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|---|---|--|--|
| Title: Orphan Works EU Directive IA No: BIS IPO001 Lead department or agency: IPO Other departments or agencies: | Impact Assessment (IA) | | |
| | Date: 04/11/13 | | |
| | Stage: Consultation stage | | |
| | Source of intervention: EU | | |
| | Type of measure: Secondary legislation | | |
| Contact for enquiries: Andrew.Sadler@IPO.gov.uk | | | |
| Summary: Intervention and Options | | RPC Opinion: RPC Opinion Status | |

| Cost of Preferred (or more likely) Option | | | |
|---|----------------------------|--|---|
| Total Net Present Value | Business Net Present Value | Net cost to business per year (EANCB on 2009 prices) | In scope of One-In, Measure qualifies as One-Out? |
| -£0m | 0 | 0 | No |
| | | | NA |

What is the problem under consideration? Why is government intervention necessary?

A copyrighted work is orphaned when it is not possible to locate the rightholders after a diligent search. If a work is orphaned it is not possible to seek permissions to use the content, and therefore it cannot be used lawfully and its value to society is lost. The Council of Ministers of the European Communities approved a Directive on certain permitted uses of orphan works, for non commercial use, by cultural organisations with a public-interest mission with orphaned works within their collection, giving the ability to digitise and make them available. Government intervention is required as copyright legislation does not allow for the use of orphaned works as set out under the Directive. The UK is bound to implementation of the Directive.

What are the policy objectives and the intended effects?

The aim is to create a system where cultural and heritage organisations with a public-interest mission will be able to make use of an exception to copyright law to digitise orphaned works of any written material, film or sound within their collection for non-commercial use and make them available to the public online.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

As an agreed European Directive, the do-nothing option is not available. The European Commission conducted its own Impact Assessment.

This impact assessment considered the options of 'do nothing', extended collective online licensing and specific licence for libraries to provide on line access. The approach to provide an exception to certain permitted uses and mutual recognition of orphan work status across the EU provides a fairer compromise and was the option most likely to achieve consensus within Europe. Non-compliance with the Directive will lead to infraction proceedings.

Will the policy be reviewed? It will be reviewed. If applicable, set review date: 10/2015

| | | | | | |
|--|---------------------|-----------------------|-----------------------|---------------------------|---------------------|
| Does implementation go beyond minimum EU requirements? | | | No | | |
| Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base. | Micro Yes | < 20 Yes | Small Yes | Medium Yes | Large Yes |
| What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent) | | | Traded: n/a | Non-traded: n/a | |

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.

Signed by the responsible SELECT SIGNATORY: Younger of Leckie Date: 3rd July 2014

Summary: Analysis & Evidence

Policy Option 1

Description: Provide an exception to copyright law to allow cultural organisations with a public mission to make certain permitted uses of orphan works

FULL ECONOMIC ASSESSMENT

| Price Base Year | PV Base Year | Time Period Years | Net Benefit (Present Value (PV)) (£m) | | |
|-----------------|--------------|-------------------|---------------------------------------|---------|------------------|
| | | | Low 0 | High: 0 | Best Estimate: 0 |
| 2013 | 2013 | 10 | | | |

| COSTS (£m) | Total Transition (Constant Price) Years | Average Annual (excl. Transition) (Constant Price) | Total Cost (Present Value) |
|---------------|---|--|----------------------------|
| Low | 0 | 33.8 | 281.1 |
| High | 0 | 171 | 1422.1 |
| Best Estimate | 0 | 102.4 | 851.6 |

Description and scale of key monetised costs by 'main affected groups'

The main costs of implementing the EU Directive are the costs of undertaking diligent searches by the cultural and heritage organisations covered (£28.5m - £73.8m) and also their costs to digitise the orphan works (£5.3m-£97.2m).

Other key non-monetised costs by 'main affected groups'

There will be a minimal cost to the national competent authority relating to forwarding on applications, which will contain details of the users' diligent searches, to the Office for Harmonisation in the Internal Market (OHIM).

| BENEFITS (£m) | Total Transition (Constant Price) Years | Average Annual (excl. Transition) (Constant Price) | Total Benefit (Present Value) |
|---------------|---|--|-------------------------------|
| Low | 0 | 33.8 | 28.1 |
| High | 0 | 171 | 1422.1 |
| Best Estimate | 0 | 102.4 | 851.6 |

Description and scale of key monetised benefits by 'main affected groups' As the directive is a permissive change, the change allows but does not force businesses to do something, then the better regulation guidance states that if there is a reasonable expectation that business will only adopt these changes where they lead to net benefits for business then it is fair to assume that the benefits are at least equal to costs, even where it is not possible to quantify or monetise the benefits. Therefore we have assumed that the benefits are at least as high as the costs and this measure is therefore cost neutral.

Other key non-monetised benefits by 'main affected groups'

The main non-monetised benefits are the cultural gain to society through cultural preservation and increased accessibility to a wider range of works, the benefit from findings works that are non-orphan, benefits from past diligent searches, providing legal certainty to organisations using orphan works and benefit from increased lawful use of the copyright system.

| | | |
|---|-------------------|-----|
| Key assumptions/sensitivities/risks | Discount rate (%) | 3.5 |
| <ul style="list-style-type: none"> - The IA for the domestic orphan works scheme (BIS1063) has been used as the starting point for the analysis in this IA, then adjustments have been made to reflect that the Directive is narrower in scope compared to the domestic scheme. - Organisations will use the Directive to reproduce orphan works within their collections. The assumption that they will recoup some costs of digitisation as set out in the Directive - Assumption that broadcasters will make limited use of the Directive | | |

BUSINESS ASSESSMENT (Option 1)

| | | |
|---|-------------------|----------------------|
| Direct impact on business (Equivalent Annual) £m: | In scope of OIOO? | Measure qualifies as |
| Costs: £0 | No | N/A |
| Benefits: 0 | | |
| Net: 0 | | |

Evidence Base (for summary sheets)

Background

This Impact Assessment relates to proposals to implement the provisions of the certain permitted uses of orphan works Directive.

