

COPYRIGHT WORKS: SEEKING THE LOST CONSULTATION RESPONSE

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This is a joint response on behalf of the **Scottish Council on Archives** and **CREATE**, submitted by **Irene O'Brien** (Chair of the Board of Trustees, Scottish Council on Archives) and **Ronan Deazley** (Founding Director, CREATE) to the Government's current consultation on orphan works. For further details, see: <http://www.ipo.gov.uk/pro-policy/consult/consult-live/consult-2014-lost.htm>.

The Scottish Council on Archives is the lead body for the advocacy and development of archives and records management services in Scotland (www.scottisharchives.org.uk).

CREATE is the RCUK-funded Research Centre for Copyright and New Business Models in the Creative Economy (www.create.ac.uk).

DOMESTIC ORPHAN WORKS LICENSING IN THE UK

AUTHORISING BODY

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

We begin by noting that archive collections typically contain more orphan works than collections held by other cultural institutions, and in particular libraries (Korn (2009)). This is largely attributable to the very different nature of archive collections when compared with library collections. Libraries aggregate, organise, enable access to, and assist users in navigating the world's accumulated knowledge. In this regard, library collections are primarily concerned with commercially published material. Archive collections, however, are primarily concerned with the unique records produced by organisations, families, and individuals during their day-to-day activities or business. And while these records have considerable social, cultural, academic and historic significance, the nature of these records is such that they are rarely created for the purposes of commercial exploitation, and only a very small proportion of these works have commercial value in themselves. Indeed, it is the organic nature of the records selected for inclusion within an archive that makes these records so reliable, authentic and trustworthy.

The fact that archival records often have little or no intrinsic commercial value means they also typically remain unpublished at the time of deposit with an archive. Indeed, archive collections are naturally prone to the so-called *orphan works paradox*: that is, the lower the commercial value of a work the less likely it is that the rights holder can be found, which in turn means that the least commercially valuable works generate the highest transaction costs in terms of

searching for the owner when attempting to clear rights (European Commission (2011)).

Conversely, the cost of clearing rights for published material is typically lower than for unpublished material and other grey literature given that information about the rights owners of published work is often readily available from collecting societies and commercial publishers.

Moreover, there is no tradition of the collective management of unpublished works within the UK (or indeed, elsewhere in the world). Collecting societies rarely carry information about grey literature or unpublished works, even when the works are not orphaned. Put another way, the type of material held within archive collections typically do not fall within the repertoire of most collecting societies. For this reason, we express no opinion on how collecting societies could improve the licensing of orphan works in their areas of expertise: improved licensing on the part of collecting societies will have very little relevance for the archive sector.

References:

Korn, N., *In from the Cold: An assessment of the scope of 'Orphan Works' and its impact on the delivery of services to the public* (JISC, April 2009), available at: <http://www.jisc.ac.uk/publications/reports/2009/infromthecold.aspx>

European Commission Staff Working Paper, *Impact Assessment on the Cross-Border Online Access to Orphan Works*, SEC (2011) 615, available at: http://ec.europa.eu/internal_market/copyright/docs/orphan-works/impact-assessment_en.pdf

LICENSING TERMS

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

We express no view on this issue. Whether licences are transferable or not is likely to have little impact on the use of the domestic licensing scheme by archives.

LICENCE FEES

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?

We welcome the suggestion that the proposed regulations might provide for an annual licence for non-commercial use by cultural institutions, although much would depend on the detail of implementation and in particular on setting a reasonable and realistic licence fee for non-commercial use by cultural institutions (that is: zero, or close to zero). We suggest, however, that the authorising body give consideration to granting licences of this kind for longer periods of time (perhaps for five or seven years) to minimise the administrative and other costs that might be involved in renewing a licence on an annual basis.

We also welcome the fact that the Intellectual Property Office is working with sector-specific groups to draw up guidance on how the use of orphan works will be priced. If an annual licence scheme is to be adopted, we think it important that

consideration be given to setting different annual licence fees for different types of user group within the cultural heritage sector. That is, because of the different nature of archive and library collections (as discussed in our answer to question 1), an annual licence fee for low value non-commercial use by archives might well be set at a lower tariff than an annual licence fee for low value non-commercial use by libraries. In both cases, however, we would advocate a fee of zero or close to zero.

