

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

**Report on Digital Preservation, Orphan Works, and  
Out-of-Print Works.  
Selected Implementation Issues**

(adopted by the High Level Expert Group at its third meeting on 18.4.2007)

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The present report follows an Interim Report on digital preservation, orphan and out-of-print works, presented by the Copyright Subgroup at the second meeting of the High Level Expert Group on 17 October, 2006. The Interim report is available at

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

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

**Report on Digital Preservation, Orphan Works, and  
Out-of-Print Works.**  
**Selected Implementation Issues**

## **1 INTRODUCTION**

The first meeting of the High Level Expert Group (HLG) on European Digital Libraries, held in Brussels, 27 March 2006, took up a number of issues highlighted by the Commission Communication “i2010: Digital Libraries”<sup>1</sup> and discussed various legal, technological and economic questions involved in the Digital Library Initiative. The agenda of the meeting listed a number of key IPR challenges: **“What are the key IPR challenges? What different actions and arrangements could be undertaken jointly by stakeholders to reduce tensions surrounding copyrights? Is there a need to harmonise at Community level exceptions and limitations that relate to libraries, archives, museums? What are possible ways for facilitating the clearance of rights for cultural institutions?”**

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

The Copyright Subgroup presented an Interim Report at the second meeting of the HLG, held in Brussels, 17 October, 2006 concentrating on issues of digital preservation, orphan and out-of-print works. The Interim report is available at

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

The Commissioner and the other members of the HLG encouraged the Subgroup’s members to bring forward their work, with a view to presenting a report extending to implementation measures at the next meeting of the HLG for Spring 2007.

The Copyright Subgroup met in Milan 25-26 January 2007 to discuss an agenda prepared by Prof. Marco Ricolfi.<sup>2</sup> On the basis of the discussions held in Milan and of subsequent online exchanges,

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

<sup>2</sup> At the meeting were present: Prof. Marco Ricolfi, Chairman of the Subgroup, Ms Claudia Dillman (Director of Deutsches Filminstitut and President of Association des Cinémathèques Européennes), Ms Tarja Koskinen-Olsson (Honorary President of IFRRO – International Federation of Reproduction Rights Organisations), Mr Olav Stokkmo (Secretary General IFRRO), Mrs Anne Bergman-Tahon (Director of FEP – Federation of European Publishers, close collaborator of Mr Arne Bach Jürgen, President of FEP; absent), Mr Jean-François Debarnot (Directeur Juridique of INA – Institut National de l’Audiovisuel, replacing Mr Emmanuel Hoog, President INA), Mr Toby Bainton, Secretary of SCONUL and Chair of EBLIDA’s Copyright Expert Group, representing Ms Lynne Brindley, Chief Executive of The British Library (excused), Mrs Myriam Diocaretz, Secretary General European Writers Congress and Mr Luis Ferrão (the European Commission).

the Copyright Subgroup prepared this Report<sup>3</sup> on the same groups of issues considered in the Interim Report, namely: Digital preservation, Orphan works, and Out-of-print works, with a view to completing the work undertaken after the first meeting of the HLG, addressing implementation issues and more generally preparing a proposal which could then be adopted at the third meeting of the HLG to be held on 18 April 2007.

The findings of the Copyright Subgroup in each area are presented in the following sections 2, 3, 4 and 5 and Annex I.<sup>4</sup>

The Copyright Subgroup confirmed that at a later stage its analysis might extend to other implementation issues concerning databases for orphan works and out-of-print works and joint clearance centres as well as to additional IPR issues connected with the Digital Library Initiative.

## **2 HIGH LEVEL PRINCIPLES**

The Commission has made digital libraries a key aspect of i2010. In its Communication 'i2010: digital libraries' of 30 September 2005, it set out its strategy for digitisation, online accessibility and digital preservation of Europe's collective memory. As indicated in recital 1 of the European Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation,<sup>5</sup> this collective memory includes print (books, journals, newspapers), photographs, museum objects, archival documents, and audiovisual material. The Council endorsed the Digital Library Initiative in the Council Conclusion on the Digitisation and Online Accessibility of Cultural Material, and Digital Preservation.<sup>6</sup>

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

All proposals should be in full compliance with all international obligations of the European Union and of its Member States<sup>7</sup> as well as respect the principle of subsidiarity as enshrined in the EU Treaty.<sup>8</sup>

For rightholders the governing principles are:

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

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<sup>3</sup> Contribution to the different sections came from the Copyright Subgroup members and by other contributors selected by the Subgroup, identified at the beginning of each section.

