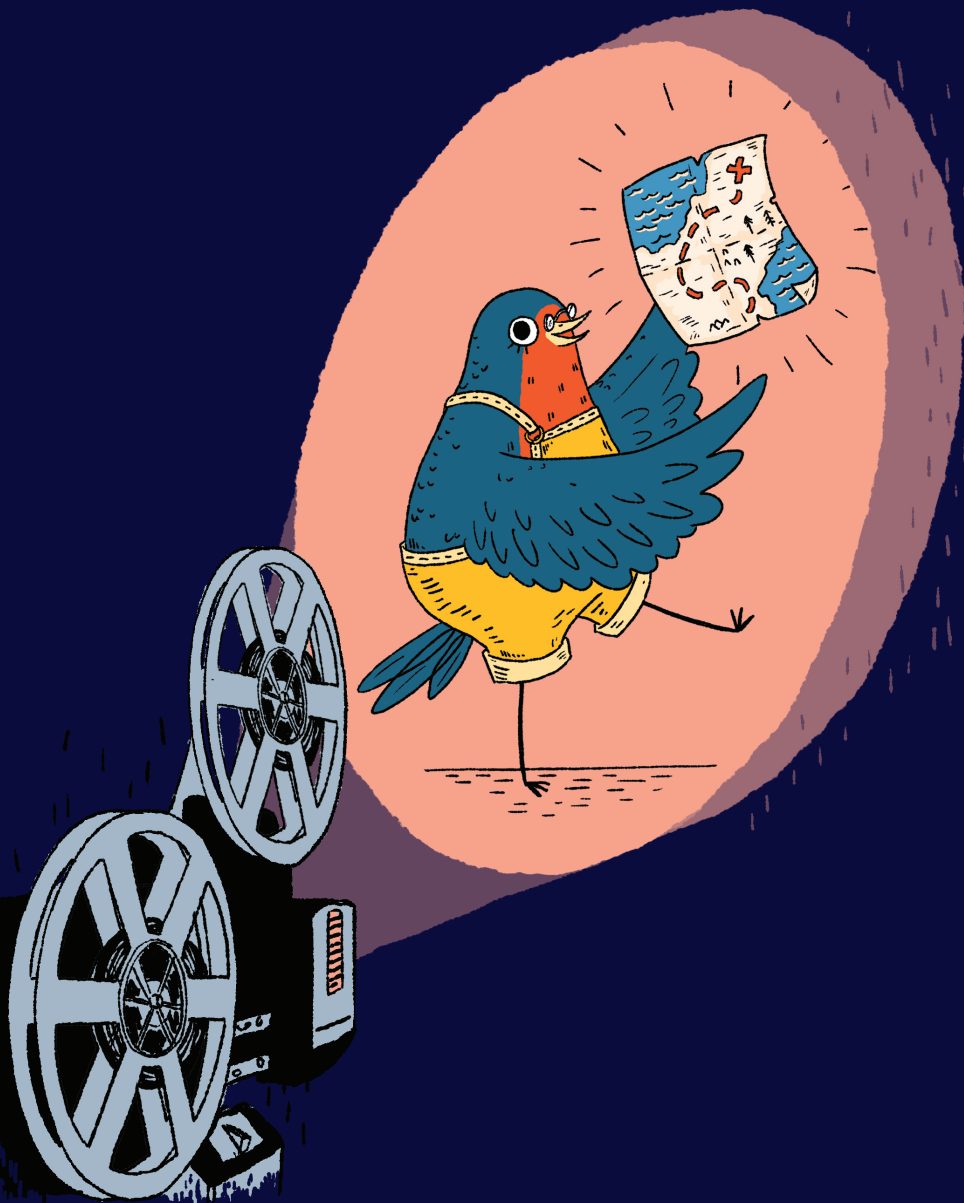


FINDING THE LOST FILMS:

Out-of-Commerce Works in the Archive



DR MELANIE STOCKTON-BROWN

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About the zine

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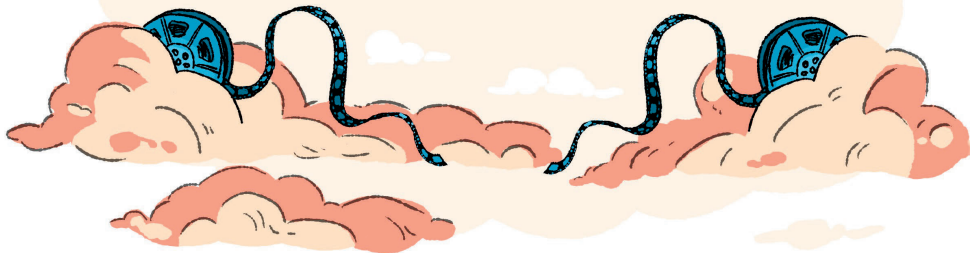
Please do share this zine with anyone you feel would be interested in it.

This zine was generously funded by ACORN funding at Bournemouth University, 2021.

Who is this zine for?

This zine is for anyone interested in film archives and archiving practices; widening access to cultural heritage; copyright practices within archives; copyright scholars; and anyone interested in the EU's new CDSM [Copyright in the Digital Single Market] Directive 2019.

It is also aimed at policymakers and legislators who are implementing the changes into national copyright law. Whilst there is an EU and European focus to this research, the issue of out-of-commerce works is a global one. The zine aims to be informative and helpful in making suggestions in relation to out-of-commerce works, and key recommendations for film archives and policymakers appear towards the end of the zine.





Why Robyn?

Robyn is the film archivist in this zine, and they also happen to be a (rather well-dressed) robin. This is for two reasons: our representations matter; and what robins symbolise. How we portray people in illustrations matters, as this can lead to bias and stereotyping of characteristics and communities of people. This zine is focusing on what the new law is, and how it can be best used in film archival practice. Therefore, we want to focus on that, as opposed to the specific individuals who make up specific film and media archives.

So, we'll leave the humans out of it, and focus on Robyn.

Robin birds symbolise new beginnings, new growth, good luck, hope, renewal and good things to come. It is our hope that the new copyright law within the EU can be a new beginning for film archives, in widening access to out-of-commerce works.

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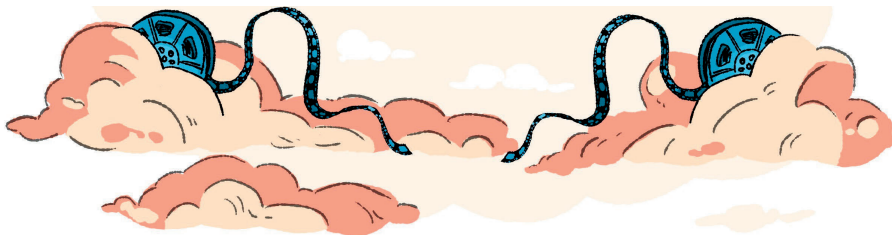
Background to Zine

Widening access to cultural heritage and enabling a diverse group of people to be able to engage with their history and see themselves in it, is something important. This belief grounds this research, both professionally and personally.

This research had begun before the pandemic, but like everything else, has been impacted by it. During the pandemic, people read books and poetry; watched films, TV, and YouTube videos; made art and crafts; talked on the phone and online. More than ever, we realised that being able to access heritage is vital; and that culture brings us all closer to one another.

For film archives, out-of-commerce works are a problem. These are films which are still subject to copyright protection, but are not commercially exploited by their rightholder or available to purchase. The majority of films do not remain in commerce throughout the duration that they are in copyright. This leads to a situation in which the public cannot view or access these films, and yet the rightholder is not exploiting them. This benefits no one.

Recent changes to copyright law in the EU aim to alleviate this copyright dead-lock, through Article 8 of the CDSM Directive. This zine explores the key legislative and practical barriers to film archives in implementing this new law; as well as the benefits in implementing it. Issues of risk tolerance to reputational harm, funding, record-keeping, and copyright expertise will be explored.





How was this research conducted?



I conducted doctrinal and comparative legal analysis of Art. 8, as well as ethnographic research at three UK and Dutch film archives. (See Brown, 2020 for an article on this.)

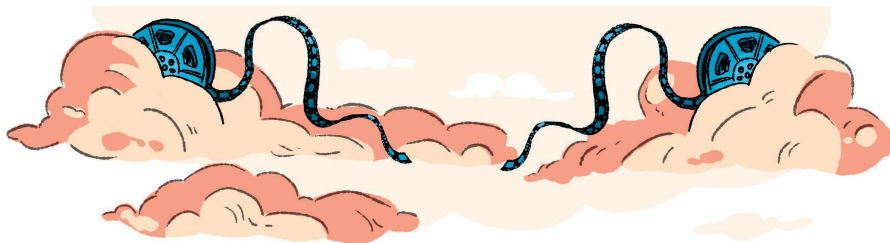
The doctrinal research found that there are issues of ambiguity in the legal text that will need to be addressed in the national implementations. Art. 8 is likely to be challenged by rightholders concerned about the opt-out nature (when it is presumed rightholders have opted-into the licensing mechanism, unless they specifically opt-out).

Ethnographic research involves the researcher spending time 'in the field', to understand the daily practices, challenges and activities of the organisation. In this research, I spent 6 weeks at the film archives, who were very kind to allow me to do so.

This data was gathered from semi-structured interviews with staff working in the film archives; observations of working practices and meetings; observations of policies and documents; and time spent seeing each part of the archival workflows.

The ethnographic research explored how Art. 8 could be incorporated into existing working film archival practices.

The nature of this research is heavily context-specific; and therefore, generalisations relating to all film archives could not be drawn from this research. Instead, the issues identified, and the copyright regime of archival practices in particular can be considered in relation to film archives more generally. Indeed, many of the barriers discussed here will be relevant to film archives internationally.



What is Art. 8?

Art. 8 offers cultural heritage institutions (“CHIs”) including film archives the ability to make use of out-of-commerce works in their collections, through the introduction of a licensing mechanism.

