FACTSHEET – Orphan Works Licensing Scheme and Extended Collective Licensing

The Enterprise and Regulatory Reform (ERR) Act 2013 provides the Secretary of State with a power to introduce two separate measures: an orphan works licensing scheme for the licensing of individual orphan works and to consider applications from collecting societies for voluntary extended collective licensing (ECL) in the UK. Both ECL and the orphan works scheme will be subject to certain safeguards set out in the ERR Act and in the regulations which are being developed.

ORPHAN WORKS

How the Orphan Works scheme will work

- A person wishing to use an orphan work will need to apply to the Intellectual Property Office (IPO), as the authorising body, for a non-exclusive licence.
- They will need to undertake a diligent search for the rights holder including searching abroad if necessary. The authorising body has a responsibility to satisfy itself as to the quality of the diligent search undertaken before a licence can be issued.
- The authorising body will maintain a register of works that are subject to a diligent search and those that have been granted and those refused a licence. The register will enable rights holders to check whether any of their works are being considered as potential orphans or have been deemed to be orphan after the diligent search. The register is not a list of works available for use. New uses would require a further licence.
- Licences will be for specified purposes and subject to a licence fee which is payable upfront at a rate appropriate to the type of work and type of use.
- The licence fee will be held by the authorising body for the missing rights holder should they reappear.
- After a number of years unclaimed monies may be used to make the authorising body self-financing. Other options for possible distribution of unclaimed monies include funding archiving and preservation in public archives/museums/libraries; and donations to creative industry training or benevolent funds.

The scheme will not allow anyone to use copyright works for free and without permission. It will not legalise the unlicensed use of foreign works in the UK nor prevent rights holders in other countries from licensing their exclusive rights in the UK. The scheme is not yet operational and cannot start until regulations have been passed by both Houses of Parliament. There will be no need to register works to ensure that the copyright in them continues to exist.
KEY FEATURES OF THE SCHEME

1. Diligent search
   - What constitutes a diligent search will be covered in regulations and guidance that the Government will publish.
   - The relevant sources that will need to be searched will differ across sectors, for example, for literary works, films, sound recordings etc. and so sector-specific guidance is being developed with a cross section of stakeholders.
   - The diligent search requirements will involve sources online as well as other sources as appropriate, such as information held by trade associations for example, to provide a safeguard against any instances where metadata has been removed.
   - If a work is not genuinely orphaned, then the rights-holder should be found.
   - If the search is not properly diligent, no licence will be issued.

2. Authorising body
   - The Intellectual Property Office (IPO) has been appointed as the authorising body and as such will be subject to public law and the Freedom of Information Act.
   - The IPO will not be able to license itself.
   - Copyright holders will not have to register their works.

3. Orphan Works Register
   - The IPO will maintain an orphan works register.
   - Listing works on a register will increase the chances of any rights holders being found.
   - The register will list all legal uses of a work so making unlawful use more obvious.
   - The register will capture metadata (electronic copyright details) on the work.
   - Any attempts, deliberate or otherwise, to strip metadata from copies of the work would be easily identified and appropriate sanctions could be enforced.

4. Licences
   - Licences will only be issued following a diligent search which has been through the verification process operated by the authorising body, and after the licence fee has been paid.
   - Licences will be granted in relation to a single orphan work but it may be possible for applications to also cover a number of individual orphan works.
   - The licence fee will be set at a rate appropriate for the type of work and type of use and held by the authorising body in case a missing rights holder reappears.
   - If a missing rights holder comes forward after the authorising body has granted a licence, they will be able to regain control of their work and claim the remuneration that has been set aside for them.
   - Licences will be on a non-exclusive basis and for a set duration only.
   - Licences will not allow sub-licensing.
   - The requirement for payment of the licence fee prevents orphan works competing on unfair terms with non-orphan works.

Given the steps that prospective licensees need to take before a licence is issued, in the case of photographs, for example, the main use of the scheme is likely to be for unique old photographs of historical interest that are held in museums, archives and libraries, where there are no substitutes, rather than contemporary digital photographs.
5. Moral Rights

- The scheme includes a presumption that absent rights holders have asserted their moral rights – the right to be named as author of a work and the right to object to derogatory treatment of a work.
- Whenever the work is used, the user will need to credit the rights holder (if known but not locatable) and provide contact details of the IPO so that rights holders can contact the office to claim the remuneration.
- The body that authorises the use of orphan works may be required to consider any modifications to, or use of the work that might be derogatory or otherwise inappropriate and refuse authorisation.

