms" in Faubian (n.62) 32

understanding of the existing practices, power dynamics and discourses within the film archives enables a clearer understanding of whether out-of-commerce works are likely to be successfully incorporated into these practices. As Chapter 9 will set out in detail, three sub-regimes were identified within the film archives.

Foucault's regime of practices therefore relates to the informal and formal rules of an organisation, including acceptable behaviour and truth. Foucault's concepts of jurisdiction and veridiction posit that these accepted behaviours and truths are shaped by the organisation in which they are based. As Foucault stated:

> [t]o analyse "regimes of practices" means to analyse programs of conduct that have both prescriptive effects regarding what is to be done (effects of "jurisdiction") and codifying effects regarding what is to be known (effects of "veridiction").[157]

In the copyright sub-regimes, forms of veridiction encompass the formulation of proper ways of articulating copyright adherence or resistance. The forms of jurisdiction include rules, such as an avoidance of situations that are viewed as too "risky" regarding copyright compliance. It has therefore been established what kind of copyright compliance and adherence behaviours were judged as proper and valid, as well as a description of the rationale offered to justify those knowledges. For example, avoiding reputational harm to the archive, which could in turn impact on the archive's longevity, was a rationale behind copyright compliance and adherence to certain copyright behaviours.

This table displays some of the veridiction and jurisdiction in the Pragmatic Compliance copyright sub-regime, which will be expanded on in Chapter 9. This table was produced by the researcher following analysis of the sub-regime.

[157] Faubian (n.62) 225. Veridiction can also be described as "the set of rules enabling one to establish which statements in a given discourse can described as true or false", see Michel Foucalt, Arnold I. Davidson and Graham Burchell *The Birth of Biopolitics: Lectures at the Collège de France, 1978-1979 (Michel Foucault: Lectures at the Collège de France)* (Palgrave Macmillan, 2008), pg. 35

Table 2.3 Veridiction and Jurisdiction

Veridiction in the Pragmatic Compliance copyright sub-regime: what is to be known.	Copyright compliance is important and should be adhered to, in most cases. The archive's desire to provide public access to material must be superseded by copyright concerns
Jurisdiction in the Pragmatic Compliance copyright sub-regime: what is to be done.	The copyright status of films impacts on whether it can be made available to the public or reused. Avoidance of situations that are viewed as too "risky" regarding copyright

This thesis proposes a copyright regime of archival practices. This regime of practices considers materials, meanings and competences.[158] Using this triad to understand the regime of archival practices present facilitates an understanding of how these three aspects hang together to form a unified regime of practices. "Meanings" is being used in this thesis to understand the spoken, written, unwritten, explicit and implied narratives that are present within the film archives. For example, copyright compliance and a desire to provide public access to the films are meanings evident in the ethnographic study.

Materials are the objects that are involved in the practice. Nicolini notes that examples of "material arrangements" as he refers to them include "artefacts, linked people, organisms and elements of nature."[159] In this research, examples of materials include the films themselves, policy documents and donor or deposit agreements. Competences refers to the technical skills, knowledge and abilities of the individuals within the archive, such as knowledge of copyright law, and film restoration skills.

Regimes of practice have been proposed for a wide range of phenomena, including sustainable living practices[160] and for personal aesthetic interior decorating taste.[161] Drawing on the ethnographic work of Denegri-Knott *et al*. in relation to sustainable living practices, it is evident that "power relations… shape and maintain"[162] the accepted practices within the film archives, especially in relation to copyright. These

[158] See Hand and Shove (n.140) 96
[159] Nicolini (n.139) 22
[160] Janice Denegri-Knott, Elizabeth Nixon and Kathryn Abraham Politicising the study of sustainable living practices (2018) 21(6) *Consumption Markets & Culture*, pp. 554-573
[161] Zeynep Arsel and Jonathan Bean Taste regimes and market mediated practice (2012) 39 *Journal Of Consumer Research,* pp. 899-917
[162] Denegri-Knott, Nixon and Abraham (n.160) 17

normative practices were likewise found to be “an ongoing endeavour”[163] and subject to change and review, as opposed to static normative practices that are established and then followed.

It does not appear from the literature that employing practice theory to copyright law has yet been attempted. Therefore, this thesis offers a methodological contribution to these fields. Taking a more holistic view, combining practice theory with ethnographic research contributes to the robustness of the methodologies utilised in the field. Together, they facilitate a deeper and more accurate analysis of the research aims than other methodologies would allow.

2.7 Conclusion

This research adopts an interdisciplinary approach. This chapter has set out the ontological, epistemological and methodological positions of the research. This research adopts an interpretivist research paradigm. This research will utilise a mixed-methodology of doctrinal research, comparative law and ethnographic research. An overview of the research methods has also been given.

This chapter has reviewed the literature in relation to practice theory. The Foucauldian concept of “regimes of practice” will be applied in Chapters 9 and 10 to propose a copyright regime of archival practices from the ethnographic case studies.

[163] Denegri-Knott, Nixon and Abraham (n.160) 8

Chapter 3 (The Problem with) Copyright and the Digitisation of Out-of-Commerce Works: Cultural Heritage, Legal and Policy Background

3.1 Introduction

This chapter will provide an overview of the concept of out-of-commerce works, and their cultural heritage, legislative and policy development at both the European and international levels.[164] This will be conducted through a doctrinal analysis and review of relevant copyright and cultural heritage literature. This chapter reviews the existing literature in relation to out-of-commerce works and identifies where this thesis can make original contributions to this existing literature.

This historical cultural heritage, legal and policy context emphasises the demand from CHIs for EU legislation on out-of-commerce works, and for the national implementations to avoid the lacklustre usage of the Orphan Works Directive. The historic problems of utilising out-of-commerce and orphan works for CHIs reaffirms the need for more contextual empirical research into the incorporation of these policies into existing archival practice, which this thesis offers.

The chapter will discuss the following: why out-of-commerce works should be made available, including discussion of the 20th century black hole, distortion of the historical narrative and the concept of European cultural heritage; how works become out-of-commerce; the Berne Convention; digitisation and the Google Books project; the "last twenty exception" in the US; the problem of out-of-commerce works for CHIs; the 2011 MoU; the Orphan Works Directive and the EnDOW project; the French law of out-of-print books and the subsequent *Soulier* case; and how this has led to Art. 8 of the DSM Directive concerning out-of-commerce works.

The impact on the historical narrative of these historic exclusions and of the digital skew is significant as Art. 8 could be utilised to begin to remedy this distortion of the historical narrative. In facilitating out-of-commerce works within CHIs being made available to the public, there is an opportunity for film archives to promote the marginalised films within their collections, and to encourage public enthusiasm for

[164] The discussion in this Chapter is applicable to out-of-commerce works in CHIs across the cultural heritage sector, as well as specifically to film archives. Although the focus of the discussion in this chapter is on EU CHIs, out-of-commerce works are an issue for CHIs globally.

engaging with these films. This can be combined with crowd curatorship, encouraging volunteers to help identify and correctly catalogue films in the collections which have been ignored.[165]

3.2 Why Make Out-of-Commerce Works Available to the Public?

Providing access to cultural heritage is pivotal to this research and is the basis for Art.8. CHIs preserve and provide access to millions of cultural heritage artefacts around the world. Access can be the end goal in itself, and it can also be an "enabler of other rights", as "'access' leads to 'expression' and to active participation in culture." [166] Article 27 of the Universal Declaration of Human Rights (1948) provides a right to "freely to participate in the cultural life of the community" and the right to protection of "moral and material interests" in works in which the individual is an author.

Likewise, Art 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights (1966) grants all people the right "to take part in cultural life". Facilitating public access to this cultural heritage is thereby aligned with these international obligations.

Furthermore, access to cultural heritage artefacts enables people to create new works and ideas. CHIs are memory institutions,[167] guarding and providing access to documents about the past. However, CHIs can also engage communities with the collections as a way of creating new works and telling new stories.[168] People can

[165] See 8.2.1 on crowd curatorship.
[166] Kristin Hausler, Camilla Adach, and Anna Khalfaoui, The Human Right to Access and Enjoy Cultural Heritage in the United Kingdom: Workshop Report (British Institute of International and Comparative Law, 2019) 23
[167] For a thorough discussion on describing various CHIs under the same label of "memory institutions", see Helena Robinson, 'Remembering things differently: museums, libraries and archives as memory institutions and the implications for convergence' (2012) *Museum Management and Curatorship* 27(4)
[168] Found footage filmmaking is an example of making new works from the films held within film archives. Found-footage filmmaking is a practice that involves using existing film footage to create new films, creating new narratives and subverting the original contexts. Some such filmmaking keeps the manipulation or change to the original film artefact as minimal as possible, and others use techniques such as chemical manipulation; adding new soundtracks or audio, extensive editing, etc, see Tom Gunning "Finding the Way: Films found on a Scrap Heap" in Marente Bloemheuvel, Giovanna Fossati, Jaap Guldemond (eds.) *Found Footage: Cinema Exposed* (AUP, EYE Film Institute Netherlands, 2012) 51. One of the most striking film 'archives' or collections is that of Rigole's (imaginary) International Institute for the Conservation, Archiving, and Distribution of Other People's Memories (ICCADOM) project, which is a collection of found home movies situated within an imagined international film archive. The project also includes "imaginary" informational films made by ICCADOM in its fictitious activities of collecting and archiving memories from people. Cammaer notes that Rigole, "treats history as a fiction, a fiction for which he can invent a new version" and therefore the "films are not used to tell stories about bygone times but to tell stories", see Gerda Cammaer, Jasper Rigole's Quixotic Art Experiments With Home Movies And Archival Practices: The International Institute for the Conservation, Archiving, and Distribution

build on what is already created, explore different cultures and identities, and become culturally literate.[169]

A crucial reason to make out-of-commerce works available is that failing to do so will contribute to the 20th century "black hole" within CHIs; and indeed within film archives, there is the risk of "double" black holes in relation to EU film.[170] Stemming in part from this 20th century black hole and in part from historic archival practices is a distortion of the historical narrative within film heritage.[171] Certain communities, cultures and individuals have been excluded from the historical narratives.[172] These reasons will be discussed below.

This impact on the historical narrative, and the exclusion of individuals and certain groups, is argued in this thesis to be the fundamental reason to make out-of-commerce works available, as Art. 8 could be utilised to begin to remedy these historical exclusions. In making out-of-commerce works available to the public, there is an opportunity for film archives to promote the marginalised films within their collections, and to encourage public enthusiasm for engaging with these films. This can be combined with crowd curatorship, encouraging volunteers to help identify and correctly catalogue films in the collections which have been ignored.[173]

3.2.1 The Impact of Out-of-Commerce Works on the Digitisation of Cultural Heritage

One of the challenges that out-of-commerce works present to CHIs is that digitising and preserving films incurs a substantial amount of money, and for works subject to copyright they cannot then freely be made available to the public. Facilitating access to film works involves several stages, including the accessioning and storage of the materials, cataloguing them, understanding the copyright status of the work, and then digitising the item. All this work incurs cost: to illustrate, the estimated total cost

---

of Other People's Memories (IICADOM) (2012) *The Moving Image: The Journal of the Association of Moving Image Archivists* 12(2), pp. 41-69, 51-52.

[169] See for a discussion on cultural literacy, Semanur Öztemiz, 'Cultural heritage literacy: A survey of academics from humanities and social sciences' (2019) *Journal of Librarianship and Information Science* 1, 2

[170] See 3.2.2 for discussion

[171] This distortion is present in CHIs more widely but will be focussed on in this thesis in relation to film archives.

[172] See 3.2.3 for discussion

[173] See 8.2.1 on crowd curatorship.

of digitising the collections of Europe's museums, archives and libraries, including the audiovisual material they hold is approximately €100 billion.[174]

Furthermore, once digitised, the material needs to be maintained as technology formats degrade and industry standards change, which incurs more cost. It has been estimated that the cost of preserving and providing access to a digital asset for a period of 10 years is approximately 50-100% of the initial cost of creating it.[175] A survey of audiovisual collections across Europe has estimated that there are approximately 10.81 million hours of audiovisual material in European CHIs, and of this, 1.03 million hours of film material.[176]

It would cost approximately €4.94 billion to digitise this audiovisual material.[177] Film is very expensive to digitise given its complexity as a medium, and therefore it has been estimated that it would cost between €2.08 billion to €1.56 billion to digitise the film material. [178] As a result of the high financial costs of obtaining the relevant copyright permissions, film archives usually choose to focus their digitisation efforts on public domain or state-owned collections.[179]

For out-of-commerce works, this means spending a substantial amount of money on materials (and often the collections hold thousands, if not millions, of items) that cannot be digitised or made available for the public to view, due to copyright concerns.

3.2.2 The 20th Century "Black Hole" of Cultural Heritage

Some commentators are concerned that without intervention there could become a time in which the 20th century is wholly "absent" from the record.[180] The Europeana Foundation[181] asserts that rectifying the issue of out-of-commerce works "would

[174] Poole (n.5) 1
[175] Poole (n.5) 3-4
[176] Poole (n.5) 3
[177] Poole (n.5) 3
[178] Poole (n.5) 71-72
[179] European Commission, 'Implementation of the 2005 European Parliament and Council Recommendation on Film Heritage: Progress report 2012-2013' (European Commission, 2014) 16
[180] Horst Forster The i2010 digital libraries initiative: Europe's cultural and scientific information at the click of a mouse (2007) 27(4) *Information Services & Use*, pp.155-159, 156
[181] Europeana is the central holding for European cultural heritage, currently providing access to more than 50 million items online, from the collections of thousands of CHIs across the EU, see Europeana, 'Welcome to Europeana Collections' (Europeana) Available at: <https://www.europeana.eu/portal/en/about.html> Accessed 17th May 2019; *and* Eleanor Kenny, 'Who we are' (Europeana, 25th July 2017). Available at: <https://pro.europeana.eu/our-mission/who-we-are> Accessed 4th May 2019

provide the basis for filling the 20th century black hole".[182] The "20th century black hole" refers to the lack of works available from the 20th century within the digitised collections of CHIs in Europe compared to other time periods due to copyright restrictions.[183] Partly due to this concern of the 20th century black hole, the European Commission signalled their intent to digitise and make the collections of all EU cultural heritage institutions available online in 2006, and the Europeana portal was launched in 2008.[184]

Mazzanti has stressed the urgency of rectifying what she refers to as the "two identical, huge black holes for European cinema", which are that analogue films will be lost for both cultural and commercial purposes; and that hundreds of digital-born films will be lost every year.[185] In short, she states that "[w]e are at risk of losing all films produced until now, plus all those produced from now on".[186]

Audiovisual works such as broadcast TV episodes,[187] films, and sound recordings[188] are particularly vulnerable to becoming out-of-commerce and subsequently "lost" to the public. Digital audio archives are especially vulnerable, with concerns that large amounts of sound heritage could be inaccessible in the future, due to copyright and related ownership issues, and whether the public is able to access these archival recordings.[189]

[182] Europeana Foundation, 'Europeana copyright policy mandate (Dec 2016)' (Europeana, 2016) 2
[183] Europeana Foundation (n.182) 1
[184] Maurizio Borghi, Kris Erickson and Marcella Favale, 'With Enough Eyeballs All Searches Are Diligent: Mobilizing the Crowd in Copyright Clearance for Mass Digitization' (2016) 16(1) *Chi. -Kent J. Intell. Prop*. pp. 135-166,137 There is more extensive discussion of this background in Borghi and Karapapa (n.4)
[185] Mazzanti (2011) (n.51); and see also Mazzanti (2012) (n.51) 12
[186] Mazzanti (2011) (n.51); and see also Mazzanti (2012) (n.51) 12
187 For example, there are many episodes of the iconic UK TV programme Doctor Who missing from the archives, see BBC, 'Re-created Lost Doctor Who episode gets YouTube premiere!' (BBC, 2nd October 2019) Available at: <https://www.bbc.co.uk/blogs/doctorwho/entries/36e9525b-1e11-4acb-b39d-247189c77142> Accessed 2nd October 2019
[188] See "Global archival consensus is that we have approximately 15 years in which to save our sound collections by digitising them before they become unplayable and are effectively lost." British Library 'Save our Sounds is the British Library's programme to preserve the nation's sound heritage' (British Library, 1st May 2019) (British Library, 1st May 2019) Available at: <https://www.bl.uk/projects/save-our-sounds> Accessed 23rd June 2019
[189] See Calamai, Ginouvès and Bertinetto (n.51)

The European Audiovisual Observatory surveyed the members of the Association des Cinémathèques Européennes (ACE). Notably, they found that out-of-commerce works and orphan works[190] presented a significant challenge for them:

> …Even more respondents stressed that ascertaining that a film work is out-of-commerce is extremely complex, due to the lack of specific tools or criteria to verify this status… and that about 60% of the feature films under copyright are presumably orphan or out-of-commerce.[191]

It is evident that prior to the adoption of the DSM Directive, the difficulties in determining the copyright status of a film often resulted in the film remaining undigitised and unseen by the public. There is a colossal amount of film heritage in CHIs waiting to be digitised and it seems more likely that CHIs will determine the cost of digitisation acceptable if they can provide public access to the digitised films.

3.2.3 The Impact of Out-of-Commerce Works in Distorting the Historical Narrative within Film Archives

Hall's research in this area is significant, and he notes that heritage should be viewed as a "discursive practice…in which the nation slowly constructs for itself a sort of collective social memory."[192] Brunow comments that "[t]hrough creating audiovisual memory, film archives play a fundamental role in shaping our view of the past", and that memory is "created in the context of reception, through processes of remediation and recontextualisation."[193]

Limitations on finances, time and staffing within film archives lead to decisions concerning which materials would be preserved and/ or digitised, and which items would work best together as a collection. Personal preference and the views of history at the time guide these decisions.[194] These archival decisions are thus

---

[190] See Anna Vuopala, 'Assessment of the Orphan works issue and Costs for Rights Clearance' (European Commission, 2010) 5 – "Works that can be presumed to be orphan without actually searching for the right holders augments the figure to approximately 225 000 film works."
[191] Fontaine and Simone (n.6) 32
[192] Stuart Hall Un-settling 'the heritage', re-imagining the post-nation: Whose heritage? (1999) 13(49) *Third Text*, pp. 3-13, 5
[193] Brunow (n.68) 98
[194] See 8.2.4 and 10.2.6 for discussion of the impact of curatorial choice. Some individual film archivist has saved collections. As Edmondson recounts, Henri Langlois hid the collection of the Cinémathèque Française whilst France was subject to Nazi occupation in WW2, dispersing it for safety; and similarly, in the Soviet era, archivists hid audiovisual material to protect it from destruction, see Ray Edmondson, You Only Live Once: On Being a

simultaneously acts of forgetting or excluding films or individuals from the archive.[195] As Lau writes, "[n]ational archives are haunted by the silenced gaps of marginalized people."[196] Brunow likewise states that:

> [a]rchives, just like other heritage institutions, can provide multiple modes of belonging. In the construction of memory and heritage, some narratives are highlighted, while others are neglected and excluded.[197]

There are many examples of this exclusion historically,[198] and excluded groups include ethnic minorities, LGBTQ+ individuals, people living with disabilities, women, and others.[199] This exclusion has been carried out "sometimes unconsciously and carelessly, sometimes consciously and deliberately".[200] In making out-of-commerce works available, these historic exclusions can be addressed.

Some silencing or exclusion from the historical narrative within archives can be a result of a failure to include intersectional experiences within the collections. Community archiving often aims to address the silencing or exclusion of certain groups from the archive. Community archives aim to preserve and save the voices and stories of the chosen community.[201] However, Flinn notes that "exclusions and silences may be found not just in mainstream histories but also in community narratives", giving the example of the black gay experience which was "rarely acknowledged in either the black community's or the gay community's public

---

Troublemaking Professional (2002) *The Moving Image: The Journal of the Association of Moving Image Archivists* 2(1), pp. 175-184, 175

[195] For example, "The process of constructing a national identity, or what could also be called a national history, remains problematic, because it tends to conceal the privileging of certain records of memory over others in an effort to form a concise and cohesive linear narrative", see Amy Lau Making Space for Silenced Histories: National History, Personal Archives, and the WWII Japanese American Internment (2014) 42 *Progressive Librarian*, pp. 82-94, 82.

[196] Lau (n.195) 83

[197] Brunow (n.68) 100

[198] Hall comments in relation to British heritage, "The National Heritage is a powerful source of such meanings. It follows that those who cannot see themselves reflected in its mirror cannot properly 'belong'", see Hall (n.188) 4

[199] See Brunow (n.68) 101

[200] Terry Cook 'We Are What We Keep; We Keep What We Are': Archival Appraisal Past, Present and Future (2011) 32(2) *Journal of the Society of Archivists*, pp. 173-189, 174

[201] See on community archives and the importance if representation within these archives, Andrew Flinn Community Histories, Community Archives: Some Opportunities and Challenges (2007) 28(2) *Journal of the Society of Archivists*, pp. 151-176; and Michelle Caswell, Alda Allina Migoni, Noah Geraci and Marika Cifor To Be Able to Imagine Otherwise': community archives and the importance of representation (2017) 38(1) *Archives and Records*, pp. 5-26.

histories".[202] Therefore, the Black LGBT archive rukus! sought to archive the black gay experience as a "way of achieving some sort of visibility."[203]

Furthermore, film archival collections traditionally focussed more on male filmmakers than women, meaning that the record of women within film in the past century has been significantly diminished.[204] Hill and Johnston have focussed on issues of cataloguing for women filmmakers within archives, and have called for film archives to include this in the metadata when cataloguing film.[205] There are a number of archival projects that focus on women in film and filmmaking, including The Women Film Pioneers Project (WFPP)[206] which details the many women who worked as professionals in the silent film industry off-camera.[207] These archives focus on women within filmmaking, as they have historically been erased and overlooked within archival history.

A report commissioned by Film Archives UK ("FAUK") in 2020 into amateur women filmmakers within the national and regional film archives of the UK found 2,267 films made by more than a hundred amateur women filmmakers[208] in these collections that had been forgotten. Of the sample taken, only 34% of these films had been digitised.[209] These films and filmmakers are in addition to the Women Amateur Filmmakers ("WAF") project at the East Anglian Film Archive.[210] It is noted that amateur women filmmakers are "doubly invisible, both as women and as non-professionals".[211] The FAUK report goes on to describe these films as "a hugely

[202] Andrew Flinn Independent and Community-led Archives, Radical Public History and the Heritage Professions (2011) 7(2) *UCLA Journal of Education and Information Studies*
[203] Flinn "Independent and Community-led Archives" (n.198)
[204] Melanie Bell's research focuses on this in particular. See Melanie Bell, Rebuilding Britain: Women, Work, and Nonfiction Film, 1945–1970 (2018) 4(4) *Feminist Media Histories*, pp. 33-56; and Melanie Bell and Melanie Williams (eds.) *British Women's Cinema* (Routledge, 2010)
[205] Sarah Hill and Keith M. Johnston (2020): Making women amateur filmmakers visible: reclaiming women's work through the film archive, Women's History Review, 2020
[206] Jane Gaines, Radha Vatsal, and Monica Dall'Asta (eds.) *Women Film Pioneers Project*. (Columbia University Libraries, 2020) Available at: < https://wfpp.columbia.edu/> Accessed on 15th September 2020
[207] Sarah Atkinson, *From Film Practice to Data Process: Production Aesthetics and Representational Practices of a Film Industry in Transition* (Edinburgh University Press, 2018) 191
[208] Stephanie Clayton, Keith M. Johnston and Melanie Williams *Invisible Innovators: Making Women Filmmakers Visible Across the UK Film Archives* (Film Archives UK, 2020), 29
[209] Clayton, Johnston and Williams (n.208) 4
[210] See Hill and Johnston (n.205)
[211] Clayton, Johnston and Williams (n.208) 3

significant element of Britain's cultural and artistic heritage that currently largely goes unseen",[212] and these works are therefore almost certainly out-of-commerce.

There are similar concerns that amateur films remain an "afterthought" within film archives, but in the last twenty years this has changed, with amateur and home films receiving more attention. This has been directly correlated to increased access and cataloguing of these films within national and regional film archives,[213] which emphasises the power of the film archive in its role as curator and gate-keeper.[214] It also emphasises the difficulties of "access", as without proper metadata in a searchable database, it is less likely that the public will find these films.

Furthermore, film archives within the EU and Europe are "still bound by their national contexts to a surprisingly large extent."[215] The focus on national collections, often due to funding restrictions, can likewise lead to the exclusion of certain communities. Andersson and Sundholm's research into immigrant cinemas in Sweden highlighted to them the power that the archive wields.[216] They have attempted, but struggled, "to create an archival life for the immigrant films, doubting if the films in question will have an archival afterlife at all."[217] They view these immigrant films as "more precarious" than experimental films, on the basis that the Swedish archive does not view them as Swedish and therefore within its remit.[218] If the films are not preserved within the film archives, it is likely that these films will be lost to the public, as people will not be able to access them.

To add to the distortion already discussed, there is a digital skew within audiovisual and film archives that further distorts the historical narrative. McCausland has discussed the "digital skew", brought about through "copyright barriers to archive clearance".[219] She notes that this skew

[212] Clayton, Johnston and Williams (n.208) 29
[213] Hill and Johnston (n.205) 2
[214] See Chapter 8 for a discussion of the literature on the notion of gatekeeping within film archives. This concept was also explored in the ethnographic research, see Chapters 9 and 10.
[215] Brunow (n.68) 107
[216] Lars Gustaf Andersson and John Sundholm, *The Cultural Practice of Immigrant Filmmaking: Minor Immigrant Cinemas in Sweden 1950–1990* (Intellect, 2019) 117
[217] Andersson and Sundholm (n.216) 117
[218] Andersson and Sundholm (n.216) 124
[219] McCausland (n.34)159

> erodes cultural memory. The sense of history which comes with access to the whole, or a substantial part, of an archive, is of much greater cultural value than a small selection curated through the random prism of copyright clearance.[220]

The "digital skew" within audiovisual archives refers to the "asymmetry between analogue and digitized collections".[221] This digital skew is attributed to a "gridlock" caused by copyright protection, impacting on which works are digitised and made available to the public.[222] The effect of the digital skew is compounded by the historic exclusions of groups of people and individuals from the archival record.

The impact on the historical narrative of these historic exclusions and of the digital skew is significant as Art. 8 could be utilised to begin to remedy this distortion of the historical narrative. In facilitating out-of-commerce works within CHIs being made available to the public, there is an opportunity for film archives to promote the marginalised films within their collections, and to encourage public enthusiasm for engaging with these films. This can be combined with crowd curatorship, encouraging volunteers to help identify and correctly catalogue films in the collections which have been ignored.[223]

3.2.4 The (Problem with) Formulation of "European Cultural Heritage"

The DSM Directive focuses on copyright and cultural heritage *of* the EU. The consequent notion of a collective European cultural heritage,[224] and how this collective heritage[225] can best be shared and protected, is therefore the focus of Art 8. Film archives within the EU (and Europe more widely) can "contribute to the creation of cultural memory"[226] and are crucial to protecting EU cultural heritage.

---

[220] McCausland (n.34)159
[221] Op den Kamp (2015) (n.36) 147
[222] Op den Kamp (2015) (n.36) 147
[223] See 8.2.1 on crowd curatorship.
[224] As Recital 2 of the Copyright Directive says "…The protection provided by that legal framework also contributes to the Union's objective of respecting and promoting cultural diversity, while at the same time bringing European common cultural heritage to the fore..."
[225] See for a discussion of this "extremely generic" notion of European cultural heritage and political reasons for its construction, Tuuli Lähdesmäki, 'Narrativity and intertextuality in the making of a shared European memory' (2017) *Journal of Contemporary European Studies* 25(1) 57, 60
[226] Brunow (n.68) 106

The concept of a collective "European cultural heritage" can be seen in the 1970s official policy discourse of EU integration onwards.[227] "Europe" is often used interchangeably as meaning the "EU", with a political agenda that "seeks to naturalize the connection between Europe and the EU as a polity by paralleling them."[228] This EU policy narrative aligns European memory and EU cultural heritage with a narrative of the emergence, development, and functioning of the EU itself.[229] Attempting to build a narrative around a collective European heritage within the EU is rooted in the fact that repeated references to historical events have been "integral to community building for centuries".[230] This narrative construction has enabled the emergence of a "transnational" European identity.[231]

As Lähdesmäki asserts, this European heritage ideal can be problematic, as the heritage focused on is often that of "'original' Europeans" and of the "commonness of styles and aesthetics of the past" as opposed to addressing present day issues with the notion of "European".[232] There is a persuasive argument made by Neumayer that the narratives constructed within EU policy have predominantly favoured the views and historical narratives of the Western EU countries, as opposed to the Central or Eastern European countries.[233] This causes further concern with the term "European cultural heritage" as it is unclear whether the cultural heritage and memory narratives reinforce structural and cultural inequalities. This can contribute to the distortion of the historical narrative discussed above.

3.3 How do Works Become Out-of-Commerce?

An "out-of-commerce" work is defined in Art. 8(5) of the DSM Directive as a work that is subject to copyright and "is not available to the public through customary channels of commerce, after a reasonable effort has been made to determine whether it is

[227] Tuuli Lähdesmäki and Katja Mäkinen "The 'European Significance' of Heritage: Politics of Scale in EU Heritage Policy Discourse" in Tuuli Lähdesmäki, Suzie Thomas, Yujie Zhu *Politics of Scale: New Directions in Critical Heritage Studies* (Berghahn Books, 2019) 36
[228] Lähdesmäki and Mäkinen (n.227) 40
[229] Lähdesmäki (2012) (n.221) 61
[230] Aline Sierp and Jenny Wüstenberg, 'Linking the Local and the Transnational: Rethinking Memory Politics in Europe' (2015) *Journal of Contemporary European Studies*, 23(3) 321, 322.
[231] Sierp and Wüstenberg (n.226) 324
[232] Tuuli Lähdesmäki, 'Rhetoric of unity and cultural diversity in the making of European cultural identity' (2012) International Journal of Cultural Policy 18(1) 72
[233] See Laure Neumayer Integrating the Central European Past into a Common Narrative: The Mobilizations Around the 'Crimes of Communism' in the European Parliament (2015) 23(3) *Journal of Contemporary European Studies,* pp. 344-363

available to the public."[234] Out-of-commerce works include both "out-of-print works and unavailable digital-first works."[235]

The majority of works do not remain in commerce or commercially available throughout the duration that they are in copyright. For example, Mulligan and Schultz found that only 6.8% of films still in copyright that were released before 1946 were commercially available in 2002.[236]

A copyright work may become unavailable commercially for a number of reasons.[237] The work could suffer from commercial abandonment if it is too cost prohibitive for the rightholder to supply the work, and so they cease making the work commercially available. Likewise, a temporary abandonment of the work could occur, in instances in which the rightholder intends to make it commercially available in the future, but for now is not exploiting the work commercially. Conversely, the work could be strategically abandoned if the rightholder begins to sell an upgraded or updated version and ceases supply of the older version. A work may also become out-of-commerce as a result of the author deciding not to continue disseminating their works, and indeed this can constitute a moral right of withdrawal,[238] as in French law.[239] A work could also become out-of-commerce due to unknown authorship. Likewise, it may be a result of unlocatable ownership.[240]

These are examples of how copyright works may become deliberately or accidentally out-of-commerce due to the action or inaction of the rightholder. There are also instances in which a work may forcibly be taken out-of-commerce by a State, for example Lilijeblan observes that French law enables cultural artefacts to be removed

[234] Article 8(5)
[235] Sarah Reis 'A Closer Look at the European Union Copyright Directive' (2019) 24(2) *AALL Spectrum,* pp. 35-37, 37
[236] See Deidre Mulligan and Jason Schultz Neglecting the National Memory: How Copyright Term Extensions Compromise the Development of Digital Archives (2002) 4(2) *Journal of Appellate Practice & Process*, pp.451-473, 451; see also Marcella Favale, Fabian Homberg, Martin Kretschmer, Dinusha Mendis, and Davide Secchi "Copyright, and the Regulation of Orphan Works: A Comparative Review of Seven Jurisdictions and a Rights Clearance Simulation" (IPO, 2015)
[237] See Dennis W. K. Khong Abandonware and the Missing Market for Copyrighted Goods (2007) 15(1) *Int J Law Info Tech,* pp. 54-89
[238] Borghi and Karapapa (n.4) 89
[239] French Intellectual Property Code, Art L121-4
[240] See for a detailed discussion on the reasons set out above Khong (n.237)

from commerce if "they belong to a community that still exists, they hold sacred value, and the community refuses to sell them".[241]

This issue of out-of-commerce works is not solely a European one, but a global one, also affecting countries such as the USA.[242] As the notion of "out-of-commerce" is relatively new within copyright literature, there are not clear statistics relating to the number of works held within CHIs that are out-of-commerce. Indeed, as will be discussed, how "out-of-commerce" is interpreted will significantly impact upon the number of works that are deemed to be out-of-commerce.

3.4 Digitisation of Cultural Heritage

Digitisation is a core priority within the EU in relation to cultural heritage.[243] As a report by the Comité des Sages notes,

> …digitisation is more than a technical option, it is a moral obligation. In a time when more and more cultural goods are consumed online, when screens and digital devices are becoming ubiquitous, it is crucial to bring culture online (and, in fact, a large part of it is already there).[244]

This highlights both the importance of the digitisation of cultural heritage within the EU, but also the necessity of ensuring access to cultural heritage is facilitated in a manner that aligns with the increasingly digital world.

Digitisation of cultural heritage is a core objective for many CHIs, as it allows them to make these works available for the public to view. Providing access to works online

---

[241] Jonathan Liljeblad The Hopi, the katsinam, and the French courts: looking outside the law in the repatriation of Indigenous cultural heritage (2017) 23(1) *International Journal of Heritage Studies*, pp.41-51, 43

[242] Rita Matulionyte 10 years for Google Books and Europeana: copyright law lessons that the EU could learn from the USA (2016) 24(1) *Int J Law Info Tech*, pp. 44-71, 50

[243] See for example European Commission "Cultural Heritage: Digitisation, Online Accessibility And Digital Preservation. Consolidated Progress Report on the implementation of Commission Recommendation (2011/711/EU) 2015-2017" (European Union, 2018); the establishment of the Expert Group on Digital Cultural Heritage and Europeana *see* European Commission "Commission Decision of 7.3.2017 setting up the Expert Group on Digital Cultural Heritage and Europeana" Document: C(2017) 1444 (European Commission, 2017);and Beth Daley, "Importance of digitising cultural heritage highlighted in 'Heritage at Risk' exhibition" (Europeana, 15th July 2019) Available at: < https://pro.europeana.eu/post/importance-of-digitising-cultural-heritage-highlighted-in-heritage-at-risk-exhibition#:~:text=Digitisation%20of%20cultural%20heritage%20can,promotion%20of%20European%20cultural%20resources.&text=By%20digitising%20their%20valuable%20collections,to%20safeguard%20our%20heritage%20sites.> Accessed on 11th October 2020

[244] Elisabeth Niggemann, Jacques de Decker and Maurice Lévy "The new Renaissance: Report of the "Comité des Sages" on bringing Europe's Cultural heritage online" (Publications Office of the European Union, 2011), pg. 14

enables a wider section of the public to view them. Many works that CHIs wish to digitise are presumed to be out-of-commerce works, and so have, prior to the DSM Directive, required the prior permission of the copyright holder. Art. 8 thus offers a strong legal mechanism for CHIs in being able to digitise these works.

Digitisation describes:

> the set of management and technical processes and activities by which material is selected, processed, converted from analogue to digital format, described, stored, preserved and distributed.[245]

Digitisation involves capturing works in a digital format, to preserve the contents for the future, and to enable people to access these works easily off-site via a CHI's website or online platform. Mass digitisation is the digitisation of CHI collections on an "industrial" scale,[246] running into millions of individual heritage works.[247]

As Thylstrup notes, this mass digitisation facilitates stronger and wider preservation of the past through historical documents and works, whilst simultaneously widening public access to these collections once digitised.[248] Thylstrup is also critical of mass digitisation efforts,[249] compellingly asserting that these efforts affect the "politics" of CHIs and of the cultural memory objects themselves.[250] She further comments that mass digitisation is not a neutral process; and rather "a complex process teeming with diverse political, legal, and cultural investments and controversies."[251]

The barriers to mass digitisation of cultural heritage are widely accepted to be technical issues, funding issues, and copyright issues.[252] The technical cost itself of digitally capturing and archiving cultural heritage has significantly decreased over the years, whilst copyright clearance remains excessively costly and burdensome for CHIs.[253] The cost of this copyright clearance for CHIs is prohibitive given their

[245] Poole (n.5) 11
[246] Nanna Bonde Thylstrup, *The Politics of Mass Digitization* (MIT Press, 2019) 4
[247] See for a detailed discussion, Borghi and Karapapa (n.4)
[248] Thylstrup (n.246) 4
[249] See Thylstrup (n.246) for an excellent discussion of the "*infrapolitical*" process of mass digitisation within CHIs.
[250] Thylstrup (n.246) 5
[251] Thylstrup (n.246) 1
[252] Joel Taylor and Laura Kate Gibson Digitisation, digital interaction and social media: embedded barriers to democratic heritage (2017) 23(5) *International Journal of Heritage Studies*, pp. 408-420, 408
[253] Stobo, Patterson, Erickson, and Deazley (n.58)

funding situations, as the cultural heritage sector as a whole suffers from low and inadequate funding.[254]

Indeed, in many cases, the cost of copyright clearance is disproportionately high[255] compared to the economic value of the work itself, as many such works have inherently little or no commercial value. This is heightened in regard to out-of-commerce works, as the fact they are protected by copyright has historically required a CHI to seek copyright permission from each individual owner, or for the CHI to adopt a more risk-tolerant approach and make use of the work without the rightholder's permission.

The cost to digitise an individual work varies hugely depending on the format of the work, the intention of the preservation and digitisation; any damage done to the work, etc. The European Commission has collated anecdotal accounts of the costs to CHIs, which are indicative: up to €100 per book; up to €50 per poster; up to €1.70 per photograph; and approximately around €27 for a short amateur film.[256] Copyright clearance therefore presents a substantial and cost prohibitive barrier for many CHIs.

Digitisation of cultural heritage facilitates the right to cultural heritage seen in legal international declarations, and with the EU's own policy incentives, and in line with Art 167 TFEU[257] and Art 3(3) TEU.[258] The digitisation of cultural heritage therefore contributes towards these legal obligations to widen access to cultural heritage. Whilst digitisation and widening of access is viewed by the majority of scholars and practitioners as positive, there has been controversy around mass-digitisation projects.

---

[254] See for example ICOM, 'The reduction in public funding threatens the very existence of museums' (International Council of Museums, 17th September 2018) Available at: <https://icom.museum/wp-content/uploads/2018/09/ICOMStatement-reduction-in-public-funds.pdf> Accessed 24th June 2019

[255] See Borghi, Erickson and Favale (n.184)

[256] See European Commission, *Impact Assessment on the modernisation of EU copyright rules,* (Commission Staff Working Document 301, 2016), 3.4.1

[257] Art. 167 Treaty on the Functioning of the European Union:
1. The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.…

[258] The Union shall establish an internal market. …It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced…

3.5 Comparison with the US

3.5.1 Google Books and the Amended Settlement Agreement

The most significant and controversial mass digitisation project to date is the Google Books project, which digitised books on an industrial scale. The Google Books homepage itself comments that it is "the world's most comprehensive index of full-text books".[259] Its aim is to scan every book ever published, and to allow the full texts of these books to be searchable online.[260] As Borghi astutely notes, this mass digitisation has been typified by a "peculiar sense of urgency and compulsiveness", in that Google was "scanning first and asking questions later."[261]

To provide a brief background, Google began digitising books for its Google Books project between 2002 and 2004, without the consent of rightholders. This included books still in copyright. In 2005 in the *Authors Guild v Google* case,[262] the Authors Guild of America and publishers from the Association of American Publishers consequently sued Google for infringing copyright in these works.[263] A Settlement was reached between the parties, which was then amended.[264] It was then also subsequently rejected by the court in 2011.[265] Consequently, the system it had proposed was not enacted. A private agreement was reached in 2012 between Google and the Association of American Publishers relating to digitisation and commercialisation of out-of-print books (and also therefore "out-of-commerce works").[266] This private agreement sat outside of the *AG v Google* litigation.

Under the rejected *Amended Settlement Agreement*[267] there were clear proposals for determining whether a work was commercially available, and it would only be the out-of-commerce works that would be included in the project. This included checking

[259] See Google Books. Available at: < https://books.google.com/> Accessed on 2nd February 2019
[260] Jeffrey Toobin, "Google's Moon Shot: *The quest for the universal library." (The New Yorker,* January 28, 2007) Available at: https://www.newyorker.com/magazine/2007/02/05/googles-moon-shot Accessed on 14th February 2019
[261] Maurizio Borghi "Knowledge, Information and Values in The Age Of Mass Digitisation" in Ivo de Gennaro (ed.) *Value: Sources and Readings on a Key Concept of the Globalized World* (Brill Academic Publishers, 2012), pg. 419
[262] *Authors Guild Inc v Google Inc*, No 05-CV-8136-DC (SDNY, 13 November 2009)
[263] For a thorough discussion on the Google Books project, the Authors Guild v Google case and the Amended Settle Agreement, see Borghi and Karapapa (n.4)
[264] Amended Settlement Agreement, *Authors Guild Inc v Google Inc*, No 05-CV-8136-DC (SDNY, 13 November 2009)
[265] *Authors Guild v. Google Inc.*, 770 F. Supp.2d 666 (S.D.N.Y. 2011), it was rejected on the grounds that it was "not fair, adequate and reasonable".
[266] Borghi and Karapapa (n.4) 89-90
[267] ASA

whether a book had been sold on the markets of Australia, Canada, the UK or the USA[268] and that rightholders could contact Google with evidence that the book was commercially available.[269] The rightholders could also contact Google if they had mistakenly classified the book as out-of-print (or out-of-commerce).

The ASA obligated the Books Registry to use "commercially reasonable efforts" to locate rightholders.[270] Katz therefore notes that the ASA, were it to have been approved and come into force, "would, in effect, have created a sui generis ECL."[271] "ECL" refers to extended collective licensing and is discussed in detail in Chapter 6. Books that were in-print but were commercially unavailable would be classed as out-of-print[272] or what is now "out-of-commerce".

The proposed system was regarded by many as a "deal with the devil",[273] as although there would be huge benefits to accessing the millions of out-of-commerce books; it granted Google a monopoly over them. This raised questions as whether such a system of mass digitisation can be facilitated in a manner that does not unfairly prejudice either rightholders or users.

The case of *Authors Guild of America v HathiTrust* [274] in 2012 involved a similar collection of digitised materials. However, the Court found in HathiTrust's favour on the basis that their activities were fair use.[275] The use of the works was found to be transformative, and therefore fall under fair use.[276]

3.5.2 The "Last Twenty Exception" in the US

In US copyright law, s.108(h)[277] allows a library or archive to make copies of a work for distribution, including online distribution, as well as public display in the final

[268] ASA, s.3.3(d)(i)
[269] ASA, s.3.2 9d((iii)
[270] ASA § 6.1(c)
[271] Ariel Katz The Orphans, the Market, and the Copyright Dogma: A Modest Solution for a Grand Problem (2012) 27(3) *Berkeley Technology Law Journal*, pp.1285-1346, 1332.
[272] Attachment A to ASA at s.3.3(a), (b)
[273] James Somers "Torching the Modern-Day Library of Alexandria" (*The Atlantic*, April 20th, 2017) Available at:< https://www.theatlantic.com/technology/archive/2017/04/the-tragedy-of-google-books/523320/> Accessed on 30th April 2019
[274] *Authors Guild of America v Hathi Trust* No. 11 Civ 6351 (HB), 2012 US Dist.
[275] See Borghi and Karapapa (n.4) 6
[276] *Authors Guild of America v Hathi Trust, 16.* See Borghi and Karapapa (n.4) 50 for further discussion.
[277] 17 U.S.C. Section 108(h): "(1)For purposes of this section, during the last 20 years of any term of copyright of a published work, a library or archives, including a nonprofit educational institution that functions as such, may reproduce, distribute, display, or perform in facsimile or digital form a copy or phonorecord of such work, or portions thereof, for purposes of preservation, scholarship, or research, if such library or archives has first

twenty years of a work's copyright term, which is known as the "last twenty exception".[278] This "last twenty exception" is only available if the work is not being commercially exploited, which is the same concept seen in Art. 8 of the DSM Directive in making out-of-commerce works available.[279]

Townsend Gard's impressive research into how libraries in the US can make use of the "last twenty exception" sets out detailed recommendations as to how s.108(h) could be utilised in practice by CHIs. Her research clearly articulates, based on empirical research, the complexity for CHIs in incorporating s.108(h) into practice.

Of particular relevance to this thesis, she recommends that, where it seems unlikely that works have been commercially exploited, it is not necessary to search each work individually, and instead CHIs could produce a policy statement explaining this choice, and that they believe the work to be out of commercial exploitation.[280] In Chapter 4, this thesis will propose a sampling mechanism to be used when making out-of-commerce works available.

3.6 European Law and Policy

3.6.1 The 2011 Memorandum of Understanding

A proposal to facilitate this access to out-of-commerce works was implemented in the 2011 Memorandum of Understanding Key Principles on the Digitisation and Making Available of Out-of-Commerce Works ("2011 MoU").[281] This 2011 MoU focused solely on books and journal articles, and established principles that would enable voluntary agreements between the parties to the agreement to make out-of-

---

determined, on the basis of a reasonable investigation, that none of the conditions set forth in subparagraphs (A), (B), and (C) of paragraph (2) apply.
(2) No reproduction, distribution, display, or performance is authorized under this subsection if—
(A)the work is subject to normal commercial exploitation;
(B)a copy or phonorecord of the work can be obtained at a reasonable price; or
(C)the copyright owner or its agent provides notice pursuant to regulations promulgated by the Register of Copyrights that either of the conditions set forth in subparagraphs (A) and (B) applies.
(3) The exemption provided in this subsection does not apply to any subsequent uses by users other than such library or archives."

[278] Elizabeth Townsend Gard, *Creating a Last Twenty (L20) Collection: Implementing Section 108(h) in Libraries, Archives and Museums* (SSRN Electronic Journal, 2017) Available at: <https://ssrn.com/abstract=3049158> Accessed on 12th November 2020

[279] There are further conditions, which will not be discussed here for brevity. See for further discussion, see Townsend Gard (n.278)

[280] Townsend Gard (n.278) 86

[281] Memorandum of Understanding: Key Principles on the Digitisation and Making Available of Out-of-Commerce Works, 2011.

commerce books and journal articles available. It was signed by prominent organisations across the EU, including the Association of European Research Libraries (LIBER); European Federation of Journalists (EFJ); and the European Writers Council (EWC). Being a memorandum, it was not binding on any signatory or Member State.[282]

In the memorandum, works were deemed to be out-of-commerce when:

> the whole work, in all its versions and manifestations is no longer commercially available in customary channels of commerce, regardless of the existence of tangible copies of the work in libraries and among the public (including through second hand bookshops or antiquarian bookshops).[283]

The definition in the 2011 MoU of out-of-commerce works leaves unclear what "commercially available in customary channels of commerce" means in practice. The MoU states that the:

> method for the determination of commercial availability of a work depends on the specific availability of bibliographic data infrastructure and therefore should be agreed upon in the country of first publication of the work.[284]

Reading the definition for out-of-commerce works in the DSM Directive in Art. 8(5), it is clear that that 2011 MoU's definition has been influential. Art. 8 also widens the scope to all copyright works, unlike the 2011 MoU's strict focus.

3.6.2 The Orphan Works Directive

The Orphan Works Directive is an EU directive aimed at solving the problem of orphan works within the CHI sector. Orphan works are works which are still in copyright, but for which the rightholder is unknown or cannot be found. Diaries, photographs, films and letters are common examples of orphan works. The inability of CHIs to use orphan works benefits neither the CHI and the public nor the rightholder, as an orphan work is by its nature not commercially exploited by the rightholder.

---

[282] Irini A. Stamatoudi *New Developments in EU and International Copyright Law* (Kluwer Law International B.V 2016), 7.3.1.1.
[283] Memorandum of Understanding (n.281) pg. 2
[284] Memorandum of Understanding (n.281) pg. 2

A report by Collections Trust concluded that orphan works usually have little commercial value, but substantial cultural and academic value. [285] Also, they noted that rightholders of these works, if traced, "would usually be happy for their works to be reproduced".[286] Therefore, there is both a cultural and economic loss in these orphan works remaining unused.[287]

The orphan works problem has increased in recent decades for various reasons, including the extension of copyright duration.[288] The increasing use of digital technologies has further exacerbated the problem of works being separated from information about the rightholder.[289] Mattingly comments that the mass digitisation projects such as Google Books "magnify" the cost of identifying rightholders and the legal complexities of doing so, to the extent that the success of these projects is at risk.[290]

Large numbers of orphan works arise for two primary reasons: the fact there are no copyright registration formalities and so the moment a work is created copyright automatically arises; and the long duration of copyright protection being in most countries 70 years after the author's death.[291] Copyright therefore also arises automatically for works which were never intended for commercial exploitation, that is to say, out-of-commerce works. These factors contribute to works becoming lost from their authors and often lacking the information needed to trace the author.[292]

There are many legal similarities between orphan works and out-of-commerce works, especially the challenges they pose in balancing public access to cultural

[285] Naomi Korn "In from the Cold: An assessment of the scope of 'Orphan Works' and its impact on the delivery of services to the public" (Collections Trust, 2009), 6
[286] Korn (n.285) 6
[287] As Bensamoun notes in relation to both out-of-commerce works and orphan works, "[t}heir status is detrimental to everyone", see Alexandra Bensamoun The French out-of-Commerce Books Law in the Light of the European Orphan Works Directive (2014) 4 *Queen Mary J Intell Prop*, pp. 213-225, 214
[288] See on the lengthy duration of copyright protection, Marci A. Hamilton Copyright Duration Extension and the Dark Heart of Copyright (1996) 14(3) *Cardozo Arts & Entertainment Law Journal*, pp. 655-660; and Jenny L. Dixon The Copyright Term Extension Act: Is Life Plus Seventy Too Much (1995) 18 *Hastings Comm & Ent LJ*, pp. 945-980. See for an excellent discussion on the way in which the day of the author conceptually shapes copyright and its duration, Abraham Drassinower Death in Copyright: Remarks on Duration (2019) 99 *BU L Rev*, pp. 2559-2580.
[289] Francis X. Mattingly If You Don't Use It, You Lose It: What the U.S. Could Learn from France's Law on out-of-Commerce Books of the 20th Century (2017) 27(2) *Indiana International & Comparative Law Review,* pp. 277–306, 280
[290] Mattingly (n.289) 280
[291] Ronan Deazley and Kerry Patterson, "Digitising the Edwin Morgan Scrapbooks: Orphan Works: Law", Digitising Morgan, 2
[292] See as an example of the difficultly of researching the work without the relevant rightholder information, Deazley and Patterson (n.291) 2

heritage and the protection of rightholders. Furthermore, the Orphan Works Directive and its minimal usage[293] by CHIs acts as a warning to legislators not to repeat these uncertainties and complexities for out-of-commerce works. For both types of work, they are works that are still subject to copyright protection, and therefore are subject to restrictions on their usage.

Before the Orphan Works Directive, this lack of information meant that rightholders could not be contacted to give their permission for uses of the works. Consequently, CHIs were unable to digitise works to make them available without fearing potential copyright infringement. The Orphan Works Directive aimed to remedy this.

The Orphan Works Directive allows certain CHIs, such as publicly accessible libraries, educational establishments, museums, archives, film or audio heritage institutions and public-service broadcasting organisations[294] to make certain uses of orphan works. The Orphan Works Directive applies to written materials such as books, magazines and journals, as well as cinematographic or audiovisual works and phonograms.[295] Art. 6 of the Orphan Works Directive states that CHIs are permitted to use certain uses of orphan works contained in their collections.[296]

3.6.2.1 The Diligent Search Required for Orphan Works

Art. 3 sets out the requirements for the diligent search to be "carried out in good faith in respect of each work or other protected subject-matter, by consulting the appropriate sources for the category of works and other protected subject-matter in question...". Art. 3(3) sets out which country the diligent search should be carried out in, and the situation is more complicated for audiovisual or cinematographic works.[297]

---

[293] See Chapter 10 for quotations from film archives in relation to their difficulty using the Orphan Works Directive
[294] Art. 1(1) Orphan Works Directive
[295] Art. 1(2)(a) and (b).
[296] (a) by making the orphan work available to the public, within the meaning of Article 3 of Directive 2001/29/EC [right of communication and right of making available to the public];
(b) by acts of reproduction, within the meaning of Article 2 of Directive 2001/29/EC [reproduction right], for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration.
[297] A diligent search shall be carried out in the Member State of first publication or, in the absence of publication, first broadcast, except in the case of cinematographic or audiovisual works the producer of which has his headquarters or habitual residence in a Member State, in which case the diligent search shall be carried out in the Member State of his headquarters or habitual residence.

The user must make "an honest effort"[298] to search for the rightholder and intend to find them. The diligent search requires that the search be conducted

> in good faith in respect of each work or other protected subject-matter, by consulting the appropriate sources for the category of works and other protected subject-matter in question.[299]

The "diligent search" required under the Orphan Works Directive[300] is generally accepted to be overly cumbersome; as it requires CHIs to consult large numbers of authoritative sources to locate the rightholder and many of these online sources are not freely accessible.[301] The list of "appropriate sources"[302] to be searched in each Member State varies significantly and is long, for example Italy has the highest number of sources to be checked at 357, and the total number of sources across 20 of the EU Member States is 1,768.[303] It has been implemented in all EU Member States, and the UK when it was a member of the EU. It also requires that the sources of information on rightholders be consulted in other countries, if there "is evidence to suggest that relevant information on rightholders is to be found" there,[304] which increases the time, effort, cost and administrative burden of the search.

Furthermore, there is academic disagreement on the nature of the diligent search, with a lack of clarity as to whether the search must be exhaustive and search all listed sources, or if the search should be considered in the context of the work, its origins and bearing in mind the knowledge of the person conducting the search. Deazley et al. advocate for the latter, noting that it is a "practical, pragmatic approach."[305]

In the case referred to in Article 1(3), the diligent search shall be carried out in the Member State where the organisation that made the work or phonogram publicly accessible with the consent of the rightholder is established.

[298] Simone Schroff The Impossible Quest – Problems with Diligent Search for Orphan Works (2017) 48(3) *IIC*, pp. 286-304, 289

[299] Art 3(1) Orphan Works Directive

[300] See Chapter 4 for discussion comparing the diligent search requirement for orphan works with the "reasonable effort" assessment required for out-of-commerce works under Art. 8 of the DSM Directive.

[301] Maria Lillà Montagnani and Laura Zoboli The making of an 'orphan': cultural heritage digitization in the EU (2017) 25(3) *Int J Law Info Tech*, pp.196-212, 208

[302] See the annex of the Orphan Works Directive for further detail on the nature of the sources to be consulted for each type of work

[303] Aura Bertoni, Flavia Guerrieri and Maria Lillà Montagnani, Report 2: Requirements for Diligent Search in 20 European Countries (EnDOW, 2017) 25

[304] Art. 3(4) Orphan Works Directive

[305] Stobo, Patterson, Erickson, and Deazley (n.58)

Indeed, Deazley et al. asserts that “diligent search and mass digitisation are fundamentally incompatible, however light-touch the nature of the diligent search obligation”.[306] They conducted a diligent search in the UK of one of 16 scrapbooks created by Edwin Morgan.[307] The sample of 432 works required 1,080 hours of diligent search and the equivalent salary cost for this time was £11,653.20.[308] Of these 432 works, 52% of the sample was found to be orphan works.[309] Patterson et al. estimated that, scaled up to the 16 scrapbooks, this equated to 26,770 orphan works in total.[310]

Their conclusion from a sample diligent search exercise predicted that it would take one full-time researcher more than 8 years and cost more than £185,000 to perform the required diligent searches.[311] Even after this Herculean search, rightholders may still refuse permissions and the scrapbooks may not be capable of being made available to the public.[312] In a damning and compelling verdict, they argue that no CHI “however well-resourced, would ever take on such a speculative and costly venture.”[313]

Significantly, there was also a lack of clarity surrounding what documentation would be sufficient for a CHI to demonstrate that their search had been diligent, and “what legal certainty”[314] a diligent search document has against potential challenges from rightholders for CHIs relying on the search. The documentation required to be kept by users such as CHIs in relation to diligent searches, including the result of the diligent search; the use made of the orphan work; any change of status of the orphan work; and the CHI’s contact information.[315] This burden was reiterated by the participants in the ethnographic research in Chapters 9 and 10.

[306] Stobo, Patterson, Erickson, and Deazley (n.58)
[307] This was the first UK study addressing the legal and practical realities of diligent search in the UK
[308] Stobo, Patterson, Erickson, and Deazley (n.58)
[309] Stobo, Patterson, Erickson, and Deazley (n.58)
[310] Stobo, Patterson, Erickson, and Deazley (n.58)
[311] Stobo, Patterson, Erickson, and Deazley (n.58)
[312] Stobo, Patterson, Erickson, and Deazley (n.58)
[313] Stobo, Patterson, Erickson, and Deazley (n.58)
[314] Merisa Martinez and Melissa Terras (2019) ‘Not Adopted’: The UK Orphan Works Licensing Scheme and How the Crisis of Copyright in the Cultural Heritage Sector Restricts Access to Digital Content (2019) 5(1) *Open Library of Humanities*, pp. 1–51
[315] Art 3(5) Orphan Works Directive

3.6.2.2 Implementation of the Orphan Works Directive in the UK and the Netherlands

In the UK, the Orphan Works Directive was implemented in the Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014 ("OWLS"). [316] From the 1st January 2021 onwards, UK CHIs will not be able to rely on the Orphan Works Directive, as the transition period will have ended.[317]

It allows for both commercial and non-commercial licensing of every type of work, with stand-alone photographs being excluded from the scope. The ability to use the works for commercial purposes contrasts to the Orphan Works Directive which only allows for non-commercial use.[318] Also, a crucial difference is that the Orphan Works Directive applied to CHIs only, whereas anyone can apply under the OWLs for an orphan works licence. The UK's Orphan Works Licensing Scheme "…has actually stymied efforts by cultural heritage organizations to engage in digitization of Orphan Works on a massive scale."[319]

Between 2014 and 2018, only 144 orphan works licences were granted under the UK OWLS, which is nothing close to the millions of items that it was hoped it would open up, as the system is "bureaucratic" and requires individual licensing[320] which is not possible for institutions which have thousands of orphan works. This contrasts to the ECL mechanism and sampling allowed for out-of-commerce works, which avoids the individual licensing approach that stalled the usefulness of the Orphan Works Directive in the EU and the OWLS in the UK.

In the Netherlands the Orphan Works Directive was implemented nationally.[321] 45 sources were identified as needing to be searched for photographs and audiovisual

[316] The diligent search requirements are set out in s.4 Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014.
[317] The references to the EU orphan works exception and the Orphan Works Directive are amended in the CDPA 1988 and the Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014 by The Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations 2019, *particularly see* sections 11, 12 and 31. The transition period is set out in Art. 126 of the revised European Union (Withdrawal) Act 2019: "There shall be a transition or implementation period, which shall start on the date of entry into force of this Agreement and end on 31 December 2020. See also UK Government "Orphan works and cultural heritage institutions: copyright from 1 January 2021" (UK Government, 2020) Available at: < https://www.gov.uk/guidance/orphan-works-and-cultural-heritage-institutions-copyright-after-the-transition-period> Accessed on 16th March 2020
[318] Martinez and Terras (n.314) 15.
[319] Martinez and Terras (n.314) 32
[320] Martinez and Terras (n.314) 36
[321] By Wet van 8 oktober 2014 tot wijziging van de Auteurswet en de Wet op de naburige rechten in verband met de implementatie van de Richtlijn nr. 2012/28/EU inzake bepaalde toegestane gebruikswijzen van verweesde werken

works, of which only 42% are easily accessible online.[322] Only one CMO, Buma/ Stemra, allows access to its database.

The Orphan Works Directive has largely been regarded as a legislative failure by copyright scholars and the CHI industry alike. The diligent search required to determine that a work is out-of-commerce has proven too onerous to be useful for the CHIs. This has led to many CHIs choosing not to use it, although there are noticeable exceptions, including EYE. The BFI also registers orphan works, but the Orphan Works Directive has not provided the necessary legal assurances and ease of implementation that is required for wide-spread use. Also, there have been criticisms of the fact that the Orphan Works Directive does not provide for the individual user as it focuses on CHIs, which has "created issues of fairness". [323]

3.6.2.3 The EnDOW Project

Recognising the difficulty in CHIs utilising the Orphan Works Directive in practice, the EnDOW project was established to help CHIs. The EnDOW project found that there are 211 total specified sources listed in relation to the diligent searches in the UK, in addition to general searches including the Internet and "databases and catalogues".[324] For sources necessary to identify the author of the film, only 53% were directly freely accessible.[325] Overall, 30% of the sources were not directly and freely accessible online in the UK.[326]

The EnDOW project consequently noted as a result of the numerous sources required to be checked in the Netherlands, "clearing audio-visual works and phonograms is more onerous in practice."[327] They further noted that the Dutch CHIs have lobbied for ECL solutions as opposing to the Orphan Works Directive, given the high cost of the diligent searches.[328] The Dutch CHIs have expressed a preference for "*redelijkheid* (reasonableness) and *billijkheid* (equity)" during the consultation

[322] Marcella Favale; Simone Schroff; Aura Bertoni Report 1: Requirements for Diligent Search in the United Kingdom, the Netherlands, and Italy' (EnDOW, 2016) p.16
[323] Mattingly (n.289) 294
[324] Favale, Schroff and Bertoni (n.322) 12
[325] Favale, Schroff and Bertoni (n.322) 13
[326] Favale, Schroff and Bertoni (n.322) 12
[327] Favale, Schroff and Bertoni (n.322) 19
[328] Favale, Schroff and Bertoni (n.322) 22

process in relation to the Orphan Works Directive diligent search.[329] The concept of reasonableness and equity are well aligned with Art. 8, with its focus on a "reasonable effort" to determine if a work is in commerce.

The EnDOW[330] project addressed the issue of orphan works uncertainty by devising a comprehensive tool, the Diligent Search Tool,[331] which is a platform designed for members of the public with no legal knowledge to carry out diligent searches on behalf of CHIs, in 20 EU jurisdictions. It also produces documentation verifying that a diligent search has been conducted. The diligent search tool was designed to assist CHIs, as this enables diligent searches to be conducted through crowd-sourcing, i.e., that volunteer members of the public could use the tool and carry out the diligent search for the CHI.[332]

In addition, the EnDOW Community has been set up, which:

> aims at recruiting, training and motivating a community of volunteers that will help the British Film Institute (BFI) and other UK national and regional film archives to clear the rights of a list of films in their collection.[333]

A similar search and documentation tool to the EnDOW diligent search tool would be very useful for CHIs in determining what the "customary channels of commerce" are. It could also provide guidance about what is a "reasonable effort" to determine that a work is out-of-commerce.[334] It could provide a similar audit trial to document and verify that a search has taken place.

[329] A. Beunen, 2011, 'Gezamenlijke reactie van Nederlandse erfgoedinstellingen op de consultatie over het Europese Richtlijnvoorstel Verweesde Werken', p. 2 and pp. 5-6; H.G. Kraai 'Reactie van het Nationaal Archief t.b.v internetconsultatie, Richtlijnvoorstel Verweesde Werken (2011) Available at: <https://www.internetconsultatie.nl/verweesde_werken/reactie/6084/bestand.> Accessed on 15th May 2019. Referred to in Favale, Schroff and Bertoni (n.322) 22

[330] "Enhancing access to 20th Century cultural heritage through Distributed Orphan Works clearance"

[331] See EnDOW, 'Diligent Search: Helping cultural heritage institutions digitise collections' Available at: <http://diligentsearch.eu/about/> Accessed on 20th March 2019

[332] See for more on utilising crowdsourcing for an orphan work diligent search, Borghi, Erickson and Favale (n.184)

[333] Diligent Search, "Join the Community – Help Unlock Orphan Films" Available at: < http://diligentsearch.eu/< Accessed on 20th March 2019

[334] See 4.5.3 for discussion on the "reasonable effort".

3.6.3 Soulier v Doke

3.6.3.1 Background to the legislation

France passed legislation in 2012 aiming to make out-of-print books available. The French national law on the Digital Exploitation of 20th Century Unavailable Books[335] relating to out-of-print (out-of-commerce) books allowed these works to be filed with the National Library, and then six months after that, a CMO could authorise the digital reproduction and public display of the book. The rightholder could at any time opt-out; and the CMO could commercialise the book.

An 'out-of-print book' means a book published in France before 1 January 2001 which is no longer commercially distributed by a publisher and is not currently published in print or in digital form.[336] There is no distinction made in the law between out-of-commerce books which are orphan works and those which are not; "it simply covers both."[337] Articles L. 134-1 to L. 134-9 of the Intellectual Property Code established a legal framework intended to make those books accessible once more by providing for their commercial exploitation in digital form.[338]

The right to authorise the reproduction or performance of those books in digital format was exercised six months after their registration in the publicly accessible database managed by the National Library of France. Only collecting societies (or CMOs) approved to do so by the Ministry of Culture may exploit these rights.[339]

Authors can object to their works being exploited on the basis of harm to their reputation or honour and can object after the six-month publication period. [340] If a publisher challenges the CMO's exploitation of the book on the basis that the publisher is the rightholder:

---

[335] Law No 2012-287 of 1 March 2012
[336] Article L. 134-1
[337] Bensamoun (n.287) 215
[338] As Article L. 134-2 sets out: "a public database indexing out-of-print books shall be created and made openly available, free of charge, through an online, public communication service. The Bibliothèque nationale de France (National Library of France) shall be responsible for implementing and updating it and for recording the information provided for in Articles L. 134-4, L. 134-5 and L. 134-6."
[339] The designated CMO is La Société Française des intérêts des Auteurs l'écrit (French Society for the Interests of Print Authors "SOFIA"), who can authorise licences to publishers wishing to digitally exploit the books on the list, and the licences are for 5 years for a fee, and can then be renewed, see Mattingly (n.289) 296
[340] Mattingly (n.289) 296

> the publisher must act to exploit the book within two years and bring proof of the effective exploitation of the book to SOFIA or the objection will be disregarded and SOFIA will maintain the right to exploit the book.[341]

The French law was in a race against time with the Orphan Works Directive, with the French law being enacted using emergency procedures before the Orphan Works Directive as "the latter explicitly does not affect laws in force prior to the DSM Directive being adopted".[342] This use of emergency procedures highlights the significance of the problem of out-of-commerce works, and how strongly the need to provide access to cultural heritage is valued in the EU.

The French legislation differs substantially from the Orphan Works Directive, including that the Orphan Works Directive is focussed on non-commercial exploitation, whereas the French legislation was "directed purely at commercialization."[343] This was a primary reason for the substantial criticism of the legislation from academics, lawyers and rightholders alike. For instance, Macrez compellingly argues that the public access objective "lacks coherence", as only books commercially distributed by a publisher, for a set price, would be available to purchase. [344] Therefore, this is not making cultural heritage available for everyone.

