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Exploring Article 8 of the Copyright Directive: Hope for Cultural Heritage

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Exploring Article 8 of the Copyright Directive: Hope for Cultural Heritage*

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Abstract:

Article 8 of the EU Copyright Directive addresses an issue that the cultural heritage sector has been struggling with for a long time: the exploitation of out of commerce works. Article 8(1) enables CHIs to agree non-exclusive licenses for non-commercial purposes with collective management organisations (“CMOs”) for copyright works which are out of commerce, and this extends to works for which the right holders have not mandated the CMO. Article 8(2) expands this, and enables CHIs to make out of commerce works available for non-commercial purposes *without* seeking the rightholder’s permission where there is no representative CMO.

This paper will address the rationale behind Article 8 of the Copyright Directive, focusing on the issue of out of commerce works for CHIs; the legal issues that are likely to arise for CHIs seeking to utilise the Directive, focusing on the legal uncertainty of terms within the Directive; and whether Art 8 signals a fundamental change within copyright law and conflicts with the Berne Convention; and the practical implementation issues, including the prior publication requirement and how rightholders opt-out, as well as issues with CMO mistrust, and a lack of CMOs in certain sectors.

The motivation and hope behind Art 8 is that it will significantly transform the manner in which CHIs can exploit the out of commerce works in their collections. This will hopefully widen public access considerably to these historically “lost” collections. There is concern, however, that there are legal and practical issues in relation to Art 8 that could result in effective implementation by CHIs being difficult. The paper will recommend that the definitions of “out of commerce works”, “customary channels of commerce”, “reasonable effort” and “non-commercial purposes” need to be clarified, for CHIs to be able to benefit from Article 8, as the current terms are vague. Copyright will also need to address the meaning of “commercial” and “non-commercial” for Art 8 to be effective, as this understanding sits at the core of the provision. It would be unfortunate for a lack of clarity of key terminology to impact upon the implementation of Art 8, when it offers legal mechanisms that CHI need to enable public access to these vast collections of cultural heritage.

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Introduction

The newly passed EU Copyright Directive¹ has been controversial, with mixed opinions on many of its articles. Articles 15 and 17 have been subject to the most controversy, both prior to the adoption of the Directive and afterwards. Articles 15 (formerly Article 11), being the press publishers' right, and 17 (formerly 13), being a requirement that online content-sharing service providers be responsible for the copyright content that their users upload, have received the strongest criticism², with some commentators stating that they risk a "serious encroachment"³ on core legal rights. Likewise, David Kaye, the UN's Special Rapporteur on Human Rights has also expressed his opposition prior to the Directive being passed, concerned that the Directive imposes "a regime of active monitoring and prior censorship of user-generated content that is inconsistent with Article 19(3) of the ICCPR [International Covenant on Civil and Political Rights]."⁴

Some organisations within the creative industries have also expressed strong support for the Directive in general, although again this has been varied. The Chief Executive of BPI, the British Phonographic Industry, commented after the Directive was adopted that it addresses "the relationship between user-upload platforms and the creative community, whose content turbocharges those services."⁵ Whilst there has been widespread criticism of the proposed Directive, there has also been widespread support. For example, the Publishers Association, the Booksellers Association and the Society of Authors have all welcomed the Directive⁶.

¹ Copyright and Related Rights in the Digital Single Market Directive (EU) 2019/790

² See for example in relation to concerns raised about the "link tax" and the risk that the internet will be subject to filtering and censorship,

Tambiana Madiaga, 'Briefing Paper: Copyright in the digital single market' (European Parliamentary Research Service, 2019), 1

<[http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/593564/EPRS_BRI\(2016\)593564_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/593564/EPRS_BRI(2016)593564_EN.pdf)>

accessed 25 September 2019

³ M.R.F. Senftleben, Christina Angelopoulos, Giancarlo Frosio, Valentina Moscon, Miquel Peguera, Ole-Andreas Rognstad 'The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform' (2018) *EIPR* 40(3) 149, 152

⁴ David Kaye, 'Mandate of the Special Rapporteur on the promotion and the protection of the right to freedom of opinion and expression', 13th June 2018, 7. <<https://www.documentcloud.org/documents/4516209-OL-OTH-41-2018.html>> accessed 1st June 2019

⁵ British Phonographic Society, 'BPI Response to EU Copyright Directive', (BPI, 26th March 2019)

<<https://www.bpi.co.uk/news-analysis/bpi-response-to-eu-copyright-directive/>> accessed 30 April 2019

⁶ Charlotte Eyre, 'Trade bodies welcome European Parliament's vote for draft copyright directive' (The Bookseller, 12th September 2018) <<https://www.thebookseller.com/news/trade-bodies-praise-european-parliament-s-vote-copyright-directive-864286#>> accessed 19 October 2018.

Copyright is often regarded as a barrier to the daily activities of cultural heritage institutions (“CHIs”) in sharing their large collections with the public.⁷ The provisions in relation to CHIs⁸ have been met with considerable support from the CHI sector,⁹ regarded as a “window of opportunity” to utilise these works when the rightholder does not do so.¹⁰ The European Film Agency of Directors for example supported the Directive on the basis it promotes cultural heritage, film education, and transparency and fairness online.¹¹

Article 8 of the Directive addresses an issue that the cultural heritage sector has been struggling with for a long time: the exploitation of out of commerce works. Article 8 has received less attention than Articles 15 and 17; however it provides a potentially huge opportunity for CHIs. Article 8(1) enables CHIs to agree non-exclusive licenses for non-commercial purposes with collective management organisations (“CMOs”) for copyright works which are out of commerce, and this extends to works for which the right holders have not mandated the CMO. Article 8(2) expands this, and enables CHIs to make out of commerce works available for non-commercial purposes *without* seeking the rightholder’s permission where there is no representative CMO. Articles 9, 10 and 11 of the Directive are relevant to Article 8, concerned with cross-border uses; publicity measures; and stakeholder dialogue, respectively, of the licensing mechanism to facilitate the access to out of commerce works.

It is helpful to understand how such copyright works may become out of commerce, and the potential scale of the issue. An “out of commerce” work is a work that is subject to copyright and “is not available to the public through customary channels of commerce, after a reasonable effort has been made to determine whether it is available to the public”.¹² A

⁷ See Ronan Deazley and Victoria Stobo ‘Archives and Copyright: Risk and Reform’ (CREATe Working Paper, 2013) <<http://doi.org/10.5281/zenodo.8373>> accessed 14 June 2019; and Merisa Martinez and Melissa Terras, ‘Not Adopted’: The UK Orphan Works Licensing Scheme and How the Crisis of Copyright in the Cultural Heritage Sector Restricts Access to Digital Content. (2019) *Open Library of Humanities* 5(1) <<http://doi.org/10.16995/olh.335>>

⁸ Article 2(3) of the EU Copyright Directive stipulates that “‘cultural heritage institution’ means a publicly accessible library or museum, an archive or a film or audio heritage institution”.

⁹ See for example “For many memory institutions it has been obvious for a long time that the current EU copyright framework is not fit for purpose to enable them to fulfil their missions in the digital environment.” – Julia Fallon, ‘Public Consultation on EU Copyright Rules’ (Europeana, 19th February 2015) <<https://pro.europeana.eu/page/public-consultation-on-eu-copyright-rules>> accessed 2nd February 2019

¹⁰ Vicky Breeman, ‘Final Report of the Comité des Sages on Digitisation of European Cultural Heritage’, in European Audiovisual Observatory, ‘IRIS plus 2012-2: The Lifespan for Copyright of Audiovisual Works’ (European Audiovisual Observatory, 2012) p. 25

¹¹ The European Film Agency Directors, ‘Film education, audiovisual heritage, and a fair, diverse and transparent online marketplace in the 21st century: European Film Agency Directors (EFADs) position on the European Commission Proposal for a Directive on Copyright in the Digital Single Market’ (European Film Agency Directors, 22nd January 2018) <<http://www.efads.eu/common-positions/european-film-agency-directors-efads-position-on-the-european-commission-proposal-for-a-directive-on-copyright-in-the-digital-single-market.html>> accessed 30th March 2019

¹² Article 8(5) of the EU Copyright Directive

copyright work may become unavailable commercially for the following reasons¹³: commercial abandonment (it is cost prohibitive to supply the work); strategic abandonment (the rightholder begins to sell an upgraded or updated version and ceases supply of the older version, as in computer games); temporary abandonment (when the rightholder intends to make it commercially available in the future); unknown authorship; and unlocatable ownership.¹⁴ This notion of “commercial abandonment” can also be understood as a form of ‘dedicating’ works to the public domain, whereby the copyright holder or author wishes the public to make use of the work however they choose. This dedication should be understood as more ethical than legal. Johnson has concluded that copyright owners cannot cause their copyright “to cease to exist” through public dedication (on an examination of UK law), and rather that such a declaration generates a licence that can be withdrawn in the future.¹⁵ A work may also become out of commerce as a result of the author deciding not to continue disseminating their works, and indeed this can constitute a moral right of withdrawal¹⁶, as in French law¹⁷.

This issue of out of commerce works is not solely a European one, but a global one, also affecting countries such as the USA¹⁸. As the notion of “out of commerce” is relatively new within copyright literature, there are not clear statistics relating to the number of works held within CHIs that are out of commerce. Indeed, as will be discussed, how the notion of “out of commerce” is interpreted will significantly impact upon the number of works that are out of commerce. The number of works that are out of commerce will also vary greatly depending on the nature of the work, with audiovisual works such as broadcast TV episodes¹⁹ and films,

¹³ *These are examples of how copyright works may become deliberately or accidentally out of commerce due to the action or inaction of the rightholder. There are instances in which a work may forcibly be taken out of commerce by a State, for an example see Jonathan Liljeblad, ‘The Hopi, the katsinam, and the French courts: looking outside the law in the repatriation of Indigenous cultural heritage’ (2017) International Journal of Heritage Studies 23(1), 41, 43 < DOI: 10.1080/13527258.2016.1232745 > “French case law allows items to be taken out of commerce if they belong to a community that still exists, they hold sacred value, and the community refuses to sell them”*

¹⁴ *See for a detailed discussion* Dennis W. K. Khong, ‘Orphan Works, Abandonware and the Missing Market for Copyrighted Goods’ (2007) *Int J Law Info Tech* 15 (1)

¹⁵ Philip Johnson, ‘Dedicating’ Copyright to the Public Domain’ (2008) *MLR* 71(4)

¹⁶ Maurizio Borghi and Stavroula Karapapa, *Copyright and Mass Digitization* (OUP 2013), 89

¹⁷ French Intellectual Property Code, Art L121-4

¹⁸ Rita Matulionyte, ‘10 years for Google Books and Europeana: copyright law lessons that the EU could learn from the USA’ (2016) *Int J Law Info Tech* 24 (1) 44, 50

¹⁹ *For example, there are many episodes of the iconic UK TV programme Doctor Who missing from the archives, see* BBC, ‘Re-created Lost Doctor Who episode gets YouTube premiere!’ (BBC, 2nd October 2019) <<https://www.bbc.co.uk/blogs/doctorwho/entries/36e9525b-1e11-4acb-b39d-247189c77142>> accessed 2nd October 2019

and sound recordings²⁰ being particularly vulnerable to becoming out of commerce and subsequently “lost” to the public. Digital audio archives are especially vulnerable, with concerns that large amounts of sound heritage could be inaccessible in the future, due to copyright and related ownership issues, and whether the public is able to access these archival recordings.²¹

Digitisation involves capturing works in a digital format, to preserve the contents for the future, and to enable people to access these works easily off-site via a CHI’s website or online platform. Mass digitisation is the digitisation of CHI collections on an “industrial” scale²², running into millions of individual heritage works. As Thylstrup notes, this mass digitisation facilitates stronger and wider preservation of the past through historical documents and works, whilst simultaneously widening public access to these collections once digitised.²³ The time demands and cost to CHIs of digitising works is substantial. This is heightened in regard to out of commerce works, as the fact they are protected by copyright has historically required a CHI to seek copyright permission from each individual owner, or for the CHI to adopt a more risk-tolerant approach and make use of the work without the rightholder’s permission.

