

Report 3

Current Best Practices among Cultural Heritage Institutions when Dealing with Copyright Orphan Works and Analysis of Crowdsourcing Options

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Enhancing access to 20th Century cultural heritage
through Distributed Orphan Works clearance



EnDOW

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EXECUTIVE SUMMARY

Object of the study

The purpose of this study is to establish the current state of best practices among Cultural Heritage Institutions (CHIs) when dealing with in-copyright orphan works in three countries: the United Kingdom, the Netherlands and Italy. A baseline understanding of current practice will provide a benchmark, against which crowdsourcing (or any other proposal) to address the challenge posed by orphan works, can be evaluated. The research team used a purposive sample to approach the 'Big 3' national libraries and film archives in each country, typically including the national library, the national archive and the national film archive. The researchers also aimed to include at least one institution from each jurisdiction that had used the EUIPO database, and one institution that digitized orphan works but opted not to use the database. 15 CHIs are included in the study. A semi-structured interview format was used to gather qualitative and quantitative data about the CHIs, their collections, their diligent search processes, the results rights clearance for specific digitization projects, their thoughts on the potential of crowd-sourcing as a solution, and their views on the current legislative framework.

Readiness to engage with orphan works and regulatory requirements

Even within a small sample of institutions, there is wide variance in the level of readiness to engage with orphan works across the CHI sector, from expert-level engagement and high-volume use of the EU IPO database, through CHIs who actively avoid digitizing orphan works, to those who digitize orphan works and make them available online on a risk-assessed basis, without using the available legal mechanisms. Rights clearance remains expensive and ranges considerably depending on the nature of the work and the approach taken by the institution. There is continued uncertainty regarding the scope of the Directive and the diligent search requirements, and views on these uncertainties differ across institutions. This suggests that even where high levels of expertise are available, when interpretation of the legislation diverges, different institutions will implement the legislation in different ways, and best practices will diverge accordingly.

Potential of crowd-sourcing as a solution

The interview data shows that the decision to engage with the EU exception or, in the case of the UK, with the Orphan Works Licensing Scheme (OWLS), was frequently expressed as an economic calculus. To succeed, crowdsourcing must do two things: firstly, offer increased benefits to institutions beyond current practices, and secondly, avoid imposing unreasonable knowledge or integration costs on the institutions involved. Readiness to engage in crowdsourcing diligent search is influenced by these economic factors, but also partially by reputational concerns. Some respondents voiced scepticism that crowd-generated diligent searches would adequately withstand external scrutiny, and preferred to maintain control over decisions about orphan work status for that reason. However, other participants responded positively to the concept, suggesting potential volunteers, and emphasising the positive aspects of rights research and the impact it can have in CHIs and on users.

PART I

1. INTRODUCTION

1.1 Report context

The purpose of this report is to establish the current state of best practices among Cultural Heritage Institutions (CHIs) when dealing with in-copyright orphan works in three countries: United Kingdom, Netherlands and Italy. The context of this research is the European Commission's Joint Programming Initiative Heritage Plus project, 'Enhancing access to 20th Century cultural heritage through Distributed Orphan Works clearance (EnDOW)'.¹ The objective of the funded work has been to design and implement a prototype crowdsourcing platform to assist CHIs in performing diligent search for rightsholders as required under the European Orphan Works Directive ([2012/28/EU](#)). In order for any crowdsourcing solution to be effective, the platform must succeed against two criteria. First, crowdsourcing must offer increased benefits to institutions beyond current practices, which typically involve having diligent search performed by trained archivists or other professional employees of CHIs; second, in order to be successful, a crowdsourcing solution should not impose unreasonable knowledge or integration costs on institutions that choose to implement the technology. Such costs relate to requirements to train staff, re-organise workflows and provide technical support for the platform. The current report is intended to provide a baseline understanding of current practice, against which to evaluate crowdsourcing (and indeed any other proposal) to address the challenge posed by orphan works.

The report proceeds by first describing the legal and technical background for treatment of orphan works in CHIs and explaining the methodology used in this study. In sections 2-4, the report presents results of interviews with professional archivists in 15 institutions (5 each in the UK, Netherlands and Italy). These interviews provide insight into previous practice, costs of rights clearance work and technical readiness for crowdsourcing. Where available, detailed cost breakdowns for previous digitization efforts are presented. Section 5 contains a short discussion of the overall position of CHIs in the three countries and the sector's response to EU Directive 2012/28/EU. Policy and technical recommendations are discussed.

1.2 Background: Orphan works and CHIs

Reduction in the cost of digitization has made it possible for cultural heritage institutions to preserve, share and enhance the contents of their collections. Wider adoption of participatory cultural practices invites engagement by CHIs, whose mandates include taking an active role in

¹ See EnDOW project page, <http://diligentsearch.eu/about/>

contemporary social trends.² The paradoxical availability of affordable digital tools alongside restrictions imposed by copyright law, places CHIs in a difficult position. The European Commission defined the problem succinctly in the following manner:

“Orphan works pose a problem because libraries, which are legally obliged to obtain prior authorization for making works available to the public online, are unable to locate and contact the relevant rightsholders. In these circumstances, libraries that make material available online without prior authorization from rightsholders risk being sued for copyright infringement. The potential for infringement is more acute in cases of mass-digitization projects given their large scale.³

One rationale outlined in the European Commission’s impact assessment, which explored regulatory solutions to the orphan works problem, was that Europe ‘lagged behind’ other jurisdictions in text and data mining, because materials that would otherwise be available to European citizens were not being digitized.⁴ Other motivations for a policy solution include the promotion of culture and societal cohesion through shared heritage, preservation of deteriorating 20th Century records, and stimulating technological investment in the arts and creative industries. Empirical research has shown unequivocally that the costs of dealing with copyright are high, and in many cases have prevented the digitization of partial or entire collections.⁵ Searching for rightsholders introduces transaction costs⁶, and in many cases a rightsholder cannot be found or will not respond, making it impossible to request a license. Furthermore, CHIs face risks when digitizing collections, extending across the ‘chain’ of an exhibition’s life from inception to display. These include risks related to selection of material, public relations, re-emergence of rightsholders, software design and dealing with rightsholder requests.⁷

The regulatory response took the form of European Directive 2012/28/EU on certain permitted uses of orphan works. The Directive introduced a specific and narrowly-drawn exception for the use of copyright orphan works by cultural heritage institutions. The Directive pertains to certain types of works (phonograms, films, printed works and embedded works) and only covers use by cultural heritage institutions as defined in the Directive. There is a requirement to carry out a diligent search for rightsholders prior to use, and registration in a central database of orphan works.

² See E Giaccardi, Introduction: Reframing heritage in a participatory culture. In *Heritage and social media: Understanding heritage in a participatory culture*, 1-10.

³ European Commission Impact Assessment on the cross-border online access to orphan works accompanying the document ‘Proposal for a directive of the European Parliament and of the Council on certain permitted uses of orphan works,’ at 48 COM (2011) 289 final, SEC (2011) 616 final (24 May 2011).

⁴ *Ibid.* p. 7.

⁵ See Stobo, V., Patterson, K., Erickson, K. and Deazley, R. (2018) “‘I should like you to see them some time:’ An empirical study of copyright clearance costs in the digitization of Edwin Morgan’s scrapbooks,’ *Journal of Documentation*, 74(3), pp. 641-667, <https://doi.org/10.1108/JD-04-2017-0061>

⁶ See Sonia Baldia, *Transaction Cost Problem in International Intellectual Property Exchange and Innovation Markets*, 34 NW. J. INT’L L. & BUS., 23 (2013).

⁷ See M Borghi, K Erickson, M Favale, "With Enough Eyeballs All Searches Are Diligent: Mobilizing the Crowd in Copyright Clearance for Mass Digitization." *Chi.-Kent J. Intell. Prop.* 16 (2016): 135.

Having been adopted by Member States relatively recently, there is an opportunity to evaluate the impact of the Orphan Works Directive on the practices of CHIs in the jurisdictions concerned. The present report represents the first multi-territorial undertaking of qualitative research with CHIs to evaluate their response since the introduction of the legislation.

1.3 Methodology and sample

Cultural heritage practices differ across sectors and across national contexts, where goals, funding environments and policies may substantially diverge. At the same time, Directive 2012/28/EU requires that Member States create an exception for specific kinds of orphan works, subject to a requirement that users perform a 'diligent search' for rightsholders and register their search with the EU IPO prior to use. As previously established, specific details of what constitute a diligent search, in particular the list of sources which must be consulted, varies significantly between Member States.⁸

Given the vast range of practices across institutions as well as the range of requirements in national law, the research team sought a methodology that would yield useful data for comparison, while being flexible enough to account for significant cultural and institutional variation. We therefore settled on a semi-structured interview method, with a guided component that asked respondents to provide cost estimates for a recent example of a specific digitization effort. By collecting structured data across institutions and territories, it was hoped to generate not only qualitative understanding of the sources of costs, but also some quantitative basis for evaluating the effects of proposed technical solutions.

Following a research team meeting in Glasgow in 2017, it was decided to approach five institutions from three countries: Italy, Netherlands and UK. A purposive sample was used to focus on at least the 'Big 3' national libraries and film archives in each country. These would typically include: The national library, the national archive and the national film archive (if separate from the national archive) of each country.

The researchers also aimed to include at least one institution from each jurisdiction that had used the EUIPO database, and one institution that digitized orphan works but opted not to use the EUIPO database. If no institutions had used the database (such as the case in certain countries) the focus was on representing the sector as a whole: e.g. a small local history institution, a medium-sized specialist archive, and a large university library. The purpose in selecting diverse organisations was not to ensure 'coverage', since total coverage was impossible given the resources of the project. Rather, the purpose was to study collection strengths to evaluate whether institution type or collection strengths influence approaches to orphan works.

Table 1 contains the list of institutions included in the study. It should be noted that it was not always possible to interview equivalent institutions across the three countries. For example, in the case of Italy, there were difficulties accessing an appropriate respondent from the National Archives.

⁸ See A Bertoni, F Guerrieri, and ML Montagnani, 'Report 2: Requirements for Diligent Search in 20 European Countries.' (2017) EnDOW Project Report. Accessed online: <http://diligentsearch.eu/wp-content/uploads/2017/06/REPORT-2.pdf>

Orphan works remain a sensitive topic for institutions because of the perceived legal risk in handling them. Some institutions preferred not to engage at all with the Orphan Works database in order to avoid incurring costs or perceived legal liability.

Table 1: Sample of institutions by country

	UK	Netherlands	Italy
1)	National Records of Scotland	Nationaal Archief	Festivaletteratura di Mantova
2)	National Library of Scotland	Stadsarchief Rotterdam	National Central Library of Florence
3)	British Film Institute	Institute of Sound and Vision	Cineteca di Bologna
4)	British Library	Koninklijke Bibliotheek	Istituto Luce Cinecitta
5)	National Library of Wales	Eye Film	Vigamus (Video Game Museum)

Interviews were carried out by three members of the research team. All interviewers were trained on the interview protocol (see Annex A). The content of interviews focused on three main lines of questioning: 1) the overall resources and technological readiness of the institution, 2) time and resources spent on a recent digitization effort, and 3) engagement with the orphan works exception or other legal options, and the benefits/costs of doing so.

In terms of local resources, the research team queried collections managers about the number or portion of full-time employed (FTE) staff and their roles, as well as the overall size of collections managed by the CHI. We also recorded managers' reported perception about knowledge of copyright within institution and the level of confidence in dealing with rights clearance. When providing examples of recent digitization efforts, managers were asked to report in standard units of hours of staff time for creation of item level metadata, hours of staff time for auditing the rights status of the collection, hours of staff time for copyright search and clearance, upload of data/processing, IPO application fees (as well as other licensing fees, etc.). These results are reported for each country in Sections 2-4 below. In keeping with previous empirical work carried out prior to the Directive, we also asked about the percentage of works where rightsholders were eventually located, or did not respond.⁹ In terms of their interaction with legal options, we asked whether institutions engaged with the exception provided by Directive 2012/28/EU. Many respondents had not yet made use of the exception, for various reasons explained in sections 2-4

⁹ See for example Dickson, M. (2010), "Due Diligence, Futile Effort", *The American Archivist*, 73(2), pp. 626-636; Akmon, D. (2010), "Only with your permission: how rights holders respond (or don't respond) to requests to display archival materials online", *Archival Science*, 10(1), pp. 45-64; As summarized in Stobo et al (2018) "I should like you to see them some time" An empirical study of copyright clearance costs in the digitization of Edwin Morgan's scrapbooks. *Journal of Documentation*, 74(3), 641-667.

below. We additionally asked UK institutions if they had engaged with the Orphan Works Licensing Scheme (OWLS) available to them nationally. For all institutions, we asked whether they had engaged with official or unofficial extended collective licensing (ECL) schemes, such as those offered by some authors' collecting societies. Finally, to help evaluate the feasibility of a crowdsourcing option, the researchers asked all respondents whether they could identify a suitable community of users that might be able to assist with diligent search.

We acknowledge certain limitations with the methods used in this report. Firstly, the coverage is partial, owing to the intensive nature of the qualitative research design. The three territories (UK, Italy and Netherlands) were chosen for their particularity in terms of national implementation of the Directive, rather than for representativeness. Within countries, the sample of CHIs is likewise partial and reflects the goal of coverage rather than representativeness. Certainly, smaller institutions including municipal and regional archives are largely missing from this analysis. The impact of copyright orphan works for smaller and non-traditional CHIs is an under-studied problem and warrants closer analysis.¹⁰ Comparison between institutions is hindered by the specificity of collections and archival methods. To a large extent, institutional practices influence the cost of rights clearance. Ambiguity in the wording of national implementations of the Directive leads to differing practices and expectations between institutions. Some institutions have not engaged with the orphan works exception at all. We have tried to mitigate these shortcomings by using a structured interview format and comparable units of analysis between responding institutions. We hope that this approach will be complementary to future studies carried out in different national and institutional contexts.

The following section reports the results of interviews summarised for each of the three territories and follows a standard reporting format.

¹⁰ However, See Stobo (2018) Doctoral Dissertation for an analysis of the UK cultural heritage landscape.

PART II

2. UNITED KINGDOM

2.1 Overview of the selected institutions¹¹

The UK institutions selected for the study were: the British Library (BL), the National Library of Wales (NLW), the National Library of Scotland (NLS), the National Records of Scotland (NRS) and the British Film Institute Archive (BFI).¹² While there is a clear skew in this sample in favour of library institutions, the national libraries of the UK hold a large variety of works, including both library and archive materials, and generally have more resources at their disposal to engage with orphan works. This diversity was complemented by the collection specialism of the BFI, and the traditional archive perspective offered by NRS.

These five institutions are amongst the largest cultural heritage institutions in the UK, all with a remit to collect the intellectual and creative output, and official records of the country: whether through legal mandate or through wide-ranging collecting policies. Indeed, the British Library is the largest library in the world, established in 1972 with a collection of over 150 million items,¹³ and the stated purpose of building, curating and preserving the 'UK's national collection of published, written and digital content.'¹⁴ The British Film Institute National Archive was founded in 1933 and collects UK moving image heritage and materials relating to film, including posters, scripts and publicity materials.¹⁵ The National Libraries of Wales and Scotland were established in 1907 and 1925 respectively, and are the legal deposit libraries for their nations, collecting Welsh and Scottish history, culture and intellectual output. The National Records of Scotland was formed in 2011 from the merger of the General Register Office for Scotland and the National Archives of Scotland. NRS is a department of the Scottish Government and collects and preserves 'information about Scotland's people and history and make[s] it available to inform current and future generations.'¹⁶

Given the focus on national institutions, the research team found that the selected institutions were generally well-resourced, especially when compared to the rest of the UK cultural heritage sector,

¹¹ This section provides a summary of the answers given to Q1 (Describe your organisations resources (number of FTE staff, part-time staff, funding, collections, etc.)); Q2 (What are the resources currently available to conduct rights clearance in your organisation? How many work on rights clearance or copyright issues? At what level would you rate their copyright knowledge? Have you spent any funds on training or guidance resources? Have you hired staff based on their experience of dealing with copyright? Please provide details); and Q3 (Can you describe an example of a collection(s) that you digitized or wished to make digitally available? It is OK to use an example of a failed or abandoned digitization effort).

¹² The respondents were: Ben White at the BL, Dafydd Tudur at NLW, Fred Saunderson and Ines Byrne at NLS, Susan Corrigan at NRS, and Annie Shaw at BFI.