That said, we think it highly unlikely that many high-volume non-commercial users will emerge within the cultural heritage sector for one very simple reason: the cost of compulsory diligent search prior to licensing or use is likely to be a significant deterrent in the uptake of either orphan works scheme (whether by exception or by licence).

For example, the Government has estimated the cost of diligent search for users of orphan works at between 3.5 and 6 hours per work, or between £44.60 and £76.50 (based on the median hourly pay for archivists and curators) (*Orphan Works Impact Assessment* BIS1063 (June 2012)). In effect, this means that a full-time archivist engaged in nothing but diligent search activities might identify between 250 and 440 right holders in any given year. Few archives, whether public or privately funded, have the resources to support that kind of activity.

UNCLAIMED FEES

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?

We do not find the analogy with either the adverse possession of land (12 years) or the use of funds in dormant bank accounts (15 years) to be helpful. In both cases, the property of the land- or bank account owner is being re-appropriated to allow for socially and economically valuable re-use of the property. In the current situation, however, the ownership and proprietary entitlements of the rights holder to the underlying property (that is, the copyright work) remain unaffected.

We think a more appropriate analogy lies with the limitation period for taking an action for infringement of copyright. In England and Wales the relevant period is six years (*Limitation Act 1980*); in Scotland the relevant period is five years (*Prescription and Limitation (Scotland) Act 1973*).

With that in mind, and taking into account our position on questions 5 and 6, we think a rights holder should be time-barred from claiming his or her remuneration after six years from the end of the calendar year in which the relevant licence has been issued.

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

For the reasons given in our response to question 4, we think the Government should be free to distribute unclaimed funds after a period of six years from the end of the calendar year in which funds are first collected.

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

We think the Government should differentiate between the distribution of unclaimed funds generated through licences granted for non-commercial and commercial use, as well as licences granted to cultural institutions and other users.

We suggest that any surplus funds that flow from a licence for non-commercial use granted to a cultural institution should be returned to the institution concerned, for two reasons. First, it should not be forgotten that cultural institutions are very likely to be seeking licences to make use of material held in their own collections, and that the ongoing cost of preserving and maintaining those collections in the public interest lies with the institution concerned. Second, if the Government is committed to granting licences for no more than seven years (regardless of the type of use or licensee) (Regulation 6), and if the renewal of an orphan works licence is to be contingent on conducting a new diligent search (Regulation 8), then we think it appropriate that a cultural institution having to renew an orphan works licence for non-commercial use should be able to draw upon funds previously paid over to the authorising body on the grant of the original licence to support diligent search for the purposes of renewing that licence.

We suggest that any surplus funds that flow from a licence for commercial use granted to a cultural institution should either be returned to the institution concerned or committed to the Heritage Lottery Fund to support archive (and other) digitisation initiatives within the UK.

We express no opinion on how surplus funds that flow from licences granted to users outside the cultural heritage sector should be used, whether for commercial or non-commercial use.

APPEALS

7. 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?

We think there should be a right of appeal for users in relation to both licence fee tariffs and refusals to grant licence. We consider the Copyright Tribunal to be an appropriate body to determine both issues.

IMPACT ASSESSMENT

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

As the strategic body for archives and records management services within Scotland, the Scottish Council on Archives represents a diverse range of archival institutions, including public archives, national bodies, local authorities, health boards, universities and the private archives of businesses, families and a wide range of other organisations. As such, we cannot provide any meaningful response to this institutional-level question; much will depend on the individual nature of the archive.

That said, we have already indicated that we think it is highly unlikely that many high-volume users will emerge within the cultural heritage sector, and especially for non-commercial uses, due to the burden and cost of the requirement of compulsory diligent search. (See our response to question 3.)

