



Intellectual  
Property  
Office

## 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





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# Copyright works: seeking the lost

The UK's copyright system is founded on the principle of licensing. If an individual wants to use a copyright work they must, with very few exceptions, seek the permission of the creator or rights owner, often via a licence. The licensing process can be straightforward, but it is impossible if no rights owner can be found. This situation benefits neither the owners of rights, who may miss opportunities for licensing, nor potential users of those works. Ultimately, the UK economy and UK culture lose out.

Under the Enterprise and Regulatory Reform Act 2013 the UK government has powers to enable licensing of copyright works in the UK where the rights holder cannot be located<sup>1</sup>. Furthermore, the EU has agreed new rules for cultural institutions to be able to digitise and display works on their websites when they cannot find the rights holder.

Following extensive consultation, the Government is committed to the introduction of a UK scheme to license orphan works, as set out in the 2012 Government policy statement, Modernising Copyright<sup>2</sup>. The Government then brought forward legislation in the Enterprise and Regulatory Reform Act 2013 to allow an orphan works licensing scheme to be introduced.

The EU Directive on certain permitted uses of orphan works (2012/28/EU) provides for a more limited scheme and must be transposed into UK law by October 2014<sup>3</sup>.

The Government is seeking views on how the two schemes should operate in practice and specifically for views on the technical detail of the draft regulations that will make them part of UK law. The overall policy is outside the scope of this consultation, as are extended collective licensing, which is the subject of a separate consultation<sup>4</sup>, and issues concerning other copyright exceptions.

This consultation is particularly relevant to rights holders, their representatives and to anyone wishing to reproduce copyright works where the copyright owner cannot be found. However, it is not limited to these groups and responses from all interested parties are welcome.

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1 <http://www.legislation.gov.uk/ukpga/2013/24/contents>

2 <http://www.ipo.gov.uk/response-2011-copyright.pdf>

3 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:299:0005:0012:EN:PDF>

4 <http://www.ipo.gov.uk/consult-2013-ecl.pdf>

# Ministerial Foreword

The UK is home to some of the world's greatest creative works and the breadth and depth of our creative talent is the envy of other countries. Our creative industries are worth more than £36 billion a year to the UK economy and the sector employs 1.5 million people, while our heritage sector – which rests upon the UK's creative heritage – engaged 73% of adults in visiting a heritage site in 2012-13<sup>5</sup>. But in respect of orphan works we are losing out.

The UK's copyright framework is the best in the world but to maintain our world-leading position we must ensure that our IP framework is flexible, modern and robust<sup>6</sup>.

A cornerstone of a robust copyright regime is enforcement. The Government is taking a number of measures to keep the UK at the forefront of IP enforcement. For example, the Government is funding the creation of an intellectual property crime unit within the City of London Police, one of the first of its kind, and reforming the IP Enterprise Court to provide access to justice at a proportionate cost. Next year we will host a major international enforcement summit which will bring together representatives from governments, law enforcement and industry to help nations work together to tackle counterfeiting and piracy. We have also helped to support the legal, licensed use of copyright works through £150,000 worth of kick-start funding for the industry-led Copyright Hub, which aims to make licensing copyright works easier and more efficient. An effective licensing regime helps reduce the incentive to copy and share content unlawfully.

Licensing is a very important source of income for creators and investors, but where a copyright owner cannot be found then a creative work cannot be licensed. Orphan works can represent a loss to rights holders and to potential users: lost revenue for creators, lost cultural artefacts and lost commercial opportunities. We want to help both creators and users re-connect to these works. That is why both the UK Government and the EU have introduced new laws to allow the use of these orphan works in some circumstances. Not only will this create new cultural and commercial opportunities, but it should also help reunite copyright owners with their work – and with appropriate remuneration.

It is important that these new laws achieve their objectives of allowing orphan works to be used while protecting the interests of absent copyright owners. This consultation is your chance to influence the UK's plans for implementing both its own scheme for licensing orphan works use and the EU Directive that allows cultural institutions such as museums and archives to upload material on their website for some types of orphan work.

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5 Creative Industries Economic Estimates 2011: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/77959/Creative-Industries-Economic-Estimates-Report-2011-update.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/77959/Creative-Industries-Economic-Estimates-Report-2011-update.pdf)  
Taking Part 2012/13 Quarter 4: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/209232/Taking\\_Part\\_2012\\_13\\_Quarter\\_4\\_Report.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/209232/Taking_Part_2012_13_Quarter_4_Report.pdf)

6 Global Intellectual Property Index: The 4th Report, Taylor Wessing LLP, 2013, [www.taylorwessing.com/ipindex/](http://www.taylorwessing.com/ipindex/)

Successful orphan works schemes will help reduce copyright infringement, help copyright owners make money and make more of the UK's considerable cultural and creative capital. Together with other initiatives such as extended collective licensing (on which we are consulting separately), it helps to keep the UK as a vibrant place to do creative business and further establish us as the commercial licensing capital of Europe.

### **Viscount Younger of Leckie**





# 1. Executive Summary

1.1 This consultation covers two separate schemes for allowing use of ‘orphan’ works whose rights holder(s) cannot be traced:

- Orphan works licensing in the UK under section 116A, C and D of the Copyright, Designs and Patents Act 1988 (CDPA) as inserted by the Enterprise and Regulatory Reform Act 2013
- Use of Orphan works under the EU Directive 2012/28/EU on certain permitted uses of orphan works (the Directive).

This technical consultation is seeking views on the drafting, structure and effect of the draft regulations.

## Orphan Works – accessing our cultural heritage

1.2 An orphan work is a creative work (or performance) subject to copyright, such as a diary, a photo, a film or a piece of music, for which one or more of the rights holders cannot be located. If an individual or organisation wants to copy the work to use it in a book, an exhibition, on a website or in a documentary they need to obtain permission from the rights holders (creators, publishers, broadcasters etc). At present, if the rights holder cannot be found, with very few exceptions, the work cannot be copied without infringing copyright.

1.3 Licensing of copyright works is important because it is how creators make money from their labour, directly or via a third party. Licences could allow many people to reproduce the work at the same time or be exclusive to one licensee. It is important that licensing works well. An effective licensing regime helps reduce the incentive to copy and share content unlawfully and is part of the Government’s wider agenda of reducing the harm of copyright infringement.

1.4 The Government has already taken some important steps to improve the licensing regime. It provided £150,000 worth of kick-start funding for the Copyright Hub, which is now an industry-led project to make licensing easier and more efficient, particularly for small businesses and creators. The Hub has the potential to reduce transaction costs and help put more potential licensees in contact with rights owners. That has to be good for everyone. While this sort of industry-led development offers real advantages to those involved on both sides of licensing transactions, it cannot help where the rights holder for a particular work is unknown or cannot be found. The most efficient licensing mechanism in the world still grinds to a halt if there is nobody able to grant the necessary permission for a work to be licensed.

1.5 The Government’s orphan works proposals aim to address the issue of reproducing works when rights holders cannot be found. The policy for an orphan works licensing scheme was debated and given effect by the Enterprise and Regulatory Reform Act 2013. The Government discussed the practical details of how the scheme might work with a cross-sector working group. This technical consultation considers the specific provisions of the two sets of draft

regulations which are intended to give effect to the proposals on both the domestic orphan works licensing scheme and the EU Orphan Works Directive.

1.6 The proposals aim to ensure the licensing system allows rights owners to benefit from their work. The current system relies on explicit permission from rights owners but there are inevitably people who simply cannot be found. This means that there is a risk that their work may be reproduced without their permission and without any of the financial benefit returning to them, or that culturally important orphan works cannot be brought to public attention. In the licensing scheme, the authorising body will take the role of the absent rights holder and look after their interests by licensing and setting money aside. Given that a licence will only be issued after a diligent search, the likelihood of the rights holder being found after the work is used is low. However, if they should reappear they will be paid and regain control of use of their work once more. This will not only protect absent rights holders but also help us to preserve and make accessible our cultural heritage.

1.7 Although licensing may be advantageous, it is not appropriate in all circumstances, particularly where there is limited commercial value at stake but the administrative cost of licensing deters useful activity. For this reason the Directive provides for an exception to copyright for cultural institutions such as museums and archives to upload material on their website for some types of orphan work. This was agreed by the EU in 2012 and is due to be implemented by the end of October 2014.

1.8 All of this work aims to reduce copyright infringement, help copyright owners make money and get the most out of the UK's considerable cultural and creative capital. Together with other initiatives, such as extended collective licensing (the regulations for which are the subject of a separate consultation), the orphan works scheme will help to keep the UK as a vibrant place to do creative business and establish us as the commercial licensing capital of Europe.

## Consultation

1.9 The Government is committed to the introduction of the UK orphan works scheme and implementation of the EU Directive. The proposals aim to enable the reproduction of works when the rights holders cannot be found, following a diligent search. The policy was debated during the passage of the Enterprise and Regulatory Reform Act 2013.

1.10 Significant consultation has already taken place including a written consultation, meetings with individual stakeholders, external research (including overseas) and a stakeholder working group. This working group comprised both rights holders (such as authors and photographers and their representatives, including collecting societies) and potential users, particularly, the museums, libraries and archives sector and representatives of publishers and broadcasters. Members are listed at Annex B. The group discussed the details of implementation and the findings from the working group have helped inform the draft regulations.

1.13 The scale and type of orphan works concerned can be seen from the Imperial War Museum's response to the Government's initial consultation:

*“More or less all the estimated 1.75 million orphan works in our documents collections are unpublished. These unpublished orphan works were generally acquired in the 1970s and 1980s where the author/donor has subsequently died and we do not hold any contact details for his or her family/executors. Similarly, the estimated 2,500 orphan works from our sound recordings collection were not broadcast as they are oral history recordings... We also hold large numbers of films deposited by amateur film makers and third parties and whilst we endeavour to secure copyright permission at the time of deposit, there are still a number of orphan works where the owners can no longer be traced – estimated to be 12,000 film and video items or 5% of the film archive. 90% of the orphan works in the film archive have not been broadcast...”<sup>7</sup>*



## 2. How to respond

2.1 When responding, please state whether you are responding as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents by selecting the appropriate interest group on the consultation form and, where applicable, how the views of members were assembled. The consultation response form is available electronically (until the consultation closes). The form can be submitted by email or by letter or fax to:

Address	Margaret Haig Copyright and Enforcement Directorate Intellectual Property Office First Floor, 4 Abbey Orchard Street, London, SW1P 2HT
Tel:	0300 300 2000
Fax:	020 7034 2826
Email:	<a href="mailto:copyrightconsultation@ipo.gov.uk">copyrightconsultation@ipo.gov.uk</a>
Issued:	10 January 2014
Respond by:	28 February 2014

2.2 The contact details above may also be used to ask questions about policy issues raised in the document, or to obtain a copy of the consultation in another format.

2.3 The consultation principles are in **Annex A** and a list of those organisations and individuals consulted is in **Annex B**. We would welcome suggestions of others who may wish to be involved in this consultation process.

## Confidentiality & Data Protection

2.4 Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want information, including personal data that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

2.5 In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

## What happens next?

2.6 The Government intends to publish a summary of responses to the consultation within three months of the closing date. The amended regulations will be laid in Parliament at an appropriate time thereafter.



## 3. The proposals

### Reading and responding to these proposals

3.1 The proposals are set out alongside the draft regulations in the pages that follow to help you see the effect of the drafting. Where an element is not yet definitive, square brackets or [tbc] will be used to indicate this. Section 4 sets out information about the overlap of the domestic orphan works scheme and the EU Directive, and the questions for consultation are in section 5. These cover both the regulations to implement the UK's domestic licensing scheme and the separate regulations to implement the EU Directive (please refer to the separate section below on the Directive).

### Context

3.2 At present, if a museum wants to exhibit a copy of a work or an author wants to publish a copy of a work in a book but they cannot find the rights holder, under UK law they cannot do so without risking infringing copyright.

3.3 The Government has passed primary legislation to introduce a domestic scheme for licensing orphan works in the UK<sup>8</sup>. This scheme allows for the commercial and non-commercial use of any type of orphan work, by any applicant, subject to the applicant undertaking a diligent search for missing rights holders and paying a licence fee. This is separate but complementary to the UK's implementation of the EU Directive on certain permitted uses of orphan works. The Directive allows publicly accessible archives to digitise certain works to display on their websites, for access across the EU. It must be implemented as an exception to copyright law.

*Draft Order laid before Parliament under section 116D(5) of and paragraph 1D(5) of Schedule 2A to the Copyright, Designs and Patents Act 1988, for approval by resolution of each House of Parliament.*

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STATUTORY INSTRUMENTS

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**2014 No.**

**COPYRIGHT**

**The Copyright (Licensing of Orphan Works) Regulations 2014**

*Made* - - - - - \*\*\*  
*Coming into force* - - - - - \*\*\*

The Secretary of State, in exercise of the powers conferred by sections 116A, 116C and 116D of and paragraphs 1A, 1C and 1D of Schedule 2A to [and paragraphs 5(1)(d) to (g) of Schedule A1 to] the Copyright, Designs and Patents Act 1988<sup>(9)</sup>, makes the following Regulations a draft of which has been approved by each House of Parliament:

**Citation and Commencement**

1. These Regulations may be cited as the Copyright (Licensing of Orphan Works) Regulations 2014 and shall come into force on [.....].

**Interpretation**

2. In these Regulations—

- “2014 Regulations” mean the Copyright (Certain Permitted Uses of Orphan Works) Regulations 2014<sup>(10)</sup>;
- “the Act” means the Copyright Designs and Patents Act 1988;
- “acts restricted in relation to a performance” means the acts to which sections 182, 182A, 182B, 182C, 182CA, 183 or 184 of the Act apply;
- “authorising body” means the Comptroller;
- “Comptroller” shall have the same meaning as in the Patents and Designs Act 1907<sup>(11)</sup>;
- “diligent search” shall have the meaning set out in regulation 4;
- “identified owner” shall have the meaning set out in regulation 12(1);
- “orphan licence” is a licence authorising the use of an orphan work or orphan right;
- “orphan licensee” means a person who either wishes to be granted or has been granted an orphan licence;
- “orphan right” and “orphan work” shall have the meaning set out in regulation 3;
- “performer’s right” means the right to authorise or prohibit the acts restricted in relation to a performance.

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<sup>(9)</sup> 1988 c.48 as amended by the Enterprise and Regulatory Reform Act 2013 c.24.  
<sup>(10)</sup> S.I. 2014/ [ ].  
<sup>(11)</sup> 1907 c.[ ].



## Domestic Orphan Works Licensing in the UK

3.4 The regulations for the domestic scheme for licensing orphan works have been developed following written consultation, extensive discussions with organisations and individuals, research on orphan works schemes abroad and after nine meetings of a stakeholder working group (see **Annex B** for the full membership of the group). The Government is grateful to the working group for its consideration of the issues underlying the regulations. The Government has taken account of significant risks that were identified and has developed the regulations with a view to making the scheme efficient to use while safeguarding rights holders adequately.

3.5 Certain principles for how the scheme will work have already been set out either in the legislation amending the CDPA or announced as government policy in “Modernising Copyright”<sup>12</sup>. Further details about how the scheme will work are set out in the accompanying regulations on which we would like your comments.

3.6 As stated above, the domestic scheme can only license use within the UK because other countries may wish to treat orphan works differently. Although the Government recognises that this may impair the attractiveness of the scheme for some potential, in the longer term, there may be opportunities to make reciprocal agreements with other countries that have or introduce compatible schemes, particularly English-speaking countries. Such agreements could allow orphan works licensed in one country for a certain purpose to also be licensed for use in the other countries party to the agreement without requiring separate applications in each territory. However, we are not consulting on this issue as it is not clear when such opportunities will arise, or the terms on which they might be offered.

### Definitions (Regulation 2)

3.7 Definitions of terms used in the regulations are detailed in this part of the regulations.

### The authorising body (Regulations 2 and 6)

3.8 The scheme will operate through an authorising body, appointed by the Secretary of State, to license the use of orphan works. Anyone wishing to use an orphan work will need to apply to the authorising body. It was announced during the passage of the Enterprise and Regulatory Reform Act that the authorising body would be a public body and likely to be an existing one. Following an assessment of the potential candidates (see **Annex D**), it has been decided that the Intellectual Property Office (IPO) will be the authorising body.

3.9 It should be noted that while the authorising body will be the IPO, the regulations will refer to the ‘Comptroller’. This is the Comptroller of the Patent Office and the ‘Intellectual Property Office’ is the operating name of the Patent Office. As the IPO is not a separate legal entity, the regulations cannot name the IPO as the authorising body but must, instead, refer to the Comptroller.

### **Orphan work and orphan right**

3. - (1) An orphan work is a copyright work where one or more of the owners of the copyright has not been identified or, if identified, has not been located after a diligent search made in accordance with regulation 4.
- (2) An orphan right is a performer's right where one or more of the owners of which has not been identified or, if identified, has not been located after a diligent search made in accordance with regulation 4.
- (3) Where a copyright work or a performer's right has more than one right holder and one or more of the right holders is either not identified or, if identified, is not located, despite a diligent search for the right holders having been carried out, then the copyright work or performer's right is an orphan work or orphan right to the extent that the rights of those right holders are either not identified or not located.
- (4) In these regulations, a reference to an orphan work or to an orphan right shall include a work or right although it is not known whether copyright subsists in it, and references to an owner who had not been identified or located are to be read as including references to a supposed owner and a supposed right or interest.
- (5) In these regulations, a reference to a copyright work or a performer's right shall include works and rights which are embedded or incorporated in, or constitute an integral part of, another copyright work or performance.
- (6) A copyright work and a performer's right ceases to be an orphan work or right when the copyright owner is identified in accordance with regulation 12.

### **Diligent Search**

4. - (1) An orphan licensee shall, prior to the grant of an orphan licence carry out a diligent search or refer to an existing diligent search which is valid and, in either case, is appropriate to the orphan work or right which is the proposed subject matter of the orphan licence and relates to the rights in that work or rights which the orphan licensee proposes to use.
- (2) A diligent search shall comprise a reasonable search to identify and locate the right holder of the copyright work or performer's right.
- (3) The authorising body may issue guidance on what comprises a diligent search for different kinds of orphan work or orphan right and the guidance shall have regard to the sources listed in the Schedule to the 2014 Regulations.
- (4) An existing diligent search is valid for seven years from the earlier of the date
- (a) on which an orphan licence of the orphan work or orphan right was first granted by the authorising body; or
  - (b) that the details of a diligent search undertaken under the 2014 Regulations [undertaken in respect of a relevant copyright work or performer's right] was first made public by the Office for Harmonization in the Internal Market (Trade Marks and Designs).
- (5) An orphan licensee shall provide the authorising body with such information concerning -
- (a) the diligent search; and
  - (b) the use that the orphan licensee proposes to make of the orphan work or right as the authorising body may require.
- (6) The orphan licensee shall provide the authorising body with an application in the form required, including in electronic form, and the application shall -
- (a) demonstrate that a diligent search has been carried out; and
  - (b) contain a declaration in writing by the orphan licensee stating that the information provided in the application is correct.
- (7) Where the declaration made by an orphan licensee under paragraph (6) is false in a material particular, the orphan licensee is granted an orphan licence and carries out any of the acts restricted by copyright, the orphan licensee is liable for infringement of copyright.
- (8) The authorising body shall take reasonable steps to ensure that the search satisfies the requirements for a diligent search.

## Diligent search (Regulations 3 and 4)

3.10 These regulations require an applicant to undertake a diligent search on a suspected orphan work. When an individual wants to use any copyright work lawfully they have to find out who the relevant rights holders are and approach them for permission. At present, if they cannot find the rights-holder, they cannot use the work lawfully and the resource used in searching for the rights-holder has, effectively, been wasted. This process of looking for rights holders, which many people carry out already, is known by some as a diligent search or due diligence.

3.11 Anyone who wishes to apply for a licence to copy an orphan work will have to provide the authorising body with the details of the diligent search. Where there are multiple rights holders, a diligent search is needed for each rights holder where the right is relevant to the proposed use.

3.12 Applicants will need to obtain the permission of any relevant known rights holder in the work, as with any other copyright work. An applicant can show copies of the orphan work to the authorising body as part of their application. Depending on the type of work, this may provide evidence to help the authorising body assess the likelihood of the missing rights holder(s) considering the proposed use derogatory. It will not be a pre-condition for an orphan works licence that the consent of all known rights holders should be obtained, which would unnecessarily slow the licensing of the work.

3.13 If a rights holder is located but chooses not to respond, the work would not qualify as an orphan work. Canada has a well-established orphan works scheme and this is the approach it has taken for non-responsive rights holders, which has proven to be effective.

3.14 The regulations set out three general requirements of the diligent search:

- it should be appropriate to the orphan work or orphan right;
- it should relate to the rights in the work or the right that the licensee proposes to use; and
- it shall comprise a reasonable search to identify the rights holder of the work or right.

Guidance will be produced on diligent search once the regulations have been agreed. The regulations will not contain this level of detail on the basis that guidance can be updated more easily than legislation in line with market or other developments. As the exact sources to be checked will vary according to the type of work and from one sector to another, the IPO is developing sector-specific good practice guidance with sector practitioners to sit alongside the regulations. There is no provision in the regulations to stop an applicant using an old diligent search in support of an application. Instead it is proposed that the guidance to applicants will contain advice that the expectation is for diligent searches to have been conducted within a reasonable period before any application on which it relies.

3.15 It is also proposed that a diligent search conducted for the purposes of the EU Directive can be relied upon for the purposes of an application under the UK licensing scheme, if the search was for the relevant rights holder. For example, the Directive search would have been for digitisation rights which are often retained by authors, while a publisher may hold the right to publish in print. In any case, the search would be subject to the authorising body's procedures for satisfying itself as to the quality of any diligent searches supporting an application.

3.16 The Directive lists a number of sources that should be searched as a minimum. Although this list of sources only covers the types of works covered by the Directive it is a useful reference point for some diligent searches for the UK licensing scheme too. Therefore, the draft regulations implementing the UK licensing scheme refer to the list from the Directive, which is duly transcribed into the regulations implementing the Directive, and described as "the sources listed in the 2014 Regulations".

