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YES ☑ NO ☐
A Single-Minded Market for Digital Assets?
Copyright clearance of orphan works in the digitisation ecosystem

Department of Digital Humanities
MA Digital Asset and Media Management 2016
Supervisor: Simon Tanner
Abstract

This dissertation assesses the Swedish and the United Kingdom (UK) legislative frameworks for cross-border copyright clearance of orphan works in mass-digitisation schemes. By reviewing relevant copyright frameworks and practices around the world, interviewing Swedish and British experts in the field of libraries and copyright, and discussing the national solutions applied in Sweden and the UK, conclusions are drawn to form a roadmap for future policy work in the area.

The findings are that even though copyright clearance systems for orphan works work well in their national context, they wouldn’t be transferable to a cross-border context due to the different legal and societal traditions in the EU Members States. Solutions for cross-border access could be a general copyright law exception (which is a time-consuming process and therefore less usable in practice in the next 5-10 years), create and build on rightsholder registers with increased collaboration with CMOs, changed management of digital collections (e.g. only digitising orphan works that are in the public domain), work towards soft legislative solution (such as an MoU).
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Abbreviations

ACE Association of European Film Archives and Cinematheques
ANT Actor-Network Theory
ARROW Accessible Registries of Rights Information and Orphan Works Towards Europeana
BL British Library
CCC US Copyright Clearance Center
CILIP Chartered Institute of Library and Information Professionals
CJEU European Court of Justice
CLM IFLA’s Committee on Copyright and other Legal Matters
CMO Collective Management Organisation, collective society
DAMM Digital asset and media management
EBLIDA European Bureau of Library Information and Documentation Associations
EC European Commission
ECL Extended collective licensing
EndDOW Endorsing access to 20th Century cultural heritage through Distributed Orphan Works clearance
EP European Parliament
EU European Union
EUIPO European Union Intellectual Property Office
GLAM Galleries, Libraries, Archives, Museums
ICA International Council of Archives
ICOM International Council of Museums
IFLA International Federation of Library Associations and Institutions
IVIR Instituut voor Informatierecht (Amsterdam)
KB Kungliga biblioteket (National Library of Sweden)
NGO Non Governmental Organisation
PRV Patent- och registreringssverket
SCCR WIPO Standing Committee on Copyright and Related Rights
UK United Kingdom
UN United Nations
US United States of America
WCT WIPO Copyright Treaty
WIPO World Intellectual Property Organisation
WPPT WIPO Performance and Phonograms Treaty
Introduction

The GLAM (galleries, libraries, archives, museums) institutions of the world – with our contemporary digital technologies, their objective to make accessible cultural heritage and art to individuals could be realised in only three clicks after you open your web browser until that you view a high resolution version of individual pieces out of their collections. Mass-digitisation projects seem to multiply quicker than Fibonacci’s rabbits, with the purpose of providing people with cultural and intellectual treasures for study, pleasure, creativity, and innovation.

However, mass-digitisation projects face many hurdles. On the technical side there are many systems and standards in use which do not yet provide full interoperability between units. In addition, there are political issues, such as resources and legal frameworks. Ten years ago, Simon Tanner (2006:21) wrote that ‘the major unresolved issues in the transition [to digital preservation] revolve around money, infrastructure, scalability and sustainability.’ In 2016, these issues remain. The unresolved issues seem to tag along with the development of technology. So, the digital collection can not just be created and left to its own devices; it must be managed.

Management of digital GLAM collections includes awareness of the comprehensive legal frameworks, the main one being copyright, which set the external frames for how a GLAM institution may act when making their collections available. This dissertation is a study of copyright management in mass-digitisation projects conducted by GLAM institutions.

Using the digital ecosystem model, an analogy built on the biological ecosystem, I will look at the copyright clearance solutions available to the GLAM institutions in the context of a digital ecosystem, and compare their rights clearance process with the management lifecycle of the ecosystem.
Aim and objectives
This dissertation assesses the Swedish and the United Kingdom (UK) legislative frameworks for cross-border rights clearance of orphan works in mass-digitisation schemes by introducing relevant copyright frameworks in the case study countries; presenting a review of different practices in use around the world; interviewing Swedish and British experts in the field of libraries and copyright; and discussing the national solutions applied in Sweden and the UK in relation to the interviews and the documentation presented in the background and the literature review.

The aim of this dissertation is to look into different solutions for rights management of orphan works with examples from Sweden and the UK, by doing the following research:

- Compare and contrast the current legal solutions for cross-border access of orphan works in mass-digitisation schemes in Sweden and the UK.
- Discuss how well suited the current legal solutions for cross-border access of orphan works in mass-digitisation schemes in Sweden and the UK would be for application in the EU.

A desirable outcome is a roadmap of possible routes for upcoming policy work in the area, but the research result is not expected to provide practical solutions for mass-digitisation projects.

Background
Rights management within the scope of general management of public digital media collections is a complex topic with several legal, practical, and economic layers. E.g. in practice, a technical framework allows for unlimited access as long as a user has access to the right ICTs (information and communication technologies), while the legal framework sets limits of what actions can be taken in the technical environment.

The main, acute issue for public GLAM institutions is to solve their mission of preserving
and disseminating works within their budget limitations. They need an economically sustainable way of clearing rights, and a way to solve the legal liability post digitisation of works. While copyright as an academic phenomenon can be discussed in a discourse of the ethical question of right or wrong, there is limited space for GLAM institutions to take part in this debate while at the same time keeping up with the ever-evolving information society.

In this chapter, I will provide a background of copyright history, copyright legislation today, licensing solutions, and the orphan works problem, and give examples of how these relate to GLAM institutions.

**Political context**

The *information society* and the *knowledge economy* are prestige phrases in the discussion of which direction the society shall take, given that society has been provided with a digital context. The Directive 2001/29/EC of the European Union (Directive on the harmonisation of certain aspects of copyright and related rights in the information society, commonly referred to as the InfoSoc Directive) was brought about by the European legislators in 2001 in order for European communities to have a harmonised way of dealing with artistic and creative works in this new context. It regulates the harmonisation of certain aspects of copyright and related rights within the EU Member States. The copyright legislations of the Member States are territorial, by which we mean restricted to the national territory of each state, and the attempted harmonisation of the copyright laws sought to facilitate an EU digital single market.

There is no clear definition of ‘information society’ in the the InfoSoc Directive; the closest description is in recital 5 where it’s written about ‘technological development [that] has multiplied and diversified the vectors for creation, production and exploitation’, with an addition that ‘copyright and related rights should be adapted and supplemented to respond
adequately to economic realities such as new forms of exploitation,’ which establishes a relationship between copyright and the information society. In spite of the lack of a universal definition of ‘information society’, for the scope of this dissertation I will wish to highlight the following two assumptions about such a society, as they have been in the back of my head when analysing the material: (1) products are immaterial objects, i.e. knowledge or digital objects, and (2) Antonio Negri’s (2015) characterising of the information society as a society in which people do immaterial labour.¹

The term *knowledge economy* is found e.g. in the European Commission’s 2008 *Green Paper on copyright in the knowledge economy*. The green paper was intended as ‘a starting point for the structured debate on the long-term future of copyright policy’ (European Commission 2016) and defines ’knowledge economy’ as

[a term] commonly used to describe economic activity that relies not on "natural" resources (like land or minerals) but on intellectual resources such as know-how and expertise. A key concept of the knowledge economy is that knowledge and education (also referred to as "human capital") can be treated as a commercial asset or as educational and intellectual products and services that can be exported for a high value return. It is obvious that the knowledge economy is rather more important for those regions whose natural resources are scarce.

