



# Facilitating access to orphan and out of commerce works

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# Outline

- ❖ **Introduction : significance of the issue of orphan works in the context of mass digitisation**
- ❖ **The OWD in a nutshell**
- ❖ **Critical evaluation of the OWD : the good, the bad and the ugly**
  - **The reservations**
  - **The merits of the OWD**
  - **Not regulated or no clear guidance**
- ❖ **Out of Commerce works**



“Increasingly if library content is not found on the Web, it effectively does not exist for many potential users”

- Dame Lynne J. Brindley, the Chief Executive of the British Library

# Making content accessible

## By individuals

- Commercial
- Non-commercial

## “Mass digitisation” by heritage institutions

- Digitise (scan) entire or part of content of collection with **objective to preserve**
  - not merely for technical preservation or restoration purposes
  - for benefit of public by making it available to them

# Collections of heritage institutions

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**Public  
domain  
works**

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**In-  
copyright  
works**

**Unpublished  
works**

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Identified works

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Orphan works

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**Published  
works**

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Identified works

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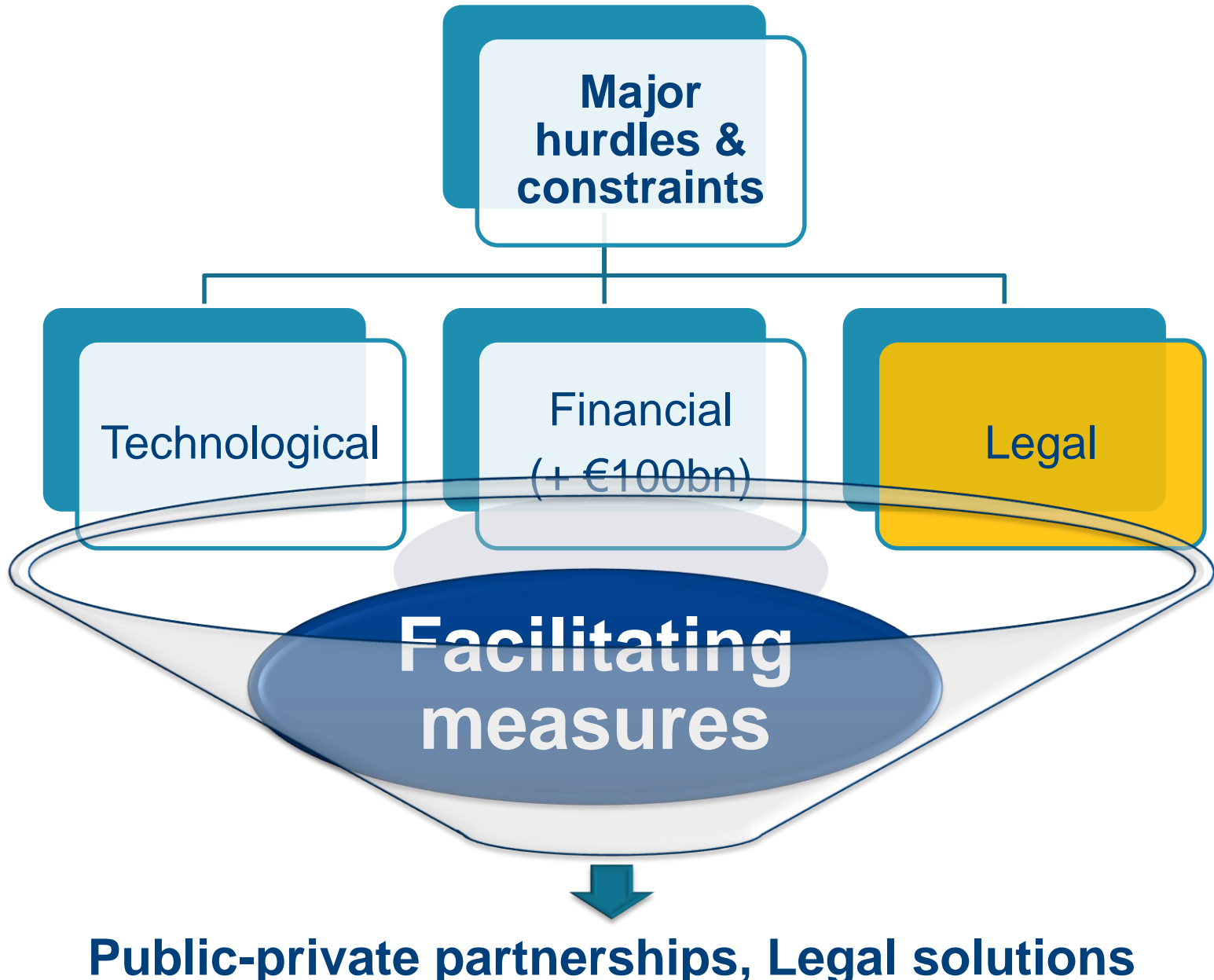
Out-of-commerce  
works

