

## 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

Comments submitted by The National Library of Wales

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#### About the National Library of Wales

The National Library of Wales (NLW) is the largest library in Wales and holds over 6.5 million printed volumes. We are one of the five legal deposit libraries in the UK and approximately 67,000 books and 100,000 periodical and newspaper issues are added to our collections annually.

NLW collections also include:

- Around 1,900 cubic metres of archival material;
- The most comprehensive collection of paintings and topographical prints in Wales, totalling over 60,000 works;
- Wales's largest collection of portraits (c.15,000 paintings and portrait pictures);
- The largest collection of photographic images in Wales (c.1,000,000 images);
- Wales's largest cartographic collection (c.1,000,000 maps);
- The National Screen and Sound Archive of Wales, which contains over 5.5 million feet of film, more than 250,000 hours of video, and over 200,000 hours of sound recordings.

We are a Welsh Government Sponsored Body and a Registered Charity, and our core objects are to 'collect, preserve and give access to all kinds and forms of recorded knowledge, especially relating to Wales and the Welsh and other Celtic peoples, for the benefit of the public, including those engaged in research and learning'.<sup>1</sup> Copyright is a key influence on the NLW's ability to achieve these aims, especially in relation to the use of digital technologies as a means of widening access to the collections in our care.

#### General comments in response to the consultation

NLW supports the Government's efforts to enable the lawful use of orphan works. A large number of historical works in NLW's collections is, or is very likely to be, orphaned,<sup>2</sup> and an effective solution to the so-called 'orphan works problem' would be a positive step towards widening access to our collections for the benefit of the public.

Such a solution must not only protect the interests of potential right holders, but also incentivize users to adopt the scheme in place of the stringent or risk-based approaches that they may currently take. Our main concern regarding the proposed scheme is that it will not offer this incentive and that its impact in enabling the lawful use of orphan works would be very limited due to the cost (in the form of both fees and administrative burden) that it would place upon users. The fees have not yet

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<sup>1</sup> NLW Supplemental Charter 2006:

[http://www.llgc.org.uk/fileadmin/fileadmin/docs\\_gwefan/amdanom\\_ni/llywodraethiant\\_llgc/Siartr\\_atodol\\_2006/bdd\\_str\\_SiartrAtodol\\_2006S.pdf](http://www.llgc.org.uk/fileadmin/fileadmin/docs_gwefan/amdanom_ni/llywodraethiant_llgc/Siartr_atodol_2006/bdd_str_SiartrAtodol_2006S.pdf)

<sup>2</sup> In 2011, the British Library estimated that as many as 40 per cent of all in-copyright works are orphan works. <http://pressandpolicy.bl.uk/ImageLibrary/detail.aspx?MediaDetailsID=635>

been set, but it is hoped that they will reflect factors such as the age of the work and the commercial intent of its author as well as its proposed use under the licence.

The most restrictive aspect of both the Directive and the domestic scheme is the requirement on users to undertake diligent searches for each individual copyright work and the fact that multiple copyright works embedded in a single item should be treated separately. In addition to this administrative burden, there would be the cost of setting up suitable databases to support the processes, the cost associated with the sharing of data on the online database, and also the cost of renewing orphan status after a certain period by repeating diligent searches. This would require a large investment of resources – one that many cultural organisations undertaking digitisation of their collections would find unfeasible and, as far as their collections are concerned, would not lead to the ‘releasing for use the vast treasure trove of copyright works’, as it was described in the Review of Intellectual Property and Growth (2011).<sup>3</sup>

This concern regarding the cost of the proposed schemes underlies our entire response to the Consultation, but we have responded to each of the questions listed in the consultation document on the implementation of a domestic orphan works licensing scheme based on the principle that we would seek to use the schemes where possible.

### **Domestic Orphan Works Licensing in the UK**

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

Collecting societies could improve the licensing of orphan works in their area of expertise by sharing data (where possible) to support the scheme and ensuring that there is consistency between their own operations, such as their role in the administration of the ECL scheme (where they may be undertaking diligent searches for copyright holders), and that of the Government licensing scheme.