**The origins of copyright**

Copyright, as defined by treaties and legislation in use today, protects original works in the field of literature and the arts – in short, creations of the mind. Performing artists, phonogram and film producers, and broadcasting organisations are protected by so-called related or neighbouring rights. Copyright law, with its limitations and exceptions, is essentially based on a principle of territoriality. The territoriality principle has its origin in the cultural history of national copyright laws, and this is important to know about when discussing modern copyright, as these cultural and historical traditions will be echoed in the arguments about the

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¹ As a side note, the relation between intellectual property and immaterial labour can be seen in the Swedish term for ‘intellectual property rights’: *immaterialrätt* (‘immaterial rights’).
future of copyright. For example, it is important to note that because the Berne Convention results from a negotiation between legal systems – between copyright and droit d’auteur (’right of the author’), between civil law and common-law traditions (Hemmungs Wirtén 2011:11) – the different legal and cultural traditions are also influential in the discussion on licensing and orphan works.

To understand the complexity of copyright one must be aware of its development through history. It is a relatively new field of law; the oldest known law is the Egyptian law which is dated ca. 2925 BC (Britannica Academic 2016), while modern copyright is most often regarded as having started with the Statute of Anne in 1710 (AD). Leading up to this statute were many printing privileges and censorship acts that followed the invention of the printing press in ca. 1450, but while ’the Statute of Anne had inherited much of what had gone before, [it] was an Act as much marked by the new as by the old’ as Ronan Deazley (2008) explains it. The novelty of the statute were ’elements of a largely original endeavour that addressed issues concerning the encouragement of learning, the position of the author, and the nature of the book trade in general.’
International copyright has its origin in the acknowledgement of the increased number of unauthorised translations and reproductions of foreign works on some national markets. While not necessarily seen as a problem (in fact Ricketson and Ginsburg (2006:19) note that some countries even ‘considered [it] an honourable practice, contributing to the spread of learning and enlightenment to the local populace’), several bilateral agreements were made between European countries during the 19th century. These bilateral agreements preambled the 1886 Berne convention for the protection of literary and artistic works (shortened to the Berne convention), which still is the main international treaty on copyright. Today, it is administered by the World Intellectual Property Organisation (WIPO), and was last amended in 1979 (WIPO 2016b).

**Global copyright: Berne convention and WIPO**
The Berne convention (1886; last amended in 1979) stipulates basic copyright rules for the contracting parties (currently 169 nations), who agree to include three criteria in their national
copyright legislation: rightsholders from other contracting parties shall have the same protection as national rightsholders; the national legislation needs to provide a certain minimum protection for copyrighted works; and there shall be no formal requirements for the protection to be valid. Two concrete examples are a minimum protection of 50 years after an author’s death (which means someone other than the author can be the rightsholder of a work) and the use of a three-step test to decide whether limitations and exceptions to copyright are applicable.

While the Berne convention hasn’t been amended recently, discussions in the World Intellectual Property Organisation\(^2\) (WIPO) have resulted in separate agreements, e.g. the WIPO Copyright Treaty (WCT) and WIPO Performance and Phonograms Treaty (WPPT), both created in 1996 and ratified in 2002. Furthermore, WIPO's Standing Committee on Copyright and Related Rights (SCCR), set up in 1998-1999, convene biannually to discuss international copyright matters. One current topic of discussion is limitations and exceptions to copyright (WIPO 2016a), where GLAM related non-governmental organisations (NGOs) such as IFLA (International Federation of Library Associations and Institutions), ICA (International Council of Archives), and ICOM (International Council of Museums), take an active part, advocating limitations and exceptions that will enable GLAM institutions to preserve and disseminate information and knowledge in a digital environment (IFLA 2015).

**European copyright: EU Directives**

Similar to the global level, the European Union (EU) level copyright system is based on the principle of territoriality (even though efforts have been made during the last 20 years to achieve more harmonisation between the EU Member States). Axhamn and Guibault (2011:vi-vii) describe two ways of dealing with this principle when disseminating content

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\(^2\) WIPO is one of the 17 specialised agencies of the United Nations (UN); examples of other specialised agencies are WHO, IMF, UNESCO (UN 2016).
across borders: either judging by the international private law rule of lex loci protectionis (applying the legislation of the state where the work is made available), or the principle of country of the reception (applying the legislation of the state where the work is accessed). They add that the combination of these two approaches would be that 'institutions would have to clear rights for every country where their content can be accessed online.' This would require legal expertise of all related copyright frameworks rather than just one, harmonised framework. Employing this expertise in public GLAM institutions is a question of resources.

The InfoSoc directive (2001/29/EC) is the main piece of copyright legislation in the EU, even though a number of other directives also cover aspects of copyright and related rights. The other EU directives that regulate copyright are Computer Programs Directive (2009/24/EC); Rental and Lending Directive (2006/115/EC); Satellite and Cable Directive (93/83/EEC); Term Directive (2006/116/EC); Database Directive (96/6/EC); Resale Right Directive (2001/84/EC); and Collective Management of Copyright Directive (2014/26/EC). A special mention should be given to the SatCab Directive (93/83/EEC), which defines collective societies\(^3\) and stipulates that for cable retransmission, the 'rights to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a collecting society.' This gives some precedent to the possible development of collective management of copyright in other areas.\(^4\)

The ongoing review of the EU copyright rules\(^5\) started with a study by the Amsterdam Instituut vor Informatierecht (IVIR) on the implementation and effect of the InfoSoc Directive in Member States' legislations, which concluded that the directive did not live up to its

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3 "[A]ny organization which manages or administers copyright or rights related to copyright as its sole purpose or as one of its main purposes." (SatCab Directive 93/83/EEC, Art. 1.4)
4 The other copyright directives only mention collective management as one of many solutions for rights management.
expected potential (IVIR 2007:165-168). The study was followed by a green paper from the EC on Copyright in the Knowledge Economy (2008), which raised questions concerning scientific and scholarly publishing, the role of libraries and researchers, and legal uncertainty in a cross-border context. In May 2011 the European Commission (EC) adopted a strategy on intellectual property rights, disregarding the green paper call for an evaluation of the InfoSoc Directive and instead suggesting ‘innovative licensing solutions’ (European Commission 2011:13).

In December 2012 the Commission initiated Licences for Europe, a solution which would require no legislative change, but involved stakeholders from the research sector withdrew in protest from the development process after six months ‘due to concerns about the scope, composition and transparency of the process’ (LIBER 2013). In December 2013 the EC issued a public consultation on the review of EU copyright rules, with the objective to gather input from all stakeholders on the review of the EU copyright rules. By the closing of the consultation in early 2014, they had received a large number of contributions (>9500). The European Parliament’s (EP) Committee of Legal Affairs released a report based on the consultation responses, including a motion for an EP resolution, in June 2015.

Discussions have continued in the EC and the EP, and a new draft on the modernisation of copyright rules is expected from the EC in September 2016.

**Brexit Implications**
The implications of Brexit in regards to the EU copyright framework have yet to be seen, but they will be complicated, and highly dependant on many factors and decision-making bodies. Some predictions have been made on the blog Ipkat, where Eleonora Rosati (2016) writes that ‘[i]f the UK leaves the EU but remains in the European Economic Area (possibly the most optimistic outlook in the very aftermath of the referendum), then the relevant body of EU
copyright legislation will continue to apply in this country.’

Rosati points out that the European Court of Justice (CJEU) ’has become a primary player in the EU copyright scene, acting in certain cases as de facto policy- and law-maker’ and that with Brexit ’UK courts would arguably lose their power to make themselves references for a preliminary to ruling to the CJEU’, resulting in that ’the UK would still apply EU legislation but its judges would be no longer able to make queries on their correct interpretation (and application).’

This, in turn, might result in UK deciding ’to pursue routes that – so far – have appeared extremely unlikely to be followed at the EU level. For instance, it could decide to abandon a closed system of copyright defences and adopt an open norm instead, possibly modelled on US fair use.’ (Rosati 2016) Another option is that ECL becomes a solution to the UK not being at the bargaining table for cross-border copyright. Instead of creating international legislation, access may be achieved through agreements between CMOs.

Either way, Brexit will be a factor to consider when developing a cross-border access framework. At the moment it is not possible to say to what extent, but a positive note might be that the UK are free to try out solutions for cross-border access that would otherwise have been hindered by EU legislation.

National copyright: the legislations of Sweden and the UK
Since the Swedish and the UK rights clearance solutions are the objects being compared and contrasted in this study, this section will provide an overview of their respective copyright legislations, how they are enforced, and recent legislative changes that are related to the development of the information society.

