

2013-5

Audiovisual Heritage 2.0

LEAD ARTICLE

Public Sector Information and Audiovisual Archives

- Background on the PSI Directive and its revision
- Scope of application of the revised Directive
- Rules set up by the revised PSI Directive
- Impact of the rules of the revised PSI Directive: some challenges ahead?

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- Subject matter and scope of the Directive
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- Cross-border use of orphan works
- Various safeguards



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Director of the Publication:

Susanne Nikoltchev, Executive Director of the European Audiovisual Observatory
E-mail: susanne.nikoltchev@coe.int

Editor and Coordinator:

Dr Susanne Nikoltchev, LL.M. (Florence/Italy, Ann Arbor/MI)

Editorial Assistant:

Michelle Ganter
E-mail: michelle.ganter@coe.int

Marketing:

Markus Booms
E-mail: markus.booms@coe.int

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European Audiovisual Observatory
76 Allée de la Robertsau
F-67000 Strasbourg
Tel.: +33 (0)3 90 21 60 00
Fax: +33 (0)3 90 21 60 19
E-mail: obs@obs.coe.int
www.obs.coe.int



Contributing Partner Institutions:

**Institute of European
Media Law (EMR)**

Franz-Mai-Straße 6
D-66121 Saarbrücken
Tel.: +49 (0) 681 99 275 11
Fax: +49 (0) 681 99 275 12
E-mail: emr@emr-sb.de
www.emr-sb.de



**Institute for
Information Law (IViR)**

Kloveniersburgwal 48
NL-1012 CX Amsterdam
Tel.: +31 (0) 20 525 34 06
Fax: +31 (0) 20 525 30 33
E-mail: website@ivir.nl
www.ivir.nl



**Moscow Media Law
and Policy Center**

Moscow State University
ul. Mokhovaya, 9 - Room 338
125009 Moscow
Russian Federation
Tel.: +7 495 629 3804
Fax: +7 495 629 3804
www.medialaw.ru



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Audiovisual Heritage 2.0

Foreword

*“...let us save what remains;
not by vaults and locks which fence
them from the public eye and use
in consigning them to the waste of time,
but by such a multiplication of copies,
as shall place them beyond
the reach of accident.”*

Thomas Jefferson

The destruction of the Library of Alexandria is a symbol of knowledge lost forever. Although the facts about this historical event are not entirely clear, the myth of a centralised source of knowledge ravaged by the flames remains in the collective conscience as a reminder of the fragility of cultural heritage.

Many centuries after its alleged destruction, the dream of a digital library of Alexandria seems to have entered the realm of the possible. Indeed, digital technologies allow for the inexpensive reproduction and transmission of text, audio and video content. In theory, a single website could harbour digital copies of all works available in public libraries and museums around the world. A mouse click away. There are already some prominent examples of projects which aim at achieving this objective: think of Google Books or the Europeana project.

This dream is permeated by what could be called the “Internet Zeitgeist”, an illusion of total and free access to information and entertainment. Paraphrasing Queen’s song, we want it all and want it now. But this utopian vision of perfect accessibility to our cultural heritage has to undergo a necessary reality check. First of all, preservation costs money. Digitisation requires time, equipment, skills and manpower. Server space and bandwidth have to be provided for. And then there is copyright: works that are still protected cannot be given access to or even be digitised without the authorisation of rightsholders. Given that the copyright term of protection in the EU is seventy years after the death of the last surviving author, this excludes most of the works made in the twentieth century! On top of that, many of those works which are still protected are “orphaned”, that is, their rightsholders are unknown or cannot be located, and hence they cannot even be asked to permit the preservation and making available of their works.

This publication presents three different aspects of this conundrum and the solutions that are proposed at EU level. The Lead Article describes the main lines of the recently amended Directive on the re-use of public sector information. This Directive provides “a minimum set of rules governing the re-use and the practical means of facilitating re-use of existing documents held by public sector bodies of the member states.” The Directive does not regulate access to such information, which remains a competence of member states, but focuses on the economic aspects of re-use of information and encourages the member states to make as much information available for re-use as possible. The Related Reporting section retraces the most recent developments concerning digital preservation of cultural heritage at EU level. Finally, the Zoom section introduces the reader to the EU rules that allow certain uses of orphan works.

Strasbourg, October 2013

Susanne Nikoltchev
Executive Director
European Audiovisual Observatory

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Public Sector Information and Audiovisual Archives

Catherine Jasserand*

Institute for Information Law (IViR), University of Amsterdam

I. Introduction

Digitisation is a means to unlock the value of audiovisual archives and to prolong the life expectancy of analogue format. It will ensure access in the future and will allow the development of new services.¹ Digitisation turns cultural resources into economic assets for the creative and innovative business at national and European level.

In recent years, several audiovisual archives have been participating in projects to make their collections and data accessible online. This is the case of the *Nederlands Instituut voor Beeld en Geluid* (Dutch Institute for Sound and Vision), which is one of the partners of the biggest digitisation initiative in Europe, Images for the Future.² The project aims at unlocking more than 100 000 hours of audiovisual materials for education and the public at large. On the basis of this project, the Dutch media platform Open Images was launched in 2009.³ Supported by the Dutch Institute for Sound and Vision in collaboration with the Dutch think tank Knowledgeland, Open Images offers online access to fragments of audiovisual collections. The purpose of the platform is to stimulate creative re-use.⁴ Access to the content is granted through Creative Commons licensing models.⁵ The platform contains approximately 2 000 videos.⁶ A small part has been marked as belonging to the public domain and therefore they can be freely re-used and redistributed, without any limitations.⁷ The British Film Institute (BFI) has also launched a funding programme, the BFI Archives for the Future,⁸ to digitise 10 000 films and “make the UK’s entire screen heritage digitally accessible” in the long run.⁹ Besides the digitisation of audiovisual content, the BFI has made available millions of digitised film-related materials such as film reviews and newspaper cuttings.¹⁰ At European level,

* Many thanks to Nico van Eijk and Mireille van Eechoud for valuable discussions and suggestions; any mistake or omission is the sole responsibility of the author of the article.

- 1) *Images for the Future: Unlocking the Value of Audiovisual Heritage*, Museums and the Web 2009, available at: www.museumsandtheweb.com/mw2009/papers/oomen/oomen.html
- 2) *Beelden voor de Toekomst*; the other partners are the EYE Film Institute Netherlands, the National Archives and Knowledgeland, see <http://imagesforthefuture.com/en>
- 3) www.openimages.eu
- 4) www.openimages.eu/blog/2011/03/03/looking-back-on-2010
- 5) Creative Commons licences offer several options to rightsholders to allow them to decide how their work will be re-used, see <http://creativecommons.org>
- 6) www.openimages.eu/blog/2012/05/31/2000th-video-on-open-images
- 7) The platform contains 83 videos, which have been marked as belonging to the public domain. See www.openimages.eu/media?q=&p=383&date=&uploaded=&_searchlang=&license=18937&sf=created&so=down&max=10&offset=0#video
- 8) The BFI Archives for the Future is a part of the five-year plan, *Film Forever*; see www.bfi.org.uk/sites/bfi.org.uk/files/downloads/bfi-film-forever-2012-17.pdf
- 9) *Film Forever*, report, p. 41, FN 8.
- 10) See press release, 18 January 2013, available at: www.bfi.org.uk/news-opinion/bfi-news/bfi-digitises-4m-newspaper-cuttings

audiovisual archives are also the partners of initiatives making their audiovisual content available and searchable through aggregators and portals such as the digital library Europeana,¹¹ or the audiovisual specialised portals the European Film Gateway, Filmarchives online¹² or EU Screen.¹³

To benefit from the new economic opportunities that the digital cultural assets represent for the internal market, the European Commission proposed to include cultural institutions in the revised scope of the Directive on re-use of public sector information (hereinafter the PSI Directive).¹⁴ The original PSI Directive, adopted in 2003, aimed at developing a European information market based on information collected, produced and disseminated by public authorities.¹⁵ It harmonised at a minimum level rules on re-use but not the rules on access to public information, which remains the sole and exclusive competence of member states.¹⁶ After 18 months of intense negotiations between the European institutions, the scope of the PSI Directive has been revised to include museums, archives and libraries among the public sector bodies subject to the rules on re-use.¹⁷

This article proposes to explain the new rules on re-use that will apply to audiovisual archives and to analyse how they will affect their policies to make their materials available. Following an overview of the PSI Directive to set up the background and the revision process in Section II, the scope of applicability of the revised Directive will be analysed in Section III. Section IV will focus on the rules on re-use applicable to audiovisual archives. Section V will analyse the impact that copyright rules, such as the rules on the term of protection and on the IP ownership, will have on the scope of re-usable information.

As a foreword, audiovisual archives should be understood as covering audiovisual heritage institutions but as excluding archives belonging to public service broadcasters since they remain outside the scope of the Directive, as this will be explained. Examples of national policies and practices of film heritage institutions will be provided as illustrations. They should in no case be considered as an exhaustive list of practices or policies.

II. Background on the PSI Directive and its revision

This section presents the elements of the discussion to understand the rationale of the PSI Directive and the reasons of the inclusion of cultural institutions (including audiovisual archives) in the scope of the revised PSI Directive.

1. Overview on the PSI Directive

Adopted in 2003, the PSI Directive aimed at stimulating the economic potential of information produced, collected, processed and disseminated by public authorities in the performance of their public tasks. The Directive was conceived as a means to boost the European information market, considered uncompetitive and underdeveloped in comparison with its US counterpart, which

11) <http://pro.europeana.eu/web/guest/about>

12) Filmarchives online provides a fast and easy access to the catalogues of film archives all around Europe, see www.filmarchives-online.eu

13) The European Film Gateway is the point of access of 24 film archives in Europe, and the aggregator for Europeana in the film domain, see www.europeanfilmgateway.eu ; EU Screen provides online access to television archives, see www.euscreen.eu

14) Impact assessment accompanying the proposal for a revision of the PSI Directive [hereinafter Impact Assessment], SEC (2011) 1552 final, 12 December 2011, p. 27; Proposal for a Directive of the European Parliament and of the Council Amending Directive 2003/98/EC on re-use of public sector information, COM (2011) 877 final, 12 December 2012.

15) Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information [2003], OJ L 345, p.90 [hereinafter the PSI Directive].

16) Impact Assessment, p. 5 and 20, FN 14.

17) Directive 2013/37/EU of the European Parliament and of the Council of 26 June 2013 amending Directive 2003/98/EC on the re-use of public sector information, OJ L 175 p. 1 of 27 June 2013 [hereinafter the amending Directive] available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:175:0001:0008:EN:PDF>; Within 24 months of the publication of the amending directive, member states will have to implement the rules in their national laws.

benefited from inexpensive and easily accessible public sector information.¹⁸ To overcome the national obstacles preventing the development of the information market, the European Commission proposed a Directive to set up a minimum framework of rules applicable in the member states. The issue of access to public sector information was left at national level in the absence of general competence of the European Community to regulate the right of access to public information in the member states. Because of the objections and concerns expressed by member states and public sector bodies, the Directive did not oblige member states to make all their public sector information available for re-use but instead encouraged them to do so.¹⁹ Once they chose to allow re-use, they had to apply the conditions set in the Directive. The notion of public sector information as originally understood was very traditional. It included information held by ministries and public bodies: legal, administrative, business or financial information but also geographical, weather or traffic information. But public sector information understood as educational information, cultural information or information held by public service broadcasters was specifically excluded from the scope of the Directive.²⁰ Arguments on these specific exclusions will be developed in Section III.

2. Revision of the scope of the PSI Directive

In 2008, the European Commission conducted a first review of the PSI Directive on its scope. After consultation of the stakeholders and the member states, the European Commission maintained the status quo on the exclusion of cultural institutions.²¹ A second phase of revision of the scope started in 2010 and resulted in a proposal of revision of the PSI Directive in December 2011.²²

2.1. The Open Data context

The European Commission presented its proposal of revision of the PSI Directive as a part of its Open Data Strategy. In addition to the revision of the PSI Directive, its Open Data Policy Framework is composed of a Communication on Open Data and the revision of the European Commission's decision on the re-use of its own documents.²³ The Commission sees new economic opportunities in the open data movement and encourages member states to adopt the concept of open data.²⁴

Neither the proposal of revision of the PSI Directive nor its impact assessment defines the concept of open data. Although there is no official definition, the notion has become very familiar in recent years. It is often understood as "a piece of data or content" that "everyone is free to use, reuse and redistribute ... subject only, at most, to the requirement to attribute and/or share alike".²⁵ The concept shares the same philosophy as the open content movement, the open licences movement or the open source movement.²⁶ A subset of the notion is the open government data movement,²⁷ which aims at making public data more accessible, more transparent and freely re-usable.²⁸ This

18) *Public Sector Information: A key resource for Europe*, Green Paper on public sector information in the information society, COM (1998) 585.

19) On the background, see Katleen Janssen, *INSPIRE and the PSI Directive: public tasks versus commercial activities*, workshop paper, available at: www.ec-gis.org/Workshops/11ec-gis/papers/303janssen.pdf

20) Article 1(2)(d), (e) and (f) of the PSI Directive; other exemptions relate to the protection of data under access regimes and privacy laws (Article 1(2)(c)).

21) Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the re-use of public sector information, COM (2009) 212 final, 7 May 2009.

22) Proposal for a Directive of the European Parliament and of the Council Amending Directive 2003/98/EC on re-use of public sector information, COM (2011) 877 final, 12 December 2012.

23) See Commission's Communication, *Open Data, an Engine for Innovation, Growth and Transparent Governance*, COM (2011) 882 final, 12 December 2011 and Commission Decision of 12 December 2011 on the reuse of Commission documents, 2011/833/EU [2011], OJ L 330 p. 39.

24) Communication on Open Data, p. 5, see FN 23; Impact Assessment, p. 5, FN 14.

25) <http://opendefinition.org/>; Definition provided by Open Knowledge Foundation, a non-profit organisation dedicated to the promotion of open data and open government, see for further details <http://okfn.org/about>

26) See http://en.wikipedia.org/wiki/Open_Data

27) Born in the United States in 2007 and embraced by several European member states.

28) See for examples the 8 Open Government Data Principles adopted in the USA in 2007 by open government activists.

movement supports democracy and citizens' participation. In the context of open government information, open data is perceived as a way of improving governance (and democracy) as well as growth.²⁹

Applied to cultural institutions, open data is the way these institutions can "open up control to their data and ... make digital copies of public domain works easily accessible and re-usable."³⁰

2.2. *The economic value of cultural information*

The inclusion of the cultural institutions in the scope of the PSI Directive has been widely discussed. Member states and stakeholders have expressed their opinions and concerns during the two phases of revision, in 2008 and 2010. The European Commission on its side has backed up its position with two economic studies: the first one on the "Economic and Social Impact of the Public Domain",³¹ the second one on "PSI re-use in the cultural sector".³²

Cultural institutions expressed concerns on the administrative burden and high costs (IPR related) that the extension would induce. In addition, those that are drawing revenues from the sale of their materials also expressed fear with regard to loss of revenues.

