

Orphan Works and Voluntary Extended Collective Licensing: Impact on UK Museums

The draft Enterprise and Regulatory Reform Bill has been amended to include provision for a legislative solution to handling orphan works and simplifying copyright licensing. This is detailed in Clause 59 of the draft Bill and Part II of Schedule 18. Both of these measures will be of great benefit to UK museums and libraries, as they will allow them to make more of their collections available to the public for their enjoyment, education and research.

EXECUTIVE SUMMARY

This proposed legislation is welcomed by UK museums because it will enable museums to display, preserve, research and use millions of suspected orphan works in their collections without risking copyright infringement. It is estimated that there are approximately 50 million orphan works in UK collections, with those at The National Archives alone occupying 180km of shelf space. Because orphan works are effectively invisible there are avoidable gaps in public knowledge and there is real risk that culturally sensitive content saved on obsolete or precarious media will be lost. Not only would the orphan works solution provide renewed public interest in collections but it is estimated that the net economic benefit to museums would be £1m - £7m per year, and the wider net economic benefit of finding works which are not orphans could be £29 - £46m per year. As it costs approximately £44 in labour costs alone to clear the rights in a single work, the voluntary extended collective license will allow publicly-funded institutions to use whole collections for which it may previously have been prohibitively expensive to do so.

ORPHAN WORKS

WHAT ARE ORPHAN WORKS?

A copyrighted work is considered an orphan when it is not possible to locate the rights holders after a diligent search. If a work is an orphan, then it is not possible to use it because permission or a licence cannot be agreed as the rights holders are either unknown or not contactable.

WHY IS THIS A PROBLEM FOR MUSEUMS AND GALLERIES?

If a museum or gallery is unable to locate the rights holder for a work which has been accessioned to their collection, the use of the work is significantly restricted. While a work might be catalogued (albeit with the limited information known about it), it cannot be digitised or be placed on the institution's own website. Literary and dramatic orphan works may not even be displayed to the public in galleries. Consequently, many of the works remain in the store or archive. Academics are unable to use them for research (beyond "fair dealing") if indeed they are aware of their existence at all. Significantly in the current climate, any commercial potential remains unrealised for both the museum and the rights holder(s). Nevertheless, museums and galleries have a duty of care for all objects in their collections and dedicate resource to the preservation of such works. Some orphan works deteriorate because they need their rights owner's permission to make preservation copies or changes to the work which would preserve the content. Therefore culturally significant content is at risk. Furthermore, if a work is unavailable for public display, the chances of successfully finding the rights holders are reduced as they may be unaware of its existence.

COST AND SCALE OF THE PROBLEM

It is estimated that there are approximately **50 million orphan works in public collections**¹ in the UK. **Between 5% and 10% of content in the UK's public collections is orphaned.**²

- 90% of the archive photographs in UK museums' collections are estimated to be orphan works.
- The British Library has estimated that over 40% of their in-copyright collections could be orphan works.
- The Natural History Museum estimates that 125,000 artworks and 200,000 books in their collection are orphans, as are 1,304 metres of manuscripts.
- 20% of the archive film content and 375,000 books at the National Library of Scotland are orphans.
- The Imperial War Museums (IWM) estimates that there are 2 million orphan works in their photography collection alone and up to a quarter of their 7.9 million documents are orphans.
- Approximately 11 million items occupying 180km of shelf space (approximately the distance between London and Bath) at The National Archives are orphan works.³
- The Fitzwilliam Museum in Cambridge has omitted works from exhibitions because they cannot be sure that they are not orphan works.

Diligent searches to trace rights holders are necessary but time-consuming. Although the time taken to conduct a diligent search varies with the sort of content, **it costs approximately £44 in labour costs alone to clear the rights in one work.**⁴ Museums go to great lengths to try and trace rights holders but in many cases the searches prove futile, even where museums seek copies of wills or place advertisements in newspapers. If after a diligent search the work is declared an orphan, museums and galleries not only lose the opportunity to use that work but also have used a not inconsiderable amount of resource in realising this.

LOST OPPORTUNITIES AND DETERIORATING COLLECTIONS

Publicly-funded museums are not able to make content available to a public which has effectively already paid for their acquisition and care meaning **there are avoidable gaps in the sum of public knowledge.** This has been brought into focus as plans to commemorate the centenary of the First World War develop. Museums across the UK hold large collections of First World War material, much of it produced by the soldiers themselves and subsequently donated to museums. Substantial proportions of the material, which could be viewed by the public (and whose interest will be piqued during the centenary commemorations) are likely to be orphan works, but could nevertheless be out of copyright. IWM is in the process of digitising a large archive of photographs from the First World War where the rights holder could be difficult to trace. The archive consists of 4,000 collections with over 75% originating from private collectors. As IWM seeks to tell the social history of the war, they would like to reproduce the private photographs. However, to undergo a diligent search for each private photographer when there is so little documentation available will take many hours and they will not be able to reproduce these private photographs without risk of copyright infringement.