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

Although a number of archives actively engage in the digital asset management of their collections for commercial purposes (and subject to what we have already said about the likely chilling effect of a compulsory diligent search requirement), we believe that many archives will contemplate using the licensing scheme to enable online and remote access to artistic works (photographs, prints, maps, technical drawings, diagrams, and so on) for non-commercial purposes (given that free-standing artistic works currently fall outwith the scope of the scheme established under the Directive).

On this issue, we suggest an amendment to the proposed regulations.

In our opinion, the Government should enable the authorising body to grant licences to cultural institutions for the non-commercial digitisation and communication of works that are not currently covered by the scope of the Directive (including free-standing artistic works) but in a manner that more closely complements the intended operation of the Directive.

That is: when dealing with an application from a cultural institution for non-commercial use, the licence granted by the authorising body should not be limited to successive periods of seven years, and should not be renewable on condition of a subsequent diligent search being carried out by the relevant institution. Rather, we suggest that licences should be granted for seven years in the first instance and renewable (upon appropriate notice being given to the authorising body by the institution) for the duration of the copyright term, but terminable at the request of a reappearing rights holder.

We suggest this for a number of reasons: first, the likelihood of identifying or locating the rights holder of material in archival collections on the basis of a diligent search typically diminishes over time (that is, we think conducting a second diligent search for the owner of the copyright in archive material will prove largely redundant); second, when cultural institutions make use of orphan works it is rare for a rights holder to reappear; and, third, even if a rights holder does reappear, it is very rare that they want to put a stop to the non-commercial use by the institution, or to claim remuneration for that use.

See also our response to question 26 concerning fair compensation for non-commercial use under the Directive.

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

Not at all. As a sector, we are interested in promoting the widest possible access to, engagement with and lawful re-use of archive collections. Indeed, we strongly urge the Government to ensure that licences granted under the scheme should only ever be non-exclusive.

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

On this issue, we draw a distinction between licences granted for commercial and non-commercial uses. We do not think the territorial nature of licences granted under the scheme will deter the use of the scheme for non-commercial purposes in any meaningful way. If it is to have any impact on the potential use of the scheme, we think it will do so in relation to the uptake for licences for commercial use.

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?

Much will depend on the nature of the collection, the institution within which it sits, and the proposed use. However, for the reasons set out in our response to questions 3 and 8 – that is, the cost of adhering to the diligent search requirements associated with the scheme – we think it is highly unlikely that many archives will make use of the scheme to clear whole collections of works.

Otherwise, we consider four weeks (20 working days) to be an acceptable amount of time for processing an application to use an orphan work.

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

Much will depend upon the nature of the archive collection concerned. However, as we set out in our response to question 1, the majority of holdings in archive collections consist of unique records produced by organisations, families, and individuals during their day-to-day activities or business. These documents and records are rarely created with commercial exploitation in mind, they often have no intrinsic commercial value and, as a consequence, they typically remain unpublished at the time of deposit with an archive. For that reason, we anticipate that a very high proportion of applications from the archive sector will relate to unpublished works.

14. Would your main use of orphan works be as part of works that you produce already, such as a book or 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?

Although some archives actively engage in the digital asset management of their collections for commercial purposes (and subject to what we have already said about the likely chilling effect of a compulsory diligent search requirement), we believe that archives principally will aspire to make use of the licensing scheme to enable online and remote access to archive collections for non-commercial purposes.

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?

Well-documented and robust data on the efficacy of diligent search in relation to archive collections is scarce (when compared with available data on clearing rights in library collections or other collections of commercially published material).

Moreover, success in locating or identifying a rights holder following a diligent search is likely to be highly variable depending on the nature and age of the collection and the rights holders concerned. Consider, for example, two recent studies concerning the digitisation of archive collections: Dickson (2010) and Stobo, Deazley and Anderson (2013).

Dickson's study relates to the copyright investigation undertaken to make the Thomas E. Watson Papers accessible online. The Thomas E Watson Papers is a manuscript collection housed at the Southern Historical Collection at the University of North Carolina, which includes 8,400 documents in the correspondence series, relating to 3,304 personal correspondents. Under US copyright law unpublished manuscript materials are protected for the life of the author plus seventy years. For this reason, the search undertaken by the project team was initially concerned with determining when potential rights holders died; that is: if the correspondent died before 1939, the work was out of copyright. Of the 3,304 named correspondents, potential identifications were confirmed for 3,280 correspondents. Of these, birth or death dates were located for 1,709 (51%) of the correspondents, revealing that 1,101 correspondents died after 1939.

