

Annex F: Response Form

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this consultation is 28 February 2014

Your name:

Organisation (if applicable):

Address:

Please return completed forms to:

Margaret Haig
 Copyright and Enforcement Directorate
 Intellectual Property Office
 First Floor, 4 Abbey Orchard Street, London, SW1P 2HT

Fax: 020 7034 2826

Email: copyrightconsultation@ipo.gov.uk

Please select the option below that best describes you as a respondent.

<input checked="" type="checkbox"/>	Business representative organisation/trade body
<input type="checkbox"/>	Large business (over 250 staff)
<input type="checkbox"/>	Medium business (50 to 250 staff)
<input type="checkbox"/>	Small business (10 to 49 staff)
<input type="checkbox"/>	Micro business (up to 9 staff)
<input type="checkbox"/>	Charity or social enterprise
<input type="checkbox"/>	Central government
<input type="checkbox"/>	Public body
<input type="checkbox"/>	Rights holder
<input type="checkbox"/>	Individual
<input type="checkbox"/>	Other (please describe)

Questions:**1. Could collecting societies improve the licensing of orphan works in their areas of expertise? If so, how?**

Yes. Collecting societies should be prepared to and able to offer advice and assistance to the authorising body, based on their own experience of the licensing process. Specifically, collecting societies should form part of the group to be consulted on a regular / routine basis by the authorising body in determining the market rate at which orphan works are licensed. The PA understands that collecting societies are already working with The IPO on pricing and terms, as part of a separate working group. This is welcome and should continue once the authorising body is established and OW licences are granted.

Collecting societies should also form part of the diligent search process, as first port of call for those wishing to determine whether a work is orphan. Collecting societies are also best placed to advise on sector-specific best practice guidance for diligent searches.

2. Should an orphan works licence be transferable? If so, in what circumstances would this be appropriate?

No, there is no clear reason why an orphan works licence should be transferable. Under the draft regulations a potential licensee will be required to provide information concerning the proposed use of the work. If a licence can be transferred then there may be no guarantee that the subsequent licensee adheres to the same conditions. Furthermore, such a transfer would complicate the licensing process and make it potentially harder for a reventant rightsholders to reclaim their work. Also it would muddle liability for any infringement deemed to have taken place if, for example, a diligent search had not been properly carried out.

However, there may be occasions where a licence could be transferred to a new licensee, such as when a publisher buys or sells a complete list. In these cases we would recommend that the acquiring licensee undertakes to the authorising body that they will use the work in the same ways as set out by the original licensee.

3. What are your views on allowing high volume users to take out an annual licence or similar arrangement to cover low value, non-commercial use?

Whilst we note the IPO's clarification that such a system would not obviate the requirement for a diligent search with respect of each work, we believe that the creation of such a blanket system for the payment of licence fees could, in the longer term, tend users towards arguments in favour of a blanket permissions system as well.

For the integrity of the overall system, and for users to be cognisant of the fact that a payment (howsoever nominal) is being paid with respect of each work, it is important to maintain a one-for-one relationship between payment and works.

The new system should not create even the possibility of a regular user mounting the defence of infringement by claiming to have thought that annual licence payment implied blanket permissions.

4. Should there be a limit on the period of time in which a rights holder can claim his/her remuneration? If yes, taking into account the examples of time limits set out at paragraph 5.9, what should that period be and why?

The PA would support a limit of 15 years in which a rights holder can claim remuneration, as long as the situation aligned with that for dormant bank accounts whereby the Government retains liability for any claims in perpetuity.

However, we note that the statute of limitation is six years, and would seem a sensible and established legal principle to adopt here.

5. At what point should the Government be able to distribute unclaimed funds? What is the rationale for your answer?

The Government should be able to distribute unclaimed funds after the period of time in which a rights holder can claim remuneration has expired i.e. after either 15 years or 6 years, in line with our response to Q4.

6. What should any unclaimed funds be used for and why?

Unclaimed funds should be used for the benefit of the creative/cultural community generally, for example to help fund the Copyright Hub.

7. Should there be a right of appeal for users of orphan works in the event of unreasonable actions by the authorising body (IPO)? If so, should this cover a) licence fee tariffs (e.g. via the Copyright Tribunal) b) refusals to grant licences or c) both?

There should be a right of appeal for users of orphan works, but this should only cover a refusal to grant licences. There would be no clear grounds for an appeal to focus on licence fee tariffs, given that these would have been set by the Authorising body following expert guidance and determined so as not to undermine the primary market.

There should also be the right of appeal for rightsholders against the granting of a licence or against the rate or other terms and conditions of a licence. This could be individual rightsholders or limited to intellectual rights property management bodies such as licensing bodies and author and publisher associations. A right of appeal would provide a safeguard to the relevant rightowner; and to ensure that the rate set by the authorising body does not undermine the primary market (consistent with one of the key principles enunciated by the Government in announcing this legislation).

It would seem sensible for this to be heard by the Copyright Tribunal, in line with current practice for non orphan works.

8. Approximately, how often would you anticipate using the orphan works scheme/how many applications a year would you envisage making?

It is impossible to anticipate usage of the orphan works scheme, however publishers regularly ask permission for each others' copyright works (e.g. in anthologies), and would thus expect to make use of this proposed system.

