

Stobo, Victoria (2019) *Archives, digitisation and copyright: do archivists in the UK avoid risk through strict compliance with copyright law when they digitise their collections?* PhD thesis.

<https://theses.gla.ac.uk/73030/>

Copyright and moral rights for this work are retained by the author

A copy can be downloaded for personal non-commercial research or study, without prior permission or charge

This work cannot be reproduced or quoted extensively from without first obtaining permission in writing from the author

The content must not be changed in any way or sold commercially in any format or medium without the formal permission of the author

When referring to this work, full bibliographic details including the author, title, awarding institution and date of the thesis must be given

Archives, Digitisation and Copyright:

Do archivists in the UK avoid risk through strict compliance with copyright law when they digitise their collections?

Submitted to School of Law, College of Social Sciences, University of Glasgow
for consideration for the degree of Doctor of Philosophy in Law

Supervised by: Professor Martin Kretschmer and Dr. Ian G. Anderson

January 2018

“I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.”

Name: Victoria Stobo

Signature: _____

*For my Gran, Agnes Stobo, who sat with me everyday after school
and made sure I did my homework.*

Abstract

The duration and complexity of copyright in relation to unpublished materials is contributing to a 20th century ‘black hole’ in the online historical record. Archives collect, preserve, and provide access to records of governments, businesses, communities and individuals: the raw evidence of transactions, activities and events that informs our understanding of the past. The transformative nature of online access to the archival record supports human rights, democracy, openness, transparency, accountability, culture, learning, research and innovation. Despite reform, the legal framework in the UK fails to provide a safe harbor for archives that could make comprehensive online access to the country’s rich and diverse archival holdings possible. This thesis presents the results of a survey of the UK archive sector that explores how copyright affects digitisation of collections, and analyses five digitisation projects at a variety of archive institutions, in order to better understand the decision-making processes and risk management strategies that make archive collections containing third party rights materials available online, despite the tendency towards risk aversion within the archive sector. The thesis found that a small proportion of UK archives have made third-party rights holder material available online, supporting the view that the sector, in general, is risk averse in relation to third-party copyrights. However, evidence gathered suggests that approaches taken by less risk-averse institutions can be adapted to suit the needs of a wide-range of cultural heritage institutions, and best-practice guidance could have a significant impact on online access to 20th century collections. The study contributes baseline data on the sectoral approach to copyright, rights clearance and risk management, and how these approaches affect digitisation, in order to provide a starting point for further research and best-practice guidance for the UK archive sector.

Table of Contents

ABSTRACT	3
LIST OF TABLES	6
LIST OF FIGURES.....	8
PREFACE	9
ACKNOWLEDGEMENTS	13
ABBREVIATIONS	15
INTRODUCTION	16
1. LITERATURE REVIEW	21
1.1 THE LEGAL FRAMEWORK AND LEGISLATIVE REFORM	21
1.2 LEGAL SCHOLARSHIP AND POLICY-MAKING.....	44
1.3 ARCHIVE SCHOLARSHIP	49
1.4 RISK MANAGEMENT LITERATURE	70
1.5 CONCLUSION.....	79
2. METHODOLOGY	81
2.1 USE OF MIXED METHODS	81
2.2 SURVEY METHOD	90
2.3 CASE STUDY METHOD	94
3. RESULTS OF A QUESTIONNAIRE SURVEY OF THE UK ARCHIVE SECTOR.....	97
3.1 DEMOGRAPHICS	97
3.2 KNOWLEDGE OF THE LAW	101
3.3 PROJECT-LED DIGITISATION.....	103
3.4 ON-DEMAND DIGITISATION	116
3.5 ADMINISTRATIVE DIGITISATION.....	119
3.6 COMPLAINTS.....	121
3.7 SURVEY DATA DISCUSSION	124
4. CASE STUDIES FROM THE UK ARCHIVE SECTOR	130
4.1 CHURCHILL ARCHIVES CENTRE.....	130
4.2 GLASGOW SCHOOL OF ART	139
4.3 NEWCASTLE UNIVERSITY	153
4.4 BRITISH FILM INSTITUTE.....	164
4.5 BRITISH LIBRARY	183
4.6 CASE STUDY DISCUSSION	192
5. CONCLUSION	203
BIBLIOGRAPHY.....	212
APPENDICES	228
APPENDIX A: CASE STUDY INTERVIEW SCRIPT	229
APPENDIX B: INTERVIEW TRANSCRIPTS	232

APPENDIX C: SURVEY INSTRUMENT	361
APPENDIX D: SURVEY DATA	383

List of Tables

Table 1.1:	Surveys of archivists on copyright
Table 1.2:	Summary of previous empirical studies on costs of rights clearance
Table 1.3:	John Cohen AIDS collection rights clearance results
Table 1.4:	Thomas E Watson Papers rights clearance results
Table 1.5:	Codebreakers rights clearance results
Table 1.6:	WL library collection rights clearance results
Table 1.7:	Temperament Families and Types in the Australian, American and Canadian Archive Professions
Table 1.8:	An example of a completed balanced scorecard for risk assessment
Table 1.9:	WL Codebreakers Risk Criteria
Table 2.1:	Pickford's types of archive service
Table 3.1:	Type of archive service
Table 3.2:	Geographic Distribution of Archive Services
Table 3.3:	Collection Size
Table 3.4:	No. of FTE salaried and volunteer staff
Table 3.5:	Annual budgets
Table 3.6:	Sources of copyright information
Table 3.7:	Copyright training
Table 3.8:	Engagement with digitisation
Table 3.9:	Project-led digitisation
Table 3.10:	Issues affecting digitisation projects
Table 3.11:	Record types selected for digitisation
Table 3.12:	Guidance types
Table 3.13:	Accessing digitised material
Table 3.14:	Controlling/encouraging reuse
Table 3.15:	Copyright status of material selected for digitisation
Table 3.16:	Results of third party rights clearance
Table 3.17:	Factors in rights clearance
Table 3.18:	Orphan works and non-responders
Table 3.19:	Rights holder responses
Table 3.20:	Licensing fees
Table 3.21:	Licensing fee policy
Table 3.22:	On-demand digitisation
Table 3.23:	Copy types
Table 3.24:	Declaration type for digital copies
Table 3.25:	Declaration types for paper copies
Table 3.26:	Declaration types for self-service photography/scanning
Table 3.27:	Engagement in administrative digitisation
Table 3.28:	Internal Administrative Use
Table 3.29:	Preservation copying
Table 3.30:	Preservation of third party material
Table 3.31:	Permission sought for preservation copying
Table 3.32:	No. of Complaints and Take-downs
Table 3.33:	Complaints as a result of digitisation
Table 3.34:	Complaints as a result of service users
Table 3.35:	Complaints as a result of administrative digitisation

Table 3.36:	Complaints as a result of sensitive data issues
Table 3.37:	Complaint resolution
Table 3.38:	Risk typologies of institutions
Table 4.1:	WL Codebreakers archive rights clearance results
Table 4.2:	Churchill Papers Microfilm rights clearance results
Table 4.3:	Churchill Papers Online rights clearance results
Table 4.4:	Glasgow School of Art rights clearance results
Table 4.5:	Bloodaxe Books rights clearance results
Table 4.6:	BFI Unlock Film Heritage rights clearance results
Table 4.7:	BL Spare Rib rights clearance results

List of Figures

- Figure 1.1: Example of an artistic photograph and use ranked using the Web2Rights OER Risk Management Calculator
- Figure 3.1: Categorisation of respondent archive services
- Figure 3.2: Ranking sources of copyright information
- Figure 3.3: Ranking of issues affecting digitisation projects
- Figure 3.4: Ranking of factors in rights clearance process

Preface

A note on the practitioner-based context in which this thesis was conceived, researched and written

The author uses the term ‘practitioner-based’ to acknowledge that during the course of the thesis, she tested many of her assumptions and applied many of the findings of the research in her everyday practice – as an archivist, researcher, copyright policy advisor, and course tutor.¹ In this thesis, the author argues that the UK archive sector needs three things: more tailored guidance on copyright law and its application to archives and their collections; training and resources to encourage greater use of risk analysis and mitigation strategies when making collections available online; and more effective advocacy on behalf of the sector with policy and law-makers at national and international levels. During the course of the thesis, the author was heavily involved in all three of these activities, and as a result, the arguments presented have been informed and supported not only by research, but also by practice and experience within the UK archives sector. This approach requires some explanation.

Prior to the commencement of the PhD, the author worked as a research assistant on Copyright and Risk: Scoping the Wellcome Digital Library Project, under the supervision of Principal Investigator Professor Ronan Deazley and Co-Investigator Dr. Ian G. Anderson. The researcher was based within CREATE, The RCUK Centre for Copyright and New Business Models in the Creative Economy, at the University of Glasgow. The Copyright and Risk project was a scoping study of the innovative approach the Wellcome Library took when addressing the issue of third-party rights holder works identified in the Library’s pilot mass digitisation project, Codebreakers: Makers of Modern Genetics. The proposed PhD thesis was a direct outcome of this scoping study, and the approach the author took to the thesis is heavily influenced by the findings of this project. Codebreakers and the scoping study are discussed in more detail in Chapter Two. It should also be noted that the author’s background is an archivist: prior to the Copyright and Risk project, the author had no legal training. **This thesis has been undertaken in the School of Law, as part of an interdisciplinary research centre, and in terms of the research design, methodology and approach, should be considered a Social Science/Archival Studies PhD.**

¹ More information about the CREATE Cultural Heritage research strand is available at www.create.ac.uk.

In addition to completing the thesis, the author worked with Professor Deazley on a number of closely-related, but distinct projects. These included: providing free training courses on various pertinent elements of copyright law for the Scottish archive sector through Deazleys' appointment as Copyright Policy Advisor for the Scottish Council on Archives (a role which the author accepted in 2015). Inevitably, this resulted in invitations to provide training at many practitioner-focused events across the UK. In addition to providing training and a guidance document, Deazley and the author have also represented the SCA at the Standing Committee on Copyright and Related Rights (SCCR) at the World Intellectual Property Organisation (WIPO), and on the Libraries and Archives Copyright Alliance (LACA). Through these two appointments, the author has been involved in advocacy for legal reform in the area of copyright law at UK, EU and International levels.

At the direction of Professor Deazley, the author also assisted in the creation and delivery of two postgraduate level modules in copyright and other information-related law: *Law and Cultural Institutions*, which is available as an optional module to students enrolled on the MSc Information Management and Preservation in the Department of Information Studies (formerly known as HATII) at University of Glasgow, and *Copyright for Information Professionals* which is available on an optional and CPD basis through the Centre for Archive and Information Studies at the University of Dundee. The author contributed course elements to these modules, and now has sole responsibility for their delivery, including the update of course materials in response to legislative change, formulating assessments, providing marking and feedback, and lecture delivery both online by distance-learning, and through face-to-face teaching.

Further to this, the author has contributed to three research projects in particular during the course of the thesis: *Digitising the Edwin Morgan Scrapbooks*, the *Copyright Evidence Wiki*, and the *Copyright Cortex*.² It is necessary to contextualise these projects as their influence can clearly be felt in the thesis, especially that of the *Edwin Morgan* project. *Edwin* interrogated the UK and EU orphan works regime through a rights clearance simulation on 20 pages of scrapbooks created by the poet, translator and Scots Makar over the course of his lifetime.³ The scrapbooks are assembled from contemporary, ephemeral sources: newspapers, magazines, leaflets, photographs, tickets and drawings, many of which are orphan works. Orphan works are works for which no rights holder(s) can be identified, or if

² Digitising the Edwin Morgan Scrapbooks is available at www.digitisingmorgan.org; the Copyright Evidence Wiki is available at www.copyrightevidence.org; and the Copyright Cortex is available at www.copyrightcortex.org.

³ A virtual exhibition of the scrapbooks is also available at <https://www.gla.ac.uk/myglasgow/specialcollections/virtualexhibitions/edwinmorganscrapbooks/>.

identified, cannot be located to seek permission from. Given the nature of archive collections, which are created naturally over time and contain the outputs of many individuals, orphan works are an exceptional problem for the archive sector, not just in the UK, but across the globe. *Edwin* was an opportunity to test assumptions, observe practice and analyse data about the rights status of collections, the practical aspects of the rights clearance process, and attitudes to risk and copyright law in a particular organisational context. The author provided support when the Project Officer began data collection, offered advice on the audit, risk analysis and management throughout the project, contributed to the online resource which showcases the scrapbooks, and was lead author of the journal article resulting from the project.

The author also worked as an intern on the *Copyright Evidence Wiki*, a CREATE project that has collected and categorised over 500 empirical studies on copyright, to build an evidence base that supports informed decision-making on the law, current reform debates and future research. In 2015, the author, alongside CREATE colleagues Deazley and Wallace, applied for funding to build the *Copyright Cortex*, a combined guidance resource and evidence base on copyright law developed specifically for the cultural heritage sector, as a direct result of the success of the Cultural Heritage research strand within CREATE. Both of these projects directly address needs identified in the thesis: for tailored guidance, practical resources and a strong, accessible evidence base for advocacy and reform.

Finally, some sections of the thesis are based on previously published material by the author. These sections are referenced where necessary throughout the text. The original sources are:

- Deazley, R. & Stobo, V. *Copyright & Archives: Risk and Reform* CREATE Working Paper 2013/3 (April 2013) Available at: <http://www.create.ac.uk/wp-content/uploads/2013/04/CREATE-Working-Paper-No-3-v1-1.pdf>
- Stobo, V. *Copyright & Risk: Scoping the Wellcome Digital Library* CREATE Working Paper 2013/10 (December 2013) Available at: <http://www.create.ac.uk/wp-content/uploads/2013/12/CREATE-Working-Paper-No.10.pdf>
- Deazley, R. & Stobo, V. (eds) *Archives & Copyright: Developing an Agenda for Reform* Conference Proceedings, Digital Proceedings of RCUK Symposium, CREATE Working Paper 2014/4 (February 2014) Available at: <http://www.create.ac.uk/wp-content/uploads/2014/02/CREATE-Working-Paper-2014-04.pdf>

- Stobo, V. *Copyright exceptions for archivists and librarians in the UK*, Art Libraries Journal, 41(1), pp. 3-10 (January 2016). Available at <http://dx.doi.org/10.1017/alj.2015.2>
- Mendis, D. and Stobo, V. *Extended Collective Licensing in the UK one year on: A review of the law and a look ahead to the future*, European Intellectual Property Review, 38(4), pp. 208-220, (April 2016). Available at <http://eprints.bournemouth.ac.uk/23247/>
- Stobo, V. *Risky Business: Copyright and Making Collections Available Online*, in Andrea Wallace and Ronan Deazley, eds, Display At Your Own Risk: An experimental exhibition of digital cultural heritage (April 2016) Available at: <http://displayatyourownrisk.org/stobo/>
- Stobo, V., Patterson, K., Erickson, K and Deazley, R. (2018) "I should like you to see them sometime": an empirical study of the costs of rights clearance in the digitisation of Edwin Morgan's scrapbooks," *Journal of Documentation*, 74:3
- Stobo, V. *WIPO SCCR Reports* (2015-2017) available at <http://www.scottisharchives.org.uk/projects/toolsstandards/copyright/wipo>

Acknowledgements

Thank you, Darren, for all your support and encouragement, taking care of me and being endlessly patient. I couldn't have done this without you.

Thank you, Mum and Dad, for bearing with me through another degree. The worst of it is finally over, and I promise this is the last one. I couldn't have done this without you.

Thank you, John and Pam, for the trips down to Sandhead, to Wigton, and the Tigh: I couldn't have done this without you.

Thank you, VAMSK: I was so lucky to get to do my PhD with Dr. Andrea Wallace, Dr. Megan Rae Blakely, Dr. Sheona Burrows and Dr. Kirsty McDougall in CREATE. Thanks for all the drinks, laughs, food, dancing and inappropriate WhatsApp conversations. Honourable mentions to Dr. Kenny Barr and Dr. Jaakko Miettinen. I couldn't have done this without you.

Thank you, Katy Thomson, Clare Deans, Cheryl McEwan, Kat Kelly and Terri McWaters, for keeping me sane and giving me a space away from the work to enjoy myself. Sorry I missed Bulgaria. I couldn't have done this without you.

Thank you to my supervisors: Dr. Ian G. Anderson and Prof. Martin Kretschmer. Honourable mention must also go to Prof. Ronan Deazley, as it's his fault this thesis exists (the best bits are likely his, and the errors are all my own). I was so lucky CREATE hired me and supported my research, over and over again, even when I felt like I had nothing to offer. My final apologies for all my tardiness. I couldn't have done this without you.

Thank you to colleagues and collaborators in CREATE: Mrs. Diane McGrattan, Dr. Andrew McHugh, Dr. Kris Erickson, Dr. Jesus Rodriguez-Perez, Ms. Kerry Patterson, Dr. Sukhpreet Singh and Dr. Joy Davidson. I really lucked out when I got you all as co-workers. I couldn't have done this without you.

Thank you to my research participants: Natalie Adams, Michelle Kaye, Ian Johnson, Becky Bradley, Kim Gaiger, Ben White, Anna Vernon, Annie Shaw, Adam Lockhart, Alison Cullingford, Helen Ford, Liz Wood and all the lovely people who took the survey in 2014. I *really* couldn't have done this without you.

Thank you to the students who have taken Law and Cultural Institutions and Copyright for Information Professionals at University of Glasgow and University of Dundee since 2014. You've been a joy to teach and I've probably learned more from you, than you have from me. I couldn't have done this without you.

Thank you to Victoria Brown and Robert Wright at the Scottish Council on Archives, everyone at LACA (especially Naomi Korn and Tim Padfield), and everyone in the IFLA/ICA delegation at SCCR/WIPO. It's been a joy to work with and get to know you all over the last few years. I'm incredibly lucky to work with you, and I couldn't have done this without you.

Thank you to the archivists, librarians and curators that have attended CREATE and SCA events over the last four years, and who we have asked to speak at our events. GLAM is full of lovely people and it's been a pleasure learning from you and hearing about what's happening across the sector. I couldn't have done this without you.

Thank you to the cafes across Glasgow that have provided respite from my office: The Gilchrist, Artisan Roast, The Glad Café, Strange Brew and Tapa. I would list the pubs too, but I did actually set myself a word limit for this section. I couldn't have done this without you.

During the course of writing this thesis, the following occurred: the Scottish Independence Referendum in 2014, local and European elections in 2014, a General Election in 2015, the European Referendum in 2016, the US Presidential Election in 2016, and a further General Election in 2017. It is genuinely amazing that anyone in the 2013/14 PhD cohort has finished within the prescribed time frame at all. During the worst points of the European referendum campaign, commentary from Marina Hyde, Frankie Boyle and Fintan O'Toole kept me going. It feels slightly absurd to thank you in my PhD acknowledgments, but writing a PhD is an absurd exercise, so there you go.

Abbreviations

A&C	Glasgow School of Art Archives and Collections
ALCS	Authors Licensing and Collecting Society
ARA	Archives and Records Association United Kingdom and Ireland
BAPLA	British Association of Picture Libraries and Agencies
BFI	British Film Institute
BL	British Library
CAC	Churchill Archives Centre
CHIs	Cultural Heritage Institutions
CMUL	Carnegie-Mellon University Library
DACS	Designers and Artists Collecting Society
DAM	Digital Asset Management
DCMS	Department of Culture, Media and Sport
ECL	Extended Collective Licensing
EU IPO	European Union Intellectual Property Office
GLAM	Galleries, Libraries, Archives and Museums
GSA	Glasgow School of Art
HLF	Heritage Lottery Fund
ICA	International Council on Archives
ICH	Intangible Cultural Heritage
JISC	Joint Information Systems Committee
LACA	Libraries and Archives Copyright Alliance
NGO	Non-Governmental Organisation
NUJ	National Union of Journalists
OHIM	Office for Harmonisation of the Internal Market (predecessor of EU IPO)
OOO	Out-of-Commerce
OWLS	Orphan Works Licensing Scheme (UK)
PCF	Public Cataloguing Foundation
PIJIP	Program on Information Justice and Intellectual Property
SAA	Society of American Archivists
SC	Newcastle University Special Collections
SCA	Scottish Council on Archives
SCA*	Strategic Content Alliance
SCCR	Standing Committee on Copyright and Related Rights
SELLL	School of English Literature, Language and Linguistics, Newcastle University
SWCAT	Sir Winston Churchill Archive Trust
TLAM	Framework Treaty on Libraries, Archives and Museums
TNA	The National Archives (UK)
TPMs	Technological Protection Measures
IPO	Intellectual Property Office (UK)
WL	Wellcome Library
WIPO	World Intellectual Property Organisation

Introduction

Do archivists in the UK avoid risk through strict compliance with copyright law when they digitise their collections?

This PhD study will evaluate whether archivists in the UK avoid risk through strict compliance with copyright law when digitising their collections. It will evaluate potential risk management strategies used by archivists with the intention of providing baseline data for the formulation of best practice recommendations for rights clearance when digitising archive material.

Previous research has shown that up to two-thirds of Canadian archivists are risk averse when selecting material for digitisation and online access, preferring to avoid third party copyrights and select material which has fallen out of copyright protection into the public domain, or where the rights holder(s) has assigned copyright to the archive institution. This study will explore whether archivists in the UK are similarly risk averse to their Canadian and North American counterparts, particularly when managing the risks associated with digitising archive material.

A comparison of available studies which document the results of rights clearance processes for the digitisation of copyright-protected archive material has shown that institutions with a larger appetite for risk have been able to make a greater percentage of individual collections available online, compared to those with smaller appetites for risk, who tend to make smaller amounts or selected parts of collections available online. These differing levels of appetite for risk across different institutions results in a skewed online version of the historical record that is not truly representative.

This is important because increasing numbers of users access archives online, and many expect material to be widely available online. Despite reform, the legal framework in the UK fails to provide a safe harbor for archivists that could make comprehensive online access to the country's rich and diverse archival holdings possible. Access to archives supports democracy, openness, transparency, accountability, culture, learning, research and innovation.

The research design contains elements of cross-sectional and comparative study, through the collection of survey data from across the UK archive sector; and elements of evaluation and descriptive research, through the collection of case studies. Mixed methods have been

chosen as an appropriate and pragmatic research methodology given the ability to cross-check results across the survey data and case studies; the level of completeness possible through the combination of discrete research methods; and the value of process-tracing particular elements from individual archive digitisation projects through to sector-wide trends.

Through the analysis of survey data, the research aims to understand the effects of copyright on different types of archive service, by exploring their digitisation practices in relation to their size, budget, subject specialism, institution type and staffing levels. By compiling case studies at different kinds of institutions and looking at different types of archive collections, a richer picture of the decision-making, policy development and rights clearance processes associated with digitisation for online access will be built up. Through the collection of data and multiple observations, a fuller understanding of the perceived risks associated with rights clearance, digitisation and online access, and how risk is assessed and acted upon at different institutions, will be possible.

In general, there has been a lack of detailed, consistently-reported evidence concerning rights clearance in archival digitisation, and especially in relation to projects that employ risk-management strategies in a sector which is known to be highly risk averse. An aim of this PhD is to collate more in-depth, practice-based examples, with a consistent reporting method.

This PhD will be the first study to consider these issues in the context of the UK. The study aims to extend the available evidence base to support future decision-making and risk analysis by practitioners and policy-makers, and to formulate recommendations for best practice guidelines for providing access to archive material online.

Research Questions: Survey Data

- 1) To what extent have archive services in the UK engaged in rights clearance for digitisation projects?
 - a) Where do archivists get their knowledge of the law? Which sources of law do archivists use, and who/where do they go to for advice?
 - b) How important a consideration is copyright law when planning a digitisation project?
 - c) How many digitisation projects involve third party rights holder material compared to public domain or copyright-assigned material?
 - d) Which collection types have been digitised, and to what extent?
 - e) How do archivists manage the risks associated with providing copies for users?

- f) Do archivists think administrative/preservation digitisation presents a risk?
- g) How often do archivists receive complaints relating to material they have made available online from rights holders, and how are those complaints resolved?
- h) Where archivists are not engaging in digitisation, is copyright ever cited as a reason for not engaging in digitisation?

Research Questions: Case Study data

- 2) What types of risk management techniques have archives used to engage in digitisation?
 - a) Does the nature of the rights involved in particular collection types have an effect on rights clearance and risk management?
 - b) How does the type of archive or collection affect the selection of risk criteria?
 - c) How does risk management affect access to the digitised collections; are there any controls on access?
 - d) What can individual digitisation projects tell us about the effectiveness of decision-making, policy development and risk management techniques; the success of rights clearance processes at different institutions, and are there common themes or divergences across project types?

Further context and definitions

Archive institutions collect, preserve, and provide access to the records of governments, businesses, communities and individuals: the raw evidence of transactions, activities and events that informs our understanding of the past. Records are unique, generally unpublished, and created for a specific purpose, whether they are letters, photographs, reports, minutes of meetings, sounds recordings or certificates, and regardless of analogue or digital format.⁴ Records are kept because they are valuable: as evidence, as memory, as witness.⁵ The foundations of archival practice are informed by archival theory and include appraisal, processing, description, preservation, access, and outreach.⁶

⁴ The international standard for Records Management defines records as “information created, received or maintained as evidence and as an asset by an organization or person, in pursuit of legal obligations or in the transaction of business.” 3.14, p.2, BSI (2016) *BS ISO 15489-1:2016 Information and Documentation – Records Management, Part 1: Concepts and Principles*, British Standards Limited: UK.

⁵ For example, see Duranti, L. and Rogers, C. (2012) “Trust in digital records: An increasingly cloudy legal area,” *Computer Law & Security Review*, 28:5, pp. 522-531 on records as evidence; Ketelaar, E. (2008) “Archives as Spaces of Memory,” *Journal of the Society of Archivists*, 29:1, pp.9-27, DOI: <https://doi.org/10.1080/00379810802499678>; Jimerson, R.C. (2003) “Archives and Memory,” *OCLC Systems and Services: International Digital Library Perspectives*, 19:3, pp.89-95, DOI: <https://doi.org/10.1108/10650750310490289>; Cook, T. (2013) “Evidence, memory, identity and community: four shifting archival paradigms,” *Archival Science*, 13:2-3, pp.95-120, DOI: <https://doi.org/10.1007/s10502-012-9180-7> on archives as memory; and Harris, V. (2007) *Archives and Justice: A South African Perspective*, Society of American Archivists: Chicago, particularly on truth and reconciliation in the aftermath of apartheid.

⁶ Key introductory texts on archives include: Craven, L. (2008) *What Are Archives? Cultural and Theoretical Perspectives: A Reader*, Ashgate: London; Brown, C. (2014) *Archives and Recordkeeping: Theory into Practice*, Facet: London; Millar, L. (2010) *Archives: Principles and Practice*, Facet: London; Williams, C. (2006) *Managing Archives: Foundations, Principles and Practice*, Chandos: Oxford; and McKemmish, S. et

Archive institutions share close ties with other cultural heritage institutions (CHIs), commonly abbreviated as GLAM (Galleries, Libraries, Archives and Museums). The collections held by these institutions tend to differ in key respects: at the most basic level, galleries collect art, libraries collect published works, archives collect records and museums collect objects. In reality, CHIs can and do collect a range of materials, and the boundaries between institutions and collection types are often amorphous.⁷

Archivists in the UK tend to be educated to undergraduate level, before taking an archives-specific postgraduate degree,⁸ although other routes into the profession exist.⁹ A workforce survey commissioned by the ARA and CILIP in 2014 estimated that 86,376 people work across the library, archives, records, information management and knowledge management sectors. The majority of workers are female (78%), highly-qualified (61% at postgraduate

al (2005) *Archives: Recordkeeping in Society*, Centre for Information Studies: Wagga Wagga NSW. A very short list of relevant theorists and areas of interest include: Eric Ketelaar (History of recordkeeping, archival education, ethics, law), Randal C. Jimerson (Accountability, social justice, ethics), Terry Cook (Appraisal, postmodernism, arrangement and description), Jeannette Bastian (Archival education, community archives, postcolonialism), Luciana Duranti (Archival diplomatics, trust in records, digital recordkeeping), Schellenberg (Appraisal), David Bearman (Digital recordkeeping), Richard J. Cox (History of recordkeeping, appraisal, ethics), Heather MacNeil (Ethics, arrangement and description, trust in records), Jenkinson (Management of public records, foundational UK theorist), Verne Harris (Social justice, deconstruction, truth and reconciliation), Anne Gilliland (Records as human rights, records of displaced persons, community archives), Geoffrey Yeo (Archival description, provenance, concepts of records and recordkeeping) and Frank Upward (Records Continuum Model).

⁷ Many museums and galleries hold their own institutional archives: a basic search of the National Register of Archives produces 671 museum institutions, including the National Museum of Wales, the Postal Museum and the Imperial War Museum. Libraries may also collect archive collections, and archives frequently hold reference libraries. A group of CHIs may purchase a collection and split the different parts of the collection between their respective institutions. For example, the Stoddard-Templeton Collection (comprising the records of a Scottish carpet manufacturer) is split between University of Glasgow Archives and Special Collections, the Glasgow School of Art, and Glasgow Life. Details are available at GUASC (2018) *Stoddard-Templeton Collection* [online] available at <https://www.gla.ac.uk/myglasgow/archives/collections/business/features/stoddard/> [accessed 10 June 2018]. The National Register of Archives can be accessed through TNA's Discovery at <http://discovery.nationalarchives.gov.uk/find-an-archive>.

⁸ The Archives and Records Association (ARA) is the professional membership organisation for archivists, records managers and conservators in the UK and Ireland. The ARA accredits postgraduate qualifications for archivists and records managers: courses are available at Aberystwyth University, Maynooth University, University College Dublin, University of Dundee, University of Glasgow, University of Liverpool and University College London. More details are available at <http://www.archives.org.uk/careers/careers-in-archives.html>.

⁹ For example, the predecessor organisation to the ARA (The Society of Archivists), used to offer a distance-learning certification in archives and records management. Working in an archive service while undertaking continuing professional development through the ARA Registration Scheme is another alternative (<http://www.archives.org.uk/training/registration-scheme.html>). Community archives may be run by volunteers without archive experience or qualifications.

level), older (55% are over 45 years of age) and identify as white (97%).¹⁰ The archive workforce is also supported by high numbers of volunteers.¹¹

Within this thesis, digitisation refers to methods whereby an analogue, 2-dimensional item, e.g., records on paper, tape, film or other materials, are either digitally scanned, photographed, or converted through other technical means to produce a digital file: a surrogate copy of the item.¹² As such, the scope of this thesis excludes 3D digitisation and born-digital records.¹³ Mass digitization refers to digitisation carried out at a large-scale. One or several collections may be digitized in their entirety, or with minimal selection processes.¹⁴ This is in contrast to smaller-scale digitisation, where a selection process limits the amount of records digitized within a single collection, or across multiple collections.¹⁵

¹⁰ Statistics are available in CILIP/ARA (2015) *A study of the UK Information Workforce: Executive Summary* [online] available at <http://www.archives.org.uk/images/Workforce/20151124WorkforceSurveyExecutiveSummaryA4WEB.pdf> [accessed 12 June 2018].

¹¹ Williams (2014) states that “Volunteering currently provides a substantial contribution to the development of the archive sector and to the accessibility of archival resources to the wider public.” (p.22) The survey data shows that, of the 100 responding institutions, 65% facilitate up to 20 volunteers annually (p.12), and that volunteers contribute to a “range of activities.” (p.22) Williams, C. (2014) *Managing Volunteering in Archives: Report 2014* [online] available at http://www.archives.org.uk/images/documents/ARACouncil/ARA_Managing_Volunteering_in_Archives_2014_Report_and_appendices_final.pdf [Accessed 12 June 2018].

¹² The Oxford English Dictionary defines digitization as “The action or process of digitizing; the conversion of analogue data (esp. in later use images, video, and text) into digital form.” Oxford University Press (2018) *OED Online*, available at www.oed.com/view/Entry/240886 [Accessed 12 June 2018]. Texts on digitization from the GLAM discipline include: Tate (2017) *Archives and Access Toolkit* [online] available at <https://www.tate.org.uk/art/archive/archives-access-toolkit> [accessed 12 June 2018]; Hughes, L. (2003) *Digitizing Collections: Strategic Issues for the Information Manager*, Facet: London; and Poll, R. (2010) NUMERIC: statistics for the digitisation of European cultural heritage, *Program*, 44:2, p.122-131, available at <https://doi.org/10.1108/00330331011039481> [accessed 12 June 2018]

¹³ The Digital Preservation Coalition defines born-digital as: “Digital materials which are not intended to have an analogue equivalent, either as the originating source or as a result of conversion to analogue form. This term has been used ... to differentiate them from 1) digital materials which have been created as a result of converting analogue originals; and 2) digital materials, which may have originated from a digital source but have been printed to paper, e.g. some electronic records.” Digital Preservation Coalition (2015) *Digital Preservation Handbook*, 2nd ed. [online] available at <https://dpconline.org/handbook/glossary> [access 12 June 2018]. 3D digitisation comprises various scanning technologies which can be used to create digital surrogates of objects, buildings, landscapes and archaeological sites: Wikipedia provides an overview of current 3D scanning technology (https://en.wikipedia.org/wiki/3D_scanner) and the Smithsonian 3DX project (<https://3d.si.edu/>) gives an idea of how the technology can be used by CHIs to capture a range of objects and environments.

¹⁴ Borghi and Karapapa (2013) define mass digitisation as “the conversion of... works in digital format on an industrial scale... books, journals, photographs, sound recordings, and film are digitized in bulk to feature in the collections of online archives, repositories, digital libraries, search engines and data aggregators.” (p.1) General examples include Google Books, the Internet Archive and Europeana (ibid, p.1). An archive-specific example would be the digitisation programme at the Wellcome Library (<https://wellcomelibrary.org/what-we-do/digitisation>).

¹⁵ Examples of selective digitisation projects include the ‘Work, Home and Leisure’ exhibition on University of Exeter’s Digital Collections Online repository (available at <https://ore.exeter.ac.uk/repository/handle/10472/17>); the Glasgow Women’s Library LGBTQ Collections Online Resource (available at <https://womenslibrary.org.uk/explore-the-library-and-archive/lgbtq-collections-online-resource/>); and the ‘100 Objects’ blog at University of Bradford Special Collections (available at <https://100objectsbradford.wordpress.com/>).

1. Literature Review

This chapter begins by considering the current legal framework in the UK, and current reform proposals at European and International levels, identifying a gap where mass digitisation of archive collections takes place. It then explores legal and archival scholarship on copyright and digitisation, analyzing proposed legislative solutions and evidence from sector surveys and cases studies, before concluding with an overview of relevant literature on risk management.

Literature which explores the relationship between copyright law, archival records and digitisation practices is limited, but can be categorized into three distinct types: reference sources on the law, which explain how the law is applied to different types of archive records and have distinctly practical uses; black letter¹⁶ analysis of copyright legislation and legal frameworks relating to archive collections, which may or may not reference the theory and practice involved in the day-to-day activities of practitioners; and original empirical research, which observes and measures how the law is applied in practice. This chapter will draw on each of three types, with a particular emphasis on original empirical research.

1.1 The legal framework and legislative reform¹⁷

Research was undertaken for this PhD between 2013 and 2017. Significant changes to UK copyright law were enacted during this period, as a result of the Hargreaves Review in 2011. It is not the purpose of this PhD to identify or analyse the effects of these changes on the UK archive sector. However, it is necessary to explain the changes. While many improvements were made to the exceptions available to archivists in 2014, the reform process fell short in key respects, and does not enable online access to digitised archive collections at scale. This has implications for future digitisation projects, research and advocacy in this area, and some consideration must be given to the gap between the reasonable acts that are permitted by the law, and the reasonable acts that are not.

This section will outline the reform process within the UK. The exceptions that directly affect archivists are then discussed: s.7(6) of the 1956 Act (which is still in force); s.29 Research and private study; s.40B Libraries and educational establishments etc.: making

¹⁶ Oxford Reference defines black letter law as “The known and accepted principles of law set down and established, either in legislation or case law, and ascertainable from printed sources.” *Oxford Reference* (2018) <http://www.oxfordreference.com/view/10.1093/oi/authority.20110803095510675>.

¹⁷ This section contains material previously published in Stobo, V. *Copyright exceptions for archivists and librarians in the UK*, *Art Libraries Journal*, 41(1), pp. 3-10 (January 2016).

works available through dedicated terminals; s.42 Copying by librarians etc.: replacement copies of works; s.43 Copying by librarians or archivists: single copies of unpublished works; s.44B Permitted uses of orphan works and the Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014. Some attention will also be given to s.31A Disabled persons: copies of works for personal use; s.31B Making and supply of accessible copies by authorised bodies; s.31BA Making and supply of intermediate copies by authorised bodies and s.31BB Accessible and intermediate copies: records and notification.¹⁸ The section concludes with a brief overview of relevant European and International legislation, and evidence submitted during the copyright reform process.

1.1.1 Legislative Reform

In 2010, Professor Ian Hargreaves was asked by the UK government to conduct an independent review to determine whether the UK Intellectual Property framework was supporting innovation and economic growth. *Digital Opportunity: Review of Intellectual Property and Growth* was published in 2011. Hargreaves found that lobbying had more influence on the policy-making process than empirical evidence, and advised that the legislative framework would have to be responsive to changing technology. He recommended that the current exceptions should be extended to all types of copyright-protected work, and that they should be protected from contract override where possible. Hargreaves also advised the UK government to adopt a text and data mining exception, a private use/format shifting exception; and create a new exception for caricature, parody and pastiche. His recommendations were accepted by the government, and the Enterprise and Regulatory Reform Bill was drafted as a result.

The Enterprise and Regulatory Reform Act 2013 passed successfully, and the exceptions in the CDPA 1988 were updated by the Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014 and The Copyright and Rights in Performances (Disability) Regulations 2014, among others. Further legislation was passed to make use of Orphan Works: the Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014 and the Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014. Finally, the Government attempted to shorten the duration of protection in unpublished works, but opted not to pursue this based on the response to the public consultation on the proposals (Consultation on reducing the

¹⁸ A more detailed analysis of the copyright landscape applicable to archives and archivists, pre- legislative reform in 2013, is available in Deazley, R. and Stobo, V. *Copyright & Archives: Risk and Reform*, CREATE Working Paper 2013/3 (April 2013)

duration of copyright in unpublished (“2039”) works).

1.1.2 The Exceptions

1.1.2.1 Research and private study (s.29)

The fair dealing¹⁹ exception for non-commercial²⁰ research and private study has been extended to include most types of works: previously the exception had only applied to literary, dramatic, musical and artistic works, but now includes film, sound recordings and broadcasts.²¹ Acknowledgement of use is only required where it is practical to do so, and contractual terms cannot override the exception.²² Use of s.29 is generally not mediated through archivists: this exception allows users of libraries and archives to obtain copies using transcription, photocopiers, digital scanners or other methods. There has been some discussion as to whether archivists can rely on s.29 to supply copies of material to users, given that they cannot rely on s.42, the exception for copying published material, which is specifically for librarians.²³ While a close reading of the legislation might suggest that archivists cannot use s.29 to supply copies,²⁴ Deazley used the exception to justify the

¹⁹ Fair Dealing exceptions are exhaustive: research and private study (s.29), criticism, review, quotation and news reporting (s.30), caricature, parody and pastiche (s.30A), and illustration for instruction (s.32). Fair Dealing is not defined within the CDPA 1988, but case law has provided general elements of use to be aware of. Padfield suggests the following: “The first issue to consider is whether the quantity being used is excessive in the circumstances. What proportion of the source work has been used?...; What is the motive for the use? Does the use compete with the copyright owner’s exploitation, for instance by evading purchase of a legitimate copy?...; Does the use fit within one of the categories of fair dealing?... If not, no matter how ‘fair’ the use is, it will not be fair dealing....; Has ‘sufficient acknowledgement’ been given?; Has the copyright owner made the work freely available to the public, or could the use be seen as a breach of confidence?; Is this use necessary in the circumstances? For instance, is direct quotation of the author’s own words necessary or would use of the information but not the actual form of expression be enough? Freedom of speech is not a sufficient justification.” Padfield (2015) 5.3.7., p.147-8.

²⁰ The 2001 Information Society Directive states that non-commercial, in this context, means: “...in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage.” Art 5 (2) (c). Pedley (2015) acknowledges that ‘the legislation doesn’t define ‘commercial purpose,’” and notes that “the test is whether the research is for a commercial purpose, not whether it is done by a commercial body,” and that “You can only decide on whether the purpose is commercial based on the facts available at the time of the copying.” 3.2.2, p.43.

²¹ CDPA s.29 (1)

²² CDPA s.29 (1) (b) - (4) (b)

²³ For example, Padfield (2015) notes that “...there are special provisions for copying on behalf of a researcher by an archivist or librarian... it therefore seems that the defence of fair dealing would not for the most part be available to a librarian or archivist who supplied copies outside the terms of those special provisions. Librarians, though, are explicitly allowed to make copies under fair dealing so long as they do not do anything that is not permitted by the library copying exception.” 5.3.9, p.149. Of course, teasing out these distinctions may become murky in practice, especially in institutions which hold both library and archive collections and employ both librarians and archivists.

²⁴ s.29 (3)(a)(b) reads: “Copying by a person other than the researcher or student himself is not fair dealing if—(a)in the case of a librarian, or a person acting on behalf of a librarian, that person does anything which is not permitted under section 42A (copying by librarians: single copies of published works), or (b)in any other case, the person doing the copying knows or has reason to believe that it will result in copies of substantially the same material being provided to more than one person at substantially the same time and for substantially the same purpose.” A rights holder could argue that material made available on an institutional website meets the criteria in 3(b).

digitisation and making available of the Edwin Morgan scrapbooks in 2017.²⁵ It remains to be seen if other CHIs use s.29 to enable digitisation for non-commercial purposes.

1.1.2.2 Copies for text and data analysis for non-commercial research (s.29A)

This new exception permits a person with ‘lawful access’²⁶ to a work to make a copy of the work for the sole purpose²⁷ of computational analysis,²⁸ providing the analysis is for non-commercial purposes²⁹ and acknowledgment of the use is given where practical.³⁰ Unless the copyright owner permits it, the copies cannot be transferred to any other person, which could make text and data mining within and across large research groups likely to be infringing.³¹ Contractual terms cannot override the exception.³² This means that, for example, academics with access to subscription journals through their university library can make copies for text and data mining purposes, regardless of the licenses in place for those journals. In practice, journal publishers often control access through technological protection measures (TPMs) when large amounts of articles are downloaded.³³

²⁵ See the Copyright Statement at Deazley, R., Patterson, K. and Stobo, V. (2017) Digitising the Edwin Morgan Scrapbooks, available at www.digitisingmorgan.org [Accessed 20 December 2017].

²⁶ Padfield (2015) considers that “Lawful access would include ownership of a copy of the work or access through an archive or library of which the user was a legitimate reader to a work that was open to public access or to which the user had been granted privileged access.” 5.3.15

²⁷ CDPA s.29A (2) (b)

²⁸ Computational analysis, also known as text and data mining, is a research methodology used across the biomedical sciences, the digital humanities, psychology, sociology, business and marketing (See https://en.wikipedia.org/wiki/Text_mining). A large dataset, e.g. the British Newspaper Archive at the British Library (<https://www.britishnewspaperarchive.co.uk/>) could be analysed textually, using pattern recognition, tagging, annotation or natural language processing to track particular stories or people. Place names could be linked to geospatial data sources to produce visualisations. Examples of this type of analysis can be found in Cordell, R. (2015) “Viral Textuality in Nineteenth-Century U.S. Newspaper Exchanges,” *Virtual Victorians*, (eds) Alfano, V. and Stauffer, A., Palgrave MacMillan: London and Terras, M., Baker, J., Hetherington, J., Beavan, D., Zaltz Austwick, M., Welsh, A., O'Neill, H., Finley, W., Duke-Williams, O. and Farquhar, A. (2017) 'Enabling complex analysis of large-scale digital collections: Humanities research, high-performance computing, and transforming access to British Library digital collections' *Digital Scholarship in the Humanities*, DOI: 10.1093/llc/fqx020.

²⁹ See previous footnote 20 on non-commercial purposes.

³⁰ CDPA, s.29A (1) (a) (b)

³¹ CDPA, s.29A (2) (a)

³² CDPA, s.29A (5)

³³ Technically, this should not be permitted by CDPA 1988 s.296 (ZE) and s.296 (ZEA) but see Library and Archive Copyright Alliance (2016) *Notice of complaint to the Secretary of State in line with sections 296ZE and 296ZEA of the Copyright, Designs and Patents Act 1988 [as amended] – where Technological Protection Measures (TPMs) prevent a complainant from benefiting from an eligible copyright exception* [online] available at https://archive.cilip.org.uk/sites/default/files/media/document/2017/notice_of_complaint_to_the_secretary_of_state_-_test_case_1_0.pdf [Accessed 12 June 2018] for a recent example of TPMs being used to prevent permissible use of s.29A.

1.1.2.3 Copying by librarians etc.: replacement copies of works (s.42)

An existing preservation exception allowed libraries and archives to copy literary, dramatic and musical works within their permanent collection for the purposes of preservation or to replace a lost, stolen or damaged item (either in the institutions' own collection, or the collection of another not-for-profit library or archive).³⁴ This has now been extended to include all types of copyright work.³⁵ Museums and galleries have also been included within the exception for the first time.³⁶ The exception can only be applied when it is not possible or reasonable to purchase a replacement copy of a work.³⁷ The requirement to charge for the copy has been removed: charging is now optional, and fees should only cover the cost of producing the copy.³⁸ The exception cannot be overridden by contract,³⁹ permits copying of copies⁴⁰ and does not specify a maximum number of copies that can be made, which enables digital preservation.⁴¹ Unfortunately, the exception is still limited to works within the permanent collection⁴² which is problematic for a number of reasons: material deposited indefinitely can require preservation treatment; born-digital items must be copied before they can be appraised and accessioned; and most preservation treatments involve the use of photography for record-keeping purposes.

1.1.2.4 Libraries and educational establishments etc: making works available through dedicated terminals (s.40B)

Educational institutions, libraries, archives and museums can now provide access to digital copies of works for research and private study, via dedicated terminals on their premises.⁴³ On the basis of recent EU case law,⁴⁴ users should not be able to print copies of material from these terminals, use removable drives to obtain copies, and the number of digital copies available for viewing should not exceed the number of physical copies available in the

³⁴ Embedded artistic works were included in the previous exception, but standalone artistic works were not. See <https://www.legislation.gov.uk/ukpga/1988/48/section/42/enacted> for previous iterations of CDPA 1988.

³⁵ CDPA 1988 s.42 (1)

³⁶ Ibid.

³⁷ CDPA 1988 s.42 (3)

³⁸ CDPA 1988 s.42 (5)

³⁹ CDPA 1988 s.42 (7)

⁴⁰ CDPA 1988 s.42 (6)

⁴¹ The Digital Preservation Coalition defines digital preservation as "...the series of managed activities necessary to ensure continued access to digital materials for as long as necessary. Digital preservation is defined very broadly for the purposes of this study and refers to all of the actions required to maintain access to digital materials beyond the limits of media failure or technological and organisational change. Those materials may be records created during the day-to-day business of an organisation; "born-digital" materials created for a specific purpose (e.g. teaching resources); or the products of digitisation projects." DPC (2015) *Digital Preservation Handbook* [online] available at <https://dpconline.org/handbook> [accessed 12th June 2018]

⁴² CDPA 1988 s.42 (1) (2)

⁴³ CDPA s.40B

⁴⁴ *University of Darmstadt v Eugen Ulmer* [2014] ECDR 449

institution.⁴⁵ However, if a user requests a copy of material they have viewed on a dedicated terminal under another fair dealing exception, this can be accommodated.⁴⁶ The EU ruling also clarified that while institutions have the right to digitise their collections in order to make them available on dedicated terminals, they cannot digitise their collections in their entirety.⁴⁷ If the works intended for display are subject to a license or purchase agreement, then communication via a dedicated terminal must be compliant with that agreement.⁴⁸

1.1.2.5 Disabled persons: copies of works for personal use (s.31A)

This exception applies if the disabled person has lawful possession or use of the works to be copied, and the person's disability prevents them from enjoying the work to the same degree as a person who does not have that disability.⁴⁹ The making of an accessible copy will not infringe if it is made by the person or on their behalf, if it is made for personal use and it is not possible to purchase a commercial, accessible copy on reasonable terms.⁵⁰ The sum charged for copying must not exceed the cost of making and supplying the copy,⁵¹ and the exception cannot be overridden by contract.⁵²

The disability exceptions previously only applied to visual impairments.⁵³ The exception now applies to all types of copyright work, rather than just literary, dramatic, musical and artistic works.⁵⁴ Previously, contract could override the exception, so this is a significant improvement. The previous exception was also dependent on no commercial copy being available.⁵⁵

1.1.2.6 Making and supply of accessible copies by authorised bodies (s.31B)

This exception applies if an authorized body (i.e., an archive or library, for example) has lawful possession of the works to be copied, including broadcasts, and the work is supplied to a person whose disability prevents them from enjoying the work to the same degree as a

⁴⁵ Padfield (2015), 6.5.3, p.194; Pedley (2015) 3.3.3, p.53-54.

⁴⁶ Padfield (2015) suggests that "Use by readers is for purposes of non-commercial research or private study only," alluding to s.29. The text of s.40B simply refers to research and private study. Pedley (2015) is silent on the question of commercial v. non-commercial research in this context.

⁴⁷ *University of Darmstadt v Eugen Ulmer* [2014] ECDR 449

⁴⁸ CDPA s.40B (3)(c)

⁴⁹ CDPA s.31A (1) (a) (b)

⁵⁰ CDPA s.31A (2) (a) (b) (c)

⁵¹ CDPA s.31A (3)

⁵² CDPA s.31F (8)

⁵³ Copyright (Visually Impaired Persons) Act 2002, s.31A (1), available at <https://www.legislation.gov.uk/ukpga/2002/33/section/1/enacted> [accessed 12th June 2018]

⁵⁴ Ibid., s.31A (1) (a) (b)

⁵⁵ Ibid., s.31A (3)

person who does not have that disability, or to a person acting on the disabled person's behalf.⁵⁶ Educational establishments conducted for profit must ensure that any copies provided using this exception are used for educational purposes only, and that it is not possible to purchase a commercial, accessible copy on reasonable terms.⁵⁷ Contract terms cannot override the exception.⁵⁸ The disability exceptions previously only applied to visual impairments. The exception now applies to all types of copyright work, rather than just literary, dramatic, musical and artistic works. Contract could override the exception, so this is a significant improvement.⁵⁹

Accessible copies must be accompanied by a statement that the copy has been made under s.31B, with sufficient acknowledgement of the author (where practicable).⁶⁰ Accessible copies must incorporate the same or similar TPMs as the original (unless the copyright owner agrees otherwise); this is an unfortunate amendment given that TPMs are often what makes electronic copies of work inaccessible for disabled people in the first place.⁶¹

An authorized body that has made an accessible copy of a work using this exception can supply it to another authorized body, to enable them to make accessible copies of the work.⁶² The sharing of accessible copies should reduce wasted effort where broadly similar material is being copied for disabled access at multiple institutions and could save significant amounts of staff time and money, although this is probably of more relevance to libraries than archives. Finally, the sum charged for copying must not exceed the cost of making and supplying the copy.⁶³

1.1.2.7 Copying by librarians or archivists: single copies of unpublished works (s.43)

This exception allows a librarian or archivist to make and supply a single copy of the whole or part of an unpublished work for non-commercial research and private study, provided that users complete a statutory declaration.⁶⁴ Declarations can now be received electronically, making it quicker and simpler to obtain copies from libraries and archives via email.⁶⁵ There

⁵⁶ CDPA s.31B (1)(2)(3)(4)

⁵⁷ Ibid., s.31B (6)

⁵⁸ Ibid., s.31F (8)

⁵⁹ Copyright (Visually Impaired Persons) Act 2002, s.31B

⁶⁰ CDPA s.31B (7) (a) (b)

⁶¹ Ibid., s.31B (8)

⁶² Ibid., s.31B (9)

⁶³ Ibid., s.31B (10)

⁶⁴ CDPA s.43 (2) (a) (b) (c). This replaces the Statutory Declaration Form mandated by The Copyright (Librarians and Archivists) (Copying of Copyright Material) Regulations 1989, Schedule 2 [online] available at <https://www.legislation.gov.uk/uksi/1989/1212/schedule/2/made> [accessed 12th June 2018]. Examples are also available in Padfield (2015) 9.2, p.302-304.

⁶⁵ Padfield (2015) 5.4.12, p.169.

is no standard format for the declaration to follow, but it must contain the following information:

- the name of the person who requires the copy and the material which that person requires
- a statement that the person has not previously been supplied with a copy of that material by any library or archive, and
- a statement that the person requires the copy for the purposes of research for a non-commercial purpose or private study, will use it only for those purposes and will not supply a copy to any other person.⁶⁶

The exception requires that the work was not published or communicated to the public before deposit, and the copyright owner has not expressly prohibited the copying of the work.⁶⁷ The exception now extends to all types of copyright work, rather than just literary, dramatic and musical works.⁶⁸ The requirement to charge for copying has also been removed: this is now optional.⁶⁹ The issue with the phrase ‘make and supply a copy of a work’ remains: this means that the copy the archivist supplies must be the only copy of the work provided, which would make fulfilling copy requests by email or other electronic means where multiple copies are an inevitable by-product a potential infringement.⁷⁰

1.1.2.8 Copying Unpublished Works (s.7(6) of the 1956 Act)

This section of the Copyright Act 1956, which is still in force, allows archives, libraries, museums and other similar institutions to copy unpublished literary, dramatic or musical works,⁷¹ if:

- “the work was created before 1st August 1989;
- the author has been dead for more than 50 years;
- the work is more than 100 years old; and
- the copy is obtained for the purposes of research (including, in this case, commercial research) or private study, or with a view to publication.”⁷²

⁶⁶ CDPA s.43 (2) (a) (b) (c)

⁶⁷ CDPA s.43 (3) (a) (b)

⁶⁸ CDPA 1988 (as originally enacted) s.43 (1) [online] available at <https://www.legislation.gov.uk/ukpga/1988/48/section/43/enacted> [Accessed 12h June 2018]

⁶⁹ Ibid., s.43 (4)

⁷⁰ CDPA, s.43 (1) Deazley (2013) p.13 highlights this issue.

⁷¹ Copyright Act 1956, s.7(6)

⁷² Padfield (2015) p.147.

Both Deazley and Padfield have observed that this exception will only benefit the first to publish such a work.⁷³

1.1.2.9 Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014

Orphan Works are copyright works for which a rights owner cannot be identified, or for which the rights holder, even if identified, cannot be located.⁷⁴ As a result, permission to use the works cannot be obtained. There are significant numbers of orphan works in both library and archive collections, although the proportions tend to be higher in archive collections because they tend to be larger.⁷⁵

This new exception allows publicly accessible libraries, educational establishments and museums, archives, film or audio heritage institutions and public-service broadcasting organisations to digitize written works, cinematographic or audio-visual works and phonograms and make them available online.⁷⁶ Before an orphan work can be made available online, the institution must conduct a diligent search⁷⁷ for the rights owner, and log the results of the search with the European Intellectual Property Office (EU IPO).⁷⁸ This allows for mutual recognition of orphan works status across the EU.⁷⁹

The exception is limited: it does not apply to standalone artistic works like photographs, maps, plans, paintings and drawings,⁸⁰ and does not cover commercial re-use.⁸¹ Embedded works (i.e. photographs, illustrations, tables) included in books, articles and other published works *are* included in the exception.⁸² For this reason, and depending on the collection in question, many art library/archive institutions may find the orphan works exception is of little relevance to their work.

⁷³ Padfield (2015) 5.4.14, p.171, and Deazley (2013) p.14. Deazley states “...once a work has been published under s.7(6) this will, by definition, prevent anyone else from being able to rely upon s.7(6) to make copies of the work in question (whether for publication or other purposes). Any further use of the work would be constrained by the availability of other relevant exceptions.”

⁷⁴ CDPA 1988 Schedule ZA1, Part 1, para. 3 (1) (2)

⁷⁵ Korn (2012), p.32.

⁷⁶ CDPA 1988 Schedule ZA1, Part 1, para 1, para 2

⁷⁷ Ibid., Schedule ZA1, Part 1, para 5 (9) and Part 2. The process of searching for rights owners can be complex: there are often multiple rights owners in a single work, or you may have to trace multiple heirs where the known rights owners are deceased. The complexity often means that diligent search is time-consuming and resource-intensive.

⁷⁸ See <https://oami.europa.eu/ohimportal/en/web/observatory/orphan-works-database> for more information.

⁷⁹ Ibid., Schedule ZA1, Part 1 para. 4

⁸⁰ Ibid., Schedule ZA1, Part 1 para. 2 (2)

⁸¹ Ibid., Schedule ZA1, Part 1 para. 6

⁸² Ibid., Schedule ZA1, Part 1 para. 2 (5)

The work remains an orphan until the period of protection runs out, or the rights holder returns.⁸³ If the rights holder reappears, they have the right to ask for fair compensation.⁸⁴ An institution using the exception cannot be sued for copyright infringement, and no civil or criminal damages are available, if they have complied with the legislation. The organisation must negotiate with the rightsholder, and offer an explanation as to how their suggested rate of compensation has been calculated.⁸⁵ It may be possible that fair compensation could mean no compensation in this context: it would depend on the type of work and the purpose it had been used for, but there must be a negotiation process to reach this agreement.⁸⁶ If the organisation and the rights holder cannot reach an agreement on fair compensation, they can appeal to the Copyright Tribunal to adjudicate on the matter.⁸⁷

There are circumstances in which an institution could be held liable for copyright infringement, despite using the register. This would occur if the institution has generated revenue from making the works available, and these funds were then used for purposes other than covering the cost of making the works available. An institution could also be held liable if an orphan work is used for a purpose other than its' public interest mission; if an identified or located rights holder does not grant permission for the use of the work; and if the author or rights holder(s) in a work, if identified, are not acknowledged.⁸⁸ It's also important to record the narrative of diligent searches, the sources used, the results, and to keep those records for at least as long as the work is registered and in use (preferably longer, given the statute of limitations).⁸⁹ Liability for copyright infringement is strict: the good intentions of the not-for-profit organisations using the EUIPO registration for non-commercial purposes are irrelevant. The 'innocence defence' can only be used when the defendant thought the work was not protected by copyright, and even if successful, this only protects from an award of damages.⁹⁰

The wording of the legislation in relation to unpublished works is also particularly unhelpful. The legislation requires that the only unpublished works within the scope of the exception

⁸³ Ibid., Schedule ZA1, Part 1 para. 7 (1) (2)

⁸⁴ Ibid., Schedule ZA1, Part 1 para. 7 (3)

⁸⁵ Ibid.

⁸⁶ This suggestion is based on evidence that, typically, rightsholders do not charge a fee for use of their works in non-commercial digitisation projects undertaken by CHIs. Examples of this can be found later in this chapter, and in chapter five of this thesis. Deazley (2013) p.45 also observes this: "...if the archive sector is to benefit meaningfully from the implementation of the [Orphan Works] Directive, "fair compensation" must often be interpreted to mean no compensation. This is not as controversial as it may, at first blush, sound: the idea that fair compensation might equate with no compensation is already a well-established principle of the European copyright law regime."

⁸⁷ CDPA 1988, Schedule ZA1, Part 1 para. 7 (4)

⁸⁸ Ibid., Schedule ZA1, Part 1 para. 6

⁸⁹ Ibid., Schedule ZA1, Part 1 para. 5 (9)

⁹⁰ Padfield, T. (2015) p.117.

are those deposited and made available to the public with the permission of the rights holder.⁹¹ For most archive collections, this is impossible to guarantee because of the large number of 3rd party rights holders represented in collections, especially in particular types of records, like correspondence.⁹² In addition, unpublished works can only be registered where it is reasonable to assume the rights holder would not object to the use of the work. Given that the works are orphaned, and in many cases the rights holder will not be identified, this is an almost impossible judgement to make.⁹³ If an institution was to make such unpublished works available using the register, and the rights holders re-appeared and could prove that the assumptions made were incorrect, that the institution should have been aware of their objections, and that the material had been deposited without permission, the institution could be liable for copyright infringement.

While this is an unlikely set of circumstances, the result of this element of the legislation means the risk taken on publication of the work is passed back to the cultural heritage institution in question. Given the balance of risks and benefits involved in making collections available online, many institutions may decide to continue using or adopt risk management strategies over using the exception. As of May 2018, the EUIPO orphan works database contains 5,416 works (incorporating a further 5,664 embedded works) registered since 2013, from only 43 institutions, which suggests that the exception is not being widely utilized. The largest single user is the British Library, with 168 main works and 5,535 embedded works registered.⁹⁴ Film archives (The Eye Institute, Netherlands and the British Film Institute, UK) have also registered large numbers of works, which may be a reflection on the rights and permission culture engrained in the film industry.⁹⁵

1.1.2.10 Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014

An alternative to the exception exists in the UK licensing scheme for orphan works.⁹⁶ Any user (not just cultural institutions like those mentioned above) can apply for a licence to use

⁹¹ CDP 1988, Schedule ZA1, Part 1 para. 2 (4)

⁹² Padfield (2015) 5.4.20, p.175.

⁹³ Deazley (2013) p.42.

⁹⁴ The register is available at <https://euiipo.europa.eu/orphanworks/>

⁹⁵ The author does not suggest that diligent search or rights clearance for film works is ‘easier’ than that for other types of works, but rather that diligent search sources for audiovisual ‘authors’ are well known within the industry, and that the licensing practices in the film industry make diligent search and rights clearance a familiar and established process for staff in these institutions. For example, see the British Film Institute case study in Chapter Four.

⁹⁶ The Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014 [online] available at <http://www.legislation.gov.uk/ukSI/2014/2863/contents/made> [Accessed 12th June 2018]

an orphan work under this scheme.⁹⁷ Licences are provided for any type of work, to any type of user, for commercial or non-commercial purposes, but the license is limited to use within the UK,⁹⁸ and only lasts for a maximum of seven years, after which you can apply to renew it.⁹⁹

Users must conduct a diligent search for the rights owner before making an application to the Intellectual Property Office (the licensing body) to license the work.¹⁰⁰ The IPO have produced a series of comprehensive guides to diligent search for different media types.¹⁰¹ A number of safeguards have been built into the scheme for rights owners: in addition to the diligent search, an applicant must pay a licence fee equivalent to that charged for the use of a similar non-orphan work, which will be kept by the IPO for returning rights owners;¹⁰² and the orphan register will be made freely available online for rights owners and diligent searchers to check.¹⁰³

Cultural heritage institutions, pursuing digitisation projects in the public interest or related to their public interest missions, will be charged a non-commercial licence rate of £0.10 per orphan work, in order to facilitate mass digitisation within the sector.¹⁰⁴ However, the administrative burden of diligent search in both the exception and licensing scheme may mean that mass digitisation is unachievable for many cultural heritage institutions.¹⁰⁵

The application process for the IPO licensing scheme is resource-intensive. The cost of taking out a licence is dependent on how many works you require a licence for.¹⁰⁶ Small numbers of works can be cleared easily through the scheme, but the burden begins to increase as the number of works increases. First, there is the cost of diligent search. The application process is a series of windows and drop down menus for each individual work, which will also prove time-consuming to complete. An application for 30 works (the

⁹⁷ Ibid., Reg. 2

⁹⁸ Ibid., Reg. 3. This is a significant limitation: when CHIs go to the effort and expense of making collections available online, we generally want everyone to be able to access them, regardless of location.

⁹⁹ Ibid., Reg. 6

¹⁰⁰ Ibid., Reg. 4. See Intellectual Property Office (2017) *View the Orphan Works register* [online] available at <https://www.orphanworkslicensing.service.gov.uk/view-register> [Accessed 20 December 2017]

¹⁰¹ Intellectual Property Office (2016) *Orphan Works diligent search guidance for applicants* [online] available at <https://www.gov.uk/government/publications/orphan-works-diligent-search-guidance-for-applicants> [Accessed 20 December 2017]

¹⁰² Ibid., Reg. 10

¹⁰³ Ibid., Reg. 5

¹⁰⁴ IPO (2016) *Guidance: Orphan Works commercial and non-commercial licences* [online] available at <https://www.gov.uk/government/publications/orphan-works-commercial-and-non-commercial-licences/orphan-works-commercial-and-non-commercial-licences> [Accessed 12th June 2018]

¹⁰⁵ See Stobo, V. et al. (2018) for an analysis of the affordability of diligent search for orphan works.

¹⁰⁶ A breakdown of the application costs is available at IPO (2016) *Guidance: Orphan Works costs, applications and license fees* [online] available at <https://www.gov.uk/guidance/copyright-orphan-works#costs-application-and-licence-fees> [Accessed 12th June 2018]

maximum that you can apply for in a single application) is £80. A cultural heritage institution looking to license 1000 works non-commercially, which is a very conservative amount of material, given the relative size of UK archive collections and the proportion of orphaned material, would quickly rack up application and licence fees in the region of £2500-£3000. This figure does not include the time already spent on diligent search, or the time spent on the application process itself, which would be considerable given the stilted nature of the drop down menus. Those wishing to license material from art-based collections may also find the pre-determined categories of works available as part of the application process do not readily correspond to the material they hold and are trying to license.¹⁰⁷

If a rights holder does return during the period when a work is licensed, the IPO will pay them the license fee for the use of the work.¹⁰⁸ The institution cannot be held liable for copyright infringement, and they can use the work until the end of the license period, which provides a certain amount of business continuity. Rights holders can complain about the conduct of the IPO to the First-Tier Tribunal.¹⁰⁹ Applicants and licensees also have recourse to complain to the Copyright Tribunal if they think the IPO are being unfair in terms of the application process and the grant of licenses. If, during the license period, the institution treated the work in a derogatory manner, they could still be sued for infringing the moral rights in the work by the returning rights holder(s). Additionally, if it is found that the declaration made by the licensee during the application process was false, they can be held liable for infringement where the works have been used.¹¹⁰

Once the work is licensed, it can only be used within the UK.¹¹¹ Any orphan work, regardless of origin, can be licensed for use within the UK, but the diligent search must take into account sources in the country of origin.¹¹² Current usage of the licensing scheme is low: only 816 works have been licensed since 2014, and the actual numbers of licensed works is likely to be lower, as the register records withdrawn and unsuccessful applications.¹¹³

Before this legislation existed, CHIs had to make a risk assessment before making orphan works available online. CHIs opted to select material for digitisation which was already out

¹⁰⁷ This became clear during discussions with the archivists at Glasgow School of Art, leading to further discussion of the works of Artistic Craftsmanship within their collections, which have also posed problems in terms of making images of them available online, especially since the repeal of Section 52 of the CDPA 1988. See Chapter Four for more details.

¹⁰⁸ Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014, Reg. 12.

¹⁰⁹ Ibid., Reg. 14

¹¹⁰ Ibid., Reg. 6

¹¹¹ Ibid., Reg. 6 (2) (a)

¹¹² Ibid., Reg. 4

¹¹³ The register can be searched at <https://www.orphanworkslicensing.service.gov.uk/view-register>

of copyright, or where their parent institutions own the copyright, or has been assigned the copyright in a collection by a depositor with the authority to do so.¹¹⁴ It's important to note that use of both the OWLS and the EU IPO register still contain elements of risk that have to be assessed and managed.

A research project at the University of Glasgow found that using the combined exception and OWLS to make a scrapbook created by the Scottish poet Edwin Morgan available online would cost £180,032.24 in salary costs, application and license fees, taking 7.8 years for a single member of full-time staff.¹¹⁵ Given the burden of cost associated with diligent search and the application process associated with the IPO OWLS, it may be the case, as with the exception, that CHIs opt to adopt or (in some cases) continue using risk management strategies in order to make collections available online. Further research on the impact of the orphan works exception and licensing scheme by the author is available in Appendix E.

1.1.2.11 Consultation on reducing the duration of copyright in unpublished (“2039”) works¹¹⁶

Prior to the introduction of the CDPA 1988, unpublished works in the UK enjoyed perpetual copyright protection.¹¹⁷ Transitional measures were included within the CDPA to bring copyright protection for unpublished works in line with the protection offered to published works.¹¹⁸ The transitional provisions apply to certain works created, but not published before 1st August 1989, where the author died before 1st January 1969.¹¹⁹ The works were given a duration of protection of 50 years from the commencement of the 1988 Act, meaning they will eventually enter the public domain at midnight on the 31st December 2039. This results in the absurdity that materials going back to the 15th, 16th and 17th centuries are still protected

¹¹⁴ Dryden (2008)

¹¹⁵ Stobo, V., Patterson, K., Erikson, K. and Deazley, R. (2017) ‘I should like you to see them sometime’: an empirical study of the costs of rights clearance in the digitisation of Edwin Morgan’s scrapbooks, *Journal of Documentation*; forthcoming

¹¹⁶ This section includes material previously published in Stobo, V. (2014) ‘Will UK unpublished works finally make their Public Domain Debut?’, CREATE blog post, available at <http://www.create.ac.uk/blog/2014/06/02/will-uk-unpublished-works-finally-make-their-public-domain-debut/> [Accessed 20 December 2017]

¹¹⁷ Copyright Act 1956, Part 1, s.2 (1)

¹¹⁸ Ibid., Schedule 1, para.12 (4) (5)

¹¹⁹ Ibid., “(4) Copyright in the following descriptions of work continues to subsist until the end of the period of 50 years from the end of the calendar year in which the new copyright provisions come into force—(a) literary, dramatic and musical works of which the author has died and in relation to which none of the acts mentioned in paragraphs (a) to (e) of the proviso to section 2(3) of the 1956 Act has been done; (b) unpublished engravings of which the author has died; (c) unpublished photographs taken on or after 1st June 1957. (5) Copyright in the following descriptions of work continues to subsist until the end of the period of 50 years from the end of the calendar year in which the new copyright provisions come into force—(a) unpublished sound recordings made on or after 1st June 1957; (b) films not falling within sub-paragraph (2)(e) above, unless the recording or film is published before the end of that period in which case copyright in it shall continue until the end of the period of 50 years from the end of the calendar year in which the recording or film is published.”

by copyright. This substantially reduces the online availability and international circulation of authentic, historical records documenting the events which have shaped the UK and its relationship with the world. The National Archives has estimated that the 2039 rule effects over 100 million archival documents in the UK, and it substantially reduces the reach and extent of the public domain within the UK.¹²⁰ This has several knock-on effects for archivists and our users.

If archivists cannot be sure of the copyright status of a work, and prefer to digitize materials that can be confirmed as public domain, or where the rights have been assigned to the institution, then the selection process for digitisation is partly being determined by rights status. As this author has previously noted:

Users who access collections online are only ever seeing material that has been filtered through this selection process, rather than material which has been deliberately chosen to illustrate the full breadth and depth of the institution's complete holdings, and by extension our shared cultural heritage: from the oldest manuscripts through to born-digital records. In short, the digital historical record becomes skewed towards material that presents no or minimal rights clearance issues. This is a concern for at least three reasons. First, if digital is now the principal method of access to records for many CHI users, those users may not be aware of or attentive to the records that are absent from the digital collection. Second, the skew towards older public domain works means these tend to be the materials that shape research opportunities and activity; this is a particular problem in disciplines such as the digital humanities, which rely on large datasets to conduct research and where researchers are not always able to travel to relevant institutions in person. Third, it creates a fundamental barrier to digital access and therefore to the digital preservation of more recently-created works.¹²¹

It has been hoped for some time that this term of protection would be reduced, given that a power to do so was included in the Enterprise and Regulatory Reform Act 2013.¹²² The Libraries and Archive Copyright Alliance have campaigned on the issue¹²³ and CREATe have been highlighted the issue in its detailed working papers and at public events since

¹²⁰ Intellectual Property Office (2014) Consultation on reducing the duration of copyright in unpublished ("2039") works in accordance with section 170(2) of the Copyright, Designs and Patents Act 1988, documentation available at <https://www.gov.uk/government/consultations/reducing-the-duration-of-copyright-in-certain-unpublished-works> [Accessed 20 December 2017]

¹²¹ Stobo, V., Patterson, K. and Deazley, R. 'Digitisation and Risk,' in Deazley, R., Patterson K., and Stobo V. (2017) *Digitising the Edwin Morgan Scrapbooks*, available at www.digitisingmorgan.org [Accessed 22 December 2017].

¹²² Enterprise and Regulatory Reform Act 2013, Part 6, s.7 (3)

¹²³ LACA (2014) *Campaign to free our history – reform copyright* [online] available at <https://archive.cilip.org.uk/news/campaign-free-our-history-reform-copyright> [Accessed 12th June 2018]

early 2013.¹²⁴ A consultation¹²⁵ was launched in October 2014 to seek evidence of the problems created by the rule, and views on potential solutions. The IPO provided two potential options in the consultation document. The preferred option was to reduce the term of protection at the point of commencement of the new regulations. The second option was to introduce a transitional provision, allowing for the reduction in term at a future point after the new regulations commenced. Unpublished films and artistic works were excluded from any term reduction, and respondents were asked whether they felt unpublished sound recordings should be included within the proposed regulations. In the run-up to the consultation and the introduction of the orphan works exception and licensing scheme, the message from the IPO seemed positive: it would make sense to reduce the term in time for the orphan works legislation, with an acknowledgement that “there shouldn’t be anything too complex in the secondary legislation,” to quote one staff member.¹²⁶

However, in the response to the consultation, to which 43 organisations and individuals responded, the government decided not to legislate to reduce the term of protection. The reasons given for this decision were fourfold: that the removal of a copyright could be considered a deprivation of property on human rights grounds; that works subject to the 2039 rule are a ‘significant’ source of income for rights holders; that the policy could have a negative impact on trusts like the Ralph Vaughn Williams Trust that use revenue from licensing unpublished works to support composers; and a lack of economic evidence.¹²⁷ It’s worth considering these justifications in more detail.

Firstly, while the reduction in term would remove the protection enjoyed by rights holders, arguing that this is a deprivation of property in human rights terms is an extreme position to take. Secondly, while a minority of rights holders are able to generate a modest income from publishing unpublished works, they are compensated by the fact that the first to publish unpublished works enjoy 25 years of protection under the Publication Right, so any rights holder that wanted to publish an unpublished work and gain monetary advantage from it

¹²⁴ More information on CREATE Cultural Heritage events and working papers is available at www.create.ac.uk.

¹²⁵ Intellectual Property Office (2014) Consultation on reducing the duration of copyright in unpublished (“2039”) works in accordance with section 170(2) of the Copyright, Designs and Patents Act 1988, documentation available at <https://www.gov.uk/government/consultations/reducing-the-duration-of-copyright-in-certain-unpublished-works> [Accessed 20 December 2017]

¹²⁶ This quote is from the Centre for Intellectual Property Policy and Management, Mass Digitisation, Public Domain and Information Monopolies event held at Bournemouth University in 2014. Details are available at <https://microsites.bournemouth.ac.uk/cippm/2014/04/10/symposium-digitisation-public-domain-informational-monopolies/> [Accessed 20 December 2017]

¹²⁷ IPO (2015) Government response to the consultation on reducing the duration of copyright in certain unpublished works [online] available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/399171/973 - Government Response - copyright in certain unpublished works.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/399171/973_-_Government_Response_-_copyright_in_certain_unpublished_works.pdf) [Accessed 12th June 2018].

would still be able to do so, until at least 2040.¹²⁸ Indeed, the Publication Right addresses both the desire to generate revenue from the unpublished work, and the charge that a reduction in term would constitute a deprivation of property.

While it is true that trusts are able to generate revenue from the licensing of unpublished works, and that those trusts and rights holders may have made business plans on the basis of protection until the year 2039, those plans are not set in stone. Commercial entities have to adjust their plans with regards to a range of factors, not least intellectual property rights. For example, as recently as 2016, furniture manufacturers specializing in reproductions of 20th century design classics were forced to abandon sales in the UK as a result of the repeal of section 52 of the CDPA 1988, which extended the term of protection given to designs, and in some cases renewed copyright in designs that had passed into the public domain.¹²⁹

In terms of economic evidence, the Society of Authors provided the example of a literary estate generating £100,000 in revenue over a 25-year period, and UK Music provided the example of a music publisher generating £20,000 in revenue over a 10-year period.¹³⁰ While this does appear to be a ‘significant source’ of income, when this is divided over the periods reported, they quickly become modest amounts of revenue. Other rights holder representatives’ examples were not included in the government response. Whereas 21 cultural heritage institutions and 3 archive sector representatives were able to provide estimates of the number of 2039 works they held, and the cost of diligent search and rights clearance associated with archive materials.

It is an understatement to say that this result was disappointing. The rule is the most significant legal stumbling block standing in the way of online access to archival collections, and the failure of the IPO and UK government to pursue legislation to reduce the term of protection in unpublished works in 2015 is a failure of their stated commitment to evidence-based policy making. While this author advocates a robust approach to risk management and encourages archivists to take sensible, pragmatic risks when making their collections

¹²⁸ The Copyright and Related Rights Regulations 1996, Part 2, Reg. 16.

¹²⁹ The Enterprise and Regulatory Reform Act 2013 (Commencement No. 10 and Saving Provisions) Order 2016. Coverage of the impact of the change is available at Institute of Art and Law (2016) An end to ‘bargain basement’ design furniture [online] available at <https://ial.uk.com/an-end-to-bargain-basement-design-furniture/> [accessed 12th June 2018]; and Willis, T. (2016) “Why the UK replica furniture market is about to be hit by new copyright laws,” *The Independent* [online] available at <https://www.independent.co.uk/life-style/design/why-the-uk-replica-furniture-market-is-about-to-be-hit-by-new-copyright-laws-a6876006.html> [accessed 12th June 2018]

¹³⁰ Intellectual Property Office (2015) *Government response to the consultation on reducing the duration of copyright in certain unpublished works*, p.4, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/399171/973_-_Government_Response_-_copyright_in_certain_unpublished_works.pdf [Accessed 20 December 2017]

available online, this approach does not create a get-out from the hangover the implementation of the 1988 Act creates. It is one thing to tacitly expect archivists to dice with their professional and ethical obligations, but it is quite another to expect respect for, and compliance with, a regime which is so clearly out of step with the needs and expectations of users, creators, citizens and rights holders.¹³¹ This ‘rule’ benefits a tiny minority of rights holders exploiting niche works, and the removal of fifty years’ worth of protection in line with the current terms of protection available to rights holders does not deprive anyone of a significant property right in any measurable, appreciable form, given that they can benefit from the Publication Right for a period of 25 years from the point of first publication.

The debacle shows a failure of nerve and ironically, the pronounced risk-aversion of the IPO. As 2039 draws closer, the impetus for amending the legislation decreases. With Brexit on the horizon, policymakers will have more important and more pressing matters to address. This is just one of the reasons why consensus-driven, responsible risk management must be considered as a way forward for the archive sector.

1.1.3 European Legislation

The Information Society Directive of 2001 harmonised basic economic rights available to creators of eligible works across Europe but did not harmonise exceptions and limitations, adopting language that made implementation of the exceptions in member states’ national legislation optional.¹³² Since the late 1980s, harmonization of aspects of copyright law has been central to the goal of a Digital Single Market,¹³³ even while research has shown that

¹³¹ The Publishers Association submitted evidence to the consultation arguing that the 2039 rule created unnecessary administrative burdens for the publishing industry. This is an unusual example of a copyright reform issue where cultural heritage organisations and publishers have found themselves on the same side of the argument: that’s how absurd the 2039 rule is.

¹³² Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society. The exceptions and limitations include: non-commercial reproduction of works (except sheet music) for personal use, by publicly accessible libraries, educational establishments, museums and archives, by broadcasting organisations, and by social institutions (Art 5(2)); illustration for teaching (Art 5(3(a))); copying for disability (3(b)); news reporting (c); quotation for the purposes of criticism and review (d); reporting of administrative, parliamentary or judicial proceedings (e); use of political speeches and public lectures (f); use for religious or public celebrations (g); use of works of public architecture or sculpture (h); incidental inclusion (i); advertising sales or exhibitions of artistic works (j); caricature, parody and pastiche (k); demonstration or repair of equipment (l); reconstruction of buildings (m); dedicated terminals (n); and uses where national exceptions already exist (o). A mandatory exception was created for transient and incidental copying (Art. 5(1)). The use of the exceptions must not conflict with the normal exploitation of the work, or unreasonably prejudice the legitimate interests of the rights holder (Art 5(5)). The Directive contains text on Technological Protection Measures. TPMs, while not directly relevant to 2D digitisation of analogue collections, are having a deleterious effect on digital preservation efforts. The 2014 reform process in the UK brought the caricature, parody and pastiche exception, and the dedicated terminals exception, into UK law for the first time. The UK government also brought in the exception for copying for personal use, but this was quashed by the High Court in July 2015.

¹³³ van Eechoud, M. et al (2009) ‘The European Concern with Copyright and Related Rights’ in *Harmonising European Copyright Law: The Challenges of Better Law-Making*, Information Law Series Volume 19, Kluwer

true harmonization of even a single area (the copyright term) has proven problematic.¹³⁴ The 2008 Green Paper on Copyright in the Knowledge Economy¹³⁵ invited comments on potential exceptions for preservation, making available, and orphan works, mostly as a reaction to the Google Books project and the need to support the European Library (which eventually became Europeana). However, the only forthcoming legislation was the Directive on certain permitted uses of Orphan Works, which became law in 2012 and is critiqued in a previous section.¹³⁶

The most recent proposed reform is the Directive on copyright in the Digital Single Market,¹³⁷ which includes text on a preservation of cultural heritage exception (Art. 5) and an ECL-style mechanism for the mass digitisation of Out-Of-Commerce works by cultural heritage institutions (Art.7). Work on preservation and out of commerce works is to be welcomed. It is positive that the preservation exception will be mandatory and apply to all types of works, although the exception will still only apply to works in permanent collections.¹³⁸ While library collections may benefit from an ECL mechanism for out-of-commerce works, the current text of the directive only supports mass digitisation where a collective management organisation (CMO) exists to facilitate the licensing. For the vast majority of collections held in archive institutions, a UK licensing body does not exist that can be said to represent the rights holders present in such collections.¹³⁹ The rest of the proposed Directive has drawn significant criticism: from the new neighbouring right for publishers that would curtail the ability to link to news articles on the web without a licence (Art.11), to the requirement that internet hosting sites monitor user uploads for infringement

Law International, The Netherlands, p5. Available at <https://www.ivir.nl/publicaties/download/967.pdf> [Accessed 20 December 2017].

¹³⁴ Angelopoulos, C. (2012) The Myth of European Term Harmonisation: 27 Public Domains for the 27 Member States, *International Review of Intellectual Property and Competition Law*, Vol. 43 No. 5, pp. 567-594.

¹³⁵ European Commission (2008) Green Paper on Copyright in the Knowledge Economy, COM(2008) 466/3, Brussels. Available at http://ec.europa.eu/internal_market/copyright/docs/copyright-info/greenpaper_en.pdf [Accessed 20 December 2017].

¹³⁶ Further detail on the reform process which led to the orphan works Directive of 2012 is available in Deazley, R. and Stobo, V. (2013) Archives and Copyright: Risk and Reform, CREATE Working Paper 2013/3, University of Glasgow, Scotland. Available at <http://www.create.ac.uk/publications/archives-and-copyright-risk-and-reform/> [Accessed 20 December 2017].

¹³⁷ European Commission (2016) Proposal for a Directive on copyright in the Digital Single Market, COM(2016) 593 final, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016PC0593&from=EN> [Accessed 20 December 2017].

¹³⁸ Ibid, Recital 21 states: “For the purposes of this Directive, works and other subject-matter should be considered to be permanently in the collection of a cultural heritage institution when copies are owned or permanently held by the cultural heritage institution, for example as a result of a transfer of ownership or licence agreements.”

¹³⁹ There will be exceptions to this general rule, of course: the personal papers of a well-known and successful author could potentially be licensed by a CMO – but only for the parts of the collection they created. The rights holders present in the correspondence series would most likely be beyond the CMO’s repertoire. This author does not believe archive services should be pressurised into taking out licenses with organisations that do not represent the rights holders in question, for facilitating non-commercial research.

(Art. 13), many human rights and information justice groups have opposed the directive.¹⁴⁰ The Commission rejected the current text in July 2018: the next plenary vote will likely take place in September 2018.¹⁴¹

1.1.4 International Developments

For many years, a delegation of Non-Governmental Organisations (NGOs) from the library and archive sectors (led by the International Federation of Library Associations, IFLA) have been advocating at the World Intellectual Property Organisation (WIPO) for an international treaty on limitations and exceptions for libraries and archives.¹⁴² In a study commissioned by WIPO, Professor Kenneth D. Crews found that many countries in the WIPO index do not have exceptions written into their national laws for the most basic and essential of copying activities, like preservation, private research and educational purposes.¹⁴³ Further analysis undertaken by William Maher of the Society of American Archivists (SAA) found that less than 50% of the 188 countries included in the study have exceptions for archives to make copies across the areas of research and private study, preservation and replacement.¹⁴⁴

This lack of consistency in national provision creates problems when librarians, archivists and their users want to share copies across borders: copying which is legal within one jurisdiction may be infringing in the next. For example, for almost fifty years, the British Library provided an international non-commercial document delivery service under the s.41 exception in UK law.¹⁴⁵ In 2011, the last year data was available, 38,100 requests for articles from 59 countries were fulfilled. In 2012, as a result of the legal uncertainty around cross-border supply and the possibility of infringement claims, the BL were forced to replace the service with a ‘publisher-approved licensing arrangement.’ The effect of this change was dramatic: the number of journal titles available for access and supply fell by 93% from 330,700 titles to 23,600. Combined with a sharp rise in license fees, demand for the service plummeted (from 38,100 successful requests in 2011 to a mere 635 in 2015) and the BL was

¹⁴⁰ A summary of the opposition to the directive is available on Julia Reda’s blog at <https://juliareda.eu/eu-copyright-reform/#timetable> [Accessed 20 December 2017].

¹⁴¹ See Reda (2018) Member of European Parliament Website [online] available at <https://juliareda.eu/en/> [accessed 12th June 2018] for full coverage of the Directive’s progress and the Save Your Internet campaign.

¹⁴² The author has been part of the delegation since 2015, representing the Scottish Council on Archives.

¹⁴³ Crews, K. (2013) Study on Copyright Limitations and Exceptions for Libraries and Archives, and Crews, K. (2015) Study on Copyright Limitations and Exceptions for Libraries and Archives: Updated and Revised, World Intellectual Property Organisation, Geneva.

¹⁴⁴ Interventions on these topics have been delivered by representatives of the Society of American Archivists and the Scottish Council on Archives, at SCCR 31, WIPO.

¹⁴⁵ CDPA 1988 s.41 *Copying by librarians: supply of single copies to other libraries* allows librarians to make and supply a single copy of the whole or part of a work to another library without infringing copyright, subject to a number of safeguards.

forced to terminate the service entirely in July 2016.¹⁴⁶

A further example detailing the uncertainty around preservation copying is provided. The ‘Bit List’ of Digitally Endangered Species, published by the Digital Preservation Coalition in 2017,¹⁴⁷ has six categories: Lower Risk, Vulnerable, Endangered, Critically Endangered, Practically Extinct, and Concern. The types of materials which have been categorized as ‘at risk’ and include intellectual property issues as an ‘aggravating condition’ include: Born Digital Photos and Video Shared on Social Media or Uploaded to Cloud Services (Endangered); Digital Music Production and Sharing (Endangered); Digital Radio Recordings (Endangered); Orphaned Digital Works (Endangered); Published Research Outputs (Endangered); Family or Personal Records (Critically Endangered); Gaming (Critically Endangered); Media Art (Critically Endangered); Smart Phone Apps (Critically Endangered); Unpublished Research Outputs (Critically Endangered); Pre-WWW Videotex Data Services and Bulletin Board Services (Practically Extinct); and Pre-WWW ViewData and TeleText Services where no archival agency has captured and retained the signal (Practically Extinct).¹⁴⁸¹⁴⁹

In order for these diverse material types to be adequately preserved, preservation exceptions must reflect the reality of even the most basic of digital preservation strategies, whether through replication and migration, or through emulation. The making of multiple copies of works, and the storage of those copies in multiple locations or jurisdictions is a basic element of most approaches. Commercial digital preservation providers like Preservica use Amazon Web Services and Amazon Glacier to store both frequently and infrequently accessed data in multiple locations for safe-keeping,¹⁵⁰ despite cross-border transfer of copies for preservation being an area of distinct legal uncertainty. Additionally, the KEEP Project (Keep Emulation Environments Portable) found that, even within the EU, the legal

¹⁴⁶ This example and data are taken from Hackett, T. (2016) ‘Licensed to Fail: How licensing ended ‘established and respected’ international document supply service,’ *EIFLnet Blog*, available at <http://www.eifl.net/blogs/licensed-fail> [Accessed 20 December 2017]. Further detail is available in the associated report: *Licensed to fail: How Licensing can decrease access to information*, available at http://www.eifl.net/sites/default/files/resources/201605/licensed_to_fail_long.pdf [accessed 20 December 2017].

¹⁴⁷ Digital Preservation Coalition (2017) *The Bit List of Digitally Endangered Species*, available at <http://www.dpconline.org/our-work/bit-list> [Accessed 20 December 2017].

¹⁴⁸ *ibid*

¹⁴⁹ The ‘aggravating conditions’ listed against the various types of material that relate to copyright or related contract law include: poorly managed intellectual property rights; uncertainty over intellectual property rights; concern over intellectual property rights; overzealous rights management protection; orphan works; confusion over intellectual property; loss or lack of documentation, including intellectual property; opaque terms and conditions; legal or other IPR restrictions; dependence on proprietary formats or processes.

¹⁵⁰ Further details on Preservica’s storage solutions are available at <https://preservica.com/digital-archive-software/secure-storage-solutions>.

framework could not support emulation strategies, as:¹⁵¹

- “None of the exceptions set out at the EC level serves fully the original purposes of the KEEP project [the creation of emulators for accessing and using digital objects created or stored with obsolete software/systems]
- EC Law does not provide for legal deposit requirements
- EC Law does not provide for scientific, study or education purposes across the full range required for KEEP
- Reproduction of computer programs and databases even when carried out by memory organisations and authorized under national laws, is in conflict with EC Law.”¹⁵²

Both of these examples show that the fragmented and inconsistent nature of legislation in different countries creates legal uncertainty, could hamper preservation efforts and promotes discrepancies in access to information between nations, especially between rich and poor nations.¹⁵³ The NGOs working at WIPO have been lobbying for an international treaty which would require signatory countries to commit to introducing legislation providing a minimum set of exceptions and limitations within their national copyright laws. While this approach would not harmonise law between different jurisdictions, it would provide a minimum standard which individual nations could rely on. As of May 2017, the proposed Framework Treaty on Libraries, Archives and Museums (TLAM) included language on preservation, reproduction, lending, acquisition, accessible formats, orphan works, text and data mining, translation, contract override, technical protection measures, permitting cross-border transfer of works, limitations on liability and limitations on remuneration.¹⁵⁴

Support for the library and archive NGOs proposals has been given by countries from Latin America and the Caribbean, Africa, and Asia Pacific regions.¹⁵⁵ Progress on text-based work has been consistently thwarted by first world economies, including the European Union, who fear the expansion of exceptions and limitations may negatively impact the creative and publishing industries. Licensing continues to be touted as the solution to the challenges

¹⁵¹ Emulation is the process of preserving digital objects that were created with obsolete software or stored on obsolete media, through the creation of operating environments which replicate the functions and actions of specific operating systems, software and storage.

¹⁵² Anderson, D. (2011) *A layman's guide to the KEEP legal studies*, University of Portsmouth, National Library of the Netherlands. Available at https://researchportal.port.ac.uk/portal/files/150295/D2.6_laymansguidelegalstudies_final.pdf [Accessed 20 December 2017] p. 8.

¹⁵³ Stobo, V. (2016) ‘Report on the Standing Committee on Copyright and Related Rights, Thirty-Second Session,’ SCA Broadsheet No. 38, available at <http://www.scottisharchives.org.uk/broadsheet/issue-38.pdf> [Accessed 20 December 2017]

¹⁵⁴ International Federation of Library Associations (2017) Treaty Proposal on Copyright Limitations and Exceptions for Libraries and Archives v.4.4 [online] available at <https://www.ifla.org/node/5858> [Accessed 12 July 2018]

¹⁵⁵ EIFL (2017) Advocating for a Library Treaty [online] available at <http://www.eifl.net/eifl-in-action/advocating-library-treaty> [accessed 12th June 2018]

identified by the library and archive NGOs,¹⁵⁶ even where licensing has been demonstrably proven to have a negative effect (the British Library example given above) and where licensing is not possible in the first place (there is no licensing mechanism available for the vast majority of archive collections, as they have never been in commerce). Negotiations were at a stalemate in November 2017, the most recent SCCR, with separate action plans for libraries, archives and museums put forward by Sylvie Forbin, WIPO Deputy Director General for the Culture and Creative Industries Sector.¹⁵⁷

1.1.5 Practical implications of the legislative framework

The previous sections outline the current legislative framework in the UK and EU, and developments affecting the sector internationally. From this, it is clear that many types of copying undertaken by archives have been reflected and enabled by copyright exceptions: archivists can make preservation copies of items in their permanent collections; they can provide single copies to users; they can provide copies for educators; they can make works available on their premises. Some of these activities were taking place regardless of the law prior to 2014; and now they have been legitimised. However, as previously mentioned, the legislative framework still falls short in several key respects. As outlined above, uncertainty around digital preservation practices persists. The orphan works exception and licensing scheme, while enabling legitimate uses, may prove to have a chilling effect on mass digitisation given the burden associated with diligent search. Efforts to address Out-Of-Commerce works at European level do not adequately address the issue of archival works that were never in-commerce in the first place. No exception exists that would permit an archive to make non-commercial archive materials available online at scale for non-commercial purposes in a straightforward way. Finally, the failure to reduce duration in 2039 works contributes to unnecessary uncertainty as to when archive material enters the public domain, and has led to absurd examples such as public domain photographs being licensed as orphan works by the UK IPO.¹⁵⁸ This thesis is concerned with the archival practice that takes place in this ‘gap’ identified within the UK legislative framework.

¹⁵⁶ IFLA (2015) Licensing not the answer: IFLA seeks minimum exceptions at WIPO SCCR [online] available at <https://www.ifla.org/FR/node/9647> [accessed 12th June 2018]

¹⁵⁷ WIPO (2017) *Draft Action Plans on Limitations and Exceptions for the 2018-2019 Biennium*, Standing Committee on Copyright and Related Rights, 35th Session, Geneva, Switzerland. Available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_35/sccr_35_9.pdf. [Accessed 20 December 2017].

¹⁵⁸ A photograph: “Group of St John Ambulance VAD nurses and soldiers outside of a wooden building, probably the St John Ambulance Brigade Hospital, Etaples. First World War” can be viewed on the UK Orphan Works register at <https://www.orphanworkslicensing.service.gov.uk/view-register/details?owlsNumber=OWLS000010-22&filter=0>. This example is discussed in the following blogpost: Korn, N. (2015) ‘When is the public domain not the public domain?’ CILIP blog, 15 April 2015, available at <https://archive.cilip.org.uk/blog/when-public-domain-not-public-domain> [Accessed 20 December 2017].

1.2 Legal scholarship and policy-making

Much has been written on the impact of copyright on digitisation in the last 20 years, especially regarding the Google Books litigation in the United States.¹⁵⁹ To date, most literature in this area has focused on the impact on library collections, and therefore published works, and much of it is written from a broad EU or US perspective.¹⁶⁰ There is also a growing body of scholarship on orphan works, again, mostly in relation to library collections.¹⁶¹ In terms of the potential legal solutions offered in relation to mass digitisation

¹⁵⁹ A brief overview includes commentary on the settlement from an academic author perspective in Samuelson, P. (2010) Academic Author objections to the Google Book Search Settlement, *Journal of Telecommunications and High Technology Law*, Vol. 8, pp.491-522, available at <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2684&context=facpubs> [Accessed 20 December 2017]; on the antitrust and competition elements of the settlement in Fraser, E.M. (2010) Antitrust and the Google books settlement: The problem of simultaneity, *Stanford Technology Law Review*, 4. Available at: <http://www.thepublicindex.org/wp-content/uploads/sites/19/docs/commentary/fraser-antitrust-and-google-books.pdf> [Accessed 20 December 2017]; on the the potential of non-expressive uses of works under the fair use doctrine in Sag, M. (2009) Copyright and Copy-Reliant Technology, DePaul University College of Law, Technology, Law & Culture Research Series Paper No. 09-001, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1257086 [Accessed 20 December 2017]; the impact of Google Books digitisation on reuse of collections on Wikipedia in Nagaraj, A. (2016) Does Copyright affect Reuse? Evidence from the Google Books Digitisation Project, MIT Sloan School of Management, student paper. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2810761 [Accessed 20 December 2017]; on the positive economic impact of Google Books digitisation on authors and publishers, despite the litigation in Travis, H. (2010) Estimating the Economic Impact of Mass Digitisation Projects on Copyright Holders: Evidence from the Google Book Search Litigation, *Journal of the Copyright Society of the USA*, Vol. 57, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1634126 [Accessed 20 December 2017]; the dangers of privatisation in Frosio, G. (2011) Google Book Rejected: Taking the Orphans to the Digital Public Library of Alexandria, *Santa Clara Computer and High Technology Law Journal*, Vol. 28, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1802843 [Accessed 20 December 2017]; and alternative solutions to the settlement including ECL and a preservation exception in Samuelson (2011) Legislative Alternatives to the Google Book Settlement, *Columbia Journal of Law & the Arts*, Vol. 34, available https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1818126 [Accessed 20 December 2017];

¹⁶⁰ An overview of relevant library and archive work is included in the following sections.

¹⁶¹ Recent scholarship on orphan works considers: diligent search requirements in Schroff, S., Favale, M., and Bertoni, A. (2017) "The Impossible Quest: Problems with Diligent Search for Orphan Works," *IIC – International Review of Intellectual Property and Competition Law*, 48:3, pp. 286-304 [online] available at <https://link.springer.com/article/10.1007/s40319-017-0568-z> [Accessed 12 July 2018]; US reform proposals, including reliance on fair use and limitations in Hansen, D. R. et al (2013) Solving the Orphan Works Problem for the United States, *Columbia Journal of Law & the Arts*, Vol. 37 No. 1, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2323945 [Accessed 20 December 2017] in fact, anything written by David Hansen on orphan works; crowd-sourcing as a potential solution in Borghi, M. at al (2016) With Enough Eyeballs All Searches are Diligent: Mobilizing the Crowd in Copyright Clearance for Mass Digitisation, *Chicago-Kent Journal of Intellectual Property*, Vol. 16 No. 1, available at <https://scholarship.kentlaw.iit.edu/ckjip/vol16/iss1/6/> [Accessed 20 December 2017]; the use of extended collective licensing in Axham, J. and Guibalt, L. (2012) Cross-Border Extended Collective Licensing: A Solution to Online Dissemination of Europe's Cultural Heritage, *Institute for Information Law Research Paper* No. 2012-19, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2001347 [Accessed 20 December 2017] and Riis, T. and Schovsbo, J. (2010) Extended Collective Licenses and the Nordic Experience - It's a Hybrid but is It a Volvo or a Lemon?, *Columbia Journal of Law and the Arts*, 33:4, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1535230 [Accessed 20 December 2017]; existing orphan works law in specific EU jurisdictions in Favale, M. et al (2015) Copyright, and the Regulation of Orphan Works: A Comparative Review of Seven Jurisdictions and a Rights Clearance Simulation, *CREATE Working Paper* 2015/, University of Glasgow, available at <http://www.create.ac.uk/publications/copyright-and-the-regulation-of-orphan-works/> [Accessed 20 December 2017], and existing schemes in Canada in de Beer, J. and Bouchard, M. (2010) Canada's 'Orphan Works' Regime: Unlocatable Owners and the Copyright Board, *Oxford University Commonwealth Law Journal*, Vol. 10, No. 2, pp. 215, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1916840 [Accessed 20 December 2017]; the doctrine of abandonment in Loren, L. L. (2012) Abandoning the Orphans: An Open Access Approach to Hostage Works, *Berkeley Technology Law Journal*, Vol. 27, pp.1431, available at

of collections, and especially in relation to orphan works, the studies tend to fall into two categories: *ex ante* and *ex post*. An *ex ante* approach would require a CHI to attempt to clear rights *before* making a work available: in most cases, this involves completing a diligent search or using a licensing scheme. In an *ex post* approach, the CHI could rely on an exception, take down policy or safe harbour to make the works available: the responsibility is passed to the rights holders to opt-out of the use, *after the fact*. In general, the first approach creates high transaction costs for the CHI but provides more legal certainty, while the second approach has lower transaction costs but a higher degree of legal risk, especially where, for example, a CHI might interpret the scope of an exception incorrectly, and leave themselves vulnerable to a claim of infringement.

Indeed, the EU orphan works exception is an example of hybrid *ex ante* and *ex post* approach that delivers, arguably, the worst aspects of both: high transaction costs (though the diligent search and registration requirement) and limited legal certainty (through the unhelpful prevarication around rights holders' potential objections in relation to unpublished works) that make it particularly unsuited to the archive sector.

In 2013, Deazley argued that archives, by their unique and generally unpublished nature, should be given special treatment in copyright law, different to that applied to library collections.¹⁶² Deazley analysed the then-UK legal framework before presenting four options for reform in relation to orphan works and mass digitisation based on current legal scholarship: a specific statutory exception, a limitation on liability rule (both *ex post* approaches), licensing by a public authority, and licensing by collecting societies from an ECL mechanism (both *ex ante* approaches).¹⁶³ From previous sections, we can see that the UK legislative framework now contains at least three of these 'solutions:' the exception created through the EU Directive (the EUIPO database), licensing by a public authority (OWLS), and ECL.¹⁶⁴ Indeed, the Copyright Licensing Association (CLA) were the first and so far, only, UK collecting society to apply for an ECL, before withdrawing that application in April 2018.¹⁶⁵ As we have seen, current EU proposals for reform also include licensing

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2049685 [Accessed 20 December 2017]; and the return of registrations and formalities in Aplin, T. (2010) A Global Digital Register for the Preservation and Access to Cultural Heritage: Problems, in Derclaye, E. (eds) Challenges and Possibilities, Copyright and Cultural Heritage: Preservation and Access to Works in a Digital World, Edward Elgar, Cheltenham.

¹⁶² Deazley, R. and Stobo, V. (2013) Archives and Copyright: Risk and Reform, CREATE Working Paper 2013/3, University of Glasgow, Scotland. Available at <http://www.create.ac.uk/publications/archives-and-copyright-risk-and-reform/> [Accessed 20 December 2017]

¹⁶³ *ibid*, p.

¹⁶⁴ CDPA 1988 s.116B; see also The Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014.

¹⁶⁵ Application documentation and the IPO consultation document are available at: <https://www.gov.uk/government/consultations/application-to-operate-an-ecl-scheme> [Accessed 20 December

by collecting societies through an ECL mechanism for Out-of-Commerce works. The only solution that has not been tested so far is limitation on liability.

Limitation on liability as part of a legislative solution to the orphan works problem was considered in detail by the US Copyright Office in 2015.¹⁶⁶ Their proposal consisted of six conditions that a user would be required to meet before a limitation on liability (i.e. a limitation on injunctive or monetary relief) would be available. The conditions are:

“Users must: (1) if sued for infringement, prove to the court by a preponderance of the evidence that they performed a good faith, qualifying search to locate and identify the owner of the infringed copyright before the use of the work began; (2) file a Notice of Use with the Copyright Office; (3) provide attribution to the legal owner of the copyright, if reasonable under the circumstances; (4) include a to-be-determined “Orphan Works” symbol with any public distribution, display, or performance of the work; (5) assert eligibility for such limitations in the initial pleading in any civil action involving the infringed work; and (6) state with particularity the basis for eligibility for the limitations during initial discovery disclosures.”¹⁶⁷

The first requirement carries the most weight in terms of investment from the archive: it is the ‘good faith, qualifying search’ that creates transaction costs. The other requirements are fairly straightforward and do not appear to be onerous. Of course, the issue with limitation on liability is that it’s attractive in a jurisdiction like the US where litigation is more common: no archive service in the UK has ever been successfully sued for copyright infringement, so archivists may question the usefulness of this as a solution. Limitation on liability might limit the amount a CHI is required to pay in remedies in a case of infringement, but such sums are unlikely to be high anyway, given the non-commercial nature of most archive collections, and the limitation does nothing to protect their reputation.

2017]. The CLA statement on their withdrawal is available at <https://cla.co.uk/news/application-extended-collective-licensing-update>.

¹⁶⁶ Other jurisdictions have also been in the process of copyright reform during the time period in which this thesis was written, and two jurisdictions in particular appear to be making progress: Australia and Singapore. For example, Australia’s new preservation exception is not limited to the permanent collection of the institution, although the requirement for the library or archive to take “...reasonable steps to ensure that a person who accesses the preservation copy at the library or archives does not infringe copyright in the preservation copy,” is arguably too onerous, given that responsibility for this is normally passed on to the user (113H 2(c)). The term of protection in unpublished works is now equal to that in published works, but crucially, they have not introduced transitional provisions: the legislation will have immediate effect, with no hangover like the 2039 rule (Copyright Amendment (Disability Access and Other Measures) Bill 2017). Singapore’s Ministry of Law has also run a public consultation on equal treatment of published and unpublished works in relation to duration, and various options for orphan works, including a limitation on liabilities approach, among other issues including Technological Protection Measures and Text and Data Mining. No draft legislation is forthcoming as yet, but the consultation documents are available at <https://www.mlaw.gov.sg/content/minlaw/en/news/public-consultations/public-consultation-on-proposed-changes-to-copyright-regime-in-s.html> [Accessed 20 December 2017].

