The implementation of the Orphan Works directive in Estonian cultural institutions

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Preface

At the start of Masters’ degree I considered myself a green leaf knowing little about museums and other cultural institutions. This includes multiple theories and authors, which were a completely new world to me. In the end I found the world of collections really intriguing and how the physical objects carry different narratives. After reading different articles I got interested in my thesis topic about orphan works. This thesis topic raised many interesting questions about items with no or little information. I found it interesting how some museological issues can be solved with regulations. Therefore, in this thesis I wanted to travel though concepts such as intellectual property, ownership with and without authorship, orphan work culminating into practice.

As I mentioned before, the process of writing this thesis was quite a journey and therefore I find it important to thank multiple people, who helped me. Firstly, I would like to thank my family for support. Secondly, I want to thank Irina Leifer, who helped to develop and write this thesis. Secondly, the other thank you words go to the whole family of Reinwardt Academy including Wilma Wesslink. And last, but not least, I want to thank all the nice people who spent time answering my questions. Thank you all.
Abstract

The cultural world has two kinds of ownerships: the physical and intellectual. Many items have an important meaning not only for the individual, but also for the society. Making the items accessible requires following regulations such as copyrights. Multiple items have no rights holder or the rights holders cannot be found. These items are mostly known as orphan works. In 2014 the orphan works directive was created by the European Parliament and Commission to make orphan works publicly available. Estonia, a European Union member state, is required to apply this directive in the heritage field.

The thesis topic focuses on Estonian institutions regarding the orphan works directive. The thesis investigates: How is the orphan works directive implemented in the Estonian cultural institutions? And what is their opinion about the directive?

In this thesis the interviews and literature research were considered as the most beneficial research methods. This thesis investigates three European cultural institutions and three Estonian cultural institutions. Interviewing European institutions like the EYE Film Institute, the British Library and the British Film Institute shows how larger cultural institutions interact with the orphan works directive. Estonian institutions have a more limited experience. Of the three institutions, Estonian National Library, the Tartu University Library and the Library of Estonian University of Life Sciences, only the first has actively implemented the directive. The previously mentioned institutions stated that the directive is challenging to implement due to lack of resources such as time, finance and not knowing the amount of orphan works.
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Introduction
Nowadays many cultural institutions want to present their collection to a larger public. In the case of objects, which can have many copies like books, films, audio-visual works, newspapers, etc. the ownership is not with the physical object, but is an intellectual property. This intellectual property is covered by copyright rules. Presenting the items and publishing information about them means to follow the copyright rules because it concerns the rights of the individual. Orphan works is a term to describe items with no- or unknown ownership. The problem with unknown rights holders motivated the European Commission and Parliament to work out a directive that helps to publish these types of items without infringing the copyright law. However, there seems to be a gap between practice and the directive. One of the examples is Estonia, which is trying to implement the directive with official government institutions having converted the directive into law practice. Many Estonian cultural institutions haven’t actively implemented the directive yet.

Motivation
Memory institutions owning copies of culturally important works may not publish the work without the consent of the owner. Therefore, there is a need for regulations that define in which cases the consent of the owner needs to be sought. Legal ownership is defined in the copyright laws, which are implemented at national and international levels.

Currently many institutions in Estonia and in other countries have emphasized the importance of digitization. In museums and libraries, the discussion of copyrights also involves digitization of objects with little information. According to Neelie Kroes, the uncertainty due to the impossibility of identifying copyright owners benefits neither the rightsholders […] the creative industries nor the wider public.¹

Orphan works are physically owned by memory institution, but the intellectual owner is not known. Many cultural institutions like publisher companies, film related institutions and museums see this a problem because it creates restrictions in their freedom to publish the work.

At the European level the issue of orphan works was captured in the form of a directive, which was activated in 2014. Many institutions find the regulations and directive challenging to apply. There is strong critique about this directive. The most common critique about the

¹ Eleonora Rosati, "Copyright issues facing early stages of digitization projects". Mobile Collections Project, 2013, 4.
orphan works directive is that it is difficult to apply because the research process trying to find out the rights holders is claiming too many resources. Copyright specialist Maarten Zeinstra has stated that the directive’s rules on “appropriate sources” obliges member states to impose a difficult burden on cultural institutions in terms of number and quality of sources to be consulted.²

This thesis will investigate the implementation of the orphan works directive with its successes and pitfalls in Estonian cultural institutions in comparison to three selected European institutions, which are known to actively implement the directive.

The following reasons are considered for conducting the research:

1. First of all, I find this personally an intriguing subject and I want to find out how cultural institutions deal with orphan works. Every time finding out more information shows the complexity of the issue.

2. Secondly, this topic has been investigated before. However, the investigation has been fairly limited and largely practiced from a legal perspective. Furthermore, the topic is fairly new in Estonia, meaning that there has not yet been a detailed discussion about it. Specifically at Estonian level, the discussion so far has been taken seriously by one memory institution. The reason for investigating this topic is to make an overview of general attitude among memory institutions in Estonia about orphan works. Estonian cases were more often personal because I feel more connected with these cultural heritage fields. Also, some cultural institutions are not aware how many orphan works they have. Therefore, there seem to be a gap between practice and the directive.

3. Thirdly, the topic offers the perspective of Estonian cultural institutions comparing to other countries. The orphan works issue can be considered a European wide issue.

Scope of the thesis
The scope of the thesis is on the orphan works directive document created by the European Commission and Parliament, activated in 2014. The directive covers cultural institutions such as libraries, archives, museums, broadcasters, other educational institutions etc. Since its creation in 2014, the criticism towards the orphan works came from multiple intellectual property experts.

The main stakeholder in Estonia is the Estonian Ministry of Justice, who advises on the implementation of the orphan works directive. Other stakeholders are the cultural institutions themselves, who implement the regulations. The third stakeholder are the European Commission and Parliament, who created the directive in order to solve the problem trying to make the items more accessible. The fourth stakeholder are the potential users, who could benefit from the directive.

The thesis includes three case studies from Europe. These examples were chosen based on initial research trying to find cultural institutions involved with the orphan works directive. This lead to contacting and interviewing these specific institutions. Many institutions were contacted, but three were willing to cooperate. The chosen institutions were EYE Film Institute, British Library and British Film Institute. In Estonia a large number of major memory institutions were contacted and many reacted. The Estonian National Library had the most experience with the orphan works directive and therefore was selected for an interview. The other two institutions that were selected are Tartu University Library and Library of Estonian University of Life Sciences. The two previously mentioned institutions have minor experience with the orphan works directive, but were considered a significant contribution.

**Research questions**

This thesis tries to answer the following research questions: How is the orphan works directive implemented in the Estonian cultural institutions? And what is the opinion about the directive?

Researching for this required to investigate practises in Europe. My research presents the practises of working with orphan works in Estonia. Furthermore, the following questions will be answered in chapters.

1. What are the conceptual and practical foundations of the orphan works directive?
2. What are the various practises regarding orphan works and the directive in Europe?
3. What is the overview of orphan works in Estonia?
4. What is the general practice working with orphan works directive?
Structure of the thesis
In the first chapter I will investigate concepts of intellectual property and copyright. Furthermore, the concept of orphan works and the directive will be discussed. In the second chapter I will analyse how three major European institutions are dealing with the directive. In the third chapter I will focus on three Estonian institutions. In the fourth chapter I will analyse the impact of the directive internationally and nationally.

My thesis is focused on a qualitative analysis of answers and discussions in interviews. Furthermore, an extensive literature study was carried out. The several opinions are reflected upon and discussed. For my thesis I used many articles, websites and reports that could give an indication about the orphan works issue and its relation to the directive.

Interviews

The way to obtain information was to talk with individuals who have either interacted with- or are aware of the orphan works directive. The interviews with representatives from cultural institutions provided more information about the topic. The interviews were done either personally or via email or skype. Interviews with the British Library and the British Film Institute were done via skype. The interviews with EYE Film Institute, Estonian National Library, Tartu University Library, and Library of the Estonian University of Life Sciences were done in person with staff members. The Institutions were selected based on their possession of orphan works. The interviews reflect on the perspectives of the institutions regarding orphan works and how are they applying the orphan works directive. As Estonia is a small country, there is a limited number of cultural institutions. In total one Dutch, two British and three Estonian institutions were interviewed. That meant interviewing many staff members such as the information specialist, law specialist and digitization specialist.

Implementing the orphan works directive is not always connected to a specific position, but this differs per institution.

Chapter two is composed of data acquired by interviewing the following people:

- Annabelle Shaw from the rights and contracts department of The British Film Institute on 28th of January 2019.
- Matthew Lambert from Publisher Relations, IP & Licensing of the British Library on 17th of December 2018.
- Leontien Bout from legal affairs of the EYE Film Institute on 3rd of December 2018.
Chapter three is composed of data acquired by interviewing the following people:

- Piret Zettur from info systems department of Tartu University Library on 24th of January 2019.

The interviews were organised flexibly and the questions were sent beforehand. The interviews were not only conducted via a fixed questionnaire (see appendix 1), but were also open to discussion. On one side, this strategy allowed to follow fixed line of questions and create structure during the interviews. On the other hand, it allowed the conversation to have a natural flow while creating a possibility for unexpected answers. The interviews were done in English and Estonian. Furthermore, some interviews were recorded with permission of the interviewed.
Chapter 1- Theoretical background of the concept and practical foundations of the orphan works directive.

Ownership
The concept of ownership is closely influencing the work of cultural institutions such as museums, archives, libraries etc. The interaction between status of ownership and culture is a continuously changing concept. Some cultural items are associated with the control over the ownership and its rightful owner and the owner is one of the most essential stakeholders.

Many items are culturally important and could therefore be symbolically meaningful for various people. These items may have an individual meaning that maintains a stronger ownership connection. However, the question remains whether the items and therefore the cultural content can be strictly regulated. Especially difficult is the situation if some items travel from their original birthplace to another location.

Cultural property in particular has the difficult challenge of determining the owner. In many cases the property is temporarily taken care of by cultural institutions, who are not the owners but the legal guardians. Therefore, it is sometimes impossible to claim singular ownership. Cultural property is the carrier of knowledge in the state of physical objects. According to Erich Kasten, cultural anthropologist, “Property relations are best viewed as social relations between people with regard to some objects.”³ Considering the items for public use is allowing the cultural institution to interact on behalf of its duties. Otherwise the information carried by orphan works will remain unused and just preserved in the museum, library, archive or any other heritage institution. It also influences the potential owners and their successors. “In short, the item is neither enjoyed by the owner nor the user, thus creating a “lose-lose” situation. The potential user misses the opportunity to create and profit from a new work, the owner loses the chance to obtain a licensing fee, and the public is deprived of the benefits of the new and future works created by the new user.”⁴ Anthropologist Haidy Gesmar has described the cultural property in international discussions as part of collecting practise related to cultural identity. In particular the cultural identity connects with the rights that they don’t have or can afford.⁵ Therefore, the question of cultural property has become from one specific national level to a global discussion. Gesmar supports the cultural property

as a conceptional connection instead of considering it purely on object level. In that case the
question of who owns the cultural property becomes indispensable a question about access,
use and interpretation of the collections.

Folklorist Valdimar Hafstein has investigated the notion of ownership in regards to cultural
property. Hafstein: “Ownership rights such as copyrights shape the production and circulation
of culture”. Moreover, they can create a legal frame that support the use of the work. Creating
regulations for cultural creations adds a level of formality and protects the owner. The
ownership rules benefit the owner, but also attempt to attract potential users to use the work
that may otherwise be unnoticed. Therefore, the discussion about these works is crucial and
has gained the attention of many cultural institutions, recognising the potential of sharing the
legacy of these objects.

Haftsein elaborates on the ownership how it connects with the rights of the objects. He
understands the need for fixed rules as encouraging the creation of cultural works by offering
protection to their creators and a financial incentive to create. Ownership in this context
means making a promise that the creative work is kept and handled by the creators
themselves and nobody other than them. The regulations that concern cultural ownership
don’t always have a positive influence. According to University of Iowa professor, Kembrew
McLeod: “Creation of ownership rights exerts a powerful influence over social interactions in
a consumer society”. The laws and regulations could act like a serious weapon in limiting
the use of information. That can be described as being threatened by suing cases and at the
end privatizing increased ownership. In this context the ownership is being fiercely protected
by anyone who might be able to create profitable use for the society. This is being
communicated as something that only individuals can own and the others are allowed to have
only a restricted use. In summary, the existence of ownership rights can have productive
influence on cultural works, but at the same time disrupts using them.

For some, the author will have more rights over their works. According to Jane Ginsburg,
Professor of Literary and Artistic Property Law at the Columbia Law School, the regulations
are designed to advance the public goal of expanding knowledge, by means of stimulating the

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117, no 465 (Summer 2004): 306.
7 Kembrew Mcleod, “Consumption and Intellectual Property,” The Blackwell Encyclopedia of Sociology
efforts and imaginations of private creative actors. Therefore, preserving the works via ownership regulations has to allow some access by ordinary people as well. For others, the ownership is too much restricted by a concrete set of regulations. For example, Ginsburg discussed the other side of the use-instructions. She cites the responsibility for users: the real authors doesn’t benefit from creativity. Rather the publishers and similar grantees take advantage from the creators. Therefore, sometimes the power of publishers is regarding the right too much in their hands.

