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ARROW

Report on legal framework
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Author(s)	*Olga Martin Sancho*

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[1] OJ L 79, 24.3.2005, p. 1.

Summary of the report on the legal framework

This report is comprised of five parts. The first one is an introduction to the work package, describing the principles on which the report is based, the methodology followed and the goals of the document. In the second part there is a description of existing copyright legislation, at EU and International level, under which it is permissible to operate. This includes the relevant legislative framework such as the Berne Convention as well as other milestones at European level in the field of digital libraries that eventually led to the work on orphan and out of print works done by the EU High Level Group on digital libraries.

The third block of the report identifies the key principles agreed by the mentioned High Level Group on how to deal with orphan and out of print works in Europe. Such principles are enshrined in the EU Memorandum of Understanding on orphan works signed in June 2008 by rightholders and cultural institutions, a joint report on several key issues and sector specific guidelines on due diligence for orphan works. These documents provide guidance to essential questions such as what is considered an orphan or an out of print works which is paramount to develop further solutions in Europe like Arrow.

The fourth part reviews what are the latest discussions and existing or planned initiatives to address the issue of orphan and out of print works. In the case of orphan works, several initiatives at national level are being envisaged to help identify rightholders after a diligent search has been done. This includes a German project to build a platform to clear rights of books in an automatic and standard way to facilitate digitisation of all types of books. Also in France, a system is under discussion following a recommendation on legislative changes by the French High Copyright Council. Moreover, the legal report also described other solutions envisaged in European countries such as The Netherlands, Scandinavian countries, the UK or Hungary.

Finally, the last part of the report on the legal framework makes some final remarks, mentioning also solutions outside of Europe. The report concludes with the idea that Arrow should be a neutral technical solution that will help both identify the rights owners and minimise the problem of orphan works in the future being capable to be used by any legal system which attempts to solve this problem by finding the “parents” of the “orphans”.

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1. Introduction

Arrow, the Accessible Registries of Rights Information and Orphan Works towards Europeana, is a project which comprises European national libraries, publishers and collective management organisations also representing authors. Arrow supports the European Digital Library by finding ways to identify rightholders, rights and clarify the rights status of a work including whether it is orphan or out of print. The report on the legal framework carried out by the partners within the third work package aims to identify the legal tools at European and International level to develop such mechanisms. The objective of this working document is to be as descriptive as possible, identifying existing legislation underpinning the project.

The legal package is based on the principles for orphan works and out of print works agreed by cultural institutions and rightholders within the High Level Group on Digital Libraries in 2008 and chaired by EU Commissioner Viviane Reding. The work of the group included a Memorandum of Understanding on orphan works to help cultural institutions to digitise books, films and music whose authors are unknown, making them available to the public online. The group also adopted a final report in which it endorsed a new model license to improve accessibility for works that are out of print or out of distribution.

The methodology followed to prepare the legal package has been to conduct a desk analysis for part of the work while for national experiences interviews have been completed with relevant parties. The coordinator of the group (Federation of European Publishers), together with other partners in the project, has actively participated in the work carried out by the High Level Group on digital libraries. Moreover, many other partners in Arrow have been actively involved in various ways in the work led by the Commission on digital libraries which is an indicator of the relevance and quality of the work achieved.

In general, the goals of this document are to:

(i) Provide an overview of the current legislative framework in Europe as well as existing clearance mechanisms to help identify the status of a work including planned initiatives at national level to improve such systems.

(ii) Provide guidance for the set up of ARROW Rights Information Infrastructure. The rights infrastructure will facilitate the search for rightholders and the identification of public domain works, orphan works, out of print works and other copyrighted works. This would help manage a risk in the digital library initiative allowing all types of works to be released for inclusion and access if only the rights information infrastructure existed.

2. Legislation in place.

In regards to existing legislation the document aims to describe the main International and European Copyright framework in general terms under which it is permissible to operate. The paper also points out other relevant milestones which highlight the specific work done in the area of orphan and out of print works by the High Level Expert Group set up by the European Commission. The increased interest in these issues and the willingness to have agreed and consensual solutions in Europe was the process that led to the existing milestones for orphan and out of print works at Community level.

2.1 Relevant International and EU legislative framework.

- Berne Convention for the Protection of Literary and Artistic Works.

The so called "Berne Convention" is the major international instrument on copyright/author's right and related rights. First signed in 1886, the last amendments incorporated to this treaty date to 1979. It is open to all States and up to 164 countries have signed so far (including all EU countries).

The Berne Convention contains a series of provisions that signing countries have to observe in their copyright laws such as the prohibition of copyright formalities. It also includes some provisions on exceptions and limitations. There are no exceptions for the benefit of libraries or for the re-use of orphan works in the Berne Convention. However, Article 9(2) allows countries to enact exceptions to the reproduction right provided the following steps are respected (i) certain special cases, (ii) provided that such reproduction does not conflict with a normal exploitation of the work and (iii) does not unreasonably prejudice the legitimate interests of the author. This provision is the so-called "three step test".

- TRIPS (Agreement on Trade –Related Aspects of Intellectual Property Rights).

The TRIPS Agreement from 1994 incorporates Article 9(2) of the Berne Convention and its importance lies in its enforceability. It requires that countries have national means to enforce IP rights and its provisions are directly enforceable by review panels of the World Trade Organisation. Furthermore, TRIPS addresses in the three-step test "any owner rights" (not just reproduction) and it refers to the interests of "right holders" (and not only authors). There is no reference to the issue of orphan works in TRIPS.

- WIPO Copyright Treaty ("WCT")

The 1996 WCT is a stand alone instrument that builds on the protection of the Berne Convention by providing additional protection in a number of areas while aiming to bring up to date international protection of copyright and related rights in the internet era. However there is no concrete reference to the use of orphan works.

While there is nothing specific referring to the use of orphan works, agreed statements, adopted by the diplomatic conference relating to Article 10 do however state that "It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention.

Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment." It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention".

- WIPO Performances and Phonograms Treaty ("WPPT")

Adopted in Geneva on December 20, 1996, the WPPT is an international copyright treaty signed by the member states of the World Intellectual Property Organization.

- Directive on the harmonisation of certain aspects of copyright and related rights in the information society (2001/29/EC).

The objectives of the Directive on the harmonisation of certain aspects of copyright and related rights in the information society (2001/29/EC) are to adapt legislation on copyright and related rights to reflect technological developments and to transpose into Community law the main international obligations arising from the two treaties on copyright and related rights adopted within the framework of the World Intellectual Property Organisation (WIPO).

The 2001/29 Directive adapts exclusive rights to the online environment and introduces a list of twenty exhaustive optional exceptions and one mandatory exception. The EU Directive harmonises the exclusive right of reproduction, making available to the public and distribution as follows:

Article 2: "*Reproduction right: Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part: (a) for authors, of their works (b) for performers, of fixations of their performances;(c) for phonogram producers, of their phonograms;(d) for the producers of the first fixations of films, in respect of the original and copies of their films;*
(e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite."

