

Title: Management of copyright (Orphan Works and Extended Collective licensing) PIR No: BEIS016(PIR)-20-IPO Original IA/RPC No: BIS1054, BIS1063, BISIPO001 Lead department or agency: Intellectual Property Office Other departments or agencies: Click here to enter text. Contact for enquiries: copyrightconsultation@ipo.gov.uk	Post Implementation Review (PIR)
	Date: 04/03/2020
	Type of regulation: Domestic
	Type of review: Non-statutory
	Date measure came into force: 01/06/2014 and 01/10/2014
	Recommendation: Keep
	RPC Opinion: not required (de minimis)

Questions

1. What were the policy objectives of the measure?

The objectives of these changes to the management of copyright were to make copyright works more widely available, while not unduly restricting the rights of copyright holders. The intended effects were to: a) decrease transaction costs for users of the licensing system, reducing barriers to entry, b) create a system for obtaining licences for orphan works for commercial or non-commercial purposes, following a diligent search and payment of appropriate licence fees, c) implement the EU directive to allow Cultural Heritage Institutions (CHIs) with a public-interest mission to digitise orphan works within their collections and make them available online.

The changes covered in this PIR relate to:

- Extended Collective Licensing (ECL)
- UK Orphan Works Licensing Scheme (OWLS)
- EU Orphan Works exception (EUOW)

2. What evidence has informed the PIR?

This PIR is informed by call for evidence responses from 83 stakeholders, and roundtable meetings with publishers, educational institutions, archives, libraries and other organisations. They provided largely qualitative/anecdotal evidence: whilst useful for understanding perceived impact, this poses challenges in assessing financial and economic impact.

3. To what extent have the policy objectives been achieved?

The policy objectives have been mostly achieved. The information gathered for this PIR showed expected benefits to users of orphan works, whether CHIs, universities or other users. The OWLS and EUOW have been operating broadly as intended, with benefits and costs in the expected areas according to information from stakeholders.

In relation to ECL, a court judgment meant that it was not possible to consider applications for authorisation. The legal framework continues to evolve and the policy objectives could be achieved in future; the government will keep this issue under review.

Sign-off for Post Implementation Review: Chief Economist

I have read the PIR and I am satisfied that it represents a fair and proportionate assessment of the impact of the measure.

Signed: **Stephanie Dales**

Date: 01/04/2020

Further information sheet

Please provide additional evidence in subsequent sheets, as required.

Questions

4. What were the original assumptions?

The following assumptions were made in the original impact assessments:

- **ECL** – We assumed that a collective management organisation would only apply for an ECL licence if it were commercially viable and if they believed their application was strong.
- **OWLS** – We also assumed that the Canadian Orphan Works scheme forms the basis of a good proxy for the UK because the Canadian scheme shares many similarities with OWLS and provided a procedural structure for the UK to follow.
- **EUOW** – We assumed that organisations would use the Directive to reproduce orphan works within their collections and that they would recoup some costs of digitisation as set out in the Directive.

5. Were there any unintended consequences?

In both stakeholder meetings and consultation responses, stakeholders did not raise any unintended consequences, nor did we find evidence of any during this review.

6. Has the evidence identified any opportunities for reducing the burden on business?

Stakeholders have suggested that the diligent search guidance for both OWLS and EUOW should be amended to provide more clarity on the process.

7. For EU measures, how does the UK's implementation compare with that in other EU member states in terms of costs to business?

The EUOW was more widely used by UK organisations compared to EU organisations. However, we have not been provided with any comparable information on costs to business for the UK and EU.

Review of the 2014 copyright licensing changes for Extended Collective Licensing, Orphan Works Licensing Scheme and Orphan Works EU Directive

Introduction

This report sets out the results of the IPO's Post Implementation Review (PIR) of three copyright licensing and management changes made in 2014 namely: Extended Collective Licensing (ECL), the UK Orphan Works Licensing Scheme (OWLS) and the EU Orphan Works exception (EUOW). These changes were intended to make it possible for users to have access to a wider range of copyright materials and ensure rights holders get paid.

In conducting the review, the IPO has considered whether and to what extent the changes:

- have achieved their original objectives;
- are still required and remain the best option for achieving those objectives; or
- could be achieved in another way which involves less onerous regulatory provision.

Context and purpose of the 2014 Copyright licensing changes

The Hargreaves Review in 2011 identified some areas where copyright licensing could be simplified for users and rights holders. Firstly, the UK's rights clearance system involved some complexity. Secondly, there were areas for which copyright works could not legally be utilised to their fullest potential such as orphan works. An orphan work is a copyright work where the rights holder(s) is unknown or cannot be found following a diligent search. In response to these concerns, the government implemented three policies.