The technical cost itself of digitally capturing and archiving cultural heritage has significantly decreased over the years, whilst copyright clearance remaining excessively costly and burdensome for CHIs.²⁴ The cost to digitise an individual work varies hugely depending on the format of the work, the intention of the preservation and digitisation; any damage done to the work, etc. The European Commission has collated some anecdotal accounts of the costs to CHIs, which cannot be assumed to be the average costs but are indicative: up to €100 per book; up to €50 per poster; up to €1.70 per photograph; and approximately around €27 for a short amateur film.²⁵ Copyright clearance therefore presents a substantial and cost prohibitive barrier for many CHIs.

²⁰ See “Global archival consensus is that we have approximately 15 years in which to save our sound collections by digitising them before they become unplayable and are effectively lost.” – British Library ‘Save our Sounds is the British Library’s programme to preserve the nation’s sound heritage’ (British Library, 1st May 2019) <<https://www.bl.uk/projects/save-our-sounds>> accessed 23rd June 2019

²¹ See Silvia Calami, Veronique Ginouvès, Pier Marco Bertinetto, ‘Sound Archives Accessibility’ in Karol Jan Borowiecki, Neil Forbes and Antonella Forbes (eds), *Cultural Heritage in a Changing World* (Springer Open 2016)

²² Nanna Bonde Thylstrup, *The Politics of Mass Digitization* (MIT Press 2019) 4

²³ Thylstrup (n.21) 4

²⁴ Victoria Stobo, Kerry Patterson, Kristofer Erickson, and Ronan Deazley, “‘I should like you to see them some time’”: an empirical study of copyright clearance costs in the digitisation of Edwin Morgan’s scrapbooks.’ (2018) *Journal of Documentation*, 74(3) <doi:10.1108/JD-04-2017-0061>

²⁵ See European Commission, *Impact Assessment on the modernisation of EU copyright rules*, (Commission Staff Working Document 301, 2016), 3.4.1

This copyright clearance cost barrier is increased when the enormous number of these works is considered. For instance, commenting on the Orphan Works Licensing Scheme, Martinez and Terras have noted that whilst the cost per individual work under the licensing scheme might be low, the cost becomes prohibitive when the number of works in the CHI is considered, sometimes hundreds of thousands or even millions of individual works.²⁶ This is part of the motivation for the licensing mechanisms for CMOs and CHIs within Art 8, to minimise these unnecessary costs for CHIs as far as possible.

This paper will address the following: (i) a summary of Article 8 and the concept of collective licensing and the licensing mechanisms available, focusing on the presumption of representation and ECL;(ii) the rationale behind Article 8 of the Copyright Directive, focusing on the aims of the Directive; the issue of out of commerce works for CHIs; the Google Books project; and the 2011 Memorandum of Understanding; (iii) the legal issues that are likely to arise for CHIs seeking to utilise the Directive, focusing on the legal uncertainty of terms within the Directive; and whether Art 8 signals a fundamental change within copyright law and conflicts with the Berne Convention; and (iv) the practical implementation issues, including the prior publication requirement and how rightholders opt-out, as well as issues with CMO mistrust, and a lack of CMOs in certain sectors.

The motivation and hope behind Art 8 is that it will significantly transform the manner in which CHIs can exploit the out of commerce works in their collections. This will hopefully widen public access considerably to these historically “lost” collections. There is concern, however, that there are legal and practical issues in relation to Art 8 that could result in effective implementation by CHIs being difficult. The paper will recommend that the definitions of “out of commerce works”, “customary channels of commerce”, “reasonable effort” and “non-commercial purposes” need to be clarified, for CHIs to be able to benefit from Article 8, as the current terms are vague. Copyright will also need to address the meaning of “commercial” and “non-commercial” for Art 8 to be effective, as this understanding sits at the core of the provision. It would be unfortunate for a lack of clarity of key terminology to impact upon the implementation of Art 8, when it offers legal mechanisms that CHI need to enable public access to these vast collections of cultural heritage.

A summary of Article 8

Before discussing the rationale behind Article 8, it is necessary to examine the text of the Directive. Article 8(1) states the following:

“Member States shall provide that a collective management organisation, in accordance with its mandates from rightholders, may conclude a non-exclusive licence for non-commercial purposes with a cultural heritage institution for the reproduction, distribution, communication to the public or making available to

²⁶ Martinez and Terras (n.7)

the public of out-of-commerce works or other subject matter that are permanently in the collection of the institution, irrespective of whether all rightholders covered by the licence have mandated the collective management organisation, on condition that:

- (a) the collective management organisation is, on the basis of its mandates, sufficiently representative of rightholders in the relevant type of works or other subject matter and of the rights that are the subject of the licence; and*
- (b) all rightholders are guaranteed equal treatment in relation to the terms of the licence.*

The second option, set out in Article 8(2), relates to the situation in which there is no sufficiently representative CMO²⁷:

2. *Member States shall provide for an exception or limitation to the rights provided for in Article 5(a), (b), (d) and (e) and Article 7(1) of Directive 96/9/EC, Articles 2 and 3 of Directive 2001/29/EC, Article 4(1) of Directive 2009/24/EC, and Article 15(1) of this Directive, in order to allow cultural heritage institutions to make available, for non-commercial purposes, out-of-commerce works or other subject matter that are permanently in their collections, on condition that:*

- (a) the name of the author or any other identifiable rightholder is indicated, unless this turns out to be impossible; and*
- (b) such works or other subject matter are made available on non-commercial websites.*

This provides two options to CHIs wishing to make use of the out of commerce works in their collections. The first option, as set out in Article 8(1), is to agree a non-exclusive license with a CMO, which extends beyond the works the CMO represents, i.e. works created by copyright holders who have not mandated the CMO to represent them. This option requires there to be a “sufficiently representative” CMO in operation, an issue which will be discussed in more depth below. Art 8(6) states that the CHI should seek a license from a CMO that is “representative for the Member State where the cultural heritage institution is established.”

For the second option as set out in Art 8(2), CHIs can make the out of commerce works held in their permanent collections available for non-commercial purposes *without* concluding a license, where there is no sufficiently representative CMO as in Art 8(1). This route also requires that the work be attributed where possible, and that the CHI only makes the out of commerce works available on non-commercial websites. For either option, the Directive is clear that Art 8 does not apply when there is evidence that the set of out of commerce works

²⁷ Article 8(3) of the EU Copyright Directive: *Member States shall provide that the exception or limitation provided for in paragraph 2 only applies to types of works or other subject matter for which no collective management organisation that fulfils the condition set out in point (a) of paragraph 1 exists.*

“predominantly” consists of third country works, unless the CMO is “sufficiently representative” of the rightholders of the relevant third country.”²⁸

Which type of licensing scheme?

Briefly, it is essential to explore the possible licensing mechanisms that Member States may choose to implement in relation to out of commerce works. The Directive allows Member States to determine the specific licensing mechanisms that it will implement in relation to Art 8.²⁹ Extended collective licensing (“ECL”) schemes are the presumed licensing mechanism that Member States will adopt in relation to Art 8. They have already been implemented in the national legislation of some Member States prior to the Directive. Another option is a presumption of representation, in which rightholders are legally presumed to have chosen to be represented by a given collecting society.³⁰ Directive 2014/26/EU, relating to music only, does not prohibit a presumption of representation³¹, and as such, Member States may choose to adopt this presumption of representation in relation to all types of out of commerce works if they wish to. There are other potential options, but it is presumed that ECL will be chosen, as it is the most compatible with the Directive’s provisions.

The presumption of representation

The presumption of representation is a legal assumption that all rightholders have chosen to be represented by a relevant CMO. It is assumed that the relevant CMO represents the rightholders in that particular field, and therefore may grant “blanket licences” to users which extend to all rightholders, even those who have not explicitly mandated the CMO. The key difference between the presumption of representation and an ECL is that the rightholders cannot opt-out if they wish to do so as they can under an ECL, and usually have no other legal recourse than to issue legal proceedings against the CMO.³² As the Directive requires the licensing mechanism chosen to be compatible with the Directive as a whole, the legal presumption of representation seems a very unlikely choice for Member States to adopt. This is due to the fact that the rightholder “opt-out” requirement in Art 8 would clash with the inability to do so under a legal presumption of representation.

ECL licensing

²⁸ Article 8(7) of the EU Copyright Directive

²⁹ Recital 33 of the EU Copyright Directive

³⁰ Romana Matanovac Vučković, ‘Implementation of Directive 2014/26/EU on Collective Management and Multi-Territorial Licensing of Musical Rights in Regulating the Tariff-Setting Systems in Central and Eastern Europe’ (2016) *IIC* 47(1) 28, 30

³¹ Vučković (n.30) 55

³² van Gompel, S. Unlocking the Potential of Pre-Existing Content: How to Address the Issue of Orphan Works in Europe? 38(6) *IIC* 669 (2007), 689

The concept of collective licensing originated in the Nordic countries, and this notion of collective bargaining has a strong history in these countries.³³ECL systems were developed in the Nordic countries in the 1960s to deal with licensing of copyright works for radio and TV broadcasting, notably Norway and Sweden, and have been substantially successful.³⁴ Extended collective licensing enables a user to negotiate with an organisation known as a collective management organisation for a license on behalf of multiple rightholders. This removes the administration, time and effort burden of individually locating and negotiating with individual rightholders. They differ to the presumption of representation above in that rightholders may opt-out if they wish to do so, and this opting out must be easy for the rightholder.

ECLs assume that the rightholders of a particular category have granted the collective management organisation authorisation to collectively manage and negotiate the licenses. They therefore require a high level of membership from that specific group of rightholders. ECL schemes extend the licence granted by a CMO to a user, such as a CHI, to include works that the CMO does not manage³⁵. This includes works by individuals who are non-members of the CMO.