There was also strong opposition to the French law,[345] due to the fact that publishers would benefit from the digitisation of the books, but might not be the rightholder of the digital rights.[346] For instance, Sganga has criticised the French scheme for introducing "a non -negotiated transfer of digital rights to publishing houses, regardless of authors' original intent…"[347] Likewise, Macrez comments that under the Act the author is forced to share the "fruits" of their creation, and that the

[341] Mattingly (n.289) 296
[342] Bensamoun (n.287) 216
[343] Caterina Sganga The Eloquent Silence of Soulier and Doke and Its Critical Implications for EU Copyright Law (2017) 12(4) *Journal of Intellectual Property Law and Practice*, pp.321-330
[344] Franck Macrez "The digital exploitation of unavailable books: what remains of copyright?" (2012) 12 *Collection Dalloz*, p.749
[345] For instance, Bensamoun comments that the French law "only concerns some out-of-commerce books and relies on a very complex regime, in which the place of moral right is quite dubious." (pg. 215) Given that moral rights sit at the core of French copyright, this is surprising. See Bensamoun (n.287) 215
[346] Bensamoun (n.287) 216
[347] Sganga (2017) (n.343)

"presumption of ownership of the exploitation rights on the work for the benefit of its natural owner is reduced to nothing."[348]

3.6.3.2 *Soulier and Doke*

Soulier and Doke, who were both authors, started judicial proceedings against the Act, believing it to be incompatible with existing copyright law. Their argument was that Articles L. 134-1 to L. 134-9 of the Intellectual Property Code "establish an exception or a limitation to the exclusive reproduction right laid down in Article 2(a) of Directive 2001/29 and that that exception or limitation is not included among those listed exhaustively in Article 5 thereof."[349] The Conseil Constitutionnel found the Act to be compatible with the French constitution. The Conseil d'État then referred the question of compatibility with Articles 2 and 5 of InfoSoc Directive to the CJEU.

The applicants argued that the Act on out-of-print books "is not compatible with the limitations and exceptions to the right to authorise the reproduction of a copyright work which are exhaustively set out in Directive 2001/29."[350] The AG expressed their opinion that:

> …national legislation like the decree at issue, which replaces the author's express and prior consent with tacit consent or a presumption of consent, deprives the author of an essential element of his intellectual property rights.[351]

The AG's Opinion observed that the possibility for the author to opt-out "in no way alters" the need for a prior express consent.[352] The AG further notes that the fact that

> an author is not fully exploiting his work, for example in the event that it is not being commercially distributed to the public… does not alter his exclusive rights to authorise or prohibit the reproduction of his work or its communication to the public.[353]

[348] Macrez (n.344) 749
[349] CJEU, para 19
[350] AG's Opinion, para 12
[351] AG's Opinion, para 39
[352] AG's Opinion, para 40
[353] AG's Opinion, para 43

Distinguishing between out-of-print books and orphan works, the AG asserts that orphan works were adopted as "it is not possible to obtain *such prior consent* to the carrying-out of acts of reproduction or of making available to the public."[354] Also, the limitations and diligent search requirements placed on those seeking to make use of orphan works are "far more stringent" than for out-of-print books under the French Act.[355] Of crucial importance is the matter of commercialisation. The Orphan Works Directive "expressly precludes any exploitation of an orphan work for commercial purposes", whereas the French Act is aimed at the commercial exploitation of the out-of-print books.[356]

The AG's Opinion was commended by Nérisson, who commented that "this Act contradicts both the core principles of authors' rights and contractual fairness. It mainly rewards publishers for doing nothing." [357] She argues that the Act allows the publisher either an exclusive licence to exploit the book, which they do not need to digitise, or a share of the revenue if someone else exploits it, meaning that the publisher is being rewarded for having stopped circulating the book in print at some point previously.

She also criticised the Conseil constitutionnel's decision that the Act did not interfere with the right to property disproportionately, considering the public interest object. She notes that the repealed article that allowed public libraries to communicate digitised books for which no rightholder could be located was the only article truly achieving a public interest objective.[358]

In line with the AG's opinion, the Court found in the *Soulier*[359] case that the French national law was incompatible with Directive 2001/29[360] on the basis that the French legislation does not offer:

[354] AG's Opinion, para 48
[355] AG's Opinion, para 52
[356] AG's Opinion, para 53
[357] Sylvie Nérisson "Opinion of AG Wathelet in the Soulier and Doke case (C-301/15): Licensing exclusive rights requires express prior consent of the author; opt-out doesn't help." Kluwer Copyright Blog, August 15th, 2016. Available at: < http://copyrightblog.kluweriplaw.com/2016/08/15/opinion-ag-wathelet-soulier-doke-case-c-30115-licensing-exclusive-rights-requires-express-prior-consent-author-opt-doesnt-help/> Accessed on 18th April 2019
[358] Nérisson (2016) (n.353)
[359] *Soulier v Doke* [2016] C-301/15
[360] Information Society Directive 2001/29/EC

> a mechanism ensuring authors are actually and individually informed. Therefore, it is not inconceivable that some of the authors concerned are not, in reality, even aware of the envisaged use of their works and, therefore, that they are not able to adopt a position, one way or the other, on it.[361]

Concerning the rightholder opt-out, the CJEU found that authors who wish to end the commercial exploitation of their work in digital format may do so, without this decision being subject to formalities.[362] The CJEU decision and the Advocate General's Opinion in *Soulier* is thus aligned with the shift within EU copyright law to focus on authors, and on those in weaker bargaining positions.[363]

The CJEU clarified that Article 2(a) and Article 3(1) of Directive 2001/29 "do not specify the way in which the prior consent of the author must be expressed…. It must be held, on the contrary, that those provisions also allow that consent to be expressed implicitly."[364] This implicit consent however "must be strictly defined in order not to deprive of effect the very principle of the author's prior consent."[365] The CJEU states that authors "must actually be informed" of future use of their work by a third party,[366] as otherwise the author "is unable to adopt a position on it".[367]

This therefore means that "the very existence of his implicit consent appears purely hypothetical in that regard", as the author had no opportunity to refuse their permission to the use.[368] The CJEU assert that it is "de facto impossible" for authors to make a decision about a future use of their work by a third party without any guarantee that they have actually been informed of the proposed use.[369]

The CJEU confirmed that the InfoSoc Directive does not preclude national legislation seeking to enable "the digital exploitation of out-of-print books in the cultural interest of consumers and of society as a whole."[370] The CJEU also acknowledged that the pursuit of public access to cultural heritage "cannot justify a derogation not provided

[361] C-301/15, 16 November 2016, para. 43
[362] Para. 46
[363] Sganga (2018) (n.64)
[364] Para. 35
[365] Para. 37
[366] Para. 38
[367] Para. 39
[368] Para. 39
[369] Para. 40
[370] Para. 45

for by the EU legislature to the protection that authors are ensured by that directive."[371]

It was decided by the CJEU that the legislation conflicted with the Berne Convention requirement of no formalities.[372] They note that Art. 5(2) of the Berne Convention does not allow for any formality on the enjoyment and exercise of the rights reproduction and communication to the public. Therefore, the author's wish to end the exploitation of their work should not be contingent on the permission of others, including "on the agreement of the publisher holding only the rights of exploitation of that work in a printed format."[373] The compatibility of the opt-out and the Berne Convention will be discussed in Chapter 5.

Sganga supports this view that the legislation conflicted with the Berne Convention, noting that the "French scheme did not have any chance of being deemed compatible with EU law."[374] The decision has been criticised for leaving uncertainties in the law. Sganga therefore notes that the Soulier decision has:

> left unsolved systematic questions and introduced principles which have created further interpretative uncertainties [and] endangered the fate of long-standing, successful national collective management schemes...[375]

This decision is significant for out-of-commerce works, as it clarified which types of limitations on rightholders' copyright are permissible in making out-of-commerce works available. Art. 8 will only be compatible with existing EU acquis if does not fall down in the same areas as the 2012 French law.

3.7 Conclusion

This chapter has provided an overview of the concept of out-of-commerce works, and their cultural heritage, legislative and policy development at both the European and international levels. The issue of out-of-commerce works for film archives and CHI more widely has been established, as has the need for legislative intervention at

[371] Para.45
[372] Para. 50
[373] Para. 49
[374] Sganga (2018) (n.64) 21
[375] Sganga (2018) (n.64) 26

the European level to assist CHIs. This is the aim of Art. 8 of the DSM Directive. The Orphan Works Directive has been focused on, as this acts as a warning for implementing the legislation in a way that CHIs cannot practically make use of it.

It is clear from the historical legislative and policy overview in relation to out-of-commerce works that the balance between providing access to cultural heritage that is no longer being commercially distributed and the protection of rightholders has been a difficult one to manage. As technology has advanced to allow mass digitisation projects and to make these works available online, this has presented legal quandaries: is doing so compatible with existing copyright doctrine and legislation; who has the right to benefit from these schemes; and whether it is fair to move copyright to an opt-out system. This public access objective has also conflicted with EU copyright legislation, as in *Soulier.*

The current inability to make out-of-commerce works available contributes to the "digital skew" within audiovisual archives. The effect of the digital skew is compounded by the historic exclusions of groups of people and individuals from the archival record. The impact on the historical narrative of these historic exclusions and of the digital skew is significant as Art. 8 could be utilised to begin to remedy this distortion of the historical narrative. In facilitating out-of-commerce works within CHIs being made available to the public, there is an opportunity for film archives to promote the marginalised films within their collections, and to encourage public enthusiasm for engaging with these films.

The following chapter will discuss the text of Art. 8 of the DSM Directive and provide a doctrinal analysis of its compatibility with the existing copyright *acquis*, as well as its likelihood of implementation into law and into the practices of film archives.

Chapter 4: Analysis of the Text of Art. 8

4.1 Introduction

The previous chapter has provided an overview of the cultural heritage, legislative and practical issues with enabling access to out-of-commerce works in CHIs, which has culminated in Art. 8. The motivation and hope behind Art. 8 is that it will significantly transform the manner in which CHIs can exploit the out-of-commerce works in their collections. This will hopefully widen public access considerably to these historically "lost" collections.

This chapter proposes that there are terminology uncertainties which could challenge successful legal implementation. For example, the definitions of key terms such as "out-of-commerce works", "customary channels of commerce", "reasonable effort" and "non-commercial purposes" currently lack certainty. The meaning of the term "sufficiently representative" in relation to CMOs will be examined in Chapter 6, as it relates to collective management. It would be unfortunate for a lack of clarity of key terminology to impact upon the incorporation of Art. 8, when it offers legal mechanisms that CHIs need to enable public access to these vast collections of cultural heritage. Likewise, the distinction between "commercial" and "non-commercial" requires clarification for Art. 8 to be effective, as this understanding sits at the core of the provision.

A proposed sampling approach for the "reasonable effort" to determine if a work is out-of-commerce is suggested in this chapter, using representational non-probability sampling, with a 95% confidence level and 5% margin of error. It is proposed here that such a sampling approach is rigorous enough to protect rightholders, whilst also minimising the cost and time spent by CHIs in conducting these searches, as often they have vast numbers of works in their collections.

4.2 Rationale for Art. 8

The cultural heritage, legal and policy reasons underlying the need for Art. 8 of the DSM Directive were discussed in the previous chapter. The DSM Directive wishes to ensure that CHIs who have out-of-commerce works in their collections can allow the

public to access these works, whilst still ensuring that rightholders have the right and ability to exclude their works from the operation of both the licensing scheme (Art. 8.1) and the exception (Art. 8.2) if they wish. These measures are essential as part of a

> functioning copyright framework that works for all parties [which therefore] requires the availability of proportionate, legal mechanisms for the licensing of works or other subject matter.[376]

This issue is recognised as the reason for implementing the Art. 8 provisions, as:

> …obstacles remain…for cultural heritage institutions wanting to provide online access, including across borders, to out-of-commerce works contained in their catalogues.[377]

The DSM Directive, through Art. 8, therefore aims to ensure that there are legal mechanisms implemented in each Member State that allow CMOs to licence these out-of-commerce works to the CHIs.[378]

In discussing their reasons for the way Article 8 is structured, the European Commission explained that they considered the out-of-commerce works provisions applying to books and journals only, as in the 2011 MoU. However, it was "deemed necessary to address the licensing of out-of-commerce works in all sectors", and therefore Art. 8 subsequently addresses all types of out-of-commerce works.[379]

4.3 Summary of Art. 8

Art. 8(1) enables CHIs to agree non-exclusive licences for non-commercial purposes with collective management organisations ("CMOs") for copyright works which are out-of-commerce, and this extends to works for which the right holders have not mandated the CMO. Art. 8(2) expands this and enables CHIs to make out-of-

[376] Recital 44
[377] See the Explanatory Memorandum
[378] Recital 31
[379] European Commission, "Proposal for a Directive Of The European Parliament And Of The Council on copyright in the Digital Single Market" (European Commission, 2016)

commerce works available for non-commercial purposes *without* seeking the rightholder's permission where there is no representative CMO.

Articles 9, 10, 11 and 12 of the DSM Directive are relevant to Art. 8, as they concern cross-border uses; publicity measures; stakeholder dialogue; and an optional scheme of collective licensing respectively.

An "out-of-commerce" work is defined in Art. 8 as a work that is subject to copyright and

> is not available to the public through customary channels of commerce, after a reasonable effort has been made to determine whether it is available to the public.[380]

Art. 8(1) states the following:

> Member States shall provide that a collective management organisation, in accordance with its mandates from rightholders, may conclude a non-exclusive licence for non-commercial purposes with a cultural heritage institution for the reproduction, distribution, communication to the public or making available to the public of out-of-commerce works or other subject matter that are permanently in the collection of the institution, irrespective of whether all rightholders covered by the licence have mandated the collective management organisation, on condition that:
>
> (a) the collective management organisation is, on the basis of its mandates, sufficiently representative of rightholders in the relevant type of works or other subject matter and of the rights that are the subject of the licence; and
>
> (b) all rightholders are guaranteed equal treatment in relation to the terms of the licence.

[380] Article 8(5)

The second option, set out in Art. 8(2), relates to the situation in which there is not a sufficiently representative CMO:[381]

> 2. Member States shall provide for an exception or limitation to the rights provided for in Article 5(a), (b), (d) and (e) and Article 7(1) of Directive 96/9/EC, Articles 2 and 3 of Directive 2001/29/EC, Article 4(1) of Directive 2009/24/EC, and Article 15(1) of this Directive, in order to allow cultural heritage institutions to make available, for non-commercial purposes, out-of-commerce works or other subject matter that are permanently in their collections, on condition that:
>
> (a) the name of the author or any other identifiable rightholder is indicated, unless this turns out to be impossible; and
>
> (b) such works or other subject matter are made available on non-commercial websites.

This provides two options to CHIs wishing to make use of the out-of-commerce works in their collections. The first option, as set out in Art. 8(1), is to agree a non-exclusive licence with a CMO for non-commercial purposes for the reproduction, distribution, communication to the public or making available to the public of out-of-commerce works, which extends beyond the works the CMO administers directly, i.e., works created by authors who have not mandated the CMO to represent them. Member States are therefore required to provide for an exception or limitation to the rights provided for in Art. 5(a), (b), (d) and (e) and Art. 7(1) of the Database Directive;[382] Articles 2 and 3 of the InfoSoc Directive;[383] Art. 4(1) of the Computer Programs Directive;[384] and Art. 15(1) of the DSM Directive.

[381] Article 8(3): Member States shall provide that the exception or limitation provided for in paragraph 2 only applies to types of works or other subject matter for which no collective management organisation that fulfils the condition set out in point (a) of paragraph 1 exists.
[382] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (known as the "Database Directive")
[383] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (known as the "InfoSoc Directive")
[384] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (known as the "Computer Programs Directive")

Art. 8(1)(a) requires there to be a "sufficiently representative" CMO in operation, an issue which will be discussed in more depth in Chapter 6. Similarly, in Art. 8(1)(b), all rightholders are guaranteed equal treatment in relation to the terms of the licence. Art. 8(6) states that the CHI should seek a licence from a CMO that is "representative for the Member State where the cultural heritage institution is established."

The second option is set out in Art. 8(2), known as the "fall-back exception". Under this, CHIs can make the out-of-commerce works held in their permanent collections available for non-commercial purposes *without* concluding a licence, where there is not a sufficiently representative CMO in the CHI's country. This route also requires that the work be attributed where possible, and that the CHI only makes the out-of-commerce works available on non-commercial websites. When a website is viewed as "non-commercial" was discussed by participants during the ethnographic research[385] and will also be discussed further later in this chapter.[386]

Art. 8(7) clarified that Art. 8 does not apply when there is evidence that the set of out-of-commerce works "predominantly" consists of third country works or cinematographic or audiovisual works in which the producers have their headquarters or habitual residence in a third country, as set out in Art. 8(7)(b). If the CMO is "sufficiently representative" of the rightholders of the relevant third country, then Art. 8 applies to the works.

As will be discussed in more depth in Chapter 6, the DSM Directive allows Member States to determine the specific licensing mechanisms that it will implement in relation to Art. 8.[387] Extended collective licensing ("ECL") schemes are the presumed licensing mechanism that Member States will adopt in relation to Art. 8. They have already been implemented in the national legislation of some Member States prior to

[385] See Chapter 10
[386] See also for an excellent discussion, Patricia Aufderheide and Peter Jaszi "Reclaiming Fair Use: How To Put Balance Back In Copyright" 2nd ed. (University of Chicago Press, 2018)
[387] Recital 33

the DSM Directive, including Sweden, Denmark and Finland. They have also been successfully implemented in Norway.[388]

Another option is a presumption of representation, in which rightholders are legally presumed to have chosen to be represented by a given collecting society.[389] Directive 2014/26/EU, relating to music only, does not prohibit a presumption of representation,[390] and as such, Member States may choose to adopt this presumption of representation in relation to all types of out-of-commerce works if they wish to. There are other potential options, but it presumed that ECL will be chosen, as it is the most compatible with the DSM Directive's provisions.[391]

4.4 DSM Directive Articles which Relate to Art. 8

4.4.1 Cross-Border Uses of the Licence

Art. 8 is closely linked to Articles 9, 10, 11 and 12 of the DSM Directive. Art. 9 of the DSM Directive provides for cross-border uses of the licences. It states that:

> 1. Member States shall ensure that licences granted in accordance with Article 8 may allow the use of out-of-commerce works or other subject matter by cultural heritage institutions in any Member State.
>
> 2. The uses of works and other subject matter under the exception or limitation provided for in Article 8(2) shall be deemed to occur solely in the Member State where the cultural heritage institution undertaking that use is established.

This enables CHIs across the EU to use the out-of-commerce works of other CHIs licensed through Art. 8(1), from any Member State. This is a fundamental benefit to CHIs across the EU, and also to the citizens of the EU in receiving widened access to cultural heritage. This cross-border licensing helps to solidify the concept of EU

[388] See Thomas Riis and Jens Schovsbo Extended Collective Licenses and the Nordic Experience: It's a Hybrid but is it a Volvo or a Lemon (2010) 33 *Colum JL & Arts*, pp. 47-498; and Lucie Guibault Cultural Heritage Online? Settle it in the Country of Origin of the Work (2015) 6(3) *JIPITEC*, pp. 173-191
[389] Romana Matanovac Vučković, 'Implementation of Directive 2014/26/EU on Collective Management and Multi-Territorial Licensing of Musical Rights in Regulating the Tariff-Setting Systems in Central and Eastern Europe' (2016) *IIC,* pp.28-59, 30
[390] Vučković (n.389) 55
[391] See Chapter 6 for further discussion

cultural heritage,[392] which has been a policy goal for a number of years within the EU. Instead of great collections remaining in one Member State only, this provides the mechanism for this cultural heritage to be shared across the EU.

This cross-border licensing also presents a substantial benefit to CHIs who may perhaps lack the copyright confidence, time, finances or staffing to agree these licences with CMOs themselves. These issues will be discussed further in the ethnographic case studies later in this thesis. If for whatever reason a CHI does not conclude a licence with the CMO in their country, they can instead choose to use the cross-border licensing and use out-of-commerce works licensed elsewhere by another CHI. Similarly, for the Member States in which there is not a sufficiently representative CMO for the specific type of work, as is the case for film works in the Netherlands, this provides an option other than the fall-back exception in Art. 8(2). This is also the case for the UK, which is no longer an EU Member State.

Art. 9(2) sets out that the cross-border licensing only applies to licences concluded through Art. 8(1), and that uses of the works utilised under Art. 8(2) "shall be deemed to occur solely in the Member State where the cultural heritage institution undertaking that use is established." This is an appropriate and necessary restriction to protect rightholders from unnecessary curtailment of their copyright.

4.4.2 Publicity Measures of Intention to Use the Work

Art.10 of the DSM Directive relates to publicity measures. It states that Member States should ensure that information from CHIs, CMOs and related bodies relating to identifying out-of-commerce works "is made permanently, easily and effectively accessible on a public single online portal from at least six months before".[393]

This requirement of prior publication and information ensures that rightholders can be made aware of the CHI's intention to use the work for at least six months prior to doing so, on a portal managed by the EU IPO. This also avoids the need to navigate

[392] See Chapter 3 for discussion

[393] Art. 10: … is made permanently, easily and effectively accessible on a public single online portal from at least six months before… The portal shall be established and managed by the European Union Intellectual Property Office in accordance with Regulation (EU) No 386/2012.
2. Member States shall provide that, if necessary for the general awareness of rightholders, additional appropriate publicity measures are taken regarding the ability of collective management organisations to license works…

separately set up portals in each Member State, once again reinforcing the desire for a pan-EU cultural heritage sector. This is likely to help successfully implement Art. 8, as the process is clear, and demonstrates a commitment to protecting rightholders whilst providing public access to out-of-commerce works. How this portal will operate will be discussed further in 6.6.1.

4.4.3 Stakeholder Dialogue

Likewise, stakeholder dialogue is important to protect rightholders and ensure successful legal implementation. Art. 11of the DSM Directive relates to stakeholder dialogue. It states that:

> Member States shall consult rightholders, collective management organisations and cultural heritage institutions in each sector before establishing specific requirements pursuant to Article 8(5), and shall encourage regular dialogue…

This stakeholder dialogue is essential to ensuring that the aim of widening public access to cultural heritage is balanced with the interests of copyright holders. Copyright users, copyright holders and CMOs etc. have differing priorities and concerns in relation to copyright and access. Art. 8 presents a limitation of the exclusivity of the copyright holder, which is a core tenet of copyright, and so it is essential to ensure that there are “safeguards for rightholders” that prevents this limitation of their right to exclusivity from being too prohibitive.

Fear of reputational harm was discussed by the film archives as a risk of rightholders not viewing the film archive as respecting their copyright and therefore not wishing to continue engaging with the film archive. This will be discussed in Chapters 9 and 10. Strong and ongoing stakeholder dialogue will help to minimise this risk.

4.4.4 Optional ECL Scheme in Addition to Art. 8

Art. 8 of the DSM Directive sets out a licensing mechanism in relation to out-of-commerce works within CHIs; and Art. 12 of the DSM Directive sets out a further scheme of extended collective licensing. Whereas Member States cannot decide whether or not to implement Art. 8 as it is mandatory, Art. 12 is optional. Member states’ national legislation relating to ECL must comply with the stipulations and

safeguards set out in Art. 12(2) and Art. 12(3) respectively.[394] Whereas the ECLs for out-of-commerce works have cross-border effect, the licences granted under Art. 12 do not.[395]

Art. 8 is a "specific" ECL, as the scope of the licence is set out by statute; whereas "general" ECLs can occur when the statute enables the agreement itself to specify the uses.[396] Art. 12 could be used through either specific or general ECLs, depending on the national implementation.[397]

In *Soulier*, the CJEU set out that authors must be "actually and individually informed "of the intention to use their works;[398] whereas the DSM in Art. 12(3)(d) states that "appropriate publicity measures" are taken,[399] which is mirrored in Art. 10(2) in relation to licences granted under Art. 8 for out-of-commerce works.

4.5 Key Concepts and Terms

There are several legal issues and uncertainties with Art. 8. A number of important terms such as the meaning of "out-of-commerce works"; of "customary channels of commerce"; of "non-commercial uses"; and of the "reasonable effort" required to ascertain if a work is out-of-commerce lack clarity in the text of the DSM Directive. The analysis below clarifies how these terms could be understood by CHIs and film archives in making out-of-commerce works available.

4.5.1 "Out-of-Commerce works"

Most countries and individual archives do not have concrete definitions of what they consider to be out-of-commerce. Some film archives already use such a definition. For example, the Czech National Film Archive considers national feature length films to be out-of-commerce if produced by private producers prior to 1992.[400] It was commented by participants during the ethnographic research[401] that there is

[394] European Copyright Society "Comment of the European Copyright Society on the Implementation of the Extended Collective Licensing Rules (Arts. 8 and 12) of the Directive (EU) 2019/790 on Copyright in the Digital Single Market" (European Copyright Society, 2020) pg. 1.
[395] European Copyright Society (n.394) 15
[396] European Copyright Society (n.394) 11
[397] European Copyright Society (n.394) 11
[398] Para 43
[399] European Copyright Society (n.394) 15
[400] Fontaine and Simone (n.6) 11
[401] See Chapters 9 and 10

currently a lack of clarity in the text of the DSM Directive regarding what makes a work out-of-commerce which reduces their confidence in utilising Art. 8.

Art. 8(5) explains that:

> A work or other subject matter shall be deemed to be out-of-commerce when it can be presumed in good faith that the whole work or other subject matter is not available to the public through customary channels of commerce, after a reasonable effort has been made to determine whether it is available to the public.

Despite this attempt at defining the term, it seems to raise more questions than it answers, especially the meaning of terms such as "*customary channels of commerce"* and *"after a reasonable effort".* The DSM Directive's preamble clarifies that works that have never been commercially available, (such as posters, leaflets, journals or amateur audiovisual works) and unpublished works may also fall under the scope of out-of-commerce works, "without prejudice to other applicable legal constraints, such as national rules on moral rights."[402]

The 2011 MoU relating to books, as discussed in the previous chapter, is a predecessor to Art.8, and can be looked to for clarity on the meaning of out-of-commerce. However, the 2011 MoU's definition does not provide further guidance. Works were deemed to be out-of-commerce in the 2011 MoU when:

> the whole work, in all its versions and manifestations is no longer commercially available in customary channels of commerce, regardless of the existence of tangible copies of the work in libraries and among the public (including through second hand bookshops or antiquarian bookshops).[403]

The 2011 MoU states that the:

[402] Recital 37
[403] Memorandum of Understanding (n.281) pg. 2

> method for the determination of commercial availability of a work depends on the specific availability of bibliographic data infrastructure and therefore should be agreed upon in the country of first publication of the work.[404]

This definition does not clarify what "commercially available in customary channels of commerce" means in practice. Reading the definition for out-of-commerce works in the DSM Directive, it is clear that that 2011 MoU's definition has been influential in its drafting.

Art. 8(5) enables Member States to

> provide for specific requirements, such as a cut-off date, to determine whether works and other subject matter can be licensed in accordance with paragraph 1 or used under the exception or limitation provided for in paragraph 2. Such requirements shall not extend beyond what is necessary and reasonable, and shall not preclude being able to determine that a set of works or other subject matter as a whole is out-of-commerce, when it is reasonable to presume that all works or other subject matter are out-of-commerce.

Cut-off dates are already used in existing EU Member State legislation regarding out-of-commerce works, so this ability to provide cut-off dates is likely to be one that Member States seek to implement in their national legislation. For example, Poland already provided for literary works published before 24 May 1994 to qualify as out-of-commerce works; and in Germany similar provisions apply to literary works published before 1 January 1966.[405] As is evident, there is a noticeable gap in these cut-off dates. Similar differences of opinion regarding what the cut-off dates should be were discussed by the participants in the ethnographic research.[406]

In implementing the DSM Directive nationally, the Netherlands is currently proposing to set "cut-off dates" for out-of-commerce works.[407] There is not yet confirmation as to what these time periods will be and suggestions for cut-off periods will be discussed further in Chapter 10.

---

[404] Memorandum of Understanding (n.281) pg. 2
[405] Noted in Geiger, Frosio and Bulayenko (n.64) 243
[406] See Chapter 10
[407] See Netherlands Ministry of Justice and Security, 'Implementation Bill on Copyright Directive in the Digital Single Market' (Ministry of Justice and Security, 2nd July 2019)

4.5.1.1 Orphan Works as Out-of-Commerce Works

Of significant importance is that Art. 8 could also remedy the failure of the Orphan Works Directive. As Dusollier comments, orphan works are usually also out-of-commerce, and therefore "could equally benefit from the application of this new provision, whose conditions are less rigid."[408] As was discussed in the previous chapter and will be discussed in the ethnographic chapters, the Orphan Works Directive has not adequately addressed the issue of orphan works.

Therefore, CHIs could choose to utilise Art. 8 in making out-of-commerce works available and include orphan works within this remit, if these orphan works are also assumed to be out-of-commerce. This could provide a remedy to the limitations of the Orphan Works Directive. This further increases the scope of Art. 8 in enabling CHIs to make cultural heritage accessible.

4.5.2 "Customary Channels of Commerce"

The meaning of "customary channels of commerce" is undefined in the text of the DSM Directive. Mirroring the 2011 MoU, the DSM Directive notes in its recital that the

> limited availability of a work or other subject matter, such as its availability in second-hand shops, or the theoretical possibility that a licence for a work or other subject matter could be obtained should not be considered as availability to the public in the customary channels of commerce.[409]

This definition provides some indications of what is *not* to be understood as customary channels of commerce, but very little guidance for practical implementation of what these channels are. Conversely, this non-specificity can also be understood as leaving room for Member States to determine this themselves nationally, in a way that caters to the different types of work.

The key issue is whether the 'test' for these customary channels of commerce is aimed at what a member of the public can be expected to search, or the CHI itself. Members of the public interested in a particular topic are likely not to have the same

[408] Dusollier (2020) (n.64) 994
[409] Recital 38

level of knowledge as an industry or cultural heritage expert as to where to search for the work, and any specialist dealers in those works. This also largely depends on the category of work, for instance, the general public may have very little knowledge about commercial distribution of films but may well know where to find a book.

On a common sense understanding of the term, taking the example of a book, this can be understood as meaning a book that is not available to purchase in any major bookshops or online retailers after a search. It does not seem reasonable to expect a member of the public interested in a particular book to search much further beyond this, and it seems even more doubtful that they would normally consult bookshops and smaller online retailers in other Member States, unless perhaps the book was written by a well-known author from another EU Member State.

Out-of-commerce works also incorporate works which have never been in commerce or intended for commercial exploitation. Considering the example of a born-digital photograph originally shared on social media or amateur holiday film found in the attic, it is unclear what “customary channels of commerce” one could be expected to consult, as there are no established channels of commerce for these sorts of works. Therefore, do CHIs first need to decide whether a work is likely to have been in commerce, and then only if it has been, to conduct a search to determine if it is still available through customary channels?

For books, music, and commercial films, they would almost certainly have originally been in commerce. For other works such as visual artworks, e.g., paintings and drawings, literary works such as poems or short stories and sound recordings, this would be harder to initially determine. In addition, does the intention of the author have any relevance when determining this, i.e., was the artwork created with an intention to be sold or otherwise exploited commercially?

However, for amateur film works that have stayed in the family attic and then been donated to the film archive at a later date, it can reasonably be assumed that these works were never in commerce and were never intended to be. For smaller regional or specialist film archives, a similar set of circumstances is likely to apply to a substantial proportion of their holdings. Of course, this caveat could be applied to all CHIs, as otherwise a failure to do so will most likely create significant administrative

and cost burdens in determining if works are in commerce that will dissuade CHIs from utilising Art. 8.

The recital also adds that

> [i]n many cases, the out-of-commerce status of a set of works or other subject matter could be determined through a proportionate mechanism, such as sampling.[410]

From this, it can be understood that the CHI is expected to conduct a search of the customary channels of commerce for a sample of the collection only. This proportionate sampling mechanism provides further weight to the argument that the DSM Directive is avoiding placing overly burdensome processes on CHIs wishing to make their out-of-commerce works available and can therefore be applied in practice in a pragmatic way that is appropriate for that specific type of work and context. This is a substantial improvement on the Orphan Works Directive diligent search process discussed in the previous chapter.

This sampling could be deliberately carried out by the CHIs on works that have been identified as likely to have once been in commerce, to enable the search process to be meaningful as opposed to administratively burdensome. For works which have never been in commerce, such as personal letters, private photographs and films, the DSM Directive can be logically interpreted as therefore requiring no such search of the customary channels of commerce. Being able to conduct a sample of a smaller number of works would significantly reduce the time, cost and effort in determining the commercial availability of individual works and would hopefully incentivise CHIs to utilise Art. 8.

That said, a sample will not always be possible, and a

> work-by-work assessment should only be required where that is considered reasonable in view of the availability of relevant information, the likelihood of commercial availability and the expected transaction cost.[411]

[410] Recital 38
[411] Recital 38

This ability to sample works from larger collections to carry out the search to determine if a work is out-of-commerce is pragmatic and practical and provides a viable option for CHIs in utilising Art. 8. The proportionate mechanism and sampling size are not further elaborated on in the DSM Directive, either allowing Member States to specify more on this, or to the CHIs themselves. What this sampling size can or should be is likely to be heavily context-dependant on the works themselves, the donation history and whether they are owned by the same copyright holder. If a collection of films were made by the same group of people and a search of one or two of shows that they never had a commercial life, it may well be sufficient to assume that the rest of the films made by this amateur group were the same.

Determining what is appropriate sampling should, ideally, be left for archivists themselves to determine on the specific collection at hand. The ethnographic research carried out in Chapters 8, 9 and 10 reiterated that the collections within film archives are extraordinarily diverse. With that in mind and considering the expertise of film archivists, it is proposed here that film archivists as professionals are best equipped to determine what sampling is appropriate for their collection.

The definition of “customary channels of commerce” is open to interpretation, allowing for Member States to provide further clarification in their national implementations, or to CHIs themselves to decide what is most suitable. The current definition is necessarily general, as the drafters of the DSM Directive cannot foresee all possible applications of the law. Member States should allow CHIs as much flexibility as possible to determine what the necessary channels of commerce are and what sampling can be conducted to determine if a work is in commerce, as the CHIs are experts in their respective fields. If Member States provided soft-law nationally focussed guidance on the suggested commercial channels for each type of work and sampling percentages, this would likely benefit the CHIs and provide reassurance.

4.5.2.1 A Proposed Sampling Approach

If a certain sample percentage of the overall collection is desired by rightholders to ensure rigour, it is proposed here that a representative, non-probability sample approach be utilised. Representative sampling “allows us to use data from a sample

to make conclusions that are representative for the population from which the sample is taken."[412] That is to say, this type of sampling enables a sample to be taken from a larger collection as the collection shares sufficient characteristics. Suspected out-of-commerce film collections come under this concept.

Non-probability sampling uses subjective methods to determine the sample to be selected, as opposed to being a randomly selected sample, known as probability sampling.[413] This is less costly than probability sampling, and is usually quicker to achieve.[414] Non-probability sampling can include four sub-types: purposive, quota, snowball and convenience. The most suitable type for this sample would be purposive sampling, which McConville and Chui define as being "[h]and-picked subjects on the basis of specific characteristics".[415] This sampling approach has been used successfully in legal research.[416]

Taken together, this is a statistical sampling method which enables a representative sample to be taken from a larger body of suspected out-of-commerce works, and for specific works to be chosen as part of the sample. The reason for choosing specific works may be that complete or accurate information may only be held for some works, and so these works are easier to search.

A confidence level of 95% is usually desirable within sampling, to ensure rigour and reliability.[417] Aiming for a 95% confidence level in the sample may initially appear daunting and likely to require thousands of works to be individually checked. However, statistical modelling operates in a manner that means that even as the sample-size increases, there can be statistical confidence and accuracy in a relatively small and manageable sample size. The following table sets out the

[412] Ben D'Exelle "Representative Sample" in Michalos, A.C. (eds) *Encyclopedia of Quality of Life and Well-Being Research* (Springer, 2014)
[413] Paul J. Lavrakas, *Encyclopedia of survey research methods* (Sage Publications, 2008)
[414] Lavrakas (n.413)
[415] Mike McConville, and Wing Hong (Eric) Chui (eds.), *Research Methods for Law*, (Edinburgh University Press, 2017), 58
[416] Non-probability sampling methods have been used in existing legal research, including: Samtani Anil, Angelia King Wen Jie, Jeanne Soon Hui Min and Queenie Chew Wan Xiu, Virtual property - a theoretical and empirical analysis (2012) 34(3) *E.I.P.R.,* pp. 188-202; and Charles Kamau Maina, Power relations in the traditional knowledge debate: a critical analysis of forums (2011) 18(2) *I.J.C.P*., pp. 143-178.
[417] Martyn Denscombe *The Good Research Guide: For small-scale social research projects* 6th ed. (OUP, 2017), 46. See also McConville and Chui (n.415) 59 "The most common level of confidence is 95 per cent which means the finding has a 95 per cent chance of being true and at the same time a 5 per cent chance of not being true."

specific sample size, when using a sample of a 95% confidence level with a 5% margin of error.[418]

Table 4.1 Proposed Sampling Approach

Number of works	Needed sample size
100	80
1,000	278
10,000	370
100,000	383
1 million	384

It is proposed here that a 95% confidence level with a 5% margin of error be used for calculating the sample size, for larger collection sizes at least. As can be seen in the table, even as the number of works goes up dramatically, the sample size needed only increases slightly. For a collection of 10,000 works, only 370 need to be checked. For a collection of 1 million works, only 384 need be checked. Of course, more works could be checked than this, if it was desired. However, this will likely create additional work and expenses.

For a smaller number of works, such as 100 works, achieving 95% confidence requires at least 80 works be checked, which is proportionately more intensive than for the larger collections. This may seem counter-intuitive, but it is doubtful that rightholders would feel comfortable with confidence levels in sample sizes being lower than 90 or 95%, as the sampling mechanism already removes the need for the CHI to check works individually. Therefore, despite it seeming strange that 80 works will need to be checked from a collection of 100, but only 384 will need to be checked for a collection of 1 million works, this is statistically sound.

For projects such as the H22 project that both the BFI and MACE are involved in,[419] this could drastically reduce the necessary number of works to be researched. The

[418] See for a detailed table with different margins of error, Denscombe (n.417) 47. These statistics can be easily calculated and sample sizes, confidence levels and margins of error can all be adapted.

H22 project aims to digitise and make available 100,000 videotapes from across the collections of the BFI and the UK regional archives. It is assumed that most of the content of the H22 consists of out-of-commerce works, given that the content on these videotapes is not believed to be available elsewhere. A sample size of only 383 would be required out of the 100,000 videotapes. This will still require specialist knowledge, time, financial resources and staff, but is a considerably reduced burden on the needed search amount.

Once this has been decided, then the search to determine whether the sample works are out-of-commerce can be conducted. Unlike the diligent search for orphan works in the Orphan Works Directive, there is no prescribed list of sources that need to be consulted. A "reasonable effort" is very different to a diligent search, as will be discussed below.

4.5.3 "Reasonable Effort"

As discussed in the previous chapter, the "diligent search" required under the Orphan Works Directive is generally accepted to be overly cumbersome for CHIs. Diligent search requires CHIs to consult large numbers of mandatory sources, sometimes several hundred, to locate the rightholder and many of these online sources are not freely accessible.[420] Many of these sources are not logical for certain works, but needed to be consulted anyway, as was discussed in the previous chapter.

Compared to the definition of "diligent search" in the Orphan Works Directive, it is clear that the "reasonable effort" required for out-of-commerce works is considerably less burdensome. Dusollier notes that it is "less stringent and burdensome" than the diligent search for orphan works, and indeed is "far more flexible and agile".[421] It seems evident from the DSM Directive that the "reasonable effort" for out-of-commerce works requirement is intended to be a substantially lower threshold than the "diligent search" requirement for orphan works.

Art. 8 does not elaborate further on what this "reasonable effort" involves and allows Member States to have discretion about how this is implemented nationally. The

[419] Which is discussed in more detail later in Chapter 8 in particular
[420] See full discussion in Chapter 3. Montagnani and Zoboli (n.301) 208
[421] Dusollier (2020) (n.64)994

recital provides some guidance on the meaning of "reasonable effort". Recital 38 comments

> a reasonable effort should be required to assess their availability to the public in the customary channels of commerce, taking into account the characteristics of the particular work or other subject matter or of the particular set of works or other subject matter.

The "reasonable effort" can therefore be understood as requiring only an "assessment of availability", as opposed to a search. In this sense, whereas the diligent search for orphan works imposed a substantial *ex ante* obligation on CHIs, the use of out-of-commerce works is largely dependent on *ex post* checks by CMOs.[422] For CHIs making use of out-of-commerce works, their *ex ante* obligations are consequently minimal, requiring only an assessment of availability.

Furthermore, the inclusion of "taking into account the characteristics of the particular work" strengthens the understanding of "out-of-commerce works" as dependant on the context and the nature of the works, as an attempt to create a blanket definition for the "reasonable effort" would likely favour some types of works and conflict with others. Once more, this lowers the burden on CHIs wishing to make the works available.

It then goes on to state that the "reasonable effort" requirement

> should not have to involve repeated action over time but it should nevertheless involve taking account of any easily accessible evidence of upcoming availability of works or other subject matter in the customary channels of commerce.[423]

This suggests that CHIs will be required to monitor and ascertain "easily accessible evidence of upcoming availability of works" through these customary channels of commerce, which provides reassurance to CHIs, as this requirement is far less onerous than ongoing monitoring activities for the out-of-commerce works.

[422] See Chapter 6 for a detailed discussion of CMOs and extended collective licensing.
[423] Recital 38

As the DSM Directive stipulates that this relates to the "easily accessible evidence of upcoming availability of works", this can be interpreted as relating only to works that were originally in commerce and for which there is evidence to believe that they could well be commercialised again. Such action could therefore be limited to regular monitoring of certain works deemed by the CHI to be more likely to be recommercialised. It can also be assumed that the channels of commerce identified as relevant to the work are the same channels through which the "easily accessible evidence of upcoming availability of works" need to be monitored.

This does not appear to present an undue burden on CHIs, as well as protecting rightholders. It is also assumed that CMOs who agree licences with CHIs will inform the CHIs of any change to the commercial status of a work, and if the rightholder intends to recommercialise it.

The "reasonable effort" requirement for out-of-commerce works is a significant and stark improvement on the situation CHIs faced in relation to the diligent search for orphan works, and therefore hopefully will be much more useful in its practical implementation.

4.5.4 "Commercial" and "Non-Commercial" Uses

The notions of cultural heritage and commercialisation are often seen as conflicting. By stipulating in Art. 8 that the uses must be "non-commercial", it therefore becomes fundamental to clearly distinguish between commercial and non-commercial uses. The meaning of "non-commercial" is yet to be clearly defined in either legislation or case law.[424] Considering the US doctrine of fair use in s107,[425] whether a use is "of a commercial nature or is for nonprofit educational purposes" forms part of deciding whether or not the use of the work is fair.[426]

Straková recounts that CMO and non-CMO responses to the UK's 2015 public consultation on the DSM Directive highlighted that their understandings of "non-commercial" were incompatible, with the UK CMOs stating that even charitable licences, or free licences granted for promotional reasons, are still at their core

[424] Lucie Straková The internet renaissance of collective management organisations: reflections on flat fee system and the role of collective management organisations (2019) 74(3) *International Review of Law, Computers & Technology,* pp. 53-75,67
[425] 17 U.S. Code § 107.Limitations on exclusive rights: Fair use
[426] For an excellent discussion on fair use, see Aufderheide and Jaszi (n.386)

commercial.[427] This is likely to be the case more widely across different Member States and different types of work, with rightholders and CMOs viewing non-commercial use differently to CHIs.

In the German *Deutchlandradio* case,[428] it was found by the LG Cologne that only "purely private use"[429] was inherently non-commercial. This case focussed on whether the German radio broadcaster Deutschlandradio breached the CC licence of a photograph uploaded to Flickr that only allowed non-commercial use when Deutschlandradio posted the photo on their website. The photographer had relied on a CC licence that stated that the photo may not be used "in any manner that is primarily intended for or directed toward commercial advantage or private monetary compensation". The OLG Cologne disagreed but did not clarify whether public or non-profit organisations generally act in a non-commercial way; but stated that the specific case itself must be examined, as opposed to who the user of the work is.[430] That is to say, being a CHI does not automatically mean that the use of copyright works will be non-commercial.

Dörre comments that German Copyright Act[431] (UrhG) offers some direction in determining if a use is commercial, where the licensee is the "ported" German version of a CC licence, as in this case. She notes that the UhrG distinguishes between "private use" and use "for the pursuit of non-commercial aims", commenting:

> Non-commercial use in accordance with Section 52a (1) means that the use is not profit-oriented. Use is private in the sense of Section 53(1)(1) when it takes place "within the private sphere in order to satisfy purely personal needs of a non-professional and non-commercial nature.[432]

[427] This is on the basis that as a fee was donated originally, and they anticipate that they will subsequently receive income as a result of the publicity, respectively, see Straková (n.424) 68
[428] Cologne District Court ruling, LG Köln, 2014-03-05, Case No. 28 O 232/13
[429] LG Cologne, MMR 2014, 478, at 479, see Tanja Dörre 'Current case law on Creative Commons licences' (2015) 10(4) *Journal of Intellectual Property Law & Practice*, pp. 310-312, 311
[430] Referred to in Straková (n.424), see Dörre (n.429) 311
[431] German Copyright Law: Act on Copyright and Related Rights (1965) or "Urheberrechtsgesetz"
[432] Dörre (n.429) 311

Rosati has noted that existing CJEU case law demonstrates the "complexities" of delineating between commercial and non-commercial uses.[433] She discusses that the profit-making intention of the user or defendant has been treated somewhat differently in its decisions. Referring to CJEU decisions including *Stichting Brein v Filmspeler*[434] it is evident overall that the context of the act is "key to the determination of the profit-making intention of the defendant".[435]

This is consistent with the approach taken in the *Deutschlandradio* case and is a logical approach. Whilst CHIs may believe that all of their activities are non-commercial due to being non-profit organisations; from a copyright perspective that is not the case. It is the context and the use itself that are the determination, not the fact that the user is a CHI.

The three-step test, which will be discussed later in this chapter, set out in Art. 9(2) of the Berne Convention considers in the second part of the test whether "such reproduction …conflict[s] with a normal exploitation of the work".[436] In considering this aspect of the three-step test, Rosati has consequently commented that whether the use of a work is commercial should be a consideration of:

> … what the effects on the market for the original work could be. In this sense, a use should be regarded as unlawful not because it is inherently commercial or driven by a 'profit-making intention', but rather because it is such as to result in the unreasonable diminution of lawful transactions relating to a protected work and, therefore, in a violation of the three-step test.[437]

Her comments reiterate the difficulty of delineating what uses or actions shall be deemed commercial, and which shall be non-commercial. Indeed, the CJEU case law suggests that, to an extent, this remains necessary to decide on a case-by-case basis. It also seems doubtful that if a lack of clarity on this distinction remains

[433] Eleonora Rosati, Non-Commercial Quotation and Freedom of Panorama: Useful and Lawful? (2017) 8 *JIPITEC*, pp. 311-321, para. 31
[434] *Stichting Brein v Filmspeler* [2017] C-527/15
[435] Rosati (n.433) para. 32
[436] Art. 9(2) of the Berne Convention: "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." The three-step test will be further discussed in Chapter 5
[437] Rosati (n.433) para. 42

present in the case law, that CHIs will find the distinction easy to make for themselves.

Recital 40 of the DSM Directive possibly provides a legal basis for CHIs to receive some financial revenue from their out-of-commerce works, as a way of covering their costs in relation to these works. It notes that:

> given that the digitisation of the collections of cultural heritage institutions can entail significant investments, any licences granted under the mechanism provided for in this Directive should not prevent cultural heritage institutions from covering the costs of the licence and the costs of digitising and disseminating the works or other subject matter covered by the licence.[438]

Although Recital 40 could be read in different ways, it appears to provide support for CHIs to receive revenue from the out-of-commerce works they make available, to cover their costs. As will be discussed in more detail in Chapters 8, 9 and 10, some non-profit film archives view all activities they carry out as non-commercial. The reason for some film archives regarding all of their activities as non-commercial is the fact that they are non-profit organisations, and therefore all revenue they make stays within the organisation to partially recoup some of its costs. A number of non-profit film archives are also charities,[439] which furthers the view that their activities are non-commercial.[440]

With that in mind, the wording appears to allow CHIs to cover the cost of digitising the works, the cost of the licence, and the costs of disseminating the work. For CHIs with a large number of out-of-commerce works, this can plausibly be understood as allowing a significant amount of the archive's activities to be compensated by money raised through the use of the out-of-commerce works.

It is proposed here that CHIs rely on this recital when negotiating licences with CMOs, in a way that allows them to cover their costs in relation to these works. At the very least, it should enable to negotiate with the CMOs regarding which uses will be commercial and under the purview of the CMOs, and which will be non-

[438] Recital 40
[439] The BFI and MACE are UK charities. EYE is as an ANBI ("Algemeen Nut Beogende Instelling'"), which is the Dutch equivalent of a charity.
[440] See Chapter 10 in particular for further discussion on this.

commercial and under the CHI's purview. These non-commercial uses could then, following the wording of the recital, allow limited revenue generation, to recover the CHI's costs.

4.5.4.1 Creative Commons Licences

Some guidance on the distinction between commercial and non-commercial uses in copyright law can be provided by the practice of Creative Commons ("CC") licences. Creative Commons is a non-profit organisation that "helps overcome legal obstacles to the sharing of knowledge and creativity to address the world's pressing challenges."[441] One of the ways in which they do that is through providing free and simple copyright licences that anyone can make use of. CC provides a set of standardised copyright licences for rightholders and users to use.[442]

Crucially, CC licences can only be applied by the rightholder and with their permission. The licences can be negotiated with the rightholder, if they are known. CC licences grant up-front permissions so that use of a work does not require a new request and licence every time (but which, if granted by the rightholder, would not only apply to the CHI, but also to the whole world). However, for orphan works or works that a CC licence cannot be applied to, CHIs could choose to use RightsStatements.org labels.[443]

CC NonCommercial licences prohibit uses that are "primarily intended for or directed toward commercial advantage or monetary compensation." [444] In addition, the type of user does not impact on whether the use is non-commercial under these licences, so being a charity does not automatically mean the use is non-commercial; and being a for-profit entity does not automatically mean the use is commercial.[445]

CC conducted a study to explore how the terms "commercial use" and non-commercial use" are understood by Internet users regarding online content, through

[441] Creative Commons, "What We Do" (Creative Commons) Available at: < https://creativecommons.org/about/> Accessed on 21st May 2020
[442] Creative Commons "Defining "Noncommercial" A Study of How the Online Population Understands "Noncommercial Use"" (Creative Commons Corporation, 2009)
[443] Rights Statements Org. "Rights Statements" Available at: <https://rightsstatements.org/en/> Accessed on 22nd March 2021
[444] Creative Commons, "Frequently Asked Questions" Available at: < https://creativecommons.org/faq/#does-my-use-violate-the-noncommercial-clause-of-the-licenses> Accessed on 21st May 2020
[445] Creative Commons, "Frequently Asked Questions" (n.444)

empirical research.[446] They found that content creators often considered a range of factors when deciding whether a use is commercial or non-commercial, issues which are set out in the table below.[447]

Table 4.2 Qualitative Research Consideration Factors

Qualitative Research Consideration Factors
Perceived economic value of the content
The status of the user as an individual, an amateur or professional, a for-profit or not-for-profit organization, etc.
Whether the use makes money (and if so, whether revenues are profit or recovery of costs associated with use)
Whether the use generates promotional value for the creator or the user
Whether the use is personal or private
Whether the use is for charitable purpose or other social or public good
Whether the use is supported by advertising or not
Whether the content is used in part or in whole
Whether the use has an impact on the market or is by a competitor

The factors are considered differently by different people. For instance, for some individuals the answer to one specific question will determine whether the work is non-commercial, and for others it is considered holistically. As is stated in their report:

> …for many creators the factors exist within a matrix in which the type of use (for example, promotional or advertising use) and the context or community-based nature of the use (for example, charitable use, or use in a public school) are important vectors.[448]

[446] Creative Commons (2009) (n.442) 10
[447] Creative Commons (2009) (n.442) 31
[448] Creative Commons (2009) (n.442) 32

They also found that

> virtually all creators agree that a noncommercial use is one in which "no money changes hands." Many then add that for a use to be truly noncommercial, there should also be no indirect commercial gain.[449]

They concluded from their study that "specific uses by *individuals* are considered less commercial if they are by amateurs or personal/ private"; and likewise, that "specific uses that *earn the user money* are rated less commercial if revenues support cost recovery or nonprofit organizations". This study by the CC highlights the subjectivity of the decision regarding whether a particular use is commercial. It emphasises the need for stakeholder dialogues.

Furthermore, CMO agreements and pilots currently in place can be looked to in understanding how they are defining commercial and non-commercial uses. The Dutch collective music rights organisation Buma/Stemra ran a pilot project that enabled musicians to make their work available only for non-commercial uses through a CC licence. CHIs were "explicitly encouraged to negotiate the use of CC licenses in public/private partnerships when reuse is one of the objectives of digitization."[450] The meaning of "commercial use" for this pilot was determined to include any use by a for-profit institution and be:

> …distributing or publicly performing or making available online the Work against payment or other financial compensation (including the use of the work in combination with ads, publicity actions or other similar activities intended to generate income for the user or a third party)
>
> … using the Work in hotel and catering establishments, work, sales and retail spaces. This also applies to organisations that use music in or in addition to

[449] Creative Commons (2009) (n.442) 33
[450] Esther Hoorn "Contributing to Conversational Copyright: Creative Commons Licences and Cultural Heritage Institutions" in Guibault, L. and Angelopoulos, C. (eds.) *Open Content Licensing: From Theory to Practice* (Amsterdam University Press, 2011), 209-211

> the performance of their duties, such as, for example, churches, schools (including dancing schools), institutions for welfare work, etc.[451]

This conception of "commercial use" seems broad. It is also implied, but not necessarily stated, that anything that falls outside of the remit of the above definition of "commercial use" is therefore an allowable "non-commercial use".

4.5.4.2 Commercial Use in the US

4.5.4.2.1 Amended Settlement Agreement

The issue of commercialisation was considered in the Amended Settlement Agreement ("*ASA*") in relation to whether the activities of the Google Books digitisation fell within the US concept of fair use, along with evaluating whether the use was transformative. The Settlement set out that Google would have received 37% of the revenue from the commercialisation of the out-of-print books, and 67% would go to the Book Rights Registry to distribute to the rightholders, after deducting its administrative expenses.[452] The background to this case has been discussed in Chapter 3.

This issue of opt-out and of fair use were pivotal to the case. The ASA would have amounted to an opt-out copyright scheme, which in that regard is similar to Art.8 of the DSM. Indeed, for Grimmelmann this fact is the "central truth" of the Settlement, as he asserts that:

> [the ASA] used an opt-out class action to bind copyright owners (including the owners of orphan works) to future uses of their books by a single defendant.[453]

Chin J in his judgment acknowledged that many of his concerns "would be ameliorated if the [ASA] were converted from an 'opt-out' settlement to an 'opt-in'

[451] Creative Commons Netherlands and Buma/Stemra "Fact Sheet Pilot Creative Commons Netherlands and Buma/Stemra", 1. Available at: < https://creativecommons.nl/bumapilot/070823factsheet_en_web.pdf> Accessed on 21st March 2020
[452] Pamela Samuelson The Google Book Settlement As Copyright Reform (2011) *Wisconsin Law Review,* pp. 479-562, 520
[453] James Grimmelmann, The Elephantine Google Books Settlement (2011) 58 *Journal of the Copyright Society of the USA,* pp. 497-520, 498

settlement".[454] This emphasises the difficulty reconciling copyright doctrine with an opt-out licensing system.

Likewise, the concept of fair use was pivotal to the case. The US has a much broader concept of fair use than most other jurisdictions.[455] The US doctrine of fair use in s107,[456] states that the factors to consider for fair use include:

> (1) the purpose and character of the use, including whether such use is of a commercial nature…
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work…

Chin J analysed each of the four factors of fair use, and it is the 4th factor of the "the effect of the use upon the potential market for or value of the copyrighted work" that is most relevant to this discussion. In rejecting the *ASA*[457] Chin J noted that Google Books is a commercial entity, but that viewed holistically the activities were not directly commercial.

Another interesting aspect of the Google Books project is that Google aimed to improve the precision of its search engines through scanning the books, which would indirectly benefit through attracting more users.[458] This seems to be a commercial activity with a commercial motivation. It was decided that Google receives commercial gain from the Google Books project, however, what was more important was that it is not directly commercialising the books.[459] Chin J went on to state that:

---

[454] Authors Guild, No 05 Civ. 8136 (DC), 2011 U.S. Dist LEXIS 29126 (S.D.N.Y. Mar. 22, 2011).
[455] Samuelson (n.452) 487
[456] 17 U.S. Code § 107.Limitations on exclusive rights: Fair use
[457] ASA
[458] Samuelson (n.452) footnote 30, p. 487
[459] Raquel Xalabarder, 'Google Books and Fair Use: A Tale of Two Copyrights?' (2014) 5(1) *JIPITEC* 5(1), Part III

> Google does not sell the scans it has made of books for Google Books; it does not sell the snippets that it displays; and it does not run ads on the About the Book pages that contain snippets. It does not engage in the direct commercialization of copyrighted works...[460]

This reasoning was also based on his assertion that Google Books enhances the sales of the books, as individuals are able to access books that they might otherwise not know existed.[461] Copyright dogma, as Katz sets out:

> defines copyright solely by the prohibitions it imposes on users. Thus, the dogma views unauthorized copying as inherently sinful, and regards prior permission as the means to avoid and absolve that venial sin of copying.[462]

Katz suggests that it is this dogmatic view that influenced Judge Chin's decision in rejecting the proposed ASA, as he endorsed the view that the rightholder is entitled to "sit back [and] do nothing" and can enjoy their property rights without others being able to infringe on them.[463]

4.5.4.2.2 The "Last Twenty Exception"

In 3.5.2, it was discussed that in US copyright law, s.108(h)[464] allows a library or archive to make copies of a work for distribution, including online distribution, as well as public display in the final twenty years of a work's copyright term, which is known as the "last twenty exception".[465]

---

[460] ASA, 21-22
[461] ASA, 25
[462] Katz (n.271) 1292
[463] Katz (n.271) 1291.
[464] 17 U.S.C. Section 108(h): "(1)For purposes of this section, during the last 20 years of any term of copyright of a published work, a library or archives, including a nonprofit educational institution that functions as such, may reproduce, distribute, display, or perform in facsimile or digital form a copy or phonorecord of such work, or portions thereof, for purposes of preservation, scholarship, or research, if such library or archives has first determined, on the basis of a reasonable investigation, that none of the conditions set forth in subparagraphs (A), (B), and (C) of paragraph (2) apply.
(2) No reproduction, distribution, display, or performance is authorized under this subsection if—
(A)the work is subject to normal commercial exploitation;
(B)a copy or phonorecord of the work can be obtained at a reasonable price; or
(C)the copyright owner or its agent provides notice pursuant to regulations promulgated by the Register of Copyrights that either of the conditions set forth in subparagraphs (A) and (B) applies.
(3) The exemption provided in this subsection does not apply to any subsequent uses by users other than such library or archives."
[465] Townsend Gard (n.278)

For determining if audiovisual works are being commercially exploited, Townsend Gard recommends that the following can be considered: using the film's International Standard Audiovisual Number (ISAN), although this system is voluntary; and through searching online retailers such as Amazon, but this is likely to less effective for older works.[466] Townsend Gard asserts that, thinking for instance of temporary availability on Netflix of films that may then be subsequently unavailable:

> [n]ormal commercial exploitation also points to the library being able to purchase a copy of the work. Can a library purchase a subscription with a stable copy of the work? If not, that may not qualify as a normal commercial exploitation for the purposes of obtaining a copy to have in a library's collection.[467]

Her comments are relevant to making out-of-commerce works available under Art. 8 of the DSM Directive. It seems logical that when considering a works' commercial availability, this is construed as commercial exploitation that would enable someone to reasonably purchase the work, as opposed to being available for only a very short period of time.

Of course, neither the rejected *ASA* and the *Authors Guild v Google* case and the "last twenty" exception are EU law, but it is illuminating to understand how the issue of commercialisation has been approached elsewhere. Indeed, it seems that this issue is yet to be resolved in a number of copyright legal systems.

4.6 Conclusion

This chapter has analysed the terminology issues present within Art. 8, using a doctrinal analysis of the legal text, copyright norms and doctrines, as well as relevant literature. As discussed, the definitions of "out-of-commerce works", "customary channels of commerce", "reasonable effort" and "non-commercial purposes" will need to be clarified, for CHIs to be able to fully benefit from Art. 8, as the current terms are vague. The meaning of out-of-commerce with its inclusion of "customary channels of commerce", "reasonable effort" and "non-commercial purposes" seems

[466] Townsend Gard (n.278) 35-36
[467] Townsend Gard (n.278) 35-36

to bring about some interpretation issues that should be resolved before they become the object of judicial scrutiny. Interpretations of these terms have been suggested in this chapter.

Currently, the DSM Directive and Art. 8 in particular is ambitious and capable of heralding a significant cultural change within the EU, for the better. However, unless the issues discussed are addressed, the confusion and uncertainty this causes for CHIs will likely lead to a similar situation of cumbersome effort and cost that made the Orphan Works Directive practically ineffective. It is hoped that these errors will not be repeated.

It is discussed in this chapter that Art. 8 could also remedy the failure of the Orphan Works Directive. As Dusollier comments, orphan works are usually also out-of-commerce, and therefore "could equally benefit from the application of this new provision, whose conditions are less rigid."[468] As was discussed in the previous chapter and will be discussed in the ethnographic chapters, the Orphan Works Directive has not adequately addressed the issue of orphan works. Therefore, CHIs could choose to utilise Art. 8 in making out-of-commerce works available and include orphan works within this remit, if these orphan works are also assumed to be out-of-commerce.

A proposed sampling approach for the "reasonable effort" to determine if a work is out-of-commerce is suggested in this chapter, using representational non-probability sample, with a 95% confidence level and 5% margin of error. It is proposed here that such a sampling approach is rigorous enough to protect rightholders, whilst also minimising the cost and time spent by CHIs in conducting these searches, as often they have vast numbers of works in their collections. This sampling approach contributes a potential new proto-practice for film archives, as well as CHIs more generally. The sampling approach can be tested in future research, to gauge its impact.

The following chapter will continue the legal analysis of Art. 8, focussing on whether Art. 8 is compatible with international and EU copyright law doctrine, or if it signals a fundamental shift.

[468] Dusollier (2020) (n.64) 994

Chapter 5: Possible Fundamental Change to Copyright Law

5.1 Introduction

The previous chapter analysed the text of Art. 8 and this chapter will continue this doctrinal analysis by focussing on its compatibility with existing copyright doctrine and international conventions.

This chapter considers whether there are potential legal incompatibilities, including with the Berne Convention and Art 17(2) EU Charter, which could challenge successful legal implementation of Art. 8 into national law. The opt-out mechanism presents a potential change to the fundamental doctrines of copyright law, which could present legal and practical issues in its implementation. For the legislation to be implemented successfully there must be compatibility with international law and EU law. Certainly, for rightholders, this appears to be a departure from the exclusive right granted by copyright.

This chapter will consider the opt-out mechanism; property rules vs. liability rules; Art 17(2) EU Charter; and the Berne Convention's prohibition on formalities and the three-step test.

5.2 Is the Opt-Out Mechanism a Fundamental Change to Copyright Law?

Following on from the discussion in Chapter 3 in relation to *Soulier,* it was reaffirmed in this case that copyright is to be viewed as an exclusive right that requires *ex ante* consent.[469] Copyright requires *ex ante* permission from the rightholder; and therefore, uses that are not authorised *ex ante* by the author are *prima facie* infringing. Rightholders have an exclusive right to decide whether and how to communicate their works to the public and reproduce them, and any consent they give to a protected use of their work must be informed and before the use, as opposed to *ex post.* Art. 8 presents, on the face of it, a departure from this general principle, as reaffirmed by the CJEU in *Soulier.* Therefore, it must be analysed as to

[469] See Para 43 of *Soulier* discussed above: "[the French law lacked} a mechanism ensuring authors are actually and individually informed. Therefore, it is not inconceivable that some of the authors concerned are not, in reality, even aware of the envisaged use of their works and, therefore, that they are not able to adopt a position, one way or the other, on it. In those circumstances, a mere lack of opposition on their part cannot be regarded as the expression of their implicit consent to that use."

whether Art. 8 is compatible with this, or if it rather signals a fundamental change to copyright law.

Copyright is tasked with the much-discussed "balance of rights" between copyright creators and copyright users. Copyright can incentivise or encourage an individual to create new works as they can choose how or when to exploit their works, which in turn increases the range of ideas and information available.[470] At its core, copyright is fundamentally focused on enabling the rightholder to allow or prohibit certain activities, i.e., copying and disseminating the work in some way.[471] This balance often leads to tensions and compromises for both sides.

The EU's copyright *acquis* has expanded in recent years, and it has been criticised for often moving away from the individual Member State's traditional copyright models,[472] motivated by a "market-oriented and industry-based" view of copyright law that disfavours the individual rightholder.[473] In particular, it disfavours individuals such as authors and performers as opposed to corporate rightholders including publishers, phonogram producers and broadcasters. The CJEU has tried to restore the balance in favour of individual rightholders in a number of cases, including *Soulier*.[474]

The DSM Directive seems to acknowledge the significant change to copyright that it mandates for and has included several strong mechanisms to protect rightholders. Art. 11 of the DSM Directive mandates that there be stakeholder dialogue between rightholders, CMOs and CHIs "to ensure that the safeguards for rightholders referred to in this Chapter are effective."

It can be argued that the opt-out system will cause a fundamental change to copyright law. Art. 8 allows for licensing mechanisms that enable the CMO to provide licences for works beyond its mandate from rightholders, to extend to rightholders

[470] Stijn van Deursen and Thom Snijders, 'The Court of Justice at the Crossroads: Clarifying the Role for Fundamental Rights in the EU Copyright Framework' (2018) 49(9) IIC 1080, 1081
[471] For a discussion on how "the concept of reproduction is not a feasible tool for resolving copyright problems in a digital society", see Taina Pihlajarinne Should we bury the Concept of Reproduction – Towards Principle-Based Assessment in Copyright Law? (2017) 48(8) *IIC,* pp. 953-976, 973
[472] Caterina Sganga and S Scalzini 'From Abuse of Right to European Copyright Misuse: A New Doctrine for EU Copyright Law' (2017) 48(4) *IIC*, pp.405-435, 406
[473] Sganga and Scalzini (n.472) 431
[474] See Maurizio Borghi, "Author" in Antiono Bartolini, Roberto Cippitani and Valentina Colcelli (eds.) *Dictionary of Statuses within EU Law* (Springer, 2019)

who have not personally given their consent for this. This “extension effect” to allow the CMO to grant a licence on behalf of non-members seems to conflict with the supposed monopoly copyright of the right holder.

Despite these concerns, it has been compellingly argued that making out-of-commerce works available does not directly conflict with the exploitation rights of the rightholders,[475] as there is no conflict with any revenue that the rightholder could receive as the works are not commercialised. If a rightholder wishes to opt-out of the scheme, they can do so as they please. Of course, the rightholder opt-out requires the rightholder to have been given sufficient notice of the intention to use their work, which was discussed in Chapter 4 in the *Soulier* case. In this case, the CJEU stated that authors “must actually be informed” of future use of their work by a third party,[476] as otherwise the author “is unable to adopt a position on it”.[477]

Likewise, if there proves to be a public interest in the work and they wish to recommercialise the work, they may do so, as the rightholder may opt-out even after the licence has been agreed. Art. 8 does not aim to prevent rightholders from exploiting their works, only to allow works that are currently un-exploited by the rightholder to be viewed by the public. It is a strong argument against the concern that this signals a fundamental shift in copyright law.