As has been described in previous sections, nations have different copyright systems, depending on legal tradition and cultural history, but assumedly also depending on the
intellectual property ecosystem of the nation. For example, the charges for the use of intellectual property are 12.1% (~$9.2m) of the total export value (~$76m) in Sweden, and 5.0% (~$18.2m) of the total export value (~$365m) in the United Kingdom (UNCTAD 2014).

If a large amount of the nation’s total export is charges for the use of intellectual property, this would probably act as an incentive for an industry beneficial legislation.

**Sweden**

The Swedish copyright law (*Lag om upphovsrätt till litterära och konstnärliga verk*, SFS 1960:729) has been amended six times since the InfoSoc Directive came into effect. Sweden does not have a specific government body for intellectual property rights; *Patent- och registreringsverket* (PRV) is responsible for patents and trademarks, while any copyright enforcement is made through judicial processing. The extended collective licensing (ECL) provision is found in 42 § of the Swedish copyright law and it was introduced in 1960 as a solution for rights clearance of transmission of literary and musical works in television and radio.

Two recent legal reviews relevant for the copyright law are the Swedish Government Official Reports (SOU series) SOU 2015:47, which looked at collective management of copyright (especially concerning musical works; the SOU follows up on the Collective Management of Copyright Directive, 2014/26/EC), and SOU 2010:24, which looked at the ECL provision in Swedish copyright law and proposed minor changes to the existing legislation.

**United Kingdom**

On 1 June 2014 copyright law reforms on research, education, libraries and archives came into force in the UK. The two major changes for the GLAM institutions were (1) regarding making copies of works for preservation, and (2) regarding copying works for those carrying
Simultaneously with this process, other action items from Ian Hargreaves’ copyright review *Digital Opportunity: Review of Intellectual Property and Growth* (2011) were followed up, one of them being the Digital Copyright Exchange which was suggested specifically to solve rights clearance issues.

Hargreaves’ idea of the Digital Copyright Exchange led to independent studies on the value of such a system (Hooper 2012; Hooper & Lynch 2012). The studies led to a proposal to create an initiative ‘capable of linking scalably to the growing network of right registries, copyright-related databases and digital copyright exchanges, [and] to facilitate cross-border and cross-sector copyright licensing,’ namely the Copyright hub (Copyright hub 2014).

While Hooper & Lynch (2012:51) envisioned a Copyright hub providing content identification, licence generation, and orphan works diligent search capability, none of these functions are currently available at the Copyright hub, and its function as a rightsholder register to facilitate diligent searches is discussed further in the literature review and the analysis.

**Licensing as a rights clearance tool**

Axhamn and Guibault have written a report on cross-border extended collective licensing for Europeana, and their view is that problems related to mass-digitisation and online dissemination of copyright protected works held by GLAM institutions would be best solved by collective licensing (2011:vii). A licence is ‘a contract, not necessarily in writing, in which one party (the licensor) transfers rights to use certain property to a user (the licensee) for some limited period of time or until some event’ (Callister & Hall 2009).

As for licensing solutions, they are not in conflict with the InfoSoc Directive, nor any other directive. In article 1.5 of the Orphan Works directive (2012/28/EU) it is stated that the
directive shall have no effect on national legislation already in place; i.e. ECL and similar legal provisions remain in effect. Malm and Axhamn (2015:85) writes that through the CJEU, principles have been developed to define 'best practices of collective management of copyright and related rights', e.g. the representation agreements of the CMOs (collective management organisations), and their relation to users and rightsholders.

**Practical Implications for Libraries**

Licensing as a solution for copyright issues in libraries offers flexibility and experimentation that is not possible within current legislative frameworks in themselves. However, a system relying on legal negotiations requires a certain amount of legal expertise from both negotiating partners as well as sufficient resources to negotiate from both partners.

A trend leaning towards wanting to hire librarians with copyright skills can be discerned in Kawooya's et al. (2015) examination of advertising trends at JobLIST (a library positions mailing list for the US and Canada). They conclude that positions mentioning copyright has increased from 9% in 2006 to 13% in 2011, and that the pattern shows a slow and steady growth. Interestingly enough, none of the 264 ads examined in the article required a Juris Doctor, and the MLS/MLIS was always mentioned first. This might indicate that legal expertise is becoming a more sought-after skill in librarians, while libraries still do not necessarily seek to expand their present hiring of legal professionals.

**The Extended Collective Licensing Model**

Extended collective licensing (ECL) is a means of conducting rights management through a third party, in lieu of direct agreements between the user and the author. Depending on the jurisdiction, ECL may concern the author's moral rights, neighbouring rights, lending rights, defamation, privacy, publicity, pornography and obscenity, international trade, exports and technology transfer, privacy, trademark, commercial codes, and employment law, as well as
the copyright (Callister & Hall 2009). The agreement’s extension to cover non-members, hereinafter referred to as outsiders, is what is meant by the extended effect of ECL (Axhamn & Guibault 2011:vii).

For GLAM institutions, an ECL scheme means that they are not liable for copyright infringement, since the CMO answers to the authors (both members and non-members) and administers remuneration for the rightsholders. A major critique to the system is the rights of the outsider, who has no influence over the licence agreement concerning their work. However, the outsider has the right to demand to opt-out of the ECL scheme.

ECL is not necessarily a preferred solution for libraries. For example, in British Library’s (BL) response to question 2 in the EU copyright consultation (Have you faced problems when seeking to provide online services across borders in the EU?) the BL expresses concern of ECL as a solution to mass-digitisation rights clearance (British Library 2014:Q2).

On the other hand, Kungliga biblioteket (KB), the National Library of Sweden (a Member State where ECL is used), expresses content with its current situation and suggest the EC look into incorporating the same ECL system in their proposal for a EU copyright reform (Kungl. Biblioteket 2014:Q4). KB refers to an EUScreen project from 2012 where material from its audiovisual archive was supposed to be made available within EU, but because of the amount of orphan works as well as rightsholders not being members of CMOs, it was not possible to make a collective licence. KB suggests that an ECL provision would have been a good solution to this problem (Kungl. Biblioteket 2014:Q1).

**Orphan Works**

When GLAM institutions carry out mass-digitisation projects they need to have the prior consent of rightsholders to digitise and make available a work (or other protected subject-matter) to the public, as described in the InfoSoc Directive (2001/29/EC). With orphan works
it is not possible to obtain such consent and prior to the Orphan Works Directive EU member states had different approaches to this issue, which could cause restrictions in the free movement of goods and services within the EU digital single market.

When GLAM institutions undertake to digitise their collections it is often in line with the mission they have been given by their owners (be it private or public institutions). Axhamn and Guibault (2011:v) write that there are two core issues for digitising these collections: the digital copy made for preservation purposes, and the online dissemination of this content to users. When this material is not in the public domain (i.e. works where the copyright has expired), the intellectual property rights must be cleared with the author. This can either be done with the author directly, or through a collective management organisation (CMO).

One problem arising from the clearance procedure under the current copyright legislation is that if the transaction costs for the rights clearance are higher than the expected value, the institution will probably not carry out any right clearing efforts (Axhamn & Guibault 2011:vi). Another problem is when the author of a work in a collection, and for which copyright still applies, is unknown. Then the work is a so-called orphan work.

Orphan works were not regarded as a rights clearance issue before mass-digitisation schemes, simply because the access was so limited that consequences of misuse and infringement were negligible.

In Anna Vuopala’s 2011 report on orphan works she finds that there is a considerable amount of orphan works in GLAM institutions around Europe. A large portion of works of unknown origin for which copyright is still in force consist of photographs and audiovisual materials, so while her conservative estimate is that 13% of books in copyright are orphan books, the percentage is even higher for photographs and audiovisual works. Her conclusion is that the cost of clearing rights ‘may amount to several times the cost of digitising the
material’ and she calls for a more efficient way to clear rights (Vuopala 2011:5-6).