The issue of ownership can be perceived as an underestimated concept regarding intellectual property. The everyday connection to the practice is essential, but still remains quite minimal. The issue of ownership rights is perceived as multi-layered challenges.

Firstly, the rights itself are understood as a difficult set of rules, which are in constant rejuvenation in terms of lifespan. These same rules are influencing the work of many publishers, museums, libraries and archives. According to law expert Yael-Lifshitz-Goldberg: “The length of rights span has been extended in most of the countries.”

Secondly, if the access to information is too complicated, then the work with the information may be not be used after all. In this context, the information may be extremely valuable, but the strict rules make it difficult to use. Therefore, items such as orphan works are even more complicated because there is no certainty if the work is under ownership or not. According to Heli Teedla, staff member of Estonian Public Broadcasting: “During the 20th century many authors were anonymous or using a different name.” Furthermore, some works have never been published at all.

Thirdly, the issue with complicated ownership regulations such as orphan works has been discussed, but it has not been explained as thorough as it could have been. Among heritage field experts, the challenge of specific works such as orphan works is essential, but need to be further communicated. According to Dinusha Mendis from Bournemouth University: “Unlocking the potential of these works has been a key issue for the modern times, where the

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question of ownership has a high importance. Introducing an appropriate scheme is intended to promote creativity and innovation.”

Also, the notion of ownership can be connected to the indigenous cultures. The large concept of cultural property is being reflected more on indigenous culture rather than western culture. Nevertheless, the concept of property is being considered from an ethnocentric point of view, where some institutions are in charge as being the caretakers of the objects. The concept has been supported by western anthropology focusing on indigenous culture. According to Erich Kasten: “In particular, presentation of multiple cultures presents various challenges.” In particular, Peter Welsh, professor of museum studies professor from the University of Kansas: “The cultural property is fundamental in the dialogue between the museums and peoples whose cultures are represented in public spaces and who assert cultural affiliation with museum collection materials. The cultural property will not only cover the physical state of objects, but also the knowledge and information”. The definition of cultural property is being used as “the tangible and intangible effects. That covers individual or group of people that define their existence. The cultural property places them temporarily and geographically in relation to their belief systems and their familial and political groups by providing meaning to their lives.”

In the view of the Native people, especially the elders, the proper transfer of the sacred knowledge from one generation to the next is not only connected with formal laws, but rituals of handling the property as something more fluid.

**Authorship**

In many cases the notion of ownership is quite strongly related with the concept of authorship. It is possible to state that the property and therefore the authorship is a socially constructed concept. In this context, owner and the author could sometimes be the same person or institution. Therefore, the authorship can be one of the many indicators of the ownership. The question of ownership and authorship raises many questions. However, the ownership questions could also create obstacles for authorship. According to law expert Lior Zemer, “the legal regulations such as copyright law has gone too far in overvaluing the creators intertwined interests of authors and the public. That is, both criticize the hegemony of romantic conceptions of the author in contemporary copyright.”

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The concept of authorship is seen as an ambivalent concept. In many mediums the author can be considered as a multitude of representatives. For example, in the case of literary, musical, dramatic and artistic work, the author can be the person who created the work. In the case of sound recording, the producer is considered to be the author. With film creations the principal director and producer are often considered to be the authors. Finally, with published typographical work, the publisher is the author. In summary, in different mediums the author is not always so easily recognisable.

Authorship and therefore the copyrights are meant to benefit the author as the creators by rewarding the rights protection. According to Zemer, the legal regulations regarding the works declare the ownership over authorial and artistic resources. Authorship confers exclusive entitlement and control to a definitive category of creators by engaging with genuine activity vested in original works. Therefore, the authorship is gives the author more rights to speak up about how the works are going to be used. In that case the authorship is acted on behalf of the author by appreciating and protecting his or her rights.

Mark Rose, a literary scholar, has attributed to the connection of authorship and ownership. Rose was especially intrigued by the “contraction between the romantic conception of authorship and the notion of the creative individual”. The question of copyright as a cultural production is far more multi-layered than just legal regulations of the modern world. Rose tackles the question of what or who is the author. He elaborates and tries to define the author as the originator and owner of a special kind of commodity, the work. Particularly, ownership refers to who owns the content and how relationship changes towards the protection from other users of the property. Therefore, the author becomes the owner of the property and then secondly the creator. According to French philosopher Michel Foucault: “These notions are the solid and fundamental unit of the author and the work. The authors eventually are the owners, who want to protect their work from being misused.”

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13 Ibidem, 75.
**Intellectual property**

Nowadays museum objects and digitization are being connected more closely than ever. Many digitization efforts are conducted primarily towards making works available for study – reflecting the centrality of items for scholar work and the need to preserve and safeguard original items – digital images can also serve as sources of enjoyment and creative inspiration.\(^\text{15}\) Therefore many items are waiting to be further investigated, digitalized and published.

Especially in the case of digitized collections the impact for publication becomes more relevant. According to Kimmo Levä, Secretary General of the Finnish Museums Association, “Digitalised collections accessed through the internet will form the foundation on which other services will be built”.\(^\text{16}\) Therefore the digitization can be seen as a platform where the different interests of stakeholders meet. If the use of digitized objects is not beneficial for the audience then what is the purpose of digitizing the collection besides preserving the collection? According to historian Helen Graham: “Putting museums and ownership rights together has the effect of illuminating the specific ways in which both are about striving for what might be seen as a legitimate management of the relationship between private and public.”\(^\text{17}\)

Publication of the information is not as simple as it looks like. Many culturally important objects carry valuable information. Publishing the information requires discussing the concept of intellectual property. The World Intellectual Property Organization (WIPO), a specialized agency of the United Nations, describes intellectual property as “creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce”.

Forms of intellectual property protection include copyrights, trademarks, and patent laws.\(^\text{18}\) Specifically the copyrights term refers very often to the right to copy something. Therefore, the owner and sometimes the author is allowed to determine whether anyone else is allowed to use the work.\(^\text{19}\) In that sense the ownership and authorship regulations create transparency,

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\(^{15}\) Kenneth D. Crews; Melissa A. Brown, “Control of Museum Art Images: The Reach and Limits of Copyright and Licensing.” (Seminar paper, Columbia University, 2010), 2.


\(^{19}\) Ibidem, 4.
which covers many fields from heritage to the legal sphere. These regulations could work very well for the owner, but create challenges for the potential users. According to Kenneth D. Crews and Mellissa D. Brown, law experts from Columbia University: “Often, these terms and conditions will mean that for example an online work is not truly available for many purposes, including publication in the context of research or simple enjoyment.”

Furthermore, there are ethical considerations on publishing works without consent. Using the material without any authorisation would be considered as illegal. Therefore, there is an ethical aspect to protect the ownership, but at the same time to be open towards researchers. In this context the legislative power has the responsibility to share the rights, but at the same time be respectful towards the public. According to author Cushla Kapitzke: “‘Intellectual property’ is imbricated in a broad spectrum of global discourses that enable national governments and transnational agencies to use copyright as part of the ‘will to govern.’” In this context the ethical perspective is to include transparent ways of achieving many objectives. In particular, it is essential to present the perspective of many stakeholders. According to Janet Marstine, Associate Professor of Museum Ethics in University of Leicester: This dialogue is relevant to include “the processes of engagement, mutuality and fluidity”. Therefore, the intellectual property presents many challenges to stakeholders.

**Copyrights**

Digitizing and publishing the collection of objects brings up the question of the copyrights. Copyrights can be considered as an example of regulations that should protect the status of authors. According to historian Helen Graham et al.: “Putting museums and copyrights together has the effect of illuminating the specific ways in which both are about striving for what might be seen as a legitimate management of the relationship between private and public.” Therefore, many official institutions such as the European Parliament and various national governments are working to make cultural properties more accessible.

Copyrights have become especially relevant in modern times. For example, due to digitization the copyrights have increased to be the decisive factor when to digitize works. They are continuously influencing creative industries and also institutions. In recent times,

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20 Brown et al., “Control of Museum Art Images: The Reach and Limits of Copyright and Licensing.”: 3.
23 Graham et al., “The Personal is still Political: Museums, Participation and Copyright”: 106.
there is a development of different copyright practises. For example, many countries have created recommendations on how to follow the copyright rules. According to Rina Elster Pantalony, copyright advisor from Columbia University: “Copyright is a bundle of rights that include both economic and moral rights.” That is the reason why copyrights are not only culturally import, but also economically.

The discussion of copyrights leads to the question regarding unknown authorship. Many items such as books, films, audio-visuals are under copyright, but there is no clear distinction who exactly is the author. However, these works still carry extremely valuable information. Unknown authorship means that there is an owner with a name, but after detailed search it wasn’t possible to track him or her down. That doesn’t mean that the work is copyright free and everybody can use it without any limitations. This can be a quite different dilemma in the case of future generations. According to Victoria Stobo, Lecturer in Record-Keeping in the Liverpool University Centre for Archive Studies: a work is “unknown authorship” if the identity of the author is unknown or, in the case of work of joint authorship, if the identity of none of the authors is known. So, in case of a joint authorship, if at least one author is known then the work cannot be considered a work of unknown authorship. Furthermore, the author is unknown if it is not possible to ascertain his identity by reasonable inquiry.

The fact that the author is unknown makes following the copyright more difficult. From a practical perspective, the unknown authorship raises many questions and complications, which might hinder or even stop the publication of the work. The issue of unknown authorship or even authorship at a more general level, brings up fundamental copyright questions: what does a person have to do in order to be characterized as an "author" for purposes of copyright?

Orphan works
In museums and libraries, the discussion of copyrights involves numerous sorts of objects: books, newspaper articles, films, audio-visual files with little information. Objects that might be under copyright law but whose rights holders are not known or cannot be located, are referred to as orphan works. Copyrighted works can become “orphaned” when the research leads to no author or any other copyright holder.

Orphan works might occur due to many reasons. For example, the author could have never been publicly known, the work was published anonymously, or never published at all. According to Neelie Kroes, vice-president of the European Commission in 2012: “The uncertainty due to the impossibility of identifying copyright owners benefits neither the rights holders [...] the creative industries nor the wider public.” The wider public might benefit from the work done and written based on orphan works.

At a European level there are discussions about a common policy regarding orphan works. According to law expert Helen Sedwick; “Orphan works such as films are disintegrating because no one has an economic incentive to preserve materials that cannot be displayed without risking copyright infringement.” In addition to Sedwick, Diane Lees stated that the intention to publish the orphan works is so big that many organisations want to make the original unpublished works more accessible, but it is problematic because the rights owner is untraceable.

The orphan works issue resonates with the accessibility of works. According to Jennifer Urban, Clinical Professor of Law from University of Berkley: “The fear of liability for providing for providing access to orphan works this threatens memory institutions’ ability to be active member of their society and representing human culture, history, and accrued knowledge.” In this case, institutions might decide against using the work altogether rather than run the risk of a costly copyright infringement suit, if the owner shows up.

Orphan works material involves mostly works that are from more recent times. Material from pre-1870 may be assumed to be in the public domain. However, there can be similar items

26 Lifshitz-Goldberg: 1.
that could be still under copyright. According to author Kerry Patterson: “The costs and challenges of rights clearance activity of dealing with orphan works have been identified as significant barriers to the digitization of cultural heritage collections by various studies.”31 In this context the issue of orphan works has a negative impact on the processes of presenting more information. The issue forces to choose certain works over other items meaning some more interesting works will not be published due to copyrights and that influences the work.

In various cultural institutions such as museums, archives and libraries there are millions of items that are culturally important and are under copyright. In Europe there are about 3 million books that can be seen as orphan works. For example, in the United Kingdom, the British Library estimated that 40% of all creative works in its entire collection of 150 million manuscripts, maps, newspapers, magazines, prints and drawings, music scores, patents, sound recordings and stamps, are orphan.32

Furthermore, a digitalization project found out that 95% of the newspapers from before 1912 are orphan. Also, in Denmark, the Danish National Library has about 160 000 works with uncertain copyright status from the period of 1880-1930.33 Many institutions make rough estimations regarding the amount but, in reality, it is quite difficult to know the exact number. Furthermore, also film archives tried to do research, which resulted in finding out that 129 000 films have no owner and 225 000 films have unknown or untraceable copyright holders.34 In British museums there is no information about 17 million photographs, which are connected to 90% of the collection. According to Tilman Lüder, Head of Copyright at the European Commission: “The most common and conservative estimation that European research has put forward is 5-10% of works included in library collections of print media are orphan. In some archives and libraries, the figure rises up to 50%.”35 Therefore, not knowing

32 Tilman Lüeder, “The orphan works” GRUR Int 677 (Speech, 2010):3
34 Teedla: 10
35 Lüeder: 3
the number of orphan works shows the depth of the problem.

**Orphan works and different mediums**

Making the items and information accessible is one of the core missions for cultural institutions. The reason why orphan works are such a considerable problem is that institutions such as museums would like to use digitalization as a means to make orphan works more accessible.

Where governments and the European Union are trying to define generic guidelines, many museums and libraries still treat their orphan works on a one-to-one basis. According to Anna Vaopola, expert from European Commission, “The question of orphan works within this field has, however, been acknowledged as a problem for a long time. The experiences relating to rights clearance and identification of orphan works in these institutions refer mainly to situations where an internal or external request for a work has been made and not to collections as such.”36 The need of a common approach is necessary as there are thousands of institutions, which are dealing with these types of challenges. According to Yael Lifshitz-Goldberg: “The problem of orphan work is still growing, “since more and more works are ‘ageing’ into orphanhood.”37 The issue of orphan works is changing its dynamics, but still remains a crucial aspect of how information is communicated.