Other respondents to the European Commission's public consultations highlighted the economic potential of cultural resources and the positive impact of the extension on the development of the European information market.

At European level, the importance of the cultural sector was recognised as early as 2000 but in terms of public investments and not of return on investment. The economic value of the cultural sector as economic driver was established in 2006 in a report on the economy of culture, which revealed the contribution of the cultural sector to the European GDP (2.6% in 2003).³³

The first economic study, mandated by the European Commission to assess whether the cultural sector was ready to adopt the principles contained in the Directive, did not find enough evidence in favour of the extension at the current level of activities. Although it acknowledged the growing role of cultural institutions in the creation of content and the significant potential value of their materials for re-users, it concluded that further investigation was necessary.³⁴

The first study found however that 32% of cultural institutions surveyed were charging for the re-use of their content. On the basis of this finding and in the perspective of the second review of the PSI Directive, the European Commission commissioned another study to "assess the importance of re-use in terms of revenues for cultural institutions and to estimate trends in the development of the re-use market for cultural material".³⁵ The study found that some cultural institutions were already making their collections available for re-use and charging for third-party re-use. It also established that many cultural institutions were trying to find a balance between their public task of dissemination and the necessity to generate income to support their activities. The study concluded that cultural institutions were looking for "opportunities to re-use their content". On the basis of the study, the European Commission considered that opening up public domain materials held by cultural institutions for re-use would contribute to "stimulating PSI re-use across the EU". As a conclusion, "the scope of the Directive should be revised to encompass cultural establishments" but taking into account the specificities of the sector.³⁶

29) See the latest development in the field of open data: the G8 Open Data Charter, available at www.gov.uk/government/publications/open-data-charter/g8-open-data-charter-and-technical-annex

30) See Neelie Kroes exhorting cultural institutions to take the opportunities offered by opening up their data, *Foreword in Uncommon Culture*, Vol. 2 N.3/4 (2011).

31) *Economic and Social Impact of the Public Domain, EU Cultural Institutions and the PSI Directive*, Rightscom, 2009.

32) *PSI re-use in the cultural sector*, Curtis+Cartwright, 2011.

33) *The Economy of Culture in Europe*, Chapter 3, Mapping out the economy of culture in figures, KEA study, 2006

34) Rightscom study, 2009, p. 5, FN 31.

35) Impact Assessment, p. 35, FN 14.

36) Impact Assessment, p. 37, FN 14.

III. Scope of application of the revised Directive

The PSI Directive aims at stimulating the economic potential of public sector information by harmonising the rules and practices on re-use of public sector information in the member states.

Article 1 of the PSI Directive defines the general principle of applicability of the Directive, i.e. the rules on re-use only apply to documents held by public sector bodies and supplied in the performance of their public task. The term “public sector information”, which is used in the title of the Directive, is not defined. Instead Article 2(3) refers to and defines “document”. A public sector document covered by the Directive is “any content whatever its medium” (i.e. written or on paper, or stored in an electronic form or as a sound, visual or audiovisual recording) and “any part of such content”. The notion of documents covers both content (such as audiovisual content, film) and data (such as statistics on films, datasets). In this section, the expressions “information”, “documents” and “materials” held by public sector bodies are used indistinctly.

The Directive does not prescribe to which type of public sector information or organisations the rules on re-use apply. Instead the Directive defines its scope by a list of exclusions. Criteria of application can be deduced a contrario from these exclusions. The first criterion relates to the type of public sector bodies. The second criterion concerns the activity of the public sector bodies. The third one pertains to the status of the documents supplied by public sector bodies.

1. Type of public sector bodies

Since its origin and until the proposal of revision of the PSI Directive in 2011, Article 1(2)(f) of the Directive excluded cultural institutions from its scope. Cultural institutions were identified in a non-exhaustive list as museums, libraries, archives, orchestras, operas, ballets and theatres. They were excluded due to the status of the materials they held (most of them were acknowledged as being covered by third party’s intellectual property rights) and to their own status as “carriers of culture and knowledge” in society.³⁷ As explained in the previous section, during the first review of the PSI Directive, the European Commission concluded that there was no evidence that the potential benefits of the application of the PSI Directive to cultural institutions would outweigh the high burden they would have to carry. After a second assessment, the European Commission concluded that public domain materials held by cultural institutions had to be unlocked and should be subject to the rules on re-use of the PSI Directive. The proposal of revision extended the scope of the Directive to three categories of cultural institutions, museums, archives and libraries, which are considered as holding a vast amount of public domain materials valuable for re-use. All the other types of cultural institutions and their related archives remain outside the scope.³⁸ In particular the exclusion of “orchestras, operas, ballets and theatres” has been maintained because of their nature as performing arts establishments and the big volume of third-party protected documents they hold (Recital 18 of the amending Directive).

In order to be considered as a public sector body under the PSI Directive, audiovisual archives must meet the criteria defined in its Article 2.³⁹ They either have to be publicly financed or controlled bodies, at state, regional or local level, or they have to be “established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character”. As inferred from Recital 10 of the PSI Directive, state-owned companies are excluded from the definition of public sector bodies.

37) Proposal for a Directive of the European Parliament and of the Council on the re-use and commercial exploitation of public sector documents, [2002], OJ C227 E, p. 382.

38) Article 1(2)(f) of the revised PSI Directive: [This Directive shall not apply to ...]: “documents held by cultural establishments other than libraries, museums and archives” and Recital 18 of the amending Directive.

39) The definition of public sector bodies is the one established in the EU Procurement Directives; see Recital 10 of the PSI Directive.

According to the European Commission's findings on the implementation of the Recommendation on Film Heritage, most film heritage institutions are governmental institutions, at national or regional level, and are financed with public funds. As such they should fall within the definition of public sector bodies.⁴⁰ As a matter of illustration, the French *Centre National du Cinéma et de l'Image Animée* (National Centre for Cinematography and Moving Image – the CNC)⁴¹ or the German *Bundesarchiv-Filmarchiv* (Federal Archives-Film Archives)⁴² are public administrative authorities operating under the authority of different ministries. Other film heritage institutions are organised under the form of non-profit associations pursuing a mission of public service (such as the *Cinémathèque française*)⁴³ or charitable organisations attached to their governmental department of culture (such as the *British Film Museum*)⁴⁴ and are receiving most of their funding from the government.

As already mentioned, public service broadcasters and their subsidiaries are excluded from the scope of the PSI Directive. Brief explanations on their exclusion are contained in the proposal of Directive.⁴⁵ Excluding them permitted to avoid any doubt about their qualification as public sector bodies and reflected their particular status as recognised in the Protocol to the Amsterdam Treaty.⁴⁶ The European Commission's impact assessment on the proposal of revision of the PSI Directive further developed the argument. The European Commission considered that subjecting PSBs to the rules of the PSI Directive would interfere with their remit and competence to organise their commercial exploitation as acknowledged in the Protocol to the Amsterdam Treaty. Besides their specific status, the European Commission provided a second argument based on the high volume of third party copyright protected materials held by PSBs: "third party intellectual property rights (e.g. music rights) form an integral part of virtually all broadcast material, i.e. not only of acquired or commissioned productions but also of programme material produced entirely by the PSB itself." As a consequence and because materials covered by third party rights are excluded from the scope of the Directive, nearly all broadcast materials held by PSBs would be excluded from the scope.⁴⁷

2. Nature of the task performed by the audiovisual archives

In application of Article 1(2)(a) of the PSI Directive, documents provided by a public sector body in the performance of a task falling outside its public mission⁴⁸ are excluded from the scope of the Directive. "Commercial" activities beyond the public task of public sector bodies are not subject to the rules on re-use.⁴⁹ A traditional example of such commercial activity is the delivery of customised weather forecasts by the public body in charge of gathering meteorological data. The production of meteorological data is a part of its public mission, whereas the commercial exploitation of the data falls outside its public mission.

Only information supplied by public sector bodies in the exercise of their public tasks is covered by the PSI Directive. The problem is the absence of definition or harmonisation of the notion of public task at EU level. The Directive has however set some criteria to allow member states to determine whether a specific task is considered to be a public task: the task has to be vested in

40) Third implementation report of the 2005 EP and Council Recommendation on Film Heritage, SWD (2012) 431 final, 7 December 2012, p. 6.

41) The CNC is under the authority of the French Ministry of Culture, see www.cnc.fr/web/fr/le-cnc

42) The Bundesarchiv is under the authority of the German State Ministry of Culture and the German Commissioner for Culture and the Media, see www.bundesarchiv.de/bundesarchiv/organisation/abteilung_fa/index.html.en

43) See the bylaws of the Cinémathèque française, available at: www.cinematheque.fr/data/document/statuts-cinematheque-francaise-20-juin-2011-signature.pdf

44) See the Royal Charter of 18 July 1983, amended on 19 April 2000, setting up the British Film Institute.

45) Proposal of the PSI Directive, 2002, see FN 37.

46) Protocol on the system of public broadcasting in the member states, (1997) OJ C340, 19 November 1997, p.109.

47) Impact Assessment, p. 33, FN 14.

48) In this sub-section the terms public mission and public task are used indistinctly.

49) Recital 9 of the PSI Directive: "activities falling outside the scope of the public task will typically include supply of documents that are produced and charged for exclusively on a commercial basis and in competition with others in the market".

a public sector body and be defined at national level by law or any other binding measures or in the absence of such measures, by common administrative practices.⁵⁰ Recital 8 of the PSI Directive provides examples of activities considered as public tasks: collection, production, reproduction and dissemination of documents.

Concerning audiovisual archives, and more specifically film heritage institutions, another European policy document provides indications on activities that fall within the public missions of film archives. The European Recommendation on Film Heritage defines their public tasks as the systematic collection, cataloguing, preservation, restoration and making accessible for educational, cultural, research or other non-commercial uses of cinematographic and audiovisual works.⁵¹ In its third report on the implementation of the Recommendation on Film Heritage, the European Commission notes an evolution of the public tasks of film heritage institutions. Their traditional task of preservation of collections has been completed, in many institutions, by the task of providing access to their collections. This evolution is mainly due to the use of and possibilities offered by the new technologies. The report mentions the new collection policy of the British Film Institute (BFI), which gives “equal priorities as objectives” to preservation and access.⁵² In Sweden as well, providing access to the film collections is also one of the public tasks of the Swedish Film Institute. Its other tasks are the acquisition, cataloguing, preservation and restoration of the collections.⁵³

Another question that arises is whether the public mission of preservation encompasses the task of digitisation. The report of the “Comité des Sages” on digitisation, online accessibility and preservation of cultural heritage considers that digitisation is the main responsibility of the public sector, even if it could involve the private sector for its execution.⁵⁴ The revised PSI Directive does not take position on this issue but acknowledges the importance of digitisation as “an important means of ensuring greater access to and re-use of cultural material”.⁵⁵ Determining whether digitisation is a public task or not is therefore left at national level. In Hungary, for example, the Hungarian Digital Archive and Film Institute is in charge of digitising the entire Hungarian cultural heritage as a part of its public missions.⁵⁶

Finally, the criteria set by the Directive to determine a public task might not take into account the hybrid nature of some audiovisual archives. Despite their industrial and commercial nature (as acknowledged by their status at national level), some audiovisual archives are cumulating a mission of public service with commercial activities. On one side, they are compelled to provide access to their holdings, on the other side they exploit them to finance new services. The French *Institut National de l'Audiovisuel* (National Audiovisual Institute – INA) is a good example. It is organised under the form of a public body of industrial and commercial nature (French category of *établissement public à caractère industriel et commercial* – EPIC).⁵⁷ As such, it should be excluded from the scope of the Directive. However the administrative practice in France has shown that a judge does not assess the nature of a public body on a given qualification but rather on its missions. In the case of INA, administrative courts have already acknowledged its dual nature.⁵⁸ The issue would be then to determine whether the public body supplies the information as part of its public mission or as part of its commercial activities.

50) New Article 1(2)(a) of the PSI Directive, completed by Recital 10 of the amending Directive.

51) Point 2 of the Recommendation of the European Parliament and the Council on film heritage and the competitiveness of related industrial activities, 2005/868/CE [2005], OJ L323/57 [hereinafter Recommendation on Film Heritage].

52) The BFI collection policy, 16 November 2011, p. 22, available at: www.bfi.org.uk/sites/bfi.org.uk/files/downloads/bfi-collection-policy-2011-11-16.pdf

53) The Policy of Archival Film Collections of the Swedish Film Institute, December 2012, available at www.sfi.se/Filmarvet/Om-filmarkivet

54) *The New Renaissance*, Report of the “Comité des Sages” 10 January 2011, pp. 9-10.

55) Recital 19 of the amending Directive [2013], FN 17.

56) See Answers to questionnaire on the implementation of the Recommendation on Film Heritage, http://ec.europa.eu/avpolicy/docs/reg/cinema/report_3/hungary_en.pdf

57) See www.ina.fr

58) For example Administrative Court of Appeal, Paris, 29 June 2004, N° 01PA03112; a specific notion of “*établissements publics à double visage*” has been created by the doctrine to reflect the dual nature of some public bodies.

3. Status of the information held by the audiovisual archives

The status of the information provided by the public sector body is the third condition that can narrow the scope of application of the Directive. Documents can be excluded on the basis of two grounds:

- They are not accessible or exempted from disclosure at national level to protect public or private interests (linked to public security, business secret or personal data) as provided by the new Article 1(2)(c to cc) of the PSI Directive;
- Third parties hold intellectual property rights in public sector information. Article 1(2)(b) excludes documents for which third parties hold intellectual property rights, even if these documents are accessible at national level under access laws. IPRs are understood as copyright and related rights (including database rights).⁵⁹ This means that documents in which third parties hold IPRs could only be made available by the rightsholders or with their permission. In addition, it should be noted that the Directive does not affect civil servants' IPRs they might have under national laws, such as the authors' rights that French civil servants benefit from (Article L. 111-1 of the French Code of Intellectual Property).

Recital 9 of the amending Directive broadens the scope of the IPR exclusion for documents held by cultural institutions. According to that recital, documents that were initially owned by third parties and for which the term of protection has not expired are treated like documents for which third parties hold intellectual property rights. The potential impact of this extension on the volume of materials available for re-use will be assessed in Section V.

Once it has been established that audiovisual archives are public sector bodies supplying public documents in the exercise of their public tasks and that the documents are not protected by a third party's IPR, the rules on re-use will apply.

IV. Rules set up by the revised PSI Directive

The amending Directive has introduced a duty for member states to allow the re-use of accessible documents.⁶⁰ This duty has however been adjusted to the specificities of cultural institutions, which benefit from several exemptions or exceptions. This section explains the general principle of re-use and describes the different conditions of re-use as applicable to audiovisual archives: available format, rules governing charges, licences, transparency and discovery, as well as rules concerning exclusive arrangements.

