

Consultation on Orphan Works

1. Nature of the Submission / Exec Summary

The British Library, the national library of the United Kingdom, very much welcomes the opportunity to comment on the proposed secondary legislation regarding the implementation of Orphan Works legislation in the UK.

As probably the national library of the United Kingdom and the largest research library in the European Union, the Library knows well the importance of copyright as a tool to manage and control the flow of copyright goods to create a well-educated society that underpins the UK knowledge economy. The Library has direct and a probably unique experience of the information ecology. It is not only a legal deposit library, purchaser of content, and licensee of publishers and collecting societies but also a publisher of databases, CDs and books, clearer of rights, licensor of IPR and exerciser of exceptions in law. We also support the creative industries through not only our unique collections but the Business and Intellectual Property Centre which is the largest resource of business information in the UK and also runs popular training courses on intellectual property for small businesses.

There are extremely high levels of public interest in accessing the British Library's collections on the open web¹. Providing cultural institutions with legal certainty, particularly around making digitised collections available online is vital to ensure that the highly valuable academic, scientific and cultural materials in our collections do not remain out of reach of the vast majority of citizens. The British Library is involved in a number of digitisation programmes including Europeana Collections 1914-1918 which has digitised many items related to the First World War, Spare Rib and the British Library Qatar Foundation partnership.

The Directive could, depending on their implementation prove invaluable when undertaking rights clearance for 20th century material. However we are strongly of the view, that high transaction costs, administrative burdens or poorly designed interfaces and functionality will dissuade cultural institutions, particularly smaller institutions from applying for orphan works licences or benefitting from the European Orphan Works Directive.

When implemented the Copyright Hub and associated digital copyright exchanges will be of great utility and provide a common platform for licensing transactions and a source for diligent search. However as identified by Professor Ian Hargreaves many of the current initiatives and registries are neither standardised nor open, meaning that the transaction costs associated in performing a wide-scale diligent search are potentially prohibitive for cultural institutions.

1. Could collecting societies improve the licensing of orphan works in their areas of expertise?

Wherever possible the knowledge and experience of collecting societies should be drawn upon. It is for this reason that the British Library has strongly supported collecting societies, and the government in its introduction of extended collective licensing.

¹ For example 19th century British Library images on Flickr get circa 500,000 page hits a day.

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

Several cultural heritage institutions have established holding companies or trading wings which are separate legal entities such as a shop, picture library, or reproduction service. As these types of entities are established in order to benefit the parent organisation it should follow that the parent organisation or its subsidiaries directly benefit from the expenditure and effort undertaken in securing an orphan works licence.

The Library is engaged in third party funded digitisation projects, where the digitised images will be hosted on the Library internal and / or external website, as well as on partners' websites. In these cases, we may wish to either transfer the licence to the third party and/or use the content under a licence for the same material that the third party has acquired from the licensing body. In addition, data protection issues often preclude us from being able to share rights holders contact details so it may mean that a cultural institution is better placed to apply on behalf of a third party. In summary, we believe that flexibility is desirable.

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?

Given that many of the orphan works that are digitised probably have little commercial value and almost by definition are not available commercially, any licence for libraries and archives should reflect the non-commercial nature of the work, and the public interest mission served by making this important material publicly accessible.

4. Should there be a limit 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?

Yes. For a maximum of six years from the date on which the cause of action accrued² which is consistent with the law of tort. We believe that the use of the Orphan Work over a 7 year period would be ample time for any emerging rights holders to become aware of the use and existence of their works and to put in a claim for remuneration.

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

Given the very low likelihood of rights holders coming forward after a diligent search, unclaimed funds should be redistributed to beneficiaries as soon as possible, but no later than 7 years post-publication.

6. What should any unclaimed funds be used for and why?

A material proportion of unclaimed funds and accumulated interest should be returned in appropriate amounts to the custodians of the orphan works who took out the licence, i.e. the universities and cultural heritage organisations, which have paid the licence fees and invested in the preservation, digitisation, publication and diligent searches associated with these items. Where the source of the content is not from a research library or archive other

² S.2 Limitation Act 1980 <http://www.legislation.gov.uk/ukpga/1980/58>

public interest beneficiaries of such funds should also include public libraries who promote access to knowledge and creative works.

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. Users of Orphan Works should have the ability to appeal any decisions by the authorising body. Whilst the Copyright Tribunal would appear to be the most logical forum, it would be important to ensure that it is able to support the needs of all types of uses and potential users of the licensing scheme who very often will have minimal levels of legal expertise and limited funding.

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

We would anticipate mainly using the Directive at this point in time.

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

We would normally use orphan works in the context of online publications, though may use them for physical publications also sometimes.

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

No impact at all.

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

The geographical limitations of the UK's licensing scheme will fail to provide a suitable solution for Orphan Works as the majority of our digital activities occur online and are intended for a global audience. Sadly, in a (digital) world without territorial borders this would render the scheme all but useless in our opinion.

This is a substantial disadvantage of the licensing scheme and restricts its benefits for the sector enormously. In particular, (such as those across Europe interested in and impacted by the First World War in its centenary year), it restricts the benefits of the scheme and still leaves libraries and archives vulnerable in having to deal with risks associated with the use of Orphan Works beyond the UK. It also leaves the question of the validity of a licence that operates in the full knowledge its usage outside the UK³ including of course the rest of the European single market is unlawful.