In particular, there are online platforms that can contribute to orphan works. Certain types of orphan works exist in virtual media, which offer different challenges. For example, blogs, web-pages and Wikipedia are informal creations and often created by the joint efforts of multiple people.38 Authors understand the copyrights issue as even more difficult depending on whether there are many authors or only one. Therefore, the process of author search can be very risky and can produce a negative result for the researcher. The question in authorship could be only the first obstacle because the author might not even be the copyright holder.

Moreover, the problem of orphan works seems to be especially relevant for mediums such as books. In the current 27 EU member states there seem to be around 4 million books. This is very counterproductive to society and for the right holders themselves. Next to books, the amount of newspapers also adds to the orphan works problem. However, the situation with

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36Vaopola: 25.
38Ibidem :3.
newspapers differs considerably because rights to works contained in newspapers are even harder to locate.\textsuperscript{39}

The process of finding the rights holders impacts the orphan works output. Neelie Kroes stated that on the internet there is a serious risk, naming orphan works as a “20\textsuperscript{th} century black hole”. It is a duty of our time not to let this happen.\textsuperscript{40} There is a responsibility to embrace the different types of challenges and open the diverse societies. Opening up to users is related with the presentation of information and how it is done. The rights information systems, which could enable swift, accurate and comprehensive searches for rights and rights holders are critical in this process. By ensuring transparency on rights and recording works identified as orphans or out-of-distribution, they ensure avoiding costly duplication of searches.\textsuperscript{41} Sharing the information about orphan works needs to be as transparent as ever. Moreover, the struggles of finding the right owner could be strongly communicated as they elevate presenting the challenges in better way. Otherwise for the general public the problem of orphan works remains extremely vague and hard to understand.

**Reasons for orphan works**

There are various reasons for orphan works. Mostly the problem can be explained due to the development of copyright laws in the 20\textsuperscript{th} century. The first reason would be the Bern Convention, which meant the elimination of formalities and registries as a condition for copyright. This complicated the implementation of rules and determination of ownership. The automatic copyright only confused the parties who wanted to use it. According to Heli Teedla: “This can be connected with the loss of information or the ability of finding the owner.” Therefore, the convention created an unpractical situation for research.

The second reason for orphan work is the change of time span. For example, in the United Kingdom the copyright was extended from 14 to 70 years (after the death of the author). Similar changes occurred in the majority of the European countries. These developments have been changed and are therefore difficult to follow.\textsuperscript{42} However, the copyrights still function on national and international level, but they haven’t been properly adjusted.

Furthermore, orphan works are considered to be not a small problem because the researchers or institutions need to spend a lot of resources to find the rightful owner. Particularly, the

\textsuperscript{39} Vuopala: 21.
\textsuperscript{40} Kroes :2.
\textsuperscript{42} Lifshitz-Goldberg: 6.
process of finding the owners is expensive, requires time, commitment and an increased number of staff.\textsuperscript{43} In the end the searching process doesn’t always guaranty that the rightful owner will be found. Moreover, the risks of a potential lawsuit could scare the user away.

**Orphan works directive**

In 2012 the European Union Parliament and Commission published a regulation, where public institutions such as libraries, education institutions, museums, archives and institutions working with film and audio files can reproduce and publish the orphan works for the purpose of preservation and restauration.\textsuperscript{44} This regulation is a formal attempt to reach out to the audience and institutions.\textsuperscript{45} According to Stef van Gompel and P. Bernt Hugenholtz, researchers and lectures from University of Amsterdam: “the transparency of publishing the orphan works is foremost beneficial to the institution and its users.”\textsuperscript{46} Therefore, the orphan works as topic deserves more intention and presentation regarding its complexities. Furthermore, the potential of orphan works is more present than cultural institutions are able to work with.

The implementation of the orphan works directive requires to do multiple steps before allowing to state the work as orphan. Firstly, the directive asks to conduct an identification focusing on using reliable sources. The process called diligent research refers to doing an investigation about that particular item and is carried out in good respect and in good faith. According to Kerry Patterson: “Diligent research is a time-consuming exercise for any digitization project. Therefore, there are serious considerations by choosing whether it is sensible to put time and effort to process.” Secondly, after going through various databases and sources, the status will be valid in the entire European Union and the organization is allowed to publish it. Thirdly, the organization is allowed to achieve aims related to their interests such as digitizing and publishing. The cultural institutions are required to document their research process. Furthermore, the institution is allowed to cooperate in a private

\textsuperscript{43} Ibidem: 4.
partnership to cover the digitization costs.47

Each type of item has a different list of sources that need to be checked in order to locate the rights holder. For example, books and films have different sources to check whether the items might be orphan work. In addition to official sources (attached to the directive), each country may have specific lists of sources. Furthermore, the institution needs to clarify its rights of use.48 In case a copyright owner shows up, then the status of orphan work can be renegotiated. Therefore, the most common works are either written works or more audio-visual works, which potentially find the most benefit from the researches. These mediums are one of the most valuable representations of cultural content. However, an interesting aspect is that a medium such as photograph is not included in the directive.

The implementation of the orphan works directive is very complex process for many cultural institutions. Particularly the diligent research process of the orphan works directive creates multiple challenges. After the research process has been conducted, the cultural institutions are expected to report to the appropriate government agency. In the case of Estonia, the Ministry of Justice could be the best option. Therefore, the attention to details are putting many cultural institutions under pressure meaning that they possibly try to avoid dealing with orphan works altogether. According to Electronic Information for Libraries: “The consequences of not carrying out diligent research may harm the credibility of cultural institutions.” In summary, if the work has been wrongfully found to be an orphan work, then the remedies for copyright infringement in national law are available.49 Still, in many cases the diligent research has resulted in finding out nothing or at most a very limited amount of information.

The issues with a directive for orphan works
Orphan works are a complex issue and create various challenges. One of the many concerns with the orphan works directive is that the institutions find it difficult to clear the rights while at the same time complying with the requirements of the legislation. There is a lack of legal certainty in the directive as to what constitutes a valid diligent search. In addition, the directive’s rules on “appropriate sources” obliges member states to impose a heavy burden on

cultural institutions in terms of number and quality of sources to be consulted. On one side the fixed number of sources can be supporting the research, but it still doesn’t give the legal security finding out the legal status of orphan works. Therefore, there are all these fixed regulation without further emphasis on how to make it work out in practice.

Another critical point is concerning the financial risk because there is a retro perspective possibility that the right owner might show up and requires compensation. Furthermore, the directive only allows to make works available for specifically sanctioned uses such as digitization or restoration. Therefore, the purpose of the directive is not considered very broad. Finally, the directive only permits to make orphan works available for limited institutions and doesn’t include initiatives such as Wikipedia.

The orphan works directive has been criticised strongly and stated as a failure by not fulfilling its purpose. The directive was developed by the European Union in order to create greater access, but in reality, the stakeholders such as libraries are not benefitting from these regulations. The proposed directive has morphed into an attempt to protect the ideology underpinning the 20th century copyright legislation against the effects of the problems created by the rigidity of this ideology. In principally for the cultural institutions, the directive is too complex.

Furthermore, doing diligent research is too complex. Checking each source is almost unthinkable especially concerning the situation with mass digitization. Another aspect was the accessibility of the sources, which are required to be consulted to get the conformation about the orphan works. COMMUNA’s 2012 analysis of the directive showed that the set of regulations was determined not to succeed. A preliminary study (undertaken by the EnDOW project) covering Italy, the United Kingdom and the Netherlands described how this directive does not provide the much-needed solution for the problem of orphan works. The study collected information about how many sources can be used for diligent research. For example, in the UK there were 210 sources, databases, and registers that could be used for finding information. A similar number of 357 sources were found in Italy and 40 sources in the Netherlands. However, not all sources were freely available meaning that either a

52 Keller, “Orphan works’ compromise fails to deliver”
53 Zeinstra , “The trainwreck that is the Orphan Works Directive”. 


subscription was needed or there is a need to visit the source physically. Therefore, the aspect of doing diligent research doesn’t always concern the lengthy timing issues, but also checking sources that aren’t even accessible. That is definitely problematic if the institutions need to check each and every source.

Another disadvantage is the availability of staff because in quite many cases, institutions have a limited number of people who fully interact with copyright issue. In best case there are a few members of staff, who are only involved during temporary projects. After the project ends, the staff is not anymore so closely related with orphan works. Therefore, the attention to orphan works and especially diligent search largely depends on singular projects.

Finally, the selection of institutions in the directive is quite limited. Currently, it includes only traditional cultural institutions such as archives, libraries and museums. However, the developments of communication channels have enabled to share and search information from the internet platform. These kind of new ways of searching information are not included in the directive. Therefore, non-profit media and internet platforms include perhaps more users than official databases. In other words, the directive is considered not practical or beneficial for the users.

**The positive sides of the directive**

There are still a few advantages in this directive that can be considered as positive. One of the positive sides would be that it also applies to works that have never been published.\(^5\) Unpublished works deserve to be included because then there is a larger opportunity to be recognized. The directive can be also applied to partial orphans like in case of multiple ownership, so the works can be still used. The right to use such a work is allowed if right holders have been identified or located.\(^5\)

Perhaps most importantly, the directive no longer ties one type of items to certain type of institutions. For example, the directive doesn’t apply only films that are in film archives, but also to museums that maintain films. Therefore, the directive is more inclusive and fitting for non-standard institutions.

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\(^5\) Keller“ Orphan works' compromise fails to deliver” .

Orphan works database
The orphan works directive is supported by the orphan works database, which in principle provides information about works contained in the collections of publicly accessible libraries, educational establishments and museums, as well as archives, film or audio heritage institutions and public-service broadcasting organisations established in EU Member States and European Economic Area countries. The database was created with the purpose to share common information about orphan works. According to the European Union Intellectual Property Office (EUIPO), the multiple cultural institutions in Europe are attempting to be more involved with the database. The research stated that a little less than half (48%) have registered as user in the orphan works database. However, the others (52%) gave a negative answer. Therefore, the database still is gaining trust of the institutions. When asked how satisfied the cultural institutions were with the practical functioning of the Orphan works System, 81% replied that they were either satisfied or at least neither satisfied nor dissatisfied.

The orphan works database is connected to doing the diligent research. The database is the place where, based on the diligent search, orphan works can be admitted. EUIPO conducted a research regarding the orphan works system and database. After questioning more details about the practical functioning of the Orphan works system, the most vocal answer was related to the complex structure of diligent research. Another factor which was named as drawback is the lack of funding for digitization of activities. Furthermore, the lack of human resources was considered a reason in over a third of the answers (34%).

Concerning diligent research, only few of the replies indicated that they were satisfied. One of the most common opinions were: “Diligent searches are too complex and require human- and time resources that make it impossible to register orphan works massively.” Another opinion from the questionnaire was sources that need to be consulted and which are not accessible online. Therefore, the cultural institutions in the European Union are attempting to interact with the orphan works directive and database, but in practice working with the directive is not that pleasant. Finally, the cultural institutions stated their expectations what

58 Ibidem: 19
could help the implementation of the orphan works directive. The general suggestion was that a short and final list of relevant sources required for diligent research was necessary. The lack of support from a national level could be used for working together and promote the orphan works to public. In conclusion, the issue of orphan works is relevant to institutions, but still needs more attention.

Another database, which is commonly known among cultural institutions is ARROW (Accessible Registries of Rights Information and Orphan Works towards Europeana). ARROW is a project of a consortium of European national libraries, publishers and collective management organisations. The programme was created to make digital content more accessible, useable and exploitable. According to Neelie Kroes, ARROW could become an official portal in Europe, where it is possible to find essential information and do automated searches of rights holders and copyrights. The ARROW database could support the official orphan works database. However, ARROW cannot be the complete solution to ‘the orphan works problem’. It is still needed to give institutions more security interacting with this problem without incurring a potential criminal liability.

The interaction of various concepts (authorship, ownership, intellectual policy, copyright and orphan works)

Each of the previously described and analysed concepts has developed through time and culminated with the creation of copyrights and the orphan works directive. The concepts of authorship and ownership can be understood as a foundation, which influences the development of the previously mentioned concepts. In principle, both concepts state the importance and recognition for the role of creator and the ownership. Therefore, the cultural works are imbedded to the property belonging to either an individual or institution. Furthermore, the intellectual property can be understood even as something tangible or intangible but it could develop some difficulties. According to Heather Haveman, Professor of Sociology and Business at the University of California, Berkeley: intellectual property create cultural constraints on […], their relative power, and the nature of their exchanges.

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61 Kroes: 3
Also, the intellectual policy can be understood as a broader umbrella for copyrights. Copyrights as a specific form refers to a detailed and legal set of regulations concerning more ownership and authorship. They clearly state on what terms the, mostly intellectual, works are allowed to be used. Still there are debates about how the copyright could better balance the many wishes of stakeholders. According to Julie E. Cohen, professor of law at Georgetown University Law Center: “Copyright theory and jurisprudence are powerfully structured by a set of interlinked anxieties about the appropriate tools for understanding the interactions between copyright and culture.” Copyrights are connected to the rights of orphan works.

