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# **‘I should like you to see them some time’: an empirical study of copyright clearance costs in the digitisation of Edwin Morgan’s scrapbooks**

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## **Abstract**

**Purpose** – The inability of cultural institutions to make available digital reproductions of collected material highlights a shortcoming with the existing copyright framework in a number of national jurisdictions. Overlapping efforts to remedy the situation were recently undertaken in the form of EU Directive 2012/28/EU, the ‘Orphan Works’ directive, and a new licensing scheme introduced by the UK Intellectual Property Office (UKIPO). This study empirically evaluates both the EU and UK policy approaches, drawing on data collected during a live rights clearance simulation.

**Design/methodology/approach** – The authors attempted to clear rights in a sample of 432 items contained in the mixed-media Edwin Morgan Scrapbooks collection held by the University of Glasgow Library. Data were collected on the resource costs incurred at each stage of the rights clearance process, from initial audit of the collection, through to compliance with diligent search requirements under EU Directive 2012/28/EU and the UKIPO licensing procedures.

**Findings** – Comparing results against the two current policy options for the use of orphan works, we find that the UKIPO licensing scheme offers a moderate degree of legal certainty but also the highest cost to institutions (the cost of diligent search in addition to licence fees). The EU exception to copyright provides less legal certainty in the case of rightsholder re-emergence, but also retains high diligent search costs. Both policy options may be suitable for institutions wishing to make use of a small number of high-risk works, but neither approach is currently suitable for mass digitisation.

**Research limitations/implications** – This rights clearance exercise is focused on a single case study with unique properties (with a high proportion of partial works embedded in a work of bricolage). Consequently, the results obtained in this study reflect differences from simulation studies on other types of orphan works. However, by adopting similar methodological and reporting standards to previous empirical studies, we can compare rights clearance costs between collections of different works.

**Originality/value** – This study is the first to empirically assess the 2014 UK orphan works licensing scheme from an institutional perspective. We hope that it will contribute to an understanding of how policy could more effectively assist libraries and archives in their digitisation efforts.

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## 1) INTRODUCTION

On 7<sup>th</sup> of June 1953, Scottish poet Edwin Morgan wrote to his literary agent with enthusiasm about an unusual creative project which he had underway. Morgan's agent had sent him a letter only days before, expressing hope that the poet might be 'planning some work on a larger scale' compared to his previously published poems (Christy and Moore, 1953). Morgan had indeed been working on a major project, however owing to its unusual scope and breadth, it would turn out to be impossible to publish in his lifetime. The work consisted of a series of large and weighty scrapbooks in which the poet collected and annotated tens of thousands of newspaper clippings, photographs and ephemera cataloguing topics which attracted the public imagination or his personal interest. Reflecting on the project, Morgan described the books as 'partly documentary/historical, partly aesthetic, partly satirical and partly personal ... a Whitmanian reflecting glass of the world [as] refracted through one personality' (Morgan, 1953).

Morgan realised that dissemination of the scrapbooks would face challenges, although he expressed a strong desire to share them with the public. He wrote to his agent that 'the practical obstacles to any kind of reproduction or publication are naturally enormous,' while nevertheless enjoining that he 'should like you to see them sometime' (*ibid*). The poet continued work on his scrapbooks project, which grew in size to cover 16 volumes. There is no recorded response to this letter in Morgan's papers, supporting the conclusion that the project was shelved, although Morgan did revisit the idea 30 years later. In 1988, with his reputation firmly established, the response from his publisher Carcanet remained that, 'the project looks absolutely fascinating. It also looks hugely expensive' (Schmidt, 1988).

The costs which made publication of the scrapbooks prohibitive in 1953 and later in 1988 were twofold. First, the technical means of capturing and reproducing the 3,600 pages

contained in the collected volumes grossly exceeded the financial return expected from a print run. Even sacrificing the integrity of the collection to publish a shorter, condensed version would have proven cost-prohibitive from a technical point of view. Morgan expressed his preference that any republication be in full color, whilst the quantity of fine detail contained on each page demanded a large format. Second, just as important as the technical costs of reproduction were the copyright issues implied in any wider publication of the works. This was because the scrapbooks nearly exclusively contained text and images originating from contemporary third-party published sources. With thousands of newspaper clippings, photographs and other works across the scrapbooks, this would have presented an insurmountable task to any commercial or non-commercial reproduction of the scrapbooks.

The advent of digital technology has provided a potential solution to the first set of costs related to technical reproduction. Cost-savings effects resulting from digitisation have been observed across a range of media and cultural industries. The proliferation of software tools has made it possible for a greater number of people to capture, manipulate and disseminate high-quality digital copies (Hesmondhalgh, 2007; Waldfogel, 2011; 2014). In book publishing, digital networking and typesetting software have enabled ‘print-on-demand’ business models, disintermediating the role of traditional publishers in the value chain (Waldfogel and Reimers, 2015). The cost of digitally capturing and archiving printed material has also declined dramatically, with impacts on libraries, archives and knowledge institutions (Gadd et al., 2003; Nelson and Irwin, 2014). Internet search company Google initiated a digitisation project in 2004 which sought to digitise some 20 million books at an estimated cost of \$30 USD per book (Samuelson, 2009). Many libraries and archives in Europe, including the Bibiotheque Nationale de France (BnF) and British Library (BL) are pursuing similar efforts to digitally archive and share their collections (Delorme, 2011).

However, a major impediment to mass digitisation of cultural works has been and remains the law of copyright. While technical costs related to digitisation have declined, the

costs imposed on Cultural Heritage Institutions (CHIs) by the need to locate and ask permission of rightsholders have increased as a proportion of the per-work cost of digitisation (Covey, 2005; Varian, 2006). Even with significant investment in rights clearance, a significant number of works in collections often have rightsholders who cannot be identified or located, even after a diligent search. These materials have been referred to as ‘orphan works’: that is, they are likely in-copyright but relevant rightsholders are unknown or cannot be located for the purpose of securing permission for use (Urban, 2012; Borghi and Karapappa, 2013). Investment in mass digitisation is therefore hindered by high transaction costs associated with searching for and locating rightsholders, and by the inability to locate some rightsholders which may prevent digitisation of those works entirely (Borghi et al., 2017). Understanding the precise source and nature of these costs is key to developing policy solutions to the so-called ‘orphan works problem’ which plagues mass digitisation efforts across the library, archive and museum sector.

The present study is situated within broader considerations of organisational responses to risk (Power, 2016; Trkman and Desouza, 2012; Hutter and Power, 2005) and in particular to legal risks such as those arising from infringement of intellectual property rights (Wastyn and Hussinger, 2011; Gibson, 2007; Simensky and Osterberg, 1999). Legal rights are complex, and organisational capabilities differ in terms of the ability to respond to risk. Capabilities include resources, processes as well as knowledge (both tacit and formalised) (Garrido and Camarero, 2014). If organisations do not take advantage of statutory exceptions designed to re-balance intellectual property rights in favour of public access, this may signal a lack of legitimacy of intellectual property policy and a questioning of the relevance of public institutions to citizens' routine practices.

In addition, this study contributes to understanding of the significance of transaction costs introduced by private property rights in intellectual property. In economic terms, these costs may lead to a situation in which there is a failure to transact, leading to socially

inefficient decrease in the production and consumption of works (Landes and Posner, 1989; Khong, 2007). This problem is particularly acute in the museum and archive sector, where a large quantity of works multiplies transaction costs, and where the generally low commercial value of older in-copyright works produces an 'orphan work paradox' in which the works most costly to clear are those with low commercial appeal (EU Commission, 2011; Sherman, 2007). The low commercial appeal of these orphan works means there are lower incentives for rightsholders to invest in offering licensing solutions to unlock them. Efficiencies offered by digitisation may present solutions to this paradox, either through private ordering (contracts, licences) or through public policy intervention, but the socially optimal way of balancing these two approaches remains highly contested, and this is an issue for regulation of the digital public sphere more generally (Hunter, 2003; Boyle, 2008; Samuelson, 2016).

