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## **Abstract**

*Cultural heritage institutions increasingly seek to make cultural heritage available to the European public by publishing their collections online. A well-known initiative through which content is disseminated is Europeana,<sup>1</sup> but even for this successful portal it has proven difficult to incorporate works from the 20<sup>th</sup> and 21<sup>st</sup> century.<sup>2</sup> The underlying reason is the copyright that protects these works; without permission from the rights holder(s) the work may not be disseminated online to all European citizens and users.<sup>3</sup> The European Union is in the process of establishing instruments in the area of copyright law that will have an important influence on acquiring this permission. This article analyses these instruments to find out whether they are compatible with each other in respect of rules on cross-border copyright clearances and whether they ease the work of cultural heritage institutions seeking to make their collections available online.*

## **1 Introduction**

Cultural heritage institutions like museums, libraries, archives and film institutions possess vast amounts of material that teaches us about our history and culture. Increasingly the institutions digitise the material and publish it on the internet, preserving it against the ravages of time and encouraging education and the spreading of knowledge. The European Union fosters such initiatives, amongst others by creating financial resources that have helped realise projects like Europeana.<sup>4</sup>

However it is very difficult for works of the 20<sup>th</sup> and 21<sup>st</sup> century. Objects from these centuries tend to be underrepresented in the online collections as the copyright on these objects may not yet be expired: the objects are not yet in the public domain. Regardless of how the object was acquired, the cultural heritage institution needs permission of the copyright holder to publish the works online.<sup>5</sup> Due to the territorial nature of copyright, permission is needed for all countries from which the website can be viewed, which essentially means that the cultural heritage institution needs to clear the rights for every country in the world.<sup>6</sup> This can genuinely limit the objects being published online, as it is unquestionably very difficult to find

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<sup>1</sup> See [www.europeana.eu](http://www.europeana.eu) (accessed 15 March 2013).

<sup>2</sup> J. Axhamn and L. Guibault, *Cross-border extended collective licensing: a solution to online dissemination of Europe's cultural heritage?*, Final report prepared for EuropeanaConnect, Universiteit van Amsterdam: Amsterdam 2011, p. 9.

<sup>3</sup> Art. 3 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (2001, OJ L 167/10).

<sup>4</sup> Europeana is a website which serves as an internet portal, guiding visitors to over 26 million digital objects at over 2200 institutions (mostly) across Europe. See [www.europeana.eu](http://www.europeana.eu) and [www.pro.europeana.eu/web/guest/content](http://www.pro.europeana.eu/web/guest/content) (accessed 15 March 2013).

<sup>5</sup> Except when rights were transferred with the purchase of the work, but normally this is not the case.

<sup>6</sup> P.B. Hugenholtz, 'The Last Frontier: Territoriality', in: M. van Eechoud and others, *Harmonizing European Copyright Law: The Challenges of Better Lawmaking*, Kluwer Law International: Alphen aan den Rijn 2009, p. 309.

and contact the rights holders for every single copyrighted object among the thousands or millions of objects that institutions have in their collection. It becomes even more difficult when the author or rights holder of a copyrighted work is unknown or unlocatable, as this makes it impossible to acquire permission for the dissemination of the 'orphaned' work.

Fortunately the European Union does not only support the work of cultural heritage institutions on a financial level, but it also aspires to solve issues arising from the territorial nature of copyright. As a part of the Digital Agenda the European Commission aims towards creating a digital single market. This would simplify the online dissemination of cultural heritage by reducing the administrative burdens required for multi-territory rights clearance.<sup>7</sup> Within this context, three important instruments influencing cross-border copyright clearance have recently been introduced or concluded; the Memorandum of Understanding on Out-Of-Commerce Works (hereinafter: MoU),<sup>8</sup> the Orphan Works Directive<sup>9</sup> (hereinafter: OWD) and the proposal for a Directive on Collective Rights Management and Multi-Territorial Licensing (hereinafter: CRMP).<sup>10</sup> None of these instruments are currently bindingly transposed into the law of all European Member states.

Even though the instruments are created to simplify the dissemination of content over the internet, the question arises whether the instruments are compatible with each other. Moreover as the dissemination of cultural resources is to a greater degree the background aim of the creation of the majority of the instruments,<sup>11</sup> the question is whether the work of cultural heritage institutions will truly become easier by the introduction of this new legal framework.

This article aims at answering these questions, evaluating whether the three instruments are compatible with each other and whether they ease the work of cultural heritage institutions seeking to make their collections available online. In the following paragraphs it describes the instruments

(§ 2) and their regimes on cross-border copyright clearances (§ 3), to be able to answer the questions whether the instruments are compatible with each other (§ 4) and whether they will ease the work of cultural heritage institutions aiming at disseminating their collections through the internet (§ 5).

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<sup>7</sup> See [ec.europa.eu/digital-agenda/en/our-goals/pillar-i-digital-single-market](http://ec.europa.eu/digital-agenda/en/our-goals/pillar-i-digital-single-market) (accessed 15 March 2013).

<sup>8</sup> Memorandum of Understanding on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works, [ec.europa.eu/internal\\_market/copyright/out-of-commerce/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/out-of-commerce/index_en.htm) (accessed 15 March 2013).

<sup>9</sup> Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works (2012 OJ L 299/5).

<sup>10</sup> Proposal for a directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market (2012, COM(2012) 372 final).

<sup>11</sup> See § 2.

## 2 The instruments

The following sections discuss the three instruments introduced in the previous section. The general differences and similarities between them are presented and summarized in figure 1 at the end of the paragraph.

### 2.1 Memorandum of Understanding on Out-of-Commerce Works

The MoU is an agreement to enable digitisation and easy online dissemination of out-of-commerce works to foster large-scale digitisation initiatives.<sup>12</sup> The MoU tries to achieve its aims by encouraging cross-border collective licences and suggesting an extended collective licensing (ECL) model,<sup>13</sup> which will be discussed in § 3.1. It is limited to academic books and articles that are 'out-of-commerce', meaning books and 'learned' articles that are copyright-protected but not commercially available anymore. Furthermore it is limited in users; the MoU covers digitisation and dissemination by publicly accessible cultural institutions only. The MoU is the result of a dialogue between stakeholders, being organisations that represent libraries, authors, publishers and collective rights management organisations. It was signed in Brussels on 20 September 2011 by representatives of rights holders on the one hand and users on the other hand, but it is primarily a declaration of intent. As such it does not bind the Member States and will not bind them in the future, nor does it impose strict obligations on the signatories.

### 2.2 Orphan Works Directive

The OWD is a minimum harmonization directive that was adopted in September 2012 to solve the problem of orphan works, understood as copyright protected works of which the rights holder is unknown or cannot be located. Like the MoU it has been introduced particularly to boost large-scale digitisation initiatives.<sup>14</sup> Studies show that although the number of orphan works in the collections of cultural heritage institutions can vary, it is a problem that many institutions are faced with.<sup>15</sup>

When the rights holder of a work cannot be identified or located, a cultural heritage institution cannot acquire the permission necessary to disseminate the work through the internet. As a result cultural heritage institutions are unable to facilitate online-access to large parts of their collections without infringing copyright. The OWD solves this issue by putting Member States under the obligation of creating an exception to the economic rights in their copyright regimes

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<sup>12</sup> A.C. Beunen and L. Guibault, 'Brussels Memorandum of Understanding inzake digitalisering en online beschikbaarstelling van out-of-commerce boeken en tijdschriften', *AMI* 2011-6, p. 221-222.

<sup>13</sup> A.C. Beunen and L. Guibault, 'Brussels Memorandum of Understanding inzake digitalisering en online beschikbaarstelling van out-of-commerce boeken en tijdschriften', *AMI* 2011-6, p. 221 and 224-225.

