

Response on orphan works

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I am a freelance science writer and editor based in London, UK. I make this submission in an individual capacity. I draw, however, on my experience as chair of the Copyright Committee of the National Union of Journalists (UK and Ireland), of the UK Creators' Rights Alliance¹, and of the European Federation of Journalists² Authors' Rights Expert Group – which gives me an international perspective on copyright and authors' rights laws and the issues facing individual creators of works which may be orphaned.

I declare an interest as a director of Copyright Hub Limited, the UK company proposing to set up the facilities for identifying works and facilitating licensing mentioned in the announcement of . I repeat therefore that this submission is made in a personal capacity. Of course I also have a personal interest in the shape of US legislation, since by definition any work suspected of being orphaned may have originated anywhere in the world and may turn out to be mine.

I regret that tonight's deadline was brought to my attention only this morning.

1) The need for legislation

Experience in Canada and Hungary shows that the use of orphan works is more of a theoretical than a practical problem: demand for licenses to use works has been low in both countries. It may need to be addressed in order to make the law of the United States self-consistent; but the large-scale issues are those raised by mass digitization. It appears to me that the issue of orphan works serves mostly as the identification of a logical crevice in the copyright system into which to insert a legislative lever to make other changes.

The proposal in the 2006 and 2008 Senate Bills that orphan works be addressed by introducing a defence to infringement is not equitable. One of the features of the mass use of digital technology is that practically every citizen is now a published or "broadcast" author or performer. Though my interest is as a professional creators, I recognize that many of the issues raised relate to the possible use and abuse of non-professionals' work.

If there is to be legislation in the US .it should provide a process by which would-be users can apply for licenses following proof of diligent search – following the experience of Canada and Hungary. The previous US proposals would place an intolerable burden on the authors and performers of works alleged to be orphaned in financing litigation to challenge their use or abuse.

I observe that, contrary to the assertions in the *Federal Register* announcement of this consultation, the UK has not yet introduced actual legislation on either the licensing of orphan works or extended

¹ www.creatorsrights.org.uk

² www.ifj.org

collective licensing: indeed we have not yet seen the draft Regulations which will be laid before Parliament in the fall – only the legislation enabling them to be thus presented.

One of the several lacunae in the policy statements from which these drafts will soon be generated is their failure to deal with the question of the territorial scope of an orphan works license. The UK government appears to have accepted in the course of the consultations in which it took part that it cannot set up a body that grants licenses for use outside the UK; so if a work is placed online, which is frequently the point, what status does it have in other territories? Equally and conversely, what is the status of such a license if the relevant author turns out not to be covered by the law of the UK but, for example, by the law of Germany, with its much stronger grant of inalienable Authors' Rights?

These considerations apply even more powerfully to any regime set up by the United States.

2) Defining good faith diligent search

I commend to the attention of US legislators the Memorandum of Understanding brokered by the Commission of the European Union.

3) The role of public and private registries

For the reasons mentioned above concerning the very wide range of citizens whose works are now distributed internationally, any linkage with requirement to register works would be unjust. The Berne Convention requires that works be protected "without formality".

Further, many of the affected works of professionals with a quantifiable economic interest will, by definition, be works from their archives. The economic burden of retro-registering a corpus of thousands of works, as journalists will typically have produced in a career – or, in the case of photojournalists, hundreds of thousands) of works would be an unjust imposition.

The orphaning of future works would be much mitigated if the United States were able to follow the international mainstream and accord authors and performers a *right* to be identified (the so-called "moral right").

4) Types of works

There is a very strong argument for excluding photographs *and illustrations* until such time as technology for searching *by submitting a sample image* (rather than by keyword) is not only more advanced, but more much thoroughly populated with works voluntarily submitted.

5) Remedies and procedures

See above: the approach of requiring application for a license is to be preferred.

6) Mass digitization

See below.

7) Extended collective licensing

The United Kingdom government made much, in launching its proposals to introduce extended collective licensing in this country, of the successful use of such schemes in the Nordic countries.

What it signally failed to acknowledge is that these schemes do not operate against the background of copyright law, which is a property right, but of Authors' Rights (*droit d'auteur*) in the international mainstream. Authors and performers in the Nordic countries in general benefit from rights to be equitably remunerated and to negotiate collectively to establish minimum terms in a particular field of creativity.

They also, of course, benefit from the right in law to be identified whenever their work is used (and to defend the integrity of their works, objecting *after the fact* to manipulation or abuse that is "contrary to their honour or reputation").

Authors and performers in United Kingdom will therefore – if the legislation is in fact passed in the Fall – serve as guinea-pigs on which the effects of introducing ECL *without* the safeguards present in Authors' Rights legislation can be tested. It will be several years before we can report back usefully.