

Response to Green Paper *Copyright in the knowledge economy*

The National Union of Journalists of Great Britain and Ireland is a trade union representing 37,000 journalists in several member states of the European Union. Our members work in newspaper, book and magazine publishing, broadcasting and public relations. They include (among others) reporters, feature-writers, photographers and authors of books.

(We follow the Berne convention of referring to all these holders of authors' rights as "authors" in the following and will refer to "creators" in contexts that include performers and any other individual holders of neighbouring rights.)

The background to our submission is the anomalous status of authors' rights, particularly journalists' authors' rights, in the UK and Ireland.

Journalists who are in staff employment in the United Kingdom and Ireland have no copyright or moral rights in the material they produce. Of the total NUJ membership, 8800 are sole trader freelancers and are first owners of the economic rights in their works; but they are frequently pressured by publishers and broadcasters into assigning all such rights, in "negotiations" on a distinctly uneven playing-field.

All journalists in the UK and Ireland are deprived by law of their moral right to be identified as the author of their work and to defend the integrity of their work when that work is done for newspapers or magazines or for the reporting of current affairs.

The NUJ adopts the response of the European Federation of Journalists. We have extensive additional comments to make on the question of "orphaned works" and some brief additional comments on the question of "user-generated content".

Orphaned works

Green Paper Q10: **Is a further Community statutory instrument required to deal with the problem of orphan works, which goes beyond the Commission Recommendation 2006/585/EC of 24 August 2006?**

Background

On the one hand, in Europe the overt pressure to do something to enable the use of works for which an author (or other rightholder) cannot be located comes from the library community: and much of the intense debate over the past year has therefore been framed in terms of ways of dealing with the *historic record*.

On the other, many creators fear for the effects of any attempt to deal with this question may have on the status of *current and future works*.

These fears are grounded in the predatory and rights-grabbing behaviour that creators observe from publishers, broadcasters and production companies. Photographers in particular fear that their works will be orphaned (verb transitive) by unscrupulous parties who may strip identifying information from their photographs, offer them to users as “orphaned” while collecting a “handling fee”, and sit back in the knowledge that few individual creators have the financial means or the time to bring civil proceedings.

The NUJ is in favour of making the historic record of published and broadcast works available to as wide a selection of citizens as possible: we believe many journalists are in general in favour of the widest dissemination of their work to the public – *so long as* they have effective and respected rights in that work and obtain equitable remuneration out of the revenue gained from that dissemination.

Essential requirements for any solution

The first essential requirement for any solution to the orphaned works question is, therefore:

1) There must be no move to allow use of orphans without simultaneous moves to stop the orphanage being filled

The advent of powerful, worldwide systems for searching texts on the world-wide web significantly simplifies the task of those who need to identify the author of a piece of text – though it does not directly address the question of would-be users discovering how to contact the person who can grant them a licence to use that text.

Equivalent means are not yet widely available for searching for a photographer, given only an image stripped of identifying information; nor, for that matter, a composer of music, given only a digital recording similarly stripped; still less to answer the question “who is this dancer?” or “who played that oboe?”

Technologies are rapidly developing, however, that will offer answers at least to the first two of these questions – “whose image?” and “whose composition”.

It should be possible for a would-be user to upload a personal copy of a work that they wish to use to a database which will tell them who must be credited and whose permission must be sought. To be more precise, what the user sees as “a database” will behind the scenes be an interoperable network of databases held by creators’ organisations worldwide – operating in much the same way

as the international Domain Name System that directed this submission from nuj.org.uk to europa.eu.

1.1) The EU can and must make a significant contribution to the development of the Knowledge Economy by supporting the development of databases linking works to their creators

From a perspective of high principle, it is arguable that the distinctive European part in the knowledge economy is intimately linked to the concept of authorship; to an unbreakable link between the creator and their creation; and to the value that users place on the assurance that the European tradition of authors' rights can offer them, even in the age of digital manipulation and cutting and pasting, that these words are in fact the work of Monica Ali; this photograph is in fact the work of Françoise Demulder; and this recording is in fact of Simon Rattle conducting the Berlin Philharmonic Orchestra.

