Memorandum to the House of Lords Secondary Legislation Scrutiny Committee

THE COPYRIGHT AND RIGHTS IN PERFORMANCES (LICENSING OF ORPHAN WORKS) REGULATIONS 2014

Comments on submission by Mr Tom Rivers

Thank you for the opportunity to provide further information on the points raised with the Committee by Mr Tom Rivers in his submission of 16 July concerning the Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014 and the accompanying Impact Assessment.

Some of Mr Rivers' points are based on misunderstandings of the orphan works scheme and the safeguards put in place under the regulations that will protect right holders. Our responses to specific points are set out below.

Commencement of licence granted by authorising body

1. Mr Rivers is concerned that the published flowchart of the orphan works licensing process does not cover the situation where a right holder emerges before a licence is granted. This is not a formal stage in the process, but it would of course mean the work was not an orphan work and could not be licensed. In the interests of clarifying the point, the IPO has amended the flow chart; the amended version is on the next page.

2. Mr Rivers proposes a 6 month moratorium before any licence is issued, to give right owners opportunity to identify themselves. This would represent a significant change to the existing policy (on which the Government has consulted extensively), which puts the onus on the applicant to locate the right holder through the diligent search process, and on the authorising body through its responsibility to check those diligent searches. It implies that right holders would check the register regularly to see if any of their works were being considered as orphans. Right holders will be able to do so if they so wish but the Government believes it would be unreasonable to expect this, particularly since many people are unaware that they own copyright in unpublished works (for example, diaries written by soldiers in the Second World War).

3. To change the policy to make an applicant wait 6 months before they can use a licence would be out of line with commercial licensing terms. This delay would make use of the licensing process less attractive for non-commercial and commercial users alike; it would also exclude some time-critical uses of orphan works. This would run counter to the public policy aim of encouraging the use of orphan works.

4. There will, necessarily, be a period of time between an application being received, when its details are placed on the public register, and – if successful – a licence being granted. This will be the time it takes the authorising body to consider and process the application. There will be targets so that applicants
will have an idea of how long it will normally take to deal with an application, but such customer service targets are not matters that need to be set out in the regulations.

5. Canada has been operating an orphan works licensing scheme since 1990 with no waiting period between decision being made on a licence application and that licence being granted, apparently without problems.
Access to diligent searches undertaken by applicants

6. Mr Rivers argues that the authorising body should publish full details of any diligent search it receives.

7. The details of diligent searches which applicants will need to provide to the authorising body may contain personal data about individuals. Even if the creator is dead, there may well be information such as the names and addresses of potential heirs, for example. Publishing such personal data is subject to legal controls and is, in the Government’s view, not justified as a default option. The IPO abides by public sector data management principles deriving from the Data Protection Act 1998 and we will ensure guidance for applicants to the scheme provides clarity on the balance between control of personal data and transparency.

8. Details of the work and its author, where known, will be published on the register to allow the work to be identified by returning right holders at any point. It will also be a requirement for a credit to be given when the work is reproduced where the right holder is known. The register entries will also include the names of any other known right holders in the work and any known identifiers such as ISBN numbers.

9. Details of diligent searches provided to the authorising body will be public records and could therefore be requested under the Freedom of Information (FOI) Act. The Act contains exemptions in respect of the release of personal data, which the Government may choose to rely on.

10. The Orphan Works Regulations provide mechanisms to ensure any shortcomings in scrutiny of diligent searches can be remedied. Right holders may appeal to the First Tier Tribunal if they are dissatisfied with the actions of the authorising body and prospective licensees may appeal to the Copyright Tribunal (Regulation 14). The Regulations also provide for an annual report to be published by the authorising body (Regulation 11). In addition, Ministers made a commitment to Parliament to review the operation of the scheme after one year at Lords Third Reading of the Enterprise and Regulatory Reform Act 2013¹.

11. These amount to a series of important safeguards to ensure the IPO carries out its functions properly.

“Umbrella Licences”

12. Mr Rivers’ argument that an “umbrella licence” for multiple works would breach the Government’s principle that each orphan work be subject to a diligent search is incorrect. The Government intends to allow a single licence fee to cover a number of works applied for during the course of a year for

purely non-commercial uses, in respect of which museums would not normally pay anything for the use of equivalent non-orphans. Each individual work and right holder within that work will require a diligent search to be submitted to the authorising body. This licence is being introduced in the interests of ensuring the price charged for orphan works is compatible with their equivalent non-orphan work being used in a similar way, as required by Regulation 10, and also for administrative convenience and cost saving.

13. That a licence fee for non-commercial use might be minimal was discussed in Parliament during the passage of Enterprise and Regulatory Reform Act 2013 at Lords Report Stage.

Unpublished Works

14. The Government has decided to include unpublished works within the orphan works licensing scheme. The issue is not how many of certain types of orphan works might or might not exist, or whether one type of orphan work is more prevalent than another, but what types of orphan works stakeholders want to use.