For those individuals who died after 1939 (and for whom death dates could not be found) additional diligent searches were undertaken in the hope that descendants of these correspondents might become identifiable and traceable. The project team were able to obtain current dependable contact information for the copyright holders of only 2% of these correspondents. As a consequence, at the end of the project, after nine months of copyright investigation, express permissions had been secured to display only four letters written by correspondents whose work was still in copyright (Dickson, 627-31).

Compare, however, the study undertaken by Stobo et al of the Wellcome Library's *Codebreakers* project, an online resource containing around 1.6 million pages of published and archive material relating to the history of genetics.

Rather than compile a complete list of potential rights holders of the archive material and engage in a comprehensive rights clearance strategy, the Wellcome Library adopted a risk-based approach to copyright compliance. A short list of well-known, high-profile potential rights holders was drawn up, incorporating 160 names only. Of these, the success rate for identifying contact details for potential rights holders was high, with only 14% of works designated as orphan following a diligent search (Stobo et al, 24-31). The high success rate should not surprise, given the project's focus on well-known, high-profile individuals.

References:

Akmon, D., "Only with your permission: how rights holders respond (or don't respond) to requests to display archival materials online" (2010) *Archival Science* 45-64

Dickson, M., "Due Diligence, Futile Effort: Copyright and the Digitization of the Thomas E. Watson Papers" (2010) *American Archivist* 626-36

Stobo, V., Deazley, R., and Anderson, I., *Copyright and Risk: Scoping the Wellcome Digital Library Project*, CREATE Working Paper No.10 (December 2013), available at: <http://www.create.ac.uk/publications/copyright-risk-scoping-the-wellcome-digital-library-project/>

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?

Yes, although the scope of the EU Directive is seriously deficient in that it does not extend to free-standing artistic works, including photographs, prints, maps, technical drawings and diagrams, and so on. In relation to these types of work, archives will have to rely on the domestic licensing scheme to enable both non-commercial and commercial use, including making these works accessible online. (See also our response to question 9.)

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?

We think it unlikely that there will be any significant overlap in using a search conducted under the Directive to support an application under the domestic scheme.

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?

As we set out in our response to questions 9 and 16, the scope of the EU Directive is deficient in that it does not extend to free-standing artistic works, including photographs, prints, maps, technical drawings, diagrams, and so on. In relation to these materials, archives within the UK will have to rely on the domestic licensing scheme to enable both non-commercial and commercial use of such material, including making these works accessible online.

ORPHAN WORKS EXCEPTION IN THE EU

COVERING COSTS

19-21. 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? How would you do this (for example by charging for access to your website)? 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?

We think it appropriate to respond to questions 19, 20 and 21 taken together.

In general, we think it is unlikely that many publicly accessible archives will be in a position to recover the costs associated with the digitisation of their archive collections (including the costs of future digital preservation of that material) directly from users.

In the first place, most archives are interested in fostering the widest possible public engagement with their collections, and charging for access to digital material runs the risk of discouraging such engagement. On this point, we draw the Government's attention to the guidance provided by the Heritage Lottery Fund (the HLF) on using digital technology in heritage projects. The HLF set out that 'publicly-funded digital content should be available free for non-commercial uses', and that '[the HLF] want as many people to have access to the material we fund and be able to use it for their own purposes' (Heritage Lottery Fund, 2012).

We note the scope afforded under the Directive for cultural institutions to generate revenue in relation to their use of orphan works in order to finance the cost of digitisation projects, and that the Directive allows for public-private partnership agreements in achieving these ends. However, we think it unlikely that many significant public-private partnerships will develop under the Directive given that the orphan works cannot be used for commercial gain, and that commercial partners are precluded from securing any rights to use or control the use of such orphan works.