Article 3: "*Right of communication to the public of works and right of making available to the public other subject-matter;*
1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:
(a) for performers, of fixations of their performances;
(b) for phonogram producers, of their phonograms;
(c) for the producers of the first fixations of films, of the original and copies of their films;
(d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article".
Article 4: "*Distribution right;*
1. Member States shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise.

2. The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent".

In addition, the EC Directive introduces the "three step test", international standard on IPR limitations, into EU legislation:

Article 5(5): "*The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder"*.

Furthermore, the exceptions foreseen in the 2001 Directive in favour of libraries and archives are the following:

Article 5(2)c: "*Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases…(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*" .

Article 5(3) n: "*Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases…(n) use by 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 paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections".*[1]

There is no further specific exception foreseen in the 2001/29 Directive referring to the use of orphan works. However, in spite of the lack of a previous European legislative instrument in this field, a number of principles, recommendations and actions both at EU and National level have been developed to deal with the need to facilitate mechanisms that help identify the status of a work including both orphan and out of print works. There is also legally nothing that prevents further analysis of possible legal solutions at European level as long as these are in line with the three step test and subject to a previous diligent search of the rights holder**.**

[1] For more information on the implementation of the 2001/29 Directive and exceptions for libraries and archives see:

- European Commission commissioned study on the implementation and effect in Member States' laws of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society: Part II: Implementation of Directive 2001/29/EC in the Member States (IVIR Institute, February 2007) http://ec.europa.eu/internal_market/copyright/docs/studies/infosoc-study-annex_en.pdf

-WIPO commissioned study on copyright limitations and exceptions for libraries and archives (Kenneth Crews, November 2008)

http://www.wipo.int/edocs/mdocs/copyright/en/sccr_17/sccr_17_2.pdf

2.2 Other relevant milestones at EU level

- Communication from the Commission of 1st June 2005 - "i2010 – A European Information Society for growth and employment", COM (2005) 229 final.

The Commission launched a five year strategy to boost digital economy and digital libraries was one of the identified priorities including the development, management and usage of digital archives for text, image and sound.

- Communication from the Commission of 30th September 2005, "i2010: digital libraries", COM (2005) 465 final.

The Communication provided an overall strategy on digital libraries, and described the barriers for digitisation, online accessibility and digital preservation.

- Commission Recommendation of 24th August 2006 on the digitisation and online accessibility of cultural material and digital preservation (2006/585).

The Commission urged Member States to take measures varying from tackling copyright related issues, to establishing clear plans for digitisation and digital preservation, and stimulating public/private partnerships for financing digitisation.

Art. 6: improve conditions for digitisation of, and online accessibility to, cultural material by (a) creating mechanisms to facilitate the use of orphan works, following consultation of interested parties, (b) establishing or promoting mechanisms, on a voluntary basis, to facilitate the use of works that are out of print or out of distribution, following consultation of interested parties, (c) promoting the availability of lists of known orphan works and works in the public domain, (d) identifying barriers in their legislation to the online accessibility and subsequent use of cultural material that is in the public domain and taking steps to remove them;

- Council Conclusions of 13th November 2006 on the Digitisation and Online Accessibility of Cultural Material, and Digital Preservation (2006/C 297/01).

National cultural ministers stressed their willingness to work together on the identified issues including developing mechanisms to facilitate digitisation and online access of orphan works and out of print and out of distribution works, while fully respecting content owners' interests and rights.

- Commission Communication of 14th February 2007 on scientific information in the digital age: access, dissemination and preservation.

The Communication presented the Commission's vision on the scientific publishing system announcing a series of measures to improve access to scientific information across Europe.

- Commission Decision of 27th February 2006 setting up a High Level Expert Group on Digital Libraries (2006/178/EC).

The Commission set up a High Level Group in 2006 and renewed its mandate in 2009 to find ways forward to issues such as orphan works. The group brought together a wide range of

cultural institutions, publishers, technology firms and academics to find common solutions to some identified matters.

Moreover, the group worked for over two years to advise the Commission on how to address certain challenges at technical, legal and organisational level as well as to contribute to a shared strategic vision in Europe for digital libraries.

Adopting a pragmatic approach of work, the group was able to build bridges between the stakeholders and suggest common results. Therefore the importance of the work achieved by this group lies not only in the practical identification of solutions to specific problems but also in the results of shared solutions by the stakeholders involved.

Three sub-groups were active, on public-private partnership, on scientific information and on copyright issues. A series of reports with recommendations and agreed principles on the issue of clearance of orphan and out of print works were achieved by the copyright subgroup which include the (a) Memorandum of Understanding on Orphan Works, (b) Final report on Digital Preservation, Orphan Works and Out of Print Works and (c) Sector Specific Guidelines on due diligence criteria for orphan works.

- Commission Decision of 22nd March 2007 setting up the Member States' Expert Group on Digitisation and Digital Preservation (2007/320/EC).

The main task of this expert group, which is still ongoing, is to monitor the implementation of the Commission Recommendation and Council Conclusions.

- Commission Communication of 11th August 2008 to the Council, European Parliament, European Economic and Social Committee and Committee of the Regions on "Europe's cultural heritage at the click of a mouse. Progress on the digitisation and online accessibility of cultural material and digital preservation across the EU". COM (2008)513 final.

This Communication describes the progress achieved to create a digital library and the actions taken so far at national level to address legal, financial, organisational and technical issues. It confirms the Commission's commitment to support this goal through policy actions and funding and encourages both Member States and stakeholders to continue their efforts to make cultural heritage more accessible.

When the Communication refers to the progress made on online accessibility and orphan works, it acknowledges that actions at EU level – such as the ARROW project in which right holders and cultural institutions together address the creation of databases of orphan works - should be backed by national efforts.

Also relevant for ARROW is that one of the key areas for attention identified in the Communication are the need for legislative and practical mechanisms to facilitate the digitisation and accessibility of orphan works, and measures to encourage voluntary agreements for out of print works, taking into account cross border aspects.

Finally, the Communication emphasises the work achieved with stakeholders in the High Level Group on Digital Libraries bringing together a wide range of interested parties to find ways forward that are agreeable to as common solutions.

-European Parliament resolution of 27 September 2007 on i2010: towards a European digital library (2006/2040(INI)).

The Resolution from the European Parliament supports the initiative and welcomes the establishment of the High Level Group with stakeholders and the development of mechanisms to facilitate the search for right holders.

- Council Conclusions 20th November 2008 on the European digital library, Europeana (2008/C 319/07).

The Council Conclusions build on the previous ones from 2006 and pay particular attention to the governance and financing model of Europeana . The Council calls for continued support to bring content to Europeana, including protected works, by concluding agreements between the parties involved in full respect of copyright rules. It also reinforces the need to establish mechanisms to facilitate the use of orphan and out of print works.

3. Agreed principles and recommendations at European level developed within the framework of the European Commission High Level Group on digital libraries.

The High Level Group agreed on key principles on how to deal with orphan and out of print works in Europe.

3.1 EU Memorandum of Understanding on Orphan works (signed on 4th June 2008 by representatives of right holders and cultural institutions)[1].