**The Orphan Works Directive**

An orphan work is, according to the Orphan Works Directive (2012/28/EU), a work ‘protected by copyright or related rights and for which no rightholder is identified or for which the rightholder, even if identified, is not located.’ The directive governs certain permitted uses of orphan works within the EU. The stated intents in the directive are e.g. that ‘free movement of knowledge and innovation in the internal market is an important component of the Europe 2020 Strategy’ and that ‘creating large online libraries facilitates electronic search and discovery tools which open up new sources of discovery for researchers and academics.’

The directive has not been received with much enthusiasm, mainly because Article 3 on Diligent Search which means that no work can be digitised and disseminated by the GLAM institution prior to conducting a diligent search for its rightsholder. As upcoming examples will show, this process is costly and ineffective; the human, organisational, and monetary resources put into diligent searches for rightsholders are to high to be long-term sustainable for most public GLAM institutions.

Another noteworthy point of directive is that it only concerns ‘publicly accessible libraries, educational establishments and museums, as well as (...) archives, film or audio heritage institutions and public-service broadcasting organisations’ of the Member States, in order to ‘achieve aims related to their public-interest missions’ and doesn't 'interfere with any arrangements concerning the management of rights at national level.’ This means that the directive is quite narrow, making it remarkable that it does not actually solve the problems of the GLAM institutions.
**Rightsholder Registers**

The orphan works directive suggests a single online database in the EU to gather the results of the diligent searches, by this avoiding duplication of efforts when tracking down rightsholders (2012/28/EU, Recital 6). Such a register has been set up by the European Union Intellectual Property Office (EUIPO): the Orphan Works Database. In this 'organisations shall (...) record works in the database that they have identified as orphan during diligent searches.' (EUIPO 2016) The number of entries in this database is 1935, which is a humble amount compared to the millions of objects available through Europeana.

Beside EUIPO’s register, there are several other initiatives with the same aim: the ARROW register (Accessible Registries of Rights Information and Orphan Works Towards Europeana) has a similar function, and is run by a consortium of European national libraries (ARROW 2016). For some digitisation projects, ARROW has proved to be an insufficient resource. For example, in a digitisation project run by Wellcome Library, they found that the ARROW catalogue records did not always contain all of the associated rightsholders with a work. This was a problem especially in the scientific material that the Wellcome Library wanted to digitise, since articles often contain multiple authors (Stobo et al. 2013:17). ARROW currently lacks both the quality and the quantity to be a sufficient tool for rights clearance in GLAM institutions.

FORWARD⁶ is a similar portal for audiovisual works, and is a three-year project initiated by the Association of European Film Archives and Cinematheques (ACE). The aim is to 'create a permanent registry for [audiovisual] Orphan Works’ and to coordinate with the database run by EUIPO (FORWARD 2016). The outcomes of the project remains to be seen – it is possible that a narrower register will be better at aggregating metadata, but at the moment there is no clear evidence indicating this.

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⁶ N.b: Not an abbreviation.
The means of collecting rightsholders in a single database is also the original intention of
the UK Copyright hub, which was mentioned in the previous section about the UK national
copyright legislation. However, the Copyright hub has come to not function as an orphan
works register, but as an advisory tool on copyright for users and rightsholders (Copyright
hub 2014).

**Risk Management**

When ECL is not available and it is not feasible to perform a diligent search for each
individual object, GLAM institutions may use risk management for mass-digitisation rights
clearance. The risk management consists of taking samples from the collection that is to be
digitised to get an idea of the composition of the collection: how many of its works are
orphan? Based on the results, appropriate legal measures are taken: for example, if it can be
assumed 70% of a collection is orphan, the collection is digitised and made available and
some of the objects deemed as high-risk might have their rights cleared separately. The risk
consists of a rightsholder appearing to claim the work, and then take legal action against the
institution for copyright infringement.

To guard themselves from legal liability, a GLAM institution may put up a takedown
notice with the presumed orphan work, which means that if a rightsholder finds a work of
theirs has been published they can contact the institution and ask for the work to be taken
down from the publication platform. Not all legislations allow for risk management, and those
that do may do it to different extents. In the Nordic countries, the ECL provision renders risk
management useless as the licence is supposed to cover that specific legal liability.

The literature review contains a UK example of risk management application in a mass-
digitisation project. The system of notice and takedown is what is currently used in the US.
The system is under review, and the US situation is explained further in the literature review.
Literature Review

Beside the reports that are referred to in the background, the specific provisions of Swedish and UK copyright law are here explored further. I also discuss two global examples (outside the EU) of how cross-border access and licensing is being discussed, and present an example of commercial licensing solutions.

ECL – A Scandinavian Compromise?

In my previous research I have studied national library contributions to the copyright consultation issued by the EC in 2014. I found that the libraries suggested different amendments to the InfoSoc Directive, depending on the copyright tradition. For example, the Nordic countries, where ECL has been in use since the 1960s (Karnell 1985), presented this method as an alternative to legislative change, while Eastern European countries generally were more in favour of changes and additions to the limitations and exceptions. Libraries in EU Member States such as France, Germany, and the UK emphasised the sovereignty of the Member States as well as their, in their opinion, already functioning legal frameworks (Andersdotter 2015).

Mikko Huuskonen, who was written a doctoral dissertation on copyright and mass use, provides useful insights to the technology related change of the copyright institution, in his words 'how copyright is developing from a system based on exclusivity towards a system of compensation increasingly adopting elements of compulsory - that is, involuntary - licensing and its variants.’ (Huuskonen 2006:17).

Huuskonen (2006:201) refers to ECL as ‘the Scandinavian compromise’ created to ‘resolve the contradiction between copyright exclusivity and mass use’, and states that the logical and practical problem of mass use of copyright protected works is ‘how to grant licenses when the identification of individual use is not possible or requires an unreasonable amount of effort.’
The collective management and the ECL model is continuously reviewed, and while the discussion in the Swedish review of collective management of copyrighted works (SOU 2015:47) is based on cross-border licensing of musical works, many points in the review are valid for cross-border licensing of other types works.

A main argument is that the view on cross-border collective licensing has changed because of borderless digital networks, such as the internet. Malm and Axhamn note that the development of online services for music has been inhibited by the territorial copyright system, because making separate agreements with CMOs in every Member State where a service is provided is a time-consuming and complicated process (Malm & Axhamn 2015:353).

A UK Case Study of Copyright and Risk
Stobo, Deazley, and Anderson (2013) have studied the risk management of rights clearance in a digitisation project run by the Wellcome Library. The aim of this interview study was to compare the rights clearance exercises with those attempted by other cultural heritage institutions, and assess whether the practice would be relevant for other UK institutions. Their findings emphasise the importance of using takedown notices for published orphan works, to cover the legal liability issues.

One conclusion related to the rights clearance of orphan works was that the ARROW catalogue records did not always contain all of the associated rightsholders with a work. This was a problem especially in the scientific material that the Wellcome Library wanted to digitise, since those articles often contained multiple authors. The library’s solution (a calculated risk) was to use a 3/3 rule to control the overall number of rightsholders to control; if an author appeared less than three times, in titles with three or more authors, they were cut out from the rights clearance process (Stobo et al. 2013:17).
Commercial Outsourcing of Licence Management

Kim Zwollo, from RightsDirect – a subsidiary in the Nethlerlands of the US Copyright Clearance Center (CCC) – writes in an article (2012) that collective licensing can be easily managed by a technology that automates the licensing process. The solution ‘enables publishers to streamline and automate permissions online’ and users to ‘access a list of conent uses the publisher is ready to authorize online’ with ‘a simple click’. An example of the service is copyright.com, the CCC's central licensing hub where ‘millions of (…) rights are licensed voluntarily through the CCC by thousands of rightsholders.’ While this solution might offer an ”all-you-can-eat subscription” to the registered conent, it would still need registration of your content in an external database (a time-consuming task), and it adds yet another party to the licensing chain. While this form of practise does solve territorial issues by contracts that allow cross-border use, the article seems to be aimed at users within a commercial context, and it does not address the possibilities for this framework to be helpful for public GLAM institutions.

