

Orphans and Images

2 July 2013, The Law Society, London

A joint event by
the **Technology Strategy Board**
and



UK Policy context

Third attempt to regulate the use of Orphan Works

- *Gowers Review 2006*: “[S]olving the problem of orphan works is good for everyone. A solution is good for all those who are involved in archiving and cataloguing; for all those creators who use older work to create new value; for those whose work is restored and who may benefit from remuneration from a new source; and for consumers.”
- *Digital Economy Bill 2010*. Clause 116A (withdrawn in ‘wash-up’): “[T]he Secretary of State may by regulations provide for authorising a licensing body or other person to do, or to grant licences to do, acts in relation to an Orphan Work which would otherwise require the consent of the copyright owner”.
- *Hargreaves Review of Intellectual Property and Growth 2011*: “The problem of orphan works – works to which access is effectively barred because the copyright holder cannot be traced – represents the **starkest failure of the copyright framework to adapt.**”

Hargreaves Implementation

Hargreaves, p. 8: The UK should look to “establish **extended collective licensing** for **mass licensing** of Orphan Works, and a clearance procedure for use of **individual works**. In both cases, a work should only be treated as an Orphan if it cannot be found by search of the databases involved in the proposed **Digital Copyright Exchange**.”

Enterprise and Regulatory Reform Act 2013: enabling legislation –

s. 116A: Power to provide for licensing of orphan works

s. 116B: Power to authorise licensing bodies for extended collective licensing

Intention to create a body for

- granting **non-exclusive** licences for both **commercial and non-commercial** use, subject to **a verified diligent search**;
- maintaining a **register** of works subject to current diligent searches and works that the body has licensed;
- collecting **upfront** licence fees “**at a rate appropriate to the type of work and type of use** and these fees will be held by the licensing body for the rights holder in case they reappear”.

Our IPO commissioned study “aims to offer a clearer understanding of **how orphan works are regulated and priced in other jurisdictions**, and how a **pricing system** could be structured to ensure that ‘parents’ are **fairly remunerated** if they re-appear, and users are **incentivised to access and exploit** registered orphan works.”

European Union

Directive of the European Parliament and of the Council on certain permitted uses of orphan works of 25 October 2012 (2012/28/EU)

Books etc. which are contained in collections or archives of publicly accessible libraries, educational establishments or museums as well as film or audio heritage institutions

Revenue can only be generated for the specific purpose of covering costs of digitization and making available to the public

Requirement of diligent search in good faith

ECL or individual licensing permitted (choice with member states)

Publicly accessible database desired

No role for CS envisaged

Copyright and the Regulation of Orphan Works

An independent report commissioned by the Intellectual Property Office

by: Marcella Favale, Fabian Homberg, Martin Kretschmer, Dinusha Mendis,
and Davide Secchi

Study I

comparative international review
of actual/proposed legislation in
several jurisdictions

→ key characteristics of orphan works
licensing schemes

Study II

simulated rights clearance for six
scenarios

→ Identify pricing models

Study I

OW legislation in place

- Canada
- Denmark
- Hungary
- India
- Japan

OW legislation proposed

- US (2 Bills)
- EU (now Dir. 2012/28/EC)

Dimensions

- × Categories of works covered
- × Uses covered
- × Standards of search
- × Mechanism for obtaining permission
- × Register for suspected orphan works
- × Role of collecting societies
- × Price setting mechanisms (Who? Negotiation?)
- × Procedure for challenging tariffs
- × Remedies for re-appearing authors
- × Aggregate revenues
- × Timing of licensing
- × Case Law

Summary Table of Legal Review

| | Legislative Basis | Categories of Work covered | Uses covered | Standard of diligent search | Mechanism for obtaining permission | Register | Role of collecting societies |
|--------|--|---|--|---|--|---|---|
| Canada | Section 77 Copyright Act 1985. Non-exclusive license | Not specified in Statute. (implied: All published works are covered) | Not specified in Statute. Copyright Board has identified uses as being both commercial and non-commercial. | Yes. 'Reasonable efforts' | Yes. Permission has to be obtained from and is granted by the Board. | Yes. a list of licenses granted or refused for used orphan works publicly available online no database for suspected works | High involvement. from the beginning in deciding on the royalties |
| USA | Various proposals. No OW legislation in force. Fair use defence | Not specified in Statute. (implied: All are covered) | Uses are not covered by proposed legislation. 4 uses | Yes. | Not applicable | Yes. (envisaged in bill) | No. |
| Japan | Article 67 Copyright Act 1970. Update in force since 2010. | Not specified in Statute. All categories covered as reflected by the types of licenses granted. | Commercial & non-commercial. | Yes. 4 specified steps | Yes. Permission has to be obtained from and is granted by the Commissioner of the Agency for Cultural Affairs. | Partial. Register/database is held by 'some institutions' for suspected Orphan Works. | No. |

