



Copyright works: seeking the lost

DACS Submission 2014

Established by artists for artists, DACS (the Design and Artists Copyright Society) is an innovative visual artists' rights management organisation, representing 80,000 creative individuals including artists, photographers and illustrators from the UK and abroad. Part of a global network of visual arts collecting societies, DACS is committed to maximising revenues for visual artists so that they can continue to create and innovate, thereby contributing to the UK economically, socially and culturally during a period of rapid and far-reaching change.

DACS welcomes the opportunity to assist the IPO in addressing the practicalities of establishing an effective, fair and transparent licensing program for orphan copyright works. It is important that this scheme balances the best possible use of available copyright works including orphan works with an understanding that orphan works are still subject to copyright and as such should be protected accordingly.

In its submission made in response to the IPO Consultation on Copyright in March 2012 ("the 2012 Submission")¹, DACS made the following points which we still believe any orphan works licensing scheme should achieve:

- Any orphan works solution has to have as a starting point the property right of the creator of the work rather than the wish of potential users to be able to use the works
- Individual creators should not effectively subsidise the mass digitisation projects of public institutions and Government
- The creation of further orphan works should be avoided as far as possible
- It is essential that a diligent search is carried out in order to determine whether a work is an orphan - the proposed nature of use cannot determine the stringency of the diligent search because the search result will classify the work as an orphan work or non-orphan work and impact subsequent use of the work
- There should be no differential treatment between orphan works and non-orphan works
- It is essential that all authorising bodies are subject to the same regulatory framework and obliged to adhere to the same standards of transparency as necessary to guarantee open and accountable administration of the orphan works licensing system

Through its experience licensing non-orphan works, DACS is aware that there can be unhelpful interpretation of copyright law by parties using copyright works which makes it difficult for the rightsholder to benefit from copyright protection. DACS believes that the wording of the proposed orphan works legislation should mitigate the risk of this happening to the greatest extent possible, but that the current draft text only partially achieves the desired balance. We set out in our response below our suggested improvements.

¹ http://www.dacs.org.uk/DACSO/media/DACSDocs/news/DACS_Submission_to_Copyright_Consultation_2012.pdf

CONSULTATION QUESTIONS

As a collecting society for artistic works we have focused our response to cover the point of view of visual artists. We have answered the questions in the Consultation² that we believe are relevant to our constituency and where we as a collecting society believe we are able to make a positive contribution to the proposed scheme.

Domestic Orphan Works licensing in the UK

The authorising body (Regulations 2 and 6)

1. Could collecting societies improve the licensing of orphan works in their areas of expertise? If so, how?

DACS has 30 years' experience in representing rightsholders and licensing their artistic works and so feels able to make helpful contributions to any new licensing scheme, in particular to ensure that copyright protection is assured. For example, DACS could provide expert guidance with regards to well-established licensing practices and tariffs, collection and distribution of royalties to rightsholders, experience of representing rightsholders, knowledge of industry sectors, due diligence and international connections such as liaising with sister societies on payment of monies when foreign rightsholders for orphan works are discovered.

DACS has the following comments on the proposed licensing of orphan works outlined in the Consultation:

Jointly owned copyright

From paragraph 3.12 of the Consultation, "It will not be a pre-condition for an orphan works licence that the consent of all known rightsholders should be obtained, which would unnecessarily slow the licensing of the work". DACS believes this is a potentially hazardous approach with regards to jointly held copyright in an orphan work. For non-orphan works, the consent of all rightsholders is required in order to use the work. Granting or withholding such consent is the basic right of a copyright holder. Obtaining consent from known rightsholders is therefore fundamental to the licensing process. This is recognized in Article 2(3) of the EU Directive 2012/28/EU, and should also be the case here.

DACS clearly states to users that if DACS does not have authority to grant a licence for use of non-orphan works where copyright is jointly owned between DACS members and non-DACS members, permission must be sought from the non-DACS members in addition to permissions granted by DACS on behalf of its members before using the relevant work to avoid infringing copyright.

