

Response to the Consultation on the implementing a domestic orphan works licensing scheme and the EU Directive on certain permitted uses of orphan works

This response is submitted on behalf of the Museums IP Network and the National Museum Directors' Council. The Museums IP Network is a group of Copyright and IP Managers from the largest museum, gallery and art collections. The National Museum Directors' Council represents the leaders of the UK's national and major regional collections. It an independent body and a full list of members and further details of the Council's work can be found at www.nationalmuseums.org.uk.

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

Any collecting society licensing orphan works should do so under the same terms as the IPO. The Regulations should apply equally to collecting societies, especially in the areas of pricing, terms, due diligence and the repayment of unclaimed cash.

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

There may be circumstances when an orphan works licence should be transferable. For example, it should be possible to transfer a licence from a museum to its trading body, and vice versa, because revenue generated by the trading body is wholly returned to the museum. Similarly, a freelancer who is working on behalf of a museum and applies for a licence, should be able to transfer the licence to the museum itself for that work. There would need to be a clear link between the transferring parties and, if this can be reasonably shown, we do not see this as a contentious area.

3 What are your views on allowing high volume user to take out an annual licence or similar arrangement to cover low value, non-commercial use?

This is the only practical way a museum (especially a large one) would be able to take advantage of the licensing scheme. The cost in staff time and administration, as well as the time taken for approvals to be made, would mean using the scheme would be prohibitively expensive. However, for non-commercial use of orphan works, the cost of the annual licence needs to be commensurate with what a museum (or similar organisation) may pay for the same use of in copyright works. The vast majority of uses a museum would make of orphan works is for what the general public and the museums' funder would consider their core business: digitisation for cataloguing or documentation, providing interpretation about the collection or for research.

4 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 a paragraph 5.9, what should that period be and why?

We feel six years is a reasonable time period both in terms of a claim being made and unallocated cash being put to a good use.

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

As stated above, six years would align this process with the requirements for financial records and the law of tort.

6 What should any unclaimed funds be used for and why?

Where funds have been generated by fees paid for the use of work in public collections, those unclaimed funds should ultimately be returned to body which has responsibility for the care of the work (and therefore the associated cost of this care). Where fees are returned to public museums they could be used to help towards ongoing digitisation costs. Museums have spent - and continue to spend - vast sums digitising content and, if some of these costs could be recouped via reallocation of unclaimed sums this would be helpful. For example, Tate has digitised most of the 70,000 artworks in its primary collection; and the National Portrait Gallery around 150,000 of its 300,000 primary, photography and archive collections.

7 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) or b) refusals to grant licences, or c) both?

Yes, there should be a right of appeal. This should be quick, straightforward, transparent and comprehensive. The Copyright Tribunal appears to be the logical body through which a right of appeal should be managed, and it should cover both licence fee tariffs and refusals to grant licences.

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

Amongst collections-based institutions, particularly large ones, there would be greater use of the scheme if there was an annual licence which covered multiple and different types of works, for multiple low value/non-commercial uses. These would include mass digitisation projects, where the licence would allow museums to digitise high volumes of material without either investing large amounts of resource in rights clearance or risking copyright infringement. If that were the case, the number of applications would probably be relatively low, but it would relate to high numbers of works being made more visible to the public. It is difficult to estimate how many applications would be made because it would be determined by the wider work of the institution and so which parts of the collection need to be used.

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

These are some typical examples of non-commercial uses museums would typically make:

- the right to take photographs, slides and make electronic copies of the work for inclusion in museum image libraries and for record and archival use;
- the right to make archival masters of the work by any means or in any media;
- the right to reproduce the work in electronic form and to store in computer systems and to make such electronic data available by any electronic platforms, including the internet and email for educational and promotional uses only;
- the right to reproduce the work for any publicity and marketing material including e-bulletins, electronic newsletters, advertising posters, invitations, membership leaflets, exhibition reviews and articles, and handbooks, annual reports, forward plans etc;
- the right to reproduce the work in scholarly publications featuring works from the collection, and in educational material, exhibition catalogues and videos;
- the right to reproduce the work on the museum's social media platforms including, but not limited to, Twitter, Facebook and Flickr;
- the right to permit The National Archives ['TNA'] and the British Library ['BL'] to include the work on archival copies of the museum's website, itself to be made available via TNA's and BL's websites.

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

This would have no effect on museums' use of the scheme.

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

This may have a significant impact on museums' use of the scheme. Putting something online means it is available worldwide, so the scheme does not provide a safeguard for institutions

who take additional risk because they need to provide global access to orphan content (and the cost and complexity of providing a way of restricting that content means museums are unable to put this in place for low value content).