<sup>4</sup> Sections 2 and 3 reproduce, with minor variations and additions, the contents of the corresponding Sections of the Interim Report. Sections 4 and 5 and Annex I build on the corresponding Sections of the Interim Report to articulate proposals concerning orphan and out-of-print works including implementation tools.

<sup>5</sup> (2006/585/EC), in *OJ* 236 of 31 August, 2006, 28 ff.

<sup>6</sup> (2006/C 297/01), in *OJ* of 7 December, 2006, 1 ff.

<sup>7</sup> These include TRIPs, the Berne Convention, WCT and WPPT as well as Article 17 of the European Charter of Fundamental Rights, Articles 6(1) and 10 of the European Human Rights Convention and Article 1 of the Protocol thereto, Article 6 of the EU Treaty, Article 27 of the Universal Declaration of Human Rights and Article 15 of the International Covenant on Economic, Social and Cultural Rights of 1966.

<sup>8</sup> In particular some members of the Copyright Subgroup suggested that the proposals must take into account the national usages in each of the EU Member States.

For libraries, archives and museums the governing principles are:

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

The proposals discussed and advanced by the Copyright Subgroup of the High Level Group on the European Digital Library should be read as practical solutions to be agreed by the different stakeholders to solve issues raised by digitisation, including the requests made by libraries and other cultural establishments. The proposals intend to take into account the national usages and best practices in the respective fields in each of the European Union Member States.

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

### **3 DIGITAL PRESERVATION<sup>9</sup>**

The Copyright Subgroup acknowledges that digitisation may in some cases be the only means of ensuring that cultural material will be available for future generations and may therefore be essential to enable continued access to it. It notes that some Member States' laws allow libraries and other institutions to make one single copy for preservation purposes pursuant to Article 5(2)(c) of the Copyright in the Information Society Directive 2001/29/EC ("InfoSoc Directive").<sup>10</sup>

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

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

- rightholders should authorise certain institutions (namely: publicly accessible libraries, educational establishments, museums and archives) to make more than one copy (an open-ended number of copies), if this is necessary in order to ensure the preservation of the work. Successive copying should be allowed to take place if and when technological developments

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<sup>9</sup> This section is based on a draft originally prepared by Mrs Anne Bergman-Tahon and Toby Bainton.

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

- are seen to require such a measure, for preservation purposes only, subject to the safeguarding of the individual publication's identity and integrity;
- preservation should be justified only for works that are no longer commercially available in any format. If the work is available on the market, there is no need to preserve it except within national libraries' deposit schemes;
  - coordination should take place amongst the various preservation initiatives at regional and national levels and across the European Union, to avoid duplication both among different initiatives and also with national 'legal deposit' libraries;
  - in the case of national deposit libraries and concerning born-digital works which have an embedded protection device, it should be noted that publishers and national librarians have agreed that this device should be disabled in the deposit copy (i.e. for the purposes of the national library, but not for access by the end-users) so as to allow permanent and unhindered access to the document.

In the discussions concerning the Digital Library Initiative the formula "to digitise once, to disseminate widely" has frequently surfaced. The Copyright Subgroup notes in this connection that the effort to avoid duplication is important and should be encouraged. It also notes that the precept to "disseminate widely" cannot possibly entail the liberty to disseminate *freely* under all circumstances, lest the opportunity for uncontrolled *secondary* dissemination destroy the incentives to create in the first place and to invest in the *primary* exploitation on works. No creator and no publisher indeed may be expected to engage in the difficult and risky task of creating a new work, if the initial digital copy were to be available without limits immediately after it is first made.

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

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

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

## 4 ORPHAN WORKS<sup>11</sup>

### 4.1 BACKGROUND – INTERIM REPORT OF THE COPYRIGHT SUBGROUP

The Interim Report of the Copyright Subgroup, submitted 17 October 2006, contains the following summary of proposals concerning orphan works.

Clarification and transparency in the copyright status of a work is an essential element in a number of areas including the European Digital Library Initiative. In some cases rightholders cannot be identified or located; as a result, works can be classified as “orphan”. Comprehensive, large scale digitisation and online accessibility, as well as other uses, are hampered by this phenomenon. As a result, libraries, museums, archives and other non-profit institutions may be prevented from fully exploiting the benefits of information technology to carry out their preservation and dissemination mandate. Both text-based and audiovisual materials include substantial amounts of works with unclear copyright status; this is so especially in connection with old materials.