¹⁶⁷ US Copyright Office (2015) *Orphan Works and Mass Digitisation: A Report of the Register of Copyrights*, available at: <https://www.copyright.gov/orphan/reports/orphan-works2015.pdf> [Accessed 20 December 2017]

So far, research has shown that neither the EU exception, nor the OWLS have enabled mass digitisation at the scale they were intended to,¹⁶⁸ and the current CLA ECL application applies only to published works.¹⁶⁹ In 2017, Deazley stated that the digitisation carried out by cultural heritage institutions was a ‘form of research, in and of itself,’ and thereby the UK sector could rely upon the s.29 ‘Research and private study,’ and s.30 ‘Criticism, quotation, review’ exceptions in the CDPA 1988 when making collections available online.¹⁷⁰

While this author supports this approach, and would recommend the use of s.29 and s.30 for this purpose, I do not believe it is sufficient ‘in and of itself’ as a solution to the challenges faced by the UK archive sector. Encouraging a sector which is already considered to be highly risk averse to use s.29 and 30 for this purpose will be a challenge. The use of different strategies and approaches at different institutions also raises the potential for confusion amongst users about practice across the UK: one local record office may take this approach and make collections available online, but another may not.¹⁷¹ A sector-led approach, including the use of s.29 and 30 to justify mass digitisation and the making available of archive collections online, could have a positive effect on the availability of 20th century archival collections online, but buy-in and consensus-building is required.

A sector-led approach that could inform this work are the various Codes of Best Practices in Fair Use developed by American University and Washington College of Law’s Program on Information Justice and Intellectual Property (PIJIP) in collaboration with different cultural sector groups in the United States.¹⁷² While the Best Practices framework is based on the

¹⁶⁸ Stobo, V., Patterson, K., Erikson, K. and Deazley, R. (2017) ‘I should like you to see them sometime’: an empirical study of the costs of rights clearance in the digitisation of Edwin Morgan’s scrapbooks, *Journal of Documentation*; forthcoming

¹⁶⁹ The CLA initially applied for 19 licenses in relation to ‘published editions of literary works including any artistic works embedded of such editions.’ The licenses in question are the CLA’s core licenses: they offer education, business and public sector licenses which include coverage for higher education institutions, the NHS, multinational businesses, the pharmaceutical industry and local and central government. Essentially, the CLA and their licenses already function as a de facto ECL scheme, and the application formalises this practice. However, the CLA withdrew their application in April 2018, citing “...the evolving EU legal framework that may affect the regulation of national collective licensing systems.” See Copyright Licensing Agency (2018) CLA’s application for extended collective licensing: update [online] available at <http://www.picsel.org.uk/wp-content/uploads/2018/04/CLA-ECL-Application-Press-Release.pdf> [Accessed 12 July 2018]. The ECL legislation has been in place since 2014, and further applications do not appear to be forthcoming, supporting the argument that they do not support mass digitisation - at least in their current guise.

¹⁷⁰ This approach is explained in the ‘Copyright Statement’ available on the Digitising the Edwin Morgan Scrapbooks web resource: Deazley, R., Patterson, K., Stobo, V. (2017) Digitising the Edwin Morgan Scrapbooks, www.digitisingmorgan.org [Accessed 20 December 2017].

¹⁷¹ The confusion created by differing practice from institution to institution in relation to self-service photography policies and charging was identified in Darby, N. (2013) ‘The cost of historical research: why archives need to move with the times,’ *Guardian Higher Education Network Blog*, 23 May 2013, available at <https://www.theguardian.com/higher-education-network/blog/2013/may/23/history-research-costs-archive-fees> [Accessed 20 December 2017].

¹⁷² PIJIP’s work in this area now covers *Codes* for Journalism, Academic and Research Libraries, Poetry, Documentary Filmmaking and remix culture: a full list is available at <http://pijip-impact.org/fairuse/publications/> [Accessed 20 December 2017], building on the work started by Aufderheide, P. and Jazsi, P. (2011) *Reclaiming Fair Use: How to put balance back in copyright*, University of Chicago

Fair Use doctrine,¹⁷³ there are elements of the framework which the archive sector in the UK could use to develop a sector-wide consensus on approaches to copyright and digitisation.

The Code of Best Practices in Fair Use for Academic and Research Libraries provides an example of this approach. The methodology involved an ‘in-depth survey, using long-form interviews, with 65 librarians at a diverse array of academic and research institutions...’ reporting that:

*“The results demonstrated clearly both that fair use is an essential component of copyright exemptions for librarians, and also that they lacked a clear sense of what they and their peers might agree to as appropriate employment of fair use in recurrent situations. As a result, librarians frequently did not use their fair use rights when they could have, and they overestimated the level of conflict between the strictures of copyright law on the one hand and their respective libraries’ missions on the other. The cost of this uncertainty was amplified because many research and academic librarians routinely act as the de facto arbiters of copyright practice for their institutions and the constituencies they serve.”*¹⁷⁴

This shows that both uncertainty around copyright and a lack of consensus on practice have contributed to risk aversion, where the exceptions and fair use factors available to the librarians are not being used to their fullest extent: a situation which many UK-based librarians and archivists would surely recognize. The researchers from Washington College of Law then conducted group discussions with a variety of librarians across five US cities between October 2010 and August 2011, using a series of hypothetical examples designed to start conversations about fair use and its limitations.¹⁷⁵ The results of those conversations are the Code of Best Practice. The Codes are reviewed by a panel of experts to ensure they fall within the scope of the law, but they do not constitute legal advice: they are statements of what a particular sector considers to be appropriate behaviour. As the Code suggests,

Press, Chicago. The Centre for Social Media at American University have also developed *Codes* for Online Video, Media Studies Publishing, Teaching for Film and Media Educators, Images for Teaching, Research and Study, Scholarly Research in Communication, Collections containing Orphan Works for Libraries, Archives and other Memory Institutions, Dance-related Materials, OpenCourseWare, Media Literacy Education, and the Visual Arts. A list is available at <http://cmsimpact.org/codes-of-best-practices/page/1/> [Accessed 20 December 2017].

¹⁷³ The Fair Use doctrine differs from Fair Dealing in that Fair Use will cover a wider range of copying, whereas Fair Dealing refers to four specific exceptions in UK law. Fair Use is flexible and non-exhaustive, allowing copying for “purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research,” if four factors have been taken into account: “(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.” (s.107 of the United States Copyright Act 1976). Unpublished works are included. See fn. 19 for discussion of fair dealing.

¹⁷⁴ Association of Research Libraries (2012) *Code of Best Practices in Fair Use for Academic and Research Libraries*, p. 2, available at <http://www.pjip-impact.org/wp-content/uploads/2012/04/Code-of-Best-Practices-2012.pdf> [Accessed 20 December 2017].

¹⁷⁵ Ibid, p.2.

“With this information in hand, each institution can undertake its own legal and risk analysis in light of its own specific facts and circumstances.”¹⁷⁶

The Code for Academic and Research Libraries contains language on eight common situations: Supporting teaching and learning with access to library materials via digital technologies; Using selections from collection materials to publicise a library’s activities, or to create physical and virtual exhibitions; Digitising to preserve at-risk items; Creating digital collections of archival and special collections materials; Reproducing material for use by disabled students, faculty, staff, and other appropriate users; Maintaining the integrity of works deposited in institutional repositories; Creating databases to facilitate non-consumptive research uses (including search); and Collecting material posted on the World Wide Web and making it available.¹⁷⁷ Each statement consists of a ‘description’ of the situation, a clear fair use ‘principle’ for the situation, and a list of practical ‘limitations’ and ‘enhancements’ which can be used to strengthen the claim of fair use in a particular circumstance.

This methodology offers an exemplar of how the cultural heritage sector, and the archive sector in particular, might approach the issue.¹⁷⁸ Without fair use as a guiding principle, discussion could focus on the scope of the current exceptions, and permissible and appropriate risk management approaches: a form of norm-setting that willing institutions could engage in, with no expectation that any institution would be expected to engage in behaviour they felt was inappropriate. Indeed, the author suggests the evidence gathered in this thesis could provide the groundwork for just such an approach.

1.3 Archive scholarship

1.3.1 General Observations

A search of the archival literature shows several distinct types of works in relation to copyright, with articles that: provide a timely update on the law, in response to reform or a contemporary issue;¹⁷⁹ cover a specific area of law, e.g. intellectual property in relation to

¹⁷⁶ *ibid*,

¹⁷⁷ *ibid*, pp. 13-27.

¹⁷⁸ Another similar example, again based on Fair Use, is provided in OCLC Research (2010), ‘Well-intentioned Practice for Putting Digitised Collections of Unpublished Materials Online,’ available at <http://www.oclc.org/research/activities/rights/practice.pdf> [Accessed 20 December 2017].

¹⁷⁹ For examples, see Crawford, M. (1983) ‘Copyright, Unpublished Manuscript Records, and the Archivist,’ *The American Archivist*, 46:2, pp.135-147. Available at: <http://www.jstor.org.ezproxy.lib.gla.ac.uk/stable/40292582> [Accessed 20 December 2017]; Winn, K. (1974) ‘Common Law Copyright and the Archivist,’ *The American Archivist*, 37:3, pp.375-386. Available at <http://www.jstor.org.ezproxy.lib.gla.ac.uk/stable/40291666> [Accessed 20 December 2017]; Maher, W. (2001)

indigenous rights,¹⁸⁰ oral history,¹⁸¹ audiovisual collections¹⁸² or preservation activity;¹⁸³ explain how copyright obligations were managed during specific projects¹⁸⁴ or those where copyright is simply mentioned in passing as an area of interest.

Traditional textbook-style guidance is also available: Tim Padfield's *Copyright for*

'Between Authors and Users: Archivists in the copyright vise,' *Archival Issues*, 26:1, pp.63-75. Retrieved from <http://www.jstor.org.ezproxy.lib.gla.ac.uk/stable/41102038> [Accessed 20 December 2017]; Coleman, A. and Davies, S.J. (2002) Copyright and Collections: recognising the realities of cross-domain integration, *Journal of the Society of Archivists*, 23:2, pp.223-232, available at <https://doi.org/10.1080/003798102200006426> [Accessed 20 December 2017]; and Post, J.B. (1986) 'Copyright mentality and the archivist,' *Journal of the Society of Archivists*, 8:1, pp.17-22, available at <https://doi.org/10.1080/00379818609514287> [Accessed 20 December 2017].

¹⁸⁰ See Janke, T. and Iacovino, L. (2012) 'Keeping cultures alive: archives and Indigenous cultural and intellectual property rights,' *Archival Science*, 12, pp.151-171, available at <http://rdcu.be/zxdU> [Accessed 20 December 2017]; Iacovino, L. (2010) 'Rethinking archival, ethical and legal frameworks for records of Indigenous Australian communities: a participant relationship model of rights and responsibilities,' *Archival Science*, 10, pp.353-372, available at <http://rdcu.be/zxLc> [Accessed 20 December 2017]; and Mathiesen, K. (2012) 'A Defense of Native Americans' Rights over Their Traditional Cultural Expressions,' *The American Archivist*, 75:2, pp.456-481, available at <http://www.jstor.org.ezproxy.lib.gla.ac.uk/stable/43489632> [Accessed 20 December 2017].

¹⁸¹ Rubel, D. (2007). Accessing their voice from anywhere: Analysis of the legal issues surrounding the online use of oral histories,' *Archival Issues*, 31:2, pp.171-187. Available at <http://www.jstor.org.ezproxy.lib.gla.ac.uk/stable/41102157> [Accessed 20 December 2017]; Swain, E. (2003) 'Oral History in the Archives: Its Documentary Role in the Twenty-First Century,' *The American Archivist*, 66:1, pp.139-158, available at <http://www.jstor.org.ezproxy.lib.gla.ac.uk/stable/40294221> [Accessed 20 December 2017]; Brewster, K. (2000) *Internet Access to Oral Recordings: Finding the Issues*, Oral History Program, Elmer E. Rasmuson Library, University of Alaska Fairbanks. Available at <http://library.uaf.edu/aprc/brewster1/> [Accessed 20 December 2017].

¹⁸² Gracy, K. (2013) 'Ambition and Ambivalence: A Study of Professional Attitudes toward Digital Distribution of Archival Moving Images,' *The American Archivist*, 76:2, pp.346-373, available at <http://www.jstor.org.ezproxy.lib.gla.ac.uk/stable/43490359> [Accessed 20 December 2017]; Gracy, K. (2012) 'Distribution and Consumption Patterns of Archival Moving Images in Online Environments,' *The American Archivist*, 75:2, pp.422-455, available at <http://www.jstor.org.ezproxy.lib.gla.ac.uk/stable/43489631> [Accessed 20 December 2017]; Bredan, I (2006) 'Sound Practices: On-Line Audio Exhibits and the Cultural Heritage Archive,' *The American Archivist*, 69:1, pp.33-59, available at <http://www.jstor.org.ezproxy.lib.gla.ac.uk/stable/40294310> [Accessed 20 December 2017]; Conrad, S. (2012) 'Analog, the sequel: An Analysis of current film archiving practice and hesitance to embrace digital preservation,' *Archival Issues*, 34:1, pp.27-43, available at <http://www.jstor.org.ezproxy.lib.gla.ac.uk/stable/41756160> [Accessed 20 December 2017].

¹⁸³ Ayre, C. and Muir, A. (2004) 'The Right to Preserve,' *D-Lib Magazine*, 10:3, available at <http://www.dlib.org/dlib/march04/ayre/03ayre.html> [Accessed 20 December 2017]; Besek, J. et al (2008) 'Digital Preservation and Copyright: An International Study,' *International Journal of Digital Curation*, 3:2, pp.104-111, available at <http://www.ijdc.net/index.php/ijdc/article/view/90> [Accessed 20 December 2017]; Charlesworth, A. (2006) 'Digital Curation, Copyright and Academic Research,' https://www.researchgate.net/publication/242473835_Digital_Curation_Copyright_and_Academic_Research [Accessed 20 December 2017]; and Bearman, D. (2000) 'Intellectual Property Conservancies,' *D-Lib Magazine* 6:12, available at <http://www.dlib.org/dlib/december00/bearman/12bearman.html> [Accessed 20 December 2017].

¹⁸⁴ Dickson, M. (2010) 'Due Diligence, Futile Effort: Copyright and the Digitisation of the Thomas E. Watson Papers,' *The American Archivist*, 73:2, pp.626-636, available at <http://www.jstor.org.ezproxy.lib.gla.ac.uk/stable/23290761> [Accessed 20 December 2017]; Akmon, D. (2010) 'Only with your permission: how rights holders respond (or don't respond) to requests to display archival materials online,' *Archival Science*, 10, pp.45-64, available at <http://rdcu.be/zxdu> [Accessed 20 December 2017]; Astle, P. and Muir, A. (2002) 'Digitisation and preservation in public libraries and archives,' *Journal of Librarianship and Information Science*, 34:2, pp.67-79, available at DOI: 10.1177/096100060203400202 [Accessed 20 December 2017]; Cave, M. et al (2000) 'Copyright Clearance in the Refugee Studies Centre Digital Library Project,' *RLG Digi News*, 4:5, available at <http://webdoc.gwdg.de/edoc/aw/rlgdn/preserv/diginews/diginews4-5.html> [Accessed 20 December 2017]; and Pritcher, L. (2000) "Ad*access: seeking copyright permissions for a digital age" *D-Lib Mag* 6:2, available at <http://www.dlib.org/dlib/february00/pritcher/02pritcher.html> [Accessed 20 December 2017].

Archivists and Records Managers, in its sixth edition, is an essential, expert-level guide, and in this author's experience, is used by practitioners across the cultural sector to resolve copyright queries, and not just by archivists or records managers.¹⁸⁵ *CARM* contains a relatively small amount of advice on the rights clearance process, and even less on risk management as a potential option during digitisation projects: the text is more concerned with the scope of the law, especially with duration in particular types of works, and the uses permitted by the exceptions.¹⁸⁶

1.3.2 Surveys of Archivists

Since 2008, a small number of surveys which explore the effect of copyright on working practices in the cultural heritage sector have been carried out in Canada, Australia, the United States and New Zealand. A high-level study was conducted in the EU, and a Delphi study on pertinent issues was carried out using case studies in Israel and policy experts in the UK and US. These surveys have generally taken the form of questionnaires, interviews, the collection of data from websites and the presentation of evidence taken from government consultations. Table 1.1 below provides an overview of the studies available.

Table 1.1: Surveys of archivists on copyright

Name of Study	Author(s)	Date	Response	Area of Interest
Copyright in the Real World: Making Archival Material Available on the Internet	Jean Dryden	2005-2008	106 respondents (from 106 Archive Institutions) + 154 websites + 22 interviews	Are archivists in Canada more or less restrictive than copyright law requires in relation to making archive materials available online?
Digital Access: The Impact of Copyright on Digitisation Practices in Australian Museums, Galleries, Libraries and Archives	Emily Hudson and Andrew T. Kenyon	2004-2005	144 respondents (from 38 Institutions)	Explores how copyright affects digitisation across the Australian GLAM sector.
In from the Cold	Naomi Korn (JISC)	2009	503 respondents + 81 follow-up interviews (61 Archive institutions)	Extent of orphan works across UK public sector, including local government in addition to GLAM institutions

¹⁸⁵ Padfield, T. (2015) *Copyright for Archivists and Records Managers*, 5th Edition, Facet: London.

¹⁸⁶ Other text-book style guidance on UK law is available in Pedley, P. (2008) *Copyright Compliance: Practical Steps to Stay Within the Law*, Facet: London; Cornish, G. (2015) *Copyright: Interpreting the Law for Libraries, Archives and Information Services*, 6th edition, Facet: London; Pedley, P. (2012) *Essential Law for Information Professionals*, Facet: London; Pedley, P. (2015) *Practical Copyright for Library and Information Professionals*, Facet: London; Pedley, P. (2012) *The e-Copyright Handbook*, Facet: London; Oppenheim, C. (2012) *The No-nonsense Guide to Legal Issues in Web 2.0 and Cloud Computing*, Facet: London; Hamilton, G. and Saunderson, F. (2017) *Open Licensing for Cultural Heritage*, Facet: London; Secker, J. with Morrison, C. (2016) *Copyright and E-Learning: A Guide for Practitioners*, 2nd Edition, Facet: London; and Korn, N. and McKenna, G. (2012) *Copyright: A Practical Guide*, 2nd Edition, Collections Trust: London.

Assessment of the Orphan works issues and Costs for Rights Clearance	Anna Vuopala	2010	22 respondents	Numbers of orphan works held in CHIs and associated transaction costs across the EU. The reporting standard for this study is problematic.
Archiving our Culture in a Digital Environment: Copyright Law and Digitisation Practices in Cultural Heritage Institutions	Susan Corbett	2011	26 respondents (from 7 institutions)	Explores the gap between current practice in New Zealand CHIs and the exceptions available in the Copyright Act of 1994.
Copyright Issues and Israeli Practice in Digitising Archives	Naomi Wolff	2014	3 case studies, 5 policy respondents	Unpublished MSc dissertation which explores the most important factors concerning copyright law to consider during a digitisation project. ¹⁸⁷
The Role of Copyright in Selection for Digitisation	Jean Dryden	2014	66 respondents (66 archive institutions) + 96 institutional websites	Are archivists in the United States more or less restrictive than copyright law requires in relation to making archive materials available online?
Archives, Digitisation & Copyright PhD Survey	Victoria Stobo	2014-2015	121 responses (121 archive institutions) + 9 case studies	Are archivists in the UK risk averse when making archive collections available online?

Dryden's PhD study examined four areas of practice around copyright and digitisation: the factors that influence decisions to make archive material available online; archivists' knowledge and perception of copyright; repositories' copyright practices; and the link between practitioner knowledge and institutional copyright practices.¹⁸⁸ Her robust methodology includes a survey of 154 institutional repository websites, 106 questionnaire responses, 22 interviews, and provides a model for further study in this area. Her conceptual framework "...posits that repositories' copyright practices pertaining to making their archival holdings available on the Internet fall along a "restrictiveness" spectrum that has been divided into three categories: More Restrictive, Midpoint, and Less Restrictive."¹⁸⁹ Dryden proposes that, "...what is made available online and attempts to control further uses," are the two aspects of digitisation that will determine which category a particular archive service falls into. The institutions that are More Restrictive than copyright requires will only make public domain material available, and will restrict possible uses through technical and non-technical measures. The Midpoint institutions will make available documents "... in which copyright has expired or those that do not merit copyright

¹⁸⁷ This source is not included in the analysis as the response was considered too small: it's findings do not diverge from the other surveys.

¹⁸⁸ Dryden, J. (2008) Copyright in the Real World: Making Archival Material Available on the Internet, PhD Thesis, University of Toronto, available at https://tspace.library.utoronto.ca/bitstream/1807/11198/1/Dryden_Jean_E_200806_PhD_thesis.pdf [Accessed 20 December 2017]. p.4-6

¹⁸⁹ *ibid*, p.67.

protection, those in which the repository owns the copyright, and those for which the repository has obtained permission from the rights holder(s),” and high-resolution copies would be made available with no restrictions on use. The Less Restrictive Institutions will make the same material available as the Midpoints, but also works for which they have not received permission, works where they have not sought permission, and works that may have been made available mistakenly.¹⁹⁰ At the Less Restrictive point on the scale, Dryden notes that “from the perspective of copyright, no repository would be less restrictive with regard to further uses, because the scope of copyright law does not extend to repositories’ control of their patrons’ uses of their holdings.”¹⁹¹

It would be instructive to consider Dryden’s conceptual framework and its relationship to the potential risks and benefits associated with making archival holdings available online. Use of restrictions and lack of restrictions may be seen as a result of interactions with risk and uncertainty, traded off against the benefits of making collections available. Some of those interactions could be related to copyright (for example, uncertainty over the copyright status of a work) and some could be related to ‘gatekeeper’ sensibilities (for example, attempting to control further uses of reproductions of public domain works, which may be permitted by property law, but is not permitted by copyright law).¹⁹²

Dryden found that archivists’ attitudes to copyright vary, but tend to be negative.¹⁹³ In terms of reform, they most frequently ask for simplification or clarification of the law, or expanded exceptions, which Dryden suggests is evidence that archivists recognize they do not have the time and expertise to fully explore the scope of the law, which may also contribute to more restrictive practices than the law requires. And while the survey respondents reported that professional workshops were their main source of copyright knowledge, colleagues were nominated as the first choice when archivists had a specific question about the law: this shows that archivists ‘filter’ the law for their colleagues,¹⁹⁴ and has positive implications

¹⁹⁰ *ibid*

¹⁹¹ *ibid*, p.68.

¹⁹² On the question of whether a new copyright can be said to exist in reproductions of public domain works, see Margoni, T. (2014) ‘The Digitisation of Cultural Heritage: Originality, Derivative Works and (Non) Original Photographs,’ available at <http://dx.doi.org/10.2139/ssrn.2573104> [Accessed 20 December 2017]; and IPO (2014) *Copyright notice: digital images, photographs and the internet*, available at <https://www.gov.uk/government/publications/copyright-notice-digital-images-photographs-and-the-internet> [Accessed 20 December 2017].

¹⁹³ Dryden, J. (2008) p.230

¹⁹⁴ *ibid*, p.232. The nomination of particular staff as in-house copyright experts or officers, and levels of copyright literacy with the library profession is explored in Morrison, C. and Secker, J. (2015) ‘Copyright Literacy in the UK: a survey of librarians and other cultural heritage sector professionals,’ *Library and Information Research*, 39:121, pp.75-97, available at <http://www.lirjournal.org.uk/lir/ojs/index.php/lir/article/view/675/704> [Accessed 20 December 2017]; Dryden, J. (2010) ‘What Canadian Archivists Know about Copyright and Where They Get Their Knowledge,’ *Archivaria*, 69, pp.77-116, available at <https://archivaria.ca/index.php/archivaria/article/viewFile/13262/14573> [Accessed 20 December 2017]; and

for the sharing of experience and best practices.

In terms of formal processes, Dryden found that:

“Where documented policies exist, their development appears to be a collaborative process involving several people from a repository. Only occasionally do repositories include outside expertise (e.g., copyright consultants or legal counsel). Where no documented policies exist, it appears that practice is based upon informal understandings, communicated orally. The apparent lack of formal processes and documented practice, combined with earlier findings about the sources of archivists’ copyright knowledge, suggest that repository practices may not be grounded in a thorough legal knowledge of copyright.”¹⁹⁵

This lack of formal policy has ramifications for the study of digitisation projects in the UK: it suggests that decisions about copyright are made on-the-fly, rather than managed at a strategic or institutional level. When asked to rank the factors influencing digitisation projects, the archivists ranked copyright in fifth place behind financial issues, staff skills and training, technical resources and the desire to increase access to collections.¹⁹⁶

In terms of selection, Dryden found that “80% of questionnaire respondents report that they select items in which the copyright has expired, or items in which the repository holds the copyright (86%); in contrast, just 36% report that they select documents in which copyright is owned by a third party.”¹⁹⁷ Of course, this is reported rather than observed behaviour, and actual practice may diverge from this figure. As a result, most Canadian repositories were found to be in the More Restrictive category outlined in the conceptual framework.

Dryden also observes the contradiction whereby 80% of the institutions surveyed report selecting material in the public domain for digitisation: but 80% also report using technical or other measures to limit or control further uses of content, which are restrictions outwith the scope of copyright law. 80% of repositories reported using low resolution images, and 24% used further measures including the prevention of copying, click-through agreements, or watermarks.¹⁹⁸ Dryden suggests that, “...compared with repositories’ interests in the intellectual and physical property, the rights of users, from the perspective of copyright, appear to be a lower priority.”¹⁹⁹ This finding is concerning if translated to the UK sector,

Hatch, P., Morrison, C. and Secker, J. (2017) A study of copyright specialists in UK educational and cultural institutions: Who are they and what do they do?, available at <https://ukcopyrightliteracy.files.wordpress.com/2017/12/copyright-officers-survey-report-final.pdf> [Accessed 20 December 2017].

¹⁹⁵ Dryden, J. (2008) p.235

¹⁹⁶ *ibid*, p.236.

¹⁹⁷ *ibid*, p.238.

¹⁹⁸ *ibid*, p.242.

¹⁹⁹ *ibid*, p. 245

especially given that both the International Council on Archives's Universal Declaration on Archives and the ARA's Code of Ethics contain language on an individual's rights to use records.²⁰⁰

Her 2014 follow-up study with the US archive sector again found that copyright is a 'significant' factor in the selection process for digitisation. She also reports that the research "...suggests that a shift is taking place, from strict compliance with the rules to a risk-assessment approach."²⁰¹ She also identifies a need to "...study the practices of repositories that are risk-takers. If they have not incurred legal challenges, others could benefit from their methods and a body of best practices could be developed and shared with others."²⁰²

While Hudson and Kenyon's 2007 study was focused on the viability of Australian copyright law and tends to feature more libraries, galleries, and museums than archives, their fieldwork includes some pertinent insights on CHIs digitisation practices. They found CHIs engaged in three types of digitisation:

- *"'Administrative digitisation', in which reproductions are made for internal purposes such as collection management and documenting loans.*
- *'On-demand digitisation', which responds to internal requests (for other institutional projects) or external requests from other entities.*
- *'Stand-alone digitisation', in which digital repositories are created, usually for one or both of preservation and public access.*"²⁰³

This categorization provides a useful means of exploring the digitisation practices in UK institutions: understanding the approach an institution takes when managing copyright for each of these types of copying will build a more detailed picture of risk perception and risk tolerance. Additionally, they note that for licensing and deposit, "...institutions of all sizes

²⁰⁰ The ICA Universal Declaration on Archives states: "We therefore undertake to work together in order that: ...archives are made accessible to everyone, while respecting the pertinent laws and the rights of individuals, creators, owners and users," (available at https://www.ica.org/sites/default/files/UDA_June%202012_web_EN.pdf); and the ARA Code of Ethics states: 8. Members ...should encourage the use of records to the greatest extent possible, consistent with institutional policies, the preservation of holdings, legal considerations, individual rights, and donor agreements. They should explain pertinent restrictions to potential users, and apply them equitably," available at http://www.archives.org.uk/images/ARA_Board/ARA_Code_of_Ethics_final_2016.pdf [Accessed 20 December 2017].

²⁰¹ Dryden, J. (2014) 'The Role of Copyright in Selection for Digitisation,' *The American Archivist*, 77:1, pp.64-95. This change may be more pronounced in the US sector as a result of the Fair Use doctrine: the Codes of Best Practices in Fair Use may contribute to this, as well as the advice on risk assessment offered by Hirtle, P. et al (2009) *Copyright and Cultural Institutions: Guidelines on Digitisation for US Libraries, Archives and Museums*, Cornell University Library, Ithaca NY, available at <https://ecommons.cornell.edu/handle/1813/14142> [Accessed 20 December 2017].

²⁰² Ibid, p.84.

²⁰³ Hudson, E. and Kenyon, A.T. (2007) 'Digital Access: The Impact of Copyright on Digitisation Practices in Australian Museums, Galleries, Libraries and Archives,' *University of New South Wales Law Journal*, 30:1, pp. 1-55, available at <http://ssrn.com/abstract=1065622> [Accessed 20 December 2017], p.10.

used documentation that did not appear to have been legally drafted or reviewed.”²⁰⁴ They also found that licensing practices diverge across the CHI sector, with libraries, galleries and museums more familiar with negotiating remunerated licenses than archives, but all opting to pursue non-commercial licenses on a regular basis. Rights holders pointed out the discrepancy between CHI spending on technology, processing and preservation, but their seeming reluctance to pay for copyrights, although this observation appears to be in relation to galleries and museums, rather than archive collections.²⁰⁵ The ‘fuzzy’ border between commercial and non-commercial use was also identified as a problematic area in the interviews.²⁰⁶

Hudson and Kenyon found that assignment of copyright was a popular method of rights clearance in archives, libraries and museums, but less so in galleries, although they note that many of the interview respondents expressed concern over “...the ability of some copyright owners to negotiate with institutions over copyright and to assign or license rights on an informed basis. Interviewees said some copyright owners had little or no knowledge of copyright law, meaning institutional staff had to spend substantial time explaining copyright documentation to them.”²⁰⁷ The ability of depositors to give an accurate account of rights across a collection when assigning copyright, especially where collections may contain material created by third parties, is a pressing concern.

In their conclusion, Hudson and Kenyon stated that copyright issues were most often determined by collection and digitisation type, rather than the size or type of CH institution. Copyright had the greatest negative impact on “audiovisual items and sound recordings, as well as orphan works.”²⁰⁸ They also observed that:

“The impact of orphan works appears to be high across the sector because of Australian institutions’ aversion to copyright risks: interviewees repeatedly reported adopting a conservative risk management position, particularly for public activities. This appears to be influenced by institutions’ public sector status, their receipt of public funds, and a desire to maintain the confidence of users and contributors that they comply with copyright law. In many cases, institutions are more comfortable in deleting or withholding public access to digital content where copyright issues cannot be resolved - even if unsuccessful efforts have been made to identify or locate copyright owners.”²⁰⁹

²⁰⁴ *ibid*, p.18.

²⁰⁵ *Ibid*, p.20.

²⁰⁶ *ibid*, p.18.

²⁰⁷ *ibid*, p.22.

²⁰⁸ *ibid*, p.36.

²⁰⁹ *ibid*, p.40.

This supports the view that archivists are risk averse, and offers insight into some of the reasoning informing such risk aversion. These reasons, and the tendency towards control and restriction could be explored in more detail within the UK archive sector.

In the largest study of its kind, *In from the Cold* sought to explore the scope and impact of the orphan works problem across the UK public sector. Korn found that the average proportion of orphan works in UK CHIs was 5-10%, although this was generally higher in archive collections. A conservative estimate of 25M orphan works across the UK public sector was given, with "...89% of participants' service delivery at least occasionally affected, whilst 26% noted that the issue of Orphan Works either frequently affects them or affects everything that they do."²¹⁰ In terms of attitudes to risk management, Korn found that:

*"It is evident from the consultations that many organisations are keen to limit their liability through a combination of processes, including risk assessment, disclaimers, passing the responsibility onto an enquirer who wants an image, making sure a larger partner in a project takes on risk and refusing permissions to make copies of Orphan Works where the risk is too great. In some cases, this applies to all Orphan Works. In other cases it applies to those categorised as more risky."*²¹¹

75% of the respondent archives (57) said they would use works for which they were unable to trace the rights holders or the rights holders were unknown, but with a risk managed approach. Compared to the Museum, Library, Education and Health Sectors surveyed, this is above average, with only Galleries reporting a higher use of risk management approaches.²¹² In terms of collection size, smaller institutions were reported to be less likely to engage in risk management.²¹³ This is an interesting counterpoint to the evidence presented so far, and may be indicative of a shift in attitudes to risk.

Vuopala's Orphan Works study²¹⁴ includes examples of rights clearance projects at 19 institutions, and while it focuses almost exclusively on the time and cost required to clear rights, it leaves out other valuable details about the right clearance process: for example, the

²¹⁰ Strategic Content Alliance (2008) *In From the Cold*, Collections Trust, London. Available at <https://www.jisc.ac.uk/podcasts/in-from-the-cold-a-report-on-orphaned-works-08-jun-2009> [Accessed 20 December 2017]. p. 6.

²¹¹ Ibid, p.22.

²¹² Ibid, p.49.

²¹³ Ibid, p.50.

²¹⁴ Vuopala, A. (2010) Assessment of the Orphan works issues and Costs for Rights Clearance, European Commission/DG Information Society and Media, available at http://www.ace-film.eu/wp-content/uploads/2010/09/Copyright_anna_report-1.pdf [Accessed 20 December 2017] See page 39, and the example of the National Archives 'Moving Here' project. 45 rights holders refused permission, but information regarding the reasons for refusal is not available. As to the rights holders who could not be identified in relation to 385 documents – it is not made clear whether contact details could not be found for these individuals, or if they were but did not respond to permission requests.

number of rights holders' contact details found; the refusal rates and reasons given for refusal at each institution; the number of rights holders who do not respond to permission requests; and the strategies the institutions employed to make the materials available. The reporting standard also varies substantially from project to project, which meant that very few of the examples in the study were included in Table 1.2 in the following section. This is unfortunate, although the study does provide good data on the overall costs of rights clearance. Indeed, Vuopala found that the costs of rights clearance often dwarf the costs of digitisation, and even the potential benefits of the accessible copy:

*"The information shows clearly that the older and less economically valuable the material is, the more transaction costs are needed to clear rights to use it. Sometimes the costs exceed also the expected benefit the materials would have to the researchers."*²¹⁵

While varying levels of orphan works across text, audiovisual, visual/photography and music/sound collections were found, the levels were generally high, leading Vuopala to conclude that a legislative solution to the orphan works problem was necessary. Although Vuopala did not specify any particular solution,²¹⁶ ECL is mentioned favourably in the Nordic examples included in the report.

1.3.3 Case Studies of digitisation and rights clearance processes²¹⁷

A survey of the available literature has identified fourteen examples of case studies which record detailed results of the rights clearance processes associated with cultural heritage digitisation projects. The majority of these case studies focus on published collections, but at least six focus on unpublished or archive collections. Studies focusing on library and published collections have been included to provide further comparison across digitisation projects, and to explore some of the differences between rights clearance for published and unpublished materials.

The following table provides a summary of case studies reporting results of rights clearance processes at various types of cultural institutions. Only case studies reporting robust data have been included. Data collection and reporting varies significantly between studies: for example, some institutions report an overall sum of money spent or rights clearance, or they

²¹⁵ Ibid, p.42.

²¹⁶ "The information and figures in the report only illustrate the dimension of the problem without implying any particular policy decisions." p.43.

²¹⁷ This section contains material previously published in Stobo, V., Patterson, K., Erikson, K. and Deazley, R. (2017) *'I should like you to see them sometime': an empirical study of the costs of rights clearance in the digitisation of Edwin Morgan's scrapbooks*, Journal of Documentation; forthcoming.

may stipulate an hourly total. They may report permission rates by number of works, or by number of rights holders. Estimated costs are noted in the text and are based on the Archives and Records Association UK and Ireland minimum salary recommendation for a qualified archivist: £22,443.²¹⁸

Table 1.2: Summary of previous empirical studies on costs of rights clearance²¹⁹

Institution	Author	Sample size and type	Results
Copyright Feasibility Study, Carnegie Mellon University Libraries	Troll Covey (2005)	277 in-copyright books	Unable to identify/locate rights holder: 19% Permission given: 24% No Permission given: 30% No response: 27% Resource cost per work: £36.96 ²²⁰²²¹ (as reported) Hours per work: 3.4 (estimated)
Posner Memorial Collection Rare Books, Carnegie Mellon University Libraries	Troll Covey (2005)	284 rare books	Unable to identify/locate rights holder: 13% Permission given: 61% No Permission given: 20% No response: 5% Resource cost per work: £37.73 ²²² (as reported) Hours per work: 3.5 (estimated)
Million Book Project, Carnegie Mellon University Libraries	Troll Covey (2005)	364 publishers (c.100,000 in-copyright books)	Unable to identify/locate rights holder: 0% ²²³ Permission given: 23% No Permission given: 32% No response: 45% Resource cost per pub: £77.77 ²²⁴ (as reported) Hours per pub: 7.2 (estimated)

²¹⁸ The Archives and Records Association UK & Ireland Salary Recommendation is available at <http://www.archives.org.uk/careers/careers-in-archives.html> [Accessed 20 December 2017].

²¹⁹ This table is reproduced in its entirety from Stobo, V., Patterson, K., Erikson, K. and Deazley, R. (2017) ‘I should like you to see them sometime’: an empirical study of the costs of rights clearance in the digitisation of Edwin Morgan’s scrapbooks, *Journal of Documentation*; forthcoming.

²²⁰ Troll Covey reports the transaction costs as roughly \$200 per successfully cleared work. With 66 cleared works from the sample of 277, this gives an estimated total cost of \$13,200. Divided across the full sample, this gives a resource cost of \$48 per work. Hours spent were not reported, nor were licensing fees paid to publishers, and Troll Covey notes that were her own time spent on the project to be included in the calculation, the estimate would be significantly higher. The authors of this paper give an estimate of hours per work based on the resource cost of \$48 per work, converted to GBP, using the ARA salary range.

²²¹ USD are converted to GBP using the exchange rate of \$1=£0.077, valid as of 10th August 2017.

²²² Troll Covey reports the transaction costs as roughly \$78 per successfully cleared work. With 178 cleared works from the sample of 284, this gives an estimated total cost of \$13,884. Divided across the full sample, this gives a resource cost of \$49 per work. Hours spent were not reported and Troll Covey notes that were her own time spent on the project to be included in the calculation, the estimate would be significantly higher. The authors of this paper give an estimate of hours per work based on the resource cost of \$49 per work, converted to GBP, using the ARA salary range.

²²³ This study reports in terms of percentage of publishers, rather than percentage of works.

²²⁴ Troll Covey reports that permission seeking was carried out at the level of publisher, rather than individual works, given the size of the sample. The transaction costs are given roughly as \$0.069 per successfully cleared work (84 publishers granted permission to digitise and make available 52,900 works). The estimated total cost is \$36,708. Divided across the total number of publishers contacted, this gives a resource cost of \$101 per publisher. Hours spent were not reported and Troll Covey notes that were her own time spent on the project to be included in the calculation, the estimate would be significantly higher. The authors of this paper give an estimate of hours per work based on the resource cost of \$101 per work, converted to GBP, using the ARA salary range.

UK Wellcome Library	Vuopala (2010)	1,400 posters	Unable to identify/locate rights holder: 78% Permission given: 19% No Permission given: N/A No response: 3% Resource cost per work: £46 ²²⁵ (as reported) Hours per work: 4.3 (estimated)
UK National Archives	Vuopala (2010)	1,114 legal documents	Unable to identify/locate rights holder: 35% Permission given: 54% No Permission given: 10% ²²⁶ No response: 0.9% Resource cost per work: £63 (as reported) Hours per work: 5.8 (estimated)
John Cohen AIDS Research Collection, University of Michigan	Akmon 2010	5254 archive items	Unable to identify/locate rights holder: 13% Permission given: 64% No Permission given: 5% No response: 18% Resource cost per work: £3.45 (estimated) Hours per work: 0.32 ²²⁷ (as reported)
The Thomas E Watson Papers, University of North Carolina at Chapel Hill	Dickson 2010	>8400 archive items	Unable to identify/locate rights holder: 99.9% Permission given: 0.09% No Permission given: 0% No response: 0.01% Resource cost per work: £0.58 (estimated) Hours per work: 0.0535 ²²⁸ (as reported)
British Library	Stratton (2011)	140 books	Unable to identify/locate rights holder: 31% Permission given: 17% No Permission given: 27% No response: 27% Resource cost per work: £43.16 ²²⁹ (estimated) Hours per work: 4 (as reported)
BBC	Hargreaves (2011) IPO (2014)	1,000 hours of factual TV programming	Unable to identify/locate rights holder: assumed 0% Permission given: assumed 100% Resource cost per work: £70 ²³⁰ (estimated) Hours per work: 6.5 (as reported)

²²⁵ Vuopala reports the salary cost in relation to rights clearance for this project as 70,000 EUR. EUR are converted to GBP using the exchange rate of EUR1=£0.091, valid as of 10th August 2017. The salary cost per work is 50EUR. The authors of this paper give an estimate of hours per work based on the resource cost of 50EUR per work, converted to GBP, using the ARA salary range.

²²⁶ Permission to use 45 works were rejected outright. The use of 77 further works was conditional on payment: TNA decided not to pay rights holders for use, and did not make the digitised material available. Total salary cost for the project was £70,000. This gives a resource per work cost of £63.

²²⁷ This calculation is based on the time taken to identify rights holders, update rights holder records, search, contact and negotiate rights reported by Akmon, which was 74.96 minutes (1.25 hrs) per rights holder. 1,377 unique rights holders were identified during the project, giving 1720.3 hours in total. To provide a very rough estimate, we divide these hours by the number of archive items (5254), to give a resource cost of 0.32 hrs per work, equating to £3.45 per work, using the ARA salary estimate of £10.79 per hour.

²²⁸ The archivists on this project spent 450 hrs or the equivalent of \$8000 (£6160) on rights clearance, giving an hourly salary cost of \$17.77 (£13.68). At the end of this process, they only managed to get permission to make four letters available (equivalent to a cost of \$2000 each). The complete collection was eventually made available under a fair use argument; the figure given here represents the 450 hours spent on rights clearance divided by the total number of works in the collection.

²²⁹ This resource cost is estimated based on the number of hours provided in the study referenced, multiplied by the ARA salary costs.

²³⁰ The BBC reports an hourly cost of 6.5 hours per work, equivalent to £91 per hour, giving an hourly rate of £14 per hour. The estimate provided in the table is based on the ARA salary costs.

UK Wellcome Library	Stobo et al (2013)	1476 books	Unable to identify/locate rights holder: 14% Permission given: 33% No Permission given: 28% ²³¹ No response: 25% Resource cost per work: £43.16 ²³² (estimated) Hours per work: 4 (estimated)
German Exile monographs 1930-1950, German National Library (DNB)	Peters and Kalshoven, 2016	22,275 monographs	Unable to identify/locate rights holder: N/A Permission given: N/A No Permission given: N/A No response: N/A Resource cost per work: £1.25 ²³³ (estimated) Hours per work: 0.116 (as reported)
Political Posters, Victoria & Albert Museum	Peters and Kalshoven, 2016	1189 posters	Unable to identify/locate rights holder: 47% Permission given: 39% No Permission given: N/A No response: 14% ²³⁴ Resource cost per work: £4.96 ²³⁵ (estimated) Hours per work: 0.46 (as reported)
Amateur Film Collection, Netherlands Institute for Film and Sound	Peters and Kalshoven, 2016	1410 films made available from a collection of 6700	Unable to identify/locate rights holder: 40% Permission given: 21% No Permission given: N/A No response: N/A Resource cost per work: £29.67 ²³⁶ (as reported) Hours per work: 2.7 (estimated)
University of Glasgow Libraries	Stobo et al (2017)	Sample of 432 individual works in a scrapbook	Unable to identify/locate rights holder: 80% Permission given: >8.5% No Permission given: 5% No response: 6.5% Resource cost per work: £39.87 Hours per work: 3.7

This literature shows that rights clearance procedures impose prohibitive transaction costs on cultural institutions, through the cost of staff time and training in both diligent search and

²³¹ Permission was denied for 206 works (14% of the overall total of 1476 books). The ownership status of 210 works was disputed by Elsevier (a further 14% of the total).

²³² Accurate costs are not available for this project. The resource cost per work is based on the Stratton (2011) study, as both projects utilised the ARROW system to complete rights clearance.

²³³ This is based on 2600 hours of rights clearance in total, with a maximum of 7 mins spent per work. The German National Library gave hourly costs of 64EUR (£58.24) and 7.47EUR (£6.79) per item. The GNL have strict guidelines for diligent search, which explains the maximum search time of 7 minutes, and does not include licensing and registration fees. For more details on this clearance project and others, see Peters and Kalshoven, 2016. The exchange rate of 1EUR=0.91GBP was used as of 10th August 2017, provided by Google Finance.

²³⁴ The report states that rights in 171 posters were not cleared, but it does not differentiate between out-right refusal and non-response.

²³⁵ The Victoria and Albert Museum spent 546 hours on rights clearance for the political posters, reporting a per hour cost of £10.50 which equates to roughly £4.82 per work. Note that the per hour cost reported by the V&A falls below the minimum salary recommended by the ARA.

²³⁶ 1410 films were made available out of a total of 6700, after 2.5 years had been spent on the rights clearance effort. This was calculated to include 42.17EUR per hour for legal experts; 34EUR per hour for other staff; and 2EUR per hour for interns. The total cost per item is reported as 27EUR (based on a total of 37,634EUR, which includes 4,100EUR on legal counsel). In reality, the hourly cost should be significantly higher: the project avoided high salary costs by relying on the labour of three interns.

the process of contacting rights holders.²³⁷ It also indicates that in most cases, the results of rights clearance processes are unsatisfactory: either copyright holders cannot be identified and traced; or those who are contacted, do not respond to permission requests. Archives, in contrast to libraries, have the added complication of dealing with larger and more varied collections of material, the majority of which has been created for non-commercial purposes; this material is often unpublished at the point of deposit with the archive, and typically includes higher proportions of orphan works (when compared with traditional library collections).²³⁸

1.3.4 Comparing empirical rights clearance studies²³⁹

The first studies reporting rights clearance results for specific archive digitisation projects were published in 2010.²⁴⁰ Akmon's *Only with your permission*,²⁴¹ concerned the selective digitisation²⁴² of the John Cohen AIDS research collection at the University of Michigan. Cohen was a science writer who amassed a large collection of material on AIDS vaccine research: the collection is made up of 20th century material, it combines personal papers with research papers, and as a result includes substantial amounts of third party copyrights. The archivists attempted to contact all of the rights holders identified in the collection, and made multiple follow-up attempts at contact. The results of this process are shown in Table 1.3 on the following page.

²³⁷ Deazley, R., and Stobo, V. (2013)

²³⁸ *ibid*

²³⁹ This section contains material previously published in Stobo, V. et al (2013) Copyright and Risk: Scoping the Wellcome Digital Library Project Report. Working Paper, CREATE/University of Glasgow, Glasgow, UK, available at [Accessed 20 December 2017] and in Stobo, V. et al (2017) 'Digitisation and Risk,' in Deazley, R., Patterson K. and Stobo, V., *Digitising the Edwin Morgan Scrapbooks*, available at www.digitisingmorgan.org [Accessed 20 December 2017].

²⁴⁰ Studies published previous to this reported general findings of the copyright clearance process and often lacked detailed results; see Cave, M., Deegan, M., and Heinink, L., (2000) "Copyright clearance in the refugee studies centre digital library project" RLG DigiNews 4(5): <http://worldcat.org/arcviewer/1/OCC/2007/08/08/0000070519/viewer/file1548.html>; Pritcher, L., (2000) "Ad*access: seeking copyright permissions for a digital age" D-Lib Mag 6(2).

²⁴¹ Akmon, D., (2010) "Only with your permission: how rights holders respond (or don't respond) to requests to display archival materials online," *Archival Science*, 45-64, 57

²⁴² Selective digitisation refers to the practice of pre-selecting the material within a collection to be digitised, and deliberately excluding material. For example, the University of Michigan decided not to digitise newspaper clippings and journal articles included in the John Cohen AIDS research collection, because they could provide links to electronic versions of that material. The exclusion of this type of material also reduced the number of rights holders they would have to contact.

Table 1.3: John Cohen AIDS collection rights clearance results

Total items in copyright	5,463 (of 13,381)
No. of Copyright Owners	1,377
Copyright Owners traced	87%
Replied	79% of those traced
Permission granted	95% of respondents
Permission denied	5% of respondents
Non Response	18% (981 items)
Orphan Works	13% (687 items)

The archivists surveyed the collection and found just under 1400 rights holders represented. They successfully found contact details for 87% of them, which is very high; perhaps given the relatively contemporary nature of the material. The response rate of 79%, again, was very high, and the permission rate of 95% was very encouraging. However, 18% of the rights holders did not respond, and material relating to 13% of the rights holders was orphaned. The University of Michigan made a risk assessment and decided not to make the non-respondent or orphaned material available online. As a result, just over a third of the collection was not made available online. One respondent requested a fee for permission to reproduce the material, but when the University declined to pay, the respondent granted permission anyway.

This study was followed by Dickson's *Due Diligence, Futile Effort*.²⁴³ Carolina Digital Library and Archives digitised the papers of Thomas E Watson, a US senator active in the late 19th and early 20th century. This was a comprehensive digitisation project²⁴⁴ and while the institution subsequently made the entire collection available online using a fair use defense,²⁴⁵ they decided to report the results of the rights clearance effort to illustrate the small amount they would have been able to make available if they had adhered strictly by the results. The results of this process are shown in Table 1.4 on the following page.

²⁴³ Dickson, M. (2010) 'Due Diligence, Futile Effort: Copyright and the Digitisation of the Thomas E. Watson Papers,' *The American Archivist*, 73:2, pp.626-636, available at <http://www.jstor.org.ezproxy.lib.gla.ac.uk/stable/23290761> [Accessed 20 December 2017]

²⁴⁴ Comprehensive digitisation refers to the practice of digitising collections in their entirety, subject to data protection or other privacy or ethical considerations. Comprehensive digitisation is contrasted with selective digitisation, where parts of collections are selected for digitisation.

²⁴⁵ Fair use arguments allow cultural institutions in the United States to make archive material available online without securing the express permission of rights holders. There are four factors: the purpose and character of the use, the nature of the work, the amount and substantiality of the portion taken, and the effect of the use upon the potential market.

Table 1.4: Thomas E Watson Papers rights clearance results

Total Items	7,253 in correspondence series
Correspondent List	3,304
Confirmed/Possible Identifications	3,280
Died before 1939 (Public Domain)	608 (19%)
Died after 1939 (In-Copyright)	1,101 (33%)
Uncertain	1,571 (48%)
Reliable contact details found	4 correspondents
Permission granted	3 (75%)
Non Response	1 (25%)
Orphan Works	81% (of 3,304 correspondents)

The archivists identified over 3000 third party rights holders in the collection; mainly in the correspondence series. They used death dates to determine the copyright status of the material, and managed to confirm that 19% of the rights holders' material was out of copyright; that 33% of rights holders' material still enjoyed copyright protection; but that for almost half (47%) of the rights holders, copyright status was uncertain. They could only find contact details for four rights holders: three granted permission and one did not respond. None of the rights holders sought fees. After investing \$8000 in the rights clearance effort, only three permissions were received and only 36% of the collection could be made available online, following a strict interpretation of the law.²⁴⁶

These US studies were followed in 2013 by *Copyright and Risk: Scoping the Wellcome Digital Library Project Report*,²⁴⁷ which reported the results of the rights clearance process for Codebreakers: Makers of Modern Genetics, a comprehensive, mass-digitisation pilot project at the Wellcome Library. 20 archive collections were digitised in partnership with five other archive institutions. In contrast with the previous examples, the Wellcome Library (WL) did not attempt to contact all of the rights holders represented in the collections: they used risk criteria to eliminate low-risk rights holders and focus their clearance efforts on high-risk rights holders. The results of this process are shown in Table 1.5 on the following page.

²⁴⁶ The whole collection has been made available under a fair use defence.

²⁴⁷ Stobo et al, (2013) *Copyright and Risk: Scoping the Wellcome Digital Library Project Report*, CREATE Working Paper 2013/10, University of Glasgow. Available at: <https://zenodo.org/record/8380/files/CREATE-Working-Paper-2013-10.pdf>

Table 1.5: Codebreakers archive rights clearance results

Names in Copyright database	160	
Reliable contact details: total letters sent	134	84% of all rights holders
Total replies	103	77% of those contacted
Permission granted	101	98% of respondents
Permission refused	2	2% of respondents
Did not respond	26	19% of those contacted
Low risk: put online after suitable delay	23	89% of non-respondents
High risk: do not put online	3	11% of non-respondents
Orphan Works	22	14% of those identified
In Progress	4	4% of those identified

The success rate for finding contact details for the rights holders was high: 84%. In comparison, staff working on rights clearance at the University of Michigan were able to find contact details for 74% of the identified rights holders (1,023 out of 1,377) and Carolina Digital Library and Archives struggled: the contact details they found are negligible. The WL's success is not particularly surprising: by focusing on high profile rights holders and limiting their total numbers, contact details should have been easier to locate. Of the 134 permission letters sent, 77% (or 101) resulted in permission being granted (98% of those who replied). Digitisation projects where an attempt to identify and clear all relevant rights holders is made, have typically yielded lower permission rates.

For example, The National Archive's Moving Here Project sought to obtain permissions to digitise 1,114 wills; they were only able to secure permission for half.²⁴⁸ A Dutch example is provided by the Koninklijke Bibliotheek: after five months, with a dedicated member of staff, permission for only 50 books out of 1000 selected had been obtained – 5% of the total.²⁴⁹

The staff at University of Michigan fared marginally better: 68% of the rights holders contacted for permission to publish responded, (748 out of 1,100 requests), with 95% of those 748 responses granting some form of permission to digitise. However, this still meant that only 64% of the collection (3,490 out of 5,463 items) was made available online, due to the high percentage of non-response to permission requests and orphan works in the

²⁴⁸ Vuopala (2010), p.5

²⁴⁹ Ibid., p.6

collection, and the decision to follow a strict interpretation of the law.

The WL experienced the same problem: 19% of rights holders did not respond. The WL dealt with situations of non-response by reviewing and reassessing the nature of the risk involved in making the relevant material available online without express permission. Only when non-respondents were considered high-risk was the decision taken not to post anything online without securing express permission first. This category contained the commercial authors and their estates. The WL's decision to reassess the non-respondents using these risk criteria has allowed them to make an extra tranche of material available online, something which the other archival digitisation projects discussed above have been reluctant to do in similar situations of non-response.

Taken together, if we add the lower-risk non-respondents, to those rights holders who granted permission or could not be located, the total comes to 146 rights holders. This means that the archive material in which copyright is owned by 91% of the rights holders identified by the original risk-assessed shortlist will be made available online: this is significantly higher than the 64% made available by University of Michigan, or the potential 36% made available by Carolina Digital Library and Archives.

The material related to the 14% of the rights holders whose contact details could not be found, can be classified as orphan works. Orphan works continue to be problematic for archives; it has been estimated that 21-30% of individual archive collections are made up of orphan works, although in practice it is likely that for individual collections, this percentage will vary greatly, and in most cases be significantly higher.²⁵⁰ Michigan and Carolina reported orphan rates of 13% and 81% respectively.

Finally, it is worth repeating that no fees were paid for the inclusion of any archive material in the Codebreakers project, which follows the trend established by Michigan and Carolina. The comparison of these projects provides us with several points for consideration. The first, and most positive insight, is that respondents tend to grant permission. The second is that they generally do this without seeking a fee. The third insight is that institutions with an appetite for risk can make greater proportions of collections available online. The WL made 91% of third party rights holder material available, compared to 64% at Michigan and potentially 36% at Carolina.

²⁵⁰ Korn, N. (2008) In From the Cold, Strategic Content Alliance/Collections Trust, London. Available at <https://www.jisc.ac.uk/podcasts/in-from-the-cold-a-report-on-orphaned-works-08-jun-2009> [Accessed 20 December 2017]

1.3.5 Comparisons to Library Studies and published works

During Codebreakers, the WL also digitised part of its library collections relating to the history of modern genetics. The results of the rights clearance process for this project were made available in addition to the archive results, and are shown in Table 1.6 below.

Table 1.6: WL Codebreakers library collection rights clearance results

Status	No. of Works	% of total
Out of copyright (In commerce or out of print)	297	14
In Copyright, In Commerce	252	13
In Copyright, Out of Print		
Permission granted	480	24
Permission denied	206	10
Outstanding Queries ²⁵¹	210	10
Did not Respond	375	19
Orphan works	205	10
Total of Books WL cannot make available <i>(In Copyright, In Commerce, Permission Denied)</i>	458	23
Total of Books WL will make available <i>(Out of Copyright; Permission Granted; Orphan Works)</i>	982	48
Total of Books WL could make available <i>(Taking risk on non-responders)</i>	375	19
Total	2025	100

The results of the Codebreakers project can be compared with the British Library (BL) rights clearance study of 140 books published between 1870 and 2010,²⁵² and the Carnegie-Mellon University Libraries (CMUL) random sample permission feasibility test.²⁵³ Both the WL and BL used the ARROW system²⁵⁴ to manage the rights clearance process, although the

²⁵¹ The status of these 210 titles was in dispute with Elsevier in 2013.

²⁵² Stratton, B. (2011), *Seeking New Landscapes: A rights clearance study in the context of mass digitisation of 140 books published between 1870 and 2010*, London: British Library/ARROW.

²⁵³ Covey, D.T. (2005) *Acquiring copyright permission to digitise and provide open access to books*, DLF, Council on Library and Information Resources, Washington DC. Available at <http://www.clir.org/pubs/reports/pub134/reports/pub134/pub134col.pdf> [Accessed: 20 December 2017].

²⁵⁴ ARROW (Accessible Registries of Rights Information and Orphan Works towards Europeana) 'is a tool to assist 'diligent search' for the rights status and rights holders of text-based works in an automated, streamlined and standardised way, thus reducing time and costs of the search process.' The main collecting societies for literary works in the UK were involved: the Authors Licensing and Collecting Society (ALCS) and the Publishers Licensing Society (PLS). Basic details about the project are available at <http://www.fep-fee.eu/Arrow>, but the main ARROW website at <http://www.arrow-net.eu> no longer appears to be functioning [Accessed 20 December 2017].

WL digitised almost ten times the number of works as the BL study. Of the titles in the WL sample, 14% were found to be in the public domain, compared to 29% in the BL project. The difference in these figures might be explained by the fact that the majority of the books the WL selected for digitisation were published in the 20th century, and therefore are less likely to be out of copyright. 252 books in total (13%) were eliminated from the project because they were found to be in-commerce. 63%, or 1266 works were in copyright but out of print, a figure which differs from the 79% found in the BL sample, but this can be explained by the outstanding queries.²⁵⁵

The WL secured permission for 24% of the books, compared to just 17% of those at the BL. One possible explanation for this higher permission rate at the Wellcome is the concentrated nature of the collection: by focusing on genetics, they were contacting scientists and academics, a group that may be positively disposed towards the aim of an open access digitisation project. By contrast, the BL project used a randomly generated sample of works, and they were also constrained by the time limit they had set for the project.

Permission was refused for 206 works, 10% of the books selected by the WL. Some of the reasons given for refusals included: publishers were about to digitise the title; a new edition of the title was due for release; or authors simply did not want to be included. Permission was refused, or could not be agreed, for 27 works in the BL study, or 19% of the total. The BL study found that associations and voluntary group were the types of publisher most likely to grant permission, with museums, schools and private institutions least likely.

Non-response to permission requests were 19% and 26% at the WL and BL respectively. Other rights clearance projects, for both books and archives, have encountered similar problems with non-response. For example, when CMUL used a random sample of books from their collection to test the feasibility of obtaining permission to digitise and publish in-copyright works online, 36% of the publishers they identified and contacted did not respond to repeated permission requests. When faced with a situation of non-response from a known rights holder, after 2 further follow-up attempts, the WL decided to make the material available online subject to their policy of take-down on request.

This is a highly unusual policy for a library or an archival institution to adopt. Archivists appear to withhold material from a digitisation project if the rights holder does not respond to a permission request. Consider, again, the University of Michigan: 13,381 items in the

²⁵⁵ All of which were identified by ARROW as being in-copyright but out of print. If the figures are adjusted to include these titles, the percentage would rise from 63% to 73%

Cohen Research Collection were selected for digitisation, but 1973 items of copyright-protected material (36%) were not made available online. It was decided that 981 of the copyright-protected items (18%) would not be displayed, as rights holders had not responded to permission requests. Compared with 687 items (13%) that were deemed to be orphan works, and 294 items (5%) for which permission was refused, the largest proportion of withheld items were those where rights holders did not respond to permission requests.

The WL requests for permission to publish online which did not illicit a response will be made available in three batches –titles published up to 1930; 1930 to 1970; and 1970 up to the present day. The most recent batch is regarded as most problematic because the rights holders will almost certainly still be living, and therefore could be more likely to object to publication without permission.

The total number of orphan works held in library collections has been estimated to be between 5-10%. This was born out by Codebreakers where 10% of relevant works were found to be orphaned. By comparison, 31% of the in-copyright material in the BL study was found to be orphaned. This is perhaps the most surprising divergence between the two projects: it cannot be explained by the BL project's inclusion of works from the late 19th century (on the basis that the older a work is, the more likely it is to be an orphan), as the BL found that the highest proportion of in-copyright orphan works included in the study were works published in the 1980s. The higher proportion of orphan works in the BL study may, however, be attributable to the inclusion of self-published works in their sample (if we accept that a self-published work is more likely to become orphaned). The likelihood of the WL sample including self-published scientific works would be reasonably low.

In total, of the 2025 works identified by the WL for inclusion in the project, 1357 or 67% have been digitised and will be made available online (including works that are out of copyright, orphan works and titles for which permission was granted).

The emphasis the WL placed on the non-commercial nature of Codebreakers also appears to have worked very successfully, given the fact that no rights holders in the library material asked for payment in return for permission to publish. One rights holder asked for a donation to a charitable trust, which the WL agreed to honor. In the BL study, which was also conducted on a not-for-profit basis, one rights holder requested fees. Given that the BL study finished before the percentage of permissions received could rise above 17%, it is difficult to say whether more rights holders would have requested fees or not. CMUL, which also worked on a non-commercial basis, saw 6% of the publishers who granted permission

request a fee, ranging from \$50-\$300.66.

This equates to 4 titles out of 66 for which permission was granted. The study also found that publishers who requested fees were also more likely to place restrictions on the length of the license granted. Both the BL and CMUL studies emphasized their public interest missions and non-commercial intent (with CMUL going so far as to provide evidence in each permission request letter from the National Academies Press that open access to its books did not decrease sales), yet still managed to pick up (admittedly very few) fee requests, while the WL have avoided any such request.

The WL have stated that they will not attempt to clear rights in such a large selection of in-copyright books again, as they felt the process was too complex and resource intensive for the return generated. In some respects this is surprising, given that the WL process returned marginally better results than other comparable projects, particularly in relation to permissions received, and the low overall number of orphan works.

It is important to draw one more distinction between the WL and BL/CMUL rights clearance processes - the BL and CMUL were working on the understanding that digitisation would not begin until express permission to digitise had been received, and this was one of the reasons set forth for limiting the time spent on the BL study to 11 months: a definite cut-off date would allow the digitisation process to begin. The WL approach was completely different: given the scale of the undertaking, the WL decided to begin digitisation straight away, regardless of which permissions, if any, had been received.²⁵⁶

The BL/CMUL approach is compliance-driven and therefore far more rigid, whereas the WL approach is more pragmatic, risk-assessed and therefore flexible. Technically, in digitising library material before permissions were received, the WL has infringed copyright; however, because copies of rights holders' material have not been made publicly available, the risk of objection is considered to be low.

1.4 Risk management literature

1.4.1 Introduction

Legal liability is just one element requiring management during a digitisation project: just

²⁵⁶ If rights holders refused permission, their works were either removed from the workflow prior to digitisation, or the resulting digital images were deleted from the WL systems.

one area of potential risk which can be managed at project, department and/or organizational level. As previously explained, this thesis is concerned specifically with compliance with copyright law in archival practice, and as a result, focuses on a very specific area of risk. Discussion of risk management approaches used by archive services when making collections available online need to be seen in a broader institutional context. However, the analysis of individual projects highlights specific practices that can be collected to form the potential building blocks of a sector-level consensus on risk management for copyright compliance.

Risk is typically expressed as the severity of an outcome (or the extent of a benefit resulting from an outcome) occurring, multiplied by the likelihood or probability of it occurring.²⁵⁷ Lemieux notes that "...risk is defined differently in different contexts and from different epistemological perspectives."²⁵⁸ Risk normally occurs as the result of interaction with uncertainty, for example: an archivist may be uncertain about the rights status of material in their collections; about the likelihood of a rights holder making a complaint about the use of material; and about the likelihood of consequences, such as financial obligations or reputational damage, arising from a complaint. An archive service may be willing to tolerate the risk of making material available despite uncertainty, on the basis that the benefits realised by digitisation outweigh the potential severity of any negative outcomes.

This formulation can often be difficult to apply to the outcomes of archives digitising copyright-protected collections as clear data on the rights clearance efforts from previous digitisation projects are not widely available, and very few archive-specific case studies have been published. Additionally, there is no case law where UK archive services have been sued for copyright infringement; allied with a lack of data on near-misses and complaints,²⁵⁹ this makes it difficult to predict the probability of litigation against a CHI or the extent of reputational damage occurring as the result of a complaint. That said, while the lack of litigation is a revealing metric in itself, in that it underlines the seeming unlikelihood of litigation arising within the heritage sector, we should be cautious of reading too much into

²⁵⁷ For example, the Institute of Risk Management defines risk as "the combination of the probability of an event and its consequences. In all types of undertaking, there is the potential for events and consequences that constitute opportunities for benefit (upside) or threats to success (downside)." See Institute for Risk Management (2002) *A Risk Management Standard*, p.1, available at: www.theirm.org/media/886059/ARMS_2002_IRM.pdf (accessed 22 November 2016).

²⁵⁸ Lemieux, V. L., (2010) 'The records-risk nexus: exploring the relationship between records and risk,' *Records Management Journal*, 20:2, pp.199-216. Available at <https://doi.org/10.1108/09565691011064331> [Accessed 20 December 2017].

²⁵⁹ The author defines 'near-miss' in this context as a complaint about copyright infringement which could result in litigation, or where litigation is threatened, but which is resolved, either by negotiation or by capitulation, before proceedings are issued, or where proceedings are abandoned.

this given the fact that reliable data on near-misses and complaints is unavailable.²⁶⁰

If archives and the rest of the CH sector were more vocal and proactive in articulating the impact and value of digitised collections, this would make it easier to calculate the benefits of digitisation as against the risk of infringement. One way of doing this would be to use the Balanced Value Impact Model to articulate the different kinds of values, benefits and impacts generated by digitisation.²⁶¹ For example, by clearly articulating the social value of digitising local film collections, a local history museum could balance the benefits (improved user experiences, new outreach activities, an increased sense of place and belonging for participants, donations of film materials, increased knowledge about collections, and so on) against the risks (copyright infringement, sensitivity, complaints from rights holders, potential loss of good reputation). By doing this, they could then put in place strategies to minimise those risks and maximise the benefits; for example: by creating a local film history group; publicising the search for rights holders and the people who appear in the films; run screenings where viewers can provide feedback, information and memories; work with local social care providers to run memory sessions; and, contribute to local schools' learning resources.

1.4.2 Insights into the archive sector workforce

The Chartered Institute of Library and Information Professionals (CILIP) and the ARA conducted a large-scale survey of workers in the UK information sector in 2015. The survey received 10,623 responses, with the following headline results:

- *“Despite having a predominantly female workforce, at 78.1%, male workers typically earn more than women, and are nearly twice as likely to occupy senior management roles than their female counterparts;*
- *The workforce has lower ethnic diversity than the national UK Labour Force Survey statistic, with 96.7% of workers identifying as ‘white’, almost 10% above the national workforce average;*
- *The sector has is an ageing pool of workers, with the highest proportion (at 55.3%) in the 45-to-55 age band;”*²⁶²

²⁶⁰ For example, the author knows of at least one action initiated against a UK archive institution, which was dropped before reaching court; of a complaint received by an archive service for unauthorised use of a copy provided to a user, even where the archive service had a declaration from the user on record; and other anecdotal evidence of complaints and mediation from consultants working in the sector.

²⁶¹ Tanner, S. (2012) Measuring the Impact of Digital Resources: The Balanced Value Impact Model, Arcadia/King's College London: London, available at https://www.kdl.kcl.ac.uk/fileadmin/documents/pubs/BalancedValueImpactModel_SimonTanner_October2012.pdf [Accessed 20 December 2017]

²⁶² Irritatingly, copies of this report are not available on an open access basis: they are only free to members of the above noted professional membership organisations. The results reported here are from a news item on the ARA website, which can be viewed at: <http://www.archives.org.uk/latest-news/600-workforce-survey-2015.html> [Accessed 20 December 2017].

To those working in the sector, the imbalances in these results are a source of continuing concern and frustration, but they are not particularly surprising. These results are relevant to the issues of copyright and digitisation as both gender and age are observed to play a role in risk perception, risk taking and risk aversion.²⁶³ Indeed, the juxtaposition of a workforce dominated by women, with the knowledge that men disproportionately take up senior management roles is instructive, given that senior management will often have a role to play in signing off on any project decision which may be perceived as ‘risky.’

A meta-analysis of 150 studies on gender differences in risk-taking found that in 14 out of 16 types of risk identified, greater risk-taking was shown in male participants, supporting the view that females tend to be more risk averse.²⁶⁴ The authors of the study deliberately used a wide definition of risk, which took into account various scenarios, from driving and gambling to choosing medical procedures and changing career, indicating “their belief in the pervasiveness of risk-taking in daily life.”²⁶⁵ This broad definition allowed them to observe that “a more qualified interpretation of our results is to say that gender differences varied according to context and age level.” This variance could be seen in relation to smoking (very little gender difference, regardless of age), driving (gender difference increased with age, with older males more likely to take risks) and sexual activity (men were more likely to engage in risky behavior when young, whereas women were more likely to engage in risky behavior in later life).²⁶⁶ This variance depending on context and age could be useful for developing an understanding of the archive sector and its approach to risk.

For example, Harris found that “...women’s greater perceived likelihood of negative outcomes and lesser expectation of enjoyment partially mediated their lower propensity toward risky choices in gambling, recreation, and health domains.”²⁶⁷ However, she also discovered that when the women taking part in the experiment were offered “...activities associated with high potential payoffs and fixed minor costs...women reported being more likely to engage in behaviors in this domain. This gender difference was partially mediated

²⁶³ The studies quoted in this section are not based on differences between sexes (biological determinism) but on differences between genders, which are socially-constructed. Social conditioning based on male and female gender roles may account for differences in risk perception and aversion reported here.

²⁶⁴ Byrnes, J. P., Miller, D. C., and Schafer, W. D. (1999) ‘Gender Differences in Risk Taking: A Meta-Analysis,’ *Psychological Bulletin*, 125:3, pp. 367-383. Available at https://www.researchgate.net/profile/James_Byrnes2/publication/232541633_Gender_Differences_in_Risk_Taking_A_Meta-Analysis/links/00b49514c47ab0f093000000.pdf [Accessed 20 December 2017].

²⁶⁵ Ibid, p. 367.

²⁶⁶ Ibid, p.377. Worryingly, the authors found that in the domain of intellectual risk-taking, women “...seemed to be disinclined to take risks even in fairly innocuous situations or when it was a good idea to take a risk (e.g., intellectual risk taking on practice SATs).” (p.378)

²⁶⁷ Harris, C. R., Jenkins, M., and Glaser, D. (2006) ‘Gender Differences in Risk Assessment: Why do Women Take Fewer Risks Than Men?’ *Judgement and Decision Making*, 1:1, pp.48-63. Available at <http://journal.sjdm.org/jdm06016.pdf> [Accessed 20 December 2017].

by women's more optimistic judgments of the probability of good outcomes and of outcomes being more intensely positive." This suggests that one way to encourage greater confidence when dealing with uncertainty and risk within the profession is to emphasise the positive outcomes that would arise from engaging in an activity, rather than solely focusing on how potential negative consequences can be mitigated.

Harris also noted that they "...found great variability in an individual's willingness to engage in risk across domains, suggesting that risk taking is not simply the product of some general personality trait that promotes risk seeking. Instead, individual and group differences are substantially due to differing perceptions of risk in different domains."²⁶⁸ Again, this suggests that the variance in different situations and in differing perceptions of risk could be useful for developing an understanding of the archive sector and its approach to risk.

1.4.3 Existing risk management tools and guidance²⁶⁹

While expert legal guidance exists for the UK archive sector,²⁷⁰ specific risk management guidance is rare,²⁷¹ with only one example of a risk management toolkit.²⁷² This section discusses the available guidance and tools in more detail. The global standard for risk management is codified in ISO 3100:2009 – Risk Management – Principles and Guidelines. The standard outlines principles for risk management, and a framework and process for implementation.

The foundation principle is that risk management creates and protects value through objectives, innovation, and performance. Risk Management is integrated across organisations and decision-making processes, and cannot be carried out separately as a stand-alone activity. Structured approaches to risk management are more efficient, leading to consistent results, and risk management frameworks and processes should be customized to specific contexts and objectives. Inclusive risk management ensures stakeholders' 'knowledge, views and perceptions' are included in frameworks and processes. It should be dynamic and responsive to change, and be based on the best available information, including

²⁶⁸ Ibid, p.49.

²⁶⁹ Sections 1.4.3 and 1.4.4 include material previously published in Stobo, V., Patterson, K. and Deazley, R. (2017) 'Digitisation and Risk,' in Deazley, R., Patterson K. and Stobo, V., Digitising the Edwin Morgan Scrapbooks (2017), www.digitisingmorgan.org

²⁷⁰ See footnote 65. JISC Legal also provided advice to the Higher Education sector, before the service was brought in-house in 2015. Some guidance is still available online at <https://www.jisc.ac.uk/website/legacy/legal> [Accessed 20 December 2017].

²⁷¹ The most authoritative sources are Pedley, P. (2015), Korn, N. and McKenna, G. (2012) referenced previously at footnote 65, and Hughes, L. (2003) Digitising Collections: Strategic issues for the information manager, Facet: London.

²⁷² Web2Rights (2010) Risk Management Calculator, Web2Rights OER IPR Support Project, available at <http://www.web2rights.com/OERIPRSupport/risk-management-calculator/> [Accessed 20 December]

‘limitations and uncertainties associated with the information.’ Human behavior and culture must be recognized in relation to risk, and management processes should be continuously improved.²⁷³

The framework included in the current draft outlines ‘the organizational arrangements for designing, implementing, evaluating and improving the use of risk management.’²⁷⁴ The framework incorporates leadership and commitment and the integration of risk management into all activities. The design elements of the framework highlight understanding the organization and its context; articulating risk management commitments; assigning organizational roles, accountabilities, responsibilities and authorities; allocating resources; and establishing communication and consultation. The framework is completed by direction on implementation, evaluation and improvement.²⁷⁵

The process for implementation aims to “provide a consistent and structured approach for establishing context, risk assessment and risk treatment along with ongoing monitoring, review, communication and consultation.”²⁷⁶ The standard explains that risk management should be considered an iterative process, rather than a sequential one.²⁷⁷ The process involves communication and consultation with appropriate stakeholders, before the context for risk management is established through defining the purpose and scope of the process; identifying the internal and external context; and defining risk criteria. At the risk assessment stage, risk identification takes place, risk analysis is undertaken, and risk evaluation is recorded. Risk Treatment can take place, and risk treatment plans can be prepared and implemented if required. The process is completed with monitoring and review, and recording and reporting.²⁷⁸

While the standard is formulated and published at a general level, it provides a potential means of assessing the maturity of risk management processes at cultural heritage institutions. Other risk management methodologies are available: the closely-linked discipline of Digital Curation offers the Digital Repository Audit Method Based on Risk Assessment (DRAMBORA). DRAMBORA assumes that “...digital curation is characterised as a risk-management activity; the job of a digital curator is to rationalise the

²⁷³ This is based on the current draft standard, which is under review. British Standards Institution (2017) Draft BS ISO 31000 Risk management – Guidelines, 17/30315446 DC, available at <https://bsol-bsigroup.com.ezproxy.lib.gla.ac.uk/Bibliographic/BibliographicInfoData/000000000030315446> [Accessed 20 December 2017].

²⁷⁴ Ibid, lines 217-218.

²⁷⁵ Ibid, lines 212-354.

²⁷⁶ Ibid, lines 357-359.

²⁷⁷ Ibid, line 367.

²⁷⁸ Ibid, lines 355-564.

uncertainties and threats that inhibit efforts to maintain digital object authenticity and understandability, transforming them into manageable risks.”²⁷⁹ The methodology consists of an interactive tool which institutions can use to guide them through the risk management process, step-by-step. The process consists of ten stages: the audit purpose and scope is defined; staffing and roles are formalized; the information to audited is categorized; mandates, constraints, objectives, activities and assets are identified and formalized; and risks are identified, assessed and managed. Assessment is based on the likelihood and potential impact of identified risks occurring. While DRAMBORA was created specifically for digital curation processes, there may be elements of the interactive approach that can be developed for the CHI sector.

1.4.4 Common risk management approaches identified in the literature

An analysis of existing literature suggests three common approaches cultural heritage institutions take to managing risks associated with copyright compliance. One example of a traditional method is the balanced scorecard approach, which can be used as part of the project management process. A completed example, taken from a JISC digitisation project, is given on the following page (Table 1.8).²⁸⁰ Users of this method are expected to assign a numerical value against the probability of an event occurring, with ‘1’ meaning no to low probability and ‘5’ meaning the event is highly likely to take place. A numerical value is then assigned to the severity of an event, with ‘1’ meaning little to no effect, and ‘5’ meaning severe consequences for project outcomes. The values for probability and severity are then multiplied to give a total score, and a section of the table is provided to record in detail how the risk identified will be mitigated or avoided. This allows project managers to see at a glance the project elements which carry the most risk and how they are being managed. This scorecard uses 5x5 scoring, but 3x3 and ‘High, Medium and Low’ scoring is also common.

²⁷⁹ Donnelly, M. et al (2009) *DRAMBORA Interactive: User Guide*, Digital Preservation Europe/Digital Curation Centre, Glasgow, UK. Available at http://www.dcc.ac.uk/sites/default/files/DRAMBORA_Interactive_Manual%5B1%5D.pdf [Accessed 20 December 2017].

²⁸⁰ This scorecard is taken from the UK Thesis Digitisation Project Project Plan, available at: webarchive.nationalarchives.gov.uk/20140702233839/http://www.jisc.ac.uk/media/documents/programmes/digitisation/ukthesespp.pdf (accessed 17 November 2016) p.6. All digitisation projects funded by JISC were subject to this project management technique.

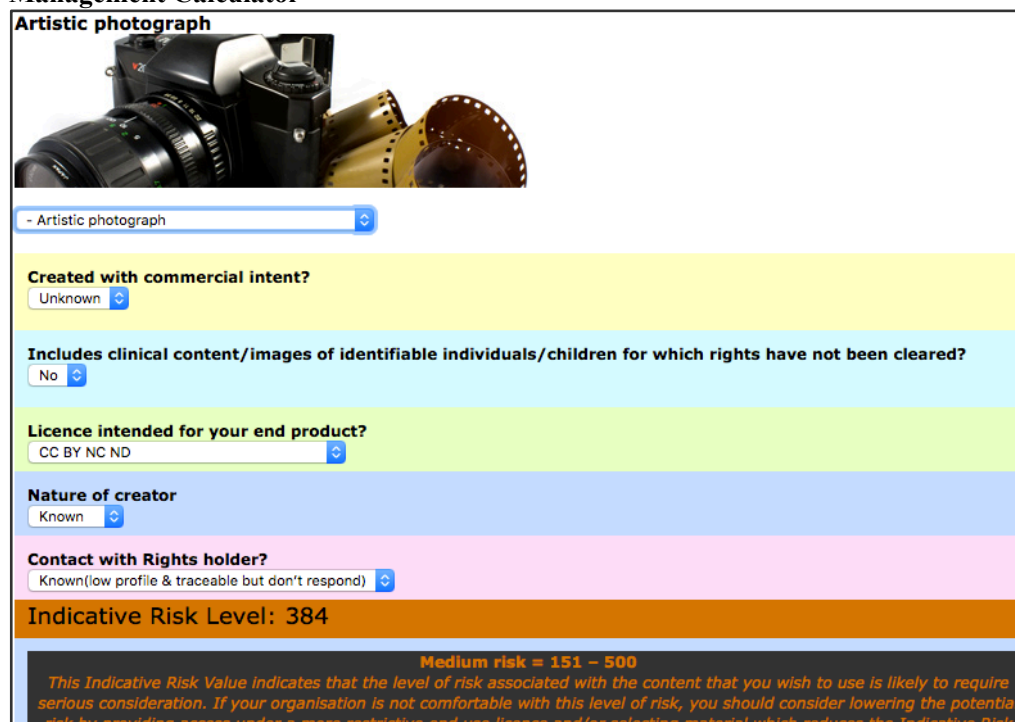
Table 1.8: An example of a completed balanced scorecard for risk assessment

Risk	Probability (1-5)	Severity (1-5)	Score (PxS)	Action to Prevent or Manage Risk
Legal	3	5	15	The EThOS and EThOSnet projects are addressing the legal aspects of collecting, digitising and making this type of material available.
More theses to be digitised than expected	5 (realised)	2	10	The project has delivered 4 times the number of theses to be digitised than originally expected. This means greater logistical involvement for the British Library, but the additional resource can be made available.
Institutions attempting to clear rights with authors	3 (small number realised)	3	9	A small number of institutions are contacting authors for clearance to make their theses available. 3 or 4 of the bigger institutions are doing this impacting on the logistics of the project. This is containable by applying a time limit of late May for decisions and the addition of further theses to replace those withdrawn.

The second approach adopts a similar methodology in that the scorecard was developed into a risk calculator, created by the Web2Rights project for an Open Educational Resources Toolkit. The risk calculator assigns numerical values to different types of material and the different ways in which they can be used, giving a high, medium or low ranking for different uses in addition to a numeric score. An example taken from the risk calculator, using an artistic photograph as the subject, can be seen on the following page (Figure 1.1).²⁸¹

²⁸¹ Web2Rights (2010) Risk Management Calculator, Web2Rights OER IPR Support Project, available at <http://www.web2rights.com/OERIPRSupport/risk-management-calculator/> [Accessed 20 December]

Figure 1.1: Example of an artistic photograph and use ranked using the Web2Rights OER Risk Management Calculator



Artistic photograph

- Artistic photograph

Created with commercial intent?
Unknown

Includes clinical content/images of identifiable individuals/children for which rights have not been cleared?
No

Licence intended for your end product?
CC BY NC ND

Nature of creator
Known

Contact with Rights holder?
Known(low profile & traceable but don't respond)

Indicative Risk Level: 384

Medium risk = 151 – 500

This Indicative Risk Value indicates that the level of risk associated with the content that you wish to use is likely to require serious consideration. If your organisation is not comfortable with this level of risk, you should consider lowering the potential risk by providing access under a more restrictive end use licence and/or selection material which reduces the Indicative Risk

In this example, the user of the calculator has decided to explore the risk associated with making an artistic photograph available: a typical record taken from an archive collection. It is not known whether the photograph was created with commercial intent, but we do know that the photograph does not include clinical content, or images of identifiable individuals or children. The user wants to make the image available under a Creative Commons Attribution Non-Commercial No-Derivatives licence. The creator is known, with a low profile, and the user has found contact details and approached the rights holder for permission, but they have not responded. The calculator gives a score of 384, which places it within the ‘Medium’ band (which includes scores of 151-500).

A third and final option is to define bespoke ‘criteria’ or ‘categories’ of risk for specific institutional digitisation projects; the Wellcome Library case study outlined in the previous section provides an example of this approach, as do many of the case studies included in Chapter Four. The risk criteria developed for the Codebreakers project was comprised of Low, Medium and High. Low Risk was a default category into which all material not deemed to be Medium or High Risk fell. The categories of Medium and High Risk are reproduced in Table 1.9 on the following page.

Table 1.9: WL Codebreakers Risk Criteria²⁸²

Medium Risk	High Risk
Author has (or had) a high public profile	Author is a well-known literary figure, broadcaster, artist
Author is alive and known to have a literary estate as recorded in the WATCH file	The author/estate/publisher is known to actively defend their copyright
The material appears to have been published or broadcast and/or prepared for commercial gain rather than to advance academic knowledge or in a not-for-profit context	The relationship between the institution and the author/estate/publisher is awkward

The risk criteria allowed the WL to identify the rights holders in their collections most likely to object to publication, and to focus their rights clearance efforts on them, rather than engage in comprehensive clearance with 1000s of potential rights holders across all 23 collections selected for digitisation.

1.5 Conclusion

In this chapter, the UK legal framework was analysed to show the copying activities that archivists are able undertake without infringement of copyright. A gap in the current framework was identified, where mass digitisation of unpublished materials for non-commercial purposes is not yet possible. Legal scholarship and policy was then summarised to show the potential legal solutions being offered to enable mass digitisation of CHI collections. Archival scholarship on copyright was considered, showing a tendency to favour digitisation of public domain works and works where rights are held by the parent institution over works containing third party rights; the use of additional controls of further uses of works made available through digitisation; the different types of digitisation taking place across the sector; a lack of experience with licensing; the extent of the orphan works problem across the UK and EU; the lack of formal practices and processes risk management of digitisation projects; and some evidence of differing approaches to risk visible within the sector. Insights into the archive sector workforce suggest that, while the UK archive sector may be considered risk-averse, by focusing on the benefits and positive outcomes associated with digitisation, archivists may be more inclined to take risks and make more collections available online, despite potential infringement. Finally, this chapter presented an overview of relevant risk management standards and the common risk management approaches used

²⁸² Stobo, V. et al (2013) Copyright and Risk: Scoping the Wellcome Digital Library Project Report, CREATE Working Paper 2013/10, University of Glasgow: Glasgow, available at <http://www.create.ac.uk/publications/copyright-risk-scoping-the-wellcome-digital-library-project/> [Accessed 20 December 2017]

by CHIs in the literature, in order to better understand current practice and to highlight areas for possible improvement.

2. Methodology

2.1 Use of mixed methods

2.1.1 Selection of methods

Both paper-based questionnaire surveys and interview surveys have been used to conduct this type of research previously.²⁸³ Specific case studies of digitisation and rights clearance projects have also been written up for the benefit of the archives sector.²⁸⁴ These are established research methods within the sector. The combination of these methods will provide a pragmatic balance between sector-level descriptive statistics, which do not currently exist and would provide an overview of practice within the sector and allow a modest amount of exploration of correlation between particular variables; and the rich descriptive detail provided by a small number of in-depth studies of single-cases.

Other potential research methods considered but rejected were participant observation, focus groups or a form of experimental design.²⁸⁵ There are specific reasons why the researcher did not choose to use these research methods. Participant Observation is considered to be too ‘deep’ a method for this particular study given the risk of getting lost in the particular and unique practices of a single institution, without being able to generalize out to the rest of the archive sector in some way. While participant observation would give a fuller understanding of decision-making processes and policy development, and provide more detail about specific projects, it would prevent the collection of multiple cases, thereby inhibiting the evaluation of different risk management techniques. The difficulty of recruiting a willing participant organization undertaking a digitisation project involving third party copyrights contemporaneous to the PhD study was identified as the main stumbling

²⁸³ See Dryden (2008), Hudson and Kenyon 2007), and Corbett 2011) for archive sector examples.

²⁸⁴ Akmon (2010), Dickson (2010), Stobo et al. (2013).

²⁸⁵ Elliot, M. (2016) *The Oxford Dictionary of Social Research Methods*, Oxford University Press: Oxford [online] available at oxfordreference.com [accessed 12th June 2018] defines participant observation as “A method, associated with ethnography, which involves long-term intensive fieldwork with a particular group of people...The researcher tries, as far as possible, to live among the people under study and become a part of the group by participating in their activities. In this way the researcher becomes less of a stranger and may develop close relationships with the subjects. Because he or she is there most of the time the researcher becomes familiar with the social setting and less likely to miss significant details.” Focus groups are defined as “A range of facilitated meeting types in which a recording is made to create qualitative research evidence to explore a phenomenon. The group typically contains six to twelve individuals, usually chosen to be representative of a wider group under study. The session lasts from one to two hours and takes the form of a facilitated discussion in which participants are asked to give their views on topics defined by the researcher.” Experimental design is defined as “Any research study carried out in a setting where the researcher has tight control over the experimental conditions. Within the social sciences, lab experiments are most commonly used in psychology and behavioural economics. They tend to be easy to replicate and more reliable than other methodologies. By using them it is possible to test hypotheses directly (by varying experimental conditions) and thus obtain some leverage on causal explanations. Critics of lab experiments, however, argue that the experimental setting is not a natural one and therefore experimental results lack validity.”

block, as was resolving concerns around the confidentiality of individual participants. In addition, many of the digitisation projects the study has explored were conducted in partnership, which would require permission from other ‘external’ participants.

In addition to participant observation, asking research participants to keep ‘diaries’ of their projects was rejected as a research method. This rejection was based on two observations; many of the projects selected for case study research were already completed or underway; and recruiting participants who would be willing to keep such detailed records would be problematic. Also, many of the project staff taking part in the case studies have kept detailed records as part of the rights clearance process, and have agreed to share these records with the researcher. While these records do not constitute ‘diaries,’ they offer valuable data tracing the success (or otherwise) or rights clearance exercises.

Focus Groups were also considered to be an inappropriate research method for this particular project, because the research is not principally concerned with meaning-making in the realm of digitisation and rights clearance within the archive sector; the study intends to collect observations from different institutions to build a picture of current practice across the sector. A focus group is a method used to seek views or reach a consensus on a particular issue.²⁸⁶ Given that the intention of the PhD is to form recommendations for best practice guidance, focus groups would be a natural way to progress towards the practical implementation of this objective, perhaps through later stage research or in a postdoctoral format; but that is not within the remit of this thesis.

The frame of a traditional lab experiment cannot accurately capture the information this study is concerned with: project-specific decisions, policy development within a particular context and process-tracing. It was felt that decisions influenced by risk assessment would not be representative of real-life practice under the conditions of a lab experiment. It was also felt that recruitment for such an undertaking would most likely be unsuccessful, given the time and travel commitment involved for participants, many of whom are employed on a full-time basis.

Experimental studies point to the possibility of capturing ‘multimodal activity’: recording decisions and activity through sensors and access to real-time activity logs on the IT equipment used by participants.²⁸⁷ For example, a team of computing scientists at University

²⁸⁶ Ibid.

²⁸⁷ Weibel, N., et al (2015) “LAB-IN-A-BOX: semi-automatic tracking of activity in the medical office,” *Personal and Ubiquitous Computing*, 19(2), 317-334. DOI: [10.1007/s00779-014-0821-0](https://doi.org/10.1007/s00779-014-0821-0)

of California have developed the 'Lab in a Box' which, "exploits a range of sensors to track computer-based activity, speech interaction, visual attention and body movements, and automatically synchronize and segment this data...fusion of multiple sensors allows us to derive initial activity segmentation and to visualize it for further interactive analysis."²⁸⁸

While the capture of certain patterns of behavior is possible using this method, such an experiment would not be able to capture processes or decision-making which take place away from the computer or a particular office-space: in meetings, over a coffee, in the archive store or using paper-based records. The ethical implications, and the ability to recruit willing participants whose behavior would not be affected by knowledge of their surveillance, were the main problems identified with this approach. There is also the associated problem of selecting and discarding data which has already been collected, based on the fact that participants may not be working on digitisation and rights clearance consistently; potentially sensitive data relating to other projects may be picked up because the large net used for this type of data collection cannot differentiate when participants work on multiple, unrelated tasks.

2.1.2 Strengths and weaknesses of the survey method

Quantitative methods are primarily concerned with measurement, causality, generalization and replication,²⁸⁹ but this emphasis on measurement can often generate knowledge with significant gaps, because the researcher is distant, focused on an imposed context rather than the participants' natural environment, and concerned with testing a pre-existing theory instead of allowing theory to emerge from participants and the data collected. Some of the criticisms leveled at quantitative research, and social surveys in particular, include: the failure to recognize that human behavior cannot be observed in the same way as objects in the natural world; the inaccuracy of certain measurements, especially when participants must interpret meaning subjectively in the absence of the researcher; the effect of observation on the behavior of participants and therefore in the data collected; and the ossified view of relationships produced by sustained focus on key variables.²⁹⁰

However, an emphasis on measurement, causality, generalization and replication can also have considerable strength depending on the research question: measurement can illuminate subtle differences, provide consistent comparisons and establish potential relationships

²⁸⁸ Ibid.

²⁸⁹ Bryman, A. (2012) *Social Research Methods* (4th Edition) Oxford University Press, UK.

²⁹⁰ *ibid*

between variables; experimental research designs may be able to demonstrate causal relationships between variables; through sampling, researchers can decide how far the results of analysis can apply to the rest of the population; and through the design of transparent processes and instruments, the research design, the results and any underlying bias, can be replicated and tested elsewhere.²⁹¹

2.1.2.1 Associated methods: Questionnaires

The self-administered questionnaire was chosen as an appropriate research method because it is a simple, quick and effective way of distributing a survey instrument to a large group of people.²⁹² In addition, the questionnaire has specific strengths: the interviewer is not present when the respondent completes the questionnaire and cannot adversely affect how the respondent answers. There is also no potential for different interviewers to bias participant answers by asking the same questions in different ways, or interpreting the meaning of questions or terminology differently. The self-completed questionnaire is also convenient for busy respondents, and the flexibility of being able to complete the questionnaire at a time and place that is convenient to the participant can improve the overall response rate to the survey.²⁹³

There are also potential weaknesses in the format: the absence of the interviewer works both ways. They are not available to prompt the respondent if they have difficulty, and if the design incorporates lots of open-ended questions, the interviewer cannot probe the respondent to answer in detail. Care must be taken not to ask too many questions, and to stick to relevant questions only, as respondents will inevitably abandon the questionnaire if there are too many open questions, if the survey is too time-consuming to complete, and if the questions begin to sound irrelevant or boring. While the questionnaire is flexible and convenient for many participants, the ephemeral nature of the instrument and the lack of personal investment means low response rates are the norm. There is also the related concern that the researcher cannot be 100% sure that the right person within an organization completed the survey.²⁹⁴

Despite this, a questionnaire was selected on the basis that the method is previously established within the sector, and that a large amount of data collected quickly would be of

²⁹¹ *ibid*

²⁹² Pickard, A. J. (2013) *Research Methods in Information*, Facet: London. p.114-116.

²⁹³ Bryman, A. (2012), p.233-234; de Vaus, D. (2014) *Surveys in Social Research*, 6th ed. Routledge: Abingdon. p.251

²⁹⁴ *Ibid.*, p.234-235, *Ibid.*, p. 256

benefit to the UK archive sector, given that such data do not currently exist.

2.1.2.2 Associated methods: Structured Interviewing

The strengths and weaknesses of structured interviewing are similar to those of self-administered questionnaires, although the presence of the interviewer can have both a positive and an adverse effect: while they may be able to draw out an unresponsive participant in a way that a questionnaire cannot, there is the problem of response sets. Participants may acquiesce by providing consistent or similar answers to everything they are asked, and they may be influenced to respond to questions by providing ‘socially desirable,’ rather than completely truthful, answers. There is also the problem of interpreting meaning; there may be an assumption that interviewers and participants mean the same thing when they discuss a particular topic or use a particular terminology.²⁹⁵

2.1.3 Strengths and weaknesses of the case study method

2.1.3.1 Case Study method

According to Flyvbjerg, a case study focuses on an “individual unit,” whether a person, religious group, neighbourhood, country or organisation.²⁹⁶ For this thesis, the case is a digitisation project at a specific institution. Case studies are “intensive;” the ability to focus observation on a single case provides a rich, detailed and complex account of the individual unit under study. Case studies involve “developmental factors;” which alludes to the expectation that a case will be composed of observations across multiple and “interrelated” events, and that a case will typically capture a period of time. Case studies have “context,” not merely in the ‘thick’ description such a research design allows for, but in setting the boundaries of a single case. The researcher must continually negotiate between the detail in the case and the context around it, in order to define the scope of the case study.²⁹⁷

Gerring suggests five types of case study which he defines using a covariational typology, including the single case, which can take three forms: diachronic, i.e. variation in a single case over time; synchronic, within-case variation at a single point in time; and a combination of synchronic and diachronic analysis in a single case.²⁹⁸ In case studies involving the

²⁹⁵ Stoecker, R. (1991) “Evaluating and rethinking the case study,” *The Sociological Review*, 39(1), p.93.

²⁹⁶ Flyvbjerg, B., (2011) *Case Study*, in: Denzin, N.K., & Lincoln, Y.S., eds. (2011) *The SAGE Handbook of Qualitative Research*, 4th ed. London: Sage. pp. 301-316. (p.301)

²⁹⁷ Ibid.

²⁹⁸ Gerring, J., (2007) *Case Study Research, Principles and Practices*. Cambridge: Cambridge University Press, p. 27-28

collection of several cases, Gerring offers two further definitions: the comparative method, where variation between cases is synchronic; and the comparative-historical method, where variation between cases is both synchronic and diachronic.²⁹⁹ In this thesis, the case studies fall somewhere between comparative and comparative-historical.

Gerring argues that the case study has a “methodological affinity” with approaches including “ethnographic, clinical, anecdotal, participant-observation, process-tracing, historical, textual, field research and so forth.”³⁰⁰ Traditionally, the case study has been critiqued by those favouring quantitative, or scientific methods, for three reasons linked to the single case basis of the design: “...objectivity is more difficult to maintain, falsifiability criteria are more difficult to meet, and generalisation is impossible.”³⁰¹

From the description above, we can see that providing a list of the strengths and limitations of the case study research design is problematic: elements of the design which may be criticised as weak by one researcher are often highlighted as a strength by another. The difficulty of demonstrating objectivity in case study research is often seen as a weakness of the genre, and a consequence of the absence of experimental controls, or other scientific methods which may (or may not) account for bias. However, some critics of the case study method have accepted that case study researchers are close enough to their subjects to have their biases, assumptions and opinions corrected by their research subjects, while other social scientists at arms’ length are not.³⁰²

This shows that meeting falsifiability criteria is more often the norm than not, and that those same criteria can and do correct for bias towards verification.³⁰³ An example of this can be extracted from the semi-structured interviews which form part of the case studies in this thesis: several participants have reflected that the process of rights clearance was a positive experience, despite the effort involved – a finding that directly contradicted the thinking of the researcher at the time. In addition, statements participants have made about the amount or type of copyright-protected material that has been made available online can be

²⁹⁹ Ibid.

³⁰⁰ Ibid p.10

³⁰¹ Stoecker, R., (1991) Evaluating and rethinking the case study. *The Sociological Review*. [e-journal] 39(1) Available at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-954X.1991.tb02970.x/abstract> [Accessed: 20 Dec 2013] p. 91

³⁰² Campbell, a former critic of the case study method, stated “While I have no doubt that there is a statistically significant bias in favour of drawing conclusions rather than holding belief in abeyance in the face of essentially random evidence, this cannot be a dominant bias, as both biological and social evolution would have eliminated such credulity in favour of more discriminating mutants.” Campbell, D. T., (1975) Degrees of Freedom and the case study. *Comparative Political Studies*. [e-journal] 8(178) Available at: <http://cps.sagepub.com/content/8/2/178.refs.html> [Accessed: 12 Dec 2013]p. 182. See also Flyvbjerg, 2011, p.310

³⁰³ Flyvbjerg, B., (2011) p.310.

crosschecked against their institution websites.

Of the three problems previously noted with the case study research design, limited generalisability has been the hardest to overcome: with no basis for probability samples or significance tests, there can be no scientific method of generalising from a single case. Kennedy suggests that researchers should use the term “strength of generalisability” or “strength of external validity,” and use judgment to rate the measure rather than seeking a yes/no answer.³⁰⁴ This is a pragmatic approach which has been adopted for the case studies in this thesis. For example, the risk management techniques outlined in a particular case study may be generalizable if the institution is of a similar type, or holds similar collections, similar budgets, similar staffing levels etc, based on relationships identified in the survey results and the identification of common themes across the case study interviews.

If a researcher considers the depth and richness of detail with which a social scientist carries out case study research to be a form of myopia: an inability to step back and gain scientific objectivity, then the case study is a weak research design indeed. Yet this same richness of contextual detail is where the forms’ greatest strengths lie. The absorption into process-tracing *how* social phenomena happen, which gives the genre its conceptual validity, also makes it a useful tool for explanatory theory generation and answering applied questions. It is this process-tracing which will allow the researcher to evaluate different approaches to rights clearance, which will then inform the development of recommendations for best practice guidance, which then directly benefits practitioners within the archive sector.

2.1.3.2 Associated methods: Qualitative Interviewing

The main research method applied in the collection of case studies for this thesis is the semi-structured interview, alongside document analysis and a survey of material available on the institutional websites of the case study participants.

The strengths of qualitative interviewing can be summarised in two ways – the strengths of the method itself, and practical considerations. Firstly, and perhaps most importantly for the researchers using the method, the vast majority of published qualitative research involves interview results of some kind,³⁰⁵ i.e. the qualitative interview is strongly established as a

³⁰⁴ Kennedy, M., (1979) Generalising from single case studies. *Evaluation Quarterly*. 3(4) Available at: <https://www.msu.edu/~mkennedy/publications/docs/Research%20Methods/Generalizing/Kennedy%2079%20Generalizing.pdf> [Accessed: 10 Dec 2013] pp. 664-5

³⁰⁵ Silverman, D., (2006) *Interpreting Qualitative Data*. 3rd ed. London: Sage. p. 113

popular, effective and reliable research method.³⁰⁶

The strengths associated with the method itself are dependent on what, as an interviewer, you are attempting to find out. Survey style or structured interviews can be used to find out facts, beliefs about facts, feelings and motives, standards of action, present or past behaviour and conscious reasons.³⁰⁷ However, researchers favouring a semi-structured or unstructured interview technique find the method allows them deeper access to the emotions of their respondents,³⁰⁸ their values, and crucially, their subjective meaning-making or experience of reality, and this in turn can expose socially-mediated discourses.³⁰⁹

Weaknesses which have been highlighted in the qualitative interview method have usually been reserved for precisely these kinds of unstructured, open-ended interview styles: the results of such interviews are seen as difficult to compare from transcript to transcript, and therefore comparative analysis is impaired.³¹⁰ The ability shown by interview respondents to contradict objective evidence of events with subjective reporting is another noted factor which must be controlled within the research design.³¹¹ However, if the research is primarily concerned with how the respondent's subjective experience differs from the accepted, objective view, then the interview is a valid research method.

Cousin also recognises that interviews are not “neutral spaces”³¹²; researchers should be aware that subjects may “embellish responses” or engage in “pleasing behaviour,”³¹³ and should pay attention to forms of “non-linguistic communication.” She also reminds the researcher that they operate within an ethical framework, where informed consent is an “ongoing process.”³¹⁴

For this thesis, a balance is sought between the deeper access afforded by the technique, and the difficulties of comparison between interviews by using a structured question pro-forma, with the opportunity to deviate when necessary. The questions are directed towards the participants' experience of a specific project to collect observations and information, specific

³⁰⁶ Silverman also points out that it is a ‘relatively economical’ method of collecting empirical data (p.113), and “no special skills are required”, in that, we do not need to be trained in the art of social interaction through conversation (p.112) before beginning the interview process.

³⁰⁷ Sellitz et al, 1964, in Silverman, 2006, p.119-20

³⁰⁸ *ibid*, p.124

³⁰⁹ *ibid*, p.129

³¹⁰ Silverman, 2006, p.122

³¹¹ *ibid* p.120

³¹² Cousin, G., (2009) *Researching Learning in Higher Education: An introduction to contemporary methods and approaches*. London: Routledge p.79.

³¹³ *ibid* p. 76

³¹⁴ *Ibid*.

decisions and policy-making, with opportunities for reflection and discussion: but the interview does not intentionally probe respondents to the level of emotional engagement, semantics or discourse analysis.

Subjects may contradict themselves in the interviews in relation to facts stated about certain projects, and the researcher will check that information provided about case study projects, especially the material which has been made available, matches what is actually available online.

2.1.3.3 Associated Methods: Content Analysis

Content analysis is concerned with significant actors, words, subjects and themes, and dispositions.³¹⁵ Significant actors can include authors of documents or resources; the person or institution the document was originally intended for; the context of the creation of the document; the type of document; and the reason the author had for creating it. The appearance or absence of specific words, terminology and phrases can be analysed, and the context in which they are used can also be explored. Subjects and themes can be highlighted, coded, extracted and categorized. Instances of disposition, where opinions, ideologies or principles are expressed, either openly or implied, can be recorded.³¹⁶

Content analysis benefits from transparency; the coding or sampling scheme can be made available and therefore the results of the process should be replicable with the same data set. It's also an unobtrusive research method; data can be collected from secondary sources and analysed without engaging with participants. However, analysis based on such sources will only ever be as good as the quality of documents available, and may not be able to answer specific questions. There is also the criticism that coding is subjective and relies upon interpretation.³¹⁷

There is potential to use secondary sources of data, particularly the information archivists make available on websites about projects, in addition to the survey and case study data, but the selection process should be undertaken with care as the researcher has no control over data quality. In the absence of key variables, analysis of content must also be undertaken with care.

³¹⁵ Bryman, A. (2012); Krippendorff, K. (2013) *Content analysis: an introduction to its methodology*, Sage: London; and Graneheim, U. H. and Lundman, B. (2004) "Qualitative content analysis in nursing research: concepts, procedures and measures to achieve trustworthiness," *Nurse Education Today*, 24:2, pp.105-112, DOI: 10.1016/j.nedt.2003.10.001

³¹⁶ *ibid*

³¹⁷ *ibid*

2.2 Survey method

2.2.1 Description of overall survey process

The questionnaire survey was developed between March-September 2014, and went through six substantive drafts before piloting. The survey was piloted on two occasions and feedback on some of the descriptive terminology was included in the final re-drafting process.³¹⁸

The researcher was provided with the current list of UK archive institutions included in the National Register of Archives (NRA) by the National Archives (TNA).³¹⁹ This information was provided in an Excel sheet, which facilitated the sampling process, and the creation of mail merges for the distribution of questionnaires. The data available in the spreadsheet was not comprehensive, and the researcher spent a significant amount of time, after sampling, to locate as many personal email addresses associated with a senior member of staff at each institution as possible, in an attempt to improve the potential response rate to the questionnaire.³²⁰ Prior to sampling, the NRA dataset contained 2,882 entries.

