Copyright and Digital Cultural Heritage: Orphan Works

In recent years, successive governments have encouraged the cultural heritage sector to make their collections available online, enhancing access to meet user expectations in a digital, networked world. But, enabling online access to material that is still in copyright requires rights clearance, an activity widely perceived to be a barrier to the digitisation and dissemination of library and archive collections. There are various reasons for this. Determining whether a work is in copyright or is public domain can be difficult (see Duration of Copyright). The time and effort involved in identifying, locating and contacting known copyright owners can be prohibitive, especially when dealing with large numbers of works. Identifying and locating rights owners provides no guarantee of a response from that owner. And, copyright owners cannot always be identified or located: the orphan works problem.

The UK has adopted a twin-track solution to the orphan works problem in the form of an exception based on the Orphan Works Directive and an Orphan Works Licensing Scheme (OWLS). Both the exception and the licensing scheme turn on carrying out a diligent search for the owner(s) of the copyright in the work. While the orphan works regime may have value for small scale digitisation initiatives, the mandatory nature of this diligent search requirement means the regime is largely irrelevant for mass digitisation schemes. Put another way, mass digitisation and diligent search are fundamentally incompatible. In this commentary, we provide an overview of the legislative framework concerning the lawful use of orphan works in the UK and Europe.
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1. ORPHAN WORKS IN CONTEXT

Essentially, a copyright work is an orphan work if the owner of the rights in the work cannot be identified or located by someone seeking permission to perform one of the exclusive rights provided for under the copyright regime (for example, publication or making the work available online).

There are two factors intrinsic to the copyright regime that contribute to work becoming orphaned. First, copyright does not require registration before work is protected, nor does a copyright notice need to be attached to a work. As soon as a work is created, it is automatically protected by copyright (so long as it meets the relevant protection criteria). This differs from other areas of intellectual property, such as patent law, where the acquisition of rights depends upon mandatory registration requirements. For this reason, reliable information about who owns the copyright in a work cannot always be easily or readily acquired, particularly in the case of unpublished works.

The second factor concerns the very long duration of the copyright term. In the absence of a compulsory registration system, tracking a chain of title over a long period can become incredibly complicated. For example, the different economic rights provided by copyright might be separately assigned or licensed to third parties, or inherited by multiple heirs who may be unaware of their rights; they may have been assigned, licensed or inherited numerous times throughout the course of the copyright term; alternatively, the corporate interests that own the rights might become bankrupt or simply go out of business. All of this can make identifying and locating the current copyright owner(s) extremely problematic.

2. ORPHAN WORKS AND THE 2039 RULE

The problem that the long duration of the copyright term poses for orphan works within the UK is compounded by the ‘2039 rule’. The Copyright Designs and Patent Act 1988 (the CDPA) states that the duration of copyright in certain unpublished literary, dramatic, musical and artistic works, films and sound recordings, continues until 50 years from the end of the calendar year in which the 1988 Act came into force (that is, until 31 December 2039). Moreover, these provisions—collectively referred to as the 2039 rule—apply regardless of when the works in question were first created or when their authors died.

The 2039 rule affects the following categories of unpublished work:

- anonymous or pseudonymous literary, dramatic, musical or artistic works (other than photographs) (Sch.1, 12(3)(b))
- literary, dramatic and musical works, engravings and photographs taken on or after 1 June 1957 (Sch.1, 12(4))
- sound recordings made on or after 1 June 1957, and films which have not been registered under the Cinematograph Films Act 1938 (and subsequent legislation) (Sch.1, 12(5))
- Crown copyright works (Sch.1, 41(3)(b), (4) and (5))

For further details and discussion, see Duration of Copyright, section 3.

The National Archives has estimated that there are more than 100 million unpublished archive items subject to the 2039 rule. A large proportion of these works will be orphan works, given their nature and age. The government has
acknowledged that the 2039 rule presents a significant problem for the use and reuse of historic materials. In October 2014, the government consulted on reforming the 2039 rule but ultimately decided not to take any action (IPO, 2014).

3. POSSIBLE SOLUTIONS FOR ORPHAN WORKS

Different solutions have been proposed for addressing the phenomenon of orphan works. Broadly speaking, they either require the prospective user to secure a licence to make use of the orphan work, or they do not. In relation to the latter, two main legislative solutions have been proposed: a statutory exception that allows for the use of an orphan work, and a limitation on liability rule. As for licensing-based solutions, again two basic models have been proposed: licensing by a public authority, or that collecting societies license the use of orphan works in accordance with the principles of extended collective licensing. You can find out more about these different approaches here (see 18-32 and 39-72) and here (see 5-55).

In Europe and the UK, a statutory exception and licensing by a public authority have been chosen as the preferred models. Specifically, an approach based on a statutory exception has been adopted in Europe in the guise of the Orphan Works Directive 2012. Within the UK, additional provision has been made by the introduction of an orphan works licensing scheme (OWLS). The OWLS regime is the world’s first online licensing scheme for orphan works, and is much broader in scope than the European Directive. And so, Britain has two options for enabling the use of orphan works: the orphan works exception that applies across the EU (implementing the Directive) and the UK-based orphan works licensing scheme. Both are discussed in further detail below.

4. THE ORPHAN WORKS DIRECTIVE: AN EXCEPTION FOR ORPHAN WORKS

The Orphan Works Directive obliges Member States to introduce a new exception to copyright that enables specific types of use of some categories of orphan work. In the UK, the Directive was implemented by the Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014 (the Orphan Works Regulations) which introduced s.44B to the CDPA (Permitted uses of orphan works) along with the accompanying Schedule ZA1. The Directive has been implemented almost verbatim by the 2014 Regulations; as such, in the commentary that follows we primarily refer to the provisions of the Directive.

The ‘beneficiary organisations’ entitled to rely on this new exception are memory institutions, in particular: publicly accessible libraries, educational establishments and museums, archives, film or audio heritage institutions as well as public-service broadcasting organisations (A.1(1)). An institution wishing to rely on the exception must maintain records of any searches it has carried out to try and identify or locate the copyright owner. They then report the work as an orphan work to the European Intellectual Property Office (EUIPO), providing information about the work and any relevant rightholders.¹ EUIPO maintains a database of items registered as orphan works (available here).

The type of material that falls within the scope of the exception includes: books, journals, newspapers, magazines and other writings, as well as phonograms, cinematographic and audiovisual works (A.1(2)). Under the Directive

¹ The EUIPO was formerly known as the Office for Harmonization in the Internal Market (OHIM). With the entry into force of Regulation No 2015/2424, on 23 March 2016 OHIM became the European Union Intellectual Property Office (EUIPO). As such, throughout the remainder of the commentary we will make reference to EUIPO.
a work will be considered orphan if ‘none of the rightholders in [the work] is identified or, even if one or more of them is identified, none is located despite a diligent search for the rightholders having been carried out’ (A.2(1)) (emphasis added). However, the Directive does allow for partially orphan works. That is, where only some of the rightholders have been identified and located, the work may still be used under the Directive provided those known rightholders have granted permission for the use in question, and a diligent search has been carried out for the remaining owners.

The concept of diligent search is fundamental to the operation of both the Directive and OWLS. The Directive stipulates that a diligent search must be carried out for each work prior to the use of that work, and provides a list of sources for each category of work to be consulted as part of the diligent search process. These sources are set out in the Annex to the Directive. We consider the concept of diligent search in greater detail in section 8 below.