<sup>14</sup> S.J. van Gompel, 'Het richtlijnvoorstel verweesde werken - Een kritische beschouwing', *AMI* 2011-6, p. 206, E. Rosati, 'The Orphan Works Directive, or throwing a stone and hiding the hand', *Journal of Intellectual Property Law & Practice* 2013, p. 306.

<sup>15</sup> Commission Staff Working Paper, 'Impact Assessment on the cross-border online access to orphan works accompanying the document 'Proposal for a directive of the European Parliament and of the Council on certain permitted uses of orphan works'', (SEC(2011) 615 final), p. 11-12.

that allows cultural heritage institutions to reproduce the work and make it available (Art. 6 (1) OWD). Works fall under the exception if they acquire the orphan work status, which can be achieved after a diligent search has been done and as a result of which the rights holders have not been found (Art. 2 (1) and 3 OWD). All orphan works have to be recorded in a database managed by the Office for Harmonization in the Internal Market (Art. 3 (6) OWD).

Regarding subject matter the OWD has the broadest scope compared with the other instruments, as it is applicable to all categories of copyright protected works, provided that their first publication or broadcast was in a Member State.<sup>16</sup> However the scope of the OWD is limited to certain (non-commercial) uses of orphan works by certain publicly accessible public-interest institutions like libraries, museums, film or audio heritage institutions and public service broadcasting organizations.<sup>17</sup> The directive has to be implemented by the Member States in 2014.

### *2.3 Proposal for a Directive on Collective Rights Management and Multi-Territorial Licensing*

The CRMP is a proposal for a minimum harmonization directive that has been submitted to the European Parliament in 2012.<sup>18</sup> The proposal is part of a European effort to create a level playing field for collective management societies.<sup>19</sup> It was introduced to facilitate legal online music services through improving governance of collective societies and encouraging multi-territorial licensing of their repertoire.<sup>20</sup> It is part of a broader effort of the Commission to combat territorial fragmentation of collective management in rights on music.<sup>21</sup>

Accordingly the CRMP has a double interlinked objective:<sup>22</sup> it aims to ensure good governance of CMO's<sup>23</sup> and to incite cross-border licensing,<sup>24</sup> which is reflected in the Title-division of the text.<sup>25</sup>

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<sup>16</sup> See recital (12) and Art. 1 (2) Directive 2012/28/EU.

<sup>17</sup> Art. 1 (1) Directive 2012/28/EU.

<sup>18</sup> Proposal for a directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market (2012, COM(2012) 372 final), Annex II, p. 45.

<sup>19</sup> L. Guibault and S.J. van Gompel, 'Collective Management in the European Union', in: D. Gervais (ed), *Collective Management of Copyright and Related Rights*, Kluwer Law International: Alphen aan den Rijn 2010, p. 136-137.

<sup>20</sup> J.P. Quintais, 'Proposal for a Directive on collective rights management and (some) multi-territorial licensing', *European Intellectual Property Review* 2013-2, p. 65.

<sup>21</sup> See for example the Commission's decision and case against the CMO's umbrella organisation CISAC: J.P. Quintais, 'The Empire Strikes Back: CISAC beats Commission in General Court', *Kluwer Copyright Blog* 23 April 2013, <kluwercopyrightblog.com/2013/04/23/the-empire-strikes-back-cisac-beats-commission-in-general-court> (accessed 23 May 2013).

<sup>22</sup> Commission Staff Working Document, 'Impact Assessment accompanying the document 'Proposal for a directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market'', (SWD(2012) 204 final), p. 14-15.

<sup>23</sup> The CRMP is about 'collective management' (see the title of the proposal) but uses the term 'collecting society' which is generally taken to be narrower than 'collective management organization', but defined broader in Art. 3

Title III on multi-territorial licensing (hereinafter: MTL) is of particular importance for cultural heritage institutions as it concerns cross-border copyright clearances. Currently cultural heritage institutions wishing to acquire a licence for online use of musical works are confronted with national CMO's for all Member States in which the content can be received. The CRMP aims at solving difficulties arising from the territorial nature of copyright. It creates a European licensing framework based on which CMO's can mandate each other to grant multi-territorial licences and it forces certain CMO's to accept those mandates. Ultimately the provisions should create the possibility to acquire a licence for a large repertoire and a large number of Member States at once, from one CMO. However the subject matter of this title is very limited as it is only applicable to online audio works (music, including music incorporated in movies and broadcasts). Moreover the section on multi-territorial licensing unfortunately only applies to CMO's managing authors' rights; related rights are excluded.<sup>26</sup> Further details of the CRMP's mechanism will be considered in § 3. As it is a proposal the CRMP is not yet binding and amendments to it can be made before the proposal is officially adopted.

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(a) of the proposal. Unfortunately discussing the difference and meaning within the CRMP is beyond the scope of this article. In this article the general (broader) definition and its abbreviation (CMO) shall be used. For criticism on the definition used in the proposal see J. Drexler et al, *Comments of the Max Planck Institute for Intellectual Property and Competition Law on the Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market COM (2012)372*, Munich 2013, p. 19-21.

<sup>24</sup> Explanatory Memorandum of the Proposal for a directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market (2012, COM(2012) 372 final), para. 1.1.

<sup>25</sup> Title II concerns good governance, Title III is about cross-border licensing.

<sup>26</sup> Art. 2 Proposal for a directive of the European Parliament and of the Council on collective management of copyright and related rights.

<b><u>Name</u></b>	<b><u>Date of adoption</u></b>	<b><u>Subject matter</u></b>	<b><u>Status</u></b>	<b><u>Characterisation</u></b>
<b>Memorandum of Understanding on Out-of-Commerce Works</b>	2011	Books, learned journals	Signed by signatories (organisations that represent rights holders and users)	Agreement ('Declaration of intent')
<b>Orphan Works Directive</b>	2012	All works (Restricted, non-commercial use.)	To be transposed into national laws by 29 October 2014.	Directive
<b>Proposal for a Directive on collective rights management and multi-territorial licensing</b>	2012	Audio/music (Also in films, videogames, broadcasts etc.)	Proposal submitted to the European Parliament.	Proposal for a directive

*Figure 1: general overview of the instruments*

### 3 Cross-border regimes

This paragraph sets out the instruments' different cross-border regimes on licensing and rights' clearances, to be able to compare them and evaluate them in § 4 and § 5.

#### 3.1 Memorandum of Understanding on Out-of-Commerce Works

As mentioned in § 2.1 the MoU tries to achieve its aims by encouraging cross-border collective licences, but it does not impose binding rules.<sup>27</sup> It is based on a system of voluntary collective licensing. As such, the MoU does not have a default cross-border effect. However it does facilitate and promote the voluntary conclusion of collective licences with cross-border effect with the aim of creating one-stop-shops out of national CMOs.<sup>28</sup> This enables cultural heritage institutions to acquire a licence for multiple territories from one CMO.

The MoU also suggests an extended collective licensing (ECL) model.<sup>29</sup> Extended collective licensing provides a solution for works for which it is hard to acquire permission because the

<sup>27</sup> A. Axhamn, 'European MoU on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works', *Kluwer Copyright Blog* 22 September 2011, <kluwercopyrightblog.com/2011/09/22/european-mou-on-key-principles-on-the-digitisation-and-making-available-of-out-of-commerce-works> (accessed 16 May 2013).

<sup>28</sup> A.C. Beunen and L. Guibault, 'Brussels Memorandum of Understanding inzake digitalisering en online beschikbaarstelling van out-of-commerce boeken en tijdschriften', *AMI* 2011-6, p. 221.