#### **Record and Register of orphan works**

5. – (1) The authorising body shall retain the information provided to it under regulations 4(5) and (6) for [ ] years.
- (2) The authorising body shall maintain and update a register which sets out the details of the orphan works and orphan rights in respect of which:
- (a) a diligent search has been carried out or is in the process of being carried out;
  - (b) orphan licences have been granted together with the permitted uses of those works or rights; and
  - (c) orphan licences have been refused.
- (3) The authorising body shall make the register available to the public electronically and free of charge.

#### **Licensing of orphan works or orphan rights**

6. (1) The authorising body may grant an orphan licence once the authorising body has received the information set out in regulation 4(5) and (6).
- (2) The authorising body may only grant an orphan licence which:
- (a) permits non-exclusive use of an orphan work or of an orphan right in England and Wales, Scotland and Northern Ireland;
  - (b) permits acts restricted by the copyright in an orphan work or in orphan rights for a term not exceeding 7 years;
  - (c) prohibits the grant of sub-licences;
  - (d) has effect as if granted by the owner of the orphan work or orphan rights; and
  - (e) provides that the use of an orphan work or orphan rights does not affect the moral rights of an author under Chapter IV of Part 1 of the Act or the moral rights of a performer under Chapter 3 of Part 2 of the Act and treats those moral rights as having been asserted.
- (3) An orphan licence may not be granted to a person authorised to grant licences.
- (4) The authorising body may grant an orphan licence, including one which permits a modification to the orphan work or orphan rights, but may refuse to grant a licence on the basis that in the reasonable opinion of the authorising body the proposed use or modification is not appropriate having regard to circumstances of the case including whether the proposed modification constitutes derogatory treatment.

## The orphan works register (Regulation 5)

3.17 An orphan works register will be created and maintained by the IPO as the authorising body and will list details of works which have been subject to diligent search, those licensed as orphans, works where a licence has been refused and where an absent rights holder has come forward subsequently. The register will help with diligent searches by providing an additional source to search, as well as provide a record of orphan works applications. It will also provide a source of information which may help reunite some works with the relevant rights holders.

## Licensing terms (Regulation 6)

3.18 The authorising body has the power to grant an orphan work licence if satisfied that a diligent search has been carried out. Licences granted under the orphan works scheme will be non-exclusive and only apply within the UK. Sub-licensing will not be permitted under the regulations. This does not mean that the licence cannot cover a range of uses, providing the licensee pays for all the rights at the appropriate rates. If a licensee subsequently wants to use the work for a purpose not covered by the licence they can apply to extend their licence, providing, again, they pay the relevant licence fee. This would be the same as with a known rights holder where the rights obtained were not in perpetuity and had not been assigned. A draft licence is at Annex E and we welcome comments on it. Further detailed work on developing orphan works licences will be taken forward through sector-specific working groups.

3.19 Licences for non-orphans are not generally transferable. As drafted, the regulations, similarly, do not allow for a licence to be transferred. This consultation seeks views on whether an orphan works licence should be treated differently and allow for transfer.

3.20 To make the scheme attractive to prospective licensees, who may be investing in making a new product or service containing the orphan work (such as a book or web service), it will be necessary to offer business certainty that they can continue selling the product even in the unlikely event of a rights holder reappearing, at least for a reasonable amount of time. On the other side of the argument, some returning rights holders may not be happy that their work had been licensed and might want to stop use of the work as soon as possible.

3.21 Consultation responses from museums, libraries and archives show that when they use orphan works on a risk basis at the moment, it is rare for a rights holder to reappear and that it is even rarer for the rights holder to want to stop the use or to claim remuneration<sup>13</sup>. It is anticipated that this is likely to be the case with non-commercial use under the orphan works scheme, particularly if a proper diligent search has been performed.

3.22 The IPO as authorising body will take account of the relevant industry norms for licensing terms. Where the licence for a non-orphan work used in a book was licensed for a print run, rather than a specific period of time, that would be mirrored in the licence term for an equivalent orphan use. The longest any licence should run (regardless of the metric used) is seven years, which accords with the longest standard period we found other than a licence in perpetuity.

3.23 The scheme can also incorporate notice periods where these are the norm for equivalent non-orphans, such as maximum periods of time within which something has to be withdrawn from circulation. The IPO is working with industry practitioners in the various sectors to develop guidance on the duration of licences and any notice periods.

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13 All consultation responses are at <http://www.ipo.gov.uk/pro-policy/consult/consult-closed/consult-closed-2011/consult-2011-copyright/consult-copyright-response.htm>.

**Use for purposes incidental to application**

7. A person may make reasonable use of an orphan work and of an orphan right for purposes which are incidental to:

- (1) the application for the grant of an orphan licence; and
- (2) the processing of the application and the maintenance of the register referred to in regulation [5(2).]

**Renewal of orphan licence**

8. (1) Upon the request of the orphan licensee, submitted in the approved form not less than six months before the expiration of the orphan licence, the authorising body may renew an orphan licence for a further term not exceeding 7 years.

(2) A request for a renewal of an orphan licence shall be accompanied by a diligent search and the information set out in regulation 4(5) and (6).

3.24 It is also proposed that there should be a simple process to allow for the renewal of an orphan works licence without the need for a full application. However, a new diligent search will be required (Regulation 8).

## Moral rights (Regulation 6)

3.25 It will be assumed that the creator of the orphan work has asserted their moral rights and therefore credits of names (where known) will need to be given when the work is reproduced, together with the details of the authorising body. This makes it clear that the use is lawful and also increases the chances of reuniting the work with its owner. This could be done by web links. As it would not always be known whether one of the statutory exceptions to providing credits applied, it will be assumed that a credit is necessary for all orphan works where the name is known<sup>14</sup>.

3.26 The assumption is that the moral rights regime in the CDPA applies, covers derogatory treatment, and creators will also retain the right to claim derogatory treatment. The Government also proposes that the authorising body should have the right to refuse to grant a licence on the grounds that it believes the proposed treatment of the orphan work could be derogatory. The authorising body will also retain a general discretion to refuse a licence if they consider it is not in the public interest, which could cover instances where the proposed use might be inappropriate.

**Initial processing fee**

9. The authorising body may charge a reasonable fee for processing an application for an orphan licence or to vary or renew an existing orphan licence.

**Licence fee for an orphan licence**

10. (1) Subject to paragraph (2), on the grant of an orphan licence the authorising body

(a) shall charge the orphan licensee a reasonable licence fee for the period of the licence calculated with regard to relevant factors which shall include the level of licence fees which are achieved under licences for a similar use of similar works or rights which are not orphan works or rights; and

(b) may charge a reasonable additional amount in respect of the costs of the authorising body.

(2) The authorising body shall

(a) hold all licence fees in a designated account;

(b) adopt accounting procedures that ring-fence a separate account for monies received from orphan licences; and

(c) retain unclaimed licence fees for a period of not less than [.....years] from the payment date.

(3) The authorising body shall maintain and make available information that sets out in respect of the orphan licences it grants how the licence fee is calculated.



## Funding the scheme (Regulations 9, 10)

3.27 The Government has agreed to fund the set up costs of the scheme. It may also have to subsidise the running of the scheme, at least initially. The estimated set up and running costs are set out in the attached impact assessment (IA – see **Annex C**).

3.28 The Government proposes that there should be an administration fee charged at the point of application to contribute to the costs of processing the application. It is likely that this will be a flat fee. To encourage use of the scheme, particularly by non-commercial users, the level of the fee will be kept as low as possible.

3.29 It is unlikely that the administration fee will cover the running costs of the scheme so the Government is also considering adding a percentage to the licence fee to help recover the authorising body's costs. Using a percentage basis is better in terms of helping non-commercial users who would probably not be able to use the scheme if the fees were too high.

3.30 As a public body, the authorising body will be subject to HM Treasury guidance in relation to how much it can charge for administration but also how it covers its costs.

## Setting of licence fees (Regulation 10)

3.31 Licence fees will be payable up-front and should reflect what is charged for an equivalent non-orphan being used in an equivalent way. This avoids orphan works under-cutting non-orphans while guarding against unreasonably high prices that would deter important cultural and other uses. The IPO is working with sector-specific groups to draw up guidance on how orphan works will be priced.

3.32 Where the use of an orphan work is non-commercial (such as a museum displaying a copy of a work), this will tend to be cheaper than the use of that orphan work for commercial purposes (such as selling copies as postcards in the museum gift shop). We are seeking views on how best to reflect what happens with similar non-commercial use of works that are not orphan. During the passage of the Enterprise and Regulatory Reform Act, the Minister confirmed that the cost of non-commercial use for museums and archives could be minimal or nominal. One approach, where the works are of a type where the non-orphan equivalent cost is zero or near to zero, would be to provide in the regulations for an annual licence for non-commercial use by cultural institutions which would cover a certain number of works being used in the year. It is important to note that the requirements for diligent search in respect of the individual works would still apply under such an arrangement. We are consulting on this point.

3.33 In determining what rate is applicable, particularly for commercial use, it is proposed that the authorising body will have reference to rate cards, where these are publicly available, which could be used as comparators.

### **Reporting requirements**

**11.** — (1) The authorising body shall publish an annual report on the operation of the orphan works scheme and the orphan licences that it has granted.

(2) The authorising body shall provide the Secretary of State with a copy of the annual report upon its publication.

### **Rights of identified owner**

**12.** — (1) This regulation applies where the right holder in an orphan work or orphan right (including a person who in the past has been granted an exclusive licence of that work or right) identifies themselves to the authorising body [within ..... years of the grant of the orphan licence] and satisfies the authorising body of their identity and of their ownership of relevant rights in the orphan work or orphan right.

(2) If the authorising body has verified the diligent search but has not granted an orphan licence then the work or right shall cease to be an orphan work or right.

(3) If the authorising body has granted an orphan licence then the orphan licence shall continue for the remainder of its unexpired term [or until the expiration of the notice period which is set out in the orphan licence] notwithstanding the fact that the right holder is identified.

(4) The authorising body shall within two months of being satisfied that the right holder has been identified

(a) notify the orphan licensee that the right holder has been identified;

(b) amend the orphan licence so that the identified owner appears as the licensor; and

(c) pay to the right holder a sum equal to the licence fee paid by the orphan licensee in respect of the orphan work or performer's right.

### **Unclaimed licence fees of orphan works**

**13.** Where not less than [ ] years have elapsed since the grant of an orphan licence and a right holder in the orphan work or orphan right (including a person who in the past has been granted an exclusive licence of that work or right) has not identified themselves [within ..... years of the grant of the orphan licence] the authorising body may pay a sum equal to the licence fee to [ ].

## Reporting requirements (Regulation 11)

3.34 The authorising body will publish an annual report. It is anticipated that, to the extent the information is available, the report will cover:

- total revenue from orphan licences;
- total costs of administering the scheme;
- allocation and distribution of revenues from orphan licences; and
- number of rights holders who have claimed payment and the payments made.

## Rights of identified owner (Regulation 12)

3.35 If a rights holder reappears after an orphan works licence has been issued they will be able to claim the remuneration set aside for them for the relevant right. A rights holder will need to satisfy the authorising body of their ownership. It is anticipated that this will be to the civil proof, that is, on the balance of probabilities.

3.36 Once an owner has been identified, their work will no longer be listed as an orphan work. The existing, non-exclusive, orphan works licence will continue for the remainder of its term, subject to any notice period set out in the original licence, but the rights holder will take over the licence from the authorising body. Future uses of the work will, of course, be up to the rights holder.

## Unclaimed fees (Regulation 13)

3.37 Unclaimed licence fees will be kept for the missing rights holders. However, given the requirement for a diligent search, the likelihood of rights holders reappearing should be relatively small and – based on the information that has been shared with the IPO – is likely to diminish further over time. As time passes the chances of a rights holder reappearing may become vanishingly small. The question then arises as to what should happen to unclaimed funds – and at what point.

3.38 Related to these questions is the issue of whether there should be a limit on when rights holders can reclaim remuneration. Please see section 5 below for the questions that the Government is seeking responses on in respect of the issues around unclaimed fees.

**Appeals**

**14.** - (1) The identified owner may apply to the First-tier Tribunal on the grounds that the authorising body has either acted improperly or failed to comply with its obligations under these Regulations.

(2) On an application under this regulation, the First-tier Tribunal may make such order as it considers appropriate.

[(3) An orphan licensee may appeal to the Copyright Tribunal concerning any amounts described in regulation 10(1) which the authorising body requires it to pay.

(4) On an application under paragraph (3) the Copyright Tribunal shall consider the matter and make such order as it considers to be reasonable in the circumstances.]

**[Disapplication of provisions relating to licensing schemes**

**15.** For the avoidance of doubt, sections 116 and sections 117 - 144A of the Act shall not apply to the authorising body nor to any orphan licences granted under these regulations.]

.....2014

*Viscount Younger of Leckie*  
Parliamentary Under Secretary of State for Intellectual Property  
Department for Business, Innovation and Skills

**Explanatory Note**

*(This note does not form part of the Regulations)*

Regulation 3 defines orphan works and orphan rights. The regulations set out certain requirements which orphan licences should contain.

A full impact assessment of the effect that this instrument will have on the costs of business and the voluntary sector is available from the Intellectual Property Office, Concept House, Cardiff Road, Newport NP10 8QQ and is annexed to the Explanatory Memorandum which is available alongside the instrument on [www.legislation.gov.uk](http://www.legislation.gov.uk). Copies have also been placed in the libraries of both Houses of Parliament.

## Appeals (Regulation 14)

3.39 As a public body, the authorising body would be subject to public law and therefore, it would be subject to judicial review, the Freedom of Information Act and other relevant legislation. Beyond that it is proposed that there should be one or two specific appeal routes.

3.40 The strongest claim to a right to appeal is likely to be that of a rights holder whose work has been licensed as an orphan when it manifestly should not have been or at a rate that was obviously not appropriate. Therefore, the Government proposes that returning rights holders should have a right of appeal; the potential grounds for this type of appeal are part of this consultation.

3.41 The likely route for appeals would be the First-tier Tribunal (FtT); this is part of the tribunals system of the United Kingdom and was created via the Tribunals Courts and Enforcement Act 2007<sup>15</sup>. The FtT is empowered to deal with a wide range of issues which might form the substance of appeals. Appeals under Regulation 14 would likely use the Tribunal Procedure (First-tier Tribunal) (General Regulatory Rules) 2009 which provide flexibility for dealing with individual cases<sup>16</sup>. In the event that an appeal by a rights holder resulted in an increase in the amount payable for the use of the orphan work, the liability for this would rest with the authorising body and not the licensee. Any party to a case has a right to appeal to the Upper Tribunal on points of law arising from a decision of the First-tier Tribunal. The right may only be exercised with the permission of either the First-tier or Upper Tribunal.

3.42 There is also a possible need for applicants wishing to obtain orphan works licences to have a right of appeal to the Copyright Tribunal in relation to the licence fee set by the authorising body. This mirrors the existing right of licensees and prospective licensees to refer such disputes to the Copyright Tribunal.

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15 <http://www.legislation.gov.uk/ukpga/2007/15/contents>

16 <http://www.justice.gov.uk/downloads/tribunals/tribunals-rules-2009-at010411.pdf>

*Draft Regulations laid before Parliament under section \*\*\* of the European Communities Act 1972, for approval by resolution of each House of Parliament.*

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STATUTORY INSTRUMENTS

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**2014 No.**  
**COPYRIGHT**

**The Copyright (Certain Permitted Uses of Orphan Works) Regulations 2014**

*Laid before Parliament* \*\*\*  
*Coming into force* - - - \*\*\*

The Secretary of State, being a Minister designated <sup>(17)</sup> for the purposes of section 2(2) of the European Communities Act 1972<sup>(18)</sup> in relation to measures relating to the protection of copyright, in exercise of the powers conferred by that section, and a draft of the Regulations having been laid before and approved by each House of Parliament, makes the following Regulations:

**Title and commencement**

1. These regulations may be cited as The Copyright (Certain Permitted Uses of Orphan Works) Regulations 2014 and shall commence on 29<sup>th</sup> October 2014.

**Interpretation**

2. In these Regulations:

“the Act” means the Copyright, Designs and Patents Act 1988<sup>(19)</sup>;

**Application**

3. These Regulations shall apply to all relevant works and relevant phonograms on or after 29<sup>th</sup> October 2014.

**Amendments to the Act**

4. – (1) After section 44A of the Act insert:

**“44B Relevant bodies and certain permitted uses of orphan works**

(1) Copyright in an orphan work is not infringed by a relevant body in the circumstances set out in paragraph 1 of Schedule 7.

(2) “Orphan work” and “relevant body” are defined in sub-paragraphs 3(1) and (2) and 2(1) of Schedule 7.

(2) After section 76 insert

**“CHAPTER IIIA**

**RELEVANT BODIES AND CERTAIN PERMITTED USES OF ORPHAN WORKS**

**76A Certain permitted uses of orphan works**

The provisions in Schedule 7 shall apply to relevant bodies and certain permitted uses of orphan works.”

(3) After Schedule 6 to the Act, insert Schedule 7 which is set out in the Schedule to these Regulations.

*Viscount Younger of Leckie*  
Parliamentary Under Secretary of State for Intellectual Property  
Department for Business, Innovation and Skills

.....2014

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<sup>(17)</sup> SI 1993/595.  
<sup>(18)</sup> 1972 c.68.  
<sup>(19)</sup> 1988 c.48

## Orphan Works exception in the EU

3.43 This part of the consultation relates to the details of the implementation of Directive 2012/28/EU on certain permitted uses of orphan works. The Directive came into force on 25 October 2012 and requires Member States to implement its provisions by 29 October 2014. It permits cultural and heritage organisations with a legal certainty to digitally reproduce (digitise) works within their collections and make them available to the public (online/on demand) after a diligent search, for non-commercial use. The uses of reproducing and making available to the public are covered under Articles 2 and 3 of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.

3.44 The types of orphan works are restricted to books, journals, newspapers, magazines or other writings, cinematic or audiovisual works and phonograms. The scope does not include the use of artistic works such as standalone photographs, illustrations and paintings, but embedded artistic works within works are permitted. The relevant bodies able to use the works are restricted to publically accessible cultural and heritage organisations with a public-interest mission:

- libraries;
- educational establishments;
- museums;
- archives;
- film or audio heritage organisations; and
- public-service broadcasting organisations.

3.45 Relevant bodies have to search for rights holders, as a minimum, in the appropriate sources set out in the Directive to find rights holders, which include those set out in the Annex to the Directive. The Directive provides that the diligent search is to be carried out in the Member State of first publication or broadcast. If there is evidence to suggest that relevant information on rights holders is found in other countries, sources of information available in those other countries should also be consulted. Member States are allowed to add to the appropriate sources but are not able to remove any of them. The responsibility for the diligence of the search will lie with the relevant body making use of the works. If rights holders emerge after the diligent search they are entitled to fair compensation for the use of their work.

3.46 Following a diligent search relevant bodies are required to submit the following information to the UK national competent authority:

- the results of the search;
- the use the organisation will make of the work;
- any change to the status of the work; and
- relevant contact details.

The UK national competent authority will forward this information to the Office for Harmonisation in the Internal Market (OHIM) which will maintain a publicly accessible database of orphan works being used. This will all be completed through the orphan works database application created by OHIM. The UK national competent authority is likely to be the same public body as the authorising body for the UK's domestic orphan works licensing scheme, that is, the IPO.

3.47 The Directive allows for mutual recognition across the EU, so a diligent search completed in one member state will be valid across the whole EU. This would avoid duplicate searches where a relevant body has a physical copy of an orphan work within their collection that has had a diligent search already completed by another relevant body.

**SCHEDULE**                      **Regulation 4(3)**

1. After Schedule 6 to the Act insert:

“SCHEDULE 7  
RELEVANT BODIES AND CERTAIN PERMITTED USES OF ORPHAN WORKS

Section 76A

PART 1 GENERAL PROVISIONS

*Relevant body and orphan works*

1. - Subject to sub-paragraphs (2) and (3), a relevant body does not infringe the copyright in a relevant work or a relevant phonogram if the relevant body either:

- (a) makes an orphan work in its collections available to the public; or
- (b) reproduces the orphan work, for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration.

(2) The relevant body shall only generate revenues in the course of such uses for the exclusive purpose of covering its costs of digitising orphan works and making them available to the public.

(3) The relevant body shall only use an orphan work in accordance with sub-paragraph (1) in order to achieve an aim related to its public-interest mission, in particular the preservation of, the restoration of, and the provision of cultural and educational access to, works and phonograms contained in its collection.



## Commentary on draft legislation

3.48 Regulation 1 provides the title of the regulations as “The Copyright (Certain Permitted Uses of Orphan Works) Regulations 2014”. The references to an “Article” are to articles in the orphan works Directive; references to a “paragraph” are to paragraphs in the schedule in the draft regulations.

3.49 Regulation 4 amends the Copyright, Designs and Patents Act 1988 (CDPA) to provide the provision of the exception. It adds section 44B to Chapter III of CDPA which inserts a new exception in relation to copyright works. The detail on how this will be applied is set out in a new Schedule 7.

### Relevant body and orphan works (Schedule 7, Paragraph 1)

3.50 This sets out the use of the exception where a relevant body does not infringe copyright. This includes relevant bodies reproducing and making works in their collections available to the public via a website. The use of the exception is to be done in pursuit of the relevant body’s public-interest mission and is for non commercial use only. However, as stipulated under the Directive relevant bodies can generate revenue from orphan works for the sole purpose of covering their costs of digitising orphan works and making available. This means that although the Directive is for non commercial use cultural organisations will have the ability to recover their costs in relation to the diligent search and digitisation of the work. The Directive also allows public-private agreement in relation to orphan works; however, the works cannot be used in the pursuit of commercial gain.

*Relevant body, relevant work, relevant phonogram and Comptroller*

2. – In this Act -

(1) “relevant body” means a publicly accessible library, educational establishment, museum, archive, film or audio heritage institution and public service broadcasting organisations including a “public service broadcaster” as defined in the Communications Act 2003<sup>(20)</sup>;

(2) “relevant work” means

(a) a work published in the form of a book, journal, newspaper, magazine or other writing contained in the collections of publicly accessible libraries, educational establishments or museums as well as collections of archives or of film or audio heritage institutions;

(b) a cinematographic or audiovisual work contained in the collections of publicly accessible libraries, educational establishments or museums as well as collections of archives or of film or audio heritage institutions; and

(c) a cinematographic or audiovisual work produced by public service broadcasting organisations up to and including 31 December 2002 and contained in their archives;

which is protected and has either been published or broadcast or made publicly accessible by a relevant body.