¹³ British Library (2018) Facts and Figures, available at <http://www.bl.uk/aboutus/quickinfo/facts/> [Accessed 22nd March 2018]

¹⁴ British Library (2017) *Annual Report 2016-2017*, p.7, available at <http://www.bl.uk/aboutus/annrep/>

¹⁵ <http://www.bfi.org.uk/archive-collections>

¹⁶ National Records of Scotland (2018) *About us* [Webpage] available at <https://www.nrscotland.gov.uk/about-us>

with budgets in the range of £10-100M.¹⁷ The institutions each employ large numbers of workers, ranging from 400 to over 1000 members of staff, yet the provision of staff dedicated to intellectual property issues is generally low. Knowledge of and responsibility for copyright tends to be distributed thinly across the institutions. Staff whose role involves some elements of rights management in addition to their main duties are often spread across different departments, and the provision of dedicated staff fluctuates according to demand. This tended to be similar across the institutions: most only had 1 or 2 FTE staff focused on higher-level or institution-wide elements of intellectual property management, and this was often combined with other responsibilities.

For example, the respondents from NLS noted that they have one Rights and Information Manager in post, but that this tends to involve providing copyright advice and formulating policy rather than carrying out rights clearance. Instead, curators might manage rights clearance for specific requests in their own departments, as the larger digitization projects that NLS have pursued tend to involve materials that do not present rights issues (public domain materials, or those where NLS owns or has been assigned the rights). NLS have a licensing team of 2 FTE for their film collections, but film is unique in this regard: other collection types do not have dedicated licensing teams, and licensing would be the responsibility of the access teams and curators involved. They have taken steps to automate some their copyright decision-making processes through the use of rights metadata, and their accessions teams cover copyright in detail at the deposit stage.

Similarly, the BL respondent stated that resources for engaging staff in rights clearance tended to be project specific. He also observed that “...the organisation has realised that... employing staff project by project by project is extremely inefficient for various different reasons. We’re now going to have a central [digitization] team, and I did bid for a full time rights clearance person in that team, but it wasn’t successful.” This suggests that rights clearance may not be perceived as a strategic need, even in larger, national institutions which tend to have the largest budgets in the UK CH sector.

The largest provision of dedicated staff was found in the British Film Institute and their Rights and Contracts department, with 7-8 FTE permanent staff working on both archive clearance (licensing in) and commercial licensing (licensing out). This reflects the specialised nature of British Film Institute collections, and the commercial reality of the film industry. However, even the BFI respondent reported that other staff members, including senior management, had to be persuaded to resource the rights clearance challenge presented by the Unlocking Film Heritage project. Table 2 presents an overview of income, collection strengths, funding sources, staff levels, and the digitization projects featured in this report.

¹⁷ Consistent statistics for funding levels across all UK cultural heritage sectors are not available, but it is a reasonable assumption that funding levels will fluctuate across the cultural heritage sector: from small community-led museums, libraries and archives, through local government services, to specialised university collections, to the largest national institutions. Of course, funding is relative: the institutions featured here preserve enormous collections, with large buildings to maintain and high numbers of staff to pay.

Table 2: Overview of institutions in the sample

Institution	2016/17 income (£)	Collection Strengths	Funding Sources	No. of staff	No. of staff on rights	Digitization project
National Records of Scotland¹⁸	28.4M	Scottish history from the 12 th -21 st century; government records	Grant-in-Aid, Trading Activities	408	0.5FTE; other staff may occasionally deal with copyright	N/A
National Library of Scotland¹⁹	26.6M	25M items: published works, manuscripts, maps and film; 200km of works	Grant-in-Aid, Donations and Legacies, Charitable Activities, Investments, Trading Activities	317	2-3FTE; other staff may occasionally deal with copyright	Publisher collection (not identified at NLS request)
British Film Institute²⁰	95.7M	British Film, in all genres and formats	Commercial revenue, Grant-in-Aid, National Lottery	c.500	7-8 FTE	Unlocking Film Heritage
British Library²¹	118M	150M+ items: published works, manuscripts, newspapers, national sound archive, legal deposit;	Grant-in-Aid, Service Provision, Investment income, Voluntary income	c.1000	3 FTE; fluctuates depending on projects and other staff may deal with copyright	Discovering Literature
National Library of Wales²²	12.2M	Legal deposit; published works; manuscripts; film; video;	Grant-in-Aid; donations and legacies; trading activities; investment income	223.4	1FTE; other staff may occasionally deal with copyright	Cymru 1914: The Welsh Experience of WWI

¹⁸ Income, funding sources and staff numbers taken from National Records of Scotland (2017) *Annual Report and Accounts 2016/17*, available at <https://www.nrscotland.gov.uk/files/about-us/nrs-annual-report-and-accounts-2016-17.pdf>.

¹⁹ Income, funding sources and staff numbers taken from National Library of Scotland (2017) *Annual Review 2016-17*, available at <https://www.nls.uk/media/1529565/2016-2017-annual-review.pdf>.

²⁰ Income, funding sources and staff numbers taken from British Film Institute (2017) *Annual Report and Financial Statement 2016/17*, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/641435/170717_BFI_Annual_Report_and_Financial_Statements_2016-17_FINAL.pdf.

²¹ Income, funding sources and staff numbers taken from British Library (2017) *Annual Report and Accounts 2016/17*, available at <https://www.bl.uk/aboutus/annrep/2016-17/Annual%20Report%202016-2017.pdf>.

²² Income, funding sources and staff numbers taken from National Library of Wales (2017) *Annual Accounts 2016-17*, available at <https://www.library.wales/about-nlw/governance/corporate-documentation/>.

The digitization projects featured in this section ranged from mass digitization efforts at the British Film Institute (Unlocking Film Heritage) and the National Library of Wales (Welsh Experience of WWI) to smaller, 'boutique' digitization projects at National Library of Scotland (the publisher collection) and the British Library (Discovering Literature). National Records of Scotland were unusual in terms of the respondents, in that they had avoided digitizing any orphan works material at all.

The Unlocking Film Heritage project (2012-2017) was funded by the National Lottery: 5000 films from the BFI National Archive were digitized, with a further 5000 films from both regional and national archives across the rest of the UK, and commercial partners. The majority of the 10,000 films are available free-to-view online through the BFI Player. The films cover 50 themes, including Britain on Film, Commonwealth Tales, Suffragettes on Film, and LGBT Britain.²³

Cymru 1914: The Welsh Experience of the First World War was a JISC-funded digitization project which brought together collections from institutions across Wales, and collections held by NLW, revealing the 'often hidden history of the First World War as it impacted all aspects of Welsh life, language and culture.'²⁴ 10 partner institutions contributed collections to the project, and each partner was responsible for the management of the rights in those collections. The digitization involved some published and audio-visual works, but the majority of the collections were composed of archival records, e.g. the Welsh Army Core archive, which consisted of over 100,000 images once digitized. In total, NLW have made almost 1.3M records available online through this project.

NLS digitized their publisher collection at the request of the publisher. "The driving force was that the actual publisher approached us. And their primary reason was to make these materials as widely accessible as possible. In the physical world their collections would be accessed by a relatively limited subscription-based membership, and they were really keen to widen that. And understanding that they wouldn't have the means to do that themselves." NLS digitized over 180 volumes from the collection, which are now available online through the NLS website.

The Discovering Literature project at BL '...brings to life the social, political and cultural context in which key works of literature were written.' Covering 700AD to 2016, over 3000 works of literature were digitized and made available online.²⁵ The collection features works by Woolf, Plath, Orwell, Shakespeare, Chaucer, Dickens, Austen, and Wilde, including notes, drafts and other supplementary materials. The resource also features specially-developed teaching packs for the English and Welsh national curriculum.

As a national archive, NRS have been able to focus on crown copyright and public records for digitization which tend to be name-rich or geo-specific. Their biggest digitization efforts comprise Scotland's People and Scotland's Places.²⁶ As such, the collections that they have prioritized for

²³ Some of themes can be seen online, and the BFI Player accessed, at <https://player.bfi.org.uk/free/collections>

²⁴ National Library of Wales (2018) *Cymru 1914: The Welsh Experience of the First World War* [website] available at <http://cymru1914.org/en/home>

²⁵ The Discovering Literature web resource is available at <https://www.bl.uk/discovering-literature>

²⁶ Scotland's People is 'the official Scottish Government site for searching government records and archives.' It is a primary source for genealogical information. It includes "...statutory registers of births, marriages, deaths... census returns; church records; valuation rolls; and legal records from Scotland's courts of law." The

digitization do not contain orphan works. When asked if rights issues had influenced the selection process for digitization, the respondent observed that: “I suppose... in a sense, yes...although I said earlier that we’re fortunate that we have a large amount of material that doesn’t fall into orphan work category, that in itself is a strategic decision, which we have taken, to not go down that road. So, that means that we do not digitize, currently, collections of private papers because the cost-benefit ratio just isn’t there.”

2.2 Institutional/Strategic aims and objectives for digitization, and intended users of the digitized works²⁷

The digitization projects were instigated for a variety of purposes. The most widely cited reasons for digitizing collections were improving access, and supporting education and research. For NLS and the publisher collection project, widening access was the main goal, as previously stated. Whereas the Discovering Literature project at the BL was specifically created to support teaching: “...that team is very much focused on high GCSE, Highers, A Levels, and then undergraduate level... but of course, anyone, because it’s a public facing website, can use it.”

The respondent from NLW reported that the institution saw the benefits of the Cymru 1914 project as: raising awareness of the collections of the NLW; the educational aspects of getting access to WW1 materials, especially during centenary of the outbreak of the war; along with the benefits of collaboration with other institutions; and the potential of bringing disparate works together, digitally. The BFI’s Film Forever strategy identified “Unlocking film heritage for everyone in the UK to enjoy by investing in preservation, digitization, interpretation and access,” as Strategic Priority No. 3 through 2012-2017.²⁸ As such, the digitization project represented the fulfilment of a clear organisational objective. Similarly, digitization at NRS for the Scotland’s People website meets their stated objective: “...to collect, preserve and produce information about Scotland’s people and history and make it available to inform current and future generations.”

2.3 Rights clearance overview²⁹

Tracking the results of rights clearance is often a complex process. The respondent institutions generally provided estimated data, either at an individual work level, or at an individual rightsholder

website is available at <https://www.scotlandspeople.gov.uk/about-us>. Scotland’s Places provides access to three national databases which contain ‘...historical resources relating to places throughout Scotland.’ The website is available at <https://scotlandsplaces.gov.uk/>.

²⁷ This section provides a summary of the answers given to Q4 (Please describe what you wanted to do with the digitized collection(s): e.g. education, public outreach, research, private study, promotional material, exhibitions etc. Please include the institutional or strategic aims and objectives for engaging in digitization) and Q5 (Who are the intended users of the digitized works?).

²⁸ British Film Institute (2012) *Film Forever*, available at <http://www.bfi.org.uk/sites/bfi.org.uk/files/downloads/bfi-film-forever-2012-17.pdf>

²⁹ This section provides a summary of the answers given to Q6 (Please give an estimate of the overall number of works that your organisation sought to digitize within the collection(s), or including those that await digitization in your overall collections (some institutions might engage in mass digitization over time). This

level, which is presented in Table 3. The rest of this section compares the different approaches taken to diligent search and rights clearance at NLW and BFI.

Table 3: Right clearance results across projects

	National Records of Scotland	National Library of Scotland	British Film Institute	British Library	National Library of Wales
Digitization project	N/A	Publisher Collection	Unlocking Film Heritage	Discovering Literature (20 th Century)	Cymru 1914: The Welsh Experience of WWI
Overall number of works selected for digitization	-	187 volumes	5169 works	503	1.3M records
No. of works where rights held by institution	-	0	456 works	0	Not specified
No. of works in the public domain	-	50-60 works	2962 works	0	401 ³⁰
No. of third party works/rights holders	-	130-140 works	1271 rights holders identified/researched	c.400	127,694 (presumed)
Granted permission	-	20-30 works	384 rightsholders	-	Not specified
Refused permission	-	0	24 rightsholders (in relation to 51 works)	-	Not specified
Non-response	-	0	7 rightsholders	-	Not specified
No. of orphan works	-	100-110 works	247 works	20	1,147,339 (presumed)

The respondent for NLW reported that the notion of undertaking diligent search on each work was considered by the Cymru 1914 project team to be impossible, given the scale of the project.

should be provided at item/work level, rather than at page or shelving metres level, if possible); Q7 (Within this total, how many were/are 'orphan works' e.g. the copyright holder is unknown? If you are not sure, could you provide an estimate?); Q8 (In how many works are the rights owned by you (e.g. the institution)? How many works are in the public domain?); Q9 (In the digitization project described, please provide numbers for, or estimate the proportion of works for which a rightsholder was located); and Q10 (Within that group of works, how many rightsholders gave permission, how many declined and how many did not respond?).

³⁰ The respondent for NLW was unable to provide numbers for the rights clearance process. The data presented for the NLW digitization project are taken from the Cymru 1914 website and are based on the catalogue data currently available. The catalogue shows the following licenses/rights statuses: Unknown (1,147,339); Copyrighted (127,694); CC Attribution-NonCommercial-ShareAlike (16,543); and Public Domain (401). Data available at http://cymru1914.org/en/search?query=* The NLW respondent acknowledges that the 'Copyright' and 'Unknown' statuses are more uncertain than the material that was identified as PD or CC-licensed.

Balancing the resources was essential and revolved around weighing available funding against the range and extent of materials selected for digitization. The respondent reported asking what steps could be taken to be responsible with the documents. For example, military materials might be under crown copyright, so determining that was important. The institution conducted a high-level risk assessment of the entire archive, opting to contact only a small number of rightsholders. The institution also used an online Risk Management Calculator, finding it very useful as a source of external judgment on copyright in terms of measuring risk.³¹ The institution also considered the nature of content (e.g. was it created for commercial intent, does it have value today, including cultural or educational value) and put in place measures to respond practically to any request for removal. The institution was under time constraints, with a deadline of 1 year to deliver the project. The website launched in autumn 2013, before changes to UK copyright legislation took place, including the orphan works legislation. The research team would identify NLW as a risk-taker in relation to this project.

The BFI took a more consistent and granular approach to diligent search in relation to the Unlocking Film Heritage project, where 1,271 rightsholders were identified and researched extensively across 5,169 film works. The UFH workflow was extremely complex: there were sixteen teams across the BFI involved from selection to publication across the project. Different work streams took place in parallel over the course of the project, and the respondent and her team had a series of rolling deadlines to meet, based on which theme was being digitized, then published.³²

At the point of selection, a brief title check would be undertaken to highlight its copyright status. The title could fall into four categories: Public Domain, In-Copyright, BFI Owns Rights, and Crown Copyright. The application of the rights status meant Crown Copyright, Public Domain and BFI Owned Rights could be prioritised and moved straight to digitization. Everything else classified as In-Copyright within a particular theme could be prioritized for rights clearance.³³

The diligent search relies on complete metadata about the titles being available in the BFI collections information database: production company, main credits, film authors, sponsors, etc. The respondent described their internal sources as: the Rights and Royalties system (BFI database) and the distributor history document, which is essentially an extended administrative history for all film distributors. For the initial copyright status check run on all titles, there were two separate processes. One for the production company, the other for film authors. BFI used Ancestry, IMDb Pro and the Electoral roll as their main sources. They also occasionally used probate searches. The

³¹ Web2Rights (2018) OER IPR Support Risk Management Calculator [online] Available at <http://www.web2rights.com/OERIPRSupport/risk-management-calculator/>

³² The 'themes' selected for digitization are: 1914 on Film, 1915 on Film, 1916 on Film, 1917 on Film, 1918 on Film, Advertising, Animals, Animation, Arts, Beat Generations, Bespoke Overcoat, BFI Content, Black Britain, Britain on Film, Charley films, China, Cinema of WW1, Coal, Comedy, Cricket, Cycling, Disability, Football, Forgotten Features, Gothic, Home Front, Home Movies, India, Jarman, Jewish Britain, LGBT Britain, Love, Lusitania, Mitchell and Kenyon, Never Mind the Ballots, Olympics, Other Grooves, Pleasure Principle, Powell and Pressburger, Public Information Films, Science Fiction, Seasonal and Anniversaries, Shakespeare, Shipbuilding, South Asian Britain, Steel, Submission Pick-up, Suffragettes, Television for Children, Tennis, Textiles, Thrill, Topical Budget, Trains, Victorian, and WTF.

³³ The main clearance challenges identified by Annie were for music and TV. If films had lots of popular music in the soundtrack, they were deselected. They may have been made available in some circumstances with the sound cut-out, but this wasn't considered an ideal way to present works.

department also set up a special Facebook profile called Drew Diligence, which provide useful in tracking down and contacting rights holders.