The exact nature of the proposal in paragraph 3.12 of the Consultation creates uncertainty as it is unclear how many known rightsholders must give permission, whether there needs to be a majority or if permission from a minority of known rightsholders is sufficient for use to be permitted under the proposed scheme. DACS is concerned that this proposal may make orphan works easier to licence, and therefore more attractive to clients, than non-orphan works and therefore risks distorting the market. The authority of the authorising body should be restricted to the licensing of orphan works only and should not extend to substituting consent from known rightsholders.

Licensing

DACS considers having a detailed set of standardised terms applicable to all licensed uses in tandem with industry-specific term sheets an effective approach to licensing that allows for flexibility and security. By contrast the sample licence at Annex E ("the Licence") seeks to cover all types of

² Copyright works: seeking the lost – Consultation on implementing a domestic orphan works licensing scheme and EU Directive on certain permitted uses of orphan works, January 2014

orphan works under the Copyright, Designs and Patents Act 1988 (“CDPA”) for all possible uses across all possible industry sectors. DACS suggests this may not be the best approach for rightsholders or licensees.

Further to paragraph 3.22 of the Consultation, DACS takes into account both print-run and territory when licensing publications because this approach enables greater certainty about the extent of rights granted and also instances where a user has acted outside of the terms of a licence.

In our experience, seven years is not an industry-specific term for licensing with clients across various industry sectors – this would be an inadequate term for the majority of licences DACS grants.

By way of illustration, the DACS website licence has a one year term, whereas TV licences have a minimum term of five years taking into account the general investment users of copyright protected materials make in creating products and the normal lifetime of these products. DACS therefore believes that more differentiated and sophisticated licences will be necessary to meet the needs of users and to align the use of orphan works with the licensing of non-orphan works.

DACS believes that for any licence to be specific to the project in question and therefore create certainty in the market place it will be necessary to include the date from which the licence is deemed to be in effect, the specific details of use granted by the licence (including for example whether there is a print-run or numerical limit on extent of use as standard), details about the date when the licence fee is payable and further information about the issuing of invoices. Also, with regards to the proposed orphan works licensing scheme, more clarification is needed on whether the “mirroring” principle in paragraph 3.22 of the Consultation whereby orphan works in a book will be licensed on terms equivalent to non-orphan works in the book extends to other types of use as well.

Renewal

DACS would expect a full application to be made for renewal of a licence as updated information will still be needed to set the boundaries of the licence (for example, print-run, distribution, updated contact information for the user) and further to comments above, it is beneficial to be as specific as possible so that there is certainty for all parties as to what has been licensed or in this case renewed.

From an administrative point of view, in the absence of fully detailed records it will be more difficult to source the original or older applications for a licence and if the subsequent renewals do not record information fully it will be harder to track back to the original “full” application. In any event, DACS believes all relevant information including previous applications should be transparent and openly accessible. Making licensing more transparent was a key concern of the Hargeaves Report and is reflected in all of the work on the Copyright Hub as articulated in the Hooper Report³ “...transparency is critical to removing some of the complexity surrounding copyright licensing”, and any orphan works solution should live up to these expectations.

Licensing terms

2. Should an orphan works licence be transferable? If so, in what circumstances would this be appropriate?

DACS does not believe that the orphan works licence should be transferable. It would be preferable for the IPO to issue new licenses to additional applicants.

Given the potential for returning rightsholders, enabling transfer would make it potentially impossible to locate the licensee to whom the rights have been transferred or to assess the scope of use before

³ Copyright works – Streamlining copyright licensing for the digital age – An independent report by Richard Hooper CBE and Dr Ros Lynch, July 2012

deciding how to proceed. Allowing for transferable licences would also decrease transparency and accountability and render enforcement efforts or control mechanisms implemented by the IPO substantially more difficult.

