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Archives and Copyright: Risk and Reform

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ABSTRACT

This paper considers the place of the archive sector within the copyright regime, and how copyright impacts upon the preservation, access to, and use of archival holdings. It will begin with a critical assessment of the current parameters of the UK copyright regime as it applies to the work of archivists, including recommendations for reform that have followed in the wake of the *Gowers Review of Intellectual Property* (2006-2010), the *Hargreaves Review of Intellectual Property and Growth* (2010-2011), the recent *Consultation on Copyright* (2011-12), as well as the government's response thereto: *Modernising Copyright* (2012). It considers the various problems the copyright regime presents for archives undertaking mass digitisation projects as well as recent European and UK initiatives in this domain. It argues that the UK copyright regime, even when read in conjunction with current national and regional recommendations for reform, falls short of delivering a legal framework that would enable archivists to realise the full potential that comprehensive, universal online access to the country's archival holdings would contribute to local and national democracy and accountability, to education, learning, and culture, and to the sense of identity and place for local people, communities and organisations. Ultimately, a case is made for the differential treatment of archives within the copyright regime – different, that is, from libraries and other related institutions operating within the cultural sector. The paper concludes with a policy recommendation that would greatly enhance the ability of archives to provide online access to their holdings, while at the same time safeguarding the economic interests of the authors and owners of copyright-protected work.

KEYWORDS: archives, copyright, mass digitisation, orphan works, limited liability

1. INTRODUCTION

In 2009 the Labour government set out its strategic vision for the future of the publicly funded archive sector within England and Wales. *Archives for the 21st Century* recognised the vital role that archives play in linking people with their communities and their heritage.¹ At the same time, the government acknowledged the radical ways in which the landscape within which archive services operate had changed in recent years. The general

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¹ HM Government, *Archives for the 21st Century* (November 2009), available at: <http://www.nationalarchives.gov.uk/archives-sector/archives-21-century.htm> (accessed: 15 March 2013).

trend from paper to digital record-keeping, the growing technical complexity of record keeping, and the fragility of digital information all present archives with new challenges in preserving authentic information and records in perpetuity. Also noted was the impact which this new digital environment has had upon society's expectations about access to and use of information generally, and archival holdings in particular. That is, user expectations are such that people now expect resources to be accessible online as and when it suits them. In that regard, two statistics in particular stand out in *Archives for the 21st Century*: first, that in 2008-09 over 170 documents were downloaded over the internet for every one document that was requested in the reading rooms of The National Archives;² and second, that, at that time, images of less than one per cent of archival holdings across England and Wales were available online.³ Not surprisingly, one of the government's key recommendations was to encourage greater online access to digitized archival content: "[i]t is essential that the archives sector is able to respond to this challenge and continues to increase the proportion of records that are accessible online".⁴ In pursuing this goal, the government urged archives to forge new, innovative partnerships within the public and private sector.⁵ What is striking however is the lack of any reference within *Archives for the 21st Century* to what Terry Cook once described as "[t]he perennial hornet's nest for archivists",⁶ and to what has more recently been referred to as "the single largest and most intractable problem as far as dealing with preservation and stewardship of the cultural record going forward", as well as the "single biggest barrier to making available the existing cultural record, and cultural and scholarly heritage": that is, the law of copyright.⁷

² *Ibid.*, 14. More recent figures available from The National Archives (TNA) indicate, perhaps unsurprisingly, that this trend towards online access versus onsite access has become even more prominent. For example, in 2011-12 visitors to the reading rooms of TNA ordered more than 600,000 documents; during the same period visitors to TNA's DocumentsOnline service (as well as related services operated by commercial licensees) downloaded close to 127 million records. Put another way, in 2011-12, for every one document that was requested onsite 211 documents were accessed online. For details, see: The National Archives, *Annual Report and Accounts 2011-12* (London: The Stationary Office, 2012), 12. For up to date figures on the accessibility and availability of TNA records, see the TNA website ('Facts and figures'): <http://www.nationalarchives.gov.uk/about/> (accessed: 8 March 2013).

³ *Archives for the 21st Century*, 18.

⁴ *Ibid.*, 1, 18.

⁵ *Ibid.*, 16-20.

⁶ Cook, T., "Archives and the Law" (1984) 18 *Archivaria* 20-24, 21.

⁷ Clifford Lynch, Director, Coalition for Networked Information, quoted in 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* (April 2009), 21, available at: <http://www.jisc.ac.uk/publications/reports/2009/infromthecold.aspx> (accessed: 15 March 2013).

This paper considers the place of the archive sector within the copyright regime, and how copyright impacts upon the preservation, access to, and use of archival holdings. It begins with a critical assessment of the current parameters of the UK copyright regime as it applies to the work of archivists, including recommendations for reform that have followed in the wake of the *Gowers Review of Intellectual Property* (2006-2010),⁸ the *Hargreaves Review of Intellectual Property and Growth* (2010-2011),⁹ the recent *Consultation on Copyright* (2011-12),¹⁰ and the government's response thereto: *Modernising Copyright* (December 2012).¹¹ It considers the various problems the copyright regime presents for archives undertaking mass digitisation projects as well as recent European and UK initiatives in this domain. It will argue that the UK copyright regime, even when read in conjunction with current national and regional recommendations for reform, falls short of delivering a legal framework that would enable archivists to realise the extraordinary potential that the fullest possible¹² online access to the country's archival holdings would contribute to local and national democracy and accountability, to education, learning, and culture, and to the sense of identity and place for local people, communities and organisations.¹³ Ultimately, controversially perhaps, a case is made for the differential treatment of archives within the copyright regime – different, that is, from libraries and other related institutions operating within the cultural sector. The paper concludes with a policy recommendation of its own that would

⁸ Gowers, A., *Gowers Review of Intellectual Property* (December 2006), available at: <http://www.official-documents.gov.uk/document/other/0118404830/0118404830.asp> (accessed: 15 March 2013). See also: *Taking Forward the Gowers Review of Intellectual Property: Proposed Changes to Copyright Exceptions* (November 2007), available at: <http://www.ipo.gov.uk/consult-copyrightexceptions.pdf> (accessed: 15 March 2013); *Taking Forward the Gowers Review of Intellectual Property: Second Stage Consultation on Copyright Exceptions* (December 2009), available at: <http://www.ipo.gov.uk/consult-gowers2.pdf> (accessed: 15 March 2013).

⁹ Hargreaves, I., *Digital Opportunity: A Review of Intellectual Property and Growth* (May 2011), available at: <http://www.ipo.gov.uk/ipreview-finalreport.pdf> (accessed: 15 March 2013).

¹⁰ *Consultation on Copyright* (December 2011), available at: <http://www.ipo.gov.uk/consult-2011-copyright.pdf> (accessed: 15 March 2013).

¹¹ HMG, *Modernising Copyright: A modern, robust and flexible framework. Government response to consultation on copyright exceptions and clarifying copyright law* (December 2012), available at: <http://www.ipo.gov.uk/response-2011-copyright-final.pdf> (accessed: 18 January 2013).

¹² We say fullest possible access because we recognise that universal online access is unlikely ever to be achieved, and for reasons beyond the copyright domain (funding, for example, as well as issues concerning data protection, sensitivity and privacy, the fragility of many archival documents and records, and so on).

¹³ *Archives for the 21st Century*, 22.

greatly enhance the ability of the archive sector within the UK to provide online access to their holdings.

2. COPYRIGHT AND THE ARCHIVE SECTOR WITHIN THE UK

The current copyright regime within the UK is set out principally within the *Copyright Designs and Patents Act 1988* (the CDPA). Copyright subsists in original literary, musical, dramatic and artistic works, as well as in films, sound recordings, broadcasts and the typographical arrangement of published editions. The duration of the copyright term varies depending upon the nature of the work in question. For literary, dramatic, musical and artistic works, as well as films, the copyright term currently runs for the life of the author plus seventy years post mortem.¹⁴ In relation to archival holdings however the duration of copyright in certain unpublished works can last much longer. For works created by an author who died before 1 January 1969 that remained unpublished at the time the CDPA came into force (that is, 1 August 1989) the duration of copyright lasts until 31 December 2039 regardless of when the author actually died.¹⁵

The exclusive rights that a copyright owner enjoys in relation to his works will also vary depending upon the nature of the work in question, but typically these exclusive rights include making copies of the work in analogue or digital form (the reproduction right), issuing copies of the work to the public (the distribution right) and communicating the work to the public either by way of broadcast or over the internet (the communication right).¹⁶ Unless the work is in the public domain (that is, the copyright term in the work has expired), performing any of these acts, or authorising another to do so, without the permission of the copyright owner will amount to infringement.

That said, there are a number of instances in which certain actions can be taken without the need for the owner's permission and without infringing copyright in the protected work. For one thing, performing any of the exclusive rights will only infringe if carried out in relation to "the work as a whole or any substantial part of it";¹⁷ put another way, copying insubstantial parts of copyright-protected works does not amount to infringement. Second, there will be no infringement if the use of the work falls within any of the statutory exceptions set out within the CDPA

¹⁴ CDPA, ss.12, 13B. See also CDPA s.13A (sound recordings), s.14 (broadcasts), and s.15 (the typographical arrangement of published editions).

¹⁵ CDPA, Schedule 1, s.12(4).

¹⁶ In general, see CDPA, ss.16-21.

¹⁷ CDPA, s.16(3)(a).

(ss.28A-76), otherwise referred to as the acts permitted in relation to copyright works. A number of these statutory exceptions apply specifically to libraries and archives and will be considered below. Third, if the use of a substantial part of the protected work does not fall within any of the statutory exceptions but can otherwise be considered to be in the public interest, then that use might not be infringing.¹⁸ It should be noted however that this public interest defence has yet to be successfully invoked before the courts within the UK. The commentary that follows within this section considers the way in which the copyright regime impacts upon two principal activities within the archive sector: copying archival material for preservation purposes; and, copying archival material to improve access to and use of that material on the part of end users.

2.1. Preservation copying

With respect to action taken for preservation purposes, s.42 of the CDPA currently provides that the librarian or archivist of a prescribed library or archive may make a copy from any item in the permanent collection of the library or archive for two distinct purposes: (i) in order to preserve or replace that item by placing the copy in its permanent collection in addition to or in place of it (s.42(1)(a)); and, (ii) in order to replace in the permanent collection of another library or archive an item which has been lost, destroyed or damaged (s.42(1)(b)). For the purposes of s.42 all archives within the UK are prescribed archives however any archive *receiving* material under s.42(1)(b) must be an archive “not conducted for profit”.¹⁹

From an archivist’s perspective, there are some obvious limitations to the current scope of s.42. First, it only applies to literary, dramatic and musical works (and to the typographical arrangement of published editions). That is, it does not extend to artistic works,²⁰ sound recordings, films or broadcasts. Second, emerging good practice with respect to the management of digital information emphasises the virtue – some might say, necessity – of retaining multiple copies of records within an

¹⁸ *Ashdown v. Telegraph Group* [2002] Ch 149 (CA). For an analysis, see Griffiths, J., “Copyright Law after *Ashdown* – Time to deal fairly with the public?” (2002) *Intellectual Property Quarterly* 240, and Barendt, E., *Freedom of Speech*, 2nd ed (Oxford: Oxford University Press, 2007), 256-57.

¹⁹ *Copyright (Librarians and Archivists) (Copying of Copyright Material) Regulations* 1989, reg.3(4) (hereafter: the 1989 Regulations). Libraries and archives that are “conducted for profit” are defined within the *Regulations* as a “library or archive which is established or conducted for profit or which forms part of, or is administered by, a body established or conducted for profit”; reg.3(5).

²⁰ Unless, that is, the artistic work in question is an illustration accompanying a literary, dramatic, or musical work.

institution as well as distributing those copies among a network of related institutions.²¹ It may increasingly be the case that archives approach other institutions within the sector (or indeed commercial third parties) to host so-called dark archives of preservation copies on their behalf.²² And while the CDPA provides that references in sections 38 to 43 to the librarian or archivist “include a person acting on his behalf”,²³ it is not entirely clear that the distributed replication of dark archives across other host institutions would be considered permissible under s.42.

Reliance upon s.42 is also contingent upon meeting a set of “prescribed conditions” set out in the *Copyright (Librarians and Archivists) (Copying of Copyright Material) Regulations 1989* (hereafter: the 1989 Regulations). In particular, the prescribed conditions require that: (i) the item in question is an item in the part of the permanent collection

²¹ Best practice in digital preservation emphasises combining different elements of preservation strategies to meet an institutions’ needs. To give an (extremely) brief overview, viable preservation strategies consist of two broad categories: ‘preserve technology’, in which hardware and software are preserved in their original state, or the software and operating systems are ‘emulated’ using modern computers, in order to render digital files accessible in their original environment (for an example of the emulation approach, see the Universal Virtual Computer developed by IBM); and ‘preserve object’, in which the digital file can be duplicated for back up (bit-stream copied), copied to new media (refreshed), copied multiple times for distribution (replicated), migrated to another file format or newer version of a file format, or encapsulated, by being bundled with the software and metadata required to display it. (For further details, see Harvey, R., *Preserving Digital Materials*, 2nd ed (De Gruyter Saur, 2011), 117-54.) Both approaches involve the copying of the original file, multiple times and at repeated intervals, in a variety of formats and media, or the copying of source code in the original software. Debate continues around emulation, migration and which is the most effective approach, and while critics of migration point out that file format obsolescence is exaggerated (Rosenthal, D.S.H., 2011, ‘Why migrate formats? The Debate Continues,’ *DSHR’s Blog*, blog post, 17 January, accessed: 1 March 2013 (<http://blog.dshr.org/2011/01/why-migrate-formats-debate-continues.html>)), the security offered by multiple copies stored in distributed locations can’t be disputed. A good example of a project using a ‘distributed copies’ approach is LOCKSS – Lots of Copies Keeps Stuff Safe. LOCKSS is a global consortium of academic libraries and publishers, which uses inexpensive software to maintain the integrity of, and access to, the open access material, e-journals and e-book collections to which libraries are subscribed. The system works with each participating library hosting the material for which they have permissions and allowing that material to be checked by bots, which then repair or replace corrupted copies using the same material held at partner institutions as a reference. Over 9000 journal titles and 250 publishers currently participate in the scheme. See www.lockss.org for more information.

²² The LOCKSS technology previously mentioned is now being used to preserve material including images, audio, government publications, social science research data and out-of-print journals held by archives and special collections, using Private-LOCKSS networks, which function as geographically-distributed dark archives. For more information, see <http://www.lockss.org/community/networks/> (accessed: 1 March 2013).