The article's proposed solution to practical licensing solution disregards the information needs of many actors who need practical licensing solutions by not disussing the intellectual property issues that arise on the way to using an automated licensing solution. For example, Zwollo does not explain what the legal implications are in all countries where this service is provided, nor the legal liability of the institutions or how one deals with orphan or out-of-commerce works. Dennis W. K. Khong (2007) provides an economic analysis of the orphan works problem, which in some way explains why orphan works is not touched upon when marketing commercial licensing solutions:

The problem of orphan works […] is the problem of missing markets. Missing markets is a form of market failure.

By this he means that a small demand for some orphan works exist, but there is no legal
supply to satisfy this demand. He suggests a solution may be to reallocate property rights to the public or temporarily allowing the public ‘to use and redistribute the work, with our without payment or a fee.’

Noteworthy in both of these cases is that they discuss copyright management from an economic point of view, and do not discuss the author's moral rights.

**Global example 1: South Korea**

Suhyeon Yoo and Hyesun Kim (2013) explore copyright clearing methods for electronic document delivery in South Korea. The nation is a contracting party of the Berne Convention since 1996 and has a fair use provision in its national copyright law similar to that of the US. Because the fair use provision is relatively new in Korean legislation it is unclear whether it applies to works from before its entry into effect. Furthermore, the fair use provision on the effect on current or potential market value of the work makes it difficult to apply fair use to electronic document delivery.

The authors' proposed solution for this is licensing agreements between institutions and publishers, but an obstacle is that copyright clearing practices are difficult in Korea due to 'linguistic and cultural barriers that often accompany most documents (...) that are published overseas.' Agreements between national copyright collectives provide 'relatively cost effective ways to manage (...) using and reproducing copyrighted materials’, but licence fees are 'quite expensive compared to library remuneration fees in Korea.' Incorporating ECL into the copyright law could be a solution to enable rapid and legitimate distribution of international works, including orphan works, since ECL is designed specifically for mass use (Yoo & Kim 2013).

ECL seems to be appreciated as the the most centralised version of a licensing scheme;

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7 Republic of Korea
8 A list of contracting parties can be found on the WIPO webpage on the Berne Convention, link available in the bibliography.
limiting the amount of time and resources libraries and similar institutions have to spend on copyright clearing.

**Global example 2: United States**

Following the US Copyright Office’s report *Orphan Works and Mass Digitization* (2015), the US based Internet Archive sent in comments (2015) on the copyright office’s proposals of an ECL pilot programme. The Internet Archive has through its project Open Library\(^9\) collaborated with a lot of libraries, and it criticises the copyright office’s report for basing assumptions on Google’s book scanning projects. It does not see this approach as realistic for libraries, because their digitisation projects often include a broader scope of creative works than books – materials that are orphan works to a larger extent than books.

The Internet Archive emphasises in its response that ‘many European digitization efforts have been managed by a strong, centralized national library,’ which differs a lot from the practices of modern US digitisation efforts. It also identifies a danger that an ’ECL proposal seems to limit digital access to those who largely already have it rather than expanding access to underserved communities without large institutional libraries nearby.’

The Internet Archive’s suggestion is to not implement an ECL system but to instead keep the ad hoc system of notice and takedown that is currently in use. While not perfect, the Internet Archive deems it easy to understand for involved parties (i.e. GLAM institutions and rightsholders), the system has a basic norm established by DMCA,\(^{10}\) and it could be improved by a ’notice and takedown safe harbor.’

\(^9\) https://openlibrary.org/
\(^{10}\) *Digital Millenium Copyright Act* (1998)
Methodology and Theoretical Framework
In this section I explain why I chose to study the solutions of Sweden and the UK, which methods I used to conduct the study, and provide the theoretical framework which is essential for understanding how I did my analysis.

Why compare and contrast Sweden and UK
As explained in the background, ECL is a legal solution that has been used in Sweden since the 1960s. Therefore, studying the use of ECL from the 1960s until today will give a picture of how this solution has been applied in the paradigm shift from analogue to digital. Furthermore, having done a master’s degree in library and information science in Sweden, I am acquainted with the Swedish legal system and as a Swedish speaker I can study Swedish documents without hindrance.

The choice of UK as a comparative country is logical because of their recently changed copyright legislation (2014), which takes into account the digital paradigm shift and tries to resolve issues that has come up with the emergence of digital technologies.

Furthermore, both Sweden and UK are members of the EU, which is relevant for this comparative study since the EU has a common legal framework for copyright issues (although not solving all cross-border issues) and are currently looking into different solutions for cross-border access to digitised material (cf. Axhamn & Guibault 2011).

Interviews
I have conducted semi-structured interviews with key people in the field. Anne Galletta (2013:2) writes that ‘the semi-structured interview (…) creates openings for a narrative to unfold (…) [and] leaves a space through which you might explore with participants the contextual influences evident in the narratives but not always narrated as such.’
I find this approach useful for my research because it helps confirming or disputing the facts presented in the background or the literature review, and furthermore the interviews provide a space to express ideas which aren’t bound by the status quo of the practice. Since an aim of the research is to provide a roadmap for future development, this idea exchange is very fruitful for discerning possible routes.

As for the interviewing methodology, I have used Anne Galletta’s handbook for semi-structured interviews, *Mastering the Semi-Structured Interview and Beyond* (2013), thus taking care to connect the interview questions to the research purpose, and place the question ’within the protocol [to] reflect the researcher’s deliberate progression toward a fully in-depth exploration of the phenomenon under study.’ (Galletta 2013:45)

I set the stage for the interviewees by presenting the following questions as the base for the conversation:

- What are the British/Sweden system’s flaws and what are its strengths?
- How is ECL discussed in the UK/Sweden (also in relation to EU)?
- Where do you see the cross-border copyright and licensing situation going in the future, especially concerning mass-digitisation projects?

However, these were not the questions being directly asked to the interviewees. To lead the conversation I used the following set of questions:

- Do you work with licensing on a practical or theoretical level? Or both?
- In light of the current copyright debate on EU level, how do you see the situation developing 1) in your national legislation, and 2) in a cross-border context?
- How would the two different solutions (copyright exception vs licensing scheme) affect archives, and other GLAM institutions?
- Does your institution have a set of principles or policies on entering into licencing agreements? If so, what does it say?
• Does your institution have an official opinion on the matter of copyright and licensing?
• Does your institution hold a lot of orphan works? How do you deal with digitisation of them?
• If you have access to numbers/estimates, approximately how many 1) orphan works and 2) licences does your institution hold?
• Is it better if the rights clearance risk management lies at CMOs or GLAM institutions? What are the pros and cons?
• Varied results have been given by research and reports: is ARROW a good/sufficient tool or not?
• Will the implementation of the music CMO directive (2005/737/EG) prejudice also other kinds of material?
• How do you personally view the conflict between a transparent copyright legislation, and licensing agreements made between private parties? Do you see a principal problem?
• Which right is more important: the rightsholders’ right to remuneration or the public’s right to access information?
• How well suited would the current legal solutions for cross-border access of orphan works in the UK/Sweden be for application in Europe (EU)?

The questions are a mix of open-ended to focus on experiences and specified and theory-driven to focus on ideas. Because the interview is a collaborative process, data analysis occurs alongside the data collection in qualitative research. It is important to keep in mind that the analysis of an interview segment might not be complete in itself, but must be contrasted and compared to other available information such as structural opportunity and historical context. As Galletta (2013:119) writes: ’an idea from the data might take several permutations before it is fully accessible.’

**Interviewees**
Because of time limitations and availability, I have conducted three interviews. The initial
plan was to interview five to six people. To compensate for this information gap, the literature review and the background have been made more comprehensive, thus ensuring I have enough data to build on in the analysis.

The interviewees were identified through their national and international affiliations and their experience and expertise in the area. I have interviewed the following persons:

- The lawyer and the legal advisor of Kungliga biblioteket (KB), Jerker Rydén, who has also been involved in EBLIDA’s (European Bureau of Library Information and Documentation Associations) expert group for copyright.
- The archivist and the copyright advisor for the Scottish Council on Archives, Victoria Stobo, who also is a PhD student at the University of Glasgow and actively participates in WIPO SCCR.
- The CEO of Chartered Institute of Library and Information Professionals (CILIP) and former chair of the Europeana Network, Nick Poole, who previously was National Policy Advisor to the UK Museums, Libraries and Archives Council.