From a practical and economic perspective all the above and all our members have to make a living out of dedicating themselves to making high-quality contributions to the knowledge economy; the alternative is a knowledge swap-shop instantiating what the author Andrew Keen derides as *The Cult of the Amateur* – with a California corporation creaming off advertising revenue down one side.

EU work to develop such databases, including seed financing, encouragement of standard-setting and assistance in bringing partner organisations together, must proceed starting now and in parallel with the Digital Libraries Initiative, to which it is an essential complement.

The NUJ has suggestions for concrete means of implementing this proposal and seeks an invitation to discuss these with the Commission.

2) Any means to facilitate the use of orphaned works must be compatible with the existing régime for licensing works of known creators.

To do otherwise would be to create a huge loophole in the existing Authors' Rights system, which is the economic and cultural underpinning of the Knowledge Economy. Suggestions of creating an "exception" to authors' (and performers') rights would create such a loophole – beside being in breach of the EU's obligations to the World Trade Organization's TRIPS agreement. The proposal recently floated in the US, whereby such abuse would remain unlawful but creators would be prevented from seeking remedies, is frankly bizarre and probably unconstitutional and contrary to international law (though until recently the latter point probably gained it domestic support).

2.1) If a work is to be used despite its creator(s) not being known, this must happen by the user obtaining a licence, in advance, for cash

This principle implies either the Canadian model of a government body that grants such licences, or a form of the extended collective licensing practised in the Nordic countries.

The NUJ is aware that the Commission has received a rather detailed proposal on the latter lines from the British Copyright Council with its response to this Green Paper. The following points about such schemes cannot be stressed too strongly:

2.2) Orphaned work must not undercut identified creators

Any body granting such licences should charge fees for specified uses of orphaned works that are commensurate with the prevailing fees for normally-issued licences for those uses.

2.3) Return of licence fees to revenant authors and other creators

Any legislation should specify that fees paid for use of a work that appears to be orphaned must be returned to revenant creators, and that on the creator reappearing they have an opportunity to negotiate payment for future use on the lines set out in the “windfall” provision of the 2002 German law governing contracts for exploitation of Authors’ Rights.

2.4) Application of unclaimed fees

Licence fees remaining unclaimed must be spent for the benefit of authors in general. Following the legislation in force in the Nordic countries, this could be for welfare, for education and to support the continuing development of databases linking works to authors, searchable by text, by image content and by musical content – as outlined above. Obvious partner organisations to develop such databases are the collecting societies and national libraries and archives.

2.5) Harmonisation will be required: crucially, of what *kind* of body is empowered to license

Contrary to the position taken by the High Level Expert Group of the Digital Libraries initiative, it will be necessary to harmonise any legislation passed across the EU.

Given the speed at which proposals are developing, it is therefore appropriate for the Commission to issue best practice guidelines immediately, strongly encouraging member states to adopt procedures that are compatible with existing well-established and well-functioning models in other member states.

In particular, in the Nordic countries that have extended collective licensing, the *quid pro quo* for granting licenses on behalf of people who are not represented is that extended collective licenses must be granted by organisations of authors. The Danish law, for example, allows uses such as cable TV broadcasts by:

...agreement on the exploitation of works in question with *an organisation comprising a substantial number of authors* of a certain type of works which are used in Denmark. The extended collective license gives the user right to exploit other works of the same nature although the authors of those works are not represented by the organisation.

[Section 50; *our emphasis*]

2.6) No use of unidentified works without a universal right to be identified

It would be a legal and logical nonsense to pass any measure allowing use of works whose authors are not identified, while there are any authors who do not have the right to be identified.

The provisions of the UK’s Copyright Designs and Patents Act 1988 exempting newspapers and magazines and “the reporting of current affairs” from the moral rights of authorship must be repealed in any UK legislation on orphaned works is brought forward.

The Commission must grasp this nettle, or abandon any attempt to deal with orphaned works.

