

Orphan works and 2021 update

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The Problem

Orphan works are works in copyright where the rights holders are either unknown or cannot be traced. Across UK heritage institutions, there are probably hundreds of millions of orphan works, sometimes representing up to 40-50% of collection items¹. These include photographs, letters, prints, films, sound recordings, plays, broadcasts, drawings and other collection items, which were often never intended by their authors for commercial exploitation. They include interpretations and reflections of events notable in peoples' lives and therefore represent an irreplaceable treasure chest of material culture and unheard voices.

In the UK, the duration of copyright in certain unpublished works runs until the end of the year 2039, regardless of how old the work is. Normally, copyright in text based works lasts for the life time of the author plus a further 70 years. This extra long duration of copyright, until 2039, presents severe resource implications for the UK's cultural heritage sector at a time when it is under an unimaginable funding crisis following the Covid-19 pandemic. In addition, the likelihood of rights research and possible licence fees associated with these works results in an inexcusable double whammy effect of extra costs when resources are so stretched. Indeed, many of these items are likely to be orphan works.

Due to their nature, the requirements of copyright law and the lack of fit for purpose solutions, orphan works represent a massive issue for the mass digitisation and publication (including online) of assets owned by UK cultural heritage institutions. The lack of access to orphan works has therefore created a black hole of cultural heritage.

The Solutions

For many years, risk management has provided the only possible option for cultural heritage institutions to make their orphan works available online. However, in 2012 the Orphan Works Directive was an important development in attempting to provide a solution to help to open up online access to orphan works held by heritage

¹ https://naomikorn.com/wp-content/uploads/2020/09/SCA_CollTrust_Orphan_Works_v1-final.pdf (accessed 2.03.2021)

institutions across the EU and facilitate mass digitization of the treasures in their collections. Requiring reasonable searches to establish if rights holders could be located and if not, heritage institutions can register details of their orphan works on an EUIPO Orphan Works database. Once this is done, orphan works can be published online with little risk. Disappointingly the EU Orphan Works Directive has not been used as widely as hoped, due to a number of issues including the cumbersome nature of its interface, difficulties in mass uploading content, and the resource/capacity issues that have resulted.

Notably, until the UK left the EU in on 1st January 2021, UK heritage institutions had used the Orphan Works Directive to publish some of their orphan works online, this included 14 UK heritage institutions such as the National Library of Scotland and the British Library. When the UK left the EU and the cross-border copyright arrangements unique to EU member states stopped, UK heritage institutions who had already used the Orphan Works Exception were no longer able to use it as a basis for their online reproduction of orphan works and could no longer consider its use for any future online publication of their orphan works. Consequently, for UK institutions not using the Orphan Works Directive, risk management becomes an even more important consideration in opening up access to their orphan works.

1. Risk managing the use of orphan works

Risk management is an organisational choice. It should always be carefully considered against any likely risks and costs, as well as documented. If your organisation either has no appetite for legal or reputational risk and/or it is unable to take any risks because of its governance, constitution etc., then this guidance may not be applicable, but if it does it is useful to think about the level of risk you are taking in the following way:

- Is the item in copyright?
- Is the item published and over 120 years old and therefore likely to be out of copyright?
- Was the item produced for commercial purposes?
- If it is, what is the likelihood of the copyright owner finding out?
- If they do find out, are they likely to object?
- If they do object, how much is it likely to cost?
- How will your organisation respond to such objections e.g. published “take down” policies and effective responses?

Remember that whilst proportionality and making informed judgments is crucial – it is

not a finite science.

2. Considering the use of the copyright exceptions

Within copyright law there are a number of fair dealing exceptions to copyright that specifically benefit heritage organisations. These exceptions to copyright are crucial to the heritage sector by enabling the use of third party copyright works in certain situations without the need to seek permission. Changes to the copyright legislation in 2014, have resulted in a more progressive regime for users, cultural heritage and educational organisations. This means that heritage organisations are more likely to consider and use the exceptions to copyright to support their activities. This includes the “quotation exception” as well as the dedicated terminal copyright exception.

A lawful extract of a work can be made under the quotation exception. In this case, the work must be fair dealing, sufficiently acknowledged and have lawfully been made available to the public. This exception includes a non-contractual override provision. The criticism and review exception would enable a whole work to be reproduced for this purpose.

The dedicated terminal exception enables a copy of a work to be made available by heritage organisations to individual members of the public via a dedicated terminal on their premises. This is possible as long as the institutions have lawfully acquired the work, it is for the public’s research or private study, and there are no licensing/purchase terms that prevent this. More about the exceptions to copyright can be found here: www.copyrightuser.org

3. Using the UK Government’s Orphan Works Licensing Scheme

Another option for the UK heritage organisations is the Orphan Works Licensing Scheme which provides a 7 year, UK only licence for the use of all types of orphan works for any commercial or non-commercial purpose. Usage of the licence by museums has been to date extremely low due to the high admin costs of the scheme, its limited coverage (it only covers the UK so anything published online would not be covered), and the relative lack of benefit in relation to costs and proportionate risks. The cost/risk/benefit of this solution does not necessarily balance out and so this solution is probably viable in only a minority of situations.

More about orphan works and the Orphan Works Licence can be found here:

<https://www.gov.uk/guidance/copyright-orphan-works#overview>

4. Not to reproduce their orphan works

Do not use is always an option. The basis of this decision would be the level of risk deemed acceptable and factors such as the age of the item, the use and the possible costs associated with the other solutions.

The Future

Looking ahead, the EU Copyright Directive includes important provisions and exceptions for cultural heritage institutions, libraries and archives such as important provisions, which enable the online reproduction of out-of-commerce works, including orphan works. Countries across the EU, excluding the UK will implement the Copyright Directive in 2021.

It remains to be seen how far the out-of-commerce provisions in the EU Copyright Directive will positively impact mass digitization and facilitate bringing in millions of orphan works from the cold. Until such time as a decent solution for orphan works is found, heritage institutions, including those in the UK, who are considering their online publication of orphan works, will need to seriously take into account the role of risk management in reducing the black hole of digital cultural heritage.



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