<sup>29</sup> A.C. Beunen and L. Guibault, 'Brussels Memorandum of Understanding inzake digitalisering en online beschikbaarstelling van out-of-commerce boeken en tijdschriften', *AMI* 2011-6, p. 221 and 224-225.

rights holders are not a member of a CMO, the so-called 'outsiders'.<sup>30</sup> In this respect it solves the mass-digitisation issues of high transaction costs arising from having to acquire permission from all individual rights holders.<sup>31</sup> The ECL model is primarily used in the Nordic countries for many categories of works, but it becomes increasingly popular in other countries as well.<sup>32</sup> The MoU-provision on extended collective licences reads:

*“For the purpose of such an Agreement, where a rightholder whose work was first published in a particular Member State has not transferred the management of his rights to a collective management organisation, the collective management organisation which manages rights of the same category in that Member State of first publication shall be presumed to manage the rights in respect of such work. In order to benefit from this presumption the collective management organisation shall make its best efforts to alert rightholders in question in accordance with information procedure methods agreed upon with organisations representing rightholders in the country where the collective management organisation is based. The rightholder organisations will commit to assist the collective management organisation in the work to alert authors and publishers.”<sup>33</sup>*

Accordingly CMOs are encouraged to conclude agreements with organisations representing a substantial proportion of authors and publishers of a Member State, whereupon CMO is presumed to manage the rights of all the works belonging to the category indicated in the agreement. The agreement can only cover works that have been published for the first time in the CMO's Member state. The agreements should contain a clause stating that non-represented right holders have the possibility to opt-out of the extended licensing scheme (Principle No. 2 sub 5). If an agreement has been concluded, the CMO is able to grant cultural heritage institutions a licence for the whole national repertoire of the category of works indicated in the agreement, amongst which may be works of outsiders and orphan works. In this respect the extended collective licensing suggested by the MoU differs from the ECL of the Nordic Member States, as in the Nordic ECL a CMO is able to clear the rights for the global repertoire, thus to grant mono-territory multi-repertoire licences.<sup>34</sup> The aforementioned provision of the MoU makes it clear that the extended effect of the MoU can

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<sup>30</sup> A. Axhamn, 'European MoU on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works', *Kluwer Copyright Blog* 22 September 2011, <kluwercopyrightblog.com/2011/09/22/european-mou-on-key-principles-on-the-digitisation-and-making-available-of-out-of-commerce-works> (accessed 16 May 2013).

<sup>31</sup> J. Axhamn and L. Guibault, *Cross-border extended collective licensing: a solution to online dissemination of Europe's cultural heritage?*, Final report prepared for EuropeanaConnect, Universiteit van Amsterdam: Amsterdam 2011, p. 41.

<sup>32</sup> T. Koskinen-Olsson, 'Collective Management in the Nordic Countries', in: D. Gervais (ed), *Collective Management of Copyright and Related Rights*, Kluwer Law International: Alphen aan den Rijn 2010, p. 283-306, J. Axhamn and L. Guibault, *Cross-border extended collective licensing: a solution to online dissemination of Europe's cultural heritage?*, Final report prepared for EuropeanaConnect, Universiteit van Amsterdam: Amsterdam 2011, p. 4.

<sup>33</sup> Principle No. 2 (4) Memorandum of Understanding on Out-of-Commerce Works.

<sup>34</sup> J. Axhamn and L. Guibault, *Cross-border extended collective licensing: a solution to online dissemination of Europe's cultural heritage?*, Final report prepared for EuropeanaConnect, Universiteit van Amsterdam: Amsterdam 2011, p. 34

only be applied to works that were first published in the CMO's Member State; consequently the MoU extended effect is limited to the national repertoire. The CMO is thus allowed to grant a multi-territory mono-repertoire licence.

However the MoU also holds that the works that fall under the licence because of the 'extended effect' may be limited in scope of use or territory:

*"If the scope of an Agreement entered into pursuant to Principle No. 1(2) and No. 1(3) includes cross-border and/or commercial uses, the collective management organisation may limit its licence of works that are out-of-commerce to those of represented rightholders."<sup>35</sup>*

Accordingly the cross-border effect may be withheld from the works of non-represented rights holders. If this is done, the cultural heritage institution could for example acquire a licence for out-of-commerce works that allows for the cross-border online dissemination of works of represented rights holders and the national making-available of works of non-represented rights holders. The works that fall under the licence solely due to the extended effect of the licence then lack the cross-border effect. It is uncertain if extended licences with cross-border effect will ever be concluded, as the Member States already having a system of ECL have not yet found a way to broaden the effect of extended collective licences to other territories.<sup>36</sup> It is still unclear how to give extended collective licences the cross-border effect.

In conclusion the cross-border effects should be negotiated and agreed upon in the licence, because the MoU does not have cross-border effect by default. This makes it hard to determine what the cross-border effects of the MoU will be, as the MoU itself does not establish rules on cross-border copyright clearances. The licences concluded on the basis of the MoU will have to be analysed in order to determine their cross-border regimes.

### 3.2 Orphan Works Directive

The Orphan Works Directive has a system (but not a procedure) for establishing the orphan-status of a work, consisting of amongst others a 'diligent search' for the right holder of the work for which the orphan work-status is sought.<sup>37</sup> The diligent search is roughly described in Art. 3 and the minimum list of sources that have to be checked is included in the Annex of the Directive, but all things considered the OWD leaves the drafting of diligent search procedures and criteria to the Member States, thereby probably creating diversity between the implementations of national laws. Yet it is not expected that this diversity leads to all orphan work statuses being sought in the Member State with the most easy procedure, as

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<sup>35</sup> Principle No. 3 (1) Memorandum of Understanding on Out-of-Commerce Works.

<sup>36</sup> Commission Staff Working Paper, 'Impact Assessment on the cross-border online access to orphan works accompanying the document 'Proposal for a directive of the European Parliament and of the Council on certain permitted uses of orphan works'', (SEC(2011) 615 final), p. 27.

<sup>37</sup> Artt. 2 and 3 Directive 2012/28/EU.

the OWD establishes that the diligent search is to be conducted in the Member State in which the work was first published or broadcast.<sup>38</sup>

If the procedure leads to an orphan-work status in a Member State, Articles 4 to 6 establish rules on recognition and usage, which also includes rules on cross-border rights clearance. Art. 4 of OWD establishes a system of mutual recognition: when a work has acquired the orphan work-status in a Member State, it shall be considered an orphan work in the other Member States as well. The provision reads:

*“A work or phonogram which is considered an orphan work according to Article 2 in a Member State shall be considered an orphan work in all Member States. That work or phonogram may be used and accessed in accordance with this Directive in all Member States. This also applies to works and phonograms referred to in Article 2(2) in so far as the rights of the non-identified or non-located rightholders are concerned.”<sup>39</sup>*

Although the OWD does not provide any specific information on the definition of ‘mutual recognition’, it is a concept that has been present in European law for a long time.<sup>40</sup> It originates from the *Cassis de Dijon* decision of the European Court of Justice in which the Court decided that goods that have been lawfully marketed in one Member State can also be introduced in other Member States.<sup>41</sup> It is clear from the Impact Assessment,<sup>42</sup> the Memorandum of Understanding<sup>43</sup> and the Recitals<sup>44</sup> of the OWD that this concept is meant in Art. 4 OWD. So the directive uses the principle of mutual recognition instead of harmonizing Member States’ law and as a result there is a horizontal transfer of sovereignty of Member States regarding the orphan work status to the ‘home state’ of the orphan work.<sup>45</sup> Once the orphan work status has been acquired in one Member State, it automatically exists in all other Member States. Member States have to recognize the orphan work status that a work has acquired in another Member State, thereby accepting that the work can be

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<sup>38</sup> Recital (15) and Art. 3 (3) Directive 2012/28/EU.

<sup>39</sup> Art. 4 Directive 2012/28/EU.

<sup>40</sup> K.A. Armstrong, ‘Mutual Recognition’, in: C. Barnard and J. Scott (eds), *The Law of the European Single Market: Unpacking the Premises*, Hart Publishing: Oxford 2002, p. 225-227.

<sup>41</sup> S.K. Schmidt, ‘Mutual recognition as a new mode of governance’, *Journal of European Public Policy* 2007, p. 667 and 673, P. Craig and G. de Búrca, *EU Law: Text, Cases and Materials*, Oxford University Press: Oxford 2011, p. 685, CJEU 20 February 1979, Case 120/78 (*Cassis de Dijon*), para. 14.