²³ CDPA, s.37(6).

maintained by the library or archive wholly or mainly for the purposes of reference on the premises of the library or the archive, or is an item in that permanent collection which is on loan only to other libraries or archives;²⁴ and (ii) that it is not reasonably practicable for the librarian or archivist to purchase a copy of the item in question to fulfil that particular purpose.²⁵

Certain aspects of these prescribed conditions also give cause for concern. First, the item to be preserved must be “part of the permanent collection maintained by the library or archive”. The term “permanent collection” is not defined within either the CDPA or the 1989 Regulations although Padfield writes that it should be understood to include material on “indefinite or permanent deposit”, whereas it “will probably not include material on loan at the whim of the depositor, and will certainly not include material on temporary deposit, for instance for conservation or exhibition purposes”.²⁶ There are however problems with tying the preservation clause to the items that an archive holds within its permanent collection, and especially in relation to digital material.²⁷ In particular, it would preclude making preservation copies to facilitate appraisal in advance of accessioning an item into the archive.²⁸

Second, the item in question must be held in the permanent collection of the archive “wholly or mainly for the purposes of reference on the premises of the library or the archive”. There are two issues of relevance here. First, the Regulations make clear that s.42 only applies to reference items; that is, it does not apply to items held within a library or an archive that are available for lending (although this limitation, of course, is of greater relevance for libraries than for archives). Second, however, is that the item must be held for the purposes of reference “on the premises of the library or the archive”. To specifically limit the operation of the preservation clause to reference items that are available for consultation within the physical premises of the archive seems

²⁴ 1989 Regulations, reg.6(2)(a).

²⁵ 1989 Regulations, reg.6(2)(b).

²⁶ Padfield, T., *Copyright for Archivists and Records Managers*, 4th ed. (London: Facet Publishing, 2010), 5.3.7.

²⁷ Even if files were, for example, on loan at the whim of a depositor, best practice dictates that born-digital content be effectively managed *throughout* its lifecycle in order to preserve it appropriately – which at the very least would involve replication, where multiple copies of the material are made in its original format, or basic migration, in which the material is copied to other media, or a more recent version of the file format. It would be difficult to imagine an archivist knowingly allowing media decay to affect material in their care, regardless of its collection status.

²⁸ Consider for example an item that has been passed to an archive in an obsolete format or medium. Before a decision can be made about whether or not to admit the item into the archive the material would need to be reformatted or transferred to a new medium (and so copied) to enable the appraisal process.

anachronistic,²⁹ and especially so at a time when the archive sector is being strongly encouraged to harness the opportunities that digitisation offers for making their collections widely available and accessible online.³⁰

2.2. Copying unpublished work

Copying unpublished work in archives can be carried out under two separate statutory regimes: s.43 of the CDPA and s.7(6) of the 1956 *Copyright Act* (hereafter: the 1956 Act). Understanding when a work has been published is obviously crucial to the operation of both regimes. Section 175(1) of the CDPA defines “publication” as meaning “the issue of copies to the public”. In the case of a literary, dramatic, musical or artistic work this includes making the material available to the public “by means of an electronic retrieval system” such that posting these types of materials online would constitute publication.³¹ By contrast, films and sound recordings that have been made available to the public online are not considered to have been published.³² Moreover, s.175(5) provides that “no account shall be taken for the purposes of this section of any unauthorised act”. That is, if material has been published without the permission of the copyright owner, for the purposes of the CDPA, the work remains unpublished.³³

It is worth stressing at this point that if, as and when an archive makes unpublished material from its collection available online this will not compromise its ability to make individual copies of such works for users under s.43. Section 43 concerns the copying of material that was

²⁹ For example, by specifying items which are available for inspection, the wording of the clause might preclude the preservation copying of closed or restricted archives, or material on loan to other institutions and repositories.

³⁰ As The National Archives put it: “Remote access to records is now the norm, so describing the permanent collection as consisting of items that are wholly or mainly used for consultation on the premises is far too restrictive”; *Taking forward the Gowers Review of Intellectual Property, Second stage consultation on copyright exceptions: Comments from The National Archives* (2010), 5 (document available from the Intellectual Property Office upon request).

³¹ In relation to literary, dramatic and musical works, the following actions do not constitute publication: performance of the work, or communication to the public (other than for the purposes of an electronic retrieval system) (s.175(4)(a)). In the case of an artistic work, the following do not constitute publication: exhibition of the work; issuing to the public copies of a work of architecture, a sculpture, or a work of artistic craftsmanship; issuing to the public copies of a film including the work; or communicating the work to the public (other than for the purposes of an electronic retrieval system) (s.175(4)(b)).

³² CDPA, s.175(4)(c).

³³ Moreover, the Act provides that if copyright does not subsist in the work then the concept of unauthorised means “by or with the licence of the author”. See CDPA s.178 for the definition of “unauthorised”.

unpublished *at the time of deposit*. Specifically, s.43(2) provides that “[t]his section does not apply if – (a) the work had been published before the document was deposited in the library or the archive”. By definition, the opportunity for relying upon s.43 will not be stripped away by the fact that archival materials have been published *after* deposit. However, the same cannot be said for s.7(6) of the 1956 Act. Its operation is conditional upon the fact that the work in question has not been published whether before or after deposit in the archive.³⁴

2.2.1. Copying unpublished work under the CDPA: s.43

Under s.43 the librarian or archivist of a prescribed library or archive, including those that are run for profit,³⁵ can make and supply a copy of the whole or part of a literary, dramatic or musical work from a document in the library or the archive but only if the work had not been published before it was deposited in the library or archive, or the copyright owner has not expressly prohibited the copying of the work.³⁶ There is no restriction as to the quantity of the work that can be copied. Nor is there any restriction on copying material that is not in the institution’s permanent collection (as is the case with copying for preservation purposes).³⁷

This provision is subject to certain “prescribed conditions” which include that copies are supplied only for the purposes of research for a non-commercial purpose or private study, that no person is furnished with more than one copy of the same material, and that the person to whom the copies are supplied must pay for the same (a sum not less than the cost attributable to their production). Moreover, the person to whom the copy is supplied must also provide the librarian or archivist with a signed declaration in writing in accordance with Form B in Schedule 2 to the 1989 Regulations.³⁸

Again, from an archivist’s perspective, this provision is unsatisfactory in a number of respects. First, as with s.42, s.43 does not apply to artistic works,³⁹ sound recordings or films. Second, that archivists

³⁴ Copyright Act 1956, s.7(6)(b).

³⁵ 1989 Regulations, reg.3(4); “conducted for profit” is defined to mean “a library or archive which is established or conducted for profit or which forms part of, or is administered by, a body established or conducted for profit”.

³⁶ CDPA, s.43(1)(2).

³⁷ See, for example, Padfield (at 5.3.7) who notes that as there is “no requirement for deposit to be on any particular terms”, the provision “presumably covers material even on short-term deposit for any reason”.

³⁸ 1989 Regulations, reg.7(2).

³⁹ That is, unless the work in question is an illustration accompanying a literary, dramatic, or musical work.

cannot rely upon s.43 if the work has been published before the document has been deposited in the archive can create problems with respect to manuscript copies of published works, unless the manuscript is sufficiently different from the published version of the work to be considered a separate (unpublished) work in its own right. Third, the fact that copying for research purposes is limited to non-commercial research is regarded within the archival sector as particularly problematic. Padfield, for example, describes this limitation as “a significant problem not only for users but for archivists and librarians trying to provide a public service”. One solution, he suggests, is “for archivists to ensure that no one in their institution knows the purpose of the user’s research, so that a declaration form may be accepted unless some other aspect of it is known to be false”.⁴⁰ “This solution”, he continues, “would not be available if the user revealed to a member of staff the purpose of his or her research, whether in conversation or on an application form for admission, because an archivist ought then to be aware that a declaration form was completed falsely”.⁴¹ For the current Chair of the UK Libraries and Archives Copyright Alliance to propose a position of ‘strategic ignorance’ (as to the reason for a user’s visit to an archive) as the ‘unhappy solution’⁴² to this problem neatly underscores the frustration that archivists often feel about the burden that copyright can bring to bear upon the exercise of their professional duties and obligations.

Another problematic aspect of s.43 concerns the fact that the archivist is only permitted to “make and supply a copy” of the work to the end user.⁴³ In the world of analogue copying imposing such a condition is relatively uncontroversial. But, the implications of this proviso become positively nonsensical within the context of the electronic delivery of digital copies to users. A literal interpretation of s.43 would require that the copy that is made by the archivist must also be the same copy that is supplied to the user. This would appear to preclude, for example, simply sending a digital copy by email.

2.2.2. Copying unpublished work under the 1956 Act: s.7(6)

As well as copying under s.43 of the CDPA, s.7(6) of the 1956 Act remains in force and permits the copying of certain unpublished works created

⁴⁰ Form B in Schedule 2 to the 1989 Regulations requires the user to declare that he “will not use the copy except for research for a non-commercial purpose or private study and will not supply of it to any other person”.

⁴¹ Padfield, 5.3.12.

⁴² *Ibid.*

⁴³ CDPA, s.43(1). This point is reiterated to a certain extent with the prescribed condition that “no person is furnished with more than one copy of the same material”; s.43(3)(b).

before 1 August 1989.⁴⁴ In particular, s.7(6) provides that where an unpublished literary, dramatic or musical work has been open to public inspection in a library, museum or other institution within the UK, it may be copied by any person without infringing copyright in the work or in any accompanying illustrations. Copying under s.7(6) is conditional on the author having died more than 50 years before, and the work in question being more than 100 years old. In addition, the copying must be “for the purposes of research or private study, or with a view to publication”. As with s.43, there is no restriction as to the quantity of the work that can be copied.

Although s.7(6) only allows copying of literary, dramatic and musical works, and it would not permit copying where the author of the work is unknown,⁴⁵ relying upon this provision nevertheless offers the archivist and the user a number of obvious advantages over s.43. First, s.7(6) extends to unpublished work held in a “library, museum, or other institution” (including, of course, an archive). Second, there is no reason why an institution can not make copies of a work for any other institution so long as the copying is made for the purpose of research or private study. Third, where an archive is making a copy for an individual user, there is no need to use the declaration form set out in Schedule 2 to the 1989 Regulations (which also means that the user is not bound by the various conditions set out therein⁴⁶). Fourth, copies can be made for the purpose of commercial as well as non-commercial research. And finally, s.7(6) explicitly anticipates subsequent publication of the work (whether by a user or an archive) without the need for the permission of the copyright owner.⁴⁷

In relation to this last point, the 1956 Act provided that anyone publishing work in accordance with s.7(6) would not be guilty of copyright infringement if the identity of the owner of the copyright in the work was not known (what is now referred to as an orphan work) and public notice was given of the intention to publish.⁴⁸ The duty to give notice of intended publication was abandoned when the CDPA was passed,⁴⁹ however

⁴⁴ See CDPA, Schedule 1, para.16 which provides that s.7(6)(7)(8) and (9)(d) continue to apply in relation to existing works.

⁴⁵ On this point, Padfield is typically pragmatic: “It seems probable that if the work is of a sufficient age that the author must have died at least 50 years earlier, that would be enough”; Padfield, 5.3.13.

⁴⁶ For example, Form B currently requires the user to declare that he will not supply a copy of the material he receives under s.43 to any other person.

⁴⁷ Moreover, s.7(8) provides that a work published in accordance with ss.7(6)(7) may also be “broadcast” or “transmitted to subscribers to a diffusion service” without infringing copyright therein.

⁴⁸ Copyright Act 1956, s.7(7).

⁴⁹ CDPA, Schedule 1, para.16.

publication will still infringe if the identity of the copyright owner is known and permission is not secured. That said, the legislation imposes no obligation to search for or attempt to identify the copyright owner. Indeed, as with s.43's restriction to copying for the purpose of non-commercial research, an archive adopting a policy of strategic ignorance as to the copyright ownership of its unpublished holdings might better serve the interests of its user community over one that is more fastidious about discovering or recording information about the same.

2.3. Copying published work

2.3.1. Copying published work under the CDPA: ss.38 and 39

Whereas s.43 permits both libraries and archives to make copies of unpublished material, only libraries are specifically authorised under the CDPA to make copies of published material for their user community (ss.38 and 39). In short, the librarian of a prescribed library can make copies of articles in periodicals (s.38) and parts of published editions⁵⁰ of literary, dramatic or musical works (s.39) subject to certain prescribed conditions.⁵¹ Like s.43, there is no requirement that the work being copied be held in the permanent collection of the library making the copy. Also like s.43 however the scope of s.39 is currently limited to copying from literary, dramatic or musical works, and does not extend to copying from artistic works,⁵² sound recordings, films and broadcasts.

While an archive that contains a library of published reference material (such as books and periodicals) will no doubt be considered to be a prescribed library for the purposes of ss.38 and 39,⁵³ it is by no means clear that the same provisions will apply to published material held among the records in an archive.⁵⁴ On this point, a number of respondents to the

⁵⁰ CDPA, s.8(1) defines a "published edition" as "a published edition of the whole or any part of one or more literary, dramatic or musical works".

⁵¹ The prescribed conditions relating to the operation of both ss.38 and 39 are set out in the 1989 Regulations. They include that copies are supplied only for the purposes of private study or research for a non-commercial purpose, and that the person requiring the copy has delivered to the librarian a declaration in writing to that effect in accordance with a statutory form set out in Schedule 2 to the Regulations; reg.4(2)(a). Moreover, no person is to be furnished with more than one copy of the same material or with a copy of more than a reasonable proportion of any work, and the person to whom the copies are supplied must pay for the same (a sum not less than the cost of production); reg.4(2)(c)(d).

⁵² That is, other than in relation to the copying of illustrations accompanying part of a literary, dramatic or musical work.

⁵³ Padfield, 5.3.16.

⁵⁴ *Ibid.* In this respect, Padfield argues that "[i]t must be probable that it was not intended to exclude such material, given the wide scope of the definition of a prescribed library, but neither the 1989 Regulations nor the 1988 Act is explicit"; *ibid.*

consultation on the *Gowers Review*, including the Lord Chancellor's Advisory Council on National Records and Archives, argued for explicit parity between libraries and archives with respect to the copying of published work under ss.38 and 39.⁵⁵ That argument should be supported. There is no coherent reason for denying archives the same privileges under ss.38 and 39 of the CDPA that libraries currently enjoy, and much is to be gained by formally extending parity of treatment to them in this regard.

2.3.2. Copying published work in archives under s.29

Finally, it is worth noting that some copying of published material held within an archive may well be permissible under s.29 of the CDPA: fair dealing for research for a non-commercial purpose or private study.⁵⁶ In the first place, the end user himself is entitled to make copies of literary, dramatic, musical and artistic work so long as the copying satisfies the criterion of fair dealing.⁵⁷ Of course copying by the user will be contingent upon the permission of the archive, and the archivist's duty to ensure the long-term preservation of unique, often fragile, archival material is not necessarily compatible with authorising users to copy such material themselves.

However, s.29 also anticipates that the copying can be carried out "by a person other than the researcher or the student himself"⁵⁸ and in theory there is no reason why this could not be by an archivist. What's more, whereas s.39 currently precludes copying of artistic works (except in very limited circumstances) s.29 explicitly allows for the copying of such works. That said, Padfield sounds a cautionary note on this reading of the legislation arguing that, because the CDPA contains special provisions for copying by a librarian or an archivist, the defence of fair dealing under s.29 is unlikely to be available to an archivist "who supplied copies outside the terms of those special provisions".⁵⁹ Padfield's conservatism is understandable, but the point has yet to be tested before the UK courts.