**Current practices of copyrights**

Many countries try to make at least some culturally important material freely available for stakeholder such as researchers. For example, paintings that have been made centuries ago are out of copyright. Particularly, Rijksmuseum allows to use pictures of its items (such as paintings or sculptures) as copyright-free for all purposes. For example, the users are allowed to use pictures of paintings on bags, wallpapers etc. Therefore, the photos with high resolution and good quality are freely downloadable without restrictions. This is a good example of coming closer to the audience and allowing the work to be used for educational or individual purposes. In this case, the chance for the copyright owner to turn up and require compensation is very minimal.

The copyrights are a complex construction of rules, which have been translated into various ideas and practises. Creative Common Licenses are standardized agreements between a rights holder and any possible user, based on which the user gets a right to access the work for free and to use it according to the licence grant. The user in turn promises to use the material according to the conditions created by right holder. In other words, the work is freely useable if the rules are followed and the process is shown in a transparent way. Institutions such as museums and libraries use this strategy to make the material more accessible. According to Esther Hoorn, lecturer from Groningen University: “Right holders can be exclusive contracts and technological measures exercise an almost perfect control over their works.” The right holder will have the control, but at the same time trust is given to the researcher. Moreover, part of the creation of Creative Commons strategy is to give trust to people. It is important to

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regulate their behaviour by signalling social norms on sharing. In this context the creative commons agenda is to facilitate the different stakeholders and to use the copyrights in an easier way. Particularly, licences are introduced to empower authors to what extent they want to allow re-use of the material.

According to the conditions of the chosen licence, works under a creative common licence can be harvested, preserved and made available by cultural heritage institutions. Users who violate the licence, also break the copyright law.\(^{66}\) Esther Hoorn states that in some contexts authors apparently find that free availability of their work on the Internet serves their interests in a better way. Particularly, the more liberal use of work can be stimulating. For example, public broadcasting organization VPRO worked together with Gemeentemuseum The Hague and World Arts Museum Rotterdam. In this project, samples of world music on original instruments were made available under the creative commons licence and users were encouraged to re-use the material. The reason for this project was to include more and younger visitors to interact with their collection. At the same time World Arts Museum Rotterdam wanted this strategy to stimulate encounters and cross-cultural inspiration.\(^{67}\)

Copyrights are embedded into the laws of countries. Many countries such as Estonia have their own copyright law, which is legally binding to all parties wanting to use the material. Furthermore, the Estonian Copyright act regulates only the copying done by libraries. According to the Estonian Copyright Act a public archive, museum or library has the right to reproduce a work included in the collection thereof, without the authorization of its author and without payment in order to: 1) replace a work which has been lost, destroyed or rendered unusable; 2) make a copy to ensure the preservation of the work; 3) replace a work which belonged to the permanent collection of another library, archives or museum if the work is lost, destroyed or rendered unusable; 4) digitise a collection for the purposes of preservation.\(^{68}\)

Also, the Netherlands have implemented copyrights into the legislation. According to Esther Hoorn: “the copyright is quite similar to general regulations by giving a bundle of exclusive rights to the author. The Dutch Copyright Act regulates the right of reproduction and the


\(^{67}\)ibidem: 11.

\(^{68}\)Aura Bertoni, Flavia Guerrieri, Maria Lillà Montagnani” Requirements for Diligent Search in 20 European Countries” (ENDOW project, 2017): 72.
The background idea is that the author can negotiate with those rights to achieve sustainable production and dissemination of his work. That also includes determining the availability of the work for society. Therefore, a set of moral or personal rights assures that the originality is being recognized. The Dutch Copyright legislation requires a ‘written act’ for the assignment of copyright and gives special rules for the interpretation regarding the ‘written act’. In summary, the copyright law protects a work as soon as it comes into existence. Dividing the power relationship influences the dynamics of the potential works because future creations are in continuation of what has been agreed previously. In some cases, the law can be stimulating, but it can be holding the essential information in hostage. Finding the right balance is the challenge in this case.

In this context, copyright creates many challenges for researchers and for potential researchers. Also, it is difficult for researchers to know this information the investigation has to be original and independent. Especially in the case of internet, there are so many authors, which makes it difficult for users to understand the regulations. In summary, it can be said that copyrights are like a double-edged sword, where on one side it protects the owners and at the same time it creates difficulties using the information.

According to Neelie Kroes: “Europe should move forward and find innovative practical solutions for tapping the huge treasures of our culture for citizens and businesses alike.” Kroes emphasized further that to a certain extent, the practises still differ per country. Few countries still have struggles how to work with the regulations. In most of Europe, the countries are implementing their own copyright law.

In the case of orphan works, the copyrights and the rights clearances are more complicated. It then depends on the particular item and other obligations whether it makes sense to find out the owner or author. In various British institutions, knowledge of- and responsibility for copyright tends to be distributed across the institutions. For example, the British Film Institute tries to find the right clearance for orphan works, which means finding the possible owner and therefore creating an agreement. Nevertheless, the process of doing the research involves working on both archive clearance (licensing in) and commercial licensing.

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70 Kroes: 2
Therefore, the research process depends on the objectives and the direction of the project. For archival purposes the research requires to be more topic-centred while for commercial purposes the public has a larger influence.

**Current practises with the orphan works directive**

There are different levels of readiness to engage with the Orphan works directive. For example, there are institutions that try to fully adopt the directive and follow the guidelines. However, there are also institutions that have made orphan works available online, but have chosen not to interact with the directive. Therefore, institutions such as the National Library of Wales and the National Library of Scotland have demonstrated a reasonably high tolerance of risk. That means balancing the expected costs of compliance against the potential benefits involved in making the collection materials online.\(^\text{72}\) The risks are decisive factors regarding the interaction with the orphan works directive.

Certain institutions such as the National Central Library in Florence have not made orphan works available online and have not used the directive. The orphan works are not digitized at all or they are digitized for preservation purposes only (no online access).\(^\text{73}\) Therefore, the digitalization of orphan works depends on the content and how important it is considered on a given moment. Copyright issues don’t appear to be recognised and resourced consistently at a strategic level: there are generally low numbers of staff with specific responsibility for copyright with the added loss of skilled and experienced temporary staff once a larger project work ends.\(^\text{74}\) Therefore, it can be said that working with copy rights doesn’t have the most significant importance for museums or libraries.

The National M. K. Čiurlionis Museum of Art in Kaunas, Lithuania, is familiar with the orphan works directive. Concerning the situation with orphan works, the museum was involved in a few projects. For example, 5 orphan works are registered in the database of orphan works and the museum did a diligent search on 38-orphan works. It is impossible to say how many orphan works the museum has, but the museum thinks that there might be around 12 000 in the museum library. Moreover, the department of Photography and Documentation has large number of orphan works (the total number is around 90 000,

\(^{71}\) Victoria Stobo, Kris Erickson, Aura Bertoni, Flavia Guerrieri. "Current Best Practices among Cultural Heritage Institutions when Dealing with Copyright Orphan Works and Analysis of Crowdsourcing Options." (Endow project, 2018),7.

\(^{72}\) Ibidem.: 49

\(^{73}\) Ibidem.: 49.

\(^{74}\) Ibidem. :50.
probably a large part is orphan works). In particular regarding the implementation, the museum tries to avoid orphan works and has the opinion that the Ministry of Culture is more informed.\textsuperscript{75} Concerning the pitfalls, the museum is an art museum and copyrights are quite a big pain in daily work. It would be helpful if visual arts could be also introduced in the orphan works directive.

\textsuperscript{75} Rainmonda Norkute. Email conversation to Heidi-Elena Stanionyte, September 5, 2018.
Chapter 2- Orphan works directive and practices in the British Library, EYE Film Institute and British Film Institute.

Introduction and history of the studied library and film institutions

In Europe the cultural institutions have responsibility to act as caretakers of national heritage. Regardless the institutions’ name, the collection has its own narratives to tell. The British Library is one of the oldest and most respected institutions with origins dating back to 1757. The British Library as it is known now was created in 1973, when the institution was separated from the British Museum. During the 20th century the collections of the library grow including audio-visual and newspapers. That period also meant the need for larger space and centralization of the departments to a single location. Currently, the British Library has a mission to advance the world’s knowledge. The vision and mission have key themes. For example, they guarantee access for future generation for research purpose. Furthermore, the library uses strategies such as digitization to reach out to people and support cultural life beyond the United Kingdom. Supporting different communities is a method to generate understanding for future generations including social and economic benefit.  

The British Library doesn’t see itself as a typical library loaning out items, but more like a museum or an archive focusing on preservation. The library is the second largest in the world, after the library of congress in the USA. The current collection of the library includes books, journals, manuscripts, maps, stamps, music, patents, photographs, newspapers and sound materials. It is very difficult to state the size of the collection. The estimation of the collection is approximately 150 million physical items and up to 200 million digital items. Overall, the collection consists of 14 million books.

Comparing to the British Library, the EYE Film Institute has a more specific scope. The predecessor of EYE, Netherlands Historical Film Archives, originated from students’ cinema Kriterion. In 1952 the Netherlands Film Museum was created and was located in Kriterion and Stedelijk Museum. In 2009, the film museum was renamed to EYE Film Institute. The institute covers the entire history of film and is expanded by previous and new titles every year.

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77 Matthew Lambert, “Interview” Interview by Heidi-Elena Stanionyte, December 17th, 2018.
year. Furthermore, the EYE is the only institution in the Netherlands that collects- and creates access to film-related collections. Currently, the mission of the film institute is to safeguard, making accessible and retain the dynamic vitality of the collection following the developments of film medium in relation to the world. The institution prioritises the serving of the general public, professionals and educational purposes. Additionally they aim to preserve the items for centuries.\(^{80}\)

Currently, the collection of the EYE Film institute has about 40,000 – 50,000 films, about 700,000 photos, a smaller number of posters, projection equipment, film music and paper archives. Furthermore, the collection also contains other film related items such as books, magazines and personal items.

The United Kingdom equivalent of the EYE Film Institute is the British Film Institute. The foundation of the institution was created in 1933. Two years later the National Archive acted to maintain a national repository of films of permanent value. The original purpose of the institution was being a library of educational films distributed to schools and other educational institutions, and act as a repository of films. During the 20th century the institute started to collect feature films on subjects such as history and science. Since 1950s the institution started to collect also television material.\(^{81}\) The Institute currently has the mission to preserve everything related with British film heritage. It encourages the development of arts of film, television and moving images throughout the United Kingdom. Furthermore, they see it necessary to promote education about film, television and the moving image in general, and their influence on society. Therefore, the role of the British Film Institution (BFI) is to reach out to multiple spheres of people establishing, caring for and developing collections reflecting the moving image history and heritage of the United Kingdom.

The British Film Institution has an extensive collection, which holds about 60,000 fiction films, including features, on all gauges of film and formats of videotape, 120,000 non-fiction films, broadly tracing the history of the use of the moving image in non-fictional settings and for non-fiction purposes.\(^{82}\) There is also a collection for distribution with 8000 titles, which contains world cinema and Hollywood movies. The British Film Institute has also an

\(^{80}\) EYE Film Institute. “EYE collection policy 2014 – 2017”, (Collection Policy, EYE Film Institute, 2014).


estimated 750,000 television titles, mostly from off-air recordings as seen by the viewer, as well as production and transmission material. For example, there are audio and video recordings of Parliamentary proceedings (Lords, Commons and Committees), 30,000 unpublished scripts, from first drafts to release scripts, mainly relating to British and American film and TV titles.83

The British Film Institute has a big collection of non-film items such as pressbooks, cinema ephemera, programmes, tickets, autographed letters, promotional material and personal memorabilia and posters. Furthermore, they have a collection of still images from or related to films and television programmes, production and costume designs, animation cells, books and journal titles.84

**Collection, Copyrights, Publication**
Currently most cultural institutions try to make the collection widely accessible. The British Library tries to make content digitally available to the users. The Digitization requires to make decisions on what type of material needs to be available. However, as with every institution, there is still a requirement and first priority to follow the copyright. Making items digitally available requires to seek permission from the rights holders.85 Copyrights are full time commitments and need a high level of specialist knowledge on finding the rights holders. Matthew Lambert, copyright specialist in British Library, stated that at the same time the aim is to publish as much of material as possible. If the rights holders procedure is not followed, then the item is not used.86 The digitized items are chosen in cooperation with the curatorial team, who choose which items to digitize. The institution considers the right balance for digitization and searching the rights holders.87 The digitization covers all kinds of material, but sometimes a project forces a prioritization of items.

Working with copyright and digitization involves a considerable amount of resources such as labour. The British Library is organized into various departments, which focus on different subjects such as Asian etc. Normally, there are 5 permanent staff members, who are involved with copyrights (on a daily basis). Obviously it would be better to have even more staff members involved. In many cases, special projects demand for more staff members.

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83 British Film Institute ‘Searching the collections’
84 Ibidem
85 Lambert, ‘Interview’.
86 Ibidem.
87 Ibidem.
Sometimes there about 10 staff members, who are involved with rights clearance. After the project ends, the staff members continue their everyday work.\(^8\)

The EYE Film Institute has emphasized the importance of the digitization. The film institute uses digitization for preservation purposes and making copies. The EYE emphasizes that only for publication there is a need for asking permission, and follows the copyright law. However, the institution thinks there is a need for more exceptions to allow further publication of material. The institution is following the rules, but still feels there is more possibility to expand the rights.\(^9\) Mostly the digitization involves items with an agreed- or that are definitely out of copyright. This makes the whole digitization process much easier.

