



ORPHAN WORKS AND ORPHAN RIGHTS

A REPORT BY THE BRITISH SCREEN ADVISORY COUNCIL (BSAC) WORKING GROUP

Executive summary

Main recommendation

The British Screen Advisory Council (BSAC) Working Group recommends the following three part approach to permit legal use of audiovisual material in which there is one or more orphan right. It builds on existing structures for rights clearance rather than tries to replace them, and is therefore believed to be a practicable and fair approach:

(1) Exceptions to rights

Existing or new exceptions to rights and other legal provisions which are not specifically directed at the orphan works/rights problem do or should permit some uses where there are orphan rights without the need for a diligent search. In particular, audiovisual archives should be permitted to preserve audiovisual material in their collections without infringing any rights.

(2) Licensing by collecting societies

Where no exception applies to a use, “licensing” of orphan rights by collecting societies should apply for uses where this adds value for all stakeholders. This may be Nordic-type extended collective licensing with no need for a diligent search, or may be otherwise when a diligent search may be required. The “licensing” should be certified by the Secretary of State where this added value has been confirmed.

(3) Licensing by the Copyright Tribunal

Where neither an exception or certified “licensing” by a collecting society applies to a use, “licensing” by the Copyright Tribunal should apply, but a user who has notified the Copyright Tribunal about his use should have the option of deferring the decision on the royalty to be paid until a right holder

turns up. The Secretary of State should, though, be able to override the deferral when appropriate to prevent abuse.

For each of the three solutions identified, if the relevant rules are followed, an orphan right would not be infringed where material to which it applies is used in the way covered by that solution, but any other rights in the material would need to be cleared in the normal way unless this is not necessary, such as where an exception to all rights applies.

The scope of each possible solution should be clear so that for any particular use only one solution would be relevant. A person wishing to use material in which an orphan right exists in more than one way would therefore sometimes have to rely on more than one solution and follow the rules relevant to each solution that applies.

Background

Not being able to clear rights where the owners are unknown or untraceable means that a significant amount of older audiovisual material is locked up, unable to be used legally. Finding a fair solution to permit legal use could mean that the material can be made available to the public and used by those developing innovative new businesses. BSAC has worked with a range of stakeholders extending beyond the BSAC membership to try and find a consensus way forward on the issue of orphan works and orphan rights. The discussions have concentrated on solutions to the problem of orphan rights in audiovisual content, but including the rights in copyright material embedded in films and also the rights of performers. In order to try and identify the best possible solution or solutions, the BSAC Working Group has gathered together a range of evidence and information about the size of the problem, the complexity of rights in audiovisual material, collective licensing, the ownership of rights and so on. Papers that have been produced for the Group have been included in the Annexes to this report. Before deciding what solutions to recommend, the Working Group carefully considered the pros and cons of a number of different possible solutions that have been proposed by various people at different times.

Other matters

The BSAC Working Group has also discussed and made various recommendations about a number of other matters common to more than one of the three solutions in the main recommendation. For example, the standard of diligent search for right holders should have regard to guidelines agreed at EU level, and voluntary registers of rights should be encouraged and improved in order to reduce the problem of orphan rights in the future, although voluntary registers are never likely to be completely accurate. For licensing by

collecting societies or the Copyright Tribunal, there will also be registers of orphan rights and diligent searches where relevant, and making these registers available for others to access will enable missing right holders to claim rights sometimes and also assist those trying to find the same right holders.

The discussions have centred on looking for solutions that make sense for the UK, and so the Working Group has not tried to solve how any solution might be interoperable with solutions in other countries and/or apply to material having its origin elsewhere. These issues are, however, likely to be developed as discussions on the recently published draft EU Directive on orphan works take place. The Working Group does, though, recommend that any “licensing” solutions should not be limited regarding whether or not something has been published. Also, the three solutions should work together so that all types of use by all types of users is possible where there is an orphan right without infringing the right.

Introduction

A significant number of older audiovisual works in the UK cannot be accessed by the public, or companies which wish to exploit them, because the copyright holder cannot be identified or traced, and therefore the work (an “orphan work”) cannot be made available legally. Further films include the whole or part of other copyright works or recordings of performances in which there are rights which were not, or were not clearly, transferred to the owner of copyright in the film as such. Where these rights cannot be cleared because the owner cannot be identified or traced (“orphan rights”), these films are also unavailable to the public.

The issue of orphan works and orphan rights encompasses a vast range of material – including feature length films, television programmes, shorts, documentaries, newsreels, cartoons and so on. The benefits of finding a way to make these works legally available by applying different and tailored clearance mechanisms would be that:

- The range of films and moving images available to British audiences and users would be significantly increased
- These works would be available to generate economic value to those who wished to exploit them on a commercial basis, whether through conventional means (e.g. DVD, clips for use within new material etc), or on new digital platforms (e.g. cloud-based services)

- The material could help to stimulate creativity and innovation in the UK through its exploitation on new platforms and in new ways; e.g. repurposing of material for mobile “apps”, incorporation into the BBC’s proposed digital Public Space etc
- The films could be used for educational purposes – e.g. use of clips in schools, higher education and in lifelong learning
- Access to the UK’s cultural heritage, as represented by these works, would be significantly increased
- UK taxpayers would have access to the orphan works which they are paying to have stored in publicly-controlled archives, but which can only be seen on a very restricted basis at present
- The works could potentially be made available across the European Union, subject to the introduction of appropriate legislation by the EU regarding mutual recognition, or other mechanisms.

In order to try and find a consensus for one or more solutions that might permit legal access where there are orphan works or orphan rights, BSAC set up a Working Group with representatives from BSAC’s membership and other stakeholders¹. The Working Group has met four times since September 2010 under the chairmanship of Mark Devereux, a Deputy Chairman of BSAC, and papers prepared by members of the Working Group and BSAC have led to in-depth and penetrating discussions about a number of relevant issues. The BSAC Working Group has primarily considered the issues as they affect audiovisual material, but recognises that many of its discussions, and the conclusions in this paper, will have relevance in other areas too.

The size of the problem

An audiovisual work typically involves a large number of different copyrights and related rights. Annex A is a case study showing how many underlying content rights there might be in a single audiovisual work. Given the large number of different rights likely to be involved, significant resources are therefore likely to be devoted towards clearing rights in general, including trying to trace missing contributors, in a single piece of audiovisual material. The cost of putting aside a royalty in case a missing right owner turns up may then be only a small part of what must be spent on clearing rights and paying royalties in order to use a film. But establishing whether or not a film is an orphan work or whether any of the rights in anything included in the film are orphan is a difficult, time-consuming and so expensive process. Devoting resources to trying to clear rights and trace missing

¹ See Annex H for a list of those who have been included in the circulation of papers considered by the Working Group and invited to meetings. Some people were unavailable for one or more of the meetings.

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right holders may often deter people from starting the process when there is no legal certainty about use of the material if one or more right holder cannot in the end be traced.

Clearing the rights in the underlying content is not always a problem. For feature films made by the Hollywood studios the rights in the underlying content have typically been transferred, or appropriately licensed, to the producer of the film, who also owns rights in the film as such. The producer of the film, or his successor in title, is therefore likely to be able to license any subsequent use of the film. Tracing ownership of rights originally owned by such producers is not a problem. This is not generally where there will be issues of orphan works/rights.

But for other audiovisual material, sometimes the owner of rights in the film as such may have become impossible to trace. Also, rights in underlying content may not have been transferred, or transferred permanently, to the producer, so it will generally be necessary to consider what rights exist and try and find who might own them before the film can be used legally. Where there is no mechanism that will permit legal use of the film when it has not been possible to identify or trace the owner of even just one right, then, as already indicated, there may be little incentive to start a costly diligent search for right holders. The size of the problem of orphan works/rights in the audiovisual area is therefore uncertain. The Working Group does, though, have an example from the BBC which illustrates the size of the problem. The BBC has a policy of setting aside money on an “await claim” basis for untraceable contributors. In 2009/10, £8.9m of programme sales contained contributions that the BBC was forced to await claim on, due to uncertainty about clearance such as untraceability or a failure to respond to a clearance request. BBC Worldwide’s total programme sales in 2009/10 were £240.8m², i.e. the orphan rights problem only arose in a small proportion of the total programme sales, but a large enough proportion to deter many people from going forward with a search for right owners and use in the absence of legal certainty.

It is important to remember that the cost of paying for content is only part of the cost involved in making material available to the public. For example, 50 or 60% of payments for online access to a film may be at the top end of what goes to right holders. If access to a film online only gives rise to a payment of the order of £1, then this would mean there may be about 50p to cover payments for all the rights in a film. If the orphan problem is in just one item of underlying content, i.e. just one of many rights in audiovisual material might be orphan, the value of this is very small. It is against this background that a solution is needed to permit legal use of material where there is an

² BBC Worldwide Annual Review 2009/10 – see <http://www.bbcworldwide.com/annual-review/annual-review-2010.aspx>

orphan right which is not disproportionately difficult, costly or bureaucratic. Any solution needs to be proportionate to the value of the use that is thereby permitted.

Orphan works/rights are, though, believed to exist in a significant quantity of audiovisual material. They are probably most likely to occur in pre-Second World War actuality material, i.e. non-fiction films such as newsreels. This sort of material can be of great interest to those making new audiovisual content which is then to be made widely available to the public. The clips that might be used this way are therefore a transformative use. Releasing the whole film may also be of great interest to the public. Orphan works/rights may also arise in the case of old British feature films, television programmes, amateur films and advertising material, although in the latter two cases there may be reasons other than not being able to clear rights for not using the material. Any solution to the orphan rights problem should not remove the need to consider issues such as rights to privacy. Those making new audiovisual material also face problems of unknown or untraceable right holders in underlying content that they wish to use. Annex B contains some examples of where orphan works/rights have arisen and how the material where this arises might be used.

A solution that would enable legal use of audiovisual material where there is one or more orphan right could, therefore, have the potential to lead to new revenue streams that are significant. The British Film Institute (BFI) has estimated conservatively that legal provisions enabling it to trade in orphan works might generate an additional annual gross income of more than £500,000³. That income would, of course, then be available to the BFI so that, amongst other things, it would be better placed to properly preserve old audiovisual material which may no longer be accessible in any other way.

Solving the problem

The BSAC Working Group has considered various possible solutions that would make it easier to use orphan works or material in which there are orphan rights. The tables in Annex C indicate some of the possible benefits of and problems with the different solutions. Although it might initially seem less complicated to have a single solution to permit use of any material in which there are orphan rights (subject to clearance of any

³ As indicated in its evidence to the Hargreaves IP Review, the BFI currently generates £100k gross per annum from footage sales of actuality material. It has been estimated that 15% of the 20,000 non-fiction titles held in the BFI's Collections are 'orphaned' which might generate a further £350k gross per annum, and 500 orphaned British features which could generate a further £350k per annum from broadcast and DVD sales, and in future from an online revenue stream – see <http://www.ipo.gov.uk/ipreview-c4e-sub-bfi.pdf>

other rights in the material which are not orphan of course), there is no single solution that is in all respects better than all of the other possible solutions.

However, the BSAC Working Group has agreed that the solutions that would vary the criminal and/or civil remedies that apply to use without permission of an orphan right are not appropriate. In both cases the use would still be an infringement of copyright and so in effect making use easier would be seen as condoning an infringement. Moreover, it is likely to be very difficult to make provision that only applies to use in good faith of something where there is an orphan right after a diligent search for the right holder, rather than something that those who wilfully infringe copyright might try to hide behind. The BSAC Working Group has therefore concluded that only solutions which make the use which is restricted by an orphan right free of copyright infringement (or infringement of any other related rights) is the right approach, so long as the user has followed all the rules that have been set out in the statute, including where relevant to conduct a diligent search to try and identify or trace the right holder.

The Working Group has also concluded that there is no single solution that makes use otherwise restricted by an orphan right free of infringement which would be appropriate in all circumstances. More than one solution will be needed, but these should work together in such a way to make all uses where there is an orphan right as straightforward and transparent as possible. It is important to stress, though, that none of the solutions would do more than provide a way of dealing with the orphan right or rights in any material that is to be used. It would still be necessary to clear the rights with any known and traceable right holders in the normal way, and those right holders would also remain free to refuse to clear their rights so that the material cannot be used, unless there is another statutory provision, such as a copyright exception, that would permit use without any right holder being able to prevent it.

The three solutions identified below are believed to be the best way forward taking into account many of the issues that the BSAC Working Group has discussed. The Working Group is not claiming to have resolved all the issues that will need to be considered to make any solution work, but nevertheless hopes that this paper will provide a useful basis for further discussions and the reaching of a wider consensus. As already indicated, the aim of the Working Group was to consider audiovisual material where there are orphan rights. But the BSAC Working Group has included people whose interests extend beyond this and so it may be that what is being proposed could form the basis of a much more general solution to the problem of orphan works/rights.

A three part approach to permit use of audiovisual material where there are orphan works and/or orphan rights

The three part approach being proposed would apply so that only one of the solutions can be relied upon for any particular use of any particular material in which there is an orphan right, i.e. the solutions are not alternatives for a person to choose which to rely upon, but, rather, solutions that would apply in different circumstances. What is covered by any particular solution therefore needs to be clearly defined in order for people to be left in no doubt what they can and must do for any particular use of any particular material. It will be important for everyone to fully appreciate that each solution is linked to a particular use and not any use of a particular item that is orphan. This means that it may be necessary to rely on more than one of the solutions, and follow all the relevant rules, if more than one type of use of material in which there is an orphan right is to take place.

All three solutions are, however, based on the principle of making use which would otherwise be restricted by an orphan right free of infringement of the right. There are, though, two main differences in the detail of the solutions proposed below which it may be helpful to set out. The first is whether or not a diligent search for a right holder must precede the permitted or “licensed” use. The second is, when a diligent search is required, whether or not someone other than the person who has conducted the search must validate that search before the use is “licensed”. What is meant by a “diligent search” is relevant to more than one of the solutions. There are other issues which may be common to all the solutions, or more than one of the solutions, to permit use of an orphan, such as whether or not material having its origin outside the UK should be covered and, if not, how to decide what the origin of something is. The BSAC Working Group has considered some of these issues too and its conclusions on these more general issues are set out later in the paper.

The BSAC Working Group has identified three solutions which would permit use of material in which there is an orphan right, and all solutions would ensure that, so long as a person has followed all the rules, they do not infringe the orphan right when undertaking that use. Different uses would require the right solution to be followed, i.e. for any particular use only one solution would apply.

First solution: Copyright exceptions and similar provision

Existing exceptions to copyright and related rights permit use of material without infringing those rights in the situations defined in the exceptions. These provisions apply to material where there are orphan rights and where there are not, and so it is right to

acknowledge that existing exceptions to rights do provide a solution that permits use as defined even when right holders cannot be identified or traced. A diligent search to establish this is not needed when such an exception applies. There are even some specific exceptions to copyright which apply where an author is unknown and essentially it is reasonable to assume that copyright has expired⁴. These provisions are not actually about orphan works/rights because the author might not have been the right holder and certainly will not be so when it is reasonable to assume that copyright has expired because it must be reasonable to assume that he died 70 years ago. But those exceptions may help in some cases.

There are also other situations when it may be possible to use something in which there is an orphan right. For example, a person who has commissioned something to be created in the past may be able to argue that they have an implied licence for at least some uses, although this would not give legal certainty of course. In looking at the law relevant to older audiovisual material, the Working Group has, however, realised that for the rights in some types of material, where it was made before 1945, it may be perfectly legal to use where it has not been possible to find the person able to grant a licence after reasonable enquiry. This is due to the fact that there was no copyright in a film as such prior to 1 June 1957 and copyright in films made before then can still only subsist either as original dramatic works and/or a series of photographs⁵. A film that did not fall within the scope of the requirements to be protected as a dramatic work, such as a film of a sporting event, could only attract copyright as a series of photographs and copyright in those would have expired at or before the end of 1994 if the film was made before 1945. Even if copyright was revived from 1 January 1996 when copyright terms in the EU term Directive were implemented in the UK, the copyright is then subject to the transitional provisions that permit any use, only subject to payment of a royalty to those right holders than can be traced⁶.