**Theoretical framework**

To analyse the interviews and connect them to the background and the arguments made in the literature review, I use the digital ecosystem model, with emphasis on the part that is the management lifecycle. A similar model have been used e.g. at the Digital Curation Centre at the University of Edinburgh (Higgins 2008) and by commercial actors in the digital asset and media management business (cf. Widen Enterprises 2014). It is prudent to use this model because it puts the role of GLAM institutions and orphan works in the context of the digital single market, a perspective sometimes overshadowed by the altruistic motive ’access to information for all’ – a more noble perspective, perhaps, but less measurable in GDP.

**The Digital Ecosystem Model**

Boley and Chang (2007:1) describe the digital ecosystem as an analogy on the biological ecosystem, a system where ’species need to interact with each other and balance each other
(even though some species may play a leading role at times). The environment supports the needs of its species so they can continue generation after generation.’ To sustain such a system, engagement and interaction is required, as well as a balance between the ’species’ in the ecosystem.

Boley and Chang (2007:2) write that ’current collaborative environments are not demand driven because people are told to collaborate or forced to work together, rather than enjoying collaboration arising from a perceived mutual interest’ and suggest the environment in the digital ecosystem is better suited to show ’species’ how they benefit from it.

The digital ecosystem model is in many ways similar to other sociological models: the network model, explained by Castells (2009:501-502) is an ‘open structure, able to expand without limits, integrating new nodes [that] communicate within the network (...) as long as they share the same communication codes (for example, values or performance goals).’ The strength of the network model would be to analyse power relationships, innovation, decentralisation, and processing of new values, but its lack of continuity would perhaps not give satisfactory results in terms of finding a long-term sustainable model for the environment I am looking at.

Similarly, the actor-network theory (ANT) as explained by Bruno Latour (2005) would be a useful tool for my analysis, but the digital ecosystem model is better established in digital asset and media management (DAMM) research so I choose to instead use concepts from ANT to enrich the ecosystem model. Latour (2005:46) defines the ’actor’ in the network as ‘what is made to act by many others’ and I apply the role of ’actor’ to both objects, subjects and agents in the digital ecosystem. The actors are both human and non-human entities, and the application is similar to Boley and Chang’s (2007:3) ’agent’ that ’can be a client and a server at the same time (...) agents may offer a service to others as a Server and request help
The Management Lifecycle as an Analytical Tool

For the analysis, I am breaking down the digital ecosystem into smaller parts by using Sheila Anderson’s (2015) visualisation of the DAMM ecosystem, and then breaking out the management lifecycle in a visualisation similar to Higgins digital curation model (2008).

Illustration 2: Visualisation of the DAMM ecosystem, based on Sheila Anderson (2015)

In this visualisation, the management lifecycle covers every interaction in the ecosystem. The ‘species’ from the ecosystem is covered by subjects (here: people, organisations, businesses), objects (here: digital assets) and agents (here: systems, technology, functions) since these interdependently interact with each other.
In this visualisation of the management lifecycle the processes of managing digital assets have been divided in four parts: create, manage, distribute, and preserve. The division is from Widen Enterprises’ (2014:3) explanation of the DAMM lifecycle and depict the continuous workflow of digital asset management. I will analyse the rights clearance workflow as an integrated part of this lifecycle model.

In the context of mass-digitisation and rights clearance, create is defined as creating the digital collection (the actual digitisation and the curational choice); manage is defined as the management of rights and the collection’s structure; distribute is defined as disseminating the digital collection to users; and preservation is defined as decisions on collection building practice and plans for collection development.
Analysis
The analysis part of this dissertation is divided into five parts: the four parts of the management lifecycle and general policy making. The four lifecycle parts are create, manage, distribute, and preserve as defined in the theoretical framework. The semistructured format of the interviews allowed for broad discussions on both institutional practice and general policy-making and I have excerpt and sorted the interviewees’ stories under the five different headings.\textsuperscript{11}

Create
Nick Poole, who was responsible in the UK government for managing large scale digitisation programmes, says he became involved in the rights discussion right at the beginning of the web: 'Copyright was this massive issue that everyone was agonising about.'

When discussing the creation of new digital collections, Poole thinks that in the current discussion the impact of the perceived balance risk is disproportionate to the actual downside risk: 'The risk of digitising orphan works is very limited in the UK; if you’ve got a decent takedown policy, safe harbour, and good intent, there is so little established case law about it that the downside risk to infringement is really small. But people have let it become this vast risk.'

Victoria Stobo says that when it’s difficult to determine whether a work is in or out of copyright, ECL is a problematic solution: 'It often means a lot of public domain works gets caught up within the scope of the ECL schemes, and they’re then subject to restrictions on their use, which they shouldn’t be. (…) For a lot of these projects I get the impression that it’s simpler just to assume, and for that reason public domain works ends up getting mixed in.'

\textsuperscript{11} Some statements are overlapping the management lifecycle categories, which is to be expected as it is a continuum.
Jerker Rydén thinks ECL is a good solution, but says that the rights discussion is over-emphasised, because there is neither structure nor infrastructure available to serve the expected purpose of mass-digitisation, and this problem that needs to be addressed before discussing legal issues for cross-border dissemination. He says that KB doesn’t have the capacity to provide the digitised material at the moment, but that they are working on pilot projects to test out legal and technical solutions.

‘We deem it reasonable to test the different options available in a way that is practical and economically justifiable,’ he explains when we discuss the recent pilot project on cross-border access that KB runs in collaboration with Åbo Akademi University, Finland. Rydén explains that the pilot projects KB runs are different ways of trying out the tools available, rather than challenging the existing legal frameworks.

**Manage**
Once a material has been chosen for mass-digitisation the material has to be managed, and this contains providing metadata and getting rights clearance. In spite of WIPO SCCR’s focussed discussion on copyright limitations and exceptions for libraries and archives, Nick Poole says that copyright is not necessarily broken in the Internet age: ’There’s lots of human policy, and emotional and psychological stuff going on about risk, fear, complexity, and scale, where people use copyright when actually what they mean is that there’s a concept there that’s to big for them to sort out.’

**Rightsholder Registers**
The UK Copyright hub was, as described earlier, a tool for rights clearance. Stobo says that the hub ’appears to have been a result of photographers being up and arms about the orphan works legislation. (...) [It was supposed to be a] a one-stop-licensing-shop, but I’m not sure if

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12 Read more about the project in the Swedish Library Association’s magazine *Biblioteksbladet* (9/2015).
13 This was for example a major discussion topic on SCCR 32 in May 2016.
it’s fulfilling that at the moment, and I don’t know what the long-term plan for it is.’

Nick Poole says that because ‘[the Copyright Hub] creates a parallel process that seeks to solve part of the specific supply chain problem [with orphan works]’ it is a failure just because it creates this parallel process; Poole thinks any rights management and diligent search should be at the point of acquisition. He mentions the IPO’s (UK Intellectual Property Office) register which despite many efforts and much money only has 375 works registered. ‘It’s highly unlikely that any secondary mechanism is going to be an effective conduit for the appropriate thought process of due diligence and rights clearance.’

Stobo doesn’t have a lot of confidence in other registers either:

ARROW, as for as I’m aware, is not functioning. The Wellcome Library used [it] during the Codebreakers project to clear rights in the books, but they decided that they’re not going to digitise them at the same scale because the rights clearance was very onerous. They used the ARROW system but it didn’t give any good results in terms of actually finding rightsholders, which is kind of what you want from a rights register. If [all CMOs] had continued working together, sharing data, I think that would’ve been potentially a really useful and worthwhile initiative, but I think it’s actually hard to convince CMOs of the benefits of that because their data is commercial. It’s not really in their interest to go sharing it because that’s how they make their money – by being the first point of contact.