Considering the concern regarding copyright opt-out formalities, prior to the Berne Convention, in the UK registration was required for copyright. The Statute of Anne[478] required authors to register their works with the Stationers Company. However, there existed common law remedies for authors who had neglected to register their work with the Stationers Company.[479] Khong asserts that this changed copyright from what had been an opt-in system to a “theoretical” opt-out system, as copyright

[475] Geiger, Frosio and Bulayenko (n.64) para. 2
[476] Para. 38
[477] Para. 39
[478] An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned 1710 (known as the “Statute of Anne”). The first official copyright Act in the world was the UK’s 1710 Statute of Anne. Deazley recounts that this first copyright law was “primarily defined and justified in the interests of society and not the individual… copyright was fundamentally concerned with the reading public...”, see Ronan Deazley, *On the Origin of the Right to Copy* (Hart Publishing, 2004) 226.
[479] Jane C Ginsburg Berne-Forbidden Formalities And Mass Digitization (2016) 96 *Boston University Law Review*, pp.745-775, 748

holders wishing to give their works to the public domain have no clear legal system or register for doing so.[480]

These considerations point to the conclusion that, despite Art. 8 seeming to be a dramatic change of direction for modern copyright law, a system of opt-out and similar formalities has a long history in copyright law. For example, prior to the Berne Convention there were a number of national legislations that included copyright formalities.[481] Both the UK and the Netherlands removed the copyright formalities in their national legislation following the Berne Convention.[482] The prohibition of formalities set out in the Berne Convention in relation to Art. 8 will be discussed later in this chapter.

5.3 Property Rules vs. Liability Rules

The issue of property rules vs. liability rules is an important issue to consider in relation to legislative approaches to out-of-commerce works. Calabresi and Melamed set out three methods of legally protecting entitlements: by property rule; by liability rule; and by inalienability rule.[483] Lemley and Weiser comment that there is another option that Calabresi and Melamed did not mention expressly, and that is what they refer to as a "rule of no liability", which they liken to the "rule as a commons or "open access" regime" within property.[484]

Calabresi and Melamed's notion of "entitlements" means that when a state has conflicting interests of two or more individuals, it must choose a side to favour.[485] Their framework can be applied to a wide range of legal issues, including copyright law. Indeed, their framework is particularly relevant to copyright, as digital copyright works presents problems for property rules for various reasons, given the nature of the Internet, mass copying and searching.[486]

---

[480] Khong (n.237) 62
[481] See Chapter 3 for discussion
[482] Stef van Gompel "Copyright Formalities and the Reasons for their Decline in Nineteenth Century Europe" in Ronan Deazley, Martin Kretschmer and Lionel Bently (eds.) "Privilege and Property: Essays on the History of Copyright" (Open Book Publishers, 2010), 180
[483] Guido Calabresi and A. Douglas Melamed "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral (1972) 85(6) *Harvard Law Review,* pp. 1089-1128, 1092
[484] Mark A. Lemley and Phil Weiser Should Property or Liability Rules Govern Information? (2007) 85(4) *Texas Law Review*, pp.783-841, 786
[485] Calabresi and Melamed (n.483) 1090
[486] Lemley and Weiser (n.484) 800

The property rule requires person A to buy an entitlement to B's property from B, in a voluntary transaction. Liability rules protect entitlements and their transfer or destruction "is allowed on the basis of a value determined by some organ of the state rather than by the parties themselves". Finally, inalienable rules prohibit a transaction between a willing buyer and seller.[487]

Property rules can be thought of as "absolute permission rules", with Merges giving the example of real property.[488] Property rules have the least state intervention. Liability rules have been described as Merges as "take now, pay later", and giving the example of the state's ability to take property, for example compulsory purchase orders, for compensation. [489] They are also found in tort law.[490] As Ott and Schafer have expressed, inalienability rules are found in statutory laws that forbids acts such as selling human organs.[491]

Property rules are based on the view of absolute rights, including property, as "as a natural extension of individual autonomy".[492] The issue with property rules is that voluntary transactions between A and B may be "prohibitively costly, preventing their transfer. [493] As Oliar has asserted, the more control copyright rightholders have, the greater their incentive to produce content, and simultaneously there is less incentive to create the necessary technologies to enjoy the content.[494]

It is said that when transaction costs are high, the property rules would prohibit "harmful but socially valuable activities"; and so the liability rules "therefore implies the acceptance of a dangerous but socially desirable activity, which, however, leads to damage compensation".[495] Liability rules thereby act as a "substitute for bargaining" when transaction costs are high.[496] Krier notes that the conventional wisdom is: "[w]hen transaction costs are low, use property rules; when transaction

[487] See for the information in this paragraph Calabresi and Melamed (n.483) 1092
[488] Robert P. Merges Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations (1996) 84(5) *California Law Review*, pp.1293-1393, 1302
[489] Merges (n.488) 1302.
[490] Claus Ott and H-B. SchaferThe Dichotomy between Property Rules and Liability Rules: Experiences from German Law (2008) 1(4) *Erasmus Law Review*, pp. 41-58, 44
[491] Ott and Schafer (n.490) 44
[492] Ott and Schafer (n.490) 43
[493] Ott and Schafer (n.490) 43
[494] Dotan Oliar The Copyright-Innovation Trade off: Property Rules, Liability Rules, and Intentional Infliction of Harm (2012) 64(4) *Stanford Law Review*, pp.951-1020, 951
[495] Ott and Schafer (n.490) 44
[496] James E. Krier and S. J. Schwab Property Rules and Liability Rules: The Cathedral in Another Light (1995) 70(2) *N. Y. U. L. Rev*, pp.440-483, 467

costs are high, use liability rules."[497] He criticises this, asserting that under the real life conditions of the market, "the conventional preference for liability rules makes no sense."[498]

Merges concurs, arguing that CMOs (or collective rights organisations as he refers to them) are based on property rules rather than liability rules, as "property rule entitlements drive IPR holders in high transaction industries into repeat-play bargaining which leads to the formation of CROs".[499] In this sense, he argues that CMOs "stand conventional entitlements theory on its head", as CMOs can lower the transaction costs more than compulsory licensing can.[500] For this reason, Merges asserts that "property rule entitlements may be superior in other situations where right holders encounter each other frequently."[501]

It is this distinction that is especially relevant for out-of-commerce works, as the extended licensing mechanism set out in Art. 8 presents a licensing regime based on liability rules, on the basis that the transaction costs are too high for CHIs under a property rules approach. As noted, there is disagreement as to which approach is more beneficial, and indeed disagreement as to which regime of rules underpins the operation of CMOs and collective management of copyright.

Whilst it is beyond the scope of this thesis to explore in depth the validity of the economic rationale as to whether it is a property rules system or a liability rules system that would be most appropriate in relation to out-of-commerce works, it is nevertheless relevant to understand the literature on this discussion.

5.4 Potential Conflict with Art. 17(2) of the EU Charter

5.4.1 The Right to Property

Art. 17 of the EU Charter[502] enshrines the right to property, and Art. 17(2) explicitly includes intellectual property. Art. 17(1) states that:

[497] Krier and Schwab (n.496) 451
[498] Krier and Schwab (n.496) 455
[499] Merges (n.488) 1296-1297
[500] Merges (n.488) 1296-1297
[501] Merges (n.488) 1297
[502] The Charter Of Fundamental Rights Of The European Union (2000/C 364/01)

> Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

Art. 17(2) simply states that: "Intellectual property shall be protected." It is noticeable that no creator or beneficial user is mentioned in Art. 17(2), unlike most other provisions in the EU Charter.[503]

The potential conflict between Art.8 of the DSM and Art. 17(2) of the EU Charter arises due to the fact that Art.8 limits the exclusivity of the rightholder through a presumption that rightholders have opted-in to allowing CHIs to make use of their out-of-commerce works. In this sense, it places limitations on the rightholders' exclusive rights, and this could conflict with the protections granted in Art. 17(2).

Article 1 of the First Protocol to the European Convention on Human Rights[504] preceded Art. 17(2) and allows for restrictions of the right to property "in the public interest". As such, the right to property including intellectual property in the EU is subject to public interest concerns. Art 1, Prot 1 encompasses three distinct rights, as set out in *Sporrong and Lönnroth v Sweden*:[505] peaceful enjoyment of one's property; that any deprivation of possessions be subject to certain conditions; and that States are entitled to control the use of property in accordance with the general interest.[506] Griffiths notes that the ECtHR has given Member States "a broader margin of appreciation" under Art 1, Prot 1 than is usually given to other qualified rights in the ECHR. [507]

[503] See for an excellent discussion, Christophe Geiger "Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles", in Geiger, C. (ed.) *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, 2015)
[504] Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (known as the "European Convention of Human Rights)
[505] *Sporrong and Lönnroth v Sweden* [1982] 5 E.H.R.R
[506] Referred to in J. Griffiths, "Constitutionalising or harmonising? The Court of Justice, the rights to property and European copyright law" (2013) 38(1) *EL Rev* 65, p. 7
[507] Griffiths (2013) (n.506) 7-8

Geiger has commented that the text of Article 17(2) is "surprising", as it '"uplifts" an ordinary economic right to an European constitutional one; it implies that intellectual property protection is "as an end in itself: no reference is made to its limited nature"; and that it contains "no reference to the beneficiary of protection."[508] It is surprising that the restriction on property rights in Art. 17(1) for the "general interest" and "public interest" is not expressly applied to intellectual property under Art. 17(2).[509]

5.4.2 CJEU Case Law

Geiger comments that Art. 17(2) has been relied upon to advocate for "maximalist" intellectual property legislative protection in the EU; and also, on CJEU decisions[510] including Infopaq,[511] SGAE,[512] Interflora,[513] and L'Oréal v. Bellure.[514] The CJEU has made repeated reference to the fundamental rights in the EU Charter in relation to its copyright law judgements, with the fundamental right to property being particularly focussed on.[515]

There is often a reference to ensuring a "fair balance" between the fundamental rights owed to rightholders, and to users, as well as third parties.[516] This need to maintain a fair balance has been "particularly significant" in cases in which the CJEU has interpreted the scope of exceptions and limitations of copyright infringement.[517] Consequently, Griffiths has criticised the CJEU's reliance on Article 17(2) as being "very thinly reasoned".[518]

The CJEU's application of Art. 17(2) can be seen in the case law. As the Court stated in *Germany v Council*:

> [T]he right to property… [is] not absolute, but must be viewed in relation to [its] social function…[it] may be restricted… provided that those restrictions …

[508] Geiger (2015) (n.503) 10-14
[509] Geiger (2015) (n.503) 10-14
[510] Geiger (2015) (n.503) 10-14
[511] *Infopaq International A/S v Danske Dagblades Forening* [2009] C-5/08
[512] *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* [2006] C-306/05
[513] *Interflora Inc. and Interflora British Unit v Marks & Spencer plc and Flowers Direct Online Ltd*. [2011] C-323/09
[514] *L'Oréal SA, Lancôme parfums et beauté & Cie SNC and Laboratoire Garnier & Cie v Bellure NV, Malaika Investments Ltd and Starion International Ltd.* [2009] Case C-487/07
[515] Griffiths (2013) (n.506)
[516] As Griffiths states, Recital 31 of InfoSoc recognises this. *See* Griffiths (2013) (n.506) pp. 11-12
[517] Griffiths (2013) (n.506) 13
[518] Griffiths (2013) (n.506) at 76 *Quoted in* Eleonora Rosati Why the CJEU Decision in Deckmyn is Broader than Parody (2015) 52(2) *Common Market Law Review*, pp. 511-529, 515

> do not constitute a disproportionate and intolerable interference, impairing the very substance of the [right] guaranteed[519]

Art. 17(2) impacts on the exceptions and limitations within copyright law and intellectual property more widely, in that it is to be understood as "an impediment to *significant and disproportionate* curtailment" of intellectual property rights brought about through either EU copyright legislature or Member States' national implementation of "*disproportionately broad*" exceptions to copyright.[520] That is to say, it prohibits any disproportionate expropriation of the fundamental right to intellectual property. To illustrate, in *Stichting de Thuiskopie v Opus Supplies Deutschland GmbH and others,*[521] the AG commented that a Member State

> cannot allow private copying and impose the obligation of compensation on private individuals unless they establish systems that effectively ensure that the compensation is paid [or] the rightholders would be deprived of the protection afforded to them by art.17(2) of the Charter of Fundamental Rights.[522]

In *Technische Universität Darmstadt v Eugen Ulmer*[523] Technische Universität Darmstadt were making available a book contained in its collection for which Ulmer was the rightholder, through terminals installed within its library. The CJEU stated that an exception to copyright does not cease to apply on the basis that the rightholder offers a licensing agreement for the acts the exception relates to, noting that:

> …if the mere act of offering to conclude a licensing agreement were sufficient to rule out the application of Article 5(3)(n) of Directive 2001/29, such an interpretation would be liable to negate much of the substance of the limitation provided for in that provision, or indeed its effectiveness...[524]

[519] *Germany v Council* [1994] I E.C.R. 4973 (C-280/93), para. 78. Quoted in Griffiths (2013) (n.506) pg. 5
[520] Maurizio Borghi, "Exceptions as users' rights?", *forthcoming in* E. Rosati (ed.) The Routledge Handbook of EU Copyright Law (Routledge: 2021), pg. 12
[521] *Stichting de Thuiskopie v Opus Supplies Deutschland GmbH and others* [2011] C-462/09
[522] par. AG25
[523] *Technische Universität Darmstadt v Eugen Ulmer* [2014] Case C-117/13
[524] Para 32

The primary components of the right to property under the Charter and the Protocol are the prohibition of dispossession, or depriving an individual of their property, other than in the "public interest" as is seen in the definition above; and that the State may control the use of property in the "general interest", as can also be seen above. As such, the right to property, including intellectual property, in the EU is subject to public interest concerns, and these interests must all be protected. Emphasising the importance of the public interest notion, the DSM Directive states that:

> [n]ew exceptions that reduce to some extent the rightholders' monopoly are justified by other public interest objectives. These exceptions are likely to have a positive impact on the right to education and on cultural diversity.[525]

It may be argued that the opt-out requirement under Art. 8, whereby rightholders must choose to notify the relevant party that they wish to opt-out of the out-of-commerce licence, infringes on the enjoyment and exercise of their copyright. As is stated in Art. 17(1) of the EU Charter, "[n]o one may be deprived of his or her possessions, except in the public interest…", and the opt-out requirement under Art. 8 could be argued to amount to a deprivation. Exclusivity and remuneration are two core tents of intellectual property[526] including copyright, and the opt-out requirement provides neither exclusivity nor remuneration to the rightholder.

5.4.3 A Possible Deprivation of Property?

Art. 17(1) recognises two main types of interference with property rights: the control of use of property, and deprivation of property.[527] Deprivation is a "full transfer" of property to another party. As Husovec notes,

> [c]ases in which the property stays with the victim and is only emptied of its content, sometimes qualify as "de facto deprivations," which are then treated in the same way as deprivations under the ECtHR.[528]

The case of *Luksan*[529] relates to deprivation of intellectual property and was a dispute between the director and producer of a film in Austria, and whether the

[525] European Commission (2016) (n.379) 9
[526] Martin Husovec (2019) "The Essence of Intellectual Property Rights Under Article 17(2) of the EU Charter," *German Law Journal*, 20(6), pp. 840–863, 841
[527] Husovec (n.526) 851
[528] Husovec (n.526) 851

director had transferred his rights to the producer through the assignment contract. The CJEU established in this case that a legal presumption of assignment of the exploitation rights to the film producer is acceptable, as long as this assignment can be refused and that the presumption can be rebutted.[530] The CJEU elucidated that a failure to ensure that the exploitation rights were given to the principal director breaches EU copyright law, and also breaches their fundamental right to property under the ECHR.[531]

Griffiths and McDonagh assert that the abolishment or limiting an intellectual property right would "undoubtedly fall within the scope of Art 17(2), although they would be likely to be considered as 'uses' rather than 'deprivations'", and only be "permissible if justifiable under the Charter".[532] They note that there is significant scope given to allow legislators

> in determining the necessity of interfering with the enjoyment of possessions in the general interest under Art 1, Protocol 1.[533]

Their assessment seems likely to apply to any potential incompatibility between Art. 8 of the DSM Directive and Art. 17 of the EU Charter. It seems unlikely that this would be held to be a deprivation of property, as Art. 8 does not deprive rightholders of the right to commercially exploit their works and enables them to opt-out. Moreover, Art. 8 applies to works that are no longer commercially exploited, and this further reduces the interference with "enjoyment of possession", at least in principle.

Therefore, Art. 8 is rather enabling use of the work for non-commercial purposes in the public interest, only when the rightholder chooses not to exploit their right to commercialise their works. Consequently, it is also not controlling the use of the property, as again, Art. 8 does not prevent a rightholder from exploiting and using their work as they see fit, or from opting-out of the licensing mechanism.

---

[529] *Martin Luksan v Petrus van der Let* [2012] C-277/10
[530] Catherine Jasserand, CJEU: the Luksan case and the protection of film directors, 24th February 2012, Kluwer Copyright Blog. Available at: <http://copyrightblog.kluweriplaw.com/2012/02/24/the-luksan-case-when-the-cjeu-defines-the-exploitation-rights-of-film-producers-and-protects-film-directors/
Law No 2012-287 of 1 March 2012> Accessed on 17th April 2019
[531] Griffiths (2013) (n.506) 20-21
[532] Jonathan Griffiths and Luke McDonagh "Fundamental rights and European IP law - the case of art 17(2) of the EU Charter" in Christophe Geiger (ed.) *Constructing European Intellectual Property Achievements and New Perspectives* (Edward Elgar Publishing, 2013), 87
[533] Griffiths and McDonagh (n.532) 87

5.5 Potential Conflict with the Berne Convention

Copyright law within the EU and the UK is subject to international obligations.[534] There are a number of international treaties and conventions with relevance to copyright,[535] including the Berne Convention and the TRIPS Agreement.[536]

The Berne Convention[537] established an international copyright union to protect the authors of literary and artistic works.[538] It also established the possibility of copyright exceptions, permitting certain reproductions without the express permission of the rightholder.[539] The Convention was clear in stating that authors of Berne Convention countries must be protected in the same manner as domestic authors, benefiting from the national laws of each country and the Convention rights.[540] It has been adopted by almost every country.[541] "Copyright" is not defined explicitly under either the Berne Convention;[542] or under EU law.[543]

---

[534] See for a discussion of international copyright law, Jane C. Ginsburg International Copyright: From a "Bundle" of National Copyright Laws to a Supranational Code? (2000) 47(1) *The Journal of the Copyright Society of the United States*, pp. 265. *See for a history of the Berne Convention,* Sam Ricketson The Birth of the Berne Union (1998) 11(1) *Colum. -VLA JL& Arts*, pp. 9-32

[535] See for a discussion of some of international instruments*,* Sam Ricketson The International Framework for the Protection of Authors: Bendable Boundaries and Immovable Objects (2018) 41(3) *Colum JL & Arts*, pp. 341-368. Ricketson notes that alongside the Berne Convention, the following instruments impact on international copyright law and neighbouring rights, the World Intellectual Property Organization Copyright Treaty (1996), the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (2013), the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961), the WIPO Performances and Phonograms Treaty (1996), the Beijing Treaty on Audiovisual Performances (2012), and the World Trade Organization Agreement on Trade-Related Intellectual Property Rights ("TRIPS Agreement").

[536] The TRIPS Agreement came into force in 1995 and is the "most comprehensive multilateral agreement on intellectual property". It governs copyright at the international level, alongside the Berne Convention. It sets down minimum standards for intellectual property protection globally and applies to all members of the World Trade Organisation, under Art 1(3). Art. 9 TRIPS relates to copyright, and states that:

(1) Members shall comply with Articles 1 through 21 of the Berne Convention … However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6*bis* of that Convention or of the rights derived therefrom.
(2) Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.

Art 6*bis* relates to moral rights or author's rights within copyright, and members of TRIPS are not required to uphold these protections.

[537] Berne Convention for the Protection of Literary and Artistic Works (1886)

[538] Art. 1 of the Berne Convention

[539] Charlotte Waelde, Abbe Brown, Smita Kheria, and Jane Cornwell, Contemporary Intellectual Property: Law and Policy 4th edn. (OUP, 2016) 37

[540] Art 5(1) of the Berne Convention

[541] 177 countries are Berne signatories, see "WIPO-Administered Treaties" Available at < https://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15> Accessed on 21st April 2019

[542] See Nicholas Caddick, QC, Gillian Davies, Gwilym Harbottle, "Copinger and Skone James on Copyright" 17th edn. (Sweet & Maxwell, 2016) at 2-01. Art. 2(1) of the Berne Convention defined "literary and artistic works as the following: "The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramaticomusical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography;

The Berne Convention and the related international copyright instruments provide significant harmonisation of copyright at the international level and are binding on all Member States and the UK. Any copyright reform within the EU must be compatible with these international obligations.

5.5.1 The Prohibition of Formalities

Art. 5(2) of the Berne Convention prohibits the "enjoyment and the exercise" of the rights it protects from being subject to formalities.[544] Unlike other types of intellectual property, including trade marks and patents, there is no system of formalities or registration in relation to copyright.[545] Copinger and Skone assert that formalities should be interpreted as a

> condition which is a prerequisite for the right to exist, such as administrative obligations laid down by national laws (for example, registration), which if not fulfilled lead to a loss of copyright protection.[546]

van Gompel asserts that the prohibition on formalities "seems to be practical rather than idealistic".[547] The prohibition on copyright formalities was rather brought about to harmonise international copyright law. As Ricketson and Ginsburg explain, in the late nineteenth century, most countries imposed copyright formalities on authors.[548] These formalities "involved considerable expense and trouble for both national and foreign authors".[549]

In the early nineteenth century, the copyright formalities in the Netherlands were mostly constitutive[550]; and in the UK they were mostly declarative.[551] The UK and the

---

works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science."

[543] Caddick, Davies and Harbottle (n.542) at 2-02

[544] Art. 5(2): 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. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed."

[545] See Caddick, Davies and Harbottle (n.542) at 2-05. There is also no revocation in copyright law; that is to say copyright protection does not expire due to a lack of use.

[546] Caddick, Davies and Harbottle (n.542) at 2-05

[547] van Gompel (n.482) 158

[548] Sam Ricketson and Jane Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (OUP, 2006), at 1.19

[549] Ricketson and Ginsburg (n.548) at 1.19

[550] "Constitutive formalities are those establishing ownership titles…No protection is established unless the formalities are completed in accordance with statutory conditions and cutoff dates". "Declarative

Netherlands removed the copyright formalities in their national legislation following the Berne Convention.[552] Whilst Berne prohibited the imposition of formalities onto only foreign authors, both countries removed the copyright formalities on domestic authors also.[553]

The prohibition on formalities is significant, as the absence of copyright formalities is one of the primary causes of orphan works, as the lack of requirement to register works to enjoy copyright protection means that works become separated from rightholder information.[554] The fact there is no revocation of copyright for a lack of use by the rightholder also means that copyright continues to exist in works that are not commercially exploited, namely out-of-commerce works. If copyright could be revoked due to a lack of use, out-of-commerce works would subsequently not present the significant problem to copyright and CHIs that they presently do.

The requirement that a copyright work be in a fixed form to attract copyright protection does not fall under this notion of a formality.[555] It can be argued that the opt-out requirement under Art. 8, whereby rightholders must choose to notify the relevant party that they wish to opt-out of the out-of-commerce licence, is a formality restricting the enjoyment and exercise of their copyright. If so, this could conflict with Berne, and all EU Member States are signatories to the Berne Convention.[556]

Art 5(2) must be read in conjunction with Art 5(3), which stipulates that "protection in the country of origin is governed by domestic law." Therefore, the prohibition on formalities does not apply to domestic authors in the country of origin of the work;[557] it only applies to foreign authors, by virtue of the principle of minimum protection. There are both practical and legal constraints on imposing formalities to domestic

---

formalities" are defined by van Gompel as "[having] nothing to do with the coming into being or continuation of protection, but rather help to establish that existing rights are legal and protected by law. Legal consequences can be attached to nonobservance of these formalities… [such as] by not permitting right owners to enforce their copyright before the courts unless the formalities have been fulfilled", see Stef van Gompel Copyright Formalities In The Internet Age: Filters Of Protection Or Facilitators Of Licensing (2013) 28 *Berkeley Technology Law Journal*, pp. 1425-1458, 1438-1439

[551] van Gompel (n.482)165

[552] van Gompel (n.482)180

[553] van Gompel (n.482)203

[554] See for an excellent discussion on this, Borghi and Karapapa (n .4)

[555] Andreas Rahmatian, 'European Copyright Inside or Outside the European Union: Pluralism of Copyright Laws and the "Herderian Paradox"' (2016) *IIC* 47(8) 912, 932

[556] 177 countries are Berne signatories.

[557] Ginsburg (n.479) 746

authors only; practically it is difficult - if not impossible - to have different standards depending on the nationality of the author.

It is important to note that the Berne Convention has been incorporated[558] into the TRIPS Agreement.[559] Therefore, it can be argued that the prohibition against formalities applies to all minimum rights under the Berne Convention. Art 62(1) TRIPS states that: "Members may require, as a condition of the acquisition or maintenance of the intellectual property rights provided for under Sections 2 through 6 of Part II, compliance with reasonable procedures and formalities. Such procedures and formalities shall be consistent with the provisions of this Agreement." This provision suggests that some level of "reasonable procedures and formalities" does not present a conflict with TRIPS.

Ginsburg has asserted that the Berne Convention does not prohibit opt-outs in relation to CMOs and extended collective licensing, as this does not affect the "existence and scope" of the author's right, but rather "the licensing and management" of these rights, which is a matter left for national legislation.[560] Likewise, critics have commented that a number of the issues set by the CJEU in *Soulier* "could be avoided if emphasis is put on the extension of the agreement instead of the extension of a general legal mandate."[561]

On this basis, it can be argued that Art. 8 does not conflict with the Berne Convention, as each EU Member State will be required to implement into its own national legislation the provisions, meaning that it will be creating the opt-out 'formality' for its own national citizens and the works will be made available within the EU only.

5.5.2 The Three-Step Test

Art. 9(1) of the Berne Convention grants authors of literary and artistic works the "the exclusive right of authorizing the reproduction of these works, in any manner or form". Art. 9(2) provides the ability for legislation to limit this right and grant

[558] Art 9(1) of the TRIPS Agreement: "Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto…"
[559] Agreement On Trade-Related Aspects Of Intellectual Property Rights, 1995
[560] Ginsburg (n.479) 775
[561] European Copyright Society (n.394) 6

exceptions, subject to conditions. Consequently, as Senftleben notes, Art. 9(2) of the Berne Convention provides legislators with a:

> flexible framework, within which national legislators would enjoy the freedom of safeguarding national limitations and satisfying domestic social, cultural, and economic needs [562]

It does this through enabling exceptions and limitations to be placed on the enjoyment of copyright, including for cultural reasons, such as making available cultural heritage. Art. 9(2) goes on to set out the three-step test that:

> [i]t shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

In the Berne Convention this test applies to reproduction rights; and is applied to distribution, rental and communication rights under Art. 10 of the World Intellectual Property Organisation Copyright Treaty (1996) and also to all exclusive rights under Art. 13 of the TRIPS Agreement.[563] This has direct relevance for making out-of-commerce works available through Art. 8's licensing mechanism, and through the fall-back exception.

The three-step test requires that the copyright exception is restricted to only certain special cases; that it does not conflict with the normal exploitation of the work; and that it does not prejudice the legitimate interests of the author.[564] It is enshrined in EU law in Art. 5(5)[565] of the 2001 European Copyright Directive or the "InfoSoc

[562] Martin Senftleben The International Three-Step Test A Model Provision for EC Fair Use Legislation (2010) 67(1) *JIPITEC*, pp. 67-82, 75
[563] Ricketson (n.535) 363
[564] See Borghi and Karapapa (n.4) 66-68; and Ricketson (n.535)
[565] "The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder."

Directive"[566] which requires that copyright exceptions and limitations are subject to the three-step test.

Art. 8(2) meets the first step, as it amends the InfoSoc Directive to include an exception to allow CHIs to make out-of-commerce works available for non-commercial purposes, subject to conditions as has been discussed in the previous chapter.[567] Therefore, the exception is for a certain, special cases. As Art.8 only allows for non-commercial use of the works, it does not interfere with the commercial exploitation of them by the rightholder. Therefore, it meets the second step.

For the third step[568] the exception must not "unreasonably prejudice the legitimate interests of the author." The opt-out mechanism under Art. 8 for the licence between the CMO and the CHI or the fall-back exception under Art. 8(2) ensures that the "legitimate interests" of the author are not unreasonably prejudiced. Rightholders may opt-out if they wish, without the need to then commercially exploit the work themselves. This opt-out can be both general and specific, and can even take place after a licence has been agreed between a CMO and CHI. Therefore, Art. 8 of the DSM Directive meets the three-step test.

5.6 *Soulier* and Art. 8

This discussion correlates with the arguments made by the CJEU in *Soulier*. Comparing Articles L. 134-1 to L. 134-9 of the French Intellectual Property Code and Art. 8 DSM Directive, both similarities and differences are noted. As Dusollier notes, in *Soulier* the principle of exclusivity was fundamental to finding the French law incompatible; and in Art. 8, the "actual availability of works prevails over the principle

[566] 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 or the **"**Information Society Directive 2001/29/EC"

[567] "Member States shall provide for an exception or limitation to the rights provided for in Article 5(a), (b), (d) and (e) and Article 7(1) of Directive 96/9/EC, Articles 2 and 3 of Directive 2001/29/EC, Article 4(1) of Directive 2009/24/EC, and Article 15(1) of this Directive, in order to allow cultural heritage institutions to make available, for non-commercial purposes, out-of-commerce works or other subject matter that are permanently in their collections, on condition that:
(a)the name of the author or any other identifiable rightholder is indicated, unless this turns out to be impossible; and
(b) such works or other subject matter are made available on non-commercial websites."

[568] See Ricketson (n.534) 26-28 for further discussion of the meaning of "does not unreasonably prejudice the legitimate interests of the author".

of exclusivity."[569] This leads to questions about the compatibility of Art. 8 and does suggest a shift within copyright doctrine.

To reiterate the discussion earlier in this thesis, the CJEU confirmed in *Soulier* that the InfoSoc Directive does not preclude national legislation seeking to enable "the digital exploitation of out-of-print books in the cultural interest of consumers and of society as a whole."[570] The CJEU also acknowledged that the pursuit of public access to cultural heritage "cannot justify a derogation not provided for by the EU legislature to the protection that authors are ensured by that directive."[571]

Crucially, the French law only applied to out-of-commerce books, not copyright works as a whole, and applies to "a book published in France before 1 January 2001 which is no longer being commercially distributed by a publisher and which is not currently published in print or in a digital format."[572] This differs to Art. 8, which applies to all copyright works, and does not have a cut-off date at which works can be deemed out-of-commerce.

For both the French law and Art. 8, the work must be registered on the database/ portal for six months prior to use.[573] Whereas under Art. 8 the EU IPO are responsible for the portal, under the French law the National Library of France (Bibliothèque nationale de France) were responsible, and this was to be a free to access, online open resource.[574]

The CJEU in *Soulier* stated, in relation to the French law, that authors "must actually be informed" of future use of their work by a third party,[575] as otherwise the author "is unable to adopt a position on it".[576] This is similar to the position in Art. 8, as although the intended use will be published on the portal, the individual author themselves will not be directly notified. It therefore seems that the CJEU's criticism of the French law may stand in relation to Art. 8. However, it is suggested here that the

[569] Dusollier (2020) (n.64) 996
[570] Para. 45
[571] Para. 45
[572] Article L. 134-1 of the French Intellectual Property Code
[573] See for the French law, Article L. 134-3.1 of the French Intellectual Property Code
[574] Article L. 134-2
[575] Para. 38
[576] Para. 39

opposition of the CJEU in *Soulier* may have been more holistic, given the serious concerns raised by the law on the rightholder's exclusive rights.

Article L. 134-4 sets out that the author of an out-of-print book or a publisher with the "right to reproduce printed copies of that book" may "oppose" a collecting society, or CMO, from exercising the right under Article L. 134-3(I). Also, the author may oppose the exercise of the right by the collecting society/ CMO "if he considers that the reproduction or performance of that book is liable to adversely affect his good name or reputation. That right is to be exercised without compensation."[577] Under Article L. 134-6, the author and publishers with the right to reproduction of the book may withdraw the collecting society/ CMO's right to authorise the reproduction and performance of that book in digital format. Under Art. 8(4) of the DSM Directive, rightholders can "exclude" their works from the licensing mechanism and the fall-back exception, "either in general or in specific cases".

The collecting society/ CMO under the French law must ensure "the equal representation" of authors and publishers amongst its members;[578] fairness of its governance rules, including that the author "must not receive a lower amount than the publisher";[579] and measures to identify and locate rightholders, in order to distribute the funds.[580] These measures are similar to those set out in the DSM Directive, including that the CMO be "sufficiently representative" of rightholders.

Under the French law, "With the exception of the case provided for in the third subparagraph of Article L. 134-5, the reproduction and performance of the book in digital format shall be authorised, in return for remuneration, on a non-exclusive basis and for a renewable period of five years."[581] Article L. 134-5 sets out that if the author and publisher do not object within the 6 months, the collecting society "shall offer authorisation to reproduce and perform an out-of-print book in digital format to the publisher having the right to reproduce that book in print." This exclusive authorisation is for a 10-year period, which is then renewable.

[577] Article L. 134-4 (1)
[578] Article L. 134-3 (3) (2)
[579] Article L. 134-3 (3) (5)
[580] Article L. 134-3 (3) (6)
[581] Article L. 134-3 (1)

A publisher may also oppose the collecting society/ CMO from exercising the right to reproduce and perform the work, and if it does so, the publisher must then themselves exploit the book within two years of their objection. If the book is not effectively exploited during this time, their opposition is deleted from the database, and the collecting society/ CMO may then do so. [582] Concerning the rightholder opt-out in *Soulier*, the CJEU found that authors who wish to end the commercial exploitation of their work in digital format may do so, without this decision being subject to formalities.[583] This contrasts with Art. 8, as the objection under Art. 8(4) does not require the rightholders to then themselves exploit the works.

A primary difference between the French law and Art. 8 is that there is an onus on the publisher with the right to reproduction to exploit the book themselves if they raise an objection to allowing the collecting society to authorise another publisher to exploit the work. In this sense, the objection to the exploitation of the book is not freely given and without conditions, and it is therefore not a fair opt-out. This is not the case under the Art. 8 opt-out.

It was decided by the CJEU in *Soulier* that the French legislation conflicted with the Berne Convention requirement of no formalities.[584] They note that Art. 5(2) of the Berne Convention does not allow for any formality on the enjoyment and exercise of the rights reproduction and communication to the public. Therefore, the author's wish to end the exploitation of their work should not be contingent on the permission of others, including "on the agreement of the publisher holding only the rights of exploitation of that work in a printed format."[585]

The objections to the French law raised by the CJEU in relation to Berne have been considered above in relation to Art. 8. They do not seem to apply to Art. 8, as it operates to impact on the "the licensing and management" of these rights, as opposed to the "existence and scope" of the author's right.[586]

[582] Article L. 134-3 (2)
[583] Para. 46
[584] Para. 50
[585] Para. 49
[586] Ginsburg (n.479) 775

5.7 Conclusion

This chapter has analysed the legal compatibility of Art. 8 with existing copyright doctrine and international conventions. Issues of copyright expansion and potential conflicts with Berne were also explored. The objections raised in *Soulier* in rejecting the French law on out-of-print books have been compared to Art. 8, to see if similar criticisms can be levied. The objections to the rejected French law do not seem to apply to Art. 8, as it operates to impact on the "the licensing and management" of these rights, as opposed to the "existence and scope" of the author's right. It is substantially fairer to rightholders than the French law was and provides rightholders with the ability to easily and effectively opt-out if they wish.

Whilst it is understandable that rightholders are concerned by the opt-out provisions, on an examination it seems that there is no legal conflict with their rights under the Berne Convention or Art. 17(2) of the Charter. Art. 8 of the DSM Directive meets the three-step test, as set out in Art. 9(2) of the Berne Convention and in Art. 5(5) of the InfoSoc Directive. Likewise, the opt-out does not amount to a formality under Art. 5(2) of the Berne Convention. There is no conflict with Art. 17(2) of the Charter as it not controlling the use of property, as Art. 8 does not prevent a rightholder from exploiting and using their work as they see fit, or from opting-out of the licensing mechanism.

The following chapter will continue the legal analysis of Art. 8, focussing on the types of licensing that could be used by CHIs and CMOs in incorporating Art. 8. Issues of trust and transparency of CMOs will be explored, as the licensing mechanism within Art. 8 will only be successful if there is public trust in the CMOs.

Chapter 6: Collective Management Organisations and Extended Collective Licensing

6.1 Introduction

The previous chapter analysed compatibility of Art. 8 with existing copyright doctrine and international conventions. This chapter will focus on the collective management organisations and extended collective licensing, aiming to examine the legal and practical issues for film archives in incorporating Art. 8. The research in this chapter has been carried out using a doctrinal and comparative analysis of the law and legal literature on the topic.

This chapter will consider: the role of CMOs including the economic rationale of collective management, and the EU policy impact on them; issues of trust and transparency; whether the CMO is "sufficiently representative"; publication of the intent to use the work; the rightholder opt-out; whether works are in the "permanent collection"; and the issue of fonds d'archive and splitting collections.

6.2 The Role of CMOs

The collective management of copyright is used in many countries in relation to a number of different categories of work. Musical works in particular rely on collective management, as it is the nature of these works that they often involve multiple copyright works layered in one item, such as music CDs.[587] CMOs collect approximately €6 billion in the EU per annum; and a substantial part of this total is income from musical works, being in excess of 80% of the income of CMOs for authors.[588]

To collectively manage copyright, an organisation is required to negotiate licences with users, continually monitor use of the works and to distribute funds to

[587] European Commission, "Directive on collective management of copyright and related rights and multi-territorial licensing – frequently asked questions" (European Commission, 2014) (European Commission, 2014) Available at: < https://ec.europa.eu/commission/presscorner/detail/de/MEMO_14_79> Accessed on 23rd May 2019

[588] European Commission (2014) (n.587)

rightholders.[589] The concept of collective management of copyright originated from the French “authors' societies”, organised by playwrights in order to collectively enforce and exploit their rights against “the monopoly of the Parisian theatre”.[590] This inequality of “bargaining positions” between rightholders and publishers when negotiating fees and contract terms is still prevalent,[591] and hence the need for collective management of copyright persists.

CMOs arose as a market response to the difficulties of licensing copyrights.[592] It is generally perceived that CMOs and collecting licensing reduce transaction costs for both users and rightholders.[593] CMOs offer significant benefit to users of copyright works, as without CMOs users would likely struggle to legally use copyright works as they wish.[594] CMOs remove the administration, time and effort burden of individually locating and negotiating with individual rightholders. It also removes the cost burden of individual management and transaction costs on large numbers of individual works, especially if the values of the individual works are “too trivial” to merit these transaction costs.[595] Therefore, the rationale behind Art. 8 is that enabling this collective licensing reduces the transaction costs for the CHIs and the rightholders, as well as the complexity.

CMOs exist in almost all EU member states as either *de jure* or *de facto* legal monopolies.[596] CMOs operate to differing degrees and success, for instance in Denmark the CMOs “handle the whole system” of rightholder negotiation, unlike in

[589] Thomas Riis, Ole Andreas Rognstad, and Jens Schovsbo, ‘Collective Agreements for the Clearance of Copyrights – The Case of Collective Management and Extended Collective Licenses’ in Thomas Riis (ed.) ‘User Generated Law. Reconstructing Intellectual Property Law in a Knowledge Society’ (Edward Elgar, 2016), 933
[590] Sylvie Nérisson Has Collective Management of Copyright Run Its Course? Not so Fast (2015) 46(5) *IIC*, pp. 505-507, 505
[591] Rita Matulionyte Empowering Authors via Fairer Copyright Contract Law (2019) 42(2) *UNSW Law Journal,* pp. 681-718, 682
[592] Towse (2012) (n.63) 28
[593] Towse (2012) (n.63) 27
[594] Ruth Towse, *Economics of collective management organisations in the creative industries*. (World Interdisciplinary Network for Institutional Research Conference, April 2016) pg.4 Available at: < https://pdfs.semanticscholar.org/5007/f2150140bd96094f6c6b094f8c1b7725cfff.pdf?_ga=2.51544041.133154817.1598364227-1809524859.1598364227> Accessed on 22nd January 2019
[595] Towse (2012) (n.63) 572
[596] *See* João Pedro Quintais “On Peers and Copyright: Why the EU Should Consider Collective Management of P2P” Nomos Verlagsgesellschaft mbH. (2012) 41 and Drexl, J., Nérisson, S., Trumpke, F. et al. “Comments of the Max Planck Institute for Intellectual Property and Competition Law on the Proposal for a Directive of the European Parliament and of the Council on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Uses in the Internal Market COM (2012)372” IIC (2013) 44: 322, 325

other countries.[597] The proper functioning of CMOs in relation to digital activities in particular is "of key importance"[598] for the EU Digital Single Market that the DSM Directive aims to facilitate. The DSM Directive reaffirms this, noting that in relation to the licensing mechanism, "a rigorous and well-functioning collective management system is important."[599]

The European Commission keeps a list of the CMOs in each EU Member State,[600] as required by Articles 36 and 39 of the Collective Rights Management Directive 2014/26/EU,[601] which sets out rules relating to good governance of the CMO, transparency and thorough reporting, and the importance of regular and accurate payment of royalties due to rightholders.

6.2.1 Economic Rationale

From the perspective of the economics of copyright, it is evident that CMOs "play a fundamental role"[602] within copyright, as CMOs enable the proper functioning of the market where it would be impractical for the rightholder to negotiate directly with the user.[603] CMOs can "benefit from economies of scale and scope", sharing the transactional costs between the rightholders and benefitting from a far larger repertoire, which attracts potential users to negotiate licences with the CMO.[604] CMOs also spread risk across all of the rightholders, acting as "a form of insurance".[605]

Indeed, there has been scholarly attention given to how CMOs assist states in adhering to human rights obligations in relation to copyright as they facilitate the

[597] Favale, Homberg, Kretschmer, Mendis, and Secchi (n.236) 63.
[598] Morten Hviid, Simone Schroff, John Street, Regulating Collective Management Organisations by Competition: An Incomplete Answer to the Licensing Problem? (2016) 7(3) *JIPITEC*, pp. 256-270, 257
[599] Recital 34
[600] See European Commission, 'Collective rights management Directive – publication of collective management organisations and competent authorities' (European Commission, 3rd July 2017)
[601] 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 (known as the "Collective Rights Management Directive")
[602] Christian Handke and Ruth Towse 'Economics of Copyright Collecting Societies' (2007) *38*(8) *IIC,* pp. 937-957, 948
[603] Handke and Towse (n.602) 948
[604] Towse (2016) (n.594) 5.
[605] Towse (2016) (n.594) 5. See also Katz (n.271) 1336.

individual rightholder's rights when the costs involved stop them contracting directly with the user.[606]

Towse has compellingly asserted that digitisation has altered the environment that CMOs operate in, particularly for the "mutuality of CMOs and to some extent also to the voluntary international collaboration that has existed …for a century".[607] She notes that the transactional costs for the CMO of digital items is reduced, but so is the revenue received per item, especially for streaming services. This can result in the administrative transaction costs being greater than the revenue received.[608] Therefore, the often-cited economic benefit of CMOs can be questioned. To illustrate, Schroff and Street elaborate that rightholders receive less revenue from online transactions than they used to via analogue transactions, thereby potentially undermining the legitimacy of the CMO in minimising administrative costs. [609]

Furthermore whilst the transaction costs of finding and negotiating with rightholders may be lowered through collective management, Watt comments that "collective management reduces enormously the choices of licenses that users can negotiate", as opposed to the freedom in individual licensing.[610] CMOs usually only offer blanket licences, meaning that users often have to licence works they do not want, as well as the works they do want.[611] The reduction of administrative costs and ease for the individual rightholder are often cited as a significant aspect of the rationale behind CMOs, and this appears to be undermined if the cost reduction is lesser in the increasingly digital age.

In addition, the vast majority of copyright works that the rightholder intends to commercialise are contracted to a publisher, such as a film company or broadcaster, as publishers have the funds to exploit the work.[612] This is of particular relevance to out-of-commerce works, as this can be assumed to limit the administrative difficulties

[606] Laurence R Helfer, 'Collective Management of Copyrights and Human Rights: An Uneasy Alliance Revisited' in Daniel Gervais, *Collective Management Of Copyright And Related Rights*. 2nd edn. (Kluwer Law International, 2010) 75, 88
[607] Towse (2016) (n.594) 10
[608] Towse (2016) (n.594) 7
[609] Schroff and Street (n.62) 1308-1309
[610] Richard Watt, "Copyright Collectives and Contracts: An Economic Theory Perspective" CREATe Working Paper 2015/8 (August 2015), pg. 3
[611] Watt (n.610) 3
[612] Towse (2016) (n.594) 2

of liaising with CHIs for out-of-commerce works, as it is expected that publishers will be aware of the change to the law and whether their works are in commerce.

6.2.2 EU Policy Impact

Cross-border licensing has become "cumbersome" in the digital world for those seeking to license works for multi-territorial use, as CMOs can only license works nationally.[613] Rightholders and users alike have been frustrated by this and pushed for change.[614] The route that this change has taken can be seen to be a result of the EU's policy focus of encouraging an open, competitive copyright market.

Part of the EU's copyright and cultural heritage policies have been significantly shaped by its focus on encouraging a competitive market. This has impacted on the EU rhetoric and policy relating to CMOs and the encouragement of creative innovation. Schroff and Street have discussed the EU's "path dependency" resulting from its historical institutionalism, which suggests that "policy options that were not chosen become ever more unlikely in the future as the cost of radical change is high."[615] They compellingly assert that

> the policy on regulating CMOs has experienced layering…part of the system has been treated as sacrosanct…As a result, the more familiar competition principles were continuously relied upon to resolve the issue of CMO regulation…[616]

This historical reliance on competition and encouraging a competitive marketplace has become enshrined in EU policy and EU law. They argue that this preoccupation with the increased competition policy does not adequately cater to the different interests of rightholders and is more likely to benefit the few larger rightholders than the numerous individuals.[617] They view this as likely to have "detrimental consequences for the DSM as the market cannot work smoothly without the involvement of a network of CMOs."[618]

[613] Schroff and Street (n.62) 1308
[614] Schroff and Street (n.62) 1308
[615] Schroff and Street (n.62) 1306
[616] Schroff and Street (n.62) 1307
[617] Schroff and Street (n.62) 1317
[618] Schroff and Street (n.62) 1317

This EU policy preoccupation with facilitating a competitive marketplace can be seen as suffering from Schroff and Street's concept of "path dependency", in that regulation of collective management within the EU has continued down a policy path, regardless of the legal and practical consequences of that policy. This CMO path dependency's impact on implementation is lessened by the fact that the licensing system set out in Art. 8 is at the national level, and therefore Member States can implement licensing systems as they see fit.

As Art. 8 addresses out-of-commerce works only, the concerns relating to the commercial competitiveness of CMOs is a lesser issue. That is not to say irrelevant, as it is reasonable to expect that rightholders will have more faith in CMOs that they regard as commercially competitive to best protect the rightholder's' interests.

6.3 Which Type of Licensing Scheme for Making Out-of-Commerce Works Available?

There are several possible licensing mechanisms that Member States may choose to implement in relation to out-of-commerce works. The DSM Directive allows the Member State to determine the specific licensing mechanisms that it will implement in relation to Art. 8.[619] Extended collective licensing ("ECL") schemes are the presumed licensing mechanism that Member States will adopt in relation to Art. 8. They have already been implemented in the national legislation of some Member States prior to the DSM Directive. Another option is a presumption of representation, in which rightholders are legally presumed to have chosen to be represented by a given collecting society.[620]

Directive 2014/26/EU, relating to music, does not prohibit a presumption of representation,[621] and as such, Member States may choose to adopt this presumption of representation in relation to all types of out-of-commerce works if they wish to. There are other potential options, but it presumed that ECL will be chosen, as it is the most compatible with the DSM Directive's provisions for the reasons discussed below.

[619] Recital 33
[620] Vučković (n.389) 30
[621] Vučković (n.389) 55

A “rights clearance exercise” conducted by Favale et al. in relation to orphan works found that there is

> licensing prices in extended collective licensing systems do not seem to be remarkably higher or lower than prices within other licensing systems.[622]

Therefore, the choice of licensing system should be based on which will be the most effective and successful legally to implement, as the impact on the licensing prices is seemingly insignificant.

6.3.1 The Presumption of Representation

The presumption of representation is a legal assumption that all rightholders have chosen to be represented by a relevant CMO. It is assumed that the relevant CMO represents the rightholders in that field, and therefore may grant “blanket licences” to users which extend to all rightholders, even those who have not explicitly mandated the CMO. The key difference between the presumption of representation and an ECL is that the rightholders cannot opt-out if they wish to do so as they can under an ECL, and usually have no other legal recourse than to issue legal proceedings against the CMO.[623]

As the DSM Directive requires the licensing mechanism chosen to be compatible with the DSM Directive as a whole, the legal presumption of representation seems a very unlikely choice for Member States to adopt. This is due to the fact that the rightholder “opt-out” requirement in Art. 8 would clash with the inability to do so under a legal presumption of representation.

This is how a presumption of representation traditionally operates. In theory, there is nothing prohibiting a national legislator from including an opt-out mechanism in the presumption of representation in their national implementation. However, this would result in a system synonymous with extended collective licensing discussed below. It can therefore be assumed that a national legislator would adopt a system of

[622] Favale, Homberg, Kretschmer, Mendis, and Secchi (n.236)113
[623] van Gompel (n.482) 689

extended collective licensing, as there is far greater precedent already of its successful operation within EU countries.

6.3.2 Extended Collective Licensing

The concept of extended collective licensing originated in the Nordic countries, and this notion of collective bargaining has a strong history in these countries.[624] ECL systems were developed in the Nordic countries, notably Norway and Sweden, in the 1960s to deal with licensing of copyright works for radio and TV broadcasting and have been substantially successful.[625] There is concern from some scholars that these examples of successful ECL schemes are unlikely to be replicated in larger countries with larger numbers of works.[626]

Extended collective licensing enables a user to negotiate with a collective management organisation for a licence on behalf of multiple rightholders. ECLs differ to the presumption of representation above in that rightholders may opt-out if they wish to do so, and this opting out is simple for the rightholder. The significant advantage of ECL is that a licence can be negotiated for a whole category of works, and not only for works in the catalogue of the CMO. This presents a substantial benefit to CHIs in being able to provide widened access to cultural heritage.

ECLs assume that the rightholders of a particular category have granted the collective management organisation authorisation to collectively manage and negotiate the licences. They therefore require a high level of membership from that specific group of rightholders. ECL schemes extend the licence granted by a CMO to a user, such as a CHI, to include works that the CMO does not manage.[627] This includes works by individuals who are non-members of the CMO.

The “extension effect” to allow the CMO to grant a licence on behalf of non-members presents a clear issue of choice in allowing the CMO to represent the copyright work. It can however be beneficial: as the CMO can “enjoy benefits from economies by the increase in the scale of its operation” and benefit can be passed on to rightholders

[624] Zijian Zhang, ‘Transplantation of an Extended Collective Licensing System – Lessons from Denmark (2016) 47(6) *IIC*, pp. 640-672, 643
[625] Zhang (n.624)
[626] “It remains to be seen whether the extended collective licensing scheme can really work efficiently outside a small country with a limited number of works in circulation.”, see Suthersanen (n.2) 249
[627] Guilbault and Schroff (n.4) 918

as increased royalties; and for users of copyright works the legal risks are reduced "since the user is shielded from claims initiated by unrepresented right holders."[628]A likely result of ECL schemes between a CMO and a CHI is that it will unduly prejudice authors whose works were published a long time ago but are still viable commercially. This is because older works are more likely to be out-of-commerce. [629]

Whilst there are still rightholder concerns relating to ECLs, the ability to easily opt-out of the licence means that this is a far more favourable option for rightholders than a presumption of representation.

ECL has been introduced in the UK in 2014 but the scheme has not been operative.[630] Indeed, the one CMO to apply to use the scheme, the Copyright Licensing Agency, went on to withdraw their request.[631] This scheme will be discussed in more detail in the following chapter. The Netherlands does not currently have a national scheme of ECL in place.[632]

6.4 Trust and Transparency

Whilst the purpose and potential advantages of CMOs where present and representative are evident in the literature, to date there have been significant issues with public perceptions of CMOs that hinder their effectiveness to the copyright system. There are substantial issues of trust, fairness and a lack of transparency that need to be addressed in order for the public to view CMOs as a credible and efficient option; and consequently, for rightholders to be willing to join them.

For example, in Greece AEPI is the CMO for the administration of rights of musical works. There has been much controversy surrounding AEPI, due to the discovery of unallocated payments owed to its members of approximately €42.5 million, as well

[628] Riis, Rognstad and Schovsbo (2016) (n.589) 64
[629] Janssens and Tryggvadottir (n.30) 32-33
[630] Benjamin White "The UK Experience Of Extended Collective Licensing: Greased Lightning Or The Road To Nowhere?" in *IFLA Background Paper on Extended Collective Licensing*, (IFLA Copyright and Other Legal Matters Advisory Committee Network, 2018), pg. 15
[631] Copyright Licensing Agency "CLA's Application For Extended Collective Licensing: Update" (CLA, 2018) Available at: < https://www.cla.co.uk/news/application-extended-collective-licensing-update> Accessed on 23rd September 2019
[632] European Commission "Cultural heritage Digitisation, online accessibility and digital preservation Report on the Implementation of Commission Recommendation 2011/711/EU 2013-2015" (European Commission, 2016), pg. 39 See Chapter 7 for further discussion.

as the retention of sums owed to foreign authors. This has led to a significant lack of public trust in AEPI with people choosing not to purchase licences from them.[633]

An issue with the transparency of CMOs is that the CMO is only required to publish information in the national language; thereby a lack of information in different languages can limit rightholders in deciding which CMO is the most suitable for them.[634] This is likely not to be as problematic for larger organisations, which will have access to additional resources and people with multiple language skills. For the individual rightholder however, this is likely to present considerable burdens, for instance if an individual cannot read a particular language, it will be much harder for them to decide whether that specific CMO should represent them.

The European Copyright Society recommend that "an administrative authorisation scheme" of the CMOs that manage the ECLs is implemented in each Member State, as this would guarantee the "highest degree of predictability and transparency" in deciding which agreements "trigger the extension effect".[635] Such an administrative authorisation scheme could alleviate some of the issues of mistrust and perceived lack of CMO transparency.

6.5 "Sufficiently Representative"

For Art. 8(1) to be implemented by a CHI, there needs to be a "sufficiently representative" CMO in that specific sector in that individual Member State. Across the different sectors, the level of representation and suitability for collective licensing is mixed. For works such as books and music, generally these are sectors with well-established CMOs[636] that can claim sufficient representation of rightholders. For visual art and photography, CMOs exist in a few Member States but not in others and for audiovisual works collective management is "limited".[637]

[633] Tatiana Synodinou 'The adventures and misadventures of the implementation of the Directive on collective management of copyright in Greece and Cyprus (Part I)' (Kluwer Copyright Blog, 27 March 2018) Available at: < http://copyrightblog.kluweriplaw.com/2018/03/27/adventures-misadventures-implementation-directive-collective-management-copyright-greece-cyprus-part/> Accessed on 22nd January 2019
[634] Schroff and Street (n.62) 1313
[635] European Copyright Society (n.394) 1
[636] See European Commission (2016) (n.379) Annexe 9F
[637] See European Commission (2016) (n.379) Annexe 9F

Film, however, struggles with collective representative and copyright management. Indeed, in some Member States there are no CMOs for audiovisual works,[638] in part as the film industry has "not developed a tradition of collective management."[639] There are immediate obstacles to effective implementation when either the particular category does not have a representative CMO or there is no CMO present in the market at all.

For the sectors in which there is no CMO at all, the alternative option available is to utilise the "fall-back exception" under Art. 8(2). In theory, this is a particularly attractive solution, as the CHIs would not have to pay any licence fees for the use of the out-of-commerce works. Considering the earlier discussion on the costs to CHIs of copyright clearance and the often-vast numbers of works they hold, the ability to legally make these works available without any licence fees is a strong boost to the CHI sector.

If CHIs feel confident and able to utilise the fall-back exception under Art. 8(2), this offers them an attractive and much lower-cost option than negotiating licences. However, this is not necessarily the case for all CHIs. Copyright fear and wariness, as is discussed in Chapters 8, 9 and 10 can substantially impact on CHIs, and lead them to adopt more risk-averse policies. It remains to be seen whether CHIs therefore feel able and willing to utilise the fall-back exception in Art. 8(2).

The European Copyright Society has recommended that the requirement of representativeness of the CMO should not be "construed too rigidly…[and] should be a flexible tool that safeguards the interests of rightholders and enables effective collective licensing."[640] Criteria to aid in determining the representativeness of the CMO could be the extent to which the CMO is established within a specific sector; the ability of the CMO to enter into reciprocity agreements with other CMOs; the CMO's remuneration system; and the level of transparency of the CMO.[641] This criteria could provide clearer and more effective measures for determining whether the CMO in question is sufficiently representative.

[638] For example, the UK and the Netherlands
[639] Guibault and Schroff (n. 4) 928
[640] European Copyright Society (n.394) 1
[641] European Copyright Society (n.394) 8

6.6 Practical Implementation

6.6.1 Publication on the Online Portal

Art. 10(1) of the DSM Directive requires that information relating to a supposed out-of-commerce work is

> …made permanently, easily and effectively accessible on a public single online portal from at least six months before the works or other subject matter are distributed, communicated to the public or made available to the public in accordance with the licence or under the exception or limitation.

Art. 10(1) also states that the EUIPO will establish and manage this online portal in accordance with Regulation (EU) No 386/2012.[642] Furthermore, Art. 10(2) states that Member States shall undertake "additional appropriate publicity measures" concerning the CMOs and their licensing of the works; to give the rightholder as much opportunity as possible to opt-out of they wish to do so.

The EU IPO portal will have a dedicated section for rightholders, which rightholders will be able to access without registering on the portal. There will be information set out as to how to issue a "general and specific opt-out", and which institutions are responsible for managing the opt-out requests in each Member State.[643] An EU IPO document sets out that the rightholders can generate a

> general opt-out request using an e-form which will generate a notification to the registered user(s), including notifying responsible organisations in multiple MS at the same time, provided their contact details are made available in the portal... There will be a possibility to request a specific opt-out for a work or a set of works, including partial opt-out.[644]

This clarifies how rightholders can opt-out and appears from the summary in the EU IPO report to be relatively straightforward for rightholders to use. Furthermore, larger

[642] Regulation (EU) No 386/2012 of the European Parliament and of the Council of 19 April 2012 on entrusting the Office for Harmonization in the Internal Market (Trade Marks and Designs) with tasks related to the enforcement of intellectual property rights, including the assembling of public and private-sector representatives as a European Observatory on Infringements of Intellectual Property Rights

[643] EU IPO, "The Out-of-Commerce Works Portal – High-Level Specification", Version 0.15 (EU IPO, 2020), pp 7-8

[644] EU IPO (2020) (n.635) 7-8

scale projects have been catered for; as there will be an option to bulk upload large sets of data.[645] This will be welcomed by CHIs, given the often-large numbers of works in their collections. However, it is also acknowledged in the report that bulk uploads may require "development effort from the organisations using the portal", in order to enable successful transfer of the data to the portal.[646]

Art. 10(2) also stipulates that these publicity measures must be undertaken in the individual Member State for which the licence is sought under Art. 8(1), and in the CHI Member State for the fall-back exception in Art. 8(2). Art. 10(2) states that these publicity measures should also be conducted in other Member States or third countries, if there is evidence that such measures in these countries are more likely to raise awareness for individual rightholders. Large and established CMOs might find this easier to achieve with networks of CMOs across Member States and in third countries.

In *Soulier*[647] the European court found that the French national law was incompatible with Directive 2001/29[648] on the basis that the French legislation does not offer "a mechanism ensuring authors are actually and individually informed."[649] Concerning the rightholder opt-out, the CJEU found that authors who wish to end the commercial exploitation of their work in digital format may do so, without this decision being subject to formalities. [650] It was therefore also considered that the legislation conflicted with the Berne Convention requirement of no formalities.[651]

It has been hoped by some scholars that the change to the EU copyright *acquis* would "help to overcome"[652] the legal consequences arising from the *Soulier* case especially the requirement that authors are "actually and individually informed", which it has been argued is likely to make practical implementation of ECL challenging.[653] Art. 8 of the DSM Directive does indeed appear to move beyond this, as although the out-of-commerce works must be published online six months before

[645] EU IPO (2020) (n.635) 15
[646] EU IPO (2020) (n.635) 15
[647] *Soulier v Doke* [2016] C-301/15
[648] InfoSoc Directive
[649] Para. 43
[650] Para. 46
[651] Para. 50
[652] Geiger, Frosio and Bulayenko (n.64) para 21
[653] Geiger, Frosio and Bulayenko (n.64) para 21

their intended use to give rightholders the opportunity to opt-out and the DSM Directive encourages as much stakeholder dialogue and public awareness of the DSM Directive's provisions as possible, there is not a requirement for CMOs or CHIs to *directly* contact individual rightholders for their approval prior to the use. Indeed, the DSM Directive clarifies that publicity measures should "be effective without the need to inform each rightholder individually",[654] as otherwise this would in effect amount to a diligent search of the rightholders themselves.

6.6.2 Rightholder Opt-out

Under Art. 8(4), the rightholder may opt-out of the licence concluded between the CMO and the CHI. The rightholder may

> …at any time, easily and effectively, exclude their works or other subject matter from the licensing mechanism set … [or] the exception …. either in general or in specific cases, including after the conclusion of a licence or after the beginning of the use concerned.

This raises a number of legal and practical issues: as discussed, this seems to challenge the modern-day conception of copyright; it requires rightholders to remain aware and vigilant to use of their work if they wish to restrict the usage of their work; the practical issue of opting out; and for CHIs, what the likelihood of a rightholder subsequently opting-out would be.

Considering first that rightholders will have to be aware and vigilant to usage of their work, Ginsburg has astutely commented that a rightholder may not have the resources to opt-out, as opposed to this being a rational decision.[655] Many rightholders will not have the necessary knowledge and understanding of copyright law that either makes them aware of Art. 8 and the DSM Directive, or an understanding that they most likely are the rightholder for a number of works, e.g. photos and films shared on social media. In the cases where the rightholder is aware and has decided to opt-out, how this is managed is crucial, as unnecessary burdens in opting out may deter rightholders who wish to do so.

[654] Recital 41
[655] Ginsburg (n.479) 766

Furthermore, Ginsburg also asserts that this system of opt-out copyright requires rightholders to remain aware of copyright developments and any additional exceptions or changes to the existing rules,[656] as over time the powers granted to CHIs under Art. 8 may change or expand. Likewise, it has been argued that the opt-out itself may be difficult for rightholders, as anecdotally publishers noted that it is "prohibitively expensive" for them to determine if they are indeed the rightholder, to consequently then decide whether to opt in or out.[657]

In relation to the Google Books project discussed above, the *ASA*[658] proposed a time-limited opt-out system for rightholders. The Agreement sought to introduce two distinct 'rights' for the rightholders: the right to remove a book from the corpus, and a right to exclude works from the corpus. Borghi and Karapapa have compellingly asserted that the right to exclude works from the corpus prevented rightholder's whose books had already been digitised from having the digital copy removed from the corpus, only that they not be displayed.[659] Borghi and Karapapa consequently comment that "the 'opt-out rights' did not apply to the so-called non-display uses of the work".[660] This in effect would have operated as a partial opt-out, as rightholders could not retrospectively require Google to remove their digitised book.

A logical concern for CHIs is that after the cost and effort of this digitisation and making the works available online, that the rightholders will appear and wish to opt-out. After the time and cost spent in making these works available to the public, it is seen by some as prohibitive that the rightholder can then opt-out, and potentially recommercialise their works. This fear of subsequent opt-out is valid and legitimate, and it is something that individual CHIs will need to determine on a risk basis.

To offer reassurance, the statistics on rightholder opt-out in existing schemes to date has been very low, which provides confidence that large numbers of rightholders appearing and objecting to the usage is unlikely. The European Commission report that for the Bokhylla book ECL scheme used by the National Library of Norway to make both out-of-commerce and in commerce books available online, approximately

[656] Ginsburg (n.479) 766
[657] Matthew Sag The Google Book Settlement and the Fair Use Counterfactual (2010/11) 55 *New York Law School Law Review,* pp.19-76, 36
[658] See 3.5.1 and 4.5.4.2.1 for further discussion
[659] Borghi and Karapapa (n.4) 78-79
[660] Borghi and Karapapa (n.4) 78-79

1.8% of the books were involved in an opt-out.[661] Likewise, they reported that the UK's Copyright Licensing Agency offers a blanket licence which is akin to an ECL, and that the works excluded from the scope of the licence were 0.0007%.[662]

6.6.3 Works Must be in the "Permanent Collection"

Art. 8(1) requires out-of-commerce works to be "permanently in the collection of the institution". This concept of the works needing to be in the "permanent collections" of CHIs is echoed in recitals 13 and 27.

This requirement that the copyright works be held in the "permanent collections" of CHIs could raise practical issues in regard to copyright ownership and contracts. Firstly, the meaning of "permanent collection": does it refer to works that have been accessioned into the CHI's collections that rightholders have granted the CHI to do with as they wish; or does it also refer to works which the CHI holds in their collections, but for which no documents or contracts prove that the CHI may do as they wish with?

The existence and extent of clear accessioning polices and documents relating to the provenance of works in the majority of CHIs is problematic.[663] It is often the case that materials are in the CHI's possession, but that it is unknown who donated or lent them the material, and which intellectual property rights they transferred to the CHI. Contractual record-keeping, especially historically, is often vague and incomplete. This was noted in the empirical research, to be discussed later in the thesis. This could potentially undermine incorporation of Art. 8 into practice, if CHIs cannot adequately demonstrate if an out-of-commerce work is in their permanent collection.

Additionally, the practice of "bulk accessioning" in archival practice could well be incompatible with attempts to make only some of the works, identified as out-of-commerce, available. Bulk accessioning is the

> …process of assigning one accession number to a large group of similar objects which have been acquired for the long-term collections.[664]

[661] See European Commission (2016) (n.379) Annexe 9E
[662] See European Commission (2016) (n.379) Annexe 9E
[663] Record-keeping will be discussed in Chapters 8, 9 and 10
[664] Collections Trust "Guidance on bulk accessioning" (Collections Trust, 2019) 1

This practice means that the cataloguing information for multiple different items in all contained as one catalogue entry, making it almost impossible to determine the copyright status, and the identity of the donor and the terms of that donation, of individual items. Again, this could hinder incorporation of Art. 8 into archival and CHI practice.