⁵⁵ See for example the submissions to the second stage consultation on the *Gowers Review* from: the Lord Chancellor's Advisory Council on National Records and Archives, the Libraries and Archives Copyright Alliance, the National Library of Wales, the Mills Archive Trust, and the Religious Archives Group (all documents available from the Intellectual Property Office on request).

⁵⁶ Indeed, copying under s.29 will also extend to unpublished work, although whether the work has been published or not is likely to be an influential factor in determining whether or not the copying is fair dealing.

⁵⁷ In relation to copying for the purposes of research for a non-commercial purpose, the copying must also be accompanied by "a sufficient acknowledgement"; CDPA, s.29(1).

⁵⁸ CDPA, s.29(3).

⁵⁹ Padfield, 5.3.21.

2.4. Proposals for reform

The various permitted acts discussed thus far present a complex set of rules concerning the circumstances in which archivists can make copies of archival holdings for the purposes of preservation, access and use. Legislative reform in this area has been promised in the guise of the recent *Consultation on Copyright*. Three proposed reforms warrant consideration. First, the government has proposed that s.42 should be expanded to allow preservation copying of any type of copyright protected work (and not just literary, dramatic and musical works), to clarify that multiple copies of a work can be made for preservation purposes, and to enable museums and galleries to make preservation copies under this provision.⁶⁰ The revised exception, however, would still be limited to works held in the institution's permanent collection for which it is not reasonably practicable to purchase a replacement.⁶¹ Second, the government is also proposing to extend the scope of ss.38 and 39 to permit librarians and archivists to make and supply a copy of all types of copyright-protected works for the benefit of students and researchers (again, rather than just literary, dramatic and musical works).⁶² What is not clear, however, is whether s.43 (which permits the copying of certain unpublished works by librarians and archivists) will be amended in the same way.⁶³ Third, the government plans to introduce a new exception to facilitate the research and private study of digitally preserved materials held in educational institutions, libraries, archives and museums. In short, this new exception will enable relevant institutions to offer access to lawfully digitised copies of works

⁶⁰ As regards multiple copying, the government make clear that works can "be copied as many times as necessary for the work to be preserved"; *Modernising Copyright*, 45. The government also make clear that the opportunity to engage in preservation copying should not be undermined by restrictive contract terms imposed upon libraries and archives by copyright owners; *ibid*.

⁶¹ See Section 2.1 (Preservation Copying) above. At this stage, it is not clear whether the government's proposed changes to s.42 address the issue raised earlier about restricting the scope of the preservation exception to works that are "wholly or mainly for the purposes of reference on the premises of the library or the archive".

⁶² In general, see *Modernising Copyright*, 32-35.

⁶³ *Modernising Copyright* and IPO, *Extend exception for copyright for research and private study, Impact Assessment BIS0311* (December 2012), available at: <http://www.ipo.gov.uk/consult-ia-bis0311.pdf> (accessed: 18 January 2013), both make clear that the amendments to ss.38 and 39 are intended to mirror the proposals for amending the exception for copying for research and private study (CDPA, s.29). There is no reason why the scope of s.43 should not be amended in a similar fashion. Indeed, amending s.43 in this way was explicitly anticipated by earlier consultations on copyright reform; see for example *Taking Forward the Gowers Review: Second Stage Consultation*, 30.

held in their collections at dedicated terminals on their premises.⁶⁴ The benefits of this new provision for libraries and archives are self-evident. Substituting digital delivery for the physical delivery of works held in their collections will allow institutions to save costs in relation to maintaining a physical document delivery service (and particularly so when materials are stored in off-site repositories), as well as facilitating the long-term preservation of fragile materials.⁶⁵

While these proposals for reform are to be welcomed, albeit tentatively,⁶⁶ they do little for the archivist who is interested in making digital copies of archival material available for general consumption online. To be sure, an archive might rely on s.7(6) of the 1956 Act to make some of its unpublished holdings available online (as an act of publication) but the scope of this provision remains limited to literary, musical and dramatic works only. Also, reliance upon s.7(6) will remain contingent upon not knowing the identity of the copyright owner of the work in question and, as we shall see, there are other national and regional plans afoot for dealing with these so-called orphan works. Otherwise, any archive undertaking a mass digitisation project with a view to making their collections available online in the manner envisaged by *Archives in the 21st Century* will need to secure the requisite copyright permissions in relation to the same (unless, that is, the institution itself holds the copyright in the work or the work is in the public domain).

3. MAKING ARCHIVAL COLLECTIONS AVAILABLE ONLINE

⁶⁴ A similar exception already exists in a number of other European states, including: Belgium, Cyprus, Denmark, Spain, Finland, Italy, Lithuania, Luxembourg, Malta, the Netherlands, Portugal and Slovenia; for details, see Favele, M., "Fine-tuning European copyright law to strike a balance between the rights of owners and users" (2008) *European Law Review* 687-708.

⁶⁵ For a discussion of these and other benefits, see: IPO, *Extend exception for copyright for research and private study*.

⁶⁶ As always, the devil lies in the detail of implementation. For example, when previous reforms to ss.39 and 43 were suggested as part of the *Gowers Review* process, it was recommended that librarians and archivists should be free to make copies of sound recordings and films on behalf of end users *but only if* those individuals were a member of an educational establishment and when the copying was for the purposes of a course of study or research being undertaken at that establishment; *Taking Forward the Gowers Review: Second Stage Consultation*, 32. That the proposed amendments were to be circumscribed in this way was, at the time, criticised as being "deeply invidious", "a very deeply flawed proposal", and "demeaning, illogical and discriminatory". See for example: Libraries and Archives Copyright Alliance, *Submission to the second stage consultation on copyright exceptions* (2010), 1 (document available from the Intellectual Property Office on request). The *Consultation on Copyright* is ambiguous about whether the government is minded to introduce a similar restriction with respect to the current proposals for reform.

As explained above, within the context of the UK copyright regime, an archive that intends to make material from its collection available online will need to clear rights to do so. The impact that copyright has upon digitisation projects has been the subject of a number of studies to date⁶⁷ and, in general, copyright is widely perceived to be a barrier to the digitisation and dissemination of library and archival holdings. There are various reasons for this. First, determining whether a work is actually in copyright, or whether it is in the public domain, can often be problematic. Second, the time and effort involved in identifying, locating and contacting known copyright owners can be prohibitive, especially when dealing with large numbers of works. Third, identifying and locating the rights owner in a particular work provides no guarantee of a response from that owner. And when owners fail to respond to requests to clear rights for including their material within a digitisation project, typically that work will be omitted from the project. Fourth, it is not always the case that copyright owners can be identified or located – the orphan works problem – an issue that will be dealt with in the next section.

3.1. Determining whether a work is in the public domain

For literary, dramatic, musical and artistic works, as well as films, the copyright term within the UK subsists for seventy years after the death of the author (subject to the exception that we have already noted concerning works created by an author who died before 1 January 1969 that remained unpublished at the time the CDPA came into force⁶⁸). Although these provisions about copyright duration draw reasonably clear lines in the sand,⁶⁹ evidentiary problems will always remain and particularly so when considering archival holdings. Consider, for example, an archive of business records. The ownership of the copyright vested in any particular collection of business records may lie with the business

⁶⁷ See for example: Cave, M., Deegan, M., and Heinink, L., "Copyright clearance in the refugee studies centre digital library project" (2000) RLG DigiNews 4(5); Pritcher, L., "Ad*access: seeking copyright permissions for a digital age" (2002) D-Lib Mag 6(2); Astle P.J., and Muir, A., "Digitization and preservation in public libraries and archives" (2002) *Journal of Librarianship and Information Science* 67-78; George, C.A., "Testing the barriers to digital libraries" (2005) *New Lib World* 106(7/8).

⁶⁸ In this case the copyright term lasts until 31 December 2039 regardless of when the author actually died.

⁶⁹ In many respects however this represents a gross oversimplification of the complicated nature of the rules on copyright duration within a national and international context. For more detailed commentary see, for example, Dussollier, S., *Scoping Study on Copyright and Related Rights in the Public Domain* (March 2011) WIPO, CDIP/7/INF/2, 25-29, 61-64, available at: http://www.wipo.int/ip-development/en/agenda/news/2010/news_0007.html (accessed: 15 March 2013).

organisation itself,⁷⁰ but the duration of the copyright term in the individual records within that collection will be tied to the life and death of the employees who created those records (as the authors of those records).⁷¹ Identifying which employee of a company created which record, as well as when they died, will tend to be much more problematic than, for example, ascertaining when the author of a commercially successful work died. In short, determining whether a work is in or out of copyright is not always so straightforward.

3.2. The cost of digitisation and clearing rights

When contemplating the cost of large scale digitisation projects, Nick Poole's report on digitising Europe's cultural heritage provides a useful point of departure. Published in November 2010, Poole presents data on the entirety of the collections held in Europe's libraries, museums, and archives, as well as the estimated costs of digitising these collections across these different sectors.⁷² The figures are revealing. Poole estimates that Europe's libraries hold around 130m unique titles of which approximately 77m titles eligible for digitisation⁷³ have not yet been digitised.⁷⁴ This in turn equates to around 1.93bn individual pages. The estimated cost of digitising this material is calculated as ranging between €0.22 and €0.68 per page.⁷⁵ Taking the lowest estimate, this would mean that the approximate total cost of digitising all 77m titles would be €4.2bn; the upper estimate produces a figure of €13.1bn.

The data in Poole's report concerning archives is limited to material held in national, local and provincial archives, as well as university archives and the archives of foreign ministries.⁷⁶ It excludes business archives, community archives, church archives, and other private

⁷⁰ The CDPA provides that “[w]here a literary, dramatic, musical or artistic work, or a film, is made by an employee in the course of his employment, his employer is the first owner of any copyright in the work subject to any agreement to the contrary”; s.11(2).

⁷¹ CDPA, s.9(1).

⁷² Poole, N., *The Cost of Digitising Europe's Cultural Heritage: A Report for the Comité des Sages of the European Commission* (November 2010), available at: http://ec.europa.eu/information_society/activities/digital_libraries/doc/refgroup/annexes/digiti_report.pdf (accessed: 15 March 2013).

⁷³ Poole defines collections as “eligible for digitisation” as “collections that are not deemed too fragile to digitise”; *ibid.*, 2.

⁷⁴ This figure does not include the digitisation of rare books, archival material, newspapers, maps, photographs and audiovisual material that might be held in libraries; *ibid.*, 38-48.

⁷⁵ These figures include estimated costs for project management, the preparation, selection and unbinding of relevant materials, scanning costs, OCR conversion costs, PDF conversion costs, as well as the costs of simple metadata creation.

⁷⁶ Audiovisual archives are dealt with separately in Poole's report.

archives.⁷⁷ But even taking this into account, Poole calculates that the total number of individual pages of archival material held within Europe comes to around 26.98bn. Of these 17.27bn are eligible for digitisation, of which approximately 10.45bn have not yet been digitised.⁷⁸ Because of the complexity and fragility of archival collections, the full economic cost of digitising this material is estimated at €4 per page. And so, the approximate total cost of digitising all 10.45bn pages would be €41.8bn, a considerably larger sum than for the library sector.

What is important to appreciate about these figures is that they only concern the estimated costs of initial digitisation. They do not extend to the costs of the long-term preservation and management of these materials, nor do they include the costs of clearing rights for the material to be digitised.⁷⁹ What's more, within the cultural heritage sector, the cost of clearing rights generally outstrips the actual expense of digitisation,⁸⁰ and typically exceeds the monetary value of the work in question.⁸¹ In relation to clearing rights in particular, payment to the copyright owner for making use of the work is only one of the ways in which cost will be incurred. Staff time and effort will be needed to verify the copyright status of the work (including any related rights), identify the appropriate rights owner, locate and contact the rights owner(s), negotiate terms and conditions of use, as well as faithfully documenting all of the above.⁸² And not only is clearing rights often very time-consuming and expensive but it

⁷⁷ Poole, 58. In the UK, for example, just less than 2000 archival institutions are accessible to the public. Of these, there are 161 archives in higher education, 140 national institutions, and 118 local authority archives, all of which would be included within Poole's analysis. Excluded from his report however would be the 64 company archives held within the UK, as well as nearly 1500 other archival repositories holding the records of a single body or a private family. For details, see The National Archives, *Taking Forward the Gowers Review of Intellectual Property, Proposed changes to Copyright Exceptions: Response to the consultation paper* (2008), 7 (document available from the Intellectual Property Office on request).

⁷⁸ Moreover, this figure does not include photographs, microforms, or audiovisual material held in these archives; Poole, 60.

⁷⁹ *Ibid.*, 16, 31.

⁸⁰ Vuopala, A., "Assessment of the Orphan works issue and Costs for Rights Clearance" (May 2010), 6, 44 (available at: http://ec.europa.eu/information_society/activities/digital_libraries/doc/reports_orphan/anna_report.pdf). One library estimated that in relation to a project to digitise 200,000 doctoral dissertations completed between 1925 and 1988, whereas the cost of digitisation came to €150,000, the transaction costs in clearing rights to make these dissertations available online would be between 20-50 times greater than the cost of digitisation; cited *in ibid.*, 5.

⁸¹ See for example the comments of Stuart Dempster, Director of the Strategic Content Alliance, quoted in Korn, *In from the Cold*, 21 ("The cost of trying to track down rights owners [invariably] far exceeds the monetary value of the work, and that's borne out by the financial profiles from the British Library").

⁸² Vuopala, 12-13.

can also be very frustrating.⁸³ Two or three examples should suffice to illustrate the point. As part of the *Moving Here* project,⁸⁴ The National Archives spent £35,000 and 2 years on obtaining copyright permissions to digitise and make 1,114 wills available online. These efforts delivered fairly limited success in that the necessary permissions were obtained for less than half of the wills identified for inclusion within the project.⁸⁵ Similarly, the Wellcome Library holds the fourth largest collection of AIDS posters in the world (2970 in all). By December 2009 the Library had spent 88 working days attempting to clear rights for 1400 posters in the collection. Relevant permissions had been obtained for 270 posters, at a cost of 70,000 euro.⁸⁶ And finally, a joint study on clearing rights recently undertaken by the British Library and ARROW⁸⁷ concluded that the total time spent on diligent search and clearing rights for a random sample of 140 books published between 1870 and 2010 involved just over 562 hours, resulting in permissions to digitise only 17 of the 102 works that were found to be in copyright.⁸⁸ In short, clearing rights for mass digitisation projects upon a work-by-work basis imposes often prohibitive burdens upon publicly funded cultural institutions, while often delivering less than satisfactory results.⁸⁹ Moreover, these various transaction costs tend to present a much heavier burden to the archive sector than to the

⁸³ For a discussion see *Response from the British Library to the Independent Review of Intellectual Property and Growth* (2011), 19-23.

⁸⁴ For details, see: www.movinghere.org.uk (accessed: 15 March 2013).

⁸⁵ The project managed to find rights owners and obtain the necessary permissions for less than half of the wills identified to be included within the project. For details, see: Vuopala, 39.

⁸⁶ *Ibid.*, 31.