It is important to note that, in almost every case, the diligent search need only be carried out in the Member State where the work was first published or broadcast (A.3). This is because the Directive operates a principle of the mutual recognition of orphan works throughout the single market. That is, a work that is considered an orphan work in one Member State is deemed to be an orphan work in all Member States (A.4). This principle of mutual recognition has the benefit of identifying one relevant jurisdiction in which the diligent search is carried out; it also removes the need to duplicate the diligent search in another Member State.

The general principle that a search need only be carried out in the state of first publication or broadcast is subject to an exception concerning cinematographic or audiovisual works. When the producer of the work in question has her headquarters or habitual residence in a specific Member State, the diligent search must be carried out in the Member State of the producer’s headquarters or habitual residence regardless of where first publication or broadcast occurred (A.3(3)). Moreover, if there is evidence to suggest that relevant information on the copyright owner is to be found in other countries, then relevant sources of information available in those other countries should also be consulted (A.3(4)).

Once a work has been designated orphan, a beneficiary organisation can take advantage of the uses permitted under Article 6(1). That is, they are permitted to use orphan works contained within their respective collections in the following ways:

- copying the work for the purposes of digitisation, indexing, cataloguing, preservation, restoration and making the work available (A.6(1)(b))
- communicating the work to the public, including making it available online (A.6(1)(a))

Article 6(2) makes clear that beneficiary organisations are only permitted to make use of orphan works to achieve aims related to their public interest missions, ‘in particular the preservation of, the restoration of, and the provision of cultural and educational access to works and phonograms contained in their collection’. However, the Directive does also state that relevant organisations may generate revenue in their use of orphan works ‘for the exclusive purpose of covering their costs of digitising orphan works and making them available to the public’.

The fact that a work has been designated an orphan does not mean that it will always remain an orphan. Member States must ensure that the owner of a work considered to be orphan

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2 Although this is subject to the proviso concerning joint authors from different Member States set out in A.3(3).
can put an end to the work’s orphan status (A.5). Within the UK, the legislation states that the copyright owner may put an end to the orphan work status of a relevant work by providing evidence of her ownership of the rights in question to EUIPO or to the relevant body (the beneficiary organisation) which carried out the relevant diligent search in the first place (see CDPA, Sch.ZA1, 7(2)).

4.1. THE ORPHAN WORKS DIRECTIVE: SOME PRACTICAL GUIDANCE

The UK Intellectual Property Office has developed an Eligibility Questionnaire to help individuals and organisations determine whether they, and their proposed use of the orphan works, fall within the scope of the Directive; the questionnaire is available here.

5. THE ORPHAN WORKS DIRECTIVE: ANALYSIS AND CRITIQUE

In the first year of the Directive, only 10 organisations in the UK registered with EUIPO as a beneficiary organisation (and only 61 organisations across the EU). At the time of writing, the EUIPO database contained just 2041 entries (although there are many more embedded works on the database than this number would suggest), entered over a period of approximately two and a half years (October 2014 to March 2017). On average, that represents just 70 items per month across all Member States. And yet, there nearly 20,000 museums in Europe, and more than 200,000 public libraries.\(^3\) Why are so few eligible institutions availing of the Directive?

Part of the answer to that question no doubt lies in the fact that, while many aspects of the Directive are to be welcomed, the scheme is generally unsatisfactory when considered from the perspective of memory institutions and particularly the archive sector. We highlight three key issues in that respect: the scope of works covered by the Directive; the Directive’s applicability to unpublished work; and, the requirement of fair compensation for reappearing copyright owners.

5.1. SCOPE

As set out in A.1(2), the Directive applies only to the use of books, journals, newspapers, magazines and other writings, as well as phonograms, cinematographic and audiovisual works. Free-standing artistic works such as maps, drawings, plans, and photographs do not fall within remit of the Directive. This is mitigated, to some extent, by A.1(4) which states that the Directive also applies to works and other protected subject-matter embedded or incorporated in, or which constitute an integral part of, books, journals, newspapers, magazines and so on. That is, artistic works, such as photographs, embedded in works that fall within the scope of the Directive also fall within the scope of the Directive. However, the fact that free-standing artistic works are omitted is an obvious shortcoming.

5.2. UNPUBLISHED WORKS

The extent to which the Directive applies to unpublished works is qualified in two ways that are very limiting. The Directive does apply to works and phonograms which have never been published or broadcast, so long as they ‘have been made publicly accessible by [a relevant organisation] with the consent of the rightholders’, and provided it is ‘reasonable to assume that the rightholders would not oppose the uses referred to in Article 6’ (A.1(3)).

Taking the latter point first, a beneficiary organisation might rely on the Directive to

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digitise and make available online various unpublished works but only if it is reasonable to assume the unknown or untraceable owner would not object. In practice, though, when will it be reasonable to make such an assumption? Although published research on rights clearance in the heritage sector is relatively sparse, it does indicate that when owners respond to requests for permission to digitise and make content available online for educational and research purposes they tend to grant permission and without requesting a fee or payment. Indeed, positive responses from copyright owners typically average around 95% or higher. This was true when the University of Michigan Library digitised the Jon Cohen AIDS Research collection (95% permission granted). It was true when the Wellcome Library digitised over four million pages of copyright material for their Codebreakers project (98% permission granted). It was true when the Churchill College Archives digitised their Churchill papers (97% permission granted). It was true when the British Library digitised the entire run of Spare Rib magazine (98% permission granted). And it was true when the Glasgow School of Art began establishing a standalone digital repository of their collection in the wake of the fire that devastated the School of Art building in May 2014 (to date, 100% permission granted). You can find out more about these case studies by reading the transcript of Victoria Stobo’s presentation at Copyright and Cultural Memory 2016 (Image 1).

If research suggests that copyright owners do typically grant permission, for free, when they respond to a request about digitisation, then perhaps our default presumption should be that an owner would not oppose the uses enabled by the Directive. In that respect, we can probably always assume compliance with that specific aspect of A.1(3).

Much more problematic is the prescription that unpublished material can only be digitised ‘if it has been made publicly accessible with the consent of the rightholder’. This poses a significant problem in relation to collections of records that include copyright material from third parties. Consider a collection of correspondence written by and to a noteworthy author. The unpublished letters written by the author may have been originally deposited with the appropriate consent such that the material falls within the scope of the Directive. However, the letters written to the author will almost certainly not have been deposited with the kind of consent regarding access which the Directive requires. This severely limits the usefulness of the Directive when dealing with unpublished archive material.

5.3. COMPENSATION

If a copyright owner reappears, and puts an end to the orphan works status of their work, the Directive requires that Member States ensure they are provided with ‘fair compensation’ for the use that has been made of their work (A.6(5)). Within the UK, Schedule ZA1 of the Orphan Works Regulations states that, following the (re)appearance of the owner, the organisation that is using or has used the work must, within a reasonable period of time, provide the owner with fair compensation for that use together with information on how the fair compensation has been calculated (reg.7(3)). So, the level of compensation is, initially at least, left to the beneficiary organisation to determine. In the case of disagreement between the organisation and the owner, either party has the right to apply to the Copyright Tribunal to determine the amount to be paid (reg.7(4)).

But what is fair compensation? Could this be interpreted to mean ‘no compensation’? This seems unlikely. Future claims to fair compensation might be calculated in line with the licence fees which the IPO currently
levy under OWLS (discussed below), at least in relation to the types of non-commercial use allowed for under the Directive. At present, those fees are set at 10 pence (£0.10) per work for non-commercial use for a period of seven years. However, a reappearing owner may well dispute the fairness of a settlement on those terms, and the Copyright Tribunal is certainly not bound to follow the tariffs suggested by the IPO.