The sampling approach proposed in Chapter 4 could alleviate these concerns, through only the sample needing to be researched. The portal can enable bulk uploads and so practically this would not present an issue to CHIs. The sampling approach proposed also alleviates issues of bulk cataloguing, or potentially incomplete record-keeping.

6.6.4 The "Fonds d'archives"

The 2011 MoU which applied to books was a clear predecessor to Art. 8 of the DSM Directive; however, extending its scope to all copyright works without considering the full impact has unexpected consequences. There is a practical issue of incorporating Art. 8, in that archivists often treat the entire collection of works donated by one individual or organisation as one entity, referred to as a *"fonds d'archives",* which are often comprised of a range of different types of copyright works.[665] Therefore, for the archivist it is incomplete to only digitise or make available part of these works forming the *"fonds d'archives".*[666] It may well be the case that a CHI agrees a licence with a CMO for a particular class of works, but not for others. This leaves the *fonds* as a whole at risk of either being viewed in part, or not at all if the CHI decides not to share this collection with the public in parts. It remains to be seen whether this issue will affect the practical implementation of Article 8.

Looking closely at the definitions, it is evident that archives are comprised of materials collected and stored in relation to a specific topic, for example:

> [a]rchives are collections of materials gathered by a certain individual (i.e., their personal papers) or institution (institutional records), or collected in relation to a specific topic…They can be a few folders, or consist of hundreds

[665] Jean Dryden 'ECL And Archives' in IFLA Copyright And Other Legal Matters Advisory Committee Network, 'Background Paper On Extended Collective Licensing' (*IFLA*, 7th August 2018) 31, 32. Available at: <https://www.ifla.org/files/assets/clm/ecl_background_paper.pdf> Accessed on 8th August 2019

[666] Dryden (n.665) 32

> of boxes of materials in varied formats (paper, audio-visual, 3D objects, etc.) [667]

Therefore, it is problematic to introduce a mechanism that enables certain categories of out-of-commerce works be made available, but not others within the same collection. Indeed, this partial selectivity could further the concerns that CHIs wield great power in shaping narratives about the past through what is and what is not shown in cultural heritage collections. As an example, the UK National Archive's guidelines recommend that

> [r]ecords selected for preservation as archives should not be re-arranged just because they are being kept for a different purpose. Their original structure and arrangement should be respected as far as possible...[668]

Consequently, it does not seem that digitising and making available to the public parts of the out-of-commerce collections is in line with existing practices and norms within archives, and risks distorting the narratives and historical records.

This further raises a concern that the text of Art. 8 and the DSM Directive overall is misaligned with the reality of film archiving policies and norms. This matter will be analysed in much greater depth later in this thesis in the ethnographic research, but it does cause concern to find that the text may well be removed from the accepted practices within film archives, as there may well be other practical issues that the text has overlooked. If it is removed from the experiences 'on the ground' this is likely to hinder incorporation into practice.

6.7 Conclusion

It is proposed in this chapter that ECL is the licensing system most likely to be adopted by a national legislator. CMOs and collective management of copyright have been examined in depth, assessing issues of trust and transparency, and of them having "sufficient representation" of rightholders to effectively mandate on their

[667] Laura Schmidt Treasure in the Archives: A Celebration of Archival Collections (2017) 36(1) *Mythlore: A Journal of J.R.R. Tolkien, C.S. Lewis, Charles Williams, and Mythopoeic Literature*, pp. 5-20, 11.
[668] The National Archive "Archive Principles and Practice: an introduction to archives for non-archivists" (Crown Copyright, 2016), pp. 15-16. Available at < https://www.nationalarchives.gov.uk/documents/archives/archive-principles-and-practice-an-introduction-to-archives-for-non-archivists.pdf> Accessed on 14th February 2019

behalf. The practical issues of implementation of online publication, rightholder opt-out and that the works are in the CHI's permanent collection have been considered. The issues of *"fonds d'archives"* nature of archival collections has also been considered.

In countries with well-established CMOs, and clear guidance for rightholders and CMOs alike as to which CMO is representative of certain rights, implementation of Art. 8 into the national law is very likely. It then remains to be seen if film archives incorporate this practice into their existing archival practices; and this will be discussed further in Chapters 9 and 10.

In countries, such as the UK and the Netherlands, where there is a lack of collective management within film copyright, CHIs will not be able to agree licences with CMOs, leaving the fall-back exception in Art. 8(2). This, theoretically, makes incorporation into archival practice more efficient, as it removes the need for rightholders to engage with a CMO, and the need for CHIs to negotiate with CMOs. For the countries where there is not a sufficiently representative CMO in certain sectors such as film, this could be of substantial benefit to those CHIs. However, the use of the Art. 8(2) fall-back exception could be limited if CHIs lack the copyright knowledge and confidence to utilise the exception. The issue of potential reputational damage with rightholders impacting on copyright fear and wariness will be discussed further in Chapters 9 and 10.

In summary, it can be reasonably assumed that Art. 8 (1) will be applied initially only by Member States where ECL already exists. It has to be seen whether the fall-back exception of Art. 8(2) represents a sufficient "incentive" to develop an ECL system for out-of-commerce works in other Member States. Furthermore, it remains to be seen whether CHIs have sufficient copyright confidence to utilise the fall-back exception of Art. 8(2).

The following chapter will provide a comparative analysis of the UK and the Netherlands and their legal and cultural compatibility with Art. 8.

Chapter 7: British and Dutch Perspectives on Implementation

7.1 Introduction

The previous chapter provided a doctrinal analysis of the functioning of CMOs and ECLs. In this chapter, the thesis will now move to a comparative analysis of the legal compatibilities of the UK and the Netherlands, to enable consideration of the likelihood of implementation of Art. 8. The national general attitudes towards cultural heritage and legal compliance will be considered as part of this.

The UK's current ECL legislation will be discussed, as will the current operation of CMOs in the Netherlands. The fact that neither the UK nor the Netherlands currently has a sufficiently representative CMO for film will also be discussed. The issue of the UK leaving the EU in relation to implementation of the DSM Directive and how the UK could choose to implement national legislation that aligns with Art. 8 will be considered.

This chapter will propose that it is very likely that the DSM Directive and Art.8 will be successfully implemented in the Netherlands. The UK has chosen not to implement the DSM Directive prior to it leaving the EU, but similar national legislation could be implemented that mirrors Art.8.

This chapter will consider the attitudes towards cultural heritage of the countries; the perceptions of legal compliance and legitimacy of the countries; existing relevant Dutch legislation; the operation of CMOs in the Netherlands; the Dutch National Draft Implementation Bill; existing relevant UK legislation; the operation of CMOs and ECL in the UK; and the UK leaving the EU.

7.2 Cultural Heritage

Within the EU, cultural heritage is defined as:

> natural, built and archaeological sites; museums; monuments, artworks; historic cities; literary, musical, and audiovisual works, and the knowledge, practices and traditions of European citizens.[669]

Within the EU, cultural heritage is left for Member States to legislate on.[670] That is not to say that the EU does not seek to protect and promote cultural heritage. Article 3(3) of the Treaty on European Union [671]("TEU") states that the Union shall "respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced".

The European Commission surveys EU citizens regularly to obtain their views on a wide range of matters, usually conducting surveys of approximately 27,000-28,000 people. These topics include cultural heritage and legal compliance. In one such survey on cultural heritage, people interviewed in the Netherlands were more likely than any other EU country to say that they regularly visit cultural heritage sites or attend cultural heritage events (59%), and in the UK it was 29%.[672]

Likewise, 27% Dutch respondents said they lived in a historic, environment, city or the building, and only 12% agreed in the UK.[673] The participants in the Netherlands were joint with Malta at 19% as the most likely to donate money or resources to cultural heritage organisations, and in the UK it was 10%.[674] In the prior 12 months, 46% of the participants in the Netherlands had viewed cultural heritage content online, and 21% of participants in the UK had.[675] For both the UK and the Netherlands, 23% of participants had been to the cinema or a film heritage festival to see a classic European film produced at least 10 years ago.[676]

The statistics on the barriers to people accessing cultural heritage are very interesting. 24% of the Netherlands participants and 22% of the UK participants cited

---

[669] See European Commission "research eu Results Pack On Cultural Heritage. Heritage at Risk: EU research and innovation for a more resilient cultural heritage" (European Union, 2018), pg. 2; *and* European Commission "Cultural heritage" (European Commission, 2020) Available at:< https://ec.europa.eu/culture/cultural-heritage> Accessed on 18th October 2020
[670] European Parliament, "Cultural heritage in EU policies" (European Parliament, 2018) 4
[671] Treaty on European Union (2007)
[672] European Commission, "Special Eurobarometer 466 Report: Cultural Heritage" (European Commission, 2017), 11
[673] European Commission (2017) (n.672) 11
[674] European Commission (2017) (n.672) 11
[675] European Commission (2017) (n.672) 15
[676] European Commission (2017) (n.672) 52

cost as a barrier to them accessing cultural heritage sites or activities.[677] A lack of time was a more significant barrier, at 39% for the Netherlands and 38% for the UK.[678]

In both the Netherlands and the UK, overall attitudes towards cultural heritage are very positive. It is also clear from these statistics that Dutch people engage more regularly with cultural heritage and see themselves as living in an area with cultural significance. People in the Netherlands were also almost twice as likely to donate money to a CHI than people in the UK and are much more likely to engage with cultural content online. This suggests that although both countries view cultural heritage -particularly national heritage- highly, it is the Netherlands which has a culture of engaging with heritage items and narratives more so than the UK.

The fact that in the prior 12 months 46% of the participants in the Netherlands had viewed cultural heritage content online suggests that people in the Netherlands would benefit especially from Art. 8, as CHIs in the Netherlands could make a lot of their cultural heritage available online to view.

7.3 Common Law and Civil Law Jurisdictions

The Netherlands is a civil law legal system, and the UK is a common law legal system. The protection of author's rights is still influenced by the legal traditions on the specific Member State, despite the extensive EU harmonisation which began in the 1990s.[679] The civil law and common law copyright systems have historically approached copyright differently. In the UK, the author is regarded as the individual who has put their "skills, labour and judgment" into the creation of the work.[680]

The CJEU in *Infopaq*[681] stated that copyright works must be the "author's own intellectual creation."[682] Regarding the Netherlands, van Gompel comments that the Dutch test is very similar to the CJEU's test of the author's own intellectual creation, as the Dutch Supreme Court has stated that works must have their "own, original

[677] European Commission (2017) (n.672) 59
[678] European Commission (2017) (n.672) 59
[679] Borghi (2019) (n.474) 49
[680] *Ladbroke v William Hill* HL [1964] 1 All ER 465
[681] *Infopaq International A/S v Danske Dagblades Forening* [2009] C-5/08
[682] *Infopaq International A/S v Danske Dagblades Forening* [2009] C-5/08, para. 48

character", as well as "[bearing] the personal stamp of the author" to attract copyright protection.[683]

Civil law countries, such as the Netherlands, often adopted a more naturalistic view of copyright, with a notion of the 'romantic author' as fundamental to copyright.[684] In this legal tradition, the individual personality of the author is thought to be expressed in their work, therefore the author is granted a "complex bundle" of both exclusive and non-exclusive rights, accompanied by moral rights.[685] This conception of copyright conflicted with the view commonly held in common law countries that copyright is indeed an economic property right.

Common law countries such as the UK usually adopted an instrumentalist approach to copyright law and therefore viewed copyright as an incentive right to encourage creativity and innovation. This right is defined by statute; as well as existing at common law in the UK and US.[686] Baldwin has commented that in the common law countries, such as the US, UK, Canada and Australia, the author's individual rights have found some protection in other areas of law, for example the tort of defamation and privacy law, but that these defences for authors are patchy.[687]

A binary view of how the common law and civil law countries approach copyright is overly simplistic. To illustrate, France is one of the countries with the strongest protection of authors in the EU, and it was France that introduced legislation relating to out-of-print books that was the focus in the *Soulier* case. In this legislation as has been discussed earlier,[688] the author's right to control the reproduction of their work was under threat. Therefore, although the historic rationales behind copyright law in

---

[683] *Zonen Endstra v. Nieuw Amsterdam* [2008] ECLI:NL:HR:2008: BC2153, HR 30.05.2008, NJ 2008, 556. (known as "Endstra"). Also see Stef van Gompel "Creativity, autonomy and personal touch: A critical appraisal of the CJEU's originality test for copyright" in Mireille van Eechoud (ed.) *The work of authorship* (AUP, 2014), 98. *As* van Gompel notes, this standard "means that its form 'may not be derived from another work' and that it 'must be the result of creative human labour and thus of creative choices, so that it is a production of the human mind' (2008, § 4.5.1). The Supreme Court considers this to be on par with the CJEU's originality test". (same page). *See also* Bernt Hugenholtz "Works of Literature, Science and Art" in Bernt Hugenholtz, Antoon Quaedvlieg and Dirk Visser (eds.) *A Century of Dutch Copyright Law: Auteurswet 1912-2012* (deLex B.V., 2012), 54: "While Dutch courts… now diligently refer to the 'author's own intellectual creation' and quote *Infopaq*, *BSA* and *Painer,* often in combination with the Endstra criteria, the originality standard applied in practice appears to have remained roughly the same. In one case the Amsterdam Court of Appeal expressly rejected the argument that *Infopaq* might imply a lowering of the Dutch originality standard."

[684] See Lior Zemer *The Idea of Authorship in Copyright* (Routledge, 2017)

[685] Borghi (2019) (n.474) 50

[686] See Donaldson v Beckett [1774] *Hansard*, 1st ser., 17 (1774): 953-1003

[687] Baldwin (n.29) 226

[688] See Chapters 3 and 5

some Member States have some residual legacies, it does not fundamentally impact on the compatibility and perceived legitimacy of copyright laws.

7.4 Legal Compliance and Legitimacy

National attitudes towards legal compliance and legitimacy impact on how legislation is enacted, and also on whether citizens abide by these laws. The attitudes in the ethnographic research of the film archives towards the law and legal compliance will be discussed more in Chapters 9 and 10.

Jackson et al. conducted a study into legal legitimacy, which they define as having three sub-components "obligation to obey, legality and moral alignment".[689] Levels of trust and legitimacy in 26 countries (focussing on the police and the courts) were studied to determine this. The public levels of trust and legal legitimacy were highest in Denmark, Finland, Switzerland and the Netherlands.[690] The level of legitimacy was lower in the UK. This suggests that the public in the Netherlands has more confidence in the legitimacy of the law and trust in the law than in the UK. This could however be impacted by the public perception of the police, more so than the laws themselves. Legal compliance is often higher in individuals and countries as a whole in which the law is regarded as legitimate.

An EC survey of approximately 28,000 people across the EU in 2019 studied public attitudes towards the rule of law. On whether the individuals thought that the principles of the rule of law need improving, approximately 66% of people in the Netherlands thought it did, and approximately 83% of people in the UK agreed.[691] This further suggests that UK citizens, although highly regarding the rule of law, feel it needs improvement nationally, to a significantly higher extent that in the Netherlands. This is likely linked to the perceived legitimacy of the national laws.

In a study of the legal cultures of Europe, Gibson and Caldeira found that the Netherlands and the UK, along with Denmark and (what was then) West Germany have similar legal cultures, in that the:

[689] Jonathan Jackson, Jouni Kuha, Mike Hough, Ben Bradford, Katrin Hohl and Monica Gerber Trust and legitimacy across Europe: a FIDUCIA report on comparative public attitudes towards legal authority. (FIDUCIA, 2013), 6
[690] Jackson, Kuha, Hough, Bradford, Hohl and Gerber (n.689) 35
[691] European Commission, "Special Eurobarometer 489 Summary: Rule of Law" (European Commission, 2019), p. 10

> peoples of these countries tend to value individual liberty, to support the rule of law, and to reject the proposition that law is an external, repressive force.[692]

Likewise, the UK and the Netherlands were both in the group of European countries in which the public believe it is not acceptable to break laws, with almost 93% of the British people disagreeing or strongly disagreeing with the statement: "If you don't particularly agree with law, it is all right to break it if you are careful not to get caught."[693] The British public were the most disapproving of law-breaking of any European county surveyed. This research was conducted some time ago however, and consequently may no longer be as fully representative of the views.

Cann and Yates assert that "if a law's purpose aligns well with our immediate preferences, personal morality, or subgroup norms, then it is far easier for us to follow it."[694] They conducted a study in the US into legal compliance, and found that:

> [c]itizens who perceive [laws] as legitimate, are less exposed to state level legal scandals or break down in systems, and who agree with legal policy outputs are more apt to have deeply held convictions on the importance of legal compliance.[695]

How the public view and adhere to the law is of course a vital aspect to successful legal implementation, but so also is the legal adherence to EU law from national legislative drafters. To illustrate, Mastenbroek interviewed Dutch legislative drafters, who draft the legislation to implement EU law nationally. She found that the majority of the Dutch drafters "try to reconcile EU law with their ministers' political demands, if necessary by reinterpreting EU law", but where this remains incompatible, they usually prioritise their national political loyalty over EU legal adherence.[696]

This suggests a strong valuing of national policy and culture, and an ability to limit legal EU adherence where it conflicts with other highly regarded values or policies. A

[692] James L. Gibson and Gregory A. Caldeira The Legal Cultures of Europe (1996) 30(1) *Law & Society Review,* pp. 55-86, 70
[693] Gibson and Caldeira (n.692) 63
[694] Damon Cann and Jeff Yates This Side of the Law: Evaluating Citizens' Attitudes Toward Legal Compliance (2020) *Justice System Journal*, pp. 1-15, 1
[695] Cann and Yates (n.694) 13-14.
[696] Ellen Mastenbroek Guardians of EU law? Analysing roles and behaviour of Dutch legislative drafters involved in EU compliance (2017) 24(9) *Journal of European Public Policy*, pp. 1289-1307, 1289

similar approach to legal adherence by Dutch participants was noted in the ethnographic studies, to be discussed later in the thesis.

In both the Netherlands and the UK, overall attitudes towards the law and legal compliance favour legal adherence and respect for the rule of law. They have similar legal cultures, both having high levels of legal legitimacy, and the rule of law is highly valued. The public in the Netherlands, which the literature discussed above demonstrates, arguably has more confidence in the legitimacy of the law and trust in the law than in the UK. Nevertheless, the rule of law and legal adherence are valued very highly in the UK, and there is a substantial amount of disapproval for law-breaking.

7.5 The Dutch Perspective

7.5.1 Dutch Legislation

In the Netherlands, s 1.1 of the Dutch Heritage Act 2016 defines cultural heritage as:

> tangible and intangible resources inherited from the past, created in the course of time by people or arising from the interaction between man and the environment that people, irrespective of the ownership thereof, identify as a reflection and expression of continuously evolving values, beliefs, knowledge and traditions, and that offer a frame of reference to them and to future generations.[697]

In the Netherlands, copyright is set out in the Dutch Copyright Act 1912 or "Auteurswet" (Author's Law)[698] and in the Neighbouring Rights Act 1993. Art. 10(1)(10) of the Dutch Copyright Act includes film works in the literary, scientific or artistic works protected by the Act. As in the UK, film is given specific attention in the Act. Art. 45(a) states that:

> Film work is understood to mean a work consisting of a series of images with or without sound, regardless of the method of recording the work, if it is recorded.

[697] 'Act of 9 December 2015, comprising an inventory and adaptation of regulations pertaining to cultural heritage', or 'the Heritage Act'

[698] Unofficial English translation available at <https://www.ivir.nl/syscontent/pdfs/119.pdf>

Art. 40 related to the duration of film copyright, and states that:

> The copyright in a film work expires 70 years after the first of January of the year following the year in which the last of the following persons to survive died: the principal director, the author of the screenplay, the author of the dialogue and he who created the music for the film work.

In the Netherlands, the producer is understood to be the first rightholder for film.[699] This differs to the UK, in which the producer and principal director are understood to be the first rightholders for film.[700]

7.5.2 Collective Management of Copyright in the Netherlands

In the Netherlands, there is no CMO for film, which presents an immediate issue with nationally implementing the out-of-commerce provisions. This makes Art. 8(1) irrelevant, and leaves Art. 8(2), which enables CHIs to make use of these out-of-commerce works without a licence.

In the Netherlands, there is also no official ECL scheme in place,[701] but various CMOs operate in the Netherlands who are affiliated to the official Association of Organisations for the Collective Management of Intellectual Property Rights (or "VOI©E" in Dutch).[702] VOI©E was set up in 2008 as a trade association for CMOs.[703] A voluntary Dutch CMO Quality Mark assessment for CMOs was subsequently established. A report into the effectiveness of the CMO Quality Mark found that:

> [t]here is increased transparency for users where rates and licence terms are concerned. The CMO Quality Mark encourages CMOs to work together closely where possible and good progress has been made in this area... The

[699] See s.45(a)(3) of the Dutch Copyright Act: "The producer of a film work is the natural or legal person responsible for the making of the film work with a view to its exploitation." See also Kamina for a discussion of how this has developed historically, Pascal Kamina, *Film Copyright in the European Union* (Cambridge University Press, 2016) 240

[700] S.9(2) (ab) Copyright, Designs and Patents Act 1988

[701] European Commission "Cultural heritage Digitisation, online accessibility and digital preservation Report on the Implementation of Commission Recommendation 2011/711/EU 2013-2015" (European Commission, 2016), pg. 39

[702] https://business.gov.nl/regulation/copyright/

[703] Stichting Reprorecht, "Today's rights management the Dutch way: Transparency and governance in collective management of copyright and neighbouring rights in the Netherlands: a progress report" (Stichting Reprorecht, 2013) 8

> CMOs have, for example, started a project to harmonize their financial affairs and reporting.[704]

It is clear from this summary that collective management of rights therefore has a strong and transparent position nationally in the Netherlands, despite the lack of ECL scheme. The CMO Quality Mark further protects rightholders.

This prominence of CMOs in the Netherlands is something that has been achieved in recent years. Before this, within Dutch copyright implementation, "self-regulation has always been a core strategic choice".[705] Hoorn elaborates on this in detail, and notes that there are many instances of "a broad involvement of diverse stakeholders", such as the Dutch collective music rights organisation Buma/Stemra who have introduced a pilot project enabling musicians to make their work available under a CC licence exclusively for non-commercial use.[706] This has been discussed earlier Chapter 4.

Focussing on the likelihood of successful incorporation of Art. 8 within Dutch film archives, the immediate issue is whether there is a representative CMO for film within the Netherlands. There is no one sufficiently representative CMO for film in the Netherlands. There are CMOs for some of the rightholders involved in film production, but not one CMO that could be sufficiently representative of out-of-commerce film works to grant a non-exclusive licence to a CHI.

However, the strong culture of collective management of copyright in the Netherlands and the strong stakeholder dialogue provide a solid foundation for a CMO for film works to appear in future. There is already a strong framework of accountability and protection for rightholders, and so it is not implausible for a CMO to appear.

As a member of the public or as a CHI, it is not straightforward to ascertain which CMO is needed for a specific work, as the use of the work is particularly important and some CMOs have overlapping areas. VOI©E's website lists CMOs it advises contacting in relation to film or audiovisual works, as well as for other types of

[704] Stichting Reprorecht (n.703) 12
[705] Hoorn (n.450) 209-211
[706] Hoorn (n.450) 209-211

work.[707] It is clear from the extensive list on the website that the number of the CMOs could potentially present the rightholder of a specific work, but it is difficult to know which CMO this would be. Indeed, it is not easily understood by potential rightholders which CMO they may need.

7.5.3 National Draft Implementation Bill and Public Consultation

The Netherlands government held a public consultation for the Draft Implementation Bill in September 2019, which will implement the DSM Directive into national legislation. Stakeholder meetings were held with CMOs, internet platforms, CHIs, authors and publishers to discuss changes to the text of the bill in November 2019.[708] *Open Nederland, Creative Commons Nederland* and *Wikimedia Nederland* responded to the government's Draft Implementation Bill, highlighting their disappointment in the national Dutch implementation of Art. 8. They noted that:

> …we are disappointed in formulating the exception for 'making available' the heritage. A strong knowledge society benefits not only from access to heritage, but also from its reuse…Although the current exceptions and restrictions make reuse limited, it is desirable that we move towards a more open heritage culture, and therefore publish heritage where possible with an open (Creative Commons) license.[709]

Their comments emphasise the national Dutch concern within CHIs and heritage bodies that making the out-of-commerce works available will not enable the same cultural and economic benefits as enabling reuse of the out-of-commerce works. Likewise, a primary concern for them is the "reasonable effort" required in Art. 8(5):

> Experience from the orphan works guideline shows that when "reasonable effort" proves to be extremely complex in practice, heritage institutions cannot

[707] VOICE "What to arrange with whom?" Available at <https://www.voice-info.nl/transparantie/overzicht-wat-met-wie-regelen> Accessed on 21st April 2019

[708] Notion, "DSM Directive Implementation: Netherlands" Available at: <https://www.notion.so/Netherlands-6681f3a8fc4d4d079648f4cff20dc29d> Accessed on 21st April 2019

[709] Open Nederland, Creative Commons Nederland en Wikimedia Nederland "Reactie internetconsultatie auteursrecht" (Open Nederland, 2020), 8. Available at: <https://docs.google.com/document/d/1Xp1FdQPhu2VLPNd9BHqScyHes-ZQf9yoT7L0eaQ4rjs/edit#> Accessed on 21st April 2019 English translation conducted via Google Translate.

> make the necessary investment of time and the desired balance between the interests of society and the rights of the maker.[710]

This concern echoes the discussion in Chapter 4 relating to the reasonable effort requirement and the failure of the Orphan Works Directive. However, as discussed in this chapter, the interpretation of "reasonable effort" is suggested in this thesis as requiring a substantially less onerous search than the Orphan Works Directive diligent search, and the use of representational non-probability sampling to limit the search costs and staffing for CHIs.

The Dutch Implementation Act will modify the Copyright Act,[711] the Neighbouring Rights Act,[712] the Database Act[713] and the Supervision of Collective Management Organisations Act,[714] and includes only changes stemming directly from the DSM Directive. This is because Dutch law allows a "streamlined legislative process" where legislation is only implementing EU directives, and this streamlined process is more efficient.[715] The fall-back exception is implemented separately to the out-of-commerce provisions in the Copyright Act,[716] the Neighbouring Rights Act[717]and the Database Act.[718]

The Dutch Supervisory Board of collective management organisations will have the authority to oversee CMOs and their licences with CHIs relating to out-of-commerce works. As is stated in the explanation of the Draft Implementation Bill (English translation*)*:

> Rightsholders should be able to know the use of their protected performance. This gives them the opportunity to decide whether or not to do so to vote. The Supervisory Board of collective management organisations [of] copyright and

[710] Open Nederland, Creative Commons Nederland en Wikimedia Nederland (n.709)
[711] Art. 44 Auteurswet
[712] Art. 19c Law of 18 March 1993, containing rules on the protection of performers, producers of phonograms or of first fixations of films and broadcasting organizations and amendment of the 1912 Copyright Act "Wet naburige rechten"
[713] Art. 5ba Law of 8 July 1999, adjusting Dutch legislation to Directive 96/9 / EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases "Databankenwet"
[714] Art. 5k Law of 6 March 2003, containing provisions with regard to the supervision of collective management organizations for copyright and related rights (Law on supervision of collective management organizations for copyright and related rights) "Wet toezicht CBOs"
[715] Notion (n.669)
[716] Art. 18c 3 Auteurswet
[717] Art. 10 (r) Wet naburige rechten
[718] Art. 4a (e) Databankenwet

> related rights will ensure that collective management organisations comply with the requirements applicable to disclosure of licenses with extended effect.[719]

It is made clear that under the fall-back exception, attribution to the author must be made where this is possible, as is stated in the explanation of the Draft Implementation Bill (English translation*)*:

> The name of creator of the work must be stated, unless this is not possible. There is maximum harmonisation. The Directive dictates the scope of that limitation and the national legislature is not free to extend it (or limit).[720]

The above excerpt from the guidance also makes clear that the DSM Directive "dictates the scope" and that national legislation can neither extend nor limit its effect, which is perhaps an attempt to minimise criticism on the Draft Implementation Bill. Maximum harmonisation prevents so-called "gold-plating" of EU legislation, which occurs "when such measures go beyond what is required by EU law."[721] Gold-plating can introduce inconsistencies across the Member States, which EU Directives directly aim to minimise, and also place unnecessary burdens on businesses and organisations in incorporating the legislation.

Member States have been given discretion in their national implementation that will not constitute "gold-plating", including the possibility of cut-off dates to determine if a work is out-of-commerce. There are outstanding issues for national implementation that are not addressed in this Draft Bill, and will follow later, namely cut-off dates and when a work becomes out-of-commerce. These issues are fundamental to the successful and meaningful implementation of the DSM Directive and for widening public access to film heritage.

Overall, it seems evident that Art. 8 is compatible with the existing laws and CMO framework in the Netherlands. The process of implementing the DSM Directive into its national legislation is ongoing, and it is likely that a cut-off date will be included in

[719] English translation via Google Translate
[720] See Open Nederland, Creative Commons Nederland en Wikimedia Nederland (n.709)
[721] European Commission, "Better Regulation principles: at the heart of the EU's decision-making process" (European Commission, 15th April 2019) Available at: < https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2117> Accessed on 23rd May 2019

the national implementation to determine if a work is out-of-commerce, as was discussed by archivists in the ethnographic research.

7.6 The British Perspective

7.6.1 UK Legislation

Under UK law, there is no definition of 'cultural heritage'.[722] The UK does not have a specific national cultural heritage Act (although it has passed legislation in related areas such as ancient monuments, treasure and exporting cultural artefacts)[723] to accompany its international obligations.

UK copyright is protected under the Copyright, Designs and Patents Act 1988 ("CDPA"). S. 1(b) of the CDPA states that "sound recordings, films or broadcasts" are included in the works protected by copyright under the Act. As with the Netherlands, film is given specific attention in the Act. Section 5(b) states that:

> (1) In this Part "film" means a recording on any medium from which a moving image may by any means be produced.
>
> (2) The sound track accompanying a film shall be treated as part of the film for the purposes of this Part.

Section 13(b) relates to the duration of copyright for films. Section 13(b)(2)) states that:

> Copyright expires at the end of the period of 70 years from the end of the calendar year in which the death occurs of the last to die of the following persons-
>
> the principal director,
>
> the author of the screenplay,
>
> the author of the dialogue, or

[722] Hausler, Adach and Khalfaoui (n.166) 4
[723] Collections Trust, "UK cultural property legislation" (Collections Trust, 2020) List available at < https://collectionstrust.org.uk/cultural-property-advice/legal-contexts/uk-cultural-property-legislation/> Accessed on 1st April 2019.

> The composer of music specifically created for and used in the film

7.6.2 Collective Management of Copyright in the UK

Licensing schemes and organisations were regulated in the UK through the Copyright Tribunal, which was able to change the terms of the licence agreement and resolve disputes.[724] As was established in *BBC v Mechanical-Copyright Protection Society*,[725] the Copyright Tribunal does not have jurisdiction over foreign copyright works, but it has jurisdiction over licences which consist of UK works and foreign works. The Copyright Tribunal is an independent tribunal established under the CDPA, which

> aims to resolve UK commercial licensing disputes between copyright owners or their agents (collective management organisations) and people who use copyright material in their business.[726]

This framework was "considerably strengthened" by the Enterprise Regulatory Reform Act 2013, which amended the CDPA to enable the Secretary of State to require a licensing body to adopt a code of practice that adheres to the regulations.[727] The Secretary of State is also able to appoint a Licensing Code Reviewer to investigate disputes about compliance with an organisation's code of practice, and a Code Reviewer to review these codes of practice.

The collective management of film copyright in the UK is very limited, Directors UK represents film and TV directors only manages film rentals and cable transmissions; and The Authors Licensing and Collecting Society manages cable transmissions on behalf of writers.[728] This leaves the majority of audiovisual of film copyright without an appropriate CMO. As Kamina notes that

[724] Kamina (n.699) 240
[725] *BBC/BBCW v MCPS/PRS (ITV and Sky Intervening)* CT 129/16 2018
[726] Copyright Tribunal, "About us", Copyright Tribunal. Available at: < https://www.gov.uk/government/organisations/copyright-tribunal/about> Accessed on 21st May 2020
[727] Kamina (n.699) 241
[728] Kamina (n.699) 241

> [i]n the audiovisual field, and subject to intervention of musical rights societies, licensing bodies are in limited numbers, and the scope of their intervention is restricted.[729]

In the UK, there is no one sufficiently representative CMO for film, which presents an immediate issue with nationally implementing the out-of-commerce provisions. As with the Netherlands, this makes Art. 8(1) irrelevant, and leaves Art. 8(2), which enables CHIs to make use of these out-of-commerce works without a licence.

There is however national legislation relating to ECLs. The UK's Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014 established a system of government approval of ECL licences.[730] The UK IPO monitors compliance with the Collective Management of Copyright (EU Directive) Regulations 2016.[731]

However, the provision has not been utilised to date by anyone, due to concerns that the system is too complex.[732] It is important to note that, prior to 2014, the UK regulated CMOs to a lesser degree than many other EU and European countries, and White notes that the introduction of the ECL scheme needs to be understood in this context.[733] Furthermore, there have been concerns raised by Suthersanen that given its specific circumstances, "[i]n the case of the UK, it is submitted that giving organisations an ECL license may be akin to awarding a monopoly."[734]

It was noted in a parliamentary debate that the CMOs "together collect around £1 billion per year and have nearly 400,000 members."[735] It was also noted that:

> [there are] concerns about the operation of some collecting societies…They ranged from the levels of transparency for members to complaints by licensees about unfair practices and heavy-handed licensing tactics.

---

[729] Kamina (n.699) 241
[730] Guibault (n.388) 179
[731] IPO, "How the IPO regulates licensing bodies" Available at < https://www.gov.uk/government/publications/how-the-ipo-regulates-licensing-bodies/how-the-ipo-regulates-licensing-bodies> Accessed on 14th February 2019
[732] See 6.3
[733] White (n.630) pg. 17
[734] Suthersanen (n.2) 249
[735] *Hansard* HL Deb. GC169-185 26th March 2014. Available from: <*https://publications.parliament.uk/pa/ld201314/ldhansrd/text/140326-gc0001.htm*> Accessed 1st September 2020

> Complainants…had no choice to shop elsewhere for their copyright material if dissatisfied.[736]

S. 4(1) of the Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014 enables the Secretary of State to give a CMO authorisation to operate an ECL scheme. There are stipulations on this, including that the Secretary of State must be confident that the CMO's representation of relevant works is "significant",[737] that their code of practice is "consistent with the specified criteria" inclusive of non-members,[738] that there are "adequate" opt-out arrangements for rightholders,[739] and that the publication details and contacting of non-members to distribute fees is "appropriate".[740]

S. 16 of the Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014 provides the rightholder opt-out mechanism from an ECL or collective licensing scheme. Section 16 states that:

> (1) A right holder may exclude or limit the grant of licences under an Extended Collective Licensing Scheme or a proposed Extended Collective Licensing Scheme in relation to their rights in a relevant work by following the opt out arrangements...
>
> (2) A non-member right holder who wishes to exercise their right to opt out must provide the relevant licensing body with their name...

S. 16(4) sets out that within 14 days of receiving the notice of opt-out, the licensing body must acknowledge the opt-out, inform the rightholder of "the date from which the opt-out takes effect and, where a licence has been granted, of the termination date of the licence" and inform any licensees that the work has been opted out together and the termination date of the licence. S.16(5) sets out that the licence termination date cannot be later than six months after the opt-out, or nine months where the licensee is an educational establishment, and the Secretary of State

[736] *Hansard* (n.735)
[737] S.4(1)(b) Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014
[738] S.4(1)(c)
[739] S.4(1)(d)
[740] S.4(1)(e)

allows a later extended termination date. S.16(6) requires the CMO to maintain a public list of the names of non-members who have opted out,[741] any works that have been opted out,[742] and anyone whose works are outside of the scheme through contractual arrangements with the licensing body.[743]

7.6.3 The UK's Withdrawal from EU Membership

The UK has chosen not to implement the DSM Directive prior to leaving the EU. However, there is no barrier to the UK choosing to implement domestic legislation after it leaves the EU that mirrors in substance the provisions of the DSM Directive, including Art. 8. Indeed, as the UK will be able to implement any legislation it chooses, the UK government could choose to implement legislation that addresses the issues with Art. 8 discussed in this thesis.

In preparation for leaving the EU, the UK government has approved six statutory instruments relating to intellectual property, under s.8(1) and para. 21(b) of Sch 7 of the European Union (Withdrawal) Act 2018, including the Intellectual Property (Exhaustion of Rights) (EU Exit) Regulations. The Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations 2019 concerns copyright law, and it removes or amends any reference to the EU, EEA or member states in current UK copyright legislation.

The amendments or removals are designed to limit the impact on UK copyright law. As is stated in s.5(1) European Union (Withdrawal) Act 2018:

> The principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after exit day… [and in s.6(1)] A court or tribunal (a) is not bound by any principles laid down, or any decisions made, on or after exit day by the European Court, and (b) cannot refer any matter to the European Court on or after exit day.[744]

Therefore, following the withdrawal from EU membership, the UK's national copyright legislation (and wider intellectual property legislation) will be separate to the EU copyright regime. Despite the fact that the EU will no longer have supremacy

[741] S.16(6)
[742] S.16(6)(b)
[743] S.16(6)(c)
[744] s.5(1) European Union (Withdrawal) Act 2018

over the UK, the supremacy of EU law will still apply to law passed before the UK leaves the EU[745] and retained EU law, principles of EU law and case law will continue to be referred to for questions of the "validity, meaning or effect of any retained EU law".[746] Likewise, a UK court or tribunal "may have regard to anything done on or after exit day by the European Court, another EU entity or the EU" as far as it is relevant to the matter in question.[747] The UK can therefore choose which approach it wishes to take in regards to copyright and in particular out-of-commerce works, and can refer to existing EU legislation and case law.

The UK Government was asked whether it plans to implement the DSM Directive. Chris Skidmore, MP replied that:

> …the United Kingdom will not be required to implement the Directive, and the Government has no plans to do so. Any future changes to the UK copyright framework will be considered as part of the usual domestic policy process.[748]

This indicates that, as it stands, there are no intentions within the UK government to implement similar changes to those that the DSM Directive will bring to the EU. This is unfortunate, but it seems likely that this since will be revisited once the transition period ends in January 2021.

Likewise, CHIs "will not be able to rely on the orphan works exception from 1 January 2021" and also "remove any orphan works currently placed online under the exception". [749] UK CHIs will instead have to apply for a licence under the UK's Orphan Works Licensing Scheme.[750] This presents a significant disadvantage to UK CHIs compared to their EU counterparts, as they cannot make out-of-commerce

[745] s.5 (2) of the European Union (Withdrawal) Act 2018 states that "the principle of the supremacy of EU law continues to apply on or after exit day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day."
[746] S.6(3) o the European Union (Withdrawal) Act 2018 states that: "Any question as to the validity, meaning or effect of any retained EU law is to be decided, so far as that law is unmodified on or after exit day and so far as they are relevant to it—
(a)in accordance with any retained case law and any retained general principles of EU law, and
(b)having regard (among other things) to the limits, immediately before exit day, of EU competences."
[747] S.6(2) o the European Union (Withdrawal) Act 2018 states that: "a court or tribunal may have regard to anything done on or after exit day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal."
[748] Copyright: EU Action: Written question – 4371, 21 January 2020. Available at: < https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-01-16/4371> Accessed on 21st May 2020
[749] UK Government (n.317)
[750] See Chapter 3 for discussion.

works available or rely on the Orphan Works Directive. For film archives, including the BFI,[751] who have made use of the Orphan Works Directive, they will need to take down these works and instead seek a UK licence.

7.6.4 British National Implementation: Towards a Solution?

Despite the concerns concerning loss of funding and experts, withdrawal from EU membership can also offer the UK scope to legislate in a way that protects its cultural heritage and widens public access. There are other options to adopting an ECL scheme if the UK wishes to implement national provisions that would enable UK CHIs to make use of out-of-commerce works and make them accessible.

For instance, Suthersanen at the ALAI Congress 2017 commented that another option is to

> investigate the possibility of incorporating the concept of abandoned/ unclaimed property within copyright law – the *bona vacantia* concept as it exists under common law… it is a legal fiction to claim that collecting societies and/or governments have a mandate to collect royalties in the absence of owners. Incorporating abandoned property concepts into copyright law shifts the responsibility and burden of property claims back to authors and rightholders.[752]

Assets that are *bona vacantia ("vacant goods")* pass to the Crown. This does not occur often, as usually there are successors to assets, including copyrights. Copyrights can pass to the Crown as *bona vacantia*, and the Crown "may sell the rights or retain them to receive royalty payments."[753]

This is an intriguing option. However, it seems more advantageous for a national scheme in the UK to mirror the licensing mechanism in the EU, to ensure legal compatibility and practical knowledge-sharing for CHIs across the EU and the UK. Whilst *bona vacantia* offers a potential solution, it seems best to first attempt to

[751] A search of the EU IPO Orphan Works Database on 11th December 2020 shows that the BFI (registered as the British Film Institute) has registered 279 orphan works. See EU IPO, "Orphan Works Database" (EU IPO, 2020) Available at:< "https://euipo.europa.eu/orphanworks/> Accessed on 11th December 2020
[752] Suthersanen (n.2) 248
[753] Tim Padfield *Copyright for Archivists and Records Managers* (Facet Publishing, 2015), 98

implement national legislation in the UK that aligns with EU copyright law, as ongoing commerce and relationships is likely to rely on compatibility.

In summary, out-of-commerce works will continue to be a problem for UK film archives after it leaves the EU. Strong working relationships and programmes have been built up in the EU between film archives that included the UK as a strong contributor; and so, it is likely that the UK individual film archives would continue to share knowledge and working practices with EU colleagues.

However, once the EU Member States have implemented the DSM Directive and the UK chooses not to, their respective copyright legal regimes will diverge. They will diverge in relation to out-of-commerce works, with the UK having no similar legislation enabling these works to be made available by CHIs for non-commercial purposes. If the UK fails to adopt similar legislation, or fails to revive the ECL scheme, UK CHIs and film archives will be severely hindered compared to their EU counterparts.

7.7 Conclusion

This chapter has provided a comparative legal review of the UK and the Netherlands, in order to consider possible implementation of Art. 8 from both the Dutch and UK perspective. The attitudes towards cultural heritage and legal compliance in both countries are similar, and they have similar legal cultures, which favour the rule of law. Cultural heritage is valued highly in both countries, but it is the Netherlands which has a social culture of engaging with heritage items and narratives more so than the UK. This suggests that people in the Netherlands would benefit especially from Art. 8, as CHIs in the Netherlands could make a lot of their cultural heritage available online to view.

Neither country has a sufficiently representative CMO for film, and therefore film archives wishing to utilise Art. 8 would have to use the fall-back exception. The UK has an existing ECL scheme in place, whereas the Netherlands does not. However, the trust and accountability of CMOs in the Netherlands appears to be especially well established, meaning that a CMO appearing for film would have a strong chance of being successful.

This chapter has also considered the issue the UK leaving the EU in relation to implementation of the DSM Directive. It has been considered whether and how the UK could choose to implement national legislation that aligns with the DSM Directive and Art. 8 in particular. Out-of-commerce works will remain a problem for UK film archives now that it has left the EU. However, once the EU Member States have implemented the DSM Directive and the UK chooses not to, their respective copyright legal regimes will diverge. They will diverge in relation to out-of-commerce works, with the UK having no similar legislation enabling these works to be made available by CHIs for non-commercial purposes. If the UK fails to adopt similar legislation, or fails to revive the ECL scheme, UK CHIs and film archives will be severely hindered compared to their EU counterparts.

The following chapter will provide an overview of the film archive case studies in the ethnographic research.

Chapter 8 Case Studies

8.1 Introduction

The preceding chapters have considered Art. 8, CMOs and ECLs from a doctrinal and comparative legal perspective. The thesis now turns to the ethnographic research conducted in the chosen film archives. The ethnographic research was conducted in order to explore the existing archival practices in place, and in order to understand how out-of-commerce works are likely to be incorporated into these film archival practices.

The BFI (the British Film Institute), EYE (the Netherlands' national film archive) and MACE (Media Archive for Central England) were the chosen film archives studied during the ethnographic research. As the national film archives of the UK and the Netherlands respectively, the BFI and EYE were chosen for this reason. MACE is a regional UK film archive and was selected to provide a contrast with the national film archives, as national film archives often receive more funding and have access to legal resources than regional film archives do.

This chapter provides a contextual overview of the three film archives studied in this thesis. These overviews provide the necessary foundation for the following chapter, in which a copyright regime of archival practices will be proposed.

A wider socio-historical film archival context in which they are placed will also be provided, including the dominant tensions within the field of film archiving. These are issues of preservation vs. access; the archivist and curatorial choice; and copyright tension. This review of the film archival literature provides relevant discussion that contextualises many of the meanings, competences, and materials found in the archives in the ethnographic research. As will be discussed further, these existing issues impact on the ability of film archives to successfully incorporate Art. 8 into archival practices.

This chapter will begin by exploring film archiving as practice; film archiving history and FIAF (International Federation of Film Archives); preservation vs. access; the archivist and curatorial choice; and then focus on copyright tension within archival

practice. It will then move to consider the BFI; then MACE; and finally, EYE as case studies.

8.2 Socio-Historical Context

Though it is beyond the scope of this thesis to offer a detailed socio-historic[754] contextualisation of film archiving, it is useful to consider some of the cultural narratives that have shaped the film archives of Europe. Narratives of public access, the need to adapt to evolving digital trends and curatorial choice or agency were both implicit and discursively expressed in the ethnographic research. These cultural narratives offer the ideological basis for many of the practices observed in the film archives.

The film archival field has undergone significant changes to its practices and workflows in recent years, largely due to the shifting of formats to digital,[755] and to an enhanced focus on access as opposed to preservation. This research is therefore timely within the archival sector, given the "technological transition from analogue to

[754] "The historical context refers to political, social, environmental, and cultural decisions or events occurring over time that can be described and linked to the situation under study." See Lisa M. Given *The Sage encyclopedia of qualitative research methods* (SAGE, 2008)

[755] The history of film archival practice can be clearly delineated into the shifting film carrier mediums used as the changing film carrier medium dramatically changes both archival practice and archival aims throughout the last century. As a result of the shifting formats of film, there is a strong emphasis within film archival practice on the film carrier material itself (e.g., celluloid film or a DVD), as well as the content contained on the material.
The oldest films were shot on nitrate film. However, it became clear after a series of fires in which film collections and cinemas burned down, that due to its chemical instability nitrate film was extremely dangerous and "very vulnerable", see Bregt Lameris *Film Museum Practice And Film Historiography: The Case of the Nederlands Filmmuseum* (1946-2000) (Amsterdam University Press, 2017) 13. This therefore led to an urgent focus within film archival practice to preserve the nitrate films, and to store them safely. This culminated in the infamous call that "nitrate won't wait!" and that something had to be done urgently. It has been estimated that between 75-80% of silent film is now lost, see Penelope Houston, Keepers of the Frame: The Film Archives (British Film Institute, 1994) 15.
The move from nitrate to acetate caused its own problems: vinegar syndrome. It was in the late 1980s that the Western film archives noticed the development and spread of vinegar syndrome, see Houston (n.755) 4. Once more, film archival practice had to rapidly adapt to the decay of the acetate films in their collections, a format which was supposed to preserve the films much longer than nitrate. It has proven to be this way with all other formats: each is subject to decay and the risk of the inability to view films due to the obsolescence of the technology needed.
The film formats of the time have also included VHS tapes, BetaMax tapes, DVDs and now a change to digital films, sometimes stored only on hard drives. This in turn has drastically impacted on how films are viewed and enjoyed. People no longer need to use film projectors or heavy tape equipment to watch films; they can now watch films on their mobile devices, see Martine Beugnet "Miniature Pleasures: On Watching Films on an iPhone" in Jeffrey Geiger and Karin Littau (eds.) *Cinematicity in Media History* (Edinburgh University Press, 2013).
This affects the role of the archive and its relationship with its users, as people do not need to engage with film archives or cinemas to view (some) films. Therefore, film archiving practices have adapted, through necessity, to manage these parallel streams of work, as each different film medium requires different preservation and conservation efforts. As a result, film archival practice can be thought of as "hybrid", due to these parallel digital and analogue films and their workflows, see Fossati (n.33*)* 14 Even films that are digital from production, the archival workflow "still relies on tools and expertise that were typical of the analog film past, see Fossati (n.33) 41.

digital film", as it is during this transition that the "dialogue" between academics and archivists can be "particularly valuable for both theory and practice".[756]

The current shift to digital formats, digitisation of older formats and born-digital films does not represent a freedom from the difficulties of previous film formats. It also relies on the notion of the digital sphere, which is not safe from risk. For example, the digital landscapes of various countries operate differently, with different freedoms and access.[757] There is not one, universal "digital sphere" that all people have access to where the files and artefacts can be stored, catalogued and stored safely forever.

Film archival practice also follows the changing formats and technologies used in film production. Film scanning techniques continue to follow the development of new technology in film production, such as computational photography.[758] This has resulted in the need to adapt to ever-changing technology formats, and to repeatedly change processes and workflows to simultaneously accommodate films in earlier formats, and to adapt to new formats.

The current archival practices have been adapted by the "shift to a digital culture", which has been fuelled partially by funding requirements.[759] This has all culminated in substantial changes to archival practices since the beginning of the digital turn in the past two decades; and Fossati comments that presently the larger Western film archives "have reached a sufficiently high competence level and are already actively integrating the new practices in their policies and workflows."[760]

8.2.1 Film Archiving as Practice

Europeana is a data aggregator and portal for European cultural heritage, currently providing access to more than 50 million items online from the collections of thousands of CHIs across the EU,[761] tasked by the European Commission.[762] The

[756] Fossati (n.33) 147
[757] Rick Prelinger "Archives of Inconvenience" in Andrew Lison, Marcel Mars, Tomislav Medak and Rick Prelinger (eds.) *Archive* (U of Minnesota Press, 2019) 24
[758] Barbara Flueckiger, Claudy Op den Kamp and David Pfluger "A Material-Based Approach to the Digitization of Early Film Colours" in Giovanna Fossati, Victoria Jackson, Bregt Lameris, Elif Rongen-Kaynakçi, Sarah Street and Joshua Yumibe (eds.) *The Colour Fantastic: Chromatic Worlds of Silent Cinema* (AUP, 2018) 249
[759] Op den Kamp (2018) (n.8) 24
[760] Fossati (n.33*)* 84
761 Europeana (n.181)
[762] Kenny (n.181)

European Commission signalled their intent to digitise and make the collections of all EU CHIs available online in 2006, and the Europeana portal was launched in 2008.[763]

EU film heritage is cared for by film archives across the EU. Each Member State has a national film archive, and there are many other regional or specialist film archives. Film archival practices have changed in recent years largely due to the shifting of formats to digital, and to an enhanced focus on access in addition to as opposed to preservation. The power of the archive and its ability to drastically shape historical and cultural narratives has been discussed by a number of scholars.[764]

Archiving involves collecting, cataloguing, preserving, conservation and digitisation activities, and also exhibition and display of the items. Film archives aim to utilise "visual reproduction techniques to render the objects in their collections accessible again… [and] duplicate films in order to render them visible."[765] Creating duplicate copies requires the ability to store and preserve these copies, as well as having the technology to play the films back and therefore "the power of the moving image is matched only by its inconvenience."[766]

Film archives differ substantially in their size, funding, structure, aims and collections. The organisational structure of the archive as an institution has a substantial impact on its collection, and consequently the collections of public or non-profit archives will usually be either national or regional, regardless of whether they own the copyright for these films.[767] Non-profit film archives aim to preserve film heritage, for the public today and for the future. They also wish to provide public access to their collections. Non-profit film archives are set up with the intention to collect, preserve, conserve, restore and share film heritage with the public. These archives can be national, regional, or set up to care for particular collections.

---

[763] Borghi, Erickson and Favale, (n.180) 137. There is more extensive discussion of this background in Borghi and Karapapa (n.4)

[764] See as an example in relation to news reels and the power of the archive, Samuel Sieber "The Politics of Archives. Media, Power, and Identity" in Kornelia Imesch, Sigrid Schade and Samuel Sieber (eds.) *Constructions of Cultural Identities in Newsreel Cinema and Television after 1945* (Transcript Verlag, 2016)

[765] Lameris (n.755) 13

[766] Rick Prelinger "The Future of Memory: Disrupting the Archives to Save It" (FIAF Symposium Presentation, 2015) Available at: < https://www.fiafnet.org/im ages/tinyUpload/E-Resources/Reports-Glossaries-And-Papers/Sydney-Symposium/Sydney-Symposium-slideshows/Rick%20Prelinger-slideshow.pdf> Accessed on 21st April 2019

[767] Op den Kamp (2018) (n.8) 22-23

Sometimes they will also collect film related paraphernalia, such as film posters, scripts, photos etc. Other collections are predominantly film collections.

Film archival practice is adapting to facilitate "new online participatory platforms" that Fossati describes as "crowd film archiving" or "crowd curatorship"; which involves downloading and uploading of content and remixing of this audiovisual content.[768] This new "crowd film archivist" can complement the traditional film archival practice and film archivists and can "result in new possibilities and reinvigorated force".[769] In doing so, the prior relationship between archivists and users is redefined; and so is the relationship between access and curatorship.[770] YouTube is a prominent example of such blurring, as users upload and comment on an extraordinarily large amount of audiovisual content, a lot of it amateur material. The EnDOW Community is an example of crowd-sourced archival activity.[771]

8.2.2 Film Archival History

There were no official film archives until the mid-1930s,[772] with the first European film archive being founded in Sweden in 1933.[773] From the start, there has been a focus on international organisation and collaboration within film archives. Federation of Film Archives ("FIAF") is the leading international body for film archives. The founders of the FIAF in 1938 included the BFI.[774] FIAF now includes 166 institutions in 75 countries.[775] Its missions include: to promote the creation of moving image archives in countries which lack them; and to seek the improvement of the legal context within which film archives carry out their work.[776]

It is archives as institutions that are members or affiliates of FIAF, not the individual archivists themselves. This signals the clear organisational power and agency of the film archives, and the influence that the institutional agency has on the field and

[768] Giovanna Fossati "Found Footage: Filmmaking, Film Archiving and New Participatory Platforms" in Marente Bloemheuvel, Giovanna Fossati, Jaap Guldemond (eds.) *Found Footage: Cinema Exposed* (AUP, EYE Film Institute Netherlands, 2012) 178
[769] Fossati (2012) (n.768) 180
[770] Grazia Ingravalle, Remixing Early Cinema: Historical Explorations at the EYE Film Institute Netherlands, (2015) *The Moving Image: The Journal of the Association of Moving Image Archivists* 15(2) 87
[771] See 3.6.3 in this thesis.
[772] Houston (n.755) 2
[773] Houston (n.755) 17
[774] Houston (n.755) 18
[775] FIAF, "FIAF's Mission" Available at: <https://www.fiafnet.org/pages/Community/Mission-FIAF.html> Accessed 17th May 2019
[776] FIAF, "FIAF's Mission" (n.775)

archival practices as a whole. It is noticeable that, unlike in some other professionals, the international collaboration and organisation of the field today remains

> institution-oriented rather than traditional 'professional associations'… in our world we have to function as parts of organizations rather than just as individuals.[777]

Preservation of the film was the focus for FIAF, as well as facilitating international archival collaboration. Its founding constitutional agreement sets out that it will:

> …consist of national, semi-official and recognized private film archives. These organisations shall have for their prime object the conservation of films, the compilation of national and private film records and, if necessary, the projection of films for a non-commercial purpose, either historic, pedagogic or artistic.[778]

The inclusion of "non-commercial purpose" demonstrates that film archives were already making distinctions between commercial and non-commercial uses of works, and this will be a benefit to incorporating out-of-commerce works into their practices.

Likewise, as FIAF members, both the BFI and EYE are bound by FIAF's Code of Ethics,[779] which states:

> 3.1. Archives recognise that the materials in their care represent commercial as well as artistic property, and fully respect the owners of copyright and other commercial interests. Archives will not themselves engage in activities which violate or diminish those rights, and will try to prevent others from doing so.
>
> 3.2. Unless and until commercial rights in items from their collection shall have expired or been either legally annulled or formally vested in their institution, archives will not exploit those items for profit.

[777] Ray Edmondson, Is Film Archiving a Profession? (1995) 7(3) *Film History*, pp. 245-255, 247
[778] FIAF, "Agreement for the International Federation of Film Archives", 17 June 1938. Available at: <https://www.fiafnet.org/images/tinyUpload/History/FIAF-History/Digitized-documents/Constitutional-papers/Original%20FIAF%20Agreement.pdf> Accessed 17th May 2019
[779] FIAF, "FIAF Code of Ethics" FIAF, "FIAF Code of Ethics" Available at: < https://www.fiafnet.org/pages/Community/Code-Of-Ethics.html> Accessed on 17th May 2019

The above clearly illuminates the importance copyright law has within film archiving, and the care which FIAF go to ensure that rightholders are protected. What is particularly relevant to this research is the notion that "screenings will not knowingly conflict with concurrent or imminent commercial exploitation of the same materials". This concept is very similar to that of out-of-commerce works. This could well be interpreted as FIAF's Code of Ethics prohibiting exploiting works that are in commerce, but there being no prohibition on utilising out-of-commerce works.

MACE is not a member of FIAF, but it is bound by a very similar code of ethics through its membership of Film Archive UK ("FAUK"). The UK film organisation that comprises the BFI and the regional film archives, Film Archive UK, sets out its joint statement of principles.[780] In the document that expands on these principles it echoes the 1998 FIAF Code of Ethics, including that:

> [a]rchives recognise that the materials in their care represent commercial as well as artistic property, and fully respect the owners of copyright and other commercial interests. Archives will not themselves engage in activities which violate or diminish those rights and will try to prevent others from doing so.[781]

The extent to which the archives distinguish between commercial and non-commercial uses and the revenue they generate from commercial uses of their collections will be explored later in this thesis.

8.2.3 Preservation vs Access Archival Tension

Within film archival practice is a long-running tension between preserving films and providing access to them. As funding, time and staffing obstacles inevitably require tasks to be prioritised, for some archives and some individual archivists, this means choosing whether preservation or access to the films is of more importance. Film preservation activities cannot easily preserve all of the films within an archive; some films must be prioritised over others. Film preservation is a primary activity within film archives, as is film restoration. Stoddard comments that:

[780] FAUK, "Moving History: Towards a Policy for the UK Moving Image Archives", FAUK, 3 Available at: < http://www.filmarchives.org.uk/information/publications/ > Accessed 17th May 2019
[781] FAUK, "The Film Archive Forum's Statement of Principles", FAUK, 8. Available at: < http://www.filmarchives.org.uk/wp-content/uploads/2013/03/mhoving_historypt2.pdf> Accessed 17th May 2019

> "film preservation" generally refers to the practices used to prevent the physical ruin of images on celluloid, whereas "restoration" refers to the practices aimed at reversing such degradation.[782]

Some film restorations will be easier than others, and some can be very costly. For some archives, a lack of funding significantly hampers preservation efforts, and for others it is a lack of expertise and technical equipment.[783]

The preservation of films is "costly and the least visible part of the exercise", which has led to increasing pressure on film archives to provide access to their archives so that the public may see them.[784] This shifting focus to access as opposed to preservation has become stronger in recent years. Indeed, it is usually expected by film archive funders and the public that film archives will utilise the opportunities to provide digital access to their films.[785] The focus on access has therefore become almost a "talisman" for film archives.[786]

For some, the fundamental tenet of the "archive" is that the public can access its collection. Access alone is not sufficient for some commentators, who instead demand what can be thought of as meaningful access. Hammond et al. note in relation to the BBC's "repository of digitised programming" that it only becomes an "archive":

> with the addition of a layer of usable metadata. In other words, indexing or cataloguing conducted with a degree of expertise is a prerequisite for this content to become widely accessible.[787]

The ability to easily navigate the archive to find desired material, in their view, becomes essential to the notion of this being an "archive", with meaningful access at the core.

---

[782] Matthew Stoddard "Film Preservation and Restoration" in Gabbard, K. (ed.) *Oxford Bibliographies in Cinema and Media Studies*, (OUP, 2018)
[783] Houston (n.755) 90
[784] Houston (n.755) 3
[785] Fossati (n.33*)* 87
[786] Houston (n.755) 90
[787] Kim Hammond, George Revill and Joe Smith "The digital citizen: working upstream of digital and broadcast archive developments" in Simon Popple, Andrew Prescott, Daniel H. Mutibwa (eds.) *Communities, Archives and New Collaborative* Practices (Bristol University Press, 2020) 144

8.2.4 Curatorial Choice

CHIs wield power and influence, through their positions as "authoritative expert[s]".[788] The human agency of individual archivists has been highlighted by scholars as a "consistently neglected and under-researched component in archival access".[789] Op den Kamp comments in her compelling research that "the most important point to take away … relates to the agency of the archivists".[790]

There is no passive or neutral archival practice, as engaging in archival practice "is to intervene in history's flow". [791] Curatorial choice impacts on the collection, how the public interacts with it, and which artefacts are exhibited, and which are not. Consequently, for Hammond et al, "any creative act of curatorship is always and equally an act of silencing and forgetting."[792] Film archivists choose which films should be preserved; which films will be restored (and how this will be done); and how these films will be exhibited "based on different interpretations and conceptualizations of film's nature and ways of approaching film archival practices."[793]

For instance, when Hoos Blotkamp was the director of EYE, she was "appalled by the huge backlog in preservation" of the films in the collection, as some films were decaying.[794] As Delpeut recounts,

> [t]aste played a major role in her thinking about collections. Since it was financially impossible to preserve everything, preservation was a method of establishing a collection, she realized.[795]

Limitations on finances and time meant decisions had to be made about what would be preserved, and which items would work best together as a collection. Personal preference and the views of history at the time guide these decisions. These acts of preservation are thus simultaneously acts of forgetting or excluding films or

[788] Taylor and Gibson (n.252) 417
[789] Op den Kamp (2018) (n.8) 119
[790] Op den Kamp (2018) (n.8) 160
[791] Prelinger (2015) (n.766)
[792] Hammond, Revill and Smith (n. 787) 146
[793] Fossati (n.33) 13
[794] Peter Delpeut "An Unexpected Reception: Lyrical Nitrate Between Film History And Art" in Marente Bloemheuvel, Giovanna Fossati, Jaap Guldemond (eds.) *Found Footage: Cinema Exposed* (AUP, 2012) 220
[795] Delpeut (n.794) 220

individuals from the archive. There are many examples of this historically, as has been discussed in Chapter 3.

To briefly reiterate some of the historic exclusions from the archive, collections have traditionally focussed more on male filmmakers than women, meaning that the record of women within film in the past century has been significantly diminished. Hill and Johnston have focussed on issues of cataloguing for women filmmakers within archives and have called for film archives to include this in the metadata when cataloguing film.[796] There are similar concerns that amateur films remain an "afterthought" within film archives, but in the last twenty years this has changed, with amateur and home films receiving more attention. This has been directly correlated to increased access and cataloguing of these films within national and regional film archives,[797] which emphasises the power of the film archive in its role as curator and gate-keeper.

The focus on national collections, often due to funding restrictions, can likewise lead to the exclusion of certain communities. Andersson and Sundholm's research into immigrant cinemas in Sweden highlighted to them the power that the archive wields.[798] They view these immigrant films as "more precarious" than experimental films, on the basis that the Swedish archive does not view them as Swedish and therefore within its preservation remit.[799]

This impact on the historical narrative, and the exclusion of individuals and certain groups, is significant to this thesis as Art. 8 could be utilised to begin to remedy these historical exclusions. In facilitating out-of-commerce works within CHIs being made available to the public, there is an opportunity for CHIs to promote the marginalised films within their collections, and to encourage public enthusiasm for engaging with these films. This can be combined with crowd curatorship, encouraging volunteers to help identify and correctly catalogue films in the collections which have been ignored.

[796] Hill and Johnston (n.205)
[797] Hill and Johnston (n.205) 2
[798] Andersson and Sundholm (n.216) 117
[799] Andersson and Sundholm (n.216) 124

8.2.5 Copyright Tension with Archival Practice

Films subject to copyright protection require the rightholder's permission before they can be used, subject to some exceptions and limitations including fair dealing.[800] This therefore creates a substantial hurdle for film archives in providing public access to the films in their collection protected by copyright. Given the increasing desire to widen access, the tension with copyright is subsequently further heightened.

Copyright has always had a significant hand in influencing film archival practice and the collections of film archives, and the copyright status of the works is a significant issue for the CHIs. For the majority of CHIs, the cost and complexity involved with determining the copyright status of a work and its copyright holder, and then locating that copyright holder and negotiating with them, has proven to be simply unworkable. As Jansens and Tryggvadottir note, the large numbers of works to be licensed and the complexity and cost involved with each one is a major issue for CHIs in digitising these works.[801]

It is highly costly to conduct the necessary research and obtain permission or licences for usage. The UK IPO has found it to be "cost prohibitive" to ascertain whether older films are subject to copyright, due to the duration of film copyright depending on the deaths of four people,[802] therefore a large majority of public domain films remain unavailable due to their uncertain copyright status.[803]

Fossati notes that approximately the first forty years of film archival practice was "quite inaccessible and, at times, even secretive, partly due to complex legal issues."[804] These issues included films within the archive that were usually owned by commercial production companies, who could (and sometimes did) exert their copyright over these films.[805] This early tension with copyright law has arguably shaped the relationship that archives as institutions and individual film archivists

[800] Fair dealing, or fair use as it is known in the US, is the term for limited exceptions to copyright, such as private studying, that do not require the rightholder's permission
[801] Janssens and Tryggvadottir (n.30) 30
[802] 13(b)(2) Copyright, Designs and Patents Act 1988
[803] IPO "Copyright and the Voice of the Public Domain: An empirical assessment) IPO 2015/11 (Crown Copyright, 2015), pg. 8
[804] Fossati (n.33) 17
[805] Fossati (n.33) 17

have with it, which in some cases involves copyright fear or anxiety. It is possible that this accounts for institutional wariness of copyright for some film archives today.

The tension between archival practice and copyright is most noticeable in the wariness of potential copyright infringement. On one view, this demonstrates a respect to the legal property rights of the rightholder, and a desire not to infringe upon them. On another view, there are archivists and scholars who have critiqued this, noting that

> [w]e are still excessively deferential to non-existent claims from unidentified rightsholders who may not even exist… Most archivists are socialized from the beginning of their professional training to assume that archival materials are all someone else's intellectual property, which may not always be the case.[806]

It is clear from this criticism that copyright is experienced by some archivists as something that is imposed upon them and is not regarded as a mutually beneficial relationship. It also speaks to the notion that all works are still subject to copyright, and that there is a rightholder waiting to be identified.

The issue of "copyright fear" can substantially impact on CHIs and lead them to adopt more risk-averse policies. This is often grounded in concerns about reputational damage if they inadvertently infringe copyright, or a concern that they will be sued by a rightholder who later appears. CHIs, and organisations more generally, differ in their "ability to respond to risk", affected by factors such as financial and legal resources, and legal knowledge within the CHI.[807] Consequently, often it is the larger or national CHIs who are able to accept more risk than smaller CHIs.

