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Results of the Survey on Orphan Works 2009/10

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Results of the Survey on Orphan Works in European Film Archives

I. Background Information

In November 2009, a questionnaire on orphan works was circulated to the member archives of the Association des Cinémathèques Européennes (ACE).¹ The survey asked about the quantity of orphan works in the archives and investigated the impact of the orphan works issue on access. The purpose was to update the 2005 ACE survey “The rights issue”, in order to give input to the European Commission. In its Communication “Copyright in the Knowledge Economy”² the EUCOM announced to examine in an impact assessment solutions to facilitate the digitisation and dissemination of orphan works as well as the establishment of common 'due diligence' standards across the EU.

Aim of the survey was to find out

- the estimated number and impact of orphan works and presumed orphan works deposited in ACE member archives
- the main obstacles to determining the rights status of a film work
- how film archives handle the request for these works
- a classification of presumed orphan works in terms of production year, country of production, and genre.

II. Key research findings³

1. The total number of film works held in 24 archives is ca. 1.064.000.
2. The average proportion of orphan works is measured 12% (ca. 129.000). The presumed number of orphan works is even higher, it is measured 21% (ca. 225.000).
3. Approx. 45% of the presumed orphan works (ca. 100.000) could be made available via the European Film Gateway and Europeana if a pragmatic or legal solution for rights clearing would exist.
4. In order to classify the amount of presumed orphan, the survey revealed that 60% were produced before 1950, 49% are national productions. 34% are non-fiction films, 31% feature films, 11% shorts, 25% unspecified. *Please see Annex I, Figures 5-7.* From this it can be concluded that the cultural value of the orphan works is higher than the commercial value.
5. Various obstacles for determining the rights status of a film are mentioned: most frequently lack of staff time (48%), lack of legal expertise (44%). Insufficient documentation of rights attached to works already held in collection for many years: 39%. All responding archives indicated obstacles in determining the rights status of a film. *Please see Annex I, Figure 2.*

¹ The questionnaire is available at: <http://www.acefilm.de/102.html>.

² http://ec.europa.eu/internal_market/copyright/copyright-info/copyright-info_en.htm#Communication_Copyright_in_the_Knowledge. The Communication was published on 19 October 2009 and addresses the results of the Green Paper “Copyright in the Knowledge Economy” to which ACE responded in November 2008.

³ 24 film archives replied to the survey 2009/2010: Arhiva Nacionala de Filme (RO), British Film Institute (UK), Bundesarchiv-Filmarchiv (DE), Cinémathèque Française (FR), Cinémathèque Royale de Belgique (BE), CNC-Archives Françaises du Film (FR), Det Danske Filminstitut (DK), Deutsches Filminstitut – DIF (DE), Deutsches Kinemathek – Museum für Film und Fernsehen (DE), Eye Filminstituut Nederlands (NL), Filmarchiv Austria (AT), Filmoteca de Catalunya (ES), Filmoteca Espanola (ES), Filmoteka Narodowa (PL), Fondazione Cineteca Italiana (IT), Hrvatska Kinoteka (HR), Hungarian Film Archive (HU), Jugoslovenska Kinoteka (RS), Kansallinen Audiovisuaalinen Arkisto (FI), Kinoteka na Macedonija (FOM), Lichtspiel – Kinemathek Bern (CH), Österreichisches Filmmuseum (AT), Slovenski Filmski Arhiv (SI), Svenska Filminstitutet (SE).

7. The average number of annual requests for orphan works is about 4000, but only 17 archives were able to indicate an estimated number.
8. Approx. 55% of the requests are for cultural purposes like screenings, exhibitions, education & research, restoration/preservation and less often for online presentations. 44 % of the requests are for commercial purposes such as re-use in film productions, broadcast, DVD production and screenings. *Please see Annex I, Figures 3-4.*
9. The majority of archives adopt a kind of “low risk” approach⁴: In case the rights holders are not found after a search, most of the archives give limited access on the premises (15 archives), grant access asking for a disclaimer (13 archives), or give access for cultural purposes (7 archives). (Please note that some archives replied with more than one answer).

III. Comparison of the survey 2005 and the survey 2009/2010

While the 2005 survey “The rights issue” revealed an estimate number of 50.000 film works⁵ with unknown rights status held in ACE member archives, in 2009/10 129.000 film works were categorised as orphan works. Moreover, in 2009/10 around 225.000 film works were considered presumed orphans. A comparison of the results of both surveys is however difficult for several reasons:

1. Terminology

When the first survey was conducted in 2005, an official and unambiguous definition of “orphan works” did not exist. The term “unknown rights” was used both for categorising film works whose rights holders even after a search could not be identified and/or located as well as film works which are presumed to be orphans. The new survey referred to the definition of “orphan works” as it was set up by the European Digital Libraries Initiative in 2008⁶ and distinguished between orphan works, presumed orphans works and works with unknown rights. The proportion of film works with unknown rights is huge, it affects approx. 1/3 of the total number of films held in the respondents’ archives.