<sup>42</sup> Commission Staff Working Paper, ‘Impact Assessment on the cross-border online access to orphan works accompanying the document ‘Proposal for a directive of the European Parliament and of the Council on certain permitted uses of orphan works’’, (SEC(2011) 615 final), p. 21-22.

<sup>43</sup> Explanatory Memorandum of the Proposal for a directive of the European Parliament and of the Council on certain permitted uses of orphan works (COM(2012) 289 final), p. 1 and 3-4.

<sup>44</sup> Recital (8) Directive 2012/28/EU.

<sup>45</sup> S.K. Schmidt, ‘Mutual recognition as a new mode of governance’, *Journal of European Public Policy* 2007, p. 667 and 673, K.A. Armstrong, ‘Mutual Recognition’, in: C. Barnard and J. Scott (eds), *The Law of the European Single Market: Unpacking the Premises*, Hart Publishing: Oxford 2002, p. 226.

accessed in their own territory.<sup>46</sup> Hence theoretically cultural heritage institutions can disseminate the work online, as other Member States may not object to the making available of the work in their territory. It must be noted however that this may be more difficult in practice. The mutual recognition regime might be incompatible with the other instruments, as shall be explained in § 4.

Although the existence of the orphan work status in all Member States happens automatically, the accompanying rules on procedures are subject to national implementation. Member States have to change national law to implement the directive and seem to have some freedom in doing so.<sup>47</sup> Consequently national implementation can be divergent regarding the details of the actual exceptions, although Art. 6 dictates in general wording that Member States shall provide for an exception to the right of making available and the reproduction right (sub 1), thus allowing cultural heritage institutions to disseminate the work via internet. Apart from that the uses that fall under the exceptions are limited:

*“The organisations referred to in Article 1(1) shall use an orphan work in accordance with paragraph 1 of this Article only in order to achieve aims related to their public-interest missions, in particular the preservation of, the restoration of, and the provision of cultural and educational access to, works and phonograms contained in their collection. The organisations may generate revenues in the course of such uses, for the exclusive purpose of covering their costs of digitising orphan works and making them available to the public.”<sup>48</sup>*

The description seems detailed enough, but the notion ‘public-interest missions’ might cause confusion. Whether it is required that the public interest mission is documented in national law or official statutes of the organisation or whether simply acting in the public interest is enough, is unclear.

According to Art. 5 Member States have to ensure that right holders can put an end to the orphan work status of their work at any time. The directive also states that the rights holder who ends the orphan status of a work should have a right to fair compensation (Art. 6 (5)). However, similar to the provision on the diligent search, the OWD does not establish any procedural rules on the termination of the orphan status or the distribution of fair compensation. The OWD has therefore been described as giving the Member States a *carte*

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<sup>46</sup> Commission Staff Working Paper, ‘Impact Assessment on the cross-border online access to orphan works accompanying the document ‘Proposal for a directive of the European Parliament and of the Council on certain permitted uses of orphan works’’, (SEC(2011) 615 final), p. 22.

<sup>47</sup> Commission Staff Working Paper, ‘Impact Assessment on the cross-border online access to orphan works accompanying the document ‘Proposal for a directive of the European Parliament and of the Council on certain permitted uses of orphan works’’, (SEC(2011) 615 final), p. 22.

<sup>48</sup> Art. 6 (2) Directive 2012/28/EU.

*blanche* in creating their national orphan works legislation.<sup>49</sup> The possible effects of the absence of clear rules on the cross-border landscape will be discussed in § 5.

### 3.3 Proposal for a Directive on Collective Rights Management and Multi-Territorial Licensing

The CRMP aims to foster multi-territorial licensing through developing a 'European Licensing Passport'; the creation of an infrastructure laying down common rules for collective licensors, allowing CMO's to mandate each other to licence their repertoire across the European Union.<sup>50</sup> Title III establishes rules for the conclusion of agreements between national CMO's, giving each other a non-exclusive mandate to grant multi-territorial licences for online music rights. In the best-case scenario this practice would ultimately lead to a situation in which companies or cultural heritage institutions wishing to disseminate content online are able to choose a national CMO to acquire a EU-wide licence from, instead of having to acquire a licence in every Member State from which the website can be accessed.

Title III mainly imposes obligations on the handling of mandates and licences. For example, Art. 28 states that the mandated society shall manage the rights of the mandating CMO on non-discriminatory terms and asserts that certain information should be in the licence and given to the members of the mandating CMO. The rules do not prescribe a particular type of agreement.

(Small) CMO's who want to have their content licensed by other CMO's are aided by Art. 29:

*"A collecting society which does not grant or offer to grant multi-territorial licences for the online rights in musical works in its own music repertoire can request another collecting society that meets the requirements of this Title to enter into a representation agreement to represent those rights in accordance with Article 28. The requested collecting society shall accept such a request if it is already granting or offering to grant multi-territorial licences for the same category of online rights in musical works in the repertoire of one or more other collecting societies. (...)"<sup>51</sup>*

This indicates that a CMO that does not grant or offer to grant multi-territorial licences may request a CMO that does (offer to) grant multi-territorial licences to represent the CMO for the online rights of its repertoire. The requested CMO has the obligation to accept the request for the category of online rights for which it is already offering said licences.

Furthermore Art. 30 gives right holders that are member of CMO's that do not participate in MTL or have requested representation agreements for MTL in online works one year after

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<sup>49</sup> E. Rosati, 'The Orphan Works Directive, or throwing a stone and hiding the hand', *Journal of Intellectual Property Law & Practice* 2013, p. 309.

<sup>50</sup> Explanatory Memorandum of the Proposal for a directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market (2012, COM(2012) 372 final), p. 6.

<sup>51</sup> Art. 29 (1) and (2) Proposal for a directive of the European Parliament and of the Council on collective management of copyright and related rights.

the transposition date of the directive the right to grant other parties or CMO's multi-territorial licences for their online rights. With this combination of possibilities and obligations the CRMP creates a system that is meant to increase the chance of establishing a 'passport regime'; a one-stop shop for cross-border licences for online music. Although the aim is to create many CMO's able to grant extensive licences, it might very well lead to an oligopoly, or even a monopoly of one European CMO regarding multi-territorial licensing.<sup>52</sup>

The figure below gives an overview of the main characteristics of the three instruments. The consequences of the differences and similarities will be analysed in the following paragraph.

<b><u>Name</u></b>	<b><u>Cross-border effects</u></b>	<b><u>Cross-border regime</u></b>	<b><u>Cross-border mechanisms</u></b>
<b>Memorandum of Understanding on Out-of-Commerce Works</b>	Not by default	Open	Multi-territorial licensing  (may be limited to repertoire of represented rights holders)
<b>Orphan Works Directive</b>	Yes	Mutual recognition	Forced mutual recognition of orphan work status
<b>Proposal for a Directive on collective rights management and multi-territorial licensing</b>	Yes	'European Licensing Passport'	Multi-territorial licensing

Figure 2: overview of cross-border effects

## 4 Compatibility

This paragraph discusses the compatibility of the three instruments with each other. First, overlap is discussed, comparing OWD with the MoU and the OWD with the CRMP. The MoU and the CRMP will not be compared, as they do not overlap since the subject matter is different; the MoU's scope is limited to certain written works whereas the CRMP is limited to audio. Overlap between the other instruments can either occur in purely national situations (two different statuses for one work in one Member State) or cross-border situations (different statuses for one work in different jurisdictions). These different situations will be taken into account in the following discussion. The instruments have yet to be implemented and the details of the national implementation may differ from Member State to Member State. To assess the compatibility the text of the instruments will be the reference point, but

<sup>52</sup> J. Drexl et al, *Comments of the Max Planck Institute for Intellectual Property and Competition Law on the Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market COM (2012)372*, Munich 2013, p. 5 and 29-30.

where published and of value for the discussion the national legislative proposals will be taken into account.<sup>53</sup>

#### *4.1 The Orphan Works Directive and the Memorandum of Understanding on Out-of-Commerce Works*

In the case that a cultural heritage institution wants to disseminate a work online that is an out-of-commerce book or learned journal without being able to track the rights holder, the MoU and the OWD can both apply. The subject matter of the MoU is also included in the OWD so they overlap. In fact an orphaned work will usually also be out-of-commerce.