This PIR reviews the impact of the 2014 copyright changes for the purposes of:

- Extended Collective Licensing (ECL)
- UK Orphan Works Licensing Scheme (OWLS)
- EU Orphan Works exception (EUOW)

The overall policy objectives were to:

a) simplify the existing licensing system, via extended collective licensing, so rights can be cleared more efficiently, reducing transaction costs, improving access to works and decreasing barriers to entry for new products and services;

b) create a system where people can obtain licences for using orphan works lawfully for commercial or non-commercial purposes, following a diligent search and payment of a licence fee; and

c) implement the EU Directive on certain permitted uses of orphan works to allow Cultural Heritage Institutions (CHIs) to digitise and place orphan works online without infringing copyright, following a diligent search.

Background, rationale for intervention and policy objectives

Extended Collective Licensing (ECL): The UK rights clearance system was complex, with multiple users and rights holders seeking and granting permissions. To simplify this, ECL was introduced as a method of rights clearance. Licensing bodies which represent a substantial number of rights holders in that sector can apply to act for all rights holders, except those who instruct it not to do so.

The 2014 ECL framework intended to:

- a. decrease transaction costs for users of the licensing system, thereby reducing barriers to entry;
- b. improve access to works and enhance legal certainty for consumers; and
- c. ensure maximum possible royalties are collected for creators by reducing the cost and inconvenience of multiple transactions and by setting aside money for absent rights holders who might not otherwise have been compensated for the use of their works.

Link to impact assessment - <http://www.legislation.gov.uk/ukxi/2014/2588/impacts>

UK Orphan Works Licensing Scheme (OWLS): If a work was considered orphan, it could only be copied lawfully in limited circumstances (primarily under copyright exceptions). Its use would be curtailed in situations such as publication of books, TV programme productions and in exhibitions. OWLS created a way to license use of orphan works while protecting the rights of absent owners.

The intention of OWLS was to create a system where people interested in using orphan works for commercial or non-commercial purposes could obtain a licence from the authorising body (the IPO) to use the works lawfully in the UK, following a diligent search, and by paying appropriate licence fees up-front. Rights holders would be able to claim the licence fee if they later came forward.

Link to impact assessment -

http://www.legislation.gov.uk/ukia/2014/431/pdfs/ukia_20140431_en.pdf

EU orphan works exception (EUOW): If a work was considered orphan, it could only be copied lawfully in limited circumstances (under copyright exceptions). CHIs could not even digitise works of social value. The EU Directive on certain permitted uses of orphan works introduced an exception to allow CHIs with a public-interest mission to digitise orphan works within their collections and make them available online.

The objective was to make more orphan works available online for the benefit of the public.

Link to impact assessment -

http://www.legislation.gov.uk/ukia/2013/275/pdfs/ukia_20130275_en.pdf

Table 1: Estimated impact of the changes in the impact assessments

Change	Net cost to business per year (£m)	Net Present Value (£m):	Total Cost (Present Value) (£m):
<i>ECL</i>	0.01	-0.09	-0.09
<i>OWLS</i>	0	0.02	0.03
<i>EUOW</i>	0	0	0
Total	0.01	-0.07	-0.06

Due to the relatively low impact of each scheme, it seems proportionate to group these together into one *de minimis* PIR. Table 1 above, illustrates that the combined annual net cost to business of these exceptions was estimated to be below the £5 million threshold for completing a full PIR. The call for evidence did not give us cause to believe this threshold has been exceeded.

Methodology / Review Process and stakeholder responses

The IPO published a call for evidence to assess the effectiveness of the legislation which ran from 30 January to 10 April 2019.

Stakeholders that might have benefitted from the policies were asked whether they had made use of them and if they could quantify the benefits. Rights holders were asked if there has been any noticeable impact from the schemes. The call for evidence generated 83 written responses. Approximately 27% of respondents mentioned ECL, 52% mentioned OWLS and 43% mentioned EUOW. The IPO also held stakeholder meetings for some of the affected groups, both users and rights holders: broadcasters; CHIs; publishers; collective management organisations; and educational institutions.

Most stakeholders responded positively to the idea of ECL; however, there were reservations as no ECL scheme had been authorised since the framework was established in 2014. An application was made by the Copyright Licensing Agency (CLA) which was later withdrawn after consulting the IPO. This was mainly due to the *Soulier and Doke* Court of Justice of the European Union (CJEU) ruling which questioned the legal status of ECL-type mechanisms¹. The CLA and its members² reported a combined cost of over £100,000 in the process of filing an application to operate an ECL scheme; most of these were staffing and advertising costs. The lack of authorised ECL schemes means that the benefits have not been fully realised. However, the legal landscape surrounding ECL continues to evolve and the positive responses from stakeholders suggest that the regulations should be retained while the IPO keeps the situation under review.