1. Interface between access to and re-use of audiovisual information

The PSI Directive does not harmonise the right of access to public sector information at EU level. As constantly repeated by the European Commission, the Directive is not a freedom of information act.⁶¹ The EU does not have a specific and direct competence to regulate access to public information held in the member states.⁶² Instead it builds on existing national access regimes, without changing the existing rules.⁶³ The rules on re-use only apply to documents that have been accessed under

59) Recital 22 of the PSI Directive: "the term 'intellectual property' refers to copyright and related rights only (including sui generis form of protection). This Directive does not apply to documents covered by industrial property rights".

60) Compare the wording of the original Article 3 of the PSI Directive: "member states shall ensure that, where the re-use of documents held by public sector bodies is allowed, these documents shall be re-usable" with the wording of the new Article 3 of the PSI Directive: "member states shall ensure that documents to which this Directive applies ... shall be re-usable" [italics added].

61) Impact Assessment, p.5, FN 14.

62) See LAPSI Policy Recommendation N°6, *Rights on Access to Public Sector Information*, available at: www.lapsi-project.org

63) See Recital 7 of the amending Directive, FN 17; and new Article 1(3) of the PSI Directive.

national freedom of information laws or that have been publicly disseminated.⁶⁴ For audiovisual archives, this principle means that materials and data supplied cannot be re-used unless they have been made available or have been disseminated in application of national laws (as explained in Section III).

The minimum framework of rules set up in the PSI Directive has led to diverging implementations at national level. Some member states expressly linked the right of re-use to a right of access; whereas other member states did not.⁶⁵ To create legal certainty and clarify the interface between the two concepts, the PSI Directive contains in its revised Article 3 the obligation for member states to allow the re-use of documents of which access is neither restricted nor excluded.

What does re-use mean?

In application of Article 2(4) of the PSI Directive, re-use covers any use by any natural or legal person for a purpose other than the initial purpose for which the document was produced (i.e. in the performance of the public task). Re-use can be made for commercial and non-commercial purposes. This includes both uses by the public sector body in a commercial activity outside its public task and uses by third parties creating added value products on the basis of the public information.

Re-use by the audiovisual archives can consist for example of the licensing of moving images to commercial entities, the licensing of films and videos to broadcasters and third parties or the sale of digitised content (such as the digitised copy of a film), either online or through their on-site shop.⁶⁶ Re-use by third parties can be the use of digitised content to create a new product (film extracts website).

2. Availability of documents out of copyright

As explained in the previous section, the obligation to make available documents for re-use applies to documents not protected by third parties' intellectual property rights. The obligation potentially covers documents for which public sector bodies hold intellectual property rights, in addition to out-of-copyright documents.

However for cultural institutions, the revised Directive has limited the scope of the obligation to out-of-copyright documents. In application of the new Article 3(2) of the PSI Directive, documents for which cultural institutions hold intellectual property rights are not subject to the obligation of re-use. Instead, cultural institutions have the choice to allow the re-use of their documents. If they do so, the conditions of re-use laid down in the revised version of the Directive should apply. Although the new Article 3(2) does not specify it, it is understood that either member states or the cultural institutions themselves can authorise the re-use.⁶⁷

In application of the rule, audiovisual archives can decide to give access to their datasets and allow their re-use under the conditions of re-use described below.

3. Available format

According to the new Article 5(1) of the PSI Directive, documents should be provided "in any pre-existing format or language and where possible and appropriate, in open and machine-readable

64) Impact Assessment, p. 5, FN 14.

65) Recital 7 of the amending Directive, FN 17.

66) For more examples, see the Curtis study 2011, pp. 14-15 and 21, FN 32.

67) This faculty is inferred from Recital 9 of the PSI Directive that explained what the original rule on re-use was: "This Directive [i.e. the Directive adopted in 2003] does not contain an obligation to allow re-use of documents. The decision whether or not to authorise re-use will remain with the member states or the public sector body concerned".

format together with their metadata". Concerning the format of the information, audiovisual archives will only have the obligation to deliver the information in its existing format. The new provision of the PSI Directive does not oblige them to provide an open and machine-readable format but encourages them to do so and to deliver their metadata. This provision leaves some leeway to member states, which can introduce stricter obligations.⁶⁸ On the issue of formats, the European Commission plans to provide further guidance (through guidelines or recommendations).⁶⁹

The supply of the information does not induce an obligation for audiovisual archives to "create or adapt documents or provide extracts ... where this would involve disproportionate effort, going beyond a simple operation" (new Article 5(2) of the PSI Directive). Since the origin of the PSI Directive, the aim has been to impose a minimum burden on public sector bodies.

4. Charges

The regime for charging for re-use is contained in the new Article 6(1) of the PSI Directive. It limits charges to marginal costs, which cover costs for "reproduction, provision and dissemination of documents".

Pursuant to an exception applicable to cultural institutions, audiovisual archives can charge at costs recovery limited to the "cost of collection, production, reproduction, dissemination, preservation and rights clearance together with a reasonable return on investment" (new Article 6(4) of the PSI Directive). Reasonable return on investment is not defined by the Directive but can be established by comparison with the prices charged by the private sector for the use of the same or similar documents (Recital 23 of the amending Directive).

The rationale of the cost recovery exception is to enable cultural institutions to generate revenues to contribute to the fulfilment of their duty to disseminate culture.⁷⁰ The study on *PSI re-use in the cultural sector* has revealed that the income of certain cultural bodies depended on the sale of their information to finance part of their operations.⁷¹

In case audiovisual archives re-use the information they hold to include it in a commercial activity (such as the sale of DVDs), which is not part of their public task, they will be subject to the same conditions of re-use and charges as the ones applicable to the private sector re-using the same information (Article 10(2) of the PSI Directive). The goal of the PSI Directive is to ensure a level playing field between public and private sector entities, which are offering new services or products on the basis of public sector information.

Audiovisual archives will also have to comply with an obligation of transparency concerning the terms and conditions applicable to charges. Following the new Article 7 of the PSI Directive, audiovisual archives will have to pre-establish (i.e. objectively and in respect of competition rules) and publish (on their websites if possible) the conditions and amounts of standard charges or the criteria used to determine other types of charges (new Article 7(1) and (2) of the PSI Directive).

5. Licences

The provision on licensing is defined in Article 8 of the PSI Directive and gives some leeway to member states and public sector bodies.

68) In the UK for example, the Freedom of Information Act was amended in 2012 to provide that all information released has to be in a re-usable and machine-readable format, see www.legislation.gov.uk/ukpga/2012/9/part/6/enacted

69) Impact Assessment pp. 30-31, FN.14; Recital 36 of the amending Directive, FN 17.

70) Impact Assessment, p. 37, FN 14.

71) See the Curtis study, FN 32.

In application of the new paragraph 1 of Article 8 of the PSI Directive, audiovisual archives can set conditions of re-use of their documents. At their choice, they can allow re-use with or without conditions. Conditions can be imposed through a licence.

When a licence is used, member states should ensure that standard licences are available in digital formats and encourage audiovisual archives to use them (Article 8(2) of the PSI Directive). Content of standard licences is decided at national level. The Directive only provides indications of possible conditions such as the acknowledgment of the source or the acknowledgment of any change introduced in the document by the user (Recital 26 of the amending Directive). The only obligation that the Directive imposes when conditions are set is to ensure that “these conditions [do] not unnecessarily restrict possibilities for re-use and [are] not used to restrict competition.”

The revised PSI Directive does not impose the use of open licences but requests member states to encourage their use. The objective is to promote open licences as common practices in the EU despite the lack of definition of “open licences” in the revised Directive. Several models have already been issued such as the Creative Commons licensing models or the Open Data Commons Licences, which can both be used for public domain materials.⁷² At national level, three member states at least have set up their own open licences for the re-use of public sector information: the “Licence Ouverte” in France, the “Italian Open Data Licence” and the “Open Government Licence” in the UK.⁷³ The French Ministry of Culture has already recommended the use of the French open licence model for the dissemination and re-use of cultural data.⁷⁴

6. Discoverability of the information

Concerning the discoverability of information, member states have the obligation to put in place tools to facilitate the search of public information and its re-use. Examples of tools are asset lists of main documents with relevant metadata, accessible where possible and appropriate online and in machine-readable format, and portal sites that are linked to the asset lists (new Article 9 of the PSI Directive). Where possible member states shall facilitate the cross-linguistic search for documents.

The PSI Directive does not impose on audiovisual archives any obligation to make their materials discoverable. But at national level, member states can create such as an obligation.

In the audiovisual field, the existing portals and aggregators such as Europeana, the European Film Gateway and EU Screen could be further used. As of 2011, audiovisual and sound content amounted to only 2% of the material made available through Europeana. The European Commission encourages Europeana to increase this volume in line with its Strategic Plan 2011-2015.⁷⁵ The Dutch Institute for Sound and Vision has already made more than 1 500 videos available on Europeana through its platform Open Images. The collections available contain among others some of the Dutch newsreels owned by the Dutch Institute.⁷⁶ EU Screen, providing free access to materials from EU broadcasters and audiovisual archives, has set up its own portal on Open Images to make a small selection of videos available for creative re-use.⁷⁷

72) For more information on open licences, see Ilaria Buri, *Accessing and Licensing Government Data under Open Access Conditions*, IViR, publications 2012.

73) Respectively available at: www.data.gouv.fr/Licence-Ouverte-Open-Licence; www.dati.gov.it/i odl/2.0/ and www.nationalarchives.gov.uk/doc/open-government-licence/version/2

74) See *Guide Data Culture*, “Pour une stratégie numérique de diffusion et de réutilisation des données publiques numériques du secteur culturel”, March 2013, available at: <https://semaphore.culture.gouv.fr/documents/10746/1502772/GUIDE+DATA+CULTURE>

75) Recital 15, Commission Recommendation of 27 October 2011 on the digitisation and online accessibility of cultural material and digital preservation 2011/711/EU [2011], OJ L 283, p. 39. See also Europeana Strategic Plan 2011-2015 available at: www.pro.europeana.eu/publications

76) See www.openimages.eu/blog/2012/05/16/open-images-in-europeana and the collection available at: www.europeana.eu/portal/search.html?query=europeana_collectionName%3A+2021601*

77) www.openimages.eu/blog/2012/11/09/euscreen-portal-on-open-images

7. Exclusive arrangements (such as public-private partnerships)

As a general principle set up in Article 11 of the PSI Directive, agreements between public sector bodies and third parties that grant exclusive rights are prohibited. The new paragraph 2a of Article 11 sets an exception for the digitisation of cultural resources to take into account the benefits that public-private partnerships can offer for the access and re-use of cultural information (Recital 30 of the amending Directive).

The conditions under which audiovisual archives will be able to contract public-private partnerships are the following ones:

- Exclusive rights can be granted to the private partner to allow it to recoup its investment for a period of 10 years.
- If the period exceeds 10 years, the exclusive arrangement should be reviewed on the 11th year and afterwards, if applicable, every 7 years.

The period of exclusivity granted by the PSI Directive is longer than the one advised in the European Commission Recommendation of 2011 on the digitisation and online accessibility of cultural material. Based on the Comité des Sages' Report, the European Commission recommended a period of 7 years maximum.⁷⁸

The revised Directive imposes obligations on private partners. They should provide a copy of the digitised materials to the cultural institutions at no cost (free of charge). At the end of the period of exclusivity, that copy will be made available for re-use. Audiovisual archives will not have the choice whether or not to allow its re-use. They will have the obligation to make it available.

Does the provision affect ongoing digitisation projects? The new Article 11(4) of the PSI Directive introduces a limited retroactive clause. Agreements concluded before the entry into force of the Directive and that do not qualify for the exceptions will be maintained until the end of the agreement. In the case of open-ended agreements, they will have to be terminated within a maximum of 30 years after the entry into force of the amending Directive.

V. Impact of the rules of the revised PSI Directive: some challenges ahead?

In determining the scope of re-usable information, audiovisual archives may face two challenges: assessing which information is out of copyright and becoming familiar with the notion of re-use.

1. IPR status of information held

Three legal issues may hinder the re-use of audiovisual materials: the determination of the expiration of the IP protection of a work, the determination of the IP ownership and the extension of the scope of materials covered by third party IP protection.

1.1. Term of copyright protection

First of all, the EU Term Directive, as last amended, has harmonised the term of protection of copyright and related rights.⁷⁹ The rule is the protection of copyright works until 70 years after the

78) Annex 1 of the Commission Recommendation of 27 October 2011 on the digitisation and online accessibility of cultural material and digital preservation, 2011/711/EU [2011], L283/39; *The New Renaissance*, Report of the "Comités des Sages" 10 January 2011, p. 40.

79) Codified version of the European Directive on the term of protection of copyright and certain related rights, Directive 2006/116/EC [2006], OJ L372/12, as amended by Directive 2011/77/EC [2011], OJ L265/1; This section briefly summarises the issues of the term of protection as analysed in the IRIS *plus* article of Christina Angelopoulos, *Determining the Term of Protection for Films: When Does a Film Fall into the Public Domain in Europe*, IRIS *plus* 2012-2.

death of the author, unless one of the several exceptions applies (such as in a co-authorship situation or in case of an anonymous/pseudonymous work). For audiovisual works, the determination of the term is rendered more complex by the multiplicity of authors and the cumulation of several layers of protection in the same work (copyright and related rights).⁸⁰ In addition, the uneven national implementations of the Term Directive, through the preservation of national exceptions extending the length of the term, creates some uncertainties on the exact expiration date of the term of protection.⁸¹

1.2. Orphan works

Second, the volume of orphan works, i.e. works for which rightsholders cannot be identified or located, constitutes another issue.⁸² According to a survey undertaken by the *Association des Cinémathèques Européennes* (ACE, European Association of Film Archives), 21% of the films held by European film archives are orphan works (i.e. about 225 000 films). Most of the films identified as orphan works are early movies from the 1920s or pre- and post WWII. But other films might be orphans because the chain of rights cannot be traced (in the absence of well-documented assignments of rights or due to bankruptcy of the film producer).⁸³ The Orphan Works Directive, adopted in 2012, does not provide solutions to determine the IP ownership of a work identified as orphan.⁸⁴ The Directive only permits certain non-commercial uses of an orphan work by cultural institutions. After a fruitless search to find the rightsholder, cultural institutions (including film and audio heritage institutions) can use the work to perform their public missions, such as the dissemination of materials for educational and cultural purposes.⁸⁵ The solutions provided by the Orphan Works Directive are not suitable for the commercial re-use of orphan works. The revised PSI Directive on its side does not address the issue of orphan works. As a consequence, a substantial amount of audiovisual works held by audiovisual archives will be excluded from the scope of re-use.

