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Margaret Haig
Copyright and Enforcement Directorate
Intellectual Property Office
First Floor, 4 Abbey Orchard Street
London, SW1P 2HT
U.K.

By email: copyrightconsultation@ipo.gov.uk

Re: “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 ”

Dear Ms Haig:

This letter is submitted on behalf of the National Writers Union, in response to your consultation request regarding a proposed U.K. scheme for licensing of reproduction and other use of so-called "orphan works", without the permission of the holders of rights to those uses.

The National Writers Union (NWU) is a national labor union that advocates for freelance, contract, and self-employed writers. The NWU includes local chapters throughout the U.S. as well as at-large members nationwide and abroad, including in the U.K. The NWU works to advance the economic conditions of writers in all genres, media, and formats. NWU membership includes, among others, book authors, journalists, business and technical writers, website and e-mail newsletter content providers, bloggers, poets, playwrights, editors, and academic writers. The NWU is a national amalgamated union (Local 1981) of the United Auto Workers, AFL-CIO.

As writers whose work is likely to be impacted by U.K. legislation and regulations, the NWU remains gravely concerned – as we have previously advised the U.K. Intellectual Property Office (IPO) – that the measures being considered by the U.K. Parliament and the IPO would:

1. Violate the obligations of the U.K., pursuant to the Berne Convention, with respect to the rights of authors of works first published in the U.S. and elsewhere outside the U.K.;
2. Misidentify many works first published in the U.S. and other countries – particularly works simultaneously published in multiple countries, U.K. editions of works previously published in different editions in the U.S., and works first published online on servers in the U.S. – as having been first published in the U.K. and as being "orphan works";
3. Identify rights as "orphaned" based on the failure of a diligent search to identify the holder of those rights, when in fact rightsholdings are not normally identifiable from any database and there are many normal forms of commercial exploitation (including but not limited to anonymous or pseudonymous publication on advertising-supported websites) that would not allow the rightsholder to be identified by even the most diligent search;
4. Authorize reproduction and use of U.S. and other foreign works without the permission of the author (or other holder of the particular rights being exploited) in ways that interfere with the "normal commercial exploitation" of rights to those works; and
5. Impose burdensome and time-costly "claim" requirements, constituting "formalities" prohibited by the Berne Convention, on foreign authors who do not want rights to our work deemed "orphaned" and authorized for reproduction or use through "orphan works" schemes. The costs which would be imposed by these proposals on authors, whether in the U.K. or abroad, of searching lists of works to which some of the rights have provisionally been identified as "orphaned", are entirely omitted from the Impact Assessment prepared by the IPO, even though these costs would manifestly be the largest category of costs imposed by the "orphan works" scheme.

The NWU has already brought these concerns to the attention of the U.S. government. In 2012, the NWU submitted comments to the U.S. Intellectual Property Enforcement Coordinator, in which we said that "These laws and legislative proposals violate, or would violate if enacted, the rights of U.S. writers and the obligations of foreign governments to the U.S. as parties to the Berne Convention. As such, they call for strong diplomatic protests by the U.S. and the invocation, if they are enacted, of appropriate treaty enforcement mechanisms and sanctions for noncompliance with treaty obligations." <<http://www.nwubook.org/NWU-IPEC-2012.pdf>>

We urge the IPO and Parliament to consider carefully the inevitability that works first published abroad will be swept up in the proposed "orphan works" and ECL schemes, and the implications of this for U.K. compliance with its obligations pursuant to the Berne Convention.

We are disappointed that, despite our specific requests, no representatives of foreign creators were included in the IPO working group. The consultation document does not mention – even to attempt to refute or to explain the complete rejection of -- any of the criticisms of the proposed "orphan works" scheme and the Impact Assessment that were received by the IPO from the NWU and perhaps others, and we do not know whether the members of the working group were even made aware that such criticisms existed and were received.

None of the specific questions on the consultation response form address any of the concerns we have raised, or any of the implications of the proposal for writers, much less any of the specific issues or problems which the proposals would create for foreign writers.

Indeed, creators aren't even one of the categories of potential respondents listed on the form. We are lumped together with publishers under the umbrella of "rights holders" even though the interests of writers are often antithetical to those of publishers, and the IPO should know better than to accept publishers as proxies for writers' interests.

Our response focuses on the questions we believe that the IPO should have asked:

- (1) To which works by foreign writers are rights likely to be identified as "orphaned" even after a genuinely diligent search for the holders of those rights?
- (2) What are the normal forms of commercial exploitation of those works, and how will the labeling of rights to those works as "orphaned" affect that exploitation?
- (3) What costs will the proposed scheme impose on foreign authors?
- (4) What could the IPO and Parliament do to mitigate the damage to foreign writers' revenues and livelihoods from the proposed "orphan works" licensing scheme?

