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Copyright works: seeking the lost

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

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Description as a respondent:

Business representative organisation/trade body

The British Copyright Council represents those who create, hold interests or manage rights in literary, dramatic, musical and artistic works, performances, films, sound recordings, broadcasts and other material in which there are rights of copyright and related rights.

Our members include professional associations, industry bodies and trade unions which together represent hundreds of thousands of authors, creators, performers, publishers and producers. These right holders include many individual freelancers, sole traders and SMEs as well as larger corporations within the Creative and Cultural Industries. Our members also include collecting societies which represent right holders and which enable access to works of creativity. See Appendix I to this submission for a list of our members.

General comments

The BCC doubts whether the ERRA provisions for orphan works licensing are sufficiently practical to operate effectively. The BCC has long argued that, for a system of orphan works licensing to work in practice, it must take account of the differences between categories of works and the ways in which those works are currently managed or represented. We are unsure whether the ERRA proposals can achieve this. We would also add that there are unlikely to be large numbers of orphan works in certain categories e.g. music and published editions, due to collective management and established identifiers/codes e.g. ISBNs.

For the BCC and its members, these ERRA proposals leave a great many questions unanswered and the guidelines referred to in the proposal should themselves be subject to a further consultation process in which rights holders can participate.

Please also note that we find it confusing that the consultation deals with both the Orphan Works Directive and with the national scheme under the ERRA in the same questions.

Question 1

Could collecting societies improve the licensing of orphan works in their areas of expertise? If so, how?

As far back as 2008¹, the British Copyright Council recommended a solution to the licensing of orphan works which incorporated the existing successful system of

¹ BCC response dated 28 November 2008 to UK IPOs paper "Orphan works – potential solutions", dated 23 September 2008 and which IPO had prepared for a meeting of stakeholders at which a number of the BCC's representatives were present.

² See "Annex BCC Orphaned Works proposal", forming part of Proposed requirements to make

collective licensing in the UK. IPO decided against the use of this system and has instead opted to give the task of managing and licensing such rights to IPO. It is, therefore, unclear how collecting societies could now be involved, apart from as an “essential source”, as required by the European Directive, in support of diligent search procedures, as long as these are at no cost to the collecting society or its members.

Given their experience in this field, it is vital that collecting societies remain part of any consultation process for advising the Government on suitable market rates for uses comparable to those that they already license and that rights holders and their representatives be given a right of appeal (see our response to Q7, 26, and 27), particularly important where orphan works licences risk undermining established and emerging markets in non-orphan works.

Question 2

Should an orphan works licence be transferable? If so, in what circumstances would this be appropriate?

No. Once an orphan work has been licensed, it should be relatively easy to obtain additional licences since the diligent search process and registration of the orphan work will have been carried out already, so there should be no need to make the licence transferable.

While the use of Orphan works will be a “permitted use” under the Copyright Act, the work itself should not be turned into a tradeable commodity, otherwise there is a risk that the work will lose value for any emerging rights holder.

Question 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 find this question difficult to answer in the abstract. It should be possible for truly non-commercial use under the Orphan Works Directive, as long as there is a mechanism in place to ensure that that use remains both directly and indirectly non-commercial. In such a case, there will, however, be no need for a licence.

The authorising body under the ERRA proposals will, on the other hand, license use but only for orphan works. So the question here must be, what value would an annual licence have if it were limited only to orphan works?

To the points above, we would add that there will be a real need, in the interests of transparency, for the authorising body to publish a distribution policy for what would effectively be a “blanket” licence for orphan works.

Question 4

Should there be a limitation on the period of time in which a rights holder can claim his/her remuneration? If yes, taking into account the examples of time limits set out at paragraph 5.9, what should that period be and why?

We would suggest a model based on an agreed period for distributing unclaimed funds, subject to the retention of a reasonable contingency fund for any future claims.

Question 5

At what point should the Government be able to distribute unclaimed funds? What is the rationale for your answer?

No response.

Question 6

What should any unclaimed funds be used for and why?

The consultation paper states at 5.8:- “Unclaimed licence fees belong to the missing rights holders.”

The BCC is opposed to any arrangement involving *bona vacantia* and restates its response to the technical consultation on the draft regulations on Extended Collective Licensing which is that the BCC is strongly opposed to the idea that undistributed funds from exploiting copyright works should go to the Crown, instead of to the creators of the works involved and it has made its position on this clear ever since the idea was first raised by IPO at its meeting held on 29th September 2008.

Furthermore, the BCC believes that the approach of the Collective Rights Management Directive is correct, that is, that any direction relating to use of undistributed monies should be limited to the funding of “social, cultural and educational activities for the benefit of rights holders” which could perhaps include funding to support the development of the Copyright Hub.