1.3. Scope of materials covered by third party's rights

Recital 9 of the amending Directive has introduced a limitation to the volume of materials available for re-use. In application of that recital, documents first owned by third parties and for which the term of protection has not elapsed are considered as "documents for which third parties hold intellectual property rights". They are as such excluded from the scope of the PSI Directive. Drafted in vague terms, this recital might create more confusion than it will bring clarifications. It has been argued by the LAPSI professional network, providing legal analysis to the European Commission on the re-use of public sector information, that this recital broadens the scope of the exclusion. In its policy recommendation paper, the LAPSI professional network considers that a vast amount of materials, such as donated materials that were first owned by third parties as well as commissioned works first owned by their creators, would fall outside the scope of the Directive. As a consequence only documents internally produced or generated by the cultural institutions would be subject to the PSI Directive.⁸⁶ The recital might create uncertainty on the notion of documents covered by third party's IPRs. However, it could also be argued that the statement it contains has not been transcribed in any article of the Directive and therefore does not bind member states.

80) See *Film Copyright in the European Union*, Pascal Kamina, (Cambridge University Press, 2002) p. 84 et seq.

81) National exceptions have been maintained for example in France, Spain and the UK, see IRIS *plus* 2012-2, FN 79.

82) "An orphan work can be defined as a copyright-protected work (or subject matter protected by related rights), the right owner of which cannot be identified or located by anyone who wants to make use of the work in a manner that requires the rights owner's consent", in Stef van Gompel and P. Bernt Hugenholtz, "The Orphan Works Problem: The Copyright Conundrum of Digitizing Large-Scale Audiovisual Archives, and How to Solve it", *Popular Communication - The International Journal of Media and Culture*, 2010-1, pp. 61-71.

83) On the general issue of orphan works, see Anna Vuopala, *Assessment of the Orphan Works Issue and Costs for Rights Clearance*, May 2010.

84) Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works [2012], OJ L299/5 [hereinafter Orphan Works Directive].

85) Article 6(2) and Recital 18 of the Orphan Works Directive, FN 84.

86) See LAPSI Policy Recommendation N°5 on *the proposed inclusion of cultural and research institutions in the scope of the PSI Directive*; available at www.lapsi-project.org

1.4. Audiovisual archives' data and metadata

Considering the issues identified above, it might be that a very small amount of materials held by audiovisual archives will be subject to the rules on re-use. However, materials held and generated by audiovisual archives are not limited to audiovisual elements of their collections. Audiovisual archives are producing reports, statistics or other data relating to their collections. They also generate metadata. But the rules on re-use applicable to the materials they own are different. Audiovisual archives are not obliged to make them available for re-use. They can decide whether or not to allow their re-use. The interest of the PSI Directive might lie in the opening of the data cultural institutions own. However, this interest is less appealing in the absence of an obligation of re-use. Nevertheless, the French *Centre National du Cinéma* has already released 30 datasets on the French governmental portal, Etalab, that are re-usable under the "Licence Ouverte".⁸⁷ Concerning metadata, audiovisual archives are merely encouraged to supply them together with the documents they provide access to.

2. Notion of re-use

The revised version of the PSI Directive has introduced a "right to re-use" out-of-copyright materials held by audiovisual archives. The duty to ensure that out-of-copyright materials are re-usable is borne by member states. Audiovisual archives on their side will have to implement the national rules in their policy of dissemination of their collection.

As mentioned in the economic study on *PSI re-use in the cultural sector*, cultural institutions are not familiar with the concept of re-use.⁸⁸ Concerning film heritage institutions, the difficulty they might have to implement the notion can be reinforced by the European policy guidelines that member states and film archives have followed until now. The leading policy document is the Recommendation on Film Heritage that targets a better preservation and exploitation of film heritage.⁸⁹ The Recommendation, adopted in 2005, called on member states to introduce appropriate measures to ensure that "cinematographic works forming part of their audiovisual heritage are systematically collected, catalogued, preserved, restored and made accessible for educational, cultural, research or other non-commercial uses of a similar nature". Public tasks carried out by film archives include making available materials they hold but for non-commercial uses. Making available audiovisual works for commercial re-use is not one of the objectives of the Recommendation.

As a consequence, film heritage institutions that have implemented this Recommendation have not taken into account the dissemination of their collections for commercial re-use.⁹⁰ By way of exception, the management collection policy of the British Film Institute (BFI) of 2011 mentions the re-use of collections data and works as part of the promotion of access to its collection. More specifically, in the context of online access, the BFI allows "free access to collections data, to read, refer to and re-use" as well as "free access to digital surrogates (where available) for reference and re-use, for works that are BFI-owned or out of copyright".⁹¹

It remains to be seen whether the Recommendation on Film Heritage will be adapted to take into account the rules set up in the PSI Directive. It should be however mentioned that the EU Recommendation on Film Heritage has been completed by the European Commission

87) www.etalab.gouv.fr/article-de-nouveaux-jeux-de-donnees-du-ministere-de-la-culture-et-de-la-communication-116421284.html

88) The Curtis Study, 2011, p. 27, FN 32.

89) Recommendation 2005/865/CE of the European Parliament and of the Council of 16 November 2005 on film heritage and the competitiveness of related industrial activities [2005] OJ L323/57.

90) Third implementation report of the 2005 EP and Council Recommendation on Film Heritage, SWD (2012) 431 final, 7 December 2012.

91) BFI Collection Policy, 2011, available at: www.bfi.org.uk/sites/bfi.org.uk/files/downloads/bfi-collection-policy-2011-11-16.pdf

policy on digitisation and online accessibility of cultural materials.⁹² The European Commission Recommendation targets all cultural institutions (including film heritage institutions) and promotes access and re-use for commercial and non-commercial purposes of digitised materials in the public domain.

VI. Conclusion

With the inclusion of libraries, museums and archives in the scope of the revised PSI Directive, audiovisual archives will be subject to the rules of the Directive. However, public service broadcasters' archives as long as they are subsidiaries of public service broadcasters, will remain exempted from the rules. From the early negotiations of the PSI Directive in 2002 through its different revision stages, public service broadcasters and their archives have remained outside the scope of the Directive mainly by reason of their special status.

The impact of the rules of the revised Directive on audiovisual archives appears contrasting.

On one side, the effects might be limited due to the narrow scope of re-usable materials. First of all, only out-of-copyright materials will be subject to the rules on re-use. The determination of which audiovisual materials have fallen in the public domain will not be easy to reach. Several obstacles can be identified: the difficulty to precisely determine the date of expiration of the term of protection as well as the difficulty to determine the IP ownership. The scope might even be further narrowed by the exclusion of materials that were first owned by a third party and for which the term of protection has not elapsed.

Second, beside the materials in their collections, audiovisual archives own data (reports, statistics) and produce metadata. If they are not compelled to supply their data, they are strongly encouraged to share their metadata. The decision to allow the re-use of their data will belong to them. The interest of the PSI Directive for audiovisual archives might lie precisely in the opening of the data they own and not in the opening of the collections they hold. However in that respect, the revised PSI Directive leaves broad freedom to member states and cultural institutions by applying the old rule of the original PSI Directive (choice to allow re-use) to cultural information. This seems to be far from the starting point of the European Commission, which wanted to place the revised PSI Directive in a context of Open Data.

On the other side, although the decision to widen the scope of the PSI Directive was not based on a cost/analysis study for each category and sub category of cultural institutions, the revised PSI Directive offers economic opportunities to audiovisual archives. First of all, the Directive has taken into account the fear of revenue loss expressed by cultural institutions and adjusted the rules on charges to their needs. Cultural institutions can charge for the re-use of materials at cost recovery together with a reasonable return on investment. The revised PSI Directive also provides some room for public-private partnerships to ensure access and re-use of cultural resources.

92) Commission Recommendation of 27 October 2011 on the digitisation and the online accessibility of cultural material and digital preservation, 2011/711/EU [2011], OJ L283/39; reinforced by the Council conclusions of 10 May 2012 on the digitisation and online accessibility of cultural material and digital preservation [2012], OJ C169/5.

The Digitisation of our Heritage

This section presents the results of almost a decade of EU measures aimed at fostering the digital preservation of our cultural heritage. During this period the European Commission and the Council of the European Union have released some important recommendations concerning this domain, notably the Recommendation on film heritage and the Recommendation on the digitisation and online accessibility of cultural material and digital preservation. Concerning the copyright-related aspects of the preservation of cultural heritage, the Commission has also been very active in recent times, starting with the Green Paper on Copyright in 2008, and following with the 2009 Communication on Copyright and the 2011 Communication entitled “A Single Market for Intellectual Property Rights”. Further information about the project Europeana, as well as the contribution of the Comité des Sages on Digitisation of European Cultural Heritage and the High Level Expert Group on Digital Libraries complete this picture.

European Commission

Implementation Report on the Film Heritage Recommendation

*Catherine Jasserand
Institute for Information Law (IViR), University of Amsterdam*

On 7 December 2012, the European Commission issued a study on “the challenges for European film heritage from the analogue and the digital era”. This study constitutes the third implementation report on the European Parliament and Council’s recommendation of 16 November 2005 on film heritage (see IRIS 2005-6/9 and IRIS 2006-1/4). The first implementation report was released in August 2008, the second one in July 2010 (see IRIS 2010-9/4).

The current report is based on national reports received from member states in response to a European Commission’s questionnaire sent in July 2011. The report is composed of a general analysis of the situation of film heritage in the European Union and an annex summarizing the situation in each member state. The general description highlights the best practices put in place in member states but also points out problems and obstacles encountered by film heritage institutions.

In terms of resources and investments, the report notes that state resources remain stable. However to allow film heritage institutions to properly perform their tasks of preservation of digital film, additional resources (and skills) are required. The study shows that only 1.5% of European film heritage is digitised but that at least 1 million hours of films held by film heritage institutions could still be digitised. The European Commission stresses the importance of digitisation as a pre-condition to online access.

Besides the lack of funding or investment, the European Commission identifies several obstacles to digitisation such as the complexity of copyright and related rights clearance or the formatting and interoperability issues.

One of the consequences of the transition to digital age is also the evolution of the definition of a film, which is not characterised anymore by its production process, recording medium or distribution channel. In that regard, the definition contained in the 2005 film heritage recommendation would need to be updated.

In conclusion, the European Commission notes that only a minority of member states have adapted to the digital age and devoted additional resources, planning and strategies to digital preservation. The European film heritage is at risk of being lost. The European Commission observes that many opportunities offered by the digital revolution are being missed.

The report does not contain any recommendations but offers general orientations for possible actions. The European Commission will keep monitoring the application of the film heritage Recommendation. Member states should submit their next application report in November 2013, based on a questionnaire that the European Commission will circulate mid-2013. Last but not least, the European Commission is considering a proposal on digital film in 2013 to foster member states’ actions.

- Commission Staff Working Document on the challenges for European film heritage from the analogue and the digital era (Third implementation report of the 2005 EP and Council Recommendation on Film Heritage), Brussels, 7 December 2012, SWD (2012) 431 final
<http://merlin.obs.coe.int/redirect.php?id=16269>

Council of the EU

Conclusions on Digitisation and Online Accessibility of Cultural Material and Digital Preservation

*Catherine Jasserand
Institute for Information Law (IViR), University of Amsterdam*

During the Council meeting of 10-11 May 2012, the Council released its conclusions on the digitisation and online accessibility of cultural material and digital preservation. These conclusions are a follow up to the Commission Recommendation of the same name (see IRIS 2012-1/4) and refer to the Comité des Sages' report "New Renaissance" (see IRIS 2011-3/5) as well as to the Commission's recent legislative proposals (orphan works, re-use of public sector information). In 2006, the Council had already issued conclusions on the same topic but since that date, the Council notes that the context for digitisation has changed, notably with the launch of Europeana.

In its introduction, the Council considers that digitised cultural materials are an importance resource for cultural and creative industries and also contribute to economic growth and job creation. Although efforts have already been made in the field of digitisation, further steps are necessary to exploit cultural heritage and turn it into an asset for European citizens. This includes better coordination of member states' actions.

The conclusions are largely focused on the development, use and support of Europeana. The Council invites the member states, the Commission and Europeana to make further progress. In an annex to the conclusions, the Council addresses specific priorities for member states in the format of actions and objectives for the period 2012-2015:

- Consolidation of their strategies and targets for digitisation (e.g., development of standards to select materials to digitise and participation in the Commission's assessment of the progress of digitisation and digital preservation);
 - Consolidation of the organisation of digitisation and funding thereof (through public-private partnerships or the use of EU Structural Funds);
 - Improvement of the conditions for granting online access to materials (tools to facilitate accessibility to out-of-commerce works and the specific issue of digitisation of public domain materials);
 - Participation in the development of Europeana (through seven action points);
 - Maintenance of the long-term digital preservation (including the promotion of specific strategies, the exchange of information between member states as well as the setup of the legal conditions for copying and depositing materials)
- Council Conclusions on Digitisation and Online Accessibility of Cultural Material and Digital Preservation
<http://merlin.obs.coe.int/redirect.php?id=15963>

IRIS 2012-7/4

European Commission

Recommendation on the Digitisation and Online Accessibility of Cultural Material and Digital Preservation

*Christina Angelopoulos
Institute for Information Law (IViR), University of Amsterdam*

On 28 October 2011 the European Commission adopted a Recommendation on the digitisation and online accessibility of cultural material and digital preservation. The Recommendation follows up on a similar Recommendation from 2006, updating for new developments such as the launch in 2008 of Europeana, the publication of the “New Renaissance” Report by the Comité des Sages and the adoption of the Commission’s proposal for a Directive on orphan works in May 2011. The Recommendation acknowledges the importance of digitisation for making Europe’s cultural productions more widely available and thereby boosting the growth of Europe’s creative industries. It accordingly challenges member states to step up their digitisation efforts.

On an organisational level, the Recommendation invites member states to set clear and quantitative targets for the digitisation of cultural material. To help manage the high costs of digitisation, public/private partnerships should be encouraged. The EU Structural Funds may also be used for this purpose.

In response to the recent trend among European cultural institutions to assert new rights over digitised versions of public domain works, not always with a solid legal basis, thus impeding their re-use, the Commission declares that material in the public domain should remain in the public domain after digitisation. Intrusive watermarks and other visual protection measures that reduce usability of digitised public domain material are also discouraged.

With regard to material that is still copyright-protected, the Commission concentrates on orphan and out-of-commerce works. It encourages the rapid and correct implementation of the Directive on orphan works as soon as that is adopted. It also promotes the creation of a legal framework conducive to licensing mechanisms that enable the large scale digitisation and cross-border accessibility of out-of-commerce works. Finally, it supports the development of European-level databases of rights information, such as ARROW, which contribute towards uncovering the information necessary to remedy the orphan status of a work or establish the expiry of copyrights.

Finally, the Recommendation addresses the question of digital preservation. As the Recitals point out, digital material has to be maintained otherwise files may become unreadable over time. Currently, no clear and comprehensive policies are in place on the preservation of digital content. Member states are therefore invited to reinforce national schemes for the long-term preservation of digital material and to exchange information with each other on strategies and action plans. Legal deposit and web-harvesting are suggested as ways of minimising the burden of collection for mandated institutions. Coordinating efforts between member states should be encouraged so as to avoid confusing national variations in the relevant rules.