Problem under consideration

Orphan works are works or other protected subject matter that are protected by copyright for whom the rightholder(s) is/are unknown or cannot be located after a diligent search has been carried out. They pose a problem for cultural and heritage organisations (libraries, educational establishments, museums, archives, film and audio heritage institutions and public-service broadcasting organisations), which are legally obliged to obtain prior authorisation for making works available to the public online, but are unable to locate and contact the relevant rightholders. In these circumstances, cultural and heritage organisations are either unable to make the works available or those that do make material available online without prior authorisations from rightholders risk copyright infringement. Scanning for preservation purposes is permissible under current copyright exceptions. However, these exceptions do not currently allow libraries to make digitised works available online on the internet, even for non commercial purposes.

The study “In from the Cold”¹ conducted by JISC found 13 to 50 million orphan works exist in the UK, e.g. 5-10% of works in library collections. Some estimates are higher with the British Library estimating that 40% of their archive may be orphaned. These works are locked away and cannot be easily accessed by the public.

The UK has introduced provisions domestically under the Enterprise and Regulatory Reform Act 2013 for a separate orphan works licensing scheme but for use in the UK only. In other respects, the domestic scheme is wider in scope and application than the Directive as any organisation can obtain a licence to reproduce any work following a diligent search for the rightholders for commercial and non commercial use. The Directive differs from this as it provides for an exception to copyright law and only allows for non commercial use but it allows for use across the EU. It also does not require an upfront payment so cultural and heritage organisations can reproduce and make works available without paying for a licence. In order to gain an understanding of the total impact of all the legislative changes in respect of orphan works (both the domestic scheme under the Enterprise and Regulatory Reform Act 2013 and under the EU Directive), it is necessary to consider the total costs and benefits from both Impact Assessments – i.e., this Impact Assessment and the updated Impact Assessment produced for the domestic orphan works scheme.

Impact assessment BIS1063 was completed for the domestic provisions under the Enterprise and Regulatory Reform Act 2013. As the EU Directive also covers orphan works this impact assessment draws on this original assessment, but considers the more restrictive provisions on use and application.

Rationale for intervention

The Commission i2010 digital libraries initiative² aims to make Europe’s cultural heritage available online through the creation of a pan-European digital library and archive, most notably Europeana, an internet portal that acts as an interface to millions of books, paintings, films,

¹ <http://www.jisc.ac.uk/media/documents/publications/infromthecoldv1.pdf>

² http://europa.eu/legislation_summaries/information_society/strategies/l24226i_en.htm

museum objects and archival records that have been digitised throughout Europe. Mechanisms such as the Directive on certain permitted uses of orphan works allow content to be made available for this purpose.

The Directive provides a harmonised approach across the EU. It provides legal certainty for cultural and heritage organisations to reproduce works and make them available. This provides greater access to works that are only available in a publicly accessible institution for on-the-spot reference use.

Policy objective

The aim is to implement the EU Directive creating an exception to copyright legislation to provide cultural and heritage organisations with a legal certainty to digitise orphan works within their collections after a diligent search, for non commercial use. This is a voluntary scheme so cultural and heritage organisations can decide if they want to reproduce works through the exception. Organisations will search as a minimum the appropriate sources set out in the Directive and any others they think will contain information on rightsholders. The responsibility for the diligence of the search will lie with the organisation making use of the works. If rightsholders emerge after the diligent search they are entitled to fair compensation which will be agreed between the parties. If the diligent search has been completed competently this process removes the risk of copyright infringement.

The Directive restricts the types of orphan works to books, journals, newspapers, magazines or other writings, cinematic or audiovisual works and phonograms. It does not include the use of artistic works such as standalone photographs, illustrations and paintings but embedded artistic works within works are permitted. The Directive also limits the organisations that are able to use the works to cultural and heritage organisations with a public mission. These are:

- Publicly assessable libraries
- Educational establishments
- Museums
- Archives
- Film or audio heritage organisations and
- Public-service broadcasting organisations

Following a diligent search, organisations are required to submit the following information to the Office for Harmonisation in the Internal Market (OHIM) who will forward a notification of the search to the UK Authorising Body: the results of the search, the use the organisation will make of the work, any change to the status of the work and relevant contact details. There is no verification of a diligent search as organisations will be expected to complete the search in good faith. OHIM will maintain a database of all orphan works being used so rightsholders will be able to identify works and organisations can see diligent searches that have been completed. The Directive allows for mutual recognition across the EU, so a diligent search completed in one Member State will be valid across the whole EU. This would avoid duplicate searches where an organisation has a physical copy of an orphan work within their collection that has had a diligent search already completed by another organisation.

The Directive will complement the domestic orphan works licensing scheme set out under the Enterprise and Regulatory Reform Act 2013. In some ways, the domestic scheme is wider in scope and application as it allows any organisation to use of any type of work for commercial or non commercial use. The Directive provides for an exception to copyright law.

Description of Options Considered

The European Commission conducted an impact assessment on cross-border online access to orphan works³ which accompanied the proposal for the Directive which was adopted by the Council of Ministers on 4 October 2012 and published in the Official Journal of the European Union on 25 October 2012. The impact assessment considered the following 6 policy options:

- (1) Do nothing
- (2) A statutory exception to copyright
- (3) Extended collective licensing
- (4) An orphan-specific licence granted by collecting societies
- (5) An orphan-specific licence granted by a public body
- (6) The mutual recognition of national solutions regarding orphan works

These options are assessed in detail in the Commission's impact assessment document which can be found here: http://ec.europa.eu/internal_market/copyright/docs/orphan-works/impact-assessment_en.pdf

Costs and benefits

As stated previously, this Impact Assessment draws on much of the analysis performed in the June 2012 Impact Assessment for the domestic orphan works scheme (BIS 1063) that was prepared as part of the Government's response to the Hargreaves Review of Intellectual Property and Growth⁴. Adjustments have then been made to reflect that the fact that the Directive is narrower in scope than the domestic scheme. Further information on the possible usage of the Directive was also sought in the recent consultation of the draft regulations. These adjustments are set out in this Impact Assessment.