Exclusion criteria were used to generate a sample of institutions. Institutions holding less than 20 collections were excluded, and in addition, if the archive service had no obvious contact point or public-facing role, they were also excluded.³²¹ Services were excluded on the basis that these smaller institutions would have very little experience of digitisation, and if they did not habitually provide access to their collections. Archives services marked 'Private' were also not included in the sample for the same reason. Further passes were made on the initially excluded institutions to ensure that no publicly accessible institutions with large collections, but who had reported a small number of collections (e.g. BT Archives) were excluded in error. The final sample consisted of 679 institutions.

679 participant institutions were contacted initially by email in early October 2014, to inform

³¹⁸ The survey was piloted with staff from University of Glasgow Archives and Special Collections, and Northamptonshire Archive Services.

³¹⁹ The data was provided in .xcl format by the Research Support team at TNA, via an email request. The National Register of Archives is searchable through TNA's web portal, Discovery, at <http://discovery.nationalarchives.gov.uk/find-an-archive>.

³²⁰ The National Register of Archives (NRA) includes multiple entries for single institutions, where the institution has a large number of departments, smaller bodies or regional offices. Examples of this include the British Museum, the various colleges at both Oxford and Cambridge Universities, and local authority archives like West Yorkshire Archives Services. The data provided by TNA was combed for multiple entries and likely candidates were picked from each to reduce the overall sample size: the researcher identified at least 221 duplicate entries from the full NRA dataset. Institutions outside the UK were also excluded.

³²¹ Institutions with less than 20 collections were excluded on the basis that very small services with small collections would be unlikely to engage in digitisation: the majority of institutions with less than 20 collections were specialist institutions.

them a survey questionnaire would be sent to them within two weeks and offering them the option of declining to participate.³²² A link to the survey, with the option of completing a paper copy or participating in a telephone interview was duly sent. Potential participants were incentivised with the offer of several prizes: an iPad for the winner, and Amazon vouchers for five runners up. A further two follow-up attempts were made, including a further sample of 45 non-respondent institutions who were sent a paper copy of the survey in November 2014, before the survey closed in mid-December 2014. The prize raffle was held immediately after the survey closed and the winners and runners up were duly informed. The survey results are reported in Chapter Two.

2.2.2 Definition of digitisation

In contrast to the survey of Canadian archive institutions undertaken by Jean Dryden in 2007, which only concerned archive services which made material available online, the researcher has chosen to explore all three types of digitisation as defined by Hudson and Kenyon, based on their qualitative interviews with Australian cultural institutions.³²³ Hudson and Kenyon define three types of digitisation; project-led, user-demand and administrative. By focusing the survey on three types of digitisation, the survey instrument captures more information about different risk management practices and how copyright may affect those practices in different ways.

Additionally, this means institutions that haven't made collections available online *yet* are included in the research. A broad frame captures more institutions and different risk management practices, and allows the researcher to understand why particular institutions may be engaging in digitisation, but not making the results available online.

2.2.3 Definition of an archive

Conversely, the research design incorporates a fairly narrow definition of an archive service, in order to limit the number of potential participants, and focus exclusively on public-facing collecting institutions which attempt to make their collections (20+) as accessible to the public as they can, within budget and staffing limits. A small number of business archives have been included within this population; although business archives tend to be inward-

³²² The initial contact prompted 72 of incorrect email address alerts, out of office notifications, and refusals to participate. The research excluded the refusals from the sample, and found alternative email addresses were necessary.

³²³ Hudson, E. and Kenyon, A.T. (2007) 'Digital Access: The Impact of Copyright on Digitisation Practices in Australian Museums, Galleries, Libraries and Archives,' *University of New South Wales Law Journal*, 30:1, pp. 1-55, available at <http://ssrn.com/abstract=1065622> [Accessed 20 December 2017]

facing within their organisations, many provide some form of enquiry service or limited searchroom access on application. The benefits of including these types of services within the target population outweigh the costs, given their perceived importance within the sector.

The difficulty of providing a single working definition of an archive service, and finding a single source of data about the UK archive sector, has been previously noted by scholars. The best examples of data continue to be the NRA,³²⁴ maintained by TNA; British Archives,³²⁵ a reference text compiled by Foster and Sheppard; and for community archives, the Community Archives and Heritage Group website³²⁶ provides a database of services. The decision to use the NRA was based on pragmatism; the NRA list is reasonably comprehensive for a range of institution types, it covers the whole of the UK, and it is readily available in Excel format, meaning the researcher could create mail merges for the distribution of the web survey efficiently.

Pickford, Coleman and Davies³²⁷ have written extensively about defining archive institutions and CHIs in general. Pickford has classified archives in the UK into four types, reproduced in Table 2.1 on the following page:³²⁸

³²⁴ Available at <http://discovery.nationalarchives.gov.uk/find-an-archive>

³²⁵ Foster, J., and Sheppard, J., eds. (2002) *British Archives: a guide to archive resources in the United Kingdom*, Palgrave, London.

³²⁶ Available at <http://www.communityarchives.org.uk/>

³²⁷ Coleman, A. and Davies, S.J. (2002) Copyright and Collections: recognising the realities of cross-domain integration, *Journal of the Society of Archivists*, 23:2, pp.224-226, available at <https://doi.org/10.1080/0037981022000006426> [Accessed 20 December 2017];

³²⁸ Chris Pickford (2002) 'Archives: A statistical overview,' in *Cultural Trends*, 12:48, 1-36, DOI: [10.1080/09548960209390339](https://doi.org/10.1080/09548960209390339)

Table 2.1: Pickford's types of archive service

Type	Definition	Key features
1	Archives as main activity of organisation or department - 'archives services'	Collecting repository with area- or subject-based remit. Important archival holdings from a broad range of depositors, including its own parent body. Key player in archival networks. Professional and dedicated support staff. Public access. Facilities formally recognised and approved. Service identifies primarily with the archives domain and the archival agenda
2	Archival activities as an identifiable secondary function of an organisation with other responsibilities (for example, library or museum) — 'archives units'	Significant archival holdings of own organisation and/or for a specified area- or subject-based remit. Some collecting. Involved in archival networks. Dedicated or specialist staff (not necessarily full time). Some public access. Covered by museum's registration (or similar) but not formally recognised or approved. The department or unit identifies with the archive agenda but with a degree of loyalty to the mission of another domain
3	Archives held peripherally as a minor element of the holdings of a library, museum or similar body — 'small archives'	Some original materials (for example, a small number of specific collections), but otherwise mainly ephemera rather than archives. Outside archival networks. Run by non-specialist staff. Limited public access. Not formally approved for archives. Primarily driven by non-archival agendas (for example, museum, library, business, administrative or professional)
4	Archives in the care of creating organisation — 'archive holders'	No collecting from outside organisation. Archives under control of administrative staff. Material primarily held and managed for internal use. Limited public access. Outside the approval system for archive repositories. No significant identity or association with the archival agenda

On the basis of the definitions given above, there is a strong argument that the sample has captured the majority of Type 1 'archive services' within the UK, and that the sample is further strengthened with examples of Types 2-4, although they are not comprehensively represented as Type 1.

2.2.4 Sampling and exclusion criteria

With over 2,882 services listed in the NRA, and given the difficulty in defining the exact nature of a typical 'archive service' (and therefore in identifying an overall population of

UK archive services), some institutions were excluded from the NRA list to create a representative sample. Type 1 Archive Services were prioritized through the exclusion criteria. Many Type 2-4 were included because they provide some form of access to their collections.

2.2.5 Size of response

150 responses were received; 132 via the web survey; 9 via telephone interview, and 9 via paper returns. 29 web survey responses were excluded on the basis that respondents only completed the first nine questions or less, and these were judged to be insufficient for analysis. The total number of useable responses received is 121, from a sample of 679, giving a response rate of 18%. Basic analysis is used to provide collated answers to the questions posed in the survey.

2.3 Case Study method

2.3.1 Description of overall case study process

8 case study participants were recruited in late 2014 and early 2015.³²⁹ The researcher organized a semi-structured interview to begin the case study process, and visited each participant archive to gain a better understanding of their collections and the context of the digitisation project under study. Participants generally provided significant amounts of additional data in the form of rights clearance records and internal documentation. It was possible to conduct additional follow-up interviews at one institution, where rights clearance processes and digitisation were still ongoing, and all participants have agreed to provide the researcher with any follow-up information as requested.

2.3.2 Selection criteria

The snowballing technique³³⁰ was used to select the institutions that agreed to take part in case studies. The institutions were selected in a variety of ways; one identified themselves through the survey process, two approached the researcher directly after conferences and training events, and five came about through the recommendation of other participants.

³²⁹ 6 of the case studies are reported in this thesis. 2 were excluded from publication on the basis of insufficient data, when compared with the other case studies.

³³⁰ The Dictionary of Social Research Methods defines snowball sampling as “A method of non-probability sampling where the respondents are themselves used to recruit further respondents from their social networks. This method is often used where no sample frame exists and the population of interest is a hard-to-reach group...”

Cousin explains that the sample is not designed to cover all potential variations within a social context, but “key sources of variation to add to the depth and plausibility of your analysis.”³³¹ Cousin also discusses saturation (whereby a researcher determines they have conducted enough interviews because no new evidence is being generated).³³²

2.3.3 Semi-structured interviews

Semi-structured interview schedules contain particular types of questions, as described by Cousins. Main questions can include “grand or mini tours,” “highs, lows and iconic moments,” “hypothetical questions,”³³³ opportunities to compare and contrast, or to demonstrate and discuss tasks.³³⁴ Probes range from the direct – “Can you tell me more?” – to indirect communication methods like nodding to encourage more detail.³³⁵ Follow-up questions are used to extract more detail, discuss “new ideas” and confirm understanding of shared concepts, or to draw out stories, explore positions, ambivalence, contradictions or theorise with the interviewee.³³⁶

Prior to starting this PhD study, the researcher worked on ‘Copyright and Risk: Scoping the Wellcome Digital Library Project.’³³⁷ During the Wellcome Study, the researcher identified relevant project staff members and developed a basic semi-structured interview schedule that could be adapted to suit different levels of staff within a single institution; based on strategic questions for managers, and process-based questions for those managing the project day-to-day. The interview schedule used for the case studies presented in this thesis, adapted from the Wellcome study, can be found in the appendices.³³⁸

2.3.4 Data collection

In addition to the semi-structured interviews, the collected data directly from the respondents, where they have been able to record observations about the rights clearance process. For example, participants have shared spreadsheets containing: rights holders’ details; how many times they have been contacted; whether the rights holder responded to a permission request; what the response was; participants have also shared copies of the

³³¹ Cousins, G. (2009) p.79.

³³² *ibid* p.80.

³³³ Cousins, G. (2009) p.86

³³⁴ *ibid*

³³⁵ *ibid*

³³⁶ *ibid* p.88-9.

³³⁷ Stobo et al, (2013)

³³⁸ Appendix A.

permission letter sent to rights holders; copies of their standard deposit agreements; and other relevant documentation.

2.3.5 Analysis Methods

For interviews, the data is analysed through transcriptions. The researcher has opted to transcribe 4 of their own interviews; the transcription process allows the researcher an initial ‘pass’ on the data.³³⁹ 6 other interviews were transcribed by a professional transcription service.

Coding is the process whereby large amounts of data are broken down into ‘manageable chunks’ through categorisation and the collection of instances of interest.³⁴⁰ Analysis begins once these instances and categories have been defined, and Potter and Weatherell break analysis into two phases: “the search for pattern in the data,” and “forming hypotheses about these functions and effects and searching for the linguistic evidence.”³⁴¹ The researcher took a pragmatic approach in this instance and gathered data from the interview transcripts using notes and very broad, high level codes, which are reported as subject-headings in Chapter Four.

³³⁹ Potter, J., and Weatherell, M. (1987) *Discourse and Social Psychology*. London: Sage. p. 165

³⁴⁰ *ibid*, p.167.

³⁴¹ *ibid*, p. 168.

3. Results of a questionnaire survey of the UK archive sector

This survey collected baseline data from the UK archive sector regarding individual archive services' approaches to digitisation, copyright and risk-taking. The survey was split into six sections: demographic information about the archive service; sources of copyright knowledge; project-led digitisation; on—demand digitisation; administrative digitisation and complaint procedures. The survey ran between September-December 2014, and received 150 responses, of which 121 were judged to be usable. Responses were received via an online form and paper questionnaires. The following sections present the results of the survey, retaining the order in the survey instrument. Discussion of results is included at the end of this chapter.

3.1 Demographics

3.1.1 Type of Archive Services in the sample

The following question was asked in order to categorise the types of archive service present in the responses: 'Which archive service do you work for?'

Table 3.1: Type of archive service

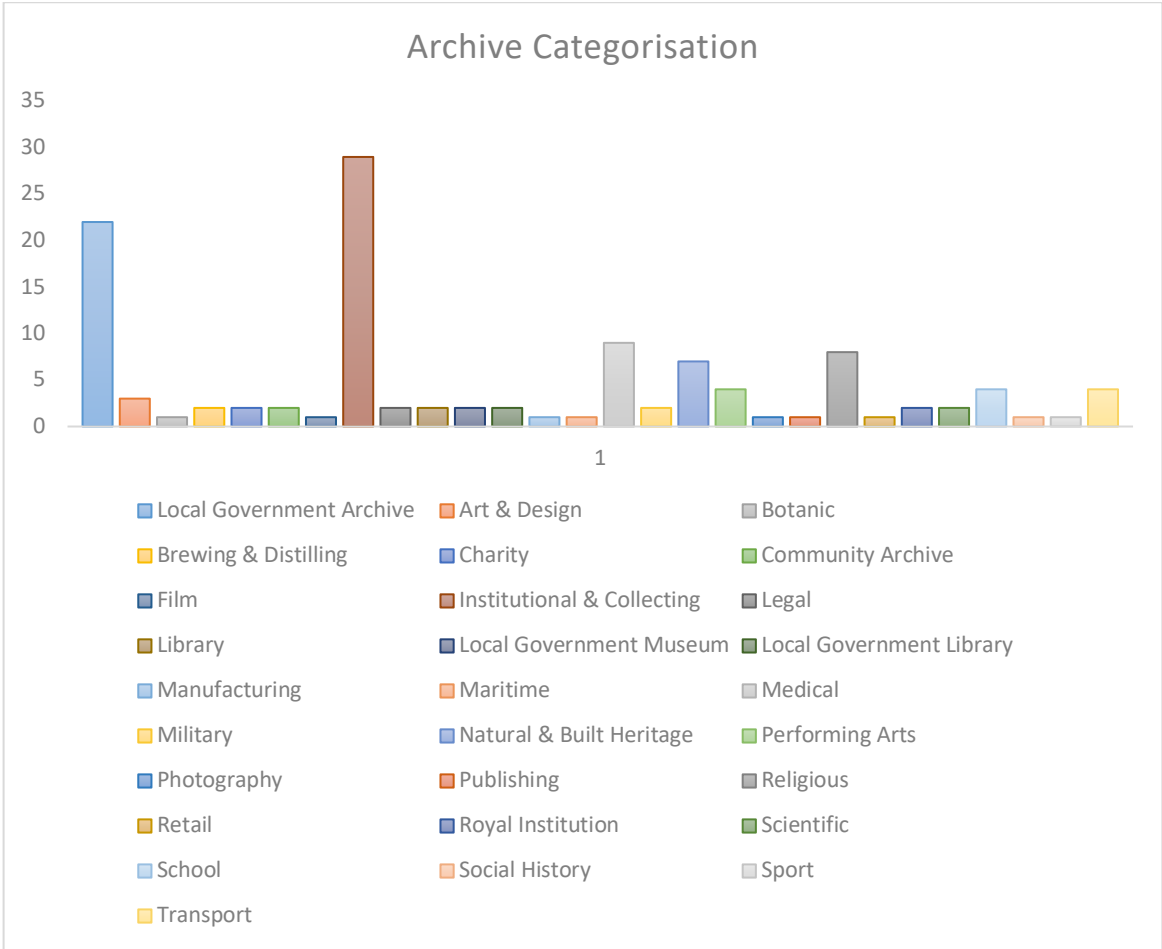
Type of archive service	Quantity in the Sample	Quantity in the Population
Business	6	40
Local	26	217
National	15	53
Special	39	171
University	35	93
TOTAL	121	574

121/121 responses

Respondents were asked to provide the name of their institution; the entry for the institution in the National Register of Archives (NRA) was checked and the classification used by the NRA applied. Comparing the distribution of the institution types, the response appears to be generally representative of the institution types found across the sector, although Local Government and Business Archives are under-represented. Business Archives may assume that copyright is not an issue they have to deal with frequently as their parent organisations can claim copyright in their own records and collections; thereby affecting the return of

completed questionnaires.³⁴² Local Government may be under-represented for two reasons: service sizes vary widely from locality to locality – some services may employ numerous staff and have spare capacity to devote to a response, whereas other services are much smaller and rely on ‘lone-arrangers’ who cannot spare the capacity for responding. In the same way, budget constraints and prioritisation of frontline services at local government record offices may also have played a role in the decreased response. The figure provided below breaks the five NRA categories down further, giving an insight into the range of institutions represented.

Figure 3.1: Categorisation of respondent archive services



Using the NRA dataset, a geographic distribution of the respondents is provided in the following table. Unsurprisingly, English services dominate the returns. In comparison with the overall population, the respondents provide a reasonable representation of the UK sector, although Wales and Northern Ireland are under-represented.

³⁴² Depending on the business in question, this could be a risky assumption: when other businesses are bought over or subsumed into another organisation, IP rights in records and other collections of materials may not be directly addressed.

Table 3.2: Geographic Distribution of Archive Services

Country/Region	Quantity
England	95
Scotland	21
Wales	2
Northern Ireland	2
Isle of Man	1

N= 121

3.1.2 Collection size

The survey instrument asked: ‘What is the total size of your collections, in shelf metres?’ This question sought data on the size of the archive service in terms of collections held, rather than building or institution size: this provides a sense of the scale involved when cataloguing, digitising, and potentially undertaking due diligence or rights clearance on collections. Three entries were excluded from the analysis because the large collections sizes skewed the results. Two of those institutions are national institutions, and one is a large local archive service. Twelve respondents provided collection size by volume rather than in metres; these entries have been estimated. The table below shows the total collection size, followed by the mean and the median.

Table 3.3: Collection Size

	n	n (%)	Total size	Mean	Median
Collection Size	98	81	264,383 m	2,783 lm	1,011 m

This result shows that collections sizes are substantial across the sector.

3.1.3 Staffing levels across the sector

This section of the questionnaire asked: ‘How many FTE (Full time equivalent) staff does your archive service employ?’ (Salaried) and (Volunteer). Two respondents were excluded from the analysis because the large staff numbers reported skewed the results. Both institutions are national institutions. Four respondents gave non-specific answers to this question, and the FTE have been estimated based on their descriptions. The table below shows total staff numbers, followed by the mean and the median.

Table 3.4: No. of FTE salaried and volunteer staff

Staff Type			
	Mean	Median	Totals
Salaried	4.6	2.0	525.01
Volunteer	3.4	1.0	239.18
Total	8.0	3.0	764.19

N= 117 (Salaried) N= 70 (Volunteers)

From this table, we can see that staffing levels across the sector are at a generally low level – the median showing three members of FTE staff per institution, one of which is in a voluntary capacity. This has clear implications in terms of the staff time that can be devoted to digitisation and dealing with copyright issues.

3.1.4 Annual Budgets

This section asked the question: ‘What is your archive service annual budget? This can include government grants, project funding, and revenue, etc.’

Table 3.5: Annual budgets

Budget	Quantity
0	1
< £10,000	40
£10,000-50,000	24
£50,000-100,000	15
£100,000-500,000	25
£500,000-1M£	3
1 - 10M£	4
> 10M£	2

114/121 responses

A significant proportion of the sector (65 respondents from a total 121) are operating on annual budgets of £50,000 or less; an observation that has implications for all of the issues discussed in this thesis. It may be possible that some of the respondents to this question were not including staff salaries within the annual budget amount. However, whether these figures include staff salaries or not, and given that staffing levels are generally low, it shows that low levels of funding are normalised and endemic across the sector. The results could also suggest that the sample of institutions in this survey is skewed towards smaller archive

institutions within the UK sector (which is borne out by the categorization presented in Figure 3.1).

3.2 Knowledge of the Law

3.2.1 Sources of information used to interpret copyright law

This section of the instrument asked: ‘What sources of information do you rely on to interpret copyright law, as it relates to archive collections and digitisation? Specify the sources you use; then rank in order of usefulness, with 1 being most useful.’

Table 3.6: Sources of copyright information

Source	Frequency	Percentage of respondents
Books, publications, blogs	102	84%
Archivists within your institution	76	63%
Legislation	72	60%
National Archives staff (for example, Tim Padfield) ³⁴³	70	58%
NRA Archives JISCmail listserv or other mailing list	67	55%
Other archivists outside your institution	56	46%
ARA/CILIP or other professional workshops	55	45%
Advice provided by a lawyer from within your institution	29	24%
Specialist copyright consultant (for example, Naomi Korn) ³⁴⁴	15	12%
Advice provided by a lawyer from outside your institution	12	10%
Case Law	10	8%

³⁴³ Padfield is a recognised expert on the application of copyright law to archive collections, and prior to his retirement in 2014, was a source of advice and support for the UK archive sector through his work at TNA.

³⁴⁴ Korn was the first copyright specialist employed by the Tate, between 2000-2003. She previously chaired the Libraries and Archives Copyright Alliance and founded one of the UK’s leading management consultancies specialising in copyright, licensing and data protection. More information on her work is available at <https://naomikorn.com/>.

Rankings of sources on the law

Figure 3.2: Ranking sources of copyright information



There are a couple of things to pick up on in these results. First of all, Books, publications and blogs are the top resources, which is unsurprising. National Archives staff, in second place, is an important result, if we consider that TNA no longer provide a dedicated member of staff to answer copyright enquiries. Tim Padfield is well known to the sector and provided guidance on a range of copyright topics. He retired in 2014, with the Information Policy team absorbing most of his responsibilities.³⁴⁵ Without Padfield, archivists will fall back on books and other staff members to provide the guidance they need. ‘Archivists within your institution’ in 3rd place, echoes Dryden’s finding that archivists ‘filter’ the law for each other: fellow staff members are an important resource for the interpretation of the law. Legislation, in 4th place, shows the importance of using primary resources, and not relying on secondary sources all of the time, although it’s worth noting that [legislation.gov.uk](http://www.legislation.gov.uk) is not updated frequently enough when it comes to copyright legislation, and the unofficial consolidated texts provided by the Intellectual Property Office are generally the most up-to-date sources. Professional workshops continue to be of use: these are provided in the UK by the Archives and Records Association, the Scottish Council on Archives and Naomi Korn Consultancy. Combined with ‘Archivists outside the institution’ in 6th place, this suggests that opportunities to share experiences and best practices are also important sources. In 7th place, the NRA Jiscmail doesn’t figure particularly highly, although this is where Tim Padfield dispensed some of his advice in reply to specific requests. Case Law is the least popular source, which is unsurprising, given the lack of cases applicable to archives.

³⁴⁵ Padfield was awarded an honorary lifetime membership of the Archives and Records Association for his work on copyright in 2014 (<http://www.archives.org.uk/news/440-tim-padfield-awarded-honorary-life-membership-of-ara.html>)

3.2.2 Uptake of copyright training

This section asked: ‘Has anyone within your archive service undertaken any training in copyright law?’

Table 3.7: Copyright training

Training undertaken	Quantity
Yes	72
No	45
Don’t Know	3
No response	1

120/121 responses

This result shows that 60% of the institutions surveyed have reported that at least one member of staff has undertaken some form of training in copyright law. The result also shows that the wider sector understands that copyright is a pertinent issue that affects their work and needs to be addressed. Understanding uptake of training across the sector could enable the provision of targeted training in various areas.

3.3 Project-led digitisation

3.3.1 Engagement with digitisation

This section asked: ‘Is the archive service you work for currently engaged in the digitisation or copying of archive material, or has it been in the past? This can include any kind of digitisation or copying – any size of project for online publication, whether internal or external, on-demand copying for users, or internal administrative digitisation.’

Table 3.8: Engagement with digitisation

Engagement with digitisation	Quantity
Yes	115
No	6
TOTAL	121

This result shows that 95% of the respondent institutions undertake some form of digitisation or digital copying on a regular basis: it’s to be expected that digital copying would be

normalised across the sector by 2014.³⁴⁶ The six respondents that replied ‘No’ to this question were three university archives, a local government service, a special archive and a business archive, all of which are very small services.

3.3.2 Project-led digitisation

This section asked: ‘Has your archive service engaged in project-led digitisation? This includes digitisation projects of any size, internally or externally funded, which involve digitising whole collections or parts of collections for publication online. This can also include working with external partners or companies like brightsolid and Ancestry.com.’

Table 3.9: Project-led digitisation

Project-led digitisation	Quantity
Yes	75
No	40
No Response	6
TOTAL	121

This result shows that 62% of respondent institutions have engaged in project-led digitisation. Again, it’s to be expected that a significant portion of the sector would have engaged in some project-specific digitisation by 2014, and that this digitisation is undertaken at a variety of scales for a variety of reasons.

3.3.3 Issues affecting digitisation projects

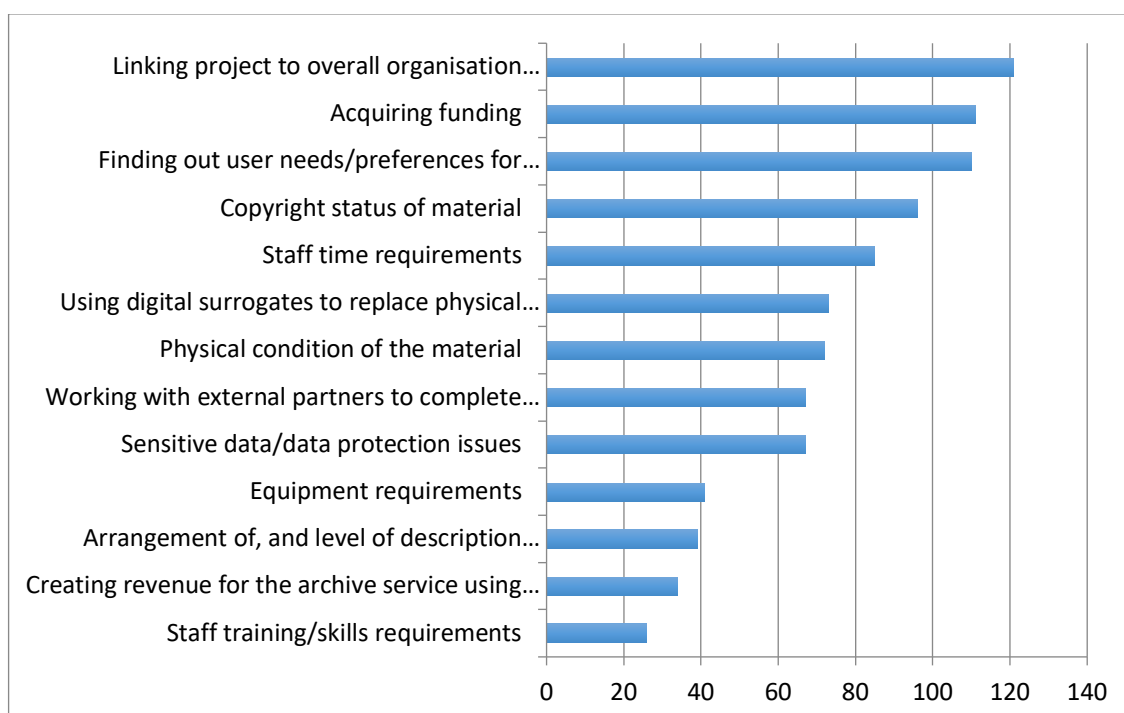
This section asked: ‘Which of the following issues has influenced how your archive service plans digitisation projects? Choose all of the issues which apply; then rank your choices in order of importance, with 1 being of the highest importance.’ This questions sought data on the most important issues identified by archive services when undertaking project-led digitisation, as this will influence how digitisation projects are conceived; what material is selected; and how the projects are managed.

³⁴⁶ The survey was undertaken in 2014.

Table 3.10: Issues affecting digitisation projects

Issue	Frequency	Percentage of respondents
Linking project to overall organisation objectives	66	40%
Copyright status of material	62	51%
Staff time requirements	62	51%
Physical condition of the material	61	50%
Finding out user needs/preferences for digitised material	60	50%
Acquiring funding	57	47%
Using digital surrogates to replace physical production of documents	55	45%
Working with external partners to complete the project	52	43%
Arrangement of, and level of description available for, collections	48	40%
Sensitive data/data protection issues	45	37%
Creating revenue for the archive service using the digitised material	42	35%
Equipment requirements	40	33%
Staff training/skills requirements	37	31%

Ranking of digitisation issues

Figure 3.3: Ranking of issues affecting digitisation projects

There is a slight difference in the ranking given to copyright status of material when compared to the survey conducted by Jean Dryden in Canada, where copyright was listed in

5th place, rather than 4th, as it is here. The frequency with which copyright was marked as a factor is higher in this survey (joint 2nd and 3rd place) compared with Dryden's survey (5th place). This may suggest that archivists engaged in digitisation for online access are becoming more aware of copyright legislation and its effects. It's reassuring that tailoring the project to fit institution needs and user needs are sitting at No. 1 and No.3 respectively: in early digitisation projects this was often neglected. This also provides a strong argument for risk-taking in the context of supporting institutional and user needs. It's unsurprising that acquiring funding is the No. 2 issue; especially if we reflect back to the annual budgets of the respondent institutions, and this is also borne out by the results of the Enumerate study.³⁴⁷ Again, this is a strong argument for a sensible, pragmatic risk-benefit analysis at the start of digitisation projects: how much funding can sensibly be assigned to rights issues where access is the main intent behind the project.

3.3.4 Record types selected for digitisation

This section asked: 'Which kinds of records were digitised in the project?' The intention here was to collect data on the types of materials being digitised, in order to flag-up any material types that aren't being digitised (perhaps as a result of copyright issues) or material types that present particular or specific copyright issues that archivists need to be aware of.

Table 3.11: Record types selected for digitisation

Record type	No. of projects
Archival records	40
Photographs	36
Manuscripts	20
Drawings	14
Postcards	12
Maps	9
Engravings/Prints	9
Posters	9
Rare books	8
Serials	8
Other	7
Other books	6

³⁴⁷ Enumerate (2012) *Survey Report on Digitisation in European Cultural Heritage Institutions*, available at <http://www.enumerate.eu/fileadmin/ENUMERATE/documents/ENUMERATE-Digitisation-Survey-2012.pdf> p. 21[Accessed 20 December 2017]

Newspapers	5
Paintings	5
Other 3D man-made objects	5
Other 2D objects	4
Audio (music and other recorded sound)	3
Sheet music	2
Video recordings	2
Microforms/Microfilms	1
3D works of art	1
Monuments and sites	1
Film	1
Other 3D objects (Incl. natural science specimens	0

70/121 responses

This result shows that typical archival records (i.e. files, letters, reports, records) are the most popular collection type; followed closely by photographs and manuscripts. This is unsurprising. Sound recordings, video recordings and sheet music being so far down the table is also not particularly surprising: these collections tend to be transferred to specialist repositories because the preservation of audio and audiovisual material is technically complex. The survey did not receive many responses from these institutions. However, specialist film repositories have been covered in the case studies. Again, the findings suggests that specialist sources of guidance may be needed for photography, sound recordings and film/video recordings and sheet music.

3.3.5 Providing Guidance

Table 3.12: Guidance types

Type of Guidance	Quantity
Reprographic information/Guidance on how to obtain copies	55
Copyright owner information in the collection level description of the catalogue	31
Other (please specify)	21
Guidance or Information on copyright law on your own website	20
Copyright status of individual documents on the website	17
Copyright owner information in the collection catalogue at series or item level	15

Contact details for a specific member of staff who answers copyright queries	15
Copyright owner information in the metadata of the digital file	13
We do not provide guidance or information about copyright to users	11
Links to guidance or information on copyright law on external websites	8

91/121 responses

Most of the respondents explained that information about copyright is made available on a case-by-case basis, or at the point where a user makes an enquiry about copying a particular item. This is problematic, as archivists are often a users' first point of call for information about copyright, especially when access restrictions or restrictions on publication have to be explained. For example, the table shows that 55 respondent institutions make 'Reprographic information/Guidance on how to obtain copies' available, yet 64 institutions indicated that they had engaged in digitisation. The results suggest that archive services should do more to make copyright issues in collections, and how copyright affects copying of materials, clearer online and in the searchroom. The availability of copyright information at different levels in catalogues, and included in item metadata are all positive insights, but it is clear from the results that only a minority of institutions provide this level of detail.

3.3.6 Access

This section asked: 'How do users access the images created during the project?'

Table 3.13: Accessing digitised material

Access type	No. of Projects
Free access on the archive service website	37
Other (please specify)	27
Subscription access or licensing via an external vendor (e.g. Ancestry/Getty/Bridgeman)	15
Digital images available on Archive premises, free to view	10
Free access through a portal website (e.g. Europeana)	9
Subscription access or licensing via the archive service website	6
Free access on a social media site (e.g. Flickr)	4
Digitised images not yet available	2
Images created for internal use only	1

69/121 responses

The responses to this question show that when archives digitise their collections, they are still most likely to be found on their own websites, rather than through social media or aggregators like Europeana. Respondents were able to select multiple options, and some indicated that they use a variety of access methods depending on the project. A small but significant proportion use licensing to make materials available, including external services like FindMyPast, JSTOR and Media Storehouse. The ‘Other’ responses generally included more information about the use, but could be sorted into the other categories: this has been reflected in the table provided.

3.3.7 Reuse

This section asked: ‘Given that users can access and often reuse material that has been made available online, some archive services attempt to control or limit the use that can be made of digitised material. Other services prefer to make reuse as simple as possible. Please select the measures you have used, from the following list.’

Table 3.14: Controlling/encouraging reuse

Control Measures	No. of Projects
Low resolution images	34
Website notice on permitted uses of images	30
Image watermarking	23
Other (please specify)	20
Creative Commons Licences	15
High resolution images	8
Online Registration, including Terms of Use	11
Subscription Access	10
Removing the option to copy and paste images	7
Other forms of open licensing	5
None	6

70/121 responses

The results here show that making low resolution images available is the most popular way of making collections available while ensuring that users have to come to the archives to request a high resolution copy, thereby maintaining some control on reproduction. Terms of Use also appear to be popular, and this is an area that requires more research. Unfortunately, image water-marking is still a popular method of controlling re-use of content. The ‘Other’ option was generally used to provide more information about the selections made, and any

necessary adjustments have been made to the table to reflect this extra information. The burgeoning use of Creative Commons licensing is encouraging. It's great to see institutions making high resolution images available, and that other forms of open licensing are being used.³⁴⁸

3.3.8 Copyright status of material selected for digitisation

This section asked: 'Thinking about the documents that were selected for digitisation as part of this project, please answer yes or no in relation to the following three categories. Did the selection include:...'

Table 3.15: Copyright status of material selected for digitisation

Copyright Status	Quantity	% of respondents engaged in digitisation
Documents in which the copyright has expired, i.e. older documents that may now be in the public domain?	48	70%
Documents in which the archive or parent institution owns the copyright?	47	68%
Documents in which the copyright is owned by a third party?	34	49%
No Response	52	

69/121 responses

These results are significant because they show that, of the 69 institutions that have reported results for project-led digitisation, almost half have digitised some third party copyright

³⁴⁸ The OpenGLAM principles state that "Galleries, libraries, archives and museums have a fundamental role in **supporting the advance of humanity's knowledge**. They are the **custodians of our cultural heritage** and in their collections they hold the **record of humankind**. The internet presents cultural heritage institutions with an unprecedented opportunity to **engage global audiences** and make their collections more **discoverable** and **connected** than ever, allowing users not only to **enjoy** the riches of the world's memory institutions, but also to **contribute, participate** and **share**. We believe that cultural institutions that take steps to open up their collections and metadata stand to benefit from these opportunities. When we say that digital content or data is "open" we mean that it complies with the Open Definition, which can be summed up in the statement that: "A piece of data or content is open if anyone is free to use, reuse, and redistribute it — subject only, at most, to the requirement to give credit to the author and/or making any resulting work available under the same terms as the original work." The first step to make a collection open is to apply an open license, but that is where the story begins. Openness to collaboration and to novel forms of user engagement are essential if cultural heritage institutions are to realise the full potential of the internet for access, innovation and digital scholarship." See <https://openglam.org/principles/>.

material. Dryden’s study reported that up to two-thirds of archivists (when asked about their own preferences for digitisation, and not digitisation that has physically taken place) would avoid including third party copyright material within a digitisation project. The result reported here may suggest that a higher proportion of institutions are engaging in the digitisation of third party copyright material than previously thought, and that archivists may be less risk-averse than previously assumed. However, 34 respondents from a pool of 121 overall accords to 28% of the sample, which may reaffirm those previous results.

3.3.9 Third-Party rights clearance

This section asked a series of questions of the institutions that identified that they had digitised third party materials. After responding positively to the question: ‘Did the selection include documents in which the copyright is owned by a third party?’, this section asked: ‘How many identified 3rd party rights holders did the institution attempt to contact?’; ‘How many rights holders granted permission?’; ‘How many rights holders denied permission?’; ‘How many rights holders did not respond?’; and ‘How many rights holders were you unable to find contact details for/could not be located?’

Table 3.16: Results of third party rights clearance

Institution type	How many identified 3rd party rights holders did the institution attempt to contact?	How many rights holders granted permission?	How many rights holders denied permission?	How many rights holders did not respond?	How many rights holders were you unable to find contact details for/could not be located?
University	1	1	0	0	0
Special	100	70	5	25	10
University	1005	1004	1	0	0
Local	1	1	NR	NR	NR
University	2	2	0	0	0
Local	5	1	NR	4	NR
National	165	50	3	91	650
National	1	1	NR	NR	NR
Special	50	50	0	0	0
Local	2	2	NR	NR	NR
Local	5	5	0	NR	NR
University	30	22	0	6	0

Special	1	1	0	0	0
Local	15	3	0	3	7
Special	2	2	NR	NR	NR
University	218	82	2	26	69
Local	1	1	0	0	0
Local	30	25	1	3	100
Local	0	0	0	0	100000
Local	1	1	0	0	0
Local	40	20	5	3	5

21/34 respondents to the question “Did the selection include documents in which the copyright is owned by a third party?”

This section gathered data on the rights clearance process at 21 institutions that attempted to clear rights in third party copyright material for digitisation. As can be seen from the table, the project sizes tended to be quite modest (1-2 identified rights holders). Only 5 projects reported rights clearance of over 100 rights holders or more. This suggests that institutions may be willing to engage in third party rights clearance for smaller projects, but still tend to avoid collections where large numbers of third party rights holders are present.

3.3.10 Factors influencing the rights clearance process

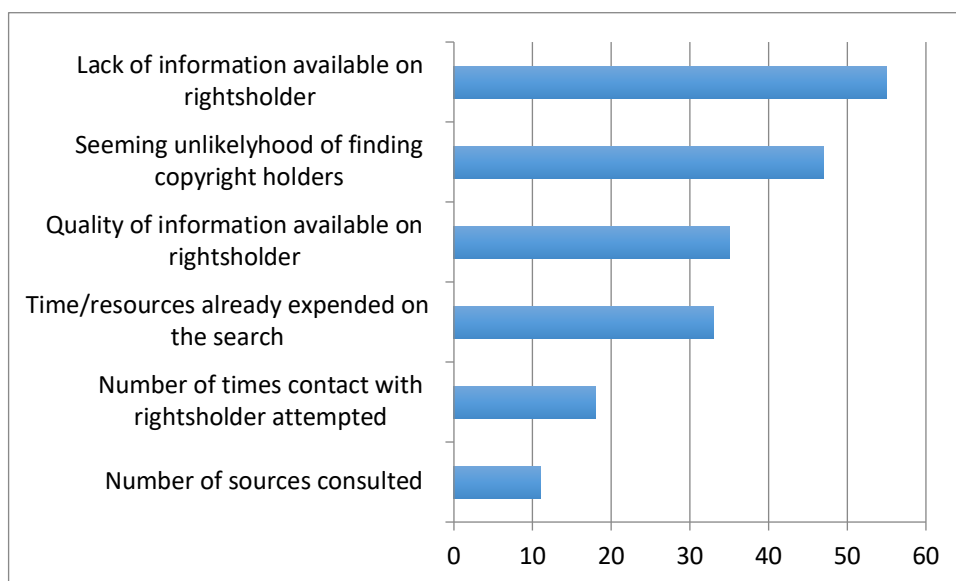
This section asked: ‘What factors influenced your decision to not try, or stop trying, to locate the rights holder(s)? Specify the factors which apply, and then rank them in order of importance, with the most important starting at 1.’

Table 3.17: Factors in rights clearance

Factors	Frequency	Percentage of respondents
Lack of information available on rights holder	21	17%
Seeming unlikelihood of finding copyright holders	21	17%
Quality of information available on rights holder	16	13%
Time/resources already expended on the search	15	12%
Number of sources consulted	12	10%
Number of times contact with rights holder attempted	11	9%

20/34 respondents to the question “Did the selection include documents in which the copyright is owned by a third party?”

Figure 3.4: Ranking of factors in rights clearance process



This result shows that lack of information about rights holders is the most influential factor when deciding whether to try, or stop trying to locate rights holders. This is followed by the seeming unlikelyhood of finding the rights holder. These findings suggest that a lack of starting point for a search for rights holders may be taken into account, especially when digitising orphan works. Time and resources expended on search, number of times contact attempted, and number of sources consulted do not appear to factor strongly on decision-making in this area.

3.3.11 Orphan works and non-responders

This section asked: ‘If you could not locate the rights holder(s), or if they did not respond to your request, what did you do?’

Table 3.18: Orphan works and non-responders

Action	No. of Projects
Used the rights holder material with a disclaimer	13
Did not digitise/provide online access to the rights holder material	10
Other (please specify)	7
Looked for similar material without rights issues to substitute instead	5
Used the rights holder material with no disclaimer	5

31/34 respondents to the question “Did the selection include documents in which the copyright is owned by a third party?”

There is almost an even split between those institutions willing to make the material available online without permission and those institutions that wouldn't make the material available at all. The 5 institutions that opted to use material without a disclaimer could be considered to have a high tolerance for risk. The 'other' category mentioned a project where an institution decided on only published 'extracts' of material with a disclaimer. Two institutions clarified that while they had gone ahead with digitisation, they had not made the material available online.

3.3.12 Rights holder responses

This section asked: 'When you were able to make contact with rights holders, what was their response to your request to digitise their material? Please tick all that apply.'

Table 3.19: Rights holder responses

Response	No. of Projects
Pleased that the material is being digitised	17
Requested formal acknowledgement	14
Unaware of their copyright ownership in the material	9
Interested in being included in events/outreach surrounding the project	6
Other (please specify)	6
Requested a licensing fee	5
Interested in depositing new material with the archive	4

25/34 respondents to the question "Did the selection include documents in which the copyright is owned by a third party?"

Other responses included a description of how permission-seeking for unpublished sheet music is managed: rights holders are asked to 'grant permission to make electronic and/or print version available to others (and earn royalties on sales where permission for this has been granted.' They go on to mention that most rights holders grant permission for both print and electronic copies to be made available. One respondent mentioned that a rights holder may request fees for commercial uses, but are 'happy to offer free use for education etc.' A respondent mentioned that rights holders request copies of titles, which has been noted in other studies of rights clearance exercises. Respondents also appeared to contradict each other in some respects: while one noted that no requests for permission were declined, another reported disputes over the conditions of agreements.

3.3.13 Licensing Fees

This section asked: ‘Has your institution ever paid a licensing fee to a rights holder in order to digitise archive material and publish it online?’

Table 3.20: Licensing fees

Fees paid	Quantity
Yes	10
No	54

64/121 responses

The payment of license fees is still fairly infrequent. The institutions that responded positively to this question include three large national institutions, a specialist music repository, three large university services, a large local studies service and an archive attached to a large commercial picture library.

3.3.14 Licensing fee policy

Following directly from the previous section, the survey asked: ‘Has your institution developed a policy for dealing with rights holders who request licensing fees? If yes, please describe below.’

Table 3.21: Licensing fee policy

Policy	Quantity
Yes	7
No	24

33/121 responses

A reasonable amount of the respondents have said that this is dealt with on a case by case basis, and a couple explained that they tend to negotiate for free use: where this isn’t possible they don’t use the material. A few, especially specialist film and sound repositories and image libraries, have particular processes in place to deal with licensing, and from their responses they appear to be far more familiar with negotiating fees and the offer of specific types of licenses.

3.4 On-Demand digitisation

3.4.1 On-demand digitisation

This section asked: ‘Has your archive service engaged in on-demand digitisation? This includes fulfilling copy requests for users and readers, and providing self-service photography in the searchroom.’

Table 3.22: On-demand digitisation

On-demand digitisation	Quantity
Yes	98
No	8

106/121 responses

92% of the respondents offer copying services for users: demonstrating that providing copies for users is virtually ubiquitous across the sector.

3.4.2 Copy services

This section asked: ‘Which types of copying does your organisation provide/allow for users? Tick those that apply.’

Table 3.23: Copy types

Copy types	Quantity
Digital Copies	93
Paper Copies	80
Self-service photography/scanners in the searchroom	71
Image licensing	48
Other	1

97/121 responses

The ‘other’ response explained that with no searchroom, making images available online is the main way they interact with the public. This table shows that providing digital copies is the most popular method of delivery of copies to users, followed by paper copies, self-service photography and image licensing.

3.4.3 Declarations

This section asked: ‘What sort of declaration do you ask users to make before providing them with copies of archive material? Please select one option which best applies for each copy type – paper copies, digital copies and self-service photography.’

This section of the questionnaire was designed to understand how archive services use the statutory declaration form mandated by the Copyright, Designs and Patents Act 1988, and whether archive services in late 2014 had started moving to electronic declarations as a result of the legislative changes in mid-2014.

3.4.3.1 Digital copies

Table 3.24: Declaration type for digital copies

Declaration type	Quantity
We use our own declaration form, which we have developed ourselves	54
We ask the user to complete a paper copy of the statutory declaration form, scan it or photograph it, and email it back to us	23
We do not ask the user to complete a statutory declaration form, ³⁴⁹ or an undertaking of any kind	16
We ask the user to complete a paper copy of the statutory declaration form and physically mail it back to us, regardless of how they contact us (email, phone, in person, through a representative)	14
We ask the user to send us an electronic declaration according to the legislative changes of June 2014	5

94/121 responses

This table shows that for digital copies, most institutions use their own declaration form that they have developed themselves. In second place users are asked to complete the statutory form by hand, and can return it to the service by any means.³⁵⁰ Interestingly, 16 institutions do not require a user to complete a declaration of any kind. A minority of institutions still require users complete a statutory declaration in writing and return the original. In late 2014,

³⁴⁹ See fn. 64.

³⁵⁰ Ibid.

very few institutions had switched to the electronic declaration permitted by the 2014 legislative changes.

3.4.3.2 Paper Copies

Table 3.25: Declaration types for paper copies

Declaration type	Quantity
We use our own declaration form, which we have developed ourselves	51
We ask the user to complete a paper copy of the statutory declaration form, scan it or photograph it, and email it back to us	21
We ask the user to complete a paper copy of the statutory declaration form and physically mail it back to us, regardless of how they contact us (email, phone, in person, through a representative)	17
We do not ask the user to complete a statutory declaration form, or an undertaking of any kind	14
We ask the user to send us an electronic declaration according to the legislative changes of June 2014	3

94/121 responses

This table shows similar results for paper copies. Most institutions use their own declaration form that they have developed themselves. In second place users are asked to complete the statutory form by hand, and can return it to the service by any means. A minority of institutions still require users complete a statutory declaration in writing and return the original.

3.4.3.3 Self Service Photography/scanning

Table 3.26: Declaration types for self-service photography/scanning

Declaration type	Quantity
We use our own declaration form, which we have developed ourselves	44
We do not ask the user to complete a statutory declaration form, or an undertaking of any kind	16
We ask the user to complete a paper copy of the statutory declaration form and physically mail it back to us, regardless of how they contact us (email, phone, in person, through a representative)	14
We ask the user to complete a paper copy of the statutory declaration form, scan it or photograph it, and email it back to us	11
We ask the user to send us an electronic declaration according to the legislative changes of June 2014	1

94/121 responses

This table shows similar results again, for self-service copying. Most institutions use their own declaration form that they have developed themselves. In second place, users are not required to sign a declaration for their own copying. In third and fourth place, users are asked to complete the statutory form.

3.5 Administrative digitisation

3.5.1 Administrative Digitisation

This section asked: ‘Has your archive service engaged in administrative digitisation? This includes preservation copying, internal copying for cataloguing, appraisal etc., or for production in the searchroom, but not for specific users or online publication.’

Table 3.27: Engagement in administrative digitisation

Administrative digitisation	Quantity
Yes	60
No	43

103/121 responses

3.5.2 Internal Use

This section asked: ‘Do you digitise or copy material in your collections for administrative purposes? This could include adding images to your catalogue, appraising born digital records, or keeping images of documents as part of the preservation process, etc.’

Table 3.28: Internal Administrative Use

Internal administrative use	Quantity
Yes	55
No	5

60/121 responses

3.5.3 Preservation copying

This section asked: ‘Do you digitise or copy material in your collections for preservation purposes; e.g. to create digital surrogates which can be produced instead of the original document?’

Table 3.29: Preservation copying

Preservation	Quantity
Yes	53
No	6

59/121 responses

3.5.4 Preservation of third party material

This section asked: ‘If you answered yes to either of the previous two questions, have you copied any material in which the copyright is owned by third parties?’

Table 3.30: Preservation of third party material

Preservation of third party material	Quantity
Yes	35
No	24

59/121 responses

3.5.5 Permission for preservation copying

This section asked: ‘Did you attempt to contact the rights holders for permission to copy the material, even though it was for internal/on-site display purposes?’

Table 3.31: Permission sought for preservation copying

Permission sought	Quantity
Yes	16
No	23

39/121 responses

This section shows that almost half of the respondents are engaged in administrative digitisation, whether for preservation, internal use for cataloguing or appraisal or for production in the searchroom. Some of this digitisation has involved the copying of third party works, but few institutions have felt the need to seek permission for these low-risk digitisation activities.

3.6 Complaints

3.6.1 Complaints and Take-down requests

This section asked: ‘Have you ever received a complaint or takedown request from a rights holder in relation to the online availability or unauthorised use of a work held in one of your collections?’

Table 3.32: No. of Complaints and Take-downs

Complaints and Take-downs	Quantity
Yes	11
No	91

102/121 responses

3.6.2 Complaint details

This section asked: ‘If you answered yes, please provide the following details. How was the complaint triggered?’

3.6.2.1 Triggered as a result of a digitisation project

(i.e., copyright-protected material made available online without rights holder permission?)

Table 3.33: Complaints as a result of digitisation

Number. of Complaints	10
Compensation requested?	In 2 cases
Did the complaint result in litigation? Yes	0
Did the complaint result in litigation? No	10

6 respondents: 1 respondent reported 5 complaints

3.6.2.2 Triggered from the unauthorised use of a work by an individual archive service user

(either from a copy provided by the archives, or from self-service photography in the searchroom?)

Table 3.34: Complaints as a result of service users

Number. of Complaints	2
Compensation requested?	0
Did the complaint result in litigation? - Yes	0
Did the complaint result in litigation? – No	2

1 respondent reporting 2 complaints

3.6.2.3 Triggered by the digitisation of material for administrative or other internal purposes?

Table 3.35: Complaints as a result of administrative digitisation

Number. of Complaints	1
Compensation requested? – Yes	0
Did the complaint result in litigation? - Yes	0
Did the complaint result in litigation? – No	1

1 respondent

3.6.2.4 Triggered by the digitisation and publication of sensitive personal data, either through a digitisation project, on-demand copying by a user, or administrative/preservation digitisation?

Table 3.36: Complaints as a result of sensitive data issues

Number. of Complaints	5
Compensation requested?	In 1 case
Did the complaint result in litigation? - Yes	0
Did the complaint result in litigation? – No	5

1 respondent reported 3 complaints

3.6.3 Complaint resolution

This section asked: ‘How was/were the above complaint(s) resolved?’

Table 3.37: Complaint resolution

Resolution	Quantity
Material taken down from the website, compensation/donation paid	2
Material taken down from the website, no compensation/donation paid	4
Published apology	0
Material kept online after paying licensing fee or other compensation/donation	0
Material kept online with acknowledgement but no licensing fee or compensation/donation paid	2
Other (please specify)	1

In the ‘other’ category, a respondent said the ‘potential result of litigation would have harmed complainant more than the service complained of.’ The results shown in these tables suggest that complaints from rights holders regarding copyright infringement are extremely rare and do not result in litigation or compensation.

3.6.4 Legal Advice

This section asked: ‘Have you ever sought professional legal advice on receiving a complaint from a rights holder? Please provide further details.’

Legal advice was very rarely sought: only two respondents confirmed that they would take legal advice in the first instance. Most respondents pointed to the fact that the vast majority of rights holders are content once the material has been taken down.

3.7 Survey Data Discussion

3.7.1 To what extent have archive services in the UK engaged in third party rights clearance for digitisation projects?

How many digitisation projects involve third party rights holder material compared to public domain or copyright-assigned material?

From the survey results, and the difficulty encountered in accessing projects for case study, this study suggests that a small proportion of the archive sector has digitised third party rights holder material, and as a consequence, engaged in rights clearance for digitisation. Of the 121 respondents to the survey, only 34 indicated that they had done so, and in a proportion of those cases, the rights clearance effort reported was extremely small – one or two third parties in total. This suggests that archivists in the UK, like their counterparts in Canada and other jurisdictions, prefer to select public domain or copyright-owned materials for digitisation.

3.7.2 Where do archivists get their knowledge of the law? Which sources of law do archivists use, and who/where do they go to for advice?

The survey results show that archivists derive their knowledge of the law from a range of sources. Books, publications and blogs are the top resources, most likely because of their ease of use. While there are a range of texts available, very few provide detailed guidance on risk management approaches to rights clearance for digitisation, which may have an effect on appetite for risk within the profession: if there are no examples or detailed guidance to build confidence and develop internal procedures from, archivists may be erring on the side of caution when selecting collections for digitisation. ‘National Archives staff,’ ranked in second place, shows that Tim Padfield was well-known and relied upon within the sector, prior to his retirement in 2014. TNA no longer provide a dedicated member of staff to answer copyright enquiries, with the Information Policy team absorbing most of Tim’s responsibilities. TNA are restricted in the guidance and advice they can provide in terms of risk management approaches to rights clearance for digitisation, given that they are part of

the UK government. Again, as a result of this guidance, archivists may be erring on the side of caution when selecting collections for digitisation and making them available online. ‘Archivists within your institution’ is ranked in third place, and echoes Dryden’s finding that archivists ‘filter’ the law for each other: fellow staff members are an important resource for the interpretation of the law, and from the literature review, it is clear that the personality traits and demographics of the sector may have an effect on perceptions of risk and the law. Legislation is ranked in fourth place, which suggests that archivists are willing to use primary as well secondary sources on the law. This finding could support the use of a best practices framework to understand the full scope of the exceptions available to archivists, especially if they are already familiar with the legislation. ‘Professional workshops’ and ‘Archivists outside the institution’ were ranked in fifth and sixth place respectively. While these resources are ranked lower, this may be because opportunities to attend tailored workshops and network with other archivists occur less frequently and are more difficult to access than the resources ranked first through fourth. This result may suggest that opportunities to share experiences and best practice should be prioritized.

A very small number of respondents to the survey (and the case studies) indicated that they used the SCA IPR Risk Management Toolkit, which is surprising.³⁵¹ A clear recommendation resulting from this thesis would be to bid for funding in order to redevelop, update and relaunch the suite of tools which Naomi Korn and Charles Oppenheim created for JISC and the SCA, along with case studies demonstrating how the tools can be used as part of a project workflow. The researcher suggests part of the reason why these tools were not cited more frequently is because they were developed by Jisc, which has a close relationship with the FE sector, and as a result they are not well-known and promoted across the whole of the UK archive sector. The website on which they are hosted has now been archived in the UK Web Archive, with navigation and discovery of the original site hampered by Error-404 notices. The website build and some of the content also appears out of date, which users may find off-putting

3.7.3 How important a consideration is copyright law when planning a digitisation project?

The survey results show that copyright is considered during digitisation, and that weight is given to it in relation to other factors that may influence project-planning while undertaking digitisation. In terms of importance, it was ranked fourth, behind ‘Linking project to overall

³⁵¹ Web2Rights (2010) *Risk Management Calculator*, Web2Rights OER IPR Support Project, available at <http://www.web2rights.com/OERIPRSupport/risk-management-calculator/> [Accessed 20 December]

organisation objectives,’ ‘Acquiring funding,’ and ‘Finding out user needs/preferences for digitised material.’ The differences in frequency and ranking reported in this study and Dryden’s may suggest that archivists engaged in digitisation for online access are becoming more aware of copyright legislation and its effects. It’s positive to note that ‘Linking project to overall organization objectives’ and ‘Finding out user needs/preferences for digitised material’ are ranked at first and third respectively: in early digitisation projects this was often neglected. This also provides a strong argument for risk-taking in the context of supporting institutional and user needs. It’s also unsurprising that ‘Acquiring funding’ is ranked as the second most important factor; especially if we reflect back to the annual budgets of the respondent institutions. Again, this is a strong argument for a sensible, pragmatic risk-benefit analysis at the start of digitisation projects.

3.7.4 How do archivists manage the risks associated with rights clearance for project-led digitisation?

From the 34 institutions that reported in engaging in third party rights clearance, only 5 had engaged in rights clearance at scale (over 100 identified rights holders). The vast majority of institutions had cleared rights with only a handful of rights holders, suggesting that even within that small subset of institutions that undertook digitisation of third party materials, institutions are still being very selective about the amount of rights clearance they can commit to.

In terms of locating rights holders, the factors archivists ranked most important for influencing search were ‘Lack of information about rights holders’ and ‘Seeming unlikelihood of finding the rights holder.’ These findings suggest that a lack of starting point for a search for rights holders is a key factor, especially given the number of orphan works reported in some of the responses. Time and resources expended on search, number of times contact attempted, and number of sources consulted do not appear to factor as strongly on decision-making in this area, suggesting that once archivists are committed to a search, they will see it through.

As to how third party materials are made available in situations of non-response, there is almost an even split between those institutions willing to make the material available online without permission after an unsuccessful diligent search subject to a disclaimer (13), and those institutions that wouldn’t make the material available at all (10). The 5 institutions that opted to use material without a disclaimer could be considered to have a high tolerance for risk. 5 institutions also indicated that they would substitute the material for similar works

with no rights issues, if possible. Respondents were able to pick multiple options, and in some cases institutions adopted multiple approaches to non-response within a single project.

Institutions that do engage in third party rights clearance generally report that rights holders are pleased that material is being digitised (17 responses) and that rights holders request formal acknowledgement (14 responses). Rights holders are often unaware of their copyright ownership in archive materials (9), and some are interested in being included in event/outreach surrounding the project (6) and in depositing new material with the archive (4). Requests for licensing fees are in the minority (5).

When archive material is made available online, institutions attempt to control further uses in various ways, which can be viewed as a form of risk management. Making low resolution images available is the most popular way of providing online access to collections, while ensuring that the institution maintains control over reproductions of high resolution copies. Terms of Use also appear to be popular, and this is an area that urgently requires further research. Unfortunately, image water-marking is still a popular method of controlling re-use of content. The burgeoning use of Creative Commons licensing is encouraging (15 responses). Only a small number of respondents reported making high resolution images available (8 responses), and that other forms of open licensing are being used (5 responses). This suggests that the UK archive sector has not yet engaged with the open access agenda at scale, and may require significant support to do so, especially if we consider that the use of CC and other forms of open licensing are now required by some digitisation funders.

3.7.5 How do archivists manage the risks associated with providing copies for users?

Archivists are generally able to pass the risks associated with making copies of third party rights holder material on to users, as users are required to sign a declaration form for research and private study. The requirement to use the statutory declaration form was stopped with the UK legislative changes in mid-2014, and a declaration can now be made electronically.³⁵²

The results reported here show that for digital, paper and self-service copies, most institutions use their own declaration form that they have developed themselves. This is surprising, and further research is required to understand how individual declarations differ from the current legislative requirement. In 2014, users were still being asked to complete

³⁵² For a discussion of Statutory Declaration Forms, see previous section at 1.1.2.7 (p.28) and fn. 64-66.

the statutory form in many cases, and were required to return it to the service by a variety of means, with a minority of institutions still requiring users to complete the form in writing and return the original. Interestingly, some institutions do not require users to complete a declaration of any kind, which suggests a high tolerance for risk and contradicts some of the assumptions made about archivists' perceived need to exercise control on further uses of archive materials. In late 2014, very few institutions had switched to the electronic declaration permitted by the 2014 legislative changes, and the author recognises that this proportion is likely to have changed in the intervening period.

3.7.6 Do archivists think administrative/preservation digitisation presents a risk?

Almost half of the respondents to the survey have engaged in administrative digitisation, whether for preservation, internal use for cataloguing or appraisal or for production in the searchroom. Some of this digitisation has involved the copying of third party works, but few institutions have felt the need to seek permission, suggesting that archivists view administrative digitisation as a low-risk activity.

3.7.7 How often do archivists receive complaints relating to material they have made available online from rights holders, and how are those complaints resolved?

Caution must be exercised in the reporting of complaints: details cannot be made available as a result of the confidentiality of the responses, and it is sensible to assume that the rate of complaints may be under-reported to spare embarrassment.

A small number of complaints were reported in the survey. Where complaints were the result of a digitisation project, 6 respondents reported 10 complaints, none of which resulted in litigation, but compensation was requested in relation to 2 complaints. Where complaints were the result of unauthorized use by an archive service user, 1 respondent reported 2 complaints, neither of which resulted in a request for compensation or litigation. Where complaints were the result of administrative digitisation, 1 respondent reported 1 complaint, which did not result in a request for compensation or litigation. Where complaints were the result of sensitive data being made available, 3 respondents reported 5 complaints, which did not result in a request for compensation or litigation.

These results show that complaints are more likely to be triggered as a result of digitisation or sensitive content being made available, and that in most cases, the complaints are resolved without compensation or litigation. In terms of resolution, most respondents reported that

takedown and acknowledgment were sufficient to address complaints. Legal advice was very rarely sought: only two respondents confirmed that they would take legal advice in the first instance. Most respondents pointed to the fact that the vast majority of rights holders are content once the material has been taken down.

3.7.8 Where archivists are not engaging in digitisation, is copyright ever cited as a reason for not engaging in digitisation?

A small number of institutions (6) reported that they did not engage in digitisation, but copyright was not cited as a reason for this. The most popular reasons were lack of funding, and lack of equipment.

4. Case studies from the UK archive sector³⁵³

This chapter presents a series of case studies, undertaken with staff at Churchill Archives Centre, University of Cambridge; Glasgow School of Art Archives and Collections; Newcastle University Special Collections; the British Film Institute, and the British Library. Case studies were chosen as an appropriate methodology as they allow for detailed description and analysis of specific digitisation projects, including decision-making, processes, policies and results of rights clearance exercises. The selection of projects was based on institutions that had undertaken rights clearance for digitisation in the past, had recently completed rights clearance for digitisation, or were in the process of rights clearance for digitisation when approached by the researcher. The collections selected for digitisation include personal papers, artistic works, films, and published literary works.

4.1 Churchill Archives Centre

4.1.1 Institution and project background

Churchill College, University of Cambridge is the national and Commonwealth Memorial to Sir Winston Churchill, founded in 1960. The College began collecting papers relating to politics, science and the military in 1965. The Churchill Archives Centre (CAC) was built in 1973 to house his personal papers. With this extensive collection (over 3000 boxes) as the cornerstone of the archive, CAC continues to collect material in the fields of politics, science and the military covering the Churchill era and after, holding over 600 collections including the personal papers of Margaret Thatcher, Ernest Bevin and John Major.³⁵⁴

The post-1945 Churchill Papers (“The Churchill Papers”) were originally gifted to the college in 1969 by Lady Spencer-Churchill, although they did not arrive at CAC until 1974.³⁵⁵ Ownership of the collection, including the relevant copyrights, was retained by the Churchill family’s private trust.³⁵⁶ Around 1988, CAC became involved in negotiations over the fate of “The Chartwell Papers,” i.e. the papers that recorded Churchill’s life from childhood to 1945, which had been retained by the family, and were owned by another family trust: the Chartwell Trust. The UK government negotiated the purchase of the papers for the

³⁵³ The consistent reporting structure in the case studies is based on Tsiavos, P. (2009) *Case Studies Mapping the Flows of Content, Value and Rights Across the Public Sector*, Jisc/Strategic Content Alliance [online] available at https://sca.jiscinvolve.org/wp/files/2009/04/sca_2009symp_ipr_casestudies-final.pdf [Accessed 12th June 2018].

³⁵⁴ The information in this paragraph was taken from Churchill College (2018) *Archives Centre – History* [online] available at <https://www.chu.cam.ac.uk/archives/about/history/> [accessed 12th June 2018]

³⁵⁵ Churchill Archives Centre Interview Transcript, p.234, lines 11-12.

³⁵⁶ Ibid, p.236, lines 6-7.

nation from the Chartwell Trust, with CAC nominated as the permanent repository to preserve and provide access to the papers.³⁵⁷

The papers were purchased in 1992 for £12.5M, with an extra £1.75M for CAC to carry out conservation work and cataloguing, with all funding provided by the Heritage Lottery Fund. Again, ownership of the copyrights in the collection was retained by the Chartwell and Churchill Family trusts. The extra funding provided for CAC resulted in a five-year project to conserve and catalogue the materials, with a full catalogue launching online in 2001.³⁵⁸

4.1.2 Project Outputs/Resources

The microfilm publisher GALE (now GALE Cengage Learning)³⁵⁹ first filmed the papers between 2000-2005. The microfilm was then sold to academic libraries: it was split into sections and institutions could purchase different parts or the full collection.

After the exclusive agreement with GALE came to an end, CAC were able to approach other publishers to create a digital version of the papers in 2010. CAC selected Bloomsbury Academic to create the online resource.³⁶⁰ Access is available on subscription basis, with free access for secondary schools worldwide.³⁶¹

4.1.3 Benefits provided by the outputs/resources

The original microfilm created a preservation copy of the collection, and reduced wear and tear from handling in the searchroom. The availability of the microfilm in academic libraries also facilitated access to the collection for research purposes, although this was limited to the institutions that had purchased some or all of the microfilm collection.

The online resource provides a single point of access to the entire digitised collection. Access is provided by subscription, with free access for schools made available in 2016. Free exhibitions and higher education modules, created by teachers and academics and covering a broad range of themes, are also available for download.³⁶²

³⁵⁷ The narrative in this paragraph is outlined in *ibid*, p.233-234.

³⁵⁸ *Ibid.*, p.234-236, and Packwood, A. (2013) *Churchill Archives Centre: The Story So Far...*, available at <https://www.chu.cam.ac.uk/media/uploads/files/History.pdf> [Accessed 12 July 2018].

³⁵⁹ GALE (2018) Official Website [online] available at <https://www.gale.com/uk> [Accessed 12 July 2018]

³⁶⁰ Churchill Archives Centre Interview Transcript, p. 236, lines 31-50.

³⁶¹ Churchill Archives Centre (2018) *Subscriber services – Churchill Archive*, Bloomsbury Academic [online] available at <http://www.churchillarchive.com/subscriber-services> [Accessed 12 July 2018]

³⁶² See <http://www.churchillarchiveforschools.com/table-of-contents>.

4.1.4 Rights ownership and results of rights clearance process

The ownership of rights in the Churchill and Chartwell Papers is exceptionally complex. The post-1945 “Churchill” papers were gifted to CAC in 1969. The Chartwell Papers were bought for the nation in 1995, unifying the collection permanently. The Churchill family trust retains Churchill’s personal copyrights, and the right to exploit the physical collection in various ways.³⁶³ As a result of Churchill’s working style, and the access he enjoyed to official records during the process of writing his histories of the first and second world wars, the papers also contain a significant amount of Crown copyright material.³⁶⁴ Indeed, it is often the case that the line between personal business and government business is not clearly defined in the records.³⁶⁵ The papers were subject to a comprehensive sensitivity review by staff from the Cabinet Office from the 1970s to the present.³⁶⁶ Added to this, the papers contain much third party copyright material, especially in the various correspondence series.³⁶⁷

There are two distinct phases of digitisation of the Churchill Papers. The first phase took place between 2000-2005.³⁶⁸ While the papers had been bought by the HLF, the Churchill family retained the right to digitize the papers and publish them commercially. The academic publisher GALE (now part of Cengage Learning) was selected by the family to microfilm the papers.³⁶⁹ GALE were also responsible for conducting the rights clearance process for the collection. This process lasted for five years. It involved 1-2 members of the publisher’s staff, and a full-time Archives Assistant and 0.5 Archivist at CAC (Natalie Adams).³⁷⁰ The results of rights clearance are shown in Table 4.1 on the following page.

³⁶³ There is more of this narrative in Packwood, A. (2013) *Churchill Archives Centre: The Story So Far...*, available at <https://www.chu.cam.ac.uk/media/uploads/files/History.pdf> [Accessed 12 July 2018].

³⁶⁴ The inclusion of crown copyright material within the collection caused public controversy when the papers were purchased by the HLF: see Abrams, F. (1998) “Lottery gifts shake-up over after Churchill papers fiasco,” *The Independent*, 8th April [online] available at <https://www.independent.co.uk/news/lottery-gifts-shake-up-after-churchill-papers-fiasco-1155125.html> [Accessed 12 July 2018] and MacDonald, M. (1996) “Churchill papers purchase was ‘vital,’” *The Independent*, 29th March [online] available at <https://www.independent.co.uk/news/churchill-papers-purchase-was-vital-1344608.html> [Accessed 12 July 2018].

³⁶⁵ Churchill Archives Centre Interview Transcript, p.235, lines 9-13.

³⁶⁶ Ibid, p.235, lines 2-9.

³⁶⁷ Ibid, p.234, lines 29-30, 40; p.240, lines 23-25.

³⁶⁸ Ibid, p.240, line 29.

³⁶⁹ Ibid, p.236, lines 8-29.

³⁷⁰ Figures are approximate, taken from learning materials provided by Natalie Adams.

Table 4.1: Churchill Papers Microfilm rights clearance results

Names in Copyright database	20482	
Reliable contact details: total letters sent	12573	61% of all rights holders
Total replies	4209	33% of those contacted
Permission granted	4195	>99% of respondents
Permission refused	14	<1% of respondents
Did not respond	8364	66% of those contacted
Orphan Works	7909	39% of those identified

Digital Project (2010-present)

The exclusive agreement with GALE came to an end, and after an appropriate amount of time, CAC were able to tender for a new publisher to create an online version of the papers in 2010, as GALE expressed no interest in digitising the papers. CAC were able to use a master copy of the microfilm for digitisation, and the rights database created during the previous project, to advertise the project to publishers. Bloomsbury Academic were selected, and the rights clearance process lasted less than a year. It involved a 0.4FTE Archivist and 0.5 FTE member of staff at the publisher.³⁷¹ The results are shown in Table 4.2.

Table 4.2: Churchill Papers Online rights clearance results

Names in Copyright database	20482	
Reliable contact details: total letters sent	10537	51% of all rights holders
Total replies	2104	20% of those contacted
Permission granted	2035	97% of respondents
Permission refused	69	3% of respondents
Did not respond	8433	80% of those contacted
Orphan Works	9945	49% of those identified

The difference between the two clearance exercises can be seen most clearly in the increased number of orphan works, and the increase in the rate of refused permissions. It may be the case that rights holders were happy to grant permission for the microfilm project, on the understanding that it would only be accessible in that format and in academic libraries. The move from microfilm to online availability (even if pay-walled) may have made some of them uncomfortable, and therefore lead them to refuse permission.

³⁷¹ The narrative for this paragraph is taken from the Churchill Archives Centre Interview Transcript, p. 236, lines 31-50.

The increase in non-response and orphan works between 2005 and 2010 is marked. There could be several reasons for this. Having been contacted in 2005 and responded, rights holders may have been less inclined to go through the same process again, for similar results. It may also be the case that many of the previous respondents have died, or moved addresses. While efforts were made to update the database, it's perfectly plausible that addresses that were valid in 2005 were not valid in 2010.

4.1.5 Access/Terms and Conditions of Use

Access to the digitised collection is based on a subscription model. As of 2016, paid subscriptions are available for institutions, and free subscriptions are available for schools worldwide. Individual subscriptions to the service are also now available.³⁷² Material included in specially curated exhibitions (e.g. "Churchill and Women" or "Churchill and Public Speaking"), which usually consist of 10-20 key documents with explanatory text, is accessible outwith the paywall, but the exhibitions may not be available permanently.³⁷³ The full catalogue is searchable through the Churchill Archives Centre website.³⁷⁴

The Terms and Conditions listed on the website limit use of the digital collection to downloading and printing files for non-commercial research and private study.³⁷⁵ Distribution of files, systematic downloading and indexing to create databases, creation of derivative works and de-embedding content is expressly prohibited. All images available on the website contain a rights statement asserting that the copyright in the digital surrogate is owned by the Sir Winston Churchill Archive Trust (SWCAT). Any requests for publication of the images go through the publisher and in some cases are forwarded to CAC for further information.

4.1.6 Interview Results

The researcher interviewed Natalie Adams in February 2015. This section is structured topically and follows the codes generated from the interview script.

³⁷² See <http://www.churchillarchive.com/subscriber-services> for subscription options.

³⁷³ For an example, see <http://www.churchillarchive.com/collection-highlights/churchill-and-women>.

³⁷⁴ The catalogue is available at <http://www-archives.chu.cam.ac.uk/perl/search>.

³⁷⁵ The Terms and Conditions are available at <http://www.churchillarchive.com/terms-and-conditions> [Accessed 20 December 2017]

Collection background

This archive was created to house Churchill's Papers.³⁷⁶ The ownership of the papers is extremely complex. Once they were secured, after a large payment from the HLF, they had to be reviewed, and access was closed because a family member was writing a biography of Churchill.³⁷⁷ A Public Record Office catalogue already existed for the collection, and it was this original catalogue that the archivists built on when they began adding to the catalogue in 1998.³⁷⁸

Managing relationships

The family have retained copyright in the collection, and the right to exploit them commercially. This was initially difficult for the archivists involved, because they are responsible for the preservation and safe-keeping of the collection, and the microfilm publishers were appointed without their input into the tendering or selection process. The publishers selected, GALE, had lots of experience of microfilming but they hadn't done any large-scale rights clearance before.³⁷⁹ The archivists were worried about sensitivity, document handling, how the copyright would be managed, and accommodating the microfilmmers on site at the archive. The Sir Winston Churchill Archive Trust were able to work between the two. They sought legal advice from chambers at Lincoln's Inn and were told that comprehensive rights clearance would have to be undertaken.³⁸⁰ The combination of GALE's inexperience, the legal advice given, and the risk aversion of the Trust and CAC resulted in an extremely comprehensive approach to rights clearance that ended up taking five years.

Rights clearance process and diligent search

Natalie's task was to devise a rights clearance process that everyone could agree on. This process was added as a schedule to the publishing agreement between the publishers, the Churchill Family and the Churchill Trust.³⁸¹ Although Natalie outlined the process, it was the publisher's job to complete the clearance. GALE were supplied with a list of rights holders, extracted from the collection catalogue.³⁸²

³⁷⁶ Churchill Archives Centre Interview Transcript, p.233, lines 40-41.

³⁷⁷ Ibid, p.233, lines 27-31 and throughout the rest of page 233.

³⁷⁸ Ibid, p.233, lines 35-36.

³⁷⁹ Ibid, p.238, line 3.

³⁸⁰ Ibid, p.238, lines 20-25.

³⁸¹ Ibid, p.245, line 50.

³⁸² Ibid, p.239, lines 14-16.

Natalie knew from the beginning of the project that the catalogue was the only realistic way of identifying the rights holders – going through the entire collection from scratch would have been an impossible undertaking. When the archivists catalogued the collection, they generally included person names and the office or role in which they appeared.³⁸³ For series like the constituency papers, constituency members were only named if they wrote to Churchill repeatedly. Essentially, this means that a large proportion of third party rights holders in the collection will have been identified, but it is probable that a certain amount were not identified using this method.³⁸⁴ Many of these decisions were based on the amount of time the archivists could realistically spend on cataloguing: some parts of the collection benefit from more detailed description than others.³⁸⁵ This highlights that the decisions archivists make in terms of processing and cataloguing collections have a profound impact on digitisation and any subsequent rights clearance efforts.

Once armed with the list, this was sent to the publisher along with the rights clearance schedule and the clearance process could begin. The schedule outlined potential sources of information to be checked: Who's Who, Dictionary of National Biography, search for heirs, National Register of Archives, the WATCH database and the Business Archives Council.³⁸⁶ Three attempts were made to elicit responses, with appropriate time periods between attempts.³⁸⁷ 8000 non-respondents were featured in an advert in the Times Literary Supplement, and after a delay of 3 months to allow them time to get in touch, digitisation could proceed.³⁸⁸ Crucially, it was decided that image capture could NOT proceed until rights had been cleared, which had an instant knock-on effect on the image capture workflow.³⁸⁹ Papers relating to Churchill's speeches, which tended to contain more Crown copyright and material created by Churchill was filmed first while clearance work progressed on other sections which contained more third-party copyrights.³⁹⁰ Rights holders often requested more details, or copies of the material, which meant further issues for the image capture workflow.³⁹¹ Indeed, Natalie notes that "...the big thing that we had to adjust to in terms of what we'd expected was that so few people did bother to reply... as the process wore on, we became more comfortable with the idea that people had been given the chance to reply and just hadn't."³⁹²

³⁸³ Ibid, p.238, lines 38-43.

³⁸⁴ Ibid, p.238-239, lines 50-55 and 1-4.

³⁸⁵ Ibid, p.238, lines 48-50.

³⁸⁶ Ibid, p.239, lines 20-30.

³⁸⁷ Ibid, p.239, line 34.

³⁸⁸ Ibid, p.239, lines 45-53.

³⁸⁹ Ibid, p.240, lines 25-28.

³⁹⁰ Ibid, p.240, lines 20-25.

³⁹¹ Ibid, p.239, lines 35-38.

³⁹² Ibid, p.240-241, lines 48-55 and 1-4.

Non-response

Non-response was identified as a problem, and the archivists at CAC, along with the Sir Winston Churchill Archive Trust and both sets of publishers, decided to make the non-respondent material available in both microfilm and online formats.³⁹³ Making this material available is certainly a risk, although that risk may be obscured by the fact that the microfilm wasn't widely available, and that the online resource is effectively hidden by a pay-wall. It's important to note that the use of take down policies and procedures, and defining rights holders as 'low-risk' because they are not currently commercially exploiting their material will have absolutely no protective effect if the rights holder was minded to take legal action – such considerations would not affect the calculation of damages, however well-meant and however much the archive service feels they have acted in good faith. Indeed, such activity should be seen as purely about deciding whether the rights holder is likely to take such action (which again, is highly unlikely based on the fact that no archive service in the UK has ever been sued, although a more affordable route is now available through the IPEC Small Claims Track in England and Wales).³⁹⁴

A vanishingly small number of rights holders complain about this type of use, and a takedown policy deals very effectively with those who do: in fact, in relation to the Churchill Papers project, CAC and the publishers have yet to receive such a request.³⁹⁵

Risk Management

The Sir Winston Churchill Archive Trust were relatively risk-averse in the pursuit of this project – as the Churchill Papers were being published for commercial gain, they went to great lengths to ensure that the publisher traced all of the identified rights holders, although they did authorise the non-respondent material being made available.³⁹⁶ This approach can also be seen in the work the Churchill Archives Centre have undertaken with the Wellcome Library. When the WL initially approached them about including the papers of Rosalind Franklin in the Codebreakers: Makers of Modern Genetics pilot mass digitisation project, CAC were reluctant to take part because the Wellcome proposal involved no rights clearance, which CAC were uncomfortable with. The WL eventually decided to complete a small amount of rights clearance and CAC did take part in the project. It may be possible to

³⁹³ Ibid, p.241, lines 7-9.

³⁹⁴ See <https://www.gov.uk/courts-tribunals/intellectual-property-enterprise-court> for more information about the IPEC Small Claims Court.

³⁹⁵ Churchill Archives Centre Interview Transcript, p.250, line 51.

³⁹⁶ Ibid, p.247, lines 10-12.

say that the CAC approach to copyright has changed as a result of working on both the Churchill Papers and with the Wellcome Library.³⁹⁷ Of course, decisions about risk-taking are context dependent, and the papers of Churchill are quite different to those of Rosalind Franklin. It is also illustrative to note that, while mass digitisation of the Thatcher Papers has also taken place at CAC, there are no plans to make the entire collection available online.³⁹⁸ While it's tempting to think this may be because of the lessons learned from the digitisation and rights clearance of the Churchill Papers, it could also be because Thatcher is a very divisive figure. There are clear issues with only small parts of the collection being presented online: by their nature, archives are full of silences. By cherry-picking, those silences are further amplified and the online record is distorted in comparison to the physical record, and an institution or trust can be accused of white-washing certain aspects of history.³⁹⁹

Silences in the digitised collections

Churchill is also seen as a divisive figure, and the rights clearance process for the collection has exposed some of those fault lines. For example, the families of certain public figures refused permission for their relatives' material to be included in the collection: for both the microfilm and the digitisation project. This is despite a concentrated effort from the archivists involved to highlight that their side of the story would be left absent from the resource as a result.

Impact of comprehensive clearance

CAC have been watched over by the Sir Winston Churchill Archive Trust, and Natalie worked closely with them to develop a rights clearance mechanism that would satisfy their misgivings but also be workable for the archives team and the publishers to administer.⁴⁰⁰ In reality, the rights clearance process appears to have had an adverse effect on GALE.⁴⁰¹ Given the complex relationship between GALE, CAC, the Churchill Family and the Trust, the amount of money awarded by the Heritage Lottery Fund, and the profile of Churchill, there was never a chance that the archives could make material available without some form of managerial oversight, and that senior management approach shows risk aversion.⁴⁰² CAC would suggest that rights clearance at this scale is achievable, but extremely difficult. Would

³⁹⁷ Ibid, p.251, lines 46-49.

³⁹⁸ Instead, a tightly-curated selection of material is available at <http://www.margaretthatcher.org/archive/thatcher-archive.asp>.

³⁹⁹ Churchill Archives Centre Interview Transcript, p.244, line 34-38.

⁴⁰⁰ Ibid, p.238, lines 25-36.

⁴⁰¹ Ibid, p.236, lines 33-34.

⁴⁰² Ibid, p.247, lines 10-12.

they do it again? Natalie says not, and that the current orphan works mechanism would probably have stopped the project all together.⁴⁰³

4.1.7 Key Points

Respondents overwhelmingly granted permission (97-99%) to CAC's request to first microfilm, then digitise their materials and make them available. While CAC took a risk by making orphan and non-respondent materials available, some of that risk is obscured by the paywall on the Churchill Archive. Senior management risk aversion and extremely cautious legal advice played a key role in the comprehensive approach to rights clearance. Yet CAC and the publishers have received no takedown requests in relation to the project. CAC believe that the current UK orphan works legislative framework would have stopped the publication of the Churchill Papers completely. The experience of comprehensive rights clearance also appears to have influenced the decision to make only a very curated selection of the Thatcher Papers available online.

4.2 Glasgow School of Art

4.2.1 Institution and project background

Glasgow School of Art is an independent educational institution established in 1845.⁴⁰⁴ Archives and Collections (A&C) preserves and provides access to the institutional records of the School, collections deposited by staff and former students, and the School's fine art and textile collections.⁴⁰⁵

Since 1869 the School has been situated in the Garnethill area of Glasgow, initially in the McLellan Galleries, before moving to a building purpose-designed by the architect Charles Rennie Mackintosh. This building, now known as the Mackintosh Building, was completed in two phases, one in 1899 and one in 1909.⁴⁰⁶ The campus has since expanded to include buildings around the original Mack building and other locations across the city. In May 2014, a fire tore through the original Mack building, severely damaging the Mackintosh Library

⁴⁰³ Ibid, p.241, lines 31-41.

⁴⁰⁴ More Information about Glasgow School of Art is available at <http://www.gsa.ac.uk/about-gsa/history-and-future/our-history/>.

⁴⁰⁵ More information about Glasgow School of Art Archives and Collections is available at <https://gsaarchives.net/about/>.

⁴⁰⁶ More Information about the history of Glasgow School of Art is available at <https://gsaarchives.net/gsa-history/>.

and some of the School's collections.⁴⁰⁷

This case study was conducted in the immediate aftermath of the fire, between May 2014 - July 2016. Prior to the fire, the PhD researcher had been contacted by staff in A&C about the copyright implications of changes they were planning to make to their online catalogue. The researcher was able to offer advice based on the experience of Wellcome Library and other rights clearance exercises undertaken at the British Library and several US institutions. The researcher was also able to interview Michelle Kaye, the member of staff leading the rights management for the online catalogue project, at key points over the course of this two-year period, in order to explore the project from start to finish.⁴⁰⁸

4.2.2 Project Outputs/Resources

Digital images, where they already existed, have been added to relevant catalogue entries on the institution's new A&C online catalogue.⁴⁰⁹ This was a direct result of feedback from focus groups that were assembled in late 2014 to consider improvements that could be made to the GSA catalogue, as the department was planning to move from an internal Axiell CALM database to Archon software.⁴¹⁰ Adding images to the online catalogue was one of the main improvements that archive service users were looking for.⁴¹¹

4.2.3 Benefits provided by the outputs/resources

Students and staff of GSA, along with the general public, now have access to digital images of GSA's collections, where they already existed and have been able to obtain permission from rights holders. As a result of the fire, there are now plans to digitize significant quantities of the historic collections held by GSA, and these will be made available online in the future.⁴¹² This should be a more straightforward process, as the staff have attempted to clear rights for all the third-party rights holders they have identified in their collections, in anticipation of this comprehensive digitisation project.⁴¹³ Michelle Kaye has also reported an increase in the number of requests for high-resolution copies of images as a result of

⁴⁰⁷ More details about the recovery project can be found at <http://www.gsa.ac.uk/about-gsa/mackintosh-building-restoration/restoration-project-updates/>. A second, more intense fire caused serious damage to the Mack building in 2018.

⁴⁰⁸ The Glasgow School of Art Interview Transcripts are available in the appendices.

⁴⁰⁹ A&C held 12,651 digital images of items in their collections as of June 2016.

⁴¹⁰ Glasgow School of Art Interview Transcript, p.255, line 33-42.

⁴¹¹ Ibid.

⁴¹² Ibid, p.253, lines 18-23.

⁴¹³ Ibid, p.261, lines 40-41.

making low-res images available online.⁴¹⁴ In general, GSA have reported no negatives in relation to the project: it provided an opportunity to think about processes, update policies and get in touch with a large group of depositors.⁴¹⁵

4.2.4 Rights ownership and results of rights clearance process

In light of the fire, staff at GSA decided to clear as many rights as possible in their collections, on the understanding that, even where the material in question was not currently digitised, it may be digitised and made available online in the future. As a result, some of the rights clearance they have engaged in is an attempt to anticipate future digitisation and online dissemination.⁴¹⁶ Clearing rights for future digitisation could have become a huge undertaking, but staff at GSA identified a relatively small number of third party rights holders to contact. This can be explained by the relative size of their overall collection, which is quite modest,⁴¹⁷ and the fact that a large proportion of their collections constitute institutional records: the staff are asserting that GSA ultimately own the rights in those records.⁴¹⁸

Table 4.3 Results of rights clearance at Glasgow School of Art Archives and Collections

Number of creators identified within framework	401	
Number of creators within framework with copyright issues	281	70% of creators within framework
Total permission requests sent (relating to 235 creators) ⁴¹⁹	253	84% of those identified
Contact details found: emails sent	85	
Contact details found: letters sent	168	
Contact made via the PCF	16	
Total replies	97	38% of those contacted
Permission granted	97	100% of respondents
Permission refused	0	0% of respondents
Did not respond	156	62% of those contacted
Number of creators where no rights holders or contact details were found	46	16% of those identified

⁴¹⁴ Ibid, p.279, lines 48-53.

⁴¹⁵ Ibid, p.260, lines 18-26.

⁴¹⁶ Ibid, p.278, lines 31-39.

⁴¹⁷ Their 'count of records' is listed as 12 on the National Register of Archives. The fire in 2014 will have impacted on the number of collections held by the institution.

⁴¹⁸ Glasgow School of Art Interview Transcript, p.265, lines 28-34.

⁴¹⁹ The discrepancy between rights holders identified and number of permission requests sent is due to multiple potential contact details being found for some rights holders.

From Table 4.3, we can see that the A&C team found contact details for 84% of the rights holders identified through the framework used. Of those contacted, 38% responded, all granting permission for use, which is a very positive result. 62% of those contacted did not respond, and 17% of those identified could not be traced. These results are not out of the ordinary, when compared with the other rights clearance exercises reported elsewhere in the thesis. A&C have opted to make both the orphan and non-responder materials available online subject to a takedown policy, which demonstrates a reasonably high tolerance for risk.⁴²⁰

The initial catalogue development project (of which rights clearance was just a small part) was funded for three months, but it was extended to six months as a result of the fire.⁴²¹ The funding was provided by Museums Galleries Scotland, and essentially the funding was the continuation of Michelle's post. She had an Archives and Collections Assistant, and a volunteer to help with the rights clearance aspect of the project. Diligent search took place during the last 2-3 months of the project. The Assistant was mostly responsible for diligence during the cataloguing project. After that, a volunteer was available one day per week for 12 weeks.⁴²² Calculating the staff time spent by the assistant is difficult: their time was split across different tasks. In terms of resources used specifically for diligent search, a survey of GSA's project documentation suggests that around 57 recorded hours were spent, with most searches taking around 15 minutes.⁴²³ This was supplemented with volunteer time and some of Michelle's time. It should be noted that diligent search is only one part of the rights clearance process.

4.2.5 Access/Terms and Conditions of Use

GSA have made their collections available as low-resolution JPEGs under the Creative Commons Attribution, Non-Commercial, Share Alike 4.0 (CC BY-NC-SA) license. Users wishing to publish or requiring high-resolution copies of images available on the catalogue are asked to contact A&C directly to arrange payment and licensing.⁴²⁴ The Terms and Conditions of using the A&C website state that users must: comply with UK copyright law; seek permission from A&C where they intend to publish; acknowledge A&C as their source; that any use of the data on the website will be non-commercial; and that any personal data

⁴²⁰ A&C's Copyright Terms and Conditions, which include the text of their Takedown Policy, are available at <http://www.gsaarchives.net/wp-content/uploads/2014/08/Copyright-and-Terms-and-Conditions.pdf> [Accessed 15 December 2017].

⁴²¹ Glasgow School of Art Interview Transcript, p.286, lines 4-9.

⁴²² Ibid, p.286, lines 13-28.

⁴²³ This estimate is based on internal project documentation shared with the author.

⁴²⁴ A&C's reprographic guide is available at <http://www.gsa.ac.uk/media/597978/reprographicguidefeb2013.pdf>.

available on the site should not be used other than for research purposes.⁴²⁵ The license and attribution terms for each image are clearly accessible in the individual catalogue entries.⁴²⁶

4.2.6 Interview Results

The researcher was able to spend a significant amount of time speaking to Michelle Kaye during the launch of the online catalogue and throughout the rights clearance process. Our conversations took place in September 2014, February 2015 and June 2016. This section is structured topically and follows the codes generated from the interview script.

Reasons for digitisation

Digitisation was considered important for preservation purposes, which was brought into stark relief by the fire in 2014.⁴²⁷ Additionally, given that A&C hold visual collections, Michelle explained that it made sense to make them available digitally.⁴²⁸ In 2014, there was no formal, senior management or strategic oversight of what would be selected for digitisation, but Michelle felt there were obvious contenders – any documentation relating to the Mackintosh Building could be digitised to assist with the refurbishment, and as a result, institutional records would be very important.⁴²⁹

User needs

In response to the question of users and their needs, Michelle stated that the bulk of A&C's enquiries are family history related, so these records would be prioritised.⁴³⁰ She also identified another big user group, besides family history and architects, as teachers and academics. It was considered very important to still be able to provide resources while A&C's collections were in off-site storage. The Textiles department in particular are heavy users of the collections for teaching. Visual Communication use the collections for student teaching, and for design purposes. The collections speak to both the history of the school but also the history of design.⁴³¹

⁴²⁵ Ibid.

⁴²⁶ An example (Item NMC/0096V - 1st Witch (from Macbeth)) is available at <https://gsaarchives.net/collections/index.php/nmc-0096v>.

⁴²⁷ Glasgow School of Art Interview Transcript, p.253, lines 14-16.

⁴²⁸ Ibid, p.253, lines 23-24.

⁴²⁹ Ibid, p.253, lines 29-43.

⁴³⁰ Ibid, p.253, lines 43-45.

⁴³¹ Ibid, p.253-254, lines 54-55 and 1-24.

Funding and strategy

Over the years, some funding was used to digitise parts of the collections, and other pieces were done in house as and when the resources were available, and where a clear need could be demonstrated: for example, format shifting. Overall, digitisation at GSA A&C has been piecemeal, but responsive.⁴³² They do not have an overall digitisation strategy, but they can draw on equipment and expertise within the rest of the School.⁴³³ For the moment, collections management is where their main focus lies.⁴³⁴

At the time of our third and final interview, Michelle had drawn up a short paper on orphan works: explaining the issue, outlining the options available to the GSA, the potential of insurance, and setting out why A&C wants to make the material available. While A&C were responsible for decision-making during the project, she felt that there should be oversight from senior levels within the GSA, and possible legal input too.⁴³⁵ As a result, A&C has had its approach ratified by GSA's Museum and Archives Committee, its Executive Group, and GSA's lawyers.⁴³⁶

The online catalogue

Prior to this project, the existing online catalogue was the Archives Hub.⁴³⁷ They used Axiell CALM as their collections database, internally. They started to explore their options in early 2014. Funding for the project was provided by Museums Galleries Scotland. As a result, they moved to ARCHON collections management software, and in 2016 they were in the process of researching other collections management software.⁴³⁸

Their catalogue is being made available without modification, but as digitisation takes place, Michelle acknowledges that there may be the need to go back and revisit descriptions and add to them.⁴³⁹ Feedback sought from users through focus groups has indicated that they prefer to browse, rather than conduct specific text searches (although of course, text search functionality has been retained). A&C felt the need to step away from traditional catalogues to something more visual.⁴⁴⁰ As a result, users can browse purely through visuals, with minimal description. It was noted during the focus groups that many users aren't familiar

⁴³² Ibid, p.254, lines 29-44.

⁴³³ Ibid, p.255, lines 53-55.

⁴³⁴ Ibid, p.256, lines 16-17.

⁴³⁵ Ibid, p.277, lines 1-10.

⁴³⁶ Correspondence with the author.

⁴³⁷ The Archives Hub provides the ability to search across over 300 UK institutions' content from a single point of access. Available at <https://archiveshub.jisc.ac.uk/>

⁴³⁸ A&C have since migrated to AtoM, and are about to launch a new online catalogue in 2019.

⁴³⁹ Glasgow School of Art interview Transcript, p.277, lines 1-10.

⁴⁴⁰ Ibid, p.255, lines 16-19.

with the structure and detail of archive catalogues; the feedback A&C received was that, in addition to visuals, users wanted clean interfaces and the ability to download images of items.⁴⁴¹

Rights clearance and risk management

Michelle developed a copyright 'framework' in order to manage the rights clearance process. The framework determined which creators would be identified and contacted for permission. Its main features are:

- Nothing under ten years old will be made available online, unless permission has been explicitly granted
- If the creator is alive, A&C will attempt to contact them for permission
- If the creator died less than 70 years ago, A&C will attempt to contact their representatives for permission
- If the creator died more than 70 years ago, A&C consider the material to be low risk or in the public domain, and as a result, they do not contact for permission⁴⁴²

To start this process, the staff at A&C compiled a long list of the named creators listed in their catalogues, although Michelle notes that creators are not always rights holders, and rights holders may not be listed in the catalogue.⁴⁴³ Details of rights holders were also taken from documentation and depositor records associated with the collection where appropriate.⁴⁴⁴ This is a similar approach to that taken by Churchill Archives Centre (CAC). Life dates and the relevant images where they existed were compiled and listed in an Excel spreadsheet, where the copyright framework could be applied.

Michelle was cautious about potentially making lists of rights holders represented in the collection available online, saying:

"It might be a good thing, it might create positive leads and encourage people to get in touch with them if they do want to use any of their work, but it might also encourage unnecessary attention that they maybe don't want. It's something to think about," and;

*"They might be happy for us to use the image but to publicise the fact that they are the rights holder, I don't know. I can see it going both ways."*⁴⁴⁵

⁴⁴¹ See fn. 410.

⁴⁴² Glasgow School of Art Interview Transcript, p.276, lines 3-13.

⁴⁴³ Ibid.

⁴⁴⁴ Ibid, p.275, lines 38-44.

⁴⁴⁵ Ibid, p.262, lines 23-26.

In terms of an end point for rights clearance, the staff decided that non-response was sufficient: they haven't set an official end date for clearance and are happy to accept any responses that come in.⁴⁴⁶ However, the materials have been made available on a collection-by-collection basis rather than waiting for individual permissions, so it may be the case that a responder's works are already available online.

Michelle admits that she feels anxious about how bold they have been. She says she is aware of the risks and she thinks they've done everything they can to mitigate them. She feels most other institutions in the Scottish sector have been more cautious, especially with orphan works: other institutions are aware of the risks but rather than confront them just don't do anything with certain collections.⁴⁴⁷ Michelle explains that when she reviews the process, the decisions and the results she feels confident again, but when she comes across other professionals that are opposed to risk taking, "It does leave me quite anxious, still."⁴⁴⁸ However, overall Michelle is proud of what they managed to achieve in a very short amount of time.⁴⁴⁹

Diligent Search

In terms of diligent search, Michelle identified their accession databases and depositor records as essential. The School's alumni network was also used, as was general internet searching, as working artists tend to promote themselves.⁴⁵⁰ Michelle observed that recording search activity is very difficult because it's not traditionally linear: it might loop, and sources will vary. Some of the searches were quick and easy, and some proved longer and more tortuous. The key collecting society and licensing contacts A&C used during the project were: the Public Cataloguing Foundation (PCF), Bridgeman Art Library, and the Designers and Artists Collecting Society (DACS).⁴⁵¹ Reliance on collecting societies means reliance on their diligence: it's difficult to be certain of their diligence, and how long they spent on individual enquiries.

Rights holder representatives and Collective Management Organisations (CMOs)

Indeed, GSA's use of the PCF, Bridgeman and DACS was not a resounding success. GSA were able to share the names of 103 creators with the PCF and DACS, netting only 20 contact

⁴⁴⁶ Ibid, p.274, lines 24-29.

⁴⁴⁷ Ibid, p.284, lines 37-47.

⁴⁴⁸ Ibid, p.284, lines 45-47.

⁴⁴⁹ Ibid, p.273, lines 43-53.

⁴⁵⁰ Ibid, p.258, lines 27-34.

⁴⁵¹ Ibid, p.272, lines 35-41.

details (4 from DACS and 16 from PCF), most of which resulted in non-response.⁴⁵² However, they were able to set up an agreement for the use of one creator's works with Bridgeman, which is to be reviewed every three years.⁴⁵³ While it is entirely responsible and appropriate to approach CMOs for assistance with rights clearance, the author questions the automatic necessity of contacting CMOs where representation appears to be so low.⁴⁵⁴ The levels of non-response also suggest that it may not be profitable for CMOs to engage in diligence for these types of non-commercial projects.

Orphan works

A&C's attitude to the orphan works identified in the collections changed based on their experience of diligent search, and the introduction of Orphan Works exception and licensing scheme in late 2014. Michelle said in our second interview:

*"One thing I should probably update you on is that as part of the project I think our attitude has changed quite a lot in doing the right search and also in just recent developments in terms of copyright law as well, especially with regard to orphan works which is something that I don't think we really recognised as a particular problem."*⁴⁵⁵

Michelle felt that, initially, they were quite rash in making the older materials available, and those where no creator was identified. This was compounded by the fact that when the project started, in early 2014, the orphan works legislation had yet to come into force. Michelle felt that it was difficult to come to a decision on how to progress with the orphan works. Her initial impression of the scheme was that it required a lot of effort, with no guarantee of benefit to the archive or the rights holder.⁴⁵⁶ At the time of our interview in February 2015, A&C had made the decision to mask some of the orphan works on the online catalogue from public view while they came to a decision.⁴⁵⁷

This is evidence that the legislation may be having a chilling effect on the sector: orphan works are not being made available while archive services weigh up the pros and cons of interacting with the exception or the OWLS, with the assumption that at least some of them

⁴⁵² Ibid, p.289, lines 5-11.

⁴⁵³ Ibid, p.288, lines 45-49.

⁴⁵⁴ This is similar to the WL experience during Codebreakers: even with the assistance of ALCS, PLS and the ARROW system, non-response and orphan rates raise questions about representation.

⁴⁵⁵ Glasgow School of art Interview Transcript, p.263, lines 5-9.

⁴⁵⁶ Ibid, p.263, lines 37-46.

⁴⁵⁷ According to project documentation, 7 artworks were hidden from public view. It was decided to keep images of orphaned textiles works online as they appeared to be of utilitarian design, and unlikely to attract copyright or design right protection (at the time). 5 works comprising photographs and designs, and images of plaster casts, were noted as available online, but pending a decision-review.

will choose to avoid risk and the financial implications of the OWLS by not making artistic orphan works available at all.

This is somewhat ironic given that a common image of Charles Rennie Mackintosh, and one the GSA have used repeatedly for marketing and promotional purposes, is an orphan work. It has been used many times over the last 10-20 years, and in all that time no one has come forward to claim copyright in the photograph.⁴⁵⁸

Some of the author's initial discussions with Michelle revolved around the difficulty of accurately defining an orphan work: the gap between identifying a rights holder and being able to contact them. Michelle provided some examples of artists in their collections that were recognizable names, but where no heirs, estates or representatives were found, leading them to conclude that the works were orphaned. The difficulty in discerning between non-responders and genuine orphans was also mentioned.⁴⁵⁹ GSA's willingness to make non-respondent material available subject to takedown while limiting access to orphan works suggests their perception of risk between the two categories differs. As Michelle observed, it's an area of practice where they'd like to wait and see how other institutions have decided to approach it:

*"It's something we haven't really looked at very much to be honest yet, and we need to consider it and see what other organisations are doing as well and what the sector as a whole feels about it. Obviously everyone's really frustrated but I think that frustration has embodied itself in just not doing anything rather than take risks. And we've certainly taken risks in putting material online where we haven't been able to contact rights holders, that's a separate issue. We've been fairly confident in doing that but this is a whole new area for us."*⁴⁶⁰

In terms of orphan works reform, Michelle suggested that the licensing scheme could be made more attractive to potential users through the option of a bulk upload function for the application process, or the offer of a blanket license for non-commercial purposes.⁴⁶¹

Creator/Rights holder concerns

Michelle reports that rights holders are happy to see the collections being used - that's why they deposited them in the first place. A&C have received a very positive reaction to the project.⁴⁶² When they contacted rights holders, they have not framed the project as a

⁴⁵⁸ Ibid, p.265, lines 8-16.

⁴⁵⁹ Ibid, p.269-270, lines 33-54 and 1-5.

⁴⁶⁰ Ibid, p.267, lines 48-55.

⁴⁶¹ Ibid, p.266, lines 43-55.

⁴⁶² Ibid, p.257-258, lines 53-55 and 1-2.

traditional digitisation project – it’s a new format of catalogue. The terms of use, use of low-res images, use of CC licenses and takedown policy are explained to rights holders as part of the permission-seeking process.⁴⁶³

Michelle noted that some rights holders were concerned about granting permission because they felt the work selected wasn’t representative of current practice, but GSA were able to offer a link from the catalogue to their current work to allay those concerns.⁴⁶⁴ This suggests that creators and rights holders of artistic works have a particular set of concerns when engaging in digitisation projects, and that a flexible, inclusive approach can accommodate many of these concerns.

Deposits and acquisitions

In terms of acquisitions, Michelle explained at our first interview that assignment of rights has always been part of the deposit process, and that the vast majority of depositors assign copyright.⁴⁶⁵ Rights clearance had also given the staff at A&C the opportunity to get back in touch and keep in touch with depositors, who are enthusiastic and excited about the project.⁴⁶⁶

In our final interview, Michelle reflected that the copyright assignment process has become a time-consuming element of A&C’s new acquisition documentation. This is specifically in relation to deposits where the paperwork is incomplete, dating back 2-3 years: she does not think it will be an issue going forward. Michelle notes that other members of staff have found the copyright aspect ‘overwhelming’ and ‘quite a task’: which suggests there is a specific need for training and guidance in this area.⁴⁶⁷ Copyright in acquisitions is now seen as a ‘new problem,’ which has made Michelle feel uncomfortable as she’s now seen as the designated copyright person, but she feels she’s not an expert.⁴⁶⁸ Again, this speaks to a need for support for members of staff who find themselves with responsibility for copyright within CHIs.

Works of artistic craftsmanship

One of the areas in which Michelle and the researcher have spent most discussion is in relation to works of artistic craftsmanship. A&C holds a large collection of textiles and plaster casts of statues and objects of antiquity. Much of these collections have been

⁴⁶³ Ibid, p.258, lines 14-22.

⁴⁶⁴ Ibid, p.269, lines 4-15.

⁴⁶⁵ Ibid, p.258, lines 43-49.

⁴⁶⁶ Ibid, p.259, lines 2-7.

⁴⁶⁷ Ibid, p.282-283, lines 32-54 and 1-10.

⁴⁶⁸ Ibid, p.282, lines 41-49.

photographed and made available online, but Michelle has found it difficult to decide whether the works qualify as works of artistic craftsmanship.