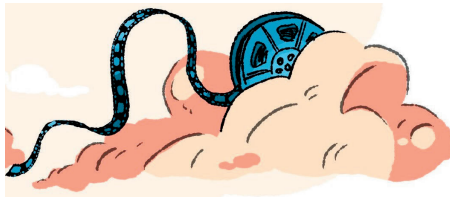
This licensing mechanism would allow EU CHIs to agree licenses with Collective Management Organisations (“CMOs”), who manage copyright on behalf of groups of rightholders. The licenses allow the CHI to make the work available to the public, for non-commercial purposes only. The license with the CMO would remove the need to research and contact individual rightholders one by one to ask permission or agree a copyright license.

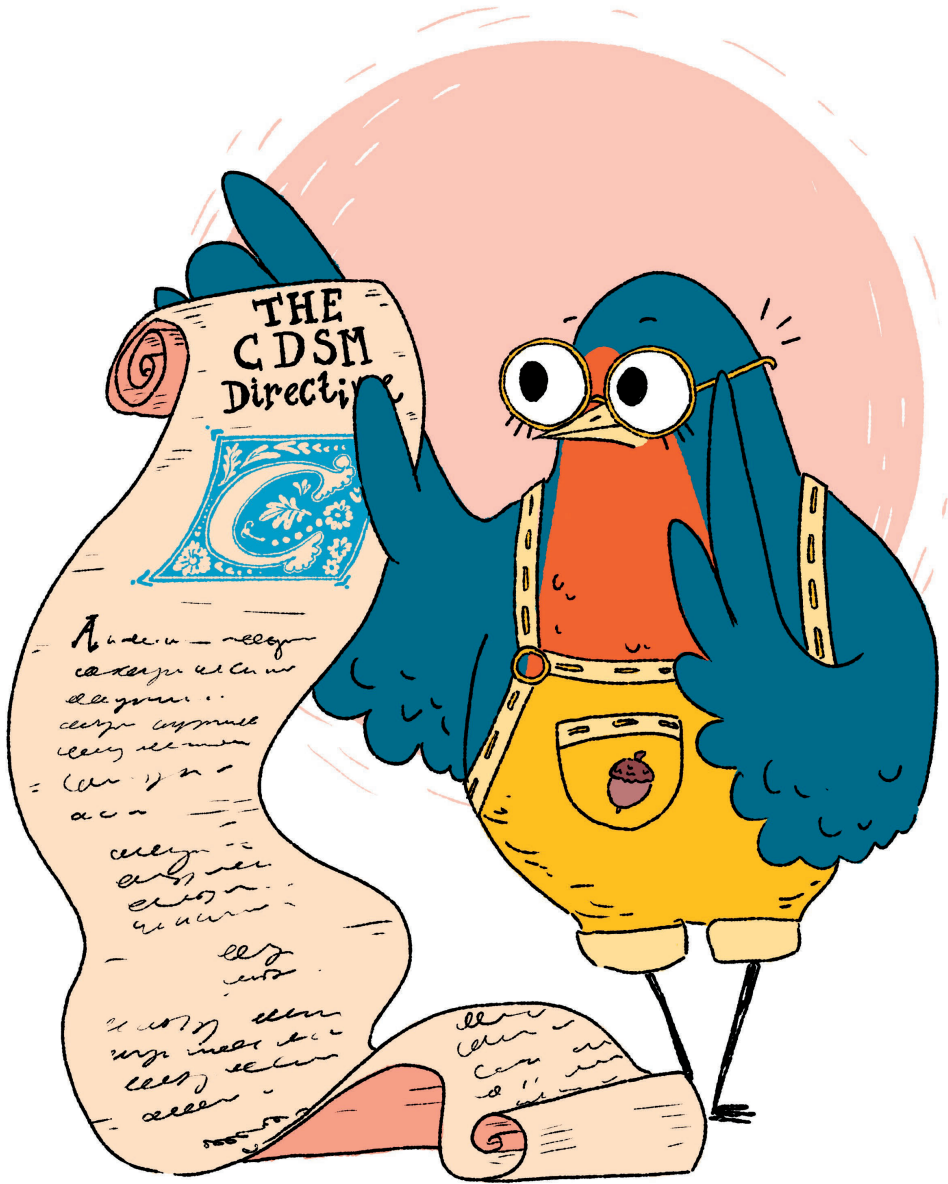
Art. 8(1)(a) requires there to be a “sufficiently representative” CMO in operation, to protect the rightholders of the works. Whether a specific CMO is sufficiently representative of a group of rightholders in that specific country is not always clear, but the CMO would need to be very well established, and be transparent with rightholders.

The second option is set out in Art. 8(2), known as the “fall-back exception”. Under this, CHIs can make the out-of-commerce works held in their permanent collections available for non-commercial purposes *without* concluding a licence, where there is not a sufficiently representative CMO in the CHI’s country.

This is the case for several EU countries, as film has less collective management of copyright by rightholders than in sectors such as music. Rightholders have the legal ability to exclude their works from the operation of both the licensing scheme and the fall-back exception, if they wish.

This fall-back route also requires that the work be attributed where possible, and that the CHI only makes the out-of-commerce works available on non-commercial websites.





What are out-of-commerce works?

An “out-of-commerce” work is defined in Art. 8 as a work that is still in copyright (usually until 70 years after the author’s death) and:

“is not available to the public through customary channels of commerce, after a reasonable effort has been made to determine whether it is available to the public.”

Out-of-commerce works include “unavailable digital-first works” or born-digital films. This offers huge potential benefit to film archives who wish to make use of their out-of-commerce works,

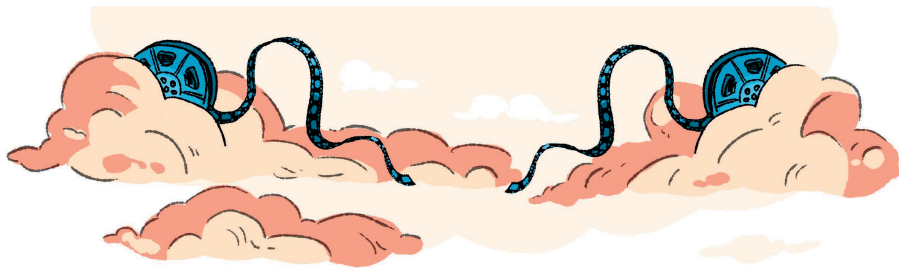
How do out-of-commerce works differ to orphan works?

As has been noted in a number of studies, the Orphan Works Directive has not adequately addressed the issue of orphan works. Orphan works are works that are still subject to copyright, but whose authors are unknown, or cannot be found.

Art. 8 could also help to remedy the failure of the Orphan Works Directive. As Dusollier comments, orphan works are usually also out-of-commerce, and therefore “could equally benefit from the application of this new provision, whose conditions are less rigid.”

Consequently, film archives could choose to utilise Art. 8 to make orphan works available, that also happen to be out-of-commerce works.

(NB: Italy is currently considering how it will “identify the applicable regulation” if a work is out-of-commerce and is also an orphan work. This is very interesting and indicates that Italy is not intending for the two categories of work to be regarded as the same where there is overlap. This would be a shame for Italian film archives.)





How many out-of-commerce works are there?



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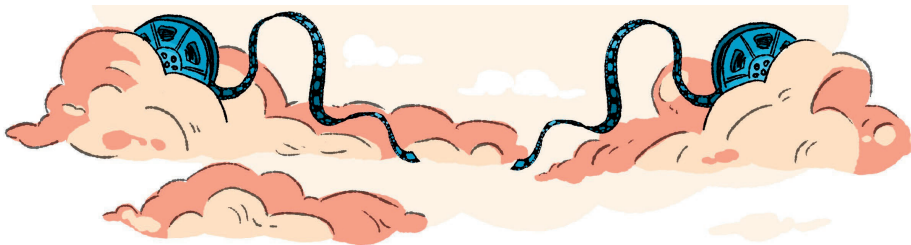
Given the lack of clarity in the definition, it is unclear how many out-of-commerce works there are in the film archives. Mulligan and Schultz found that only 6.8% of films still in copyright that were released before 1946 were commercially available in 2002. When the European Audiovisual Observatory surveyed the members of the Association des Cinémathèques Européennes, they estimate that approximately 60% of the feature films still in copyright in the collection are either orphan or out-of-commerce.

Some estimates from the individual archivists in this research were: approximately 5-10%; an unclear number, but a higher number than the number of orphan works in the collection; at least a quarter of the collection, and probably much higher; approximately 50%; and as high as 80-90%, depending on how out-of-commerce is defined.