In this paper, we evaluate the effectiveness of two recent legislative approaches to orphan works: EU Directive 2012/28/EU (the 'Orphan Works' Directive) and the national implementation of an orphan works licensing scheme by the UK Intellectual Property Office (UK IPO). We assess whether these legislative solutions achieve the purpose of allowing CHIs to make use of orphan works in their collections. We proceed by reviewing existing literature on the costs associated with digitisation of collections consisting of copyright material. Drawing on previous studies, we characterise the potential costs to CHIs along the 'chain' from exhibition concept to public display. Existing empirically grounded literature offers a fuller understanding of the importance of copyright clearance within the overall cost of mounting a digital collection. Overall, the literature shows that the costs of digitisation are significant, and that they occur throughout the process of curation, and not only in the phase traditionally understood as 'rights clearance'. We standardise and report the results of 13 independent empirical exercises led by university libraries and CHIs, to develop a baseline estimate of costs for different types of collections under different institutional and legislative conditions. Finally, we contribute our own empirical findings on the costs of rights clearance by reporting results of an attempt to make use of the orphan works regulations provided under

the EU Directive and the UKIPO licensing scheme, when seeking to digitise a portion of the scrapbooks created by the Scottish poet Edwin Morgan.

### *1.1 Previous studies on the cost of rights clearance*

A modest number of empirical studies have assessed the costs of rights clearance for CHIs as well as measured the proportion of orphan works comprising these collections. Table 1 below summarises the results of previous studies. As far as possible we attempt to standardise reporting across the studies, by converting disparate reporting methods to allow comparison. For each study, we report the overall number of works in a collection, the ‘success’ rate as a percentage of rightsholders located, the time spent on rights clearance for every work in the collection, and the total costs of rights clearance across every work in the collection (including works where permission was never received, and including staff hourly costs). This approach resolves certain problems in comparing different collections, such as biases introduced by the age of collections, higher or lower ‘hit rates’ in certain mediums, etc. However, this method introduces other idiosyncrasies: for example a study by Dickson (2010) which originally managed to clear only 4 works from a total of 8400, attained a cost of USD \$2000 per cleared work. However, significantly lower per-work costs were achieved when we consider that the archivists examined the whole collection of 8400 works. Since the archive decided to make available the whole collection (as have many other institutions on a risk-assessment basis) we find it expedient to report the clearance costs in relation to the number of works in entire collections.

The rate of success in locating rightsholders is similar within mediums but varied widely depending on age and type of collection. A study by Covey (2005) conducted at Carnegie Mellon University examined 277 randomly selected book titles held in the university library and recorded the costs of rights clearance. For 19% of the books in the sample, a rightsholder could not be located. Of the 81% of titles where a rightsholder was located, 34% did not respond to the requests for permission. A further 37% of rightsholders

denied permission to digitise the work, while 30% of those contacted agreed to digitisation. A similar study on library holdings by Stratton (2011) recorded information on the cost of locating rightsholders in a sample of 140 books published between 1870 and 2010 held by the British Library. The study sought to identify the resource costs required to ascertain the copyright status of the material as well as the proportion of orphan works in the sample. Of the total sample, 29% of titles were found to be in the public domain due to expiration of copyright term while 71% of works were judged to be in-copyright. Of those in copyright, 43% were determined to be orphan works after a diligent search, corresponding to 31% of the total sample of 140 works. This is in line with findings from a number other studies of library collections of 19<sup>th</sup> and 20<sup>th</sup> Century printed material (Korn, 2009; Dickson, 2010).

Studies on other types of material have confirmed the presence of orphan works, but in different proportions depending on the nature of the collection and the medium under study. Reporting on rights clearance costs in sound recordings, the British Library (2011) published results of an effort to digitise 220 analogue recordings of oral histories with jazz musicians. The recordings were originally made in the 1980s. A search for 200 rightsholders between 2005-2007 was able to successfully clear copyright permissions in 53.5% of cases. A remaining 26.5% of the collection remained orphaned, even after extensive search.

Within the overall literature on costs of rights clearance, a relatively small number of studies have attempted to capture the amount of time spent on neighbouring activities: not only diligent search, contact and negotiation with rightsholders, but also the initial rights audit of the collection and the creation of item-level rights metadata to manage access to the digitised collection. For example, Akmon (2010) reported that 85% of staff time on the John Cohen AIDS Collection digitization project was spent on copyright-related tasks, with only 15% devoted to digitization preparation, processing and arrangement, and the creation of Encoded Archival Description. Similarly, Dickson (2010) reported that, with a single part-time staff member responsible for copyright tasks on the Thomas E Watson digitisation

project, 4.5 months and a total of \$8000 was spent on identifying rightsholders, finding contact details and contacting them.

The following table presents the most significant case studies on the rights clearance process for cultural heritage institutions. We report all studies, including the scrapbooks, using an average hourly rate of £10.79, calculated from the most conservative archivist annual salary estimate of £22,443 as reported by the Archives and Records Association of the United Kingdom and Ireland (ARA).<sup>5</sup> This rate provides a consistent estimate throughout this paper for the resource costs involved in rights clearance across different collection and project types in GBP.<sup>6</sup> Please see the footnotes for the original costings provided in the individual studies. Unless otherwise noted, the percentages detailed here refer to works, not rightsholders.

**Table 1: Summary of previous empirical studies on costs of rights clearance**

Institution	Study	Sample size and type	Results
Copyright Feasibility Study, Carnegie Mellon University Libraries	Troll Covey (2005)	277 in-copyright books	Unable to identify/locate rightsholder: 19% Permission given: 24% No Permission given: 30% No response: 27% Resource cost per work: £36.96 <sup>7b</sup> (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 rightsholder: 13% Permission given: 61% No Permission given: 20% No response: 5%

<sup>5</sup> ‘The ARA recommends that the minimum starting salary for recently qualified archivists, archive conservators and records managers is between £22,443 and £38,000.’ Accessed online: <http://www.archives.org.uk/careers/careers-in-archives.html>

<sup>6</sup> Although it is important to note that where institutions pay a higher hourly rate than the minimum ARA recommended salary, the estimated hours spent on rights clearance will be reduced.

<sup>7</sup> 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.

<sup>8</sup> USD are converted to GBP using the exchange rate of \$1=£0.077, valid as of 10<sup>th</sup> August 2017.

			Resource cost per work: £37.73 <sup>9</sup> (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 rightsholder: 0% <sup>10</sup> Permission given: 23% No Permission given: 32% No response: 45% Resource cost per pub: £77.77 <sup>11</sup> (as reported) Hours per pub: 7.2 (estimated)
UK Wellcome Library	Vuopala (2010)	1,400 posters	Unable to identify/locate rightsholder: 78% Permission given: 19% No Permission given: N/A No response: 3% Resource cost per work: £46 <sup>12</sup> (as reported) Hours per work: 4.3 (estimated)
UK National Archives	Vuopala (2010)	1,114 legal documents	Unable to identify/locate rightsholder: 35% Permission given: 54% No Permission given: 10% <sup>13</sup> 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 rightsholder: 13% Permission given: 64% No Permission given: 5% No response: 18% Resource cost per work: £3.45 (estimated) Hours per work: 0.32 <sup>14</sup> (as reported)

<sup>9</sup> 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.

<sup>10</sup> This study reports in terms of percentage of publishers, rather than percentage of works.

<sup>11</sup> 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.

<sup>12</sup> 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 10<sup>th</sup> 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.

<sup>13</sup> Permission to use 45 works were rejected outright. The use of 77 further works was conditional on payment: TNA decided not to pay rightsholders 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.

<sup>14</sup> This calculation is based on the time taken to identify rightsholders, update rightsholder records, search, contact and negotiate rights reported by Akmon, which was 74.96 minutes (1.25 hrs) per rightsholder. 1,377 unique rightsholders 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

The Thomas E Watson Papers, University of North Carolina at Chapel Hill	Dickson 2010	>8400 archive items	Unable to identify/locate rightsholder: 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 <sup>15</sup> (as reported)
British Library	Stratton (2011)	140 books	Unable to identify/locate rightsholder: 31% Permission given: 17% No Permission given: 27% No response: 27% Resource cost per work: £43.16 <sup>16</sup> (estimated) Hours per work: 4 (as reported)
BBC	Hargreaves (2011) IPO (2014)	1,000 hours of factual TV programming	Unable to identify/locate rightsholder: assumed 0% Permission given: assumed 100% Resource cost per work: £70 <sup>17</sup> (estimated) Hours per work: 6.5 (as reported)
UK Wellcome Library	Stobo et al. (2013)	1476 books	Unable to identify/locate rightsholder: 14% Permission given: 33% No Permission given: 28% <sup>18</sup> No response: 25% Resource cost per work: £43.16 <sup>19</sup> (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 rightsholder: N/A Permission given: N/A No Permission given: N/A No response: N/A Resource cost per work: £1.25 <sup>20</sup> (estimated) Hours per work: 0.116 (as reported)

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.