There is no statutory definition of artistic craftsmanship, but the UK IPO has provided a set of criteria based on cases heard before UK courts:

- *It is not enough for a work (such as a piece of furniture) to look attractive to qualify as a work of artistic craftsmanship.*
- *The phrase “artistic craftsmanship” designates two requirements combined in the same work: artistic quality and craftsmanship.*
- *“Craftsmanship” presupposes special training, skill and knowledge for production. One suggestion from users of artistic works is that examples of craftsmen include silversmiths, potters, woodworkers and hand-embroiderers.*
- *“Artistic” means it will have a real artistic or aesthetic quality and must be a work of art or fine art.*
- *Whether an article is artistic must be determined in light of evidence.*
- *This could include: evidence of the intentions of the maker, in particular whether or not he had the conscious purpose of creating a work of art; evidence from ordinary members of the public; expert evidence; whether the maker already has works to his name which are acknowledged to be artistic; and the level of aesthetic appeal.*
- *One factor in determining whether a work is a work of artistic craftsmanship is assessing the extent to which the particular work’s artistic expression is unconstrained by functional considerations. The extent to which functional considerations impact on the likelihood of a work being one of artistic craftsmanship is debated by legal scholars.⁴⁶⁹*

In July 2016, the repeal of Section 52 of the CDPA 1988 brought the UK into line with the rest of Europe, in that ‘industrial’ artistic works (i.e. those that had been designed to be reproduced 50 times or more) would benefit from a period of protection of life of the author plus 70 years, rather than the previous 25 years from point of production. This gives them equal status with other artistic works protected by copyright law. It also means that the copyright in many design and artistic works which had transferred to the public domain has now been revived. This will affect any CHI which holds items like textiles, garments or furniture that are considered to qualify as works of artistic craftsmanship.

The lack of a statutory definition creates further uncertainty around copyright status for institutions which hold collections containing these items. As evidenced in the other case studies and literature review, it is the presence of uncertainty around copyright status and duration which makes accurate risk analysis and management so difficult. Indeed, it is precisely this uncertainty and the lack of a general, sector-led response to uncertainty which

⁴⁶⁹ Intellectual Property Office (2017) *Repeal of Section 52 of the Copyright, Designs and Patents Act 1988: Guidance for affected individuals, organisations and businesses*, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/606207/160408_guidance_s52_final_web_accessible.pdf [Accessed 15th December 2017].

contributes directly to risk aversion across the sector. Defining what constitutes a work of artistic craftsmanship happens on an individual, case-by-case basis, and that means that a lot of archivists all over the country are working this out by themselves, in departments with potentially conflicting opinions and a lack of tailored guidance. How should archivists judge these cases, when many will have little to no experience and knowledge of case law?⁴⁷⁰ This area is a clear candidate for tailored guidance and training to encourage and build the confidence of archivists who care for these types of collections.

Assumptions around ownership of copyright

GSA assert that they hold copyright in their institutional archive. In some areas of this collection, especially in relation to photographs, they have very little annotation to work with. Michelle explained:

“...that’s basically the assumption that we’ve made. I don’t know if it’s entirely correct for every single photograph in the collection though, but for the majority I would think we could assume that they were taken on behalf of the school, but there are certainly some in there which have been donated to our archives and which we have classified as part of the institutional work but which are snapshots by someone else, they were not taken on behalf of the school.”⁴⁷¹

Most of these works are orphan and without them, GSA wouldn’t be able to ‘tell the story of the school’s history, visually, at all.’⁴⁷² Michelle notes that no action has resulted from the uses that have already been made of the photographs, and feels that the longer they are available without complaints or takedown requests, the more confident they will feel in their decision.⁴⁷³

Controlling re-use

In relation to the decision to make only low-resolution images available online, Michelle said that, personally, she would rather maintain some control ‘over the quality of images that are available.’⁴⁷⁴ She noted that making the low-res images available has actually increased the number of requests for high-res images. She confirms that they’re not generating a huge amount of revenue from the licensing, but it’s ‘something.’⁴⁷⁵ Michelle expresses a similar aim to that articulated by Natalie Adams at Churchill Archive Centre: it’s important to bring in some revenue, to contribute to running costs, even if it isn’t very much. She also explained

⁴⁷⁰ The respondents to the survey ranked case law as the least popular source when interpreting the law.

⁴⁷¹ Glasgow School of Art Interview Transcript, p.265, lines 45-51.

⁴⁷² Ibid, p.265, lines 33-34.

⁴⁷³ Ibid, p.266, lines 1-8.

⁴⁷⁴ Ibid, p.280, lines 7-8.

⁴⁷⁵ Ibid, p.280, lines 13-19.

that the reasoning behind retaining control over further uses: “We like to retain some sense at least knowledge of how people are using them.”⁴⁷⁶

This attitude appears to be one that a lot of archivists share.⁴⁷⁷ There appears to be a need within the profession to continue to protect records once they are made available online, and to make sure there is no derogatory treatment of them, even where, arguably, there is no requirement for institutions to do so. Interestingly, this need is never articulated in terms of the moral rights of attribution or the right to object to derogatory treatment of a work.⁴⁷⁸ Michelle notes that low-res images for personal and academic use was how the project was pitched to the rights holders, and suggests that the rate of permissions may have changed if they had asked to make high-res images available online for a wide variety of uses, which is a reasonable assumption.⁴⁷⁹

While understanding and having examples of how collections are re-used is essential for understanding impact, reach and use of collections, and for monitoring potentially problematic uses, this should really only apply where an institution owns the copyright. Third party rights holders might expect some form of oversight on a CHIs part, but they have agreed to a specific license for use of the materials. The control of images of public domain works is ethically problematic and most likely falls outside the scope of UK copyright law.⁴⁸⁰

Michelle acknowledges that they have never refused a request for use on the grounds of inappropriate or disparaging treatment, which suggests there is little evidence that derogatory uses are happening.⁴⁸¹ When the topic of going open access is brought up, Michelle explains that they are anxious about the process and that she feels it is too ‘new’ at the moment.⁴⁸² She asks for examples of other institutions that have done it, suggesting that with more case studies, as other institutions do it and report their results, they might be more encouraged to do it.⁴⁸³

⁴⁷⁶ Ibid, p.280, lines 38-42.

⁴⁷⁷ See Dryden, J. (2011) ‘Copyfraud or Legitimate Concerns? Controlling Further Uses of Online Archival Holdings,’ *The American Archivist*, 74:2, pp. 522-543, available at <http://www.jstor.org/stable/23079049> [Accessed 20 December 2017] and Wallace, A. and Deazley, R. eds. (2016) *Display At Your Own Risk: An experimental exhibition of digital cultural heritage*, available at <http://displayatyourownrisk.org/publications/> [Accessed 20 December 2017]

⁴⁷⁸ The moral rights to be identified as the author of a work (s.77-79); to object to derogatory treatment of works (s.80-83); to object to false attribution (s.84); and the right to privacy in certain photographs and film (s.85) is outlined in Ch.4 of the CDPA 1988.

⁴⁷⁹ Glasgow School of art Interview Transcript, p.280, lines 30-38.

⁴⁸⁰ Intellectual Property Office (2014) *Copyright notice: digital images, photographs and the internet*, available at <https://www.gov.uk/government/publications/copyright-notice-digital-images-photographs-and-the-internet> [Accessed 20 December 2017]

⁴⁸¹ Glasgow School of art Interview Transcript, p.280, lines 42-44.

⁴⁸² Ibid, p.281, line 44.

⁴⁸³ Ibid, p.281, line 53.

It's worth noting that GSA have received no complaints or comments from users about the CC license terms not being open enough: just positive feedback on the catalogue and availability of images. They have not received negative feedback on the requirement for payment for high-resolution versions of images.⁴⁸⁴ At present, they do not have the content management systems or technical support that would be needed to facilitate the provision of large numbers of high-res images for download, and the various access levels required.⁴⁸⁵

4.2.7 Key Points

The rightsholders who responded to permission requests from A&C overwhelmingly granted permission, and no fees were requested in relation to the project. Decision-making for the rights clearance process has been internal within the department, with approval sought and granted from senior management. A&C took a risk by making non-respondent and orphan materials available online, subject to a takedown policy, although some orphan works have been hidden from public view due to uncertainty. A&C find the current UK orphan works legislative framework inhibiting. Uncertainty in the definition and legal status of works of artistic craftsmanship and design have also caused issues during the project. Taking responsibility for copyright within a small team and department can create anxiety for staff members, especially when making decisions in areas of uncertainty and deciding on risk management approaches. So far, A&C have received no takedown requests in relation to the digitisation undertaken.

4.3 Newcastle University

4.3.1 Institution and project background

The Philip Robinson Library at the University of Newcastle is the home of Special Collections and Archives (SC).⁴⁸⁶ In early 2013, SC came to an agreement on the purchase of the Bloodaxe Books Archive. The cost was shared between the University Library and the School of English Literature, Language and Linguistics (SELLL). The archive was immediately the subject of a small-scale Arts and Humanities Research Council (AHRC) project application. From the beginning, the project focused on a creative response to the archive.⁴⁸⁷ Initial funding was awarded for a period of 3 months, with a larger bid awarded

⁴⁸⁴ Ibid, p.282, lines 22-26.

⁴⁸⁵ Ibid, p.281, lines 27-33.

⁴⁸⁶ For more information, see <https://www.ncl.ac.uk/library/special-collections/>.

⁴⁸⁷ Newcastle University Transcript, p.290, lines 18-22.

in late 2013 for an 18-month project, Poetics of the Archive (POTA).⁴⁸⁸

4.3.2 Project Outputs/Resources

The entire archive was catalogued (4700 items) during the project, and 1500 of those items have been digitised. The digitised items have been made available via an interactive website, created through collaboration with the Culture Lab based at Newcastle University, which resulted in a ‘generous, opened-ended and playful’ user interface to encourage greater creative interactions with the collection.⁴⁸⁹ The archivists have engaged in collaborative work with poets, artists, programmers and digital humanists during the project, and further collaboration is planned for the future.⁴⁹⁰

4.3.3 Rights ownership and results of rights clearance process

Rights issues were not covered in the contract negotiations when the collection was purchased, but through the deposit agreement. Bloodaxe haven’t assigned copyright in any of the material to SC, which is perfectly understandable: it’s an obvious business decision for Bloodaxe to retain their intellectual property rights.⁴⁹¹ Given the complex nature of the rights in this type of collection, from various publishing agreements, through anthologies, to works in translation; the staff at SC think this is the best arrangement.⁴⁹²

With no assignment of copyright, the clearance process was mediated through Bloodaxe. SC have a good working relationship with Neil Astley at Bloodaxe and their rights manager, which has been invaluable: Neil is happy to check material for them and vice versa.⁴⁹³ The staff reflect that all the working relationships during the project have been very positive, especially with Culture Lab.⁴⁹⁴ Table 4.4 shows the results of the rights clearance process.

⁴⁸⁸For more details on POTA, see the case study written by the project PI and the Head of Special Collections and Archives: Anderson, L. and Johnson, I. (2017) “Exploring the Bloodaxe Archive: A Creative and Critical Dialogue,” *Insights*, 30 (3) pp. 31–37, available at DOI: <http://doi.org/10.1629/uksg.378> [Accessed 20 June 2018].

⁴⁸⁹ The project website is available at <http://bloodaxe.ncl.ac.uk/explore/index.html#/splash> [Accessed 20 December 2017].

⁴⁹⁰ Ian Johnson highlighted the work that Special Collections and Archives have done with SELLL since the Bloodaxe project: collection development, joint staffing with SELLL (they now have a permanent Literary Archivist), applying for Research Innovation Funding, and the forthcoming publication of *The Contemporary Poetry Archive: Essays and Interventions* (Edinburgh University Press, 2019), edited by Linda Anderson, Mark Byers and Ahren Warner (see <https://edinburghuniversitypress.com/book-the-contemporary-poetry-archive.html>). SC have also been involved with the Newcastle Poetry Festival since 2016: see <https://www.newcastlepoetryfestival.co.uk/> for more details. [Correspondence with the author].

⁴⁹¹ Newcastle University Transcript, p.292, lines 37-43.

⁴⁹² Correspondence with the author.

⁴⁹³ Newcastle University Transcript, p.293, lines 12-20.

⁴⁹⁴ Ibid, p.293, lines 1-2.

Table 4.4: Results of Bloodaxe rights clearance process

NAMES IN COPYRIGHT DATABASE	360	
Reliable contact details: total letters sent	327	91% of all rights holders identified
Total replies	173	53% of those contacted
Permission granted	125	72 % of respondents
Permission refused	23	13% of respondents
Did not respond	154	47% of those contacted
Orphan Works	33	9% of those identified
In progress	25	15% of those identified

As reported in Table 4.4, we can see that contact details were found for 91% of the identified rights holders. This is very high in comparison with other projects and reflects the fact that the archivists were able to work directly with the rights manager at Bloodaxe, and the contemporary nature of much of the material. However, only 53% of those contacted responded, which is very low, especially if we consider again that the publisher was directly involved in the rights clearance process. The permission rate is also lower than other projects reported in the thesis: 72% of respondents granted permission, and 13% did not. This could be explained by the fact that many of the poets published by Bloodaxe are still producing creative works, and would prefer to retain control of their work. The number of orphan works, again, is lower than the other examples in the thesis.

4.3.4 Access/Terms and Conditions of Use

The images are made available for non-commercial use only, including private study, personal use, and educational purposes, subject to the exceptions provided in the CDPA 1988.⁴⁹⁵ A copyright notice available on the website informs users that they must seek permission from the rights holders for all other uses of the items. The material is made available subject to the University of Newcastle's takedown policy.⁴⁹⁶

4.3.5 Interview Results

The researcher interviewed Becky Bradley, Ian Johnson and Kim Gaiger in March 2015.

⁴⁹⁵ See the copyright statement on the project website for more details at <http://bloodaxe.ncl.ac.uk/explore/index.html#/splash>.

⁴⁹⁶ The takedown policy is available at <https://www.ncl.ac.uk/info/legal/>

This section is structured topically and follows the codes generated from the interview script.

Project impetus

As previously mentioned, a small-scale scoping project was awarded funding from the AHRC for a period of three months in 2013. Rather than posing a specific research question, or focusing on the specific content of the collections, the project was conceived as a more general response to the idea of an archive: a deliberately ‘ill-defined’ outline.⁴⁹⁷

Everyone involved in the small-scale project came together to pitch for what they would like out of a larger AHRC project bid. Those on the technology and digital humanities side wanted to create generous interfaces. SC wanted to be able to catalogue: for all the same reasons as they had with the artists. The fact that they had gone through the pilot project and all of the issues therein, they knew it was a problem that had to be addressed. Their pitch, on top of the catalogue, included digitisation, rights clearance and project management. They benefited from the Digital Humanities expertise and support of Marion Dirk, who insisted they needed metadata and rights clearance in order to provide an interface.⁴⁹⁸

The bid was for the proposed generous interface, but as a result they got a traditional archival catalogue into the bargain, as the descriptive metadata provided by the catalogue would be essential to the functioning of the resource. Everything in the project bid revolved around providing access in a new and cutting-edge way: everything else was a by-product of that aim. The main impetus for the purchase and digitisation of the collection was to make it more accessible but in a very particular way.⁴⁹⁹ It’s also very strategic for SC and the SELLL: they are interested in the acquisitions policy of SC, and they want to embed themselves in the team by providing volunteers and other members of staff, because it compliments SC’s collecting strength in contemporary literature. This was already established before the project, as they were building this collection strength with local writer’s archives, but the Bloodaxe collection, and the working relationship with the SELLL has cemented it.⁵⁰⁰

There was a further bid for follow-on funding, which was unsuccessful, but they’ve managed to get successor funding from the University, so there’s still a member of staff working on the Bloodaxe collection one day a week.⁵⁰¹ There is also a named staff member responsible for literary archives.⁵⁰² It’s important for the collection to be held in Newcastle because

⁴⁹⁷ Newcastle University Transcript, p.290, lines 25-29.

⁴⁹⁸ Ibid, p.290-291, lines 54-55 and 1-20.

⁴⁹⁹ Ibid, p.291, lines 22-27.

⁵⁰⁰ Ibid, p.291, lines 33-46.

⁵⁰¹ Ibid, p.291, lines 42-46.

⁵⁰² Ibid, p.291, lines 45-46.

Bloodaxe is local, and Neil, the founder and publisher, went to Newcastle University. He also has a relationship with the SELLL because of Prof. Linda Anderson.⁵⁰³ Linda was the driving force as PI on the project: working with Bloodaxe and SC appear to have been a goal for several years. The long-term aim is to make the SELLL and SC a hub for local poets and writers, not just the publishers.⁵⁰⁴

Accessing an uncatalogued archive

The first issue that the archivists noted was that the poets and artists involved in the project would be responding to an uncatalogued archive.⁵⁰⁵ Staff also recognised there would be copyright issues as requests for copies came in, and also that data protection would be an immediate issue too.⁵⁰⁶ This is all in addition to the obvious logistical issues presented by an uncatalogued collection: allowing access without knowing the exact contents, maintaining an audit trail, and being able to answer enquiries about the contents of the collection in a satisfactory way.

Partnership working

The writers and artists were very understanding of the issues and wanted to work collaboratively to explore and resolve them. The archivists worked with them to develop basic box lists to provide an audit trail for access to the collection and to aid discovery.⁵⁰⁷ A two-sheet declaration outlining user responsibilities under copyright and data protection legislation was prepared for the artists working on the project to sign.⁵⁰⁸ Staff noted that the artists were very good at coming back and checking if they were breaching anything.⁵⁰⁹

The archive was purchased and arrived in accruals. It's arranged under a "Quasi-legal contract." They pay in three instalments for each yearly accrual – the accrual in 2015 was the final one (as planned).⁵¹⁰ They are open to receiving more as time goes on, and it would appear that the expectation is that the arrangement will continue.⁵¹¹

⁵⁰³ Ibid, p.292, lines 1-7.

⁵⁰⁴ Ibid, p.292, lines 15-24.

⁵⁰⁵ Ibid, p.294, lines 5-10.

⁵⁰⁶ Ibid, p.294, lines 18-23.

⁵⁰⁷ Ibid, p.290, lines 41-44.

⁵⁰⁸ Becky stated that they relied on exemptions – citing incidental use as an example. This is not exactly an exception (it's a limitation), but an example of how they are referred to. 'Exemption' could also be used as this is the term used in Data Protection legislation, versus 'exceptions' in the CDPA 1988.

⁵⁰⁹ Newcastle University Interview Transcript, p.290, lines 47-49.

⁵¹⁰ Ibid, p.292, lines 28-32.

⁵¹¹ Ian Johnson confirmed that they have continued to receive accruals [Correspondence with author].

Perceptions of archivists and their skills

The only issues SC staff highlighted in terms of working relationships has been that communication with the depositor (Bloodaxe) has been mediated through a third party (SELLL), which is not usual for archives. Eventually they would like to go more directly to Neil Astley to ensure sustainability in the relationship.⁵¹²

SC were clear that certain work had to be committed to for the project to work properly, but those requirements were not immediately understood, without further contextualisation from the wider project group, e.g. that cataloguing metadata provides the digital infrastructure for more non-standard interfaces to work.

Ian had previous experience of working on a multiple-disciplinary team for the Hillsborough Disaster, where archivists were seen as administrative rather than professional. The continual changes to the level of descriptive metadata meant he felt the discoverability product at the end of the project was sub-standard.⁵¹³ Many of these decisions were out of the archivists' hands, despite their warnings. Ian was initially concerned something similar would happen here: i.e., "We don't need a catalogue, just a list." For example, staff from Culture Lab felt early on that users didn't need the reference numbers on individual items, whereas the archivists had to persuade them of their importance, in order to provide physical access to the items, and a bibliographic link for those wanting to cite the materials.⁵¹⁴

Depositing new works from the project

The researchers, artists and poets involved in the project also deposit their work with the archive. It is held electronically and can be made available on the project website from the SC digital asset management system.⁵¹⁵ All of the archive material has a full ISAD(G) metadata schema, although they didn't create one for the participants' work. It was expected that the participants/research associates would do this themselves, but there have been problems with this, as the researchers, largely creative practitioners, didn't know what they wanted from the metadata, and then there have been issues communicating those wants and needs to Kim, who is responsible for the administration of the metadata.⁵¹⁶

Communication and sustainability

Communication issues seem to have been recurring theme throughout the project, but not to a critical extent. Becky explained that the participants haven't always communicated with

⁵¹² Newcastle University Interview Transcript, p.293, lines 22-29.

⁵¹³ Ibid, p.294, lines 25-33.

⁵¹⁴ Ibid, p.294, lines 35-40.

⁵¹⁵ Ibid, p.293, lines 33-35.

⁵¹⁶ Ibid, p.293, lines 35-41.

each other, in addition to not communicating directly with the archive service, so the archivists have ended up engaged in a lot of time-consuming mediation.⁵¹⁷ One of the other issues SC staff encountered relates to working with academics, especially early career researchers (ECRs): ECRs tend to move on quickly and are interested in short-term impact because of the length of their employment contracts, whereas Special Collections want to build sustainability into what they're doing.⁵¹⁸

SC's main concerns going into the project were that they would not get the archival catalogue that they needed to manage the collection and that they would have to provide access to uncatalogued material, a real long-term logistical and collections care problem. The experience of the pre-project and this project have loosened up SC's view of giving access to uncatalogued material.⁵¹⁹ Given the precautions staff took, and how they work with the poets and artists, it's been a positive experience. Staff also went to some lengths to make sure participants understood the importance of good document handling. Sometimes documents would end up being moved out of sequence, but that didn't happen as often as expected.⁵²⁰ All participants were supervised in the reading room and they only let a certain number in at a time.⁵²¹ There still have to be limits: negotiation and flexibility is important, but some things are not allowed.⁵²²

The project has also allowed them to think more about digital preservation: to identify master and access formats, think about emulation and applying to IT services for access to older equipment and hardware.⁵²³ The digital/digitisation policy may be updated at some point, as they build up more experience. The collection development policy may also be updated as a result of the project and the collaboration, to make it clear that SC actively look at contemporary literature as an area of growth.⁵²⁴

Selective vs mass digitisation

The level of digitisation the participants and project board expected was an issue, because they didn't have an idea of scope until several months into the project.⁵²⁵ The participants asked for specific material to be digitised, but SC also picked material to be digitised, subject to rights clearance.⁵²⁶ Ian felt that comprehensive or mass digitisation for an archive like this

⁵¹⁷ Ibid, p.293, lines 46-47.

⁵¹⁸ Ibid, p.293, lines 49-54.

⁵¹⁹ Ibid, p.294, lines 8-10.

⁵²⁰ Ibid, p.294, lines 20-23.

⁵²¹ Ibid, p.295, lines 22-24.

⁵²² Ibid, p.295, lines 31-33.

⁵²³ Ibid, p.296, lines 6-17.

⁵²⁴ Ian Johnson confirmed that this has happened since the Poetics of the Archive project was completed [Correspondence with author].

⁵²⁵ Newcastle University Interview Transcript, p.294, lines 42-45.

⁵²⁶ Ibid, p.295, lines 1-7.

would not be achievable because of rights clearance and finite resourcing, and the project scope eventually became about selective digitisation. Certain authors were prioritised because of requests from participants or the project team.⁵²⁷ The decision was taken early on that no full drafts would be digitised: only selected pages that contained annotations. They also decided not to digitise any correspondence, which removed the potential for sensitivity review: this was a very tightly curated, selective digitisation project.⁵²⁸ SC believe that selection process has been managed well: the resource is a good compromise between the artists and researchers, and the archivists.⁵²⁹

Sensitivity review

In terms of policy development, access to uncatalogued collections is managed on a case by case basis. In the past, someone with legitimate research needs may have gotten favourable access to an uncatalogued collection, but then as a result of what they publish, other people want to see the archive, which still hasn't been catalogued. A few people have been turned away because of the logistical, legal, and collections care issues, or access has been mediated where staffing allows to show a sample of the contents.⁵³⁰ Box-listed collections can be made available, but it's the un-catalogued ones that cause problems, especially with sensitive data. Becky mentioned the Carcanet Press Archive as an example: their archivist will check collections for data protection issues before allowing access, rather than use the DPA historical research exemption,⁵³¹ whereas SC are willing to give researchers access if they complete a declaration linked to the DPA exemption. The catalogue allows the sensitive material to be flagged and appropriately mediated before being issued in the searchroom.⁵³²

Best practices

The archivists weren't aware of any similar case studies that they could have accessed for help with the rights clearance aspects of the project, other than the Wellcome Library example. Looking at the Copyright and Risk case study was useful because it highlighted issues they needed to be aware of, and gave letters and processes that they could adapt for their own purposes.⁵³³

⁵²⁷ Ibid, p.295, line 5.

⁵²⁸ Ibid, p.295, lines 9-17.

⁵²⁹ Ibid, p.295, lines 19-20.

⁵³⁰ Ibid, p.295, lines 39-48 and correspondence with the author.

⁵³¹ See Conditions Governing Access at <https://archiveshub.jisc.ac.uk/search/archives/c9d21e66-6e05-3b38-aece-5a9fdb5236ac>.

⁵³² Newcastle University Interview Transcript, p.295-296, lines 52-55 and 1-2.

⁵³³ Ibid, p.296, lines 42-48.

Cataloguing

The project was 18 months long, but item level cataloguing didn't start until month 16: very late. A catalogue structure was created before they knew what was in the boxes, to save time, which was both useful and a hindrance as the project went on. Item level metadata was entered into a spreadsheet using ISAD(G), with upload to the Archives hub. Once material was catalogued to item level and the description was confirmed, they'd port it across to a digitisation spreadsheet. Once the metadata was uploaded to the hub, the description was confirmed. At that point, rights clearance started.⁵³⁴

Rights clearance process

Only poets were contacted for permission: no editors beyond the Bloodaxe team.⁵³⁵ If the response was positive, the digitisation assistant would use the cataloguing spreadsheet to identify any material that could be digitised by that poet: annotated proofs, etc.⁵³⁶ Items that could be digitised were scanned in order. If they said no, nothing was done with their materials.⁵³⁷

If a poet wanted to review the material before granting or refusing permission, they would be sent a sample. In some cases, all of their material was sent, rather than a sample. The poet would then be able to make a decision. This is a lot of effort to go to for potential refusal, but the staff in SC were pushed to get material out: there was clearly an expectation that there would be plenty of content on the site, and a small amount for each author was felt to be better than nothing. By asking for samples, the poets were tacitly granting permission for digitisation, but once they saw the images, they could veto any they didn't want made available online.⁵³⁸

A lot of the poets, once they had seen the material, were happy to say yes to everything they had been sent, and yes to future projects as well, but there were a couple who were very selective from what was sent. If there were annotations by someone else on their work, they didn't want it published in case of infringement. Their reasons weren't always about copyright: some poets didn't want draft work made available. Others were concerned about

⁵³⁴ Ibid, p.297, lines 23-44.

⁵³⁵ In additions to the authors, there are rights held by global publishers, depending on the title, artist's rights, and photographer rights. With the approval of Bloodaxe, rights clearance has gone ahead on the basis that the author owns the rights in most cases. This could be viewed as a risk. Some of the global publishers were contacted, and SC directed them to the website to get more of an idea of what they are doing, but have yet to receive a response. Some of the bigger poets are with that publisher, so it may take time to get them onside and get them included. Newcastle University Interview Transcript, p.297-298, lines 46-55 and 1-3.

⁵³⁶ All responses are scanned, stored and easily searchable by author. Interview Transcript

⁵³⁷ They left a delay of up to six months between letter contacts. They also relied on the poets involved in the project to contact people that they knew. There was opportunity for the American poets to be asked during project interviews but it didn't happen, so they had to be contacted afterwards. Interview Transcript

⁵³⁸ Newcastle University Interview Transcript, p.298, lines 17-23.

full drafts being made available, and some took the permission letter to mean that e-books were being made available.⁵³⁹

Generally, SC received a very positive response, with lots of interest in the project. They were happy to provide extra information online for rights holders that requested them: websites, where their own papers are held, etc.⁵⁴⁰ But while the response was generally positive, even from some of those who refused permission, there were issues with understanding. There were communication issues at the start, as the permission letter had to be revised. At least one respondent didn't want to be involved based on a misunderstanding of that wording. There were some more ambiguous responses, which couldn't really be classified as a yes or a no. One particular author thought they might lose royalties as a result of the project.⁵⁴¹ The archivists had to explain the aims of the project: we want people to engage with poetry, we want to promote your work, we're showing draft work up to the final draft in a sympathetic way, allowing people to explore the process, generating interest.⁵⁴²

There were responses where they had to further justify the aims of the project. They had to explain a lot of their processes: document handling, searchroom rules, how the material is accessed on site, etc. Those responses were escalated to Linda, as PI and an expert in the field of poetry to mediate and assuage any concerns.⁵⁴³ One respondent had a previous grievance with Bloodaxe, so that coloured the exchange. They didn't want to be involved, but they wanted to know more about the project.⁵⁴⁴ Some respondents were also unaware that the archive had been sold to Newcastle University and queried the basis of having their material. The archive had to explain how that happened: they own and care for the actual material, constituting part of a legitimate business archive and retained as such. Further explanation was required about how the material is accessed, how personal data is handled, intellectual property, etc.⁵⁴⁵

There were issues with the letter, in addition to those mentioned previously. People would ask for clarification but sometimes it would be because they hadn't read the full letter, as it was quite long. A decision had to be made about whether to copy and paste the same text, or to provide a more specific explanation. The layout of the letter also may have played a role in the confusion: an outline of the contents of the archive may have given the impression

⁵³⁹ Ibid, p.298, lines 25-47.

⁵⁴⁰ Ibid, p.302, lines 9-25.

⁵⁴¹ Ibid, p.302, lines 29-38.

⁵⁴² Ibid, p.302, lines 40-53.

⁵⁴³ Ibid, p.302-303, lines 45-55 and 1-2.

⁵⁴⁴ Ibid, p.303, lines 4-6.

⁵⁴⁵ Ibid, p.303, lines 8-30.

that everything was being digitised, even though the text of the letter explained the selection process.⁵⁴⁶

Becky highlighted the need to get permission before publishing the material quite early in the project. There was an initial delay while the research associates came up with a ‘contract’ style permission request which had a very legal wording. Again, there was further delay while the project board ratified to confirm SC could contact people for permission. Once contact was made with the Bloodaxe rights manager Suzanne, they discussed what should go in the covering letter and they adapted the Wellcome Trust example. Once it was sent out, there was an initial flurry of replies which allowed digitisation to start. The cataloguing was ongoing, but the permissions process held up digitisation starting in parallel.⁵⁴⁷

The rights manager shared their rights information with the archive team, which made things easier. Additionally, any requests for reproductions are dealt with by Bloodaxe: the archive are only required to signpost this, and they don’t have to deal with permission requests from users to use the material.⁵⁴⁸

They used the rights holder information provided by Bloodaxe, but they found some of the details were out of date. They also relied on Ahren and Colette, the main poets involved in the project, to use their contacts and experience to engage people.⁵⁴⁹ There were a couple of instances where they managed to turn a no into a yes. Given the selection policy for the project was so tight, they were under a lot of pressure to get a good response rate, or there would be hardly any images to put on the site.⁵⁵⁰ Any updated information will be passed back to Bloodaxe when the project is finished, but they aren’t actively seeking new contact details because it would take too much time.⁵⁵¹

4.3.6 Key Points

The Bloodaxe project reports a lower permission rate than the other case studies featured in the thesis. The rights holders contacted for permission expressed more concerns with this type of non-commercial digitisation than reported in other projects, although the overall rate of permission was still positive at 72%. Non-response to permission requests continues to be problematic, even where SC were able to work closely with the publisher and their rights manager. SC opted to avoid copyright and sensitivity issues by selectively digitising the

⁵⁴⁶ Ibid, p.303, lines 32-53.

⁵⁴⁷ Ibid, p.299, lines 1-9.

⁵⁴⁸ Ibid, p.299-300, lines 51-55 and 1-2.

⁵⁴⁹ Ahren Warner (<https://www.ahrenwarner.com/>) and Collete Bryce (<http://colettebryce.com/>) Interview Transcript

⁵⁵⁰ Newcastle University Interview Transcript, p.300, lines 39-47.

⁵⁵¹ Ibid, p.300-301, lines 49-54 and 1-7.

collections, and did not make orphan or non-respondent material available. SC have demonstrated willingness to take managed risks, through providing access to uncatalogued collections, but in other ways they have avoided risk, especially when digitising. While partnership working was a positive experience, but the archivists in SC had to advocate strongly for important professional considerations and in some cases, needed support from other departments to achieve this.

4.4 British Film Institute

4.4.1 Institution and project background

The British Film Institute, founded in 1933, is a charity with responsibility for the BFI National Archive, the Reuben Library, BFI Southbank, BFI IMAX, and related publishing, distribution, exhibition and education networks required to support British Film. They distribute funding for all aspects of British Film on behalf of the National Lottery. They are based in London, with BFI Mediatheques in various cities in the UK, and they employ approximately 500 staff across these locations.⁵⁵²

The BFI has three main funding sources: the largest is Grant in Aid funding from the Department of Media, Culture and Sport, and the rest comes from commercial revenue generating activity from BFI Southbank, BFI IMAX and DVD sales, and grants and sponsorship. The BFI are responsible for distributing lottery funding to the UK film sector.⁵⁵³

The BFI National Archive is one of the largest film archives in the world. Their collections extend to:

- a. *60,000 fiction films, including features, on all gauges of film and formats of videotape.*
- b. *120,000 non-fiction films, broadly tracing the history of the use of the moving image in non-fictional settings and for non-fiction purposes.*
- c. *An estimated 750,000 television titles, mostly from off-air recordings as seen by the viewer, as well as production and transmission material.*
- d. *Audio and video recording of parliamentary proceedings (Lords, Commons and Committees).*
- e. *30,000 unpublished scripts, from first drafts to release scripts, mainly relating to British and American film and TV titles.*

⁵⁵² See <https://www.bfi.org.uk/about-bfi> for more details, and Interview Transcript

⁵⁵³ British Film Institute Interview Transcript, p.314, lines 36-42.

- f. 30,000 pressbooks and 2000 items of cinema ephemera, such as programmes, tickets, autographed letters, promotional material and personal memorabilia.
- g. 15,000 posters
- h. 600 collections of personal and company papers reflecting the history of British film and television production from the earliest days to the present.
- i. 1 million still images from or related to films and television programmes, including publicity material, production shots and portraits.
- j. 3000 production and costume designs.
- k. 3000 animation cels
- l. 51,000 books.
- m. 7000 journal titles, trade and academic, including many hundreds of thousands of volumes and issues.
- n. 1 million periodical article citations
- o. 4 million newspaper cuttings⁵⁵⁴

Film Forever: Supporting UK Film 2012-2017 explains the BFI's three strategic priorities: Education and Audiences; British film and filmmaking; and Unlocking Film Heritage (UFH).⁵⁵⁵ UFH is described as "Our ultimate goal... to digitise and make accessible to the public all of our screen heritage."⁵⁵⁶ UFH is a five-year project intended to preserve and provide access to 10,000 films. This incorporates 5,169 films from the BFI's own holdings, and 4,831 from other contributors, comprising the national and regional film archives across the UK,⁵⁵⁷ and numerous independent distributors and rights holders.⁵⁵⁸ £5M of funding was made available to commercial rights holders and for significant public collections. The films cover both commercial and amateur output and are selected by curatorial teams at the BFI: there are 52 themes across the UFH project.⁵⁵⁹ To qualify for inclusion in the project, the

⁵⁵⁴ I'm grateful to Annie Shaw, Rights Database Manager at the BFI, for supplying this information in addition to our recorded interview.

⁵⁵⁵ Film Forever is available at <http://www.bfi.org.uk/about-bfi/policy-strategy/film-forever> [Accessed 20 December 2017].

⁵⁵⁶ Ibid.

⁵⁵⁷ The national and regional film archives are East Anglian Film Archive (UEA), Imperial War Museum, London Screen Archives (Film London), Media Archive Central England (University of Lincoln), North East Film Archive (Teesside University), Northern Ireland Screen, National Sound & Screen Archive Wales, National Library of Wales, North West Film Archive (Manchester Metropolitan University), Screen Archive South East (University of Brighton), National Library of Scotland, Moving Image Archive, South West Film and Television Archive, and the Yorkshire Film Archive (York St. John University).

⁵⁵⁸ The independent rights holders and distributors are Adelphi Films, Akenfield Trust, Barzo Productions, JN Films/Isaac Julien Studios, Cohen Media, Eclectic Films, Film Four Ltd, Handmade Films, HBO, ICON, ITV, London Film School, Lux, Network Distributing, Paramount, Park Circus, Renegade Films, Renown Pictures, Royal Geographical Society, S4C, Scala Films, Studiocanal Films Ltd, The National Archives and Watchmaker Films.

⁵⁵⁹ 1914 on Film, 1915 on Film, 1916 on Film, 1917 on Film, 1918 on Film, Advertising, Animals, Animation, Arts, Beat Generations, Bespoke Overcoat – (DCP – so cleared for wider rights), BFI Content (DCP – so cleared for wider rights), Black Britain, Britain on Film (3 themes – Cities, Rural, Coastal – and the map), Charley films ex FTS, China, Cinema of WW1, Coal, Comedy, Cricket, Cycling, Disability, Football, Forgotten Features, Gothic, Home Front, Home Movies, India, Jarman, Jewish Britain, LGBT Britain, Love, Lusitania – FastTrack, Mitchell and Kenyon, Never Mind the Ballots, Olympics, Other Grooves, Pleasure Principle, Powell and Pressburger, Public Information Films, Science Fiction, Seasonal and Anniversaries, Shakespeare, Shipbuilding, South Asian Britain, Steel, Submission Pick-up, Suffragettes, Television for Children – Fast Track Submission (Bof title), Tennis, Textiles, Thrill, Topical Budget, Trains, Victorian, and WTF.

films selected for digitisation must be British, must originate on film, must not be currently, lawfully, available, and must have been made between 1890 and the present day.⁵⁶⁰

4.4.2 Project Outputs/Resources

Over 10,000 films have been made available via the BFI Player, the preferred delivery method for the films.⁵⁶¹ Most of the films are free to view, while some of the longer works are available on a pay-per-view or subscription basis.⁵⁶² The collection is available to view in the UK and Ireland.⁵⁶³ Annie also feels that rights are now better understood across the BFI, which had been an issue prior to, and at the beginning of the project.⁵⁶⁴

4.4.3 Benefits provided by the outputs/resources

The main aims of UFH were to preserve film that is scattered across the UK, and to provide access to film. The BFI have recognised the need to develop a digital preservation infrastructure, which includes both skills and equipment. The BFI also wanted to push the BFI Player as the place to access all this content. There are plans that the content digitised during UFH will be pushed out to the mediatheques and regional hubs, so the project also has an outreach and local community aspect as well.⁵⁶⁵

4.4.4 Rights ownership and results of rights clearance process

The Rights and Contracts team are responsible for rights research and clearance for the UFH project. The team consists of eight members of staff, four of whom are responsible for licensing for commercial distribution, and four of whom work on the archive collection and licensing for educational uses. During UFH, three staff members were responsible for the primary rights research and licensing. Two of those are permanent posts dedicated to rights research and contracts, and one was a fixed-term contract specifically for UFH.⁵⁶⁶

This is the best-resourced project in terms of staffing for rights management and clearance that the researcher has come across during the PhD: three full-time staff over a period of five years is highly unusual. Of course, rights management and licensing is an essential

⁵⁶⁰ British Film Institute Interview Transcript, p.316, lines 28-32.

⁵⁶¹ The BFI Player is available at <https://player.bfi.org.uk/>.

⁵⁶² British Film Institute Interview Transcript, p.316, lines 48-49.

⁵⁶³ Ibid, p.316-317, lines 53-54 and 1-2.

⁵⁶⁴ Ibid, p.346, lines 16-31.

⁵⁶⁵ Ibid, p.316, lines 32-46.

⁵⁶⁶ Ibid, p.314-315, lines 52-55 and 1-11.

component of BFI's day-to-day operation, and it's more of a necessity on this project because of the scale and commercial elements. The difference here, between the WL and BL approach, is clear.

Table 4.6: Results of BFI UFH rights clearance

Rights Status	No. of Works	No. of Rights holders
Public Domain	2962 (<i>Not provided</i>
BFI copyright	456	1
Third Party	1504	1271 researched
Granted permission	<i>Not provided</i>	384
Refused permission	51	24
Non-response	<i>Not provided</i>	7
Orphan	247	<i>Not provided</i>

Table 4.6 shows that, of the 5,169 films selected for digitisation, 2962 (57%) were found to be in public domain. BFI owned the rights in 456 titles (9%). Only 247 (5%) of the selected films were found to be orphan works, which is a lowest rate reported in any of the case studies collected during the PhD. This may reflect the levels of expertise and resource available within the BFI to conduct extremely thorough diligent searches over long periods of time. 1504 films (29%) were found to be third party works. In relation to these works, 384 rights holders granted permission. 24 rights holders refused permission, in relation to only 51 titles. Annie identified 7 non-responders, which is an extremely low rate. Overall, this is an exceptionally successful rights clearance project.

The salary costs for rights staff are estimated to be £272,000 over four years.⁵⁶⁷ A music rights consultant was paid a fee of £3,000. CMOs are paid approximately £2150 in annual licenses. The cost of accessing subscriptions services to assist with diligent search, e.g., Ancestry.com. the Electoral Register and IMDbPro, are approximately £400 annually. This brings the staff and resource costs for the rights clearance process over four years to £285,200. Divided by the 5,169 films selected for digitisation, this equates to £55.17 per title.⁵⁶⁸

⁵⁶⁷ This is based on 1 full-time fixed-term contract staff member for 4 years at £133,000, 1 permanent staff member at 0.5 for 4 years at £73,000, and 1 permanent member of staff at 0.5 for four years at £66,000.

⁵⁶⁸ British Film Institute Interview Transcript, p.331-332, lines 1-55 and 1-7.

4.4.5 Access/Terms and Conditions of Use

The digitised content is available to view/stream on the BFI Player. Users cannot download the films, and the information made available about each title is basic: a descriptive overview is provided, with original title, genres, release date, country, location and language fields, with additional subject areas included as tags. License terms for individual films are not available, and users do not have to register with the site in order to access the free material.⁵⁶⁹ The BFI Player's Terms of Use specify that, "The service is for your personal and non-commercial use. You may not modify, copy, distribute, transmit, display, revise, perform, reproduce, publish, license, deep-link, create derivative works from, transfer, or sell any information or content obtained from the service unless expressly authorised by us."⁵⁷⁰

4.4.6 Interview Results

The author interviewed Annie Shaw, Rights Database Manager, in March 2017. This section is structured topically and follows the codes generated from the interview script.

Professional Knowledge

Annie describes the professional experience level in the department as high: "So, no one in the department is a lawyer. I've done a postgrad diploma in copyright law at King's, but I think that's the only legal qualification, law qualification anyway, that anyone's got. Everyone's been working in the field of licensing for, probably about at least ten years, some come from a more broadcast or music background, others from film, kind of more commercial than us... it's a professional expert level, that's the best way to describe it."⁵⁷¹ Experience of rights clearance is necessary for staff when hiring: there is a minimum Annie would expect a new hire to know about the law.⁵⁷²

Annie is "trying to do a bit more in terms of staff training on copyright, we don't have anything formally in place in terms of induction or FAQs or policies even, so that's an area that I'm trying to develop, not just for film works but across the board, everything."⁵⁷³ Annie notes that the BFI are generally good at supporting training and conference travel needs:

⁵⁶⁹ As an example, see 'Manchester Tickled Pink' at <https://player.bfi.org.uk/free/film/watch-manchester-tickled-pink-1993-online>.

⁵⁷⁰ The BFI Player Terms of Use are available at <https://player.bfi.org.uk/terms-of-use> [Accessed 20 December 2017].

⁵⁷¹ British Film Institute Interview Transcript, p.315, lines 13-29.

⁵⁷² Ibid.

⁵⁷³ Ibid, p.315, lines 26-29.

they funded Annie's postgrad diploma, and she has been able to attend the EU IPO Train the Trainer Orphan Works Database day, a CREATE Orphan Works event at the Digital Catapult in London; and the Mass Digitisation and Information Monopolies event at CIPPM, Bournemouth University. Annie also self-funded a place on the KES International 2-day Course on Copyright and Licensing to improve her broadcast knowledge.⁵⁷⁴

Access levels

Early discussions around UFH assumed that the material would be free to access, but Annie notes that 'free to access' means different things to different people. The complexity of the rights in some of the films meant that this wasn't possible across the board, so when users access the BFI Player, there's mix of content: free to view, pay per view, and subscription access. The 'free' issue appears to be about realistic market prediction as much as rights issues: users are unlikely to pay for something so short, i.e. anything from a few minutes up to 40 minutes long.⁵⁷⁵

There is ambition to open up access to the collections from a wider range of jurisdictions, but there were no concrete plans at the time of our interview. Annie expresses the view that archive material in particular would be easy to clear Worldwide.⁵⁷⁶

The rights have been handled on a case by case basis, as the external partners weren't restricted to materials that they held the rights in, or where they knew the rights holder. In some cases, no rights were available at all, and the externals were expected to come up with an exploitation plan as part of their application. Even where rights for the BFI Player were not available, they could still be licensed as long as the applicant could show public access in some form, from a screening to a re-release, then they were deemed eligible for funding. 'Public access' covered a variety of different delivery mechanisms: from the BFI Player to screenings to a DVD release.⁵⁷⁷

Some big features have been digitised for preservation: *Far From the Madding Crowd*, Sir Ian McKellen's *Richard the Third* and *The Crying Game* are all recognizable titles.⁵⁷⁸ The bigger films that have been digitised tend to be made available on a pay per view basis, and sometimes the BFI Player release has been 'windowed' to take into account a theatrical

⁵⁷⁴ Ibid, p.315, lines 34-53.

⁵⁷⁵ Ibid, p.316-317, lines 49-55 and 1-19.

⁵⁷⁶ Ibid, p.317, lines 19-24.

⁵⁷⁷ Ibid, p.318, lines 6-18.

⁵⁷⁸ Ibid, p.317, lines 48-54.

release.⁵⁷⁹ Annie found that some commercial rights holders were very happy to grant free access, but others wanted to retain rights. The materials from the regional film archives are free to view, and they were responsible for clearing rights themselves.⁵⁸⁰

Partnership working

The regional archives, national archives and commercial rights holders are all defined as ‘external partners’ for the purposes of the project. The external partners were required to apply for the funding to BFI: a £5M pot of lottery funding was available. The condition of the digitisation funding was that they would license the BFI the rights to put the film onto BFI Player and the Mediatheques. The BFI would receive at least one LTO tape of the digitised work. If the archive or commercial rights holder had preservation structures in place, they also kept at least one tape, so that there are multiple copies in different collections in appropriate preservation conditions.⁵⁸¹

Externals retaining responsibility for rights clearance is a somewhat unusual approach to take, given the way other partnership projects reported in the thesis have approached rights clearance. The film archives remained responsible for their own rights clearance, and they were required to indemnify the BFI. This was very difficult to negotiate at the outset of the project. As part of the contract, they also agreed a cap on liability. Annie highlighted that information-sharing and sharing of expertise was very important during the project: the regional archives don’t have legal departments, so the ability to share experience and expertise was very beneficial for them.⁵⁸²

Annie also reported that problems could arise when the same rights holders were being contacted by different archives for permission for similar titles, but for different purposes. This was a valuable lesson learned for project managing large digitisation projects like this.⁵⁸³

⁵⁷⁹ Ibid, p.318, lines 12-15.

⁵⁸⁰ Ibid, p.318, lines 23-26.

⁵⁸¹ Ibid, p.317, lines 40-48.

⁵⁸² Ibid, p.318-319, lines 31-54 and 1-2.

⁵⁸³ Ibid.

Right clearance process

The rights research started in early 2014: they were expecting the Orphan Works legislation as the BFI were part of the IPO Working Group on diligent search for film, but they didn't know what the legislation would contain.⁵⁸⁴

A straightforward management decision would be to get permission for digitisation before you start digitising, because a rights holder might say no, and then you've spent money on digitisation for no result. For example, the WL decided not to do this as the digitisation was at such scale that the processes couldn't stop without resource costs. Since 2014 the preservation exception has also been available to cover preservation copying, which is essentially what all of these digitisation projects are doing at a basic level. In practice, the BFI found this permission-before-digitisation model unworkable too. The workflow is extremely complex: there are sixteen teams involved from selection to publication across the UFH project. Different work streams took place in parallel over the course of the project, and Annie and her team had a series of rolling deadlines to meet, based on which theme was being digitised, then published.⁵⁸⁵

At the point of selection, a brief title check would be undertaken to highlight its copyright status, but nothing more than that at that stage. The title could fall into four categories: Public Domain, In-Copyright, BFI Owns Rights, and Crown Copyright. The application of the rights status meant Crown Copyright, Public Domain and BFI Owned Rights could be prioritised and move straight to digitisation. Everything else classified as In-Copyright within a particular theme could be prioritized for rights clearance. Some films were easy to categorise because back catalogues have been bought by big studios and distributors.⁵⁸⁶

Once one of the four rights categories had been assigned on the curatorial selection database, Red-Amber-Green signage was used to prioritise clearance. Green meant that work could start immediately, Amber meant proceed with caution, and Red essentially stopped selection/digitisation until the rights were resolved.⁵⁸⁷ Reflecting back at the end of the project, Annie thinks they would have progressed quicker just using Red and Green signage.⁵⁸⁸

Some of the themes were easier to classify than others: for example, for the Victorian cinema theme, they could assume that most of the selection would be in the public domain. Another

⁵⁸⁴ Ibid, p.323, lines 44-49.

⁵⁸⁵ Ibid, p.319, lines 19-40.

⁵⁸⁶ This workflow outline is based on internal project documentation.

⁵⁸⁷ British Film Institute Interview Transcript, p.322, lines 23-32.

⁵⁸⁸ Ibid, p.322, lines 36-38.

example is provided: “The British Transport Film Collection was assigned to the BFI... Public Information Films: that’s Crown,” whereas “...on the flip side, for things like disability, advertising...” assumptions couldn’t be made without more research.⁵⁸⁹ Those themes were harder to predict, and for some themes, Annie felt it was obvious that they would be tricky to clear, though not necessarily for copyright reasons: the examples mentioned include sensitivity and privacy reasons, and brand reputation.⁵⁹⁰

With a project this size, there were frustrating instances when rights were cleared for a title only for the reel or tape to turn out to be missing, or so badly damaged it couldn’t be digitised. Wasted effort is a reality that has to be factored into projects of this scale.⁵⁹¹

The main clearance challenges identified by Annie were for music and TV. If films had lots of popular music in the soundtrack, they were deselected. They may have been made available in some circumstances with the sound cut-out, but this wasn’t considered an ideal way to present works.⁵⁹²

BFI have assumed in their contracts that whoever is licensing to them, has the authority to do so for the whole film: “Licensing the film, fully cleared.”⁵⁹³ Annie explains that most people signed on this basis. This assumption is one way of managing the level of administration that would be created if licensors were required to prove chain of title. Annie identifies that some institutions ‘that are a bit more clued up on rights’ could identify for them where they weren’t able to license something, and Annie explains that when this happened, the BFI took a mixed approach. For materials published on BFI Player, PRS for Music (performance rights) have given them a blanket license, which will cover ‘certain things’: presumably not the Beatles or the Stones. The Musicians Union have agreed a blanket license which covers TV.⁵⁹⁴ Unfortunately, BFI haven’t been able to agree terms with the Writer’s Guild or Equity, so there’s not much TV that can be made available.⁵⁹⁵ The implication here is that, if some licensors are more experienced than others, then embedded works for which they do not hold the rights may be slipping through without appropriate clearance.

Annie also provided gives some examples where they had the rights to proceed with digitisation, but decided to re-check or re-clear them, particularly with ‘performance or

⁵⁸⁹ Ibid, p.319-320, lines 46-55 and 1-12.

⁵⁹⁰ Ibid.

⁵⁹¹ Ibid, p.320, lines 16-26.

⁵⁹² Ibid, p.328, lines 52-54.

⁵⁹³ Ibid, p.329, lines 6-8.

⁵⁹⁴ Ibid, p.329, lines 8-37.

⁵⁹⁵ At the time of our interview, BFI were also negotiating a blanket licence with PPL (the CMO for recorded music played in public).

engagement agreements’. Michael Caine, Sean Connery and Annette Newman were asked if it was acceptable to make adverts they appeared in available online.⁵⁹⁶

Risk policy

As a result of this project, the BFI have adopted a ‘risk policy’, approved by senior management, which is the first time the BFI have done this. They used the WL’s Codebreakers risk criteria, with slight modifications. They also adopted the Wellcome Library risk rating levels, with some specific adaptation for film collections.⁵⁹⁷ The risk criteria are:

1. “Low: (default – all titles not considered Medium/High)
 - a. Digitisation cost is no more than £1,000

ACTION: Sign off by Rights Database Manager & proceed to digitisation/publication

2. Medium:
 - a. Digitisation cost is over £1,000
 - b. Author/Rights Holder has/had a high public profile
 - c. Author/Rights Holder is alive or estate is known
 - d. Title has been commercially available/was made for commercial exploitation

ACTION: Sign off by Head of Content Development & proceed to digitisation/publication or alt. title chosen by theme Curator.

3. High:
 - a. Author/Rights Holder is well known public figure
 - b. Author/Rights Holder is known to actively protect/enforce their copyright
 - c. Relationship between BFI and author/rights holder is awkward

*ACTION: Sign off by Creative Director, Programme or do not proceed and select alternative title.”*⁵⁹⁸

Annie noticed that some of regional archives are a lot more cautious than the BFI: the assumption is that the BFI can take more risks. This is a fair point: Annie says they know how to ‘react to it if it kicks off.’ If an institution knows that they can handle a complaint from a rights holder, it promotes more confidence.⁵⁹⁹

One risk the BFI have taken is similar to the approach adopted by GSA A&C, where works created before 1945 are assumed to be in the public domain. This wasn’t entirely a blanket approach however, and there have been a couple of exceptions to the rule.⁶⁰⁰

⁵⁹⁶ British Film Institute Interview Transcript, p.330, lines 24-30.

⁵⁹⁷ Ibid, p.320, lines 30-46.

⁵⁹⁸ The policy also states: “In addition to the factors below, risk needs to be considered in view of the Type of film; Commercial value; planned exploitation and expected value of revenue generated.” These criteria are taken from internal BFI documentation.

⁵⁹⁹ British Film Institute Interview Transcript, p.320-321, lines 54-55 and 1-9.

⁶⁰⁰ Ibid, p.326, lines 45-54.

Non-responders

Annie feels that sometimes that non-response happens because it's just not worth the rights holders' bother to reply: 'They see the work that we're doing as unrelated to their business.' Big commercial companies are less interested in spending their time on paperwork for small, non-commercial projects: it doesn't sound like a sensible use of their time. Annie points out that this means 'Keep them sweet and be ultra-polite,' in practice. They may not know what to charge, or who could look at the contract without having to pay for it.⁶⁰¹ It creates a discrepancy because there are other similar rights holders that have been contacted and have gone through the negotiation process, but there has to be a result at the end of the process. The particular example of non-response that Annie is concerned about is in relation to a group of films, not just one, and their exclusion would leave a sizable hole in the project coverage.

They made one particular film available on a risk basis, as they hadn't been able to contact the rights holder. Eventually the rights holder got in touch with BFI: it turned out that they were really pleased it had been made available, and they wanted to licence their other films, so it turned into a good deal.⁶⁰² Indeed, Annie notes that, as a result of UFH, many of the rights holders they get in touch with ask if BFI are interested in their other films, so it leads to more content being licensed, or it may do so in future.⁶⁰³

Dealing with a complaint

They have received only one take down request in relation to UFH so far. They were sent a letter stating that the rights holder was going to take action against them. Despite the fact that the BFI are indemnified by their contract with the regional archive, they feel responsibility lies with them because the Player is their platform, so the BFI investigated the claim: it wasn't just handed off to the regional partner. It was found that the rights holder had a stronger chain of title. The rights holder refused a licensing deal. They also asserted ownership in all of the copies of the film, claiming that they were infringing. Astonishingly, the lawyers gave undertakings that would have removed all of the BFIs rights to use the material, even uses permitted by the exceptions. The complaint is now resolved, and as a result, they have had to sign undertakings in relation to the takedown request.⁶⁰⁴

⁶⁰¹ Ibid, p.323, lines 11-25.

⁶⁰² Ibid, p.322, lines 8-18.

⁶⁰³ Ibid.

⁶⁰⁴ Ibid, p.321, lines 37-54.

Issues with the selection process

An issue Annie identified with the selection process was the staggered nature. An example is provided by Fremantle Media: within a particular theme, you might get a batch of 50 films to clear, and then two years later, another 10 in a different theme. You have to re-open the lines of communication again with the rights holder, who may be impatient or confused as to why they are being contacted multiple times. What ended up happening was that a contract would be signed, then amended multiple times over the course of the project.⁶⁰⁵

The ultimate de-selection decision was taken by curatorial, it was never just a technical or a rights-based decision. Annie thinks this is problematic. Some of the films where they couldn't clear rights, they could make them available on a risk basis: but for others, Annie just felt they shouldn't be made available.⁶⁰⁶

Diligent search

The rights research relies on complete metadata about the titles being available in the collections information database: production company, main credits, film authors, sponsors, etc. Annie outlines their internal sources: the Rights and Royalties system and the distributor history document, which is essentially an extended administrative history for all film distributors are the key sources.⁶⁰⁷ Annie calculates that 1,271 companies and rights holders were researched in total.⁶⁰⁸ The curatorial selection database had to work in tandem ('an extra, direct spool') with the collections information database.⁶⁰⁹ The ramifications of individual silos of information within single institutions are obvious in a project of this scale.

Annie describes the initial copyright status check they ran on all titles. There are two separate processes: one for the production company, the other for film authors. They used Ancestry, IMDb Pro and the Electoral roll as their main sources. They also used probate searches 'a bit', but you have to pay by cheque and getting one issued internally is problematic. Electoral roll credits only last for a few months so you have to plan your searches accordingly, although Annie notes that Ancestry and IMDb Pro were the most frequent sources: 'I don't think we really used the Electoral Register that much.' They may have gone to the probate registry once, but the rest was done via email/, letter and phone. Setting up a special Facebook Profile called Drew Diligence 'actually proved really useful as well.' Emma, Annie's colleague on a fixed term contract from the UFH project, did most of the diligent

⁶⁰⁵ Ibid, p.322-323, lines 53-55 and 1-11.

⁶⁰⁶ Ibid, p.322, lines 36-38.

⁶⁰⁷ Ibid, p.322, lines 38-47.

⁶⁰⁸ Ibid, p.322, lines 48-49.

⁶⁰⁹ Ibid, p.322, lines 38-42.

searching: “She is kind of like a detective. It is a bit like being a stalker. And finding interesting ways of getting through to people.”⁶¹⁰

“Yeah, I mean, in one instance she had to write a letter to someone like Lord Attenborough, and all she had was the village in the county, so I think she just wrote Lord, this village, Hampshire, and posted it. And she just assumed it would get to the village, and they would know: and it did! And eventually we got a letter back, about a year later...” this illustrates that some of diligent search is a case of winging it, and hoping for the best.⁶¹¹

Annie explains that you can do diligent search for a few months and not get anywhere, leave it, then come back to it later and suddenly have a breakthrough. A news article, or perhaps more information becomes available online: serendipity is an element of any search.

Importance of rights research

Annie makes the very important point that copyright research isn’t taken as seriously as curatorial knowledge or archival knowledge, even though rights knowledge in general gives insights into the context of creation and the administrative history of collections. The discrepancy in staffing is distinct: 35 people in curatorial, 3 permanent staff in rights for the archive collections.⁶¹²

Annie feels strongly that rights are a legitimate part of the ‘whole research on the work,’ and that diligent search is always seen as a burden. She argues that, “If you see it as part of the same value of the knowledge around your collections, then you might love it a little more.”⁶¹³ This is especially relevant for archives, because rights give an insight into “context of creation, provenance, all of those things are tied up with it.”⁶¹⁴ This is a very positive and constructive way of looking at the rights research process and the insight and context it can bring to a project.

Capturing the life dates of authors and creators is highlighted as a strategy ‘We want to try and do’ so that it is clear when titles are out of copyright, “And if we don’t start trying to get that information captured right now, you’re going to end up with so much of a sort of blurred public domain.”⁶¹⁵

In terms of cataloguing standards, where person names are used as an index term, they should have life dates. While life dates are often used to differentiate between people with the same

⁶¹⁰ Ibid, p.325, lines 15-52.

⁶¹¹ Ibid, p.326, lines 2-6.

⁶¹² Ibid, p.323-324, lines 51-55 and 1-2.

⁶¹³ Ibid, p.324, lines 16.

⁶¹⁴ Ibid, p.324, lines 18-20.

⁶¹⁵ Ibid, p.324, lines 22-27.

name, life-dates can also immediately give you an insight into duration of copyright in a particular item. It also ties in with semantic linking: if one person has materials housed in different institutions, but who have all made their collections available online, the items are linkable through that person name.

Orphan Works

BFI have registered 274 works (including 5 embedded works) on the EU IPO orphan works database. BFI's estimate for orphans across their collections has always been 15%: it may in fact be lower, going by the results reported here. Annie notes that if they had 'a different rule' on out of copyright: if they had decided on an earlier cut-off date, 1935 or 1925 for example, thereby bringing more titles within the scope of copyright protection, they would have come across more orphans. It's all a matter of where an institution decides to draw the line.⁶¹⁶

Annie says dealing with the orphan works issues as a result of the legislation has made them go back and question some of information on their rights system. "...We now have, on our rights system, quite a chunky list of films that, they were set up as orphans before orphan works came in, or they're also listed as, BFI claims rights, and this is all very kind of subjective, individual decisions by certain people across decades... we kind of really need to sort of clean that up a bit, and go back and say, "Why was this decision taken?"⁶¹⁷

Annie spoke to Studio Canal and asked how orphan works were affecting them, and it sounds like they are also reviewing some of their older titles. Annie said that this can mean that older, perhaps anecdotal information, and historic decisions can come under the spotlight again as a result of the Orphan Works legislation and how this is implemented at a practical level. There are questions to be asked about returning to long held positions, in this new light, and revalidating their accuracy as well as decisions about whether you decide to effect a change. Dealing with volumes of clearances for mass digitisation, where you are trying to get permission the most efficient way does mean there is scope for historic decisions being ignored especially when information is not centrally recorded.⁶¹⁸

Consultancy services

They hired a consultant that specialised in film music rights. The consultant was hired in relation to two themes: Other Grooves and Beat Generations, which included promotional music videos. He took the basic information the BFI had (the performers, whether it was a

⁶¹⁶ Ibid, p.327-328, lines 53-55 and 1-4.

⁶¹⁷ Ibid, p.335, lines 2-8.

⁶¹⁸ Ibid, p.335, lines 8-12.

soundtrack recording or a live recording, whether it was a genuine promo video, etc.) and then did further research. “He had some conversations with some of the key players, the bigger music labels, i.e. Warners, Sony, Universal, and I think he spoke to PRS and PPL, and really taking very pragmatic views that for a lot of these things nobody would know what was cleared in the first place, no one would be able to prove, yes or no.”⁶¹⁹ Even the big commercial companies can be very pragmatic about this stuff: they don’t know the rights status either. As a result, BFI took ‘a blanket risk approach to music.’⁶²⁰

“And we just said we were going to go ahead and publish everything, except for the Beatles, the Rolling Stones, Bob Dylan and someone else – was it the Kinks, I think? They were flagged as ones that would be tricky to deal with and very expensive to license,” although Annie points out that it’s a shame a British film project doesn’t feature the Beatles or the Stones.⁶²¹

No license fees were offered during the project: if rights holders wanted to charge for use, they were offered a revenue share of 50/50 net, and the film was placed behind the BFI Player paywall. With commercial external partners, if they wanted a revenue deal, 10% had to go to recouping the grant for digitisation with a 45% split of the net.⁶²²

There are only one or two examples where fees were paid, but those were for more than just making available: “I think there might be one or two films where we did pay fees, or advances, but that was when we were getting a much bigger bundle of rights, and we were also doing film distribution, DVD release, theatrical re-release ... the money that would allocated against VOD [video on demand] might be tiny.”⁶²³

Takedown

There is a takedown policy in place for the Player, but they haven’t formally firmed up the process for what to do when one actually comes in. “We haven’t really had the sort of conversation across the various teams about actually what happens when we get someone coming in complaining.” Annie explains that “...across the board in the organisation, in terms of any infringement, whether it’s us infringing, or there’s someone infringing us, it’s all a bit ad hoc.”⁶²⁴ Claims generally either go to Annie or General Counsel.⁶²⁵ The takedown request they have received has not affected current or future plans for digitisation. The takedown hasn’t led to the risk categories being re-assessed, but Annie mentions that she

⁶¹⁹ Ibid, p.329, lines 29-33.

⁶²⁰ Ibid, p.329, lines 33-37.

⁶²¹ Ibid, p.329, lines 37-42.

⁶²² Ibid, p.331, lines 31-38.

⁶²³ Ibid, p.331, lines 38-42.

⁶²⁴ Ibid, p.334, lines 11-20.

⁶²⁵ Ibid, p.334, lines 45-47.

would probably do this anyway. They were developed specifically for this project, but they should be able to be modified and applied across the BFI if required.⁶²⁶

Outreach

The Britain on Film collection was launched in May 2015. It's the biggest launch the BFI has ever undertaken. Since the launch, there have been 2M views on BFI Player, with more than 200,000 hours of footage viewed, and 50,000 monthly views. Most of the views come via Facebook. This is 4x the BFI's original target for the project. There is intent within BFI to start crowdsourcing geographical indicators and potentially other information in the films as well.⁶²⁷ Annie explains that the small level distribution is unfamiliar to BFI, but that this has changed with UFH:

*"...there's definitely been lots of different regional shows, and in terms of, it's always quite an interesting one for us, because we have a fully-blown, fully-developed distribution department who do theatrical releases, and for a lot of this stuff, that doesn't really fit within that model, because we're not officially taking it into distribution and then doing posters and new prints and everything. So, it's a bit of an odd area, some of this smaller level distribution, we've had quite a few requests from, again, community groups, to screen from Player."*⁶²⁸

Commissioning creative works

The filmmaker Penny Woolcock was commissioned to create a film by BFI as a creative response to the Britain on Film collection.⁶²⁹ While the contractual agreement between the BFI and the external partners stipulated that the digitised film would be housed in the archive, it would be available on BFI Player, and it would be available to view at the Mediatheque, the contracts also contain a promotional rights clause. The BFI can use extracts, 'either 3 minutes or 10% of the full running time.' For any other uses they have to go back to the external partners or to the third parties. Penny's film was constructed from a mixture of BFI material, regional archives material, 'and some other things,' i.e., third party materials. When they went to clear rights with the regional archives, they were happy to contribute so long as they got a credit: no licensing fees were paid.⁶³⁰ The issue was with how certain third-party materials were re-used and needing to obtain further clearances especially as Channel 4 wanted to broadcast it, which meant "...we really had to get it

⁶²⁶ Ibid, p.334, lines 45-47.

⁶²⁷ This information was taken from BFI internal documentation.

⁶²⁸ British Film Institute Interview Transcript, p.338, lines 33-39.

⁶²⁹ 'Out of the Rubble' is available to view on the BFI Player at <https://player.bfi.org.uk/free/film/watch-out-of-the-rubble-2015-online> [Accessed 20 December 2017].

⁶³⁰ British Film Institute Interview Transcript, p.339, lines 12-25.

cleared because...it was something that was going to be nationally broadcast.”⁶³¹ Annie acknowledges that this is a ‘topsy-turvy’ way of doing things, and not the way they would normally do things with a commission. Annie explains that ‘...the BFI wants to do a lot more in terms of creative reuse and really enabling mashup and all those kind of things.’⁶³²

However, in terms of UFH, BFI “don’t have the right to sublicense.”⁶³³ The films are not available for creative re-use. Annie doesn’t think BFI is quite ready for Creative Commons, although BFI do want to start introducing it for the next digitisation project of 100,000 TV works. Annie has flagged it for discussion. When I try to clarify this: is it an attitude, or a process, policy or behavioural issue? Annie says “I think it’s everything.”⁶³⁴ Creative Commons isn’t well-understood across the organization: “I don’t think people actually know what Creative Commons is.”⁶³⁵ Annie explains that this is the first project where rights have been given a seat at the table. Everything about the project, from the policies, processes, and decisions, has been about getting the 10,000 films out.⁶³⁶ As Annie says: “How do you start really rolling this kind of concept out across other areas, because other activities don’t have this kind of clarity...” Annie anticipates that there may be some conflict with current practices across the organisation. It’s about an evolution, building on previous experience.⁶³⁷

BFI did dip its toe in the water with the Creative Archive License. Annie feels that “There’s quite a big discussion to be had in terms of, when people say creative re-use, what do they actually mean, and do they understand the different bits of licensing that’s required, in all the steps?”⁶³⁸ Annie explains that providing access, especially to third party material, can get ‘really blurry’ depending on the use.⁶³⁹ Annie also provides an interesting example of how a creator might describe their work in relation to copyright, and Annie having to explain that personal definitions don’t matter under the law: it’s covered by copyright. The example given is of a sound engineer saying they have created a soundscape as opposed to a soundtrack. Annie had to explain that you can call it what you want, but it functions in the film as a soundtrack and is therefore protected as such.⁶⁴⁰

⁶³¹ Ibid, p.339, lines 39-41.

⁶³² Ibid, p.339, lines 41-50.

⁶³³ Ibid, p.340, lines 19.

⁶³⁴ Ibid, p.340, lines 19-28.

⁶³⁵ Ibid, p.340, lines 32.

⁶³⁶ Ibid, p.340, lines 32-40.

⁶³⁷ Ibid, p.341, lines 3-8.

⁶³⁸ Ibid, p.341, lines 17-20.

⁶³⁹ Ibid, p.341, lines 21-28.

⁶⁴⁰ Ibid, p.339, lines 41-50.

Collaboration

UFH has been a big step change for the BFI in terms of how they work internally: there has been more collaboration between and across departments internally. They've also engaged with different communities: during the diligent search process they engaged with fan sites and various blogging communities, and Annie has been thinking about the best way to 'make that approach' to those communities. The cataloguing department within BFI may be going down the crowdsourcing route in future, so making sure rights information is included is something Annie has been trying to flag with them.

Benefits of engaging with orphan works schemes

Rather than changing the way they undertake due diligence, or formalising an approach they were already taking, Annie explains that engaging with the orphan works process has been 'a bit of both really'. It has formalised practice to a certain extent, but it's also provided an outline and structure for search, and helped to start conversations around rights within the BFI. Annie says: "I think it also allowed us to pay some more attention to the resources we were using and also be a bit more kind of...inventive, or things like a Facebook page, or just trying to find slightly oblique ways of getting in, getting bits of information. And, so I still kind of want to make a bit more of a point about that skill, rights research skill, detective work skill, as a something that should be recognised as a skill."⁶⁴¹

Working on the project has brought together existing practice, new practice and copyright awareness. Annie had to position the department to catch Orphan Works as the legislation developed: they knew it was coming, but there wasn't awareness across the organisation, even though they were going into a mass digitisation project.⁶⁴² Annie states that UFH would have gone ahead regardless of the EU IPO OW database and the UK IPO OWLS. They would have had to take a more risk-assessed approach, but it would have happened regardless. BFI are happy to continue using the OW database. In fact, Annie intends to prioritise registration of works before Brexit takes place, although she notes that getting traction for this internally has proved difficult, which she finds disappointing. Annie wants to take a collection-by-collection based approach rather than register everything at once.

Annie lists the positive of engaging with rights clearance and the OW database as: success and engagement with the EU, with other archives, with peers and colleagues; finding new

⁶⁴¹ Ibid, p.346, lines 16-31.

⁶⁴² Ibid, p.323, lines 44-49.

rights holders, heirs, and families; licensing their material; building new relationships with them; and coming across new material in the archives.

Orphan works reform

Annie feels that the way the UK IPO OWLS is structured doesn't make sense for film rights. Also, feedback internally at the BFI is that the scheme is too expensive for film, and screenings and DVDs in particular are too expensive.⁶⁴³ Annie notes that the BFI are in the awkward (and absurd) position of having lobbied for an orphan works solution and are now unable to use it.

Annie also highlights some of the negatives associated with the EU IPO orphan works database and exception: screenings are not included within the scope of the exceptions, so in some ways, the exception is not very helpful for audiovisual archives. We also discuss what might happen after Brexit: what happens to the works that you've already registered with the EU IPO orphan works database? Will UK institutions be able to continue doing so?

On the subject of further legal reform, Annie thinks that any solution would need to reflect the fact that many film and TV titles will be part-orphans. Annie expresses displeasure at the current definition of out-of-commerce that's being used. Annie also notes that there is a 'lack of any real collective mechanisms' for the AV sector. In terms of an ECL, the BFI did consider the Educational Recording Agency as a potential partner, but BFI have found that 'We actually seemed to get a more positive response' by doing what they're doing now, i.e. discussions and deals with big rights holders and multiple CMOs, rather than doing a deal with ERA.

Annie doesn't think Film Bank and the Motion Picture Licensing Company (MPLC) are really CMOs in the sense that would be required to support an ECL scheme. Annie reflects that getting the industry on board would be very difficult because the rights are so diffuse in the AV sector: "I think the industry, everyone loves the infinite divisions and divisions and divisions of rights, and they just create more and more and more of them...So, unless the industry was to back it and really throw lots of money at it and push it through, I just can't see how it would happen for AV, sadly."

⁶⁴³ It's possible to check potential costs using the online application process for the UK IPO OWLS, without committing to an actual application. The author's experience with the OWLS suggests that this conclusion is accurate: film screenings in particular are prohibitively expensive.

4.4.7 Key points

The majority of rights holders who were contacted, responded positively. This project had a lower orphan and non-response rate than other rights clearance exercises. BFI were able to take advantage of blanket licenses available from CMOs, which is unusual for an archive digitisation project: this is because of the specialist subject matter. The rights team at BFI developed new policies as a result of the project, including a risk-based approach to clearance for digitisation. BFI used the EU IPO Orphan Works database to register the orphan films they digitised, despite the fact that digitisation would have gone ahead in the absence of a legal mechanism. BFI worked with multiple external partners during the project. The external partners were required to indemnify the BFI as part of the project contract, which is unusual when compared with other partnership digitisation projects. Only one takedown request has been received in relation to material made available during the project.

4.5 British Library

4.5.1 Institution and project background

The British Library is the UK's national library, created by the British Library Act 1972. It is a legal deposit library and holds over 150M collections items. In 2016/17 there were 415,000 visits to their reading rooms, and 4M items were consulted online. The BL has six purposes, the fulfillment of which enables them to '...achieve our wider objective of making our intellectual heritage available to everyone, for research, inspiration and enjoyment:'

- *"Custodianship: We build, curate and preserve the UK's national collection of published, written and digital content*
- *Research: We support and stimulate research of all kinds*
- *Business: We help businesses to innovate and grow*
- *Culture: We engage everyone with memorable cultural experiences*
- *Learning: We inspire young people and learners of all ages*
- *International: We work with partners around the world to advance knowledge and mutual understanding.*"⁶⁴⁴

The journalist Charlotte Raven attempted to relaunch the feminist magazine Spare Rib in April 2013, and initially, the founders of Spare Rib were excited about the project. As time

⁶⁴⁴ British Library (2017) Annual Report and Accounts 2016/2017, HM Stationery Office HC170 SG/2017/10, available at <http://www.bl.uk/aboutus/annrep/2016-17/Annual%20Report%202016-2017.pdf> [Accessed 20 December 2017].

went on, Rosie Boycott and Marsha Rowe ‘felt that the relaunch was really not in the spirit of the original magazine.’⁶⁴⁵ They decided to trademark Spare Rib so that Raven couldn’t use the title: Raven she ended up launching ‘Feminist Times’ instead.⁶⁴⁶

The attention generated by the dispute meant that Marsha and Rosie, along with other original contributors, felt that there was an opportunity for Spare Rib to get a new audience. At the same time, a BL curator, Polly Russell, ran a very successful oral history project called ‘Sisterhood and After’ which tapped into Spare Rib as a resource.⁶⁴⁷

The BL have very little in the way of technical capacity for hosting this sort of project online, so it was essential to find a partner who could, but who would also accept the rights issues inherent in the project. Initially the BL were working on the project proposal with the London School of Economics, but they ended up backing out. Ben believes this was because of the rights issues presented by the project. As a result, the BL needed to find a new partner to work with: staff within the BL suggested they approach the Joint Information Systems Committee (JISC). JISC agreed to come onboard in 2014.⁶⁴⁸

4.5.2 Project Outputs/Benefits provided by the outputs

The full run of 239 issues of Spare Rib is available through JISC’s Journal Archives service. 300 selections from the archive have been made available on the British Library’s own Spare Rib website, where the curated content is contextualized with 20 articles written by a variety of contributors.⁶⁴⁹

4.5.4 Rights ownership and results of rights clearance process

Spare Rib contains a variety of material from a large range of contributors: writers, poets, artists, photographers and designers. To identify the contributors, a group of 15 volunteers was recruited and worked onsite at the BL for two weeks, listing every individual name in the issues. This produced a list of 4, 714 names. The volunteers’ job was made slightly easier

⁶⁴⁵ British Library Interview Transcript, p.307, line 17.

⁶⁴⁶ Media reports from the time are available at <https://www.theguardian.com/media/2013/may/08/charlotte-raven-spare-rib-radical-feminism> and <http://www.telegraph.co.uk/women/womens-life/10138461/My-wounding-battle-with-Spare-Rib-founders-over-feminism-2.0.html> [Accessed 20 December 2017].

⁶⁴⁷ The project website is available at <https://www.bl.uk/sisterhood> [Accessed 20 December 2017].

⁶⁴⁸ British Library Interview Transcript, p.307, lines 30-41.

⁶⁴⁹ These can be accessed at <https://www.bl.uk/spare-rib/articles> [Accessed 20 December 2017].

by the fact that Spare Rib were very consistent with attribution and acknowledgements. They did no risk assessment on the rights holders: it was decided to contact all of them.⁶⁵⁰

In terms of the rights clearance process, contributors were sent a letter or an email if an address was found for them, or if they approached the BL as a result of the publicity. They also employed Sticks Research Agency (a rights clearance agency) to manage the clearance.⁶⁵¹ The emails included an embedded link which meant permission could be given electronically.

In addition to contacting rights holders, the BL used a variety of publicity strategies to seek out former contributors: staff appeared on Women’s Hour, wrote about the project for the Guardian, and they also used various list serves, relating to any groups that “naturally coalesce around feminist issues.”⁶⁵² Table 4.6 presents the results of the rights clearance process for the Spare Rib Digitisation project at the time the case study was conducted, in June 2015.⁶⁵³

Table 4.6: Results of Spare Rib rights clearance process as of June 2015

TOTAL RIGHTS HOLDERS IDENTIFIED	4,714	
Total replies	1263	27% of those identified
Permission granted	1232	98% of respondents
Permission refused	31	2% of respondents
Orphan rights holders and non-responders	3421	73% of those identified

While a 27% response rate is low compared to the other projects reported in the thesis, the size of the response is relatively large. It is positive to note that 98% of those respondents granted permission for use. The BL team identified rights holders whose works were orphaned, and these have been recorded on the EU IPO Orphan works database. This is a combination of anonymous works, works where the rightsholders could be identified but where contact details could not be found, and works where the rightsholder did not respond to permission requests. The difficulty of determining orphan works status in situations of

⁶⁵⁰ More detail on this process is available in Vernon, A. (2015) ‘Digitising Spare Rib Magazine: The Inside Story,’ *Living Knowledge blog*, British Library, 28th May 2015, available at <http://blogs.bl.uk/living-knowledge/2015/05/digitising-spare-rib-magazine-the-inside-story.html> [Accessed 20 December 2017].

⁶⁵¹ <http://www.stick.org.uk/> [Accessed 20 December 2017].

⁶⁵² British Library Interview Transcript, p.309-310, lines 54-55 and 1-2.

⁶⁵³ It’s worth noting that these figures will have changed in the intervening period as the project progressed and was eventually completed. The orphan works registered on the EU IPO Orphan Works database give a good sense of the scale and detail involved in the rights clearance effort.

non-response is well-known and reported elsewhere in the thesis.

The EU IPO Orphan works database shows that 5,531 embedded works have been identified as orphan in the Spare Rib collection: 3255 where the rightsholder is anonymous, and 2276 where the rightsholder has been identified, but has not been located.⁶⁵⁴ This is a large number of orphan works, despite the BL working closely with the activists involved with Spare Rib, and despite working with rights holder representatives including ALCS, BAPLA, DACS and the Society of Authors (SoA).⁶⁵⁵ This raises questions about the level of representation in such organisations.

Over the course of the project, over 2000 hours were spent on rights clearance. This is in addition to the fees paid to the rights agency.⁶⁵⁶

4.5.5 Access/Terms and Conditions of Use

The BL generally offered rights holders a Creative Commons Attribution Non-Commercial licence (CC BY-NC), and while this licence proved the most popular, variations were offered based on feedback from rightsholder organisations, and the BL website does note that all usage is non-commercial.⁶⁵⁷ Rights status is given on each individual item available online. In practice, this is quite cumbersome: you can see the rights information when you select ‘Thumbnail’ search on the JISC Journal Archives site. Rights information is included on a separate page after each scanned page of the journal.⁶⁵⁸ The Spare Rib page on the JISC Journal Archives site contains a standard Terms of Use page,⁶⁵⁹ and a ‘Spare Rib Ethical Use Statement.’⁶⁶⁰

⁶⁵⁴ Search for ‘Spare Rib’ in the EU IPO database at <https://euiipo.europa.eu/orphanworks/#search/basic/all/Spare%20Rib>

⁶⁵⁵ British Library Interview Transcript, p.310, lines 40-50.

⁶⁵⁶ Correspondence with the author.

⁶⁵⁷ See <https://www.bl.uk/spare-rib/about-the-project> for more details.

⁶⁵⁸ An example is available at https://data.journalarchives.jisc.ac.uk/britishlibrary/sparerib/view?volumeIssue=33313337323334343737%233383234353738313239%2339&journal=33313337323334343737%233383234353738313239&pubId=P523_344_Issue52PDFP523_344_Issue52_0004-0005_10pdf

⁶⁵⁹ This can be accessed at <http://www.bl.uk/aboutus/terms/copyright/> [Accessed 20 December 2017].

⁶⁶⁰ The Ethical Use statement goes further than the usual terms of use language and asks re-users to apply the following principles: ‘Please credit the author; Please respect the creators’ works, including their moral rights; Please ensure you consider traditional cultural expressions and all ethical concerns in using the material, and make sure that any information relating to the creator is clear and accurate; For the minority of works available under a Creative Commons Attribution Non Commercial licence please note, any adaptations made to a contribution should be marked as your adaption, and that use of the work should always be done with respect; Unless asked otherwise by the creator, please preserve all notices attached to the works - this will notify other users of any copyright restrictions and encourage appropriate use of the resource.’ This can be accessed at <https://journalarchives.jisc.ac.uk/britishlibrary/sparerib/ethicaluse> [Accessed 20 December 2017].

Material relating to almost 1000 contributors has been redacted (around 20% of the online resource) pending permissions,⁶⁶¹ and the BL have made use of the EU IPO database to register orphan works. To date, there are 127 entries on the database in relation to Spare Rib, which are comprised of 127 main works and 5,531 embedded works.⁶⁶²

4.5.6 Interview Results

The author interviewed Ben White (Head of Intellectual Property) in 2015. This section is structured topically and follows the codes generated from the interview script.

Project impetus

The BL holds the Spare Rib collection as a result of their legal deposit status. Ben's view is that 'a modern library has to make its collections available online. That's just part and parcel of being a large research library in 2005, let alone 2015.'⁶⁶³

Ben makes the interesting point that if you go back and look at what was available online in 1994, libraries and museums were making information available even then. 'Museums and libraries were really the only institutions that were online.' However, he also acknowledges that progress in the UK on digitisation has been slow for different reasons.⁶⁶⁴

Partnership working

JISC agreed to work with the BL on the Spare Rib project. Generally, JISC resources are available to Higher and Further Education subscribers, but it was negotiated as part of the contract between JISC and the BL that Spare Rib would be available to anyone. They also had to make special arrangement in the contract for JISC to be able to host the material, and all liability has been assumed by the BL.⁶⁶⁵

The arrangement for JISC to host the material has implications in terms of the Orphan Works directive: only beneficiary organisations can make the material available online, and they must be educational institutions. JISC are not an educational institution, so under the terms of the contract they are acting as agents of the British Library. It specifies in the contract that

⁶⁶¹ See <https://www.bl.uk/spare-rib/about-the-project> for more details.

⁶⁶² This data is accurate as of 20 December 2017. See <https://euiipo.europa.eu/orphanworks/#search/basic/all/Spare%20Rib>

⁶⁶³ British Library Interview Transcript, p.306, lines 27-28.

⁶⁶⁴ Ibid, p.306, lines 25-55.

⁶⁶⁵ Ibid, p.308, lines 10-32.

JISC have no rights to use the content other than as agents of the BL. Ben explains that this is to try and minimise any claim of infringement under the regulations.⁶⁶⁶

That element of risk had to be run past the Directors of the Library, internally. Ben didn't describe any sort of pushback from the Directors in terms of the risk, and the contract has been approved and signed with all liability assumed by the BL, so it would be safe to assume here that the Directors of the BL are comfortable with the risk associated with the project.⁶⁶⁷

Ben explains that they 'don't know' when it comes to the extent of the risk when using JISC as an agent, but that they believe it to be quite low to non-existent, as UK law allows the appointment of an agent to perform an action on one's behalf the contract gives JISC no rights to do anything other than host, so is entirely acting in the capacity of the British Library's agent/data processor.⁶⁶⁸

Sensitivity review

When I asked Ben about his main concerns going into the project, he suggested that I would get different answers depending on who I asked, but that his main concern was data protection issues, rather than copyright.⁶⁶⁹ He was aware of the scale of the rights issues, but he was concerned that the material had been written 'over 40 years ago' and that the contributors views on 'politics, society, sexuality' could have changed significantly in that time. Indeed, when they started seeking permission to make material available online, they received a couple of requests to anonymise certain contributions.⁶⁷⁰ Ben observes that he has discussed this approach with North American colleagues who are shocked that the BL have been so willing to comply with requests for anonymization, given the very strong emphasis placed on Freedom of Expression within the US constitution.⁶⁷¹ Ben agrees that copyright has been a 'bigger' issue, but he said his initial feeling was, 'This was less about copyright but more about privacy,' given that the vast majority of contributors were not paid, and were writing on women's issues for political reasons, as part of a civil rights movement – the women's liberation movement.⁶⁷²

Publicity

Ben mentioned some of the negative publicity the project generated, which he thought might be related to the issue of privacy over copyright. He explains that there was a big publicity

⁶⁶⁶ Ibid.

⁶⁶⁷ Ibid.

⁶⁶⁸ Ibid, p.308, lines 28-32.

⁶⁶⁹ Ibid, p.308, lines 36-48.

⁶⁷⁰ Ibid.

⁶⁷¹ Ibid, p.308, lines 50-54.

⁶⁷² Ibid, p.309, lines 6-7.

push with the project, in order to try and get in touch with as many contributors as possible: one of the BL curators went on BBC Radio 4 Woman's Hour to talk about it, and there were several articles in the Guardian. The articles in particular started to attract attention, and there was a lot of discussion in the comments section, not all of it positive.⁶⁷³ It resulted in a blog post, critical of the project in general, but also of the decision to use CC BY-NC licenses to make the works available.⁶⁷⁴ Ben acknowledged that using publicity was very important to the project: you want people to know about it, you want contributors to hear about it and get back in touch in order to clear rights. However, he also felt that by using it the BL made themselves a target, to a certain extent.⁶⁷⁵

And yet, the negative publicity was only a few voices out of over a thousand permissions, and the overwhelming majority agreed to a Creative Commons licence.⁶⁷⁶ Ben describes the response to the project and the requests for permission from contributors as "almost unanimously positive." He points out that most of the online reception has been warm.⁶⁷⁷ He reports that there have been 'a few' requests for removal, and for anonymization.⁶⁷⁸ There doesn't appear to have been any kind of upset or problems for those who wanted material removed.⁶⁷⁹

Diligent Search

In terms of search and information sources to assist in rights clearance, several members of the advisory board for the project are original contributors. There were also volunteers, some of whom were contributors or were involved in Spare Rib. Contributors were able to use their contacts to find individuals. Towards the end of the project, the BL also approached the National Union of Journalists (NUJ), ALCS and DACS, to see if any of their membership are represented in the magazine.⁶⁸⁰

The rights agency did the search once the initial burst of publicity was over: Ben explains that both the BL and the agency contributed suggestions to a list of potential search sources,

⁶⁷³ Ibid, p.309, lines 10-15.

⁶⁷⁴ Spraggs, G. (2013) 'Beware the Spare Rib Digitisation Project,' Action on Author's Rights blog, 18th December 2013, available at <https://blog.authorsrights.org.uk/2013/12/18/beware-the-spare-rib-digitisation-project/> [Accessed 20 December 2017].

⁶⁷⁵ British Library Interview Transcript, p.309, lines 17-23.

⁶⁷⁶ Ibid, p.309, lines 23-36.

⁶⁷⁷ The Spare Rib hashtag on Twitter gives a flavour of how the project has been received.

⁶⁷⁸ British Library Interview Transcript, p.311, lines 43-48.

⁶⁷⁹ Ibid, p.311-312, lines 50-54 and 1-8.

⁶⁸⁰ Ibid, p.310, lines 40-50.

and that the rights agency selected was a specialist in probate and genealogical searches, which the BL don't have expertise in.⁶⁸¹

Risk management

The BL haven't changed the existing approach to rights clearance as a result of this project, but they have increased the amount of internal guidance and procedures relating to rights clearance and digitisation projects. The BL have a policy of advertising their projects and expending time and effort on diligent search. Ben suggests that this might appease a returning rights holder: "So, essentially if anyone appears who is aggrieved, at least we can say I'm very sorry we didn't find you, but we have expended a lot of resource looking for others and we have had generally positive response."⁶⁸² While this is a stance that many CHIs take, it's worth noting that if the rights holder is minded to take action, this sort of effort may offer little protection in terms of the law.

The BL didn't make digitisation dependent on the rights clearance process, but they only went ahead with digitisation once some thresholds had been reached. The first was that the advisory board of ex-contributors agreed that the project should go ahead. The second was that, after the initial publicity push on the Guardian and Women's Hour, they hadn't received 'a tidal wave of refusals.' Most were positive, so they felt that they could go ahead.⁶⁸³

The rights issues in Spare Rib are complicated. As time went on, eventually a 'Copyright Spare Rib' statement appears on the individual issues, but by speaking to the advisory board, the staff at the BL learned that, other than for photographers and even then, only occasionally were contracts used, so they made the decision that they would treat all contributors as if they held the rights to the material. They asked for permission to use 'Spare Rib' as this had been trademarked. They were also unsure about the possibility of a database right and a compilation right existing in the publications, so they sought permission for these as well.⁶⁸⁴

In common with many of the institutions the researcher has spoken with, the BL also writes to rights holders three times, where an address is available. They won't do anything with the material until the rights holder has been contacted three times.⁶⁸⁵ As Ben explains, after no response to three attempts where there is a lack of certainty as to whether it is the correct

⁶⁸¹ Ibid, p.311, lines 26-34.

⁶⁸² Ibid, p.311, lines 11-12.

⁶⁸³ Ibid, p.309, lines 42-45.

⁶⁸⁴ Ibid, p.310, lines 12-21.

⁶⁸⁵ Ibid, p.311, lines 21-22.

person or the correct address: “That’s probably an orphan from our perspective as we have no certainty as to whether we have identified and located the rightsholder, and we will use a variety of different methods and methodologies in terms of logically appropriate sources that can be searched.”⁶⁸⁶

Orphan works

Ben states that the Spare Rib project would not have gone ahead without the orphan works exception.⁶⁸⁷ In contrast, he does not believe the OWLS is appropriate for large scale projects such as Spare Rib. He does mention that the bulk upload function on the EU IPO database is problematic, and that more needs to be done to make it a simpler process.⁶⁸⁸ Prior to this project, Ben acknowledged that the BL had made orphan works available online prior to the legislation. Now that the legislation has been brought in, they intend to leave the material where it is, but the BL will comply with the legislation going forward.⁶⁸⁹

4.5.7 Key Points

The rightsholder contacted for permission responded overwhelmingly positively (98%), although response rates were very low for this project (27%). A very high number of orphan works were identified within the collection. The BL were fairly risk-averse, opting to use the EU IPO Orphan Works database, and further redacting parts of the collection as a result of feedback from rights holder representatives. The project would not have taken place without the orphan works legislation. The BL have also made extremely detailed rights information available for each work featured in the collection. The publicity created to contact former contributors to seek permission was effective but may also have made the BL a target. The BL has worked closely with rights holder representatives and collective management organisations over the course of the project, and have been able to improve the response rate by a relatively small amount, raising questions about the representation of such groups.

⁶⁸⁶ Ibid, p.311, line 24. This quote has been edited at the interviewee’s request.

⁶⁸⁷ Ibid, p.313, lines 7-8.

⁶⁸⁸ Ibid, p.313, lines 8-10.

⁶⁸⁹ Ibid, p.313, lines 12-22.

4.6 Case Study Discussion

This section presents discussion of some of the key findings taken from the individual case studies, including the types of risk management techniques used to engage in digitisation; whether the nature of the rights in particular collections has an effect on rights clearance and risk management; the effect the type of archive service has on the selection of risk criteria; how risk aversion affects access to digitized collections; and insights into decision-making, policy development and risk management techniques provided by the individual cases. The chapter concludes by presenting key risk factors identified across the case studies, with a detailed explanation of the risk factor and suggestions for mitigating those risks.

4.6.1 What types of risk management techniques have archives used to engage in digitisation?

From both the survey data and the case study data, it is clear that while some institutions have demonstrated an appetite for risk in relation to copyright-protected materials, the ways in which those institutions assess that risk, manage and mitigate it are not easily standardized or quantifiable. For the most part, institutions appear to categorise risks using particular criteria, or develop frameworks to guide clearance, rather than use traditional methods like probability vs. impact tables. The exception to this has been JISC-funded digitisation projects, where risk-analysis and management across digitisation projects was standardized in a project plan template.⁶⁹⁰ In some cases, risks do not appear to be officially codified, externally communicated or internally recorded at all: archivists may follow hunches or decide on a particular course of action after some pragmatic discussion with other staff members.⁶⁹¹ Conversely, the use of takedown policies appears to be well-established, and very few takedown requests have been reported by the case studies or the survey data.

⁶⁹⁰ Project documentation from JISC's 'Digitisation and Content' strand is available at <http://webarchive.nationalarchives.gov.uk/20140702162934/http://www.jisc.ac.uk/whatwedo/programmes/digitisation.aspx> [Accessed 20 December 2017]

⁶⁹¹ This was the case for University of Warwick, University of Bradford and Rewind: UK Artists' Video in the 70s and 80s, three case studies that were conducted as part of the PhD but which were not reported as the institutions did not have data on the rights clearance process. This type of approach was also noted by Dryden in her 2008 study.

4.6.2 Does the nature of the rights involved in particular collection types have an effect on rights clearance and risk management?

There appear to be some variations in rights clearance and risk management across the case studies, depending on collection type. For example, projects that have involved personal papers have diverged sharply: the WL demonstrated a high tolerance for risk when they completed minimal rights clearance for 20 collections of personal papers, whereas CAC engaged in the most comprehensive rights clearance reported of all the case studies, for Churchill's personal papers. While the CAC project was commercial and the WL project was non-commercial, this doesn't completely explain the difference in approaches: the CAC Board of Trustees and their legal advice were extremely cautious, whereas the WL's previous experience of rights clearance had taught them that they would have to be very pragmatic when making such a large amount of archive material available.

The GSA digitisation project has shown that rights holders in artistic works are happy for their works to be used for non-commercial purposes, provided acknowledgement is made, in some cases incorporating references to current practice.⁶⁹² Conversely, the poets featured in the Bloodaxe project returned the lowest permission rate of the case studies, despite the publishers' rights department providing rights holder details. This suggests that creative practitioners' attitudes to digitisation projects undertaken by CHIs can vary from discipline to discipline, and CHIs should explore the concerns of creative workers sensitively and empathetically.

The Spare Rib project involved a collection of published, journalistic material, and while the BL enjoyed a very high permission rate from responders, the diffuse nature of the rights involved and the publicity generated by digitisation meant that the BL were forced to adopt a risk-averse, defensive position for much of the project. This is unfortunate, as the BL were able to generate positive publicity that had a pronounced positive effect on the number of permissions they received.

The BFI's UFH project involved films for the BFI's own collections, and from external partners. This was the most resource-intensive rights clearance project reported from the case studies, and the nature of the rights in film collections is extremely complex. While other digitisation projects outlined in the case studies were able to work with rights holder representatives and CMOs in order to find contact details for rights holders, BFI were able

⁶⁹² The Rewind project also reported a high permission rate from rights holders, and generally the same concerns around how the work was presented, and whether it was representative of the artists' current practice.

to negotiate blanket licenses with certain CMOs, given the nature of the layered rights in film collections. This is a very rare occurrence in archive digitisation projects: generally, CMOs cannot claim representation of the types of rights holders featured in archive collections.

4.6.3 How does the type of archive or collection affect the selection of risk criteria?

Two institutions used explicitly stated risk criteria: the WL and the BFI. Other institutions used 'copyright frameworks' which provided guidance on the classification of works (public domain works, works for which the institution claims copyright, third party works), so that rights clearance could take place. The type of archive and collection do not appear to have an effect on the selection of risk criteria.

4.6.4 How does risk management affect access to the digitised collections; are there any controls on access as a result?

Access terms across the case studies vary widely. Access to the Churchill Papers is based on a subscription model, with some curated selections of material available for general access outwith the paywall. The Terms and Conditions listed on the website limit use of the digital collection to downloading and printing files for non-commercial research and private study. The Churchill Family Trust claim copyright in the digital surrogates created during the project. Any requests for publication of the images go through the publisher (Bloomsbury Academic). It is likely that some of the risks CAC have taken in making non-respondent and orphan material available online is obscured by the paywall.

A&C have made their collections available as low-resolution JPEGs under the Creative Commons Attribution, Non-Commercial, Share Alike 4.0 (CC BY-NC-SA) license. GSA control further publication and high resolution reproduction through payment and licensing. The Terms and Conditions of using the A&C website generally limit use to non-commercial purposes. The license and attribution terms for each image are clearly accessible in the individual catalogue entries. It is possible that the permission rate for this project would have been lower if GSA had wanted to make high resolution copies available, so their decision to offer low-resolution copies can be seen as a risk-based decision.

University of Newcastle Special Collections do not provide a specific license: the images are made available for non-commercial use only, including private study, personal use, and educational purposes, subject to the exceptions provided in the CDPA 1988. A copyright

notice available on the website informs users that they must seek permission from the rights holders for all other uses of the items. Combined with their comprehensive approach to clearance and the lower permission rate reported, this approach demonstrates a low-tolerance for risk.

For the UFH project, the BFI have made the digitised content available to view/stream on the BFI Player. There is no option to download, and license terms for individual films are not available. Users are not required to register with the site in order to access the 'Free' material. The BFI Player's Terms of Use specify that use must be personal and non-commercial. In terms of risk, this is a fairly restrictive approach: access is limited in terms of the ability to download, and the Terms of Use.

The BL generally offered rights holders a Creative Commons Attribution Non-Commercial license (CC BY-NC), and the BL website states that all usage is non-commercial. Rights status is given on each individual item available online. Material relating to almost 1000 contributors has been redacted (around 20% of the online resource) pending permissions. The Spare Rib page on the JISC Journal Archives site contains a standard Terms of Use page,⁶⁹³ and a 'Spare Rib Ethical Use Statement.' The redaction that the BL have applied to Spare Rib is probably the most irritating form of access control reported across the case studies, and is an attempt to placate rights holder representatives. The BL have been forced into taking a very risk-averse approach to access.

4.6.5 What can individual digitisation projects tell us about the effectiveness of decision-making, policy development and risk management techniques; the success of rights clearance processes, and common themes or divergences across project types?

Generally, if rights holders can be found and respond to permission requests, they grant permission for use. This is true across virtually all of the case studies reported in this thesis, and other rights clearance exercises reported in the literature. They generally do so without seeking a fee: none of the case studies report paying license fees for works, apart from CAC. BFI entered revenue-share agreements with some of the commercial rights holders involved in the UFH project.

⁶⁹³ This can be accessed at <http://www.bl.uk/aboutus/terms/copyright/> [Accessed 20 December 2017].

Additionally, all of the digitisation projects reported in the case studies accepted risks of some form when making collections available online, and some accepted more risk than others. All of the projects besides the WL attempted to clear as many rights as possible. Generally, risk was perceived to be highest when deciding how to make non-respondent and orphan materials available.

Most of the archivists interviewed would not have used the orphan works schemes had they been available when they undertook their digitisation projects, and some said being forced to comply with the legislation would have stopped their projects. The only institutions that opted to use it were the BL and the BFI, and that was to use the EU exception, not the UK IPO OWLS. The BL felt that the Spare Rib project could not have gone ahead without the EU IPO orphan works database, whereas the BFI would have pursued the UFH project regardless, but it was felt it was important to comply once the legislation came into force.

Archivists continue to struggle to determine orphan works status in situations of non-response, with the inevitable result that some works will be classified as orphans incorrectly. Given the generally high rates of non-response and very low levels of complaints and take down requests, this does not appear to be a problem for the overwhelming majority of rights holders represented in archive collections. High levels of non-response, despite the information provided by CMOs like ALCS, PLS, DACS and BAPLA during rights clearance, suggest that the rights holders in archive collections are not represented by these bodies. As a result of this observation, it could be argued that CHIs digitising archive collections for non-commercial purposes should not be required to accept overly restrictive terms from CMOs.

Trust and reputation played important roles in mediating the decisions archivists make, and the rights clearance process in general. CHIs rely on their reputations as trusted guardians of their collections, and their commitments to preserving and making those collections accessible when contacting rights holders for permission. Several of the case studies rely on close partnership working to bring projects to fruition, and communication has played a role in the success of the projects. Communicating the aims and objectives of the individual projects clearly and concisely was noted as an important factor. Being able to argue for support and a seat at the table when major decisions were being taken were important to several of the projects. This all speaks to a level of confidence that the archivists and rights managers involved in the projects have to be able to project. Finding new ways to support archivists in developing this confidence requires further research.

Finally, underestimating the amount of time rights clearance will take was common across all projects, except for the BFI, who have a very high level of expertise and resource available. This ranges from creating item level metadata, to auditing collections, to meeting the expectations of rights holders that they will get to see a copy of the work before they grant permission. This can also be linked to the complexity of the law, to archivists' uncertainty, and to archivists discovering more issues as they conduct more research into the rights present in a collection. Across the case studies, the layering of rights present in certain types of work was noted as an issue. Works of artistic craftsmanship were considered difficult to define, and the repeal of Section 52 of the CDPA 1988, concerning mass-produced designs, also contributed to anxiety and uncertainty. These are concepts that most archivists aren't aware of when they enter the profession, and rights clearance for digitisation becomes a very steep learning curve. These are difficult areas even for lawyers, yet archivists are expected to find workable solutions to these issues.

4.6.6 Risk factors identified in the case studies⁶⁹⁴

The collation of the case studies has highlighted certain risk factors that institutions should be aware of when making decisions about the digitisation of third party rights holder materials. These risk factors could be included in a best practices framework for the UK archive sector.

4.6.6.1 The donor/depositor

Depositors can take many forms. A depositor may be the creator of a particular collection of items, papers or records; they may be a close relative of the creator; they may be an employee of an organisation or business that is donating its records; or they may be entirely unrelated to the collection in any meaningful sense (for example, a solicitor or accountant responsible for the disposal of assets).

An institution may spend significant amounts of time courting and negotiating with specific depositors, and go on to establish a long, fruitful relationship with them and their descendants. Alternatively, institutions may receive the offer of a deposit unsolicited, and signing the paperwork is the last contact the institution expects to have with the depositor. Indeed, legacy collections may have no depositor or gift documentation associated with them

⁶⁹⁴ This section was originally published in Stobo, V. (2016) 'Risky business: Copyright and Making Collections Available Online' in Wallace, A. and Deazley, R. (eds) (2016) *Display At Your Own Risk*, available at <http://displayatyourownrisk.org/stobo/> [Accessed 20 December 2017]

at all, and where they do, these may not cover the ownership of copyrights in the collection. The relationship between an institution and a depositor can be positive, benign, or in some cases, awkward and strained.

Depositors may hold all, some, few or none of the copyrights in the collection they are gifting, donating or loaning to the institution. Every collection is different in this respect. They might ask for the collection to be closed to external researchers, and insist that the institution forward all requests for access to them for review and permission. Alternatively, they might grant full access and use of the collection subject to certain terms: for example, a specific form of acknowledgement on publication, exhibition or display of the materials. They may assign the copyright that they hold to the institution, or they may retain it. They may use the deposit agreement to permit only certain types of use of the material, for example, copying for preservation or other non-commercial purposes, while precluding forms of commercial use. Where the terms and conditions of the deposit agreement conflict with existing copyright exceptions, consideration should be given to whether these exceptions are subject to contractual override or not. For example, within the UK, any term of a contract that attempts to prevent the use of a work for the purposes of quotation, criticism and review (whether commercial or otherwise) is unenforceable. Of course, when presented with terms of this nature, an institution may decide to prioritize good relations with the depositor. Indeed, maintaining the trust of depositors that they have built up over time is of huge importance to CHIs.

4.6.6.2 The material

The risks and benefits associated with making material created in a personal capacity available online (for example, private correspondence) are different to those associated with a photograph or a sound recording created in the course of employment, or an art installation created in the course of a residency. Older material may carry less risk than recent or contemporary material, where the rights holder might still expect to be able to commercially exploit their work. However, older does not always equate with less risk, at least not within the UK where certain extremely old, unpublished material remains in copyright (until 31 December 2039) regardless of when it was created.

Institutions may give consideration to the fact that a collection that contains a great variety of material will take longer to audit, and longer to clear rights. This is particularly true of collections that contain sound and film recordings in addition to letters, photographs and other more traditional paper-based records. This is because sound and film recordings often

have multiple, complex rights associated with them. This can be further complicated by collections that contain large amounts of born-digital material. Born-digital material is often very hard to audit because of the number of files within the collection, viewing and conversion issues with older file formats, and because file names may not logically correspond to the contents of the files.