There are multiple situations in which a work can acquire two statuses in practice. First of all it is possible that in Member State a collective licence based on the MoU is granted, covering works for which an orphan work status has already been acquired in that Member State. At first glance this seems unlikely, as a collective licence will probably require the cultural heritage institution to pay a fee while use of an orphan work would be free of charge under the OWD. Nevertheless there are many reasons why a cultural heritage institution would prefer orphan works to be licensed by CMO's. The most important is the bulk-argument: with an MoU-licence the rights can be cleared for all (orphan) works of a certain category at once, while the OWD requires a diligent search for every individual work before the rights are cleared. Also with an MoU-licence the cultural heritage institutions can be certain that they will not face liability claims if a rights holder opts-out since the CMO has licensed and carries the responsibility,<sup>54</sup> whereas the cultural heritage institution itself carries the burden when a rights holder terminates the orphan work status on the basis of Art. 5 OWD. In § 5.4 the choice between the OWD regime and collective licences will be considered in more detail.

Although the national law of Member States will contain an exception to the making available right for orphan works after the implementation of the OWD, concluding collective licences including orphan works still seems possible because the OWD explicitly allows this in the recitals:

*“This Directive is without prejudice to specific solutions being developed in the Member States to address larger mass digitisation issues, such as in the case of so-*

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<sup>53</sup> The United Kingdom has passed a bill regarding orphan works and extended collective licensing (Enterprise and Regulatory Reform Act 2013, in particular para. 74-78), France has adopted a law on out-of-commerce works (LOI n° 2012-287 du 1er mars 2012 relative à l'exploitation numérique des livres indisponibles du XXe siècle) and Germany has published a proposal regarding both orphan works and out-of-commerce works (Entwurf eines Gesetzes zur Nutzung verwaister Werke und zu weiteren Änderungen des Urheberrechtsgesetzes und des Urheberrechtswahrnehmungsgesetzes, 20.02.2013).

<sup>54</sup> J. Axhamn and L. Guibault, *Cross-border extended collective licensing: a solution to online dissemination of Europe's cultural heritage?*, Final report prepared for EuropeanaConnect, Universiteit van Amsterdam: Amsterdam 2011, p. 33, T. Koskinen-Olsson, 'Collective Management in the Nordic Countries', in: D. Gervais (ed), *Collective Management of Copyright and Related Rights*, Kluwer Law International: Alphen aan den Rijn 2006, p. 283-306.

*called 'out-of-commerce' works. Such solutions take into account the specificities of different types of content and different users and build upon the consensus of the relevant stakeholders. This approach has also been followed in the Memorandum of Understanding on key principles on the digitisation and making available of out-of-commerce works, signed on 20 September 2011 by representatives of European libraries, authors, publishers and collecting societies and witnessed by the Commission. This Directive is without prejudice to that Memorandum of Understanding, which calls on Member States and the Commission to ensure that voluntary agreements concluded between users, rightholders and collective rights management organisations to licence the use of out-of-commerce works on the basis of the principles contained therein benefit from the requisite legal certainty in a national and cross-border context.”<sup>55</sup>*

It is clear that the OWD provides cultural heritage institutions with the possibility to conclude collective licences covering orphan works. But the reverse of the aforementioned situation is also possible: there is a collective licence in a Member State, but an orphan work status is sought for a work by a cultural heritage institution in the same Member State. For the acquisition of an orphan works status, the rights holder must be unknown or unlocatable. If there is a ‘regular’ collective licence it means that the CMO knows who the rights holder is and a licence can be acquired from the CMO. According to the Annex of the OWD a diligent search requires a checking with the relevant CMO’s, so acquiring an orphan status for a work is impossible, as the rights holder is known.

When an *extended* collective licence is in place it is a different situation. For the extended works the CMO is presumed to manage the rights of behalf of the outsider, but the CMO is not the rights holder within the meaning of Art. 2 OWD:

*“A work or a phonogram shall be considered an orphan work if none of the rightholders in that work or phonogram is identified or, even if one or more of them is identified, none is located despite a diligent search for the rightholders having been carried out and recorded in accordance with Article 3.”<sup>56</sup>*

Consequently an ‘extended effect work’ can still acquire the orphan work status. Because of the aforementioned recital the licence is not affected by the orphan status of the work, but neither does the licence affect the orphan work status. The licence-agreement only binds the signatories, being the CMO and a cultural heritage institution. If for example another cultural heritage institution had the same work in its collection, this second cultural heritage institution could make the work available online, regardless of the licence of the first cultural heritage institution. The two statuses co-exist and are not incompatible.

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<sup>55</sup> Recital (4) Directive 2012/28/EU.

<sup>56</sup> Art. 2 Directive 2012/28/EU.

In a cross-border setting the situation is more complicated. It is for example possible that a work has acquired the orphan work status in Member State A, after which a collective licence or an extended collective licence based on the MoU is concluded in Member State B. Another theoretical possibility is the existence of an extended collective licence that has cross-border effect in Member State A, although it is uncertain whether and how such licences are possible, see § 3.1.

In these situations the work still automatically acquired the orphan work status in Member State B due to the principle of mutual recognition (see § 3.2), even though the previously cited recital (4) of the OWD allows the conclusion of a collective licence. Accordingly the cross-border situation is similar to the national situation; cultural heritage institutions are not prevented from concluding licences covering orphan works. However in the international context this means that a cultural heritage institution is free to conclude an agreement with a CMO in Member State B covering orphan works for the aforementioned bulk-argument and the evasion of liability, but this does not prevent other cultural heritage institutions from making the work accessible in Member State B. An agreement with the CMO is not required to disseminate the orphan work online, nor does the conclusion of the agreement influence the lawful use that other parties can make of the orphan work. The cultural heritage institution that has a licence agreement with the CMO still has to abide by the licence agreements however, as the agreement is valid (see above) and, regardless of the OWD, not abiding by the licence agreement would be a breach of contract.

It must be noted that when a collective licence without extended effect is concluded covering a work, this means that a rights holder for that work is known (by the CMO) in the Member State in which the collective licence is concluded. Art. 5 OWD states that the rights holder can terminate the orphan work status for his work. Accordingly it is very likely that in the case of a collision between the OWD and a collective licence, the orphan work status and thus the lawful online dissemination of the work will be terminated. This scenario is comparable with the simultaneous applicability of the CRMP and the OWD, which will be discussed in the following paragraph.

#### *4.2 The Orphan Works Directive and the Proposal for a Directive on Collective Rights Management and Multi-territorial Licensing*

As the audio works of the CRMP can fall under the broad subject matter of the OWD, the directive and the proposal could be simultaneously applicable to one work. However as the OWD deals with works of which the rights holder cannot be traced and the CRMP deals with works of which it has acquired a licence or transfer of rights from the copyright holder, it is not very likely that they would conflict often in practice. For example, nationally it is impossible to acquire an orphan status for a work if the work is already managed by the national CMO, as the rights holder is then known and cultural heritage institutions are obliged to check with their national CMO's as part of the diligent search (see Art. 3 and Annex under (4) OWD).

However it is possible that a work has an orphan status in a Member State, after which the CMO in that Member State is asked to represent the rights in the work by the rights holder. International variations are also possible, for example when a cultural heritage institution in a Member State cannot trace the rights holder and acquires an orphan status for the musical work, while the work and its rights holder are known and represented by a CMO in another country. It is possible that this situation arises in practice, because cultural heritage institutions do not necessarily have to check the databases of all European CMO's in order to fulfil the diligent-search requirements (see Art. 3 and Annex under (4) OWD).