<sup>15</sup> 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.

<sup>16</sup> This resource cost is estimated based on the number of hours provided in the study referenced, multiplied by the ARA salary costs.

<sup>17</sup> 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.

<sup>18</sup> 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).

<sup>19</sup> 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.

<sup>20</sup> 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 10<sup>th</sup> August 2017.

Political Posters, Victoria & Albert Museum	Peters and Kalshoven, 2016	1189 posters	Unable to identify/locate rightsholder: 47% Permission given: 39% No Permission given: N/A No response: 14% <sup>21</sup> Resource cost per work: £4.96 <sup>22</sup> (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 rightsholder: 40% Permission given: 21% No Permission given: N/A No response: N/A Resource cost per work: £29.67 <sup>23</sup> (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 rightsholder: 80% Permission given: >8.5% No Permission given: 5% No response: 6.5% Resource cost per work: £39.87 Hours per work: 3.7

As shown by the overall view of studies in Table 1, the inability to identify rightsholders or locate contact details for them is a consistent obstacle facing CHI digitisation projects in the existing literature. Prior to the new UK and EU legislation for orphan works, CHIs wishing to digitise their collections were left with three choices. They could opt to digitise only material that they knew to be in the public domain, where they were certain the rights were owned by their institution, or where the rights had been assigned to their institution.<sup>24</sup> Alternatively, they could opt to accept the risk of making orphan works available online, and choose to mitigate those risks in various ways – by providing a takedown policy on their website, requiring users to register and accept terms and conditions before accessing

<sup>21</sup> The report states that rights in 171 posters were not cleared, but it does not differentiate between out-right refusal and non-response.

<sup>22</sup> 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.

<sup>23</sup> 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.

<sup>24</sup> It is important to note that assumptions about the public domain and rights ownership status of works are not easy to make without extensive assessment and research, which also create transaction costs. Indeed, decisions about deposited collections need to be made very carefully indeed. Without proper documentation at the point of deposit, it may be impossible to determine whether the depositor is in fact the owner of the intellectual property rights in the material that was given to the institution, or whether they had the necessary authority to assign those rights.

material, advertising for rightsholders, or holding funds in an ESCROW account for reappearing rightsholders.<sup>25</sup>

There are several issues with the above approaches. If an institution decides to avoid all forms of legal risk, the material they make available online will be limited by arbitrary factors like age, or the relationship of the depositor of the collection to the institution.<sup>26</sup> The historical record, which already suffers from various biases, becomes skewed even further in the present digital era. Additionally, the online resource may be incomplete: those users who wish to explore the entire collection must still travel to the institution to access the collection directly. And while some institutions studied were able to take on the risk of making orphan works available online prior to the legislative changes in 2014, evidence suggests that these institutions were in the minority.<sup>27</sup> Practitioners and their employers prefer to operate within the law, and within their own professional codes of conduct (International Council on Archives, 2010). Indeed, research has shown that copyright law makes librarians and other staff in the cultural heritage sector feel anxious (Morrison and Secker, 2015). Nevertheless, at a symposium organised by CREATE at the Digital Catapult in September 2015, it was reported that the Wellcome Library, the National Portrait Gallery and the Tate had decided to continue making orphan works available online according to their own internal risk management policies, rather than comply with the new orphan works legislation (CREATE, 2015).

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<sup>25</sup> Risk management has been part of the copyright guidance available to the cultural heritage sector through various sources and sector bodies since 2008: albeit, as a very small part of that guidance, although rights clearance generally involves risk management of one form or another. One well-known tool available to the sector is the Web2Rights risk management calculator, available at <http://www.web2rights.com/OERIPRSupport/risk-management-calculator/> [Accessed 24 Nov 2016].

<sup>26</sup> We accept that material made available online will always be limited by different factors – sensitive data, institutional priorities, availability of funding and skills – but we argue that copyright is an important determining factor.

<sup>27</sup> For example, Jean Dryden found that 64% of Canadian archivists included in a survey for her doctoral dissertation would not select material for digitization where the copyright was owned by a third party. For more details, see 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](https://tspace.library.utoronto.ca/bitstream/1807/11198/1/Dryden_Jean_E_200806_PhD_thesis.pdf) [Accessed 17 November 2016].

## 2) RESEARCH METHOD: RIGHTS CLEARANCE SIMULATION

The study of rights clearance in the cultural heritage sector presents a particular challenge for researchers, owing to the high resource costs involved in mounting a digital exhibition as discussed above. In order to generate useful data on rights clearance while overcoming the cost barrier, we undertook a live simulation exercise using a smaller sample of works within a larger collection. The sample was drawn from the collection of Edwin Morgan's scrapbooks held by the University of Glasgow Library Special Collections.

Broadly, simulation refers to a research method allowing the observation of effects in a partially or wholly artificial environment where the researchers can alter conditions, inputs and rules (Gilbert and Troitzsch, 1999). Artificial simulations need not engage real human subjects: since first being introduced as a tool for social science research, computer simulations have been used to understand and predict group behaviour, for example through multi agent based modelling techniques (Davidsson, 2002). By contrast, live simulations can involve human participants and occur outside of artificial laboratory environments. Consequently, the live simulation approach introduces real-world constraints, institutions and actors. In certain domains such as medicine, urban planning and education, live simulation exercises have been successfully used for training as well as to improve organisational management under semi-controlled conditions (Borodzicz and Van Haperen 2002). In hospital management for example, a disaster simulation might involve setting up an artificial crisis scenario to test and improve protocols for intake and care of patients (Franc-Law et al., 2008).

An advantage of the live simulation exercise method is that it offers practitioners access to realistic conditions while providing a degree of safety without the consequences of failure. As such, live simulation may offer improved external validity over purely numerical

simulation by introducing real-world conditions; however, it remains an imperfect reflection of real behavior (since agents in the simulation do not face the consequences of failure when trying new strategies). Despite shortcomings related to its artificial characteristics, live simulation may offer advantages over other self-reporting mechanisms such as survey methods, such as in situations where participants may not be capable or willing to report conscious strategies. The simulation method has also been applied successfully in socio-legal studies research, particularly where live observation would present challenges or where the researcher would otherwise not have the ability to isolate variables of interest (for example see Correll et al., 2007; Finch and Munro, 2008;).

In intellectual property policy, Favale et al. (2013) employed a live simulation approach to studying the cost of copyright licences for both commercial and non-commercial use. The researchers designed a series of hypothetical orphan works scenarios (e.g. ‘over 100,000 items in an archive of photographs’), and submitted those to relevant national authorities in jurisdictions of interest. The objective of their method was to ‘generate data based on realistic licensing prices for real-life situations involving the commercial and non-commercial use of orphan works in the given country’ (2013: 59). The approach enabled the researchers to quickly gather data about a range of possible use-types (commercial, non-commercial) across four national jurisdictions, where the price of licences is determined on a case-by-case basis. Obtaining empirical evidence about fees and transactions costs is necessary for evaluating the practicability of licensing schemes for different types of cultural user.

One limitation of the study by Favale et al. was that prices were obtained only for licences granted by central authorities. Because orphan works use-cases were hypothetical, the authors were not able to gather reliable data on the costs of determining orphan status of works within and across collections. The researchers also did not gather information on cultural users’ transaction costs (i.e., the costs of locating, communicating and bargaining

with relevant authorities, additional to any processing fees charged by the administering authority), which likely vary depending on national authorities' procedures. It may be that search and transaction costs make up a non-negligible or significant portion of the overall cost for cultural institutions of availing themselves of orphan works schemes. Despite these limitations, the authors offered compelling evidence that on the basis of fees, the national *ex ante* orphan works clearance schemes examined are not currently suitable for their stated purpose. The authors observe that 'the licensing prices, the required formalities, the licensing duration, as they stand, present immense hurdles for private and public institutions willing to undertake mass digitisation projects.' (Favale et al., 2013: 81).