4.6.6.3 Circumstances of creation

It's important to consider the context in which the collection materials were originally created. This can have implications in terms of identifying the authors and rights holders within the collection. For instance, a collection of personal papers created over the span of a single person's life will contain similar material like correspondence, photographs and personal records, but the contents of the papers created by a statesman (e.g. Winston Churchill), a geneticist (e.g. Rosalind Franklin), and an author (e.g. Virginia Woolf) will vary significantly. The records of a business or an institution will also vary depending on the industry and sector in which they operated.

Institutions may need to consider whether material has been created in a personal or an official capacity, whether it was created for mundane, everyday purposes or exhibits intellectual, creative endeavour, and whether it was created with commercial exploitation in mind. Special attention should be paid to whether the creator worked as a freelancer, whether the works were created in the course of employment, and whether the relevant contracts that formalised these arrangements still exist. Often they will not.

4.6.6.4 Sensitive content

Naturally, the circumstances of creation are very closely linked to the content of the material in the collection. A collection might contain clinical content, sensitive personal data, images of individuals or images of children, which may or may not have been obtained with consent, and while this essay is primarily concerned with copyright compliance issues, in the UK dealing with sensitive personal data is regulated by the Data Protection Act 1988. In short, material of this nature should not be made available online.

Indeed, sensitivity review presents particular problems for mass digitisation and born-digital collections. Some institutions have found it simpler to check material for sensitive content after it has been digitised, either at item level or by sampling. Other institutions prefer not to digitize sensitive material at all, but will carry out a review on the physical collection to

determine what material from the collection is available for access on site, and what material remains closed to access and for how long.

4.6.6.5 Intellectual control

The extent to which the collection has been processed will affect the entire digitisation project. A collection that has been minimally processed is essentially an unknown quantity: you won't be familiar with the contents, and you won't understand the extent of the rights issues until a full review has taken place. In contrast, a collection that has been catalogued to item level (a rarity in archives, but far more common in library and museum collections) may provide details with which to identify potential rights holders, and enough description to make the creation of metadata, file-names and description for the digital version of the collection a much simpler process.

4.6.6.6 Distribution of rights in the collection

With the benefit of a catalogue and a rights audit, institutions will have a better understanding of the rights implications presented by the collection selected for digitisation. Both the catalogue and the audit should help identify what (if any) rights have been transferred to the institution at deposit (or afterwards), and to what extent rights in the collection lie with third parties. And of course, there will always be material with uncertain status: the existing documentation concerning the deposit of the collection will not necessarily provide bright line answers. However, once there is a sense of the number of potential rights holders, as well as how the rights in the collection are distributed among these individuals, an institution can begin to prioritize copyright compliance activity: clearing rights with one person who holds 50% of the rights in the collection makes much more sense – in terms of transaction costs – than approaching 300 people to clear rights in 15% of the material.

4.6.6.7 Staff training and volunteers

Consideration must be given to all of the staff who will work on the project, but especially to those who will work on rights clearance. It is essential that staff with little or no experience of rights clearance are supported with appropriate training, not simply in understanding and interpreting the relevant legislation, but also in the complexities of copyright licensing and the nuances of diligent search. Moreover, anything recommended for staff applies equally to volunteers: they should also benefit from training, supervision and support in what is a

crucially important step in the digitisation workflow, albeit one that is often perceived as an unnecessarily complicated and bureaucratic process.

Those involved in the digitisation process would also benefit from basic training in copyright and sensitivity review, as sensitive or high-risk material that may have been overlooked during the audit might be identified as part of the item-level digitisation process.

4.6.6.8 Lawyers and senior management

It's also essential that the institution's legal team (if there is a legal team) understand both the intention behind the project and that a certain amount of risk must be tolerated if the project is to happen at all. Similar overtures should be made to senior management: if archivists are able to convince them that the potential value of the digitisation initiative outweighs any risks associated with making the material available online, then support for the project is more likely to be forthcoming. However, these are often difficult arguments to make.

4.6.6.9 The user community

Institutions should have an intended audience for the digital resource being created, and they may be lucky enough to have subject or technical expertise to draw on. For example, an institution could digitize the collection of a notable 20th century poet and, within the English Department at a local university, there is an academic that not only has a specific research interest in this poet, but is also eager to engage in Knowledge Exchange with an external organisation. This expert knowledge could be drawn on to build up a picture of the most noteworthy rights holders within the collection to clear rights with. The expertise could also be relied on following the clearance process when attempting to identify which non-responses are simple non-responders and which are genuine orphan rights holders (bear in mind, that this will never be an exact science).

It's also important to consider the audience for specific projects, and the community that could potentially be built around a resource. If there is a feedback or contact function within the resource, users may be able to provide additional contextual information about the collection, and about rights holders that may have been missed.

4.7 Conclusion

While some institutions have demonstrated an appetite for risk in relation to copyright-protected materials, the ways in which those institutions assess that risk, manage and mitigate it are not easily standardized or quantifiable. There are variations in rights clearance and risk management processes across the case studies, especially for collections of published materials, where the institutions tend to be more risk averse. The type of archive and collection do not appear to have an effect on the selection of risk criteria. Additionally, all of the digitisation projects reported in the case studies accepted risks of some form when making collections available online, and some accepted more risk than others.

The case studies also show that access terms across the case studies vary widely and in general are fairly restrictive in terms of re-use. Generally, if rights holders can be found and respond to permission requests, they grant permission for use without seeking a fee. Most of the archivists interviewed would not have used the orphan works schemes had they been available when they undertook their digitisation projects, and some said being forced to comply with the legislation would have stopped their projects. High levels of non-response to permission requests, despite the information provided by CMOs like ALCS, PLS, DACS and BAPLA during rights clearance, suggest that the rights holders in archive collections are not represented by these bodies.

Trust and reputation played important roles in mediating the decisions archivists make, and the rights clearance process in general. Underestimating the amount of time rights clearance will take was common across all projects, except for the BFI, who have a very high level of expertise and resource available. Common risk factors identified in the case studies included: the donor/depositor of the collection, the material, the circumstances of creation, sensitive content, intellectual control, the distribution of rights, staff training and volunteers, legal teams and senior management, and the user community.

5. Conclusion

5.1 Discussion

The key question this thesis addresses is whether archive services in the UK avoid risk through strict compliance with copyright law when they digitise their collections. The survey data and case studies presented in previous chapters suggest that the majority of archive services in the UK do avoid risk through strict compliance with copyright law when they digitise their collections. However, a minority of institutions use risk management approaches when digitising collections that contain third-party rights.

Approaches to risk vary from institution to institution, and most respondents acknowledge that their approach will vary from project to project. Very few archive services have formalised processes for managing copyright in collections, or for rights clearance for digitisation. When institutions decide to make collections available that may contain third party works, they tend to use categorisations of risk, rather than engage with traditional tools like probability x severity tables, where the likelihood of an event taking place is multiplied by the severity of the event to provide an overall risk score.

In many cases, risks do not appear to be officially codified, externally communicated or internally recorded at all: archivists may follow hunches or decide on a particular course of action after some pragmatic discussion with other staff members. This may reflect the assumption that approaches will have to evolve depending on context and the project in question. In contrast, the use of takedown policies appears to be established throughout the sector, and these are often cited as a form of first line defence to claims of infringement: but in practice, take-down procedures are rarely used. Few of the case study institutions have reported any requests for takedown, and the number of complaints reported in the survey data was low. While the availability of a takedown policy would make very little difference to a claim of infringement which went before the courts, they do appear to be effective in the very small number of instances where they have to be used.

While no UK archive service has been sued for copyright infringement, data on near-misses, mediation and abandoned proceedings is extremely hard to locate. While many archivists may know of instances anecdotally, and consultants and lawyers may be able to offer anonymised examples, hard data is not forthcoming. No archive wants to admit that their internal management processes or due diligence may have failed when making collections available, and many rights holders are reluctant to appear to be targeting the cultural sector,

especially where public interest missions support access and budgets are generally low. It may also be the case that the formalisation of processes which explicitly involve infringement, or otherwise lead to infringement, make the archivists involved anxious or nervous.

Over the course of completing this thesis, it has become clear how anxious and uncomfortable copyright makes many archivists feel. Further research to explore attitudes to risk across the UK archive sector workforce (not just copyright-related), could allow for the development of support specifically tailored to improving archivists' confidence and risk-tolerance.

The need for control over uncertainty extends to how users of archives access collections online. Archivists still feel the need to retain an element of control over works when they are made available: in some cases, even when they are in the public domain. Indeed, the way CHIs manage risk in relation to copyright means that responsibility for compliance is often pushed back on to users. That's understandable and legitimate in relation to the use of some exceptions, but as one case study respondent pointed out, there's been a generational shift in attitudes to copyright, so without appropriate guidance and sign-posting, archivists are expending a lot of effort to be compliant, but it's not necessarily being followed by users. A balance needs to be struck between permitting re-use and retaining control of digitised archive collections: further research is required on the restrictions individual archive institutions apply to the collections they make available online, including technical measures, licensing and terms of use.

The 'challenge' of rights management can be considered from a variety of angles. We know that rights clearance imposes prohibitive burdens on cultural heritage institutions: if this is the case, should a lack of formal rights clearance processes for certain types of collections be considered a risk? We could view such arrangements as an operational efficiency, but would this change archivists' perceptions? This approach does not take into account archivists' professional codes of conduct, nor the experience of archivists who have engaged with rights clearance: when such processes are formalised, important knowledge about rights holders is gained, collection information is improved, efficiency becomes possible, and the right status of works is clearer for users. Many of the archivists who undertook comprehensive rights clearance felt it was very positive experience.

Those positive experiences have yielded insights into the rights holders that are contacted during rights clearance exercises for archive collections. The majority of respondents grant

permission and are positively disposed to, and supportive of the work archives do. Attitudes to making works available online have changed since the earliest digitisation projects, and in some ways these changes are mediated by privacy concerns and publicity-seeking. For example, a comparison of the CAC microfilm and online projects shows a dip in permissions for online use, in relation to a collection of personal papers. Yet another project involving video artists showed that, while artists have been wary about making things available online in the past, this is now changing and many are in favor of works being digitised. Creators in particular have a specific set of concerns when archivists contact them about making their material available online. They request acknowledgement, and they want to know what material is being made available, and in what context. They worry about their earlier work being made available with no reference to how their practice has developed, and writers also have concerns about draft material being made available. These are requests that archives can easily accommodate, and making approaches to rights holders on this basis should be encouraged.

The reaction to the Spare Rib digitisation project shows a sensitivity on the part of rights holder representatives to cultural heritage digitisation. While the response to the project was overwhelmingly positive from rights holders, access to the digitised material is mediated in various ways: through redaction and an Ethical Terms of Use statement. This pressure to redact online collections must be addressed. The rights clearance exercises reported in the case studies raise serious questions regarding the claims to representation made by some CMOs. All of the case study project staff contacted or worked with CMOs and publishers to ensure that, if their members were identified in collections selected for digitisation, rights could be cleared. Yet in most cases, very few contact details were available, and all projects except the BFI suffered from low response rates.

It cannot be denied that archive services and their staff leave themselves open to unacceptable risk when the law is not clearly understood: at one end of the spectrum, the risk of flagrant infringement, and at the other the risk of restricting access unnecessarily, with an institution's reputation as a trusted repository at stake. This combination of uncertainty around the law, and the time and effort associated with copyright compliance when making large collections of third party materials available online contributes to an overall tendency to risk aversion.

Should we look to legal reform as part of the answer? As reported in the case studies, legal reform on orphan works may be having a chilling effect of the availability of collections. From the literature review, it is clear that the reform process in 2014 brought many benefits,

but did not go far enough. Legal reform at EU level is focused on the publishing industries, and as such, will not bring the simplified exceptions that most survey and case study respondents suggested as a solution. The general trend of legal reform is unlikely to deliver the solutions archivists desire, because the sector does not bring enough GDP to the negotiating table. Further research to explore the use of intellectual property insurance as an alternative to the UK IPO OWLS and EU IPO Orphan Works database could bear fruit in this area.

In the absence of meaningful and effective legal reform, where should efforts be focused? Based on the data and observations collected in this thesis, the author suggests several complementary approaches. Rather than have archivists go to various different handbooks and online sources for advice, the creation of a single point of entry for multiple sources of guidance on copyright, with the addition of expert commentary, would provide practitioners not only with appropriate expertise, but also contextual knowledge about the type of guidance: does it assume strict compliance? Can it offer advice if you're thinking about taking a less compliant approach? Guidance could also be updated quickly and easily in response to legislative reform and case law.

In addition to new, up-to-date, tailored guidance on copyright law and its specific application to archives and their collections, knowledge of copyright could be improved through the creation of new postgraduate-level modules in the subject. These would be available to students entering the profession, and to existing professionals through Continuing Professional Development routes. This would improve copyright literacy throughout the profession over time, build confidence in the interpretation and application of the law, and crucially, reduce the anxiety associated with managing copyright compliance.

The case studies collected during the thesis could form the basis of targeted training and resources to encourage greater use of risk analysis and mitigation strategies when making collections available online. Several of the staff at the case study institutions cited the WL Codebreakers project as a useful example that they relied on when formulating their own rights management approaches. Indeed, several of the survey and case study responses indicated that archivists prefer to 'wait and see' what other institutions are doing before developing new projects. A shared evidence base of practical examples would encourage and support those archivists to take project decisions with confidence.

Any work towards a solution for the challenges the archive sector faces must be addressed at a sector-wide level. The Best Practices in Fair Use framework offers a basis for best

practices work in the UK, although adjustments would have to be made for the differences between UK and US copyright laws. The adoption of the code of best practices methodology would allow the sector to create a 'consensus' on acceptable uses of copyright-protected materials by archive services, where those use are in furtherance or support of a particular mission or objective. This could include sensible, pragmatic risk management processes.

How can this be achieved? The Best Practices methodology requires that research is undertaken across the archive sector, before several focus groups are convened with a variety of attendees to discuss specific scenarios. Those discussions, and the consensus reached during the discussions, then form the basis of the Code, which is reviewed and approved by legal experts. The Code is then available to be endorsed by archive institutions and sector bodies. The survey data and case study examples gathered in thesis could contribute to the first stage of the Best Practices methodology, and to the discussion scenarios at the focus group stage. Existing networks of expertise on copyright could be tapped into: LACA and CREATE could be drawn upon for this. Support and endorsement from sector bodies including the Archives and Records Association UK and Ireland, the Scottish Council on Archives, Museums, Archives and Libraries Wales and the National Archives would be important factors in the success of such an approach. While the National Archives policy team are available to answer copyright queries and to provide advice on copyright issues, it may be the case that TNA, as an executive arm of the UK government, are unable to provide advice or guidance that might advocate engaging in infringing activity, however harmless or responsibly managed.

A longer-term issue to address is the many interest groups now competing in this space. Funders are beginning to require that digitised collections are made available using Creative Commons or other forms of open licenses. Open GLAM groups advocate for the shift to open access. CMOs, publishers and rights holder representative continue to argue the other way. The expectations of these groups must be balanced against legal requirements, professional ethical standards, technological solutions, and the value that is placed on digitised collections, whether implicit or explicit. The sector's efforts must be evaluated long-term: more focus on the impact and value of digitised collections would make it easier to calculate the benefits of digitisation against the risks posed by copyright infringement.

The limitations of this thesis include the nature of the self-reporting questionnaire. The author suggests that any follow-up research with the UK archive sector should utilise web-harvesting software to understand in more accurate detail the collections that are being made available online, and under what terms. There is a disconnect between the archivist as an

individual unit of study, and how their actions become institutional practice, as the institution is the unit of study in the thesis. This was impossible to address in the survey data, although the case study data has offered some insight. Additionally, the response to the survey (121 usable returns) was not enough to make general claims about the archive sector population, and case studies cannot be generalised from. Therefore, any claims made in the thesis must be exercised with caution. Another obvious limitation is that the scope was restricted to the 2D digitisation of materials: future research should address born digital archives and digital preservation needs identified by the sector. The thesis was intended to be exploratory: the collection of data necessary to develop a baseline snapshot understanding of digitisation and rights clearance practice taking place across a diverse sector.

5.2 Recommendations

1. The creation of new, up-to-date, tailored guidance on copyright law and its specific application to archives and their collections;⁶⁹⁵
2. The creation of further education opportunities for archivists and students that want to learn more about the law and how to apply it in everyday practice;⁶⁹⁶
3. Further, targeted training and resources to encourage greater use of risk analysis and mitigation strategies when making collections available online;⁶⁹⁷
4. More effective advocacy on behalf of the archive sector with policy and law-makers at both national and international levels, to ensure new copyright legislation enables and does not hinder archival work;⁶⁹⁸
5. Further research to explore risk-aversion within the UK archive sector workforce (not just copyright-related), allowing for the development of tailored support;
6. Further research to explore the application of the thesis findings to born digital archives and digital preservation needs identified by the sector;⁶⁹⁹

⁶⁹⁵ The author, along with Ronan Deazley and Andrea Wallace, has developed the Copyright Cortex: "...an online resource dedicated to copyright and digital cultural heritage. It was developed to provide libraries, archives, museums and other memory institutions with information and expert commentary on how copyright law affects the creation and management of digital cultural heritage." The Cortex is available at <https://copyrightcortex.org/> [Accessed 20 December 2017]

⁶⁹⁶ The author has worked with Ronan Deazley to develop two postgraduate-level modules: *Law and Cultural Institutions* which is available as part of the MSc in Information Management and Preservation in the department of Information Studies at University of Glasgow, and *Copyright for Information Professionals*, available as a CPD distance-learning module from the Centre for Archive and Information Studies, University of Dundee.

⁶⁹⁷ The author provides free training in copyright and risk management strategies to the Scottish archive sector through her appointment as Copyright Policy Advisor to the Scottish Council on Archives: further training resources will be developed in 2018 through the use of data gathered in the thesis.

⁶⁹⁸ The author represents the Scottish Council on Archives at SCCR at WIPO. Further advocacy work will be developed with representatives from the ARA, ICA and SAA through 2018/19 using data gathered in the thesis.

⁶⁹⁹ The author believes that this research topic could form the basis of a further PhD study, and will seek to develop such a proposal in late 2018, as part of her Lectureship in Record-Keeping at LUCAS, University of Liverpool.

7. Further research to explore the use of intellectual property insurance as an alternative to the Orphan Works Licensing Scheme and the orphan works exception;⁷⁰⁰
8. Using the conclusions identified in the thesis as the basis for sector-led work on best practices when making copyright-protected archive material available online, in the style of the “US Best Practices in Fair Use” created by Washington College of Law;⁷⁰¹
9. Further research on the restrictions individual archive institutions apply to the collections they make available online, including technical measures, licensing, terms of use and takedown policies and procedures.⁷⁰²

5.3 Future work

The thesis makes a number of recommendations for further study, building on previous and current research in this area. Some of this work is already underway: for example, several of the education and training recommendations were acted upon during the completion of this thesis (Rec. 1-3), but other work is yet to begin. New research should focus on three areas in particular: a deeper understanding of attitudes to risk across the archive workforce, beyond basic demographics (Rec. 5); the potential impact of copyright and risk aversion on born digital archives and digital preservation efforts (Rec. 6); and the use of consensus-driven, norm-setting, best practices work modelled on the “Best Practices in Fair Use” guides created by PIJIP at Washington College of Law (Rec. 8). It is hoped that these recommendations will be the foundation for a more confident approach to copyright across the UK archive sector.

5.4 Summary

This thesis posed the question: do archivists in the UK avoid risk through strict compliance with copyright law when they digitize and make their collections available online? The research study took a mixed methods approach, using a questionnaire survey of the UK archive sector to gather baseline data on approaches to copyright, and case studies at nine

⁷⁰⁰ The author intends to carry out a short scoping project on this issue in 2018 in collaboration with Naomi Korn Copyright Consultancy, again as part of her academic work.

⁷⁰¹ The author intends to begin work on this recommendation in Summer 2018, by seeking potential early-stage buy-in from the main UK sector bodies: the Archives and Records Association UK & Ireland; the National Archives; the Scottish Council on Archives; and Museums, Archives, Libraries Wales, and interested academic parties.

⁷⁰² The survey data collected during this PhD could provide a starting point for the project, building on current research including Dryden, J. (2011) ‘Copyfraud or Legitimate Concerns? Controlling Further Uses of Online Archival Holdings,’ *The American Archivist*, 74:2, pp. 522-543, available at <http://www.jstor.org/stable/23079049> [Accessed 20 December 2017] and Wallace, A. and Deazley, R. eds. (2016) *Display At Your Own Risk: An experimental exhibition of digital cultural heritage*, available at <http://displayatyourownrisk.org/publications/> [Accessed 20 December 2017].

archive institutions to understand decision making processes, project workflows and rights clearance when digitising third-party rights holder material in more detail. The study found that, while a majority of archive services do avoid risk when digitising and making their collections available online by not selecting third party materials, different archive institutions identify and manage risk in different ways, and do not always strictly comply with copyright law.

This work supports a nascent literature showing similar results in the US, Canada, New Zealand, and Australia. It contributes to the literature by providing further data on real world practices, and analysing that data in relation to the current UK legal framework, the demographics of the UK archive profession and potential risk management frameworks and processes.

These findings will be of interest to archive institutions and other cultural heritage institutions and their staff working in the UK, especially those staff with responsibility for digitisation, managing rights and licensing, or legal compliance. The case studies provide multiple examples of the varied risk management approaches institutions can take when making third party collections available online, and it is hoped that many institutions that are considering digitisation will be able to learn from these approaches and adapt them to suit their own needs and objectives with confidence.

The findings will be of interest to sectoral bodies, including the National Archives, the Scottish Council on Archives, the Archives and Records Association UK and Ireland, and Museums, Archives and Libraries Wales. The data collected through the survey and case studies provide valuable insights on digitisation and project management practices at archive institutions across the UK, which sectoral bodies can use to inform strategic planning, advocacy and potential best practices work.

They will also be of interest to legal academics specializing in copyright law and its application to cultural heritage, rights holder representatives and policy makers. The evidence presented in the case study and the case studies can inform ongoing legal scholarship, current reform debates in the UK and elsewhere, and can also be used to help CHIs, rights holders and their representatives have appropriately informed discussions and negotiations.

The findings may also be of use to users of archives, and of CHIs in general: users expect online access and they should be given it where possible and feasible. In particular, community and user groups are encouraged to use the examples in this thesis to ask for more

from their archive services, to support them in making collections available online, and in generating new social and cultural impacts through the use and re-use of those collections.

Bibliography

- Abrams, F. (1998) "Lottery gifts shake-up over after Churchill papers fiasco," *The Independent*, 8th April [online] available at <https://www.independent.co.uk/news/lottery-gifts-shake-up-after-churchill-papers-fiasco-1155125.html> [Accessed 12 July 2018]
- Akmon, D. (2010) "Only with your permission: how rights holders respond (or don't respond) to requests to display archival materials online," *Archival Science*, 10, pp.45-64, [online] available at <http://rdcu.be/zxdu> [Accessed 12 July 2018]
- American University Centre for Social Media (2005) *Documentary Filmmakers' Statement of Best Practices in Fair Use* [online] available at http://archive.cmsimpact.org/sites/default/files/fair_use_final.pdf [Accessed 12 July 2018]
- Anderson, D. (2011) *A layman's guide to the KEEP legal studies*, University of Portsmouth, National Library of the Netherlands [online] available at https://researchportal.port.ac.uk/portal/files/150295/D2.6_laymansguidelegalstudies_final.pdf [Accessed 12 July 2018]
- Anderson, L. and Johnson, I. (2017) "Exploring the Bloodaxe Archive: A Creative and Critical Dialogue," *Insights*, 30 (3) pp. 31–37, available at DOI: <http://doi.org/10.1629/uksg.378> [Accessed 12 July 2018]
- Angelopoulos, C. (2012) "The Myth of European Term Harmonisation: 27 Public Domains for the 27 Member States," *International Review of Intellectual Property and Competition Law*, 43:5, pp. 567-594 [online] available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2145862 [Accessed 12 July 2018]
- Aplin, T. (2010) "A Global Digital Register for the Preservation and Access to Cultural Heritage: Problems," in Derclaye, E. (eds) *Challenges and Possibilities, Copyright and Cultural Heritage: Preservation and Access to Works in a Digital World*, Edward Elgar, Cheltenham.
- Archives and Records Association UK & Ireland (2015) "Landmark UK information workforce survey reveals ongoing gender pay gap," *ARA website* [online] available at <http://www.archives.org.uk/latest-news/600-workforce-survey-2015.html> [Accessed 12 July 2018]
- Archives and Records Association UK & Ireland (2016) *Code of Ethics* [online] available at http://www.archives.org.uk/images/ARA_Board/ARA_Code_of_Ethics_final_2016.pdf [Accessed 12 July 2018]
- Archives and Records Association UK & Ireland (2017) *Careers in Archives* [online] available at <http://www.archives.org.uk/careers/careers-in-archives.html> [Accessed 12 July 2018]
- Association of Research Libraries (2012) *Code of Best Practices in Fair Use for Academic and Research Libraries* [online] available at <http://www.pijip-impact.org/wp-content/uploads/2012/04/Code-of-Best-Practices-2012.pdf> [Accessed 12 July 2018]
- Astle, P. and Muir, A. (2002) "Digitisation and preservation in public libraries and archives," *Journal of Librarianship and Information Science*, 34:2, pp.67-79 [online] available at <http://dx.doi.org/10.1177/096100060203400202> [Accessed 12 July 2018]

- Aufderheide, P. and Jazsi, P. (2011) *Reclaiming Fair Use: How to put balance back in copyright*, University of Chicago Press, Chicago.
- Axhamm, J. and Guibalt, L. (2012) Cross-Border Extended Collective Licensing: A Solution to Online Dissemination of Europe's Cultural Heritage, Institute for Information Law Research Paper No. 2012-19 [online] available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2001347 [Accessed 12 July 2018]
- Ayre, C. and Muir, A. (2004) "The Right to Preserve," *D-Lib Magazine*, 10:3 [online] available at <http://www.dlib.org/dlib/march04/ayre/03ayre.html> [Accessed 12 July 2018]
- Bearman, D. (2000) "Intellectual Property Conservancies," *D-Lib Magazine* 6:12 [online] available at <http://www.dlib.org/dlib/december00/bearman/12bearman.html> [Accessed 12 July 2018]
- Besek, J., Coates, J., Fitzgerald, B., Mossink, W., LeFurgy, W. G., Muir, A., Rasenberger, M. and Weston, C. D. (2008) "Digital Preservation and Copyright: An International Study," *International Journal of Digital Curation*, 3:2, pp.104-111 [online] available at <http://www.ijdc.net/index.php/ijdc/article/view/90> [Accessed 12 July 2018]
- Borghi, M. and Karapapa, S. (2012) *Copyright and Mass Digitisation*, Oxford Scholarship Online: University of Oxford Press [online] available at <http://dx.doi.org/10.1093/acprof:oso/9780199664559.001.0001> [Accessed 12 July 2018]
- Borghi, M., Erickson, K. and Favale, M. (2016) "With Enough Eyeballs All Searches are Diligent: Mobilizing the Crowd in Copyright Clearance for Mass Digitisation," *Chicago-Kent Journal of Intellectual Property*, 16:1 [online] available at <https://scholarship.kentlaw.iit.edu/ckjip/vol16/iss1/6/> [Accessed 12 July 2018]
- Breaden, I. (2006) "Sound Practices: On-Line Audio Exhibits and the Cultural Heritage Archive," *The American Archivist*, 69:1, pp.33-59 [online] available at <http://americanarchivist.org/doi/pdf/10.17723/aarc.69.1.t16h8h650t70gg47> [Accessed 12 July 2018]
- Brewster, K. (2000) *Internet Access to Oral Recordings: Finding the Issues*, Oral History Program, Elmer E. Rasmuson Library, University of Alaska Fairbanks [online] available at <http://library.uaf.edu/aprc/brewster1/> [Accessed 12 July 2018]
- British Film Institute (2012) *Film Forever* [online] available at <http://www.bfi.org.uk/about-bfi/policy-strategy/film-forever> [Accessed 12 July 2018]
- British Film Institute (2017) *Britain on Film* [online] available on BFI Player at <http://www.bfi.org.uk/britain-on-film> [Accessed 12 July 2018]
- British Library (2016) *Spare Rib* [online] available at <https://journalarchives.jisc.ac.uk/britishlibrary/sparerib> [Accessed 12 July 2018]
- British Library (2016) *Spare Rib Ethical Use Statement* [online] available at <https://journalarchives.jisc.ac.uk/britishlibrary/sparerib/ethicaluse> [Accessed 12 July 2018]
- British Library (2017) *Annual Report and Accounts 2016/2017*, HM Stationery Office HC170 SG/2017/10 [online] available at <http://www.bl.uk/aboutus/annrep/2016-17/Annual%20Report%202016-2017.pdf> [Accessed 12 July 2018]
- Brown, C. (2014) *Archives and Recordkeeping: Theory into Practice*, Facet: London

- Bryman, A. (2012) *Social Research Methods* (4th Edition) Oxford University Press, UK.
- BSI (2016) *BS ISO 15489-1:2016 Information and Documentation – Records Management, Part 1: Concepts and Principles*, British Standards Limited: UK.
- Byrnes, J. P., Miller, D. C., and Schafer, W. D. (1999) “Gender Differences in Risk Taking: A Meta-Analysis,” *Psychological Bulletin*, 125:3, pp. 367-383 [online] available at https://www.researchgate.net/profile/James_Byrnes2/publication/232541633_Gender_Differences_in_Risk_Taking_A_Meta-Analysis/links/00b49514c47ab0f093000000.pdf [Accessed 12 July 2018]
- Campbell, D. T., (1975) “Degrees of Freedom and the case study,” *Comparative Political Studies* 8:178 [online] available at: <http://cps.sagepub.com/content/8/2/178.refs.html> [Accessed 12 July 2018]
- Cave, M., Deegan., M. and Heinink, L. (2000) “Copyright Clearance in the Refugee Studies Centre Digital Library Project,” *RLG Digi News*, 4:5 [online] available at <http://webdoc.gwdg.de/edoc/aw/rlgdn/preserv/diginews/diginews4-5.html> [Accessed 12 July 2018]
- Centre for Media and Social Impact (2014) *Statement of Best Practices in Fair Use of Collections Containing Orphan Works for Libraries, Archives and Other Memory Institutions* [online] available at <http://cmsimpact.org/wp-content/uploads/2016/01/orphanworks-dec14.pdf> [Accessed 12 July 2018]
- Charlesworth, A. (2006) *Digital Curation, Copyright and Academic Research* [online] available at https://www.researchgate.net/publication/242473835_Digital_Curation_Copyright_and_Academic_Research [Accessed 12 July 2018]
- Churchill Archives Centre (2012) *Churchill Archive*, Bloomsbury Academic [online] available at <http://www.churchillarchive.com/> [Accessed 12 July 2018]
- Churchill College (2018) *Archives Centre – History* [online] available at <https://www.chu.cam.ac.uk/archives/about/history/> [Accessed 12 July 2018]
- Coleman, A. and Davies, S. J. (2002) “Copyright and Collections: recognising the realities of cross-domain integration,” *Journal of the Society of Archivists*, 23:2, pp.224-226 [online] available at <https://doi.org/10.1080/0037981022000006426> [Accessed 12 July 2018]
- College Art Association (2015) *Code of Best Practices in Fair Use for the Visual Arts*, [online] available at http://cmsimpact.org/wp-content/uploads/2016/01/best_practice_rfnl.pdf [Accessed 12 July 2018]
- Community Archives and Heritage Group (2017) Website [online] available at <http://www.communityarchives.org.uk/> [Accessed 12 July 2018]
- Conrad, S. (2012) “Analog, the sequel: An Analysis of current film archiving practice and hesitance to embrace digital preservation,” *Archival Issues*, 34:1, pp.27-43 [online] available at <https://www.jstor.org/stable/41756160> [Accessed 12 July 2018]
- Cook, T. (2013) “Evidence, memory, identity and community: four shifting archival paradigms,” *Archival Science*, 13:2-3, pp.95-120 [online] <https://doi.org/10.1007/s10502-012-9180-7> [Accessed 12 July 2018]

Copyright Act 1956 (UK) [online] available at <http://www.legislation.gov.uk/ukpga/1956/74/contents/enacted> [Accessed 12 July 2018]

Copyright Amendment (Disability Access and Other Measures) Act 2017 (Australia) [online] available at <https://www.legislation.gov.au/Details/C2017A00049> [Accessed 12 July 2018]

Copyright, Designs and Patents Act 1988 (as amended) (UK) [online] available at <https://www.legislation.gov.uk/ukpga/1988/48/contents> [Accessed 12 July 2018]

Copyright Licensing Agency (2018) CLA's application for extended collective licensing: update [online] available at <http://www.picsel.org.uk/wp-content/uploads/2018/04/CLA-ECL-Application-Press-Release.pdf> [Accessed 12 July 2018]

Copyright (Visually Impaired Persons) Act 2002 (repealed) (UK) [online] available at <https://www.legislation.gov.uk/ukpga/2002/33/contents> [Accessed 12 July 2018]

Corbett, S. (2011) *Archiving our Culture in a Digital Environment: Copyright Law and Digitisation Practices in Cultural Heritage Institutions*, New Zealand Law Foundation Report [online] available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2040977 [Accessed 12 July 2018]

Cordell, R. (2015) "Viral Textuality in Nineteenth-Century U.S. Newspaper Exchanges," *Virtual Victorians*, (eds) Alfano, V. and Stauffer, A., Palgrave MacMillan

Cornish, G. (2015) *Copyright: Interpreting the Law for Libraries, Archives and Information Services*, 6th edition, Facet: London

Cousin, G. (2009) *Researching Learning in Higher Education: An introduction to contemporary methods and approaches*. London: Routledge

Covey, D.T. (2005) *Acquiring copyright permission to digitise and provide open access to books*, DLF, Council on Library and Information Resources, Washington DC [online] available at <https://www.clir.org/pubs/reports/pub134/> [Accessed 12 July 2018]

Craven, L. (2008) *What Are Archives? Cultural and Theoretical Perspectives: A Reader*, Ashgate: London

Crawford, M. (1983) "Copyright, Unpublished Manuscript Records, and the Archivist," *The American Archivist*, 46:2, pp.135-147 [online] available at: <https://www.jstor.org/stable/40292582> [Accessed 12 July 2018]

CREATe (2018) *Copyright Evidence Wiki* [online] available at <https://www.copyrightevidence.org> [Accessed 12 July 2018]

Crews, K. (2015) *Study on Copyright Limitations and Exceptions for Libraries and Archives: Updated and Revised*, World Intellectual Property Organisation [online] available at http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=306216 [Accessed 12 July 2018]

Darby, N. (2013) "The cost of historical research: why archives need to move with the times," *Guardian Higher Education Network Blog*, 23 May [online] available at <https://www.theguardian.com/higher-education-network/blog/2013/may/23/history-research-costs-archive-fees> [Accessed 12 July 2018]

de Beer, J. and Bouchard, M. (2010) "Canada's 'Orphan Works' Regime: Unlocatable Owners and the Copyright Board," *Oxford University Commonwealth Law Journal*, 10:2, pp. 215 [online] available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1916840 [Accessed 12 July 2018]

Deazley, R. and Stobo, V. (2013) *Archives and Copyright: Risk and Reform*, CREATE Working Paper 2013/3, University of Glasgow [online] available at <http://www.create.ac.uk/publications/archives-and-copyright-risk-and-reform/> [Accessed 12 July 2018]

Deazley, R., Patterson, K. and Stobo, V. (2017) *Digitising the Edwin Morgan Scrapbooks* [online] available at www.digitisingmorgan.org [Accessed 12 July 2018]

Deazley, R., Stobo, V. and Wallace, A. (2017) *The Copyright Cortex* [online] available at <https://copyrightcortex.org> [Accessed 12 July 2018]

de Vaus, D. (2014) *Surveys in Social Research*, 6th ed. Routledge: Abingdon

Dickson, M. (2010) "Due Diligence, Futile Effort: Copyright and the Digitisation of the Thomas E. Watson Papers," *The American Archivist*, 73:2, pp.626-636 [online] available at <http://americanarchivist.org/doi/pdf/10.17723/aarc.73.2.16rh811120280434> [Accessed 12 July 2018]

Digital Preservation Coalition (2015) *Digital Preservation Handbook*, 2nd ed. [online] available at <https://dpconline.org/handbook/glossary> [Accessed 12 July 2018]

Digital Preservation Coalition (2017) *The Bit List of Digitally Endangered Species* [online] available at <http://www.dpconline.org/our-work/bit-list> [Accessed 12 July 2018]

Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [online] available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001L0029> [Accessed 12 July 2018]

Donnelly, M., Innocenti, P., McHugh, A. and Ruusalepp, R. (2009) *DRAMBORA Interactive: User Guide*, Digital Preservation Europe/Digital Curation Centre [online] available at http://www.dcc.ac.uk/sites/default/files/DRAMBORA_Interactive_Manual%5B1%5D.pdf [Accessed 12 July 2018]

Dryden, J. (2008) *Copyright in the Real World: Making Archival Material Available on the Internet*, PhD Thesis, University of Toronto [online] available at https://tspace.library.utoronto.ca/bitstream/1807/11198/1/Dryden_Jean_E_200806_PhD_thesis.pdf [Accessed 12 July 2018]

Dryden, J. (2010) "What Canadian Archivists Know about Copyright and Where They Get Their Knowledge," *Archivaria*, 69, pp.77-116 [online] available at <https://archivaria.ca/index.php/archivaria/article/viewFile/13262/14573> [Accessed 12 July 2018]

Dryden, J. (2011) "Copyfraud or Legitimate Concerns? Controlling Further Uses of Online Archival Holdings," *The American Archivist*, 74:2, pp. 522-543 [online] available at <http://www.jstor.org/stable/23079049> [Accessed 12 July 2018]

Dryden, J. (2014) "The Role of Copyright in Selection for Digitisation," *The American Archivist*, 77:1, pp.64-95 [online] available at <http://americanarchivist.org/doi/pdf/10.17723/aarc.77.1.3161547p1678423w> [Accessed 12 July 2018]

Duranti, L. and Rogers, C. (2012) "Trust in digital records: An increasingly cloudy legal area," *Computer Law & Security Review*, 28:5, pp. 522-531 [online] available at <https://doi.org/10.1016/j.clsr.2012.07.009> [Accessed 12 July 2018]

Elliot, M. (2016) *The Oxford Dictionary of Social Research Methods*, Oxford University Press: Oxford [online] available at www.oxfordreference.com [Accessed 12 June 2018]

Enterprise and Regulatory Reform Act 2013 (UK) [online] available at <http://www.legislation.gov.uk/ukpga/2013/24/contents/enacted> [Accessed 12 July 2018]

Enumerate (2012) *Survey Report on Digitisation in European Cultural Heritage Institutions* [online] available at <http://www.enumerate.eu/fileadmin/ENUMERATE/documents/ENUMERATE-Digitisation-Survey-2012.pdf> [Accessed 12 July 2018]

European Commission (2008) *Green Paper on Copyright in the Knowledge Economy*, COM(2008) 466/3, Brussels [online] available at http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/greenpaper_en.pdf [Accessed 12 July 2018]

European Commission (2016) *Proposal for a Directive on copyright in the Digital Single Market*, COM(2016) 593 final [online] available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016PC0593&from=EN> [Accessed 12 July 2018]

European Union Intellectual Property Office (2018) *Orphan Works Database* [online] available at <https://oami.europa.eu/ohimportal/en/web/observatory/orphan-works-database> [Accessed 12 July 2018]

Favale, M., Homberg, F., Kretschmer, M., Mendis, D., and Secchi, D. (2015) *Copyright, and the Regulation of Orphan Works: A Comparative Review of Seven Jurisdictions and a Rights Clearance Simulation*, CREATE Working Paper 2013/7, University of Glasgow [online] available at <http://www.create.ac.uk/publications/copyright-and-the-regulation-of-orphan-works/> [Accessed 12 July 2018]

Federation of European Publishers (2012) ARROW [online] available at <https://fep-fee.eu/ARROW-ARROW> [Accessed 12 July 2018]

Flyvbjerg, B. (2011) "Case Study," in: Denzin, N.K., & Lincoln, Y.S., eds. (2011) *The SAGE Handbook of Qualitative Research*, 4th ed. London: Sage, pp. 301-316.

Foster, J., and Sheppard, J., eds. (2002) *British Archives: a guide to archive resources in the United Kingdom*, Palgrave, London.

Fraser, E.M. (2010) "Antitrust and the Google books settlement: The problem of simultaneity," *Stanford Technology Law Review*, 4 [online] available at: <http://www.thepublicindex.org/wp-content/uploads/sites/19/docs/commentary/fraser-antitrust-and-google-books.pdf> [Accessed 12 July 2018]

Frosio, G. (2011) "Google Book Rejected: Taking the Orphans to the Digital Public Library of Alexandria," *Santa Clara Computer and High Technology Law Journal*, 28, [online]

available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1802843 [Accessed 12 July 2018]

Gerring, J. (2007) *Case Study Research, Principles and Practices*, Cambridge: Cambridge University Press.

Glasgow School of Art (2016) *Archives and Collections: Copyright Terms and Conditions* [online] available at <http://www.gsaarchives.net/wp-content/uploads/2014/08/Copyright-and-Terms-and-Conditions.pdf> [Accessed 12 July 2018]

Glasgow School of Art (2018) *Archives and Collections Online Catalogue* [online] available at <http://www.gsaarchives.net/> [Accessed 12 July 2018]

Glasgow Women's Library (2018) LGBTQ Collections Online Resource [online] available at <https://womenslibrary.org.uk/explore-the-library-and-archive/lgbtq-collections-online-resource/> [Accessed 12 July 2018]

Gracy, K. (2012) "Distribution and Consumption Patterns of Archival Moving Images in Online Environments," *The American Archivist*, 75:2, pp.422-455 [online] available at <http://americanarchivist.org/doi/10.17723/aarc.75.2.085785x17862105t> [Accessed 12 July 2018]

Gracy, K. (2013) "Ambition and Ambivalence: A Study of Professional Attitudes toward Digital Distribution of Archival Moving Images," *The American Archivist*, 76:2, pp.346-373 [online] available at <http://americanarchivist.org/doi/pdf/10.17723/aarc.76.2.t401kx8j64682224> [Accessed 12 July 2018]

Graneheim, U. H. and Lundman, B. (2004) "Qualitative content analysis in nursing research: concepts, procedures and measures to achieve trustworthiness," *Nurse Education Today*, 24:2, pp.105-112 [online] available at <http://dx.doi.org/10.1016/j.nedt.2003.10.001> [Accessed 12 July 2018]

GUASC (2018) *Stoddard-Templeton Collection* [online] available at <https://www.gla.ac.uk/myglasgow/archives/collections/business/features/stoddard/> [Accessed 12 July 2018]

Krippendorff, K. (2013) *Content analysis: an introduction to its methodology*, Sage: London

Hackett, T. (2016) "Licensed to Fail: How licensing ended 'established and respected' international document supply service," *EIFLnet Blog* [online] available at <http://www.eifl.net/blogs/licensed-fail> [Accessed 12 July 2018]

Hackett, T. (2016) *Licensed to fail: How Licensing can decrease access to information*, EIFL Report [online] available at http://www.eifl.net/sites/default/files/resources/201605/licensed_to_fail_long.pdf [Accessed 12 July 2018]

Hamilton, G. and Saunderson, F. (2017) *Open Licensing for Cultural Heritage*, Facet: London

Hansen, D. R., Hinze, G., Urban, J.M., Hashimoto, K., and Samuelson, P. (2013) "Solving the Orphan Works Problem for the United States," *Columbia Journal of Law & the Arts*, 37:1, pp.1-55 [online] available at <https://lawandarts.org/article/solving-the-orphan-works-problem-for-the-united-states-2/> [Accessed 12 July 2018]

Harris, C. R., Jenkins, M., and Glaser, D. (2006) "Gender Differences in Risk Assessment: Why do Women Take Fewer Risks Than Men?" *Judgement and Decision Making*, 1:1, pp.48-63 [online] available at <http://journal.sjdm.org/jdm06016.pdf> [Accessed 12 July 2018]

Harris, V. (2007) *Archives and Justice: A South African Perspective*, Society of American Archivists: Chicago

Hatch, P., Morrison, C. and Secker, J. (2017) *A study of copyright specialists in UK educational and cultural institutions: Who are they and what do they do?*, UK Copyright Literacy Report [online] available at <https://ukcopyrightliteracy.files.wordpress.com/2017/12/copyright-officers-survey-report-final.pdf> [Accessed 12 July 2018]

Hirtle, P., Hudson E. and Kenyon, A. T. (2009) *Copyright and Cultural Institutions: Guidelines on Digitisation for US Libraries, Archives and Museums*, Cornell University Library: Ithaca NY [online] available at <https://ecommons.cornell.edu/handle/1813/14142> [Accessed 12 July 2018]

Hudson, E. and Kenyon, A.T. (2007) "Digital Access: The Impact of Copyright on Digitisation Practices in Australian Museums, Galleries, Libraries and Archives," *University of New South Wales Law Journal*, 30:1, pp. 1-55 [online] available at <http://ssrn.com/abstract=1065622> [Accessed 12 July 2018]

Hughes, L. (2003) *Digitising Collections: Strategic issues for the information manager*, Facet: London.

Iacovino, L. (2010) "Rethinking archival, ethical and legal frameworks for records of Indigenous Australian communities: a participant relationship model of rights and responsibilities," *Archival Science*, 10, pp.353-372 [online] available at <http://rdcu.be/zxLc> [Accessed 12 July 2018]

Institute of Art and Law (2016) An end to 'bargain basement' design furniture [online] available at <https://ial.uk.com/an-end-to-bargain-basement-design-furniture/> [Accessed 12 July 2018]

International Council on Archives (2012) *Universal Declaration on Archives*, ICA: France [online] available at https://www.ica.org/sites/default/files/UDA_June%202012_web_EN.pdf [Accessed 12 July 2018]

Institute for Risk Management (2002) *A Risk Management Standard* [online] available at: www.theirm.org/media/886059/ARMS_2002_IRM.pdf [Accessed 12 July 2018]

Intellectual Property Office (2014) *Consultation on reducing the duration of copyright in unpublished ("2039") works in accordance with section 170(2) of the Copyright, Designs and Patents Act 1988* [online] available at <https://www.gov.uk/government/consultations/reducing-the-duration-of-copyright-in-certain-unpublished-works> [Accessed 12 July 2018]

Intellectual Property Office (2015) *Government response to the consultation on reducing the duration of copyright in certain unpublished works* [online] available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/399171/973

[- Gouvernement Response - copyright in certain unpublished works.pdf](#) [Accessed 12 July 2018]

Intellectual Property Office (2014) *Copyright notice: digital images, photographs and the internet* [online] available at <https://www.gov.uk/government/publications/copyright-notice-digital-images-photographs-and-the-internet> [Accessed 12 July 2018]

Intellectual Property Office (2016) *Guidance: Orphan Works commercial and non-commercial licences* [online] available at <https://www.gov.uk/government/publications/orphan-works-commercial-and-non-commercial-licences/orphan-works-commercial-and-non-commercial-licences> [Accessed 12 July 2018]

Intellectual Property Office (2016) *Orphan Works diligent search guidance for applicants* [online] available at <https://www.gov.uk/government/publications/orphan-works-diligent-search-guidance-for-applicants> [Accessed 12 July 2018]

Intellectual Property Office (2017) *Application to operate an ECL scheme*, Public consultation: 8th December 2017-2nd February 2018 [online] available at <https://www.gov.uk/government/consultations/application-to-operate-an-ecl-scheme> [Accessed 12 July 2018]

Intellectual Property Office (2017) *Repeal of Section 52 of the Copyright, Designs and Patents Act 1988: Guidance for affected individuals, organisations and businesses* [online] available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/606207/160408_guidance_s52_final_web_accessible.pdf [Accessed 12 July 2018]

Intellectual Property Office (2017) *View the Orphan Works register* [online] available at <https://www.orphanworkslicensing.service.gov.uk/view-register> [Accessed 12 July 2018]

International Federation of Library Associations (2017) *Treaty Proposal on Copyright Limitations and Exceptions for Libraries and Archives v.4.4* [online] available at <https://www.ifla.org/node/5858> [Accessed 12 July 2018]

Janke, T. and Iacovino, L. (2012) "Keeping cultures alive: archives and Indigenous cultural and intellectual property rights," *Archival Science*, 12, pp.151-171 [online] available at <http://rdcu.be/zxdU> [Accessed 12 July 2018]

Jimerson, R.C. (2003) "Archives and Memory," *OCLC Systems and Services: International Digital Library Perspectives*, 19:3, pp.89-95 [online] available at <https://doi.org/10.1108/10650750310490289> [Accessed 12 July 2018]

JISC Legal (2015) *Jisc Legal: From 2 January 2015, Jisc is bringing its member-facing teams, including Jisc Legal, in-house* [online] available at <https://www.jisc.ac.uk/website/legacy/legal> [Accessed 12 July 2018]

Kennedy, M. (1979) "Generalising from single case studies," *Evaluation Quarterly*, 3:4, pp.661-678 [online] available at: <https://www.msu.edu/~mkennedy/publications/docs/Research%20Methods/Generalizing/Kennedy%2079%20Generalizing.pdf> [Accessed: 12 July 2018]

Ketelaar, E. (2008) "Archives as Spaces of Memory," *Journal of the Society of Archivists*, 29:1, pp.9-27 [online] available at <https://doi.org/10.1080/00379810802499678> [Accessed 12 July 2018]

- Korn, N. (2008) *In From the Cold*, Strategic Content Alliance/Collections Trust: London [online] available at <https://www.jisc.ac.uk/podcasts/in-from-the-cold-a-report-on-orphaned-works-08-jun-2009> [Accessed 12 July 2018]
- Korn, N. (2015) “When is the public domain not the public domain?” *CILIP blog*, 15 April [online] available at <https://archive.cilip.org.uk/blog/when-public-domain-not-public-domain> [Accessed 12 July 2018]
- Korn, N. and McKenna, G. (2012) *Copyright: A Practical Guide*, 2nd Ed., Collections Trust: London.
- Library and Archive Copyright Alliance (2014) *Campaign to free our history – reform copyright* [online] available at <https://archive.cilip.org.uk/news/campaign-free-our-history-reform-copyright> [Accessed 12 June 2018]
- Library and Archive Copyright Alliance (2016) *Notice of complaint to the Secretary of State in line with sections 296ZE and 296ZEA of the Copyright, Designs and Patents Act 1988 [as amended] – where Technological Protection Measures (TPMs) prevent a complainant from benefiting from an eligible copyright exception* [online] available at https://archive.cilip.org.uk/sites/default/files/media/document/2017/notice_of_complaint_to_the_secretary_of_state_-_test_case_1_0.pdf [Accessed 12 June 2018]
- Lemieux, V. L. (2010) “The records-risk nexus: exploring the relationship between records and risk,” *Records Management Journal*, 20:2, pp.199-216 [online] available at <https://doi.org/10.1108/09565691011064331> [Accessed 12 July 2018]
- Loren, L. L. (2012) “Abandoning the Orphans: An Open Access Approach to Hostage Works,” *Berkeley Technology Law Journal*, 27, pp.1431-1470 [online] available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2049685 [Accessed 12 July 2018]
- MacDonald, M. (1996) “Churchill papers purchase was ‘vital,’” *The Independent*, 29th March [online] available at <https://www.independent.co.uk/news/churchill-papers-purchase-was-vital-1344608.html> [Accessed 12 July 2018]
- Maher, W. (2001) “Between Authors and Users: Archivists in the copyright vise,” *Archival Issues*, 26:1, pp.63-75 [online] available at <https://www.jstor.org/stable/41102038> [Accessed 12 July 2018]
- Margaret Thatcher Foundation (2018) *Thatcher Archive* [online] available at <http://www.margaretthatcher.org/archive/thatcher-archive.asp> [Accessed 12 July 2018]
- Margoni, T. (2014) *The Digitisation of Cultural Heritage: Originality, Derivative Works and (Non) Original Photographs*, Institute for Information Law (IViR) University of Amsterdam [online] available at <https://www.ivir.nl/publicaties/download/1507> [Accessed 12 July 2018]
- Mathiesen, K. (2012) “A Defense of Native Americans' Rights over Their Traditional Cultural Expressions,” *The American Archivist*, 75:2, pp.456-481 [online] available at <https://doi.org/10.17723/aarc.75.2.0073888331414314> [Accessed 12 July 2018]
- McKemmish, S. et al (2005) *Archives: Recordkeeping in Society*, Centre for Information Studies: Wagga Wagga NSW
- Millar, L. (2010) *Archives: Principles and Practice*, Facet: London

Ministry of Law (2016) *Proposed Changes to Copyright Regime in Singapore*, Public Consultation: 23rd August 2016 - 7th November 2017 [online] available at <https://www.mlaw.gov.sg/content/minlaw/en/news/public-consultations/public-consultation-on-proposed-changes-to-copyright-regime-in-s.html> [Accessed 12 July 2018]

Morrison, C. and Secker, J. (2015) "Copyright Literacy in the UK: a survey of librarians and other cultural heritage sector professionals," *Library and Information Research*, 39:121, pp.75-97 [online] available at <http://www.lirjournal.org.uk/lir/ojs/index.php/lir/article/view/675/704> [Accessed 12 July 2018]

Nagaraj, A. (2016) Does Copyright Affect Reuse? Evidence from the Google Books Digitisation Project, MIT Sloan School of Management, student paper [online] available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2810761 [Accessed 12 July 2018]

National Register of Archives (2018) *Find An Archive* [online] available at <http://discovery.nationalarchives.gov.uk/find-an-archive> [Accessed 12 July 2018]

The National Archives (2017) *Finding Records in Discovery* [online] available at <http://www.nationalarchives.gov.uk/archives-sector/finding-records-in-discovery-and-other-databases/> [Accessed 12 July 2018]

OCLC Research (2010) *Well-intentioned Practice for Putting Digitised Collections of Unpublished Materials Online* [online] available at <http://www.oclc.org/research/activities/rights/practice.pdf> [Accessed 12 July 2018]

Open Knowledge (2013) OpenGLAM Principles v.1.0 [online] available at <https://openglam.org/principles/> [Accessed 12 July 2018]

Oppenheim, C. (2012) *The No-nonsense Guide to Legal Issues in Web 2.0 and Cloud Computing*, Facet: London

Oxford Reference (2018) black-letter law [online] available at <http://www.oxfordreference.com/view/10.1093/oi/authority.20110803095510675> [Accessed 12 July 2018]

Oxford University Press (2018) *OED Online* [online] available at www.oed.com/view/Entry/240886 [Accessed 12 July 2018]

Packwood, A. (2013) *Churchill Archives Centre: The Story So Far...*, available at <https://www.chu.cam.ac.uk/media/uploads/files/History.pdf> [Accessed 12 July 2018].

Padfield, T. (2010) *Copyright for Archivists and Records Managers*, 4th Ed., Facet: London

Padfield, T. (2015) *Copyright for Archivists and Records Managers*, 5th Ed., Facet: London

Pedley, P. (2008) *Copyright Compliance: Practical Steps to Stay Within the Law*, Facet: London

Pedley, P. (2012) *Essential Law for Information Professionals*, Facet: London

Pedley, P. (2012) *The e-Copyright Handbook*, Facet: London

- Pedley, P. (2015) *Practical Copyright for Library and Information Professionals*, Facet: London
- Peters, R. and Kalshoven, L. (2016) *Europeana Factsheet: What rights clearance looks like for Cultural Heritage Organisation – 10 case studies* [online] available at https://pro.europeana.eu/files/Europeana_Professional/IPR/160331rights_clearance_case_studies_public.pdf [Accessed 12 July 2018]
- Pickford, C. (2002) “Archives: A statistical overview,” *Cultural Trends*, 12:48, pp.1-36 [online] available at <https://doi.org/10.1080/09548960209390339> [Accessed 12 July 2018]
- Poll, R. (2010) “NUMERIC: statistics for the digitisation of European cultural heritage,” *Program*, 44:2, p.122-131 [online] available at <https://doi.org/10.1108/00330331011039481> [Accessed 12 July 2018]
- Post, J. B. (1986) “Copyright mentality and the archivist,” *Journal of the Society of Archivists*, 8:1, pp.17-22 [online] available at <https://doi.org/10.1080/00379818609514287> [Accessed 12 July 2018]
- Potter, J., and Weatherell, M. (1987) *Discourse and Social Psychology*, London: Sage.
- Pritcher, L. (2000) “Ad*access: seeking copyright permissions for a digital age” *D-Lib Mag*, 6:2 [online] available at <http://www.dlib.org/dlib/february00/pritcher/02pritcher.html> [Accessed 12 July 2018]
- Reda, J. (2018) Member of European Parliament Website [online] available at <https://juliareda.eu/en/> [Accessed 12 July 2018]
- Riis, T. and Schovsbo, J. (2010) “Extended Collective Licenses and the Nordic Experience - It’s a Hybrid but is It a Volvo or a Lemon?” *Columbia Journal of Law and the Arts*, 33:4, [online] available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1535230 [Accessed 12 July 2018]
- Rubel, D. (2007) “Accessing their voice from anywhere: Analysis of the legal issues surrounding the online use of oral histories,” *Archival Issues*, 31:2, pp.171-187 [online] available at <https://www.jstor.org/stable/41102157> [Accessed 12 July 2018]
- Sag, M. (2009) Copyright and Copy-Reliant Technology, DePaul University College of Law, Technology, Law & Culture Research Series Paper No. 09-001 [online] available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1257086 [Accessed 12 July 2018]
- Samuelson, P. (2010) “Academic Author objections to the Google Book Search Settlement,” *Journal of Telecommunications and High Technology Law*, 8, pp.491-522, [online] available at <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2684&context=facpubs> [Accessed 12 July 2018]
- Samuelson, P. (2011) “Legislative Alternatives to the Google Book Settlement,” *Columbia Journal of Law & the Arts*, 34:4, pp. 697-729 [online] available https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1818126 [Accessed 12 July 2018]
- Schroff, S., Favale, M., and Bertoni, A. (2017) “The Impossible Quest: Problems with Diligent Search for Orphan Works,” *IIC – International Review of Intellectual Property and Competition Law*, 48:3, pp. 286-304 [online] available at <https://link.springer.com/article/10.1007/s40319-017-0568-z> [Accessed 12 July 2018]

- Secker, J. with Morrison, C. (2016) *Copyright and E-Learning: A Guide for Practitioners*, 2nd Ed., Facet: London
- Silverman, D. (2006) *Interpreting Qualitative Data*, 3rd Ed., London: Sage
- Spraggs, G. (2013) "Beware the Spare Rib Digitisation Project," *Action on Author's Rights blog*, 18th December [online] available at <https://blog.authorsrights.org.uk/2013/12/18/beware-the-spare-rib-digitisation-project/> [Accessed 12 July 2018]
- Stobo, V., Deazley R. and Anderson, I. G. (2013) Copyright and Risk: Scoping the Wellcome Digital Library Project Report, CREATE Working Paper 2013/10, University of Glasgow [online] available at <http://www.create.ac.uk/publications/copyright-risk-scoping-the-wellcome-digital-library-project/> [Accessed 12 July 2018]
- Stobo, V. (2014) "Will UK unpublished works finally make their Public Domain Debut?" CREATE blog, 2nd June [online] available at <http://www.create.ac.uk/blog/2014/06/02/will-uk-unpublished-works-finally-make-their-public-domain-debut/> [Accessed 12 July 2018]
- Stobo, V. (2016) "Copyright exceptions for archivists and librarians in the UK," *Art Libraries Journal*, 41:1, pp. 3-10 [online] available at <https://doi.org/10.1017/alj.2015.3> [Accessed 12 July 2018]
- Stobo, V. (2016) "Report on the Standing Committee on Copyright and Related Rights, Thirty-Second Session," *SCA Broadsheet No. 38* [online] available at <http://www.scottisharchives.org.uk/broadsheet/issue-38.pdf> [Accessed 12 July 2018]
- Stobo, V. (2016) Risky business: Copyright and Making Collections Available Online in Wallace, A. and Deazley, R. (eds) (2016) *Display At Your Own Risk* [online] available at <http://displayatyourownrisk.org/stobo/> [Accessed 12 July 2018]
- Stobo, V. et al (2017) 'Digitisation and Risk,' in Deazley, R. et al (2017) *Digitising the Edwin Morgan Scrapbooks*, available at <https://www.digitisingmorgan.org/Risk> [Accessed 12 July 2018]
- Stobo, V., Patterson, K., Erikson, K. and Deazley, R. (2018) "I should like you to see them sometime": an empirical study of the costs of rights clearance in the digitisation of Edwin Morgan's scrapbooks," *Journal of Documentation*, 74:3, pp. 641-667 [online] available at <https://doi.org/10.1108/JD-04-2017-0061> [Accessed 12 July 2018]
- Stoecker, R. (1991) "Evaluating and rethinking the case study," *The Sociological Review*, 39:1, [online] available at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-954X.1991.tb02970.x/abstract> [Accessed 12 July 2018]
- Stratton, B. (2011) *Seeking New Landscapes: A rights clearance study in the context of mass digitisation of 140 books published between 1870 and 2010*, British Library/ARROW: London [not currently available online]
- Swain, E. (2003) "Oral History in the Archives: Its Documentary Role in the Twenty-First Century," *The American Archivist*, 66:1, pp.139-158 [online] available at <http://americanarchivist.org/doi/pdf/10.17723/aarc.66.1.9284q6r604858h40> [Accessed 12 July 2018]
- Tanner, S. (2012) *Measuring the Impact of Digital Resources: The Balanced Value Impact Model*, Arcadia/King's College London: London [online] available at

https://www.kdl.kcl.ac.uk/fileadmin/documents/pubs/BalancedValueImpactModel_SimonTanner_October2012.pdf [Accessed 12 July 2018]

Tate (2017) *Archives and Access Toolkit* [online] available at <https://www.tate.org.uk/art/archive/archives-access-toolkit> [Accessed 12 July 2018]

Terras, M., Baker, J., Hetherington, J., Beavan, D., Zaltz Austwick, M., Welsh, A., O'Neill, H., Finley, W., Duke-Williams, O. and Farquhar, A. (2017) "Enabling complex analysis of large-scale digital collections: Humanities research, high-performance computing, and transforming access to British Library digital collections," *Digital Scholarship in the Humanities*, 33:2, pp.456-466 [online] available at <http://dx.doi.org/10.1093/llc/fqx020> [Accessed 12 July 2018]

The Copyright Act of 1976 (United States) [online] available at <https://www.copyright.gov/title17/> [Accessed 12 July 2018]

The Copyright and Related Rights Regulations 1996 (UK) [online] available at <https://www.legislation.gov.uk/ukxi/1996/2967/contents/made> [Accessed 12 July 2018]

The Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014 (UK) [online] available at <https://www.legislation.gov.uk/ukxi/2014/2861/contents/made> [Accessed 12 July 2018]

The Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014 (UK) [online] available at <https://www.legislation.gov.uk/ukxi/2014/2588/contents/made> [Accessed 12 July 2018]

The Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014 (UK) [online] available at <http://www.legislation.gov.uk/ukxi/2014/2863/contents/made> [Accessed 12 June 2018]

The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014 (UK) [online] available at <https://www.legislation.gov.uk/ukxi/2014/1372/contents/made> [Accessed 12 July 2018]

The Copyright (Librarians and Archivists) (Copying of Copyright Material) Regulations 1989 (UK) [online] available at <https://www.legislation.gov.uk/ukxi/1989/1212/schedule/2/made> [Accessed 12 July 2018]

Travis, H. (2010) "Estimating the Economic Impact of Mass Digitisation Projects on Copyright Holders: Evidence from the Google Book Search Litigation," *Journal of the Copyright Society of the USA*, 57, [online] available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1634126 [Accessed 12 July 2018]

Tsiavos, .P. (2009) *Case Studies Mapping the Flows of Content, Value and Rights Across the Public Sector*, Jisc/Strategic Content Alliance [online] available at https://sca.jiscinvolve.org/wp/files/2009/04/sca_2009symp_ipr_casestudies-final.pdf [Accessed 12 July 2018]

UK Thesis Digitisation Project (2007) Project Plan, JISC Digitisation project documentation [online] available at: webarchive.nationalarchives.gov.uk/20140702233839/http://www.jisc.ac.uk/media/documents/programmes/digitisation/ukthesespp.pdf [Accessed 12 July 2018]

University of Bradford Special Collections (2017) *100 Objects from Special Collections at the University of Bradford* [online] available at <https://100objectsbradford.wordpress.com/> [Accessed 12 July 2018]

University of Darmstadt v Eugen Ulmer [2014] ECDR 449 [online] available at <http://curia.europa.eu/juris/liste.jsf?num=C-117/13> [Accessed 12 July 2018]

University of Dundee (2018) *REWIND: Artists' Video in the 70s and 80s* [online] available at <http://www.rewind.ac.uk/rewind/index.php/Welcome> [Accessed 12 July 2018]

University of Exeter (2018) "Work, Home and Leisure," in Digital Collections Online [online] available at <https://ore.exeter.ac.uk/repository/handle/10472/17> [Accessed 12 July 2018]

University of Newcastle Special Collections (2018) *The Bloodaxe Archive* [online] available at <http://bloodaxe.ncl.ac.uk/explore/index.html#/splash> [Accessed 12 July 2018]

University of Warwick (2017) *Trabajadores: The Spanish Civil War through the eyes of organized labour* [online] available at <https://warwick.ac.uk/services/library/mrc/explorefurther/digital/scw/> [Accessed 20 December 2017]

US Copyright Office (2015) *Orphan Works and Mass Digitisation: A Report of the Register of Copyrights* [online] available at: <https://www.copyright.gov/orphan/reports/orphan-works2015.pdf> [Accessed 12 July 2018]

van Eechoud, M., Hugenholtz, P.B., van Gompel, S., Guibault, L. and Helberger, N. (2009) "The European Concern with Copyright and Related Rights" in *Harmonising European Copyright Law: The Challenges of Better Law-Making*, Information Law Series Vol. 19, Kluwer Law International: The Netherlands [online] available at <https://www.ivir.nl/publicaties/download/967.pdf> [Accessed 12 July 2018]

Vernon, A. (2015) "Digitising Spare Rib Magazine: The Inside Story," *Living Knowledge blog*, British Library, 28th May [online] available at <http://blogs.bl.uk/living-knowledge/2015/05/digitising-spare-rib-magazine-the-inside-story.html> [Accessed 12 July 2018]

Visual Resources Association (n.d.) *Statement on the Fair Use of Images for Teaching, Research and Study* [online] available at http://cmsimpact.org/wp-content/uploads/2016/01/vra_fairuse_statement.pdf [Accessed 12 July 2018]

Vuopala, A. (2010) *Assessment of the Orphan works issues and Costs for Rights Clearance*, European Commission/DG Information Society and Media [online] available at http://www.ace-film.eu/wp-content/uploads/2010/09/Copyright_anna_report-1.pdf [Accessed 12 July 2018]

Wallace, A. and Deazley, R. (eds.) (2016) *Display At Your Own Risk: An experimental exhibition of digital cultural heritage* [online] available at <http://displayatyourownrisk.org/publications/> [Accessed 12 July 2018]

Web2Rights (2010) *Risk Management Calculator*, Web2Rights OER IPR Support Project [online] available at <http://www.web2rights.com/OERIPRSupport/risk-management-calculator/> [Accessed 12 July 2018]

Weibel, N., Rick, S., Emmenegger, C., Ashfaq, S., Calvitti, A. and Agha, Z. (2015) "LAB-IN-A-BOX: semi-automatic tracking of activity in the medical office," *Personal and Ubiquitous Computing*, 19:2, pp. 317-334 [online] available at <http://doi.org/10.1007/s00779-014-0821-0> [Accessed 12 July 2018]

Wellcome Library (2017) Codebreakers: Makers of Modern Genetics [online] available at <http://wellcomelibrary.org/collections/digital-collections/makers-of-modern-genetics/> [Accessed 12 July 2018]

Williams, C. (2006) *Managing Archives: Foundations, Principles and Practice*, Chandos: Oxford

Williams, C. (2014) *Managing Volunteering in Archives: Report 2014* [online] available at http://www.archives.org.uk/images/documents/ARACouncil/ARA_Managing_Volunteering_in_Archives_2014_Report_and_appendices_final.pdf [Accessed 12 July 2018]

Willis, T. (2016) "Why the UK replica furniture market is about to be hit by new copyright laws," *The Independent* [online] available at <https://www.independent.co.uk/life-style/design/why-the-uk-replica-furniture-market-is-about-to-be-hit-by-new-copyright-laws-a6876006.html> [Accessed 12 July 2018]

Winn, K. (1974) "Common Law Copyright and the Archivist," *The American Archivist*, 37:3, pp.375-386 [online] available at <https://doi.org/10.17723/aarc.37.3.d64180222h18601j> [Accessed 12 July 2018]

WIPO (2017) *Draft Action Plans on Limitations and Exceptions for the 2018-2019 Biennium*, Standing Committee on Copyright and Related Rights, 35th Session [online] available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_35/sccr_35_9.pdf [Accessed 12 July 2018]

Wolff, N.R (2014) Copyright Issues and Israeli Practice in Digitising Archives, MSc Dissertation, University of Aberystwyth [online] available at http://cadair.aber.ac.uk/dspace/bitstream/handle/2160/26273/Wolff_N.pdf?sequence=2&isAllowed=y [Accessed 12 July 2018]

Woolcock, P. (2015) *Out of the Rubble* [online] available to view on the BFI Player at <https://player.bfi.org.uk/free/film/watch-out-of-the-rubble-2015-online> [Accessed 12 July 2018]

Appendices

Appendix A: Case Study Interview Script	p.229
Appendix B: Interview Transcripts	p.232
Appendix C: Survey Instrument	p.361
Appendix D: Survey Data	p.383

Appendix A: Case Study Interview Script

Project Impetus

1. Why is it important for (institution) to have this collection?
2. Why is it important to digitise it?
3. How did the project come about?
4. (If partnership)

Who approached who?

How long did it take to negotiate?

What was discussed during the negotiations?

5. What were your main concerns going into the project?

Digitisation

6. What does the cataloguing process involve?
7. How does the digitisation process work?
8. How does the cataloguing process integrate with digitisation and rights clearance?

Rights Clearance

9. When did you realise rights were an issue?
10. What sorts of rights issues have you identified in the collection?
11. How did you decide to manage the rights clearance process?
12. What does the process involve?

13. If you developed risk criteria, what did they consist of?
14. What sources do you use for diligent search?
15. If you developed risk mitigation strategies, what did they consist of?
16. (If Partnership)
How were the other partners involved in rights clearance?

Policies and Processes

17. What policies have you developed as a result of this project?
18. Have you changed other policies as a result of working on this project?

Responses

19. What was the response from rights holders like?
20. What were the positive responses?
21. What were the negative responses?
22. What do you do when people are upset?
23. What do you do when they do not respond?
24. Are you going to make the non-respondent material available?
25. If yes/If no, why?
26. Do you have data on the responses?
27. Would it be possible to share that data?

Orphan Works

28. How many orphan rights holders/works did you identify in the material to be digitised?
29. Will you/did you make them available online?
30. Will you use/have you used the orphan works exception or licensing scheme to make them available?
31. If yes/If no, why?
32. What was your experience of use the exception/scheme like?
33. If your collections were available online prior to the orphan works exception/licensing scheme, are you now considering taking that material down?
34. If yes/If no, why?
35. If you were starting that project again now, would you use the exception/licensing scheme, or would follow the same process?

Appendix B: Interview Transcripts

1. Churchill Archives Centre	p.233
2. Glasgow School of Art Archives and Collections	p.253
3. Newcastle University Special Collections	p.290
4. The British Library	p.306
5. British Film Institute	p.314

1 **Case Study:** Churchill Archives Centre
2
3 **Date:** 2015-02-24
4
5 **Interviewer:** Victoria Stobo (VS)
6
7 **Interviewee:** Natalie Adams, Senior Archivist, Churchill Archives Centre (NA)
8
9
10 VS: It's 24th February and I'm interviewing Natalie Adams from Churchill College
11 Archives, Churchill Archive Centre. So the first question that I had in mind was
12 basically about the history of the collection, how did it come to the college, how
13 is it catalogued and how did that feed into publications. That's maybe a bit broad
14 so maybe start with the history of the collection and how it came to the college.
15
16 NA: It's actually slightly complicated. The provenance is that it's Sir Winston
17 Churchill's own archive. It contains more official documents than a prime
18 ministerial collection now would. The rules governing official material have
19 been tightened up a lot. Churchill had the collection and had a special room
20 where it was all kept and he drew on the collection very heavily to write his
21 history of the Second World War and the First World War before that, but you
22 can see that the collection had a contemporary life and then it was revisited and
23 chunks of text were marked up to be published.
24
25 As Churchill got towards the end of his life, his son, Randolph, started the task
26 of writing the official biography of Churchill's life. Very document heavy, as a
27 publication. I'm not sure there are others like it. There were, in the end, 8
28 volumes of the biography and each of those volumes has about 3 companion
29 volumes of documents basically. Churchill's son, Randolph, did I think the first
30 2 volumes and then the task went to Martin Gilbert, who's only just died, but it's
31 monumental.
32
33 So the collection went from Churchill's house to his son's house. His son had a
34 special iron room for it and then it came to Churchill Archive Centre. Before
35 Churchill died, it had been arranged and catalogued by the then Public Record
36 Office, but they were basically doing a consultancy job there, so Churchill and
37 his office paid them for that work, but the collection is quite, the arrangement
38 and the structure is still that PRO National Archives approach.
39
40 So the collection came to Churchill College and the Archive Centre was really
41 purpose built to hold it in 1973, but Martin Gilbert was based in Oxford and
42 didn't want to come to Cambridge, so I'm not absolutely sure how it worked,
43 whether chunks of the collection went to the Bodleian or whether the whole lot
44 went to the Bodleian and then was sent to Cambridge as he'd finished with it,
45 but it was stored at the Bodleian and he, I think, used it in the stacks. So he had
46 some kind of access where he was surrounded by the archive. So through all of
47 that time, it was closed to everybody apart from the official biography. So this
48 Martin Gilbert, an anomaly of research assistants and the official biography takes
49 a very chronological approach to Churchill's life, so they made tonnes of
50 photocopies from the documents and then they arranged them chronologically.
51 So quite interesting because you can see the breadth of issues that Churchill was
52 dealing with, but hard to extract the themes because you're doing that.
53
54 That state of affairs, Churchill died in '65 and that official biography period
55 really went all the way up to the '90s, when the Heritage Lottery Fund bought

1 the collection so that that period from the start of the outgoing century, the start
2 of the '70s to the '90s, was really difficult for the Churchill [Archives Centre]
3 because we were getting in lots of other collections on the back of this, but we
4 didn't own the Churchill papers and their long term future wasn't even secure.
5 The family were perfectly able to take it away and there were fears that they
6 would sell bits of it and that the integrity would be lost.

7
8 It's a terribly complicated issue, but one of the other things going along there is
9 I'm really talking all this time about the pre-1945 papers with the ownership
10 issues, because that takes Churchill up to the end of the Second World War. It
11 is the most significant bit of the collection. The post-war stuff was owned by a
12 different family trust and that was given to the college, but it was recognised that
13 that wasn't the best bit. I think the reason for the 2 different chunks of the
14 collection, it's really one archive, was all about money. So Churchill lived an
15 extravagant lifestyle and had a lot of money, but he came very close to living
16 beyond his means all the time, so he was very careful about tax and I think that
17 the way that the papers were divided up was a way of minimising his tax bill. I
18 think that the Daily Telegraph were involved somehow but I don't really
19 understand the ins and outs of it but it was very complicated. So the provenance
20 and the custody is quite complicated really, much more complicated than any of
21 the other collections I've ever come across really.

22
23 So onto the cataloguing side. I already mentioned the arrangement, so the
24 National Archive Scheme. That is a very good skeleton structure for the
25 collection but what we found once the lottery grant had been given to us and the
26 onus then was to open the collection. We were able to open it, subject to Cabinet
27 office review. It's such a big collection, it's about 2,500 boxes and very hard for
28 people to trace a person or a subject across that collection, so really laborious.
29 People are looking through political correspondence by year, trying to trace
30 things. So our catalogue, which there's examples of in that handout, is a really
31 detailed one, I think partly because we had lottery money to fund it, so we had 5
32 archivists in the end working for about 7 years on it. It started off as a document
33 level description exercise and we covered most of the main important bits of the
34 collection that way, but it was really slow. So the collection is divided up into
35 files. Each of those files has 150 or so pages in and we were finding that
36 archivists could probably catalogue one of those files in a week and I think
37 there's about 2,000 or so files. So it wasn't, we weren't going to finish it with
38 that approach and also we felt that although the collection is very rich and some
39 bits of it are very valuable, there are also big swathes of it which are much less
40 so. So there's a series of constituency correspondence. They're good for social
41 history issues. If you look post-'45 you see the issues of women in the
42 workplace, soldiers coming home and needing homes, pensions, but you don't
43 need to describe every single letter to draw out those themes. So we switched to
44 describing the collection file by file, still really detailed, still lots of lists of all
45 the correspondents mentioned and all the subjects, but the idea really was that
46 the catalogue was on a database then and now it's online, but you could begin to
47 cut across it, so you could follow an individual or you could follow a theme.
48 You might still have a bit of looking through papers to do, but people were much
49 more targeted, so research visits got shorter and the wear and tear on the
50 collection was much less because they were really looking at, they knew where
51 they were going and they could go straight in. So that was the catalogue.

52
53 VS: I was just going to follow up there on what you were saying about the Cabinet
54 office review. Did that happen at the then Public Record Office or was that an
55 ongoing –

1
2 NA: That was an ongoing thing. I think it must have been tied in with the official
3 biography, but there was this period where I guess there was a trust between the
4 Cabinet office and the official biography that the text would probably be vetted.
5 So it all happened before I got to the Archive Centre, but the government office
6 reviews are usually carried out by retired civil servants, so they had come and
7 read through all the papers and highlighted ones that needed to be taken out and
8 kept closed. So that had, by the time of the lottery purchase, that had been done
9 on the papers up to '45 and then it was ongoing for the post-'45 papers. I think
10 the expectation had been that the post-'45 stuff would be quite trivial to do, but
11 because Churchill drew war time material into his literary works post-war, in
12 fact there was a bit more sensitive stuff than they thought because the original
13 documents were out of chronological sequence if you like. But that was very
14 laborious and I think it's our flagship collection, I suppose. It's the one that
15 people have lavished decades of time on really and we had paginated, foliated
16 every single document. So when it came to the review, it was easy to take the
17 documents out and to know that you could put them back in, easy for the Cabinet
18 office to be confident they were talking about the same document and we've
19 found that that kind of granular approach to review doesn't work for other
20 collections for us because we don't want to take the material out. We haven't got
21 time to paginate it. We would rather keep files as files and keep whole files
22 closed, but of course that cuts against freedom of information because we ought
23 to really be able to open up all the information that's available. So that's currently
24 quite a difficult one for us to administer actually and we're hoping to meet with
25 the Cabinet office this spring and talk a little bit more about making it more
26 workable, for them and for us, because this piece by piece approach, I don't think
27 it's sustainable.

28
29 VS: I guess that won't just be for Churchill. That will be for your other –

30
31 NA: Yes, [12:51 cross talking] Churchill, there's a tiny proportion of the material
32 that's still closed and it either comes up for review every 10 years or if someone
33 puts in an FOI request, then it gets re-reviewed at that point. But yes, for other
34 collections, for that particularly, it doesn't really, it's not working.

35
36 VS: I guess in terms of the digitisation as well, having it folioed and paginated must
37 have been incredibly useful.

38
39 NA: Yes, really useful and the fact that the closed material being physically removed
40 was great because it was microfilmed for preservation means but in a completely
41 separate sequence, so there just wasn't a worry that it would leak out or that sort
42 of thing, which it can be difficult to be sure you're talking about the right
43 document without the folio numbers.

44
45 VS: I thought I would ask about the impetus for the project so why digitise or
46 microfilm and why digitise for online access and I guess that has to do with the
47 fact that the collection was purchased for the nation by the HLF.

48
49 NA: Yes, so the Archive Centre or the college, really this new trust that was set up to
50 own the collection received a grant. The purposes of that were to catalogue it,
51 make it accessible and to have an exhibition programme and it was a 5 year
52 programme. It didn't include money for microfilm it would have been then, but
53 it didn't include an element of capturing the images, but the purchase documents
54 for the Churchill were a kind of bible. I'm showing Victoria a kind of 3" high
55 stack of paper. Buried in amongst that was the right for the Churchill family to

1 microfilm the collection and to publish it. I think that reflects a lack of trust
2 between the 2 parties, between the family and the Archive Centre.
3

4 Happily that's all in the past now, but the impetus for the microfilm project
5 actually came from the Churchill family, so the family were keen to make money
6 out of the collection. They regarded it as an asset. They'd sold the physical
7 collection but they'd retained the copyrights. I think they probably didn't
8 appreciate the amount of third party copyright material in it. I think they thought
9 they owned copyright in most of it and the Crown owned the copyright in the
10 rest, but they appointed a microfilm publisher who then came to us in slightly a
11 hostile way, really, and said we're here to exercise this right on behalf of the
12 Churchill family and you need to make the collection available for this. Quite
13 terrifying, really, for us as archivists, because we hadn't selected somebody who
14 we wanted to work with and there were lots of worries about the copyrights.
15 There was worry about them physically removing the collection to film it. So
16 there were negotiations, legal negotiations, which I think went on for about
17 probably 3 ½ years or so, very long. The chairman of the Sir Winston Churchill
18 Archive Trust was Andreas Whittam Smith who founded the Independent. He
19 was very good and very firm that the trust should do the right thing. This was
20 coming from outside so the trust didn't have the budget for the legal fees, so in
21 fact the publisher paid for all our legal fees and we went to some intellectual
22 property experts in Lincoln's Inn who I'm sure weren't cheap. We reached this
23 agreement in the end to microfilm the collection. So the agreement was signed
24 in 2000 but at the start of the negotiations, so 1997/1996, microfilm was really
25 the only way that that would have been done. I think by the time it was signed,
26 digital and online was coming on stream, but there were worries about the
27 copyrights and things and I think the publishers just thought if we start talking
28 to them about online, we'll never sign up with them really. So it was a
29 conservative approach there.
30

31 So then the collections, our copyright clearance process starts, then it's
32 microfilmed and then the microfilm was sold to Academic [Libraries] [inaudible
33 18:24] and then I think it must have been a loss to the microfilm publishers
34 because they weren't interested in publishing it digitally themselves. So at the
35 point where their initial exclusive rights came to an end, we asked them if they
36 wanted to do digital and they said that they didn't and then a certain amount of
37 time had to lapse but eventually the way became clear for us to negotiate with
38 someone else, so that what we'd taken away from the microfilm project was the
39 master microfilms, so the images of the whole collection. It also got the
40 copyright clearance data, so we'd got all the information about the rights holders
41 and we were able to present this as our offer to a commercial publisher. Then
42 we shortlisted a number of people and asked them to present or tender for it and
43 we went for Bloomsbury Academic, mainly because they were quite new, keen
44 to make their mark and the other publishers we approached were more
45 established but much more conservative in their approach and we felt that
46 incorrectly really that this was an unusual project and that it could be quite a
47 special one and we didn't just want it to be one of a number of e-books in the
48 catalogue. We wanted them to be really proactive about it. So Bloomsbury
49 hadn't done much of this before but they were very excited about it and they have
50 been more innovative than the other ones would have been in fact.
51

52 VS: Just in terms of challenging the deal with Bloomsbury, how much involvement
53 did Churchill Archive Centre have in the web design of the site? Was that
54 entirely on the Bloomsbury side?
55

1 NA: There was input that there were benchmarks in the agreement about the site,
2 particularly really deliverables about the number of concurrent users and
3 performance levels and then Bloomsbury commissioned designers and they, I'm
4 trying to remember how it went, we were definitely given the chance to approve
5 or not the design, but I'm pretty sure that they had more designs on their list that
6 they filtered out and the initial design for the site, which is still live at the
7 moment, it's about to change, it's quite a conservative one really, I think we,
8 myself and then the director of the Archive Centre who report to the trust and
9 they are quite happy now I think for us to do a lot of the liaison with the
10 publishers. I think with the microfilm, we referred things more to the trust and
11 it was, everything was much slower because we had to wait for meetings and
12 things and now it goes much faster and we just consult them about things that
13 we're really worried about. The particular things which we held out for really
14 were to do with archival concerns, really, how our catalogue was being
15 presented. For archivists it's about original order, isn't it, so we found that the
16 initial design of the site, if your search took you to a description of a document,
17 you'd then be taken to the images of that document, which is absolutely great,
18 but it wasn't linked in any way to the other documents in that file, so you couldn't
19 easily browse forward and back to see what was the context for it. So those sort
20 of things, we were really worried about and Bloomsbury initially didn't really
21 get it, couldn't understand why that would matter really. We just worked with
22 them, so I think the initial site didn't allow you easily to see the context but now
23 that's sorted.

24
25 Bloomsbury are much more, they go forward much more without us almost on
26 the things that they commission for the site. So they do what we might do as an
27 Archive Centre in that they present the catalogue finding aid and the context of
28 the collection and the images of the document and then there's all the social
29 media and exhibitions side of it, surface the material they say, but they are also
30 commissioning higher education modules so the idea is it's UK and US but it's
31 aimed really at an undergraduate level and you've got, somebody's written about
32 an aspect of Churchill's rise, so maybe his time as Chancellor of the Exchequer
33 and then they select, the author has selected maybe between 10 and 20 key
34 documents. So the idea is that we're recognising that the collection is quite
35 unmanageable because it's so big. It works well for people who are skilled at
36 archive research but it's a bit daunting if it's your first time. So these are ways
37 in, starting points and the idea is that you might in time curate a resource the
38 presents slightly differing views of Churchill. Somebody will have written
39 something about him as an empire builder or a colonialist and somebody else
40 can write a different piece, select different documents or interpret them
41 differently and the use of that material is looking good. Sometimes the articles
42 have got powerful links as well so that you could teach them quite easily if it
43 overlapped with your subject. I think the challenge for Bloomsbury has been
44 commissioning material that has the widest possible application because when
45 they go out and try and sell subscriptions, they're going to the British history but
46 they want to go into politics and they want to demonstrate the reach of the
47 collection.

48
49 VS: So the next question is really about how the rights clearance process was
50 established, first with the microfilm and then with Bloomsbury for the online
51 process. Was it based on, did Gale, I'm saying Gale because I assume that Gale
52 were the microfilm publisher.

53
54 NA: That's right.

55

1 VS: Did they have previous experience of rights clearance –
2
3 NA: No. They had done microfilm products before. So there's –
4
5 VS: There's papers –
6
7 NA: There's newspapers for them and there are very parallel products at the time from
8 Adam Matthews and Chadwick Healy, where they published, I've forgotten all
9 of the examples, but archives they'd microfilmed and published them and as far
10 as we know none of those things had ever had any copyright clearance done.
11 They weren't thought necessary. So Gale hadn't expected that this would be a
12 requirement of them, but because we were using these lawyers, what happened
13 in the run up to the agreement was that counsel's opinion was sought about the
14 third party copyright. So we were asked at the Archive Centre to have a think
15 about how much material this would be and I mentioned before that there was a
16 misconception that there would be hardly any, but the idea was always that it
17 should be a comprehensive publication, not a cherry picked, curated view of
18 Churchill but this is the evidence and you can use it to do research.
19
20 So counsel's opinion was sought and the hope and the expectation I think was
21 that they would say that's fine, just do what the other microfilm publications
22 have done. Maybe you could put a notice in The Times but you're not going to
23 have to do anything at all. But the opinion that came back was absolutely
24 categoric and it was the opposite. It was you must make efforts to clear the third
25 party copyrights. So then actually the onus was on me as an archivist, the
26 lawyers said we're framing this publishing agreement and we need to set out in
27 a schedule to the agreement what will be important about the copyright clearance
28 process. So really I wasn't able to find out about any similar projects but I'm not
29 sure there have been any really. So we had to think about something that the
30 trustees would be happy to sign up to, that they would say it was sufficient, but
31 also that it wasn't completely mad because it would, the lawyers and the National
32 Archives would have been happy if we'd said we're going to check every single
33 page and every single file and make a list of the copyright holders and we won't
34 publish anything unless we've got permission and it was a massive collection
35 and our strong feeling was that it was the comprehensiveness of it which was the
36 important thing. It would have been possible to back off from that and let's just
37 do this, tied papers or something, focus on the Crown stuff, but the aim was not
38 to do that. It was to take the whole collection out there really. So I thought we
39 must use our catalogue. We can't go through the documents. I'd spent a year
40 and a half doing the item level, cataloguing by then, so I knew how slow it was
41 and I also knew how difficult it was to really decide who owns copyright in some
42 of the documents because it was very clear that the writers weren't really thinking
43 about the capacity that they were writing to Churchill in. They were often his
44 friends but they might have been office holders as well. They might have been
45 writing on headed paper but include elements of personal news, really difficult.
46 So we decided the big thing was to go from the catalogue, not from the
47 collection. So already, if a name wasn't identified in the catalogue, that meant it
48 wasn't, there were no appearances, references made for it. The document level,
49 the descriptions in the catalogue were fine but the file level descriptions, they're
50 very detailed but we didn't include every correspondent in those. We had a rule
51 for who we put in. We put in people who were significant in the sense that they
52 were in Who's Who or some other similar reference resource. So they were
53 people who were publicly significant or they're significant because they had
54 written to Churchill more than once, so there were 3 or more letters from them
55 in that file. So it worked quite well really because it meant that the descriptions

1 did pull out the constituency had wrote repeatedly and that's probably the richest
2 material but it didn't mention everybody's name. So going from the catalogue
3 was really important but I was really worried that it did mean that we were
4 missing out loads and loads of names, so the trustees did approve that approach.
5

6 VS: So were you working between the publishers and the trustees and the legal
7 advice at this point?
8

9 NA: Mainly just with the legal team really because relations with the publisher during
10 the negotiations were really quite tricky, quite confrontational. Led from the
11 trust really, there was this idea that we must do the right thing and we'd been
12 presented with them [the publishers] and so it was up to us to keep them up to
13 the mark really. So it was just me and the lawyer really and then I would devise
14 things and then see what my colleagues put on it. So then we thought okay,
15 you've got the names from the catalogue and hopefully you can get from the
16 catalogue an idea of the context that they're writing in. So if the cataloguers put
17 Leo Amery and then they've put Secretary of State India, let's assume that's
18 correct and I think that was a good rule of thumb really. So you've got the names
19 and you've got some indication of whether or not they're writing as individuals
20 or on behalf of an organisation, whether it's the government or someone else. So
21 the names and the copyrights went into a database and then there was a process
22 of trying to trace the copyrights in the names. So we listed a number of sources
23 that the publisher had to contact and looking back on it now, the internet was
24 just so much smaller than it is now. There just wasn't the reach of stuff that there
25 is now, so you couldn't just say just Google it. That wouldn't work so we said
26 search the reference sources again, so Who's Who and DNB and all of that sort
27 of thing, so find out whether they had an heir, also the National Register of
28 Archives, the Watch database and the Business Archives Council if it was a
29 business or now Wikipedia would tell you that this publisher had gone through
30 lots of different names. So then they'd got a name or an organisation, someone
31 to write to and if they followed all those steps, checked all those sources and
32 they hadn't managed to trace a contact, then that was okay. We were going to
33 say, now you'd say it was your diligent search for the Orphan Works Scheme,
34 but if you've got an address the idea was that 3 letters were sent to the person.
35 So lots of people wrote back and said tell me all about the documents and then
36 there was masses of work to do, photocopying, no digital cameras, documents
37 because they rightly were saying I can't give my permission until I know what it
38 is. Fair enough. The copyright clearance went ahead of the microfilm, so if it
39 had gone after, you could have sent copies from the microfilm but the wear and
40 tear on the originals and the looking was a big job. So sometimes that was a yes
41 or a no. Quite often it didn't get anywhere at all, so there was just no reply.
42 You've looked at the letters, they are quite formal and I think lots of people just
43 thought I'll deal with that later and maybe just never did.
44

45 So the process had 2 further letters were sent at specified intervals, giving them
46 time to reply and then if they didn't reply to the third one, their name went into
47 an advert and the agreement stipulated that it had to be in the national press.
48 After the agreement we agreed with the publisher that that could be the TLS
49 because that was the cheapest one, but I think it was approaching 8,000 names
50 that went into adverts, so it was a very costly, the adverts were, the biggest ones
51 were about quarter pages, just jammed full of names and obviously responses to
52 the adverts were going to the publisher, not to us, but anecdotally I really don't
53 think anybody came forward as a result of them. I know that one literary agent
54 did, but I really don't know about anyone else. So that was the process. The
55 name went in the adverts and then 3 months needed to go by to allow people to

1 get in touch and then at that point, we were going to allow the material to be
2 filmed. So we'd said that the publisher had made the right efforts to trace people,
3 either got yeses or nos from they'd made contact with, or the names had gone
4 into the advert.
5

6 So just before the filming, I think it was a couple of months before the filming
7 of each section was to start, we got sent masses of outputs from the database and
8 we then had to check back looking at the catalogue, did we agree with what
9 they'd thought the copyright was. We would ask lots of queries before you
10 signed things off. So that was something that was shared out. I did a lot of it
11 but there was an archives assistant who helped me and there were some
12 particularly large bits of the collection where pretty much the whole team had to
13 help with bits because we had this 2 month deadline to turn the whole thing
14 around and then say yes, you can start filming.
15

16 VS: So did that entire process take 5 years before they could film?
17

18 NA: It went in stages. The sections of the collection that the PRO had set up, so the
19 structure of the collection meant that you could pursue themes really, so the
20 microfilm was published in these themes. So we started off with Churchill's
21 speeches because the advice really was in terms of copyright, these would be
22 more straightforward because it was Churchill's speech notes, some source
23 material but a lot of that was official. So we started with that and we basically
24 moved through the chunks, putting the personal correspondence where we knew
25 there would be more third party copyright holders towards the end. The
26 publisher started working on the chunks and it was an iterative process. So the
27 filming, once the filming had begun it never stopped and the copyright clearance
28 was just going backwards and forwards ahead of the filming of that chunk. So
29 the whole thing took 5 years, but for each bit it was much shorter than that. So
30 as we got towards the end, the names had already been cleared so there were
31 loads that no further action was needed. The workflow thing was quite
32 challenging because once the camera operators were on site, we needed to make
33 sure that they had materials to film and keep everything flowing through and
34 then we had to programme in what we'd put into the agreement about the
35 intervals between the letters and the amount of time that had to elapse after the
36 adverts. You almost had to work back from when you thought you'd be filming
37 and what's the last point. I think probably the publishers put some names into
38 the adverts which then were cleared actually, but it was easier to advertise for
39 them and cover that really.
40

41 VS: Did the process go through several iterations or was it a case of getting the advice
42 from the lawyers and then finding a way to sensibly put it into practice?
43

44 NA: The agreement included the rubric for the process and then following the
45 agreement we worked then, then we were working with the publisher, once we'd
46 signed it was then important to work with them. So there was a little bit of
47 iteration. I think there were 1 or 2 things that the lawyers had to advise us on,
48 but not much, really. It was working by then and we had to, the big thing that
49 we had to adjust to in terms of what we'd expected was that so few people did
50 bother to reply. So you would look at the clearance documentation and they'd
51 have the name for, let's say it was something like Lloyds Bank and you'd think I
52 know there's a Lloyd Bank, so it must be possible to get an answer, so that the
53 temptation would be to say no, you can't film that because I know you ought to
54 be able to clear it and what we found when we checked over the clearance
55 documentation, in more cases than I would have expected, was that the publisher

1 had found the right contact details. If you checked it there was nowhere else for
2 them to write, it's just that the people hadn't replied. So as the process wore on,
3 we became more comfortable with the idea that people had been given the
4 chance to reply and just hadn't. Their name had gone into the advert and the
5 expectation at the beginning was that the explicit permission, there'd be more of
6 them really. So that was interesting and obviously the advice from the National
7 Archives was without explicit permission you shouldn't publish. So it was, I
8 suppose the gap opened up as the process went on, but we became more
9 comfortable, I suppose, with the fact that people hadn't replied.

10

11 VS: I think you also mentioned in the Wellcome interview that you did how just
12 knowing what to do in a situation of non response is very important. The fact
13 that you had that to fall back on, it means you've covered.

14

15 NA: Yes, you've got to have an end to the process, definitely and I think you have to
16 cater for the fact that you may well not get a reply. So reflecting on the Orphan
17 Works Licence in the scheme of what would happen if this was going through
18 now and I haven't used it yet, correct me if you think I'm wrong, but I don't think
19 it would have been relevant for all the material work we haven't got a reply.

20

21 VS: Yes.

22

23 NA: I think they would say you've traced the person and it's not our job to licence it
24 just because they don't want to reply. So we would have introduced another
25 category of, I think we lumped everyone who went into the advert, they were
26 called untraceable, but actually they weren't really. They were either untraceable
27 or they were non-respondent. So we would have to have had a different category
28 there and then we'd have to have asked the trustees to accept the non-
29 respondents.

30

31 VS: They're not orphans. We know who these people are and we know we've reached
32 them.

33

34 NA: Yes, they just, would their appetite for risk have extended to signing that off?
35 Really not sure.

36

37 VS: And then also would they have been able to finance the licences for the –

38

39 NA: Yes. I initially thought, as lots of archivists do think really, that the Orphan
40 Works Licensing Scheme wouldn't have worked very well for it and I think that
41 is true. My favourite example for that is Churchill liked, early in his career he
42 had this obscure astronomer from Norwich who wrote him and gave him
43 predictions about you should not do that Mr Churchill because if you do, it will
44 go terribly wrong. Really charming actually, that Churchill attached quite a bit
45 of belief to this and sometimes sent the letters onto other people, you know,
46 Archie Hickling has advised me to share and I think it's probably between 12
47 and 20 letters from him in the collection and the Orphan Works Scheme would
48 have us licensing every single one of them, not just the writer. I honestly think
49 we would just to the IPO and talk to them about it because I think this scale of
50 exercise would be big enough to do that with. I know the scheme is under
51 review, isn't it? It's launched but it's actively under review and whether it would
52 help to influence it or not, I don't know. But I think it would have slowed
53 everything down, for sure and I don't know what the outcome would be.