Question 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. There should be a right of appeal for users under the national scheme. If the authorising body is set up as a licensing body operating a licensing scheme then it will, in any case, be subject to the Copyright Tribunal which is the more appropriate forum to hear complaints than the First-Tier Tribunal. There should not be a burden of proof requirement in the negotiation and should the issue be referred to the Copyright Tribunal there should be no presumptions either way in accordance with normal practice.

Question 8

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

Question 9

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

In trying to assist IPO in finding a solution to orphan works licensing, the BCC and individual members of the BCC have, on a number of occasions, asked for more information about what use will be made of such works. IPO has been encouraged by the BCC to investigate and research this with users and potential licensees, throughout the whole of the consultation process on orphan works. As these questions continue to be asked, it is clear that there is still no satisfactory answer.

As we said in our opening comments, the number of applications and the types of use are likely to differ according to the category of work or subject matter. No doubt, individual submissions made by our members will be of more assistance here. Nevertheless, we continue to urge IPO to take account of the particular problems which exist in certain sectors, such as those identified by visual artists (photographers and illustrators)² and in particular the need to encourage the use and retention of meta data associated with images when the authorising body licenses these as orphan works.

Question 10

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

A non-exclusive licence must be the only form of licence available, if it is offered as a statutory licence by a public/Government body.

² See “Annex BCC Orphaned Works proposal”, forming part of Proposed requirements to make provision for the licensing of orphan works, 11th March 2011
<http://www.britishcopyright.org/page/225/licensing-of-orphan-works/>

Question 11

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

No response.

Question 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?

We leave it to individual members to comment on what is an acceptable amount of time for processing an application to use an orphan work. The licensing experience of our members tells us that from the perspective of the user, it is likely to depend on commercial considerations relating to the user and the use.

We have kept our response to Questions 13, 22 and 24 on unpublished works together.

Question 13

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

Question 22

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

Question 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?

The BCC does not think that unpublished works should be covered by the provisions.

The right to publish is protected by international law which cannot be removed by any national scheme. Given the limitations of the UK moral rights regime, any powers conferred on the authorising body to license the use of unpublished works should be subject to a requirement to evaluate the impact on the author's reputation, prior to the issue of a licence. Unpublished works are sometimes unpublished for a good reason, they include private letters and personal diaries and the author's decision on the publication of these should not be overridden by default.

If Government decides to include unpublished works in its national scheme, then it is acceptable to apply the same test of Part 2.

Question 14

Would your main use of orphan works be as part of works that you produce already, such as a book or 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?

Please see our response to Questions 8 and 9 above.

Question 15

The impact assessment assumes that in 10% of orphan works applications, a diligent search would have already established that the work is orphan. Without a lawful means to use an orphan work, this would be wasted time and resource. Approximately, how often, at present, are you unable to locate or identify a right holder following a diligent search?

No response.

- Question 16** We have assumed that the majority of diligent searches carried out by publicly accessible archives are likely to be undertaken under the auspices of the EU Directive. Is the case for your organisation, if you are a publicly accessible archive?
- Question 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?
- Question 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?

These questions highlight the scope for confusion, particularly in the overlap between the exception under the EU Directive and the ERRA proposals.

Not directly related to these questions, but on the matter of diligent searches undertaken under the auspices of the EU Directive, the BCC is also concerned about how registers of orphan works established under the ERRA proposals and those established under the EU Directive will integrate. Regardless of records being sent to OHIM, the UK authorising body should be under a duty keep a record of orphan works licences granted and to make it freely available. We understand that the OHIM register will not be publicly accessible until July 2014 and it's website currently makes no reference to orphan works or any proposals for a register of such works, so we are unable to comment further on this point.

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- Question 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?

Not applicable.

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- Question 20** How do you do this (for example by charging for access to your website)?

Not applicable.

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- Question 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?

Not applicable.

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

The BCC recommends that entering any available information on the work and its rights holders into a search engine should form part of the minimum search requirements.

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

No. The full range of sanctions will be available. If the user does not fulfil the criteria to benefit from the Orphan Works Directive he is infringing copyright and normal sanctions will apply. We are in favour of this approach. Within normal sanctions, the BCC also includes the possibility of criminal sanctions, that is, CDPA s.107(1)(e) where a distribution outside of the course of a business is to such an extent as to

affect prejudicially the copyright owner.

