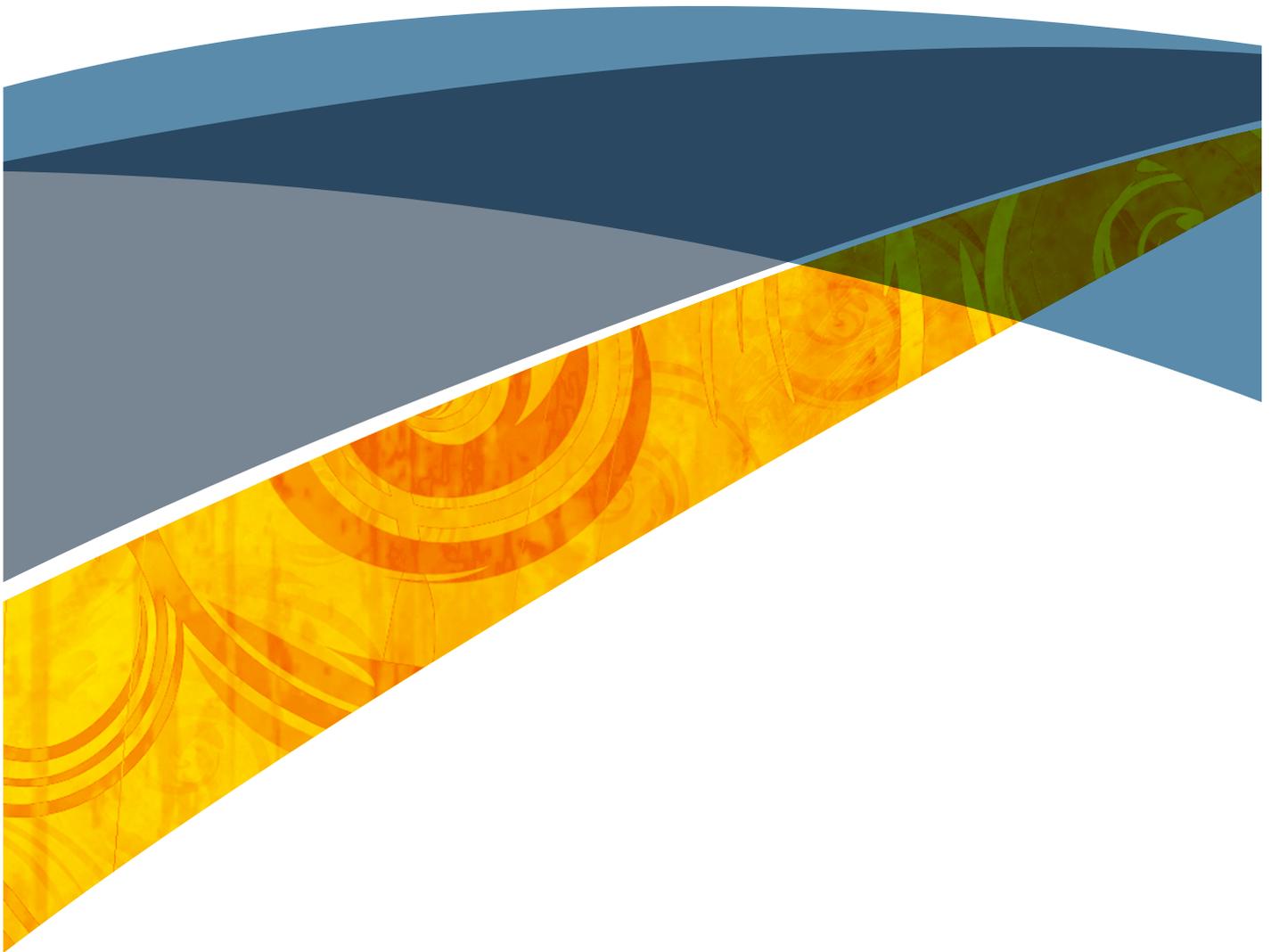




Intellectual
Property
Office

Government response to the technical consultation on orphan works





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Executive summary

Orphan works are copyright works where the right holder is unknown or cannot be located. If an individual wants to use a copyright work they must, with a few exceptions, seek the permission of the creator or right holder. If the right holder – or perhaps one of a number of right holders – cannot be found, the work cannot lawfully be used. This situation benefits neither the right holder, who may miss opportunities for licensing, nor potential users of those works. This is not a situation peculiar to the UK; other countries face the same issues.