In this respect, reliance on the exception scheme involves something of a gamble: it provides an opportunity to make use of the work today, set against the uncertain financial commitment that may be triggered by a reappearing owner(s) in the future.

6. THE UK ORPHAN WORKS LICENSING SCHEME (OWLS)

The parameters of the OWLS regime are set out in the Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014 (the OWLS Regulations). Under the Regulations the Intellectual Property Office was appointed as the licensing body for OWLS. In turn, the IPO has established an Orphan Works Register, which can be accessed [here](#).

OWLS is much broader in scope than the European Directive. For example:

- while the scheme adopts the same definition of an orphan work as the Directive, it applies to all types of copyright work including free-standing artistic works (photographs, drawings, maps, and so on)
- anyone can apply for a licence under OWLS, not just libraries, educational establishments, museums and archives; although, this is subject to one exception: the Regulations state that ‘[a]n orphan works licence may not be granted to a person authorised to grant licences’ [that is, the IPO] (reg.6(4))
- OWLS enables both commercial and non-commercial uses of orphan works
- under OWLS the IPO will grant licences for all types of commercial or non-commercial activity, and not just those activities permitted under the Directive

So, whereas the Directive enables the use of certain orphan works by certain organisations for certain purposes (across the EU), OWLS enables the use of all orphan works by [almost] anyone for any purpose (but only within the UK).

See Table 1 for a summary of the different nature and scope of the orphan works schemes provided for under the Directive and OWLS.

The other considerable advantage that OWLS offers over the Directive concerns what may or may not happen when a copyright owner reappears. In this context, reliance on the Directive provides no guarantee of immunity from future litigation. That is, a reappearing copyright owner might contest the robustness of the diligent search carried out in relation to their work; if that argument was successful, what was thought to be a lawful use would be deemed to fall outside the scope of the Directive. OWLS on the other hand directly mitigates this risk: it provides users with a reassurance about regulatory compliance which the exception cannot, as well as a shield against future liability should any owners reappear. The licence guarantees immunity from future litigation. From this perspective, it would be entirely understandable if risk-averse institutions opted for the safety-net of the OWLS regime instead of the Directive, even if it comes with an additional financial cost, and even if use turns on having to renew the relevant licence every seven years.

Finally, it is also important to appreciate that the schemes are not mutually exclusive. That is, it is perfectly acceptable to use both the Directive and OWLS as part of the same digitisation
initiative, choosing the more appropriate route for each type of work to be digitised. Consider, for example, a collection of letters sent to and from soldiers on the frontline during the First World War, one of which contains a photograph. While the letters may be eligible to make available online under the Directive, the photograph will not: digitising the collection may well involve engaging with both regimes.

6.1. OWLS: SOME PRACTICAL GUIDANCE

As with the Directive, applicants under OWLS must conduct a diligent search in relation to each work for which they are seeking a licence. Crucially, the search undertaken should be properly documented. As part of the licensing process, applicants need to be able to clearly demonstrate that their search was diligent. Indeed, the IPO has produced check lists that must be completed (for each relevant rightholder that cannot be identified or located) and submitted with the licence application.

In addition to diligent search, applicants must also pay an application fee and a licence fee. The application fee is paid when the application is submitted, and is determined by the number of works for which a licence is sought (for example, to make an application to license the use of one orphan work, the fee is £20; for 10 works, the fee is £40; for 20 works, it is £60). The maximum number of works that can be covered in a single application is 30 (for a fee of £80).

The licence fee is payable once an application has been successful, and the fee will vary depending on the type of orphan work and the proposed use. For example, while licence fees for commercial use are calculated in accordance with current market rates (wherever possible), the licence fee for non-commercial use is significantly lower. Indeed, the IPO have set a licence fee of 10 pence (£0.10) per work for all non-commercial uses. Moreover, it is possible to check how much a licence fee will cost before making a formal application, which helps with securing appropriate funding and/or changing the scope of the application to
**Nature of the scheme**

- **Directive (EU)**: Copyright exception
- **OWLS (UK)**: Non-exclusive licence

**Who can use**

- **Directive (EU)**: Cultural and educational institutions
- **OWLS (UK)**: Anyone

**What work can be used**

- **Directive (EU)**: Books, journals, newspapers, magazine and other writings, phonograms, cinematographic and audiovisual work
- **OWLS (UK)**: Everything

**How can the work be used**

- **Directive (EU)**: Copying to digitise, index, catalogue and preserve
  Communicate to the public, including making available online
- **OWLS (UK)**: Anything

**Conditions**

- **Directive (EU)**: Diligent search
  Non-commercial use only
- **OWLS (UK)**: Diligent search
  Application fee (upfront)
  Licence fee

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**Table 1**

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<th>Nature of the scheme</th>
<th>Directive (EU)</th>
<th>OWLS (UK)</th>
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<td><strong>Who can use</strong></td>
<td>Cultural and educational institutions</td>
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<tr>
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| **Conditions**       | Diligent search
  Non-commercial use only | Diligent search
  Application fee (upfront)
  Licence fee |

ensure affordability. VAT is payable on licence fees, but not on the application fee.

Licence fees paid under the scheme are held by the IPO on behalf of owners that are unknown or cannot be located. Should the owner reappear within eight years following the grant of the licence, the IPO will pay over any licence fee that was collected in respect of that work. After eight years, the owner no longer has a right to reclaim the relevant fee although the IPO can, at its discretion, make payment if there are good reasons for so doing. Any unclaimed licence fees will be used to offset the costs of administering OWLS; should there be a surplus it will be applied to fund social, cultural and educational activities. At present, the IPO have indicated that the decision-making process concerning the use of surplus funds will be established ‘closer to the time’ (that is, at some point within the first eight years of launching OWLS).

All licences granted under OWLS are non-exclusive (meaning that the orphan work in question remains available for others to license and use) and are only valid for a term not exceeding seven years (OWLS Regulations, reg.6(1)(b)). Thereafter, a new application must be submitted, contingent on carrying out a new diligent search, to enable the continued use of the work.

The IPO may refuse to grant a licence if they consider that a proposed use or adaptation of the work is not appropriate, including whether the proposed adaptation constitutes a derogatory treatment of the work (or on any other reasonable ground). Should a licence be refused, the applicant can appeal the IPO’s decision to the Copyright Tribunal.

General guidance as to the operation of the licensing scheme is available here.

During the first year of the scheme, 48 applications were made in relation to nearly 300
individual orphan works. Of these works, 79% concerned still images (typically, photographs). Application fees collected over this period totalled £1,492, and 27 licences were granted to make use of 247 works, generating revenue of £8,001.97 (excluding VAT). Seven of the licences were granted for commercial use (in relation to 35 works), with the remaining 20 concerned with non-commercial use (in relation to 212 works). The revenue generated by non-commercial licences was £21.20 (excluding VAT). It is also worth noting that during this period no licences were refused by the IPO, and no copyright owners reappeared in relation to licensed orphan works. However, the IPO have reported that owners have been identified by applicants while carrying out the required diligent search making use of the sources detailed in the IPO’s guidelines.

7. OWLS: ANALYSIS AND CRITIQUE

In many respects, OWLS is a much more progressive and enabling regime than the exception provided under the Directive. That said, there are issues specific to OWLS that warrant comment; they concern: the appropriateness of state-sponsored licensing; time-limited licences; and, the implications of commodifying all archive and heritage collections.