⁸⁷ ARROW stands for Accessible Registries of Rights Information and Orphan Works towards Europeana, a project co-funded under the European Commission's eContentplus Programme with the aim of supporting the Commission's *i2012 Digital Library* programme by exploring ways to clarify the rights status of orphan and out of print works. For further details, see: <http://www.arrow-net.eu/> (accessed: 15 March 2013).

⁸⁸ Stratton, B., *Seeking New Landscapes: A rights clearance study in the context of mass digitisation of 140 books published between 1870 and 2010* (London: British Library/ARROW, 2011), 5, 45-50. Moreover, these 17 works included "a book [later] confirmed by the rightsholder to be in the public domain plus another book that had entered the public domain during the final contact phase of the project". Stratton continues: "If digitisation were to go ahead with the rights clearances received at the point the study closed, the Library would only be able to digitise just 55 works out of 140 (39%) – the 40 public domain works plus the 15 in-copyright works that had been cleared. This leaves 85 works which would have to be discounted from the project, 43 of which were orphan works"; *ibid.*, 48.

⁸⁹ In general, see Vuopala, 35-42. See also Stratton, *Seeking New Landscapes*, 5 ("The study confirmed through analysis of a representative set of titles published within the 140 years between 1870 and 2010, that rights clearance of works on an individual, item by item basis is unworkable in the context of mass digitisation").

library sector and for one very obvious reason: in terms of the volume of individual items, archives tend to have much larger collections than other cultural institutions, including libraries. In this respect, a statistical analysis carried out by JISC in 2009 indicates that while the average library holds between 100,000 and 500,000 works, the average archive holds between 500,000 and 1m records. Similarly, whereas 29% of libraries hold more than 1m works, the equivalent figure for the archive sector is 43%.⁹⁰

The costs – both real and perceived – incurred in investigating the copyright status of a work and in obtaining relevant permissions to make use of the work can impact upon the decisions that institutions make when determining which materials to include within a digitisation project and which to leave out. In this respect Jean Dryden’s study on the digitisation of archival materials in Canada revealed that nearly two-thirds of the institutions surveyed simply do not select items involving third-party rights owners for inclusion in digitisation projects.⁹¹ As a consequence, institutions were not always selecting the most appropriate or significant documents for inclusion in a project, instead favouring those that presented fewer problems with respect to clearing rights.⁹² Hudson and Kenyon reached a similar conclusion: “[W]ith tight budgets and timelines, selecting works for public digitisation is often based, in whole or in part, on the ease of copyright compliance”.⁹³

3.3. Risk management in situations of non-response or when copyright owners cannot be found

For those institutions that are willing to take on the burden of clearing rights on a work-by-work basis, their efforts are typically frustrated by the fact that copyright owners cannot be identified or found (the orphan works problem) or owners can be found but do not respond to requests for use. In relation to the latter, Akmon has specifically considered the problem of non-response to institutional requests for making archival material available online. Her study of the rights clearance process for the Jon Cohen AIDS Research Collection at the University of Michigan is

⁹⁰ Korn, *In from the Cold*, 32.

⁹¹ Dryden, J., “Copyright issues in the selection of archival material for internet access” (2008) *Archival Science* 123-47, 133 (“[W]hen asked if they selected documents in which the copyright is owned by someone other than their repository, only 36% of the questionnaire respondents said that they did so”).

⁹² Dryden, 145.

⁹³ Hudson, E., and Kenyon, A., “Digital Access: The impact of copyright on digitisation practices in Australian museums, galleries, libraries and archives” (2007) *UNSW Law Journal* 12-52, 42. See also: Korn, *In from the Cold*, 7.

revealing.⁹⁴ The project involved the digitisation of 13,381 items in the Cohen Research Collection of which 5,463 were in copyright which rights were held by 1,377 different copyright owners. Despite the fact that 85% of staff time on the project was spent on securing copyright permissions, 1973 items of copyright-protected material (36%) were not made available online. The biggest obstacle to securing permissions proved to be non-response from known copyright owners. In total, 981 of the copyright-protected items (18%) could not be displayed due to non-response. This compares with 687 items (13%) that were omitted because the rights owners could not be identified or located and only 294 items (5%) that could not be included because permission had been expressly refused.⁹⁵ The study undertaken by the British Library and ARROW presents a similar picture. Rights owners could only be identified for 74 of the 102 books that were in copyright. Of those 74 rights owners, 16 granted permission for their work to be used in the project, and 9 expressly refused; 22 simply did not respond.⁹⁶

Writing in 1986 about the likelihood of copyright litigation within the archive sector, Post observed that “[i]t may seem laughable to invoke a bogey which is as rare in archival circles as the yeti, but the risk is there”.⁹⁷ Within the context of a pre-digital environment, Post could afford to be relatively glib about the threat of copyright litigation. Today however archivists find copyright law complicated and confusing and they do worry

⁹⁴ Jon Cohen, the author of *Shots in the Dark: The Wayward Search for an AIDS Vaccine* donated his collection of AIDS-related research material to the University of Michigan; Akmon, D., “Only with your permission: how rights holders respond (or don’t respond) to requests to display archival materials online” (2010) *Archival Science* 45-64, 50.

⁹⁵ *Ibid.*, 57. Interestingly, commercial rights owners were both noticeably slower in responding to requests to clear rights than items without a commercial copyright owner, and more likely to refuse permission than non-commercial owners; *ibid.*, 55, 58.

⁹⁶ Stratton, 45-48. As for the remaining 18 rights owners, the British Library was unable to conclude discussions concerning rights clearance within the timescale of the project itself; as Stratton notes, this was “primarily due to the time taken to clear any third-party rights embedded in the work ... or because the rightsholders were unaware of their rights or had no knowledge of the work” (*ibid.*, 46). Other studies indicate that non-response from identified rights owners is a significant problem when clearing rights. See for example the findings about non-response in the study of orphan works conducted by the Carnegie Mellon University Libraries: “Over a third (36%) of the publishers we successfully located did not respond to multiple letters of inquiry. Most (79%) of the books about which they did not respond were out of print”; for further details, see: www.copyright.gov/orphan/comments/OW0537-CarnegieMellon.pdf (accessed: 16 June 2011). Similarly, in relation to the Wellcome Library’s AIDS Posters project, of the rights owners that had been identified and contacted with a request to include their work in the project only 16.5% responded to the request for permission; cited in Vuopala, 31.

⁹⁷ Post, 21.

about it,⁹⁸ particularly with the heightened public and legal exposure that comes with putting archival materials online.⁹⁹ Perceptions of risk tend to dictate how institutions respond when permissions cannot be obtained as a consequence of non-response or when copyright owners cannot be found. In the case of the Jon Cohen Research Collection for example the University of Michigan Library was not willing to make any item available online without having first obtained express permission from the rights owner, a stance that Akmon attributes to the Library's "high aversion to the possibility of copyright litigation".¹⁰⁰ Again, Dryden's work is instructive. Two-thirds of her questionnaire respondents indicated that if they were unsuccessful in locating a rights owner, or they did not get a response, they would not use the item in question.¹⁰¹ Similarly, Kenyon and Hudson concluded that institutions are often more inclined to withhold public access to digital content where copyright issues cannot be explicitly resolved, even when substantial efforts have been made to identify or locate copyright owners.¹⁰²

In many respects, the adoption of a risk-averse strategy is entirely understandable. Entrusted with safeguarding the nation's social and cultural record, publicly funded archives do (and should) strive to act within the law at all times (including copyright law) to ensure the

⁹⁸ In general, see Dryden, J., *Copyright in the Real World: Making Archival Material Available on the Internet* (Doctoral Thesis, University of Toronto), 230-36, available at: https://tspace.library.utoronto.ca/bitstream/1807/11198/1/Dryden_Jean_E_200806_PhD_thesis.pdf (accessed: 15 March 2013).

⁹⁹ Making work available online without the copyright owner's permission may trigger liability for infringement both in the country where the initial steps to make the work available online were taken, as well as in any other country where members of the public can access that material. In this respect, Ricketson and Ginsburg comment upon the nature of the "making available" right as follows: "The focus of the 'making available' right seems to train on the individual members of the public who access the work. As a result, it would seem that the right is exercised when the work is made available *to* the place where the accessing individual is located, rather than *from* the country from which the communication departed. In other words, the copyright-triggering act would be accessing the work"; Ricketson, S., and Ginsburg, J.C., *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, 2 vols (Oxford: OUP, 2010), 1310. By way of comparison, the European Directive on satellite broadcasting specifically stipulates that the exercise of the right of communication only takes place in the Member State where the uplink occurs (or, where "the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth") and not in those jurisdictions where the signal is received. The reason for adopting this approach was to simplify the process of clearing rights for the purposes of cross-border satellite broadcasting. In general, see *Satellite Directive* 93/83/EEC, recitals 13-15, and A.1.

¹⁰⁰ Akmon, 47.

¹⁰¹ Dryden, *Copyright in the Real World*, 186.

¹⁰² Kenyon and Hudson, 40.

continued confidence of funders, contributors and users.¹⁰³ And yet, as Post put it, lily-white need not mean lily-livered.¹⁰⁴ Not all cultural institutions are entirely risk averse and increasingly a more nuanced approach to risk management is being adopted within this sector. In this regard, JISC's survey of orphan works across the public sector provides an interesting snapshot of different institutional attitudes to risk within the UK. While less than 5% of the institutions surveyed were prepared to digitise, publish or display a particular item if doing so represented a high level of risk to their organisation, 60% of respondents considered that they were putting their organisations at low risk by making use of orphan works either due to their diligence in searching for rights owners or because the material they were dealing with was primarily of academic rather than commercial value.¹⁰⁵ Consider again the Wellcome Library's collection of AIDS posters. In relation to the digitisation of orphan works in this collection the Library adopted a "best endeavours" approach to obtaining permission, while promising to immediately remove any content from its website should a previously unknown copyright owner come forward and make such a request.¹⁰⁶ What's more, the Library dealt with instances of non-response from an identified rights owner in the same way.¹⁰⁷ Technically, making these works available online amounts to copyright infringement; however, the steps taken in good faith to identify and contact potential rights owners, the non-commercial nature of the subject-matter (as well as the fact that the posters are not licensed for commercial use by others),¹⁰⁸ and the charitable not-for-profit status of the Library are factors that, in the Library's opinion, mitigate any

¹⁰³ See for example the comments in Maher, William J., "Between Authors and Users: Archivists in the Copyright Vise" (2001) *Archival Issues* 63-75, 65, as well as Kenyon and Hudson, 40.

¹⁰⁴ Post, 21.

¹⁰⁵ Korn, *In from the Cold*, 22. In particular, the survey noted that organisations "are keen to limit their liability through a combination of processes, including risk management, disclaimers, passing the responsibility onto an enquirer who wants an image, making sure a larger partner in the project takes on risk and refusing permissions to make copies of Orphan Works where the risk is too great"; *ibid*.

¹⁰⁶ See: http://library.wellcome.ac.uk/doc_wtdv025956.html (accessed: 15 March 2013).

¹⁰⁷ Email correspondence with William Schupbach, Prints, Photographs, Paintings and Drawings Librarian, Wellcome Library (16 June 2011). At the time of this correspondence no non-responders had subsequently come forward to request that material be taken down from the AIDS Posters website.

¹⁰⁸ "[T]he AIDS posters were produced not for entertainment etc but for public safety and well-being, often by artists acting gratis and pro bono at a time of crisis"; email correspondence with William Schupbach, Prints, Photographs, Paintings and Drawings Librarian, Wellcome Library (16 June 2011).

meaningful threat of litigation. It shaped its digitisation strategy accordingly.¹⁰⁹

3.4. Summary

Copyright law has a substantial impact upon institutional practices when making archival holdings available online. The perceived cost of clearing rights impacts digitisation initiatives in that the ease of copyright compliance is often an important factor in determining what materials are included within any particular project. The actual costs involved in identifying and locating rights owners, as well as in actually clearing rights, can use up scarce public sector resources with often unsatisfactory results. Moreover, the cost of securing permissions typically exceeds the actual expense of digitisation as well as the monetary value of the works in question. When rights cannot be cleared, institutions are presented with a choice of either denying access to the material online, or running the risk of possible litigation by making the material available without permission. While some institutions are willing to draw upon a risk management approach in determining their copyright policy, others are entirely risk-averse. Whether archives should feel compelled to engage in any risk management exercise when considering whether to make their collections available online is a point to which we will return. For now, we turn to the recent developments within Europe and the UK to address the specific problem of orphan works.

4. ORPHAN WORKS IN EUROPE AND THE UK

The problem posed by orphan works has been referred to a number of times already within this paper. In brief, a copyright-protected work is an orphan work if its rights owner cannot be identified or located by someone seeking permission to perform one of the exclusive rights provided for within the CDPA. There are two particular factors *intrinsic* to the copyright regime itself that contribute to works becoming orphaned.¹¹⁰ First, the international copyright regime prohibits making the subsistence of copyright contingent upon observing any formalities such as registration

¹⁰⁹ For more information on Wellcome's current approach to clearing rights (a "best endeavours approach"), as part of its digitisation programme, see 'Copyright clearance and takedown', available here: <http://wellcomelibrary.org/about-this-site/copyright-clearance-and-takedown/> (accessed: 14 March 2013).

¹¹⁰ For relevant commentary, see: van Gompel, S., "Unlocking the potential of pre-existing content: how to address the issue of orphan works in Europe?" (2007) *International Review of Intellectual Property and Competition Law* 669-702, 672-77; and Khong, D.W.K., "The (abandoned) orphan-works provision of the Digital Economy Bill" (2010) *European Intellectual Property Review*, 560-64, 560-61.

or affixing a copyright notice.¹¹¹ That is, unlike other areas of intellectual property law where the acquisition of rights turns upon mandatory registration requirements (for example, patent law), as soon as a qualifying work is created it is automatically copyright-protected. This means that reliable information about the rights owner cannot always be easily or readily acquired, and particularly so for unpublished works. The second factor is the very long duration of the copyright term. In the absence of a compulsory registration system, tracking a chain of title over a lengthy period of time can be incredibly complicated, especially given that the various economic rights provided by copyright can be separately assigned or licensed to third parties, or indeed inherited by one or more heirs (who are often unaware of their rights), that these rights may have been assigned, licensed or inherited numerous times throughout the course of the copyright term, that corporate rights owners can become bankrupt or simply go out of business, and so on. And of course, this is a problem that is compounded in the UK by the fact that for unpublished works created by an author who died before 1 January 1969 the duration of copyright lasts until 31 December 2039.¹¹²

In terms of addressing this problem, different solutions have recently been proposed within both Europe and the UK. In Europe, for example, a Comité des Sage (a Reflection Group) was established in April 2010 to provide the European Commission with a set of recommendations on bringing Europe's cultural heritage online.¹¹³ In January 2011 the

¹¹¹ Berne Convention A.5(2).

¹¹² CDPA, Schedule 1, s.12(4).

