

28 February 2014

Dear Viscount Younger,

The Creators' Rights Alliance is writing to you as a response to the technical consultations on orphan works and in lieu of a formal response to that on extended collective licensing.

Apart from delays due to ill-health, we face serious difficulties responding to the consultation as framed. We believe we understand why the Intellectual Property Office has restricted formal comments to observations on whether the proposed Regulations implement existing policy: but there are several points that we must raise in defence of the 100,000 individual creators that we represent. (A list of CRA member organisations is appended.)

First: as we have observed throughout the earlier consultations, from the Gowers and Hargreaves Reviews to last year's meetings at the IPO, where extended collective licensing has been implemented to date it has been done against a background of much stronger authors' (and performers') rights. This is the case not only because the Nordic countries are within the *droit d'auteur* tradition, but also because they have laws and practices guaranteeing equitable remuneration for creators. This means, among other things, that in the Nordic countries:

- 1) the orphaning of works is strongly discouraged by creators having an unwaivable right in law to be identified; and
- 2) creators are guaranteed a share of income from extended collective licensing because they simply cannot assign all rights in their work.

We have previously submitted the reasons why the health of the creative economy depends absolutely on remuneration that permits individual creators, most of whom operate as sole traders or nano-businesses, to continue to operate and develop our wares as independent professionals.

We argued throughout the processes that led to these draft regulations that it was a necessary corollary of any attempt to implement extended collective licensing in the UK that these issues be addressed, in particular those of the unenforceability and waivability of the so-called moral rights. This has not, as you will have noticed, been done.

Further, we understand that others have submitted in detail the reasons why the proposed regulations permitting authorisation to issue extended collective licences are a complete mess, which do not necessarily implement anything at all.

We would hope for these reasons that you will resist the temptation to legislate early, and rather take the time to get it right. Though all involved may blench at the thought of yet more consultations, they are condemned to these by the current review in Brussels, in light of which it is probable in any case that any UK action will need to be amended.

Second: implementation of extended collective licensing in the UK continues to require these issues to be addressed. If, however, the government has indeed missed the opportunity to do this now, it will take time to catch up, and at a minimum we need a concerted and immediate effort to

address the **unfair contract practices** of which we have made you aware.

As we have observed in the earlier consultations, there is already, in advance of the Regulations, a renewed push by publishers – in particular, but not only, newspaper publishers – to demand assignment of all rights in creators' work.

Where this imposition of contracts is successful, it means that the safeguards in the proposed extended collective licensing regulations are of no relevance to individual creators, since the publishers will, bizarrely, have the legal status of “authors” and “performers” of the works. This also throws into doubt the applicability of certain parts of the proposed Orphan Works Regulations.

We shall, as promised, get back to you with further examples of the imposition of unfair contracts.

Third: one size does not fit all. Arrangements that may be acceptable to musicians – for want, perhaps, of technological means of distributing equitable payments for uses such as public performance of recordings directly to individual composers and performers – will certainly not be acceptable to many photographers.

While we appreciate the theoretical appeal of drafting legislation to cover all bases identically and avoid special cases, we suggest that the differing needs of different sectors must be recognised.

In particular, the requirements for representativeness of bodies applying for extended collective licensing vary widely between sectors. In some, membership of collecting societies is near-universal among active creators; in some, there is active democratic participation in the affairs of collecting societies; and in some sectors neither is the case.

Fourth: as a matter of principle, **undistributed monies** both from extended collective licensing and from orphan works licensing must be applied for the benefit of creators in general.

We support the proposal that they be transferred, after seven years, to benevolent funds on which all creators may draw, independently of their membership of a collecting society (though such membership would be one piece of evidence for their application to the fund). We propose that this be stated on the face of the legislation.

Such funds are, as we have repeatedly submitted, held on trust for as-yet-unidentified creators. Simple considerations of natural justice dictate that this is the only appropriate disposition for them, and obviate the need to go into secondary considerations about the acceptability and perceptions of legitimacy of any scheme.

The Orphan Works questions:

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

Any government body issuing licences will need to contact collecting societies in the course of verifying diligent searches. It is for them to expound on how this may work or work better.

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

No. It is government policy, as we understand it, that such licences would be granted for specific uses for specified times. They should not therefore be sublicensable (except perhaps in cases such as transfer to the heirs of a deceased licensee.)

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?

Such licences should not be granted, nor permitted. The definition of “low-value” is in constant flux in the turmoil of the invention of new online business models, many of which extract, or seek to extract, high value in non-obvious ways such as sale of advertising or, more subtly, of user data to advertisers.

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?

No, there should not. If, for example, a new search technology becomes available seven years and a day after a licence is granted, and an author or performer thereby becomes aware of the use of their work, on what theory should they be deprived of the chance to claim?

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

Seven years seems appropriate: the risk of later claims from authors can effectively be self-insured from the funds held. The reasons for seven, as against other numbers, are probably to be found in Vladimir Propp’s *Morphology of the Folktale* (Leningrad, 1928).

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

The only acceptable disposition of such funds is for the benefit of authors and performers in general, such as to benevolent funds: see above.

