

# Orphan works: the UK solution - the story so far

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# Three questions

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1. What's the problem?
2. What's the evidence?
3. What's the solution? Will it solve anything?

# 1. What's the problem? (1)

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- There are millions of print works (books, newspapers) which are said to be “locked up”, “frozen”, “unavailable for use” “entirely unusable in any circumstances”
- they are referred to, metaphorically, as “orphan”.

# What's the problem? (2)

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- If “orphans” were re-branded as “copyrights of negligible value” they might seem less problematic.
- The argument that there is a problem about which something needs to be done turns on two claims
  - (a) that there are many orphans and
  - (b) that they are of considerable commercial value.
- Claim (a) is certainly true and is an inevitable consequence of very long terms of protection.
- Claim (b) is almost certainly untrue.
- In fact there is market and research evidence that shows extremely uneven income distribution among copyright creators - J K Rowling earns many millions but the great majority of writers earn pathetically small amounts mostly within nine months of first publication.

# What's the problem? (3)

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- Consider the claim that orphan works are entirely unusable. Is anyone prevented from buying, owning or reading a copy of a book because of its copyright status?
- Is anyone prevented from visiting a library and reading the library's copy of a book because of its copyright status?
- These are all valuable forms of use

# What's the problem? (4)

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- The term “orphan work” invites us to forget the distinction between books and rights and assumes that the only use that matters is digital use.

# What's the evidence? (1)

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- To establish how difficult/expensive it really might be to obtain rights clearances for the digital use of cultural assets one would need to start by identifying and excluding
  - that part of the collection which is not going to be digitised;
  - that part which is in the public domain; and
  - (in the UK) that part which is Crown copyright.
- It would only be the remaining subset where the level of unidentified rightsowners would be material.

# What's the evidence? (2)

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- Bad evidence is constantly re-cycled.
- For example, the British Library's "Seeking New Landscapes" states that its results were based on
- "(as)random selection as possible".
- The procedure excluded government publications, non-English language publications, and "grey" material.
- It follows that the reported 43% of in copyright works that were assessed as orphans is a figure that applied only to the 140 books in the sample and could not possibly be applied to the library's book stock as a whole.
- But the 43% figure re-appears again and again as though it were reliable



# What's the evidence? (3)

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- Another example of bad evidence.
- The IPO's impact assessment gives a figure for the number of items in the British Library's newspaper collection. The figure is 112.5 million items. There is no explanation where this figure comes from or what the items counted are.
- In the last months the Library has published on its website a figure for the number of pages in the newspaper collection - 750 million.

# What's the evidence? (4)

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- Another example.
- A study for the European Commission in 2010 described a relatively small-scale clearance exercise undertaken by the British Library to digitise 60 pre-1912 newspaper titles (it is unclear whether what is actually meant is “issues” rather than titles). As 235 manhours were spent in all - around 4 hours per newspaper - clearances were probably being sought for individual issues. Only one rightholder was located - and the study doesn't say whether permission was granted.
- The conclusion drawn by the study's author was that 95 per cent of pre-1912 newspapers are orphan

# What's the solution? (1)

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Hargreaves recommended

“extended collective licensing for mass licensing of orphan works, and a clearance procedure for use of individual works”

## What's the solution? (2)

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- The Enterprises and Regulatory Reform Act 2013 and the draft regulations, which have been published but are not yet in force bear no resemblance to the Hargreaves recommendation. In fact, the legislation has done virtually the opposite.

## What' s the solution? (3)

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The Secretary of State has been given the power to make regulations setting up a scheme under which an authorising body (the Intellectual Property Office) will issue licences for the use of works that qualify as orphan.

# What's the solution? (4)

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- A person who wishes to use an orphan work will be able to obtain a licence from the IPO to use the work, subject to satisfying the IPO that a diligent search has been done to try and locate the rights owner and that search has not been successful.
- If someone appears who can establish that he is the rightsowner he will be entitled to be paid the licence fee but not to terminate the licence.

# What's the solution (5)

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- A licence will be non-exclusive and for a term of not more than seven years in the first instance.
- A licence fee must be charged, calculated with regard to the level of licence fee achieved for a similar use of similar but non-orphan works.
- It is not clear how the IPO will obtain the relevant information about the level of licence fees for non-orphan works.

# Will it solve anything? (1)

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- The IPO officials have indicated that Extended Collective Licensing is not a way to get authorisation to do mass digitisation of orphan works. They have also made it clear that orphan works licensing will be done on an individual basis.
- In other words mass digitisation of orphan works is not covered by the UK legislation.



# Will it solve anything? (2)

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- “No”
- But now that cultural institutions can see the possibility of making wholly new digital uses of their collections, they have the remedy in their own hands.
- No material should by now be being accessioned unless a decision has been taken that digital access is not needed or an appropriate licence has been obtained giving the institution the appropriate rights for digital exploitation.

# Orphan Works: the UK solution

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- Thank you