ADDITIONAL INFORMATION

Metadata

- It is a civil infringement under UK copyright law to knowingly and without authority strip metadata from a copyright work. This will continue to be the case under the orphan works scheme. UK copyright law has various requirements including that the person who stripped the metadata must know, or have reason to believe, that by so doing he is inducing, enabling, facilitating or concealing an infringement of copyright. The law also deals with other matters including, for example, the distribution of copies where such information has been removed from a work.
- Criminal proceedings may be brought under UK copyright law if the infringer communicates the work to the public providing the person making the communication knows or has reason to believe that they are infringing copyright and the act was either done in the course of a business or it prejudicially affects the owner of the copyright. It may also be a criminal offence if the infringer claims to be the rights holder (under the Fraud Act 2006).
- The fact that metadata may have been removed from a copyright work will not mean that it would meet the criteria for an “orphan work” under the scheme.
- A Working Group set up by the industry-led Copyright Hub project has considered the issue of metadata. The Group sought cross-industry agreement to help keep metadata with copyright works.
- The group included key players including the Association of Photographers, Stop43, the British Association of Picture Libraries and Agencies, and Getty Images.

The Copyright Hub

- The work of the Copyright Hub is led by the UK’s music, publishing, audio-visual and images industries, supported by initial seed money from Government. The Hub was launched in July 2013 and is currently in its ‘test phase.’ It is continuing to develop links with a growing network of national and international digital copyright exchanges and other copyright-related databases. See [www.copyrighthub.co.uk](http://www.copyrighthub.co.uk).
- The Copyright Hub could help the functioning of an orphan works scheme by, for example, by making the diligent search easier by resolving queries regarding ownership of more contemporary works.
- Although the Hub could help in a diligent search, there will be many instances where a creator cannot be located. In the absence of an orphan works scheme, properly authorised by the Secretary of State, it would remain illegal for the Hub or anyone else to license the use of orphan works.
Orphan works and works of foreign origin
The origin of a work or the location of potential rights-holders will not always be obvious and there will be cases where the diligent search process indicates that a potential rights-holder may be based outside the UK. The issue of foreign works will be specifically addressed in the guidance on diligent search and the search will need to be as robust as for any other orphan work.

- Canada has operated an orphan works licensing scheme since 1988 without legal challenge.
- The Copyright Board of Canada has taken the view that they can issue a licence to use an orphan work, even if owned by an unlocatable foreign national.
- The UK is intending to take a similar approach to Canada in the licensing of orphan works owned by an unlocatable foreign national.

Compatibility with UK international obligations
- The UK scheme is compatible with relevant international obligations such as the Berne Convention.
- The orphan works scheme does not interfere with a rights holder’s rights because it puts them in a better position than at present.

Currently a work may be used unlawfully without the permission of the rights holder or may not be used because the prospective licensee cannot find the rights holder. Often the rights holder may be unaware of unlawful use and even where they are aware they would need to pay for legal action to pursue compensation. Where they are unaware of the use or where a potential licensee cannot find them and therefore does not use the work, they receive no remuneration.

Under the orphan works licensing scheme there is a greater chance of rights holders being reunited with their work and they can obtain remuneration.

EU Orphan Works Directive
The EU has also adopted a Directive on certain uses of orphan works which has to be implemented in the UK by October 2014. The UK orphan work scheme is wider in its scope and application and has been designed by the Government to be complementary to the Directive.

- The Directive is narrower in its use and scope.
- It provides for an exception to copyright law rather than a licensing scheme as under the domestic process.
- It focuses on the digitisation and making available online of orphan works by publicly accessible cultural and heritage bodies only for non-commercial use – unlike the UK scheme which provides for broader commercial and non-commercial use.
- It excludes stand-alone artistic works such as photographs which constitute a large part of orphaned works in archives (however, embedded works, such as a photograph within a book, are included)
- It allows for the reproduction and making available of a work for example to digitise a work and put it on a cultural institutions' website. This will allow EU citizens to view orphan works online without physically visiting the library, archive or museum. However it does not provide for publication in a book or communication to the public by means of a TV programme - even by museums and archives.
The EU Orphan Works Directive allows use across the EU, but the UK scheme only allows use within the UK.