According to data from the IPO's system, 828 orphan works were licensed from launch of OWLS in October 2014 until the end of the call for evidence period of 11 April 2019, generating £21,571.77 in licence fees which is currently held in a separate account in case rights holders come forward³. The number of orphan works licensed stated above was less than originally estimated in the impact assessment meaning the scheme has generated less income than expected, but it also means there have been lower administrative costs to run the scheme. Furthermore, 84% of licences were granted for non-commercial purposes and 16% for commercial purposes. We received mixed responses from users about OWLS. Most users welcomed the scheme and said they would find it useful for stand-alone copyright works. For example, management information confirms that the Hayward Gallery

¹ See further below on issues raised by stakeholders.

² CLA members include: Authors Licensing and Collective Society (ALCS), Publishers' Licensing Service (PLS), Design and Artist Copyright Society (DACs) and Picture Industry Collecting Society for Effective Licensing (PICSEL)

³ These licence fees may be used to recover the costs of creating OWLS after eight years, and once that has been recouped, it will be used for social, educational and cultural purposes – [Regulation 13](#), Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014.

had used this scheme to license orphan works as part of the *History is Now: 7 Artists Take on Britain* in 2015⁴ exhibition which attracted 26,000 visits.⁵ However, a large number of stakeholders responded to the consultation saying they had not yet used the scheme.

Overall CHIs tended to prefer EUOW over OWLS as they considered it more cost-effective. Importantly, this does not take into account the different scope of OWLS (which may license any use of a work) from EUOW (which is restricted to non-commercial digitisation and making available online).

In the first five years, 28 beneficiary organisations registered with the European Union Intellectual Property Office (EUIPO) which runs the database of orphan works used under EUOW. The majority of contributions to the EUIPO's orphan works database came from UK institutions. There were 11,368 works from the UK registered on the EUIPO database; around 94% of those were embedded works such as articles with whole magazines or illustrations and around 6% were main works such as whole books.

Most consultation respondents were positive about EUOW, with some citing instances where the scheme was used to digitise some of their works. For example, the University of Kent reported that it used EUOW for its Great War Project which digitised plays written between 1914-1918. The British Film Institute (BFI) also used the exception and registered 279 works on the EU orphan works database for its Britain on Film project, which formed 5% of the BFI's national archive.

However, some stakeholders said the exception imposed an administrative burden on their organisation in terms of carrying out a diligent search (which is a fundamental protection for rights holders in both OWLS and EUOW). The other limitation cited was that the exception does not cover stand-alone artistic works.

It is important to note that many users of OWLS and EUOW were only able to give qualitative statements, as there were difficulties in quantifying the impact of the different options to use orphan works. Most of the data relate to the number of applications filed and granted. Also, associated cost estimates were provided by a few respondents. The data provided is supplemented with qualitative evidence provided by stakeholders in their consultation response to portray a fuller picture of the impacts of ECL, OWLS and EUOW.

Even though it was not possible to make a global estimate for costs/benefits over the last five years from the stakeholder responses only, the information provided should be sufficient to determine whether this policy had a net positive outcome.

Issues and recommendations from stakeholders

Several issues and recommendations were made about the schemes covered by this PIR, which are listed below. The IPO will consider all these matters, although anything requiring legislative changes would need to go through the usual policy-

⁴ <https://www.southbankcentre.co.uk/venues/hayward-gallery/past-exhibitions/history-now>

⁵ The London School of Economics and Political Science also reported this use by the Hayward Gallery as part of its submission to the Call for Evidence.

making process. The case for change would require significant evidence to show the need for it and the impact on both users and rights holders.

Implications of the Soulier and Doke ruling

The *Soulier and Doke* case, which numerous stakeholders cited, had the effect of making the ECL framework legally questionable, and many stakeholders thought that this should be fixed.

. However, given the UK's departure from the EU, the legal landscape is still evolving.

Diligent search for OWLS and EUOW

Anecdotal evidence suggested that in some cases orphan works licences were granted when the rights holders should have been easily found. For example, the Design and Artist Copyright Society (DACS) which represents more than 100,000 visual artists expressed concerns that it 'had not been contacted as part of any diligent searches' (DACS). Furthermore, BAPLA reported receiving 58 diligent search requests for still visual works since 2014. There have been 652 orphan works licensed which are still visual works. Therefore, the BAPLA only conducted 8.9% of all the diligent searches for the 652 orphan works licences granted for still visual works. Nevertheless, it is notable that no rights holders have come forward for any licences which have been granted in the five years of the operation of OWLS, although some have been found through the diligent search process.

