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ARROW

Guidelines for clearance mechanisms for out of print works

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¹ OJ L 79, 24.3.2005, p. 1.

Table of contents

ARROW and the principles of the High Level Expert Group on digital libraries for clearance mechanisms for out of print works	3
Annex	
Final Report on Digital Preservation, Orphan Works, and Out-of-Print Works Contributing authors	5
Extracts of the report dealing with out of print and clearance mechanisms	6
6. Works out of print	6
6.1 Definitions and basis for a solution	6
6.2 Proposed solution – key elements	6
6.3 The licensing of digitisation and the making available of works out-of-print. General licensing criteria	7
6.4 Databases of and rights clearance centres for out-of-print works	8
6.5 Granting of authorisation to digitise and make the work available	9
7. The Model Agreement for the digitisation and making available of out of print works to authorised users in closed networks	10
8. The model agreement authorising libraries to allow online access to out-of-print books	10
8.1. The scope of the agreement	10
9. Key principles for orphan works and out-of-print works databases (DB) and rights clearance centres (RCC)	12
9.1. Background	12
Notes	13

ARROW and the principles of the High Level Expert Group on digital libraries for clearance mechanisms for out of print works

The overall objective of the Arrow project is to provide a determination of the status of a book in order to facilitate the licensing of this book provided the rights holders agree to it.

All stakeholders involved in the ARROW project agree that when a book is considered as out of print, licensing mechanisms should be found to permit cultural institutions to provide online access to that book, in secure or over open networks..

The ARROW project when drafted had foreseen that a deliverable would be dedicated to guidelines for clearance mechanisms for out of print books. In the meanwhile, the High Level Expert Group on digital libraries chaired by Commissioner Viviane Reding tasked its copyright subgroup to work on a number of legal issues including out of print works, how they should be defined and how once they were defined as out of print they could be eventually licensed to cultural institutions.

The Guidelines for the clearance mechanisms for out of print works are based on the work of the EC i2010 digital libraries High Level Experts Group (HLEG) chaired by Commissioner Reding and its copyright subgroup which addressed specifically this issue. Extracts of the relevant reports are annexed. The HLEG copyright subgroup developed criteria for Rights Clearance Centres (Annex 2) and databases (Annex 3) for out-of-print works and these documents. They also developed model licensing agreements for the digitising and making available of out of print books in secure networks (http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/reports/copyright/copyright_subgroup_final_report_26508-annex3-final.pdf) and over open networks (http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/reports/copyright/copyright_subgroup_final_report_26508-annex4-final.pdf). These documents were a result of a joint effort and agreed to by stakeholders concerned including representatives of authors, publishers, RROs (Reproduction Rights Organisations) and libraries. The consortium therefore requested an amendment to the Work Plan.

At the first meeting of the Management Board of the ARROW project, the partners agreed that we should build the project on the consensus reached within the HLEG.

The HLEG documents which form an important basis for the ARROW have agreed on the following main principles:

- A work is “out-of-print” when the rights holder concerned has declared it not to be commercially available;
- Rights holders should be in a position to decide whether a work which has been defined as out of print should be licensed to be made available 1. within secured networks; 2. over the internet. The HLEG has approved two model licenses which should be used by cultural institutions when dealing with out of print works;
- Any scheme for out of print works needs to be voluntarily set by the rights holders;
- Permission to make available 1. within secured networks; 2. over the internet can either be granted individually, through a joint administration or through collective mechanisms.

These principles have been agreed by representatives of stakeholders concerned.

Identification of whether a work is out of print has to be based on search for rights status in relevant sources including in books in print databases where they exist and in the registries of RROs and other rights clearing organisations. Mechanisms to clear the rights to digitise and make available out of print works must be based on the rights clearer verifying whether the out-of-print work is

- i. in or out of copyright
- ii. orphan, using the guideline for orphan works (see deliverable D.3.2.1)

If there are no rights involved in the work no rights clearance is necessary. If the work is orphan rights clearance will be performed by a duly authorised orphan works rights clearer or administrator. When the out of print work has been identified as being in copyright and the rights holder is identifiable and locatable rights clearance must be sought from and, when appropriate, performed by the rights holder directly or, when mandated, by a rights clearance centre such as an RRO.

The HLEG guidelines should serve as model at national level and the partners of the ARROW project have agreed to work on basis of these guidelines. The principles and steps listed above represent practical guidelines for the implementation of the rights clearance of orphan works. They also form the basis for the building of the relevant part of the ARROW system.

ANNEX

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

The second Report is available at
http://ec.europa.eu/information_society/newsroom/cf/document.cfm?action=display&doc_id=295

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Extracts of the report dealing with out of print and clearance mechanisms

6. WORKS OUT OF PRINT

For out-of-print works²¹ 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 reverted²² 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 RRO⁴ 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.

Authorisation to digitise the work

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

6.2 PROPOSED SOLUTION – KEY ELEMENTS²³

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 rightholder²⁴ 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.²⁵ 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.²⁶ 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 this Report; and (ii) Model Agreement II which encompasses online accessibility over open networks to *books in libraries*²⁷ 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;
- 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)²⁸

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.

8. THE MODEL AGREEMENT AUTHORISING LIBRARIES TO ALLOW ONLINE ACCESS TO OUT-OF-PRINT BOOKS²⁹

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 print³⁰. 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.

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 team³¹ was established to draft the Key Principles presented by the Copyright Subgroup and incorporated in this Report.

Notes

²¹ For audiovisual works: out of distribution.

²² The rights may or may or may not revert to the author depending on the contracts.

²³ 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.

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

²⁵ 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 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.

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

²⁷ 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

²⁸ 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.

²⁹ 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.

³⁰ For the definition of an out-of-print work see 6.1

³¹ 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