¹¹³ Within Europe the issue of orphan works has been on the European Commission's legislative agenda since September 2005 when the Commission launched its *i2010: Digital Libraries* programme to promote the preservation, digitisation, and online accessibility of material held in cultural institutions. This was followed in August 2006 by the adoption of a Recommendation on digitisation and the online accessibility of cultural content. Among other things, this Recommendation encouraged Member States to create mechanisms to facilitate the use of orphan works. The Commission also established a High Level Expert Group on Digital Libraries to provide advice on the organisational, legal and technical challenges of delivering the *i2010: Digital Libraries* agenda. This High Level Expert Group subsequently established a Copyright Subgroup charged with (again, among other things) considering the problem posed by orphan works. In October 2006 the Copyright Subgroup issued an Interim Report concluding unanimously that a solution to the issue of orphan works would be desirable, at least for literary and audiovisual works, while emphasising the importance of the interoperability of any solution adopted within the European territory. The Subgroup's Final Report was released in June 2008 providing guidance and recommendations on three key implementation issues concerning orphan works. First, confirming the principle that the use of any orphan work should be contingent upon a prior diligent search for the copyright owner, the Subgroup affirmed the importance of developing sector-specific due diligence guidelines in collaboration with relevant rights owners and cultural institutions. Second, it recommended that Member States establish a series of interlinked national databases and registries of orphan works to make it easier for users

Comité recommended that a European legal instrument be adopted as soon as possible to tackle the issue of orphan works and proffered a set of eight principles to guide the development of the same.¹¹⁴ Four months later, in May 2011, the Commission proposed a draft *Directive on certain permitted uses of orphan works* (the Orphan Works Directive). The Orphan Works Directive – one of the key initiatives in the *Digital Agenda for Europe*¹¹⁵ which forms part of the Commission’s *Europe 2020* strategy¹¹⁶ – was subsequently adopted by the European Parliament on 25 October 2012.¹¹⁷

Within the UK the *Digital Britain Report* in June 2009 promised “changes to the legislative framework around copyright licensing, to tackle

to search for and share information about such works. Third, it proposed the creation of national Rights Clearance Centres to assist and advise users on their diligent search obligations, and to licence the use of the work in question. This was followed in July 2008 with the release of the Commission’s *Green Paper on Copyright in the Knowledge Economy* the stated purpose of which was to foster debate on how knowledge for research, science and education could best be disseminated online. Noting the lack of progress on orphan works at a national level, the Green Paper suggested that a harmonized approach might be necessary within Europe. Following a public consultation on the Green Paper, the Commission launched an impact assessment to consider the development of an EU-wide solution to the problem of orphan works. For relevant details, see: Commission Communication COM (2005) 465; Commission Decision 2006/178/EC of 27 February 2006; Commission Recommendation 2006/585/EC of 24 August 2006; High Level Expert Group (HLG) – Copyright Subgroup, *Interim Report* (16 October 2006) (available at: http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/reports/copyright/interim_report_16_10_06.pdf); High Level Expert Group (HLG) – Copyright Subgroup, *Final Report on Digital Preservation, Orphan Works, and Out-of-Print Works* (4 June 2008) (available at: http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/reports/copyright/copyright_subgroup_final_report_26508-clean171.pdf); *Green Paper on Copyright in the Knowledge Economy*, COM(2008) 466; *Communication from the Commission: Copyright in the Knowledge Economy*, COM(2009) 532; European Commission Staff Working Paper, *Impact Assessment on the Cross-Border Online Access to Orphan Works*, SEC(2011) 615, available: http://ec.europa.eu/internal_market/copyright/docs/orphan-works/impact-assessment_en.pdf (accessed: 15 March 2013).

¹¹⁴ *The New Renaissance: Report of the ‘Comité des Sages’* (January 2011), available at: http://ec.europa.eu/information_society/activities/digital_libraries/comite_des_sages/index_en.htm (accessed: 15 March 2013).

¹¹⁵ *A Digital Agenda for Europe*, COM(2010) 245, available at: http://ec.europa.eu/information_society/digital-agenda/documents/digital-agenda-communication-en.pdf (accessed: 15 March 2013).

¹¹⁶ *Europe 2020: A strategy for smart, sustainable and inclusive growth*, COM(2010) 2020, available at: http://ec.europa.eu/eu2020/index_en.htm (accessed: 15 March 2013).

¹¹⁷ *Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works*, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:299:0005:0012:EN:PDF> (accessed: 5 February 2013).

problems such as those surrounding the use of so-called orphan works”.¹¹⁸ A legislative framework was put forward in December 2009 when the first draft of the *Digital Economy Act 2010* was introduced to the House of Lords,¹¹⁹ however this was dropped from the Bill as it was rushed through the House of Commons shortly after the dissolution of parliament had been announced.¹²⁰ Thereafter, the *Hargreaves Review* recommended the adoption of a mechanism to enable the licensing of orphan works,¹²¹ and in July 2012 the government once again committed to introducing such a scheme.¹²² However, before reflecting upon the substance of either the Orphan Works Directive or the government’s recent proposals, it will be useful to briefly consider the different solutions to this issue that have been proposed or adopted elsewhere.

4.1. Possible solutions to the orphan works problem

Various models have been proposed and adopted for dealing with the problem of orphan works.¹²³ Broadly speaking they can be categorised as solutions that do not require the prospective user to licence the use of the orphan work, and those that do. In relation to the former, two main legislative solutions have been proposed: a specific statutory exception that allows for the use of an orphan work, and a limitation on liability rule. In relation to the latter, again two basic models have been proposed: licensing by a public authority, or that collecting societies licence the use of

¹¹⁸ *Digital Britain: Final Report* (June 2009), 17, available at: http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/16_06_09digitalbritain.pdf (accessed: 15 March 2013).

¹¹⁹ *Digital Economy Bill* (first draft) (November 2009), clause 42. This proposed scheme would have enabled the Secretary of State to establish a licensing body (or bodies) to authorise the use of an orphan work that would otherwise require the consent of a copyright owner, a scheme which anticipated that the grant of a licence would have been conditional upon the payment of an appropriate fee; *ibid.*

¹²⁰ For relevant commentary, see Khong, 560-64.

¹²¹ *Hargreaves Review*, 8, 38-40.

¹²² HMG, *Government Policy Statement: Consultation on Modernising Copyright* (July 2012), available at: <http://www.ipo.gov.uk/response-2011-copyright.pdf> (accessed: 5 February 2013).

¹²³ For relevant discussion, see: Vetulani, A., *The Problem of Orphan Works in the EU: An overview of legislative solutions and main actions in this field* (February 2008), 8-14, available at: http://ec.europa.eu/information_society/activities/digital_libraries/doc/reports_orphan/report_orphan_v2.pdf (accessed: 15 March 2013); de la Durantaye, K., “finding a Home for Orphans: Google Book Search and Orphan Works Law in the United States and Europe” (2010-2011) *Fordham Intellectual Property, Media and Entertainment Law Journal* 229-91, 247-58.

orphan works in accordance with the principles of extended collective licensing.¹²⁴ Let us consider each of these four general approaches in turn.

4.1.1. A statutory exception for orphan works

It is often suggested that a specific exception allowing for the use of orphan works has yet to be incorporated within any legislative regime.¹²⁵ As we have already seen however the UK copyright regime does include a statutory exception in the guise of s.7(6) of the 1956 Act, a provision could possibly be relied upon to enable the dissemination of archival material online. The prospective user is neither required to search for or attempt to identify the unknown copyright owner, nor does the provision anticipate that any payment should be made for use. But, as it stands, this exception only extends to unpublished literary, dramatic and musical works, only for work that is more than 100 years old, and only if the author has died more than 50 years before. Moreover, there is little evidence to indicate that this provision is actually actively relied upon within the archival community, or indeed by any other relevant sector within the UK.

4.1.2. A statutory provision limiting liability for use

For a model based upon limiting liability for use, it is useful to draw upon the *Report on Orphan Works* issued by the US Copyright Office in January 2006. After concluding that the orphan works problem was real, albeit difficult to quantify and describe comprehensively, the US Copyright Office recommended the introduction of statutory provision limiting the remedies available against those making use of an orphan work. The proposal was intended to apply to the use of all types of copyright-protected orphan work, published as well as unpublished,¹²⁶ although it would become inapplicable once an owner came forward or was subsequently located.¹²⁷ Under the proposal, following a reasonably diligent search for the rights owner, a user would benefit from a limitation on the remedies available against him for his use of the orphan work in two ways: in relation to monetary and injunctive relief.

¹²⁴ For a discussion of other suggested solutions to the orphan works problem, see van Gompel, 678-99.

¹²⁵ Vetulani, 14 (“[A] model based on limitation or exception to copyrights, does not function for the moment in any legislation.”)

¹²⁶ US Copyright Office, *Report on Orphan Works: A Report of the Register of Copyrights* (January 2006) 101-102, available at: <http://www.copyright.gov/orphan/orphan-report-full.pdf> (accessed: 15 March 2013).

¹²⁷ As the Report sets out: “[T]he primary goal of this study is to prompt owners and users to find each other and commence negotiation – it is *not* intended to allow use of works in disregard of the owner’s wishes after that owner has been found”; *ibid.*, 97.

First, any award of damages for use would be limited to reasonable compensation only – in effect, a reasonable licence fee, which might in certain circumstances amount to a low or zero royalty. Of particular interest to the library and archive sector was the further recommendation that an additional limitation on monetary relief be introduced where the user is making non-commercial use of the work and ceases the infringement after receiving notice from the rights owner. In these circumstances, the Report concluded, “there should be no monetary relief at all”.¹²⁸ However, this was tempered by the further suggestion that if and when a copyright owner resurfaced, should the relevant institution wish to continue making use of the work it should have to pay reasonable compensation for both its *past and future* use, rather than just future use.¹²⁹ Second, the availability of injunctive relief would be limited in two ways. Where the orphan work has been incorporated into a derivative work (for example, using orphan photographs within a published book, or basing a film upon an orphaned novel) then an injunction would not be available to prevent the exploitation of the derivative work, provided that the user pays reasonable compensation to the rights owner.¹³⁰ In all other cases, full injunctive relief would be available to prevent the continued use of the work subject to the court mitigating any unnecessary hardship upon the user in question.¹³¹

Following these recommendations legislation was proposed in both 2006 and 2008 providing for the introduction of a new section, s.514, in Chapter 5 of the *Copyright Act 1976* (concerning infringement and remedies),¹³² but without success.¹³³ More recently, in the wake of the

¹²⁸ *Ibid.*, 118. The Report continues: “Libraries, archives and museums indicated that posting material on the Internet was a primary use they would like to make of orphan works, and that they would take down any material if a copyright owners resurfaced. This additional provision provides certainty about their exposure in that circumstance. If the organization wishes to continue making use of the work, it would have to pay reasonable compensation for its past use, and, as described below, for future use of the work”.

¹²⁹ *Ibid.*, 118.

¹³⁰ *Ibid.*, 120.

¹³¹ *Ibid.*, 120-21. The Report gives the example of a user who had printed 10,000 copies of a book that have yet to be sold, in which case the injunction might be tailored to allow the user to sell his existing copies but not to print or publish any more; *ibid.*

¹³² See: Orphan Works Act of 2006, H.R. 5439, 109th Cong. (2006); The Copyright Modernization Act of 2006, H.R. 6052, 109th Cong. (2006); Orphan Works Act of 2008, H.R. 5889, 110th Cong. (2008); and the Shawn Bentley Orphan Works Act of 2008, S.2913, 110th Cong. (2008).

¹³³ For relevant commentary, see Aaron, J., “The *Authors Guild v. HathiTrust*: A way forward for digital access to neglected works in libraries” (2012) *Lewis & Clark Law Review* 1317-47, 1323-24.

decision in *Authors Guild v. HathiTrust* (2012),¹³⁴ the US Copyright Office has launched a new review of the issue of orphan works under US copyright law. In particular, the Copyright Office is seeking views on the continued viability of the limited liability model with respect to the occasional and case-by-case use of orphan works, as well as potential solutions to the orphan works phenomenon within the context of mass digitisation initiatives.¹³⁵

¹³⁴ *Authors Guild v. HathiTrust* (SDNY, 10 Oct. 2012) 11 CB 6351 (HB). The *HathiTrust* case concerned an action taken by a consortium of individuals and associational organisations alleging the unauthorised reproduction and distribution of books owned the defendants. The defendants consisted of a group of university research libraries who, in 2008, formed a partnership named HathiTrust. The partnership was established with the aim of creating a centralized, comprehensive database of the member libraries' digitised copies of books in their collections. Initially, these digital copies were produced in collaboration with the Google Books project, but HathiTrust now also collaborates with the Internet Archive and Microsoft, as well as developing digitisation initiatives in-house. In addition, four of the HathiTrust libraries established an *Orphan Works Project*, led by the University of Michigan Library (see: <http://www.lib.umich.edu/orphan-works/faq> (accessed: 14 March 2013)). The *Orphan Works Project* was designed to "identify and make available to University students, faculty and library patrons full copies of so-called 'orphan works'"; *Authors Guild v. HathiTrust*, 3. The process to determine which works would be included in the project involved deciding whether a work was commercially available, and if not, attempting to contact the rights owner. If that proved unsuccessful HathiTrust would then list the bibliographical information for the work on their Orphan Candidates webpage for 90 days, after which time the work would become available for "full view" for University of Michigan students, staff and other authenticated users and visitors to libraries across the University of Michigan's campuses. In the *HathiTrust* decision, Baer J held that digitising works for the purposes of preservation ("the protection of the Defendant's fragile books"), to provide enhanced search capabilities, and, most importantly, to enable access for the print-disabled ("the unprecedented ability of print-disabled individuals to have an equal opportunity to compete with their sighted peers"), constituted fair use under s.107 of the US *Copyright Act* 1976. The case did not, however, decide upon the lawfulness of HathiTrust's *Orphan Works Project*. Shortly after the claimants filed their original complaint the University of Michigan suspended the *Orphan Works Project* (the procedures used to identify orphan works apparently allowed a number of works to appear on the project's Orphan Works list in error), and at the time of writing the project remains in suspension. That said, the complainants sought a declaration from the court that digitisation pursuant to the *Orphan Works Project* at some point in the future would constitute infringement. Baer J rejected the claim as "not fit for adjudication". He continued: "Were I to enjoin the OWP, I would do so in the absence of crucial information about what the program will look like should it come to pass and whom it will impact ... If and when that time comes, [the claimants] can request relief"; *Authors Guild v. HathiTrust*, 11. For information about HathiTrust, and further commentary on the case see: HathiTrust Digital Library, "Welcome to the Shared Digital Future", available at: <http://www.hathitrust.org/about> (accessed: 14 March 2014); and, Aaron, "The *Authors Guild v. HathiTrust*", 1318-20. For a general critique of the relevance of the *HathiTrust* decision for US-based orphan works digitisation initiatives, see Aaron, *ibid*.