If transfers are allowed, they must be clearly regulated and recorded by the IPO in an accessible format to mitigate this adverse impact and it must also be made absolutely clear that there is no transfer of rights in the work.

Licence Fees

3. What are your views on allowing high volume users to take out an annual licence or similar arrangement to cover low value, non-commercial use?

With regards to paragraph 5.6 of the Consultation, DACS is aware of situations where the costs of administering a licence are more than the value of the fee and sympathises. Further work on reducing costs should be pursued, but if the IPO is allowed to waive this process and instead operate an annual fee based scheme it will undermine the efforts of those in the market, including DACS, to strive for clear 1:1 licensing of works for its members to ensure certainty in terms of fees paid and rights conferred. As it stands this both undermines transparency and gives the IPO a competitive advantage by effectively discounting the administration of its licensing business and DACS cannot support any high volume scheme which does not mitigate these adverse effects.

DACS has previously surveyed its members for the 2012 Submission (“the Survey”). In the Survey DACS requested evidence from its members to demonstrate how a competitive advantage for orphan works could prejudice non-orphan works and disrupt the market by showing the impact of low or no-cost stock images on photographers. 78.4% of DACS members favoured market rate pricing so as not to undermine the primary market for creators through introduction of a lower charge or its equivalent for the use of orphans.

If an annual licence scheme is introduced DACS is keen to emphasise that payment of an annual fee should in no way remove the need to perform a diligent search to determine whether any single work is an orphan work – this is an essential part of the process and it cannot be removed. DACS would also welcome further information on the details of any annual licensing scheme regarding tariffs, limits on use and measures to avoid creating a hierarchy whereby orphan works are preferred to non-orphan works.

If the justification for collecting an annual fee is that the cost to the IPO of collecting and retaining fees is greater than the fees themselves, this dispensation should apply across the board for all collecting societies. The Hooper Report makes it clear that the aim of reforming the copyright system in the UK is to reduce the cost of transactions, not the cost of licences themselves: “[T]he transaction cost of licensing [is] not the price at which the rights are licensed. The aim of all this work is to make the process of licensing as frictionless and as cheap as possible so that more of it happens.”

It is important to consider the use of the work as well as the industry sector, as cultural organisations are very capable of making highly commercial use of non-orphan works through wholly-owned subsidiary companies which pursue purely commercial enterprises. The DACS licensing tariffs are publicly available⁴ and are based on the commerciality of use as well as the nature of the entity making the use, so that for example a cultural organisation such as a public museum would pay less for the same use than a commercial gallery or auction house. There is also a volume discount for certain types of licensed uses, but these are not generally drafted as annual blanket volume licences, which reduce transparency and accountability.

⁴ <http://www.dacs.org.uk/licensing-works>

Funding the Scheme

From experience DACS considers that seeking to apply a flat fee for administration is unrealistic as this assumes largely the same cost for each licence of an orphan work, whereas actually processing certain licences will always involve more work than others and actual costs incurred can vary greatly. DACS therefore operates a charging model based on a percentage of the licence fee.

The licensing of an artistic work for use in a feature film for example usually requires a more detailed and specific licensing arrangement where the actual reproduction of a life-like painting may need to be authorised and produced to then feature in the film as it will have various ways of exploitation, including public cinema showings, DVD, download-to-own and ultimately broadcasting online or on TV. The fees in these transactions are normally significantly higher than the reproduction of an artistic work inside a multi-artist book publication where standard licences are being put in place and only occasionally do certain colour corrections need to be made to ensure that the work is as true to the original as possible.

Unclaimed Fees (Regulation 13)

4. Should there be a limit on the period of time in which a rightsholder can claim his/her remuneration? If yes, taking into account the examples of time limits set out at paragraph 5.9, what should that period be and why?