Here, we adopt the live simulation approach used by Favale et al. and attempt to improve understanding in specific ways. Rather than obtain information about hypothetical fees from national authorities, our study considers the cost of handling in-copyright works throughout the process of designing a digital collection of works in an actual institutional setting. We obtain 'live simulation' data from a trained archivist by observing her performance of various tasks related to compliance with the EU and UK legislation. By collecting observational data about the potential sources of costs at various stages of a digitisation exercise, we hope to contribute to fuller understanding of the impact of current legislation on the cost-benefit analysis associated with digitisation efforts by staff within cultural institutions.

This study was undertaken in the context of an initiative launched in Spring 2014 by the Special Collections department (SCD) at the University of Glasgow.<sup>28</sup> The University of Glasgow SCD employs 8 professional librarians and is supported by two conservators available from the main University Library. In cooperation with the CREATE Research Centre in the School of Law, a decision was made to attempt to mount a digital exhibition of

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<sup>28</sup> Project initiators were Senior Assistant Librarian Sarah Hepworth of University of Glasgow Archives and Special Collections, and Professor Ronan Deazley of Queen's University Belfast, School of Law.

the Edwin Morgan Scrapbooks, achieving both the public interest aims of the SCD to raise public awareness of this important body of work by a significant national writer, and to serve as a case study to analyse the effects of the newly-introduced Orphan Works legislation. The project was initially supported by approximately £50,000 from Research Councils UK. These funds enabled the library to support an additional post for 18 months, to support the pilot study and conduct rights clearance work on the collection. A trained curator was employed as project officer in November 2014 with responsibilities to both deliver a digital exhibition pilot to the SCD and take part in the live simulation of rights clearance described in the present study.

The sample of individual works used in this study consists of 432 literary or artistic expressions contained in 380 individual cuttings (some items contain more than one copyright work) affixed to the first 30 pages of Volume 12 of the Edwin Morgan Scrapbooks collection. With 3,600 pages across 16 scrapbooks and an average of 15 cuttings per page, the entire collection contains an estimated 51,480 copyright works. Book 12 contains 300 pages, making this a 10% sample of Volume 12. Although the composition and themes of the scrapbooks shifted over time, the contents of Book 12 are typical in composition and type to those of previous and subsequent volumes.

Book 12 covers the period roughly from 1954-1960. In addition to its representativeness, this book was selected because it crosses over two UK copyright regimes (the Acts of 1911 and 1956), potentially enabling the researchers to observe effects of the law on the creative contents of the books. Where possible, the researchers recorded all costs associated with identifying, searching for and communicating with relevant rightsholders, collecting societies and national authorities. The project officer maintained a database of works contained in Book 12 and recorded variables including the type of work, the known status of rightsholders, the time spent locating and communicating with rightsholders and any transformations made to the original work by Edwin Morgan. The project officer recorded information about all

staff resources devoted to the rights clearance enterprise, both in terms of time and hourly staff and overhead costs. These costs were significant to the overall ambition of making the Edwin Morgan scrapbooks digitally available.

### *2.1 Composition and description of the collection*

The scrapbook collection is part of the overall papers of the Scottish poet Edwin Morgan (1920-2010) collection held by the University of Glasgow. The scrapbook holdings consist of sixteen large volumes, compiled by Morgan between 1931 and 1966. The physically imposing books (occupying slightly over 2 meters of shelf space) comprise 3,600 pages of collaged material from a diverse range of sources; contemporary and historical newspapers, books and periodicals, photographs, stamps, advertisements, flyers, cigarette cards and other everyday items. Material is predominately from newspapers and magazines. Of the overall sample, 85% is from published sources: text, artwork and photographs from books, newspapers and periodicals, with the remaining 15% made up of original artwork, photographs and handwriting, images from TV broadcasts and ephemera. Periodical photographs account for the largest percentage of the material, at 41% of the total.

The Scrapbooks presented a particularly challenging mass digitisation project for a number of reasons. Many archival digitisation projects involve individual items grouped in files and boxes which have come from a known source and origin due to the information recorded about the collection when deposited. Copyright often rests with the source, or where there are multiple creators, they have a link with the source, such as in the case of authors in correspondence with one another (manuscript letters). In contrast with other studies of copyright clearance, the Scrapbooks involve an unusually large number of third-party creators due to Edwin Morgan's use of published material from a wide range of sources.

The copyright status of the scrapbooks is complex. Nearly all of the works contained in the volumes are in copyright, owing to the long duration of copyright term (70 years from the death of the creator of literary or artistic works in the UK). Some 9% of the items contained in the books (such as photographs, handwritten notes and drawings) were originally created by Morgan himself, with copyright now residing with the Edwin Morgan Trust which administers his estate. Some of the items contained in the scrapbooks are well known third-party works, such as poems and long-form newspaper or magazine articles. However, the majority of the material contained in the scrapbooks is of third-party but unknown origin, presenting a problem for rights clearance. These orphan works include cuttings of photographs which are removed from their original context, small excerpts from newspapers and magazines missing information about their provenance and other ephemeral materials which do not display information about possible rightsholders. Compared with prior studies of rights clearance for purposes of digitisation, the Edwin Morgan scrapbooks are unusual due to the mixed, partial nature of the works contained within.

The project officer began the rights clearance process by looking through all the scrapbooks to gain an understanding of their materiality and content. The objective of this first pass was to understand what kind of material was in the books, how the composition changed over time, what kinds of sources Morgan preferred and which items could be grouped together for purposes of rightsholder search. This early information-gathering process took 3 months at an average salary cost of £5610.80.

**Table 2: Initial audit of rightsholder status in the scrapbooks**

Copyright Status	No. of Works	Percentage of Works
Edwin Morgan Copyright	37	8.5%
Third-party copyright	50	11.5%

Unknown rightsholder	345	80%
<b>Total:</b>	<b>432</b>	<b>100%</b>
<b>Time spent extracting initial data from scrapbooks:</b>	<b>520 hours</b>	
<b>Equivalent salary cost:</b>	<b>5610.80</b>	

The research team concurrently developed methods to record the costs of rightsholder search. The researchers made decisions about what the project officer was going to record, how she would code variables about each work, and the size of the initial sample of works. The design of the research was intended to closely match the practice of a typical rights clearance audit of a collection. The project officer then proceeded through each page in the sample of 432 items and completed an audit for each individual copyright work contained on a page. Every item was assigned an individual reference number on the page, classified by type. The project officer recorded sources (publication), creators and dates, if known. If a rightsholder was discovered through this process, the project officer recorded information about how they were located (personal knowledge, contextual knowledge, fresh information acquired). This detailed audit took a further 6 months, at a salary cost of £11,653.20.

Within the sample of 432 works, some 37 (9%) were found to have been created by Edwin Morgan himself. These included his own photographs (identified by subject matter and photographic printing techniques) as well as doodles and writing in the margins of pages. Permission to reproduce these items digitally was obtained from Edwin Morgan's estate. The pre-clearance copyright audit identified some 33 third-party rightsholders in relation to 68 works. Periodicals and magazines were among these works with identified rightsholders, where details of the publisher could sometimes be obtained from analysing the typography and formatting of clippings. The WATCH database of writers and their copyright holders was used to locate the publication if the authors name was available. For artistic works, artists who were well known could be contextually identified. The research team contacted the rightsholders directly by email or telephone to ask for permission to use these works. Of

those, a response was received from 22 rightsholders. Of those rightsholders who responded, 11 provided permission for use with no additional conditions imposed in relation to 25 works, while 4 did impose various non-commercial criteria in relation to 4 works such as the provision of additional information, linking to the source of the work, or signing an agreement of conditions of use. Finally, 7 of the respondents asked for a fee in relation to 19 works (ranging from £15 for web-based use plus VAT per item, to £1300 GBP per item by Life Magazine). The researchers received non-responses from 6 known rightsholders, including major publishing firms with long response times (greater than two months). Table 3 below provides detail on the breakdown of works in the sample according to rights status at the end of this process.