¹³⁵ US Copyright Office, "Orphan Works and Mass Digitization: A Notice by the Copyright Office, Library of Congress on 10/22/2012", available at:

4.1.3. Licensing by a public authority

Canada adopted this model as a solution to the orphan works phenomenon in 1988.¹³⁶ When a prospective user has made a reasonable but unsuccessful effort to locate a rights owner he can apply to the Canadian Copyright Board for a licence to make use of the orphan work.¹³⁷ This legislative provision extends only to published works and sound recordings, as well as fixed communication signals and performances.¹³⁸ Licences granted under this provision are non-exclusive, limited to the territory of Canada alone, and subject to such terms and conditions as the Board see fit.¹³⁹ They are also conditional upon payment of a licence fee set by the Board which is generally ordered to be paid directly to the collecting society that would ordinarily represent the untraceable copyright owner.¹⁴⁰ The copyright owner can recover the fee up to five years after the licence granted by the Board has expired. Thereafter the

<https://www.federalregister.gov/articles/2012/10/22/2012-25932/orphan-works-and-mass-digitization> (accessed: 14 March 2013).

¹³⁶ Similar systems have been adopted in a number of other jurisdictions, including: South Korea (art.50 of the 1957 *Copyright Act* (as amended) provides that the Minister of Culture and Tourism can authorise the use of published orphan works); Japan (art.67(1) of the 1970 *Copyright Law* (as amended) provides that the Commissioner of the Agency for Cultural Affairs can grant a compulsory licence to make use of a published orphan work); India (s.31A of the 1957 *Copyright Act* (as amended) provides that the Indian Copyright Board can direct the Registrar of Copyrights to grant a compulsory licence for the use of published *and unpublished* orphan works); and, Hungary (A.57 of the 1999 *Copyright Act* (as amended) enables the Hungarian Patent Office to grant compulsory licences to make use of orphan works for a maximum period of five years). For a discussion of the orphan works regimes in Canada, Japan, India and Hungary see Favale, M., Kretschmer, M, and Mendis, D., “The Treatment of Orphan Works under Copyright Law in Seven Jurisdictions: A comparative review of the underlying principles” (2012) (unpublished Research Paper on file with the authors). In the UK, the CDPA operates this model in very limited circumstances: the Copyright Tribunal may, upon the application of a person wishing to make a copy of a recording of a performance, give consent to make such a copy where the identity or whereabouts of the person entitled to the reproduction right cannot be ascertained by reasonable inquiry (s.190).

¹³⁷ Canadian Copyright Act 1985 C-42, A.77. The Board can only grant licences for the various activities set out in ss.3, 15, 18 and 21 of the 1985 Act. For recent analyses of the Canadian orphan works scheme, see de Beer, J., and Bouchard, M., *Canada’s “Orphan Works” Regime: Unlocatable Copyright Owners and the Copyright Board* (December 2009), available at: <http://www.cb-cda.gc.ca/about-apropos/2010-11-19-newstudy.pdf> (accessed: 15 March 2013), and Favale, Kretschmer and Mendis, 30-37.

¹³⁸ A.77(1).

¹³⁹ A.77(2).

¹⁴⁰ While the Copyright Board has rejected the argument that a reasonable fee for using an orphan work might be set at zero, it has not always required that a licence fee be paid in advance; de Beer and Bouchard, 24-25.

collecting society is free to use any unclaimed funds for the benefit of its members.¹⁴¹

The Canadian regime has been criticised on account of the wide discretion that s.77 confers upon the Copyright Board (both to grant licences and to set licence terms and conditions), for being administratively burdensome, for omitting unpublished works from its remit,¹⁴² for involving collecting societies in the licensing process, and, more generally, for delivering little in the way of actual public benefit.¹⁴³ In relation to the later, it is certainly true that the Copyright Board has issued relatively few licences with respect to the use of orphan works. Indeed, at the time of writing, since the introduction of this scheme only 274 applications have resulted in a determination by the Copyright Board; of these, 266 licences have been granted,¹⁴⁴ and 8 have been denied.¹⁴⁵ That said, applications are often withdrawn or abandoned because the copyright owner has been found with the help of the Copyright Board. Moreover, a single application may contain a request to licence multiple copies of orphan works. So, for example, whereas by the end of 2009 the Copyright Board had only dealt with 421 applications under s.77, these applications related to more than 12,500 different works.¹⁴⁶

4.1.4. Extended collective licensing (ECL)

¹⁴¹ A.77(3). See also: Copyright Board Canada, *Unlocatable Copyright Owners Brochure* (July 2001), available at: <http://www.cb-cda.gc.ca/unlocatable-introuvables/brochure1-e.html> (accessed 22 April 2012). In practice, the Board permits collecting societies to make use of these orphan work licence fees from the outset, provided that the society guarantees to compensate the copyright owner within the relevant statutory period; de Beer and Bouchard, 26.

¹⁴² As already stated, s.77 applies to published works and sound recordings, and fixed communication signals and performances. Fixation however is obviously not the same as publication. In this respect s.77 does extend to certain unpublished works in that a performance or a communication signals may have been fixed but may never have been made available to the public. See de Beer and Bouchard, 12.

¹⁴³ See for example the comments in the US Copyright Office's *Report on Orphan Works*, 83, 114. See also: British Screen Advisory Council, *Copyright and Orphan Works: A Paper Prepared for the Gowers Review by the British Screen Advisory Council* (2006), 11, available at: http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/gowers_review_index.htm (accessed: 15 March 2013), and the various criticisms considered in de Beer and Bouchard, 9-31.

¹⁴⁴ For details, see: <http://www.cb-cda.gc.ca/unlocatable-introuvables/licences-e.html> (accessed: 6 February 2013).

¹⁴⁵ For details, see: <http://www.cb-cda.gc.ca/unlocatable-introuvables/denied-refusees-e.html> (accessed: 6 February 2013).

¹⁴⁶ de Beer and Bouchard, 32 (although at different times in their report de Beer and Bouchard also claim that the total number of files opened by the Copyright Board is either 411 or 441).

Recital 10 of the European Commission’s 2006 Recommendation on the online accessibility of cultural material suggests that licensing mechanisms should be promoted in close cooperation with rights owners to address problems such as orphan works. First developed in the Nordic countries in the 1960s to facilitate the mass licensing of copyright-protected works within the broadcasting sector,¹⁴⁷ the concept of extended collective licensing (ECL) provides one such mechanism.¹⁴⁸ It turns upon a voluntary transfer of rights from rights owners to a collecting society combined with a legal extension of the repertoire of the society to encompass rights owners that are not members of that society.¹⁴⁹ That is, an organisation that collectively manages the interests of a substantial number of rights owners is given a statutory mandate to grant licences to prospective users on behalf of rights owners who have not formally agreed to be represented by the organisation.¹⁵⁰ The extended collective licence applies to all rights owners in the given field, whether domestic or foreign, deceased, and unknown or untraceable.¹⁵¹ Rights owners who are not formally represented by the organisation can only subsequently claim remuneration for the use of their work against the organisation, and not the end user.¹⁵² Typically, although not always,¹⁵³ rights owners who are not members of the collecting society can opt out of the system such that they will not be covered by any licence granted by the collecting society. In this way, ECL avoids becoming a form of compulsory licensing that might

¹⁴⁷ Riis, T., and Schovsbo, J., “Extended Collective Licences and the Nordic Experience: It’s a Hybrid but is it a Volvo or a Lemon?” (2009-2010) *Columbia Journal of Law and the Arts* 471-98, 473-76. In Denmark ECL is now relied upon for mass licensing in a number of different areas, including: reproduction within educational institutions or by business enterprises; recordings of works in broadcasts for the visually impaired; broadcasts by certain national Danish TV companies; broadcast by certain national TV companies of works in their archives; cable retransmission to more than two connections; and, digital reproduction by libraries. *Ibid.*, 474. See also Koskinen-Olsson, T., “Collective Management in the Nordic Countries”, in Gervais, D., ed., *Collective Management of Copyright and Related Rights*, 2nd ed. (The Netherlands: Kluwer Law International, 2010), 283-306.

¹⁴⁸ For others, see van Gompel, 686-91.

¹⁴⁹ Gervais, D., “Collective Management of Copyright: Theory and Practice in the Digital Age”, 21, in Gervais, *Collective Management of Copyright*, 1-28.

¹⁵⁰ For example, s.16(a) of the Norwegian *Copyright Act* 1961 provides that archives, libraries and museums “can make copies of published works in the[ir] collections and make such works available to the public if the conditions of the extended collective licence pursuant to section 36 first paragraph are fulfilled”.

¹⁵¹ Although ECL was not initially developed to address the orphan works phenomenon it does largely eliminate the problem which orphan works present, at least within the jurisdiction to which the ECL applies.

¹⁵² That is, upon the grant of a licence, the user can make use of the work safe in the knowledge that they will not be sued for copyright infringement.

¹⁵³ Riis and Schovsbo, 476, n.13.

otherwise violate well established principles of the international copyright regime.¹⁵⁴

From the user's perspective, the obvious advantage of this model is that the relevant collecting societies effectively become a one-stop shop for licensing the use of large numbers of works without the need to negotiate with individual rights owners, and, with respect to orphan works, without the need to engage in a reasonable or diligent search for their owners.¹⁵⁵ For a cultural institution embarking upon a mass digitisation project, given the time and costs involved in searching for rights owners and clearing rights this would be a considerable gain. However there are two important aspects of ECL to bear in mind. First, with respect to the work of unrepresented rights owners the operation of ECL is necessarily territorial in nature. That is, the relevant collecting society can only grant permission for the use of these works within its own national jurisdiction. As Ringnalda puts it, "[j]ust as with exceptions and limitations, the effect of an extended collective licence is limited to the territory of the country under whose laws it was granted".¹⁵⁶ Second, relying upon a licence granted by a collecting society might prove to be equally costly in the long run, in that traditionally these licences do not differentiate between the charge for using an orphan work and the charges that apply to the rest of the works subject to the licence.¹⁵⁷ This is based upon the rationale that the commercial rates negotiated on behalf of members of the collecting society will *prima facie* be acceptable to rights owners who are not members, given the society's mandate to manage the interests of a large number of rights owners seeking to exploit the same

¹⁵⁴ For a discussion of this and other aspects of the extent to which ECLs are compliant with international copyright norms, see Riis and Schovsbo, 481-95.

¹⁵⁵ For a discussion of the way in which the Danish copyright legislation regulates the use of orphan works by way of ECL, see Favale, Kretschmer and Mendis, 16-21.

¹⁵⁶ Ringnalda, A., "Orphan Works, Mass Rights Clearance, and Online Libraries: The Flaws of the Draft Orphan Works Directive and Extended Collective Licensing as a Solution" (2011) *Medien und Recht International* 3-10; see also Riis and Schovsbo, 498.

¹⁵⁷ In this regard, reference is often made to the Norwegian National Library's Bokylla project (<http://www.nb.no/bokhylla>). The project involved making more than 50,000 in-copyright books available online, all of which were licensed under an ECL agreement at €0.067 per page per year, whether the work was orphan or not. Scaling these costs up to account for the estimated total number of orphan books within Europe, the European Commission has estimated that treating orphan works in the same way as non-orphan works would result in an annual cost of around €1.625bn to make Europe's orphan books available online; *Impact Assessment (Orphan Works)*, 27-28. Given the potential costs involved in making all types of orphan works available online under a traditional form of ECL, and the fact that many owners of orphan works may never reappear to lat claim to their copyright, it is reasonable to question whether the same (or even similar) commercial rates should apply to both orphan and non-orphan works. And certainly, the scale of these anticipated costs appears to have been one of the influential factors in shaping the proposed *Orphan Works Directive* and its rejection of the ECL model; *Impact Assessment (Orphan Works)*, 27-28 (for further discussion, see below).

type of work.¹⁵⁸ To licence the use of works by non-members on different terms and conditions would otherwise undermine the legitimacy of the ECL model. As a consequence however cultural institutions may find that they are paying to make use of materials for non-commercial purposes that rights owners – if asked – might ordinarily be willing to permit for free.¹⁵⁹

The fact that the user need no longer conduct a diligent search does not necessarily mean that this responsibility is taken up by the relevant collecting society. In this respect relying upon a system of ECL administered by collecting societies gives rise to an obvious potential conflict of interest between rights owners that are members of the organisation and the unidentified owners of orphan works. Why, for example, would a collecting society invest any significant time or effort in identifying and locating the owners of orphan works when the consequence of identifying fewer owners means that more money in unclaimed fees can be applied for the benefit of its existing members? And this is of particular concern to foreign copyright owners whose work is licensed under an ECL scheme. Aside from the obvious practical difficulties of discovering whether one's work has been licensed for use in another jurisdiction by an unfamiliar collecting society, as Riis and Schovsbo point out, the actual allocation policies of collecting societies operating ECL schemes often do not result in *any* remuneration being paid to foreign rights owners.¹⁶⁰ The fact that, in practice, domestic rights owners are

¹⁵⁸ Foged, T., "Licensing schemes in an on-demand world" (2010) *European Intellectual Property Review* 20-28, 22.

¹⁵⁹ In relation to making payment for the use of orphan works in mass digitisation projects, Vuopala notes that the issue of paying remuneration generally arises only when cultural institutions are negotiating for use with collecting societies. By contrast, "when institutions have contacted the authors directly most of them have not claimed any remuneration "because they value the fact that their works would be accessible for teaching and educational purposes""; Vuopala, 14. See also the comments of Dame Lynne Brindley on digitisation initiatives undertaken by the British Library: "Much of this type of material is of high educational value, but low or no commercial value – we find that once people understand the project is free and it is for universities a 'royalty fee' is the last thing on their mind"; Brindley, L.J., "Phoenixes in the internet era – the changing role of libraries", in Bently, L., Suthersanen, U., Torremans, P., eds, *Global Copyright: three hundred years since the Statute of Anne, from 1709 to cyberspace* (Cheltenham: Edward Elgar, 2010), 176-86, 180.

¹⁶⁰ Riis and Schovsbo, 491. Riis and Schovsbo raise an additional concern in that a well-established feature of the collective administration of copyright is that a certain percentage of all royalties collected by the organisation on behalf of its members (typically 10 per cent) are applied for the collective benefit of those members. This practice also extends to use of funds generated under an ECL scheme. On this point, the authors comment as follows: "In principle, the practice of withholding a share of the royalties for collective purposes contravenes the rule on national treatment in the Berne Convention insofar as foreign rights holders do not benefit from the collective purposes

treated more favourably than foreign owners raises obvious questions about whether ECL schemes are compliant with the principle of national treatment as set out in the Berne Convention. Within Europe, similar questions can be asked about compliance with A.18 of the Treaty on the Functioning of the European Union which prohibits any direct or indirect discrimination on the grounds of nationality.¹⁶¹

4.2. The Orphan Works Directive

As previously noted, on 25 October 2012 the European Parliament adopted the Orphan Works Directive.¹⁶² Under the Directive a work will be considered orphan if “none of the rightholders in [the work] is identified or, even if one or more of them is identified, none is located despite a diligent search for the rightholders having been carried out”.¹⁶³ A diligent search must be carried out for each work prior to the use of that work, but need only be carried out in the Member State where the work was first published or broadcast.¹⁶⁴ This is because the Directive operates a principle of the mutual recognition of orphan works throughout the single market. That is, a work that is considered an orphan work in one Member State is deemed to be an orphan work in all Member States.¹⁶⁵ To facilitate

... Nevertheless, the practice is widespread and generally accepted due to the prevalence of the practice (at least in continental Europe).”; *ibid.*, 492.