There are 274 works (including 5 embedded works) registered on the EU IPO orphan works database. The respondent notes that if they had ‘a different rule’ on the cut-off for copyright duration: if they had decided on an earlier date, 1935 or 1925 for example, thereby bringing more titles within the scope of copyright protection, they would have come across more orphans. It’s all a matter of where an institution decides to draw the line.³⁴ The respondent also developed a set of formalised risk criteria, based on the criteria used by the Wellcome Library during their Codebreakers mass-digitization project, to assist with decision-making during the publication process.³⁵

2.4 Use of extended collective licenses³⁶

While ECL has been enabled in the UK with the passing of the Copyright and Rights in Performances (Extended Collective Licensing) Regulations in 2014, no UK collecting society currently offers an ECL which would adequately cover the types of works represented in the collections of these institutions, for the purposes of heritage digitization and making available online,³⁷ and as a result, the institutions interviewed did not use an extended collective license to make their collections available. The exception in this case is the BFI. For Unlocking Film Heritage, they were able to

³⁴ Another example of drawing the line is that BFI have assumed in their contracts that whoever is licensing to them, has the authority to do so for the whole film: “Licensing the film, fully cleared.” The respondent explained that most people signed on this basis. This assumption is one way of managing the level of administration that would be created if licensors were required to prove chain of title. The implication here is that, if some licensors are more experienced than others, then embedded works for which licensors do not hold the rights may be slipping through without clearance.

³⁵ “1: Low - default (all titles not considered Medium/High, or where digitization cost is no more than £1,000. ACTION: Sign off by Rights Database Manager & proceed to digitization/publication. 2: Medium – a) Digitization cost is over £1,000; b) Author/Rights Holder has/had a high public profile; c) Author/Rights Holder is alive or estate is known; d) Title has been commercially available/was made for commercial exploitation. ACTION: Sign off by Head of Content Development & proceed to digitization/publication or alt. title chosen by theme Curator. 3: High – a) Author/Rights Holder is well known public figure; b) Author/Rights Holder is known to actively protect/enforce their copyright; c) Relationship between BFI and author/rights holder is awkward. ACTION: Sign off by Creative Director, Programme or do not proceed and select alternative title.” *The research team thanks Annie Shaw for access to BFI internal documentation.*

³⁶ This section provides a summary of the answers given to Q11 (Alternatively, did you use an official or unofficial ECL scheme? Were you forced to use one? How much did it cost? What does it allow you to do with the digitized works? How many of the works identified for digitization are covered by it?).

³⁷ The exception is the Copyright Licensing Agency (CLA) who operate a de-facto ECL within the UK for the education and public sectors. They applied to the UK IPO for authorisation to offer an official ECL covering their current range of licenses in November 2017: the results of the public consultation on the application are available at <https://www.gov.uk/government/consultations/application-to-operate-an-ecl-scheme>. While published works, and therefore library collections may fall within the scope/repertoire of some UK CMOs, it would be extremely difficult for a CMO to demonstrate representation for the types of rights holders commonly found in unpublished archival works. Therefore, suggestions that ECL may be an appropriate solution to the challenges posed by mass digitization and orphan works must be considered in the context of genuine representation of rights holders, and the type of material selected for digitization.

negotiate annual licenses with certain CMOs, covering the use of soundtracks, musical performances and artworks featured in the films selected for digitization,³⁸ but these do not constitute extended collective licenses.

There are examples of other digitization projects in the UK that have benefitted from collaboration with CMOs like the Authors Licensing and Collecting Society (ALCS) and Publishers' Licensing Services (PLS) to support rights clearance. However, in general, collective licenses are not yet available for mass digitization in the UK.³⁹ The NLS, NLW and BL indicated that they would be willing to pay for an ECL, if such a scheme was available, depending on the overall cost and conditions of the arrangement. The respondent from the BFI was sceptical of there ever being an available ECL for film titles in the UK, given the lack of an overarching CMO and the fragmented nature of rights licensing in the film industry: "I just think in terms of setting up anything like an ECL, when you haven't even really got a CMO, would just take forever," and "...the industry, I doubt, is very behind it. I think the industry, everyone loves the infinite divisions and divisions and divisions of rights, and they just create more and more and more of them... So, unless the industry was to back it and really throw lots of money at it and push it through, I just can't see how it would happen for AV, sadly." This supports the conclusion that ECL may be seen as a potential solution to the challenges created by large-scale rights clearance for some parts of the CHI sector, but not all.

Affordability of the ECL was seen as key by those parties. This is an area in which very little data is available: identifying relevant CMOs across multiple jurisdictions is difficult and licensing fees are generally not disclosed. The BL respondent was able to provide details of schemes in Norway,

³⁸ The CMOs in this case were: the Musician's Union, PRS for Music, the Design and Artists Copyright Society (DACS) and the Performers Alliance.

³⁹ An example of CMO engagement is provided by the ARROW project (Accessible Registries of Rights Information and Orphan Works Towards Europeana). The aim of the project was the creation of an "...automated system for distributed management of rights information." The initial project (2008-11) involved the library and publishing industry across Spain, France, the UK and Germany. The UK pilot connected the "...British Library catalogue in the European Library (TEL); Nielsen Books in Print database lookup via RRO UK; the UK RRO Copyright Licensing Agency (CLA); the PLS and ALCS repertoires and databases." ARROW was used by the British Library and the Wellcome Library in two separate rights clearance exercises. The British Library conducted a test of the ARROW system with a sample of books from across their collections, and found that the system reduced the amount of time spent on diligent search, in some cases significantly. The Wellcome Library utilized ARROW for the digitization of library collections during the Codebreakers: Makers of Modern Genetics pilot mass digitization project. While the automated nature of the rights search was preferable to a manual diligent search, and despite reasonably positive results, the Wellcome Library team felt that the system did not represent an adequate return on investment, and stated in 2013 that they would be unlikely to attempt rights clearance for large numbers of in-copyright books in future. The ARROW website is no longer available and the project appears to have been on indefinite hiatus. Quotes in this footnote are taken from Caroli, C. et al (2012) 'Accessible Registries of Rights Information and Orphan Works Towards Europeana,' *D-Lib Magazine*, 18(1/2) [online] Available at <http://www.dlib.org/dlib/january12/caroli/01caroli.html> [accessed 30 March 2018] Further reference is made to Stratton, B. (2011) *Seeking New Landscapes: A rights clearance study in the context of mass digitization of 140 published between 1870 and 2010*, London: British Library/ARROW [online] Available at https://www.nlib.ee/public/documents/raamatukogule/orbteoste_uurimus2011.pdf [accessed 30 March 2018] and Stobo, V. et al (2013) *Copyright and Risk: Scoping the Wellcome Digital Library*, CREATE Working Paper 2013/10, University of Glasgow [online] Available at <http://www.create.ac.uk/publications/copyright-risk-scoping-the-wellcome-digital-library-project/> [accessed 30 March 2018].

Denmark and Germany, where collective licenses have been offered to libraries for print materials and photographs at 0.05, 0.01 and 0.045p per page, respectively.⁴⁰

While UK CMOs may be in a position to offer ECLs for certain types of published works, it should be noted that no CMOs could claim to represent the rightsholders in the majority of unpublished archival records, as these works have never been in-commerce. ECL may be seen as a potential solution to the rights challenges of mass digitization for library collections, but it does not represent a solution for archive collections.⁴¹ Institutions considering an ECL may also find that the uses permitted by the license are more restrictive than the uses for which they would otherwise be granted permission, or permit themselves after a risk assessment.⁴²

2.5 Costs of rights clearance process⁴³

Accurate information regarding the costs of the rights clearance process was patchy for the projects reported by the respondents. This is not unusual: costs for rights clearance generally aren't itemized

⁴⁰ For example, a modest digitization project, encompassing 1000 books at 300 pages each, would cost £15,000 to license in Norway, but only £3000 in Denmark. There are also issues of cross-border supply: ECL limits access to specific territories, e.g. you can only access the Nordic National Library collection if your IP address is registered in Norway. The schemes also vary in terms of scope. The Norwegian scheme allows the digitization of works published up to the year 2000, while the Danish cut-off date is 1918. As an example, the requirements of the German scheme include: "...the works were published in Germany before 1 January 1966; works are contained in the collections of publicly accessible libraries, educational institutions, museums and archives; use of the work is only for non-commercial purposes; right holders have a right to object at any time as well as a right to fair remuneration; and the works are entered into a public registry of out-of-commerce works which will be held by the German Patent and Trademark Office." Source: <http://www.ip-watch.org/2014/05/06/digitization-projects-for-orphan-and-out-of-commerce-works-presented-at-wipo/>.

⁴¹ Eblida, Public Libraries 2020, IFLA, Europeana and LIBER signed a joint statement in September 2017, calling on the European Commission to include an exception in the text of Articles 7-9 (of the proposed DSM Directive) on Out-of-Commerce Works, which would apply where no collective license or ECL was available. The statement is available at http://www.eblida.org/Documents/Copyright_Reform/Art.7to9_OOCW.pdf.

⁴² Further discussion of ECL as a solution to the challenges presented by rights clearance for mass digitization are available in: Keller, P. (2016) 'CJEU ruling in Doke & Soulier case emphasizes the need for a real solution to the out-of-commerce problem,' *Communia-association.org* [Blog] 23rd November 2016, available at <https://www.communia-association.org/2016/11/23/cjeu-ruling-doke-soulier-case-emphasizes-need-real-solution-commerce-problem/>; Deazley, R. and Stobo, V. (2013) *Archives and Copyright: Risk and Reform*, CREATE Working Paper 2013/3, University of Glasgow, available at: <http://www.create.ac.uk/publications/archives-and-copyright-risk-and-reform/>; Axhamn, J. and Guibault, L. (2012) *Cross-Border Extended Collective Licensing: A Solution to Online Dissemination of Europe's Cultural Heritage*, Amsterdam Law School Research Paper No. 2012-22, available at <https://ssrn.com/abstract=2001347>

⁴³ This section provides a summary of the answers given to Q12 (Estimated costs involved for the digitization project described (e.g. Hours of staff time for creation of item level metadata, hours of staff time for auditing the rights status of the collection, hours of staff time for copyright search and clearance, upload of data/processing, IPO application fees, other licensing fees, etc.). If data is unavailable, estimates for each of these tasks are appropriate); Q13 (Estimate of the amount of time spent doing 'diligent search'? (This can be reported either as per-work, in minutes, or total amount of time for the whole collection, as long as the total number of works is specified. Ask about the search process for OWLS or EUIPO or both if necessary)); and Q14 (Provide the total number of person-hours spent digitizing the collection, and any additional costs. (We can then calculate the cost in GBP per work, in a collection where rights clearance was attempted)).

on an hourly or per item basis, especially when a job role may include multiple responsibilities other than rights clearance. With older projects such as Cymru 1914, data usually isn't available, and estimates may be given. Previous research suggests that rights clearance can cost anywhere between £3 and £77 per work.⁴⁴ The costs of the rights clearance process are context-dependent: the resources and risk appetite of the institution, the particular types of material they are seeking permission for, and the number of third-party rightsholders present in a collection, will all have an effect on costs.

The BFI were able to report clear staffing and licensing costs for the Unlocking Film Heritage project: staff, resource and licensing costs for the rights clearance process over four years totalled £285,200. Divided by the 5,169 films selected for digitization, this equates to £55.17 per title.

The BL reported that they had spent almost 12 hours of rights clearance per item identified as in-copyright in the Discovering Literature project, alluding to the training required to bring staff up to speed on copyright: "...we're about 12 hours for clearance per item and that includes all the support, training and the discussions." There are approximately 400 creators identified in the 20th century collection for Discovering literature: this would equate to roughly 4800 hours spent on copyright and rights clearance activities. A conservative salary rate would cost this process at £61,536.⁴⁵

The NLS did not record costs for the rights clearance process in relation to the publisher collection, but they did estimate staff time for rights clearance activities at around 24-25 full days over the course of the project, which took a year to complete. This would equate to approximately 188 hours spent on copyright and rights clearance activities. Again, the same conservative salary rate would cost this process at £2,410.

The figures presented here vary widely, and take into account the different types of works present, the size and scope of the digitization projects, and the appetite for risk at the various institutions, e.g. it appears that BL and BFI have spent longer on diligent search and are likely to have checked more sources than NLS.

2.6 Takedown policies, processes and reacting to complaints⁴⁶

BFI and NLW reported that they had received takedown requests in relation to works that had been made available online, but all noted that such requests were extremely rare. Of the two institutions, each mentioned one or two such requests at most, and only one of these requests was in relation to the projects reported here. The BL reported that over the years they had received 'scores' of takedown requests in relation to multiple projects, but all of the respondents noted that the

⁴⁴ This is based on the reported expenses for the rights clearance process, divided across the number of items in a collection selected for digitization. In reality, not all items need to be cleared on an individual basis, so the cost per work ratio is likely to be higher than the low figure of £3 given here. See Stobo et al (2018) "I should like you to see them some time" An empirical study of copyright clearance costs in the digitization of Edwin Morgan's scrapbooks. *Journal of Documentation*, 74(3), 641-667.

⁴⁵ A salary rate of £25,000 p.a., or £12.82 per hour, is used.

⁴⁶ This section provides a summary of the answers given to Q15 (Has your organisation ever had a takedown request or other contact from a rightsholder? How do you plan to manage such requests if they arise? How were these resolved? How has this affected the current or future digitization projects?).

requests have been resolved simply by removing the work(s) in question from their institutional websites. The threat of litigation was mentioned in only two reported cases at two separate institutions, and this was resolved through negotiation without resorting to compensation or litigation. NLS and NRS reported that they had never received a takedown request.

NLS, NLW and the BL had takedown policies in place and available to consult on their websites.⁴⁷ NRS and BFI did not. The takedown policies generally consist of a commitment to investigate claims or chain of title if a rights holder requests takedown, before a final decision on takedown or restoration is taken, usually within a stated timeframe. The material may or may not be removed from the website pending the results of the investigation.

2.7 Usage data and evaluation of digital resources⁴⁸

Anticipating, understanding and meeting user's needs and desires when it comes to digitization of CHI collections has long been identified as an area in need of improvement within the CH sector.⁴⁹ Often the impetus for digitization does not come directly from users, but from funding bodies or through the anticipated demand of specialised groups of users. Examples of this might include genealogy (Ancestry, FindMyPast) or groups of academics, especially in subject areas which rely on library and archive collections, like the humanities (British Newspapers Online, British Literary Manuscripts Online). Attempts to understand access to and re-use of collections have tended to focus on web analytics rather than a deeper engagement with the impact on users: why they seek access to CH materials, how they search and use catalogues, and what digitized materials are then used for once they have been selected, copied or downloaded by online users.⁵⁰

The approach by the respondent institutions to engaging with potential users and evaluating use of the resources varied, and the timing of the projects may reflect this: more recent projects may have recognised the importance of understanding use and users, whereas older projects may not have factored user testing or evaluation into their timelines. For example, the BL engaged in user evaluation of *Discovering Literature* in 2017, but NLW did not during *Cymru 1914*, which was

⁴⁷ The NLS takedown policy is available at <https://www.nls.uk/copyright>. The NLW takedown policy is available at <https://www.library.wales/about-nlw/copyright/>. The BL takedown policy is available at <http://www.bl.uk/aboutus/terms/notice/index.html>.

⁴⁸ This section provides a summary of the answers given to Q16 (Have you undertaken any evaluation of usage/uptake of the digital resources created through digitization? Can you provide any insights about the users of the digitized collection, and what they are using the material for?).

⁴⁹ "Cultural and higher education institutions around the world are investing vast resources on digitization and making their collections available online but still know very little about who uses these and how they interact with the data." Economou, M. (2017) 'Use and Impact of Digital in Cultural Heritage: Insights from the Scottish Network of Digital Cultural Resources Evaluation,' *Museums and the Web 2017*, available at <https://mw17.mwconf.org/paper/evaluating-impact-and-use-of-digital-cultural-resources-lessons-from-the-scotdigich-network/>

⁵⁰ Europeana have developed a toolkit for understanding the impact of digitized cultural heritage collections, which involves deeper user engagement: Europeana (2017) *Impact Playbook* [Webpage] available at https://pro.europeana.eu/what-we-do/impact?utm_source=Pro%20Blog&utm_medium=Blog&utm_campaign=Impact%20Playbook%20launch&utm_content=Playbook%20launch%20blog

completed and online by 2013. However, NLW have undertaken impact evaluation for a wikimedia project in the intervening period, with case studies available online.⁵¹

NLS have collected web analytics in relation to their publisher collection: “For this particular collection, I can tell you that it went online in autumn last year (2016), and it had 12.5k pageviews in the first month of which 9.5k were unique. Since then, the average monthly views are 5,800 views, of which 4,300 are unique. And that’s been relatively consistent.” When asked about the types of users identified, NLS were able to provide information about their nationalities: “...we do know that the UK, the USA, India, Australia, the Philippines, Germany and France are usually within the top 10. Ireland as well. And that is fairly consistent throughout all of our collections.” However, the respondents from NLS also observed: “We understand why they come into the building because we engage directly with what they are using and what their story is. We don’t know so much about people that are online, or how they come to value our particular collections.”