The collection of the British Film Institute is extensive and multi-layered. Working with copyrights requires interacting with multiple scenarios. In the rights department there are about 8 people, 2 of them working full time with rights. The BFI has invested in a special department because it is involved with commercial activities.\(^9\) Most people work with acquisition, sales and commercial exploitation. In addition to the rights department, BFI has a legal counsel, discussing about policies etc. According to Amanda McCormick, law specialist from University of Buffalo: “The balance between the rights of copyright holders and information users has always been tenuous at best, and, at its worst, is considered to be an “asymmetric distribution of uncertainty” among the parties.”\(^9\) In cases where the rights get denied, the rights department recommends the curatorial team to deselect the title. However, the BFI may still digitize for preservation and for educational purposes. A project working with copyrights is Heritage 2022, where BFI has a video data collection, containing 1.8 million videotapes. From this collection the institution is planning to digitize 100 000 tapes with fellow regional and national partners for preservation purposes. Before digitization, the BFI is considering the value of the material and its current status.

Another project was ‘Unlocking film heritage’, which in 2012-2017 was created to digitize films. At first the curatorial team did initial copyright checks to determine whether it was okay to go ahead with publication. The total selection consisted of 10000 film items. In the UK there are many regional archives. Half the items came from the archive of BFI collection

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\(^8\) Lambert, “Interview”

\(^9\) Leontien Bout, “Interview” Interview by Heidi-Elena Stanionyte, December 3\(^{rd}\), 2018.

\(^9\) Annabelle Shaw, “Interview” Interview by Heidi-Elena Stanionyte, January 28\(^{th}\), 2019.

and other half were from regional partners. In this project, the films were digitized and made available through the BFI video platform called BFI player. The main purpose is to develop thematic collection such as comedy, historical, social and cultural. Whether the rights holders were unknown or known, there was always need to contact the copyright holder. The experience showed that there is no problem with copyright holders that the institution has frequent contact with and they ordinarily granted permission. The BFI sees the value of the item more important than copyrights for digitization. According to Jean Dryden, archives specialist: “Copyright was important enough to rank, but it was by no means the most important factor.”

Copyrights are a difficult topic and not all staff members comprehend its extent. Therefore, the communication about copyrights depends on the curator. Some select the items with the rights in mind while others mainly consider the content. The institution wants to make staff members aware by giving them instructions concerning copyrights. According to Annabelle Shaw, rights are important as anything else. However, Shaw stated that quite often the rights ownership could be prioritized more at the beginning of the selection process.

The significance of orphan works
In Europe the discussion about orphan works has been present for a longer period of time. In British Library there has been some research done on orphan works. For example, in 2011 the research examined a sample of 140 books published between 1876 and 2010. The study found that 43% of the British Library’s collections could be orphan works. This result shows the seriousness of the problem. The British Library has registered approximately 6 000 orphan works in the EU IPO (European Union Intellectual Property Office) database.

According to Bingbin Lu, intellectual property specialist from Nanjing University:
“Estimates of the number of orphan works vary not only because it depends on the sector involved, but also because there is currently no standardized methodology and criterion that libraries, archives, and museums can use to establish the status of an orphan work.”

In many cases it is impossible to know the total amount of orphan works as the size can vary from only to thousands.

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The British Library has been fairly supportive regarding the orphan works with an attempt to make them more useable. It is a complex issue to deal with and getting the balance between making it easy for people to use orphan material while still ensuring that appropriately detailed searches are undertaken to find the creators (and so protecting the interests of rights holders), is a tricky one, which I think on the whole the current provisions manage pretty well.”95 Matthew Lambert stated: “The orphan work provisions (that being Licenses and Exceptions in the UK) currently work reasonably well in my opinion. In summary, finding the balance between creating accessibility and doing research is working fairly good in the case of the British Library.

The orphan works are considered important, but are not overlooked on the expense of the standard items. Most of the time works chosen for digitization are part of a larger project.96 According to David R. Hansen: “But in recent years the problem posed by orphan works has risen in importance and, as a result, has received vigorous consideration by a variety of owners, users, and policy makers, all of whom have differing opinions about how to solve the problem.”97 In this context, the importance of orphan works depends per case.

Researchers, and not the public, are mostly influenced by the publication of the orphan works. British Library’s copyright expert Matthew Lambert has stated the general opinion among the people and responsibilities of stakeholders: “Regular members of the public are not eligible to use the exceptions.”98 Furthermore, rights holders also need to be aware of the provisions to check if their material is being used, and perhaps more awareness is needed there.

The EYE Film Institution considers orphan works important culturally valuable material. In most cases the orphan works are used by the institution itself for its everyday museological and cultural purposes. The orphan works are a considerable part of the collection of the EYE film institute and their significant is related to their content. Searching for new orphan works is an ongoing process. Many orphan works are historically important for the Netherlands and are being used in different projects. In most cases, larger projects which take place about

95 Matthew Lambert, email conversation to Heidi-Elena Stanionyte, September 23, 2018.
96 Lambert, “Interview”
98 Matthew Lambert, email conversation with the author, September 23, 2018.
every six years, interact with orphan works. So far, the research has shown that there are many orphan works among amateur films.

Based on the information from 2012, the British Film Institution stated that the most common form of orphan works are films. The estimation of orphan works with confirmed status is between 5-10% of the non-fiction collection. During the digitization project called “Unlocking film heritage”, 5168 films were digitized and 273 were uploaded to the orphan works database and therefore conformed as orphan.

There are many reasons why the BFI preserves orphan works. The most important reason is connected with cultural heritage. The BFI stated that they need to preserve all works regardless being orphan or not. The British Film Institute doesn’t always consider orphan works being different from ordinary items. There might be the case that movies have multiple rights holders. Films have been treated differently in the course of 20th century because changes of authorship and ownership. In the UK, there are three copyright acts, dating from 1911, 1956 and 1988. These different acts define different ownership of films. Therefore, the determination of the rights holder has changed. The film own subject matter became a separate medium in the 1956 act. Before that time film was regarded part of photographic- or dramatic work. For example, if there is non-fiction work from 1947, the author would be considered to be photographer. If it was a feature film, then it would be treated as dramatic work. Currently, the producer and the director are considered as rights holders. According to, Chioma O. Nwabchili, and Chudi C. Nwabachili, lecturers from the University of Nigeria: “The concept of authorship and ownership of copyright is distinct, and each attracts its own peculiar rights. There are instances where the author of a copyright is also the owner. In other instances, the author may be different from the owner.”

Implementing orphan works directive
The diligent search requires working with the obligatory list of sources. The British Library considers working with the mandatory list of sources challenging. According to Matthew Lambert: “If the library has a huge list of sources (the UK IPO has provided long checklists to assist with a diligent search), do we need to check them all to ensure library gain protection, or is it enough to do only the ones we think are relevant?” The confusion of

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99 Bout, “Interview”
checking the sources is therefore disturbing the digitization and publishing process. According to Aurora Bertoni et al, Endow project: “it will be difficult for cultural institutions to clear the rights for their collections while fully complying with the requirements of legislation.”

Furthermore, the Library has questions about the minimum amount of sources that need to be checked. For example, is there a ‘minimum amount’ of the checklist the library is required to use to gain protection. If so, will that result in ticking boxes – i.e. checking with bodies they are sure won’t be able to help – but doing so anyway to satisfy the search requirements. The British Library still claims that this list of sources doesn’t offer enough security.

The British Library stated the time commitment factor depends per work. For example, a search to track down the estate of a long dead author might take days, whereas the search for a more modern author might take only an hour. The Library does occasionally employ freelance staff, but will not normally use an independent researcher to undertake diligent searches as the library has had problems with the quality of the diligent search work done on past projects when this was handled by non-BL staff.

The British Library has different experiences regarding diligent search. One of the projects was concerned with the Spare Rib magazine. The Spare Rib magazine was known as a feminist magazine, which run from 1972-1983. For many women this magazine was one of the most important sources regarding feminism. Spare Rib was not organized like any other normal magazine, but worked more as a collective contribution. Because of this, the magazine was contributed to by multiple authors. This is especially relevant in the case of working with orphan works, where the process of finding out the information was much more complicated. The working environment required a matriarchically developed system, where the responsibilities were divided between multiple people. For example, many tasks were varying from typing the material, making the tea, working out the design and layout to conducting high-profile interviews. For many institutions, the possibility of a common licence is the most optimal possibility to share the amount of material almost with the fullest possibilities. According to Shein Greenstein: “Experimental forms of copyright, such as the creative commons license, also have begun to play a prominent role in online


103 Matthew Lambert, email conversation to Heidi-Elena Stanioyte, September 23, 2018.
experimentation and choices over organizational form.”104 This raises the value of different
types of unique information, or the ownership of assets for exploiting that information.105
Therefore, the common licences can be used as necessary tools for various institutions.

One of the most important and significant outcomes was actually working with the
contributors, who were still alive and happy to work with the material. For example, 15
previous staff members were present at the library and helped to identify the former staff
members, which made the libraries’ work much easier. There was another reason why the
presence of the original contributors was crucially important. Many of them were giving
information and validated the metadata helping to better organize the current information.
The second reason was to improve the quality of the search engine, which is essential for the
final searches of the libraries’ online platform. Therefore, the library was open to multiple
solutions and in this case it helped reaching out to an even larger amount of people.

The British Library said that the orphan works directive is a beneficial tool because it helps to
make more content available. At this moment it is as good as it can be. Working with the
directive is resource demanding. The library has to follow the copyright, but keep in mind the
interests of the public.106 Regardless of the challenges related to copyrights and even orphan
works, the British Library has tried to open up its current collections. For example, the library
put its 1 000 000 images from its out of copyright digitized books into the public domain in
December 2013.107 Digitizing the content is one of many ways to present orphan works.
Furthermore, the orphan works directive is still not quite working and even if an institution
like the British Library is committing fully, it is difficult to show the works. Therefore, the
institution tries to digitize, even though risking infringement.

The EYE is doing diligent search focusing on obligatory searches. The EYE starts the
diligent search from their own databases. The searching process is semi-automated to check if
there is any information at all. For example, there could be an indication about year of death,
etc. More information will be obtained from the National Archive, newspaper archives,
Chamber of Commerce and genealogical sources. The film institute has stressed that it is
sensible to check only the sources that have the most importance to the work. Therefore,

104 Shane Greenstein, Josh Lerner, and Scott Stern. "Digitization, innovation, and copyright: What is the
agenda?." Strategic Organization 11, no. 1 (2013): 112.
105Ibidem: 112.
106 Lambert, “Interview”
during the research process there is a strategy implemented. Researching silent films doesn’t require to look into the sources that involve music rights. Therefore, excluding these certain sources simplify the process of finding out the possible copyright holder. Furthermore, it can also simplify the research process if there are obvious options excluded. With films, one interesting aspect is that for movies after 1985, the rights are considered to be with the producer. Movies before 1985 require to ask rights from multiple holders such as director, producer etc.

The diligent search is working best if staff is well connected to a particular item. Specialized knowledge will definitely be expected to help to make a breakthrough in finding the copyright holder, but depends on many factors. One of them would be getting in touch with the right contacts, which are not always so easy to find. For example, reaching out to the contact is challenging because of location or language barriers. Going to the contact person or institution might be financially demanding, requiring extra considerations and patience. of the Validation is also important. According to Kevin T O’Sullivan: “In light of the criticisms surrounding such schemes, national intellectual property offices will undoubtedly be cast as gatekeepers against the undue deprivation of such interests, likely leading to an inflating of the diligent search criteria, and a commensurate raising of costs for would-be applicants.”

The selection of checking the sources is different per project and per item, which actually makes it not so easy to develop an exact list of sources. Sometimes social media are used if there is a possibility that the right holder exist. In addition to contacting the right source and person, EYE stated that the diligent search is challenged by the accessibility of sources. The project research also resulted in finding out that some sources cost money to consult.

EYE film institution used the FORWARD project to determine the importance of different sources. Concerning the relevance of sources, investigating 232 sources showed that less than half of the sources (38%) are highly relevant for the EYE film institution. However, there are at least a quarter of the sources (25%) that have a low relevance. In between there are sources that have some kind of relevance. According to Leontien Bout, sources are only consulted if they are relevant even if they are mandatory according to law. EYE has one staff member specialised in copyright and law, working with curatorial staff. In the case of EYE Film Institute, the staff commitment regarding orphan works directive is not constant. There are

109Bout, “Interview”
curators, sales personnel and archivers, who are continuously being involved researching the copyrights holders. The curators try to conduct the first investigation. In case of further questions, the law specialist is consulted. Extra staff will be hired for special projects. The staff members like curators are familiar with the procedure and understand the diligent search process to a certain extent. According to Leontien Bout, for an independent researcher it would be very difficult to do the diligent search. The reason is that for diligent search, a certain amount of specific knowledge is needed.

The EYE film institute has specific cases and examples where the films were orphaned and the publication was challenged by the rights. For example two Dutch films, “Mijn Vader is een detective - Het geheimzinnige forteiland” and “Mijn vader is een detective - The Battle”. Both titles were orphaned because the production company went bankrupt and the rights were not transferred to another copyright holder. Bout states this information was obtained by pure accident when the EYE staff tried to contact the production company to finalize a donation agreement. The result was that the liquidator was contacted, who again informed EYE that the rights were not sold and the file didn’t show any rights. This example showed again how the orphan works issue is very complex.