¹⁶¹ Treaty on the Functioning of the European Union, 2010 OJ (C83), A.18 (“Within the scope of the application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on the grounds of nationality shall be prohibited”).

¹⁶² *Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works*, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:299:0005:0012:EN:PDF> (accessed: 5 February 2013).

¹⁶³ A.2(1).

¹⁶⁴ This is subject to an exception concerning cinematographic or audiovisual works when the producer of the work in question has his headquarters or habitual residence in a Member State: in this case, the diligent search must be carried out in the Member State of the producer’s headquarters or habitual residence; A.3(3). Moreover, if there is evidence to suggest that relevant information on rightholders is to be found in other countries, then relevant sources of information available in those other countries should also be consulted; A.3(4).

¹⁶⁵ A.4. This principle of mutual recognition offers two advantages. First, it identifies a single relevant jurisdiction in which the diligent search is most conveniently carried out (subject to the proviso concerning joint authors from different Member States set out in A.3(3)). Second, it ensures that there is no need to duplicate the diligent search in any other EU Member State. See: *Impact Assessment (Orphan Works)*, 20.

the operation of this principle of mutual recognition, records of all diligent searches carried out within a given territory should be provided to a relevant, competent national authority,¹⁶⁶ and each Member State is to ensure that that information is subsequently recorded in a single publicly accessible online database to be established and managed by the Office of Harmonization in the Internal Market (OHIM).¹⁶⁷ The fact that a work has been designated an orphan does not however mean that it will always be considered so. The Directive requires that Member States ensure that a rightholder in a work considered to be orphan is afforded the possibility of putting an end to the work's orphan status.¹⁶⁸

Once a work has been designated orphan, the Directive requires Member States to provide for an exception or limitation enabling certain permitted uses of that work under Article 6(1). Under this provision publicly accessible libraries, educational establishments, museums, archives, film and audio heritage institutions and public service broadcasting organizations, established in Member States, shall be permitted to use orphan works contained within their respective collections¹⁶⁹ in the following ways: (i) communicating the work to the public, including making it available online;¹⁷⁰ (ii) copying the work for the purposes of digitisation, indexing, cataloguing, preservation, restoration and making the work available.¹⁷¹ Article 6(2) makes clear that the designated organisations are only permitted to make use of orphan works in order to achieve aims related to their public interest missions, "in particular the preservation of, the restoration of, and the provision of cultural and educational access to works and phonograms contained in their collection".¹⁷² That said, the Directive does provide that relevant organisations may generate revenues in their use of orphan works "for the

¹⁶⁶ A.3(5). The records required to be maintained include: (a) the results of the diligent searches that the organisations have carried out and which have led to the conclusion that [the work] is considered an orphan work; (b) the use that the organisation made of the orphan work in accordance within the Directive; (c) any change (in accordance with A.5 of the Directive) of the orphan work status of work that has been used; (d) the relevant contact information of the organisation concerned; *ibid.*

¹⁶⁷ A.3(6).

¹⁶⁸ A.5.

¹⁶⁹ The scope of the Directive extends *only* to orphan works held within the collections and archives of these designated organisations; A.1(2).

¹⁷⁰ A.6(1)(a) provides that relevant organisations are permitted to make the orphan work available to the public "within the meaning of Article 3 of Directive 2001/29/EC [the Information Society Directive]". A.3(1) of the Information Society Directive provides authors with the exclusive right "to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them".

¹⁷¹ A.6(1)(b).

¹⁷² A.6(2).

exclusive purpose of covering their costs of digitising orphan works and making them available to the public”.¹⁷³

While certain aspects of the Directive are to be welcomed, when considered from the perspective of the archive sector, it is unsatisfactory in a number of key respects. In the first place, as set out in A.1(2), the scope of the Directive applies only to the use of books, journals, newspapers, magazines and other writings, as well as phonograms, cinematographic and audiovisual works. Immediately apparent is that free-standing artistic works such as maps, drawings, plans, and photographs do not fall within the compass of the Directive.¹⁷⁴ And while estimates concerning the scale of the problem of orphaned visual and artistic materials can vary quite dramatically,¹⁷⁵ their omission from the Directive represents a rather obvious shortcoming.

The Commission’s Summary of the Impact Assessment is revealing as to the reason for omitting artistic works from the Directive: “[I]t would be extremely difficult to identify the owners of entire collections of

¹⁷³ A.6(2).

¹⁷⁴ The Directive does however provide that it extends to “works and other protected subject-matter that are embedded or incorporated in, or constitute and integral part of, the [works listed in A.1(2) and (3)]”; A.1(4).

¹⁷⁵ For example, a survey conducted by CEPIC of the commercial picture archives specialising in historic material reported that 50% of archives answered that orphan works comprise less than 10% of their stock, whereas 20% of respondents estimated that orphan works comprise between 20-30% of their stock; Fodor, S., *Results of CEPIC Survey on Orphan Works in Historical Archives* (September 2011), 4, available at: http://cepic.org/news/cepic_news/2011/10/results_cepic_survey_orphan_works_historical_archives (accessed: 12 February 2013). By contrast, in a study conducted by The National Archives in 2009 it was found that for works registered for copyright protection between 1883 and 1912, only 5% of the rights owners were traceable for 80,000 images still in copyright; cited in Vuopala, 30. Similarly, the *Gowers Review* (at 69) estimated that of 19 million photographs held in 70 cultural institutions throughout the UK, the percentage of photographs for which the author is known (other than for fine art photographs) is no more than 10 per cent; that said, the reliability of this estimate has been called into question by the authors of the CEPIC report (they write (at 4) as follows: “At the moment, there is very little statistically-valid data available about orphaned visual material ... As no study has investigated these issues in depth, some related reports vase their findings on false or inconsistent assumptions. For example, some reports point to the UK’s Gower [*sic*] Review of 2006 and state that rights holders of the image collections in museums could be identified in only 10% of the cases. This is not the case. In fact, the original survey carried out by the Museums Copyright Group learned that museums, libraries and archives estimate a figure that is the reverse of this conclusion – i.e. that only some 5-10% of their collections might be termed true ‘orphan works’”). For other estimates concerning orphaned visual material, see IPO, *Orphan Works, Impact Assessment No. BIS1063* (June 2012), 10, available at: <http://www.ipo.gov.uk/consult-ia-bis1063-20120702.pdf> (accessed: 7 February 2013) (which, for example, reports that 25% of 500,000 pieces of artwork held by the National History Museum in London is orphan, as are 25% of the prints and drawings held in the London Metropolitan Archive).

photographs whose provenance is unknown. The lack of attribution or other identifying information makes diligent search particularly difficult. Moreover, the technology to carry out visual searches as compared to text based searches is not as highly developed and is very costly”.¹⁷⁶ That is, conducting a diligent search for the owners of artistic works is likely to be much more difficult and more costly than is the case for (published) literary works, films, and so on. No doubt this is true, and particularly so for photographs which often do not carry any information about either the authorship or the copyright ownership of the work. But aren't these exactly the circumstances under which we should be making it easier for cultural institutions to make use of such works? When tracking down copyright owners is likely to prove particularly troublesome and costly, and which in turn is likely to preclude such works being made available online?¹⁷⁷

Second, the extent to which the Directive applies to unpublished works – which make up an extremely significant proportion of archival holdings – is qualified in a rather unhelpful manner. The Directive makes clear that it applies to the works referred to in A.1(2) “which have never been published or broadcast but which have been made publicly available by” a relevant organisation; however, this is subject to the proviso that “it is reasonable to assume that the rightholders would not oppose the uses referred to in Article 6”.¹⁷⁸ But when will it be reasonable to make such an assumption? We know that archivists find copyright law complicated and confusing and that they worry about the potential consequences of (real or perceived) infringement; we also know that archives are, typically, risk-averse institutions. Will they be prepared to assume consent (or, rather, a lack of opposition) on the part of a copyright owner that cannot be identified or located? Can one make a reasonable assumption as to the state of mind of a copyright owner, when one does not know who that copyright owner is? For instance, in Akmon's analysis of the rights clearance process for the Cohen Research Collection he reports that commercial copyright owners were much more likely to refuse permission to digitise and display than non-commercial owners.¹⁷⁹ Indeed, when the item in question had at least one commercial copyright owner the likelihood of being refused permission increased by a staggering

¹⁷⁶ *Impact Assessment (Orphan Works)*, 1, n.1.

¹⁷⁷ It is worth noting, however, that the Commission has been charged with keeping under review the possibility of extending the scope of the Directive to include “stand-alone photographs and other images”; A.10.

¹⁷⁸ A.1(3).

¹⁷⁹ Akmon categorises the 1,377 copyright owners, whose permission was being sought, into six different groups: individuals; non-profit organisations; government bodies; educational institutions; professional associations and societies; and, commercial and corporate entities (such as pharmaceutical companies, corporate laboratories, and publishers); Akmon, 53.

9000%.¹⁸⁰ What then, for example, if the archival material in question consists of the business records of a commercial entity that has ceased trading or can no longer be located? What should an archivist be prepared to assume? As we have seen, the work of Dryden, Hudson and Kenyon, and others, confirms that archives and archivists are generally inclined to withhold access to digital content where copyright issues cannot be explicitly and definitively resolved; when faced with the uncertainty inherent in determining the applicability of the Directive to unpublished works, archives may simply choose to select material for digitisation that present fewer problems (or allows for greater certainty) with respect to copyright compliance.

Third, is the issue that making use of any work under the Directive is necessarily contingent upon conducting a diligent search. Imposing a mandatory search in all circumstances is likely to seriously frustrate the implementation of mass digitisation projects, and particularly in relation to archival collections. The transaction costs involved in carrying out diligent searches for each and every work to be digitised are likely to prove prohibitive for cultural heritage institutions. Korn puts it as follows: “[d]ue diligence is ... time consuming, resource intensive and may not be realistically practical for large-scale digitisation activities”.¹⁸¹ Stratton is more direct: “[the] rights clearance of works on an individual item by item basis is unworkable in the context of mass digitisation”.¹⁸² It may be that, in time, initiatives such as ARROW will make the mass clearance of rights more achievable and efficient by way of automated diligent search,¹⁸³ but, perhaps necessarily, they will almost always be geared to facilitating rights clearance for (commercially) published material.¹⁸⁴ As such, their value to

¹⁸⁰ Akmon, 59-61.

¹⁸¹ Korn, *In from the Cold*, 13. See also: McCausland, S., “Googling the Archives: Ideas from the Google Books Settlement on Solving Orphan Works Issues in Digital Access Projects” (2009) *SCRIPT-ed* 377-93, 382 (“Diligent search models may work reasonably well to balance the interests of owners and users in the case of one off “adoptions” where the user is well resourced with plenty of time, but they are clearly a compromise of interests which do not adequately address the needs of large scale users in the digital environment”); as well as the comments of the National Library of the Netherlands that “a title by title search is not feasible for large scale digitisation projects”, and advocating a solution for the mass digitisation of orphan works “which does not require a diligent search on a per-work basis” (reported in Vuopala, 16).

¹⁸² Stratton, 5.

¹⁸³ The ARROW system, funded by the EU, is a network of databases and rights registries designed to enable the identification and rights clearance of works to support mass digitisation throughout Europe. The project represents a collaboration between libraries and rightsholders groups to find technological solutions to the challenges presented by clearing rights for mass digitisation projects. For further details, see: www.arrow-net.eu (accessed: 7 February 2013), and Stratton, *Seeking New Landscapes*.

¹⁸⁴ Primarily, the ARROW project was concerned with published books. It was designed to enable libraries to request permission to digitise a book (or books) within their

the archive community will be limited. Indeed, in their feasibility study on the diligent search of image rights conducted as part of the ARROW initiative, Ibbotson et al recommend that when digitising specialised collections that include unpublished and private material “project managers would be very much better employing specialist professional picture researchers to identify and locate Image Works Authors, and to identify and locate other right holders in such works”.¹⁸⁵ While the Directive was still in draft form, the cultural heritage sector called for a more balanced and practical solution to this issue, warning that strictly adhering to a requirement of diligent search in all circumstances would result in a Directive that delivered very little benefit with respect to large scale digitisation initiatives.¹⁸⁶ Unfortunately that warning went unheeded.

And finally, with respect to rightholders that put an end to the orphan work status of their work under A.5, the Directive requires that Member States shall provide them with “fair compensation” for the use that has been made of their work under A.6.¹⁸⁷ The Directive leaves it for each Member State to determine the level of compensation to be awarded, as well as “the circumstances under which the payment of such compensation may be organised”.¹⁸⁸ The crucial question for the archive

collections by providing its own catalogue record for the relevant item(s) concerns. That information was then checked against relevant data held by The European Library (TEL), as well as various “books in print” databases (in the country of publication) and Reproduction Rights Organisations (collecting societies). ARROW-plus is a network project that builds on the original ARROW initiative by increasing the number of countries in which ARROW is used, as well as broadening the type of works for which it is used. In relation to the integration of image searches within the ARROW system, the focus of ARROW-plus has been on images that are embedded in, or appear on the cover of, published books. For details, see: Ibbotson, J., et al, *D6.2 Feasibility Study on diligent search of image rights* (October 2012), available at: https://www.globalcube.net/clients/evartists/content/medias/D6.2_Feasibility_study_images.pdf (accessed: 12 February 2013).

¹⁸⁵ *Ibid.*, 31.

¹⁸⁶ Guibault, L., “Cultural heritage institutions concerned over proposed European orphan works directive” (23 February 2012), available at: <http://kluwercopyrightblog.com/2012/02/23/cultural-heritage-institutions-concerned-over-proposed-european-orphan-works-directive/> (accessed: 15 March 2013).

¹⁸⁷ A.6(5).

¹⁸⁸ *Ibid.* On this point, the preamble to the Directive provides as follows: “Rightholders that put an end to the orphan work status of a work or other protected subject-matter should receive fair compensation for the use that has been made of their works or other protected subject-matter under this Directive, to be determined by the Member State where the organisation that uses an orphan work is established. Member States should be free to determine the circumstances under which the payment of such compensation may be organised, including the point in time at which the payment is due. For the purposes of determining the possible level of fair compensation, due account should be taken, inter alia, of Member States’ cultural promotion objectives, of the non-commercial

community is what should be understood by the concept of “fair compensation”? Without doubt, few archival institutions will have either the appetite or the budget to pay copyright fees (of any kind) to make their holdings available online. Once again, Dryden’s research on the digitisation of archival materials is illuminative. Of the 154 archival repositories that she canvassed, only six respondents reported that they had ever paid a licence fee to a copyright owner to make a document available online.¹⁸⁹ But also, copyright fees are not typically sought for this type of non-commercial use, and permission is rarely refused. In Dryden’s study only three respondents reported that permission had ever been declined, whereas just nine respondents reported that a copyright owner had ever asked for royalties or a licence fee.¹⁹⁰ In Akmon’s study, permission to digitise and display was explicitly denied for only 5% of the copyright-protected items in the collection (that is, 294 of 5,463 works).¹⁹¹ The Michigan University Library – the organisation undertaking the digitisation project – did not offer payment to digitise and display; moreover, the Library was asked by just one of the 1,377 copyright owners approached to pay a copyright fee (the Library refused, and the owner subsequently granted permission).¹⁹²

These are, of course, just two studies but they capture an experience that, we suspect, is typical of archival digitisation initiatives throughout the UK and elsewhere: rarely are archives willing or able to pay copyright fees to digitise and display their holdings, and rarely are fees sought by copyright owners who grant archives permission to make their work available online (and this is especially true for rightholders who are non-commercial entities). Any compensation scheme implemented within the UK that does not take cognisance of the commercial (or rather, the non-commercial) realities of archival digitisation is likely to render the new Directive largely irrelevant to the archive sector. Put another way, if the archive sector is to benefit meaningfully from the implementation of the Directive, “fair compensation” must often be interpreted to mean *no compensation*. This is not as controversial as it may, at first blush, sound: the idea that fair compensation might equate with no compensation is

nature of the use made by the organisations in question in order to achieve aims related to their public-interest missions, such as promoting learning and disseminating culture, and of the possible harm to rightholders” (para.18).

