

IWM (Imperial War Museums) is the world's leading authority on conflict and its impact, focusing on Britain, its former Empire and the Commonwealth, from the First World War to the present day.

IWM's collections are unparalleled and unique. Created to record the toil and sacrifice of every individual affected by war the collections include a wide range of material, from multimedia holdings such as film and oral history to historic works of art and large objects.

IWM documents, cares for and protects its collections through innovative and enterprising projects. We aim to reach the widest possible audience through our varied programme of permanent and topical exhibitions, our award-winning learning programme, loans and support to partner organisations, and digital and commercial activity. We also undertake and support research, handle a huge volume of public and press enquiries and offer drop-in access to a range of material at our Explore History Centre at IWM London.

IWM has submitted a large body of evidence to all the UK reviews of Intellectual Property and to EU consultations on copyright over the years to highlight and communicate to policy makers the deficiencies in the current copyright framework in relation to IWM's collections and activities.

IWM welcomes the efforts of the Intellectual Property Office in trying to address the issue of Orphan Works. In particular we commend the IPO in its engagement with us and other key stakeholders to find adequate solutions for the implementation of the proposed Orphan Works licensing scheme as outlined in the Enterprise and Regulatory Reform Act (ERRA) 2013.

Following discussions with IPO officials, we understand that there maybe some doubt that the provisions outlined in the ERRA 2013 for the reduction of term in certain unpublished text based works from the end of 2039, to lifetime plus 70 years, may not be implemented until April 2015. This is of great concern to us because it means that one of the main causes of Orphan Works for IWM will not be alleviated at the same time as the Orphan Works Licensing Scheme and the Exception are implemented (29 October 2014). Note that we have an estimated 1.75 million documents that are orphan works, or approximately 20-25% of the 7.9 million documents within our collections. In practical terms, this means that we will be carrying out at the very least due diligent searches (under the terms of the Exception) and possibly also paying an admin/licence fee (under the terms of the Orphan Works Licensing Scheme), needlessly, for many of these works which are within the scope of the reduction of term measures in the ERRA 2013. In addition, this will mean that the IPO will be dealing with works which are strictly not Orphan any longer, and also a greater likelihood that these types of Orphans will be registered on the OHIM database, causing confusion across Europe (they will be in copyright in the UK, but presumably out of copyright elsewhere across Europe?), only for them to come off it again once the provisions are implemented in the UK, (if they are able to be deleted?).

We urge the IPO to move these provisions forward to ensure that there is a seamless transposition between both legislative provisions in the ERRA, and therefore ensuring that one of the reasons for Orphan Works is dealt with at the same time that the solutions are implemented.

(Question 1) Yes. However, we believe that once the Government Licensing Scheme is in operation, any licensing of Orphan Works by CMOs should be done on the same terms as those offered by the

IPO. In particular, everything in the regulations should also apply to CMOs, including pricing; licensing terms; due diligence requirements; appeal routes and the reallocation of any unclaimed monies.

(Question 2) Yes. Many museums, like IWM, will have agreements with their trading arms to licence out their assets. This would mean that it is vital that in these instances, the licence is transferable. Moreover, we have a number of projects where IWM works in partnership with third parties, where we carry out the due diligence and rights clearance on behalf of our partners because of the inherent rights clearance expertise that our museum staff may have and also because of Data Protection issues which preclude us from being able to share rights holders' contact details. Specific examples include digitisation projects, funded by a third party, where the digitised images may appear on the IWM website, as well as for the non commercial uses of our partners. Other examples include our book publishing activities whereby IWM is producing a book in association with an established publisher. In these cases, we should be able to either transfer the licence to the third party and/or apply for their uses as well.

(Question 3) A high volume licence for non commercial use would be vital for our work, and cut down the costs for IWM of taking out the licence. An annual upfront admin and licence fee would ensure that the costs of the Licensing Scheme for both the users of the scheme and the IPO in administering the scheme are kept to a minimum, particularly in instances where the works themselves were unlikely to have been created with commercial intent.

(Question 4) Yes. For the maximum of 7 years which would be consistent with the law of Tort and would therefore be consistent with the common practices of licensing. We believe that the use of an 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.

(Question 5) After 7 years have elapsed.

(Question 6)

As custodians of millions of items, IWM is responsible for ensuring that all its items are cared for and preserved for prosperity. Ultimately, this means that all the items in IWM's collections are on ephemeral carriers and will eventually need to be copied for preservation. This would include the entire film, photo and sound collection comprising of 23,000 hours of moving image, 11 million photos and 56,000 hours of sound recordings. Of immediate concern are the more vulnerable items, which will become unusable in the next 10-20 years. This includes the entire videotape collection, (around 10,000 hours) and all of the sound collection which has yet to be copied (digitised) for preservation (around 10,000 hours of recordings), as well as several million images from our photo archive.

