

**04/06/08**

**i2010: Digital Libraries  
High Level Expert Group – Copyright Subgroup**

**Final Report on Digital Preservation, Orphan Works, and  
Out-of-Print Works**

**Contributing Authors**

**Prof. Marco Ricolfi**, Chairman of the Subgroup

**Lynne Brindley**, Chief Executive of The British Library

**Claudia Dillman**, Director of Deutsches Filminstitut and President of  
Association des Cinémathèques Européennes

**Tarja Koskinen-Olsson**, Honorary President of IFRRO - International  
Federation of Reproduction Rights Organisations

**Toby Bainton**, Secretary of the Society of College, National and University Libraries, and Chair of  
the Copyright Expert Group of EBLIDA – European Bureau of Library, Information and  
Documentation Associations

**Anne Bergman-Tahon**, Director of FEP - Federation of European Publishers

**Jean-François Debarnot**, Directeur Juridique of INA - Institut National de  
l'Audiovisuel

**Myriam Diocaretz**, Secretary General - The European Writers' Congress

**Olav Stokkmo**, Chief Executive - IFRRO

The present report follows an Interim Report on Digital Preservation, Orphan and Out-of-Print works, presented by the Copyright Subgroup at the second meeting of the High Level Expert Group on 17 October 2006 and the Report on Digital Preservation, Orphan Works, and Out-of-Print Works presented at the third meeting of 14 April 2007.

The Interim report is available at

[http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/hleg\\_minutes/copyright/interim\\_report\\_16\\_10\\_06.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg_minutes/copyright/interim_report_16_10_06.pdf)

The second Report is available at [http://ec.europa.eu/information\\_society/newsroom/cf/document.cfm?action=display&doc\\_id=295](http://ec.europa.eu/information_society/newsroom/cf/document.cfm?action=display&doc_id=295)

Dissemination is encouraged for reproduction without restrictions other than those safeguarding the integrity of the text and attribution to the authors.

## TABLE OF CONTENTS

<b>Executive Summary .....</b>	<b>4</b>
<b>1. Introduction.....</b>	<b>4</b>
<b>2. Object and Purpose of the Report.....</b>	<b>5</b>
<b>3. Digital preservation.....</b>	<b>7</b>
<b>4. Preservation of Web-content and Web-Harvesting.....</b>	<b>8</b>
4.1 Background .....	8
4.2 Relevant Community legislation.....	9
4.3 Recommendation .....	9
<b>5. Orphan Works .....</b>	<b>10</b>
5.1 Overview .....	10
5.2 The Different Solutions to the Orphan Works Issue.....	11
5.3 The European Approach: Mutual Recognition of National Solutions .....	14
5.4 Diligent Search Guidelines .....	14
5.5 Databases and Rights Clearance Mechanisms .....	16
5.6. Measures to Prevent Future Orphans .....	16
5.7 Conclusion .....	17
<b>6. Works out of Print .....</b>	<b>17</b>
6.1 Definitions and basis for a solution.....	17
6.2 Proposed solution – Key elements .....	18
6.3 The Licensing of digitisation and the making available of works out-of-print. General licensing criteria .....	18
6.4 Databases of and Rights Clearance Centres for out-of-print works.....	20
6.5 Granting of authorisation to digitise and make the work available .....	21
<b>7. The Model Agreement for the digitisation and making available of out-of-print works to authorised users in closed networks .....</b>	<b>22</b>
<b>8. The Model Agreement authorising libraries to allow online access to out-of-print books .....</b>	<b>23</b>
8.1. The scope of the agreement .....	23
<b>9. Key Principles for Orphan Works and Out-of-Print Works Databases (DB) and Rights Clearance Centres (RCC).....</b>	<b>24</b>
9.1. Background .....	24
9.2. Orphan Works .....	25
9.3. Out-of-Print Works .....	27
9.4. Possible Community Measures for orphan works and out-of-print works .....	28
<b>10. Implementation of the proposed solutions.....</b>	<b>29</b>
10.1 Implementation of the model agreements.....	29
10.2. Possible Commission Measures.....	29

## **Annexes**

<b>Annex 1</b>	<b>Case study on web-harvesting legislation in France</b>
<b>Annex 2</b>	<b>Case study on web-harvesting legislation in Finland</b>
<b>Annex 3</b>	<b>Model Agreement for a Licence on digitisation of Out-of-Print-Works</b>
<b>Annex 4</b>	<b>Model Agreement for a Licence on digitisation of Out-of-Print-Works with option for online accessibility</b>
<b>Annex 5</b>	<b>Implementation of proposed solutions through eContent<i>plus</i> projects: the ARROW project as an example</b>
<b>Annex 6</b>	<b>Recommended Key Principles for rights clearance centres and databases for orphan works</b>
<b>Annex 7</b>	<b>Recommended Key Principles for rights clearance centres and databases for out-of-print works</b>

## EXECUTIVE SUMMARY

The Final Report prepared by the Copyright Subgroup of the High Level Expert Group (HLG) on European Digital Libraries intends to respond to the Mandate entrusted to it. It identifies three areas which have to be dealt with as priorities, as far as IPR challenges encountered by the Digital Library initiative are concerned: digital preservation of content, including via web-harvesting and the facilitation of clearances concerning rights on orphan and out-of-print works. It indicates what actions and arrangements could, if properly implemented, reduce the difficulties currently encountered in these areas.

The solutions proposed by the Report are based on a set of high level principles, which should govern actions in the field. The recommendations put forward are underpinned by consultation with main stakeholders, particularly in connection with the issue of identification and use of orphan works.

In the area of digital preservation, the Report proposes several actions at the Member State level which are in conformity with current European legislation and would clear the ground from legal obstacles encountered in certain Member States by institutions engaged in digitisation. The measures envisaged encompass the possibility of creating multiple digital copies for preservation purposes and of providing for web-harvesting under national legal deposit legislation.

The approach recommended by the Subgroup in the area of orphan works builds on the specifically European concept of mechanisms in each Member State having a minimum common denominator and mutual recognition of national solutions concerning orphan works. Once common core principles are established, including in the area of due diligence guidelines for identifying and/or locating rightholders, material whose rightholders have been considered diligently searched for should also be considered accordingly in the other Member States.

It is also suggested that out-of-print works, once digitised, could be made available to a larger range of users than currently occurs on the basis of a licensing solution. To encourage this availability, the Copyright subgroup developed two Model Licences, one intended for use in secure networks, the other on line over open networks.

The Report describes a mechanism based on Data Bases and Rights Clearance Centre to facilitate lawful use both of orphan and out-of-print works. It also suggests a number of deployment issues, including the identification of test-beds for the measures, a specific e-content Plus Project (ARROW) and actions, including dissemination, by the European Community.

## 1. INTRODUCTION

The first meeting of the High Level Expert Group (HLG) on European Digital Libraries, held in Brussels, 27 March 2006, took up a number of issues highlighted by the Commission Communication “i2010: Digital Libraries”<sup>1</sup> and discussed various legal, technological and economic questions involved in the Digital Library Initiative. The agenda of the meeting listed a number of key IPR challenges: **“What are the key IPR challenges? What different actions and arrangements could be undertaken jointly by stakeholders to reduce tensions surrounding copyright? Is there a need to**

---

<sup>1</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions “i2010: Digital Libraries” Brussels 30.9.05 COM (2005) 465 final.

**harmonise at Community level exceptions and limitations that relate to libraries, archives, museums? What are possible ways for facilitating the clearance of rights for cultural institutions?”**

At the end of the meeting, the HLG took the decision to appoint some members to work together as “the Copyright Subgroup” to analyse and discuss relevant IPR issues and to report to the plenary sessions of the HLG on available options. The following were appointed as members of the Copyright Subgroup: Dr. Arne J. Bach (President of FEP – Federation of European Publishers), Ms Lynne Brindley (Chief Executive of the British Library), Ms Claudia Dillman (Director of Deutsches Filminstitut and President of ACE – Association de Cinémathèques Européennes), Ms Tarja Koskinen-Olsson (Honorary President of IFRRO – International Federation of Reproduction Rights Organisations), Mr Emmanuel Hoog (President of INA– Institut National de l’Audiovisuel), and Prof. Marco Ricolfi (University of Torino) to act as the Chair of the group.

The Copyright Subgroup presented an Interim Report at the second meeting of the HLG, held in Brussels, 17 October 2006 concentrating on issues of digital preservation, orphan and out-of-print works. The Commissioner Viviane Reding and the other members of the HLG encouraged the Subgroup’s members to bring forward their work, with a view to presenting a report extending to implementation measures. At the next meeting of the HLG held in Brussels 18 April 2007 the Copyright Subgroup presented a second Report on selected implementation issues in the areas covered by the earlier report.

The Copyright subgroup has in the meantime completed its findings and presents them in this Final Report.<sup>2</sup> The Final Report in part presents new analysis, recommendations and proposals, with particular emphasis on implementing mechanisms and deployment; in part it consolidates the analysis and recommendations in the two previous reports.

## **2. OBJECT AND PURPOSE OF THE REPORT.**

The Commission has made digital libraries a key aspect of i2010. In its Communication ‘i2010: digital libraries’ of 30 September 2005, it set out its strategy for digitisation, online accessibility and digital preservation of Europe’s collective memory. As indicated in recital 1 of the European Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation,<sup>3</sup> this collective memory includes print (books, journals, newspapers), photographs, museum objects, archival documents, and audiovisual material. The Council endorsed the Digital Library Initiative in the Council Conclusion on the Digitisation and Online Accessibility of Cultural Material, and Digital Preservation.<sup>4</sup>

On this basis, the Copyright Subgroup has taken up the issues indicated in the mandate. It has identified three areas considered a priority in dealing with the IPR challenges faced by the Digital Library Initiative, namely digital preservation of cultural material, including web harvesting, the status of orphan works and possible actions and arrangements concerning their identification; finally, actions and arrangements concerning out of print works.

---

<sup>2</sup> Contributions to the different sections came from the Copyright Subgroup members and by outside contributors selected by the Subgroup, identified at the beginning of each section.

<sup>3</sup> (2006/585/EC), in *OJ* 236 of 31 August 2006, 28 ff.

<sup>4</sup> (2006/C 297/01), in *OJ* of 7 December 2006, 1 ff.

In this connection, the Copyright Subgroup used as a frame of reference a number of **high level principles**, intended to govern all work items of their work.

All proposals should be in full compliance with all international obligations of the European Union and of its Member States<sup>5</sup> as well as respect the principle of subsidiarity as enshrined in the EU Treaty.<sup>6</sup>

For rightholders the governing principles are:

- Respect for copyright and related rights, including moral rights of creators and performers of copyrighted works;
- Digitisation and use within the premises of libraries should take place with rightholders' consent or be based on statutory exception;
- Online availability should take place with rightholders' consent;
- Rightholders' consent means in principle rights clearance, which should be based on individual or collective licensing or a combination thereof.

For libraries, archives and museums the governing principles are:

- For these institutions it is important to have legal certainty in their activities;
- Access means either within the premises of libraries, archives and museums or online availability;
- For born-digital works or works digitised by rightholders this means getting permissions for access to works;
- For analogue works this means getting permissions for large scale digitisation and access;
- Legal certainty presupposes a solution for so-called orphan works: unknown or non locatable rightholders and their works.

The proposals discussed and advanced by the Copyright Subgroup of the High Level Group on the European Digital Library should be read as practical solutions to be agreed by the different stakeholders to solve issues raised by digitisation, including the requests made by libraries and other cultural establishments. The proposals intend to take into account the national usages and best practices in the respective fields in each of the European Union Member States. Their main focus is on printed works and text; however, works in the audiovisual, visual photography and music/sound sectors are also, to the extent possible, taken into consideration.

In connection with the issue of works that are out of print, the Subgroup shares the concept advanced by item 6(b) of the European Commission Recommendation of 24 August 2006 whereby the mechanisms intended to facilitate the use of such works should in principle be established or promoted on a voluntary basis. Thus the proposals which follow should not be understood as a blueprint for future legislation.

The Google representative<sup>7</sup> fully supported the objective of the subgroup, in particular with regard to the far reaching and long term benefits to the user and citizen that digitisation offers through better

---

<sup>5</sup> These include TRIPs, the Berne Convention, WCT and WPPT as well as Article 17 of the European Charter of Fundamental Rights, Articles 6(1) and 10 of the European Human Rights Convention and Article 1 of the Protocol thereto, Article 6 of the EU Treaty, Article 27 of the Universal Declaration of Human Rights and Article 15 of the International Covenant on Economic, Social and Cultural Rights of 1966.

<sup>6</sup> In particular some members of the Copyright Subgroup suggested that the proposals must take into account the national usages in each of the EU Member States.

<sup>7</sup> Antoine Aubert, who took part in the meetings from the second part of 2007.

access to information. In this respect, he submitted comments and expressed reservations on some of the key principles for orphan works and out-of-print works, and without opposing the adoption of the copyright subgroup report was not in position to endorse it. It is in the interest of all concerned that the i2010 digital libraries initiative is allowed to progress and solutions developed by the Copyright Subgroup be tested out. There was a general agreement in the Copyright Subgroup that proposed solutions will have to be reviewed in the light of practice and best practices.

### **3. DIGITAL PRESERVATION<sup>8</sup>**

The Copyright Subgroup acknowledges that in some cases digitisation may be the only means of ensuring that cultural material will be available for future generations and may therefore be essential to enable continued access to it. It notes that some Member States' laws allow libraries and other institutions to make one single copy for preservation purposes pursuant to Article 5(2)(c) of the Copyright in the Directive 2001/29/EC.<sup>9</sup>

The Copyright Subgroup notes however that this exception to the exclusive reproduction right conferred by copyright may prove insufficient with regard to digital preservation on account of the format-shifting that may be required for continued preservation due to technical obsolescence of recording media and the resulting need for recurrent "migration" from one format to the next. Moreover, in the audiovisual sector, not even current digitisation might always be a panacea for preservation, as current digital media might last a shorter time than analogue media. Hence, in this latter sector other complementary but equivalent solutions need to be envisaged.

In consequence it recommends that, where a Member State has implemented an exception to allow digital copies of a work and where copies are made for the sole purpose of preservation:

- rightholders should authorise certain institutions (namely: publicly accessible libraries, educational establishments, museums and archives) to make more than one copy (an open-ended number of copies), if this is necessary in order to ensure the preservation of the work. Successive copying should be allowed to take place if and when technological developments are seen to require such a measure, for preservation purposes only, subject to the safeguarding of the individual publication's identity and integrity;
- preservation should be justified only for works that are no longer commercially available in any format. If the work is available on the market, there is no need to preserve it except within national libraries' deposit schemes;
- coordination should take place amongst the various preservation initiatives at regional and national levels and across the European Union, to avoid duplication both among different initiatives and also with national 'legal deposit' libraries;
- in the case of national deposit libraries and concerning born-digital works which have an embedded protection device, it should be noted that publishers and national librarians have agreed that this device should be disabled in the deposit copy (i.e. for the purposes of the national library, but not for access by the end-users) so as to allow permanent and unhindered access to the document.

---

<sup>8</sup> This section is based on a draft originally prepared by Mrs Anne Bergman-Tahon and Mr Toby Bainton.

<sup>9</sup> Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, in *OJ L* 167 of 22 June 2001, 10 ff.

In the discussions concerning the Digital Library Initiative the formula “to digitise once, to disseminate widely” has frequently surfaced. The Copyright Subgroup notes in this connection that the effort to avoid duplication is important and should be encouraged. It also notes that the precept to “disseminate widely” does not by itself entail the liberty to disseminate *freely* under all circumstances, lest the opportunity for uncontrolled *secondary* dissemination destroy the incentives to create in the first place and to invest in the *primary* exploitation on works. Indeed, in many contexts creators and publishers may not be expected to engage in the difficult and risky task of creating a new work, if the initial digital copy were to be available without limits immediately after it is first made.

Therefore, the Copyright Subgroup wishes to underline that these recommendations deal with digital copying for the purpose of preservation only and are strictly limited to the purpose of preserving, for the long term, items of cultural and national heritage produced and distributed in different formats and editions. Any copies made in excess of that permitted by applicable law may not be used to increase the number of copies available for access to end users until the expiry of copyright, provided that access to any copy may occur only for onsite consultation.

The Copyright Subgroup also notes that in certain cases, national legislatures have implemented Article 5(3)(n) of the Directive 2001/29 allowing libraries to make use of communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in Article 5(2)(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections. The recommendations made in this document do not conflict with any such provision.

The Copyright Subgroup noted that archives and museums may face a number of problems in connection with digital preservation and access which are peculiar to them. The costs of digitisation tend to be higher in connection with multimedia and audiovisual works than for text; and the number of users accessing the premises of archives and museums may be substantially lower than in the case of libraries. Additionally, audiovisual works entail the need for clearances by vast numbers of rightholders, including holders of related rights. Issues of privacy and of right of publicity may also frequently arise. Typically these more complex situations should be dealt with in what sometimes is described as a “second basket” of measures, on the basis of experience accumulated in more traditional contexts, such as text. However, the Subgroup surmises that even in this area mechanisms intended to facilitate the use of works held in archives and museums can be established or promoted on a voluntary basis. Collective licensing may be actively encouraged; it may, depending on the context, concern digitisation, access, or, under given circumstances, even commercial uses to the extent that they do not compete with the primary exploitation of works.

## **4. PRESERVATION OF WEB-CONTENT AND WEB-HARVESTING<sup>10</sup>**

### **4.1 BACKGROUND**

The Commission Recommendation of 24 August 2006 describes web-harvesting<sup>11</sup> as follows:

---

<sup>10</sup> Based on a draft originally prepared by Ms Tarja Koskinen-Olsson and Mr. Jean François Debarnot.

<sup>11</sup> Preamble 14 of the Recommendation.



*“Web-harvesting is a new technique for collecting material from the Internet for preservation purposes. It involves mandated institutions actively collecting material instead of waiting for it to be deposited, thus minimizing the administrative burden on producers of digital material, and national legislation should therefore make provision for it.”*

The Commission recommends<sup>12</sup> the Member States to:

*“Make provisions in the legislation for the preservation of web-content by mandated institutions by using techniques for collecting material from the Internet such as web harvesting, in full respect of Community and international legislation on intellectual property rights<sup>13</sup> .”*

## **4.2 RELEVANT COMMUNITY LEGISLATION**

As for material on the Internet protected by intellectual property rights, it is important to assess the relevant Community legislation which, in this regard, is the Directive 2001/29. The most important provision in that Directive is Article 9 entitled “Continued application of other legal provisions”, which explicitly states that:

*“This Directive shall be without prejudice to provisions concerning in particular ...legal deposit requirements...”*

Article 5 includes two optional provisions on exceptions and limitations that concern libraries and other cultural institutions, as follows:

*2. (c): in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;*

*3. (n): use by communication or making available, for research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2 (c) of works or other subject matter not subject to purchase or licensing terms which are contained in their collections.*

The quantity of web-content is increasing in the new media and communication environment and with the development of the information society. As more and more content is only available online, preservation of web-content is becoming a matter of priority. The obligation to preserve web-content is a matter for legal deposit legislation.

The Copyright Subgroup has studied the legislative provisions in two Member States, France and Finland. In these two countries, current legislation supports long-term preservation of web-content. The Case Studies (Annexes 1 and 2) are enclosed for information.

## **4.3 RECOMMENDATION**

Based on the considerations above, the Copyright Subgroup submits the following recommendation:

---

<sup>12</sup> Point 11 of the Recommendation.

<sup>13</sup> Emphasis added.

- 1) It is essential that Member States address web harvesting as a priority issue, because an increasing amount of material is created and updated only in electronic form as web-content. The obligation to preserve web-content by specially mandated organisations is a matter for legal deposit legislation.
- 2) The current Community legislation on intellectual property rights, in particular the Directive 2001/29 and Articles 9 and 5.2 (c) therein, provides for the preservation of web-content.
- 3) The following issues concerning the preservation of web-content should be addressed in any legislation concerning copyright and related rights:
  - a) Whereas copyright legislation uses the term of “right of reproduction”, long-term preservation of web-content necessitates acts such as copying and migration of material, and this should be clarified in the terminology.
  - b) Web-content may have been harvested and deposited, either in the country or abroad, before an obligation arose for legal deposit, and in order to permit the use of such deposited material from the copyright point of view, the issue of retroactivity needs to be addressed, aiming at widest possible preservation of web-based cultural heritage.

## **5. ORPHAN WORKS<sup>14</sup>**

### **5.1 OVERVIEW**

Clarification and transparency in the copyright status of a work is an essential element in the European Digital Library initiative. In some cases rightholders cannot be identified or, if they can be identified, they cannot be located, hence the term “orphan”. Comprehensive, large scale digitisation and online accessibility could be greatly hampered, if adequate solutions are not found to the problem of orphan works.

From the beginning, the Copyright Subgroup concluded that it is important to offer solutions to orphan works. It acknowledges that various voluntary and regulatory mechanisms to facilitate the use orphan works exist in different countries, and new proposals are pending. It also shares the view, expressed by the Commission Recommendation of 24 August 2006, that this is an area where Member States, in consultation with the stakeholders, need to formulate policies. Based on that approach, the Copyright Subgroup emphasised the need for interoperability and introduced the concept of mutual recognition of national solutions as a possible way forward.

Under all voluntary or regulatory measures, there needs to be guidance on what constitutes diligent search required before the use of a work. Stakeholders in different cultural sectors confirmed the view of the Copyright Subgroup that due diligence guidelines can best be established in collaboration with rightholders and cultural institutions. Based on that understanding, the Commission invited representatives of several stakeholders to discuss and agree upon due diligence guidelines for four creative sectors on European level. The European level guidelines including generic information resources can be linked to national resources (such as the name and contact details of a Collective

---

<sup>14</sup> This section is based on a draft originally prepared by Ms Tarja Koskinen-Olsson on the basis of inputs, discussions and comments by Ms Lynne Brindley and Mr Toby Bainton, Mr J.F. Debarnot, Ms Claudia Dillmann and Mr Olav Stokkmo.

management organisation (CMO)), thereby establishing a map of available information resources across Europe.