(3) “relevant phonogram” means

(a) a phonogram contained in the collection of publicly accessible libraries, educational establishments or museums as well as collections of archives or of film or audio heritage institutions; and

(b) a phonogram produced by public service broadcasting organisations up to and including 31 December 2002 and contained in their archives;

which is protected and has either been published or broadcast or made publicly accessible by a relevant body.

(4) A relevant work or phonogram is protected if it is protected by copyright or related rights and was first published or broadcast in the United Kingdom or, in the absence of publication or broadcast, has been made publicly accessible by a relevant body in the UK.

(5) A relevant work or phonogram, has been made publicly accessible by a relevant body if the work or phonogram

(a) has been published or broadcast and has been made publicly accessible by the relevant body with the consent of rightholders, provided that it is reasonable to assume that the rightholders would not oppose making the work available to the public or reproducing the work for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration; or

(b) has not been published or broadcast but has been made publicly accessible by the relevant body with the consent of the rightholders, provided that it is reasonable to assume that the rightholders would not oppose making the work available to the public or reproducing the work for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration.

(6) References to a relevant work or a relevant phonogram include works and other protected subject-matter that are embedded or incorporated in, or constitute an integral part of, a relevant work or a relevant phonogram.

(7) “Comptroller” shall have the same meaning as in the Patents and Designs Act 1907<sup>(21)</sup>.

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<sup>(20)</sup> 2003. c.21.

<sup>(21)</sup> 1907 c.29.

## Relevant body, relevant work and relevant phonogram (Schedule 7, Paragraph 2)

3.51 This defines a ‘relevant body’ as a publicly accessible library, educational establishment, museum, archive, and film or audio heritage organisation. A public service broadcaster will be an organisation as defined under the Communications Act 2003. It also defines ‘relevant work’ and ‘phonogram’ as required in Article 1(2). These are works or phonograms under copyright and published, broadcast or made publicly available (which includes unpublished works).

3.52 It is proposed not to include the optional provision contained in Article 1(3) to consider limiting the application of unpublished works and phonograms to those that have been deposited with relevant bodies before 29 October 2014. This was included in the Directive as it was thought to provide an additional safety net to address concerns about creator’s moral right in relation to their ability to choose whether to publish or not publish the work and to limit the use of unpublished works to those already in public archives. However, we do not see the necessity for this restriction and consider that it would stop valuable unpublished material from being accessible from an arbitrary date. Such works might be very old but only deposited in a public archive after the Directive is implemented.

3.53 Relevant bodies already seek reproduction permissions when works are deposited where possible and it is anticipated that with any unpublished works deposited after the transposition date the rights holders or relevant bodies will ensure that it is clear how the works can be used. If this is not the case then the Directive would still apply. Moreover, as with unpublished works that have been deposited before the cut off date, cultural organisations will need to conduct a diligent search before using the work. The choice of whether to publish something is likely to apply to living professional creators who are both more likely to be found in the diligent search than non-professionals and whose work is less likely to be of a type residing in archives. For example, it is less likely that an archive would have an unpublished manuscript of a novel by a living author than unpublished diaries written by non-professionals who are no longer alive.

3.54 Paragraph 2 also covers cinematographic or audiovisual works and phonograms, produced by public-service broadcasting organisations up to and including 31 December 2002 and contained in their archives. Works that have been produced by public service broadcasters and held in their archives can include orphans. Given the fact that public-service broadcasters could be both producers and users of orphan works and to limit the phenomenon of orphan works in the future, a cut off date of 31 December 2002 for the application of this Directive has been made. This aims to avoid any conflict of interest of public service broadcasters creating orphans deliberately that could be used under the Directive.

3.55 Paragraph 2 also provides for the inclusion of embedded or incorporated works under Article 1(4). This refers to illustrations, photographs and so forth which are contained in another work, such as a book.

*Orphan works*

3. - (1) A relevant work or a relevant phonogram is an orphan work if there is a single rightholder and the rightholder is either not identified or, if identified, is not located despite a diligent search for the rightholder having been carried out and recorded in accordance with paragraph 4.

(2) Where a relevant work or a relevant phonogram has more than one rightholder and one or more of the rightholders is either not identified or, if identified, is not located, despite a diligent search for the rightholders having been carried out and recorded in accordance with paragraph 4, then the relevant work or relevant phonogram is an orphan work to the extent of the rights of those rightholders which are unidentified or unlocated.

(3) Where there is more than one rightholder in a relevant work or a relevant phonogram, and not all of them have been identified or, even if identified, located after a diligent search has been carried out and recorded in accordance with paragraph 4, the relevant work or relevant phonogram may be used in accordance with paragraphs 1 and 5 provided that the rightholders that have been identified and located have, in relation to the rights they hold, authorised a relevant body to carry out the acts of reproduction and making available to the public.

(4) Sub-paragraphs (2) and (3) shall be without prejudice to the rights in a relevant work or a relevant phonogram of rightholders that have been identified and located.

(5) Paragraph 7 shall apply to the rightholders that have not been identified and located in the works referred to in sub-paragraphs (1)-(3).

## Orphan Works (Schedule 7, Paragraph 3)

3.56 Paragraph 3 defines an 'orphan work' to reflect Article 2(1) of the Directive and addresses the issue of a single rights holder, multiple rights holders and partial orphans. This paragraph tries to address the situation where there are multiple rights holders and not all of them can be identified or found following a diligent search. Permission should be sought from locatable rights holders. For those unlocated, only the rights assigned to them can be applied through the Directive. So, for example, where there are multiple rights holders in a book, the unidentified or unlocated authors might not hold the rights relating to reproduction and making available. In this case the user would have to identify the correct rights holder who holds those rights. This would be the same situation for partial orphan works.



*Diligent Search*

4. (1) For the purposes of establishing whether a relevant work or relevant phonogram is an orphan work, a relevant body shall ensure that a diligent search is carried out in good faith in respect of each work or other protected subject-matter, by consulting the appropriate sources for the category of works and other protected subject-matter in question.

(2) The relevant body shall carry out the diligent search prior to the use of the relevant work or phonogram.

(3) Subject to sub-paragraph (4), the sources that are appropriate for each category of relevant work or relevant phonogram shall as a minimum include

- (a) the relevant databases maintained by the Office for Harmonization in the Internal Market (Trade Marks and Designs); and
- (b) the relevant sources listed in Part 2 to this Schedule.

(4) If there is evidence to suggest that relevant information on rightholders is to be found in other countries, the relevant body shall also consult the sources of information available in those other countries.

(5) A diligent search shall be carried out in the Member State of first publication or, in the absence of publication, first broadcast, except in the case of cinematographic or audiovisual works the producer of which has his headquarters or habitual residence in a Member State, in which case the diligent search shall be carried out in the Member State of his headquarters or habitual residence.

(6) In the case referred to in sub-paragraph (5), the diligent search shall be carried out in the Member State where the organisation that made the work or phonogram publicly accessible with the consent of the rightholder is established.

(7) A relevant body shall maintain records of its diligent searches and shall provide the following information to the Comptroller:

- (a) the results of the diligent searches that the relevant body has carried out and which have led to the conclusion that a work or a phonogram is considered an orphan work;
- (b) the use that the relevant body will make of orphan works in accordance with this Act;
- (c) any change, pursuant to paragraph 7, of the orphan work status of works and phonograms that the relevant body has used; and
- (d) the relevant contact information of the relevant body concerned.

(8) The Comptroller shall without delay forward to the Office for Harmonization in the Internal Market (Trade Marks and Designs) any information that it receives under sub-paragraph (7).

*Permitted uses of orphan works*

5. - (1) A relevant body shall only generate revenues in the course of the permitted use of orphan works, for the exclusive purpose of covering the body's costs of digitising orphan works and making them available to the public.

(2) A relevant body shall indicate the name of identified authors and other rightholders in any use of an orphan work.

## Diligent search (Schedule 7, Paragraph 4)

3.57 The paragraph sets out the requirement for a diligent search as set out under the Directive to be completed in respect of each work or other protected subject matter prior to use of an orphan work. This includes searches of embedded works where there is a different rights holder. This will ensure that a diligent search has been completed for all works prior to use under the exception. A diligent search by a relevant body will be completed in good faith – there is no verification process. The paragraph proposes the appropriate sources for the search which include the list in part 2 of the schedule. This replicates the annex in the Directive and adds the Office for Harmonisation in the Internal Market orphan works' database. The appropriate sources from the Directive are the minimum requirement for relevant bodies to consult. These were agreed during the negotiations of the Directive and we are not able to remove any of these. However, the Directive allows us to add sources that are relevant to the UK. The only suggested additions to the list are unpublished works and the OHIM database.

3.58 Paragraph 4 also provides for relevant bodies to refer to the appropriate sources in other countries if there is evidence to suggest that information on rights holders can be found there. It also provides for where a diligent search should be carried out, in relation to where the work was published or broadcast and also makes provision for unpublished works.

3.59 Relevant bodies must maintain records of their diligent searches and provide the relevant information to the national competent authority. It is proposed that the national competent authority for the UK will be the authorising body for the domestic licensing scheme, the IPO.



*Mutual recognition of orphan work status*

6. – (1) A relevant work or a relevant phonogram which is designated an orphan work in another Member State shall be an orphan work in the United Kingdom.

(2) The relevant work or relevant phonogram may be used and accessed in the United Kingdom in accordance with paragraphs 1-5.

(3) This paragraph also applies to relevant works and relevant phonograms in so far as the rights of the non-identified or non-located rightholders are concerned.

*End of orphan work status*

7.- (1) A rightholder in a relevant work or a relevant phonogram considered to be an orphan work may put an end to the orphan work status so far as his rights are concerned by providing the relevant body with evidence of his ownership of the rights.

(2) The relevant body shall provide the rightholder with fair compensation for the body's use of the relevant work or relevant phonogram.

(3) If the relevant body and the rightholder cannot agree what constitutes "fair" compensation they shall refer the matter to the [TBC.]



## Mutual recognition of orphan works status (Schedule 7, Paragraph 6)

3.60 To avoid duplication of efforts across Europe, the Directive allows for mutual recognition of completed diligent searches between member states. This means that if an organisation has an orphan work in their collection that has already been subjected to a diligent search in another member state and the details are on the OHIM database, they can rely on that diligent search and make use of the exception. This is why we have suggested including the OHIM database in the appropriate sources for a diligent search.

## End of orphan works status (Schedule 7, Paragraph 7)

3.61 If a rights holder returns they can end the orphan status of their work so far as their rights are concerned as provided for under Article 5. This paragraph covers the ending of orphan work status and the provision of fair compensation. They will need to provide the relevant body making use of the work with sufficient evidence of ownership. The burden of proof of ownership of a work will be on the emerging rights holders. The relevant body will decide if the evidence is sufficient.

3.62 Article 6(5) states that the relevant body shall provide fair compensation to the emerging rights holders for making the work available. As the Directive limits the use of works to digitisation and making available we would assume that this would be a low amount. The amount of compensation will be influenced by factors such as the cultural objective of the organisation to achieve its public-interest mission, the non-commercial nature of the use of the work and the possible harm to rights holders. The fair compensation will be agreed between the relevant body and the rights holder.

3.63 If fair compensation cannot be agreed between the parties we have suggested that an appeals process is established. We are seeking views on which body would be best placed to administer an appeals process.

PART 2  
SOURCES TO BE SEARCHED DURING DILIGENT SEARCH

Category of Relevant Work or Relevant Phonogram	Sources to be searched
1. Published books	<ul style="list-style-type: none"> <li>(a) legal deposit, library catalogues and authority files maintained by libraries and other institutions;</li> <li>(b) the publishers' and authors' associations in the respective country;</li> <li>(c) existing databases and registries, WATCH (Writers, Artists and their Copyright Holders), the ISBN (International Standard Book Number) and databases listing books in print;</li> <li>(d) the databases of the relevant collecting societies, in particular reproduction rights organisations;</li> <li>(e) sources that integrate multiple databases and registries, including VIAF (Virtual International Authority Files) and ARROW (Accessible Registries of Rights Information and Orphan Works).</li> </ul>
2. Newspapers, magazines, journals and periodicals	<ul style="list-style-type: none"> <li>(a) the ISSN (International Standard Serial Number) for periodical publications;</li> <li>(b) indexes and catalogues from library holdings and collections;</li> <li>(c) legal deposit;</li> <li>(d) the publishers' associations and the authors' and journalists' associations in the respective country;</li> <li>(e) the databases of relevant collecting societies including reproduction rights organisations.</li> </ul>
3. Visual works, including fine art, photography, illustration, design, architecture, sketches of the latter works and other such works that are contained in books, journals, newspapers and magazines or other works	<ul style="list-style-type: none"> <li>(a) the sources referred to in points (1) and (2);</li> <li>(b) the databases of the relevant collecting societies, in particular for visual arts, and including reproduction rights organisations;</li> <li>(c) the databases of picture agencies, where applicable.</li> </ul>

## Appropriate sources (Schedule 7, Part 2)

3.64 This replicates the appropriate sources to be searched in a diligent search as contained in the annex of the Directive. As there are no sources for unpublished works included in the annex we have suggested that organisations refer to the relevant sources for the type of unpublished work already in the annex. So, for unpublished books potential users would refer to the sources for published books.



<p>4. Audiovisual works and phonograms</p>	<ul style="list-style-type: none"> <li>(a) legal deposit;</li> <li>(b) the producers' associations in the respective country;</li> <li>(c) databases of film or audio heritage institutions and national libraries;</li> <li>(d) databases with relevant standards and identifiers such as ISAN (International Standard Audiovisual Number) for audiovisual material, ISWC (International Standard Music Work Code) for musical works and ISRC (International Standard Recording Code) for phonograms;</li> <li>(e) the databases of the relevant collecting societies, in particular for authors, performers, phonogram producers and audiovisual producers;</li> <li>(f) credits and other information appearing on the work's packaging;</li> <li>(g) databases of other relevant associations representing a specific category of rightholders.</li> </ul>
<p>5. Unpublished works</p>	<p>Those sources that are listed in paragraphs 1 – 4 above which are appropriate to the unpublished work.</p>

**EXPLANATORY NOTE**

*(This note is not part of the Order)*

These regulations amend the Copyright, Designs and Patents Act 1988 (“the Act”) and implement the provisions of Directive 2012/28/EU of the European Parliament and of the Council of 25<sup>th</sup> October 2012 on certain permitted uses of orphan works (OJ L299/5, 27.10.2012, p.1).

A full impact assessment of the effect that this instrument will have on the costs of business and the voluntary sector is available from the Intellectual Property Office, Concept House, Cardiff Road, Newport NP10 8QQ and is annexed to the Explanatory Memorandum (together with a transposition note) which is available alongside the instrument on [www.legislation.gov.uk](http://www.legislation.gov.uk).

## 4. Inter-relationship of the Orphan Works Proposals

4.1 This section considers the overlap between the EU Directive on certain permitted uses of orphan works and the UK domestic licensing scheme.

4.2 It is possible a person or organisation may wish to apply for a UK orphan works licence for a work that has been digitised to be displayed on the website of a publicly accessible archive under the auspices of the Directive. The applicant might be the archive themselves or a third party who could be a commercial or non-commercial user, if they wanted to use the work in a publication, for example.

4.3 The Directive would apply to an example provided by the Research Councils UK in their response to the government consultation<sup>22</sup>. The Medical Research Council (MRC), which celebrates its 100th Anniversary this year, holds in its archive a number of medical research reports published throughout the 20th century. It is likely that a number of these are orphan works. The MRC have been unable to digitise these reports, and therefore this scarce resource is not easily accessible to other researchers or to the public.

4.4 To digitise these works under the Directive, the MRC would need to conduct a diligent search and notify the UK National Competent Authority who would forward the information to the OHIM public database. Only if a rights holder reappeared would the MRC be expected to pay fair compensation to the rights holder.

4.5 If, later, a commercial publisher wanted to use one of the works they saw on the MRC's website in a book to be published in the UK, they would need to apply to the UK orphan works licensing scheme. The diligent search conducted for the purposes of the Directive could be submitted for the UK scheme application if the search was for the relevant rights holder (such as for the right to publish in the UK as opposed to the digitisation rights). If the authorising body for the UK scheme was satisfied that all was in order with the application and the applicant paid the appropriate licence fee, a licence would be issued. The licence would specify who was permitted to copy the work, for what purpose and for what duration.

4.6 An example of where the Directive would not apply, even when used by a not-for-profit organisation, is one provided by the Imperial War Museum (IWM)<sup>23</sup>. The IWM wanted to reproduce a painting of Winston Churchill by Arthur Pan on the front cover of the Churchill exhibition book (a copy of the painting hangs in the Churchill War Rooms). They carried out extensive research into the estate of Arthur Pan including contacting existing holders of Churchill

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22 <http://www.ipo.gov.uk/response-2011-copyright-rcuk.pdf>

23 <http://www.ipo.gov.uk/response-2011-copyright-iwm.pdf>

papers, such as his family and Churchill College, Cambridge. As the rights holder could not be traced they decided against using the image on the front cover. Under the regulations for the UK's domestic licensing scheme the IWM would be able to reproduce the image on the exhibition book. They would provide the evidence from their diligent search to the authorising body and then the application would be processed as for the MRC example.

## Overlap with Extended Collective Licensing

4.7 Extended Collective Licensing (ECL) is a form of licensing for which a collecting society is given permission to extend an existing collective licence to cover the works of all rights holders in the sector where they have a mandate, except those who opt out<sup>24</sup>. The Government has previously made it clear that ECL is not intended to be the default solution for licensing works that are or could be orphans. Any collecting society wishing to run an ECL scheme must have a rights holder mandate. This requirement will not be met if the number of rights holders that are not known or cannot be located reaches such a level that the collecting society cannot be said to be significantly representative of rights holders affected by the ECL scheme, or works covered by it.

4.8 The potential areas of overlap between the UK orphan works licensing scheme and the ECL schemes will be limited to works and rights of a type licensed by a collecting society. For example, many unpublished works by non-professionals would not be included in ECL schemes but would likely feature strongly in orphan work licensing applications. It should be noted that licences for orphan works under the UK scheme and licences for the works of non-members in ECL schemes are non-exclusive, so nothing precludes the possibility of them co-existing in respect of the same work. Use of orphan works under the Directive will be as an exception to copyright law, subject to certain safeguards, so no licensing is required.

### **Where a rights holder cannot be found for a work when royalties are distributed by a collecting society in an ECL scheme, will it be possible to continue licensing the work as part of that ECL scheme?**

Yes, but it may not happen very often. To run an ECL scheme the collecting society must demonstrate it has a mandate from rights holders, which includes a requirement that it is significantly representative of rights holders affected by the ECL scheme, as well as works covered by it. The number of actual or potential orphans in an ECL scheme needs to be consistent with these principles. Additionally, ECL assumes consent barring opt out and there is no assumption made that absent rights holders would opt out of an ECL scheme.

Searches by the collecting society for missing rights holders (which will be akin to a diligent search and will be repeated for as long as the work is used under the licence) will increase the chances of any missing rights holders being reunited with their work. The collecting society will collect remuneration on behalf of the rights holder, who will always retain the absolute right to opt out if they re-emerge or are found by the collecting society.

**If someone doing a diligent search, in support of an application for an orphan works licence, finds that the work has been licensed as part of an ECL scheme will they be able to obtain an orphan works licence?**

Yes, if the collecting society had been unable to locate the relevant rights holder and the rights holder was not a member of the society and all other requirements of the diligent search were met. Money would be set aside for the rights holder as with other licensed orphan works.

**Will it be possible for a collecting society to obtain authorisation for an ECL scheme in which it is known that there are some works that have been licensed as orphans?**

Yes, providing it meets the mandate requirements and is significantly representative of rights holders in the sector. Therefore, the majority of works in the scheme could not be orphan works licensed through the UK scheme (or identified through the exception in the Orphan Works Directive).

**Will it be possible to seek an orphan works licence for a work where the rights holder has opted out of a relevant ECL scheme, is not a member of the collecting society concerned and who cannot now be located?**

Yes. If the current contact details of the opted out rights holder are not available and if the diligent search does not locate that rights holder, the prospective licensee can apply for an orphan works licence.







# 5. Consultation questions

## Domestic Orphan Works Licensing in the UK

5.1 While we welcome responses to the detail of the drafting on any aspect of the proposed regulations, we would particularly welcome views on the following questions and issues.

### Authorising Body

5.2 Ministers announced during the passage of the Enterprise and Regulatory Reform Act that the authorising body would be an existing public body. The authorising body will be the Intellectual Property Office (IPO). One of the key factors in deciding to have one central authorising body for orphan works rather than allowing collecting societies or other licensing bodies to license the use of orphan works, is that many orphan works are works of a type that are not currently collectively licensed. For example, unpublished works by non-professionals.

5.3 While the authorising body with the legal responsibility for licensing the use of orphan works will be the IPO, there may still be a secondary role for collecting societies which utilises their expertise and knowledge, for example, where they already license the equivalent non-orphan type and use.

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

### Licensing terms

5.4 Sub-licensing is not permitted under the orphan works licensing powers, but there is a question of whether a licence should be transferable, and if so, in what circumstances.

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

### Licence fees

5.5 There is a particular issue with how the licence fees for non-commercial use are calculated. The principle is that the licence fees for orphan works should reflect what happens currently for non-orphan works. However, we have been told by stakeholders in the museums and archives sector that rights holders do not normally require payment for non-commercial use of works, as they are pleased that the work is being used and made available. Often, where payment is required, the museum is unable to use the work because it cannot afford to do so.

5.6 It follows that licence fees for individual orphan works that are used non-commercially are likely to be very low and that there will be cases where the costs to the authorising body of collecting and retaining the fee would be greater than the value of the fee.

5.7 One approach might be to aggregate these fees through something like an umbrella licence, or annual subscription where the licensee was likely to be a high volume user of orphan works. We are seeking your views on whether to allow the authorising body discretion to waive the individual licence fee if the costs of collecting and retaining such fees would be greater than the value of the fee. This would be replaced by an annual fee to cover a certain number of works.