The resultant digitised material, whether in-copyright or in the public domain, should be made available through Europeana, the European digital library. Although already home to over 19 million digitised objects, as the Recommendation points out, the ultimate success of Europeana will depend on its systematic enrichment with new digital content. The Recommendation sets a target of 30 million digitised objects to be added to Europeana by 2015, including all European public domain masterpieces. The free availability of metadata (i.e., descriptions of works) produced by cultural institutions should also be ensured.

- Recommendation on the digitisation and online accessibility of cultural material and digital preservation, C2011 7579 final
<http://merlin.obs.coe.int/redirect.php?id=11391>

IRIS 2012-1/4

Communication on a Single Market for Intellectual Property Rights

*Christina Angelopoulos
Institute for Information Law (IViR), University of Amsterdam*

On 24 May 2011, the European Commission adopted a Communication entitled “A Single Market for Intellectual Property Rights”. The Communication’s overall objective is to encapsulate its strategic vision for creating a true European IPR regime capable of releasing the full potential of European inventors and creators, thus fuelling economic growth. According to the Communication, a Single European Market for IPRs, by doing away with the current fragmentation of the EU’s IPR landscape, would contribute significantly towards creating and maintaining the momentum of a virtuous IPR circle. Alongside sections on modernising the patent and trademark systems in Europe and the complimentary protection of intangible assets, the Communication also included an examination of current copyright-related issues.

The Communication heralds the submission by the Commission in 2011 of proposals for the creation of a legal framework for the collective management of copyright to enable multi-territorial, pan-European licensing, as well as the revisiting in 2012 of the 2001 Copyright Directive as part of the programme set out in the Digital Agenda for Europe. Along this vein, the Communication also discusses the possibility of a more far-reaching overhaul of copyright in the EU through the creation of a European Copyright Code consolidating the present body of EU directives on copyright and related rights, though for the time-being it stops short of proposing concrete steps in this direction.

The Communication announces the Commission’s intention of further examining the question of User-Generated Content, noting the growing realisation of the necessity of instituting efficient and affordable permission systems through which end-users can lawfully re-use third-party copyright-protected content, in particular for non-commercial purposes. Similarly, the Communication promises the redoubling of efforts to kick-start, on the basis of the draft Memorandum of Understanding brokered in 2009, a stakeholder agreement on the conciliation of private copyright levies and the smooth cross-border trade in goods subject to such levies. Also on the Commission’s agenda for 2011 is the implementation of a two-pronged approach to the promotion of the digitisation and making available of the collections in Europe’s cultural institutions, consisting of (a) the institution of collective licensing schemes for out-of-commerce works and (b) the adoption of a European legislative framework to identify and release orphan works to the public (see IRIS 2011-7/5).

Specifically with regard to audiovisual works, the Commission declares its intention of launching in 2011, with a view to reporting in 2012, a consultation on the online distribution of audiovisual works, addressing copyright issues, video-on-demand services, their introduction into the media chronology, the cross-border licensing of broadcasting services, licensing efficiency and the promotion of European works. An audiovisual Green Paper will also address the status of audiovisual authors and their participation in the benefits of online revenue streams.

Finally, the Communication also makes mention of its plans to extend the term of protection of performers’ and producers’ rights in the music field. The adoption of the relevant proposal for a directive is expected in the very near future.

It should be noted that, according to the Communication, the development of a fair and unified IPR regime should be undertaken in such a way as to ensure the promotion and preservation of cultural and linguistic diversity, while the protection of rights over intellectual assets should go hand in hand with the promotion of access and the circulation and dissemination of goods and services.

- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "A Single Market for Intellectual Property Rights Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe"
<http://merlin.obs.coe.int/redirect.php?id=13312>

IRIS 2011-7/4

Europeana Sets out its Strategy for the Period 2011-2015

*Kelly Breemen
Institute for Information Law (IViR), University of Amsterdam*

On 14 January 2011 Europeana launched its Strategic Plan for the period 2011-2015. The plan can be seen "as a clear-sighted assessment of the route Europeana must take in order to fulfill its potential", Dr Elisabeth Niggeman, Chair of the Europeana Foundation Board, states in her foreword.

Jill Cousins, Executive Director of Europeana, notes in her introduction to the Strategic Plan that it is Europeana's ambition "to provide new forms of access to culture, to inspire creativity and stimulate social and economic growth". However, while working towards the achievement of this ambition, several challenges have been encountered, for example intellectual property barriers to digitisation. To overcome these challenges, the Strategic Plan presents four tracks on which Europeana will focus in the coming five years. These tracks have been developed through consultation with stakeholders and analysis of the results. Amongst the stakeholders both users and policy makers were included.

The first track listed is named "Aggregate". Its goal is to build the open trusted source for European cultural heritage content. Several elements of the goal are mentioned in the plan: the source content must represent the diversity of European cultural heritage, the network of aggregators must be extended and the quality of metadata improved. The diversity-aspect, for example, will be addressed by covering content from under-represented cultures and countries. Another aim is to stimulate digitisation programmes to make sure that Europeana displays a proper level of visibility. Europeana especially aims to fill the lacuna that exists with regard to audiovisual and 20th/21st century content, making sure that it covers a range of formats from all domains. Where new types of cultural heritage develop, such as 3D visualisations, Europeana wants to ensure that these are included as well.

The second track, "Facilitate", aims for support for the cultural heritage sector through knowledge transfer, innovation and advocacy. Elements of this aim are the sharing of knowledge among cultural heritage professionals, fostering research and developments in digital heritage applications and the strengthening of Europeana's advocacy role. When it comes to the sharing of knowledge, Europeana plans to build on its previous achievements, while also seeking new platforms and methods to develop and reinforce digital competencies throughout the cultural heritage sector. It wants to promote dialogue and collaboration between parties such as librarians, curators, archivists and the creative sector to work together regarding interests they share. In addition, an online publishing programme will be launched to spread best practice guidelines, standards and positioning papers on policy issues. Conferences and workshops to broadly distribute information will continue to be organised as well.

The third track, "Distribute", seeks to make cultural heritage available to users wherever they are and whenever they want it. In order to achieve this goal, the plan states that Europeana's portal must be upgraded, content put in the user's workflow and partnerships developed to deliver content in new ways. The portal Europeana.eu is the flagship for the content and services and will continue to be so, but it will be developed according to users' evolving needs and expectations. The content is aimed to be made as findable, understandable and reusable as possible. Also, Europeana wants to bring the content to the places that the users often visit, instead of depending on the users seeking out content, for example by using web services to put content in places like social networks, educational sites and cultural spaces.

The fourth track mentioned by the plan is "Engage", which aims to cultivate new ways for users to participate in their cultural heritage. This engagement should be realised through enhancing the user experience, extending Europeana's use of web 2.0 tools and social media programmes and arranging a new relationship between curators, content and users. As the plan states, by enhancing the user experience, a richer and more intuitive service will be created that maximises users' participation and interaction and increases usage of the content. It is believed that greater participation in the site will increase user interest and loyalty.

Lastly, the plan elaborates on the resources for Europeana in the period 2011-2015, including budget, cost allocation and Cost-Benefits.

- Europeana Strategic Plan 2011-2015
<http://merlin.obs.coe.int/redirect.php?id=13059>

IRIS 2011-4/6

Final Report of the *Comité des Sages* on Digitisation of European Cultural Heritage

Vicky Breemen
Institute for Information Law (IViR), University of Amsterdam

On 10 January 2011 the *Comité des Sages*, a reflection group on bringing Europe's culture online, published its report entitled "The New Renaissance". The research, which started in April 2010, was carried out by order of Neelie Kroes (Vice President of the European Commission for the Digital Agenda) and Androulla Vassiliou (European Commissioner for Education, Culture, Multilingualism and Youth).

A focus point was to make recommendations for the digitisation, online accessibility and preservation of Europe's cultural heritage in the digital age, with special attention to the question of public-private partnerships for digitisation in Europe. The report aims to help the European Union and member states to develop policy in these fields.

The *Comité* points at the new information technologies that have created incredible opportunities for bringing the European cultural heritage to the general public. Accessibility is a central aspect of the vision of the *Comité*. Consequently, one of its core missions is to ensure full access to the cultural expressions and knowledge of the past, the present and the future for the largest possible audience. With regard to recommendations concerning accessibility and use models, a distinction is made between public domain material and in-copyright material.

Many digitised works are not protected by copyright anymore and thus fall into the public domain. When their digitisation is funded with public money, the *Comité* feels that everyone should have free access to them for non-commercial purposes. Commercial re-use could be

charged. The Comité also points at the EU Directive on the re-use of public sector information. Public institutions should comply with this when they make their information available for re-use, although the Directive does not currently apply to cultural institutions.

Since users are used to finding everything they want on the internet, they expect the same from cultural institutions. It is therefore important that these institutions digitise their collections. As concerns in-copyright material, rights have to be cleared. This costs much time and money given the size of the collections, which makes individual negotiations impracticable. Furthermore, the Comité points to the issues of out-of-distribution works and orphan works. The rightsholders of orphan works cannot be identified or located, as a result of which they form a barrier to mass digitisation projects.

Europeana is referred to as the platform for Europe's cultural heritage. It would be a problem if this digital library, archive and museum would lack 20th century works. The Comité recommends that a European legal instrument be adopted regarding the issue of orphan works. Such an instrument is in preparation by the Commission. The Comité sets out an 8-step test, which requires for example that the instrument cover all different sectors (audiovisual, text, visual arts, sound) and that it be in place in all the member states. In addition, future orphan works should be avoided. In order to achieve this some form of registration could be considered; this would mean that the Berne Convention would have to be changed. Regarding out of distribution works, the Comité states that rightsholders should be the first to exploit them. However, when they do not do so, cultural institutions should be able to digitise these works. In this regard the Comité suggests collective licensing systems and a window of opportunity backed by legislation.

The Comité stresses the central role of Europeana in the strategy of bringing Europe's cultural heritage online. This requires its development from a portal into an application platform to which digitisation activities in the member states are linked. In-copyright materials that private providers offer against payment should complement free offer. The Comité recommends that Europeana keep a digital copy of all digitised or born digital material with the aim of preservation. Furthermore, all member states should ensure that their public domain masterpieces are made available by 2016. Finally, Europeana must actively be promoted among the general public and in schools.

The digitisation process demands large investments. Therefore, an important aspect of the report is the examination of sustainable financing for digitisation and Europeana. According to the Comité, this is primarily the responsibility of the public sector. Making digitised material available through Europeana should be a condition for all public funding for digitisation. Since public funding is scarce, cooperation with private partners should be encouraged as a complement. The Comité suggests basic conditions for these partnerships, such as respect for rightsholders, transparency and encouragement of free access for end users. member states should also create favourable conditions for involving European players, for example by encouraging digitisation in new areas such as audiovisual material.

- Report of the Comité des Sages, "The New Renaissance"
<http://merlin.obs.coe.int/redirect.php?id=15332>

European Commission

Report on the Challenges for European Film Heritage

*Christina Angelopoulos
Institute for Information Law (IViR), University of Amsterdam*

On 6 June 2010 the European Commission's Information Society and Media Directorate General published a study on the challenges for European film heritage from the analogue and the digital era. The study constitutes the second implementation report of the 2005 Recommendation on Film Heritage, which calls for EU member states to improve conditions of the conservation, restoration and exploitation of film heritage and remove obstacles to the development and full competitiveness of the European film industry. Member states are encouraged to inform the Commission every two years of action taken in response to the Recommendation. The first implementation report was released in August 2008.

The current report is based on a questionnaire circulated by the European Commission and covering all aspects of the Film Heritage Recommendation, as well as two additional questions: the challenges and opportunities for European film heritage which arise from the transition from the analogue to the digital era and the link between film funding policies and film heritage. These issues therefore also form the subject matter of the report and are organised into three chapters: I. Analysis of the situation of film heritage in Europe in those areas covered by the Film Heritage Recommendation; II. Challenges and opportunities of the digital era for film heritage institutions; III. Access to European film heritage. The report suggests that Europe's film heritage institutions should take a new approach to the way they safeguard and provide access to Europe's film heritage. The traditional model of conserving fragile film materials in vaults cannot guarantee preservation for posterity nor accessibility. A move should be made from the old "sealed box" approach to a new "full access" model. The report further suggests that amendments to the existing legal framework might be necessary so as to permit such access, particularly the efficient cultural and educational use of the films and related film material. Finally, best practices collected from among the member states for dealing with the challenges of analogue and digital film heritage are highlighted.

The report is only a first evaluation of the situation in this area. Further action is foreseen: this summer the Commission launched an invitation to tender for an independent study which will look in detail into the question of the challenges of the digital era for film heritage institutions. On the basis of the study the Commission intends to consider whether a new Communication or a revision of the existing Film Heritage Recommendation will be necessary to bolster efforts in the field. Meanwhile, the next application report by the member states is due by November 2011.

- Commission Staff Working Document on the challenges for European film heritage from the analogue and the digital era, Brussels, 2 June 2010, SEC(2010) 853 final
<http://merlin.obs.coe.int/redirect.php?id=12685>
- Recommendation of the European Parliament and of the Council of 16 November 2005 on film heritage and the competitiveness of related industrial activities, [2005] OJ L 323/57
<http://merlin.obs.coe.int/redirect.php?id=15051>

IRIS 2010-9/4

New Reflection Group on the Digital Dissemination of European Cultural Heritage

Stef van Gompel

Institute for Information Law (IViR), University of Amsterdam

The European Commission has recently established a Reflection Group entrusted with the task of finding innovative solutions to make European cultural heritage publicly available on the Internet. The Group will build on the previous work of the High Level Expert Group on Digital Libraries (see IRIS 2007-6: 5/6, IRIS 2008-7: 5/6). The setting up of the Reflection Group is part of a broader strategy, with which the Commission aims to address the current digitisation challenges for the cultural section and, on a more general level, to establish a favourable environment for creative industries in the digital environment.

The Reflection Group will address issues relating to the digitisation, online accessibility and preservation of European cultural heritage. It has been invited to make recommendations about the funding of digitisation projects, including public-private partnerships. Moreover, it will examine copyright issues, such as licensing practices to facilitate the digitisation and making available of copyright protected material, in particular, of out-of-print works and orphan works (i.e. works the copyright owners of which are untraceable).

The Reflection Group will consist of Maurice Lévy (Chief Executive Officer of the French advertising and communications company Publicis), Elisabeth Niggemann (Director-General of the German National Library) and Jacques De Decker (Belgian writer and journalist). The Group has been asked to submit its conclusions to the Commission before the end of 2010.

- “Boosting cultural heritage online: the European Commission sets up a Reflection Group on digitisation”, IP/10/456, 21 April 2010
<http://merlin.obs.coe.int/redirect.php?id=12457>

IRIS 2010-6/5

Communication on Copyright

Ana Ramalho

Institute for Information Law (IViR), University of Amsterdam

On 19 October 2009, the European Commission adopted a Communication on Copyright in the Knowledge Economy. The document was prompted by the results of the public consultation on the Green Paper on Copyright and the Knowledge Economy (see IRIS 2008-8/4).