⁴ The survey 2005 revealed a similar approach: commercial use seems not to be granted without right clearance, while access for a cultural purpose – for example a screening – could be granted with a disclaimer.

⁵ In 2005, 23 out of 34 ACE member archives responded to the survey, 14 indicated an estimated number of orphan works:

British Film Institute (UK), Bundesarchiv-Filmarchiv (DE), Cinémathèque de Luxembourg, Cinémathèque Royale de Belgique (BE), Cinteca di Bologna (IT), CNC-Archives Françaises du Film (FR), Det Danske Filminstitut (DK), Deutsches Filminstitut – DIF (DE), Deutsches Kinemathek – Museum für Film und Fernsehen (DE), Filmoteca de Catalunya (ES), Filmoteca Espanola (ES), Finnish Film Archive (FI), Gosfilmofond (RU), Greek Film Archive (GR), Hrvatska Kinoteka (HR), Hungarian Film Archive (HU), IVAC - Instituto Valenciano de Cinematografía (ES), National Film Archive of Iceland (IS), Netherlands Filmmuseum (NL), Norsk Filminstitut (NO), Österreichisches Filmmuseum (AT), Slovenski Filmski Arhiv (SI), Svenska Filminstitutet (SE).

⁶ A work is “orphan” with respect to rightholders whose permission is required to use it and who can either not be identified or located, based on diligent search on the basis of due diligence guidelines. This search must be both in good faith (subjectively) and reasonable in light of the type of rightholder (objectively). THE EUROPEAN DIGITAL LIBRARIES INITIATIVE. Sector-specific guidelines on due diligence criteria for orphan works. Joint Report, June 2008. http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/guidelines.pdf.

2. Comparability of data

Besides the fact that the definition of orphan works was not consistent in the 2005 and the 2009/2010 surveys, other factors impeded the comparability of the data, e. g.

- In 2009/2010, 17 archives out of 24 indicated an estimated number of orphan works, while in 2005 only 14 archives out of 23 respondents indicated an estimated number of works with unknown rights.
- The 2005 survey did not ask about the total number of film works held in the archives, therefore the average proportion of orphan works could not be determined.
- 16 archives replied to the 2005 as well as to the 2009/10 survey, but only two of them indicated approx. the same number of orphan works. One archive indicated a slightly lower number of orphans in 2009/10 than in 2005, while nine archives indicated a considerably higher number of orphan works in 2009 than in 2005. Three archives which replied to the 2009 survey did not indicate a number of orphan works in 2005. The film collection of one archive has considerably increased between 2005 and 2009/10, as has the number of orphan works accordingly.

Film archives today have a greater awareness of the complexity of the rights situation than before. The restrictive copyright legislation in the EU members states may contribute to the fact that archives tend to classify the status of their films more easily as presumed orphans or rights uncleared. This happens due to the archives' insecurity about the actual copyright status.

To a certain extent, these facts explain the big difference in the amount of orphan works in 2009/10 (ca. 129.000) and presumed orphan works (ca. 225.000) compared to the numbers of works with unknown rights revealed in 2005 (ca. 50.000). Not only the quantity of orphan works grows as the collections grow, but the longer the films are deposited in the archives, the more likely it is that they fall into the orphan works category.

IV. Conclusion

With an average proportion of 12% orphan works and 21% presumed orphan works held in European film archives, the scale and impact of the problem is huge. It locks up film heritage and prevents archives to serve the public interest. Since film archives do not have hardly any resources to clear rights, the situation will aggravate.

All ACE members are publicly funded film archives, and they don't clear rights for deposited works just on spec. Although film archives report statistics and keep records of the depositors, original distribution and production companies, the information is only updated when there is an external or internal request.

Furthermore, rights clearance in the film heritage sector is complex, since there are many rights holders to a film work and it is almost impossible to follow the chain of rights across Europe. In many cases archives are not informed if one entity sells the rights to another entity.

As it is a costly task, archives are reluctant to spend public money on rights clearance when at the same time there is no initiative from rights holders organisations in this respect (e. g. setting up rights registries and databases).

Film archives tend to give access to these works for cultural purposes in connection with a respective disclaimer, but this is in most cases without any legal certainty . This means that the archives as well as the users run the risk to infringe copyright.