Summary Table of Legal Review

| | Legislative Basis | Categories of Work covered | Uses covered | Standard of diligent search | Mechanism for obtaining permission | Register | Role of collecting societies |
|----------------|---|--|--|---|---|--|---|
| India | Section 31A Copyright Act 1957 (as amended). Compulsory license for published or unpublished orphan works | Not specified in Statute. (implied: All are covered) | Commercial & non-commercial. (implied) | Yes. Specific steps must be carried out in order to satisfy “due diligence” search criteria | Yes. Copyright Board directs the Registrar of Copyrights to grant license if the Board is satisfied with application and diligent search. | None. | No. |
| Hungary | Act CXII of 2008 & Gov’t Decree 100/2009. (V. 8.) | Not specified in Statute. (implied: All are covered). | Commercial. (non-commercial exempted) | Yes. Diligent search is required and Proved through certificates; | Yes. Hungarian Copyright Office, grants the licence, subject to legal requirements. | Yes. Register of used (and licensed) works to be administered by the Hungarian Patent Office | Yes. Collecting societies collect unclaimed revenues after five years from licence expiry |
| Denmark | Danish Copyright Act § 50 subsec. 2 applies (general ECL) | All copyright works (implied) | All uses (implied) | None | Yes. Negotiation with the competent collecting society | None | Yes. CopyDan |

Findings

. Main Systems

- 1) Limited liability (US)
- 2) Extended Collective Licensing (ECL)
(Denmark)
- 3) Central Public Authority CPA
- 4) Combination of *2 and *3

. Diligent search

- 1) Different definitions/requirements
- 2) Specification of sources (DB)
- 3) Advertising in the national press or
equivalent

. Prices

- 1) Negotiation (e.g. ECL)
- 2) Set by Authority -*Note: on a “case by case basis” “depending on the nature of the applicant”*

. Licensing Fees

- 1) No fees (US)
- 2) Paid upfront
- 3) Paid in case the author shows up;
- 4) Either *2 or *3, depending whether Commercial or
Non-commercial use

. Online registers

- 1) Compiled by Authority,
- 2) Compiled by Users //
Containing licensed Orphans
Containing Suspected Orphans

. Remedies

- 1) Ordinary courts
- 2) Special tribunals (for fee challenges and
infringement claims)

Study 2: Rights clearance simulation

1. Historical geographic maps for a video game for mobile phones (up to 50 maps)
2. A vintage postcard collection for web publication and eventual sale of prints (up to 50 cards)
3. National folk tune recordings for multimedia/teaching (DVD) (up to 50)
4. Re-issuing a 1960/70s TV series as part of a digital on-demand service (one series)
5. Mass digitization of photographs (archives) by a public non-profit institution, with possible sale of prints (above 100.000 items)
6. Mass digitization of books by a private for-profit institution, with possible sale of books (above 100.000 items)

Questionnaire

Price for **permanent non-exclusive** use. In the absence of a permanent licence, prices should be indicated **per year**.

| | Source | Artefact | Use | Price (licence) |
|-------------------|---|--|--|--------------------------------|
| <i>Scenario 1</i> | National war museum | Geographic map | Developing a videogame for mobile phone | Commercial: Non-commercial: |
| <i>Scenario 2</i> | Private collector | Vintage postcard | Publication on a website | Commercial: Non-commercial: |
| <i>Scenario 3</i> | Hungarian folk Music archive | Folk tune | Use in multimedia educational artefact, issued on DVD | Commercial: Non-commercial: |
| <i>Scenario 4</i> | Magyar Televízió (Hungarian National Television) | TV series from the 60' or 70's, or, in the absence, theatrical emission or TV show | Re-issuing the TV emission for digital on-demand service | Commercial: Non-commercial: |
| <i>Scenario 5</i> | Budapest Főváros Levéltára (Budapest City Archives) | Photographs, Maps, Motion-pictures and Audio Recordings | Digitising and publishing online over 100.000 items | Commercial: Non-commercial: |
| <i>Scenario 6</i> | Hungarian Private Company | Books not commercially available | Digitising and publishing online over 100.000 items | Commercial: Non-commercial: |