The main costs of the Directive will be for the diligent searches conducted by the organisations [£28.5-£73.8m]; the costs to digitise the orphan works [£5.3m-£97.2m]; the running costs for the competent national authority; the fair compensation organisations will provide to rightsholders; and the cost to the copyright tribunal for any appeals against the fair compensation. It is important to note that the scheme is voluntary so the costs to organisations will be optional. The Directive also allows for organisations to recoup the costs for the sole purpose of covering digitisation and making available therefore this potentially makes the costs for digitisation neutral.

The European Commission have confirmed that the recoverable costs include those associated with the diligent search. For example whether cultural organisations would charge for viewing their website or whether private sector businesses would be interested in engaging in public private partnerships to make such works available to the public without being able to charge more than the costs involved in making works available through the Directive. However, in the consultation of the draft regulations organisations that responded stated that the possibility of recouping all costs is unlikely due to the non commercial nature of the Directive. Publicly funded organisations stated that it is not their function to recover costs but to provide access to their collections. When asked how they could recoup costs the idea of charging access to a website was criticised and this would mainly come through indirect sources.

Currently cultural organisations may conduct diligent searches but where rightsholders can't be found the works cannot be used lawfully. With the implementation of the Directive such searches will not be wasted. Therefore in this IA we have assumed that some of the costs of making orphan works available to the public could be recouped but not all of them. This assumption was confirmed by organisations that they could recover some costs indirectly. . We have taken the conservative approach that cultural organisations could recoup the

³ www.ec.europa.eu/governance/impact/ia_carried_out/docs/ia_2011/sec_2011_0615_en.pdf

⁴ Note, an updated Impact Assessment for the domestic orphan works scheme will be issued when the domestic scheme Regulations are submitted for public circulation/comment.

digitisation costs and not the diligent search costs purely on the basis that these costs are less than the diligent search costs.

The main benefits of this Directive are: the cultural gain to society undertaken in the interest of cultural preservation and accessibility; mutual recognition across Member States would avoid duplicate diligent searches of the same works if they are within the collection of other organisations; organisations would avoid the cost of licensing and paying an upfront fee; and the likelihood of more rightsholders being reunited with their works following a diligent search.

Costs of diligent searches (£28.5m - £73.8m)

The Directive stipulates that organisations who wish to make use of orphan works within their collection must complete a diligent search of the minimum appropriate sources listed in its annex. Member States can add to this list if there are other appropriate sources available, we have taken the decision to provide guidance that provides other possible sources for organisations to consider when conducting a diligent search. This approach mirrors our position on the domestic diligent searches. . Searches will need to be compatible with the requirements of those set out in the sector specific guidelines in the European Digital Libraries recommendations⁵.

When assessing the domestic orphan work scheme information on the number of orphan works available was used from the BBC and the British Library. We have used those figures to estimate the costs and benefits for this IA but removed artistic works such as standalone photographs as they are excluded under the Directive. These were some of the few data points available for estimating the size of archives and proportion of orphans. These figures are approximations based on length of shelf space and volume holdings.

| Media | Archive | Total collection size |
|------------|-----------------|-----------------------|
| TV & Radio | BBC | 950,000 |
| Newspapers | British Library | 112,500,000 |
| Books | British Library | 14,000,000 |

The Directive requires the carrying out of a diligent search for the right-holders and/or creators prior to its use. Organisations will have to submit the following details to OHIM; the results of the search, the use the organisation will make of the work, any change to the status of the work and relevant contact details.

We need an estimate of how many items are likely to be searched under the orphan works Directive. In the impact assessment for the domestic licensing scheme the IPO drew heavily on the available information about the BBC and British Library archives. In their responses to the consultation, the BBC and British Library did not object to our estimates, and each added further detail as to its holdings on material, with the caveat that these are approximations based on length of shelf space and volume holdings⁶. We also received many submissions from other archives who want to use an orphan works system, beyond the interest expressed by the BBC and British Library.

After further discussions with the BBC on the possible use of the Directive their current view is that they would make very limited use of the process. ITV have also indicated that they would most likely use the domestic licensing scheme rather than the Directive as they would want to make commercial use of any content. We have therefore made an assumption that

⁵ The European Digital Libraries Initiative, 2007, "Sector-specific guidelines on due diligence criteria for orphan works", http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/guidelines.pdf

⁶ BBC submission to the Copyright Consultation, page 5

broadcasters would only use 25% of orphan works under the Directive process. This is represented by the works under TV and Radio.

| Media | Archive | Total collection size |
|--------------|-----------------|----------------------------------|
| TV & Radio | BBC | 950,000 (revised figure 237,500) |
| Sundry items | BBC | 2,000,000 |
| Newspapers | British Library | 112,500,000 |
| Books | British Library | 14,000,000 |
| Sundry items | British Library | 18,500,000 |

We aim to estimate the cost of conducting diligent searches in these types of archives, which are amongst the largest in the UK, where the holders are keen to use orphan works. To get an hourly cost of labour we use the UK Annual Survey of Hours and Earnings (ASHE) (2012) median hourly pay for Librarians (£13.62 p/h) and Archivists and Curators (£14.01 p/h).

To establish the cost of searching books we use the 2006 Carnegie Mellon University Library's pilot project and submission (#537) to the US Orphan Works Report ⁷ which estimates that it costs \$78 per item in 2006, plus \$132 in legal and supporting costs, making it \$200 per item. Converting into pounds for 2006 this is equivalent to £43 at the lowest cost and £115 for the highest cost per item, using an exchange rate of 0.55⁸. Controlling for inflation the 2012 price would be £49 and £131, which we do to make the figures comparable to the ASHE figures from 2012, using the Bank of England's GDP deflator.

We then need to establish how long it takes to undertake diligent searches for different types of content.

TV & Radio: The BBC's rights clearance trial found that checking 1,000 hours of factual programming (which is less complex than drama or comedy programmes) for rights implications, cost them 6,500 person hours⁹. Given this, we estimate that clearing television footage and radio material takes 6.5 hours per hour of material, so to clear the revised figure for the BBC archive of TV and Radio would take 1.54m hours ([237,500 hours of TV and radio] × 6.5 hours to clear). The Federation of Commercial Audio Visual Libraries, FOCAL, pointed out that much of this time was spent clearing rights rather than searching for right-holders, as older contracts did not have sufficient permissions for current needs¹⁰. The 6.5 hours could therefore be considered an upper bound, and we assume that half the time was spent clearing identified rights, so reduce the figure by 50%, to 3.25 hours, to get a lower bound estimate of 771k hours ([237,500 hours of TV and radio] × 3.25 hours).