The Copyright Subgroup concludes unanimously that a solution to the issue of orphan works is desirable, at least for literary and audiovisual works. Various mechanisms to facilitate the clearance of rights for orphan works and their use, including digitisation, exist in different countries, and new proposals in the area are pending. These offer a rich source of alternatives to arrive at a preferred European solution. Any solution adopted in a Member State should be interoperable with those adopted in other Member States so that the mechanism fully supports the Digital Library Initiative.

The Copyright Subgroup recommends some non-legislative solutions that enhance transparency and/or prevent the further expansion of the phenomenon of orphan works, such as:

- Dedicated databases concerning information on orphan works;
- Improved inclusion of metadata (information on rightholders) in the digital material;
- Enhanced contractual practices, in particular for audiovisual works.

Both the InfoSoc Directive and the Commission Recommendation of 24 August 2006 emphasise contractual solutions that can be negotiated between stakeholders.

A “soft law approach” can be achieved through contractual arrangements, combined with some support mechanism for voluntarily negotiated contracts. The European Commission could recommend that the Member States support contractual arrangements in a suitable manner, taking into account the role of cultural establishments. The adopted mechanism may be supported or complemented by an extension effect to collective licence contracts, by a legal presumption and by other measures to the same effect.

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

- Cover all orphan works (unidentified or non locatable rightholders), on the basis of a shared definition;
- Include guidance on diligent search;
- Include provision for withdrawal if the rightholder reappears;

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<sup>11</sup> This section is based on a draft originally prepared by Ms Tarja Koskinen-Olsson (team leader) on the basis of inputs, discussions and comments by Ms Lynne Brindley and Mr Toby Bainton, Mr J.F. Debarnot, Ms Claudia Dillmann and Mr Olav Stokkmo.

- Offer cultural, not-profit establishments a special treatment when fulfilling their dissemination purposes, to be further discussed between stakeholders;
- Recognise that clearance of rights, in particular in large collections, may not always be possible at the level of each unique item;
- Offer also for commercial users a possibility to use orphan works;
- Include a requirement for general remuneration or remuneration if the rightholder reappears.

It is a prerequisite that all Member States have solutions which are interoperable and agree to mutually recognise any mechanism that fulfils the generally accepted core principles. Mutual recognition is important with a view to the cross-border nature of the use.

## **4.2 COPYRIGHT SUBGROUP'S DECISIONS OF 16 OCTOBER 2006**

At the second meeting of the Copyright Subgroup it was decided that the notion and conditions of a "diligent search" requirement in the context of orphan works will be elaborated.

During the preparatory work the representatives of INA, BL and Deutsches Filminstitut were asked to supply their current instructions and criteria for diligent search, which they have all done. The following recommendations take these submissions into account.

Some legislative practices or proposals have been analysed in point 4.3.

## **4.3 SHORT OVERVIEW OF CURRENT PROPOSALS**

Some existing or proposed criteria for diligent search in dealing with orphan works are listed below.

### **4.3.1 Canadian Regime for Unlocatable Copyright Owners**

The regime is based on the notion that the user has performed reasonable effort to locate the copyright owner of a published work. The user makes an application to the Copyright Board of Canada.

The user shall first contact for example the following: collecting societies, publishing houses, the internet, libraries, universities, museums, Provincial Departments of Education, and in case of a dead author, the heirs.

As the Copyright Board is involved in each case, the quality of the search is controlled.

### **4.3.2 Report on Orphan Works, US Register of Copyrights, January 2006**

The report includes the notion of reasonably diligent search. The user must perform a reasonably diligent search and must have been unable to locate the rightholder. The search must have been completed before the use.

The criteria include several factors, including:

- The amount of identifying information on the copy of the work itself, such as the author's name, copyright notice, or title;
- Whether the work had been made available to the public;

- The age of the work, or the dates on which it was created and made available to the public;
- Whether information about the work can be found in publicly available records, such as the Copyright Office records or other service;
- Whether the author is still alive, or the corporate copyright owner still exists, and whether a record of any transfer of the copyright exists and is available to the user; and
- The nature and extent of the use, such as whether the use is commercial or non-commercial, and how prominently the work figures in the activity of the user.

#### 4.3.3 Gowers Review in the UK

The Gowers Review of Intellectual Property, December 2006, includes a recommendation on a solution to the problem posed by orphan works, which arise in situations where the owner cannot be identified or it is not possible to locate and seek permissions from owners of rights.

The proposed recommendation is based on the notion of reasonable search. It is recommended that the Patent Office works with groups of rights holders, collecting societies, libraries and archives to establish clear guidelines for reasonable search.

The report states that reasonable search will vary by medium, such as music, literature, film. A voluntary register is considered.

