

2014 No. 2861

COPYRIGHT

**The Copyright and Rights in Performances (Certain Permitted
Uses of Orphan Works) Regulations 2014**

Made - - - - - 27th October 2014

Coming into force - - - - - 29th October 2014

The Secretary of State is a Minister designated for the purposes of section 2(2) of the European Communities Act 1972(a) in relation to matters relating to the protection of copyright and rights in performances(b).

In accordance with paragraph 2(2) of Schedule 2 to that Act, a draft of this instrument was laid before Parliament and approved by resolution of each House of Parliament.

The Secretary of State, in exercise of the powers conferred by section 2(2) of that Act makes the following Regulations:

Citation and commencement

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

Interpretation

2. In these Regulations “the Act” means the Copyright, Designs and Patents Act 1988(c).

Amendments to the Act

3.—(1) After section 44A of the Act(d) insert—

“Orphan works

44B Permitted uses of orphan works

(1) Copyright in an orphan work is not infringed by a relevant body in the circumstances set out in paragraph 1(1) of Schedule ZA1 (subject to paragraph 6 of that Schedule).

(2) “Orphan work” and “relevant body” have the meanings given by that Schedule.”.

(2) After section 76 of the Act insert—

(a) 1972 c.68; section 2(2) was amended by the Legislative and Regulatory Reform Act 2006 (c.51), section 27(1) and the European Union (Amendment) Act 2008 (c.7), section 3(3) and Part 1 of the Schedule.

(b) S.I. 1992/707 and 1993/595.

(c) 1988 c.48.

(d) Section 44A was inserted by the Legal Deposit Libraries Act 2003 (c.28), section 8(1).

“CHAPTER 3A
CERTAIN PERMITTED USES OF ORPHAN WORKS

76A Certain permitted uses of orphan works

Schedule ZA1 makes provision about the use by relevant bodies of orphan works.”.

(3) In section 149 of the Act (jurisdiction of the Copyright Tribunal)(a), after paragraph (f) insert—

“(fa)paragraph 7 of Schedule ZA1 (application to determine compensation for use of orphan works).”.

(4) In Schedule 2 to the Act (rights in performances: permitted acts), after paragraph 6H(b)insert—

“Certain permitted uses of orphan works

6I.—(1) The rights conferred by this Chapter are not infringed by a relevant body in the circumstances set out in paragraph 1(2) of Schedule ZA1 (subject to paragraph 6 of that Schedule).

(2) “Relevant body” has the meaning given by that Schedule.”.

(5) Before Schedule A1 to the Act(c), insert the Schedule ZA1 which is set out in the Schedule to these Regulations.

27th October 2014

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

(a) Section 149 has been amended in ways which are not relevant to these regulations.

(b) Paragraph 6H of Schedule 2 was inserted by S.I. 1372/2014.

(c) Schedule A1 was inserted by the Enterprise and Regulatory Reform Act 2013 (c.24), section 77(4) and Schedule 22, Part 1 paragraph 1.

1. Before Schedule A1 to the Act insert—

“SCHEDULE ZA1

Section 76A

CERTAIN PERMITTED USES OF ORPHAN WORKS

PART 1

GENERAL PROVISIONS

Certain permitted uses of orphan works by relevant bodies

1.—(1) A relevant body does not infringe the copyright in a relevant work in its collection which is an orphan work by—

- (a) making the orphan work available to the public; or
- (b) reproducing the orphan work for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration.

(2) A relevant body does not infringe the rights conferred by Chapter 2 of Part 2(a) by doing either of the following in relation to a relevant work in its collection which is an orphan work—

- (a) making the orphan work available to the public; or
- (b) reproducing the orphan work for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration.

(3) A relevant body does not commit an offence under section 107(b) or 198(c) by using an orphan work in a way which, by virtue of this Schedule, does not infringe copyright or the rights conferred by Chapter 2 of Part 2.

(4) This paragraph is subject to paragraph 6 (further requirements for use of orphan works).