The development of databases of information on orphan works can facilitate users in their search. The rationale of a database is to provide assistance to users in their search. The interlinking of national databases and registries is needed to achieve a common multilingual access point and a European-wide resource. In this, different cultural institutions, such as libraries, archives and museums, can contribute their varied resources (catalogues, bibliographies, filmographies etc.) and their specific expertise. Aiming to ensure interoperability, enhance coordination and facilitate a multilingual access point, the Copyright Subgroup has developed a set of Key Principles for Databases and Rights Clearance Centres for Orphan Works (see below Section 9). As a result of preliminary work in this area, it appears that this will be implemented as a test-base in a forthcoming project, called ARROW<sup>15</sup>, short listed by the Commission under the eContent Plus Programme. Several representatives of rightholders and cultural institutions are partners in the project.

Development of a rights clearance procedure and a Rights Clearance Centre (or centres) to grant licences to use orphan works is another proposal by the Copyright Subgroup. Rights clearance can take place where licences are offered by a mechanism set up by rightholders. This is an integral part of the ARROW Project.

At the same time, the Copyright Subgroup has advocated suitable measures to minimise the quantity of future orphan works, which occur basically as a result of missing or inadequate information. Improved inclusion of metadata (information on rightholders and rights) in the digital material will be one measure to eliminate or diminish future orphans.

CMOs or other intermediaries can play an active role in finding out the status of a work.

Good practices in the Member States - regulatory measures, voluntary mechanisms or combinations of both - are important. Some mechanisms already exist and more are forthcoming. The Copyright Subgroup also stresses the crucial role of the Commission as an information resource and recommends the publication of good practices and examples on its website.

Both the Directive 2001/29 and the Commission Recommendation of 24 August 2006 emphasize contractual solutions that can be negotiated between stakeholders. The Copyright Subgroup has used this as a point of departure and has listed a number of measures that greatly reduce the problem of orphan works. It thus offers a toolbox of possible contributions to a solution to the issue.

In the sections that follow, each of the elements and recommendations will be dealt with more in depth.

## **5.2 THE DIFFERENT SOLUTIONS TO THE ORPHAN WORKS ISSUE**

Clarification and transparency in the copyright status of a work is an important element in the European Digital Library initiative. Cultural institutions need adequate certainty in dealing with orphan works, and this principle is also included in the high level principles that govern the work of the Copyright Subgroup.

---

<sup>15</sup> Accessible Registries of Rights on Orphan Works (towards the European Digital Library (EDL)). For more detail see below, Section 10.3.

The following general prerequisites need to be fulfilled when considering the use of orphan works:

- A user wishes to make good faith use of a work with an unclear copyright status;
- Due diligence has been performed in trying to identify the rightholders and/or locate them;
- The user wishes to use the work in a clearly defined manner;
- The user has a duty to seek authority before exploiting the orphan work, unless a specific copyright exception applies.

Guidelines on “due diligence” need to be established, based on what is reasonable under the circumstances.

In some countries regulatory and voluntary mechanisms for orphan works have been established. These can be tailored for orphan works, or designed for more general purposes.

A short summary of these solutions is given below<sup>16</sup>.

## **THE CANADIAN REGIME FOR NON LOCATABLE COPYRIGHT OWNERS**

Pursuant to section 77 of the Canadian Copyright Act, the Copyright Board of Canada<sup>17</sup> may grant licenses authorising the use of published works, fixed performances, published sound recordings and fixed communication signals, if the copyright owners cannot be located. The copyright owner is entitled to collect royalties within a deadline of five years from the expiry of a licence. The Board has decided to involve CMOs in the process.

In general, the Canadian model allows works and other subject matter to be used where it is not possible to locate copyright owners. The fact that a licence is issued protects the licensee from subsequent prosecution.

## **OTHER REGIMES WHERE A PUBLIC BODY MAY ISSUE THE LICENSE**

There are various regimes where a public body is empowered to issue a licence. In the following, some of them are briefly described:

- Copyright Tribunal: the UK (s. 190) and Fiji (s. 190) Acts provide that the Copyright Tribunal may consent to a person making a recording from a previous recording of a performance where the identity and whereabouts cannot be ascertained by reasonable inquiry.
- Government Body: The Japan Act (s.67) authorises the Commissioner of the Agency for Cultural Affairs to issue a compulsory license for the exploitation of a work that has been made publicly available if, after due diligence has been exercised, the copyright owner is unknown or cannot be found.
- Copyright Commission: In South Korea (s. 47 of the Act), the Minister of Culture, in practice the Copyright Commission for Deliberation and Conciliation, can issue a license for the exploitation of a work if, despite considerable efforts, the owner of the copyright cannot be located.

---

<sup>16</sup> For a more extensive analysis see the 2006 Report.

<sup>17</sup> <http://cb-cda.gc.ca/unlocatable/brochure-e.html>

## **THE FRENCH MODEL FOR AUDIOVISUAL WORKS**

The French National Audiovisual Institute (INA) has the task of preserving and exploiting audiovisual archives produced or co-produced by public television companies. INA has concluded general and collective agreement with representatives of various categories of rightholders through their CMO<sup>18</sup> or the trade unions.

Under this regime, there is a collective management of the relevant authors' rights; this solution only concerns authors who have contributed their royalties on the works involved to the societies of authors that are signatories of these agreements with INA. Regarding the artists-performers, the agreements concluded by INA with trade unions authorise INA to exploit the presentations of "all" the performers on its archives' fund (subject to possible restrictions appearing in some employment contracts) for all modes of exploitation (even the one which didn't exist when their employment contracts have been signed).

The French intellectual property code (Art. L122-9 and 211-12 for related rights) includes a provision for dealing with the risk of a blockage. The Act of 1 August 2006 also introduces a special provision connected to the exploitation by Ina of its archives including performances of artists-performers.<sup>19</sup>

## **POWER TO EXTEND THE APPLICATION OF A SCHEME OR LICENCE**

The UK Act (s. 167 and 168) includes an implied indemnity in certain schemes and licences for reprographic copying which is valid "within the apparent scope of the licence". For reprographic copying in educational establishments in connection with teaching activities (s. 168), the Minister may by order provide that a licensing scheme or license shall extend also to works of such rightholders that the licence does not cover.

## **EXTENDED COLLECTIVE LICENCES**

Since the early 1960s, Nordic Countries have applied a legislative technique to deal with certain complex usage situations. This legal technique, called "extended collective licence (ECL)"<sup>20</sup>, is a support mechanism for freely negotiated licensing agreements. During the years 2002 and 2006, the Nordic countries extended the ECL to cover certain activities in libraries, museums and archives. Whereas an ECL is not tailored for orphan works, to a large extent it can eliminate the issue of unknown or non-locatable rightholders in the designated area.

In Denmark, a recent revision of the copyright law (January 2008) foresees an organisation to be appointed to issue licences for orphan works under an ECL stipulation. The provision will enter in force on 1 July 2008.

---

<sup>18</sup> SCAM, SACD, SACEM, SDRM, SESAM.

<sup>19</sup> See also the comprehensive Report on Orphan works issued in March 2008 and now available at <http://www.culture.gouv.fr/culture/cspla/rapoeuvor08.pdf>

<sup>20</sup> Extended collective license, leaflet prepared by the Ministry of Education and Culture, Finland, June 1991.

## **HUNGARIAN PENDING LEGISLATION**

The Hungarian copyright system has several different rules which can help the users in searching and finding the rightholders of the works. There is a functioning extended licensing system managed by CMOs and on the basis of that system the users can get licenses for the use of orphan works as well.

The Hungarian Government has proposed an amendment of the Copyright Act that will give more solutions for the problem of orphan works. The proposed amendments are “to insert a new heading and Article 57A into the Copyright Act “Authorisation of use in case if the author or his/her location is unknown”. According to the proposal, a non-exclusive, non-transferable authorisation of use for at most 5 years at the request of the user could be given by the Hungarian Patent Office.

## **US PENDING LEGISLATION ON ORPHAN WORKS**

In 2006, a draft bill was proposed by the Copyright Office, with a short title “The Orphan Works Act of 2006”. According to the bill, a user would be allowed to use an orphan work without an authorisation. The bill is based on the concept of limited liability (a “limits-on-remedy” system) whereby, once the threshold requirement of a reasonably diligent search to find a copyright owner is met, liability would be limited. – Legislation is pending. In April 2008, the US House and Senate versions of the Orphan Works Act of 2008 were made available. The proposal is based on the elements included in the 2006 draft bill, with enhanced proposals concerning identification of certain types of works with the help of databases among others.

## **5.3 THE EUROPEAN APPROACH: MUTUAL RECOGNITION OF NATIONAL SOLUTIONS**

Taking into account that various alternative mechanisms exist to deal with the issue of orphan works, the Commission has recommended that Member States, in collaboration with stakeholders, establish mechanisms to facilitate the use of orphan works. Under this approach, interoperability and mutual recognition of existing solutions become an important issue, especially if the cross-border nature of the use is considered.

The Copyright Subgroup has suggested that in order to ascertain the interoperability between the Member States, common “diligent search” criteria for finding rightholders should be established. It has further recommended that Member States recognise solutions in other countries that fulfil “diligent search” criteria in order to achieve the cross-border effect. As a result, material whose rightholders are considered diligently searched for in one Member State would also be considered accordingly in another. The solution would be based on the concept of mutual recognition.

Thus it is a prerequisite that all Member States have solutions which are interoperable and agree to mutually recognise any mechanism that fulfils the generally accepted core principles.

## **5.4 DILIGENT SEARCH GUIDELINES**

Solutions in different Member States may be different, but they need all to fulfil certain commonly accepted core principles, such as:

- Cover all orphan works (those with unidentified or non locatable rightholders), on the basis of a shared definition;
- Include guidance on diligent search;
- Include provision for withdrawal if the rightholder reappears;
- Offer cultural, not-profit establishments a special treatment when fulfilling their dissemination purposes, to be further discussed between stakeholders;
- Include requirement for general remuneration or remuneration if the rightholder reappears.

The Copyright Subgroup suggested that the notion and conditions of “diligent search” in the context of orphan works need to be elaborated. The work would be based on the following parameters:

- Any solution for orphan works should be applicable to all kinds of protected works.
- The potential user of orphan works should be required to conduct a thorough search in good faith in the country of publication/production if applicable, with a view to identifying, locating and contacting the copyright owner, prior to the use of the work.
- A flexible approach should be adopted to ensure an adequate solution in dealing with individual circumstances of each orphan work, taking into account various categories of works.
- Guidelines or best practices specific to different kinds of work can be worked out by stakeholders in different fields.
- Any regulatory initiative should refrain from prescribing minimum search steps or information sources to be consulted, due to rapidly changing information sources and search techniques.

At the recommendation of the Copyright Subgroup, the Commission organised a meeting called “Stakeholders’ Perspectives” on 14 September 2007. It was the wish of the Copyright Subgroup to include representatives of different cultural sectors in deliberations on due diligence guidelines for their respective sector.

The following is a summary of the findings of the meeting:

- All representatives of stakeholders confirmed that “orphans” exist;
- Representatives of cultural institutions gave examples of concrete cases;
- The necessity of addressing the issue separately in each creative sector was emphasised by rightholders;
- It was acknowledged that legal certainty is important for cultural institutions.

The spirit of cooperation was eminent at the meeting and representatives of cultural institutions and rightholders were willing to engage in a constructive dialogue in order to establish due diligence guidelines for their respective sector.

As a follow-up to the deliberations at the Stakeholders’ Perspectives meeting, the Commission set out a plan for facilitating the creation of sector specific diligent search criteria. Such criteria could be a voluntary measure in a form of Industry Guidelines or Best Practices that European representatives of relevant industries and cultural institutions endorse. The main creative sectors working in accordance with the plan are: text, audiovisual, visual/photography and music/sound; consequently, four different Working Groups (WGs) were nominated to decide on the guidelines for their sector. The work on diligent search guidelines took place from October/November 2007 and is at its final stage. Endorsement is foreseen to begin on 4 June 2008, after the work is concluded.

The Copyright Subgroup has initiated the work and encourages it, but is not a participant in the sector-specific groups. The work is thus a spin-off of the Copyright Subgroup. The WGs work independently and report on their work to the High Level Group and the Commission.

Diligent search guidelines on European level are by their nature generic (European). They will include a common understanding on information resources and the procedure to be followed. It will be important to “customise” the generic information resources locally and link national resources into a European-wide information pool. This will be particularly important as the country of origin of the work will normally be the place where the search will be initiated.

Spreading of good practices in the Member States, be they regulatory, voluntary or a combination of the two, is important for all dealing with orphan works. Some measures already exist and many more are under planning.

For instance, CMOs and other intermediaries can play an active role in finding out if the status of a work is orphan. They can for example search for missing authors by “advertising”; many CMOs already have such procedures. Other intermediaries, such as “Books in Print”, can play a similar role. This recommendation of the Copyright Subgroup finds practical implementations in the ARROW project and in national contractual arrangements between CMOs and cultural institutions.

## **5.5 DATABASES AND RIGHTS CLEARANCE MECHANISMS**

While due diligence guidelines are an important feature in facilitating the use of orphan works, they need to be supplemented by practical tools to serve the users.

The Copyright Subgroup concluded that databases and Rights Clearance Centres will be a useful part of the overall solution of orphan works. Aiming to ensure interoperability, enhance coordination efforts and facilitate a multilingual access point incorporating national and local initiatives, the Copyright Subgroup decided to develop a set of Key Principles for Databases and Rights Clearance Centres for Orphan Works and Out-of-print Works (see below Section 9).

## **5.6. MEASURES TO PREVENT FUTURE ORPHANS**

A work becomes orphan just for one reason: information about it is missing. The best way to ensure that works do not become orphan is to address the creation, maintenance and accessibility of relevant information.

Different measures to improve the availability of information on works, rightholders and rights have been mentioned, among them the following:

- Use of electronic and other identifiers;
- Creation, use and maintenance of metadata in the digital files;
- Recognition of the value of standard identifiers.

Preventative measures also include enhanced contractual practices, in particular in the audiovisual field.



Follow-up and implementation of preventative measures are to a large extent a matter of private sector stakeholders. It could be an area where representatives of rightholders and cultural institutions have a joint interest. Cooperative efforts can bring a win-win solution for the future.

## **5.7 CONCLUSION**

Both the Directive 2001/29 and the Commission Recommendation of 24 August 2006 put emphasis on contractual solutions that can be negotiated between stakeholders. The Copyright Subgroup has had this as its point of departure and has listed a number of measures that greatly reduce the problem of orphan works. It thus offers a toolbox of contributions to a solution to the issue. It is thus important to foresee a combination of measures.

## **6. WORKS OUT OF PRINT**

For out-of-print works<sup>21</sup> the Copyright Subgroup proposes pragmatic solutions within the existing legal frameworks to meet specific requirements put forward by libraries and archives. It addresses mainly printed works and does not analyse in detail the extent to which the suggested solution could be adapted also to other categories of work.

### **6.1 DEFINITIONS AND BASIS FOR A SOLUTION**

#### **Definitions**

A “work” means the work itself, e.g. a poem, a novel, an article, etc., as well as a physical copy of it, e.g. a book, a journal, etc.

A work which is “out-of-print” means that the rightholder concerned has declared it not to be commercially available.

- A work is not considered to be out-of-print albeit it may be out of stock and there may be no printed tangible copies available if:
  - it is still commercially available, typically by being offered for online access or for print on demand;
  - the rights have reverted<sup>22</sup> to the author and the author offers the work in the market place directly, through an agent or a CMO, e.g. a Reproduction rights organisation (RRO);
  - the author or publisher directly, through an agent or through a RRO<sup>4</sup> offers a permission to use the work, e.g. through a licence.

#### **Withdrawal of the edition/Alternative editions**

The work may have been withdrawn from the market deliberately, either by the publisher or by the author. In this context, providing online access to works which are no longer available might conflict with the normal exploitation of the newer version of the work or prejudice the economic interest and possibly also the moral rights of the rightholders.

---

<sup>21</sup> For audiovisual works: out of distribution.

<sup>22</sup> The rights may or may not revert to the author depending on the contracts.

## **Authorisation to digitise the work**

Digitisation of works for preservation purposes is dealt with in part 4, “Digital preservation”.

## **6.2 PROPOSED SOLUTION – KEY ELEMENTS<sup>23</sup>**

The solution proposed by the Copyright Subgroup is based on four main elements:

- (1) Two Model Agreements – for (i) authorised users in closed networks only; and (ii) for online access to copyright out-of-print books
- (2) National DataBases (DB) of out-of-print works
- (3) National Rights Clearance Centres (RCC)
- (4) A defined procedure for the clearance of rights.

The elements of the proposed solution were presented in a report to and approved by the High Level Expert Group at its meeting on 17 October 2006. The Model Agreement for the digitisation and making available of out-of-print works by libraries to authorised users in closed networks was endorsed by the High Level Group on 18 April 2007. It is presented in Section 7 of the Report. The Model Agreement to allow libraries to provide online access over open networks to out-of-print books is presented in Section 8, whereas the Criteria for Databases and Rights Clearance Centres are dealt with in Section 9 of the Report together with the Criteria for Databases of and Rights Clearance Centres for Orphan Works.

## **6.3 THE LICENSING OF DIGITISATION AND THE MAKING AVAILABLE OF WORKS OUT-OF-PRINT. GENERAL LICENSING CRITERIA**

In respect of copyright works that are out of print according to the definitions in this document, authorisation by the rightholder<sup>24</sup> through a licensing agreement is needed for the:

- ✚ digitisation beyond what is authorised by law;
- ✚ making available of the work on the library premises unless permitted through a statutory exception (as enabled by implementation of Article 5(3)(n) of the Directive 2001/29);
- ✚ making available to a user outside the library premises.

Although libraries and archives may be authorised by law to digitise a work, the communication to the public including making it available by way of interactive on-demand transmissions remains covered by an exclusive right. Such interactive on-demand transmissions are characterised by the public being offered access to the works from a place and at a time individually chosen by them. This requires permission from the rightholders concerned.<sup>25</sup>

---

<sup>23</sup> Based on a draft originally prepared by Mr Olav Stokkmo (team leader) discussed with Mr Toby Bainton, also on behalf of Lynne Brindley, Ms Tarja Koskinen-Olsson, Dr Myriam Diocaretz and Mrs Anne Bergman-Tahon. In the work on the Model Agreements the group has also drawn on the expertise of IFRRO’s General Counsel Franziska Schulze.

<sup>24</sup> In this context, the author, the publisher or both may be considered rightholders, depending on the contractual arrangements between themselves.

<sup>25</sup> Recital 40 of the EC Directive 2001/29 states that Member States may provide for an exception or limitation for the benefit of certain non-profit making establishments, such as publicly accessible libraries and equivalent institutions, as well as archives. However, this should be limited to certain special cases covered by the reproduction right. Such an exception or limitation should not cover uses made in the context of online delivery of protected works or other subject-matter. The Directive is without prejudice to the Member States’ option to derogate from the exclusive public lending right in

National legislation and/or existing licensing arrangements already grant certain rights to libraries/archives, including the making available of works on the premises of these establishments on dedicated terminals. The proposed Model Agreements allow acts that are not already covered by law and by existing licensing arrangements. Licensing conditions observe established balances in the Intellectual Property framework and deliver conditions whereby rightholders are allowed to be rewarded for their creativity and investment while at the same time creating the climate for future inspiration through public access to the creative output.

The Copyright Subgroup considered proposals put forward in certain Member States, whereby it would be for copyright legislation to indicate the conditions and terms under which out-of-print works, once digitised, might be made available to the public at large.<sup>26</sup> It considers that a contract based solution is more in line with international obligations, including TRIPs.

### **General licensing criteria**

The proposed licensing mechanism to facilitate the digitisation of such works by libraries and archives beyond what is generally authorised by law and their subsequent online accessibility builds on current national and community legislation. It does not propose new legislation or mandatory stipulations beyond those which already exist. In line with the European Commission Recommendation of 24 August 2006 it is based on voluntary solutions.

The following general licensing criteria apply:

- ✚ The Model Agreements recognise that the rightholder shall have the liberty to choose to digitise a work her/himself. Thus access to the work including that of the library/archive could then be obtained from the rightholder's database.
- ✚ The rightholder may at her / his sole discretion decide that a work shall be treated as a work in print if there are other editions commercially available and the making available of the out-of-print edition would conflict with the legitimate interest of the rightholder in the commercialising of the alternative edition.
- ✚ The Model Agreements grant legal certainty to the library / archive providing online access to works
  - The licensing agreement includes the right to digitise and provide online access to the work including the right to make the work available.
- ✚ Works the rightholders of which are not identified / located should be handled as orphan works (*see* above, Section 5 of the Report).

Some form of remuneration to the rightholders, which the rightholders will be at liberty to waive, is made possible for the digitisation and the making available of their works.

### **The use of the Model Agreements**

There are two Model Agreements: (i) Model Agreement I that covers the digitisation and making available of copyright *material to authorised users in secure networks* only, presented in Section 7 of

---

accordance with Article 5 of Directive 92/100/EEC. Therefore, specific contracts or licences should be promoted which, without creating imbalances, favour such establishments and the disseminative purposes they serve.

<sup>26</sup> See F. STASSE, *Rapport au ministre de la culture et de la communication su l'accès aux œuvres numériques conservées par les bibliothèques publiques*, April 2005.

this Report; and (ii) Model Agreement II which encompasses online accessibility over open networks to *books in libraries*<sup>27</sup> which the rightholder has declared as no longer being commercialised as well as access to out-of-print works for authorised users in secure networks, presented in Section 8.