Still, cultural heritage institutions would be wise not to limit their search unnecessarily, as they have an obligation to check information in other countries if there is evidence that it might be relevant (Art. 3 (4) OWD). The rights holder can hold cultural heritage institutions liable for copyright infringement if the search was not performed diligently (Recital (19) OWD). In these situations the cultural heritage institution assumes that the rights are cleared as based on Art. 4 OWD as the work is orphan in all Member States as soon as it has acquired orphaned-status in one Member State, but at the same time the rights holders are known and the rights are not cleared. Accordingly in principle the proposal and the directive are incompatible. Nevertheless the OWD seems to offer a solution. Art. 5 OWD stipulates that Member States have the obligation to ensure that rights holders in orphan works have the possibility to terminate the orphan work status for their rights at any time. In theory the rights holder can terminate the orphan work status. The CRMP prevails over the OWD; there seem to be no compatibility-issues between the CRMP and the OWD.

But a solved issue on the level of the European instruments is not necessarily a solved issue in practice. As explained in § 3.2 mutual recognition sees to it that a work becomes orphan in the whole European Union without any action being required after it has acquired the orphan work status in one Member State. The *end* of the orphan work status on the other hand requires an action from the rights holder (Art. 5 OWD). Thus what will happen in practice is that a work of which the author is known and of which the rights are managed by a CMO can suddenly become an orphan work, free to be made available online by cultural heritage institutions. The same holds true for the situation in which a CMO acquires a mandate to manage the rights and grant multi-territorial licences in a Member State in which the work has the orphan work status: as the orphan work status is subject to the principle of mutual recognition the status must be terminated by the rights holder, otherwise the work stays orphan with the corresponding rights clearance for cultural heritage institutions.

The CMO or the rights holder of the work bears the burden of having to fix this 'error' in accordance with the procedures that national law prescribes to terminate the orphan work status. What those national procedures will look like is not known yet. There might be deviations between national laws. For example, the German proposal implementing the orphan works directive does not require an action by the rights holder to end the status; as soon as the cultural heritage institution learns that there is a rights holder, it should cease the

use of the work.<sup>57</sup> So the problem would be relatively quickly solved in Germany, as no complicated procedures need to be followed. However the proposal has been criticised on this issue, amongst others because it is judged to be not in line with the OWD.<sup>58</sup> In addition it is very likely that other Member States will follow the text of the directive more closely and will establish stricter national procedures for the rights holder to end the orphan work status.

Another important question is whether the end of the orphan work status in one Member State automatically leads to the end of the orphan work status in *all* Member States. This issue is also relevant for the aforementioned incompatibility-issues between the MoU and the OWD, see § 4.1.<sup>59</sup> Unfortunately the OWD does not contain a mutual recognition rule regarding the *end* of the orphan work status. However it can reasonably be expected that the termination of the orphan work status works the same as obtaining the status, meaning that as soon as the orphan work status is ended in one Member State the work has automatically lost the orphan work status in all other Member States as well. If the work lost the orphan work status in one Member State this would mean that the foundation of the orphan work status dissolves, which would also render the justification of mutual recognition of the orphan work status void.

If it were not case, there would be a great imbalance between the rights of rights holders and the rights of cultural heritage institutions. It would be fairly easy to acquire the orphan work status but comparatively extremely hard to terminate it, as the rights holder should go through the national procedures in twenty-eight Member States.

Still even mutual recognition of the end of the orphan work status has its shortcomings, because as mentioned before it is not to be expected that national procedures will be identical. For example legislation like the discussed German example could undermine the OWD as acquiring the orphan work status takes quite some effort, while losing/ending the status is fairly easy through Germany.

It is not to be expected that national law will resolve all of the aforementioned issues. Concluding there might be a serious incompatibility between the OWD and the CRMP in practice, resulting in a major difficulty for rights holders or CMO's to reclaim the rights of works that are falsely judged to be orphan.

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<sup>57</sup> Art. 1 under § 61b Entwurf eines Gesetzes zur Nutzung verwaister Werke und zu weiteren Änderungen des Urheberrechtsgesetzes und des Urheberrechtswahrnehmungsgesetzes, 20 February 2013.

<sup>58</sup> R.M. Hilty et al, *Stellungnahme des Max-Planck-Instituts für Immaterialgüter- und Wettbewerbsrecht zur Anfrage des Bundesministeriums der Justiz vom 20. Februar 2013 Zum Referentenentwurf eines Gesetzes zur Einführung einer Regelung zur Nutzung verwaister Werke und weiterer Änderungen des Urheberrechtsgesetzes sowie des Urheberrechtswahrnehmungsgesetz*, 15 March 2013, p. 23.

<sup>59</sup> It is only a problem when a rights holder is known, accordingly with a non-extended collective MoU licence or with the CRMP, as in those cases a rights holder is known. With an 'extended effect work' there is no known or locatable rights holder, accordingly there is no problem as the two status can co-exist.

#### *4.3 National implementation*

It has already been remarked that it is hard to discuss the compatibility of the instruments, as they do not contain rules that will end up in Member States' legislation literally, word for word. The rules that will govern cross-border copyright clearances will be national and thus they are currently unknown, as the instruments have not been implemented into national law yet. The fact that the Member States have ample freedom in achieving the results dictated by the instruments could lead to differences between the national laws of Member States in the area that is supposed to be harmonized.

An example regarding the end of the orphan work status and the German proposal on orphan works is given in the previous paragraph. However, it is not only the OWD that gives the Member States ample discretionary power in regulation cross-border copyright clearances. The CRMP is minimum harmonisation as well and there is a trend among national legislators to create general or specific extended collective licensing competences in national law. For example in the United Kingdom a bill has recently been adopted that allows for the creation of a general extended licensing body, creating a domestic (extended) collective licensing scheme for amongst others the use of orphan works.<sup>60</sup> France has adopted a proposal and one is pending in Germany, both settling the matter of out-of-commerce works but with different approaches, amongst others regarding the scope/date of applicability.<sup>61</sup> Presumably Member States have taken it upon themselves to settle these contemporary issues because the European legislator has not gone far enough in enabling copyright exceptions for specific categories of works or users. The natural consequence of the resulting deviations in national law is further fragmentation of the cross-border landscape.

#### *4.4 Conclusion*

In conclusion there are no compatibility issues between the MoU and the CRMP, as the subject matter does not overlap but incompatibility issues might arise between the OWD and the MoU and the OWD and the CRMP. If there is collective licensing for a work (under the MoU or the CRMP) and an orphan status is sought, this is in most cases impossible as the rights holder is known and locatable and the cultural heritage institution has the obligation to check with certain CMO's.

However if an orphan status already exists but the rights holder of the work desires to be represented by a CMO, incompatibility issues arise, as termination of the orphan work status requires action by the rights holder. Furthermore compatibility issues exist between the OWD and the CRMP as an orphan work status can automatically come into existence in a Member State in which rights holders are known and represented by a CMO based on the CRMP. Although OWD provides for a right to terminate the orphan work status, upholding the CRMP

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<sup>60</sup> Art. 76 under (3) at 116B Enterprise and Regulatory Reform Act 2013, 25 April 2013.

<sup>61</sup> Art. 1 at 'Art. L 134-1' LOI n° 2012-287 du 1er mars 2012 relative à l'exploitation numérique des livres indisponibles du XXe siècle, Art. 2 at '§ 13d' under (1) 1. Entwurf eines Gesetzes zur Nutzung verwaister Werke und zu weiteren Änderungen des Urheberrechtsgesetzes und des Urheberrechtswahrmungsgesetzes.

and the licences that are concluded as a result thereof, the actual procedures are dependent on national law and it is unclear what they would look like and to what extent they are compatible. Accordingly it might be difficult for a rights holder to 'get his rights back'. In the event that a rights holder reclaims his rights the cultural heritage institution might be faced with claims for remuneration for the former use according to the national procedures implemented because of Art. 6 (5) OWD. In the case that it can be proven that the cultural heritage institution did not perform a proper diligent search it might even be faced with liability for copyright infringement based on Recital (19) OWD. The former and possibly even the latter situation can arise even if the cultural heritage institution was in good faith, because of an action in another Member State that has cross-border effects. Moreover there is much uncertainty about the creation and effects of cross-border extended collective licences.