Meaning of “relevant body”, “relevant work” and “rightholder”

2.—(1) In this Schedule “relevant body” means—

- (a) a publicly accessible library, educational establishment or museum,
- (b) an archive,
- (c) a film or audio heritage institution, or
- (d) a public service broadcasting organisation.

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- (a) Chapter 2 of Part 2 has been amended in the following ways: section 182 was substituted by, and sections 182A to 182D were inserted by, S.I. 1996/2967 and amended by S.I. 2003/2498, S.I. 2006/18 and S.I. 2013/1782; section 183 was amended by S.I. 2003/2498; section 185 was amended by S.I. 2006/18; sections 186 and 187 were amended by S.I. 2003/2498; section 189 was amended by S.I. 2006/18; section 190 was amended by S.I. 1996/2967 and S.I. 2006/18; section 191 was substituted by S.I. 1995/3297 and amended by S.I. 2003/2498, S.I. 2006/18 and S.I. 2013/1782; sections 191A to 191M were inserted by S.I. 1996/2967 and sections 191A, 191C, 191D and 191I were amended by S.I. 2003/2498 and S.I. 2006/18; sections 191HA and 191HB were inserted by S.I. 2013/1782; sections 192A and 192B were substituted by S.I. 1996/2967 and amended by S.I. 2006/18 and 2013/1782; and sections 192 and 193 were amended by S.I. 1996/2967 and S.I. 2006/18.
 - (b) Section 107 has been amended in ways which are not relevant to these Regulations.
 - (c) Section 198 has been amended by S.I. 2003/2498 and S.I. 2006/18 and in other ways which are not relevant to these Regulations.

(2) Subject to sub-paragraph (4), in this Schedule “relevant work” means a work to which sub-paragraph (3) applies which is—

- (a) a work in the form of a book, journal, newspaper, magazine or other writing which is contained in the collection of a publicly accessible library, educational establishment or museum, an archive or a film or audio heritage institution;
- (b) a cinematographic or audiovisual work or a sound recording which is contained in the collection of a publicly accessible library, educational establishment or museum, an archive or a film or audio heritage institution; or
- (c) a cinematographic or audiovisual work or a sound recording which was commissioned for exclusive exploitation by, or produced by, one or more public service broadcasting organisations on or before 31 December 2002 and is contained in the archives of that organisation or one or more of those organisations.

(3) This sub-paragraph applies to a work if—

- (a) it is protected by copyright or rights conferred by Chapter 2 of Part 2, and
- (b) the first publication or first broadcast of the work was in a member State.

(4) In this Schedule “relevant work” also includes a work listed in any of paragraphs (a) to (c) of sub-paragraph (2) which—

- (a) is protected by copyright or rights conferred by Chapter 2 of Part 2, and
- (b) has never been published or broadcast, but
- (c) has been made publicly accessible by a relevant body with the consent of the rightholders,

as long as it is reasonable to assume that the rightholders would not oppose the use of the work as mentioned in paragraph 1(1) or (2).

(5) References in this Schedule to a relevant work include—

- (a) a work that is embedded or incorporated in, or constitutes an integral part of, a relevant work, and
- (b) a performance in relation to which rights are conferred by Chapter 2 of Part 2 and which is embedded or incorporated in, or constitutes an integral part of, a relevant work.

(6) In this Schedule “rightholder” in relation to a relevant work means—

- (a) an owner of the copyright in the work,
- (b) a licensee under an exclusive licence in relation to the work,
- (c) a person with rights under Chapter 2 of Part 2 in relation to a performance recorded by the work, or
- (d) a licensee under an exclusive licence in relation to those rights.

(7) In the application of sub-paragraph (6) to a performance by virtue of sub-paragraph (5), the reference in sub-paragraph (6)(c) to a performance recorded by the work is to be read as a reference to the performance.

(8) In this paragraph “public service broadcasting organisation” includes a public service broadcaster within the meaning of section 264 of the Communications Act 2003(a).