The “extension effect” to allow the CMO to grant a licence on behalf of non-members presents a clear issue of choice in allowing the CMO to represent the copyright work. It can however be beneficial: as the CMO can “enjoy benefits from economies by the increase in the scale of its operation” and benefit can be passed on to right holders as increased royalties; and for users of copyright works (such as CHIs) the legal risks are reduced “since the user is shielded from claims initiated by unrepresented right holders.”³⁶A likely result of ECL schemes between a CMO and a CHI is that it will unduly prejudice authors whose works were published a long time ago but are still viable commercially. This is because older works are more likely to be out of commerce.³⁷

³³ Zijian Zhang, ‘Transplantation of an Extended Collective Licensing System – Lessons from Denmark’ (2016) *IIC* 47(6) 640, 643

³⁴ Zhang (n.33)

³⁵ Lucie Guibault and Simone Schroff, ‘Extended Collective Licensing for the Use of Out-of-Commerce Works in Europe: A Matter of Legitimacy Vis-à-Vis Rights Holders’ (2018) *IIC* 49(8) 916, 918

³⁶ Thomas Riis, Ole Andreas Rognstad, and Jens Schovsbo, ‘Collective Agreements for the Clearance of Copyrights – The Case of Collective Management and Extended Collective Licenses’ in Thomas Riis (ed.) ‘User Generated Law. Reconstructing Intellectual Property Law in a Knowledge Society’ (Edward Elgar 2016) 64

³⁷ Marie-Christine Janssens and Ran Tryggvadottir, ‘Facilitating Access to Orphan and Out of Commerce Works to Make Europe’s Cultural Resources Available to the Broader Public’ (2014), 32-33 < <https://ssrn.com/abstract=2538097> or <http://dx.doi.org/10.2139/ssrn.2538097> > accessed 1st November 2018

Whilst there are still rightholders concerns relating to ECLs, the ability to easily opt-out of the license means that this is a far more favourable option for rightholders than a presumption of representation.

Rationale behind Art 8

Aims of the Directive

The Directive wishes to ensure that CHIs who have out of commerce works in their collections can allow the public to access these works, whilst still ensuring that rightholders have the right and ability to exclude their works from the operation of both the licensing scheme (Art 8.1) and the exception (Art 8.2) if they wish. These measures are essential as part of a “functioning copyright framework that works for all parties [which therefore] requires the availability of proportionate, legal mechanisms for the licensing of works or other subject matter.”³⁸

As the Directive explains “[c]ultural heritage institutions should benefit from a clear framework for the digitisation and dissemination, including across borders, of works or other subject matter that are considered to be out of commerce for the purposes of this Directive.”³⁹ The recital also recounts the issues that CHIs face when dealing with such out of commerce works, noting “...obtaining the prior authorisation of the individual rightholders can be very difficult. This can be due, for example, to the age of the works or other subject matter, their limited commercial value or the fact that they were never intended for commercial use or that they have never been exploited commercially.” The Directive, through Article 8, therefore aims to ensure that there are legal mechanisms implemented in each Member State that allow CMOs to license these out of commerce works to the CHIs.⁴⁰

In discussing their reasons for the way Article 8 is structured, the European Commission explained that they considered the out of commerce works provisions applying to books and journals only (as in the 2011 Memorandum of Understanding Key Principles on the Digitisation and Making Available of Out-of-Commerce Works), but that that it was “deemed necessary to address the licensing of out-of-commerce works in all sectors”, and therefore Art 8 subsequently addresses all types of out of commerce works.⁴¹

The problem of out of commerce works for CHIs

For the majority of CHIs, the cost and complexity involved with determining the copyright status of a work and its copyright holder, and then locating that copyright holder and negotiating with them, has proven to be simply unworkable. As Jansens and Tryggvadottir note, the large numbers of works to be licensed and the complexity and cost involved with

³⁸ Recital 44 of the EU Copyright Directive

³⁹ Recital 30 of the EU Copyright Directive

⁴⁰ Recital 31 of the EU Copyright Directive

⁴¹ European Commission (n.25)

each one is a major issue for CHIs.⁴² This issue is recognised as the reason for implementing the proposed Article 8 provisions:

Despite the fact that digital technologies should facilitate cross-border access to works and other subject-matter, obstacles remain, in particular for uses and works where clearance of rights is complex. This is the case for cultural heritage institutions wanting to provide online access, including across borders, to out-of-commerce works contained in their catalogues. As a consequence of these obstacles European citizens miss opportunities to access cultural heritage. The proposal addresses these problems by introducing a specific mechanism to facilitate the conclusion of licences for the dissemination of out-of-commerce works by cultural heritage institutions.⁴³

Taking film archives as an example (sometimes referred to as film heritage institutions or “FHIs”), it is evident that prior to the adoption of the Directive, the difficulties in determining the copyright status of a film often results in it remaining undigitised and unseen by the public. The efforts across the EU to digitise and restore film heritage have “greatly helped the distribution and exhibition of film heritage”, however the cost for each film to be restored is approximately €100,000-150,000, and can be €300,000 for complicated films.⁴⁴ As a result of the high financial costs (and drains on time) of obtaining the relevant copyright permissions, film archives usually choose to focus their digitisation efforts on public domain or state-owned collections.⁴⁵

Considering the large obstacles that film archives face, the European Audiovisual Observatory surveyed the members of the Association des Cinémathèques Européennes (ACE). 32 film archives of the 44 members replied, focusing on access to the film works in their collections for research and education purposes. Notably, they found that out of commerce works and orphan works⁴⁶ presented a significant challenge for them:

“...Even more respondents stressed that ascertaining that a film work is out-of-commerce is extremely complex, due to the lack of specific tools or criteria to verify this status... FHIs estimate that 76% of the film works in their collections

⁴² Janssens and Tryggvadottir (n.37) 30

⁴³ See the Explanatory Memorandum of the EU Copyright Directive

⁴⁴ Gilles Fontaine and Patrizia Simone (eds.) *The Exploitation of Film Heritage Works in the Digital Era* (European Audiovisual Observatory 2016), 55

⁴⁵ European Commission, ‘Implementation of the 2005 European Parliament and Council Recommendation on Film Heritage: Progress report 2012-2013’ (European Commission 2014) 16

⁴⁶ See Anna Vuopala, ‘Assessment of the Orphan works issue and Costs for Rights Clearance’ (European Commission, 2010) 5 – “When handling requests for using older film material, film archives across Europe categorized after a search for right holders 129 000 film works as orphan works which could not therefore be used. Works that can be presumed to be orphan without actually searching for the right holders augments the figure to approximately 225 000 film works.”-

are under copyright, and that about 60% of the feature films under copyright are presumably orphan or out-of-commerce.”⁴⁷

The issues above relating to the cost and burden of determining the copyright status of a work, and therefore the risk that only works with a clear copyright status are digitised and shared with the public, contributes to what is referred to as the “20th century black hole”. This “20th century black hole” is the term for the lack of works available from the 20th century within the digitised collections of CHIs in Europe compared to other time periods, and this lack of availability is attributed to copyright restrictions.⁴⁸ Some commentators are concerned that without intervention there could become a time in which the 20th century is wholly “absent” from the record⁴⁹, which has repercussions on our understanding of this time period. The Europeana Foundation asserts that rectifying the issue of out of commerce works “would provide the basis for filling the 20th century black hole”⁵⁰. The Directive addresses this “20th century black hole” through Article 8.

The Google Books project

The most significant and controversial mass digitisation project to date is the Google Books project, involving mass digitisation of books on an industrial scale. The Google Books homepage itself comments that it is “the world’s most comprehensive index of full-text books”.⁵¹ Its aim is to scan every book ever published, and to allow the full texts of these books to be searchable online.⁵² To provide a brief background, Google began digitising books for its Google Books project between 2002 and 2004, which included in copyright books. This digitisation was taking place without the consent of rightholders. In 2005, in the *Authors Guild v Google* case⁵³, the Authors Guild of America and publishers from the Association of American Publishers consequently sued Google for infringing copyright in these works.⁵⁴ A Settlement was reached between the parties, then amended⁵⁵ and then subsequently rejected in 2011, and the system it proposed was not enacted. A private agreement was reached in 2012 between Google and the Association of American Publishers

⁴⁷ Gilles Fontaine and Patrizia Simone (eds.), *The access to film works in the collections of Film Heritage Institutions in the context of education and research* (European Audiovisual Observatory 2017), 32

⁴⁸ Europeana Foundation, ‘Europeana copyright policy mandate (Dec 2016)’ (Europeana, 2016) 1

⁴⁹ Horst Forster, ‘The i2010 digital libraries initiative: Europe’s cultural and scientific information at the click of a mouse’ (2007) *Information Services & Use* 27(4) 155, 156

⁵⁰ Europeana Foundation (n.48) 2

⁵¹ See <https://books.google.com/>

⁵² Jeffrey Toobin, “Google’s Moon Shot: *The quest for the universal library.*” (*The New Yorker*, January 28, 2007) <<https://www.newyorker.com/magazine/2007/02/05/googles-moon-shot>>

⁵³ *Authors Guild Inc v Google Inc*, No 05-CV-8136-DC (SDNY, 13 November 2009)

⁵⁴ *For a thorough discussion on the Google Books project, the Authors Guild v Google case and the Amended Settle Agreement*, see Borghi and Karapapa (n.16)

⁵⁵ Amended Settlement Agreement, *Authors Guild Inc v Google Inc*, No 05-CV-8136-DC (SDNY, 13 November 2009)

relating to digitisation and commercialisation of out-of-print books (and also therefore “out of commerce works”).⁵⁶

Under the rejected *Amended Settlement Agreement*⁵⁷ there were clear proposals for determining whether a work was commercially available, and it would only be the out of commerce works that would be included in the project. This included checking whether a book had been sold on the markets of Australia, Canada, the United Kingdom or the USA⁵⁸; and that rightholders could contact Google with evidence that the book is commercially available⁵⁹; and that rightholders could contact Google if they had mistakenly classified the book as out-of-print (or out of commerce). Books that were in-print but were commercially unavailable would be classed as out of print⁶⁰ (which is the same notion as “out of commerce”). The proposed system was regarded by many as a “deal with the devil”⁶¹, as although there would be huge benefits to accessing the millions of out of commerce books; it granted Google, a commercial entity, a monopoly over them.

This was the beginning of the momentum behind facilitating access to out-of-print or out of commerce works to the public. As Google is a global commercial corporation, the discussion since has also turned to *who* should be allowed to build digital archives of copyright material and subsequently distribute it to the public.

The 2011 Memorandum of Understanding Key Principles on the Digitisation and Making Available of Out-of-Commerce Works

A proposal to protect this access to out of commerce works was implemented in the 2011 Memorandum of Understanding Key Principles on the Digitisation and Making Available of Out-of-Commerce Works (“2011 MoU”)⁶². This 2011 MoU focused solely on books and journal articles, and established principles that would facilitate voluntary agreements between the parties to make out of commerce books and journal articles available. It was signed by prominent organisations across the EU, including the Association of European Research Libraries (LIBER); European Federation of Journalists (EFJ); and the European Writers Council (EWC). Being a memorandum it was not binding on any signatory or Member

⁵⁶ Borghi and Karapapa (n.16) 89-90

⁵⁷ Amended Settlement Agreement, *Authors Guild Inc v Google Inc*, No 05-CV-8136-DC (SDNY, 13 November 2009)

⁵⁸ Amended Settlement Agreement, s.3.3(d)(i)

⁵⁹ Amended Settlement Agreement, s.3.2 9d((iii)

⁶⁰ Attachment A to Amended Settlement Agreement at s.3.3(a), (b), *Authors Guild Inc v Google Inc*, No 05-CV-8136-DC (SDNY, 13 November 2009)

⁶¹ James Somers “Torching the Modern-Day Library of Alexandria” (*The Atlantic*, April 20th 2017) <<https://www.theatlantic.com/technology/archive/2017/04/the-tragedy-of-google-books/523320/>> accessed 30th April 2019

⁶² Memorandum of Understanding: Key Principles on the Digitisation and Making Available of Out-of-Commerce Works, 2011. <http://ec.europa.eu/internal_market/copyright/docs/copyright-info/20110920-mou_en.pdf>

State⁶³. As a result of the 2011 MoU, Germany implemented legislation directly applicable to the MoU, and France and the UK introduced similar schemes⁶⁴.