Understanding users and use of collection is important in terms of balancing the benefits of digitization against the costs of rights clearance. If institutions had a better understanding of users and the use they intend to make of collections, this could influence the licenses institutions offer to depositors, the permissions they seek from rightsholders, and the risks they are willing to take during the digitization and rights management process. Understanding online users and use of collections would also be beneficial to the EnDOW project, and could influence the success of a crowd-sourced diligent search model. The results reported here suggest that this is an area of user engagement which still requires improvement across the UK CHI sector.

2.8 Engaging with the ‘crowd’⁵²

Some interview respondents were cautiously optimistic about the potential of crowd-sourcing as a solution to the orphan works problem, whereas others were sceptical. All recognised the need for a specific, engaged, ‘niche’ community of users that would require some form of interest or investment in the digitization project to encourage the use of an online tool. The respondents from NLS noted that, “I’m not sure on the crowdsourcing. I think this comes back to the issue about in terms of what our crowd is, and that we don’t have that distinct user-base that maybe a university or a public library might have.”

Three of the respondents mentioned groups of users that could be incentivised to conduct diligent search: existing groups of volunteers known to the institutions, and in the case of the BFI Film Archive, film enthusiasts. NLW explained that they have volunteers working in the library, so potentially they would be interested in helping, e.g. family history societies use the newspaper collections. They also mentioned a dedicated volunteer coordinator, who collects ideas from staff for projects which can’t be undertaken by staff. This echoes the experience of the BL during the Spare Rib project: “We...did use some volunteers to do, towards the end, some of the rights

⁵¹ The case studies are available at <https://pro.europeana.eu/post/exploring-our-impact-at-the-national-library-of-wales>.

⁵² This section provides a summary of the answers given to Q17 (Can you think of an engaged community who could undertake portions of rights clearance task if they were empowered to assist? Have you made patrons or users aware of the effort that went into copyright clearance for digitization?).

clearance... and they were very good at using their networks in getting rights clearance, they were very good at using networks to get people.”

The respondent from the BFI noted that during the rights clearance process for Unlocking Film Heritage, they had occasionally relied on online communities of film buffs for information about particular directors and publishers: “...we’ve certainly engaged with fan sites, and blog sites as part of diligent search, and you get lots of information there, so potentially those are [the] kind of places you could go.”

The respondent from the BL expressed concern that the diligent search process was too complex to be carried out remotely and via an online tool: “I think we want, to the extent that it’s possible... some agreed methodology for reading the tea leaves, and the runes. Because that’s what it is, you know. George Orwell, you know, is not like reading tea leaves, but George Smith is like reading tea leaves.” He is referring to the possibility of developing a methodology which directs staff or volunteers undertaking rights clearance to make defensible decisions when searching for people on Google, Twitter, Facebook and elsewhere online, where clear disambiguation of similar search results can be extremely complex.

The respondent for the BL also raised two further important points regarding the administrative costs of running crowd-sourced diligent search, and the possibility of reputational damage or liability. He observed that, “Towards the end of phase two of Spare Rib, I think we felt that the cost and time of managing what people had actually done, and what decisions they’d actually made, was probably not worth it.” He was also reluctant to rely on the searches of individuals external to the institution, given the possibility of reputational damage or liability the institution could face in the event of a claim of copyright infringement resulting from a poorly or incorrectly performed diligent search. The respondent said: “Where it was less good, was some of the messaging that was coming from them around what BL thinks and wants to do around [Spare Rib]. It did actually, around the messaging, cause some concern from some of the trade bodies that were interested in the project. I don’t think I would recommend organisations like ourselves using a federated rights clearance model, because of those reputational messaging inconsistencies that inevitably occur.”

It may be the case that the tool could be used for gathering information about potential rights holders, but not necessarily for performing a complete diligent search. For example, the respondents at NLS suggested that, “What type of the diligent search you are getting them to do: whether it is the full search, or whether you only actually outsource specific aspects of doing diligent search, identifying authors or whatever.” Indeed, from the ensuing discussion with respondents, it is clear that the complexity of the interplay between the institution, the external searcher, the information made available to start the search, and the information gathered during the search, is an area that will need deeper and more nuanced exploration during the test-phase of the EndOW project.

None of the institutions informed users about the effort that goes into rights clearance for digitization, beyond the acknowledgement of the difficulty in locating rightsholders that is often

included in the text of takedown policies, or might be included in project-related blog posts.⁵³ The responding institutions generally provided basic information about copyright law on their websites, and some guidance for users of collections, although this varies from institution to institution. For example, the NLS website includes a page on copyright which contains information about the law, exceptions, collection specific information, takedown procedures and links to further guidance.⁵⁴ Another example of the information made available about rights clearance is provided by NLW: their website contains a page which lists the names of rightsholders that the institution would like to make contact with, regarding potential orphan works.⁵⁵

2.9 Use of the orphan works exception (EUIPO Database) and the UK IPO Orphan Works Licensing Scheme (OWLS)⁵⁶

All of the responding institutions were aware of and familiar with the orphan works exception. The institutions that had used the exception and EUIPO database (BL and BFI) were generally positively disposed towards them, but they also offered some criticism. BFI found the manual entry of works on the database was tiresome: "...we went the individual logging route which became quite quickly, a bit of a chore... not all of the fields necessarily kind of make complete sense all the time."

The BL felt that the bulk data upload function could be made simpler for users: "The database is very difficult to work with, really difficult and onerous, the way that you have to upload the information... it's very clunky." The BL respondent also felt that rights holders may struggle to search for, and find details of their works through the database: "...the Association of Authors Agents, again, isn't happy in the way that material is displayed, it's confusing. And I think we would agree, as well, the display is confusing."

The respondent from the BFI was the most positively disposed towards the exception from the institutions interviewed: "I think it has formalised what we're doing, I also think it gives a bit more, helpful structure, in terms of talking with colleagues about, what this thing is, what it allows you to do and why you have to do XYZ, so it's been quite a good framework in terms of having more conversations around rights." She also noted that BFI would continue to use the exception in future: "...making the most of the successes and engagement that we've had, with the EU IPO office, and other EU archives, and building on that as much as possible, as a kind of profile for the organisation as well as just engagement with peers and colleagues. Plus, just the information that you're gathering all the time as you're doing this is good. And new relationships, because finding either

⁵³ For example, the British Library discuss rights clearance, diligent search and orphan works in relation to the Spare Rib project at <http://blogs.bl.uk/living-knowledge/2015/05/digitizing-spare-rib-magazine-the-inside-story.html>

⁵⁴ See <https://www.nls.uk/copyright> for more details.

⁵⁵ Publishing lists of potential orphan rights holders in order to seek information about them has also been used by Churchill Archives Online, and the National Portrait Gallery.

⁵⁶ This section provides a summary of the answers given to Q18 (Were you / Are you aware of the OWLS or EUIPO database? If you did use the OWLS/EUIPO route, what were your thoughts on the process?); Q19 (OWLS: Highlight any thoughts, negatives or positives about the uses currently permitted by the UK licensing scheme (if applicable)); and Q20 (EUIPO: Highlight any thoughts, negatives or positives about the uses currently permitted by the exception and database (if applicable)).

new rightsholders or families or whoever, who are then, people who want us to do more stuff with their films, stuff that we already have in the archive that they didn't realise we had, you know, all those kinds of things: it all builds a lovely positive picture of what we're about."

This is an excellent example of the positives associated with the outcomes of the diligent search process, and the use of the Directive. It not only supports the respondent in her role, through gaining leverage within her institution and the ability to provide a more structured search process for colleagues, but it has also enabled her to network with other peers and colleagues in audio-visual heritage institutions, and policy-makers across Europe, and to enrich the collections data at BFI. This is an element of rights clearance that is often not recognised in the literature: searching for rightsholders in a work, and clearing those rights, often gives insight into the context of the creation of the work, and provides further information about the work and the overall collection which can be included in the catalogue record. As the respondent observes later in the interview, "...there's a huge amount of value put on curatorial knowledge and archival knowledge, but for some reason, copyright research isn't considered in the same way, but it is part of the whole research on the work." The respondent also notes that the right clearance process facilitates outreach, and that getting in touch with rightsholders can spark new donations, restorations of existing works, and other forms of collaboration.

Uncertainty around the scope of the exception, and the extent of diligent search required for both the exception and the OWLS continues to be an issue. The NLS respondents noted that "...there are still some issues around the diligent search criteria. What exactly we need to do. It is a bit more comfortable to do what we consider a diligent search for the risk-based approach, rather than what IPO guidance or so on is about, in terms of what on earth a diligent search is for either of those schemes." When asked if they interpreted the legislation as requiring a substantial search, they replied, "I would say that either yes, or it's still unclear. It is unclear from the guidance that is available that the EUIPO search threshold probably should probably be lower than the OWLS one. More of the issue is, that we are not entirely confident that the guidance there tells us exactly what to do. I think we would spend a lot of time figuring out what diligent search means for us, and justifying that, and initiating all of the procedures for dealing with that, and I can see that taking a long time."

The respondent from the BFI noted some areas of uncertainty within the Directive, and the current format of the database: "...most of the works we have registered really should be partial orphans, and that's something I raised... because at the moment it's just black and white, it's an orphan or it's not," which alludes to confusion created by the ability to identify multiple rights holders in a single work, partial orphans or embedded works within larger works through the database. She also identified issues around "unpublished works and differences in national laws."

NLS and NLW both stated that they would consider the exception, although both indicated that their own internal risk management processes were robust and appropriate for the non-commercial digitization they were engaged in. In the case of NLW, the Cymru 1914 project had been completed in 2013, before the orphan works exception came into effect in the UK. The respondent from NLW felt that, had the project taken place after 2014, it would have looked very different: they would not have been able to digitize as much of the material, they would have had to focus on public domain

and crown copyright materials, and the digital collections would most likely have been much smaller.

The respondent from the NRS felt that, as a branch of the Scottish government, it would be inappropriate to ignore the legal route to publication, should they in future select orphan works for digitization: “I think it’s operational risk because we are executing a number of pieces of legislation in a number of different ways as befits those pieces of legislation wherever they are. And I think... one arm of government can’t really disregard laws passed by another arm of government, laws being implemented by another arm of government. I think there’s also... there can be a perception that, in terms of an hierarchy of information laws, copyright comes pretty low. Because it’s pretty low risk, you’re not going to get hauled before the Information Commissioner. You’re not going to get a horrible big fine of a proportion of your turnover. But as an organisation which, for instance, relies on the cooperation of the public in order to execute the decennial census, and part of that negotiation with the public is saying, “We will keep your answers safe.” If we start eroding that trust in other parts of the organisation, I don’t think that’s a great story.”

None of the responding institutions had used the UK IPO Orphan Works Licensing Scheme to enable their digitization projects, and none suggested that they would be likely to in future. The respondents from NLS said, “We wouldn’t consider it for normal digitization online access stuff. Due to the costs, and the bureaucracy and the time, and the fact that it is limited to 30 works, all of that stuff.” While the respondents were generally more positively disposed towards the exception than the licensing scheme, the respondent from the BL highlighted that the legal certainty provided by the OWLS was a positive aspect of the scheme: “I think, if they looked at the pricing, if they looked at something around diligent search to make it more scalable, then it would probably be, from my perspective, more attractive than the exception, because it gives, I think, a much higher level of certainty that you’re compliant with the law and if there’s a problem, you know, the problem sits with the IPO and not us.”

However, all respondents noted the high administrative costs associated with the licensing scheme, and some of the limitations: e.g. the short license periods and the UK-only coverage. The respondent from the BFI also highlighted issues with the scheme’s approach to film: “...for film works, audio-visual works, half the rights don’t make sense... I just couldn’t understand the way it was trying to push you down certain routes, and the cost is prohibitive, most of the time.” NLS and NRS agreed that a one-off, high-risk commercial project might utilise the licensing scheme, but in general, the respondents were not inclined to engage with the OWLS. Again, the respondent from NRS noted that while the costs of using the scheme were high, legal compliance was important to NRS, and should the situation arise in future, they would use the OWLS where the exception was not applicable.

Both NRS and NLS also noted that they advise users to explore the OWLS when the possibility of publishing or otherwise re-using an orphan work from their collections is raised through a reproduction request or an enquiry. However, they are unaware of any users actually obtaining a license from the UK IPO for such a purpose.

2.10 Future use of orphan works mechanisms⁵⁷

As previously noted, NLS and NLW indicated that they would explore using the exception for future digitization projects. Both the BL and BFI stated they would continue to use the exception, but all four institutions were unlikely to use the licensing scheme, unless it was felt necessary, or the scheme was updated. NRS felt that it would be inappropriate for an institution connected with the Scottish Government to flout the law, and that if digitization of orphan works was to take place in future, then using the exception or OWLS would be the most appropriate route.

2.11 Potential solutions to the orphan works issue⁵⁸

Several suggestions for potential solutions to the orphan works issue were made in the interviews, including: an exception for Out-of-Commerce Works; reform of the current OWLS; the creation of an auditor specifically for best practice-based diligent search; revisiting the 2039 rule; and the use of indemnity insurance.

A respondent for NLS suggested: “You could allow cultural organisations to digitize all out-of-commerce works, provided there was a takedown mechanism in place, post hoc and non-commercial use, without any regulatory hurdles. Make it exceptions based, and then if there was a licensing solution available already, that could form the basis for an underlying exception.” This is essentially the proposal put forward by various library and archive groups, to amend Articles 7-9 on Out-of-Commerce Works in the proposed DSM Directive.⁵⁹

NLW felt that, “One step would be to return to the 2039 rule. It would be a good first step to take. The older the work becomes, the framework is not practical at all. A framework that takes into consideration the age of the work would be useful.” The 2039 rule affects certain unpublished works: prior to the CDPA 1988, unpublished works were granted perpetual copyright protection in the UK, regardless of when they were created, meaning very old works still benefitted from copyright protection. Transitional provisions of the CDPA 1988 reduced this protection from perpetual to 50 years from point of the CDPA entering into force, i.e. midnight on the 31st December 2039. UK Government abandoned reform of the 2039 rule in early 2015, after powers to reduce the term of protection were included in the Enterprise and Regulatory Reform Act 2013. The reasons given for not pursuing the reduction in terms were: removal of a copyright could be considered a deprivation of property on human rights grounds; works subject to the 2039 rule are a ‘significant’ source of income for rights holders; the policy could have a negative impact on trusts like the Ralph

⁵⁷ This section provides a summary of the answers given to Q21 (Would you use the existing schemes for future projects?).

⁵⁸ This section provides a summary of the answers given to Q22 (If your institution was to be encouraged to digitize more materials in future, do you have suggestions for technical or regulatory solutions for putting orphan works online?); Q23 (Prompt: Would you prefer an affordable ECL scheme? Even if the scheme required some form of diligent search? How much would you be willing to pay – per work? Per year?); and Q24 (Prompt: Other solutions could include limitation on liability, an expanded exception or ditching exhaustive diligent search in favour of non-exhaustive search/best practices guidelines for diligent search).

⁵⁹ Eblida et al (2017), *supra* note 41.

Vaughn Williams Trust that use revenue from licensing unpublished works to support composers; and a lack of economic evidence.⁶⁰

The respondent from the BL felt that the licensing scheme could be improved: “I do believe that the way that individual rights holders we approach view the activities of cultural heritage institutions, are clearly viewed very differently by those individual rights holders, to the way that they would view an approach from a commercial entity. And therefore, I do think there is a legitimate argument to be said that there should be, within the licensing scheme, a different regime, perhaps with different levels of diligent search required, because there will be collections where ECL in the way that we have it in the UK, because they’re not representative, they will not be able to offer a license. I do think a different regime for cultural heritage institutions, within the licensing scheme could be very enabling.” They also suggested the use of independent auditing and sampling of rights clearance processes as part of the solution: “I think that sampling is something that could be interesting too,” and “I do think this concept of independent oversight is a good one. You could envisage, perhaps say, they audit your processes, and therefore they say, ‘Yeah, you’re following these processes,’ then that looks... you know, there’s a parallel with data protection here, isn’t there? That the ICO will put out Best Practice guidelines, and then, within those best practice guidelines, if you’re, you know, certified to be complying with that, you know, that could be another way of approaching it, couldn’t it?”