Libraries, archives and rightholders signed a MoU on Orphan Works at European level on the 4th June 2008 recognising that older material may include works whose rightholders are not identifiable or, if they are, can not be located. It also emphasises the need for **adequate certainty** when institutions deal with orphan works while **respecting copyright and moral rights**. The Memorandum considers that **standards of due diligence** can be best established in collaboration between stakeholders and following this path, the signing institutions engaged on a voluntary basis in defining generic due diligence guidelines for the lawful use of orphan works. Furthermore, the MoU includes that a set of due diligence guidelines adopted by the High Level Group should be observed, to the extent applicable, when searching for rightholders.

Another important point is the agreement that a work can only be considered orphan if the relevant criteria, including the **documentation of the process,** have been followed without finding the right holders. The MoU also encourages and supports the further **development of tools to identify and mechanisms to facilitate the lawful use** of orphan works while advocating for measures suitable to prevent future orphan works.
Finally, the document calls for the promotion of the guidelines as acceptable standards to be used at national level. A revision of the implementation of the guidelines should take place after an appropriate period of time (twelve months being suggested as an appropriate period of

[1] Memorandum of Understanding on Orphan Works (http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/mou.pdf).

time). However cultural institutions look forward to the 'further development of mechanisms to facilitate the lawful use of orphan works' as agreed in clause 3 of the MoU[1].This clause relates to the development of tools such as ARROW and the importance to develop common tools to identify rightholders of works.

Some of the principles and recommendations from the MoU that could be implemented in ARROW are:

1. Tools to query European network of metadata sources to define the rights status (public domain, in print, out of print, orphan) and the right holders of a work and support diligent search.

2. Creation of an Orphan Work Registry.

3. Tools to enable right holders to declare rights ownership, thus enriching existing metadata sources.

4. Guidance to enhance existing metadata sources with rights and right holders information according to standard formats

3.2 Final Joint Report on Digital Preservation, Orphan Works and Out-of-Print Works: Model License on Out of Print Works[2].

The Copyright Subgroup of the High Level Expert Group (HLG) on Digital Libraries set up by the European Commission, published a final report on the 4th June 2008 identifying three priority areas in regards to IPR challenges. These were (i) digital preservation of cultural material, (ii) actions concerning out of print works and (iii) the status of orphan works including possible actions and arrangements concerning their identification.

→ The Copyright Subgroup used as a frame of reference the following high level principles, intended to govern all work items of their work:

"For right holders 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.

[1] According to clause 3 MoU the signing sectors agree " *to encourage and support the further development of tools to identify and mechanisms to facilitate the lawful use of orphan works, and to advocate for measures suitable to prevent future orphan works*"

[2] Final Report on Digital Preservation, Orphan Works, and Out of Print Works (http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/reports/copyright/copyright_subgroup_final_report_26508-clean171.pdf).

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 right holders 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"[1].

→ In regards to digital preservation, the report envisages a series of measures that foresee the possibility of creating multiple copies for preservation purposes, on account of the format-shifting that may be required for preservation due to technical obsolescence of recording media and the need for recurrent "migration" from one format to the next, and of providing for web-harvesting under national legal deposit legislation.

→ In the area of out of print works, the report suggests that on the basis of licenses these works, once digitised, could be made available to a larger range of users than is currently the case. The Copyright subgroup developed two Model Licenses to encourage this availability, one intended for use in secure networks, the other on line over open networks.

→ In the case of orphan works, **the approach recommended builds on the idea of mechanisms in each Member State having a minimum common denominator and mutual recognition of national solutions.** Once common core principles are established, including in the area of due diligence guidelines for identifying and/or locating right holders, material whose right holders have been considered diligently searched for should also be considered accordingly in the other Member States.

The report acknowledges that several voluntary and regulatory mechanisms to facilitate the use of orphan works exist in different countries and new proposals are pending. In order to make sure that there is a European and coordinated approach, **interoperable national solutions** would need to be mutually recognised.

The report recommends that Member States recognise mechanisms that fulfil **certain commonly accepted core principles**, such as:

(i) Cover all orphan works (those with unidentified or non locatable right holders), on the basis of a shared definition;

(ii) Include guidance on diligent search;

(iii) Include provision for withdrawal if the right holder reappears;

[1] Page 6 Final Report on Digital Preservation, Orphan Works, and Out of Print Works.

(iv) Offer cultural, not-profit establishments a special treatment when fulfilling their dissemination purposes, to be further discussed between stakeholders;

(v) Include requirement for general remuneration or remuneration if the right holder reappears.

The need for guidance and further development as to **what constitutes "diligent search**" is also highlighted and it is established that the best way to do so is in collaboration with right holders and cultural institutions.

The following parameters are suggested:

(i) Any solution for orphan works should be applicable to all kinds of protected works.

(ii) 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.

(iii) 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.

(iv) Guidelines or best practices specific to different kinds of work can be worked out by stakeholders in different fields.

(v) 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.

The report establishes the importance to develop sector specific guidelines on what sort of diligent search has to be done to identify the rightholders depending on the sector. But the **development of databases of information to search the status of works** has been identified just as necessary by the group.
For this purpose, the Copyright Subgroup developed a set of key Principles for Databases and Rights Clearance Centres for Orphan Works. Another proposal by the group was to develop a rights clearance procedure and a Rights Clearance Centre (or centres) to grant licenses to use orphan works. Finally, the inclusion of metadata in the digital works was advocated in order to diminish future orphan works.

3.3 Sector Specific Guidelines on due diligence criteria for orphan works[1].

As a result of the work developed by the Copyright Subgroup, Member States are encouraged to develop mechanisms enabling the use of orphan works against agreed terms and remuneration. However, according to the final report agreed by the subgroup the pre-condition for the use of orphan works is that a **diligent search** is performed prior to the use to identify and locate the right holders.

[1] http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/guidelines.pdf

In September 2007, the Commission invited representatives from cultural institutions and the creative sector to take part in four specific working groups (text audiovisual, visual/photography and music/sound) with the mandate to develop a set of guidelines for diligent search for rightholders. A joint report and four specific reports were delivered by the group in April 2008. The goal of the guidelines is to be **a generic practical tool, designed to assist in identifying and locating right holders**.

First of all, the guidelines provide with a general **definition of "orphan work"** and some sector specific definitions for text, music, visual/photography and audiovisual. Orphan works are defined a " ***A work is orphan with respect to rightholders whose permission is required to use it and who can either not be identified, or located based on diligent search on the basis of due diligence guidelines. This search must be in good faith (subjectively) and reasonable in light of the type of rightholder (objectively)".***

Moreover, the more sector specific definition for orphan works agreed by the working group of the print sector is: "*An orphan work is a work protected by copyright but the current owner is unknown or untraceable by diligent search. The current owner of the copyright might be the author or other creator, some other first owner if the rights (such as the author's employer - when applicable) or a publisher) or any right holder who is presumed to be the right holder according to the legislation or contractual agreement or any successor of the first owner*."

Secondly**,** some very helpful **principles** are foreseen in the guidelines **to identify and/or locate the rights holder,** which are that**:**

(i)The search is done prior to the use of the work

(ii) The search is done title by title or work by work

(iii)The relevant resources would usually be those of the country of the work's origin.