9. What types of use do you envisage using orphan works for?

See above. We would anticipate an orphan work could be used in the following way in the publishing industry: publisher x wishes to publish an anthology of poems, one (or more) of which appears to be an orphan. Publisher x approaches the authorising body to license orphan works and arranges and/or conducts due diligence on the putative orphan(s) The authorising body responsible for granting the licence will determine the appropriate rate which the organisation is required to pay to include the orphan within the anthology. This rate would align with the market rate for such works. Having completed due diligence to confirm orphan status, a licence for use of the orphan would be granted by the body to publisher x for inclusion within the anthology.

10. How much does the fact that licences are non-exclusive impact upon your potential use of the scheme?

It does not. Publishers would take this into account in the normal course of licensing.

11. How much does the fact that licences are limited to the UK impact upon your potential use of the scheme?

The PA does not believe it is practical to limit use of licensed orphan works to the UK and would have preferred the legislation to support the authorisation of a UK-originated orphan work for use outside of the UK, so as to facilitate the widest exploitation of the work within the limits of the licence granted to the licensee.

Limiting the licence to the UK only reduces the potential benefit in licensing the orphan in the first place, especially for publishers who publish on a pan European, if not multi territorial basis. Further, having a UK only licence scheme alongside a pan European Directive will be confusing and unhelpful.

12. If you are a potential licensee would you use the scheme only when you are fairly sure you want to use a particular work or would you use it to clear whole collections of works in your archives? What do you consider would be an acceptable amount of time for processing an application to use an orphan work?

Publishers would use the scheme when they wanted to use a particular work.

An acceptable amount of time for processing an application would be two months.

13. What proportion of your applications would be for unpublished works and what sort of works would these be?

The PA strongly disagrees with the inclusion of unpublished works within the orphan works scheme, since by definition the rights holder has not consented to any kind of publication, possibly for legal reasons (such as libel), or other very good reasons of their own.

Since the late 18th Century creative works have been recognised as part of the author's personality; such moral rights not only protect the rights of paternity and integrity but also the right of the author to determine timing, manner and form of exploitation. This view gives rise to the protection of the divulgation right in the Berne Convention Articles 10 which makes "free uses" subject to a "work which has already been lawfully made available to the public." The decision to publish is thus an important and internationally recognised part of the personality of the author and should not be overridden by a Statutory Instrument without justification.

The EU Orphan Works Directive permits use of unpublished works only when they have been made publicly accessible before 29 October 2014. We strongly believe the UK government should adopt similar limitations.

14. Would your main use of orphan works be as part of works that you produce already, such as a book or a television programme or would you develop a new product or service based on a whole collection of orphan works or a collection that is likely to contain many orphans or partial orphans?

Not for The PA to answer.

15. The impact assessment assumes that in 10% of orphan works applications, a diligent search would have already established that the work is orphan. Without a lawful means to use an orphan work, this would be wasted time and resource. Approximately, how often, at present, are you unable to locate or identify a rights holder following a diligent search?

Not for The PA to answer.

16. We have assumed that the majority of diligent searches carried out by publicly accessible archives are likely to be undertaken under the auspices of the EU Directive. Is this the case for your organisation, if you are a publicly accessible archive?

Not for The PA to answer.

17. If you are an organisation covered by the Directive, how often do you anticipate using a search conducted under the Directive to then support an application under the domestic scheme?

Not for The PA to answer.

18. If you are an organisation covered by the Directive, able to display much of your material on your website under the provisions of the Directive on certain permitted uses of orphan works, how much will you use the domestic orphan works licensing scheme?

Not for The PA to answer.

19. If you are a cultural organisation, how likely is it that you would be able to recover the full costs related to the digitisation and making available of an orphan work?

Not for The PA to answer.

20. How would you do this (for example by charging for access to your website)?

Not for The PA to answer.

21. Would you attempt to engage in a public-private partnership to digitise and make available such works? Any charges can only reflect the cost of search, digitisation and making available, with no profit margin. What evidence do you have of the level of interest of private enterprises in such partnerships?

Not for The PA to answer.

22. Do you agree that we should not implement the optional provision?

No. Please see our response to Question 13.

23. Are there any other sources that should be added to this list of essential sources?

No, but it should always be made clear that this list are those sources to be searched at a minimum, and the list is not exhaustive.

24. Do you agree with the addition for non published works under Part 2 of the Schedule? Are there any other sources that could be added for unpublished works?

The Schedule looks fine to us, notwithstanding concerns outlined above about unpublished works.

25. Is there a realistic prospect that civil sanctions will not provide appropriate remedies? In what circumstances?

The PA does not have a view on this.

26. Do you agree with this approach? Where should the burden of proof lie, and why?

Yes, fair compensation should be decided between the relevant body and the relevant rightsholder. Provided a diligent search has been carried out, the burden of proof should be with the relevant rights holder to demonstrate that they are the parent.

27. Is it necessary to provide for an appeals process on the level of fair compensation? Who should administer such an appeals process?

Yes. The PA does not have a view on who should administer this but it would seem sensible for The Copyright Tribunal to take on this role.

Do you have any other comments that might aid the consultation process as a whole?

Please use this space for any general comments that you may have, comments on the layout of this consultation would also be welcomed.

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply Yes No

At the IPO we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

Yes No