In the memorandum, works were deemed to be out of commerce when “*the whole work, in all its versions and manifestations is no longer commercially available in customary channels of commerce, regardless of the existence of tangible copies of the work in libraries and among the public (including through second hand bookshops or antiquarian bookshops).*”⁶⁵

The definition in the 2011 MoU of out of commerce works leaves unclear what “commercially available in customary channels of commerce” means in practice. The MoU states that the “method for the determination of commercial availability of a work depends on the specific availability of bibliographic data infrastructure and therefore should be agreed upon in the country of first publication of the work.”⁶⁶ Therefore, it is left to the individual organisations to attempt to determine this. Reading the definition for out of commerce works in the EU Copyright Directive, it is clear that that 2011 MoU’s definition has been influential.

Legal issues

“European cultural heritage”

CHIs preserve and provide access to millions of cultural heritage artefacts around the world. Within the EU, CHIs are either usually nationally focused, or EU focused in terms of their collections. There is a strong narrative of “European cultural heritage” within EU policy documents and some EU CHIs, which needs to be explored before moving on to further discussions. Europeana is the central holding for European cultural heritage, currently providing access to more than 50 million items online, from the collections of thousands of CHIs across the EU⁶⁷, tasked by the European Commission⁶⁸. The European Commission signalled their intent to digitise and make available online the collections of all EU cultural heritage institutions in 2006, and the Europeana portal launched in 2008.⁶⁹

As Recital 2 of the Copyright Directive notes in relation to the existing EU directives relating to copyright, “...*The protection provided by that legal framework also contributes to the*

⁶³ Irini A. Stamatoudi, *New Developments in EU and International Copyright Law* (Kluwer Law International B.V 2016), 7.3.1.1.

⁶⁴ Stamatoudi (n.63) 7.3.1.1.

⁶⁵ Memorandum of Understanding (n.62) pg. 2

⁶⁶ Memorandum of Understanding (n.62) pg. 2

⁶⁷ Europeana, ‘Welcome to Europeana Collections’ (Europeana)

<<https://www.europeana.eu/portal/en/about.html>> accessed 17th May 2019

⁶⁸ Eleanor Kenny, ‘Who we are’ (Europeana, 25th July 2017) <<https://pro.europeana.eu/our-mission/who-we-are>> accessed 4th May 2019

⁶⁹ Maurizio Borghi, Kris Erickson and Marcella Favale, ‘With Enough Eyeballs All Searches Are Diligent: Mobilizing the Crowd in Copyright Clearance for Mass Digitization’ (2016), *Chi. -Kent J. Intell. Prop.* 16(1) 135, 137 *There is more extensive discussion of this background in Borghi and Karapapa* (n.16)

Union's objective of respecting and promoting cultural diversity, while at the same time bringing European common cultural heritage to the fore"(emphasis added.) The Council of Europe's⁷⁰ *Faro Convention*⁷¹ provides further guidance on the meaning of cultural heritage and the collective responsibilities associated to it. It defines cultural heritage in Art 2(a) as a "group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions.." In Art 3, it addresses the "common heritage of Europe", which consists of:

- (a) *all forms of cultural heritage in Europe which together constitute a shared source of remembrance, understanding, identity, cohesion and creativity, and*
- (b) *the ideals, principles and values, derived from the experience gained through progress and past conflicts, which foster the development of a peaceful and stable society, founded on respect for human rights, democracy and the rule of law.*

Not being an EU Directive this not does carry the same weight as the wording of EU Directives and any relevant case law, but it does provide an understanding of the origins and rationale behind the conceptualisation of "European cultural heritage".

The EU Copyright Directive focuses on copyright and cultural heritage *within* and *of* the EU. The consequent notion of a collective European cultural heritage⁷², and how this collective heritage can best be shared and protected, is therefore the primary focus of Art 8. It can easily be accepted without critical review that there is indeed a real and concrete European heritage that all EU citizens are connected to. Lähdesmäki has explored this idea in depth, and comments that this concept of European heritage, when referred to in policy documents within the EU, is "extremely generic, abstaining from focusing on any particular cultural features"⁷³, as detailed commentary on the exact nature on this European heritage would likely lead to disagreements.

This EU policy narrative aligns European memory and EU cultural heritage with a narrative of the emergence, development, and functioning of the EU itself.⁷⁴ Attempting to build a narrative around a collective European heritage within the EU is rooted in the fact that repeated references to historical events have been "integral to community building for

⁷⁰ A Council of Europe Convention is not the same as an EU Directive, but all members of the EU are also members of the Council of Europe. The Convention was ratified in 2011 and is therefore applicable to all EU Member States.

⁷¹ Council of Europe Framework Convention on the Value of Cultural Heritage for Society, Faro, 27.X.2005

⁷² As Recital 2 of the Copyright Directive says "...The protection provided by that legal framework also contributes to the Union's objective of respecting and promoting cultural diversity, while at the same time bringing European common cultural heritage to the fore..."

⁷³ Tuuli Lähdesmäki, 'Narrativity and intertextuality in the making of a shared European memory' (2017) *Journal of Contemporary European Studies* 25(1) 57, 60

⁷⁴ Lähdesmäki (n.73) 61

centuries”.⁷⁵ This narrative construction has enabled the emergence of a “transnational” European identity.⁷⁶ To that end, there have been compelling arguments made that note that cultural heritage has often been employed within EU policies to advance its political agenda of further harmonisation and togetherness.⁷⁷ As Lähdesmäki asserts, this European heritage ideal can be problematic, as the heritage focused on is often that of “original” Europeans” and of the “commonness of styles and aesthetics of the past” as opposed to addressing present day issues with the notion of “European”.⁷⁸

Why facilitate access to out of commerce works?

Briefly, it is essential to explore why facilitating access to out of commerce works benefits CHIs and the public as a whole. The notion of the public domain is a complicated, and it has been defined in a number of ways in relation to copyright. As Deazley explains, it has often been considered to be a “negative space” resulting from expired or abandoned copyright.⁷⁹ This “negative space” contains works for which no copyright claims exist, and thus the general public may use them as this wish. Some more modern conceptions of the public domain go further, and include any works for which the author’s permission is not required, giving the examples of fair dealing or fair use.⁸⁰ Litman asserts that the public domain enables the copyright system to function by providing the “raw material of authorship” available for people to use in creating new works.⁸¹ Whether out of commerce works are regarded therefore as residing in the legal public domain in relation to copyright, facilitating CHIs to allow access to the huge volumes of works online is monumentally transformative for the general public and for the ongoing creation of creative and innovative works.⁸²

This is important to consider, as often CHIs are thought of as memory institutions⁸³, guarding and providing access to documents about the past. Whilst this is a crucial function of their role, CHIs and collective cultural heritage that people can access easily and freely also allow

⁷⁵ Aline Sierp and Jenny Wüstenberg, ‘Linking the Local and the Transnational: Rethinking Memory Politics in Europe’ (2015) *Journal of Contemporary European Studies*, 23(3) 321, 322.

⁷⁶ Sierp and Wüstenberg (n.75) 324

⁷⁷ See Tuuli Lähdesmäki, ‘Rhetoric of unity and cultural diversity in the making of European cultural identity’ (2012) *International Journal of Cultural Policy* 18(1)

⁷⁸ Lähdesmäki (2012) (n.77) 72

⁷⁹ Ronan Deazley, *Rethinking Copyright: History, Theory, Language* (Edward Elgar Publishing 2008), 103

⁸⁰ Johnson (n.15)

⁸¹ Jessica D Litman, ‘The Public Domain’ (1990) *Emory LJ* 29(4) 965, 968 (referred to in Johnson (n.15))

⁸² Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (NYU Press, 2011) 186

⁸³ For a thorough on describing various CHIs under the same label of “memory institutions”, see Helena Robinson, ‘Remembering things differently: museums, libraries and archives as memory institutions and the implications for convergence’ (2012) *Museum Management and Curatorship* 27(4)

people to create new works and ideas, building on what is already created, and to explore different cultures and identities, and to become culturally literate.⁸⁴

The UK IPO found that in an analysis of 1,933 Kickstarter campaigns, the use of public domain materials and third party licensed materials were “significantly associated with the higher likelihood of project success.”⁸⁵ Likewise, in an interesting assessment of pictures attached to 1,700 Wikipedia biographies, the UK IPO found that pages with public domain images or photos received between 17-19% more visits than similar pages with no image.⁸⁶ They concluded that this was a reflection on the way users assess the authenticity and authority of information. The troubling aspect was that less than 58% of authors born after 1880 have an image or photo attached to their biography on Wikipedia, due to copyright restrictions.⁸⁷ This highlights the way that material protected by copyright affects availability of works, including images, and - in turn – the perceived authority of the subsequent source.

Considering all of the benefits of providing open access to cultural heritage and information in general, the EU Commission has declared the “free movement of knowledge and innovation to be the ‘fifth freedom’ of the internal market.”⁸⁸ Allowing the access to the out of commerce works currently residing in storage in CHIs would greatly help in facilitating this free movement of knowledge and innovation.

Interpreting the key terms

There are a number of legal issues and uncertainties with Article 8, and indeed the Directive as a whole. A significant concern is the lack of clarity of a number of important terms, such as the meaning of “out of commerce works”; of “customary channels of commerce”; of “non-commercial uses”; of the “reasonable effort” required to ascertain if a work is out of commerce; and whether a CMO is “sufficiently representative of rightholders”.

“Out of commerce works”

Part of the substantial challenge to the daily activities of CHIs is the lack of clarity concerning what makes a work out of commerce; and most countries and individual archives do not have concrete definitions. This is not true of all member states however; for example, the Czech National Film Archive considers national feature length films to be out-of-commerce if produced by private producers prior to 1992.⁸⁹

⁸⁴ See for a discussion on cultural literacy Semanur Öztemiz, ‘Cultural heritage literacy: A survey of academics from humanities and social sciences’ (2019) *Journal of Librarianship and Information Science* 1, 2

⁸⁵ IPO, *Copyright and the Voice of the Public Domain: An empirical assessment* (IPO 2015/11, 2015) 3

⁸⁶ IPO (n.85) 4

⁸⁷ IPO (n.85) 3

⁸⁸ Justine Pila and Paul Torremans, *European Intellectual Property Law* (OUP 2016) 255

⁸⁹ Fontaine and Simone (n.47) 11

Fundamental to Article 8 is this notion of “out of commerce works”. Article 8(5) explains that “A work or other subject matter shall be deemed to be out of commerce when it can be presumed in good faith that the whole work or other subject matter is not available to the public through customary channels of commerce, after a reasonable effort has been made to determine whether it is available to the public.”