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Orphan works

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# Making content accessible



# Legal constraints for cross border use

## ❖ IPR Issues

- Multiple laws apply to an online library:
  - ✓ Location of act of making available
  - ✓ Lex protectionis (Rome II, art. 8)

## ❖ Ownership of physical copy v. **Copyright**

- Permission must be sought
  - Making digital copies is *reproduction*
  - Giving on-line access is *communication to the public*
- ✓ Exceptions for libraries are mainly for the analogue world
  - Preservation exception
  - Consultation on the premises (if no contractual terms)
- ✓ Copyright is territorial in nature

# Mass digitization & legal constraints

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**Agreement with rightholder or recognized representative for cross-border use for each and every work**

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In-copyright works

Unpublished works

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Identified works

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Orphan works ?

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Published works

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Identified works

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Out-of-commerce works

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Orphan works ?

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Danger of the 20th century “black hole”



# High transaction costs + not part of their normal activities!

- Title by title search is time-consuming and costly
  - Work in or out of copyright ?
  - Identification of authors and rightholders
  - Varies according to nature of work
    - E.g. audiovisual works with multiple rightholders
    - Initiatives as ARROW (print sector) and FORWARD (film) will lessen problem
- Rights-clearance
  - Negotiation of agreement with rightholders
  - Rights clearance for cross-border use

## ORPHAN WORKS

- **Idem but in vein**
- **Hold-up problem (or liability issue)**

Issue of orphan works is mainly a **rights clearance issue**

- How to ensure that users are ***not liable for copyright infringement*** when the rightholder reappears

# Directive 2012/28 EU on certain permitted uses of orphan works

## ❑ Preceded by

- The i2010:Digital Library Initiative (2005)
- soft law approach : Commission Recommendation 2006/585/EC of 24 August 2006 on the digitization and online accessibility of cultural material and digital preservation
  - ✓ Few MS undertook initiatives
  - ✓ Could never address envisaged use in an online cross-border environment

## ❑ Fits in the Europe 2020 Strategy

- Development of a Digital Agenda for Europe

## ❑ Deadline for implementation = 29 October 2014

# Orphan works – what?

## ❖ Works whose *rightholders cannot be identified*

- Author is known
  - ✓ If old works, often complicated calculation of term
    - E.g. special term for unpublished works (UK)
    - Transitory provision in case of term extension
    - Term extensions due to war situations
- Author is unknown
  - ✓ Hence, death + term of protection cannot be established
  - ✓ Hence, in-copyright status rests on presumption (death cannot)
- Rightholders that can be identified do not hold digital (online) rights

## ❖ Works whose rightholders are known but *cannot be traced or located*

- Often situation for (the multiple) heirs , bankrupt companies,

# Orphan Works – distinguish

## Definition (cf. in generic sense)

- Orphan works are in-copyright works whose rightholders can either not be identified or located

## ‘Orphan work status’ in sense of OWD

- Idem +
- prior diligent search
  - Consultation of indicated sources required
- Recordal of search results and uses
  - National competent authority