**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?**

## Unclaimed fees (Regulation 13)

5.8 Unclaimed licence fees belong to the missing rights holders. The question arises as to what should happen to unclaimed funds if they remain unclaimed for a long period of time – and at what point. Related to these questions is the issue of whether there should be a limit on when rights holders can claim remuneration.

5.9 There are various models that can be considered in determining for how long rights holders could claim monies and when Government should take control of the funds. For example, the statute of limitations for making claims for the adverse possession of land is 12 years in many cases, but with some longer periods in others<sup>25</sup>. Alternatively, the Government can use money contained in dormant bank accounts after 15 years but retains a liability for any claims in perpetuity<sup>26</sup>. Another factor to be considered is the possible lifespan of missing rights holders. This is why copyright generally lasts for the life of the author plus seventy years – that is to cover the lifetime of the author plus at least one generation. It may be appropriate to limit liability for one generation, which is for seventy years from when the licence was issued.

5.10 It would be simpler to apply the same time period for when the Government can take control of the money and when the liability to the rights holder ceases. If the liability continues beyond the time when the Government can distribute the money, records still need to be maintained for very long periods of time, if not forever.

5.11 The question also arises on what the unclaimed monies could be spent. The Government will have paid for the setting up of the scheme and may have contributed to the running costs (although no such contribution is currently planned). Therefore, the funds could be used to reimburse the Government for these costs.

5.12 Beyond that any unclaimed monies could be distributed to appropriate charitable uses such as industry benevolent or training funds, thereby benefitting the wider rights holder community. They could also be used to contribute to archiving, preservation and digitisation funds, thereby benefitting the types of groups that paid the fees. This will be determined by the Government if there appears to be a substantial amount of unclaimed funds.

**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?**

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25 S.15 Limitation Act 1980 <http://www.legislation.gov.uk/ukpga/1980/58>

26 S.10, Dormant Bank and Building Society Accounts Act 2008 <http://www.legislation.gov.uk/ukpga/2008/31/section/10>

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

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

## Appeals

5.13 The Government has proposed a right of appeal for returning rights holders if proper procedures have not been followed. We seek views on whether there should also be a right of appeal for prospective users of orphan works. Views are also welcome on whether the Regulatory Chamber Rules of the First-tier Tribunal would be suitable for the handling of appeals under Regulation 14.

**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?**

## Impact assessment

5.14 We have revised the impact assessment for the UK orphan works licensing scheme since the one issued with the consultation document to reflect the fact that many of the uses it envisaged will now accrue to the EU Directive on certain permitted uses of orphan works. However, we are asking potential licensees of the UK scheme, now that they know much more about how the scheme would work, how much they would expect to use the scheme. In particular, would the fact that licences are non-exclusive and are limited to the UK impact upon your potential use of the scheme?

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

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

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

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

**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?**

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

**14. 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?

**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?**

**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?**

**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?**

**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?**

## Orphan Works exception in the EU

### Covering costs

5.15 The Directive provides that cultural organisations may generate revenues when using orphan works for the exclusive purpose of covering costs of digitising and making available to the public. This would cover the diligent search and digitisation of works and making them available online.

**19. 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?**

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

**21. 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?**

### Unpublished works

5.16 The Directive provides an optional provision under Article 1 (3) to limit its application to unpublished works and phonograms that have been deposited with relevant bodies before 29 October 2014. We have decided against implementing this provision as we believe that this would unnecessarily and arbitrarily limit the use of any unpublished works deposited after

transposition.

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

## Diligent search

5.17 The list of appropriate sources in Part 2 of the Schedule is the minimum requirement for a diligent search

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

**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?**

5.18 The Directive provides that if a diligent search is found not to be diligent then national infringement provisions will apply. Under UK copyright law, criminal copyright infringements only apply to making commercial use of works. Since commercial use is not permitted by the Directive, civil sanctions alone would be available. This is consistent with the current position where unlawful non-commercial use of orphan works would not be criminal.

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

## Fair compensation

5.19 The Directive states 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?**

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



# Annex A: Consultation principles

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the consultation principles.

<http://www.cabinetoffice.gov.uk/sites/default/files/resources/Consultation-Principles.pdf>

## Comments or complaints on the conduct of this consultation

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

John Conway,  
BIS Consultation Co-ordinator,  
1 Victoria Street,  
London  
SW1H 0ET

Telephone John on 020 7215 6402  
or e-mail to: [john.conway@bis.gsi.gov.uk](mailto:john.conway@bis.gsi.gov.uk)

However if you wish to comment on the specific policy proposals you should contact the policy team (see section 2).

## Annex B: List of Individuals/ Organisations consulted

<b>Stakeholder working group members:</b>	
Archives & Records Association	Association of Authors' Agents
Association of Illustrators (AOI)	Association of Photographers
Authors' Licensing Collecting Society (ALCS)	BBC
British Association of Picture Libraries and Archives (BAPLA)	British Equity Collecting Society
British Film Institute (BFI)	British Screen Advisory Council
Copyright Licensing Agency (CLA)	Creators' Rights Alliance
Directors UK	Federation Of Commercial Audio-visual Libraries (FOCAL)
Jisc	Libraries And Copyright Alliance
Musicians' Union	National Museum Directors' Council
Producers Alliance for Cinema and Television (PACT)	Publishers Licensing Society
Society of Authors	Society of London Theatre and Theatrical Management Association
Stop 43 (photographers)	UK Music

<b>Consultation will also be sent to:</b>	
Action on Authors Rights	Artists Collecting Society (ACS)
Artists Rights Administration (ARA)	Arts Council England
Associated Press	Association for University Research and Industry Links (Auril)



<b>Consultation will also be sent to:</b>	
Association of Independent Musicians (AIM)	Association of Learned and Professional Society Publishers
Association of Online Publishers	Bedfordshire and Luton Archives Service
Birmingham City University	Bodleian Library, University of Oxford
Bridgeman Art Library	British Association of Songwriters, Composers & Authors (BASCA)
British Copyright Council (BCC)	British Institute of Professional Photography
British Librarians Association (BLA)	British Library
British Literary and Artistic Copyright Association (BLACA)	British Museum
British Press Photographers' Association	British Recorded Music Industry (BPI)
British Society of Underwater Photographers	British Universities Film & Video Council (BUFVC)
British Video Association	Brunel University
Chartered Institute of Journalists	Chartered Institute of Library & Information Professionals (CILIP)
Cinema Exhibitor's Association (CEA)	City of London Law Society
Coalition for a Digital Economy (COADEC)	Commercial Association of Broadcasters (COBA)
Consumer Features	Department for Culture Media and Sport (DCMS)
Designs and Artists Collecting Society (DACS)	Educational Recording Agency
English Heritage	Entertainment Retailers Association
Featured Artists Coalition (FAC)	Film Archives UK
Getty Images	Google
Imperial College London	International Association of Music Libraries (IAML)
International Federation of Reproduction Rights Organisations (IFRRO)	International Film & Television Alliance (IFTA)
International Music Manager's Forum (IMMF)	ITV
Jonathan Worth - Photographer	Law Society of Scotland
London Metropolitan Archive	Loughborough University
Manchester Archives	Masters Photographers Association

<b>Consultation will also be sent to:</b>	
Motion Picture Association of America (MPAA)	Motion Picture Licensing Corporation (MPLC)
Museums and Galleries Scotland	Museums Association
Museums of Liverpool	Music Managers Forum
Music Publishers Association (MPA)	Music Users Council
National Archives (TNA)	National Education Network
National Galleries of Scotland	National Library of Scotland
National Library of Wales	National Maritime Museum
National Museum of Scotland	National Museum of Wales
National Museums Northern Ireland	National Records of Scotland
National Union of Journalists (NUJ)	Natural History Museum
Newcastle University	Newspaper Licensing Agency
Newspaper Publishers Association	Newspaper Society
Newsreel Archive PTY Ltd	Open Rights Group
Open University	Periodical Publishers Association
PPL	Press Association
Professional Publishers Association	Pro-Imaging
PRS for Music	Publisher Research Consortium
Publishers Association	Publishers Content Forum
Research Councils UK	Research Libraries UK
Science Museum	Scottish Confederation of University and Research Libraries (SCURL)
Share the Vision	Society of College National and University Libraries (SCONUL)
Tate	UCL Libraries
UK Music Producers Guild (MPG)	Universities UK
University of Cambridge	University of Central Lancashire
University of Glamorgan	University of Leicester
University of Nottingham	University of Reading
University of Southampton	University of Wales Online Library
Victoria and Albert Museum	Wellcome Trust
Writers Guild of Britain	

# Annex C: Impact Assessments

## Domestic Orphan Works Licensing in the UK

<b>Title:</b> Orphan Works <b>IA No:</b> BIS1063 <b>Lead department or agency:</b> IPO <b>Other departments or agencies:</b>		<b>Impact Assessment (IA)</b>			
		<b>Date:</b> 17/10/2013			
		<b>Stage:</b> Consultation			
		<b>Source of intervention:</b> Domestic			
		<b>Type of measure:</b> Secondary legislation			
		<b>Contact for enquiries:</b>			
<b>Summary: Intervention and Options</b>		<b>RPC Opinion: Green</b>			
<b>Cost of Preferred (or more likely) Option</b>					
<b>Total Net Present Value</b>	<b>Business Net Present Value</b>	<b>Net cost to business per year</b> (EANCB on 2009 prices)	<b>In scope of One-In, Two-Out?</b>	<b>Measure qualifies as</b>	
£0.07	£0.04m	-£0.004m	Yes	OUT	
<b>What is the problem under consideration? Why is government intervention necessary?</b> <p>A copyrighted work is orphan when it is not possible to locate one or more of the right-holders following a diligent search. If a work is orphaned it can only be copied lawfully to a very limited extent and its use in books, tv programmes, exhibitions and on websites is curtailed, rights holders gain nothing and its value to society is lost. The Government has passed legislation to allow for regulations to license the use of such works while protecting the rights of absent owners.</p>					
<b>What are the policy objectives and the intended effects?</b> <p>The aim is to create a system where people interested in using orphan works for commercial or non-commercial purposes can obtain a licence from the authorising body to use the works lawfully in the UK, following a diligent search, and by paying appropriate licence fees up-front.</p> <p>This would create a system where archive holders are able to use and make available all works within their archives, and put remuneration aside for right-holders who re-appear later for doing so.</p>					
<b>What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)</b> <p>Government has already legislated in the Enterprise &amp; Regulatory Reform Act to provide the power for regulations to allow for the licensed use of orphan works in the UK.</p> <p>This is separate from and complementary to the EU Directive on certain permitted uses of orphan works</p>					
<b>Will the policy be reviewed?</b> It will be reviewed. <b>If applicable, set review date:</b> 09/2018					
Does implementation go beyond minimum EU requirements?			N/A		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.		<b>Micro</b> Yes	<b>&lt; 20</b> Yes	<b>Small</b> Yes	<b>Medium</b> Yes
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)		<b>Traded:</b> n/a		<b>Non-traded:</b> n/a	

*I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.*

**Signed by the responsible  
SELECT SIGNATORY:**

**Date:**

## Summary: Analysis & Evidence

## Policy Option 1

Description:

### FULL ECONOMIC ASSESSMENT

Price Base Year 2012	PV Base Year 2012	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: -1.84	High: 1.99	Best Estimate: 0.07

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	0.54	1	0.149	1.82
High	1.07		0.303	3.67
Best Estimate	0.81		0.226	2.76

#### Description and scale of key monetised costs by 'main affected groups'

The main costs of this proposal are the public expenditure of setting up the authorising body ( £0.54m-£1.07m transition cost),p11; running the body itself (£50k p.a.), p11; and the costs of undertaking diligent searches by potential users, as museums, galleries, libraries and archives will potentially be able to use all works within their collections, but this would be voluntary and only done if the potential users believe it worth the effort of conducting the diligent search (£99k-£253k pa)

#### Other key non-monetised costs by 'main affected groups'

Existing unlawful uses in the UK are likely to be reduced by the availability of lawful licensed use, thus transferring some value from former infringers to rights owners, but this transfer has not been monetised..

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	0	1	0.213	1.83
High	0		0.443	3.81
Best Estimate	0		0.329	2.83

#### Description and scale of key monetised benefits by 'main affected groups'

The main benefits are the value to users of being able to use content that is currently orphaned. As the scheme is voluntary users will only apply for a licence if the benefits at least outweigh the costs (diligent search + admin fee + licence fee) £213k - £439k per annum. There will also be benefits from the creation of value to museums and trusts from exhibitions and cultural activities ( £1k - 4kpa)

#### Other key non-monetised benefits by 'main affected groups'

There will be a potential benefit to users from legal certainty in the UK; a benefit from records of past diligent searchers; a benefit of expanded resource database. There may also be growth and innovation benefits see page 16.

Key assumptions/sensitivities/risks

Discount rate (%)

3.5

The scope of this legislation covers all types of work and so includes many different markets (eg: books, audio-visual, photographs, music) and we have used consultation responses to refine assumptions about the scale of the problem where we use the largest UK archives as proxies, and rely on orphan work estimates. We also assume that the Canadian Orphan Works scheme forms the basis of a good proxy for the UK and have used assumptions developed by the IPO for the setting up the authorising body.

### BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OITO?	Measure qualifies as
Costs: 0.14	Benefits: 0.14	Net: 0.004	Yes	OUT

## Evidence Base (for summary sheets)

### Problem under consideration;

A copyrighted work is an orphan when it is not possible to locate one or more of the relevant right-holders following a diligent search. If a work is orphan it can only be copied to a very limited extent without legal risk and therefore its use in books, tv programmes, exhibitions and on websites is curtailed: As it is not possible to obtain permission for use, there is at least the risk of civil infringement or criminal liability if there is commercial use. For example, even putting images of works on website involves making a copy of the work and hence cannot be done lawfully at present and that even making a copy of a fragile work so it can be displayed to the public is also not lawful at present.

The orphan works problem has resulted in large quantities of copyright works being unavailable for use, whether for cultural or commercial purposes. This concerns millions of pieces of content ranging from video and sound recordings, as in the British Film Institute where 10% of the collection is orphaned to more than two million archive photos in the Imperial War Museum. There are also approximately 150 miles of shelved documents in The National Archives and National Records of Scotland, where up to 40% of the content is suspected orphan and much of it unpublished.

Both the Hargreaves Review of Intellectual Property and Growth [1], and the Gowers Review of Intellectual Property [2] identified Orphan Works as a problem that needed resolving to avoid leaving large parts of content unavailable for use and missing commercial opportunities.

The Government has legislated in the Enterprise and Regulatory Reform Act 2013 to allow the Secretary of State via regulations to allow for the licensed use of orphan works, subject to appropriate safeguards.

The Government has developed the draft regulations which will provide much of the detail on how the licensing of orphan works will operate and these are currently subject to consultation.

The domestic orphan works scheme complements the EU Directive on Orphan Works which will come into force by October 2014. This IA therefore needs to be read in conjunction with the IA on the EU Directive on Orphan Works in order to obtain the totality of the costs and benefits from the changes to facilitate the lawful use of orphan works.

The consultation will also seek evidence on the potential likely levels of use of the scheme to check against the assumptions that have been developed in this IA.

## Rationale for intervention;

Private sector solutions have been proposed in the past and are, for the most part, based on using insurance to indemnify users of orphan works against subsequent legal challenges (i.e. if the owner of the right later comes forward). While Government does, as a rule, prefer industry led solutions, the current state of the law does not make the private sector initiatives legally possible. The orphan works problem therefore results in a missing market which the private sector cannot solve. The full demand for authorised orphan works can only be satisfied by government intervention in the form of legislative changes. This may also stem existing unauthorised use of works and encourage respect for copyright.

The Government agreed to accept Hargreaves's Recommendation to introduce legislation that will enable the use of orphan works. The only way to address this issue is to allow the fair and regulated use of the large amount of material containing orphaned rights within the UK by legislating to allow for approved authorisation on a regulated basis.

The Government has legislated in the Enterprise and Regulatory Reform Act 2013 to amend the Copyright, Designs and Patents Act 1988, to allow the Secretary of State via regulations to allow for the licensed use of orphan works, subject to appropriate safeguards and remuneration for absent rights-holders.

## Policy objective;

The aim is to create a system where people interested in using orphan works for commercial or non- commercial purposes can obtain a licence to use the works lawfully, following a diligent search, and by paying a licence fee.

This domestic orphan works scheme complements the EU Directive on Orphan Works which will come into force by October 2014.

The domestic orphan works scheme exists alongside the Directive as a licensing system within the framework of copyright law within the UK. It applies to all types of works, potentially allows all types of use, including commercial use, and can be used by anyone. The domestic scheme will:

- enable lawful use of orphan works in books, TV documentaries, exhibitions & on websites for commercial and non commercial use;
- enable access to potentially culturally valuable works;
- contribute to economic growth;
- minimise market distortion;
- maximise benefits to the economy;
- minimise perverse incentives to use orphan works illegally; and
- protect and remunerate rights holders

The Enterprise and Regulatory Reform Act gives the Secretary of State the power to make regulations to create an orphan works authorising body which will:

- Set licence fees for all different types of works and all different uses.
- Operate a searchable register of works which are subject to a current diligent search and works that have been granted an orphan works licence.
- Set and collect administration fee for applications.
- Process applications for licences including a verification process of diligent searches, determine what tariff applies, determine what licence conditions apply (uses, duration etc) and collect fees.
- Set licence conditions & issue licences.
- Maintain escrow account with fees for rights holders.
- Check whether claims to be a returning rights holder are genuine – if satisfied of veracity, pass remuneration to rights holder/s.

This should create a system where archive holders (including museums, galleries and libraries and not just archives in the strict sense) can use and make available orphan works in their archives, and pay fees for right-holders. This means that resources used on a diligent search will not have been wasted (as is the case at present) should a work turn out to be orphan. By allowing the use of orphan works, all content held in archives would potentially be available for use, including commercial uses such as publishing and broadcasting – against payment. The system would ensure that diligent searches are undertaken and that orphans are registered with the authorising body in a simple manner.

The EU Directive on Orphan Works creates an exception to copyright legislation to allow cultural and heritage organisations to digitise orphan works within their collections after a diligent search, and to make available to the public on their websites. The Directive does not allow any other uses.

The Directive also restricts the types of orphan works to books, journals, newspapers, magazines or other writings, cinematic or audiovisual works and phonograms. It does not include the use of artistic works such as standalone photographs, illustrations and paintings but embedded artistic works within works are permitted. The Directive also limits the organisations that are able to use the works to publicly accessible cultural and heritage organisations with a public mission.

## Description of options considered (including do nothing);

### Option 0: Do Nothing

This is not an option as the Government has already legislated in the Enterprise & Regulatory Reform Act to provide the power for regulations to allow for the licensed use of orphan works in the UK.

Not implementing these powers would leave the current system unchanged and leave orphan works as a largely untapped resource for creativity, innovation and growth, in creative output.

Risks and assumptions;

- Risks failing the Government's commitment to implement an orphan work solution
- Risks loss of important cultural material because archives cannot afford to preserve it without being able to recoup their costs through use of the material
- The Government has received comments that the ability to utilise orphaned works on a basis backed by statute is likely to increase overall confidence in copyright per se, so not fulfilling that promise may also have a negative impact.

### Option 1: Establish an orphan works system

The Government has legislated to enable these culturally and economically valuable works to be used while protecting the interests of the owners of rights in orphan works. For example, orphan works will be able to be used in exhibitions, publications, in educational material, documentaries and other programmes and in any other way that a non-orphan work can be used. Section 77 of the Enterprise and Regulatory Reform Act therefore creates a power for the Secretary of State to appoint a body or bodies to license the use of orphan works through regulations.

The Act sets the parameters of the scheme to be covered by the regulations. These include:

- Requiring a diligent search for rights holders to be undertaken by the applicant before a work is classed as orphan;
- No self-licensing – a licence to use an orphan work cannot be granted to a body that can itself authorise the use of orphan works;
- Providing for a licence to use an orphan work to have the same effect as if granted by the missing rights-holder;
- Providing that an orphan works licence can only grant non-exclusive rights;



- Mandating that the regulations make provision about specified matters, including the treatment of royalties and other monies; and
- Providing for the withdrawal of an authorisation to grant licences, including for determining the rights and obligations when an authorisation is withdrawn.

## Monetised costs and benefits

In order to allow us to calculate the costs and benefits we need to be able to estimate the potential levels of use of the scheme. To do this we have taken the Canadian system as a proxy

### *Canadian orphan works scheme as a proxy for UK scheme*

Canada has provided for the use of orphan works under Section 77 of its Copyright Act which permits the Copyright Board of Canada to issue a licence on a non-exclusive basis to an applicant who has been unable to find a rights-holder after every reasonable effort to do so (<http://www.cb-cda.gc.ca/unlocatable-introuvables/brochure2-e.html>).

The Canadian orphan works system has been in operation since 1990 and between 1991 and 2009 dealt with some 421 applications covering 12,640 different works.

The Canadian system shares many characteristics with the proposed UK Orphan Works scheme. It works on the basis of licensing individual works following a search for rights-holders and allows both commercial and non-commercial use. Between 1991 – 2009 49% of applications were classed as “commercial”.

One of the key differences between the two schemes is that the Canadian scheme only applies to works that have been published, whereas the UK scheme applies to all works – both published and unpublished. (Other orphan works’ schemes such as India’s include unpublished works.)

This is a significant difference when assessing potential demand for the scheme. Consultation responses indicated that a substantial proportion of orphan works held in the archives of large museums and archives were unpublished. For example, The National Archives stated that that their orphan works are “for the most part” unpublished, and the British Library state that “very large proportion are unpublished”

The assumption applied is that the low end of the range will be twice the level of usage of the Canadian scheme, with the high end of the range four times the level. This is likely to be a conservative estimate, given that many orphan works held in the UK are unpublished. Also the population of Canada is approximately 35m compared to approximately 63m in the UK. This factor might also be reasonably expected to impact on potential levels of usage of the respective orphan works schemes.

