

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

2014 No. 2863

1. This explanatory memorandum has been prepared by The Department for Business, Innovation and Skills and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 The Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014 (the “Regulations”) allow for the licensed use of orphan works within the framework of UK copyright law, subject to appropriate safeguards and remuneration for absent rights-holders.

3. Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None

4. Legislative Context

- 4.1 Section 77 of and Schedule 22 to the Enterprise and Regulatory Reform Act 2013 (c.24) inserted sections 116A, C and D and paragraphs 1A, 1C and 1D into Schedule 2A of the Copyright, Designs and Patents Act 1988 (“CDPA”). These provisions enable the Secretary of State to make regulations to allow for the licensed use of orphan works, subject to appropriate safeguards.
- 4.2 The Act sets the parameters of the scheme to be covered by the regulations and in doing so provides that the regulations must make provision about the following specified matters:
- Treatment of royalties and other sums
 - Requirement for a diligent search before a work is classed as orphan
 - That a licence to use an orphan work cannot be granted to a body authorised to licence the use of orphan works
 - That a licence must have the same effect as if granted by the missing right-holder
 - That an orphan works licence can only grant non-exclusive rights
 - The withdrawal of an authorisation to grant licences.

- 4.3 The licensing scheme for orphan works to be introduced under these regulations will complement the Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014, which implement Directive 2012/28/EU, by amending the CDPA, and a draft of which is laid before the Joint Committee along with the Regulations.

5. Territorial Extent and Application

- 5.1 This instrument extends to all of the United Kingdom.

6. European Convention on Human Rights

- 6.1 The Viscount Younger of Leckie has made the following statement regarding Human Rights:

“In my view the provisions of the Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014 are compatible with the Convention rights.”

7. Policy background

- *What is being done and why*

- 7.1 Most uses of a copyright work require prior permission from the copyright owner. Orphan Works are copyright works or performers' rights for which one or more right holder cannot be identified, or if identified, cannot be located, so permission to use them cannot be obtained. Orphan works, some of which are culturally and economically significant, can only be used lawfully to a very limited extent at present.
- 7.2 The objective of the Regulations is to create a licensing scheme within the framework of UK copyright law to allow for the use of any orphan work. The licensing scheme set out in the Regulations can be used by anyone wishing to use an orphan work, applies to all types of works, and would allow any type of use for which the right-holder's permission would otherwise be required.
- 7.3 The licensing scheme will enable the lawful use of orphan works for both commercial and non-commercial use, for example, in books, TV programmes, exhibitions and on web-sites. In doing so, it will enable access to culturally valuable works, contribute to economic growth, minimise existing perverse incentives to use orphan works illegally and protect and remunerate right holders. The Regulations also allow any person to use an orphan work for the purposes related to making an application, otherwise providing a copy of the orphan work with an application would amount to unlawful use.

- 7.4 There are also a number of important safeguards for the right holder. In order to establish the orphan work status, a diligent search for all relevant right holders must be carried out. An applicant for an orphan licence may rely on a previous search which has been carried out in the last seven years, under the regulations or under Directive 2012/28/EU, and is appropriate for the work. Alternatively the applicant must carry out a new search, which the authorising body must then be satisfied meets the required standard. A licence fee will be payable, prior to the licence being issued and the fee will be set aside by the IPO for any right holders that subsequently come forward. The licence fee will reflect what is charged for an equivalent non-orphan work used in an equivalent way. The IPO will also maintain an electronic, free, publicly available register to enable right holders to check if their works have been licensed as orphans (or are subject to application for an orphan works licence).
- 7.5 The licensing scheme will be operated by an authorising body, appointed by the Secretary of State to license the use of orphan works. It was announced during the passage of the Enterprise and Regulatory Reform Act that the authorising body would be a public body and likely to be an existing one. It has been decided that the Intellectual Property Office (“IPO”) will be the authorising body. It should be noted that the Regulations refer to the “Comptroller” (the Comptroller of the Patent Office), as the IPO is the operating name of the Patent Office.
- 7.6 The licensing scheme will complement Directive 2012/28/EU on the Certain Permitted Uses of Orphan Works, which, it is intended, will also be implemented in October 2014 by the Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014. The Directive creates a limited exception to copyright to allow cultural and heritage organisations to digitise orphan works in their collections and to make them available to the public on their web-sites. The Directive does not allow any other uses, does not apply to all works (stand alone artistic works, such as photographs, illustrations and paintings are excluded), and can only be used by publicly accessible cultural and heritage organisations.