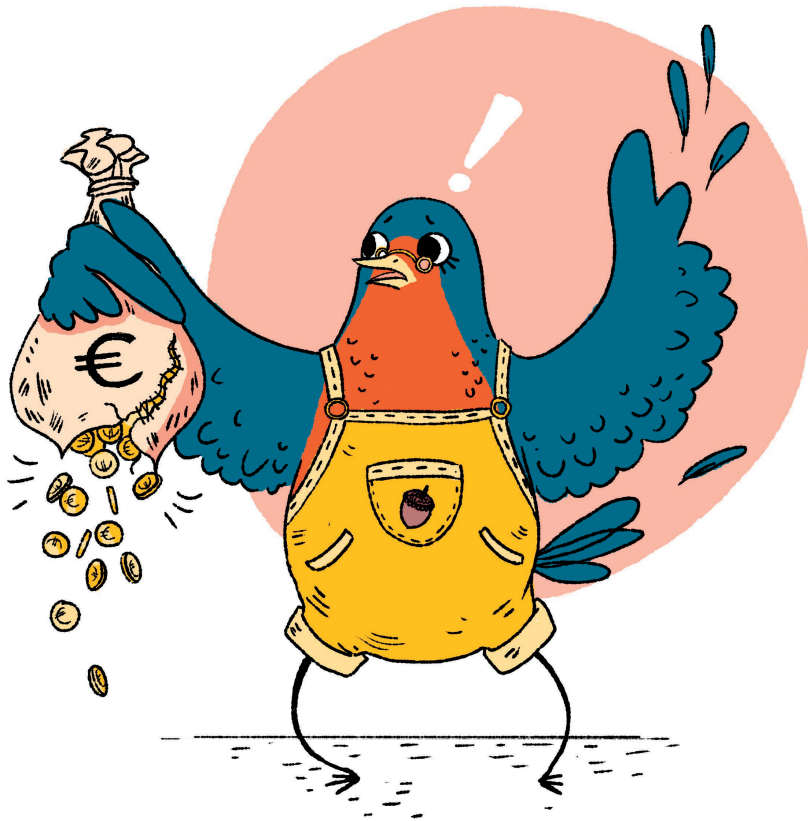
It was stated by many participants that the number of out-of-commerce works largely depends on if cut-off dates are used to determine when a film can be presumed to be out-of-commerce. Everyone spoken to viewed the collection as likely having a considerable number of out-of-commerce works, but there is very little information available to determine this.

A lack of accurate figures on the number of these films weakens the incentive to invest time and money in bringing these works to the public, as the potential scale of the benefit is unknown.

Furthermore, for many film archives, there is a 'backlog' in the archives of un-catalogued or un-accessioned items. This presents a challenge in knowing how many works are out-of-commerce. This leads to the issue of a film archive being wary of investing substantial time and money into researching whether works are out-of-commerce unless they know it will be productive; and this cannot be known until searches are conducted.



Barriers to practice: funding



There are a number of barriers that film archives will likely face in implementing the new copyright law into existing practices. The barriers discussed here are the ones identified as most significant.

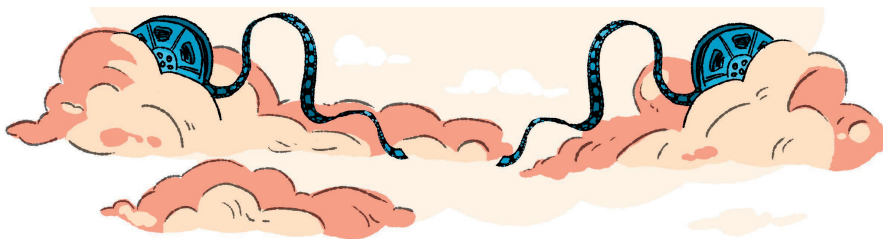
One of the significant barriers to making out-of-commerce films available is the necessary levels of funding. The archives face continually diminishing funds, and greater pressure from the government for them to be more financially independent. Many film archives, even those that receive national funding, are required to self-fund to some extent. For some film archives, they need to be almost wholly self-funded.

As a result, they are hesitant to spend time and money on utilising out-of-commerce works, when Art. 8 only allows them to do so for non-commercial purposes. There remains a focus on prioritising activities that are economically viable, and that align with funding objectives.

The fact that out-of-commerce works can only be used for non-commercial purposes is also deemed a significant concern for its usefulness:

[i]t's difficult, as we need to generate revenue, so the non-commercial uses for out-of-commerce works doesn't help with that. It's great from a public point of view, but the archive needs to be able to provide access, so we need commercial revenue to keep going.

At all of the archives, it was commented and observed that due to both space and budgets, decisions have to be made as to which material is kept, and which material is to be prioritised for digitisation and access. This was an issue for the individual film archives to varying degrees.



Barriers to practice: lack of clarity of key terms

Terminology of the key terms of Art. 8 is a considerable barrier for film archives.

The definitions of “out-of-commerce works”, “customary channels of commerce”, “reasonable effort” and “non-commercial purposes” will need to be clarified, for film archives to be able to fully benefit from Art. 8. Currently, it is felt by the film archives and scholars that the terms are too vague.

Customary Channels of Commerce

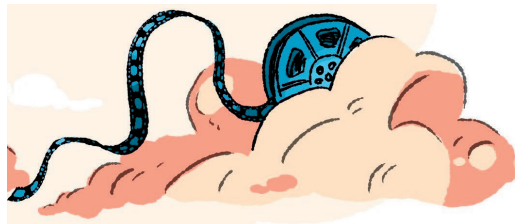
The meaning of “customary channels of commerce” is undefined in the text of the Directive, and will be crucial for film archives who wish to make use of Art. 8. The Directive notes in Recital 38 that the:

limited availability of a work or other subject matter, such as its availability in second-hand shops, or the theoretical possibility that a licence for a work or other subject matter could be obtained should not be considered as availability to the public in the customary channels of commerce.

This definition provides some indications of what is *not* to be understood as customary channels of commerce, but very little guidance for practical implementation of what these channels *are*.

For amateur film works that have stayed in the family attic and then been donated to the film archive at a later date, it can reasonably be assumed that these works were never in commerce and were never intended to be.

For smaller regional or specialist film archives, a similar set of circumstances is likely to apply to a substantial proportion of their holdings.





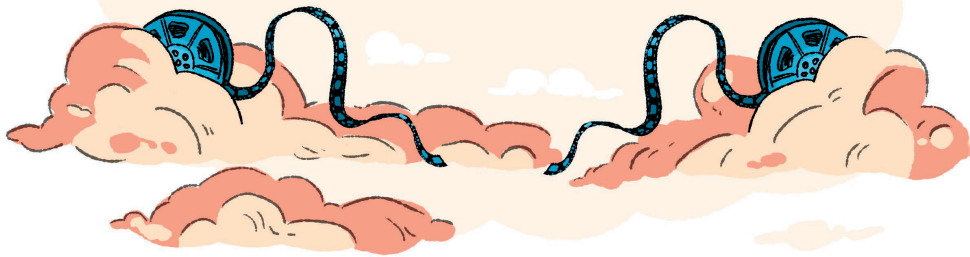
Non-commercial use

By stipulating in Art. 8 that the uses must be “non-commercial”, it therefore becomes fundamental to clearly distinguish between commercial and non-commercial uses. The meaning of “non-commercial” is yet to be clearly defined in either legislation or case law.

Some film archives view all activities they carry out as non-commercial; as many are non-profit organisations, and therefore all revenue they make stays within the organisation to partially recoup some of its costs. A number of non-profit film archives are also charities, which furthers the view that their activities are non-commercial.

Recital 40 of the Directive possibly provides a legal basis for CHIs to receive some financial revenue from their out-of-commerce works, as a way of covering their costs in relation to these works. It notes that:

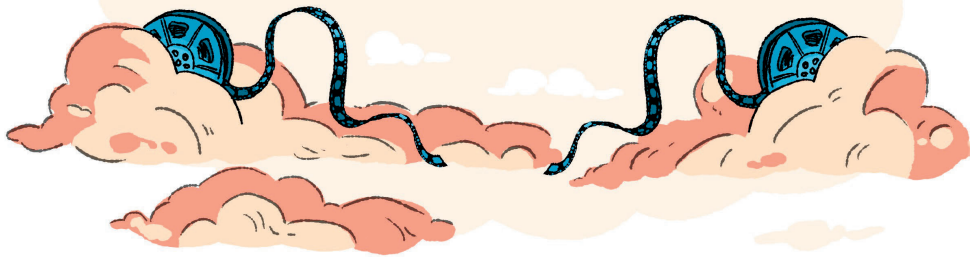
given that the digitisation of the collections of cultural heritage institutions can entail significant investments, any licences granted under the mechanism provided for in this Directive should not prevent cultural heritage institutions from covering the costs of the licence and the costs of digitising and disseminating the works or other subject matter covered by the licence.





This appears to provide support for CHIs to receive revenue from the out-of-commerce works they make available, to cover their costs. With that in mind, the wording appears to allow CHIs to cover the cost of digitising the works, the cost of the licence, and the costs of disseminating the work.

For CHIs with a large number of out-of-commerce works, this can plausibly be understood as allowing a significant amount of the archive's activities to be compensated by money raised through the use of the out-of-commerce works.



Reasonable effort



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The “reasonable effort” requirement for out-of-commerce works is a significant and stark improvement on the situation CHIs faced in relation to the diligent search for orphan works, and therefore hopefully will be much more useful in its practical implementation.

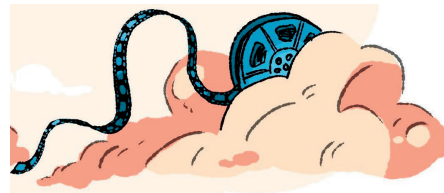
Compared to the “diligent search” that is required for orphan works in the Orphan Works Directive, it is clear that the “reasonable effort” required for out-of-commerce works is less cumbersome. This is a relief for film archives, who have found the orphan works diligent search process very burdensome.

Art. 8 does not elaborate further on what this “reasonable effort” involves and allows Member States to have discretion about how this is implemented nationally. The recital provides some guidance on the meaning of “reasonable effort”. Recital 38 comments

a reasonable effort should be required to assess their availability to the public in the customary channels of commerce, taking into account the characteristics of the particular work or other subject matter or of the particular set of works or other subject matter.

The “reasonable effort” can therefore be understood as requiring only an “assessment of availability”, as opposed to a full search. This lowers the required threshold.

Furthermore, the inclusion of “taking into account the characteristics of the particular work” strengthens the understanding of “out-of-commerce works” as dependant on the context and the nature of the works. Therefore, for some collections, it may be that a very limited assessment is required; and for some films, perhaps no assessment of availability is needed at all.