### *Assumption on potential levels of use*

It should be noted that the assumptions used in calculating all the costs and benefits in this IA have been revised and differ from those used in IA BIS 1063. In particular, the assumption that archives would clear 5-10% of their works over a 10 year period (which would enable any orphan works found in this process to be used) in IA BIS 1063 has been up-dated. This reflects the fact that IA BIS 1063 was drafted when the EU Directive on Orphan Works was at an early stage and its potential impact on the domestic scheme was not taken into account. Taking the potential impact of the EU Directive on Orphan Works into account, the 5-10% clearance figure is more properly attributed to the EU Directive scheme (adjusted to reflect the narrower scope of the EU Directive scheme). Furthermore, it should be noted that the domestic scheme provides for the licensing of individual orphan works for specific purposes, rather than permitting any mass licensing of works. Accordingly, in order to gain an understanding of the total impact of all the legislative changes in respect of orphan works (both the domestic scheme under the Enterprise and Regulatory Reform Act and under the EU Directive), it is necessary to consider the total costs and benefits from both IAs.

The assumptions on the potential level of usage for the domestic scheme are based on the work that the IPO has undertaken in planning for the setting up and running of the Authorising Body, which, in turn, was based on evidence from the Canadian Orphan Works scheme.

As discussed above the assumption of the potential level of usage for the domestic scheme is based on evidence of the number of applications under the Canadian orphan works scheme, up-rated to reflect the fact that the Canadian scheme only applies to published works, whereas the UK scheme also covers unpublished works. The indicative evidence from museums and archives is that unpublished works make up a large part of the orphan works in the UK.

Up-rating the number of applications under the Canadian scheme (which licenses about 750 works annually) by 2 and 4 respectively as discussed above gives an estimate of 1,500 and 3,000 as the expected annual number of works for the UK scheme.

Using the information on the number of archive holdings and the estimated proportion range of these holdings that are orphans provided by the BBC, British Library and consultation respondents we can estimate the current number of orphans in the UK. We took the midpoint of the orphan ranges and multiplied this by the archive holdings size, to give us an estimate of 91m orphans held by archives. The table below summarises the calculation:

Media category	UK sample holdings	BBC & BL	Orphan Range	Orphan Range	
				Mid-point	Estimated Orphan Works Holding
Artwork	548,000	-	20%-25%	22.50%	123,300
Sound Recording	750,000	350,000	5%-10%	7.50%	82,500
Archive Films	513,000	600,000	5%-35%	20%	222,600
Archive photos	28,280,000	5,000,000	5%-90%	47.50%	15,808,000
Written material	10,400,000	14,000,000	4%-30%	17%	4,148,000
Newspapers*	-	112,500,000	4%-95%	50%	56,250,000
Mixed collections	38,000,000	20,500,000	8%-40%	24%	14,040,000
TOTAL					90,674,000
*we keep the low newspaper percentage equal to books, and the high equal to the British Library's suggestion of the estimated number of orphans in the newspaper collection [9, page 22, 36, 38]					

We exclude commercial film archives and photo libraries (other than the BBC) as there were differing views on whether there were many orphans within these sectors. Some of the representative organisations in these sectors responded in the consultation that they had relatively few orphans in their archives. (One response relating to commercial film archives estimated 0%-7% as their orphan range. One response relating to photo archives and picture libraries reported approximately 0% as their orphan range but this excluded archive photographs which are more likely to be orphan than contemporary ones). However, other respondents stated that photo libraries may have 5-10% as their orphan range.

Accordingly, the estimate of 91m orphan works is likely to be a conservative one.

Therefore we are expecting 0.0017% - 0.0033% of orphan works to be cleared using the scheme per year. This has been calculated by dividing the anticipated 1,500 – 3,000 annual number of applications by 90.1m.

These calculations have utilised real-world information from work the IPO has been doing on planning for the running of the authorising body, and so make use of the best available information to recalculate the clearance rate of orphans, given it is an individual licensing scheme.

## Costs

### Cost of creating an authorising body - £0.54m - £1.07m

The IPO has commenced detailed planning for setting up and running the Authorising Body. The estimated IT set up costs are between £500k- £1m and the estimated other costs (such as staffing, training) are between £42k-£67k.

The estimated IT costs are based on extending an existing IPO IT project (MyIPO) to support the Orphan Works services. Only the specific additional components needed to implement the back office activities that build these processes will need to be developed and maintained as shown above. MyIPO is based upon an extendable infrastructure which already supports auditing, document management and payment handling which are required for the other services that it is designed to host.

Given that the MyIPO project will be delivering a core system by March 2014 this minimises the amount of development and cost required to successfully deliver a robust and secure system for public use by building upon this infrastructure.

Estimated Total IT Cost = £500k - £1m depending on rate card for selected supplier. Hardware/ Software costs will be zero or minimal as this will be met by the wider MyIPO infrastructure costs. Using this option the Orphan Works system is a component of the MyIPO deliverable for IT rather than a separate IT demand. As with all current digital spend, approval is being sought on the proposed approach to IT and the associated spend, through the BIS Digital Leaders group and the Cabinet Offices' Government Digital Service (GDS). This provides further scrutiny and assurance that public money for this project is being spent correctly and appropriately in line with wider government spending control.

£25-50k of the costs is for the staff involved in running the Authorising Body (see below for more detail).

The remaining £17k of the set up costs is the initial training costs for staff running the scheme.

This gives a total estimated set up cost of between £0.54m-£1.07m. The estimated transition time is just 1 year, given that the authorising body is likely to be the IPO, which already exists. The transition time would mainly relate to creating the infrastructure and functionality to enable the IPO to act as the authorising body.

### Cost of running authorising body - £50k p.a.

While detailed decisions about staffing are yet to be taken, we have assumed that the resource involved will be equivalent to one FTE at Executive Officer (B2) level once the Authorising Body is set up.. The estimated staff levels are based on an assessment of the work needed to process

the estimated number of applications a year (1,500) referred to above (Assumption on Potential Levels of Use), and is based on the processes the IPO is currently developing for the licensing of orphan works.

This approach should cost no more than £50,000 per annum, which represents the full out-turn costs of one FTE at B2 level.

These administrative costs will be passed on in the form of an administration fee to users, although exactly how this will be distributed has not yet been decided and may need to take into account factors such as the amount of work involved, the value of the licence and type of use.

## Cost of diligent search for users of orphan works - £99k - £253k pa

Legislation allowing the use of orphan works, both under the domestic scheme and the EU Directive require the carrying out of a diligent search for the (right-holders and/or creators). For the domestic scheme such searches will be carried out by the applicants, according to sector-specific guidelines, set by the authorising body with input from the sector. The authorising body would require details of sources searched and methods used with each orphan work application. The search will be compatible with the requirements of the EU Directive where applicable [5].

Therefore we need an estimate of how many items are likely to be searched under an orphan works licensing system. We then need to subtract those searches carried out under the auspices of the EU Orphan Works Directive to establish the number (and cost) of diligent searches that fall under the domestic orphan works scheme.

In the earlier impact assessments the IPO drew heavily on the available information about the BBC and British Library archives. These were some of the few data points available for estimating the size of archives and proportion of orphans. In their responses to the consultation, the BBC and British Library did not object to our estimates, and each added further detail as to its holdings on material, with the caveat that these are approximations based on length of shelf space and volume holdings [23]. We also received many submissions from other archives who want to use an orphan works system, beyond the interest expressed by the BBC and British Library.

Media	Archive	Total collection size
TV & Radio	BBC	950,000
Photos	BBC	5,000,000
Sundry items	BBC	2,000,000
Newspapers	British Library	112,500,000
Books	British Library	14,000,000
Sundry items	British Library	18,500,000

We aim to estimate the cost of conducting diligent searches in these types of archives, which are amongst the largest in the UK, where the holders are keen to use orphan works. To get an hourly cost of labour we use the UK Annual Survey of Hours and Earnings (2012) (ASHE) median hourly pay for Librarians (£13.62 p/h) and Archivists and Curators (£14.01 p/h).

To establish the cost of searching books we use the 2006 Carnegie Mellon University Library's pilot project, and submission (#537) to the US Orphan Works Report [9, page 36], which estimates that it costs \$78 per item in 2006, plus \$132 in legal and supporting costs, making it \$200 per item. Converting into pounds for 2006 this is equivalent to £43 at the lowest cost and £115 for the highest cost per item, using an exchange rate of 0.55 [34]. Controlling for inflation the 2012 price would be £49 and £131, to make the figures comparable to the ASHE figures from 2012, using the Bank of England's GDP deflator.

We then need to establish how long it takes to undertake diligent searches for different types of content.

TV & Radio: The BBC's rights clearance trial found that checking 1,000 hours of factual programming (which is less complex than drama or comedy programmes) for rights implications, cost them 6,500 person hours [1]. Given this, we estimate that clearing television footage and radio material takes 6.5 hours per hour of material, so to clear the BBC archive of TV and Radio would take 6.1m hours ([600,000 hours of TV + 350,000 hours of radio] × 6.5 hours to clear). The Federation of Commercial Audio Visual Libraries, FOCAL, pointed out that much of this time was spent clearing rights rather than searching for right-holders, as older contracts did not have sufficient permissions for current needs [26]. The 6.5 hours could therefore be considered an upper bound, and we assume that half the time was spent clearing identified rights, so reduce the figure by 50%, to 3.25 hours, to get a lower bound estimate of 3.1m hours ([600,000 hours of TV + 350,000 hours of radio] × 3.25 hours).

Photos: We assume that each of the BBC's five million still photographs take 3.5 hours to clear as we do not have comparable data on the cost of clearing photographs. We do know that the Wellcome Library's digitisation project cleared the rights for posters, which should be simpler than photographs as they are usually signed, and this cost an average €50 (£43) per poster, which is similar to 3.5 hours of archivists working time cost in the UK (at £14.01 per hour, this is £49). Similarly, the Imperial War Museum takes on average half a day, or 3 ¾ hours (in a 7.5 hour work day) to search an artwork in their collection [25], and the suggestion in other archive submissions was that 3.5 hours was an appropriate estimate. That means it would take 17.5m hours to clear the photo archive. (5,000,000 photos × 3.5 hours)

Sundry content: We assume that the BBC's other content takes one hour at the low estimate for each of the approximately two million items, but 3.5 hours at the high, as sundry items would include various artworks, music scores, and other material. This gives a range from 2m to 7m hours to clear. Similarly for the British Library's 18.5m pieces of sundry content the range would be 18.5m to 64.8m hours.

Newspapers: For the British Library holdings of 150m items we assumed in the previous impact assessment that 75 per cent of the orphans were newspapers, and the British Library did not disagree with this rough estimate. It is worth noting that the newspaper figure is not the number

of titles as suggested in one criticism of the figures, but the number of issues from all titles. This is important, as the Chartered Institute of Journalists pointed out, because 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. Therefore it is potentially not just newspaper issues but individual stories that can be orphans, and according to the Institute “based on limited sampling, the number of works involved appears to run into hundreds of thousands, perhaps millions, of immense value. This is because so many items were published in newspapers or magazines without attribution, and only limited records were retained” [24].

Given this, we retain the total newspaper figure in calculating the potential cost of searching the archives:

Books: The British Library provided a figure of 14m monographs in the archive as part of their response to the consultation, which we have included, and then we have treated the remainder of the collection (18.5m items) as sundry items, with clearance time equivalent to the BBC content [29]. In a 2009 digitisation project at the British Library it took them 235 man hours to search the rights for 60 titles alone. This suggests an average time of between three and a half and four hours per issue ( $235 / 60 = 3.91$ ).

The table below provides an overview of the total cost from fully searching both the BBC and British Library archives, which makes it a total expenditure of between £6.6bn and £8.4bn.

The cost of searching the full archive					
Archive	Content	Hours to clear	Quantity	Cost	Total cost
BBC	TV & Radio, low est.	3.25	950,000	£14.01 p/h	£43.3m
BBC	TV & Radio, high est.	6.5	950,000	£14.01 p/h	£86.5m
BBC	Still photos	3.5	5,000,000	£14.01 p/h	£245.2m
BBC	Sundry items, low est.	1.0	2,000,000	£14.01 p/h	£28.0m
BBC	Sundry items, high est.	3.5	2,000,000	£14.01 p/h	£98.1m
BL	Newspapers	3.5	112,500,000	£13.62 p/h	£5,362.9
BL	Books low est.	-	14,000,000	£49 p/item	£686.0m
BL	Books, high est.	-	14,000,000	£131 p/item	£1,834m
BL	Sundry items, low est.	1	18,500,000	£13.62 p/h	£251.9m
BL	Sundry items, high est.	3.5	18,500,000	£13.62 p/h	£881.9m

Given an orphan works licensing system the BBC and British Library would engage in clearing more of their archives, as they could make use of the orphans through the permission system. We do not expect that such a project would happen immediately, nor that it would cover the entire archive, as only parts of it will contain suspected orphans. So we maintain the assumption that between 0.0017% and 0.0033% of the available content in the BBC and British Library would be cleared per year. The total cost of this would be between £109k and £282k per annum ( $[0.0017\% \times \text{£}6.6\text{bn}]$  and  $[0.0033\% \times \text{£}8.4\text{bn}]$ ). The best estimate being the average of the two, £195k p.a.

However we know that a percentage of these searches occur already but are often wasted as the users would not be able to achieve any benefits as a result of discovering the work was an orphan. We have therefore reduced the costs of the scheme to take this into account. We have assumed that 10% of the searches would already occur, but are keen to test this assumption at consultation. Therefore the costs of diligent search are reduced by 10% giving an estimate of between £99k and £253k with a best estimate of £176k per annum

As has been pointed out in a number of responses, such costs seem high for two organisations that are far from typical even if they intend to make use of an orphan works system. This is a fair point, which is why we do not use these costs and scale up for the 2,500 museums, 3,393 public libraries, 3,000 community archives, 979 academic libraries and approximately 3,500 trust archives which might seek to use an orphan works scheme [27]. Instead we use our established archive holding figures for the BBC and British Library as a proxy for expected total UK activity. Fortunately, as part of the consultation, other institutions have provided information about their collections and an initial estimate of their suspected orphan work holdings. We can use this to test if our cost figures are in the appropriate range. The table below summarises the majority of estimates provided by archive holders, and the percentage of each collection they consider potentially orphan.

This is probably the most complete list of orphan work estimates that have been collected, even compared to the EU Commission's research [9]. These are sorted by rough categories which correspond to artwork, sound recordings, films, photographs, written material and mixed holdings but this is not exhaustive.

Media	Archive (source, if different)	Total collection size	Orphans
Art	Imperial War Museum	48,000 works	20%
Paintings	Guildhall Art Gallery (LMA)	-	20%
Prints / drawings	London Metropolitan Archive	-	25%
Artwork	National History Museum, London	500,000 items	25%
Sound recording	Imperial War Museum	33,000 records	5%-10%
Sound recording	British Library	700,000 hours	-



Media	Archive (source, if different)	Total collection size	Orphans
Film	UK film archives (FOCAL)	17,000,000 hrs	0.5% for most
Film	Imperial War Museum (FOCAL)	-	0.25%
Film (Europe)	European Film Archives [9, page 25]	3,200,000 titles	4%-7%
Archive Film	Imperial War Museum	230,000 items	5%
Archive Film	British Film Institute	-	10%
Archive Film	National Library of Scotland	32,500 items	20%
Archive Film	Huntley Film Archives (FOCAL)	80,000 titles	20%
Archive Film	London Metropolitan Archive	-	35%
Digital Photos	Getty	33,000,000 items	-
Physical photos	Getty	70,000,000 items	-
Photo libraries	British Association of Picture Libraries and Agencies	-	~0%-5% “non-issue”
“New deal” photo	London Metropolitan Archive	260,000	5%-40%
Archive Photos	London Metropolitan Archive	-	15%
Archive Photos	Imperial War Museum	11,000,000	20%
Archive Photos	UK Museum collections [9, page 29]	19,000,000	90%
Archive Photos	National Archive sample [9, page 30]	85,000	95%
Books	Authors Licensing & Collecting Society (PwC)	-	<4.7%
Documents	Bedfordshire and Luton Archives Services	-	15%
Books	National History Museum, London	1,000,000	20%
Books	National Library of Scotland	1,500,000 items	~25%
Documents	Imperial War Museum	7,900,000 items	20%-25%

Media	Archive (source, if different)	Total collection size	Orphans
Manuscripts	National Library of Scotland	-	20%-30%
Books	British Library sample [10]	-	31%
Books in copyright	British Library sample [10]	-	43%
Manuscripts	National History Museum, London	1,304 metres / 195m <sup>3</sup>	50%
Texts	Oxford University	600,000 items	100%
Photos, reports, plans, drawings	English Heritage	12,000,000 items	8%
Overall collection	London Metropolitan Archive	-	15%-20%
Text & drawings	Museum of Childhood (NMDC)	-	15%-20%
Text, photos, maps, plans	National Records of Scotland	80km shelf space	~15%-50%
Text, photos, illustrations etc	National Archive	11,000,000 cat. Items ~180km shelf space	40%
Records / Photos	Southampton City Council	-	30%-50%
Collection on industrial heritage	Leicester University	-	60%
Testimonials	Imperial War Museum	8,000 reels	100%

These figures suggest that there are many organisations that hold potential orphans. These could benefit from a diligent search and the certainty of a permission to use orphans, or agreeing licensing terms with right-holders where such are found. The data, while indicative, compares well to the orphan work estimates in a 2009 JISC report [6] and suggest that different sectors and content have different needs.

Media category	UK sample holdings	Orphan range
Artwork	548,000	20%-25%
Sound Recording (hrs)*	750,000	5%-10%
Commercial film (hrs)**	21,800,000	0%-7%
Archive Films (hrs)	513,000	5%-35%
Photo libraries	>100,000,000	~0%
Archive photos	28,280,000	5%-90%
Written material†	10,400,000	4%-30%
Mixed collections§	38,000,000	8%-40%
<p>*Scaling the average IWM record to 90 minutes, or one standard cassette tape  **Treating an average film as 1.5hrs long, and including both UK and European film archives  †not counting the 600,000 orphan texts at Oxford and the 195m3 material at the national history museum.  §Treating the average work at the National Archive &amp; National Records Scotland as a 1cm wide holding.</p>		

These exclude the commercial film archives and photo libraries as there were differing views provided in consultation responses on whether there were many orphans within this sector. Some of the representative organisations in these sectors responded that they had relatively few orphans in their archives. (The commercial film archives responded 0%-7% as their orphan range, while photo libraries responded approximately 0% as their orphan range – excluding archive photographs). However, other respondents in these sectors stated that photo libraries may have 5-10% as their orphan range.

### Impact of fees on the user and market,

The issue of finding both orphans and right-holders raises the issue of how the authorising body should structure its fee schedule. The fee schedule has not yet been decided so it is not possible for us to calculate the costs of fees. It will be a fundamental principle of the scheme that the Authorising Body in setting licence fees for the use of orphan works, as far as possible, should seek to mirror what happens with equivalent non-orphan works. This is aimed at ensuring that the licensing of orphan works does not under-cut the market for non-orphans.

## Benefits

### Benefit to Users and the public from content that is orphan (£214k-443k),

Currently, the majority of archives would not undertake large diligent search projects because too much of their time will be wasted when works turn out to be orphans and therefore unusable. This is why the orphan works solution may mean a change to business practice, as users would be able to use all works covered by such searches. The majority of these searches are likely, however, to be undertaken under the auspices of the EU Directive and are now attributed to the EU Directive IA.

While the public will benefit from accessing these works and the users may extract additional value from cleared orphans, our estimate of the benefits is based only on the cost of clearance, not any additional gain. We do this partly because the costs can be estimated with some degree of certainty, while potential benefits to the public and users would be speculative. As participation is voluntary, a user would not attempt to clear content where it did not believe the value of that activity to at least cover the costs. As we cannot, with any certainty, predict the value of the orphan works beyond this business decision, we use the costs as our benchmark benefit to users.

We calculated the benefit to orphan works users as being at least as much as the cost of the search plus the administration fee charged by the Authorising Body. The administrative fee, which is yet to be finalised, is calculated here by taking the annual running costs and assuming the set up costs are recouped over 10 years. This is a conservative minimum estimate as it would also be reasonable to assume that the benefit would be at least as much as all the associated costs with using an orphan work which would also include the licence fee payable and in most cases may be considerably more. It is not possible, however, to estimate the value of the licence fee element as it will vary according to the rate payable for comparable use of non-orphan works of the same type.

This yields an expected benefit of between £213k and £439k per annum, with the best estimate being the average of the two, £326k [30]. (£109k+50k+ 54k and £282k+50k +107k)

These are just the cost-based figures however, and it should be borne in mind that additional commercial opportunities can arise from permissions to use orphan works. For example, the British Film Institute estimates that, if it were enabled to use orphan works, it might generate an additional annual gross income for itself of more than £500,000 [1, page 39]. So there are additional un-quantified benefits to users of the orphan works system.

The Collections Trust estimates that UK museums and trusts contribute around £1.2 billion to the UK economy each year through their exhibitions and cultural activities. The average proportion of Orphan Works in collections across the UK's public sector was measured at 5% to 10%, whilst in certain sectors (archives) this proportion was higher. So if 5-10 per cent of UK museum collections are orphan as estimated in [6, page 6], and therefore not used, adding them to the economic contribution of the exhibitions could potentially add more value to the

museum, trusts and the visitor experience. We could assume the value of orphans is equal to that of non-orphans in the museums and trusts sector, meaning they could add between £50m and £130m p.a. (low:  $[\pounds 1.2\text{bn}/95] \times 5 = \pounds 50\text{m}$ , i.e. the current £1.2bn value reflects 95% of the collection and we want to know how much 5% would be worth; high:  $[\pounds 1.2\text{bn}/90] \times 10 = \pounds 130\text{m}$ ).

Using our assumption that 0.0017%-0.0033% of holdings would be cleared per year under the UK orphan work scheme, we can estimate a rough indicator that between £800 (0.0017% x £50m) and £4,300 (0.0033% x £130m) of additional value would be released per year with an average of £2,550pa.

Therefore adding the two together we get estimated benefits to users of between £214k (£213k +£1k) and £443k (£439k + £4k) giving an average benefit of £329k

Following consultation, and in particular discussion with the author of the report on the scope of orphan works [6], who has undertaken a survey to estimate the incidence of orphan works in museums, it has been suggested that the value of orphans was uneven, although within this there is some highly valuable content. But it was argued that highly valuable content was unused. Not wanting to over-estimate the potential contribution of orphan works in this impact assessment, we do not presume that orphans are more valuable, but this is an indication that our figure may be an under-estimate of the benefits.

