

***'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**

*Introduction*

The Newspaper Society (NS) represents and promotes the interests of Britain's regional and local media. As well as 1,100 core daily and weekly titles the regional press offers 1,600 companion websites, hundreds of niche and ultra local publications and a range of other digital and broadcast channels. It delivers local news and information to 31 million print readers every week and 62 million web users every month. The Newspaper Publishers Association (NPA) is the association for British national newspapers. Its current members are Associated Newspapers, Evening Standard, Guardian News & Media, Independent Newspapers (UK), MGN (Trinity Mirror national titles), News UK and Telegraph Media Group. National newspapers reach 22 million adults a day, while national Sunday newspapers reach 20 million adults.

The existence of IP rights incentivises the substantial investments that drive creativity and consumer choice. Publishers face challenges in developing paid content digital offerings, and advertising revenues alone are insufficient to sustain innovation and development in the newspaper sector.

This memorandum concentrates on two areas of the consultation paper which are of particular concern to NS and NPA members.

*Evidential deficiencies*

With regard to the British Library's newspaper archive, the Impact Assessment is predicated upon speculative benefits. It is stated that "For the British Library holdings of 150m items we assumed in the previous impact assessment that 75 per cent of the orphans [sic: it would appear that what is actually meant is 75% of the total collection size] were newspapers, and the British Library did not disagree with this rough estimate" [at page 66]. It is further estimated that the 'orphan range' would be between 4% and 95% - a range that is so broad as to be essentially meaningless - and the assessment proceeds on the arbitrary basis of the midpoint figure, namely 56,250,000 newspapers.

The upper end of the 'orphan range' represents "the British Library's suggestion of the estimated number of orphans in the newspaper collection". The NS and NPA took issue with this assessment in our submissions on the *Consultation on Copyright*. That gave as its source for this figure a report entitled '*Assessment of the Orphan works issue and Costs for Rights Clearance*', which was prepared for

the European Commission by Anna Vuopala in 2010. This in turn alluded to "a digitisation project in the UK" as finding that "95% of newspapers from before 1912 are orphan" (note: not 95% of extant newspapers). Ms Vuopala cites 'The British Library, UK, December 2009'. The BL advised us that: "The passage that you refer to in the EC report is based (possibly only in part) on data that was passed to the EC at their request. The interpretation that Ms Vuopala draws is based on her reading of that data and is not an interpretation that the Library has made. The reference to the BL (British Library, UK December 2009) on page 38 of the document is not very clear, as this refers not to a BL report but to an interpretation of data associated with rights clearance in this project".

Having had sight of the relevant data on 19th century newspapers it is impossible to understand how a figure of 95% was extrapolated from this material.

### *Ownership of copyright*

The Impact Assessment states that "it was only with the 1988 Copyright Act that publishers obtained full copyright in material produced by all their employees, unlike the 1911 and 1956 Acts" [at page 67]. This is wholly incorrect. Section 5(1)(b) of the Copyright Act 1911 states that the author of a work will generally be the first owner of the copyright, but "*where the author was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright*".

Section 5(1)(b) goes on to provide that where the work in question is "an article or other contribution to a newspaper, magazine, or similar periodical", there would, in the absence of any agreement to the contrary, "be deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper, magazine, or similar periodical". The right of restraint (or 'right of veto') only allowed an injunction prior to the subsequent use, and did not allow the creator to take legal action after the use had occurred. It did not give a positive right of publication, as this would have been an infringement of the copyright vested in the employer.

Section 4(2) of the Copyright Act 1956 states: "*Where a literary, dramatic or artistic work is made by the author in the course of his employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship, and is so made for the purpose of publication in a newspaper, magazine or similar periodical, the said proprietor shall be entitled to the copyright in the work in so far as the copyright relates to publication of the work in any newspaper, magazine or similar periodical, or to reproduction of the work for the purpose of its being so published; but in all other respects the author shall be entitled to any copyright subsisting in the work by virtue of this Part of this Act*".

The rationale is that newspaper publishers should get a reasonable return for their risks incurred in paying for the creation of the work and the investment in marketing and distribution.

In the case of 'anonymous' works, section 6 of the Copyright Act 1911 provides that where the name of the publisher of the work "is printed or otherwise indicated thereon in the usual manner", then that person shall, unless the contrary is proved, be presumed to be the owner of the copyright. In consequence, the copyright in unattributed news stories is owned by the publisher of the newspaper in which they appeared. It is probable that the same applies to by-lined articles, and the IPO should adopt this presumption when considering applications for the re-use of such works.



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