Using the web to advance knowledge and educational levels is nowadays common practice of the public, and institutions will make every effort to increase access to their collections by exploiting the opportunities offered by the internet. Although the orphan works problem in film archives is not only related to digitisation, the archives would be able to provide 45% of the orphan works to web portals like the [European Film Gateway](#) and [Europeana](#), if a pragmatic or legal solution existed.

For legal reasons, orphan works are blocked for these kind of uses, thus contributing to create the so called “20th century blackhole”. The matter of orphan works is mainly a problem of European film heritage, as in the U.S. copyright legislation is different. The fact that the EU is blocking its own film heritage indirectly promotes the accessibility of non European, especially U.S. films.

A change in legislation, may it be a mandatory exception to the 2001 Copyright Directive or a legally binding stand-alone-instrument, is therefore a matter of urgency.

Annex I: Evaluation results

I. General Information

24 ACE members out of 39 replied to this survey.⁷ All responding archives are national archives.

II. Rights Situation

1. Are you aware of the Memorandum of Understanding (MoU) and the diligent search guidelines for the audiovisual sector established in 2008 in the framework of the European Digital Libraries Initiative⁸?

All responding archives are aware of the Memorandum of Understanding.

2. If yes, do you make use of them?

8 archives make use of it.

3. If no, please specify why: (Multiple choices were possible)

14 archives do not use it mainly because they have no financial and personnel capacities (8), because the MoU does not provide legal certainty because is not legally binding (7) or because it is not a priority (4).

4. What is the estimated number of film works held by your archive?

The number of film works held in the 24 archives is approx. **1.064.000**.

5. How many of your film works have documented rights?

58% of these films (ca. 600.000) have documented rights, but these information not necessarily updated.

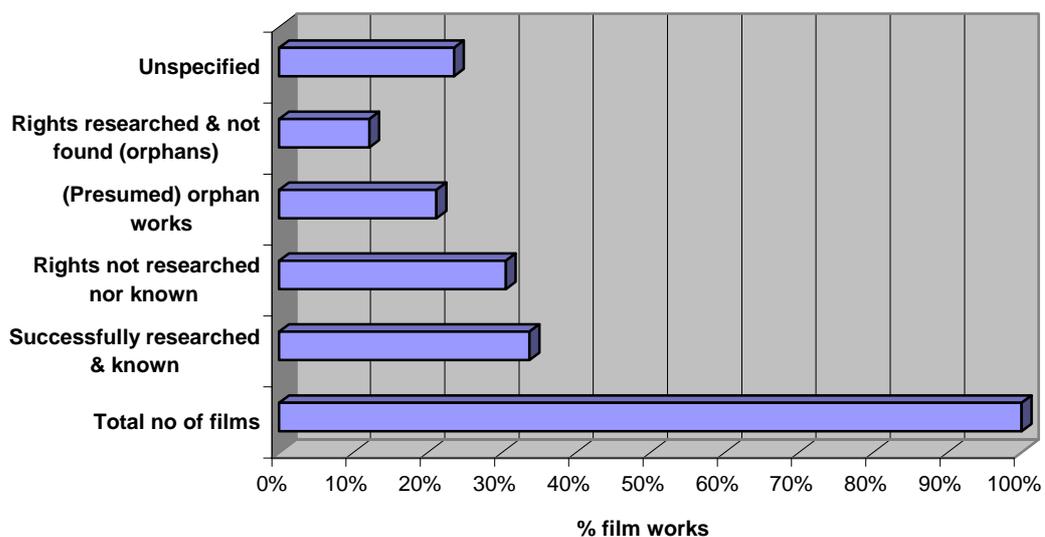
6. Please indicate the rights status of your collection (estimation in %):

- a) rights neither researched nor known: **31%** or ca. 325.000 works
- b) rights researched but not found (orphan works): **12 %** or ca. 129.000 works
- c) successfully researched and known: **34 %** or ca. 360.000 works
- d) unspecified: **24 %** or ca. 250.000 works

⁷ One of the responding archives does not hold orphans works, one archive considers the research and listing of orphan works as too cost expensive regarding the fact that this work is paid with public money.

⁸ THE EUROPEAN DIGITAL LIBRARIES INITIATIVE. Sector-specific guidelines on due diligence criteria for orphan works. Joint Report. http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/guidelines.pdf

Figure: 1 Rights status of the film collections



7. How many of the film works indicated in 6a would you presume to be orphan works?

30% of about 325.000 works = ca. 96.000 film works.