Some of the principles and recommendations from the final joint report and sector specific guidelines that could be implemented in ARROW are:

1. Provide standard communication formats to ask rightholders/agents for permissions according to the terms and conditions under which that work may be used by classes of users for specific purposes.

2. Provide standard communication formats to express licenses for usages of Out of Print works and Orphan works, according to the HLEG model licence if rightholders agree. The Arrow infrastructure is meant to assist cultural institutions in performing diligent search by aggregating and making available for querying a selection of the best resources available as agreed among stakeholders This means that the process of searching for rightholders will be modelled, following regular patterns, thus producing a single access point to begin the search, minimising time and costs of diligent search for cultural institutions. The Arrow model will be tested on books but it is meant to be scalable also to other domains.

4. Clearance mechanisms to facilitate the use of orphan works and out of print works (examples of existing and planned initiatives).

The document reviews what are the latest discussions and existing or planned initiatives to facilitate the re-use of orphan and out of print works. In the case of orphan works, several initiatives at national level are being envisaged to help identify rightholders after a diligent search has been done. This will interact with the Arrow model achieving the same goal through interoperable solutions. The legal package deals less with out of print works at national level but it does point out an instrument aimed to facilitate the digitisation and re-use of out of print works. This instrument is the two model licenses that have been developed by the High Level Group to facilitate access to out of print works by cultural institutions. The European Commission has also set up an expert working group of Member States that is looking into the issue at national level. Other recent development at national level is a Franco-German cooperation to explore further how to give access to orphan, out of print and copyright protected works in digital libraries.

4.1. With respect to out of print works

According to the agreed definition in the copyright sub-group of the Commission High Level Group on digital libraries, an "*Out of Print Work is a Work which the Rights holder has decided is no longer commercially available regardless of the existence of tangible copies of the Work in libraries and among the public*".

The Copyright subgroup proposed pragmatic solutions for out of print works, within the existing legal frameworks addressing mainly printed works. Moreover, the proposed solutions are based on four 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.

Following this, two Model Agreements for a license on digitisation of out of print works were presented by the group in the relevant report.

The first one (Model Agreement I) covers the digitisation and making available of copyright material to authorised users in secure networks only. Therefore this license is recommended if the relevant agreement between the library and the right holder is limited to providing access to authorised users in secure networks only.

The second license (Model Agreement II) encompasses online accessibility over open networks to books in libraries which the right holder has declared as no longer being commercialised as well as access to out-of-print works for authorised users in secure networks. This license is intended as a basis for the negotiations of an agreement when the right holders 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.

The Model Agreements are intended to be used as a basis for negotiations.

Principles and recommendations that could be implemented in ARROW:
1. Promote and support the creation of Rights Clearing Centres.
2. Redirection of users requests to appropriate Rights Clearing Centres or individual rights holders. Onix for licensing terms is also of relevance.

Arrow will facilitate the identification of the rights status of a work so it will deal with all types of works, whether orphan, out of print or in print. With regards to out of print works, this issue seems not to have been discussed to the same extend as the question of orphan works in the different countries. As far as France, for example, is concerned, no public debate on the identification of the status of out of print works has taken place yet. In Germany, the German collecting society, VG Wort, will give licenses for the use of both orphan and out of print works once the publishers has agreed (see below description of the German system).

4.2. With respect to orphan works:

The Arrow model should fit into each national case since it is a technical solution, neutral with respect to the legislative framework in place or already existing solutions adopted. Several initiatives are being developed and discussed at national level in Europe both at a legislative and at a more pragmatic level.

Germany and France have recently started a dialogue to share experiences regarding the inclusion of copyright-protected books in digital libraries. In both countries the respective national libraries and associations representing rightholders, which are also Arrow partners, are developing models to provide practical solutions to this issue. On the one side, the French model is based on Gallica 2[1], the legislative work from the French Supreme Copyright Council and their involvement in Arrow. On the other side, the German model is based on a collaboration of the German National Library and associations representing rightholders, the Libreka project[2] as well as the German involvement in Arrow. The Arrow project was also subject of discussion in the first French-German meeting in order to ensure an interoperable approach integrating all models under discussion.

In Germany, the German National Library, the Reproduction Rights Organisation (VG Wort) and the Publishers Association have set out in detail the possibilities for digital licensing between users and publishing companies, as well as an indemnity solution for libraries who want to digitise copyright protected works.

[1] Gallica is a unique search portal offering full text search engine with all types of books. In case of public domain works, there will be full access at no cost and for copyright protected works, direct free of charge access to the record, table of contents etc. So far, around 100 publishers and 10 e-distributors are participating.

http://gallica.bnf.fr/

[2] Libreka is a full text platform providing paid access to copyright protected books. There are around 104,000 titles to be searched from around 1,200 different publishers.

http://www.libreka.de/

The idea behind this project is to build a platform to clear rights of books in an automatic and standard way, combining several databases, in order to facilitate that libraries digitise and make these books available online. This systems aims to serve as a solution both for orphan and copyright protected out-of-print books for which it is necessary to obtain the individual approval of the rights holder in order to digitise and make them available.

The diligent search to be provided is the following:

1. The user (library) should check whether the book is not commercially available any more but still in copyright.

2. Contact the publishers who can (a) conclude a license agreement (b) refuse the license if he decides to make a digital version himself (c) refer the library to the rights holder (if e.g. he doesn't have the online rights) (d) refer the library to the collecting society (if e.g. it is impossible to trace the rights holder).

3. If the rights holder can not be found by the collecting society either, the books can be considered as orphan.

4. In order to digitise the book, the library will have to pay a fee to an escrow account of the collecting society. In return, the library will be indemnified by the collecting society from any claim of the rights holder.

The exact amount of the escrow fee is still being negotiated; most probably it will be calculated according to the books' publication date and be based on a certain percentage of the former retail price. Additionally, an opt-out option for the rights holder is provided, should he/she show up later. A statistics report on the use per title may be supplied to the publishers by the library.

Without such a platform, it would be very difficult to carry out mass digitisation projects because of the administrative costs involved for all parties. In a second stage, this platform should also be useful for other uses such as standardised acquisition of secondary licenses by academic authors for open access schemes.

It is expected that there is great interaction between the results from ARROW and the planned German platform. Ideally, this platform would serve as a local infrastructure for ARROW as far as German literary works are concerned. At the same time ARROW will support the diligent search and the information workflow within the German platform enhancing the rights information retrieval and management. Such a practical approach in Germany would not necessarily entail legislative changes however legislation to back up the model is not excluded.

In France, the High Copyright Council (CSPLA, including all cultural sectors, users and administrations) officially recommended a modification of the French IP law in order to establish compulsory collective management for orphan works in the written and visual art sectors, in particular for their digitization and making available online[1].

[1] Opinion of the special CSPLA Committee on orphan works adopted on April 10, 2008 under http://www.cspla.culture.gouv.fr/CONTENU/avisoo08.pdf

This recommendation is based on the observation that many wide-scale digitization projects are currently blocked by the existence of orphan works, which cannot be used without the authorization of right-holders. The Committee defined an orphan work as "a protected and disclosed work, whose copyright or neighbouring right holder(s) cannot be identified or located, despite proved and serious search".