**Table 3: Detailed rights status of sample**

Copyright status of work	No. of Works	Percentage of sample
Works created by Edwin Morgan	37	9%
Works without or unlikely to attract copyright protection		
Works that have entered the public domain (e.g., mexican stamps, older original photographs, ancient statues, paintings, tapestries)	22	5.1%
Ephemera (e.g., adverts and tickets)	9	2.1%
Insubstantial works	84	19%
Permission Granted		
Works where permission granted by 15 rightsholders for use free of charge (4 works subject to specific instructions)	29	7%
Works where permission granted by 7 rightsholders for use dependent on fee (which project staff decided not to pay)	19	4.4%
Non response		
No response from 2 rightsholders, with accurate contact details	2	0.5%
No response from 3 rightsholders, with uncertain contact details (These could be defined as orphan works)	3	0.7%
Work where publisher was unable to license for online use (advised staff to use an exception instead)	1	0.2%
Definite orphan works (excluding non-responders where contact details are uncertain)	226	52%
<b>Total works in sample</b>	<b>432</b>	<b>100%</b>
<b>Time spent: 1080 hours</b>		

If the rightsholder was unknown, a search would be conducted if at all possible. Works deemed too insubstantial to be protected by copyright were excluded automatically from the search, as use of an insubstantial part of a work without permission falls within the law. The project officer used the partial nature of a given work within the scrapbook as a practical proxy for the legal concept of substantiality, although other factors were included in such subjective decision-making. The quality of the available work was used to help determine whether a search was worthwhile. For example, it was decided that ephemera including product pictures from newspaper adverts, concert tickets, signage and foreign language packaging were not likely to hold commercial interest for rightsholders (these items are rarely the subject of copyright disputes). The project officer also built up significant experience through the materiality of the scrapbooks, e.g. font styles, weights and types of paper, contextual dating of the scraps, and duplication of familiar sources, which reinforced decisions about search. Google reverse image search was used to some success with certain types of work, in particular those which were in the public domain or publicly known works by famous photographers.

Morgan himself turned out to be a significant source of assistance during the project, as his approach to organising his papers was diligent and consistent. Within the scrapbooks, every page is numbered and Morgan cross references across volumes, adding notes when a related item appears on another page. Within his correspondence and papers, references to scrapbook pages also appear. In the case of complete or substantial newspaper and magazine articles used in the scrapbooks, Morgan usually gives a date and name (or initials) of the source. With images, he may note the name of the subject of a photograph or the title of a painting, but does not do this every single time. Moreover, so abundant and densely crowded is the visual material that it would not have been practicable to include the source of every image without disrupting the look of the scrapbooks or creating a substantial parallel record.

### 3) EVALUATING THE UK AND EU ORPHAN WORKS SOLUTIONS

In this section, we discuss the options available to cultural institutions under the EU and UK orphan works legislation introduced in 2014. We also report the results of our attempt to comply with the legislation using our sample of orphan works from the Edwin Morgan Scrapbooks (our live simulation of a full-scale rights clearance attempt). For the purposes of this section, it is important to highlight the types of works that are present in the sample, as this informs our estimates for the overall time and cost of interacting with both the UK and EU legislation.

The EU Orphan Works Directive obliges Member States to introduce a new exception to copyright that enables specific types of use of some categories of orphan works. To benefit from the exception, CHIs are required to report the results of their diligent search for a rightsholder to the EUIPO's Orphan Works database. For the purposes of this paper, we refer to this process as making use of the EUIPO database. By contrast, the licensing scheme within the UK (OWLS) is exactly that: a licensing scheme; a user submits an application to the UK IPO who has authority to grant a licence (or not) to make use of the orphan work. The licence granted by the IPO only applies within the UK.

One of the main differences between OWLS and using the EUIPO database concerns the type of works that fall within the scope of each scheme. Any type of artistic or text-based work can be licensed through OWLS and for any purpose. However, the Directive only applies to the use of books, journals, newspapers, magazines and other writings, as well as phonograms and audiovisual works. Freestanding artistic works such as maps, drawings, plans and photographs are excluded, unless they are embedded or incorporated in, or constitute an integral part of other publications such as books, journals, newspapers and

magazines. So, within the context of our sample, embedded works fall within the scope of the Directive, whereas all other artistic works must be licensed through OWLS. Table 4 outlines the types of artistic and text-based works found in the sample.

**Table 4: Type of Work found in the sample of the scrapbooks**

TYPE OF WORK	NO. OF WORKS	% OF SAMPLE
<b>Embedded Artistic Works</b>		
Book Artwork	7	
Book Photograph	10	
Newspaper Artwork	8	
Newspaper Photograph	23	
Periodical Artwork	15	
Periodical Photograph	177	
<b>Total</b>	<b>240</b>	<b>56%</b>
<b>Standalone Artistic Works</b>		
Original Artwork	11	
Original Photograph	37	
Photograph of a TV broadcast	1	
<b>Total</b>	<b>49</b>	<b>11%</b>
<b>Text-based works</b>		
Book Text	9	
Newspaper Text	74	
Periodical Text	44	
Original Handwriting	7	
Ephemera	9	
<b>Total</b>	<b>143</b>	<b>33%</b>
<b>OVERALL TOTAL</b>	<b>432</b>	<b>100%</b>

Table 4 shows that only 11% of the sample has been found to contain standalone artistic works. This means that for the majority of orphan works in the scrapbooks the Directive applies. This is preferable given the non-commercial, educational nature of the digitisation undertaken: there are no application or licensing fees to be paid for using the EUIPO database. The standalone works can be licensed through OWLS, requesting a fee appropriate for non-commercial use.

The total estimated works across the 16 volumes of scrapbooks is 51,480. As can be seen in Table 3, we found that 52% of the total sample were orphan works, which equates to

26,770 works across the scrapbooks. After further analysis, the project officer determined that, of the 49 standalone artistic works in the sample, 14 were orphan works. If we assume that the type of works found in the sample correspond to the rest of the contents of the scrapbook, we can extrapolate from the 14 orphan standalone artistic works, and the 212 orphan embedded artistic works and text-based works. Therefore, we estimate that 6% of the 26,770 orphan works (1,606) can be licensed through OWLS, while the other 94% (25,164) can be uploaded to the EUIPO orphan works database.

### *3.1 Making Use of the UK IPO Orphan Works Licensing Scheme (OWLS)*

The UK IPO Orphan Works Licensing Scheme (OWLS), introduced in 2014, is available to any type of applicant for both commercial and non-commercial purposes. If an institution completes a diligent search and an application, and the IPO accepts the results of that diligent search, they will grant a licence to use an orphan work for an initial period of 7 years. The institution must credit the author of the work where possible. After 7 years, assuming the rightsholder has not returned, the institution can apply for another 7-year licence. If the institution wants to use the work indefinitely, they must re-apply every 7 years until the work is out of copyright. If they license the work for non-commercial purposes, then later decide to exploit the work commercially, they must apply for a separate licence for the commercial use, and vice versa. If a rightsholder does return, the IPO will pay them the licence fee for the use of the work. The institution will not be held liable for copyright infringement, and may use the work until the end of the licence period, which provides some certainty.

