

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

Response from the National Records of Scotland

National Records of Scotland (NRS) has a wide and diverse community of stakeholders and plays a central role in the cultural, social and economic life of Scotland, supporting several of the Scottish Government's key National Outcomes and measuring its Population Purpose Target. We perform the registration and statistical functions of the Registrar General for Scotland and the archival functions of Keeper of the Records of Scotland, including maintaining the archives as one of Scotland's five National Collections, and our leadership role for Scottish archive and record professionals.

Q3

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?

This is a reasonable proposal, but unlikely to be of use to archives as archives are extremely unlikely to be 'high volume' users of the orphan works licensing scheme.

Q4

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?

Difficult. If the limit is for as long as the work is in copyright, this will lead to anomalies with varying copyright terms for different types of work. Nevertheless, to do so would not diminish the rights' holder in any way. The consultation's analogy with dormant bank accounts is therefore a better one than that with adverse possession of land.

The likelihood of rights holders coming forward is however extremely low (if not nil), especially in relation to unpublished, low value archival collections.

Q5

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

After 7 years – end of licence duration. Again, the likelihood of rights holders coming forward is extremely low (if not nil), especially in relation to unpublished, low value archival collections so the risk to government is negligible.

Q6

What should any unclaimed funds be used for and why?

Channel the funds back into the cultural heritage sector in the form of training or as grant-aid for projects. If the latter, the fund could either be stand alone, or added to other existing funds such as HLF.

Q7

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?

Option c), via firstly an IPO review process and then if necessary via the Copyright Tribunal.

Q8

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

Probably never – due to the onerous nature of a diligent search and the anticipated low-level of success. Given the nature of archival collections, as a general rule one diligent search would be relevant for only a small number of items. So the effort would be out of all proportion to the ‘reward’.

We can also envisage that NRS might make arms-length use of the domestic scheme. Where a work is still in copyright, and NRS is unable to provide a user with a copy (for instance a request for a photograph for publication) it is possible that we suggest that the enquirer carry out a diligent search and obtain an orphan works licence. On production of the licence, NRS could supply the enquirer with a copy of the photograph.

Q9

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

In the unlikely event that NRS were to use the scheme, it would be for archival collections – unpublished literary and artistic works, mainly.

Q10

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

Not at all. NRS agrees that licences should be non-exclusive.

Q11

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

Not the main factor in NRS being unlikely to use the scheme, but it is a further disincentive. Limitation to the UK will however create an additional overhead when managing content licensed under the orphan works scheme.

Q12

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?

Due to the onerous nature of a diligent search, NRS would only use the scheme when certain that a particular work was to be used.

Q13

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

In the unlikely event that NRS were to use the scheme, it would almost certainly be for unpublished literary or artistic works.

Q14

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?

Any use of the scheme would likely be as part of an ongoing digitisation programme to create enhanced onsite and/or online access.

Q15

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?

Due to its time-consuming nature and nil success rate, NRS only carries out a diligent search in exceptional circumstances. When we have experimented with diligent searches, with the advantage of ready access to genealogical source material such as census and vital events registers, our 'hit' rate has been nil.

Q16

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, although the exclusion of independent artistic works is extremely limiting. NRS for instance has a collection of over 200000 maps and plans and over 76000 photographs.

Q17

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?

Difficult to envisage a situation where this would happen.

Q18

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?

The Directive excludes independent artistic works, so NRS – and other archives – would have to apply under the domestic scheme. As mentioned throughout

this response however, the requirements of a diligent search are so onerous that either scheme is likely only to be used in exceptional circumstances.

Q19

If you are a cultural organisation, how likely is it that you would recover the full costs related to the digitisation and making available of an orphan work?

Difficult to answer. NRS would take a view at the time on whether to charge, and how, based on the record(s) in question, and prevailing policy and legislation.

Currently NRS operates a mixed economy on charging for access to digitised content. Costs range from full cost recovery to nil.

Q20

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

Website charging probably, but see Q19.

Q21

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?

NRS does not rule out public-private partnership for the digitisation of such material.

Q22

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

Yes – to do so would place arbitrary limits on use of the scheme.

Q23

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

No

Q24

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?

'Appropriate to the unpublished work' is key. Archival works by definition are unpublished, and the sources listed almost exclusively focus on published works. We note that the ARROW database does not appear to be publicly available at the time of responding to this consultation.

In NRS's experience, the only source mentioned in Part 2 which may have any relevance for archival works is 1(C) WATCH. But even that is extremely unlikely. Having carried out various searches of WATCH over the years, NRS's Copyright Officer has only had one successful search.

In NRS for instance, when trying to work out the author's date of death in order to determine whether or not an item is still in copyright we search in appropriate reference works such as *Dictionary of Scottish Architects* or the *Biographical Dictionary of Civil Engineers*. If relevant, we then sometimes search statutory registers of births, deaths and marriages. NRS however has an advantage with in-house access to vital registers, at no cost. The search process for determining an author's date of death is not the same as that for a diligent search, but there are similarities.

NRS would welcome the opportunity to work with UKIPO and other bodies in this area, to further define 'appropriate' in the context of unpublished works.

Q25

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

No

Q26

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

Yes

Q27

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

As per answer to Q7.

Susan Corrigall
Copyright Officer
National Records of Scotland

Email: [REDACTED]
Phone: [REDACTED]

Submitted: 28 February 2014