Moreover, the existence of a greater number of orphan works in the written and visual sector, in comparison with the audiovisual and music sector, requires a specific solution for the former sector, whereas the latter can still use the current legal system consisting of asking permission to a court. Against this background the Committee aimed at finding a balanced solution aiming at both providing access to cultural heritage and respecting the essential copyright principles.

It therefore proposed to establish a compulsory collective licensing system for orphan works in the written and visual art sectors, in particular for their digitization and making available online. This flexible and dynamic mechanism should allow collecting societies accredited by the Ministry of Culture to provide for relevant authorizations, while granting legal security to users. The accreditation by the Ministry would be conditioned by usual criteria and by the participation to a common portal aiming at facilitating access and updating information on orphan works. The criteria to define orphan works and therefore the requirements to meet for a "proved and serious" research could be fixed by a committee with an equal representation of right-holders, users and the government.

The Committee also suggested taking measures to prevent the existence of orphan works in the future, notably through the development and access of information via the cooperation of all the creative chain. For exploitations involving particularly high investments, such as audiovisual adaptations, users would still have the possibility to use the current legal system by having their permission formally endorsed by a court, in order to reduce any judicial risk.

Besides the recommendation of this committee, a working group of the written sector led by the French RRO (CFC) explored concrete solutions to support searches. It suggested the following two-level scheme:

- As a first step, the user would have to perform elementary searches to limit the number of orphan works concerned by its request. Arrow will clearly fit at this point, helping to make the search.

- For the remaining works whose right-holders would remain unfound, the metadata should be published (on the internet on a dedicated website) for a period of time to allow the rights holders to claim their rights

- If not claimed, then the user would receive a temporary, renewable and non-exclusive permission to digitize and to give online access, against a remuneration to be negotiated with the collecting society and to be based on the compensation for the digitization and for the effective use of the work.

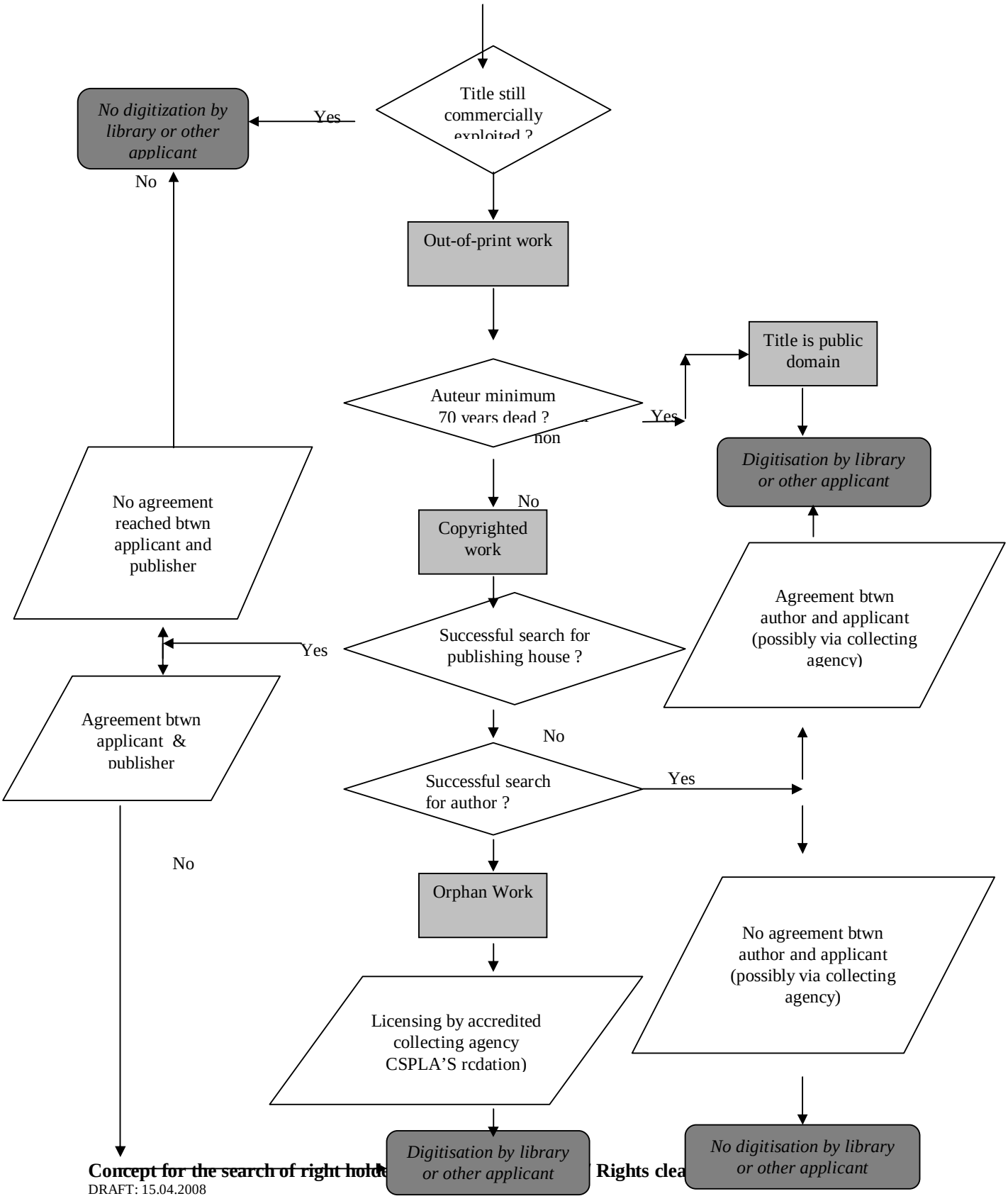
- The collecting society would therefore only endorse the research undertaken by the user by checking that it is meeting the official criteria fixed by the committee including right-holders, users and the government.

- The user would provide the collecting society with declarations of consultations (title by title) in order to determine whether complementary searches would need to be undertaken, as a second step, for the most consulted works.