If the relevant agreement between the library and the rightholder is limited to providing access to authorised users in secure networks only, it is recommended to base the agreement on the Authorised User/Secure Network Model Agreement (Model Agreement I). The Online Accessibility Model Agreement (Model Agreement II) is intended as a basis for the negotiations of an agreement when the rightholders and the library agree that some or all of the digitised out-of-print books can also be made accessible online on the library's website.

A necessary incident to the functioning of the mechanism is that the library/archive wishing to digitise will be informed whether another institution has already proceeded to digitisation and whether such an institution is authorised to provide access also to other libraries and their users (see below Section 7).

The Model Agreements are intended to be used as a basis for negotiations. They will have to be adapted to the situation in the library and Member State concerned. Although they are directed mainly towards libraries, they may also be used by archives and others who wish or need to agree with rightholders on the use of works which are out of print/distribution/commerce. The definition of out-of-print works allows the scope of the licence to be generic and thus not limited to print material. At least the Authorised User/Secure Network Model Agreement may also be adopted by other copyright sectors.

Moreover, the Model Agreements have been drafted with a view to being used on national as well as on a multinational and European level. They may be used by libraries and individual rightholders, their agents and representatives including Collective Management Organisations such as Reproduction Rights Organisations (RROs).

The Copyright Subgroup also notes that no dispute settlement mechanism is in place on the European level. The Model Agreements therefore turned to the World Intellectual Property Organisation (WIPO) for a solution.

## **6.4 DATABASES OF AND RIGHTS CLEARANCE CENTRES FOR OUT-OF-PRINT WORKS**

### **Right Clearance Centres (RCC)**

With the aim of facilitating the licensing of out-of-print works, it is recommended that each Member State considers encouraging the establishment of national Rights Clearance Centres (RCC). These clearance centres could act as national portals for clearance of rights in respect of out-of-print works unless the proposed user finds it simpler to contact the rightholder directly. Existing CMOs such as RROs could run the portals. The rightholders may also opt for other solutions. Subject to the mandate from the rightholder, the RCC may:

- a. Grant the permission and offer a licensing agreement;

---

<sup>27</sup> Whereas the remit and the competence of the team was limited to out-of-print “books in libraries” the stipulations in the Model Agreement may well be applicable beyond this. This is left to be decided by the negotiating parties in each case through adapting the Model Agreement and taking into account, if necessary, specific national and local requirements.

- b. Redirect the request to the pertinent rightholder;
- c. Refuse permission (which may e.g. be the case if the CMO does not have the mandate to grant the permission).

The RCC will not encompass all rightholders and all works. It would, however, be expected to represent a substantial portion of them.

### **Databases (DBs) of out-of-print works**

The Rights Clearance Centre should also consider building a register of works for which permission has been granted *inter alia* to avoid duplication of efforts. The data would provide information and metadata about what has been digitised; by whom; where the digitised work is preserved; and how and by whom access to the work is provided. The solution would take the form of a portal. The national portals need to be interlinked to offer a pan-European register.

## **6.5 GRANTING OF AUTHORISATION TO DIGITISE AND MAKE THE WORK AVAILABLE**

Authorisation to digitise and make an out-of-print work available can be granted

- (a) Directly by individual rightholders;
- (b) Through a joint administration, i.e. joint licensing through an intermediary e.g. in the form of redirection from a joint portal for rights clearance to the individual rightholder concerned for the granting of the permission and the licence;
- (c) Collectively via Rights Clearance Centre administered by a CMO such as a RRO. Depending on the mandate, the license offered by the CMO may either be offered on a transactional basis (i.e. case by case) or offered as a repertoire licence. A “repertoire licence” means that the library/archive through the licence is (a) granted preauthorisation to digitise and make available the works that the Rights Clearance Centre has in its repertoire (b) normally at a standardised set of conditions.

### **Procedure for clearance of rights and obtaining a license**

The following procedure for clearance of rights is proposed:

1. The library/archive that wishes to digitise in order to provide online access to an out-of-print work makes a request to the rightholders [give a (list of) work(s) for which it seeks permission]. The request can either be made to:
  - i. The rightholder directly which will often be the case if there is only one rightholder involved and the rightholder’s contact details are known or easily available
  - ii. The Rights Clearance Centre (RCC)
  - iii. The CMO where the CMO is not the RCC
2. Depending on the mandate, the rightholder or the CMO / RCC will
  - i. Grant the permission
  - ii. Refuse to grant permission, with or without justification
  - iii. Redirect to the pertinent rightholder

In case of transactional licensing by CMOs, individual direct licensing and licensing through joint administration, a reasonable time must be defined to respond to the library's/archive's request for permission. This is addressed in the Criteria for Rights Clearance Centres (See Section 9)<sup>28</sup>

## **7. THE MODEL AGREEMENT FOR THE DIGITISATION AND MAKING AVAILABLE OF OUT-OF-PRINT WORKS TO AUTHORISED USERS IN CLOSED NETWORKS**

### **The scope of the licence**

The Model Agreement I annexed as Annex 3 offers a practical solution to specific needs as defined by libraries and will assist them in satisfying user requirements for access to information and content once printed and published. It has been designed to be adaptable to the different legal regimes and models for administration of rights in force throughout the European Union Member States.

Access should be offered in a way that does not interfere with the copyright holders' legitimate interest in controlling the commercialisation of their works. The Model Agreement allows the library to digitise and provide access to out-of-print works to authorised users through closed networks. It is not limited in respect of territory, but access may not be offered through open networks.

### **The content of the Model Agreement**

The Model Agreement grants the library a non-exclusive and non-transferable right to digitise and make the licensed work available to users in closed networks. The rightholder is entitled to payment which (s)he is at liberty to waive. The pertinent author/publisher retains copyright in the work and in the digitised version and may at any time revoke the licence, *inter alia* to re-commercialise the work in question. The author / publisher may require information from the library on the use of the work to better assess its commercial potential. If the licensor withdraws from the library any part of the licensed material and the material withdrawn represents more than 10% of a title, the library is entitled to a reimbursement of its actual costs.

Under the licence the library may digitise, access the digitised version, store it in a systematic way to facilitate search and retrieval, provide access to it to authorised users through secure networks, and reproduce it electronically or on paper for internal back-up or preservation purposes.

Subject to a separate agreement with the rightholder or his/her representative the library may provide other libraries with online access to the digitised work in order for them to make it available in closed networks to their respective authorised users. Also, subject to a separate licence the library may provide on-line access to a third party such as an enterprise or a university.

The authorised user is allowed to search, view, retrieve and display the digitised work. The library may also agree with the author or publisher who holds the right that the authorised user may electronically save and make single copies of parts of the work.

---

<sup>28</sup> In certain specific cases, also the new Nordic "library-specific" Extended Collective Licensing scheme might be a good way forward; yet, as negotiation of the required agreements with the stakeholders is still underway, it is suggested that the adaptability of the mechanism to out-of-print works needs to be further scrutinized.

## 8. THE MODEL AGREEMENT AUTHORISING LIBRARIES TO ALLOW ONLINE ACCESS TO OUT-OF-PRINT BOOKS<sup>29</sup>

### 8.1. THE SCOPE OF THE AGREEMENT

In line with the Copyright Subgroup's intention to work out practical solutions to specific needs and expectations indicated by the cultural institutions in the digitisation and making available process of copyright works, a team was established tasked with the development of a solution to enable online access to books which are out of print<sup>30</sup>. As with other solutions proposed by the copyright subgroup under the i2010 Digital libraries initiative the stakeholder representatives agreed that this should be done in a way that does not interfere with the copyright holders' legitimate interest in commercialising their works.

The Copyright Subgroup including the online accessibility team has limited its considerations to the digitisation and providing access online to out-of-print *books* by *libraries*. It concluded that the most appropriate solution would be to offer a Model Agreement, hereafter referred to as the Model Agreement II annexed as Annex 4. It is further assumed that a library that offers online access to out-of-print books will also grant access to the same categories of works to authorised users in closed networks. Therefore, the Model Agreement that has been worked out therefore comprises both options.

It has not been assessed whether Model Agreement II may also be applied to other types of works than books, to other sectors such as the music and/or visual and/or audiovisual sectors, or other institutions than libraries. However, the terms that are used are generic and the Model Agreement II's applicability should be possible beyond out-of-print books in libraries.

#### **The content of the Model Agreement II**

The agreement grants the library a non-exclusive and non-transferable right to digitise and make the relevant out-of-print books covered by the agreement available to users on line over open networks. In addition it may offer authorised users access through secure networks to works which are not otherwise accessible online on the same conditions as granted by the Authorised User/Secure Network Model Agreement I for out-of-print works described in Section 7 of this Report.

For out-of-print books that may be accessed online over open networks the Model Agreement grants the library the right to digitise the book and make the digitised version either freely available on its website to anyone who accesses the website or subject to registration, depending on the option agreed with the rightholder or her/his representative. The library may index the digitised copy in its system. Only the Licensee is authorised by the Agreement to offer the content on its web-site.

The User may search, retrieve and display the digitised version of the book, store it electronically on a hard-drive or other storage and, subject to it being specified in the agreement or other agreement, or authorised by law, make single copies of parts of it. The Model Agreement II also allows the library and the rightholder / rightholder representative to specify allowed uses.

---

<sup>29</sup> The Online accessibility Model Agreement has been developed by a Team made up of Mr Olav Stokkmo (team leader), Ms. Anne Bergman-Tahon, Mr. Vianney de la Boulaye, Dr. Myriam Diocaretz, Ms. Mette Møller, Mr Toby Bainton, Dr. Elisabeth Niggemann, Mr. Ben White and Ms Tarja Koskinen-Olsson. In drafting Model Agreement II the team has also drawn on the expertise of IFRRO's General Counsel Ms. Franziska Schulze.

<sup>30</sup> For the definition of an out-of-print work see 6.1

The agreement does not allow the library or the user to make systematic print or electronic copies of multiple extracts of the book, or alter, abridge, adapt or modify it in any way. Moral rights have to be respected.

As with the Authorised User/Secure Network Model Agreement (Model Agreement I) the rightholder is entitled to payment which (s)he is at liberty to waive. The pertinent author / publisher retains copyright in the work and in the digitised version and may at any time revoke the licence, *inter alia* to re-commercialise the book; the author / publisher may require information from the library on the use of the work to better assess its commercial potential; and the withdrawal from the library of the book – partly or in total – may cause reimbursement by the rightholder of the library’s costs.

## **9. KEY PRINCIPLES FOR ORPHAN WORKS AND OUT-OF-PRINT WORKS DATABASES (DB) AND RIGHTS CLEARANCE CENTRES (RCC)**

### **9.1. BACKGROUND**

The Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation noted the strong roots of the European digital libraries in national and local efforts to digitise and preserve the cultural heritage. Creating the European dimension through a common multilingual access point requires thus a high degree of interoperability.

The Recommendation further noted that “Licensing mechanisms in areas such as orphan works [ ] and works that are out of print or distribution (audiovisual) can facilitate rights clearance” and “should therefore be encouraged in close cooperation with rightholders.”

Concurrent with the Commission Recommendation, the Report of the Copyright Subgroup of 18 April 2007 stressed the voluntary aspect of solutions to be implemented within the framework of the i2010 digital libraries initiative. The Report further affirmed that among the governing principles for rights holders are (i) “digitisation and use within the premises of libraries should take place with rightholders’ consent or be based on statutory exception”; and (ii) “Rightholders’ consent means in principle rights clearance, which should be based on individual or collective licensing or a combination thereof.” One of the governing principles for the cultural institutions is that “Access means either within the premises of the libraries, archives and museums or online availability.”

*Inter alia* on this basis the Copyright Subgroup Report of 18 April 2007 concluded that Databases and Rights Clearance Centres must be a part of the solution both for orphan works and out-of-print works. Aiming to ensure interoperability, enhance co-ordination efforts and facilitate the multilingual access points incorporating national and local initiatives, the Copyright Subgroup decided to develop a set of Key Principles for Databases and Rights Clearance Centres for Orphan Works and Out-of-Print Works. A team<sup>31</sup> was established to draft the Key Principles presented by the Copyright Subgroup and incorporated in this Report.

---

<sup>31</sup> Team led by Mr. Olav Stokkmo (IFRRO) and otherwise made up of Mr. Toby Bainton (SCONUL and EBLIDA), Ms. Claudia Dillman (Association des Cinémathèques Européennes), Ms. Anne Bergman-Tahon (FEP), Dr. Myriam Diocaretz (EWC), Ms. Sophie Scrive (ENPA) and Ms. Tarja Koskinen-Olsson (IFRRO). Members of the Copyright Subgroup who



## 9.2. ORPHAN WORKS

### General point of departure

The overall solution for orphan works consists of:

- i. Diligent search criteria that a user needs to fulfil prior to the use of the work. (Diligent search for rightholders to the work, and clearance of rights, will normally be carried out in the country of origin of the work when identifiable) (see above, Section 5.4);
- ii. Database(s) (DB) of orphan works to facilitate users in their search, which is needed irrespective of any legislative solution;
- iii. A rights clearance procedure and (a) Rights Clearance Centre(s) (RCC) to grant licences when they can be offered by a mechanism set up by rightholders;
- iv. National solutions which may include legislative/regulatory support and mutual recognition of different solutions in various Member States to achieve the cross-border effect needed for the European Digital Libraries (EDL) (see above Section 5.4).

The Key Principles proposed by the Copyright Subgroup with this Report concentrate on three implementation issues, which are not dependent on each other, and are needed in an overall solution to find a workable mechanism to use orphan works, primarily by cultural institutions but also by other users:

- Sector specific criteria for diligent search for rightholders to copyright works
- databases of orphan works; and
- a mechanism to clear the rights to use an orphan work.

### Database and Rights Clearance Centre

The rationale of a Database (DB) is to provide assistance to users in their search endeavours. Interlinking national databases and registries is needed to enable a European common multilingual access point and a European wide resource possible. It should take account of the variety of existing and future information resources.

The national Rights Clearance Centres (RCCs) could act as portals and common access points for clearance of rights and be accessible across borders. The user, defined as the one who requires a licence to digitise and/or make available the work and/or make other use of it, has the full responsibility for carrying out a diligent search for rightholders to the orphan works. The diligent search must be carried out and documented prior to the granting of a licence. The process could typically be:

- The institution or individual wishing to digitise, make available or otherwise make use of a work states the interest and includes a description of the required use with a declaration that the user has been unsuccessful in identifying or locating the rightholder and that the work may be an orphan work
- The potential orphan work is described with whatever metadata (name of the author, producer, etc.; title of the work, etc.) is available, and, in the absence of metadata, makes use of other means to describe the work such as snapshots, a facsimile, photo, video clip, excerpt of a piece of music

---

were not on the team have been copied in. Ms. *Patricia Moll* (Google) commented on the OPW Key Principles, Mr. *Jean François Debarnot* (INA) on the OW Key Principles.

- The licensing conditions of the work if it remains orphan following a diligent search for the rightholder should be available prior to the start of the diligent search
- Diligent search for the rightholder(s) is carried out according to established search criteria and guidelines for the sector concerned
- Evidence that a diligent search has duly taken place according to the sector specific criteria and guidelines are presented
- The intention to make use of the work and by whom as well as the evidence of the diligent search for the rightholder(s) are registered in and publicised in the Orphan Works DB
- The RCC assesses whether the search is diligent, and, if so, informs about licensing criteria for the work in question and grants/refuses to grant a licence within a defined period of time
- The RCC may wish to take up an insurance to limit financial risks in respect of future claims that may be raised
- The required fees, i.e. transaction costs and, when applicable, the licence fee are paid to the RCC by the user
- The information on the granting of the licence and the licensing conditions including the further use of the work are publicised in the DB
- If the rightholder, or his/her representative reappears the RCC examines the claim and certifies that the claimant is the correct rightholder and pays out, when applicable, the collected fees
- Upon certifying the right claimant, the information on the rightholder and the consequences, etc. for the licence is published in the Orphan Works DB.

### **The Key Principles**

The Database foreseen to be interlinked in the European Digital Libraries initiative is a register of metadata rather than a works database. In order to facilitate interoperability also with existing resources a general principle is that it should, as a starting point, be based on existing standards rather than developing new ones. The Key Principles encompass

1. Policy of the Database
2. The Database structure and content
3. Metadata to be contained as a minimum and how to address the absence of metadata
4. Standards and how to address issues of standards
5. Interoperability criteria, including a registry of works which have been digitised and for which authorisation has been granted.

The Rights Clearance Centre Key Principles include

1. Policy of the Rights Clearance Centre
2. Licensing policy and issues
3. Licensing conditions and how to address them
4. Remuneration policy
5. Interoperability issues
6. Transparency issues.

## 9.3. Out-of-Print Works

### General point of departure

The solution for out-of-print works is based on

- (i) Model Licence;
- (ii) Database registers on works declared to be out of print/distribution/commerce; and
- (iii) National Rights Clearance Centres to be used by rightholders on a voluntary basis to complement individual direct licensing by rightholders.

The Model Licence has already been approved by the Copyright Subgroup and the HLG and is posted on the European Commission's website. With this Report the Copyright Subgroup presents the Recommended Key Principles for the establishment of Databases and Rights Clearance Centres in connection with the i2010 Digital Libraries initiative.

The Key Principles build on previous conclusions taken by the Copyright Subgroup as approved by the HLG, including the definition of works out of print/distribution being those declared by the pertinent rightholder(s) to be no longer actively commercialised. Moreover, the Rights Clearance Centres are foreseen to be used on a voluntary basis by rightholders who often will be in a position to enter themselves into direct licensing agreements with libraries, museums and archives. It is, however, necessary to consider clearance centres which can act in a complementary fashion to individual, direct licensing.

### The Database

The Database foreseen to be interlinked in the European Digital Libraries initiative is a register of metadata and not a works database. The rationale is to provide assistance to cultural institutions on works that are no longer being commercialised by the rightholder(s). Users may be offered access to such works on conditions that may be different from those which apply for works in print. The Key Principles aim to provide information on such works to be available across border and thus to facilitate a European wide solution through interoperable national databases.

The optional use of the database is recognised. The result of this is that the registry will not be complete. It is, however, assumed that it will be in the interest of all stakeholders that a high quality registry of out-of-print works be established. Its quality depends largely on the use of the opportunity that such a database provides. It is assumed that institutions will present to rightholders and/or their representatives a request to digitise a work. The out-of-print works register will typically be built up through registering the work upon a declaration by the rights holders of their lack of intention to commercialise it further. The rightholders may also wish to register a work with the database as being out-of-print regardless of a request for digitisation or other use of it.

In order to facilitate interoperability with existing resources a general principle is that it should, as a starting point, be based on existing standards rather than developing new ones. The Database Key Principles further address

1. Policy of the Database
2. The Database structure and content

3. Metadata to be contained as a minimum and how to address the absence of metadata
4. Standards and how to address issues of standards
5. Interoperability criteria, including a registry of works which have been digitised and for which authorisation e.g. under the Model Licence has been granted

### **The Rights Clearance Centres**

The Rights Clearance Centre can, subject to the mandate, both grant licences to digitise and make available works and redirect to the pertinent rights holder for possible direct licensing. The Key Principles address

1. Policy of the Rights Clearance Centre
2. Mandating by rightholders
3. Licensing policy and issues
4. Licensing conditions and how to address them
5. Remuneration policy
6. Interoperability issues
7. Transparency issues

## **9.4. POSSIBLE COMMUNITY MEASURES FOR ORPHAN WORKS AND OUT-OF-PRINT WORKS**

The European Commission could

- A. Based on the Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation
  - i. Recommend to the Member States that they encourage rightholders to establish Rights Clearance Centres for orphan works
  - ii. Publish the Key Principles for Orphan Works Databases and Rights Clearance Centres on its website and recommend that they be used when such databases and rights clearance centres are established
  - iii. Publish the Key Principles for Out-of-Print Databases and Rights Clearance Centre on its website and recommend that they be used when such databases and rights clearance centres are established
- B. As a prerequisite for establishing the suggested measure A. above, provide financial assistance to the development of technical standards and test beds for orphan works and out-of-print works Databases and Rights Clearance Centres, such development to take place in collaboration with rightholders, cultural institutions and other stakeholders.

## **10. IMPLEMENTATION OF THE PROPOSED SOLUTIONS**

### **10.1 IMPLEMENTATION OF THE MODEL AGREEMENTS**

The actual impact of the Model Agreements (MAs) shall depend on their implementation. A prospective deployment plan has been formulated through a process of consultations with libraries representatives and other stakeholders; therefore, a number of actions are recommended for full dissemination, promotion and implementation.

The European Commission might wish to promote the adoption of the MAs, post them on the digital libraries home page and encourage their use.

They should be disseminated and brought to the attention of potential users through relevant channels in the EU Member States which should include: pertinent ministries; national libraries and library organisations; authors' associations, publishers' associations and RROs. The model agreements should be available through relevant portals and web sites on a national and Community level including those of the Member States ministries, rightholder associations, library associations and Collective Management Organisations.

The voluntary use of the MAs can be effectively deployed through the establishment of test-beds. For this purpose, national libraries and other digitising institutions should be encouraged by the EC to use either of the MAs as a solution to digitise and make available out-of-print works. Cultural institutions can thus build examples of "effective practices" as a result of their voluntary institutional actions.

The multiplier effect is a key factor for implementation. The test-beds deployment will be enhanced if the Commission invites current relevant initiatives such as EUROPEANA project and additional EU digitising initiatives to consider implementing the MA. Moreover, the Commission could encourage the adoption of the MA through a selection of "Champion Projects" to promote best practices.