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

An orphan works licence should be transferable. Some of the users of copyright works may not have the resources or expertise to undertake diligent searches. In such instances, the option of commissioning a third party to undertake the diligent search on their behalf could further encourage the adoption of the scheme and the lawful use of orphan works. When a request is received for the use of copyright works from its collections, NLW will sometimes search for and/or contact rights holders as part of its licensing service. The service could be extended to include diligent searches for orphan works at the end of which a licence could be transferred to the user of the service. This could also be a model that would enable cultural organisations with experience of searching for rights holders to recover some of the costs of making orphan works within their collections available more widely under the Directive.

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<sup>3</sup> *A Digital Opportunity: A Review of Intellectual Property and Growth* (2011), 4.

**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?**

We strongly support the idea of allowing high volume users to take out an annual licence or similar arrangement to cover low value, non-commercial use, for the reasons described in 5.5 – 5.7. As a cultural organisation engaged in digitisation projects that may use a large number of orphan works, we would be more likely to adopt the scheme if it were based on an annual fee to cover a certain number of works as this would also reduce the administrative costs of multiple payments. We would also wish to have the option of applying for individual licences where this may be considered more appropriate.

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

The period of time in which a rights holder can claim his/her remuneration should be limited to 7 years in line with the law of tort. If unclaimed funds were distributed as described in our response to question 6, the prospect of recovering some of the costs of obtaining the licence within a reasonable timeframe would perhaps act as further incentive to organisations engaged in the task of widening access to orphan works.

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

The Government should be able to distribute unclaimed funds once a rights holder can no longer claim remuneration (i.e. 7 years). The rationale behind the period of 7 years is noted above and it would be reasonable for the Government to distribute any funds which have not been claimed once this period has expired.

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

The unclaimed funds should support ongoing access to orphan works. They should be distributed back to users that have invested time and resources in making orphan works available for use. In this way, users would be able to recoup or cover costs of further diligent searches (in order to renew the licences) and/or recover some of the other costs associated with the preservation, sustainability and providing long-term access to these works.

**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?**

Users of orphan works should have a right of appeal in the event of unreasonable actions by the authorising body (IPO). Appeals, which should include both licence fee tariffs and refusals to grant licences, should be heard by the Copyright Tribunal.

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

As explained in our general comments above, NLW's use of the scheme will depend on its cost (fee, admin and the resources required to undertake the diligent search) and the assurance gained from obtaining the licence. If this is considered excessive or disproportionate given the nature of the work (e.g. its age, that it would not appear to have been created with any commercial intent), then NLW would make very few applications a year. A high volume licence would be considered as an option but, again, as noted in our general comments, the requirement that users must undertake diligent searches for each individual work would continue to be the main barrier to adopting the scheme.

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

NLW would wish to include more orphan works in the services that we already deliver (e.g. online digital resources). This would include a wide range of potential uses such as digitisation projects, promotional material, educational resources, print publications and other products based on our collections.

NLW also licenses the use of digital reproductions of items from the collections to our users. In instances where users request the use of an item for which the copyright holder is unidentifiable or untraceable, we would have the option of directing them to the scheme to obtain the appropriate licence.

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

The fact that the licences are non-exclusive is unlikely to impact upon our potential use of the scheme. They are also unlikely to impact upon the type of use that is made of our collections under our licensing service (which only issues non-exclusive licences).

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

NLW's digitisation programme aims to widen access to the collections not only within Wales and the UK, but worldwide via the Web. The fact that licences are limited to the UK would therefore limit the benefit gained from obtaining the licence.

Also, approximately half of the users that contact NLW to obtain licences for the use of reproductions of items from our collections will request a worldwide licence. Television companies, for example, request worldwide licences so that their productions can be made available via web-based on-demand services such as S4C Clic. NLW may be able to ask users to provide evidence that they have obtained a licence under the orphan works scheme, but it would not be sufficient to protect NLW or the licensee if the product were distributed worldwide.

- 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?**

Subject to a cost-benefit analysis, we would potentially use the scheme in both of the situations described.

We would consider the acceptable amount of time for processing an application to depend on the proposed use of the orphan work. In line with the Libraries and Archives Copyright Alliance's submission, we would suggest 10 working days for non-commercial use of orphan works and 5 working days for commercial use.

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

While it is difficult to state the exact proportion of applications for unpublished works, we have found from our experience that unpublished works are much more likely than published works to be orphaned. The fact that many of them will not be covered by the proposed ECL scheme either would also mean that unpublished works are more likely to be the subject of applications under the scheme. In response to the second half of the question, NLW collections include all types of works, many of which are unpublished and may become the subject of applications.