The Communication aims at offering an overview of these results on the one hand, and at paving the way for future follow-up actions on the other. As regards the former, the Communication identifies the two antithetical positions that emerged from the public consultation: unsurprisingly, libraries, archives and universities support a flexible copyright system, whereas publishers, collecting societies and rightsholders favour a stronger regime. Roughly speaking, the first group supports a shift towards a more permissive copyright system and the second advocates the maintenance of the status quo.

These two divergent interests are apparent in the specific issues dealt with by both the Green Paper and the Communication, which include: the digital preservation and dissemination of scholarly, cultural and educational works; orphan works; copyright exceptions for persons with disabilities; and user created content. Hence, the main challenge ahead is the conciliation of these views.

The Communication sets forth a number of steps to be followed. In relation to the digital preservation and dissemination of works in general, it clarifies that the strategy to pursue will include an analysis of the legal implications of mass-scale digitisation and the suggestion of options to tackle the costs of rights' clearance. In this arena, the Commission is bound to examine all possible solutions and to verify whether further initiatives - e.g., the establishment of an exception for this kind of digitisation - are needed.

Specifically as concerns research and learning materials, the Communication underlines that the Commission is already active in the area of granting open access to publicly-funded research results. Moreover, it is recognised that universities face a cumbersome task when licensing copyright works. Thus, this issue will be on the Commission's agenda, as it will be the object of a consultation on best practices. Finally, the Commission will continue monitoring activities in the field of distance learning.

In regard to orphan works, the Communication remarks on the need to establish common standards for rights clearance and to find a solution for the infringement of rights in orphan works. The Commission will be working on an impact assessment, but possible solutions might include a legally binding instrument, an exception to Directive 2001/29/CE or guidance on mutual recognition of orphan works.

Furthermore, it is acknowledged that more works should take into account the needs of persons with disabilities. The Commission will organise a stakeholder forum on that issue, with a particular focus on visually impaired persons, cross-border trade in works in accessible formats and access to online content.

Lastly, the Communication determines that the Commission will carry out consultations on options for rights clearance for user created content.

It is therefore recognised that copyright policy has to be prepared to face the current knowledge economy. And, it is noted, the selected strategy will be to coordinate the different interests at stake.

- Communication from the Commission on Copyright in the Knowledge Economy, Brussels, 19 October 2009, COM(2009) 532 final
<http://merlin.obs.coe.int/redirect.php?id=15378>

IRIS 2010-1/3

Progress towards an European Digital Library

*Christina Angelopoulos
Institute for Information Law (IViR), University of Amsterdam*

Launched in September 2005, the Digital Libraries Initiative is the centrepiece of the European Commission's i2010 policy framework for the information society and media. The Digital Libraries Initiative focuses on the digitisation of Europe's cultural and scientific heritage (books, newspapers, films, maps, photographs and archival documents from Europe's cultural institutions) for the purposes of preservation and online accessibility. The project aspires to enable quick and easy access for Europeans to museums, libraries and archives wherever they may be located, while simultaneously preserving Europe's cultural heritage for future generations. A key goal of the initiative is the creation of Europeana, the European Digital Library, a multilingual one-stop-shop to digital material from across the EU. A first prototype of Europeana, intended to showcase the potential of the project, is due to be launched in

November 2008, while work is geared towards developing a fully operational interface over the next two years.

On 11 August 2008, the Commission adopted a "Communication on Europe's Cultural Heritage at the Click of a Mouse". The Communication monitors progress towards the establishment of the European Digital Library, as well as actions undertaken by member states to tackle organisational, financial, technical and legal obstacles to the implementation of the 2006 Recommendation on the digitisation and online accessibility of cultural material and digital preservation (see IRIS 2006-8: 4). On the basis of this analysis, the following areas were singled out as requiring particular attention:

- Financial resources and quantitative targets for digitisation;
- Increased support for Europeana on the part of the member states, through e.g. the establishment of criteria for financing digitisation to the creation of national aggregators or work on standardisation;
- Legislative and practical measures facilitating the digitisation and accessibility of orphan works and measures to encourage voluntary agreements on works that are out of print or out of distribution, also on a cross-border basis;
- Financial and organisational aspects of digital preservation.

Another issue examined was the work of the stakeholder-comprised High Level Expert Group on such issues as copyright, orphan works, out-of-print works and the preparation of guidelines for digitization. The Communication also confirmed the Commission's commitment to supporting the Digital Libraries initiative through both its policy initiatives and funding programmes. In 2009-2010, EUR 69 million from the 7th Framework Programme for Research and Development have been earmarked for digital libraries and preservation, while a total of EUR 50 million from the eContentplus programme and Competitiveness and Innovation Programme are being channelled the same way in 2008-2010.

- Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Europe's cultural heritage at the click of a mouse. Progress on the digitisation and online accessibility of cultural material and digital preservation across the EU, COM(2008) 513 final, Brussels, 11 August 2008 <http://merlin.obs.coe.int/redirect.php?id=11392>

IRIS 2008-9/101

Green Paper on Copyright

Stef van Gompel
Institute for Information Law (IViR), University of Amsterdam

On 16 July 2008, the European Commission announced the adoption of a Green Paper on Copyright in the Knowledge Economy. This Green Paper aims at fostering a debate on how research, science and educational materials can best be disseminated to the public in the online environment. It queries whether knowledge is freely circulating in the Internal Market, whether the existing Community framework on copyright and related rights is sufficiently robust to protect knowledge products and whether it provides sufficient incentives for authors and publishers to create and disseminate digital versions of their works. With this approach the Commission endeavours to ascertain whether the balance provided by the current Community framework on copyright and related rights is still in line with the rapidly changing environment.

To achieve a fair balance between the interests of rightsholders and users exceptions and limitations to copyright and related rights are considered of paramount importance. Therefore,

the Green Paper first looks into some general issues relating to the closed set of – mostly non-mandatory – exceptions and limitations provided for in the 2001 Directive on Copyright in the Information Society. The Green Paper questions, inter alia, whether an approach based on a list of non-mandatory exceptions is adequate in the light of evolving Internet technologies and the prevalent economic and social expectations and whether certain categories of exceptions should be made mandatory to ensure more legal certainty and better protection of beneficiaries of exceptions.

Subsequently, the Green Paper focuses on particular exceptions and limitations which the Commission thinks are most relevant for the dissemination of knowledge. These include particular exceptions for the benefit of libraries and archives (i.e. the exception for the purpose of preservation, the exception for the making available of digitised works on dedicated terminals and a possible exception for orphan works); the exception for the benefit of people with a disability; the exception allowing dissemination of works for teaching and research purposes; and a possible exception for user-created content. The Commission wonders whether these exceptions should evolve in the era of digital dissemination and formulates specific questions to that purpose.

With this Green Paper the Commission attempts to organise and structure the debate on the long-term future of copyright policy in the given fields. All stakeholders are therefore invited to submit responses to the different policy questions it formulates.

- European Commission, Green Paper on Copyright in the Knowledge Economy, Brussels, 16 July 2008, COM(2008) 466 final
<http://merlin.obs.coe.int/redirect.php?id=11340>
- “Intellectual Property: Commission adopts forward-looking package”, Press Release of the European Commission of 16 July 2008, IP/08/1156
<http://merlin.obs.coe.int/redirect.php?id=11343>

IRIS 2008-8/4

Memorandum of Understanding on Orphan Works and Other Developments in the European Digital Libraries Framework

*Stef van Gompel
Institute for Information Law (IViR), University of Amsterdam*

On 4 June 2008, the High Level Expert Group on Digital Libraries (HLEG) held its 5th Meeting in Brussels. At this meeting, the HLEG presented the achievements so far with regard to a number of matters that were identified as urgent and of high priority in order to make the “i2010: European Digital Libraries” initiative a success.

First, with regard to the issue of orphan works (i.e. works whose rightsholders cannot be identified or located), the HLEG welcomed a Memorandum of Understanding on Diligent Search Guidelines for Orphan Works, which was signed by representatives of libraries, (audiovisual) archives and rightsholders. The due diligence guidelines were established by four sector specific working groups (text, audiovisual, visual/photography and music/sound), in which stakeholders voluntarily collaborated. They contain a definition of orphan works, recommendations regarding the procedure and methodology to be applied, and a list of appropriate and generic information resources available for research. This should provide a practical tool to assist cultural institutions in identifying and locating rightsholders. The guidelines are not prescriptive, but should as far as possible be observed when searching for rightsholders. The stakeholders have also agreed to refine the guidelines if necessary and, in general, to encourage and support measures to facilitate the lawful use of orphan works and

to prevent works from becoming orphaned. The implementation of the guidelines shall be reviewed after an appropriate period of time (e.g. a year).

In addition, the HLEG adopted a Final Report on Digital Preservation, Orphan Works and Out-of-Print Works. This report partly consolidates the recommendations made in previous reports (see IRIS 2007-6/5). What is new here is the recommendation for member states to provide for web-harvesting (i.e. the technique for collecting material from the Internet for preservation purposes) under national legal deposit legislation. As regards orphan works, the report lists a number of measures, including voluntary and regulatory measures to be taken at member state level, which are to be mutually recognised at the inter-state level. Moreover, the HLEG endorsed two model licenses for making works that are out-of-print or out-of-distribution accessible for all: the first for authorised users in secure networks, the other for online access over open networks. Finally, the report describes certain key principles for the development of rights clearance centres and databases of orphan works and out-of-print works.

Lastly, the HLEG adopted a Final Report on Public Private Partnerships (PPP). On the basis of case studies, this report offers practical guidelines and includes a set of recommendations for partnerships between public institutions, such as libraries, archives and museums and private organisations. While currently PPPs are not widespread within the cultural sectors in Europe, the report concludes that these partnerships are essential to provide funding, technology, software and expertise for large-scale digitisation projects. It is recommended, therefore, that public institutions actively engage with private institutions when developing and implementing mass digitisation strategies. This will bring significant additional benefits to all parties involved, including the partners, citizens, rightsholders and users.

- Memorandum of Understanding on Diligent Search Guidelines for Orphan Works
<http://merlin.obs.coe.int/redirect.php?id=15349>
- Sector-Specific Guidelines on Diligence Search Criteria for Orphan Works - Joint Report
<http://merlin.obs.coe.int/redirect.php?id=15350>
- Final Report on Digital Preservation, Orphan Works, and Out-of-Print Works
<http://merlin.obs.coe.int/redirect.php?id=15351>
- Final Report on Public Private Partnerships for the Digitisation and Online Accessibility of Europe's Cultural Heritage
<http://merlin.obs.coe.int/redirect.php?id=15352>

IRIS 2008-7/6

High Level Expert Group on Digital Libraries

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

Stef van Gompel
Institute for Information Law (IViR), University of Amsterdam

On 18 April 2007, the Copyright Subgroup of the High Level Expert Group (HLEG) on Digital Libraries adopted a "Report on Digital Preservation, Orphan Works and Out-of-Print Works". The HLEG, which was set up to assist the European Commission in implementing the "i2010: Digital Libraries" initiative (see IRIS 2005-10: 5), formed a Copyright Subgroup to analyse and discuss the

relevant copyright issues arising in this context. The present report follows an Interim Report presented by the Copyright Subgroup on 17 October 2006.

The report concludes that digitisation may be essential in order to enable continued access to cultural material. Digital preservation, however, may be jeopardised by recording media becoming technologically obsolete and current digital media being more short-lived than analogue media. As a result, content must be shifted to other formats on a recurring basis. The Copyright Subgroup therefore recommends that member states that have implemented a copyright exception for the digital preservation by libraries and other cultural institutions allow multiple digital copies to be made if this is necessary for ensuring the preservation of the work. The exception should only apply to works that are no longer commercially available. Furthermore, preservation initiatives should be coordinated to avoid duplication and copy protection devices should be disabled to allow permanent and unhindered access to works for preservation by libraries.

Orphan works are works where the copyright owners cannot be identified or located. The Copyright Subgroup unanimously concludes that this issue must be resolved, at least for literary and audiovisual works. Non-legislative solutions may include: establishing databases concerning information on orphan works; improved inclusion of rights management information in digital content; and enhanced contractual practices. In addition, the Copyright Subgroup suggests that the Commission recommend that member states encourage contractual arrangements in an appropriate manner, taking into account the role of cultural institutions. Finally, solutions in the member states may be different, on the condition that they fulfil certain commonly accepted core principles. A prerequisite is that the solutions in the different member states are interoperable. member states should agree to mutually recognise any mechanism that fulfils the prescribed core principles.

Out-of-print works are defined as works that are not commercially available, as declared by the appropriate rightsholders. The Copyright Subgroup is united in recommending a solution to facilitate the use of out-of-print works by libraries. This solution includes a model licence, the establishment of a database of out-of-print works, a joint clearance centre, and a procedure to clear rights. The Model Licence is attached to the report. It grants libraries a non-exclusive and non-transferable licence to digitise and make the licensed work available to users in closed networks. Rightsholders are accorded a waivable right to payment. They may at any time revoke the licence, thereby withdrawing the licensed material. If such withdrawal represents more than ten per cent of a title, the library is entitled to reimbursement of its costs. To encourage the adoption of the Model Licence, the Copyright Subgroup urges the Commission to use its communication resources and to publish best practices on the use of the Model Licence.

- High Level Expert Group Report on Digital Preservation, Orphan Works and Out-of-Print Works, Selected Implementation Issues of 18 April 2007 (including Annex I: Model Agreement for a Licence on Digitisation of Out of Print Works)
<http://merlin.obs.coe.int/redirect.php?id=10783>

IRIS 2007-6/6

European Commission

Recommendation on the Digitisation and Online Accessibility of Cultural Material and Digital Preservation

Mara Rossini

Institute for Information Law (IViR), University of Amsterdam

In a recent Recommendation, the European Commission has outlined measures to be taken by member states in order to bring out the full economic and cultural potential of Europe's cultural and scientific heritage through the internet. It is part of the Commission's efforts towards realizing digital libraries EU-wide (see IRIS 2005-10: 5 and IRIS 2006-4: 5). The digital libraries initiative aims to enable all Europeans to access Europe's collective memory for educational, professional, recreational and creative activities while contributing to EU competitiveness and supporting European action in the field of culture. The measures set out in the Recommendation should lead to a more coordinated approach by member states and help create a multilingual access point for online digital cultural heritage.

With regard to digitisation and online accessibility, the Commission recommends that member states:

- gather information about current and planned digitisation of cultural material (such as books, journals, newspapers, photographs, museum objects, archival and audiovisual material) and create overviews of such digitisation in order to prevent overlaps;
- set quantitative targets for the digitisation of analogue material in archives, libraries and museums and indicate the budgets allocated by public authorities;
- encourage private-public collaboration for alternative means of funding;
- set up large-scale digitisation facilities;
- promote a European digital library (i.e a multilingual common access point to Europe's fragmented digital cultural material) by encouraging rightholders to make their digitised material available through the European digital library and by ensuring that such rightholders apply common digitisation standards.