Despite this attempt at defining the term, it seems to raise more questions than it answers, especially the meaning of terms such as “*customary channels of commerce*” and “*after a reasonable effort*”. The Directive’s recital clarifies that works that have never been commercially available, (such as posters, leaflets, journals or amateur audiovisual works) and unpublished works may also fall under the scope of out of commerce works, “without prejudice to other applicable legal constraints, such as national rules on moral rights.”⁹⁰

Customary channels of commerce

The meaning of “customary channels of commerce” is vague and very likely to cause confusion for CHIs and legal scholars alike. The Directive notes in its recital that the “limited availability of a work or other subject matter, such as its availability in second-hand shops, or the theoretical possibility that a licence for a work or other subject matter could be obtained should not be considered as availability to the public in the customary channels of commerce.”⁹¹ This provides some indications of what is *not* to be understood as customary channels of commerce, but very little guidance for practical implementation of what these channels are.

The key issue is whether the ‘test’ for these customary channels of commerce is aimed at what a member of the public can be expected to search, or the CHI itself. Members of the public interested in a particular topic are likely not to have the same level of knowledge as an industry or cultural heritage expert as to where to search for the work, and any specialist dealers in those works. This also largely depends on the category of work, for instance, the general public may have very little knowledge about commercial distribution of films, but may well know where to look to find (or not to find) a book.

On a common sense understanding of the term, we might suppose it means that, taking the example of a book, a book which is not available to purchase in any major bookshops or online retailers after a search. It does not seem reasonable to expect a member of the public interested in a particular book to search much further beyond this, and it seems even more doubtful that they would normally consult bookshops and smaller online retailers in other Member States, unless perhaps the book was written by a well-known author from another EU Member State.

What is somewhat confusing about the “reasonable effort” search of the “customary channels of commerce” is that the out of commerce provisions, as discussed, are also to apply to works which have never been in commerce. Considering the example of a born-digital photograph originally shared on social media or amateur holiday film found in someone’s attic, it is

⁹⁰ Recital 37 of the EU Copyright Directive

⁹¹ Recital 38 of the EU Copyright Directive

unclear what “customary channels of commerce” one could be expected to consult, as there are no established channels of commerce for these sorts of works.

Therefore, do CHIs first need to decide whether a work is likely to have been in commerce, and then only if it has been, to conduct a search to determine if it is still available through customary channels? For books, music, and professional/ commercial films, they would almost certainly have originally been in commerce. For other works such as visual artworks, e.g. paintings and drawings, literary works such as poems or short stories and sound recordings, this would be harder to initially decide. In addition, does the intention of the author have any relevance when determining this, i.e. was the artwork created with an intention to be sold or otherwise exploited commercially? If so, then it needs to be decided at what point it became out of commerce.

As the recital adds that “[i]n many cases, the out-of-commerce status of a set of works or other subject matter could be determined through a proportionate mechanism, such as sampling”⁹², perhaps the CHI is expected to conduct a search of the customary channels of commerce for a sample of the collection, specifically chosen as works that have been identified as likely to have once been in commerce. However, this seems nonsensical for collections in which the entireties of the works have never been in commerce, such as personal letters, private photographs, etc. In this instance of a collection of works that have never been in commerce, the Directive must logically be interpreted as therefore requiring no such search of the customary channels of commerce.

The definition of “customary channels of commerce” is currently ambiguous, and could cause confusion for CHIs seeking to utilise Art 8 in the way that the Directive intends. However, understanding the Directive and Art 8 as context-dependent hopefully lessens this uncertainty.

“Reasonable effort”

The “diligent search” required under the Orphan Works Directive⁹³ is generally accepted to be overly cumbersome, as it requires CHIs to consult large numbers of authoritative sources to locate the rightholder and many of these online sources are not freely accessible.⁹⁴ Significantly, there was also a lack of clarity surrounding what documentation would be sufficient for a CHI to demonstrate that their search had been diligent, and “what legal certainty”⁹⁵ a diligent search document has against potential challenges from rightholders for CHIs relying on the search.

⁹² Recital 38 of the EU Copyright Directive

⁹³ Orphan Works Directive 2012/28/EU

⁹⁴ Maria Lillà Montagnani and Laura Zoboli, ‘The making of an ‘orphan’: cultural heritage digitization in the EU’ (2017) *Int J Law Info Tech* 25 (3) 196, 208

⁹⁵ Martinez and Terras (n.7)

The EnDOW⁹⁶ project addressed this issue by devising a comprehensive tool⁹⁷ for CHIs to determine which sources need to be checked in individual Member States in relation to orphan works, and produces documentation verifying that a diligent search has been conducted. The diligent search tool was designed to assist CHIs through a tool operated on the basis of crowdsourcing, i.e. that volunteer members of the public could use the tool and carry out the diligent search for the CHI.⁹⁸ A similar search and documentation tool to the EnDOW diligent search tool would be very useful for CHIs in determining both what the “customary channels of commerce” are and what the threshold is for “reasonable effort”.

Compared to the definition of “diligent search” in the Orphan Works Directive, it is clear that the “reasonable effort” required for out of commerce works is considerably less burdensome. The definition of a “diligent search” requires that the search be conducted “in good faith in respect of each work or other protected subject-matter, by consulting the appropriate sources for the category of works and other protected subject-matter in question”⁹⁹, meaning that the user must make “an honest effort”¹⁰⁰ to search for the rightholder and intend to find them.

The list of “appropriate sources”¹⁰¹ to be searched in each Member State varies significantly and is long, for example Italy has the highest number of sources to be checked at 357, and the total number of sources across 20 of the EU Member States is 1,768¹⁰². It also requires that the sources of information on rightholders be consulted in other countries, if there “is evidence to suggest that relevant information on rightholders is to be found” there¹⁰³, which increases the time, effort, cost and administrative burden of the search. Unlike put of commerce works, sampling is not an option in relation to diligent searches, as each individual work requires its own diligent search. More cumbersome still is the documentation required to be kept by users such as CHIs in relation to diligent searches, including the result of the diligent search; the use made of the orphan work; any change of status of the orphan work; and the CHI’s contact information¹⁰⁴.

It seems evident from the Directive that the “reasonable effort” requirement is intended to be a substantially lower threshold than the “diligent search” requirement for orphan works, thereby lessening the search burden for CHIs. Nonetheless, there remains concern that the “reasonable effort” to ascertain the out of commerce status of a work could still involve a difficult or vaguely defined search. Article 8 does not elaborate on what this “reasonable

⁹⁶ “Enhancing access to 20th Century cultural heritage through Distributed Orphan Works clearance”

⁹⁷ See EnDOW, ‘Diligent Search: Helping cultural heritage institutions digitise collections’ <<http://diligentsearch.eu/about/>>

⁹⁸ See *for more on utilising crowdsourcing for an orphan work diligent search*, Borghi, Erickson and Favale (n.16)

⁹⁹ Art 3(1) of the Orphan Works Directive

¹⁰⁰ Simone Schroff, ‘The Impossible Quest – Problems with Diligent Search for Orphan Works’ (2017), *IIC* 48(3) 286, 289

¹⁰¹ See the annex of the Orphan Works Directive for further detail on the nature of the sources to be consulted for each type of work

¹⁰² Aura Bertoni, Flavia Guerrieri and Maria Lillà Montagnani, ‘Report 2: Requirements for Diligent Search in 20 European Countries’ (EnDOW 2017) 25

¹⁰³ Art 3(4) of the Orphan Works Directive

¹⁰⁴ Art 3(5) of the Orphan Works Directive

effort” involves, and allows Member States to have discretion about how this is implemented nationally, including who is responsible “for making that reasonable effort.”¹⁰⁵ Article 8(5) provides some guidance, noting that

“Member States may provide for specific requirements, such as a cut-off date, to determine whether works and other subject matter can be licensed in accordance with paragraph 1 or used under the exception or limitation provided for in paragraph 2. Such requirements shall not extend beyond what is necessary and reasonable, and shall not preclude being able to determine that a set of works or other subject matter as a whole is out of commerce, when it is reasonable to presume that all works or other subject matter are out of commerce.”

Cut-off dates are already used in existing EU Member State legislation regarding out of commerce works, so this ability to provide cut-off dates is likely to be one that Member States seek to implement in their national legislation. In implementing the Directive nationally, the Netherlands is currently proposing to set “cut-off dates” for out of commerce works¹⁰⁶.

The recitals also provide some guidance on the meaning of “reasonable effort”. Recital 38 comments “a reasonable effort should be required to assess their availability to the public in the customary channels of commerce, taking into account the characteristics of the particular work or other subject matter or of the particular set of works or other subject matter.” The inclusion of “taking into account the characteristics of the particular work” is important, as it strengthens the understanding of “out of commerce works” depending on the context and the nature of the works, as an attempt to create a blanket definition for the “reasonable effort” would likely favour some types of works and conflict with others.

It then goes on to state that the “reasonable effort” requirement “should not have to involve repeated action over time but it should nevertheless involve taking account of any easily accessible evidence of upcoming availability of works or other subject matter in the customary channels of commerce”¹⁰⁷. This suggests that CHIs will be required to monitor and ascertain “easily accessible evidence of upcoming availability of works” through these customary channels of commerce. This seems to be a potential concern for CHIs wishing to utilise Art 8, as they will be required to undertake a form of on-going monitoring of the works.

As the Directive stipulates that this relates to the “easily accessible evidence of upcoming availability of works”, perhaps this is to be interpreted as relating only to works that were originally in commerce and for which there is evidence to believe that they could well be commercialised again, for example commercially successful or cult books and films. Such action could therefore be limited to regular monitoring of certain works deemed to be more

¹⁰⁵ Recital 38 of the EU Copyright Directive

¹⁰⁶ See Netherlands Ministry of Justice and Security, ‘Implementation Bill on Copyright Directive in the Digital Single Market’ (Ministry of Justice and Security, 2nd July 2019) <<https://www.internetconsultatie.nl/auteursrecht>> accessed 4th July 2019

¹⁰⁷ Recital 38 of the EU Copyright Directive

likely to be recommercialised. However this is to be interpreted, there is more clarity needed to understand what this obligation is, otherwise it will likely become the “repeated action over time” that the recital expressly aims to avoid.

A similar concern will be the sheer volume of work in determining whether each individual work is commercially available. The Directive goes some way in addressing this concern, stating that in many cases “the out-of-commerce status of a set of works or other subject matter could be determined through a proportionate mechanism, such as sampling.”¹⁰⁸ The size and nature of the sampling is left undefined. Being able to conduct a sample of a smaller number of works would significantly reduce the time, cost and effort in determining the commercial availability of individual works, and would hopefully incentivise CHIs to utilise Art 8. That said, a sample will not always be possible, and a “work-by-work assessment should only be required where that is considered reasonable in view of the availability of relevant information, the likelihood of commercial availability and the expected transaction cost.”¹⁰⁹

Although the “reasonable effort” requirement still requires some clarity, it is a significant and stark improvement on the situation CHIs faced in relation to the diligent search for orphan works, and therefore hopefully will be much more useful in its practical implementation.