12 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?

Museums would most likely use the scheme to pre-clear vast bodies of works rather than for individual works.

Ten working days is a reasonable time for applications to be processed, and would be considered normal. Long waiting times for processing an application would mean museums are less likely to use the scheme.

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

This largely depends on how the IPO define 'published'. If "unpublished" is considered to be material having been made available to the public (for example, in a public collection and accessible via an archive or public study room for consultation by the public), then most of the works would fall into this category. If it means 'published' in the traditional sense of mass dissemination (printed or electronic), then on average c.70% of museum collections (including their archives) probably falls into this category.

14 Would your main use of orphan works be as part of works that you produce already, such as a book or 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?

It is unlikely that this scheme would prompt development of a new product or service, but it may help museums develop new ways of making content more widely available to the public.

15 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?

Approximately 1% of rights holders come forward following a diligent search of an orphan work. In an 8 month period between June 2013 and February 2014, no orphan works' rights holders came forward for Tate's collection works. However, if it is thought that a collection may contain a lot of orphan works, museums may choose not to fully utilise it because of the probable futility of a diligent search. These figures will alter depending on the sort of collections and it might be easier to trace rights holders with a local collection.

16 We have assumed that the majority of diligent searches carried out by publicly accessible archives are likely to be undertaken under the auspices of the EU Directive. Is this the case for your organisation, if you are a publicly accessible archive?

This is not the case for a significant proportion of museums, galleries and some archives. The EU scheme does not cover standalone artistic works, and these form the basis of many public galleries' and museums' collections. Collections of standalone artistic works are not only held in art galleries. The second largest art collection in the UK is held by Imperial War Museums and the Natural History Museum collection contains over 500,000 artworks.

17 If you are an organisation covered by the Directive, how often do you anticipate using a search conducted under the Directive to then support an application under the domestic scheme?

This will depend on the nature of a museum's collection. Tate, for example, may use this occasionally if considering using a literary work. If a museum's collection contains a greater proportion of the works eligible under the Directive, the museum will make greater use of it (providing they know of it knows the Directive exists).

18 If you are an organisation covered by the Directive, able to display much of your material on your website under the provisions of the Directive on certain permitted uses if orphan works, how much will you use the domestic orphan works licensing scheme?

See response to Question 8.

19 If you are a cultural organisation, how likely is it that you would be able to recover the full costs related to the digitisation and making available of an orphan work?

It is unlikely museums would be able to cover the significant cost of staff, equipment, storage, conservation and cataloguing involved in the digitisation process. Some cost-recovery might be made via image licensing or other semi-commercial activity but this income is relatively small in relation to the substantial cost of digitising collections (perhaps being in the ratio 1:10). Large-scale digitisation usually requires support from an external funder, be it the Heritage Lottery Fund, European Union sources or through a public/private partnership.

20 How would you do this (for example, by charging for access to your website)?

There would be an understandable public backlash if public museums charged for access to their websites. Some image licensing of digitised content might help cover some of the costs but the copyright will - by definition - not belong to the museum so there is a risk in charging for such material. The financial operation of public museums is complex, and becoming more so as public funding reduces. Museums seek revenue from a number of sources including commercial activity such as retail, catering and venue hire; via corporate sponsorship; admissions fees (for special exhibitions where the museum is free); or exploring the commercial potential of their IP. However, it is very unlikely that these activities would make use of the digitised orphan works.

21 Would you attempt to engage in a public-private partnership to digitise and make available such works? Any charges can only reflect the cost of search, digitisation and making available, with no profit margin. What evidence do you have of the level of interest of private enterprises in such partnerships?

Some museums, libraries and archives already do this, although these are largely dependent on the value of the material to a private organisation. The British Library has experience of this, and is presently in a ten-year arrangement with brightsolid to digitise their newspaper archive.

22 Do you agree that we should not implement the optional provision?

Yes

23 Are there any other sources that should be added to this list of essential sources?

No.

24 Do you agree with the addition for non-published works under Part 2 of the Schedule? Are there any other sources that could be added for unpublished works?

No.

25 Is there a realistic prospect that civil sanctions will not provide appropriate remedies? In what circumstances?

No.

26 Do you agree with this approach? Where should the burden of proof lie, and why?

The burden of proof should lie with the claimant.

**27 Is it necessary to provide for an appeals process on the level of fair compensation?
Who should administer such an appeals process?**

A European equivalent of the Copyright Tribunal should administer the process.

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