# The OWD in a nutshell

## Scope of application = exhaustive list of

- **Selected works**: Written work, audiovisual works and phonograms,
  - first published or broadcast in a Member State ONLY
  - Contained in the collections of beneficiaries
- **Beneficiaries**
  - Publicly accessible libraries, archives, educational establishments, museums, and public service broadcasting organisations

## Obligations of diligent search obligations and record keeping as mandatory preliminary conditions

# Establishment of Orphan Work status

- Principle of **mutual recognition**: establishment in one Member State shall be considered as such in other Member States
- Necessary to allow use of the work with cross-border effect

## Mechanism of a new mandatory exception (art. 6) to be added to list of Art. 5 InfoSoc Directive

- Permitted uses
  - making the orphan work available to the public
  - by acts of reproduction for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration.
- But note : exception may be limited in time !

## A rightholder can put an end to an orphan work status of his work at any time

- fair compensation

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  - **The merits of the OWD**
  - **Not regulated or no clear guidance**



# Impressive number of reservations

- ❖ Specific solutions being developed in the Member States to address larger mass digitisation issues, such as in the case of so-called '**out-of-commerce**' works; Recital (4).
- ❖ The **exceptions and limitations provided for in Article 5** of Directive 2001/29/EC; Recital (20).
- ❖ The **arrangements in the Member States concerning the management of rights** such as extended collective licenses, legal presumptions of representation or transfer, collective management or similar arrangements or a combination of them,
- ❖ National provisions on **anonymous or pseudonymous works**; Art. 2.5.
- ❖ The freedom of contract of beneficiary organisations in the pursuit of their public-interest missions, particularly in respect of **public-private partnership agreements**; Art. 2.5.
- ❖ Provisions concerning, in particular, patent rights, trade marks, design rights, utility models, the topographies of semi-conductor products, type faces, conditional access, access to cable of broadcasting services, the protection of national treasures, legal deposit requirements, laws on restrictive practices and unfair competition, trade secrets, security, confidentiality, data protection and privacy, access to public documents, **the law of contract**, and rules on the freedom of the press and freedom of expression in the media; Art. 7.
- ❖ Any acts concluded and rights acquired before 29 October 2014

# Merits of the OWD

- ❖ Providing **legal certainty** when using orphan works according to OWD
- ❖ Mechanism of **mutual recognition**
  - Interesting example to solve territoriality issue
- ❖ ‘**One search per Member State principle**’
  - Avoids expensive duplication of search efforts
- ❖ New ***mandatory*** exception
  - Essential step in harmonization process
- ❖ Non-commercial (of course) but no obstacle to public-private partnerships
  - Important in view of technological and financial burdens (supra)

# Merits of the OWD

- ❖ Establishment of a **unique EU database**
  - Increases chances that rightholders will be re-united with work
  - Introduction of requirement of formality is interesting 😊
- ❖ Setting up of **national competent authorities**
- ❖ **Remuneration** scheme that may not have been available if work had not been used
- ❖ Leaving intact **alternative schemes**
  - E.g. ECL, Voluntary licensing agreements (MoU)
- ❖ Possibility to link framework to **complementary scheme**
  - Collective licensing of other works, other uses, other users

# Not regulated or no clear guidance

## Use of 'other orphan' works not mentioned in Art. 1(2)

- Important categories such as photographs
- = former situation of uncertainty
- Quid 'other writings'? Only printed works?
- Works with multiple authors where only one could not be identified or located

## Principle of mutual recognition is clear BUT

- How should status precisely be established
- When exactly will status be established
- Whose responsibility?
  - Automatic at certain date? Validation by an authority?

# Not regulated or no clear guidance

## Termination of status of orphan work (art. 5)

- Rightholder has “possibility of putting an end”
- Decision with cross-border effect? (may be assumed)
- Where (country?) should rightholder assert right
- To whom (beneficiary, OHIM, national authority)?
- What sort of proof is required to prove assertion of copyright ownership?