Poole’s analysis of CMOs is similar:

We’ve created [CMOs] which ought, in a sensible economic model, to be an efficient means of aggregating supply and demand between the two parties [rightsholders and GLAM institutions]. And we’ve given them, because of the way they’re structured and governed, and because of their business model, a vested interest in keeping those parties at odds from each other.

Stobo thinks that more pointed registers could be more useful than a central register, mentioning FORWARD as an example where the register has been able to aggregate more data, but that this on the other hand it would require more work if the GLAM institution have a more diverse collection. She adds: ‘But I probably also think that because I’m in a country where the CMOs are split in terms of their market.’
So, the economic motives from CMOs is described by Stobo as a hinder for the success of rights registers, but she doesn’t necessarily think rights registers is the right solution to the overall problem.

If they were to be the preferred solution though, Ian Hargreaves and Bernt Hugenholtz have suggested a solution for the CMOs’ reluctance to share data in their reply to the copyright consultation (2014): 'EU law could provide further incentives to make metadata publicly available, for example by requiring that CMO’s permit public access to their metadata.’

Jerker Rydén says there seems to be an overconfidence in the availability of metadata and the register solution: 'Registers are only as good as the data they hold. As a comparison, libraries hold sufficient metadata for about 30% of the collections. If you don’t have enough data the whole register becomes flawed.’

**ECL**

Stobo isn’t too fond of the option of outsourcing the rights clearance process through an ECL scheme. First of all she points out that the UK doesn’t have that strong tradition of collective management (except in a couple of sectors), and secondly she calls the licensing scheme a bureaucratic nightmare: 'It’s not well-used, it’s expensive in terms of the time it takes to go through the applications process, and you can’t use it for mass-digitisation. It could perhaps be used for high-risk orphans.’

Poole agrees with Stobo’s opinion, and says that he has 'yet to see a collective licensing scheme that is cheaper than it is to simply deal with the risk.’ He adds that 'the collective licensing always falls down on price. (…) It costs human and organisational resources even if the licence cost is very low. (…) If [a work] has become orphaned it is highly unlikely the cost of collective licensing scheme is going to be proportionate.’
The UK has recently passed ECL legislation and just issued guidance for CMOs thinking about applying for ECL. Stobo comments that: 'A lot of work has been done on making CMOs more transparent, but it’s not always clear [how they work]. It’s not always in the CMOs best interests to search for [unrepresented] rightsholders too hard, and just keep the fee they’ve collected for their own national members.’

Rydén, who works in a country where an ECL scheme been in place since the 1960s, on the other hand sees many positive things about ECL: 'It is useful, because it solves the rights clearance issues for the libraries.' He believes that the ECL model works very well in the Nordic countries because of the societal structure, but he acknowledges that it might be more problematic in countries with no collective tradition.

Rydén believes compromises are needed between the different stakeholders; his experience is that it has become a very polarised debate, where publishers and libraries have been digging themselves down into opposite trenches. He says the MoU [of Out-of-Commerce Works]14 is an example of how solutions could be reached, and would welcome this approach in more areas.

Rydén has a pragmatic approach to KB’s mass-digitisation programmes: 'I have nothing against [copyright] exceptions but as a professional I need tools that work, I need to see that the solutions provided work for what we are trying to achieve.'

**Distribute**

When it comes to distribution, Stobo notes that licensing schemes for educational purposes has worked very well, e.g. for university libraries: 'The way the [ECL] legislation is phrased about showing that you’re representative over a particular sector. I think the CMOs have found it difficult to decide how they might demonstrate that representation. (...) The CLE,

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14 The European Memorandum of Understanding: Key Principles on the Digitisation and Making Available of Out-of-Commerce Works was signed in 2011.
which is the school and universities CMO, have been preparing an application for some time. They run a de facto ECL at the moment anyway, so it would just be applying to make that official.’

Because ECL is nationally restricted (unless there are reciprocal agreements with other CMOs) Stobo says there is a lot of debate about the rights of international rightsholders. When it comes to making available the national material in GLAM institutions, Stobo mentions the Norwegian mass-digitisation scheme, where the content is only available to Norwegian citizens, and the Slovakian subscription model for the content of their national library, which can then also be accessed cross-border. Stobo comments that 'the sort of arguments we have on WIPO about this is "Why would someone [from another country] want to access material from Norway?"' and then adds some examples where this access would be motivated, e.g. in research, the mobility of people, and translations (which indeed was the trigger for the Berne convention in the first place!)

Rydén also discusses linguistic borders of the copyright market, and disagrees with the idea of a European single market: 'Not only is the digital single marketplace not defined, it does not even exist. (...) It’s a global market, which is quite fragmented from a linguistic point of view.’ He also comes back to the fact that the technical infrastructure might be a bigger issue than the actual legislation, and emphasises that interoperability on a legal, technical, and administrative level, so only having a discussion on the legal level doesn’t make sense.

On the function of licensing schemes to ensure cross-border access, he notes: 'Exceptions and fair use are territorial, so for systems to be interoperable they need to be legally compatible. For example, countries with ECL and mandatory licensing would possibly be compatible for cross-border access, since rightsholders in ECL countries can opt-out on a national level, meaning their works wouldn’t be available in the other country anyway.’ In that
way, he means cross-border licensing solutions would be possible in all countries that allow for either ECL or mandatory licensing, but on the other hand the same exchange would not possible between countries with ECL and fair use provisions.

Rydén doesn’t think a global exception is plausible, because exceptions with the same intital purpose tend to be formulated differently in national legislations, and therefore will have to be completed by licensing schemes anyway. Furthermore, a global exception would most likely be so watered down that it still wouldn’t allow for the all-round access that is being called for. Stobo mentions an example from her experience which highlights the national differences: ’Any sort of discussion [we have about the 2039 rule or] unpublished works is quite difficult at European level because of [the copyright cultural traditions], particularly in France.’

Nick Poole calls for a discussion on the purpose of cross-border exchange in the copyright debate: ’What are we trying to do? And when we know what we’re trying to do we can figure outh whether it’s proportionate to have multilateral harmonised copyright (across many nations) or whether a bilateral agreement will do for the moment.’

Rydén asks the same question: ’[What are the] different processes that a cross-border agreement needs to cover – digitisation, dissemination, cross-border access, and public performance (e.g. in education)? Since exceptions and limitations are quite narrow, all of these might be hard to cover within one exception while at the same time being compliant with the three-step-test. In this way licences are currently more flexible.’

When it comes to making material available, Poole comments: ’One of the things none of us has learned yet, because it’s still so early, is that in a disrupted economy, what is the relationship between owning and borrowing? (…) All of the old industries weren’t the way they were because they were evil; they were the way they were because they were dealing
with an exhaustible. Because of digital, the principle of exhaustibility has gone [but] our economy hasn’t caught up.’

**Preserve**

Nick Poole puts the collection building of GLAM institutions in its historical context, mentioning the development phases of libraries: the ’collect everything’ period when material was collected en masse (Poole refers to it as a ’status race to build a European identity’); the ’catalogue everything’ period when card indexes were created for every item (”’otherwise it doesn’t exist,”’, comments Poole, ’and with the previous collect phase this was already disproportionate’); the ’digitise everything’ period (which Poole thinks ’compounds the error we made when we started collecting in the first place’); and then the ’connect everything’ period (the one we’re currently experiencing). He predicts the next phase will be ’share everything’, where items get added value from users and there will be a dissolved boundary between the library and its users.

Poole says that in these development periods, librarians don’t seem to consider the capacity issue. ’Therefore it’s irresponsible to suggest that the problem is a fundamentally broken copyright law.’ He thinks that the collection habits of GLAM institutions cause many problems, including the copyright and mass-digitisation problem:

It’s not just the fast technological development that has caused problems, it’s also the collecting habits that were already there. We’re still acquiring more than we can catalogue and manage. (...) Why are we acquiring these vast collections of material if we lack the capacity and infrastructure to connect that material with the administrative information that makes it legally usable? (...) Despite big data analytics and digital humanities, it’s not a useful practice to collect everything. And it’s certainly not a sustainable practice. (...) It’s an unprecedented capacity, but we have to have better strategies for it.

