

**EXPLANATORY MEMORANDUM TO
THE COPYRIGHT AND RIGHTS IN PERFORMANCES (CERTAIN PERMITTED
USES OF ORPHAN WORKS) REGULATIONS 2014**

2014 No. XXXX

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 (Certain Permitted Uses of Orphan Works) Regulations 2014 (the “Regulations”) amend the Copyright, Designs and Patents Act 1988 (the “Act”) in order to implement Directive 2012/28/EU of the European Parliament and of the Council on certain permitted uses of orphan works. Orphan works are works which are protected by copyright but where one or more rightholders cannot be identified or the right holder/s, even if identified, cannot be located, so permission to reproduce them cannot be obtained. The Regulations insert a new section 44B into the Act, so that the copyright in an orphan work is not infringed by a relevant body which uses an orphan work in the circumstances set out in the new Schedule ZA1 to the Act. Relevant bodies are defined to include publicly accessible libraries, education establishments and museums as well as archives, film or audio heritage institutions and public service broadcasters. Any revenues which are generated from the reproduction of the orphan work may only be used for the exclusive purpose of covering the costs of the relevant body in digitising orphan works and making them available to the public.

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

- 3.1 None.

- 4. Legislative Context**

- 4.1 Directive 2012/28/EU was adopted by the Council of Ministers on 4 October 2012 and published in the Official Journal of the European Union on 25 October 2012. The Regulations which, have to be implemented by 29th October 2014, are made under the powers contained in section 2(2) of the European Communities Act 1972 and will amend the Copyright, Designs, and Patents Act 1988.

- 4.2 An Impact Assessment produced by the Commission on the proposed Directive was submitted on 17 June 2011 to the House of Commons European Scrutiny

Committee and to the House of Lords European Union Committee. The proposal was cleared by the Commons on 17 July 2012 and by the Lords on 26 July 2012.

- 4.3 A transposition note on the implementation of the provisions of the Directive has been prepared and is annexed to this memorandum. In line with Government policy, the intention has been to use copy out wherever possible, however it is not possible to implement the Directive by simply copying out its basic provisions. There are a number of reasons for this: first the Directive provides Member States with a discretion on how to legislate in certain areas, for example the procedures required in the event that a work's orphan status is ended; second, as orphan works will, in certain respects, be treated differently from other works which are protected by copyright, it will be necessary to amend the existing legislation to provide that the general rules do not apply to orphan works. Subject to this, copy out has been followed as the method of implementation of the Directive into UK Law wherever appropriate.
- 4.4 It is intended that the Regulations will be considered by Parliament with two other sets of regulations, the first of which introduces a domestic orphan works licensing scheme and the second of which introduces a domestic Extended Collective Licensing Scheme. The affirmative resolution procedure will apply to each set of regulations and the Regulations will be made first as they will be referred to in the regulations which set up domestic orphan works scheme.

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 (Certain Permitted Uses of Orphan Works) Regulations 2014 are compatible with the Convention rights”

7. Policy background

- *What is being done and why*

- 7.1 Orphan Works are copyright works or performers' rights for which one or more rightholders cannot be identified or for which the right holder/s, even if identified, cannot be located, so permission to use them cannot be obtained. Most uses of a copyright work require prior permission from the copyright owner and many orphan works, some of which are culturally and economically significant, cannot

be reproduced and made available online. The Directive provides for an exception to copyright law to allow certain uses of certain types of works.

- 7.2 The main objective of the Directive is to create a legal framework to facilitate the digitisation to put on websites works and other subject-matter which are protected by copyright or related rights and for which the relevant right holder/s cannot be located. This is to be achieved through a system of mutual recognition across the EU of the orphan status of a work. The Directive does not apply to all copyrighted works, but to written works, cinematographic or audiovisual works and phonograms held in the collection of publicly accessible libraries, educational establishments and museums, as well as by archives, film or audio heritage institutions and public-service broadcasting organisations. The Directive provides that these organisations may make certain uses of orphan works to reproduce (digitise) and make available (online) in order to achieve aims related to their public-interest missions.
- 7.3 The Regulations include the definition of a right holder as the owner of the rights within the work, a licensee under an exclusive licence for a work, a person with rights in relation to performance or a licensee under an exclusive licence in relation to those rights. This applies to a licensee under an exclusive licence as s.92 of the Copyright, Designs and Patents Act provides that a copyright owner of the rights within a work can authorise the exclusive rights to another person to the exclusion of all other persons, including the copyright owner. There are a number of important safeguards for the rights holder included in the Directive. In order to establish the orphan work status, a diligent search for the rights holder must be carried out in the Member State where the work was first published or first broadcast. In the case of an unpublished work the search is carried out in the state where the organisation that holds the work is established.
- 7.4 Cultural and heritage organisations must retain records of their diligent search for future reference. The results of the diligent search and the subsequent uses made of such an orphan work shall be recorded on a single European database established and maintained by the Office of Harmonisation in the Single Market (OHIM). OHIM will perform this function as part of its role to combat and prevent infringement of intellectual property rights. Relevant bodies will register to use the database with OHIM and for a central co-ordination will provide the relevant information on works directly to the database. To satisfy articles 3 (5) and (6) of the Directive once a record is complete a notification will be sent to the national competent authority (the Intellectual Property Office) who will forward this to OHIM. There is no verification process for the Intellectual Property Office as this is an exception to copyright law, so it will only need to acknowledge the notification by forwarding to OHIM. The Regulations have been drafted to reflect the operational function of the database.
- 7.5 Once the orphan status of a work has been established after the diligent search and by recording the work on the single European database, the work in question will

