



Copyright Works: Seeking the Lost Response Form

Type of respondent: trade body

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Copyright Works: Seeking the Lost

A Response by the Independent Film & Television Alliance [IFTA]

I. Preamble

The Independent Film & Television Alliance is a non-profit trade association based in Los Angeles representing the economic interests of over 150 independent companies from 23 countries, the majority of which are independent producers and exporters of feature films and television programmes. IFTA has 25 Member companies based in or with significant business operations in the UK¹, all of which are active in film production, sales and/or distribution. IFTA Members produce about 400 feature films annually and countless hours of television programming and this content is increasingly found on emergent online platforms worldwide, including, the UK. IFTA regularly provides input to governments around the world on a wide range of copyright, trademark, financing and export issues that impact the independent industry. Further background on IFTA is available at the bottom of this document (Page 9).

IFTA appreciates the opportunity to input into the UK Government's process of finalising the drafting of two Statutory Instruments to address the issue governing the use of orphan works. IFTA already contributed initial thoughts on the orphan works/rights issues in a prior filing on the review of the UK Copyright framework.² Our preamble remarks follow-on from this initial position. We have also

¹ Altitude Film Sales, AV Pictures, Ltd., BFI - British Film Institute, Content, Cori Distribution Group, Distant Horizon, Embankment Films Limited, Fortissimo Films, GFM Films, Goldcrest Films International, HanWay Films Ltd., Independent, Intandem Films Plc, K5 International, LIONSGATE, Metro International Entertainment, Mister Smith Entertainment Limited, Moviehouse Entertainment, Pathé, Protagonist Pictures Limited, Shine International, Stealth Media Group, Ltd., STUDIOCANAL, Umedia International and The Works.

² IFTA Response to the Hargreaves Review of IP and Economic Growth, submitted 4 March 2011 (<http://www.ipo.gov.uk/ipreview-c4e-sub-independent.pdf>).

answered questions in *Copyright Works: Seeking the Lost*, selecting those that seemed most relevant to the activities of our Member companies.

IFTA remains unconvinced that the need for a specific UK orphan works regulation as per the Enterprise and Regulatory Reform Act 2013 (ERR Act 2013)³ - over and above compliance with the EU Directive 2010/28/EU on Certain Permitted Uses of Orphan Works - has been conclusively demonstrated. The Directive deals with the issue through an exception to copyright. Its beneficiaries are strictly limited to public interest bodies and institutions and to usage designed to buffer their cultural and educational mandates. IFTA believes that any regulatory intervention governing orphan works and orphan rights should be strictly limited to such public interest organisations when acting in pursuance of their mission. The UK Government's plan encompasses instead, any other applicant, including those who would be making commercial uses of the works deemed orphan. IFTA believes this approach is unnecessarily broad and far exceeds the legitimate public interest boundaries within which solutions to the orphan works issue should be confined in order to avoid setting precedents which may result in the erosion of contractual freedom and the exercise of exclusive rights.

We also regret the one-size-fits-all approach: whereas the need for specific intervention on orphan works appears to have been supported by solid evidence (both anecdotal and quantitative) in areas such as scientific publishing or photography, no such conclusive data has been forthcoming as yet with regards to film and audiovisual works. The most recent survey by the European Association of Film Archives (ACE) dates back to 2009/10. Whilst the document refers to an average of 12% of the inventory of 24 national film archives having been identified as orphan works, there is scant detail as to the nature of those works: it appears that 60% of the works concerned were made prior to 1950, with only 31% as feature films. Alarming, ACE cites the "lack of staff time" and "lack of legal expertise" as the two leading factors in the lack of success by film archives in determining the rights' status of a piece of film. It should perhaps be stressed that such factors in no sense constitute a sound basis from which to justify the introduction of an exception to copyright and/or a licensing scheme such as is proposed under the ERR Act 2013. Constraints of any kind on the application of exclusive rights by creators and producers of films should not be used as palliative for the deficiencies in the manpower, resources and skills available to public or private sector organisations. This would be both inefficient and unfair.