DACS is strongly of the opinion that the only limit for the period during which remuneration may be claimed by the rightsholder should be the existing term of copyright enshrined in the CDPA. There is no statute of limitation on copyright for non-orphan works so there should not be one for orphan works. If anything the rules about trusts should apply to the authorised body which may result in royalties for missing rightsholders being held for a period of time substantially longer than the statutory limitation periods. However, we would urge Government to refrain from introducing de facto terms of protection for orphan works which are different to those for non-orphan works as outlined in paragraph 5.9 of the Consultation.

5. At what point should the Government be able to distribute unclaimed funds? What is the rationale for your answer?

The Government should only be able to distribute unclaimed funds at the end of the copyright term as stipulated in the CDPA. This gives sufficient opportunity for the rightsholder to come forward. It should further be taken into account that the authorizing body as a licensing body may have to adhere to regulations applicable to Collective Management Organisations (CMOs), whose members will ultimately be able to decide how undistributed funds shall be used by the CMO. Even if the authorising body is the IPO as indicated in the Consultation, and therefore does not necessarily have members per se, a further investigation into what would be appropriate and comparable should be undertaken.

6. What should any unclaimed funds be used for and why?

As outlined above unclaimed funds should be used according to the wishes of rightsholders in a manner consistent with the Collective Rights Management Directive. Alternatively DACS suggests establishing benevolent funds for rightsholders according to the relevant respective class of orphan works. As revenue is generated through exploitation of rights without permission from the relevant rightsholders, DACS believes there should be some form of reinvestment in the creative talent which gave rise to the orphan works themselves.

The results of the Survey showed that 56.7% of responding members wanted funds redistributed to other rightsholders within the sector, 30.5% wanted funds used for social, cultural or charitable purposes, and 31.7% wanted funds used for investment in creative industries.

Appeals

7. Should there be a right of appeal for users of orphan works in the event of unreasonable actions by the authorising body (IPO)? If so, should this cover (a) Licence fee tariffs (e.g. via the Copyright Tribunal), (b) refusals to grant licences or (c) both?

As the Copyright Tribunal already deals with disputes over copyright licensing fees, DACS is comfortable with it performing a similar role here. With regards to an appeals process for refusal to grant licences, DACS would welcome further detail on this point and suggests that if this is being considered then there should also be a similar appeals process for emergent rightsholders who want to exercise their copyright under the CDPA and prevent further use of their works under an orphan works licence.

DACS recommends that questions about reasonableness of administrative actions should also be dealt with by the Copyright Tribunal which should be open to users and rightsholders alike.

Impact Assessment

10. How much does the fact that licences are non-exclusive impact upon your potential use of the scheme?

Although DACS is unlikely to use the scheme, we do not believe that issuing exclusive licences for the use of orphan works should even be an option and we consider the question to be leading. Obviously exclusivity is desirable in a highly competitive market place and is very often paid for with a premium. The system proposed in the Consultation does not cater for this.

The IPO is not well equipped to ensure that all potential bidders are brought in to any competitive process for acquiring a seven-year exclusive right as contemplated under the Licence. Given the lack of consent from the unidentified rightsholder, non-exclusive licensing has a far lower risk of permanently associating the orphan work with a user whom an emergent rightsholder may subsequently object to. Licences issued for the use of orphan works should therefore not be made exclusive in any way. It has to be recognised that exclusive licences work to the exclusion of the actual rightsholder along with any other third party. To grant such all-embracing rights in the absence of the true rightsholder seems to exceed any legal mandate and is contradictory to the general purpose of making orphan works accessible for licensing and therefore opening up the cultural potential.

11. How much does the fact that licences are limited to the UK impact upon your potential use of the scheme?

From experience DACS believes that a significant amount of licences in particular in the book publishing and online sector require worldwide rights to be of any practical value. For example, to date DACS has received 1057 website licence requests since 2006 and records do not show any of these requests being limited to the UK only. Given the international nature of website use across territories on the internet, this is unsurprising.