8. Consultation outcome

- 8.1 The IPO ran a public consultation during the period 10th January to 28th February 2014 on the Government’s proposed approach to implementation of the legislation to establish a scheme to allow the licensed use of Orphan Works in the UK. The consultation paper and supporting documents were made available through the IPO website.
- 8.2 The consultation invited comment on the detail of draft Regulations and other aspects of the licensing scheme for Orphan Works, as well as on the Government’s proposed approach to implementation of the EU Directive 2012/28/EU on certain permitted uses of orphan works. There were 55 responses

received but minimal comment on the draft Regulations. In taking forward the Regulations the Government considered the responses to the specific questions asked by the consultation and amended the Regulations where necessary.

- 8.3 Views were sought on how collecting societies might be able to use their expertise to improve the licensing of orphan works. There was no consensus on whether collecting societies should be able to license orphan works within their areas of expertise. The Government's first priority is to establish an effective licensing scheme. Most orphan works are likely to be of a type (such as unpublished material held in archives) that are not licensed by collecting societies. Furthermore, for collecting societies to take a role in authorising the use of orphan works they would also have to take on the same obligations, safeguards and processes as the IPO in its capacity as the authorising body, which is potentially both burdensome and inefficient. The Government therefore has no current plans to do this. There was agreement amongst respondents, however, that the expertise of collecting societies should be used on issues such as pricing, licence conditions and diligent search. The IPO is using sector-specific groups to advise on these issues and the groups include collecting societies among their members.
- 8.4 Another major issue on which views were sought was for how long unclaimed licence fees should be held and what should happen to them. Again there was no consensus among respondents. The maximum licence duration is seven years, and it is judged likely that if a right holder does emerge it will be while the work is being actively used under licence. Any re-licensing of the work would take place at the seven year mark. Given that a diligent search will be made for rights holders before licensing and before any re-licensing, and the small and diminishing prospect of a rights holder emerging thereafter, the Government has decided to hold unclaimed licence fees for eight years.
- 8.5 Stakeholders did not agree on what should be done with any unclaimed licence fees. Both users and right holders argued that they should be the beneficiaries of any such moneys. However, since without the orphan works licensing scheme there would be no licence fees (claimed or unclaimed), the Government has decided to use any unclaimed fees to help pay for the costs of the scheme. This should benefit both users (who will see lower up-front costs) and right holders (who will benefit from higher levels of scheme use if administration fees are lower). After eight years any unclaimed funds will therefore be used to contribute to the scheme's set up and running costs. Any surplus may be used for social, cultural and educational purposes, or otherwise at the discretion of the Secretary of State. This reflects how unclaimed money held by collecting societies is treated under the recent Collective Rights Management Directive, which will take effect in 2016.
- 8.6 The Government response was published on 30th May 2014 at www.gov.uk/government/consultations/copyright-uk-orphan-works-licensing-scheme.

9. Guidance

- 9.1 The relevant pages on the IPO website will be updated with an explanation of the changes and detailed guidance on how to apply to the IPO for a licence to use an Orphan Work, and sector specific good practice guidance on conducting a diligent search, prior to the licensing scheme becoming operational.

10. Impact

- 10.1 An Impact Assessment was produced and is provided with this Explanatory Memorandum

11. Regulating small business

- 11.1 The Regulations apply to small business.
- 11.2 However, as the Regulations are a permissive change, so that the change allows but does not force businesses to do something, the reasonable expectation is that the Regulations will only be adopted where there are benefits for business.

12. Monitoring & review

- 12.1 During the passage of the Enterprise and Regulatory Reform Act, the Minister confirmed that a review to evaluate the effectiveness of the licensing scheme will take place one year after the scheme becomes operational.

13. Contact

- 13.1 **Mark Darby** at the Intellectual Property Office can answer any queries regarding the instrument. Tel: 0207 034 2812 or email: mark.darby@ipo.gov.uk.