Sundry content: We assume that the BBC's other content takes one hour at the low estimate for each of the approximately two million items, but 3.5 hours at the high, as sundry items would include various, music scores, and other material. This gives a range from 2m to 7m hours to clear. Similarly for the British Library's sundry 18.5m pieces of sundry content the range would be 18.5m to 64.8m hours.

⁷ <http://www.copyright.gov/orphan/orphan-report.pdf>

⁸ which is the average of the exchange rate from the first (2 Jan), middle (3 Jul) and last (31 Dec) trading day in 2006, with rates from x-rates.com, 0.581801, 0.543183, 0.510569

⁹ Hargreaves, Ian. 2011. *Digital Opportunities: A Review of Intellectual Property and Growth*. London: Intellectual Property Office. <http://www.ipo.gov.uk/ipreview>

¹⁰ FOCAL International submission to the Copyright Consultation, page 9

Newspapers: For the British Library holdings of 150m items we assumed in the previous impact assessment that 75 per cent of the orphans were newspapers, and the British Library did not disagree with this rough estimate. It is worth noting that the newspaper figure is not the number of titles as suggested in one criticism of the figures, but the number of issues from all titles. This is important, as the Chartered Institute of Journalists pointed out, because it was only with the 1988 copyright Act that publishers obtained full copyright in material produced by all their employees, unlike the 1911 and 1956 Acts. Therefore it is potentially not just newspaper issues but individual stories that can be orphans, and according to the Institute “based on limited sampling, the number of works involved appears to run into hundreds of thousands, perhaps millions, of immense value. This is because so many items were published in newspapers or magazines without attribution, and only limited records were retained”¹¹.

Given this, we retain the total newspaper figure in calculating the potential cost of searching the archives:

Books: The British Library provided a figure of 14m monographs in the archive as part of their response to the consultation, which we have included, and then we have treated the remainder of the collection (18.5m items) as sundry items, with clearance time equivalent to the BBC content¹². In a 2009 digitisation project at the British Library it took them 235 man hours to search the rights for 60 titles alone. This suggests an average time of between three and a half and four hours per issue ($235 / 60 = 3.91$).

The table below provides an overview of the total cost from fully searching both the BBC and British Library archives (making the 25% adjustment for broadcasters use), which makes it a total expenditure of between £6.5bn and £8.2bn.

| The cost of searching the full archive | | | | | |
|---|-------------------------------|----------------|-------------|-------------|------------------|
| Archive | Content | Hours to clear | Quantity | Cost | Total cost £m |
| BBC | TV & Radio, low est. | 3¼ | 237,500 | £14.01 p/h | 10.8 |
| BBC | TV & Radio, high est. | 6.5 | 237,500 | £14.01 p/h | 21.6 |
| BBC | Sundry items, low est. | 1.0 | 2,000,000 | £14.01 p/h | 28.0 |
| BBC | Sundry items, high est. | 3.5 | 2,000,000 | £14.01 p/h | 98.1 |
| BL | Newspapers | 3.5 | 112,500,000 | £13.62 p/h | 5,362.9 |
| BL | Books low est. | - | 14,000,000 | £49 p/item | 686 |
| BL | Books, high est. | - | 14,000,000 | £131 p/item | 1,834 |
| BL | Sundry items, low est. | 1 | 18,500,000 | £13.62 p/h | 252.0 |
| BL | Sundry | 3.5 | 18,500,000 | £13.62 p/h | 881.9 |

¹¹ Chartered Institute of Journalists submission to the Copyright Consultation, page 1

¹² British Library submission to the copyright consultation, page 6

| | | | | | |
|--|------------------|--|--|--|--|
| | items, high est. | | | | |
|--|------------------|--|--|--|--|

Given an orphan works exception the BBC and British Library would be incentivised in clearing more of their archives and making available to the public. We do not presume that such a project would happen immediately, nor that it would cover the entire archive, as only parts of it will contain suspected orphans. So we maintain the assumption from BIS 1063 that between 5% and 10% of the available content in the BBC and British Library would be cleared over a ten year period. We maintain this assumption as the Directive provides a legal avenue with no upfront payments.

The total cost of this would be between £31.7m and £81.9m per annum over ten years ($[0.05 \times £6.48bn] / 10 \text{ years}$ | $[0.10 \times £8.24bn] / 10 \text{ years}$). The best estimate being the average of the two £56.9 p.a.

As has been pointed out in a number of responses, such costs seem high for two organisations that are far from typical even if they intend to make use of an orphan works exception. This is a fair point, which is why we do not use these costs and scale up for the 2,500 museums, 3,393 public libraries, 3,000 community archives, 979 academic libraries and approximately 3,500 trust archives which might seek to use an orphan works scheme¹³. Instead we use our established archive holding figures for the BBC and British Library as a proxy for expected total UK activity. Fortunately, as part of the previous consultation part of the Government's response to the Hargreaves Review, other institutions have provided information about their collections and an initial estimate of their suspected orphan work holdings. In Annex 1 the table summarises the majority of estimates provided by archive holders, and the percentage of each collection they consider potentially orphan.

This is probably the most complete list of orphan work estimates that have been collected, even compared to the EU Commission's research¹⁴. These are sorted by rough categories which correspond to sound recordings, films, written material and mixed holdings but this is not exhaustive.

These figures suggest that there are many organisations that hold potential orphans. These could benefit from a diligent search and the certainty of an exception to use orphans, or agreeing licensing terms with right-holders where such are found. The data, while indicative, compares well to the orphan work estimates in a 2009 JISC report¹⁵ and suggest that different sectors and content have different needs.

| Media category | UK sample holdings | Orphan range |
|------------------------|--------------------|--------------|
| Sound Recording (hrs)* | 750,000 | 5%-10% |
| Archive Films (hrs) | 513,000 | 5%-35% |

¹³ Museums and galleries: <http://www.museumsassociation.org/about/frequently-asked-questions>;

Public Libraries: Figure from DCMS, from Chartered Institute of Public Finance and Accountancy;

Archive figures from Archives & Records Association submission to the copyright consultation;

Academic Library figure (2008/09) from Bridgeman submission to the copyright consultation.