7.1. STATE-SPONSORED LICENSING

Some have questioned whether state-sponsored licensing is an appropriate mechanism at all, with the US Copyright Office rejecting this model as ‘highly inefficient’ (Pallante, 2015, 48). Nevertheless, licensing regimes have been implemented in Canada, South Korea, Japan, India and Hungary. Of these, the Canadian system is longest established, dating to 1988. However, since that time the Canadian Copyright Board has issued relatively few licences regarding orphan works, which has led some commentators to criticise the Canadian scheme for being administratively burdensome and for delivering little in the way of actual public benefit. It may be that OWLS will prove more successful. For one thing, it enables the use of a much greater variety of orphan works than the Canadian scheme, which may encourage greater engagement. However, initial figures regarding the uptake of OWLS (see section 6.1) are not particularly impressive or encouraging.

7.2. SEVEN-YEAR LICENCES

The licences that can be granted under OWLS are capped at seven years. After this time, if the licensee wants to continue making use of the work they must carry out a new diligent search and apply for a new licence. For memory institutions seeking to digitise their collections to enable online access, the prospect of having to renew the orphan works licence every seven years may well deter applications to the scheme, especially for medium- and large-scale digitisation initiatives.

7.3. COMMODIFYING ORPHAN WORKS

Whereas the transaction costs of engaging in diligent search (discussed below) and the need to renew licences every seven years may prove to be deterrents, the actual cost of the licence fee itself for non-commercial use is unlikely to be off-putting. In setting the licence fee at 10 pence (£0.10) per work for all non-commercial use, the IPO have strived to make licensing affordable while maintaining their commitment to ensuring that reappearing copyright owners would receive some financial recompense for the use of their work.

For example, in Canada, licences are only available in relation to published works and sound recordings, as well as fixed communication signals and performances.
But, is it appropriate to commercialise orphan works in this way at all?, and particularly when considering orphans in archive collections? The records typically held in archives, have social, cultural, academic and historic significance although they were rarely created with the intention of commercial exploitation, and only a small proportion of these works have any intrinsic commercial value. Indeed, it is the organic nature of the records—the fact that they evidence individual and business actions and transactions—that makes them reliable, authentic and trustworthy, and so appropriate for inclusion in an archive collection. Should this material be subject to any form of commercialisation, however small the fee? And should institutions tasked with the cost of preserving these collections in the public good in perpetuity be subject to such fees? Addressing these questions lies beyond the scope of this commentary. But, they remain important questions.

8. UNDERSTANDING DILIGENT SEARCH

As mentioned above, the concept of diligent search is fundamental to the operation of both the Directive and OWLS, and must be carried out for each work prior to the use of that work. But what exactly does diligent search require? And, are the demands of diligent search the same when relying on the Directive or applying for a licence through OWLS?

8.1. HOW DILIGENT IS DILIGENT?

Within the UK, the concept of diligent search has been defined differently in the Orphan Works Regulations and the OWLS Regulations. The Orphan Works Regulations state that for the purposes of establishing whether a relevant work is an orphan work ‘a relevant body must ensure that a diligent search is carried out in good faith in respect of the work by consulting the appropriate sources for the category of the work in question’ (Sch.ZA1, 5(1)). Now, compare the wording of the OWLS Regulations: before applying for a licence, a licensee shall carry out a diligent search appropriate to the orphan work in question, and ‘a diligent search must comprise a reasonable search of the relevant sources to identify and locate the right holders of the relevant work’ (reg.4(2)).

So, whereas the search to be conducted out in accordance with the exception must be ‘carried out in good faith’, the search required to satisfy the licensing scheme must constitute a ‘reasonable search of the relevant sources’. Should we read these different standards—reasonableness and good faith—as synonyms in this regulatory landscape? It is not entirely clear. In relation to the exception, the requirement of a good faith diligent search is clearly articulated within the Directive (A.3(1)). So why not simply transpose the same good faith standard into the OWLS regime?

One explanation might lie in the fact that while ‘good faith’ as a legal term of art is familiar to continental lawyers, it has tended to cause interpretive difficulties within common law systems such as the UK. That said, ‘good faith’ is not entirely alien to British law or jurisprudence: it is a concept employed in consumer rights legislation, insurance law, and in relation to the actions of fiduciaries such as an agent, a solicitor, or the director of a company. With consumer rights, for example, the law provides that any unfair term of a consumer contract will not bind the consumer, and defines a term to be unfair if ‘contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations’ under the contract (Consumer Rights Act 2015,
s.62(1)(4)). And in this context, Lord Bingham has described acting in good faith as engaging in ‘fair and open dealing’ (Director-General of Fair Trading v. First National Bank plc (2001)). Still, for lawyers trained in the common law legal tradition (the UK legal system) the concept has a vagueness which, from a legal perspective, can seem unsettling. This may explain why the legislature has opted for the more familiar concept of reasonableness when implementing the UK-specific licensing scheme, while remaining faithful (literally) to the good faith standard set out in the Directive.

But that still begs the question: when considering diligent search, are these standards one and the same?

The CDPA makes extensive use of the concept of reasonableness, whether in the context of reasonable terms (s.31A), a reasonable proportion of a work (s.42A), a reasonable royalty (s.66), and so on. Moreover, as we discuss elsewhere, determining whether a work is of unknown authorship or not depends on making a reasonable inquiry as to the author (s.9(5)). What constitutes reasonableness in any given situation will depend on the facts at hand. The courts have rarely discussed the concept within the context of copyright litigation, but they would almost certainly rely on an objective standard: that is, what steps would the honest and fair minded person think it is reasonable to take in the same circumstances?

With good faith, however, there are different ways to frame the appropriate standard. It might be determined objectively, as with the concept of reasonableness (here, the terms may indeed by synonyms). On the other hand, one might interpret it to mean no more than an absence of bad faith or improper conduct on the part of the person carrying out the diligent search, rather than imposing a more positive, substantive obligation. That is, so long as the researcher genuinely believes they have conducted a sufficient search and have not knowingly or intentionally omitted to check some relevant or obvious sources then the duty is discharged. Much will depend, however, on what constitutes a relevant source and when it should be consulted. We turn to these issues next.

8.2. WHAT ARE THE RELEVANT SOURCES?

With respect to the sources to be consulted when conducting a diligent search, in relation to the exception, Article 3(2) of the Directive lays down a clear direction to each Member State as follows: ‘The sources that are appropriate for each category of works or phonogram in question shall be determined by the Member State, in consultation with rightholders and users’: that is, each Member State has a responsibility to outline which sources are appropriate to consult for each category of work.

The Directive continues that the list of sources shall include ‘at least the relevant sources listed in the Annex’. In the interests of clarity, we reproduce the text of the Annex to the Directive in Table 2.

Not surprisingly, different jurisdictions have taken different approaches when discharging their obligation under A.3(2). The Netherlands, for example, has simply transposed the list of sources set out in the Annex to the Directive into the Dutch copyright regime, an approach that has been described as ‘consciously hands-off’ (Schroff et al, 2016).

Other jurisdictions have chosen to incorporate a more complete list of sources within their enabling legislation. Article 61a of the German Copyright Act outlines the diligent search obligation in Germany stating that ‘at the
very least the sources set out in the Annex [to this Act] must be consulted’. (You can find an English language version of the German Copyright Act [here].) The Annex to the German Copyright Act is based upon the Annex to the Directive, but provides additional detail and direction. For example, in relation to audiovisual works whereas the Directive identifies ‘databases of film or audio heritage institutions and national libraries’ as relevant, the German Annex refers to the following:

The databases of institutions and national libraries active in the field of cinematographic and audio heritage, in particular the Association of Film Archives, the Federal Archive, the Foundation of German Film Archives, the German Film Institute [www.filmportal.de] database and catalogue), the DEFA Foundation and the Friedrich Wilhelm Murnau Foundation, and the catalogues of the State Libraries in Berlin and Munich.

