STATUTORY INSTRUMENTS

2014 No. 2863

COPYRIGHT

The Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014

Made - - - -	*27th October 2014*
Coming into force - -	*29th October 2014*

A draft of the Regulations has been laid before and approved by each House of Parliament under section 116D(5) and paragraph 1D(5) of Schedule 2A to the Copyright, Designs and Patents Act 1988 [M1].

The Secretary of State, in exercise of the powers conferred by sections 116A, 116C and 116D of and paragraphs 1A, 1C and 1D of Schedule 2A to that Act, makes the following Regulations:

Marginal Citations

M1 1988 c.48, **sections 116A**, 116C and 116D were inserted by section 77 of the Enterprise and Regulatory Reform Act 2013 (c.24) and paragraphs 116A, 116C and 116D were inserted into Schedule 2A of the Copyright, Designs and Patents Act 1988 by section 77(4) and Part 2 of Schedule 22 to the Enterprise and Regulatory Reform Act 2013. Schedule 2A was inserted by S.I. 1996/2967.

Citation and commencement

1. These Regulations may be cited as the Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014 and shall come into force on 29th October 2014.

Interpretation

2. In these Regulations—

"the Act" means the Copyright, Designs and Patents Act 1988;

"authorising body" means the Comptroller;

"Comptroller" means the Comptroller-General of Patents, Designs and Trade Marks;

"diligent search" has the meaning set out in regulation 4;

"identified right holder" is a right holder of the type referred to in regulation 12(1);

"orphan licence" is a licence authorising the use of an orphan work;

"orphan licensee" means a person who either wishes to be granted or has been granted an orphan licence;

"orphan work" has the meaning set out in regulation 3;

"relevant work" has the meaning set out in regulation 3;

"restricted acts" means the acts in relation to a performance to which sections 182, 182A, 182B, 182C, 182CA, 183 or 184 of the Act [M2] apply;

"right holder" has the meaning set out in regulation 3.

Marginal Citations

M2 Section 182 was substituted by, and sections 182A – 182 C and 182CA inserted by S.I 1996/2967 and amended by S.I. 2003/2498, **S.I**. 2006/18, S.I 2013/1782; section 183 was amended by S.I. 2003/2498.

Relevant work, right holder and orphan work

3.—(1) "Relevant work" means a work which is protected by copyright or a performance in respect of which certain acts constitute restricted acts.

(2) A reference to a "relevant work" includes a reference to a work or a performance, which itself falls within the definition of "relevant work" and is embedded in or incorporated in, or constitutes an integral part of, another relevant work.

(3) "Right holder" in relation to a relevant work means—

(a) an owner of the copyright in the relevant work;

(b) a licensee under an exclusive licence in relation to the relevant work;

(c) a person with rights to permit or prohibit one or more of the restricted acts in relation to a performance recorded by the relevant work and, in the case of a performance, which is embedded or incorporated in or constitutes an integral part of another relevant work, a person with rights to permit or prohibit one or more of the restricted acts in relation to the performance; and

(d) a licensee under an exclusive licence in relation to those rights.

(4) A relevant work is an orphan work where, after a diligent search made in accordance with regulation 4, one or more of the right holders in the relevant work have either not been identified or, if identified, have not been located.

(5) Where a relevant work has more than one right holder and, after a diligent search made in accordance with regulation 4, one or more of the right holders have either not been identified or, if identified, have not been located, then the relevant work is an orphan work to the extent that the rights of those right holders are either not identified or not located.

(6) In these Regulations, a reference to an orphan work includes a relevant work in which it is not known whether copyright or the right to permit or prohibit the restricted acts subsists, and references to a right holder who has not been identified or located are to be read as including references to a supposed right holder.

(7) A relevant work ceases to be an orphan work to the extent that a right holder is identified in accordance with regulation 12.

Diligent search

4.—(1) An orphan licensee shall, before applying for an orphan licence, carry out a diligent search or refer to an existing diligent search which is valid and, in either case, is appropriate to the

orphan work which is the proposed subject matter of the orphan licence and relates to the rights in the relevant work which the orphan licensee proposes to use.

(2) A diligent search must comprise a reasonable search of the relevant sources to identify and locate the right holders of the relevant work.

(3) The sources that are relevant for the relevant work must, as a minimum, include—

(a) the relevant register maintained by the authorising body [F1]...

[F2](b) . . . . . .

(4) The authorising body may issue guidance on what sources may additionally be relevant in the case of different relevant works.

(5) A diligent search is valid, for the purposes of paragraph (1), for seven years from the earlier of the date—

(a) on which an orphan licence of the orphan work was first granted by the authorising body; or

[F3](b) . . . . . .

(6) An orphan licensee shall provide the authorising body with such information concerning—

(a) the diligent search; and

(b) the use that the orphan licensee proposes to make of the orphan work,

as the authorising body may require in connection with the application for an orphan licence.

(7) The orphan licensee shall, when applying for an orphan licence, provide the authorising body with an application in the form required by the authorising body, including in electronic form, and the application shall—

(a) demonstrate that a diligent search has been carried out; and

(b) contain a declaration in writing by the orphan licensee stating that the information provided in the application is correct.

