

Introduction

The Libraries and Archives Copyright Alliance (LACA) is a UK umbrella group convened by CILIP (Chartered Institute of Library and Information Professionals). LACA brings together the UK's major professional organisations and experts representing librarians and archivists to lobby in the UK and Europe about copyright issues which impact delivery of access to knowledge and information by libraries, archives and information services in the digital age, including those in museums, schools and universities.

LACA 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 the organisations that it represents.

LACA welcomes the efforts of the Intellectual Property Office in trying to address the issue of Orphan Works. In particular we commend the Intellectual Property Office in its engagement with key stakeholders to find adequate solutions with regards to the implementation of the proposed Orphan Works licensing scheme as outlined in the Enterprise and Regulatory Reform Act 2013.

Whilst we understand the complexities in implementing legislative provisions which satisfy the conflicting priorities of stakeholders, we are concerned that the cost for users of implementing the requirements of this proposed scheme, balanced against the perceived minimal benefits will render the licensing scheme redundant for the education and cultural sectors. Specifically, users of Orphan Works in libraries and archives (for that matter also in museums and galleries) are likely to find the requirements of the proposed Licensing Scheme too cumbersome and costly and therefore in practice will not be able to take advantage of it. We believe that this will mean that the ability of libraries and archives as well as other cultural heritage and educational organisations to provide digitised access to our rich content will continue to be crippled, thus undermining the rationale and anticipated benefits of the legislative provisions in the first place.

As one of the major beneficiaries of such legislation this is extremely disappointing given that this issue has been worked on extensively both in the UK, Europe and beyond for over 10 years.

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Representing ARA: The Archives & Records Association, ARLIS/UK & Ireland: The Art Libraries Society of the UK and Ireland, BIAL: British and Irish Association of Law Librarians, The British Library, CILIP: the Chartered Institute of Library and Information Professionals, IAML/UK & Ireland: The International Association of Music Libraries, Archives and Documentation Centres, JISC: Joint Information Services Committee, LIS-COPYSEEK online community, Museum Libraries, The National Library of Scotland, The National Library of Wales, Share the Vision, Society of Chief Librarians in England and Wales, and SCONUL: Society of College, National and University Libraries, Wellcome Trust.

Roll Out of Reduction of Term in Unpublished Works

We understand that the provisions outlined in the Enterprise and Regulatory Reform Act (ERRA) 2013 for the reduction of term in certain unpublished text based works from the end of 2039, to life 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 in libraries and archives will not be alleviated at the same time as the Orphan Works Licensing Scheme and the Directive are implemented (29 October 2014). We are also mindful that Parliament will be dissolved on 30 March 2015, 25 days ahead of the next General Election on 7 May 2015 so legislation is unlikely to be passed in April 2015.¹ In practical terms, this would mean that at the very least for many months, if not for a year or more, libraries and archives, etc. will have to conduct diligent searches (under the terms of the Directive) or possibly pay an admin/licence fee (under the terms of the Orphan Works Licensing Scheme), needlessly, for works within scope of the reduction of term measures in the ERRA. Moreover, the Scheme and the Directive will lose credibility and cause confusion for users if the repertoire of material that is covered changes. We find it puzzling that the measures outlined within the ERRA will not be implemented on the most appropriate date and, given the age and unpublished nature of the works concerned, cannot understand why bringing them into line with other copyright works should be at all controversial.

We also would point out that given that most other European countries do not have the excessively long durations for unpublished works that exist in the UK, not only does this mean that the UK education sector and cultural sector have unnecessary overheads that their counterparts in other European countries do not, but that it acts as a chilling factor in putting British history online for all to access and reuse.

Diligent Search as a Potential Obstacle to the Opening Up of our Archives

In terms of archival materials, an individual copyright work could be as small as a single-page letter; archives are full of such things. Thus, in order to secure an Orphan Works licence for, say, a set of private papers containing correspondence, it would be necessary to carry out a diligent search for, and to register, every single letter. This would not be practical or feasible for most archival collections. In addition to this, given that “diligent search” appears to have the same high benchmark for the Directive and the UK licensing scheme, the UK licensing scheme would appear to be far less attractive given that it creates further bureaucratic and financial barriers on top of those required by the Directive.

