



## **BSAC COMMENTS ON DRAFT LEGISLATION FOR A UK ORPHAN WORKS LICENSING SCHEME AND UK IMPLEMENTATION OF THE EU ORPHAN WORKS DIRECTIVE**

**28 February 2014**

### **Diligent search**

Our comments here relate to both the UK scheme and the Directive implementation. The first issue is how an orphan work is defined. At the moment, the definition in Regulation 3 of both statutory instruments defines an orphan work as one where the right owner has not been identified, or, if identified, has not been located after a diligent search. This drafting could mean that a work is automatically not orphan if the right owner is not identified, i.e. that there is no need to do a diligent search to try and establish the identity of the right owner. It may be that the details of what is required for a diligent search mean that this is not the case, but it should be made clear in the definition that it is necessary to conduct a diligent search to both try and identify the right owner where this is not known and, once identified, if this has been possible or where already known, to try and locate the right owner.

We agree that a diligent search that has been done to identify and locate right owners, in order to benefit from the provision that implements the orphan works Directive, may sometimes be the same as that necessary to identify and locate right owners before applying for an orphan work licence under the UK scheme. However, as the drafting of the Regulations providing that scheme recognise, the search must be for the right owner or owners for the rights relevant to the uses envisaged, and so it will be very important to ensure that those seeking a licence under the UK scheme understand that rights for different uses may be owned by different people. If it has not been possible to identify and locate a right owner for the uses permitted under the orphan works Directive, this does not necessarily mean that it is not possible to identify and locate a right owner for other uses. To the extent that the authorising body is going to validate searches, this is therefore likely to be a difficult task that needs to be done very carefully, and we are not sure that issues such as this have been properly considered in the current proposals for the staffing of the authorising body.

We are not, however, necessarily suggesting that the proposed staffing of the authorising body should be changed. We have in the past made proposals under which there would not be such validation, and this may still be a very reasonable approach. A body acting under the orphan works Directive implementing Regulations will not have their search validated in any way. This does, therefore, raise the question of whether, given that such a search may be

accepted as part of an application under the UK scheme, the authorising body will be validating that search and, if so, what this then means for bodies that have acted under the Directive implementing Regulations if the authorising body then finds that the search is not in fact adequate. We have also in the past said that a second person who wishes to use the same material could certainly use an earlier search as a starting point for the diligent search that they would need to do. They would, however, have to decide whether or not any additional searching is appropriate. For the uses permitted by the Directive, this approach does not seem possible, but we are unsure to what extent the drafting of the UK provision copies the approach in the Directive or otherwise. The consultation document says that the expectation is for diligent searches to have been conducted within a reasonable period before any application on which it relies. It is not at all clear how this statement is consistent with the drafting of the Regulations, which seem to permit a person to rely on an existing diligent search that can be valid for seven years from the granting of an orphan work licence.

Providing details about the diligent search to the authorising body is, of course, made a requirement, and the expectation would be that it would be very rare for right holders to ever claim ownership of the relevant rights if the person doing the diligent search had been unable to trace them. However, we are not sure that the Regulations as currently drafted ensure that a person applying for an orphan work licence, who has done a diligent search to the required standard and who has not been able to identify and locate a right owner, is properly protected from infringement of copyright should the authorising body grant a licence and a right holder subsequently emerge. Information about the diligent search must be provided to the authorising body and the licensee must provide a declaration that the information is correct, but it is not clear that this declaration applies only to information about what has been done rather than any guarantee that the right owner is indeed untraceable. The latter may sometimes, of course, in time prove to be untrue.

## **Licence fees**

Our comments relate to just the UK scheme and are related to the question about allowing high volume users to take out an annual licence, or similar arrangement, to cover low value, non-commercial use. We understand the concerns that give rise to this question and the proposed solution could be one way of solving the problem. However, the question does expose the problem with the policy that there should always be an up-front payment for an orphan work licence more generally. We have previously raised concerns with the idea of an up-front payment, including by pointing out that, even where there is commercial use of a copyright work in a film, there is not always such a payment to a traceable right owner rather than an agreement to pay royalties if and when there has been a certain level of success in exploiting the film. We therefore think there should be more flexibility for all types of users about how payments are made for an orphan work licence so that these can reflect what happens currently for all users of non-orphan works. One solution would be to ask a person applying for an orphan work licence to propose when a licence fee should be paid and how much it should be, or how it should be calculated, with this being generally accepted by the authorising body. The authorising body could then have a right to reject what is proposed when there are concerns, given what is known about licensing terms and conditions for various uses in different sectors and for different types of material.

