



**IAML (UK & Irl) Response to the BEI’s Preliminary observations on the transposition into Irish copyright law of Chapter 1 (Out-of-Commerce works and other subject matter) of DSM Copyright Directive (EU) 2019/790**

IAML (UK & Irl) welcomes the further opportunity to comment on the DBEI’s proposed approach to the transposition of the out-of-commerce works provisions.

**Determining whether a work is out of commerce**

The Department expresses the view that it would not be practicable to apply a cut-off date to determine whether a work is out-of-commerce. We remain of the opinion that a cut-off date would be a simple criterion to apply, and indeed this mechanism is already in place in several countries with existing legislation relating to out-of-commerce works (e.g. France, Germany and Poland). We would reiterate our view that a cut-off date (with a moving wall) of 20 years prior to the act of digitization would be appropriate, with the caveat that works first made commercially available after this date can still be declared out-of-commerce where reasonable searches determine this to be the case.

For the avoidance of doubt, the legislation should also make it clear that works that were never in commerce (e.g. unpublished works) also fall within the definition of out of commerce works.

**Defining “reasonable effort”**

We understand the rationale behind the Department’s proposal not to define reasonable effort. We do however believe it is imperative that the legislation includes the necessary sections of recital 38 which make explicit what **doesn’t** need to be undertaken (e.g. not involving repeated action over time, second-hand shops not needing to be considered and that work-by-work checking is not required).

**Allocation of responsibilities**

We agree that the legislation should clarify which party is responsible for determining the out of commerce status of a work, however we strongly take the view that this responsibility should reside with the collective management organisation. For this licence to be of any practical use it cannot place a myriad of obstacles in the way of cultural heritage institutions, in the way that comparable schemes relating to orphan works have (e.g. the UK Orphan Works scheme, which has had very little take-up owing to the onerous “diligent search” requirements). CHIs should not be required to conduct time-consuming searches in an attempt to prove a negative (i.e. demonstrate the absence of commercial availability), when rights holder bodies – who will of course be receiving revenue from issuing licences – are far better equipped with the information about their distribution channels in order to be able to prove a positive. They should also be required to provide CHIs a judgement on commercial availability within a defined time period – we would advocate for 72 hours.

Claire Kidwell  
Chair, IAML (UK & Irl) Trade and Copyright Committee  
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