With respect to the first two of these three questions, we refer you to our previous submissions to the U.S. Copyright Office, which explain in detail the fallacy of assuming that any commercial exploitation of the work will necessarily make the identity of the holder(s) of rights to that work identifiable through diligent search. It should be self-evident that anonymous and pseudonymous commercial publication is a normal form of exploitation of copyrighted work, and that the holders of rights to such works cannot be identified through diligent search.

The IPO has based its analysis on the entirely unsupported and unsupportable myth that if a work is being exploited commercially, it will be possible to ascertain through diligent search who holds which rights to that work. From this premise, the IPO has wrongly concluded that rights that would be deemed "orphan" are "by definition" not currently being exploited, and that no consideration need be given to the authors of those works, to our rights, to our revenues and livelihoods, or to the impact on us of the proposed scheme.

This erroneous foundation poisons the entirety of the IPO analysis.

A typical case for a member of the NWU or another writer in the U.S. would be that a publisher in the U.S. licenses the publication in the U.K. of an edition of a book or journal first published in the U.S., or including a story or article first published in the U.S. (either in hardcopy or on a website), or that a copy of a letter, document, pamphlet, or other ephemera written in the U.S. is deposited in the collection of an archive or library in the U.K.

Typical U.S. author-publisher contracts don't require publishers to notify authors when they license foreign editions, so the author is unlikely to know which of her works have been republished in U.K. editions. No law requires a copy of a published book or journal, much less a letter, pamphlet, or other ephemera, to identify the place of publication, the author's nationality or country of residence, or whether or where all or part of the work was previously published.

So typically there is nothing in the copy in the U.K. that indicates its connection with an author in the U.S. or of the work having previously been published in the U.S., and typically the author in the U.S. will not know that the edition or copy of her work in the U.K. even exists.

The publishers in the U.S. and/or the U.K. may have ceased trading. Even if they are still in business, they may no longer hold any rights to the work, and may never have held any rights to use of the work in digital form. They may no longer know how to contact the writer, and are unlikely to have any knowledge whatsoever of how the author is now exploiting the work.

Meanwhile, the author may be, and quite often is, actively exploiting the work. She may have self-published a new hardcopy or print-on-demand edition of the work or of some revised or updated work incorporating portions of its content (perhaps with a different title and/or under a different pen name). She may have self-published or licensed a new e-book edition of the work, of part of the work, or of a collection including the work. Or she may have placed all or part of the work on a website that generates revenue through advertising or other means.

None of these normal forms of commercial exploitation of the work by the author are likely to be reflected in any bibliographic database, or any of the databases which have been suggested for consultation as part of a diligent search to determine if rights are orphaned.

The fact of having published an edition of a work says nothing about whether the publisher of that edition, in that format, in that place, and at that time currently holds any rights to the work(s) included in that edition, or if so, which rights they might currently hold.

Publication records are not records of current rights holdings. Most of the databases which have been proposed to be consulted as part of a diligent search for "rights holdings" are bibliographic and publication databases which actually contain *no information at all* about current rights holdings. A writer is under no obligation to declare publicly or to former publishers of other editions of a work how she is exploiting her rights to that work, or to record in any database which rights, if any, she has assigned, to whom, or on what terms. Most rights holdings are not recorded in any database and could not be ascertained by any search, no matter how diligent, unless that search involves a personal conversation with the author.

Nothing about the act of exploiting a work commercially necessarily exposes the identity of the writer to public discovery. Some writers prefer not to make themselves discoverable. That choice is not a legitimate basis for a determination that rights to the work have been abandoned.

Assuming that the author has already chosen the mode of exploitation of her work which she believes will be most remunerative for her, any reproduction of the work carried out pursuant to an "orphan works" scheme is likely to reduce her total revenues. That is particularly likely to be the case if she has decided that she can most effectively exploit the work by self-publication, rather than by granting licenses to third parties for reproduction or other use of the work.

What would the costs of the proposed scheme be to NWU members and other writers?

The IPO doesn't say. The Impact Assessment doesn't mention any costs to writers, not even with a sentence to explain why it estimates the costs to authors as zero. The IPO has deliberately refused to even acknowledge that this is a disputed issue, despite our having pointed out this omission in the previous Impact Assessment and supplied an estimate of these costs.

An author who does not wish to have her work licensed pursuant to an "orphan works" scheme, but prefers to continue to make her own choices about how to exploit her work, will need to check periodically whether rights to any of her work have been designated as "orphaned". The IPO has yet to spell out how this might be possible, or to specify mandates for procedures (as discussed further below) which would mitigate but not eliminate this burden.

But in a best-case scenario, if ten million authors whose work might be found in U.K. libraries need to conduct a search for each of their works on a quarterly basis, and on average the search takes each of them an hour, and their time is worth the U.K. minimum legal wage of slightly more than six pounds per hour, the costs would be about 240 million pounds per annum.

A more realistic estimate might be that twenty million authors would need to conduct such a search monthly, that it might take on average two hours, that their time is worth 10 pounds per hour, and therefore that the total costs imposed on creators would be about 4.8 billion pounds per annum.

