

February 28, 2014

AMERICAN SOCIETY OF



Ms Margaret Haig
Copyright and Enforcement Directorate
Intellectual Property Office
First Floor, 4 Abbey Orchard Street
London SW1P 2HT

Submitted by email: copyrightconsultation@ipo.gov.uk

Regarding: “Copyright works: seeking the lost; Consultation on implementing a domestic orphan works licensing scheme and the EU Directorate on certain permitted uses of orphan works”

Dear Ms Haig:

We are writing on behalf of the American Society of Journalists & Authors (ASJA) because we’re concerned that the measures under consideration in the U.K. Parliament and IPO, if carried through, would mean the works of many American writers are likely to be labeled “orphan” when they most decidedly are not.

ASJA, which originally was organized in 1948 as The Society of Magazine Writers, is the professional association of independent freelance writers. We are a primary spokesman for freelance writers’ interests, most notably for your purposes, the right to control and profit from the uses of our work. Our members write for a vast array of publications that publish in print and online, and they also write nonfiction books. While most of our members reside in the United States, we also have members in Canada.

ASJA has headquarters in New York City, and chapters exist in Arizona, Atlanta, Boston, Chicago, Denver, Northern California, San Diego, Southern California, Minneapolis and Washington, D.C.

(1.) First, let me say we’re sorry to see that the creators of the written works being discussed by the IPO aren’t in any way allowed to speak for themselves. Writers aren’t a category of potential responders.

We writers are the ones at risk of having our works declared “orphaned.” We’re the ones you’ll be searching for, but oddly enough, nobody appears to have consulted

writers about the best ways to find us. Surely that would be helpful to everyone involved! ASJA believes that checking the databases you mention isn't going to approach a sufficient level of diligence -- not to mention fairness -- where American writers are concerned, and perhaps for writers, period. (More on that in a moment.)

(2.) Your proposal puts writers and their interests in the same basket with publishers and their interests, in a sort of universal "rights holder" grouping. Above all else, we urge you to change this. Authors and publishers sit on opposite sides of the table when we negotiate money and rights; this is true all over the world.

ASJA does not believe the IPO is deliberately setting out to ignore the interests of writers or to do harm to writers, and especially foreign writers. *Yet you will be doing both those things if, for the sake of convenience or habit, you use publishers as the proxies for writers' interests.*

The publishing industry has undergone, and is continuing to undergo, changes as jolting and financially unsettling as those experienced by the livery trades when automobiles appeared. Last year, half the e-books sold on Amazon.com, the largest bookseller in the United States, were self-published by writers. No publisher was involved.

Please don't set up publishers as the guardians of writers' interests. They are less likely to be that now than ever.

(2.) Along the same lines, it isn't unusual for an author to discover that his publisher has assigned the digital rights to a book or article, when the publisher doesn't own those rights. Only in the last decade or so have digital rights clauses routinely been included in contracts. U.S. law unequivocally says any rights not specifically assigned belong to the author of the work. The courts -- including our Supreme Court -- have agreed, and uniformly rejected the false claims of publishers.

Nothing in a typical book contract in the United States requires a publisher to notify an author about the sale of foreign rights. Sometimes it happens, sometimes it doesn't. Therefore, please don't assume that an American writer (or any foreign writer) necessarily will know if a book or other work has been declared "orphaned," and is re-published or re-licensed in the U.K. Neither can a writer be presumed to know if an article, letter or any other work has been placed in a U.K. database or archive.

No law obliges a publisher (including a self-publisher) to name the place a book, article or other written ephemera are being published. No law requires saying where the author resides, the author's nationality, or whether all or a portion of a work previously has been published in another country.

ASJA urges the IPO to recognize that your decisions are being made in the midst of many disputes between authors and publishers over digital rights:

A. The burden of proof for claims that a work has been "orphaned" should rest with the publisher or third-party entity claiming the rights and revenues connected to the work. As matters now stand in the IPO plan, the author bears the burden of proof -- and the author may never even discover his work has been declared "orphaned" and is being used by someone else for profit.

