

BCC draft proposal on orphan works

Following an unsuccessful diligent search for the right holder, the use of an orphan work will be enabled through a system based on collective licensing, in ways which consider the interests of creators, right holders and users, whilst complementing the licensing options within the existing system.

1. Due diligence search – existence of orphan works

Firstly, to determine whether a work actually is an orphan work, due diligence search criteria have been put forward by a High Level Working Group under the auspices of the European Commission (DG Information Society).¹ These criteria have been agreed by right holders such as publishers and collecting societies, as well as by users such as libraries. We agree with the Memorandum of Understanding and the Guidelines on the central importance of due diligence search subject to any search conducted being fully documented and carried out to agreed standards and within a reasonable time frame. The due diligence search criteria need to be specific for the categories of orphan works concerned, a one size fits all solution is not sufficient. For instance, the problem of identifying orphan works is common for literary and artistic works but rarely occurs in the music industry given the comprehensive databases available through our collecting society members (PRS for Music and PPL).

2. Licensing of orphan works via collecting societies or the Copyright Tribunal

Secondly, a mechanism to enable the legitimate use by licensing orphan works could easily be achieved by building upon existing sections of the Copyright Designs and Patents Act 1988 (in particular sections 143 and 144A and 190 CDPA 1988). This would provide a simple mechanism for obtaining the necessary licences in return for fees or royalties in line with current industry practice and based on long established infrastructures in the creative industries.

- (a) In circumstances where collective management is available for the orphan work for requested use(s), a licence would be issued by the relevant collecting society.
- (b) If either
no collective management licensing body holds a mandate for the genre or type of work relevant to the work identified as orphan;
or
there is no collective management body mandated to grant licences for use of the work identified as orphan for the specific act(s) in which a prospective licensee is interested;

the licence would be granted by the Copyright Tribunal in ways similar to those provided for under section 190 CDPA . Section 190 CDPA already enables the Copyright Tribunal to give consent “*in a case where the identity or whereabouts of the person entitled to the reproduction right cannot be ascertained by reasonable inquiry.*”

This mechanism does not conflict with European legislation and only requires the adjustment of already established sections of the UK Copyright Act (Copyright Designs and Patents Act 1988) to facilitate and provide legal authority for the licensing of orphan works. This adjustment will lead to legal clarity and protect the user from civil liability and criminal responsibility for copyright infringement, under section 107 CDPA.

Should the owner of the orphan work not claim the fee or royalty within three years of the licence being granted, the money could be used to support creative and/or charitable causes in

accordance with distribution rules approved by the membership of the collecting society in question (and recognised at the time when an orphan works licensing scheme is certified).

3. Draft Wording

144B Collective exercise of certain rights in relation to orphan works

(1) This section applies to the copyright in a literary, dramatic, musical or artistic work, sound recording or film work, to the extent that the relevant copyright owner cannot be located or identified after “reasonable inquiry” has taken place and for the purposes of relevant use the work comprises an orphan work as defined in section 144C .

(2) The use of an orphan work can be exercised through a licensing body operating a licensing scheme certified for the purposes of this section under section 143 providing for the grant of licences to do acts in relation to an orphan work within the scope of the certified licensing scheme which would otherwise require the consent of the missing copyright owner.

(3) Where the missing copyright owner is not the sole owner of copyright in the work, an authorisation does not affect the need for consent from any other owner of copyright.

(4) An authorisation or licence under this section in favour of any person must not preclude any authorisation or licence in favour of another person.

(5) A licensing body operating a certified licensing scheme which manages rights of the same type of work for the relevant restricted act(s) as the orphan work shall be deemed to be eligible to manage the right for the orphan work on securing the necessary certification.

(6) Any licensing scheme to be certified for the purposes of this section must provide for the treatment of royalties and other sums received in respect of authorisation for use of an orphan work including

- (a) the deduction of administrative costs
- (b) the period for which sums must be held for the copyright owner;
- (c) the treatment of sums held after expiry of any period specified under (b).

(6) A licensing body must notify the Secretary of State of the details of any proposed licensing scheme or the licensing scheme to be applied for the exercise of certain rights in relation to orphan works and seek certification for the licensing scheme or the application of an identified licensing scheme under section 143.

(7) The Secretary of State may at any time refer the licensing scheme or licences operated within in to the Tribunal for a determination of whether the licence or licensing scheme is reasonable in the circumstances, or may notify the licensing body that he does not intend to refer it to the Tribunal.

(8) No licensing scheme certified for the purposes of this section may authorise the grant of a licence in respect of an unpublished work, unless it is a broadcast or a work included in a broadcast.

(9) In the absence of a certified licensing scheme in relation to any specific orphan work, the Copyright Tribunal may, on the application of a person wishing to use the orphan work, give consent in a case where the identity or whereabouts of the missing copyright owner cannot be ascertained by reasonable inquiry.

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144C Meaning of “orphan work”

(1) A work is an orphan work if a person—

(a) has carried out a diligent search to find or, if necessary, to identify and find, the owner of, or of an interest in, copyright in the work, and

(b) has published the notice required by this section, but has not found the owner.

(2) References to the missing copyright owner in relation to an orphan work are references to that owner.

(3) For the purposes of subsection (1)(a) the person carrying out the search must in particular—

(a) make such use as is reasonable of all sources of information, including sources within subsection (4), relating to the work’s apparent country of origin, and

(b) have regard to any presumptions under section 104 or 105 that would apply in relation to the work in any proceedings.

(4) The sources referred to in subsection (3)(a) are—

(a) licensing bodies;

(b) associations of copyright holders for the relevant type of work;

(c) systems for identifying works of the type concerned;

(d) published library catalogues and indexes;

(e) public databases, including public records that may indicate successors in title.

(5) For the purposes of subsection (3)(a) a work’s apparent country of origin is the country which the person carrying out the search reasonably believes is most likely to be—

(a) the country of the work’s first publication, or

(b) if the work has not been published, the country with which its making is most closely connected.

(6) The notice required by subsection (1)(b) is notice of the proposal to enter the interest concerned in a register, published in a way designed to bring the proposal to the attention of the owner of the interest.

(7) The Secretary of State may by regulations amend any of the preceding provisions of this section.

Para (1f) needs to be added to section 143

Certification of licensing schemes

(1) A person operating or proposing to operate a licensing scheme may apply to the Secretary of State to certify the scheme for the purposes of -

(a) section 35 (educational recording of broadcasts),

...

(e) section 141 (reprographic copying of published works by educational establishments), or

(f) section 144B (collective exercise of certain rights in relation to orphan works).

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