As the orphan works licensing scheme is being introduced through national legislation, the territory will be inherently limited to the UK. The scheme can be made more attractive over time by entering into reciprocal arrangements with other countries adopting equivalent measures. Without this DACS expects the scheme to be far less attractive to potential users. The IPO will need to be very clear about the nature and extent of the rights being granted to licensees, especially with regards to use on the web as users may take it for granted that they are able to communicate these works without limitations, breaching the terms of the licence.

12. If you are a potential licensee would you use the scheme only when you are fairly sure you want to use a particular work or would you use it to clear whole collections of works in your archives? What do you consider would be an acceptable amount of time for processing an application to use an orphan work?

Whether a single particular work or an entire collection is to be subject to orphan works licensing under this scheme, a diligent search must be carried out for each individual work that any licensee would like to use, *before* applying for any orphan works licence. Orphan works can only be classified as such following a diligent search and a work is not an orphan work until that point.

Legislation should be clear in distinguishing between (1) collections containing only orphan works, (2) collections containing a mixture of orphan works and non-orphan works (where orphan works have been identified pursuant to a diligent search) and (3) collections where no diligent search has been conducted and so it cannot be stated whether or not the collection includes orphan works.

From experience DACS believes that it is important that the processing of licensing applications is conducted rigorously to ensure that potential issues are mitigated. The acceptable amount of time for processing is the time necessary to ensure the application is considered fully and the licensing body has positively confirmed that a genuine diligent search has established that the work in question is indeed an orphan work.

Potential licensees will consider an appropriate time frame differently depending on the work, the use, the sector and the amount of works requested. We believe it will be essential for the authorizing body to verify that a diligent search has been carried out and this may involve a differing degree of administration in each case. However, we believe that the IPO should publish service standards to create some certainty and transparency for users and rightsholders alike.

15. The impact assessment assumes that in 10% of orphan works' applications, a diligent search would have already established that the work is orphan. Without a lawful means to use an orphan work, this would be wasted time and resource. Approximately, how often, at present, are you unable to locate or identify a rightsholder following a diligent search?

DACS would expect that 100% of applications would have established that the relevant works are orphan works by conducting a diligent search prior to making the application because it is not possible to classify an orphan work without a diligent search.

Government must set out clear criteria for what constitutes a diligent search, as respondents to this question will not know whether what they are carrying out constitutes a diligent search. These criteria need to take account of how recently the search was made in determining if it remains diligent.

According to regulation 4(4) a diligent search is considered valid for seven years after the orphan licence was first granted. This is not linked to when the diligent search was in fact conducted. There must therefore be a certain immediacy between the diligent search and the application. Delays between the search and the application should be to the detriment of the applicant who may have to verify the search results once again before application can be made. Alternatively that authorizing body may need to verify with increased scrutiny that the search results are still valid.

The scheme will provide licences for orphan works, so it is unhelpful to view the diligent search that currently results in the inability of using the copyright protected work as wasted. In fact this process results in assertion of copyright by the rightsholder and certainty for the potential user so that all parties know where they stand in the given scenario – DACS does not consider this to be wasteful.

The Copyright Hub and other schemes are speeding up the process of connecting potential licensees and known rightsholders, but simply because a rightsholder is known or can be traced does not mean that permission for the use of the work would automatically be granted, similarly leading to administrative costs being incurred without the result wished for by the potential user of

the work. This is however the nature of copyright as an exclusive right, and DACS does not believe that it is very helpful or beneficial to users and rightsholders to consider the administration involved in complying with the law as being wasted.

DACS collects royalties for Artist's Resale Right for artists who mandated DACS but also for artists that are not represented by any collecting agency in the UK and where the actual rightsholder is not known or cannot be traced, similar to orphan works. DACS has a very good success rate in locating rightsholders for Artist's Resale Rights and to date has successfully paid out 98.9973% of all royalties collected since the Artist's Resale Right came into force in the UK in 2006. Achieving these results involves a rigorous search process with continuous review of results over a six-year period and includes online and correspondence work.

