

CAYMAN ISLANDS



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**THE COPYRIGHT (CAYMAN ISLANDS) ORDER 2015
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**THE COPYRIGHT (LICENSING OF ORPHAN WORKS)
REGULATIONS, 2016**

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In exercise of the powers conferred by sections 116A, 116C and 116D of the Copyright, Designs and Patents Act 1988 as extended to the Cayman Islands by the Copyright (Cayman Islands) Order 2015, the Cabinet makes the following Regulations -

1. These Regulations may be cited as the Copyright (Licensing of Orphan Works) Regulations, 2016 and shall come into force on the 30th day of June, 2016.

Citation and commencement

2. In these Regulations -

Definitions

“Act” means the Copyright, Designs and Patents Act 1988 as extended to the Islands by the Copyright (Cayman Islands) Order 2015;

“authorizing body” means the Registrar of Patents and Trademarks or the Registrar’s delegate;

“diligent search” has the meaning set out in regulation 4;

“orphan licence” means a licence authorizing the use of an orphan work;

“orphan licensee” means a person who either wishes to be granted or has been granted an orphan licence;

“orphan work” has the meaning set out in regulation 3;

“relevant work” has the meaning set out in regulation 3; and

“right holder” has the meaning set out in regulation 3.

Relevant work, right holder and orphan work

3. (1) “Relevant work” means a work which is protected by copyright.

(2) A reference to a “relevant work” includes a reference to a work, which itself falls within the definition of “relevant work” and is embedded in or incorporated in, or constitutes an integral part of, another relevant work.

(3) “Right holder” in relation to a relevant work means-

- (a) an owner of the copyright in the relevant work;
- (b) a licensee under an exclusive licence in relation to the relevant work; or
- (c) a licensee under an exclusive licence in relation to those rights.

(4) A relevant work is an orphan work where, after a diligent search made in accordance with regulation 4, one or more of the right holders in the relevant work have either not been identified or, if identified, have not been located.

(5) Where a relevant work has more than one right holder and, after a diligent search made in accordance with regulation 4, one or more of the right holders have either not been identified or, if identified, have not been located, then the relevant work is an orphan work to the extent that the rights of those right holders are either not identified or not located.

(6) In these Regulations, a reference to an orphan work includes a relevant work in which it is not known whether copyright or the right to permit or prohibit the restricted acts subsists, and references to a right holder who has not been identified or located are to be read as including references to a supposed right holder.

(7) A relevant work ceases to be an orphan work to the extent that a right holder is identified in accordance with regulation 12.

Diligent search

4. (1) An orphan licensee shall, before applying for 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 which is the proposed subject matter of the orphan licence and relates to the rights in the relevant work which the orphan licensee proposes to use.

(2) A diligent search shall comprise a reasonable search of the relevant sources to identify and locate the right holders of the relevant work.

(3) The sources that are relevant for the relevant work shall, as a minimum, include -

- (a) the relevant register maintained by the authorizing body; and
- (b) where there is no record that the relevant work is an orphan work in the register referred to in subparagraph (a), any relevant sources listed for that category of work in Part 2 of Schedule ZA1 to the Act.

(4) The authorizing body may issue guidance on what sources may additionally be relevant in the case of different relevant works.

(5) A diligent search is valid, for the purposes of paragraph (1), for seven years from the earlier of -

- (a) the date on which an orphan licence of the orphan work was first granted by the authorizing body; or
- (b) the date that the record of a diligent search undertaken in respect of a relevant work was first made public.

(6) An orphan licensee shall provide the authorizing body with any information concerning-

- (a) the diligent search; and
- (b) the use that the orphan licensee proposes to make of the orphan work,

that the authorizing body may require in connection with the application for an orphan licence.

(7) The orphan licensee shall, when applying for an orphan licence, provide the authorizing body with an application in the form required by the authorizing body, including in electronic form, and the application shall -

- (a) demonstrate that a diligent search has been carried out; and
- (b) contain a declaration in writing by the orphan licensee stating that the information provided in the application is correct.

(8) The orphan licensee is liable for infringement of copyright where -

- (a) an orphan licensee makes a declaration under paragraph (7)(b) that the orphan licensee knows or has reason to believe is false; and
- (b) the orphan licensee is granted an orphan licence and carries out any of the acts restricted by copyright.

(9) The authorizing body shall take reasonable steps to ensure that the search relied on by the orphan licensee satisfies the requirements for a diligent search.

Register of orphan works

5. (1) The authorizing body shall maintain and update a register which sets out the details of the orphan works in respect of which -

- (a) a diligent search has been carried out and an application for the grant of an orphan licence has been made to and is being considered by the authorizing body;
- (b) orphan licences have been granted together with the permitted uses of the relevant works; or
- (c) orphan licences have been refused.

(2) The authorizing body shall make the register available to the public free of charge by electronic means.

Licensing of orphan works

6. (1) Once the authorizing body has received the information set out in regulations 4(6) and (7), the authorizing body may grant an orphan licence.

(2) The authorizing body may only grant an orphan licence which -

- (a) permits non-exclusive use of an orphan work in Cayman Islands;
- (b) permits acts restricted by the copyright in an orphan work for a term not exceeding 7 years;
- (c) prohibits the grant of sub-licences;
- (d) has effect as if granted by the right holder of the relevant work; and
- (e) provides that the use of an orphan work does not affect the moral rights of an author under Chapter IV of Part 1 of the Act and treats those moral rights as having been asserted.