“Commercial” and “non-commercial uses”

The notions of cultural heritage and commercialisation are often seen as conflicting. The fact that cultural heritage can be commercialised or has inherent commercial value is recognised Art 10 of the Faro Convention, “[i]n order to make full use of the potential of the cultural heritage as a factor in sustainable economic development, the Parties undertake to raise awareness and utilise the economic potential of the cultural heritage...” This provides encouragement that commercialising cultural heritage is not inherently at odds with the aims and principles of CHIs and indeed many CHIs support their income via revenue generated from the collections. Likewise, recital 40 of the Directive notes that “given that the digitisation of the collections of cultural heritage institutions can entail significant investments, any licences granted under the mechanism provided for in this Directive should not prevent cultural heritage institutions from covering the costs of the licence and the costs of digitising and disseminating the works or other subject matter covered by the licence.”¹¹⁰

Article 8 requires a distinction to be made between commercial and non-commercial uses; this is a new distinction within copyright law and one that is hazy. By stipulating in Art 8 that the uses must be “non-commercial”, it therefore becomes fundamental to clearly distinguish between commercial and non-commercial uses. The meaning of “non-commercial” is yet to

¹⁰⁸ Recital 38 of the EU Copyright Directive

¹⁰⁹ Recital 38 of the EU Copyright Directive

¹¹⁰ Recital 40 of the EU Copyright Directive

be clearly defined in either legislation or case law.¹¹¹ In the German *Deutschlandradio* case¹¹², it was found by the LG Cologne that only “purely private use”¹¹³ was non-commercial. The OLG Cologne disagreed but did not clarify whether CHIs generally act in a non-commercial way, but stated that the specific case itself must be examined, as opposed to who the user of the work is.¹¹⁴

Straková recounts that CMO and non-CMO responses to the UK’s 2015 public consultation on the EU Copyright Directive highlighted that their understandings of “non-commercial” were incompatible, with the UK CMOs stating that even charitable licenses, or free licenses granted for promotional reasons, are still at their core commercial, as a fee was donated originally, and they anticipate that they will subsequently receive income as a result of the publicity, respectively.¹¹⁵

The issue of commercialisation was considered in the *Amended Settlement Agreement* in relation to whether the activities of the Google Books digitisation fell within the US concept of fair use, along with evaluating whether the use was transformative, as commercial uses often makes a finding of fair use less likely. In rejecting the *Amended Settlement Agreement*¹¹⁶, Chin J noted that Google Books is a commercial entity, but that viewed holistically the activities were not directly commercial. It was decided that Google receives commercial gain from the Google Books project, however, what was more important was that it is not directly commercialising the books.¹¹⁷

Chin J went on to state that:

Google does not sell the scans it has made of books for Google Books; it does not sell the snippets that it displays; and it does not run ads on the About the Book pages that contain snippets. It does not engage in the direct commercialization of copyrighted works... Google does, of course, benefit commercially in the sense that users are drawn to the Google websites by the ability to search Google Books...¹¹⁸

This reasoning was also based on his assertion that Google Books enhances the sales of the books, as individuals are able to access books that they might otherwise not know existed.¹¹⁹

¹¹¹ Lucie Straková, ‘The internet renaissance of collective management organisations: reflections on flat fee system and the role of collective management organisations’ (2019) *International Review of Law, Computers & Technology* 33(1) 53,67

¹¹² Cologne District Court ruling of 5 March 2014 (Case no. 28 O 232/13),

¹¹³ LG Cologne, MMR 2014, 478, at 479

¹¹⁴ Referred to in Straková, see Tanja Dörre, ‘Current case law on Creative Commons licences’ (2015) *Journal of Intellectual Property Law & Practice* 10(4) 310, 311

¹¹⁵ Straková (n.111) 68

¹¹⁶ Amended Settlement Agreement, *Authors Guild Inc v Google Inc*, No 05-CV-8136-DC (SDNY, 13 November 2009)

¹¹⁷ Raquel Xalabarder, ‘Google Books and Fair Use: A Tale of Two Copyrights?’ (2014) *JIPITEC* 5(1), Part III

¹¹⁸ Amended Settlement Agreement, 21-22

¹¹⁹ Amended Settlement Agreement, 25

Of course, neither the rejected *Amended Settlement Agreement or the Authors Guild v Google* case have any bearing on EU law, but it is illuminating to understand how the issue of commercialisation has been approached elsewhere.

Applying this reasoning, it could well be argued that most, if not all, of the activities of the CHIs could be viewed as non-commercial, and therefore allowed under Art 8. This approach sits at odds with the approach taken in the *Deutschlandradio* case, in which it seemed to be that it will be the use of the work itself that determines its commercial nature, as opposed to the nature of the user. At present, there is no clear EU source of authority of the issue. Whether the uses are commercial or not will depend on the exact license terms agreed between the CMO and the CHI, for licenses concluded under Art 8(1). Under Art 8(2), the CHI will need to address this issue of whether the uses are non-commercial themselves.

“Sufficiently representative”

The Directive leaves it to Member States to determine whether a CMO is “sufficiently representative”, provided that this criterion includes the CMO representing a “significant number of rightholders”.¹²⁰ The Member State may also establish a system applicable to the circumstances in which there is more than one CMO sufficiently representative for the relevant work, giving the examples of “requiring for example joint licences or an agreement between the relevant organisations.”¹²¹ EU/ Nordic countries currently utilising the scheme have similar terminology, such as Norway’s requirement that the CMO represent a “substantial part”¹²² of the rightholders in that field. In Denmark, the requirement that CMOs represent a “substantial number” of rightholders to utilise ECL has arguably led to incentivised rightholders establishing CMOs for other works too.¹²³

Before the Directive, the EU had not explored the issue of representativeness of CMOs in depth, and in fact even the Collective Management of Copyrights Directive¹²⁴ does not expressly consider the issue.¹²⁵ An ECL scheme can only succeed if it is “representative” of the relevant right holders. Guibault and Schroff have persuasively articulated the three components of a CMO’s character necessary for them to be sufficiently representative: that the CMO has a broad membership of rightholders; that it has a “proper mandate” for those rightholders; and that “appropriate measures” are taken by the CMO to inform non-members about the exercise and exploitation of their rights.¹²⁶

This summary of the requirements for a CMO to be “sufficiently representative” is comprehensive and addresses the vagueness of the term. From a CHI and CMO perspective,

¹²⁰ Recital 33 of the EU Copyright Directive

¹²¹ Recital 33 of the EU Copyright Directive

¹²² S.38(a) Act No. 2 of 12 May 1961 Relating to Copyright in Literary, Scientific and Artistic Works

¹²³ Thomas Riis, Rognstad OA and Schovsbo, J. ‘Extended Collective Licenses in Action’ (2012) *IIC* 43(8) 930, 933-934

¹²⁴ 2014/26/EC

¹²⁵ Guibault and Schroff (n.35), 919

¹²⁶ Guibault and Schroff (n.35), 916

it is possible that a percentage, or minimum threshold, in Member States' national implementation could provide them with more security that the CMO is "sufficiently representative".

Fundamental change to copyright law

Copyright is tasked with the much-discussed "balance of rights" between copyright creators and copyright users. Copyright can incentivise or encourage an individual to create news works as they can choose how or when to exploit their works, which in turn increases the range of ideas and information available.¹²⁷ At its core, our conception of copyright is fundamentally focused on enabling the rightholder to allow or prohibit certain activities, i.e. copying and disseminating the work in some way.¹²⁸ This balance often leads to tensions and compromises for both sides.

The EU's copyright *acquis* has expanded in recent years, and it has been criticised for often moving away from the individual Member State's traditional copyright models,¹²⁹ motivated by a "market-oriented and industry-based" view of copyright law that disfavors the individual rightholder.¹³⁰ For instance, an open letter from a collection of CMOs and organisations representing the music, audio-visual, broadcasting and sports industries was signed prior to the Directive being approved, expressing their desire for the Directive to be changed or cancelled, as it contains provisions "*which fundamentally go against copyright principles enshrined in EU and international copyright law*".¹³¹

The Directive seems to acknowledge the significant change to copyright that it mandates for, and has included several strong mechanisms to protect the rightholders of the content. As Art 11 of the Directive mandates "*Member States shall consult rightholders, collective management organisations and cultural heritage institutions in each sector before establishing specific requirements pursuant to Article 8(5) ... on a sector-specific basis, to foster the relevance and usability of the licensing mechanisms set out in Article 8(1) and to*

¹²⁷ Stijn van Deursen and Thom Snijders, 'The Court of Justice at the Crossroads: Clarifying the Role for Fundamental Rights in the EU Copyright Framework' (2018) *IIC* 49(9) 1080, 1081

¹²⁸ For a discussion on how "the concept of reproduction is not a feasible tool for resolving copyright problems in a digital society", see Taina Pihlajarinne, 'Should we bury the Concept of Reproduction – Towards Principle-Based Assessment in Copyright Law?' (2017) *IIC* 48(8) 953, 973

¹²⁹ Caterina Sganga and S Scalzini, 'From Abuse of Right to European Copyright Misuse: A New Doctrine for EU Copyright Law' (2017) *IIC* 48(4) 405, 406

¹³⁰ Sganga and Scalzini (n.129) 431

¹³¹ Murray Stassen, 'Article 13 Disaster For Music Biz, Joy For Youtube, As Labels Call For EU Copyright Bill To Be Cancelled' (*Music Business Worldwide*, 7th February 2019) <<https://www.musicbusinessworldwide.com/article-13-disaster-for-music-biz-joy-for-youtube-as-labels-call-for-eu-copyright-bill-to-be-cancelled/>> accessed 26th July 2019

ensure that the safeguards for rightholders referred to in this Chapter are effective.” In light of Art 8, there is concern that the opt-out system will cause a fundamental change to copyright law.

Art 8 allows for licensing mechanisms that enable the CMO to provide licenses for works beyond its mandate from rightholders, to extend to rightholder who have not personally given their consent for this. This “extension effect” to allow the CMO to grant a licence on behalf of non-members seems to conflict with the supposed monopoly copyright of the right holder. Despite these concerns, it has been compellingly argued that making out of commerce works available does not directly conflict with the exploitation rights of the rightholder¹³², as there is no conflict with any revenue that the rightholder could receive as the works are not commercialised. If a rightholder wishes to opt-out of the scheme, they can do so as they please. Likewise, if there proves to be a public interest in the work and they wish to recommercialise the work, they may do so, as the rightholder may opt out even after the license has been agreed. Art 8 does not aim to prevent rightholders from exploiting their works, only to allow works that are currently un-exploited by the rightholder to be viewed by the public. It is a strong argument against the concern that this signals a fundamental shift in copyright law.

Moreover, despite concerns that the Directive as a whole and Article 8 move away from fundamental principles of copyright law, it is essential to consider where and why copyright originated. The first official copyright Act in the world was the UK’s 1710 Statute of Anne. Modern copyright originated in the 18th century, mainly to protect the publication of books and the revenue of booksellers¹³³, or so the common wisdom goes. Deazley counters this historical understanding, recounting that this first copyright law was “*primarily defined and justified in the interests of society and not the individual... copyright was fundamentally concerned with the reading public...*”¹³⁴ On this understanding, Art 8 and the EU Copyright Directive as a whole, with its broad focus on access to knowledge and cultural heritage, is very much in-keeping with the original conceptualisation and motivations for copyright law.

