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To: [Copyright Consultation](#)
Subject: BBC Response to the Consultation on implementing a domestic orphan works licensing scheme and the EU Directive on certain permitted uses of orphan works
Date: 28 February 2014 12:25:17

BBC Response to the Consultation on implementing a domestic orphan works licensing scheme and the EU Directive on certain permitted uses of orphan works

As we are responding to only a few of the questions asked in the Response Form, we have set out below the questions and our responses below and have addressed some general concern at the end.

3. What are your views on allowing high volume users to take out an annual licence or similar arrangement to cover low value, non-commercial use?

We would support any proposals that would make the process as flexible, efficient and cost effective as possible for users as we are concerned that the potential time and costs involved in the process in order to use an individual orphan work may make it an unrealistic option in a number of circumstances.

7. Should there be a right of appeal for users of orphan works in the event of unreasonable actions by the authorising body (IPO)? If so, should this cover a) licence fee tariffs (e.g. via the Copyright Tribunal) b) refusals to grant licences or c) both?

Yes we do think there should be a right of appeal covering both fees and refusal to grant licence. If there was none the only alternative would be an application for judicial review which would be a disproportionate and unwieldy remedy in these circumstances.

8. Approximately, how often would you anticipate using the orphan works scheme/how many applications a year would you envisage making?

9. What types of use do you envisage using orphan works for?

8 & 9 This is very difficult to assess at present. How often we might use the scheme would be very dependent on the turnaround time for applications and/or the costs involved. When it comes to the potential use of orphan works in our programmes, because our production teams are often working to tight deadlines and on limited budgets, this process may well not be practicable. If it were a question of the use of one orphan work in a programme the decision would most likely be not to use it unless it was editorially crucial which is rare. There have been the occasional documentaries that have centred on a collection of works that are orphan and we have in the past been unable to identify the estate of an author of a collection of stories that we wished to use as the basis for a drama series. In those cases where the number of works is substantial and/or the investment in the production is significant, this process could be useful but that is possibly a maximum of once or twice a year. We may also consider this scheme for the purposes of making some of our archive available online (where the EU scheme is not applicable) but again we do not foresee this as involving a significant number of applications.

10. How much does the fact that licences are non-exclusive impact upon your potential use of the scheme?

11. How much does the fact that licences are limited to the UK impact upon your potential use of the scheme?

10 & 11 Neither of these is likely to impact on our potential use of the scheme.

12. If you are a potential licensee would you use the scheme only when you are fairly sure you want to use a particular work or would you use it to clear whole collections of works in your archives? What do you consider would be an acceptable amount of time for processing an application to use an orphan work?

Both scenarios are possible as described above. Productions have very varying lead times (and an online release of archive would generally be longer) but the shorter the turnaround the more helpful the scheme would be. We would suggest a turnaround of a week or 2.

13. What proportion of your applications would be for unpublished works and what sort of works would these be?

This is impossible to estimate at this stage.

14. Would your main use of orphan works be as part of works that you produce already, such as a book or a television programme or would you develop a new product or service based on a whole collection of orphan works or a collection that is likely to contain many orphans or partial orphans?

At present we would probably say the former though with potential for the latter too as outlined above.

17. If you are an organisation covered by the Directive, how often do you anticipate using a search conducted under the Directive to then support an application under the domestic scheme?

18. If you are an organisation covered by the Directive, able to display much of your material on your website under the provisions of the Directive on certain permitted uses of orphan works, how much will you use the domestic orphan works licensing scheme?

17 & 18 At present we would probably envisage using the schemes for different purposes (particularly given the limitations of the types of works covered by the EU scheme) but it is very difficult to assess this at the moment.

19. If you are a cultural organisation, how likely is it that you would be able to recover the full costs related to the digitisation and making available of an orphan work?

20. How would you do this (for example by charging for access to your website)?

19&20 We would not necessarily expect to and would not of course charge for access to our website.

21. Would you attempt to engage in a public-private partnership to digitise and make available such works? Any charges can only reflect the cost of search, digitisation and making available, with no profit margin. What evidence do you have of the level of interest of private enterprises in such partnerships?

We have entered into partnerships with other cultural organisations and would consider partnerships with private organisations subject to the quite strict parameters we would have to work within but we do regularly receive a considerable amount of interest in our archive from private organisations.

22. Do you agree that we should not implement the optional provision?

Yes – the scheme already has a number of limitations around the types of works that it will cover and any additional limitations would further reduce the future usefulness of the scheme.

23. Are there any other sources that should be added to this list of essential sources?

No

24. Do you agree with the addition for non published works under Part 2 of the Schedule? Are there any other sources that could be added for unpublished works?

We don't in theory have a problem with adding something to cover searches for the limited category of works that have not been published or broadcast but have been made publicly accessible but we are concerned about the terminology used. We have on many occasions in the past and in many submissions, pointed out that the definition of "publication" in the 1988 Act does not include communication to the public (which of course includes broadcast) and is out dated. We have been advised in the past that this was an error when the Information Society Directive was implemented into UK law and that it should have been updated then. It would be helpful if this could be corrected when the 1988 Act is being updated but in this context it means that the reference to unpublished here is incorrect and should be widened to works that have not been broadcast too.

25. Is there a realistic prospect that civil sanctions will not provide appropriate remedies? In what circumstances?

We think civil sanctions are sufficient and that the introduction of criminal sanctions in these circumstances would be wholly inappropriate.

26. Do you agree with this approach? Where should the burden of proof lie, and why?

Yes. The emerging rights holder should bear the burden of proof as they would in any infringement proceedings.

27. Is it necessary to provide for an appeals process on the level of fair compensation? Who should administer such an appeals process?

Yes there should be a process in place if the parties are unable to agree what the fair compensation would be.

General Comments - The Copyright (Certain Permitted Uses of Orphan Works) Regulations 2014

“Phonogram” – this term is not used in UK law and should be replaced with “sound recording”. Sound recordings are protected by copyright in the UK and there is therefore no need for them to be treated as a separate category of work. They should just be brought within the definition of “relevant work”.

“Relevant Body” – the Directive does not require “archives or film or audio heritage institutions” to be “publicly accessible” and this is recognised in the definition of “relevant work” but not in the definition of “relevant body”. The definitions need to be consistent. This clarity is important to the BBC as our Written Archive which potentially contains many orphan works whilst allowing members of the public to carry out research by appointment is not “publicly accessible” in the same way that a library is.

“Cinematographic or audiovisual works... phonograms produced by public service broadcasters” – recital 11 of the Directive makes it clear that these works should also include works that are commissioned by public service broadcasters for the exclusive exploitation by them or other co-producing public service broadcasting organisations. This is not covered by the draft regulations.

If you have any queries arising from the above, do not hesitate to contact us.

Regards

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