Until there is a wider legislative solution to permit use of orphan works/rights, the Working Group therefore urges the Government to produce comprehensive data about legal provisions such as this which would actually permit legal use of at least some material now.

⁴ See sections 57 and 66A of the Copyright, Designs and Patents Act 1988

⁵ See paragraph 7 of Schedule 1 of the Copyright, Designs and Patents Act 1988

⁶ See Regulations 23 and 24 of the Duration of Copyright and Rights in Performances Regulations 1995 (SI 1995/3297), but these only cover the economic rights so it may also be necessary to have regard to moral rights, particularly the author's right to object to derogatory treatment

Regarding exceptions to rights, the Working Group has not exhaustively discussed whether or not, and if so where, the current statutory framework should be amended. Amendments to certain exceptions and possible new exceptions were, of course, proposed by the Gowers Review⁷, but no changes to the law have as yet been made. At least some changes to the current exceptions do, however, seem to be widely accepted. For example, all members of the BSAC Working Group support an amendment to the exceptions to permit libraries and archives to preserve all types of material, including audiovisual material, in their collections. An exception to rights which would permit appropriate preservation of films would, of course, solve some of the most immediate problems which currently prevent this to be done legally where there are orphan rights. Where a preservation exception permits action, such as digitisation, to preserve audiovisual material, there should be no requirement for a diligent search for any right holders before the activity can be undertaken.

It may be that other adjustments to the current exception regime should also be explored and that this would further help solve the problem of orphan rights. Exceptions to rights could, of course, in some cases be modelled on the current exception permitting educational recording off-air of broadcasts where what is permitted under the exception only applies where there is no licensing by right holders. Exceptions of this type might be appropriate for any changes to use permitted for private and non-commercial as well as educational purposes. The Working Group has not attempted to reach agreement on what might be appropriate, but does agree that the debate on possible changes to the exception regime more generally should continue. This debate is, of course, already happening as evidenced by the recent report published by the Hargreaves Review of Intellectual Property, which recommends certain changes to the copyright exception regime⁸.

There is an urgent need to amend exceptions to rights to permit libraries and archives to preserve the audiovisual material in their collections without infringing any rights, orphan and otherwise. The debate about other changes to the exception regime, including exceptions which can be overridden where known and traceable right holders licence the use within the scope of an exception, should be taken forward by the Government.

Second solution: Licensing by collecting societies

⁷ See <http://www.official-documents.gov.uk/document/other/0118404830/0118404830.asp>

⁸ Digital Opportunity: A Review of Intellectual Property and Growth published in May 2001 – see <http://www.ipo.gov.uk/ipreview.htm>

The BSAC Working Group has discussed licensing by collecting societies as a solution to the orphan rights problem and this has included considering the role of “extended collective licensing”. The discussions about extended collective licensing have been greatly facilitated by a paper about Nordic extended collective licensing produced by Hubert Best (see Annex D). The Working Group has noted that the term “extended collective licensing” has sometimes been used to refer to solutions to permit use of orphan works which would not fall within the scope of the Nordic use of this term. For example, the proposed new section 116B for the Copyright, Designs and Patents Act 1988 (the CDPA), which would have been inserted into the CDPA by the Digital Economy Act 2010 if the relevant provision had not been withdrawn, was given the title “extended licensing schemes”⁹. But the power to make Regulations under that new section could apparently have covered licensing for a type of use and for a type of protected material where there was no collective licensing by a collecting society for that type of use for that type of material as a result of mandates given by right holders. Extended collective licensing is being used in this paper, however, to have the same narrow scope as it has in Nordic countries and so for avoidance of doubt is identified as “Nordic-type extended collective licensing”.

Thus, a Nordic-type extended collective licence can only exist where a substantial number of known and traceable right holders have mandated a collecting society to collectively license on their behalf the rights they have in a particular type of protected material for a particular use. Where there is such collective licensing, then the collective licences could be extended to cover the rights of similar right holders in that type of protected material for that use, but this is all that a Nordic-type extended collective licence could permit. A Nordic-type extended collective licence would, then, also cover known and traceable, but non-mandating, right holders, but it would in addition be possible to copy the Nordic model of permitting right holders to opt out of any such extension, by notifying the relevant licensing body. The extended collective licence would then cover the rights of all right holders of the defined type for that particular use, other than those who have specifically opted out. A user seeking a licence from the collecting society would therefore not have to search for any right holders before a licence under a Nordic-type extended collective licence is granted. The collecting society simply represents them all (except those who have opted out) and a user need not ask, or find out, whether any particular right holder has mandated the collecting society, has not mandated the collecting society but could be identified and traced after a diligent search, or cannot be identified or traced after a diligent search. The only thing the user would need to do would be to check for any right holders who have opted out of the Nordic-type

⁹ See clause 43 of the Digital Economy Bill as brought from the Lords at <http://www.publications.parliament.uk/pa/cm200910/cmbills/089/10089.i-iii.html>

extended collective licence and then avoid using the material in which they have rights, unless it is possible to get a licence directly from them.

“Licensing” by collecting societies other than Nordic-type extended collective licensing and/or “licensing” by other bodies, e.g. the British Film Institute (BFI), has been proposed by various interests as a solution to permit use of orphans. Indeed, this seems to have been the essence of what would have been possible had new section 116A of the CDPA been enacted by the Digital Economy Act 2010¹⁰. The collecting society or other body would grant a “licence”¹¹ to cover a right for which the holder cannot be identified or traced and the licence would permit a specific use. It would generally be the case that any such licensing would, unlike Nordic-type extended collective licensing, need to be preceded by a diligent search for the right holder, and that this would probably be done by the person requiring the licence. But there may be situations where the body offering licences can greatly facilitate that search, or even in some cases have sufficient knowledge about right holders from licensing that already exists so that a search is not necessary for a particular right holder. Licensing by a collecting society of orphan rights of a certain type for a specific use could in particular be appropriate where the collecting society is already licensing that specific use on behalf of many right holders of that type. This would be the same sort of situation where Nordic-type extended collective licensing could be considered. Given that Nordic-type extended collective licensing would also cover known but not-mandating right holders, there may, though, be situations where that is not appropriate or compatible with international law because a right holder can only exercise his rights as he chooses by taking action to opt out of the licensing. But compulsory licensing of the orphan rights by a collecting society may be more acceptable. The starting point for licensing by collecting societies as a solution must, though, be approval of this activity by the members of the society, i.e. by identified and traceable right holders. The scope of orphan works/rights licensing is therefore likely to be less than the mandates that operate for identified rights, but this does not mean that it should not be pursued as an option in some cases.

Where there is no exception to rights that can be relied upon, the BSAC Working Group therefore supports licensing by collecting societies as an appropriate solution for some uses of some types of orphan rights. The key criterion for this solution is that there must be some benefit for all stakeholders from the licensing. The interests of missing right holders are likely to be protected with this approach because the collecting society will ensure that a diligent search is done when this is required and then validate the search.

¹⁰ Also in clause 43 of the Digital Economy Bill as brought from the Lords – see footnote 9

¹¹ The word “licence” may not be appropriate as the collecting society does not actually have a mandate from a right holder to grant it, but it is nevertheless used hereafter

The benefits for users are not so obvious because they will face the bureaucracy of obtaining a licence as well as, in some cases at least, the work involved in meeting the requirements for a diligent search. Users may, though, benefit in various ways. The diligent search for right holders would not be necessary at all where there is Nordic-type extended collective licensing. In other cases, the burden of the search for a user might be less than would otherwise have been the case with no collecting society involvement because the collecting society has considerable knowledge about the relevant right holders as a result of its other licensing activities. Another benefit for users might be where there is some value in the reassurance they are given by the independent validation of the diligent search. Users might also benefit from being able to establish what an appropriate royalty is, including where royalties must be paid to known as well as unknown right holders. Before there is licensing of any type by collecting societies to cover orphan rights, it will, though, be necessary to have a process to confirm that there are indeed benefits for all.

The paper at Annex D shows that there are a number of issues that need to be considered very carefully before giving statutory backing to Nordic-type extended collective licensing. These include whether or not an extended collective licence offered by a UK collecting society can ever provide a solution for authors or right holders who are not British nationals, whether there can be an extended collective licence where there is more than one collecting society offering licences for the same type of use of the same type of material with different right holders having mandated different collecting societies, and whether or not an extended collective licence is in any case compatible with the Berne Convention. It may be that some of these issues will be resolved as a result of the content of, and discussions in connection with, the proposed EU Directive on orphan works¹², and it is beyond the BSAC Working Group's ability to provide definitive answers. But the Working Group would like to see the benefits of, as well as the limitations of, Nordic-type extended collective licensing explored further by the Government.

Other licensing by collecting societies will, as indicated above, generally be preceded by a diligent search for a right holder before a licence is granted and the licence being granted is then in respect of that particular right holder. Such licensing is therefore not actually "collective" even if offered by a collecting society. Collective licensing is about granting a licence covering the rights of more than one person, but, if there is a need to do a diligent search before getting a licence for the particular work/right that is orphan and the licence then only covers that work/right, the licence is an individual one. It does not, therefore, seem inherently better for the licensing to be granted by a collecting society

¹² The European Commission published a draft Directive in May 2011 – see http://ec.europa.eu/internal_market/copyright/orphan_works_en.htm

rather than any other body. Indeed, it has been argued by some stakeholders that an archive which has invested considerable amounts in storing and preserving protected material for many years where the right holders are unknown or untraceable is a better guardian for the missing right holders and a better judge of whether or not a licence should be granted than a collecting society. Some people are, naturally, concerned that permitting a collecting society to offer licences means that they can set the level of a licence fee and then benefit from that fee because it is rarely likely to be claimed by a right holder.

Before licensing by a collecting society which is not Nordic-type extended collective licensing is adopted as a solution, issues in addition to those indicated in the paper in Annex D therefore need to be considered to deliver an outcome fair to all. The BSAC Working Group is aware of the recently updated proposals from the British Copyright Council¹³ that seem to particularly favour licensing by collecting societies beyond anything that might come within the scope of a Nordic-type extended collective licence. It may be much more questionable to conclude that a collecting society is, though the only or the best body for offering licences to permit use of an orphan work or in respect of an orphan right where the collecting society does not operate its ordinary collective licences to cover works or rights of that type. But, as indicated above, a collecting society might be able to make an attractive offer to potential licensees about help with a diligent search for right holders so that the resources that a potential licensee must put into such a search are less than they might otherwise have been. This might well be something that would make a collecting society one that should be approved to grant licences covering orphan rights in some situations.

The BSAC Working Group believes that there must, therefore, be appropriate regulation of what bodies can offer “licensing” and what uses of what types of works or rights this applies to. Regulations could set out detailed requirements about how anybody wishing to offer such licensing must operate and be approved. The BCC suggestion of a “certification” process might be the right approach. But in order to ensure that only those collecting societies that are most appropriate to a particular situation, i.e. orphan rights in a particular type of material for a particular use, are able to offer “licences”, it would be desirable for the certification process to be preceded by consultation with any interested party wanting provide their views on whether or not the body should be approved.

The BSAC Working Group recommends that the Government further explores the benefits of “licensing” by collecting societies as a solution to the orphan

¹³ See the BCC proposal on licensing of orphan works at http://www.britishcopyright.org/pdfs/policy/2011_005.pdf

works/rights problem, as well as the limitations, and then develops appropriate regulation so that such “licensing” can be operated to solve the orphan works/rights problem at least some of the time where this is of benefit to all. The situations in which this solution rather than the first solution (i.e. exceptions to rights) or the last solution (i.e. licensing by the Copyright Tribunal) applies will need to be clearly defined.

Annex E identifies collecting societies relevant to the audiovisual area, and, where it has been possible to ascertain this easily, indicates what types of material is licensed for what uses, but it may well be incomplete or inaccurate. In order for people to properly assess where Nordic-type extended collective licensing or other licensing by collecting societies might be appropriate, as a starting point it would be extremely helpful for the Government to collate and make available accurate information about all the collective licensing that exists in the UK. It is often quite hard even having found a collecting society’s website to ascertain exactly what licensing it operates on a collective basis. The Working Group is, though, aware of codes of practice that have been or are being developed by the British Copyright Council and others as acknowledged by the Hargreaves Review¹⁴. Work at EU level, on the governance and transparency of collecting societies is also relevant. If collecting societies are to have a role in licensing orphan works/rights, these issues are clearly crucial too and the Government should pursue them to ensure that they meet the needs of all stakeholders.

Users as well as right holders can, of course, benefit from collective licensing in appropriate situations and so, where this is the norm, then the idea of a statutory provision solving the orphan works/rights problem by collective licensing is, though, attractive. In order to decide how far such a solution should apply and extend beyond collective licences to individual licences too, it will be very important to look at the licensing by collecting societies on behalf of known and traceable right holders. However, for use of audiovisual material, collective licensing by the owners of rights in audiovisual material as such is not the norm except for a very few uses. Collective licensing, that is the Nordic-type of extended collective licensing or otherwise, may, however, provide more of a solution for clearing the rights of unknown or untraceable right holders in underlying content.

Any solution to the orphan works/rights problem that can be delivered by “licensing” by collecting societies is not, of course, a static thing. Known and traceable right holders will from time to time approve more licensing by collecting societies on their behalf, and

¹⁴ See page 36 of the recently published report as indicated in footnote 8

at other times withdraw mandates for collective licensing. Collective licensing will, however, as already acknowledged, in many situations be beneficial to all stakeholders and, where new licensing is developed, this could give rise to new opportunities for this to also solve the orphan works/rights problem, either because the licensing can be developed as Nordic-type extended collective licensing or otherwise. Any statutory approval of licensing by collecting societies as a solution to the orphan rights problem therefore needs to be capable of being adjusted over time.

The Government should collate and keep up-to-date accurate information about collective licensing by known and traceable right holders as part of the need to improve transparency about what collective licences are available both now and in the future. Where there are changes to collective licensing that has been mandated by right holders, this might also require changes to any certification of collecting societies to license uses where there are orphan rights.

Third solution: Licensing by the Copyright Tribunal

Licensing by collecting societies depends on people or a body other than the person wanting to use material in which there are orphan rights doing something. The starting point for Nordic-type extended collective licensing must be a decision by most known and traceable right holders to mandate a collecting society to undertake collective licensing. Licensing by a collecting society other than Nordic-type extended collective licensing is unlikely to be possible where a collecting society is reluctant to pursue that because its members are not happy to approve the society seeking certification linked to certain licensing of works that are orphan. The BSAC Working Group therefore agrees that there must be a solution that can permit use of orphan works/rights where neither of the above solutions on exceptions to rights and licensing by collecting societies will help a potential user. This would be either because there is no use where there is an orphan work/right covered by a collecting society licence or where some uses are covered by such a licence but other uses are not.

The British Copyright Council has proposed that in these cases there should be a mechanism for obtaining a licence from the Copyright Tribunal similar to that already possible in some situations in relation to unknown or untraceable performers¹⁵. BSAC on the other hand has in the past proposed that the solution should be an exception to

¹⁵ See the BCC proposal identified in footnote 13 and section 190 of the Copyright, Designs and Patents Act 1988

rights¹⁶, or, more recently, that the use should be treated as licensed so long as the user has notified the Copyright Tribunal of their intention to use the material after a diligent search has not led to the right holder being identified or traced¹⁷.

There have been concerns raised about the bureaucracy of the Copyright Tribunal process favoured by the BCC, but there have also been concerns raised about the BSAC proposals, especially an exception to rights with no third party oversight of when this is relied upon. It may be, however, that the treated as licensed approach is not that different from the licence from the Copyright Tribunal approach. In the treated as licensed approach, the Copyright Tribunal would still have a record of who is using material in which there are orphan rights, and the Copyright Tribunal may still have a role to settle the licence fee should a right holder turn up. It may be, therefore, that both approaches can be brought together in one solution that has built in flexibility.