Similarly, whereas the Directive suggests ‘databases of other relevant associations representing a specific category of rightholders’, the German Annex clarifies as follows: ‘such as associations of film directors, screenwriters, film music composers, composers, theatre publishing houses, theatre and opera associations’ (Annex to A.61a). The German Annex also includes a series of directions regarding unpublished works, which are not formally addressed within the Directive guidelines. Diligent search for unpublished material in Germany requires consulting with the current and original owners of the work, the National Registers of Estates, finding aids in the national archives, museum inventory lists, as well as credit agencies and telephone books (Annex to A.61a).

The approach adopted in the UK follows neither the Dutch nor the German model. We discuss it in detail in the next section.

8.3. IPO GUIDANCE ON DILIGENT SEARCH

Within the UK, the sources listed in the Annex to the Directive are replicated verbatim in the Orphan Works Regulations (see Sch.ZA1, Part 2) with some additional guidance regarding unpublished works. As with the Directive, these set out the ‘minimum’ ‘appropriate sources’ to be consulted for each category of work when carrying out a good faith search. The same is true for the OWLS Regulations (reg.4(3)).

However, the UK Intellectual Property Office has also produced three sets of guidelines relating to: film, music and sound-related orphan works (September 2016); literary orphan works (November 2015); and, still visual art orphans (November 2015). These guidelines are ‘primarily intended’ for those wanting to make an application through OWLS, although each does state that they ‘may also be of help to those conducting a diligent search in relation to the EU Directive’.

Each set of guidelines is accompanied by a Diligent Search checklist: these checklists set out, simply and unambiguously, the key organisations where inquiries regarding orphan works might be made, although they are not intended to be exhaustive. Taken together, the guidelines and the checklists offer very useful information and signposting when undertaking a diligent search. However, at no point do these guidance documents address

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5 The Regulations recommend consulting ‘Those sources that are listed in paragraphs 1 to 4 above which are appropriate to a relevant work which is unpublished’.

6 Under both the Orphan Works Regulations and the OWLS Regulations the Intellectual Property Office are empowered to produce guidance on the appropriate sources to be consulted when conducting a diligent search. These guidelines are currently available [here]. The IPO is committed to reviewing and revising these guidelines as appropriate, and indeed they have already been updated since OWLS was launched.
<table>
<thead>
<tr>
<th>Relevant Work</th>
<th>Sources to be searched</th>
</tr>
</thead>
</table>
| 1. Published Books                                                         | - Legal deposit, library catalogues and authority files maintained by libraries and other institutions  
- The publishers’ and authors’ associations in the country in question    
- Existing databases and registries, WATCH (Writers, Artists and Their Copyright Holders), the ISBN (International Standard Book Number) and databases listing books in print  
- The databases of the relevant collecting societies, including reproduction rights organisations  
- Sources that integrate multiple databases and registries, including VIAF (Virtual International Authority Files) and ARROW (Accessible Registries of Rights information and Orphan Works) |
| 2. Newspapers, Magazines, Journals and Periodicals                        | - The ISSN (International Standard Serial Number) for periodical publications  
- Indexes and catalogues from library holdings and collections  
- Legal deposit  
- The publishers’ associations and the authors’ and journalists’ associations in the country in question  
- The databases of relevant collecting societies including reproduction rights organisations |
| 3. Visual Works, including Fine Art, Photography, Illustration... and other such works contained in Books, Journals, Newspapers and Magazines or other Works | - The sources referred to in paragraphs 1 and 2  
- The databases of the relevant collecting societies, in particular for visual arts, and including reproduction rights organisations  
- The databases of picture agencies, where applicable |
| 4. Audiovisual Works and Sound Recordings                                  | - Legal deposit  
- The producers’ associations in the country in question  
- Databases of film or audio heritage institutions and national libraries  
- Databases with relevant standards and identifiers such as ISAN (International Standard Audiovisual Number) for audiovisual material, ISWC (International Standard music Work Code) for musical works and ISRC (International Standard Recording Code) for sound recordings  
- The databases of the relevant collecting societies, in particular for authors, performers, sound recording producers and audiovisual producers  
- Credits and other information appearing on the work’s packaging  
- Databases of other relevant associations representing a specific category of rightholders |

Table 2
Relevant sources listed in the Annex to the Directive
1. Published Books

- Legal deposit, library catalogues and authority files maintained by libraries and other institutions
- The publishers’ and authors’ associations in the country in question
- Existing databases and registries, WATCH (Writers, Artists and Their Copyright Holders), the ISBN (International Standard Book Number) and databases listing books in print
- The databases of the relevant collecting societies, including reproduction rights organisations
- Sources that integrate multiple databases and registries, including VIAF (Virtual International Authority Files) and ARROW (Accessible Registries of Rights information and Orphan Works)

Table 3  Sources listed in the Annex relevant to published books

<table>
<thead>
<tr>
<th>Source Category</th>
</tr>
</thead>
<tbody>
<tr>
<td>Textual Observation of Published Books</td>
</tr>
</tbody>
</table>
| Consider the list of sources set out in the Annex to the Directive regarding published books (Table 3). The IPO guidelines elaborate on these five different categories of sources (Table 4). That is, when conducting a search against the categories of sources listed in the Annex to the Directive, the IPO recommend 16 relevant sources for consideration; for ease of reference, let’s call these the core list of recommended sources (or the core sources). As noted above, the guidelines carry the general caveat that they are ‘primarily intended’ for those planning to make an application through OWLS. But, a common-sense interpretation would be to read these core sources as a de facto means by which the government is providing additional guidance on relevant sources under Article 3(2) of the Directive. In other words, in the UK, these would appear to be the appropriate sources to consult when conducting a good faith diligent search for a work that falls within the scope of the Directive. Certainly, to ignore the potential relevance of these sources when conducting a search under the Directive would run the risk of compromising the good faith nature of that search.

Thereafter, the guidelines for published books set out an additional 22 sources that might be helpful in locating the owner of the rights in the work; let’s refer to these as the additional sources. These include a mixture of very specific suggestions (for example, the Firms Out of Business database and the Companies House Register) as well as more generic advice (for example, ‘general internet searching’). Again, these are not presented as an authoritative or exhaustive list of sources. But, in presenting a set of additional sources that appear to lie outside the scope of the minimum requirements prescribed by the Annex to the Directive, perhaps we can detect an attempt to differentiate between the standard required of a good faith diligent search (under the Directive) and a reasonable search (under OWLS). Intuitively, if a different standard of care is implied, then the way the IPO have

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7 The various additional categories of sources are listed as follows: Credits and other information appearing on the work; FOB (Firms Out of Business) database; Companies House; The provenance of a works (i.e. where it was found); General internet searching; Records of literary agents; International Standard Text Code (ICTS); Copac; Author and book info database; Poetry library; International Standard Name Identifier (ISNI) database; Books in Print database; Copyright Hub; Academic and scientific databases; Online databases and catalogues; Digitised newspaper archives; Genealogy websites; Wills—search for family members or connections of the author; Archives; Treasury solicitors; Biographical directories online; Other sources identified.
Legal deposit, library catalogues and authority files maintained by libraries and other institutions | Check the British Library catalogue. In addition, applicants might also check the following libraries:
- The Bodleian library, University of Oxford
- Cambridge University
- National Library of Scotland
- The National Library of Wales