We welcome the fact that the UK Government has avoided dealing with the orphan works issue through a specific exception to the rights laid out in the Copyright, Designs and Patents Act 1988.⁴ Whilst we are not persuaded of its usefulness, a licensing scheme administered by an authorising body (IPO) has the distinct advantage of offering a relatively pragmatic and flexible approach to be driven by specific applications, rather than curtailing the exclusive rights of creators and publishers of works through a bespoke exception to copyright.

Our answers to the consultation questionnaire follow hereunder (Page 3 to 8).

II. Questions

Authorising Body

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

³ http://www.legislation.gov.uk/ukpga/2013/24/pdfs/ukpga_20130024_en.pdf

⁴ <http://www.legislation.gov.uk/ukpga/1988/48/contents>

If so, how?

There are fewer cases where collective licensing is necessary in the audiovisual sector than in allied creative industries such as music, books or still images. IFTA does not see any particular advantage in audiovisual rights' collecting societies' involvement in this case, other than as possible recipients of queries as part of diligent searches carried by potential "licensees." In the licensing scheme under consideration, collecting societies cannot substitute for/or complement the function of the authorising body given the very nature of the licensing which does not correspond to any copyright-related right currently necessitating collective management. In particular, it is vital that the IPO should be autonomous from collecting societies in all matters governing the assessment of whether a diligent search complies with the established criteria.

Licensing Terms

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

IFTA does not see any in-principle issue with the transferability of the license granted by the authorising body. Transfer of licenses may occur in the normal course of business transactions and involves choices freely made by the contracting parties. In this instance, the terms of transfer need to encompass the features that are particular to this novel form of licensing, including those clauses concerning obligations towards the reventant rights holders which refer to rights holders who could not be found initially and asserted ownership at a later stage. The authorising body needs to remain the entity policing and enforcing the license terms viz the initial licensee or its successor in title.

License fees

3. What are your views on allowing high volume users to take out an annual licence or similar arrangement to cover low value, non-commercial use?

IFTA does not believe such case scenarios are applicable to audiovisual works and we oppose any extension of this principle to our sector. Films and other audiovisual works made to a professional standard are generally high value and comparatively low volume and their uses are governed by case-by-case licensing initiated through individual face to face negotiation as to uses and price. Additionally, the need for the authorising body to consider whether or not each individual diligent search is compliant with the established standard militates against any form of blanket licensing.

Unclaimed fees

4. Should there be a limit on the period of time in which a rights holder can claim his/her remuneration? If yes, taking into account the examples of time limits set out at Paragraph 5.9, what should that period be and why?

So long as one or several parties are making available/exploiting the work to which the right holder(s) is attached, there is no justification for a statute of limitation shorter than the right-holders' legal term under copyright and/or related rights.

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

The Statute of Limitations for copyright infringement should be applied as with all claims for remuneration attached to the copyrighted work.

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

IFTA believes that fees should be paid out to the rights holders at any stage while the work is still in copyright and actively in use by one or several licensees. Should government decide to reallocate funds after a statutory time limit, we think unclaimed funds should be redistributed to other rights holders whose works were included in the system so as to provide compensation on a pro rata basis agreed upon by relevant stakeholders taking into account certain criteria such as the volume of uses made of the work and the actual revenue generated by the licensee in cases of commercial exploitation of the orphan works.

Appeals

7. Should there be a right of appeal for users of orphan works in the event of unreasonable actions by the authorising body (IPO)? If so, should this cover a) licence fee tariffs (e.g. via the Copyright Tribunal) b) refusals to grant licences or c) both?

Inasmuch as the IPO will be a *de jure* monopoly licensor, there will be a need for an appeals structure as part of deploying appropriate and effective checks and balances. This should be preceded by clear obligations and transparent procedures on the part of the IPO including full disclosure of how it arrived at its decision governing the granting of licenses and attendant tariff.

Impact Assessment

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

IFTA Member companies are active in the development, production, financing, distribution and international sales of films and other audiovisual products worldwide. They are experts at commercial clearance procedures that must comply with insurance requirements for production and distribution. Our companies are unlikely to find the scheme especially useful for anything other than potential “stock footage.” However, commercial stock footage houses not only provide materials to producers, but also provide a warranty and indemnity that such footage can be used in commercial production in compliance with underlying errors and omissions insurance coverage. Given the particularity of clearing and licensing to create a clear chain of title for audiovisual works, it is reasonable to anticipate only a marginal demand for the scheme.