The positive results DACS has achieved come at a cost which DACS believes is commensurate to the benefit afforded the rightsholder and DACS would hope that a similar standard of due diligence was maintained for the purposes of diligent search in the orphan works licensing scheme so that rightsholders are not prejudiced.

Orphan works exception in the EU Covering Costs

19. If you are a cultural organisation, how likely is it that you would recover the full costs related to the digitisation and making available of an orphan work?

From paragraph 3.50 of the Consultation, "[U]nder the Directive relevant bodies can generate revenue from orphan works for the sole purpose of covering their costs of digitising orphan works and making available".

DACS is concerned that unless Government clearly sets out the obligations on cultural organisations when accounting for the costs of digitising and making available orphan works, rightsholders may effectively subsidise this process. If a cultural organisation (as a relevant body) continues to expend resource on digitising and making available further orphan works from its archives then it seems possible that the costs of this on-going activity will never be met and so the process will simply continue indefinitely.

To avoid this DACS suggests that cultural organisations should be made to account for the costs of digitisation and making available separately to other costs because this will provide precise figures for sums to be recouped and avoid possible confusion of income-generating activity of the cultural organisations with recovery of costs for digitisation. As with collecting societies, transparency and accountability regarding the costs incurred and revenue generated from the relevant bodies must be required and a clear scrutiny regime set out to monitor when sufficient monies have been recouped to ensure that no profit is made.

In determining whether a cultural organisation has recovered its full costs of digitisation and making available, consideration must be given to the uplift in revenue across the board that will come from being able to make a fuller repertoire available in this manner as an even more comprehensive authority.

20. How would you do this (for example by charging for access to your website)?

Whilst cultural organisations should be free to identify the ways in which they recoup costs and utilise orphan works within the exception, clear accounting rules will be needed as stated above. It will also be necessary to make a clear differentiation between commercial and non-commercial use as the commercial use per se may not comply with the three-step-test.

21. Would you attempt to engage in a public-private partnership to digitise and make available such works? Any charges can only reflect the cost of search, digitisation and making available, with no profit margin. What evidence do you have of the level of interest of private enterprises in such partnerships?

Any public-private partnership to digitise and make available orphan works will need to clearly assign responsibilities and account for costs and usages of the works. There have already been examples of public-private partnerships breaking down with issues over which party is responsible for meeting which obligations in its aftermath (for example, collaboration between The British Library and Microsoft, the Google Art Project etc.)

DACS is concerned that if the private entity in the partnership refuses to accept responsibility for unauthorised use of copyright works, and the public entity pleads limited resources, it will be the rightsholders who will not only lose revenue but who will be effectively subsidising these efforts of making orphan works accessible. As such DACS urges Government to ensure that any public-private partnerships which are created pursuant to this scheme do not undermine the rights or interests of rightsholders and that the parties to the partnership are aware that the responsibilities to rightsholders are shared equally amongst them. Equally Government should not legitimise what would effectively be a circumvention of the requirements of any such exception to the benefit of commercial users of orphan works without there being any remuneration for rightsholders, which would effectively undermine any orphan works licensing scheme discussed above.

DACS is concerned about the lack of definition for the term “non-commercial”. This has the tendency to be widely interpreted amongst potential licensees. Cultural organisations may derive a significant proportion of their revenue through commercial activity, sometimes through wholly owned commercial subsidiaries, as with the Tate Museums and Tate Enterprises. DACS is concerned that commercial activity undertaken by cultural organisations should not be treated as “non-commercial” activity. Although DACS does license use by cultural organisations at a preferential rate⁵, the more commercial an activity is the higher the licence fee that is charged, irrespective of the corporate structure of the licensee organisation.

Unpublished Works

22. Do you agree that we should not implement the optional provision?

According to paragraph 3.52 of the Consultation, the optional provision has as its main goal the prevention of arbitrary limitation of use of unpublished works and on this basis DACS agrees that Government should not implement the optional provision.