In conclusion incompatibility can have serious implications for both rights holders as well as cultural heritage institutions, which creates confusion and uncertainty. These implications are not merely theoretical. Especially when translations, adaptations or joint works are to be disseminated the chance of encountering difficulties or incompatibilities is high. For example it is possible that a cultural heritage institution seeks to make a movie available to the public, but the rights holder cannot be located. The movie can be based on an out-of-commerce book falling under an MoU-licence and include a soundtrack that consists of various songs that are written and performed by numerous authors and performers from different Member States, some of which are represented by CMO's and some of which are not or cannot be traced. Another example is an out-of-commerce translation of an orphaned book. Figure 3 below gives a general overview of the consequences of subsequent application of the different instruments, concluding whether it is impossible (not possible to acquire two statuses for one work), compatible (possible co-existence of two statuses for one work) or incompatible (two statuses for one work can be acquired, but this causes severe practical problems).

As Member States have ample freedom in implementing the instruments and the agreements between stakeholders are to be freely negotiated it is difficult to describe the exact problems. However the likelihood of issues arising in practice is clear, even though they are limited largely because the subject matter does not overlap. The following paragraph will assess the possible fragmentation that still exists regardless of the instruments and analyse whether the three instruments make the work of cultural heritage institutions easier.

<b><i>First status</i></b> →	<b><i>Orphan status</i></b>	<b><i>MoU-collective licence</i></b>	<b><i>MoU-extended licence</i></b>	<b><i>MoU-extended cross-border licence</i></b> <sup>62</sup>	<b><i>CRMP representation</i></b>
<b><i>Subsequent status</i></b> ↓					
<b>Orphan status</b>	x	impossible	compatible	unknown	impossible
<b>MoU-collective licence</b>	incompatibl e	x	x	x	no overlap
<b>MoU-extended licence</b>	compatible	x	x	x	no overlap
<b>MoU-extended cross-border licence</b>	unknown	x	x	x	no overlap
<b>CRMP representation</b>	incompatibl e	no overlap	no overlap	no overlap	x

Figure 3: Overview of national compatibility (two statuses in one member state)

<b><i>First status, member state A</i></b> →	<b><i>Orphan status</i></b>	<b><i>MoU-collective licence</i></b>	<b><i>MoU-extended licence</i></b>	<b><i>MoU-extended cross-border licence</i></b>	<b><i>CRMP representation</i></b>
<b><i>Subsequent status, member state B</i></b> ↓					
<b>Orphan status</b>	compatible	incompatible	compatibl e	unknown	in- compatible
<b>MoU-collective licence</b>	incompatibl e	compatible	compatibl e	unknown	no overlap
<b>MoU-extended licence</b>	compatible	compatible	compatibl e	unknown	no overlap
<b>MoU-extended cross-border licence</b>	unknown	unknown	unknown	unknown	no overlap
<b>CRMP representation</b>	incompatibl e	no overlap	no overlap	no overlap	compatible

Figure 4: Overview of international/cross-border compatibility (different statuses from one work in different jurisdictions)

<sup>62</sup> Whether the instruments are compatible with an MoU-extended cross-border licence will depend on the actual licence. Extended cross-border licences are still unknown; further research would be required to assess how such licences would be designed and what the effects and compatibility would be. See § 3.2.

## 5 Easy dissemination of cultural heritage

Evidently there is no single clear and comprehensive system to acquire cross-border copyright clearances for the online dissemination of collections by cultural heritage institutions at the moment. Which regime is applicable depends on the nature of work and what is known about it. The following questionnaire shows which instrument applies and gives insight in the fragmented regime for cultural heritage institutions seeking cross-border copyright clearances:

1. Was the first publication of the work 70 years or more ago (for anonymous or pseudonymous works) or has the author of the work died 70 years or more ago?	
Yes:	the work is not copyright protected and can be disseminated online.
No:	→ question 2.
2. Is the rights holder of the work known?	
Yes:	→ question 4.
No:	→ question 3.
4. Can the rights holder be found through a diligent search? ( <i>Orphan Work Directive</i> )	
Yes:	→ question 4.
No:	after a diligent search the work acquires an orphan work status which has to be recognized by all Member States, the orphan work can be disseminated online.*
4. What is the character of the work?	
Out-of-commerce book or learned journal:	→ question 5.
Audio:	→ question 6.
Other:	individual permission from rights holders is required.
5. Is there a licence (with extended effect) in the country of first publication? ( <i>Memorandum of Understanding on Out-of-Commerce Works</i> )	
Yes:	clearance depends on the conditions of the particular licence.
No:	individual permission from the rights holders is required.
6. Are the rights of the work managed by a collective management organization? ( <i>Proposal for a Directive on Collective Rights Management</i> )	
Yes:	pay a fee for the licence(s) and acquire cross-border rights clearance.
No:	individual permission from the rights holders is required.**
* <i>The work may be disseminated only after the orphan work status has been obtained. The procedure of acquiring the orphan work status may vary according to Member States' implementation of the directive.</i>	
** <i>Save for the countries in which an extended collective licensing scheme for audio works exists, like Denmark. In those countries a licence can be acquired from a CMO.</i>	

Figure 5: Instruments questionnaire

The starting point for getting the rights cleared is asking individual permission for every work from every individual rights holder. As the questionnaire shows there are many instances in which the regime of an instrument applies, which allows the cultural heritage institution to acquire permission from one single point instead of individual rights holders<sup>63</sup> or to acquire clearance for a large repertoire or multiple territories at once.<sup>64</sup> There is also a solution to the problem of not being able to track a rights holder.<sup>65</sup> From the questionnaire it can be concluded that the instruments do make acquiring cross-border copyright clearances easier under specific circumstances. However there are also many issues that might neutralize the positive effects of the future European framework. The main problems will be analysed around the three themes of restrictions, fragmentation and implementation. In § 5.4 the conclusion of agreements, which seems the only solution to the uncertainty, will be discussed.

### 5.1 Restrictions

A first general problem that cultural heritage institutions wishing to disseminate their collections online are confronted with is the restricted scope of the instruments' provisions. Limitations can be found in all instruments and some have already been discussed above, like MoU of which the subject matter is restricted to books and learned journals. Despite its broad applicability, the OWD excludes unpublished works from its subject matter.<sup>66</sup> And as mentioned before Title III of the CRMP sees only to online rights and it is also limited to authors' rights. Thus neighbouring rights do not fall under the scope of the directive, although an audio work may not be disseminated online unless all rights – including neighbouring rights – are cleared.<sup>67</sup> Moreover both the OWD and the MoU to a greater or lesser extent limit how the work may be used; commercial use or re-use by third parties can be prohibited. The definitions of the instruments describing to what cultural heritage institutions the provisions apply or a narrow and strict interpretation of definitions like 'public interest mission' might further limit applicability and impact of the instruments.<sup>68</sup>

### 5.2 Fragmentation

It is clear that the permission-landscape is very fragmented. Cultural heritage institutions wishing to disseminate a work online first need to determine which regime is applicable to the

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<sup>63</sup> Extended collective licensing resulting from the MoU or multi-territorial licences from CMO's resulting from the CRMP, questions 5 and 6.

<sup>64</sup> Multi-territorial licences for large repertoires resulting from the CRMP, question 6.

<sup>65</sup> Orphan work status resulting from the OWD, question 4.