¹⁸⁹ Dryden, *Copyright in the Real World*, 185.

¹⁹⁰ *Ibid.*

¹⁹¹ Moreover, permission was expressly denied for less than 4% of the items without a commercial copyright owner; Akmon, 59-61.

¹⁹² *Ibid.*, 52.

already a well-established principle of the European copyright law regime.¹⁹³

4.3. Orphan works and the *Consultation on Modernising Copyright*

Within the UK the need for a legislative solution to the orphan works phenomenon was recommended by both the *Gowers Review*¹⁹⁴ and the *Hargreaves Review*,¹⁹⁵ and the issue has most recently been taken up in the government's *Consultation on Copyright*. In December 2011 that *Consultation* proposed a twin-track approach to the licensing of individual orphan works and situations of mass licensing,¹⁹⁶ a proposal that currently being developed as part of a bundle of legislative reforms set out in the *Enterprise and Regulatory Reform Bill*.¹⁹⁷ That is, with respect to approving individual uses of orphan works, the government are making provision for the establishment of an independent authorising body to licence the use of such works after a diligent search has been carried out. In addition, the legislation will enable voluntary extended collective licensing in the UK for the first time which licences – where they are available – will necessarily extend to the use of orphan works.¹⁹⁸ In effect, this is a hybrid solution that

¹⁹³ The Information Society Directive provides (at Recital 38) that: “In certain cases of exceptions or limitations, rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter. When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question ... *In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise*” (emphasis added). For a discussion of the concept of fair compensation in the context of private copying, see: Kretschmer, M., *Private Copying and Fair Compensation: an empirical study of copyright levies in Europe* (London: IPO, 2011).

¹⁹⁴ *Gowers Review*, 71.

¹⁹⁵ *Hargreaves Review*, 39.

¹⁹⁶ *Consultation on Copyright*, 18-19, 32.

¹⁹⁷ Relevant documentation and debates about the current iteration of the *Enterprise and Regulatory Reform Bill* can be found here: <http://services.parliament.uk/bills/2012-13/enterpriseandregulatoryreform.html> (accessed: 14 February 2013); for the proposals regarding orphan works and extended collective licensing, see Part VI, clause 69.

¹⁹⁸ Although the Intellectual Property Office's Impact Assessment on ECL (concluded six months after the *Consultation on Copyright* was published) makes the point that “Extended Collective Licensing is not proposed as a specific policy solution for orphan works”, it continues as follows: “[B]y its nature an ECL will include all works within the scope of an authorisation (whether the copyright owner is traceable or otherwise, and except for any works which are opted out). However, on this basis it is likely that some

draws upon both the Nordic and the Canadian models discussed above, but one that will operate to complement the UK's obligations under the *Orphan Works Directive*.

What is notable about the scope of the government's proposal, by contrast with the proposed *Orphan Works Directive*, is that it anticipates that all types of copyright protected work (including free-standing artistic works) will fall within the scheme, both published and unpublished, and that it will enable commercial as well as non-commercial uses of orphan works.¹⁹⁹ Also notable is the way in which the government has proposed to square the circle of diligent search in mass licensing situations. While recognising that requiring a diligent search in advance of licensing would defeat the objective of an efficient rights clearance procedure such as ECL, the *Consultation on Copyright* recommends that the requirement of a prior search should be replaced with a search *ex post facto*. That is, if at the end of a rights clearance procedure by way of ECL the relevant collecting society discovers that it has cleared rights for the use of orphan works then the collecting society will be obliged to conduct a search for the authors of those works.²⁰⁰ Obviously this approach offers the end user the benefit of not having to conduct any searches prior to use, and in a way that addresses previous criticisms that have been levelled at ECL as a mechanism for dealing with orphan works (discussed above). However, it does simply transfer the transaction costs involved in executing a diligent search to the collecting society and, without doubt, those additional transaction costs will be passed on to the individuals and organisations seeking to clear rights under an ECL scheme in the guise of increased fees. Indeed, it is the potential financial costs involved in clearing rights to make use of orphan works under the government's hybrid solution that may prove most troublesome for the cultural heritage sector in general.

Although the reasoning for introducing an orphan works scheme within the *Consultation* makes reference to the fact that orphan works present a "significant problem for organisations such as archives" and that the public is missing out on "the benefits of access to potentially important cultural and scientific works", the underlying rationale for the introduction of the orphan works scheme rests squarely upon commercial considerations. For example, the *Consultation* stresses that "commercial opportunities appear to be being missed", that the orphan works problem

orphan works will be cleared for use through Extended Collective Licences to the extent that such licences are available"; IPO, *Extended Collective Licensing (ECL), Impact Assessment No. BIS1054* (May 2012), 3-4, available at: <http://www.ipso.gov.uk/consult-ia-bis1054-20120702.pdf> (accessed: 7 February 2013).

¹⁹⁹ HMG, *Government Policy Statement: Consultation on Modernising Copyright* (July 2012), 7-9.

²⁰⁰ *Consultation on Copyright*, 38.

“results in a missing market”,²⁰¹ and that the key principles underpinning the proposals include “[m]inimising market distortion between orphan and non-orphan works” as well as “maximising the benefits to economic growth”. It continues that the government will only introduce a scheme “if absent rights holders are adequately protected”, that such protection must include “making due provision for remuneration for right holders”, and that at all times any remuneration for use “should be at market rate”.²⁰² True, the government has acknowledged that setting a market rate for works “not created for publication” will not be straightforward,²⁰³ and that any fee structure implemented by the authorising body should be proportional to the intended use.²⁰⁴ Without doubt, though, the emphasis in all of this lies in extracting commercial value from orphan works whatever their nature or origin. But, is it appropriate to commercialise the orphan works (or indeed other non-orphan material) held in archival collections in this way at all? One of the striking features about all of the recent reviews of the UK copyright regime – the *Gowers Review*, the *Hargreaves Review* and the *Consultation on Copyright* – is the extent to which they treat libraries and archive collections, and library and archival functions, as largely analogous. And yet, as should already be apparent from much of our commentary and analysis thus far, library and archival collections are two very different phenomena. In the concluding section of this paper we briefly consider some of the differences between library and archival collections and begin to map out an argument for the differential treatment of libraries and archives within the copyright regime with respect to mass digitisation initiatives.

5. COPYRIGHT AND ARCHIVES IN THE 21ST CENTURY: AN AGENDA FOR REFORM

Previously we noted that clearing rights for mass digitisation projects can impose prohibitive burdens upon publicly funded cultural institutions while often delivering less than satisfactory results. We also noted that the various costs involved in both digitising collections and clearing rights with respect to those collections tend to present a much heavier burden to the archive sector than to the library sector, and for one very obvious reason: archives tend to have much larger collections than other cultural institutions, including libraries. In a similar vein, a greater proportion of archival collections are made up of orphan works, when compared with

²⁰¹ *Ibid.*, 16-17.

²⁰² *Ibid.*, 19, 27. See also the discussion of this issue in HMG, *Government Policy Statement: Consultation on Modernising Copyright* (July 2012), 7-9.

²⁰³ HMG, *Government Policy Statement: Consultation on Modernising Copyright* (July 2012), 8.

²⁰⁴ IPO, *Orphan Works, Impact Assessment No. BIS1063* (June 2012), 5.

libraries, museums and other cultural institutions.²⁰⁵ That archives typically house more orphan works than libraries should not surprise given the fundamentally different nature of archival and library collections. Whereas library collections are largely made up of commercially published material, archival collections are principally concerned with the unique records produced by organisations, families, and individuals during their day-to-day activities or business. And while these records have extraordinary social, cultural, academic and historic worth, they are rarely created for the purpose of commercial exploitation, often have little or no intrinsic commercial value, and so typically remain unpublished at the time of deposit with the archive.²⁰⁶ Indeed, archival holdings are naturally prone to the so-called *orphan works paradox*: that is, the lower the commercial value of a work the less likely it is that the owner can be found to grant permission, which in turn means that the least commercially valuable works generate the highest transaction costs in terms of searching for the owner in attempting to clear rights.²⁰⁷

It is because archival holdings predominantly consist of unpublished material with very little intrinsic commercial value that an argument for the differential treatment of archives and libraries within the copyright regime begins to take shape. In effect, the UK government's solution to the problems posed by the mass licensing of copyright protected content is a market-driven response. ECL is being trailed as the appropriate mechanism for facilitating mass digitisation initiatives, both for orphan and non-orphan works. Within the context of the cultural heritage sector, one can certainly argue that ECL is an appropriate mechanism for facilitating the digitisation of library collections (given the essentially commercial nature of those collections), but is it appropriate for archival collections? We do not think so for two reasons: one practical, the other normative. First, we question whether the market will – or

²⁰⁵ Korn, *In from the Cold*, 18.

²⁰⁶ In its response to the Hargreaves consultation, the National Archives put this issue as follows: "Archives face a particular problem in this area, since they hold works that, for the most part, were not created with any awareness of copyright: private and business letters, for instance, are usually created to communicate information to the recipient. There are many millions of such work in archives throughout the UK and the prospect of identifying and tracing the owners of rights in them is, in all but a tiny majority of cases, very unlikely"; *Review of Intellectual Property and Growth: Response to the call for evidence by The National Archives* (2011), 3.

²⁰⁷ Stratton puts it as follows: "[A] myriad of reasons can cause works to become orphaned, from people moving away to firms going out of business and as time passes the risk increases. It would seem, however, that the more personally produced and distributed or the less commercial the publication is, the greater that risk becomes a reality. This greatly affects the possibility of digitising collections in libraries archives and museums because as public interest institutions the hold a huge range of works which are not commercially published or, in the case of archives, not published as all"; Stratton, 41.

indeed can – ever actually provide a means for facilitating ECL with respect to archival collections. As discussed above, the general principle underpinning the viability of ECL is that the collecting society seeking to extend its repertoire by means of ECL must already represent a substantial number of rights owners in a relevant field or sector. But, without an appropriate, representative body there can be no ECL, and there is no collecting society currently operating within the UK that represents (or could represent) even a very small proportion of the rights owners that hold rights in the type of copyright-protected material typically held in archival collections; that is: unique, unpublished records produced by organisations, families, and individuals during their day-to-day activities or business. The government have made clear that ECL schemes will be introduced only on a voluntary basis, noting that “it is reasonable to assume that a collecting society will apply for an ECL licence only if it is a commercially viable decision”.²⁰⁸ But given the nature of archival collections – largely unpublished material with very little intrinsic commercial value – will ECL ever be commercially viable?

Second, the UK’s copyright regime is fundamentally predicated upon an incentive-based rationale. That is, the law guarantees authors time-limited economic (and moral) rights in the work that they create as a way of incentivising creative and intellectual endeavour. And yet, part of what makes archival holdings so valuable – in evidentiary terms – is their organic nature. Put another way, the very existence of these documents and records rarely (if ever) turns upon the promise or expectation of future commercialisation activities. Whatever role the copyright regime might play in incentivising the creation of cultural and intellectual works that provide the bedrock of the creative industries (and reliable, robust evidence for that role is limited in itself), it plays little if any role in incentivising the creation of the types of work that typically populate archival collections within the UK. That being the case, why should archives be compelled to treat these materials as commodities at all? This is not to say that there are no opportunities for commercialising archival collections. Of course there are. This is simply to say that when archives and archivists wish to engage in digitisation activities with a view to making their archival collections available online for non-commercial purposes they should not be required to clear rights or pay copyright fees in relation to the same. What archives and archivists need is a copyright regime that takes the risk as well as (some of) the financial burden out of the way in which they deliver on their public interest mission. What archives and archivists need is a safe harbour.

The implementation of a safe harbour for cultural institutions when making their archival collections available online would be straightforward: it should take the form of a limitation on liability rule

²⁰⁸ IPO, *Extended Collective Licensing (ECL), Impact Assessment, 2.*

similar to that proposed by the US Copyright Office as a solution to the orphan works phenomenon. This limitation on liability rule however should extend to all types of archival holdings, whether orphan or not. More specifically, a statutory provision would provide that the remedies available against cultural institutions digitising and making work available online without the prior authorisation of a copyright owner should be limited to injunctive relief only. Damages or any other form of monetary relief would not be available. This safe harbour should apply to unpublished archival material, but not to material that has been commercially published.²⁰⁹ Also, it should only apply to archival material made available online for non-commercial purposes.²¹⁰ Should an archive wish to engage in commercialisation activities with respect to any of its archival holdings, then clearing rights should be the order of the day.

Moreover, this safe harbour provision should be subject to two important exceptions: (i) If at the time of deposit the copyright owner expressly provides that the material being deposited should not be made available online without their consent, then the safe harbour provision should not apply; (ii) If after deposit the institution in question receives an express notice from the copyright owner that the material should not be made available online then the safe harbour provision should not apply.²¹¹ In the latter situation, if the institution has already made the material available online then, upon the receipt of a notice from the copyright owner, the institution must take down the material within a reasonable period of time. And finally, it should be stressed that this safe harbour would not extend to subsequent users of material made available online. Where copyright continues to apply, the economic interests of copyright owners should not be compromised in relation to any subsequent use of their material: their prior authorisation for any subsequent use would still be required.

At present, the copyright regime is not fit for purpose with a view to enabling archivists to deliver on the aspirations of the strategic vision set out in *Archives for the 21st Century*. Moreover, the current proposals for reforming the copyright regime – both within Europe and the UK – will do little to improve the situation in any meaningful way. What is needed is an agenda for reform that is responsive to the manner in which library and

²⁰⁹ There is no reason why archives should not be required to clear rights for commercially published material in the same way as libraries and other cultural heritage institutions.

²¹⁰ It should also extend to the activities of partners of cultural institutions that are assisting in any way to make this material available online for non-commercial purposes.

²¹¹ In this case, the express notice from the copyright owner should also contain a good faith statement on the part of the copyright owner as to how and why the institution making the archival material available online for non-commercial purposes is damaging the copyright owner's economic interests.

archival collections differ both in nature and scope, one that does not tether the public's access to archival collections to the vagaries of the market, and one that enables cultural institutions to make their archival holdings available online within a simple, straightforward and easily understood copyright framework. The policy recommendation mapped out above provides just such a framework.

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