Finally, the Commission recommends that conditions in this matter be improved by creating mechanisms to facilitate the use of orphan works and works that are no longer printed or distributed; by promoting the availability of lists of known orphan works and works in the public domain and by identifying and removing barriers in member states' legislation which stand in the way of online accessibility and subsequent use of cultural material in the public domain.

With regard to digital preservation, the Commission recommends that member states:

- establish national strategies for long-term preservation of and access to digital material in full respect of copyright law;
- exchange information with each other on the strategies and plans;
- make provision in their legislation so as to allow copying and migration of digital cultural material by public institutions for preservation purposes, in full respect of intellectual property rights;
- take into account each other's policies and procedures for the deposit of material originally created in digital format in order to prevent wide divergences in depositing arrangements;
- make provision in their legislation for the preservation of web-content by mandated institutions using techniques for collecting material from the internet such as web-harvesting, in full respect of intellectual property rights.

These measures should contribute to bringing about a European virtual library as they identify and seek to tackle the main obstacles that digital libraries face: financial questions (who will pay for the digitisation), organisational challenges (how to create synergies, avoid

duplication of effort and encourage private-public collaboration), technological issues (how to secure low costs/high quality) and legal difficulties (how to address intellectual property rights in order to ensure coverage of protected works). This Recommendation also comes as a complement to an earlier European Parliament and Council Recommendation which specifically focused on -the digitisation of- film heritage and the competitiveness of related industrial activities (see IRIS 2006-1: 4).

- Commission Recommendation on the digitisation and online accessibility of cultural material and digital preservation, provisional draft of 24 August 2006
<http://merlin.obs.coe.int/redirect.php?id=15201>

IRIS 2006-8/3

Council of the European Union

Recommendation on Film Heritage and Related Industrial Activities

*Mara Rossini
Institute for Information Law (IViR), University of Amsterdam*

On 16 November 2005, the Council of the European Union adopted a recommendation on film heritage and the competitiveness of related industrial activities. This recommendation stems from a proposal put forward by the European Commission in March 2004. Its main purpose is to encourage better preservation and exploitation of the European film heritage as an essential component of European cultural and art heritage as well as an element of competitiveness. It therefore calls on all member states to introduce appropriate measures to ensure the systematic collection, cataloguing, preservation, restoration and making available to the public of their cinematographic heritage. The latter is to be done for “educational, cultural, research or other non-commercial uses of a similar nature, in all cases in compliance with copyright and related rights”.

The Commission’s initial proposal was amended by Parliament to include more ambitious terms (see IRIS 2005-6/6). With regard to the collection of films, for example, Parliament called on member states to ensure collection “through a mandatory legal or contractual deposit of at least one high quality copy of cinematographic works in designated bodies” where the Commission suggested this be achieved “through a legal or contractual obligation”. Also, while the Commission’s text recommends that deposit should cover at least works which have received public funding, Parliament extended this to those works not having benefited from such support (albeit after a transitional period).

Other amendments introduced by Parliament which have been retained in the final text include, among others, recommendations to member states to adopt appropriate measures to increase the use of digital and new technologies in the collection, cataloguing, preservation and restoration of films; to explore the possibility of establishing a network of databases encompassing the European audiovisual heritage in collaboration with the relevant organizations, in particular the Council of Europe (Eurimages and the European Audiovisual Observatory); to ensure access for people with disabilities to deposited cinematographic works; to promote the use of film heritage in education and foster visual education, film studies and media literacy in education at all levels and in professional training and European programmes.

The Council found the Parliamentary amendments to be acceptable which eventually led to the final adoption of the recommendation. The procedure, however, could have resulted

in a second reading, were it not for the fact Parliament took into consideration a package of compromise amendments which was instrumental in avoiding such an outcome.

The recommendation gives a definition of “cinematographic works”, according to the text this term covers moving-image material of any length, in particular cinematographic works of fiction, cartoons and documentaries, which is intended to be shown in cinemas.

- Recommendation of the European Parliament and of the Council on Film Heritage and the Competitiveness of Related Industrial Activities of 16 November 2005
<http://merlin.obs.coe.int/redirect.php?id=15051>

IRIS 2006-1/4

Audiovisual Works and the European Directive on Certain Permitted Uses of Orphan Works

*Lucie Guibault and Manon Oostveen,
Institute for Information Law (IViR), University of Amsterdam*

Introduction

Cultural heritage institutions, including film institutions and broadcasting organisations, possess vast amounts of material that teaches us about our history and culture. Increasingly these institutions digitise the material in their collection and publish it on the Internet, preserving it against the ravages of time and encouraging education and the spreading of knowledge. The European Union fosters such initiatives, amongst others by creating financial resources that have helped realise projects like Europeana¹ and EUScreen.² While financial resources may be the main requirement to digitise and disseminate works belonging to the public domain, the situation is entirely different for works of the 20th and 21st century. Objects from recent times tend to be underrepresented in the online collections, as the copyright on these objects may not yet have expired. Regardless of how the object was acquired, the cultural heritage institution needs permission from the rightsholder to reproduce and make the work available online.³ Due to the territorial nature of copyright, permission is needed for all countries from which the website can be viewed, which essentially means that the cultural heritage institution needs to clear the rights for every country in the world.⁴ This can genuinely limit the objects being published online, as it is unquestionably very difficult to find and contact the rightsholders for every single copyrighted object among the thousands or millions of objects that institutions have in their collection. It becomes even more difficult when the author or rightsholder of a copyrighted work is unknown or unlocatable, as this makes it impossible to acquire permission for the dissemination of the “orphaned” work.⁵

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- 1) Europeana is a website which serves as an Internet portal, guiding visitors to over 26 million digital objects at over 2200 institutions (mostly) across Europe. See www.europeana.eu and www.pro.europeana.eu/web/guest/content.
 - 2) EUScreen aims to promote the use of television content to explore Europe’s rich and diverse cultural history. The project consortium is made up of 28 partners and 9 associate partners from 20 European countries. See: www.euscreen.eu/about.html
 - 3) Except when rights were transferred with the purchase of the work, but normally this is not the case.
 - 4) P.B. Hugenholtz, “The Last Frontier: Territoriality”, in: M. van Echoud and others, *Harmonizing European Copyright Law: The Challenges of Better Lawmaking*, Kluwer Law International: Alphen aan den Rijn 2009, p. 309.
 - 5) Commission Staff Working Paper, “Impact Assessment on the cross-border online access to orphan works accompanying the document ‘Proposal for a directive of the European Parliament and of the Council on certain permitted uses of orphan works’”, (SEC(2011) 615 final), p. 11-12.

A 2010 Report by the European Commission⁶ reveals that cultural institutions around Europe hold considerable amounts of orphan works in their collections. The Report defines “orphan works” as works whose rightsholders are unidentified or unclear or works whose rightsholders cannot be traced or located. The percentage of orphan works is high for almost all categories of works, especially for photographs and audiovisual content. Numerous rightsholders are typically involved in the creation of a particular audiovisual work, such as the director, producer, actors, screenplay writer, etc. This work can itself include other works or protected subject matter. For this reason, the problem of orphan works is quite tangible for film heritage institutions and broadcasters. The challenge of identifying and locating rightsholders would be reduced in practice, if cultural heritage institutions were able to rely on rightsholder information contained in registries of collecting societies and publishers, or kept in the databases of libraries. Unfortunately, there exists to this day no comprehensive database where all rights management information on audiovisual works is registered. In many countries the rights to audiovisual works are presumed to have been transferred to the film producer, at least with respect to some central forms of exploitation of the film – such as the theatrical release. However, this presumption may not encompass the online dissemination of the film, which would require additional permissions to be obtained. Hence, considering the number of rightsholders concerned, clearing the digital rights to a film may prove to be very difficult, if the rights have not been transferred to the producers at the time of creation of the work.

The European Union does not only support the work of cultural heritage institutions on a financial level, but it also aspires to solve issues arising from the territorial nature of copyright. The Orphan Works Directive (OWD)⁷ is one of the measures adopted to solve the problem of orphan works. The OWD is a minimum harmonisation directive, introduced for the particular purpose of encouraging large-scale digitisation initiatives.⁸ When the rightsholder of a work cannot be identified or located, a cultural heritage institution cannot acquire the permission necessary to disseminate the work through the Internet. As a result cultural heritage institutions are unable to facilitate online access to large parts of their collections without infringing copyright. The Directive creates a legal framework designed to prevent the infringement of rights from occurring and to favour the cross-border digitisation and dissemination of works within the Single Market. The Directive achieves this essentially by targeting the specific problem of the legal determination of orphan work status and its consequences in terms of the permitted users and permitted uses of works or phonograms considered to be orphan works.

The Directive was adopted rather swiftly, especially in comparison to the three copyright-related directives that immediately preceded this one, that is, the Information Society Directive⁹, the Resale Right Directive and the Term Extension Directive. Eighteen months lapsed from the introduction of the Initial Proposal on 24 May 2011 to the adoption of the final text on 25 October 2012. The European Parliament accepted the Proposal in first reading subject to 61 amendments. The resulting Amended Proposal was presented on 5 September 2012 and adopted shortly thereafter. Member states have been given a delay of two years to implement the provisions of the Directive into their national law, until 29 October 2014. As described in greater detail below, the OWD establishes a special regime for works that are declared orphan, within the general legal framework set by the Information Society Directive and others.

6) Assessment of the orphan works issue and costs for rights clearance, European Commission, DG Information Society and Media, Unit E4 Access to Information, February 2010 (author Anna Vuopala), available at: http://ec.europa.eu/information_society/activities/digital_libraries/doc/reports_orphan/anna_report.pdf

7) Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works (2012 OJ L 299/5).

8) S.J. van Gompel, “Het richtlijnvoorstel verweesde werken - Een kritische beschouwing”, *AMI* 2011-6, p. 206, E. Rosati, “The Orphan Works Directive, or throwing a stone and hiding the hand”, *Journal of Intellectual Property Law & Practice* 2013, p. 306.

9) Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

Subject matter and scope of the Directive

According to its Article 1(1), the Directive applies to publicly accessible libraries, educational establishments or museums, as well as archives, film or audio heritage institutions and public-service broadcasting organisations. This list is broader than that of Article 5(2)c) of the Information Society Directive, which concerns exceptions or limitations to the reproduction right and only covers publicly accessible libraries, educational establishments, museums and archives. The OWD would not be able to achieve its objective of facilitating the large-scale digitisation of Europe's cultural heritage (recital 5) if film or audio heritage institutions as well as public-service broadcasting organisations holding copyright protected works and other subject matter in their collections were not included in the list. Contrary to Article 5(2)c) of the Information Society Directive, the institutions listed in Article 1(1) OWD are not restricted by their non-profit purpose. Instead, recital 20 OWD specifies that those organisations listed may use orphan works provided such use fulfils their public interest missions, in particular the preservation of, the restoration of, and the provision of cultural and educational access to, their collections, including their digital collections. Film or audio heritage institutions should, for the purposes of the Directive, cover organisations designated by member states to collect, catalogue, preserve and restore films and other audiovisual works or phonograms forming part of their cultural heritage. Public-service broadcasters should, for the purposes of the Directive, cover broadcasters with a public-service remit as conferred, defined and organised by each member state. It is not clear from the text of the Directive, however, whether the public-interest mission of all institutions mentioned in Article 1(1) OWD must always be laid down in a law or other regulatory instrument. If so, several national institutions, like the Dutch *Beeld en Geluid Instituut* (Netherlands Institute for Sound and Vision), would presumably fall outside the scope of the Directive for lack of a statutory mandate.

Recital 10 clarifies that cinematographic or audiovisual works and phonograms in the archives of public-service broadcasting organisations and produced by them may include orphan works. Taking into account the special position of broadcasters as producers of phonograms and audiovisual material and the need to adopt measures to limit the phenomenon of orphan works in the future, the European legislator thought it appropriate to set a cut-off date for the application of the Directive to works and phonograms in the archives of broadcasting organisations. According to Article 1(2)(c) OWD, the Directive applies to "cinematographic or audiovisual works and phonograms produced by public-service broadcasting organisations up to and including 31 December 2002 and contained in their archives". In addition, recital 11 specifies that, with respect to works produced by public-service broadcasting organisations themselves, these should be regarded as including cinematographic and audiovisual works and phonograms which are commissioned by such organisations for the exclusive exploitation by them or other co-producing public-service broadcasting organisations. Cinematographic and audiovisual works and phonograms contained in the archives of public-service broadcasting organisations which have not been produced or commissioned by such organisations, but which those organisations have been authorised to use under a licensing agreement, should not fall within the scope of this Directive.

Article 1(2) OWD establishes that the Directive applies to works or phonograms contained in the collections of the institutions listed in Article 1(1) OWD, which are first published or broadcast in a member state. The need to specify that, in the absence of publication, the country where the work was first broadcast also constitutes a point of attachment of protection, undoubtedly arises because of the definition of "publication" in Article 3(3) of the Berne Convention. According to this provision in the Berne Convention, acts of communication to the public where no copy is made available to the public do not constitute a "publication". Without the last sentence of Article 1(2) OWD, a work first broadcast in a member state but not published in a tangible form would not fall within the ambit of the Directive leaving such unpublished orphan works and phonograms outside the scope of the new regime.

In line with the previous paragraph, Article 1(3) OWD clarifies that the Directive also applies to works and phonograms, which have neither been published nor broadcast, but which have been made publicly accessible by the cultural heritage institutions referred to in paragraph 1 with the consent of the rightholder. The application of the Directive is under the condition, however, that it can reasonably be assumed that the rightholder would not oppose the uses, as defined in Article 6

OWD. Since the Directive applies to a vast array of works and phonograms held in the collections of different types of institutions, it is not inconceivable that some works contained in the collections of cultural heritage institutions have never been published or broadcast, but have been made publicly accessible with the consent of the rightsholders. This would be the case, for example, of a unique recording of a live concert, a rare documentary or a television programme that was never broadcast, held in the collection of an institution and made available with the consent of the rightsholders. Cultural heritage institutions may, pursuant to this provision, limit the application of this paragraph to works and phonograms that have been deposited with those organisations before the implementation deadline, that is, 29 October 2014.