be deemed an orphan work throughout the EU. It can be reproduced by organisations that also hold a copy of the work within their collection to avoid duplication of effort on diligent searches. This single European database will be publicly accessible for rights holders to check the works that are being used. A rights holder of a relevant right in an orphan work (including a single rights holder, where a work has multiple rightholders) may come forward at any time and put an end to the orphan status in so far as his rights are concerned. They can either make this claim on the database or directly with the relevant body. Emerging rights holders are entitled to fair compensation for the reproduction of their work, the level of compensation will be decided between parties taking into consideration the non commercial use of the work. If this cannot be decided an appeals process will be available through the Copyright Tribunal.

- 7.6 The Directive contains provisions to ensure that it is attractive to cultural and heritage organisations to use.

Exception to copyright legislation - If the diligent search for a rights holder fails to find the rights holder/s, cultural and heritage organisations will be able to make limited use of the works.

Mutual recognition - Provides for mutual recognition of other Member States' processes and designation of Orphan Works which is key to the whole pan-European nature of the Directive.

Unpublished works - Unpublished/unbroadcast works are included, but only if it is reasonable to assume that the 'lost' rights holder would not have opposed their reproduction - for example if they knowingly gifted a batch of works for use in a museum and had not explicitly forbidden certain uses. This should help to assuage concerns over unpublished works and what they may be used for.

Single European database - Search records must be kept and details of works added to a single-European database hosted by OHIM, the European Trademark office that also has some responsibility for the prevention of counterfeiting and piracy of Intellectual Property. This process should provide a single point of contact for both rights holders and users in order to check the searches performed and works that are being used.

Embedded works - Embedded works, e.g. photographs in a book, where the rights holder in the photograph may be different to the rights holder of the book, will need to be searched for as well.

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 EU Directive 2012/28/EU on certain permitted uses of orphan works. The

consultation paper and supporting documents were made available through the IPO website.

8.2 The consultation invited comment on the detail of transposition of the Directive into UK law, in particular specific provisions in the Directive that required further clarification. The responses received demonstrated general support for the Government's approach to implementation of the Directive. In taking forward the implementing Regulations the Government considered the responses to the specific questions asked by the consultation and amended the Regulations where necessary. In particular, in light of the responses received, the Government amended the draft regulations to provide for an appeal route to the Copyright Tribunal where the relevant parties cannot agree on the level of fair compensation under the Directive. The Directive also contains an optional provision which would limit its application to unpublished works deposited with relevant bodies prior to 29th October 2014. The Government agrees with the majority of respondents that this optional provision should not be implemented and the draft regulations reflect this.

8.3 The Government response to the consultation is available on the GOV.UK website at www.gov.uk/government/consultations/copyright-uk-orphan-works-licensing-scheme

9. Guidance

9.1 The relevant website pages on the IPO website will be updated with an explanation of the changes and guidance prior to implementation date of 29th October 2014.

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 will introduce a permissive change, so that the change allows but does not force businesses to do something, the reasonable expectation is that it will only be adopted where there are benefits for business. The beneficiaries of the Regulations will be cultural organisations which will not be permitted to reproduce orphan works for commercial gain.

12. Monitoring & review

12.1 A Ministerial review to evaluate the effectiveness of the Directive will take place five years after transposition into UK law. The Directive does not require Member

States to conduct a review but requires the Commission to report on the application of the Directive by 29th October 2015.

13. Contact

- 13.1 Andrew Sadler at the Intellectual Property Office can answer any queries regarding the instrument. Tel: 01633 813516 or email: Andrew.Sadler@ipo.gov.uk