<sup>66</sup> Reaction of the COMMUNIA association to the proposed directive on certain permitted uses of orphan works (COM/2011/0289), p. 4.

<sup>67</sup> J. Drexl et al, *Comments of the Max Planck Institute for Intellectual Property and Competition Law on the Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market COM (2012)372*, Munich 2013, p. 48-49.

<sup>68</sup> Reaction of the COMMUNIA association to the proposed directive on certain permitted uses of orphan works (COM/2011/0289), S.J. van Gompel, 'Het richtlijnvoorstel verweesde werken - Een kritische beschouwing', *AMI* 2011-6, p. 208-210.

work (see the questionnaire). The outcome can be the regime of the OWD, the CRMP, a MoU-licence or asking individual permission. Regardless of the differences in scope and subject matter, the applicable regimes may overlap to a certain extent and in many instances none of the regimes will provide an adequate solution, leaving the cultural heritage institution with no other choice than to acquire permission from individual rights holders. This is the case with works that do not fall under the subject matter of the instruments (i.e. visual art of which the author is known), works that are composed of multiple works (movies of which only the audio can fall under the CRMP) or works for which an exception of the instruments' regimes applies (no cross-border effect on extended repertoire in an MoU-licence). The possibility for rights holders to opt out of a licensing scheme or to end the orphan status further adds to fragmentation and leads to unstable repertoires.<sup>69</sup>

### *5.3 Implementation*

Additionally it is likely that there will arise problems because of national implementation of the instruments. The difficulties can result from general difficulties that are related to the fact that the instruments do not dictate how the results aimed for should be achieved, or be the result of deviations between the national implementation of Member States. As Member States are obliged to achieve the results of the instruments, but are fairly free in designing the national laws and procedures to get to the results, there can be great differences among Member States. There can be differences in remuneration rights and procedures and in the implementation of the copyright exceptions of the OWD,<sup>70</sup> leading to legal uncertainty or dissimilarities between the scope of rights and exceptions in different Member States. There could also be different procedures and requirements for conducting a diligent search to acquire an orphan work status, making the degree of difficulty to acquire the status vary in the Member States and thus vary for each work. Another problem of the discretionary nature of the instruments is that procedures to acquire for example the orphan work status might in practice become very burdensome, as the instruments do not dictate strict and concrete rules on what the procedure should look like. This might further undermine the positive effects of the instruments.

### *5.4 The agreements-solution*

From the above it is clear that the instruments do not cover the complete collections of cultural heritage institutions. Furthermore if an instrument is applicable, the cultural heritage institution does not automatically acquire a cross-border copyright clearance; particular procedures must be followed to acquire permission, in many cases accompanied by a fee charged for dissemination of the work. These procedures may very well be considered too burdensome by a cultural heritage institution and the question arises whether it would not be

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<sup>69</sup> J. Drexler et al, *Comments of the Max Planck Institute for Intellectual Property and Competition Law on the Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market COM (2012)372*, Munich 2013, p. 58 and 63.

<sup>70</sup> Reaction of the COMMUNIA association to the proposed directive on certain permitted uses of orphan works (COM/2011/0289), p. 6 and 7.

feasible and more time and cost efficient to conclude (collective) agreements with rights holders or representatives instead. Concluding or expanding licences in the vein of the MoU for different categories of works would be a possibility for this.<sup>71</sup> In addition a licence shifts the burden of responsibility for rights holders that opt out or file claims and complaints to the CMO, while under the OWD the cultural heritage institution carries the responsibility if a rights holder ends an orphan work status.<sup>72</sup> Cultural heritage institutions might prefer to conclude agreements with CMO's instead of going with the OWD's regime complemented by individual permission, for reasons of liability and efficiency.<sup>73</sup>

However, collective licensing in general and collective licensing with extended effect (ECL) in particular requires rights holders to be organised in CMO's.<sup>74</sup> Moreover for ECL it is usually required that a substantial amount of rights holders is represented in that CMO.<sup>75</sup> For many kinds of works the agreements-solution is not feasible, as rights holders in many sectors are not organised and there are no CMO's that can be considered to represent a substantial amount of rights holders. National laws on collecting societies differ from each other<sup>76</sup> and these laws might also pose a barrier to concluding ECL-agreements between CMO's and cultural heritage institutions.<sup>77</sup> For some Member States and works of which the rights holders are organised in a CMO an ECL-agreement would be possible, but such agreements have to be negotiated and are easily blocked by single organisations.<sup>78</sup>

Concluding (ECL) agreements seems at the moment no viable easy alternative for the system created by the instruments. It has been possible to conclude the MoU on out-of-commerce books and learned journals, but there are some fundamental differences between out-of-commerce books and learned journals and other categories of works. It is not to be expected that agreements could fully replace the OWD and CRMP, although the possibility of concluding ECL-agreements for different kinds of works should be researched for the future.

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<sup>71</sup> See in general: J. Axham and L. Guibault, *Cross-border extended collective licensing: a solution to online dissemination of Europe's cultural heritage?*, Final report prepared for EuropeanaConnect, Universiteit van Amsterdam: Amsterdam 2011.

<sup>72</sup> See § 4.1 and Art. 5 Directive 28/2012/EU.

<sup>73</sup> J. Axham and L. Guibault, *Cross-border extended collective licensing: a solution to online dissemination of Europe's cultural heritage?*, Final report prepared for EuropeanaConnect, Universiteit van Amsterdam: Amsterdam 2011, p. 4.

<sup>74</sup> J. Axham and L. Guibault, *Cross-border extended collective licensing: a solution to online dissemination of Europe's cultural heritage?*, Final report prepared for EuropeanaConnect, Universiteit van Amsterdam: Amsterdam 2011, p. 30-32 and 41.

<sup>75</sup> T. Riis and J. Schovsbo, 'Extended collective licenses in action', *International Review of Intellectual Property and Competition Law* 2012, p. 934.

<sup>76</sup> R. Matulionyte, 'Cross-Border Collective Management and Principle of Territoriality: Problems and Possible Solutions in the EU', *The Journal of World Intellectual Property* 2009, p. 467-497.

<sup>77</sup> T. Riis and J. Schovsbo, 'Extended collective licenses in action', *International Review of Intellectual Property and Competition Law* 2012, p. 935.

<sup>78</sup> T. Riis and J. Schovsbo, 'Extended collective licenses in action', *International Review of Intellectual Property and Competition Law* 2012, p. 950.

## 6 Conclusion

The Memorandum of Understanding on Out-Of-Commerce Works, the Orphan Works Directive and the Proposal for a Directive on Collective Rights Management and Multi-Territorial Licensing will each regulate parts of copyright law relevant for the online dissemination of works by cultural heritage institutions. As the starting point for acquiring copyright clearances is acquiring permission from the individual rights holders, the instruments certainly make things easier for the cultural heritage institutions, even though they do not establish an all-encompassing permission system.

However even if the instruments overlap only partially, severe issues of incompatibility might emerge on many occasions. These incompatibilities create confusion and uncertainty regarding the (future) status of a work and liability, both for cultural heritage institutions as well as rights holders. Although solutions seem to be provided in case of eventual incompatibilities it is questionable whether they are going to work in practice, most notably because it requires the creation of national procedures by the Member States and the compliance with these procedures by rights holders.

Implementation by the Member States could also cause further conflicts. All of the instruments require transposition into the laws of Member States or the conclusion of licences. Both Member States and stakeholders have a great amount of freedom in achieving the desired results and this might lead to divergent implementation. Differences in implementation can lead to incompatibility and fragmentation, which undermines the aims of the instruments in terms of the easy dissemination of cultural heritage. MoU-like licences with extended effect could be preferable from the point of view of the cultural heritage institution, but at the moment this seems impossible for many types of works. Thus the examined future European framework as developed by the three instruments, complemented with individual permission, is the basis from which cultural heritage has to be disseminated to the public online. Compared with a system in which individual permission has to be acquired from all rights holders it most certainly solves some important issues.

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