The respondent from the BL also brought up the possibility of using IP indemnity insurance as an alternative to the exception and OWLS: “...we’re actually asking DCMS about indemnity insurance, and whether there’s a conflict, we can take that out... that’s an ongoing conversation.” Anecdotal evidence suggests that a small number of institutions in the CH sector already use indemnity insurance against some of the digitization they engage in, and that the details and level of diligence required by the insurance companies are significantly less onerous than those required by the exception and licensing scheme.⁶¹

Limitation on liability was mentioned in passing by the interviewer, but did not spark much interest or response; other than the respondent from NLW noting that it “...would help with attitudes to risk.” Conjecture might suggest that this is because very little litigation takes place in this area in the UK, and reputational damage is more of a concern. As noted previously, three institutions indicated that they would be willing to pay for an ECL or other collective licenses, if such a scheme was available, depending on the conditions of the arrangement.

⁶⁰ Intellectual Property Office (2014) Consultation on reducing the duration of copyright in unpublished (“2039”) works in accordance with section 170(2) of the Copyright, Designs and Patents Act 1988, documentation available at <https://www.gov.uk/government/consultations/reducing-the-duration-of-copyright-in-certain-unpublished-works> [Accessed 20 December 2017]

⁶¹ This observation is based on discussions with staff and contractors from institutions that have used IP indemnity insurance.

PART III

3. THE NETHERLANDS

3.1 Overview of the selected institutions

The Netherlands institutions selected for the report are: the Nationaal Archief (the National Archives), the Koninklijke Bibliotheek (the National Library), Beeld en Geluid (the Institute for Sound and Vision, i.e. the Dutch Audiovisual Archive), the Eye Film Institute (the National Museum for Film), and Stadsarchief Rotterdam (Rotterdam City Archives).⁶²

Nationaal Archief (TNA), formed in 1802, is a departmental agency of the Dutch government, mandated to receive records produced by administrative authorities under the Public Records Act 1995. Koninklijke Bibliotheek (KB), founded in 1798, is the National Library of the Netherlands, now incorporating the Sector Institute Public Libraries, the Library.nl Foundation, and the Digital Library for Netherlands Literature.⁶³ Beeld en Geluid (BeG), established in 1997, brings together the archive of the Dutch public broadcaster, the film archive of the Dutch film and science foundation, the broadcasting museum, and the Dutch press museum.⁶⁴ Eye Film Institute (Eye) was created in 2010 from the merger of the Filmmuseum, Holland Film, the Filmbank, and the Netherlands Institute for Film Education.⁶⁵ Stadsarchief Rotterdam (SR) is the municipal archive for the city of Rotterdam and surrounding areas, founded in 1857, and is one of the largest archive institutions in the Netherlands. The table on the following page presents an overview of the institutions.

⁶² The respondents were: Leontien Bout at Eye Film Institute, Marie-Claire Dangerfield at Stadsarchief Rotterdam, and Annemarie Beunen at Koninklijke Bibliotheek. Two of the institutions selected, Beeld en Geluid and Nationaal Archief, indicated that they would not be able to answer the questions in the interview script because they did not encounter problems with orphan works. Pieter Koenders at the Nationaal Archief explained that they have a licensing agreement with Pictoright which covers all the images they make available online, and that, as the national archive, 99% of their collections are owned by them/the state. [Email correspondence with research team]. Mieke Lauwers at Beeld en Geluid responded similarly, indicating that the institution has very few problems with orphan works as their collections are generally made up of broadcast materials. [Email correspondence with research team]. Indeed, Mieke advised that the research team contact Eye Film instead. The research team have included this data in the report as we feel this is a legitimate research finding: while orphan works may not be an issue for certain CHIs, where the right status of records and collections is clear from the point of deposit and the fonds tends to be fairly homogenous (i.e. National Archives, broadcaster archives, business archives), they present deeper and more problematic challenges for other CHIs that tend to collect materials across a broader spectrum (i.e. collecting institutions including local authorities, communities, universities, and other specialist subjects areas).

⁶³ Koninklijke Bibliotheek (2014) *Annual Report 2014: English Summary* [online] available at <https://www.kb.nl/en/news/2015/annual-report-2014>.

⁶⁴ This information is available in the 'History' section of the Sound and Vision website at <https://www.beeldengeluid.nl/en/about/history>.

⁶⁵ This information is available in the 'About Eye' section of the Eye Film Institute website at <https://www.eyefilm.nl/en/about-eye>.

Table 4: Overview of selected Dutch institutions

Institution	Annual budget	Collection strengths	Funding sources	No. of FTE staff	No. of staff in rights	Digitization project
Eye Film ⁶⁶	4.5M	Film in all genres: "40,000 films as well as related collections: photos, posters, projection equipment, film music, as well as paper archives of filmmakers and businesses." ⁶⁷	Dutch government; municipality of Amsterdam; subsidy for digitization; revenue from onsite activities; business services, etc	125 FTE	1-2 FTE	Images for the Future
Stadsarchief Rotterdam ⁶⁸	*	100,000s of prints, photographs, films, maps, sound recordings and more than 18 km archival records.	Municipality of Rotterdam	c.70-100	1 FTE	ImageBank
Koninklijke Bibliotheek ⁶⁹	91M	7 million printed items: 115 km of library materials (books, newspapers, journals, microforms) 10,800 current periodicals, 500 licensed databases and e-journals	Ministry of Education, Culture & Science	349.76 FTE	1.6 FTE	Delpher (Dutch Newspapers)
Beeld en Geluid ⁷⁰	31.8M	Public broadcasting, film and science collections, press collections.	Government grants, funded activities, revenue generation, sponsorships etc	135 FTE	Not disclosed	Not disclosed
Nationaal Archief ⁷¹	Not disclosed	"137 km of archives, 15 million photographs, 300,000 maps and drawings and 800	Part of the Dutch Government: Department of	Not disclosed	Not disclosed	Not disclosed

⁶⁶ In addition to 125 FTE equivalent staff, there are also 110 volunteers reported in Eye (2016) Annual Report 2016 [online] available at <https://www.eyefilm.nl/en/about-eye>.

⁶⁷ Bout, L. (2017) *Dealing with Orphan Works: A Dutch Film Archive's Perspective*, [online] available at <http://diligentsearch.eu/wp-content/uploads/2017/11/L-Bout-presentation-orphan-works-a-film-archives-perspective.pdf>, p.2.

⁶⁸ This information is available in the 'About Us' section of the Stadsarchief Rotterdam website at <https://www.stadsarchief.rotterdam.nl/en/about-us>.

⁶⁹ Data available at <https://www.kb.nl/en/organisation/organization-and-policy/kb-in-a-nutshell>

⁷⁰ Data available in Beeld en Geluid (2016) Annual Report 2016 [online] available at <https://www.beeldengeluid.nl/en/about/annual-reports> [Google Translate].

⁷¹ The collection overview is available at <https://www.nationaalarchief.nl/over-het-na/ons-verhaal/missie-en-meerjarenvisie>.

		terabytes of digital files from national government, civil society organizations and individuals.”	Education, Culture and Science			
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Images for the Future was a mass-digitization project undertaken across the Netherlands between 2007-2014, involving Eye Film Institute, Beeld en Geluid, the Nationaal Archief and Kennisland. Images for the Future restored, preserved, digitized and made available the audio-visual heritage of the Netherlands: over 90,000 hours of video, 20,000 hours of film, 100,000 hours of audio, and 2.5M photographs. The project was funded with 115M EUR from the Dutch Government, with 24M allocated to Eye.⁷² As a result, almost 15% of Eye’s collections are now digitized, and the legal team was able to map the rights status of 7,090 film works.

The respondent for KB nominated Delpher, the Dutch Newspaper digitization project, which provides access to over 12M pages of Dutch newspapers published between 1618-1995.⁷³ SR opted to tell the research team about their Imagebank, where any material digitized from their collections is made available via the SR online catalogue. For example, a search for ‘photographic documents’ on the site returns 60,494 results.⁷⁴ The material available is wide-ranging, from genealogical sources (Births, marriages and deaths, etc.) through the records of the Rotterdam branch of the Dutch East India Company, to the collections of local photographers.⁷⁵

The institutions selected for the report are large, with corresponding budgets and staff numbers. However, echoing the UK institutions, the provision of staff dedicated to intellectual property issues is still generally low: staff numbers may go up during specific projects, but in general there are only 1-2 staff responsible for copyright, and the day-to-day of the role generally doesn’t involve rights clearance, specifically. For example, the respondent from Eye explained that “At this point, I’m the only dedicated lawyer within Eye, and even I don’t spend my day clearing rights. I just do that whenever there’s a specific question or a specific project. But if it’s a larger project, we usually attract people on a project basis from outside of Eye, to work here, part time. And they can either be a lawyer, or somebody who just have to do the clearing.” She noted that during Images for the Future, “At the height of that project... I had a legal department of, I think, about nine people, and we did some really in-depth research.”

⁷² This summary is taken from the Images for the Future website, which contains vast amounts of information and research regarding the project, including information about the approach taken to rights issues. For example, the page on ‘Copyright Arrangements’ discusses the use of ‘window agreements with copyright holders or their representatives.’ See <http://www.beeldenvoordetoeekomst.nl/en/project/copyright-arrangements.html> for more details.

⁷³ The portal is available at www.delpher.nl.

⁷⁴ The catalogue can be searched at <http://stadsarchief.rotterdam.nl/collectie/beeld-en-geluid>. Note that not all search results have digitized images attached.

⁷⁵ More collection details are available at <http://stadsarchief.rotterdam.nl/collecties>

KB explained that, “We have no resources earmarked specifically for rights clearance,” but the respondent identified two members of staff, “copyright lawyers... a senior and a junior,” at 1.6 FTE. They noted that, “the junior has a university degree in copyright and the senior a PhD in copyright.”

The respondents for SR explained that rights clearance takes up a small proportion of two staff members’ roles: “It depends, in general, say perhaps, six hours per week?” This tends to be in response to requests for publication from users: if there is clear benefit to SR, they will undertake rights clearance on behalf of the user, as it means they can seek additional permissions for SR. In relation to their decision-making process, they observed: “...when do we take over the search for copyright? Do we do it for everyone? Who’s responsible? We made a decision regarding the size of collections, so when it’s useful for us, longer term, if it’s more than fifty images from a collection, or we think it’s particularly important, we will probably re-use it: then we will go about getting the copyright, or approve getting the copyright approved.” Their current digitization programme does not require rights clearance, therefore data is not available.⁷⁶

3.2 Institutional/Strategic aims and objectives for digitization, and intended users of the digitized works

The respondent from KB explained that, “We make the newspapers available for use by academics (in language, history etc.) and private study by the general public.” They linked this to KB’s 2015-2018 strategic plan, which outlines two overarching objectives: “to realise the national library” and “reinforcing national and international co-operation.”⁷⁷ Several of the elements relating to ‘realising the national library’ are pertinent to digitization: “The customer: ...has a platform for research in Dutch publications...has access to as much digital content as possible, freely accessible to all to the greatest possible extent [and] can rely on the fact that Dutch books, newspapers, magazines and international scientific publications remain permanently accessible.”⁷⁸

The respondents from SR agreed that their digitization programme encompassed the objectives set out in the question: supporting education, public outreach, research, private study, promotional material, and exhibitions. They have also engaged in research to understand their ‘user identities’ and at the time of the interview, had recent completed usability testing of SR website.

The respondent from Eye related that they did not have a specific target group or demographic for their digitization programmes: “...that’s very broad, that’s general public and professionals. That’s

⁷⁶ The respondents alluded to the fact that rights status plays a role in selection: their current digitization priorities are based on a cost-benefit analysis. “We have a multi-year plan from 2015-2017, from what we would like to ideally digitize, and then we ranked it based on size, and cost, and how much work needed to be done to get the metadata added, and then legal restrictions regarding privacy. A lot of what would be valuable to digitize are things like the passenger lists from the Holland America line, because genealogy ...it’s the largest audience. And then on the long list, all of the architectural drawings, but then again, copyright restrictions there...so, is it the property of the architectural firm? Is it the property of the architect? Is it the property of the person who drew it? Is it the property of the depositor? You come up against all of these things.”

⁷⁷ Koninklijke Bibliotheek (2015) The Power of Our Network: Strategic Plan 2015-2018 [online] available at <https://www.kb.nl/sites/default/files/docs/strategicplan-2015-2018.pdf>.

⁷⁸ Ibid, p.9.

basically everybody.” In terms of their strategic objectives, Eye’s Collection Plan 2013-2017 stated that “Digitization is currently the most important precondition for optimal access to the collection for the general public and professionals,” and “Digitization is essential for the management and preservation of the collection, as well as for making it as optimally and widely accessible as possible.”⁷⁹

3.3 Rights clearance overview

Unfortunately the responding institutions were unable to provide rights clearance data in the format asked for by the research team. This is due to the nature of the digitization projects specified: rights clearance for the Imagebank was not undertaken at SR, and the Images for the Future project was completed in 2014, meaning rights clearance data was not easily producible at Eye.

The respondents for SR explained that the Imagebank had been built-up, piecemeal over the years, without having a rights clearance or copyright policy in place: “There was no policy at all,” and “...we had a lot of images, that was also shared with everyone, it was on different platforms, and then because of the investigation into copyright, we had to shut it down. It’s like an insurance... you see how much damage it will cause, and if the negative outweighs positive, then you recall everything.” The investigation referred to here is explored in the next section.

The Dutch Newspapers project at KB was partly facilitated by a collective license. The respondent explained: “For our newspaper digitization, we have to deal with two groups of copyright holders:

1. Newspaper publishers; they own copyright in the works created by their employees. Most publishers were traced (although some did not exist anymore and had no successors in title), only 1 publisher refused permission some 10 years ago but has recently given us permission.
2. Freelancers (journalists, photographers): we did not search for them but concluded an ECL-like contract with 2 CMOs for them. Only 2 photographers so far made use of the possibility to opt out.”⁸⁰

⁷⁹ Eye Film Institute (2014) *Collection Policy 2014-2017*, p.11-12. “In its memo titled *Ontgrenzen en verbinden 2013* (Connecting across Borders 2013), the Council for Culture (Raad voor Cultuur) has also acknowledged that making collections digitally accessible provides many opportunities for the general public and the creative industry. In line with this, EYE offers a great number of public domain and ‘orphaned’ films online for free; it allows the public to access as many other films as possible, depending on agreements with copyright holders, either free or for a charge (through video-on-demand platforms). In addition, EYE also allows many works in the public domain to be accessed for reuse via a channel specifically designed for this purpose called *OpenBeelden.nl*.”

⁸⁰ This is reflected in the Terms of Use statements available at delphur.nl. For example, a search for an in-copyright title (in this case, *De Waarheid*, published 15-07-1974) renders the following Terms of Use: “Because there is copyright on this object, you may only download and/or print it for private use, such as study. You may not redistribute or republish the download or print, not on paper and not digitally, such as via the internet. You may link to the object from your own website or social media account... In addition, the forms of use permitted by the Dutch Copyright Act, provided that all legal conditions are met. For example, the law permits short quotations to be cited in support of an argument (quotation right)... Permission from the

This is often the case with large-scale digitization that takes place as a matter of course, rather than as one-off projects. For example, the respondent from KB explained that, “We engage in large scale digitization, so it is hard to give exact numbers. Our website www.delpher.nl contains over 320,000 books (published until 1940), 1.3 million newspapers, and 1.5 million magazine pages and is continuously being fed with more material. We have several other websites that contain even more material, such as digitized books at www.dbnl.org.”

During Images for the Future, Eye digitized a total of 7,500 titles, or 3,874 hours of film. The respondent was able to establish the rights status of 7,090 film works. The rights team found that 483 (7% of 7,090) were public domain works, and 2,479 (35% of 7,090) were orphan works. The respondent has previously reported on Eye’s ‘common sense’ diligent search process:

“The most useful information (to EYE) is to be found in the National Archive, newspaper archives, the Chamber of Commerce, various genealogical sources and, of course, EYE’s own collection database. Strangely enough, sources such as newspaper archives and genealogical archives are not mentioned in the list of mandatory sources to be consulted, as the sources in the list seem to be aimed at finding “makers” and NOT “rights holders”. To EYE, this is a gross omission as EYE tried to explain to the Dutch Ministry of Culture in the consultation rounds in preparation for the implementation of the OWD. As EYE tried to stress on numerous occasions, the whole point of the search is to find rights holders as opposed to makers. In fact, a film is often orphaned not because one doesn’t know who made it in the first place (although this happens a lot, as well), but because there are no known heirs to the original rights holders, or the production company went bankrupt without a transfer of rights. It also makes sense to only consult those sources that are really relevant.”⁸¹ 780 film works have now been registered on the EU IPO database, as a result of this diligent search process.

copyright holder(s) is required for any other use. This can be the publisher and/or for example the author(s), the illustrator(s), the photographer(s) and/or any other employees (hereafter referred to as the creator(s)). Who is the rightful claimant depends on the name and determines the term of protection of the copyright. If there is no name or if there is, for example, "one of our reporters", the copyright lies with the publisher. The object is then protected up to 70 years after publication. If a name is mentioned, the copyright lies with the maker (s) and the copyright is valid until 70 years after his/her/their death. In order to be able to display the object on Delpher, agreements have been made with both publishers and collective management organizations that represent (freelance) makers. We cannot help you with contact details of individual claimants.” [Google Translate] See Gebruiksvoorwaarden in the side bar at <https://resolver.kb.nl/resolve?urn=ddd:010375903>. More detailed terms, and a disclaimer, are available at <https://www.delpher.nl/nl/platform/pages/helpitems?nid=518>.