¹⁴ Vuopala, Anna, 2010, "Assessment of the orphan works issue and costs for rights clearance", for the EU Commission, http://ec.europa.eu/information_society/activities/digital_libraries/doc/reports_orphan/anna_report.pdf

¹⁵ JISC, 2009, *In from the Cold: An assessment of the scope of 'Orphan Works' and its impact on the delivery of services to the public*. Naomi Korn, Cambridge: Collections Trust, <http://www.jisc.ac.uk/media/documents/publications/infromthecoldv1.pdf>

| | | |
|--------------------|------------|--------|
| Written material† | 10,400,000 | 4%-30% |
| Mixed collections§ | 38,000,000 | 8%-40% |

*Scaling the average IWM record to 90 minutes, or one standard cassette tape
**Treating an average film as 1.5hrs long, and including both UK and European film archives
†not counting the 600,000 orphan texts at Oxford and the 195m3 material at the national history museum.
§Treating the average work at the National Archive & National Records Scotland as a 1cm wide holding.

Discussion with stakeholders from the cultural heritage sector indicate that at present organisations tend to avoid undertaking diligent searches on works, or bodies of works within an archive they suspect are likely to be orphan or have a high number of orphans within them (which is reflected in the fact that the number of orphan works can only be estimated). This is because such searches would turn out to be a waste of time and resource should the work turn out to be orphan and not be able to be used lawfully. However, there are still many instances at present where searches are undertaken and it transpires that the work is orphan.

Therefore, we have assumed that 10% of diligent searches that will be undertaken under the orphan works scheme are searches that are already undertaken and, as such should be removed from the estimate of the costs of the orphan works schemes. This is a conservative estimate as we do not wish to over-estimate the current scale of diligent searches that are undertaken and find that the work is orphan. (0.9*31.7 and 0.9*81.9)

The total estimate of a cost of a diligent search is in the range of £28.5-£73.8m with a best estimate of £51.2m

Costs of running the national competent authority

The Directive requires that Member States establish a national competent authority to receive a notification of a search from OHIM. As the UK will be implementing a domestic orphan works scheme with an authorising body this will act as the appropriate body for the Directive. The Intellectual Property Office (IPO) has been nominated to fulfil this role. To avoid confusion all reference to the national competent authority in this assessment will be referred to as the authorising body.

The role of the authorising body will be to acknowledge a notification of a search from OHIM who will maintain a publicly accessible database of all searches across the EU. OHIM are currently developing the database, they will incur the costs for the development and maintenance. This will be a web based system. Organisations will log on to the system and fill in an application with all the relevant information on the diligent search and the works. A notification of the search will be forwarded to the authorising body which will complete the process by acknowledging it. The authorising body has no mandate to validate a search as the Directive applies an exception to copyright legislation. In essence they will only acknowledge a notification through the web based system and thus satisfying the requirement under the Directive.

The authorising body will also manage the domestic orphan works licensing scheme and for this, collect fees and validate diligent searches. The costs for establishing this body have been covered in the updated impact assessment for those provisions (as £0.54m - £1.07m), as have the cost of running the authorising body (as £50k p.a.). The cost related to the authorising body to fulfil the function under the Directive would therefore be minimal and this could be absorbed in the running costs related to the domestic scheme.

Cost of digitising works (£5.3m - £97.16m)

The Directive allows organisations to digitise works and make them available online. The cost associated with digitising works varies hugely depending on the type and length of works. There is no one definitive answer to the cost as digitising is a process and with any process the actual cost depends on the organisational context, the complexity of the material and the sophistication of the output. However, for the purpose of the assessment we will look at a set of reasonable projected costs for organisations.

It is important to note that although the Directive can only be used for non commercial use it does allow for organisations to generate revenue for the sole purpose of recouping the cost of digitisation and making available – so the Directive is potentially cost-neutral in regards to this cost. However, organisations have suggested that recovering the full costs is unlikely.

In order to obtain an estimate of costs we have conducted analysis and obtained a range for possible costs of digitisation. As part of “The New Renaissance”¹⁶ report of the "Comité des Sages" on bringing Europe's cultural heritage online, a study was conducted by the Collections Trust on the Cost of digitising Europe's Cultural Heritage¹⁷. The report looks at digitisation of collections in Libraries, Museums, Archives and Audiovisual Archives across Europe. It does not include audiovisual collections held by Broadcasters. Our analysis makes use of the unit costs within this report.

We calculated the estimate for the cost of digitisation by multiplying the number of orphans found per annum (low and high values), by the per-unit digitisation cost set out in the aforementioned Collections Trust report. We removed the digitisation cost for archive artistic works such as photographs as these are not covered by the Directive.

The calculations are set out below:

1) To obtain figures for the number of orphans found per annum. We have adjusted the sound recording and archive film holdings at the BBC and British Library to 25% of their previous level, to reflect the fact broadcasters have told the IPO they will make limited use of the Directive.

| Media category | UK sample holdings | BBC & BL | Orphan range | Orphans found p.a. | |
|--|--------------------|-------------|--------------|--------------------|-----------|
| | | | | Low | High |
| Artwork | 548,000 | - | 20%-25% | 548 | 1,370 |
| Sound Recording | 750,000 | 87,500 | 5%-10% | 209 | 838 |
| Archive Films | 513,000 | 150,000 | 5%-35% | 166 | 2,321 |
| Archive photos | 28,280,000 | 5,000,000 | 5%-90% | 8,320 | 299,520 |
| Written material | 10,400,000 | 14,000,000 | 4%-30% | 27,380 | 410,700 |
| Newspapers* | - | 112,500,000 | 4%-95% | 22,500 | 1,068,750 |
| Mixed collections | 38,000,000 | 20,500,000 | 8%-40% | 23,400 | 234,000 |
| Low calculation: (total holding × 5% × low orphan %) /10 years High calculation: (total holding × 10% × high orphan %)/10 *we keep the low newspaper percentage equal to books, and the high equal to the British | | | | | |