Summary Statistics

Table 3.2: Descriptives by Scenario

| | Scenario | Licence | Obs | Mean | Std. Dev. | Min | Max |
|---|---------------------|----------------|-----|----------|-----------|----------|----------|
| 1 | National War Museum | commercial | 2 | 842.34 | 856.32 | 236.83 | 1,447.85 |
| | | non-commercial | 2 | 78.19 | 26.84 | 59.21 | 97.17 |
| 2 | Private Collection | commercial | 2 | 842.34 | 856.32 | 236.83 | 1,447.85 |
| | | non-commercial | 2 | 78.19 | 26.84 | 59.21 | 97.17 |
| 3 | Folk Music Archive | commercial | 2 | 4,750.35 | 6,451.49 | 188.46 | 9,312.24 |
| | | non-commercial | 3 | 583.82 | 460.40 | 188.46 | 1,089.30 |
| 6 | Private Company | commercial | 1 | 1,570.50 | . | 1,570.50 | 1,570.50 |
| | Books | non-commercial | 2 | 1,602.23 | 44.87 | 1,570.50 | 1,633.95 |

Note: No prices available for scenarios 4 "TV" & 5 "mass digitization"

Comparison of Mean fee by system

Table 3.4: Comparing ECL and IL systems

| Country | Type | Licence | Obs | Mean | Min | Max |
|------------|------|----------------|-----|----------|---------|---------|
| Denmark | ECL | commercial | 2 | 1,633.95 | 1307.16 | 1960.74 |
| | ECL | non-commercial | 2 | 1,361.62 | 1089.3 | 1633.95 |
| Rest incl. | IL | commercial | 10 | 2,488.89 | 188.46 | 9818.17 |
| Hungary | IL | non-commercial | 10 | 1,123.14 | 59.21 | 8181.82 |
| Rest excl. | IL | commercial | 8 | 3,032.34 | 188.46 | 9818.17 |
| Hungary | IL | non-commercial | 8 | 1,340.90 | 59.21 | 8181.82 |

- *Similarity in non-commercial fees*
- *Variation in commercial fees*

Scaling Exercise

- *Commercial licence fee provided is CAD 0.25 per page*
- *Non commercial licence fee is CAD 0.15*
- *Canadian Copyright Board stated that the rate will be much lower
→ reduction by CAD 0.10 in both cases*

| Table 3.1: Scenario 6, Licences based on Canadian Legislation | | | | | | | |
|---|-------------------|------------------|----------------------|-------------------------|-------------|----------------------------------|---------------------------------|
| | reported (CAD) | applied (CAD) | no. Books (items) | average size (pages) | total pages | Licence fee reported (CAD) | Licence fee applied (CAD) |
| commercial | 0.25 | 0.15 | 100,000 | 300 | 30,000,000 | 7,500,000 | 4,500,000 |
| non commercial | 0.15 | 0.05 | 100,000 | 300 | 30,000,000 | 4,500,000 | 1,500,000 |
| | | | | | | GBP | GBP |
| commercial | | | | | | 4,711,500 | 2,826,900 |
| non commercial | | | | | | 2,826,900 | 942,300 |

Findings

- No “standard price”. **Tariffs vary widely**. To clear 50 items from a folk tune archive for commercial use will cost the equivalent of £188/year in Canada, and £9312/year in France.
- Licences were not available for all scenarios. Re-issuing orphaned broadcasts particularly problematic, with **no licence offered in any of the countries** investigated.
- No systematic recognition of what may constitute an **appropriate duration for licences**. Licences range from a monthly to a five-year licence, without the provision of a permanent licence.

Findings

- Per item fees initially appearing very low turn out to render **mass-digitization unviable** for non-profit institutions when scaled up under reasonable assumptions.
100,000 items → annual fees exceeding £1m
- **Fees are similar in collective and individual licensing regimes.**
Interesting! Operating costs for orphan works scheme an important factor when choosing between IL & CL.
- **Limited liability** system seems to have advantages for **archives** and other non-profit institutions; **up-front rights clearing** may be more appropriate for **commercial uses**, guaranteeing that a re-appearing rightholder will be compensated for the exploitation of any work.

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RCUK Centre for Copyright and New Business Models in the Creative Economy www.create.ac.uk