The BFI tries to do the diligent research, using a mixture of internal resources. First, they start with their internal resources, system and rights system. Then there are 273 sources listed by the UK officials, but these sources are checked depending on the specific item. For example, the researchers try to find out when it was produced and the type of content. Furthermore, the BFI uses the sources they think can be useful. That includes online and free resources. For example, they have a subscription with ancestry.co.uk, IDMB pro and electroroll. There have been cases, where the staff went through the recommended list of sources just to see how much time it would take and concluded that is not worth to search them all. Researching at location makes sense if there are multiple titles. The BFI also tries to interact with people directly. For example, they set up special Facebook pages that have helped to find the people.

In the BFI, the diligent search is related with rights specialists and curators. During one of the last projects, the BFI had 30 members of curatorial team, who looked at content related material. However, with 5000 digitized films, there were two people working with rights.

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110 Bout. “Dealing with orphan works: A Dutch Film Archive”.  

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The BFI understands the directive has advantages because it allows to make items available with legal basis. According to Stef van Gomel, University of Amsterdam lecturer: “A broad supply of adequate rights management information to the public would enhance transparency, thus helping to alleviate the problems associated with rights clearance of copyrighted works, especially those works which would other-wise be liable to become “orphaned”.”\textsuperscript{111} The BFI wants to make the items available for the rest of Europe. Currently they have 170 films available on the YouTube. According to Ian Francis, founding director of Flatpack Projects: ”Not just a copyright battleground, the field has opened out fruitful territory for researchers, restorers and artists, raising provocative questions about the things we keep and the things we lose.”\textsuperscript{112}

The British Film Institute mentions challenges related to the commercial aspect. There is an opinion that most of the voices that are heard are from commercial holders even though most copyright holders are ordinary people, who don’t know that they are rights holders. The BFI tries to do a detailed search to prove that they did every possible effort, but there is always a possibility wasn’t found, but still exists.

**Ethical considerations**

The interviewed institutions were asked about their ethical considerations. The British Library thinks that there are not. The sensitive material is covered by other data protection rules, which are not determined by the directive. However, the only ethical aspect is related to filling the directive according to its possibilities and following the copyright regulations.

The EYE has ethical considerations when interacting with amateur films. The institution feels that they cannot use the amateur films so lightly. In the collections there are many amateur films that cover the West Indies. The Film Institute is avoiding to use these films. If anything is possible, they try to find on the right holders. Another consideration are commercial activities. In principle the orphan works directive cannot be used in any commercial purpose. However, sometimes these commercial activities can lead to reaching out towards many people. According to Janet Marstine: “The process empowers institutions such as museums to

\textsuperscript{111} Stef van Gompel. "Audiovisual archives and the inability to clear rights in orphan works." IRIS Plus, no. 4 (2007): 4

\textsuperscript{112} Ian Francis,” Shelter from the storm: the Orphan Film Symposium” BFI, accessed April 1 2019
change because it builds public trust through democracy, transparency and relevance.”\textsuperscript{113}
Therefore, the aspect is not only focusing on what is the use for the institution, but what kind of potential it could offer to the larger audience.

The BFI has another understanding about ethics and its relations to the directive. For example, one aspect would be interaction with donors. If the donor doesn’t want the BFI to make the item available using the directive then the institution is not doing that. Another ethical issue could be with amateur films, which sometimes portray donors with private content. In this case, the question is related to asking permission rather than publish based on content.

Chapter 3- Orphan works directive and practices in the Estonian National Library, Tartu University Library and the Library of the Estonian University of Life Sciences.

Introduction and history of the studied libraries
In Estonia there are multiple libraries preserving works of historic and heritage value. Each library has its own history and specific collection. The creation of the Estonian National Library coincided with the birth of the Estonian Republic. The initial steps were made on December 21st, 1918, when the temporary representation of the government agreed to create a national oriented library institution. Significant further developments took place in 1919, when the National Library started to collect an exemplar of each book that has been printed in Estonia. The same year the Library extended its scope by starting to collect archival material. The original collection consisted of 2000 books but already in the 1930s, the collection of the Library exceeded over 50 000 items. The Library became a central institution for obtaining educative and cultural related content in Estonia. Therefore, the library was one of the foundations for the acknowledgement of modern Estonian culture. Currently, the mission of the Library is to maintain and give access to the Estonian cultural heritage. Furthermore, the library aims to create a bridge between people and knowledge. Therefore, a sustainable collection is significant for current as well of future generations.

The Tartu University Library has a different background than the Estonian National Library. The creation of the Library is considered to be in 1803. One of the first collections was a donation of 350 books from Maria Aurora Lestocq. By the time of 1919, the library was given a significant role in collecting Estonian scientific materials. After the period of 1940-1989 the Tartu University Library was transformed from communist ideological collections to transparent collection development. The current strategy is to publish as much as possible digitally.114 The mission of the Library is to support and share scientific research to provide a study environment for students.115

In comparison to the two previously mentioned libraries, the Library of the Estonian University of Life Sciences is considered relatively new, being created in 1951. Originally the collection consisted of 24 919 books, magazines and agricultural dissertations from 1918-1941.116 After the independence of Estonia, the Library got the opportunity to specialize,

focusing on animal science and agriculture. The mission of the library is to be an active member of science and to provide support for agricultural research, study and development work.117

**Collection, Copyrights, Publication**
Currently the collection of the Estonian National Library consists of 3.3 million items making this library’s collection one of the largest in Estonia. The majority of the collection consists of books. Furthermore, there are over 426,000 e-materials and 19,500 e-books, but also posters and postcards. The Library also own 547 databanks or databases.

The Tartu University Library has a collection that is comparable to the size of the Estonian National Library. The collection has 4.9 million items including the institution’s faculties specialized libraries.118 The main collection counts 3.9 million items, which includes books, 41,670 manuscripts, 78,819 photos and 157,248 incunabula. There are more than 2000 books from the 16th century, 241 Elseviers, 50 printed books in Cyrillic script from the 16th-18th centuries, 800 Russian books from the 18th century, more than 100 early Finnish-, Latvian- and other early printed books, and many other valuable publications.119 In addition, the non-literary collection includes music CDs, notes, and sculptures.

The collection of the Library of the Estonian University of Life Sciences is considerably smaller than the two previously mentioned institutions, containing over 297,245 items. In the collection there are 258,596 books. Furthermore, the library has 12,839 journals and 276 newspapers years. The collection also contains some CDs, DVDs and one VHS tape.

The mentioned Estonian collections carry the aim to preserve as diverse collection covering any kind of medium that has a connection to Estonian heritage. Overall, it can be said that the three institutions in Estonia have a less diverse collection compared to the two British institutions. This could indicate the significance of orphan works.

All cultural institutions including libraries want to share their collections. This includes digital publishing. According to Mohammed Nasser: “Digital age is posing another important challenge for libraries, and the challenge is to protect the intellectual property rights in a

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117 "Põhimäärus," Estonian University of Life Sciences, accessed March 11, 2019
119 Ibidem
Digitization means that copyrights must be checked and approved. Checking copyrights can be a laborious job. For example, the Estonian National Library has stated that before anything could be published, there is a necessity to check who the rights holders are. Most importantly the Library’s own databases must be checked first. There are still some challenges checking the information from common sources such as the ESTER database, which is Estonian national catalogue for libraries. Variable dates such as year of death (and related to this, the item becoming free of copyrights after 70 years if there are no other rights holders), cannot be followed by the ESTER database because these dates have to be added manually. The plan is to automate the process so that the copyright deadlines are calculated automatically when a date of death has been entered. For the institution it would make the research process to find rights easier and it would speed up the process. A similar strategy is used by the EYE Film Institute in Amsterdam. Therefore, the suitable strategies benefit the potential material to be published and digitized.

Digitization takes a considerable amount of resources such as finance, time and people. For example, when the copyright department of the Estonian National Library makes something available then they also state if the item is under copyright and they try to add the time frame of the copyright. Currently, over 2.7 million pages are digitized and the Library has stated the intention to increase that amount. That number itself is considered quite small, but compared to the size of the Library it is still significant. According to copyrights specialist Ivi Schmitt, digitization is a way to make a collection available to larger amount of audience. 121There are 2 people who are working most actively with copyrights. One staff member is a specialist, focussing on copyrights, the orphan works directive and other rights related policies. The other staff member is responsible for working with copyrights in addition to being information specialist. Overall, there are still few more staff members that are experienced with copyrights, but not on daily basis.

Digitization could have a connection to data protection influencing the publication. Sometimes, there are arguments between individuals and the Library asking that information about them is hidden. For example, people don’t want to see their name in the digitized newspaper. If this happens, the institution has to limit the access to the whole newspaper

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121 Ivi Smitt, “Interview” Interview by Heidi-Elena Stanionyte, January 11th, 2019.
number. In this case, data protection is connected to copyrights. The aspect of content ownership of digitized works becomes a key factor as it determines the process and the possible outcome. According to Dan L. Burk, associate Professor at the Seton Hall University School of Law: “Because the institution may invest heavily in such course materials and in the infrastructure to present them, it may wish to control their use and dissemination in order to be certain it receives a return on the investment.”

After the copyrights have been determined, there are three levels of access. Firstly, there are special workstations inside the Library. The document can be read with the possibly to request a copy for restricted reasons. Secondly, there is restricted access through reserved log-in from any computer. Thirdly, there is total free access from the internet. In all these cases, the copyright might automatically change when its deadline is reached. In this way the ownership is protected by the different levels of access. Therefore, it can create some challenges for researching the needed information if it is difficult to access the information.

The Tartu University Library mainly has works with known rights holders. Therefore they have less issues with digitization of large amount of items. They aim to digitize as much of their collection as possible. This also influences their use of resources. Tartu University Library has 2-3 people working with copyrights in case of special projects. Most staff members are primarily involved in cataloguing or digitizing. Tartu University Library works often with dissertations that are maintained in the repository. That means that usually working with copyright requires a direct communication with the author. Recently, there was a project where the library searched old authors of some dissertations. The Tartu University library made a public announcement about the dissertations, which resulted in contracts and written agreements with authors to publish. In total this project resulted in 300 new contracts. That means the University has the responsibility to preserve the dissertations and must have permission to make some of them accessible.

Furthermore, there are discussions with authors who state under what conditions their work may be published. In addition, there is also an embargo period possible, which means that the item will not be available for publication for a certain period, after which the item will either be openly accessible or only via the universities network. This decision shares the opinion, where rights holder still has the control, when it would be possible to share the work publicly.

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According to Marie-Christine Janssens and Rán Tryggvadóttir: “Dealing with unidentifiable and/or un-locatable right holders, such a burden of proof may be extremely difficult to meet by beneficiary institutions.”

Digitization involves mostly Estonian literature and, for example, school books, which were published as open access. The priority is on the collection with larger interests such as science themed items. Currently Tartu University Library is focusing on material in Estonian language because it is used more often than other languages. Furthermore, some themes have also higher priority like literature about the Baltic German history. Another priority are books from the 1600s or older. In this case also German universities order copies. Previously mentioned items are most often either out of copyright or have already an agreement on digitization.

Working with copyrights and knowledge are still gaining momentum. The Tartu University Library has the impression that the Estonian National Library is more focused on-, and has more experience with- the copyright topic. They have better opportunities because they have more experience in that field. The Tartu University uses their work and follows the examples if the work is copyrighted. Also, if the Estonian National Library has a suspicion regarding the status, then Tartu University Library agrees to share the digital file if they have one. In other words, communication about digitization is growing and many institutions try to share the work.

Similar to the Estonian National Library, Tartu University Library has three levels of access to the digitized material. First, there is restricted access for specific purposes. That means that the file can only be seen from specific accounts without the possibility to print or copy. The second level of access is university account. The third level is freely available. The works in this repository are maintained in DSpace. DSpace is another example of a platform for cultural institutions to make items digitally accessible.

Opposite to the two previous libraries, the Library of Estonian University of Life Sciences works significantly less with copyrights. The Library is not actively involved with digitization and most of its works are publications of students and university staff. The ownership and therefore the copyright is depending on who commissioned the work. If the

124 Marie-Christine Janssens, Rán Tryggvadóttir. "Facilitating access to orphan and out of commerce works to make Europe’s cultural resources available to the broader public." (conference, Acropolis Museum, June 6, 2014): 12.
125 Zetter, “Interview”
university commissioned the work then the university is the holder. In case the work is done by initiative of the authors, then the authors themselves are the holders. The Library stated that if the student doesn’t get paid to do the work, then the rights belong to the individual student. Sometimes authors themselves question who the actual copyright holder is if the work is produced as part of a university project. In such a case the library gets advice from a lawyer. The process occurs only at a marginal level and it is initiated by the author’s initiative. During the interviews the opinion was formed that this library is purely focused on the borrowing aspect. Reaching out to a larger audience is not necessarily prioritized.

The library staff involved with copyrights is mostly working with cataloguing and the digital archive. Staff working digital archive, DSpace has some interactions with copyrights if they need to add the status for access. Overall, there are about 6 library staff members, who are familiar with- or at least aware of copyrights. For example, the staff knows either to make items fully accessible or partly accessible. According to Robert Kirk Walker stated that copyright is still live and enforceable, and the potential for liability remains should the owner state other opinion.”

