



The Irish Visual Artists Rights Organisation

Submission to the Department of Enterprise, Jobs and Innovation

Consultation on Transposition of the Orphan Works Directive and
the Use of Orphan Works under Irish Law

23rd April 2014

About IVARO

IVARO is a non-profit organisation which represents visual artists and their heirs in relation to matters of copyright and related rights. IVARO offers copyright licensing services and collects the Artists Resale Right on behalf of its members. It has over 1,600 Irish artist members and has reciprocal rights agreements with over 20 sister societies worldwide. IVARO is also a member of the Creative Industries' Forum which represents all of the collective management organisations (CMOs) operating in Ireland.

Our general position on Orphan Works can be summarized as follows:

- We advocate for an orphan works licensing scheme similar to that proposed in the UK Orphan Works regulations;
- We believe that the inclusion of stand-alone photos and other images, within a licensing scheme, is essential;
- There should be an up front fee to prevent orphan works competing unfairly against other works and to provide fair compensation for rights holders who are found;
- The National Competent Authority must be adequately resourced to fulfill the role;
- We believe that further consultation with each sector is required in order to compile a list of appropriate sources when carrying out diligent searches;
- Moral rights should be strengthened by making them unwaivable and thereby helping to prevent the unintended creation of further orphan works.

IVARO supports the aim of providing legal certainty when expanding access to previously unavailable copyright works held in Irish libraries, museums and other beneficiary institutions.

Any measure introduced to address the orphan works issue has to have as its starting point the property right of the creator in their work. Images are disproportionately at risk for being determined orphan works, as visual works are particularly likely to be published without identifying information such as the creator's name, copyright owner information, or a title of the work, especially when reproduced online.

Scope of the Directive

With regard to images, the Directive applies only to ‘works embedded or incorporated in other works or phonograms (e.g. pictures in a book)’. Stand-alone images such as photographs, paintings and other art work are specifically excluded. As the consultation document states, the European Commission estimates that 90% of the photographs held in European libraries, museums and archives are orphans. If these stand-alone images are excluded, our cultural institutions will be unable to digitise the major body of works which are held in their collections. We recommend that the scope of the Orphan Works legislation should be broadened to include stand-alone images, for non-commercial use within a licensing scheme.

Orphan Works Licensing Scheme

We believe that there should be a mechanism to allow beneficiary organisations secure licences for the use of orphan works. Such a scheme is envisaged in the UK Orphan Works regulations.

Some points regarding the UK Orphan Works Scheme:

- The UK Orphan Works Scheme is complimentary to the EU Directive but wider in its scope and application.
- It provides for a licensing scheme rather than an exception.
- It provides for commercial and non-commercial use.
- It includes stand alone artistic works such as photographs which constitute a large part of orphaned works in archives.
- Under the Orphan Works licensing scheme there is a greater chance of rights holders being reunited with their work and they can obtain remuneration.
- It includes a requirement for upfront payment which stops orphan works from competing with available works at unfair advantage.
- The UK scheme is compatible with relevant international obligations such as the Berne Convention.
- The Intellectual Property Office (IPO) will fulfill the role of National Competent Authority.

The UK scheme allows for reciprocal arrangements with other countries. IVARO advocates for a similar legal basis allowing either the national competent authority or collecting societies to licence the use of orphan works, for an up front licensing fee.

We do not believe it is a viable option to introduce a system which favours delaying the payment of appropriate fees for the use of orphan works until the rightsholder has been found (as the Directive proposes). The delayed payment option would not encourage the on-going search for the rightsholder and the user would potentially have an incentive not to find the rightsholder as claims for the use of the work may be barred by statutory limitation.

Another downside to the delayed payment is the matter of the time between when the work is used and when the rights holder appears. Market rates change over time and it would not be fair to charge a current rate for a work that was used a number of years previously.

Orphan works should be offered for licence at rates appropriate for the type of work. Any lower charge than market rate could negatively impact on the orphan and also on the non-orphan works and their market in the same category. A requirement to pay market rates would ensure that orphans do not compete with other available works at unfair rates.

“One marketing company told me that they would rather suggest cheap stock photography to a client than original photography because they were worried that the client would think they were too expensive and go elsewhere. If even cheaper orphan works appeared this would make this situation worse as images could be used for free, further limiting people’s willingness to understand or appreciate the value of photography”¹

The licence fee should be held until the owner is identified, or until a reasonable period of time has elapsed. Any unclaimed monies could then be used for social or cultural purposes.

National Competent Authority

It has been proposed that the Irish Patents Office will be nominated as the national competent authority. If this is the case then adequate resources must be made available to the Patents Office so that it may efficiently fulfil its role, including the ability to licence the use of orphan works.