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?

³ s24 Copyright Design and Patents Act 1988.

The licensing scheme should be flexible enough to allow the clearance of a whole collection.

For the non-commercial use of Orphan Works we would suggest a maximum period of 10 working days for any applications to be processed.

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

This is very difficult to say given that given that the requirements for diligent search are the same as the Directive, and therefore given the relative time and financial barriers to using the licensing scheme, we are unlikely to use it.

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?

Our main use would relate to online digitisation projects.

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 rights holder following a diligent search?

This very much depends on the type of material but for archival materials, an individual copyright work could be as small as a single-page letter. Thus, in order to secure an Orphan Works licence for, say, a set of private papers containing correspondence, it would be necessary to carry out a diligent search for, and to register, every single rights holder within every single letter.

We have provided many statistics of this sort to the IPO in the past and would refer you to our many previous submissions on this issue. For the recent Spare Rib digitisation project, we identified c3000 rights holders for 239 issues spanning from 1972-1993. In spite of the content being comparatively modern, contributor's affiliations with closely defined networks, a wide reaching rights clearance exercise, features in national press and radio (Women's Hour, and the Guardian) to obtain contributor's permission we have only been able to secure to date approximately 10% of the required permissions.

This approach is extremely resource intensive and is not practical or feasible for most archival collections. In addition to this, given that "diligent search" appears to have the same high benchmark for the Directive as the UK licensing scheme, the UK licensing scheme would appear to be far less attractive given that it creates further bureaucratic and financial barriers on top of those required by the Directive.

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 this the case for your organisation, if you are a publicly accessible archive?

Yes, while the benchmark for diligent search is the same for the Directive and the licensing scheme.

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?

This would depend on the project and the type of material. For example, digitised material made available by the Library on the web, could be used subsequently in a publication.

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?

While the benchmark for diligent search is the same for the Directive and the licensing scheme we are likely to use the Directive wherever practical. However rights clearance of works on an individual, item by item basis is unworkable in the context of mass digitisation. Mass digitisation potentially involves the copying and making available of hundreds of thousands of copyright works. At 4 hours per book it would take one researcher over 1,000 years to clear the rights in just 500,000 books.⁴

The exclusion of independent photographs and other artistic works from the EU exception, combined with the requirement in the exception and the licensing scheme for each embedded Orphan Work (including photographs and other artistic works) to be dealt with individually in terms of due diligence, renders both solutions unworkable for mass digitisation projects for libraries and archives.

The IPO has often said that ECL is the answer for mass digitisation, however in saying this it seems not to recognise that a) collecting societies may not apply for an ECL; b) there are no collecting societies that represent film (other than for making available within the context of an educational establishment), or private materials such as letters, videos or sound recordings; c) depending on the material to be digitised a collecting society may not be deemed to be sufficiently representative.

Unlike France and Germany the UK appears now to have created a situation where we have no certain legal basis to digitise in-copyright content. Given the depth and breadth of British cultural output in the 20th century we find this very disappointing.

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?

Other than in the rare instance of “merchandising” we would not expect to recover costs.

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

Our role is to give wide public access to our collections, not to recover costs.

⁴ Seeking New Landscapes, A rights clearance study in the context of mass digitization of 140 books published between 1870 and 2010. Barbara Stratton, accessed 24/02/2014
<http://www.arrow-net.eu/sites/default/files/Seeking%20New%20Landscapes.pdf>

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?

The British Library has embarked on many public-private partnerships. The content digitised may be thematic ('Emancipation of Women'); by date range ('Early English Books Online') by genre ('19th-century Newspapers') or by collections ('The Burney Collection' of 18/19th-century periodicals). The first of these digital online partnerships dates from over 10 years ago.

The 'partners' are drawn from the limited range of secondary publishers that are prepared to bear the commercial risk for such endeavours. Examples of such companies include Cengage Learning, Proquest, Adam Matthew, Google and DC Thomson Family Learning.

The bulk of content digitised is in the public domain. Where content may lie outside of the public domain the responsibility lies on the partner to undertake due diligence and to clear rights.

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

n/a

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

We believe that the sources as listed are adequate and represent the types of places where rights holders who want to be found, can be found. We would question whether probate is in most instances a proportionate or appropriate source of information when performing a diligent search.

We also would urge the IPO to keep in mind that the reason for orphan works solutions is to facilitate the reuse of copyright works, and the more obstacles that are put in place to the reuse of orphan works the less works that can be used.

24. Do you agree with the addition for non-published works under Part 2 of the Schedule?

We welcome the addition of unpublished works.

Are there any other sources that could be added for unpublished works?

We do not believe any additional sources are necessary (see response to Q.23)

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

No, criminal sanctions would not be appropriate for the scenarios we can envisage.

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

The burden of proof should lie with the claimant on supply of documentary proof, to the civil standard of proof.

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

A fast track, low cost way to resolve disputes would be preferable.

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

Please use this space for any general comments that you may have, comments on the layout of this consultation would also be welcomed.

Yes. We believe it vital to address the issue of the duration of unpublished copyright works (in copyright until 2040) at the same time as the Orphan Works scheme and implementation of the Directive. Without addressing these issues at the same time organisations will have to spend time and money performing a diligent search for material that that the government is intending on shortly making public domain, which seems illogical and not the best use of public resource.

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