The digitization responsibilities are shared between many libraries such as the Estonian National Library, Tartu University Library, Tallinn Technical University, Estonian Literary Museum and the Tallinn University Library. They have the obligation to preserve and maintain the information. Since 2016 the libraries agreed to make it mandatory to keep newly acquired items in two formats. One is the physical form which is saved in a special room. The other is a digital copy. This type of access is meant to make the items available and at the same time meeting the expectations of publishers. The libraries of course want to give access, but publishers need to earn money.

The significance of orphan works

The discussion about orphan works and the directive is still a relatively new topic in the Estonian heritage field. Estonia implemented a copyright law in 1992, where in the previous Soviet era the copyright wasn’t really strictly checked. The orphan directive was implemented into law in 2014 and therefore the cultural institutions should be well informed about the directive. The decision regarding the importance of orphan works is largely relying on

on each institution because they have to decide how to balance between the governmental regulations and additional interests. Estonian Ministry of Justice stated that the Copyright Act gives a general basis and instructions for the use of orphan works (definition, diligent search, free use possibilities etc.).

One of the main archives in Estonia is the Estonian National Archive, which maintains the majority of the most valuable heritage and history items such as photos, films and documents. The strategy of the archive is digitization in order to make historical information accessible. The Estonian Copyright Act allows memory institutions to use their collections for publishing, exhibiting, reproducing without having to worry about the copyright. It applies, as long as the memory institution is using its own collections on its own grounds.

The institution stated that most the common forms of orphan works are films and photos. According to Eva Näripea, the amount of works where the status might be orphan is quite small. The Estonian National Archive has estimated that about 4% of the film items are orphan. Considering the small amount it can be claimed, according to the institution, that the orphan works problem doesn’t offer a serious challenge for the institution. Examples of the orphan works in the archive are feature films such as “Cheka Commissar Miroschtschenko” 1925, “Borrowed Wife” 1912, and about 10 documentaries from 1920s-1945. Since the film archives of the National Archives of Estonia only collects and preserves films made in or about Estonia or by Estonians, they hold a very local collection that does not include any foreign works, making their life a bit easier compared to other European institutions for example that collect the works of the world. Based on the answers of the EYE Film Institute and the British Film Institute one of the most common forms of orphan works are films. According to Sally McCausland: “Orphan works and these related copyright barriers apply to all kinds of media, but are particularly vexing in relation to recorded media such as television archives, which have multiple layers of underlying rights owners such as script writers, actors, footage owners and composers.” For works with unknown authors the copyright law allows personal-, research- and study use. The Estonian National Archive allows to use orphan works on one’s own responsibility, when there is the aim of using for

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128 Kärt Nemvalts, email interview to Heidi-Elena Stanionyte, 5 March, 2019.
129 Gerli Toomet, email interview to Heidi-Elena Stanionyte, 7 January, 2019.
130 Eva Näripea, email interview to Heidi-Elena Stanionyter, 5 February, 2018.
131 Toomet
purposes such as publication. In this context, the archive has to make these type of works accessible without doing the only the preservation.

Another well-known museum in Estonia is the Estonian National Museum. The Museum has a limited number of orphan works, mainly manuscripts, which consist of 0.001% of the museum items. However, the Estonian National Museum addressed that the institution has possible orphan works in the form of photographs.

Furthermore, the following cultural institutions were contacted:

- Vabamu- the Estonian Museum for Occupation and Freedom
- Estonian Open Air Museum
- Estonian Art Museum
- Estonian History Museum
- Estonian Defence Forces Library,
- Tallinn Technical University library
- Estonian Academy of Music
- Tartu City Library
- Baltic Defence College Library

All these institutions answered that they are aware about orphan works, but they think that they don’t have them or don’t know if there are any orphan works in the collection. Many mentioned photographs or other physical items. Based on their answer it is possible to claim that their overall knowledge about orphan works is limited. For example, Estonian History Museum and its library answered that in order to find out more about the possible orphan works then an independent researcher is expected to come physically to the library and conduct the investigation. Vabamu also stated the existence of orphan works in their museum. The museum estimated that most orphan works can be in the form of photos and guessed the number as 40%. The research regarding the orphan works is mostly conducted by the head of collection, who uses all appropriate sources that might help to find the holder. Sometimes other institutions are consulted. The Museum is trying to obtain as much information as possible by contacting certain people or sources. However, the institution is not spending too much time on it.

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133 Elvi Nassar, email communication to Heidi-Elena Stanionyte, 1st February, 2018.
Based on interviews it can be said that the role of orphan works in all institutions is not very significant. Actually, there is no discussion among the professionals in Estonia. For example, Tartu University Library assumes that there might be orphan works from Soviet era, but they haven’t checked it separately. In case of potential orphan work, the Tartu University Library consults the specialists from the Estonian National Library, trusting their expertise. The staff member of University Library has seen and briefly read the directive and created awareness for herself and tried to understand its basics. Also, there is always a possibility to ask help from a lawyer who works for the University. Similar to Tartu University Library, the Library of Estonian University of Life Sciences has seen and read the directive.

In Estonia the biggest libraries are organized under the network of the Estonian Konstortsium, which is maintaining the databases and other material related information. There has been some limited communication with professionals in the libraries consortium. The Library of Estonian University of Life Sciences thinks that there could be more communication between different stakeholders.\textsuperscript{134} They have organized groups for the purpose of digitization in order to avoid duplication of work. Estonian literature, including the orphan works, is under supervision of the Estonian National Library. Tasks are more divided between the libraries. For example, the Estonian Literary Museum is focusing on old literature while Tallinn University focuses on science related articles. Furthermore, the Estonian Broadcasting Union is focusing on audio-visual files and TV programmes. The Library of the Estonian University of Life Sciences belongs to the network of other Estonian libraries, where information is shared. They understand that a lot of work is done by larger libraries such as the Estonian National Library. So far, there have been a few discussions about orphan works in the working groups. The last discussion was last year and it will resume if there is need.

The practice of orphan works directive among Estonian heritage institutions

The Estonian National Library is the only institution in Estonia working with orphan works. The Estonian National Library staff member was present during a EUIPO seminar, where there where instructions about the directive and specifically about the orphan works database. The board of Estonian National Library has decided that the topic is important enough to investigate. They see themselves as the leading library. The reason why the interest towards the directive has been low is because the Estonian Copyright rule has good benefits and

\textsuperscript{134} Heli Viira, “Interview” Interview by Heidi-Elena Stanionyte, January 21\textsuperscript{st}, 2019.
exceptions that allow using items for educational purposes. That means ordinarily for research purposes copyright law is enough flexible. The Estonian National Library has to make certain choices in order to implement the directive focusing on selected collections. The work with orphan works is activated only when there is a project like a special collection. This strategy is similar to other European cultural institutions such as British Library. The Estonian National Library chose to focus on pre-world war II children’s literature because the collection was small enough to investigate. Another example is a project involving the publishing company “Loodus”. This publishing company held a novel-writing competition. With some novels there was a need to search the rights holders. As the result of the search some novels were considered as orphan works and a rights search was conducted. Overall, the Library has not strictly counted the amount of orphan works and it is difficult is to say how many orphan works they have. This connects well with the rest of Europe, such as the British Library, having no exact overview regarding the amount of orphan works. The Estonian National Library has stated a fairly general number of orphan works being up to a few hundreds. Last year about 300 works were investigated and 100 or so were stated as orphan. This number seems small, but it is proportional to the size of the collection.

One important aspect regarding the orphan works directive is diligent search. The Estonian National Library has previously described the diligent search process as very intense and time consuming. They are facing challenges regarding working with the mandatory sources. First, the Library checks the possible names or copyright holders to determine a list of potential orphan works. Then, other institutions are contacted for diligent search, but many of them don’t have a good database that allows to get the required information. For example, the Estonian Literary Museum is known to have difficulties searching information for the Library because they don’t have the necessary resources and time. Therefore, the process of finding the ownership depends significantly from other factors.

There is always an attempt to create a compromise between the requirements and own experiences. In Estonia, the communication is directed towards official, obligatory sources. For example, the Estonian Literary Museum is considered as one of the official sources. The list of names of specific items will be sent to these institutions and then, hopefully, confirmed. Quite many institutions don’t reply at all or require a very long time to do so. According to the diligent search rules, the Estonian National Library fulfils the demand to

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135 Smitt, “Interview”
136 Ibidem
check the obligatory sources, but usually continues with Google. The Library is mostly involved in contacting institutions such as the Copyright fund and researching the Encyclopaedia, Ise (articles database), Geni database (from Google). However, the database of Geni is not totally reliable. Therefore, the library is very aware of the risks and critically analyses the information obtained. ¹³⁷

In the case of 19th (end) or beginning of 20th century’s literature, the average diligent search takes 20 minutes but the process takes weeks due to correspondence with the contacts. They are seen as the most relevant and most sensible.

In some cases it is especially difficult because so many people left during the war and now their successors have, for example, American names, making it very difficult to find and approach them. Even a successful search can result in an unsuccessful contact. Generally if there are too many similar names, the process will stopped as the library is limited in resources to put on the research process. Writing the letters and waiting for answers (and replying them again) would take weeks. In this case, the effort is only taken when it can be justified.

The Estonian National Library has worked with the orphan works database and their concern is that the orphan works database is not user friendly. Uploading certain file types is not always possible and requires the Library to make extra contacts. Another disadvantage is that an item in the database apparently stays orphan forever. The Library tries to certify that at some point the orphan work becomes freely useable and should not be in the database anymore. However, it is difficult to change the status in the database and that limits the usage. Therefore, the library would like to see a pan-European free usage of orphan works. That would allow spreading the usage of orphan works and promote free use. The cooperation between the Ministry of Justice and the Library has not been frequent because the interest has been low. However, the Ministry of Justice has twice a year contact with the EUIPO. The opinion of the Estonian National Library is that there should be more proactive support from the government. The steps regarding the orphan works directive could be more coordinated among the memory institutions, especially when it comes to diligent search. Therefore, the implementation of the directive could be considering the size of Estonia and

¹³⁷ Ibidem
the involvement of the institutions. If one institution has done the diligent search then the information could be more shared.

Many institutions are active with digitization, which is partly due to the requirements by the Ministry of Culture. Digitization and diligent search are not always compatible processes that are undertaken by all institutions. With mass digitalization, a more careful selection will have to be made. At first the diligent search was made for more or less all items but nowadays the Library first decides on how far they will follow the directive. The Estonian National Library thinks diligent search doesn’t work with mass digitization and tries to keep a balance. There are similarities with the EYE Film Institution which tries to use the obligatory sources within its best possibilities without making the process even more complex. According to Helle Porsdam: “There is well placed scepticism that diligent search demands […] will make them impractical for institutions to use with any true impact.” Same opinion is shared with Ministry of Justice in Estonia, who stated that most likely the main issue is related to the nature of the diligent search requirement (a somewhat problematic issue not only in Estonia).

If the search gives no results, it is published anyways. Therefore, the institution takes the decision to share the orphan works. They believe that regardless the outcome the most important step should be revealing the items. In most cases, there are no concerns or negative experiences, so the institution takes that decision of making the most of items accessible. According to Martin S. Copenhaver from the Massachusetts Institute of Technology: “everyone should care about orphan works because of their potential limitations on the ability of society to shape the development of culture.”

Working with the directive creates its own challenges when possible rights holders are approached. Generally people are surprised about the possibility of being a rights holder. This same remark was made by the representatives of EYE Film Institute and British Film Institute.

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138 Helle Porsdam, Copyrighting Creativity: Creative Values, Cultural Heritage Institutions and Systems of Intellectual Property (Routledge, 2016), Google books https://books.google.nl/books?id=pOO1cwaAQBAJ&pg=PT72&lpg=PT72&dq=orphan+works+diligent+search+negatives&source=bl&ots=S5tToNbgbC&sig=ACfU3U3Lr6WbM2s-SPShopsovX9Bmp5R7Q&hl=en&sa=X&ved=2ahUKEwj1w6i3--DuQHUKg4KHKRomBQk4ChDoATADegQjBBAB#v=onepage&q=orphan%20works%20diligent%20search%20negatives&f=false

Tartu University Library thinks there is a need for a stronger explanation about the orphan works. There should be a way to determine the size of the problem and what resources are required. Moreover, it would also help to understand what the Estonian National Library is doing and how to share experiences. However, not only the input of heritage institutions is essential, but also the governmental institutions. If the Estonian government finds it important that there should be more focus on orphan works and copyright holders, then there could be bigger support via different channels as it is not especially the aim of the University to find out the copyright holders of Estonian literature. There should be a better communication with the authors union about rights holders. Furthermore, a common database about orphan works could give a better overview.

Concerning the diligent search there could be a few improvements. The diligent search as such seems quite objective, but Tartu University Library doesn’t fully comprehend the necessary process. They question how to know when the diligent search is enough and whether working with sources meets with documentation requirements. If there is a serious need for implementation, then the Library would need more staff and finance to be involved with the orphan works directive.

The Library of the Estonian University of Life Sciences has a different attitude towards orphan works. The staff members have stated that they are not aware of having orphan works at all.¹⁴⁰ For example, the newspaper Sirp gave some information about the issue. Already in 2009, there was already an introduction to the concept of orphan works. “Sirp” journalist Tarmo Teder stated that the intention is that the memory institution will use it without causing a copyright infringement.¹⁴¹ Furthermore, the library has not researched the orphan works and the chance of having them is estimated to be quite slim. Therefore, any possible orphan work in their possession could already have been researched in other larger, libraries. The opinion of Library of Estonian University of Life Sciences is that the state should take its responsibility and allow more items to be published. When asked about it, the library stated that they never even heard of diligent search that they assume the process of diligent search is long and complicated.

