

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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Executive summary

- The UK's audio-visual sector plays an important cultural role in people's lives and makes a significant economic contribution to the UK. In 2012, sector revenues for the UK independent production sector were £2.8 billion¹.
- An effective copyright regime is vital to securing future growth in the sector.
- Content producers are both rights holders and rights users and therefore have an interest in fair access to available rights, provided that rights holders are adequately compensated for their use.
- The Pact submission touches on a number of themes, but the key messages are:
 - Pact is uncertain as to how collecting societies could improve on the current system of licensing orphan works. Our view is that the current system works at zero cost and we need to be mindful of what works currently.
 - Pact is very clear on the fact that the orphan works licence should be transferable. In simple terms, if the licence is not transferable then it cannot be used.
 - The definition of 'non-commercial use' is important and this needs to be clarified. It is simply not justified for 'non-commercial' organisations to not pay, or pay less, for licences.
 - In terms of pay, Pact is wary of any blanket approach to this as it would be difficult to implement and operate in practice for the audio visual.
 - Unclaimed funds should be distributed for use and in consultation with the industry.
 - A right of appeal process is essential in the event of unreasonable actions by the IPO.
 - Pact raises issues around the fact that the licences are limited to the UK and therefore any fee is a premium for the UK use and does not take into account the overall worldwide exploitation which contributes to the fee. Therefore, any fee has to be limited to the value to UK use only and to that market. Currently any rate cards are based on all exploitation use and not restricted to the UK, therefore IPO needs to take this into account.

¹ Pact Census Independent Production Sector Financial Census and Survey 2013, by Oliver & Ohlbaum Associates Limited (July 2013)

Introduction

- 1) Pact is the trade association that represents the commercial interests of the independent production sector.
- 2) The UK independent television sector is one of the biggest in the world, with revenues of £2.8 billion in 2012.²
- 3) The copyright licensing framework underpins growth in this sector. It enables rights holders to exploit their intellectual property by controlling access to their content which they use to generate revenues to invest in future productions.
- 4) The UK copyright framework is considered to be one of the best in the world. It has been effective in enabling competition and growth in the television production sector, and as a result:
 - The UK is now the second-largest exporter of television programmes in the world.
 - Audiences in the UK and across the globe have had access to high-quality, thought provoking and entertaining content in a range of different genres, much of which is provided free-of-charge via television broadcasting.
 - The flexibility of the copyright licensing regime has allowed independent producers, including many SMEs, to adapt to changes in market conditions and find new business opportunities in the UK and overseas.
 - There are now many examples of audio-visual content producers working with non-linear digital content providers to create new, innovative content and services for consumers in the UK and elsewhere.
- 5) Any disruption to the ecology of this complex market would have a significant impact on UK original content production.
- 6) Secondary sales rights are vital to the continued growth of the UK creative industries. Any changes to the existing IP regime must take into account the value of these rights and the potential impact which changes would have on content producers in this sector.
- 7) For further information on this issue please contact Pact's Head of Legal Affairs, Amanda Russell at amanda@pact.co.uk or on 020 7380 8237.

² Pact Census Independent Production Sector Financial Census and Survey 2013, by Oliver & Ohlbaum Associates Limited, July 2013

Consultation Questions

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

At present, Pact is not clear on how collecting societies could improve on licensing works. Due diligence is undertaken by the user to ensure that all steps have been taken to discover the owner. It may not be wise to pass on this obligation when the collecting society may not understand the purpose or use in that particular instance. In addition, collecting societies are not in a position to licence outside the UK or necessarily understand the risks or insurances required. Whilst in some instances, producers may contact a collecting society to establish ownership; it would not improve the quality of licensing. Collecting societies, under the current arrangements, have only existed since the early 1990s and may have not fully established or represent all parties.

Pact, at this point, does not consider that collecting societies would offer any more of a service, except possibly as part of a producer undertaking their due diligent search.

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

The nature of production and the basis of broadcast performance mean that the industry standard requires the ability to transfer or licence the rights, in order that they can be used for the purposes of 'making available'. Producers create content, however, they are not broadcasters or distributors who licence the content onto broadcasters. Therefore, by not having a licence that is transferable for content which is created, there is no basis to use this as there would be no commercial value or ability to make it accessible to the public.

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?*

There needs to be a clearer definition of non-commercial use as there should not be competition with a commercial user.

The licence or arrangement should be based on the use of the work.

Pact considers that non-commercial should be dictated by the type of use online and not the type of user.

There should also be clarification as to what is deemed to be '*low value*' and how the IPO intend to attribute what is a low value work without understanding the basis of the use. There is also the issue of how it will be incorporated in a work or standalone and also how the IPO intends to ensure that it does not cause a market distortion by setting prices.

It is important to note that in many instances a value is unknown until it reaches the market. A low value/high volume use may alter definition, notwithstanding the resources that go into establishing whether something is a genuine orphan work.

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 examples of time limits set out at paragraph 5.9, what should that period be and why?*

Pact considers this should be the same as it is currently, which is for the life of the copyright. However, in this respect, it may be considered that this should be limited to the term of the licence period in which it was granted. Pact finds it difficult to respond to this as we understand the basis was not to treat an orphan rights holder differently to one that can be identified. However, this would appear to restrict the orphan works rights holder's right to remuneration, which currently is not the position.