### *3.2 Costs under the UK IPO Orphan Works Licensing Scheme (OWLS)*

The Project Officer created a series of applications through the UK IPO Orphan Works Licensing Scheme to gain a greater understanding of the application process, the information

required by the IPO, and to gather data to estimate the costs of using the scheme for a large, disparate collection like the Edwin Morgan Scrapbooks. Five items were selected from Scrapbook 12 to form the test subjects: a short poem; a hand-drawn cartoon; a cutting of unknown authorship from Doubt Magazine; a black and white photograph of an unidentified man, and a small black and white cartoon by an unknown illustrator named ‘Paton’.<sup>29</sup>

For the purpose of reporting results within the section, we focus on the Paton cartoon. Following the online guidance provided by IPO, the Project Officer undertook a diligent search for the rightsholder of this cartoon by using relevant sources listed in the guidelines.<sup>30</sup> Thirty minutes of the diligent search consisted of web research, including a search of the existing IPO orphan works registry and contacting the British Cartoon Archive (BCA) for information on Paton via web form. The BCA replied after a number of days with a web-link to a different cartoon by Paton which appeared in the magazine Parade, but could provide no other information. The IPO guidelines also suggest the Professional Cartoonists Organisation (PCO), the Comic Creators Guild (CCG) and the Cartoonists Club of Great Britain (CCGB) as potential search sources. The CCG is primarily concerned with strip cartoons so was not appropriate. Paton was not a listed member on the sites of either the PCO or the CCGB, and the PCO were unable able to help with research enquiries. The CCGB have a reasonably active web forum, however 25 minutes spent registering and engaging with the CCGB forum resulted in a reply that did not provide identifying details but did provide some additional contextual information. The forum poster explained that cartoons like the Paton work were

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<sup>29</sup> These works can be viewed on the IPO Orphan Works register at <https://www.orphanworkslicensing.service.gov.uk/view-register>

<sup>30</sup> According to the Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014, s.4(3), applicants must search the Orphan Works Register, the EUIPO Database and the relevant sources listed in Schedule ZA1 of the CDPA 1988 at a minimum. Source listed in Schedule ZA1 include Legal deposit, Library catalogues, Professional associations, Collective rights organisations and Databases and registries (e.g. WATCH, ISBN, ARROW). Additional relevant sources have been issued by the IPO as guidance, in line with s.4(4) of the legislation. The guidelines suggest that the additional relevant sources may be useful to institutions considering using the EUIPO database, but there is nothing in the legislation to say that CHIs are required to use the UKIPO guidance when registering works with the EUIPO using the orphan works exception.

used as ‘filler’ material in newspapers, similar to crosswords and horoscopes.<sup>31</sup> The project officer spent 15 minutes emailing both the Association of Illustrators and Punch but received a non-response and negative response. In total, 1 hour 10 minutes was spent on diligent search for the item, with no positive results.

Additional time was spent on the administrative task of applying for a licence to use the orphan work. An OWLS application takes place entirely online. The process requires comprehensive information about the work but for the purposes of this section and in the interest of brevity, we provide commentary on selected elements of the application process. The first issue we encountered was providing a title for the work. For most published sources, this is unlikely to cause significant problems, although there could potentially be issues with items that are published under different titles in different jurisdictions. Licensees should be aware that rightsholders and other users may search the register periodically, so the title should include information about the work that is likely to be used as a keyword in a search. If titles given to works in archive or museum catalogues are unlikely to satisfy this requirement, some consideration should be given to the potential effort providing such titles will create at this stage of the overall rights management process.<sup>32</sup>

The definition of commercial use employed by the IPO is worth consideration: ‘Commercial use covers any uses... that make money from the work – such as selling copies of the work or charging directly for access to it. As well as activities that generate revenue, such as merchandising or selling copies of a publication, commercial use would also cover any other uses that are commercial in nature, such as any use in commercial advertising,

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<sup>31</sup> The reply is available at: [http://www.ccgb.org.uk/q\\_and\\_a\\_forum/simpleforum\\_pro.cgi?fid=01](http://www.ccgb.org.uk/q_and_a_forum/simpleforum_pro.cgi?fid=01)

<sup>32</sup> Archivists, librarians and curators are generally very adept at creating titles for works in their collections, through cataloguing, but it may often be that a title in a catalogue isn’t specific enough - they may be relying on an identifying number rather than a descriptive title. For example, to identify individual scraps within the scrapbooks, the project officer had to devise a numbering scheme. This meant extra time had to be allotted to the creation of descriptive titles when the applications were submitted.

marketing or promotion activities. This applies equally to not-for-profit organisations.’ (Intellectual Property Office, 2015). Imagine, hypothetically, a small local history society wishing to use 4-5 orphan images in a publication with a small print-run. Normally, they would cover the costs of printing by charging a small fee for the publication. Even though the local history society does not intend to profit from the publication, they would still be charged the same commercial rate as a much larger publisher. Indeed, the cost of the licence could make the planned publication unfeasible, unless they are willing to raise the price per copy.

During our application, we also had to make a number of assumptions about the work in order to proceed. The most difficult assumption to make was the decision to identify Paton, the cartoonist that created the work, as the rightsholder of the work. We know nothing about the publication the work was taken from, and nothing about Paton. It could be the case that the publisher holds the rights to the work as part of a contract of employment. This is a recurring issue for the scrapbooks as whole, given the huge amount of the material contained in the volumes is taken from newspapers published in the 1950s. Special consideration was given to the statutory presumptions regarding the ownership of works created by journalists under both the 1911 Copyright Act and the 1956 Copyright Act. Without employment records, it is difficult to guess whether the journalist (or in this case, cartoonist) was working under a contract of employment, whether they were a freelance worker, and whether there are any specific contractual terms to bear in mind (Copyright Act, 1956). Each of these factors impact on where ownership of the copyright might lie.

The application process, in its entirety, took 1 hr and 10 minutes. Diligent search took the same amount of time, leaving us with a total of 2 hrs and 20 minutes spent on the single Paton cartoon. The table below presents these results alongside the other works for which applications were made to the IPO.

**Table 5: Results of the application process for the IPO Orphan Works Licensing Scheme**

Name of Work	Time spent on Diligent Search (DS)	Time spent completing DS checklist	Time spent on Application	Time spent on extra DS requested by IPO	Total time spent	Application fee (Average) <sup>33</sup>	Commercial Usage Licence Fee	Terms of Use	Non-commercial Licence cost
Paton Cartoon	70 mins	20 mins	50 mins	10 mins	140 min	£2.67	£75.12 +VAT	Reproduction in a published book (not a textbook), Inside the book, 1/16 page or less, 1 year or less, 1000 copies or less	0.10
Appleton Poem	85 mins	15 mins	10 mins	5 mins	110 min	£2.67	£96.43 + VAT	Reproduced as a book, up to 1,000 copies, sale price of £10	0.10
Giovannetti Cartoon	100 mins	25 mins	20 mins	15 mins	160 min	£2.67	£89.15 + VAT	Reproduction in a published book (not a textbook), Inside the book, 1/4 page or less, 1 year or less, 1000 copies or less	0.10
Doubt Magazine cutting	180 mins (60 online/120 library)	15 mins	20 mins	15 mins	230 min	£2.67	£56.25 + VAT	Reproduction in a published book (not a textbook), Inside the book, 100 words or less, 1 year or less, 1000 copies or less	0.10
B&W photo of man	10 mins	15 mins	10 mins	15 mins	50 min	£2.67	£77.13 + VAT	Reproduction in a published book (not a textbook), Inside the book, 1/8 page or less, 1 year or less, 1000 copies or less	0.10
<b>Total staff time: 690min. Average time per work: 138 min. Average staff salary costs per work: £24.82</b>									
<b>Application and licence fee per work for non-commercial use: £2.67 + £0.10 = £2.77 per work.</b>									

<sup>33</sup> Maximum number of works in one application is 30, at a fee of £80

The length of time taken to complete the OWLS application for the Paton Cartoon is anomalous because it was the first item we processed. However, this may be indicative of first-time costs for other institutions with a small number of works. Across each of the works, diligent search and completing the checklist remains the most significant source of costs in terms of time, with the application process taking between 10-20 minutes, regardless of the type of work. The total time taken to make an application for five works through OWLS, including diligent search, was 11 hours and 30 minutes.