### **Benefit to growth and business creation,**

In addition to the direct reduction in costs of clearance through orphan works reform, we expect benefits to growth and innovation from the availability of very large amounts of historic orphan content in UK archives. While there are firms in this market, and organisations such as the BBC, British Library, The National Archives, British Film Institute who already want to digitise collections for use, we treat this as an indirect benefit for the purposes of One-In Two-Out (OITO) calculations; as the commercial firms in this space do not yet exist, or have not yet decided to work with UK archives, due to the orphan works problem.

The Government has not been able to obtain evidence on which one might be able to base any monetisation/quantification of the indirect benefits to growth and business creation. Nonetheless, we would expect benefits to growth and innovation from the potential availability of large amounts of historic orphan content. The previous impact assessment used the genealogy sector in the UK and the US as a proxy for the orphan works scheme. This was based on a mass clearance type approach rather than the clearance of individual works and so is no longer applicable.

Evidence from responses to the consultation (carried out as part of the Government's response to the Hargreaves Review) indicated that there would potentially be benefits to growth but did not estimate the scale of these or monetise them. For example, the CBI in its response stated that it "welcomes the Government's proposal to legislate so that orphan works can be accessed more easily, allowing businesses to exploit valuable IP - which would otherwise go untapped - without the risk of infringement".

Evidence from the operation of the Canadian Orphan works scheme, which, like the UK scheme, allows for commercial and non-commercial licence use of individual orphan works, shows that a substantial proportion of use under the scheme has been commercial. 37% of applicants were from businesses, with 49% of applications for commercial use.

This indicates that the UK scheme has the potential to generate a high level of orphan work use from businesses for commercial uses, with the concomitant benefits to growth and business creation. This is particularly so when one takes into account the larger scope of the UK scheme, which includes unpublished works as well as published works, combined with the fact the UK population is nearly double that of Canada.

At present the time required to undertake diligent searches of complex content can prevent new technology opportunities being exploited, as content cannot be used if it is orphan. (Note that under the domestic orphan works scheme, organisations would still be required to perform a diligent search.) The BBC, one of the largest holders of historic content in the world, made this clear in its submission to the Hargreaves review:

“The existing copyright framework poses challenges for BBCW as it can be difficult to clear all the rights in sufficient time to facilitate a deal. In the digital age “speed to market” is critical to maximise returns and often with new types of technology there is only a limited window of time to leverage the best deals. However the complexity of the clearing rights for commercial purposes has sometimes previously prevented BBCW from pursuing commercial opportunities. For example, BBCW lost out on a lucrative deal several years ago involving making classic comedy clips available on mobile phones at a time when delivery of content to mobile phones was in its infancy.”

Orphan works would only have been one of the issues in this case. However in discussions with BBC Archives, and in the BBC submission, it has been suggested that orphan material can be a much greater problem in older material. The BBC has one of the largest audio visual and written history archives in the world, some of which is too costly to clear and make available to the public. In its submission BBC says “It is not always possible to trace underlying rights holders for orphan works for a number of reasons.

- The existence of underlying rights may not always be clear, e.g. “we cannot always determine whether presenters of a show wrote their own scripts or simply voiced a script written by someone else. While performance contributions are currently protected by copyright for a period of 50 years, there may be other elements (e.g. pre-written script/literary content) protected by copyright for a longer term of lifetime + 70 years. In many cases these elements were not identified in early programmes or programme listings. It is therefore impossible to know if there are contributions within the period of copyright protection or not.
- It is not always possible to identify or to contact the rights holder. This happens, for example, in the case of anonymous contributions, or where it is not possible to determine who has inherited rights upon the death of a rights holder.”

BBC policy is to make available as much as possible of its archive to the public. It is also interested in creating commercial value through its assets, which would include the use of archive material for personal history services, for which there is growing demand - spurred by and reflected in the audiences for family history TV programmes (e.g. “Who do you think you are”, which attracts 6 million viewers and has been adapted as a format in ten other countries)

### **Benefit to current orphan work users, from more legal certainty in the UK**

A number of museums and archive holders which responded to the consultation are currently using works that have been diligently searched, and have been found to be orphan. A number of them do so by making provisions for potential right-holders through a risk insurance, which a few museums referred to in their consultation responses; some set aside funds in an “awaiting claims” account, as the BBC does. Some simply take the calculated risk that no-one will come forward and do not keep funds aside at all. Without a system of permissions, all this activity is effectively infringing copyright even though cases can be, and often are, settled through a licensing agreement.

The orphan works system will offer licences that cover the UK, which remove legal uncertainty as to the use of orphan works. For example, in 2009/10 the BBC had programme income of £8.9m subject to awaiting claims due to untraceable owners or failures to respond to clearance requests [31]. The orphan works system would remove the need for a legal risk premium where content was aimed at the UK market, and would remove the need to keep money aside as it would charge fees up-front.

Institutions which do not put aside funds for their use of orphans will, with an orphan works system in place, be more exposed to discovery which should make the enforcement of rights simpler. It is not possible to quantify the total benefit of this, as it will depend on how much is currently put aside, how much content is aimed at the UK market and the legal risk assessments of each firm, all of which is commercially sensitive or confidential information which we cannot access. However the overall effect should be positive. It may even reduce the legal risk for entities looking to use orphan works globally as permission in the UK could be seen as a strong argument for the orphan status of a work where other countries offer legal means of using orphan works.

### **Benefit of increased lawful use of the copyright system**

The Government has received comments that the ability to utilise orphan works on an authorised basis is likely to increase overall confidence in copyright per se. The situation where culturally valuable material cannot be used without permission, to the detriment of the public and the right-holder, tends to decrease respect for the copyright system as a whole, and may reduce compliance in other areas.

Furthermore, increased lawful use through the scheme would mean additional revenue being paid by currently unlawful users to reventant rights holders.

There would also be a further benefit in terms of making the unauthorised use of orphan works easier to detect.

## Risks and assumptions;

In addition to the key assumption of demand being as predicted in the section on “assumption on potential levels of use” above, the following risks and assumptions have been considered:

### Risk of actively “orphaning” work by ripping metadata, medium

There is a justified concern particularly from photographers about the current copyright system, where their work, once digitised, is appropriated by unscrupulous content sellers, and the identifying information (metadata) is removed in order that the work can be presented as owned by the unauthorised seller.

Allowing the licensed use of orphan works would not prevent such abuse across the copyright system, but nor will it exacerbate the problem, and there are a range of safeguards which will mitigate any risks arising from the removal of metadata in the context of orphan works. Before any licence to use a work as an orphan can be issued the applicant must have conducted a diligent search for the rights-holders, in accordance with sector specific guidance. Experience of licensing orphan works in Canada has demonstrated that 22% of applications do not need to be pursued as the diligent search process identifies the rights-holder. Nor will the absence or removal of metadata in itself make a work “orphan” or allow its use under the orphan works scheme. It is also worth bearing in mind that the over-whelming majority of orphan photographs held by museums and archives are old analogue historical photographs rather than digitally created images. The requirement for an up-front payment at the going rate would also act as a disincentive to the deliberate removal of metadata and to inadequate diligent searches.

### Unlawful use

On the basis of evidence from stakeholders received through the consultation and subsequent discussions with the cultural heritage sector, we have assumed that, if there were a workable scheme to allow users to use orphan works lawfully, then the majority would choose to use such a scheme rather than choose to continue with a risk based approach. The impact of introducing schemes to allow for the lawful use of orphan works is therefore expected to significantly reduce the unlawful use of orphan works through a “risk based” approach.

## Wider impacts

The relationship between the orphan works system and the Copyright Hub

The Hub is an industry-led initiative that aims to make copyright licensing easier and more streamlined with low transaction costs for both licensors and licensees. When completed, the Hub will be a portal with intelligent connections to a wide range of websites, digital copyright exchanges and databases in the UK and around the world, with the focus on making copyright licensing easier in the digital age



The Hub is currently in its test phase. A fully functioning Hub could reduce the costs of those wishing to use some types of orphan works. It could be easier to search for content and rights holders could monitor all their content in one place, rather than the present situation where there is no central registry/database. There would be no benefit from the Hub for unpublished archive material.

## Orphan Works Directive

The EU Directive creates an exception to copyright legislation to allow cultural heritage organisations to digitise and make available to the public orphan works within their collections after a diligent search, for non commercial use. Organisations will search as a minimum the appropriate sources set out in the Directive and any others they think will contain information on rightsholders. The responsibility for the diligence of the search will lie with the organisation making use of the works. If rights holders emerge after the diligent search they are entitled to fair compensation which will be agreed between the parties. If the diligent search has been completed competently this process removes the risk of copyright infringement.

The Directive restricts the types of orphan works to books, journals, newspapers, magazines or other writings, cinematic or audiovisual works and phonograms. It does not include the use of artistic works such as standalone photographs, illustrations and paintings but embedded artistic works within works are permitted. The uses under the Directive are limited to digitising material and making it available to the public. The Directive also limits the organisations that are able to use the works to cultural and heritage organisations with a public mission. These are:

- Publicly assessable libraries
- Educational establishments
- Museums
- Archives
- Film or audio heritage organisations and
- Public-service broadcasting organisations

Following a diligent search organisations are required to submit the following information to the Office for Harmonisation in the Internal Market (OHIM) via the national competent authority: the results of the search, the use the organisation will make of the work, any change to the status of the work and relevant contact details. OHIM will maintain a database of all orphan works being used so rightsholders will be able to identify works and organisations can see diligent searches that have been completed. The Directive allows for mutual recognition across the EU, so a diligent search completed in one Member State will be valid across the whole EU. This would avoid duplicate searches where an organisation has a physical copy of an orphan work within their collection that has had a diligent search already completed by another organisation.

## Post Implementation Review plan

A full evaluation strategy and Post Implementation Review is being developed for the introduction of the Hargreaves recommendations. The Post Implementation Review will detail the benefits associated with the introduction of the copyright reforms and will include input from external stakeholders. The plan will also set out how and when the benefits will be measured, which will depend on the type of benefit, as some benefits will be measured by applications and take-up that can be measured from the first year of operation, whereas others will depend on information that will take several years. The evaluation strategy will set out the activities that will be undertaken in order to evaluate the policy, drawing on management information collected through the copyright system, as well as research that is commissioned in order to measure the benefits.

In addition, during the legislative passage of the Enterprise and Regulatory Reform Act 2013, a Ministerial commitment was given to review the domestic orphan works scheme after its first year of operation.

## Direct Costs and Benefits to Business Calculations (following OITO methodology) and Micro Exemption

The orphan work solution would mean that holders and users of works with an unknown or un-locatable creator would be effectively exempt from the regulatory framework surrounding copyrighted works providing they have met the requirements of the scheme: so it recasts regulation in order to reduce the burden on organisations holding or wishing to use orphan works. There will be a series of safeguards around the use of orphan works but these impact businesses indirectly as they only apply when businesses choose to use the orphan work. Freelance creators should benefit from an increased probability of being reunited with any orphan works in the diligent search and, in the limited cases where they are not found at that stage but appear after the work has been licensed, they will receive licensing fees for the use and regain control of the work. Micro businesses are not excluded from the scope of this proposal because, there would be an overall benefit for them from being able to use orphan works.

Given the main users are likely to be archives and some of these would classify as public bodies we have attributed 50% of the costs and benefits to business. This gives an annual net benefit to business of £0.008m and is therefore classified as an OUT.

We are not able to calculate all the benefits to business given a lack of available evidence of potential value, however given that this is an entirely voluntary scheme and therefore applications will only be made if the benefits outweigh the costs we believe this in reality to be a larger out.

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26	FOCAL International submission to the Copyright Consultation, page 9
27	Museums and galleries: <a href="http://www.museumsassociation.org/about/frequently-asked-questions">http://www.museumsassociation.org/about/frequently-asked-questions</a> ; Public Libraries: Figure from DCMS, from Chartered Institute of Public Finance and Accountancy; Archive figures from Archives & Records Association submission to the copyright consultation; Academic Library figure (2008/09) from Bridgeman submission to the copyright consultation

28	Calculation: Media × UK sample × hours to clear × cost per hour = cost to search that medium.																																																								
	<table border="1"> <thead> <tr> <th>Media category</th> <th>UK Sample</th> <th>Hours to clear</th> <th>Cost</th> <th>sum</th> </tr> </thead> <tbody> <tr> <td>Artwork</td> <td>548,000</td> <td></td> <td></td> <td></td> </tr> <tr> <td>Sound Recording</td> <td>33,000</td> <td>1</td> <td>£12.76</td> <td>£421,080</td> </tr> <tr> <td>Archive photos</td> <td>28,280,000</td> <td>3.5</td> <td>£12.76</td> <td>£1,262,984,800</td> </tr> <tr> <td>Archive films, low</td> <td>342,000</td> <td>3.25</td> <td>£12.76</td> <td>£14,182,740</td> </tr> <tr> <td>Written material, low</td> <td>10,400,000</td> <td>per item</td> <td>£47.00</td> <td>£488,800,000</td> </tr> <tr> <td>Mixed collections, low</td> <td>38,000,000</td> <td>1</td> <td>£12.76</td> <td>£484,880,000</td> </tr> <tr> <td>Archive Films, high</td> <td>342,000</td> <td>6.5</td> <td>£12.76</td> <td>£28,365,480</td> </tr> <tr> <td>Written material, high</td> <td>10,400,000</td> <td>Per Item</td> <td>£126.00</td> <td>£1,310,400,000</td> </tr> <tr> <td>Mixed collections, high</td> <td>38,000,000</td> <td>3.5</td> <td>£12.76</td> <td>£1,697,080,000</td> </tr> </tbody> </table>	Media category	UK Sample	Hours to clear	Cost	sum	Artwork	548,000				Sound Recording	33,000	1	£12.76	£421,080	Archive photos	28,280,000	3.5	£12.76	£1,262,984,800	Archive films, low	342,000	3.25	£12.76	£14,182,740	Written material, low	10,400,000	per item	£47.00	£488,800,000	Mixed collections, low	38,000,000	1	£12.76	£484,880,000	Archive Films, high	342,000	6.5	£12.76	£28,365,480	Written material, high	10,400,000	Per Item	£126.00	£1,310,400,000	Mixed collections, high	38,000,000	3.5	£12.76	£1,697,080,000						
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29	British Library submission to the copyright consultation, page 6																																																								
30	The cost figures are the multiplication of hours to clear and costs from footnote 28, and then the low columns and high columns are multiplied separately to get estimated lows and highs.																																																								
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33	The full list of exclusive acts is in Section 16 of the Copyright Designs and Patents Act (1988)
34	Which is the average of the exchange rate from the first (2 Jan), middle (3 Jul) and last (31 Dec) trading day in 2006, with rates from x-rates.com, 0.581801, 0.543183, 0.510569
35	EU MILE project, 2005, Metadata and Intellectual Property Rights: Orphan Works Meeting, page 3:
36	<a href="http://www.nasdaq.com/symbol/acom/financials">http://www.nasdaq.com/symbol/acom/financials</a>
37	<a href="http://techcrunch.com/2012/04/25/ancestry-com-acquires-archives-com-from-inflection-for-100-million/">http://techcrunch.com/2012/04/25/ancestry-com-acquires-archives-com-from-inflection-for-100-million/</a> ; <a href="http://www.archives.com/aboutus">http://www.archives.com/aboutus</a>
38	<a href="http://genealogy.about.com/b/2010/09/23/ancestry-com-to-acquire-footnote-com.htm">http://genealogy.about.com/b/2010/09/23/ancestry-com-to-acquire-footnote-com.htm</a> ; <a href="http://ir.ancestry.com/releasedetail.cfm?ReleaseID=510451">http://ir.ancestry.com/releasedetail.cfm?ReleaseID=510451</a>
39	2010 and 2011 Annual Accounts of Brightsolid Online Innovation Limited
40	Office of fair trading, 2009, "Anticipated acquisition by Brightsolid Group Limited of Friends Reunited Holdings Limited" OFT decision, ME/4212/09; page 4: <a href="http://www.of.gov.uk/shared_of/mergers_ea02/2009/Brightsolid_FriendsReunited.pdf">http://www.of.gov.uk/shared_of/mergers_ea02/2009/Brightsolid_FriendsReunited.pdf</a>
41	Ancestry.com annual report 2011, page 13-14, <a href="http://ir.ancestry.com/secfiling.cfm?filingID=950123-11-23066">http://ir.ancestry.com/secfiling.cfm?filingID=950123-11-23066</a>
42	HM Government, 2011, One-In One-Out (OIOO) Methodology, paragraph 32 <a href="http://www.bis.gov.uk/assets/biscore/better-regulation/docs/o/11-671-one-in-one-out-methodology">http://www.bis.gov.uk/assets/biscore/better-regulation/docs/o/11-671-one-in-one-out-methodology</a>
43	The Impact Assessment calculator, initially developed by the IPO, automates these calculations and is available on <a href="http://www.bis.gov.uk/ia">http://www.bis.gov.uk/ia</a> under "IA calculator".

<b>Title:</b> Orphan Works EU Directive  <b>IA No:</b> BIS IPO001  <b>Lead department or agency:</b> IPO  <b>Other departments or agencies:</b>	<b>Impact Assessment (IA)</b>	
	<b>Date:</b> 04/11/13	
	<b>Stage:</b> Consultation stage	
	<b>Source of intervention:</b> EU	
	<b>Type of measure:</b> Secondary legislation	
<b>Contact for enquiries</b>		

<b>Summary: Intervention and Options</b>	<b>RPC Opinion: Green</b>
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Cost of Preferred (or more likely) Option			
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, One-Out? Measure qualifies as One-Out?
-£425.8m	0	0	No   NA

**What is the problem under consideration? Why is government intervention necessary?**  
 A copyrighted work is orphaned when it is not possible to locate the rightholders after a diligent search. If a work is orphaned it is not possible to seek permissions to use the content, and therefore it cannot be used lawfully and its value to society is lost. The Council of Ministers of the European Communities approved a Directive on certain permitted uses of orphan works, for non commercial use, by cultural organisations with a public-interest mission with orphaned works within their collection, giving the ability to digitise and make them available. Government intervention is required as copyright legislation does not allow for the use of orphaned works as set out under the Directive. The UK is bound to implementation of the Directive.

**What are the policy objectives and the intended effects?**  
 The aim is to create a system where cultural and heritage organisations with a public-interest mission will be able to make use of an exception to copyright law to digitise orphaned works of any written material, film or sound within their collection for non-commercial use and make them available to the public online.

**What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)**  
 As an agreed European Directive, the do-nothing option is not available. The European Commission conducted its own Impact Assessment.  
  
 This impact assessment considered the options of 'do nothing', extended collective online licensing and specific licence for libraries to provide on line access. The approach to provide an exception to certain permitted uses and mutual recognition of orphan work status across the EU provides a fairer compromise and was the option most likely to achieve consensus within Europe. Non-compliance with the Directive will lead to infraction proceedings.

**Will the policy be reviewed?** It will be reviewed. **If applicable, set review date:** 10/2015

Does implementation go beyond minimum EU requirements?		No			
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	<b>Micro</b> Yes	<b>&lt; 20</b> Yes	<b>Small</b> Yes	<b>Medium</b> Yes	<b>Large</b> Yes
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)			<b>Traded:</b> n/a	<b>Non-traded:</b> n/a	

*I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.*

Signed by the responsible SELECT SIGNATORY: \_\_\_\_\_ Date: \_\_\_\_\_

## Summary: Analysis & Evidence

## Policy Option 1

**Description:** Provide an exception to copyright law to allow cultural organisations with a public mission to make certain permitted uses of orphan works

### FULL ECONOMIC ASSESSMENT

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low: -613.77	High: -237.02	Best Estimate: -425.8
2013	2013	10			

COSTS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	0	1	33.8	281.1
High	0		171	1422.1
Best Estimate	0		102.4	851.6

#### Description and scale of key monetised costs by 'main affected groups'

The main costs of implementing the EU Directive are the costs of undertaking diligent searches by the cultural and heritage organisations covered (£28.5m - £73.8m) and also their costs to digitise the orphan works (£5.3m-£97.2m).

#### Other key non-monetised costs by 'main affected groups'

There will be a minimal cost to the national competent authority relating to forwarding on applications, which will contain details of the users' diligent searches, to the Office for Harmonisation in the Internal Market (OHIM).

BENEFITS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	0	1	5.3	44.1
High	0		97.2	808.4
Best Estimate	0		51.2	425.8

**Description and scale of key monetised benefits by 'main affected groups'** The main monetised benefit is the ability for cultural organisations to recoup their costs. This means that the Directive is potentially cost-neutral - it is important to note that although the Directive can only be used for non commercial use it does allow for organisations to generate revenue for the sole purpose of recouping their costs.

#### Other key non-monetised benefits by 'main affected groups'

The main non-monetised benefits are the cultural gain to society through cultural preservation and increased accessibility to a wider range of works, the benefit from findings works that are non-orphan, benefits from past diligent searches, providing legal certainty to organisations using orphan works and benefit from increased lawful use of the copyright system.

Key assumptions/sensitivities/risks	Discount rate (%)
	3.5
<ul style="list-style-type: none"> <li>- The IA for the domestic orphan works scheme (BIS1063) has been used as the starting point for the analysis in this IA, then adjustments have been made to reflect that the Directive is narrower in scope compared to the domestic scheme.</li> <li>- Organisations will use the Directive to reproduce orphan works within their collections. The assumption that they will recoup costs of digitisation as set out in the Directive</li> <li>- Assumption that broadcasters will make limited use of the Directive</li> </ul>	
Low NPV is low costs –low benefits and High NPV is high costs – high benefits	

### BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: £0	Benefits: 0	Net: 0	No	N/A



# Evidence Base (for summary sheets)

## Background

This Impact Assessment relates to proposals to implement the provisions of the certain permitted uses of orphan works Directive.

## Problem under consideration

Orphan works are works or other protected subject matter that are protected by copyright for whom the rightholder(s) is/are unknown or cannot be located after a diligent search has been carried out. They pose a problem for cultural and heritage organisations (libraries, educational establishments, museums, archives, film and audio heritage institutions and public-service broadcasting organisations), which are legally obliged to obtain prior authorisation for making works available to the public online, but are unable to locate and contact the relevant rightholders. In these circumstances, cultural and heritage organisations are either unable to make the works available or those that do make material available online without prior authorisations from rightholders risk copyright infringement. Scanning for preservation purposes is permissible under current copyright exceptions. However, these exceptions do not currently allow libraries to make digitised works available online on the internet, even for non commercial purposes.