¹⁴⁰ Viira, “Interview”
Chapter 4 - Analysis of the interviews

There are different perceptions of the number of orphan works that each institution holds in its collection. Most of Estonian institutions, except Estonian National Library, don’t know if they have orphan works at all. The head of collections of Tallinn City Museum expressed worries that the orphan works are a problem that multiple museums in Estonia face, but don’t really admit that these works can be a major part of a bigger problem. The Estonian Defence Forces Library stated that they don’t have orphan works and therefore their connection to the orphan works directive is non-existent.\(^{142}\) Opposite to this, the British Library estimated in a study that the number of orphan works in their collection could be as high as 43%. With such varying numbers it is very difficult to state the exact number of orphan works.\(^{143}\)

The interviews showed that the directive is still a challenge for many cultural institutions in Europe including Estonia. Many institutions mention that implementing the directive would cost too many resources such as money and knowledge. As the British Library expressed, working with the directive is resource demanding. The library has to follow the copyright, but keep in mind the interests of the public.\(^{144}\) The British Library faces challenges implementing the directive taking into account the time and number of staff available. According to Matthew Lambert: “The main disadvantage of using the orphan works provisions is not knowing if we have done a detailed enough diligent search to ensure protection, which means the library will almost always go above and beyond what is legally required. That in turn takes a lot of time, and so employing someone to do that costs a lot, which in turn impacts the budgeting for the digitisation projects.” \(^{145}\)

The British Library, EYE Film Institute, British Film Institute (to some extent) and the Estonian National Library also see advantages because the directive offers some security and clarity. EYE stated that the institution feels more secure because the directive provides legal backup. Furthermore, it helps the searching process to find the rights holder and working with the database makes the information is more public. However, Leontien Bout senses that some countries still don’t put the directive into effective use. Still, the EYE thinks that the directive is logical and there are not really disadvantages.\(^{146}\) According to Bout: “we think that the directive gives us that space actually, and the other thing is more pragmatic in that we know

\(^{142}\) Kristina Rallmann, email communication to Heidi-Elena Stanionyte, 13\textsuperscript{th} August, 2018.
\(^{143}\) Lambert, “Interview”
\(^{144}\) Ibidem
\(^{145}\) Ibidem
\(^{146}\) Bout, “Interview”
that for most of our orphan works, we’ve used them before, and nobody has ever come forward to claim anything so there again is a risk assessment that says okay, it’s fine.” The BFI said that the UK licencing scheme is awful and to apply for it costs a lot of money. After seven years there is need to do it again because it is not lasting longer. Cultural heritage organisations think more long term and from that perspective the directive is better suited. Because it is self-certifying and there is no need to show the diligent search in the orphan works database, the orphan works directive is better suited.

In the case of newspapers, it is very difficult to imply the directive because every article needs to be researched, possibly revealing more contributors or rights holders. Only the larger European institutions like British Library, EYE Film Institution and British Film Institution have an active implementation of the directive. In Estonia the implementation is limited to one institution, which only implements the directive for special projects. The other Estonian institutions are not actively involved or are not aware. Many of them would like the government to be actively involved. They would prefer if the workload and the expertise would be shared among the other institutions. For example, the Tartu University Library shared that communication would help to understand the orphan works topic in a better way. It would be advisable if the Estonian institutions would cooperate more and share responsibilities. Considering the size of Estonia, the cooperation would definitely be easier than in some other bigger countries. The British Film Institute is already applying this strategy through their project called “Unlocking film heritage” involving regional partners across the UK.

The problem of orphan works has not yet been investigated properly in Estonia. Therefore, the advice would be to make an educated estimation of the actual problem. Those institutions that know about the directive mention that the directive is too complex to work with. Obtaining the right information is challenging. It is challenging because collecting information depends on external sources and slow communication. Even the Estonian National Library has proposed that there could be easier ways to check the information about rights holders.

One of the stakeholders, the Ministry of Justice, has done the minimum by implementing the directive into the law. It would be advisable if the Ministry of Justice would take the initiative to investigate the collection of the memory institutions. Multiple institutions such as the Estonian National Library, Tartu University Library and the Library of the Estonian
University of Life Sciences have stated that they sense the role of the government limited. The orphan works directive should be better explained. The current explanations have not fulfilled its purpose and can be understood as complex.

Several institutions mention the struggles of finding the rights holders. According to the British Library licencing team: “Due to collective sharing of responsibilities, contributors rarely signed any contracts to assign copyright in their contributions and so in order to digitise the magazine, the Library had to assume that all contributors retained copyright in their contribution, be it an article running across multiple pages, a photograph, a cartoon or a short news piece.”

Another strategy to introduce the topic of orphan works would be involving the public. This could be done by addressing a specific community or by means of an internet platform. This could have a positive impact as the public feels more involved and included. The British Library used social media platforms in order to get further information about the contributors of Spare Rib magazine. The library used platforms such as Guardian, Radio 4 Women’s platforms and the library’s social science blog. This strategy shows that searching contributors requires to look beyond the traditional sources such as official magazines-related platforms.

Also, the diligent search causes challenges. The obligatory list of sources are checked mostly in order to fulfil the requirements. The directive and the local copyright regulation recommend what kind of sources need to be checked and therefore also documented. Institutions such as EYE Film Institute try to adapt the directive according to their own collection and their own needs. Most of the time, in the case of Estonian National Library, the search process starts with Google search. As the Estonian Library has stated, the Google search gives much more information than the obligatory list of sources. Also, the British Library commented that working with the obligatory sources gives unclear results. This common critique lead to the question whether the process has been turned overcomplicated. That has caused many institutions such as Tartu University Library to focus on items that already have clear copyrights. The Estonian National Library mentioned that contacting the

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148 Vernon, “Digitising Spare Rib magazine: The inside story,”
149 Smitt,”Interview”
possible right holders can be sometimes uncomfortable because the person might be well known or in a high position.

There could be changes of the practical structure of the orphan works database. Currently, it is very difficult to change the status and to find information. Therefore, the database is not user friendly for researchers and institutions. A good aspect of the directive and diligent search is that it offers juridical back up. Furthermore, the documentation gives a second assurance to help to understand the process.

The EYE Film Institute has the opinion orphan works are challenges that continue to be influencing the future. The film institute has a clear vision for future uses of orphan works. According to Leontien Bout, it is a misconception to think that are only so many orphan works in the world and once they have been identified, that’s that. Clearly, the orphan works directive is not directly stopping the issue of orphan works, but at least it is an attempt to tackle the issue.\(^{150}\) Furthermore, it gives more attention, which could influence the rest of institutions to work with directive in more detail. Bout said that the main problem is a lack of involvement and ignorance because many institutions are not being involved with the directive. The main issue is to persuade them and show them there is no need to be afraid.

The implementation of the directive is an ongoing process with successes and setbacks. The success regarding the orphan works directive varies per institution and project. However, there are still some generalizations that can be made. Libraries can be most influenced by orphan works because many items are books. Therefore, the libraries are one of the most active contributors to the directive.

Dealing with orphan works allows to make them accessible to the public. According to Ian Francis, founding director of Flatpack Projects: "Not just a copyright battleground, the field has opened out fruitful territory for researchers, restorers and artists, raising provocative questions about the things we keep and the things we lose."\(^{151}\) Furthermore, according to Mary Murell, anthropologist from University of Wisconsin: "notion of an “orphan,” activists resorted neither to an outside of property (the juridical public domain) nor to an inside of property (ownership) but to a space for negotiation between the public domain and private

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\(^{150}\) Bout,”Interview”

\(^{151}\) Francis,” Shelter from the storm: the Orphan Film Symposium, 4
property, where alternative relations might be established.\textsuperscript{152} Orphan works are appreciated by some, but neglected by others, the importance needs to be discovered.

**Advice**

In the Estonian cultural field, there is no understanding or estimation about the number of orphan works. One of the possible ways to improve understanding is sharing information by means of a common platform, especially about rights holders. A platform could help to avoid double work. For example, the EYE is using a semi automatized database and this could be a good strategy for others as well. As Estonia is a small country, maintaining the platform would be easier compared to other countries.

Many Estonian cultural institutions like Estonian National Library and Tartu University Library mentioned the need for better explanations. Therefore, the advice would be creating a discussion group that includes cultural institutions influenced by the orphan works. The special focus could be on the aspect that many cultural institutions don’t have a law specialist.

Furthermore, crowdfunding could help to finance projects that involve orphan works. In this way the institution is fulfilling its aim to preserve and share heritage. At the same time this gives a significant role to the public as one of the stakeholders. Distributing the search would be an option if it is legally possible. In some cases, outsiders are not trusted, but in other cases it can be successfully applied. For example, British Library used it during the digitization process of magazine Spare Rib when many former colleagues were used for tracing back the rights holders. In the case of Estonian National Library former colleagues often have more insight knowledge about specific collections. Based on working experience they have initiated communication with other specialists. For example, an item about children’s literature was under the responsibility of an old colleague, who could help to contact the old publisher. The advice would be to involve the public if the project allows. Furthermore, public involvement can help to explain the concept of orphan works to the wider audience.

Conclusion

How is the orphan works directive implemented in the Estonian cultural institutions? And what is their opinion about the directive?

One of the reasons why the orphan works directive is not implemented in Estonia is due to limited awareness of the orphan works problem. The investigation showed that many cultural institutions either didn’t know or were not really aware whether they had orphan works. Estonian institutions claimed that the orphan works are not prioritized and they cannot spend more on resources as finance, staff or time. Estonian National Library is the only institution in Estonia that has applied the directive. Multiple Estonian cultural institutions have stated that the interaction with the orphan works directive is influenced by the communication and explanation. The institutions choose to focus on verified ownership. Fixed ownership allows to do mass digitization. Furthermore, many institutions such as Tartu University Library are open to collaborations with other libraries, claiming however that the orphan works directive could be better explained to the institutions. From that context, the orphan works directive could have potential if there would be a significant support from governmental institutions.

Another reason was concerned with the availability of resources like time and expertise, which is a problem in Estonia and elsewhere. The third issue would be the difficult structure, which is not only an issue in Estonia, but also for other institutions in Europe. The complexity of the directive makes many institutions in Estonia and elsewhere to prioritize on other items. The implementation of orphan works directive is not depending on one factor, but rather many ones. Items such as orphan works are difficult to work with because researching the right holder expects the institutions to conduct insightful research.

The opinion of the Estonian National Library about the orphan works directive is that they acknowledge the need to apply it when the occasions arises. In the case of certain projects they allocate the resources, but in everyday practice the directive is not part of their work. Tartu University Library and Library of Estonian University of Life Sciences and the other contacted Estonian institutions either confirmed their awareness or they have never heard of it. In any case none of them is actively implementing the orphan works directive. The common opinion is that currently the orphan works directive is not considered important enough.

To improve the awareness of the orphan works problem, the discussion among professionals could be more intense than it is now. Therefore, more cultural institutions in Estonia can
become more informed by either communicating to each other on the issue or use a media platform. It would be already a start if they begin to discuss the subject with each other.

The thesis included the concepts related to orphan works directive (ownership, copyrights, orphan works) and collected valuable and constructive responses trying to show the reasons why the orphan works directive is difficult to apply.

Personally, I expected that the orphan works topic would be more an issue among Estonian cultural institutions. After the new independence of Estonia, the institutions are in a state of transition and I expected the directive to be part of it. Compare to this I found other European institutions much more active and knowledgeable.
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Appendix 1.

I Collection and copyrights

1. How large is the estimated size of the collection?
2. How many people are working with copyrights?
3. What is the impact of copyrighted material on the selection and digitisation of items?
4. What are the different opinions regarding the copyright law in general, digitisation, copyright exceptions, and rights clearance?

II Orphan works

1. In your opinion, how well are the orphan works managed in Estonia?
2. What is the reason why the institution preserves orphan works?
3. Why is the discussion about orphan works so relevant for the institution?
4. What percentage of works are estimated orphaned?
5. In what ways have the copyrights rules influenced the investigation of orphan works?
6. How is the everyday work of the institution influenced by orphan works?

III Directive

1. How has the level of knowledge (regarding copyrights) influenced working with orphan works regulations?
2. In what ways is the directive stimulating the work of presenting collections? Is it supporting the work with orphan works?
3. What are advantages and disadvantages of working with the orphan directive?
4. How is the diligent research being practised? What kind of methods are used?
5. How much time does it take to do the diligent search (on average)?
6. How is the orphan works directive improving the accessibility of orphan works?
7. In what ways it can be said that working with fixed list of sources creates a challenge rather than supports the diligent search process?
8. What are the ethical considerations while working with the directive?
9. In what ways does the presumption of authorship and transfers of copyright contribute to the understanding of the directive?

IV Practise

1. Who is doing the diligent research and can an independent researcher do it?
2. What are the requirements and considerations for different mediums regarding working with orphan works?
3. In what ways, is it possible to use the directive more extensively?
4. What is the impact of the directive on the publication regarding copyright works?
5. What are the biggest challenges implementing the orphan works directive and why?