It is important to remember that users and uses of material in which there are orphan rights can vary enormously. A solution that seems fair and proportionate for a big company may be very different from one that would be appropriate for a SME or small archive. Users will vary in many ways, including regarding how much it is reasonable to spend on getting a licence bearing in mind the scale of the use and regarding their desire for certainty about a licence fee. Many users will also want to take into account how many rights other than the orphan one need to be cleared and paid for before the audiovisual material can be used. Licensing by the Copyright Tribunal can therefore have options built in so that it can work for different users and/or different types of use in a flexible way. The starting point in all cases must be that anyone wanting a Copyright Tribunal licence must do a diligent search to try and identify and trace the relevant right holder. If they have done a diligent search but have not been able to identify or trace the right holder, then the person wishing to use the material must inform the Copyright Tribunal so that their desire for a licence can be made public by the Tribunal. Where a user then wants the certainty of knowing that their diligent search has met the required standard and how much they should pay for a licence, they then request the Tribunal to decide that. Where a user does not need this certainty or feels that the cost of the Tribunal process is unjustified, then they can take advantage of a “licence” after notifying the Tribunal and agreeing to pay a royalty if and when the right holder turns up, with the Tribunal then only deciding on what that royalty should be if a right holder turns up and there is no agreement between the user and right holder about payment. In both cases,

¹⁶ See briefing paper at <http://www.bsac.uk.com/published-reports.html> - Copyright and orphan works: a paper prepared for the Gowers Review 2006

¹⁷ See response to 2008 consultation at <http://www.bsac.uk.com/published-reports.html> - Implementing the Gowers Review orphan works

though, it would be necessary to ensure that the statutory provision makes use as notified something that does not infringe copyright, provided all the relevant rules have been followed, including a search to the required standard of diligence.

Any solution must also protect the interests of any right holder who may turn up. Ensuring that all uses are therefore made public in that they must be notified to the Copyright Tribunal, which in turn must keep a public register of notifications, will mean that right holders concerned about inappropriate use of their protected material under this solution are easily able to check what is happening. Right holders who find that they have been listed as unknown or untraceable when this was wrong because they should have been easy to trace if a diligent search had been done properly will then be able to seek redress against a user. The user will in fact be infringing rights if a diligent search was not done to the required standard. Right holders who were impossible to trace but who do at some point in the future turn up will also be able to seek a royalty for use because they will be able to obtain information about the use and user.

The details of this solution may need to be developed further, particularly in the light of consultation with stakeholders. But it will be important to ensure that flexibilities for all types of user and use as would be delivered by the above are incorporated. There are two useful details that the BSAC Working Group does think are worth including though. The first would be to permit bodies other than the Copyright Tribunal to in effect manage the records of who is using what orphan works/rights and how. For example, where audiovisual material is being used, it may be that the BFI would be a better place for storing and giving access to these records. The BFI is an extremely important source of information about rights in audiovisual material and so is likely to be consulted by anyone doing a diligent search for a right holder in any case. Making sure that the BFI records then work with notifications to the Copyright Tribunal may be easier if those notifications have been made to the BFI because this has been appropriately authorised by the Copyright Tribunal. If the BFI has been authorised to hold the records of notifications to the Copyright Tribunal for certain types of material, it would, of course, be necessary for the Copyright Tribunal website to direct people to these.

The second detail is a mechanism that would provide a safeguard where there appeared to be any abuse of the flexibility to defer a decision on the royalty to be paid. As already indicated, a person who decides to defer the Copyright Tribunal decision about the royalty will also have decided for themselves whether or not they have done their search to the required standard of diligence. If they have not done so, they will actually be infringing copyright if they go ahead and use the material in which there is an orphan right. A great deal of protection against abuse is, of course, provided by the fact that

there must have been a notification of the intention to use something and that will have been made available for all to see. It may in addition, though, be appropriate to give the Secretary of State the power to refer any case to the Copyright Tribunal soon after a notification where the user has decided to defer the Copyright Tribunal decision. That power could then be used where possible abuse by a choice to defer the Copyright Tribunal decision needs to be investigated.

It will also be important to ensure that this solution works with, but does not overlap with, any licensing by collecting societies so that everyone knows which solution applies when. It may be, of course, that for a particular orphan work certain uses will require a collecting society licence and other uses will require a Copyright Tribunal licence. A person who is entitled to a Copyright Tribunal licence for a particular use of something may therefore still need to approach a collecting society for another use of the same thing.

The BSAC Working Group recommends that, for uses not covered by exceptions to rights or licensing by a collecting society, the Government develops licensing by the Copyright Tribunal based on proposals that have been made by both the British Copyright Council and British Screen Advisory Council so that a user has flexibility as to whether or not to defer the Copyright Tribunal decision on the royalty due until a right holder turns up, but with the safeguard that the Secretary of State can refer the matter to be decided by the Tribunal earlier when appropriate. Users must in all cases, though, notify the Copyright Tribunal of their intended use, but records of orphan rights and uses could be held by organisations like the BFI.

Practicality of a three part approach

Some people may be concerned that a three part approach, i.e. three different solutions, is too complicated. However, as already indicated above, the proposal is that for any particular use of any particular material in which there is an orphan right, only one of the solutions should apply. For some uses an exception to rights might apply. If no exception applies, there might be a licence from a collecting society. If there is no collecting society scheme certified for the relevant use, then a user can take advantage of a Copyright Tribunal licence. But if that user wants to use the material a different way, then they can consider whether an exception to rights applies for that use, and, if not, they must consider whether there is a licence possible under a certified collecting society scheme. Only if neither of these applies, can they benefit from a Copyright Tribunal licence for this further use.

Although this may sound complex, it is actually no more complex than the situation that applies to rights that are not orphan. Any rights in the audiovisual material that are not orphan must generally be cleared in the normal way, unless an exception to rights applies for those too for the desired use. For some uses where there are non-orphan rights, the rights owners will have mandated a collecting society and so a collecting society licence will be needed. For other uses and/or other rights, it will be necessary to obtain an individual licence directly from the rights owners. Anyone wishing to use any audiovisual material, therefore, has to consider how to clear the rights in a variety of different ways depending on the particular rights and nature of the use or uses. A user of audiovisual material may, for example, already be approaching various collecting societies to obtain licences to cover known and traceable right holders.

Some people have suggested that a possible solution to the orphan rights problem might involve a single, specially set up body in order to get permission for all uses. This could actually make the situation more complicated than the suggested three part solution. The suggested three part solution in many respects fits well with the different ways rights must be cleared, or use is free of infringement, where there are known and traceable right holders. A special body just dealing with orphan rights would be an additional body users would have to deal with in all cases, whereas with the suggested three part solution users would sometimes only need to approach the collecting societies they are already dealing with for known and traceable right holders. The Working Group therefore believes that the three part approach would work in a commercial and business environment to unlock the problem of orphan works and rights, fitting in well with how the rights of known and traceable right holders must be dealt with. It builds on existing structures rather than tries to replace them.

Other issues

1. Diligent search

Where a diligent search is required before use of audiovisual material in which there are orphan rights, this should be conducted to the standard identified in the sector specific guidelines on search criteria for orphan works agreed at EU level¹⁸. The guidelines developed by the audiovisual sector working group are particularly relevant. However other guidelines may be relevant too. The Working Group has looked at audiovisual

¹⁸ Published as part of the EU Digital Libraries Initiative at http://ec.europa.eu/information_society/activities/digital_libraries/other_groups/hleg/meetings/index_en.htm

material in particular, but, as already indicated, there is very likely to be a significant amount of underlying content to consider as well as the rights in the film as such. There may, therefore, be one type of layering of rights where rights in the overall material are owned by someone other than the person or people who own rights in the underlying content. But there can be another sort of layering. Say, for example, a film includes a literary work. That literary work is likely to be a copyright work and the law provides rules on both who is the first owner of copyright and the rights that arise as a result of copyright. But it is not essential for all of those rights to remain with the first owner, or always be transferred together to a single other person. Thus, for example, the right to make the literary work available on demand for commercial purposes might be held by one person and the right to make the literary work available on demand for non-commercial purposes may be held by another person.

Where audiovisual material includes underlying content, the producer of the film must, of course, obtain clearance from the relevant right holders to include that content in the film in the first place. The terms of this clearance may in some cases mean that the producer then owns the relevant rights in that content, at least to cover any use when the film is used. In other cases the producer may only have a licence. But those permissions may be time limited so that rights in the underlying content prevent its use without further clearance after a certain time. Finding the producer, or his successor in title, is, therefore, likely to be an important first stage of any diligent search, but it may be that as a result of what has been discovered during that search, it will then be necessary to conduct a diligent search for one or more holder of the relevant rights in the underlying content who is different from the holder of the rights in the film as such.

An orphan works/rights problem will therefore exist for audiovisual material where the right holder cannot be identified or traced and is either:

- (1) the person who owns the rights in the film as such relevant to the desired use, where the original owner of the rights was probably the producer but may now be one or more successors in title with the possibility that different rights have been passed to different people; and/or
- (2) the owner of the relevant rights in the underlying content, which may be the original owner of those rights, or one or more successors in title, again with the possibility that different rights have been passed to different people, and in particular with the possibility that the rights to use the content in the audiovisual material at least in some ways may have been transferred to the producer, even

though the rights to use the content separately from the audiovisual material remained with the original rights owner.

In the case of rights in the underlying content, various types of arrangement on rights ownership and licensing could have applied and it may be necessary to consider what these might have been in order to decide how best to conduct a diligent search where this is required. Possible situations that might apply to the rights in underlying content include the following:

- (a) all the necessary rights for any use of the underlying content as included in the film were originally assigned to the producer or his successor in title so no right holder other than the producer or his successors in title needs to be found;
- (b) the producer or his successor in title had an assignment (or licence) of rights in the underlying content as included in the film but only of the rights relevant to some uses of the film and so (a) above will apply to these uses, i.e. they can be cleared by the producer or his successors in title (but where there is only a licence subject to any terms in the licence). Rights relevant to other uses, such as, perhaps, the right to make available online, therefore remain with the original owner of rights in the underlying content or his successor in title;
- (c) assignments (or licences) applying as in either (a) or (b) above were time limited and have come to an end and so rights have reverted to the original owner of rights in the underlying content or his successors in title for all or some uses of this content as included in the film.

It is really difficult for a person wishing to use some audiovisual material to know who might have owned rights, how these might have been assigned or licensed and so what right holders to search for. The starting point would be to consider who would have been the first owner of the relevant rights in the material. This does not necessarily mean that person is still the owner, but without even knowing who that first person was, it is more difficult to try and find the right person now. This may be far more complicated for some types of material given the various changes to the law, and the fact that older laws are still relevant because, where there are orphan rights, it is likely to be older material. Annex F sets out what is believed to be the relevant law for a film as such, including with a flow chart in Annex G illustrating the main elements of these rules for films made from 1 July 1912 and before 1 June 1957. The BSAC Working Group believes that the Government could greatly facilitate the diligent search process by producing definitive material of this sort for all ages and types of material. For example, as already mentioned

above, from this analysis it is clear that for films made in 1944 or earlier which were not protected as dramatic works, there is no problem in using the film where the right holder in the film cannot be traced or identified and there are no underlying rights to worry about. The film is only protected, if at all, as a collection of photographs in which copyright was revived on 1 January 1996. Any copyright in the photographs is therefore subject to the transitional provisions permitting use without infringing copyright where the name and address of the right holder cannot be ascertained by reasonable enquiry.

2. Registers

Registers of rights are useful to those trying to find a right holder, and, if kept up-to-date, they will reduce the number of orphan works/rights in the future. Future-proofing against new orphans is an important objective. Registration of rights cannot, though, be required for material having its origin in other countries as that would be contrary to the Berne Convention. But arguably it would be possible to require registration of copyright for material having its origin in the UK. It may, though, be undesirable for the UK to act alone to change the law in this respect. Moreover, material of UK origin that is unregistered and so not protected in the UK would still have to be given copyright in other Berne Convention countries. A person using the material in a film in the UK without the need for a copyright licence because there is no copyright protection could not, then, make that film available in other countries without getting a licence from the right holder in those countries who did not need to register there in order to get copyright.

Improving the data on any voluntary registers of rights is, however, worthwhile for audiovisual material in particular where there are so many different rights. This would include trying to ensure that there is more consistency in the collection and aggregation of metadata, that data is updated as necessary to reflect any changes of ownership, and that the owners of different rights in the same material are clearly identified. Where voluntary registration can be helpful to all does, though, need to be considered together with better access to collecting society databases and the possible development of a Digital Copyright Exchange as recommended by the Hargreaves Review¹⁹. There will always be problems in keeping the data up-to-date. For example, ownership may become unrecorded when a rights' owner becomes insolvent. But, even if only the first owner of a right is identified, it still provides a starting point for anyone trying to identify and trace the current right owner. In order to encourage right holders whose rights might otherwise be thought to be orphan to voluntarily register their rights, it is important to ensure that potential licensees are able to easily locate and consult the registers. This is not likely to

¹⁹ See page 37 of the recently published report as indicated in footnote 8

happen if registers are not available online and/or are costly to consult. The BSAC Working Group therefore believes that the Government should encourage the development of easy to use and free to access voluntary and up-to-date registers of rights. However, there can sometimes be problems with people claiming rights which they are not actually entitled to and so the Working Group would also like the Government to explore ways of policing any registers of rights to ensure that they are as accurate as possible.

As well as registers of rights, registers of orphans are useful. These can include the details of any diligent search for rights' owners too. This information would then provide a starting point for anyone else trying to find a right owner in the future. Registers will exist as a result of at least some of the solutions discussed above, because the process that would permit use of the material will result in someone having to keep a record of what is used. Just as users should be able to consult registers of known rights easily and preferably without charge, so should right holders be able to consult any registers of orphans easily and freely so that they can find any use where they do actually have rights even though it was thought to be orphan. Given that right holders may, therefore, emerge, and/or because they may be easier to find in the future, the BSAC Working Group does not, however, think that a register of orphans can be something that new people in the future wishing to use the protected material can rely on rather than consider whether a further diligent search is required.

3. Country of origin

Discussions about orphan works often involve references to doing things, or limiting things in some way, to the country of origin of a work. However, this term is rarely defined in such discussions and so may mean different things to different people. It is a concept used in the Berne Convention in relation to points of attachment, and the EU term Directive in relation to the rules on reciprocity of term. But neither of these use the term for all types of work that can attract copyright. Nor is it clear what it might mean in relation to performers' rights. For Nordic-type extended collective licensing, the licensing is limited in that it can only be extended to national right holders. This is therefore a different test to the country of origin one as in the Berne Convention and the term Directive where the country of first publication may determine the country of origin.

Country of origin is also a difficult concept for something like an audiovisual work. The audiovisual work itself may be a co-production and so there may be right holders in more than one country. The underlying content in the film may have its origin in a number of different countries. And some of this underlying content may involve more than one

right holder owning different rights or owning rights jointly. Some of the underlying content may in addition itself comprise more than one protected work. For example, a literary work may have been written in one language with the author being a national of one country, but it may be a translation used in the film where the author is a national of another country, and so use of the translation is not possible without clearing the rights in both that and the version in the original language. Another complication is that there has been very little harmonisation at EU level on the rules on subsistence of copyright, authorship and first ownership so that different rules can apply in different countries. As has already been discussed above, these rules have not even been static in the UK so that there can be different results for material created at different times. Laws also vary on what contractual arrangements relating to rights are permitted. For example, in UK law the reversionary interest for an author's estate will often still apply to old material. Even if, therefore, it were decided that the UK is the country of origin and the relevant right holder cannot be identified or traced here, it may be that the right holder was and is different in another Member State and could have been identified and traced there.