(8) Where an orphan licensee makes a declaration under sub-paragraph (7)(b) that the orphan licensee knows or has reason to believe is false and the orphan licensee is granted an orphan licence and carries out any of the acts restricted by copyright or the restricted acts, the orphan licensee is liable for infringement of copyright or sections 182, 182A, 182B, 182C, 182CA, 183 or 184 of the Act as appropriate.

(9) The authorising body shall take reasonable steps to ensure that the search relied upon by the orphan licensee satisfies the requirements for a diligent search.

Textual Amendments

F1 Words in reg. 4(3)(a) omitted (31.12.2020) by virtue of S.I. 2019/605, reg. 31(a)(i) (as substituted by The Intellectual Property (Amendment etc.) (EU Exit) Regulations 2020 (S.I. 2020/1050), regs. 1(2), **3**)

F2 Reg. 4(3)(b) omitted (31.12.2020) by virtue of S.I. 2019/605, reg. 31(a)(ii) (as substituted by The Intellectual Property (Amendment etc.) (EU Exit) Regulations 2020 (S.I. 2020/1050), regs. 1(2), **3**)

F3 Reg. 4(5)(b) omitted (31.12.2020) by virtue of The Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations 2019 (S.I. 2019/605), regs. 1(2), **31(b)** (with reg. 38) (as amended by S.I. 2020/1050, regs. 1(2), 4); 2020 c. 1, Sch. 5 para. 1(1)

Record and register of orphan works

5.—(1) The authorising body shall maintain and update a register which sets out the details of the orphan works in respect of which—

(a) a diligent search has been carried out and an application, for the grant of an orphan licence, has been made to and is being considered by the authorising body;

(b) orphan licences have been granted together with the permitted uses of the relevant works; and

(c) orphan licences have been refused.

(2) The authorising body shall make the register available to the public by electronic means and free of charge.

Licensing of orphan works

6.—(1) Once the authorising body has received the information set out in regulations 4(6) and (7), it may grant an orphan licence.

(2) The authorising body may only grant an orphan licence which—

(a) permits non-exclusive use of an orphan work in the United Kingdom;

(b) permits acts restricted by the copyright or sections 182, 182A, 182B, 182C, 182CA, 183 or 184 of the Act in an orphan work for a term not exceeding 7 years;

(c) prohibits the grant of sub-licences;

(d) has effect as if granted by the right holder of the relevant work; and

(e) provides that the use of an orphan work does not affect the moral rights of an author under Chapter IV of Part 1 of the Act or the moral rights of a performer under Chapter 3 of Part 2 of the Act and treats those moral rights as having been asserted.

(3) Subject to the requirements set out in paragraph (2), the authorising body may grant a licence subject to conditions.

(4) An orphan licence may not be granted to a person authorised to grant licences.

(5) The authorising body may refuse to grant a licence—

(a) on the ground that, in its reasonable opinion, a proposed use or adaptation is not appropriate having regard to the circumstances of the case, including whether the proposed adaptation constitutes derogatory treatment of the work; or

(b) on any other reasonable ground.

(6) Subject to the requirements set out in paragraph (2), the authorising body may, during the term of a licence, vary the terms of an orphan licence.

Use for incidental purposes

7. Any person may, without infringing copyright or sections 182, 182A, 182B, 182C, 182CA, 183 or 184 of the Act, make reasonable use of an orphan work for purposes which are incidental to—

(a) the application for the grant of an orphan licence; and

(b) the processing of the application and the maintenance of the register referred to in regulation 5(1).

Renewal of orphan licence

8.—(1) Upon the request of the orphan licensee, submitted in the form required not less than six months before the expiration of the orphan licence, the authorising body may renew an orphan licence for a further term not exceeding 7 years.

(2) A request for a renewal of an orphan licence shall be accompanied by evidence of a diligent search carried out in accordance with regulation 4 together with the information set out in regulations 4(6) and (7).

Processing fee

9. The authorising body may charge a reasonable fee for processing an application for an orphan licence or to vary or renew an existing orphan licence.

Licence fee for an orphan licence

10.—(1) Subject to paragraph (2), on the grant of an orphan licence the authorising body—

(a) shall charge the orphan licensee a reasonable licence fee for the period of the licence calculated with regard to relevant factors which shall include the level of licence fees which are achieved under licences for a similar use of similar relevant works which are not orphan works; and

(b) may charge a reasonable additional amount in respect of the costs of the authorising body.

(2) The authorising body shall—

(a) hold all licence fees paid under this regulation in a designated account;

(b) adopt accounting procedures that ring-fence in a separate account for monies received from orphan licences; and

(c) retain unclaimed licence fees for a period of not less than eight years from the date of the grant of the relevant orphan licence.

(3) The authorising body shall maintain and make available information that sets out, in respect of the orphan licences it grants, how the licence fee is calculated.

Reporting requirements

11.—(1) The authorising body shall publish an annual report on the operation of the orphan works scheme and the orphan licences that it has granted.