EXTENDED COLLECTIVE LICENSING (ECL)

The Government has taken a power for the Secretary of State to enable collecting societies to apply to operate extended collective licensing within the UK. The Secretary of State has the power to consider such applications and authorise or reject them, depending on whether certain criteria and safeguards have been met.

How the ECL process will work

- It would be up to a collecting society to apply to use the system and any rights holder whose rights could be affected by the scheme would always retain the capacity to opt out at any point.
- An application would only be successful if the collecting society demonstrated that it already represented a significant number of rights holders relevant to the works and uses covered by the proposed scheme, and showed the consent of its members to the ECL application.
- If ECL were authorised for a particular use of a type of work (for example, for the reprographic copying of literary works), collective licensing in that area would shift from an ‘opt in’ to an ‘opt out’ basis.
- An authorised collecting society would be able to license the use of all works within the scope of an authorisation, except where the rights holder chose to opt out of the scheme. The collecting society would be required to have in place a process allowing rights holders to opt out at zero or minimal cost.
- Remuneration would be collected for rights holders for any use of works under an ECL scheme – there is no question of copyright works being used for free.
- ECL has been used in the Nordic countries for around 50 years and has not been challenged. European law explicitly recognises ECL as a means of rights management.

In practice, some ECL-type schemes already operate in the UK - albeit with questionable legality - where they have been developed as a response to market need. ECL is only likely to be viable for works and uses where there is strong existing support for collective licensing. Where there is no significantly representative collecting society for the work and use in question, ECL will simply not be available. For example, most use of photographic works in the UK is currently licensed directly. Therefore it is unlikely that ECL will have any significant impact on the licensing of images.

ECL and works of foreign origin

- Foreign rights-holders will be in the same position as UK rights holders – they can opt out of a scheme and claim remuneration for any uses of a work.
- Where there is the possibility of foreign works being involved, an applying collecting society would need to demonstrate proportionate efforts to advertise the proposed scheme in places those rights holders are likely to see.

ECL - incidental inclusion of works that turn out to be orphaned and opt out provision

- Extended Collective Licensing (ECL) is a form of licensing for which a collecting society is given permission to extend an existing collective licence to cover the works of all rights holders in the sector where they have a mandate, except those who opt out. The Government has previously made it clear that ECL is not intended to be the default solution for licensing works that are or could be orphans. Any collecting
A society wishing to run an ECL scheme must have a rights holder mandate. This requirement will not be met if the number of rights holders that are not known or cannot be located reaches such a level that the collecting society cannot be said to be significantly representative of rights holders affected by the ECL scheme, or works covered by it.

- The potential areas of overlap between the UK orphan works licensing scheme and the ECL schemes will be limited to works and rights of a type licensed by a collecting society. For example, many unpublished works by non-professionals would not be included in ECL schemes but would likely feature strongly in orphan work licensing applications. It should be noted that licences for orphan works under the UK scheme and licences for the works of non-members in ECL schemes are non-exclusive, so nothing precludes the possibility of them co-existing in respect of the same work. Use of orphan works under the Directive will be as an exception to copyright law, subject to certain safeguards, so no licensing is required.

ADDITIONAL INFORMATION

Orphan Works and ECL Working Group

The orphan works licensing scheme and ECL are two separate measures. Further details of how the orphan works scheme and ECL will operate will be set out in regulations along with additional safeguards. The Working Group set up by the IPO discussed these issues and the outcome of their discussions was fed into the development of the draft regulations. The Working Group comprised a range of stakeholders including representatives of rights holders from a variety of sectors, collecting societies and potential licensees. The regulations will be subject to full parliamentary scrutiny.

The IPO has set up sector-specific groups comprising a range of stakeholder practitioners to assist in the development of guidance for diligent search and the pricing and licensing of orphan works.

INTELLECTUAL PROPERTY OFFICE
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