⁸¹ Leontien continues: “For instance: for silent film, there is no sense in consulting a CMO for music rights. In the case of amateur film, there is no sense in consulting databases of organisations of professional film makers. In the case of an old newsreel: there is no sense in consulting ISAN code (this International Standard Audiovisual Number was introduced in 2000 and does not track rights holders). If you have found what you are looking for in a source, there is no need to consult more sources any more than it makes sense to consult any source if you have no leads whatsoever. The latter may occur when you have an audiovisual work without any credits or title on the film, no information on the film can and the provenance of the work doesn’t provide any leads either (for instance, the film was donated to the archive by a collector)... This same principle (highly professional people exercising a certain professional discretion to only consult those sources that are relevant) was used for the diligent search in the framework of the FORWARD project... It resulted in the following sources for the Netherlands: BUMA/STEMRA (Mandatory); Delpher; EYE database (M);

3.4 Use of extended collective licenses

The respondent from TNA indicated that they currently pay for an ECL-like license from Pictoright, the CMO responsible for “visual makers... illustrators, visual artists, graphic designers, photographers, architects and other image makers (or their heirs).”⁸² This agreement covers the making available of 1.5M images on TNA’s website.⁸³

This was echoed by KB, who explained that they have also concluded ECL-like licensing deals with various CMOs to enable their business-as-usual digitization programmes: “With digitization on such a large scale, diligent searches are undoable so ECL-like contracts are the only available option in the Netherlands. These contracts lack a legal basis, but in October 2015 the Dutch government (after a common lobby by CHIs, CMOs and makers) decided to introduce an ECL system in our legislation. Work on a bill was however put on hold because the government wants to wait for the new DSM Directive. Under the current ECL-like contracts, we have permission to digitize, make available online and provide copies to CHIs for indexing purposes and to researchers for their research (they may share them within their research group in a closed network only). Moreover, one contract is geared to a specific digitization project ‘Metamorfoze’ and for this, other CHIs who lend us their material to digitize may put these works online themselves as well.” The respondent for KB also explained that, “The licence fees paid to CMOs for our ECL-like contracts are confidential.”

SR were offered a collective licence by Pictoright in 2013, to cover the making available online of visual works through the Imagebank on SR’s website. There were over 10,000 images available on the image bank at this time. SR declined the offer of an annual license. The respondent explained that the license fee Pictoright had suggested was too high for SR to pay on an annual basis. SR continued to make the Imagebank available, but were sued by Pictoright in 2014, eventually losing on appeal in 2017.⁸⁴ Again, the details of the license offered to SR by Pictoright are confidential. Rather than take up the license, SR have opted to remove any copyright-protected material from the Imagebank, which now features 6311 works, which are either in the public domain, or where SR has permission from rightsholders or depositors to make their works available.⁸⁵ The respondents

Familieadvertenties/Central Bureau for Genealogy; Filmproducenten Nederland (M); ISAN Nederland (M); Dutch Directors Guild (M); Lira (M); Media Archief (M); Nederlandse Beroepsvereniging van Film - en Televisiemakers (M); VEVAM (M); Wie was Wie. In FORWARD’s diligent search process as in EYE’s own practice, sources are only consulted if they are relevant even if they are mandatory according to law. The system allows the user the discretion to select the source the user deems relevant and document this search, but the system does not require the user to select and consult all sources.” Leontien also provides excellent advice to peers worried about ignoring mandatory sources: “In case you feel uncomfortable refusing to search legally mandatory sources, even though they are clearly not relevant, EYE suggests contacting the source in question to obtain a written statement (or even to enter into an agreement) in which they state they cannot provide any relevant data so this source doesn’t have to be consulted anymore.” See *supra* note 67, pp. 4-6.

⁸² Taken from the ‘About Us’ section on the Pictoright website at <https://pictoright.nl/over-ons/>.

⁸³ Email correspondence with the research team.

⁸⁴ See ECLI:NL:RBAMS:2014:6959 (Case Number C/13/519351 / HA ZA 12-717, 23 July 2014); ECLI:NL:RBAMS:2015:3590 (Case Number C/13519351 HA ZA 12-717, 10 June 2015); and ECLI:NL:GHAMS:2017:523 (Case Number 200.177.853/01, 14 March 2017) at Rechtspraak.nl for more details.

⁸⁵ Indeed, multiple rights holders got in touch with SR after the works were taken down to enquire what had happened to their siblings/parents/grandparents images. When they heard what had happened, they granted permission to SR to make the works available online once again.

estimated that the number of images made available online has fallen by approximately 80% as a result of the disagreement with Pictoright.

The respondent for Eye pointed out that “there is no ECL as such for audio-visual in the Netherlands... it doesn’t take care of every problem we have, it never will, because there never will be a CMO for audio-visual. [The industry] like to be in control of everything that happens with their material,” but also explained that, as part of the Images for the Future project, the CHIs involved partnered with *XIMON*, a VOD-platform which was built on a voluntary ECL scheme. The partnership involved the association of Netherlands Film Producers, Eye Film and Beeld en Geluid. *XIMON* was a not-for-profit organisation, aiming to catch the expanding market for VOD in late noughties.⁸⁶ The respondent explained the scheme: “For every sale that was made from the platform, five or six collective management organisations, received together, 10% of every sale. And in return for that, they gave us permission to use the works on behalf of their members.” The respondent described this as ‘ahead of its’ time’ and she felt that this “...was a very workable and a very practical solution for us, because that saved at least some clearing activities. And a big advantage was that we didn’t have to put money up front... in a normal ECL scheme you would pay them upfront, no? You would pay them for permission. In this case, they only got 10% of any sale, actual sales. And they did give permission for everything, so that was excellent.” Despite this arrangement, and even with a catalogue of over 4,300 films, documentaries and TV series, *XIMON* was only active between April 2011 and January 2014: it was discontinued as the result of insufficient consumer demand.

3.5 Costs of rights clearance process

The respondent institutions were unable to provide specific data on the costs of/time spent on the rights clearance process. Again, this can be attributed to a number of factors. In the case of SR, no rights clearance was undertaken in relation to the Imagebank facility. The respondent from KB explained that, “I do not dispose of these numbers and I doubt whether we can produce them at our library, because in our library digitization is an ongoing process instead of a project,” suggesting that firm data would be difficult to obtain in a setting where digitization is an ongoing, business-as-usual process rather than a separate project-by-project instance. The respondent was however able to outline that “For our website dbnl.org-website we spend between 30 minutes and 90 minutes per author... which is excluding the time that the answering by authors or their heirs takes after we mailed them.” With 113,496 authors listed on dbnl.org, clearing even 50% of those listed at 30 minutes per search would provide a very conservative estimate of the cost for this process at 872,784.24EUR.⁸⁷

The respondent from Eye was able to state that they had spent an average of approximately 1 hour on clearance per work during the Images for the Future project. Given the total of 7,090 film works whose rights status was ‘mapped’ during the project,⁸⁸ a conservative estimate would put the cost

⁸⁶ More information on *XIMON*, the nature of the collective agreement and what happened to the platform is available in the final project report for Images of the Future - Images of the Future (2014) *Images of the Past: 7 Years of Images for the Future*, [online] available at http://beeldenvoordetoekomst.nl/publication/Images_of_the_Past-publication.pdf.

⁸⁷ This is based on a conservative annual salary of 30,000EUR, or 15.38EUR per hour.

⁸⁸ See *supra* note 86, p.39.

of this process at 109,044.20EUR. The respondent also noted that, as a policy, Eye tends to offer a licensing deal rather than pay for permission: "...we never pay rights holders upfront for anything. The money they get is only if there is a sale and they get a percentage, or the whole sum... but never anything upfront." This is identical to the licensing process at BFI in the previous section, reflecting the established practice in the AV industry.

3.6 Takedown policies, processes and reacting to complaints

KB indicated that they have received takedown requests in the past: "Yes, we then put the works offline according to the opt-out provisions in our ECL-like contracts." The respondent from Eye stated that they had never received a takedown request. The respondents from SR outlined that, aside from the proceedings with Pictoright, they had only ever received one other takedown request, which was in relation to a disagreement over the physical restoration of a work. Again, these findings support the view that, in the vast majority of cases, rights holders do not object to the non-commercial digitization for online access that most CHIs are engaged in.⁸⁹

In terms of takedown policies, SR⁹⁰ have a statement on their website asking third parties to contact them, if they are concerned that their material has been made available through the site without permission. Eye do not have a takedown policy available on their website. KB do not have a takedown policy on the delpher.nl portal, but a short statement is available on the main KB website.⁹¹ Neither SR nor KB's takedown statements set out a process for the takedown: they simply ask rights holders to contact them if necessary.

3.7 Usage data and evaluation of digital resources

The respondent for KB said, "We make users statistics to monitor use frequency. (E.g. I know that genealogists are heavy users of our newspapers)." The respondents from SR noted that "...three years ago they organised an event where archive users could talk about their experiences, and we got a lot out of it... and then, recently, because we are re-doing our website, we had usability testing, usability testing and user journeys created, for the specific groups. And that's been really, really helpful for us. We don't really have metrics for the website... We use a little bit through Facebook,

⁸⁹ See: Dickson, M. (2010), Akmon, D. (2010), Stobo et al (2018), Peters, R. and Kalshoven, L. (2016) *Europeana Factsheet: What rights clearance looks like for Cultural Heritage Organisation – 10 case studies* [online], available at https://pro.europeana.eu/files/Europeana_Professional/IPR/160331rights_clearance_case_studies_public.pdf and Stobo, V. et al (2013) *Copyright and Risk: Scoping the Wellcome Digital Library Project Report*, CREATE Working Paper 2013/10, University of Glasgow: Glasgow, available at <http://www.create.ac.uk/publications/copyright-risk-scoping-the-wellcome-digital-library-project/>

⁹⁰ There is a takedown statement available in SR's website disclaimer at <https://www.stadsarchief.rotterdam.nl/disclaimer>: "The City Archives Rotterdam has done its best to track down the rights holder (s) of displayed material and to request their permission for publication on the internet. If you believe that the online availability of certain material infringes any right that you are entitled to, please contact us." [Google Translate]. A further statement is available on the sound and vision collection search page: <http://stadsarchief.rotterdam.nl/nl/collectie/beeld-en-geluid>

⁹¹ The statement is available at <https://www.kb.nl/en/copyright-kb-website>.

and a little bit through Twitter, and we've just started using Instagram, so we're getting metrics from that as well." The respondent for Eye explained that they hadn't engaged with users in a 'structured way' during the Images for the Future project.

This suggests a similar situation to that in the UK: more user evaluation is needed to understand what sort of re-use users want to make of cultural heritage collections, and how that can be best-facilitated through the digitization process. Such insights will also support any attempt to crowd-source diligent search.

3.8 Engaging with the 'crowd'

KB indicated that they could not think of an engaged community to engage in diligent search. "...this is difficult because for diligent searches we get the most hits not via the sources prescribed in the Dutch source list accompanying the Dutch orphan works legislation, but via information of colleague CHIs such as the Literature Museum (sharing information happens on a trust basis)." This echoes findings in previous studies, and is acknowledged in the text of the Directive itself: internal databases and sources of information within and across CHIs are often prime diligent search sources.⁹² This also alludes to the issue of accessibility of search sources highlighted in the previous EnDOW reports.⁹³

The respondent from Eye was also sceptical. "Well, we've discussed this internally... and we have to say, no. Well, for audio-visual, that is. It might be different for other works, which are probably a bit simpler. I mean, audio-visual is pretty complicated. First of all, we think it's really too boring for a lot of people to spend any time on, that's the engaged part. We think it might only be possible to have people - if you find them, you know, enthusiastic to search anything for you - for really tiny, very 'effectual' portions of a search... We think that it involves too much required knowledge to have people conduct a broader search and combine the search results... if you could find someone enthusiastic enough, it's really very small portions that you can have them search for. And it still takes someone with a more audio-visual and legal background to actually combine the results and make something of it."

The respondents from SR were a little more enthusiastic. "I think... it would depend how much education was required, to do it, and what sort of material it was... we'd probably first ask our existing volunteers because we have direct contact with them... There's always educational groups and community groups, and students, students you can get, because they can put it on their CV, it's something active and proactive." They went on to note that the concept of diligent search for rights holders in cultural heritage collections would need to be 'meaningful' in some way: "...it depends how you frame it... because if I read 'undertake portions of rights clearance task,' that's quite indifferent. It's a difficult question. You know, how do you frame that as something they'd latch on to?" They also acknowledged the labour that the institution in question would need to commit to

⁹² ANNEX to Directive 2012/28/EU on certain permitted uses of orphan works; and Stobo et al (2013), Stobo (2018).

⁹³ See Favale, M., Schroff, S., and Bertoni, A. (2016) Report 1: Requirements for Diligent Search in the United Kingdom, the Netherlands and Italy, EnDOW Project Report [online] available at http://diligentsearch.eu/wp-content/uploads/2016/05/EnDOW_Report-1.pdf, and Bertoni, A., Guerrieri, F., and Montagnani, M.L. (2017).

any crowdsourcing effort: “...there’s a number of groups we’d approach, but how much effort we’d have to then spend educating them about it, that would have an effect on which groups.”

This echoes the suggestions made by the respondents for the UK institutions: make small elements of the search available to the crowd, or attempt to engage existing volunteers known to the institutions. The nature and extent of labour required at the cultural institutions running the crowdsourcing will also need to be explored.

3.9 Use of the orphan works exception (EUIPO Database)

All of the respondents were aware of the orphan works exception, and the EU IPO database. Both Eye and the KB had used the EU IPO database, making 780 film work and 21 literary work registrations, respectively. Their responses about the experience were mixed.

The respondent for KB noted that: “A disadvantage is that [registering works] must be done on a per work [basis] which is very time consuming given that with books, whole oeuvres are orphan if an author’s address or his/her heirs cannot be found. Moreover with orphaned books, authors are mostly known but their (or their heirs’) whereabouts are not.” When asked if they had negative or positive thoughts about the Directive, the respondent highlighted that the Directive “...omitted to permit analogue forms of making available.” This echoes comments made by the British Film Institute respondent in relation to facilitating screenings of analogue orphaned film works.

However, the respondent for Eye took a different view: “I think [the Directive] allows for much more than most people make use of. I know that we don’t restrict ourselves to online use. And we also allow commercial, in between brackets, use. In the sense that we ask a fee, which is of course to cover our digitization costs, but nevertheless, I think most people read it too strictly. And I don’t think that’s necessary.”⁹⁴ The respondent also recognised the low-risk nature of cultural heritage digitization: “On a more practical note, from our experience, this material is completely [risk-free], nobody’s ever going to come forward.” When asked if Eye would have made the same films available online without the existence of the Directive, the respondent confirmed that this would have been the case: “I think that if the Directive was not in place, we would have made a simple risk assessment, we would have probably decided that this material was risk free, and we would have used it anyhow.” But she did acknowledge that the Directive provided benefits in spite of this: “I think we are.. pleased that at least there’s a sort of legal recognition that there is such a thing as a work for which it is impossible to find a rights holder.” This echoes the comments made by the respondent from the BFI in the UK section: that the Directive provides useful leverage within CHIs themselves, to support internal recognition of the orphan works issue and resource the rights clearance process accordingly. The respondent for Eye also reported that they had used the bulk upload function with the EU IPO database, and that they did not experience any technical issues during this process.

While SR have yet to make use of the Directive and the EUIPO database, the respondents made two observations. “With the European Orphan Works Directive, it’s very confusing about what we’re meant to do. I mean, we know roughly what we’re meant to do, but then, how long do we wait, do

⁹⁴ Leontien has further outlined the use Eye makes of their orphan works, see *supra* note 67

we get informed, what license do we place it under then?” and “We didn’t really understand what the checks and balances were, regarding correction of authorship. How’d you validate that? They don’t seem to validate it...” This speaks to some of the uncertainty that exists in the way the exception and the database operate: CHIs must establish their own internal practices to address the legislation, and are reliant on the quality of their own diligent search, as there is no verification procedure and very little safeguarding within the legislation, should a rightsholder reappear.