Determination of orphan status

The Orphan Works Directive establishes a system (but not a procedure) for determining the orphan status of a work, consisting of amongst others a “diligent search” for the rightsholder of the work for which the orphan work status is sought.¹⁰ The diligent search is roughly described in Article 3 OWD, making reference in an Annex to a minimum list of sources to be checked as part of the diligent search. All things considered, however, the OWD leaves the drafting of diligent search procedures and criteria to the member states, which will inevitably create diversity between the national laws on orphan works. Yet attempts to avoid more stringent diligent search requirements by concentrating efforts in a specific member state are not to be expected as the diligent search is to be conducted in the member state in which the work was first published or broadcast.¹¹

A work will be declared orphan if none of the rightsholders in that work or phonogram is identified or, even if one or more of them is identified, none is located despite a diligent search for the rightsholders having been carried out and recorded in accordance with Article 3 OWD. The Commission’s proposal originally stated that “where a work has more than one right owner, and one of the right owners has been identified and located, that work shall not be considered an orphan work.” During the Parliamentary debates, the point was made that this wording would create a situation in which a majority of works (particularly in the audiovisual sphere) would be rendered inaccessible. The final text makes clear that the rights of identified and located rightsholders remain unaffected. Recital 17 further specifies that the beneficiaries of this Directive should only be permitted to use a work or phonogram that is “partly” orphan (e.g. for which one or more of the rightsholders are not identified or not located), if they are authorised to carry out the acts of reproduction and of making available to the public by those rightsholders that have been identified and located, including the rightsholders of works and other protected subject matter which are embedded or incorporated in the works or phonograms. Rightsholders that have been identified and located can give this authorisation only in relation to the rights that they themselves hold, either because the rights are their own rights or because the rights were transferred to them, and should not be able to authorise under this Directive any use on behalf of rightsholders that have not been identified and located. In practice, this may well mean that a single identified or located rightsholder among many others, who have not been identified or located, may effectively prevent the making available of a work. Think, for example, of the screenplay writer or the leading actor.

As recital 12 explains, “for reasons of international comity” (in French “*pour des raisons de courtoisie internationale*”), the Directive should apply only to works and phonograms that are first published, broadcast or made publicly accessible by the beneficiaries of the Directive with the consent of the rightsholders in the territory of a member state. Recital 15 explains that in order to avoid duplication of search efforts, a diligent search should be carried out in the member state where the work or phonogram was first published or, in cases where no publication has taken place, where it was first broadcast. In respect of cinematographic or audiovisual works the diligent search should be carried out in the member state where the producer of the work has his headquarters or habitual residence. In the case of cinematographic or audiovisual works which are co-produced by

10) Art. 2 and 3 Directive 2012/28/EU.

11) Recital 15 and Art. 3(3) Directive 2012/28/EU.

producers established in different member states, the diligent search should be carried out in each of those member states. With regard to works and phonograms which have neither been published nor broadcast but which have been made publicly accessible by the beneficiaries of this Directive with the consent of the rightsholders, the diligent search should be carried out in the member state where the organisation that made the work or phonogram publicly accessible with the consent of the rightsholder is established.

Recital 15 OWD also repeats the requirement laid down in Article 3(4) OWD that sources of information available in other countries should also be consulted if there is evidence to suggest that relevant information on rightsholders is to be found in those other countries. Pursuant to Article 3(5) OWD, member states must ensure that the organisations referred to in Article 1(1) OWD maintain records of their diligent searches and that those organisations provide the following information to the competent national authorities:

- (a) the results of the diligent searches that the organisations have carried out and which have led to the conclusion that a work or a phonogram is considered an orphan work;
- (b) the use that the organisations make of orphan works in accordance with this Directive;
- (c) any change, pursuant to Article 5, of the orphan work status of works and phonograms that the organisations use;
- (d) the relevant contact information of the organisation concerned.

This paragraph is completed by Article 3(6) OWD, which further requires that member states take the necessary measures to ensure that the information referred to in the previous paragraph is recorded in a single publicly accessible online database established and managed by the Office for Harmonization in the Internal Market ("the Office") in accordance with Regulation (EU) No 386/2012. To that end, member states shall forward that information to the Office without delay upon receiving it from the organisations concerned.

According to Article 5 OWD, a rightsholder in a work or phonogram considered to be an orphan work must have, at any time, the possibility of putting an end to the orphan work status in so far as his rights are concerned. A rightsholder who ends the orphan status of a work should, under Article 6(5) OWD, have a right to fair compensation. However, similar to the provision on the diligent search, the OWD does not establish any procedural rules on the termination of the orphan status or the distribution of fair compensation. The OWD has therefore been described as giving the member states a *carte blanche* in creating their national orphan works legislation.¹²

Permitted uses

Pursuant to Article 6(1) OWD, member states must create an exception to the economic rights in their copyright regimes that allows cultural heritage institutions to reproduce the work and make it available. The organisations may use works contained in their collections in the following ways:

- (a) by making the orphan work available to the public, within the meaning of Article 3 of Directive 2001/29/EC¹³;
- (b) by acts of reproduction, within the meaning of Article 2 of Directive 2001/29/EC, for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration.

Moreover, such uses must take place only in order to achieve aims related to their public-interest missions, in particular the preservation of, the restoration of, and the provision of cultural and educational access to, works and phonograms contained in their collection. Recital 20 emphasises that the "exception or limitation should permit certain organisations to reproduce and make

12) E. Rosati, "The Orphan Works Directive, or throwing a stone and hiding the hand", *Journal of Intellectual Property Law & Practice* 2013, p. 309.

13) Information Society Directive. Supra note 9.

available to the public orphan works, provided that such use fulfils their public interest missions, in particular the preservation of, the restoration of, and the provision of cultural and educational access to, their collections, including their digital collections. The exception or limitation established by this Directive to permit the use of orphan works is without prejudice to the exceptions and limitations provided for in Article 5 of Directive 2001/29/EC". Recital 20 also recalls the application of the so-called "three-step-test", according to which an exception or limitation "can be applied only in certain special cases which do not conflict with the normal exploitation of the work or other protected subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder".

Cross-border use of orphan works

Article 4 OWD establishes a system of mutual recognition: when a work has acquired the orphan work status in a member state, it shall be considered an orphan work in other member states as well. The provision reads:

"A work or phonogram which is considered an orphan work according to Article 2 in a Member State shall be considered an orphan work in all Member States. That work or phonogram may be used and accessed in accordance with this Directive in all Member States. This also applies to works and phonograms referred to in Article 2(2) in so far as the rights of the non-identified or non-located rightholders are concerned."¹⁴

Although the OWD does not provide any specific information on the definition of "mutual recognition", it is a concept that has been present in European law for a long time.¹⁵ It originates from the *Cassis de Dijon* decision¹⁶ of the European Court of the European Communities in which the Court decided that goods that have been lawfully marketed in one member state can also be introduced in other member states.¹⁷ It is clear from the impact assessment,¹⁸ the explanatory memorandum¹⁹ and the recitals²⁰ of the OWD that this concept is meant in Article 4 OWD. The Directive therefore uses the principle of mutual recognition instead of harmonising member states' law and as a result, there is a horizontal transfer of sovereignty of member states regarding the orphan work status to the "home state" of the orphan work.²¹ Once the orphan work status has been acquired in one member state, it automatically exists in all other member states. Member states have to recognise the orphan work status that a work has acquired in another member state, thereby accepting that the work can be accessed in their own territory.²² Hence theoretically a cultural heritage institution that has declared a work orphan can disseminate the work online, as other member states may not object to the making available of the work in their territory. Although the existence of the orphan work status in all member states happens automatically,

14) Art. 4 Directive 2012/28/EU.

15) K.A. Armstrong, "Mutual Recognition", in: C. Barnard and J. Scott (eds), *The Law of the European Single Market: Unpacking the Premises*, Hart Publishing: Oxford 2002, p. 225-227.

16) Judgment of the Court of 20 February 1979. - Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein. - Reference for a preliminary ruling: Hessisches Finanzgericht - Germany. - Measures having an effect equivalent to quantitative restrictions. - Case 120/78, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61978CJ0120:EN:HTML>

17) S.K. Schmidt, "Mutual recognition as a new mode of governance", *Journal of European Public Policy* 2007, p. 667 and 673, P. Craig and G. de Búrca, *EU Law: Text, Cases and Materials*, Oxford University Press: Oxford 2011, p. 685, CJEU 20 February 1979, Case 120/78 (*Cassis de Dijon*), para. 14.

18) Commission Staff Working Paper, "Impact Assessment on the cross-border online access to orphan works accompanying the document 'Proposal for a directive of the European Parliament and of the Council on certain permitted uses of orphan works'", (SEC(2011) 615 final), p. 21-22.

19) Explanatory Memorandum of the Proposal for a directive of the European Parliament and of the Council on certain permitted uses of orphan works (COM(2011) 289 final), p. 1 and 3-4.

20) Recital 8 Directive 2012/28/EU.

21) S.K. Schmidt, "Mutual recognition as a new mode of governance", *Journal of European Public Policy* 2007, p. 667 and 673, K.A. Armstrong, "Mutual Recognition", in: C. Barnard and J. Scott (eds), *The Law of the European Single Market: Unpacking the Premises*, Hart Publishing: Oxford 2002, p. 226.

22) Commission Staff Working Paper, "Impact Assessment on the cross-border online access to orphan works accompanying the document 'Proposal for a directive of the European Parliament and of the Council on certain permitted uses of orphan works'", (SEC(2011) 615 final), p. 22.

the accompanying rules on procedures are subject to national implementation. Member states have to change national law to implement the Directive and seem to have some freedom in doing so.²³ Consequently national implementation can be divergent regarding the details of the actual exceptions, although Article 6 OWD dictates in general wording that member states shall provide for an exception to the right of making available and the reproduction right (sub 1), thus allowing cultural heritage institutions to disseminate the work via the Internet.

As explained above, mutual recognition sees to it that a work becomes orphan in the whole European Union without any action being required after it has acquired the orphan work status in one member state. Putting an end to the orphan status of a work, on the other hand, requires an action from the rightholder. The rightholder of the work, or his assignee, bear the burden of having to fix this “error” in accordance with the procedures the national law prescribes to terminate the orphan work status. What those national procedures will look like is yet unknown. There might be deviations between national laws. For example, the German proposal implementing the Orphan Works Directive does not require an action by the rightholder to end the status; as soon as the cultural heritage institution learns that there is a rightholder, it should cease the use of the work.²⁴ So the problem would be relatively quickly solved in Germany, as no complicated procedures need to be followed. However the proposal has been criticised on this issue, amongst others because it is judged to be not in line with the OWD.²⁵ Moreover it is very likely that other member states will follow the text of the Directive more closely and will accordingly establish national procedures for the rightholder to end the orphan work status. As a result it will be much more difficult and time-consuming to end an orphan status in many member states as compared to Germany, in which many works will easily and quickly lose their orphan work status.

This raises the question whether the end of the orphan work status in one member state automatically leads to the end of the orphan work status in *all* member states. Unfortunately the OWD does not contain a mutual recognition rule regarding the *end* of the orphan work status. However it can be reasonably expected that the termination of the orphan work status operates in the same way as obtaining the status, meaning that as soon as the orphan work status is ended in one member state the work automatically loses the orphan work status in all other member states as well. If it were not the case, there would be a great imbalance between the rights of rightholders and the rights of cultural heritage institutions. It would be fairly easy to acquire the orphan work status but comparatively extremely hard to terminate it, as the rightholder would have to go through the national procedures in 28 member states. In addition if the work loses the orphan work status in one member state this means that the foundation of the orphan work dissolves, which also renders the justification of mutual recognition of the orphan work status void.

Various safeguards

The OWD contains certain safeguards introduced either in favour of rightholders or cultural heritage institutions. To help cultural heritage institutions in their digitisation efforts, knowing how difficult it is to find the necessary financial resources, Article 6(2) OWD expressly states that cultural heritage institutions covered by the Directive may generate revenues in the course of the uses permitted under Article 6(1), for the exclusive purpose of covering their costs of digitising orphan works and making them available to the public. The Directive is also without prejudice to the freedom of contract of such organisations in the pursuit of their public-interest missions, particularly in respect of public-private partnership agreements. This is in line with the more

23) Commission Staff Working Paper, “Impact Assessment on the cross-border online access to orphan works accompanying the document ‘Proposal for a directive of the European Parliament and of the Council on certain permitted uses of orphan works’”, (SEC(2011) 615 final), p. 22.

24) Art. 1 under § 61b Entwurf eines Gesetzes zur Nutzung verwaister Werke und zu weiteren Änderungen des Urheberrechtsgesetzes und des Urheberrechtswahrnehmungsgesetzes, 20 February 2013.

25) R.M. Hilty et al, *Stellungnahme des Max-Planck-Instituts für Immaterialgüter- und Wettbewerbsrecht zur Anfrage des Bundesministeriums der Justiz vom 20. Februar 2013 Zum Referentenentwurf eines Gesetzes zur Einführung einer Regelung zur Nutzung verwaister Werke und weiterer Änderungen des Urheberrechtsgesetzes sowie des Urheberrechtswahrnehmungsgesetz*, 15 March 2013, p. 23.

recently adopted Directive 2013/37/EC on the re-use of public sector information.²⁶ Recital 23 of this Directive reads as follows:

“Libraries, museums and archives should also be able to charge above marginal costs in order not to hinder their normal running. In the case of such public sector bodies the total income from supplying and allowing re-use of documents over the appropriate accounting period should not exceed the cost of collection, production, reproduction, dissemination, preservation and rights clearance, together with a reasonable return on investment. For the purpose of libraries, museums and archives and bearing in mind their particularities, the prices charged by the private sector for the re-use of identical or similar documents could be considered when calculating a reasonable return on investment”.²⁷

To ensure that the interests of rightsholders and authors are sufficiently protected, Article 6(3) OWD requires that cultural heritage institutions indicate the name of identified authors and other rightsholders in any use of an orphan work. In addition, Article 6(5) OWD obliges member states to provide for fair compensation of rightsholders who put an end to the orphan work status of their works or other protected subject matter for the use that has been made by cultural heritage institutions of such works and other protected subject matter in accordance with the first paragraph of this article. Member states shall be free to determine the circumstances under which the payment of such compensation may be organised. The level of the compensation shall be determined, within the limits imposed by Union law, by the law of the member state in which the organisation which uses the orphan work in question is established.

Conclusion

The OWD is a minimum harmonisation directive, introduced for the particular purpose of encouraging large-scale digitisation initiatives. The Directive achieves this essentially by targeting the specific problem of the legal determination of orphan work status and its consequences in terms of the permitted users and permitted uses of works or phonograms considered to be orphan works. Considering the number of rightsholders concerned, clearing the digital rights to a film often proves to be very difficult, where the rights have not been transferred to the producers at the time of creation of the work. Be that as it may, opinions are divided on the capacity of the Directive to significantly reduce the burden of cultural heritage institutions in their efforts of mass-digitisation of the works contained in their collections. While the interests of rightsholders of orphan works are upheld and protected under the Directive, the library community has expressed doubts whether a directive based on a diligent search requirement will be useful for any other types of institution than small scale, niche projects.

26) Directive 2013/37/EU of the European Parliament and of the Council of 26 June 2013 amending Directive 2003/98/EC on the re-use of public sector information Text with EEA relevance, Official Journal L 175, 27/06/2013 p. 1-8.

27) For more information on the PSI Directive see Catherine Jasserand, “Public Sector Information and Audiovisual Archives”, in: Susanne Nikoltchev (Ed.), *Audiovisual Heritage 2.0*, IRIS plus 2013-5, European Audiovisual Observatory, Strasbourg 2013.



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