54

1 VS: I think in terms of it would strengthen the argument for a blanket licence,
2 because if it's an £80 application fee for 30 items and then the licence fee on top
3 of that and then really you would be making a very strong argument for just a
4 blanket licence. But then how do you go through the diligent search process for
5 a blanket licence? How do you evidence the diligent search for such a blanket
6 licence?
7

8 NA: I don't know whether you do. It would be interesting to look at what the division
9 between non-respondents and orphans actually was, wouldn't it?
10

11 VS: But even with the IPO application process at the moment, it's basically a series
12 of drop down menus and then some information that you submit. How is anyone
13 going to do that for anything over, normally be 20 or 30 items at a time? It's
14 incredibly labour intensive.
15

16 NA: It is and I can't think that it will stay like that because you think organisations
17 like the British Library and things, it would be much better for them to pay one
18 fee and submit up to however many they need to. So I think it must surely be in
19 its infancy and this would be a good example of how it didn't really work.
20

21 VS: Fingers crossed, they will change it on that basis.
22

23 NA: Maybe, but it would have been, it would certainly have added an extra layer of
24 bureaucracy to an already heavily bureaucratic process for us.
25

26 VS: So to go back to rights clearance for Bloomsbury, I guess they had the benefit of
27 that copyright holder database.
28

29 NA: Yes, so the trustees still decided that it needed to be revisited. The letter that
30 Gale had sent perhaps would have covered the online publication but they
31 wanted to do the right thing. So Bloomsbury sent out letters to all the contact
32 holders again but of course they just didn't have to go through any of the business
33 with doing anything with the untraceable names because it was already accepted
34 that they'd been signed off really. It still took about a year and there were still a
35 lot of queries from people saying they'd like to see copies, but that was much
36 easier because the microfilm, it's a million images or so on the microfilm and it
37 was digitised in 2 weeks, because the image capture had taken 5 years but you'd
38 done all the graft there and digital images were right there so they weren't being
39 published but Bloomsbury could just pick documents off and send them to the
40 rights holders. It was still a significant task and I think it was still bigger than
41 Bloomsbury had expected it to be, but it was nothing like as bad as the first time
42 around. Then what we did for the non-respondents was a pointer was published
43 in the national press this time. I think it was the TLS again, but there's part of
44 the Bloomsbury product still has it up now. It's a page for copyright holders and
45 there's a one page that acknowledges all the people that said yes and thanks them
46 for the support and then there's another PDF of names that they have managed
47 to trace and as far as I know, nobody's come forward this time around either.
48

49 VS: I guess Gale had only licensed it for microfilm, so the idea of them asking for
50 something more than permission for the microfilm –
51

52 NA: I think they did ask for digital and I think if the trust had been less averse to risk,
53 they could have proceeded without revisiting the process, but it was better.
54

1 VS: Do you think the difference in the permission granted between the microfilm and
2 the online access project interesting in that regard?
3

4 NA: Yes, so there's been, I suppose you could say roughly 10 years between the 2
5 processes. So probably a lot of the contacts had just died, moved on and then
6 contact details aren't still current. Bloomsbury were still, if letters came back
7 saying return to sender, they still had to go through a process of trying to
8 establish another address for them.
9

10 VS: Was that the same process that you'd established with the microfilm, so the same
11 sources?
12

13 NA: Sort of, but I think there was so much more information online that we just added
14 in Google for it and that unlocked a lot more, really. I thought one of the things
15 would have been quite interesting, if you could go back in time and contrast a
16 search done at the microfilm time with the digital time and just see, it would be
17 so different. So yes, so fewer people said yes. I think partly that was because
18 the contact information had gone dead really, but also I think people are just
19 more used now to stuff being available online and I don't think the people who
20 want to consent to it perhaps didn't feel that they particularly needed to bother
21 to consent. We had more no's, saying that I think that was a very good thing
22 about revisiting it, because potential for offending somebody and possibly
23 ending up in court over it was probably higher. I think that again, would
24 probably the increased number of nos would probably reflect the perception that
25 once things are online then they're much more out there. People are consenting
26 to a microfilm that was going to be bought by academic libraries and looked at
27 by academics and even though a subscription to the product is, at the moment
28 it's academic libraries but this year we're going to bring a schools aspect to it
29 which will be free to all secondary schools here and in America and Canada, so
30 there will be public access to much more of the material that way. But I think if
31 you were worried about it, you'd be more likely to say no probably just because
32 the medium was different. So I think those were the 2 main differences really.
33

34 VS: You mentioned in terms of advice, there was an IP lawyer in Lincoln's Inn the
35 first time around. Did it change the second?
36

37 NA: No, he's still our lawyer. He was the advisor on the legal side and he was very
38 good. I think he got his head around what we were doing and how we worked.
39 He was very important I think. In fact, as the process of negotiating with Gail
40 dragged on, they decided not to have their own lawyer, but just, although he was
41 just representing the trust, they decided to just come to the meetings without
42 legal advice, which was interesting. It must have reflected their trust in doing
43 the right thing.
44

45 The other person who was really key for us was Tim Padfield. We didn't
46 approach him for input on the agreement because it was fairly clear what we
47 needed to do really, but we did go to him, Gail went to him for a lot of advice
48 about particular copyrights. We asked him for advice about foreign governments
49 and found out about the difference between civil law countries and we asked him
50 about various obscure organisations. There were things like munition, the
51 Munitions Council Social Club. It was clear that the Munitions Council was a
52 government thing but what was the social club? He seemed to really enjoy
53 getting his head around all of those queries. His advice was really useful and we
54 collated some of that. So where it wasn't as specific as the Munitions Council.
55 One of the things I was quite interested in was that in Churchill's private office,

1 he has, politicians have them now, parliamentary private secretaries. So you
2 have lots of private secretaries who are government employees, but your
3 parliamentary private secretary is actually a political party appointment. They
4 have copyright. It's Conservative party. So that's quite interesting. So we kept
5 lots of notes about that kind of stuff. So his advice was really important and I
6 don't know where we'd go to for similar now. I guess you'd put it on the archives
7 and NRS and see what happened maybe.
8

9 VS: Yes, you could still go the information policy advisers at TNA but whether
10 they'd be able to go into the same level of detail.
11

12 NA: Yes. So the advisers, they were our best ones really.
13

14 VS: I know that in order to identify the rights holders, once you'd extracted the names
15 from the catalogue, you were classifying the rights holders in terms of ones that
16 you thought would be awkward.
17

18 NA: We did that for the online publication. So we reflected on the microfilm
19 publication and on the people who'd been particularly difficult and on the people
20 who'd said no and we drew up a very small shortlist of people to be very careful
21 with handling. So that was only possible because of the experience of the
22 microfilm publication, but we wanted to try to convert some of the nos into yeses
23 but we didn't really manage to do that, I think because most of them reflect
24 genuine grudges, political or personal, that people or their ancestors have.
25

26 VS: That's just what I was about to ask, were they more worried about the content of
27 the material rather than their copyright and also how do you negotiate with
28 people who aren't interested in money but just feel aggrieved?
29

30 NA: You can't. We tried, we tried really hard and sort of had a charm offensive on
31 particular ones, but we didn't actually manage to budge a single one of them,
32 which I think is a great pity because one of the nos is Arthur Scargill, who
33 represents the miners' trade union and he's, the miners hate Churchill. That's
34 fine. But the problem with them saying no is that then they're absent from this
35 comprehensive picture, so actually all it does is push them into obscurity really
36 and what we really wanted was for people to be able to make their own minds
37 up to see the conflict between Churchill and the miners and to be able to draw
38 their own conclusions. There was loads of material about negotiating over
39 various miners, strikes, which put the miners, position and we can't publish any
40 of that and that's a real pity because all it does is allow Churchill's view of events
41 to dominate really. But we tried to explain that but it didn't work. So a pity. I
42 think, but when it goes out of copyright, I suppose.
43

44 VS: I just wanted to talk through the permission letters. They're quite formal. They
45 explain why the project is taking place. There's a difference between the first
46 and the second one, in that the second one I think you explain the option of going
47 online, using the catalogue to search the type of material that's available.
48

49 NA: Yes, so when the first letters were drawn up, the catalogue was just on a database
50 in house. People couldn't look for themselves.
51

52 VS: And then the third one, there's an acknowledgement towards them along the lines
53 of this is the third letter we've sent you and if we don't hear from you we're going
54 to publish the material.
55

1 NA: Yes, the lawyers didn't really like that. They thought you shouldn't say that but
2 we want to be clear with people and we thought it was better just to say this is
3 your last chance to contact us. We are going to publish it.
4
5 VS: Then you've still got the press adverts after that.
6
7 NA: Absolutely, but I think did ask Tim Padfield about that and his advice just
8 absolutely firm, without explicit permission, you should not publish it and that
9 didn't, the fact that you'd told them that that was what you were going to do didn't
10 change it.
11
12 VS: Doesn't change the fact.
13
14 NA: No, that's right. So I did feel that I railed against a lot of that sort of thing and
15 found it terribly unfair because I thought we'd been so conscientious, that it was,
16 I wanted Tim Padfield to say you've done a brilliant job, this is an exemplar of
17 what you should do, but obviously, I think about it now, of course he's
18 representing the TNA. He can't tell you to break the law, can he? But equally,
19 I felt that we'd been so reasonable. We had this audit trail that we would hold
20 up.
21
22 VS: I guess it's difficult to try and quantify, but based on the names that were
23 extracted from the catalogue and the names that have never made it into the
24 catalogue, like how big is the gap?
25
26 NA: I think it would be, it would vary a lot for the different bits of the collection and
27 the one bit where it would probably be significant is the constituency
28 correspondence where it isn't public figures who are writing in, but I think the
29 rest of it, you know the likelihood is that people either were significant anyway,
30 so they got into the catalogue and then there an awful lot of people who weren't
31 public figures but who had an ongoing relationship with him and they were just
32 in the catalogue. So I think the constituency bit, there would be a significant gap
33 in that material, but it's a smallish chunk of the collection. It's not –
34
35 VS: It's not a particularly high-risk point in the collection.
36
37 NA: It's not particularly heavily used because of that. So I think when we were
38 presenting this to the trustees, that was our rationale. If they'd said this isn't good
39 enough, you've got to put all the names in, it would probably have meant we
40 weren't going ahead with the project I suspect. I think they were satisfied that
41 most of the third party people would be catered for and I do think that was right.
42 And plenty of constituents wrote to him often, so then they did get dealt with.
43
44 VS: So the rights clearance process, that was developed on guidance from the lawyer.
45
46 NA: Yes, it was really the lawyer and I working together.
47
48 VS: And was that written into the agreement with the publisher, with Gale?
49
50 NA: It was a separate schedule.
51
52 VS: And you signed off on what Gale did.
53
54 NA: Yes.
55

1 VS: And that was ultimately approved by the trust.
2
3 NA: Yes. The principles were in the legal agreement and then the practical
4 responsibility was really delegated to me by the trust. We checked things
5 through. I think we certainly talked to the trust about some of the more difficult
6 rights holders or the big copyright holders. I think I said it before, you probably
7 need to be careful about what you publish about it, but the Chamberlain family
8 unfortunately never reached a satisfactory conclusion. There were all sorts of
9 efforts made there and we did talk to the trust about that because there was a real
10 concern that leaving that material out was a really bad thing. What we did
11 instead in lieu of the material was to write really detailed catalogue descriptions
12 of the material that was left out so that users of the publication could see what
13 they were missing and there was a very clear pointer that if they wanted to see it
14 they could contact us and we would, they could still see it at the Archive Centre
15 because it was open.
16
17 I think the other thing we talked to the trust about in an ongoing way was the
18 burden that the whole thing placed on us and reporting the amount of time it was
19 taking and there were tensions to address. One of them was about getting it done
20 in time for the filming to carry on and then the other undercurrent of tension
21 which went on through the whole of the image capture really was about the speed
22 of the image capture. So we wanted the microfilm to be done in house and I'm
23 really glad we did do that because we were on hand to advise on all sorts of
24 things really. The conservator was able to help with physical things, but as
25 archivists, we were able to say, for example, if there was a whole newspaper in
26 a file, but it was really clear what article it had been kept for, we would say don't
27 film the rest. That's fine. So there was a kind of constant dialogue. That was
28 great. We wanted to do that. But the publishers wanted the image capture to be
29 as cheap as possible and nobody I think had factored in how hard it was to handle
30 the archive material to camera. I think they had had a lot of experience of filming
31 archives but it tended to be more repetitive materials, so you could the set up and
32 then you could work your way through the file and the set up didn't really need
33 to change. What they were finding was that there were lots of colour documents
34 or varying contrasts and each image needed to be set up to get the right result.
35 So the other ongoing tension really was that the publishers felt that we were
36 insisting on very slow and careful handling and that that was, that and the
37 copyright [1:08:14] meant that they weren't going to recoup the money, which
38 I'm sure they didn't. I look back on it and think it would have been better to
39 have been working with them in partnership from the beginning, for it to have
40 started in a more harmonious way, because I feel a bit like somebody would if
41 you're putting someone out of business. You're holding them to this gold
42 standard really but of course, in the end, that meant that the thing wasn't really
43 profitable for them and of course that was why they were doing it really. So a
44 difficult thing. So yes, so the trustees were consulted about the copyright.
45
46 VS: And that's where you would go if there was a particularly difficult rights holder.
47
48 NA: I think we reported them because we were conscious that they were all very well
49 connected and that they might have links, they might be able to approach people.
50 There were certainly attempts with the Chamberlain family from the trustees to
51 make overtures to them, but that was only for a very few people. They didn't
52 come up very much, to be honest.
53
54 VS: Leading on from what you were saying there about maybe with the benefit of
55 hindsight, working in partnership with the publisher might have been a more

1 harmonious way of working through the project. What was your working
2 relationship, what were the working relationships like between the archive, the
3 trust and the publishers? I think we've already touched on that, but also we've
4 mentioned that the trust were quite risk averse and has this changed over the
5 course of the project?
6
7 NA: I think it stayed fairly constant for the microfilm project and the relations with
8 that publisher and I think we started off on a better footing with Bloomsbury, as
9 we chose them to work with them and we already knew that we liked them. I
10 think they [the Trustees] are still risk averse and it would be interesting to know
11 whether they, how they would view a risk managed approach if we were to
12 revisit it again. [8 lines of transcript redacted at interviewees request]. The
13 Wellcome Library can take a risk management approach and they can genuinely
14 say that this is not for profit and it's educational, it's for the greater good. We
15 can say it's educational and it's for the greater good, I do think that's the case, but
16 we can't hide from the fact that it's also about a revenue stream. It needs to fund
17 itself. The image capture and all the costs associated with commissioning
18 material, it's meant to be self-financing. I don't think there's ever a hope that it
19 will produce profit, but it ought to be able to run on the money that it creates.
20 So it is different. You are doing worse by somebody by publishing without
21 permission in those circumstances, I think.
22
23 VS: So the risk calculation is still different for those 2 different kinds of –
24
25 NA: I think so, yes.
26
27 VS: I do feel instinctively that comprehensive clearance is more appropriate for
28 commercial projects.
29
30 NA: Yes.
31
32 VS: I know I got a bit of stick at the Wellcome conference for saying about
33 commercial use but I was saying it in the context of if you're taking a risk
34 managed approach, then you shouldn't really be working on a commercial
35 project in that way. There has to be a balance struck.
36
37 NA: And I think it's interesting about copyright law when you really think about it.
38 We often have enquiries in from people who've used us as researchers who want
39 to publish material in their books and where we own the rights and things, we
40 don't own the rights to very much, but where we do, if we think that the book is
41 an academic one, then we would never ask for money for it. But that is still
42 commercial really in the eyes of copyright law, but I think that people would
43 probably understand that it's not as overtly commercial as a coffee table,
44 'Greatest Hits from Churchill' would be. So it is quite a difficult thing because I
45 think that our comprehensive application is an academic thing. It's actually quite
46 hard for people to use. You need to be quite good at archive research to get the
47 best out of it. It's absolutely fine to recognise that it is commercial and to
48 approach it accordingly, but it is interesting, isn't it, if you are the rights holder
49 or if you're representing the rights holder and when you're presented with
50 projects, the line between academic and commercial, it isn't easy to always
51 decide what the best answer would be. I think as a responsible custodian, you
52 do have to think about whether there are cases where responsibly you actually
53 want to be asking for some money because they're making money out of
54 something that you own and it's perhaps not, I mean everything based in archives
55 is probably educational in the broader sense, but it might not be –

1
2 VS: Yes, I think there's a, between commercial and non-commercial there's quite a
3 broad spectrum in figuring out where what you're doing fits on that spectrum.
4 It's quite difficult because you might, even as an archive yourself, you might be
5 charging for something but the revenue from that is going back into providing a
6 front facing service for the public. That's not really commercial.
7
8 NA: No and wouldn't you be doing the right thing to support that, rather than just
9 being a leech on your funding body really. I find these things really quite tricky
10 actually, but I think you're right, this thing, this project, the Churchill Papers
11 thing is commercial. The Thatcher Papers, the Thatcher Archive, that has an
12 online presence but it's a different one. The purpose is different. It's never
13 intended to be comprehensive and they've decided not to even go there with the
14 third party copyrights. They just don't put that material online. The images have
15 been captured for preservation, but that's fine, but there's no question of doing
16 this sort of exercise. I think because they'd seen what it involved. But then you
17 know, a curated thing, it tends towards the one point of view, doesn't it?
18 Archives I think, if you're publishing things online, you want to be neutral. You
19 want to be presenting the collection, giving people the tools to inform their own
20 judgement. It's not saying this is all about why Churchill is the greatest man who
21 ever lived.
22
23 VS: I was going to ask about the deed of gift and whether the signing over of
24 copyright has changed over the, the wording of the deed of gift, whether it's
25 changed. Has it changed as a result of Churchill or is Churchill quite a separate
26 project?
27
28 NA: It's quite a separate project, but I suppose the experience informs the rest of it.
29 But because it's overseen by the trustees, and indeed the Thatcher archive is
30 overseen by a different trust, it means that there may be different policies for
31 those 2 big collections compared to all the over 600.
32
33 VS: So they're compartmentalised by that trust relationship.
34
35 NA: Yes, that's right, and I guess it's because we're externally accountable because
36 those are both charitable trusts. It's a different, we hope we would stand up to
37 scrutiny anyway, but we actually are scrutinised through the trusts there. So the
38 way we handle all the other collections definitely has changed in the time that
39 I've been at the Archive Centre. For a start we didn't have a deed of gift. We've
40 got files of correspondence about all the collections we've got, but when we went
41 back and looked at them, some of the older collections, it's very unclear the basis
42 that they're here on. Somebody's just written and said I'd be delighted for you
43 to have my papers and it is a gift, is it a loan? Hard to tell and nobody's ever
44 mentioned copyright, probably because I think so many people don't realise that
45 physical and intellectual property are so different. Until you explain it, I think
46 they don't. So I think we were saying on the phone that I think initially we drew
47 up the deed of gift and we thought the deed of gift must be the best case scenario
48 for the Archive Centre, therefore it should include copyrights wherever possible,
49 personal copyrights wherever possible, but I would say in the last 10 years, our
50 approach towards that has softened really. I think the team at the Archive Centre
51 is very steady. We don't have masses of staff changeover so there's a lot of
52 experience of dealing with depositors and different types of depositors and I
53 think what we've recognised, partly through the copyright clearance process of
54 other things, is that it's much better to try and retain contact with the family or
55 the creator. I think the archive text books would say get your deed of gift and

1 make it so that you can walk away from that and your needs as an archive are
2 covered. But I think we found that we don't have a purchase fund so we're never
3 able to buy collections from people. So when they're giving them to you, they're
4 giving you something huge, aren't they? And as part of building that relationship
5 with them, it often seems more appropriate to point out that they could keep the
6 copyright and that that quite often allays lots of fears actually, because they
7 imagine that they might give the collection to us and by doing that, they have
8 closed off the right of a member of their family to come in and perhaps write a
9 biography or a study of the person and we want them to understand that they
10 could if they want to retain an influence on the course of that sort of thing. They
11 could gain reassurance. So often now we point out that copyright is separate and
12 that they could retain it and use that as an important tool really in building that
13 relationship with them. We always find at the Archive Centre, really with big
14 collections, that people first will say I haven't really kept anything at all, nothing
15 that you'd be interested in and then they might let you in a little bit of a chunk
16 and then you're initially given not the best bit of the collection really but they'll
17 tell you that that's all there is and it's basically the bit of the collection that they
18 would trust you with, because they're not worried about it. So time and time
19 again, what's happened, is that a deposit of papers is arranged by a diligent
20 archivist who set it up and then we send a catalogue to the person and open it up
21 for access and they gain trust in us and say there is this extra material that I've
22 got. So then you get a significant deposit which then distorts the arrangement
23 completely. We never knew it was there and I think copyright and the process
24 of people retaining it and then perhaps moving towards not really exercising it
25 very much and then hopefully ultimately giving it to us is all part of that process
26 of the trust building it. It doesn't seem appropriate to rush that. It's a very
27 emotional experience, giving the papers into the archives. They feel, often I
28 think they feel guilt about it. They feel that they ought to have got to grips with
29 it themselves. They ought to have arranged it before it comes and then they
30 recognise that they can't and it comes to us and I need to just tread really
31 carefully.

32
33 Yes, so I think we've changed the wording in the deed of gift anyway, because
34 we've added in I think fairly recently that we will be producing preservation or
35 access copies digitally which is really us getting ready for the digital side of
36 things. But often, the copyright is deleted from this clause, so if we looked at
37 the ones we've signed up to recently, probably many of them would just have
38 that bit taken out.

39
40 VS: And that feeds into, I was going to ask whether you'd had new deposits or interest
41 in the archive as the result of contacting rights holders.

42
43 NA: Yes, so it sort of, I think it raised our profile with existing depositors, which was
44 good and sometimes gave us new information about where they were or who
45 was representing a particular copyright. I think, I'm not sure I could say that
46 there were many where you could say categorically that that was the thing that
47 had led to a collection coming in, but I think it made the rights holders realise
48 that the material was of interest and that we would be a home for it and it
49 definitely helped that process of collecting material, collecting more material in.
50 So in a few cases we definitely tried, had people in to look at the material as
51 rights holders and then ask them if there was more material, but I think mostly
52 it's probably a little bit more passive, lodged in their brains that we were there
53 and then when they were ready, they got in touch. That's what often happens for
54 us. We do do a bit of head hunting, but mostly it's a question of [inaudible
55 1:25:40] really.

1
2 VS: So what happened to the rights holder contact details after the project? Do you
3 still have that database?
4
5 NA: Yes.
6
7 VS: Does that feed into your depositor records?
8
9 NA: Well, we're just wrestling with that at the moment actually. At the moment
10 they're separate, so we've got information about depositors and where they're
11 also copyright holders, it's in there and then we've got separate records about the
12 Churchill copyright process. The other thing that we've been building up over
13 the years is a meta data database where we digitise images, so much more
14 piecemeal than the Churchill and Thatcher digitisation but as we need it for
15 exhibitions or as researchers order high resolution copies, then we keep a
16 database and put all the copyright information in there. But then I'm just
17 chewing over at the moment the possibility of bringing all that information
18 together really, so that you could look for a copyright name, an author and you
19 could know what we've done before really. I think we do know for many of the
20 big copyright holders but one of the things I'll be saying this afternoon is how
21 when you're doing something non-commercial, many more people than you
22 might expect will just say yes and be pleased that you've asked them, even if
23 they're commercial. So lots of the material that's in our college archive, where
24 we've got local photographers represented, nearly all of them are happy for non-
25 commercial use to be made of their material, as long as you put a credit in it and
26 I just thought it would be actually quite useful to have a central source of
27 information where you could have a rights holder but you could have notes,
28 they're usually happy to grant permission and then also you could ask for the
29 broadest possible permission and record it somewhere so that next time you were
30 asked for it –
31
32 VS: You don't have to do the work.
33
34 NA: And maybe that's again tied in with if we do make use of the Orphan Works
35 Scheme, because then you can put in that information, any licences you'd applied
36 for, for that. So it's one of those things that's just, I feel like we often have this,
37 things swirl around and you chew them over and you think about them from a
38 number of different angles and as you're just doing your normal work, it'd be
39 useful if you could do that as well and there's a process of gestation almost where
40 you just chew it over and then you'll do something. So I'm absolutely positive
41 it won't happen quickly because there's so much day to day work to keep on top
42 of, but I think we could do with doing that really and then also making sure about
43 data protection. The other records we keep about data protection tend to be a
44 little bit more about our readers. So we're telling them that we're keeping it for
45 data protection, so I think we'd need to factor data protection in there as well,
46 but it would be mad not to keep it because you're doing the responsible thing by
47 using and retaining it, I think.
48
49 VS: Have there been any take down requests associated with –
50
51 NA: None at all. Interesting, isn't it? What you can see from outside the paywall
52 though is only thumbnails. So you can access the catalogue, the descriptions of
53 the image and then you'll just see a bunch of thumbnails and a place holder that
54 says this is a subscription site. So that applies for most of the material, apart from
55 there's quite a lot of exhibition material which is in front the paywall and then

1 there's a Twitter feed which is mainly chronological really. So it's on this day
2 Churchill did this and then the relevant documents come up in front of the
3 paywall for a month or so and then they go back to obscurity behind. So what
4 the rights holders could see would be fairly small unless it happened to be on
5 exhibition.
6

7 VS: I guess the thing with having the paywall, I guess it obscures some of the risk,
8 although the fact that it's a paywall itself is risky in terms of the commercial
9 nature of the project, but it's about what's actually visible on the web.
10

11 NA: Yes, so the images themselves have a little notice underneath them which has a
12 statement which asserts the Sir Winston Churchill Archive Trust's ownership in
13 the copyright of the image, so if there is a copyright in the image, which we're
14 not sure there is, but if there is one, we own that and then it says and content is
15 copyright for copyright owner. So once you've got a subscription to the product,
16 you can download images and files of images, masses of material really and take
17 it away on your laptop or whatever, but there's always going to be that notice
18 next to the image and the hope would be that as they go to read it that they ask
19 for permission. We talked about whether that process needed to be fed into the
20 site, whether there needed to be a special contact that users could email if they
21 wanted permission and we decided it was just too complicated to factor that in
22 really. I think essentially those sort of queries probably come to the Archive
23 Centre. I think they go the publisher first and then they're forwarded to us, but
24 there aren't as many as you might think, so probably lots of people are using it
25 without clear permission. But I think we've put enough in place for them at least
26 to be aware that there is copyright there. I think probably there is an expectation
27 though that if you buy a subscription that you've bought the use of the material.
28

29 VS: At least you're covered in that respect already because you have put the onus on
30 the user to do the due diligence before they publish.
31

32 NA: I think if you looked back over the course of online publication of archives
33 really, I think if you went back to the early 2000s, lots more, there was lots more
34 watermarking going on there, lots of anxiety about putting things online and this
35 genuine feeling I think that if you put it online it had gone, that's it, you'd let it
36 go and I think we've moved on a bit from that haven't we and I think people sort
37 of feel that there's really the law is there. All the barriers you might put up,
38 watermarking and things are actually not very effective and what you have to
39 rely on is the law. I think that's the position that literary agents take anyway but
40 I think they did used to say no, you can't use it without watermarking this,
41 encrypting it and this, that and the other.
42

43 VS: Have you found that other archives have approached you for advice on how to
44 manage rights clearance processes?
45

46 NA: Not apart from you, no. We did talk to the Wellcome, because the Archive
47 Centre was part of the genetics first strand of digitisation for the digital library
48 there and the process of going through the Churchill clearances made us say no.
49 Initially we couldn't sanction the no clearance approach. I think initially the
50 approach would have been not even to contact the family, just to do it. So they
51 came. [4 lines of transcript redacted at interviewee's request]. I've enjoyed
52 participating in things like this and the conference. I've shied away from making
53 too much of it public really, I think.
54

1 VS: And we can, I can, when it comes to writing up these interviews, you'll obviously
2 get to see whatever I'm putting out and I don't think anyone will read my thesis.
3

4 NA: Don't say that.
5

6 VS: It's probably just as safe and just as obscure. But yes, I can make sure that it's
7 framed in the right way.
8

9 NA: Yes, but I think we've looked at a bit of that beforehand. What's quite good is
10 that this is a good chance for us to make the most of some of this experience
11 really. The other thing I did with it, following on from that Wellcome
12 Conference, was get in touch with the IPO about the copyright clearance and I
13 told them about what we'd done and I think that probably fed into that vigilant
14 search guidance, which was nice to know that it has legs really and also I guess
15 because it was something that we put together in response to a situation, nice to
16 know that it was the right thing to do really. We hadn't gone wrong. So no, we
17 haven't, do other archives do commercial publications? That's the thing. I'm not
18 sure many of them actually have to worry so much about that side of it.
19

20 VS: I don't know of any on the scale of Churchill.
21

22 NA: Most of the digitisation projects I've seen, they tend to have gone for things
23 which are fairly simple for copyright, not the Wellcome stuff which is different,
24 but the other projects at the moment are still of that nature, aren't they?
25

26 VS: Do you find, given that the whole Thatcher collection was copied as a
27 preservation copy essentially, do you find the new preservation exception
28 useful? Is that something you would have done anyway because it's relatively
29 low risk?
30

31 NA: We were doing digital copies of literary material within the law, so that was all
32 right. But we'd also been doing the audio visual stuff for preservation, which
33 was obviously not right, but important to do. The great thing about the new
34 copyright law for us is the photos and being able to supply them for private study
35 and research use now. We have an awful lot of orphan works, orphan photos in
36 our collections and they're a fantastic source, but we were caught in this
37 ridiculous system of people wanted photos of things but they didn't know if they
38 wanted to use them because they hadn't seen the image. So weren't allowed to
39 supply a copy until they'd got permission. So we did supply copies. We got
40 them to sign a licence saying that they wouldn't publish them but we tried not to.
41 If there was a copyright holder we'd make them approach it. So that research
42 and private study use of all the materials is terrific. It simplified our processes
43 enormously. We deal with a fair number of picture research and book projects
44 where they want a lot of visuals. It's great and certainly the audio visual one and
45 the film stuff, that is great. It's positive, isn't it, the changes?
46

47 VS: Definitely. That's all I have to ask today.
48

49 NA: Are you sure?
50

51 VS: Yes, thank you very much.
52

53 [ENDS]
54
55

1 **Case Study:** Glasgow School of Art Archives and Collections (Interview 1)

2

3 **Date:** 2014-09-03

4

5 **Interviewer:** Victoria Stobo (VS)

6

7 **Interviewee:** Michelle Kaye, Collections Development Officer, Archives and Collections,
8 Glasgow School of Art (MK)

9

10

11 VS: Why do you think it's important for GSA to digitise its archive collections?

12

13 MK: Well, it's important for us to digitise our collections for quite a few reasons.
14 Firstly, obviously in terms of preservation, it's really important for us especially
15 because we have just had a really disastrous incident; the fire that happened in
16 May this year. So, not that it wasn't an issue before and we weren't aware of the
17 benefits of digitization, but it's really brought it home to us how important it is.
18 Now that it's happened, and while we've got a chance over the next few years to
19 kind of recover from that, digitisation will really form quite an important factor
20 in that process. We haven't started on the digitisation project just yet, any
21 digitisation that has been done in the past will feed into the online catalogue, but
22 we're still thinking about how we will roll that out over the whole collection in
23 the next few years. Also, because our collections are very visual, it makes sense
24 to digitise them and to have that material available for people. We need to think
25 about what scale of digitisation we do, whether we digitise absolutely
26 everything, or do we focus on the things that are visual only. These are the
27 discussions that we'll be having over the next

28

29 VS: So, you're still at the start of the digitisation project, or digitisation as a whole
30 and you've still got a lot of decisions to make about which collections are
31 digitised and does that feed into... in terms of the governance board, the
32 directorate of the school, does that feed into anything that they're particularly
33 focusing on at the moment?

34

35 MK: Not really to be honest. There's certainly things that we see as being important
36 and that we should start with, like the institutional records, things like the
37 building committee papers which chart how the Mackintosh building was
38 decided upon, who the competition entrants were, who won the competition,
39 what the demands for the building were, 'cause these are records that will be
40 really vital in the coming years, while a lot of research is being done to try and
41 decide what they do in terms of a refurbishment of the building. So, they're going
42 to be used very heavily. Obviously there's only one original, and they're going
43 to be in demand, so they're a priority, I think. Also, our institutional records like
44 the student registers, annual reports, prospectuses, which again, get used very
45 heavily especially for family history which tends to be the bulk of our enquiries.
46 But not - I can't really think that the directorate would sway our decision in any
47 way, really.

48

49 VS: No. So, it's about supporting GSA as an institution, and obviously that's been
50 thrown into a harsher light because of the fire, so there's an obvious impetus
51 there. But aside from supporting GSA as an institution, would you look at
52 teaching as a driver for digitisation?

53

54 MK: Yeah, possibly. One of our main user groups use the archive as a teaching
55 resource. While we have external visitors and family historians and architects

- 1 and that sort of thing, actually we... before the fire, made really good use of our
2 collections as a teaching resource, and that's something we want to continue.
3 Even while the material will not be available - the original material - it would be
4 great to provide surrogates of that and that's something that will drive us. There's
5 certainly been specific departments which have used us more heavily than
6 others, in particular the textiles department. So, that's a kind of tricky one,
7 because digitisation of textiles doesn't necessarily translate so well, so we need
8 to think about how best we can meet their needs, really. Yeah.
9
- 10 VS: And what other departments besides textiles, would you say?
- 11
- 12 MK: Viz Com [Visual Communication] tend to use us quite a lot, we have a really
13 large collections of posters which document events that have happened at the
14 school from around about the 1950s up until the present. So, things like fashion
15 shows or talks, or lectures, or dances or Christmas fairs and that sort of thing,
16 which in themselves are beautiful objects, they're really well designed, so from
17 one aspect looking at the design process but also in terms of the school's history,
18 they really chart the events that have happened over those years so they're
19 actually a really vital resource. And the posters themselves are quite large, so it
20 would be good to have them available in some other format, which is more
21 readily accessible. And things like photographs as well, which are easy to do and
22 actually we could do ourselves, things that won't cost a lot of money, because
23 obviously we're a small institution, budget's a problem, so anything we can do
24 ourselves.
25
- 26 VS: In terms of the digitisation that you've already engaged in, did you have specific
27 funding for that or was it more of a piecemeal process?
- 28
- 29 MK: There has been targeted funding over the years in specific areas, so things like
30 Charles Rennie Mackintosh's Italian sketchbook, and the magazine which was a
31 student publication, not just by Mackintosh, but contributed to by his circle
32 basically, so Francis McNair, his wife Margaret Macdonald and some other
33 people as well. There are four volumes of that and that was digitised as well, so
34 there was targeted funding for that, I think from Museum Galleries Scotland. But
35 that's quite a few years ago now. Since then, it has been very piecemeal, it's been,
36 "Do we have the staff to do it? Can we do it in-house?" Very recently, as a result
37 of the fire, we've just had quite a large number of slides digitised, around about
38 6000 of them, which chart degree show work from around about the 1970s up
39 until the 1990s. And that was basically because we needed to put them into some
40 other format, they weren't readily accessible, we were worried about what would
41 happen to them in the interim. It was an ad hoc decision to do that, and actually,
42 yeah, that does tend to be the way things are done. But it works, and it means
43 that it is quite piecemeal, and we can focus on things collection by collection,
44 and get them tidied up and catalogued.
45
- 46 VS: Do you find that digitisation in that way fits in with what you're doing with the
47 catalogues? Is it about going back, once it's been digitised, and thinking, maybe
48 we could add some more to these descriptions, or maybe we could go down to
49 item level?
- 50
- 51 MK: Exactly. At the moment, the project to put the catalogue online is basically to
52 put it online in its current format to make it ready to be viewed by the public, but
53 not necessarily to enhance the descriptions as they currently stand. So, I think in
54 the longer term, what we will do is to look at certain collections, think about how
55 we could enhance, how the images could be better, yeah, do we catalogue them

1 further to item level, that sort of thing. But that will be very much on a collection
2 by collection basis. Where the needs lie, be they teaching needs, or otherwise.
3

4 VS: Sure. And on that, why do think it's important to have images of the material
5 available on the catalogue? I know that you've used Archives Hub in the past,
6 and that doesn't really have a facility for images.
7

8 MK: Well, it does actually, you can add images to it, but it's quite a lengthy process,
9 and also, it doesn't look great, it's quite old-fashioned and it's quite a traditional
10 archives catalogue sort of thing. What we tried to do is to make our catalogue
11 very visual, not just by including images but by the way you can search as well,
12 so you can browse the images alone, without even seeing the descriptions, which
13 is very different to a lot of other archive catalogues, and that's really because the
14 demands of our users are very different. So, yeah, we've kind of gone away from
15 the norm slightly, and we've had to engage in open source software and bespoke
16 web design to make that happen, but we've really tried to respond to what we've
17 found in the past few years, our users need, and that really is to be able to browse.
18 They don't necessarily know what they're looking for, so a normal search doesn't
19 necessarily work.
20

21 VS: Visuals is first point of access?
22

23 MK: It's not necessarily the first point of access, but it's one of the various ways into
24 the catalogue. Normal, academic users can still search in the traditional way, but
25 we've just tried to broaden the access points into the catalogue by making it
26 possible to search by image alone, by various index terms as well, so you can
27 search by date range, say you're just interested in one specific period, the
28 Glasgow Style for example, that's a way in.
29

30 VS: How have users responded to the new catalogue?
31

32 MK: Well, we haven't launched the catalogue yet, and that isn't due to happen until
33 around the end of November this year. But we have engaged a small focus group,
34 so far, in the design process, and the feedback so far has been really good. I think
35 some of the users haven't been familiar with catalogues before, even? So, it's
36 trying to get, it's trying to find a way to get to them to try and make it very
37 simple, easy to manoeuvre as well, and the feedback has been really good.
38 People like the fact there are a lot of images, that it's a very clean interface, the
39 fact that it's possible to download low resolution versions of images is something
40 that our users actually demand now, and they've found that really useful. We've
41 had a lot of really positive comments about that and the fact that we're doing
42 that.
43

44 VS: In terms of the actual physical digitization, what sort of equipment do you use
45 and how much time have you been able to devote to it, and do you rely on
46 volunteers for that?
47

48 MK: We did have a programme of various volunteers working on specific projects,
49 and digitisation often formed a part of the work they were doing, however, I
50 wouldn't say that we depended on volunteers to do it. It was very much our own
51 set-up, so cameras, scanners, that sort of thing, but also in-house facilities, so the
52 fact that we're based in an art school is really good, we have two digitisation
53 photographic studios. We have been able to call on that expertise when
54 necessary, especially for 3D objects, textiles, that sort of thing. That's been really
55 useful. We're looking into the possibility of a more structured digitisation set-

1 up, but that's really in its infancy at the moment. Especially, maybe sharing that
2 with other departments in the school, other institutions nearby as well, to try and
3 share the burden of cost and managing and things like that. There hasn't really
4 been a digitisation strategy up until now, it has been very piecemeal, but I think
5 that's something we need to implement in a more structured way, soon.

6

7 VS: It's like a burgeoning idea.

8

9 MK: Yeah, at the moment we're really just populating the catalogue with existing
10 images that we happen to have. In the future we will enhance the current
11 catalogue with a programme of digitisation.

12

13 VS: If a lot of your collections are in storage, do you see that happening in the next
14 few years, or is it much longer term?

15

16 MK: No, I think it will happen in the next few years, because it's really a chance for
17 us to work on the collections. We won't necessarily be able to offer a front of
18 house service to users so that gives us time to work behind the scenes and focus
19 on things like this, on digitisation, on cataloguing. So, while things are currently
20 offsite, there is a plan to get some collections back in small stages to work on,
21 and to set up some sort of digitisation facility in order to process the material,
22 make it safe, re-package it again, put it back into storage. So, it will form a real
23 part of what we do over the next few years, and definitely not, we won't be able
24 to ignore it. It's something where we'll be focused.

25

26 VS: Definitely. And when did you decide to start putting images online on the
27 catalogue, was it when the idea of having a different catalogue set up to the
28 archives hub came about it, or was it -

29

30 MK: Yeah, previous to this cataloguing project, we have never had, other than the
31 archives hub, any sort of catalogue online, so there was always a need to have
32 that, and we always seemed to know that if we were going to have a catalogue,
33 it did have to be in a very visual format. And when we started to explore the
34 various options be that to enhance what was already on the archives hub by
35 adding images there, or by getting a different version of CALM, which was our
36 cataloguing software up until now, which allowed us to put images online;
37 having this visual element always seemed to be part of the plan.

38

39 VS: When did the project start? Was it last year?

40

41 MK: No, it's actually just started in April this year. And it was initially for three
42 months, then the fire happened so it was... it went on for an extra month. There
43 was an extra month to allow for that. And then as I said, Museum Galleries
44 Scotland have given us funding to continue with our project for an extra three
45 months until November, at present.

46

47 VS: You used CALM before, and is it Archive Space?

48

49 MK: No, we did use CALM before, we have now moved over to an open-source
50 software called ARCHON, which is the predecessor of Archive Space. Few
51 reasons for doing that; yes, Archive Space would ultimately be the type of
52 software we move over to in the future; but when we started the project it wasn't
53 actually launched, it's only just launched in August this year. So, to wait for it
54 would really, really put back the project start date. So, we decided to go for
55 ARCHON in the meantime, under the understanding that any work done to

1 ARCHON would be easily transferable over to Archive Space. We do have a
2 scoping project underway at the moment to see what sort of work would have to
3 be done to make the transition as easy as possible, and that's something we might
4 end up doing in the next few years as well, because Archive Space is a kind of...
5 changing software. There's lots more contributors to it now, lots more support,
6 whereas ARCHON, because it was the forerunner, has become quite static
7 recently. There isn't as much support for it at the moment. It's definitely fit for
8 purpose, for our needs at the moment, but yeah, we're looking into the possibility
9 of Archive Space in the future.

10

11 VS: In terms of the particular collections and images that have been put online, did
12 you use risk criteria in deciding which ones would be published online and which
13 ones wouldn't be published online?

14

15 MK: Yes, first of all we had to work out if there were any copyright issues with any
16 of the images. Our criteria for that was basically, if anything was less than ten
17 years old we decided not to publish it at the moment, but kept it in line to be
18 digitised at a future date as and when time allows. Secondly, we have... our
19 criteria's quite simple: basically, if the creator is still alive, we are aware of that
20 and we will try and still put that image online but obviously we will get in touch
21 with the rightsholder to check that they're ok with that. If the creator is no longer
22 alive, but has died after 1939, we again will try and make contact with the current
23 rightsholder to check that they're ok with that. If the creator died pre-1939, we
24 see that there's less risk involved and we're quite happy to publish these images.

25

26 VS: Does the way that particular creator worked - if they worked for an obvious
27 commercial profit, or if they were driven more by... I guess it's a judgment on
28 the type of art they might have been creating -

29

30 MK: Exactly

31

32 VS: - or what they did for a living. Has that had an impact on the decisions that you've
33 made as well?

34

35 MK: It has. I would say that, certainly for some creators, we have a few collections of
36 work by illustrators who perhaps did design work for newspapers, catalogues for
37 department stores, that sort of thing. I would say that, it hasn't really put us off
38 publishing the images, but it's certainly made us more aware of the risks
39 involved. I think the commercial aspect to it has made us, yeah, perhaps more
40 risk aware. It hasn't put us off completely though, and we do still seek to put
41 them online, we will just endeavour to make sure that we're doing everything we
42 can to make sure it's ok to do that.

43

44 VS: How does that affect the relationship with your depositors? If the creator is still
45 alive, or if they've only recently died, do you contact their heirs?

46

47 MK: Yes.

48

49 VS: In terms of the collections you've already put online, and the people you've been
50 in touch with, are they generally positive about the project and happy for stuff
51 to go online, or have you had any -

52

53 MK: So far, everyone has been positive about it, they want the collections to be used,
54 that's why they deposited them in the first place, generally. I would say that,
55 we're still in the very early stages of contacting people, we're really in the midst

1 of the diligent search project at the moment. But so far, anyone we have talked
2 to about it has been very positive. I know we haven't started properly getting in
3 touch with people, but I don't really envisage there being any issues because I
4 think we've made it clear that our reasons for doing it are genuine. We're not
5 trying to harm anything in any way.
6
7 VS: Are you at the point where you have a standard email or letter to contact them
8 with?
9
10 MK: Yes
11
12 VS: How do you describe the project to them?
13
14 MK: I would say we haven't described it as a digitisation project as such, more a case
15 of putting our current catalogue in a different format. We have explained the fact
16 that we're only using low resolution images, we've explained the terms of use,
17 the fact that we're bound by a creative commons license. And explained that as
18 clearly as we possibly can, and that there will be a takedown policy in place; if
19 anyone has any issues whatsoever with any of the material. So, we've put it all
20 there in plain English, and people are perfectly within their rights to get back in
21 touch and say they don't want to be involved, which is fine. But we want to make
22 sure we've done all we can to ensure.
23
24 VS: Have your current depositor records proved to be useful in that process or have
25 you had to go back and find new addresses?
26
27 MK: We certainly have, yeah. At first, we're using our accessions databases for
28 contact details, but obviously people move house, people die, lots of things, so
29 we have employed other means to try and find contact details. What is really
30 useful is that the majority of donors or creators have some sort of connection to
31 the school. So, we have an alumni department, which has a bank of addresses
32 and contact details, so that has been really helpful. Also, artists tend to, if they're
33 living, tend to publicize themselves quite well, so we have been able to use the
34 internet to find addresses and contact details that way as well.
35
36 VS: In the past, when you've accepted collections from depositors, you've discussed
37 copyright with them at that stage -
38
39 MK: Yes.
40
41 VS: So that was part of your -
42
43 MK: Yeah, it's always been part of the practice of acquisitions. We ask at that point,
44 whether they sign over copyright as well. The vast majority of people do. There
45 have been one or two who haven't, and it's not because they're fearful in any
46 way, I think it's more just they, at that point, didn't really understand what it
47 meant, perhaps, but I think this is a chance to reiterate the benefits and to make
48 them less afraid of doing so. So, there's really only been one or two situations
49 like that.
50
51 VS: Do you think the experience of doing diligent search will change the way you
52 manage your relationship with depositors, or do you think it's fit for purpose and
53 you'll continue to work that way?
54

1 MK: I think it was fit for purpose, but I think it will give us something new to discuss
2 a bit further at the acquisition stage. I can't really see it changing. I think, in one
3 instance, it will really boost our relationship with depositors because it gives us
4 a chance to get in touch with them again, and we have been thinking that, because
5 of that, it would be good to, perhaps, just keep them a bit more updated than we
6 do at present. You know, we want to maintain a good relationship, and I think
7 this provides us with an opportunity to keep in touch, really.
8

9 VS: Yeah, I know from other projects that they've been able to do really good
10 outreach, just from having gotten back in touch with depositors.
11

12 MK: I think, and I can see that happening already actually, just from discussing,
13 informally, the project with people: with donors, they're generally very excited,
14 and want to help and want to be involved. And I think, enabling this conversation
15 is a really good thing and it will benefit us in the long term.
16

17 VS: In terms of attempting to contact the creators of the collections, the main
18 depositors I assume, unless it's been deposited by someone around them; what
19 sources have you used for diligent search, you mentioned that a lot of them have
20 been quite easy to find?
21

22 MK: Yeah. The first point is our in-house accessions register. Slightly different
23 formats for the archive collections and for the museum collections, which is no
24 bad thing, the information is still there, so that's good. Again, as I mentioned,
25 the Alumni department also has a lot of contact details, which is good. People
26 are... the art scene in Scotland is quite a kind of small and close community,
27 generally people know each other, so word of mouth is a really good factor to
28 rely on as well. But also, some of the other online sources for information, like
29 the project at University of Texas [The WATCH File], that sort of thing as well.
30 So, yeah.
31

32 VS: So, diligent search for collections like this might not actually be as difficult for
33 other collections – and do you find that, does it change whether the creator is
34 still living, or whether they've died, for older...?
35

36 MK: For older collections it is more difficult, but we wouldn't necessarily be as
37 worried. I should say also that we have enlisted the help of the Public
38 Cataloguing Foundation as well, because all of our oil paintings feature on the
39 BBC Your Paintings website, which was done in collaboration with the Public
40 Cataloguing Foundation a few years ago. As a result, in order to put them online
41 then, they had to undertake a diligent search project. Instead of doubling up on
42 their efforts, I got in touch with them to ask them if they would mind providing
43 us with the details of people they found a few years ago, for those artists which
44 feature. And they have said yes, they will be happy to provide details. So, that
45 has removed quite a lot of work for us. It's very good of them, and it does make
46 sense; there's no point in duplicating effort, really.
47

48 VS: Absolutely, I can definitely see, even from a project that's happening at [another
49 CHI] just now, they've been able to rely on the Wellcome searches from the
50 Codebreakers project. Yeah, I think, particularly if you're working in a specific
51 area, if you start looking into it, there probably are other institutions you could
52 go to and say...
53

54 MK: Yeah, and it makes sense to share information, there's no point in withholding
55 it.

1
2 VS: Well, if they've found that information anyway, it must be publicly available
3 somewhere. So, have you noticed any third party rightsholders in the
4 collections? So, maybe within correspondence, I don't know how much
5 correspondence the collections hold?
6
7 MK: To be honest, we haven't started to look into things like that at the moment,
8 we're really concentrating on just art work. I would think it will be a
9 consideration, longer term, but at the moment it's not really an issue yet. And to
10 be honest, I'm not sure if digitising that sort of material will form part of our
11 remit in the end, anyway. But yeah, it's a consideration.
12
13 VS: So, you're still in the middle of diligent search at the moment, so there's no
14 outcomes, and we've already discussed positive outcomes of that process of
15 getting back in touch with depositors, and maybe contacting other rightsholders;
16 have you found anything negative about it?
17
18 MK: No. I think the whole process has actually really brought home things that have
19 needed done or been neglected, and going through everything again has just
20 made us notice things that are necessary and reminded us of things. So no, I can't
21 think of anything negative. I mean, it's a lengthy process, but I think it'll future
22 proof us as well in a way, because this is a chance to do it and do it properly, and
23 without having embarked on this project I can't think of an instance where we
24 would have to get in touch with all of our donors on this mass scale. Or to review
25 our copyright policy, or to review our terms and conditions, so I think the project
26 has really, really spurred us on in a variety of ways.
27
28 VS: Well, that's all of my questions for now, because I think you're still in an early
29 stage, and if I can maybe come back, just to see how things are going, that would
30 be great.
31
32 [ENDS]
33
34 *****
35
36 **Case Study:** Glasgow School of Art Archives and Collections (Interview 2)
37
38 **Date:** 2015-02-25
39
40 **Interviewer:** Victoria Stobo (VS)
41
42 **Interviewee:** Michelle Kaye, Collections Development Officer, Archives and Collections,
43 Glasgow School of Art (MK)
44
45
46 MK: So what I've brought with me today are our copyright tracking spreadsheets.
47 We've basically been using one document to track what we've been doing, and
48 it'll give you an idea of the criteria we were following, and then all of the
49 collections which it was applied to, and if we were able to contact someone, if
50 we were able to get a response from them, and the dates involved in that, and
51 any further notes. What we did try and do, this is one thing I need to check with
52 the person who did a lot of this research, at the time I tried to get them to record
53 how long it was taking for each person, for each bit of research, and they have
54 done it for some, they put in like it took a quarter of an hour, but they've only
55 filled it in for some of them and I'm not sure if that's because they've just

1 forgotten to delete it in some instances or if they've only filled it in when that
2 person has occurred in multiple instances, they've just recorded it once so that's
3 one thing I need to check with someone because I don't really have an idea yet
4 of how long this took. I mean I know it took two months but I don't know
5 exactly how many hours it took.
6
7 VS: Yeah, I think it's difficult quantifying how long you spend looking for one
8 person, it's really difficult. We're having similar issues with digitising Edwin
9 Morgan's scrapbooks. Kerry Patterson has started the process of collecting data
10 from the scrapbooks, but I really don't know how she's going to record how long
11 she spends on it and it's difficult.
12
13 MK: It's difficult, because for some people you're doing research for that one
14 individual, but quite often you'll find that you'll be able to take off a chunk of
15 people with very similar routes to that research in one, so I'm not really sure how
16 this person did it.
17
18 VS: Yeah, or if you get it from your Alumni Department, if they send you a load of
19 contact details, that's not time that you've spent, so you don't know how long
20 it's taken them to extract stuff.
21
22 MK: Exactly. And then sometimes where we have been in touch with other
23 organisations like the Public Catalogue Foundation or Bridgeman or DACS, it's
24 taken a lot of time for us to gather together the concise information that we need
25 to send to them. I don't know how long they're spending on it either so it is hard
26 to quantify in some instances. I brought that along because although that is very
27 basic stats, I don't know if you want to look at this and maybe try and ...
28
29 VS: If you wanted to share that with me that would be amazing, but I don't want to
30 make you uncomfortable about what information you're sharing with me.
31
32 MK: I spoke to Susannah about it and we said we'd be happy to. We'll maybe draw
33 up a form for you to sign just to say that obviously it does contain personal
34 information and that you won't use any of it and that you're going to anonymise
35 everything if you do use it. Does that sound okay?
36
37 VS: Yeah, definitely.
38
39 MK: So I can send you this. What I'm working on at the moment, which I actually
40 should have done at the very, very start but I never did, was to get a complete
41 list of all the creators in our collection which is something really basic but I
42 didn't do it at the start. I know that we have 635. I'd quite like a list of them
43 all.
44
45 VS: Yeah. I know that the Churchill Archives when they digitised Churchill's papers
46 and put them online, there's a page where they thank everyone that said yes, on
47 the website, so that is a nice way to acknowledge the people that have given
48 permission, but they also have a page where they list everyone that they weren't
49 able to find contact details for, and it's basically saying if you know of these
50 people or you want to direct them to the website then please do get in touch and
51 we can discuss.
52
53 MK: That's a really good idea actually, I might borrow that. So that was the Churchill
54 Archives?
55

1 VS: Yeah. I think that's on the public facing side of the website because the Churchill
2 papers were, the digitisation was commercial, so you have to subscribe through
3 Bloomsbury Academic to get access but I think there is a public area of the
4 website where you can see information like that.
5

6 MK: And in doing that did they have to ask if people wanted to have their details
7 publicised?
8

9 VS: I don't think so, it's basically just a list of names, I guess they were working on
10 the basis those names are present in the catalogue for the collection anyway, so
11 they're already available online somewhere.
12

13 MK: That wouldn't be the case for us necessarily because ...
14

15 VS: Your catalogue doesn't go into that level of detail.
16

17 MK: Well, we don't list the rights holders, that's in the background. We know them
18 but we haven't publicised that, and I do wonder if that's something that people
19 ...
20

21 VS: Would be sensitive about.
22

23 MK: Yeah. It might be a good thing, it might create positive leads and encourage
24 people to get in touch with them if they do want to use any of their work, but it
25 might also encourage unnecessary attention that they maybe don't want. It's
26 something to think about.
27

28 VS: I suppose they might get into a situation where someone else wants to use an
29 image of their work, and they might say to them, "Oh well, you let Glasgow
30 School of Art do it, why are you not letting me do it?" That sort of argument
31 might develop.
32

33 MK: Yeah, I just wonder if that's something people wouldn't want to be involved
34 with. They might be happy for us to use the image but to publicise the fact that
35 they are the rights holder, I don't know. I can see it going both ways.
36

37 VS: Yeah. I think putting up the non-responders though, could be useful.
38

39 MK: I mean, we have our terms and conditions on the website, where you can go
40 down and find information about the takedown policy... that idea of actually
41 making it explicit that we have not been able to find details for these people, I
42 think is really transparent and a good thing.
43

44 VS: Yes. I guess it also feeds into, I don't know if you have anything like that
45 mentioned on the website at the moment, I don't think I noticed it the last time I
46 had a look, but in terms of soliciting information from users, so if they can
47 identify people in photographs or if they can identify some of the non-
48 responders, that sort of thing?
49

50 MK: Yeah, that would be good.
51

52 VS: Whether there's a facility for that, whether it's maybe just looking back?
53

54 MK: There are certainly plenty of options to get in touch with us, but it hasn't actually
55 been made very clear that that is a reason to get in touch.

1
2 VS: I have been keeping an eye on the website actually and there's so much material
3 on it, it looks great.
4

5 MK: There is so much material on it. One thing I should probably update you on is
6 that as part of the project I think our attitude has changed quite a lot in doing the
7 rights search and also in... just recent developments in terms of copyright law
8 as well, especially with regard to orphan works, which is something that I don't
9 think we really recognised as a particular problem.
10

11 VS: Yeah. I was going to follow up on that. I've got a few questions, just how many
12 orphan works have you found so far, have you looked at the licensing scheme,
13 and would you consider using it?
14

15 MK: Well, recently just in the last few weeks we have started to try and extract that
16 sort of information and look at how many orphan works are involved, and there's
17 actually a lot. It depends what you would class as an artistic work - that's the
18 issue we're having at the moment. Where there's definitely artwork or archive
19 material that is an orphan work, it's really obvious, but because a lot of our
20 collections are, for example, textile based, it's whether you consider something
21 like a tea cosy an artistic work, because it's a domestic item but it's embellished.
22

23 VS: I think that could come under design rights rather than copyright, but design
24 rights are of much shorter duration than the copyright term. You might find that
25 some of them are already outside the scope of protection. I could have a look at
26 the legislation and forward some things on to you.
27

28 MK: Yeah, that would be useful, because I think that's something we're finding quite
29 difficult at the moment. Initially we had been quite rash I suppose and just put
30 images up. Where we were aware of it there was no creators, but because a lot
31 of the material was so old it just seemed unnecessary to consider it as an orphan
32 work and to go to the lengths of applying for licences, etc.
33

34 VS: And also when you started the project the scheme hadn't come into force yet, so
35 the legislation hadn't come through.
36

37 MK: Exactly, so it's changed a little bit since then and actually since attending the
38 Copyright Conference that was in Edinburgh just last month [*Copyright and*
39 *Cultural Heritage 2.0: Protecting Creators, Sharing Content*, organised by the
40 SCA and held at the Scottish National Gallery on 2nd February 2015], that really
41 highlighted to me that this is something we should be doing. So, since then I
42 have looked at our collections, identified all the orphan works including those
43 textile ones which are a bit of a unique area, and I have removed the images from
44 public view at the moment pending a decision about what we do with them,
45 because it's something we do need to think about. We've looked at the licensing
46 scheme, it seems like so much effort really to do.
47

48 VS: I think the application for you is quite expensive as well.
49

50 MK: Yeah, especially because we have so many that are going to be applicable. We
51 need to come up with a decision about that. It's tricky. There are certainly
52 photographs as well that are involved where, although photography is considered
53 an aesthetic work, I think for some of the photographs in our collection we could
54 argue that that's not the case, it's documentary.
55

1 VS: Yeah, I think... in terms of the legislation, nobody tends to make distinctions
2 like that, if it's a photograph then it's generally considered to be a visual artistic
3 work.
4

5 MK: It's funny because that's the argument we've been having. I said that, but other
6 people in my office have come back with this argument, that no, it's recording
7 an event.
8

9 VS: The photographer still has copyright though. It's something that I've actually
10 been discussing with my students who take the Law and Cultural Institutions
11 course because a lot of the case law, particularly for artistic works, revolves
12 around conceptual or installation art, and basically the law just cannot seem to
13 deal sensibly with conceptual artworks, especially ones that have been taken
14 from photographs, even the case that we discussed at the Copyright Conference,
15 but there's other ones involving people like Jeff Koons, when they've made
16 sculptures from photographs. The law just really struggles to distinguish
17 between where you're taking influences and inspiration from, and then where
18 you're actually creating something separate.
19

20 MK: It is a grey area, and it's something you can only really deal with on an individual
21 basis as well, because it can vary so much in terms of percentage of the original
22 used and proportion and that sort of thing.
23

24 VS: So what kinds of works have you found are orphaned apart from the textiles and
25 the photographs?
26

27 MK: Well, there are certainly a few oil paintings within our collection which are
28 Unknown Man by Unknown Artist which are really difficult to complete a
29 diligent search for, so in that case it would be just impossible to meet the
30 requirements of the licensing.
31

32 VS: Yeah. [Redacted material] ... if there isn't a starting point for research then you
33 can log that as your diligent search.
34

35 MK: And not do the rest.
36

37 VS: Well, if there's no starting point for the search, you can't do one, so just log that?
38
39 [Redacted material].
40

41 MK: That would be the case for so many people. That's the whole problem with
42 artworks in the first instance, is that you cannot do a diligent search.
43

44 VS: And they can talk about technical measures like reverse image searching and
45 stuff like that, but when that involves you uploading to a service like, I think
46 there's Google Goggles [Google Image Search] and PicScout and stuff like that,
47 so you're already infringing by uploading it to those services, and then a lot of
48 the time you're not getting anything.
49

50 MK: That would be very unlikely as well.
51

52 VS: Yeah. You're not getting anything sensible back because all of their databases
53 are based on images that are already available on the web, so if it's a unique
54 photograph that's been held principally in your collection, they're not going to
55 be able to identify it for you.

1
2 MK: I can't see that ever working.
3
4 VS: I think it might work for professional photographers and people like that, who
5 do a lot of work and have already made their work available online, and those
6 are the people that are most concerned about the orphan works licensing scheme.
7
8 MK: For archives, the nature of the material is that it's unlikely to be by, well I mean
9 it could be, but it's more likely to be by a living artist, so it's not [inaudible]. So
10 the ones we've found, for example, there's an album of photographs of
11 Mackintosh and his associates on holiday basically in the countryside, and it is
12 part of a collection by one of, of one of those people... Jessie Keppie, but we
13 don't know who the photographer was of these images, but they're so core to
14 our collection. These are like really, really well-known photographs that we used
15 in the past without really realising that there was an issue, and we don't know
16 what to do to be honest.
17
18 VS: Yeah, I suppose it's an awkward situation in that, you don't want to licence some
19 and then not licence others, because that's inconsistent, but then you have to
20 come up with a policy that covers the whole collection.
21
22 MK: One thing we do know is the date they're from, so the photographer is likely to
23 be deceased by now, but we don't know if he worked for a company which is
24 potentially still in existence.
25
26 VS: Or if he was an independent photographer, then it would have passed to his heirs.
27
28 MK: So, it's tricky. Another problem is that our institutional archives have a huge
29 collection of photographs. Because they're part of institutional archive, which
30 overall we have decided is our copyright because it's the school archives, the
31 photographs really pose a problem for that because there's 2,000 odd
32 photographs. Very few of which the creator is annotated, the rest are orphan
33 works but that would mean that we cannot tell the story of the school's history,
34 visually, at all.
35
36 VS: Unless you simply assert institutional copyright in them, which, I mean
37 potentially you could do in the absence of any agreements to the contrary. You
38 don't have proof that the photographer was working freelance or whether the
39 copyright was vested with the school, but the likelihood of the photographer
40 reappearing and having that proof is also very slim, so it could just be a case of
41 making the decision that, because it's part of the institutional collection, you're
42 just going to assert copyright in it anyway.
43
44 MK: Well, that is what we have done. I don't know if there's any legal requirements
45 that we have to assert to make that more clear, but that's basically the assumption
46 that we've made. I don't know if it's entirely correct for every single photograph
47 in the collection though, but for the majority I would think we could assume that
48 they were taken on behalf of the school, but there are certainly some in there
49 which have been donated to our archives and which we have classified as part
50 of the institutional work, but which are snapshots by someone else, they were
51 not taken on behalf of the school.
52
53 VS: Yeah, it would be different for deposited collections I think, it would be harder
54 to argue that point. But also I mean if these images have been used by the school

1 already, then I guess you have the evidence of that period of time when there's
2 been no action.
3

4 MK: Yeah, I mean there's never been an issue. I don't know if that's safe enough to
5 assume, but it's certainly a tricky area.
6

7 VS: And what sort of age ranges does orphan works cover, is it the whole gamut
8 basically?
9

10 MK: Yeah, some of the textile pieces go back to the 15th century.
11

12 VS: Well, they wouldn't be protected by anything now anyway.
13

14 MK: At all?
15

16 VS: Yeah.
17

18 MK: Yeah, if it's design rights though –
19

20 VS: As a piece of artwork.
21

22 [Some repetitive discussion has been removed here for brevity].
23

24 VS: So you've had a look at the orphan works' licensing scheme application process
25 and its all dropdown boxes. If you've got a spreadsheet full of diligent search
26 information they don't really speak to each other.
27

28 MK: No, because you have to do each one on an individual basis as well, and we have
29 so many, the staff time involved in that, as well as the costs in licensing, would
30 be really prohibitive so we haven't started to do that yet. It just means that, sadly
31 the material that is considered an orphan work, we just won't be able to use it
32 and that's a shame.
33

34 VS: Yeah. Would you consider getting in touch with the IPO directly and basically
35 giving them a spreadsheet of orphan works and saying this is what we've
36 managed to identify so far, is there a way that we can work together to do some
37 sort of blanket licence rather than going through this individual item-by-item
38 process?
39

40 MK: I hadn't thought of that. I didn't realise that that was something they would be
41 party to.
42

43 VS: Well, this is the thing. During the consultation they did talk about blanket or
44 annual licences for cultural institutions, but it hasn't come up in the scheme as
45 it's being launched at the moment, but the point is the scheme is in its fairly early
46 stages and I feel like the IPO are probably quite open to developing it, that's the
47 impression I get from them anyway. I think if enough cultural institutions get in
48 touch with them and say, "I can't use the scheme as it stands at the moment, but
49 I can share this information with you and can we come to some sort of
50 arrangement?", I think the more institutions that do that, the quicker the IPO will
51 realise that we need to change the application process.
52

53 MK: Yeah, that's a good idea, because as it stands it isn't really working. From the
54 person speaking at the Copyright Conference it sounded like very few
55 institutions had actually even applied for licences.

1
2 VS: Yeah, I think there's not that many. What I've seen online, the last time I
3 checked it was around about the 300 mark, but that's only 300 individual items
4 so that might only be ...
5
6 MK: One institution perhaps.
7
8 VS: I haven't met her, but apparently it's someone called Margaret Haig at the IPO
9 that's in charge of the orphan works licensing scheme at the moment, so she's
10 probably the best person to get in touch with. I can get her email from someone
11 in CREATE who will pass those contact details on to you.
12
13 MK: That would be good.
14
15 VS: I think it would be interesting to look at how that might affect the rights clearance
16 and diligent search process, if you're thinking about it with the orphan works
17 scheme and minding the sort of information that they're looking for. If you
18 could come to some sort of agreement with the IPO where you just supplied
19 them with a spreadsheet or database then the IPO might ask you to structure it
20 in a certain way or something like that.
21
22 MK: Which would be fine, it's just going to the extreme trouble of completing the
23 form item by item.
24
25 VS: And it's £80.00 for 30 items and that's just the application fee. I mean because
26 it's for non-commercial purposes they'll charge you a licence fee but the
27 application fee itself will cripple.
28
29 MK: It's just not something that had been factored in to our project because as you
30 say it didn't exist when we started the project, and now it's something we're
31 having to do retrospectively. It is prohibitive. I mean the project's finished now.
32 We're having to sadly go back and remove items that probably we shouldn't
33 have put up in the first place... were available and now they're not.
34
35 VS: Yeah. As I mentioned earlier, whether it's inconsistent to licence some but take
36 a risk view on others, think how comfortable you would be as a service doing
37 that.
38 MK: To show you our indecision really about that ... currently I have identified some
39 orphan works and some of them I've automatically taken down from the
40 catalogue, but then there are others which I've identified and not taken down
41 because they're in that grey area over whether they're artistic works or not, and
42 that's my reason for not doing it so far. I don't know if we'd be as risky about
43 applying that process to the ones that are definitely artistic works.
44
45 VS: Would age of the material factor in at all?
46
47 MK: Well common sense tells you, yeah, that it should affect your decision, but in
48 terms of legislation it shouldn't, so I'm not sure. It's something we haven't
49 really looked at very much to be honest yet, and we need to consider it and see
50 what other organisations are doing as well, and what the sector as a whole feels
51 about it. Obviously everyone's really frustrated but I think that frustration has
52 embodied itself in just doing anything rather than take risks. And we've
53 certainly taken risks in putting material online where we haven't been able to
54 contact rights holders, that's a separate issue. We've been fairly confident in
55 doing that but this is a whole new area for us.

1
2 VS: It's interesting that if they hadn't brought the scheme in you might have gone
3 ahead on a risk basis, but because there is a legitimate alternative it makes the
4 decisions much trickier to me.
5
6 MK: It's because there is a process that should be followed and we can't really do
7 that. It's made us not do anything and I think that would be the same for a lot of
8 institutions.
9
10 VS: I'm just wondering whether the orphan works, when you go through the drop-
11 boxes and there's all the different kinds of material, whether they include textiles
12 in that or not. I'll maybe have a look at that when I get back.
13
14 MK: Yeah, it's difficult. There are certain textiles which, having spoken to you, it
15 sounds like they are definitely covered by design rights rather than artistic rights,
16 but then again, there's some which are for example wall hangings ...
17
18 VS: Wall hangings and tapestries are more artistic. Obviously the project is finished
19 now, are you essentially in the process of... the material is on the catalogue for
20 which you've been granted permission, and are you just adding things in as
21 permission is granted now?
22
23 MK: Not quite. We're adding things to the catalogue in chunks depending on what
24 collection it belongs to basically, and assuming that by now we will have heard
25 from most people that we've got in touch with, so whether we've heard from
26 people or not is not really affecting what we're putting online.
27
28 VS: So it would only be the outright no that something would come down, and if it's
29 an orphan work that you're not sure about, it's coming down?
30
31 MK: We're taking it down, yeah. But we're continuing to add more and more images
32 to the collection. Even though the project is finished that side of the project is
33 ongoing.
34
35 VS: And what has the response been like from users since you launched the
36 catalogue?
37
38 MK: Really good, really positive. One of the reasons for that is because it's so visual.
39 It's really useful especially for our users who are mostly from an artistic visual
40 arts background, and it is quite different to any other archive catalogue that
41 people have seen, and that's the kind of comments we've been getting, it's
42 different but better because it can meet the demands of that type of user but it
43 still acts like a traditional catalogue as well. Really positive.
44
45 VS: I wonder would it be worth having a chat about the responses that you've
46 received so far?
47
48 MK: Yeah, sure. We were able to find some sort of contact details for 195 potential
49 rights holders. If we break that down in terms of letters, there were 63 sent to
50 named rights holders where we actually had a definitive contact, and then 57
51 where we had potential rights holders, so that was people who were perhaps
52 leads or people who could put us in touch with the people who were the rights
53 holders, and then similarly 47 emails were sent to named rights holders, 28 to
54 possible rights holders. That takes it to 195 in total and so far we've had 83

1 responses. I think that has gone up now to about 85 just in the last few weeks.
2 Everyone has said yes.
3
4 There were two people who got back and were not in any way negative but they
5 required some clarification or some reassurance about the way that their images
6 were going to be displayed so, for example, there was one rights holder who is
7 a living, practising artist and they were slightly concerned that the work we had
8 by them was a student work done some 20/25 years ago, and obviously their
9 work has changed quite a lot since then. They were just a bit concerned that it
10 wouldn't be representative of their current practice, so they just wanted it to be
11 clear that it was a student work and that there was a direct link to their website
12 so that people could see their current practice which is absolutely fine by us.
13 That's what we tried to do as far as possible, so it was good to have that
14 highlighted and it's made us aware of the concerns that other people would have
15 had like that.
16
17 In total, that works out as a 43% success rate in contacting ... but having said
18 that there's still 68 creators that we weren't able to find any contact details for.
19 Having completed a diligent search we still weren't able to track anyone down.
20
21 VS: The 68 though, is that included in the 195, so you think you've found details, but
22 you haven't been able to contact them?
23
24 MK: No, it's not included.
25
26 VS: So the full total of 635 creators?
27
28 MK: That includes people where there is no rights issue at all, so the creator may have
29 died, the works are not in copyright. The 195 is the people who we have
30 contacted who do have rights issues, 60 is the ones who do have rights issues but
31 we've not been able to contact them, so I would say that's 263 where there was
32 a rights issue.
33
34 VS: So I guess the ones who you know who they are, but you haven't been able to
35 get contact details for, could be classified as orphan, their material could be
36 classified as orphan?
37
38 MK: Well I don't think so, because we do know who the creator is.
39
40 VS: This is the problem in terms of defining what an orphan work is because there is
41 the very narrow definition where you can't identify the creator at all, but they do
42 also include if the creator is named, but if you can't find reliable contact details
43 for them, it's still an orphan work. So that means there's more under the scope
44 of the scheme if you know what I mean. There's a difference between knowing
45 who the creator is, finding contact details for them and sending something to
46 them, and not getting a response back: that's just a non-response.
47
48 MK: This is having done a diligent search based on the information we have. We
49 haven't been able to find our rights holder, or a lead.
50
51 VS: Then they're orphans.
52
53 MK: Really?
54

1 VS: Yeah. I'm pretty much 99% positive on that. I'll go back and look at the
2 legislation again but I'm pretty positive that they're orphan works.
3

4 MK: That seems unusual, because I mean for some of these cases, these are quite well-
5 known artists, they're not unknown.
6

7 VS: In that case, I'd maybe separate some out if they are well-known, but it's weird
8 that you can't find contact details for someone who's well-known. I mean... it
9 happens with library collections as well, where you'll have a book and there is
10 an author and a publisher, but when you search for the author you can't find
11 contact details, and when you search for the publisher they've gone out of
12 business, nobody bought the publishing business. The States have had real
13 problems because they don't have an orphan works scheme, and they've tried to
14 make orphan works available, well they made the mistake of trying to automate
15 the diligent search process, I don't even understand how that's possible but
16 basically the automation didn't work and they made some works available online
17 which were clearly not orphans and they got sued. [VS is referring to the Hathi
18 Trust litigation in the US]. If you've done your diligent search it's fine, it's just
19 they tried to, because they had so ...
20

21 MK: Bypass that search.
22

23 VS: Well not necessarily bypass it, it's just their collections are so huge they were
24 thinking about trying to clear or search for 100,000 orphan works and they're
25 like we can't do that manually, maybe we can automate the process by just
26 searching specific databases.
27

28 MK: And actually what's required is a thorough diligent search.
29

30 VS: I think potentially for published works like that, there might be a search
31 algorithm that you could use that would be effective, it's just they didn't get their
32 algorithm right and it's come back to bite them basically, but this is a completely
33 different situation.
34

35 MK: No, these are people who, we do know the details, we know in some cases the
36 people's life dates, we know quite a lot about them as artists, but we just haven't
37 been able, having completed a diligent search, to find any contact details for the
38 rights holders for that material.
39

40 VS: So, you can't find the heirs basically?
41

42 MK: No.
43

44 VS: I think that would still fall under orphan work. Would it though, in the case of
45 you being rights holder?
46

47 MK: I thought these would be the ones that, having completed a diligent search,
48 people get in touch to say, "Oh, actually that was my dad and I'm now the rights
49 holder." So are they orphan works? The rights holders are probably out there
50 somewhere but we just haven't been able to find them.
51

52 VS: Do you have any information about whether they had family or not?
53

54 MK: Well, it's all on a case by case basis. I can't think of any now that it would apply
55 to ...

1
2 VS: I also meant to ask just quickly, with the letters and emails have you sent follow-
3 up requests as well?
4
5 MK: Yes. There's been a few who we got in touch with where they had been potential
6 rights holders, but they got back in touch to say we're not the rights holder,
7 however, we know the person who is and they provided details, so we got back
8 in touch that way, so that was good, it was still worthwhile. For anyone who did
9 respond obviously we thanked them and everyone seemed really overwhelmed
10 and pleased that material is being made available, and has been really happy for
11 that to be the case.
12
13 It's also provided a way for us to reconnect with people as well, because quite
14 often the rights holders have been the donors or at least are the children of the
15 donors of the material, so it's a good way for us of getting in touch with our
16 circle, really, of important people who at some point in the future may want to
17 donate further material to us so it's been a really beneficial communication
18 exercise anyway.
19
20 One thing is that it's also really informed our process for accessioning material
21 into the collection, and as such, we have recently revamped our acquisition
22 policy and transfer of title form, to include signing over the copyright as a vital
23 part of that. So as far as possible we would encourage people at the point of
24 donating material to also sign over the copyright, even if they own the material,
25 if they're not the copyright holder, to at least try and direct us to who the
26 copyright holder might be, so hopefully that will prevent any of these issues from
27 occurring in the future and from now on. That's been really, really useful
28 because it was something we did talk about with donors, but it was never
29 formally really part of the forms before and now we added it in.
30
31 VS: I've had quite an interesting conversation with [Redacted] and they've found
32 that in some cases, it depends on the depositor and what sort of material they're
33 depositing, but it can actually be quite useful, at the start, so when the material
34 was initially deposited, not to have copyright assigned to the archive. But if
35 enquiries come in and they start to get in touch with the depositor about
36 copyright, to then bring it in as something that they could manage for them, so
37 it's almost a way of being able to reconnect with the depositor, to maintain
38 communications, and then at some point the copyright will be assigned to the
39 archive. I guess it has to be on a case by case, depositor by depositor basis.
40 Copyright is one element of the collection that you can use to maintain a
41 relationship with a depositor. There's other things you can do at exhibitions and
42 stuff like that, and outreach that you know you can use. Copyright isn't just
43 something that you have to think about, clearly you can use it to your advantage
44 and you can use it as a tool for negotiating with depositors.
45
46 MK: Yeah definitely, I hadn't really thought about it that way to be honest.
47
48 VS: Yeah, I hadn't either, but I thought it was a really interesting point. Considering
49 that their policy was originally that they would always try and get copyright
50 straightaway, she says they've actually took a step back a bit and their approach
51 is much softer now, but I think that's because their archive is collecting political
52 papers, so they want to establish and maintain really strong links with their
53 depositors, because it suits them as much as it suits the depositors. I guess it's
54 just one more element of, I hate to use the word relationship management, but
55 it's the sort of thing you think about.

1
2 MK: It's a reason to get back in touch with people ... Sorry, I was trying to find an
3 example ... Sorry, I can't find any at the moment where that's the case, but
4 certainly amongst those 68 there were certainly some well-known people, but
5 we just haven't been able to get in touch. I need to look at that and see if that's
6 right about them also being orphan works, because that would add another view
7 to the list.
8
9 For example, we did get in touch with the Public Catalogue Foundation quite
10 early on in the process prior to us conducting our own diligent search to see if
11 they could provide details of their diligent search with us and, in doing so, we
12 identified that 103 of our creators featured on the BBC Your Paintings website
13 and, as such, they must have had to clear copyright for all of those paintings, but
14 they were actually only able to provide contact details for four people.
15
16 VS: That raises questions about their due diligence last time.
17
18 MK: It really does. They've shared details before and they were able to send on an
19 extra 16 letters on our behalf.
20
21 VS: 20 out of 103.
22
23 MK: Exactly. It raises questions but it does also show how difficult it is to get in
24 touch with people.
25
26 VS: You don't know, they could have gone through a very rigorous diligent search
27 process and still only managed to find 20 rights holders.
28
29 MK: I don't know what their process was, that's the issue.
30
31 VS: But yeah, that's what I was going to follow up on as well, you don't know what
32 their diligence is, but also when you contact collecting societies as well, so I was
33 going to ask you about Bridgeman and DACS, how that went?
34
35 MK: Not great, they didn't really respond to be honest. Bridgeman were better.
36 DACS, there was only a few that applied to DACS and I don't think we've had
37 a response from them at all. I will say, though, that even where we have got in
38 touch with these third parties like PCF or DACS, if they haven't been able to
39 provide details, that hasn't meant that we've assumed that their diligent search
40 has been good enough and that we won't bother. It's just made us have to go
41 and do a diligent search ourselves.
42
43 VS: Yeah, I think it's interesting, given the presentation that DACS gave at the
44 conference in Edinburgh and what they might actually be like in practice. I guess
45 it is about trust and your right from an institutional point of view not to trust that
46 DACS and Bridgeman and the Public Catalogue Foundation have done their
47 diligence properly, but if there was a way that these kinds of institutions could
48 work together in a more transparent way I think it would be really good. I think
49 part of the problem is that collecting societies like DACS are not transparent,
50 and also it just re-enforces how difficult it is in general.
51
52 MK: It is really difficult, and I think having that kind of commercial aspect to their
53 work just adds a whole different way of working and of sharing information, I
54 think it generally makes them reluctant to do so.
55

1 VS: Yeah, if they know it's a non-commercial project, the impetus isn't really on
2 them to get in touch with the rights holders.
3

4 MK: Yeah, they're not going to bother are they?
5

6 VS: Yeah, because they're not going to see any money from it, at the end of the day.
7

8 MK: Included in this document is the process that we went through, and I will say we
9 probably went back to front actually. I mean as a starting point we used our own
10 files, our own information for the most part, and then as a follow-up [inaudible]
11 and then resorted to things like DACS and Bridgeman as well.
12

13 VS: Did you think that developed, over time did you end up adding more sources?
14

15 MK: Yeah, definitely. On reflection, obviously all this happened in the very major
16 aftermath of the fire and as such a lot of our own departmental accession
17 information wasn't available at the time and has only very recently started to
18 become available. And what we will do in the coming months is retrospectively
19 look through some of the material that wasn't available, to see if it shines any
20 light on those rights holders we weren't able to get in touch with, and I think that
21 will actually really help.
22

23 There were certainly two folders of the creators' files which have been really useful,
24 where they've been available but which have been in storage which we've now
25 found and already we've turned up someone who I was looking for, for an
26 enquiry, so when we get them back properly and when we have staff time
27 available to work with it that will be our next process.
28

29 VS: That's good ...
30

31 MK: Do you have any other questions?
32

33 VS: No, I think that's pretty much the last one. I was just going to ask, because in
34 the last interview we finished with asking obviously the experience so far has
35 been really positive has there been any negative aspects, and I was going to ask
36 that again?
37

38 MK: Do you mean for users or for us?
39

40 VS: For you completing the project, is it mainly the orphan works that's thrown a
41 spanner into it?
42

43 MK: Yeah, I would say that. Also I think I would again reiterate that the whole
44 copyright element was not really something that we had factored into the
45 cataloguing project. From the outset it was a very short term project, it was only
46 intended to be three months, and actually to do this properly takes time and
47 we've had to do it on a really small scale with no budget whatsoever to
48 accommodate it, and in quite a rush as well. We're always trying to do it
49 properly. I think it's not been the most ideal way of doing it but it shows that it
50 can be done on a budget, etc., and I think that is a positive experience to at least
51 have tried and we've managed. Definitely there's some patches of the collection
52 which we'll need to look at again now that there's other information available,
53 but it was still positive.
54

1 VS: That's good. So in terms of the process of contacting the rights holders, so
2 sending the letter out, doing follow-up emails, at what point do you say that's
3 enough, we've done our due diligence, we're happy that we've done everything
4 we can? Do you feel like you've fully, I don't want to say integrated, that's not
5 the right word, but is that part of the policy that you've developed? That there is
6 an endpoint or is it because the way the project is developed and the fact that
7 you haven't had access to all of the records, that it's a bit more fluid, I guess?
8

9 MK: I think until we discovered this extra departmental accession information was
10 available the endpoint for us was probably sending that letter and awaiting a
11 response, and if we didn't get a response, well at least we'd tried. I think that
12 has been our endpoint but, in light of this new material becoming available, that
13 will force us to look again at those ones that we haven't had a response from,
14 and at least try that second step, and I think that would be the case again if any
15 other material becomes available. I don't know if we would necessarily go out
16 and actively seek any extra information because what we've done in terms of a
17 diligent search in the first place was very thorough. I don't know what else we
18 could do to be honest.
19

20 VS: In terms of the endpoint of the diligent search process, is it maybe three or four
21 weeks after the last email or letter was sent, is it six weeks, are you thinking
22 about a time for it almost?
23

24 MK: No, I don't think we would impose any time limit. I mean most of these letters
25 were sent out July/August/September time last year, and I'm still getting the odd
26 response now, probably because a lot of these people are quite elderly and it's
27 not really a priority for people, they're not that bothered about the rights they
28 have in the material, they're happy. Where it's a positive response, I think
29 people aren't that bothered to get back in touch.
30

31 VS: And the non-responders, there's various reasons you could ascribe to someone
32 not responding, but I think the most likely is probably that they're just not that
33 bothered, which is fine.
34

35 MK: Yeah, or that we haven't tracked down the right person.
36

37 VS: That's also something that has to be factored in.
38

39 MK: Yeah, I mean I think we could assume that, especially because all of the
40 responses we've had have been positive. I would assume that the reason we've
41 not heard from the others is because we haven't got to them.
42

43 VS: Well, that's all I have.
44

45 [ENDS]
46

47 *****
48
49

50 **Case Study:** Glasgow School of Art Archives and Collections (Interview 3)
51
52 **Date:** 2016-06-22
53
54 **Interviewer:** Victoria Stobo (VS)
55

1 **Interviewee:** Michelle Kaye, Collections Development Officer, Archives and Collections,
2 Glasgow School of Art (MK)
3
4
5 VS: What you were saying there about how orphan works tend to be more of an issue
6 with the art collections whereas with the archive collections, because you've
7 investigated that at collection level, and from what I've read in the previous
8 interviews that you've done, what you were saying about copyright usually
9 being handled at the point of deposit: in general, you've only come across, like,
10 a couple of instances where it hasn't been assigned at the point of deposit?
11
12 MK: Yes...
13
14 VS: So most of the time, with the archive collections, I'm guessing, that you've been
15 able to assume either copyright has been assigned, or the School has held it
16 anyway, because it's an institutional record of some kind?
17
18 MK: Unless it's a historical acquisition, in which case it has been more problematic,
19 but generally, where we have some sort of custodial history to the collection,
20 then we've been able to investigate it a bit more easily and get in touch with a
21 relative who's been able to provide at least, you know, some sort of hint as to
22 where it comes from. But, yeah, I think it's generally the art work that's a bit
23 more problematic because usually we'll buy it, and, or it's gifted to them, they're
24 not necessarily the creator, and that's where it becomes more difficult. Whereas,
25 the archive collections, it's usually people have had it in the family, it's been in
26 their attic, it's come through that sort of stream to us.
27
28 VS: And in terms of, so I remember you saying in a previous interview, that you did,
29 as whole, you'd identified, I think it was about 650 creators altogether?
30
31 MK: With our framework, falling within the realms of the issues, there was 401.
32
33 VS: Okeydoke.
34
35 MK: Creators that we needed to research first of all, I can give you a copy of this. Of
36 those, we found that 281 had issues relating to copyright. Where the creator had
37 died, pre-1944, as it was when we did this project, so obviously time has moved
38 on since then. Or, it was an orphan work. We've been able to do a bit more
39 research since I last spoke to you, we had a volunteer placement, who... what
40 happened was that, following the fire, we found some of the curator's custodial
41 history accession files that had been in offsite storage as a result of the fire, and
42 since we've moved they've come back to us. And they turned out to be really,
43 really useful in tracing the rightsholders in quite a lot of the material, so we got
44 a volunteer to use these new sources to try and trace the rightsholders. So,
45 through that, they were able to find another twenty or so – I can't remember the
46 exact figures. But I've updated these results [gestures to file], so that's the most
47 up to date figures. It has improved a little bit actually. But still, there are some
48 issues.
49
50 VS: Sure. So how would you define... when you say total number of creators
51 identified within our framework, how would you identify or describe the
52 framework? Sorry, I know!
53
54 MK: I'll need to think back to what our framework was! We identified that as....
55

1 VS: First of all, did you use the catalogue as the basis for identifying creators?
2

3 MK: Yes, so basically we created a list of everything within the collection, so whether
4 it was an art collection, not within the institutional archives at all, we decided
5 that anything that was within our institutional archive was our copyright and just
6 made that blanket rule, that if it was a deposited collection we had to investigate
7 that, and then whether it was part of the Museum collection, an artwork, that got
8 added on to the list. So, what I did was I made a list of every single creator who
9 appeared in any of those collections, and then, worked out, from that, whether
10 or not their life dates correlated to the copyright framework, and so that's what
11 that relates to. There was 401, in total, within the whole of our collections, 401
12 creators; the 281 relates to those who were/are either alive or have died post-
13 1944, and then... yeah, so that's it. Based it really quite simply on that.
14

15 VS: And then, so yeah, you've gone through that process, those are the results, and
16 you've been able to go back and do a wee bit more with the benefit of the
17 curatorial files, so that's, that's changed some of the results.
18

19 MK: I've got the last version of this for you to see how it's changed. It wasn't that
20 drastic, but it's certainly, I think we've made another 30 or so attempts to get in
21 touch, and received about sixteen or seventeen extra replies.
22

23 VS: I'm trying to... just trying to think why there were more permission requests
24 than there were creators, the double-up...?
25

26 MK: Because sometimes there were more than, there's more than one lead, so it might
27 be that we'd found multiple addresses for one person.
28

29 VS: Sure. And you've got the non-respondents. Yeah. And you've got the orphan
30 works separate from the non-responders.
31

32 MK: But that's not even, just the orphan works, that's the ones where we weren't able
33 to find any contact details at all, that's not including all the ones we were able to
34 find contact details for but didn't receive a response, so actually there's a lot
35 more orphan works than just that.
36

37 VS: Yeah.
38

39 MK: What's that – 156 plus 46?
40

41 VS: Yeah, the non-responders, I mean that's one of the problems with actually
42 defining what an orphan work, or an orphaned rightsholder is, because some of
43 those non-responders will just be genuine non-responders, they won't be orphan
44 works at all. You can't pull that apart yourself.
45

46 MK: For us, we've considered the non-responders to be non-responders, we have still
47 published that material, and ...etc, however, if you actually read the legislation,
48 the definition of what an orphan work is, even if you are able to find contact
49 details but don't get a response those could be considered orphan works...
50

51 VS: Yes, and the, so the 46, the material relating to those 46 creators, have you made
52 that available online?
53

54 MK: Yes and no. We have made items that are textiles, that are orphan works
55 available online, however, if it's an artwork, we have hidden it from public view

1 at the moment, pending a decision. Recently, I created a paper, a very basic
2 paper, roughly outlining some of the issues relating to orphan works that I gave
3 to our Head of Department here, because I felt personally it's not really
4 something that I can make a decision on, and maybe it should go further up the
5 chain, or maybe get further clarification on from the legal team or something
6 like that. Saying what an orphan work is, what the options are, what the
7 registration scheme involves and how much that costs, so how much time that
8 would involve as well, and what the other options might be, whether it's going
9 down the limited liability insurance way of things, which you had mentioned to
10 me as an option.

11

12 VS: Uh-huh.

13

14 MK: Another, you know, we have a takedown policy in place, do we just put things
15 up, is that enough? So, I've done a paper, I did this quite a long time ago, at the
16 moment it seems like it's not maybe a priority for the School, just yet, but I've
17 recently tried to flag it up again. I'm aware that, it's a shame that we've done a
18 lot of digitisation and there's a few items where we haven't got leads, and that's
19 not accessible at the moment.

20

21 VS: I do wonder if it'll be a case of, if the non-respondents ... up there for a certain
22 period of time, without any takedown requests, or any complaints or anything,
23 then whether it will just start to look like, you know, what difference would it
24 make if we added a few more to that pot, sort of thing. Yeah, and I think, I mean,
25 insurance is certainly an option, although I would say, it depends what... again,
26 it's what is it exactly that you're insuring, is it strict liability, in terms of, if you
27 get sued, and they're claiming damages, you know, realistically the likelihood
28 of that is low, so you know, your premium would probably be quite low, but that
29 doesn't really protect your reputation in an instance of... it's purely a
30 financial....

31

32 MK: If something was to happen, if someone was to complain, would that just be
33 resolved anyway by us going through the process of taking it down, and
34 apologizing – would it ever come to us being sued? I guess we don't know until
35 it happens.

36

37 VS: And having had discussions at various conferences and things like that, there
38 seems to be, it's happening, or it has happened to the [redacted] to a certain
39 extent, with the [redacted] project, I don't know if you've noticed, but they've
40 put out a couple of blog posts about how they're managing the project in terms
41 of orphan works and using the orphan works exception, but there does appear to
42 be a reluctance on the side of the rightsholders as well, because they don't want
43 to affect their reputation – they don't want to be seen as especially litigious,
44 either, or picking on particular types of institutions, or particular types of people.
45 So, it's almost like there's reputation [inaudible] going on, on both sides. I mean,
46 the only thing I would say is, having done the survey of the archive sector in
47 2014, I think only five institutions reported complaints, about copyright, and of
48 those five, I think only two actually ended up in some form of compensation
49 being paid. So it does seem to be...and the very small number of complaints that
50 archive services receive generally seem to be solved by taking the material down
51 and apologizing. I think it's one of those things, particularly for senior
52 management, where it may just be a case of monitoring it for a certain period of
53 time and then going back and saying....

54

1 MK: Exactly. And now, quite a long time has passed since we initially looked at this,
2 and the material has been online for almost two years now, so I wonder if we're
3 at a stage where we can be a bit more confident about making a decision on
4 orphan works. I think what's more off-putting, for me certainly, is that the
5 government now have a scheme, and that feels more rebellious to not comply
6 with a scheme that has been set up to deal with this problem, and to go
7 [inaudible] on it. I think that's what makes it feel more risky. But I mean, the
8 scheme...
9

10 VS: I mean, it's clear from, but also, they've been subject of an FOI request, so
11 they're not making, you don't really need the FOI request to tell that they're not
12 making a huge amount of money off it, you can see...
13

14 MK: You can see what has been licensed. There's not that much on it.
15

16 VS: No. I mean, it's the 12-month review, I think they probably – I don't know how
17 they can resolve the issues with the scheme, but I get the impression they will
18 have to do something to make it more attractive. But how that will actually work
19 in practice, I've got no idea. This is a really good two-pager, though.
20

21 MK: Well, a lot of it was pulled from the Orphan Works Licensing Scheme website,
22 it was really an argument to show the pros and cons of signing up to the
23 registration scheme, rather than, here's everything you need to know about
24 orphan works. I just wanted to outline how expensive it was to start off with, but
25 also, how heavily our collections are affected by orphan works, and how it could
26 affect our digitisation in the future. So, I don't know if I've updated this actually,
27 to reflect the new figures. I don't think I have. Not quite.
28

29 VS: It's useful to have the number of digital images as well.
30

31 MK: That number's gone up all the time, because we do, obviously, digitise material
32 on an ad hoc basis as well as, you know, digitising on a project basis as well. It
33 is always increasing, and it's something I'm more aware of as the recovery
34 project will happen, and we're going to be doing an awful lot of digitisation, and
35 although this diligent search attempted to trace the rights holders for everything
36 in the collection, so we wouldn't have this problem doing it again and again in
37 the future, it's still a concern. I mean, I know we did it as well as we could at
38 that time, it was really, really not very much time to do it, it was part of a much
39 bigger project, but yeah, it's still a concern. It's going to be there forever.
40

41 VS: Yeah, I was going to ask, in terms of the big push for digitisation, is that, has
42 that started?
43

44 MK: Not quite. We're still waiting on approval of funding for our recovery project,
45 but we are due to hear about that very soon hopefully, possible in the next few
46 weeks. At which point, we will hopefully be able to start the digitisation process.
47 We don't quite have the infrastructure to cope with all of these digital images
48 though, so even if we get everything digitised, it will be quite a while before
49 we're able to make things publicly accessible, because we're also reviewing our
50 cataloguing software as well, so even though it was just a few years ago that we
51 got a new catalogue and put everything online, we're now going to be getting a
52 new collections management software –
53

54 VS: Is this the move from Archon to Archives Space?
55

1 MK: Yeah, did I mention this before? Yeah, so, that won't happen immediately, we
2 need to have that infrastructure set up, and we also have to have an image
3 management software system set up as well, that will talk to Archives Space,
4 and we want to have all of that in place before we start ingesting any of the new
5 images into it, so although, yes, everything might start to happen quite soon, it
6 won't be online for quite a while.
7
8 VS: Sure.
9
10 MK: But one thing that I'm really keen to do as part of this process is to make sure
11 that all of the results of our diligent search, all of our rightsholders, all that
12 information goes online somewhere, because although we do have all the records
13 of our diligent search saved for in-house use, we weren't able to publish them
14 online so although the image is online, it doesn't say: Copyright of Mr. So and
15 So or anything like that. And that's something I'd really like to do in the future.
16
17 VS: In terms of, would it be available in the catalogue, or are you thinking purely in
18 terms of image metadata?
19
20 MK: I think it should be on the catalogue, I think it should be visible, just because it
21 would make it really transparent and clear. In cases where we're not looking for
22 copyright holders, then the onus is on the user to seek permission from that
23 person as well as us to use it, so there will be other information stored as
24 metadata that's private, sensitive information like addresses and things like that,
25 but we'll only use for in-house use. But I would at least like, if people are open
26 to being included, the person's name or the family name to be there.
27
28 VS: Yeah, I think there's quite a lot of work being going on in that with Europeana,
29 so they've done rights statements work, which is hopefully going to standardise,
30 how rights are signalled in catalogues, so it might be worth having a look at that,
31 and there's also, Andrea Wallace in CREATE, who's a PhD colleague of mine,
32 is looking at how terms and conditions vary across different GLAM institutions,
33 her research is focused on public domain works, and how they're made available,
34 so it's not strictly relevant in that sense, because, I mean we're talking about
35 stuff that's still in copyright at the moment, but it would probably be relevant
36 when you are making public domain stuff available. But yeah, also how you
37 communicate information about rights, she's done a lot of really interesting,
38 really useful work on that. I'm trying to think what else... yeah. So, the big
39 digitisation is still in the future, and that all has to fit into those technical, back-
40 end processes that you have to sort first before you start... I was going to ask
41 about making stuff available, whether you've had any more focus groups with
42 your users, since 2014?
43
44 MK: No, actually, not since the project ended. We've continued to get feedback, ad
45 hoc, just from enquirers and people using the catalogue, which has continued to
46 be good and people are still pleasantly surprised by how many images are online
47 and how freely accessible they are, and the fact that people are able to download
48 versions of them to play around with... definitely our, the number of image
49 requests for high resolution images has increased markedly, and I think that's
50 because people are able to just browse around and see what's there, put in an
51 official request for a high res version, that's really good actually. I think people
52 maybe would have thought the opposite would happen, but if so many low-res
53 versions are available the high res would go down, but in actual fact it's changed.
54

1 VS: Yeah, something Andrea's been looking at as well as part of her research, which
2 institutions are making high res available for free, and which are only making
3 low res available, and that's what I was going to ask about next, was, requests
4 for high res are going up, and whether it's something you would think about
5 making available in general, or is it something you would rather...?
6

7 MK: Well, personally I think I would rather maintain some sort of control over the
8 quality of images that are available. I think having low res available is really
9 good and it gives people certain freedoms to go off and do what they want with
10 them, you know, and we make very clear what our rules about using those
11 versions are, but to make high res versions available, I think, opens a whole new
12 can of worms eventually, and I'm not sure what the benefits to us would be,
13 because we are a very small institution and we still need to make some sort of
14 income from our collections, and that's the only way in which we do that. And
15 it's not very much money that we make off providing images to people, but it's
16 something, and it's now much, much easier to be able to provide them, because
17 you know, we don't have to search through all the images and make suggestions,
18 people come to us now saying "I want that image as a high res," and we'll send
19 it to them. Whereas before, people would get in touch and be like, "I want a
20 green picture of..." We'd have to search through and send them lots of versions
21 and have big conversations, so it's definitely improved the way we get in touch
22 with our users, and made those conversations much, much easier, but I don't
23 think, well, personally, I would not like to give people freedom to make high res
24 available. I'm not sure what the benefits would be, to us.
25

26 VS: Sure, and do you feel like, is that, is the control aspect, is it purely about income
27 or is it, is there an element of, particularly if it's material that's still in copyright
28 —
29

30 MK: Yeah, exactly, because one of the main reasons I think we were able to get such
31 positive results to our requests to put material online was the fact that we stated
32 it was, it would only be low resolution versions that were available, you know,
33 that they were only for academic or personal use. So we, I think if we did that
34 exercise again, and said to everyone that we're putting high res versions up
35 online, anyone can use them, we'll make no money off it and no one will be able
36 to ask your permission, I think the results would have been quite different,
37 somehow. Because it... I think that's just a certain level of control and it just
38 kind of controls how people use the images as well. I mean, we like to retain
39 some sense, at least knowledge, of how people are using them, what they're
40 being published in, if they're going on a t-shirt or a tea-towel or that sort of thing,
41 it's good to know and at least we have control over what we give permission to
42 and what we say no to. Generally, we never say no, but, I mean, it's good to at
43 least know how things are being used. Whereas, if they're just up there and
44 anyone can use them, I don't know how I feel about that.
45

46 VS: Uh-huh. And does that extend to works that are in the public domain as well?
47

48 MK: I hadn't really thought about that, actually. I guess, I should feel differently about
49 them, because we shouldn't have much control over them in the public domain,
50 but I'm not sure why I feel differently. Yeah.
51

52 VS: I think it's one of those ones as well, I mean, they're still being made available,
53 I would... it's as much about, particularly if it's something you haven't planned
54 in from the start, I think it's difficult to go back and say well, we're going to
55 change our policy for these particular class of images, without thinking about

1 what the implications might be in terms of, even from a very practical point of
2 view, how you would actually provide so many high res images for download at
3 any one time without thinking about all your back end processes as well, whether
4 you've even got the actual capacity to offer that. But I do think it's sort of
5 becoming, it's certainly been brought home to me through Andrea's work, but
6 also, there seems to be a sort of general perception, at least within academia at
7 the moment, that the treatment of public domain works seems to be
8 unnecessarily restrictive, given that they are not protected by copyright any
9 longer. And yet, I think there is, particularly with archives, libraries, galleries,
10 there's an element of control there, because you are responsible for the physical
11 artefact, and there are moral rights associated with it, attribution and stuff like
12 that. So, you do want to be able to make sure those things are still being
13 respected. But I think it's the sort of thing that you would need to consider long,
14 long term, along with, particularly if you're moving from one system to another
15 –

16

17 MK: It's the kind of thing where if we were going to do it now and make sure that
18 whatever system we're going to use was capable now, rather than five years
19 down the line, decide, "Oh no, wait, actually, we want to do this." But also, I do
20 think, there'd be so much involved with making, with doing that we'd have to
21 get back in touch with all of these people. I think, we would have to, out of
22 courtesy, and say –

23

24 VS: Well, not necessarily for the Public Domain, and I wouldn't suggest doing that
25 just for the sake of high res images for the ones that are still in copyright,
26 because, I mean, it's still really up to the user to seek permission if they want a
27 high res image. It's more just, it's really more to do with, do you actually have
28 the resources to offer that for public domain works, and it may be the case at the
29 moment, you don't, but sometime in the future, you might. So, it might be worth
30 thinking about those issues just now as you're switching from system to system
31 and you're getting the back-end capabilities for all of that.

32

33 MK: Yeah, it's something to consider. And I know there are other museums, galleries
34 etc that are going down that route, maybe it's just me, but personally I've always,
35 I've found it quite... I've been quite anxious about being so freely open. I don't
36 know why.

37

38 VS: It's a similar thing with, even with, you know, doing rights clearance, you watch,
39 you see what other institutions are doing, and you watch to see what the
40 consequences are, and then as other institutions start doing it, you've got more
41 information about the process to work with and information about the
42 repercussions, and it's maybe just, the archive sector is at the start of that -

43

44 MK: It's too new at the moment.

45

46 VS: I think there's an element of that. It's different for museums and libraries, it's
47 much more clear cut about when a work is in the public domain. Places like the
48 Rijksmuseum, where the material they hold is so old you know it's in the public
49 domain, it's really obvious it's in the public domain, whereas it's a lot harder for
50 archives because of the 2039 rule, because of orphan works and all of that. So, I
51 think it's hit those institutions a lot earlier than it has for archive services.

52

53 MK: Do you know of any examples of archives going down that route?

54

55 VS: University of Edinburgh have started, basically –

1
2 MK: Is it not on a kind of permission basis though, in-house only, or, I thought they
3 had different levels of permission?
4
5 VS: Yeah, I think that's how they're operating at the moment, but the long-term goal
6 is that they will eventually be open-access, but how long that might take, it could
7 be years and years before that's actually realised. It's so many, there's so many
8 processes and policies that you would need to have in place, and you're almost
9 working backwards through your collections, what's already available, what's
10 going to become available, that stuff, it's a very long-term process. Aside from
11 that, I think because of all of the big digitisation projects for name-rich records,
12 family history and stuff like that, all of those deals that were struck in the early
13 2000s, I think it almost became standard practice for a while that you would go
14 to either a funder or a private company like Ancestry or someone like that, you
15 would work with them, and basically it would be all tied up in whatever contract
16 you'd signed with them, so it wasn't something that you necessarily needed to
17 think about, or were able to, because it was all covered in the contract. But I
18 think it will eventually start to become more of an issue, especially as more
19 digitisation takes place, and there's more stuff online, I think users will start to
20 ask, "Why has it been made available in this way and not in this other way?"
21
22 MK: So far, we haven't had any, that I know of, comments about the type of version
23 that's available online for free, no one's commented, no one's had any negative
24 comments about the fact that they've had to pay for a high-res version, which is
25 really good, I think. I'm not, although, I don't know if I'm surprised by that, to
26 be honest, I think, I would expect that's the case...
27
28 VS: I think generally there's, I mean, digitisation itself is an expensive process, so I
29 can understand, it's perfectly legitimate for services to charge for it, because it's
30 not something that we can offer for free, realistically.
31
32 MK: There needs to be some sort of recoup, recovery of cost. One thing I was going
33 to mention just briefly is that as we get new acquisitions, I'm noticing, actually,
34 how time-consuming the copyright aspect is, of dealing with those new
35 acquisitions.
36
37 VS: Really?
38
39 MK: Not for me, it's maybe not the complete, entirely new acquisitions, actually
40 that's not true. It's the slightly grey area, recent, not entirely historical, not
41 entirely completed new acquisitions. So, let me try and clarify that. These are
42 ones that were maybe, deposited two or three years ago, the paperwork was
43 never quite completed, it was prior to this new form which now clearly states
44 whether or not you sign over copyright, or at least, do you allow for your images
45 to be made available online. So, with these types of material, I'm noticing, not
46 with me but with other members of staff, that they're finding it quite difficult,
47 the whole process of having to do a diligent search, because they weren't
48 involved in the project to do it, as a result of the online catalogue project,
49 explaining now to them, what they have to do, they're quite overwhelmed by
50 what's involved, I think, and, maybe it's because I was able to do it, as a one-er,
51 I was in the mind-set of "I need to do this, and this, I've got a template, draft it,
52 send it," but maybe having to deal with it on an individual, ad-hoc basis, as part
53 of a process is more time-consuming, and I think people don't realise....
54

1 VS: So is this where, so the material was deposited two or three years ago, you've
2 looked at the paperwork and realised it's not been completed so you're going
3 back, three years later –
4

5 MK: So, it's retrospectively trying to complete paperwork, and realising that, "Oh no,
6 the copyright wasn't signed," or "We don't have the right contact details," and
7 "Who's the rightsholder." So yeah, now when other members of staff are trying
8 to do that, I think they are finding it quite a task, to do that all within the realms
9 of this process. Which is fair enough, it is par for the course, it's part of the job,
10 but it's just time-consuming.
11

12 VS: Yeah, I think it's interesting to note though, just in general, that it's something,
13 like, those particular skills are needed at various points, not just when you're
14 doing rights clearance, at the point of deposit as well, or potentially
15 retrospectively when you're trying to –
16

17 MK: I think we'll be fine going forward now that we've addressed it, and included a
18 section on that in our new transfer of title form, but it's just, I mean, there's not
19 many where this is the case, but for the twenty or so where there is an issue, it's
20 definitely time-consuming, and problematic. So, it's just something to point out.
21 It's also, I'm really pleasantly surprised with what we achieved actually. When
22 I look back and see that we were able to send out so many, 253 letters and emails
23 to people, as part of a three-month project, which also involved actually putting
24 a catalogue online and transferring loads of images, and proof-reading, that's a
25 tiny amount of time, I can't believe we did that now. So, I think, it depends on
26 your needs, we were really pushed to do this, because of the project –
27

28 VS: Yeah, and that probably had an effect on, in terms of diligent search, maybe just
29 being like quite brutal about it, "I've check these four sources, I think those are
30 appropriate, if we've not got anything from it, I'm just going to move on to the
31 next one now." But still managing to find 253 -
32

33 MK: And maybe that's it – maybe now that it's not so much of a push, and maybe it's
34 –
35

36 VS: That time is a bit more elastic now -
37

38 MK: And I find also that I am seen as the copyright person here, so it's difficult –
39

40 VS: It's not comfortable...
41

42 MK: It's not a comfortable place to be, because I feel also that I am not an expert, but
43 I feel like it's also quite difficult to hit home the importance of doing this to other
44 members of staff as well, who just see it as a burden and a problem to deal with.
45 They don't, it's not something they ever maybe did before. You know, they did
46 their accessions paperwork, but they didn't really care who the rightsholder was,
47 because they didn't have to put the images online. So, it's just like a new problem
48 for some people. I just wondered if any other institutions had had similar
49 problems to that. It's not an overarching problem, but -
50

51 VS: Yeah, yeah, I think that it's either, it can be viewed in both positive or negative
52 lights, I think that's what I'm taking.
53

1 MK: I think it's a really positive thing, if we can, and especially going forward, I think
2 we can nip it in the bud and it won't be a problem. But I just think altering
3 people' mind-set and making sure it's dealt with, so it doesn't become a problem.
4

5 VS: Yeah, I think a lot of it is... even having done the training [SCA Copyright
6 Training], I hate telling people what a pain in the arse it's going to be for them,
7 because there's no... and yet, I feel particularly when I'm teaching, I'm trapped
8 between saying, you know, a lot of the education work that CREATE's done
9 with Copyright User and things like that is supposed to be very empowering"
10 "This is what you can do," whereas, eventually, particularly with archive
11 collections, it feels like there's always a point where you have to say, "Well, no,
12 actually, the law is completely inadequate," and I've always cast it in terms of
13 risk, as a way of saying, "Well, you can still do it, you just have to be aware that,
14 that's technically infringement," and stuff like that. I hate it when people come
15 along to training and they don't know very much about the law and you tell them
16 what the exceptions are and they're just like, "I can't do anything online!" And
17 you're just like, "I'm really sorry!" It's really depressingly negative at times,
18 which is why, I think emphasising the good points, what you can do, but also the
19 actual positives of having an up to date relationship with your depositors. A lot
20 of the time people deposit stuff and you never hear from them again, but that's
21 actually kind of weird. For some depositors that's probably what they want, they
22 just want to draw a line under something and get rid of the stuff and that's fine,
23 but for other depositors it's probably kind of a weird, truncation, like a chopping
24 off of a limb, sort of thing.
25

26 MK: I do worry, in having conversations with other people in the sector in Scotland,
27 that, I occasionally get quite anxious about our approach, and have we been too
28 risk averse. I'm certainly aware of the risks, and I think we've done everything
29 we can to avoid the risks.
30

31 VS: But, do you come across institutions that often that have gone further?
32

33 MK: No, I just feel that they've been more cautious, that's all.
34

35 VS: So, you feel like you've put yourself out on more of a limb?
36

37 MK: Yeah, exactly. I feel that other institutions are perhaps aware of the risks, the
38 same way that we are, but it's prevented them from doing anything, like the
39 complete opposite, they've just not done anything with some collections because
40 they believe they're orphan works and won't touch them. Whereas, we've not
41 done that. We're aware of it, we know the risks, but we feel that there's reasons
42 for doing what we have, and I feel, at times I feel comfortable, when I read over
43 everything again and I get my mind back into why we've done it I feel really
44 comfortable, but just occasionally, when I come across those individuals who're
45 SO opposed, from the other side of the fence, it does leave me quite anxious still.
46 But I guess it will always be that, until there's more clear-cut way, or just more
47 clear cut legislation that we can follow, that's easier for us to use, then...
48

49 VS: So there's a need there, in terms of training that's not being met in the wider
50 sector, in general, around acquisition, around diligent search, it's almost like, if
51 there was guidance available to point people towards, that would be useful? I
52 mean, that's kind of what the Edwin Morgan project is going to be producing,
53 diligent search guidance that goes, that's more tailored than what the IPO have
54 produced as part of the licensing scheme, so that's one thing. The other thing is,
55 you mentioned, you have a new acquisitions paperwork, policy, guidelines, that

1 sort of thing. So are you saying that previously, copyright wasn't covered at all,
2 or it was covered but it wasn't specific—
3
4 MK: It was covered, but it wasn't specified about use of material online, it was just:
5 "Do you own copyright?" "Do you sign it over?" and that was where it ended.
6 And I think it wasn't really then discussed in much detail. Like, it was a tickbox,
7 it wasn't really something that was discussed in great detail. Benefits could be...
8 well the disadvantages could be as well, I just think it wasn't really something
9 that was discussed in much detail.
10
11 VS: So, when you did the rights clearance, some of those depositors may actually
12 have ticked the box to assign it, but you've decided to go back and -
13
14 MK: We may have done, we may have done. Although...
15
16 VS: Is that the sort of thing that ruled people out? If they'd already assigned it?
17
18 MK: Yeah, well, if they'd already assigned it to us to be the copyright holder, we're
19 not going to catch back up to check -
20
21 VS: So, it was just the ones where it wasn't... in some cases when archivists have
22 done rights clearance, even when it's been assigned to them, sometimes they
23 have gone back just to double-check, particularly if it's being used in a way that
24 wouldn't necessarily have been envisaged at the point of, the people that
25 assigned that sort of thing, but I think that's... I think it's very sensible just to
26 take the tick as well. Courtesy, but also what you've done there, what you're
27 doing retrospectively, not creating an enormous burden for yourself but going
28 back -⁷⁰³
29
30 MK: Yeah, and they've signed it over, so there shouldn't really need to be a
31 conversation.
32
33 VS: Absolutely.
34
35 MK: I can see why some might cover their back.
36
37 VS: I remember you showing us the spreadsheet with me, so I'll need to go through
38 the spreadsheet in more detail, again, I haven't actually look at it in a while -
39
40 MK: I can email an up to date version of it, it's barely changed, but...
41
42 VS: I think, I remember you saying in the last interview, that you weren't sure about
43 how time had been recorded for diligent search, and I don't know if you've had
44 time to resolve that, I imagine that's totally fine.
45
46 MK: As in roughly, whoever's involved in diligent search has recorded, estimated,
47 per quarter of an hour, so it's 0.25, 0.25 -
48

⁷⁰³ Susannah Waters reports that for the project [Pioneers of Post War Pattern](#), which produced new textiles based on designs from deposited collections, A&C got in touch with the relevant donors to let them know their plans, even if they didn't need copyright permission from them. This was to ensure they felt informed and were happy about how their material was being used.

