

BRITISH COPYRIGHT COUNCIL

Proposed requirements to make provision for the licensing of orphan works

Introduction

The British Copyright Council (BCC) makes this proposal for a licensing system to cover agreed use of orphan works.

The proposal will meet the challenges in licensing the use of works and performances which are protected under the Copyright, Designs and Patents Act 1988 (“CDPA”) but in respect of which the relevant right owner or licensor is unknown, or cannot be located, after diligent search (“orphan material”).

BCC believes that the system, will in a practical manner and in the interests of rightowners, disseminators and the public, allow the obtaining of the necessary licences.

An essential element of the proposed system must involve agreed procedures for the conducting of diligent search to ascertain if a work is properly to be treated as an “orphan work” for the purposes of required licensing.

The membership of the BCC includes a number of bodies representing the interests of owners of photographs, graphic works and other artistic works.

The BCC proposal is intended to enable collecting societies who already hold mandates for the collective licensing of photographs and graphic works (including when such works have been embedded within other works under primary licences) to seek certification of their licence schemes in the way envisaged for collecting societies representing the interests of other works and performances.

However, to the extent that new licensing schemes may be required to permit the licensing of photographs or graphic works, where the works are deemed orphan material after diligent search, BCC members who represent the interests of such works have joined with other representative bodies for artistic works to agree a set of Principles of Licensing.

A copy of these Principles for Licensing are attached as an Annex to the BCC proposal and amount to conditions which the sector would expect to be satisfied before approval for any new collective licensing schemes covering orphan photographs or orphan graphic works might be certified or otherwise permitted in the context of the framework proposed by the BCC.

Licensing of orphan works and performances via collecting societies or the Copyright Tribunal

The BCC believes that a procedure to enable the legitimate use by licensing orphan works could helpfully be established on the basis of the existing sections of the CDPA, in particular sections 143 and 144A and 190.

Appropriate licensing schemes might be certified by the Secretary of State under section 143 CDPA, as follows:

- (a) where collective management is available regarding the relevant rights in works or performances of the same type as the orphan material concerned, a licence would be issued by the relevant collecting society, and
- (b) if no licensing body administers rights of the category involved in the desired use, following application made to the Copyright Tribunal as under the provisions of s.190 CDPA .

It is submitted that such an approach would not conflict with European legislation and only requires the adjustment of already established sections of the CDPA. The approach envisaged is designed to lead to legal clarity and protect the user from civil liability and criminal responsibility for copyright infringement, under CDPA section 107.

Should the owners of the relevant rights not claim the allocated fees or royalties within six years of a licence being granted, it is proposed that the reserved sums could be used to support creative and/or charitable causes in accordance with distribution rules approved by the membership of the relevant collecting society.

Suggested requirements

BCC would propose that collective exercise of certain rights in relation to orphan works and performances should be enabled under the provisions of s 143 CDPA.

(1) The provisions should apply only for the purposes of relevant use a work or performance which comprises an orphan work as defined by the legislation and subject to this :-

(a) to the copyright in a literary, dramatic, musical or (subject to (c) below) artistic work, sound recording or film, to the extent that the relevant copyright owner cannot be located or identified after reasonable inquiry has taken place;

(b) to performances where the relevant rightowner is unknown or cannot be located, or identified after reasonable enquiry has taken place;

(c) to the copyright in photographs or graphic works only to enable collecting societies who already hold mandates for the collective licensing of such works (including when such works have been embedded within other works under primary licences) to seek certification of their licence schemes in the way envisaged for collecting societies representing the interests of other works and performances. However, to the extent that new licensing schemes may be required to permit the licensing of photographs or graphic works, where the works are deemed orphan material after diligent search, BCC members who represent the interests of such works have joined with other representative bodies for artistic works to agree a set of Principles of Licensing. A copy of these Principles for Licensing are attached as an Annex and amount to conditions which the sector would expect to be satisfied before approval for any new collective licensing schemes covering orphan photographs or orphan graphic works might be certified or otherwise permitted in the context of the framework proposed by the BCC.

(2) The use of an orphan work can be licensed through a licensing body operating a licensing scheme certified for the purposes of section 143 providing for the grant of licences to do acts in relation to an orphan work within the scope of such scheme which would otherwise require the consent of the missing copyright owner. It will be important that such licences include rules concerning the treatment of reventant right owners.

(3) Where the missing copyright owner is not the sole owner of copyright in the work, as regards the relevant use, a licence issued under a certified licensing scheme should not affect the need for consent from any other owner of copyright.

(4) A licence issued under a certified scheme in favour of any person should not preclude any authorisation or licence which may be required from another person.

(5) A licensing body operating a certified licensing scheme which manages rights in respect of the same type of rights in works of the same category as the orphan work concerned should be deemed to be eligible to manage the right for the orphan work concerned on securing the necessary certification.

(6) Any licensing scheme to be certified for the purposes of licensing orphan works must provide for the treatment of royalties and other sums received in respect of licensing for use of an orphan work in accordance with the good practice of the licensing body 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); and
- (d) provision for the treatment of reversionary right owners.

(7) A licensing body should be able to 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.

(8) The Secretary of State should be able at any time to refer a proposed licensing scheme or licence to be issued thereunder to the Copyright Tribunal for a determination of whether the scheme or licence is reasonable in the circumstances.

(9) No licensing scheme certified for the purposes of licensing orphan works should be able to authorise the grant of a licence in respect of an unpublished work, unless regulation by the Secretary of State is developed after consultation, to establish rules enabling such work to be brought within the provisions of a licensing scheme otherwise certified for the purposes of licensing orphan works.