#### 4.3.4 IVIR<sup>12</sup> Report “The recasting of Copyright and Related Rights for the Knowledge Economy

The Report was released in November 2006. Chapter 5 deals with “Rights clearance issues relevant to the reutilization of existing works: multiple ownership and orphan works”. Whereas no recommendations are made concerning the multiple ownership issue, proposals on orphan works include the following:

- It would be an important step to address the orphan works problem if the Member States were to introduce a system whereby a prospective bona fide user, after a reasonably conducted inquiry, may apply to a public authority to obtain a licence to use an orphan work;
- If a system as proposed were introduced at Member State level, it would be commendable if this system were complemented by appropriate measures at EU level that attend to the licensing difficulties that may occur in case of a cross-border exploitations of orphan works;
- It would be commendable if supportive measures were taken to stimulate the supply to the public of copyright ownership information or rights management information.

## 4.4 NOTION AND CONDITIONS OF DILIGENT SEARCH

Firstly, submissions from working group members and some rightholder representatives<sup>13</sup> concluded that all kinds of protected works can be orphan. Thus any solution should be applicable to various work categories.

Secondly, the potential user of orphan works should be required to conduct a thorough search in good faith, with a view to identifying, locating and/or contacting the copyright owner, prior to the use of the work.

<sup>12</sup> Institut for Information Law (Amsterdam).

<sup>13</sup> STM (International Association of Scientific, Technical & Medical Publishers (27 December 2006) and ENPA (European Newspaper Publishers Association, 12/13 June 2006).



The submissions use the following terms in describing this, such as:

- Make an in-depth investigation to retrieve the copyright holder before the work is considered as an orphan work (ENPA);
- The reasonably diligent search should necessitate a high level of care (STM);
- The level of search should not be too easily satisfied, but also not impossible to achieve (BL);
- Anyone intending to exploit an orphan work would need to be able to demonstrate significant effort in tracing the copyright owner (BL);
- The notion of diligent search should consider several elements: kind of orphan work, kind of exploitation envisaged, kind of user. The significance of the effort of search cannot be evaluated in the same way for all cases (INA).

Thirdly, several submissions advocate a flexible approach that will ensure an adequate solution in dealing with individual circumstances of each orphan work, taking into account various categories of works. Any regulatory initiative should refrain from prescribing minimum search steps or information sources to be consulted, because of the rapidly changing information sources and search techniques<sup>14</sup>. The Gowers Report proposes that the Patent Office works with representatives of rightholders, collecting societies and users to produce guidelines for reasonable search. Such guidelines should not be part of any legislative measure, to allow flexibility.

The submission of ACE includes the following:

“The Executive Committee of ACE and the European film archives wish to play an active role in defining the whole procedure of copyright clearing, because – concerning audiovisual material – the archives are the better experts in search. A clearance centre shall be established (in cooperation with collective licensing agencies). The archives will define criteria for “due diligence” and publish in a database or on the ACE website the orphan material they want to use (or have used).

The ACE submission advocates diligent standards for audiovisual material. This is in line with the above; relevant stakeholders can discuss guidelines for different kinds of protected materials.

In conclusion:

- Any solution for orphan works should be applicable to all kinds of protected works;
- A bona fide/good faith user needs to conduct a thorough search/reasonable search prior to the use of an orphan work;
- Best practices or guidelines specific to particular categories of works can be devised by stakeholders in different fields, but legislative measures to define minimum steps or information sources should not be introduced.

The criteria for demonstrating that reasonable search has been performed depend on the legislative method chosen. In cases where a competent public authority, or a collective management organisation duly authorised by a competent public authority, issues a licence, the

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<sup>14</sup> STM position, seconded by BL.

evidence is evaluated by the authority. This method provides for legal certainty for users prior to the use of the work. In cases where a limited liability is introduced for users who use an orphan work after an unsuccessful but reasonable search for the copyright owner, full legal certainty is achieved only when a court examines the case and determines that the search was indeed reasonable.

#### **4.5 POSSIBLE MEASURES**

As a follow-up to the recommendations of the High level Expert Group on Digital Libraries, submitted 17 October 2006, concerning orphan works, the Subgroup makes the following recommendation:

“Where there are works whose rightholders are not identifiable or rightholders are not locatable (so called orphan works), Member States are encouraged to establish a mechanism to enable the use of such works for non-commercial and commercial purposes, against agreed terms and remuneration, when applicable, if reasonable search prior to the use of the works has been performed in trying to identify the work and/or locate the rightholders. The mechanisms in the Member States need to fulfil prescribed criteria concerning context and usage.