Further to this and considering the concern regarding copyright opt-out formalities, prior to the Berne Convention, in the UK registration was required for copyright. The Statute of Anne required authors to register their works with the Stationers Company. However, there existed common law remedies for authors who had neglected to register their work with the Stationers Company.¹³⁵ Khong asserts that this changed copyright from what had been an

¹³² Christophe Geiger, Giancarlo Frosio and Oleksandr Bulayenko, ‘Facilitating Access to Out-of-Commerce Works in the Digital Single Market – How to Make Pico della Mirandola’s Dream a Reality in the European Union’ (2018) *JIPITEC* 9 (3) para. 2

¹³³ Charlotte Waelde, Abbe Brown, Smita Kheria, and Jane Cornwell, *Contemporary Intellectual Property: Law and Policy* (4th edn OUP 2016) 36

¹³⁴ Ronan Deazley, *On the Origin of the Right to Copy* (Hart Publishing 2004) 226

¹³⁵ Jane C Ginsburg, ‘Berne-Forbidden Formalities And Mass Digitization’ (2016) *Boston University Law Review* 96 745,748

opt-in system to a “theoretical” opt-out system, as copyright holders wishing to give their works to the public domain have no clear legal system or register for doing so.¹³⁶

These considerations point to the conclusion that, despite Art 8 seeming to be a dramatic change of direction for modern copyright law, its motivation of public access to knowledge and culture appears aligned with the motivation behind the original copyright legislation; and that a system of opt-out and similar formalities has a long history in copyright law.

Conflict with the Berne Convention

The Berne Convention¹³⁷ established a copyright union to protect the authors of literary and artistic works.¹³⁸ It also established the possibility of copyright exceptions, permitting certain reproductions without the express permission of the rightholder.¹³⁹ The Convention was clear in stating that authors of Berne Convention countries must be protected in the same manner as domestic authors, benefiting from the national laws of each country and the Convention rights.¹⁴⁰

It also prohibited registration formalities for copyright, as set out in Art. 5(2): “*The enjoyment and the exercise of these rights shall not be subject to any formality...*” The requirement that a copyright work be in a fixed form to attract copyright protection does not fall under this notion of a formality.¹⁴¹ It can be argued that the opt-out requirement under Art 8, whereby rightholders must choose to notify the relevant party that they wish to opt-out of the out of commerce license, is a formality restricting the enjoyment and exercise of their copyright. If so, this could conflict with Berne, and all EU Member States are signatories to the Berne Convention.¹⁴² There has been support in the past for copyright registration to avoid the generation of future orphan works, but it was considered that to do so would require a change to the Berne Convention.¹⁴³

Art 5(2) must be read in conjunction with Art 5(3), which stipulates that “protection in the country of origin is governed by domestic law.” Therefore, the prohibition on formalities does not apply to domestic authors in the country of origin of the work.¹⁴⁴ There are both

¹³⁶ Khong (n.14) 62

¹³⁷ Berne Convention For The Protection Of Literary And Artistic Works (Paris Text 1971)

¹³⁸ Art. 1 of the Berne Convention

¹³⁹ Waelde, Brown, Kheria and Cornwell (n.133) 37

¹⁴⁰ Art 5(1) of the Berne Convention

¹⁴¹ Andreas Rahmatian, ‘European Copyright Inside or Outside the European Union: Pluralism of Copyright Laws and the “Herderian Paradox”’ (2016) *IIC* 47(8) 912, 932

¹⁴² 177 countries are currently signatories to the Berne Convention, including all EU states. *See* WIPO, ‘WIPO-Administered Treaties: Contracting Parties > Berne Convention (Total Contracting Parties: 177)’ (WIPO) <https://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15> accessed 9th September 2019

¹⁴³ Breeman (n.10), 25

¹⁴⁴ Ginsburg (n.135) 746

practical and legal constraints on imposing formalities to domestic author only; practically, it is difficult, if not impossible, to have different standards depending on the nationality of the author.

It is important to note that the Berne Convention has been incorporated¹⁴⁵ into the TRIPS Agreement.¹⁴⁶ Therefore, it can be argued that the prohibition against formalities applies to all minimum rights under the Berne Convention. Art 62(1) TRIPS states that: “Members may require, as a condition of the acquisition or maintenance of the intellectual property rights provided for under Sections 2 through 6 of Part II, compliance with reasonable procedures and formalities. Such procedures and formalities shall be consistent with the provisions of this Agreement.” This provision suggests that some level of “reasonable procedures and formalities” does not present a conflict with TRIPS.

Ginsburg has asserted that the Berne Convention does not prohibit opt-outs in relation to CMOS and extended collective licensing, as this does not affect the “existence and scope” of the author’s right, but rather “the licensing and management” of these rights, which is a matter left for national legislation.¹⁴⁷

On the basis of this above discussion, it can be argued that Art 8 does not conflict with the Berne Convention, as each EU Member State will be required to implement into its own national legislation the provisions, meaning that it will be creating the opt-out ‘formality’ for its own national citizens and the works will be made available within the EU only.

Practical implementation issues

Publication

Article 10(1) of the Directive requires that information relating to a supposed out of commerce work is “...made permanently, easily and effectively accessible on a public single online portal from at least six months before the works or other subject matter are distributed, communicated to the public or made available to the public in accordance with the licence or under the exception or limitation.” Article 10(1) also states that the EUIPO will establish and manage this online portal in accordance with Regulation (EU) No 386/2012. Furthermore, Art 10(2) states that Member States shall undertake “additional appropriate publicity measures” concerning the CMOs and their licensing of the works; to give the rightholder as much opportunity as possible to opt-out of they wish to do so.

On a practical note, Art 10(2) stipulates that these publicity measures must be undertaken in the individual Member State for which the license is sought under Art 8(1), and in the CHI’s Member State for the fall-back exception in Art 8(2). What is particularly interesting is the included requirement in Art 10(2) that these publicity measures should also be conducted in other Member States or third countries, if there is evidence that such measures in these

¹⁴⁵ Art 9(1) of the TRIPS Agreement: “Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto...”

¹⁴⁶ Agreement On Trade-Related Aspects Of Intellectual Property Rights, 1995

¹⁴⁷ Ginsburg (n.135) 775

countries are more likely to raise awareness for individual rightholders. How this is to be practically implemented and managed on large scale projects remains unclear, and it seems likely to be difficult for CHIs to manage this easily. Large and established CMOs might find this easier to achieve with networks of CMOs across Member States and in third countries, but Art 10 seems to imply that this responsibility is to fall to CHIs.

The French national law on the Digital Exploitation of 20th Century Unavailable Books¹⁴⁸ relating to out-of-print (out of commerce) books allowed these works to be filed with the National Library, and then six months after that, a CMO could authorise the digital reproduction and public display of the book. The rightholder could at any time opt-out; and the CMO could commercialise the book. This law has been challenged by the CJEU in the *Soulier*¹⁴⁹ case, in which it was found that the French national law was incompatible with Directive 2001/29¹⁵⁰ on the basis that the French legislation does not offer “a mechanism ensuring authors are actually and individually informed. Therefore, it is not inconceivable that some of the authors concerned are not, in reality, even aware of the envisaged use of their works and, therefore, that they are not able to adopt a position, one way or the other, on it. In those circumstances, a mere lack of opposition on their part cannot be regarded as the expression of their implicit consent to that use.”¹⁵¹ Concerning the rightholder opt-out, the CJEU found that authors who wish to end the commercial exploitation of their work in digital format may do so, without this decision being subject to formalities.¹⁵² It was therefore also considered that the legislation conflicted with the Berne Convention requirement of no formalities.¹⁵³

It has been hoped by some scholars that the change to the EU copyright acquis would “help to overcome”¹⁵⁴, the legal consequences arising from the *Soulier* case especially the requirement that authors are “actually and individually informed”, which it has been argued is likely to make practical implementation of ECL challenging.¹⁵⁵ Art 8 of the Directive does indeed appear to move beyond this, as although the out of commerce works must be published online six months before their intended use to give rightholders the opportunity to opt-out and the Directive encourages as much stakeholder dialogue and public awareness of the Directive’s provisions as possible, there is not a requirement for CMOs or CHIs to *directly* contact individual rightholders for their approval prior to the use. Indeed, the Directive clarifies that publicity measures should “be effective without the need to inform each rightholder individually.”¹⁵⁶

Rightholder opt-out

¹⁴⁸ Law No 2012-287 of 1 March 2012

¹⁴⁹ *Soulier v Doke* C-301/15, EU:C:2016:878, 16 November 2016

¹⁵⁰ Information Society Directive 2001/29/EC

¹⁵¹ C-301/15, 16 November 2016, para. 43

¹⁵² C-301/15, 16 November 2016, para. 46

¹⁵³ C-301/15, 16 November 2016, para. 50

¹⁵⁴ Geiger, Frosio and Bulayenko (n.132) para 21

¹⁵⁵ Geiger, Frosio and Bulayenko (n.132) para 21

¹⁵⁶ Recital 41 of the EU Copyright Directive

Under Art 8(4), the rightholder may opt-out of the license concluded between the CMO and the CHI. The rightholder may

“...at any time, easily and effectively, exclude their works or other subject matter from the licensing mechanism set out in paragraph 1 or from the application of the exception or limitation provided for in paragraph 2, either in general or in specific cases, including after the conclusion of a licence or after the beginning of the use concerned.”

This raises a number of legal and practical issues: as discussed, this seems to challenge our modern day conception of copyright; it requires rightholders to remain aware and vigilant to use of their work if they wish to restrict the usage of their work; the practical issue of how the rightholder opts out and to whom; and for CHIs, what the likelihood of a rightholder subsequently opting-out would be.

Considering first that rightholders will have to be aware and vigilant to usage of their work, Ginsburg has astutely commented that a rightholder may not have the resources to opt-out, as opposed to this being a rationalised decision.¹⁵⁷ Many rightholders will not have the necessary knowledge and understanding of copyright law that either makes them aware of Article 8 and the EU Copyright Directive, or an understanding that they most likely are the rightholder for a number of works, e.g. photos shared on social media. In the cases where the rightholder is aware and has decided to opt-out, how this is managed is crucial, as unnecessary burdens in opting out may deter rightholders who wish to do so. Furthermore, Ginsburg also asserts that this system of opt-out copyright requires rightholders to remain aware of copyright developments and any additional exceptions or changes to the existing rules¹⁵⁸, as over time the powers granted to CHIs under Art 8 may change or expand.

Likewise, it has been argued that the opt-out itself may be difficult for rightholders, as anecdotally publishers noted that it is “prohibitively expensive” for them to determine if they are indeed the rightholder, to consequently then decide whether to opt in or out.¹⁵⁹

There is a practical issue at the core of the Art 8 provisions, how and to whom do rightholders opt out? The Directive does not make it clear how this opt-out will operate in practice, leaving that to individual Member States to decide. It seems most likely that the rightholder will opt-out with the CMO, as attempting to opt-out to individual CHIs could increase this time and effort if the work is being made available online by multiple CHIs. It seems logical that a rightholder who may wish to opt-out is more likely to be able to locate the relevant CMO for their sector than individual CHIs.