Moreover, the Commission could contribute to identifying and publishing best practices on the use of the MAs. The text of the MAs may be set in a national context to be in line with the respective laws, economic models and related factors. This information needs to be gathered. Furthermore, cultural institutions need to have information about already existing model agreements at national level in other Member States; it would be beneficial for all to have a collection of these examples.

For the above strategic approach, the Commission's support and endorsement is essential.

### **10.2. POSSIBLE COMMISSION MEASURES**

The Model agreement for a licence on digitisation of out of print works for closed networks exists in the following languages: English, German, Spanish, French, Italian, Dutch, Polish and Romanian. The Commission may contribute to its dissemination by helping to make the Model Agreements known and

available throughout the EU, in all main EU languages and by resorting to its legal and linguistic expertise to review the Model Agreements both in the original version (English) and in the translations. The deployment potential for MA test-beds largely depends on the communication to and engagement of the Member States. The Commission is advised to give prominence to the potential use of the MA from the very beginning of its adoption by the HLG, to ensure that it is acknowledged in all Member States for national and/or cross-border contracts. An important support and involvement in this direction needs to emerge from **Member States' Expert Group on Digitisation and Digital Preservation**. Both the mandate and the strategic role of this Expert Group within policy making and major ongoing initiatives in digitisation and digital preservation<sup>32</sup> ensures a coordinated approach which can help to avoid duplication of efforts. Thus, they are the most appropriate body to support the further adoption of the MA for additional test-beds. The Commission is advised to announce and promote the solutions proposed by the Copyright Subgroup in the MS Expert Group meetings and to invite further dissemination in each MS for a prospective endorsement at national level that would facilitate a widespread voluntary adoption by cultural institutions.

The implementation process will require **coordination** to gather best practices, to promote the exchange of experience and knowledge, as well as to collect the different national views and procedures existing in the MS. There is an increasing interest amongst libraries and other digitising cultural institutions in finding out about the situation and procedures for out-of-print works in other European countries. Parallel to the test-beds, it will be important to gather information and feedback from currently existing digitising practices, business models within private-public partnerships, national and regional initiatives (Norway, France, Germany, among others). The implementation requires EU-wide research on a country-by-country basis, concerted analysis, follow-up, dissemination, and discussion. Such coordination should aim at providing the driving force for a much needed cross-fertilisation. If no such coordinating body exists, it will be important to consider these identified needs for a future EC Call (FP7).

The Commission is advised to identify initiatives within the Seventh Framework Programme (FP7), of community funded EU digital libraries projects, such as *eContentplus* programme, in order to select Champion Projects that would be willing and ready to start the implementation. The new *eContentplus* project ARROW (see Annex 5 to this Report) is a good example of a concrete beginning of deployment.

---

<sup>32</sup> Established by the Commission on 22 March 2007, the group's mandate includes: "To monitor progress and assess the impact of the implementation of the [Commission Recommendation of 24 August 2006](#) on the digitisation and online accessibility of cultural material and digital preservation.[...] To provide a forum for cooperation between Member State bodies and the Commission at European level and to exchange information and good practices of Member States' policies and strategies on the digitisation and online accessibility of cultural material and digital preservation."

## Annex 1

### The INA's performance of its legal deposit role

Below, you will find a description of the articles of the French law dated August 1, 2006 which implements the requirements of directive number 2001/29/CE from the European Parliament and the Council dated May 22, 2001 concerning the harmonisation of certain aspects of copyright and related law in the information society. These were not contested during the debates held at the National Assembly and the Senate, and consequently any examination of alternatives would be a futile exercise here. The articles in question concern the legal deposit system.

In order to draw up an overview of the legal deposit as it currently exists, enshrined by the law dated August 1, 2006 and based on the INA's experience in this area, the following aspects will be examined in turn:

- The legal framework underpinning the legal deposit;
- The INA's current performance of its legal deposit role;
- The contributions brought about by the law dated August 1, 2006 concerning the legal deposit activities carried out by the INA.

#### **I – A reminder of the legal framework underpinning the legal deposit system**

Under French law, the legal deposit is an obligation incumbent upon all publishers, printers, producers, distributors and importers of documents (i.e. those who bring into France any documents published or produced outside French territory under the terms of article L. 132-2 of the heritage code) to submit a copy of the said document to those bodies specified under the law. Initially introduced for printed material (with the creation of the Royal Library by Francis 1st in 1537), it has gradually been extended to cover all types of creative material and forms of expression.

The legal deposit (a generic term) of audiovisual documents and sound recordings was established by law number 92-546 dated June 20, 1992, and its application decree number 93-1429 of December 31, 1993. This is an important public service activity for the INA, as it makes it possible to collect the nation's audiovisual and sound recording heritage, and to make this available to researchers in the widest sense of the term (academics: including professors, students and researchers; professionals: including journalists, document and research officers, and authors etc., in addition to private individuals pursuing a personal research project) who are authorized (following accreditation) to consult these documents at the *Inathèque de France*, a consultation centre located at the BNF site (the *Bibliothèque Nationale de France* or French National Library).

The purpose of this legal deposit is twofold: firstly to preserve records for the future and secondly to enable duly accredited researchers to have access to this content through the French television and radio archives.

The programmes stored by the INA as part of its legal deposit activities may only be consulted following the granting of an authorisation, and exclusively for research purposes, unlike those archives for which the INA has been granted ownership or joint ownership under the law, and for which it has a public service role regarding the storage and commercial or non-commercial use of such material.

.../...

The INA may only exploit (including commercially) programmes covered by a legal deposit when it possesses an express authorisation to do so, granted by the owners of the exploitation rights for these programmes.

The legal deposit role conferred upon the INA was reaffirmed by law number 2000-179 dated August 1, 2000, which modifies law number 86-1067 of September 30, 1986 concerning the freedom of communication, article 49 of which describes the Institute's missions.

Following the order dated February 20, 2004 repealing the law dated June 20, 1992 and its application texts, the rules governing the legal deposit have been enshrined in articles L. 131-1 to L. 133-1 of the heritage code, with a number of these articles being wholly or partially added to, modified, replaced or created via the law dated August 1, 2006 (please see below regarding the legal deposit requirements for websites).

Under the terms of these laws, the following have responsibility for the legal deposit, which they manage on behalf of the state, as per the terms set down in the decrees issued by the Conseil d'Etat (Council of State): the *Bibliothèque Nationale de France* (for graphical or photographic printed documents, software packages, databases and expert systems, and certain sound and picture recordings and multimedia documents); the *Centre National de la Cinématographie* (for certain picture recordings and cinematographic documents), the INA (for audiovisual documents and sound recordings) and the Ministry of the Interior's legal deposit department (for certain periodicals).

This decree may also assign the responsibility for carrying out legal deposit activities to other national or local establishments or public departments, on condition that these are able to provide the statutory guarantees and possess the resources (particularly those of a scientific nature) needed to meet the objectives described in article L. 131-1.

Under the terms of article L.131-1 of the heritage code, the legal deposit is organised in order to provide for:

- a) The collection and conservation of the documents mentioned in article L. 131-2;
- b) The constitution and circulation of national bibliographies;
- c) The consultation of the documents mentioned in article 131-2, with the exception of secrets protected by the law in accordance with conditions compatible with intellectual property legislation and with their conservation.

Article L.131-2 states that the following works are subject to the legal deposit requirement:

- Printed, graphical, photographic, sound, audiovisual and multimedia documents regardless of the production, publishing, broadcasting or circulation methods used, at such a time as such documents are made available to the public.

The law dated August 1, 2006 added the following to this list:

- Software and databases at such a time as these are made available to the public via the distribution of a physical medium, regardless of the nature of this medium;
- Signs, signals, written material, images, sounds or messages of any kind communicated to the public by electronic means.

.../...



Finally, it should be remembered that the legal deposit involves the submission of a limited number of copies of the document to the custodian organisation, (these can also be sent by free post), with it being stipulated that the legal deposit requirements can be fulfilled by other means, including by recording those programmes broadcast by television or radio (art. L.132-1).

## **II - The INA's current performance of its legal deposit role**

When the legal deposit system was created in France in 1992, the audiovisual sector chiefly comprised the major national terrestrial broadcasting channels.

As a result, under the above-mentioned application decree dated December 31, 1993, only audiovisual and sound recordings of French origin needed to be collected, the first time that these were broadcast by these national terrestrial broadcasters, with it being borne in mind that according to their nature the documents were collected either integrally or selectively (based on sampling for news programmes, game shows and broadcast of sports programmes).

Consequently, legal deposit requirements initially only concerned the programmes of TF1, France 2, France 3, Canal +, La Cinquième, M6 and Arte, in addition to those of the five national stations belonging to Radio France; France Inter, France Info, France Culture, France Musique and Radio Bleue.

The expansion of radio broadcasting by national networks, the growth in the number of channels broadcast by cable and satellite and the advent of digital terrestrial television have resulted in changes to the collection and deposit perimeter.

In order to be able to offer a collection of programmes for consultation purposes which accurately represent the entire French audiovisual spectrum, since 2002 the INA has entered into agreements with the cable or satellite channels and the private radio stations in order to have them voluntarily submit their programmes for deposit. In 2005, the collections were further expanded with the addition of the programmes from the free DTT television broadcasters.

It should also be stressed that the fast pace of technological progress has made it possible to expand the direct digital captation of broadcast signals at a low cost.

Consequently, in order to facilitate collection, since January 1, 1995 the INA has carried out the direct digital reception of radio programmes, with this being extended to cover televised programmes since July 1, 2001 (with no further need for the television channels to supply hard copies).

This complete reception service (which is carried out 7 days a week and 24 hours a day using a special fibre-optic link or a satellite link) makes use of digital recording techniques. The collection of the supporting documentation for the programmes and the programme scheduling documentation needed for indexing purposes is chiefly carried out by the transmission of digital files and the sending of a small number of paper documents by the channels concerned.

In this way, the INA fulfils its mission of storing the programmes from the terrestrial, cable and satellite television channels, in addition to those of the public radio stations and a number of private stations. As a result, the INA has preserved a record of the programmes produced by the main French television and radio stations since 1995, the year in which the legal deposit laws came into effect. This already amounts to almost 680,000 hours of television and 950,000 hours of radio up to December 31, 2005.

.../...

The INA has gone from the legal deposit of programmes for 7 television channels and 5 radio stations in 1999 to 48 television channels and 17 radio stations today (involving no fewer than 65 audiovisual communication companies). With the extension of the second “objectives and resources” contract which it recently concluded with the state, its target for 2009 is to become the legal custodian for programmes from 100 television channels and 20 radio stations.

Almost 300,000 hours of new programmes are collected each year by the INA. In 2009, 268,000 hours of television and 175,000 hours of radio should be deposited with the Institute.

In practice, the legal deposit collection currently chiefly concerns programmes broadcast by:

- National Terrestrial television: TF1, France 2, France 3, Canal +, M6, Arte, France 5.
- Cable and satellite television: 34 channels including Paris Première, Canal J, Canal Jimmy, Euronews, Eurosport, Planète, RTL 9, TMC, TV5, Histoire, La chaîne parlementaire and Public Sénat, etc.;
- Digital terrestrial television (DTT): 10 channels including Direct 8, NT1, France 4, BFM TV, I-Télé, Gulli, etc.;
- A radio collection: The programmes broadcast by the five stations belonging to Radio France (France-Inter, France-Musique, France-Culture, France-Info and France-Bleue), with the collection perimeter now extended to RFI and to 11 general entertainment private radio stations including Europe 1, RTL, RMC, NRJ, RTL2, RFM, etc.

### **III - The new aspects introduced by the law dated August 1, 2006 concerning the legal deposit role played by the INA**

These changes firstly concern the INA’s current legal deposit role, and secondly the new perspectives in view where the legal deposit of websites is concerned.

#### **A) Aspects concerning the INA’s current role as custodian of the legal deposit.**

Naturally, the performance of the legal deposit role involves the use of literary and artistic property rights including reproduction and performance rights (or the right of communication to the public) for the holders of copyrights and related rights (including among others actors and performers) for the collected works (and where applicable the collected documents) concerned by the legal deposit.

The digital recordings made by the INA naturally concern performance rights belonging to the authors and holders of related rights (as the need to store the documents means that it is necessary to be able to reproduce them, in this case by digital means) while the consultation and viewing of the material both involve the performance rights (or the right of communication to the public) belonging to the said owners, as the researchers concerned may be considered as an audience (with these documents being broadcast on individual players belonging to the custodian organisations).

Where the legal deposit is concerned, the law of 1992 and the subsequent texts included in the heritage code do not in any way establish any special reproduction and performance rights for the legal deposit without obtaining the authorisation of the beneficiaries concerned, with the result being that the performance of legal deposit activities generates *de facto* exceptions to the said rights.

It is certainly true that the provision of individual access for researchers to the various media on which the collected documents are stored has never been challenged by the holders of copyrights or related rights for these documents.

.../...

Keen to see the legal deposit activities conferred upon it being carried out in conditions which do not infringe intellectual property laws, the INA has obtained the authorisation to reproduce and/or to totally or partially represent the works which it receives under the terms of the legal deposit, for professional consultation and research purposes. This authorisation has been obtained from the authors societies managing copyright issues for audiovisual documents and sound recordings, operating in the audiovisual and sound communication field (SACD, SACEM, SCAM, SDRM, SESAM), under the terms of the general agreement dated November 22, 1996, and its two amendments dated June 21, 2000 and June 16, 2005.

However, these agreements only concern the holders of copyrights having contributed their copyrights to one of the above-mentioned copyright companies, and as a result they only partially enshrine the waivers to copyrights and related rights arising from the performance of legal deposit activities.

In order to clarify the conditions for this use of the legal deposit vis-à-vis intellectual property legislation, it is therefore vital that the law be modified.

These major modifications were introduced by law number 2006-961 dated August 1, 2006, concerning copyright and related rights in the information society, part IV of which concerns the legal deposit (articles 39 to 47 of the 2006 law).

These modifications draw upon two articles from directive number 2001/29/CE issued by the European Parliament and the Council dated May 22, 2001 regarding the harmonisation of certain aspects of copyright law and related rights in the information society: article 5. 2 c) (which envisages the entitlement for public libraries, educational establishments, museums or archives deriving no direct or indirect commercial or economic benefit from this to carry out specific reproduction activities) and article 5. 3 n) (which envisages the possibility for these various bodies to use the protected works and other items included in their collection by communicating them to, or providing access to them for private individuals for research purposes only, by means of specialised terminals).

The law dated August 1, 2006 introduced specific exceptions to copyrights and related rights in order to facilitate the performance of legal deposit activities.

Indeed, article L.131-1 of the heritage code (modified by the 2006 law) now states that the custodian organisations (including the INA) must now conform to intellectual property legislation, but are subject to the special terms provided for in the heritage code where the legal deposit is concerned. And in application of the 2006 law (article 42) three new articles have been created in this section of the heritage code (articles L.132-4, L.132-5 and L.132-6) which establish a genuine exception to copyright laws, and to the entitlements of holders of related rights and of database producers, (legally governed by conditions stipulating the terms under which audiovisual and sound collections of the legal deposit may be used).

Under the terms of article L.132-4, the author may not prevent the legal deposit custodians from carrying out any of the following activities:

1° The consultation of the work in question on-site by researchers who are duly credited by each custodian organisation, this consultation taking place via individual consultation terminals, dedicated exclusively to use by the said (accredited) researchers, on the custodian organisation's site;

2° The copying of a work on any medium and via any process required, when such reproduction is necessary to the collection, conservation and on-site consultation of the work as per the conditions described in 1°.

.../...

Additionally, under the terms of article L.132-5, the performing artist, the producer of sound recordings or videographs and the audiovisual communication company may not forbid the reproduction and communication to the public of the documents mentioned in article L.131-2 (those covered by the legal deposit) under the conditions described in article L.132-4.

Finally, under the terms of article L.132-6, the producer of a database may not forbid the extraction and reuse (by the provision of access) of all or part of the database under the conditions provided for in article L.132-4.

The INA and any other custodian body may now safely collect, reproduce for conservation purposes and communicate to researchers those documents of which it is the legal custodian.

#### B) New perspectives offered by the law of 2006 concerning the legal deposit of websites

It became necessary to include measures in this new legislation to take account of the spread of digitised content and its communication by digital networks such as the Internet. The law dated August 1, 2006 extended the scope of the legal deposit to cover French websites.

The decision by the lawmakers to include the archiving of websites within the legal framework underpinning the legal deposit system is in line with French tradition, and further extends the twofold legal deposit role: i.e. ensuring the continuity and thoroughness of the collections by including all new media, in addition to collecting documents and other items which bear witness to a given period in history and its accompanying changes.

Regarding the extension of the legal deposit's scope, the law dated August 1, 2006 adds the following paragraph to article L.131-2 of the heritage code: "Signs, signals, written material, images, sounds or messages of any kind communicated to the public by electronic means are also subject to legal deposit requirements".

As a result, the legal deposit obligations described in the new article L.132-2 are now also incumbent upon anyone publishing or producing signs, signals, written material, images, sounds or messages of any form with a view to communicating these to the public via electronic means, with this definition covering the notions of audiovisual communication and communication to an online audience.

A new article (article L.132-2-1 which describes the implementation of this legal deposit requirement for data transmitted by electronic means) has been incorporated into the heritage code. Among other things, this stipulates that custodian bodies must inform the depositor of the collection procedures which they use in order to meet the various legal deposit obligations, and that the custodian bodies may themselves carry out this collection using automated procedures or determine the methods to be used in agreement with these persons, should automatic collection prove to be impossible from a technical viewpoint (including in this case the hypothesis of the provision of physical media or the sending of files).

.../...

Under the terms of the current article 49-IV of the law dated August 1, 2000 which modifies the law of September 30, 1986 regarding the freedom of communication, modified by the law dated August 1, 2006, the INA has sole responsibility for the collection for legal deposit purposes of sound or audiovisual documents broadcast by radio or television, in application of articles L.131-2 (concerning the deposited material) and L.132-3 (concerning the custodian organisations) of the heritage code. Along with the *Bibliothèque Nationale de France* it participates in the collection of signs, signals, written material, images, sounds or messages of all kinds publicly communicated online, for legal deposit purposes. It manages the legal deposit collections, for which it has responsibility in line with the objectives and conditions laid down in article L.131-1 of this same legal code (concerning the observance of intellectual property legislation subject to the above-mentioned exceptions introduced by the law dated August 1, 2006).

As the exact division of activities between the INA and the BNF has never been formally defined by law, these two organisations have agreed their own areas of involvement concerning the legal deposit of websites and the technical means and methods needed to achieve this. This breakdown now needs to be formally enshrined in statutory texts.

An opportunity existed to formally define the dividing line between the activities carried out by the INA and the BNF where the legal deposit of websites is concerned in the law dated June 21, 2004 concerning “trust in the digital economy”.

This law modified the scope of the 1986 law concerning the freedom of communication, by organising the scope of communication activities as follows:

- Electronic communication, which can be subdivided into private electronic communication (e-mail and telephony, etc.), covered by the code governing telecommunications and communication to the public by electronic means;
- Communication to public via electronic means, which can be subdivided into audiovisual communication on the one hand and communication to an online audience on the other hand.

Audiovisual communication includes services (television services, radio services, and other services). A television (or radio) service is characterised by the simultaneous nature of the broadcast to the public, an organised series of programmes and a composition of images and/or sounds. It is defined regardless of the broadcasting method used (terrestrial, cable, satellite, ADSL, digital terrestrial television, Web TV or Web radio).

Communication to an online audience is characterised by the individual nature of the access provided (via websites, electronic libraries, VOD, etc.).

The INA’s core business where the legal deposit is concerned is clearly situated in the first of these two fields, i.e. audiovisual communication. Accordingly, the INA has been set the task by the legislator of handling the conservation of France’s radio and television heritage regardless of the broadcasting technology involved (terrestrial - whether encrypted or otherwise - cable, satellite or ADSL). It goes without saying that radio and television programmes broadcast via the Internet or digital terrestrial television should also naturally be included in within the scope of this heritage conservation mission.

Consequently, the INA collects the content from websites falling within the scope of “audiovisual communication” under the terms of the law dated September 30, 1986, modified by the law dated June 21, 2004 concerning trust in the digital economy.

.../...

The conservation of web content at the INA is therefore intended to guarantee long-term content collection in addition to the indexing and the provision of access for duly authorized viewers of websites in the “audiovisual communication” category.

The INA needs to have overall responsibility for the collection of all radio and television services broadcast via the Internet.

The scope of its activities should also concern support sites and peripheral sites (the so called “associated” sites) for these media sites, in addition to those falling within the category of “online communication to the public” in order to maintain overall coherence concerning the INA’s collections (in keeping with the spirit of the current legal deposit scheme for support documents).

With this in mind, the INA needs to collect website content from the CSA (the French broadcasting authority) by electronic means, in addition to content from websites representative of a given professional or institutional environment, related to radio and television activity on the web, or the content of Skyblogs, alongside the collection of content from the Skyrock site for example.

Where the INA is concerned, we can quickly see that in order to archive the web, the obvious unit to be used for archiving purposes is the website (which covers all of the documentary sub-units possessing variable volumes and technical characteristics, particularly concerning audiovisual communication falling within the scope of the INA’s activities) including links between the pages of a site and between the sites themselves.

Media websites in the widest sense of the word are relatively restricted in number, despite the fact that they continually publish a great deal of extremely varied content even if there is a certain degree of uniformity where content themes are concerned.