The need to tackle the orphan works problem was identified by both the Gowers Review of Intellectual Property in 2006 and the more recent Review of Intellectual Property and Growth (the “Hargreaves Review”), which reported in May 2011.^{1 2} This review commissioned by the Prime Minister in November 2010, undertaken by Professor Ian Hargreaves on the impact the Intellectual Property system has on growth and innovation. The Government’s response to the Hargreaves Review in August 2011 indicated that it broadly accepted the recommendations. The Government then published its Consultation on Copyright on 14 December 2011, which received 471 responses. The Government response on orphan works was published on 2 July 2012.³ Reflecting the broader European interest in access to orphaned cultural works, the European Commission also adopted a Directive on certain permitted uses of orphan works in 2012.⁴ This requires transposition into UK law by 29 October 2014.

There is interest in being able to reproduce orphan works internationally, with differing systems already functioning in, for example, Canada, Denmark, Hungary, India and Japan.⁵ The UK Government wants to help creators, right holders and users make the most of these works, making the most of cultural and commercial opportunities, while providing a mechanism for reuniting right holders with their work and appropriate remuneration. This will also help to reduce copyright infringement of orphan works.

The Government is introducing a licensing scheme for orphan works in the UK for both commercial and non-commercial use, alongside transposing the Directive to allow digitisation of orphan works by certain cultural organisations for non-commercial use. A cross-sector working group of representatives of potential licensees and of right holders was convened to discuss ways to proceed with the licensing scheme. This was followed by sector-specific groups to consider guidance on diligent searches, pricing and licensing terms. This has informed the development of draft regulations for the UK scheme and for the EU Directive. A technical consultation on these draft regulations was published alongside the impact assessments on 10 January 2014 for response by 28 February.⁶

This document is a summary of what respondents to the consultation said on the proposals. It also sets out the draft rules the Government intends to introduce to Parliament in the light of the consultation.

1 Gowers Review https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228849/0118404830.pdf

2 Hargreaves Review <http://www.ipo.gov.uk/ipreview.htm>

3 <http://www.ipo.gov.uk/response-2011-copyright.pdf>

4 Directive 2012/28/EU <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:299:0005:0012:EN:PDF>

5 Research was published on these systems in 2013: <http://www.ipo.gov.uk/ipresearch-orphan-overseas-201307.pdf>.

6 Copyright Works: Seeking the Lost <http://www.ipo.gov.uk/pro-policy/consult/consult-live/consult-2014-lost.htm>

The Government would like to thank all those who took the time to contribute to the consultation. A list of respondents is included in Annex A to this document, with the membership of the sector-specific groups at Annex B.

How this document works

This document sets out the questions asked during the recent consultation, *Copyright Works: Seeking the Lost*, comprising a summary of the comments received and the Government's response.

Each section contains the Government response, which explains the rationale for its position in relation to comments made in the consultation.

The draft regulations which accompanied the consultation are being revised and will be available publicly when they are laid before Parliament in Summer 2014.

The Role of Sector-Specific Groups

Some of the areas of the consultation were also considered by sector-specific stakeholder groups made up of potential users of the UK Orphan Works Licensing Scheme and the EU Directive, as well as right holders. The groups have also been split into sectors to ensure that the guidance is fit for purpose in all sectors. A membership list is included in Annex B to this document. The IPO has presented three issues to the groups to consider:

- pricing terms;
- licensing terms; and
- diligent search.

The groups have met to discuss these areas in some detail, which will inform the day to day operation of orphan works licensing, the EU exception and guidance issued alongside these. Summaries of discussions held are also included in this document, where relevant.