- 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?**

Our main use of orphan works would be as part of the services that we already provide. This could include a wide range of potential uses such as digitisation projects, promotional material, educational resources, print publications and products based on our collections.

- 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?**

This would depend on the age of the work, whether or not it is published and the amount related information available. However, from our experience, only a small percentage of diligent searches lead to a right holder and, regardless of whether or not the search has been successful, the actual cost of undertaking the diligent search on a single item is often disproportionate to the proposed use and the estimated commercial value of the work. In most cases, it is possible to estimate the probability of locating or identifying a rights holder

based on the age of the item, the information recorded on the item (e.g. name of creator) and/or information in the catalogue/accession record for the item or the collection to which it belongs. Also, a diligent search can only be undertaken if there is a piece of information associated with the work that acts as a starting point for the search. There will be works in our collections which have no information on which a search could be based and the scheme should enable these to be registered as orphan works too.

Also, depending on the age and the commercial intent of the author, we have found that when diligent searches lead to a potential rights holder, the person contacted will sometimes be uncertain whether or not they are in a position to grant permission to the user.

**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?**

As some works have been omitted from the Directive (e.g. artistic), whether or not the diligent search will be undertaken under its auspices will depend on the type of work in question. There is a possibility that the Directive (and also the domestic orphan works licensing and the Extended Collective Licensing schemes) may influence the works selected for inclusion in NLW's digitisation programme and projects in the future.

The majority of licensing requests received from third parties are made for uses and types of works that are not covered by the Directive (i.e. commercial uses and photographs or other artistic works).

**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?**

While it is possible that NLW would use a search conducted under the Directive to support an application under the domestic scheme, it is more likely that a third party user of NLW (a television company or publisher, for example) that has discovered an item published on the website under the terms of the Directive would make use of the domestic scheme to obtain a digital copy for commercial purposes. Again, however, many of the requests received from third party users are for photographs or other artistic works which are not covered by the Directive.

**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?**

This would depend on the work(s) in question (whether or not it/they are covered by the Directive), the proposed use, and which scheme would be most appropriate (including the Extended Collective Licensing scheme). Due to the non-commercial nature of our services,

material is more likely to be displayed under the provisions of the Directive than the domestic scheme. We have found that photographs and other artistic works are popular digital resources, and their omission from the Directive would require us to use the domestic orphan works licensing scheme. Unless the use and the type of work is covered by the Directive, the key factor in the decision whether or not to use the domestic orphan works licensing scheme will be the associated costs.

## **Orphan works exception in the EU**

### **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?**

NLW is a publicly-funded organisation that aims to widen access to the knowledge that is held in our collections for the benefit of the public. While we are willing to explore ways of generating income from our collections, we would be unlikely to recover the full costs related to the digitisation and making available of orphan works. We would argue that factors other than their potential to recover costs, such as value to research and learning, should determine whether or not cultural organisations should use, and enable others to use, orphan works.

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

NLW uses digital technologies for the purpose of widening access to our collections and, since we began to digitise our collections about fifteen years ago, we have not charged users to access any of the digital resources that we have created. We would prefer other methods of recovering the full costs of digitisation that are based on 'added value' (such as licensing and reprographic fees for high resolution versions). We would place these methods within the wider context of enabling access our collections non-commercially rather than as use in the pursuit of commercial gain. Income generation should be measured in relation to the overall costs of delivering online access to our collections rather than individual items, and we would argue that the orphan works scheme should distinguish between 'commercial' activities of cultural organisations and commercial uses made by users within the commercial sector.

### **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?**

While NLW has not proactively sought to develop public-private partnerships to digitise and make available its collections, the level of interest of private enterprises in such partnerships has from our experience been very limited.

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

We agree that this optional provision should not be implemented as it would unnecessarily and arbitrarily limit the use of any unpublished works deposited after transposition.

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

We believe that the list of essential sources is sufficient and adequate.

**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?**

We agree with the addition and have no other sources to suggest for unpublished works.

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

We would argue that civil sanctions will provide appropriate remedies.

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

The burden of proof should lie with the person making the claim and it should be supported by documentary evidence.

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

We would agree that it is necessary to provide for an appeals process on the level of fair compensation.

**End.**