The publishers’ and authors’ associations in the country in question | Information on a right holder might be found with:
- The Society of Authors
- The Writers’ Guild of Great Britain
- The Association of Author’s Agents
- The Publishers’ Association

Existing databases and registries, WATCH, the ISBN (International Standard Book Number) and databases listing books in print | • The WATCH database might provide contact details for the author, the author’s agent or literary executor
• The ISBN applies to books published after 1967. It identifies the title to which a work is assigned and provides details of the publisher

The databases of the relevant collecting societies, including reproduction rights organisations | Check the databases of all the relevant collecting societies, as an author might only be registered with one. Recommended databases for consultation include:
- Authors’ licensing and collecting society
- The publishers’ licensing society
- The copyright licensing agency
- The public lending right register

Sources that integrate multiple databases and registries, including VIAF and ARROW (Accessible Registries of Rights information and Orphan Works) | There are sources that will hold information from multiple sources. These include VIAF (Virtual International Authority Files) which combines multiple name authority files into a single computer centre

| Table 4 |
| IPO guidelines regarding published books |
structured and presented the range of sources within their guidelines may represent one way in which this different standard is realised and articulated, albeit tacitly. That is, when conducting a reasonable diligent search to make use of a work in accordance with a state-sponsored licensing scheme greater efforts are required (perhaps, should be required) than when conducting a good faith diligent search to enable access to orphan material within the context of a memory institution delivering on its non-commercial public interest mission. Or, more simply: the standard of reasonableness appears to be set at a higher threshold than that of good faith.

This lack of conceptual clarity about the concept of diligent search within the context of the UK’s twin-track approach to orphan works is unfortunate. At present, it is unclear whether the imposition of a different obligation was intended by the legislature, and the IPO do not address the issue in their guidance. From our perspective, we do not think it desirable, or necessary, to complicate the UK orphan works regime with different standards regarding diligent search. Nor do we believe that this was the intention of the legislature. Instead, we prefer and advocate an approach that treats good faith and reasonableness as synonymous in this context, rather than introducing a hierarchy of practice. This would provide a simplicity of process, while adequately safeguarding the interests of unknown and unlocatable copyright owners. It would be helpful, however, to have a clear and unambiguous direction from the IPO on this issue.

8.4. DOES DILIGENT MEAN EXHAUSTIVE SEARCH? (SPOILER ALERT: NO)

The Directive requires that a diligent search be carried out in relation to each work ‘by consulting the appropriate sources for the category of works … in question’ (A.3(1)). The sources that are appropriate are to be determined by each Member State, but shall include at least the relevant sources listed in the Annex (A.3(2)). But must every source listed as a relevant source be consulted in relation to each type of orphan work? Or, might an archivist or librarian decide that certain of the relevant sources are in fact irrelevant in the circumstances and still be acting in good faith?

Consider, for example, an archivist conducting a search for the copyright owner of an extract from a newspaper article written by an unnamed author in the mid-20th century and published in an unknown newspaper. There exists no contextual metadata that might assist the diligent search. The IPO’s Guidelines, as they relate to newspapers, magazines, journals and periodicals, list 40 organisations, registers and other sources that might be consulted; but should an archivist really consult them all? Should they consult the UK National Centre of the International Standard Serial Number (that is, the British Library at Boston Spa), relevant library indexes and catalogues, legal deposit data, records held by all Publishers’ and Authors’ Associations, as well as the databases of all relevant collecting societies? If the newspaper article has nothing to do with food, travel or science writing, is there any point in consulting
the Association of British Science Writers, the Garden Media Guild, the Guild of Food Writers, Travel Writers UK, or the British Guild of Travel Writers? Is the National Union of Journalists, the Chartered Institute of Journalists or the British Association of Journalists likely to be able to assist in identifying the relevant copyright owner?

For one thing, practically speaking, consulting all relevant sources simply might not be possible. In a study of diligent search requirements in the United Kingdom, the Netherlands and Italy, the researchers discovered that, across all three jurisdictions, just over half of the sources that might fall within the scope of the Annex were freely accessible online. The remaining sources could only be consulted offline (that is, on site), only granted partial access to the relevant records, or could be accessed online but only on payment of a fee. On this basis, the authors recommend that a diligent search must be considered as carried out in good faith if ‘all relevant freely and easily accessible sources have been consulted’ (Favale et al, 2016, 38).

We endorse that recommendation but it still begs the question: when is a listed source genuinely relevant such that it ought to be consulted? One view is that if a Member State has provided guidance on diligent search incorporating a list of relevant sources then all those sources should be consulted; otherwise, the search cannot be deemed to be diligent. In other words, under the Directive the concept of diligence is simply a proxy for an exhaustive search. We disagree. For example, if presented with a photograph of a building or public work of art, the British Society of Underwater Photographers is unlikely to provide any useful information about who the photographer might be. Or take another example: conducting an ISBN search is recommended in both the Annex to the Directive and the IPO Guidelines for published books. But, the ISBN scheme was only created in 1967 and first introduced in 1970. So, should an ISBN search really be conducted for works that were published before 1970? Would a good faith diligent search be rendered invalid if ISBN was not consulted? That would be absurd. Indeed, carrying out futile and irrelevant search activity of this kind would seem to be the very antithesis of diligence, which requires care and conscientiousness in thought and action.

It may be that some Member States have imposed a strict obligation to consult all relevant listed sources in their implementation of the Directive. Germany provides an example. The German Act states that ‘at the very least the sources set out in the Annex [to this Act] must be consulted’ (emphasis added). That is, consulting each source listed is necessary to ensure a good faith diligent search; and yet, this may not be sufficient to provide legal certainty. Depending on the context, consulting other sources not listed may also be required. We suggest, however, that the language adopted in the German regime goes beyond what it required by the Directive. After all, the Directive sets out sources that are appropriate to be consulted when conducting a diligent search, rather than required to be consulted in every instance.

If the Directive is not to be rendered a complete irrelevance whether for mass digitisation initiatives or otherwise, we suggest that a more pragmatic approach to good faith diligent search must be adopted. What constitutes a relevant source should not be unthinkingly predetermined by the category of work, regardless of the nature of the work and the context in which it occurs. Consider again, our example of an extract from a newspaper article by an unnamed author published in an unknown newspaper. It would be unreasonable, indeed irrational, to interpret the concept of a good faith search as requiring an exhaustive
engagement with all the relevant sources set out in the IPO Guidelines. Sending email information requests to all listed organisations and professional bodies would amount to little more than an exercise in generating spam, even if they are neither sent nor received in that spirit. And often, recipient organisations will simply not bother to respond. In truth, the realpolitik of a good faith search in relation to such a work is likely to start and end with no more than an internet-based search for the title of the article or for key passages of text. If the search returns nothing meaningful to go on, should more than this be required? We suggest not.

Moreover, our practical experience of conducting reasonable diligent searches under the OWLS regime confirms this view. In the next section, we discuss the results of a rights-clearance simulation conducted as part of a research project exploring the reality of diligent search under the orphan works regime in the UK.

9. ORPHANS IN THE EDWIN MORGAN SCRAPBOOKS

Edwin Morgan, the distinguished Scottish poet and translator, was born in Glasgow in 1920. Appointed the city’s first Poet Laureate in 1999, he received the Queen’s Gold Medal for Poetry in 2000 and was named Scotland’s national poet—the Makar—in 2004. After graduating with a degree in English Language and Literature from the University of Glasgow in 1947, Morgan taught in the Department of English Literature until he retired as Titular Professor in 1980. Before his death in 2010, he transferred his personal papers, in periodic instalments, to the University’s Library.

