

Briefing: Orphan works copyright exception in the case of a no deal Brexit

22 February 2019

What's happening?

If the UK leaves the European Union without a deal, one direct impact on cultural organisations and their users will be the [removal of the orphan works copyright exception](#) immediately upon the UK's exit.

The UK Government has stated:

*"In the UK, the exception to copyright infringement for orphan works will cease. CHIs that wish to digitise and make available online orphan works in their collections will not be able to do so in the UK under an exception to copyright. Works that UK CHIs have previously placed online will need to be removed to avoid infringing the copyright in those works."*¹

On 19 February 2019 the British Library [announced](#) plans to suspend access to its digitised Spare Rib Archive in the event of a no deal Brexit, because the resource heavily relies on this exception to copyright.²

If the UK concludes a deal with the EU, during any transition period the exception will remain in place. In this situation, organisations can continue to benefit from the exception during the transition period. Whether the exception would remain in place after a transition period would be contingent upon terms of agreement made between the UK and EU during the transition.

This briefing focuses on action required in the case of a no deal exit.

What do I need to do?

1. Identify if your library, archive or cultural organisation has digitised and made available works under the orphan works exception - works made available under this exception will have had to be registered on the EU Intellectual Property Office (EUIPO) Orphan Works Database, which you can search at <https://euipo.europa.eu/orphanworks/>.
2. Determine whether you have another lawful route for keeping digitised orphan works available if the exception is withdrawn.
 - One option may be the separate UK orphan works licensing scheme, which is *not* being removed in the case of a no deal Brexit. This scheme is run by the UK Intellectual Property Office (IPO). However, this is a *licensing* scheme, not an exception, meaning that you will need to successfully apply and pay for a licence from the IPO in respect of each work before you can lawfully make content available. The licensing scheme is not suited to mass digitisation, as you may only license a small number of works at one time and you must pay individual permission and processing fees per work. If you consider this approach, you should also read the details of the licence on offer carefully. Unlike the orphan works exception, a licence will only cover your use of material for a period of up to seven years. Renewal of the licence is possible,

¹ www.gov.uk/government/publications/changes-to-copyright-law-in-the-event-of-no-deal/changes-to-copyright-law-in-the-event-of-no-deal#mutual-recognition-of-orphan-works

² blogs.bl.uk/socialscience/2019/02/spare-rib-archive-possible-suspension-of-access.html

but requires you to update the diligent search carried out in respect of the original licence. Details of the licensing scheme are available at <https://www.gov.uk/guidance/copyright-orphan-works>.

- It *may* in some cases be possible to provide more limited access to digitised orphan works. For example, you may find that in the right circumstances you are able to rely on the ‘dedicated terminals’³ exception to provide onsite access. This is an exception, like the orphan works exception, meaning that you do not need to make an application for use of works under it or pay a licence fee. However, the terms of this exception are quite different from the orphan works exception. LACA has [published guidance on this exception](#).⁴
3. You may need to consider your options for removing material from public access if you are not able to benefit from a separate lawful route to keeping orphan works available online. As noted by the Government, if the exception is removed, content already made available under it will infringe copyright from the time the exemption is withdrawn, unless there is another lawful route in place for maintaining access, such as a licence.⁵ Depending on the extent of material you have made available under the exception, you should consider whether it would be best to remove a whole collection or whether you are able to remove only those specific works that are available under the exception. The British Library has stated that just over half - 57% - of its Spare Rib Archive resource was made available under the exception. However, the British Library has decided to suspend online access to the entire resource if the exception is withdrawn, noting that the remainder of the material ‘would not form a sufficiently coherent resource to be useful to researchers’.⁶

What happens next if the exception is withdrawn?

If the orphan works exception is withdrawn due to a no deal Brexit, the library and archive sectors will need to make the case for a suitable replacement. This is likely to take time, as there will be a wide range of pressures on the Government related to the UK’s exit from the EU.

The best course in this scenario would be a like-for-like replacement, with a UK orphan works exception put into law without delay. LACA’s view is that this is demonstrably reasonable and feasible. After all, the UK has benefited from an orphan works exception since 2014. LACA will strongly make the case to the Government for a suitable framework, in the case of a no deal exit from the EU.

How can we raise concern about this with the Government?

If this change will affect you, immediately or in terms of long-term digitisation planning, you are **strongly encouraged** to [contact](#)⁷ the Intellectual Property Office (IPO) to note this and to ask for detailed advice on mitigating the impact of withdrawal. You should also ask the IPO for details of how the Government will be working to replace the exception, if withdrawn.

It is important that the IPO understands the impact this withdrawal will have on the UK cultural landscape. The best way to do this is for individual organisations to raise the matter directly with the IPO.

³ www.legislation.gov.uk/ukpga/1988/48/section/40B

⁴ uklaca.org/329/

⁵ www.gov.uk/government/publications/changes-to-copyright-law-in-the-event-of-no-deal/changes-to-copyright-law-in-the-event-of-no-deal#mutual-recognition-of-orphan-works

⁶ blogs.bl.uk/socialscience/2019/02/spare-rib-archive-possible-suspension-of-access.html

⁷ information@ipo.gov.uk or visit www.gov.uk/government/organisations/intellectual-property-office