The V&A Museum of Childhood holds two large collections, Lines Bros. Ltd and the Paul and Marjorie Abbatt Collection. Together these represent 25% of the estimated total volume of archival material, and each is made up of approximately 80% of orphan works. **These collections illustrate the peculiarity of the orphan works problem in museums.** The Lines Bros. archive is constituted by mostly corporate records. The majority of the collection consists of material the copyright ownership of which clearly resides with Lines Bros. Ltd. However, Lines Bros. went bankrupt in 1971, its constituent assets being split and sold to a range of other companies, many of which have since also been sold and divided. In addition, there is also a large amount of photographic material (10% of the total number of files within the collection)

¹ JISC/Collections Trust, *In From The Cold*

² JISC/Collections Trust, *In From The Cold*

³ Orphan Works Impact Assessment (BIS1063), published by IPO on 15th June 2012 (www.ipo.gov.uk), p.10

⁴ JISC/Collections Trust, *In From The Cold* and the UK Annual Survey of Hours and Earnings (2010). £12.76 p/h is the median hourly pay for Archivists and Curators and the average time taken for a diligent search is half a working day.

which constitutes orphan works in the traditional sense. The Paul and Marjorie Abbatt archive is constituted by corporate records of Paul and Marjorie Abbatt Ltd. (PMA Ltd.), as well as the Abbatts' personal papers. As such, the ownership of copyright is clear, but the vast majority of material is rendered orphan due to the difficulty in identifying and contacting the current owners. Both Paul and Marjorie Abbatt died without having children, and the only addresses in their will for family members are 25 years out of date and have not yet yielded a response. PMA Ltd. was sold to another company, the Educational Supply Association. This has now ceased to trade. As with Lines Bros., to trace the current owners of the original corporate copyright has proved incredibly difficult and, for all practical purposes, this corporate material is considered as orphan.

Museums need to preserve orphan works which exist in precarious or obsolete media. Larger museums, libraries and archives will all have some collections of audio-visual material. The technology for recording sound and moving images has changed considerably over the past 70 years and therefore some of these collections are deteriorating because copies cannot be made without the rights holder's permission. The National Portrait Gallery's multi-monitor video portrait of Duncan Goodhew by Marty St James and Anne Wilson had to be transferred to digital media owing not only to deterioration of the video tapes in question (VHS and cassette tapes become sticky and brittle if not played regularly) but also because the video players were becoming obsolete. Undertaken with consultation with the artists, such 'format shifting' would in fact have been unlawful had this been an orphan work.

As public funding to museums has reduced, projects are being scaled back to focus on parts of the collections where copyright ownership is clear. This not only restricts the ambition of the public programming and proportion of the collections made available for public research and display, but it also affects commercial operations. For example, the IWM has recently launched a Posters app which provides the image, background information and historical context of 30 posters in their collection. There is also a function to purchase a copy of the poster. It was launched in response to the recent popular interest in wartime public information posters. IWM is currently unable to extend the scope of the app to include the large number of orphan work posters due to the risk of infringement.

BENEFITS OF THE PROPOSED SOLUTION

Museums are keen to ensure that an orphan works scheme protects rights holders and feels that the proposed legislation offers this. The scheme retains the rightful need for a diligent search but now provides for a fair scheme to make the content available for commercial and non-commercial use (following that search). Public display, preservation and wider use of orphan works may help in reuniting orphan works with their rights holders, as would the Orphan Works Register (also proposed by the Government). This would also make more efficient use of public funding within the museum sector as museums will be able to benefit from past diligent searches. NMDC is supportive of a system where the process is commensurate with the end-use and which would allow future training to reduce the instances of orphan works.

Aside from alleviating the problems outlined above, there is evidence that **the orphan works solution may result in renewed interest in previously unavailable collections.** There is usually an initial enthusiasm for using material for which the term of copyright has expired. For example, works by the photographer Herbert Ponting have recently come out of copyright, allowing those public institutions which hold collections of his work, such Royal Museums Greenwich, to use these more extensively. Evidence suggests that the appetite for the works to either be viewed by the public, used by academics or used commercially has not been diminished because of the extra volume of works available. The availability of Ponting's work allowed the Natural History Museum, Scott Polar Institute, the Royal Collection and the Royal Geographic Society to all publicly display material created by him during commemorations of the centenary of Captain Scott's Polar Expedition. These exhibitions were very popular (and occurred simultaneously) and they have added to the sum of public knowledge about the expedition and allowed each institution to use selected works for commercial purposes.

The Collections Trust estimates that **UK museums and trusts contribute around £1.2 billion to the UK economy each year** and therefore the Intellectual Property Office has suggests that the **net economic benefit to museums and trusts of the orphan works solution would be between £1m and £7m per year**.⁵ The economic benefit is not just restricted to the use if orphan works for museums. The IPO estimate that the proposal will incentivise archives to use more content because diligent searches would be easier with the creation of orphan works register and a system of licensing orphan works. Therefore the economic benefit of finding works which are not orphans (but which the organisation may not otherwise have prioritised) is **£29m-£46m per year**.⁶

VOLUNTARY EXTENDED COLLECTIVE LICENSING (ECL)

The voluntary ECL will be very helpful to larger museums which have over time acquired large collections within which there are a multitude of rights holders. The cost of clearing the individual rights in collections like this is prohibitive and consequently collections which could be better used are not. The V&A recently acquired a collection of 2000 20th Century posters. The donor, Leslie Shreyer, unusually also paid for the cost of the rights to be ascertained and cleared to enable the V&A to make best use of them. As many of the posters were designed by multiple artists it has been a very time-consuming exercise taking 35 hours to clear 850 of the works. A voluntary ECL would have made the exercise easier and if the V&A had had to use their grant-in-aid to finance this, it may not have been undertaken.

⁵ Orphan Works Impact Assessment (BIS1063), published by IPO on 15th June 2012 (www.ipso.gov.uk), p.13

⁶ Orphan Works Impact Assessment (BIS1063), published by IPO on 15th June 2012 (www.ipso.gov.uk), p.12