Estimating total costs of rights clearance based on the sample of typical works used in the exercise, we find that OWLS is not practicable for mass digitisation. For non-commercial use, the per-work share of the administrative application fee (£2.67) plus the non-commercial licence (£0.10) multiplied by the number of orphan standalone artistic works estimated to reside in the scrapbooks (1,606 works) would amount to £4,448.62 in application and licence fees for a full digitisation effort. However, this figure is overshadowed by the salary costs incurred by interacting with OWLS itself, which at 138 minutes (or £24.82 of salary costs) per work, comes to £39,860.92 over a combined 1.8 years of full-time employed person hours.<sup>34</sup>

### *3.3 Making Use of the EUIPO Orphan Works Database (s.44B, CDPA 1988)*

The CDPA contains an orphan works exception implementing the European Orphan Works Directive. The Directive allows publicly accessible institutions such as archives, libraries, galleries and museums to make orphan works available online for non-commercial purposes, excluding standalone artistic works like photographs, paintings and drawings. As previously noted, embedded artistic works, i.e. those photographs, painting and drawings included in newspaper articles and books, are included within the scope of the exception. Non-commercial uses permitted by the exception include making available to the public, and

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<sup>34</sup> Based on 40 hours per week, 52 weeks in a year.

reproduction for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration. CHIs may create revenue through digitisation and access, but such revenues may only be used to cover the costs of digitisation and making the works available. To benefit from the exception, an organisation must register as a beneficiary organisation with the EUIPO, and they must upload details of works and the results of diligent search to the EUIPO Orphan Works database. At this point, the work is considered an orphan and is recognised as such across all EU member states, meaning the work can be used across borders within the EU. The institution must acknowledge the author of the work where possible. No checks are carried out by the EUIPO regarding the diligent searches conducted, in contrast to the role played by the IPO in administering OWLS. It is left to the discretion of the organisation in question to determine whether the search has met the requirements of the legislation, and if they are satisfied with the number, type and origin of the sources consulted.

The work remains an orphan until copyright expires and the work enters the public domain, or the rightsholder reappears. If the rightsholder returns, they have the right to seek fair compensation. 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. It is important to note that fair compensation may 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. If the organisation and the rightsholder cannot reach an agreement on fair compensation, within the UK they can appeal to the Copyright Tribunal to adjudicate on the matter.

#### *3.4 Costs under the EUIPO Orphan Works Database (the EU Directive)*

To evaluate the time and resource costs involved in relying on the exception by making use of the EUIPO database, we selected 5 additional representative items from the Edwin Morgan scrapbooks collection. These items were chosen for their similarity in length and provenance to the works used in the OWLS exercise, but they were unique in order to simulate a first-time rightsholder diligent search.

For the purposes of this section, we describe the process of registering a small newscutting about a football pools winner as an orphan work. The Project Officer undertook a diligent search for this cutting by trying to find the text directly through a web search. As with OWLS, registering works on the EUIPO orphan works database takes place entirely online. Before registering works, institutions must register as a ‘beneficiary organisation’ with the EUIPO. The application process is simple, and it took 5 working days for registration to be confirmed by the EUIPO, permitting log-in and registration of works on the database.

Many of the features noted during the OWLS application apply equally here: instead of creating a title for the work, users can record that the work has no title, and provide a full description instead. Assumptions about right(s) holders still have to be made: in this case, the project team assumed that the newspaper publisher would hold copyright in the cutting, although there is certainly an argument that the journalist could be listed as an additional rightsholder (depending on the specifics of the contractual agreement between journalist and employer).

The information required for the EUIPO database is less detailed than for the UK licensing scheme, and the database benefits from a bulk upload function that simplifies the process. However, it is important to note differences between OWLS and the exception. The EU exception cannot be used to make standalone artistic works available, which restricts its relevance for artistic/graphic collections. The exception offers less legal certainty to users than OWLS. For example, the applicability of the legislation to unpublished works is

problematic. The legislation requires that the only unpublished works covered by the exception are those deposited and made available to the public with the permission of the rightsholder. For most archive collections, this is impossible to guarantee because of the large number of third-party rightsholders represented in collections, especially for certain types of records, such as personal correspondence. In addition, unpublished works can only be used where it is reasonable to assume the rightsholder would not object to the use of the work. Given that the works are orphaned, and in many cases the rightsholder will not be known, this determination becomes difficult.<sup>35</sup>

There are other circumstances in which an institution could be held liable for copyright infringement, despite using the EUIPO database. 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; and, if the author or rightsholder(s) in a work, if identified, are not acknowledged. For these reasons, it is important to record the narrative of diligent searches, the sources used and the results, to monitor how the work is used, and to keep those records for at least as long as the work is in use (preferably longer, given the statute of limitations). This diligent search requirement adds significant costs, as we observe above in section 2.1.

At the time of this study, it was possible to do a bulk upload of works via a spreadsheet. The EUIPO requests that users submit spreadsheets to them before upload: this is a check to ensure the data can be processed rather than an audit of individual diligent

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<sup>35</sup> An institution could rely on the fact that response rates to requests for permission from rightsholders for digitisation projects are notoriously low, as proof that it is reasonable to assume that rightsholders would not object to non-commercial use of works. Otherwise, the inclusion of unpublished material within digitisation projects using the EUIPO orphan works database could leave institutions open to allegations of infringement.

searches. Such an upload function makes it significantly quicker to register works, although the same information required by the web form will have to be recorded in the spreadsheet.

**Table 6: Results of the EUIPO Orphan Works Database registration process**

<b>Name of Work</b>	<b>Time spent on Diligent Search (DS)</b>	<b>Time spent on Application</b>	<b>Total time spent</b>
Newscutting 'Atomic Particle's Travels'	25 mins	17 mins	42 mins
Newscutting – 'Football Pools winner'	20 mins	14 mins	34 mins
B/W newspaper photograph – mushroom cloud	10 mins	16 mins	26 mins
B/W magazine photograph – doorways	10 mins	11 mins	21 mins
Newscutting – 'BIS takes you there'	15 mins	10 mins	25 mins
		<b>Total</b>	158 mins
		<b>Average time per work</b>	31.6 mins
		<b>Staff salary cost per work:</b>	£5.68

The EUIPO database registration process is less resource-intensive than the UK IPO licensing scheme, but it covers fewer works and it does not allow commercial use. Furthermore, the requirements for a diligent search must be known and performed by the user independently of the database itself, and these vary widely between Member States. In our study, the average time per work complying with the UK diligent search requirements and interacting with the online system was 31.6 minutes. Applied to the 25,164 orphan embedded artistic and text-based works estimated to reside in the scrapbooks, and using the standard salary cost of £10.79 per hour used in other estimates (£5.68 for 31.6 minutes), this would amount to a total salary cost of £142,931.52 over a combined 6.4 years of full-time employed person hours. It is likely that this total could be further reduced by making use of the bulk upload options available and grouping works together. However, at the time of writing (September 2017), the database contained 5,229 main works (incorporating a further 5,833

embedded works), registered by 42 institutions, suggesting that no single institution has yet undertaken a major mass digitisation effort using this system.<sup>36</sup>

### *3.5 Combined costs under the UKIPO Orphan Works Licensing Scheme and the EUIPO Orphan Works Database*

The total cost of using both OWLS and the EUIPO database in tandem to make all orphan works contained in the scrapbooks available online would be £187,241.06 (including application and licence fees, and salary costs) and would take 8.2 years. Given the conservative salary costs used, this is likely to be an under-estimate.

#### 4) CONCLUSION

A single full-colour, print-ready digital photograph of a page from the Edwin Morgan Scrapbooks takes up 103.8mb of storage and measures 7,360x4,912 pixels. It could be transferred on a USB drive or uploaded to the Internet to be shared with anyone with a connection. The technological obstacles that prevented wider circulation of Edwin Morgan's curatorial work have been overcome to an extent that would likely astonish the poet and his publishers as they pondered publication of the scrapbooks in 1953 and 1988. And yet, an institution with significant financial support and high quality digital equipment remains unable to share the work to a wider public. The reason, as explored in this paper, is that copyright law imposes costs on would-be users of works to seek out and ask permission of relevant rightsholders. This is one of the trade-offs that society makes to incentivise creators via the grant of an exclusive property right. The long duration of copyright term contributes to

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<sup>36</sup> Indeed, the vast majority of entries on the database (94%) originate from only 6 institutions. For example, the EYE Film Institute in Amsterdam has registered 780 works: in the context of film, this could be considered a large-scale digitisation project. The largest contributors are Wydział Polonistyki Uniwersytet Warszawski (University of Warsaw), with 3,188 literary works registered, and the British Library, with 172 works incorporating 5,772 embedded works registered. Roughly 60% of the works on the database are literary, with artistic works and moving image at approximately 25% and 11% respectively. There are also a small amount of sound recordings registered.

these costs by creating rightsholders who are often unaware they hold rights at all, perpetuating the problem of orphan works.