Keep in mind that, as noted above, a foreign writer has no way to know which of her works might have been re-published or licensed for use in the U.K., or which of her works – even unpublished works – might have been lodged in a U.K. archive. So the search described above would need to include each work to which she wants to preserve her rights.

Again, these are best-case estimates. These costs could be several times higher.

If a writer finds one of her works previously published in hardcopy, digitization rights to which have been deemed "orphaned", there's a good chance that the publisher(s) of the hardcopy edition(s) will also claim those digitization rights. Digital rights to virtually all copyrighted works previously published on paper are in dispute as between print publishers and writers. Print publishers falsely claim to hold rights to digital use, even where no such rights were mentioned in contracts for print publication. Such claims by print publishers persist despite having been rejected by U.S. courts, including by the U.S. Supreme Court in *New York Times v. Tasini* (533 U.S. 483, 2001) a lawsuit in which the lead plaintiff was the then President of the NWU.

The IPO needs to recognize that this scheme is being established in the middle of the field of battle of this ongoing conflict. The IPO cannot ignore the inevitability of such disputes. If claims to rights aren't disputed, it will only be because authors don't find out that rights to their works have first been deemed "orphaned" and then been given away to wrongful claimants.

There doesn't appear to be anything in the IPO proposal to put the burden of proof on publishers or other non-creator third parties claiming rights or revenues related to rights that have been deemed "orphaned", or to require notice to the author and an opportunity to dispute such claims, or to set substantive or procedural standards for adjudication of such disputes.

Without knowing anything about the dispute resolution mechanisms, it's hard to estimate the costs to authors of fending off these expected bogus claims on our rights. But it's difficult to imagine that even the most streamlined sort of summary arbitration would not cost a participant at least in the thousands of pounds, perhaps an order or two greater. Costs are likely to be higher for authors than for publishers, since many U.S. publishers already have U.K. representatives.

Our preliminary estimate of the lower bound of combined costs to foreign authors of regularly and periodically searching for each of their works, rights to which might have wrongly been deemed "orphaned", and fighting off bogus claims from previous print publishers to digital rights to such works, would certainly be on the order of billions of pounds per annum.

Interference with normal exploitation by foreign authors of rights which would be deemed "orphaned", in violation of U.K. obligations pursuant to the Berne Amendment, is inherent in the proposed scheme, which should be abandoned and withdrawn in its entirety.

But if the IPO and the U.K. government persist in putting this ill-considered scheme into effect, the damage to foreign writers and the violations of U.K. obligations pursuant to the Berne Convention could be mitigated, although not cured, through the following amendments:

1. To be considered diligent, a search cannot be limited to a search of databases.
2. To be considered diligent, a search must include an individualized search for, and an attempt to contact, the author(s) of the work(s) in question, regardless of whether the searcher believes that the author(s) hold(s) the rights at issue.
3. A diligent search must include a diligent attempt to give notice to the author(s) and an opportunity to dispute any claims to rights holdings by publishers or other third parties, even if the searcher does not believe that the author(s) hold(s) any of those rights.
4. To be considered diligent, a search must be worldwide. The failure to identify, locate, obtain a response from, and confirm the holding of all rights by a rights holder or rights holders in the U.K. should be considered *prima facie* evidence that rights holders may be located outside the U.K., and that a worldwide search must be conducted.
5. A search for an author must include, at a minimum, searches of databases of authors including ORCID and ISNI, but these must not be presumed to be accurate or complete. A search for an author must also include an individualized, diligent Internet search for the author's name and any known pseudonyms, any title(s) known to be associated with the author, the first line of text, and several text fragments from throughout the work.
6. Availability of the work online, in whole or in part, must be deemed conclusive evidence that the work is being exploited by someone, and cannot be deemed "orphaned". It is not necessary to know who holds the rights or is receiving the revenues for advertisements on a website to know that somebody is exploiting all of the works that appear on that site.
7. The IPO should maintain a database of all works, rights to which have been deemed or proposed to be deemed "orphaned". This database should include and be searchable by all known names and pseudonyms of authors, all titles and subtitles, and all first lines, of works or components of works, including articles, stories, poems, items in archives, or other distinguishable elements in collective works. A work proposed to be deemed orphaned should be listed in this database for at least one year before any use is allowed.

We thank you for the opportunity to have this submission considered. We look forward to the revision of the Impact Assessment – if the proposal is not withdrawn – to reflect the costs which the proposed scheme would impose on U.S. writers who wish to retain our rights. We will be happy to consult with the IPO or Members or staff of Parliament on these issues.

We waive any objection to the publication of this submission and our contact details.

Please acknowledge this response.

Respectfully submitted,

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Attachments:

NWU comments to the U.S. Copyright Office on "orphan works" (February 4, 2013)
NWU reply comments to the U.S. Copyright Office on "orphan works" (March 6, 2013)