The INA should be assigned the task of collecting content from four main website categories:

- Among the websites concerned with audiovisual communication, the radio and television websites offer content organised based on an editorial system very similar to that of TV and radio programme schedules, including a front page, regular columns and sections, in addition to a feature schedule similar to that found in traditional terrestrial, cable or satellite broadcasting systems. These sites are usually backed up by a pre-existing communication service, whether this is a television or radio station (i.e. LCI.fr). We should also mention the WebTV outlets which today can take full advantage of the increasing prevalence of broadband networks, and which offer an ever-increasing range of themed content.
- Sites related to programmes broadcast on a particular channel, which account for more than half of the websites on the domain including: sites for TV programmes (Planète Thalassa) or for series (the French ER website) or devoted to the heroes of various series (Columbo) or those devoted to media personalities, artists or presenters (Planète Arthur). We should also mention “event” sites related to the latest news (i.e. the Canal + website for the Cannes Festival). Most of these sites host or offer blogs;
- Websites directly or indirectly related to the activities of radio and television stations including: institutional sites (the CSA broadcasting authority), and the websites of companies (Vivendi) or service providers;
- Documentary websites offering specialised directories, web guides, portals for television packages or radio frequency guides (i.e. Series-onair.com for television series).

To conclude, we should add that over above the performance of its legal deposit activities, via its current and future aspects the law has set the INA another, far older task: that of conserving and exploiting the many programmes inherited from the RTF, the ORTF and the national programming .../...

companies derived from these, for which the Institute is the owner of both the corporeal and incorporeal property rights.

To this end, in 1999 the INA launched a huge backup and digitisation plan spanning some 15 years for the collections concerned, and costing a total of 200 million euros.

## **Annex 2**

### **WEB HARVESTING, Case Study Finland by Tarja Koskinen-Olsson**

#### **1. Legislative Framework**

Legal deposit legislation was recently renewed in Finland and the new statute<sup>1</sup> entered into force on 1 January 2008.

The legislation is generic and covers the legal deposit of different genres of cultural heritage. It replaces previous separate statutes providing for the deposit of print material and films. It now also includes national television and radio programs and web-based material. The legislation has references to copyright legislation.

In implementing the Information Society Directive, Finland included the relevant provisions concerning deposit copies in its copyright law, with the date of coming into force of some provisions to be prescribed to coincide with the entry into force of the legal deposit legislation.

#### **2. Legal Deposit Legislation**

The need to renew the legal deposit legislation arose from the new media and communication environment and the development of the information society. The aim was to cover long term preservation of all cultural material to serve the needs of researchers and others.

This outline concentrates on web-based material, referred to below as internet resources<sup>2</sup>. The law on legal deposit and preservation of cultural material includes the following provisions<sup>3</sup> concerning internet resources:

- Scope of application (2 §): resources available from servers situated in Finland and other internet resources that are meant for the public in Finland;
- Definition (3 §): internet resources are materials available in information networks.

Chapter 3 of the law concerns internet resources and the following is a general summary of the provisions:

- Web-harvesting and deposit: The National Library shall gather/harvest and deposit internet resources from the net, and the material shall make a representative and diversified picture/sample of all material that is made available for the public over the net at different times;
- The web publisher shall enable the harvesting of material or deposit the material himself, if harvesting through technical means is not possible (the web publisher thus has a secondary liability for deposit);

---

<sup>1</sup> Act on Legal Deposit and Preservation of Cultural Material (1433/2007).

<sup>2</sup> Information is based on discussions with Mr. Juha Hakala, Director of IT Development, the National Library of Finland.

<sup>3</sup> Unofficial translations.



- Special provisions apply to material that cannot be deposited due to a technical reason;
- The Ministry of Education and Culture shall confirm the plan of the Finnish National Library concerning the volume and frequency of harvesting and the conditions of delivery; the internet resources shall be deposited in such a way that the original time and place of the resources are recorded.

The National Library has in practice harvested material from the net since 2000. Extensive harvesting takes place once a year; moreover special collections on selected topics are gathered. More than 50 million resources are harvested annually.

Within the framework of IIPC (International Internet Preservation Consortium) technical tools for web-harvesting have been developed and are currently used by the Internet Archive<sup>4</sup> and several national libraries, including the National Library of Finland, under the name "Heritrix". These open source applications are freely available at <http://crawler.archive.org/>.

The aim of the Finnish National Library is to harvest the following internet resources:

- All internet resources made available from Finnish sites, regardless of the domain name (it can be fi, com, net, org or anything else);
- All Finnish language sites anywhere on the net;
- All sites that include information about Finland.

Harvesting is based on exhaustive list of Finnish servers. The systematic gathering uses more than 50.000 root pages as starting points.

### 3. Copyright Legislation

The implementation of the Information Society Directive brought about amendments to the Finnish Copyright Act, which entered into force on 1 January 2006. Some legal deposit provisions were activated with the passage of the legal deposit legislation and entered into force on 1 January 2008.

The provision concerning web-harvesting in the Finnish Copyright Act (section 16b) is entitled "Use of works in legal deposit libraries". The relevant provision, section 16b (1), paragraph 3, reads as follows:

*Make copies of works made available to the public in an open information network for inclusion in its collections.*<sup>5</sup>

The on-site use of the works in public libraries is made possible by Article 5. 3 (n) of the Information Society Directive:

---

<sup>4</sup> The Internet Archive (US) is a private foundation that harvests web resources from all over the world, including Finnish websites. It is estimated that the collections include some 60 billion pages. Some libraries have bought older information concerning their countries from the Internet Archive foundation.

<sup>5</sup> Unofficial translation.

*An archive or a library open to the public, to be determined in a Government Degree, may, unless the purpose is to produce direct or indirect financial gain, communicate a work made public that it has in its collections, to a member of the public for purposes of research or private study on a device reserved for communication to the public on the premises of the institution. This shall be subject to the provisions that the communication can take place without prejudice to the purchasing, licensing and other terms covering the use of the work and that digital reproduction of the work other than reproduction required of the use referred to in this subsection is prevented, and provided that the further communication of the work has been prevented (Section 16a (2)).*

Thus the copyright legislation made provision for the needs of legal deposit and enabled web-harvesting.

#### **4. Evaluation**

The provisions in the legal deposit legislation covering cultural material and stipulations in copyright legislation are well suited to cover the needs of web-harvesting.

## **Annex 3**

# **MODEL AGREEMENT FOR A LICENCE ON DIGITISATION OF OUT OF PRINT WORKS**

THIS LICENCE AGREEMENT is made on [date]

BETWEEN: [full name of the Licensor / his organisation and its authorised representative signing it] of [full address including fax number and email where this is to be the method of communication] ("the Licensor")

AND: [full name of the licensee's organisation and its authorised representative signing it] of [full address including fax number and email where this is to be the method of communication] ("the Licensee")

### **RECITALS**

- A) WHEREAS the following agreement is to be understood as a practical solution to be agreed by the different stakeholders to solve issues raised by digitisation, including the request made by libraries and other cultural establishments,
- B) AND WHEREAS the following agreement intends to take into account the national usages and best practices in the respective fields in each of the European Union Member States,
- C) AND WHEREAS the following agreement is designed to implement the concept advanced by item 6(b) of the European Commission Recommendation of 24th August 2006 whereby the mechanisms intended to facilitate the use of such works should in principle be established or promoted on a voluntary basis,
- D) AND WHEREAS libraries may be authorised by law to digitise a work (i.e. under an exception or limitation to the exclusive right of reproduction), in accordance with Articles 2 and 3 and Recitals 21-24 and 40 of the EC Directive 2001/29 the right of reproduction, the right of communication to the public and the right to make available are separate rights, each of them requiring separate permission from the Rightsholders concerned,
- E) AND WHEREAS the following agreement is designed to allow acts that are not already covered by statutory or licensing arrangements,
- F) AND WHEREAS it is recognised that the Rightsholder shall have the liberty to choose to digitise a work him/herself and that consequently access to the work including that of the library could be obtained from the Rightsholder.
- G) AND WHEREAS it is recognised that the Rightsholder may at his sole discretion decide that a work shall be treated as a work in print if there are other editions commercially available, whether on- or offline, and the making available of the out-of-print edition would conflict with the legitimate interest of the Rightsholder in the commercialising of the alternative edition,

IT IS AGREED AS FOLLOWS:

## 1. DEFINITIONS

1.1. Access on site	Allow Authorised Users access to the Licensed Material and/or Digitised Version on terminals on the library premises.
1.2. Author	The natural person(s) who created the Work.
1.3. Authorised user	A person, whether natural or legal, who is authorised to use the particular service of the library according to its regulations and on the conditions specified in this agreement through which he obtains access to the Licensed Material.
1.4 Digitisation	Technical process which produces a faithful copy of the Licensed Material in a machine readable form
1.5. Digitised Version	A faithful copy in machine readable form of the Licensed Material produced within the framework of this agreement
1.6. Document Delivery	(Physical) delivery or (electronic) communication of a Work to a remote client on the client's request
1.7 End use	The legitimate uses by the last natural or legal person in the chain of uses that are permitted by or through this agreement.
1.8. End users	Person, whether natural or legal, which has legitimately received access to use the Work according to this agreement.
1.9 Licensed Material	Out-of-Print Works that are subject to this agreement, (and listed in Annex 1) as well as copies thereof if they are produced within the framework of this agreement
1.10 Licensee	The licensed library which is authorised to act under this agreement
1.11. Licensor	The Licensor is the person, whether natural or legal, authorised to license the uses subject to this agreement either by reason of being a Rightsholder owning or holding the rights necessary to grant the requisite licence or by being so authorised by the Rightsholder as his representative.
1.12. Making available to the public	Making the Licensed Material available by way of an interactive on-demand transmission being characterised by the public being offered access to it from a place and at a time individually chosen by them.
1.13. Open network	A network that is not a Secure Network.
1.14. Out-of-Print Work	A Work which the Rightsholder has decided is no longer commercially available regardless of the existence of tangible copies of the Work in libraries and among the public.

1.15 Out-of-Print Date	The date which the Work was declared an Out-of-Print Work as specified in Annex 1.
1.16. Purpose of this agreement	This agreement is only valid for non-commercial purposes. This means that the Licensee must not obtain a commercial advantage from it, whether directly or indirectly. Commercial use is subject to (a) supplementary agreement(s)
1.17. Right of communication to the public	The exclusive right as defined in Article 3 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.
1.18. Right of Making available	The exclusive right as defined in Article 3 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.
1.19. Right of reproduction	The exclusive right as defined in Article 2 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.
1.20. Rightsholder	The individual or legal person having the requisite rights necessary to grant the Licensee this licence. Whether this person is the Author, the publisher or other depends upon the circumstances of the contractual agreements/the applicable law.
1.21 Secure Network	A network (whether standalone or virtual, whether within the internet, in the form of an intranet or extranet or otherwise) access to which is restricted to Authorised Users by effective controls such as effective password controls or IP address validation.
1.22. Work	A poem, a novel, an article etc. as well as its manifestation in a physical or electronic format (for example as a book, a journal, a magazine, an e-book, a CD, film, a piece of music etc).
1.23. Work in Copyright	Work as defined in Definition 1.22 protected by copyright laws
1.24. Work out of Copyright	A Work as defined in Definition 1.23 that is not protected by copyright laws irrespective of the reasons for not being so protected (whether for example because the term of protection has expired or because the work is of a type that cannot benefit from copyright protection at all).

## 2. PARTIES TO THE AGREEMENT

- 2.1. The Licensor is authorised to license the uses subject to this agreement by reason of [ADD THE APPROPRIATE AND DELETE THE REMAINING CHOICES:]

being the author of the work(s) in question and owning all rights necessary to grant the requisite licence for the uses subject to this agreement

being the publisher of the work(s) in question and holding all rights necessary to grant the requisite licence for the uses subject to this agreement

being a representative authorised by the Rightsholder with respect to all rights necessary to grant the requisite licence for the uses subject to this agreement.

- 2.2. The Licensee is at liberty to subcontract any such third parties as it may deem fit to carry out technical work, such as digitisation, for it. The Licensee is and remains, however, fully responsible and liable towards the Rightsholder to ensure that this agreement is complied with in letter and spirit as regards its own actions as well as those of any third parties, employees, servants, agents or others that it may use for the purposes of this agreement.

### **3. THE AGREEMENT**

- 3.1. The Licensor grants the Licensee a non-exclusive and non-transferable licence to perform all Permitted Uses of the Licensed Material as set out under clause 4 for the term of this Agreement for the Purposes of this agreement against a payment of [INSERT DETAILS] due within [INSERT TIME] provided the Licensee complies with its obligations set out under 6 (Procedure) and 7 (other Obligations), subject to the limitations in clause 5.
- 3.2. Where the Rightsholder waives payment, the parties agree that this agreement shall remain fully enforceable by both parties and will both undertake all such steps as are necessary to keep it enforceable.
- 3.3. Copyright Status in the Licensed Material and Digitised Version.
  - 3.3.1. For the avoidance of doubt, the Rightsholder retains all intellectual property rights in the Licensed Material including the Digitised Version and any metadata created by the Rightsholder relating to it already in existence when this contract was concluded.
  - 3.3.2. In case applicable law should regard it as a separate work, the Licensee hereby transfers the copyright in the Digitised Version to the Rightsholder.
- 3.4. The Licensor may decide to revoke this licence at any time to withdraw the Licensed Material entirely or any item or part of an item from it if the Licensor no longer retains the right necessary for this Licence, or if it has reasonable grounds to believe that the withdrawn whole or part infringes copyright or is defamatory, obscene, unlawful or otherwise objectionable or if it decides to re-commercialise the whole Licensed Material or any item or part of an item of it.
  - 3.4.1. The Licensor shall act in accordance with the procedure under clause 6.3 of this agreement.
  - 3.4.2. If the material withdrawn under 3.4. represents more than ten per cent (10%) of a title in the Licensed Material the Licensee may claim from the Licensor such costs as the Licensee can demonstrate to have incurred to digitise the Licensed Material and make available the Digitised Version, pro rata, taking into account the amount of material withdrawn.

### **4. PERMITTED USES**

- 4.1. The Licensee may digitise the Licensed Material.
- 4.2. The Licensee may access the Digitised Version.
- 4.3. The Licensee may reproduce the Digitised Version on paper or electronically in appropriate numbers of copies necessary for the sole purpose of back-up or preservation subject to exceptions under applicable law and existing licences for the Purposes of this agreement
- 4.4. The Licensee may store the Digitised Version in a systematic way so as to facilitate its search and retrieval.
- 4.5. The Licensee may provide access to the Digitised Version on site to Authorised users.
- 4.6. The Licensee may provide access to the Digitised Version through Secure Networks to Authorised Users.
- 4.7. Authorised Users may:
  - 4.7.1. search, view, retrieve and display the Digitised Version
  - 4.7.2. electronically save parts of the Digitised Version for personal use [AS AGREED BETWEEN THE LICENSOR AND THE LICENSEE IN A SEPARATE AGREEMENT] or [AS PERMITTED BY LAW. LAW [SPECIFY APPLICABLE LAW TAKING INTO CONSIDERATION ARTICLE 10.1.1 OF THIS AGREEMENT] ] [KEEP WHAT IS APPROPRIATE, DELETE WHAT IS REDUNDANT]
  - 4.7.3. Print off single copies of parts of the Digitised Version [AS AGREED BETWEEN THE PARTIES TO THE AGREEMENT [INSERT DETAILS], ] or [AS PERMITTED BY LAW [SPECIFY APPLICABLE LAW TAKING INTO CONSIDERATION ARTICLE 10.1.1 OF THIS AGREEMENT] ]. [KEEP WHAT IS APPROPRIATE, DELETE WHAT IS REDUNDANT]
  - 4.7.4. The Authorised user may not forward a part or the whole of the digitized version of the work to anyone.
- 4.8. The Licensee may provide other libraries with on-line access to the Digitised Version so that they may make it available to their respective Authorised Users for the Purposes of this agreement provided there is a specific agreement thereto in a separate licence with the Licensor which is/is not [DELETE WHAT IS REDUNDANT] annexed to this agreement.
- 4.9. The Licensee may provide third parties with on-line access to the Digitised Version in the framework of this agreement provided there is a specific agreement thereto in a separate licence thereto with the Licensor which is/is not [DELETE WHAT IS REDUNDANT] annexed to this agreement.
- 4.10. Nothing in this Licence agreement shall constitute a waiver of any statutory rights or benefits from statutory exceptions to copyright applicable to the Licensee.
- 4.11 [KEEP WHAT IS APPROPRIATE, DELETE WHAT IS REDUNDANT]

The Licensee may charge a fee to the user only at the level necessary to cover its costs, which may in particular include the licensing fee as set out in article 3 of this agreement;

Or:

The Licensee may charge a fee to the user which can exceed the level necessary to cover its costs. Therefore, the Licensee may achieve a net income from any use of the work.

Or:

The Licensee may charge a fee to the user which can exceed the level necessary to cover its costs. Therefore, the Licensee may achieve a net income from the following uses of the work [LIST USES]:

Or:

The Licensee will not charge any fee to the user taking into consideration Article 3 of this agreement.

## **5. LIMITATIONS**

- 5.1. The Licensee may not provide access to the Licensed Material or the Digitised Version over Open Networks to anyone.
- 5.2. Neither the Licensee nor Authorised Users may remove or alter authors' names or publisher's copyright notices or other means of identification or disclaimers as they appear in or on the Licensed Material.
- 5.3. Neither the Licensee nor Authorised Users may alter, abridge, adapt or modify the Licensed Material, except to the extent necessary to make it perceptible on a computer screen, or as otherwise permitted in this agreement, to Authorised Users. For the avoidance of doubt, no alteration of the words or their order is permitted.
- 5.4. This agreement does not include a right for the Licensee to produce subsequent digitisations of the Licensed Material or the Digitised Version in other formats, except as provided in clause 4.3 or in so far as is necessary to allow continued use of the material in the light of changes in standards for operating systems, software applications or data format.

.

## **6. PROCEDURES**

### **6.1. Digitisation Procedures**

[ALTERNATIVE A: WHERE THE LIBRARY CARRIES OUT THE DIGITISATION:]

- 6.1.1. The Licensee organises the digitisation of the Licensed Material in any way that appears practical to it as long as it can assure compliance with this agreement.
- 6.1.2. The Licensee will usually own a copy of the Licensed Material in paper form and digitise this. In case the Licensee does not own a copy of the Licensed Material or any part of it, the Licensor will name a source for the Licensee to obtain a copy for digitisation.



- 6.1.3. The Licensee will ensure that the Digitised Version will be accessible upon request to associations officially designated to represent Visually Impaired Persons or with a strong representativity of Visually Impaired Persons, or as provided by law taking into consideration Article 10.1.1 of this agreement, provided adequate measures are utilised by the Licensee to protect from unauthorised use of the work.
- 6.1.4. The Licensee will provide the Licensor with a copy of the Digitised Version.
- 6.1.5. The Licensee will moreover provide the Licensor with access to the Digitised Version in its systems provided that no conflict would thereby arise with other agreements that the Licensee has entered into.
- 6.1.6. The Licensee will use previously available metadata on the Work if appropriate and if the Licensee creates any additional metadata for the Licensee's own purposes it will be created in a format to be agreed between the Licensee and the Licensor and made available upon request to the Licensor.

[ALTERNATIVE B: WHERE THE RIGHTSHOLDER CHOOSES TO CARRY OUT THE DIGITISATION ITSELF]:

- 6.1.7. The Licensor organises the digitisation of the Licensed Material in any way that appears practical to it as long as it can assure compliance with this agreement.
- 6.1.8. The Licensor will ensure that the Digitised Version will be accessible to Visually Impaired Persons.
- 6.1.9. The Licensor will cooperate with the Licensee to enable it to link to the Licensor's resources containing the Digitised Version.
- 6.1.10. The Licensor will deliver any metadata on the Licensed Material and the Digitised Version to the Licensee in a format to be agreed between them.

## **6.2. Procedures to make work accessible**

- 6.2.1. The Licensee will use the metadata on the Licensed Material and Digitised Version mentioned under 6.1

## **6.3. Procedures for withdrawal of edition**

- 6.3.1. According to 3.4 the Licensor is at liberty to decide at any time to terminate its licence under this agreement e.g. with a view to commercialise the Licensed Material in any way it sees fit.
- 6.3.2. The Licensor must give the Licensee [INSERT TIME: i.e. NUMBER OF MONTHS OR CLEAR CALENDAR DAYS ETC] written notice and the Licensee may claim from the Licensor such costs as he can demonstrate to have incurred to digitise the Licensed Material and make available the Digitised Version.
- 6.3.3. The Licensee must deliver up the Digitised Version to the Licensor in such a form as will be agreed between the parties. Provided that the Digitised Version remains lawful (as regards libel, etc.) it may be retained by the Licensee for on-site use only. As to any refund of costs as stipulated in Article 3.4.2 of this agreement, the part of the costs to be refunded shall be decided by the Licensee and the Licensor by common agreement annexed to this licence agreement. Any replacement of the delivered work will have to be agreed between the Licensee and the Licensor in a separate agreement.
- 6.3.4. When appropriate, the Licensor will provide the Licensee with the new Digitised Version on terms to be agreed upon and which takes into account clause 6.3.3 of this agreement.

## **7. OTHER OBLIGATIONS OF THE LICENSEE**

- 7.1. The Licensee will inform the Licenser every [INSERT FREQUENCY: E.G. ONCE A YEAR, MONTH, EVERY SIX MONTHS ETC.] of:
  - 7.1.1. the frequency in which the Digitised Version is accessed,
  - 7.1.2. [OTHER TYPES OF INFORMATION THAT MIGHT BE SPECIFIED IN INDIVIDUAL AGREEMENTS]
- 7.2. With the exception of costs that incur under Articles 3.5, 3.6 and 3.7 of this agreement, the Licensee will bear all costs relating to this agreement, save as otherwise agreed in writing.
- 7.3. The Licensee shall:
  - 7.3.1. Use all reasonable endeavours to ensure that all Authorised Users are appropriately notified of the importance of respecting the intellectual property rights in the Licensed Material and of the sanctions for failing to do so;
  - 7.3.2. Use all reasonable endeavours to ensure that Authorised Users are made aware of and undertake to abide by the terms and conditions of this agreement; use all reasonable endeavours to monitor compliance and immediately on becoming aware of any unauthorised use or other breach, inform the Licenser and take all reasonable steps, including, where appropriate disciplinary action, both to ensure that such activity ceases and to prevent any recurrence;
  - 7.3.3. Use all reasonable endeavours to ensure that only Authorised Users are permitted access to the Digitised Version.