1 VS: That's totally fine. I can have a look at that, but I think in general, you said it
2 was a two-month project. Or, because it was mixed in with the catalogue –
3

4 MK: That's the problem, it's hard to extract exactly how long the diligent search took,
5 but initially the online catalogue project was supposed to be three months, then
6 the fire happened and that delayed everything by a month, and then we got some
7 extra funding as a result of the fire, to increase the cataloguing project by an
8 extra three months, I think, so I think it ended up being six months. I think that
9 the diligent search only happened for the last three months of the project.
10

11 VS: And was that, was that internally funded? So was that the Museum –
12

13 MK: No, it was Museum Galleries Scotland –
14

15 VS: Museums Galleries Scotland funding, who did the whole project?
16

17 MK: No, sorry, the initial three-month project was internally funded. The extra three
18 months was funded by MGS.
19

20 VS: And so, does that mean that the rights clearance would have been partially
21 funded by MGS? And I had the impression that it had kind of gone in two phases,
22 so you did the initial phase but then you also had a volunteer working for you –
23

24 MK: Because the project was extended and because this rights clearance became a
25 much bigger task than we'd envisaged, I got some help from our Archives and
26 Collections Assistant to do some of the diligent search, to do a lot of the diligent
27 search, and then actually after the project had finished, last year, I had a
28 volunteer for one day a week for 12 weeks, doing our diligent search.
29

30 VS: And would it be possible to estimate, were they working on that full time?
31

32 MK: The volunteer?
33

34 VS: Not the volunteer, that's actually really good to know specifically, that was one
35 day a week, for 12 weeks, so that's actually very clear to see how much time
36 was spent on that. With the Archives and Collections assistant, is that harder?
37

38 MK: It's much harder. But, it should be easy to pull from the spreadsheet.
39

40 VS: Okeydoke, and that, is it clear from the spreadsheet, the different waves of
41 activity, or is it all –
42

43 MK: Yes, because you can tell, it's dated -
44

45 VS: It'll be dated.
46

47 MK: Yeah, when the attempt to get in touch was made.
48

49 VS: Okeydoke. Great, I can have a look at that. And, is there a way that I can look,
50 just for myself, working between the spreadsheets, and what's actually available
51 on the website, like, almost do a trace between the creator and the works that are
52 available?
53

54 MK: Yes, I think the easiest thing to do would be to search by the reference number.
55 So, the spreadsheet isn't done by creator, it's done by reference number, so in

1 instances, there'll be one creator will appear 100 times because there'll be 100
2 images, so I think that's easy for you to search.
3

4 VS: That'll be really good, because I think this is probably, this is one of the only
5 case studies where we've been able to look at it from both sides, sort of thing,
6 with the diligent search and all of the information that's been internal and what's
7 actually been made available externally. Like, with some of the projects it's been
8 a case of, seeing the sort of end result here, then looking at what's available.
9 That'll be really nice.
10

11 MK: The results of the spreadsheet, even if there's been a positive result, doesn't
12 necessarily mean that there is an image online because it might be that that
13 material hasn't been digitised yet. What I could also give you access to is a very
14 short document, a spreadsheet, which I pulled together when looking at this
15 orphan works issue, when I was trying to decide whether or not to leave orphan
16 works images online or not. So, I made a list of all of the ones that were orphan
17 works that were online currently, and then I tried to pull them apart and tried to
18 categorise them, whether they were textiles, or whether they were artworks or
19 whether they were a bit more iffy, and what I did with them. So, the artworks, I
20 think I've taken down, the textiles I've left up, and then I think there's a third
21 tab that's "I don't know what to do with these." So, I could possibly give you
22 that as well.
23

24 VS: That would be really useful. That would be great, yeah. The other thing I was
25 going to ask is, and I don't fully understand the implications of this myself, but
26 have you heard about the repeal of Section 52 of the CDPA?
27

28 MK: No.
29

30 VS: Ok. So, it applies to works of design and artistic craftsmanship that have been
31 made in industrial quantities, so it's basically anything over 100 copies, so if it's
32 been made by means of an industrial process –
33

34 MK: And it's published patterns?
35

36 VS: Published patterns to a certain extent but also chairs, furniture, textiles, they used
37 to only get 25 years of protection and now they're getting the full term of 70
38 years.
39

40 MK: No, you're kidding! When did that change?
41

42 VS: The IPO consulted on it at the end of last year. [Redacted] They've only done a
43 six-month turnaround on it, so this month, it comes into effect. And nobody, do
44 not worry about not having stuff online, nobody is prepared for it at all.
45

46 MK: I guess it depends what it is, isn't it, I mean, some of our textiles are one off
47 pieces, so that's fine.
48

49 VS: That's not going to apply at all.
50

51 MK: It's when it's more industrial, so if it's, we have some sample books by a
52 company called Donald Brothers...
53

54 VS: See, that may or may not be. This is partly, industrially produced but also
55 whether it's purely a functional utilitarian work, then it wouldn't attract

1 copyright protection, but if it qualifies as a work of artistic craftsmanship, and
2 that's basically, the IPO have said, that's why the definition of artistic
3 craftsmanship is so loose, is so that you have –
4

5 MK: If it's been made in quantities over 100, surely that limits the sense of artistic
6 craftsmanship? No?
7

8 VS: Yeah. [Discussion of textile works, dissertation research, without relevance to
9 interview topic, removed for brevity].
10

11 VS: I'm trying to think if there's anything else. So, yeah, so the rights clearance, the
12 initial, so the project was initially extended for, extended to six months, and the
13 last three months, that's when the rights clearance would have taken place.
14

15 MK: Yeah.
16

17 VS: Museums Galleries Scotland provided -
18

19 MK: They provided the funding for the extension of the project, but not specifically
20 for the rights clearance.
21

22 VS: Ok. And how much did the funding run to?
23

24 MK: I don't know specifically, sorry. It was just to fund my post, to fund my post
25 basically.
26

27 VS: And yeah, I guess rights clearance was only one of things you were doing during
28 that period, yeah.
29

30 MK: But I'm not sure, I mean they weren't aware that's how their funding was being
31 spent, and to be honest, not very much of my time was spent on the diligent
32 search, I was busy doing a whole load of other stuff related to the online
33 catalogue project. Actually, it allowed, it wasn't that their funding was targeted
34 at the diligent search, just to make that clear.
35

36 VS: Yeah. And I guess, you did have an archives and collections assistant at that
37 point as well. The only other point I was going to put in, and I'm pretty sure
38 we've discussed it before and it might be that I can see it in the spreadsheets, is
39 when, so I know that you contacted Public Cataloguing Foundation, and you
40 contacted DACS?
41

42 MK: We contacted DACS as a result of, I think there was three, only three or so of
43 the creators featured on their list of people they represented, so... but I think in
44 the end they weren't able to – I don't think they were able to provide any contact
45 details. I think, Bridgeman set up an agreement, so they did represent, I think
46 one person, and I was expecting them to licence us making their permission, but
47 in the end they basically provided their permission for free. But, it was just, they
48 wanted an agreement set-up. And it would be reviewed every three years or
49 something like that, I can't remember the intricacies of it.
50

51 VS: That's interesting. Because it is something we're constantly being told, like
52 licensing is the solution, and it's like, well, every archive service that I've spoken
53 to that have gone to DACS, or Bridgeman, or ACLS, or any of these people, you
54 know, they're getting a handful, like, literally a handful -
55

1 MK: Yeah, it's hardly any!
2
3 VS: - back.
4
5 MK: I mean, you can see it there, that for the PCF, certainly, we found that, I think it
6 was 110 of our creators featured on the BBC Your Paintings website, so in my
7 head, we would hopefully have found the 110 contacts, but actually, we sent 10
8 letters, they were only able to send 10 letters, and six emails, and I don't think
9 we even got any of the responders via them. So, it kind of made me question
10 how well they'd, not how well they'd done their diligent search, but just, you
11 now, well, maybe? I don't know. I expected higher, I expected more from that.
12
13 VS: I think in general, that's why, particularly, I've heard it from other projects as
14 well, just that there's not, and it's not necessarily a failing on their part, it's just
15 generally a reflection that you don't represent the rightsholders that we're
16 looking for, so the exhortation of governments and licensing bodies, that we have
17 to work with these organisations, like, it doesn't add up. It's a waste of time for
18 you as much as it's a waste of time for us, and there's no benefit at the end.
19
20 MK: That's what was quite disappointing.
21
22 VS: Yeah, you're not distributing anything to rightsholders, and you're not getting
23 in touch with the people we need to get in touch with.
24
25 MK: That's what I find, certainly, is that, I spent quite a lot of time trying to work out
26 which if the creators were on, were on the Your Paintings website, thinking,
27 "Great! This is a really easy short cut!" And in actual fact it took so long to do
28 that and the results of doing that were really not great. So, it probably was more
29 work than it needed to be. But that's just one example. I don't know...
30
31 VS: Yeah. No, I would say that's consistent, across all the projects I've looked at.
32
33 MK: Ok.
34
35 [Ends]
36
37
38

1 **Case Study:** Newcastle University Special Collections and Archives

2

3 **Date:** 2015-03-06

4

5 **Interviewer:** Victoria Stobo (VS)

6

7 **Interviewees:** Ian Johnson, Head of Special Collections and Archives, University of
8 Newcastle (R1); Rebecca Bradley, Project Archivist, Newcastle University
9 Special Collections and Archives (R2); Kimberley Gaiger, Digital Assistant,
10 Newcastle University Special Collections and Archives (R3)

11

12

13 I: Rather than start with the first question, I might go for the third. So, how did the
14 project come about? Because I know there's Special Collections, there's
15 Bloodaxe, but there's also Culture Lab and the SELLL (School of English
16 Literature, Language and Linguistics).

17

18 R1: It's been rumbling on for a long time that we wanted to... between the Library
19 and the SELLL, that they wanted to purchase the Bloodaxe Collection to do
20 research around it. And eventually they come up with an agreement in 2013 –
21 early 2013, I think – on how we were going to share that cost and got that signed
22 off. And immediately, what they wanted to do was a small-scale AHRC project
23 where two poets and a visual artist as well – the two poets, Tara Bergin and Anna
24 Woodford, and Kate Sweeny as well, who's the visual artist – to respond
25 creatively to the Bloodaxe Books Archive. And it was quite ill-defined, I would
26 say, but rather than a scope and content thing of what was in it, it was responding
27 creatively to what archives are, and especially from a creative standpoint. So it
28 was different to answering a research question. I would say it was more of a
29 creative response type of thing.

30

31 That went on for about three months and it required them to respond to an
32 uncatalogued archive. And straight away, from our point of view, I knew what
33 the issues were going to be there, in that there would be some goodwill in the
34 beginning and then it would be, "Right. Can I have a look at this? Can I have a
35 look at this?" and from my point of view I've no idea where it is, because it's
36 not catalogued. But also the copyright issues in terms of wanting copies of things
37 – that obviously came out as well quite quickly; the data protection issues behind
38 that; and generally, the logistical issues from an archivist's point of view in
39 giving people access to something that wasn't catalogued.

40

41 So what we did in that, we worked with them and they were very good in wanting
42 to understand what the issues were – which is very good for this kind of pilot
43 project. But we kind of worked in tandem to come up with a very basic box list
44 of what was in each one as well, to have a bit of an audit trail there. But we kind
45 of devised forms around the whole data protection thing, the copyright issues,
46 and we gave them a two-sheet thing on what they needed to be aware of in terms
47 of copyright and data protection. And again, they were very good in liaising with
48 that, and Kate Sweeny especially would come back and check whether she was
49 in breach of copyright by doing this and this. And we relied on certain
50 exemptions, like incidental use, in that they weren't taking any photocopies, it
51 was a very kind of artistic sweeping of material.

52

53 Then, at the end of that, it was kind of a coming together and saying, "Right
54 what do we want to do now?" And I remember me and the other archivist,
55 Geraldine, who's on maternity leave now, everyone had to get together and pitch

1 for what they would want out of a big AHRC project. So you obviously had your
2 creative people coming in and saying, “Oh, we want to do this type of research,
3 we want to create generous interfaces,” so the whole kind of digital humanities
4 thing was big on the agenda; and then you had us going, “We want to catalogue,”
5 so for the reasons that came across to those poets in that project. So it was
6 helpful, because they now understood what the issues were, so we didn’t have
7 to pitch that hard. And also, we had a digital humanities person there who is very
8 big in that field – [Marion Dirk]. And he’s shown them these interfaces and got
9 them very interested in them. And we gave our presentation, which was like,
10 “We can do this, this, this and this,” which didn’t include just cataloguing but
11 digitisation, rights clearance, project management to an extent as well. And it
12 was [Marion Dirk], interesting, I think it was his voice that won over in the end,
13 because they were like, “I’m not sure if the AHRC would fund something like
14 that.” and he said, “Well, you can’t do the generous interface if you don’t have
15 the building blocks in terms of the metadata in the first place and you don’t have
16 the rights clearance to digitise stuff.” So immediately, there was that shared
17 understanding. And what came out of that was this bid, which was based on
18 making a generous interface that isn’t an archival catalogue, but at the same time,
19 almost clandestinely, you’re kind of creating an archival catalogue as well. And
20 it worked quite well.

21
22 So, that was the impetus for the project, I think: wanting to do something in the
23 arena of digital humanities that was quite cutting edge, wanting to make the
24 archive accessible in modern ways, and then all of the requisite research and
25 creativity that comes almost as a by-product of that. So I would say the main
26 focus of the project was this product in terms of accessibility; everything else
27 kind of hung off that, I think.

28
29 I: That covers the question about why was it important for Special Collections to
30 have this particular collection and to digitise it. You had this more accessible
31 product in mind at the end.

32
33 R1: Yes, and I think with SELLL as well, having them as a real stakeholder who
34 suddenly are now interested in our acquisitions policy and the mechanics of the
35 team and embedding themselves – we’ve got two volunteers in there from
36 SELLL – has actually worked out really well, I would say, strategically. But
37 also, in terms of getting it in, it complemented our ambitions to have a collection
38 strength in contemporary literature, which we were already slowly building up
39 and that we had local writers’ archives and things like that. But it was almost
40 like a statement of intent to say, “This is going to be a proper collection strength
41 now and it’s going to be a focus of our acquisitions work that we do.” I think
42 that’s been solidified, in that they tried to get additional funding through AHRC
43 – admittedly unsuccessfully – but they have managed to get a little bit of
44 successor funding from the School itself to carry this on on a one-day-a-week
45 thing. And we’ve replied to that by having... we now have a senior archives
46 assistant whose specific remit is literary archives.

47
48 I: And why do you think Bloodaxe Books themselves are interested particularly in
49 having their archive held here, but also...?

50
51 R1: Why?

52
53 I: Yes. And also the project itself around the archive.

54

1 R1: Well, here, I guess it's because of the link with Newcastle, the local link, and the
2 fact that Neil went to Newcastle. But here in particular as well because of SELLL
3 and because of that relationship.
4

5 R2: Him and Linda's relationship as well, who is the head of the SELLL. I think they
6 collaborate quite a lot and she's done a few publications with him, so they know
7 each other and it's been quite good liaising with them two, I think.
8

9 R1: [Redacted]
10

11 R2: They have done stuff like that as well, so we've got access to... They wanted
12 some photographs and things which we were meant to have, so they can use us
13 when they're doing reprints or new editions of stuff and things like that.
14

15 I: You mentioned the fact that discussions had been going on for several years. Is
16 that where the main impetus came from, Neil and Linda thinking it would be...?
17

18 R1: Yes, I would say so. I think she was the driving force behind it and, yes, doing a
19 creative kind of hub for not just the local publishers but local poets as well, which
20 is kind of the next stage, really.
21

22 R2: Yes, the project's bringing together lots of people into a poetry festival as well,
23 so obviously for Bloodaxe that's going to be excellent promotion and promoting
24 the archive being here and people being aware of it as well, which is really good.
25

26 I: And you mentioned that the archive was purchased. I'm assuming that was more
27 like a contract between you and Bloodaxe, rather than a normal deposit?
28

29 R1: Yes, it's a semi-quasi-legal kind of contract, in that we pay for the... I think
30 we're paying in three instalments for every accrual that we get each year. So the
31 next, and actually the final one, is due this year. But we would hope that it would
32 be a flow of accruals, as we call them.
33

34 I: And were the rights issues in the collection dealt with in the contract
35 negotiations?
36

37 R1: No. Well, actually, in the deposit agreement they are. The deposit agreement's
38 been a very quasi-legal thing. And we always put in our kind of template, "Are
39 you gifting us the copyright as well, as far as you are able?" Because with
40 archives, obviously, if you say, "Oh, yes, you can have the copyright," but it
41 might be that you don't even have the copyright in the archives. So we almost
42 have kind of a tick-box and the answer is all there – obviously no, because it
43 wouldn't make commercial business sense to give us the copyright.
44

45 I: I guess that's sort of leading to the issue of rights being a continuous back and
46 forth process with Bloodaxe.
47

48 R1: Yes. Kim and Becky manage really well.
49

50 I: How would you see the working relationship between Bloodaxe, Culture Lab,
51 SELLL? It sounds from what you've said already that there's a lot of goodwill
52 on both sides.
53

54 R1: Yes, I would say that.
55

1 R2: Yes, I think with the Culture Lab particularly it's been very good with us two
2 and Tom.
3
4 R3: I work quite closely with Tom, deciding what goes up and what's best for him.
5 So it's quite close on the digitisation and the cataloguing side as well.
6
7 R2: We've been really accommodating as a service to make sure that the researchers
8 have had access to what they want when they want. We've also allowed them to
9 film in the stores and do interviews in our spaces with different people. I think
10 we've made that available to them, which is quite good as well.
11
12 The SELLL have been good in working collaboratively like that and checking
13 things that we're doing with the advisory board, and also speaking to Neil about
14 certain stuff. And then Bloodaxe has been really good; so Suzanne Fairless
15 Aitken, their rights manager, has been really good in talking us through certain
16 rights and issues, but also giving us access to the information we need to contact
17 rights owners and things like that. She's been really good. And Neil's been really
18 good at checking certain things for us – and us to him as well. So if he's asked
19 for anything that he wants checking, we'll go and do that quite happily. So it's
20 been a nice back and forth, really. I think generally it's worked quite well.
21
22 R1: I think the issue for us is turning the project into a programme of work, so that
23 we have... that the SELLL aren't always a mediator between us and the
24 depositor.
25
26 R2: Yes, and eventually we'll move over to Neil just contacting us, rather than Linda,
27 and working with us, which would be better for our relationship. I think
28 sometimes understanding has been a bit of an issue with the working relationship
29 as well; so explaining our point of view.
30
31 [22 lines of transcript redacted at interviewees request]
32
33 So the researchers and participants, when they've created things they've been
34 depositing it with us so that we can hold it electronically and that can be put on
35 the website. But what we've got with the things that we've digitised from the
36 archive, we have the full metadata from the ISAD(G) template to go onto that,
37 whereas we weren't going to create something like that for the participants'
38 work. So we've expected the researchers, the research associates to do that for
39 us, but then there have been a lot of issues with them understanding what they
40 actually want from it and then communicating this to Kim, who's been doing the
41 administration for it so that we can keep it in a digital file.
42
43 [3 lines of transcript redacted at interviewees request]
44
45 R2: But as I said, you've flagged that every time it's happened and you've tried to
46 communicate that very well. So I think from our point of view, our relationship
47 with them is a lot of mediation.
48
49 R1: I think it's worth saying as well about academia that it's a transient kind of
50 community; that academics, especially early career academics, move around a
51 lot. So there's this sense of, "Oh, we'll go and do something, then we'll move
52 on to the next thing and the next thing." Obviously, for us, our point of view, we
53 want some sustainability behind everything that we do, because that's not our
54 remit, we're not transient.
55

1 I: And what were your main concerns at the start? I know you mentioned that you
2 definitely wanted an archival catalogue. Did you have any other concerns
3 coming into the project?
4

5 R2: I think giving access to people to uncatalogued material. That always causes
6 something.
7

8 R1: Yes, that was the thing... It was almost addressed in that initial project, that pre-
9 project. I must admit, from that, my stance kind of loosened a little bit in that I
10 saw things from a different perspective. And we gave a talk on that, actually, me
11 and Tara, to a group of archivists. It was called "For or Against the Uncatalogued
12 Archive". We've given it to a few different audiences now, and it's interesting
13 that they react in different ways. Archivists find it very funny – you maybe
14 wouldn't expect that. Tara wrote a poem and at the end it says, "You signed the
15 yellow archivists' form in pencil and pocketed everything" – huge laughs. And
16 I think when you give it to poets it's more chin-stroking.
17

18 R2: But like Ian said, even sorting out the forms – so the forms about copyright and
19 about data protection – under the research exemptions we allowed people to do
20 that when we were doing it, and we gave proper talks about document handling
21 and how they're meant to do it. We did have some issues where they'd move
22 things and that was a bit of an issue – but it was going to happen. But it didn't
23 happen very often.
24

25 R1: I'll tell you my concerns at the beginning of the project specifically, is that I
26 came from a project working on the Hillsborough Disaster where it was a very
27 multidisciplinary team and, again, archivists were very kind of bottom-of-the-
28 rung. And the project steer on that took things away from us all the time; like,
29 "We don't need that piece of metadata, we don't need that and we don't need
30 that." And at the end, the end product was poor because of that. So I was
31 concerned about that; that even though we had an archivist in post, that they'd
32 kind of go, "We don't need a full catalogue. Can you just do a listing for us?"
33 So that was mine.
34

35 And I had initial meetings [where they] didn't understand why we needed a
36 reference number, like an archival reference number on things. And I kept
37 saying, "To link back to the actual thing that sits in the archive." And he was
38 saying, "Oh, people might not necessarily care about that." "We would care
39 about that because we wouldn't be able to give access to it." So that was one of
40 my main ones.
41

42 And also the digitisation; the level of digitisation that they expected.
43

44 R3: And what they expected. Because it wasn't until a couple of months into the
45 project that they realised what they wanted.
46

47 R2: And even that was a bit... the remit around that's been quite...
48

49 R3: Yes. And then deciding what they want, but then for me having a bit of free rein.
50 I think that's maybe what my concern was; having free rein of what I thought
51 was interesting to digitise.
52

53 I: I was going to ask this. Was it completely comprehensive digitisation or was it
54 selective?
55

1 R1: No, it couldn't have been comprehensive. And I think me and Becky... what you
2 always get with non-archival people is, "Oh, let's just digitise it all." And it's
3 completely unsustainable.
4

5 R2: We did prioritise certain authors that they want. And clearly, from our point of
6 view, it's been fairly selective because we'd only digitise if we had rights
7 clearance for it anyway. So that's cut it down quite a lot.
8

9 R3: Full books weren't digitised.
10

11 R2: No full books.
12

13 R3: Only pages with annotations on.
14

15 R2: Yes, draft material, no correspondence, nothing like that. So it was selective in
16 that sense. But also, they just want everything they can doing, which is a bit...
17 it's a lot.
18

19 R1: I think the end product is a good compromise, though. I think it's been managed
20 well, again, by Becky and Kim.
21

22 R2: Yes. Just also to say, when we're letting participants in the reading room, they're
23 completely supervised and we're only letting a certain amount of people in at
24 the same time.
25

26 I: I guess from what you were saying there, it sounds like those concerns have been
27 addressed, because you've sort of managed expectations on both sides.
28

29 R1: I think so. I think so, yes.
30

31 R2: Yes. A bit like you said, we've been accommodating, but also, obviously, we
32 have to do certain things to say, "You can't do that," or what's appropriate or try
33 and negotiate what you can get out of them.
34

35 I: So if I just come on to policies, have you developed any policies as a result of
36 this project? So I guess the access to uncatalogued collections is a good... It's
37 not really a formal policy? I'm guessing it's more...
38

39 R1: It's not. It's one of those kind of informal policies where, normally, it's... Well,
40 actually, no. Normally it isn't no; normally it's kind of, "Oh, let's have a look at
41 it. Can we do that?" It's a case-by-case type thing.
42

43 [14 lines of transcript redacted at interviewees request]
44

45 So no, it's not a formal written policy, but it is...
46

47 R2: We just consider it on a case-by-case basis. If it's fairly comprehensive and box-
48 listed, we can make it available to people. There you go.
49

50 [3 lines of transcript redacted at interviewees request]
51

52 R1: But I'll tell you, in other collections – and the practice diverges a lot on the sector
53 on this – the data protection issue kind of restrictions here aren't absolute. We
54 do let people apply the research exemption behind that. Again, probably going
55 forward, we'll decided that on a case-by-case basis. But we're in the better

1 position in that, because of Becky's catalogue, we'd be able to pick those out
2 straight away.

3

4 I: So, have any other policies developed as a result of the project?

5

6 R1: I think we've kind of, in a very small-scale way, implemented digital
7 preservation policy a little bit, in terms of we have preferred formats. So we had
8 kind of master formats and then we changed those into access formats – but
9 that's more of a technical thing. And we were hoping to trial that as part of the
10 project. No, I think we did on kind of a lower level.

11

12 R2: If there's been the need for... it's identified the need for hardware, emulation
13 hardware and things like that, to be able to access digital things, because they're
14 going to be coming in, obviously. And we've got a lot of videos and tapes and
15 floppy disks that we don't have access to currently, but we've looked and put in
16 with IT to get the stuff so that we can do that and move forward with that, migrate
17 it onto a better system so that we can allow access to it.

18

19 R1: So it's validated our digital preservation policy a little bit, I would say.

20

21 I: And have you changed any of your existing policies?

22

23 R1: No.

24

25 R2: The digi one might get updated eventually, when we get stuff and things like
26 that.

27

28 R1: It could be, yes. And I'd just add to that that I would say we'll probably look at
29 our collection development policy as well, to make it more clear that we're
30 actively looking at contemporary literature as an area of growth. So possibly
31 that's in the pipeline for something that would be updated as a policy as a result
32 of this project.

33

34 R2: I think that links to your question earlier that we do have quite a lot of... I was
35 showing you collections currently that do link to the Bloodaxe Archive, so it's
36 good for us.

37

38 I: I think that's everything in terms of policies and relationships. I was going to ask
39 in what way was the Wellcome Report useful, but I don't know if that's
40 something that you would just answer yourself.

41

42 R2: Yes, I've just said... I've put here that it was useful for me, because I haven't
43 done a digi project like this before. So being able to get a background in a
44 different one, but also how they've done it, with examples of stuff and awareness
45 raising of certain issues I'm growing to find was really useful as well. And how
46 they've gone about it and contacting people, because obviously I used their
47 letter, the Wellcome Trust letter, as an example of how to structure mine. And
48 how it's worked for them, I felt that was really useful to know.

49

50 I: I'm trying to think of examples where other projects that have done digitisation
51 on that scale and rights clearance on that scale, where they've made their
52 working process available. And I don't really know where else you'd go for
53 those sorts of...

54

55 R1: Case studies.

1
2 I: So I don't know if you're aware of any other ones?
3
4 R2: No.
5
6 R1: No especially, no.
7
8 R2: No, because I contacted you directly about that and that's what you pointed me
9 to. And it was useful.
10
11 I: So, the questions I have now are mainly about the cataloguing and digitisation
12 process, and the rights clearance process. I don't know, Ian, if you want to stay
13 for those or if you want to...?
14
15 R1: Do you need me? No, okay.
16
17 [Leaving remarks, redacted for brevity]
18
19 I: I was just going to start off by asking about the cataloguing process – because
20 I'm assuming in terms of project management cataloguing comes before
21 digitisation – and what that involved.
22
23 R2: Yes, that's right. What's happened, basically, the project was 18 months and I
24 came in at 16 months. Before that, what they'd done to save time is create a
25 structure before they knew what was there – which has been good and a
26 hindrance in some ways, but also meant that we could get on straight away, just
27 to direct item-level cataloguing, essentially, for each box. Everything was
28 already coded. So that's what I did; just item-level cataloguing into an Excel
29 spreadsheet, into ISAD(G) format. Once I'd done a month of that, I would
30 upload it to the Archives Hub, which is our interface that we're using, and that
31 was it. Each time that was done, we would then... Shall I talk about the digi
32 process with this as well?
33
34 I: Sure, yes – you moved onto it.
35
36 R2: Yes, exactly. So each time I would get that done, that metadata onto there, it
37 would verify what we wanted in the digital object. So once that was done, it
38 would move to a digitisation spreadsheet.
39
40 R3: And I wasn't working on your spreadsheet, so I wouldn't ruin the cataloguing!
41
42 R2: Because once it was on the Hub it was okay, because it was kind of verified then
43 that that would be the official description and code. So we did that and then what
44 would happen then is once we'd got rights clearance for something...
45
46 R3: We would contact the poets... I think we just contacted the poets; we didn't do
47 the editors or the translators. We just contacted the poets and if they replied as a
48 yes, then I would go into Becky's cataloguing spreadsheet and select the ones
49 whose codes appears under their names; I would select that material. And if it
50 was correspondence, I wouldn't scan it or I would maybe scan... if there were
51 proofs in there that had been annotated. But other than that, I would go through
52 each item and look through where there were annotations and take those out and
53 then scan those in order, how they appeared. And if they said no, nothing was
54 done with their stuff. And if they had replied back saying that they wanted to
55 make a case-by-case basis, then I would send samples; or some of them didn't

1 want samples, they wanted everything all at once, so I would have to send
2 everything. And they would select the pages or say yes to everything or no to
3 everything.
4

5 R2: I think this is where we were saying about them wanting as much as possible,
6 because normally it's a lot of effort to go to if someone's going to say no. But
7 because we'd really been pushed to get a lot of stuff out there, Kim's done that
8 so that we've been able to do that. Even if it's a small amount for one author,
9 it's better than none.
10

11 I: So at that point, it was almost like they were granting permission for you to
12 digitise it, but then they wanted to see the images and they were picking which
13 ones you were allowed to make available.
14

15 R2: Yes.
16

17 R3: There was one poet... A lot of them who I contacted who wanted to make a case-
18 by-case basis just said yes to everything that I'd sent them, and then said yes for
19 the future as well. But there were a couple who, when I sent them samples, they
20 would... say it would be five pages in one sample, they would only want two of
21 them to be made public because there were reasons behind the others that they
22 didn't want. So then it would be selecting pages instead of whole items to make
23 public on the website.
24

25 I: And did you get the impression sometimes that it was necessarily about rights;
26 it might have been about the content or they might have been concerned about
27 the fact that it was maybe an earlier work by them and they didn't...?
28

29 R2: Yes, people weren't keen on having... some people weren't keen on having their
30 draft work made available.
31

32 R3: Yes, if there were comments on their draft work made by another hand, then they
33 saw that as infringing on other possible publications with other companies. So
34 they didn't want some of their annotations to be displayed. Others, it was the
35 content that was written about; if it was an early draft, they just... I think one of
36 them said that they felt a bit embarrassed to show that; and their work in
37 progress, they just wanted the finished poem. And then others were concerned
38 about their full books being made available. We had to clarify that it wasn't
39 going to be the full books.
40

41 R2: Yes, they were concerned that we were making e-books [and 0:35:23] with Neil
42 thinking we were making e-books.
43

44 R3: But we don't hold the rights to do that.
45

46 R2: No. We would never put the full book on; just a selected amount of poems from
47 each and only if they're annotated or changed or anything like that.
48

49 I: And did you find that because you were seeking permission before you digitised
50 that that was holding up the digitisation process? Or were you able to switch
51 between?
52

53 R3: It was at the start.
54

1 R2: Can I say? Essentially, what held up the digitisation process was the fact that I'd
2 said that we would need permission and we would need to send that letter to get
3 permission from people. And I was trying to draft something with some of the
4 research associates and I don't think they understood where I was coming from.
5 So there were issues about some of them creating contracts, which I think would
6 have frightened people, and they were very...
7
8 R3: The wording used was...
9
10 R2: The wording was very heavy [we] waited for qualification from somebody from
11 the advisory board to say, "Yes, you will need to send out permission letters,"
12 which held us up for two months, I think; where I was like, "You need to do this,
13 you need to do this." And then once we got the rights manager in, Suzanne, we
14 had a chat with her about what needed to be explained in it and then we used the
15 Wellcome Trust letter. That held up the process. And I think once it was sent
16 out, we had quite a good initial flurry of replies.
17
18 R3: Yes, but it's obviously waiting for those, maybe a couple of weeks waiting for
19 those replies to come back. But then, from then, I could scan and digitise stuff
20 while the replies were coming in.
21
22 R2: And also me cataloguing, holding up stuff. So obviously, if it hasn't been
23 catalogued... Kim was just waiting for a seam of me doing something where
24 someone had said yes. So once that had done, she could do that. But obviously,
25 as you wait for me to do that, the process obviously takes a bit longer.
26
27 R3: And then there would be flurries of it all being correspondence, so then I couldn't
28 catalogue any of that, so there'd may be only one or two items that I'd catalogue
29 and have to wait for another set from Becky to come through.
30
31 R2: But Kim was working while she was doing this! But yes, there were a lot of
32 things that I think... holding it up initially and then a lot of the process before
33 we could actually digitise a finalised piece.
34
35 I: So that kind of answers the question I've got here about when did rights become
36 an issue.
37
38 R2: They were always going to be an issue.
39
40 I: They were always going to be an issue; there was just a hold-up in...
41
42 R2: Yes. We've got a lot of rights issues, though. So, obviously with the authors, but
43 then there's the global publishers as well. So maybe that's an issue where they're
44 published by an American company but also here, and then the rights change
45 and the licensing between them. So trying to get in touch with global publishers
46 is just not... Because they don't understand what we're trying to do, really,
47 either. And that's just been a bit of a faff. But then we also have photographer
48 rights as well, artist rights with certain things... There's a lot. So it's always been
49 an issue. We knew that we'd have to get it.
50
51 So, what happened was Bloodaxe's rights manager made their spreadsheet with
52 their rights information available to us, which was really good. And also, I think
53 we're going to do back and forth with that as it goes on, which is really good.
54 And also, in the catalogue I've basically put that Bloodaxe and the author will
55 help with the reproduction. So what happens then is people can get in touch with

1 Bloodaxe, who can put them in touch with the right people, so they take that sort
2 of stress away from us, so we wouldn't have to do that all the time.
3
4 I: So you've got someone to direct your users to.
5
6 R2: Exactly, as well. And also, because they hold more information, more up-to-date
7 information... Because I know you were finding some of the addresses were
8 wrong.
9
10 R3: Yes, some of them were wrong or out-of-date; they'd moved, hadn't been
11 updated.
12
13 R2: But she could then notify them or...
14
15 R3: Yes, and I made a note on that spreadsheet. But then also, we contacted the
16 main... Ahren and Colette, the main poets on the project, because they had closer
17 connections. Because obviously, I don't know anything about poetry.
18
19 R2: And they have personal relationships with a lot of people, so they've been able
20 to get in touch with them like that.
21
22 R3: And sometimes... I don't know if there were any cases, but if a poet had said no
23 initially, then they might have closer contacts than I do or we do...
24
25 R2: Persuade them.
26
27 [5 lines of transcript redacted at interviewees request]
28
29 R3: And I don't think we would have got a response back as quickly or as many as
30 we have. I can't remember how many we've got.
31
32 R2: I've sent you the information for it, haven't I?
33
34 R3: Because I can remember we were in a meeting with someone from the British
35 Museum – what's his name?
36
37 R2: The British Library, Richard Price. He's Head of Modern Literary Collections.
38
39 R3: And he was saying that sometimes they don't even get ten percent back.
40
41 R2: We've done very well.
42
43 R3: We were a bit like, "Oh, well, if we don't get anything back, there's nothing to
44 digitise and nothing to put on the website for the archive side." And then I can
45 remember thinking, "That's going to be a bit worrying!"
46
47 R2: Yes, it's been pretty good, yes.
48
49 I: Obviously, Bloodaxe were a source of information. If you had to update any of
50 that information, you would just send that back to Bloodaxe for them too?
51
52 R3: I've started to edit their spreadsheet, so I record everything on there, through
53 emails if I happen to receive an email or if there's been some correspondence
54 back and forth; I record that all on there. And if there's something to update, I

1 put it all onto the spreadsheet and then that will be sent at the end of the project
2 through to the rights manager.
3
4 I: So you're not looking for those updated addresses; you're just making them
5 aware that they need to update these things.
6
7 R2: Yes. I think it would just take too much time.
8
9 I: You said Suzanne at Bloodaxe was able to highlight a lot of the rights issues for
10 you. Did you seek advice from anywhere else? Like, any lawyers within the
11 University or...?
12
13 R2: I think Linda... We've had a couple of responses that we've escalated to our
14 Principle Investigator, Linda, and I think she's sought advice from the University
15 legal teams. But we haven't had to do that.
16
17 R3: That was just on a case-by-case.
18
19 R2: Yes, that's just been case-by-case. But as Ian said earlier, with the disclaimer, I
20 think that's the only time. But generally, we've got information from the rights
21 manager at Bloodaxe, also our/my basic understanding of what the rights should
22 be – which is essentially the author just owns everything. And if they know that
23 the global publisher owns it, they're not going to give us the right to use it
24 because they're very aware that that could jeopardise what they do.
25
26 I: In terms of managing that process, I guess... So you've got the spreadsheet from
27 Bloodaxe and then you've come up with your standard letter format that you're
28 going to send out, and then it's just a case of waiting for replies and then that
29 pushes through into the digitisation process and you can start digitising.
30
31 R2: Yes. It's all colour-coded.
32
33 R3: Yes, nicely colour-coded and all of the letter responses are kept.
34
35 R2: We keep them in files, so everyone's got their own. So if we get letters, Kim
36 scans them as well so we can keep it all electronically. So you can search the
37 'Yes's and 'No's.
38
39 R3: So I record the name, then 'Yes' and then the date they've said yes. And in that
40 folder, you can see all of the correspondence we've had. And it's by email and
41 letter.
42
43 I: And did you use risk criteria to categorise the rights holders at all?
44
45 R2: No. I've done no risk management. We've decided that it is not worth it. The
46 risk is too high, I think, with the publicity of the project. And also...
47
48 I: I guess they're all living authors, aren't they?
49
50 R2: Yes, a lot of them are. And you don't want to do that because it's going to affect
51 their royalties or anything like that as well; you don't want to do that. And even
52 with the correspondence, we've not risked any sensitive or personal information
53 being put out there; it's just literally draft material and it's only if they've said
54 yes. If they say no, we don't do anything.
55

1 R3: And if there's any personal information, then that's redacted.
2
3 R2: Yes, so [name redacted] stamps her addresses on her typescripts, so we have an
4 ordinary copy that we digitise, then when Kim makes an access copy we redact
5 that information so that we can make it available.
6
7 I: And overall, what would you say the response from rights holders has been like?
8
9 R2: Positive.
10
11 R3: Positive, yes. They've all... most of them have wanted to be more involved with
12 the project. They're happy that their material is going to be within an archive.
13
14 R2: They're giving you more information, like their own website and where their
15 archives are held.
16
17 R3: Yes, and connections with other archives as well. Even most of the ones who
18 have said no were positive about it and just wanted to see what the website was
19 going to look like, who else was going to be involved before they said yes. But
20 then that would be too late after the project. But a lot of them were positive.
21
22 R2: Because they could look and it sounds like an interesting project, they were
23 generally... We have had a very positive response, I think. The negative
24 responses, people have been a bit "mmm" about the project, not really
25 understanding it. We've had one where...
26
27 R3: Not copyright.
28
29 R2: So, negative responses that we've had, there have not been many and there have
30 been some people concerned with the wording of our initial letter...
31
32 [12 lines of transcript redacted at interviewees request]
33
34 But it was okay. We had one particular issue with an author who was very
35 concerned about the project in the sense that she felt that we may be making
36 things available to people that they would then lose money by doing this, and
37 things like that. You know, it's people's choice if they want to do it and also
38 we're hoping that it will promote people engaging with poetry a lot more.
39
40 R3: And promote their work.
41
42 R2: And promoting it in a good way; showing their draft material up until the final
43 piece, so people want to access that material as well and we'd show it in a
44 sympathetic way and an interesting way that people would be keen to explore it
45 and use it like that. We had quite a few exchanges where we had to sort of justify
46 what we were doing and make it very plain, very clear that this was what we're
47 doing, this is not what we're trying to do, and this is how the process is working
48 as well. Like, although it was uncatalogued, it was restricted access in the sense
49 that we wouldn't... they're not allowed to come into the archive and just go
50 through stuff; it was very document-handling guidelines, they came in on certain
51 days and they were only... I think it was six people per day and they were only
52 allowed two boxes each, and they would all be supervised in the reading room
53 and it was very... You know, we were having to explain these things. So those
54 are the types of things that we escalated to Linda to make sure that we had that
55 back-up from her and if we needed the legal team to be... I mean, if it just says

1 no, we won't do anything, like I said. So we weren't going to do anything
2 without anybody's permission.
3
4 R3: Yes, and I think there was one that had a previous grievance with Bloodaxe, so
5 didn't want to... was wanting to know a bit more, but it was obvious that [they]
6 didn't want to be involved.
7
8 R2: One of the odd things that we've had as well was that people were a bit funny
9 because they weren't made aware that their work was going to be put here.
10
11 R3: They didn't know that we'd bought it.
12
13 R2: That we'd bought it, and also they didn't know that Neil had kept this stuff. And
14 it was kind of a bit like, "Well, we're not..."
15
16 I: "We hold the material, but we weren't necessarily responsible for the decisions."
17
18 R2: Exactly, and Neil hadn't made people aware that their work had been coming
19 into the Special Collections here. And I think people were a bit concerned
20 sometimes.
21
22 R3: Yes, there were a couple of questions raised where they were a bit unsure about
23 the material being accessed publicly, and we had to explain that they were just
24 researchers involved with the project. And then they were querying about their
25 work being made public online, and that's when we had to confirm, well, it
26 would be [selectively, with permission]⁷⁰⁴ made public online, but you would
27 have to have special permission to view it all physically in the archive.
28
29 R2: And that, yes, we'd follow all the data protection things. Like, everything that's
30 got any type of identifiable addresses and things like that on is just flagged.
31
32 R3: But after that confirmation, I think that one case said yes. So it's just having to
33 talk them through it and explain, because there were some that clearly hadn't
34 read the whole of the letter.
35
36 R2: Yes, because it says on it, "We won't do editorial stuff..." because I think...
37
38 R3: And then it's sort of having to repeat what's been said in a different way so that
39 it's not you're just copying and pasting. Because there was one who wanted...
40 he just said, "Please clarify." So then I had to clarify, but in a way that just wasn't
41 copying and pasting from the letter.
42
43 R2: I think maybe the structure of the letter was a bit disconcerting, because I think...
44
45 R3: Because it was quite long.
46
47 R2: Yes. Because we tried to explain what the project was, but also what the archive
48 holds, so it kind of bullet-pointed that. And they obviously hadn't read the bit
49 after that, which says, "We would only do your draft work and not the..."
50 Because it says we hold editorial correspondence, but it does say later on that we
51 wouldn't do anything like this. So I think that was maybe
52 misinterpretation/miscommunication on my part in the letter. But you learn from
53 that.

⁷⁰⁴ Edit made at interviewees request.

1
2 I: Yes. And I think it's always difficult to get that right first time, because you
3 don't necessarily know what their concerns are going to be. Or there isn't really
4 anything you can do about people who won't read the second page of the letter.
5 I do find it interesting, though, because every case study I've done, that's always
6 come up as an issue. People always want to see what you're talking about, and
7 if you don't have a catalogue to refer them to at that point it's really difficult.
8 And it takes up so much of your time because you have to go through... like,
9 look for the stuff, take images of it, send it to them. And I do wonder sometimes
10 whether even having a sort of dummy website set up for that, so that you can
11 just direct someone to one place...
12
13 R3: It would give them a sense of "once digitised".
14
15 R2: Well, we did that with the global publishers, didn't we, because they got back in
16 touch about somebody and I just said, "Can you just look at what we're doing?"
17 And they haven't responded.
18
19 R3: I think that was going to be very hard, to talk about what we were doing. And
20 there were quite a few held... Well, a few big poets held under there, and I think
21 it's going to take a long time, probably past the project, that they'll come to it.
22
23 R2: The difficulty is, as well, I think, for a lot of people, because a lot of the stuff's
24 been held for nearly 30 years – 30, 20, 15 years – they have no idea what's in it.
25
26 I: They can't remember.
27
28 R3: Yes, there were a few that came back and said, "Well, what is there?" And then
29 there were some that had only been in anthologies, so there was maybe only one
30 poem. But we were just having to reassure that it might be for future stuff that
31 we get, or if I do come across one poem by itself is it okay to digitise it.
32
33 R2: Yes, people just don't know what's there.
34
35 R3: And then it will take a lot of research for me to go in and see, research each one
36 to see if they've been in an anthology... Obviously, I'd recognise the larger
37 authors, but some of the smaller ones I didn't know how many they'd published,
38 if they'd published a book or if it was just an odd poem here and there.
39
40 I: What have you decided to do with the non-responders?
41
42 R3: So, the initial letter was sent out; if no one replied, I think it was maybe six
43 months and I sent another one, but also asked the poets involved in the project
44 to contact the ones that they knew of.
45
46 R2: Because the ones that they wanted specifically, there were a lot of American
47 ones which hadn't replied and they know them, and they went and interviewed
48 a lot of them for the project, so...
49
50 R3: Yes, which we'd asked, "Could you take this letter along?"
51
52 R2: And then, later on, they've gone on to get in touch with some of the people.
53
54 R3: But as for the people who haven't replied, we haven't digitised them; we've just
55 left it, recorded it on the sheet.

1
2 R2: I mean, if they get back in touch one day, I guess, if they have funding to do
3 more stuff on the project, then they can deal with that from there. But after this
4 sort of thing, we'll just take it as... as I said with the risk management, we
5 wouldn't use it.
6
7 R3: So we'd just take it as a no, really.
8
9 R2: Pending! Pending reply.
10
11 I: Well, that covers all the questions that I have. What I might do is when I do the
12 transcript, if anything else springs to mind I might just give you a phone or I
13 could just email, do that sort of follow-up process. And I think you've already
14 sent me the documents, so the letters and stuff.
15
16 R2: Yes.
17
18 R3: Is that alright? Do you need any more explanations about it?
19
20 I: I think the only thing I would ask is I might have a look... Would it be possible
21 to have a look at the catalogue? And you can show me the sorts of areas that you
22 prioritised for digitisation; just maybe sit and go through that.
23
24 R2: I'll show you my end and then you can go through to Kim and she can show you
25 what she does. Is that alright? But then you can then see that, then. That would
26 be quite good.
27
28 I: What I'll do is I'll finish the interview just now and then for that I'll just maybe
29 take some notes.
30
31 [ENDS]
32
33
34

1 **Case Study:** The British Library

2

3 **Date:** 2015-06-01

4

5 **Interviewer:** Victoria Stobo (VS)

6

7 **Interviewee:** Ben White, Head of Intellectual Property, British Library (BW)

8

9

10 VS: Shall we just get started then?

11

12 Basically I have a standard schedule that I go through, I ask about the beginnings
13 of the project and why it's important for the British Library to be doing this
14 project and then go through digitisation, the rights clearance process, any
15 policies or processes that you've developed as a result of the project and then
16 maybe have a discussion about the sort of response that you've had from rights
17 holders, what you do about non-responders and what you've done about Orphan
18 Works. And obviously I've had a look at the British Library website and I've
19 had a look at Spare Rib, so I kind of know some of what you've done already.

20

21 So basically the project impetus questions are looking at why is it important for
22 the British Library to have Spare Rib and why was it important to the British
23 Library to digitise it?

24

25 BW: Well, we got it as a legal deposit collection in the main, so that's why we have
26 it. I guess it's important for digitisation purposes. My view is that a modern
27 library has to make its collections available online. That's just part and parcel of
28 being a large research library in 2005, let alone 2015. If you think that Google
29 worked with large US research libraries and Oxford in 2004 and actually, really
30 interestingly – and I love this video - if you go on YouTube you can find from
31 1994 a Vatican exhibition of Vatican related collections from the Library of
32 Congress, but that was in 1994.

33

34 I wrote an article which was entitled 'Are digital laws making or breaking digital
35 libraries' and part of that, I tried to look at what was available online in 1994,
36 and it's really difficult actually, because we don't have web archives going back
37 to that point. People don't write about what was on the web in 1994 either. They
38 write about the technology, but they don't actually write about the information
39 that was available. The only thing that I could find that actually gave you some
40 handle on what was available in 1994 – there is a reason I'm saying all this – is
41 this magazine, I think it's called 'Internet Magazine' and they listed... so, you
42 know, it was 1994, they were listing what was available on the web, and actually
43 at that time museums and libraries were really the only institutions that were
44 online.

45

46 Really interesting. So it's mainly individuals, but libraries, librarians, museum's
47 archives were like the first institutions to realise that this was going to be a
48 transformational technology. The government wasn't there. Banks weren't there.
49 Travel industry wasn't there. The book industry wasn't there. You know, it was
50 really interesting.

51

52 I would say the library sector was there in 1994 when no one else was, and we've
53 been very, for lots of different reasons, certainly in the UK, rather slow at
54 digitising and making modern material available online. So, it's a very long way
55 of saying I think that's part and parcel of being a research library.

1
2 VS: I didn't know that actually. That's really interesting that we were pioneering.
3
4 BW: If you go on the IFLA website you can see all the cross links, but it was Internet
5 Magazine, and you can still find it on YouTube – I love it, it's so retro when you
6 look at it. You've got the little revolving globe as it loads still. So if you put in
7 that, the Library of Congress Vatican Exhibition you should be able to find it on
8 YouTube.
9
10 VS: And how did the project come about, because I know you were working with
11 JISC?
12
13 BW: Yeah, so the project really came about after... there was an attempt to relaunch
14 Spare Rib, the magazine, online, by someone called Charlotte Raven, which
15 again if you Google, you can see and in the end, two of the contributors...
16 initially they were very happy about this and then I think that as time went on
17 they felt that the relaunch was really not in the spirit of the original magazine.
18 So two of the contributors, who I'm wanting to say are Rosie Boycott and
19 Marsha Rowe, end up trademarking Spare Rib as a magazine publication to
20 ensure that the Charlotte Raven project could not be branded Spare Rib, and
21 actually was launched under the title 'Feminist Times.'
22
23 If you Google that you can find their articles in The Guardian but that sort of in
24 a sense brought back... there was a spotlight on Spare Rib and it also galvanised
25 some of the individuals that were involved in the publication from '73 to '92. So
26 I think she felt because of that spotlight, because people had kind of come back
27 together again in some senses around the Charlotte Raven proposal, but it would
28 be a good time to get permission for us. So that I was, I think, the catalyst really.
29
30 VS: Sure. So, because you were working in partnership in terms of how the project
31 started, who approached who?
32
33 BW: Well, originally we were discussing it with the LSE who backed out, we think
34 because of the rights issues. So that basically led to a situation where either we
35 had to host it ourselves or we needed the partner to host it and we're not very
36 good at hosting stuff.
37
38 [2 lines redacted at interviewees request]
39
40 So one of my colleagues recommended JISC. I don't know whether it was Anna
41 or Simon, but one of them said why don't we approach JISC to host it.
42
43 VS: I suppose they're established and they have.... is it digital collections online?
44
45 BW: Yeah, is it JISC Archives? But my understanding is this is the first one that's
46 going to be publically available.
47
48 VS: That is good actually because I think it's only HE and FE it's available to at the
49 moment.
50
51 BW: Yeah, so this is available to anyone.
52
53 VS: Excellent. Do you know what was discussed in the negotiations with JISC? Was
54 it mainly about the hosting or was it mainly about the rights clearance?
55

1 BW: It was everything. From a copyright perspective we were very conscious of the
2 fact that the Orphan Works directive and the UK regs, it gives the library the
3 right to host...so as far as we were concerned we wondered / were concerned
4 that there could be a question of the legitimacy of hosting by JISC given that
5 they are not an educational establishment or a library defined by the info
6 directive.
7

8 VS: Yeah.
9

10 BW: So what we ended up doing was, in the contract, discussing why we had to
11 legally... in the contract... and if you look on the website it states this as well,
12 they are operating as our agents and if you look on the information it refers to
13 JISC being our agent to host it. And the reason that we did this was to try and
14 minimise any claims of infringement under the regs.
15

16 Again, the contract, as you would expect, gives JISC no rights to use any of the
17 Orphan Works over and above the right to host it as our agent. So contractually
18 that was something we had to work through with them.
19

20 VS: Definitely. Yeah.
21

22 BW: And also internally to raise that to the directors to say that there is a risk here in
23 terms of the law.
24

25 VS: Did you get the impression that there was any push back on that or did they think
26 the risk was quite high or that it was manageable or...?
27

28 BW: Well in terms of the contract, we've assumed all liabilities, so all the liability is
29 on the British Library. I think our view is we don't know. We think the risk is
30 quite low given that they are our agents. They have no rights in regards to the
31 Orphan Works other than to host on our behalf and we are the beneficiary, so we
32 don't think the risk is high.
33

34 VS: Sure. What were your main concerns going into the project - was it the rights?
35

36 BW: I think again if you talk to the curator you might get a different answer, but from
37 my perspective I was primarily concerned about data protection issues, actually.
38 That was my sort of first wave, and we have a couple of examples where people
39 have asked us to certainly anonymise some of the articles for data protection
40 reasons.
41

42 VS: Is that after they've been put online or beforehand?
43

44 BW: Before. Some of these articles were written over 40 years ago and it's only
45 natural that peoples' views on politics, society, sexuality, is going to change over
46 that time.
47

48 VS: Absolutely, yeah.
49

50 BW: So, I think we were very alive to those concerns and in order to make the project
51 happen we are quite happy to comply with the wishes of the individuals. We
52 have discussed this actually at IFLA with American colleagues who were very
53 shocked given the very strong freedom of expression in the States. They were
54 quite shocked that we were readily compliant with requests to anonymise.
55

1 VS: Yeah, I think it's interesting when you speak to American archivists but also
2 every single interview I've done for this project and for the Wellcome project
3 before it, every single archivist I asked about copyright says copyright was an
4 issue but they were more concerned about data protection.
5

6 BW: Yeah, I mean actually so far the bigger issue has been copyright. But my initial
7 thing was that this is less about copyright but more about privacy. If you Google
8 'The Register Orphan Works Sister Protect your Rights'because we
9 publically made it clear that we were wanting to digitise this and were looking
10 actively for rights holders. My colleague, Polly, went on Woman's Hour - there
11 articles in The Guardian, so if you look at the comments to the article on The
12 Guardian, you can see certain individuals who also were active in the debate,
13 discussions around the introduction of Orphan Works legislation. So we did
14 actually end up with a negative article in the Register essentially criticising the
15 project, and our choice to use Creative Commons Non Commercial Licences.
16

17 VS: Yeah, I guess you're trying to publicise the project and get in touch with as many
18 rights holders as possible, but by doing that you're making yourself a target as
19 well.
20

21 BW: Yes, we are. And this article was December 2014, which was two months after
22 the Orphan Works legislation came into law in the UK, so it was very fresh in
23 people's minds who were involved in that campaign. However, on the rights
24 clearance side in terms of the actual contributors, we got permission from 99.X
25 per cent to say yes, you can release this article under Creative Commons Non
26 Commercial Licence.
27

28 VS: Okay. I think just in the interests of time, I might skip the digitisation process. I
29 don't know how involved you would have been in that, it might be better to
30 speak to the curator. Did the rights clearance process integrate with digitisation
31 at all?
32

33 BW: No.
34

35 VS: So you didn't hold up digitisation in terms of waiting for right holders to get
36 back to you?
37

38 BW: No.
39

40 VS: Sure. Okay, that's fine.
41

42 BW: I mean, we only digitise once we kind of had the feeling and the support from...
43 we had an advisory board of ex-contributors. We only digitised once we had
44 their yes, we want this project to go ahead and we'd done that initial thing on
45 Woman's Hour and The Guardian and that we hadn't got a tidal wave of refusals.
46

47 VS: Sure. And what sorts of rights issues did you identify in the collection? I know
48 that there's obviously Orphan Works, but from the description I've got online
49 there's writers, illustrators, designers, photographers. There's a range of
50 contributors there. How did you decide to manage the rights clearance process,
51 because I know there was a pilot project before the main project got underway,
52 wasn't there?
53

54 BW: Yeah, basically we appealed through The Guardian, Woman's Hour, through
55 LISTSERVs, feminist LISTSERV. So that's how we tried to reach people,

1 publically as well as through groups that naturally coalesce around feminist
2 issues.
3
4 Then what we tried to do was we sent them a letter - those where we were able
5 to get an address, where they approached us or we could find them, because we
6 employed external rights agencies to do rights clearance as well, so we basically
7 sent them an email saying we'd like to clear the rights under Creative CC for the
8 following reasons. Get in contact with us if you've got any questions. If not,
9 please click on this link and so the actual permission was given electronically in
10 most instances.
11
12 The actual rights status of this material is very difficult to establish because at
13 some point through the publication it had Copyright Spare Rib on there. The
14 advisory board said that other than a few instances, often with photographers,
15 usually there was no contract, so we made the working assumption that probably
16 in all instances the copyright sat with the author or creator. Then because there
17 may be.... you know, database rights, compilation rights, all a bit murky, there
18 probably is a database right. Does the compilation rights still exist? I'm not sure,
19 separate database rights... definitely the term 'Spare Rib' was trademarked, we
20 got permission for the compilation rights, whether it existed or not and the
21 permission to use Spare Rib as a trademark also.
22
23 VS: And the 4550 rights holders that were identified, how did you go about the
24 process of identifying them, did that come from Spare Rib themselves?
25
26 BW: So basically we got volunteers to come in and sit in a room for two weeks and
27 list every single individual name. I think there were about 15 people in the end
28 that came in.
29
30 VS: Yes, that corresponds to what was online.
31
32 BW: The magazine is very, very, very well attributed and acknowledged.
33
34 VS: And in terms of the rights holders and contacting them did you develop risk
35 criteria or try to grip them at all or did you just try to contact as many as possible
36 in a blanket way?
37
38 BW: We just tried to contact as many as possible.
39
40 VS: Sure. So the sources you were using, you've got these sort of original
41 contributors who are part of the advisory board. You've got the volunteers.
42 You're using a rights clearance agency. Did I see, was it ALCS and DACS that
43 were involved?
44
45 BW: Yeah. So towards the end we approached... and that's still work in progress. We
46 wrote to NUJ (National Union of Journalists) and DACS and ALCS to ask
47 whether they could help us. ALCS and DACS said that they could, so we sent
48 them the list of all the contributors and they're in the process now of approaching
49 contributors that they think may... you know, according to their list might be the
50 person who contributes to Spare Rib. So that's still work in progress.
51
52 VS: So in addition to that there's feminist networks, professional bodies and their
53 own address books, so their own contacts.
54
55 BW: Yeah.

1
2 [1 line of transcript redacted at interviewees request]
3
4 VS: Okay. So aside from putting out the blanket statements, like using The Guardian,
5 using Twitter, did you do rights clearance yourself or was it all done through the
6 agency?
7
8 BW: They did the search. They basically did the search where people weren't
9 contacting us.
10
11 VS: I have a series of questions about risk mitigation strategies, whether you
12 developed any, what did they consist of, but also any policies that you've
13 developed as a result of the project or if any policies have been changed as a
14 result of working on the project?
15
16 BW: I don't think at this point any policies have changed. I mean, we do have a policy
17 of advertising where appropriate, making clear that we're doing the project and
18 also expending time and resource on doing a diligent search. So essentially if
19 anyone appears who is aggrieved, at least we can say I'm very sorry we didn't
20 find you, but we have expended a lot of resource looking for others and we have
21 had generally positive responses. We do have a policy where we will always
22 write to somebody three times if we have an address.
23
24 [3 lines of transcript redacted at interviewees request]
25
26 VS: So that leads on to the question in terms of the rights agency you're using. Do
27 you specify the search to them or are you expecting them to know the appropriate
28 sources?
29
30 BW: It's a combination of the two. Here are our thoughts. They do a lot of
31 genealogical searches. They look at probate, which is definitely not our area of
32 expertise, but we'll approach the NUJ and it would be good to look here, there
33 and in that place. So it's probably a combined effort in terms of discussing what
34 appropriate resources would be.
35
36 VS: Okay, and can you remember the sources that you specified to them?
37
38 BW: No, that's a question for Anna.
39
40 VS: Okay, I can follow up with Anna. So if we move on, what has the response from
41 rights holders been like?
42
43 BW: It's been almost unanimously positive. If you look at #Spare Rib, there's been
44 lots of public welcoming of it and we've only had a few requests for removal.
45 We've had some for anonymisation, again for privacy reasons. [Redacted: Ben
46 mentions one example of refusal] ...they were involved in that debate, so have
47 very strong opinions on libraries digitising copyright material and also using
48 Creative Commons Licences.
49
50 VS: Okay. So, from the negative responses, would you say anyone was particularly
51 upset, or is it more a case of people just ask for something to be taken down, or
52 they just ask for it to be anonymised and it's not necessarily something that
53 spirals?
54

1 BW: If you go on The Guardian, the comments, you can see there that's one individual
2 who was involved in the Orphan Works lobbying....because we assumed from
3 the comments that she wouldn't give permission, we actually didn't approach
4 her and then the week that it was launched we got an email saying "I would like
5 you to confirm that you're not going to use my work, that I'm not an Orphan
6 Work that it isn't on OHIM's database." So we were able to write back and go
7 "No, we're not using it. It's been anonymised and you're not an Orphan Work
8 or on the database."
9

10 VS: Okay, that's good. So, what do you do when rights holders do not respond - I
11 guess that feeds into what you were saying about, you have the three letters
12 policy?
13

14 BW: Yeah.

15

16 VS: So, there's a period of time...

17

18 BW: Yeah. Obviously that's only where we have an address.

19

20 VS: So, a period of time elapses and then do you then term that an Orphan Work and
21 go through OHIM?
22

23 BW: Yeah, in reality I think the majority of the Orphan Works are probably not those
24 where we've had an address. The majority of them are where we have no
25 information, because there's thousands.
26

27 VS: Have you had any situations where you've had to use the Licensing Scheme, are
28 you arguing that everything's embedded?
29

30 BW: Yeah.

31

32 VS: Yeah, that's fine. Do you have data on the responses - would it be possible to
33 get numbers at the end of the project?
34

35 BW: Yeah, I think Anna probably could get you numbers.
36

37 VS: Sure. I don't know if you could give like a rough guide of how many Orphan
38 rights holders or works did you identify in the material to be digitised out of that
39 4500 total?
40

41 BW: I think it's something like 3600 / 3700 / 3800, the majority are Orphan Works.
42

43 VS: Okay. And they are being made available through OHIM?
44

45 BS: Correct.
46

47 VS: Are you getting to the point now where everything's been made available or are
48 there still some...?
49

50 BW: We've made everything available.

51

52 VS: So the rights clearance process is essentially finished?
53

54 BW: Other than...
55

1 VS: ALCS?
2
3 BW: And DACS, yeah.
4
5 VS: What was your experience of using the exception like?
6
7 BW: Well, the project would not have gone ahead without that exception, so it was
8 the lynchpin to the project. And uploading the records to OHIM, Ann spent days,
9 they really need to make that easier, the data uploading is quite problematical.
10 They could do a better job there in PR and technical infrastructure.
11
12 VS: So again, I'll speak to Anna about that in more detail. Probably Spare Rib isn't
13 the best project to ask about in this context, but had you made Orphan Works
14 available online previous to this project before the exception and licensing
15 scheme was available?
16
17 BW: Yes.
18
19 VS: And since the Orphan Works exceptional licensing scheme came into force, are
20 you now considering taking that material down or leaving it?
21
22 BW: No, leaving it.
23
24 [Short discussion of IPO Licensing Scheme redacted for brevity]
25
26 VS: I think that's covered everything really. I'm pretty sure I was going to ask
27 something specific about Spare Rib ...so if I ask Anna about uploading records
28 to OHIM.
29
30 BW: Yeah, numbers.
31
32 VS: Data on the responses, that sort of thing. The only thing I was going to ask in
33 addition to speaking to Anna, would it be possible to have access to the data that
34 you've collected on rights clearance?
35
36 BW: I would have thought so, yeah.
37
38 [Short discussion of data release cut for brevity]
39
40 VS: Actually that's what I was going to ask. In terms of the cost of rights clearance
41 because this is something we're trying to calculate with Edwin Morgan, I don't
42 know whether it would be possible to calculate... I'm sure you must know how
43 much you've spent with the rights clearance agency?
44
45 BW: Yes. We'll know that, yeah.
46
47 VS: Is that maybe something else that Anna could let me know?
48
49 BW: Yes.
50
51 [General chit-chat, cut for brevity]
52
53 [ENDS]
54
55

1 **Case Study:** British Film Institute

2

3 **Date:** 2016-03-30

4

5 **Interviewer:** Victoria Stobo (I)

6

7 **Interviewee:** Annabelle Shaw, Rights Database Manager, British Film Institute (R)

8

9

10 I: It's the Thursday, Thirtieth of March and I'm at BFI Stephen Street to interview
11 Annabelle Shaw, the Rights Manager at BFI?

12

13 R: Rights Database Manager.

14

15 I: So, yeah, basically just to quickly run through the script that I have, we're
16 basically interested in looking at institutions', the resource costs that goes into
17 rights clearance, so we have these questions about the resources that you have
18 available to you at the moment, a particular project that you've worked on, which
19 is going to be Unlocking Film Heritage in this case, how the works have been
20 made available, how many were orphan works and basically how much has been
21 spent and how they've been made available online. So, does that all sound –

22

23 R: Yes, that makes sense. Cool.

24

25 I: Some of these questions, if you don't have the information to hand it might be
26 the sort of thing that I can get from annual reports of things like that. So for
27 example, the first question – Describe your organisation's resource, number of
28 full time staff, part-time, funding, collections – that's the sort of general sort of
29 organisation-level overview.

30

31 R: Yes. I did pull together, in terms of, we have about 500 members of staff, but I
32 don't know the breakdown between FT and PT.

33

34 I: Sure, fair enough.

35

36 R: And, in terms of funding, there's three sources of income: the largest is grant
37 money, again I don't actually know how much we're getting at the moment,
38 from DCMS. The second largest source is commercial activity, so that's from
39 our own revenue generation: ticket sales, DVDs, etc. Sponsorship and Grants,
40 National Lottery Grants, Private Sponsors, things like that. And then, we're also
41 a distributor for National Lottery monies to film for film production and film
42 development. So it's not really money for us, we just give that out.

43

44 I: Yeah, sure.

45

46 R: But yeah, there will be the latest financial reports and annual reports online,
47 which will go into much more detail.

48

49 I: I'll look that up online. What resources are currently available to conduct rights
50 clearance in your organisation? So I guess within your own department...?

51

52 R: Yes, so within our own department, the Rights and Contracts department, there
53 are 8 staff, four permanent, three fixed term. So, you can take this stuff away
54 with you, I've given you loads. At the moment we have an interim Head of
55 Department, that's due to the restructure, but the department is kind of split down

1 the middle between those who are focused on acquisition for commercial
2 distribution which is, we have distribution collection which is not part of the
3 archive, and that's Hollywood stuff, World Cinema, lots of other things. But for
4 the purposes of this, the rest of the team, there's four of us, who really look after
5 archive collections and educational uses primarily. So, from that, there's myself,
6 so I'm permanent, Sue and Tony are permanent, and we have Emma, who has
7 come in just for Unlocking Film Heritage, so it's four or five years she's been
8 with us, I think. Yeah. And in terms of actual rights clearances and research,
9 there's really, I'm just trying to think – Sue doesn't really do that, so yeah, it's
10 really us three who are looking at rights research on our collections, and the
11 actual contracts, etc.

12

13 I: At at what level would you rate your own and your colleagues copyright
14 knowledge?

15

16 R: So, no one in the department is a lawyer. I've done a postgrad diploma in
17 copyright law at King's, but I think that's the only legal qualification, law
18 qualification anyway, that anyone's got. I mean, everyone's been working in the
19 field of licensing for, probably about at least ten years, some come from a more
20 broadcast music background, others from film, kind of more commercial than
21 us. There's a, it's a, professional expert level, that's the best way to describe it,
22 I think.

23

24 I: So it's based on practical experience, that's been built up over a number of years.

25

26 R: Yes, I mean we do, well I'm trying to do a bit more in terms of staff training on
27 copyright, we don't have anything formally in place in terms of induction or
28 FAQs or policies even, so that's an area that [unintelligible] trying to develop,
29 not just for film works but across the board, everything.

30

31 I: Sure, and that kind of leads on to the next question: have you spent any funds on
32 training or guidance resources related to copyright.

33

34 R: So, my postgrad diploma was funded by the BFI, and they do, they will fund you
35 if you want to travel somewhere, go to a course or conference. But in terms of
36 actual working up of guidance documents or anything like that, that's just kind
37 of part of my job.

38

39 I: Sure. Can you think of any of the conferences or training courses off the top of
40 your head that you or other staff members might have been on?

41

42 R: Okay, so I went to the EUIPO Train the Trainer day for the Orphan Works
43 Database, oh my mind is going to go blank, there was that conference at Digital
44 Catapult, which was orphan works, that was you, yes? The CIPPM/CREATE
45 one, was it Mass Digitisation? Yes. I also went on the KES International, they
46 did a two-day course on Copyright and Licensing, and I mean that was very
47 much more sort of on a broadcast side, run by the BBC, but actually I self-funded
48 that, so...

49

50 I: Okay.

51

52 R: So, beyond that... I think there's probably a couple of others, I can't quite
53 remember now, but yeah.

54

55 I: Have you hired staff based on their experience of dealing with copyright?

1
2 R: Yes, yeah. So, there'll always be a requirement, in terms of... a level of
3 understanding and at least, I think we usually ask for, maybe say, three years of
4 experience of licensing and copyright, and yeah, you have to be able to show
5 that you, at least you know about UK copyright law, at a minimum.
6
7 I: Sure. So, third question. Can you describe an example of a collection that
8 digitised or wished to make digitally available, again, for the purposes of this
9 interview, we're talking about the Unlocking Film Heritage project in general.
10
11 R: Yes.
12
13 I: So, could you describe what you wanted to do with the digitised collections,
14 obviously UFH covers quite a lot of ground in terms of education, public
15 outreach, etc etc. But in particular we're interested in the institutional or strategic
16 aims and objectives for engaging in digitisation.
17
18 R: Okay. So. UFH which was the third strategic priority of the organisation, that
19 was published in 2012 was, the aim was to digitise 10,000 british films, so these
20 were 5000 from the BFI's National Film Foundation Collection, 5000 from the
21 combined collections of the regional and national film archives, do you want me
22 to say them all out, or I can send that list?
23
24 I: Yeah, that's fine.
25
26 R: And a list of about 20+, what we deem commercial rights holders, some big ones
27 like ITV and Studio Canal, and then some individual film makers, so in terms of
28 the actual collections, I mean the selection process for digitisation was they had
29 to be British film, made any time from 1890/95 up to now, so the most recent
30 one was from 2012. Originally made on film, physical film, and not currently
31 available (lawfully, I put there as well) online, or on DVD, or in a data file
32 format. So the main aim was to say, there's a huge amount of moving image
33 material out there that no one's seen since it was made or maybe even never saw
34 it anyway, that is being looked after by mainly publicly funded archives and
35 obviously government wants national collections to be made available to the
36 public, so the main aims of UFH are to digitise films for preservation and access.
37 So on the one hand you're creating the digital preservation files, part of this
38 project was also about developing digital preservation infrastructure at the BFI
39 so that we have the skills and the equipment for both the analogue and digital
40 world, and then on the access side, is was to use the BFI's Video on Demand
41 (VoD) platform, called BFI Player, which we launched in October 2013, and
42 that's the main platform where we published all these works. We also have the
43 mediatheques, so the BFI mediatheque, and there are eight regional
44 mediatheques across the UK, so that's coming on a bit, we haven't really...
45 we're actually doing a technology-sort-of-refurb on our mediatheques right now,
46 which should be opening next month, so I think, I don't know, I'll have to check
47 on this, most of the UFH material hasn't gone on there yet, but it will be. So in
48 terms of BFI Player, it's a sort of mixed platform of free to view, pay per view
49 and subscription. There was an interesting debate in the early days of UFH about,
50 when we were saying public access, did we mean free public access, or just,
51 what does public access mean? Does it mean free or from a rights point of view
52 I automatically think paywall, but from lots of other people in the organisation
53 it was, "It has to be free." So, yeah, what we were looking at was putting as much
54 as possible up there for you to view, and the Player is available in the UK and

1 Ireland only, and that's what we've cleared for. We haven't cleared anything
2 beyond that, for now.

3

4 I: So I get that there's this suggestion implicit there that you might look to expand
5 it territorially at some point?

6

7 R: I think, yes, there definitely is that ambition. I think given that... there's so many
8 different parts to BFI Player, for some it's very much commercial, you get output
9 deals with studios, we have quite independent releases on there, so those are
10 mainly transactional. We also have quite a lot of British classic feature films and
11 those tend to sit within the subscription model. And then the vast majority of
12 UFH material is all free-to-view. One of the reasons is that a lot of the material
13 is short-form, it's under forty minutes or under twenty minutes, or its even
14 shorter, and generally people are not going to pay for anything very short. So, I
15 think anything over, I think it's between twenty and forty minutes, might get put
16 behind a paywall, where it's a £1 per view. Features... and there a number of
17 features that we've done for UFH, and depending on the rights holder,
18 sometimes you can get them for free but often you'll have to put them behind a
19 paywall, sort of £2.50, £3.50. So yeah, in the longer term, in terms of expansion,
20 obviously a lot... certain types of collection would be easier to clear for
21 worldwide than others, some of the archive material probably would be easier to
22 clear – we obviously have a lot of our own material in there, which we could
23 exploit, but at the moment I don't know what, how concrete those plans are. It's
24 definitely been an ambition for a while.

25

26 I: Sure. And who are the intended users of the digitised works.

27

28 R: I have some notes on this. So, as well as...

29

30 I: Ooh, I did have a follow-up question there that I thought of. In terms of... so
31 you're looking at collections held by archives and publicly funded bodies, so
32 you wouldn't necessarily be looking at commercially distributed films or films
33 that are still commercially available in some form, available on DVD and things
34 like that. Would you look at material that's available from specialist suppliers or
35 distributors like LUX?

36

37 R: We did yeah, LUX were one of the partners that we worked with. If I give you
38 a bit more background on the external partners, which is what we call the regional
39 and national archives, and other commercial rightsholders. Because it's a lottery
40 funded project, so a chunk of money was made available in three tranches, and
41 all the partners would then put in applications for funding, and part of the terms
42 of application are saying, okay, you have to put forward why you want certain
43 collections to be digitised and funded by this money. In return, you will license
44 us the rights to put the films onto BFI Player and onto the Mediatheque and the
45 BFi will also, in most cases, get one LTO tape of the film digitised. If that archive
46 or that rightsholder has their own digital preservation infrastructure they may
47 keep both tapes, or they may keep just one, so the general rule is that there should
48 be at least two tapes somewhere in proper conditions. The... certainly for some
49 of the commercial rights holders, we have digitised works that would be
50 considered commercial works, commercially made films. I'm thinking, for
51 instance, Far From the Madding Crowd, the Ian McKellan Richard the Third,
52 The Crying Game, there've been some sort of bigger features. But the vast
53 majority of the ones that have...kind of, not neglected but, you know, just
54 haven't really seen the light of day for a while....

55

1 I: And were, so in terms of the agreement, you would provide funding for the
2 digitisation and preservation, you would get a copy of the film in return, and the
3 material, would it be made freely available, or would it depend on the individual
4 case, whether it ended up pay-per-view, subscription or freely available?
5

6 R: Yeah, it's done case by case really, so for a number of them, we couldn't get any
7 rights at all. But in those situations the applicant had to show there was an
8 exploitation plan in place, either by themselves or if they were an agent, the
9 ultimate rights holder. So it was all about making the sort of, ensuring that even
10 if it wasn't coming to the BFI, to go on Player, that someone would be releasing
11 the film, either on DVD, or doing a re-release theatrically. Public access, is a
12 tick, somehow. So for the majority of those bigger titles it would always be on a
13 pay-per-view basis on Player. Quite often that would be windowed, depending
14 on if there was a DVD release coming or a theatrical release because obviously
15 they don't want Player to [inaudible] beforehand, but one or two rights holders
16 did – ITV for instance agreed pretty much across the board with us free to view
17 for everything, I think, actually. So yeah again it would depend really on the film
18 itself and who ultimately owned and whether they were happy with [inaudible].
19

20 I: Yeah. So we were talking about the arrangements with the regional film archives
21 and with the externals -
22

23 R: So, for regional film archives, it was all free to view. They were never asked to
24 clear rights, because obviously they were going to have to go back and clear the
25 rights themselves, and I don't think there was any instance where there was a
26 paywall put up. No. It's all free to view.
27

28 I: And the responsibility for rights clearance always remained with the regional
29 partners, you didn't offer to indemnify them?
30

31 R: They had to indemnify us. And basically, that was probably one of the trickiest
32 bits, right at the beginning of agreeing the contracts, was the indemnity and the
33 cap on liability, which we agreed, eventually. I mean, basically, UFH is about
34 partnership, about collaboration between, very strongly between all the archives,
35 and knowing full-well that most of them don't have rights departments, legal
36 departments, so there was quite, there was a lot of, you, know, sharing of
37 information, assisting one another, you know, who knows more about these
38 kinds of collections, or has a great relationship with a particular rights holder,
39 and some of the films that they were digitising, that were either owned by the
40 BFI, because we do have collections that we're copyright holder of, or they're
41 crown works and we're the... well, a delegated authority, and there would be
42 other times where, particularly, ITV's probably the single largest rights holder
43 across the whole project, so we were contacting ITV, they were contacting ITV,
44 ITV were also applying for funding, so there was lots going on where it, you
45 know, sometimes it would transpire there was a series called "Come with me
46 to..." Swansea, Come with me to Newcastle I think, where ITV wanted funding
47 to digitise four of the series, we wanted to digitise one, National Screen and
48 Sound Wales wanted to digitise one, and it all sort of, anyway, got a bit
49 complicated and confused, but eventually it all got worked out and I think ITV
50 had all of them. So, but sometimes there would slight kind of clashes in terms of
51 if we were trying to get something from a rights holder and saying transactional,
52 and a regional archive is asking them for the same thing but for Free VoD, there
53 would be something, some things got a bit mucky and, because this is very end
54 of the project, we're going through lessons learnt series of workshops and trying

1 to identify benefits, so those kind of things are getting picked up now about what
2 went well, and what could have gone better.
3

4 I: So the next one is, please give an overall estimate of the number of works your
5 organisation sought to digitise... this should be provided at item or work level.
6

7 R: So, we had... well, I have the figure according to our [inaudible] at the moment
8 it's 5, 169 film works. I think across the whole collections it'd just over ten
9 thousand films, and I can get the actual figures for you, for that. We are still,
10 there are still films going through the workflow, so in terms of the actual plans
11 for publication, the extra challenge for us was that the selection of films, the
12 rights clearance and research, the digitisation and the publication were all
13 parallel workstreams with rolling deadlines, because the selection was based
14 really on themes. So we had 56, I think, collections to be published, so it just
15 kind of goes on and on like that [Annie shows Victoria list of themes] and we're,
16 the last collection I think is due to go live in early 2018, so we've still got about
17 11 collections still to publish.
18

19 I: And do I take that to mean that, although those work flows are parallel, rights
20 clearance has to come before digitisation, because you don't want to spend the
21 money on the digitisation process unless you're sure you've got permission, or
22 is that -?
23

24 R: In an ideal world, I would say yes, that's how it should be, but it wasn't. So,
25 because, I mean, this project is meant to be five years, but really didn't start until
26 very late 2013, early 2014, and, I didn't actually bring the main workflow
27 document, but I brought you, this is the current schedule so what happened right
28 at the beginning of the project, this is the, I mean to begin with, this was about
29 six, only three sheets and we had about, more up on the wall, and this is the final
30 one, so we would basically go for the proposed date for publication of a
31 collection, and work back from that across all these particular tasks, that had to
32 happen across the sixteen teams that are involved in the organisation, so for some
33 of the tasks, are, have very definite times against them, and of course, when
34 anyone asks you, how long is going to take to clear the rights, and you just go,
35 how long is a piece of string? There were one, two tasks which we could kind of
36 quantify, in terms of... the title selection will start here, there'll be a broader
37 groups of films, which would then have to be approved by senior curatorial team,
38 so we would then do this rights status check, at this point, so this was just to flag
39 whether a film was in copyright, out of copyright, BFI owned, Crown
40 copyright... those are the main ones I think, yes. So, on the basis of that, we
41 could immediately say anything that we owned, or that was out of copyright, or
42 that was crown, could just go straight through and go across all this workflow.
43 Then, for us, obviously more in-depth work would start, actual rights research.
44 And what we would do, I don't know if there's any actual examples here that
45 would be helpful, some of these themes are kind of more helpful in their
46 descriptions than others, but we would be able to identify, well, let's say
47 Victorian cinema, so we know full well that the vast majority of that is going to
48 be out of copyright, we had similar things for trains, because the British
49 Transport Film Collection was assigned to the BFI, Public Information Films,
50 that's Crown, and once we could say, ok, this is going to be very less work for
51 us, and on the flip side, for things like disability, advertising, I don't know where
52 that is now, but it should still be on here -
53

54 I: It's just at the bottom there.
55

1 R: Yes, and a few other collections where we just thought, not knowing obviously
2 what the actual content was at this time, what the [inaudible], we could
3 immediately say, we think that's going to be trickier, just because, say for
4 advertising, you're going to be dealing with, you know, the three companies who
5 now own the entirety of every single alcohol brand, and their things may not be
6 so much to do with copyright, it's to do with the actual brand values, and adverts
7 that are probably a bit un-PC now. Also home movies and amateur films because
8 again, it's less likely to be the rights/copyright issue, it's more to do with privacy
9 or families and their relationships with films and thing like that. So we flagged
10 that there are going to be films that get digitised that we won't clear, the good
11 news for us, I think you ask this question later on actually, was how many
12 refused us rights. Only 51 films have been refused –

13

14 I: That's fantastic. That's amazing out of those numbers.

15

16 R: Which is good, that's 24 rights holders who refused rights or permissions. We
17 also had, the two main things that are going to muck up your ultimate plan are
18 rights, or materials. Given the volume that we're dealing with, and this kind of
19 parallel work stream happening at the same time, there were obviously things
20 that were maybe shown as listed on the catalogue but actually when you went to
21 get the reel, it's not there, or it's so badly damaged you just can't do anything
22 with it. So there were actually times where we'd end up clearing the rights, and
23 then it turned out actually it had to be deselected because anyway, because we
24 couldn't digitise. So, I don't actually have the number for that, but it would be
25 interesting to find out how many got deselected on the basis of poor material. Or
26 just, it wasn't there. Certain things, you know...

27

28 I: Things go missing in the archive...

29

30 R: Yes, so, we did adopt a kind of risk policy, that again was something that
31 happened in 2014, we got a sort of policy document, guidance document,
32 endorsed by the senior management group for the whole programme, which is
33 the first time I think BFI's actually done such a thing, for anything really, for a
34 project, and that was, you can have a copy of that, I actually read up the
35 Codebreakers –

36

37 I: Really?

38

39 R: I remember reading that and going, ok, yes, this has masses of stuff that's really,
40 really useful, and in terms of the risk levels we had, we had three levels of risk,
41 with slightly different criteria, what did determine that,

42

43 I: So, did the Codebreakers report actually end up having an influence on how you
44 thought about the risk management process.

45

46 R: Yes, directly.

47

48 I: Ok, that's very interesting to know.

49

50 R: I mean, you'll probably recognise it, how similar they are!

51

52 [Laughter]

53

54 R: But we had the risk assessment, I mean the BFI has, I think, quite a healthy
55 appetite for risk, and as a sort of national body, it's quite interesting the

1 discussions we've had with some of the regional archives who are much more
2 cautious. And yeah, that's been quite interesting because I know of one, I'm
3 saying things and making an assumption about something, and they're looking
4 at me and going, yes, but you're the BFI. You could probably get away with this.
5 They would feel much less, they wouldn't be very comfortable with certain risks,
6 but in fact we haven't really had to do anything beyond low risk, we've got a
7 few where we've gone medium, and I think one where we've gone high risk, and
8 that was basically with a petroleum company, oil company who we've worked
9 with for years and years and years, and they just wouldn't respond.

10

11 I: Just never got back to you?

12

13 R: They basically just put the phone down on us. And I think it's just because it's
14 not central to their business.

15

16 I: Yeah, so it's like, we don't even see the point in engaging...

17

18 R: Yeah, and it's a sizable number of films, we've got collections digitised from
19 other oil companies so we're sort of saying well, there's a big hole here, and
20 because obviously we've worked with them for a long time, and we don't want
21 to damage the relationship, so that one we've went as a high risk, because the
22 commercial value of the films is not, isn't going to be high risk. It was mainly
23 to do with that, so that gives you a member of executive to sign off. Low risk I
24 would sign off, Medium risk was my former boss, she'll sign off. And we've
25 only had to takedown one film so far.

26

27 I: That is amazing.

28

29 R: Yeah.

30

31 I: What was the background to the takedown request?

32

33 R: So, I can't say huge amount about this.

34

35 [Four lines of transcript redacted at interviewees request]

36

37 We were sent a really abrupt and quite aggressive letter, and said that they were
38 instructing their lawyers in London to see what action they could take against
39 us, and we were a bit non-plussed, because our immediate reaction to anything
40 like that is, well, first we want to see their chain of title, because we have it
41 obviously under license from the regional archive, and although on black and
42 white we're fully indemnified by the regional archive, in reality the BFI is the
43 best place, and it's our platform obviously, so we have a responsibility to that,
44 so we investigated this really, and we got the chain of title, from the regional
45 archive and the chain of title from the complainer, turned out that they had better
46 chain of title than the regional archive, so we then, we didn't want to take it down
47 if we could help it, we asked if we could come to a licensing deal with them,
48 they said no, they just wanted it off, and they actually asked us to remove the
49 film from the archive, remove all physical copies, they said every single copy
50 was infringing, really over the top. It took quite a few phone calls with partners
51 at the law firm to sort of come to an agreement. The lawyers tried to get us to
52 sign undertakings which would in effect remove any of the uses we could have
53 done under an exception, I don't know enough about the law to know, I think
54 we argued that they can't really do that, but maybe you can.

55

1 I: You can't contract out of most of the exceptions.
2
3 R: Well yeah, there are a few exceptions where... so I think we managed to get
4 them to roll back a bit on that.
5
6 [20 lines of transcript redacted at interviewees request]
7
8 Most of the time – there was another film where we put it up on a risk basis, and
9 the rights holder got in touch with us, actually we had licensed it to Talking
10 Pictures TV, and they'd seen it on there, and obviously been put back in touch
11 with us. And they got in touch and were like, well, it's great! Having the film
12 out there and yeah, great that you've done it. Oh, well, we tried to find you and
13 we couldn't. But they were really happy and delighted and actually wanted to
14 then licence a whole bunch more of their other films, because they were like,
15 well, you're the place to put them, put this stuff back out there. And that's usually
16 what happens, is people are going, ooh! Can you take all these other films? Yeah,
17 so yeah, I think probably that one online must have really irked them, and made
18 them slightly more...
19
20 I: So in terms of, if we go to the workflow again, so we got to the initial rights
21 status check, what then happens in the next stage?
22
23 R: So, if we can look at it on screen just to show you, so it still gets used for this
24 part, this bar is curatorial selection database, so there'll be a rights statement put
25 against each one, which would be proceed, just get on with it, proceed with
26 caution I think, I mean the wording, there was lots of debate about the wording,
27 I wish we probably hadn't said proceed with caution, uh, I think for the one, it
28 was either for the one with a red flag, don't use it, green flag, and then the sort
29 of in-between-y one. And in terms of the workflow, so obviously anything green,
30 off it goes, anything red would pretty much stop although the ultimate decision
31 for de-selecting something from this project was actually not a rights decision
32 nor was it the technical basis of the material, it was curatorial.
33
34 I: Sure.
35
36 R: Which is something I would have preferred not to have happened, because well,
37 if we can't clear the rights, I mean you can try put them through on a risk basis,
38 but for some of them they really were just no...so stop. So at that point, from a
39 rights and contracts perspective, the curatorial selection database was basically
40 an extra direct spool from our collections information database, so that would
41 list, usually would list, the production company, the main credits, you know,
42 film authors, sponsors, so from there we would then start the research. So we
43 have various resources, we have our own Rights and Royalties system, which
44 has a fair amount of information, we have something called the distributor
45 history doc which is a wonderful Word document, which gets added to every so
46 often, which kind of like just a potted history of distributors and how they're
47 catalogued and moved and sold and come back together again, and again, now I
48 did somewhere start writing down exactly how many rights holders... I think
49 there was something like 1,271 companies and rights holders researched.
50
51 I: Sure.
52
53 R: Now, depending on the nature of the film, or indeed the production company,
54 you know if it's a fiction film and made by RANK or Ealing or any of those big
55 British studios, that's really easy generally, because you either know its RTE or

1 Studio Canal who own it, pretty much the entire back catalogue. Then, so we
2 had a lot of information still in our rights system, had we ever done deals with
3 this company before, and then starting to get in touch with the rightsholders. The
4 other slight sort of additional challenge was because of the nature of the selection
5 and the dates it was happening, so we have a collection, let's say you have a
6 collection that was selected in March 2014, of 50 films and 5 of those are going
7 to be, let's say Fremantle Media, so they're only across the road, and then we've
8 got something coming here, if you're only getting, for instance, two years later,
9 another batch of 50 films, and another ten from Fremantle, then you've got this
10 whole of thing of having to go and knock on their door again and go, can we
11 have these? So that was something we raised early on and obviously, if this was
12 purely led from a rights point of view, wouldn't have happened, because we just
13 said, because it's a non-commercial project, they're really not, lots of rights
14 holders are not going to be interested, and they don't want to deal with the
15 paperwork. And generally speaking, the larger the organisation and the more
16 commercial the organisation, the less interested they will be in very small Video
17 on Demand deals.

18
19 I: Yeah.

20
21 R: So I mean we managed that, so I think, you know, the number of rights holders
22 that ended up doing a main contract with about five amendments, but it was, you
23 had to sort of be really, keep them sweet and be ultra-polite, and you know, I
24 think some of them got quite exasperated about the repeats, coming back and
25 asking for more. So, in terms of that actual rights research, so there was a kind
26 of, the known, so when we had a production company that we knew was either
27 still operating or we knew where a distributor or agent was, that was relatively
28 easy. And then you're left with the ones where you either don't know or
29 individuals, obviously.

30
31 I: Yeah. And did you, did you tend to, they're coming through in batches by theme,
32 I guess you're immediately going to pick off the easy ones and get those done
33 quickly and then you're left with the residuals, or?

34
35 R: It would kind of be, yeah. I mean, if they were obvious, and we knew it was just
36 adding on to an existing agreement, that would be fine. It turns off the actual
37 search, the more diligent search happening, it was actually quite interesting,
38 because sometimes you'd start to do and just not really get anywhere, and then
39 you'd leave it a couple of months, and you'd do it again, and you'd have a
40 breakthrough. Because, I don't know, a news article would come up, or someone
41 would have added some information somewhere. You know, you didn't always
42 know exactly what it was, but there would just be the thing where you'd sort of
43 hammer at it for a bit, right, ok, I'm just going to get on with the stuff I know,
44 and then yeah, six weeks later, you might just find something. So obviously
45 when we started doing this it was early 2014 so we knew orphan works
46 legislation was coming along, we didn't know exactly what it was going to look
47 like.

48
49 But we were involved with the IPO working group on diligent search for film,
50 so I always put my hand up about that – oh yeah, here's the list of resources that
51 we went to look at, although I do think organisations kind of have this weird
52 attitude sometimes to rights research, for memory institutions and knowledge
53 institutions who have, you know, we have 35 I think, people in curatorial, doing
54 research on titles and basically two people in the rights team doing rights
55 research, and there's a huge amount of value put on curatorial knowledge and

1 archival knowledge, but for some reason, copyright research isn't considered in
2 the same way –
3
4 I: No.
5
6 R: But it is part of the whole research on the work.
7
8 I: Absolutely.
9
10 R: So I kind of feel, because I know when people talk about diligent search being
11 this hugely onerous thing, and it's a burden and it's this, but if you see it as part
12 of the same value of the knowledge around your collections –
13
14 I: Absolutely!
15
16 R: Then, you know, then you might love it a little more.
17
18 I: Yeah, and it also makes sense particularly from an archival point of view,
19 because it's the context of creation, provenance, all of those things are tied up
20 with it.
21
22 R: Exactly. And also, something that we haven't managed to do really, but it's been
23 flagged as something we want to try and do, is ensure that we start recording and
24 capturing death dates of authors as far as possible, so you know, because you
25 can just see that no one's ever really going to know when something goes out of
26 copyright. And if we don't start trying to get that information captured right now,
27 you're going to end up with so much of a sort of blurred public domain.
28
29 I: Yeah. I think, it's something that I've ended up writing about a wee bit, in my
30 sort of, I've sort of getting to the point now where I'm thinking about
31 conclusions, recommendations to the PhD, even though I haven't actually
32 finished the discussion... But one of the recommendations I was thinking about
33 is putting more of an emphasis on, like, personal names as an indexing, as part
34 of the, like just in general if we put more emphasis on that as part of the
35 cataloguing process, and like, associated metadata and all of that as well, I feel
36 like we would, like in the future in wouldn't be as much of an issue as it is now
37 for us.
38
39 R: Yeah.
40
41 I: - and also in terms of, the way things are going in terms of, you know, like
42 semantic web and the way catalogues are hopefully going to be able to speak to
43 each other in future, that seems like a really obvious point of connection between
44 descriptions at different institutions and things like that. But yeah, I think that's
45 ideal world thinking.
46
47 R: Yes! I'm just thinking in terms of, there's more information here in terms of the
48 initial status check that we were doing. And then...
49
50 I: Yeah, because I think Bartolomeo sent me, I think it's from 2015, this document?
51 Is that like an earlier version?
52
53 R: Let's have a look, oh yeah! Is there a date at the top of that?
54

1 I: It says 2015 in here. If I look at file properties? That just tells me when it was
2 downloaded.
3
4 R: Oh, ok. I'm trying to think if that's – I don't think that's exactly the same as this,
5 but it probably has a lot of the same information in there. Oh right, so you go
6 straight into the orphan works piece in there.
7
8 I: So, it doesn't have anything about risk management in that section.
9
10 R: The appendix. It has best endeavours. So, that's our list, that we gave to the IPO,
11 oh yeah that's it.
12
13 I: Yeah.
14
15 R: So this is on a, at a production company level, and then a film authors level, and
16 what you would, well usually you'd pick, come out with something at the end. I
17 mean we used, we signed up with Ancestry.co.uk, we've got a subscription to
18 IMDb Pro, we've also got some tokens or whatever it is for the Electoral or
19 whatever it is, is it the Electoral Roll?
20
21 I: Oh yeah, those –
22
23 R: You have to buy, I can tell you, somewhere – Electoral Register, yeah. So,
24 www.192.com, where you get credits for six months. So you really need to plan
25 your searches.
26
27 I: Don't waste the precious searches!
28
29 R: I mean, Ancestry was brilliant. We got that subscription a bit later on, but when
30 we did it kind of really helped. I don't think we really used the Electoral Register
31 that much. Probate searches, we've done a bit, but again, you have to send them
32 a cheque, and for us to actually issue a cheque is... quite a complicated thing
33 now.
34
35 I: And you're probably spending just as much on the issuing of the cheque as on
36 the cheque itself.
37
38 R: Yes, absolutely. And IMDb Pro is pretty good, most of the time.
39
40 I: Did you go to the Probate Registry in person, at all?
41
42 R: I think a colleague did once. But other than that I think it was done mostly via
43 communication. We also set up a facebook page, that was mainly because we
44 were looking for people on Facebook, and we didn't really want to use our
45 personal accounts to contact them. So we set up a thing called 'Drew Dilligence'
46 (laughter) brackets Rights and Contracts, and we weren't allowed to give it
47 official BFI branding, which is a bit weird, I'm not quite sure why, but anyway.
48 And that actually proved really useful as well. And my colleague Emma Cook,
49 who has probably, she's done most of the diligent search actually, she's using
50 that a lot. She treats diligent search as, I mean she is kind of like a detective. It
51 is a bit like being a stalker. And finding interesting ways of getting through to
52 people.
53
54 I: Yeah, whenever I see Heir Hunters on TV, I'm like, that is pretty much exactly
55 what you're doing when you're doing rights clearance.

1
2 R: Yeah, I mean, in one instance she had to write a letter to someone like Lord
3 Attenborough, and all she had was the village in the county, so I think she just
4 wrote Lord, this village, Hampshire, and posted it. And she just assumed it would
5 get to the village, and they would know – and it did! And eventually we got a
6 letter back, about a year later –
7
8 I: That's amazing!
9
10 R: going, I found this amongst the papers... and it was just amazing that we got it
11 back. Wow, it worked! So, you do just wing things sometimes. We also had a
12 few instances, dealing with companies where their UK office wasn't so helpful,
13 at all, but one of the regional archives had been dealing with the head office in
14 Amsterdam I think it is, I think that's the head office, I kind of assumed it is, and
15 they put us in touch with them and they were really helpful. So, we got clearance
16 just by going through a different route. So that would sometimes happen, you're
17 dealing with certain organisations where you go through one door, you're just
18 not going to get anywhere, but actually, if you go through the back door, or
19 actually the front door, you know.
20
21 I: So networking plays a role as well.
22
23 R: Yes.
24
25 I: So, we've got the overall number which was just over ten thousand, and then
26 you've got the numbers for, so, would you have aggregate numbers for the entire
27 collection, or is it just for your own BFI collections?
28
29 R: What I've got here is just for the BFI 5000, but we will have the total figures,
30 there's actually a presentation being done next Wednesday on the whole thing,
31 I kind of wrap-up, so I'll be able to get them for you. But I mean, in terms of...
32
33 I: Can you do a breakdown in terms of how many turned out to be out of copyright,
34 how many were in copyright but BFI or crown, how many turned out to be
35 orphaned, how many did you not get a response...
36
37 R: Yeah. We did keep sort of stats on stuff, and there were actually more stats that
38 we would have likely to have kept track of, whether we can go back and
39 extrapolate some of that information, but ... so, currently, from the 5169 BFI
40 works, 456 were copyright BFI, I haven't done the breakdown of how many
41 were crown.
42
43 I: Sure, that's fine.
44
45 R: 2962 were deemed out of copyright under UK copyright law. So, we took, our
46 rule of thumb for out of copyright was 1945. So for non-fiction works made
47 before 1945 we didn't clear, and for fiction works where the authors have died
48 before 1945, we didn't clear. There were some international uses for certain
49 films, and we hadn't really figured that in, right at the start, so when I was asked
50 by content teams, "We want to do this tour," and I was like, "Well, we've used
51 the 45 rule," we got some legal advice, we took that 1945 rule and I said, for
52 international we don't really want to do that, I think we need to be more cautious,
53 so we did 1925 basically. Although maybe we should have gone with 23 is it,
54 for the US? Anything in the US is pre-23.
55

1 I: Yeah, that sounds about right.
2
3 R: Well, it's fine. So, obviously that's a fair chunk of... films we don't have to
4 worry about. Then, let's say... estimated proportion of works for which a
5 rightsholder was located. So 1500, so about 30%. Within that group, 384
6 rightsholders have given permission, non-response from 7 rights holders, which
7 is actually, non-respondents I mean, sometimes there was absolutely no
8 response, and other times there was response and then nothing. And that was a
9 mix of major studios and primarily companies just not in the business of film, or
10 anything. 24 rights holders donors refused rights or permission across 51 works,
11 and I think actually the bulk of that is from one particular donor who donated on
12 the basis that none of the works would be published, they would just be made
13 available for private viewing or in venue. And we've asked several times
14 whether they would ever change that, and they've always said no. In a way, they
15 probably shouldn't have actually gone, been put through, selected in the first
16 place. So yeah. And then... O that's interesting actually. So I said – proportion
17 of work for which a rights holder was located. Oh no that's works. So a total of
18 1271 rights holders or companies were researched. And obviously that's from
19 things like Warner Brothers down to individual estates, or girl guides, or
20 Methodists, brand owners, and political parties, so yeah, all manner of every
21 kind of rights holder you can think of. Pretty much, yeah.
22
23 I: Sure. And within that total, how many were/are orphan works?
24
25 R: Oh yeah. 247 works.
26
27 I: That's works in relation to how many rightsholders, would you know that ... off
28 the top of your head?
29
30 R: Oh. No, but I can find out.
31
32 I: Sure, as long as I'm clear I'm talking about works, and I can find out how that
33 relates to actual rights holders later on, that's fine.
34
35 R: Ok. So all those, 205 of those are registered on the EUIPO database, and not all
36 of them have been published yet, so the information is at least on the EUIPO
37 site. We're holding some back because we want to test some on the EnDOW
38 platform. I hope.
39
40 I: Oh, nice! I'm looking forward to that!
41
42 R: Yes, so I think we're going to try and have a sort of batch of about 20, that we
43 won't look at all, and we might fling in a few that we done, and just see whether
44 we get the same answers.
45
46 I: That's perfect!
47
48 R: Yes, we've even, we've gone it's orphan, or we won't tell, we'll just see what
49 happens.
50
51 I: That's good.
52
53 R: So yes, I think that comes to 4% out of the whole 5000 and whatever, and you
54 know obviously if we'd taken a different rule on the out-of-copyright and gone
55 earlier, then there would probably have been more. I think BFI has always said

1 that 15% of its non-fiction holding would be orphan, we haven't really done
2 anything more on actually working out, really what orphans we have, although
3 obviously I'm minded that we probably need to get on and register as much as
4 possible in the next two years.
5
6 I: Yes.
7
8 R: Joy. Yeah. Again, but it's quite difficult getting that, getting traction within,
9 internally in the organisation for people to have any interest in that. Yeah. Sadly.
10 I: So, please provide numbers for, or estimate the proportion of works for which a
11 rights holder was located.
12
13 R: That was, so 30% that was 1500, a rights holder was located.
14
15 I: Yes. And out of them, how many gave permission again?
16
17 R: So, 384 rights holders gave permission.
18
19 I: And, how many declined?
20
21 R: 24 rights holders/donors declined.
22
23 I: And how many did not respond?
24
25 R: 7.
26
27 I: Excellent.
28
29 R: Somewhere I do have a print-out list, a tracker list. Where is it? Oh here. Sorry,
30 tiny. You can take a copy of this. So this is by theme. I don't know how many
31 of these there are. 1568. So I'm one out. But that will basically tell you obviously
32 we're still working through 341 titles, orphans, public domain, cleared, refused,
33 total.
34
35 I: Sweet.
36
37 R: There are more sort of ways to break some of that down, but that's where we
38 stand at the moment.
39
40 I: Cool.
41
42 R: And, I'm not 100% sure actually if we're even asking for this kind of level of
43 detail from the regional archives, which would be a shame, I mean they've had
44 to do sort of interim reports and status updates, and they'll do final reporting on
45 everything, but I mean we have the list of all the films they've sent. Metadata
46 was also a huge part of this project as well.
47
48 I: Yeah.
49
50 R: We didn't really get involved in that said so much, and things would get swapped
51 in and replaced due to certain issues. The two biggest problems...issues!
52 Challenges we didn't manage to solve were music and TV. So, yeah, certain
53 films, particularly if they had for instance, the Beatles, or the rolling stones, had
54 to go, or just have the sound turned off, which seems a bit perverted.
55

1 I: Yeah, I did wonder about layers of rights in the titles, or whether, like, from the
2 diligent search annex it did seem like it was just a production or director/author
3 level things were being cleared.
4

5 R: Ok. So in terms of underlying rights, yeah, the majority of our focus was
6 production level or author level. Then, for music, obviously our contracts, all the
7 contracts we were doing for this project started off on the premise that whoever
8 was licensing the rights to us was licensing the film fully cleared to us. And most
9 people would sign that. Obviously, organisations that are a bit more clued up on
10 rights would be able to identify where they couldn't, and on those instances, we
11 kind of took a mixed approach. So, in terms of publication on BFI Player, we
12 have a PRS agreement for that, so certain things would be covered under that
13 blanket, and we also got an agreement with Musician's Union, blanket deal for
14 TV material. Unfortunately we haven't managed to get terms agreed with the
15 Writer's Guild of Great Britain or Equity, so in terms of particularly TV material,
16 we can put TV material on with certain music, but not if, you know, it's scripted,
17 or there's actors, i.e., there's not very much we can put up, which is a shame.
18 We also haven't actually got a PPL agreement in place yet. For Player. So
19 generally speaking, we did get a guy in, a consultant, to help us, just to take an
20 overview on films, moving image works particularly for two themes that we had,
21 which was Other Grooves and Beat Generations, this was 60s, 70s, there were
22 quite a few sort of music promotional videos, and so he, we did the initial kind
23 of basic research around what, where we had the information about who was
24 actually filmed, whether it was a sound track recording, whether it was a live
25 recording, whether it really was a music promotional video and therefore
26 probably would have been owned by the label. So all these different things we
27 were trying to identify who was in what, who was singing what and where. And
28 he went off and did a bit more in-depth research, and he's a film music rights
29 specialist. He had some conversations with some of the key players, the bigger
30 music labels, i.e. Warners, Sony, Universal, and I think he spoke to PRS and
31 PPL, and really taking very pragmatic views that for a lot of these things nobody
32 would know what was cleared in the first place, no one would be able to prove,
33 yes or no. So, and if we went knocking at the door of a big record company and
34 said, here's 60 films and videos we want to... they'd just scratch their head and
35 say we don't have the time to go and find this stuff. So, you know, we wouldn't
36 have got anywhere. So we basically took a sort of blanket risk approach to music,
37 where obviously we weren't already getting in cleared as part of the film. And
38 we just said we were going to go ahead and publish everything, except for the
39 Beatles, the Rolling Stones, Bob Dylan and someone else – was it the Kinks, I
40 think? They were flagged as ones that would be tricky to deal with and very
41 expensive to license. Anyway, it's a real shame, because we're talking about
42 British film, and that period, you don't have the Beatles and the Rolling Stones,
43 and in fact we did put, a clip went up on Facebook of a gig, a Rolling Stones gig
44 which I saw one weekend, and I was sitting going, what on earth are they doing?!
45 Phone up our digital marketing team going "Can you take that down right now
46 please?" So things would slip through, but no one noticed. It may well be that it
47 would have been fine, but we just went, better safe than sorry. So, that was really
48 the music side. In terms of literary rights, again, I think there were one, two
49 where we did go and re-clear underlying literary rights, I'm thinking of Murder
50 in the Cathedral, TS Elliot. And, oh there's another one, again bigger, it was kind
51 of, I think there's one we haven't actually done yet. It's a film we've got from
52 Studio Canal, and it's a, the guy who wrote the [Maigret]...
53

54 I: Oh, I don't know that one.
55

1 R: I can't remember his name... anyway. It's a known estate, you know, so, certain
2 production companies, or bigger agents, sales agents, would say yes we can
3 license this to you, but we're... it's up to you to manage all the underlying stuff.
4 And then it would be up... internally up to us about whether we do actually go
5 and clear it all, or whether we just say, we're going to risk this, or... yeah.
6
7 I: Ok, so that's the underlying rights.
8
9 R: Yeah, the only other underlying rights, artistic works, we did get, we've actually
10 been assigned the rights in the Arts Council film collection, this was sort of
11 slightly outside of this project, but we digitised a number of the film under this
12 project, and again, certain paperwork's missing, we're not really sure what's
13 cleared, what isn't cleared. So we did do a bigger remit with Designers and
14 Artists Copyright Society, on their members works, but there are probably other
15 works that we probably need to look at. And I haven't gone near Section 52.
16 What that might mean for us.
17
18 I: Oh god. Yeah.
19
20 R: So I'm just at the moment... I don't even know where to start.
21
22 I: Yeah.
23
24 R: I'm trying to think... a few other things where we would go and re-check or re-
25 clear, say, performance or engagement agreements. So adverts, I think we did
26 those on adverts, an advert with Michael Caine, a beer, I think it was a beer, so
27 we actually went to Michael Caine's people, and it was a similar thing with Sean
28 Connery and said are actually still happy with that, and Annette Newman I think
29 as well, partly just because, you know, endorsements of products which they
30 may have done, you know, 40 years ago, just to check they're still happy.
31
32 I: So, we've gone through rights, permissions etc. I have a question on ECLs just
33 because I'm going to be interviewing some Dutch institutions. So I might come
34 back to ECL later. Now we get into costs, which are usually super-tricky to
35 estimate.
36
37 R: Yes.
38
39 I: Estimated costs involved for digitisation, so this would be hours of staff time for
40 creation of item level metadata, which I know was happening in a different part
41 of the institution, so that's fine. Hours of staff time for auditing rights status of
42 collection, staff time for copyright search and clearance, upload of data,
43 processing, so updating all of your internal database and things like that, any
44 other licensing fees, and if data's unavailable, estimates for each of these tasks
45 where appropriate.
46
47 R: Ok.
48
49 I: I know, I'm sorry.
50
51 R: No, no, I mean, again, it's something I wish we'd kind of just paid a bit more
52 attention to along the way. It would have been a good thing to do, in the middle
53 of it all you just don't... So, I'm thinking, in our.... How to start all this.
54
55 I: Would starting with your staff labour costs be a good place?