Consultation

The Government conducted a technical consultation between 10 January and 28 February 2014 on the drafting, structure and effect of the draft regulations on the two separate schemes to allow the use of orphan works where the right holder is unknown or cannot be located. The draft regulations covered:

- orphan works licensing under section 116A, C and D of the Copyright, Designs and Patents Act 1988 – as amended by the Enterprise and Regulatory Reform Act 2013 (the domestic scheme);^{7 8} and
- use of orphan works under the EU Directive 2012/28/EU on certain permitted uses of orphan works (the Directive).⁹

The Government received 55 responses within the consultation period and two late responses. There were three confidential responses out of the total of 57 that were received. Most respondents were either right holders (including representative bodies and collecting societies) or potential users of orphan works (primarily from the cultural heritage sector but also including those from the commercial sector including representative bodies). Individual responses will be available online in due course.

The proposals for an orphan works licensing scheme in the consultation document have already been the subject of significant consultation, including through a stakeholder Working Group comprising both right holders and potential users. The discussions of the Working Group helped shape the draft regulations in the consultation document and the responses received to the consultation have helped to further refine the regulations on key issues such as appeal rights.

In addition, a number of the points raised by respondents did not concern the draft regulations but related to anticipated use of both the Directive and the licensing scheme in response to questions we asked to inform operational planning.

7 Copyright, Designs and Patents Act 1988 <http://www.legislation.gov.uk/ukpga/1988/48/contents>

8 Enterprise and Regulatory Reform Act 2013 <http://www.legislation.gov.uk/ukpga/2013/24/contents>

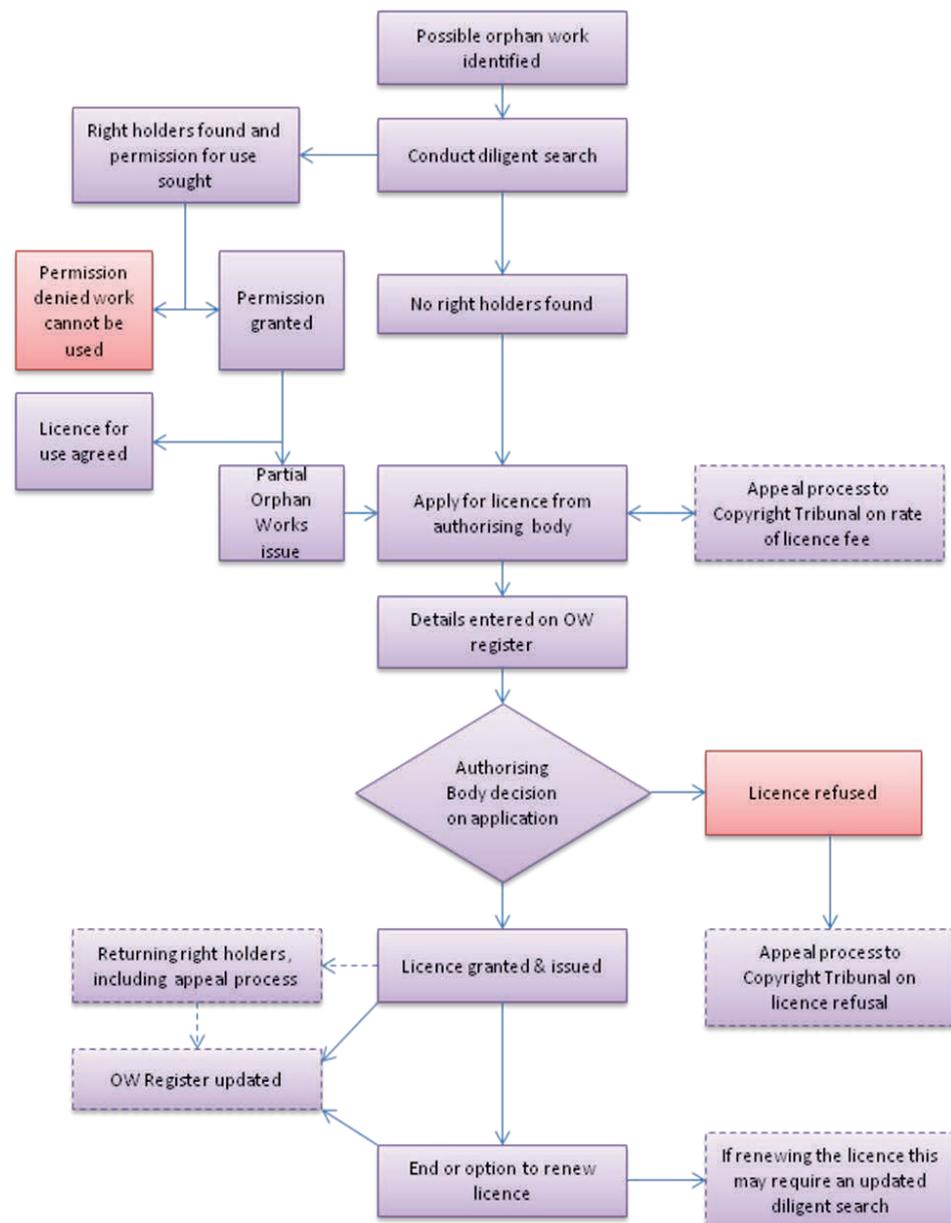
9 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:299:0005:0012:EN:PDF>