References:

Heritage Lottery Fund, *Using digital technology in heritage projects: Good practice guidance* (Heritage Lottery Fund, December 2012), available at: http://www.hlf.org.uk/HowToApply/goodpractice/Documents/Using_Digital_Technology_Good_Practice.pdf

UNPUBLISHED WORKS

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

Yes. We agree with the Government's position that to implement the provision would unnecessarily and arbitrarily limit the use of unpublished works deposited after transposition.

DILIGENT SEARCH

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

No.

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?

We begin by noting that while the scope of the Directive extends to the digitisation and communication of unpublished works (that is: 'writings' and 'audiovisual works and phonograms' held in the collections of relevant cultural institutions), the mandatory list of relevant sources required to be consulted as part of a diligent search set out in the Annex to the Directive relates specifically to: (1) published books; (2) newspapers, magazines, journals and periodicals (all of which, by definition, are published materials); (3) visual works embedded within a published book, newspaper, magazine, journal or periodical; and (4) audiovisual works and phonograms. That is, *only* in relation to audiovisual works and phonograms does the Directive mandate sources that *must be* consulted when dealing with potentially unpublished material.

Moreover, as we noted in our response to question 1, there is no tradition of the collective management of unpublished works and grey material within the UK (or indeed, anywhere else in the world), and so consulting the records of collective management organisations would generally prove to be a pointless exercise when searching for the rights holders of unpublished archive material.

With this in mind, we agree with the approach of the Government that only those sources listed in paragraphs 1-4 of Part 2 to the relevant regulations 'which are *appropriate* to the unpublished work' (emphasis added) should be consulted when engaging in a relevant diligent search. (In many circumstances, when dealing with unpublished archive material, it may not be appropriate to consult very many or indeed *any* of the sources listed.)

This flexible and situational approach is one that defers to the high professional and ethical standards of archivists, and we applaud the Government for it. That is, as the custodians of our collective national memory, archivists can and should be trusted to engage in a diligent search for rights holders without a mandated checklist of sources to be consulted, and without having to engage in a perfunctory and redundant search of sources primarily concerned with commercially published material.

That said, we think there would be considerable value in the Intellectual Property Office working specifically with representative organisations within the archive community (such as The National Archives, the Archives and Records Association, the Scottish Council on Archives, and so on) to develop sector-wide recommendations and guidelines of indicative sources that might be consulted when engaging in diligent search for different types of unpublished work.

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

No.

FAIR COMPENSATION

The Directive state under Article 6(5) that Member States should provide that fair compensation is due to rights holders. We have stated that this will be decided between the relevant body and the emerging rights holder.

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

Generally speaking, when archives engage in non-commercial digitisation initiatives, rights holders do not seek copyright fees or claim remuneration.

Consider, for example, the Wellcome Library's *Codebreakers* project referred to in our answer to question 15. Of the 134 permission letters that were sent to identifiable rights holders, 103 (or 77%) replied; of those who replied, 101 (or 98%) granted permission to digitise and display the material in question. None of these rights holders sought payment or a licensing fee for the use of their material. Moreover, of the two rights holders who refused permission, one was specifically concerned with preventing the release of potentially sensitive information online rather than with protecting their copyright interests.

Similarly, in Akmon's study of the rights clearance process for digitising the Jon Cohen AIDS Research Collection at the University of Michigan, of the 1377 copyright owners approached by the Michigan University Library for permission, only one requested a copyright fee. The Library refused, and the owner subsequently granted permission (Akmon (2010) 59-61).

Dryden's research on this issue is also illustrative. Of the 154 repositories that she canvassed in her study of the digitisation of archival materials in Canada, only nine respondents reported that a copyright owner had ever asked for remuneration or a licence fee to make work available online, and only six respondents reported that they had ever paid a licence fee to a copyright owner to make a document available online (Dryden (2008) 185).

With this in mind, we agree that fair compensation under the Directive should be decided between the relevant body and any emerging rights holder. That is, as noted in the consultation document, when museums, libraries and archives make use of orphan works it is rare for a rights holder to reappear and it is even rarer for the rights holder to want to stop the use or claim remuneration. To proceed on any other basis would be to introduce an unnecessary administrative process (and/or other unnecessary costs) within the scheme to address what is, in effect, a non-existent problem.