## **Transferable licences**

This is again an issue relevant to just the UK scheme. We are pleased that the issue of transferable licences has been recognised by a specific question. This is an important issue for commercial producers of audiovisual material that might include an orphan work. If a producer has decided to make, say, a documentary including a photograph or clip from an earlier film where it has been impossible to trace the right holders, then an orphan work licence would be possible to enable that material to be copied so that it could be included in the documentary. However, in order to exploit the documentary, the producer will often want to do so by reaching an agreement with a broadcaster and/or one or more distributors. They will obviously want to know the situation regarding rights in the documentary and any underlying content. These deals may not always be done prior to the documentary being made, and so it is not always possible to ensure that the broadcaster and distributors also obtain the necessary orphan work licence to exploit the documentary before the producer has invested in the production of the documentary. If a producer is able to obtain an orphan work licence that covers copying and subsequent use by, say, broadcasting and making available to the public, and the relevant parts of the licence are transferable to the broadcaster and distributor, then the producer will know that he has the ability to negotiate deals for exploitation of the documentary and so secure some return on his investment in making the documentary. Without this option, uncertainty about whether or not it would be possible for the broadcaster or distributor to obtain an orphan work licence at a later stage would probably mean that the producer would not make a documentary that included an orphan work in the first place.

## **Non-exclusive licences**

This also is an issue relevant to just the UK scheme. We understand the reasons for providing that an orphan work licence is non-exclusive. However, there is a problem where a person has obtained an orphan work licence to, say, enable some material to be included in a film, and then makes the film available to the public, because the latter may not happen for some time after they had originally decided to obtain an orphan work licence and make the film. However, it would seem that knowledge about the orphan work licence would be made available to the public by the authorising body, and even that a second person could then rely on the diligent search to also get an orphan work licence, well before the first person has been able to make the film available to the public. The actions of the second person, who would have not even had to undertake their own diligent search, could then undermine the first person's ability to get a return on their investment. It may be that it should, therefore, be possible for a person seeking an orphan work licence to request that this is kept confidential until they have made material incorporating the work available to the public, or that a second person should not be able to get an orphan works licence for the same thing until after that has happened.

## **When a rights owner makes a claim**

We are concerned that the current drafting of Regulation 12 of the UK scheme seems to have the option of imposing a time limit on a right owner being able to claim that they own the rights in something that has been treated as an orphan work. The ability to identify oneself as the right owner cannot in our view be limited this way.

Regulation 12 of the UK scheme also provides that a person who claims to own rights that have been the subject of an orphan work licence must satisfy the authorising body of their identity and ownership. This is in contrast to the Regulations implementing the orphan works Directive, where it is the body that has been using the orphan work that must be approached by a person making such a claim, and so presumably it is this body that must be satisfied that the person does indeed own the rights. There are therefore two problems. The first is what happens to those who are acting under the Directive when a UK licence was granted, on the basis of the search done under that, and the UK authorising body decides that a person has indeed proved their ownership of the rights? The second is what happens when a UK orphan work licensee disagrees with the decision of the authorising body with regards to the claim to ownership? Regarding the second problem, it may be that there is no immediate consequence for the licensee in that their orphan work licence does not immediately cease, but there would be a detrimental impact upon future licensing if they do not agree that there is, indeed, now a locatable right owner, but a person has been confirmed by the authorising body as the owner of the rights.

### **Drafting**

We are not proposing to supply detailed comments on where the drafting in both statutory instruments may cause problems, even if there is no problem with the policy. However, we hope that the drafting is improved before these Regulations are made because there are a number of instances where the drafting does make the scope of what is proposed very hard to understand, particularly because of conflicts with how current UK copyright law is drafted. For example, the Regulations implementing the Directive refer to a work protected by copyright or related rights. The latter term is presumably supposed to include performers' rights, but this is not clear, especially given that there does not seem to be an exception to performers' rights in the provisions currently proposed.

### **Overlap with extended collective licensing**

Please refer to our comments made in response to the recent consultation on the proposed Regulations to deliver extended collective licensing. The concerns that we raised there are not resolved by what is said in this consultation.