## 8. TERM AND TERMINATION

- 8.1. This agreement is terminated [KEEP WHAT IS APPROPRIATE, DELETE WHAT IS REDUNDANT]  
at a date agreed by the parties to the agreement [INSERT DATE]. It is automatically renewed for [INSERT NUMBERS OF MONTHS OR YEARS] unless written notice to the contrary has ben given [INSERT NUMBER OF MONTHS] prior to the expiry of the agreement.  
  
Or:  
at the expiry of copyright in the Licensed Material.
- 8.2. The agreement may also be terminated by the Licenser if the Licenser gives the Licensee [INSERT TIME] written notice. Upon the termination of the agreement, any intellectual property rights subsisting in any metadata created by the Licensee are automatically assigned to the Licenser, though this provision shall not affect the Licensee's continued gratis use of such metadata for catalogue purposes.
- 8.3. On termination all rights and obligations of the parties automatically terminate, except 8.2. and 9.1.

## 9. WARRANTIES AND INDEMNIFICATION

- 9.1. The Licenser warrants to the Licensee that it owns, holds or is sufficiently authorised with respect to the rights necessary to grant the Licensee the licence stipulated in clause 3.1 and that the Permitted Uses of the Licensed Material used as contemplated in this licence agreement do not infringe any

copyright or other proprietary or intellectual property rights of any natural or legal person. The Licensor shall indemnify and hold the Licensee harmless from and against any loss, damage, cost, liability or expense (including reasonable legal and professional fees) arising out of any legal action taken against the Licensee claiming actual or alleged infringement of such rights. This indemnity shall survive the termination of this agreement for any reason. This indemnity shall not apply if the Licensee has amended or used (or allowed others to do either of these) the Licensed Material in any way not permitted by this agreement.

## 10. MISCELLANEOUS

### 10.1. Dispute Resolution

10.1.1. The parties agree that they will attempt to settle any disputes amicably and in good faith, and where it cannot be so solved within reasonable time that either party may commence alternative dispute resolution as set out in Article 10.1.2 below

10.1.2. [SELECT THE APPROPRIATE OPTION AND DELETE THE REMAINING OPTION.]

[OPTION A]

[Any difference between the parties arising under, out of or relating to this Licence Agreement, including the rights and liabilities of the parties thereto, and any subsequent amendments of this License Agreement shall in the first instance be referred to expert determination in accordance with the WIPO Expert Determination Rules. Unless the parties have expressly agreed otherwise, the expert's determination shall not be binding upon the parties nor prevent either party from pursuing its interest further in court as specified in Article 10.1.1 below. The costs of the expert determination shall be borne by the parties in such proportions as the expert may determine to be fair and reasonable in the light of all the circumstances and the outcome of the expert determination, or, if no such determination is made, in equal portions. The language to be used in the expert determination shall be [SPECIFY LANGUAGE].]

[OPTION B: AVAILABLE ONLY WHERE THE LICENSEE AND THE LICENSOR ARE BOTH REGISTERED AND OPERATE IN THE SAME COUNTRY, AND WHERE THE EFFECT OF THIS LICENSE AGREEMENT IS LIMITED TO SUCH COUNTRY. PARTIES MAY EITHER (a) AGREE TO ADOPT OPTION "A" AS SET OUT ABOVE, OR (b) AGREE TO ADOPT A DIFFERENT ALTERNATIVE DISPUTE RESOLUTION PROCEDURE RECOGNISED BY THE RELEVANT NATIONAL LAW AND LEGAL TRADITION TO BE SPECIFIED BELOW.]

[Any difference between the parties arising under, out of or relating to this Licence Agreement, including the rights and liabilities of the parties thereto, and any subsequent amendments of this Licence Agreement shall in the first instance be referred to [INSERT DESCRIPTION OF ALTERNATIVE DISPUTE RESOLUTION PROCEDURE TO BE ADOPTED]. The costs of the alternative dispute resolution shall be borne by the parties in such proportions as the decision-maker may determine to be fair and reasonable in the light of all the circumstances and the outcome of the alternative dispute resolution, or, if no such determination is made, in equal portions. The language to be used in the alternative dispute resolution shall be [SPECIFY LANGUAGE].]

10.2. Applicable Law and forum

10.2.1. The parties agree that, subject to the provisions in Articles 10.1.1 and 10.1.2 above, any dispute arising out of or in connection with this Licence Agreement shall be subject to and within the jurisdiction of the [NATIONAL] courts.

10.2.2. This Licence Agreement shall be governed and construed in accordance with [NATIONAL] law.

[WHERE THE LICENSOR AND THE LICENSEE ARE GOVERNED BY DIFFERENT NATIONAL LAWS, THE LICENCE AGREEMENT SHALL BE GOVERNED BY THE LAW OF THE LICENSEE.]

10.3. Words in the feminine form equally denote to the masculine form and the single to the plural as and where appropriate.

10.4. Non-assignability:

10.4.1. This Licence agreement may not be assigned by either party to any other person or organisation, without the prior written consent of the other party, which consent shall not unreasonably be withheld.

10.4.2. If rights in all or any part of the Licensed Material are assigned to another publisher or pass on death of the author to his estate, the terms and conditions of this Licence shall survive the assignment.

10.5. If any provision of this agreement shall be adjudged by a court of competent jurisdiction to be void or unenforceable but which provision would be valid and enforceable if it were varied or modified then such provision shall apply with such variation or modification as shall be necessary to make it valid or enforceable. In case such variation or modification is not possible, the clause shall be struck out of the agreement. The fact that one clause has been held void or unenforceable, will not affect the validity of the remaining agreement in any event.

10.6. Alterations to this agreement and to the Annexes to it (which may be altered separately from the body of this agreement without affecting the validity of the agreement as a whole) are valid only if they are recorded in writing and signed by both parties.

[SIGNED ETC]

---

Annex: list of works to be digitised / made available in digital format, specifying the Out-of-Print Date per Work.

## Annex 4

# MODEL<sup>1</sup> AGREEMENT FOR A LICENCE ON DIGITISATION OF OUT OF PRINT WORKS with option for online accessibility<sup>2</sup>

THIS LICENCE agreement is made on [date]

BETWEEN: [full name of the Licensor / his organisation and its authorised representative signing it] of [full address including fax number and email where this is to be the method of communication] (“the Licensor”)

AND: [full name of the licensee’s organisation and its authorised representative signing it] of [full address including fax number and email where this is to be the method of communication] (“the Licensee”)

### RECITALS

- A) WHEREAS the following agreement is to be understood as a practical solution to be agreed by the different stakeholders to solve issues raised by digitisation including online accessibility, including the request made by libraries and other cultural institutions<sup>3</sup>,
- B) AND WHEREAS the following agreement intends to take into account the national usages and best practices in the respective fields in each of the European Union Member States,
- C) AND WHEREAS the following agreement is designed to implement the concept advanced by item 6(b) of the European Commission Recommendation of 24th August 2006 whereby the mechanisms intended to facilitate the use of works out of print/distribution should in principle be established or promoted on a voluntary basis,
- D) AND WHEREAS libraries and other cultural institutions may be authorised by law to digitise a work (i.e. under an exception or limitation to the exclusive right of reproduction), in accordance with Articles 2 and 3 and Recitals 21-24 and 40 of the EC Directive 2001/29 the right of reproduction, the right of communication to

---

<sup>1</sup> Anyone using this agreement out to seek independent legal advice as to its effects and so as to adjust this model to national law or other requirements.

<sup>2</sup> Two Model Agreements have been developed for the digitisation and making available of copyright works by cultural institutions: (i) there is a Model Agreement that covers the digitisation and making available of copyright *material to authorised users in secure networks* only; and (ii) this Model Agreement which encompasses online accessibility to books which the rightholder has declared as no longer being commercialised as well as access to out-of-print works for authorised users in secure networks. If the relevant agreement between the library and the rightholder is limited to providing access to authorised users in secure networks only, it is recommended to base the agreement on the Authorised User/Secure Network Model Agreement. The Online Accessibility Model Agreement is intended as a basis for the negotiations of an agreement when the rightholders and the library agree that some or all of the digitised out-of-print books can also be made accessible online on the library’s website.

<sup>3</sup> ‘cultural institutions’ in this licence refers to publicly accessible libraries, archives, museums and equivalent non-profit making institutions

the public and the right to make available are separate rights, each of them requiring separate permission from the Rightsholders concerned,

- E) AND WHEREAS the following agreement is designed to allow acts that are not already covered by statutory or licensing arrangements and will not affect statutory exceptions or limitations,
- F) AND WHEREAS it is recognised that the Rightsholder shall have the liberty to choose to digitise a work him/herself and that consequently access to the work including that of the library or other cultural institution could be obtained from the Rightsholder.
- G) AND WHEREAS it is recognised that the Rightsholder may at his sole discretion decide that a work shall be treated as a work in print if there are other editions commercially available, whether on- or offline, and the making available of the out-of-print edition would conflict with the legitimate interest of the Rightsholder in the commercialising of the alternative edition,
- H) AND WHEREAS it is acknowledged that the availability of a work through resale markets is irrelevant for the determination of its status as an out of print work.

IT IS AGREED AS FOLLOWS:

## 1. DEFINITIONS

1.1. Access on site	Allow Authorised Users access to the Licensed Material and/or Digitised Version on terminals on the library premises.
1.2. Author	The natural person(s) who created the Work.
1.3 Derivative Work	A derivative work is a work based upon one or more pre-existing works. A derivative work is for example a translation, adaptation, arrangement of music and other alteration, dramatisation, fictionalisation, motion picture version, sound recording, art reproduction, abridgment, condensation or any other form in which a work may be recast, transformed, reworked or adapted.
1.4 Digitisation	Technical process which produces a faithful copy of the Licensed Material in a machine readable form
1.5. Digitised Version	A faithful copy in machine readable form of the Licensed Material produced within the framework of this agreement
1.6 Rights Management Information	Rights Management Information as defined in Article 7 of the Information Society Directive, identifies the Work, the Rightsholder or information about the terms and conditions of use of the Work and any numbers or codes that represent such information.
1.7 Technical Protection Measures	Technical Protection Measures as defined in Article 6 of the Information Society Directive, are designed to prevent or restrict acts in respect of Works which are not authorised by the Rightsholder
1.8 End use	The legitimate uses by the last natural or legal person in the chain of uses that are permitted by or through this agreement.
1.9 Further Dissemination	Transferring the Digitised Version by any means or media to any natural or legal person other than the original Authorised or Open Network User.
1.10 Index	Extracting, processing and storing information from a Digitised Version in the Licensee's data system in order to facilitate its retrieval.
1.11 Licensed Material	Out-of-Print Works that are subject to this agreement, (and listed in Annex 1) as well as copies thereof if they are produced within the framework of this agreement.
1.12 Licensee	The licensed library or cultural institution (understood as museum, archive and equivalent non-profit making institutions) which is authorised to act under this agreement
1.13. Licensor	The Licensor is the person, whether natural or legal, authorised to license the uses subject to this agreement either by reason of being a Rightsholder owning or holding the rights necessary to grant the requisite licence or by being so authorised by the

	Rightsholder as his representative.
1.14 Low Resolution	Refers to an electronic version which displays the work in a form which is not fit for commercial use in a way that would threaten the Rightsholder's legitimate interests in the Work.
1.15. Open Network	A network that is not a Secure Network.
1.16. Out-of-Print Work	A Work which the Rightsholder has decided is no longer commercially available regardless of the existence of tangible copies of the Work in libraries and among the public (including through second hand bookshops or antiquariats). .
1.17 Out-of-Print Date	The date on which the Work was declared an Out-of-Print Work as specified in Annex 1.
1.18. Purpose of this agreement	This agreement is only valid for non-commercial purposes. This means that the Licensee must not obtain a commercial advantage from it, whether directly or indirectly. Commercial use is subject to (a) supplementary agreement(s)
1.19 Registration	Access to the Digitised Version by a username and password or another means of authentication agreed between the parties to this agreement.
1.20. Right of communication to the public	The exclusive right as defined in Article 3 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.
1.21. Right of Making available	The exclusive right as defined in Article 3 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.
1.22. Right of reproduction	The exclusive right as defined in Article 2 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.
1.23. Rightsholder	The individual or legal person having the requisite rights necessary to grant the Licensee this licence. Whether this person is the Author, the publisher or other depends upon the circumstances of the contractual agreements/the applicable law.
1.24 Secure Network	A network (whether standalone or virtual, whether within the internet, in the form of an intranet or extranet or otherwise) access to which is restricted to Authorised Users by effective controls such as effective password controls or IP address authentication.
1.25 Users	1. Any User: A User who is either an Authorised User or an



	<p>Open Network User</p> <p>2. End User: Person, whether natural or legal, which has legitimately received access to use the Work according to this agreement.</p> <p>3. Open Network User: A person who accesses the Work through the world wide web or online portal other than through a Secure Network.</p> <p>4. Authorised User: A person, whether natural or legal, who is authorised to use the particular service of the library according to its regulations and on the conditions specified in this agreement through which he obtains access to the Licensed Material.</p>
1.26. Work	A poem, a novel, an article etc. as well as its manifestation in a physical or electronic format (for example as a book, a journal, a magazine, an e-book, a CD, film, a piece of music etc) protected by copyright law.
1.27. Work out of Copyright	A Work as defined in Definition 1.22 that is not protected by copyright laws irrespective of the reasons for not being so protected (whether for example because the term of protection has expired or because the work is of a type that cannot benefit from copyright protection at all).

## 2. PARTIES TO THE AGREEMENT

2.1. The Licensor is authorised to license the uses subject to this agreement by reason of **[ADD THE APPROPRIATE AND DELETE THE REMAINING CHOICES:]**

being the author of the work(s) in question and owning all rights necessary to grant the requisite licence for the uses subject to this agreement

being the publisher of the work(s) in question and holding all rights necessary to grant the requisite licence for the uses subject to this agreement

being a representative authorised by the Rightsholder with respect to all rights necessary to grant the requisite licence for the uses subject to this agreement.

2.2. The Licensee is at liberty to subcontract any such third parties as it may deem fit to carry out technical work, such as digitisation, for it. The Licensee is and remains, however, fully responsible and liable towards the Licensor to ensure that this agreement is complied with in letter and spirit as regards its own actions as well as those of any third parties, employees, servants, agents or others that it may use for the purposes of this agreement.

## 3. THE AGREEMENT

3.1. The Licensor grants the Licensee a non-exclusive and non-transferable licence to perform all uses of the Licensed Material permitted under clause 4 for the term of this agreement for the Purposes of this agreement against a payment

of [INSERT DETAILS] due within [INSERT TIME] provided the Licensee complies with its obligations set out under 6 (Procedure) and 7 (other Obligations), subject to the restrictions in clause 5.

- 3.2. Where the Licensor waives payment, the parties agree that this agreement shall remain fully enforceable by both parties and will both undertake all such steps as are necessary to keep it enforceable.
- 3.3. Copyright Status in the Licensed Material and Digitised Version.
  - 3.3.1. For the avoidance of doubt, the Licensee does not acquire any rights in the Licensed Material including the Digitised Version and any metadata relating to it created by the Licensor and already in existence when this contract was concluded except to the extent contemplated by this agreement.
  - 3.3.2. In case applicable law should regard it as a separate work, the Licensee hereby transfers the copyright in the Digitised Version to the Rightsholder.
- 3.4. Nothing in this licence agreement shall constitute a waiver of any statutory rights or benefits from statutory exceptions to copyright applicable to the Licensee.

#### **4. PERMITTED USES**

##### **COMMON PROVISIONS FOR ACCESS BY AUTHORISED USERS THROUGH SECURE NETWORKS AND ONLINE ACCESSIBILITY**

- 4.1. The Licensee may digitise the Licensed Material.
- 4.2. The Licensee may access the Digitised Version.
- 4.3. The Licensee may reproduce the Digitised Version on paper, microfilm or electronically in appropriate numbers of copies necessary for the sole purpose of back-up or preservation subject to exceptions under applicable law and existing licences for the Purposes of this agreement.
- 4.4. The Licensee may store the Digitised Version in a systematic way so as to facilitate its search and retrieval.

##### **ACCESS BY AUTHORISED USER THROUGH SECURE NETWORKS**

- 4.5. The Licensee may provide access to the Digitised Version on site to Authorised Users.
- 4.6. The Licensee may provide access to the Digitised Version through Secure Networks to Authorised Users.
- 4.7. Authorised Users may: **[CHOOSE WHAT IS APPLICABLE AND DELETE THE REMAINDER]**
  - 4.7.1. search, view, retrieve and display the Digitised Version
  - 4.7.2. electronically save parts of the Digitised Version for personal use **[AS AGREED BETWEEN THE LICENSOR AND THE LICENSEE IN A SEPARATE AGREEMENT]** or **[AS PERMITTED BY LAW. LAW [SPECIFY APPLICABLE LAW TAKING INTO CONSIDERATION ARTICLE 10.1.1 OF THIS AGREEMENT] ] [KEEP WHAT IS APPROPRIATE, DELETE WHAT IS REDUNDANT]**

- 4.7.3. Print off single copies of parts of the Digitised Version **[AS AGREED BETWEEN THE PARTIES TO THE AGREEMENT [INSERT DETAILS],] or [AS PERMITTED BY LAW [SPECIFY APPLICABLE LAW TAKING INTO CONSIDERATION ARTICLE 10.1.1 OF THIS AGREEMENT] ]**. **[KEEP WHAT IS APPROPRIATE, DELETE WHAT IS REDUNDANT]**
- 4.7.4. The Authorised User may not forward a part or the whole of the digitized version of the work to anyone.
- 4.8. The Licensee may provide other libraries or cultural institutions with on-line access to the Digitised Version so that they may make it available to their respective Authorised Users for the Purposes of this agreement provided there is a specific agreement thereto in a separate licence with the Licensor which is/is not **[DELETE WHAT IS REDUNDANT]** annexed to this agreement.
- 4.8.1. The Licensee may provide third parties with on-line access to the Digitised Version in the framework of this agreement provided there is a specific agreement thereto in a separate licence thereto with the Licensor which is/is not **[DELETE WHAT IS REDUNDANT]** annexed to this agreement.
- 4.9. **[KEEP WHAT IS APPROPRIATE, DELETE WHAT IS REDUNDANT]**

The Licensee may charge a fee to the user only at the level necessary to cover its costs, which may in particular include the licensing fee as set out in article 3 of this agreement;

Or:

The Licensee may charge a fee to the user which can exceed the level necessary to cover its costs. Therefore, the Licensee may achieve a net income from any use of the work.

Or:

The Licensee may charge a fee to the user which can exceed the level necessary to cover its costs. Therefore, the Licensee may achieve a net income from the following uses of the work **[LIST USES]**:

Or:

The Licensee will not charge any fee to the user taking into consideration Article 3 of this agreement.

## **ONLINE ACCESSIBILITY OVER OPEN NETWORKS**

### **4.10. Online accessibility over open networks**

- 4.10.1.**[EITHER:]** The Licensee may make the **[ADD WHERE APPROPRIATE: "low resolution"]** Digitised Version freely available on its web-site to anyone.

**[AND/OR]**

The Licensee may make the Digitised Version available on its web-site only to persons registered on its site. **[CHOOSE THE OPTIONS YOU AGREE ON AND WHERE APPROPRIATE DELETE THE OTHER]**

4.10.2. The Licensee may index the Digitised Version in its own systems so as to enhance the quality of its services. **[DELETE IF INAPPROPRIATE]**

4.11. Open Network Users may **[CHOOSE THE PURPOSES OF THE AGREEMENT OR LEAVE THEM OPEN]::**

4.11.1. search, view, retrieve and display the Digitised Version

4.11.2. download the Digitised Version temporarily so as to be able to carry out the uses permitted under 4.9.1. und 4.9.4 **[AND WHERE APPLICABLE 4.9.5]**.

4.11.3. electronically store the Digitised Version permanently on a hard-drive or other storage device **[WHERE APPLICABLE]**

4.11.4. Print off single copies of parts of the Digitised Version **[AS AGREED BETWEEN THE PARTIES TO THE AGREEMENT [INSERT DETAILS], ] or [AS PERMITTED BY LAW [SPECIFY APPLICABLE LAW TAKING INTO CONSIDERATION ARTICLE 10.1.1 OF THIS AGREEMENT] ]. [KEEP WHAT IS APPROPRIATE, DELETE WHAT IS REDUNDANT]**

4.11.5. **[SPECIFY SUCH OTHER USES AS AGREED, for example regarding further dissemination]**

4.12

The Licensee will not charge any fee to the user taking into consideration Article 3 of this agreement.

## 5. RESTRICTIONS

5.1. Neither the Licensee nor Any User may remove or alter authors' names or publisher's copyright notices or other means or identification or disclaimers as they appear in or on the Licensed Material.

5.2. Neither the Licensee nor Any User may make systematical print or electronic copies of multiple extracts of the Licensed Material for any purpose other than expressly provided for under this agreement.

5.3. Neither the Licensee nor Any User may alter, abridge, adapt or modify the Licensed Material, except to the extent necessary to make it perceptible on a computer screen, or as otherwise permitted in this agreement, to Any Users. For the avoidance of doubt, no alteration of the words or their order is permitted.