# Not regulated or no clear guidance

## Parameters for the diligent search (art. 3)

- Interpretation of requirements of
  - ‘In a diligent way’
  - ‘In good faith’
- Which sources should be consulted (besides Annex)?
  - Individual lists for the individual MS?
- How long should beneficiaries keep records?
- Who should forward data to OHIM
  - Prototype model suggests central national authority

## Permitted uses (Art. 6)

- **‘Public interest mission’** is crucial determining factor to justify use but with little guidance
- **Other uses** are not at all regulated
  - MS cannot opt for an exception in this respect (List Art. 5 is exhaustive)
  - Solutions in MS will not have cross-border effect

## Fair compensation for reappearing rightholder (Art. 6.5)

- It is left to the MS to determine circumstances under which payment may be organized, incl. point in time at which payment is due
  - System of mandatory collective management OK? (Yes)
  - Case law CJEU : “compensate harm”?
    - But there was no commercial exploitation of work

# Last but not least

- ❑ **Onerous reporting requirements - Administrative burdens**
  - Prior search
  - Verification and registration in database
  - Burden of proof for unpublished works is difficult to meet
  - Exception to the 'one search per MS principle' in case relevant information can be found in ANY other country
  
- ❑ **Only useful for small scale, niche projects (not for large scale digitisation efforts)**
  - Larger organisations more likely to buy into a licensing scheme
  
- ❑ **Fully harmonised solution in the EU not likely**
  - Mutual recognition applies to OW status only
  - Likely that MS will put in place different mechanisms
    - ✓ Different conditions for use
    - ✓ Prior authorisation or not



# Future opportunities

## □ OWD – Art. 10

- constant review of the development of rights information sources [eg [ARROW](#) and [VIAF](#)],
- by 29 October 2015 (and at annual intervals thereafter) a report concerning the possible inclusion in the scope of application of the Directive of publishers and of works or other protected subject-matter not currently included in its scope, and in particular stand-alone photographs and other images

## □ Follow up of Public Consultation on the review of the EU copyright rules

- Extension of scope of libraries' exceptions
  - ✓ Mandatory character
  - ✓ Extending scope of preservation exception
  - ✓ Extend Consultation on premise to remote online consultation for purposes of research and private study
- Extend exception 'educational purposes' to cover public access to materials (including orphan works)

# Out of commerce works



## Orphan works

- Rights clearance is not possible
  - Solution by legislator : exception
  - Hard law : directive