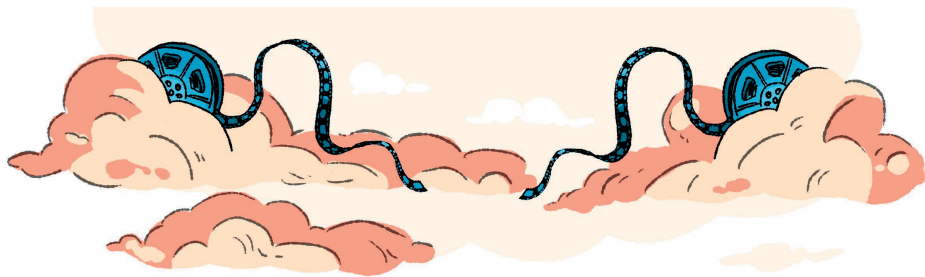


The recital of the Directive then goes on to state that the “reasonable effort” requirement:

should not have to involve repeated action over time but it should nevertheless involve taking account of any easily accessible evidence of upcoming availability of works or other subject matter in the customary channels of commerce.

This can be interpreted as relating only to works that were originally in commerce and for which there is evidence to believe that they could well be commercialised again.

Such action could therefore be limited to regular monitoring of certain works deemed by the CHI to be more likely to be recommercialised. This could reduce the cost, time, and effort of ongoing monitoring, as not all films will require it.



Barriers to practice: reputational harm

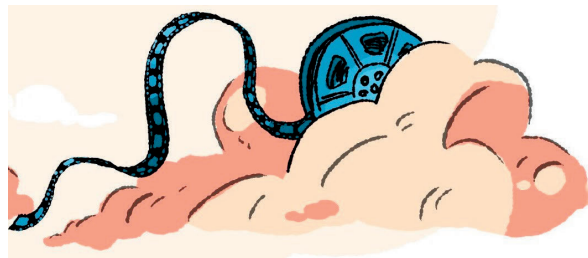
Reputational harm (both actual and perceived) to the archive and to the individual archivist was discussed in relation to copyright by many individuals during the ethnographic research. All archives and archivists in this research regarded any potential reputational harm to the archive as potentially disastrous.

Reputational harm was observed as having a very negative impact on the film archive in a financial and professional sense. This was viewed as likely to occur if the archive suffers from a reputation of being careless with copyright works, of not respecting rightholders, and of failing to comply with legal requirements. The focus on the relationship with rightholders was of key importance to the film archives in this research, as without rightholders agreeing to allow their material to be stored and used, the film archives could not continue.

Reputational risk is an issue that, from speaking to the participants, can be separated into a fear of harming relationships with four distinct groups: current or future financial donors; current or future donors of material to the collection; members of the public or users of the collection; and other CHIs or partner institutions. No individual or archive articulated the fear of reputational harm as having these four aspects, but they appeared through analysing the comments made.

This fear of reputational harm is itself interlinked with on-going fears of funding and the continuing viability of the archive.

This could lessen the likelihood of film archives making out-of-commerce works available, and indeed decrease the probability that they utilise a sampling mechanism such as the one proposed in this zine.





Barriers to practice: degradation of film formats; backlogs; and historic record-keeping

A likely barrier to film archives wishing to implement Art. 8 is the backlog of accessioning, cataloguing, and digitising the existing collection. For many film archives, there is a 'backlog' in the archives of un-catalogued or un-acquisitioned items.

The focus for the film archive is therefore often reducing this backlog before considering any new or additional projects, such as utilising out-of-commerce works.

Furthermore, this backlog prevents film archives from knowing how many works are out-of-commerce. This leads to the issue of a film archive being wary of investing substantial time and money into researching whether works are out-of-commerce unless they know it will be productive; and paradoxically this cannot be known unless the copyright research is conducted.

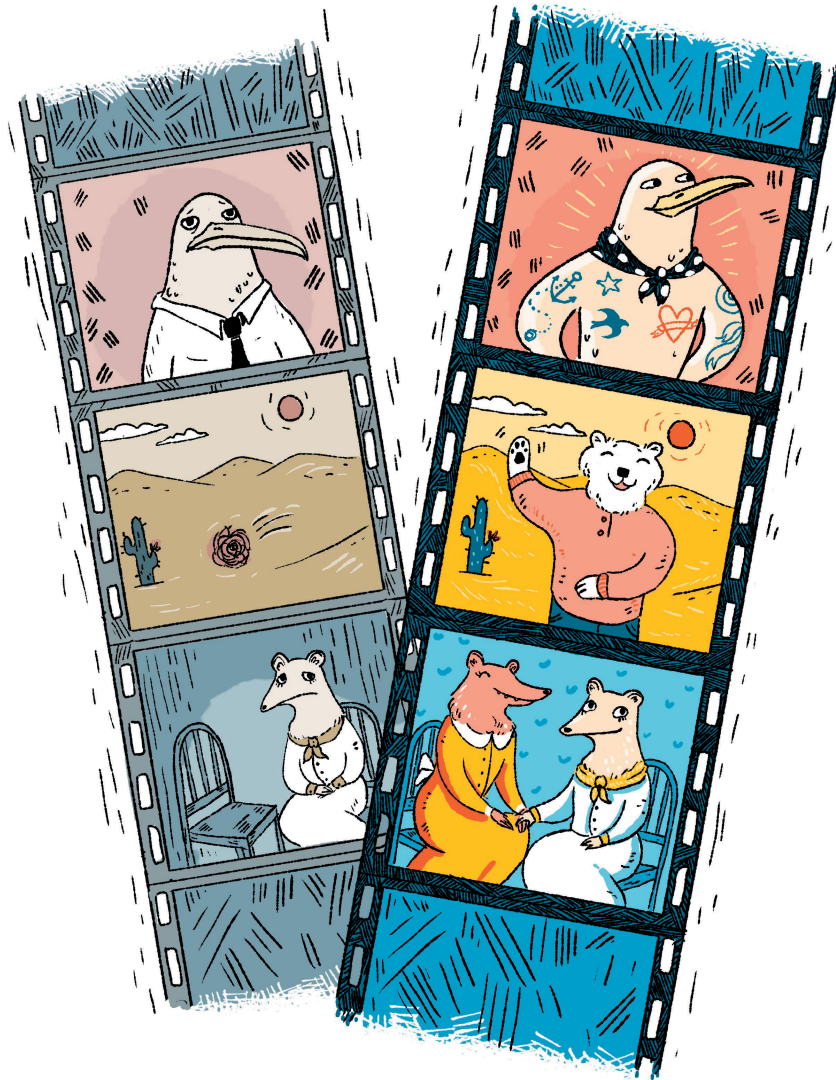
The film formats used throughout history have included celluloid film, nitrate film, VHS tapes, BetaMax tapes, DVDs and now a change to digital films, sometimes stored only on hard drives. This in turn has drastically impacted how films are viewed and enjoyed. Therefore, film archiving practices have adapted, through necessity, to manage these parallel streams of work, as each different film medium requires different preservation and conservation efforts.

Another possible barrier to implementation is historic record-keeping. The ability to utilise out-of-commerce works requires accurate and reliable data about the film works, and any potential commercial exploitation of the works that the archive is aware of. Incomplete record-keeping, especially historically, can lead to incomplete, inaccurate, and confused information relating to the films in the collections.





Benefits of implementation: addressing historic exclusion



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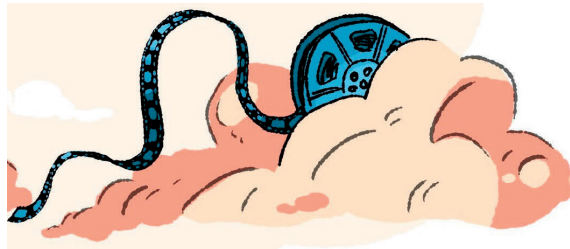
Though there are barriers to film archives making use of the new law, there are also considerable benefits that could come from making out-of-commerce works more widely available to the public. A huge benefit could be in addressing the historic exclusion of certain communities of people. This can be partly addressed in making large parts of the collection available, and in highlighting these hidden histories. This can be combined with crowd curatorship, encouraging volunteers to help identify and correctly catalogue films in the collections which have been ignored.

Limitations on finances, time and staffing within film archives lead to decisions concerning which materials would be preserved and/ or digitised, and which items would work best together as a collection. Personal preference and the views of history at the time also guide these decisions.

Brunow comments that “[t]hrough creating audiovisual memory, film archives play a fundamental role in shaping our view of the past”. These archival decisions are thus simultaneously acts of forgetting or excluding films or individuals from the archive. As Lau writes, “[n]ational archives are haunted by the silenced gaps of marginalized people.”

There are many examples of this exclusion historically, and excluded groups include ethnic minorities, LGBTQ+ individuals, people living with disabilities, women, and others (see Brunow). This exclusion has been carried out “sometimes unconsciously and carelessly, sometimes consciously and deliberately”, as Cook notes. In making out-of-commerce works available, these historic exclusions can be addressed.

In facilitating out-of-commerce works within film archives being made available to the public, there is an opportunity for film archives to promote the marginalised films within their collections, and to encourage public enthusiasm for engaging with these films.



Benefits of implementation: ongoing usage, with new, born-digital works



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Another significant benefit to implementing Art. 8 into archival practices is that it provides the ability to make out-of-commerce films available be viewed as part of an ongoing archival collection approach, rather than solely being for making available older works.