The study “In from the Cold”<sup>27</sup> conducted by JISC found 13 to 50 million orphan works exist in the UK, e.g. 5-10% of works in library collections. Some estimates are higher with the British Library estimating that 40% of their archive may be orphaned. These works are locked away and cannot be easily accessed by the public.

The UK has introduced provisions domestically under the Enterprise and Regulatory Reform Act 2013 for a separate orphan works licensing scheme but for use in the UK only. In other respects, the domestic scheme is wider in scope and application than the Directive as any organisation can obtain a licence to reproduce any work following a diligent search for the rightholders for commercial and non commercial use. The Directive differs from this as it provides for an exception to copyright law and only allows for non commercial use but it allows for use across the EU. It also does not require an upfront payment so cultural and heritage organisations can reproduce and make works available without paying for a licence. In order to gain an understanding of the total impact of all the legislative changes in respect of orphan works (both the domestic scheme under the Enterprise and Regulatory Reform Act 2013 and under the EU Directive), it is necessary to consider the total costs and benefits from both Impact Assessments – i.e., this Impact Assessment and the updated Impact Assessment produced for the domestic orphan works scheme.

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27 <http://www.jisc.ac.uk/media/documents/publications/infromthecoldv1.pdf>

Impact assessment BIS1063 was completed for the domestic provisions under the Enterprise and Regulatory Reform Act 2013. As the EU Directive also covers orphan works this impact assessment draws on this original assessment, but considers the more restrictive provisions on use and application.

## Rationale for intervention

The Commission i2010 digital libraries initiative<sup>28</sup> aims to make Europe's cultural heritage available online through the creation of a pan-European digital library and archive, most notably Europeana, an internet portal that acts as an interface to millions of books, paintings, films, museum objects and archival records that have been digitised throughout Europe. Mechanisms such as the Directive on certain permitted uses of orphan works allow content to be made available for this purpose.

The Directive provides a harmonised approach across the EU. It provides legal certainty for cultural and heritage organisations to reproduce works and make them available. This provides greater access to works that are only available in a publicly accessible institution for on-the-spot reference use.

## Policy objective

The aim is to implement the EU Directive creating an exception to copyright legislation to provide cultural and heritage organisations with a legal certainty to digitise orphan works within their collections after a diligent search, for non commercial use. This is a voluntary scheme so cultural and heritage organisations can decide if they want to reproduce works through the exception. Organisations will search as a minimum the appropriate sources set out in the Directive and any others they think will contain information on rightsholders. The responsibility for the diligence of the search will lie with the organisation making use of the works. If rightsholders emerge after the diligent search they are entitled to fair compensation which will be agreed between the parties. If the diligent search has been completed competently this process removes the risk of copyright infringement.

The Directive restricts the types of orphan works to books, journals, newspapers, magazines or other writings, cinematic or audiovisual works and phonograms. It does not include the use of artistic works such as standalone photographs, illustrations and paintings but embedded artistic works within works are permitted. The Directive also limits the organisations that are able to use the works to cultural and heritage organisations with a public mission. These are:

- Publicly assessable libraries
- Educational establishments
- Museums
- Archives
- Film or audio heritage organisations and
- Public-service broadcasting organisations

Following a diligent search, organisations are required to submit the following information to the UK Authorising Body to then forward to the Office for Harmonisation in the Internal Market (OHIM): the results of the search, the use the organisation will make of the work, any change to the status of the work and relevant contact details. OHIM will maintain a database of all orphan works being used so rightsholders will be able to identify works and organisations can see diligent searches that have been completed. The Directive allows for mutual recognition across the EU, so a diligent search completed in one Member State will be valid across the whole EU. This would avoid duplicate searches where an organisation has a physical copy of an orphan work within their collection that has had a diligent search already completed by another organisation.

The Directive will complement the domestic orphan works licensing scheme set out under the Enterprise and Regulatory Reform Act 2013. In some ways, the domestic scheme is wider in scope and application as it allows any organisation to use of any type of work for commercial or non commercial use. The Directive provides for an exception to copyright law.

## Description of Options Considered

The European Commission conducted an impact assessment on cross-border online access to orphan works<sup>29</sup> which accompanied the proposal for the Directive which was adopted by the Council of Ministers on 4 October 2012 and published in the Official Journal of the European Union on 25 October 2012. The impact assessment considered the following 6 policy options:

1. Do nothing
2. A statutory exception to copyright
3. Extended collective licensing
4. An orphan-specific licence granted by collecting societies
5. An orphan-specific licence granted by a public body
6. The mutual recognition of national solutions regarding orphan works

These options are assessed in detail in the Commission's impact assessment document which can be found here: [http://ec.europa.eu/internal\\_market/copyright/docs/orphan-works/impact-assessment\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/orphan-works/impact-assessment_en.pdf)

## Costs and benefits

As stated previously, this Impact Assessment draws on much of the analysis performed in the June 2012 Impact Assessment for the domestic orphan works scheme (BIS 1063) that was prepared as part of the Government's response to the Hargreaves Review of Intellectual Property and Growth<sup>30</sup>. Adjustments have then been made to reflect that the fact that the Directive is narrower in scope than the domestic scheme. These adjustments are set out in this Impact Assessment.

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29 [www.ec.europa.eu/governance/impact/ia\\_carried\\_out/docs/ia\\_2011/sec\\_2011\\_0615\\_en.pdf](http://www.ec.europa.eu/governance/impact/ia_carried_out/docs/ia_2011/sec_2011_0615_en.pdf)

30 Note, an updated Impact Assessment for the domestic orphan works scheme will be issued when the domestic scheme Regulations are submitted for public circulation/comment.

The main costs of the Directive will be for the diligent searches conducted by the organisations [£28.5-£73.8m]; the costs to digitise the orphan works [£5.3m-£97.2m]; the running costs for the competent national authority; the fair compensation organisations will provide to rightsholders ; and the cost to the copyright tribunal for any appeals against the fair compensation. It is important to note that the scheme is voluntary so the costs to organisations will be optional. The Directive also allows for organisations to recoup the costs for the sole purpose of covering digitisation and making available therefore this potentially makes the costs for digitisation neutral.

The European Commission have confirmed that the recoverable costs include those associated with the diligent search. However, we have no information about how likely it is that cultural organisations will be able to recoup any costs in practice. For example whether cultural organisations would charge for viewing their website or whether private sector businesses would be interested in engaging in public private partnerships to make such works available to the public without being able to charge more than the costs involved in making works available through the Directive. Therefore we are asking questions in the consultation about how likely it is that cultural organisations would attempt to recover their costs at all.

Currently cultural organisations may conduct diligent searches but where rightsholders can't be found the works can not be used lawfully. With the implementation of the Directive such searches will not be wasted. Therefore in this IA we have assumed that some of the costs of making orphan works available to the public could be recouped but not all of them. This calculation may need to be adjusted in light of responses to the consultation. We have taken the conservative approach that cultural organisations could recoup the digitisation costs and not the diligent search costs purely on the basis that these costs are less than the diligent search costs.

The main benefits of this Directive are: the cultural gain to society undertaken in the interest of cultural preservation and accessibility; mutual recognition across Member States would avoid duplicate diligent searches of the same works if they are within the collection of other organisations; organisations would avoid the cost of licensing and paying an upfront fee; and the likelihood of more rightsholders being reunited with their works following a diligent search.

## Costs of diligent searches (£28.5m - £73.8m )

The Directive stipulates that organisations who wish to make use of orphan works within their collection must complete a diligent search of the minimum appropriate sources listed in its annex. Member States can add to this list if there are other appropriate sources available, we are consulting with stakeholders on any additions. Searches will need to be compatible with the requirements of those set out in the sector specific guidelines in the European Digital Libraries recommendations<sup>31</sup>.

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31 The European Digital Libraries Initiative, 2007, "Sector-specific guidelines on due diligence criteria for orphan works", [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/hleg/orphan/guidelines.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/guidelines.pdf)

When assessing the domestic orphan work scheme information on the number of orphan works available was used from the BBC and the British Library. We have used those figures to estimate the costs and benefits for this IA but removed artistic works such as standalone photographs as they are excluded under the Directive. These were some of the few data points available for estimating the size of archives and proportion of orphans. These figures are approximations based on length of shelf space and volume holdings.

Media	Archive	Total collection size
TV & Radio	BBC	950,000
Newspapers	British Library	112,500,000
Books	British Library	14,000,000

The Directive requires the carrying out of a diligent search for the right-holders and/or creators prior to its use. Organisations will have to submit the following details to the authorising body; the results of the search, the use the organisation will make of the work, any change to the status of the work and relevant contact details.

We need an estimate of how many items are likely to be searched under the orphan works Directive. In the impact assessment for the domestic licensing scheme the IPO drew heavily on the available information about the BBC and British Library archives.. In their responses to the consultation, the BBC and British Library did not object to our estimates, and each added further detail as to its holdings on material, with the caveat that these are approximations based on length of shelf space and volume holdings<sup>32</sup>. We also received many submissions from other archives who want to use an orphan works system, beyond the interest expressed by the BBC and British Library.

After further discussions with the BBC on the possible use of the Directive their current view is that they would make very limited use of the process. ITV have also indicated that they would most likely use the domestic licensing scheme rather than the Directive as they would want to make commercial use of any content. We have therefore made an assumption that broadcasters would only use 25% of orphan works under the Directive process. This is represented by the works under TV and Radio.

Media	Archive	Total collection size
TV & Radio	BBC	950,000 (revised figure 237,500)
Sundry items	BBC	2,000,000
Newspapers	British Library	112,500,000
Books	British Library	14,000,000
Sundry items	British Library	18,500,000

We aim to estimate the cost of conducting diligent searches in these types of archives, which are amongst the largest in the UK, where the holders are keen to use orphan works. To get an hourly cost of labour we use the UK Annual Survey of Hours and Earnings (ASHE) (2012) median hourly pay for Librarians (£13.62 p/h) and Archivists and Curators (£14.01 p/h).

To establish the cost of searching books we use the 2006 Carnegie Mellon University Library's pilot project and submission (#537) to the US Orphan Works Report <sup>33</sup>[which estimates that it costs \$78 per item in 2006, plus \$132 in legal and supporting costs, making it \$200 per item. Converting into pounds for 2006 this is equivalent to £43 at the lowest cost and £115 for the highest cost per item, using an exchange rate of 0.55<sup>34</sup>. Controlling for inflation the 2012 price would be £49 and £131, which we do to make the figures comparable to the ASHE figures from 2012, using the Bank of England's GDP deflator.

We then need to establish how long it takes to undertake diligent searches for different types of content.

TV & Radio: The BBC's rights clearance trial found that checking 1,000 hours of factual programming (which is less complex than drama or comedy programmes) for rights implications, cost them 6,500 person hours<sup>35</sup>. Given this, we estimate that clearing television footage and radio material takes 6.5 hours per hour of material, so to clear the revised figure for the BBC archive of TV and Radio would take 1.54m hours ([237,500 hours of TV and radio] × 6.5 hours to clear). The Federation of Commercial Audio Visual Libraries, FOCAL, pointed out that much of this time was spent clearing rights rather than searching for right-holders, as older contracts did not have sufficient permissions for current needs<sup>36</sup>. The 6.5 hours could therefore be considered an upper bound, and we assume that half the time was spent clearing identified rights, so reduce the figure by 50%, to 3.25 hours, to get a lower bound estimate of 771k hours ([237,500 hours of TV and radio] × 3.25 hours).

Sundry content: We assume that the BBC's other content takes one hour at the low estimate for each of the approximately two million items, but 3.5 hours at the high, as sundry items would include various, music scores, and other material. This gives a range from 2m to 7m hours to clear. Similarly for the British Library's sundry 18.5m pieces of sundry content the range would be 18.5m to 64.8m hours.

Newspapers: For the British Library holdings of 150m items we assumed in the previous impact assessment that 75 per cent of the orphans were newspapers, and the British Library did not disagree with this rough estimate. It is worth noting that the newspaper figure is not the number of titles as suggested in one criticism of the figures, but the number of issues from all titles. This is important, as the Chartered Institute of Journalists pointed out, because 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. Therefore it is potentially not just newspaper issues

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33 <http://www.copyright.gov/orphan/orphan-report.pdf>

34 which is the average of the exchange rate from the first (2 Jan), middle (3 Jul) and last (31 Dec) trading day in 2006, with rates from x-rates.com, 0.581801, 0.543183, 0.510569

35 Hargreaves, Ian. 2011. Digital Opportunities: A Review of Intellectual Property and Growth. London: Intellectual Property Office. <http://www.ipo.gov.uk/ipreview>

36 FOCAL International submission to the Copyright Consultation, page 9

but individual stories that can be orphans, and according to the Institute “based on limited sampling, the number of works involved appears to run into hundreds of thousands, perhaps millions, of immense value. This is because so many items were published in newspapers or magazines without attribution, and only limited records were retained”<sup>37</sup>.

Given this, we retain the total newspaper figure in calculating the potential cost of searching the archives:

Books: The British Library provided a figure of 14m monographs in the archive as part of their response to the consultation, which we have included, and then we have treated the remainder of the collection (18.5m items) as sundry items, with clearance time equivalent to the BBC content<sup>38</sup>. In a 2009 digitisation project at the British Library it took them 235 man hours to search the rights for 60 titles alone. This suggests an average time of between three and a half and four hours per issue ( $235 / 60 = 3.91$ ).

The table below provides an overview of the total cost from fully searching both the BBC and British Library archives (making the 25% adjustment for broadcasters use) , which makes it a total expenditure of between £6.5bn and £8.2bn .

The cost of searching the full archive					
Archive	Content	Hours to clear	Quantity	Cost	Total cost £m
BBC	TV & Radio, low est.	3¼	237,500	£14.01 p/h	10.8
BBC	TV & Radio, high est.	6.5	237,500	£14.01 p/h	21.6
BBC	Sundry items, low est.	1.0	2,000,000	£14.01 p/h	28.0
BBC	Sundry items, high est.	3.5	2,000,000	£14.01 p/h	98.1
BL	Newspapers	3.5	112,500,000	£13.62 p/h	5,362.9
BL	Books low est.	-	14,000,000	£49 p/item	686
BL	Books, high est.	-	14,000,000	£131 p/item	1,834
BL	Sundry items, low est.	1	18,500,000	£13.62 p/h	252.0
BL	Sundry items, high est.	3.5	18,500,000	£13.62 p/h	881.9

37 Chartered Institute of Journalists submission to the Copyright Consultation, page 1

38 British Library submission to the copyright consultation, page 6

Given an orphan works exception the BBC and British Library would be incentivised in clearing more of their archives and making available to the public. We do not presume that such a project would happen immediately, nor that it would cover the entire archive, as only parts of it will contain suspected orphans. So we maintain the assumption from BIS 1063 that between 5% and 10% of the available content in the BBC and British Library would be cleared over a ten year period. We maintain this assumption as the Directive provides a legal avenue with no upfront payments.

The total cost of this would be between £31.7m and £81.9m per annum over ten years ( $[(0.05 \times \text{£}6.48\text{bn}) / 10 \text{ years}] \mid [0.10 \times \text{£}8.24\text{bn}) / 10 \text{ years}]$ ). The best estimate being the average of the two £56.9 p.a.

As has been pointed out in a number of responses, such costs seem high for two organisations that are far from typical even if they intend to make use of an orphan works exception. This is a fair point, which is why we do not use these costs and scale up for the 2,500 museums, 3,393 public libraries, 3,000 community archives, 979 academic libraries and approximately 3,500 trust archives which might seek to use an orphan works scheme<sup>39</sup>. Instead we use our established archive holding figures for the BBC and British Library as a proxy for expected total UK activity. Fortunately, as part of the previous consultation part of the Government's response to the Hargreaves Review, other institutions have provided information about their collections and an initial estimate of their suspected orphan work holdings. In Annex 1 the table summarises the majority of estimates provided by archive holders, and the percentage of each collection they consider potentially orphan.

This is probably the most complete list of orphan work estimates that have been collected, even compared to the EU Commission's research<sup>40</sup>. These are sorted by rough categories which correspond to sound recordings, films, written material and mixed holdings but this is not exhaustive.

These figures suggest that there are many organisations that hold potential orphans. These could benefit from a diligent search and the certainty of an exception to use orphans, or agreeing licensing terms with right-holders where such are found. The data, while indicative, compares well to the orphan work estimates in a 2009 JISC report<sup>41</sup> and suggest that different sectors and content have different needs.

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39 Museums and galleries: <http://www.museumsassociation.org/about/frequently-asked-questions>;  
Public Libraries: Figure from DCMS, from Chartered Institute of Public Finance and Accountancy;  
Archive figures from Archives & Records Association submission to the copyright consultation;  
**Academic Library figure (2008/09) from Bridgeman submission to the copyright consultation.**

40 Vuopala, Anna, 2010, "Assessment of the orphan works issue and costs for rights clearance", for the EU Commission, [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/reports\\_orphan/anna\\_report.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/reports_orphan/anna_report.pdf)

41 JISC, 2009, In from the Cold: An assessment of the scope of 'Orphan Works' and its impact on the delivery of services to the public. Naomi Korn, Cambridge: Collections Trust, <http://www.jisc.ac.uk/media/documents/publications/infromthecoldv1.pdf>



Media category	UK sample holdings	Orphan range
Sound Recording (hrs)*	750,000	5%-10%
Archive Films (hrs)	513,000	5%-35%
Written material†	10,400,000	4%-30%
Mixed collections§	38,000,000	8%-40%

\*Scaling the average IWM record to 90 minutes, or one standard cassette tape  
\*\*Treating an average film as 1.5hrs long, and including both UK and European film archives  
†not counting the 600,000 orphan texts at Oxford and the 195m3 material at the national history museum.  
§Treating the average work at the National Archive & National Records Scotland as a 1cm wide holding.

Discussion with stakeholders from the cultural heritage sector indicate that at present organisations tend to avoid undertaking diligent searches on works, or bodies of works within an archive they suspect are likely to be orphan or have a high number of orphans within them (which is reflected in the fact that the number of orphan works can only be estimated). This is because such searches would turn out to be a waste of time and resource should the work turn out to be orphan and not be able to be used lawfully. However, there are still many instances at present where searches are undertaken and it transpires that the work is orphan.

Therefore, we have assumed that 10% of diligent searches that will be undertaken under the orphan works scheme, are searches that are already undertaken and, as such should be removed from the estimate of the costs of the orphan works schemes. This is a conservative estimate as we do not wish to over-estimate the current scale of diligent searches that are undertaken and find that the work is orphan. (0.9\*31.7 and 0.9\*81.9)

The total estimate of a cost of a diligent search is in the range of £28.5-£73.8m with a best estimate of £51.2m

## Costs of running the national competent authority

The Directive requires that Member States establish a national competent authority to receive the relevant information from organisations relating to a diligent search and forward to OHIM. As the UK will be implementing a domestic orphan works scheme with an authorising body this will act as the appropriate body for the Directive. To avoid confusion all reference to the national competent authority in this assessment will be referred to as the authorising body.

The role of the authorising body will be to forward diligent search information to OHIM who will maintain a publicly accessible database of all searches across the EU. OHIM are currently developing the database, they will incur the costs for the development and maintenance. This will be a web based system. Organisations will log on to the system and fill in an application with all the relevant information on the diligent search and the works. This application will be forwarded to the authorising body which will complete the process by sending on to OHIM. The authorising body has no mandate to validate an application as the Directive applies an exception to copyright legislation. In essence they will only forward applications through the web based system and thus satisfying the requirement under the Directive.

The authorising body will also manage the domestic orphan works licensing scheme and for this, collect fees and validate diligent searches. The costs for establishing this body have been covered in the updated impact assessment for those provisions (as £0.54m - £1.07m), as have the cost of running the authorising body (as £50k p.a.). The cost related to the authorising body to fulfil the function under the Directive would therefore be minimal and this could be absorbed in the running costs related to the domestic scheme.

Cost of digitising works ( (£5.3m - £97.16m)

The Directive allows organisations to digitise works and make them available online. The cost associated with digitising works varies hugely depending on the type and length of works. There is no one definitive answer to the cost as digitising is a process and with any process the actual cost depends on the organisational context, the complexity of the material and the sophistication of the output. However, for the purpose of the assessment we will look at a set of reasonable projected costs for organisations.

It is important to note that although the Directive can only be used for non commercial use it does allow for organisations to generate revenue for the sole purpose of recouping the cost of digitisation and making available – so the Directive is potentially cost-neutral in regards to this cost.

In order to obtain an estimate of costs we have conducted analysis and obtained a range for possible costs of digitisation. As part of “The New Renaissance”<sup>42</sup> report of the “Comité des Sages” on bringing Europe’s cultural heritage online, a study was conducted by the Collections Trust on the Cost of digitising Europe’s Cultural Heritage<sup>43</sup>. The report looks at digitisation of collections in Libraries, Museums, Archives and Audiovisual Archives across Europe. It does not include audiovisual collections held by Broadcasters. Our analysis makes use of the unit costs within this report.

We calculated the estimate for the cost of digitisation by multiplying the number of orphans found per annum (low and high values), by the per-unit digitisation cost set out in the aforementioned Collections Trust report. We removed the digitisation cost for archive artistic works such as photographs as these are not covered by the Directive.

The calculations are set out below:

1) To obtain figures for the number of orphans found per annum. We have adjusted the sound recording and archive film holdings at the BBC and British Library to 25% of their previous level, to reflect the fact broadcasters have told the IPO they will make limited use of the Directive.