DACS firmly believes that having invested in this solution Government should take steps to ensure that future production of orphan works is minimised as far as possible and so encourages Government to be proactive in penalising parties for stripping data from works and also ensuring that proper credit is applied diligently by licensees.

Diligent Search

At paragraph 3.57 of the Consultation, “A diligent search by a relevant body will be completed in good faith, there is no verification process.” This must be aligned with UK guidelines on what constitutes a diligent search to avoid confusion and abuse. It is proposed that a diligent search under the EU exception can be used for UK orphan works licensing purposes if covering the use of the same rights.

⁵ <http://www.dacs.org.uk/licensing-works/price-lists/public-galleries-museums-cultural-organisations>

It would be a matter for concern if a less stringent search requirement was sufficient where a particular use is considered to be less commercial, especially as the costs of the diligent search can be recovered through revenue generated by its use under this exception. It is crucial for Government to understand and promote the message that a work can only be considered an orphan work following a diligent search, its envisaged use is irrelevant.

If a lower threshold for what constitutes a diligent search were in operation for less commercial uses then a work could be branded as an orphan for what is considered to be a less commercial use but would presumably remain an orphan subsequently no matter what type of commerciality is envisaged in future uses – this is why DACS believes that the criteria for what constitutes a diligent search should not be impacted by use. As it is difficult to find a satisfactory all-encompassing definition of what a diligent search is, DACS would suggest further that any such definition be specific to the particular type of copyright work in question. As collecting societies already have data relevant to specific categories of works, DACS suggests Government consider greater involvement of collecting societies in developing its criteria for what constitutes a diligent search.

There is an issue with the overlap of renewals and the proposed licensing period with regards to the duration for which a diligent search may be used. Draft regulation 4(4) states that an existing diligent search is valid for seven years from the date upon which an orphan licence was first granted. Draft regulation 8(1) states that the renewal request must be received no later than six months before the expiry of the orphan licence.

As applications for renewals of orphan licences must be received six months before the expiry of the seven-year licence, and the proposal states that the diligent search result is valid for seven years, it seems that the diligent search used for the original application for the orphan licence can also be used when renewing for the first time, thus rendering the original diligent search valid for licences spanning 14 years. This does not appear to be the intention of the IPO and we believe this is not a satisfactory situation. A new diligent search should be undertaken when renewing any orphan licence to ensure that the status of the work as an orphan is still correct as it may be that the rightsholder has been discovered during the course of the licence.

23. Are there any other sources that should be added to this list of essential sources?

DACS suggests a regular review and update of sources for further useful resources to be added over time.

24. Do you agree with the addition for non-published works under Part 2 of the Schedule? Are there any other sources that could be added for unpublished works?

DACS suggests a regular review and update of sources for further useful resources to be added over time.

25. Is there a realistic prospect that civil sanctions will not provide appropriate remedies? In what circumstances?

If an orphan work is used in a manner which damages the reputation or causes great distress to the emergent rightsholder, but does not cause them quantifiable financial loss, DACS suggests that criminal sanctions may act as an effective additional deterrent.

Fair Compensation

26. Do you agree with this approach? Where should the burden of proof lie, and why?

There are potential issues with this approach if there are conflicting standards on application across Member States. Notwithstanding this, the burden of proof should be with both parties as informed by any applicable agreed standards.

DACS would expect relevant bodies to downplay the amount of compensation due and claim that works were promoted for the benefit of the rightsholder. DACS asks for clarification on what “fair” compensation is and who decides this – DACS would expect the compensation to include consideration for the loss of exclusivity in copyright suffered by the emerging rightsholder in addition to any economic redress for the use under the orphan licence. Without prejudice to the exclusive rights of the rightsholder to ultimately determine the level of fee to be charged, any rates should be in line with standard charges in the industry sectors and territories concerned.

27. Is it necessary to provide for an appeals process on the level of compensation? Who should administer such an appeals process?

The level of compensation between a relevant body and rightsholder should be proportionate to the use of the relevant work. The Copyright Tribunal already deals with this type of appeal and so it would make sense for the Copyright Tribunal to also administer this appeals process.