(10) In the absence of a certified licence scheme being in place in relation to a specified use of any orphan work the Copyright Tribunal should be able, on the application of a person wishing to use the orphan work, give consent for use as prescribed provided that

- (a) the Copyright Tribunal is satisfied that the applicant has previously carried out a diligent search to find or, if necessary, to identify and find, the owner of the relevant interest in the copyright in the work for the use for which consent is sought; and
- (b) after the service or publication of such notices as may be required by rules made under general procedural Rules of the Copyright Tribunal, or as the Copyright Tribunal may in a particular case direct.

(11) Where the Copyright Tribunal gives consent to the use of orphan works it should be required to make an order as to the payment to be made by the applicant for the benefit of the owner(s) of the orphan works relevant to the consent in consideration of the consent being given and make provision for the treatment of reversionary rights owners to vary the extent of consents for the use of relevant orphan works otherwise previously approved by the Copyright Tribunal.

Identification of works and performances which are subject to any licensing scheme certified as envisaged by the above proposals should be included in a publicly accessible online database operating on conditions established by the Secretary of State by regulation.

How and when a work or performance is to be treated as “orphan”

(1) A work should only be treated as 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 a Notice of search entered in a publicly accessible online database designed to bring to the attention of the owner of the right in the work concerned the proposed use of such work, such database operating on conditions established in accordance with regulations made by the Secretary of State, but has not found the owner.

(2) References to a missing copyright owner in relation to an orphan work should be treated as references to that owner.

(3) Legislation should provide that the person carrying out the search must in particular:-

(a) make such use as is reasonable of all sources of information, 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) Sources of information relevant to this should specifically include:-

(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; and

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

(5) A work's apparent country of origin should be 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 same diligent search requirements should apply in respect of an orphan performance, namely a performance where the relevant right owner is unknown or cannot be located, as they apply in respect of an orphan work.

(7) Rules regarding the licensing of copies or transmissions of orphan works or orphan performances in cases where such copies or transmissions originate outside the United Kingdom should be subject to rules made in this regard by regulation by the Secretary of State.

Annex to BCC Orphaned Works proposal

21 February 2011

This Appendix has been prepared by the following organisations:-

Association of Illustrators, Association of Photographers, Bridgeman Art Library, British Institute of Professional Photography, British Photographic Council, British Press Photographers' Association, Design and Artists Copyright Society, Editorial Photographers UK, National Union of Journalists, Pro Imaging, The Royal Photographic Society, Stop 43.

The bodies listed have made representation to the BCC that its proposal for a licensing system to cover agreed use of orphan works should apply in respect of artistic works which are photographs and graphic works only: (to enable collecting societies who already hold mandates for the collective licensing of such works to seek certification of their licence schemes within the scope of mandates granted to such collecting societies representing the owners of interests in identified artistic works (or specified genre(s) of artistic works).

However, to the extent that any new licensing schemes may be required to permit the licensing of photographs or graphic works (where the works are deemed orphan material after diligent search) the following Principles for Licensing must be observed and enforced for the purposes of the provision for and grant of licences.

The following Principles for Licensing are the conditions under which the sector would expect an orphan works licensing scheme to operate.

a) Moral rights legislation and sanctions against any rights infringement must be strengthened for all artistic works as a prerequisite for the licensing of artistic works which are photographs or graphic works within the licensing frameworks envisaged for other types of copyright work found to be orphan works. Moral Rights must automatically, completely and exclusively reside with the creator and be automatically asserted, inalienable and unwaivable in all circumstances unless the creator expressly, voluntarily and without contractual coercion requires anonymity (in order to protect his identity, his privacy, or to voluntarily place his work in the public domain).

(b) The licensing framework proposed is intended to address only the licensing for non-commercial use of photographs or graphic works which are found to be orphan works. If a license to use a photograph or graphic work outside non-commercial uses is required, then the user will not have recourse to apply the certified licence framework or the Copyright Tribunal licence provisions of works deemed to be orphan. Ownership of rights in such orphan works will be reserved by a copyright owner whilst copyright in the work subsists.

(c) The diligent search* to identify a rights owner in a photograph or other specified artistic work which is a photograph or graphic work must be a robust procedure that

is both stringent and not a cheap option for the prospective licensee, and implemented such that no conflict of interest can arise between licensee and prospective licensor, e.g. because they are one and the same. Picture Libraries should be treated as bodies to be consulted when seeking details of the owner of relevant rights in a photograph thought to be orphan. Administration fees for a collecting society operating a certified licence for orphan works which are photographs or graphic works must remain competitive and be kept at an acceptable level.

(d) Where the non-commercial licensing framework can be applied, the regulations need to provide for users who could have secured a non-commercial licence under a certified licence scheme or via the Copyright Tribunal to be subject to punitive damages payment when licence terms are properly established.

(e) Any licensing within the framework must include provisions for licensees to include any and all metadata linked to any digital images licensed or metadata detailing the provenance of the image and also include effective sanctions against the alteration, stripping or removal of metadata (specifically for ownership and rights information).

(f) No licensing scheme for artistic works which are photographs or graphic works that are orphan works should authorise the creation of an adaptation of a work that would adversely affect the interests of the owner in the original orphan work. The terms of any certified licence scheme or licence granted via the Copyright Tribunal should include terms to recognise and reserve the rights of the original orphan work. No authorisation to use any permitted adaptation within the scope of the framework for licensing use of orphan works, should exceed the scope of the non-commercial use authorised.

OUR UNDERSTANDING OF TERMS

Non-commercial Use is any use (including use for preservation, private study and private research) that DOES NOT directly or indirectly generate revenue for the user, including the rights holders; promotes their educational, political, religious or charitable objectives, allow copying; allow inclusion of derivative works.

Commercial Use is any use (including use for preservation, private study and private research) that directly or indirectly generates revenue for the user, including the rights holders, promotes their educational, political, religious or charitable objectives, allow copying; allow inclusion of derivative works.