

Simulating rights clearance for Orphan Works in seven jurisdictions: What does it tell us about formalities?

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UK Policy context

3 attempts to regulate the use of Orphan Works

- *Gowers Review 2006*: “[S]olving the problem of orphan works is good for everyone. A solution is good for all those who are involved in archiving and cataloguing; for all those creators who use older work to create new value; for those whose work is restored and who may benefit from remuneration from a new source; and for consumers.”
- *Digital Economy Bill 2010*. Clause 116A (withdrawn in ‘wash-up’): “[T]he Secretary of State may by regulations provide for authorising a licensing body or other person to do, or to grant licences to do, acts in relation to an Orphan Work which would otherwise require the consent of the copyright owner”.
- *Hargreaves Review of Intellectual Property and Growth 2011*: “The problem of orphan works – works to which access is effectively barred because the copyright holder cannot be traced – represents the starkest failure of the copyright framework to adapt.”

Hargreaves Implementation

Orphans & ECL

- The UK should look to “establish extended collective licensing for mass licensing of Orphan Works, and a clearance procedure for use of individual works. In both cases, a work should only be treated as an Orphan if it cannot be found by search of the databases involved in the proposed Digital Copyright Exchange.”

Enterprise and Regulatory Reform Bill will set up central body

- granting non-exclusive licences for both commercial and non-commercial use, subject to a verified diligent search;
- maintaining a register of works subject to current diligent searches and works that the body has licensed;
- collecting upfront licence fees “at a rate appropriate to the type of work and type of use and these fees will be held by the licensing body for the rights holder in case they reappears”.

Independent Report for UK IPO

[not yet released: I speak in personal capacity]

Bournemouth Team (Homberg, Favale, Mendis, Secchi):

- Study I: comparative international review of actual/proposed legislation in 7 jurisdictions: → key characteristics of orphan works licensing schemes
- Study II: simulated rights clearance for six scenarios → effects of such schemes by controlling for the characteristics identified in Study I

Given the policy decision to propose a central licensing system, IPO emphasis was on pricing models (Call for tender: p. 7):

“The aim is to have a clearer understanding of how an orphan work is priced in other jurisdictions and how a pricing system could be structured to ensure that „parents“ are fairly remunerated if they re-appear, and users are incentivised to access and exploit registered orphan works.”

Study I: Canada, Denmark, Hungary, India, Japan (plus EU and US)

- (i) categories of works covered;
- (ii) standards of diligent search;
- (iii) mechanism for obtaining permission;
- (iv) register for suspected orphan works;
- (v) role of collecting societies;
- (vi) tariffs set by category of work;
- (vii) mechanisms for challenging tariffs;
- (viii) remedies for re-appearing authors

SUMMARY TABLE OF LEGAL REVIEW

	Legislative Basis	Categories of Work covered	Uses covered	Standard of diligent search	Mechanism for obtaining permission	Register	Role of collecting societies
Canada	Section 77 Copyright Act 1985.	Not specified in Statute.	Not specified in Statute.	Yes.	Yes.	Yes.	High involvement.
	Non-exclusive license	(implied: All are covered)	Copyright Board has identified uses as being both commercial and non-commercial.	'Reasonable efforts'	Permission has to be obtained from and is granted by the Board.	The Copyright Board of Canada holds a list of licenses granted or refused for used orphan works although there does not appear to be a database for suspected works.	The Copyright Board involves the collecting societies (CS) from the beginning in deciding on the royalties. The royalties are paid to the collecting societies by the applicant. CS can use the money ,as they see fit from the outset, on condition that the re-appearing author is paid if and when they re-appear.
	Granted by the Copyright Board of Canada	Literary works have accounted for 60% of all applications.	Commercial applications have amounted to 49%		In granting permission the Board involves the collecting society from the beginning.		
	Subject to terms and conditions	For the period 1990-2012 the Copyright Board has issued 260 licenses.	Non-commercial applications amounted to 51%.				

Findings

- Ex ante and Ex post systems
- Limited liability (US), Extended Collective Licensing ECL (Denmark), Central Public Authority CPA (all others)
- Varying standards for diligent search; Advertising requirements (in the national press or equivalent) in Japan and India.
- For ECL, prices set by collecting societies; For CPA prices set on a case by case basis without negotiations
- Ordinary courts or special tribunals for fee challenges and infringement claims
- Upfront payments in Canada, Japan, India, Denmark and France; Hungary: fee identified but not paid until rightholder appears; US no payment unless finding of infringement
- Voluntary public online register in US, in Hungary, and in EU (and France); registers by institutions in Japan; no register in India, Canada or Denmark.