5.4. Neither the Licensee nor Any User may further distribute a part or the whole of the Digitised Version of the work to anyone and in particular not deposit it in any file sharing systems except to the extent expressly agreed upon in this agreement.

5.5. Neither the Licensee nor Any User may create any Derivative Works of the Licensed Material except to the extent expressly agreed upon in a separate licence which is/is not in annexed to this agreement. **[DELETE WHAT IS REDUNDANT]**

5.6. Neither the Licensee nor Any User may allow any third party to carry out any rights under this agreement, notwithstanding clause 2.2

5.7. No one except for the Licensee may offer the content on a web-site.

5.8. **[SPECIFY SUCH OTHER RESTRICTIONS AS MAY BE AGREED]**

- 5.9. This agreement does not include a right for the Licensee to produce subsequent digitisations of the Licensed Material or the Digitised Version in other formats, except as provided in clause 4.3 or in so far as is necessary to allow continued use and/or long-term archiving of the material in the light of changes in standards for operating systems, software applications or data format.

## **6. PROCEDURES**

### **6.1. Digitisation Procedures**

**[ALTERNATIVE A: WHERE THE LICENSEE CARRIES OUT THE DIGITISATION:]**

- 6.1.1. The Licensee organises the digitisation of the Licensed Material in any way that appears practical to it as long as it can assure compliance with this agreement.
- 6.1.2. The Licensee will usually own a copy of the Licensed Material in paper or other analogue form and digitise this. In case the Licensee does not own a copy of the Licensed Material or any part of it, the Licensor will name a source for the Licensee to obtain a copy for digitisation.
- 6.1.3. The Licensee will ensure that the Digitised Version will be accessible upon request to associations officially designated to represent Visually Impaired Persons or with a strong representativity of Visually Impaired Persons, or as provided by law taking into consideration Article 10.1.1 of this agreement, provided adequate measures are utilised by the Licensee to protect from unauthorised use of the work.
- 6.1.4. The Licensee will provide the Licensor with a copy of the Digitised Version.
- 6.1.5. The Licensee will moreover provide the Licensor with access to the Digitised Version in its systems provided that no conflict would thereby arise with other agreements that the Licensee has entered into.
- 6.1.6. The Licensee will use previously available metadata on the Work if appropriate and if the Licensee creates any additional metadata for the Licensee's own purposes it will be created in a format to be agreed between the Licensee and the Licensor and made available upon request to the Licensor.

**[ALTERNATIVE B: WHERE THE LICENSOR CHOOSES TO CARRY OUT THE DIGITISATION ITSELF]:**

- 6.1.7. The Licensor organises the digitisation of the Licensed Material in any way that appears practical to it as long as it can assure compliance with this agreement.
- 6.1.8. The Licensor will ensure that the Digitised Version will be accessible to Visually Impaired Persons.
- 6.1.9. The Licensor will cooperate with the Licensee to enable it to link to the Licensor's resources containing the Digitised Version.
- 6.1.10. The Licensor will deliver any metadata on the Licensed Material and the Digitised Version to the Licensee in a format to be agreed between them.

### **6.2. Procedures to make work accessible**

- 6.2.1. The Licensee will use the metadata on the Licensed Material and Digitised Version mentioned under 6.1

### **6.3. Procedures for withdrawal of edition**

- 6.3.1. According to 8.1.1 the Licensor is at liberty to decide at any time to terminate its licence under this agreement e.g. with a view to commercialise the Licensed Material in any way it sees fit.
- 6.3.2. The Licensor must give the Licensee [**INSERT TIME: i.e. NUMBER OF MONTHS OR CLEAR CALENDAR DAYS ETC**] written notice and the Licensee may claim from the Licensor such costs as he can demonstrate to have incurred to digitise the Licensed Material and make available the Digitised Version.
- 6.3.3. The Licensee must deliver up the Digitised Version to the Licensor in such a form as will be agreed between the parties. Provided that the Digitised Version remains lawful (as regards libel, etc.) it may be retained by the Licensee for on-site use only. As to any refund of costs as stipulated in Article 8.1.2 of this agreement, the part of the costs to be refunded shall be decided by the Licensee and the Licensor by common agreement annexed to this licence agreement. Any replacement of the delivered work will have to be agreed between the Licensee and the Licensor in a separate agreement.
- 6.3.4. The Licensor will upon receipt of the notice to terminate the agreement forthwith disable all remote access to the Digitised Version and remove it from all its systems (except as specified above), and in particular without being limited to the following remove it from its Secure Network, its Open Network, any and all web-sites and all other platforms under its control, except in so far as permitted by applicable law.
- 6.3.5. When appropriate, the Licensor will provide the Licensee with the new Digitised Version on terms to be agreed upon and which takes into account clause 6.3.3 of this agreement.

## **7. OTHER OBLIGATIONS OF THE LICENSEE**

- 7.1. The Licensee will inform the Licensor every [**INSERT FREQUENCY: E.G. ONCE A YEAR, MONTH, EVERY SIX MONTHS ETC.**] of:
  - 7.1.1. the frequency in which the Digitised Version is accessed,
  - 7.1.2. [**OTHER TYPES OF INFORMATION THAT MIGHT BE SPECIFIED IN INDIVIDUAL AGREEMENTS**]
- 7.2. The Licensee will respect the Licensor's instructions with respect to Technical Protection Measures to be employed so as to ensure that uses made of the Digitised Version do not exceed the uses permitted under clause 4. The Licensee will also respect the Licensor's instructions regarding Rights Management Information.
- 7.3. With the exception of costs that incur under Article 10.1 of this agreement, the Licensee will bear all costs relating to this agreement, save as otherwise agreed in writing.
- 7.4. The Licensee shall:
  - 7.4.1. Use all reasonable endeavours to ensure that Any Users are appropriately notified of the importance of respecting the intellectual property rights in the Licensed Material and of the sanctions for failing to do so;
  - 7.4.2. Use all reasonable endeavours to ensure that Any Users are made aware of and undertake to abide by the terms and conditions of this agreement; use all reasonable endeavours to monitor compliance and immediately on becoming

- aware of any unauthorised use or other breach, inform the Licensor and take all reasonable steps, including, where appropriate disciplinary action, both to ensure that such activity ceases and to prevent any recurrence;
- 7.4.3. Use all reasonable endeavours to ensure that only those Users are permitted access to the Digitised Version as foreseen under Clause 4.

## **8. TERM AND TERMINATION**

- 8.1. This agreement is terminated at the expiry of copyright in the Licensed Material or at an earlier date if either party gives the other advance written notice in the following circumstances .
- 8.1.1. The Licensor may decide to terminate this licence at any time to withdraw the Licensed Material entirely or any item or part of an item from it
- 8.1.2. The Licensor may in particular terminate this licence without being limited to such circumstances if the Licensor no longer retains the right necessary for this licence, or if it has reasonable grounds to believe that the withdrawn whole or part infringes copyright or is defamatory, obscene, unlawful or otherwise objectionable or if it decides to re-commercialise the whole Licensed Material or any item or part of an item of it.
- 8.1.3. The Licensor shall act in accordance with the procedure under clause 6.3 of this agreement.
- 8.1.4. If the material was withdrawn under 8.1.1. the Licensee may claim from the Licensor such costs as the Licensee can demonstrate to have incurred to digitise the Licensed Material and make available the Digitised Version, pro rata, taking into account the amount of material withdrawn.
- 8.1.5. Either party commits a material or persistent breach of any term of this licence and fails to remedy the breach (if capable of remedy) within thirty days of notification in writing by the other party
- 8.1.6. Either party becomes insolvent or subject to similar proceedings.
- 8.1.7. [ADD OTHER CIRCUMSTANCES AS APPROPRIATE]
- 8.2. The agreement may also be terminated by the Licensor if the Licensor gives the Licensee [INSERT TIME] written notice. Upon termination of the agreement, any intellectual property rights subsisting in any metadata created by the Licensee are automatically assigned to the Licensor, though this provision shall not affect the Licensee's continued free of charge use of such metadata for catalogue purposes.
- 8.3. On termination all rights and obligations of the parties automatically terminate, except 8.2. and 9.1.

## **9. WARRANTIES AND INDEMNIFICATION**

- 9.1. The Licensor warrants to the Licensee that it owns, holds or is sufficiently authorised with respect to the rights necessary to grant the Licensee the licence stipulated in clause 3.1 and that the uses of the Licensed Material permitted under clause 4 of the agreement as contemplated in this licence

agreement do not infringe any copyright or other proprietary or intellectual property rights of any natural or legal person. The Licensor shall indemnify and hold the Licensee harmless from and against any direct loss, damage, cost, liability or expense (including reasonable legal and professional fees) arising out of any legal action taken against the Licensee claiming actual or alleged infringement of such rights. This indemnity shall survive the termination of this agreement for any reason. This indemnity shall not apply if the Licensee has amended or used (or allowed others to do either of these) the Licensed Material in any way not permitted by this agreement.

## **10. MISCELLANEOUS**

### **10.1. Dispute Resolution**

**10.1.1.** The parties agree that they will attempt to settle any disputes amicably and in good faith, and where it cannot be so solved within reasonable time that either party may commence alternative dispute resolution as set out in Article 10.1.2 below

**10.1.2.** **[SELECT THE APPROPRIATE OPTION AND DELETE THE REMAINING OPTION.]**

#### **[OPTION A]**

[Any difference between the parties arising under, out of or relating to this licence agreement, including the rights and liabilities of the parties thereto, and any subsequent amendments of this license agreement shall in the first instance be referred to expert determination in accordance with the WIPO Expert Determination Rules. Unless the parties have expressly agreed otherwise, the expert's determination shall not be binding upon the parties nor prevent either party from pursuing its interest further in court as specified in Article 10.1.1 below. The costs of the expert determination shall be borne by the parties in such proportions as the expert may determine to be fair and reasonable in the light of all the circumstances and the outcome of the expert determination, or, if no such determination is made, in equal portions. The language to be used in the expert determination shall be **[SPECIFY LANGUAGE].**]

**[OPTION B: AVAILABLE ONLY WHERE THE LICENSEE AND THE LICENSOR ARE BOTH REGISTERED AND OPERATE IN THE SAME COUNTRY, AND WHERE THE EFFECT OF THIS LICENSE AGREEMENT IS LIMITED TO SUCH COUNTRY. PARTIES MAY EITHER (a) AGREE TO ADOPT OPTION "A" AS SET OUT ABOVE, OR (b) AGREE TO ADOPT A DIFFERENT ALTERNATIVE DISPUTE RESOLUTION PROCEDURE RECOGNISED BY THE RELEVANT NATIONAL LAW AND LEGAL TRADITION TO BE SPECIFIED BELOW.]**

[Any difference between the parties arising under, out of or relating to this licence agreement, including the rights and liabilities of the parties thereto, and any subsequent amendments of this licence agreement shall in the first instance be referred to **[INSERT DESCRIPTION OF ALTERNATIVE DISPUTE RESOLUTION PROCEDURE TO BE ADOPTED]**. The costs of the alternative dispute resolution shall be borne by the parties in such proportions as the decision-maker may determine to be fair and reasonable in the light of all the circumstances and the outcome of the alternative dispute resolution, or, if no such determination is



made, in equal portions. The language to be used in the alternative dispute resolution shall be [SPECIFY LANGUAGE].]

10.2. Applicable Law and forum

10.2.1. The parties agree that, subject to the provisions in Articles 10.1.1 and 10.1.2 above, any dispute arising out of or in connection with this licence agreement shall be subject to and within the jurisdiction of the [NATIONAL] courts.

10.2.2. This licence agreement shall be governed and construed in accordance with [NATIONAL] law.

**[WHERE THE LICENSOR AND THE LICENSEE ARE GOVERNED BY DIFFERENT NATIONAL LAWS, THE LICENCE AGREEMENT SHALL BE GOVERNED BY THE LAW OF THE LICENSEE.]**

10.3. Words in the feminine form equally denote to the masculine form and the single to the plural as and where appropriate.

10.4. Non-assignability:

10.4.1. This licence agreement may not be assigned by either party to any other person or organisation, without the prior written consent of the other party, which consent shall not unreasonably be withheld.

10.4.2. If rights in all or any part of the Licensed Material are assigned to another publisher or pass on death of the author to his estate, the terms and conditions of this licence shall survive the assignment.

10.5. If any provision of this agreement shall be adjudged by a court of competent jurisdiction to be void or unenforceable but which provision would be valid and enforceable if it were varied or modified then such provision shall apply with such variation or modification as shall be necessary to make it valid or enforceable. In case such variation or modification is not possible, the clause shall be struck out of the agreement. The fact that one clause has been held void or unenforceable, will not affect the validity of the remaining agreement in any event.

10.6. Alterations to this agreement and to the Annexes to it (which may be altered separately from the body of this agreement without affecting the validity of the agreement as a whole) are valid only if they are recorded in writing and signed by both parties.

10.7. Neither party's delay or failure to perform any provision of this agreement, as a result of circumstances beyond its control (including without limitation war, strikes, floods, governmental restrictions) shall be deemed to be, or to give rise to, a breach of this agreement.

[SIGNED ETC]

---

Annex: list of works to be digitised / made available in digital format, specifying the Out-of-Print Date per Work.

## Annex 5

### **Implementation of proposed solutions through *eContentplus* projects: the ARROW project as an example.**

It should be noted that a consortium of stakeholder representatives has filed applications under the European Commission *eContentplus* program to *inter alia* implement solutions developed by the Copyright Subgroup for the i2010 Digital libraries initiative. One such project application is referred to as ARROW (Accessible Registries of Rights information on Orphan Works for the EDL). It focuses on print material and has been shortlisted by the European Commission for negotiations of a final contract. Subject to a contract being signed project start is anticipated between July and September 2008.

The Arrow consortium involves six National and one University libraries; three publishers' associations; one authors' association; three technology developers and ISBN agencies; seven Reproduction Rights Organisations (RRO); and the three international organisations European Digital Library (EDL), Federation of European Publishers (FEP) and International Federation of Reproduction Rights Organisations (IFRRO). In addition the European Writers Congress (EWC) has been invited to attend the steering committee without being a formal partner.

The project takes as a starting point challenges posed by the fact that national solutions vary according to different criteria such as cultural and economic requirements, commercial practices, publishing arenas, library infrastructure and legislative frameworks. Also, current resources are not interoperable, neither nationally nor across borders, and rarely include information on rights ownership and status.

Key aspects of the ARROW project include the enabling of interoperability of resources *inter alia* based on the key principles for databases and rights clearance centres proposed by the Copyright Subgroup and the deployment of different tools. The project aims to deliver an interoperable right information and clearance structure across Europe that will facilitate the identification of rightholders and the status of intellectual property rights to works. Test beds are provided for the out-of-print Model Agreements, for the criteria for diligent search to rightholders to orphan works as well as registries and rights clearance mechanisms for orphan and out-of-print works.

The project is based on a broad stakeholder involvement, private-public partnership and a true pan European dimension. It also involves a broad specter of European Union Member States. It will enable to try out in practice the solutions proposed by the Copyright Subgroup with the view to later refine them and adopt them better to the requirements revealed through the implementation of them in actual and real situations.

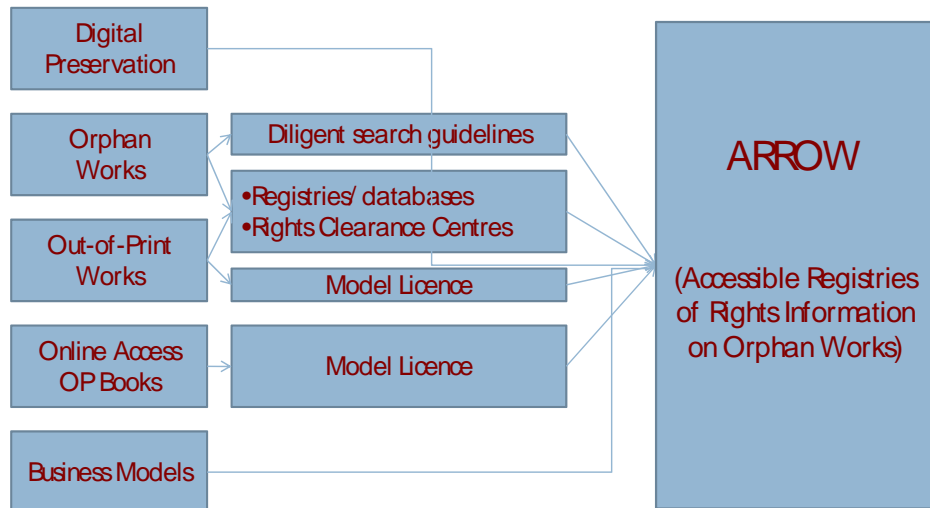
The link between the work of the Copyright Subgroup and the ARROW project may be illustrated as follows:

# EC i2010 Digital Libraries

## - A summary



10



## Annex 6

### **i2010 DIGITAL LIBRARIES COPYRIGHT SUBGROUP'S RECOMMENDED KEY PRINCIPLES FOR RIGHTS CLEARANCE CENTRES AND DATABASES FOR ORPHAN WORKS<sup>1</sup>**

#### **PREFACE**

The European Commission has made digital libraries a key aspect of i2010 as expressed *inter alia* in its Communication *i2010: Digital Libraries' of 30 September 2005*. The Commission's Recommendation of 24 August, approved by the Council in November 2006 focuses on digital preservation, orphan works and out-of-print works. Text-based and audiovisual materials include substantial amounts of works with unclear copyright status. Comprehensive, large scale digitisation and online accessibility, as well as other uses could be facilitated.

A High Level Expert Group (HLG) was appointed to advise the Commission on implementation issues regarding the European Digital Libraries initiative. To develop solutions on key copyright issues, the HLG established a Copyright Subgroup which worked out a set of High Level Principles<sup>2</sup> that were endorsed by the HLG at its meeting 17 October 2006.

As a part of the solution on copyright issues, the Copyright Subgroup recommended rights clearance centres and dedicated databases concerning information on orphan works taking into account that any mechanism intended to facilitate the EDL should in principle be established or promoted on a voluntary basis. It further noted that the European Commission could recommend that the Member States support or complete contractual arrangements by "an extension effect to a collective licence contracts by some legal presumption and by other measures to the same effect." The High Level Principles are fundamental for the establishment of Rights Clearance Centres (RCC) and Databases (DB) in relation to the i2010 European Digital Libraries (EDL).

Moreover, co-ordination should take place among the various initiatives at national level and across the European Union, to avoid unnecessary duplication among different initiatives. Also, mutual recognition is important with a view to the cross border effect of the use. National RCCs could act as portals and centralised access points for clearance of rights and be accessible across borders, supported by DBs and registries. In building these RCCs will also involve and co-operate, when appropriate, the cultural institutions with the view to draw on their expertise to enable a best possible result to the benefit of right holders as well as institutions and other users of copyright works. Interlinking national databases would establish a European centralised access point and a European wide solution. It should take account of the variety of existing and future information resources available.

#### **HIGH LEVEL PRINCIPLES GOVERNING THE CLEARANCE OF RIGHTS FOR WORKS PRESUMED TO BE ORPHAN**

Key elements in respect of the clearance of rights to digitise and make available works presumed to be orphan by institutional or other users:

- Works and materials from all relevant categories of works protected by copyright may be orphan. The Databases and Rights Clearance Centres for orphan works must take account of this
- Prior to requesting a licence to digitise and/or make available an orphan work, the user or, when agreed, the Rights Clearance Center on the user's behalf shall carry out a diligent search for the rightholders to the work observing sector specific criteria for such rightholder search
- Subsequently, the Rights Clearance Centre needs to establish a licence for the digitisation and making available of a presumed orphan work with a set of default conditions (default licence)
- Legal certainty for the right clearer as well as for the user in the licence presupposes a solution for so-called orphan works: the identity and/or the location of a right holder to a given work is/are not known by the user

---

<sup>1</sup> Whenever the term "orphan work" is used, the work is considered to be orphan until the contrary has been proven.

<sup>2</sup> Report on Digital Preservation, Orphan works and Out-of-Print works. Selected Implementation Issues, page 2/3

## HIGH LEVEL PURPOSE OF RIGHTS CLEARANCE CENTRES AND DATABASES

A national Rights Clearance Center (RCC) and a national Database (DB) for orphan works are established to implement the European Digital Libraries initiative. Diligent search for rightholders to work to be digitised and/or made available using established sector-specific criteria is carried out using resources from the country of origin/publication/production of the work provided this information is available. The main purpose of these instruments is to create convenient though not compulsory centralised national access points based on the legal solutions chosen by the individual countries for the clearance of rights, when applicable, to digitise and make available orphan works. The combined solution shall *inter alia* through authoritative registers:

1. enable users, institutional as well as commercial ones, to conduct an online search, in order to discover whether
  - a. the identity and/or the location of a rightholder to a given work required by the user is/are known
  - b. whether information is available on previous diligent search on the right holder to the work to enable further search or engage in a diligent search for the rightholder(s) to the work
  - c. the work is already registered as available digitally, e.g. from another library/archive/museum or other user who has already sought and obtained clearance through a default licence or, when applicable, on some mechanism based on legislation
2. enable users, institutional as well as commercial ones, to proceed from discovery of digitisation status to
  - a. digitising the work, subject to the relevant terms and conditions established, and, when applicable, subsequently making the digitisation accessible to users on the conditions established in the licensing agreement; or
  - b. enabling access to a work that has been digitised and made available digitally from another source, e.g. another national or foreign library, archive or museum, or other authorised user

## DEFINITIONS

Database means a network of databases (cultural institutions including libraries, archives, museums; creators/authors; publishers; industry sources; Reproduction Rights Organisations (RROs); other authorities (both national and international)) of metadata accessed via national portals. The national databases are foreseen to be interoperable to allow a European-wide solution.