¹⁶ http://ec.europa.eu/information_society/activities/digital_libraries/doc/refgroup/final_report_cds.pdf

¹⁷ http://ec.europa.eu/information_society/activities/digital_libraries/doc/refgroup/annexes/digiti_report.pdf

2) We then multiply the low and high figures from this table by the per-unit digitisation costs from the Collections Trust *Cost of Digitising Europe's Cultural Heritage* study. The table below displays these per-unit costs:

| Items/materials in collection | Cost per unit (€) | Exchange rate (€) | Cost per unit (£) | Units | Costs per unit – 2012 figures (£) |
|-------------------------------|---|-------------------|--|---------|-----------------------------------|
| Books | 191 | 0.8735 | 166.84 | Volumes | 176.85 |
| Newspapers | No per unit cost provided in study. Cost per page provided instead. | 0.8735 | £19.04 - See Note B two pages ahead | | 20.18 |
| Journals and other serials | 15 | 0.8735 | 13.10 | Volumes | 13.89 |
| Music and recorded sound | 14 | 0.8735 | 12.23 | Hours | 12.96 |
| Film and video recordings | 1125 | 0.8735 | 982.69 | Hours | 1,041.65 |
| Photographs | 4.07 | 0.8735 | 3.56 | Number | 3.77 |
| Drawings | 4.82 | 0.8735 | 4.21 | Number | 4.46 |

(The 0.8735 is the EUR/GBP exchange rate per oanda.com as at 31 May 2009 – the date of publication of the NUMERIC report, which the Collections Trust report used for its data. NUMERIC is a European Commission report (EU-funded) that aimed to measure the progress of the digitisation of Europe's cultural heritage).

3) To obtain our range for digitisation costs we then multiply the low and high 'orphans found per annum numbers by the relevant item category from the Collections Trust study.

The relevant categories are as follows:

- 'Written material' – we use 'Books'
- 'Archive Films' – we use 'Film and video recordings'
- 'Sound Recording – we use 'Music and recorded sound'
- 'Archive photos' – we use 'Photographs'
- 'Artwork' – we use 'Drawings'
- 'Mixed collections' – we use Journals and other serials' (See **Note A** on next page)

The table below shows the costs of digitisation that we have calculated:

¹⁸ The reference to [9, page 28] is to the paper *Assessment of the orphan works issue and costs for rights clearance* by Anna Vuopala, 2010.

| Media category | Orphans found – low estimate) | Digitisation Cost p.a. – low estimate (£m) | Orphans found – high estimate | Digitisation Cost p.a – high estimate (£m) |
|----------------------------------|-------------------------------|--|-------------------------------|--|
| Written material | 27,380 | 4.8 | 410,700 | 72.6 |
| Newspapers | 22,500 | 0.45(Note B) | 1,068,750 | 21.6 |
| Archive Films ¹⁹ | 166 | 0.17 | 2,321 | 2.4 |
| Sound Recordings ²⁰ | 209 | 0.002 | 838 | 0.01 |
| Exclude Archive photos | 8,320 | -0.03 | 299,520 | -1.1 |
| Exclude Artwork | 548 | -0.002 | 1,370 | -0.006 |
| Exclude 50% of Mixed Collections | 23,400 | -0.2-0.2 | 234,000 | -1.6 |
| TOTAL | | £5.3 (low estimate) | | £97.16 (high estimate) |

(Note A: ‘Mixed collections’ are made up of 20.5m items recorded as sundry items from the BBC and British Library, and also 38m items from English Heritage, National Records of Scotland and the National Archive.. However, we do not have a detailed breakdown of what proportion of these figures are made up of works of a certain type.

However we know that sundry items include ‘various artworks, music scores, and other material’. There are 38m items are made up of ‘photos, reports, plans, drawing, texts, and illustrations’.

We know not all these works are types covered by the Directive (for example, stand-alone artwork and photos are excluded), but not having further information, we have made an assumption that 50% of ‘mixed collections’ are works covered by the Directive. This assumption enables us to obtain an estimate for digitisation costs for mixed collections,)

(Note B: For newspapers, the Collections Trust did not provide a per-unit digitisation cost, but instead a per-page digitisation cost (which was €1.56, which we converted to £1.36, using the same 0.8735 oanda.com exchange rate used earlier). To obtain a per-unit cost, we have multiplied this per-page cost by 14 – which was the median estimate for average number of pages in a newspaper given by the Collections Trust report – to obtain a per-unit cost of £19.04. We were unable to find any other estimates for the average number of pages in a newspaper.)

The report notes that there could be initial capital investment for equipping an institution to undertake digitisation that might need to be considered. This is a one-off capital expenditure but the assumption is that due to the nature of the organisations they would already have access to the relevant equipment to undertake projects. Also these costs could be reduced as the larger a digitisation process the lower the unit cost to digitise works.

Administrative costs for organisations to add diligent search to database

There will be a minimal administrative cost for organisations relating to the time taken to provide the information on a diligent search to OHIM. OHIM are developing a web based system which

¹⁹ Making 25% adjustment for broadcasters.

²⁰ Making 25% adjustment for broadcasters.

requires organisations to log on and complete the basic information of the works and the search completed.

Creating authorities

There will be no set up costs because the authorising body will be the same organisation appointed under the domestic scheme and these costs have been covered in the updated impact assessment for the domestic scheme (as £0.54m - £1.07m transition cost). As this body already exists, there will be a nil creation cost for the purposes of this EU Directive Impact Assessment.

Running costs of authorities

This will be a minimal cost as the OHIM database will allow the authorising body for each Member State access and permission to acknowledge diligent searches assigned to it. OHIM are creating and maintaining the database at their expense this is not a cost for the UK. The database will be a web based application and the role of the authorising body will be to acknowledge the information, there is no requirement to validate searches. The authorising body will not have to collate information on the use of the Directive in the number of applications and the works being used as OHIM will collate this relevant data and send to the authorising body.