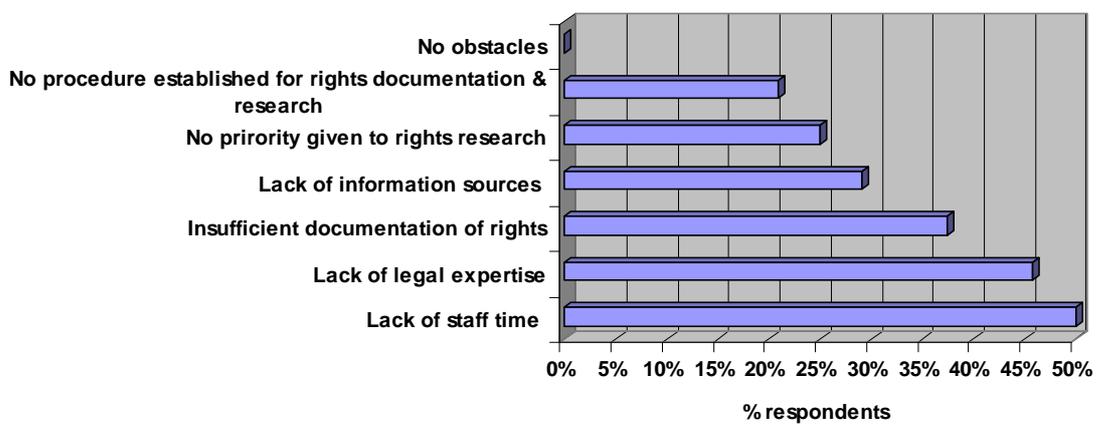
Adding the results from question 6b (129.000 orphan works), **ca. 225.000 films (= 21 % of the films held in 24 archives)** can be considered orphans.

8. Of the film works indicated in 6b, for how many of these were the rights researched according to the due diligent search criteria mentioned in Question II.1?

25 % of about 129.000 works = approx. 33.000 film works

9. What are the main obstacles to determining the rights status of a film?
(Multiple answers were possible)

Figure 2: Obstacles to determining the rights status of a film



III. Access and Use

1. What is the estimated total number of requests a year for works with unknown rights status?

Total number of request ⁹	Commercial purposes	Cultural purposes	Not specified
4416	44% (= 1950)	55% (= 2436)	1% (= 30)

⁹ Numbers provided by 17 of the 24 respondents.

For what kind of purposes? (Multiple choices were possible)

Figure 3 Kind of requests for commercial purposes

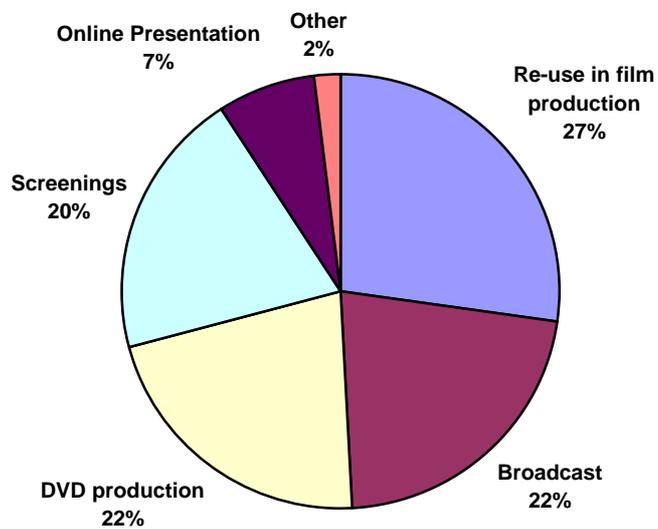
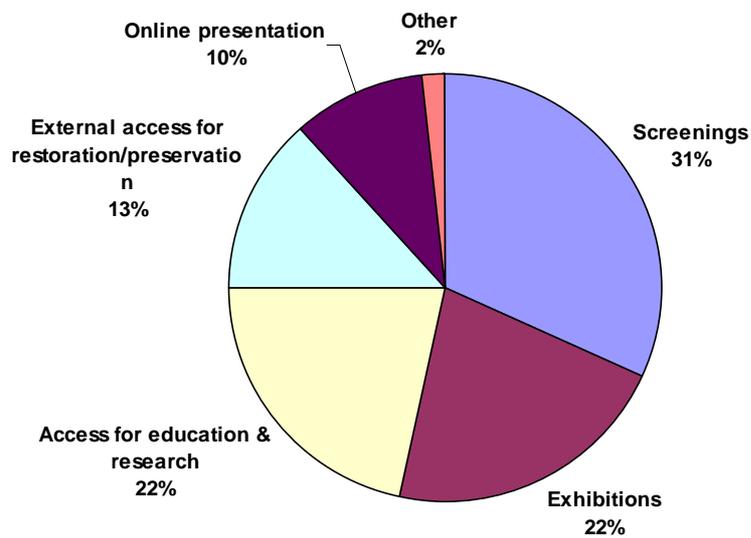


