



32 Rose Street
London WC2E 9ET
T 020 7557 6700
enquiries@soltukt.co.uk

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Ms Margaret Haig
Intellectual Property Office
1st Floor
4 Abbey Orchard Street
London
SW1P 2HT

By email to: copyrightconsultation@ipo.gov.uk

Dear Ms Haig

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

1. I write on behalf of the Society of London Theatre ("SOLT") and UK Theatre Association ("UK Theatre") in response to the Intellectual Property Office's invitation for comments on the introduction of an orphan works licensing scheme in the UK.
2. SOLT and UK Theatre are the trade associations representing the interests of those engaged in the production and presentation of medium to large-scale dramatic and lyric theatre in the UK. SOLT represents approximately 190 London-based producers, theatre owners and managers. UK Theatre represents approximately 270 theatres, concert halls, dance companies, producers and arts centres throughout the UK. UK Theatre also now operates as a professional association, supporting over 1,000 individuals working professionally in theatre and the performing arts in the UK.
3. Combined annual attendance at our member venues exceeded 33 million people in 2013. This is more than the entire cumulative attendance at all English Premier League (13.6 million), English Football League (15.6 million) and Scottish Premiership (1.9 million) matches for the 2012/13 season.
4. SOLT and UK Theatre participated in the working group for the orphan works licensing scheme and we have sought responses to the consultation questions from both memberships. We have not answered all of the consultation questions, as they were not all relevant to our members. In particular, we have only answered questions that relate to the implementation of the Copyright (Licensing of Orphan Works) Regulations 2014 (the "Regulations").

Society of London Theatre is a company limited by guarantee registered in England and Wales, whose registered office is at the above address.

Company No 527227
VAT Registration No 242 2802 92

"UK Theatre" is the operating name of UK Theatre Association, which was founded by Sir Henry Irving in 1894 and is a company limited by guarantee registered in England and Wales, whose registered office is at the above address.

Company No 323204
VAT Registration No 242 2801 94

General comments

5. Although our members are neither frequent nor high volume users of orphan works, many have at some point in time used or wanted to use orphan works.
6. At present, if our members are unable to locate the owner of a suspected orphan work after a thorough search, they have three options. The first option is to use the orphan work and hope that the rights owner does not appear and request royalties which the user may not have if the production has closed and the accounts have been finalised. The second option is to use the orphan work and keep back a sum to cover royalties in case the rights owner does appear. The final option is to not use the orphan work as consent has not been obtained. Many of our members will currently go ahead and use orphan works as set out in the first or second options above, even though this puts them at risk of a copyright infringement claim from a returning copyright owner. This risk also means that there is a lack of commercial certainty for users when presenting productions which incorporate orphan works.
7. Although we welcome the introduction of an orphan works licensing scheme for the reasons outlined above, we are concerned that the proposals for the terms on which the authorising body will grant orphan work licences (as set out in Regulation 6(2)) will adversely affect participation in the scheme by our members. Although participation in the scheme means that users of orphan works will no longer be at risk of an action from a returning copyright owner for copyright infringement (which is the case when a user decides to use an orphan work at the moment as described above) we are concerned that the proposed licence terms mean that the authorising body will not be able to grant orphan work licences on terms which are equivalent to standard theatre industry terms. In fact, the restrictions on term, transfer, territory and exclusivity set out in the draft Regulations have led a number of our members to question whether there will be any more commercial certainty for users of orphan works under the orphan works licensing scheme than there is at present. In fact, if it is the case in the final draft of the Regulations that licences will be non-transferable, there will be more restrictions on the use of orphan works than there are at present.
8. In our answers to Q10 and Q11 below, we have set out our concerns about the fact that orphan work licences will be non-exclusive and for use in the UK only. We appreciate that for policy reasons it will not be possible to amend these terms. However, we would like to draw your attention to our answer to Q2 below regarding the transferability of orphan works licences (which we understand to be a policy decision which remains open for discussion). We consider it essential that the final draft of the Regulations allows the transfer of an orphan work licence by a licensee in certain permitted circumstances.
9. Finally, with regard to the licence fee (Regulation 10), we would like to understand on a practical basis how the authorising body proposes to set appropriate licence fees for the use of orphan works in theatrical productions. It is important that these are set at a competitive rate, as if they are set too high, this is likely to adversely impact the extent to which our members participate in the orphan works licensing scheme. Unlike some other industries where the authorising body will be able to take account of collecting society standard rate cards in order to set an appropriate licence fee, copyright licences for theatrical productions are usually negotiated and whilst there are certain parameters within which licence fees are determined, the outcome of the negotiation will depend on a number of factors including the type of copyright work, the type of proposed use and the relative bargaining power of the parties. Furthermore, licence fees will vary in type depending on circumstances. Some are based on a fixed fee, some are based on royalties (with or without an advance) and some are a combination of a fixed fee and royalties.