2.7) Implementation of the InfoSoc Directive provision on preserving identification is deficient

It would equally be a legal and logical nonsense to make provision for use of works whose authors are not identified, while would-be users can remove identification from any work with

effective impunity. In particular, the UK's implementation of the provisions of the requirement of the EU InfoSoc Directive to protect against removal of author identification and other authors' rights "metadata" from works is, now that we re-examine it in this context, barking mad.

The creator may sue as they would for an unauthorised use; but may sue only for the commercial value of the use in question. What, exactly, is the commercial value of a credit or byline?

The Commission must re-examine this question, which is central to the entire knowledge economy; probably through amendment to the Enforcement Directive. The only solution that the NUJ can see at present is to direct that member states must make the removal of a credit or byline or other metadata a criminal offence and make that offence effectively prosecutable.

Wilful abuse of any provisions made for licensing of orphaned works should also be brought within the criminal law.

This is the only way that we can presently see to make any such provision enforceable, given that enforcement in the civil courts would depend on quantifying the unquantifiable. We would be keen to meet with the Commission to discuss any alternative proposals.

2.8) The Commission must set standards for diligent search

This is an extension of our argument that Member States' provisions must be harmonisation-ready, as it were. The Commission should immediately and strongly recommend that no Member State make provision for licensing use of orphaned works unless it be by licensing organisations that demonstrate their capability to audit the licence requester's compliance with guidelines on diligent search for an author or other creator – and these guidelines should be at least as stringent as those agreed by the EU High Level Expert Group on Digital Libraries.

The certification process should also be capable of expansion to certify the databases connecting authors to their works, mentioned above, as effective – but not the sole – means of locating authors.

2.9) Member states urgently need to ensure that creators have access to justice

From the point of view of the individual author – and the great majority of authors are sole traders and not wealthy – any provisions in any amending legislation for remedies against abuse are, as things stand, moot. Individual authors need access to justice through a process as accessible as the Small Claims Court and capable of handling copyright-related matters.

For all stakeholders, enforcement of any legislation on the use of works on the grounds that they are "orphaned" would remain pretty much moot while it is difficult-to-impossible to extract civil damages higher than the fee that would have been paid for a licence had it been asked for. The courts' default position should be that damages for use without a valid licence (including obtaining a licence for an allegedly-orphaned work by unsound means) are considerably higher than the commercial value of use made with one.

2.910) Declaration and publication of the status of orphaned works

In the context of mandatory identification of authors to prevent further works being orphaned, further discussion is needed on a European standard specifying the form of credit or byline to be attached to a work used when one or more of its authors is unknown. Each agency licensing use of

orphaned works should maintain a database (searchable by image and musical content where necessary) of works thus licensed, to be integrated into the network of creator-identification databases, referring would-be users to that agency to obtain further licences.

'User-created content'

Green Paper Q25: Should an exception for user-created content be introduced into the Directive?

The NUJ is concerned that the loose phrasing of this question in the Green Paper appears to conflate two separate issues concerning “user-generated content”:

- The first ownership of rights in including right to reproduce, *etc*, content such as readers’ comments on a magazine’s website, or users’ annotations of a well-known mapping website; and
- The fact that in the mapping case, and similar cases, the users create derivatives of others’ works.

Such lack of clarity in a proposal may threaten the exercise of the rights of all affected.

Being naturally – and indeed professionally – suspicious, we see here an attempt to sneak through a presumption of wholesale transfer of Authors’ Rights in “amateur” contributions freely made to commercial, profit-making publishing operations – under the cover of an appeal to innovation, to the fostering of “mash-ups” and “remixes” and other such sexy beasts.

Every professional creator – and every professional creator’s contribution as the very wellspring of the Knowledge Economy – started as an amateur creator.

No amateur creator can know when they start out whether they will become professional, nor what value – whether cultural or financial – their early creations will accrue later.

Authors Rights must be available to and enforceable by all, without exception, or the Knowledge Economy will die. Much, much more supporting argument for this position is available on request.

No exception for “user-created content” as mentioned in the Green Paper should be introduced.

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