Figure 4 Kind of requests for cultural purposes



2. How do you deal with these requests for works with unknown rights status? (Please note that some archives replied with more than one answer)

	No. of archives
You demand that the requesting person locate the rights holder	17
You make a reasonable search to locate the rights holder	9
You deny access	5
You archives grant access	4

3. If the rights are not found after a search - with or without following due diligence criteria: (Please note that some archives replied with more than one answer)

	No. of archives
You give limited access only (e. g. viewing on the premises)	15
You grant access after the user has signed a disclaimer exempting the archive from liability	13
You give access for cultural/non-profit purposes only	7
You deny access	6
You give access for both cultural and commercial purposes	5
<i>Other</i> : demand the user to clear the rights with a legal action	1

4. What use do you make of works with unknown rights or presumed orphan status in order to fulfil your archival mission? (Please note that some archives replied with more than one answer)

	No .of archives
Access for education & research	19
For restoration/preservation purposes	16
Screenings	13
DVD production	3
Online presentation	3
<i>Other</i> : clipping outtakes for third parties	1
<i>Other</i> : no use if the rights are not cleared	1

5. How many of the orphan works and presumed orphan works would you be able to make available through the European Film Gateway and Europeana, if a legal or pragmatic solution for rights clearing would exist?

45% of approx 225.000 presumed orphan works (ca. 100.000).

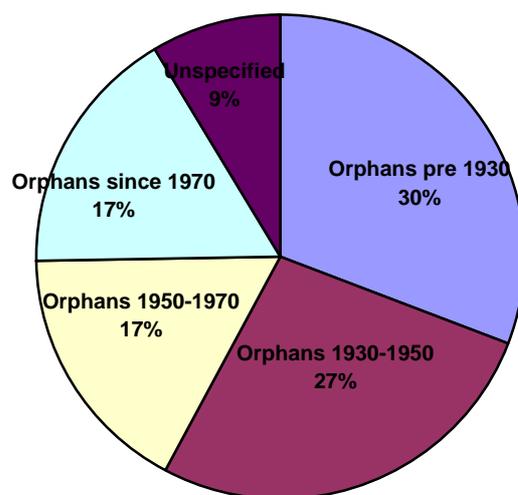
IV. Classification of (Presumed) Orphan Works

In order to categorise orphan works and presumed orphan works (results from question II. 6b and II. 7), please indicate if these are from specific production periods, countries of origin or mainly of a certain genre of work.

1. Main period of production: (If possible, please give an estimate in %.)

Pre 1930	31 % of approx. 225.000 = ca. 69.000
1930 –1950:	27% of approx. 225.000 = ca. 61.000
1950 –1970 :	17% of approx. 225.000 = ca. 37.000
After 1970 :	17% of approx. 225.000 = ca. 37.000
Unspecified:	9% of approx. 225.000 = ca. 20.000

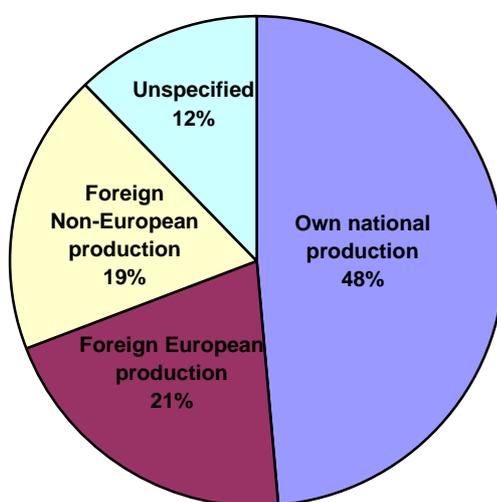
Figure 5 Period of production



2. Country of production

Own National production	49% of approx. 225.000 = ca. 110.000
Foreign European production	21% of approx. 225.000 = ca. 46.000
International production	19% of approx. 225.000 = ca. 42.000
Unspecified	12% of approx. 225.000 = ca. 27.000

Figure 6 Country of production



3. Genre of work: (If possible, please give an estimate in %.)

Feature long (fiction)	30% of approx. 225.000 = ca. 65.000
Short fiction	11% of approx. 225.000 = ca. 24.000
Non-fiction	34% of approx. 225.000 = ca. 77.000
Unspecified	25% of approx. 225.000 = ca. 56.000

Figure 7 Genre of work