The BSAC Working Group has been looking at possible solutions with the UK very much in mind. It may be that these should, or must, be limited to only apply to material where the author is a British national and/or where the material has its origin in the UK, but, given the difficulties indicated above, such ideas are not without problems. The idea of a solution that would be interoperable with those in other parts of the EU is nevertheless attractive. The recently published draft EU Directive does seem to require a diligent search in only the country of origin in order for a work to be treated as orphan throughout the EU, but it is not currently clear how those proposing this have taken into account all the issues indicated above, and so how this can actually work and whether this can give a fair result. It could be especially problematical where audiovisual material can include so many different pieces of content with different right holders and different types of contractual arrangements about rights. Where there is licensing by collecting societies of orphan rights, it may, though, be possible for this to operate across the EU with the support of suitable bilateral agreements. The BSAC Working Group recommends that the Government should look very carefully at the problems here so that it is well placed to work very closely with the EU Commission and other Member States to try and resolve how solutions in different countries can fairly be interoperable and what things like "country of origin" mean where solutions depend on this.

4. Types of permitted use

Some proposals to solve the orphan works problem, including the recently published draft EU Directive, are aimed at only some uses and/or some users. Limiting what can be

done to only some users or uses, such as, for example, permitting only uses that are “non-commercial”, is problematical. As well as uncertainty about the scope of what is permitted, it could also lead to unfair competition where some organisations are able to do things and other organisations are not. Any limitation to only certain uses that might make sense at the moment also risks being a limitation which at some point in the future no longer makes sense. The Working Group therefore believes that the only way to deliver future-proofing and to ensure that there is no anti-competitive effect is to have no restrictions on which uses by which users are permitted where there is an orphan right. Of course, as already explained, a different part of the three-part solution might apply to different uses, but all uses should be possible so long as a person has followed all the relevant rules for the particular use desired.

5. Types of material covered

The BSAC Working Group has looked at use of audiovisual material only, but covering the rights in any underlying content. A limitation to only audiovisual material that has been published has been considered. “Publication” is defined in UK copyright law and the Berne Convention so that material that has been communicated to the public, including by being broadcast, has not been “published”. There will therefore be some old films in audiovisual archives which have never been “published”²⁰. That problem might be solved, though, by using the concept of material which has been made available to the public. This would then include material that has only been broadcast. There can certainly be sensitivities about using material that has never been made available to the public, such as where a person might have a right to privacy. But there is much material in audiovisual archives that has probably never been made available to the public and/or where it is difficult to be sure whether or not it has, but where it may be quite reasonable to do certain things with it. A provision which excludes material that has not been made available to the public could, therefore, seriously damage the effectiveness of the solutions to the orphan rights problem. The solutions to the orphan rights problem do not, however, do more than solve the problem of the missing owners of copyright and related rights. Any person wishing to use material in which there is one or more orphan right will still need to consider very carefully whether or not the use would be contrary to a right to privacy, be defamatory and so on. It will therefore be very important for the Government to make available, not only guidance about the orphan rights solutions when legislation is in place, but also what other factors a person should consider as well as copyright before undertaking any use restricted by those rights.

²⁰ Other films in archives may only have been exhibited in the cinema but the distribution of film prints to cinemas for showing to the public may amount to “publication”.

6. Photographs

The BSAC Working Group has been looking at the problem of orphan works and rights in the context of audiovisual material. Photographs are, of course, often used in a film and use of that film could be impossible if the rights in the photograph become orphan. The rights in an embedded photograph may, of course, not actually reside with the original photographer. For example, they may have been assigned to the producer of the film for use in the film. But it will, nevertheless generally be necessary to consider whether there are rights in any photographs and who might own them before a film can be used. It is also important to remember that films did not attract copyright as such in the UK before 1 June 1957 and that remains the legal status of pre-1957 films. But films made before 1 June 1957 could be protected by copyright in each frame of the film, i.e. copyright in each individual photograph.

The Working Group is aware of the concerns that have been raised by photographers about a statutory provision that permits use of photographs in which the rights are orphan. The BCC proposal, for example, does not apply to photographs without major modifications which would, it seems, in practice mean that there can be very few uses of photographs in which the rights are orphan. The Working Group is sympathetic to the concerns of photographers where metadata may have been removed from recent photographs so that they too easily appear to be orphan. Some of the proposals that have been made do, though, seem to be based on a belief that it will be possible to find an equivalent photograph in which rights are known and traceable so that an alternative photograph can be used rather than any photograph in which rights appear to be orphan. But, as indicated above, the Working Group has been concentrating on how old audiovisual material in archives might be used. Excluding photographs from any solutions could seriously undermine what the solutions discussed above would otherwise achieve. Much audiovisual material could remain locked in archives unable to be used. This is for two reasons. The first is that the old photographs are embedded in the film. It may be technically possible sometimes to strip them out but they are often irreplaceable. They depict something that it is not possible for anyone to photograph now. The second is because the actual rights in the film may be rights in the series of photographs which make up the film. Something that does not apply to photographs will not, therefore, apply to old films.

The Working Group cannot, therefore, at the moment accept that photographs should be excluded from the solutions it has proposed above. BSAC has, though, offered to discuss these issues further with photographers' representatives. But it has been decided that any discussions should not delay this report in view of the Government's current interest in

taking work forward in the light of the recent recommendation on orphan works in the Hargreaves Review²¹.

7. Mass digitisation

Mass digitisation is an issue that is probably raised more in the context of old text-based material held by libraries and archives. But it cannot be ruled out as something that audiovisual archives might want to do. Those wanting to undertake mass digitisation seek a simple solution so that the relevant rights are not infringed, i.e. without having to undertake a diligent search to the normal standards as discussed above. However, this is not strictly speaking a solution that is directed at the problem of orphan works/rights alone as, without a diligent search to the right standard, it will not be known whether or not all the rights are indeed orphan ones. Actually, in most cases it is likely that at least some of the rights are not orphan in that they belong to known and traceable right holders.

Where digitisation is being undertaken in order to preserve the material in an archive, then an exception to rights to permit this for all types of material is, as already discussed above, the right approach. This will ensure that the rights of both known and traceable rights holders as well as orphan rights are not infringed of course. Those talking about mass digitisation are, though, not always doing so in the context of digitisation being undertaken for the purposes of preservation only. They often also want a solution to permit at least some mass uses of digitised material. An exception that would permit digitisation for preservation purposes would clearly not extend to permit subsequent use of that material. Use would have to be within the scope of another exception to rights where that is appropriate or be covered by licensing. Where it is desired to use large amounts of digitised material there are, of course, likely to be known and traceable right owners as well as orphan ones. Nordic-type extended collective licensing may, therefore, provide a useful solution for uses that can be agreed collectively with a large number of known and traceable right owners. But there cannot be Nordic-type extended collective licensing unless a sufficiently high proportion of known right holders have mandated a collecting society to license the use of digitised material collectively on their behalf. Those wishing an easy solution to facilitate such uses therefore need to work with known right holders and/or collecting societies to encourage those mandates to be granted. As well as examining how to deliver a statutory provision to permit Nordic-type extended collective licensing, the BSAC Working Group therefore recommends that the Government should facilitate discussions between collecting societies and others about collective licensing for certain uses of material held in archives where large amounts

²¹ See footnote 8

have been, or are to be, digitised. But it will be important to have regard in any such discussions to the need to avoid anti-competitive practice against commercial users who may wish to digitise archive material and publish this online.

8. Legal base

No changes to the law can be made unless they are compatible with the UK's obligations under EU and international law. Some references are made to this above. At international level, the 3-step test as in, for example, the Berne Convention and the WIPO Copyright Treaty applies to limitations and exceptions to copyright in most cases, but how much this might limit what changes to the law might be possible is not clear. A clearer problem is the very limited scope for exceptions and limitations to rights permitted by the 2001 EU information society Directive. Article 5 sets out a list of permitted exceptions and limitations to rights, and does not permit such provision generally for orphan works/rights. However, Recital 18 and Article 9 (where Recital 60 is also relevant) both provide some legal support for making provision to permit use of orphan works even where this is outside the scope of Article 5. The Working Group understands that the provisions in the Digital Economy Bill referred to above²² were thought by the then Government to be compatible with the 2001 Directive on the basis of what is permitted by Recital 18 and/or Article 9. If that is true, then what is proposed above can probably also be justified as compatible with that Directive. Presumably the then Government also thought that the Digital Economy Bill proposals were compatible with the relevant international conventions. The Government will no doubt now also have to consider the recently published draft EU Directive which appears to have the effect of changing the scope of the 2001 Directive. The Working Group would, though, be concerned if this resulted in only some uses by some users being possible in statutory solutions to the problem of orphan rights.

²² See footnotes 9 and 10

Annex A

Case study of an audiovisual work

The table below, provided by the BBC, shows the number of underlying contributor rights typically included in a single episode of archive Doctor Who. When the programme was originally made, the Production Manager would have had the responsibility for ensuring all the underlying rights included in the episode were cleared for use on the BBC's public services. (Typical agreements would have granted permission, subject to further contractual payments, for unlimited transmissions and five years for Public Service uses). However, if the BBC now wishes to repeat the episode or make the programme available on a new platform, they may need to request permission to do so from the underlying rights holders or arrange a fee. In some instances this is relatively straight forward as the BBC can negotiate with a collective body with a mandate to act on behalf of all its members. However in other cases the BBC may need to seek permission for re-use from individual contributors.

Average number of contributions per episode

<i>Type of contribution</i>	<i>Average no of contributions per episode</i>
Music tracks ⁺	2
Orchestras ⁺	1
Specially commissioned music ⁺	16
Walk – ons ⁺	14
Actors ⁺	15
Supporting or Additional Dialogue artists ⁺	12
Directors ⁺	1
Script*	1- 2
Character format*	2+
Show runner*	1
Literary extracts*	1
Photographic stills*	23

⁺ Collective body with mandate

*Individual contract binding to third party group required (not retrospective)

Annex B

Examples of use of audiovisual works with one or more orphan rights

Actuality films (i.e. non-fiction films such as newsreels) – much interest in using clips from old films (i.e. transformative use) in new broadcasts, DVDs etc, as well as making available whole films by BFI. Old actuality films rarely have music so main rights' issue is successors in title to production company.

Example:

- Secrets of Nature – series of nature study films from 1920s believed to have orphan rights. Of interest to BFI making DVD of whole films commercially available and also of interest to others to use, including transformative use where only clips are used. [See <http://ftvdb.bfi.org.uk/sift/title/342257> for BFI data]

British feature films – interest in a particular film might arise as a result of the death of, say, an actor, and interest would then largely be in broadcasting, making DVDs available etc of whole film.

Examples:

- The Girl on the Boat – stars Norman Wisdom and film became popular again following his death. Successors to producer, Knightsbridge Films, untraceable and other possible right holders unknown or thought to have died more than 70 years ago. Film of interest to broadcasters and for commercial DVD sales etc. [See <http://ftvdb.bfi.org.uk/sift/title/34720> for BFI data]
- There was a Crooked Man – another Norman Wisdom film with similar rights issues and interest to The Girl in the Boat as above. [See <http://ftvdb.bfi.org.uk/sift/title/53864>]
- Sherlock Holmes films produced in 1920s – rights have been claimed by Stoll Moss, although they were probably only the distributor and not the rights owner so film may have orphan rights. Also George Ridgewell, the director of the Sherlock Holmes films, died in 1935, i.e. more than 70 years ago. Thought to be much commercial potential in films, although Stoll Moss has not to date apparently done anything with the films. [See <http://ftvdb.bfi.org.uk/sift/series/3060> for BFI data]

Amateur films – use will often be impossible due to privacy concerns and/or contractual arrangements with those who have donated the films and/or are the subject of the films. Regional archives probably have more amateur films than BFI. Material held by the BFI

from the 1930s and before often includes no records of ownership though. Educational use such as viewing via BFI Mediatheque (see http://www.bfi.org.uk/whatson/bfi_around_the_uk/mediatheques) where there are no known privacy issues etc can be of interest.

Example:

- Film of shooting of tigers – dates from time of British Empire. Successors to those shown in the films have refused permission for use, although these people are not necessarily rights’ owners.

Advertising material – possible interest in educational use, such as BFI Mediatheque (see above). Rarely a problem tracing the owner of rights in an advertised brand (who may or may not own the rights in the film) and brand owner often refuses permission for re-use so very little actual use possible.

Example:

- Pretty Polly stockings advert – use in BFI Mediatheque. Director untraceable after diligent search and brand owner uninterested.

Television programmes – underlying rights will generally only have been cleared for the original broadcast and use for a time thereafter. Additional uses therefore require the rights in the underlying content to be cleared again, and the owner of these may not always be traceable.

Examples:

- BBC archives – as can be seen from the example in Annex A, there may be many rights in underlying content that need to be cleared before programmes in the archives can be used, including by making it available on the internet. There may be orphan rights, but the cost of trying to clear the rights, which would be necessary to determine exactly how many rights are orphan, is considerable.
- Mobile phone clips – BBC Worldwide has been prevented from making clips of programmes available on mobile phones because of the difficulties in clearing the rights in all the underlying works included in the clips.

Examples of rights clearance issues for underlying content to be used in new audiovisual productions

A key problem for the BBC is clearing all the underlying rights for works that might be included in a programme for public service broadcasting. In particular the administrative

cost of identifying and/or contacting programme contributors can sometimes be prohibitively expensive and represent a deadweight loss that benefits neither producers nor consumers.

Examples:

- James Boswell's journal portraying life in London from 1762-3 discovered at Malahide Castle in the 1920s. This is likely to be in copyright. BBC4 adaptation is being considered, but have had to deal extensively with Yale who bought the papers. Attempts have been made to correspond with his heirs without getting any informed reply and the BBC has consulted the archives of the Bodleian in Oxford, but even their extensive collection of the family's documents does not appear to contain a title document.
- Marilyn Monroe. Photos were locked up in a legal dispute and the BBC ended up writing to a judge in New York in the nineteen nineties to clear use of the one where her skirt is being blown upwards over a grating.

Annex C

Benefits of and problems with different solutions to permit use of material with orphan rights

Notes:

1. "Right holder" refers to a person who has rights in audiovisual material, including any underlying content included in the material.
2. "User" refers to a person wishing to use material where there are rights owned by a right holder who cannot be identified or traced after a diligent search. In some cases a user may, of course, be the owner of other rights in the material.
3. The solutions identified are only applicable to the rights of a right holder who cannot be identified or traced after a diligent search and so any other rights in the material to be used must be cleared in the normal way. If such clearance is not forthcoming, then the material cannot generally be used.
4. The pros and cons of the solutions do not explore the implications of use of the material with modification to its content, i.e. derivative use, but derivative use could probably be permitted as part of most, if not all, of the solutions.
5. In each case use can continue after a right holder turns up under an agreement with a right holder, but even without agreement, for most, if not all, of the solutions, use could be permitted in some cases (such as where there has been derivative use) even when the right holder has not agreed, but this has not been taken into account in the pros and cons as there would probably be no difference between the solutions in the effect of delivering this.
6. Some things, such as a requirement to keep a register of orphans used, can be added to any solution so the following analysis is only indicative of the likely benefits of and problems with different solutions with some of these being possible to alter or reduce by appropriate adaptation.