Meaning of “orphan work”

3.—(1) For the purposes of this Schedule a relevant work is an orphan work if—

- (a) there is a single rightholder in the work and the rightholder has not been identified or located, or

(a) 2003 c.21.

- (b) there is more than one rightholder in the work and none of the rightholders has been identified or located,

despite a diligent search for the rightholder or rightholders having been carried out and recorded in accordance with paragraph 5.

(2) Subject as follows, a relevant work with more than one rightholder is also an orphan work for the purposes of this Schedule if—

- (a) one or more of the rightholders has been identified or located, and
- (b) one or more of the rightholders has not been identified or located despite a diligent search for the rightholder or rightholders having been carried out and recorded in accordance with paragraph 5.

Mutual recognition of orphan work status

4. A relevant work which is designated as an orphan work in another member State is an orphan work for the purposes of this Schedule.

Diligent searches

5.—(1) For the purposes of establishing whether a relevant work is an orphan work, a relevant body must ensure that a diligent search is carried out in good faith in respect of the work by consulting the appropriate sources for the category of work in question.

(2) The relevant body must carry out the diligent search prior to the use of the relevant work.

(3) The sources that are appropriate for each category of relevant work must as a minimum include—

- (a) the relevant databases maintained by the Office for Harmonization in the Internal Market; and
- (b) where there is no record that the relevant work is an orphan work in the databases referred to in paragraph (a), the relevant sources listed in Part 2 of this Schedule for that category.

(4) The Comptroller-General of Patents, Designs and Trade Marks may issue guidance on the appropriate sources to be consulted under this paragraph for any particular category of work.

(5) Subject to sub-paragraphs (6) to (8), a search of the sources mentioned in sub-paragraph (3)(b) must be carried out in the member State in which the relevant work was first published or broadcast.

(6) If the relevant work is a cinematographic or audiovisual work and the producer of the work has his or her headquarters or habitual residence in a member State, the search must be carried out in the member State of the headquarters or habitual residence.

(7) If the relevant work falls within paragraph 2(4), the search must be carried out in the member State where the organisation that made the work publicly accessible with the consent of the rightholders is established.

(8) If there is evidence to suggest that relevant information on rightholders is to be found in other countries, a relevant body carrying out a search in accordance with sub-paragraph (3)(b) must also consult the sources of information available in those other countries.

(9) A relevant body that makes use of orphan works in accordance with this Schedule must maintain records of its diligent searches and must provide the following information to the Office for Harmonization in the Internal Market—

- (a) the results of the diligent searches which the relevant body has carried out and which first established that a work is an orphan work;
- (b) the use that the relevant body makes of the orphan works;

- (c) any change, pursuant to paragraph 7, of the orphan work status of a relevant work that the relevant body has used and in respect of which the relevant body has been supplied with evidence by a rightholder in accordance with paragraph 7(2); and
- (d) the contact information for the relevant body.

Further requirements for use of orphan works

6. This Schedule does not prevent the use by a relevant body of an orphan work as mentioned in paragraph 1 from infringing copyright or the rights conferred by Chapter 2 of Part 2 if—

- (a) the revenues generated in the course of the use of the orphan work are used otherwise than for the exclusive purpose of covering the costs of the relevant body in digitising orphan works and making them available to the public;
- (b) the relevant body uses the orphan work in order to achieve aims which are not related to its public-interest mission (and the aims which are to be treated as related to its public interest mission include, in particular, the preservation of, the restoration of, and the provision of cultural and educational access to, works contained in its collection);
- (c) any rightholder who has been identified or located has, in relation to the rightholder’s rights, not authorised the relevant body’s use of the orphan work as mentioned in paragraph 1; or
- (d) the relevant body fails, in the course of the permitted use of the orphan work, to acknowledge the name of any author of or other rightholder in the work who has been identified.

End of orphan work status

7.—(1) This paragraph applies to a rightholder who has not been identified or located in relation to a relevant work.

(2) A rightholder may put an end to the orphan work status of a relevant work by providing evidence of his or her ownership of the rights to the Office for Harmonization in the Internal Market or to the relevant body which carried out the diligent search which first established that the relevant work is an orphan work.