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42 [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/refgroup/final\\_report\\_cds.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/refgroup/final_report_cds.pdf)

43 [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/refgroup/annexes/digiti\\_report.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/refgroup/annexes/digiti_report.pdf)

Media category	UK sample holdings	BBC & BL	Orphan range	Orphans found p.a.	
				Low	High
Artwork	548,000	-	20%-25%	548	1,370
Sound Recording	750,000	87,500	5%-10%	209	838
Archive Films	513,000	150,000	5%-35%	166	2,321
Archive photos	28,280,000	5,000,000	5%-90%	8,320	299,520
Written material	10,400,000	14,000,000	4%-30%	27,380	410,700
Newspapers*	-	112,500,000	4%-95%	22,500	1,068,750
Mixed collections	38,000,000	20,500,000	8%-40%	23,400	234,000
<p>Low calculation: (total holding × 5% × low orphan %) /10 years   High calculation: (total holding × 10% × high orphan %)/10</p> <p>*we keep the low newspaper percentage equal to books, and the high equal to the British Library's suggestion of the estimated number of orphans in the newspaper collection [9, page 38]<sup>44</sup></p>					

2) We then multiply the low and high figures from this table by the per-unit digitisation costs from the Collections Trust Cost of Digitising Europe's Cultural Heritage study. The table below displays these per-unit costs:

Items/ materials in collection	Cost per unit (€)	Exchange rate (€)	Cost per unit (£)	Units	Costs per unit – 2012 figures (£)
Books	191	0.8735	166.84	Volumes	176.85
Newspapers	No per unit cost provided in study. Cost per page provided instead.	0.8735	£19.04 - See Note B two pages ahead		20.18
Journals and other serials	15	0.8735	13.10	Volumes	13.89
Music and recorded sound	14	0.8735	12.23	Hours	12.96
Film and video recordings	1125	0.8735	982.69	Hours	1,041.65
Photographs	4.07	0.8735	3.56	Number	3.77
Drawings	4.82	0.8735	4.21	Number	4.46

44 The reference to [9, page 28] is to the paper Assessment of the orphan works issue and costs for rights clearance by Anna Vuopala, 2010.

(The 0.8735 is the EUR/GBP exchange rate per oanda.com as at 31 May 2009 – the date of publication of the NUMERIC report, which the Collections Trust report used for its data. NUMERIC is a European Commission report (EU-funded) that aimed to measure the progress of the digitisation of Europe’s cultural heritage).

3) To obtain our range for digitisation costs we then multiply the low and high ‘orphans found per annum numbers by the relevant item category from the Collections Trust study.

- The relevant categories are as follows:
- ‘Written material’ – we use ‘Books’
- ‘Archive Films’ – we use ‘Film and video recordings’
- ‘Sound Recording – we use ‘Music and recorded sound’
- ‘Archive photos’ – we use ‘Photographs’
- ‘Artwork’ – we use ‘Drawings’
- ‘Mixed collections’ – we use Journals and other serials’ (See Note A on next page)

The table below shows the costs of digitisation that we have calculated:

Media category	Orphans found – low estimate)	Digitisation Cost p.a. – low estimate (£m)	Orphans found – high estimate	Digitisation Cost p.a – high estimate (£m)
Written material	27,380	4.8	410,700	72.6
Newspapers	22,500	0.45(Note B)	1,068,750	21.6
Archive Films <sup>45</sup>	166	0.17	2,321	2.4
Sound Recordings <sup>46</sup>	209	0.002	838	0.01
Exclude Archive photos	8,320	-0.03	299,520	-1.1
Exclude Artwork	548	-0.002	1,370	-0.006
Exclude 50% of Mixed Collections	23,400	-0.2-0.2	234,000	-1.6
TOTAL		£5.3 (low estimate)		£97.16 (high estimate)

(Note A: ‘Mixed collections’ are made up of 20.5m items recorded as sundry items from the BBC and British Library, and also 38m items from English Heritage, National Records of Scotland and the National Archive.. However, we do not have a detailed breakdown of what proportion of these figures are made up of works of a certain type.

However we know that sundry items include ‘various artworks, music scores, and other material’.

45 Making 25% adjustment for broadcasters.

46 Making 25% adjustment for broadcasters.

There are 38m items are made up of 'photos, reports, plans, drawing, texts, and illustrations'.

We know not all these works are types covered by the Directive (for example, stand-alone artwork and photos are excluded), but not having further information, we have made an assumption that 50% of 'mixed collections' are works covered by the Directive. This assumption enables us to obtain an estimate for digitisation costs for mixed collections,)

(Note B: For newspapers, the Collections Trust did not provide a per-unit digitisation cost, but instead a per-page digitisation cost (which was €1.56, which we converted to £1.36, using the same 0.8735 oanda.com exchange rate used earlier). To obtain a per-unit cost, we have multiplied this per-page cost by 14 – which was the median estimate for average number of pages in a newspaper given by the Collections Trust report – to obtain a per-unit cost of £19.04. We were unable to find any other estimates for the average number of pages in a newspaper.)

The report notes that there could be initial capital investment for equipping an institution to undertake digitisation that might need to be considered. This is a one-off capital expenditure but the assumption is that due to the nature of the organisations they would already have access to the relevant equipment to undertake projects. Also these costs could be reduced as the larger a digitisation process the lower the unit cost to digitise works.

## Administrative costs for organisations to add diligent search to database

There will be a minimal administrative cost for organisations relating to the time taken to complete the application form and sending the relevant data to the authorising body. OHIM are developing a web based system which requires organisations to log on and complete the basic information of the works and the search completed.

## Creating authorities

There will be no set up costs because the authorising body will be the same organisation appointed under the domestic scheme and these costs have been covered in the updated impact assessment for the domestic scheme (as £0.54m - £1.07m transition cost). As this body already exists, there will be a nil creation cost for the purposes of this EU Directive Impact Assessment.

## Running costs of authorities

This will be a minimal cost as the OHIM database will allow the authorising body for each Member State access and permission to forward applications assigned to it. OHIM are creating and maintaining the database at their expense this is not a cost for the UK. The database will be a web based application and the role of the authorising body will be to forward the information, there is no requirement to validate searches. The authorising body will not have to collate information on the use of the Directive in the number of applications and the works being used as OHIM will collate this relevant data and send to the authorising body.

## Fair Compensation to rightsholders

The Directive provides for a delayed payment mechanism – the rights holder is only paid fair compensation if they return. The level of compensation will be decided between parties and should be proportionate to reflect the works and the use as it is restricted to non commercial use. Anecdotal evidence from stakeholders suggests that it is rare for an emerging rightsholder to demand compensation. The cultural heritage sector have informed us, through email correspondence and in responses to the Government consultation on the domestic scheme carried out from December 2011 – March 2012, that right holders very rarely return, and when they do, there is very rarely a payment of money to the rightholder. This is because, in the cultural heritage sector, rightholders are mainly interested in having the work made available to the public rather than financial gain.

## Appeals Process

It is proposed to provide an appeals process if the rightsholder and the organisation cannot agree on fair compensation. The body to oversee these appeals is still to be decided. To give an indication of costs we have used figures from the Copyright Tribunal . The Court currently costs £1,600 per day (broken down as £700 per day for the chair and deputies, and £450 for each of the two lay members)<sup>47</sup>. Additional time cost would come through having to read case documentation and in post-hearing work - namely preparing the decision. However, anecdotal evidence from stakeholders suggests that this avenue is unlikely to be pursued. Where cultural organisations have taken a risk based approach to orphan works, current returning rightsholders tend not to seek financial recompense but are usual happy for the work to be made available to the public and therefore we do not see this having an impact.

## Benefits

### Cultural gain to society through cultural preservation and increased accessibility

Libraries and archives in the UK contain millions of books, documents, pamphlets, manuscripts and other written material. . As stated above the study “In from the Cold”<sup>48</sup> conducted by JISC found 13 to 50 million orphan works exist in the UK libraries, e.g. 5-10% of works in library collections. Some estimates are higher with the British Library estimating that 40% of their archive may be orphaned.

A monetised value on access to these works cannot be provided as commercial use of works is not permitted but they will benefit and enrich society as a whole. People will not need to travel to view works where they are actually housed. The Directive will ensure lawful cross-border online access to orphan works contained in the collection of cultural organisations. EU-wide online availability of orphan works promotes Europe’s and the UK’s cultural diversity and

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47 Information obtained from source at Copyright Tribunal.

48 <http://www.jisc.ac.uk/media/documents/publications/infromthecoldv1.pdf>

increases sources of knowledge and learning. Citizens of the UK and Europe will be able to access consolidated EU library collections from a computing device anywhere in the EU.

As the Directive provides an exception to copyright law and legal certainty to reproduce works it is anticipated that this will encourage organisations to digitise a wider range of works rather than cherry picking those that would have a financial benefit. The current practice limits the content and choice available to society.

## Benefit from recouping costs of digitisation

The Directive is potentially cost-neutral in regards to digitisation costs. It is important to note that although the Directive can only be used for non commercial use it does allow for organisations to generate revenue for the sole purpose of recouping their cost of digitisation<sup>49</sup>.

*However as stated earlier we are consulting on the likelihood of cultural organisations recouping their costs and to what level.*

*Benefit from diligent searches no longer being wasted Currently, many diligent searches result in wasted effort and resource when works are discovered to be orphan, because currently no legal route to use orphan works exists. A benefit of the exception provided by the EU Directive is that diligent searches that presently would result in wasted effort would, as a result of the exception, now be able to be used.*

## Benefits from past diligent searches

Duplicate searches would be avoided as the Directive allows for mutual recognition of diligent searches completed by other organisations i.e. a diligent search by a French library is valid across Europe as long as the cultural organisation holds the same works. Details of previous searches will be held on the OHIM database and there is no time limit to how long diligent searches are valid for. Cultural organisations will be able to look for previous diligent searches on works. They would only need to provide OHIM with contact details and the proposed use for the works. This is to keep a full record of secondary users making use of works in case the rightsholder should emerge.

## Organisations avoiding the cost of licensing and paying an upfront fee

The EU Directive is an exception to copyright, not a licensing system (like the domestic scheme). There is no upfront payment and fair compensation is only provided if a rightsholder should emerge. This can incentivise cultural organisations to make use of works that they previously could not reproduce or make available.

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49 In the Impact Assessment calculator, we have used the cost of digitisation figures as the benefit figures, to reflect that organisations are able to recoup these costs.

This could well be a significant benefit as effectively legal orphan works usage would now be free at the point of usage for cultural heritage organisations, provided the work and the usage are covered by the Directive.

## Benefit to rightsholders separated from their works –

The OHIM database will be publicly accessible and have a search function for the public. This means that collecting societies and rightsholders will be able to search the register to see if any works are being used as orphans under the Directive. If this is the case, the rightsholder can contact the cultural organisation directly and, providing proof of ownership is shown, the orphan status of the work can be removed. The proof of ownership lies with the emerging rightsholder.

Ultimately, the OHIM register provides a channel for reuniting rightsholders with their works.

## Benefit from finding works that are not orphans

As archive holders would be incentivised to undertake diligent searches, they would not just benefit from the found orphans, but also from the content for which they have discovered rightsholders. As with the domestic scheme, the exception would incentivise archives to use more content. When rights holders are found during the diligent search, the user will be able to seek permission for use and agree licensing terms if necessary. Organisations would also have access to rightsholders and could obtain rights for further exploitation if they required.

We expect this benefit to be significant, but have not been able to quantify it due to not having sufficient data. *Providing legal certainty to organisations using orphan works*

Currently, many museums and archive holders who responded to the previous Government consultation (which provided information used to produce BIS 1063) are using works that have been diligently searched and which have been found to be orphan. A number of them do so by making provisions for potential right-holders through a risk insurance, which a few museums referred to in their consultation responses; some set aside funds in an 'awaiting claims' account, as the BBC do. Some simply take the calculated risk that no-one will come forward and do not keep any funds aside at all. Nonetheless, this use is effectively infringing copyright even though cases can and often are settled through a licensing agreement.

The exception provided for by the Directive is a mechanism for the legal use of orphan works, provided the work and use are of a type covered by the Directive and the organisation seeking use is a publicly accessible cultural heritage institution or a public service broadcaster.

## Benefit from increased lawful use of the copyright system

Government has received comments that the ability to utilise orphan works on an authorised basis is likely to increase overall confidence in copyright per se. Although the Directive is not a



licensing system – there is no authorising function, as it is an exception – it is true that the ability for the organisations covered by the Directive to now make use of the works in their holdings, as set out in the Directive, will also increase confidence in copyright.

## Rationale and evidence that justify the level of analysis used in the IA

We have used the June 2012 final stage Impact Assessment (IA number: BIS1063 – conducted as part of the Government’s response to the Hargreaves Review of Intellectual Property and Growth) carried out for the domestic orphan works licensing system as the starting point for our analysis<sup>50</sup>. We have then made appropriate adjustments to reflect the fact the Directive is narrower in scope than the domestic system.

We have also subsequently engaged with organisations from the cultural heritage sector and, as would be expected, they have confirmed many of the views they provided when previously consulted for the domestic process.

We have performed quantitative analysis where we have been able to find appropriate data. Where it has not been possible to perform a quantitative analysis, qualitative analysis has been provided – primarily using information received from stakeholders in person or in email exchange.

## Risks and assumptions

The negative present value of this policy should not be seen as a risk, it is a natural outcome given that the Directive is for non commercial purpose only. The main benefit of the provisions is a cultural and educational gain to society through increased accessibility to orphan works that have previously not been easily accessible – which is not easily quantifiable – whereas a reasonable estimate of costs can be ascertained.

Whilst the larger cultural heritage organisations (such as the British Library, Natural History Museum, British Film Institute) have not been able to tell us exactly how many orphan works they would expect to use as a result of the Directive, the general sentiment expressed by the cultural heritage sector – based on IPO interactions with sector representatives – is that having a legal and free at point of use means of digitising orphan works and making them available to the public, would be an attractive option.

There is no validation of searches under the Directive as the organisations that it applies to are cultural and heritage bodies with a public mission and the use is not for commercial gain. It is assumed that these are trusted organisations which will use the Directive responsibly and effectively complete diligent searches.

For the purposes of this Impact Assessment, we have not classified the organisations covered by the Directive (please see page 4 of this Impact Assessment) as businesses, despite the fact

<sup>50</sup> Note an updated Impact Assessment for the domestic orphan works scheme is being prepared and the intention is to submit both this EU Directive IA and the domestic scheme IA for public comment together.

that some of these organisations might have business revenue generating elements. Our rationale for this decision is that the Directive would not be used or impacted by these elements, because the Directive permits non-commercial use only – specifically, reproducing and making available to the public. This is why we do not have a business net present value or a net cost to business per year in this Impact Assessment.

The level of demand estimated in BIS 1063 did not appear to have made adjustments to reflect the fact that the domestic scheme only licenses use of orphan works in the UK. This is likely to have a downward effect on commercial demand for the UK scheme because some organisations will be looking to use works internationally (i.e., in more than one country) but they will not be able to do this with a licence granted from the authorising body.

## Direct Costs and Benefits to Business Calculations (following OITO methodology)

The Directive is out of scope of OITO as it is a European measure however we have calculated the EANCB number as we believe the institutions are considered to be civil societies and therefore count.

### Evaluation

The European Commission will review the Directive by 29 October 2015 and at annual intervals thereafter. The report will look at the possibility of expanding the Directives scope and focus.

### Annexe 1

Media	Archive (source, if different)	Total collection size	Orphans
Sound recording	Imperial War Museum	33,000 records	5%-10%
Sound recording	British Library	700,000 hours	-
Film	UK film archives (FOCAL)	17,000,000 hrs	0.5% for most
Film	Imperial War Museum (FOCAL)	-	0.25%
Film (Europe)	European Film Archives [9, page 25]	3,200,000 titles	4%-7%
Archive Film	Imperial War Museum	230,000 items	5%
Archive Film	British Film Institute	-	10%
Archive Film	National Library of Scotland	32,500 items	20%
Archive Film	Huntley Film Archives (FOCAL)	80,000 titles	20%

Archive Film	London Metropolitan Archive	-	35%
Books	Authors Licensing & Collecting Society (PwC)	-	<4.7%
Documents	Bedfordshire and Luton Archives Services	-	15%
Books	National History Museum, London	1,000,000	20%
Books	National Library of Scotland	1,500,000 items	~25%
Documents	Imperial War Museum	7,900,000 items	20%-25%
Manuscripts	National Library of Scotland	-	20%-30%
Books	British Library sample [10]	-	31%
Books in copyright	British Library sample [10]	-	43%
Manuscripts	National History Museum, London	1,304 metres / 195m <sup>3</sup>	50%
Texts	Oxford University	600,000 items	100%
Photos, reports, plans, drawings	English Heritage	12,000,000 items	8%
Overall collection	London Metropolitan Archive	-	15%-20%
Text & drawings	Museum of Childhood (NMDC)	-	15%-20%
Text, photos, maps, plans	National Records of Scotland	80km shelf space	~15%-50%
Text, photos, illustrations etc	National Archive	11,000,000 cat. Items ~180km shelf space	40%
Records / Photos	Southampton City Council	-	30%-50%
Collection on industrial heritage	Leicester University	-	60%
Testimonials	Imperial War Museum	8,000 reels	100%



## Annex D: Selection of Authorising Body

The Enterprise and Regulatory Reform Act 2013<sup>51</sup> allows the Secretary of State to appoint a body to license the use of orphan works (the authorising body). The Minister informed Parliament during the passage of the Act that this would be a public body and likely to be an existing public body.

The Government has conducted an assessment of existing public bodies to identify potential candidates to undertake the authorising body role. These were identified on the basis that they had expertise in running processes to support licensing or similar functions. Whether the potential candidates had any knowledge of intellectual property rights and issues particular to orphan works was also considered.

Many potential candidates were ruled out at an early stage because their functions did not require them to make complex licensing decisions and, therefore, they lacked experience in this area.

A short list was then drawn up which included:

- the Copyright Tribunal;
- the Office of Public Sector Information (OPSI) – which licenses Crown copyright; and
- the Intellectual Property Office (IPO).

The candidates were then assessed according to their suitability and their capability to undertake the role. The assessments against these criteria indicated that only one body – the IPO – fully met both the suitability and capability criteria. On this basis the Secretary of State has selected the IPO as the authorising body to license the use of orphan works.

The secretariat for the Copyright Tribunal is provided by the IPO and is very small. If the Tribunal was the authorising body the IPO would need to provide the IT infrastructure and administrative staff. There is also a potential conflict of interest if the Copyright Tribunal is needed to act as an appeal body for the orphan works scheme.

OPSI felt that running the orphan works licensing scheme would not fit easily with its remit. There would also be a potential conflict of interest because OPSI sits within The National Archives, which is likely to be a potential licensee of the scheme.

The IPO has advised Government on copyright policy for a long period of time and it also has experience of processing applications on a large scale in relation to grant of patents and the registration of trade marks and designs. It will draw on sector expertise to develop guidance on how to find rights holders, how to set prices for licences and what to include in other licensing terms.

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51 <http://www.legislation.gov.uk/ukpga/2013/24/section/77/enacted>

# Annex E: Sample Orphan Works Licence

Non-exclusive licence issued to the [ ] for the use, reproduction and public performance of film footage [description of work]

Licensee: [name and details of licensee]

Pursuant to the provisions of Regulation 6 of the Copyright (Licensing of Orphan Works) Regulations 2014 the [Authorising Body] grants a licence to [ ] as follows:

The Licence authorises the use of a film footage of [description of footage including any known details such as creator/publisher, year produced etc.] in the documentary entitled [ ] produced by [ ].

The Licence also authorises the reproduction of the footage on DVD, its public performance or communication to the public by telecommunication as part of the exploitation of the documentary.

## Terms & Conditions

(1) The Licence is for a period of 7 years and expires on [ ]. A Licence may be renewed in accordance with the provisions set out [reference to regulation].

(2) The Licence is non-exclusive.

(3) The Licence is valid only in the United Kingdom. For other territories, it is the law of that country that applies.

(4) The Licensee cannot sub-license the Licensed Material identified in this Licence.

(5) The issuance of the Licence does not release the Licensee from the obligation to obtain permission for any other use not covered by this Licence.

(6) The issuance of the Licence does not release the Licensee from the obligation to obtain permission from any other rights holder in the work.

(7) The coming into force of this Licence is conditional on the Licensee complying with the conditions set out in paragraphs (5) and (6) above.

(8) The Licensee will pay the sum of [ ] to the Authorising Body.

(9) The use of the Licensed Material must be accompanied by a credit identifying the creator of the work where known, or [the web address of the Authorising Body] where the creator of the work is not known.

(10) No ownership or copyright in any Licensed Material shall pass to the Licensee by the issue of this Licence.

(11) Provided the Licensed Material is only used in accordance with the Terms and Conditions set out in this Licence, the Licensee shall not be held responsible for any damages, liabilities and expenses arising out of any action by a third party for infringement of copyright.

(12) The [Authorising Body] shall not be held responsible for any damages, liabilities and expenses arising out of any claim by a third party where the Licensee has acted outside the Terms and Conditions set out in this licence, or where the claim by the third party is not on the basis of an infringement of copyright.

(13) Any use of the Licensed Material in a manner not expressly authorised by the Licence may result in the termination without refund of the Licence by the Authorising Body.

## Definitions

“Licensee” means the person or body identified as such in this Licence.

“Licensed Material” means the material identified in paragraph (1) above.

“Licence” refers to this agreement, including the Terms and Conditions stipulated within it.



# Annex F: Response Form

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this consultation is 28 February 2014

Your Name:

Organisation (if applicable):

Address:

Please return completed forms to:  
Margaret Haig  
Copyright and Enforcement Directorate  
Intellectual Property Office  
First Floor, 4 Abbey Orchard Street, London, SW1P 2HT  
Fax: 020 7034 2826  
Email: [copyrightconsultation@ipo.gov.uk](mailto:copyrightconsultation@ipo.gov.uk)

Please select the option below that best describes you as a respondent.

	Business representative organisation/trade body
	Large business (over 250 staff)
	Medium business (50 to 250 staff)
	Small business (10 to 49 staff)
	Micro business (up to 9 staff)
	Charity or social enterprise
	Central government
	Public body
	Rights holder
	Individual
	Other (please describe)



## Questions:

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

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

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?

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?

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

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

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?

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

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

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

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

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?

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

14. 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?

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?

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?

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?

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?

19. 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?

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

21. 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?

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

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

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?

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

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

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

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

Please use this space for any general comments that you may have, comments on the layout of this consultation would also be welcomed.

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply    Yes                      No

At the IPO we carry out our 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                      No

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Any enquiries regarding this publication should be sent to:

Department for Business, Innovation and Skills

1 Victoria Street

London SW1H 0ET

Tel: 020 7215 5000

If you require this publication in an alternative format, email [enquiries@bis.gsi.gov.uk](mailto:enquiries@bis.gsi.gov.uk), or call 020 7215 5000.

Concept House  
Cardiff Road  
Newport  
NP10 8QQ

Tel: 0300 300 2000  
Fax: 01633 817 777

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