



UK Orphan Works Licensing and the EU Directive on Orphan Works

Licensing is an important part of the UK's copyright system. If a rights holder cannot be found, a copyright work cannot be used unless an exception applies. An orphan works licensing scheme will allow these rights to be licensed while protecting the rights of the copyright owner. Under the Enterprise and Regulatory Reform Act 2013, the UK government has powers to enable licensing of copyright works in the UK where the rights holder cannot be located. In addition, the EU has agreed new rules for cultural institutions to be able to digitise and display works on their websites when they cannot find the rights holder. This fact sheet addresses some common misunderstandings about the proposed scheme.

Myth - the orphan works provisions pave the way for the Government to grab your copyright works, including photographs and other visual images

Fact – This is not the case. An orphan work is a work where the rights-owner cannot be found and so cannot be used lawfully at present. The provisions provide the Secretary of State with a power to introduce an orphan works licensing scheme in the UK subject to certain safeguards so that works where the rights owner cannot be found can be licensed for use following a diligent search for the owner and payment of a licence fee to be set aside for the rights holder should they reappear. It does not give the Government right to 'grab' and use any work it wishes.

Myth - the provisions remove the automatic right to copyright for owners of photographs posted online

Fact - The powers do not remove copyright for photographs or any other works subject to copyright – in fact they allow that copyright to be upheld, even if the owner cannot currently be traced.

Myth – anyone can use a photo they have found on the internet as an “orphan” if they cannot find the copyright owner after a search

Fact – A licence must be obtained to use a work as an “orphan”. For a work to be declared an orphan will require the applicant to undertake a diligent search, which will be subject to the verification process run by the independent authorising body. A licence will be issued only for specific uses on payment of the licence fee.

Myth – anyone will be able to use my photos for free if they cannot find who owns them?

Fact – If a work is to be licensed, once the authorising body is satisfied with the diligent search, there will be a licence fee payable up-front for its use. The fee will be set at the going rate for the type of work and type of use proposed and held on behalf of the copyright owner in case they are found.

Myth – anyone can use my work (photos etc) without my permission

Fact – Anyone wishing to use a work as an orphan must first undertake a diligent search for the rights holder(s) which is then subject to the verification process before permission to use the work can be granted by the authorising body. If the work is not genuinely orphan then the rights holder should be found. If the search is not properly diligent, no licence will be issued.

Myth – the Act is the Instagram Act. Amateur photographers who upload photographs to the internet including to Flickr or other photo hosting website, will find their images are included in the scheme.

Fact – None of the changes removes copyright from photographs or any other works subject to copyright. Given the steps that must be taken before an orphan work can be copied, such as the diligent search, verification process for the search and payment of a going rate fee, it is unlikely that the scheme will be attractive in circumstances where a substitute photograph is available.

However, consumers should be aware that any pictures they upload to host websites are subject to the terms and conditions of the website owners. If consumers are concerned they should check the terms and conditions attached to the relevant social media channel.

Myth – a company can take my work and then sub-license it without my knowledge, approval or any payment

Fact – A company cannot do anything with your work unless it has permission from you as the rights holder, or in your absence the orphan works authorising body. Orphan works licence holders will not be able to sub-license works.

Myth - the stripping of metadata creates an orphan work

Fact – the absence or removal of metadata does not in itself make a work “orphan” or allow its use under the orphan works scheme.

Myth – I will have to register my work to claim copyright

Fact – Copyright will continue to be automatic and there is no need to register a work in order for it to enjoy copyright protection.

Myth - When you introduce extended collective licensing it will just mean that anyone’s copyright material can be licensed by anyone

Fact – This is not the case. The orphan works scheme and Extended Collective Licensing (ECL) are separate. The orphan works scheme will enable the licensing of individual works where the owner cannot be found.

Extended Collective Licensing (ECL) is a type of licensing that allows an authorised collecting society to extend an existing collective licence so that it can license on behalf of all rights holders in the sector, except those who opt out. While traditional collective licensing relies on rights holders opting in by giving the collecting society express permission to license their works, ECL assumes that rights holders want their works to be licensed, unless they opt out.

ECL schemes are only likely to be an option where there is strong existing support for collective licensing. Any rights holder who is worried about how their work could be used under an ECL scheme will always retain the ability to opt out. It is also unlikely that ECL will be an option for photography where there is a strong tradition of direct licensing: there is no collecting society for photographers in the UK, so no application for an ECL is feasible at present.

Myth – the UK is doing something radical and unprecedented with the orphan works powers

Fact - Other jurisdictions already allow the use of orphan works, including in the EU. The UK powers are largely based on what happens in Canada – which has been licensing orphan works since 1990.

Myth – Foreign images are going to be caught by the orphan works scheme, leading to lots of international litigation

The issue of foreign works will be specifically addressed in the guidance on diligent search. The diligent search for foreign material will need to be as robust as for any other orphan work.

This will include a requirement to conduct a diligent search abroad if necessary. If a satisfactory diligent search cannot be demonstrated or is not possible then use of the work cannot be licensed.

Myth – the EU Orphan Works Directive permits Member States to retain any existing orphan works legislation already on its statute books – hence the rush to introduce a domestic orphan works scheme

Fact - The domestic scheme does not need to be implemented in advance of (or at the same time as) the Directive because the word ‘existing’ was removed from an earlier draft of the Directive in relation to licensing schemes which only grant rights in the member state concerned. However, it makes sense to introduce the two schemes at the same time as they are complementary.

Myth – the UK scheme is illegal under EU law and is not compatible with relevant international obligations

Fact - The Government’s proposals on orphan works have been developed over several years in conjunction with lawyers, and through detailed consultation with our stakeholders. The proposals have been discussed in detail with the European Commission to ensure the UK scheme is compatible with EU law. Within the EU, Hungary already has a similar licensing scheme for orphan works.