As listed in point 4.4, the prescribed criteria are:

- The solution should be applicable to all kinds of works;
- A bona fide/good faith user needs to conduct a thorough search/reasonable search prior to the use of the work;
- Best practices or guidelines specific to particular categories of works can be devised by stakeholders in different fields, but such guidelines should not form part of legislation.

The Member States are encouraged to recognise solutions in other Member States that fulfil the prescribed criteria in order to achieve the cross-border effect needed in the Digital Library Initiative. As a result, material that can be lawfully used in one Member State would also be lawfully used in another.”

### **5 WORKS OUT OF PRINT<sup>15</sup>**

#### **5.1 BACKGROUND – INTERIM REPORT OF THE COPYRIGHT SUBGROUP**

The Interim Report of 16 October 2006 from the Copyright Subgroup of the i2010 Digital Libraries High Level Expert Group concluded unanimously that a solution is required to facilitate the digitisation and the making available of out-of-print works by libraries.

#### **Definition of out-of-print works**

The Interim Report agreed on the concept of out-of-print work, which it defined as a work that is not commercially available, as declared by the appropriate rightholders, regardless of the existence of tangible copies of the work as normally understood.

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<sup>15</sup> This section is based on a draft originally prepared by Mr Olav Stokkmo (team leader) on the basis of inputs and discussion by Mr Toby Bainton, also on behalf of Lynne Brindley, Ms Tarja Koskinen-Olsson, Ms Myriam Diocaretz and Mrs Anne Bergman-Tahon. In the work on the Model Licence the group has also drawn on the expertise of IFRRO’s Deputy Secretary General and legal adviser, Franziska Schulze.

### **Proposed solution –key elements**

The Copyright Subgroup further agreed on a solution which it recommended to the European Commission and the High Level Expert Group (HLG) at the HLG meeting on 17 October 2006. This solution was based on four main elements:

- (1) a model licence
- (2) the establishment of a database of out-of-print works
- (3) a joint clearance centre
- (4) a procedure to clear rights.

### **5.2 IMPLEMENTATION OF THE OUT-OF-PRINT WORKS SOLUTION**

At its meeting on 16 October 2006, the Copyright Subgroup established a team to start preparation for the implementation of the proposed solution.

With this report the Copyright Subgroup delivers the first step in the implementation of the out-of-print works solution in the form of a Model Licence for the digitising and making available of out-of-print works by libraries. The Model Licence is attached hereto as Appendix I.

### **5.3 MODEL LICENCE - CURRENT PROPOSAL**

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

The Copyright Subgroup has aimed to identify and work out practical solutions to specific needs and expectations indicated by libraries that would assist them in satisfying their user requirements for adequate access to information. All stakeholder representatives concerned agreed that this should be done in a way that does not interfere with the copyright holders' interest in commercialising their works.

Following these requirements and current needs specified by the libraries, the model licence is at present limited to allowing the library to digitise and provide access to out-of-print works to users through closed networks. It is not limited in respect of territory, but the library may not provide access through open networks.

The model licence has also been designed to be adaptable to the different legal regimes and models for administration of rights in force throughout the Member States.

#### **The content of the licence**

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

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

Subject to a separate agreement with the rightholder or his/her representative the library may provide other libraries with online access to the digitised work in order for them to make it available

in closed networks to their respective authorised users. Also, subject to a separate licence the library may provide on-line access to a third party such as an enterprise or a university.

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

### **The potential use of the model licence**

Even though the model licence is directed mainly towards libraries, it may also be used by archives and others who wish or need to agree with rightholders on the use of works which are out of print. Moreover, the definition adopted of out-of-print works allows the scope of the licence to be generic and thus not limited to print material. It may also be adopted by other copyright sectors.

Finally, the model licence has been drafted with a view to use on a national as well as a multinational and European level. It may be used by libraries and individual rightholders, their agents and representatives including Collective Management Organisations such as Reproduction Rights Organisations (RROs).

### **5.4 IMPLEMENTATION OF THE MODEL LICENCE**

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

Furthermore, the European Commission might wish to promote the adoption of the model licence, post it on its home page and encourage the use of it.

### **5.5 POSSIBLE COMMISSION MEASURES**

The Commission should use its communication resources to encourage the adoption of the model licence. This should include promoting the model licence through conferences for stakeholder representatives whether or not they have participated directly in the Copyright Subgroup's work in developing it. Also, the Commission is advised to research and publish best practices on the use of the model licence.

Finally, the Copyright Subgroup notes that no dispute settlement mechanism is in place on the European Commission level. The model licence therefore turned to the World Intellectual Property Organisation (WIPO) for a solution.