

Rue Joseph II, 9-13
B-1000 Brussels
Belgium

PRESIDENT
Rainer JUST

CHIEF EXECUTIVE & SECRETARY GENERAL
Olav STOKKMO

Ms Margaret Haig
Copyright and Enforcement Directorate
Intellectual Property Office
First Floor, 4 Abbey Orchard Street,
London, SW1P 2HT
United Kingdom
Email: copyrightconsultation@ipo.gov.uk
Fax: +44 (0) 20 7034 2826

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UK PUBLIC CONSULTATION: “COPYRIGHT WORKS: SEEKING THE LOST”

This submission is made by the International Federation of Reproduction Rights Organisations (IFRRO). IFRRO is the main international network of collective management organisations – the Reproduction Rights Organisations (RROs) - and creators’ and publishers’ associations in the text and image spheres. Our UK-based members are the Copyright Licensing Agency (CLA), Authors Licensing and Collecting Society (ALCS), Design and Artists Copyright Society (DACs), Newspaper Licensing Agency (NLA), National Union of Journalists of Great Britain and Ireland (NUJ), Publishers Association (PA) and Publishers Licensing Society (PLS), which we are proud to count amongst our 143 members.

We thank the UK Government for the opportunity to participate in the consultation and would like to comment on some of the questions raised.

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

IFRRO notes and has no objections to the proposed regime in the UK, by which certain permitted uses of orphan works are administered by the Intellectual Property Office (IPO). It is, however, indispensable that it is clarified what type of role Collective Management Organisations (CMO) should have. CMOs can be helpful with respect to due diligence searches, but it is important to provide safeguards for any activities beyond that. CMOs can improve the licensing of orphan works. The very competence and expertise of CMOs is the licensing of copyright works. This includes establishing licensing and other conditions for the use of works in their area of expertise. Through their members and / or the representation of categories of the rightholders and works concerned on their governing bodies, they have a better basis than any other organism for the establishment of such conditions.

Also, as a part of their activities, CMOs have established and administer registries of works, and of authors and publishers and other rightholders. They have the know-how and experience of identifying copyright holders in their respective sectors and of distributing revenues to them for various types of uses of their works.

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

At the outset, we do not think that an orphan works licence should be transferable. Therefore, sub-licensing should, generally, not be permitted. However, in cases where the identity of the licensee is not a matter of great importance to the granting of the licence, these licences could be reissued or novated to a new licensee – provided it is done only with the consent of the authorising body.

Contractual arrangements to enable Public-Private-Partnerships may play a role in fostering the making available of European cultural heritage. Libraries, educational establishments, museums or archives and film heritage institutions may, with a view to undertake the permitted uses, conclude agreements with commercial partners for the digitisation of orphan works. Such arrangements should, however, not include any transfer of rights. .

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?

Whilst the concerns of various public institutions can be recognised, we think that it is vital to obtain permission for a licence for each use individually to ensure rightholders' legitimate interests are not damaged and that there is no distortion in the market.

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?

IFRRO supports the idea of a time limit until when rightholders can claim remuneration. The details should be decided on a national level, jointly with the representatives of authors and publishers, including the CMOs. We would suggest that, in the UK, the liability remains throughout the copyright period in question or, at worst, within a time limit of 15 years.

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

Unclaimed revenues collected for the digitisation and / or making available of orphan works should be used for the benefit of authors and publishers of the same category of

work, unless their representative trade bodies and / or CMOs decide otherwise. The proceeds should be transferred to the pertinent CMO, which will be responsible for their further distribution or use. The details should be worked out with the representatives of authors and publishers of the category of works concerned.

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

Unclaimed revenues collected for the digitisation and / or making available of orphan works should be used as decided by authors and publishers of the same category of work or, when appropriate, the licensing collective management organisation. This includes that funds may be used to contribute to financing rights information sources that will facilitate diligent search, by low-cost and automated means, in respect of categories of works that fall actually or potentially within the scope of application of the orphan works scheme.

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

We agree that there should be a right of appeal of both returning rightholders and prospective users of orphan works. This may cover both licence fee tariffs and refusals to grant licences.

Unless there is an agreement to the contrary on a national level among rightholders and their representatives, there should be an immediate right of appeal for rightholders generally, to protect the missing orphan works copyright owners' interest and to ensure that unduly low fees are not agreed which may undercut the primary market.

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

The EU Orphan Works 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.

Generally, before implementing national legislation to deal with orphan works (including unpublished works), it seems important to provide clear definitions and guidance, and to define clearly e.g. what is meant by the term “publicly accessible” as opposed to “publication”, including an objective consideration of the nature of the works and the original intentions of the rightholders. It should also be assessed carefully whether the exploitation of certain works never intended for publication complies with the 3-step test enshrined in the Berne Convention.

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

The sources that are appropriate to perform a diligent search for each category of works in the UK must be determined in agreement with the UK authors and publishers, their trade bodies and the CMOs. They should include at least the sources listed in the Annex of the Directive 2012/28/EU and those listed in the Joint Report of the European Digital Libraries Initiative, “Sector-Specific Guidelines on Due Diligence Criteria for Orphan Works” (http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/guidelines.pdf), with an expansion of the resources at: http://www.ifrrro.org/upload/documents/i2010%20Appendix%20to%20Joint%20report_sector%20report.pdf). We would recommend checking which of the sources listed in those documents are relevant for the UK, and include them in the list of 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?

In the text sector, there are likely to be rightholders in “grey” and unpublished literature. As a rule, an unpublished work exists only in one manifestation (the original). A significant amount of unpublished works are relatively mundane materials such as business and private letters, accounts, diaries, minutes of meetings, reports, registers. Often, however, the author will not be represented by professional organisations of writers or other creators. In these cases, useful sources could be, for instance, relevant personal and/or business directories and search engine searches, the contacting of other owners of the same or similar works by the same author/creator, and additional publicly available sources, such as probate records (to trace authors’ heirs).

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

We agree with the approach taken by the UK Government that the fair compensation, which is due to the respective rightholder, should be decided between the relevant body and the emerging rightholder. It should also be specified in the legislation that the copyright holder concerned shall have the right to be assisted or represented by a trade body or a CMO. The burden of proof should lie on the user having been authorised to use the orphan works and the body having granted the authorisation.

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

The proposed appeals process on the level of fair compensation seems appropriate. It appears to us that the UK Copyright Tribunal would be the correct body for such a process.

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

The legislation on orphan works should also enable orphan works to be included in collective licensing schemes. Any unclaimed payment due for the digitising or making available of an orphan work should be transferred to the CMO that is representative for the category of authors and publishers that are concerned by the digitisation and making available.

We thank you for taking IFRRO's comments into consideration in the further work on this consultation. We will be pleased to provide additional comments, information and explanation, as required.

Respectfully submitted,



Olav Stokkmo
Chief Executive
and Secretary General



Anita Huss-Ekerhult
General Counsel
and Deputy Secretary General