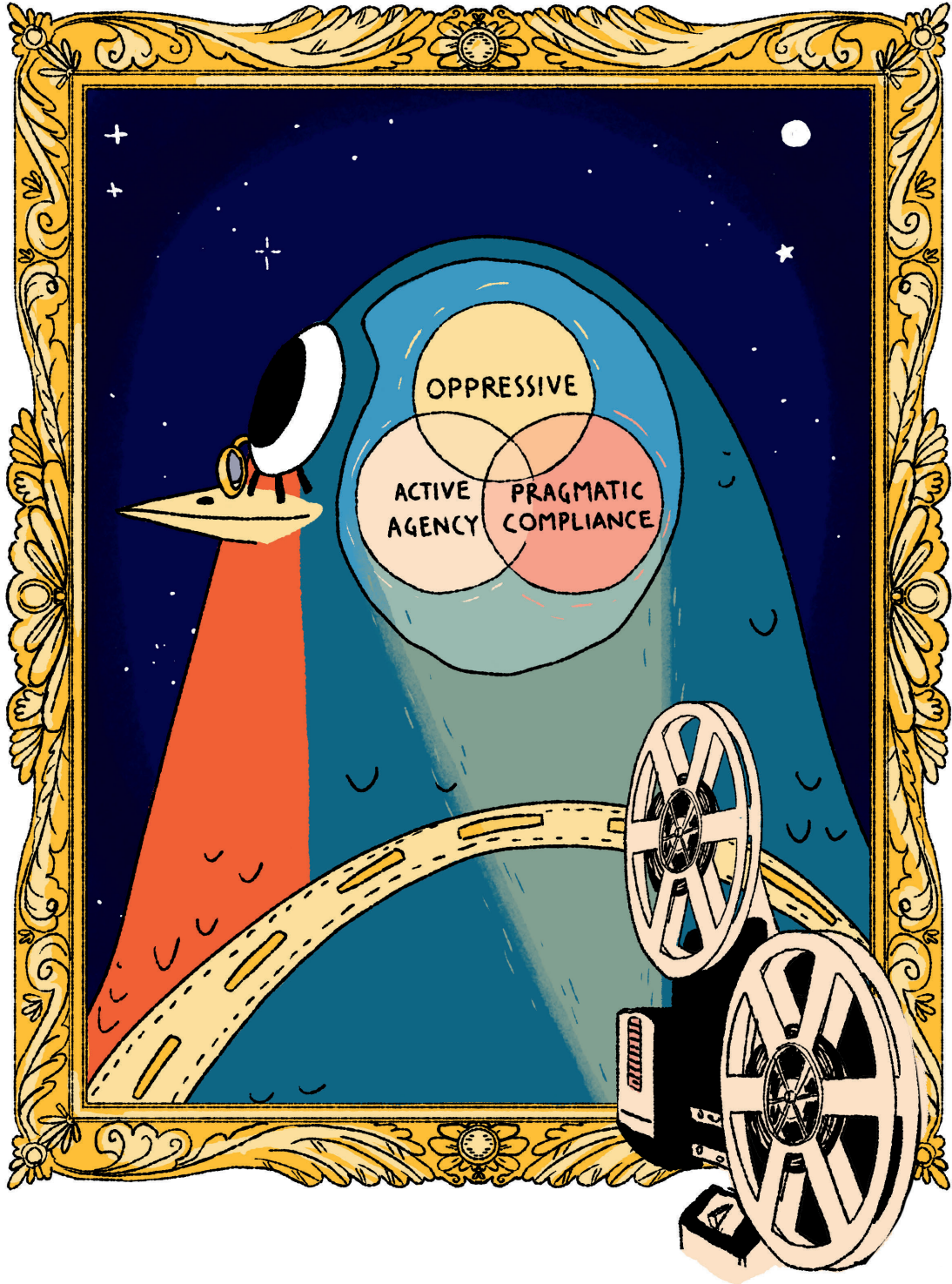
Art. 8 could potentially be invaluable for collecting contemporary works, especially given the vast numbers of digital-born films being created by amateurs.

The historical exclusion of certain groups of people and individuals from the archives can also be actively addressed through making these new out-of-commerce films available, by adding and sharing more diverse voices and experiences within the collection.

As has been noted by the Comité des Sages:

Today's wealth of cultural expressions and knowledge will be our common cultural heritage tomorrow... the past and the present must be available to future generations.





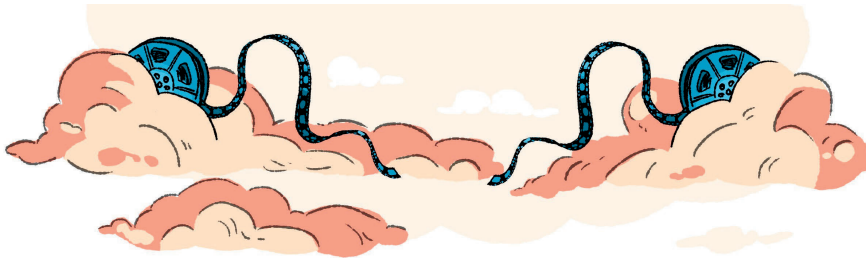
Copyright regime of archival practices

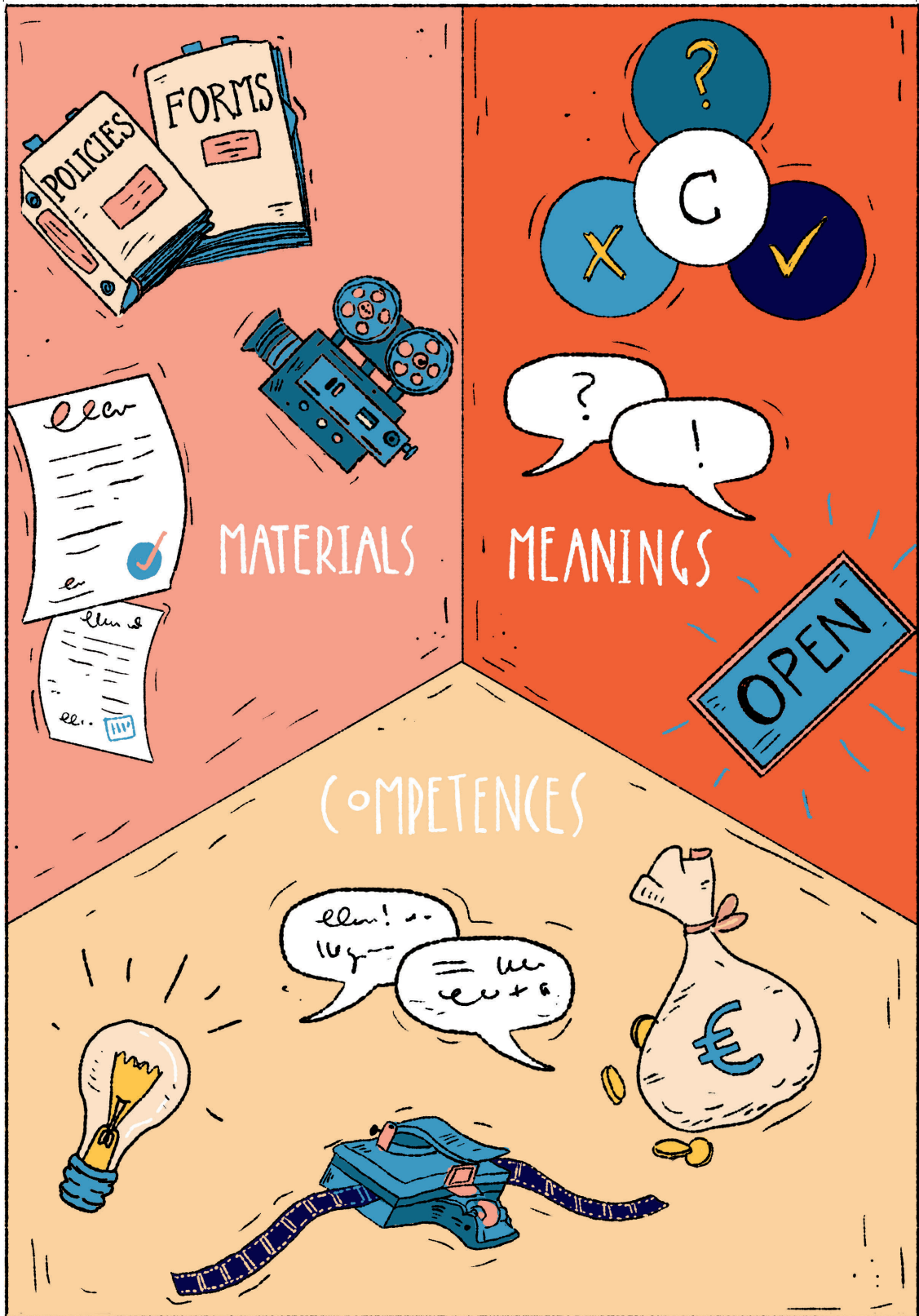
The research has proposed a copyright regime of archival practices, that offers a theoretical understanding of the way film archives engage with copyright law, and what practices are carried out. This theoretical regime will be explored in more detail in a second zine.

Within the copyright regime, three distinct sub-regimes were apparent: the copyright as “oppressive” regime; “pragmatic compliance” to copyright; and “active agency”. These three distinct sub-regimes could be thought of sitting on a scale of strong copyright compliance motivated by copyright fear, to active resistance to copyright on the other end.