(2) The authorising body shall provide the Secretary of State with a copy of the annual report upon its publication.

Rights of identified right holder

12.—(1) This regulation applies where the right holder in an orphan work identifies themselves to the authorising body and satisfies the authorising body of their identity and of their ownership of relevant rights in the orphan work either—

(a) in the period between the receipt by the authorising body of an application for the grant of an orphan licence and the grant by the authorising body of that licence; or

(b) within eight years or less of the date on which the authorising body has granted an orphan licence of the orphan work.

(2) If the authorising body has verified the diligent search but has not granted an orphan licence then the work shall, to the extent of the rights of the identified right holder, cease to be an orphan work.

(3) If the authorising body has granted an orphan licence then the orphan licence shall continue for the remainder of its unexpired term or until the expiration of the notice period which is set out in the orphan licence notwithstanding the fact that the right holder is identified.

(4) The authorising body shall within two months of being satisfied that the right holder has been identified—

(a) notify the orphan licensee that the right holder has been identified;

(b) pay to the right holder a sum equal to the licence fee paid by the orphan licensee in respect of the orphan work.

Unclaimed licence fees of orphan works

13.—(1) Where more than 8 years have elapsed since the grant of an orphan licence and no right holder in the orphan work has identified themselves, the authorising body shall apply the licence fee, received by it in respect of that orphan licence, to pay the reasonable costs which the authorising body has incurred in connection with the orphan works scheme, including the setting up and running of the scheme.

(2) To the extent that the licence fees referred to in paragraph (1) constitute a surplus over the reasonable costs of the authorising body, the authorising body may apply the surplus to fund social, cultural and educational activities.

(3) If a right holder in an orphan work identifies themselves to the authorising body more than eight years after the grant of the orphan licence and satisfies the authorising body of their identity and of their ownership of relevant rights in the orphan work, the authorising body may make such payment to the right holder as the body considers reasonable in all the circumstances of the case.

Appeals

14.—(1) A right holder who has identified themselves to the authorising body under regulation 12, may appeal to the First-tier Tribunal on the grounds that the authorising body has either acted improperly or failed to comply with its obligations under these Regulations.

(2) An orphan licensee may appeal to the Copyright Tribunal concerning—

(a) the refusal by the authorising body to grant an orphan licence to the orphan licensee;

(b) any condition imposed by the authorising body in connection with the grant of the orphan licence; or

(c) any amount described in regulation 10(1) which the authorising body requires it to pay.

(3) On an application under paragraph (2) the Copyright Tribunal shall consider the matter and may make such order as it considers to be reasonable in the circumstances.

Baroness Neville Rolfe
Parliamentary Under Secretary for Business, Innovation and Skills

Department for Business, Innovation and Skills

EXPLANATORY NOTE

(This note is not part of the Regulations)

The Regulations appoint the Comptroller-General of Patents, Designs and Trade Marks as the authorising body with the power to grant licences of orphan works in respect of which a diligent search has been carried out in accordance with the requirements of regulation 4.

"Relevant work", "right holder" and "orphan work" are defined in regulation 3.

Regulation 4 provides that a diligent search requires a reasonable search of the relevant sources to identify the right holder of the relevant work and provides that the relevant sources must, as a minimum, include the register maintained by the authorising body, any relevant databases maintained by the Office for Harmonization in the Internal Market and, where there is no record of the relevant work on the register or in the databases, any sources listed for that category of work in Part 2 of Schedule ZA1 to the Copyright, Designs and Patents Act 1988. The authorising body has the power to issue guidance on what sources may additionally be relevant for a particular relevant work.

An orphan licensee may make use of an appropriate diligent search that has already been carried out if the search is valid or may carry out a new diligent search.

Regulation 5 requires the authorising body to maintain a register of orphan works.

Regulation 6(2) sets out the restrictions which apply to an orphan licence and regulation 6(5) sets out the circumstances in which an authorising body may refuse to grant an orphan licence.

Regulation 7 permits any person to make reasonable use of an orphan work for purposes which are incidental to the application for an orphan licence, the processing of an application or the maintenance of the orphan works register.

Regulation 8 sets out the circumstances in which the authorising body may renew an orphan licence and regulation 10 provides a framework for the computation of the licence fee.

Regulation 11 requires the authorising body to publish an annual report.

Regulation 12 sets out the rights of an identified right holder and regulation 13 sets out how the authorising body is to deal with unclaimed licence fees.

Regulation 14 sets out the circumstances in which an identified right holder or an orphan licensee may appeal to the First-tier Tribunal or to the Copyright Tribunal.

A full impact assessment of the effect that this instrument will have on the costs of business and the voluntary sector is available from the Intellectual Property Office, Concept House, Cardiff Road, Newport NP10 8QQ and is annexed to the Explanatory Memorandum which is available alongside the instrument on www.legislation.gov.uk . Copies have also been placed in the libraries of both Houses of Parliament.

Changes to legislation:
There are currently no known outstanding effects for the The Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014.