Any other comments?

Moral rights

In the 2012 Submission DACS stated that orphan works must be treated the same way as non-orphan works; because any discrimination which makes orphan works easier to use than non-orphan works will distort the market.

The ability to refuse use of copyright works can be as valuable to rightsholders as the remuneration received for use. DACS believes that the IPO should avoid undermining this decision-making power and recommends that the IPO publish sector-specific guidelines, informed by the relevant operators in these sectors, on what types of use will constitute derogatory treatment of an orphan work and will not therefore be licensed.

If the IPO licenses use of orphan works which it does not consider to be derogatory, but which rightsholders for non-orphan works in that specific sector typically do not licence as these rightsholders consider such use to be derogatory, then the net effect is to make orphan works easier to use than the non-orphan equivalent.

DACS has concerns that making orphan works easier to use in ways which non-orphan works are not used because the rightsholder refuses permission for what is deemed to be derogatory treatment could result in such market distortion.

Credit

Receiving proper credit for copyright work is extremely important to DACS members and if the requirements for crediting works are weakened and adopted on a wider basis it risks proliferating future orphan works where works have not been credited in a rigorous and inalienable manner.

Further to paragraph 3.25 of the Consultation DACS suggests that in addition to details of author (where known) and authorising body, the credit should also include information on the reference source for the image.

With regards to the use of web links for credits, DACS would welcome more detail on exactly what is envisaged by Government, in particular whether the web link credit is envisaged as a replacement for a credit appearing on the actual physical product reproducing the work which would not be adequate. DACS is concerned that this use of web links for credits may establish a precedent for using web links instead of traditional credits and unless there are appropriate safeguards DACS believes this risks proliferating further orphan works in future as detailed below.

From experience, very few clients are willing to reference a web link in credits where this goes against the general format for publication and as a result some clients do not include a credit at all

– if there is less chance of credit being accorded or it is simply left off the product using the work, the chances of further orphan works being created increases and the likelihood of making rightsholders in orphan works aware of the use of their works decreases, both of which are not desirable. Similarly, DACS would query how the web links would be maintained to ensure that the correct information is still available in the future as without maintenance there is a risk of losing the credit information for the works used or for the information on the web links becoming outdated and erroneously qualifying a work as an orphan although emergent rightsholders have been identified.

DACS would suggest that a human-readable credit should be provided, along with machine-readable metadata that meets the standards being identified by the Copyright Hub. The orphan works scheme is an important opportunity for Government to support the adoption of standards in such identifiers.

Derogatory Treatment

In the Survey 54.3% of DACS members thought that none of the following should be allowed: cropping, overprinting, or manipulation of works. This accords with DACS licensing practices where emphasis is placed on works being reproduced and portrayed as close to the original as possible. The IPO should similarly consider cropping, overprinting or manipulation of work as being impermissible so that the orphan works scheme does not offer a lower standard of protection than the DACS licensing scheme. DACS recommends setting universally applicable parameters in line with industry standard licensing practices which ensure that rights of visual artists are respected and works are not used in a derogatory way. Without these standards it will be difficult to assess whether a use is derogatory where the author of the work is unknown.

Reporting

In addition to the information which paragraph 3.34 of the Consultation states will be covered in the annual report from the authorising body, DACS believes there should be more itemised data to include the number of licences applied for and issued as well as the number of licensing clients making applications and using orphan works. Further to paragraph 3.36 of the Consultation, we believe that an emergent rightsholder should receive a detailed report of where the relevant works have been licensed by the IPO. Open data is a key government objective, as is transparency in licensing. The IPO should aim to provide the maximum possible amount of detail in an accessible format to enable innovative use of this rich data set.

In becoming a licensing body, the IPO will need to meet and exceed the minimum standards applied to collecting societies, standing out as an example of good practice. DACS would welcome further details of its proposed service provision standards.