Because of the costs of preserving these items, we believe that any unclaimed funds and accumulated interest should be returned to IWM and other owners of the Orphan Works who have already paid any licence fees (e.g. cultural heritage organisations), in order to fund their preservation, digitisation and diligent searches.

(Question 7) 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 reviewed and intrinsic changes made to it to ensure that it is able to support the needs of all types of uses and potential users of the Licensing Scheme.

(Question 8)

In total, we have an estimated 4 million orphan works in our collections, including 2.2 million photographs or 20% of 11 million images where the rights holder has not been traced. We have over 2,300 recorded orphan works within our art collections with a further 7,300 works where a diligent search has not yet been made to confirm whether these works are orphan or not – together these represent 20% of the 48,000 works in our art collections. We have over 12,000 orphan works consisting of amateur films, films with several rights, some traceable and others untraceable plus holdings of commercial films by companies which have no known rights holder. This represents around 5% of the archive of 230,000 film and video items. We have an estimated 2,500 sound recordings that are orphan works or 5-10% of the 56,000 hours of recordings in our collections. Finally, we have an estimated 1.75 million documents that are orphan works, or approximately 20-25% of the 7.9 million documents within our collections.

There is potential for IWM to use the Licensing Scheme across our 5 IWM sites, particularly in the run up to and during the First World War Centenary. Subsequently a high volume licence covering a large volume of works would again be essential to making sure that the Scheme would work for us. It should be one that not only covers multiple works, but those that can be used in multiple ways, rather than based on an image by image use. If the scheme is based on a granular image by image basis, it is likely that the scheme will be too onerous to be of use, as well as too onerous to be run cost effectively. It is likely that IWM will use the scheme many times a year, as long as a basic cost/benefit analysis makes the scheme stack up.

(Question 9)

IWM would like to use, copy and reproduce orphan works from our collections in the same way that we use, copy and reproduce other works in our collections. Here are some examples of the ways we use our collections where the rights holder has either been contacted or copyright is administered by IWM

- Publish images and stream film and sound recordings as part of our online collections database. We check such images and recordings for sensitive subject matter and to ensure we comply with data protection issues.
- Use in educational materials
- Use within our museums, such as exhibition display panels
- Use in IWM marketing and promotional material
- Use in IWM publications in printed and digital form such as IWM books, books published in association with IWM, apps for mobile devices and ebooks
- Use on IWM commercial prints and products including merchandise
- Supply and license copies through our Image, Film and Print Sales websites.

IWM, like other museums and cultural heritage organisations, also wants to participate in innovative digital schemes such as Culture Grid<sup>1</sup> and Europeana<sup>2</sup>, Google Art<sup>3</sup>, and also the BBC Your Paintings project through the Public Catalogue Foundation<sup>4</sup>.

(Question 10) This is not an issue which we believe will impact negatively upon us, and we would welcome a Licensing Scheme which offers as many people the opportunity to use Orphan Works as possible.

(Question 11) The geographic limitations of the UK's Orphan Works Licensing Scheme fail to provide a suitable solution for independent artistic Orphan Works, which we want to put online. In particular, as most of our digital (i.e. website) activities are meant for a global audience, (such as those interested in and impacted by the First World War), the UK only applicability of the Scheme restricts its benefits and still leaves us having to deal with risks associated with the use of Orphan Works beyond the UK.

Almost all of our publications are distributed and sold internationally, and therefore we always clear world rights in copyrighted material that we wish to include in our publications, so this is another limitation to the scheme being restricted to the UK only.

The exclusion of independent photographs and other artistic works from the Exception, yet the requirement remaining 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 (for the Exception), and due diligence and an application for a licence (for the Licensing Scheme), renders both solutions unworkable for us for any mass digitisation projects we may wish to pursue, as well as online use of artistic works.

(Question 12)

The Licensing Scheme should be flexible enough so that applicants are able to change their minds e.g. add/remove items. In particular, if we know the costs of the Scheme upfront, or have paid the annual fee, then this will help us make decisions regarding costs.

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

For the commercial use of Orphan Works – we would suggest a maximum period of 5 working days for any applications to be processed.

(Question 13) We approximate that the proportion will be in the vicinity of 90%, and largely consisting of archival material in our collection, such as photos, unpublished text based works - diaries, letters etc, amateur films and sound recordings.