There is a concern for CHIs that after the cost and effort of this digitisation and making the works available online, that the rightholders will appear and wish to opt-out. After the time and cost spent in making these works available to the public, it is seen by some as prohibitive

¹⁵⁷ Ginsburg (n.135) 766

¹⁵⁸ Ginsburg (n.135) 766

¹⁵⁹ Matthew Sag, ‘The Google Book Settlement and the Fair Use Counterfactual’ (2010/11) *New York Law School Law Review* 55 19, 36

that the rightholder can then opt-out, and potentially recommercialise their works. This fear of subsequent opt-out is valid and legitimate, and it is something that individual CHIs will need to decide if they are comfortable with the risk. The statistics on rightholder opt-out in existing schemes has been very low, which provides reassurance that large numbers of rightholders appearing and objecting to the usage is unlikely. The European Commission report that for the Bokhylla book ECL scheme used by the National Library of Norway to make both out of commerce and in commerce books available online, approximately 1.8% of the books were involved in an opt-out.¹⁶⁰ Likewise, they reported that the UK's Copyright Licensing Agency offers a blanket licence which is akin to an ECL, and that the works excluded from the scope of the licence were 0.0007%.¹⁶¹

Collective management organisations and Extended collective licensing

The role of Collective management organisations

To collectively manage copyrights, an organisation is required to negotiate licenses with users, continually monitor use of the works and to distribute funds to rightholders.¹⁶² The concept of collective management of copyright originated from the French “authors' societies”, organised by playwrights in order to collectively enforce and exploit their rights against “the monopoly of the Parisian theatre”.¹⁶³

The proper functioning of CMOs in relation to digital activities in particular is “of key importance”¹⁶⁴ for the Digital Single Market that the Directive aims to facilitate. The Directive reaffirms this, noting that in relation to the licensing mechanism, “a rigorous and well-functioning collective management system is important.”¹⁶⁵ Collective management of online music rights only is subject to Directive 2014/26/EU¹⁶⁶, which sets out rules relating to good governance of the CMO, transparency and thorough reporting, and the importance of regular and accurate payment of royalties due to rightholders. The European Commission keeps a list of the CMOs in each EU Member State,¹⁶⁷ but the list does not cover all Member States as approximately 10 have not submitted this information to the Commission, as required by Articles 36 and 39 of the Collective Rights Management Directive.

¹⁶⁰ See European Commission (n.25), Annexe 9E

¹⁶¹ See European Commission(n.25) Annexe 9E

¹⁶² Riis, Rognstad and Schovsbo (n.123) 933

¹⁶³ Sylvie Nérissou, ‘Has Collective Management of Copyright Run Its Course? Not so Fast’ (2015) *IIC* 46(5) 505

¹⁶⁴ Morten Hviid, Simone Schroff, John Street, ‘Regulating Collective Management Organisations by Competition: An Incomplete Answer to the Licensing Problem?’ (2016) *JIPTEC* 7(3) 256, 257

¹⁶⁵ Recital 34 of the EU Copyright Directive

¹⁶⁶ Collective Rights Management Directive 2014/26/EU

¹⁶⁷ See European Commission, ‘Collective rights management Directive – publication of collective management organisations and competent authorities’ (European Commission, 3rd July 2017) <<https://ec.europa.eu/digital-single-market/en/news/publication-collective-management-organisations-competent%20authorities-collective-rights-management-directive>> accessed 3rd June 2019

Within the literature of the economics of copyright, it is evident that CMOs “play a fundamental role”¹⁶⁸ within copyright, as CMOs enable the proper functioning of the market where it would be impossible for the rightholder to negotiate directly with the user.¹⁶⁹ Indeed, there has also been scholarly attention given to how CMOs assist states in adhering to human rights obligations in relation to copyright as they facilitate the individual rightholder’s rights when the costs involved stop them contracting directly with the user.¹⁷⁰

Issue with CMO trust and transparency

Whilst the purpose and potential advantages of CMOs (where present and representative) are evident in the literature, to date there have been significant issues with public perceptions of CMOs that hinder their usage, and therefore their effectiveness to the copyright system. There are concerns within the literature that there are substantial issues of trust, fairness and a lack of transparency that need to be addressed in order for the public to view CMOs as a credible and efficient option; and consequently for rightholders to be willing to join them. For example, in Greece AEPI is the CMO for the administration of rights of musical works. There has been much controversy surrounding this dominant CMO, due to the discovery of unallocated payments owed to its members of approximately €42.5 million, as well as the retention of sums owed to foreign authors. This has led to a significant lack of public trust in the CMO, with people choosing not to purchase the licences to play music subject to copyright.¹⁷¹

Lack of CMOs across different sectors

For Art 8(1) to be implemented by a CHI, there needs to be a “sufficiently representative” CMO in that specific sector in that individual Member State. Across the different sectors, the level of representation and suitability for collective licensing is mixed. For works such as books and music, generally these are sectors with well-established CMOs¹⁷² that can claim sufficient representation of rightholders. For visual art and photography, CMOs exist in a few Member States but not in others; and for audiovisual works collective management is “limited”¹⁷³, and indeed in some Member States there are no CMOs for audiovisual works,¹⁷⁴ in part as the film industry has “not developed a tradition of collective.”¹⁷⁵ Likewise, in some

¹⁶⁸ Christian Handke and Ruth Towse, ‘Economics of Copyright Collecting Societies’ (2007) *IIC* 38(8) 937, 948

¹⁶⁹ Handke and Towse (n.168) 948

¹⁷⁰ Laurence R Helfer, ‘Collective Management of Copyrights and Human Rights: An Uneasy Alliance Revisited’ in Daniel Gervais, *Collective Management Of Copyright And Related Rights*. (2nd edn, Kluwer Law International 2010) 75, 88

¹⁷¹ Tatiana Synodinou, ‘The adventures and misadventures of the implementation of the Directive on collective management of copyright in Greece and Cyprus (Part I)’ (Kluwer Copyright Blog, 27 March 2018) <<http://copyrightblog.kluweriplaw.com/2018/03/27/adventures-misadventures-implementation-directive-collective-management-copyright-greece-cyprus-part/>> accessed 22 January 2019

¹⁷² See, European Commission (n.25) Annexe 9F

¹⁷³ See European Commission (n.25) Annexe 9F

¹⁷⁴ For example, the UK and the Netherlands

¹⁷⁵ Guibault and Schroff (n.35) 928

Central and Eastern Europe countries, many of the works made up to the late 1980s have an unclear copyright and ownership status, having been created under now defunct copyright laws by companies and countries that no longer exist.¹⁷⁶

There are immediate obstacles to effective implementation when either the particular category does not have a representative CMO or there is no CMO present in the market at all. For the sectors in which there is no CMO at all, the alternative option available is to utilise the “fall-back exception” under Art 8(5). In theory, this is a particularly attractive solution, as the CHIs would not have to pay any license fees for the use of the out of commerce works. Considering the earlier discussion on the costs to CHIs of copyright clearance and the often vast numbers of works they hold, the ability to legally make these works available without any license fee is a strong boost to the CHI sector. Logically, this can only occur when there is no CMO to negotiate a license with, as otherwise this would conflict with the interests of rightholders in the “balancing act” within copyright.

If CHIs feel confident and able to utilise the fall-back exception under Art 8(2), this offers them an attractive and much lower cost option than negotiating licenses. However, this is not necessarily the case for all CHIs. The often-discussed issue of “copyright fear” can substantially impact on CHIs, and lead them to adopt more risk-averse policies. This is often grounded in concerns about reputational damage if they inadvertently breach copyright, or a concern that they will be sued by a rightholder who later comes forwards. CHIs, and organisations more generally, differ in their “ability to respond to risk”, affected by factors such as financial and legal resources, and legal knowledge within the CHI.¹⁷⁷ Consequently, often it is the larger or national CHIs who are able to accept more risk than smaller CHIs.

Within the cultural heritage sector, the perceived risk of potential legal consequences for copyright infringement is often greater than the statistical risks. For instance, a survey of 2,828 respondents within the US cultural heritage sector found that only one respondent reported being involved in legal proceedings over copyright infringement, and only 10% reported being challenged on the legality of the usage.¹⁷⁸ It is this perceived risk that has a greater impact on CHIs than the statistical likelihood. The perceived risks are significant and impact upon decision-making within CHIs to varying extents. It remains to be seen whether CHIs feel able and willing to utilise the fall-back exception in Art 8(2).

In addition, the 2011 MoU was the basis for Art 8 of the Directive, but extending its scope to all copyright works without considering the full impact of this has unexpected consequences. There is a practical issue of implementation, in that archivists often treat the entire collection

¹⁷⁶ European Bureau of Library, Information and Documentation Associations, ‘Articles 7 to 9 – Out of Commerce Works’ (EBLIDA, 14th September 2017) 2
<http://www.eblida.org/Documents/Copyright_Reform/Art.7to9_OOCW.pdf> accessed 21st April 2019

¹⁷⁷ Stobo, Patterson, Erickson and Deazley (n.24)

¹⁷⁸ See Patricia Aufderheide, Tijana Milosevic and Bryan Bello, ‘The impact of copyright permissions culture on the US visual arts community: The consequences of fear of fair use’ (2016) *New Media & Society*, 18(9) 2012, 2019

of works donated by one individual or organisation as one entity, referred to as a “*fonds d’archives*”, which are often comprised of a range of different types of copyright works.¹⁷⁹ Therefore, for the archivist it is incomplete to only digitise or make available part of these works forming the “*fonds d’archives*”.¹⁸⁰ It may well be the case that a CHI agrees a license with a CMO for a particular class of works, but not for others. This leaves the *fonds* as a whole at risk of either being viewed in part, or not at all if the CHI decides not to share this collection with the public in parts. It remains to be seen whether this issue will affect the practical implementation of Article 8.

Conclusion

To summarise, this paper has addressed the motivations behind Article 8 of the EU Copyright Directive and recounted that the primary motivation is to widen access to European cultural heritage held by CHIs as widely as possible across the EU. Whilst this notion of “European cultural heritage” may be used to advance policy agendas within the EU, there nonetheless remains an enormous cultural wealth held by CHIs. Enabling CHIs to provide the public with access to these works in instances in which there is no commercial avenue to access them facilitates a truly worthwhile cultural and social cause.

Whilst it is understandable that rightholders are concerned by the opt-out provisions, on an examination it seems that there is no legal conflict with their rights under the Berne Convention. Furthermore, it does not hold that there is a commercial conflict either, as these out of commerce works by their nature are not or never have been commercially exploited. Clarity for rightholders, CMOs, CHIs and the public as a whole on the exact meaning of “commercial” and “non-commercial” uses would likely alleviate much of this concern.

As discussed, the definitions of “out of commerce works”, “customary channels of commerce”, “reasonable effort” and “non-commercial purposes” will also need to be clarified, for CHIs to be able to fully benefit from Article 8, as the current terms are vague. The meaning of out of commerce with its inclusion of “customary channels of commerce”, “reasonable effort” and “non-commercial purposes” seems to bring about some interpretation issues that should be resolved before they become the object of judicial scrutiny.

Currently, the Directive as a whole and Article 8 in particular is ambitious and capable of heralding a significant cultural change within the EU, for the better. However, unless the issues discussed are addressed, the confusion and uncertainty this causes for CHIs in

¹⁷⁹ Jean Dryden, ‘ECL And Archives’ in IFLA Copyright And Other Legal Matters Advisory Committee Network, ‘Background Paper On Extended Collective Licensing’ (*IFLA*, 7th August 2018) 31, 32 <https://www.ifla.org/files/assets/clm/ecl_background_paper.pdf> accessed 8th August 2019

¹⁸⁰ Dryden (n.179) 32

particular will likely lead to a similar situation of cumbersome effort and cost that made the Orphan Works Directive practically ineffective. It is hoped that these errors will not be repeated. Presently, despite these concerns, this opportunity to utilise out of commerce works offers great hope to CHIs and for our cultural heritage.

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