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

See above reply.

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

The non-exclusive approach appears to be somewhat contradictory with the choice of also authorising commercial uses, which pre-suppose an upfront investment at risk by a party who, in this case, may find the lack of exclusivity a distinct disincentive. Competitors applying at a later stage may effectively benefit from the pre-existing diligent search without the costs outlay which the first applicant faced when trying to establish the status of the work. This logic also seems to imply that orphan works and out-of-copyright works are one and the same, which they are not.

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

The question seems somewhat academic, given that it is not within the UK’s legislative or regulatory powers to extend such licensing to uses outside its sovereignty. Licensing tends to be based on territorial and rights exclusivity.

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?

As licensors of film and audiovisual content, IFTA Member companies are of the view that – whether dealing with volume applications or single ones, the authorising body must ensure that its assessment of application reviews the standard of diligent search for each individual work, given that each will present its own search challenges. Archives and other applicants wishing to make use of a large number of works should not be permitted to cut corners or streamline diligent search standards in any way. Due to the inevitable delay in a diligent search to clear necessary rights prior to production and certainly prior to any distribution, commercial producers may continue to use private stock footage houses for clips, etc.

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

IFTA believes unpublished works should not be included in this system. Due to the uncertainty of whether commercial producers could secure the necessary warranties and indemnification to comply with errors and omissions production insurance coverage and whether such clearances, even if compatible with commercial production practices could be secured in the short time allowed to clear a film, it is unclear what use, if any, IFTA Members would make of this system.

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?

To the extent that IFTA companies may make use of the scheme (we anticipate very marginal demand), it would likely be confined to the inclusion in a new audiovisual work of segments of an orphan work too large to come under an existing limitation or exception to copyright and/or fair dealing.

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?

N/A

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?

N/A

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?

This question raises the issue of the compatibility between the diligent search minimum criteria as set out in directive 2010/28/EU on Certain Permitted Uses of Orphan Works and those to be defined in the guidance notes to accompany the UK Statutory Instrument on licensing of orphan works. IFTA is concerned about the compatibility between the directive and the UK licensing scheme with respect to diligent search. A prior search conducted as part of compliance with the uses authorised in the directive may not necessarily always cover the uses to be made by an applicant for a UK license. In both cases, diligent searches must concern those rights and rights owners relevant to the intended

use(s). Therefore, the authorising body cannot merely rubber-stamp prior searches conducted in the context of the EU directive exception when considering the grant of a license within the boundaries of the UK scheme. Each case will require careful consideration, knowing there will be no automatic fit between the two.

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?

N/A

Orphan Works Exception in the EU

Covering Costs

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?

Although IFTA Members have no direct stake in this aspect of the directive's implementation we note that the question appears to assume that costs predictions can be generalised, as if every orphan work were the same. In actual fact, each orphan work (if materials for the work can even be located) will present different challenges in terms of restoration, reproduction and digitisation, depending on the state of preservation of the original material, whether several archival sources may be involved, etc. Regarding the costs of restoration, the film industry abounds with examples of public/private partnerships. These partnerships will allow public sector archives and cultural institutions not only to access relevant orphan works, but also to alleviate the costs of producing digital copies and making those available as per the term of their cultural remit. This cost-sharing and cross-subsidising of the public sector by private sector companies should be taken into account when establishing the bottom line figures for the recovery of costs.

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

N/A

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?

N/A

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

No, we believe the optional provision regarding unpublished works should be implemented. Article 1(3) of the directive⁵ offered a reasonable compromise for implementing dispositions regarding unpublished work by giving Member States the option to limit the application of unpublished works to those deposited with relevant bodies before 29/10/2014. IFTA disagrees in principle with the inclusion of unpublished works within the gamut of the licensing scheme as far as audiovisual works are concerned: we think the option in Article 1(3) offers a sound compromise and this option should therefore be exercised. The explanatory note (3.54. in Copyright Works: Seeking the Lost) of the

⁵ This Directive also applies to works and phonograms referred to in paragraph 2 which have never been published or broadcast but which have been made publicly accessible by the organisations referred to in paragraph 1 with the consent of the rightsholder, provided that it is reasonable to some that the rightsholder would not oppose the uses referred to in Article 6. Member States may limit the application of this paragraph to works and phonograms which have been deposited with those organisations before 29 October 2014.

proposed Statutory Instrument makes no compelling argument for not exercising this option. On a practical note, unpublished works may be unlikely to have any materials available for licensing because they were never exploited.