	Benefits	Problems	Legislative ease	"Registers" and future proofing
Adjusting criminal offences so that orphan use is outside their scope	No upfront bureaucracy for users so easy for users	Could be seen as condoning unlawful behaviour as use would still be an infringement	Would need to consider carefully whether any change is TRIPS compliant, but otherwise could be delivered just for UK without any problems as does not actually alter that use of orphans is an infringement. Likely to be difficult to reduce scope of criminal offences without leading to abuse by copyright pirates trying to hide behind the provision.	Public or private "register" of orphans is not essential, but could be required. No particular encouragement for voluntary registration by known right holders unless there is real chance that copyright pirates might try and claim protection from criminal offences for illegal use of unregistered material.
	Payment by user for use deferred if necessary at all	No transparency of what rights are orphan and which users are relying on provision		
	Leaves right holder turning up able to negotiate what a reasonable licence fee is rather than have this set by someone else	No independent validation of whether user's diligent search complies with the statutory requirements or standard set/checked by insurer is inappropriate		
	Could increase attractiveness of insurance as insurance can cover most other risks of use	Use would still be an infringement, so risk averse or uninsured users (and cost of insurance for public bodies dependent on contributions from taxpayer might be a problem) would still be reluctant to use orphans as additional damages could be awarded for the infringing use		
	Insurer might set standard for diligent search and would have an interest in ensuring that it has been met which could be helpful	No money in a kitty for right holder to claim so right holder turning up has to take action to get royalty, including possibly suing for infringement		
	If there is no risk of a criminal offence, could reduce situations in which lawyers advise against investment	Could increase use of "orphans" without required diligent search by users who are less risk adverse, especially if right holder thought to be unable to afford an infringement action		
		User does not know in advance how much they might have to pay if a right holder turns up		
		Disputes about use would ultimately have to be dealt with in the courts as the use is still an infringement		

	Benefits	Problems	Legislative ease	"Registers" and future proofing
Adjusting civil remedies to constrain remedies against orphan use	No upfront bureaucracy for users so easy for users	No transparency of what rights are orphan and which users are relying on provision	Could be delivered just for UK without any problems as does not actually alter that use of orphans is an infringement. Might be difficult to reduce scope of additional damages without leading to abuse by copyright pirates trying to hide behind the provision.	Public or private "register" of orphans is not essential but could be required. No particular encouragement for voluntary registration by known right holders unless there is real chance that copyright pirates might try and claim no liability for additional damages for illegal use of unregistered material.
	Payment by user for use deferred if necessary at all	No independent validation of whether user's diligent search complies with the statutory requirements		
	Amount to be paid probably limited only to reasonable licence fee so user knows likely level of payment	Use would still be an infringement so cost of dealing with an action for infringement could still be significant even if damages that can be awarded to right holder are limited to a licence fee		
	Leaves right holder turning up able to negotiate what a reasonable licence fee is rather than have this set by someone else	No money in a kitty for right holder to claim so right holder turning up has to take action to get royalty, including possibly suing for infringement		
	Especially if coupled with adjustment of criminal sanctions, could leave user only with only very limited liability to pay a licence fee to the user in those few cases where a right holder turns up and so insurance may not be needed	Could increase use of "orphans" without required diligent search by users who are less risk adverse, especially if right holder thought to be unable to afford an infringement action		
		User does not have certainty in advance about how much they might have to pay if a right holder turns up		
		Disputes about use would ultimately have to be dealt with in the courts as the use is still an infringement		
		Solution may favour only those who can afford lots of lawyers to advise them		

	Benefits	Problems	Legislative ease	"Registers" and future proofing
Licence from a governmental body for orphan use	User has assurance that use is legal and so user has certainty that cannot be sued for infringement	Could be very bureaucratic for user because, as well as conducting a diligent search, user must go through process of applying for licence, but the process could be made less bureaucratic than, say, appears to be the case in Canada	TRIPS and Berne compliance supported by existence of this solution in Canada. Would be a limitation on rights and so not permitted by Article 5 of the 2001 EU copyright Directive unless can be argued as about management of rights permitted by recital 18 or delivering other legal provisions permitted by Article 9, or Directive is amended.	Official body will have "register" of orphans and users. May be little incentive for right holders to establish voluntary register as that may be deemed unnecessary cost to them when they can rely on user doing a proper diligent search as this is independently verified.
	There is independent validation of diligent search before a licence for use is given	User has to pay for licence in advance even if a right holder never turns up to claim royalty		
	User knows in advance what the cost of use will be	Right holder turning up has no say in how much they get as royalty		
	Right holder turning up has a guaranteed royalty without having to negotiate this	Cost for public purse of official body unless all costs retrieved from charges to users		
	Transparency of orphan rights and which users are relying on provision	User likely to have to pay towards cost of, or full cost of, validation by official body as well as cost of licence and diligent search.		
	User does not face disputes about use after the official licence has been given	Right holder turning up may have to seek judicial review of official body that has failed to meet statutory requirements of permitted licensing, but may have no remedy against user that was licensed improperly by official body		

	Benefits	Problems	Legislative ease	"Registers" and future proofing
Orphan use treated as licensed/covered by statutory licence, with public "register" of use	Little upfront bureaucracy for users so easy for users	User would not have any independent validation of whether the diligent search they had conducted complied with the statutory requirements	Not a solution adopted elsewhere, although idea of "licensing" more in tune with approaches elsewhere so less difficulty with Berne/TRIPS compliance than an exception. Would be limitation on rights and so not permitted by Article 5 of the 2001 EU copyright Directive unless can be argued as about management of rights permitted by recital 18 or delivering other legal provisions permitted by Article 9, or Directive amended.	"Register" of orphans and users would exist. Right holders may have more incentive to establish voluntary register in order to avoid misuse of provision as there is no independent verification of diligent search and use of things believed to be orphans is transparent.
	Payment by user for use deferred if necessary at all and amount to be paid could be limited only to reasonable licence fee	Some cost to user of "registering" orphan rights and use and also cost for person who holds register if this is not user or costs not recovered from user		
	Leaves right holder turning up able to negotiate what a reasonable licence fee is rather than have this set by someone else	User does not know in advance how much they might have to pay if a right holder turns up		
	Transparency of orphan rights and which users are relying on provision	Open to more abuse than where there is external validation although problems of this reduced as deliberate abuse unlikely with public "register"		
	Disputes about size of royalty only most likely and so can be dealt with by Copyright Tribunal rather than the courts	Right holder turning up might have problems securing payment as no royalty waiting to be claimed in third party pot		
	Right holders can still sue for infringement if they think that diligent search wasn't done properly			

	Benefits	Problems	Legislative ease	"Registers" and future proofing
Orphan use covered by exception to rights	No upfront bureaucracy for users so easy for users	No transparency of what rights are orphan and which users are relying on provision	Not a model that has been adopted elsewhere and so Berne/TRIPS compliance may be questioned. Not an exception permitted by Article 5 of the 2001 EU copyright Directive so not possible without amendment of Directive unless can rely on Article 9 of that Directive.	Public or private "register" of orphans is not essential but could be required. No particular encouragement for voluntary registration by known right holders unless they think it important to deter reliance on exception when this is not justified, but they will not easily be able to see where there has been such reliance.
	Payment by user for use deferred if necessary at all	No independent validation of whether user's diligent search complies with the statutory requirements, but user could have mechanism for seeking validation voluntarily		
	Leaves right holder turning up able to negotiate what a reasonable licence fee is rather than have this set by someone else	No money in a kitty for right holder to claim so right holder turning up has to take action to get royalty, and this might include suing for infringement as may not be transparent that use falls within scope of exception		
	User does not even need insurance because use is not an infringement	Could increase use of "orphans" without required diligent search or otherwise beyond scope of what exception permits by users who are less risk adverse, especially if right holder thought to be unable to afford an infringement action, even though these actions would be illegal		
	Royalty for use for right holder turning up could be settled if necessary by Copyright Tribunal rather than courts as use is not an infringement	User does not know in advance how much they might have to pay if a right holder turns up		
	Right holders can still sue for infringement if they think that diligent search wasn't done properly or use was otherwise outside scope of exception			

	Benefits	Problems	Legislative ease	"Registers" and future proofing
Extended collective licensing covers orphan use	User has assurance that use is legal and so user cannot be sued for infringement	Only covers use for type of material and type of uses where majority of right holders have mandated a collecting society	Would be limitation on rights and so not permitted by Article 5 of the 2001 EU copyright Directive but would be reasonable to argue that it is about management of rights permitted by recital 18 of that Directive, a recital provided specifically for Nordic extended collective licensing. Questions of Berne Convention compliance might be raised, especially if applied to foreign works, as not only a compulsory licence but also right holder wishing to opt out to exercise his rights is in effect subject to a formality in order to enjoy rights.	Public or private "register" of orphans is not essential but could be required, although would then raise question of who does a diligent search and when to identify orphans. Right holders may be more likely to voluntarily "register" rights with collecting society in order to get royalties which have been collected.
	User knows in advance what the cost of use will be	Probably won't work if there is more than one collecting society licensing the same use of the same type of material		
	Right holder turning up has a guaranteed royalty without having to negotiate this	Works in Nordic countries where coverage is small and limited to national right holders, but could be viewed as less legitimate in larger countries		
	User does not face disputes about use after the collecting society licence has been given	If also limited to use in single country only, may be unworkable for audiovisual material where single country productions are rarely economically viable		
	User does not need to conduct diligent search as licence covers orphans as well as known mandating right holders and non-mandating right holders unless they have specifically opted out	EU competition issues may mean any EU collecting society must be able to grant an extended collective licence for any EU-origin work so a right holder must opt out of all EU collecting societies offering extended licensing		
	Collecting society licence will permit most appropriate use, including commercial use, of orphans as will be in line with licensing by mandating right holders			
	Incentive for right holders to register their interests with collecting society to collect royalties, or specifically opt out, and so reduces number of orphans			

	Benefits	Problems	Legislative ease	"Registers" and future proofing
Licence from collecting society, other than extended collective licensing, covers orphan use	User has assurance that use is legal and so user cannot be sued for infringement	Collecting society as representative of right holders not necessarily impartial in deciding on level of diligent search, royalties etc	Not a solution adopted elsewhere yet, although licensing by collecting society in tune with approaches, such as extended collective licensing, elsewhere so likely to be accepted as Berne/TRIPS compliant. Would be limitation on rights and so not permitted by Article 5 of the 2001 EU copyright Directive but could be reasonable to argue that it is about management of rights permitted by recital 18 of that Directive.	"Register" of orphans and users can be required. Right holders may be likely to establish voluntary register of known rights in order to avoid misuse of provision because collecting society involvement might encourage and facilitate this.
	There is validation of diligent search before a licence for use is given by a body sensitive to concerns of right holders	Very bureaucratic for user because, as well as conducting a diligent search, user must go through process of applying for licence		
	User knows in advance what the cost of use will be	User has to pay for licence in advance even if a right holder never turns up to claim royalty		
	Right holder turning up has a guaranteed royalty without having to negotiate this	Right holder turning up has no say in how much they get as royalty		
	Transparency of orphan rights and which users are relying on provision so long as collecting society required to keep public register	Cost for collecting society, including cost of establishment if new one created, unless all costs retrieved from charges to users		
	User does not face disputes about use after the collecting society licence has been given	User likely to have to pay towards cost of, or full cost of, validation by collecting society as well as cost of licence and diligent search.		
	Collecting societies have knowledge about right holders and expertise in tracking right holders so right holders are incentivised to register their interests which reduces number of orphans	Right holder turning up may have to take legal action against a collecting society that has failed to meet statutory requirements of permitted licensing, but may have no remedy against user that was licensed improperly by collecting society		
		Non-commercial use of material donated to an archive would not have been expected by the donor (now orphan) to lead to payments to a collecting society		

	Benefits	Problems	Legislative ease	"Registers" and future proofing
Licence from body, other than collecting society or governmental body, covers orphan use, e.g. licence from an archive	User has assurance that use is legal and so user cannot be sued for infringement	Body other than collecting society may be biased against right holders and so not necessarily impartial in deciding on level of diligent search, royalties etc	Not a solution adopted elsewhere, although idea of "licensing" more in tune with approaches elsewhere so less difficulty with Berne/TRIPS compliance than an exception. Would be limitation on rights and so not permitted by Article 5 of the 2001 EU copyright Directive unless can be argued as about management of rights permitted by recital 18 or delivering other legal provisions permitted by Article 9, or Directive amended.	"Register" of orphans and users can be required. The transparency thus provided might encourage right holders to establish voluntary register of known rights in order to avoid misuse of provision by a body granting licences that does not represent them.
	There is validation of diligent search before a licence for use is given by body that might be sensitive to burden of search on user	Very bureaucratic for user because, as well as conducting a diligent search, user must go through process of applying for licence		
	User knows in advance what the cost of use will be	User has to pay for licence in advance even if a right holder never turns up to claim royalty		
	Right holder turning up has a guaranteed royalty without having to negotiate this	Right holder turning up has no say in how much they get as royalty		
	Transparency of orphan rights and which users are relying of provision so long as body required to keep public register	Cost for body providing licences unless all costs retrieved from charges to users		
	User does not face disputes about use after the licence has been given	User likely to have to pay towards cost of, or full cost of, validation by body granting licences as well as cost of licence and diligent search.		
	Cultural bodies are publically accountable and so are likely to be more widely accepted as impartial than, say, as collecting society	Right holder turning up may have to take legal action against a body granting licences that has failed to meet statutory requirements of permitted licensing, but may have no remedy against user that was licensed improperly by that body		

Annex D

Hubert Best's paper on extended collective licensing

22 February 2011

Nordic extended collective licensing

Here are my observations on Nordic extended collective licensing, as promised.¹

I have observed that in some quarters the "Nordic extended collective licensing model" is cited as the magic bullet for nearly all things orphan.

However, I have never seen a detailed application of the Nordic statutory extended collective licensing régime to orphan works - especially not to all potential uses of audiovisual orphan works.

Therefore, I hope that this brief explanation of the Nordic system may be helpful to the Orphan Works Group.

The permitted extent of Nordic extended collective licences

1. The Swedish statute is typical.²
2. First, common provisions set out the extended effect of collective licences; then further provisions set out the specific circumstances in which such licences are permitted.

*The common provisions*³

3. An extended collective licence:
 - a. applies to the exploitation of works in a specific manner,
 - b. when an agreement has been concluded concerning such exploitation of works,
 - c. with an organization representing a substantial number
 - d. of Swedish authors

¹ Special thanks to Judith Sullivan for her perceptive comments, especially about paragraphs 24ff, considerations which arise when applying the Nordic principles outside the Nordic countries.

² Act on Copyright In Literary and Artistic Works (Act 1960:729, of December 30, 1960, as amended), unofficial translation.

³ Article 42 a.

e. in the field concerned.

4. The extended collective licence confers on the user the right to exploit works of the kind referred to in the agreement despite the fact that the authors of those works are not represented by the organisation.

5. The conditions concerning the exploitation of the work that follow from the agreement apply to its use.

6. In respect of the remuneration deriving from the agreement, and in respect of other benefits from the organisation that are paid for out of the remuneration, the author must be treated in the same way as those authors who are represented by the organisation.⁴

7. The author always has a right to remuneration for the exploitation, provided he forwards his claims within three years from the year in which the work was exploited.

8. Claims for remuneration may be directed only towards the organisation.⁵

9. The provisions of the agreement do not apply if the author has filed a prohibition against the exploitation of his work with any of the contracting parties.⁶

The specific permitted circumstances

10. The specific kinds of exploitation set out below are permitted, provided always that an extended collective licence as described above has been concluded between the relevant parties in relation to the exploitation:

a. Reprographic copying

Reprographic copying of published works (including artistic works reproduced in connection with the texts; excluding computer programs)⁷

b. Educational copying

⁴ Under the Swedish statute this principle applies to every kind of collective remuneration available, including blank tape levies and resale rights for artistic works: no Swedish right holder can be prejudiced through failing to become a member of any CRO. Resale right claims can only be statute-barred (after 10 years, in Sweden) where the CRO has undertaken reasonable measures to find the person entitled to remuneration.

⁵ Remuneration payable to producers and performers in relation to public performance, broadcast (not webcast) and cable and satellite retransmission of works (excluding sound films) can also only be collected through a CRO (Article 47). The provisions are analogous to Article 42 f. but no collective licence agreement is required.

⁶ In fact, the statute repeats this provision with each kind of extended licence permitted in the following list.

⁷ Article 42 b.