Consultation questions

Q1. Could collecting societies improve the licensing of orphan works in their areas of expertise? If so, how?

10. UK collecting societies may be able to assist the authorising body with the orphan works licensing scheme, particularly with regard to the setting of licence fees. However this will only be relevant to the industry sectors and/or to copyright works covered by these collecting societies. We expect that in many cases, orphan works to be licensed by our members using the scheme will not be covered by any collecting society. This will mean that (as described in the General comments section above) licence fees will have to be negotiated. Furthermore, at present, even when a copyright work could be licensed by a UK collecting society it is often the case that our members would prefer to negotiate the licence with the copyright owner directly (for example music incorporated into a theatrical production which could be licensed by PRS for Music is often licensed directly by the music publishers). We therefore do not see much scope for collecting societies to improve the licensing of orphan works in relation to their use in theatrical productions.

Q2. Should an orphan works licence be transferable? If so, in what circumstances would this be appropriate?

11. We strongly support changes to the Regulations which would make orphan works licences transferable. In the theatre industry, there are numerous situations where it is important for a licensee of a copyright work to be able to transfer a licence of that work to a third party (either by assignment or more usually by sub-licensing).
12. It is often the case that a licensee will need to transfer a licence when a licensee is establishing the corporate structure for the presentation of a theatrical production incorporating the licensed work. For example, a licensee may secure a licence in their own name but then establish a separate company to produce the production and so will need to transfer the licence to that company. Similarly, if a licensee secures co-producers to produce the production, it is often the case that a new company jointly owned by all of the co-producers will be established to produce the production and the licence will need to be transferred to the new company. A third example is where the licensee is a charity (virtually all producers and theatres in the subsidised sector are constituted as charities). If the charity wishes to commercially exploit a licence of a copyright work, in order to comply with its charitable objects, it may need to establish a separate trading company and transfer the licence to that company.
13. In addition to the above examples relating to structuring a production, the ability to exploit a stage production incorporating a licensed work beyond the initial presentation is often crucial for licensees in order to ensure the commercial viability of the production (for example, in order to secure investment). Although many producers lead the subsequent exploitation of a successful production themselves (for example a UK tour or a transfer to the West End) it is often the case that they transfer their licence to a third party and retain only an ongoing income participation in subsequent presentations of the production.
14. As set out above, there are a number of situations where the transfer of a licence of rights in a copyright work may be necessary to enable the successful initial and ongoing exploitation of a stage production incorporating that work. We are concerned that if the orphan works licensing scheme does not permit the transfer of orphan works licences, our members will be less likely to participate in the scheme as it will not offer sufficient flexibility to enable them to successfully commercially exploit any licence granted to them by the authorising body. We would therefore recommend that the Regulations permit licensees to transfer the rights granted by the orphan works licences to third parties by way of sub-licensing and/or assignment. This right could be limited to a set of designated circumstances including the

reasons described above or otherwise could be more widely drafted but made subject to the prior permission of the authorising body acting reasonably.

Q4. 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?

15. We would support a limit being placed on the period of time in which a rights owner should be able to come forward and claim his/her licence fee, with such time limit being linked to the point in time at which the Government can start distributing unclaimed licence fees (see Q5 below).

Q5. At what point should the Government be able to distribute unclaimed funds? What is the rationale for your answer?

16. The majority of our members considered that, out of the examples of time limits set out in the consultation, the most appropriate period would be 15 years. However, a significant number of our members would also like to see this being a much shorter time period. This is on the basis that, in our members' experience, missing copyright owners who have been absent for a while do not tend to re-appear.

Q6. What should any unclaimed funds be used for and why?