The author who does make such a discovery now has the burden and expense of proving the work is not orphaned, and very likely, he must sue in an unfamiliar court

system to recover money due him. Before he can begin that daunting task, he may have to sue an American publisher who improperly claimed the right to license his work. It's unfair that the IPO would require an individual writer to carry such a heavy weight, when he or she is not the instigator of any wrong and indeed, is the party being wronged.

B. There should be a penalty or penalties for lack of diligence in finding authors, in line with the degree of profit or anticipated profit from the exploitation of the work erroneously designated as orphaned.

C.. There should be a clear path set out for the resolution of disputed claims.

(3.) The IPO proposal lists databases to be checked for authors, before works are declared "orphaned." Many of these databases appear to be bibliographic in nature, or else, they are unlikely to yield information about who owns the rights to a work. The proposal also suggests checking with publishers. It makes the assumption that if a work is still being sold, and the author is still around, these methods will ferret out any work still commercially viable, the author, or both.

Ten years ago, you might have been right. Not so, today.

Many of our member writers are making e-books of their older titles, and selling them on their own websites and on the many independent sites that publicize and sell e-books. A writer who has written a book about living with chronic disease may publish it in e-book form and sell it on the site of an association for those with arthritis, for instance. She may reprint the book -- since the rights have reverted to her -- and sell it at conferences.

A writer might repurpose his magazine article about children's games in pamphlet form, and sell it in bulk to parent-school associations. Or it may become a mini e-book which a parent may download for a small sum, on the eve of a child's birthday party.

Our members are finding many such ways to turn older works into an income stream. Yet searching only the databases you mention would lead one to believe their books and articles aren't on the market. Asking the former publisher for an author's contact information may well be fruitless. People do move about. Publishers often lose track of writers, once they are no longer actively selling a book, and having to send our royalties. Also, the fact that a publisher once owned or shared rights to a book or other work says nothing about who owns any rights on the day you ask.

Unless the IPO expands and augments the "diligence" search now proposed, a good many works by American writers will be declared "orphaned" in error. We believe that few entities will be eager to publish genuinely orphaned works, since most will be quite dated. If a vigorous search is performed, the outcome probably will be a conversation with the author or the legal representative of a deceased author. ASJA would be delighted to suggest ways to locate American writers.

At the very least, please consider including databases of authors (there are several such in the United States), and entering an author's name and any known pen names into multiple search engines, into your "due diligence" requirements.

(4.) We at ASJA are puzzled about why the IPO's Impact Assessment estimates the cost to writers is zero. The more so because there is no explanation.

Once again, let us take as our example the writer who turns her out-of-print book about chronic disease into an e-book, and sells it herself and on association websites.

Under the IPO's present plan, the only way she can protect her work from being declared "orphaned" is to regularly check to see if it's happened. Assuming she sits in front of a computer checking lists of works recently listed as "orphaned" twice a month for two hours, that time is taken from her normal activities. As we all know, time is money. (Two hours is a conservative estimate for such a task, but we'll leave it at that.) If we agree to pay her 10 pounds an hour, the IPO plan will cost her 240 pounds annually, or \$400. [We beg pardon that our keyboard lacks a sign for pounds sterling.]

If 20 million other authors similarly spend two hours a month protecting their literary interests, the IPO proposal would impose an annual burden worth 4.8 billion pounds (\$8 billion) on American writers alone.

If our writer discovers her book on a "provisionally orphaned" list, she must make some sort of claim or otherwise begin a process (whether in the courts or elsewhere) to ensure control of her own work. We cannot imagine there would not be a considerable financial burden, as well as a time burden -- or that any such process wouldn't be one of the "formalities" prohibited by the Berne Convention.

We urge you to reconsider the Impact Assessment.

And let us say again that our most pressing concern about the IPO proposal is that it mistakenly assumes the interests of writers and publishers are one and the same. They never have been.

Thank you for considering our submission. ASJA would be pleased to be of use as you move forward.

Would you be so kind as to inform us this e-mailed letter has arrived?

Yours sincerely,

Minda Zetlin, ASJA President

Salley Shannon, Advocacy Chair, Board of Directors

[Either of us may be reached through the ASJA
New York office: ██████████.]

We grant permission to share this communication
but ask that you first remove Ms Shannon's

personal

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Alexandra Owens • Executive Director • ██████████

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