Using film from an archive, either to screen as it is or to incorporate into new copyright works, requires archivists to engage with copyright law. This is especially problematic for non-profit public film archives, as they usually own the copyright to an extremely small proportion of their films, whilst owning or holding on deposit the

[806] Prelinger (2015) (n.766)
[807] Stobo, Patterson, Erickson, and Deazley (n.58)

material films.[808] This is further complicated by the fact that the majority of films within film archives are still protected by copyright.[809]

Evidence of copyright's impact on film archival practice can be found in the fact that some archives choose not to list their entire catalogues online, as "the rights status is uncertain and researching the status of the rights for each would be too expensive."[810] Once more, this reluctance due to copyright concerns conflicts with the goal to provide widened access to films. Fossati comments that the reluctance of film archives to make their digitised material available online is likely to stem from a combination of factors including fear of infringing copyright; to act as a "chaperone" between the film and user; and to maintain their relevance.[811]

For some film archivists, the issue of copyright is, more precisely, one of possible rightholders reappearing in the future. This leads to different archival practices: some film archives and individual archivists choose to avoid sharing access to works with uncertain copyright; and other archival practice involves "hiding" their contents from potential rightholders, "who would repossess materials and bureaucrats who might not understand the importance of what we do."[812]

This concept of "repossessing the material is an interesting one, particularly in the context of out-of-commerce works. It suggests that legal rightholders do not "own" or "possess" the films once they have fallen out of use and exist then only in the archive. It also challenges the notion that these films can be "possessed" or reclaimed by rightholders at a later date. This discourse of legal copyright ownership as being in a state of flux does not align with the legal view of out-of-commerce works, in which they may not be commercialised, but they nevertheless remain the intellectual property of the rightholder. This view of works having a changeable copyright status has more parallel with orphan works, as discussed in Chapter 3.

[808] Op den Kamp (2018) (n.8) 26
[809] Op den Kamp (2018) (n.8) 52. As a further example, for the Dutch *Images of the Future* project that EYE was involved in, copyright fundamentally shaped its outcome, as only approximately 2% "of the overall digitized content…could be made available online for the general public." see Fossati (n.33)137.
[810] Fossati (n.33)132
[811] Fossati (n.33) 135-6
[812] Prelinger (2015) (n.766)

Due to its impact, Op den Kamp regards copyright "as a filter that helps shape access to archival film in ways that both impede *and* facilitate."[813] She summaries the key issues that copyright poses for film archives:

> copyright term extension, elimination of mandatory formalities, and multiple individuals determining copyright expiration are some of the legal causes underlying the orphan works problem that impacts archival practice directly.[814]

She also notes the administrative and political factors that impact on archival practice, being the often-unclear origins of archival collections; a lack of adequate information; and "a structural lack of the necessary man-power and financial infrastructure" within non-profit archives needed to allow the time to be spent researching film works individually.[815] Consequently, it is clear that copyright shapes archival practice, but it is not the only factor to do so. Copyright concerns exist within a network of other issues and tensions. Its impact therefore needs to be considered in the wider archival context.

These copyright restrictions and challenges directly shape film archival practice and the collections of the archives. That does not mean that in all cases and for individual archivists that copyright concerns will prevent a particular use or film exhibition. Particularly seen from Dutch film archivists and scholars, there is sometimes a resistance to copyright and its impact.

Concerning orphan film works and diligent search, EYE has taken a more "pragmatic approach" to this. Their approach means "that a diligent research should only focus on consulting those sources that are relevant…in some cases that means not consulting *any* sources."[816] As Bout has explained from EYE's perspective,

> [t]he orphan works issue is not a recent phenomenon. As long as there have been film archives, there have been "orphan works". They just weren't called that; they were the films in the archive of which nobody had any idea who made them and/or when, or sometimes even what the title was. So, they were

[813] Op den Kamp (2018) (n.8) 14
[814] Op den Kamp (2018) (n.8) 78
[815] Op den Kamp (2018) (n.8) 79
[816] Leontien Bout "Dealing With Orphan Works: A Dutch Film Archive's Perspective" Conference Presentation, EYE Filmmuseum, July 2017, pg. 13 Available at: < http://diligentsearch.eu/wp-content/uploads/2017/11/L-Bout-presentation-orphan-works-a-film-archives-perspective.pdf> Accessed on 19th February 2018

> just used for whatever purpose and nobody cared, at least no rights holder ever came forward in EYE's case. Of course, this practice was technically in breach of copyright, but as stated, this never led to any problems.[817]

The mention of "Of course, this practice was technically in breach of copyright…" echoes the discourse or meaning of copyright resistance and departure from copyright adherence, which will be discussed in much more depth in Chapters 9 and 10. This is an example of film archival practice in which, despite the use not being legally sanctioned, film archivists will conduct a risk analysis and decide to do so anyway, thereby "the archive plays an active role in shaping access to its holdings."[818] This approach is not seen as commonly in countries such as the UK and the US, where the risk and fear of litigation is greater.

Within the film archival sector, there is some active resistance to copyright, and concern about its ongoing expansion and evolution. Prelinger has spoken about his significant concerns on expanding copyright legislation, including the notion of ECLs. He has noted that:

> ECL is a real problem…Who will these collective licensing organizations be, how much will they cost to administer, and who will get the money? And why should individuals go through the same process that a major publisher or studio must go through? ... Questions of Aboriginal, indigenous or community cultural and intellectual property rights, and the moral rights of creators, all pose issues that go far beyond the bounds of copyright.[819]

Here, it is evident that for some film archivists the changes within European copyright law, including ECLs and out-of-commerce works, are not well reconciled with film archiving. Similarly, these cultural indigenous and moral concerns relating to film reuse and access for some archivists "go far beyond the bounds of copyright". Therefore, it could be that copyright, or at least a focus more on the commercial exploitation of copyright divorced from its spiritual, cultural or moral context, is not sufficient to address these concerns.

[817] Bout (n.816) 2
[818] Op den Kamp (2018) (n.8) 171
[819] Prelinger (2015) (n.766)

The above discussion emphasises the tension between copyright and archival practice, and how either copyright adherence or copyright tension shapes archival practice. The remainder of this chapter sets out the three film archive case studies.

8.3 The BFI

The BFI is the UK's national film organisation. It is a charity that supports filmmaking and film education throughout the UK and manages and preserves the national film archive. The BFI was founded in 1933, registered as a charity in 1964, and became a Royal Charter body in 1983.[820] The BFI is responsible for supporting British and international filmmaking, exhibition and education in relation to film; and maintaining the BFI National Archive and the BFI Reuben Library.[821] It is also the designated National Television Archive for the UK.[822]

The BFI is funded through a variety of sources: directly by the Government;[823] Grant-in-Aid from DCMS; funding from TV broadcasters;[824] and Lottery funding.[825] The BFI is also obliged to self-fund some of its income. The BFI became responsible for distributing Lottery funding for film projects across the UK in 2011.[826]

The BFI has five physical sites: Berkhamsted (a Conservation Centre); Gaydon (Master Film Store); Southbank (Exhibition Venue); IMAX (Exhibition Venue); and Stephen Street (Head Office).[827] The BFI cares for the UK's Master Film Store at Gaydon, and approximately half of it is highly flammable nitrate film which requires special storage conditions.[828] The only site not visited during the ethnographic research was Gaydon, as it is not relevant to this research.

The BFI cares for a vast collection of film material and many other materials. The BFI National Archive[829] houses the world's largest collection of screen heritage.[830] It is

[820] Department of Culture, Media & Sport, "Triennial Review of the British Film Institute" (Department of Culture, Media & Sport, 2014)
[821] Department of Culture, Media & Sport (n.820) 16
[822] Department of Culture, Media & Sport (n.820) 34
[823] Department of Culture, Media & Sport (n.820) 43
[824] Department of Culture, Media & Sport (n.820) 34
[825] Department of Culture, Media & Sport (n.820) 16
[826] Department of Culture, Media & Sport (n.820) 16
[827] Department of Culture, Media & Sport (n.820) 40
[828] Department of Culture, Media & Sport (n.820) 16
[829] Its National Archive has likewise undergone several name changes, including the National Film Library, the National Film Archive and the National Film and Television Archive.
[830] Ruth Kelly (ed.) "Strategy for UK Screen Heritage" (UK Film Heritage Group, 2007), pp 9-10

also one of the most highly accessed film archives in the world.[831] It is an expert in film preservation and provides this service to other UK institutions that do not have the necessary facilities or expertise to do it themselves.

Its film collections include: approximately 20,000 silent films;[832] 60,000 fiction films, including features; 120,000 non-fiction films, approximately 750,000 television titles; and audio and video recordings of Parliamentary sessions and proceedings.[833] The BFI's TV holdings are a crucial part of its audiovisual collection. Approximately 12.5% of all daily broadcast TV is captured and stored in the Archive.[834]

The BFI underwent a "very rapid rate of acquisition" in its earlier years, which meant that it had "little breathing space for thinking out policies"[835] before they were implemented. Films were being acquired by the BFI three times faster than cataloguing could be completed,[836] meaning that a backlog was rapidly growing. This practice is linked to the meaning of preservation vs. access and the associated notion that one must be prioritised over another.

Of particular interest to this research concerning out-of-commerce works is the BFI's *Missing Believed Wiped* campaign, which "attempts to locate and recover programming 'lost' from the official archive collections, with irregular, but often spectacular success."[837] It is highly probable that any such works would be out-of-commerce works. The *Missing Believed Wiped* campaign has been instrumental in finding and preserving British film and TV heritage. The BFI then holds screenings of these films and programmes.[838]

A significant project that the BFI has undertaken with the UK's regional film archives in film heritage is the Unlocking Film Heritage programme (UFH), which ran between 2014 and 2018. It digitised 5,000 film titles from the BFI's own Archive and an

[831] Department of Culture, Media & Sport (n.820) 46
[832] BFI, "Silent films" Available at: <https://www.bfi.org.uk/archive-collections/introduction-bfi-collections/exploring-collections/silent-film> Accessed 2nd October 2019
[833] BFI, "What the archive contains" Available at: https://www.bfi.org.uk/archive-collections/about-bfi-national-archive/what-archive-contains Accessed 2nd October 2019
[834] BFI, "Acquisition"
[835] Houston (n.755) 34
[836] Houston (n.755) 46-47
[837] BFI, "Acquisition" (n.834)
[838] BFI, "BFI Showcases A Haul Of Missing Believed Wiped TV Rediscoveries Plus Festive Fun At The TV Panto", (BFI, 2019) Available at< https://www.bfi.org.uk/sites/bfi.org.uk/files/downloads/bfi-press-release-bfi-showcases-haul-of-missing-believed-wiped-tv-rediscoveries-plus-festive-fun-tv-panto-2019-11-12.pdf> Accessed 2nd October 2019

additional 5,000 titles from the regional archives.[839] It is very likely that this project made a large number of out-of-commerce works available to the public, as many of these films had been "unknown and unseen for decades."[840] UFH needed to obtain copyright permissions or "rights clearance", which added time and cost to the project.

Utilising Art. 8 would hopefully reduce the time, cost and staff needed for obtaining copyright permission in future projects. This would be a benefit to the BFI, as copyright ownership and obtaining copyright permission have been problematic for the BFI throughout its history. Houston noted in the mid-1990s that: "the rights holder occupies the central ground: rights must be cleared, permission obtained, a fee negotiated."[841] This was found in the ethnographic studies to remain the same today.

During its lifetime, the BFI has undergone several iterations and various attempted mergers and redistributions of responsibility with other UK governmental or film bodies. In 2009, it was suggested that the BFI and the UK Film Council ("UKFC") merge, due to concerns that their funding would be cut. Nowell-Smith comments that this was due to the fact that organisations that had already evidenced the ability to cut costs "had a better chance of survival than either component on its own.[842] This financial vulnerability and the need to be visibly evidencing its ability to reduce costs where possible are likewise present within the BFI today, and informs both institutional and personal decision-making. There remains a focus on prioritising activities that are economically viable, and that align with funding objectives.

8.4 MACE

The Media Archive for Central England (MACE) is a regional film archive, with a focus on the East and West Midlands of England. It is a small film archive, with approximately 8 staff members and volunteers. It cares for a large, unique collection of approximately 75,000 films and TV programmes held in various formats,[843]

[839] Department of Culture, Media & Sport (n.820) 44
[840] BFI, "Digitisation Fund" Available at < https://www.bfi.org.uk/supporting-uk-film/funding-organisations/unlocking-film-heritage-digitisation-fund> Accessed 2nd October 2019
[841] Houston (n.755) 101
[842] Geoffrey Nowell-Smith "Epilogue 2011" in Geoffrey Nowell-Smith and Christophe Dupin *The British Film Institute, the government and film culture, 1933-2000* (Manchester University Press, 2012), 307
[843] MACE, "The Collection" (n.16)

including the ITV Central regional collection.[844] MACE was formally established by the registration of the company in 1995 and became active in 2000.[845]

The first regional film archive in the UK was the East Anglian Film Archive and it opened in 1976, with a further six regional film archives opening before MACE did in 2000.[846] MACE is based at (but not part of) Lincoln University, as a separate company and charity. MACE has strong links and collaborates with the UK's national film archives, including the BFI.[847] MACE is one of nine English regional film archives.[848] As one of the youngest of the regional UK film archives, it is "catching up" on the collecting and preserving of the region's film heritage. [849]

The regional archives have developed in an "ad hoc" manner and have been considerably shaped by their funding situation and challenges.[850] Historically, regional film archives have suffered from a lack of funding from the UKFC when it was operational, as their agendas have not been aligned with the UKFC's funding agenda. [851] This has naturally led to regional film archives that have adapted

> to changing funding circumstances and building governance models and partnerships which have supported the broad aims of securing and making available the screen culture and history of the region or nation it serves.[852]

Kelly states that regional film archives in the UK "all supplement their income through project-based funding and commercial activity" and this activity is "high-risk, short-term and geared towards priorities set in accordance with external criteria". [853] She therefore concludes that this is "highly inappropriate for long-term management of

---

[844] This substantial and unique collection was the rationale for choosing MACE as a comparison case study as opposed to other regional film archives in the UK. Logistics also played a part in the decision, as some regional film archives were unable to host a research visit.
[845] MACE, "Cataloguing And Documentation Policy" pg. 1. Available at < https://www.macearchive.org/sites/default/files/downloads/MACE%20_Cataloguing_Documentation_Policy.pdf> Accessed on 4th May 2019
[846] Luke McKernan and Frank Gray, "A Short History of the UK's Film Archives (2013)", FAUK. Available at: < http://www.filmarchives.org.uk/about/history/> Accessed on 17th May 2019
[847] MACE, "About MACE" Available at < https://www.macearchive.org/about-mace> Accessed on 4th May 2019
[848] MACE, "About MACE" (n.847)
[849] University of Leicester, "News - Press Releases: MACE Presents Archive Film at Phoenix Arts" Available at <https://www.le.ac.uk/ebulletin-archive/ebulletin/news/press-releases/2000-2009/2007/03/nparticle.2007-03-10.html> Accessed on 17th April 2019
[850] James Patterson, The National Strategy for Screen Heritage: A Personal View (2009) 6(2) *Journal of British Cinema and Television*, pp. 313-318, 316
[851] Patterson (n.850) 316
[852] Patterson (n.850) 316
[853] Kelly (n.830)13

screen heritage", and prevents the regional film archives from "attending to many of the basic collections management tasks that underpin widespread access."[854]

It seems likely that this continual funding uncertainty has impacted upon the policies and practices of the regional archives, and on their tolerance for risk. They have needed to ensure that their agendas and projects were aligned with funding bodies, and that they minimise cost where possible. This can be seen at MACE, as their website is commercially minded and states that "[o] ur licence fees are highly competitive and tailored to your project requirements".

Film Archive UK ("FAUK") is the UK film organisation that comprises the BFI and the regional film archives, including MACE. The BFI is influential within FAUK, and often leads its projects. FAUK is intended to allow the regional film archives and the UK to come together to share best practices, and to collaborate on projects. FAUK:

> brings together archives, archivists, associate organisations and individuals who are interested in and committed to the work and development of the UK's public sector film archives.[855]

Its focus includes the development and sharing of best practices in relation to: the preservation of all moving images; the digitisation of film and video tape; analogue and digital storage; cataloguing and metadata; resource development; online delivery; copyright and licensing; public access and outreach; programme production; moving image archive standards; archival ethics; research, teaching and learning related to these practices and the wider public role of film archives; and film archive training and professional development.[856]

It is therefore not surprising that MACE intentionally has policies and practices that comply with "standards laid down by the wider film archive community."[857] They have four policies publicly available on their website: a Cataloguing and Documentation Policy; an Access Policy; an Acquisition and Disposal Policy; and a Preservation Policy.

---

[854] Kelly (n.830) 13
[855] Film Archives UK, "About" Available at: < http://www.filmarchives.org.uk/about/> Accessed 17th May 2019
[856] Film Archives UK, "About" (n.855)
[857] MACE, "MACE Policies" Available at: https://www.macearchive.org/about/mace-policies Accessed on 4th May 2019

They provide commercial services to professional clients, and their website focuses on how the archive can best help or provide services for their commercial clients and the public. These services include researching films for a particular client from the collection; providing screener files for viewing the film; licensing and fees and providing master material, using their Golden Eye Scanner.[858] They digitise material in-house, which not all regional archives have the equipment to do.

8.5 EYE

EYE is the national film archive of the Netherlands, and its archive holds approximately 40,000 films.[859] It is therefore the largest film library in the Netherlands.[860] It was founded in 2010 as a result of the merging of the Filmmuseum, Holland Film, the Filmbank, and the Netherlands Institute for Film Education.[861] The EYE collection dates back to 1946, when the first predecessor of Eye was founded: the Nederlands Historisch Filmarchief.[862]

EYE has a strong focus on education and develops educational programmes as part of its activities.[863] It also has a multifaceted nature: as a museum; film archive; film exhibitor; educational film institute; and meeting place.[864] It is focussed on providing access to the public, and to being shaped by its users. As Fossati notes:

> EYE is a non-profit organisation and receives state funding in the Netherlands but is not a state institution.[865] In 2016, EYE's Collection Centre opened, which has enabled all of EYE's film collection to be brought together for the first time.[866] Its nitrate holdings are still held elsewhere, away from the rest of the collection for safety.

[858] MACE, "How to Licence Footage" Available at: <https://www.macearchive.org/how-license-footage> Accessed on 4th May 2019
[859] EYE, "Collections" Available at: <https://www.eyefilm.nl/en/collection/about-the-collection/collections> Accessed on 2nd May 2019
[860] EYE, "professionals" Available at: < https://www.eyefilm.nl/en/about-eye/professionals> Accessed on 2nd May 2019
[861] EYE, "About EYE" Available at: <https://www.eyefilm.nl/en/about-eye> Accessed on 2nd May 2019
[862] EYE, "About the collection" Available at: <https://www.eyefilm.nl/en/collection/about-the-collection> Accessed on 2nd May 2019
[863] EYE, "professionals" (n.860)
[864] Sandra den Hamer "Introduction" in Marente Bloemheuvel, Giovanna Fossati, Jaap Guldemond (eds.) *Found Footage: Cinema Exposed* (AUP, 2012) 5
[865] Fossati (n.33*)* 222
[866] Fossati (n.33*)* 230

EYE's collection is "very heterogeneous".[867] As the archive's holdings are very diverse, it was found that the "more traditional criteria used to categorize or to classify films ended up contributing very little extra knowledge."[868] Consequently, more appropriate and innovative classification criteria were developed by EYE's archivists. The Desmet Collection is one of EYE's most significant collections, both in terms of cultural importance and in size of the collection[869] and is recognised as world film heritage.

EYE is a leader within film archival and film history scholarship.[870] The annual EYE International Conference brings together academics and archivists from across the world, and each year's theme is on a different aspect of film archival practice, including orphan works and colour silent film. [871] EYE also hosts an annual public lecture series called *This is Film! Film Heritage in Practice*, which focusses on archival reuse and archival film, including in VR experiences, 3D film and in immersive VJ sets (multimedia video performances).[872] Likewise, in 2017 it set up an Artist and Scholar-in-Residence programme, to invite both academic and artistic reuse of its archival material. [873]

EYE is now a world leader in terms of its film archival practices, particularly for film preservation and exhibition. EYE is a prominent and influential film archive, both nationally and internationally and a member of FIAF, and therefore "its historical development is inextricably linked to the wider international practice of film archiving."[874] In many instances, EYE's internal film archival practices have shaped film archival practices and research around the world.

---

[867] Mark-Paul Mayer "From the Archive And Other Contexts" in Marente Bloemheuvel, Giovanna Fossati, Jaap Guldemond (eds.) *Found Footage: Cinema Exposed* (AUP, 2012) 146
[868] Mayer "From the Archive And Other Contexts" (n.867) 146
[869] EYE, "The Desmet dossier" Available at <:https://www.eyefilm.nl/en/collection/search-and-watch/dossiers/the-desmet-dossier> Accessed on 2nd May 2019
[870] The chief curator, Giovanna Fossati, is also the Chair in Film Heritage and Digital Film Culture at the University of Amsterdam (UvA)
[871] Giovanna Fossati, Victoria Jackson, Bregt Lameris, Elif Rongen-Kaynakci, Sarah Street, and Joshua Yumibe "Introduction" in Fossati, Jackson, Lameris, Rongen-Kaynakci, Street, and Yumibe (n.749) 10
[872] EYE "Public lecture series This is Film! on recycling, re-using and remixing archival film" (EYE) Available at: < https://www.eyefilm.nl/en/about-eye/news/public-lecture-series-this-is-film-on-recycling-re-using-and-remixing-archival-film> Accessed on 2nd May 2019
[873] EYE "Public lecture series" (n.872)
[874] Lameris (n.755)13

There was a period of “very active restoration practice” in the 1980s, due to a large amount of state funding, which has shaped EYE ever since.[875] During this time, experimental film practices were tested, as the funding provided the scope for more exploratory archival practice. Stemming from these activities and including the pioneering practices present today, EYE is also a leader in experimental film presentation practice.[876] It began to achieve its “excellent reputation in the fields of film archiving and film historiography” in the 1990s.[877]

What is clear in any historical overview of EYE, especially in more recent decades, is the emphasis on the individuals within the archive and their expertise. Lameris recalls that when EYE received the most prestigious award for film history and archiving, the Premio Jean Mitry,

> [t]o emphasise the fact that the institution and not just the director had received the accolade, Blotkamp asked all the Filmmuseum employees to come up on stage to celebrate their achievement together.[878]

Foe several decades, there has been a “period of significant experimentation” concerning silent film restoration, preservation, and exhibition archival practices. [879] EYE has embraced this period of experimental and innovative practice, as part of its focus on digitising the collection. Ingravalle asserts that this has led to a “revisionist approach” in the practices, which aims to encourage the public to remix the collection’s material into new material, as a way of engaging with history in a modern setting. [880]

8.6 Conclusion

This chapter has provided a contextual overview of the three film archives studied in this thesis: the BFI and MACE in the UK, and EYE in the Netherlands. The wider

[875] Fossati (n.33*)* 223
[876] Fossati (n.33*)* 224-225
[877] Lameris (n.755) 12
[878] Lameris (n.755) 11
[879] Ingravalle (n.770) For example, the Bits & Pieces and the later Celluloid Remix programmes. The Bits & Pieces programme “gave visibility to unidentified orphan film fragments in a very unconventional way at the time”, see Ingravalle (n.770) 83. In doing so, it is argued that this archival practice challenged the notion that “narrative integrity” is fundamental to the viewing and cataloguing of film material, and indeed to viewing pleasure, see Ingravalle (n.770) 85.
[880] Ingravalle (n.770) 82

socio-historical film archival context in which they are placed has also been explored. These overviews provide the necessary foundation for the following chapter, in which a copyright regime of archival practices will be proposed.

The issues of preservation vs. access, curatorial choice and copyright tension are prominent discourses within film archiving and have been discussed in relation to the case studies. The copyright challenges expressed by film archivists and film archival scholars are of significant interest, given the focus on exploring to what extent the out-of-commerce provisions could be compatible with and incorporated into existing film archival practice.

This impact on the historical narrative, and the exclusion of individuals and certain groups, is significant to this thesis as Art. 8 could be utilised to begin to remedy these historical exclusions. In facilitating out-of-commerce works within CHIs being made available to the public, there is an opportunity for CHIs to promote the marginalised films within their collections, and to encourage public enthusiasm for engaging with these films. This can be combined with crowd curatorship, encouraging volunteers to help identify and correctly catalogue films in the collections which have been ignored.

Furthermore, the emerging practice of crowd film archiving can complement the traditional film archival practice and film archivists and can "result in new possibilities and reinvigorated force".[881] The EnDOW Community is an example of crowd archival activity.[882] A similar approach can be utilised in making out-of-commerce works available, and film archives could utilise crowd-sourcing for the "reasonable effort" search to determine the commercial availability of a work, as was discussed in Chapter 4.

The following chapter will propose a copyright regime of archival practices, based on the case studies set out in this chapter.

[881] Fossati (2012) (n.759) 180
[882] See 3.6.3 in this thesis.

Chapter 9 Copyright Regime of Archival Practices

9.1 Introduction

This chapter will propose a copyright regime of archival practices, based on the case studies set out in the previous chapter. The ethnographic case studies demonstrate that copyright regimes shape archival practices, and shape how the constituent elements of practice come together within film archives. Formulating this regime of practice enables a deeper analysis of whether Art. 8 is likely to be successfully incorporated within the existing practices. It can also elucidate which constituent parts of the practices may need to be altered to successfully incorporate making out-of-commerce works available to the public.

Foucault's concept of a "regime of practice" is applied below to propose a new copyright regime of practice that orchestrates archival practices. The different sub-regimes of copyright in each archive establish how the various elements of archiving come together, and the discourses of copyright and legal incorporation. This chapter will outline the different copyright sub-regimes of archival practice present in each of the case study archives.

This proposed copyright regime enables a much deeper and nuanced understanding of the way copyright is engaged with in the archives, and the meanings that are dominant, and those that are subordinate. It also highlights any self-regulation that is carried out to maintain adherence to these meanings.[883]

This in turn illuminates which practices are likely to be accommodating to the utilisation of out-of-commerce works within the archive, and which are conversely likely to limit incorporation into archival practice. For Art. 8 to be beneficial to film archives in providing public access to out-of-commerce works, understanding the practices and meanings of copyright more generally is crucial, as their current response to copyright is a likely indicator of the success of future copyright provisions.

[883] See Shove, Pantzar and Watson (n.61) 52; *see also* Norbert Elias Technicization and civilization (1995) 12(3) *Theory, Culture and Society*, pp. 7–42, 25

This chapter will consider the theoretical basis for copyright regimes of archival practice, building on Chapter 2. Three sub-regimes are proposed: the Oppressive regime; the Pragmatic Compliance regime; the Active Agency regime; and a comparison of these proposed regimes is provided in this chapter.

9.2 A Copyright Regime of Archival Practice

Applying Foucault's concept of "regimes of practice" offers the ability to propose an organised copyright regime of practice within film archives from the case studies. He comments that "practices" can be defined as "places where what is said and what is done, rules imposed and reasons given, the planned and the taken-for-granted meet and interconnect."[884] Foucault's concepts of regimes of practice enable an understanding of how power-knowledge governs the various ways in which different elements, such as people, knowledge, discourses, rules, material artefacts and competencies, come together in practices.

A more thorough understanding of the existing practices, power dynamics and discourses within the film archives enables a clearer understanding of whether out-of-commerce works are likely to be successfully incorporated into these practices. Understanding the existing discourses and tensions with copyright compliance, the materials available to the archivists, the way rules and policies are formed and imposed, and how individuals respond to these policies and rules offers a stronger foundation on which to predict whether and how out-of-commerce works can be incorporated within these existing archival practices.

Foucault's regime of practices therefore relates to the informal and formal rules of the archives in relation to copyright, which behaviours are deemed acceptable, and which copyright meanings are dominant and which materials or objects are engaged with, and how. They prescribe what copyright conduct or behaviour is acceptable, and what knowledge is true. Foucault's concepts of jurisdiction and veridiction posit that these accepted behaviours and truths are constructed and shaped by the organisation in which they are based. As Foucault stated:

[884] Faubian (n.62) 225

> [t]o analyse “regimes of practices” means to analyse programs of conduct that have both prescriptive effects regarding what is to be done (effects of “jurisdiction”) and codifying effects regarding what is to be known (effects of “veridiction”).[885]

A copyright regime of practice is proposed in this thesis, encompassing the materials, meanings and competences that constitute the archival practices. This proposed copyright regime enables a much deeper and nuanced understanding of the way copyright is engaged with in the archives, and the meanings that are dominant, and those that are subordinate. It also highlights any self-regulation that is carried to maintain adherence to these discourses.[886]

This regime of practice considers materials, meanings and competences.[887] It was evident in the course of the ethnographic research that the competences, materials and meanings are interwoven, and the existing archival practices rely on each constituent part. It was commented on explicitly and observed that many desired activities were hindered by the materials available within the archive, for example there is one film scanner at MACE. It is a high-end scanning machine, but there being only one means that the digitisation workflow can only be done one at a time. This is also impacted by the dominant meaning within MACE that commercial activities are to be prioritised, and so requests for scanning from commercial clients take precedence over scanning the archive’s collection backlog. This then conflicts with their desire to digitise as much of their archival collection as possible, to make it available to the public.

To illustrate, in the digitisation of film materials observed in the archives, this practice was driven by a meaning of being able to provide public access to the film. The materials involved included the archivists themselves, the physical film material (it was celluloid film and videotape that was most observed), the film scanners,[888] film splicers[889] used to join physical strips of celluloid film, cleaning equipment used in some instances to clean the film, and computer equipment used to monitor the film

[885] Faubian (n.62) 225
[886] See Shove, Pantzar and Matt Watson (n.61) 52; see also Elias (n.883) 25
[887] See Hand and Shove (n.140) 96
[888] Scanity film scanners were observed at the BFI, and there is also one at EYE.
[889] Sometimes referred to as “film joiners”

as it is scanned, to enable adjustments to be made to the film, including light, colour, frame speed, etc. The competences involved in this practice are the technical archiving competences, such as cleaning and preparation of the film, film scanning, and post-scanning computer manipulation of the film to achieve the best quality.

Within the copyright regime proposed here, three distinct sub-regimes were apparent: the copyright as "oppressive" regime; "pragmatic compliance" to copyright; and "active agency". These three distinct sub-regimes could be thought of sitting on a scale of strong copyright compliance motivated by copyright fear, to active resistance to copyright on the other end.

Fig 9.1 Copyright Sub-Regimes

Each of the three archives within this research had an institutional approach that adhered to one of these regimes: MACE adhered to the copyright as "oppressive" regime; the BFI adhered to "pragmatic compliance" of copyright; and EYE exhibited "active agency" to copyright compliance. These regimes were identified through discursive analysis[890] of the observations, interviews and documents viewed during the ethnographic studies.

For individuals within the film archives, their individual experiences and views were more nuanced, as was expected. Not all individuals within the archive adhered to the sub-regime set out above or to the same extent, but the overall adherence to the archive's institutional copyright regime was evident. This is likely the result of the power dynamics and dominant meanings in each film archive. The staff in the

[890] See Chapter 2

archives were keen to adhere to what was perceived as proper or correct legal compliance, including concern for rightholders and avoiding reputational harm.

9.2.1 Components

Practices involve the integration of a complex array of components, and in this thesis these components are borrowed from Shove et al, and are: materials, competences and meanings.[891]

9.2.1.1 Meanings

"Meanings" is being used in this thesis to understand the spoken, written, unwritten, explicit and implied narratives that are present within the film archives. They are situated in a wider socio-historical context as was discussed in the previous chapter. For example, copyright compliance and a desire to provide public access to the films are meanings evident in the ethnographic study.

The dominant meanings across the archives include copyright compliance; copyright fear; fear of reputational harm; specialist knowledge and competence; public access; gatekeeping; and an ethical duty to preserve and share film heritage. A dominant meaning of funding concerns was also present, but the nuance of the meaning was particularly archive specific.

9.2.1.2 Competences

Competences refers to the technical skills, knowledge and abilities of the individuals within the archive, such as knowledge of copyright law, and film restoration skills.[892]

An immediately evident aspect regarding competences was that individuals are highly specialised, with specific roles and knowledge in relation to archival practice. This extended to copyright law, with either an individual or a very small number of individuals within the archive having expert copyright knowledge, and then lower levels of copyright competency amongst other staff, who were specialised in their own roles. Record-keeping was also a prominent skill amongst staff, and there were a variety of record-keeping practices and meanings around proper record-keeping.

[891] See Chapter 2
[892] See Chapter 8 for a discussion on the activities undertaken within a film archive

All three archives liaised with rightholders in relation to copyright licensing and access.

9.2.1.3 Materials

Materials are the objects that are involved in the practice. Nicolini notes that examples of "material arrangements" as he refers to them include "artefacts, linked people, organisms and elements of nature."[893]

The materials noted in each of the three archives include record-keeping documentation relating to their field collections, copyright and donor materials and licensing agreements. None of the three archives have a formal copyright policy, although all do have policies on other topics. MACE's documentation is the most public-facing. In terms of human resources, two of the film archives have a legal expert, and MACE does not.

The table below sets out the copyright sub-regimes found in the film archives, and the materials, meanings and competences associated with each of these three main copyright sub-regimes of archival practice. Following a practice theory approach to data interpretation, a comparative table is provided for ease of analysis.[894]

[893] Nicolini (n.139) 22
[894] See for a similar table on a different subject, Hand and Shove (n.140) 96

Table 9.2 Copyright Sub-regimes

Copyright Regime	Materials	Meanings	Competences
Oppressive - Copyright is experienced as oppressive and restrictive on other activities. Strict legal compliance.	Contracts Policies (no formal copyright policy) Records spreadsheets and index cards Physical film materials and equipment	Copyright fear Copyright compliance Fear of reputational harm Strong concern for the archive's longevity Commercial licensing focus due to limited funding Public access Gatekeeping	Limited specialist copyright knowledge Avoidance of copyright activities deemed 'risky' Specialist knowledge of staff within their roles Record-keeping Liaising with rightholders Technical archiving skills (digitising, preserving, restoring, etc.) Fundraising skills Commercial revenue generating
Pragmatic Compliance - Copyright is restrictive, but more a logistical barrier than oppressive. Legal compliance is adhered to, with some limited exceptions where staff lack confidence or knowledge	Contracts Policies (no formal copyright policy) Records spreadsheets Internal documents and information memos to staff Emails containing information Physical film materials and equipment	Copyright fear (some staff) General copyright compliance Hesitant about legal compliance that is limited Fear of reputational harm Limited concern for the archive's longevity Public access Gatekeeping	Specialist copyright knowledge Avoidance of copyright activities deemed 'risky' Specialist knowledge of staff within their roles Record-keeping (historically lax) Liaising with rightholders Liaising with national government Technical archiving skills (digitising, preserving, restoring, etc.) Fundraising skills Commercial revenue generating
Active Agency - Copyright is restrictive, but not oppressive. Legal compliance to the extent that it is deemed necessary, and some active departure from copyright.	Contracts Policies (no formal copyright policy) Records spreadsheets Physical film materials and equipment	Copyright compliance that is balanced with professional judgement, some active departure. Fear of reputational harm Confidence in the archive's longevity Public access Gatekeeping	Specialist copyright knowledge Specialist knowledge of staff within their roles Record-keeping Liaising with rightholders Liaising with national government Technical archiving skills (digitising, preserving, restoring, etc.) Fundraising skills Commercial revenue generating

This table was produced by the researcher following the analysis of the ethnographic data.

9.3 Oppressive Copyright Regime

In the “Oppressive” copyright regime of archival practices, copyright is experienced as oppressive and restrictive on other activities. There is strict legal compliance, due to substantial copyright fear. MACE is the film archive where the Oppressive copyright regime of archival practices was evident. This copyright regime of practice adhered to strict legal compliance, and copyright was experienced as oppressive and as restrictive of other activities, including providing public access.

This shaped archiving through the prohibition of any archival activities that could infringe copyright, for example reusing someone’s film or making it available online. Copyright concerns had an overt effect on the choice of films made available on the archive’s website, for filmmakers and students to reuse, and for commercial licensing. In this sense, copyright has a core orchestrating impact on wider archival activities.

Foucault’s concepts of jurisdiction and veridiction posit that accepted behaviours and truths are constructed and shaped by the organisation in which they are based. As Foucault stated:

> [t]o analyse “regimes of practices” means to analyse programs of conduct that have both prescriptive effects regarding what is to be done (effects of “jurisdiction”) and codifying effects regarding what is to be known (effects of “veridiction”).[895]

Copyright orchestrates the archival practices considerably. From a jurisdiction perspective, copyright impacts on what activities are to be performed, and which films can be made accessible to the public or for reuse. Only the films with a clear and known copyright status were allowed to be reused. Also, copyright compliance led to a strong copyright fear within the regime. This in turn culminated in a practice of always re-seeking rightholder permission when access or reuse is requested by a third party, to avoid reputational harm. This practice limited the available films for reuse and public access.

[895] Faubian (n.62) 225

Considering veridiction, copyright shapes accepted truths within the archive. Within the Oppressive regime, it was accepted by all individuals involved in the research that copyright compliance is very important, and that over-compliance is preferable to under-compliance and consequent potential liability. It was also an accepted truth that the archive's desire to provide public access to material must be superseded by copyright concerns.

These accepted truths have a substantial impact on the archive's likelihood to be able to successfully incorporate out-of-commerce works into existing archival practices. This is a result of the fact that over-compliance is preferable to under-compliance regarding copyright, and as such there may be concern about using out-of-commerce works in case they are actually in commerce or the rightholder objects.

9.3.1 Meanings

The meanings observed in the Oppressive regime of practices were the following: copyright fear; copyright compliance; fear of reputational harm; a strong concern for the archive's longevity; commercial licensing focus due to limited funding; public access; and gatekeeping.

Public access practices were observed as a crucial part of the archives' daily functions. MACE is a partner organisation in the H22 project, aiming to restore 100,000 videotapes at risk of decay in British film archives, with a national and regional focus. At MACE, providing access for local people or for people interested in the history of the local area is part of its core mission, as set out in each of its four online policies:

> ...and creating the widest possible range of access opportunities to it for the benefit of the people of the Midlands and beyond.[896]

Meanings of funding concerns, fear of job losses if the archive closes and a fear of reputational harm were noted in the interviews with the staff at MACE. Copyright fear and copyright compliance were dominant meanings, and it was viewed that copyright compliance would lessen the chance of reputational harm for the archive. For instance, A noted that copyright is a "nightmare, coupled with threat", and that "you

[896] MACE, "Cataloguing And Documentation Policy" (n.845) 1

are confined by copyright". Copyright fear and a strong meaning of legal compliance culminate in a risk-averse approach to reuse, with many films regarded as too complex to get copyright permission to reuse. This emphasises that concerns about the copyright status of some of their films prevent them from using them, and that it restricts the ability to allow reuse of materials.

There was also a conflict noted in the meanings of providing public access and of needing to generate revenue though generating commercial revenue from some of the collection. W noted that their fundamental goal of access therefore necessitates some commercialisation of the archive, "…but the archive needs to be able to provide access, so we need commercial revenue to keep going." For MACE, it was therefore observed that commercial sales of films within the archive are a core practice by which the archive is maintained, and therefore how public access is enabled. The commercial activities and access activities are therefore part of the same practice. The nature of the archival collection at MACE including the ITV Central Regional Collection films, particularly lends itself to commercial re-uses of these films.

A meaning of gatekeeping or protecting donors and rightholders was present, with the view held by the staff that the film archive has an ethical or moral duty to protect donors and rightholders. They are very cautious about what they allow to be done with the film material, as a lot of it is very sensitive or personal. A noted that "[y]ou have to be sensitive" about allowing the use of certain content, including amateur films with private moments such as strip teases, etc. These are ethical issues that are seriously considered, alongside the copyright ownership.

9.3.2 Competences

The competences observed in the Oppressive copyright regime of archival practices were: limited specialist copyright knowledge; avoidance of copyright activities deemed 'risky'; specialist knowledge of staff; record-keeping; liaising with rightholders; technical archiving skills (digitising, preserving, restoring, etc.); fundraising skills; and commercial revenue generating.

Competences were observed to be held by individuals in specific roles, with individuals being highly specialised and knowledgeable about their specific roles. Of

the competences observed, not all competences were displayed by all individuals, and it was common for specific individuals to be deferred to for set tasks or topics. All individuals observed and spoken to displayed the ability and desire to generate commercial revenue, and to prioritise commercial client projects. All individuals who encountered copyright decisions (either customer or public facing, or in charge of creating film projects) displayed avoidance of copyright activities deemed 'risky'. This was evident alongside a strong meaning present that, if in any doubt about the legality of something, it is best to avoid the use or activity.

W is the person who primarily deals with copyright. W at MACE is not a legal specialist and does not have a legal background. As W describes, knowledge and process have been built upon and established over time regarding copyright: "There's no particular protocol in place, we all just know what to do". W noted that:

> [a] lot of the procedures are sensible and common sense. And lots is done on a case-by-case basis, so a stringent policy in place doesn't work for everything.

Record-keeping was regarded as very important at MACE. Digital files and physical files including index cards were all maintained. This practice appeared linked to the copyright fear discourse and overall strict legal compliance discourse, it was observed to generate a culture of strict adherence to rules and procedures.

They were involved in liaising with rightholders, donors and commercial clients, and had set internal norms for these interactions. Commercial clients were prioritised, as a result of the strong desire to generate income. This was also linked to competences in fundraising and commercialisation of their archive: they offer archival footage searches to potential clients as a way of obtaining income from licence fees. The focus on maintaining good relationships with clients was prevalent throughout all activities and practices in the archive, as reputational harm was perceived as likely to dissuade clients from licensing with them.

Also, there was an observed avoidance of activities regarded as 'risky' from a copyright perspective. As D noted in relation to a co-creation project on women using the archive's films:

> I'll have to get them to choose way more footage than they'll need, so I can go through and say "woah! Definitely not that one for rights!"

9.3.3 Materials

The competences observed in the Oppressive copyright regime of archival practices were contracts; policies (no formal copyright policy); records spreadsheets and index cards; and physical film materials and equipment.

At MACE, there is also no formal written copyright policy. There is also no legal specialist, which was observed to correlate with strict legal compliance practices, as there was no desire to resist copyright. This contrasts with the Active Agency regime. D noted that "copyright is very important, [so we do] anything that makes us feel more confident, more comfortable." W commented that concerning copyright "[i]t's on a case-by-case basis. It's '*can I do this?*' We ask [person] and [person] if we have any questions."

As D also noted:

> [w]e don't have a standard policy for copyright. But I'm the new kid on the block, so maybe I don't know. But it's all about procedure here, and we do this in a uniform way.

They have set contracts that they use with their clients, which were written by a lawyer, which was observed to provide legal reassurance. They struggle with lawyers from commercial clients trying to adapt their contract or remove parts, as they fear this could led to potential liability for them. D further commented that there is a:

> uniform approach to contracts, written by a legal advisor/ IP person…We feel fully indemnified…We feel bullied a lot by lawyers from big companies, as they try to remove our indemnity clause.

They have clear policy documents, which are public-facing and available on their website. The policies, including Access policies, are clear and aimed at providing detailed information to potential users, and to donors. As MACE is particularly focussed on revenue generation from commercial licensing, this practice seems

linked to the fear of reputational harm to the archive, and a desire to be seen as legally compliant and rigorous.

There was also physical material relating to the preservation and digitisation of the films. There was a film vault, a scanning machine, various machines to playback films on, chemicals and assorted tools to splice and clean the films, and computer systems designed to colour correct and edit the films once digitised.

9.4 Pragmatic Compliance Copyright Regime

In the “Pragmatic Compliance” copyright regime of practice, copyright is experienced as restrictive on archival activities, but more a logistical barrier than oppressive. Legal compliance is adhered to, with some limited exceptions where staff do not have necessary confidence or knowledge.

This shaped archiving through the avoidance of archival activities that could infringe copyright, for example reusing someone’s film or making it available online. Copyright concerns had an overt effect on the choice of films made available on their website, for filmmakers and students to reuse, and for commercial licensing. In this sense, copyright has a core orchestrating impact on wider archival activities. However, this regime differs to the one discussed above in that there is not at absolute prohibition on activities with an unclear copyright status, as some staff members are more willing to engage with them anyway.

The BFI is the film archive where the Pragmatic Compliance copyright regime of archival practices was present. Copyright is viewed as restrictive on other activities, but more of a logistical barrier than an oppressive force. To illustrate, extensive copyright research is undertaken on some films, demonstrating that copyright is viewed as something that can be understood and managed. Curatorial staff noted that in some cases they cannot use the works they want, because of the copyright status. Legal compliance is adhered to in almost all areas with some limited exceptions, where there is a lack of confidence or knowledge.

Foucault’s concepts of jurisdiction and veridiction posit that the accepted behaviours and truths are constructed and shaped by the organisation in which they are

based.[897] Within the Pragmatic Compliance regime, copyright orchestrates the archival practices considerably. From a jurisdiction perspective, copyright impacts on what activities are to be performed, and which films can be made accessible to the public or for reuse. Films with a clear and known copyright status were preferred for reuse, and some film titles are viewed as not able to be utilised due to copyright concerns. As was noted in the Oppressive regime, there is a practice of avoiding situations deemed too 'risky' from a copyright perspective. At the BFI however, this presented more through a meaning of hesitancy around limited legal compliance.

Considering veridiction, copyright shapes accepted truths within the archive. Within the Pragmatic Compliance regime, it was accepted by all individuals involved in the research that copyright compliance is important, but there is not the same belief that over-compliance is better than under-compliance. There is hesitancy about legal compliance that is limited however, highlighting that it is still an accepted truth that legal compliance should be maintained. It was also an accepted truth that the archive's desire to provide public access to material must be superseded by copyright concerns in some instances. However, the BFI has been a user of the EU Orphan Works Scheme and is able to undertake detailed and lengthy diligence to track down rightholders.

These accepted truths and practices impact on the archive's likelihood to be able to successfully incorporate out-of-commerce works into existing archival practices, as incorporating this may not be possible given the avoidance of situations deemed too 'risky' from a copyright perspective.

9.4.1 Meanings

The meanings observed in the Pragmatic Compliance regime of practices were the following: copyright fear (some staff); general copyright compliance; hesitancy about legal compliance that is limited; a fear of reputational harm; limited concern for the archive's longevity; public access; and gatekeeping.

Meanings of funding concerns and a fear of reputational harm were noted in the interviews with the staff at the BFI. Copyright fear and copyright compliance were

[897] Faubian (n.62) 225

dominant meanings, and it was viewed that copyright compliance would lessen the chance of reputational harm for the archive.

There were a number of people who were wary about speaking about copyright, and especially saying something incorrect. It was common when speaking with people for them to comment in a similar way to T: “I’m not a lawyer and I don’t really know much about copyright” and to state that there are other people who might be able to answer the questions better. T was also reluctant to discuss specific issues concerning copyright or rights clearance and made a comment at the end of the discussion that they would “have to go and brush up on the rights strand”, implying that the conversation had made them feel unsure of their knowledge.

Z also explained that people are “quite nervous” in the BFI about copyright and about “saying things and sharing whether decisions worked”. Z said that they used to be “hesitant” in relation to copyright but are not anymore. They commented that an “agreed, basic kind of approach” to copyright and rights is needed, but that this is difficult when there is misunderstanding and ignorance of copyright “across the board”.

Despite this copyright fear evident in some of the individuals at the BFI, the overall copyright approach remains one of pragmatic compliance. This was observed to be due to the presence of a copyright specialist, which is not present in the Oppressive regime. This specialist individual, and the wider Rights & Contracts team, provided reassurance and guidance to their colleagues, which has lessened the depth of the copyright fear present. It is common in the archival sector that individuals have specialist roles and knowledge, so this legal specialism is accepted and aligned with wider archival practice.

As was noted at MACE, there is a practice of avoiding situations deemed too ‘risky’ from a copyright perspective. At the BFI however, this presented more through a meaning of hesitancy around limited legal compliance. To illustrate, it was commented that orphan works at the BFI have been “fudged” and that the BFI does not directly advertise that people can license them from the BFI, but if someone asks the BFI “quietly”, the BFI will license it to them. In such a case, the BFI will not provide contractual indemnities or warranties, and will reserve the right to terminate

the licence immediately if an original rights holder comes forward. The BFI “doesn’t encourage” the public to use the orphan works scheme with the IPO for a film, as it is too difficult. It was noted that the scheme is “trying to do too many things”, and that the end result is “awkward”, largely because the orphan works scheme does not work with royalties, and that the film industry works on royalties. These concerns about the Orphan Works Directive mirror the discussion in earlier chapters.

It was noted across various observations and discussions and interviews that there is a discourse of copyright issues being considered at the end of projects, and not holistically part of them. During an informal H22 project meeting between several members of the Rights and Contracts team, the H22 timeline made for the next few months was examined. It was noted that “Rights” is at the end of this timeline with no specific date attached to it. K joked in relation to this that “the rights department…we’re like the ugly cousins no one wants to claim…we’re always forgotten about and put to the end”. This sentiment was echoed in several other discussions and group meetings, that rights clearance and the Rights and Contracts department’s work is only considered after the other work has been completed, and not always as a cohesive part of it.

This copyright compliance practice is one of pragmatism; it is recognised as a practice that must be performed, but not one that orchestrates all archival practices from the beginning, as can be seen in the Oppressive regime. It is also likely to be a result of the more recent focus on internal legal compliance, whereas historically this has not been a primary archival focus.

9.4.2 Competences

The competences observed in the Pragmatic Compliance regime of practices were the following: specialist copyright knowledge; an avoidance of copyright activities deemed ‘risky’; specialist knowledge of staff; record-keeping (which has been historically lax); liaising with rightholders; liaising with national government; technical archiving skills (digitising, preserving, restoring, etc.); fundraising skills; and commercial revenue generating.

Despite the lack of a formal copyright policy, there were clear practices observed and commented upon in the interviews, which indicated a specific individual, Z, who

is consulted for copyright advice both formally and informally by others. Competences are embodied by key personnel within the archive, and thus archiving practices require coordination between those who have copyright competences and those who do not and who may be handling the management of the archive. There are a few team members who are consulted mostly in relation to copyright. Z works within the Rights and Contracts team. As was observed by a member of the Rights and Contracts team, U, in relation to Z:

> [Z is] a mine of information and [they] answer a lot of our questions, we send [them] a lot of questions all the time… [They are] great; [they will] just know something off the top of [their] head.

Z is emailed and spoken to about copyright issues and queries by staff from other teams too, and other have commented that they are a "fountain of knowledge". It is therefore clear that certain members of the Rights and Contracts team are highly skilled in relation to copyright and others seek them out for information. A staff member, E, from another team in the BFI, commented that

> [i]n organisations like the BFI, from my experience in the heritage sector, you have small pockets of people who understand copyright in-depth, and then there is a spectrum of understanding from everyone else. And everyone then asks those few people all the questions. Curators especially can lack this depth of knowledge [skill].

As only a small, dedicated number of staff are responsible for researching copyright and copyright clearance, specialist copyright compentence was not present across all staff. In addition, it was observed that a dedicated Rights and Contracts team email address, copyright rightholder memos and guidance notes had all been developed, to minimise the impact of copyright uncertainty on staff across the BFI.

Z commented that this email account consequently "builds up information resources, as stuff comes up again and again." From April 2018, when the account was set up, to early March 2019, 1, 344 email enquiries were received. This equates to approximately 112 emails per month, or 3/4 per day. The majority of the internal BFI questions were similar to: "Can we license this?" and "Do you know who the rights

holder is?" There are "recurring problems with certain titles, and the same questions come up again and again with those." Many of these questions are sent by the archive sales and footage sales teams, theatrical bookings and archive bookings, usually in relation to materials in the BFI's own collection but for which it does not own the copyright.

All of the individuals spoken to across the archives had an awareness of copyright and a desire to uphold the law, but their personal copyright knowledge was limited; and the majority of copyright issues passed to the highly specialised individual. Some of this practice was observed to be informal conversations and emails, as well as more formal delegation of responsibility for certain tasks.

Copyright training sessions were only observed to be given to individuals or teams deemed likely to 'need' it. The practice was also observed of holding copyright or "rights" training sessions with the Archive Sales team led by Z, as copyright significantly impacts on the daily work of the Archive Sales team. From this, there appeared to be a culture of only individuals who interact with copyright as a core part of their role being given copyright training, presumably to reduce cost and staff time.

These training sessions were a place for the individuals to ask questions and to share best practices with one another, as well as receive training and guidance from Z. These were very open, informal sessions led by Z in which Z was honest about areas the BFI lacked clear processes or guidance on, such as "fudging" orphan works. This in turn was observed to enable the Archive Sales team to feel more confident in asking questions, as there was no culture or feeling of shame for anyone who lacked competences.

9.4.3 Materials

The materials observed in the Pragmatic Compliance regime of practices were the following: contracts; policies (no formal copyright policy); records spreadsheets; internal documents and information memos to staff; emails containing information; and physical film materials and equipment.

There is no specific written copyright or related policy that is followed within the archives at the BFI. There is an increasing internal focus on copyright compliance at

the BFI. For example, Z noted that there has been both an external and internal review of copyright processes and systems recently. This review consulted people across various BFI departments to ask them whether they came across copyright issues often and where they look for information.

From this review, functional issues, data issues and technical issues were found. Some of these changes have been implemented, and some are ongoing. This internal review emphasises that strict copyright compliance has not been adhered to, and historically there has been a lax approach to compliance. Conducting the internal review and aiming to remedy these issues highlights the more recent focus on general legal and copyright compliance.

A member of the Rights and Contracts team, K, commented in relation to how "rights clearance" to obtain copyright permissions is conducted, that they and Z are the two team members mostly responsible for this. K also noted that "three set templates for contacting rights holders" are followed, and that they always attempt to obtain the necessary rights to digitise and exploit the film content. They explained that:

> the curators come up with a list of films that they want for various projects, for educational use, for heritage reasons, for its entertainment value, etc. They are chosen as high value content. The curators send this list to [Z and K], and it is then our job to clear it.
>
> We look at whether the film is in copyright, who the copyright holders look to be from the credits, etc. Our aim is to decide whether to clear the film, or to find that it is out of copyright, so we don't need to obtain any permission.

From this, it is clear that the curators compile a list of films they would like to include in an upcoming exhibition and then the Rights and Contacts team aim to "clear" the copyright for these films if possible. This suggests that copyright restrictions may not necessarily impact upon the selection of films, but that difficulties in obtaining the necessary copyright permission may nevertheless impact on whether the film can be used as intended. K commented in that regard that it can be "difficult" if the curators say there is a particular film that is "fundamental" to the collection, and if they cannot "clear the film, there's no point clearing the rest of the collection". This evidences that

copyright orchestrates curatorial practice, and the selection of which films are made available to the public.

The material documents at the BFI concerning copyright and licensing deals are not consistent across the archive and leave potential gaps in the distribution of knowledge. The Rights and Contracts team does not act for all other teams at the BFI; for example, the Southbank programming team operates separately. Conversations with Rights and Contracts team members described that the Southbank film programming team manages their own copyright research and copyright licensing, with the two teams "swapping notes" to share knowledge.

It was likewise commented during an Archive Sales Clinic on the topic of copyright issues that Exhibition, Education and British Screen do not fall within the Rights and Contracts team's remit. Z commented that "as far as I'm aware Education don't keep any records at all [of rights or deals they do]". These teams who operate separately from the Rights and Contacts team and their expertise may therefore be operating very differently in regard to copyright. The lack of clear documentation of any copyright permissions or agreements in the Education team is also a possible weakness for accurate information to be easily accessed across the BFI. However, copyright processes were not observed by the researcher in these other teams and therefore it could be that copyright is adhered to and records kept in all of them.

It was noted by staff members that the BFI's approaches and internal practices have sometimes later transpired to be incorrect. For instance, in the Archive Sales Clinic on the topic of copyright issues, it was noted that the BFI's internal guidance relating to Crown Copyright films on this lasting for 50 years was "incorrect", as it should be the same as any other film. This emphasises that the internal guidance documents on copyright and "rights information" relied on by non-legal staff has historically been inaccurate or out of date. This interpretation suggests a simplified understanding, as s.163(3) of the CPD Act states that Crown copyright lasts:

> (a) until the end of the period of 125 years from the end of the calendar year in which the work was made, or

(b) if the work is published commercially before the end of the period of 75 years from the end of the calendar year in which it was made, until the end of the period of 50 years from the end of the calendar year in which it was first so published.

It was commented by Z that prior to internal changes in 2014, there was very little written down within the Rights and Contracts team regarding policies and procedures; and that historically there has been "anecdotal, subjective decision-making". Z noted that a lot of decisions are made during "informal conversations"; and often no record is kept of these. Z explained that this subsequently made it very difficult to understand historic decision-making and rationales, especially when staff left.

This has also led to historic legal and factual "misunderstandings" regarding rights ownership becoming clear upon investigation, in regard to incorporating the Orphan Works Scheme. This evidences that historically copyright has not been a primary orchestrator of practices. This has changed in recent years, with the rise of copyright infringement litigation causing concern, and so copyright has been focussed on much more.

The H22 project is the BFI's focus until 2022, which aims to digitise 100,000 vulnerable videotapes from both their internal Archive and the regional film archives in the UK. The BFI's aim is to digitise about 10% of their video tape collection. T noted that videotapes are at risk because of difficulties with finding and maintaining the right technology to play back the material and old formats. T also explained that the BFI is creating "mini –factories" for the old formats, with people with the technical knowledge obtaining, maintaining, repairing and in some cases building the necessary equipment for older formats. There will be just two Rights and Contracts team members, Z and K, clearing the copyright for these 100,000 films.

Public access practices were observed as a crucial part of the archive's daily functions. For instance, the *Missing Believed Wiped* campaign has been instrumental in finding and preserving British film and TV heritage and providing public access to these physical films and TV programmes once thought lost. This campaign does not appear to be commercially motivated, but solely focussed on

finding these lost films and sharing them with the public for their own sake. The BFI's public access is best evidenced through its UFH programme and its ongoing H22 project.

There was also physical material relating to the preservation and digitisation of the films. There were several large film vaults, a scanning machine, various machines to play back films on, chemicals and assorted tools to splice and clean the films, computer systems designed to colour correct and edit the films once digitised, equipment to restore the films, large records vaults and equipment used to record TV transmissions daily.

9.5 Active Agency Copyright Regime

In the "Active Agency" copyright regime of archival practices, copyright is experienced as restrictive to archival activities, but not oppressive. There is legal and copyright compliance to the extent that it is deemed necessary, and there is some active departure from copyright. This departure is based on professional judgement of the archivists.

This shaped archiving through the understanding that public access to films is of the utmost importance and that copyright law offers the archive opportunities to make use of their collection, as well as placing restrictions on its use. Whilst individual wariness of copyright was still present and was evidenced to restrict some curatorial activities, there was a wider institutional acceptance that there can be some resistance to copyright.

EYE is the film archive where the active agency copyright regime of archival practices was evident. Legal compliance is adhered to the extent deemed necessary and compatible with its public access goals. There is some active departure from copyright, including their approach to orphan works, as was discussed earlier in this thesis.

Foucault's concepts of jurisdiction and veridiction posit that the accepted behaviours and truths are constructed and shaped by the organisation in which they are

based.[898] Within the Active Agency regime, copyright orchestrates the archival practices considerably. From a jurisdiction perspective, copyright impacts on what activities are to be performed, and which films can be made accessible to the public or for reuse. Some films with an unclear copyright status or no rightholder permission cannot be made available to the public, but many films are made available, even without express consent. Only the films with a clear and known copyright status were allowed to be reused.

Considering veridiction, copyright shapes accepted truths within the archive. Within the Active Agency regime, it was accepted by all individuals involved in the research that copyright compliance is important, but that this compliance must be balanced with professional judgment and with the view to providing public access. This is echoed in the archive's approach to orphan works, as discussed in Chapter 8.

These accepted truths and practices have substantial impact on the archive's likelihood to be able to successfully incorporate out-of-commerce works into existing archival practices, as incorporating this is likely to be compatible with these truths and practices.

9.5.1 Meanings

The meanings observed in the Active Agency regime of practices were the following: copyright compliance that is balanced with professional judgement, with some active departure; fear of reputational harm; confidence in the archive's longevity; public access; and gatekeeping.

Copyright compliance and ethical practice is regarded as very important to the practices at the archive. As S noted in regard to EYE's copyright approach:

> …our policy is to respect the law. We are a public institute, and we take that seriously…We work with these issues on a daily basis and we're really respectful of that.

There was also a dominant meaning of expertise and professional judgement noticed across various issues and roles. Legal compliance is adhered to the extent deemed necessary and compatible with its public access goals, as was discussed

[898] Faubian (n.62) 225

previously in the thesis in relation to orphan works. EYE only consults the sources it deems necessary during a diligent search, even if this means omitting sources that are legally required to be consulted. Copyright adherence is therefore balanced with internal professional judgement, and there is some departure from copyright compliance. The public access concern leads to a more resistant attitude towards copyright compliance.

This discourse is strongly correlated to the discourse of knowledge and roles being highly specialised across the archive. Many of the staff is reassured by F, the copyright specialist at EYE. All of the individuals spoken to across the archives had an awareness of copyright and a desire to uphold the law, but their personal copyright knowledge was limited; and the majority of copyright issues passed to the highly specialised individual. Some of this practice was observed to be informal conversations and emails, as well as more formal delegation of responsibility for certain tasks. For instance, F at EYE is the primary individual for conducting copyright research, noting:

> If you mean establishing the rights status (in or out of copyright, orphaned) or looking for rights holders, that's something that really only I do at the moment.

This emphasises that copyright research and permission practices are, where a specialised individual is present, carried out almost exclusively by that person. This logically accounts for the lack of copyright training given to individuals across the film archive, as it appears that this is not viewed as essential.

Likewise, there is a meaning that views all of EYE's activities as non-commercial, but that what is viewed as non-commercial might be different when a member of the public wants to carry out the same use. A contextual approach to the meaning of commercial and non-commercial was observed. When the archive itself was the copyright user, individuals within the organisations commented that they then tended to interpret the meaning of commerciality differently to when charging commercial

clients. This seemed to correlate to the belief at EYE that all of their activities are inherently non-commercial.[899]

At EYE, there is a clear public access imperative throughout its exhibition practices such as Celluloid Remix; as well as its copyright practices such as adopting a pragmatic approach to orphan works in order to make more of them publicly accessible.

9.5.2 Competences

The competences observed in the Active Agency regime of practices were the following: specialist copyright knowledge; specialist knowledge of staff; record-keeping; liaising with rightholders; liaising with national government; technical archiving competences (digitising, preserving, restoring, etc.); fundraising competences; and commercial revenue generating.

There was observed to be a widely accepted practice of relying on F for copyright guidance, as B noted: "[F] gives us the rules". C commented that for approximately 80% of cases it is clear what the copyright situation is, and for the remaining 20% it is "unclear, but [F] does those".

Staff members from across EYE engage with copyright, but it is primarily F who manages "rights clearance" to obtain the necessary copyright permissions:

> …getting permission from known rights holders, that is also being done by multiple colleagues from various departments... establishing the rights status (in or out of copyright, orphaned) or looking for rights holders, that's something that really only I do at the moment.

Limited or historically limited record-keeping and documentation was noted. M commented that when they joined EYE, there was a "huge backlog" of registration of contracts for acquisitions, and consequently these acquisitions were not registered anywhere. M noted that they therefore were unsure "what rights/ licences were

[899] See 8.2.2 for a discussion on the FIAF Code of Ethics: "3.1. Archives recognise that the materials in their care represent commercial as well as artistic property, and fully respect the owners of copyright and other commercial interests. Archives will not themselves engage in activities which violate or diminish those rights, and will try to prevent others from doing so.
3.2. Unless and until commercial rights in items from their collection shall have expired or been either legally annulled or formally vested in their institution, archives will not exploit those items for profit."

agreed upon, or the duration". M was part of the efforts to clear this backlog, and therefore "I really got to know how these contracts work".

Understanding the copyright position of a film is only possible with accurate and sufficient information about the film. B noted that fully cataloguing a work in their records "can take a long time, up to 10 years for the result." This length of time is due to an issue with incorrect IDs for the films, and a lack of information about the films. They consequently have to "look down different routes and speak to the public", to find more information. Due to these complexities, the research into some films is "on the back burner".

Furthermore, B noted that they have a "very little limited budget now". They noted that this significantly impacts the film restoration activities, and that they are "very selective now" about which films are taken in and restored. In this sense, decisions and archival practices are influenced by what is economically viable.

9.5.3 Materials

The materials observed in the Active Agency regime of practices were the following: contracts; policies (no formal copyright policy); records spreadsheets; and physical film materials and equipment.

There is no specific written copyright or related policy or procedure that is followed within EYE. Despite this, there were clear practices observed and commented upon in the interviews, which indicated a specific individual, F, who is consulted for copyright advice. F commented that:

> [t]here are no policies as in written manifests or anything like that. But everybody within the organisation is (made) aware that copyrighted material cannot be used without the proper clearance. In case of doubt, colleagues usually ask me. Especially when in doubt about the applicability of copyright exceptions…

B noted that they have adopted an approach of first "clearing copyright", before deciding whether to restore the film, as there is a lack of money. This demonstrates how copyright impacts upon curatorial choice and archival practice. B noted that archivists do not want to be too concerned about copyright and commented that

once the copyright research for a film has been completed “I try not to think about it too much” after doing the research.

There was also physical material relating to the preservation and digitisation of the films. There were film vaults, a scanning machine, various machines to playback films on, chemicals and assorted tools to splice and clean the films, and computer systems designed to colour correct and edit the films once digitised. Not all of the archive was able to be viewed during the study, but the preceding list were the observed materials.

9.6 Regime Comparison

The general copyright culture in each of the film archives was observed to be collaborative and supportive, with no shaming of staff or practices being observed or commented on by participants.

The table below sets out a summary of copyright in the film archives. None of the film archives had a copyright or intellectual property policy. At all three, staff had someone to ask specific copyright questions to or with, but how this was coordinated varied.

9.3 Archive Copyright Comparison

Archive	Official IP/ copyright policy	Staff able to ask copyright questions to someone in the organisation	Official staff training related to copyright	Copyright specialist within the organisation (self-identifying)
BFI	No	Yes, via email and in person and at copyright clinic sessions with Z	Some staff	Yes
MACE	No	Yes, more informally discussed as a group	None that was commented on or observed	No
EYE	No	Yes	Some staff	Yes

It seems likely that the archives that adhere to an “Active Agency” copyright regime, with a legal specialist that is knowledgeable and confident about copyright, are the most likely to utilise Art. 8 once it is nationally implemented. This is due to this copyright regime of displaying less copyright wariness and fear. It is also due to the fact that this regime practices displays copyright compliance balanced with professional judgement and departure from copyright when it is deemed too restrictive or too onerous, such as the departure from the Orphan Works Directive diligent search requirements.

It is suggested here that this copyright regime will be most aligned to making use of Art. 8(2) in particular, as utilising the fall-back exception will require the film archive to have copyright confidence, and confidence that this action will not cause reputational harm with rightholders and donors, to do so. For film archives aligned to this regime in a Member State with a sufficiently representative CMO for film, or if such a CMO were to appear in the Netherlands, it seems very likely that they would seek to liaise with the CMO to agree a non-exclusive licence. This is due to the same confidence that this action will not cause reputational harm with rightholders and donors, especially in countries with effective stakeholder dialogue.