Absent a radical change to copyright law, such as shortening the term of protection or requiring registration and renewal of copyright (see Kretschmer 2006; van Gompel, 2012), regulators have sought innovative solutions to the problem of clearing rights in archival collections of copyright works so that they can be shared with the public. The EU Orphan Works Directive and the UK licensing scheme represent two such approaches in a relatively young field.<sup>37</sup> The regulations provide a number of significant improvements over the pre-existing situation where cultural institutions were forced to abandon use of unidentifiable works in their collections or assume the risk of a re-emergent rightsholder.<sup>38</sup> For cultural institutions and publicly-funded organisations, this risk was mainly reputational, since the cost of removing an infringing item from a digital collection was likely to be low, but the negative perception of legal non-compliance could be high.

OWLS and to a lesser extent the EUIPO database both offer a measure of legal certainty to cultural institutions wishing to make use of orphan works. In the UK, emergent rightsholders can claim the licence fee held by the IPO as compensation for the use of the

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<sup>37</sup> A number of alternative solutions have been proposed to the orphan works problem, and the EU Commission considered six potential options in the Impact Assessment carried out prior to the Orphan Works Directive in 2012 (EU Commission, 2011). These were: 1) doing nothing; 2) providing a statutory exception to provide online access to orphan works; 3) Extended Collective online Licensing; 4) a specific licence for libraries to provide online access to orphan works; 5) a centrally granted state licence for libraries to provide online access to orphan works; and 6) mutual recognition of national solutions enabling libraries to provide for online access to orphan works. An example of an alternative solution is being tested by the EnDOW (Enhancing access to 20<sup>th</sup> Century cultural heritage through Distributed Orphan Works Clearance) project team, who aim to use crowd-sourcing to reduce the diligent search burden on CHIs. A crowd-sourcing tool is in development and can be tested at <http://diligentsearch.eu/>.

<sup>38</sup> Risk-based approaches to rights clearance have become a more acceptable option in the UK in recent years, but for CHIs in certain EU jurisdictions, it is an impossibility. In countries with a strong tradition of collective rights management, CHIs could be threatened with litigation if they made particular types of material available online without seeking a licence beforehand, even where the materials selected for digitisation were orphans. For example, a local government archive in the Netherlands were threatened with litigation by Stichting Pictoright in relation to photography collections they had made available online without clearance. This situation has not changed with the advent of orphan works legislation.

work by the licensee. However, after a licence has been granted, the licensee may use the work for up to 7 years, even upon a claim by a rightsholder. In the EU, an organisation in compliance with the requirements of the Directive enjoys exemption from liability for copyright infringement. However, it is for the cultural institution to ensure the requirements of diligent search have been met, and the institution must still negotiate fair compensation with a rightsholder should one reappear. To date, there is limited evidence about the costs of these negotiations owing to the recent introduction of the legislation.

To benefit from the legal certainty offered by the legislation, applicants must bear the administrative costs of interacting with the relevant authorities. As we have shown in this paper, these costs are linear and may become unmanageable for larger collections. Use of OWLS and the EUIPO database both come with risks that must be assessed and managed carefully. The significant resource commitments required to engage with these schemes also need to be balanced against the potential benefits of using them.

The problem of rights clearance costs is known to regulators, as a number of prior studies indicate. Transaction costs were considered in the EU Orphan Works Directive Impact Assessment, and they were factored into both policy and legislative consultations at an EU and UK level. However, with the decision of the UK Government not to legislate to reduce the term of protection in unpublished works in 2015, it increasingly appears that copyright policy makers have other priorities besides CHIs. It is likely that they seek to protect commercial creative industries from any reform that might upset any perceived optimum balance between the interests of creators and audiences.

Without the same compelling economic justifications for special treatment, CHIs and their users will continue to be on the losing side of arguments for progressive legislative reform. Where this sector cannot make the same clear economic claims as other industries, it must argue for social, cultural and educational value (Tanner, 2012). It is somewhat of a

catch-22 that one way to maximise social, cultural and educational value and impact of CHIs in this digital era is by making collections as openly available online as possible (Verwayen et al., 2011; Kelly, 2013; Kapsalis, 2016; Wallace and Deazley, 2016).

Given the unmanageable transaction costs associated with these orphan works schemes when dealing with collections of any notable size, as well as the lack of other useful cognate legislative reform, we argue that CHIs must learn to live with the uncertainty inherent in copyright law: that is, they must explore risk management strategies in more depth, and utilise the full scope of the exceptions already available within the copyright regime. The research team's experience from the Edwin Morgan Scrapbooks project suggests at least two ways to facilitate and support this: firstly, through specific educational initiatives which make copyright law accessible and less intimidating to those working in the CH sector,<sup>39</sup> and secondly, by providing detailed case studies and best practice guidance regarding the use of risk management strategies for making copyright-protected material available online.<sup>40</sup>

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<sup>39</sup> In recent years, the CREATE research team have collaborated with other organisations to produce training courses and online education initiatives in copyright for the cultural heritage sector, in response to this need. These include: CopyrightCortex.org provides a copyright evidence base for the cultural heritage sector; CopyrightUser.org provides accessible guidance on various aspects of copyright law; the Copyright for Information Professionals module is offered on a distance-learning basis by the Centre for Archive and Information Studies at the University of Dundee; the Law and Cultural Institutions module is offered as part of the MSc in Information Management and Preservation in the Department of Information Studies, University of Glasgow; and the Scottish Council on Archives offers training courses, online guidance and attends the World Intellectual Property Organisation to lobby for an international copyright treaty for libraries and archives. This is in addition to existing support available within the sector: the Libraries and Archives Copyright Alliance runs events, posts blogs and lobbies the UK government for legislative reform; Naomi Korn Copyright Consultancy offers training and consultancy in copyright law; and UK Copyright Literacy offer training, guidance, and games on various aspects of copyright and licensing.

<sup>40</sup> The Best Practices in Fair Use methodology, while specific to the United States, offers a framework for a potential UK sector-led response to the current lack of meaningful copyright reform. For example, the Code of Best Practices in Fair Use for Academic and Research Libraries states that archives and special collections could be digitised and made available where the material was not created for commercial purposes (p.20). Additionally, other resources available to the sector include the Open Educational Resources Intellectual Property Rights Toolkit, which features a risk management calculator, the Naomi Korn Copyright Consultancy which offers training, guidance and support for risk managed approaches to copyright law, the Copyright and Risk: Scoping the Wellcome Digital Library Project report, which outlines the Wellcome Library's approach to risk management and has been used by other institutions to inform their own digitisation projects, and other case studies to be made available as part of an Archives, Digitisation and Copyright PhD (expected 2017).

Finally, in the case of the Edwin Morgan scrapbooks, the costs presented in this study made both the UK OWLS and the EU Orphan Works Registry unserviceable for addressing the large number of orphan works contained in the full 16-volume scrapbook collection. A digital exhibition of the research sample was made available in 2017.<sup>41</sup> As we noted earlier, various rightsholders who responded to our request for permission indicated that they would only grant permission contingent upon a fee. The project team opted not to take up licences where payment of a fee was required.<sup>42</sup> Instead, in relation to those works, as well as the vast majority of orphan works within our sample, we make them available in reliance of s.29 and s.30 of the CDPA 1988: the exceptions for non-commercial research, and quotation, criticism, and review (Deazley et al., 2017). This is intended as a statement. We believe that our use of these works constitutes legitimate quotation. More importantly, we assert that the non-commercial digitisation and making available of works from cultural heritage collections is a form of research, in and of itself. No takedown requests or complaints have been received in relation to the sample, as yet. However, Morgan's vision of sharing the full extent of his curatorial imagination with the wider public will need to wait, at least until copyright policy better aligns with the cultural possibilities of our prodigious technological present.

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<sup>41</sup> See <http://www digitisingmorgan.org/>.

<sup>42</sup> This was a decision taken by the project team, after much discussion and consideration. We wanted to present Morgan's scrapbooks in their entirety, as he intended, upholding his moral right to the integrity of his works, without resorting to the redaction of scraps where we were unwilling to pay licence fees for a non-commercial research project. This was a decision made on the basis of a risk assessment, legal knowledge, and our professional and ethical obligations.

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