15. However, the evidence that the Government has received from cultural heritage institutions is unequivocal. In their responses to the recent Technical Consultation on Orphan Works, they confirmed that a majority of the orphan works they hold are unpublished, and that excluding unpublished works would therefore severely limit the usefulness of the scheme. It is not surprising that so many orphan works are unpublished because, often, the right holders will be non-professionals who are unaware that copyright exists in items such as correspondence, diaries and photographs. Therefore, they do not monitor use of these works. Nevertheless, these items are often of great historical or cultural interest.

16. The UK Government has noted both the more limited approach to unpublished works taken by the EU Directive on Certain Permitted Uses of Orphan Works and the Canadian Orphan Works scheme, but that the Indian and Hungarian schemes do permit use of unpublished orphan works. The need for a wider measure is one of the reasons for introducing a UK orphan works licensing scheme. Where archives hold a work which is accompanied by instructions restricting access they would be bound to respect those instructions but, in most cases, works deposited with public cultural institutions are given for the purpose of letting people see them.

17. The orphan works register will contain sufficient details of the work, its provenance and the applicant to assist a right holder in identifying their works, including a thumbnail of the work where it is an image.

18. In respect of the argument that there should be a “waiting period” prior to the grant of a licence, as set out above the Government believes it is right to put

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3 https://www.gov.uk/government/consultations/copyright-uk-orphan-works-licensing-scheme
the onus on an applicant to locate the right holder through the diligent search process. The diligent search requirements apply to unpublished works and the Government sees no compelling reason for them to be treated differently.

Foreign Right holders

19. Mr Rivers suggests that the authorising body should have an obligation to bring non-UK works to the attention of foreign right-holders, otherwise there is a risk that other countries when implementing orphan works scheme will adopt a lower standard of treatment for UK right holders.

20. Where a right holder might be located outside of the UK, the onus remains on the applicant to conduct an appropriate diligent search, which may mean that the search needs to cover other countries. Mr Rivers wishes the authorising body to be obliged to find foreign right holders, even when they have not been located by the applicant’s diligent search. Where a properly conducted diligent search has failed to find the right holder, an attempt to do so by the authorising body is unlikely to yield a different result. Furthermore, this would privilege non-UK right holders. Extensive sector-specific guidance on diligent searches is being produced with practitioners to ensure that, where applicants are not accustomed to conducting such searches, they are aware of the range of possible sources to explore both in the UK and abroad.

21. If other countries develop schemes to allow the use of orphan works then they, like the UK, will need to establish appropriate safeguards for right holders. The UK would, of course, be happy to speak to any other countries interested in developing orphan works schemes to help them reach the standards it believes to be both appropriate and practical.

Evidence and the Impact Assessment

22. The Impact Assessment contains a rough estimate of the potential scale of the orphan works problem in the UK and gives a figure of 91m. As the Impact Assessment makes clear, this is highly likely to be a significant underestimate of the true number of orphan works in the UK. The figures represent those made known to us, rather than a comprehensive study of all cultural institutions, let alone private archives. Until searches are made it cannot be ascertained whether the right holders can be found. Absent a legal means of reproducing orphan works (in books, exhibitions etc), those holding the physical works had little incentive to spend resources (often public money) to conduct such searches where they thought there was a chance that right holders could not be found.

23. In arriving at the figure of 91m, a rough estimate was made of the newspaper holdings at the British Library and an assumption developed on the potential level of orphan works within this collection. It is true, as Mr Rivers states, that (together with other written material held by the British Library) this accounts for approximately 65% of the 91m figure.
24. The purpose of this was to provide a rough estimate of the scale of the orphan works issue in the UK rather than present a precise breakdown of these works by type and where they are held.

25. The Impact Assessment does not seek to give a comprehensive picture of the entirety of the British Library’s holdings. To do so would not have been relevant to the purpose of the Impact Assessment, which was to use relevant information about the British Library’s holdings to help estimate the approximate scale of the orphan works problem in the UK. Mr Rivers’ information about the British Library’s holdings, while interesting, is simply not relevant to this.

26. What the Impact Assessment establishes is that there are millions of orphan works in the UK. The key issue is not whether there is more of one type of work than another but what types of work users are looking to use under the scheme, which need not be in proportion to the number of such works.

27. By definition it is difficult to estimate the number of unpublished works that are likely to be orphan, but, as demonstrated by the responses received from cultural heritage organisations to the recent Technical Consultation on Orphan Works⁴, it is precisely these unpublished orphan works that they are most likely to use the orphan works licensing scheme for.

28. There is in any case no contradiction between the 112.5m items figure in the Impact Assessment and the 750m pages of works figure given by Mr Rivers. The rough estimate is for 112.5m items, (a figure that the British Library has not taken issue with). The 750m figure is for the number of pages (rather than items) that would be available digitally once a particular project had been completed.

29. While the monetised benefits predicted by the Impact Assessment for the domestic orphan works licensing scheme are relatively low, the Impact Assessment also details an expected benefit to growth and business creation. While it has not been possible to quantify the likely level of interest from commercial users, evidence from consultation respondents such as the CBI suggests that benefits are expected but not yet quantifiable.

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⁴ https://www.gov.uk/government/consultations/copyright-uk-orphan-works-licensing-scheme