Conversely, for archives aligned to the “Oppressive” copyright regime, it seems very unlikely that they will be able to incorporate utilising out-of-commerce works into their practices. The current lack of clarity of terms including “commercial use”; “non-commercial use”; “out-of-commerce” and “customary channels of commerce” are likely to be incompatible with the meanings of strict legal compliance, copyright fear and fear of loss of jobs if the archive closes. For this reason, it is deemed unlikely that archives aligned to this copyright regime would feel able to utilise the fall-back exception, as it will be deemed too high-risk.

There is more likelihood that they would consider utilising Art. 8(1) if there is a sufficiently representative national CMO, as this places less onus on the archive itself to make copyright decisions, as the licensing process will be led by the CMO. That said, the strong meaning of fear of reputational harm with existing and future donors and rightholders could lead to the decision that agreeing non-commercial

licences with a CMO would discourage rightholders from trusting the film archive and its motives.

The “Pragmatic Compliance” copyright regime is positioned between the Active Agency and Oppressive regime, as legal compliance is adhered to in almost all areas, with some limited exceptions where the staff lack confidence or knowledge. Its meaning of general compliance, hesitancy about limited legal compliance and fear of reputational harm suggest that there is a lesser chance of utilisation in these archives than Active Agency regimes, but more so than Oppressive regime archives.

As there is general copyright and legal compliance, it is possible that film archives aligned to this regime will feel able to utilise Art. 8(1) at least, as they have more legal clarity and the CMO will lead the process for them once a licence is agreed. However, it was noted at the BFI, which overall adheres to this regime, that there is some “mistrust” of CMOs. This relationship with CMOs would have to be strengthened considerably for Art. 8(1) to be utilised by film archives. It could be that this mistrust stems from a lack of engagement with CMOs, as there is currently no representative CMO for film in the UK. With this mistrust in mind, it remains possible that Art. 8(1) would be utilised.

However, from observing the meanings present in the Pragmatic Compliance copyright regime, it is deemed unlikely that archives aligned to this copyright regime would feel able to utilise the fall-back exception in particular, as it will be deemed too high-risk. The hesitancy around areas of limited copyright compliance, such as the “fudged” orphan works practice that is not directly advertised to users, suggests that where the archive lacks confidence, it prefers to abstain from copyright engagement. It is suggested here that the fall-back exception in Art. 8(2) is likely to be perceived in a very similar way by these archives.

9.7 Conclusion

Using Foucault’s concept of a “regime of practice”, a new copyright regime of archiving practice that orchestrates archival practices has been proposed in this chapter. The different sub-regimes of copyright in each archive establish how the various elements of archiving come together, and the meanings of copyright and

legal incorporation. This contributes a theoretical framework for the understanding of how copyright shapes archival practices. Future research could apply the sub-regimes proposed here to a wider variety of film archives and CHIs, to test their generalisability, which would widen the scope of this framework,

This chapter has outlined the different copyright sub-regimes of archival practice present in each of the case study archives: an Oppressive Regime; Pragmatic Compliance regime; and Active Agency regime. The proposed copyright sub-regimes enable a much deeper and nuanced understanding of the way copyright is engaged with in the archives, and the meanings that are dominant, and those that are subordinate. The meanings present in the ethnographic observations and interviews echo the discourses discussed in Chapter 8, for example, copyright tension, curatorial choice and gatekeeping practices were observed in each of the three sub-regimes. Additional meanings were also observed in the ethnographic research, including a fear of potential reputational harm.

This in turn illuminates which practices are likely to be accommodating to the utilisation of out-of-commerce works within the archive, and which are conversely likely to hamper incorporation into practice. For Art. 8 to be beneficial to film archives in providing public access to out-of-commerce works, understanding the practices of copyright is crucial, as their current response to copyright is a likely indicator of the success of future copyright provisions.

Furthermore, it facilitates an understanding of how existing practices, and elements of these practices, can be modified to adapt to the new proto-practice of making out-of-commerce works available to the public. The sampling approach proposed in Chapter 4 contributes a potential new proto-practice for film archives, as well as CHIs more generally. These proto-practices could support one another in becoming performed practices, as the sampling approach will address the lack of funding, time and staff present to conduct individual assessments of availability. In this sense, the sampling approach if utilised by film archives and CHIs, would result in making it easier to incorporate making out-of-commerce works into archival practice.

The following chapter discusses the core findings from the ethnographic research in relation to incorporating out-of-commerce works into archival practice, examined through the triad of meanings, competences and materials.

Chapter 10: Applying the Copyright Regime of Archival Practices to Out-of-Commerce Works

10.1 Introduction

The previous chapter proposed a copyright regime of archival practices and set out the three sub-regimes identified during the research. This chapter will explore the meanings, competences and materials issues in these regimes that are most relevant to the incorporation of out-of-commerce works in film archival practice.

This chapter will begin by exploring the meanings of copyright compliance followed by that of out-of-commerce works. The meanings viewed as likely to have a significant impact on the likelihood of successful incorporation will then be discussed, and these issues are: a strong desire not to cause potential reputational harm with current or future donors; commercialisation of the archive; and that the risk tolerances of the film archives vary. This will be followed by discussion of the meanings of curatorial choice and human agency, and gatekeeping. These meanings were commented on and observed in the archives but are likely to have a lesser impact on incorporation of out-of-commerce works into existing archival practices than the meanings noted above.

This chapter will then go on to explore the materials and competences issues that could hinder successful incorporation of out-of-commerce works into archival practice. This chapter will first consider the issue in that there is no representative CMO for film in the UK or the Netherlands. Next will follow a consideration of the fact that funding issues and issues with technology obsolescence and material degradation are competing interests and will take priority over the incorporation of new copyright reform.

10.2 Meanings

Within the meanings identified in the copyright sub–regimes of archival practice, there are both dominant meanings and subordinate meanings present. The term “dominant meanings” is being used here to refer to what “should” or “ought to be” done, that is to say, the meanings that set standards of best practice. “Subordinate

meanings" are meanings that are exhibited by some individuals but are not the meaning held at the institutional level across the archive. It is important to acknowledge the existence of these subordinate meanings as it is an over-simplification to state that all individuals within the film archives adhere to the organisational culture and dominant meanings of the archives.

For example, in the Pragmatic Compliance regime, there is a dominant meaning present that legal compliance and copyright compliance should be adhered to. In the majority of observations made and interviews, this appeared to be followed. However, in other team meetings it was observed that some legal compliance was limited, either because it had been "fudged", or because separate teams had control over supervising their own legal compliance. Therefore, what was observed to be happening in practice was a dominant meaning of general (but not complete) legal compliance, and a meaning of hesitancy around these areas of limited legal compliance.

Another example that demonstrates this in practice with even more clarity is the meanings of copyright in the Active Agency regime. Overall, the dominant meaning present in the archive was of copyright compliance that is balanced with professional judgement, with some active departure from copyright law. There is not a dominant meaning of copyright fear. However, comments made by individuals in the Active Agency indicated that some of them are wary of copyright, specifically relating to an accompanied fear of reputational harm. Whilst copyright fear may not be the dominant meaning of the archive as an institution, some individuals still experienced it, and hence this was a subordinate meaning.

10.2.1 Copyright Compliance

In each of the copyright sub-regimes of archival practice observed at the film archives, the meanings of copyright compliance and resistance were instrumental to the overall regime of practices. Copyright tension and copyright fear are prominent discourses or meanings present in the literature on archiving,[900] as was discussed in Chapter 8. These meanings were found in the ethnographic studies, and tension with public access was especially noted.

[900] See in particular Fossati (n.33) and Prelinger (2015) (n.766)

“Rights clearance” to research the often-complex copyright situation and obtain necessary permission to reuse a work was observed at the BFI to be an ‘afterthought’. A meaning of copyright clearance being an afterthought was noted at the BFI, and it was commented that copyright is not usually considered as a cohesive part of the overall project. This sentiment was echoed in several other discussions and group meetings, that rights clearance and the Rights and Contracts department’s work is only considered after the other work has been completed, and not always as a cohesive part of it.

It was likewise noted by Z that in 2014 they had advised that a takedown notice should be on the BFI Player, but there was still not one in March 2019.[901] This presents a substantial barrier to incorporation, as it could suggest that even if the Rights and Contracts team were to internally advocate for the adoption of a policy of utilising out-of-commerce works or another copyright policy, this policy may not be actioned or adhered to.

10.2.2 Out-of-Commerce Works

The meanings concerning out-of-commerce works are essential to their successful incorporation into existing archival practices. Individuals at each of the three archives were positive about the concept of out-of-commerce works, viewing it as potentially very beneficial for film archives. It was commented by many of the individuals that they believe there are many out-of-commerce works in the archives; and that the concept is well aligned with the desire to make these publicly available. To illustrate, A at MACE commented that they believe that there:

> would be loads of out-of-commerce films in the archive; and it could maybe help raise the archive’s profile if they were used.

A meaning of making films available for public access was strongly intertwined with the narrative of out-of-commerce works, and it was observed that they were viewed as potentially very beneficial for enabling public access. It was observed from the list of films in their collections and the discussions generally that many of the films

[901] In December 2020 there remains no clear takedown policy on the BFI Player

appear to be out-of-commerce, as they are thought not to be available anywhere else, according to the curators.

Likewise, at the BFI, T noted that their organisation is hopeful that the out-of-commerce works scheme could be “very useful”, even more so if

> it allows more public engagement and for us to be able to give more access; and raise more money, as we are a charity.

The out-of-commerce works scheme “could be really powerful for lots of places, especially for us being the national film archive”. Once more, the meaning of public access is dominant, and boosts enthusiasm for out-of-commerce works.

As a result, this copyright reform was viewed more positively than other copyright and legal issues discussed, as being able to make available out-of-commerce works were regarded as beneficial to film archives, as opposed to being additional legal rules imposed upon archives that restricts them.

T also noted that out-of-commerce works could potentially be a way of “supporting the archive” financially and of “building awareness of the archive”. They hope it will help with future commercial sustainability for the archive, which is “particularly important for charities”, which the BFI is. This is an interesting comment given that out-of-commerce works cannot be commercialised, which this participant understood, and suggests that the film archives anticipate that making these works available to the public will attract more viewers. This in turn could attract more commercial interest in the archive’s collection.

This notion could offer reassurance to film archives wishing to prioritise commercial activities to support their limited funding, and thus do not view making available out-of-commerce works as a financially viable activity. If this was viewed as attracting additional revenue over a longer period of time, this could be a more attractive option. When film archives have experience of making out-of-commerce works available, further research into whether this leads to enhanced commercial licensing should be conducted.

Q further noted that the BFI foresees the out-of-commerce provisions applying to the H22 project; and also, other suitable projects, as it

> could be used for anything if it works well… [it could be] very useful for us, as a large chunk of our remit is making stuff available for educational and public access.

At EYE, F likewise commented:

> We believe that especially when a cut-off date is elected, this whole OOC [out-of-commerce] business could be beneficial for film archives. And more so for Eye as we are launching our vod [Video on Demand] platform and this means we will be able to offer a substantial part of our collection to view for free

As was observed at the other archives, EYE viewed out-of-commerce works as compatible with the public access meaning and could foresee the access it will provide through the VOD (video on demand) platform. This cumulated in a positive view of out-of-commerce works. Overall, the attitude towards out-of-commerce works is very positive, and the three archives all felt it could be of significant benefit to film archives generally, as well as their own specific collections.

10.2.3 Reputational Harm

The orchestrative power of the copyright regime of archival practices is evident in meanings such as a fear of reputational harm. The individuals or archives who do not adhere to the discourse of copyright compliance are aware of the "penalty" or "punishment" that reputational harm to the archive could bring. This fear of causing any reputational harm was observed to be a self-regulating mechanism that individuals placed upon themselves,[902] which in turn shaped their archival practices. It is therefore in this self-discipline and self-regulation that the impact of copyright on orchestrating archival practices is most prominent.

Reputational harm (both actual and perceived) to the archive and to the individual archivist was discussed in relation to copyright by many individuals during the

[902] See Shove, Pantzar and Matt Watson (n.61) 52; see also Elias (n.883) 25

ethnographic research. All archives and archivists in this research regarded any potential reputational harm to the archive as very serious.

Reputational harm was observed as having a very negative impact on the film archive in a financial and professional sense. This was viewed as likely to occur if the archive suffers from a reputation of being careless with copyright works, of not respecting rightholders, and of failing to comply with legal requirements. The focus on the relationship with rightholders was of key importance, as without rightholders agreeing to allow their material to be stored and used, the film archives could not continue.

Reputational risk is an issue that, from speaking to the participants, can be separated into a fear of harming relationships with four distinct groups: current or future financial donors; current or future donors of material to the collection; members of the public or users of the collection; and other CHIs or partner institutions. No individual or archive articulated the fear of reputational harm as having these four aspects, but they appeared through analysing the comments made. The sub-groups are proposed here as a way of understanding this reputational harm in more depth. It was the potential reputational harm to current or future financial donors; and current or future donors of material to the collection that was spoken about by the majority of the participants.

Fear of reputational harm was a dominant meaning, including within the Active Agency copyright regime of archival practices, which was typified by the most resistant attitude towards copyright. This suggests that avoiding reputational harm is motivated by the fear of legal redress, especially by the BFI and MACE. At EYE, it was observed that they are motivated by an ethical sense of duty and care towards rightholders, due to the dominant meaning of gatekeeping. To illustrate F at EYE states that existing rightholder relationships will not be risked by utilising the out-of-commerce provisions, even if the works are eligible:

> [w]e would never consider anything OOC if we were in contact with the rights holder(s), even if it would fit the bill. So, we do not expect any negative reactions in that respect. We also do not believe any negative impact for rights holders given the opt-out options given to them.

Reputational harm and the relationship with rightholders is paramount to EYE and to the individual archivists. As C noted: “[i]t’s very important for us to have good relationships with copyright owners and to respect their rights.” They commented that EYE wants to put as many films online as possible, but this must be done in a way that corresponds to the “very strong respect” EYE has for copyright owners.

Similarly, M commented: “reputation as an archive is really important”. This is clearly evidenced through access practices, as commented by F:

> [a]ccess to material that is still in copyright is only open to rights holders (regarding their own material) and third parties who have acquired the rights holders’ permission unless permission is not required such as under the in-situ exception.

S noted that some rightholders do not give permission to reuse of their material, and “[w]e will not deliver material that the rightholder does not agree to”. For instance, some rightholders will not allow clips to be used from their film, only allowing the full film to be shown, or others will not agree to the context of the proposed reuse.

At the BFI, Z noted that for “very high-risk things [in relation to copyright], there is also a reputational risk, as we do not want to impact on our donor relations”. This meaning is likewise present at MACE. T observed that

> [t]he majority of collections are here on deposit. Everything else is treated as a deposit term and that the rightholder needs to be contacted for permission. We need to have a relationship with donors. So even if we know it’s a gift, we do anything as a courtesy to maintain those donor relationships for our stuff. It’s an ethical view.

This comment demonstrates the acknowledgement that some of their practices related to copyright are also ethical or gatekeeping concerns, more so than legal requirements. It is likely that they would adopt a similar approach with out-of-commerce works if they were to utilise them, most likely wishing to request permission from rightholders and donors to do so, as a “courtesy”.

This could lessen the likelihood of film archives making out-of-commerce works available, and indeed decrease the probability that they utilise a sampling mechanism such as the one proposed in this thesis.

The concept of archival gatekeeping was noted when reviewing the existing archival literature in Chapter 8. For instance, Fossati commented on the "chaperone model" that is often present within film archives, in which archivists feel a personal moral or ethical responsibility to control access to and use of certain films, and in certain contexts. This research has found that this gatekeeping or chaperone model is present and was observed to varying degrees across each of the archives.

This thesis can contribute to the existing literature by providing empirical data that demonstrates the relationship between this gatekeeping and a meaning of avoiding reputational harm. It was observed in the case studies that gatekeeping was carried out on a basis of respect and professionalism as well as through a feeling of being the films' chaperone. This respect and professionalism were intertwined with a perceived need to maintain the highest levels of professionalism in order to avoid reputational harm.

This fear of reputational harm is itself interlinked with on-going fears of funding and the continuing viability of the archive. In the copyright regime of archival practices proposed here, the relationship between these meanings and their influence on archival practice evidences the orchestrating power that copyright exerts within film archives. Drawing on Hand and Shove's understanding of orchestration,[903] copyright is an orchestrating node within the wider archival practices, which intersects with them and shapes the practices. The fear of reputational harm is a meaning that acts as an orchestrating node within many archival practices.

10.2.4 Commercialisation of the Archive

An interesting concept that arose at each of the three archives in multiple interviews is that of commercialisation and generating revenue. The three sub-regimes approach commercialisation differently, with the Oppressive regime viewing commercial activities as having priority over non-commercial activities. In contrast, the other two sub-regimes have dominant meanings that public access non-

[903] Hand and Shove (n.140) 95

commercial work should take priority. This difference in approach is a result of financial necessity in the Oppressive regime; as well as differences in categorisation of what is “commercial”.

As has already been noted[904] FIAF members, including the BFI and EYE are bound by FIAF’s Code of Ethics[905] which prohibits engaging in activity that interferes with the intellectual property rights of a film or its commercial exploitation. MACE is not a member of FIAF, but as a member of FAUK adheres to a similar ethical code. At each of the film archives, there remains a concern with generating revenue for the film archive via licence fees.

To that end, all of the film archives engaged to some extent in licensing films commercially. Individuals at the archives commented on the limited funding, and how licensing films commercially provided needed revenue. In some cases, they are required to raise money commercially. For instance, at the BFI, Z commented that DCMS[906] have said that the BFI has “to commercialise some of our stuff as part of Heritage 22 [current digitisation and access project], as part of our sustainability” and that the BFI is required by the Government to generate more income than it receives in Government aid.

For smaller or regional film archives in particular, their funding is often more restricted and so commercial sales of their film material are very important to the archive’s continuing success. As D commented at MACE, their funding has “decreased over time, and then stagnated” and that it is “quite a precarious situation [as] archives have an enormous financial deficit”. Due to this, they noted that the “ability to license is so critical for MACE, without that ability, we simply couldn’t function”. D also commented that “[j]ust under half the money MACE needs to function is raised through sales – commercial sales.” MACE is now a charity, and D commented that “[c]harites can make money – we need to understand the commercial environment to survive” and also to “pull in” grant money.

[904] See 8.2.2
[905] FIAF, “FIAF Code of Ethics” (n.779)
[906] UK Department for Digital, Culture, Media and Sport

It was noted by another participant that MACE is often asked for historic news report footage in relation to “a lot of true-crime documentaries, mostly reopening of cases”, particularly historic abuse cases. They commented that:

> It’s more common than you’d think… at least a few each year…Copyright takes on a whole other level with this. ITV whizz it to their legal departments. It’s really important, we are evidence! ...It’s not all fluffy here. We hold a lot of news, so it’s not all fluffy.

This highlights the vital role the archive plays, in this case in literally rectifying historic injustices and oppression. It also emphasises that the nature of many of the films in the collection are more suited to commercial licensing, and that careful consideration needs to be given to the context of any reuse of these news reports.

Many of the commercially exploited films at the film archives studied were orphan works or public domain films, as they are easier to manage from a copyright perspective. Z at the BFI assumes “there are many more out-of-commerce works than orphan works”; and in their UFH project, they found that 5% of the works were orphan works. It can therefore be assumed that there are “many more” out-of-commerce works than this.

Art. 8 provides the ability to provide widened access to out-of-commerce films in their collections, but not to commercially exploit these films. This is inherently incompatible with provisions that will only allow non-commercial uses of the works. In this sense, it seems that the out-of-commerce provisions sit at odds with the reality of daily archival practice and misunderstand the fundamental commercial roles the archives are required to play. Being unable to commercialise the out-of-commerce films, whether members of FIAF or not, does not address the funding gap that many archives face.

If a film archive’s existence is at risk due to financial uncertainty, and by extension the livelihood of the individuals working within the film archive, provisions that focus on non-commercial use are unlikely to be regarded as a key priority. The regional film archives face the greatest financial uncertainty and are therefore more likely to adopt policies and projects that focus on commercial uses of the collection.

These funding concerns are also shared by the national film archives. The BFI in very recent years has been the focus of potential mergers to cut costs and substantial budget cuts; and subsequently the crucial need to generate commercial revenue and demonstrate commercial savvy increases. Despite its large budget, EYE's finances are stretched, and thus commercial and businesses decisions are made as to what is the best use of the money, and which films are most likely to generate revenue. If an archive's focus is on generating revenue, the out-of-commerce provisions do not seem beneficial.

10.2.5 Risk Tolerance

From a comparative perspective, there is a noticeable difference in the UK and Dutch approaches to copyright compliance, influenced by their risk appetites or risk tolerance. Framing this risk tolerance within the sub-regimes, it is evident that the Oppressive regime is the least able to tolerate risk, and Active Agency is the most able to tolerate risk. This appears to be a result of the meanings concerning copyright compliance: the meanings that most align to strict copyright compliance therefore consequently also align with the lowest appetite for risk.

This risk appetite is influenced by a number of factors, with funding security and copyright confidence being crucial.[907] In the UK, there seemed to be a desire not only to uphold copyright law, but *to be seen to be* following and upholding copyright law, which has led to risk averse policies. In the Netherlands, there seemed to be a view of following and upholding copyright requirements, but also wishing to benefit from copyright too; and therefore, there has not been the same focus on ensuring that their compliance is visible, seeming to result in more risk-tolerant approaches.

EYE has the boldest approach, evidenced by its position of only consulting sources during an orphan works diligent search that it deems relevant, and will disregard irrelevant sources even if they are legally required.

In contrast, MACE was observed to have the lowest tolerance for risk, and to actively avoid activities it deems likely to carry legal risk. Consequently, some film works are

[907] See Chapter 7 for a comparative legal overview of the UK and the Netherlands in relation to copyright and general legal compliance

in essence embargoed with no reuse allowed. As D from MACE noted in relation to a co-creation project on women using the archive's films:

> I'll have to get them to choose way more footage than they'll need, so I can go through and say "woah! Definitely not that one for rights!

Where there was a legal copyright specialist within the film archive, the overall confidence in copyright processes was higher, as the individuals within the film archive expressed knowing that they could speak to that specific individual for guidance.

The national film archives appeared to have a noticeably higher risk tolerance than MACE as a regional film archive. Despite the BFI being larger than EYE, EYE had a higher tolerance for risk, suggesting that there is a strong component of the nationality of the archive that impacts on the risk tolerance. The meanings of legal compliance, copyright and cultural heritage, and the likelihood of litigation, all appear to shape this risk tolerance.

The appetite for risk was seen to consequently impact on film archival practice, for instance: the adoption of averse copyright and accessioning policies; seeking permission from a material donor every time even when there is an existing donor agreement in place that would allow the use; strong ethical policies that do not allow a use that is legally sanctioned; an indication that there would be a risk-averse approach to out-of-commerce works; and hesitation in using or sharing works unless the CHI is very confident that this does not infringe copyright. For instance, MACE stated that they will seek rightholder permission every time, regardless of any standing agreement in place.

It seems evident that the UK film archives have a more risk averse approach than in the Netherlands and are therefore less likely to make use of the 'backstop' in Art. 8(2).

10.2.6 Curatorial Agency and Gatekeeping

Curatorial choice and human agency were discussed in 8.2.4, the concept that archivists wield power in their everyday decision-making. The act of archiving

shapes the overall collections and the historical narrative.[908] The influence of the individual archivist and curatorial choice was evident in each of the three archives studied. This gatekeeping was observed to be aligned to the dominant meaning of avoiding reputational harm, which was observed across each of the archives. The gatekeeping practices can therefore be understood as a self-disciplining mechanism, to adhere to the dominant meaning.

This could be thought of as transgressive within the overall copyright regime of archival practices, as it seems to resist copyright compliance. However, from the observations it rather seems that this meaning is linked to the competence of specialist knowledge and roles of staff. As staff have very specific roles within the workflows, this only functions if they have agency. This is therefore one of the existent practices that is sometimes in tension with copyright compliance.

The agency of the individual was implicit and observed in activities and comments that kept certain films or collections out of public view or refused reuse for ethical reasons. Such gatekeeping was noted in all of the archives, with the view expressed that archives have a "duty" to protect the rightholders and donors. This aligns with Fossati's chaperone model as discussed in Chapter 8.

A focus on "sensitivity" was observed in the film archives, with a strong emphasis on ethical use of the film, of films being viewed in their original context, and of rightholders, especially elderly or more vulnerable rightholders, being protected by the archive. A at MACE noted that "[y]ou have to be sensitive" about allowing the reuse of certain material, including amateur films with private moments such as strip teases. It was viewed that these films contain private moments from people's lives that were never made with public viewing in mind.

At EYE, S also commented that in regard to amateur and home movies, EYE is "extra careful with those, as "[t]he people who donated them are not professionals- so we feel a responsibility to protect them… we're more hesitant." This ethical or moral responsibility to the rightholder often results in the film archives restricting access or reuse of certain material.

[908] See for example Hill and Johnstone (n.205) and Andersson and Sundholm (n.216)

Curatorial choice was observed both explicitly and implicitly and was noticeable in the choices of films for restoration. To illustrate, restoration of titles within the archive is a key activity for the BFI. It restores approximately 20 film titles per year, chosen from strict criteria to prioritise the films viewed as most important.[909] These restored films are subsequently screened nationally and internationally, and released on DVD and online or TV. This allows as many people to view these films as possible.[910] These films are chosen according to guiding principles, but ultimately this is an area of personal preference. Likewise, the films to be included in film projects such as H22, UFH, and the archival reuse and exhibition events at EYE are chosen by a curator, which evidences the clear influence and power they wield within the archive.

10.3 Materials

Both the materials present and the materials absent from the archives impacts on their ability to make use of out-of-commerce works in line with Art. 8. It was observed in the case studies that a lack of legal guidance (a material) on the terms in Art.8 is likely to have substantial impact on archives being able or willing to make use of Art.8. There were many other archival materials present in the archives, but they will not be discussed here as they do not relate directly to copyright compliance.

10.3.1 Lack of Legal Guidance Documentation

Clarity of terminology is desired by the film archives, as although most individuals feel that they have the necessary subject expertise to know the length of the commercial lifecycle for a film, or what uses should be thought of as non-commercial, the risk of infringing copyright and subsequent legal action creates wariness. This is fuelled by the meanings of copyright fear and copyright compliance discussed. This redoubles the significance of minimising the burden of unclear terms in Art. 8, as this creates both legal and practical issues to implementation and incorporation.

10.3.2 The Definition of Out-of-Commerce Works

The immediate concern for the archives as institutions and for individual archivists and staff members was what “out-of-commerce” means. The meaning of the term

[909] Department of Culture, Media & Sport (n.820) 44
[910] Department of Culture, Media & Sport (n.820) 44

“out-of-commerce” was raised by several individuals across the archives as causing concern, as it was regarded as being vague. There is no document or policy document that can be referred to by the film archives for guidance. The DSM Directive text was viewed by the participants as explaining the term insufficiently for archival practice.

A failure to clarify this definition was regarded by some individuals within the ethnographic research as meaning they would not be able to use it. To illustrate, on the definition and scope of “out-of-commerce”, Q at the BFI noted that:

> [i]f the definition is not specific enough, no one is going to feel comfortable using it. So that will be quite a tricky one, across the EU.

This ambiguity creates further problems, as the copyright knowledge within the film archives has been observed to stem from one specific copyright specialist or small team, particularly in the Pragmatic Compliance and Active Agency copyright regimes. If the copyright specialist within the film archives does not have clear guidance on Art. 8, they cannot disseminate clear guidance to others within the archive.

Amateur and home videos were regarded as likely to be out-of-commerce, given that these materials are less likely to have been commercialised. When determining which works are out-of-commerce, some of the individuals commented that whether or not the film content was legally available would impact on them ascertaining the out-of-commerce status.

Likewise, a clear cut-off date was identified by many as being crucial and would provide the clarity that the film archives need. It was commented by F that EYE could make available “presumably quite a few [films] if the new legislation contains a cut-off date”. It was viewed by many that without a clear timescale at which a work could be deemed to be out-of-commerce, it would be too onerous to be used. W at MACE commented that the “time aspect” is an issue, meaning a potential cut-off date, as clarity is needed for them to be able to consider using it.

The length of the cut-off was discussed, with differing suggestions given by those interviewed. It was noted by some that the rightholders are likely to lobby for this

limit, if one is introduced, to be as long as possible. Time limits are therefore essential to the usability and proper functioning of out-of-commerce works within archival practice. As F at EYE commented:

> [w]e have heard proposals for twenty years, but that seems unrealistic. Likely the rights holders would collectively oppose such a proposal. But forty years could work.

In contrast, Q at the BFI suggested a time-limit of approximately "a couple of years … two-five years maybe with six months' notice of intention". It was further noted by Q that before a time limit could be set, it would have to be established how long is required for an agreement to be made: "how long does it take to do a deal somewhere? Rightholders need to have the chance to negotiate with people." These suggested cut-off limits were therefore positioned to safeguard and respect the rightholder, not simply to benefit the film archive.

The individuals who discussed a cut-off date all related it back to negotiations with rightholders and agreeing a position that rightholders view as fair to them. This focus on the relationships with rightholders reiterates the desire to utilise out-of-commerce works for instances in there is no likelihood of commercialisation, as opposed to encroaching on the right of the copyright owner to commercialise their work. This is aligned to the meaning of avoiding reputational harm present in each of the copyright regimes.

Different cut-off dates for different genres of film work were suggested, as different genres have their own unique commercial life cycles. Z at the BFI noted that most distribution deals for film were historically always at least seven years; and often it was a minimum of ten years at the BFI for archival material, to recoup the cost of restoration and preservation. Consequently, Z stated that the cut-off date chosen is likely to be influenced by the film distribution timeline, as films tend to have natural breaks in their lifetimes.[911]

Z stated that during these natural commercial "breaks" it is unlikely the work could be considered out-of-commerce. These discussions further highlight the need for

[911] For example, a six-month break between theatrical release and DVD sales.

sector-specific guidance and definitions, as commercial film works do not follow the same commercial life cycles as works such as books.

If such a cut-off limit was introduced this will still require some information to be available on individual works concerning the year they were created, to determine when the cut-off date applies. This research will still require some time and therefore staffing cost and resources. The proposed sampling mechanism set out earlier could alleviate some of this burden.

A further issue identified by a small number of the individuals is whether the activities of the film archive could inadvertently place the work 'back' into commerce, for example placing it on a YouTube channel or on the film archive's website for the public to view. One individual commented "is the BFI putting stuff on YouTube to view for free putting it in commerce?" If so, some of the individuals within the film archives expressed concern that the rightholders might then reappear and want the work to be taken down or want financial compensation for their works.

10.3.3 "Commercial" or "Non-Commercial" Use

The issue of whether or not a use is "commercial" was a significant concern for all of the archives. This issue was regarded as essential for the successful incorporation of Art. 8 by the archives, as a lack of clarity on this renders Art. 8 ineffective. Defining what is clearly non-commercial use appeared to be easier than defining non-commercial use. Uses such as research and education were generally viewed as non-commercial. One individual noted:

> [s]ome things are clearly commercial and some things are clearly non-commercial, and others on a sliding scale, depending on who you talk to as well.

This recognises the subjectivity in determining whether a work is commercial or non-commercial, and that people within the same archive can hold differing views on this.

A significant difference was noted between the Dutch and UK film archives on this issue. EYE in particular regards all of their activities as non-commercial, as they are a non-profit organisation. Regarding how EYE distinguishes between commercial and non-commercial uses of a work, F noted that:

> [w]e don't as such. Of course, being a foundation under Dutch law means we cannot make a profit, so all our activities could be considered "non-commercial".

Likewise, C noted that all of EYE's activities are inherently non-commercial:

> [w]e are an archive, we are a museum; commercial is where you make a profit. Everything we make goes back into the funds to keep us going, so we make no profit.

It was evident from these discussions that Dutch archives adopt a bolder approach than the UK archives in deeming all of their activities as non-commercial. There is a difference of approach when discussing the reuses of the films by clients, with a tendency towards assuming these will be commercial. At EYE, S commented that regarding distinction between commercial and non-commercial uses that are requested by clients, "[i]t can be tricky and difficult… it's a case-by-case basis." S regarded academic and educational uses as most likely non-commercial, but "I consider some of it as commercial".

At the BFI, they shared EYE's view that, in theory, all of their activities are non-commercial. Z from the BFI notes:

> [n]othing the BFI does makes a profit as it all goes back into the institution…In some ways, we could say that everything we do is non-commercial

However, in practice it was noted that this view is not held as strongly or boldly as by the Dutch archives; and in reality, great caution is exercised in uses that could be viewed as commercial. As Q noted, non-commercial use is when "no one is making any money at all – is the simple answer".

Advert revenue was a cause of uncertainty for some archives, as to whether it is non-commercial. As one individual at the BFI commented:

> [i]t's becoming more difficult to distinguish between commercial and non-commercial use… [This situation has been] blurred with YouTube, as ad revenues on the side, are potentially quite a lot of money.

An individual at a UK archive commented that it is now possible to request that YouTube pays the archive the advert revenue generated from channels that have uploaded their film content illegally, as opposed to taking it down, “but I think this starts to be more commercial”.

Furthermore, sponsorship on websites was raised by one individual, who viewed advert revenue on YouTube as commercial, but was “not sure” whether sponsored content would be. This was because it was regarded as being “more difficult to distinguish when it’s indirect revenue.”

When asked about the monetisation of YouTube channels via advert revenue, individuals at EYE in the Netherlands regarded this as commercial, and further noted that they think that is a political matter that needs to be addressed. This highlights the uncertainty the archives are facing in relation to out-of-commerce works, and the risk that this uncertainty will discourage some archives from attempting to use Art.8.

Similarly, DVD sales of archival materials by the film archives was an issue mentioned by several people in regard to whether the activity is commercial. Individuals at the BFI expressed that in their view this would be commercial; Z commented that this “would be commercial, as we are in a competitive market”; and Q noted that “I don’t think sales like that would stand up in court”. Activities that overlap with third party commercial activities were therefore regarded as commercial, and something that the BFI is not permitted to do without rightholder permission.

10.3.4 The “Reasonable Effort” Requirement

This issue has been discussed in depth in the doctrinal legal analysis conducted earlier in this thesis also arose in the ethnographic research. It was noted by individuals at MACE and the BFI that the Orphan Works Directive has been difficult to use, and some individuals viewed it as altogether unhelpful. The primary reasons for it being “too onerous” to use successfully are the diligent search required; the fact that reappearing orphan work authors need to be compensated and that the orphan works scheme does not work with royalties; and the film industry is structured in a royalty system. Within these film archives, there are varying attitudes towards the Orphan Works Directive and the diligent search process.

In relation to out-of-commerce works, Z is concerned that it would be “a similar mechanism” to the orphan works scheme and would therefore “be a non-starter”. Therefore, they said that the BFI will lobby the IPO and the DCMS to make sure there is the “right appetite for this to work”. Similarly, Q from the BFI commented that the UK orphan works scheme had been:

> clunky and difficult to use, and, anecdotally, I know some people have decided it’s better just to take the risk and have a pot of money just in case. So, we would hope that the out-of-commerce provisions could be better than the orphan works scheme.

At MACE, two individuals in conversation agreed that the Orphan Works Directive “is not helpful” to their daily work, as it is too difficult to use, and that registering orphan works will not address the archive’s revenue needs. If the out-of-commerce provisions are similarly onerous, they are at risk of being unused by the film archives, or at least not used to the extent anticipated by legislators.

EYE has a more flexible understanding of the Orphan Works Directive and is happy to use it to exploit orphan works. As has been stated by EYE’s legal advisor, the “sources are only consulted if they are relevant *even if they are mandatory according to law*.” EYE’s position is that it will search all sources that are relevant to the material at hand, and disregard sources that are not relevant, even if legally they are required. The reason for omitting certain irrelevant sources is that it saves time, and therefore money, as otherwise this can be a cumbersome task.

This approach demonstrates a focus on the law’s intention, more so than its direct wording. Given this more positive view of the Orphan Works Directive and the pragmatic approach to the diligent search, it seems likely that EYE will be comfortable adopting a similar pragmatic approach in determining whether a work is in commerce. For the UK film archives, this is less likely to be the case.

10.3.5 Funding Issues

One of the significant materials lacking from the archives in order to make out-of-commerce works available is the required levels of funding. The archives face continually diminishing funds, and greater pressure from the government for them to

be more financially independent. Many film archives, even those that receive national funding, are required to self-fund to some extent. For some film archives, they need to be almost wholly self-funded, as they receive only a small amount of national or public funding.

As a result, they are hesitant to spend time and money on utilising out-of-commerce works, when Art. 8 only allows them to do so for non-commercial purposes. This financial vulnerability and the need to be visibly evidencing its ability to cut costs where possible informs both institutional and personal decision-making. There remains a focus on prioritising activities that are economically viable, and that align with funding objectives.

MACE in particular has a fundamental funding gap and has to prioritise commercial activities over non-commercial activities. From observing general conversation and from the interviews, it is clear that funding is a primary concern, and the focus therefore is on all activities that can generate income. It was commented in conversation between two staff members that it is a "month to month" worry about funding and being able to continue the archive. D at MACE said that their funding has:

> decreased over time, and then stagnated…It's quite a precarious situation, archives have an enormous financial deficit…There has been "a drop-off of around 60%", down to £10,000-20,000 now.

The fact that out-of-commerce works can only be used for non-commercial purposes is also deemed a significant concern for its usefulness:

> [i]t's difficult, as we need to generate revenue, so the non-commercial uses for out-of-commerce works doesn't help with that. It's great from a public point of view, but the archive needs to be able to provide access, so we need commercial revenue to keep going.

D further commented that "[f]unders want access, so we need to provide access to get funding."

At all of the archives, it was commented and observed that due to both space and budgets, decisions have to be made as to which material is kept, and which material is to be prioritised for digitisation and access. This was an issue for the individual film archives to varying degrees. At MACE for instance, only 6,000 film items are digitised out of 100,000. Once again, the ability to digitise the rest of the collection is hindered by a lack of funding and staffing resources. Only once these materials are digitised can MACE make them available, and only at this point can there be a consideration as to whether the out-of-commerce provisions can be used.

Backlogs of digitisation and preservation were also observed at the BFI and EYE. B at EYE noted that they have a “very little limited budget now”, and that this significantly impacts the film restoration activities, and that they are “very selective now” about which films are taken in and restored. At the BFI, shelves in the film vaults were stacked with material that is uncatalogued, yet to be accessioned, viewed and digitised. The focus within the archives is therefore to manage this backlog before considering other less urgent projects and utilising the out-of-commerce provisions is likely to fall down the priority list.

10.3.6 Unknown Number of Out-of-Commerce Works

Given the lack of clarity in the definition, it is unclear how many out-of-commerce works there are in the film archives. A lack of accurate figures weakens the incentive for film archives to invest time and money in bringing these works to the public, as it is unclear what the potential scale of the benefit is for the archive.

For many film archives, there is a ‘backlog’ in the archives of un-catalogued or un-accessioned items. This presents a dual challenge: that the focus for the film archive is often reducing this backlog before considering any new or additional projects, such as utilising out-of-commerce works; and in knowing how many works are out-of-commerce. This leads to the issue of a film archive being wary of investing substantial time and money into researching whether works are out-of-commerce unless they know it will be productive; and paradoxically this cannot be known unless the copyright research is conducted.

The H22 project that the BFI and MACE are part of almost certainly comprises many out-of-commerce works, as much of the material is not accessible anywhere else at

all. This project impacts on the other UK regional film archives too. If the project were able to utilise similar national legislation to Art. 8, this could save the archives considerable time and money, which are in short supply.

10.3.7 "Permanent Collection"

Works must be in the "permanent collection" of the film archives in order for Art. 8 to apply. Some material is accessioned into the permanent collection of the archive and some is cared for on the rightholder's behalf, who may withdraw it as they please. If it is unclear whether the film archive holds the material permanently, this could create difficulty in utilising Art. 8.

For instance, W at the BFI noted that the new donor access agreements were approved in 2018, and they began using them in 2019. The agreements now make it explicitly clear that when people donate material, they are making a "permanent gift". This therefore means that these works are entering the permanent collection of the BFI's archive. W noted that historically this has not always been the case, and there is very haphazard historical record-keeping relating to donation, and whether a material is held in the permanent collection. This could lead to issues in exploiting these out-of-commerce works.

10.4 Competences

Both the competences present and absent from the archives impact on the ability to make out-of-commerce works available. The specialist knowledge of individuals is likely to increase the likelihood of film archives successfully incorporating Art. 8 into archival practice. On the other hand, it was observed in the case studies that historically incomplete record-keeping is likely to have substantial impact on archives being able to make use of Art.8.

10.4.1 Specialist Knowledge

At each of the three archives, it was noted from the interviews and observations that individuals hold specialist roles and have specialist knowledge. That was true for copyright knowledge, but also other topics such as software or scanning film material. For example, D at MACE commented that "[e]ach person has a role in the film heritage circle. It is a finely tuned machine; every cog is critical". This shapes

archival practices as certain individuals are the primary source of knowledge and best practice in relation to copyright. It was observed that their personal and professional views on copyright partially shaped the overall film archive's risk tolerance to potential copyright infringements.

The copyright regime of practice proposed here describes how copyright orchestrates archiving practices. As copyright knowledge is embodied in one person, or a very small number of people, within the archive, this could limit its orchestrating potential. However, what was observed in the ethnographic studies was, overall, the opposite. As it is the norm within film archives for individuals to be specialised in their roles, it was not deemed unusual or difficult for the archive that only the specialised individuals had expert copyright knowledge.

The fact that specialist copyright knowledge and functions are carried out mostly by one person were observed to amplify the copyright meanings and risk appetite of the copyright expert as an individual across the staff at the film archive. For instance, EYE's legal advisor is a lawyer and displayed a pragmatic and activist stance towards copyright. As discussed earlier, they advocate for a "pragmatic" approach to the Orphan Works Directive diligent search for orphan works, only checking sources deemed relevant to that specific work, even if this means not consulting legally mandatory sources.

Their approach is aligned to the "Active Agency" approach to copyright: copyright is restrictive on other activities, but not oppressive. There is legal compliance to the extent that it is deemed necessary and compatible with internal goals, especially public access and reuse, and some active departure from copyright laws.

This is not to say that there was not copyright wariness or copyright fear commented on or displayed by other staff members at EYE, as there was. Rather, that this unease or fear was mitigated by the specialist nature of individuals within the archive: that they could rely on the specialist to manage copyright issues. This was evidenced by several interviewees commenting that F deals with copyright on their behalf. F commented that:

> In case of doubt, colleagues usually ask me. Especially when in doubt about the applicability of copyright exceptions.

There was observed to be a widely accepted practice of relying on F for copyright guidance, as B noted: “[F] gives us the rules”. W commented that for approximately 80% of cases it is clear what the copyright situation is, and for the remaining 20% it is “unclear, but [F] does those”.

A similar situation was present at the BFI, with many interviewees commenting that they can rely on Z for copyright knowledge and for Z to manage copyright issues. Z is emailed and spoken to about copyright issues and queries by staff from other teams too, and others have commented that they are a “fountain of knowledge”.

MACE differs to EYE and the BFI, in that there is no one legal copyright specialist. Copyright permission clearance is handled primarily by one person, who is not a copyright expert (in their own view). There was far less copyright confidence as a result of this. Decisions were discussed collectively as a group, and decisions deemed more high-risk were made by senior members of staff, due to the perceived severity of a copyright infringement or offending a rightholder.

In this case, it was observed that a lack of specialist expert appeared to limit the orchestrating potential of copyright, as the lack of confidence led to avoidance of “risky” decisions. In this sense, copyright has failed to orchestrate archival practice, instead leading to avoidance of wider archival practices, including making works available. This contrasts to the BFI and EYE, which further emphasises the core importance of copyright to archival practice and that one specialist in copyright appears to be significant in a confident copyright regime of archival practices.

This finding is significant for several reasons. Firstly, it formulates a copyright regime of archival practices within film archives that is orchestrated via specialists and specialised knowledge. This is also significant as it demonstrates the power and influence of these expert individuals (or lack of individuals) within a film archive, and how this shapes the meanings towards and practices of copyright, as well as archival practices themselves. This is directly relevant to the research of this thesis, as it is likely that the legal specialist’s attitude and knowledge towards out-of-commerce

works will shape whether and how out-of-commerce works is adapted into the current copyright sub-regimes of archival practice.

This thesis contributes to the existing literature through demonstrating the influence and power of a specific individual with specialist copyright knowledge across the archive as a whole. Whilst the literature to date has thoroughly discussed the impact of specific individuals on the film archival field,[912] this is the first research to place these specialist individuals within a copyright regime of archival practices that emphasises their influence.

The legal specialist has a more direct role in orchestrating copyright practices, given that they have an active role in shaping the dominant meanings within the archive. In this sense, they can be described as a central authority figure, which shapes the norms of the organisation in relation to copyright. Arsel and Bean used this concept of a "singular, centralized authority" in their work in relation to a taste regime.[913] This role is of significant importance to this thesis, as this central authority figure is likely to have a substantial influence over the dominant meanings that are held relating to out-of-commerce works.

10.4.2 Record-Keeping

The practices of record-keeping were of particular interest during the ethnographic studies. The ability to utilise out-of-commerce works requires accurate and reliable data about the film works, and any potential commercial exploitation of the works that the archive is aware of. Incomplete record-keeping, especially historically, can lead to incomplete, inaccurate and confused information relating to the films in the collections.

[912] Film archival history has documented in great detail how the personalities and views of a handful of individual archivists have shaped the institutions they worked in, and consequently the collections and archival practices. Houston argues that during their lifetimes, "the history of the archive movement was also effectively the history of two men, Ernest Lindgren and Henri Langlois." Houston (n. 755) 37

[913] Arsel and Bean (n.161) 900

At MACE, there is a strong focus on accurate documentation and record-keeping of all agreements with rightholders, but not all works are in the permanent collection. MACE's Acquisition and Disposal Policy[914] states that:

> [t]he act of acquisition requires that formal documentation is maintained by MACE relating to the deposit of material in its care. Agreements will be signed with all depositors covering all the terms and conditions of the deposit.

This focus on record-keeping and documentation ensures that it is easy to ascertain the terms of deposit, and what rights MACE has regarding the work. Its Access Policy[915] states that:

> [w]hereas MACE will endeavour to negotiate the widest possible use of deposited material there may be access limitations imposed by the depositor or the rights owner. Any required copyright clearances must be achieved or indemnities agreed prior to the use of material in the collection.

At EYE, regarding physical ownership of the material, S explained that they distinguish between "donations", where EYE owns the physical material but not the copyright, and "deposits", where the rightholder owns both. S further commented "[w]e prefer film donations", but some rightholders will not agree to that. In this case, the film is deposited instead. Once more, this approach could create difficulty in exploiting out-of-commerce works.

In 2011, the BFI merged a number of archives and databases into one comprehensive system, Adlib, which works alongside its Collections Information Database (CID).[916] CID was made available to the public in 2013.[917] CID is the "primary meta-data storage of information in the BFI". It records a range of information, such as the physical location of items, and key information relevant to copyright, such as the name and director of the work. The data in CID is "mostly

[914] MACE, "Acquisition and Disposal Policy", 2. Available at < https://www.macearchive.org/sites/default/files/downloads/MACE_Acquisition_Disposal_Policy.pdf> Accessed on 4th May 2019
[915] MACE, "Access Policy", 3. Available at < https://www.macearchive.org/sites/default/files/downloads/MACE_Access_Policy.pdf> Accessed on 4th May 2019
[916] Sarah Atkinson, *From Film Practice to Data Process: Production Aesthetics and Representational Practices of a Film Industry in Transition* (Edinburgh University Press, 2018) 184
[917] Atkinson (n.916) 184

manually catalogued". There are attempts within the archive to encourage a practice of populating spreadsheets so that data can be imported into CID.

At the BFI, the cataloguing systems are not fully comprehensive, and gaps are present. Media Maestro is the primary database system used by the Rights and Contracts team, but not all film titles are recorded in it. As Z commented, "there is no centralised rights management workflow at the BFI"; there are multiple systems working together and overlapping. CID runs alongside Media Maestro. Some collections, such as the distribution collection, "sit outside of the rest of the collection" and are therefore not available on CID.

This is concern regarding the accuracy of historic information. Z referred to the Distributor History Doc and commented that they are "looking to validate it" as "there is stuff in there that really isn't true, and we have run into trouble using the information in there." Z commented that on the need for a centralised data system:

> we do a lot of research here; we generate a lot of information. But often this stays in an email chain and then gets lost. So, we need a centralised data system.

The historic record-keeping in some of the collections may therefore hinder efforts to make the works available to the public, in line with Art.8.

10.4.3 No Representative CMO

As has been discussed in the previous chapters, there is no representative CMO in either the UK or the Netherlands for film and therefore the option of licensing with a CMO is not available to them. This was commented on in the archives by individuals who are copyright experts or with extensive copyright experience throughout their careers; it was not raised by participants from the wider archive.

If a sufficiently representative CMO were to appear, how the film archives regard CMOs will impact whether they go on to agree a licence. Differing views on CMOs were expressed, with evidence of some mistrust of CMOs in general expressed by the individuals in the film archives, and no archive expressed a desire that an external CMO would emerge. This mistrust echoes the concerns discussed in Chapter 6 on CMOs and ECLs.

Concerning the lack of sufficiently representative CMO for film in the UK, Q noted that “I don’t think a CMO will come forward for film, as there are so many different interests”. As a result, Q commented that the successfulness of Art. 8 once more depends on how the fall-back will operate and be defined. Z likewise commented that “there is no CMO in the UK for film, and no one is anywhere near close to being one.” More problematic for Z is that in their view, the BFI “has an internal blind spot with collecting societies. In the senior realms, there’s quite a bit of mistrust of them.”

For the Dutch archives the same issue of a lack of CMO applies. As with the BFI, there was not a strong desire present to have a CMO appear, and they seemed unconcerned by the lack of CMO. The individual archivists at EYE seemed more willing to utilise the “fall-back” or “backstop” provision under Art. 8(2), which seemed to be a result of their higher risk-tolerance than the UK film archives.

10.4.4 Alignment of Activities to Funders

One of the competences demonstrated by the archives was the ability to align their activities to the objectives of their funders, as a way of increasing their funding. The regional archives in particular need to adapt to the direction of the sector and the funders’ requirements, to ensure their longevity. MACE has intentionally aligned their projects with the BFI, as D commented:

> [we] align our strategic objectives with what’s going on in the film cultural sphere. Not a lot of choice, as the BFI is the only funder for film heritage. You’d be foolish to ignore what the national archive is doing. If you’re not aligned to them, you’re counting yourself out… Approaching it in a uniform way [all regional UK archives] to get together helps the BFI to advocate for us for funding further up the chain as well.

The H22 project that they are collaborating on alongside the BFI and the other regional film archives is complex, and tensions arise. In selecting what to digitise, “we have to convince the other 14 archives that our video stuff is important…We’re pitching in for a really tiny amount of money”. T mentioned that H22 is likely to bring in only £8000 for them, which is “tiny” for all the work involved; and there is no guarantee that all archives will have content chosen as part of the final 100,000 videotapes to be digitised.

This alignment to the activities of funders suggests that the regional film archives may be more likely to use Art. 8 if the national film archives do. In other words, if national film archives lead the way in making use of out-of-commerce works, the regional film archives may do the same.

10.5 Conclusion

This chapter has provided a cross-sectional analysis of the meanings, materials and competences present in the case studies. This chapter has applied the copyright regime of archival practices to out-of-commerce works. Using the elements of practice outlined in the previous chapter, it has been examined how existing practices are likely to adapt to the introduction of a new proto-practice of making out-of-commerce works available.

Meanings are an important part of regimes of practice, and the meanings present in the copyright sub-regimes of archival practice set out in the previous chapter are likely to actively shape the success of incorporation into existing archival practices. The meanings viewed as likely to have a significant impact on the likelihood of successful incorporation are a strong desire not to cause potential reputational harm with current or future donors; commercialisation of the archive; and that the risk tolerances of the film archives vary.

The competences and material elements present in the archives has also been analysed in relation to incorporating a new practice of making out-of-commerce works available. This chapter has explored the lack of a guidance policy or document that can be referred to by film archives, which the participants view as necessary to make out-of-commerce works available. These concerns echo those discussed in Chapter 4 and reiterate that clarity of the key terms is needed by the film archives in order for them to make use of the out-of-commerce provisions. A cut-off date is desired by the film archives to determine if a work is out-of-commerce.

Likewise, it must be clarified what “non-commercial” and “commercial” uses are, at least in the context of Art. 8. The film archives in this research are non-profit, so some of them view their activities as a whole as non-commercial. This is likely to be a markedly different understanding of “commercial” than for CMOs and rightholders.

To avoid unnecessary conflict between these stakeholders, clear agreement needs to be reached on what uses can categorically be deemed either commercial or non-commercial. MACE in particular has a fundamental funding gap and has to prioritise commercial activities in order to maintain the archive and provide livelihoods for the staff.

Chapter 11 Conclusion

11.1 Introduction

This research has been carried out grounded in the belief that widening public access to collective cultural heritage is fundamental to the wellbeing and cultural memory of society. Widening access to cultural heritage can also begin to remedy the historic silences and exclusion of certain communities and individuals, as well as addressing the digital skew. This research focuses on this effort in the context of the 2019 DSM Directive that introduces provisions relating to out-of-commerce copyright works that CHIs can utilise to provide public access to these works. The DSM Directive addresses the understandable frustration out-of-commerce works causes the cultural heritage sector. It does so in a way that protects the rightholder's ability to object and opt-out to this use of their work. Balancing these interests is vital to the long-term usefulness of Art.8.

In summary, to address the research question: *"To what extent can "out-of-commerce works" in the DSM Directive successfully benefit film archives and the existing practices of film archivists in widening public access to film heritage?"*, it is concluded that the "out-of-commerce works" provisions in the DSM Directive *are capable of* successfully benefitting film archives and the existing practices of film archivists in widening public access to film heritage. However, this legislative change alone is insufficient for successful incorporation into existing archival practices. Further guidance for CHIs and the use of a sampling mechanism will alleviate CHI concerns, hopefully increasing their confidence to make use of Art. 8. The risk tolerances of film archives and CHIs will influence how comfortable they are with making use of a sampling mechanism, to avoid reputational harm.

Although it is hoped that Art. 8 will be useful to the film archives in the EU, it is feared that there will be *en masse* rightholder opt-outs and burdensome research requirements that will in effect render Art. 8 as "onerous" and unusable as the Orphan Works Directive. It if does benefit film archives and become incorporated into film archival practice, it is likely to do so only for the largest film archives with the greatest risk tolerances, such as EYE, as part of large-scale projects in which rights

research is already being conducted. It is doubtful that regional film archives and archives with lower risk tolerances will accept the risks necessary to utilise Art. 8 successfully, without further clarity.

The likelihood of implementation of Art. 8 in the Netherlands is very high, as the Dutch government was amongst the first in the EU to conduct public stakeholder consultations on its national implementation and is in the draft stages of the Implementation Act. There is a more risk-tolerant culture within EYE which further increases the chances of Art. 8 being utilised. It is assumed that EYE will be a prominent and vocal advocate of its use to widen public access to out-of-commerce works. However, this study has only focussed on EYE, and future research should go on to include additional Dutch film archives.

The UK government has been clear that prior to the end of the transition period, it has no intention of implementing the DSM Directive. Indeed, it has not done so. That said, the UK will hopefully implement national provisions similar to the DSM Directive, as a failure to do so will make trade and working relationships with EU partners needlessly complex. Furthermore, the UK will remain bound to its wider international legal obligations concerning mutual copyright protection and recognition. The BFI is a strong campaigner for the film archival sector in the UK and will most likely stress the need for this implementation with the UK's IPO. It is hoped here that the IPO and government will respond by passing similar national legislation. If similar national legislation were to be passed, projects such as H22 would substantially benefit.

11.2 Doctrinal Analysis Summary

This research focus and aims were addressed through doctrinal, comparative and ethnographic analysis. Art. 8 and the DSM Directive must be compatible with existing EU *acquis* and international law. It can be argued that Art. 8 moves copyright away from the author, more towards the public.

As the DSM Directive is new national implementations within member states are ongoing, and drafting has begun. There is a lack of clarity in the DSM text in relation to the key terms, and this will need to be addressed in the legal national

implementations. Otherwise, it is likely that Art. 8 would not be as effective as the legislators envisioned. Issues of ambiguity relating to the key terms of "out-of-commerce works", "customary channels of commerce", "reasonable effort" and "non-commercial purposes" have been examined. Greater clarity is needed on these, and it is hoped that national implementations will provide this clarity. The requirement in Art. 8 to distinguish between "commercial" and "non-commercial" uses (and the lack of any definition in the DSM Directive of these terms) seems misaligned with copyright law and scholarship. This is not a distinction that is clear, either legally or practically, and it seems to be an oversight to place so much importance in Art. 8 on a definition that is ambiguous. Chapter 4 suggested interpretations of these terms, to address some of this uncertainty.

An ECL approach is the most likely to be adopted by the CMOs and CHIs and is advocated for in this thesis. CMOs have been examined in depth, assessing issues of trust and transparency, and of them being "sufficiently representative" of rightholders to effectively mandate on their behalf. From an EU-wide perspective, the representation of rightholders through CMOs is inconsistent, and challenged by public perceptions of a lack of transparency and difficulty receiving royalties. There are also countries with a very strong, well-established CMO culture that are likely to find implementation of Art. 8 easier.

Essentially, in countries with well-established CMOs, and clear guidance for rightholders and CMOs alike as to which CMO is representative of certain rights, implementation is likely to be successful. In countries, where there is a lack of collective management within copyright, CHIs will not be able to agree licences, and therefore Art. 8 will struggle to be implemented effectively. Film especially struggles with collective representation. Therefore, given the inconsistencies, it is likely that the licensing mechanism envisioned by Art. 8 is unrealistic in some countries or sectors.

Of significant importance is that Art. 8 could also remedy the failure of the Orphan Works Directive. As Dusollier comments, orphan works are usually also out-of-commerce, and therefore "could equally benefit from the application of this new provision, whose conditions are less rigid."[918] As was discussed in the doctrinal and

[918] Dusollier (2020) (n.64) 994

ethnographic chapters, the Orphan Works Directive has not adequately addressed the issue of orphan works. Therefore, CHIs could choose to utilise Art. 8 in making out-of-commerce works available and include orphan works within this remit, if these orphan works are also assumed to be out-of-commerce.

Overall, the doctrinal legal analysis found that there are issues of ambiguity that will need to be addressed in the national implementations. The rightholder opt-out provision in Art. 8 presents a fundamental departure from copyright norms and is likely to be challenged by rightholders. However, despite this it has been discussed in Chapter 5 that it is not incompatible with either the Berne Convention or Art. 17(2) of the EU Charter.

11.3 Comparative Analysis Summary

This research has produced a comparative legal review of the UK and the Netherlands, in order to consider possible implementation of Art. 8 from both Dutch and UK perspectives.

The attitudes towards cultural heritage and legal compliance in both countries are similar, and they have similar legal cultures that favour the rule of law. Cultural heritage is valued highly in both countries, but it is the Netherlands which has a social culture of engaging with heritage items and narratives more so than the UK. This is in contrast with the UK, which has a stronger organised archiving culture. This suggests that people in the Netherlands would benefit especially from Art. 8, as CHIs in the Netherlands could make a lot of their cultural heritage available online to view.

Neither country has a sufficiently representative CMO for film, and therefore film archives wishing to utilise Art. 8 would have to use the fall-back exception. The UK has an existing ECL scheme in place, whereas the Netherlands does not. However, the trust and accountability of CMOs in the Netherlands appears to be especially well established, meaning that a CMO appearing for film there would have a strong chance of being representative. There is already a strong framework of accountability and protection for rightholders in place. The strong culture of collective

management of copyright in the Netherlands and the strong stakeholder dialogue presents a solid foundation for a CMO for films to appear in the future.

Out-of-commerce works will continue to be a problem for UK film archives now that the UK has left the EU. It has been considered whether and how the UK could choose to implement national legislation that aligns with the DSM Directive and Art. 8. If the UK does not implement similar legislation, its CHIs will face a double disadvantage of not being able to make out-of-commerce works available, as well as no longer being able to rely on the EU Orphan Works Directive.

Overall, the comparative legal analysis found that both countries could implement national legislation on out-of-commerce works in relation to Art. 8, but it is assumed that only the Netherlands will do so. This is on the basis of the National Implementation Bill currently being progressed in the Netherlands to implement the DSM Directive.

11.4 Ethnographic Analysis Summary

The ethnographic research found that the existing archival practices are capable of being altered to accommodate making out-of-commerce works available. As has been discussed, it is a proto-practice with the requisite existing elements to form a new practice of making out-of-commerce works available, and now these elements need to come together.

However, there are barriers to this incorporation. The lack of clarity of the key terms and the need for a cut-off date are issues that apply to all of the film archives. The film archive sector as a whole and the wider cultural heritage sector would benefit from this uncertainty being resolved.

Fear of reputational harm is an issue that impacts on each of the archives, but to noticeably differing extents and they were resistant to exploiting films in copyright where they view this as potentially damaging to the existing rightholder relationships. Rightholder relationships and avoiding reputational harm was a core concern for individuals within the film archives and is likely to hinder their inclination to utilise the fall-back exception.

Furthermore, it has been discussed that funding cuts remain a concern for the film archives and therefore to commercialise as much of their activities as possible. All of these factors have impacted on the daily film archival practices and priorities. Past decision-making and record-keeping have been haphazard, and there are ongoing efforts to rectify this and corroborate information viewed as dubious in existing records.

Whilst these barriers are present, there is also optimism from the film archives in relation to Art.8. There is great hope for making out-of-commerce works available as they are viewed as likely to be very beneficial to the film archives. The ongoing H22 project that the BFI and MACE are involved in would likely benefit significantly from being able to exploit out-of-commerce works, as it is assumed many of the videotapes are out-of-commerce works.

Bolder approaches to copyright have been evidenced at EYE, with EYE adopting the most pragmatic approach to copyright law, as they do not carry out legally required copyright research where in their professional view it is unnecessary. EYE expressed an interest in using the fall-back, depending on the national implementation.

The crucial role of highly knowledgeable individuals within the film archives has been discussed. It has been discussed how this specialist individual shapes the institutional meanings and risk tolerance towards copyright. If these individuals are supported within the film archival sector with further guidance and clear national implementations of the DSM Directive, it is hoped they can shape a positive attitude within their film archive towards utilising Art.8. to make out-of-commerce works available.

11.5 Contribution to Knowledge

Formulation of the copyright regimes of archival practices: this research has formulated a copyright regime of archival practices, drawing on Foucault's concept. A Foucauldian approach to copyright has been utilised extensively by scholars such as Woodmansee,[919] Woodmansee and Jaszi,[920] Rose,[921] Chartier[922] and by other

[919] Woodmansee (n.23)

scholars,[923] but has not utilised the Foucauldian concept of a regime of practices within film archives.

This copyright regime of practice provides a theoretical framework for analysing and understanding the existing regimes of archival practice within the film archives, consisting of the materials, meanings and competences present, in relation to copyright law. It facilitates an understanding of how existing practices, and elements of these practices, can be modified to adapt to the new proto-practice of making out-of-commerce works available to the public. This copyright regime of archival practices can be utilised by future research in relation to many other film archives, and new sub-regimes potentially formulated. It is therefore an interdisciplinary contribution to the fields of copyright law, film archiving and practice theory.

Proposal of a representative, non-probability sampling approach with a 95% confidence level to determine if a collection of works held by the film archives are out-of-commerce: this contribution could alleviate the significant cost, time and effort required to research the commercial availability of the works. This builds on the empirical research undertaken by scholars including Stobo, Erickson, Patterson and Deazley[924] and the EnDOW project,[925] in relation to the difficulty for CHIs determining if a work is an orphan work. This research contributes to this existing scholarship through proposing a sampling mechanism to be utilised for making out-of-commerce works available, in order to avoid CHIs facing the same logistical burdens they have faced regarding the Orphan Works Directive. This sampling approach contributes a potential new proto-practice for film archives, as well as CHIs more generally. The sampling approach can be tested in future research, to gauge its impact.

Methodological and theoretical contribution: this research has utilised doctrinal, comparative and ethnographic research, combined with a practice theory lens, in analysing copyright practices within film archives. This methodological and theoretical combination has enabled the research question and aims to be

[920] Woodmansee and Jaszi (n.24)
[921] Rose (n.25)
[922] Chartier (n.26)
[923] See for further examples and discussion, Borghi (2018) (n.27); and Bently (n.27)
[924] Stobo, Patterson, Erickson, and Deazley (n.58)
[925] This project has been discussed in Chapter 3 and 7 in particular.

successfully addressed. Therefore, this approach could be utilised by film archival scholars and copyright scholars in future research.[926] It is likely to also be of benefit to research exploring copyright practices within CHIs more widely, as the methodology could be applied in the same way. The theoretical approach utilises the components of practice theory formulated by Shove, Pantzar and Watson[927] and utilises the concept of a regime of practices, which builds on Foucault's work.[928] This thesis applies these theoretical concepts to copyright practices within film archives, to create new knowledge.

This is the first ethnographic study to be undertaken within film archives concerning making out-of-commerce works available. It has been found throughout conducting this research that the combination of ethnographic research and of practice theory has enabled a deeper, and nuanced, understanding of how copyright impacts on film archival practices.

Contribution to copyright law and film archiving through the doctrinal, comparative and ethnographic legal analysis of Art. 8 of the DSM Directive: production of a mixed-methodology analysis of Art. 8 and its interaction with the existing EU *acquis* and international obligations, with a focus on film archives specifically. The ECL mechanism envisioned in Art. 8 has been explored by scholars including Schroff; Street; Guibault; Towse; and Ginsburg, which provides an excellent body of work to draw on in this research.[929] Scholars such as Geiger, Frosio, Bulayenko; Sganga; and Dusollier have provided detailed analysis of out-of-commerce works.[930] However, what has not been addressed in the existing literature is practice-based empirical analysis of how Art. 8 is likely to be incorporated into archival practice. This thesis addresses this gap, through conducting empirical ethnographic research, which examines the potential barriers to implementation and incorporation from both

[926] Detailed discussion of how this research was conducted is given in Chapter 2 and the Appendices detail the coding themes identified and indicative questions asked. This detail would enable scholars interested in conducting similar research to do so. Chapter 9 provides a detailed analysis of the copyright regime of archival practices formulated using practice theory, and Chapter 10 demonstrates how this has been applied to the focus on out-of-commerce works. It is intended that this detail be included as part of a publication focusing on the methodological and theoretical approach utilised in this thesis.
[927] Shove, Pantzar and Watson (n.61)
[928] See Faubian (n.62)
[929] See for example Guibault and Street (n.4); Schroff and Street (n.62); Towse "Economics of Copyright Collecting Societies and Digital Rights" (n.63); and Ginsburg (2017) (n.63) 564.
[930] See for example, Geiger, Frosio and Bulayenko (n.64) 240; Sganga (2018) (n.64)*;* and Dusollier (2020) (n.64)

a legal and practical perspective, informed by the data gathered during the ethnographic research.

From film archival scholarship, Fossati's and Op den Kamp's research provide detailed analyses of the impact of copyright law on archival practices.[931] This thesis continues this existing research with a specific focus on out-of-commerce works. These scholars conduct research that bridges copyright law and cultural heritage/ film archival practice.