Copying of published works for educational purposes⁸

c. Archives and Libraries

Provision of single copies of articles or short extracts of works (excluding computer programs) by archives and libraries⁹

d. Sound Radio or Televisions Broadcasts

Broadcasting of published literary, musical works and artistic works by Government designated broadcasters excluding

- all dramatic works and grand rights,
- where "there are otherwise special reasons to assume that [the author] would oppose the broadcast"
- satellite transmissions (except simultaneous satellite transmissions of terrestrial broadcasts)¹⁰

e. Re-transmission of works contained in broadcasts

Simultaneous, unaltered cable or satellite re-transmission (except where the re-transmission right belongs to the original broadcaster)¹¹

11. Some of the above provisions are subject to further limitations set out in other parts of the copyright statute.¹²

Commentary

12. The application of extended collective licences is limited to:

- a. rights of national right holders
- b. prescribed kinds of exploitation
- c. standard contract terms including fees agreed by a majority of relevant right holders
- d. rights which have not been withdrawn by the right holder.

Rights of national right holders

⁸ Article 42 c.

⁹ Article 42 d.

¹⁰ Article 42 e.

¹¹ Article 42 f.

¹² For example, Article 16 sets out the conditions which apply to making and distributing copies by archives and libraries.

13. Extended collective licences escape classification as compulsory licences because the right owner may notify her withdrawal from the agreement. This requires that the right holder is aware of the agreement and her right to withdraw from it, and is easily able to locate and contact the relevant CRO.

14. It appears that these conditions are considered reasonably satisfied in the Nordic countries because *inter alia*

a. only the rights of relatively small and cohesive groups of national right holders are involved: Sweden has a population of 9,3 million; Denmark 5,5m; Finland 5,3m; Norway 4,8m and Iceland 300,000 (by contrast with the UK's 61,8m and the USA's 307m)

b. the kinds of exploitation permitted under extended collective licences are limited

c. there is a strong union-membership culture amongst creators, resulting in near 100% membership of the organisations which act as CROs for the permitted uses, notably the authors' associations¹³

d. extended collective licensing arrangements have been in place for many years

e. the outlets for the permitted uses in each country are limited in number, which is a factor of both population and language: for example, there are relatively few broadcasters in each country

f. the limitations of language and population sizes mean that the demand for international content is manageable outside the context of extended collective licences.¹⁴

Prescribed kinds of exploitation

15. Apart from the inclusion of non-dramatic works in broadcasts,¹⁵ all permitted extended collective licences cover kinds of exploitation which are related to

¹³ For example, nearly every Swedish author is a member of Sveriges Författarförbund (The Swedish Authors' Union) and it is inconceivable that a Swedish author or aspiring author would not be aware of it. This suggests that the förbund has a demonstrable democratic mandate to agree "rate cards" for inclusion of non-dramatic works in broadcasts.

¹⁴ In practice, Nordic CROs operate extended collective licences and licences which depend on grants of rights side-by-side, as (for example) in the UK the CLA operates a *de facto* extended collective licensing arrangement in relation to its "opt out" national repertoire:

http://www.cla.co.uk/excluded_works/excluded_categories_works/ whilst licensing only those foreign rights which have been specifically granted to it under reciprocal agreements with other RROs: http://www.cla.co.uk/licences/excluded_works/international/.

exceptions or limitations to copyright in the UK (with or without licensing schemes). A popular author can easily withdraw her works from the broadcasting collective licence and charge higher fees; the fees paid to an unknown author are protected by the collective arrangement. Music rights are not subject to extended collective licences.

Standard contract terms and fees

16. Standard contract terms of use (including of course limitation to the national territory) and standard fees must be agreed in respect of all licensed exploitations.

17. This can work in practice in relation to the kinds of uses which are permitted, such as reprographic and educational schemes. Because of the special national circumstances described above, the arrangement works in relation to the broadcasting of non-dramatic literary works of national origin.

18. Each of the exploitations in question is administered by a single national CRO.

19. Works where standard terms of exploitation are not agreed cannot be licensed in this way. An example is exploitation of audiovisual works, including secondary transmissions where the rights have been retained by the broadcaster.

Rights which have not been withdrawn by the right holder

20. As mentioned above, in the Nordic situation withdrawal of these limited rights by the particular groups of right holders is not generally viewed as a democratic deficit.

21. Whether transplanting the same principle to much larger demographics and to primary exploitations of the right holders' rights

a. could be democratically legitimate

b. would in reality amount to imposition of compulsory licences needs consideration.

22. One can speculate why in the UK context, authors and publishers accept (for example) *de facto* extended collective licences in relation to reprography. Possible reasons could include

a. the right licensed and income received is traditionally regarded by authors as "secondary" (along with rights such as anthology and quotation rights, rental rights) to their "primary" royalties

¹⁵ which is a special case in the Nordic context, see footnote 12.

b. the arrangement produces significant income which would not otherwise be collected

c. a misunderstanding that section 136 of the UK Copyright Act amounts to a compulsory licence.

Some points for consideration when applying extended collective licensing to orphan rights

National right holders

23. How useful would national extended collective licence solutions be in the audiovisual field? Is the Canadian experience instructive?¹⁶

24. Is there any way by which such solutions be applied cross-border or on a pan-European basis?

a. Nordic CROs which offer extended collective licences of national rights notably only offer licences of *actual rights granted* to the CRO by corresponding foreign CROs (including CROs in other Nordic countries).

b. Nordic CROs do not purport to license national rights to foreign CRO which they themselves license within the country by virtue of an extended collective licence.

c. The above follow from the explicit provisions of national law and limitations of national jurisdiction.

d. There is a further consideration in the application of extended collective licences to works of foreign origin. As stated above, each statutory provision permitting extended collective licensing in a defined situation stipulates that provisions of the collective agreement do not apply if the author has filed a prohibition against the exploitation of his work with any of the contracting parties. The effect of this is to permit compulsory licences¹⁷ to be issued until an author has filed a prohibition, and/or is likely to amount to a mandatory formality under Article 5 of the Berne Convention (in that compliance is mandatory if compulsory licences are to be avoided) - both of which raise the question of whether the extended

¹⁶ Canadian audiovisual producers and archives have suggested that the reason that only one licence has been applied for and issued by the Copyright Board of Canada for an audiovisual licence of orphan rights is that single-country audiovisual productions are rarely economically viable. The Board has issued 249 licences and refused 8 applications in the approx. 10 years during which it has performed this function.

¹⁷ Only permitted under the Berne Convention in respect of works of foreign origin in a few circumstances, such rebroadcasting and sound recordings, and in developing countries (e.g. the Indian Copyright Board's compulsory licences for publication of published orphan works which are no longer available).

collective arrangements in their current form can be applied to works of foreign origin.¹⁸

e. This limitation with respect to foreign rights, as I understand, is also the practice of non-Nordic CROs which offer *de facto* extended collective licences.

i. For example, the CLA offers what is in effect an extended collective reprographic licence (i.e. right holders must "opt out" to prevent their works from being licensed) confined to UK rights.¹⁹

ii. Foreign rights offered to CLA's UK customers under the same licence are confined to rights which have been specifically mandated to the CLA for licensing in the UK by corresponding RROs overseas through reciprocal agreements.

iii. Foreign customers of CLA are also offered UK rights on the same "opt out" basis. I am not aware of any statutory basis for this: there is no statutory basis for such a licence *within* the UK, and the UK copyright act does not extend to foreign countries. Perhaps the scale of income *vs.* probability and size of any claims justifies the arrangement as an economically worthwhile risk.

iv. The risk and potential size of claims in relation to unlicensed exploitation of audiovisual rights may be greater than in relation to reprographic copying of extracts from printed works.

v. Can a model for use of orphan works which is predicated on potential infringement and management of risk/claims be morally or philosophically acceptable? Is that an appropriate question in this post-modern age?

f. How could extended collective licensing work on a pan-European basis? Would a Directive mandating the necessary legal framework for each Member State be able to mandate the necessary crossborder effect, or would an amendment to Berne be required? Is it appropriate to ignore potential legal issues, and try to establish *de facto* mutual recognition of nationally-recognised extended collective licensing provisions?

g. *Competition issues:* Any EU right holder must be able to join any EU CRO (and conversely any user must be able to get a licence from any

¹⁸ It is also necessary to consider whether or not the limitation on rights that may result from extended collective licensing is within the scope of a permitted exception or limitation to rights within the scope of the Berne Convention.

¹⁹ See footnote 13.

CRO), but here we are talking about *withdrawal* of rights. Does this mean that any EU CRO must be able to grant an extended collective licence for any EU-origin work, and a right holder must therefore withdraw from all EU CROs?

Standard terms of agreement and fees

25. Currently no standard terms (including rate cards) are agreed for the many and varied primary or secondary exploitations of audiovisual material in the Nordic countries.

26. Would such standard terms, in the context of extended collective licences covering most audiovisual material for the particular use, have to be agreed by right holders, before such terms and licences could legitimately be applied to orphan rights?²⁰

27. If not, who would have the legitimacy to agree such terms on behalf of orphan right owners?

Withdrawal of works

28. A precondition of all permitted extended collective licensing arrangements is that authors are free to withdraw. If one is dealing with Danish (population 5,5m) language works of authorship, where most Danish authors and their heirs are known to be members of the Danish writers' union, a search of the list of excluded rights may permit a reasonable conclusion about whether the right is covered by the collective agreement or not.

29. Can the same conclusion be drawn in relation to English language works? (UK population 61,8m, USA 307m, Commonwealth countries...) Is there a "tipping point" where an opt-out arrangement becomes in effect a compulsory licence? English language involves international issues in a way that Icelandic or Finnish languages do not. The Berne Convention issues mentioned in paragraph

²⁰ *In the UK:*

- Could this be licensing under a licensing scheme where the terms have been set out by the CRO in advance of any licences being granted (i.e. there are standard terms), or a licence from the CRO (which must, of course, cover the rights of more than one right holder to be collective) where the terms can be negotiated between the CRO and licensee on a case by case basis?
- Both licensing schemes and individual licences could be extended to cover non-mandating and non-opting out right holders.
- In the case of individual licences, any non-mandating and non-opting out right holder (including orphan right holders) could expect to receive the same royalty as those who mandated the CRO, but this would be what had been agreed with the relevant licensee and so not necessarily a standard amount.

24(d) and footnote 18 must be considered, to determine the legitimacy of applying extended collective licences to works of foreign origin.

30. Nordic courts have prevented authors who have not withdrawn from extended collective licensing agreements from asserting exclusive rights retroactively.²¹ As a matter of natural justice, the rightness of such judgments (or, put another way, why such licences don't amount to compulsory licences) must depend on a high probability that the right holder knows about the collective licence and knows about her ability to withdraw from it. What is the necessary level of national public awareness? How can this be established in a country where there is no widely known, understood and accepted practice of extended collective licensing? Can it be established on a pan-European basis? Can it be established in relation to works of non-EU foreign origin?

Is a search needed?

31. Many constituents, notably amongst audiovisual right holders, insist that a search for the right owner is required before an orphan right can be used, under whatever arrangement is adopted.

32. A basic premise of extended collective licensing is that all rights in the category can be used in accordance with the terms of the agreement, except for those whose owners have withdrawn from the agreement. A search for these owners with the appropriate CRO is the only search needed. By definition no orphan right owner can have withdrawn from the agreement.

33. Therefore, orphan works are already being licensed under the Nordic extended collective agreements, without a search for the right owner of the kind generally envisaged before using an orphan right. No one has the obligation to conduct such a search: the Nordic country's CRO is only required to maintain records of right owners who have withdrawn from the agreement, and the user is only required to ascertain whether the right owner has or has not withdrawn from that agreement.

34. Nordic extended collective licences may also, by failure of right owners to come forward, also extend to exploitation of out-of-commerce rights.

35. Consequently, a "pure" Nordic extended collective licensing approach would rule any search for right owners (other than with the CRO for right owners who

²¹ e.g. Swedish Högsta Domstolen, case T 4739-04. Swedish Radio turned Alfons, a Swedish children's cartoon character, into a Danish drug-peddling pimp, to celebrate his 30th birthday. His author Gunilla Bergström was unable to establish infringement of copyright partly because she had been paid pursuant to the applicable extended collective agreement - see paragraph 10(d) above: "Broadcasting of published literary, musical works and artistic works by Government designated broadcasters." (In fact, this was held to be a parody, consequently neither her copyright nor her moral right had been infringed.)

have withdrawn from the CRO's contract) from an orphan rights or out-of-commerce rights solution.

36. Until recently, these issues had not been widely considered in the Nordic countries: recent attention to orphan and out-of-commerce rights has brought them into consideration now. What is under consideration is extending existing well-known licensing arrangements to orphan and out-of-commerce rights (which as mentioned already happens in practice, anyhow) and not introducing a new kind of licensing arrangement or extending extended collective licensing to other, wider spheres.

37. Whether a search for right owners is appropriate is clearly a legitimate question in relation to any collective licensing solution, including an extended collective licensing solution.

The extent and other aspects of the search

38. Should a search for right owners (beyond that for right owners who have withdrawn from the CRO's contract) should be mandatory if extended collective licensing solutions are used for orphan rights, or can the search requirement be abandoned?

39. Are blanket licensing and extended collective licensing of orphan works mutually exclusive?

40. Can including orphan works in blanket licences amount to compulsory licensing (see paragraph 32)?

41. If a CRO can issue blanket licences which include orphan works and licensed use is reported after the event, the extent of the search can only be to locate right holders in order to pay them.

42. Should a CRO be required actively to try and find, and pay royalties to, right holders who have not mandated the CRO and have not opted out? If so, should the CRO be permitted to charge the licensee a higher fee to cover the cost of such a search done by the CRO? Can such charges be levied retroactively, in the case of blanket licences?

43. Or should the licensee be obliged to search for such right holders, and present evidence to the CRO which the CRO must assess before issuing the licence?

44. What should the extent of a licence applicant's obligations be? Can the licensee be required

- a. to search for a CRO which
 - licenses particular rights

- in particular types of work
- for particular uses

b. then to search in order to identify the missing right holder

before applying with evidence of the search (b) to the CRO? The statutory licensing arrangements for orphan works which are in place in Canada and India require searches by the prospective licensee.²²

²² This invites the wider question as to whether a licence issued by a CRO is after all the appropriate orphan right solution.

Annex E

Collecting societies relevant to use of audiovisual material – limited to those acting to collectively administer rights

Authors licensing and collecting society (ALCS) (See <http://www.alcs.co.uk/Home.aspx>)

Cable retransmission of wireless broadcasts

For simultaneous showing of one country's broadcasting in another country via a cable network only (see also for example AGICOA below). ALCS receives fees for cable transmission of British programmes containing literary, scripted or underlying literary material, which it then distributes to writers whose works have been broadcast in this way.

Educational recording and copying of broadcasts

ALCS is responsible for paying writers their share of the fees collected by ERA (see below).

Relevance to extended collective licensing as solution in the UK for orphan works/rights – same conclusions as for AGICOA below.

Association De Geston Internationale Collective Des Oeuvres Audiovisuelles (AGICOA) (See <http://www.agicoa.org/english/about/about.html>)

Cable retransmission of wireless broadcasts

Collects royalties in many countries for independent producers for immediate retransmission by cable of wireless broadcasts. No royalties actually due in the UK where retransmission is as a result of a must-carry provision or free-to-air public service broadcasts are only retransmitted for reception in the area for which the broadcast was made (see section 73 of the CDPA). For rights in a film included in a broadcast from the EEA other than the UK, the cable retransmission right can only be exercised through a collecting society, so AGICOA can only collect royalties for use that must be permitted (see section 144A of the CDPA). AGICOA does not appear to have distributed any royalties in the UK for this.

Educational recording and copying of broadcasts

Belongs to ERA (see below) and distributes royalties to AGICOA members for educational copies made of broadcasts.

Relevance to extended collective licensing as solution in the UK for orphan works/rights – collective licensing only applies where rights have already been cleared for inclusion of orphans in the broadcast and so can only help if that primary use has been made possible by another solution. In most cases in any

case the uses of orphans that are the same as those collectively licensed by AGICOA will already be possible in the UK given the provision in the CDPA:

- for cable retransmission, this is within an exception to copyright or can only be exercised through a collecting society and so use of orphans either does not infringe copyright or is covered by an AGICOA licence; and
- for educational recording, copying etc, an exception to copyright applies where there is no collective licensing (see ERA below).