Alternatively, collecting societies are also well placed to administer an orphan works scheme and issue licences for the use of such works in their sector. Collecting societies in general have well established tariffs that could serve as the general market rate for the relevant type of use. Collecting societies are set up to collect and distribute royalties to rightsholders, are rightsholders owned or managed, are nearly always not-for-profit and operate as part of an international network, which would support the application on a European level.

Diligent Search

We feel that further consultation should be made with sector-specific groups comprising a range of stakeholder practitioners to assist in the development of guidance for diligent search. IVARO would be happy to participate.

We would like to make the following points at this stage:

- The Directive provides a number of sources to carry out a diligent search in the images sector including libraries, image banks, WATCH file and others. However it is only possible to perform text based searches of these databases using key words. Without some identifying information about the creator these databases may be of limited use.

¹Photographers response to DACS survey on the IPO Consultation on Copyright. DACS, March 2012

- For works embedded or incorporated in other works or phonograms (such as illustrations or photographs) it has to be assumed that the rights were cleared only for that specific work, therefore the rights to copy or digitise the embedded works will have to be investigated also.
- We do not believe that the proposed end use of a work can or should have any implications on what constitutes a diligent search. The process and obligations should be the same regardless of how the work is to be used.
- We believe that any definitions of a diligent search should be open ended as these definitions will depend on technological development and tools available in the establishing of rightsholders and in tracing them.

We can provide an example of how a diligent search can uncover a rightsholder previously thought to be untraceable.

Paul Henry (1876 – 1958) is recognised as Ireland’s greatest 20th Century landscape painter. His west-of-Ireland landscapes became famous as poster images for tourism in the 1920s. His works hang in national and public collections around Ireland. Despite the artists high profile there was no known rightsholder for Paul Henry’s work after the death of his second wife. After a number of fruitless attempts to find a rightsholder it was generally held that his works were ‘orphans’ and were considered so for over 30 years. It wasn’t until the National Gallery of Ireland began an extensive diligent search that the trail was picked up and the beneficiaries finally brought together in 2012. The beneficiaries are now members of IVARO and are receiving royalties from the reproduction and resale of the artist’s works. This raises a vital point which is that the income from royalties is an incentive for rightsholders to come forward and end the orphan status of works. Without remuneration there is less incentive for rightsholders either to be found or to come forward to take on the task of managing the artists’ legacy.

Legislation

We believe that any measures brought in should be implemented through legislation rather than through a statutory instrument. By way of example, IVARO manages the Artists Resale Right on behalf of our members. The resale right regulations were introduced by way of a statutory instrument in 2006.

We do not believe that the EU Directive was implemented in an effective manner by way of the regulations. The various options in the Directive which would have assisted with the collection of royalties and made the resale right more meaningful to artists could only be adopted through legislation. This has had a significantly negative impact on the benefit of the resale right for Irish artists. We have made a number of submissions to the Department which highlight the problems with the regulations.

Metadata and protecting Orphan Works

Every time metadata identifying an author is removed from an image, a new orphan work is potentially created. We believe that there needs to be more explicit protection for metadata and a greater awareness of its value in identifying authorship and other valuable information, including the licence terms on which a work is made available.

One of the major issues confronting visual artists (and photographers in particular) is the absence of a universal method for tagging visual images. Developing a universal protocol for locating and tagging images in the digital domain would contribute significantly to the release of images into the public domain and to ensuring the continued supply of original content by professional artists, illustrators and photographers. Coupled with effective sanctions against those who strip or alter metadata attached to images, this would reduce the 'creation' of orphan works in the future.

Images are particularly vulnerable to unauthorised copying once they have been posted online. It is essential that the orphan works regulations require beneficiary institutions to utilise technical protection measures which help reduce and deter unauthorised copying.

Moral Rights

In the majority of cases the divorce between the rightsholder and the works they hold rights in will not have happened voluntarily and/or under the condition that rights in the work have been relinquished. The moral rights of the artist should therefore be respected in the same way as if the rightsholder could be contacted.

Moral rights should be strengthened by making them unwaivable and thereby helping to prevent the unintended creation of further orphan works. An automatic right to attribution (meaning no need to assert) would help avoid situations where works need to be credited but current contact details are unknown. Any orphan works solution should include obligations on users to attribute the work whenever and wherever used and highlight that the works may not be reproduced. We feel that this is particularly important, given that orphan works do not have anyone with the legal right to initiate action for infringement of moral or economic rights.

In summary, it is not appropriate to allow users to commercially exploit works without providing remuneration. Rights-holders should not be compelled to subsidise the digitisation projects of publicly funded institutions. Appropriate remuneration would further the Governments agenda for innovation and economic growth as it would enable rightsholders to invest more in the creation of new content – which in the end is the asset which stimulates growth.

Rather than introduce another exception or limitation on the rights of authors into Irish copyright law, a licensing scheme, with an up front payment, will ensure parity between orphan works and non-orphan works. It has benefits for all parties and will allow cultural institutions and others to use works in a manner not covered by the scope of the Directive.