This thesis contributes a holistic legal analysis that considers the key terms of the text, the licensing mechanism and CMO operation, the fall-back exception, and whether the opt-out constitutes a fundamental shift within copyright law. This research contributes to this scholarship in particular through a comparative analysis of collective management of copyright in the UK and the Netherlands, and the likeliness of either country to implement the DSM Directive. The impact of the UK's withdrawal from EU membership on the UK CHIs making use of out-of-commerce works is considered.

Conceptual contribution that reshapes the focus of out-of-commerce works: in addressing the existing distortion of the historical narrative and digital skew within film archives. This thesis recommends that making out-of-commerce works available can be reframed through the lens of addressing this historic silencing and exclusion, as much as is possible. This builds upon the concept of the digital skew and the distortion of history within archives, discussed in detail by scholars including Op den Kamp;[932] McCausaland;[933] and Brunow.[934] This thesis extends this discussion to out-of-commerce works. Dusollier has proposed that orphan works can also be out-of-commerce works,[935] and this thesis supports this assertion, in finding that much of the collections of the film archives are both orphan works and out-of-commerce

[931] See Op den Kamp (2018) (n.8); and Fossati (n.33)
[932] Op den Kamp (2018) (n.8) 26
[933] McCausland (n.34)159
[934] Brunow (n.68)
[935] Dusollier (2020) (n.64)

In addition, this thesis recommends that the concept of out-of-commerce works be envisioned as part of the archive's ongoing collection and accessioning policies of new film works, as well as to address the existing backlog.[936] This thesis therefore contributes to the existing academic, legislative and CHI discussion on out-of-commerce works and advances the understanding of both the impact of these works not being made available, and the profound impact that making them available could have.

11.5.1 Recommendations

For CHIs

1. That a representative, non-probability sample be used in determining whether groups of works are out-of-commerce, with a 95% confidence level. This will considerably reduce the time and cost of researching the commercial status of a large number of works.

2. That the ability to make out-of-commerce works available be viewed as part of an ongoing archival collection approach, as opposed to solely being for making available older works. As has been noted by the Comité des Sages:

   > Today's wealth of cultural expressions and knowledge will be our common cultural heritage tomorrow… the past and the present must be available to future generations.[937]

   Art. 8 could potentially be invaluable for collecting contemporary works, especially given the vast numbers of digital-born films being created by amateurs. The historical exclusion of certain groups of people and individuals from the archives can also be actively addressed through making these out-of-commerce works available.

3. Rightholder dialogue is important for avoiding reputational harm; and active and clear dialogue with existing rightholders to reassure them of copyright compliance will likely alleviate worries of potential copyright infringement for both CHIs and their donors.

[936] Of course, this will subject to any cut-off date restrictions in individual Member States concerning when a work can be deemed out-of-commerce.
[937] Niggemann, de Decker and Lévy (n.244)14

4. Crowd-sourcing of the “reasonable effort” search to determine the commercial availability of set works would alleviate the burden on CHIs. The EnDOW project evidences that a platform can be created to facilitate this. It is strongly recommended here that a similar tool be designed in relation to out-of-commerce works, and that CHIs consider utilising crows-sourcing.

For Legislators

1. National implementations should contain clear cut-off dates for when a work can be assumed to be out-of-commerce. Strong liaison with both rightholders and CHIs is needed on this. This should be work specific and could be further defined within this. For example, there could be a cut-off date for film works, or there could be specific cut-off dates for feature films that differs to documentaries, etc. Rightholder dialogue and consideration of the commercial lifecycle of the specific type of film work can guide what these cut-off dates are.

2. Soft law guidance within Member States should be created on which channels *could* be checked to see if a work is in commerce. This should be sector specific; and be a guide only, not a mandatory list of sources that must be consulted.

3. Soft law guidance within Member States should be created on which uses *could* be considered “commercial” and “non-commercial”. This should be sector specific; and be a guide only, as strict definitions are likely to struggle to adapt to ever-evolving digital works and formats.

4. Funding issues impact on the ability of film archives to consider activities that relate to out-of-commerce works, if this cannot bring in much-needed revenue to cover costs. Advanced funding to film archives is as essential a part of making out-of-commerce works available as legislation is. If Member States are committed to ensuring that film archives can make these works available, then additional necessary funding forms part of this.

11.6 Limitations and Further Research

11.6.1 Limitations of the Research

As has been noted by an interdisciplinary legal scholar regarding their own legal thesis, the "interdisciplinary nature of the study is its greatest strength and possibly its weakness."[938] This research is situated at an interdisciplinary intersection that involves legal researchers, academic copyright scholars, copyright lawyers, film archivists, film archives as institutions, film archival and film heritage scholars, cultural heritage and the wider public as whole. This wider relevancy is an asset of the research, as is its interdisciplinary mixed-methods approach that combined doctrinal, comparative and ethnographic methodologies.

That said, this approach is also where the research is limited. The interdisciplinary breadth of the research necessarily impacts on the space given in this thesis to each of the three methodologies employed. A criticism can be levied at the research for this. Had the research been seeking to understand only the legal mechanism of the copyright law in a doctrinal manner, or only to conduct ethnographic research of film archives, this would be an accurate criticism.

However, this research aimed to address the following question, from both a legal and practical approach: *"To what extent can "out-of-commerce works" in the DSM Directive successfully benefit film archives and the existing practices of film archivists in widening public access to film heritage?"* This question was researched to ascertain whether and how this law could be best used by film archivists to provide and widen access to their out-of-commerce copyright works. Therefore, failing to incorporate both a doctrinal and empirical approach would not have adequately addressed the research aim.

A limitation of the research is its scope, in that it examines two Member States and three film archives. Future research in this area should expand the scope of this research, to include further EU Member States and to include a greater number of film archives. Ethnographic research is considered very suitable for further research, as it produced detailed and contextualised data.

[938] Melanie Klinker, *Towards Improved Understanding and Interaction Between Forensic Science and International Criminal Law in the Context of Transitional Justice* Doctoral thesis (Bournemouth University, 2009), 218

11.6.2 Communicating the Research

In extending this research in the future, communicating the research findings to film archivists in an appropriate forum would be a priority. For example, creating a short film or short guidance document that outlines the key aspects of Art. 8 and the issues found to incorporation into archival practice would likely be more impactful in practice than academic journals. The *Display At Your Own Risk* project created by Wallace and Deazley was an "experimental exhibition" concerning the use and reuse of digital surrogates of public domain works of art produced by CHIs.[939]

Their project was an inspiration for adopting a more empirical approach to this thesis; and will be revisited in considering what future avenues of public communication could be the most effective to reach film archivists and CHIs. It is intended this research be disseminated through networks such as FAUK or FIAF, to reach film archivists directly.[940]

11.6.3 Further Research

The most significant further research to be conducted is an empirical trial of the proposed sampling approach within a film archive. It was beyond the scope of this thesis to do so. If this sampling approach was successful, it could be utilised by CHIs and film archives across the EU, once the DSM Directive is nationally implemented.

Future research should examine how the copyright regime of archival practices proposed in this thesis can be applied to a wider number of film archives. The regime of practices has three sub-regimes, and it may be that additional film archives would either align to one of the existing identified sub-regimes, or that additional sub-regimes are formulated. This would provide a theoretical basis for film archivists, film archival scholars and copyright scholars to understand how copyright impacts on archival practice; and in turn, how practices could be modified. Research into smaller, regional film archives would be a priority in this.

France was considered for inclusion in this thesis, given that it also has prominent national and regional film archives, and the fact that the *Soulier* case was based on a

[939] Andrea Wallace and Ronan Deazley "Display At Your Own Risk: An Experimental Exhibition of Digital Cultural Heritage" (2016) CC-BY 4.0, xviii

[940] This is an intention only; there have not been discussions with these networks about doing so.

dispute of the French law on out-of-print books.[941] The ability to conduct meaningful legal ethnographic research relies on fluency in the spoken and written language of the institution or community being studied. As the researcher lacks this fluency, meaningful ethnographic research could not have taken place within the French film archives. Progressing the research in this thesis in the future would involve working with interdisciplinary collaborators within the French film archives, to further this research by testing the copyright regimes of archival practices proposed here.

Likewise, further research that expands on this thesis should consider the views of CMOs on Art. 8, by conducting ethnographic or interview research with them. This was deemed to be beyond the scope of what was achievable for this thesis. Similarly, in-depth empirical research into rightholder views of Art. 8 would contribute to a more holistic understanding of whether Art. 8 is capable of incorporation into the existing practices of film archives, particularly focusing on their relationships with stakeholders.

[941] See Chapter 3 for a detailed discussion.

Bibliography

Case Law

UK

BBC/BBCW v MCPS/PRS (ITV and Sky Intervening) [2018] CT 129/16

Donaldson v Beckett [1774] *Hansard*, 1st ser., 17 (1774): 953-1003

Ladbroke v William Hill [1964] 1 All ER 465

Dutch

Zonen Endstra v. Nieuw Amsterdam [2008] ECLI:NL:HR:2008: BC2153, HR 30.05.2008, NJ 2008, 556

European

Germany v Council [1994] I E.C.R. 4973 (C-280/93)

Infopaq International A/S v Danske Dagblades Forening [2009] C-5/08

Interflora Inc. and Interflora British Unit v Marks & Spencer plc and Flowers Direct Online Ltd. [2011] C-323/09

LG Cologne, MMR 2014, 478

LG Köln, 2014-03-05, Case No. 28 O 232/13

L'Oréal SA, Lancôme parfums et beauté & Cie SNC and Laboratoire Garnier & Cie v Bellure NV, Malaika Investments Ltd and Starion International Ltd. [2009] Case C-487/07

Martin Luksan v Petrus van der Let [2012] C-277/10

Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA [2006] C-306/05

Soulier v Doke [2016] C-301/15

Sporrong and Lönnroth v Sweden [1982] 5 E.H.R.R

Stichting Brein v Filmspeler [2017] C-527/15

Stichting de Thuiskopie v Opus Supplies Deutschland GmbH and others [2011] C-462/09

Technische Universität Darmstadt v Eugen Ulmer [2014] Case C-117/13

International

Amended Settlement Agreement, *Authors Guild Inc v Google Inc*, No 05-CV-8136-DC (SDNY, 13 November 2009)

Authors Guild Inc v Google Inc, No 05-CV-8136-DC (SDNY, 13 November 2009)

Authors Guild of America v Hathi Trust No. 11 Civ 6351 (HB), 2012 US Dist.

Authors Guild v. Google Inc., 770 F. Supp.2d 666 (S.D.N.Y. 2011)

Garcia v. Google, Inc 743 F.3d 1258 (9th Cir. 2014), amended by 2014 WL 3377343 (9th. Cir. July 11, 2014).

Legislation

UK

An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned 1710 (known as the “Statute of Anne”)

Collective Management of Copyright (EU Directive) Regulations 2016

Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014

Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014.

Copyright, Designs and Patents Act 1988

Enterprise and Regulatory Reform Act 2013

European Union (Withdrawal) Act 2018

Intellectual Property (Exhaustion of Rights) (EU Exit) Regulations.

Revised European Union (Withdrawal) Act 2019

The Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations 2019

Dutch Legislation

Copyright Act or “Auteurswet” (Author’s Law) Unofficial English translation, in Mireille van Eechoud “Copyright Act – *Auteurswet* Unofficial Translation” in Bernt

Hugenholtz, Antoon Quaedvlieg and Dirk Visser (eds.) *A Century of Dutch Copyright Law: Auteurswet 1912-2012* (deLex B.V., 2012)

Database Act, Law of 8 July 1999, adjusting Dutch legislation to Directive 96/9 / EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases “Databankenwet”

Neighbouring Rights Act, Law of 18 March 1993, containing rules on the protection of performers, producers of phonograms or of first fixations of films and broadcasting organizations and amendment of the 1912 Copyright Act “Wet naburige rechten”

Netherlands Ministry of Justice and Security, ‘Implementation Bill on Copyright Directive in the Digital Single Market’ (Ministry of Justice and Security, 2nd July 2019) < https://www.internetconsultatie.nl/auteursrecht>

Heritage Act, ‘Act of 9 December 2015, comprising an inventory and adaptation of regulations pertaining to cultural heritage’, English translation available at < https://english.cultureelerfgoed.nl/publications/publications/2016/01/01/heritage-act-2016>

Supervision of Collective Management Organisations Act Law of 6 March 2003, containing provisions with regard to the supervision of collective management organizations for copyright and related rights (Law on supervision of collective management organizations for copyright and related rights) “Wet toezicht CBOs”

Wet van 8 oktober 2014 tot wijziging van de Auteurswet en de Wet op de naburige rechten in verband met de implementatie van de 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 in connection with the implementation of Directive No. 2012/28 / EU on certain permitted uses of orphan works)

European

Charter Of Fundamental Rights Of The European Union (2000/C 364/01)

Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (known as the “European Convention of Human Rights)

Council Resolution of 26 June 2000 on the conservation and enhancement of European cinema heritage (2000/ C 193/01)

Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (known as the “InfoSoc Directive”)

Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (known as the “Computer Programs Directive”)

Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works Text with EEA relevance (known as the “Orphan Works Directive”)

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 (known as the “Collective Rights Management Directive”)

Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights (known as the “Copyright Duration Directive”)

Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (known as the “Database Directive”)

French Intellectual Property Code

German Copyright Law: Act on Copyright and Related Rights (1965) or “Urheberrechtsgesetz”

Regulation (EU) No 386/2012 of the European Parliament and of the Council of 19 April 2012 on entrusting the Office for Harmonization in the Internal Market (Trade Marks and Designs) with tasks related to the enforcement of intellectual property rights, including the assembling of public and private-sector representatives as a European Observatory on Infringements of Intellectual Property Rights

Treaty on European Union (2007)

Treaty on the Functioning of the European Union (1957)

Other

Memorandum of Understanding: Key Principles on the Digitisation and Making Available of Out-of-Commerce Works (2011)

International

Agreement On Trade-Related Aspects Of Intellectual Property Rights (1995)

Berne Convention for the Protection of Literary and Artistic Works (1886)

International Covenant on Economic, Social and Cultural Rights (1966)

Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (2013) (known as the “Marrakesh Treaty”)

Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961)

U.S. Code

Universal Declaration of Human Rights (1948)

WIPO Performances and Phonograms Treaty of 1996, the Beijing Treaty on Audiovisual Performances (2012)

World Intellectual Property Organization Copyright Treaty (1996)

World Trade Organization Agreement on Trade-Related Intellectual Property Rights (1994) (known as the "TRIPS Agreement")

Journal articles

Anil, S., A.K.W., Min, J.S.H., and Xiu, Q.C.W. Virtual property - a theoretical and empirical analysis (2012) 34(3) *E.I.P.R.,* pp. 188-202

Arsel, Z. and Bean, J. Taste regimes and market mediated practice (2012) 39 *Journal Of Consumer Research,* pp. 899-917

Aufderheide, T. M. and Bello, B. The impact of copyright permissions culture on the US visual arts community: The consequences of fear of fair use (2016) 18(9) *New Media & Society*, pp. 2012-2027

Banerjee, A. Copyright Piracy and the Indian Film Industry: A “Realist” Assessment (2016) 34 *Cardozo Arts and Entertainment Law Journal*, pp. 609-698

Barstow, R. I Am an Amateur Moving Image Archivist (2011) 11(1) *Moving Image: The Journal of the Association of Moving Image Archivists*, pp. 150-154

Bens, J. and Vetters, L. Ethnographic legal studies: reconnecting anthropological and sociological traditions (2018) 50(3) *The Journal of Legal Pluralism and Unofficial Law*, pp. 239-254

Bensamoun, A. The French out-of-Commerce Books Law in the Light of the European Orphan Works Directive (2014) 4 *Queen Mary J Intell Prop*, pp. 213-225

Bently, L. Copyright and the Death of the Author in Literature and Law (1994) 57(6) *The Modern Law Review*, pp. 973–986

Bell, M. Rebuilding Britain: Women, Work, and Nonfiction Film, 1945–1970 (2018) 4(4) *Feminist Media Histories*, pp. 33-56

Bitsch, A. The micro-politics of emotions in legal space: an autoethnography about sexual violence and displacement in Norway (2018) 25(10) *Gender, Place & Culture*, pp. 1514-1532

Borghi, M., Erickson, K. and Favale, M. With Enough Eyeballs All Searches Are Diligent: Mobilizing the Crowd in Copyright Clearance for Mass Digitization (2016) 16(1) *Chi. -Kent J. Intell. Prop*. pp. 135-166

Bronner. S.J. Practice Theory in Folklore and Folklife (2012) 123(1) *Folklore*, pp. 23 - 47

Brownsword, R. Ethics in legal education: High roads and low roads, mazes and motorways (1999) 33(3) *The Law Teacher*, pp. 269-283

Brunow, D. Curating Access to Audiovisual Heritage: Cultural Memory and Diversity in European Film Archives (2017) 18(1) *Image [&] Narrative*, pp. 97-110

Calabresi, G. and Melamed, A.D. “Property Rules, Liability Rules, and Inalienability: One View of the Cathedral (1972) 85(6) *Harvard Law Review,* pp. 1089-1128

Cammaer, G. Jasper Rigole's Quixotic Art Experiments With Home Movies And Archival Practices: The International Institute for the Conservation, Archiving, and Distribution of Other People's Memories (IICADOM) (2012) 12(2) *The Moving Image: The Journal of the Association of Moving Image Archivists*, pp. 41-69

Cann. D. and Yates. J. This Side of the Law: Evaluating Citizens’ Attitudes Toward Legal Compliance (2020) *Justice System Journal*, pp. 1-15

Carbone, K. M. Artists and records: moving history and memory (2017) 38(1) *Archives and Records*, pp. 100 – 118

Caswell, M., Migoni, A. A., Geraci, N., and Cifor, M. To Be Able to Imagine Otherwise’: community archives and the importance of representation (2017) 38(1) *Archives and Records*, pp. 5-26

Chan, J. Ethnography as Practice: Is Validity an Issue? (2013) 25(1) *Current Issues In Criminal Justice*, pp.503-516

Cook, T. ‘We Are What We Keep; We Keep What We Are’: Archival Appraisal Past, Present and Future (2011) 32(2) *Journal of the Society of Archivists*, pp. 173-189

Dagan, H. and Kreitner. R. The New Legal Realism and the Realist View of Law (2018) 43(2) *Law and Social Inquiry*, pp. 528-553

Denegri-Knott, J., Nixon, E. and Abraham, K. Politicising the study of sustainable living practices (2018) 21(6) *Consumption Markets & Culture*, pp. 554-573

Derrida, J, and Prenowitz, E. Archive Fever: A Freudian Impression (1995) 25(2) *Diacritics,* pp. 9-63

Dixon, J. L. The Copyright Term Extension Act: Is Life Plus Seventy Too Much (1995) 18 *Hastings Comm & Ent LJ*, pp. 945-980

Dörre, T. 'Current case law on Creative Commons licences' (2015) 10(4) *Journal of Intellectual Property Law & Practice*, pp. 310-312

Drassinower, A. Death in Copyright: Remarks on Duration (2019) 99 *BU L Rev*, pp. 2559-2580

Drexl, J., Nérisson, S., Trumpke, F. et al. Comments of the Max Planck Institute for Intellectual Property and Competition Law on the Proposal for a Directive of the European Parliament and of the Council on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Uses in the Internal Market COM (2012)372 (2013*)* 3 *IIC,* pp*.* 263–292.

Dusollier, S. The 2019 Directive on Copyright in the Digital Single Market: Some Progress, a Few Bad Choices, and an Overall Failed Ambition (2020) 57(4) *Common Market Law Review*, pp.979-1030

Eberle, E. J. The Methodology of Comparative Law (2011) 16(1) *Roger Williams University Law Review,* pp.52- 71

Edmondson R. Archiving 'Outside the Frame': Audiovisual Archiving in South East Asia and the Pacific (2000) 12(2) *Film History*, pp. 148-155

Edmondson, R. Is Film Archiving a Profession? (1995) 7(3) *Film History*, pp. 245-255

Edmondson, R. You Only Live Once: On Being a Troublemaking Professional (2002) 2(1) *The Moving Image: The Journal of the Association of Moving Image Archivists* pp. 175-184

Elias, N. Technicization and civilization (1995) 12(3) *Theory, Culture and Society*, pp. 7–42

Eppinger, E. and Vladova, G. Intellectual property management practices at small and medium-sized enterprises (2013) 61(1) Int. *J. Technology Management*, pp. 64-81

Erlanger, H. S., Garth, B., Larson, J. E., Mertz, E. E., Nourse, V. and Wilkins, D. B. Is it Time for a New Legal Realism? (2005) 2 *Wisconsin Law Review*, pp. 335-363

Falgoust, M. "The Incentives Argument Revisited: A Millean Account of Copyright" (2014) 52(2) *SJP*, pp.163-183

Feldman, M. S. and Wanda J. O. Theorizing Practice and Practicing Theory (2011) 22(5) *Organization Science*, pp. 1240-253.

Flinn, A. Community Histories, Community Archives: Some Opportunities and Challenges (2007) 28(2) *Journal of the Society of Archivists*, pp. 151-176

Flinn, A. Independent and Community-led Archives, Radical Public History and the Heritage Professions (2011) 7(2) *UCLA Journal of Education and Information Studies*

Forster, H. The i2010 digital libraries initiative: Europe's cultural and scientific information at the click of a mouse (2007) 27(4) *Information Services & Use*, pp.155-159

Foster, K. and Osborn, G. Dancing on the Edge of Disciplines: Law and the Interdisciplinary Turn (2010) 8(1) *ESLJ*, pp. 2

Gardner, A. Brexit, boundaries and imperial identities: A comparative view (2017) 17(1) *Journal of Social Archaeology*, pp. 3-26

Geiger, C., Frosio, G and Bulayenko, O. Facilitating Access to Out-of-Commerce Works in the Digital Single Market – How to Make Pico della Mirandola's Dream a Reality in the European Union 9 (2019) *JIPITEC*, 240

Gibson, J. L. and Caldeira, G. A. The Legal Cultures of Europe (1996) 30(1) *Law & Society Review,* pp. 55-86

Ginsburg, J. C. Berne-Forbidden Formalities And Mass Digitization (2016) 96 *Boston University Law Review*, pp.745-775

Ginsburg, J. C. 'Extended Collective Licenses in International Treaty Perspective: Issues and Statutory Implementation' (2017) 14 *Columbia Public Law Research Paper*, pp.564

Ginsburg, J. C. International Copyright: From a "Bundle" of National Copyright Laws to a Supranational Code? (2000) 47(1) *The Journal of the Copyright Society of the United States*, pp. 265

Grimmelmann, J. The Elephantine Google Books Settlement (2011) 58 *Journal of the Copyright Society of the USA,* pp. 497-520

Guibault, L. and Schroff, S. Extended Collective Licensing for the Use of Out-of-Commerce Works in Europe: A Matter of Legitimacy Vis-à-Vis Rights Holders (2018) 49(8) *IIC*, pp. 916-939

Guibault, L. Cultural Heritage Online? Settle it in the Country of Origin of the Work (2015) 6(3) *JIPITEC*, pp. 173-191

Hall, S. Un-settling ‘the heritage’, re-imagining the post-nation: Whose heritage? (1999) 13(49) *Third Text*, pp. 3-13

Hamilton, M. A. Copyright Duration Extension and the Dark Heart of Copyright (1996) 14(3) *Cardozo Arts & Entertainment Law Journal*, pp. 655-660

Hand, M. and Shove, E. Condensing Practices: Ways of living with a freezer (2007) 7(1) *Journal of Consumer Culture*, pp. 79–104

Handke, C. and Towse, R. ‘Economics of Copyright Collecting Societies’ (2007) *38*(8) *IIC,* pp. 937-957

Heald, P. J., How Copyright Keeps Works Disappeared (2013) *Illinois Public Law Research Paper No. 13-54*

Hill, S. and Johnston, K. M. Making women amateur filmmakers visible: reclaiming women’s work through the film archive (2020) 29(5) *Women's History Review,* pp. 875-889

Hudson, E. and Burrell, R. Abandonment, Copyright And Orphaned Works: What Does It Mean To Take The Proprietary Nature Of Intellectual Property Rights Seriously? (2011) 35(3) *Melbourne University Law Review,* pp. 971–1004.

Husovec, M. (2019) “The Essence of Intellectual Property Rights Under Article 17(2)

of the EU Charter,” *German Law Journal*, 20(6), pp. 840–863

Hutchinson, T. and Duncan, N. Defining and Describing What We Do: Doctrinal Legal Research (2012) 17(1) *Deakin L Rev,* pp. 83-119

Huurnink, B., Hollink, L., van den Heuve, W. and de Rijke, M. Search Behavior of Media Professionals at an Audiovisual Archive: A Transaction Log Analysis (2010) 61(6) *Journal Of The American Society For Information Science And Technology*, pp.1180–1197

Hviid, M., Schroff, S. and Street, J. Regulating Collective Management Organisations by Competition: An Incomplete Answer to the Licensing Problem? (2016) 7(3) *JIPITEC*, pp. 256-270

Ingravalle, G. Remixing Early Cinema: Historical Explorations at the EYE Film Institute Netherlands, (2015) 15(2) *The Moving Image: The Journal of the Association of Moving Image Archivists*, pp. 82-97

Janssens, M. and Tryggvadottir, R. ‘Facilitating Access to Orphan and Out-of-commerce Works to Make Europe's Cultural Resources Available to the Broader Public’ (2014). Available at < https://ssrn.com/abstract=2538097 or http://dx.doi.org/10.2139/ssrn.2538097> accessed 1st November 2018

Johnson, P. ‘Dedicating' Copyright to the Public Domain (2008) 71(4) *MLR*, pp.587-610

Katz, A. The Orphans, the Market, and the Copyright Dogma: A Modest Solution for a Grand Problem (2012) 27(3) *Berkeley Technology Law Journal*, pp.1285-1346

Kelly, E. J. Listening harder: Queer archive and biography (2019) 51(10) *Educational Philosophy and Theory*, 995-1005

Kemper, T. The lost Feldman files and the loss of direction at the AFI: A personal reflection on archives (2010) 22(3) *Film History*, pp. 309-312

Khong, D. W. K. Orphan Works, Abandonware and the Missing Market for Copyrighted Goods (2007) 15(1) *Int J Law Info Tech,* pp. 54-89

King, L., Stark, J. F. and Cooke, P. Experiencing the Digital World: The Cultural Value of Digital Engagement with Heritage (2016) 9(1) *Heritage & Society*, pp.76-101

Koehler, P. J., Lameris, B. and Hielscher, E. (Neurocinematography in Pre-World War II Netherlands: The Magnus-Rademaker Collection 2016) 25(1) *Journal of the History of the Neurosciences*, pp. 84-101

Krier, J. E. and Schwab, S. J. Property Rules and Liability Rules: The Cathedral in Another Light (1995) 70(2) *N. Y. U. L. Rev*, pp.440-483

Kroeze, I.J. Legal Research Methodology And The Dream Of Interdisciplinarity (2013) (16)3 *PER / PELJ*, pp. 36-65

Lähdesmäki, T. Narrativity and intertextuality in the making of a shared European memory (2017) 25(1) *Journal of Contemporary European Studies*, pp. 57-72

Lähdesmäki, T. Rhetoric of unity and cultural diversity in the making of European cultural identity (2012) 18(1) *International Journal of Cultural Policy*, pp. 59-75

Lau, A. Making Space for Silenced Histories: National History, Personal Archives, and the WWII Japanese American Internment (2014) 42 *Progressive Librarian,* pp. 82-94

Leiter, B. Legal Realism and Legal Positivism Reconsidered (2001) 111(2) *Ethics,* pp. 278-301

Lemley, M. A. and Weiser, P. Should Property or Liability Rules Govern Information? (2007) 85(4) *Texas Law Review*, pp.783-841

Lemley, M. A., Ex Ante Versus Ex Post Justifications for Intellectual Property (2004) 71(129) *University Chicago Law Review*, pp. 124-149

Lenk, S. and Stufkens, A. “Then Began the Battle Royal”: Marion Michelle and the FIAF Crisis (2013) 13(1) *The Moving Image: The Journal of the Association of Moving Image Archivists*, pp. 199-217

Levers, M.-J. D. ‘Philosophical Paradigms, Grounded Theory, and Perspectives on Emergence’ (2013) *SAGE Open*.

Liljeblad, J. The Hopi, the katsinam, and the French courts: looking outside the law in the repatriation of Indigenous cultural heritage (2017) 23(1) *International Journal of Heritage Studies*, pp.41-51

Litman, J. D. The Public Domain (1990) 29(4) *Emory LJ*, pp.965-1023

Lubina, K. Protection and Preservation of Cultural Heritage in the Netherlands in the 21st Century (2009) 13(2) *Electronic Journal of Comparative Law*, pp. 1-62

Macaulay, S. The New Versus the Old Legal Realism: 'Things Ain't What They Used to Be' (2005) 2 *Wisconsin Law Review*, pp. 365-403

Maina, C. K. Power relations in the traditional knowledge debate: a critical analysis of forums (2011) 18(2) *I.J.C.P*, pp. 143-178.

Martinez, M. and Terras, M. (2019) ‘Not Adopted’: The UK Orphan Works Licensing Scheme and How the Crisis of Copyright in the Cultural Heritage Sector Restricts Access to Digital Content (2019) 5(1) *Open Library of Humanities*, pp. 1–51

Mastenbroek, E. Guardians of EU law? Analysing roles and behaviour of Dutch legislative drafters involved in EU compliance (2017) 24(9) *Journal of European Public Policy*, pp. 1289-1307

Mattingly, F. X. If You Don’t Use It, You Lose It: What the U.S. Could Learn from France’s Law on out-of-Commerce Books of the 20th Century (2017) 27(2) *Indiana International & Comparative Law Review,* pp. 277–306.

Matulionyte, R. 10 years for Google Books and Europeana: copyright law lessons that the EU could learn from the USA (2016) 24(1) *Int J Law Info Tech*, pp. 44-71

Matulionyte, R. Empowering Authors via Fairer Copyright Contract Law (2019) 42(2) *UNSW Law Journal,* pp. 681-718

Meierhenrich, J. The practice of international law: a theoretical analysis (2013) 76(3-4) *Law & Contemporary Problems*, pp. 1-83

Merges, R.P. Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations (1996) 84(5) *California Law Review*, pp.1293-393

Merry, S. E. (2006) New Legal Realism and the Ethnography of Transnational Law (2006) 31(4) *Law & Social Inquir,* pp. 975-995

Montagnani, M. L. and Zoboli, L. The making of an 'orphan': cultural heritage digitization in the EU (2017) 25(3) *Int J Law Info Tech*, pp.196-212

Mousmouti, M. Operationalising Quality of Legislation Through The Effectiveness Test (2012) 6(2) *Legisprudence*, pp. 191-205

Mulligan, D.K. and Schultz, J.M., Neglecting the National Memory: How Copyright Term Extensions Compromise the Development of Digital Archives (2002) 4(2) *Journal of Appellate Practice & Process*, pp.451-473

Nérisson, S. Has Collective Management of Copyright Run Its Course? Not so Fast (2015) 46(5) *IIC*, pp. 505-507

Neumayer, L. Integrating the Central European Past into a Common Narrative: The Mobilizations Around the 'Crimes of Communism' in the European Parliament (2015) 23(3) *Journal of Contemporary European Studies,* pp. 344-363

Oliar, D. The Copyright-Innovation Trade off: Property Rules, Liability Rules, and Intentional Infliction of Harm (2012) 64(4) *Stanford Law Review*, pp.951-1020

O'sullivan, S. The economy of memory: Archive-driven documentaries in the digital age (2013) 14(3) *Journal of Media Practice*, pp. 231-248

Ott, C. and Schafer, H-B. The Dichotomy between Property Rules and Liability Rules: Experiences from German Law (2008) 1(4) *Erasmus Law Review*, pp. 41-58

Öztemiz, S. Cultural heritage literacy: A survey of academics from humanities and social sciences (2019) *Journal of Librarianship and Information Science* 1

Panezi, A. Europe's New Renaissance: New Policies and Rules for Digital Preservation and Access to European Cultural Heritage (2018) 24 *Colum J Eur L*, pp.596- 611

Patterson, J. M. The National Strategy for Screen Heritage: A Personal View (2009) 6(2) *Journal of British Cinema and Television*, pp. 313-318

Patterson, J. M. Afterword: film as research resource – response from the perspective of the archivist (2011) 47(4) *Paedagogica Historica*, pp.567-571

Pessach, G. [Networked] Memory Institutions: Social Remembering, Privatization and its Discontents (2008) 26 *Cardozo Arts &Entertainment Law Journal*, pp. 71-149

Pihlajarinne, P. Should we bury the Concept of Reproduction – Towards Principle-Based Assessment in Copyright Law? (2017) 48(8) *IIC,* pp. 953-976

Rahmatian, A European Copyright Inside or Outside the European Union: Pluralism of Copyright Laws and the ''Herderian Paradox'' (2016) 47(8) *IIC*, pp. 912-940

Reis, S. 'A Closer Look at the European Union Copyright Directive' (2019) 24(2) *AALL Spectrum,* pp. 35-37

Řehořová, I. Curating access, shaping cultural memory: the Czech National Film archive in the era of digitisation (2019) 11(2) *Studies in Eastern European Cinema*, pp. 186-201

Ricketson, S. The Birth of the Berne Union (1998) 11(1) *Colum. -VLA JL& Arts*, pp. 9-32

Ricketson, S. The International Framework for the Protection of Authors: Bendable Boundaries and Immovable Objects (2018) 41(3) *Colum JL & Arts*, pp. 341-368

Riis, T. and Schovsbo, J. Extended Collective Licenses and the Nordic

Experience: It's a Hybrid but is it a Volvo or a Lemon (2010) 33 *Colum JL & Arts*, pp. 47-498

Robinson, H. Remembering things differently: museums, libraries and archives as memory institutions and the implications for convergence (2012) 27(4) *Museum Management and Curatorship*, pp. 413-429

Rønning, H., Thomas, P., Tomaselli, K. G. and Teer-Tomaselli, R. Intellectual property rights and the political economy of culture (2006) 20(1) *Critical Arts*, pp. 1-19

Rosati, E. Just a Matter of Laugh? Why the CJEU Decision in Deckmyn is Broader than Parody (2015) 52(2) *Common Market Law Review*, pp. 511-529

Rosati, E. Non-Commercial Quotation and Freedom of Panorama: Useful and Lawful? (2017) 8 *JIPITEC*, pp. 311-321

Ross, T. On Ernest Lindgren's "Cataloguing the National Film Library" (1940) (2020) 2012 *Journal of Film Preservation*, pp.69-80

Sag, M. The Google Book Settlement and the Fair Use Counterfactual (2010/11) 55 *New York Law School Law Review,* pp.19-76

Samuelson, P. The Google Book Settlement As Copyright Reform (2011) *Wisconsin Law Review,* pp. 479-562

Schatzki, T. R. The Sites of Organizations (2005) 26(3) *Organization Studies*, pp. 465-484

Schmidt, L. Treasure in the Archives: A Celebration of Archival Collections (2017) 36(1) *Mythlore: A Journal of J.R.R. Tolkien, C.S. Lewis, Charles Williams, and Mythopoeic Literature*, pp. 5-20

Schroff, S. The Impossible Quest – Problems with Diligent Search for Orphan Works (2017) 48(3) *IIC*, pp. 286-304

Schroff, S. and Street, J. The politics of the Digital Single Market: culture vs. competition vs. copyright (2018) 21(10) *Information, Communication & Society*, pp. 1305-1321

Scotland, J. Exploring the Philosophical Underpinnings of Research: Relating Ontology and Epistemology to the Methodology and Methods of the Scientific, Interpretive, and Critical Research Paradigms (2012) 5(9) *English Language Teaching*, pp. 9-16

Senftleben, M. The International Three-Step Test A Model Provision for EC Fair Use Legislation (2010) 67(1) *JIPITEC*, pp. 67-82

Sganga, C. and Scalzini, S. From Abuse of Right to European Copyright Misuse: A New Doctrine for EU Copyright Law (2017) 48(4) *IIC*, pp.405-435

Sganga, C. From Soulier to the EU Copyright Law Reform: What Future for Non-Voluntary Collective Management Schemes? (2018) 19(1) *ERA Forum,* pp.137-154

Sganga, C. The Eloquent Silence of Soulier and Doke and Its Critical Implications for EU Copyright Law (2017) 12(4) *Journal of Intellectual Property Law and Practice*, pp.321-330

Shaw, A. Copyright, Rights Research, and Orphan Works in the UK (2018) 99 *Journal of Film Preservation*, pp.51-56

Siems, M. M. The Taxonomy Of Interdisciplinary Legal Research: Finding The Way Out Of The Desert (2009) 7(1) *Journal of Commonwealth Law and Legal Education*, pp. 5-17

Siems, M. M. and Sithigh, D. M. Mapping Legal Research (2012) 71(3) *Cambridge Law Journal*, pp. 651-676

Sierp, A and Wüstenberg, J. Linking the Local and the Transnational: Rethinking Memory Politics in Europe (2015) 23(3) *Journal of Contemporary European Studies*, pp. 321-329

Singhal, A. K. and Malik, I. Doctrinal and socio-legal methods of research: merits and demerits (2012) 2(7) *Educational Research Journal*, pp. 252-256

Sloyan, V. Born-digital archives at the Wellcome Library: appraisal and sensitivity review of two hard drives (2016) 37(1) *Archives and Records*, pp. 20-36

Stappert, N. Practice theory and change in international law: theorizing the development of legal meaning through the interpretive practices of international criminal courts (2020) 12(1) *International Theory*, pp. 33–58.

Stobo, V., Patterson, K., Erickson, K. and Deazley, R. “I should like you to see them some time”: an empirical study of copyright clearance costs in the digitisation of Edwin Morgan’s scrapbooks (2018) 74(3) *Journal of Documentation*, pp. 641-667

Straková, L. The internet renaissance of collective management organisations: reflections on flat fee system and the role of collective management organisations (2019) 74(3) *International Review of Law, Computers & Technology,* pp. 53-75

Taylor, J. and Gibson, L. K. Digitisation, digital interaction and social media: embedded barriers to democratic heritage (2017) 23(5) *International Journal of Heritage Studies*, pp. 408-420

Towse, R. Economics of Copyright Collecting Societies and Digital Rights: Is There a Case for a Centralised Digital Copyright Exchange? (2012) *Review of Economic Research in Copyright Issues*, 9(2) 3

Treiger-Bar-Am, K. Speech, Balance, and a Telos of Respect: Review of Abraham Drassinower's What's Wrong with Copying? (2016) 29(1) *I.P.J.* 11

Turkel, G. Michel Foucault: Law, Power and Knowledge (1990) 17(2) *Journal of Law and Society,* pp.170-193

van den Hoven, P. Analysing Discursive Practices in Legal Research: How a Single Remark Implies a Paradigm (2017) 13(3) *Utrecht Law Review*, pp.56–64

van Deursen, S. and Snijders, T. The Court of Justice at the Crossroads: Clarifying the Role for Fundamental Rights in the EU Copyright Framework (2018) 49(9) *IIC*, pp. 1080-1098

van Gompel, S. Copyright Formalities In The Internet Age: Filters Of Protection Or Facilitators Of Licensing (2013) 28 *Berkeley Technology Law Journal*, pp. 1425-1458

van Gompel, S. Unlocking the Potential of Pre-Existing Content: How to Address the Issue of Orphan Works in Europe? (2007) 38(6) *IIC*, pp. 669-702

van Gompel, S. and Hugenholtz, P. B. The Orphan Works Problem: The Copyright Conundrum of Digitizing Large-Scale Audiovisual Archives, and How to Solve It (2010) 8(1) *Popular Communication*, pp. 61-71

Vučković, R. M. Implementation of Directive 2014/26/EU on Collective Management and Multi-Territorial Licensing of Musical Rights in Regulating the Tariff-Setting Systems in Central and Eastern Europe (2016) *IIC,* pp.28-59

Warde, A. (2005) ‘Consumption and Theories of Practice (2005) 5(2) *Journal of Consumer Culture*, pp.131–153

Woodmansee, M. On the Author Effect: Recovering Collectivity (1992) 10 *Cardozo Arts & Ent. L.*J., pp. 279-292

Xalabarder, R. ‘Google Books and Fair Use: A Tale of Two Copyrights? (2014) 5(1) *JIPITEC*, p. 53

Yonucu, D. The Absent Present Law: An Ethnographic Study of Legal Violence in Turkey (2018) 27(6) *Social & Legal Studies*, pp.716–733.

Yu, P. K. Moral copyrights 2.0 (2014) 1(4) *Tex. A&M L. Rev.*, pp. 873-900

Zhang, Z. Transplantation of an Extended Collective Licensing System – Lessons from Denmark (2016) 47(6) *IIC*, pp. 640-672

Books

Abel, R. *Silent Film* (The Athlone Press, 1999)

Adams, M. and Bomhoff, J. *Practice and Theory in Comparative Law* (Cambridge University Press, 2012)

Adler, P. and Adler, O. “The past and the future of ethnography” in Atkinson, P. and Delamont, S. (eds.), *SAGE qualitative research methods* (SAGE Publications, 2010)

Andersson, L. G. and Sundholm, J. *The Cultural Practice of Immigrant Filmmaking: Minor Immigrant Cinemas in Sweden 1950–1990* (Intellect, 2019)

Armstrong, C., de Beer, J., Kawooya, D., Prabhala, A. and Schonwetter, T. *Access to Knowledge in Africa: The Role of Copyright* (Double Storey Publishers, 2011)

Atkinson, S. *From Film Practice to Data Process: Production Aesthetics and Representational Practices of a Film Industry in Transition* (Edinburgh University Press, 2018)

Aufderheide, P. and Jaszi, P. *Reclaiming Fair Use: How To Put Balance Back In Copyright* 2nd ed. (University of Chicago Press, 2018)

Azam, M. *Intellectual Property and Public Health in the Developing World* (Open Book Publishers, 2016)

Baldwin, P. *The Copyright Wars: Three Centuries of Trans-Atlantic Battle* (Princeton University Press, 2014)

Bell, M. and Williams, M. (eds.) *British Women's Cinema* (Routledge, 2010)

Beugnet, M. “Miniature Pleasures: On Watching Films on an iPhone” in Geiger, J. and Littau, K. (eds.) *Cinematicity in Media History* (Edinburgh University Press, 2013)

Blaikie, N. “Interpretivism” in Lewis-Beck, M.S., Bryman, A. and Liao, T.F. (eds), *The sage encyclopedia of social science research methods* (SAGE Publications, 2004)

Borghi, M. “Author” in Bartolini, A., Cippitani, R. and Colcelli, V, (eds.) *Dictionary of Statuses within EU Law* (Springer, 2019)

Borghi, M. Copyright and the Commodification of Authorship in 18th- and 19th-Century Europe *Oxford Research Encyclopedia of Literature* (Oxford University Press, 2018)

Borghi, M. “Exceptions as users’ rights?” *forthcoming in* Rosati, E. (ed.) *The Routledge Handbook of EU Copyright Law* (Routledge: 2021)

Borghi, M. and Karapapa, S. *Copyright and Mass Digitization* (OUP, 2013)

Borghi, M. “Knowledge, Information and Values in The Age Of Mass Digitisation” in Gennaro, I. D. (ed.) *Value: Sources and Readings on a Key Concept of the Globalized World* (Brill Academic Publishers, 2012)

Brown-Saracino, J., Thurk, J. and Fine, G. “Beyond groups: seven pillars of peopled ethnography in organizations”, in Atkinson, P. and Delamont, S. (eds.), *Sage qualitative research methods* (SAGE Publications, 2010)

Burke, P. *Law's Anthropology: From ethnography to expert testimony in native title* (ANU Press, 2011)

Caddick, N., Davies, G. and Harbottle, G. *Copinger and Skone James on Copyright* 17th edn. (Sweet & Maxwell, 2016)

Calamai, S., Ginouvès, V. and Bertinetto, P.M. “Sound Archives Accessibility” in Borowiecki, K.J., Forbes, N. and Forbes, A. (eds.) *Cultural Heritage in a Changing World* (Springer Open, 2016)

Chartier. R. “Figures of the Author” in Sherman, B. and Strowel, A. (eds.) *Of Authors and Origins: Essays in Copyright Laws* (Clarendon Press, 1994)

Choongh, S. “Doing Ethnographic Research: Lessons from a Case Study” in McConville, M.(ed.) *Research Methods for Law”* (Edinburgh University Press, 2017)

Corbin, J. and Strauss, A. *Basics of qualitative research techniques and procedures for developing grounded theory* 3rd ed. (SAGE Publications, 2008)

Crotty, M. *The Foundations of Social Research: Meaning and Perspective in the Research Process* (SAGE Publications Ltd. 1998)

D’Exelle, B. “Representative Sample” in Michalos, A.C. (eds) *Encyclopedia of Quality of Life and Well-Being Research* (Springer, 2014)

Davies, M. “Keynote: Reforming Law – The Role of Theory” in Levy, R., O’Brien, M., Rice, S., Ridge, P. and Thornton, M. (eds.) *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017)

Deazley, D. *Rethinking Copyright: History, Theory, Language* (Edward Elgar Publishing, 2008)

Deazley, R. *On the Origin of the Right to Copy* (Hart Publishing, 2004)

Delpeut, P. “An Unexpected Reception: Lyrical Nitrate Between Film History And Art” in Bloemheuvel, M., Fossati, G. and Guldemond, J. (eds.) *Found Footage: Cinema Exposed* (AUP, 2012)

Denscombe, M. *The Good Research Guide: For small-scale social research projects* 6th ed. (OUP, 2017)

Denzin, N.K. and Lincoln, Y.S. (eds.) *The Sage handbook of qualitative research* (Sage Publications, 2005)

Drahos, P. *A Philosophy of Intellectual Property* (Routledge 2016),

Drassinower, A. *What’s Wrong with Copying?* (Harvard University Press, 2015)

Dupin, C. “’Je taime…moi non plus’ Ernest Lindgren and Henri Langlois, pioneers of the film archive movement” in Nowell-Smith. G. and Dupin, C. *The British Film Institute, the government and film culture, 1933-2000* (Manchester University Press, 2012)

Dusollier, S. “Realigning Economic Rights With Exploitation of Works: The Control of Authors Over the Circulation of Works in the Public Sphere” in Bernt Hugenholtz (ed.) *Copyright Reconstructed: Rethinking Copyright’s Economic Rights in a Time of Highly Dynamic Technological and Economic Change* (Kluwer Law International, 2018)

Elliott, M. and Thomas, R. *Public Law* (OUP, 2011)

Fairclough, N. *Critical Discourse Analysis* (Longman, 1995)

Faubian, J.D. (ed.) *Power: The Essential Works of Michel Foucault 1954-1984: Essential Works of Michel Foucault 1954-1984 v. 3 (Essential Works of Foucault 3)* (Penguin, 2002)

Flood, J. A. “Socio-Legal Ethnography” in Banakar, R. and M. Travers, M. (eds.) *Theory And Method In Socio-Legal Research* (Hart Publishing, 2005)

Flueckiger, B., Op den Kamp, C. and Pfluger, D. “A Material-Based Approach to the Digitization of Early Film Colours” in Fossati, G., Jackson, V., Lameris, B., Rongen-Kaynakçi, E., Street, S. and Yumibe, J. (eds.) *The Colour Fantastic: Chromatic Worlds of Silent Cinema* (AUP, 2018)

Fontana, A. “Postmodern ethnography” in Lewis-Beck, M.S., Bryman, A. and Liao, T.F. (eds) *The sage encyclopedia of social science research methods* (SAGE Publications, 2004)

Fossati, G. “Found Footage: Filmmaking, Film Archiving and New Participatory Platforms” in Bloemheuvel, M., Fossati, G. and Guldemond, J. (eds.) *Found Footage: Cinema Exposed* (AUP, 2012)

Fossati, G. *From Grain to Pixel: The Archival Life of Film in Transition* (AUP, 2009)

Fossati, G., Jackson, V., Lameris, B., Rongen-Kaynakci, E., Street, S. and Yumibe, J. “Introduction” in Fossati, G., Jackson, V., Lameris, B., Rongen-Kaynakci, E., Street, S. and Yumibe, J. (eds.) *The Colour Fantastic: Chromatic Worlds of Silent Cinema* (Amsterdam University Press, 2018)

Foucault, M. “Politics and the study of discourse”, in G. Burchell, C. Gordon and P. Miller (eds), *The Foucault Effect: Studies in Governmentality* (Harvester, 1991)

Foucault, M. *Archaeology of Knowledge*, 2nd ed. (Routledge, 2002)

Foucault, M. *Power/ Knowledge* (Pantheon, 1980)

Foucalt, M., Davidson, A.I. and Burchell, G. *The Birth of Biopolitics: Lectures at the Collège de France, 1978-1979 (Michel Foucault: Lectures at the Collège de France)* (Palgrave Macmillan, 2008)

Geiger, C. "Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles”, in Geiger, C. (ed.) *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, 2015)

Giblin, R. and Weatherall, W, (eds.) *What if we could reimagine copyright?* (ANU, Press 2017)

Given, L. M. *The Sage encyclopedia of qualitative research methods* (SAGE, 2008)

Glanert, S. (ed.) *Comparative Law - Engaging Translation* (Routledge, 2014)

Glöde, M. “A Different Re-Discovery of Something (Lost): The Dynamics of Found Footage Film After 1990” in Bloemheuvel, M., Fossati, G. and Guldemond, J. (eds.) *Found Footage: Cinema Exposed* (AUP, 2012)

Goffman, E. “On fieldwork”, in Atkinson, P., and Delamont, S. (eds.) *Sage qualitative research methods* (SAGE Publications, 2010)

Gorton, K. and Garde-Hansen, J. *Remembering British Television: Audience, Archive and Industry* (Bloomsbury Publishing, 2019)

Griffiths, J. and McDonagh, L. “Fundamental rights and European IP law - the case of art 17(2) of the EU Charter” in Geiger, C. (ed.) *Constructing European Intellectual Property Achievements and New Perspectives* (Edward Elgar Publishing, 2013)

Guba, E. G. and Lincoln, Y. S. “Competing paradigms in qualitative research” in Denzin, N. K. and Lincoln, Y. S. (eds.) *Handbook of qualitative research* (Sage, 1994)

Gunning, T. “Finding the Way: Films found on a Scrap Heap” in Bloemheuvel, M., Fossati, G. and Guldemond, J. (eds.) *Found Footage: Cinema Exposed* (AUP, 2012)

Hamer, S. “Introduction” in Bloemheuvel, M., Fossati, G. and Guldemond, J. (eds.) *Found Footage: Cinema Exposed* (AUP, 2012)

Hammond, K., Revill, G. and Smith, J. “The digital citizen: working upstream of digital and broadcast archive developments” in Simon P., Prescott, A. and H. Mutibwa, D. H. (eds.) *Communities, Archives and New Collaborative* Practices (Bristol University Press, 2020)

Helfer, L. R. “Collective Management of Copyrights and Human Rights: An Uneasy Alliance Revisited” in Gervais, D. (ed.) *Collective Management Of Copyright And Related Rights*. 2nd ed. (Kluwer Law International, 2010)

Hoorn, E. “Contributing to Conversational Copyright: Creative Commons Licences and Cultural Heritage Institutions” in Guibault, L. and Angelopoulos, C. (eds.) *Open Content Licensing: From Theory to Practice* (Amsterdam University Press, 2011)

Houston, P. *Keepers of the Frame: The Film Archives* (British Film Institute, 1994)

Hugenholtz, B. “Works of Literature, Science and Art” in Hugenholtz, B., Quaedvlieg, A. and Visser, D. (eds.) *A Century of Dutch Copyright Law: Auteurswet 1912-2012* (deLex B.V., 2012)

Husa, J. *New Introduction to Comparative Law* (Bloomsbury, 2015)

Johannisson, B. *Disclosing Entrepreneurship as Practice* (Edward Elgar Publishing, 2018)

Kamina, P. *Film Copyright in the European Union* (Cambridge University Press, 2016)

Kelly, E. J., *The Adventures of Jonathan Dennis: Bicultural film archiving practice in Aotearoa New Zealand* (John Libbey Publishing Ltd, 2015)

Knappe, H. *Doing Democracy Differently: Political Practices and Transnational Civil Society* (Verlag Barbara Budrich, 2017)

Lähdesmäki, T. and Mäkinen, K. “The ‘European Significance’ of Heritage: Politics of Scale in EU Heritage Policy Discourse” in Lähdesmäki, T., Thomas, S. and Zhu Y. *Politics of Scale: New Directions in Critical Heritage Studies* (Berghahn Books, 2019)

Lameris, B. *Film Museum Practice And Film Historiography: The Case of the Nederlands Filmmuseum (1946-2000)* (Amsterdam University Press, 2017)

Lamp, N. “The ‘Practice Turn’ in International Law: Insights from the Theory of Structuration” in Hirsch, M. and Lang, A. (eds.) *Research Handbook on the Sociology of International Law* (Edward Elgar, 2018)

Lavrakas, P.J. *Encyclopedia of survey research methods*, (Sage Publications, 2008)

Locke, T. *Critical Discourse Analysis: Critical Discourse Analysis As Research* (Bloomsbury Publishing, 2004)

López, F. Z. “Mandatory Collective Management” in Blomqvist, J. (ed.) *Copyright, To Be or Not To Be* (Ex Tuto Publishing, 2019)

Lynch, M. “Ethnomethodology and the logic of practice" in Schatzki, T.R., Knorr-Cetina, K. and von Savigny, E. (eds.) *The Practice Turn in Contemporary Theory* (Routledge, 2001)

Mayer, M. “From the Archive And Other Contexts” in Bloemheuvel, M., Fossati, G. Guldemond, J. (eds.) *Found Footage: Cinema Exposed* (AUP, 2012)

McCausland, S. Getting Public Broadcaster Archives Online (2009) 14(2) *Media and Arts Law Review*, pp. 142–165

McConville, M. and Chui, W. H. (eds.), *Research Methods for Law*, (Edinburgh University Press, 2017)

McLaughlin, H. *Understanding social work research* 2nd ed. (SAGE Publications Ltd, 2012)

Menotti, G. *Movie Circuits: Curatorial Approaches to Cinema Technology* (Amsterdam University Press, 2019)

Mousmouti, M. *Designing Effective Legislation* (Edward Elgar Publishing Ltd, 2019)

Nicolini, D. “Practice Theory as a Package of Theory, Method and Vocabulary: Affordances and Limitations” in Jonas, M. et al. (eds.) *Methodological Reflections on Practice Oriented Theories* (Springer International Publishing, 2017)

Nicolini, D. *Practice Theory, Work, and Organization: An Introduction* (OUP, 2012)

Nowell-Smith, G. “Epilogue 2011” in Nowell-Smith, G. and Dupin, C. *The British Film Institute, the government and film culture, 1933-2000* (Manchester University Press, 2012)

Nowell-Smith, G. “Towards the Millennium” in Nowell-Smith, G. and Dupin, C. *The British Film Institute, the government and film culture, 1933-2000* (Manchester University Press, 2012)

Op den Kamp, C. “Audiovisual Archives and the Public Domain: Economics of Access, Exclusive Control and the Digital Skew” in Crisp, V. and Gonring, G. M. (eds.) *Besides the Screen: Moving Images through Distribution, Promotion and Curation* (Palgrave Macmillan, 2015)

Op den Kamp, C. *The Greatest Films Never Seen: The Film Archive and the Copyright Smokescreen* (AUP, 2018)

Padfield, T. *Copyright for Archivists and Records Managers* (Facet Publishing, 2015)

Payne, G. and Payne, J. *Key concepts in social research* (SAGE Publications, 2004)

Peacock, A. and Rizzo, I. *The Heritage Game: Economics, Policy, and Practice* (OUP, 2008)

Pila, J. and Torremans, P. *European Intellectual Property Law* (OUP, 2016)

Prelinger. R. “Archives of Inconvenience” in Lison, A., Mars, M., Medak, T. and Prelinger, R. (eds.) *Archive* (University of Minnesota Press, 2019)

Pruce J.R. (eds.) *The Social Practice of Human Rights* (Palgrave Macmillan, 2015)

Quintais, J. P. *On Peers and Copyright: Why the EU Should Consider Collective Management of P2P* (Nomos Verlagsgesellschaft mbH, 2012)

Ramalho, A. *The Competence of the European Union in Copyright Lawmaking: A Normative Perspective of EU Powers for Copyright Harmonization* (Springer International Publishing 2018)

Ricketson, S. and Ginsburg, J. *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (OUP, 2006)

Riis, T., Rognstad, O.A. and Schovsbo, J. ‘Collective Agreements for the Clearance of Copyrights – The Case of Collective Management and Extended Collective Licenses’ in Riis, T. (ed.) *User Generated Law. Reconstructing Intellectual Property Law in a Knowledge Society* (Edward Elgar, 2016)

Rose, M. *Authors and Owners: The Invention of Copyright* (Harvard University Press, 1993)

Salkind, Neil. J. *Encyclopedia of research design* (SAGE Publications, 2010)

Salter, M. and Mason, J. *Writing Law Dissertations* (Pearson Education Limited, 2007)

Sarfaty, G. *Values in Translation: Human Rights and the Culture of the World Bank* (Stanford University Press, 2012)

Scassa, T., Goudreau M., Doagoo, B. C. and Saginur, M. *Intellectual Property for the 21st Century: Interdisciplinary Approaches* (Irwin Law, 2014)

Schatzki, T. R. "Practice Theory as Flat Ontology" in Spaargaren, G., Weenink, G. and Lamers, M. (eds.) *Practice Theory and Research: Exploring the Relevance for Social Change* (Routledge, 2016)

Schatzki, T. R. *Social Practices: A Wittgensteinian Approach to Human Activity and the Social* (CUP, 1996)

Schatzki, T. R., Cetina, K. K. and von Savigny, E. (eds.) *The Practice Turn in Contemporary Theory* (Routledge, 2001)

Schensul, S. L., Schensul, J. J. and LeCompte, M. D. *Initiating Ethnographic Research: A Mixed Methods Approach* (Rowan & Littlefield, 2013)

Shaffer, G. "Legal Realism and International Law" in Dunoff, J. L. and Pollack, M. A. (eds.) *International Legal Theory: Foundations and Frontiers* (Cambridge University Press, 2019)

Shaffer, G. "Legal Realism and International Law" in Dunoff, J. L. and Pollack, M.A. (eds.) *International Legal Theory: Foundations and Frontiers* (Cambridge University Press, 2019)

Shove, E., Pantzar, M. and Watson, M. *The Dynamics of Social Practice: Everyday Life and how it Changes* (SAGE Publications, 2012)

Shuy, R. W. "Discourse Analysis in the Legal Context" in Tannen, D. et al. *The Handbook of Discourse Analysis* (John Wiley & Sons, 2015)

Sieber, S. "The Politics of Archives. Media, Power, and Identity" in Imesch, K., Schade, S. and Sieber, S. (eds.) *Constructions of Cultural Identities in Newsreel Cinema and Television after 1945* (Transcript Verlag, 2016)

Silbey, J. M. "IP and Ethnography: A Qualitative Research Approach" in Calboli, I. and Montagnani, L. (eds.) *Oxford Handbook on Intellectual Property Research* (Oxford University Press, 2019)

Slide, A. *Nitrate Won't Wait: A History of Film Preservation in the United States* (McFarland & Co., 2000)

Smets, M., Aristidou, A., & Whittington, R. “Towards a practice-driven institutionalism” in Greenwood, R., Oliver, C., Lawrence, T.B. and Meyer, R. (eds.) *The Sage handbook of organizational institutionalism*, 2nd ed. (Sage, 2017)

Stamatoudi, I. A. *New Developments in EU and International Copyright Law* (Kluwer Law International B.V., 2016)

Stoddard, M. “Film Preservation and Restoration” in Gabbard, K. (ed.) *Oxford Bibliographies in Cinema and Media Studies*, (OUP, 2018)

Suthersanen, U. “Eyeing the Need for Licensing Using the Orphan Works Lens” in Blomqvist, J. (ed.) *Copyright, To Be or Not To Be* (Ex Tuto Publishing, 2019)

Taylor, S. *What is Discourse Analysis?* (Bloomsbury Publishing, 2013)

Thylstrup, N.B. *The Politics of Mass Digitization* (MIT Press, 2019)

Torlasco, D. *The Heretical Archive: Digital Memory at the End of Film* (University of Minnesota Press, 2013)

Vaidhyanathan, S. *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (NYU Press, 2011)

Valcke, C. “Reflections on comparative law methodology – getting inside contract law” in Adams, M. and Bomhoff, J. *Practice and Theory in Comparative Law* (Cambridge University Press, 2012)

van Eechoud, M. “Copyright Act – *Auteurswet* Unofficial Translation” in Hugenholtz, B., Quaedvlieg, A. and Visser, D. (eds.) *A Century of Dutch Copyright Law: Auteurswet 1912-2012* (deLex B.V., 2012)

van Gompel, S. “Copyright Formalities and the Reasons for their Decline in Nineteenth Century Europe” in Deazley, R., Kretschmer, M. and Bently, L. (eds.) *Privilege and Property: Essays on the History of Copyright* (Open Book Publishers, 2010)

van Gompel, S. “Creativity, autonomy and personal touch: A critical appraisal of the CJEU’s originality test for copyright” in Mireille van Eechoud (ed.) *The work of authorship* (AUP, 2014)

Van Hoecke, M. *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Bloomsbury Publishing, 2011)

Waelde, C., Brown, A., Kheria, S. and Cornwell, J. *Contemporary Intellectual Property: Law and Policy* 4th edn. (OUP, 2016)

Wallace, A. and Deazley, R. eds, *Display At Your Own Risk: An experimental exhibition of digital cultural heritage* (2016, CC-BY 4.0)

Watson, M. “Placing Power in Practice Theory” in Hui, A., Schatzki, T. and Shove, E. *The Nexus of Practices: Connections, constellations,* practitioners (Routledge, 2016)

Welch, D. “Ethnography” in Southerton, D (ed.), *Encyclopedia of consumer culture* (SAGE Publications, 2011)

Welch, D. and Warde, A. “Theories of practice and sustainable consumption” in Thøgersen, J. and Reisch, L. A. *“Handbook of Research on Sustainable Consumption”* (Edward Elgar Publishing, 2015)

Woodmansee, M. and Jaszi, P. (eds.) *The Construction of Authorship: Textual Appropriation in Law and Literature* (Durham University Press, 1994)

Zemer, L. *The Idea of Authorship in Copyright* (Routledge, 2017)

Official Documents

Hansard
Hansard HL Deb. GC169-185 26th March 2014. [Online]. Available from: <*https://publications.parliament.uk/pa/ld201314/ldhansrd/text/140326-gc0001.htm*> Accessed 1st September 2020

Question for Department for Business, Energy and Industrial Strategy, Copyright: EU Action: Written question – 4371, 21 January 2020, Available at: < https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-01-16/4371> Accessed on 21st May 2020

Studies and Reports
Ballesteros, M., Mehdi, R., Eliantonio, M. and Petrovic, D. “Tools for Ensuring Implementation and Application of EU Law and Evaluation of their Effectiveness” (European Parliament, 2013)

Bertoni, A., Guerrieri, F.and Montagnani, M. L. ‘Report 2: Requirements for Diligent Search in 20 European Countries’ (EnDOW, 2017)

Beunen, A. 2011, ‘Gezamenlijke reactie van Nederlandse erfgoedinstellingen op de consultatie over het Europese Richtlijnvoorstel Verweesde Werken’ Available at: <https://www.internetconsultatie.nl/verweesde_werken/reactie/6098/bestand>

Clayton, S., Johnston, K. M. and Williams, M. *Invisible Innovators: Making Women Filmmakers Visible Across the UK Film Archives* (Film Archives UK, 2020)

Collections Trust “Guidance on bulk accessioning” (Collections Trust, 2019)

Creative Commons “Defining “Noncommercial” A Study of How the Online Population Understands “Noncommercial Use”” (Creative Commons Corporation, 2009) (CC By 3.0)

Deazley, R. and Patterson, K. “Digitising the Edwin Morgan Scrapbooks: Orphan Works: Law”, Digitising Morgan Available at: < https://www.digitisingmorgan.org/uploads/LAW_SECTION_DigiMorgan.pdf>

Department of Culture, Media & Sport, “Triennial Review of the British Film Institute”, (Department of Culture, Media & Sport, 2014)

EU IPO, “The Out-of-Commerce Works Portal – High-Level Specification”, Version 0.15 (EU IPO, 2020).