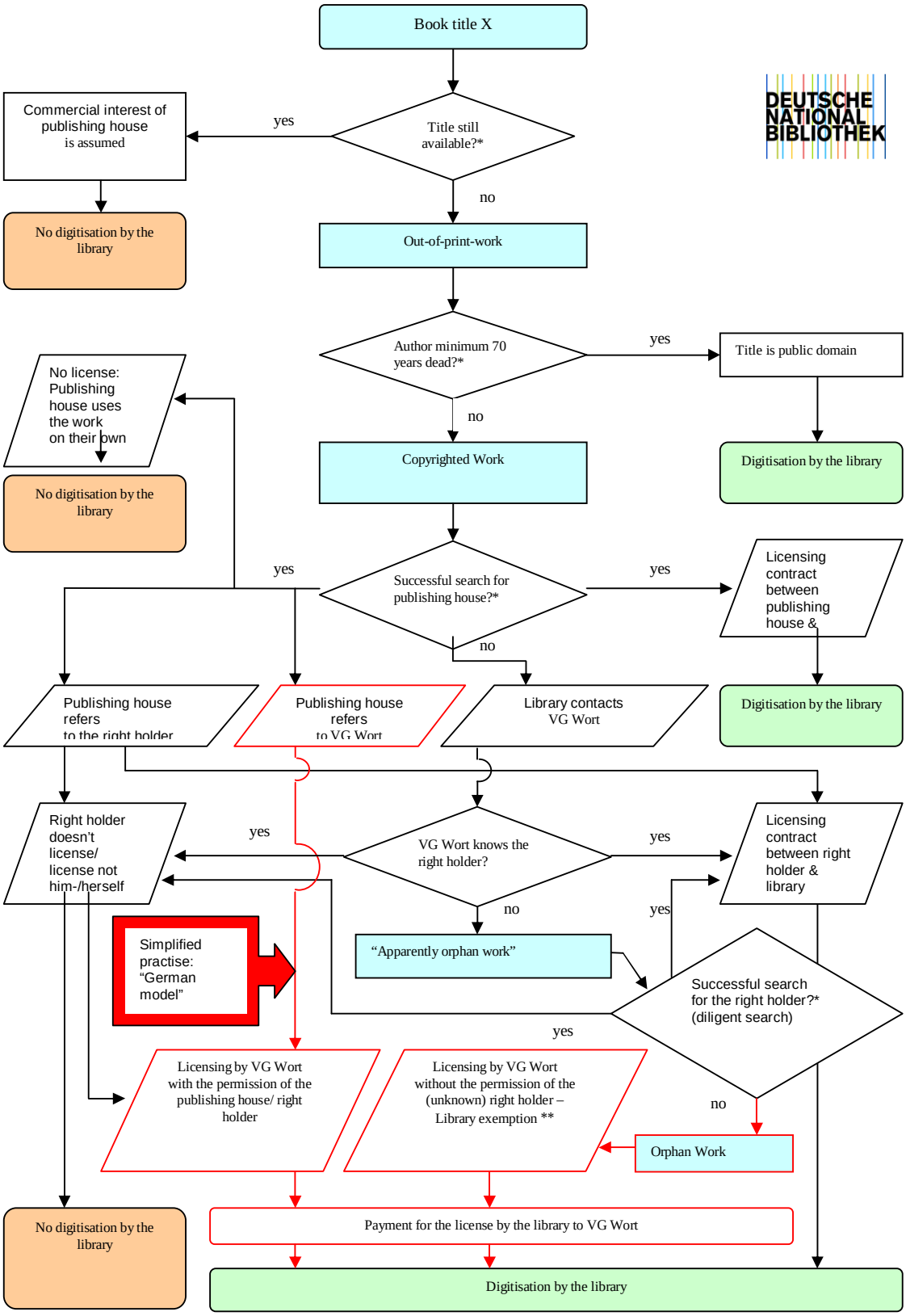
Despite the consensus among the members of the CSPLA, and in particular among cultural industries, the proposed solution by the CSPLA has not led to a legislative proposal and a concrete implementation, more than one year after its publication. However in its response to the European Commission Consultation on the Green paper on copyright in the knowledge society, the French government interestingly mentions that a legislative proposal could be put on the table in 2009. The French publishing community and the libraries would definitely welcome such an initiative.

Draft concept for the proposed French scheme
(recommended by the French working group of the written sector)

Book Title X



Concept for the search of right holde Rights clea



*Search by the library necessary; relevant criteria and tools are defined separately.
**If the right holder appears at a later time, s/he will be compensated by VG Wort.

Other approaches to orphan works already in place include the use of extended collective licensing mechanisms in the Nordic countries, the legislative solution in Hungary or voluntary agreement to facilitate the digitisation of orphan works such as the agreement reached in The Netherlands.

The Nordic Countries are making use of the legal technique of "extended collective licence" (ECL) to deal with the issue of unknown or non-locatable right holders. The ECL is a support mechanism for freely negotiated non-exclusive licensing agreements between an organisation representing rightholders and users in certain sectors for specific uses. Once the voluntary agreement is achieved and comes into force, it is extended to other rightholders that are not members of the organisation. These may have the option to opt out of the agreement or extend the mandate to the rights administrator on a non exclusive basis.

The elements of an extended license system are the following[1] :

1. The organization and the user conclude an agreement on the basis of free negotiations.
2. The organization has to be representative in its field.
3. The agreement is by law made binding on non-represented right owners.
4. The user may legally use all materials without needing to meet individual claims.
5. Non-represented right owners have a right to individual remuneration.
6. Non-represented right owners have in most cases a right to prohibit the use of their works.

In Denmark, an amendment to the Copyright law in 2008 foresees that an organisation be appointed to issue licenses for orphan works under the ECL agreement. This solution has been found on a voluntary basis and in total agreement with users (libraries) and rightholders.

In Norway during May 2009, Kopinor (the Norwegian Reproduction Rights Organisation) and the National Library of Norway signed an agreement regarding a pilot project for digital books on the Internet. Through the project, called Bokhylla.no ('Bookshelf'), the library will make all Norwegian books from the 1790s, 1890s and 1990s available on the Internet. All titles from the 1990s and some titles from the 1890s – together approx. 50.000 books – are under copyright. These books will not be prepared for print or download, but will be made available to Norwegian IP-addresses. The licensing agreement will be supported by the ECL and rightholders will be able to opt out of the agreement if they wish so.

The ECL system could be well suited to solve the issue of orphan works in the Nordic countries; however it is important to recall that the starting point is a voluntarily negotiated license with the rights holder where the necessary conditions are agreed.

In Hungary[2], new regulations regarding orphan works were included in the Copyright Act amended by Act CXII of 2008 in force since the 1st February 2009.

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[1] J. Liedes, H.Wager, T.Koskinen and S.LAHTINEN, *Extended Collective License,* leaflet prepared by the Ministry of Education, Finland (June 2001)

[2] 'Extended Collective Licensing Arrangements and their practicality for dealing with Orphan Works' Dr. Mihály Ficsor, President, Hungarian Copyright Council

http://www.mileproject.eu/ixbin/indexplus?record=ART480

These provide that administration of orphan works will be carried out by the Hungarian Patent Office, as set out in the detailed rules of decree No. 100/2009 (V. 8.) Korm, which are also in force since May 2009.

The Hungarian regulation specifies in Article 57(a)that it covers works in case the person who intends to use it « has made all those measures to find the author, which, in view of the nature of the work and manner of its use, are justified, and still has not succeeded to locate him".

Furthermore, Article 3 of the 2009 Decree describes how the requirements of due diligence search are fulfilled and proved. The user who submits a request to the Patent Office has to prove the following sources (depending on the nature of the work concerned), where available:

1. Search in the voluntary work registry of the Patent Office
2. Search in the databases of collective management organisations
3. Search in relevant databases on the internet
4. Search in databases suitable to find addresses or contact information of right holders
5. Search in databases of public libraries and archives
6. Request information from the relevant organisations I charge of publishing and disseminating the work.

If the above sources are not available, due diligence search may be done by publishing an advertisement in a newspaper of national distribution (depending on the nature of the work and the use). It is also foreseen in the Decree that in case of presumed foreign works, the same search should be conducted unless it creates a disproportionate burden. Furthermore, the Patent Office will have to maintain a publicly available online database of those works which have been recognised as orphan and for which a license has been granted including relevant data.