3.10 Future use of orphan works mechanisms

Eye have stated that they will continue to use the orphan works database, where feasible, suggesting that this will most likely happen during project-based digitization: “I think that we will, consensus allowing, continue to search for rightsholders, decide that some films can be considered orphan, and upload them, yes. But, it’s more likely to be happening if there’s another big project than on a day-to-day basis, because there’s not a lot of people here... I don’t have any time for any structured searches every day.”

KB reported that they would not use the orphan works directive/EU IPO database in future: “No, diligent searches are undoable for large scale digitization, so we prefer an ECL system where no diligent search is required.” The respondent then went on to suggest a comparison with the “...Scandinavian ECL systems, the German Out-of-commerce legislation and the DSM proposal,” suggesting that the Orphan Works Directive does not compare favourably. This conforms to general consensus that ex ante approaches to rights clearance are more efficient than ex post, for CHIs.

SR have yet to use the Directive, but indicated that they will use it as and when they make orphan works available online in future. Indeed, they have drawn up internal documentation to facilitate use of the orphan works exception, when the need arises. This is part of the internal copyright policy development they have undertaken in response to the Imagebank project.

3.11 Potential solutions to the orphan works issue

The respondents mentioned the Scandinavian ECL systems, the German out-of-commerce legislation, the current DSM proposal, revenue-based ECL schemes similar to the business model used by XIMON, and the possibility of giving advance notice to rights holders of the intention to make works available for non-commercial purposes, as potential solutions. When the possibility of an expanded exception was floated, the respondent from Eye sounded a note of caution: “Well, of course, in an ideal world, there would ...be an expanded exception for cultural heritage institutions. I think it’s also safe to say that’s not going to happen anytime soon. So that would be ideal world, but I can assure you that the rights holders that are out there are going to object in any way they can.”

PART IV

4. ITALY

4.1 Overview of the selected institutions

The selected institutions are: the National Central Library of Florence (National Central Library); the Istituto Luce; the Cineteca of Bologna (Cineteca); Festivaletteratura of Mantua (Festivaletteratura) and the Museum of Videogames of Rome – Vigamus (Vigamus).

The sample of institutions contains one large national institution (the National Central Library), and four small and medium-sized institutions. The research team found that the National Library, the Istituto Luce, the Cineteca and the Festivaletteratura are primarily involved with the digitization of written works, phonograms and audio-visual works. However, the core activities pursued by Vigamus are related to video games that, as multimedia interactive works, are inevitably subject to rights clearance requirements and management methods different from the ones followed for other kinds of works.

Videogames, as “born digital works”, cannot be digitized. They are preserved and divulged through emulation. This process *“is not able to perfectly reproduce every aspect of the video game and does not maintain the original platform”*.⁹⁵ This difference in substance is remarkable, especially for the purposes of the overall analysis here required. Therefore, it has been necessary to differentiate the outcomes of the research concerning this specific institution through an independent paragraph at the end of each section.

From the data collected by the research team, it was found that the provision of staff dedicated to rights management is homogeneously and significantly low for all the institutions concerned (from 1 to 2 people maximum per institution). Nevertheless, the importance of rights management is far from being underestimated and the perception and status of rights management was raised by all the respondents. For example, the Cineteca and Vigamus have decided to partially externalise the consultancy related on rights management, asking for additional external support when needed, for specific projects.

Instead, the Festivaletteratura and the Istituto Luce opted for internalization, relying on the fact that there is substantial homogeneity between those problems and issues related to copyright most frequently occurred. An internal expertise has been developed among the members of staff.

⁹⁵ According to Mr. Marco Accordi Rickards, president and founder of Vigamus, emulation can be considered as *“as a form of further digitization. Using a software named MAME, which replicates the behaviour of arcade games on modern computers, we created a collection ordered by genre of the golden age of arcade games. This way, visitors can relive those games – even though the experience is not exactly the same – without the need for the spaces that the use of arcade cabinets would require”* he explained. Indeed, more information on emulation as a digital preservation strategy can be found on the Open Preservation Foundation website at <http://openpreservation.org/knowledge/interest-groups/emulation/>.

Furthermore, it was highlighted that the most important obstacle to hiring new staff members specifically employed for rights management is the limited amount of available resources and funding. As to the National Library, the recruitment is entirely managed by the Ministry through a public selection process.

Some of the digitization projects pursued by the selected institutions have significant national and international relevance. In particular, the National Central Library in its project carried out in collaboration with Google, has made a considerable number of works available to the general public in digital form. The mass digitization (still in progress) covers 120.000 works. The Istituto Luce restored several precious old works, included, for their historical value, in the register “Memory of the World” created by UNESCO. The Cineteca participated to several initiatives including the project FORWARD (Framework for an EU-wide Audiovisual Orphan Works Registry). The digitization pursued by the Festivalletteratura is aimed to the preservation and the divulgation of the content mainly related to the activity of the Festival.

Vigamus is a private foundation founded in October 2012, through personal resources of the founding members. The original staff was composed of four people and some volunteers. At present, they have a permanent staff composed of seven people, plus some part-time employees and external collaborators for specific projects and activities (15 people in total). The museum’s main collection ranges from the first experimental video game of 1958, up to the rebirth of video games in Japan between 1983 and 1985. The selection comprehends works considered important in the history of video games. Due to the small spaces available, only part of their collection is on display.

Video games operate on digital platforms that tend to become obsolete and inaccessible as time passes: for this reason older video games are at risk of disappearing. However, copyright law forbids the use of some preservation strategies (like migration on updated systems). The respondent affirmed that, at the moment, the only choice for the institution is taking the risk in order to avoid losing important games due to physical deterioration of the original media. For now, the institution does not dispose of sufficient resources to hire someone with specific knowledge in the area of copyrights and, for the moment, two people deal with rights management even if they have an artistic and literary background. The institution relies a lot on know-how from EFGAMP – European Federation for Game Archives, Museums and Preservation Projects – which they co-founded, and which sets out to preserve the video games heritage. Emulation is not able to perfectly reproduce every aspect of the video game and does not maintain the original platform. Because of that, some copyright-owners are not so open to allow the use of their video games, even if it is for preservation purposes. The table on the following page presents an overview of the selected institutions.

Table 5: Overview of selected Italian institutions

Institution	Annual budget	Collection strengths	Funding sources	No. of FTE staff	No. of staff in rights	Digitization project
Cineteca	Not specified	documentaries and newsreels about the city of Bologna; restorations	Funding from Municipality of Bologna and Emilia Romagna; State funding and European funding, self-funding; specific partnership (e.g. collaboration with World Cinema Foundation by Martin Scorsese)	Not specified	External consultant	FORWARD; project on the Second World War (to be developed), I-Media Cities; annual restoration of silent films
Festivaletteratura	60,000 euro		Funding from the Organizing Committee and funding coming from the participation to competition notices.	2	1	The photo collection which dates back from 1997 to 2004 (around 20,000 photos), audio selection (145 out of 350) which dates back from 1998 to 2002.
Istituto Luce	Not specified	5,000 hours of film and 3 mln of images; films and photos from 20s – 50s	Ministry of Economy	80	2	Films and photos produced by Istituto Luce dating back from 20s -50s and part of UNESCO Memory of the World
Vigamus		Evolution of game industry from 1958 – 1985 (most important pieces only).	Self-financing	7	1 + External consultancy	Emulation projects: creating an archive.
National Central Library	3M per year + 20-25,000 self-financing <u>in 2017:</u> 729,000 euros (extraordinary funding) + 15M for expanding the sites.	9 mln of pieces (6.200.000 monographs 2.700.000 booklets) + 3 mln of serials.	State funding, donations, self-financing.	155	2 (part-time)	Google project (started in 2013 and still in progress); ProQuest Project.

4.2 Institutional/Strategic aims and objectives for digitization, and intended users of the digitized works

The main purpose of digitization projects pursued by the selected institutions is, in the first place, restoration for the purposes of preservation. Sometimes this objective is followed up by dissemination of the digitized content. The National Central Library within its participation in the Google project, aims to make the majority of its digitized contents available. Therefore, the intended users are not only academics and researchers, but also by the general public. It is somewhat unusual that some specific contents, even if digitized, are not available online but they can only be accessed through the archives accessible in the National Library.

The Istituto Luce digitizes mainly for the preservation of works that need to be saved from obsolescence and secondly for dissemination purposes. The intended users are editors, film production companies and broadcasters but also enthusiasts, collectors and students.

The Cineteca reports that it digitizes both for restoration and for public dissemination of contents, making its choices on the basis of the estimated intrinsic value of each work, without doing a full systematic search on the target users.

The Festivalletteratura digitizes for the purpose of the dissemination and promotion of its own activities. Thus, the intended users of digitized works are primarily the participants in the Festival. According to their internal investigation of web traffic, primarily researchers and publishers access the digitized content.

As to Vigamus, the primary educational and cultural mission of the institution is discovering and publicly presenting the history of video games. Preservation through emulation is another important institutional aim, but certainly one relevant factor is that emulation can easily be pursued by anyone through the use of their personal devices. The intended users are primarily video game lovers and fans.

4.3 Rights clearance overview

The table in the following page presents an overview of the results of the rights clearance process at each of the institutions.

Table 6: Overview of rights clearance results at Italian institutions

	Cineteca	Festivaletteratura	Istituto Luce	Vigamus	National Central Library
Digitization project	FORWARD and other restorations	Photo and audio collection	Restoration and preservation of photo and film works.	digitization = Emulation	Google project and ProQuest project
Overall number of works selected for digitization	70,000	around 20,000 photos; audio selection (145 out of 350) graphic material and other documents	1 mln of digital copies of photos, 5,000 hours of film works	2,400	Google project: 120,000 works (objective: 15,000 volumes per year); Pro-quest Project 6,000 works from 14 th - 15 th century
No. of works where rights held by institution	3,500	A relevant part	A relevant part	Very few	Not a considerable number
No. of works in the public domain	7,000	Not specified	Some works are in the public domain.	0	The majority
No. of third party works	49,000	Some	Unknown author: less than 10% of the photos, less than 3% of film works	The majority	Not specified
Granted permission	Approx. 49,000	Some	The major part of the third party works.	yes	Not specified
Refused permission	0	Few cases	Few cases, but all illegitimate	0	Not specified
Non-response	Not specified	Not specified	Not specified	0	Not specified

No. of orphan works	Not specified	10,000 - photos	Some	0	0
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The National Central Library carried out a digitization project focused on the front cover and table of contents of volumes. It affected about 100,000 works, and was limited to the first 3 or 4 pages of each volume. The aim was improving the bibliographic records of the National Central Library. Subsequently, the most important pieces of the collection (including manuscripts, art books and geographical maps) have been digitized. The aim was to ensure a wider access to pieces with a considerable historical and cultural value but only available at the National Central Library. The most recent project has been the Google project, involving mass digitization aimed at enhancing access to the full contents of the volumes involved. Smaller projects are planned for the future. One of them is the partnership agreement with the National Library of Israel for the digitization of a small number of Jewish manuscripts.

In none of the digitization projects carried out so far by the National Central Library, the problem of orphan works has arisen. All digitization has dealt with works not covered by copyright, recently by following rules on the age of works to be included as adopted by Google.⁹⁶ When, in few cases, there is ambiguity about the date of publication (that is for those works with an uncertain date), Google digitizes the works but does not make them available to the public, unless a more precise date is provided by the National Central Library.

The National Central Library has been publishing the Italian National Bibliography, in various forms since 1886, under this name since 1958. Since 2016, it is in a digital form and free of charge and free accessible.

The Cineteca has carried out digitization projects on its audio-visual collections.⁹⁷ According to respondents, the Cineteca manages to restore approximately 15 movies per year. The films selected are those considered to be more suitable to be screened in movie theatres and well-known film festivals (e.g. the Venice Film Festival).

As to the digitization aimed at restoration, the Cineteca has restored several Italian silent movies, which have been screened during the festival named “Il Cinema Ritrovato” Furthermore, the Cineteca usually responds to some external requests for restoration (e.g. those requests coming from the Martin Scorsese World Cinema Foundation). The Cineteca have a vast collection of restored films in analogue format and one of the future projects of the institution is their conversion into digital form. Currently, digitization is conducted in response to more immediate needs and requests. The standard digitization process, instead, has digital files in lower definition as final

⁹⁶With specific reference to the Google Project, the National Central Library decided to digitize only the works that have been published within a buffer of 140 years from the date of publication (70 years for periodicals). When digitization of most recent publications came at stake, digital texts are only made available for internal use. Therefore, also in this last case, copyright issues do not arise.

⁹⁷ The Cineteca pursues two types of digitization: digital restoration, (which requires more investment but guarantees high quality products and the conservation of films in high definition) and standard digitization.

product.⁹⁸ This kind of digitization involves about 300 films per year (they are mainly rare films not suitable for being sold). In this context, the biggest project pursued by the Cineteca is the collaboration with Corona Cinematografica.⁹⁹

Beyond the digitization of private collections, the Cineteca took part in some EU funded digitization projects, such as the I-Media-Cities, aimed to the digitization of some of the cinematographic and photographic works related to the city of Bologna. Finally, the institution is planning to be involved in a project aimed to the digitization of works dating back to the Second World War.

The institution has chosen to digitize (without carrying out a diligent search) about 20-25% of works whose author is unknown (mostly silent movies). Some 5% of the institution's works are owned by the Cineteca (mostly documentaries and newsreels) and about 10% are in the public domain. The institution managed to identify the authors of about 70% of the digitized works. All of them gave permission.

The digitization of analogue material carried out by Istituto Luce began around the mid-1990s and particularly in 1998. At that time, they were managing the digitized works through an online platform. The works concerned were still in low resolution being a necessary condition to grant their availability and accessibility online. They continued to invest in digitization and they began to digitize films and photographs in high definition. When the demand began to be mainly addressed to works in digital form, the Istituto Luce engaged in bigger digitization process.

The primary purpose of the institution is the public dissemination national heritage. Secondly, digitization was found to be a good instrument for the preservation of original works. These processes have, therefore, been structurally incorporated into the core activity of the institution, being currently a real institutional requirement.

The first works to be converted into digital form were newsreels and photographs produced by the Istituto Luce between 1920s and 1950s, finally included in the Memory of the World Register realised by UNESCO.¹⁰⁰ The already digitized works include 1,000,000 copies of the photographic content and 10% of 5,000 hours of film.

The respondent reported a surprising amount of third-party works (usually coming from donations). The respondent for the institution remarked that, in these specific cases, the main aim of the Istituto Luce is to be sure that author is known. Therefore, only in very few cases will the institution deal with works whose author is unknown (an estimated 10% of the photographs and less than 3% of the film archive). These works have not been converted into a digital format yet, as the institution is not able to obtain more information before engaging in the digitization process. The institution has the ownership of all the works included in its archive. Some of these works are in the public domain.

⁹⁸ They can be made available online or used to create DVDs, but they are unsuitable for cinema projection.

⁹⁹ It was a production company specialised in documentaries and newsreels dating back to the period comprised between the 60s and the 90s: the operators of Cineteca are currently digitizing the archive materials (constituted by about 2,500 documentaries, 1,500 newsreels and several animated movies).

¹⁰⁰ The rationale behind the digitization process (meaning the choices of the works that are going to be digitized) is generally based on the need to save those works that are considered to be at risk of deterioration.

The main target is the general public, but quite remarkable is the contribution of professional users (i.e. publishers, television channels and film production companies). A considerable number of enthusiasts, collectors, students, are also taken into account.

The digitization project pursued by Festivaletteratura took place between 2012 and 2013 through the contribution of Regione Lombardia. The digitization involved about 20,000 photos from the years 1997 to 2004, and 145 of the 350 audio recordings (on cassettes), dating back to the period between 1998 and 2002. Additionally, the institution digitized about 20,000 photos, 150 recordings, and a selection of drawings and administrative documentation concerning the activity of the institution itself.

The process is not yet completed and the remaining works to be digitized are represented by more than 200 recordings and about 150 audio and video files shot with Betacam by Rai network.¹⁰¹

As for the audio recordings, none of the works is an orphan work, since the speaking author is always known. A preliminary written consent to the use of the contribution is always predisposed by the institution. The respondent suggested that this kind of safeguard reduces the risk of future takedown requests.

There were orphan works contained in photographic materials dating back to the early years of the Festival. The respondent affirmed that they have been able to identify some of the photographers (who gave them permission) but in very few cases they encountered a denial. About 10,000 of the 20,000 digitized photographs have not been published because the author is still unknown. Since the Festival is organised, put in place and hosted by the institution itself, they own the rights to all the related materials.

As to Vigamus, their collection contains about 1,000 physical games and they emulated 1,400 works. The identification of the author of a video game is a complex issue. On the cover, the name of the developer and the publisher can be found. The video game developer can be considered as equivalent to a literary author. In the majority of cases it is a development company. Developing a video game requires a large number of people (it would be near impossible to locate every single co-author).