Fair Compensation to rightsholders

The Directive provides for a delayed payment mechanism – the rights holder is only paid fair compensation if they return. The level of compensation will be decided between parties and should be proportionate to reflect the works and the use as it is restricted to non commercial use. Anecdotal evidence from stakeholders suggests that it is rare for an emerging rights holder to demand compensation. The cultural heritage sector have informed us, through email correspondence and in responses to the Government consultation on the domestic scheme carried out from December 2011 – March 2012, that right holders very rarely return, and when they do, there is very rarely a payment of money to the rightholder. This is because, in the cultural heritage sector, rightholders are mainly interested in having the work made available to the public rather than financial gain.

Appeals Process.

In the consultation for the draft regulations we asked if an appeals process is needed if the rights holder and the organisation cannot agree on fair compensation. There was overwhelming consensus from respondents that this should be provided. The body to oversee these appeals will be the Copyright Tribunal. The Court currently costs £1,600 per day (broken down as £700 per day for the chair and deputies, and £450 for each of the two lay members)²¹. Additional time cost would come through having to read case documentation and in post-hearing work - namely preparing the decision. However, anecdotal evidence from stakeholders suggests that this avenue is unlikely to be pursued. Where cultural organisations have taken a risk based approach to orphan works, current returning rightsholders tend not to seek financial recompense but are usually happy for the work to be made available to the public and therefore we do not see this having an impact.

Benefits

²¹ Information obtained from source at Copyright Tribunal.

Cultural gain to society through cultural preservation and increased accessibility

Libraries and archives in the UK contain millions of books, documents, pamphlets, manuscripts and other written material. As stated above the study “In from the Cold”²² conducted by JISC found 13 to 50 million orphan works exist in the UK libraries, e.g. 5-10% of works in library collections. Some estimates are higher with the British Library estimating that 40% of their archive may be orphaned.

A monetised value on access to these works cannot be provided as commercial use of works is not permitted but they will benefit and enrich society as a whole. People will not need to travel to view works where they are actually housed. The Directive will ensure lawful cross-border online access to orphan works contained in the collection of cultural organisations. EU-wide online availability of orphan works promotes Europe’s and the UK’s cultural diversity and increases sources of knowledge and learning. Citizens of the UK and Europe will be able to access consolidated EU library collections from a computing device anywhere in the EU.

As the Directive provides an exception to copyright law and legal certainty to reproduce works it is anticipated that this will encourage organisations to digitise a wider range of works rather than cherry picking those that would have a financial benefit. The current practice limits the content and choice available to society.

Benefit from recouping costs of digitisation

The Directive is potentially cost-neutral in regards to digitisation costs. It is important to note that although the Directive can only be used for non commercial use it does allow for organisations to generate revenue for the sole purpose of recouping their cost of digitisation²³. However, as previously stated, in the consultation of the draft regulations organisations that responded stated that the possibility of recouping all costs is unlikely due to the non commercial nature of the Directive. They did state that they would cover some costs indirectly, we have maintained the assumption that these costs related to digitisation could be recouped in this manner.

Benefit from diligent searches no longer being wasted

Currently, many diligent searches result in wasted effort and resource when works are discovered to be orphan, because currently no legal route to use orphan works exists. A benefit of the exception provided by the EU Directive is that diligent searches that presently would result in wasted effort would, as a result of the exception, now be able to be used.

Benefits from past diligent searches

Duplicate searches would be avoided as the Directive allows for mutual recognition of diligent searches completed by other organisations i.e. a diligent search by a French library is valid across Europe as long as the cultural organisation holds the same works. Details of previous searches will be held on the OHIM database and there is no time limit to how long diligent searches are valid for. Cultural organisations will be able to look for previous diligent searches on works. They would only need to provide OHIM with contact details and the proposed use for the works. This is to keep a full record of secondary users making use of works in case the rights holder should emerge.

Organisations avoiding the cost of licensing and paying an upfront fee

²² <http://www.jisc.ac.uk/media/documents/publications/infromthecoldv1.pdf>

²³ In the Impact Assessment calculator, we have used the cost of digitisation figures as the benefit figures, to reflect that organisations are able to recoup these costs.

The EU Directive is an exception to copyright, not a licensing system (like the domestic scheme). There is no upfront payment and fair compensation is only provided if a rights holder should emerge. This can incentivise cultural organisations to make use of works that they previously could not reproduce or make available.

This could well be a significant benefit as effectively legal orphan works usage would now be free at the point of usage for cultural heritage organisations, provided the work and the usage are covered by the Directive.

Benefit to rights holders separated from their works

The OHIM database will be publicly accessible and have a search function for the public. This means that collecting societies and rightsholders will be able to search the register to see if any works are being used as orphans under the Directive. If this is the case, the rights holder can contact the cultural organisation directly and, providing proof of ownership is shown, the orphan status of the work can be removed. The proof of ownership lies with the emerging rights holder.

Ultimately, the OHIM register provides a channel for reuniting rightsholders with their works.

Benefit from finding works that are not orphans

As archive holders would be incentivised to undertake diligent searches, they would not just benefit from the found orphans, but also from the content for which they have discovered rightholders. As with the domestic scheme, the exception would incentivise archives to use more content. When rights holders are found during the diligent search, the user will be able to seek permission for use and agree licensing terms if necessary. Organisations would also have access to rightsholders and could obtain rights for further exploitation if they required.

We expect this benefit to be significant, but have not been able to quantify it due to not having sufficient data.

Providing legal certainty to organisations using orphan works

Currently, many museums and archive holders who responded to the previous Government consultation (which provided information used to produce BIS 1063) are using works that have been diligently searched and which have been found to be orphan. A number of them do so by making provisions for potential right-holders through a risk insurance, which a few museums referred to in their consultation responses; some set aside funds in an 'awaiting claims' account, as the BBC do. Some simply take the calculated risk that no-one will come forward and do not keep any funds aside at all. Nonetheless, this use is effectively infringing copyright even though cases can and often are settled through a licensing agreement.