British Equity Collecting Society (BECS) (See <http://www.equitycollecting.org.uk/>)

Cable retransmission of wireless broadcasts

No royalties can be collected in the UK where public service broadcasts are retransmitted, and retransmission of other broadcasts in the UK cannot be prevented but can give rise to royalties paid to a collecting society such as BECS for distribution to performers (as explained for AGICOA above). However, see above under AGICOA for reasons why royalties might not be forthcoming. But BECS is responsible for distribution of ex gratia payments which Equity negotiates with the BBC (and ITV) covering payment for the cable retransmission of performances in television programmes broadcast from within the UK but relayed in Ireland, the Netherlands and Belgium. BECS also collects retransmission payments triggered in a number of other EU member States under reciprocal agreements with other collecting societies.

Video on demand and catch up television

Some collective licensing to some broadcasters on behalf of performers permits these uses. Equity has negotiated lump sum payments to cover performers' consents to cover use in many new UK based catch up TV services and BECS has been appointed distribution agent for these monies. There is therefore a mechanism in place through BECS to allow for micro payments to be distributed to individual audio visual performers.

Rental of DVDs etc

Performers retain a right to equitable remuneration for rental even when the rental right has been transferred to the producer of the film (see section 191G of the CDPA) and royalties for rental are collected by BECS acting collectively on behalf of performers.

Private copying under blank media and equipment levy arrangements

Collects private copying levy payments for its members via reciprocal agreements in place with societies based in many EU members states, for example ADAMI in France, AISGE in Spain, and GVL in Germany.

Relevance to extended collective licensing as solution in the UK for orphan works/rights – for cable retransmission of broadcasts, see comments regarding licensing by AGICOA. For rental, if rights have been transferred to the producer (including by the presumed transfer provision in section 191F of the CDPA), then only the producer's successors in title need to be found to clear any rights in order

for rental to be possible. Rental where there are orphan performers' rights does not therefore require a solution relating to performers in order for this use to be possible, but BECS could be permitted to collect and hold royalties that any orphan performer is entitled to have. No private copying under a levy in the UK, and presumably where there is, levy covers orphan works/rights, i.e. they can be copied even if there is no-one to distribute levy to. Any collective licensing by BECS of video on demand and catch-up TV could, however, be extended to cover orphan performers to the extent that performers own the relevant rights.

Compact (See <http://www.compactmediagroup.com/pages/background.htm>)

Cable retransmission of wireless broadcasts

Belongs to AGICOA and so receives and then distributes royalties that have been received by that collecting society, but nothing really collected in the UK – see above.

Other uses in the UK

May act as agent for various right holders but not clearly collectively licensing anything in the UK.

Relevance to extended collective licensing as solution in the UK for orphan works/rights – same situation as for AGICOA applies where there is collective licensing. Where there is no collective licensing, there is nothing to extend to orphans.

Design and Artists Copyright Society (DACS) (See <http://www.dacs.org.uk/>)

Various uses where visual art has been included in broadcasts

Collectively licenses use of broadcasts with visual art such as cable retransmission and off-air educational recording.

Relevance to extended collective licensing as solution in the UK for orphan works/rights – not clear whether any uses licensed are beyond those in the situations discussed for ERA and AGICOA.

Directors' UK (D:UK) (See <http://www.directors.uk.com/>)

UK distribution

Under a rights agreement with broadcasters and producers, collects payments to compensate directors for rights assigned under contracts where there is secondary exploitation, e.g. repeat transmissions, sales, DVD releases.

Private copying, cable retransmission and educational recording

Has agreements with collecting societies throughout Europe to receive payments for these secondary uses, including via ERA (see below) for educational recording off-air and copying in the UK.

Relevance to extended collective licensing as solution in the UK for orphan works/rights – same as for AGICOA, ERA etc for money received from other collecting societies. UK distribution scheme could cover unknown or untraceable right holders, but scheme only covers directors engaged after 1 July 2001 under a freelance contract. Directors may not have had any rights in older material in any case.

Educational Recording Agency (ERA) (See http://www.era.org.uk/about_era.html)

Educational recording and copying of broadcasts

Collectively licenses recording off-air, copying and making available of broadcasts by educational establishments for educational purposes on behalf of many of those who own rights in the material. Rights in the UK for recording, copying and making available on the premises of an educational establishment can only be exercised through a licensing body and any rights not so licensed are covered by an exception to copyright (see section 35 of the CDPA). (Also, Open University broadcasts covered by an Open University Worldwide licence – see below.)

Relevance to extended collective licensing as solution in the UK for orphan works/rights – collective licensing only applies where rights have already been cleared for inclusion of orphans in the broadcast and so can only help if that primary use has been made possible by another solution. In most cases in any case the uses of orphans that are the same as those collectively licensed by ERA will already be possible in the UK given that the exception to copyright in section 35 of the CDPA applies where there is no collective licensing.

Eurocopya (See <http://www.eurocopya.org/>)

Private copying under blank media and equipment levy arrangements

European organisation of movie and television producers' collecting societies in charge of private copy (blank media & equipment) rights management, i.e. collection and distribution of levies. Statutory members are the societies representing producers from Austria, Belgium, Denmark, France, Germany, the Netherlands, Spain, Sweden and Switzerland.

Relevance to extended collective licensing as solution in the UK for orphan works/rights – Societies may be able to extend mandates to cover certain licensing of works that are held to be “orphan”, but note that there is no private copying levy in the UK at the moment and so no UK collective licensing in this area.

Federation of Commercial Audiovisual Libraries (FOCAL International) (See <http://www.focalint.org/>)

Educational recording and copying of broadcasts
Belongs to ERA (see above).

Relevance to extended collective licensing as solution in the UK for orphan works/rights – same as for ERA (see above)

Filmbank (See <http://www.filmbank.co.uk/>)

Playing films in public

Collective licence covers some Hollywood films and films from some independent film studios, presumably for rights owned by producers and distributors (see <http://www.filmbank.co.uk/default.asp?page=article§ion=pvsl&subsection=home&id=45178> for coverage). Different licences available, including for screening a single film to a paying audience, an annual licence for unlimited screening to non-paying audiences such as in schools, youth centres and pubs, and screening films to passengers on coaches.

Use in hotels

Licences available for either loan of DVDs to hotel guests for playing in their bedrooms or for streaming films to bedrooms.

Relevance to extended collective licensing as solution in the UK for orphan works/rights – type of films covered are not ones where orphan problems most likely. Licence for screening seems to apply to films that have been made available for rental or retail as VHS videos or DVDs in the UK so rights would have been cleared to permit that in any case. Hotel use is also either of DVDs that have already been made available to the public, or via a streaming service which Filmbank seems to operate with technology providers and so presumably only offers streamed films where all rights are cleared. Collective licence does not even cover all Hollywood films as MPLA (see below) licenses in the same area. Difficult to extend a collective licence to cover orphans when there are two collecting societies operating in the same area.

Mechanical Copyright Protection Society (MCPS) (See <http://www.prsformusic.com/creators/membership/MCPSroyalties/Pages/MCPS.aspx>)

Use in television programmes and by independent producers – licences mechanical (reproduction) rights in music,

Relevance to extended collective licensing as solution in the UK for orphan works/rights – could be scope of extended collective licensing

Motion Picture Licensing Corporation (MPLA) (See <http://www.themplc.co.uk/index.php>)

Playing films in public

Collective licence covers some Hollywood films and films from some independent film studios (presumably different from those covered by Filmbank - see above), although the website does not seem to set out which producers are covered. Only an umbrella licence for unlimited screening to non-paying audiences seems to be offered, i.e. not as many options as the Filmbank licences. Licence presumably covers all rights owned by producers and distributors, although the terms and conditions specifically point out that any separate fee due to music publishers is the responsibility of the licensee.

Relevance to extended collective licensing as solution in the UK for orphan works/rights – as for Filmbank, type of films covered are not ones where orphans most likely. Licence also limited to films that have been made available for personal, private or home use so rights would have been cleared for this. Licensing in same area as Filmbank so idea of extension difficult (see above).

Open University Worldwide (See <http://www.ouw.co.uk/store/catalog/record-tv.953.aspx>)

Educational recording and copying of broadcasts

Collectively licenses recording off-air and copying of Open University broadcasts (made in collaboration with the BBC) by educational establishments for educational purposes. Rights in the UK for these uses can only be exercised through a licensing body and any rights not so licensed are covered by an exception to copyright (see section 35 of the CDPA). (Also, much other broadcast material covered by an ERA licence – see above.)

Relevance to extended collective licensing as solution in the UK for orphan works/rights – as for ERA, collective licensing only applies where rights have already been cleared for inclusion of orphans in the broadcast and so can only help if that primary use has been made possible by another solution. In most cases in any case the uses of orphans that are the same as those collectively licensed by Open University Worldwide will already be possible in the UK given that the exception to copyright in section 35 of the CDPA applies where there is no collective licensing.

PPL and VPL (See <http://www.ppluk.com/en/>)

Uses similar to those licensed by PRS

Collective licensing covering the rights of the producers of commercial sound recordings and music videos, and performers, is available for uses similar to those covered by PRS for Music (see below).

Relevance to extended collective licensing as solution in the UK for orphan works/rights – PPL and VPL collective licensing could be extended where audiovisual material includes commercial sound recordings or music videos with orphan rights, but this situation is probably very rare. Audiovisual material is probably more likely to include recordings made especially for the film, production music (as licensed for initial inclusion in the film by MCPS), or, for old material, no music.

PRS for Music (See <http://www.prsformusic.com/Pages/default.aspx>)

Broadcasting of audiovisual material which includes music

TV blanket licence covers any rights owned by composers and music publishers for broadcasting of audiovisual material containing music. Also possible to get a collective licence for certain secondary uses of the music in audiovisual material which has previously been broadcast.

Online use of audiovisual material which includes some music

General Entertainment Online Licence, which is a collective licence covering the rights of composers and music publishers, is being offered on an experimental basis.

Copying and selling copies of audiovisual material which includes some music

Collective licence covers rights of music composers and publishers for making and selling copies of DVDs etc.

Relevance to extended collective licensing as solution in the UK for orphan works/rights – where audiovisual material contains music that has orphan rights, PRS collective licences could be extended to permit quite a number of uses. But a PRS licence would not clearly cover the right holders if rights in the music as it was originally included in the audiovisual material were transferred to the film producer, and would not be needed if the audiovisual material is used without any accompanying music, or if the audiovisual material does not include any music.

Annex F

Rules on subsistence and ownership of rights relevant to films as such

This paper does not currently explore the rules on subsistence and ownership of copyright in any works included in the film, or on the rights of performers whose performances are recorded in the film. Where these rights exist, they may have been transferred to the producer of the film, but this may have only been for some uses of the film. Nor does this paper currently cover the rights in a work that attracts copyright as a broadcast as well as a film.

The starting point for deciding who might be the owner of copyright in a film as such is probably deciding how copyright in the film subsists and then who the first owner of copyright was. Ownership may, of course, have been transferred by an assignment or otherwise to another person, but a transfer may apply only to part of the copyright, such as for only certain rights restricted by copyright and/or for rights exercised in certain situations only and/or for certain territories. Also, any assignment of copyright in whole or in part may have been limited in time by contract or provisions in the relevant law. Finally, at least since the Copyright Act 1956 came into force, it has been possible for whoever is to be the first owner of copyright as a result of the rules in the statute, to assign future copyright to another person, i.e. so that copyright in a work yet to be created is owned right from the beginning by a person other than the first owner of copyright according to the rules in the statute. Nevertheless, knowledge of who was the first owner of copyright may help a person trying to find the current owner avoid following unnecessary trails.

This paper identifies how copyright has subsisted in a film at different times, and where relevant includes the rules on duration of copyright which are relevant to whether or not copyright still subsists, and then sets out the rules on first ownership for the different types of works by which a film may be protected. Also noted are some other provisions that might have had an effect on ownership beyond what would be expected as a result of assignments of copyright, transfers on death of an author etc.

Relevant laws are:

- Laws applying prior to the Copyright Act 1911
- The Copyright Act 1911 (the 1911 Act) - which came into force on 1 July 1912
- The Copyright Act 1956 (the 1956 Act) - which came into force on 1 June 1957
- Part I and Schedule 1 of the Copyright, Designs and Patents Act 1988 (the CDPA) - which came into force on 1 August 1989
- Amendment of the CDPA by the Duration of Copyright and Rights in Performances Regulations 1995 (SI 1995/3297) - which came into force on 1 January 1996

- Amendment of the CDPA by the Copyright and Related Rights Regulations 1996 (SI 1996/2967) - which came into force on 1 December 1996, but which applied provision on authorship of films to those made from 1 July 1994

Subsistence of copyright – the general rule

Copyright subsists in a film as defined in section 5B of the CDPA, subject to the transitional provisions and savings in paragraphs 5 to 9 of Schedule 1 of the CDPA, and the transitional provisions in SI 1995/3297, which amended the CDPA by inserting section 5B and revoking section 5.

First ownership of copyright – the general rule

First ownership of copyright is determined by section 11 of the CDPA, as amended by SI 1996/2967 and subject to the transitional provisions in that SI when that amendment was made, and the rule in paragraph 11 of Schedule 1 of the CDPA for works existing at commencement of the CDPA that first ownership is determined by the law in force at the time the work was made.

Films made on or after 1 August 1989

Subsistence of copyright

Copyright subsists in a film as such with a “film” defined as a “recording on any medium from which a moving image may by any means be produced” (see section 5B of the CDPA). There is no provision of the type in the 1956 Act which rules out copyright for a film as a “dramatic work”. Indeed, there is now case law under the CDPA which has found that a film that is a work of action may also be a dramatic work under the CDPA (see *Norowzian v Arks Ltd (No. 2) [2000] F.S.R. 363*). Films cannot, though, be protected as a series of photographs as the definition of “photograph” excludes things that are part of a film (see section 4(2) of the CDPA).

Additional comments:

- Where a film is protected as a “dramatic work”, it must be “original”, but this may be a relatively low threshold to meet, only requiring the camera angle, editing and so on to include something of dramatic significance. (There is no requirement of “originality” for protection as a “film”, other than that what is protected is not copied from a previous film.)
- A film sound track associated with a film was protected as a sound recording from 1 August 1989 as it fell within the definition of “sound recording” and was not specifically included as part of the definition of “film” (see section 5 of the CDPA as enacted).

- A film sound track accompanying a film became part of the film from 1 January 1996, and this applied to existing sound tracks, with transitional provisions and savings on things like ownership of copyright applying to these changes (see Regulation 26 of SI 1995/3297).

First ownership of copyright

The main rule on first ownership of copyright for films in section 11(1) of the CDPA is that the “author” is first owner of copyright, subject to the provisions in subsections (2) and (3). Authorship is defined in section 9 of the CDPA. Amendments made by SI 1996/2967 to section 9 and section 11(2) of the CDPA may lead to a different result on who is the first owner of copyright for films made on or after 1 July 1994 compared to those made before this date.

For films made on or after 1 August 1989 and before 1 July 1994, the first owner of copyright in a film was the “author” and the “author” was defined as the “person by whom the arrangements necessary for the making of the film are undertaken” (see sections 11 and 9 of the CDPA as enacted). The first owner of copyright was therefore usually the producer.

For films made on or after 1 July 1994, the first owner of copyright in a film is the “author” and this is the “producer and principal director”, i.e. copyright is first owned jointly by these two people, unless they are the same person. However, where a film is made by an employee in the course of his employment, the employer is the first owner of copyright, subject to any agreement to the contrary (see sections 11 and 9 of the CDPA as amended by SI 1996/2967). If the principal director is employed by the producer, the producer as employer, as well as in his own right for his share of the joint copyright, may therefore be the sole owner of copyright in a film.