(Question 14) We think that our main use is likely to be what we do already, however, once Orphan Works are unlocked, this is likely to open up the potential for other uses beyond those that we anticipate right now.

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<sup>1</sup> <http://www.culturegrid.org.uk/>

<sup>2</sup> <http://www.europeana.eu/portal/>

<sup>3</sup> <http://www.googleartproject.com/>

<sup>4</sup> <http://www.bbc.co.uk/arts/yourpaintings/galleries/locations/imperial-war-museum-london-3346>

(Question 15) After a diligent search, we have found that it is more unusual for rights holders to be found. Based on our experiences, we estimate this to be in the region of 5-10%.

(Question 16) This depends on the material that is being used by us and for what purposes, bearing in mind that photos are beyond the scope of the Directive.

(Question 17) This depends on the project. For example, digitised texts used under the Directive by libraries and archives on the web, could be used subsequently in a book.

(Question 18)

The exclusion of independent photographs and other artistic works from the Exception, yet the requirement remaining in the Exception (and the Licensing Scheme) for each embedded Orphan Work (including photographs and other artistic works) to be dealt with renders both solutions unworkable for certain activities. In particular, the need to carry out due diligent searches individually for each embedded artistic works for both the Exception and the Licensing Scheme, as well as an application for a licence (for the Licensing Scheme), puts at risk the benefits of both solutions for mass digitisation projects for museums as well as publishing and other activities where we may have more than one embedded artistic work. Moreover, the time and geographical limitations of the UK's Orphan Works Licensing Scheme fails to provide a suitable solution for independent artistic Orphan Works, (representing a large proportion of the Orphan Works owned by the cultural heritage sector), which cultural heritage organisations may wish to put online.

The IWM's publication of a WWI diary by Ethel Bilborough in association with Ebury Books, which included text by the author for which copyright was assigned to IWM by the rights holder, has included multiple orphan embedded artistic works. IWM has carried out extensive due diligence for each work. In this case, as this is a commercial product, we feel that the likely additional licence fees associated with the use of each embedded artistic work as outlined within the Orphan Works Licensing Scheme and limited geographical reach of the Scheme, had it been in place, would have rendered it too expensive and of limited benefit, subsequent to any cost/benefit analysis.

(Question 19) The staff time involved in digitisation activities and carrying out due diligent searches means that we are unlikely to directly recover the full costs of these activities..

(Question 20) We are likely to recover some costs indirectly, but like most Museum archives, we do not charge for visitor entry to our premises, nor to browse our website etc.

(Question 21) Possibly.

(Question 22) We believe that the IPO should not implement this provision.

(Question 23) No. 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.

(Question 24) Yes. We do not believe that any more sources would be necessary (see our answer to Q.23)

(Question 25) No. We believe that civil sanctions would be adequate.

(Question 26) Yes. The burden of proof should lie with the claimant on supply of documentary proof.

(Question 27) Yes. We need a cross-border solution which can deal with the use of OWs under the Directive in one country, where the rights holder may be based in another and the user based in yet another one. This should be administered by the European equivalent of the Copyright Tribunal, and provide a fast track, low cost way to resolve disputes.

Other comments:

- The Orphan Works Licensing Scheme needs to be cost effective for the users as well as cost effective to run for the IPO. This can be facilitated by ensuring an up-front payment for bulk non commercial use of Orphan Works by cultural heritage organisations, and automated bulk upload of records for applications. Records that are uploaded should also include the optional upload of thumbnail images of any artistic works, to aid the differentiation of one image from another which cannot necessarily be done by description alone. We believe strongly that this should be optional and not mandatory otherwise this could prove to be too onerous and costly an obligation.
- The Licensing Scheme must take into account that due to the nature of the work and the fact that most orphan works were not created with commercial intent, there may not be a starting point for the OWs in terms of any due diligent searches. As owners of any Orphan Works, and usually the most authoritative and expert on these types of works, if cultural heritage organisations are unable to even start due diligent searches because of the lack of any information, that in itself should be deemed to be satisfactory due diligence.
- Any information produced by the IPO to accompany the Licensing Scheme as well as the Directive must include user-friendly flow charts and clear guidance notes. These notes should include information to help users differentiate between works in copyright and those for which copyright is no longer present, as well as works covered by Bona Vacantia.
- The licence fees charged need to reflect that we are generally not charged by our rightsholders for commercial uses of copyright works because they support our broad mission and because we care for and ensure the preservation of their work. This means that the licensing fees should reflect the following:
  - Non commercial use by cultural heritage organisation
  - Commercial use by cultural heritage organisation
  - Non commercial use by commercial organisation
  - Commercial use by commercial organisation