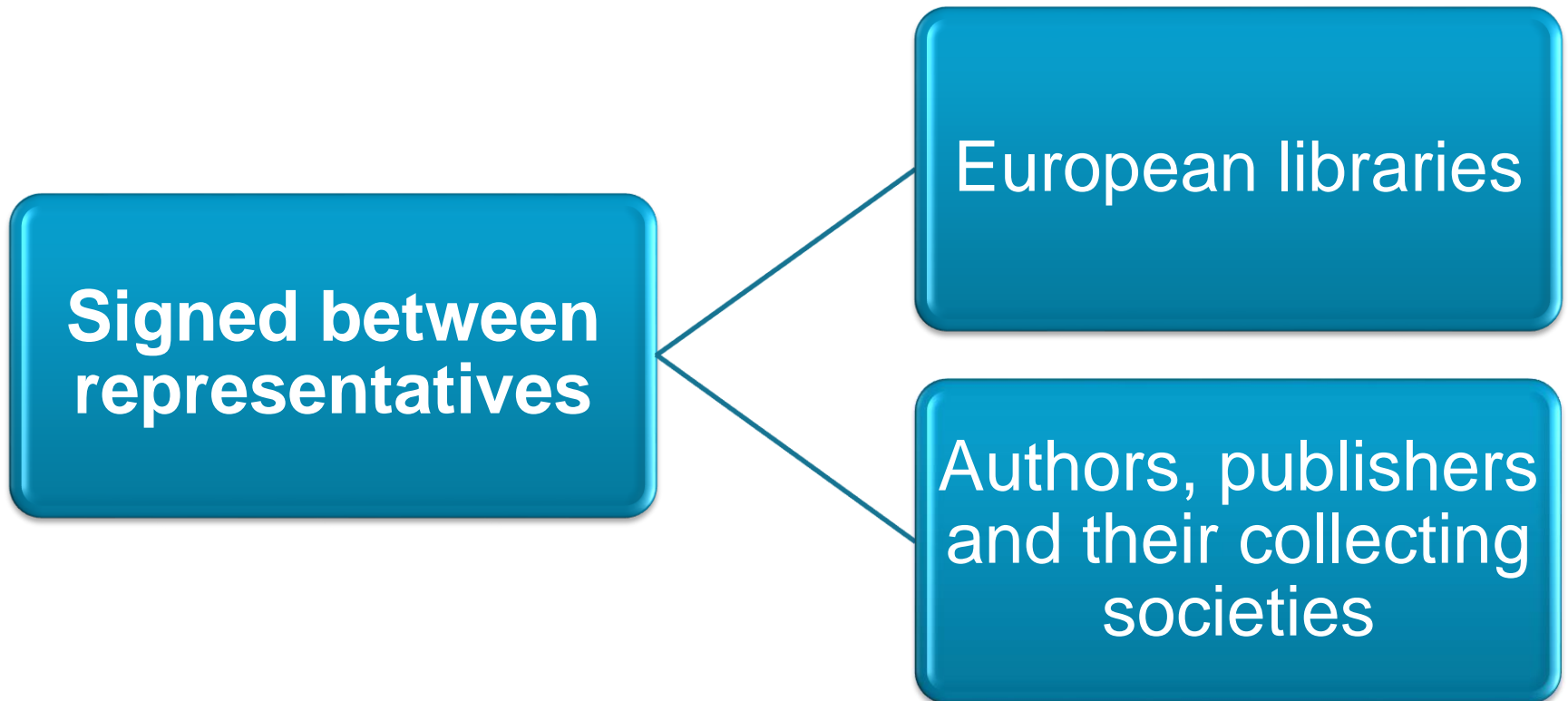


## Out of commerce works

- Rights clearance is possible
  - Solution by rightowner or representative CMO: license
  - Soft law : framework for voluntary collective management (MoU)



# The 2011 MoU (literary works)



# 3 key principles for use of OOCW

1.

- Voluntary agreements between potential users and rightholders

2.

- Agreements can only be granted by representative collective management organisations and are subject to certain conditions

3.

- Cross-border effect

# The understandings – key principle 1

## Voluntary agreements between potential users and rightholders

- Rightholders = authors and publishers
- Agreement should cover typical licensing issues
  - May include search effort by user
  - May adopt option of cut-off date (e.g. works published before 2001)

# The understandings – key principle 2

## Agreements can only be granted by representative collective management organisations

- For both authors and publishers
- Presumption rule for non-members
  - Cf. effect of an ECL
  - Requires legal backing
- Rules on publication and alerting rightholders
- Subject to opt-out right for rightholder (only for non-members)

# The understandings – key principle 3

**Cross-border effect of the agreement**

**Subject to 2 reservations in case of cross-border or commercial use**

- The Agreement may exclude works of outsiders
- Specific procedure to reach outsiders whose works are used frequently or intensively

# Evaluation

## □ Weakness

- Lack of legal certainty in cross border context
  - ✓ See also Recital 9: legislation might be required to create legal basis for the presumption of representation
  - ✓ See also Recital 11 calling on the EU to consider legislation necessary to ensure legal certainty in a cross-border context

## □ Advantages

- No need for agreements on individual basis
  - ✓ Reduction of search and negotiation costs
- Framework of voluntary collective licensing
  - ✓ Incl. – depending on ‘back up’ by national law - solutions of
    - Extended collective management
    - Presumptions of representation
    - Equivalent mechanisms