However, we do have a further practical question relating to sanctions. That is, the ERRA provisions do not appear to include any proper system for allowing the authorising body to enforce the rights of right holders in orphan works or to monitor use of works which it may have licensed,

How will the authorising body pursue:

- Unlicensed users of orphan works which it has licensed;
- Users licensed by the authorising body who exceed the terms of the licence;
- Protection for the Moral Rights of rights holders.

Question 26

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

Question 27

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

The ERRA proposals do not currently incorporate an appeals/complaints procedure for rights holders, or their representatives who may suffer as a result of any licensing by the authorising body which undermines markets in non-orphan works – a key principle underlying the creation of an Orphan Works licensing scheme. The right of appeal should not only apply to tariffs, licensing fees charged and royalties paid to emerging rights holders, it should also apply to the terms and conditions of the licences offered.

IPO also states that fair compensation under the EU Directive will be decided between the relevant body and the emerging rights holder. An appeals/complaints procedure should again be available for emerging rights holders and their representatives, for the purpose of determining fair compensation under the EU Directive.

See also our response to Question 7.

Do you have any other comments that might aid the consultation process as a whole?

Orphan performances

The draft regulations fail to recognise the practicalities of work within the performance sector.

The BCC supports its members the Musicians' Union and Equity which have requested from IPO clarification of their position under their existing collective bargaining agreements with respect to application of any orphan works Regulations. The role played by these unions in enabling and supporting exactly the licensing that the Regulations are intended to facilitate appears to have been ignored.³

IPO does not need to acknowledge this reply.

The BCC would be pleased to be contacted by IPO at any time on any matter.

³ Letter of February 2014 to John Alty of IPO from John Smith of the Musicians' Union and Christine Payne of Equity

The British Copyright Council represents:-

BCC Members	Membership numbers	President/Chairman
Artists Collecting Society (ACS)	800 artists and estates	Harriet Bridgeman Chairman
Association of Authors' Agents	99 agencies representing authors and other rights holders	Peter Straus Rogers, Coleridge & White Ltd Chairman
Association of Illustrators (AOI)	1,450 illustrators and artists	Andrew Coningsby Chairman
Association of Learned and Professional Society Publishers (ALPSP)	210 publishers	Simon Ross Cambridge University Press Chairman
Association of Photographers (AOP)	950 professional photographers	-
Authors' Licensing & Collecting Society	85,000 authors	Maureen Duffy, FRSL President
BPI (British Recorded Music Industry) Ltd	300 independent music companies and the 3 UK major record companies	Tony Wadsworth, CBE Chairman
British Academy of Songwriters & Composers	2,000 composers and songwriters	Simon Darlow Chairman
British Association of Picture Libraries & Agencies	300 agencies and libraries	David Redfern President
British Equity Collecting Society (BECS)	CMO with 27,000 performer members	Jean Rogers Chairman
British Institute of Professional Photography (BIPP)	3,200 professional photographers	Roy Meiklejon, FBIPP President
Broadcasting, Entertainment, Cinematograph & Theatre Union (BECTU)	25,000 including staff, contract and freelance workers in the audiovisual sector	Christine Bond President
Chartered Institute of Journalists (CIOJ)	2000 members	Charlie Harris President
Copyright Licensing Agency (CLA)	CMO with 2 members and 1 agency agreement	Tom Bradley Independent Chairman
Design and Artists Copyright Society (DACS)	CMO representing 60,000 visual artists & artists estates worldwide	Mark Stephens CBE Chairman
Directors UK	CMO and professional body with 4500 director members	Paul Greengrass President
Educational Recording Agency Ltd (ERA)	CMO with 20 members including broadcasters	Deborah Annetts Chairman
Equity	36,000 performers	Malcolm Sinclair President
Incorporated Society of Musicians (ISM)	6500 musicians	Richard Hallam MBE President
Music Publishers Association (MPA)	259 companies	Chris Butler Chairman
Musicians' Union	30,500 musicians and performers	Kathy Dyson Chairman
National Union of Journalists (NUJ)	32,000 staff, contract and freelance journalists	Barry McGall President
PPL	CMO with 65,000 record company and musician members	Fran Nevrla President
Professional Publishers Association (PPA)	250 publisher members	Kevin Hands Chairman
PRS for Music (MCPS & PRS)	CMO with 100,000 composer, author and publisher members	Guy Fletcher President
Publishers Licensing Society (PLS)	CMO with 2,325 publisher members	Mark Bide Chairman
The Publishers Association	200 publishing companies	Nick Fowler Elsevier President

The Royal Photographic Society	11,000 photographers	Roy Robertson Hon FRPS President
The Society of Authors	9,000 authors	Philip Pullman President
The Writers' Guild of Great Britain	2,100 authors	Olivia Hetreed President