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

Pact is not clear to whom the Government intends to distribute unclaimed funds. If the intention is to return such funds to the user who is then responsible in the event an orphan works user arises; the security to the user is that will be the sum established by the IPO as the sum due.

There is a problem that some works may already be out of copyright when licensed, as companies may license if unsure for comfort (for themselves and the relevant broadcaster). Pact is not clear as to how this will be dealt with; would these monies be returned to the user if it is established to be out of copyright?

Interest on such sums should be returned to the user of the copyright holder or such consultation is held where the sums should be attributed to the benefit of the industry or alternatively agreed by the user.

Pact would seek to understand that copyright has no statute of limitations and would appreciate how this limit would work whereby users, having not used the system, would not have the benefit of the reduced right to claim by an orphan works holder or recognised trustee.

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

Pact considers that any monies should be agreed to be distributed having been agreed following consultation with the industry. Such orphan works scheme should not be a profit organisation and should be cost neutral.

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?

Pact considers where the IPO has appeared to inflate the costs, or not recognise industry standards custom and practice, there should be an appeal process. This is essential where a failing has been established, the IPO should then be held responsible for any process costs to the user. Pact considers that any appeal process must be quick, and should take no more than 14 days.

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

Pact is not in a position to comment on this.

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

Pact is not in a position to effectively comment on this question. It is impossible to gauge how the industry will use an orphan work, as it depends on: the type of content being sought to be used; how it intends to be used and the value of orphan works is subjective to the basis of its use. Pact considers that it may be used more for historical archives but, again, this is subjective and Pact has no way of gauging the type of orphan works or its future (if any) intended use.

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

Pact understands the importance of a non-exclusive licence and this is how the scheme should be run. These rights require to be treated as non-exclusive.

Pact is aware that concerns have been raised that the use may be used to take advantage of another's company due diligent search and research to establish the existence of an orphan work.

A potential solution to this may be a premiere right for the first licensee dependent on whether it is being sought and there is a legitimate basis for it.

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

In terms of production, selling content internationally and the current digital models that exist, as well as SVOD (for example, Netflix) and the use of YouTube and how consumers like to access information; the fact that this is limited to UK is particularly unhelpful for producers. However, Pact understands that the legislation can only be made available to the UK.

It is important to note that content in the UK is largely deficit funded by distributors who sell content outside of the UK.

Pact would like to raise a number of issues that come up for producers which highlights the importance of the proposed scheme being efficient and cost effective.

For example, as producers may be required to create a version of content for international sale, this is costly for producers.

A producer may be still open to a claim, from a member outside of the UK for example Pact is concerned there may be potential issues as a result of the Rome II Convention.³

Therefore, it is not clear that this system does more than provide basic assurances in the UK for primary broadcast.

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

³ Regulation (EC) No [864/2007](#) of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

be an acceptable amount of time for processing an application to use an orphan work?

Pact considers that orphan works should be processed in the same way. Due diligence must be performed to confirm it is an orphan work. Pact appreciates that in some instances similar works of the same type that could be established as a collection of works, however due diligence should be used to establish this.

It is important that any processing for an application should be quick; otherwise it would impact and impede a production using an orphan work.

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

Not applicable. Pact is unable to provide a view on this point.

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 or orphan works or a collection that is likely to contain many orphans or partial orphans?

Pact represents producers that create copyright, therefore taking into account production companies activities it is likely that orphan works, if used, will be used within or part of the content. That point made, many production companies are involved in the digital field and may be involved in creating a new service. However, Pact is unable to further comment on this.

15. The impact assessment assumes that 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 able to locate or identify a rights holder following a diligent search?

Pact understands that producers do not work on the basis that works are assumed to be orphan.

Pact is unable to comment on 10% to be a fair and accurate representation of the industry and is not clear how these figures have been established.

We cannot say how often a rights holder is located, as companies may not always use the work when they cannot find the rights holder.

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?

Not applicable. Pact is unable to provide a view on this assumption.

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?

Not applicable. Pact is unable to provide a view on this.

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?

Not applicable. Pact is unable to provide a view on this.

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?

Not applicable. Pact is unable to provide a view on this.

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

Not applicable. Pact is unable to provide a view on this.

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

Pact is concerned about the intention here as a cultural organisation should not be commercialising without having undertaken a due diligent search.

Pact agrees that costs should only cover the digitisation and making available once established as an orphan work.

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

Pacts consider this is a very short period of time to implement an optional provision and believes it may be useful to have further review of this proposal.

Pact notes it benefits the industry to be as widely applicable as possible. However, privacy sensitivities should be considered along with additional legal issues, including confidentiality etc. However, Pact recognises that the above concerns are unlikely to be applicable to works out of copyright, for where the life of the author has likely been succeeded.

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

Pact suggests that the IMDB, general industry database could be included or where publically available Collecting Society databases.

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?

Pact is unable to provide a view in this matter.

25. Is there a realistic prospect that civil sanctions will not provide appropriate remedies? In 1 what circumstances?

Pact considers civil sanctions are adequate.

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

IPO should be responsible as they have outlined the procedure for due diligence. It is important to note that fair compensation is relative due to value.

However, where a party has used the licence scheme the user / licensee should not be affected otherwise this would result in undermining the orphan works scheme

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

Pact is unable to comment on this any further however where a value has been established by the IPO the user of the licence should not be responsible for further costs. In addition, where a user has created a value as the result of their use this should not result in further costs being borne by the licensee.