Copyright Sub-Regime	Materials	Meanings	Competences
Oppressive - Copyright is experienced as oppressive and restrictive on other activities. Strict legal compliance.	Contracts Policies (no formal copyright policy) Records spreadsheets and index cards Physical film materials and equipment	Copyright fear Copyright compliance Fear of reputational harm Strong concern for the archive's longevity Commercial licensing focus due to limited funding Public access Gatekeeping	Limited specialist copyright knowledge Avoidance of copyright activities deemed 'risky' Specialist knowledge of staff within their roles Record-keeping Liaising with rightholders Technical archiving skills (digitising, preserving, restoring, etc.) Fundraising skills Commercial revenue generating
Pragmatic Compliance - Copyright is restrictive, but more a logistical barrier than	Contracts Policies (no formal copyright policy) Records spreadsheets	Copyright fear (some staff) General copyright compliance	Specialist copyright knowledge Avoidance of copyright activities deemed 'risky' Specialist knowledge of staff within their roles

<p>oppressive. Legal compliance is adhered to, with some limited exceptions where staff lack confidence or knowledge</p>	<p>Internal documents and information memos to staff</p> <p>Emails containing information</p> <p>Physical film materials and equipment</p>	<p>Hesitant about legal compliance that is limited</p> <p>Fear of reputational harm</p> <p>Limited concern for the archive's longevity</p> <p>Public access</p> <p>Gatekeeping</p>	<p>Record-keeping (historically lax)</p> <p>Liaising with rightholders</p> <p>Liaising with national government</p> <p>Technical archiving skills (digitising, preserving, restoring, etc.)</p> <p>Fundraising skills</p> <p>Commercial revenue generating</p>
<p>Active Agency - Copyright is restrictive, but not oppressive. Legal compliance to the extent that it is deemed necessary, and some active departure from copyright.</p>	<p>Contracts</p> <p>Policies (no formal copyright policy)</p> <p>Records spreadsheets</p> <p>Physical film materials and equipment</p>	<p>Copyright compliance that is balanced with professional judgement, some active departure.</p> <p>Fear of reputational harm</p> <p>Confidence in the archive's longevity</p> <p>Public access</p> <p>Gatekeeping</p>	<p>Specialist copyright knowledge</p> <p>Specialist knowledge of staff within their roles</p> <p>Record-keeping</p> <p>Liaising with rightholders</p> <p>Liaising with national government</p> <p>Technical archiving skills (digitising, preserving, restoring, etc.)</p> <p>Fundraising skills</p> <p>Commercial revenue generating</p>







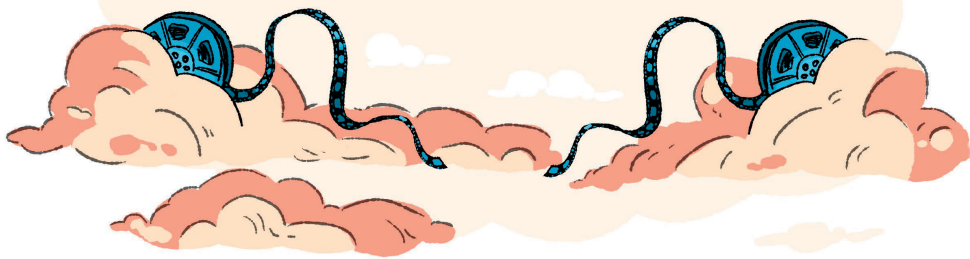
“Meanings” is being used to refer to the spoken, written, unwritten, explicit and implied narratives that are present within the film archives.

The dominant meanings across the archives include copyright compliance; copyright fear; fear of reputational harm; specialist knowledge and competence; public access; gatekeeping; and an ethical duty to preserve and share film heritage. A dominant meaning of funding concerns was also present, but the nuance of the meaning was particularly archive-specific.

Competences refers to the technical skills, knowledge and abilities of the individuals within the archive, such as knowledge of copyright law, and film restoration skills. Individuals are highly specialised, with specific roles and knowledge in relation to archival practice.

This extended to copyright law, with either an individual or a very small number of individuals within the archive having expert copyright knowledge, and then lesser levels of copyright competency amongst other staff, who were specialised in their own roles. Record-keeping was also a prominent skill amongst staff, and there were a variety of record-keeping practices and meanings around proper record-keeping.

Each of the archives liaised with rightholders in relation to copyright licensing and access.





Materials are the objects that are involved in the practice. Nicolini notes that examples of “material arrangements” as he refers to them include “artefacts, linked people, organisms and elements of nature.”

The materials noted in each of the three archives include record-keeping documentation relating to their field collections, copyright and donor materials and licensing agreements.

The three archives in the research did not have a formal copyright policy, although all had policies on other topics.



National implementations so far



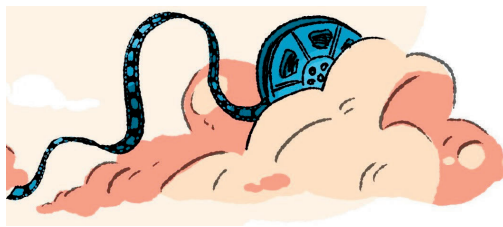
For a number of the EU countries, the adaptation of the Directive into their national implementation is still ongoing, despite the deadline of 7 June 2021 having now passed.

The Netherlands, Hungary, Germany and Malta have implemented the Directive into their national legislation, with the Netherlands being the first to do so. Netherlands has no sufficiently representative CMO for film, and therefore film archives wishing to utilise Art. 8 would have to use the fall-back exception. The strong culture of collective management of copyright in the Netherlands and the strong stakeholder dialogue presents a solid foundation for a CMO for films to appear in the future.

Both France and Italy have adopted delegation legislation, and we are yet to see France's implementation decree. France has passed legislation in relation to specific articles, being Articles 15, 17 -23, but this does not include the articles on out-of-commerce works.

Italy is proposing in its implementation decree that a work must have been commercially unavailable via customary channels for 10 years to be considered out-of-commerce. In Art. 9 of Italy's delegation laws, it implements the licensing mechanism of the Directive, but crucially not the fall-back exception for when there is no sufficiently representative CMO to agree a license with (see Piora).

The UK has chosen not to implement the DSM Directive prior to leaving the EU. However, there is no barrier to the UK choosing to implement domestic legislation that mirrors in substance the provisions of the DSM Directive, including Art. 8.



Key recommendations: for film archives – sampling mechanism



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Currently, large-scale film archive projects are being undertaken in relation to digitising collections and widening access to the vast collections. Whilst immensely beneficial for cultural heritage, they are expensive and time-consuming projects, largely due to the work required for so many individual artefacts.

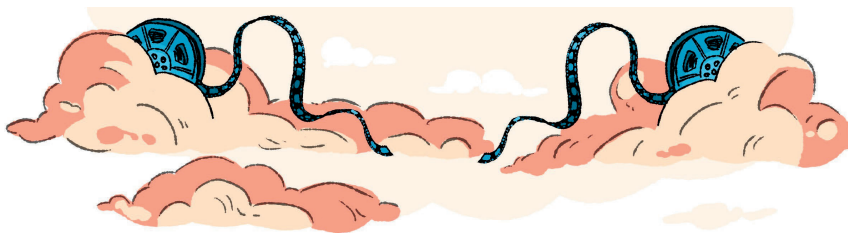
If film archives are required to undertake similarly expensive and time-consuming projects to make their out-of-commerce works available, it is likely that many film archives will never be able to do so.

The Directive allows a sampling mechanism to be used in assessing whether a collection of works is out-of-commerce, and provides no further information about how this sampling could operate.

I propose a sampling approach here, that still ensures protection for rightholders, as well as making it practically feasible.

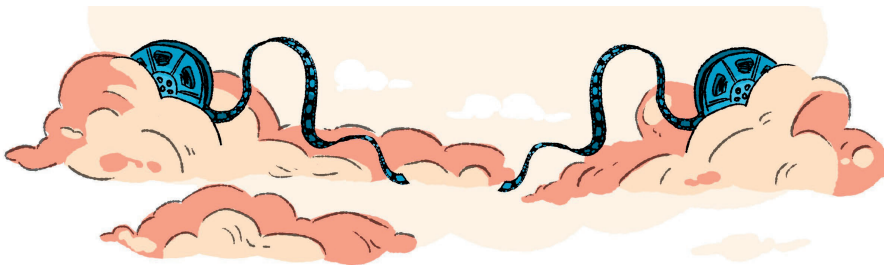
I propose a representative, non-probability sample approach be utilised. This is a statistical sampling method which enables a representative sample to be taken from a larger body of suspected out-of-commerce works, and for specific works to be chosen as part of the sample. The reason for choosing specific works may be that complete or accurate information may only be held for some works, and so these works are easier to search.

A confidence level of 95% is usually desirable within sampling, to ensure rigour and reliability. However, even as the sample-size increases, there can be statistical confidence and accuracy in a relatively small and manageable sample size. The following table sets out the specific sample size, when using a sample of a 95% confidence level with a 5% margin of error.



Number of films	Needed sample size
100	80
1,000	278
10,000	370
100,000	383
1 million	384

It is proposed here that a 95% confidence level with a 5% margin of error be used for calculating the sample size, for larger collection sizes at least. As can be seen in the table, even as the number of works goes up dramatically, the sample size needed only increases slightly. For a collection of 10,000 works, only 370 need to be checked. For a collection of 1 million works, only 384 need be checked. Of course, more works could be checked than this, if it was desired.