Based upon conversations with Intellectual Property Office staff and also a review of the draft data entry forms for recording Orphan Works under the Directive from OHIM, we understand that in addition to carrying out a diligent search for the use of each Orphan Work, a separate record will have to be completed for each embedded Orphan Work. Again this provision is highly impractical. So much detailed bureaucracy will be too expensive to implement and will result in few Orphan Works being digitised.

¹ <http://www.parliament.uk/about/how/elections-and-voting/general/general-election-timetable-2015/>

We believe the exclusion of independent photographs and other artistic works from the EU exception, combined with the requirement 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, renders both solutions unworkable for mass digitisation projects for libraries and archives. Moreover, the geographical limitations of the UK's Licensing Scheme fails to provide a suitable solution for Orphan Works as their main usage will be online.

The IPO has often said that ECL is the answer for mass digitisation, however, in saying this it seems not to recognise the nature of the huge variety and complex nature in copyright terms of the materials held in libraries and archives and that a) collecting societies may not apply to offer an ECL; b) there are no collecting societies that represent film, broadcasts, or private letters and other unpublished materials c) depending on the material to be digitised a collecting society may not be deemed to be representative enough.

In such instances libraries and archives, etc. would either have to continue to apply their current risk based approach to the digitisation (which after ten years of legislative activity in this area would be extremely disappointing), or rely on the Directive's Orphan Works exception which also risks being overly bureaucratic in its implementation.

LACA believes that despite the immense amount of time spent on these issues since 2005 by stakeholders, civil servants and government we now appear to be in a situation, unlike France and Germany who have acted swiftly, whereby we will continue to have no certain legal structure to digitise 'orphaned' in-copyright British history and culture, European Commission Vice-President, Neelie Kroes' "20th century black hole" on the internet.²

Costs of complying with the proposed licensing scheme will render it unusable

At this stage, we understand that the costs for the use of each Orphan Works are likely to comprise the following:

1. There will be a licence fee (whether on a case by case basis, or an upfront one-off payment).
2. There will be an admin fee.
3. Expensive due diligence per work *and* per embedded work will need to be carried out.
4. Information about each work and each embedded Orphan work will need to be added to an online database.
5. Libraries and archives, etc. will need to invest resources into the admin and institutional databases supporting the Licensing Scheme as well as the Exception.

² Addressing the orphan works challenge http://europa.eu/rapid/press-release_SPEECH-11-163_en.htm?locale=en

6. Libraries and archives, etc. will need to repeat the above costly process every 7 years.

Given that research has shown that much of what is digitised has little commercial value and/or is not available commercially, and often not represented by a Collecting Society, LACA believes that libraries and archives and other educational and cultural institutions will be put in a situation where the proposed licensing scheme will be overly cumbersome and administratively difficult to implement. As a result, the legislation will not help digitise Orphan Works: libraries and archives will simply have to continue to do as they have always done and take a risk-based approach or not use the works at all.

We find this not only extremely disappointing, but symptomatic of the low priority given to education and research generally in copyright law in the UK.

Questions

(Question 1) Yes. However, we believe that once the Government Licensing Scheme is in operation, any licensing of Orphan Works by CMOs in the context of the scheme should be done on the same terms as those offered by the IPO. In particular, everything in the regulations should also apply to a CMO, including pricing; licensing terms; due diligence requirements; appeal routes and the reallocation of any unclaimed monies.

(Question 2) Yes. Many libraries will work in partnership with third parties, where we carry out the due diligence and rights clearance on behalf of our partners. This is likely because of inherent rights clearance expertise that our library and archive staff have, also because of Data Protection issues which might 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 a website, as well as for the non-commercial uses of partners. In these cases, we should be able to either the transfer the licence to the third party and/or apply of their uses as well. Other examples include organisations that might have trading arms and/or commercial units for whom the licence would need to be transferable.