Once the conditions for an orphan work are fulfilled, the Patent Office will grant a non-exclusive license for the use of this works for five years. In case of non-commercial usage, the fee is paid after the rights owner has been located, while commercial users have to pay a fee that will be administered by the Patent Office. If the copyright owner were to reappear and he/she so requests it, the license could be withdrawn. However the licensee can continue to use the work for one year or until the license expires, whichever is shorter. The copyright owner can claim the remuneration for 5 years, otherwise the Patent Office will transfer it to the collective management organisation authorised to manage the rights of the owner of copyright in respect of other uses of his woks. In the absence of this, the remuneration will go to the National Cultural Fund.

However, the Hungarian legislation provides that the above process will not apply in case a collective management organisation has the right to authorise the uses of "orphan works" or collect remuneration for them on the basis of obligatory or extended collective management. In such cases, the distribution rules of the organisation will regulate how an owner of copyright may claim remuneration.

In **The Netherlands** they are handling orphan works through voluntary agreements. In this case the organisations representing the libraries (FOBID) and the right holders (VOI©E) have

reached agreement within the Digiti©E Committee (Digitisation of Cultural Heritage) in 2008 which will facilitate the use of orphan works.

Under the agreement, Dutch libraries, archives or museums can register their digitisation projects in a Registration Centre that has been set up by the rightholders associations.

If the project complies with the Registration Centre's conditions, then the institution can make use of the consent that is given for approved projects on behalf of the rightholders.
There will be no need to give further consent to digitise each work after consent has been given for the project and remuneration will be provided for digitisation and making available of online access to works.

The conditions for the digitisation projects to be accepted in the Registration Centre are the following[1]:

1. The institution is a publicly accessible library, museum, or archive which does not have as its object – either in general or with the activity concerned – the achievement of any direct or indirect economic or commercial advantage;

2. Only works forming part of the institution's collection will be digitised;

3. The works to be digitised form part of the Dutch cultural heritage;

4. The works to be digitised have been lawfully acquired by the institution;

5. To the best knowledge of the institution, the works to be digitised are no longer commercially available;

6. To the best knowledge of the institution, the rights regarding the works to be digitised are vested in Dutch right holders or in right holders who can be represented – or most of whom can be represented – by a Dutch collecting society;

7. It is difficult for the institution to contact individual right holders;

8. As long as no other arrangements have been made with or on behalf of the right holders, the digitised works shall be made available solely via a closed network on the premises of the institution and for the purposes of teaching, research, or private study;

9. In the case of visual material, the quality of the digitised representation shall be such that digital reproduction cannot have a negative effect on the opportunities for exploitation on the part of the original right holder;

10. Either on the institution's website or in some other way directly associated with display of the digitised works, right holders will be offered the opportunity to object to access being provided to the digital copy of the work in which they can still exercise copyright; Should such

[1] From the Declaration by the Digiti©E Committee (Digitalisation of Cultural Heritage Collections, 29 January 2009)

objection be received, the institution shall immediately cease the provision of access to the digital copy until agreement has been reached with the party or parties concerned;

11. The institution has notified the Registration Centre of its intention to digitise material and make it accessible and the Registration Centre has approved that intention because it complies with the considerations and basic principles of the present Declaration;

12. The institution has provided the Registration Centre with as complete a list as possible of the works that are to be digitised, including – insofar as these are known – the date of first appearance and the name or names of the author or authors .

For the time being the only ongoing project concerns newspapers published before 1995. Arrow will also play a role here in particular for the clearing centres.

Moreover, ongoing debates and planned changes to legislation are taking place in many European countries.

In the UK, the 1988 Act already provides that the Copyright Tribunal may consent to a person making a recording from a previous recording of a performance where the identity and whereabouts of the rights holder cannot be ascertained by reasonable enquiry, but this has never been extended beyond recorded performances to cover copyright works in general. The UK's IP Office has been consulting stakeholders on the possibility of a wider orphan works licence, which would almost certainly involve amendment of the 1988 Act, and the Copyright Licensing Agency (CLA) has proposed a draft Licence. The library community is also in the process of promoting draft exception based legislation to the UK's Intellectual Property Office. They hope that such proposed legislation will provide for the protection of the moral rights of authors, and that subsequent to reasonable activity to identify and inform rights holder groups of digitisation, that cultural organisations shall be able to copy orphan works without infringement. If a rightholder reappears the material shall be removed in line with best-practice "notice and takedown" procedure. Given that an indemnity based solution cannot entirely prevent legal action from rightholders under existing UK law, the UK Library Community does not believe that a collective licensing based solution is appropriate for publicly funded organisations. However, the UK government's recent Digital Britain report[1] has now proposed legislation to enable commercial schemes for dealing with orphan works to be set up on a regulated basis, which would mean that those obtaining orphan works licenses under such schemes would be protected from any risk of illegality.

The IP Office has expressed concerns about any apparent authorisation of criminal acts under s.107 of the UK Act, as well as civil copyright infringements, so express legitimation in the legislation of any permission or licences will be involved. Currently in existing UK law the UKIPO has made it clear at the moment that only the copyright owner themselves can issue a licence for a third party to use their content, which essentially rules out a collective licensing solution at present without amendment to the legislation.

However, it is thought the required amendments need not be particularly complex, in light of the precedent for recorded performances which already exists, and the British Copyright

[1] UK Government Report on Digital Britain 16th June 2009: http://www.culture.gov.uk/images/publications/digitalbritain-finalreport-jun09.pdf

Council has made a detailed Proposal to the IP Office (supported by Counsel's Opinion) showing exactly which (minor) amendments would be required : (1) to permit the Secretary of State (the relevant Minister) to certify orphan works licences; (2) to permit licensing bodies such as CLA to manage rights in orphan material, and (3) to provide for application to the Copyright Tribunal for permission where no licensing scheme exists.

It is likely that any statutory licences which may result will include provision for agreed 'due diligence', sufficient acknowledgment of the rights holder, and reasonable remuneration (at no more than normal commercial rates) should the rights holder eventually reappear.

Some other countries that have announced plans to consider amendments to their copyright laws to find a solution for orphan works are Slovenia, Estonia or Belgium.

In Slovenia, the Copyright and related rights act does not handle the orphan works separately. These works can (like the rest of the copyrighted materials which are not available on the market any more) be digitized from the library's own collection items for the purpose of preservation or lost copy substitution, but they cannot be made publicly available in any way. Article 50(sub 3-5) however provides ground for out of print works use exceptions which basically encompass the rights of the public archives, libraries and educational institutions:

(1) Subject to Article 37, the reproduction of a disclosed work shall be free, if made in no more than three copies and provided that the conditions of paragraphs 2 or 3 are fulfilled.
(2) A natural person shall be free to reproduce works:
1. on paper or any similar medium by the use of a photographic technique or by some other process having similar effects; and
2. on any other medium if this is done for private use, if the copies are not available to the public, and if this is not done for direct or indirect economic advantage.
(3) Publicly accessible archives and libraries, museums and educational or scientific establishments shall be free to reproduce, on any medium, works from their own copies for internal use, provided that this is not done for direct or indirect economic advantage.
(4) Reproduction according to the foregoing paragraphs shall not permitted with respect to written works to the extent of the whole book, graphic editions of musical works, electronic databases and computer programs, and in the form of building of architectural structures, unless otherwise provided by this Act or by contract.
(5) Notwithstanding paragraph 4, it shall be permissible, under the conditions of paragraph 1:
1. to reproduce a written work to the extent of the whole book, if such work is out of print for a minimum of two years;
2. to reproduce a graphic edition of musical work by means of handwritten transcription.