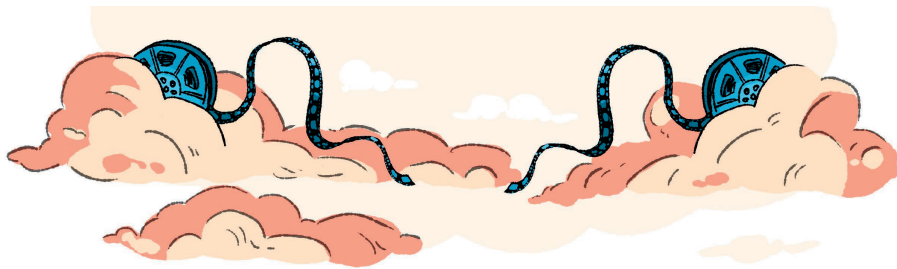






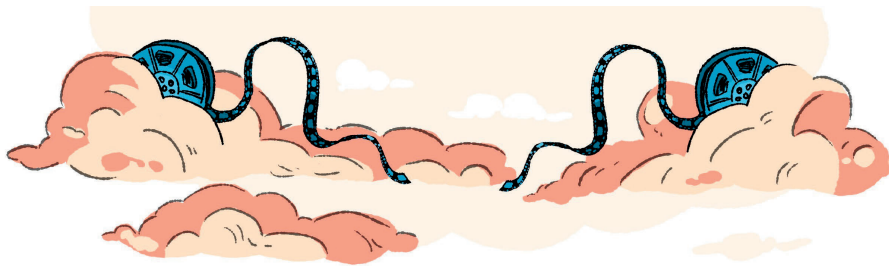
Key recommendations: for film archives

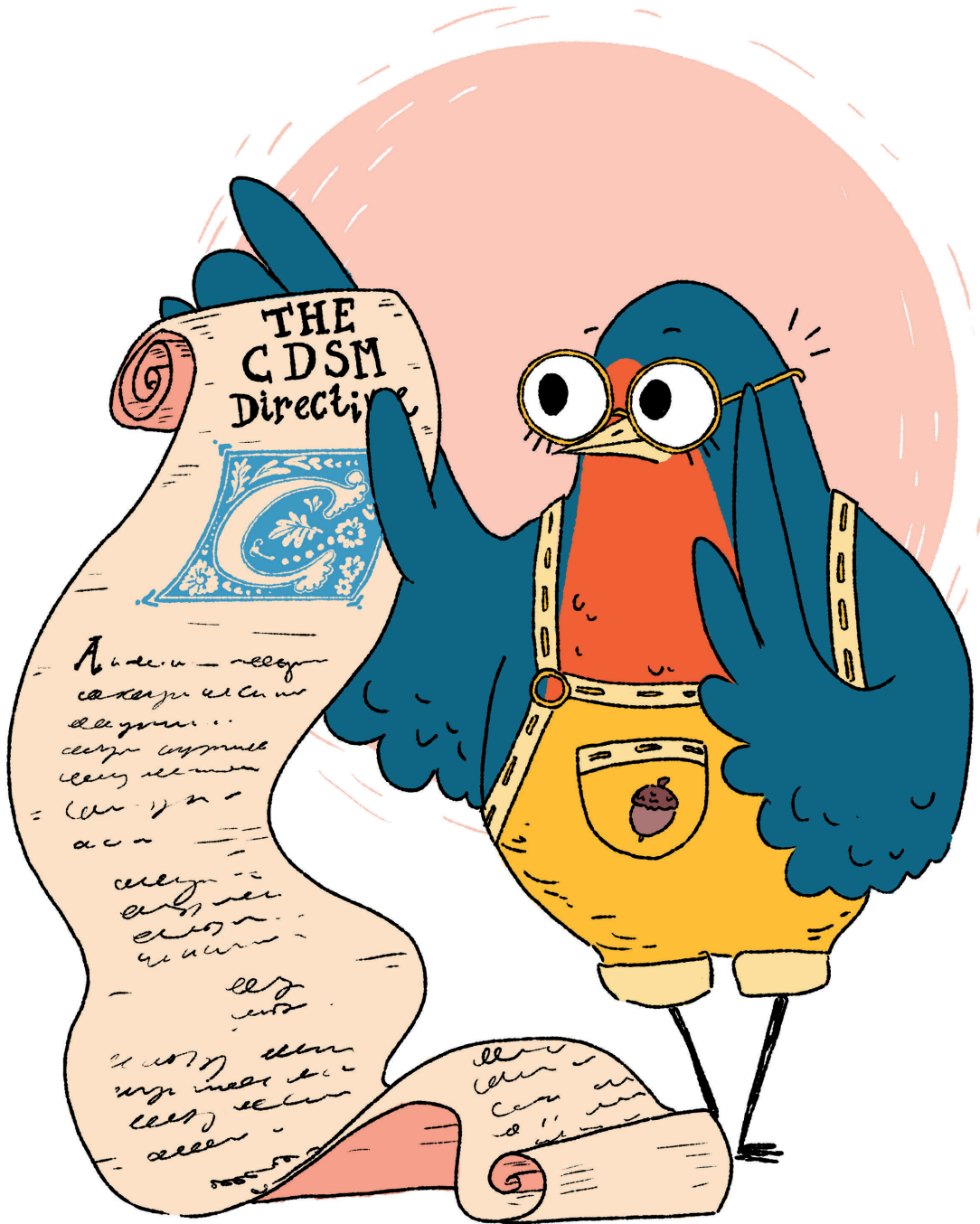
1. That a representative, non-probability sample be used in determining whether groups of works are out-of-commerce, with a 95% confidence level. This will considerably reduce the time and cost of researching the commercial status of a large number of works.
2. Crowd-sourcing of the “reasonable effort” search to determine the commercial availability of set works would alleviate the burden on CHIs. The EnDOW project (in relation to the diligent search for orphan works) evidences that a platform can be created to facilitate this.
3. That the ability to make out-of-commerce works available be viewed as part of an ongoing archival collection approach, as opposed to solely for older works. Art. 8 could potentially be invaluable for collecting contemporary works, especially given the vast numbers of digital-born films being created by amateurs.
4. That the ability to make out-of-commerce works available be viewed as a way of addressing historic exclusions of certain communities.
5. That film archives consider whether they could use Art. 8 to make use of orphan works, where they are also out-of-commerce.
6. Rightholder dialogue is important for avoiding reputational harm; and active and clear dialogue with existing rightholders to reassure them of copyright compliance will likely alleviate worries of potential copyright infringement for both CHIs and their donors.



Key recommendations: for law-makers

1. National implementations should contain clear cut-off dates for when a work can be assumed to be out-of-commerce. Strong liaison with both rightholders and CHIs is needed on this. This should be work specific and could be further defined within this. For example, there could be a cut-off date for film works, or there could be specific cut-off dates for feature films that differs to documentaries, etc. Rightholder dialogue and consideration of the commercial lifecycle of the specific type of film work can guide what these cut-off dates are.
2. Soft law guidance within Member States should be created on which channels *could* be checked to see if a work is in commerce; and also which uses *could* be considered “commercial” and “non-commercial”. This should be sector specific; and be a guide only, not a mandatory list of sources that must be consulted.
3. Funding issues impact on the ability of film archives to consider activities that relate to out-of-commerce works, if this cannot bring in much-needed revenue to cover costs. Advanced funding to film archives is as essential a part of making out-of-commerce works available as legislation is. If Member States are committed to ensuring that film archives can make these works available, then additional necessary funding forms part of this.







How to make your out-of-commerce films available

Key questions for EU countries:

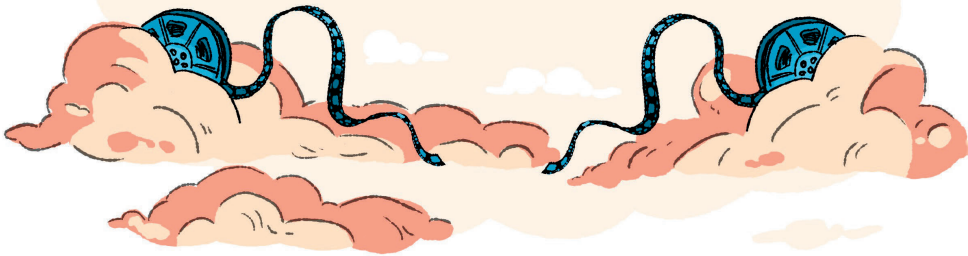
Do you have any information about how many films in the archive may be out-of-commerce?

Do you have the time, money, and staffing to carry out a reasonable assessment of whether a sample of the films are commercially exploited?

And indeed, do you feel able to make use of a sampling approach, as opposed to checking all individual works?

Has it been implemented in your national legislation? Some countries are still implementing the Directive into their national legislation. Check the specific adoption in your country and understand if there are specific requirements you will need to consider.

Is there a sufficiently representative CMO for film works in your country? If yes, contact the CMO about agreeing a non-commercial license with them.





If not, only the fall-back exception is an option.

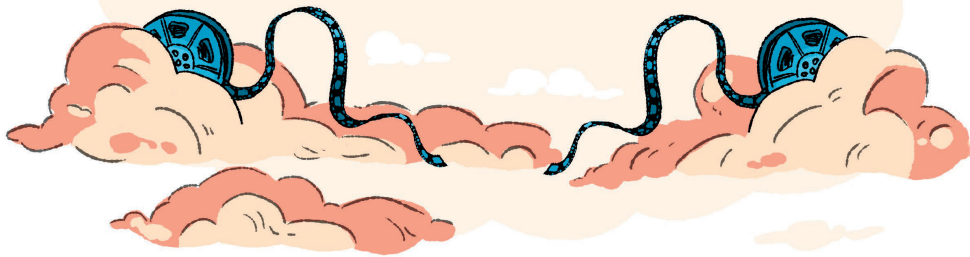
How will your rightholders feel about this? Can you engage them in dialogue before you make use of any of the out-of-commerce works in your archive, and alleviate any fears?

Key questions for non-EU countries

For film archives not in the EU, I would suggest speaking to EU partners once the legislation is nationally implemented for them, and understanding the benefits of the provisions, and any challenges in its practical application.

Lobbying national intellectual property organisations or governments to implement similar provisions may provide a method for film archives globally to provide public access to millions of film works currently 'stuck' unexploited and unseen in the archives.

Unfortunately, the UK cannot use the Directive, as the UK chose not to implement the law before it left the EU.





The vault

This is a short story, written by Melanie, about a film archivist and of finding the lost films and stories in the archive. Because we should never stop telling stories, and those who keep our stories safe for future generations should be very proud of the good they do.

The archivist worked down there all day in the belly of the cavernous, grey building. No sunlight could penetrate through the thick concrete walls; she was so far down into the earth that sometimes she could hear whispers of prehistoric memories just beyond the concrete block around her.

You might think this is a tale of woe, but it is quite the opposite. She was the greatest thing anyone could be: she was a film detective. Children all across the world hoped to be many things: book binders; musical composers; makers of the finest canvases in all the land. But most of all, they hoped to one day be film detectives.

Only the bravest children could one day enter the Film Detective Academy, to learn the great arts of Restoration, Preservation and Archiving. It took many years of study to learn the mysterious ways of the Film Archive, and only a handful of people ever truly learned to speak to the Archive, and listen to its quiet whisper back.