(Question 3) A high volume licence for non-commercial use would be vital for the work of libraries and archives to unlock the millions of orphan works held in their collections. An annual upfront admin and licence fee would ensure that 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, and have zero/near zero commercial value.

(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 the 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) We believe that any unclaimed funds and accumulated interest should be returned in suitable proportions to the owners of the Orphan Works who have already paid the licence fees (e.g., universities and cultural heritage organisations), and invested in funding the preservation, digitisation, publication and diligent searches associated with these items.

(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 able to support the needs of all types of users and potential users of the Licensing Scheme who very often will have minimal levels of legal expertise.

(Question 8) The high volume needs to cover multiple works used in multiple ways, rather than based on an item by item usage. If the scheme is based on a granular item by item basis, the scheme will be too onerous to be of use, as well as too onerous to be run cost effectively. It is likely that the Library and Archive sector is unlikely to use the scheme many times a year, if the basic cost/benefit analysis does not make economic sense to it.

(Question 9) It is unlikely that libraries and archives would use the scheme for one-off uses only, due to the deficiencies outlined above.

(Question 10) N/A

(Question 11) This is a substantial disadvantage of the Licensing Scheme and restricts its benefits for the sector enormously. 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 in its centenary year), it restricts the benefits of the Scheme and still leaves libraries and archives vulnerable in having to deal with risks associated with the use of Orphan Works beyond the UK. It also leaves the question of the validity of a licence which is offered in the full knowledge its usage is infringing outside the UK.

(Question 12) The Licensing Scheme should be flexible enough so that applicants are able to change their minds e.g. add/remove items.

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) If there was a fully functioning ECL system allowing for mass digitisation of text, sound and film (which appears unlikely) we estimate that the proportion will be in the vicinity of 70-90%, 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 (e.g. digitisation projects), however, once Orphan Works are unlocked, this is likely to open up the potential for other uses beyond those that we anticipate right now.

(Question 15) After 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. For example the larger research libraries and archives also have public private partnerships with publishers, and in such instances the directive could not be used. However given that many of these companies are US based they may well prefer to simply rely on Fair Use rather than expend time and money on a complex UK orphan works licensing scheme.

(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 book.

(Question 18) We believe the exclusion of independent photographs and other artistic works from the EU exception, combined with the requirement 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, renders both solutions unworkable for mass digitisation projects for libraries and archives. Moreover, the geographical limitations of the UK's Licensing Scheme fails to provide a suitable solution for Orphan Works as their main usage will be online. The IPO has often said that ECL is the answer for mass digitisation, however in saying this it seems not to recognise that a) collecting societies may not apply for an ECL; b) there are no collecting societies that represent film, or private letters, videos or sound recordings; c) depending on the material to be digitised a collecting society may not be deemed to be representative enough.

(Question 19) For libraries and archives, other than in the context of "merchandising" it will not be possible to recover the costs.

(Question 20) It is not the function of publicly funded libraries and archives to recover costs. Our role is to give access to our collections.

(Question 21) Possibly. This is only likely in the context of the largest libraries and archives who are very few in number.

(Question 22) N/A

(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. We do not believe that probate is in most instances a proportionate or appropriate source of information when performing a diligent search.

(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 users. 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 appropriate descriptive metadata for applications. Any database must be simple and easy to use as well as be proportionate.
- 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 not, as well as works covered by Bona Vacantia.
- The licence fees charged need to reflect that commercial uses of OWs by cultural heritage organisations are often those where when they do find rights holders, but are not charged because the profits from their commercial activities are part of their self-generated funding activities. This means that the licensing fees should be differentiated as follows:
 - Non-commercial use by cultural heritage organisation
 - Commercial use by cultural heritage organisation
 - Non-commercial use by commercial organisation
 - Commercial use by commercial organisation

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