Current alternatives to the existing situation include (i) possible library initiative to suggest a special collective remuneration management system/agreement for out of prints and orphans (ii) possible initiative to suggest respective amendments to the current Copyright Act regarding this issue.

In **Belgium,** consultations on the issues of copyright were held since August 2007 with the Belgian Intellectual Property Office. The Belgian Advisory Board on IPR held a series of meetings starting in 2007 where the issues of orphan works was discussed and a detailed list of existing legal means and of possible future options was established. The section Copyright and

neighbouring rights of the Belgian Advisory Board on IPR met last on 27 May 2009 with the matter of the orphan works on the agenda. Finally, in **Estonia** there is a plan underway to make some further amendments to the Copyright Act in 2008-2009 in order to provide mechanisms to facilitate online access to orphan works.

Conclusion

In terms of legislative actions, many European countries are discussing or will be considering in the near future measures to facilitate the use of orphan works. However, this is not just a European trend but solutions are being explored in other parts of the world like in the US where the proposed legislation for orphan works[1] would introduce limitations on remedies if the infringer meets certain requirements, including proving that *the infringer performed and documented a reasonably diligent search in good faith to locate and identify the copyright owner before using the work, but was unable to locate and identify the owner*.

Other parts of the world outside Europe also have legal mechanisms in place for orphan works like in Canada[2] where an administrative body grants licenses on behalf of unlocatable copyright owners, after the user pays a royalty which is held in escrow until the owner reappears. It is also relevant to note that attempts are also being made outside of Europe to find practical approaches to this problem. For example, the Society of American Archivists recently publishes a statement of best practices for orphan works that can be a very helpful to guide to identify and locate rightholders of unpublished and published works[3].

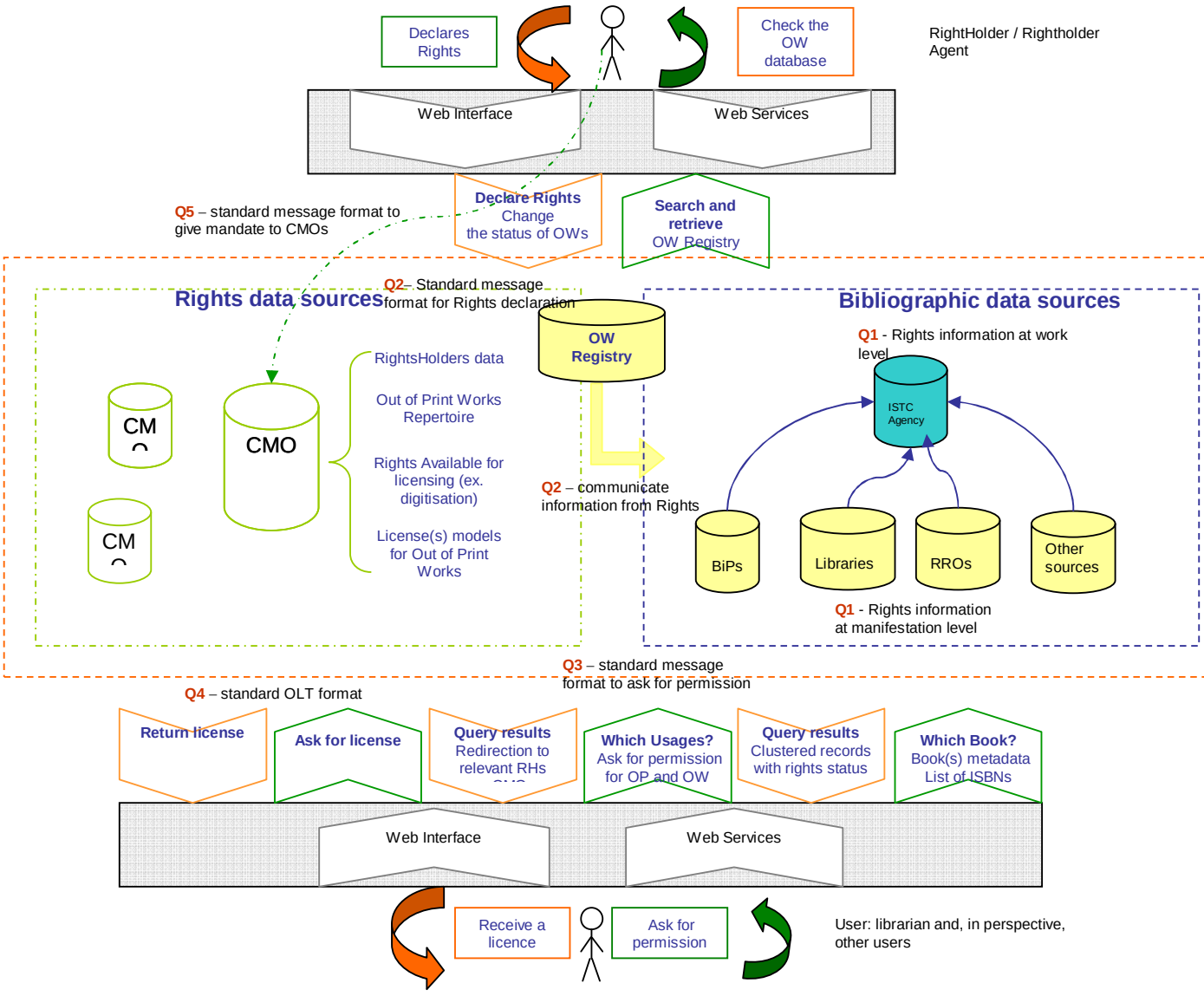
In Europe a lot of work on orphan and out of print works has been done and facilitated by the European Commission within the High Level Group on digital libraries and this could serve as the basis for further consideration of the matter at European level. In any case, and regardless of future legislation in the field of orphan works, Arrow should be a neutral technical solution that will help both identify the rights owners and minimise the problem of orphan works in the future being capable to be used by any legal system which attempts to solve this problem by finding the "parents" of the "orphans". Arrow should address the IPR issues in a comprehensive rights information infrastructure serving all the different players in the digital content value chain.

[1] Proposed US Act of 2008 and Shawn Bentley Orphan Works Act of 2008 (S.2913)

[2] http://www.cb-cda.gc.ca/unlocatable-introuvables/licences-e.html

[3] http://www.archivists.org/standards/OWBP-V4.pdf

"Possible" overview of the future Arrow rights information infrastructure:



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Memorandum of Understanding on Diligent Search Guidelines for Orphan Works (http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/mou.pdf)

Final Report on Digital Preservation, Orphan Works, and Out-of-Print Works (http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/reports/copyright/copyright_subgroup_final_report_26508-clean171.pdf)