The licensing scheme for use of orphan works in the UK only

The proposals for an orphan works licensing scheme allow for the lawful use of orphan works within the framework of copyright law by placing an authorising body in the role of the absent right holder. The Authorising Body will consider applications to use orphan works, determine the licence fee the user has to pay, grant the licence to use the work and hold the monies for the absent right holder for a specified period. The Intellectual Property Office (IPO) will take on the role of the Authorising Body.

A licence to use an orphan work can only be granted after a diligent search has been conducted in accordance with the requirements set out in the regulations. The licensing scheme, and the safeguards set out within the regulations, will not only protect absent right holders but also help make accessible our cultural heritage. The licensing scheme for orphan works will allow all types of work to be used for potentially any use that a copyright work can be licensed for, by any type of licensee within the UK.

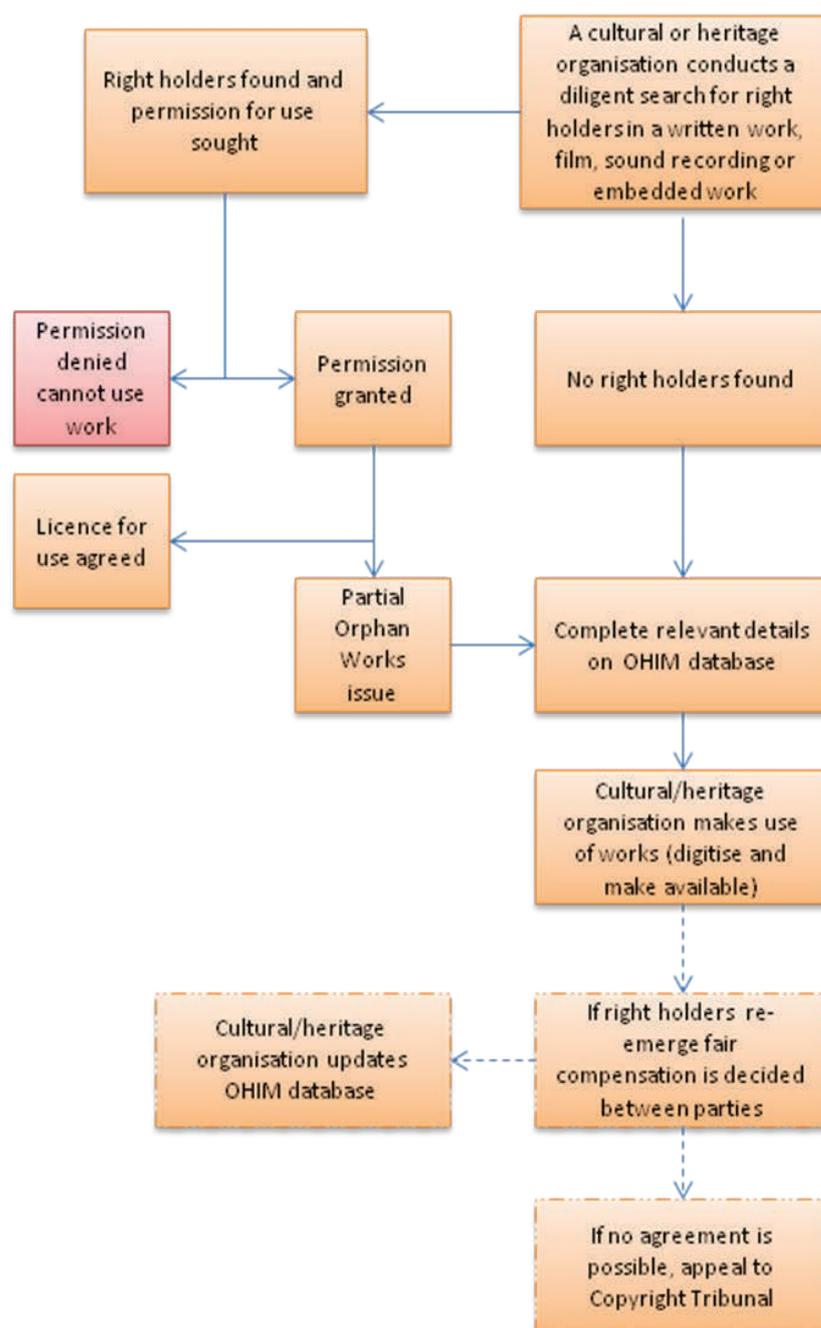
UK Domestic Process outline



The EU Directive

When it comes into force in autumn 2014, the Directive for non-commercial use of orphan works by certain cultural organisations within the EU will provide a limited exception to copyright for cultural institutions such as museums and archives to upload material onto their websites for some types of orphan works. The Directive aims to make Europe's cultural heritage available online, across the EU, by providing greater access to works that are only currently available in a museum, archive or library for on the spot reference. As the Directive allows only non-commercial use by specific beneficiary organisations there is no requirement to set money aside for absent right holders but compensation should be paid if they do reappear. There is also no independent verification of the diligent searches.

EU Directive Process outline



Questions

Domestic Orphan Works Licensing in the UK

These questions relate to the UK orphan works licensing scheme. Questions on the EU Directive follow at page 28.

Question

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

While there were three separate issues identified by respondents, it is notable that, the same broad points were made by all types of respondents, whether they were right holders, cultural heritage organisations or representative bodies.