Rights clearance simulation

1. Historical geographic maps for a video game for mobile phones (up to 50 maps)
2. A vintage postcard collection for web publication and eventual sale of prints (up to 50 cards)
3. National folk tune recordings for multimedia/teaching (DVD) (up to 50)
4. Re-issuing a 1960/70s TV series as part of a digital on-demand service (one series)
5. Mass digitization of photographs (archives) by a public non-profit institution, with possible sale of prints (above 100.000 items)
6. Mass digitization of books by a private for-profit institution, with possible sale of books (above 100.000 items)

Price for **permanent non-exclusive** use. In the absence of a permanent licence, prices should be indicated **per year**. Example: HUNGARY

	Source	Artefact	Use	Price (licence)
<i>Scenario 1</i>	National war museum	Geographic map	Developing a videogame for mobile phone	Commercial: Non-commercial:
<i>Scenario 2</i>	Private collector	Vintage postcard	Publication on a website	Commercial: Non-commercial:
<i>Scenario 3</i>	Hungarian folk Music archive	Folk tune	Use in multimedia educational artefact, issued on DVD	Commercial: Non-commercial:
<i>Scenario 4</i>	Magyar Televízió (Hungarian National Television)	TV series from the 60' or 70's, or, in the absence, theatrical emission or TV show	Re-issuing the TV emission for digital on-demand service	Commercial: Non-commercial:
<i>Scenario 5</i>	Budapest Főváros Levéltára (Budapest City Archives)	Photographs, Maps, Motion-pictures and Audio Recordings	Digitising and publishing online over 100.000 items	Commercial: Non-commercial:
<i>Scenario 6</i>	Hungarian Private Company	Books not commercially available	Digitising and publishing online over 100.000 items	Commercial: Non-commercial:

Table 3.2: Descriptives by Scenario

	Scenario	Licence	Obs	Mean	Std. Dev.	Min	Max
1	National War Museum	commercial	2	842.34	856.32	236.83	1,447.85
		non-commercial	2	78.19	26.84	59.21	97.17
2	Private Collection	commercial	2	842.34	856.32	236.83	1,447.85
		non-commercial	2	78.19	26.84	59.21	97.17
3	Folk Music Archive	commercial	2	4,750.35	6,451.49	188.46	9,312.24
		non-commercial	3	583.82	460.40	188.46	1,089.30
4	TV Series	commercial	0				
		non-commercial	0				
5	City Archives	commercial	0				
		non-commercial	0				
6	Private Company Books	commercial	1	1,570.50	.	1,570.50	1,570.50
		non-commercial	2	1,602.23	44.87	1,570.50	1,633.95

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Table 3.4: Comparing ECL and IL systems

Country	Type	Licence	Obs	Mean	Min	Max
Denmark	ECL	commercial	2	1,633.95	1307.16	1960.74
	ECL	non-commercial	2	1,361.62	1089.3	1633.95
Rest incl. Hungary	IL	commercial	10	2,488.89	188.46	9818.17
	IL	non-commercial	10	1,123.14	59.21	8181.82
Rest excl. Hungary	IL	commercial	8	3,032.34	188.46	9818.17
	IL	non-commercial	8	1,340.90	59.21	8181.82

3.1: Scenario 6, Licences based on Canadian Legislation

	reported (CAD)	applied (CAD)	no. Books (items)	average size (pages)	total pages	Licence fee reported (CAD)	Licence fee applied (CAD)
Commercial	0.25	0.15	100,000	300	30,000,000	7,500,000	4,500,000
Commercial	0.15	0.05	100,000	300	30,000,000	4,500,000	1,500,000
						GBP	GBP
Commercial						4,711,500	2,826,900
Commercial						2,826,900	942,300

Key messages

- No standard price. Tariffs vary widely. To clear 50 items from a folk tune archive for commercial use will cost the equivalent of £188/year in Canada, and £9312/year in France.
- Licences were not available for all scenarios. Re-issuing orphaned broadcasts particularly problematic, with no licence offered in any of the countries investigated.
- No systematic recognition of what may constitute an appropriate duration for licences. Licences range from a monthly to a five-year licence, without the provision of a permanent licence.

Key messages

- Per item fees initially appearing very low turn out to render mass-digitization unviable for non-profit institutions when scaled up under reasonable assumptions.
100,000 items → annual fees exceeding £1m
- Fees are similar in collective and individual licensing regimes. Interesting! Operating costs for orphan works scheme an important factor when choosing between IL & CL.
- Limited liability system seems to have advantages for archives and other non-profit institutions; up-front rights clearing may be more appropriate for commercial uses, guaranteeing that a re-appearing rightholder will be compensated for the exploitation of any work.

What follows for formalities?

Copyright works that are not used have no economic or cultural value.

Non-use must have consequences in any healthy copyright system.

The information and filter function of registration systems may appear to be a solution.

Empirical reality: Establishing non-use formally through orphan licensing systems does not appear to work well.

Paradox: The less commercial (e.g. archive materials: Deazley & Stobo 2013), the more onerous to clear.

I would advocate a general principle that non-use will erode rights (e.g. may limit remedies).