Additional comments:

- SI 1996/2967 came into force on 1 December 1996, but backdated the new rule on authorship, and so the meaning of the rules on first ownership, of copyright to 1 July 1994. However, savings in Regulation 36 of this SI ensured that any rights that a principal director became entitled to as a result of the new rules on authorship could not be enforced when the producer was doing anything with a film made on or after 1 July 1994 in pursuance of arrangements for the exploitation of the film made before 19 November 1992.
- The first owner of copyright in a film sound track accompanying a film, protected as a sound recording from 1 August 1989 until 1 January 1996, was the producer (see sections 9 and 11 of the CDPA as enacted). In practice, therefore, the same person was probably the first owner of copyright in both the film and film sound track, although note that for the period from 1 July 1994 to 1 January 1996 the first owner of copyright in a film was only the producer if the principal director was employed by the producer. But with

films and film sound tracks protected as different copyright works, assignments or other transfers may have led to different copyright owners.

- From 1 January 1996 film sound tracks accompanying a film have been part of the film and subject to the above rules on first ownership of copyright in a film. This also applies to film sound tracks accompanying films made before 1 January 1996 and rights in such sound tracks accompanying films were given to the owners of copyright in the existing films, but this was subject to various savings for anyone who had rights in the film sound track as a sound recording (see Regulation 26 of SI 1995/3297).

Films made from 1 June 1957 and prior to 1 August 1989

Subsistence of copyright

Copyright was provided in a film as such for the first time from 1 June 1957, so long as it fell within the scope of the definition in the 1956 Act of a “cinematograph film” (see section 13 of the 1956 Act). The copyright was in the sequence of visual images regardless of how they were recorded. Films could not be protected as dramatic works or a series of photographs as the definitions of these works excluded any application to cinematograph films (see section 48 of the 1956 Act). According to the rule in paragraph 5(1) of Schedule 1 of the CDPA, all films which attracted copyright under the 1956 Act can attract copyright under the CDPA. Although the definition of “film” in the CDPA is much simpler than that in the 1956 Act, in practice there may be no difference in scope. Thus, in general, how copyright subsists in films as such made from 1 June 1957 and before 1 August 1989 is the same as how copyright subsists in a film made more recently.

Additional comments:

- Some doubts about whether or not video recordings were within the scope of the 1956 Act definition of “cinematograph film” had been raised, although others thought there was no such doubt.
- Unlike the CDPA, the 1956 Act definition of a “dramatic work” specifically excludes a cinematograph film (see section 48(1) of the 1956 Act). Arguably, therefore, a film made from 1 June 1957 and before 1 August 1989, unlike a film made since 1 August 1989, cannot be protected as a “dramatic work” as well as a “film”. There was no copyright subsisting in a film as a dramatic work immediately before commencement of the CDPA for there to be copyright as a dramatic work after commencement under the rule in paragraph 5(1) of Schedule 1 of the CDPA about when there could be copyright in an existing work. But note that there can apparently be a different result in this respect for (foreign) works existing before commencement of the CDPA but which only qualified for protection after commencement as a result of the rule in paragraph 5(2) of Schedule 1 of the CDPA. Also, it may be that the rule in paragraph 5(1) of

Schedule 1 of the CDPA does not require existing copyright works to attract the same type of copyright under the CDPA.

- A film sound track associated with a film was included in the copyright in the cinematograph film under the 1956 Act (see section 13(9) of the 1956 Act). However, such sound tracks became protected as sound recordings from 1 August 1989 (see paragraph 8 of Schedule 1 of the CDPA), but then became part of the film again from 1 January 1996 (see Regulation 26 of SI 1995/3297), with transitional provisions and savings on things like ownership of copyright applying to these changes.
- Films had a term of protection of at least 50 years and so all would have been in copyright on 1 January 1996 and then copyright would have been extended to the life plus 70 year term introduced by UK implementation of the term Directive.

First ownership of copyright

The first owner of copyright in a film was the “maker”, which was defined as the “person by whom the arrangements necessary for the making of the film are undertaken” (see section 13 of the 1956 Act). This is the same as the definition of the “author” in section 9(2)(a) of the CDPA as enacted, and so, as a result of the rule in the CDPA that the author is the first owner of copyright (see section 11(1) of the CDPA), the person who was first owner of copyright in films made from 1 June 1957 and before 1 August 1989 was generally the same as the person who was first owner of copyright in films made from 1 August 1989 and before 1 July 1994. The person satisfying this definition will generally be the producer.

Additional comments:

- Film sound tracks existing on 1 August 1989 were protected separately from the film from 1 August 1989 until 1 January 1996 even if they accompanied the film, but the first owner of copyright in the film was also to be treated as having been the first owner of copyright in the sound recording (see paragraph 8(2) of Schedule 1 of the CDPA).
- Although the reversal to make sound tracks accompanying a film as part of the film again from 1 January 1996 as it applied to existing film sound tracks gave rights in such sound tracks to the owners of copyright in the existing films, this was subject to various savings for anyone who had rights in the film sound track as a sound recording (see Regulation 26 of SI 1995/3297). During the time from 1 August 1989 until 1 January 1996, films and film sound tracks were different copyright works even though they were the same copyright work when created between 1 June 1957 and 1 August 1989. As different copyright works, they could have been treated in different ways in assignments or other transfers and so it is necessary to consider the effect of the savings to decide whether or not there

may be relevant rights in the film sound track separate from the rights in the film as such.

Films made from 1 July 1912 and prior to 1 June 1957

Subsistence of copyright

Only copyright as a “dramatic work” and/or a series of “photographs” is possible for a film made from 1 July 1912 until 1 June 1957. The CDPA specifically saves copyright for films this way, and excludes protection for a film as such (i.e. within that category of work as protected under the CDPA) where the film was made before 1 June 1957 (see paragraph 7 of Schedule 1 of the CDPA). The film must be within the meaning of “dramatic work” and/or “photographs” as protected by the 1911 Act. The definition of “dramatic work” in section 35 of the 1911 Act includes “any cinematograph production where the arrangement or acting form or the combination of incidents represented give the work an original character” and “cinematograph” is defined to include “any work produced by any process analogous to cinematography”. “Photograph” is not defined in the 1911 Act to exclude photographs forming part of a film as is the case for the 1956 Act and the CDPA.

Additional comments:

- Both a “dramatic work” and a “photograph” (as a type of “artistic work”) could only be protected under the 1911 Act if they were “original”, but this was probably, as now, a low threshold (see section 1(1) of the 1911 Act).
- The “original character” requirement for films if they were to be protected as a dramatic work under the 1911 Act does, though, exclude some types of films from protection this way. For example, case law has excluded protection for a film of a sporting event as a dramatic work.
- For photographs taken in 1944 or earlier, copyright would have expired at the end of 1994 or earlier and will only subsist if it has been revived as a result of the UK implementation of the EU term Directive. Where copyright has been revived and the name and address of the person entitled to authorise any act restricted by copyright cannot be ascertained by reasonable enquiry, then it is not an infringement of copyright in any case to do that act (see Regulation 23(4) of SI 1995/3297).
- Dramatic works had a term of protection of life of the author plus 50 years, which has continued to apply until 1 January 1996 when the term for any works still in copyright was extended to life plus 70 years, and when copyright may also have been revived where it had expired (and then the rule on no infringement as indicated above for photographs would also be relevant). All films protected as dramatic works and made in or after 1945 are therefore in copyright, and many films made much earlier will still be in copyright too as a result of an extension of

copyright, with some though only being in copyright as a result of revival of copyright.

- A film sound track was probably protected as a sound recording and the rule in Regulation 26 of SI 1995/3297 indicated above for sound tracks made before 1 January 1996 making existing sound tracks part of a film would not have any effect as there is no copyright in a film as such in any case for films made before 1 June 1957.
- The term of protection of only 50 years from making was preserved by the transitional provisions in both the Copyright Act 1956 (see paragraph 11 of Schedule 7) and the CDPA (see paragraph 12(2)(d) of Schedule 1) so that copyright in film sound tracks made in or before 1944 would have expired. Where a film sound track (as part of the film or otherwise) has only first been made available to the public one or more year after making, the term could have been revived, but then the same rule on no infringement as indicated above for photographs would also be relevant.

First ownership of copyright

The first owner of copyright in a dramatic work was the author, or the employer if made by an employee in the course of employment, in the absence of any agreement to the contrary (see section 5(1) of the Copyright Act 1911). The first owner of copyright in a photograph was the author, or the commissioner if commissioned, in the absence of any agreement to the contrary, or the employer if made by an employee in the course of employment, in the absence of any agreement to the contrary (see section 5(1) of the Copyright Act 1911).

Additional comments:

- The “author” of a dramatic work was not defined in the 1911 Act but was likely to be the person or people who were responsible for deciding on the action in the film. This was probably the director and editor.
- The “author” of a photograph was the person who owned the negative from which the photograph was directly or indirectly derived at the time the negative was made (see section 21 of the 1911 Act). This definition clearly includes the possibility of the “author” being a legal rather than a natural person. The author may therefore have been the producer if the production company provided the material to be used to make the film.
- The rules on first ownership for dramatic works and/or photographs made by employees, and for photographs made as a result of a commission, could mean that the producer of a film was the first owner of copyright.

- There is a qualification to possible subsequent transfers of ownership where the first owner of copyright was the author and copyright was then assigned before 1 June 1957 to someone else - the copyright reverts to the author's legal personal representative as part of his estate 25 years after his death, unless this reversionary interest has been assigned by the author to someone else during the author's life (see paragraph 27(1) and (2) of Schedule 1 of the CDPA).
- The reversionary interest for the author as above does not, though, apply where the work was a "collective work", that is a work written in distinct parts by different authors, or in which works, or parts of works of different authors are incorporated (see paragraph 27(4) and (5) of Schedule 1 of the CDPA), but where the film has copyright as a series of photographs, each photograph is a copyright work and so must presumably be judged separately against this test to decide whether or not it is a collective work.

Films made before 1 July 1912

Subsistence of copyright

According to the provisions applying to existing works in the 1911 Act, copyright as in the 1911 Act (i.e. as a dramatic work and/or photographs) can only apply if a right as set out in the First Schedule of the 1911 Act applied immediately before 1 July 1912 (see section 24 of the 1911 Act). Photographs were protected under the Fine Arts Copyright Act 1862 so there could be copyright in a film as a series of photographs prior to 1 July 1912. Copyright in a film as a dramatic work was not possible.

Additional comments:

- A dramatic work, that is works of action, protected under the Literary Copyright Act 1842, also had to be capable of being printed and published, as was the case under the earlier Dramatic Copyright Act 1833 which protected dramatic works. The "printing and publishing" requirement that was established by case law disappeared under the 1911 Act, but this pre-1911 Act requirement seems to exclude any possibility of protection for films as "dramatic works" before 1 July 1912. Indeed, case law confirms no protection for the acting performance of a film as a dramatic work.
- For unpublished works, these were protected by common law. (Note that any common law rights were, however, terminated by section 31 of the Copyright Act 1911, although common law rights were then subject to the rules in section 24 and the First Schedule to that Act on replacement by rights in the 1911 Act – see note below the table in the Schedule.)
- Any copyright in photographs would have expired before 1994 and so even if copyright was then revived as a result of UK implementation of the term Directive, as indicated above for photographs taken in or before 1944 when

the Copyright Act 1911 was in force, copyright is not infringed by doing anything when the name and address of the person entitled to authorise any act restricted by copyright cannot be ascertained by reasonable enquiry.

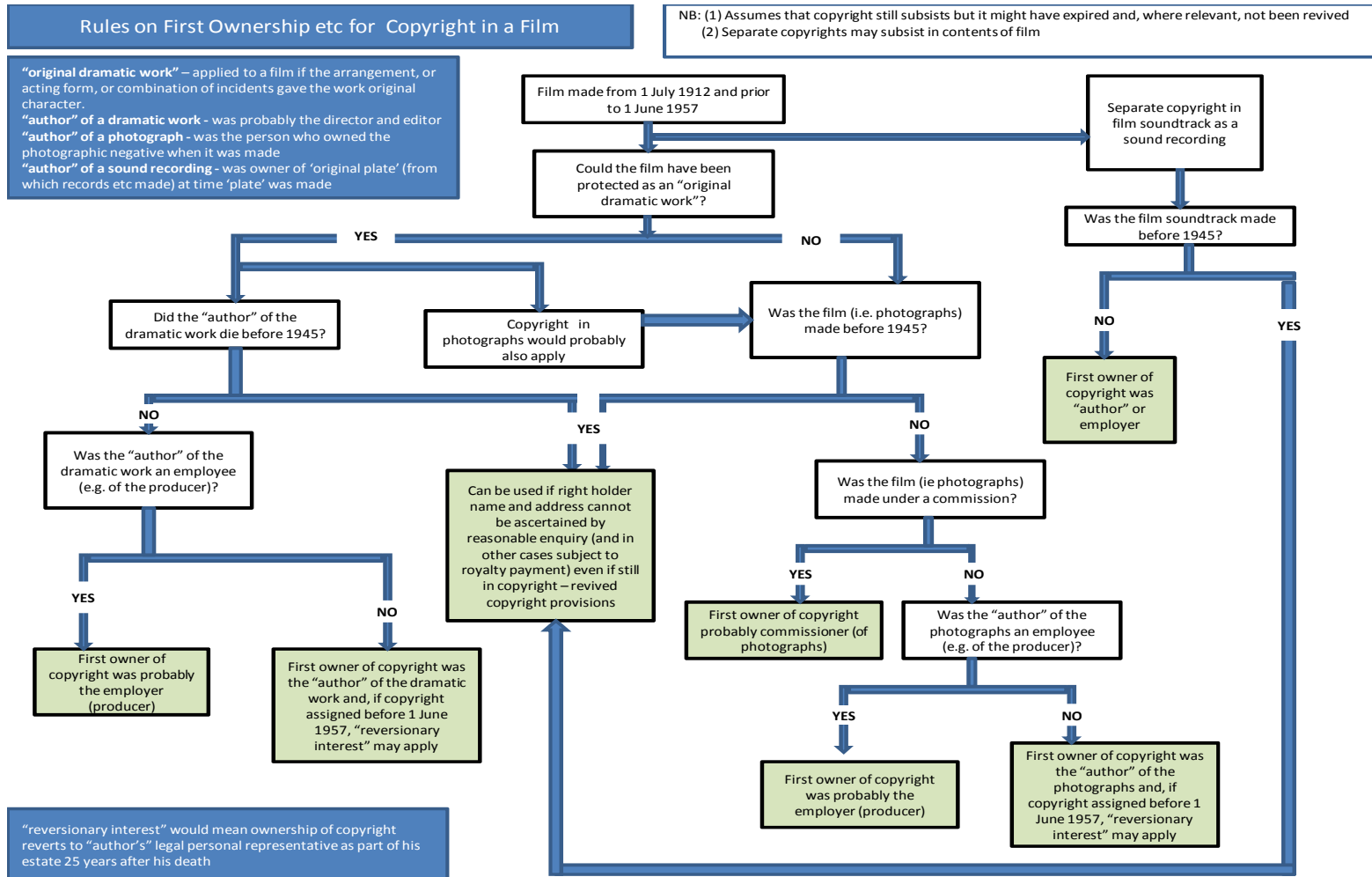
First ownership of copyright

The law preceding the 1911 Act determines who the first owner of copyright was. For photographs, the first owner of copyright was generally the author, and this was probably just the creator, i.e. the photographer. But for photographs that were commissioned, the commissioner was the first owner of copyright unless there was a written and signed agreement to the contrary. The commissioner in the case of a film protected as a series of photographs could have been the producer.

Additional comments:

- The reversionary interest for the author or his personal representative in certain circumstances provided for existing works in section 24 of the 1911 Act and preserved by paragraphs 38 of Schedule 7 of the 1956 Act, and which came into effect before commencement of the CDPA, is also continued by paragraph 28 of Schedule 1 of the CDPA, but note that this does not prevent a person with a pre-1911 Act assignment or licence from continuing to use the work, subject to the conditions, such as payment to the author, set out.
- The first owner of any common law rights was the author (the creator).

Annex G



Annex H

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Mark Devereux (Chair) – Olswang
Tony Dillon – PACT
Sarah Hunter – Google
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