This girl was the best Film Detective in the country, having studied under the Great Keaton many years ago. She wore her hair pulled tight into a bun on the top of her pale face, careful not to let a single strand contaminate the specimens.

She furrowed her brow in concentration and held the film fragment carefully between gloved hands, squinting to make out the faint image. She had been trying to Restore this film for almost a month now, but her progress was very slow. She knew this must be a very special film indeed.

You see, only a true Film Detective knows that the way to Restore a film is to hold the fragment of film reel and allow your mind to expand. Slowly, you must do it slowly. Slowly, your mind expands beyond your ears, so you can feel your thoughts tickle at the back of your neck. Then, you allow them to expand more, so that your thoughts are now curling along the walls and snaking lightly across the ceiling.

Now, for the hard part. You have to close your eyes almost all the way so that all you see is a blur of light, and then find a place of quiet inside your mind. As she closed her eyes and her mind pooled, the electricity flashed as strong as lightning in her skin.

Holding the memory steady, she then allowed her mind to circle upwards, a bolt of blue smoke drifting up the stairs, up and up to the top of the Library's golden spire. And then through the tiled roof, up into the lazy summer air beneath the warm sun. There, and only there, your mind can expand beyond the horizon, searching for a different set of stars.

This is the moment of Oblivion, and this is the moment that the Film Detective must achieve. The girl's mind soared into Oblivion, and she opened her eyes, now wild with electric streaks. She could now stand and see time unspooling like a yellow ribbon, fluttering both into the past and the future in front of her. It was very much like standing on a train station and being able to board a train travelling in either direction.

Her skin tingled as she moved her mind back into the past, feeling the slight lurch of having your body and mind in different centuries. She travelled back and back, scanning the decades for the frayed edges of the story that matched the film reel fragment in her small hand.

She saw people riding proudly on tall horses; soldiers fighting on battlefields; pretty women dancing under the moonlight; children playing games in the school ground. All of it was a slightly grey haze as her mind romped further back.

She had been searching the cobbled Victorian streets of 1899 in her previous Oblivions, trying desperately to see the loose threads out of the corner of her eye. The streets were dark and wet here, with shadowy figures darting from door to door on shadowy business.

There was a crack of gunfire behind her which almost went straight through her, but the girl managed to swerve out of the way just as a large silver bullet sailed through the air like a whip. She felt a sharp pain as it singed her arm, before piercing the wooden door behind her head.

This was a dangerous place to linger in, and she moved on quickly. She raced across the steep rooftops, melting into the shadows amongst the smog. She strained her eyes all around her, feeling her energy begin to wain as she moved her mind further away than it had ever ventured before.

Aha! She laughed with glee when she saw the frayed edge of a person who didn't belong, of a story that had become muddled into another one over the years. It was a little girl in a beautiful red sari, with bands of gold around her wrists. She clung to a large doorway in the street below with her chubby fists clenched tight, all too aware that she was not meant for these grimy streets.

The girl floated down to the street, hovering just above the cracked cobbles. She smiled at the child, and grasped out with her fingertips, just catching the thin purple thread from a faraway land. She reached out with the last of her energy, focusing on the deep warmth in her heart.

She found enough electricity left to hold onto the thread. She carefully pulled it back through time with her, her mind slowly coiling its way back into her body. With a small hiss she became herself again, with all of her thoughts where they should be.

Finally, she had found it! She slumped into her old red chair, exhausted. She gingerly rubbed her arm, which stung slightly from where the bullet had scorched her skin as it tore past her. It did not matter: this was the work of a

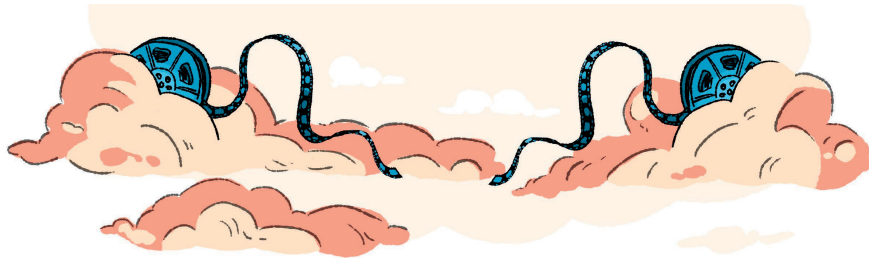
Film Detective, and everyone knew that it was dangerous work. All of the most important work is dangerous.

She opened her black case which sat on her desk and pulled out her 23-gauge Time Needle, threading a strong, silver strand through it. She held the film fragment in her left hand and cautiously overlapped the edge of the story she had just retrieved from 1899.

Weaving her thread through the two parts, she married them together with tiny spider-web stitches. With every stitch, the story glowed brighter, knowing it was re-joining its sister. With one final stitch, the film fizzed to life, whizzing and whirring. It was a beautiful thing in her hands, stirring gently like a new-born baby.

She carefully helped the film back into its canister, feeling its low sigh as it settled back home. She closed the metal case and filed the film in its proper place. Turning back to her long parchment list, she looked to see which film was next.

For a Film Detective's work is never done, and the list goes on into Oblivion.





Key References

Melanie Brown "Exploring Article 8 of the Copyright Directive: Hope for Cultural Heritage" in Luigi Carlo Ubertazzi (ed.) *AIDA Italian Annals of Copyright XXVIII*, Giuffrè Francis Lefebvre, 2019.

Melanie Stockton-Brown. Out-of-commerce Copyright Works in EU Film Archives: A Solution? Upcoming article in the *Journal of Film Preservation*, 2021

There is a great online resource that provides detailed guidance about each of the articles of the CDSM, and a break-down of the requirements that would be very helpful for implementation. Available at: <https://www.notion.so/Articles-8-11-Use-of-out-of-commerce-works-b0091ea89dac4cca96fe537293ed22e6>

*

Borghi, M. "Exceptions as users' rights?" in Rosati, E. (ed.) *The Routledge Handbook of EU Copyright Law* (Routledge, 2021)

Borghi, M. and Karapapa, S. *Copyright and Mass Digitization* (OUP, 2013)

Brunow, D. Curating Access to Audiovisual Heritage: Cultural Memory and Diversity in European Film Archives (2017) 18(1) *Image [&] Narrative*, pp. 97-110





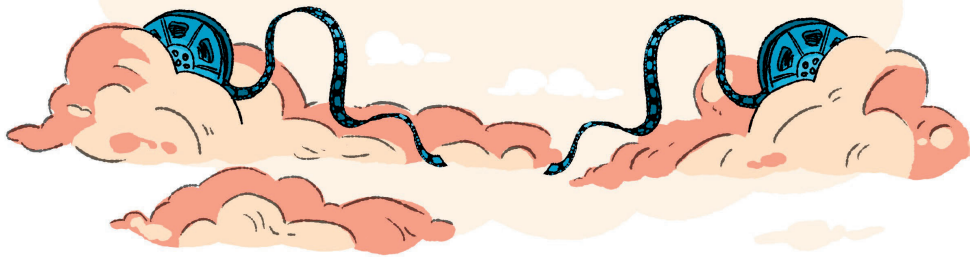
Dusollier, S. The 2019 Directive on Copyright in the Digital Single Market: Some Progress, a Few Bad Choices, and an Overall Failed Ambition (2020) 57 (4) *Common Market Law Review*, pp.979-1030

Fossati, G. *From Grain to Pixel: The Archival Life of Film in Transition* (AUP, 2009)

Geiger, C., Frosio, G and Bulayenko, O. Facilitating Access to Out-of-Commerce Works in the Digital Single Market – How to Make Pico della Mirandola’s Dream a Reality in the European Union 9 (2019) *JIPITEC*, 240

Guibault, L. and Schroff, S. The Use of Extended Collective Licensing for the Use of Out-of-Commerce Works in Europe: A Matter of Legitimacy Vis-à-Vis Rights Holders (2018) 49(8) *IIC*, pp. 916-939

Op den Kamp, *The Greatest Films Never Seen: The Film Archive and the Copyright Smokescreen* (AUP, 2018)





This zine was written and created by Dr Melanie Stockton-Brown, of Bournemouth University.

Email: mstocktonbrown@bournemouth.ac.uk

Twitter: [@MelCopyright](https://twitter.com/MelCopyright)

Co-created with Amy Tatum, Doctoral Researcher in Women in Political Leadership at Bournemouth University

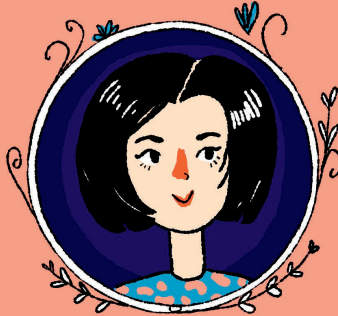
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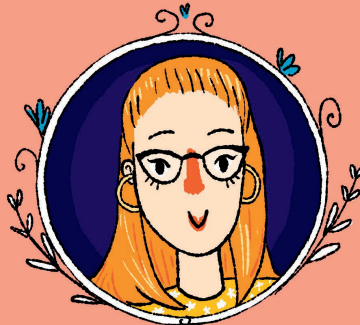
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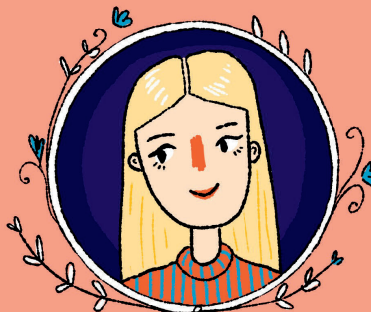
CONTACT INFORMATION



Melanie Stockton-Brown
@MelCopyright



Amy Tatum
@AmyETatum



Hana Berggren
www.hanaberggren.com





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