Rights Clearance Centre (RCC) means a national centralised access point to a network of clearance centres made up of that of the RCC and those of individual authors or publishers and their representatives such as RROs. The national rights clearance centres are foreseen to be interoperable to allow a European-wide solution.

Metadata is a relationship that someone claims to exist between two entities, one of which is the referent. (Definition used by Indecs)

## **GOVERNING PRINCIPLES OF THE DATABASES AND RIGHTS CLEARANCE CENTRES FOR ORPHAN WORKS**

For rightholders<sup>3</sup> the governing principles are:

- Respect for copyright and related rights, including moral rights of creators and performers of copyrighted works;
- Digitisation and use within the premises of libraries/archives/museums should take place with rightholders' consent or be based on statutory exception;
- Online availability should take place with the consent of the rightholders or their representatives;
- In the absence of the rightholder when not known or located, online availability should take place either with the consent of an authoritative body established by and governed by rightholders or by some other process established on the basis of law recognised by rightholders.
- Rightholders' consent in this context means in principle rights clearance.
- An authoritative source established by rightholders on the basis of the country's legislation to grant the right to digitise and/or make available copyright works when the rightholder is presumed unknown or not possible to locate.

For libraries, archives and museums the governing principles are:

- Respect for copyright and related rights, including moral rights of creators and performers of copyrighted works;
- For these institutions it is important to have legal certainty in their activities;
- Access means either within the premises of libraries, archives and museums or online availability;
- Digitisation of copyright works requires getting permission through rights clearance or some other mechanisms based on legislation recognised by the rightholders;

---

<sup>3</sup> By right holders is meant any person or institution legally holding rights or having been authorized to act on the right holders behalf

## **DATA BASES (DB). KEY PRINCIPLES**

### **1. Policy**

- ✚ The DB shall contain metadata on digitised presumed orphan works and other orphan works in respect of which a diligent search has been undertaken or for which a lawful licence for use has been granted
- ✚ The DB owner may at its sole discretion establish and publicise its policy for collecting, storing and making available metadata in the DB
- ✚ The DB owner shall publicise its criteria for linking to other national DBs on metadata
- ✚ The DB owner shall publicise its criteria for storing and/or linking to metadata DB outside its national territories
- ✚ Duplication of existing databases/catalogues shall be avoided as far as possible

### **2. Database**

- ✚ The DB shall include metadata on works (See, however, also 3 below)
- ✚ The DB shall enable the storage of metadata on works on the basis of different types of contractual arrangements
- ✚ Subject to the principles established in this document the DB owner shall at its own discretion establish technical and other standards as well as the policy for the use of the DB, taking into account that it must facilitate interoperability with other databases
- ✚ The principles for building, including the structuring of the DB, shall start from existing DBs (both private and public)
- ✚ The DB must allow redirection to other relevant DBs both in and outside its territory
- ✚ The DB shall enable the registration of sector specific criteria for diligent search for rightholders to orphan works and whether they have been complied with, per work
- ✚ The DB shall enable the announcement of the undertaking of a due diligent search by a user
- ✚ The DB shall enable the registration of users' compliance with the diligent search criteria to identify the right holder to an orphan work
- ✚ The DB shall enable the publicising of the licence granted to use a specific orphan work and the conditions to be applied for the use of it
- ✚ The DB shall publicise the change of status (from orphan to known rightholder, or from orphan work/known right holder to located rightholder)
- ✚ The database shall allow integration with existing databases on orphan works

### **3. Metadata**

- ✚ The DB shall apply a definition of metadata and their values as devised by the Copyright Subgroup in the context of the i2010 Digital Libraries initiative
- ✚ As a minimum the DB shall include
  - rights
  - manifestation of works
  - meta-metadata (who is declaring what, and when)
- ✚ In the absence of or in addition to traditional metadata (such as name of the author, name of the publisher, title of the work, etc.), the database may contain expressions that may help to identify the rightholder(s) to the work, e.g. a facsimile, a snapshot, a short extract of a piece of music, a copy in low resolution of the cover page, photo, video clip, i.e. part of a video, etc.
- ✚ The DB owner shall establish and publicise
  - criteria for quality control
  - criteria for enriching and updating of metadata
  - criteria for accessing metadata

#### 4. Standards

- ✚ The DB shall use existing standards.
- ✚ The DB shall contribute to the further development of existing international standards rather than looking for own proprietary solutions
- ✚ Standards are required for
  - Identification of works, manifestation of works, parties, and possibly rights, i.e. ISO TC-46, SC-9 for content (in text and image based and audiovisual works: ISBN, ISSN, ISTC, ISAN, CEN, ISMN, DOI, ISNI are directly relevant)
  - Metadata and metadata interoperability models
  - Messaging and accessing metadata
- ✚ Standards are referred to:
  - Content (at work and at manifestation of work (publication) level)
  - Rights and right terms
  - Parties
- ✚ The metadata standards will likely be based on the ONIX family of standards

#### 5. Interoperability

- ✚ The DB owner shall make such information available on the structure etc. as is necessary to ensure interoperability with other DBs for orphan works
- ✚ The DB must enable a register of orphan works which have been digitised and/or made available during their orphan works status



## **RIGHTS CLEARANCE CENTRE (RCC). KEY PRINCIPLES**

### **1. Policy**

- ✚ The RCC is foreseen to be an authoritative source for the clearance of rights to digitise and/or make available orphan works in accordance with the national legal regime. The rights clearance can be carried out directly or in combination with other authoritative clearance mechanisms depending on the legislation of the country concerned.
- ✚ The RCC may operate on the basis that it shall establish that a search for a right holder to an orphan work has been duly carried out according to criteria developed for such searches; or be engaged in the diligent search for the right holder itself; or carry out both tasks. The RCC shall clarify which of these tasks it performs.
- ✚ A diligent search should normally be carried out using resources relating to the country of origin, where known, of the creation/publication/production of the work
- ✚ The orphan works licence offered by the RCC must provide for its replacement by a licence with the pertinent rightholder or his/her representative and include a take down procedure when the rightholder has been identified and/or located and normal rights clearance mechanisms may be used. Such replacement procedure must take due account of the needs of the library/archive/museum or other user, institutional or commercial, that has been allowed to digitise and/or make available under the RCC orphan works licence.

### **2. Licensing**

- ✚ The Licensing policies and criteria shall be worked out in co-operation with the pertinent right holder associations and the Collective Management Organisations (CMOs) in the relevant fields
- ✚ The fee including, when applicable, remuneration handling policy shall be worked out in co-operation with the pertinent rightholder associations and the Collective Management Organisations (CMOs) in the relevant fields
- ✚ The RCC shall establish a request handling policy which shall include
  - i. Direct licensing including a register of works in respect of which the RCC has been granted an authorisation e.g. by law or otherwise to licence
  - ii. Redirecting to other sources including CMOs
  - iii. A list of works for which the RCC has been authorised to redirect (when applicable)
- ✚ The RCC shall establish and publicise its licensing policy and criteria, including the policy for using the RCC outside its national territory, and criteria, remuneration handling policy,
- ✚ The licensing policy must enable both libraries, archives, museums, etc. as well as commercial users to apply for a licence of orphan works




### **3. Licensing Conditions**

- ✚ The RCC shall establish a set of default<sup>4</sup> conditions
- ✚ The default licences shall ensure that moral rights are respected to the extent possible
- ✚ The default licence shall provide terms that allow monitoring and enforcement of the licence terms
- ✚ The default conditions shall be established in co-operation with authors and publishers/producers associations as well as the pertinent CMOs in the relevant sector and be based on the conditions for the use of similar categories of works
- ✚ The licence must take account of specific stipulations in national legislation in support of contractual and/or other arrangements for such works
- ✚ The Licence must include stipulations that regulate the relationship with the user and the rightholder when the rightholder has been identified and/or located, including what shall happen to the digitised work and the making available and the further use of it.



---

<sup>4</sup> Conditions established by the RCC in the absence of right holder set ones which the right holder may choose to replace when (s)he reappears





#### **4. Remuneration**

-  The RCC pays out to the rightholder all such fees it collects on his/her behalf through such channels as follows from the licence or as agreed with the rightholder when (s)he has been located
-  The RCC will ensure shortest possible period from collection to distribution of remuneration to right holders and pay out any collected fees on the right holder's behalf as soon as possible after the right holder to a work that has been registered as an orphan work has been identified and/or located
-  The RCC shall work out and publicise a policy for handling of any money held in trust (for non identified rightholders). This policy shall be worked out in co-operation with the pertinent rightholder associations, the CMO in the relevant sectors and the cultural institutions, and may include the possibility for cultural institutions to share in the undistributed funds.

#### **5. Interoperability**

-  The RCC shall work out and publicise its policy on integration with individual rights clearance mechanisms
-  The RCC shall ensure and publicise a policy on interlinking with other RCCs outside its borders

#### **6. Transparency**

-  The RCC shall define and publicise “relevant information” to pertinent rightholder representatives including CMOs, cultural institutions and potential licensees.
-  What is “relevant information” shall be worked out in co-operation with the pertinent national rightholder associations, the CMO in the relevant sectors and the cultural institutions, and include administrative costs
-  The RCC shall ensure that “relevant information” is easy accessible to rightholder associations, CMOs and cultural institutions
-  The RCC shall keep and make publicly available a register of orphan works on which metadata is available

26 November, 2007

- END of Documents -

## Annex 7

### **i2010 DIGITAL LIBRARIES COPYRIGHT SUBGROUP'S RECOMMENDED KEY PRINCIPLES FOR RIGHTS CLEARANCE CENTRES AND DATABASES FOR OUT-OF-PRINT WORKS**

#### **PREFACE**

The European Commission has made digital libraries a key aspect of i2010 as expressed *inter alia* in its Communication *i2010: Digital Libraries* of 30 September 2005. The Commission's Recommendation of 24 August, approved by the Council in November 2006 focuses on digital preservation, orphan works and out-of-print works. Text-based, visual, musical and audiovisual materials include works which the pertinent rightholder (author or publisher/producer) may no longer wish to commercialise. Digitisation and online accessibility to such works could be facilitated.

A High Level Expert Group (HLG) was appointed to advise the Commission on implementation issues regarding the European Digital Libraries initiative. To develop solutions on key copyright issues, the HLG established a Copyright Subgroup which worked out a set of High Level Principles<sup>1</sup> that were endorsed by the HLG at its meeting 17 October, 2006.

As a part of the solution on copyright issues, the Copyright Subgroup recommended rights clearance centres and dedicated databases concerning information on out-of-print works taking into account that any mechanism intended to facilitate the European Digital Libraries (EDL) should in principle be established or promoted on a voluntary basis. The High Level Principles are fundamental for the establishment of Rights Clearance Centres (RCC) and Databases (DB) in relation to the i2010 European Digital Libraries.

Moreover, co-ordination should take place among the various initiatives at national levels and across the European Union, to avoid unnecessary duplication among different initiatives. National RCCs could act as portals and centralised access points for the clearance of rights and be accessible across borders, supported by DBs and registries. Interlinking national databases would establish a European centralised access point and a European wide solution. It should take account of the variety of existing and future information resources available. Aiming to facilitate the digitisation and making available out-of-print works the Copyright Subgroup developed a Model Licence. It was endorsed by the HLG at its meeting 18 April, 2007 and is available on the European Commission's web page<sup>2</sup>.

#### **OUT-OF-PRINT WORKS - RIGHTS AND PROCEDURES**

There are various reasons why a work is declared to be no longer commercially available/out of print<sup>3</sup>. Preamble G of the out-of-print works Model Licence<sup>2</sup> recognises that the rightholder may at his/her sole discretion decide whether a work is to be considered in or out of print. At the time of a request by a cultural institution to digitise a work in copyright it may already have been declared by the right holder as being no longer commercially available and "out-of-print", or it may be declared as such as a consequence of the request.

Rights in an out-of-print work depend on the legislation as well as contractual arrangements between the creator and publisher/producer. The legislation of some countries decides that the rights to works which are no longer commercialised or in print revert to the author of the work. Rights may also revert to the author by contract, sometimes depending on the number of copies available or other conditions. Often also publishers/producers hold rights in an out of print/commerce works.

---

<sup>1</sup> Report on Digital Preservation, Orphan works and Out-of-Print works. Selected Implementation Issues, page 2/3

<sup>2</sup> [http://ec.europa.eu/information\\_society/newsroom/cf/itemlongdetail.cfm?item\\_id=3366](http://ec.europa.eu/information_society/newsroom/cf/itemlongdetail.cfm?item_id=3366)

<sup>3</sup> For audiovisual works « out of commerce », see e.g. Commission Recommendation of 24 August 2006 on the digitisation, and online accessibility of cultural material and digital preservation, Whereas 10 and Recommendation 6b

A work that is declared by the rightholder to be out of print/no longer commercially available may already exist in (an) electronic format(s)<sup>4</sup>. Where this is not the case, the rightholder may wish to digitise the work her/himself. Moreover, the rightholder may also wish to authorise directly her/himself the digitisation and/or making available of the out-of-print/commerce work and administer all or some rights in such works directly her/himself or through (an) agent(s). Rightholders or the agent(s) may also on a voluntary basis choose to co-operate in the establishing of a centralised clearance centre and/or make use of an already established one, e.g. a Reproduction Rights Organisation (RRO) for the licensing of the digitisation, making available or the accessing of a work that has been declared as being no longer commercially available/out-of-print.

## **HIGH LEVEL PURPOSE OF RIGHTS CLEARANCE CENTRES AND DATABASES**

The main purpose of Rights Clearance Centres (RCCs) and the Databases (DBs) for out-of-print works is to create nationally convenient, albeit not compulsory centralised access points for the clearance of rights to digitise and make available works that the pertinent rightholders have declared to be no longer commercialised/out of print. These instruments would facilitate the realisation of the European Commission i2010 Digital Libraries initiative. They are therefore intended for use by rightholders and cultural institution for the clearance of rights in respect of such works and represent a part of the out-of-print work solution proposed by the Copyright Subgroup endorsed by the HLG as an alternative to individual licensing directly by rightholders,. When a mandate has been granted by the rightholder to the RCC, this may imply that it is authorised to license the digitisation and/or making available of the out-of-print work or to redirect the request to the rightholder.

The RCCs and DBs represent a combined solution that shall:

1. enable cultural institutions such as libraries, archives and museums to conduct an online search in order to discover whether
  - a. the work has been declared out-of-print and is already registered as available digitally, e.g. from another library which has already sought and obtained permission to digitise the work
  - b. the work has been declared out-of-print and no permission has been granted to make it available online
2. enable cultural institutions such as libraries, archives and museums to proceed from discovery of digitisation status to
  - a. seek permission to digitise the work, either directly from the rightholder(s) or through the procedures established by the centralised Rights Clearance Centre (RCC).
  - b. digitise the work subject to the relevant terms and conditions established, and, when applicable, subsequently make the digitisation accessible to its users on the conditions established in the licensing agreement; or
  - c. seek access to a work that has been digitised and made available digitally from another source, e.g. another national or foreign library, archive or museum, or another authorised user

## **DEFINITIONS**

Database means a network of databases (libraries; publishers; industry sources; Reproduction Rights Organisations (RROs); other authorities (both national and international)) of metadata accessed via national portals.

Rights Clearance Centre (RCC) means a nationally established centralised access point to a network of clearance centres made up of that of the RCC and those of individual authors or publishers and their representatives such as RROs

---

<sup>4</sup> In the case of an electronic version the rightholder may decide to offer it on demand or declare not to commercialise it.

Metadata is a relationship that someone claims to exist between two entities, one of which is the referent. (Definition used by Indecs)

## **GOVERNING PRINCIPLES OF THE DATABASES AND RIGHTS CLEARANCE CENTRES FOR OUT-OF-PRINT WORKS**

For rightholders the governing principles are:

- Respect for copyright and related rights, including moral rights of creators and performers of copyrighted works;
- Digitisation and use within the premises of libraries should take place with rightholders' consent or be based on statutory exception;
- Online availability should take place with rightholders' consent;
- Rightholders' consent means in principle rights clearance, which should be based on individual or collective licensing or a combination thereof.

For libraries, archives and museums the governing principles are:

- Respect for copyright and related rights, including moral rights of creators and performers of copyrighted works;
- Legal certainty in their activities;
- Making works available to their users, which means access either within the premises of libraries, archives and museums or online availability;
- Digitisation of copyright works requires getting permissions to digitise and access the work.

## **RIGHTS CLEARANCE CENTRE (RCC). KEY PRINCIPLES**

### **1. Policy**

- ✚ The RCC shall be based on voluntary participation by the rightholders
- ✚ The use of the RCC shall be voluntary by cultural institutions
- ✚ Rights clearance can be carried out directly from the RCC or as a redirection to the rightholder's own database or other sources authorised by the rightholder to license the digitisation and/or making available of the work, depending on the mandate from the rightholder to the RCC.

### **2. The Mandate**

- ✚ Subject to the mandate from the rightholder, the RCC licenses the digitisation, making available and use of a work on the principle of a voluntary mandate
- ✚ The rightholder shall be at liberty to register metadata on the work with a RCC and, if so, with one or more RCCs

### **3. Licensing**

- ✚ The RCC shall establish a request handling policy which shall include
  - i. Direct licensing including a register of works which the RCC has been authorised to licence
  - ii. Redirecting to individual rightholders
  - iii. Redirecting to rightholder representatives including Collective Management Organisations (CMOs)
  - iv. a list of works for which the RCC has been authorised to redirect
- ✚ The Licensing policies and criteria shall be worked out in co-operation with the pertinent rightholder associations and the collective management organisations in the relevant fields
- ✚ The RCC shall establish and publicise its licensing policy and criteria, including the policy for using the RCC outside its national territory
- ✚ The licensing policy must enable cultural institutions to apply for a licence to digitise and make available an out-of-print work.



### **4. Licensing Conditions**

- ✚ Subject to national legislation, the RCC shall allow rightholders to establish licensing conditions individually
- ✚ The RCC shall establish a set of default conditions which shall apply in the absence of conditions set by the rightholder
- ✚ The default licences shall include stipulations on the moral rights to be observed
- ✚ The default licence shall include the terms on the monitoring and enforcement of the licence conditions
- ✚ The default conditions for out-of-print works shall be based on the Model Licence for out-of-print works developed by the Copyright Subgroup of the i2010 Digital Libraries initiative.





### **5. Remuneration**

- ✚ The RCC pays out to the rightholder all such fees it collects on his/her behalf through such channels as are agreed
- ✚ The RCC will ensure shortest possible period from collection to distribution of remuneration to rightholders

## **6. Interoperability**

-  The RCC shall work out and publicise its policy on integration with individual rights clearance mechanisms
-  The RCC shall establish and publicise a policy on interlinking with other RCCs outside its borders

## **7. Transparency**

-  The RCC will define and publicise “relevant information” to participating rightholders, cultural institutions and other potential licensees
-  What is “relevant information” shall be worked out in co-operation with the pertinent national rightholder associations and the CMOs in the relevant sectors consulting also representatives from the cultural institutions, and include administrative costs
-  The RCC shall ensure that “relevant information” is easy accessible to participating rightholders and cultural institutions
-  The RCC shall keep and make publicly available a register of works on which metadata is available for out-of-print works

## **DATA BASES (DB). KEY PRINCIPLES**

### **1. Policy**

- ✚ The DB shall contain metadata on out-of-print works, not the content/work itself
- ✚ The DB owner may at its sole discretion establish its policy for collecting, storing and making available metadata in the DB
- ✚ The DB owner shall publicise its criteria for
  - linking to other national DBs on metadata
  - storing and/or linking to metadata DBs on out-of-print works outside its national territories
- ✚ Duplication of existing databases/catalogues shall be avoided as far as possible

### **2. Database**

- ✚ The DB shall include metadata, and only metadata on works
- ✚ The DB shall enable the storage of metadata on works on the basis of different types of contractual arrangements
- ✚ Subject to the principles established in this document, especially at 5, the DB owner shall at its own discretion establish technical and other standards as well as the policy for the use of the DB, taking into account that it must facilitate interoperability with other databases
- ✚ The principles for building, including the structuring of the DB, shall start from existing DBs (both private and public)
- ✚ The DB must allow redirection to other relevant DBs both in- and outside its territory
- ✚ The DB shall include the registration of all data relevant to the Model licence on out-of-print works as devised by the i2010 Digital Libraries Copyright subgroup

### **3. Metadata**



- ✚ The DB shall apply a definition of metadata and their values as devised by the Copyright Subgroup in the context of the i2010 Digital Libraries initiative
- ✚ As a minimum the DB shall include metadata describing:
  - works
  - rights
  - manifestation of works
  - meta-metadata (who is declaring what, and when)
- ✚ The DB owner shall establish and publicise
  - criteria for quality control
  - criteria for enriching and updating of metadata
  - criteria for accessing metadata

### **4. Standards**

- ✚ The DB shall use existing standards.
- ✚ The DB shall contribute to the further development of existing international standards rather than looking for own proprietary solutions
- ✚ Standards are required for
  - Identification of works, manifestation of works, parties, and possibly rights, i.e. ISO TC-46, SC-9 for content (in text based: ISBN, ISSN, ISTC, ISAN, ISMN, DOI, ISNI are directly relevant)
  - Metadata and metadata interoperability models
  - Messaging and accessing metadata
- ✚ Standards are referred to:
  - Content (at work and at manifestation of work (publication) level)
  - Rights and right terms
  - Parties
- ✚ The metadata standards will likely be based on the ONIX family of standards



## **5. Interoperability**

-  The DB owner shall make such information available on the structure etc. that is necessary to ensure interoperability with other DBs for out-of-print works
-  The DB must provide a register for out-of-prints for which permission has been granted

26 November, 2007

- END of Documents -