17. Out of the examples set out in paragraphs 5.11 and 5.12 of the consultation, the majority of our members considered that unclaimed licence fees should go towards the archiving and preservation of orphan works. There was no support for the unclaimed licence fees being used to reimburse the Government for the costs of setting up the scheme on the basis that this should be covered by the application fee. A significant number of our members consider that unclaimed licence fees should be returned to the licensee of the orphan work on the basis that, if there was no copyright owner, no licence fee should have been payable.

Q7. 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?

18. The majority of our members agree that there should be a right of appeal for both applicants and licensees. The right of appeal should cover both appeals against licence fee tariffs set by the authorising body via the Copyright Tribunal (although see the General comments section above for our additional comments on licence fees) and against refusals by the authorising body to grant licences.

Q8. Approximately, how often would you anticipate using the orphan works scheme/how many applications a year would you envisage making?

19. Our members tend to use orphan works on a sporadic basis. As a result it is impossible to give any approximation as to how many applications they would expect to make in a year. However, we would not expect any member to make more than one or two applications (if any) in any given year. We also expect use of the orphan works licensing scheme to be dependent on how flexible the scheme is (see the General comments section above).

Q9. What types of use do you envisage using orphan works for?

20. In most cases, orphan works licensed by our members will be used in theatrical productions or as part of publicity or other commercial activities linked to such productions.

Q10. How much does the fact that licences are non-exclusive impact upon your potential use of the scheme?

21. We expect participation by our members in the orphan works scheme to be adversely affected by the fact that orphan works licences will be non-exclusive. A number of our members commented that this was a very significant issue. In the theatre industry it is usually the case that a licence of the stage rights in a copyright work is exclusive (at least for an initial period). This is important as it gives the licensee a designated period in which to develop and present a unique production incorporating the work without the risk of another producer securing a licence to present a substantially similar production incorporating the same work at the same time. If orphan works licences are to be non-exclusive, there will be less commercial certainty for the licensee, which in turn will make it harder for the licensee to secure financial backing for the production incorporating the orphan work.

Q11. How much does the fact that licences are limited to the UK impact upon your potential use of the scheme?

22. We expect participation by a number of our members in the orphan works scheme to be adversely affected by the fact that orphan works licences will be limited in territory to the UK. In the theatre industry, although licences are usually granted to licensees for a limited territory (for example, a specific theatre, for a tour of the United Kingdom, for a run in the West End), there are usually options to extend the licence to cover other territories, including territories outside the UK (for example, Broadway). It is therefore often the case that licensees have the future exploitation of a production overseas as part of their business plan for the use of the licensed work, and the commercial success of a production incorporating a licensed work may depend on the licensee being able to exploit further the production overseas. In the words of one member, "international exploitation is always going to be an important part of a business plan". Without provision in the Regulations for the use of orphan works in other territories, participants in the orphan works licensing scheme will effectively be in the same position that they are at present if they want to exploit an orphan work outside the UK.

Q12. 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?

23. Our members would like the Regulations to specify the maximum time period that the authorising body will have to grant or refuse an orphan works licence from the date that it receives a complete application. This is important because if an applicant wants an orphan work to form the basis or a fundamental part of a new theatrical production, they will be unable to move forward with plans to produce that production until they know whether or not the authorising body will grant them a licence to use that work. Giving a time frame for the period between the application and the grant of a licence will give our members business certainty.
24. Our members have suggested a range of time periods within which they would expect the authorising body to process an application for an orphan work licence. However, the majority would like the processing time to take no more than two or three months as this would sit best within normal production planning time frames.

Q13. What proportion of your applications would be for unpublished works and what sort of works would these be?

25. In most cases, our members expect to use both published and unpublished works. It is not possible to give proportions, as use of orphan works by our members is sporadic. However,

when asked, none of our members commented that they expected to use only unpublished works.

26. An example given by one of our members of the type of unpublished work which they might use is a choreographic score.

Q14. 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?

27. Our members expect to use orphan works licensed by the scheme both for inclusion in a larger work (for example, playing an orphan sound recording as part of the staging of a play) and as the basis for the development of a completely new theatrical production.

Q15. 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?

28. At present our members sometimes find the owner of an orphan work following a thorough search. However, in the majority of cases our members have not been able to identify the copyright owner.
29. Thank you for giving us the opportunity to contribute our comments. If you require any further information, please do not hesitate to contact me. We would be grateful if you would keep us informed of any developments.

Yours sincerely



Louise Norman
Head of Legal Affairs