Firstly, the issue of whether collecting societies should license orphan works was addressed by some respondents. The point was made that, in such a circumstance, any collecting society would need to be subject to the same obligations, safeguards and processes that are currently set out in the regulations in respect of the IPO as the Authorising Body. There was also a view expressed by a creator right holder that the licensed use of orphan works would be difficult enough for right holders to monitor without having the additional burden of monitoring numerous licensing organisations. If collecting societies were in future permitted to license orphan works, they would need to log their applications on the central database, maintained by the Authorising Body, to avoid such issues.

Secondly, a number of respondents expressed the view that it would be beneficial for collecting societies to act in an advisory capacity, providing experience and knowledge. In particular, the issues of pricing and licence conditions were mentioned as areas where the expertise of collecting societies would be helpful.

Lastly, many said that collecting societies could add most benefit in respect of diligent search. It was felt that collecting societies should be included within the diligent search criteria and that collecting societies' databases should be searchable as part of this process. This view was echoed in the responses from collecting societies, who also made the point that any such searches should not be conducted at the expense of the collecting society.

Government response

The Government's first priority is to establish an effective licensing scheme. There are no current plans to authorise collecting societies to license orphan works, although the option remains open for a future role for collecting societies where they already license the equivalent non-orphan work type and use. Whoever is authorised to license the use of orphan works would have to operate in accordance with the requirements, obligation and safeguards as set out in the regulations.

The IPO is already obtaining the expertise of collecting societies on issues such as pricing, licence conditions and diligent search. This is being taken forward through sector-specific groups which comprise key groups of stakeholders across different sectors and which include representatives from a number of different collecting societies, as well as other right holder groups. Membership of these groups is set out at Annex B.