Some recommendations from DACS, BAPLA and similar bodies said the IPO should ensure that diligent searches include the relevant bodies and representatives in the search process. The IPO has published sample diligent searches as well as guidance and templates for completing these. These all include the relevant places to check. Applicants must provide a record of their diligent search and make a statement of truth when applying for a licence.

There was a suggestion that the IPO should maximise technology in the process of diligent searches e.g. by adding a free online search tool to the diligent search check list. Project EnDOW⁶ has been developed since the launch of EUOW and has put together a web-based tool to assist CHIs in completing diligent searches by providing links to online sources and compiling a search report. We agree that it provides a helpful tool and can be used for free, providing a useful report which may be retained by a CHI for use of EUOW, but may also be provided in support of an OWLS application.

It was also suggested that the IPO should take measures to better support customers carrying out diligent searches, for example, by adding protocols in OWLS to identify when there are multiple rights in a work. This issue is now referred to in the IPO's diligent search guidance, which was drafted with expertise from the relevant sectors, as well as the application process itself. However, suggestions on how to improve this are always welcome.

Cost of diligent searches and applications

⁶ An academic project working on potential solutions for diligent search requirements in different countries: <http://diligentsearch.eu/>

Some organisations also commented on the costs and administrative burden for conducting a diligent search mainly for OWLS and to a lesser extent for EUOW. This was emphasised most strongly by CHIs and universities as they tended to use OWLS for non-commercial purposes. The BFI in its response cited 'British Library costs are well in excess of £28.60 an hour for diligent search' and argued that it could be disproportionately costly for CHIs. BAPLA conducted a survey of its members and asked about costs of processing a search in their records for an orphan work logged through the BAPLA webform⁷: 62% of respondents said that they spent less than £1000 processing diligent search requests and 38% of respondents spent more than £1000. The BFI also made some suggestions for how the OWLS scheme could be improved for CHIs: reducing the application and re-examination fees and enabling a functionality for bulk applications for them. Some of these suggestions would require legislative changes to the underpinning regulations and would need strong evidence of impact for consideration.

Concerns about the impact of the UK's departure from the EU on EUOW and OWLS

A number of stakeholders expressed concerns about the impact of the UK's departure from the EU with no deal on EUOW. Now that the UK has left with a deal, this issue becomes relevant at the end of the transitional period in December 2020. This concern was strongest amongst CHIs as key beneficiaries of the exception: for example, there might be an increased demand for OWLS, which could not be met, if the EUOW scheme is not adopted. Furthermore, some stakeholders suggested the UK should adopt a similar exception to EUOW, but not as a replacement for OWLS.

Some change in behaviour towards orphan works

Most CHIs (over 70% of CHI respondents) welcomed the introduction of both OWLS and the EUOW exception. There was also support from universities and their libraries that did not use either option, with 50% and 58% welcoming EUOW and OWLS respectively. However, a small percentage (approximately 27%) of universities reported that they still took a risk-based approach to using copyright material. Part of the reason for this, according to a response from IP academics, is due to the increase in knowledge base about copyrights over time in these institutions. The IPO does not endorse a risk-based approach if it leads to copyright infringement. Overall, OWLS and EUOW were welcomed by most CHIs and universities.

However, according to industry experts such as the Libraries and Archives Copyright Alliance (LACA), it usually takes longer than five years to witness behavioural changes.

Conclusion and Next Steps

The information gathered as part of this PIR showed benefits to users of orphan works, whether CHIs, universities or other users. This strongly suggested that OWLS and EUOW have operated broadly as intended, with evidence to suggest benefits and costs in the expected areas. Suggestions have been received about improvements; where these require legislative interventions, careful balancing of evidence of impact will inform these being taken forward.

⁷ BAPLA allows third parties to specify when they are trying to locate a rights holder in an artistic work on their website, which they pass on to members to process. BAPLA does not conduct diligent searches on behalf of others.

The impact of external case law on the ECL framework has resulted in it not being used to date. This is not an unintended impact of the policy itself. The possibility of ECL schemes was clearly welcomed in the evidence received. Despite the lack of benefits to date, the legal landscape is still evolving. This is partly due to the UK's departure from the EU and we intend to keep this matter under review.

The original rationale for policy intervention in this space remains valid and this review has identified positive evidence, the policies are supported by stakeholders. This review has not identified any changes or improvements in the assumptions which would change the original assessments. We therefore find it appropriate for the policies reviewed to be retained in their current form.