Poole also raises the issue of why we have orphan works in the first place, because objects and records are orphaned for a reason. ’They either become orphaned because they become disassociated from the rightsholder, at which point one’s got to suppose that if the material
were of great significance or value the rightsholder would have put in a greater effort to not becoming divorced from their right.’

Rydén believes the issue of orphan works is exaggerated: 'The question of orphan works is a fictional question in many ways. [The works] are protected by copyright. The reason that orphan works has become a big [rights clearance] issue is the Google Books digitisation project,’ he says and explains that in a streamlined mass-digitisation process, a corporation would naturally want a simpler way of clearing rights than the manual diligent search.

Nick Poole’s view on the orphan works directive is that it bears the scars of the conflict between rightsholders and libraries: 'It’s an attempt to reconcile [them] (...) but it’s not the right thing.’ He comments:

If I look at a playground full of kids and I don’t know who their parents are, that doesn’t make them orphans. So if I’ve got 40,000 orphan works in my collection, because I can’t afford to do diligent search (...) our collecting habits might have made them orphan. (...) Unless or until our collecting practices are absolutely gold-standard and we are actively protecting against the creation of new orphans, publishers are always going to be suspicious of our motives.

To summarise, both Rydén and Poole seem to agree that the orphan works issue have been construed as an answer to other questions.

**Policy Making**

Jerker Rydén notes that as an authoritative body, KB produces statements and consultation responses, but these are not necessarily related to the practical reality; KB’s practice is bound strictly by the current legislative framework. 'KB is not an NGO, we have to work with the tools provided to us by the government. (...) Private institutions can do risk management, but KB can’t. That would be unconstitutional.’

This is a good point which highlights the difference between the Swedish and UK legislative system. In a common law system it is possible to use risk management because the law is built on precedent cases, while in a civil law system (like Sweden), the action would
challenge the law, but give no policy outcome.

The differences in legal system resound in the EU context as well. Poole says that harmonisation of legislation is incredibly hard: 'You have to have some secondary layer of harmonisation which doesn’t depend on the European legislative process. Which has to be cross-border agreements: it’s got to be cross-border contract licence, a memorandum of understanding.' All of the interviewees agree that legislative change would take a long time.

For example, Rydén says:

There are many institutionalised truths about copyright in different camps, and they persist because the parts (publishers, libraries...) sport these as opinions. (…) If we are going to wait 20 years to get the best solution from each part, it's not likely much will happen in this field.

Poole questions the need of a legislative change and suggest communication as an alternative to regulation:

Doing just-in-case multilateral agreements which try and encompass absolutely everything is always going to delay the process of what you’re trying to do.(…) In my experience, if you go directly from the institution to the rightsholder and you have a grown-up dialogue about what you want to enable, nine times out of ten you end up with a sensible agreement.

To the question *Which right is more important: the rightsholders’ right to remuneration or the public’s right to access information?* Stobo replies:

The right of remuneration is obviously very important, but I feel there are ways and means of ensuring that, whereas increasingly there seems to be only one way to guarantee access to information, and that’s through exceptions... Or open access, creative commons, and things like that.

Rydén notes that the right to access information is not an absolute right, and calls for GLAM stakeholders to also consider the right to contract when in discussion with other stakeholders. Poole says that while he fundamentally believe in openness and transparency, if we’re in this complex world where we’re trying to reconcile parties with different interests there are things of public interest which we may well need to agree within a licence agreement. Of the
rightsholders’ right to remuneration or the public’s right to access information, Poole says: ‘Neither takes precedence; they exist in a balanced ecosystem.’

While there is an economic value in mass-digitised collections, it seems to their cultural capital that’s used in policy discussions. For example, Poole says: ’I’ve sat in meetings with cultural ministers where they trade quantities [of cultural heritage records]. So it’s used in these soft diplomacy discussions.’

This implies is that large quantities of data have a value for policymaking, even though they are unmanagable, which would argue for the mass-digitisation schemes to continue, even if the collections aren’t curated to the extent Nick Poole calls for. On the other hand, uncurated collection wouldn’t be very useful for study, pleasure, creativity, and innovation, which is what GLAM institutions could contribute to the knowledge economy.

Noteworthy is also Poole’s observation that when the economy is strong, lots of public money goes into digitisation, and when the economy is weak, there isn’t enough money to do the job properly. ’That’s when the commercial imperative rears its head,’ says Poole. ’”How can we make these things economically sustainable? What are we actually doing here?”

If a behavioural change is needed, it’s just not the GLAM institutions that needs to change; if the political establishment value the cultural capital when the finances allow it, this attitude signifies that cultural heritage has a significant value not only to the GLAM institutions, rightsholders, or the end-users, but also to the society.
Conclusions

The aim of this dissertation was to compare and contrast the different solutions for rights management of orphan works in mass-digitisation schemes with examples from Sweden and the UK, and assess the suitability for an EU wide application of said solutions. Several conclusions can be drawn from the presented material, and this study does not provide an unambiguous answer as to which direction upcoming policy work should take.

First of all, I perceive a conflict between pragmatic and ideal solutions, where the ideal solution would be a wide exception in copyright law that would allow for GLAM institutions to go through the management lifecycle with a minimal number of subjects and objects in the digital ecosystem. Since an exception would eliminate the need for a rightsholder register, the number of agents would also decrease. In short, an exception would slim down the ecosystem considerably (without inhibiting its function).

A problem with working towards a copyright exception is that the legislative process takes a very long time, and as Rydén mentions, the scope would be hard to formulate, and the tendency of exceptions to be formulated differently in national legislations would probably also cause problems.

In addition to the long wait, the cross-border discussions would be (and are already) complicated by the different legal traditions and the cultural history of copyright in EU Member States. Stobo mentions that discussions about unpublished works is difficult especially with France, because it has a very clear focus on an author’s moral rights. For this reason, ECL would be difficult to implement in countries without a collective management tradition, and at it would likewise be hard to remove the ECL provision from the countries that use it, because it is very well suited to their traditions.

If licensing is not a solution, and legislative change is too far off, some solutions to try out
in the meantime could be:

- require CMOs to submit their metadata to rightsholder registers (thus achieving more usable registers for rights clearance of orphan works)
- not digitising works that are not in the public domain (if you’re not certain, it’s probably not public domain)
- work towards a new MoU, which because of its ’soft legislation’ nature would be slightly less extensive process than legislative change, and would only require consent from the direct stakeholders

As for the UK, they could embrace the possibilities Brexit has brought; if a development towards open-ended norms were to be realised in, this would almost certainly be to the advantage of GLAM institutions in charge of mass-digitisation and access to orphan works. While fair use provisions suffer from their lack of specificity, they also give a large degree of freedom to the institutional disseminators of cultural contents or digitisers to assess their own needs and for the courts to appreciate those assessments.

The unresolved issues in the transition to digital preservation that was mentioned in the introduction (money, infrastructure, scalability and sustainability) are apparent in the discussion about financing and revenue, technical capabilities, and collection management.

As Poole mentioned, the resources given to GLAM institutions for mass-digitisation follows the economy in general. Therefore it is hard to predict what is economically sustainable when building, digitising, and developing a collection. Because the resources are connected to political missions, it might not always be the GLAM institutions that cause the mismanagement of collection practices. If copyright is a problem for accomplishing a mission given to a public institution, this should be acknowledged.
On a theoretical note, I’m not convinced of the ecosystem and management lifecycle model as explanatory models for this issue, but an advantage is that it contains the process within a frame, whilst the network theory and the ANT theory do not have the same natural borders.

Can GLAM institutions do anything about their situation? Yes, they can. While they might be government bodies bound by legislation, it is certainly not uncommon for government bodies to be outspoken about promoting legislative changes that would make their mission easier to accomplish (cf. police, healthcare).

The transition to an information society and a knowledge economy is difficult, but not impossible. If the economy is disrupted, this should not be seen as a threat to the existing models of knowledge production, but rather be seen as an opportunity to explore new ways of creation and collaboration. Making GLAM collections available should be seen as one of these ways, and we need to follow that road to see where it leads.
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