Diligent Search

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

In the film industry, the producer generally centralises all – or most – of the rights entering into the making of the finished film, including authors’ rights, music synchronisation and publishing rights, as well as relevant performance rights. In some cases, extending diligent search to production companies or their successors in the chain of title may be necessary as the information regarding rights and rights holders relevant to the uses for which the orphan work license is sought, may not reside with any public register, collecting society or trade association.

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?

N/A. IFTA believes the inclusion of unpublished works as part of this scheme is misconceived.

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

Yes. Criminal remedies may be more effective in cases where applicants would seek to deliberately mislead the authorising body on diligent searches in order to obtain access to works and generate commercial gains from infringing copyright.

Fair Compensation

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

The EU directive only posits fair compensation as a guiding principle; although the language is generic, it is sufficiently clear to guide appropriate transposition by Member States. The authorising body – in partnership with each creative industry sector touched by this measure - should develop guidance notes regarding the standard of acceptable evidence. In our view, ‘fair compensation’ should be based on the range of uses authorised by the licensing body, the duration of the period of use (e.g. whether a work is in its first or second 7-year license), the volume of use and, where commercial exploitation has taken place, the revenue generated.

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

As with our answer to question 7: Inasmuch as the IPO will be a *de jure* monopoly licensor, there will be a need for an appeals structure as part of deploying appropriate and effective checks and balances. This should be preceded by clear obligations on the part of the IPO for full disclosure of how it arrived at its decision governing the compensation, with an independent fairness test.

About IFTA

The Independent Film & Television Alliance is a non-profit trade association based in Los Angeles, California. IFTA represents the economic interests of over 150 companies from 23 countries, the majority of which are independent producers and exporters of feature films and television programmes. IFTA has 22 Member companies in the UK, all of which are active in film production, sales and/or distribution. IFTA Members produce about 400 feature films annually and countless hours of TV programming and this content is increasingly to be found on emergent online platforms in the United States, the UK and the rest of the world. IFTA regularly provides input to governments around the world on a wide range of copyright, trademark, financing and export issues that impact the independent industry.

IFTA also produces the American Film Market[®] (AFM[®]) each year in Santa Monica, California, where more than 8,000 industry leaders and participants from over 70 countries come together to carry out worldwide film and television production and distribution deal-making. Over \$800 million in production and licensing deals are closed each year at AFM. The AFM provides a birds-eye view into the economic interactions that underpin the independent financing and worldwide distribution of audiovisual product and the importance of the global copyright framework which supports this dynamic trade.

In the UK, IFTA is a member of the Creative Coalition Campaign (CCC). As a pivotal market for independent audiovisual content worldwide, the UK is home to some of the most economically and creatively active Member companies of IFTA. Over the years, they have been involved in a number of British Oscar[®]-winning films, including *Gandhi*, *Chariots of Fire* and *Slumdog Millionaire*, and helped to launch the international careers of these films. Recent productions to which IFTA's Members have been associated also include British critical and commercial successes such as *Brideshead Revisited*, *The Queen*, *Happy Go Lucky*, *Pride And Prejudice* and *The King's Speech* (winner of four Academy Awards[®], including Best Picture[®]) *The Great Beauty* (Cannes Palme d'Or and winner of the Golden Globe for Best Foreign Language Film) and *Philomena* (winner of BAFTA Award for Best Adapted Screenplay).

As the trade association for independent film companies operating on a global basis, IFTA boasts a breadth and depth of experience in measuring the positive impact of intellectual property law on the development of this vital segment of the audiovisual sector: independent film companies assume the majority of the financial risk for the production of a film or television program and control its distribution in a majority of territories worldwide. They are therefore entirely reliant on a coherent global framework for copyright and licensing, as well a robust enforcement, in order to raise finance to make the films and ensure their widest possible outreach to the consumers.