Among his papers are 16 volumes of scrapbooks which Morgan began compiling as an 11-year-old boy in the early 1930s. The final volume ends in 1966. The scrapbooks are meticulously created, full of cuttings from newspapers, magazines and books, often consisting of a single word or a small, cropped area of a larger image. Taken together, the scrapbooks total 3,600 pages containing an estimated 51,480 works. Of these, we estimated 52% were orphans (that is, 26,770 in total).

To explore the nature and demands of diligent search within the context of a real-world digitisation initiative, we carried out a rights clearance simulation for a 10% sample of Scrapbook 12, a 30-page long section (the actual rights clearance activity was carried out by Kerry Patterson, the project officer). The process was informed by the IPO’s diligent search guidelines, although we also made extensive use of online search engines such as Google, and web-based reverse image search tools such as TinEye and PicScout. Within the sample, we identified 432 works present in 380 cuttings (some items, such as a clipping from a newspaper also included an embedded photograph or illustration).

About 36% did not require rights clearance, either because they had been created by Morgan himself, or they were in the public domain, ephemera or cuttings that were deemed to be an insubstantial part of the original work. For the rest, following a diligent search, 226 works (52%) were deemed to be orphans. The total time taken over diligent search was 1080 hours, or about two and a half hours per work over the life of the project. Much of this time was absorbed by initial project design, analysing and documenting the material, and so on. Indeed, for many works, the actual time spent engaging in diligent search amounted to no more than 10 or 15 minutes of research, typically internet-based. We provide a full account of the process and findings on the Digitising the Edwin Morgan Scrapbooks website.
The Grave of Prometheus

No one comes here now, neither god nor man.
For long the animals have lived away,
Scared by immortal ones and the shades of culture.
The heavenly chasm where the soul
Hades' dangerous temple turned to common earth
When that great company fandom Olympian.
The fire was out, and he became his sorrow,
Two yards long there he lay unvisited, and grass
Grew over him: all else is a breath forgotten.
Yet there you still see a tongue of stone,
Shaped like a clefted hand where no hand should be
Forsaken from the earth as for altars.
Its palms all licked and blackened as with fire.
A solemn change made cool his angry bed,
And made his burning body a mound of earth,
And his great face a vacant ring of despair.

Between Yesterday and Doomsday

A Donor's Look (from 2,000 ft.) at Eye Cliff

 Confidence in Atom Bomb

Jockey's Good Prospects

A page from Scrapbook 12
As part of the project, an application was made to OWLS featuring five different types of work including a published poem and an original black and white photograph (Image 4). The author of the poem is Peter Appleton, as recorded by Morgan in Scrapbook 12. When carrying out the diligent search for the copyright owner of this work, we relied on 15 of the recommended sources on the IPO’s extended checklist. This included seven of the 16 relevant Annex-related sources, and eight of the 22 additional sources listed in the IPO guidelines. The Society of Authors, the Writers’ Guild, and the Authors’ Licensing and Collecting Society were unable to help. Who’s Who, the Dictionary of National Biography and the Poetry Library led nowhere. VIAF (the Virtual International Authority File) provided information for other authors named Peter Appleton but not this specific poet. Google also proved to be a dead end. After 90 minutes searching for the owner of the work, over a period of nearly four months, we determined the work to be orphan. The IPO agreed.

For the original photograph (see Image 3) only six sources were considered including the UK Orphan Works Register, web-based reverse image search tools (Google, PicScout and Tineye), as well as industry organisations such as the British Institute of Photographers, the Association of Photographers, and the British Association of Picture Libraries (BAPLA). They were all unable to help identify the copyright owner. The total time spent on the search was 25 minutes, over a period of one day. The work was deemed to be an orphan. Again, the IPO agreed.

In both cases the IPO considered the diligent search to be a reasonable search of the relevant sources for the works in question, and this was despite that the complete list of recommended Annex-related sources had not been consulted.

The key point is that while the Annex to the Directive sets out a list of ‘minimum’ sources to be consulted when conducting a diligent search, all sources need not be consulted in every case, at least not in the UK. Just because a source is potentially relevant to a category of work, does not mean it will be a relevant source in relation to a specific example of that type of work. Much will depend on the content of the work and the context in which it is found, as well as the expertise and knowledge-base of the person conducting the search. Diligence does not demand a perfunctory or dogmatic adherence to a boilerplate check-list of sources, however useful and well-crafted. There is no minimum requirement to be followed in every case. Our research evidences this, and the IPO have confirmed it.

9.1. DILIGENT SEARCH: SOME PRACTICAL EXAMPLES

In this section, we provide some more examples of the search activity conducted on material from the Edwin Morgan Scrapbooks. Details of the diligent search activity are presented in Table 5, relating to the material in Image 2. We consider every search to be a diligent search conducted in good faith.
<table>
<thead>
<tr>
<th>Work</th>
<th>Diligent search activity and time spent</th>
</tr>
</thead>
</table>
| ![Some coffins nowadays are proof against nuclear radiation.](image) | Tried web searches for a match to the sentence. No matches.  
Time spent: 10 minutes within one day. |

The Image Recognition Tools PicScout and TinEye did not identify the image. However, Google Images recognised it as part of a cover from the French magazine Réalités (May 1954) with title strapline: ‘le village le plus secret de l’afrique’. Magazine not available online or in the Glasgow University library.  
Searched for images from a couple of photographers who were named as frequent contributors to the magazine: Jean-Philippe Charbonnier and Édouard Boubat. In an image search filtered by colour images, none similar came up. No results for image search of full cover of magazine.  
Identified possible relevant photo agencies, and conducted an orphan works search through BAPLA’s online tool. Emails to Getty and Camera Press. Replies from LAT Photo (negative), Camera Press (negative), PA Images Getty (negative), Lee Miller Archive (negative).  
World Cat indicated that an English language version of the magazine available in the National Library of Scotland in Edinburgh. Applied for a library card. A visit to the National Library revealed that the May 1954 edition of the English language version had a different cover. Morgan likely took his cutting from the French language version.  
Time spent: 5 hours 56 minutes over a period of 10 months. |

![The Grave of Prometheus](image) | After discovering dates for Edwin Muir were 1887-1959, we found him online on the Faber website. Initial web research and then an online application for permission was submitted jointly with another work. No response after the stated six to eight week reply period. There was further follow up correspondence over a period of seven months. Faber concluded that they could not grant permission for use online, and that they did not have any contact information regarding Muir’s literary estate.  
Time spent: 60 minutes over a period of 10 months. |

![“Great care must always be exercised on tending horses to trees, as they are apt to bark, and thereby destroy the trees.” —Army Order.](image) | Tried web searches for a match to the sentence. No matches.  
Time spent: 10 minutes within one day. |

![DR. KINSEY’S collection of five and a half million wasp has been donated by his widow to the American Museum of Natural History. 1937](image) | Tried web searches for a match to the sentence. No matches.  
Time spent: 10 minutes within one day. |

Item is cut from a larger photograph such that it is difficult to determine precisely the subject of the photograph, or what relation it bears to the source image. Decided not to engage in search activity as the cutting can likely be considered an insubstantial part of the larger work.  
Time spent: 5 minutes within one day.
<table>
<thead>
<tr>
<th>Table 5</th>
<th>Some examples of diligent search activity from the Edwin Morgan Scrapbooks project</th>
</tr>
</thead>
</table>

Time spent: 15 minutes within one day.