7. Should there be a right of appeal for users of orphan works in the event of 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?

Since the authors and performers of the work are by definition unable to appeal, to grant such a right to would-be licencees would introduce a very strange asymmetry.

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

Not applicable to the CRA.

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

Not applicable to the CRA.

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

Not applicable to the CRA: but we observe that licences *must* be non-exclusive, or the many government undertakings to protect the interests of creators, identified and otherwise, will be nugatory.

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

Not applicable to the CRA.

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?

The CRA would not be seeking such licences. We are strongly concerned that the mention of institutions wishing to “clear whole collections of works” suggests a mechanism that contradicts government policy, which as we understand it is that orphan works licenses should be granted only for specific works for specific uses.

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

Not applicable to the CRA.

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?

Not applicable to the CRA.

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?

Not applicable to the CRA.

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?

Not applicable to the CRA.

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?

Not applicable to the CRA.

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?

Not applicable to the CRA.

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 to the CRA.

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

Not applicable to the CRA.

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 to the CRA. We observe, however, that such public-private partnerships at the very least throw into question the applicability of the EU Directive provisions and imply instead that a licence that does not depend on an uncontested non-commercial purpose must be obtained. See our observations above about non-obvious garnering of commercial value by the probable commercial partner(s).

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

Pass.

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

The lists given focus on the case in which the creator is not identified.

Equally important are the cases in which the creator's name is known but contact details are missing, or the relevant rights have passed by inheritance but the heir(s) are not located. To cover this, each of the paragraphs 1 to 4 should include such records as:

- The Electoral Register
- Companies' House databases
- Records of wills and probate

This is almost certainly not a complete list.

These lists should be reviewed annually, in the light of rapid developments in data processing and cross-referencing. Probably the best way to do this is to refer in the clause that points to Schedule 2 a reference to *additional* guidance specified by the Intellectual Property Office – *not*, we hasten to add, to a power to shorten the lists by issuing guidance.

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?

Clearly, since the sources referred to in paragraphs 1-4 primarily catalogue published works, further research will be required. We would suggest that paragraph 5 continue: "and whatever further sources are required in the case in hand, for example in the case of correspondence attempting to contacting persons and organisations mentioned in it."

(We submitted previously that there were serious problems with the granting of licences for unpublished material – many of them, such as confidentiality and the protection of journalistic sources, outside authors' rights legislation.)

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

Yes: few individual authors and performers can afford to bring a case in full-fat County Court, which may in any case refuse to hear a case or impose punitive costs orders if it regards the amount of compensation sought as beneath its dignity. Can it be made explicit, for the avoidance of doubt, that the Small Claims track is available for such breaches?

26. Do you agree with this approach [*deciding fair compensation between the relevant body and relevant right-holders*]? Where should the burden of proof lie, and why?

The *burden of proof* must lie on the body that granted the licence and has the resources to research evidence and best practice.

In this European context, the concept of “fair compensation” must lead to the presumption that the relevant creator is entitled to a fee not less than would have been paid for a normal licence at the time the orphan work licence was issued, plus a consideration for the delay in receiving the funds – in the same way that the civil courts are empowered to uplift damages for unauthorised use.

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

See our comments above about the difficulty of individual creators using the County Courts: these apply even more strongly to the Copyright Tribunal, which would be the “downhill path” in terms of an apparent solution within the existing legal framework.

28. Additional comments

- A)** Member organisations of the Creators’ Rights Alliance stand ready, when necessary, to assist in the setting of default tariffs – some have continuing open market surveys – and to advise on reasonable licence fees for exceptional cases not covered by such defaults.
- B)** We do not see in the Regulations a clear statement that it should be compulsory that works licensed as orphans be used with identifying information – including electronic metadata in the case of works distributed as digital files – indicating this fact and linking to a register and a means of claiming authorship or neighbouring rights. To include this would be in the spirit of government policy on identification.

Appendix: Creators' Rights Alliance member organisations

The Creators' Rights Alliance is an affiliation of organisations representing the interests of over 100,000 original creators in a wide range of fields – including music, illustration, journalism, photography and writing.

Most of these 100,000 creators make their living by licensing copyright and performers' rights in their work. All are at times presented with contracts on a "take-it-or-leave-it" basis: the differences between the different sectors of creativity are minor and within sectors the wording of the contracts tends to be suspiciously similar between clients.

Member organisations include:

- ABSW (Association of British Science Writers)
- AOI (Association of Illustrators)
- BAPLA (British Association of Picture Libraries and Agencies)
- BASCA (British Academy of Songwriters, Composers & Authors)
- CIOJ (Chartered Institute of Journalists)
- GMG (Garden Media Guild)
- ISM (Incorporated Society of Musicians)
- MU (Musicians Union)
- NUJ (National Union of Journalists)
- PCAM (Producers and Composers of Applied Music)
- PCO (Professional Cartoonists' Organisation)
- OWPG (Outdoor Writers and Photographers Guild)
- SOA (Society of Authors)
- WGGB (Writers Guild of Great Britain)

Observers include:

- ALCS (Authors' Licensing and Collecting Society)

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