1 R: Well, staff, yeah. So I did start trying to get some information down, this
2 morning. Just in terms of Rights and Contracts team?
3
4 I: Yeah.
5
6 R: So we had... one fixed term staff member for four years. So she's the only person
7 100% on this project. So across those four years is 133K. One member of staff
8 on half time, which is me, is 73K, and then 66K for another member of staff. I
9 can tot that up in my head...
10
11 I: No, that's fine I can tot it up later. Using a calculator!
12
13 R: Yes!
14
15 I: That's staff time. So you, did you hire the music rights consultant for a short
16 period?
17
18 R: Yes, for a short period. We paid, we can make a note of these but I can remind
19 myself of what we did, so music consultant I think, if it was, I'm trying to think,
20 maybe it was... £2000 sounds like a lot. I'll check what that was. What we did
21 do on the back of his piece for us, we also put away a pot, actually I think it's
22 just a £3000 pot, like a wait claim, so that's sitting there, still. Other licenses: so
23 PRS, for a VOD platform, I think we're paying about £650 a year, Musician's
24 Union is a 7-year deal... is it a 7 year deal or a 5 year deal? I think we're paying
25 £1500 a year, but in effect that's a... we're not really exploiting the rights
26 [inaudible]. DACS, oh, yes, we paid them a per film work fee, and again I'll
27 have to remember what that is because I can't remember off the top of my head,
28 but I can send that to you. I'm trying to think if there are any other licensing fees
29 we paid. We also have, I suppose yeah, there are the ongoing, again blanket
30 agreements we have for the Mediatheques, so again, PRS and Performers
31 Alliance for that, so I can tell you those figures as I can't remember them. I
32 mean, generally, we didn't offer any advances or licence fees to anyone, it was
33 all revenue share if it's behind a paywall, so 50/50 of net. And if it was a film
34 being, the digitisation had been funded by us for an external partner, but not the
35 regional archives, there's a recruitment position. So, 10% of the BFI Player
36 revenue would go back to recouping the grant amount. And then after that...
37 there isn't an after that actually, it's just a 10% corridor. So then it would be a
38 45% each net. So we'd keep that. Then, I think there might be one or two films
39 where we did pay fees, or advances, but that was when we were getting a much
40 bigger bundle of rights, and we were also doing film distribution, DVD release,
41 theatrical re-release, and I can check those, but it, the money that would allocated
42 against VOD might be tiny. But again, it's still there.
43
44 I: Sure.
45
46 R: I think they're the only ones....
47
48 I: I think that pretty much covers it. The big things.
49
50 R: Yeah, in terms of... because I just put down the amounts we're paying for...
51
52 I: Oh, the subscriptions.
53
54 R: For diligent search. So that's...
55

1 I: That's ideal as well, that's important to know.
2
3 R: So for IMDb Pro, which is approximately £115 a year. Probate searches, I think
4 we only ended up doing four, so £10 a search. Electoral Register, £29
5 (something) for ten credits valid for six months. I would be very surprised if we
6 actually used all of those. Ancestry, we went for the worldwide subscription
7 account, so ... the average is about £400 a year.
8
9 I: Sure.
10
11 R: For those. Yes.
12
13 I: Ok. Ideal.
14
15 R: We didn't do any IPO OWLS applications. And we still haven't. Yes.
16
17 I: Yes.
18
19 R: That's a whole other thing...
20
21 I: Yes. So, can you please provide an estimate of the amount of time you spent
22 doing diligent search? This can be reported either per work.... Total amount of
23 time for the whole collection, as long as the total amount of works is specified.
24 So, basically what we're trying to do is we can work out the full time load and
25 then divide per total number of works, we get a general idea of the resource cost
26 per work, that's gone into it, so maybe what, I mean it's been a 4-year project?
27 Coming up for 4 years?
28
29 R: It's been a... coming up for 5 years. I would take, I would say, we didn't really
30 do anything in 2013. Things got up and running, 2014... I mean in terms of
31 actual diligent search, again that would have happened later, because we were
32 still kind of working out how we were going to implement everything. And I
33 seem to recall, I just said, "Hold off on doing that further diligent search until I
34 know what the orphan works scheme's going to look like." But, let's say, end of
35 2014, 15, 16, 17... we've still got some to do. So you're going to be looking at
36 four years, probably.
37
38 I: Yeah, and that's, it was mainly Emma who was doing the diligent search.
39
40 R: It was mainly Emma, yeah. I've actually asked her to have a bit of a think, or to
41 go back and look at what she's done. To give you an example, and again, we
42 kind of didn't, it's not something we did from the outset. But this would be the
43 sort of sign off diligent research summary sheet, so this is just the latest one she's
44 actually sent through, which is for a bunch of films which according to the
45 production company, should be owned by ITV. ITV, I mean ITV have been
46 amazing, because they've, we've basically been working with a massive google
47 doc with them, they've been doing a huge amount of research for us, internally
48 into underlying rights, and you know, they've basically given us a) free to view
49 rights and just done all this extra, you know, help us out. We've had to take a
50 certain level of risk in the agreement, so they haven't provided full indemnity or
51 warranty to us about certain things, but these ones, and there are a number of
52 ones where you are insistent that this company owns them, and you keep telling
53 them that, and they're just going no. So, this is what all these are. There's a
54 chunk of them. So, in... what Emma then would do is, I mean this again is very
55 much a sort of summary of the overall due diligence, but then just talks about

1 where she's gone and looked for things. So these are like internal systems –
2 collections information database, MM's Media Maestro, that's our rights
3 system, donor films, master files...
4

5 I: Rights and Contracts
6

7 R: All of those... and the thing is, I suppose on the basis of certain themes, you
8 know, sometimes there'd be a sort of group all made by one company, where
9 you could go and dig around a bit, and I will, probably the best thing is to get
10 her to sort of cast her mind back and look over... see if she can give us a bit
11 more information on the specifics really, of how long certain things will take.
12 Because really she'd kind of divide her time up between just doing full blown
13 diligent search all day, you know, is she was in a particularly good mood to, you
14 know, be a terrier, or she'd be doing sort of data entry and input and all kinds of
15 contract drafting and phoning people up and stuff like that.
16

17 I: Yeah, ok.
18

19 R: So, I think, you know, there are ones where she's been looking around or she's
20 been trying to get responses from people and it's kind of dragged on and on and
21 on, and whether it gets classed as a diligent search at the end of the day, or it just
22 ends up as a... well I suppose yeah, uncontactable, unlocatable, an orphan work
23 is where... unlocatable or unknown, isn't it?
24

25 I: Yeah.
26

27 R: Does unlocatable mean... no, it doesn't mean uncontactable... You know who
28 they are. You can't get hold of them.
29

30 I: And then there's that grey area of, they might be a genuine orphan work, or they
31 might just be a non-responder, and sometimes there's no way of telling.
32

33 R: Yeah. No. So generally, I mean this sheet gets used kind of for both, in terms of
34 risk sign off/diligent search and we should be able to sort of work out an average
35 anyway, how long it took. She's also a very, very fast worker. So, our colleague
36 was not so fast. So, yeah, that would be quite interesting. It would be good to do
37 a sort of race, you know, who can find it first.
38

39 I: [laughing]
40

41 R: So, yeah. We'll need to work that one out I think.
42

43 I: Next question – it's just another way of calculating it. So we've talked about
44 takedown requests and other contact from rightsholders. How do you plan to
45 manage requests if they arise – so, you already have a process in place for that,
46 so you ask for chain of title, you can take the material down, I'm guessing – do
47 you take it down while the dispute is ongoing?
48

49 R: In the case where we ended up having to take it down, I didn't, I said I'm not
50 taking anything down until I see, you know, show me your hand first. Yeah, I
51 just think that's... perhaps if they'd been a bit more polite. When they'd
52 contacted me. I'd have said, yes, take it down. But yeah, I was just like, well no,
53 I'm not going to, I feel like you're bullying me now. I think actually, having said
54 that, a couple of days ago I think we did get asked by a regional archive to take
55 something down because they realised there was an issue with music rights, but

1 I don't think came out of... it was them discovering this rather than a claim
2 coming. I think the...
3
4 I: Is there a takedown policy on the BFI website? I'm trying to think if I've seen
5 one on the website...
6
7 R: I think... so there is, there should be on BFI Player.
8
9 I: Yeah, I would've expected there to be one on the player –
10
11 R: But I'd need to check exactly what there is. I noted it in the, in our sort of internal
12 policy document, but there isn't, it isn't a sort of widely known, we haven't
13 really had the sort of conversation across the various teams about actually what
14 happens when we get someone coming in complaining.
15
16 I: Ok, so it's more of a, you react when it happens sort of thing?
17
18 R: Yes. I mean that's... across the board in the organisation, in terms of any
19 infringement, whether it's us infringing, or there's someone infringing us, it's
20 all a bit ad hoc.
21
22 I: Ok. But you know, you know who you would go to immediately if, when it
23 happens, when you receive a complaint.
24
25 R: Yes. I mean, generally, so things will either go directly to our general counsel,
26 or they'll come to me. And yeah, I think, if it's sort of, a bigger, scarier, claim,
27 it probably goes straight to legal counsel. But for most of the time, in terms of
28 sort of, yeah, anything else probably comes to me first.
29
30 I: Sure. And so, how... I think we're already discussed how the various take down
31 requests were resolved, haven't we?
32
33 [2 lines of transcript redacted at interviewees request]
34
35 R: The other example was a license agreement, we agreed terms, and they asked us
36 to take more films, so it was plus all round.
37
38 I: And have those takedown requests affected current or future digitisation plans?
39
40 R: No.
41
42 I: Have they made you reconsider your risk categories? Or your risk assessment
43 process?
44
45 R: Not specifically, I mean I'd like to reassess them anyway, and also because
46 they're specific for this project and I think we should have them more broadly
47 across the organisation. There's still quite a sort of between us in rights being
48 the more cautious than some of our colleagues who are very happy to sign, and
49 don't really get why we're trying to even... just put this piece of paper in front
50 of them and say, "Sign it." So, it's trying to sort of get that, around certain
51 colleagues that at least if you have a trail, an audit trail, you can show that
52 decisions... certain things were done, a decision was made, it fits something that
53 everyone's agreed, and you know, you know...
54
55 I: It's stronger than someone just deciding to sign off on this...

1
2 R: Yeah. That's one of the things I've...I'd like... I think the orphan works things
3 is actually, I don't know... I felt it made us focus more on that kind of question,
4 because we now have, on our rights system, quite a chunky list of films that,
5 they were set up as orphans before orphan works came in, or they're also listed
6 as, BFI claims rights, and this is all very kind of subjective, individual decisions
7 by certain people across decades, and it's, we kind of really need to sort of clean
8 that up a bit, and go back and say, why was this decision taken? I also, think that,
9 having had a discussion with Studio Canal, on a particular catalogue, I did ask
10 them, well, on the back of orphan works are you doing more now with your
11 [inaudible] and they seemed to indicate they were, to try and actually work out
12 what they've got and the sort of chain of title around their catalogues.
13
14 [33 lines of transcript redacted at interviewees request]
15
16 I: And in terms of, policies, again, thinking about it, so risk assessment possibly
17 will be looked at in future across the organisation, and you're thinking take down
18 procedures might have to be looked at, as well.
19
20 R: I think, well, I think in terms of, it depends on what BFI wants to go, so, say, if
21 you're looking at say, 100,000 tapes, the main platform for those is going to be
22 the mediatheques, actually, which is much, much lower risk anyway, and for
23 some of them, certainly, the dedicated terminals thing, Southbank will be
24 covered. There is the ambition to actually have a wifi zone around it with a – so
25 that won't be covered by the – so we'd have to clear that. But I think, for Player,
26 yeah, if you were to – there's nothing really sort of automated at the moment,
27 and because our rights system doesn't talk to our catalogue system, doesn't talk
28 to our VOD platform –
29
30 I: Ah, right.
31
32 R: So, we don't actually have anything where you can press a button and go, "Uh-
33 uh." That again is something that we've kind of, well, I'm meant to be looking
34 at next year. [laughter] So, to make that kind of thing a bit easier. Anything on
35 You Tube at the moment is manual, takedown, takedown, takedown.
36
37 I: Ah right, ok, so there's actually a transaction cost there because it's not as simple
38 as just going into the system and hitting a button to say it's not available
39 anymore. There's a process that you have to go through.
40
41 R: Yeah. And also, on a platform where you have to know that it's a) your film that
42 you can takedown or, for instance, if we were to see someone, another party,
43 another platform with one of our films, there is an internal process, but not a lot
44 of people know about it still, and that's because there is an assumption that we
45 can takedown anything. But of course, we can't. The different is whether we're
46 an exclusive rightsholder or a non-exclusive rightsholder, where our rights are,
47 do we just have UK rights, worldwide rights, all these sort of things, and actually
48 that kind of level of granularity, that you're not that aware of, means that you
49 can't just act as if you are the copyright holder, because you're not.
50
51 And, you know, certain things that happen, can happen, if you do take some
52 [proaction?] without thinking it through and then someone thinks, "Excuse me,
53 what do you think you're doing?" you know, you're totally over-stepping your
54 mark, potentially ruining your relationship with the copyright holder, and that
55 kind of thing. So... but that's more if people are infringing us, so yeah, there is,

1 I think, Player, we've had one instance of someone actually ripping off of Player,
2 it was a local history organisation in Wales, and I always feel slightly bad, but
3 they ripped everything, and they took a copy, and they took everything, you
4 know, it's like, "You could just embed a link." You know, a link here, and just
5 do that, you don't need to actually go in and you know... And I think there might
6 have been a couple of other instances. Big question for us is about watermarking
7 as well. Obviously for regional and national partner archive material on Player
8 there is a little logo of their archive on the screen, on the films, but we don't
9 want, we haven't watermarked our stuff, and there's been an ongoing debate
10 about that, whether we should really?

11

12 I: Generally, I'm against watermarking. If you can possibly help it –

13

14 R: Yeah –

15

16 I: I would rather things aren't watermarked. But I understand why people would
17 prefer there to be that link back to the –

18

19 R: Yeah. I have seen a video on a US site where when you play it full screen you
20 can actually see where they've tried to rub out the BFI logo, it's hilarious.

21

22 I: That's so much work, that's frame by frame! Why?!

23

24 R: I know! I was flabberghasted by that. Like, really? And it's, the annoying thing
25 is it's a 1903 film, we restored it. Ok. Off on a tangent there.

26

27 I: Ok, takedown requests – have you undertaken any evaluation of usage or uptake
28 of the digital resources created through digitisation? So, I'm guessing you must
29 get some idea from the Player itself, how it's being used?

30

31 R: Yes, so, we do have, yeah, in terms of sort of KPIs for projects, obviously one
32 of the biggest ones really is about audience engagement and reach, you know
33 one of the main things for BFI Player was to get the BFI out into the nations and
34 regions. And Again, I have made some notes of which... oh yes. Ok. At the very
35 top level there is an impact value piece that I'm assuming will be published, I
36 think it's with DCMS at the moment. So we're waiting for that to come through.
37 So we capture viewing figs for So since May 2015 which was the launch of
38 Britain on Film which is the single biggest collection, it's also where we did the
39 map, if you look on Britain on Film on the Player, then you can search by any
40 town/village name in the UK and it will show you the films from that area. So
41 that was the single biggest launch the BFI has done across anything, ever. Which
42 was very exciting, May 2015. We've had 2 million views on BFI Player, so that's
43 more than 200,000 hours of footage viewed, 4x our original target, so an
44 equivalent to 7 years of admissions at BFI Southbank. On a monthly basis, we're
45 looking at 50,000 views on BFI Player, but actually most of the views come via
46 Facebook.

47

48 I: Interesting.

49

50 R: So, I think that's right, hold on. So, in October 2016, we had 1.38 million views
51 via Facebook. So, I think on the, at the moment we get sent a kind of, it's meant
52 to be monthly I think, update on all these kind of things, there will be again, the
53 presentation next week will give us the big, full, figure of views. We've also had
54 clips available on our YouTube channel allowing for certain titles and extracts
55 of titles to be seen globally. So, last September 44,000 views, doesn't sound very

1 much for YouTube actually. So, you'd have peaks of interest, so we did a Cricket
2 on Film collection and that had a lot of interest from India. Mostly, and we have
3 done that piece to collect, we get most interest from the USA, Canada, Ireland,
4 New Zealand and Germany. There will be more figures on that to come through,
5 in terms of, who's watching. I think they've also collected... information about
6 demographics as well.
7
8 I: That would be interesting to see, yeah.
9
10 R: I should have put this... I should have stapled it all! So then I would know...
11
12 I: That's ok!
13
14 R: Ok, I can't find it, but I know we have, in terms of, yeah, age brackets. And
15 generally speaking, there'll be a report that lists, you know, particularly titles
16 that have gone, not necessarily viral but they've really peaked, on the back of an
17 event, or just a film that's really captured interest. Obviously we try and work,
18 and we are working with the regional archives and things to get local interest
19 and stuff, if there's a film about a house that's in the middle of a motorway
20 somewhere and that went, everyone went, loved it, and trams, people love trams.
21 I think there's trams in Belfast, and in Preston or something, and yeah, again,
22 one of those.
23
24 I: And what sort of thing are they using the material for, is it a lot of sharing on
25 social media?
26
27 R: Yeah, so people will do share it, I do it myself. And, yeah, sharing on social
28 media...
29
30 I: People commenting...?
31
32 R: Yeah, there are comments...
33
34 I: Do they identify things in the films? Things like that?
35
36 R: Some people will, yes. Yeah, we've had, in fact that's another kind of strand to
37 the whole project, which is, I think, I'm not sure when it's launching, maybe it's
38 launching in the summer? Or there's two things really, there's crowdsourcing,
39 so the BFI is going to do, launch some sort of crowdsourcing platform, which is
40 more to do with, I suppose, geographical information on films, where they are,
41 what the buildings are... we have done stuff where we've posted something and,
42 you know, for instance, say a film of a boy singing on the beach in Brighton I
43 think it is, in Bournemouth or somewhere, "Does anyone know who this kid is?"
44 That kind of stuff. Right at the beginning of the project there's a film of a bus
45 trip in Scotland to the Forth Bridge, and I can't remember the name of the town,
46 or the village they come from, but it's actually our where our Creative Director
47 was born, I think it's about two years before she was born, and her Mum's in it,
48 her Aunt's in it, you know, everybody's in it –
49
50 I: That's amazing!
51
52 R: So, she's, you know, this is the wonderful, the wonderful thing about these films.
53 So, certainly the BFI has been trying to get some of that engagement in terms of,
54 who knows who these people are, do you know what happened to this place. The
55 crowdsourcing, again, I'll find out when that's actually going live, and also,

1 we've had people sort of contact us, directly, sort of on email, so I think another
2 local history society who were asking about a film, it's a house and one of the
3 guys from the local history group actually lives in the house now, and it used to
4 be lived in by someone quite well-known, and so they want it for their group,
5 thinking they can get a copy for their group, so you know, going, you can do this
6 and you can do that, but please note that this thing's going to be coming along,
7 so it would be great if you could be involved.
8

9 I: Yeah. And do they get used for... like, special screenings, in particular
10 communities and things like that, or does it tend to be more at community group
11 level, just like accessing them online?
12

13 R: So, we've had, there've been some kind of... what would you call it? More
14 formal, kind of touring programmes, some are done directly by the regional
15 archives, and some kind of come through us, so the in-house cinema office are
16 doing, I think they're on their fourth compilation now, so they did rural Britain,
17 trains, Black Britain and coast I think is the next one. And we've also got... so
18 that's one way to get the stuff out, and they're very good at the marketing side
19 of things in, to it's mainly, some it's ours and some it's non-theatrical venues,
20 so there's also a company, Synergy? Do you know Synergy? Synergy Arts and
21 Film. They, as a kind of pilot project actually, it's a digital distribution service
22 for non-theatrical community venues.
23

24 I: Oh cool.
25

26 R: And it's an Arts Council funded project, in partnership with us, they've got
27 content from us from [Royal Opera House], Royal Shakespeare Company, Arts
28 Council, various other people, so it's about getting all manner of arts moving
29 image kind of film out to communities.
30

31 I: Cool.
32

33 R: But there's definitely been lots of different regional shows, and in terms of, it's
34 always quite an interesting one for us, because we have a fully-blown, fully-
35 developed distribution department who do theatrical releases, and for a lot of
36 this stuff, that doesn't really fit within that model, because we're not officially
37 taking it into distribution and then doing posters and new prints and everything.
38 So, it's a bit of an odd area, some of this smaller level distribution, we've had
39 quite a few requests from, again, community groups, to screen from Player.
40 Now, if it's fully-owned by us, we can kind of go, okay, but really, technically,
41 we shouldn't. The Terms of Use are the Terms of Use and if it's a third party
42 film we're not, unless, we just can't. But obviously, it's quite... it's good quality
43 film so that's the sort of thing, yeah, we're trying to work out. But this is where
44 things like Synergy probably come into their own, to take that on.
45

46 I: And have there, any, like, artworks or anything like that, been commissioned,
47 based on the collection? Has there been any sort of exploitation, like that?
48

49 R: So, we have, we commissioned a filmmaker, Penny Wilcock –
50

51 I: I think I recognise that name, yeah.
52

53 R: And BFI's worked with her on and off, for a while, 2012, she did From the Sea
54 to [Albion?], a big, feature-length archive film, but we commissioned her to do
55 a film, it's called Out of the Rubble, it's a... I don't know, 20 minutes or so? It's

1 a... I don't know how to describe it really... it's about post-war Britain and
2 housing, child-poverty, immigration and lots of other topics, and they went, they
3 basically used the archive footage and then they were going back to the same
4 place and trying to find people who'd been filmed, say in the 50s, talking about
5 what happened now, so they went, I think there was London, Glasgow, and
6 somewhere else, I can't remember the other place it was. So that was a piece that
7 we commissioned and got new music done, and... is there anything else?
8

9 I: Did that involve, did you have to look at the rights issues again, in the material
10 that was chosen?
11

12 R: Yes. So, various levels to do with that. So, our agreements with our regional
13 partners, in fact, everyone else, is, you deliver us the digitised film, goes into the
14 archive, goes into Player, Mediatheque, we have a promotional rights clause,
15 which gives us extracts, either 3 minutes or 10% of the full running time for all
16 media used to promote the film, BFI Player, etc. Then... but any other uses are
17 obviously, we have to go back to the rights holders and clear, or if it was a third
18 party we direct them there. So, for this film it was a bit of a weird one actually,
19 because it was a mixture of our stuff, some regional material and some other
20 things, yeah, third party owned. And what happened, was most of the regional
21 archives were fine. As long as they were credited at the end, they were fine. We
22 didn't have to do any further kind of licensing, fees, or anything like that.
23 Unfortunately what happened with this was, a particular film was used, various
24 extracts throughout the new piece, and the soundtrack from that film was de-
25 synced.
26

27 I: Ah.
28

29 R: And then the soundtrack was then, in effect, mashed up into a new soundtrack
30 with other things, by a sound engineer. Which of course, we didn't have the
31 rights to do at all. So we had to pedal furiously to then a) speak to the filmmaker,
32 and then to the composer.
33

34 [2 lines of transcript redacted at interviewees request]
35

36 I: Yeah.
37

38 R: So, and one of them, sort of higher, well I suppose it was a bit of a coup for us
39 in terms of Channel 4 actually agreed to broadcast this programme. And so we
40 really had to get it cleared because... it was something that we going to be
41 nationally broadcast. So that was, yeah, a slightly kind of topsy-turvy way of
42 doing it. We usually wouldn't do thing that way round if we were commissioning
43 a new work to be created, and it was quite interesting, the terminology being
44 used, from certain people who seemed, if you call yourself a, I think it was, like
45 a sound engineer, or a soundscape artist... or no, an engineer creating a
46 soundscape, that because you weren't calling it a soundtrack, that somehow you
47 wouldn't have the same rights implications. I'm like, no, you can call it anything
48 you like, but that's what it is. So yeah, there were things about, I mean, the BFI
49 wants to do a lot more in terms of creative reuse and really enabling mashup and
50 all those kind of things. There are certain kinds of works to avoid, really, when
51 you're doing that kind of thing, so yeah.
52

53 I: I think, yeah, that's sort of where I was going with the questions, like the ability
54 to re-use the material, I'm guessing is restricted by the licence terms, and I don't
55 know whether, would you be able to share examples of the licences with me?

1
2 R: Yes, Yes.
3
4 I: Particularly the one for the, like the freely available material, which I'm guessing
5 is that...
6
7 R: This should be it?
8
9 I: I'm guessing that's pretty much limited to personal use, private research?
10
11 R: So, this is the standard Unlocking Heritage digitisation funding agreement,
12 and... you're going to have fun reading all of this on the train!
13
14 I: Yes, I can!
15
16 R: But yeah, the rights that [] assign to us, non-exclusive, Video on Demand, non-
17 exclusive educational rights, so, these are defined specifically as BFI
18 Mediatheque, although actually BFI Mediatheque [] so there's no, yeah, we
19 don't have the right to sublicense. There's no kind of creative re-use, or anything.
20 For the next batch, 100,000, they want to start introducing that. To my mind, the
21 BFI is not ready for, in effect, Creative Commons. We're just not set up for it
22 yet. So, I'm not quite sure how that's all going to work really. I don't know. I've
23 flagged it up already as a kind of, we need to have this discussion.
24
25 I: And do you think it's an attitude within organisation, or that it's the, it's a case
26 of like, processes, policies, behaviour isn't ready for Creative Commons yet?
27
28 R: I think it's everything.
29
30 I: Ok.
31
32 R: I don't think people actually know what Creative Commons is, yeah. In terms of
33 things like a policy, and practice, and the tools and the systems, this project has
34 kind of been the first one where a) senior management have actually understood
35 that this was important, and therefore have given you, given me, and the team,
36 you know, a place at the table and the actual ability to try and get policies in
37 place, so in terms of, as well as the broader sort of guidance document, you
38 know, because it's a lottery funded project, obviously the auditing is massive on
39 it, so in terms of governance, you know, getting things signed off and getting
40 papers done, and the process of, there's a basically like a delivery group, and
41 then there's the PDG, which is the Programme Delivery Group, which is sort of
42 main management team, and then there's the Programme Management Group,
43 which mainly consists of the exec, so for certain things like the rights, the
44 document would have to go right up to PMG, so that has four members of the
45 exec on it, so present that, get them to endorse it, fine. For orphan works we had
46 to do the same, for the music risk thing we had to do the same. It goes through
47 each level, until you get the final sign off. And that's me, I mean, we haven't
48 done, we've never done that before.
49
50 I: And I'm guessing having approval at that level was essential to all of the
51 workflows, basically.
52
53 R: Yes, yeah. I mean the thing about all the workflows and all the processes and
54 everything is they're all designed, primarily with the, to achieve the ten thousand
55 digitised, in the archive, on Player, that kind of, so you're working knowing that

1 that's why you're doing this, and obviously decisions are made in that context.
2 So, what's the interesting thing next is quite apart from the 100,000 is the,
3 actually, ok, how do you start really rolling this kind of concept out across other
4 areas, because other activities don't have this kind of clarity, and so it's, some
5 of them might be... there's going to be a conflict, potentially, with current
6 practice and some may be going, "Well, we think you should be doing it like this
7 now..." and how much that might impact on how people currently work. So it's,
8 I'm hoping it's a thing to evolve and build on, definitely. But in terms of... you
9 know, obviously BFI was involved in the Creative Archive with the BBC, and –
10
11 I: Oh, of course, uh huh –
12
13 R: Was it the Arts Council, and Open University as well? I think.
14
15 I: Yeah. The Creative Archive Licence?
16
17 R: Yeah. So it's like Creative Commons, except it's only within the UK, and some
18 other things... so, I've... yeah. There's quite a big discussion to be had in terms
19 of, when people say creative re-use, what do they actually mean, and do they
20 understand the different bits of licensing they're required, in all the steps? And
21 you know, where you can rely on an exception and where you can't, and I think
22 quite often there's a sort of misunderstanding that the BFI can somehow provide
23 access to a third party under an exception, that that third party has... the third
24 party can use the exception, but we can't provide material to someone under an
25 exception, because that exception just doesn't exist. So quite often that gets
26 really blurry, so quite often for, you know, educational uses, you say "well, yes,
27 here you go, have it under this education exception," but this isn't... they can do
28 it, we can't. So yeah, there's some discussions to be had around that.
29
30 I: And I'm guessing the lessons learned period will be useful for that as well.
31
32 R: Yeah, I'm kind of quite, I think pretty direct, in what I'm saying needs to be
33 done across the organisation on that front.
34
35 I: And what's the event next week?
36
37 R: We have an all-staff meeting next week, so because, obviously UFH finishes
38 tomorrow, technically, officially, so the programme manager will be giving a
39 kind of talk, a summary of everything, so in terms of the whole kind of workflow
40 process, not just for the digitisation and access project but for the DPI, digital
41 preservation, and also the national catalogue, which we haven't spoken about at
42 all yet, so she's a lady called Colette McFadden, she's basically been the one
43 who's kind of pulled it all together, designed the workflows, you know, talking
44 to everybody, sixteen teams, so we had sessions where we'd all be in a room,
45 post-it notes going up, everyone saying di-di-di-di, most people in the
46 organisation have never done, hadn't worked in that way before, so I think it
47 was, yeah, in terms of sort of change management here, and actually working
48 more collaboratively, because we're quite a silo-ed organisation, and the more
49 tend to do, the more silo-ed we tend to get. So this has been, yeah, quite a thing
50 for just the organisation itself, and in terms of working together in this way.
51
52 [Irrelevant questions cut for brevity]
53
54 R: So I'll say about three words... I haven't quite worked out what I'm going to
55 say. But, so yeah, I want to do a bit more, I mean I was thinking about trying to

1 write something, I actually wanted to write a bit about the... it goes back really
2 I suppose to the orphan works and the codification of what was, at least for us,
3 standard practice in terms of, there were places we were going to look for things,
4 but obviously, you know, trying to see how much does it really change what
5 you've always been doing? And is it more, just, you need to be more aware of
6 how you're recording what you're doing. And obviously the end, the things of
7 registration and all that kind of stuff. And back to the question of the sort of
8 value of copyright research, and how it's not necessarily seen in the same light
9 as other kinds of research.

10

11 I: You should definitely write that, that sounds amazing.

12

13 R: Yeah, so I do really want to do that, at some point. [laughter]. I will.
14 Interestingly, actually, the thing about patrons, it's reminded me that I actually
15 need to go and talk to one of our patrons, because the... we got legal advice from
16 Blackstone Chambers, this was our sort of duration advice, way back, and I
17 didn't know it at the time, but Ian Mills QC is actually a patron of the BFI.
18 [laughter] So, it wasn't actually him, it someone else in the chamber, but he was
19 the one who we ended up talking to, and "Well, I'm a patron of yours so yes I
20 want to come," Oh right, ok. And, we've actually never gone back to them and
21 really given them an update on, you did this, this is how we kind of, you know,
22 took it on in terms of stuff and we really need to that, because it's a bit bad of us
23 not to. And I would really like the opportunity to try and do a bit more of
24 something, just, more within the organisation itself, because I think again, lots
25 of people still have a, all sorts of myths, they just find it scary, going, "No, it's
26 not." And...

27

28 I: Is the rights status of the films easily accessible on the Player, is it, are there
29 clear rights statements in the catalogue and on the Player?

30

31 R: No. So yeah, that's another thing. [laughter] We... so we have various
32 statements in the curatorial selection database, so that doesn't really, that, it was
33 actually started out as a temporary system for this project, there's no, yeah, we
34 don't really have rights statements against anything. Our rights system is
35 actually predicated on fully executed contracts going in, because ultimately, it's
36 actually a royalty payment system. But we have a kind of contract type, so we
37 now have a contract type that says EU Orphan works, out of copyright, crown,
38 and various other sort of collections. But it's not across everything, and CID,
39 Collections Information Database doesn't have rights information in that sense.
40 It doesn't have rights statements. So that's again, part of another project, which
41 really around the rights system and the catalogue system, marrying those up and
42 also using rights statements or something, because our head of data, he's quite,
43 he's involved with British Standards Institute, and yeah, loves all that stuff, so
44 in terms of kind of, we're, we use IE... EIDR references and, you know, we
45 haven't been involved in like, the ARROW project or FORWARD or anything
46 like that, but, you know, the BFI has been by far the biggest contributor to the
47 FIAF cataloguing standards doc, so there was a bit of work we did on that, in
48 terms of, what kinds of information, rights information, you should be collecting,
49 and yeah, basically there's a meeting to be had fairly shortly on rights statements,
50 because I think, you know, we really need to start working on that to start getting
51 into our catalogue system.

52

53 I: Have you seen the Europeana Rights Statements?

54

1 R: Yes, yes. So that's one of the things I was looking at, because I was in touch
2 with, who was it?
3

4 I: Was it Roxanne Peters?
5

6 R: It was wasn't Roxanne Peters, it was... no, it was, I think I got in touch with Eye
7 Film Institute, and the German Film Institute, and somewhere else, and that was
8 about rights statements and orphans, and various other things, yeah, so they were
9 coming back saying about Europeana using the Rights Statements, and "Are you
10 going to use them?" And I was like, "Well, I'd love to yes, but it's not my
11 decision." But yeah, we really want to, because it's an area that everybody in the
12 organisation... everyone in the collections information team and Rights and
13 Contracts team are kind of going, we need, we really need to get [inaudible]
14 because it's big thing to do. Yeah.
15

16 I: Having used the EU IPO route, what were your thoughts on the process? That
17 can be thoughts, negatives, positives about the uses currently allowed by the
18 exception and database, so just your general thoughts.
19

20 R: Ok. I love the database, I love looking at it. I like to see how we're doing
21 compared to everyone else. Or not! I think the actual process of logging, because,
22 I mean, we thought about bulk, the bulk import, and we did play around a bit,
23 internally, about how we would try to capture information from different
24 systems, because what we've actually done is, in the Collections Information
25 System, we have a grouping which says... not potential orphan, but it's basically
26 orphan but not registered orphan, and then when we actually get to registration,
27 it then changes to EU registered, and we have a grouping for UK registered but
28 we haven't done that yet. And that also then gets set up in the right system,
29 accordingly. In terms of actual upload of information, so we didn't do the bulk
30 one because at the training session I went to in Alicante, they were kind of like,
31 well, if it's thousands, then your bulk's good, bulk import's good, but if it's just
32 a few here and there, if it's say, under 500, they didn't really think it was worth
33 it. So, we went the individual logging route –
34

35 I: Ok
36

37 R: - which became quite quickly, a bit of a chore.
38

39 I: Yes, definitely!
40

41 R: Not all of the, yeah, not all of the fields necessarily kind of make complete sense
42 all the time...? Embedded works... also, I mean, because I know, probably,
43 really, most of the works we have registered really should be partial orphans,
44 and that's something I raised with, Gyta Berasnevicute, I think it was, about
45 the... what was it?... yeah, how you kind of flag something, because at the
46 moment it's just black and white, it's an orphan or it's not an orphan sort of
47 thing, or...
48

49 I: I think you can, there's a tickbox for partial orphan?
50

51 R: Ok, yes. There was something else, I think it was to do with, I need to remind
52 myself what the question was...
53

54 I: Is it multiple, so basically positives and negatives of using the EUIPO route. Oh
55 sorry, I thought you meant... questions in the process!

1
2 R: Yeah, it was just a question about...
3
4 I: They ask about multiple rightsholders, but it's not necessarily clear that they're
5 talking about underlying rights, it's more they're talking about joint ownership.
6 Is that what you mean?
7
8 R: I think that was, I think yeah, I was ...back and look at my notes again, the
9 specific questions I asked, and it was also... I mean the other questions I have
10 are more I suppose, not quite philosophical, they're not really of practical use
11 right now, that was mainly to do with unpublished works and differences in
12 national laws, what does that mean, and... but in terms of the actual, you know,
13 having a link there I think is really good, it's something we haven't managed to
14 quite get done here, is that obviously none of our orphans are currently available
15 to view outside of the UK or Ireland, we want to get a playlist on to YouTube,
16 and then put those links on to the EU IPO site, so everyone can see them. And...
17 yeah, I think if there was an easier way to do sort of automated, upload of
18 information, straight from our system, because in effect you do this research,
19 and you find out all this information, but the only stuff they need, really, is the
20 kind of core record from our main catalogue. In a way you feel a bit weird,
21 having to put all this stuff [inaudible].
22
23 I: Yeah, I guess they're kind of relying on you keeping your records should
24 anything, eventually –
25
26 R: Yeah, it's a kind of, a good faith, you know, but I think we'd, yeah, we would
27 like to have that option to be able to in effect just click a button. And it'll all just
28 go.
29
30 I: Yeah, and in terms of, did you feel, I mean you were doing like a pretty
31 exhaustive search anyway, but do you feel that the EU IPO using the database
32 as a slightly more light-touch mechanism than the IPO process for the licensing
33 scheme?
34
35 R: Yes, although I think, yeah, as you were saying, I think the diligent search we're
36 doing is at the moment, I don't think we would make any distinction between
37 whether we were going the IPO route or the EU route, but certainly I've always
38 taken it that the EU with a little less onus than the UK one.
39
40 I: Because we're having the discussion at the moment within EnDOW that, we
41 think it's fairly clear from the UK perspective, the way it's been enacted that you
42 don't have to search every single source in the guidance, basically, whereas,
43 some of the other EU members, because there's a difference between a
44 reasonable... there's a difference between reasonable and good faith and
45 basically the way Italy and Ger... is it Italy and the Netherlands or is it Italy and
46 Germany? The way they're interpreting it at the moment, Italy in particular, is
47 that it has to be exhaustive.
48
49 R: Oh really?
50
51 I: There's no other... which is just unbearable, but, if that's the interpretation of
52 the wording, then that's...
53
54 R: Yeah, because UK, I think it's reasonable, isn't it?
55

1 I: I think so, the, so Ronan's highlighted the UK, the IPO have used both
2 terminology, and he has questioned the IPO and they've basically just said, no,
3 we mean, whatever you think is appropriate.
4

5 R: Ok [laughter].
6

7 I: Based on, like, collections knowledge, professional knowledge, what you think
8 is an appropriate source.
9

10 R: I mean I did...I haven't actually done the OWLS one, but I did kind of do a
11 dummy run, and I haven't looked on it for a while, yeah, but for film works,
12 audiovisual works, half the rights don't make sense. And it was just, why've
13 you... I just couldn't understand the way it was trying to push you down certain
14 routes, and the cost is prohibitive, most of the time. I think online is probably
15 doable, but...
16

17 I: Screenings are huge...
18

19 R: Yeah, screenings are, and I mean, DVD –
20

21 I: I can't get over –
22

23 R: I sort of took that back to everyone here and they just looked at me, "What the
24 hell, no-one's going to do that." Which is a real shame, and I don't think many
25 people wanted to really engage with them, certainly from the film side on
26 providing them with information that would help them come up with a sensible
27 pricing model, which was also a shame, really. And I hope, you know, Margaret
28 Haig got in touch with me quite recently going, "Are you guys going to make
29 any applications?" And I feel like we should just put five through and [inaudible]
30 it wouldn't cost you very much to do that online, just to show willing, but then
31 you might think well, five might be more pathetic than just one. But obviously
32 there is, quite a big question has to be put in terms of, all these people were
33 lobbying for it, BFI was lobbying for it, and we haven't done anything with it.
34 We really should.
35

36 I: I kind of hope that, as a system, I don't think it works in its current format, so if
37 people aren't using it, it might persuade the IPO to become more responsive to,
38 like a, an annual, or a bulk licence, rather than doing them individually, but
39 whether they'll actually ever move on that, I don't know.
40

41 R: I suppose, we asked them about that in terms of discount rates or something if,
42 for bulk, but in terms of, like, big collections, yeah, they surely have to do
43 something. And the other thing about the EU, the scope of the EU one is it
44 doesn't allow for screenings, which is... no, it doesn't, does it, which is crazy.
45 And, yeah, because that's really annoying, I remember when talking to the
46 partner archives about that, what does it cover and what doesn't it cover, and
47 they all just went, ffffffft, if you're going to have to pay to do a screening of a
48 film that you would have just screened anyway...like?! That doesn't make any
49 sense. So yeah, I think, just as a kind of end-to-end process it's been kind of
50 interesting and enjoyable doing the EU stuff, and I haven't actually followed up
51 on what other kind of changes they've made to the system, because I remember
52 them saying quite a few things about what they wanted to try and do on a sort of
53 technology front. To improve it. And obviously, again, it's like, what's going to
54 happen in two years' time?
55

1 I: Mhmm.
2
3 R: I just get this impression that, like, my account will just be blocked and I'll never
4 be able to get on there again! [inaudible] [laughter]. And it'll just be horrible,
5 and whether, I don't know whether the IPO will... how that'll work. This is not
6 the most important thing out of everything but, it's kind of –
7
8 I: Really, really low down the list of priorities...
9
10 R: Yeah.
11
12 I: And do you feel that engaging with the orphan works process has changed the
13 way that you do diligence, or is it more that it's just formalised what you were
14 already doing?
15
16 R: I think it's... a bit of both really, I think it has formalised what we're doing, I
17 also think it gives a bit more, actual sort of more helpful structure, in terms of
18 talking with colleagues about, what this thing is, what it allows you to do and
19 why you have to do XYZ, so it's been quite a good framework in terms of having
20 more conversations around rights. and there's one of the reasons, you know to
21 do the guidance document, and actually spell out who film authors are, because
22 at the moment, we're just making it up, "Oh well, it's this person, or that person,"
23 how long copyright lasts and you know, not everyone knew it was the whole 70
24 year thing, so it was quite a good sort of springboard for more discussion. And
25 yeah, in a way it formalised within Rights and Contracts at least, kind of what
26 we'd been doing already, but I think it also allowed us to pay some more
27 attention to the resources we were using and also be a bit more kind of... what's
28 the word? Inventive, or things like a Facebook page, or just trying to find slightly
29 oblique ways of getting in, getting bits of information. And, so I still kind of
30 want to make a bit more of a point about that skill, rights research skill, detective
31 work skill, as a something that should be recognised as a skill.
32
33 I: Yeah
34
35 R: And... it's almost like you should have a certificate for rights research.
36
37 I: Yes, uh-huh!
38
39 R: So, for me it's kind of brought quite a few things together, in terms of current,
40 you know, existing practice and new practice, as well as a kind of copyright
41 awareness, kind of tool, it's been quite handy. But most people, I mean they
42 know me now, they just roll their eyes when I say orphans, "Oh, Annie and her
43 orphans again," no one's started singing to me though. But yeah. [laughter]. But
44 to me it was, just like, because this project started when it did, and we knew this
45 was coming down the line, "Ok, this is a really interesting time to start doing a
46 mass digitisation project." And you know, most of us didn't even have a clue
47 that this was coming in, so it was like, ok, how can we, you know, how can we
48 position ourselves, so we're kind of prepared for it, and so for me that was just
49 interesting and again it's something I'll probably take away and think a bit more
50 about what, you know, what the impact really was.
51
52 I: Yeah, and if we didn't have the Orphan Works Licensing Scheme, or the
53 exception and database, Unlocking Film Heritage would have gone ahead
54 anyway, and the orphan works would have been made available anyway?
55

1 R: Yes.
2
3 I: Just under a risk –
4
5 R: Just under a risk –
6
7 I: - assessed basis. But going forward now, with the scheme in place, and because
8 you're already using the database, would you say that you're happy to continue
9 using that system? In future projects?
10
11 R: Yeah, yes. Absolutely. In fact, we want to increase it a bit more, and it's really
12 why, I mean, for the, yeah, for the EU side, I'm hoping we're going to take a bit
13 more of a sort of by collection, collection-focus rather than just all this stuff, so
14 we can, and you know, say with the EnDOW platform, that would be a really
15 great way to be able to go, you know, ok, so there's a particular collection I have
16 in mind, which I think would be a fascinating thing to use, it's a mixture of
17 fiction and non-fiction, it's quite early, there's some really interesting stuff in
18 there and I want to see what happens, because there is someone who's potentially
19 claiming it, but I don't... believe them [laughter] so I just want to test this out.
20 So I'm hoping, again it's just one of those things where, sort of, making the most
21 of the successes and engagement that we've had, with the EU IPO office, and
22 other EU archives, and building on that as much as possible, as a kind of, you
23 know, profile for the organisation as well as just engagement with peers and
24 colleagues, plus, just the information that you're gathering all the times as you're
25 doing this is good. And new relationships, because, I mean, finding either new
26 rightsholders or families or whoever, who are then, people who want us to do
27 more stuff with their films, stuff that we already have in the archive that they
28 didn't realise we had, you know, all those kinds of things, so it all builds a lovely
29 positive picture of what we're about. Yes.
30
31 I: Yes. Good, good. And moving, like, giving the 100,000 tape digitisation that's
32 coming up, do you have suggestions for technical or regulatory solutions for
33 putting orphan works online, in addition to what we already have, or maybe
34 replacing what we already have, or are you quite happy at the moment to go
35 ahead with the, I guess Brexit plays a role in that as well.
36
37 R: Yeah...
38
39 I: I guess, in a what-if scenario kind of way, you could say, you do lose access to
40 the database, what –
41
42 R: Oh, so if we lost it, so the exception would still stand, it's in UK law already,
43 yes, because it's a Directive... so, in terms of, I mean in my head I would sort
44 of think, "Oh, well the IPO will just sort of have a..."
45
46 I: Create a website for us?
47
48 R: Yeah, just have that bit there, and in effect just copy it from what the EU IPO
49 already does. And then just allow us to carry on in that way. In terms of, I
50 suppose, for film and TV works, it's, the biggest thing really is the layering of
51 rights, and just, really the reality that an awful lot of these are not going to be
52 fully orphan, and what to do about that. So, I think I've seen your next question
53 and it talks about ECL, sorry! Very well-structured! [laughter]
54
55 I: Yeah.

1
2 R: ECLs, and also with out-of-commerce, I mean if that comes in, and really, you
3 know, what is out-of-commerce? To what percent there'll be an overlap between
4 out-of-commerce and orphan, and you know the definition of out-of-commerce
5 so far, I find really does my head in at the moment, and for the AV sector, just
6 the lack of any real collective mechanisms for anything.
7
8 I: So, you don't see it as a realistic proposition within the UK, anyway, like an
9 ECL for –
10
11 R: The only thing, and we have had sort of early discussion, you should speak to
12 Richard Patterson, probably, but in terms of out-of-commerce works, ERA was
13 the sort of first thought –
14
15 I: Actually, I do remember Richard talking about that, I think last year or the year
16 before. Although I guess the French ruling, is kind of, knocked out-of-commerce
17 on its backside a wee bit. Although, I mean the commission have still put it in
18 the paper in the knowledge economy so I guess, they're still considering it, and
19 it's whether they can do anything with it before we leave...
20
21 R: [laughter] I mean, we did think about the ERA thing, but that would... we
22 actually seemed to get a more positive response from, say, actually going down
23 a licensing route with, you know, having discussions with the big rightsholders,
24 having discussions with performing rights, and just doing it kind of how we've
25 been doing it already.
26
27 I: Yeah.
28
29 R: You know, I don't know, I just think in terms of setting up anything like an ECL,
30 when you haven't even really got a CMO, would just take forever. So maybe in
31 20 years' time there might be something up and running! Because I mean, I come
32 from a collecting society background, it's where I started, and, so in terms of
33 ease of being collecting societies for particular subject matter, or collecting
34 societies for particular rights, and for AV I just think, where would you start? I
35 know they list Film Bank, and MPLC on the IPO website as, actually it lists them
36 as collecting societies, which I find a bit odd, because to my mind they're not.
37 The licenses, well, I don't know, they're not like membership organisations like
38 DACS or ALCS or PRS or anything like that, so it doesn't really make sense to
39 me. And I think the industry, I doubt, is very behind it, I think the industry,
40 everyone loves the infinite divisions and divisions and divisions of rights, and
41 they just create more and more and more of them, and call them different silly
42 names, and no one really knows what you mean when you say, and you know,
43 BBC will call it something, and Channel Four will call it something different,
44 and you're going, "What is it?" You know, I no longer really know how to define
45 something I just watched on my telly, like, "What is this, I don't know!" And in
46 terms of that, because you could end up with bodies who are going to be like,
47 "We're going to collect for this particular VOD right," and you're going, "No,
48 no, no, no." I don't know. So, unless the industry was to back it and really throw
49 lots of money at it and push it through, I just can't see how it would happen for
50 AV, sadly. Other than, you know, ERA's the only thing, that's there, and
51 particularly in the educational, research, archive, private use kind of sphere,
52 where you know, as one person you sort of move from, in this activity, because
53 I'm a student, and therefore I benefit from the ERA license, and I might benefit
54 from an exception here, and then I get to this point and, you know, you kind of
55 have this arc of uses that's kind of really in the same, you know, you're either a

1 student or you're a private individual, or you're an academic and that kind of,
2 your personal interaction with uses and copyright which change, and sometimes
3 it doesn't really make sense that at one point, suddenly it cuts off and you're
4 having to pay out, or just [inaudible], or infringe.
5

6 I: Yeah. So the other, I mean apart from ECL, people sort of hope Limitation on
7 Liability as a potential solution, so that would be alongside the exception, but
8 then a lot of the limitation on liability would depend on your definition, as an
9 organisation, so if you're, if you have a commercial arm, you might not
10 necessarily benefit from limitation on liability. That sort of thing. Then also, like,
11 best practices has worked more effectively in the States, obviously, because
12 they've got Fair Use, and Fair Dealing doesn't really allow for best practices,
13 but in terms of risk assessment, risk management, there probably is some scope
14 for producing guidelines of what to do if you're not going to use the, you know,
15 what's available to you.
16

17 R: Yeah. So...I mean I suppose in reality in effect we do, yeah, we do that anyway,
18 we take that sort of mixed approach, and it's only whether I think the orph- you
19 know, internally we'll have a, a sort of a best practice approach, and try to sort
20 of [inaudible] that a bit more. You know, the music thing would be an example,
21 where we've just gone, you know, we know that Sony owns stuff, we know
22 Warners own it, we know Universal own it and we're just not going to go and
23 bother them, and so far, they're not going to bother us. And, you know, just
24 having... the awareness there, as a potential issue, and you know, how to kind
25 of react to it if it kicks off. Again, I don't know enough about other sectors, but
26 particularly for music in film, if you can license an entire film, for worldwide
27 rights in perpetuity on a revenue share basis, and then you have to pay a ludicrous
28 amount of money on 30 seconds of music, I mean, that just strikes me as barmy.
29 That's how the licensing world works. So, I think, I mean expanding the
30 exception, I think generally the BFI would like expended exceptions anyway,
31 I'm sure most people would. Please!
32

33 I: Yeah, it's just how we convince...

34

35 R: Yeah. But also just the definitions of exceptions, you know, how things are
36 defined, the lack of – I think we got some advice on dedicated terminals, you
37 know, how far you can stretch the scope, but also just, this endless thing of
38 exceptions coming in and you finally go "Yay, we've got this!" and then you're
39 immediately, what you want to do is beyond that scope. Or, it's just – I always
40 find, particularly with how the UK brings in EU Directives is in the worst
41 possible way, on all sides, it's really just nasty, it's horrible. And you really wish
42 they didn't do it like that. I mean, is the CDPA, apparently the longest, one of
43 the longest pieces of legislation?
44

45 I: Yeah, it's, oh someone referred to it, I think it was in the 1709 blog, yesterday
46 or the day before, as like a, like a Frankenstein's Monster piece of legislation,
47 because it's just had so many bits tacked on to it, so they were kind of saying in
48 the wake of Brexit we could have our fingers crossed for a new Copyright Act –
49

50 R: Oh yeah, we could start again –

51

52 I: But whether, you know, how far down the list of priorities, will they actually
53 ever reach us, before, you know, the apocalypse arrives.
54

55 R: Oh god.

1
2 I: Sorry, it's so depressing!
3
4 R: No, I know! Yesterday, I was really... oh. Yeah, I mean, the thing is, it's kind
5 of, you think there must be someone with common sense, can look at institutions,
6 you know, what do you do, all the time, and what do you never, ever clear, ok.
7 Do you ever get in to trouble with that? But you know, obviously, you put it in
8 black and white it becomes, "Oh no, you can't allow that."
9
10 I: I think a lot of it is, like sharing practice, so I think what you've been able to do,
11 working with the regional film and television archives and, like, that sort of, even
12 I've noticed it over the course of my PhD, like, the more I talk about it, I have
13 managed to convince, like, a couple of institutions to take more risks, and I feel
14 like, if that happens every year you're convincing another handful and another
15 handful it will start to build up momentum at some point.
16
17 R: And I suppose it's then having, yeah, being able to have that conversation and
18 awareness that that's happening across sectors. Yeah, it's certainly, I think, I'm
19 hoping with this, we've got this film archives copyright group that's in its
20 infancy, so that's obviously something that would be good to try and develop a
21 bit more.
22
23 I: Maybe we can talk about the cataloguing side because we haven't really covered
24 that yet, but I was thinking, do you want to stop for a break? We have spoken
25 for two and three quarters of an hour! It's gone in very quickly! Thank you so
26 much!
27
28 R: No, it's just, I could talk about this forever, really. But, yeah, have a bit of
29 breather, and there's a few other bits I was going to give you. It turns out, on the
30 cataloguing I'm not sure how useful I'll be.
31
32 I: I think also, talking about how you worked with regional archives as well would
33 be good, because I have spoken to East Anglian Film Archive, Jane and Angela,
34 and that was, I actually spoke to them, I think it was about two years ago, and
35 I've never really done anything with the interview because I was waiting on
36 getting to speak to you, fingers crossed, I will get to speak to Annie at some
37 point, I'll get an interview, it'll be fine. But yeah, it would be, I've had a read
38 through the interview, and a lot of what they've said is similar to what you've
39 said –
40
41 R: That's good.
42
43 I: I think, also, I think how they've, the way they've described it, it was in terms
44 of, the first wave, the second wave and the third wave –
45
46 R: Oh yeah –
47
48 I: So, obviously things that they did in the first wave, they were able to go back
49 and think about them and then do things differently in the second and third, so I
50 think it would be useful to tease that out a wee bit.
51
52 R: Yeah, cool.
53
54 I: Okeydoke. Would you like a tea or a coffee?
55

1 ***** COFFEE BREAK *****

2

3 I: Yeah, so it's really, we've already covered project impetus basically, really, so
4 it was just in terms of, so obviously, you were approaching the regional film
5 archives, and the external, sort of commercial bodies, and was that a condition
6 of the lottery funding that you were distributing? Or was that what you had bid
7 for? Basically, how that bid came about.

8

9 R: It's what we, right, yeah, so the project was devised and as a lottery distributor,
10 there's a thing called Section 27 in the Lottery Act, which we have to get DCMS
11 to sign off on to allow the BFI to in effect take lottery money itself.

12

13 I: Sure.

14

15 R: So, the whole bid was designed to, always designed to be half, you know the
16 five thousand from the BFI itself and the five thousand from other organisations,
17 and so an application form was done, with all the guidance on it, about what this
18 whole project was, and then calling for submissions, applications to come in
19 from regional archives. They've, it was actually I think defined as significant
20 collections, and when we did an earlier project, the SHUK, Screen Heritage UK
21 Project that was where these particular collections were defined as significant
22 collections to the UK. So that was, all the regional archives, Imperial War
23 Museum was another one, I think [Annivum?] was in there as well, so they were
24 all invited to apply for funding, and there was tranches of money each time, three
25 different applications, and then there was an assessment, so I was involved in
26 the assessments, in terms of doing a rights assessment on, you know, what
27 information they were telling us, all the regional archives, I don't know if, now
28 I can't remember, if we asked the commercial rightsholders for this, but they had
29 to, obviously give some information about their approach to rights clearance,
30 collections that they might sort of say were very easy or what they thought the
31 problems might be in there, they had their own risk register obviously, you know,
32 big risk register across the whole programme, and they were asked to apply on
33 the basis of the curatorial themes, 56 of them. Which is somewhere.... Yes. And
34 then, so, they'd get marked, and then there was a panel, there was also a
35 curatorial board or advisory board I think, right at the very start, which was also
36 helpful, about actually defining these themes, and then on the basis of the mark
37 of the application, they'd be awarded a grant, the grant was purely for
38 digitisation work, so the BFI as well getting engagement with all these
39 organisations, we also set up a framework partnership with a number of
40 facilities/houses to set up particular rates for this kind of work, because
41 obviously it's going to be big. So, most people applying would then have to go
42 through one of these particular setup, framework partners as well. And again,
43 depending on the organisation, sometimes it would actual be the framework
44 partner who was doing much more of the delivery directly to us, rather than the
45 applicant themselves. There were one or two where there would be a kind of, a
46 bit of an alarm against a particular group of films, the one big organisation we
47 didn't really get anywhere with, or I think probably right at the beginning we
48 just knew we weren't going to get anywhere with them was BBC. Just because
49 you can't really get VOD licensing out of them because of iPlayer. And that was
50 actually, in terms of communication with partners, we didn't really make that
51 very clear, so I think East Anglia had selected a whole bunch of BBC stuff, and
52 I do remember marking on their application going, "Wow, are you actually in
53 discussion with them about this because if you're going to get a license with
54 them that would be amazing," but no actually they wouldn't, they couldn't. So,
55 and we would sort of flag certain things to be aware of, and I think we learned

1 after the first round, for instance we got some TV material in, and we were quite
2 slow on that whole, the whole challenge around putting TV material on for free,
3 without performers' rights sorted out. So, yeah, that was something that we sort
4 of flagged up later and also we kind of, we made more of effort to flag things up
5 about, "Please note" about music and things like that. So we were kind of
6 learning as we went. And, in terms of rightsholders, again actually, I think
7 rightsholders, maybe find it a bit trickier, the whole, what we were doing.
8 Because quite a few, one of the criteria being that it wasn't meant to already be
9 available somewhere, now that rule got fudged a bit along the way. And also,
10 the thing you couldn't already necessary know was, we obviously hold lots, the
11 vast majority of the archive we don't have any rights in, we think, yes, great, this
12 should be digitised because it's not out there already, and then it actually
13 transpires that the rightsholder is doing exactly the same thing. So we did have
14 a couple of scenarios where that came up, or there was, they'd be slightly put
15 out by the fact that we were kind of doing it and hadn't really told them we were
16 doing it. Because, particularly with the commercial rightsholders, of course, we
17 were as well as getting them to apply for stuff, we were also going to them to
18 license for stuff that we were, from our archives, so sometimes that would get a
19 bit confusing, because the terms weren't always exactly the same, if we were
20 clearing. And just, mainly because, if they were getting funded by us, there was
21 this recruitment position of 10%, but if we were doing it, there was no
22 recruitment position.

23

24 I: Ah, right, ok.

25

26 R: So, yeah, sometimes that just got a bit confusing for everybody, what the
27 difference was.

28

29 I: Sure. Would it be possible to see the risk registers?

30

31 R: I will ask. So we have –

32

33 I: Sure, I can sign a, like a data confidentiality agreement, anything like that, and
34 it's the sort thing, I would only quote in general terms, like I can generalise. Or,
35 I can clear a quote sort of thing.

36

37 R: Yeah, I will, so we have a colleague Sue Todd, who's our main, I don't know
38 what her job title is, I think it's relationships manager or something, it always
39 sounds bit odd, but she's the main person for all the regional and national
40 archives, and their relationship with the BFI, so all their reporting goes in to her,
41 and then we'll be updated, so I can find out. I mean, I did, it was something we
42 discussed internally, partly for the copyright group but also just generally for the
43 project, we're going to get all this information in, this reporting in, but what are
44 we actually going to do with it? And I'm particularly keen to try and use, you
45 know, the information and the lessons learned from that, you know, what would
46 everyone think would be a risk, and actually what really was.

47

48 I: Well, whatever I produce for the PhD or for the EnDOW project, if that would
49 be useful as well to use, or if you want to build on top of that –

50

51 R: Yeah.

52

53 I: I'd be happy to hand it over.

54

55 R: Brilliant.

1
2 I: We're both doing it anyway, yeah.
3
4 R: But yeah, have a chat with her, and yeah...
5
6 I: And did you find, so I'm thinking, just in terms of the Codebreakers project,
7 when the Wellcome talked about what they wanted to do in terms of risk, and
8 they did have, a bit of a period where they had to, sort of, reassure the partners
9 that it was going to be fine, and they did eventually end up indemnifying all of
10 them, and obviously it's the other way round in this project, but did you find, the
11 partner archives, in general were they quite risk averse, or were some more risk
12 averse than others, and maybe needed a bit more persuading, a bit more
13 reassurance?
14
15 R: I would say in general, all of them are more risk averse than us. I'm trying to
16 think now, I've had more in depth discussions on particular titles with say
17 National Screen Archive of Wales, East Anglia, Yorkshire... and so that, it was,
18 this was another thing actually, I think it was more of a communications or the
19 fact that people at the BFI weren't necessarily comfortable making it known that
20 we were taking this 1945 rule, and my feeling, you know, to be really in
21 partnership, and people were asking me for advice on something, which, I was
22 going, "Well, we're just not clearing that." And it would be the same production
23 company and everything, a big question over Pathe material, because everyone
24 keeps asking why on earth are we still clearing Pathe, half the time, and everyone
25 goes, everybody knows why, and you know, you get the sort of confusion
26 between access to materials and stuff and all that... I think... I'm not sure if
27 anyone's necessarily moved their position on risk, I also think that, I doubt very
28 much whether most of them actually have anything explicit about how they treat
29 this. Probably the most noticeable difference I think, was their general caution
30 around damaging relationships with donors and families. And we, we've had
31 that, but it actually, our biggest thing was always copyright. And that's partly to
32 with organisational structure in terms of the curatorial team are the first port of
33 call for donors. Rights and Contracts, obviously rightsholders. But for smaller
34 archives, of course, you're doing everything. And, the one, actually, that local
35 history group that ripped stuff off the player, that was a Welsh archive title, and
36 it was the family who got in touch with the Welsh archive –
37
38 I: Ah, right.
39
40 R: ...who then came to us going, sort this out quickly, because they're really not
41 happy about it. There were quite, I mean, I remember there were quite a few
42 issues raised right at the beginning, we had these sort of big group meetings, all
43 the partners. Unsurprising, but the anxiety around publishing online on Video
44 On Demand platforms and how secure it was, and is, you can't really say, all
45 you can say is, well, we have a system in place, we have protection measures,
46 but everybody knows, you can get round everything. So, you know, there's only
47 so much you could really do to try and sort of alleviate any anxiety around that.
48 I think, I mean, I'm hoping that we'll get the opportunity, we haven't had an
49 opportunity, now, towards the end of the project, to actually all meet up and
50 really kind of have the sort of lessons learned discussion with everybody. I mean,
51 they've been asked to sort of write in, a sort of main comments, answering
52 certain questions, but I think probably a round table would be a really good thing
53 to do, to actually really be able to be, yeah, upfront about things you might not
54 want to put in black and white.
55

1 I: I was going to ask, as well, whether, did any, so I've got two questions, did any
2 sensitivity or privacy issues come up with any of the films that were selected?
3 Particularly with the partner archives? And then, the other one was, obviously at
4 some point they're transferring the metadata to you, and then the films are
5 coming from the, the people that have been doing the transfer, but were they, so
6 at that point was, so if they'd identified orphans, were you then entering them
7 on the database through the BFI account? Or were you asking them to enter their
8 own orphans on the EU database?
9

10 R: On the EU database. So, the Northern Ireland Screen entered their own orphans
11 onto the database, there was a whole issue around that, that I have deliberately
12 not opened up, in terms of, sublicensing orphans. Which is obviously not
13 covered by the Directive?
14

15 I: Not by the EU –
16

17 R: And nor is it covered by the UK – I don't think?
18

19 I: Margaret Haig has said that you can?
20

21 R: Really? OK.
22

23 I: Yeah, but I think, but then I also hear Tim say that you can't, and then I've read
24 Margaret Haig say that you can, and when I go back to the legislation I find it
25 difficult to parse out whether you can or can't. But that's what she said at the
26 Digital Catapult event.
27

28 R: Oh, Ok, so [inaudible] went through EU IPO anyway, so yeah, we haven't made
29 any, other than the actual metadata on the film work itself and the synopsis, and
30 the keywords, and all that, which obviously has come back into the collections
31 information database, so there's a whole kind of template spreadsheet about how
32 it works in terms of rights information, for the regional archives, we haven't
33 really done anything on, putting any kind of rights statement or anything against
34 that, because most of those, the regional archives were, for each batch, doing
35 100, 200 films, we haven't even recorded them title by title in our rights system,
36 it's just, at the moment, a spreadsheet added to the deal record. In, again, in an
37 ideal world, if we had more resource, I would rather we actually put everything
38 in. But also, that in a way, raised an interesting thing for us in terms of materials
39 that were coming in which were saying and being licensed by a regional archive,
40 to us, where we would say, actually it's out of copyright. And so, probably
41 wouldn't live in the system that I look after. So those kind of things about how
42 actually, you've got different approaches to clearances, different approaches to
43 copyright, out of copyright, orphans, you know, where should that information
44 ultimately live. They have their catalogue system, we have ours, so there's sort
45 of things which if we'd had more time, more money, more people, we could
46 have gone in to in a bit more detail.
47

48 I: Fair enough.
49

50 R: Also, in terms of.... No. But yeah.
51

52 I: Yeah, that's fair enough. And in terms of, yeah, so the final bit, I was just going
53 to ask about was the cataloguing process, and the metadata, and maybe how that
54 integrated with rights clearance and digitisation? OR at least, what you can tell
55 me about that.

1
2 R: Yeah, it might be, I mean, I can certainly ask my colleague, Lucy Wales, who
3 will be the person to talk to about metadata and all that side of it. So, I will give
4 you... so this is the general kind of, I think this is the most up to date version of
5 technical standards and deliverables, so this is, I mean, as a sort of benefit of the
6 project, establishing technical standards, kind of in my mind, it would be lovely
7 to have, to be able to do something like that for rights clearance in the same way.
8 And there's quite a lot here which you can get into about technical metadata,
9 descriptive, yeah –
10
11 I: Descriptive, yeah.
12
13 R: And there was a series of these sort of spreadsheets that were sent out that they
14 had to fill in, with specific information, including all sorts of map references for
15 the map and all that, which some people didn't like. In fact, again, archives were
16 much more engaged in this side of things, not surprised, than commercial rights.
17 What? [Laughter]. Yes, you do. So in terms of the grants, you know, say a
18 hundred thousand pounds or something, the grant, the payment of that would be
19 done, say, in three batches, dependent on their delivery to us, of a certain number
20 of their film digitised. Along with metadata. And the files. The [inaudible] files
21 and the LTO files, and then there was a whole sort of QC process that had to
22 happen. And the, what it, the other strand of Unlocking Film Heritage is the, I
23 think it's called National Catalogue, or the UK Filmography. And there'll be
24 stuff coming out later in the summer about this, I mean UK Filmography is the
25 distributors definitive catalogue I suppose, of UK feature films, I think. So that's
26 the beginning of a sort of, a bigger piece of the BFI to be lead data body for
27 moving image in all it's forms. But obviously, specifically for UK film. So the,
28 obviously it's a lot of work going on in CID, the Collections Information
29 database, to add in, or rather migrate enriched metadata into that, and then
30 obviously that informs things like the map, how you search for things. And the
31 UK Filmography will be, I've seen a little bit of it, it's amazing, but yes, for sort
32 of data nuts and film fans, it's just going to be, they'll probably lose it. It's so
33 exciting. In terms of actually, I don't think there was any particular sort of
34 correlation with us on that, although you, it probably would be quite interesting
35 to find out again, if you have time, about, I don't know, anything about
36 underlying rights will get picked up. I mean, one if the things, because of the
37 volume and the timings in all of this, is quite often stuff was being digitised
38 blind. So if you had a very limited synopsis, very little information, you wouldn't
39 necessarily know actually what it was until it was live, pretty much. And we did
40 have a few instances where something went up and actually it turned out there
41 was no sound, and it's like, "Take it down right now," it was awful.
42
43 It doesn't really make any sense. Or, because we were digitising sort of full
44 works, I think the regional archives commented on this, quite recently, that, you
45 know, you might get so and so's thirty minute piece, and most of it's awful, but
46 actually there's a ten minute jewel in the middle of it. And actually, they would
47 just rather digitise that, and make that available, and not have to you know spend
48 money on all these other bits around it.
49
50 I: Yeah.
51
52 R: So in terms of, I mean certainly things like production companies, we had to fill
53 that in, but we didn't really focus on, kind of authors, or actually sort of real
54 copyright specific information, again, that might be something to look at, next
55 time.

1
2 I: It's been brought up in EnDOW because the, like, Lucie and, I've forgotten her
3 name, that's terrible, at IvIR, particularly the Eye Institute, in Amsterdam, the
4 works that they made available on the database, they're like, we know for a fact
5 that they didn't consider underlying rights –
6
7 R: Oh....
8
9 I: - and they're like, it's really, they're on very dangerous grounds there, and like,
10 partly I know, in the eyes of the law, yes, they are, but then at the same time, I'm
11 like, I don't see that as a being a huge risk, most of the time, unless, the
12 underlying right is a really famous play or really famous novel or whatever,
13 famous music. A lot of the time.
14
15 R: Yeah, I think we take, yeah, pretty much that view. And, yeah, again, unless
16 it's... for a lot of these things there's also, there's a sort of, the doubt, there's the
17 reasonable doubt, or there, you know, it may well all have been cleared, and
18 actually depending on the film, depending who's involved, it might be a... well,
19 nothing was ever signed, it was people chatting in a bar and they made this film
20 and that's it, and no one knows who owns it. Or, yeah, I don't know, it's kind
21 of, but I suppose it goes back to the question of resource, and you know, if you
22 want to spend, if you want to resource finding out about a particular building
23 that was filmed in a film and really getting into family histories of someone
24 walking across a street, and this and that and that, then, why not get into the
25 detail of all the underlying rights? But it's just not something that... it would be
26 great to see an organisation actually go, "Yes, we're going to really go to town
27 on this!" Money's no object to find somebody. Give us a chunk of money and
28 let's do this. Because the thing, I just think, in a way it's, again, for large
29 institutions, memory institutions, when you're thinking about legacy, it's kind
30 of the more times your just going to put it off and put it off and put it off, fudge
31 it, fudge it, fudge it: ultimately, who are you helping? And, actually, don't you
32 want to get the most information you can get?
33
34 I: Definitely, yeah.
35
36 R: And is it just a mindset thing? I don't know, because copyright never gets, you
37 know, it's not an area that gets funded in and of itself, research and clearance
38 and stuff.
39
40 I: And a lot of the time, as well, depending on the institution, copyright is like, the
41 task that gets handed off to like, the newest or the youngest recruit, sort of thing,
42 it's one of those tasks that nobody wants to touch, so someone gets dumped with
43 it, almost. So it has that, it just, like, very unfairly it has that aura about it.
44
45 R: Yeah, it's...telling tales, on my first job, one of our clients twice a year you'd
46 have this mad flurry of clearances for their catalogues, showing a comparative
47 work, or something, and it was always interns who just didn't know, you know,
48 they'd just been told.....and they didn't know. You know, you've got a big
49 company, you've been around for ages, you should know this by now.
50
51 I: You've got loads of money, it's fine!
52
53 R: Exactly, yes. But the other thing with... oh god, it's gone. It was just, it was on
54 the same theme. Oh that was it, yes. Again, I think it's a sort of sector wide
55 approach or mentality, you know, I mean, we have no excuse for film, because

1 copyright predates film by quite a long time, and also, yeah, there was a call for
2 papers, for what was it, Collections and Communities, or something, I can't
3 remember if it's National Archives, quite a big sounding conference.
4

5 I: Is that DCDC?

6

7 R: Yeah, that's it. It got sent round a while ago and I was quite interested, looking
8 down, and there was one on, it was about, something something something
9 "...and overcoming the obstacles of copyright." And I just kind of went, I would
10 just go there and give a paper, and say, "This title is just wrong." Stop it.
11

12 I: It's very leading as well.

13

14 R: It's very leading! And everyone always uses that, or.... When I joined the BFI,
15 like at all staff meetings no one ever mentioned copyright, no one ever
16 mentioned rights, for years, and they've gradually started to mention it, but it's
17 always, "Subject to copyright issues," "If we get over the copyright problem,"
18 "The problem with copyright," "The problem with digitisation," blah blah blah.
19 No! This is not very good for my morale! But just the fact that it's, it's almost
20 like people don't even think when they say it, it's kind of, it's just become a
21 thing you say – Copyright's an obstacle, a problem. I'm doing a paper here called
22 "The Record's Stuck, CHI's stuck in a rut," because you should've really got
23 over it by now. You should see it as something... it can be a challenge, yes, it
24 definitely is a challenge. But just don't always put it in that light. And try to start
25 thing about the value of it, quite aside from the commercial side, which, I was
26 on a course quite recently, talking about motivations for work, and I was with a
27 bunch of people who works in the arts, the charity sector, and I put myself in the
28 [] box, everybody looked at me in horror. They were just, "Why?!" Copyright,
29 you know, underpins the marketing, the distribution, the making of the stuff in
30 the first place, and I was like, "Stop bring so coy about it." But it just seems to
31 me that, yeah, in terms of, why is it that institutions, and is there an institution
32 out there, well, let's say, in the UK, who does actually see the value, and sees, I
33 mean I'd love to know, is there somewhere, this is the sort of vanguard
34 institutions who's really like, [on it].
35

36 I: I don't know. Maybe TNA.

37

38 R: Ok, yeah.

39

40 I: It's the one that I would pick, it seems to, at least, the people that I've met from
41 TNA seem to have generally a positive attitude towards it, particularly, is it,
42 Cathy Williamson? I think she organises the UKAD Forum, each year, and they
43 have talked about copyright in the past. But I think it is, it is definitely, and even
44 like I find in Scotland because I do work for the SCA in copyright, and I do a lot
45 of training session, and I'm still, even having done however many of the last
46 three years, I'm still coming across archivists that haven't even thought about it.
47 And when they do come into contact with it, it terrifies them, and it's just there's,
48 I don't know how to get over that initial shock.
49

50 R: Yeah.

51

52 I: And even presenting it, trying to do it, softly-softly, building up, it's still the
53 looks of horror on their faces at the end of it. There's no-
54

1 R: No, I don't know what the answer is. I think Naomi Korn has some pointers on
2 that.
3

4 I: Yeah, she does speak about it in a very positive light. That's true.
5

6 R: But yeah it's the sort of thing I try and do here, you know in a sort of small way,
7 hopefully trying to get it a bit more, just a bit more formalised and something
8 that becomes an induction. Because we don't actually get support here to educate
9 staff at all about copyright. And I sit there, and I go, "We're the lead body for
10 film in the UK," I shouldn't be saying this, and we don't do, there's no one
11 senior, even, you know, sort of championing it at all.
12

13 I: It's really just, is it skillset were doing training?
14

15 R: Yeah.
16

17 I: That was that commercial one?
18

19 R: Yeah, but they did the one with, was it BAFTA and UCL? Those visible rights
20 thing they did.
21

22 I: And then there was that KES International one as well. Those are the only two
23 that I've seen that are directly film-related.
24

25 R: I mean the KES thing, I went, it was interesting actually and Northern Ireland
26 Screen were there, because I remember sort of posting it round to everyone,
27 going, "Worth a look," the thing I found about the KES was, half the group was
28 BBC, and it was run by someone from the BBC, so it became a bit of a BBC
29 training session. To the point that actually one question, the person said I can't
30 answer this unless half of you leave the room. And it was like, "Well..."
31

32 I: Maybe run this internally and then run it externally?
33

34 [9 lines of transcript redacted at interviewees request]
35

36 R: Yeah, I think, you know, obviously we do a lot in terms of government
37 consultation and policy work, but that's much more industry-side, you know, I
38 think there's a space there for the film archive sector. I think other archive sector,
39 you know it's nowhere near as sophisticated, as evolved, as the library sector, I
40 think in terms of forums and discussion and general sort of awareness around
41 what's going on. Certainly that's my experience, that's why it would be good to,
42 at least I want to, lead on, to get the BFI to sort of, pull the sector up.
43

44 I: Yeah, definitely. I think as well, I can see that becoming more and more, like,
45 rights information, rights research, becoming more and more important as time
46 goes on, because I think, realistically, a lot of, so much focus, particularly in the
47 archive sector has been on cataloguing, descriptive standards, dealing with
48 cataloguing backlogs, a lot of that realistically can be done by volunteers, and
49 crowdsourcing, whereas rights research is the gateway to the stuff actually being
50 used, long-term, so it's almost as if you put that emphasis on it, against where
51 our priorities have traditionally been in the past, that's the sort of argument we
52 need to start making.
53

54 R: Yeah. There's two things have, just scenarios, was it a session, a conference in
55 York? This was the Film Archives UK Group, and I did one on orphans, and at

1 the end of kind of broke out into groups, it was all about trying to work out, sort
2 of, skills gaps, in archive professionals, and you could opt which group you
3 wanted to sit with. So, I was there as the copyright person, and then there was
4 someone as metadata, and everyone just went 'shoop.' [To metadata]. I had three
5 people sat with me, and I was trying to say, if you start sort of slipping copyright
6 in as sort of a metadata thing, that's one way to try and get people engaged in it.
7 And certainly here, that's kind of what I'm trying to do with our data geeks,
8 because it is a metadata thing as well. [] could peel back on that, because
9 everyone loves metadata. And the other thing was, I keep forgetting where I'm
10 going with the point. Sorry.

11

12 I: It's ok! We have been going for a long time. It is ten past five if you want to...

13

14 R: It'll come back to me, whatever it was.

15

16 I: I think, once I've gone through the transcript, if there's anything to follow-up
17 on, I'll let you know. And also, I'll have a look through all this material, and if
18 there's anything else. And also, if getting access to other things like the risk
19 registers require, like me signing agreement or anything, like I already have a
20 sample one that I can send through, but I'm sure you'll probably want to come
21 up with your own one. I'm happy to do that.

22

23 R: Okay, yeah. I've got other notes on here, if that's useful, I didn't do all of them.
24 There's no page numbers on this.

25

26 I: That's fine, I can work it out. Yes, perfect. So that's the risk sign-off format?

27

28 R: Yes, and these are my own benefits and lessons learnt, if you want to look at
29 those.

30

31 I: Yes, that's fantastic!

32

33 R: If there's any other things I can get on that front, on the metadata side if there is
34 the template doc, that would be useful.

35

36 I: And then, if it would be possible to query, I mean, I'll go through what you've
37 told me in terms of respondents, rightsholders works, repondents, orphans and
38 things like that, if I do have any questions around the data on the rights clearance
39 process itself, would it be ok to send those through and see whether it's possible
40 to query the database, for those?

41

42 R: Yeah, the EU IPO database or our database?

43

44 I: Your database.

45

46 R: The rights database, you'd need to come and look the... I mean I could show
47 you.

48

49 I: Yeah, if that's ok that would be great, but it's also, I would only ever be taking
50 aggregate numbers I wouldn't be anything from the database itself, if you know
51 what I mean. Just general, high level numbers. That sort of thing, we'd be
52 interested in. Okeydoke. And I might, in terms of numbers, resource costs, things
53 like that, you said I'd probably be better speaking to Emma?

54

1 R: So in terms of the actual diligent search, yeah, I can, I've asked her to try and
2 pull some things together anyway, now we're at the end of the project. I think,
3 yeah, on any more detailed stuff on diligent search, that kind of thing, yeah.
4
5 I: Ok, so yeah, I could maybe follow up with her on the phone. Yes.
6
7 [ENDS]
8
9

Appendix C: Survey Instrument



Copyright and Digitisation: Questionnaire Survey of UK Archive Services

Survey completion deadline:
Friday 12th December 2014 at 5pm

Research Statement (please read before completing the survey)

This survey aims to fill a significant gap in the current evidence base available to policy makers in this area, and to support further reform of copyright legislation in the future. Representatives of the UK Intellectual Property Office have publicly asked for more empirical evidence from the library and archive sectors on how copyright affects our work. This survey is the ideal opportunity to tell others about our experiences of digitisation and collate our responses to the law. Even if you have little or no experience of digitisation, this still counts as an important part of the research.

What is the purpose of the study?

The survey asks you for information about how the archive service you work for deals with copyright, with particular attention paid to digitisation projects (although experience of digitisation is not essential to undertake the survey). The survey data will be used to develop our understanding of how current UK copyright law affects the work of archivists. The data gathered will be used to lobby policy makers for more robust copyright exceptions for archives, libraries, galleries and museums, and to develop simple guidelines, policies and practices which will help the profession digitise more collections, and make more of them available online.

Why have I been chosen?

I have chosen you as a potential respondent to this survey because you work in an archive service within the United Kingdom. I have contacted you using details which were available on your institution website.

Do I have to take part?

Taking part in this survey is entirely voluntary; there is no obligation to respond. You may also withdraw at any stage without giving a reason.

What does the questionnaire contain?

The survey is broken down into sections: there are questions about the archive service you work for; previous or current digitisation projects you may have/may be engaged in; how you approach on-demand copying for users; details about rights holder and user behaviour (if you have these details available); and administrative and preservation digitisation. You can answer all of the questions or just a selection: your route through the survey is dependent on how much experience of digitisation you have. For this reason, the survey could take anywhere between 10 and 45 minutes to complete. I understand that this is a significant investment of time, and for this reason I am offering a range of incentives for taking part - on the final page of the survey, you can enter your contact details into the prize draw.

Will my taking part in this study be kept confidential?

The only information that identifies you individually is for the purposes of the prize draw. As the primary researcher, I will keep this information to administer the prize draw. After the survey has been completed, this information will be deleted, preserving your anonymity. If you want to remain entirely anonymous you can complete the survey without providing any identifying information, but you will not be entered into the prize draw. I also ask for two supplementary pieces of information, which may identify you: the name of your archive service, and a description of the collections you have digitised. When I create the dataset

from the survey responses, this information will be recorded as categorical data, and the service and collection will not be individually identifiable.

What will happen to the results of the research study?

The results of the research study will be written up in my PhD thesis, which is due to be submitted by September 2016. Some results will also be published in journal articles and on my personal blog, but again, these will never involve individual cases, only an aggregate of responses. The anonymised dataset will be kept in an open format and will be freely accessible to other practitioners and researchers, to encourage more research in this area. If you would like a copy of the dataset, the thesis, a relevant journal article or a summary of the survey results, this can also be arranged – just drop me an email. Research outputs will also be available via my website: www.create.ac.uk/archivesandcopyright.

Who is organising and funding the research?

This research is funded through my Arts and Humanities Research Council scholarship, one of the main national funders of academic research in the UK.

Who has reviewed the study?

Several people have helped me by reviewing and testing the survey; my supervisors, Prof. Ronan Deazley and Dr. Ian G Anderson, and several archivists. I have also sought and obtained permission to conduct the survey from the College of Social Science Research Ethics committee at University of Glasgow, who have reviewed each element of the survey in detail.

Contact for Further Information:

Victoria Stobo (PhD Researcher)

Victoria.Stobo@glasgow.ac.uk or 0141 330 7018

Room 503, CREATE, 10 The Square, University of Glasgow, Glasgow G12 8QQ

Prof. Ronan Deazley (PhD Supervisor)

Ronan.Deazley@glasgow.ac.uk

Dr. Ian G Anderson (PhD Supervisor)

Ian.G.Anderson@glasgow.ac.uk

If you have any concerns regarding the conduct of this research project, you can contact the College of Social Sciences Ethics Officer, Dr Muir Houston, at Muir.Houston@glasgow.ac.uk or at the following webpages: <http://www.gla.ac.uk/colleges/socialsciences/info/students/ethics/committee/> quoting application no. 400130245.

Contents of the Survey

Depending on your experience of digitisation, you may NOT have to complete all sections of the questionnaire.

Section 1:	Questions about the archive service you work for	5
	(4 questions)	
Section 2:	Questions about copyright law	6
	(2 questions)	
	<i>Logic Questions</i>	7
Section 3:	Questions about project-led digitisation and rights clearance	8
	(16 questions)	
	<i>Logic Question</i>	16
Section 4:	Questions about on-demand copying	17
	(6 questions)	
	<i>Logic Question</i>	20
Section 5:	Questions about administrative/preservation digitisation	21
	(4 questions)	
Section 6:	Questions about complaints, and near-miss scenarios	22
	(4 questions)	
Section 7:	Reasons for not digitising or copying collections	24
	(4 questions)	
Section 8:	Final Comments and prize draw details (optional)	25
	(1 question)	

Blank paper is included at the end of the survey, for any answers which could not be accommodated in the text box provided.

Section 1: Questions about the Archive Service you work for

- 1) Which archive service do you work for?

--

- 2) What is the total size of your collections, in shelf metres?

--

- 3) How many FTE (Full time equivalent) staff does your archive service employ?

FTE salaried:

FTE voluntary:

- 4) What is your archive service annual budget? Place 'X' in the appropriate box. This can include government grants, project funding, and revenue, etc.

< £10,000		£500,000-1M£	
£10,000-50,000		1 - 10M£	
£50,000-100,000		> 10M£	
£100,000-500,000			

END OF SECTION

Section 2: Questions about copyright law

- 5) What sources of information do you rely on to interpret copyright law, as it relates to archive collections and digitisation?

*Please place 'X' in the boxes of **all** the sources you rely on, and rank your choices in order of importance, with 1 being of the highest importance.*

Information Sources	Relevant?	Rank
Archivists within your institution (other employees)		
Other archivists outside your institution		
Advice provided by a lawyer from within your institution		
Advice provided by a lawyer from outside your institution		
Specialist copyright consultant (for example, Naomi Korn)		
National Archives staff (for example, Tim Padfield)		
ARA/CILIP or other professional workshops		
NRA Archives JISCmail listserv or other mailing list		
Books, publications, blogs		
Legislation		
Case Law		
Other (please specify)		

- 6) Has anyone within your archive service undertaken any training in copyright law? (Place 'X' next to the correct answer).

Yes:

No:

Don't know:

END OF SECTION

Logic Questions

- 7) Is the archive service you work for currently engaged in the digitisation or copying of archive material, or has it been in the past? This can include any kind of digitisation or copying – any size of project for online publication, whether internal or external, on-demand copying for users, or internal administrative digitisation. (Place 'X' next to the correct answer).

Yes: (Go to Question 8)

No: (Go to Question 41)

- 8) Has your archive service engaged in project-led digitisation? This includes digitisation projects of any size, internally or externally funded, which involve digitising whole collections or parts of collections for publication online. This can also include working with external partners or companies like brightsolid and Ancestry.com. (Place 'X' next to the correct answer).

Yes: (Go to Question 9)

No: (Go to Question 25)

Section 3: Questions about project-led digitisation and rights clearance

- 9) Which of the following issues has influenced how your archive service plans digitisation projects?

*Please place 'X' in the boxes of **all** issues with influence, then rank your choices in order of importance, with 1 being of the highest importance.*

Issue	Influence?	Rank
Arrangement of, and level of description available for, collections		
Finding out user needs/preferences for digitised material		
Linking project to overall organisation objectives		
Working with external partners to complete the project		
Sensitive data/data protection issues		
Staff time, training and skill requirements		
Creating revenue for the archive service using the digitised material		
Copyright status of material		
Using digital surrogates to replace physical production of documents		
Physical condition of the material		
Acquiring funding		
Equipment requirements		
Other (please specify)		
<div style="border: 1px solid black; height: 60px; width: 100%;"></div>		

Think about your **most recent, significant** digitisation project:

This can include comprehensive digitisation of an entire collection; selective digitisation of a single collection; digitisation of parts of different collections around a particular theme or project; contributing to a network like Europeana, SCRAN or A2A; or digitisation provided by an external partner like Ancestry.com.

- 10) Which collection(s) were chosen, and why?

- 11) Please provide the following descriptive details about the project, if you can; estimates are fine.

Overall project budget (in £)	
Funding provided by?	
How many staff were involved in the project? (FTE)	
Start and End dates for the project (mm/yyyy)	
How do users access the images created during the project? (Place 'X' next to the correct answer(s))	<p>Free access on the archive service website:</p> <p>Free access on a social media site (e.g. Flickr):</p> <p>Free access through a portal website (e.g. Europeana):</p> <p>Subscription access or licensing via the archive service website:</p> <p>Subscription access or licensing via a vendor (e.g. Ancestry/Bridgeman Art Library):</p> <p>Other (please specify below)</p> <div style="border: 1px solid black; height: 40px; width: 100%;"></div>
How many images/records/files were created in total?	

- 12) Which kinds of records were digitised in the project? Please select all that apply from the following list: place 'X' in the appropriate box(es).

Archival records	<input type="checkbox"/>	Rare books	<input type="checkbox"/>	Other books	<input type="checkbox"/>	Newspapers	<input type="checkbox"/>
Serials	<input type="checkbox"/>	Manuscripts	<input type="checkbox"/>	Sheet music	<input type="checkbox"/>	Microforms/Microfilms	<input type="checkbox"/>
Maps	<input type="checkbox"/>	Photographs	<input type="checkbox"/>	Engravings/Prints	<input type="checkbox"/>	Drawings	<input type="checkbox"/>
Posters	<input type="checkbox"/>	Postcards	<input type="checkbox"/>	Paintings	<input type="checkbox"/>	Other 2D objects	<input type="checkbox"/>
3D works of art	<input type="checkbox"/>	Other 3D man-made objects	<input type="checkbox"/>	Other 3D objects (incl. natural science specimens)	<input type="checkbox"/>	Monuments and sites	<input type="checkbox"/>
Film	<input type="checkbox"/>	Video recordings	<input type="checkbox"/>	Audio (music & other recorded sound)	<input type="checkbox"/>	Other (please specify)	<input type="checkbox"/>

- 13) Given that users can access and often reuse material that has been made available online, some archive services attempt to control or limit the use which can be made of digitised material. Other services prefer to make reuse as simple as possible. Please select the measures you have used, from the following list. Place 'X' in the appropriate box(es).

Creative Commons Licences	
Other forms of open licensing	
Removing the option to copy and paste images	
Low resolution images	
High resolution images	
Image watermarking	
Website notice on permitted uses of images	
Online Registration, including Terms of Use	
Subscription Access	
None	
Other (please specify)	

- 14) If you received an external grant or private investment to complete the project, did those funders place any requirements on you regarding copyright in the collections? This includes any contractual requirements set by companies like brightsolid or Ancestry.com. Please describe below.

--

- 15) Thinking about the documents which were selected for digitisation as part of this project, please place 'X' next to yes or no in relation to the following three categories.

Did the selection include:

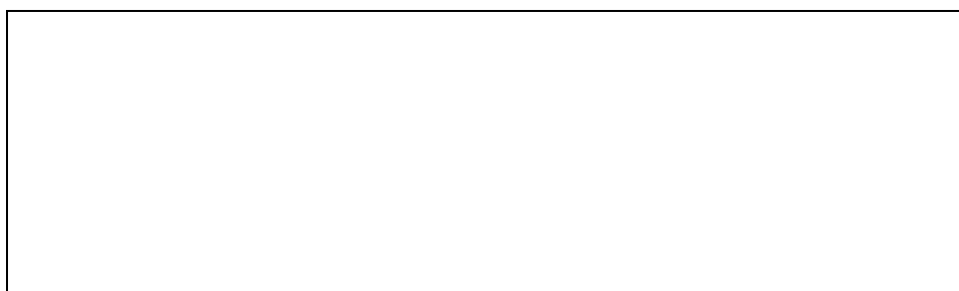
Documents in which the copyright had expired, i.e. older documents which may now be in the public domain?	Yes: No:
Documents in which the archive or parent institution owns the copyright?	Yes: No:
Documents in which the copyright is owned by a third party?	Yes: No:

- 16) How did you determine the copyright status of the material? This can include using depositor records, catalogue data, TNA flowcharts, or a form of risk assessment. Please try to answer for each category.

Copyright expired (Go to Question 22)



Copyright owned by the repository/parent organisation (Go to Question 22)

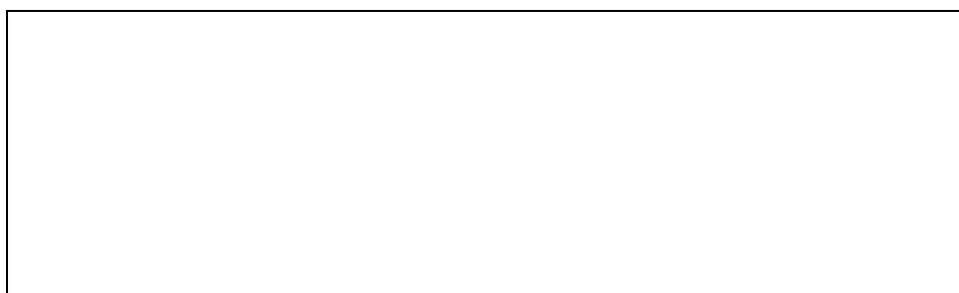


Copyright owned by a third party (Go to Question 17)



- 17) If you answered yes to the third category at Questions 15 & 16, how did you manage the process of trying to locate the third party rights holder(s)?

This can include a risk assessment, deciding whether or not to contact rights holders, your search strategy, sources consulted, and recording your due diligence.



18) Please supply totals for the following if possible; estimates are fine:

How many identified 3 rd party rights holders did the institution attempt to contact?	
How many rights holders granted permission?	
How many rights holders denied permission?	
How many rights holders did not respond?	
How many rights holders were you unable to find contact details for/could not be located?	

19) What factors influenced your decision to not try, or stop trying, to locate the rights holder(s)? Place X in the applicable boxes, and then rank them in order of importance, with the most important starting at 1.

Factors	Applicable?	Rank
Time/resources already expended on the search		
Seeming unlikelihood of finding copyright holders		
Number of sources consulted		
Quality of information available on rights holder		
Lack of information available on rights holder		
Number of times contact with rights holder attempted		
Other (please specify)		

20) If you could not locate the rights holder(s), or if they did not respond to your request, what did you do? Place 'X' in the appropriate box(es).

Used the rights holder material with a disclaimer	
Used the rights holder material with no disclaimer	
Did not digitise/provide online access to the rights holder material	
Looked for similar material without rights issues to substitute instead	
Other (please specify):	

21) When you were able to make contact with rights holders, what was their response to your request to digitise their material? Place 'X' in the appropriate box(es).

Requested a licensing fee	
Requested formal acknowledgement	
Unaware of their copyright ownership in the material	
Pleased that the material is being digitised	
Interested in being included in events/outreach surrounding the project	
Interested in depositing new material with the archive	
Other (please specify):	

22) Has your institution ever paid a licensing fee to a rights holder in order to digitise archive material and publish it online? (Place 'X' next to the correct answer).

Yes: (Go to Question 23)

No: (Go to Question 24)

23) If you answered yes to Question 22, has your institution developed a policy for dealing with rights holders who request licensing fees? (Place 'X' next to the correct answer).

Yes: Please provide details of the policy below.

--

No: (Go to Question 24)

24) How much time and money did you spend as a whole on determining the copyright status of the material selected for digitisation, and in engaging in rights clearance? Again, best estimates are fine.

25)

Staff Time	No. of staff (FTE)	Time (working days)	Cost
			£

Licence Fees	No. of rights holders	Payment Total
		£

END OF SECTION

Logic Question

- 26) Has your archive service engaged in on-demand digitisation or copying? This includes fulfilling copy requests for users and readers, and providing self-service photography in the searchroom. (Place 'X' next to the correct answer).

Yes: (Go to Question 26)

No: (Go to Question 32)

Section 4: Questions about on-demand digitisation and copyright

- 27) Which types of copying does your organisation provide/allow for users? Place 'X' in the appropriate box(es).

Paper copies	
Digital copies	
Self-service photography/scanners in the searchroom	
Image licensing	

- 28) What sort of declaration do you ask users to make before providing them with copies of archive material? Place 'X' in the box corresponding to the option which best applies for **each** copy type – paper copies, digital copies, and self-service photography.

	Paper copies	Digital copies	Self Service Photography/ scanning
We ask the user to complete a paper copy of the statutory declaration form and physically mail it back to us, regardless of how they contact us (email, phone, in person, through a representative)			
We do not ask the user to complete a statutory declaration form, or an undertaking of any kind			
We use our own declaration form, which we have developed ourselves			
We ask the user to send us an electronic declaration according to the legislative changes of June 2014.			
We ask the user to complete a paper copy of the statutory declaration form, scan it or photograph it, and email it back to us			

- 29) In addition to a declaration, do you ask the user to sign any other waivers or disclaimers in relation to the future use of the copies/digital images? If so, please describe below.

30) If there are copy types for which you do not use a declaration form, why not?

--

31) Do you inform your users about copyright in your collections, or provide guidance on how to deal with copyright in archive material? Place 'X' in the appropriate box(es).

Copyright owner information in the collection level description of the catalogue	
Copyright owner information in the collection catalogue at series or item level	
Copyright owner information in the metadata of the digital file	
Copyright status of individual documents on the website	
Reprographic information/Guidance on how to obtain copies	
Guidance or Information on copyright law on your own website	
Links to guidance or information on copyright law on external websites	
Contact details for a specific member of staff who answers copyright queries	
We do not provide guidance or information about copyright to users	
Other (please specify)	

32) How do you assist readers who wish to publish copies of archive material, for example, in books, journal articles, or on blogs and social media?

--

END OF SECTION

Logic Question

- 33) Has your archive service engaged in administrative digitisation? This includes preservation copying, internal copying for cataloguing, appraisal etc, or for production in the searchroom, but **not** for specific users or online publication. (Place 'X' next to the correct answer)

Yes: (Go to Question 33)

No: (Go to Question 37)

Section 5: Questions about administrative/preservation digitisation and copyright

- 34) Do you digitise or copy material in your collections for administrative purposes?
This could include adding images to your catalogue, appraising born digital records, or keeping images of documents as part of the preservation process, etc.
(Place 'X' next to the correct answer)

Yes:

No:

- 35) Do you digitise or copy material in your collections for preservation purposes; i.e. to create digital surrogates which can be produced instead of the original document? (Place 'X' next to the correct answer)

Yes:

No:

- 36) If you answered yes to either of the previous two questions, have you copied any material in which the copyright is owned by third parties? (Place 'X' next to the correct answer)

Yes: (Go to Question 36)

No: (Go to Question 37)

- 37) Did you attempt to contact the rights holders for permission to copy the material, even though it was for internal/on-site display purposes? (Place 'X' next to the correct answer)

Yes:

No:

END OF SECTION

Section 6: Questions about complaints, and near-miss scenarios

The information provided in this section will be treated as strictly confidential, and the collated results will be presented in such a way as to guarantee full anonymity of respondent institutions.

- 38) Have you ever received a complaint or takedown request from a rights holder in relation to the online availability or unauthorised use of a work held in one of your collections? (Place 'X' next to the correct answer)

Yes: (Go to Question 38)

No: (Go to Question 45)

- 39) If you answered yes to Question 37, please provide the following details.

Type of complaint	No. of complaints	Compensation requested? Y/N	Litigation? Y/N
Triggered as a result of a digitisation project (i.e., copyright-protected material made available online without rights holder permission?)			
Triggered from the unauthorised use of a work by an individual archive service user (either from a copy provided by the archives, or from self-service photography in the searchroom?)			
Triggered by the digitisation of material for administrative or other internal purposes?			
Triggered by the digitisation and publication of sensitive personal data, either through a digitisation project, on-demand copying by a user, or administrative/preservation digitisation?			
Other (please specify):			

40) How was/were the above complaint(s) resolved? Place 'X' in the box of **one** option which best applies.

Material taken down from the website, compensation/donation paid	
Material taken down from the website, no compensation/donation paid	
Published apology	
Material kept online after paying licensing fee or other compensation/donation	
Material kept online with acknowledgement but no licensing fee or compensation/donation paid	
Other (please specify)	

41) Have you ever sought professional legal advice on receiving a complaint from a rights holder? Please provide further details.

--

END OF SECTION

Section 7: Reasons for not copying or digitising collections

(This section should only be completed if you answered no to Question 7. If you've digitised or copied, skip forward to Question 45)

- 42) If you haven't engaged in digitisation or copying or archive collections, why not?
Please give reasons below, in order of importance.

- 43) Have copyright issues prevented you from copying or digitising? (Place 'X' next to the correct answer)

Yes: (Go to Question 43)

No: (Go to Question 44)

- 44) If copyright issues have prevented you from copying or digitising, please outline below. Please be as specific as possible.

- 45) Do you intend to engage in digitisation in the future? (Place 'X' next to the correct answer)

Yes:

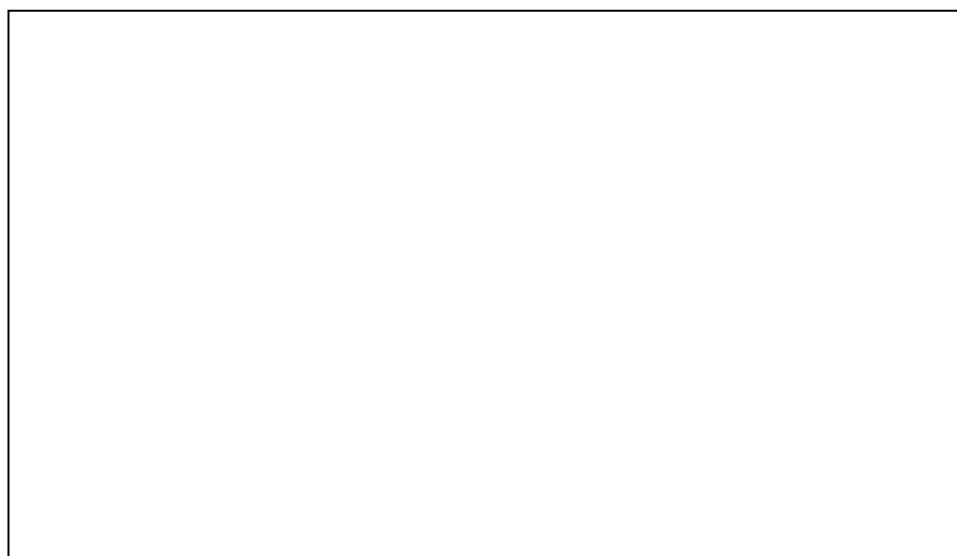
No :

END OF SECTION

Section 8: Final comments and prize draw details

- 46) Do you have further information or comments on copyright law and the digitisation of archive collections to share with the researcher?

Also, please feel free to highlight any problems you've had with questionnaire in general.



- 47) If you would like to be included in the prize draw (to win an iPad Air or one of four £50 Amazon vouchers), please provide your details below:

Name:
Email Address:
Postal Address:

Thank you very much for taking the time and effort to complete this survey. If you have any questions about how I will use the data you have provided, or if you would like a copy of any of the outputs of this research, please contact me at victoria.stobo@glasgow.ac.uk, or alternatively, through the channels below:

Telephone: 0141 330 7018

Postal Address:
Room 503
CREATE
10 The Square
University of Glasgow
Glasgow
G12 8QQ

Twitter: @vstobo

Appendix D: Survey Data

The survey data are available in a separate file through the University of Glasgow online research repository.