Contact with Newsweek over a three-month period via emails, web contact form and finally via Twitter. Eventually Newsweek granted permission for use of the text online. However, they indicated that copyright in the images belonged to the US Airforce. We emailed US military contact details found online over a period of three months to enquire about rights clearance. No response was ever received.

Time spent: 2 hours 10 minutes over a period of three months.

See comments immediately above.

Cropped image from page but there were no image search matches on Google, TinEye or Picscout.

Time spent: 15 minutes within one day.

Cropped image from page but there were no image search matches on Google, TinEye or Picscout.

Time spent: 15 minutes within one day.

Tried web searches for a match to words in cutting. No matches.

Time spent: 10 minutes within one day.

Tried web searches for a match to words in cutting. No matches.

Time spent: 10 minutes within one day.
Orphan Works Licence
Issued under UK orphan licensing scheme

Licence number: OWLS000057
Licensee: The University of Glasgow
Date of issue: 09/06/2016

The Licensee agrees to be bound by and comply with the Terms and Conditions of this licence agreement.

A. Grant of licence

Subject to the terms and conditions of this Licence, the Licensor hereby grants a non-exclusive Licence to the Licensee, The University of Glasgow, Glasgow.

This Licence Agreement allows the Licensee to use the Licensed Material in the following ways:

<table>
<thead>
<tr>
<th>Licence ID</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>OWLS000057-1</td>
<td>Single frame cartoon with cartoonist named as Paton. Showing two men in a canoe with an explosion mushroom cloud in the distance. Caption: 'We must be approaching civilisation' Non commercial Non commercial £0.10</td>
</tr>
<tr>
<td>OWLS000057-3</td>
<td>Cartoon of Max the Hamster by Giovannetti Non commercial Non commercial £0.10</td>
</tr>
<tr>
<td>OWLS000057-4</td>
<td>Extract from Doubt Magazine Non commercial Non commercial £0.10</td>
</tr>
<tr>
<td>OWLS000057-5</td>
<td>Black and white photograph of unknown man, with hands behind head Non commercial Non commercial £0.10</td>
</tr>
<tr>
<td>OWLS000057-2</td>
<td>The Responsibility Non commercial Non commercial £0.10</td>
</tr>
</tbody>
</table>

Image 4
The Orphan Works Licence issued by the Intellectual Property Office in relation to the Edwin Morgan project
10. UNDERSTANDING DILIGENT SEARCH: SOME CONCLUSIONS

The orphan works regime is still in its infancy. So too is our shared understanding and experience of what constitutes a diligent search. As helpful as the IPO’s guidelines are in providing an overview of sources that may be useful when conducting a search, the sheer volume of potential sources listed in those guidelines is likely to seem overwhelming to many archivists or institutions contemplating making use of OWLS or the Directive. By way of counterpoint, we offer the following general observations:

- We consider the concept of a good faith diligent search and a reasonable diligent search to be equivalent: the standard imposed is the same whether relying on the Directive or OWLS. We do not believe the legislature intended that different standards should apply to these two tests. Rather, they should be considered as one and the same.
- We consider that the concept of diligent search (whether good faith or reasonable) should be judged objectively. A useful rule of thumb would be to ask whether an honest and fair-minded archivist, librarian or curator would consider the search to be diligent in the circumstances. In other words, the sector should feel able (and empowered) to assess the diligence or not of any given search according to its own professional standards. If you think the search is diligent, if your colleague regards it as diligent, then it probably is diligent.
- What constitutes a relevant source to be consulted as part of a diligent search should not be unthinkingly predetermined by the nature of the work. Rather, whether a source is relevant will always be context specific.
- The IPO guidelines provide a very useful starting point for identifying sources that may be relevant, but it would be a mistake to treat those guidelines as a list of sources that must be consulted in any given situation. Again, whether any given source is relevant will be context specific.
- Although the Directive appears to prescribe a list of sources that should be consulted when conducting a search, the IPO have clearly indicated this is not the case. Diligent search does not require an exhaustive search of identified sources. There is no minimum requirement to be followed in every case. Everything depends on context.
- Within the context of the Edwin Morgan project we secured a licence from the IPO to make use of an orphan photograph based on 25 minutes of search activity, consulting just six relevant sources. This, and other examples from the project, indicate that diligent search needn’t be too burdensome, depending on the circumstances.

These observations are intended to be reassuring, enabling. The orphan works regime in the UK offers considerable scope for enabling online access to work when the owner cannot be identified or located. But it is a regime that is being underused. Greater clarity and confidence in the concept and practice of diligent search would help. And, we believe that clarity and confidence can come from within the sector itself. With the Edwin Morgan project, we documented and shared the practical reality of our diligent search activity. We would encourage other institutions to do the same. More examples of project-specific search activity—search activity that has been considered and approved by the IPO as part of the licensing process—
would prove invaluable in helping the sector to better understand and define the nature of the diligent search requirement. A shared practice of diligent search could prove instrumental in positively shaping the sector’s engagement with the orphan works regime in the UK.

And yet, despite the potential for improving and enhancing engagement with the Directive and OWLS, the fact remains that for anything other than small-scale digitisation initiatives, the long-term relevance of both schemes appears compromised by the demands of diligent search. The costs and challenges of rights clearance activity are a significant barrier to the digitisation of cultural heritage collections. Existing literature evidences this, and the Edwin Morgan project confirms that diligent search and mass digitisation are fundamentally incompatible, however light-touch the nature of the diligent search obligation. With respect to the 16 scrapbooks created by Edwin Morgan, we estimate that it would take one researcher over eight years to undertake the diligent search activity alone, at a cost of more than £185,000. No memory institution, however well-resourced, would ever underwrite such a costly venture. The orphan works regime has value, but not for mass digitisation.

11. LEGAL MATERIALS AND BIBLIOGRAPHY

11.1. LEGISLATION

- Copyright Designs and Patents Act 1988 c.48
- Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014

11.2. CASES

- Director-General of Fair Trading v. First National Bank plc [2001] UKHL 52

11.3. BIBLIOGRAPHY

- Favale, M., Schroff, S., and Bertoni, A., EnDOW Report 1: Requirements for Diligent Search in the United Kingdom, the Netherlands, and Italy (February 2016) (accessed: 01 April 2017)
**Image Credits**

**Image 1:** Victoria Stobo at the Copyright and Cultural Memory conference, Michael Gimenez, 2016. Proceedings from the conference, including this image, are available at: [http://ccm.create.ac.uk](http://ccm.create.ac.uk) (accessed: 8 June 2017)

**Image 2:** A single page from the Edwin Morgan Scrapbooks, Scrapbook 12, page 2245, from the Papers of Edwin Morgan (MS Morgan), held by Special Collections, University of Glasgow. This page and others from Scrapbook 12 are available to view at: [http://www.digitisingmorgan.org/](http://www.digitisingmorgan.org/) (accessed: 8 June 2017)

**Image 3:** Photograph by an unknown author, taken from the Edwin Morgan Scrapbooks (Scrapbook 12), submitted as part of an application to the Orphan Works Licensing Scheme. The Papers of Edwin Morgan (MS Morgan) are held by Special Collections, University of Glasgow. This page and others from Scrapbook 12 are available to view at: [http://www.digitisingmorgan.org/](http://www.digitisingmorgan.org/) (accessed: 8 June 2017)


**Table Credits**

**Table 1,** Comparing the Orphan Works Directive and OWLS

**Table 2,** Relevant sources listed in the Annex to the Directive

**Table 3,** Sources listed in the Annex relevant to published books

**Table 4,** IPO guidelines regarding published books

**Table 5,** Some examples of diligent search activity from the Edwin Morgan Scrapbooks project
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