(3) A relevant body that is using or has used the orphan work must within a reasonable period provide the rightholder with fair compensation for that body’s use of the relevant work together with information on how the fair compensation has been calculated.

(4) If a relevant body and the rightholder cannot agree on the amount of compensation payable, either of them may apply to the Copyright Tribunal to determine the amount.

PART 2

SOURCES TO BE SEARCHED DURING DILIGENT SEARCH

Category of relevant work	Sources to be searched
1. Published books	<ul style="list-style-type: none"> (a) legal deposit, library catalogues and authority files maintained by libraries and other institutions; (b) the publishers’ and authors’ associations in the country in question; (c) existing databases and registries,

	<p>WATCH (Writers, Artists and their Copyright Holders), the ISBN (International Standard Book Number) and databases listing books in print;</p> <p>(d) the databases of the relevant collecting societies, including reproduction rights organisations;</p> <p>(e) sources that integrate multiple databases and registries, including VIAF (Virtual International Authority Files) and ARROW (Accessible Registries of Rights Information and Orphan Works).</p>
<p>2. Newspapers, magazines, journals and periodicals</p>	<p>(a) the ISSN (International Standard Serial Number) for periodical publications;</p> <p>(b) indexes and catalogues from library holdings and collections;</p> <p>(c) legal deposit;</p> <p>(d) the publishers' associations and the authors' and journalists' associations in the country in question;</p> <p>(e) the databases of relevant collecting societies including reproduction rights organisations.</p>
<p>3. Visual works, including fine art, photography, illustration, design, architecture, sketches of the latter works and other such works that are contained in books, journals, newspapers and magazines or other works</p>	<p>(a) the sources referred to in paragraphs 1 and 2;</p> <p>(b) the databases of the relevant collecting societies, in particular for visual arts, and including reproduction rights organisations;</p> <p>(c) the databases of picture agencies, where applicable.</p>
<p>4. Audiovisual works and sound recordings</p>	<p>(a) legal deposit;</p> <p>(b) the producers' associations in the country in question;</p> <p>(c) databases of film or audio heritage institutions and national libraries;</p> <p>(d) databases with relevant standards and identifiers such as ISAN (International Standard Audiovisual Number) for audiovisual material, ISWC (International Standard Music Work Code) for musical works and ISRC (International Standard Recording Code) for sound recordings;</p> <p>(e) the databases of the relevant collecting societies, in particular for authors, performers, sound</p>

	<p>recording producers and audiovisual producers;</p> <p>(f) credits and other information appearing on the work’s packaging;</p> <p>(g) databases of other relevant associations representing a specific category of rightholders.</p>
5. Relevant works which have not been published or broadcast	Those sources that are listed in paragraphs 1 to 4 above which are appropriate to a relevant work which is unpublished.”

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the Copyright, Designs and Patents Act 1988 (“the Act”) by inserting new sections 44A and 76A, a new paragraph 6I in Schedule 2 and a new Schedule ZA1. The Regulations implement the provisions of Directive 2012/28/EU of the European Parliament and of the Council of 25th October 2012 on certain permitted uses of orphan works (OJ No L299/5, 27.10.2012, p.1).

The Regulations provide for the permitted uses of orphan works by relevant bodies. The Regulations define “relevant body”, “relevant work”, “rightholder” and “orphan work”.

The Regulations set out the requirements for a diligent search, for the purpose of establishing whether a relevant work is an orphan work, and include a list of the minimum sources to be searched in different cases. The Regulations require a relevant body to supply certain information to the Office for Harmonization in the Internal Market.

The Regulations provide that, if a relevant work is designated as an orphan work in another Member State, it shall be treated as an orphan work in the United Kingdom.

The Regulations provide that, if the owner of an orphan work is identified, a relevant body that is using or has used the orphan work shall provide the owner with fair compensation for that body’s use of the work.

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 (together with a transposition note) which is available alongside the instrument on www.legislation.gov.uk.

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