In light of the above, the respondent claimed that the idea of “orphan work” does not really apply to video games, because when a permission to emulate a game has to be obtained the institution contacts the publisher. In the majority of cases an answer would be obtained.

The respondent affirmed that it is quite impossible for an institution like Vigamus to develop large-scale video games (as the costs involved would be prohibitive). They have created a small text adventure, in collaboration with an Italian author. It represents both an experiment of interactive fiction and a presentation of the Museum, its activity and its mission.

¹⁰¹ The respondent of the Festivaletteratura explained that for the digitization of this kind of works, the contribution of new investors would be necessary, as it requires specific expensive equipment.

4.4 Use of extended collective licenses

None of the selected institutions has ever used extended collective licenses, neither any unofficial ECL scheme.

4.5 Costs of rights clearance process

Not all the selected institutions were able to give to the research team an estimation of costs involved for their digitization projects.

The activity of the National Central Library within the Google Project is limited to the handling of books, (such as physical delivery and for the verification of their conditions). This has a cost of 1 Euro per book. When the Library carries out digitization activities on its own, the cost per digitized page is about 0.30 Euros, while for the ancient books the cost is 8 Euros per bibliographic unit.

Moreover, the digitization refers to collections dating back to the 1700-1800 period and, in addition to the costs mentioned, there are those for the creation of the digital bibliographic record. This choice is justified by the fact that the conversion of the catalogues from paper to digital has been started from the oldest and most recent editions inward.

As to the activity of Istituto Luce, the digitization process has proved to be a source of economy rather than a cost. After a first necessary investment cost which includes film scanners, technical assistance contracts involving the IT infrastructure (that handles the data traffic, and all the other equipment for the digital conversion). A considerable savings has been recorded, because the expensive manual process required by analogue copies is finally overcome: the creation of a copy, that previously needed 10 people, is now carried out by a single person.

The digitization activity of the Cineteca is based both on standard definition digitization and digital restoration: the estimated cost for a standard definition digitization of 10 minutes of film (identified as the normal length of a documentary) is about 150 Euros, while a digital restoration can cost between 2,000 and 5,000 Euros. The amount of costs depends on the condition of the original film. The aforementioned costs include all the tasks required by the digitization/restoration process.

The respondent for the Festivalletteratura reported that, for the digitization project of the material related to the activity of the Festival, the estimated cost of the remaining audio recordings is 13,000 Euros.

As to the diligent search, only one respondent (Festivalletteratura) out of 5 affirmed that during the digitization project a diligent search has been carried out and, that the amount of time varied on a case by case basis.

The remaining institutions either avoid the problem by choosing to digitize those works already in the public domain or by choosing to digitize works without carrying out any diligent search.

The respondent for Vigamus affirmed that emulation does not involve any costs. Emulators are developed by others and are freely made available to anyone.

4.6 Takedown policies, processes and reacting to complaints

The respondents for the National Central Library and the Cineteca did not report any problems concerning their digitization selection criteria, nor with take down requests by re-emerging authors.

As to the Istituto Luce, only in very few cases they have received a takedown request from a rightsholder. In these few cases the requests turned out to be illegitimate and the situation was resolved by providing the necessary evidence.

The Festivaletteratura received some requests from photographers who had previously given permission to use their works on the website of the institution. The photographs in question have been removed from the website.

The respondent for Vigamus stated that, even if they never conduct diligent searches, they still need to contact the copyright owners if they decide to emulate a game. Rights are owned by video game companies and not by individual authors: so the only possible difficulty would be locating the successor to a company that no longer exists. In this case, the institution takes the risk and emulates the game. In very rare cases they could be contacted by the owners and asked to remove the content.

Even if the respondent never spoke about diligent search as defined in the Directive, he illustrated the “*standard procedure*” used to find the owners of the works. It takes place almost entirely online and it does not involve additional search costs. One of the most-used sources is MobyGames, an American website where a list of all the individual co-authors is also available. Other sources are the official websites of the main video game companies. This method is the result of personal and institutional know-how, best practices and common general knowledge.

4.7 Usage data and evaluation of digital resources

None of the interviewed respondents has been able to give an evaluation of usage/uptake of the digital resources created through digitization.

The respondent of National Central Library reported that, as far as the Google digitization Project is concerned, they currently do not possess any data on their digitized volumes. The only available data are related to the number of visitors to their institutional website. The respondent highlighted the importance of this data source, since digitized works are collected on the website. For the same reason, certainly relevant are the visits and searches done on the OPAC.

The respondent for the Cineteca was not able to give a comprehensive evaluation, since the usage of the digitized film works varies on a case by case basis: there are some examples of film works which resulted to be very successful and, therefore, continue to be purchased.

Likewise, the respondent of Festivaletteratura affirmed that, since they did choose not to have an economic return on the digitized materials, they cannot make any kind of economic evaluation. However, some information about users could be extrapolated from SoundCloud, which keeps records of the data on the number of users that accessed the recordings. This information does not, however, extend to the further use of the digital material.

4.8 Engaging with the ‘crowd’

When the respondents were asked whether they could think of an engaged community who could undertake portions of rights clearance tasks, no response was provided. We might speculate that this suggests that a crowd-sourced solution for diligent search in Italy would struggle to generate enough volunteers to be viable. However, it may also be the case that the respondents have simply never considered opening up diligent search to the crowd before, and therefore they cannot think of an obvious community who would participate.

4.9 Use of the orphan works exception (EUIPO Database)

Even if the majority of the respondents confirmed they were aware of the contents of the Directive, none of them had tried or succeeded to apply the Directive directly to their activities. The respondent for the National Central Library confirmed that the awareness of the content of the Directive is not accompanied by a detailed knowledge of the matter. This is because the issue of orphan works has never been directly encountered by the institution.

Similarly, from the answers given by the respondent for Istituto Luce, it is clear that at present the institutional priority is completing the digitization of the film archive. He added that the limited amount of resources is not sufficient to deal with both the issues of digitization as such and orphan works.

The point of view of the respondent for the Cineteca raised some interesting aspects on the relationship between rights management by a single institution and orphan works. In particular, the awareness of the existence of databases and the content of the Directive is accompanied by a lack of effective tools available to cultural institutions and other stakeholders. At present, the main concern is that it is not possible to make public the results of any diligent search. Therefore, in their view it was not possible to “*legally determine*” the orphan work status.¹⁰²

Secondly, the speaker for the Cineteca affirmed that the whole diligent search process is seen as a “*discouraging factor*”, since it requires a number of highly expensive (and not always useful) steps to be accomplished by the concerned institution. Those steps, according to the respondent, hardly lead to conclusions different from the initial information (known to the operators by simply relying on both the common practices of the sector and the general knowledge). The respondent suggested that it will be necessary to give the beneficiaries of the Directive the facilitated access to the needed resources. This would allow them to efficiently carry properly out the diligent search.

The respondent for Vigamus mentioned the video game archive made available by the Cineteca as a very useful tool. Since a national database for video games is not currently available, the respondent does not exclude that, among the projects of the institution, would be included the creation of an archive, even in cooperation with other institutions sharing the same interests. Vigamus is very active at the international level. Through EFGAMP they have submitted a request

¹⁰²The same point had been highlighted at the end of the FORWARD project, according to the respondent.

to the EU institutions specifically about video games rights. The most experienced foreign institution is Computerspielemuseum of Berlin and it pursues a coordination role.

4.10 Future use of orphan works mechanisms

The respondents for the National Central Library envisaged the possibility to extend the digitization even beyond the current buffer of 140 years,¹⁰³ if they were able to provide Google with the results of a diligent search declaring (with certainty) the status of orphan works.

The respondents for the Festivaletteratura confirmed to be aware of the existence of databases. In spite of this, they never used them. They added that the possibility to use them is not excluded for future projects.

4.11 Potential solutions to the orphan works issue

The respondents of the National Central Library and Cineteca were in agreement that one challenge in the Directive is the possibility for a copyright holder (who challenges the orphan work status) to receive a compensation for the infringement of rights. The fact that the compensation must be paid by the institution that digitized the work, could potentially represent a dangerous deterrent for any digitization activity, being a considerable economic risk to be taken by the organisation itself.

Concerns were also expressed about the lack, in the text of the Directive, of a precise detailed definition of "fair compensation" (and symmetrically, the lack of any criteria to determine its possible amount). This represents a further obstacle, from a financial point of view, in the event that an organisation wished to set up a risk fund.

The respondent for the Cineteca expressed his concerns about the possibility that the Directive will raise barriers rather than facilitate the uses of orphan works. It reported that, at present, the institution has never experienced any problem with rightsholders, even if any diligent search has never been carried out. Taking into account general practices, experience and common general knowledge, it has always been easy to assess the risk of making a digital work public without exposing the institution to possible claims of authors concerning their rights.

The Cineteca is willing to use digital instruments (such as the already available databases), provided that they are further developed in order to be more efficient. Currently, the IT systems allowing the availability of materials online requires unjustified maintenance costs. The use of sharing platforms (such as YouTube) has been envisaged to make more easily accessible to the general public the digitized works.

The respondents of the Festivaletteratura affirmed that all the possible solutions to improve the already available tools should be taken into account, provided that they will not cause damages to the credibility of the institution towards the authors.

¹⁰³ See *supra* note 96.

PART V

5. DISCUSSION AND CONCLUSION

5.1 Discussion

This section presents some observations based on the findings from the three jurisdictions featured in this report: the UK, the Netherlands, and Italy.

It is clear from the institutions interviewed, even in a limited sample of 15, that there are different levels of readiness to engage with orphan works across the CHI sector. This can be seen among the institutions that have the resources and the confidence to engage with the Orphan Works Directive and the EU IPO database: the British Film Institute, Eye Film Institute, the British Library and Koninklijke Bibliotheek. Indeed, Koninklijke Bibliotheek's experience with the Directive and diligent search appears to have cemented their preference for ECL-like mechanisms over the OW legislation.

We also observe institutions that have made orphan works available online, but have chosen not to interact with the Directive and the EU IPO, whether for current or legacy projects: National Library of Wales and National Library of Scotland. These institutions have demonstrated a reasonably high tolerance for risk, by balancing the expected costs of compliance against the potential benefits involved in making the collection materials available online.

A group of institutions featured in the report have not made orphans available online and have not used the Directive: National Central Library, Istituto Luce, Cineteca, Festivaletteratura and Vigamus. Either orphan works are not digitized at all, or they are digitized for preservation purposes, not online access. The homogeneity of this approach in Italy is striking, suggesting that Italian CHIs are not ready to engage with the orphan works Directive, or the EU IPO database. This could be as a result of the lower levels of funding available to Italian institutions, when compared with the funding levels of the UK and Dutch institutions included in this report.

The exceptions to this are three national archive institutions who do not report having particular issues with orphan works in their collections (National Records of Scotland, Nationaal Archief and Beeld en Geluid). This is not unusual in institutions that serve as government archives of public records, or where the archive service exists to preserve and provide access to the records of a parent organisation, as these collections tend not to contain significant numbers of orphan works. The final institution has potentially made orphan works available in the past, but as a result of litigation has removed these from their website, and they do not currently have plans to confirm the rights status and register those works with the EU IPO (Stadsarchief Rotterdam).

We expect that some of these results will be reflected in the wider CHI sector in these individual jurisdictions: uptake of the Directive is extremely low, and uptake of the UK IPO Orphan Works Licensing Scheme is even lower.¹⁰⁴

There are also different drivers influencing engagement with the Directive and EU IPO: requirements to comply with legal obligations, economic factors, reputation management, public trust, internal processes, availability and quality of collection data, appropriate legal training and demand from users have all been observed to play a role in the decision-making process at CHIs.

The perception and status of rights management within the institutions was raised by several interview respondents: some had felt that rights issues were not adequately considered when digitization projects were initially planned, but became more important as projects progressed. Copyright issues don't appear to be recognised and resourced consistently at a strategic level: there are generally low numbers of staff with specific responsibility for copyright, with the added loss of skilled and experienced temporary staff once larger project work ends. As a result, at least two respondents noted that the Directive has been useful for internal leverage and for raising the profile of copyright issues within CHIs.

The report has also found that there is continued uncertainty regarding the scope of the Directive and the diligent search requirements, and that views on these uncertainties differ across institutions. This suggests that even where high levels of expertise are available, interpretation of the legislation diverges, and different institutions will implement the legislation in different ways. The uncertainty relates to: the nature and extent of the diligent search required and whether search sources must be checked exhaustively; the ability to screen and otherwise exploit analogue versions of orphaned audio-visual works; the extent of the commercial use that can be made of registered orphan works; and the unpredictable level of compensation required for rightsholders, in the event of a registered work being declared non-orphan.

The use of collective licensing and ECL-like schemes as potential solutions for the challenges created by rights clearance for mass digitization is supported by at least four of the larger library institutions featured in the report. While ECL works for certain institutions (Koninklijke Bibliotheek, Nationaal Archief) it clearly doesn't for others (Stadsarchief Rotterdam, Eye to an extent), and it won't work for all types of collection materials (AV, unpublished archival records). The increasing demand for ECL-style schemes in the UK is notable, while the same question did not receive such an enthusiastic response in Italy.

The respondents made several observations and suggestions regarding the potential for crowd-sourcing the diligent search process. Potential groups of users that could be incentivised to invest in a digitization project and the use of an online tool included existing volunteers known to the institutions, specific online communities e.g. film enthusiasts identified by the British Film Institute, or retirees with a particular interest in genealogy. The possibility of using the tool to gather life-

¹⁰⁴ As of 10th May 2018, there were 5,416 works registered (incorporating a further 5,664 embedded works) on the EU IPO database, and 801 works on the UK IPO Orphan Works Register (the Register includes entries for withdrawn license applications, so it may be the case that the actual number of works licensed is slightly lower). These numbers are low, considering that both of these resources have been available for approximately four years.

dates or smaller portions of rights clearance tasks was also suggested. This could potentially spark the interest of genealogists, in particular.

Some concerns were expressed around the complexity of rights research and the results of the diligent search process, notably by Eye Film Institute and the British Library. The respondent for the British Library also raised concerns regarding the administrative costs of running crowd-sourced diligent search, and the possibility of reputational damage or liability in situations where externally-conducted diligent searches were inaccurate or incomplete.

Perhaps the main obstacle for the CHIs considering using a crowd-sourcing platform is the labour required within the institution itself. While the diligent search element of the rights clearance process is carried out elsewhere, there is still a significant amount of management that must take place within the institution. This might include: ensuring that collection data is available, that the remote diligent searches are checked for accuracy, that the rights clearance process continues once the diligent searches have been completed, and that relevant information is uploaded to the EU IPO database. As previously noted, the complexity of the interplay between the institution, the external searcher, the information made available to start the search, and the information gathered during the search, is an area that will need deeper and more nuanced exploration during the test-phase of the EndOW project.

Many cultural heritage institutions simply aren't at the point of engaging with orphan works yet, so awareness-raising, education and sharing best practices will continue to play an important role in the decision-making process for uptake of any of the available exceptions and licensing schemes.

5.2 Conclusion

This study shows that digitization remains a paradox for CHIs. Rights clearance in particular remains expensive and ranges considerably depending on the nature of the work and the approach taken by the institution. At the same time, the number of staff dedicated to full-time rights clearance activities, even within the largest institutions, is low. Most institutions in this study reported fewer than 2 FTE staff in a rights clearance role. Digitization is necessary to fulfilling the public mandates of CHIs (which our study reveals includes preservation, restoration, outreach, education and promotion). At the same time, institutions are unable to invest more resources to overcome the barrier of orphan works status when digitizing collections. This suggests that crowdsourcing could be an applicable solution, by offering the ability to leverage resources outside the boundaries of the organization. There remain several barriers to adoption of such a solution however.

Firstly, reputation emerged as a centrally important issue for institutions. National-level CHIs in particular expressed concern about public perception when undertaking digitization activities. These institutions felt constrained by changes to copyright law that required diligent search, where before they had engaged in risk-assessed digitization. This may have the unexpected effect of reducing the quantity of digitized materials. Readiness to engage in crowdsourcing diligent search is partially influenced by reputational concerns. Respondents voiced scepticism that crowd-generated diligent searches would adequately withstand external scrutiny, and preferred to maintain control over decisions about orphan work status for that reason.

Secondly, the decision to engage with the EU exception or, in the case of the UK, with the OWLS was frequently expressed as an economic calculus. The relative benefit of the legal exception varies across institutions and across individual collections. Where the underlying work is complex in terms of rights clearance – for example in the case of films held by the BFI – the incentive to engage with the exception and diligent search process is higher than for mass digitization projects where the ‘value’ of individual works is lower. A combination of improved legislation and a low-cost crowdsourcing solution might be able to close the gap between these two use cases, increasing the attractiveness of engagement with the Orphan Works exception for mass digitization projects.

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