

Enterprise and Regulatory Reform Act 2013

The **primary legislation** is the **Enterprise and Regulatory Reform Act 2013 section 77** which amends the Copyright Designs and Patents Act 1988 by inserting a new power which is in the following terms:

“Orphan works licensing and extended collective licensing

116A Power to provide for licensing of orphan works

(1) The Secretary of State may by regulations provide for the grant of licences in respect of works that qualify as orphan works under the regulations.

(2) The regulations may—

(a) specify a person or a description of persons authorised to grant licences, or

(b) provide for a person designated in the regulations to specify a person or a description of persons authorised to grant licences

(In fact, the most recent consultation put out by the government states that the Intellectual Property Office will be the body authorised to grant licences.)

(3) The regulations must provide that, for a work to qualify as an orphan work, it is a requirement that the owner of copyright in it has not been found after a diligent search made in accordance with the regulations.

(4) The regulations may provide for the granting of licences to do, or authorise the doing of, any act restricted by copyright that would otherwise require the consent of the missing owner.

- (5) The regulations must provide for any licence—
- (a) to have effect as if granted by the missing owner;
 - (b) not to give exclusive rights;
 - (c) not to be granted to a person authorised to grant licences.
- (6) The regulations may apply to a work although it is not known whether copyright subsists in it, and references to a missing owner and a right or interest of a missing owner are to be read as including references to a supposed owner and a supposed right or interest.

The Copyright(Licensing of Orphan Works) Regulations 2014 (Draft)

Orphan work and orphan right

3 - (1) An orphan work is a copyright work where one or more of the owners of the copyright has not been identified or, if identified, has not been located after a diligent search made in accordance with regulation 4.

(2) An orphan right is a performer's right where one or more of the owners of which has not been identified or, if identified, has not been located after a diligent search made in accordance with regulation 4

(3) Where a copyright work or a performer's right has more than one right holder and one or more of the right holders is either not identified or, if identified, is not located, despite a diligent search for the right holders having been carried out, then the copyright work or performer's right is an orphan work or orphan right to the extent that the

rights of those right holders are either not identified or not located.

(4) In these regulations, a reference to an orphan work or to an orphan right shall include a work or right although it is not known whether copyright subsists in it, and references to an owner who had not been identified or located are to be read as including references to a supposed owner and a supposed right or interest.

(5) In these regulations, a reference to a copyright work or a performer's right shall include works and rights which are embedded or incorporated in, or constitute an integral part of, another copyright work or performance.

(6) A copyright work and a performer's right ceases to be an orphan work or right when the copyright owner is identified in accordance with regulation 12.

Diligent Search

4- (1) An orphan licensee shall, prior to the grant of 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 or right which is the proposed subject matter of the orphan licence and relates to the rights in that work or rights which the orphan licensee proposes to use.

(2) A diligent search shall comprise a reasonable search to identify and locate the right holder of the copyright work or performer's right.

(3) The authorising body may issue guidance on what comprises a diligent search for different kinds of orphan work or orphan right and the guidance shall have regard to the sources listed in the Schedule to the 2014 Regulations

(4) An existing diligent search is valid for seven years from the earlier of the date
(a) on which an orphan licence of the orphan work or

orphan right was first granted by the authorising body; or
(b) that the details of a diligent search undertaken under the 2014 Regulations [undertaken in respect of a relevant copyright work or performer's right] was first made public by the Office for Harmonization in the Internal Market (Trade Marks and Designs).

(5) 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 or right

as the authorising body may require.