The exception provided for by the Directive is a mechanism for the legal use of orphan works, provided the work and use are of a type covered by the Directive and the organisation seeking use is a publicly accessible cultural heritage institution or a public service broadcaster.

Benefit from increased lawful use of the copyright system

The Government has received comments that the ability to utilise orphan works on an authorised basis is likely to increase overall confidence in copyright per se. Although the Directive is not a licensing system – there is no authorising function, as it is an exception – it is true that the ability for the organisations covered by the Directive to now make use of the works in their holdings, as set out in the Directive, will also increase confidence in copyright.

Overall Benefits

As the directive is a permissive change, the change allows but does not force businesses to do something, then the better regulation guidance states that if there is a reasonable expectation that business will only adopt these changes where they lead to net benefits for business then it is fair to assume that the benefits are at least equal to costs, even where it is not possible to quantify or monetise the benefits. Therefore we have assumed that the benefits are at least as high as the costs and this measure is therefore cost neutral.

Rationale and evidence that justify the level of analysis used in the IA

We have used the June 2012 final stage Impact Assessment (IA number: BIS1063 – conducted as part of the Government’s response to the Hargreaves Review of Intellectual Property and Growth) carried out for the domestic orphan works licensing system as the starting point for our analysis²⁴. We have then made appropriate adjustments to reflect the fact the Directive is narrower in scope than the domestic system.

We have also subsequently engaged with organisations from the cultural heritage sector and, as would be expected, they have confirmed many of the views they provided when previously consulted for the domestic process.

We have performed quantitative analysis where we have been able to find appropriate data. Where it has not been possible to perform a quantitative analysis, qualitative analysis has been provided – primarily using information received from stakeholders in person or in email exchange.

The recent consultation on the draft regulations has informed us on organisations ability to recoup costs related to the digitisation and making available of works.

Risks and assumptions

The negative present value of this policy should not be seen as a risk, it is a natural outcome given that the Directive is for non commercial purpose only. The main benefit of the provisions is a cultural and educational gain to society through increased accessibility to orphan works that have previously not been easily accessible– which is not easily quantifiable – whereas a reasonable estimate of costs can be ascertained.

Whilst the larger cultural heritage organisations (such as the British Library, Natural History Museum, British Film Institute) have not been able to tell us exactly how many orphan works they would expect to use as a result of the Directive, the general sentiment expressed by the cultural heritage sector – based on IPO interactions with sector representatives – is that having a legal and free at point of use means of digitising orphan works and making them available to the public, would be an attractive option.

There is no validation of searches under the Directive as the organisations that it applies to are cultural and heritage bodies with a public mission and the use is not for commercial gain. It is assumed that these are trusted organisations which will use the Directive responsibly and effectively complete diligent searches.

²⁴ Note an updated Impact Assessment for the domestic orphan works scheme is being prepared and the intention is to submit both this EU Directive IA and the domestic scheme IA for public comment together.

For the purposes of this Impact Assessment, we have not classified the organisations covered by the Directive (please see page 4 of this Impact Assessment) as businesses, despite the fact that some of these organisations might have business revenue generating elements. Our rationale for this decision is that the Directive would not be used or impacted by these elements, because the Directive permits non-commercial use only – specifically, reproducing and making available to the public. This is why we do not have a business net present value or a net cost to business per year in this Impact Assessment.

The level of demand estimated in BIS 1063 did not appear to have made adjustments to reflect the fact that the domestic scheme only licenses use of orphan works in the UK. This is likely to have a downward effect on commercial demand for the UK scheme because some organisations will be looking to use works internationally (i.e., in more than one country) but they will not be able to do this with a licence granted from the authorising body.

Direct Costs and Benefits to Business Calculations (following OITO methodology)

The Directive is out of scope of OITO as it is a European measure.

Evaluation

The European Commission will review the Directive by 29 October 2015 and at annual intervals thereafter. The report will look at the possibility of expanding the Directives scope and focus.

Annexe 1

| Media | Archive (source, if different) | Total collection size | Orphans |
|-----------------|--|-----------------------|---------------|
| Sound recording | Imperial War Museum | 33,000 records | 5%-10% |
| Sound recording | British Library | 700,000 hours | - |
| Film | UK film archives (FOCAL) | 17,000,000 hrs | 0.5% for most |
| Film | Imperial War Museum (FOCAL) | - | 0.25% |
| Film (Europe) | European Film Archives [9, page 25] | 3,200,000 titles | 4%-7% |
| Archive Film | Imperial War Museum | 230,000 items | 5% |
| Archive Film | British Film Institute | - | 10% |
| Archive Film | National Library of Scotland | 32,500 items | 20% |
| Archive Film | Huntley Film Archives (FOCAL) | 80,000 titles | 20% |
| Archive Film | London Metropolitan Archive | - | 35% |
| Books | Authors Licensing & Collecting Society (PwC) | - | <4.7% |
| Documents | Bedfordshire and Luton Archives Services | - | 15% |
| Books | National History Museum, London | 1,000,000 | 20% |

| | | | |
|-----------------------------------|---------------------------------|---|----------|
| Books | National Library of Scotland | 1,500,000 items | ~25% |
| Documents | Imperial War Museum | 7,900,000 items | 20%-25% |
| Manuscripts | National Library of Scotland | - | 20%-30% |
| Books | British Library sample [10] | - | 31% |
| Books in copyright | British Library sample [10] | - | 43% |
| Manuscripts | National History Museum, London | 1,304 metres / 195m ³ | 50% |
| Texts | Oxford University | 600,000 items | 100% |
| Photos, reports, plans, drawings | English Heritage | 12,000,000 items | 8% |
| Overall collection | London Metropolitan Archive | - | 15%-20% |
| Text & drawings | Museum of Childhood (NMDC) | - | 15%-20% |
| Text, photos, maps, plans | National Records of Scotland | 80km shelf space | ~15%-50% |
| Text, photos, illustrations etc | National Archive | 11,000,000 cat. Items ~180km shelf space | 40% |
| Records / Photos | Southampton City Council | - | 30%-50% |
| Collection on industrial heritage | Leicester University | - | 60% |
| Testimonials | Imperial War Museum | 8,000 reels | 100% |