European Commission, ‘Collective rights management Directive – publication of collective management organisations and competent authorities’ (European Commission, 3rd July 2017)

European Commission “Commission Decision of 7.3.2017 setting up the Expert Group on Digital Cultural Heritage and Europeana” Document: C (2017) 1444 (European Commission, 2017)

European Commission “Cultural Heritage: Digitisation, Online Accessibility And Digital Preservation. Consolidated Progress Report on the implementation of Commission Recommendation (2011/711/EU) 2015-2017” (European Union, 2018)

European Commission “Cultural heritage Digitisation, online accessibility and digital preservation REPORT on the Implementation of Commission Recommendation 2011/711/EU 2013-2015” (European Commission, 2016)

European Commission, *Impact Assessment on the modernisation of EU copyright rules,* (Commission Staff Working Document 301, 2016)

European Commission, ‘Implementation of the 2005 European Parliament and Council Recommendation on Film Heritage: Progress report 2012-2013’ (European Commission, 2014)

European Commission, “Proposal for a Directive Of The European Parliament And Of The Council on copyright in the Digital Single Market”

European Commission “research eu Results Pack On Cultural Heritage. Heritage at Risk: EU research and innovation for a more resilient cultural heritage” (European Union, 2018)

European Commission, “Special Eurobarometer 466 Report: Cultural Heritage” (European Commission, 2017)

European Copyright Society “Answer to the EC Consultation on the review of the EU copyright rules” (European Copyright Society, 2014)

European Copyright Society “Comment of the European Copyright Society on the Implementation of the Extended Collective Licensing Rules (Arts. 8 and 12) of the Directive (EU) 2019/790 on Copyright in the Digital Single Market” (European Copyright Society, 2020)

European Parliament, “Cultural heritage in EU policies” (European Parliament, 2018)

Europeana Foundation, ‘Europeana copyright policy mandate (Dec 2016)’ (Europeana, 2016)

Favale, M., Homberg, F., Kretschmer, M., Mendis, M. and Secchi, D. “Copyright, and the Regulation of Orphan Works: A Comparative Review of Seven Jurisdictions and a Rights Clearance Simulation” (IPO, 2015)

Favale. M., Schroff, S. and Bertoni, S. ‘Report 1: Requirements for Diligent Search in the United Kingdom, the Netherlands, and Italy’ (EnDOW, 2016)

Fontaine, G. and Simone, P. (eds.) *The Exploitation of Film Heritage Works in the Digital Era* (European Audiovisual Observatory, 2016)

Fontaine, G. and Simone, P. (eds.), *The access to film works in the collections of Film Heritage Institutions in the context of education and research* (European Audiovisual Observatory, 2017)

Hausler, K., Adach, C. and Khalfaoui, A. The Human Right to Access and Enjoy Cultural Heritage in the United Kingdom: Workshop Report (British Institute of International and Comparative Law, 2019)

ICOM, ‘The reduction in public funding threatens the very existence of museums’ (International Council of Museums, 17th September 2018) Available at: <https://icom.museum/wp-content/uploads/2018/09/ICOMStatement-reduction-in-public-funds.pdf> Accessed 24th June 2019

Iphofen, R. “Research Ethics in Ethnography/Anthropology” (European Commission, 2015)

IPO, *Copyright and the Voice of the Public Domain: An empirical assessment* (IPO 2015/11, 2015)

Jackson, J., Kuha, J., Hough, M., Bradford, B., Hohl, K. and Gerber, M. Trust and legitimacy across Europe: a FIDUCIA report on comparative public attitudes towards legal authority. (FIDUCIA, 2013)

Kelly, R. (ed.) “Strategy for UK Screen Heritage” (UK Film Heritage Group, 2007)

Korn, N. “In from the Cold: An assessment of the scope of ‘Orphan Works’ and its impact on the delivery of services to the public” (Collections Trust, 2009)

Kraai, H.G. ‘Reactie van het Nationaal Archief t.b.v internetconsultatie, Richtlijnvoorstel Verweesde Werken (2011) < Available at: https://www.internetconsultatie.nl/verweesde_werken/reactie/6084/bestand.> Accessed on 15th May 2019

Macrez, F. “The digital exploitation of unavailable books: what remains of copyright?” (2012) 12 *Collection Dalloz*

Mazzanti (ed.) Digital Agenda For The European Film Heritage: Challenges of the Digital Era for Film Heritage Institutions (European Commission, 2012)

Niggemann, E., de Decker, J. and Lévy, M. “The new Renaissance: Report of the “Comité des Sages” on bringing Europe’s Cultural heritage online” (Publications Office of the European Union, 2011)

Office of the Parliamentary Counsel “When Laws Become Too Complex A review into the causes of complex legislation” (UK Cabinet Office, 2013)

Poole, N. “The Cost of Digitising Europe’s Cultural Heritage: A Report for the Comité des Sages of the European Commission” (The Collections Trust, November 2010)

Ricketson, S. “Standing Committee on Copyright and Related Rights Ninth Session Geneva, June 23 to 27, 2003. WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment” (WIPO, 2003)

Stichting Reprorecht, “Today’s rights management the Dutch way: Transparency and governance in collective management of copyright and neighbouring rights in the Netherlands: a progress report” (Stichting Reprorecht, 2013)

Townsend Gard, E. *Creating a Last Twenty (L20) Collection: Implementing Section 108(h) in Libraries, Archives and Museums* (SSRN Electronic Journal, 2017) Available at: <https://ssrn.com/abstract=3049158> Accessed on 12th November 2020

Vuopala, A. ‘Assessment of the Orphan works issue and Costs for Rights Clearance’ (European Commission, 2010)

Watt, R. “Copyright Collectives and Contracts: An Economic Theory Perspective” CREATe Working Paper 2015/8 (2015)

White, B. “The UK Experience Of Extended Collective Licensing: Greased Lightning Or The Road To Nowhere?” in *IFLA Background Paper on Extended Collective Licensing*, (IFLA Copyright and Other Legal Matters Advisory Committee Network, 2018)

PhD theses

Brown, L. *The adjustment journey of international postgraduate students at a university in England: an ethnography* Doctoral thesis (Bournemouth University, 2008)

Bosher, H. *A framework using the internal and external perspectives and its application to online copyright infringement: an analysis of copying and communication to the public* Doctoral thesis (Bournemouth University, 2017)

Klinker, M. *Towards Improved Understanding and Interaction Between Forensic Science and International Criminal Law in the Context of Transitional Justice* Doctoral thesis (Bournemouth University, 2009)

Reynolds, J. T. *Multilingual and intercultural communication in and beyond the UK asylum process: a linguistic ethnographic case study of legal advice-giving across cultural and linguistic borders.* Doctoral thesis (Durham University, 2018)

Tijssen, H. *De Juridische Dissertatie Onder de Loep: De Verantwoording van Methodologische Keuzes in Juridische Dissertaties* Doctoral Thesis (Tilburg University, 2009)

Wallace, A. *Surrogate IP rights in the cultural sector* Doctoral thesis (University of Glasgow, 2018)

Websites

BBC, 'Re-created Lost Doctor Who episode gets YouTube premiere!' (BBC, 2nd October 2019) Available at: <https://www.bbc.co.uk/blogs/doctorwho/entries/36e9525b-1e11-4acb-b39d-247189c77142> Accessed 2nd October 2019

BFI, "BFI Showcases A Haul Of Missing Believed Wiped TV Rediscoveries Plus Festive Fun At The TV Panto" (BFI, 2019) Available at< https://www.bfi.org.uk/sites/bfi.org.uk/files/downloads/bfi-press-release-bfi-showcases-haul-of-missing-believed-wiped-tv-rediscoveries-plus-festive-fun-tv-panto-2019-11-12.pdf> Accessed 2nd October 2019

BFI, "Digitisation Fund", BFI. Available at < https://www.bfi.org.uk/supporting-uk-film/funding-organisations/unlocking-film-heritage-digitisation-fund> Accessed 2nd October 2019

BFI, "Regional and national archives" (BFI) Available at: < https://www2.bfi.org.uk/britain-on-film/regional-national-archives> Accessed on 16th January 2019

BFI, “Silent films” Available at: <https://www.bfi.org.uk/archive-collections/introduction-bfi-collections/exploring-collections/silent-film> Accessed 2nd October 2019

BFI, “What the archive contains” Available at: https://www.bfi.org.uk/archive-collections/about-bfi-national-archive/what-archive-contains Accessed 2nd October 2019

Bout, L. “Dealing With Orphan Works: A Dutch Film Archive’s Perspective” Conference Presentation, EYE Filmmuseum, July 2017. Available at: < http://diligentsearch.eu/wp-content/uploads/2017/11/L-Bout-presentation-orphan-works-a-film-archives-perspective.pdf> Accessed on 19th February 2018

British Library ‘Save our Sounds is the British Library’s programme to preserve the nation’s sound heritage’ (British Library, 1st May 2019) Available at: <https://www.bl.uk/projects/save-our-sounds> Accessed 23rd June 2019

Collections Trust, “UK cultural property legislation” (Collections Trust, 2020) List available at < https://collectionstrust.org.uk/cultural-property-advice/legal-contexts/uk-cultural-property-legislation/> Accessed on 1st April 2019.

Copyright Licensing Agency “CLA's Application For Extended Collective Licensing: Update” (CLA, 2018) Available at: < https://www.cla.co.uk/news/application-extended-collective-licensing-update> Accessed on 23rd September 2019

Copyright Tribunal, “About us”, Copyright Tribunal. Available at: < https://www.gov.uk/government/organisations/copyright-tribunal/about> Accessed on 21st May 2020

Creative Commons Netherlands and Buma/Stemra “Fact Sheet Pilot Creative Commons Netherlands and Buma/Stemra” Available at: < https://creativecommons.nl/bumapilot/070823factsheet_en_web.pdf> Accessed on 21st March 2020

Creative Commons, “Frequently Asked Questions” Available at: < https://creativecommons.org/faq/#does-my-use-violate-the-noncommercial-clause-of-the-licenses> Accessed on 21st May 2020

Creative Commons, “What We Do” (Creative Commons) Available at: < https://creativecommons.org/about/> Accessed on 21st May 2020

Daley, B. “Importance of digitising cultural heritage highlighted in 'Heritage at Risk' exhibition” (Europeana, 15th July 2019) Available at: < https://pro.europeana.eu/post/importance-of-digitising-cultural-heritage-highlighted-in-heritage-at-risk-exhibition#:~:text=Digitisation%20of%20cultural%20heritage%20can,promotion%20o

f%20European%20cultural%20resources.&text=By%20digitising%20their%20valuable%20collections,to%20safeguard%20our%20heritage%20sites.> Accessed on 11th October 2020

Diligent Search, “Join the Community – Help Unlock Orphan Films” Available at: < http://diligentsearch.eu/< Accessed on 20th March 2019

Dryden, J. ‘ECL And Archives’ in IFLA Copyright And Other Legal Matters Advisory Committee Network, ‘Background Paper On Extended Collective Licensing’ (*IFLA*, 7th August 2018) 31 Available at: <https://www.ifla.org/files/assets/clm/ecl_background_paper.pdf> Accessed on 8th August 2019

EnDOW, ‘Diligent Search: Helping cultural heritage institutions digitise collections’ Available at: <http://diligentsearch.eu/about/> Accessed on 20th March 2019

EU IPO, Orphan Works Database” (EU IPO, 2020) Available at:< “https://euipo.europa.eu/orphanworks/> Accessed on 11th December 2020

European Commission, “Better Regulation principles: at the heart of the EU's decision-making process”, (European Commission, 15th April 2019) Available at: < https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2117> Accessed on 23rd May 2019

European Commission “Cultural heritage” (European Commission, 2020) Available at:< https://ec.europa.eu/culture/cultural-heritage> Accessed on 18th October 2020

European Commission, “Directive on collective management of copyright and related rights and multi-territorial licensing – frequently asked questions” (European Commission, 2014) Available at: < https://ec.europa.eu/commission/presscorner/detail/de/MEMO_14_79> Accessed on 23rd May 2019

Europeana, ‘Welcome to Europeana Collections’ (Europeana) Available at: <https://www.europeana.eu/portal/en/about.html> Accessed 17th May 2019

EYE, “About EYE” Available at: <https://www.eyefilm.nl/en/about-eye> Accessed on 2nd May 2019

EYE, “About the collection” Available at: <https://www.eyefilm.nl/en/collection/about-the-collection> Accessed on 2nd May 2019

EYE, “academic activities” Available at: < https://www.eyefilm.nl/en/about-eye/academic-activities> Accessed on 2nd May 2019

EYE, “Collections” Available at: <https://www.eyefilm.nl/en/collection/about-the-collection/collections> Accessed on 2nd May 2019

EYE, “professionals” Available at: < https://www.eyefilm.nl/en/about-eye/professionals> Accessed on 2nd May 2019

EYE “Public lecture series This is Film! on recycling, re-using and remixing archival film” (EYE) Available at: < https://www.eyefilm.nl/en/about-eye/news/public-lecture-series-this-is-film-on-recycling-re-using-and-remixing-archival-film> Accessed on 2nd May 2019

EYE, “The Desmet dossier” Available at <: https://www.eyefilm.nl/en/collection/search-and-watch/dossiers/the-desmet-dossier> Accessed on 2nd May 2019

FAUK, “Moving History: Towards a Policy for the UK Moving Image Archives”, FAUK Available at: < http://www.filmarchives.org.uk/information/publications/ > Accessed 17th May 2019

FAUK, “The Film Archive Forum’s Statement of Principles” FAUK. Available at: < http://www.filmarchives.org.uk/wp-content/uploads/2013/03/mhoving_historypt2.pdf> Accessed 17th May 2019

FIAF, “Agreement for the International Federation of Film Archives”, 17 June 1938 Available at: <https://www.fiafnet.org/images/tinyUpload/History/FIAF-History/Digitized-documents/Constitutional-papers/Original%20FIAF%20Agreement.pdf> Accessed 17th May 2019

FIAF, “FIAF Code of Ethics” Available at: < https://www.fiafnet.org/pages/Community/Code-Of-Ethics.html> Accessed on 17th May 2019

FIAF, “FIAF’s Mission”. Available at: <https://www.fiafnet.org/pages/Community/Mission-FIAF.html> Accessed 17th May 2019

Film Archives UK, “About” Available at: < http://www.filmarchives.org.uk/about/> Accessed 17th May 2019

Gaines, V. J. R., and Dall’Asta, M. (eds.) *Women Film Pioneers Project*. (Columbia University Libraries, 2020) Available at: < https://wfpp.columbia.edu/> Accessed on 15th September 2020

Google Books. Available at: < https://books.google.com/> Accessed on 2nd February 2019

IPO, “How the IPO regulates licensing bodies”, IPO. Available at < https://www.gov.uk/government/publications/how-the-ipo-regulates-licensing-bodies/how-the-ipo-regulates-licensing-bodies> Accessed on 14th February 2019

IPO, “Orphan works commercial and non-commercial licenses” 2nd August 2016, IPO. Available at: < https://www.gov.uk/government/publications/orphan-works-commercial-and-non-commercial-licences/orphan-works-commercial-and-non-commercial-licences> Accessed on 14th February 2019

Jasserand, C. CJEU: the Luksan case and the protection of film directors, 24th February 2012, Kluwer Copyright Blog. Available at: <http://copyrightblog.kluweriplaw.com/2012/02/24/the-luksan-case-when-the-cjeu-defines-the-exploitation-rights-of-film-producers-and-protects-film-directors/

Law No 2012-287 of 1 March 2012> Accessed on 17th April 2019

Kenny, E. ‘Who we are’ (Europeana, 25th July 2017) Available at: <https://pro.europeana.eu/our-mission/who-we-are> Accessed 4th May 2019

Luke McKernan and Frank Gray, “A Short History of the UK’s Film Archives (2013)”, FAUK. Available at: < http://www.filmarchives.org.uk/about/history/> Accessed on 17th May 2019

MACE, “About MACE” Available at < https://www.macearchive.org/about-mace> Accessed on 4th May 2019

MACE, “Access Policy” Available at < https://www.macearchive.org/sites/default/files/downloads/MACE_Access_Policy.pdf > Accessed on 4th May 2019

MACE, “Acquisition and Disposal Policy”. Available at < https://www.macearchive.org/sites/default/files/downloads/MACE_Acquisition_Disposal_Policy.pdf> Accessed on 4th May 2019

MACE, “Adding to the Region’s Collection” Available at: <https://www.macearchive.org/resources/adding-regions-collection> Accessed on 4th May 2019

MACE, “Cataloguing And Documentation Policy” Available at < https://www.macearchive.org/sites/default/files/downloads/MACE%20_Cataloguing_Documentation_Policy.pdf> Accessed on 4th May 2019

MACE, “How can MACE help you?” Available at < https://www.macearchive.org/about/how-can-mace-help-you> Accessed on 4th May 2019

MACE, “How to Licence Footage” Available at: <https://www.macearchive.org/how-license-footage> Accessed on 4th May 2019

MACE, “MACE Policies”, Available at: https://www.macearchive.org/about/mace-policies Accessed on 4th May 2019

MACE, “The Collection” Available at: <https://www.macearchive.org/about/collection> Accessed on 4th May 2019

Mazzanti, N. “The Twin Black Hole: Key findings and proposals from the EU-commissioned Study “Digital Agenda for European Film Heritage” European Film Gateway Conference Presentation, Bologona, June 2011. Available at: < https://www.efgproject.eu/downloads/EFG_Mazzanti.pdf> Accessed on 7th December 2020

Nérisson, S. “Opinion of AG Wathelet in the Soulier and Doke case (C-301/15): Licensing exclusive rights requires express prior consent of the author; opt-out doesn’t help.” Kluwer Copyright Blog, August 15th, 2016. Available at: < http://copyrightblog.kluweriplaw.com/2016/08/15/opinion-ag-wathelet-soulier-doke-case-c-30115-licensing-exclusive-rights-requires-express-prior-consent-author-opt-doesnt-help/> Accessed on 18th April 2019

Netherlands Government, “Copyright” Available at: <https://business.gov.nl/regulation/copyright/> Accessed on 21st April 2019

Netherlands Ministry for Education, Culture and Science, “Heritage Act 2016” Available at: <https://english.cultureelerfgoed.nl/publications/publications/2016/01/01/heritage-act-2016> Accessed on 21st April 2019

Notion, “DSM Directive Implementation: Netherlands” Available at: <https://www.notion.so/Netherlands-6681f3a8fc4d4d079648f4cff20dc29d> Accessed on 21st April 2019

Open Nederland, Creative Commons Nederland en Wikimedia Nederland “Reactie internetconsultatie auteursrecht” (Open Nederland, 2020) Available at: <https://docs.google.com/document/d/1Xp1FdQPhu2VLPNd9BHqScyHes-ZQf9yoT7L0eaQ4rjs/edit#> Accessed on 21st April 2019

Prelinger, R. “The Future of Memory: Disrupting the Archives to Save It” (FIAF Symposium Presentation, 2015) Available at: < https://www.fiafnet.org/images/tinyUpload/E-Resources/Reports-Glossaries-And-Papers/Sydney-Symposium/Sydney-Symposium-slideshows/Rick%20Prelinger-slideshow.pdf> Accessed on 21st April 2019

Rights Statements Org. “Rights Statements” Available at:

<https://rightsstatements.org/en/> Accessed on 22nd March 2021

Somers, J. “Torching the Modern-Day Library of Alexandria” (*The Atlantic*, April 20th, 2017) Available at:< https://www.theatlantic.com/technology/archive/2017/04/the-tragedy-of-google-books/523320/> Accessed on 30th April 2019

Synodinou, T. ‘The adventures and misadventures of the implementation of the Directive on collective management of copyright in Greece and Cyprus (Part I)’ (Kluwer Copyright Blog, 27 March 2018) Available at: < http://copyrightblog.kluweriplaw.com/2018/03/27/adventures-misadventures-implementation-directive-collective-management-copyright-greece-cyprus-part/> Accessed on 22nd January 2019

The National Archive, “Archive Principles and Practice: an introduction to archives for non-archivists” (Crown Copyright, 2016) Available at < https://www.nationalarchives.gov.uk/documents/archives/archive-principles-and-practice-an-introduction-to-archives-for-non-archivists.pdf> Accessed on 14th February 2019

Toobin, J. “Google’s Moon Shot: *The quest for the universal library.” (The New Yorker,* January 28, 2007) Available at: https://www.newyorker.com/magazine/2007/02/05/googles-moon-shot Accessed on 14th February 2019

Towse, R. *Economics of collective management organisations in the creative industries*. (World Interdisciplinary Network for Institutional Research Conference, April 2016) Available at: < https://pdfs.semanticscholar.org/5007/f2150140bd96094f6c6b094f8c1b7725cfff.pdf?_ga=2.51544041.133154817.1598364227-1809524859.1598364227> Accessed on 22nd January 2019

UK Government “Orphan works and cultural heritage institutions: copyright from 1 January 2021” (UK Government, 2020) Available at: < https://www.gov.uk/guidance/orphan-works-and-cultural-heritage-institutions-copyright-after-the-transition-period> Accessed on 16th March 2020

University of Leicester, “News - Press Releases: MACE Presents Archive Film at Phoenix Arts” Available at <https://www.le.ac.uk/ebulletin-archive/ebulletin/news/press-releases/2000-2009/2007/03/nparticle.2007-03-10.html> Accessed on 17th April 2019

VOICE “What to arrange with whom?” Available at <https://www.voice-info.nl/transparantie/overzicht-wat-met-wie-regelen> Accessed on 21st April 2019

WIPO, “WIPO-Administered Treaties” Available at < https://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15> Accessed on21st April 2019

Appendix A – Indicative Interview Questions

What is your background, and how did you come to work in this film archive?

Can you tell me about your role and what your job entails on a regular basis?

What projects are you working on at the moment?

Is there a copyright or “rights management “policy, as far as you are aware?

Is there an access policy, as far as you are aware?

Does copyright/ “rights management” affect your work? If so, in what ways?

Do you feel comfortable dealing with copyright issues/ “rights issues” as they come up?

How would you describe the way copyright is handled in the archive?

Do copyright restrictions on a film ever prevent you from being able to provide access to it?

Are there certain individuals who handle copyright issues and requests?

Is the term “out-of-commerce works” one you are familiar with?

Are you aware of approximately how many films in the collection are in copyright, but are not available anywhere else to access?

What percentage of the films in the collection does the archive own the copyright for?

Can you tell me what sort of activities in the film you would deem non-commercial, or commercial? (I give examples of selling DVDs, online VODs, on YouTube with advert revenue if they need some examples.)

How does the archive distinguish between commercial and non-commercial uses?

How does the archive see the out-of-commerce provisions being incorporated into its existing practices and policy?

Do you know approximately how many more films the archive could make available if the out-of-commerce provisions were incorporated?

Is there an active collective management organisation/ collecting society for film, or a group that you feel is capable of becoming a representative CMO? If so, does the archive currently interact with them?

Do you think that the out-of-commerce provisions will likely entail a search similar to that of the orphan work diligent search? If so, would this impact the effectiveness of the provisions for the archive?

Are there any concerns you have regarding how rightholders could be impacted by out-of-commerce works being used, or any negative reactions from them?

Do you think the archive would make use of the 'fall back' exception that will allow CHIs to use the out-of-commerce works in their permanent collections for non-commercial purposes where there is no representative CMO?

What period of time do you think would need to lapse before a work is deemed out-of-commerce? Do you think that a cut-off date would be useful for film archives?

Appendix B - Example coded transcripts and Coding Template

Coded Interview Transcript 1

(This was a semi-structured pre-arranged interview. The participant did not wish to be audio recorded. Direct quotations where indicated, the rest I have paraphrased from notes taken during the interview, as closely to the original as possible. Some comments have been removed, if they would prevent P from being anonymous.)

Key:

M: The Researcher

P: The Participant

Coding themes:

ABCD- Copyright fear/ wariness

ABCD – Orphan Works Directive and orphan works

ABCD- Specialist knowledge and roles

ABCD- Non-commercial/ Commercial use

ABCD- Out-of-commerce works definition, including cut-off date

ABCD- Out-of-commerce works beneficial to film archive

ABCD- Rightholders

ABCD- CMO

ABCD- Reputational harm and risk

ABCD – Copyright clearance

ABCD – Copyright internal processes

ABCD – Financial concerns

*

P is the Head of Archive Access, all enquiries come through them. P has been at the archive for about six and a half years.

[P's background and history removed, to maintain anonymity. The daily routine has been removed for similar reasons, as it would also potentially identify other research participants.]

P divides some of their role with another person (D). "With archive sales commercially – commercial clients are on my radar, and not D's. It's the bread and butter of the archive really". D deals with public requests, people looking for their films of their Grandad, etc.

P notes that the archive often works with academics and researchers – "we work a lot with students; students want to use our films in their films." They also have non-profit projects, exhibitions, and non-profit screenings. The archive provides free viewing appointments to the public to see anything in the archive. P notes that the archive can also digitise this for them.

[Discussion relating to rates removed for commercial reasons]

There are also commercial clients, including feature films, businesses, documentaries, some BFI projects as well. There are "more BBC documentaries and talking head shoes etc. Not as many features as we would like". P notes that the archive has built up regular commercial clients and upgraded their website to appeal to commercial clients. "We aimed our processes on the top, and then the same processes trickle down to the non-profits."

P notes that ITV material amounts to 70/80% of their sales and is their "main bread and butter". P commented on the "really nice relationship "they have with the rights team at ITV and that the ITV team are "very stream-lined."

3rd party copyright, especially with advertising, they want you to guarantee that they're covered against any 3rd party. But our policy doesn't do that, they won't cover 3rd party. For the UFH project, the archive had to clear 3 party rights for that. "I feel confident about saying this now, about not offering an indemnity against 3rd party. I used to really worry this." P said the archive does not have any of the ITV contracts, so they have "no idea who owned what. So, we make people clear that themselves! This seems to come up case less and less, but advertising "is a different kettle of fish".

"It's all about risk assessment, which we have to pass onto them". P notes that regular clients understand that risk. "Everyone in the team is very sensible and knowledgeable. They always double-check with someone else".

"But just because we're cleared it doesn't mean we should do it". – So, I still always check with the depositor, "our priority is the depositor and the collection, over money". It took me a while to learn that, given that the role [her job] is about commercial generation.

"Charity is now having to be commercial, it's always been really difficult for us". "We always want to do more in the community, but the reality is we have to keep the lights on, so we need to be commercial."

Job security – “I was always warned about that when I started. I’m not as worried now but we’re all still really worried.” Archive sales – some months we make nothing on licence fees, some we make more. “We can never rest easy; we never feel fine. It’s the nature of the beast.”

For out-of-commerce works, “the time aspect is an issue”. P commented that the Orphan Works Directive is “not helpful” for the archive.

“It’s difficult, as we need to generate revenue, so the non-commercial uses for out-of-commerce works doesn’t help with that. It’s great from a public point of view, but the archive needs to be able to provide access, so we need commercial revenue to keep going.”

People very rarely say no to providing access, once you’ve explained the situation and that we won’t make millions from it.

“We focus on material we can clear. If it would take weeks to clear rights for something, we’d say the rights issue is too problematic.” –especially when researching for other people. “I know I don’t have the time to research that, so I know to go nowhere near it.”

Defunct film companies – too difficult to research them and to clear the rights. It’s sad, because these films are still really important.

“Our priorities are unfortunately driven by income. Commercial jobs have to be bumped to the top of the list.” But often we can then put it online for the public, so it does feed into helping the public.

“For me, it’s always about the human story, that’s our history on there.”

The archive is asked for footage for a lot of true-crime documentaries, “mostly reopening of cases”. For example, child abuse cases in the police or historic abuse. “It’s more common than you’d think… at least a few each year”. “Copyright takes on a whole other level with this. ITV whizz it to their legal departments. It’s really important, we are evidence! ...It’s not all fluffy here. We hold a lot of news, so it’s not all fluffy”.

“We’re the keeper of the material, so we need rightholder permission”.

Copyright procedures:

Knowledge has been built up over time and the database will list rightholders were known. Identifying rights, that’s the first port of call. “There’s no particular protocol in place, we all just know what to do”.

I then go into the depositor file, to look back through the paper trail – I do the due diligent search. I always have a conversation with [two individuals at the archive] if

there are any issues. A lot of the procedures are sensible and common sense. And lots is done on a case-by-case basis, so “a stringent policy in place doesn’t work for everything.”

“I’m the one who deals with copyright”.

P cleared all the rights for the UFH project. It’s “a lot of stress, but it was fine. As the rounds went on, it got a lot easier as we understood what they wanted from us.” UFH rights clearance “felt like a full-time job. I dedicated half a day for it for a very long time.” A lot of it was ITV, so it was an easy department, but often it took days contacting people. “It could take months and months for some of them, waiting to hear back from people.” P noted that the films that contained music and maps and Crown Copyright, they went to [two individuals at the archive] to decide if they needed to remove things, etc.

P explained that some rightholders “cropped up again and again” and that it “always takes longer with new rightholders”, “but I was quite new then, so I was still learning.” The archive gave the depositors copies of their materials, as a courtesy. There is still a back catalogue of those, which the archive is still working through now.
“Promotional films are always the most difficult. And we had quite a few now for promotional. They just don’t understand what we are, as a film archive.”

*

Coded Interview Transcript 2

(This was conducted via emailing the list of questions and received the document back with these answers, due to staff unavailability at the time of my visit to the archive)

Key:

M: The Researcher

P: The Participant

Coding themes:

ABCD- Copyright fear/ wariness

ABCD – Orphan Works Directive and orphan works

ABCD- Specialist knowledge and roles

ABCD- Non-commercial/ Commercial use

ABCD- Out-of-commerce works definition, including cut-off date

ABCD- Out-of-commerce works beneficial to film archive

ABCD- Rightholders

ABCD- CMO

ABCD- Reputational harm and risk

ABCD – Copyright clearance

ABCD – Copyright internal processes

*

M: What is the copyright clearance process for films at EYE? Are other people involved in the copyright clearance process, or would that all be done by you?

P: That depends what you consider “clearance”. If you mean getting permission from known rights holders, that is also being done by multiple colleagues from various departments. Such as archival loans, sales, programming etc.

If you mean establishing the rights status (in or out of copyright, orphaned) or looking for rights holders, that’s something that really only I do at the moment.

M: Does EYE have a copyright or intellectual property policy; and an access policy? If so, could you explain the process?

P: There are no policies as in written manifests or anything like that. But everybody within the organisation is (made) aware that copyrighted material cannot be used without the proper clearance. In case of doubt, colleagues usually ask me. Especially when in doubt about the applicability of copyright exceptions (as you might know, we do not have “fair use” in the Netherlands, but a fixed set of exceptions). Access to material that is still in copyright is only open to rights holders (regarding their own material) and third parties who have acquired the rights holders’ permission unless permission is not required such as under the in-situ exception.

M: Approximately what percentage of EYE's collection do you own the copyright for?

P: If you mean for works that are still protected, it’s a very, very small percentage. I can’t say for sure, but it can’t be more than 1 or 2 percent if that.

M: How does EYE see the out-of-commerce provisions being implemented into its existing practices and policy?

P: Hopefully our legislation will contain a cut-off date, so that it will be easy to establish when a work is OOC. As we do not have a CMO for film, we can benefit from the fall back exception. This will mean that a large portion of the films in our archive will presumably be OOC. Downside is these films can then only be used online on our websites. So, we will put them on our new vod [video on demand] platform to view for free and our YouTube channel, corporate website etc.

M: Do you know approximately how many more films could EYE make available if the out-of-commerce provisions were implemented?

P: As said, presumably quite a few if the new legislation contains a cut-off date.

M: How does EYE distinguish between commercial and non-commercial uses of a work; and commercial and non-commercial activities?

P: We don’t as such. Of course being a foundation under Dutch law means we cannot make a profit, so all our activities could be considered “non-commercial”.

M: Is there an active collective management organisation/ collecting society for film in the Netherlands, or a group that you feel is capable of becoming a representative CMO? If so, does EYE currently interact with them?

P: No there is not.

M: Do you think that the out-of-commerce provisions will likely entail a search similar to that of the orphan work diligent search? If so, would this impact the effectiveness of the provisions for EYE?

P: No we think and hope there will be a cut-off date.

M: What period of time do you think would need to lapse before a work is deemed out-of-commerce? Do you think that a cut-off date would be useful for film archives?

As said, yes very useful. We have heard proposals for twenty years, but that seems unrealistic. Likely the rights holders would collectively oppose such a proposal. But forty years could work.

M: Are there any concerns you have regarding how rightholders could be impacted by out-of-commerce works being used, or any negative reactions from them?

P: We would never consider anything OOC if we were in contact with the rights holder(s), even if it would fit the bill. So we do not expect any negative reactions in that respect. We also do not believe any negative impact for rights holders given the opt-out options given to them.

M: Do you think EYE would make use of the 'fall back' exception that will allow CHIs to use the out-of-commerce works in their permanent collections for non-commercial purposes where there is no representative CMO? (How risk adverse would you be in using this provision? Do you think this provision could potentially impact on existing relationships with commercial partners and right holders?)

P: As said, yes. Risk relatively non-existing. See answer to previous question.

M: Any other thoughts or potential benefits/ concerns you have relating to out-of-commerce works for film archives.

P: We believe that especially when a cut-off date is elected, this whole OOC business could be beneficial for film archives. And more so for Eye as we are launching our vod [video on demand] platform and this means we will be able to offer a substantial part of our collection to view for free.

*

Coded Conversation 3

(This conversation was informal and involved an orientation of the building and the teams. I did not record it, as part of the conversation was during walking around the building and some whilst informally talking. Direct quotations where indicated, the rest I have paraphrased from notes made at the time, as closely to the original as possible.)

Key:

M: The Researcher

P: The Participant

Coding themes:

ABCD- Copyright fear/ wariness

ABCD – Orphan Works Directive and orphan works

ABCD- Specialist knowledge and roles

ABCD- Non-commercial/ Commercial use

ABCD- Out-of-commerce works definition, including cut-off date

ABCD- Out-of-commerce works beneficial to film archive

ABCD- Rightholders

ABCD- CMO

ABCD- Reputational harm and risk

ABCD – Copyright clearance

ABCD – Copyright internal processes

*

P explained that prior to 2014, there was nothing written down in the Rights team regarding policies and procedures etc. Historically, there has been “anecdotal, subjective decision-making” over the years. P noted that usually this had worked, but it was hard when staff left to understand historic decision-making and rationales. Not clear what had happened, or why.

It was also clear from reviewing older files etc. in relation to implementing the Orphan Works Scheme that there had been legal and factual “misunderstandings” regarding rights ownership. P commented that there is a “huge amount of detective work” in their role, as it has been hard to keep clear and accurate records of

decisions, like due diligence. P noted that a lot of decisions or facts are made during "informal conversations", and often no record is kept of these (as it does not seem important to do so at the time).

The BFI used to have an Information department, and they used to keep the History Distribution Doc (I think this was the name). It had been regularly updated, but "this has now fallen to the wayside". P has tried to validate some of the information in the document.

In relation to out-of-commerce works, P believes there is "potentially a huge benefit to the BFI", and the BFI sees the OOC works as potentially being very valuable for their H22 project.

P commented that the BFI and film heritage are seen as "creative industries" rather than "cultural heritage". DSM invite them to the creative industry groups and discussions, and not to the cultural heritage ones with museums and libraries, etc. I asked why this is, and P looked unhappy and said that film "isn't viewed as art or cultural heritage" by the wider Gov. P commented that "film gets left behind because it's a complex beast". Film is viewed as a "commercial or industry", when often this is not the case.

M Observations:

There are approximately 570 people working at the BFI, as many staff work off-site or with flexi-working etc. The Stephen Street head office is split over 3 floors of office-workers, a ground floor level open to the public and a basement level with two screening rooms and meeting rooms.

Each of the three floors of offices is designed and laid out in the exact same way, with open-plan working and communal places to work in an "agile" manner – including small pods for independent working, sofa seating areas with laptop tables, a large central meeting table with screens, and 3 smaller meeting rooms that are closed off with doors, and these can be booked out.

The teams sit in central shared desktop hubs of approximately 8 desks laid out in 2 rows of 4 desks on the same hub, with each person having a desktop and two screens. P noted that although there are now 9 people within the R&C team (and only approximately 4 when they started), the team is only allocated 6/7 desks as it is assumed people will sometimes work from home/ work in other spaces on site etc. The top 2 floors of the building are rented to businesses for revenue, and they have nothing to do with the BFI. The UK Oscars office is on the ground floor of the building, along with meeting rooms, seating areas and a restaurant open to staff and the public.

The BFI is involved with copyright "at every stage of the process, as a user, creator, owner, licenser, funder etc."

Copyright exception uses – there have been “interesting discussions about this recently at the BFI” regarding the 2014 copyright changes. The IPO tends to focus on the user’s use of an exception, not the right holder’s view. Often people approach the BFI wishing to use materials, not knowing about the copyright exceptions. P commented “there is not much conversation between these groups” (or even internally at the BFI depending on which team someone is in, and therefore whether the BFI is the copyrighter owner/ has provided access or the one wishing to acquire the copyright to a film. There “needs to be congruence between the two”. P commented that it “depends on who you ask” and that people rely on “historic rationales” internally to determine what is acceptable copyright compliance.

There is no copyright policy at the BFI.

The BFI owns the rights in about 1% of the collection.

There was both an external and internal review of copyright processes and systems about 1 year ago. They spoke to people across various BFI departments (but not all, including Education “for some reason”) to ask people whether they come across rights often, where they look for info, etc. 277 issues were found, including functional issues, data issues and technical issues. P said it was a “fairly comprehensive review”.

People are “quite nervous” in the BFI about copyright and about “saying things and sharing whether decisions worked”. P used to be “hesitant” but is no longer hesitant. P commented that an “agreed, basic kind of approach” to copyright and rights is needed, but that this is difficulty when there is misunderstanding and ignorance of copyright “across the board”. P commented that rightholders “need to be more educated about what they’re signing away”.

The BFI is an observer member of the Film Archives UK group. P is currently working with them to set up a copyright group and would “love to get sector agreement on copyright positions”. In relation to being sued for breach of copyright regarding films, P noted that it wasn’t ever really an issue for them. P said they do “have trouble with photographers, but not film really”.

The BFI does engage in some enforcement, issuing takedown notices on YouTube. CVP tool on YouTube allows you to perform multiple, immediate takedowns on YouTube. This also gives the infringing account a ‘strike’ on their channel. The BFI “usually only does it for full films”. They are not overly proactive with monitoring YouTube, but they recommend there are “probably quite a lot” of films the BFI owns or licenses that have been uploaded without permission. P thinks they should be more proactive for the smaller film makers, as they need the money and illegal uploads can really negatively affect smaller film makers. P commented that there is a “difficulty” with people seeing the BFI (as a charity) issuing takedown notices for copyright breach or for films that breach the BFI Player’s terms of use.

Orphan works at the BFI have been “fudged”. The BFI doesn’t directly advertise that people can license them from the BFI, but if someone asks the BFI “quietly”, the BFI will license it to them. In such a case, the BFI won’t provide contractual indemnites or warranties, and will reserve the right to terminate the licence immediately if an original rights holder comes forward. The BFI “doesn’t encourage” the public to use the orphan works scheme with the IPO for a film, as it is too difficult. P noted that the scheme is “trying to do too many things”, and that the end result is “awkward”.

P commented that the orphan works scheme does not work with royalties, and that the film industry works on royalties. In relation to out-of-commerce works. P is concerned that it would be “a similar mechanism” to the orphan works scheme and would therefore “be a non-starter”. The BFI will lobby the IPO and the DCMS to make sure there is the “right appetite for this to work”.

*

Appendix C – Coding Themes

The below are the initial coding themes used to code the interview transcripts and notes:

ABCD- Copyright fear/ wariness

ABCD – Orphan Works Directive and orphan works

ABCD- Specialist knowledge and roles

ABCD- Non-commercial/ Commercial use

ABCD- Out-of-commerce works definition, including cut-off date

ABCD- Out-of-commerce works beneficial to film archive

ABCD- Rightholders

ABCD- CMO

ABCD- Reputational harm and risk

ABCD – Copyright clearance

ABCD – Copyright internal processes

These themes are discussed extensively in Chapters 9 and 10.

Appendix D – Participant Information Form and Consent Form

Bournemouth University

Participant Information Sheet

The title of the research project

"How can the benefits of the proposed "out-of-commerce" works in the Copyright Directive be best implemented into working practice in film archives?" Ref: "Melanie Brown Film Archive Research"

Invitation to take part

You are being invited to take part in a research project. Before you decide it is important for you to understand why the research is being done and what it will involve. Please take time to read the following information carefully and discuss it with others if you wish. Ask us if there is anything that is not clear or if you would like more information. Take time to decide whether or not you wish to take part.

What is the purpose of the project?

Copyright law is an issue for many sectors, including the film heritage sector. Many works are still subject to copyright (so are not freely available to use in the public domain) but are not commercially exploited by the copyright owners. This can lead to a situation in which works are 'lost' to the public and cannot be reused, even though their copyright owner may not know that they own the work, and also might not care if people reuse the work.

My research aims to understand whether/ how the new "out-of-commerce" works copyright provision in the new EU Copyright Directive can be best implemented into existing everyday working practices in film archives. Therefore, I wish to spend time in the film archive to understand what the current reality is for the sector and the individuals, to enable me to understand whether the new out-of-commerce provisions could benefit the sector. If the provisions would be compatible with current practices, I would also seek to suggest guidance for implementing the new provisions into existing practices.

Therefore, my research would involve me being at the archive for a period of time, to observe and understand the institution and its daily routine. I would like to observe what is going on, and to chat to staff members/ volunteers informally, as well as arranged formal interviews, if they wished to.

Why have I been chosen?

I will be conducting research with several film archives in the UK and the Netherlands of various sizes, to allow me to understand the experiences within the film heritage sector at various levels, and to understand any regional/ country-specific differences. My research will be conducted at approximately 3-5 institutions.

Do I have to take part?

It is up to you to decide whether or not to take part. If you do decide to take part, you will be given this information sheet to keep and be asked to sign a participant agreement form. You can withdraw from participation during the research study/ observations at any time and without giving a reason. If you decide to withdraw, we will usually remove any data collected about you from the study. Once the research study/ observations have finished you may still be able to withdraw your data up to the point where the data is analysed and incorporated into the research findings or outputs. At this point your data will usually become anonymous, so your identity cannot be determined, and it may not be possible to identify your data within the anonymous dataset. Withdrawing your data at this point may also adversely affect the validity and integrity of the research. Deciding to take part or not will not impact upon you, or your institution in any way.

What would taking part involve?

I would like to conduct ethnographic research at your archive - meaning that I want to spend time with you to become immersed in the experience and wider context of the film archive and its practices to understand whether/ how this change to copyright law could impact upon film archives. This period of time would depend on what you are able to/ willing to accommodate and is estimated to be between one week and one month.

I would be observing the daily life and working practice of the film archive, making notes, and recording audio informal or semi-structured interviews with staff/ volunteers if they expressly consented to this.

What are the advantages and possible disadvantages or risks of taking part?

Whilst there are no immediate benefits for those people participating in the project, it is hoped that this work will further academic understanding of the reality of handling copyrighted works/ out-of-commerce works for film archives, and to understand whether/ how the new out-of-commerce provisions could be incorporated into existing best practices. This enhanced understanding will hopefully lead to proposed best practice guidelines for institutions, but this is not certain.

There are no anticipated physical or psychological risks to the institution, or the individual being interviewed. There will not be any questions asked of a sensitive or

personal nature, and the individual being interviewed/ observed may choose to stop the interview/ observation at any point.

What type of information will be sought from me and why is the collection of this information relevant for achieving the research project's objectives?

From the institution, the data collected will be (where volunteered, and if applicable): name, location and size of the institution; a copy of any policies or procedures relating to rights management of the collections, out-of-commerce works, copyright in general and any policies or procedures, etc. There is no obligation to provide any documents or policies/ procedures relating to your institution.

The reason for collecting this information from your institution is to allow me to understand more about the context and everyday working practices of your institution, and if (and how) the new out-of-commerce works provisions can be best implemented into existing practices.

Will I be recorded, and how will the recorded media be used?

The audio recordings of your interview made during this research will be used only for analysis and the transcription of the recording(s) for illustration in conference presentations and lectures. No other use will be made of them without your written permission, and no one outside the project will be allowed access to the original recordings.

No photographs or films will be taken during the research.

How will my information be kept?

All the information we collect about you during the course of the research will be kept strictly in accordance with current data protection legislation. Research is a task that we perform in the public interest, as part of our core function as a university. Bournemouth University (BU) is a Data Controller of your information which means that we are responsible for looking after your information and using it appropriately. BU's Research Participant Privacy Notice sets out more information about how we fulfil our responsibilities as a data controller and about your rights as an individual under the data protection legislation. We ask you to read this Notice so that you can fully understand the basis on which we will process your information.

Publication

You will not be able to be identified in any external reports or publications about the research without your specific consent. Otherwise, your information will only be included in these materials in an anonymous form, i.e., you will not be identifiable.

The preliminary results of this research will be communicated to the academic community at conferences and will be included in my PhD thesis. If you wish to

receive an electronic copy of any conference papers, academic papers or my thesis that contain the research findings, I will be happy to provide this. Your institution will not be identified in any report or publication without your specific consent.

Security and access controls

BU will hold the information we collect about you in hard copy in a secure location and on a BU password protected secure network where held electronically.

Except where it has been anonymised your personal information will be accessed and used only by appropriate, authorised individuals and when this is necessary for the purposes of the research or another purpose identified in the Privacy Notice. This may include giving access to BU staff or others responsible for monitoring and/or audit of the study, who need to ensure that the research is complying with applicable regulations.

Sharing and further use of your personal information

As well as BU staff and the BU student working on the research project, we may also need to share personal information in non-anonymised form with external auditors and transcribers or any similar third parties who may need to access the data for audit or examination purposes.

The information collected about you may be used in an anonymous form to support other research projects in the future and access to it in this form will not be restricted. It will not be possible for you to be identified from this data. Anonymised data will be added to BU's Data Repository (a central location where data is stored) and which will be publicly available.

Retention of your data

All personal data collected for the purposes of this study will be held for five years after the award of the degree. Although published research outputs are anonymised, we need to retain underlying data collected for the study in a non-anonymised form for a certain period to enable the research to be audited and/or to enable the research findings to be verified.

Contact for further information

If you have any questions or would like further information, please contact me or any of the Supervisory team:

Researcher: Melanie Brown, PhD Candidate, Faculty of Media & Communication, email: mbrown@bournemouth.ac.uk

Professor Maurizio Borghi, Professor of Law and Director of the Centre for Intellectual Property Policy & Management, email: mborghi@bournemouth.ac.uk

In case of complaints

Any concerns about the study should be directed to Professor Maurizio Borghi. If you concerns have not been answered by Professor Maurizio Borghi, you should contact Professor Iain MacRury, Deputy Dean for Research & Professional Practice, Faculty of Media and Communication, of Bournemouth University by email to researchgovernance@bournemouth.ac.uk.

Finally

If you decide to take part, you will be given a copy of the information sheet and a signed participant agreement form to keep.

Thank you for considering taking part in this research project.

Participant Agreement Form – General Use

Full title of project: ("the Project") "How can the benefits of the proposed "out-of-commerce" works in the Copyright Directive be best implemented into working practice in film archives?"

Name, position and contact details of researcher: Melanie Brown, PhD Candidate, email: mbrown@bournemouth.ac.uk

Name, position and contact details of supervisor: Professor Maurizio Borghi, Professor in Law & Director of CIPPM, email: mborghi@bournemouth.ac.uk

PART A

In this Form we ask you to confirm whether you agree to take part in the Project. We may ask you to agree to some specific additional uses of your identifiable information (see additional consent boxes below) for which we need your consent.

You should only agree to take part in the Project if you understand what this will mean for you. If you complete the rest of this Form, you will be confirming to us that:

You have read and understood the Project Participant Information Sheet Ref: "Melanie Brown Film Archive Research" and have been given access the BU Research Participant Privacy Notice which sets out how we collect and use personal information (https://www1.bournemouth.ac.uk/about/governance/access-information/data-protection-privacy)

You have had the opportunity to ask questions.

You understand that:

Taking part in the research will include being recorded (audio) on the basis that these audio recordings will be deleted once transcribed.

Your participation is voluntary. You can stop participating in research activities at any time without giving a reason, and you are free to decline to answer any particular question(s).

If you withdraw from participating in the Project, you may not always be able to withdraw all of your data from further use within the Project, particularly once we have anonymised your data and we can no longer identify you.

Data you provide may be included in an anonymised form within a dataset to be archived at BU's Online Research Data Repository.

Data you provide may be used in an anonymised form by the research team to support other research projects in the future, including future publications, reports or presentations.

Consent to take part in the Project	*Yes*	*No*
I agree to take part in the Project on the basis set out above	☐	☐

Part B

Consent to participating in specific Project activities	*Yes*	*No*
I agree to being recorded (audio only) during the Project.	☐	☐

Consent to use of information in Project outputs	Yes	No
I understand that my words may be quoted in publications, reports, web pages and other research outputs. Please choose one of the following two options: I would like my real name used in the above. I would not like my real name to be used in the above.	☐ ☐	

Consent to take part in the Project	*Yes*	*No*

I agree to take part in the Project on the basis set out above	☐	☐

PART B Signature

_____ _____
_____

Name of Participant Date Signature

_____ _____
_____

Name of Researcher Date Signature

This Form should be signed and dated by all parties after the participant receives a copy of the participant information sheet and any other written information provided to the participants. A copy of the signed and dated participant agreement form should be kept with the project's main documents which must be kept in a secure location.

Appendix E – Photographs of Observation Notes, Archives and Drawings

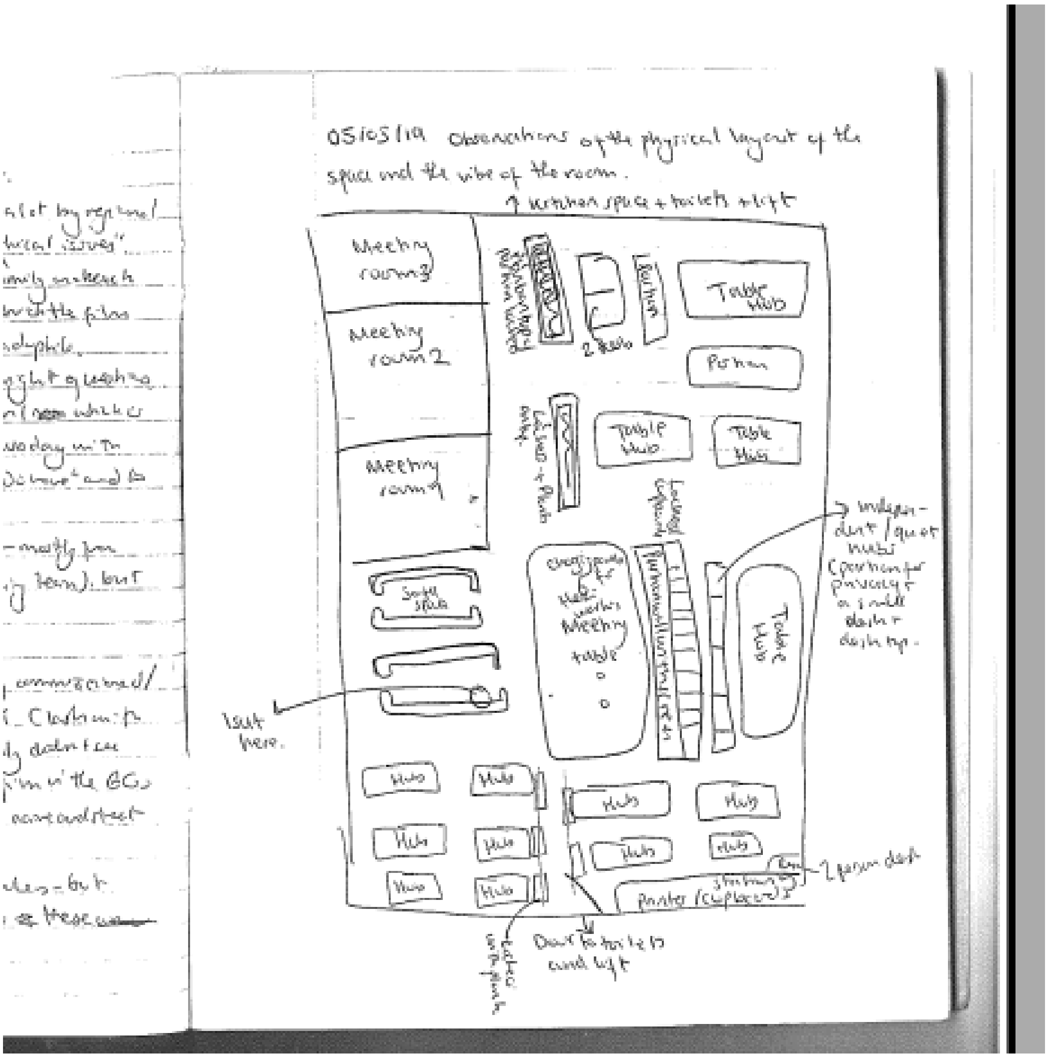


Image E1: Drawing of BFI Head Office Floor

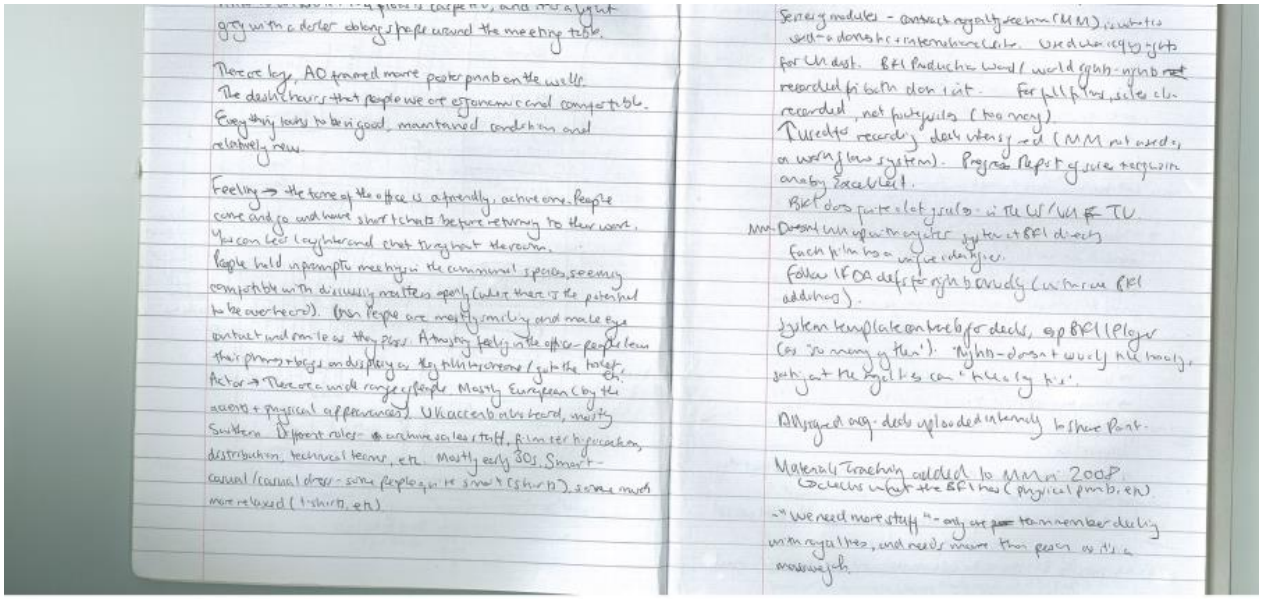


Image E2: Observation Notes from Informal Discussion

Image E3: EYE Filmmuseum (taken by researcher)

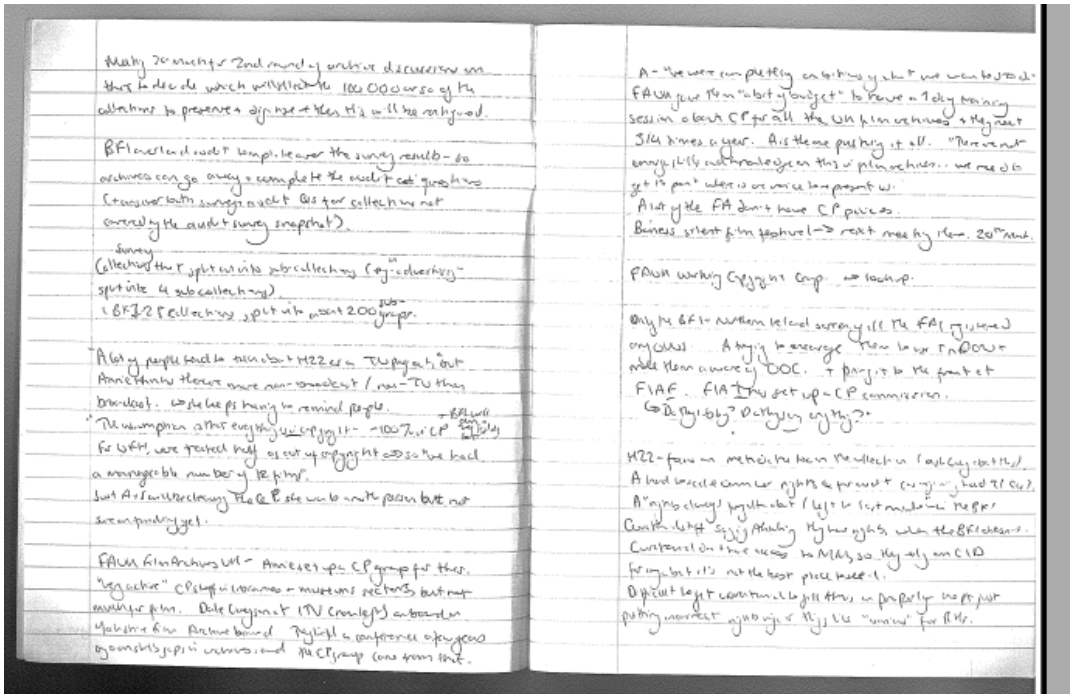


Image E4: Team Meeting Observation Notes

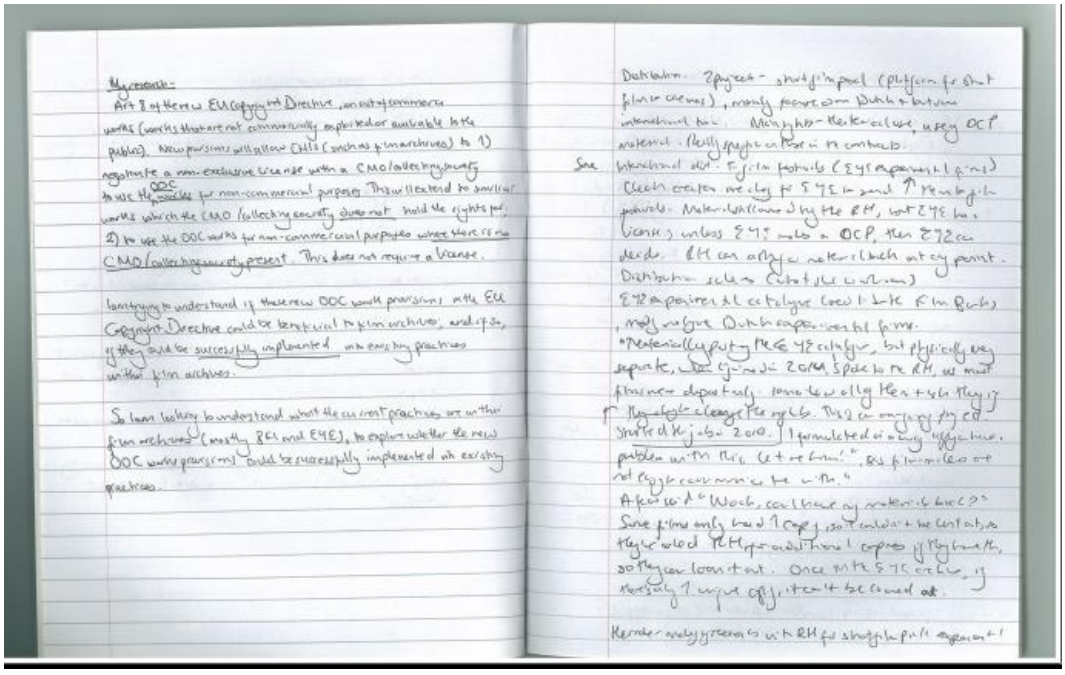


Image E5: Notes by researcher on describing the research to participants; and on the right hand-side informal discussion notes

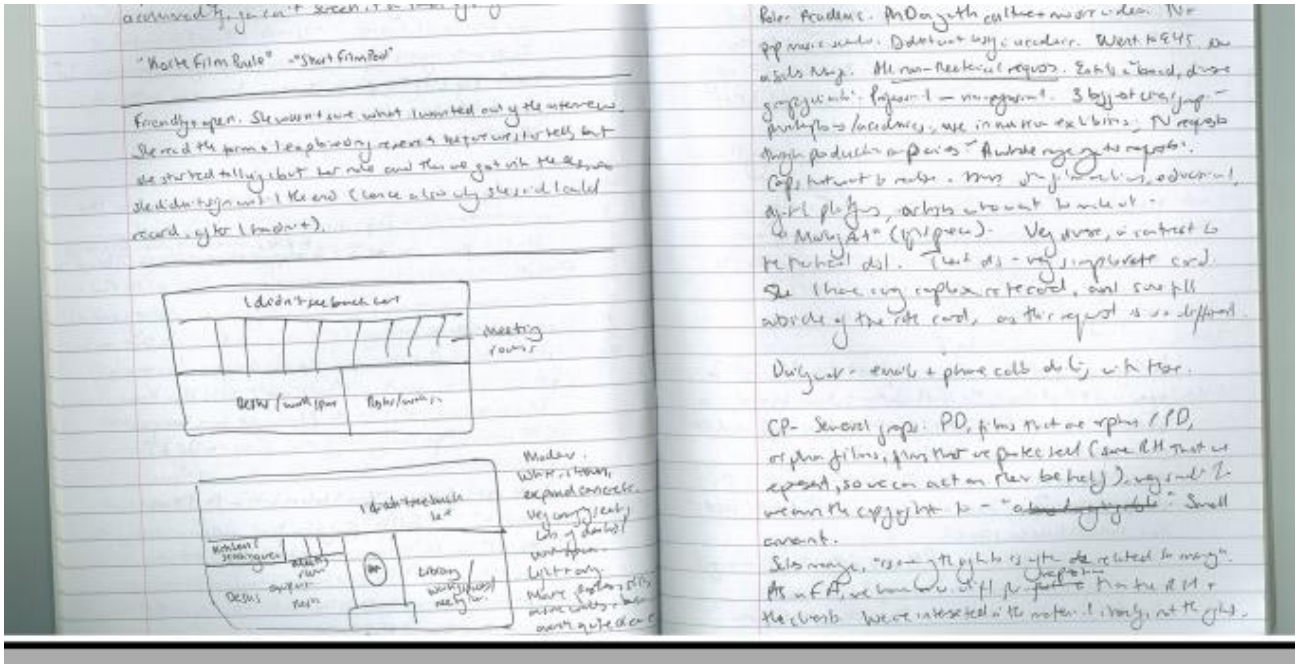


Image E6: Drawing of EYE Collection Centre layout, and meeting notes

Appendix F- Further Notes on Triangulation and Progressive Focusing

Below is an illustration of an example of triangulation. This graphic depicts the meaning of copyright fear emerging. Together the pieces of data form a comprehensive contextual picture of how copyright is being experienced. Likewise, triangulating the data also puts explicit comments made into a wider context, and facilitates an understanding of any differences between what is said and what is observed.

F.1

The matter of "confirmation bias" needed to be considered, being the danger of presupposing findings to the extent that the researcher 'discovers' "just what she was looking for".[942] For this reason, this research also utilised "progressive focusing" during the ethnographic research. Iphhofen conducted research into the research ethics of ethnography for the European Commission, and he defined progressive focusing as:

[942] Iphofen (n.109) 22

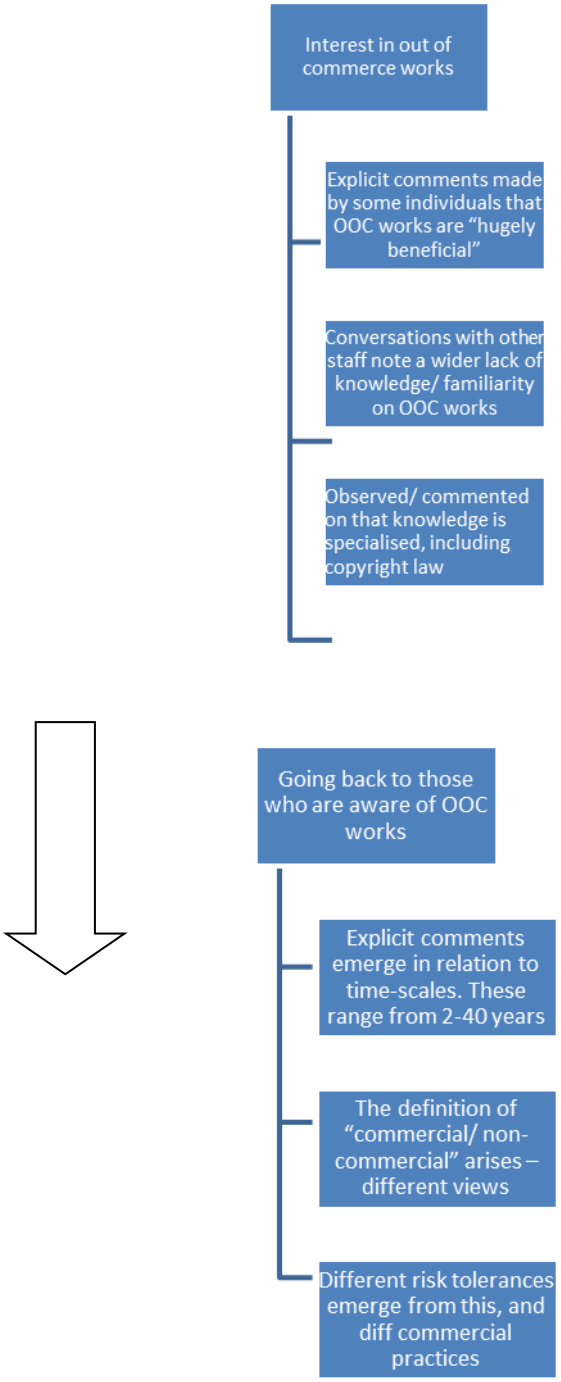
> one begins with broad ideas or observes general spheres of interest. Sensitising concepts may be developed which illustrate general or specific problems within the group. Significant persons and/or significant events are noted. Several 'hypotheses' about what people are doing or why they are doing it may be 'tested' in a speculative sense rather than via a formal statistical probability test. It is more like estimating whether a particular explanation seems to 'work' or be adequate for understanding what is going on.[943]

The reason for using progressive focusing is to enable the researcher to become aware of the key concepts, practices, events and people that are most meaningful for the research's aim. Instead of conducting the observations with a preconceived hypothesis that is being scrutinised, as this would almost certainly bias the observations that the researcher notes, the researcher allows the observations to guide them in formulating preliminary hypotheses.

The illustration on the following page sets out an example of how progressive focussing was used to identify views towards out-of-commerce works. No assumptions or agenda were used as the basis for any conversations or interviews, and instead the researcher allowed the particpants to guide the conversations organically.

[943] Iphofen (n.109) 9

F.2


Interest in out of commerce works
Explicit comments made by some individuals that OOC works are "hugely beneficial"
Conversations with other staff note a wider lack of knowledge/ familiarity on OOC works
Observed/ commented on that knowledge is specialised, including copyright law
Going back to those who are aware of OOC works
Explicit comments emerge in relation to time-scales. These range from 2-40 years
The definition of "commercial/ non-commercial" arises – different views
Different risk tolerances emerge from this, and diff commercial practices

Appendix G – Reflexive Observations on the Research

The PhD research process has enabled me to improve upon and gain new research skills. The reality of the research process differed to what I had expected, and the end product is different to what I had originally assumed it would be. I had begun my research from a purely doctrinal perspective and was struggling with how to address my research question and aims, which originally focused on how Art. 8 can be used in film archives to make out-of-commerce works available. My struggle culminated in the realisation that empirical data collection was needed to complement the doctrinal research and would enable more contextualised analysis. This also led to the comparative element between the UK and the Netherlands, as looking at film archives in only country was not likely to provide any wider EU or European observations.

Conducting the ethnographic research was more complex, and considerably more enjoyable, than anticipated. I had expected to gain a wider contextual awareness of film archiving from the ethnographic data collection. This turned out to be the case, and indeed I gained a more nuanced and deeper understanding of the various issues and tensions within archival practice. Fundamentally, I feel this approach allowed me to address my research question and aims more deeply. This reaffirmed for me the validity and power of ethnography as a research methodology, which has shaped my outlook as a researcher. I intend to conduct future research into copyright law using a similar approach. I also hope to see more use of this methodology in legal research, which often can default to doctrinal research.

However, collecting data in this manner was more complex than I had originally anticipated. There was more difficulty in ensuring an ethical adherence to anonymity; originally, I had thought anonymising names would be sufficient. I found that participants shared detailed and insightful stories and opinions with me that greatly aided the depth of my understanding, but their inclusion in the thesis would indirectly identify them, even once anonymised. It was a difficult decision to therefore not include some quotations which further supported the findings, as it would not have been an ethical decision to do so. My awareness of ethical considerations as being

an on-going and subjective matter has been developed substantially by this research and is an area that I am more knowledgeable on as a result.

When I originally began this research, I had expected to find that film archives worked from some form of copyright policy or guidance and incorporating out-of-commerce works was a matter of best adding this to the existing guidance. Crucially, I also assumed that this copyright law would be an area that most of the film archivists would be familiar, and confident, with. I was incorrect in my assumptions, as it soon became evident that a) there are not copyright policies in the film archives studied, and b) there is limited copyright knowledge, and it is often localised in specific individuals. The level of copyright fear observed in some participants was not something I had expected; and is something I would like to explore in considerably more depth in future research. I feel, at the end of this research, that this underlying copyright fear and lack of copyright knowledge likely frustrate efforts to reform and harmonise copyright law.

Conceptually, I have taken away from this research that, no matter how considered and elegant copyright reform is, there will be limited practical effect if the lived experience of these laws means that people are too wary to engage with them. I hope that this will not be the fate of Art. 8, which potentially is a substantial gift to CHIs and the public. It therefore follows that any soft law guidance and national implementations need to have an awareness of the tensions, resource limits and skillsets in the archives.