That said, in the rare circumstances that a rights holder re-emerges and requests fair compensation, we would suggest that the concept of fair compensation could or should be shaped by the existing practice of the authorising body (the IPO). That is: we think that the sector-specific guidelines developed by the authorising body in determining appropriate licensing fees for commercial and non-commercial use

by cultural institutions would provide an obvious and useful benchmark against which to determine what constitutes fair compensation. In certain circumstances this would mean that fair compensation is, in effect, no compensation (zero, or close to zero).

See also our response to question 27.

References:

Akmon, D., "Only with your permission: how rights holders respond (or don't respond) to requests to display archival materials online" (2010) *Archival Science* 45-64

Dryden, J., "Copyright issues in the selection of archival material for internet access" (2008) *Archival Science* 123-47

Dryden, J., *Copyright in the Real World: Making Archival Material Available on the Internet* (Doctoral Thesis, University of Toronto), available at: https://tspace.library.utoronto.ca/bitstream/1807/11198/1/Dryden_Jean_E_200806_PhD_thesis.pdf

Stobo, V., Deazley, R., and Anderson, I., *Copyright and Risk: Scoping the Wellcome Digital Library Project*, CREATE Working Paper No.10 (December 2013), available at: <http://www.create.ac.uk/publications/copyright-risk-scoping-the-wellcome-digital-library-project/>

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

In the rare circumstances that an emerging rights holder claims remuneration and fair compensation cannot be agreed between the archive and the rights holder, we think it is important – to safeguard the interests of both parties – that the scheme provides for an appeals process.

We suggest that, in the first instance, the matter should be referred to the authorising body (the IPO) established under the domestic licensing scheme, and that a determination on fair compensation could be made in line with the established licensing practices of that body. If either party was dissatisfied with the determination of the authorising body, they would, in line with our response to question 7, be entitled to appeal the matter to the Copyright Tribunal.

ADDITIONAL COMMENTS

Do you have any other comments that might aid this consultation process as a whole?

We note the Government's intention to incorporate respect for moral rights within the proposed licensing scheme by empowering the authorising body to refuse to grant a licence on the basis that, in the reasonable opinion of the authorising body, the proposed use is not appropriate having regard to the circumstances of the case including whether any proposed modification of the work in question constitutes derogatory treatment (Regulation 6).

We cannot envisage a situation in which any professional archivist would subject an item held in their collection to a modification that might constitute derogatory treatment.

However, we do note that, at present, the circumstances under which the authorising body might refuse to grant a licence are much broader in scope than the right to object to derogatory treatment as currently provided for by the CDPA 1988. For one thing, the enjoyment of the right of integrity, as defined by the 1988 Act, is limited only to certain types of copyright protected work (see sections 80(1) and 81), and only when those works are being subjected to a treatment in certain circumstances (sections 80(3)(4) and (6)). For example, while the Government's proposed scheme anticipates licensing the use of orphan works for non-commercial purposes, statutory liability for infringing the right of integrity under the CDPA only bites when a derogatory treatment of a work of literature, drama, music or art is *published commercially* (section 80(3)). Moreover, the right to object to derogatory treatment does not extend to the author of any work of literature, drama, music and art that died before 1 August 1989, or to the author of any film made before the same date (see CDPA, Schedule 1, paragraph 23).

Does the Government anticipate the authorising body might refuse to grant licences for the modification of an orphan work if it constitutes derogatory treatment *even when the work in question does not attract any moral rights protection under the CDPA?*

For the sake of conceptual clarity and regulatory simplicity, it might be advisable to ensure the moral rights provisions of the proposed Regulations directly correspond to the parameters of the existing moral rights regime under the CDPA. Alternatively, Government might consider amending the moral rights provisions of the CDPA so that they more closely correspond to the regime proposed under the new Regulations.

--- END OF COMMENTARY ---

Please acknowledge this reply?

YES

At the IPO we carry out research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

YES