(3) Subject to the requirements set out in paragraph (2), the authorizing body may grant a licence subject to conditions.

(4) An orphan licence may not be granted to a person authorized to grant licences.

(5) The authorizing body may refuse to grant a licence -

- (a) on the ground that, in the opinion of the authorizing body, a proposed use or adaptation is not appropriate having regard to the circumstances of the case, including whether the proposed adaptation constitutes derogatory treatment of the work; or
- (b) on any other reasonable ground.

(6) Subject to the requirements of paragraph (2), the authorizing body may, during the term of a licence, vary the terms of an orphan licence.

7. Any person may, without infringing copyright, make reasonable use of an orphan work for purposes which are incidental to - Use for incidental purposes
- (a) the application for the grant of an orphan licence; and
 - (b) the processing of the application and the maintenance of the register referred to in regulation 5(1).
8. (1) On the request of the orphan licensee, submitted in the form required not less than six months before the expiration of the orphan licence, the authorizing body may renew an orphan licence for a further term not exceeding seven years. Renewal of orphan licence
- (2) A request for a renewal of an orphan licence shall be accompanied by evidence of a diligent search carried out in accordance with regulation 4 together with the information required by regulations 4(6) and (7).
9. The authorizing body may charge a reasonable fee for processing an application for an orphan licence or to vary or renew an existing orphan licence. Processing fee
10. (1) Subject to paragraph (2), on the grant of an orphan licence the authorizing body - Licence fee for an orphan licence
- (a) shall charge the orphan licensee a reasonable licence fee calculated with regard to relevant factors including the period of the licence and the level of licence fees which are achieved under licences for a similar use of similar relevant works which are not orphan works; and
 - (b) may charge a reasonable additional amount in respect of the costs of the authorizing body.
- (2) The authorizing body shall -
- (a) hold all licence fees paid under this regulation in a designated account;
 - (b) adopt accounting procedures that ring-fence in a separate account for monies received from orphan licences; and
 - (c) retain unclaimed licence fees for a period of not less than eight years from the date of the grant of the orphan licence.
- (3) The authorizing body shall maintain and make available information that sets out, in respect of the orphan licences it grants, how the licence fee is calculated.
11. The authorizing body shall publish an annual report on the operation of the orphan works scheme and the orphan licences granted by the authorizing body. Reporting requirements

Rights of identified right holder

12. (1) This regulation applies where the right holder in an orphan work identifies themselves to the authorizing body and satisfies the authorizing body of their identity and of their ownership of relevant rights in the orphan work either -

- (a) in the period between the receipt by the authorizing body of an application for the grant of an orphan licence and the grant by the authorizing body of that licence; or
- (b) within eight years or less of the date on which the authorizing body has granted an orphan licence for the orphan work.

(2) If the authorizing body has verified the diligent search but has not granted an orphan licence then the work shall, to the extent of the rights of the identified right holder referred to in paragraph (1), cease to be an orphan work.

(3) An orphan licence granted by the authorizing body shall continue for the remainder of the unexpired term of the licence or until the expiration of the notice period set out in the licence, notwithstanding the fact that the right holder is identified.

(4) The authorizing body shall within two months of being satisfied that the right holder has been identified -

- (a) notify the orphan licensee that the right holder has been identified;
- (b) pay to the right holder a sum equal to the licence fee paid by the orphan licensee in respect of the orphan work.

Unclaimed licence fees of orphan works

13. (1) Where more than eight years have elapsed since the grant of an orphan licence and no right holder in the orphan work has identified themselves, the authorizing body shall apply the licence fee, received in respect of that orphan licence, to pay the reasonable costs which the authorizing body has incurred in connection with the orphan works scheme, including the setting up and running of the scheme.

(2) To the extent that the licence fees referred to in paragraph (1) constitute a surplus over the reasonable costs of the authorizing body, the authorizing body may apply the surplus to fund social, cultural or educational activities in Cayman Islands.

(3) If a right holder in an orphan work identifies themselves to the authorizing body more than eight years after the grant of the orphan licence and satisfies the authorizing body of their identity and of their ownership of relevant rights in the orphan work, the authorizing body may make such payment to the right holder as the body considers reasonable in the circumstances.

14. (1) An orphan licensee may appeal to the Copyright Tribunal concerning - Appeals
- (a) the refusal by the authorizing body to grant an orphan licence to the orphan licensee;
 - (b) any condition imposed by the authorizing body in connection with the grant of the orphan licence; or
 - (c) any amount described in regulation 10(1) which the authorizing body requires the licensee to pay.

(2) A right holder who has identified themselves to the authorizing body under regulation 12 may appeal to the Copyright Tribunal on the grounds that the authorizing body has either acted improperly or failed to comply with obligations imposed on the authorizing body by these Regulations.

(3) On an application under this regulation, the Copyright Tribunal shall consider the matter and may make such order as the Copyright Tribunal considers reasonable in the circumstances.

(4) The Copyright Tribunal is deemed to have the jurisdiction under section 149(fa) of the Act to hear an appeal under this regulation and to make an order under paragraph (3).

Made in Cabinet this 24th day of June, 2016.

Kim Bullings

Clerk of the Cabinet.