In developing sector-specific guidance on diligent search, where relevant, collecting societies will be listed as potential sources of information. Collecting societies expressed the view that they should not have to absorb the expense involved in assisting a third party with a diligent search. Where an organisation or body is approached as part of a diligent search, it is a matter for them whether they choose to provide information to the person undertaking the search. Similarly whether there is any charge for any service provided to the searcher is a matter for the parties involved. It should also be noted that the works of right holders represented by collecting societies are less likely to become orphan than, for example, unpublished works.


Question

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

There was no consensus on this issue among respondents with views generally polarised between right holders – who were opposed (often strongly) to a licence being transferable – and potential users, particularly from the cultural heritage sector, who were generally in favour of a licence being transferable. Many respondents misunderstood how limited the proposal on transferability was intended to be.

Some of the reasons given why a licence should not be transferable were that it would undermine the market for intellectual property (IP) creators and that normal, non-orphan IP sales by professional creators are frequently expressed to be non-transferable. There was no reason why this should be different for orphan works.

Those in favour of a licence being transferable generally gave two different scenarios where they thought it might be appropriate: firstly, in the circumstances where a body or business is taken over or merged with another. Secondly, where a museum or similar institution had a commercial or trading arm that was a separate legal entity, or in the case of third party funded digitisation projects or where the body had a commercial partner, such as a publisher.

It was also argued by one respondent that a licence must necessarily be transferable in order for the scheme to work where the orphan work is used within another product such as the use of an orphan work in a documentary. It was argued that the orphan works licence in such a case would need to be transferable to the same extent as the rights in the work or production as a whole are transferable.

Government response

The Government will provide orphan works licences that are not freely transferable. There should, however, be a discretion for the Authorising Body to allow a licence to be transferred where there are compelling reasons to do so. The regulations will not cover the issue of the transferability of a licence; this will be dealt with through the licence conditions, and the power to vary those conditions. Whether a licence may be transferred will be decided on a case by case basis by the Authorising Body.

The other scenarios set out by respondents, such as where a museum has a separate trading arm or a commercial partner, can be dealt with through specific licence conditions rather than allowing the licence to be transferred. Similarly, with the example of the use of an orphan work in a documentary, this too would be dealt with through licence conditions that permit specified follow on uses.


Question

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?

Again, views on this issue were polarised between potential users and right holders (and those representing right holders). There was also some misunderstanding in this area.

There was strong support for an annual licence or similar from museums, archives and libraries sector, who viewed such an arrangement as essential if the scheme were to be affordable and practical for them to use.

The majority of right holders were opposed to the idea and there was concern about what was meant by “low commercial value” and that this could distort and undermine the market value of non-orphan works. Another concern was how non-commercial use would be defined and that any definition truly reflected uses that had no commercial element to them.

There was also a widespread misunderstanding that the diligent search requirements would be diluted. It was suggested that any arrangement that departed from the requirements for a diligent search for the right holders in every work was unacceptable.

Government response

As well as providing for individual orphan works licences covering individual applications, consideration will be given to developing an annual or blanket type licence which would allow multiple works to be licensed for non-commercial use, subject to a diligent search being carried out for each work. It is envisaged that this would make the scheme more affordable for the non-commercial use of orphan works by cultural heritage institutions and this has been confirmed by the consultation responses we have received.

All the key safeguards of the scheme would still be in place, including the diligent search requirements for each individual right holder in each orphan work (as set out at regulation 4).

The uses that would be defined as non-commercial are yet to be finalised but the intention is that they would exclude any use primarily intended for or directed toward commercial advantage or private monetary compensation.


Question

4. Should there be a limit on the period of time in which a right 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?

There was no consensus on the period of time in which a right holder can claim his/her remuneration. There was a wide range of views expressed with potential users of orphan works favouring a shorter period typically six or seven years and right holders generally favouring no time limit or a very long period of time such as one mirroring copyright term. Some other respondents such as trade organisations, representative bodies and collecting societies favoured periods typically around 15 years.

Government response

The Government has decided to set a time limit on its financial liability of eight years for a returning right holder to claim remuneration and this will be set out in the regulations. This means that from the date on which an orphan works licence is issued by the Authorising Body, an absent right holder would have eight years to come forward and claim the licence fee which the Authorising Body is holding on their behalf. The Authorising Body will retain discretion to pay remuneration in exceptional circumstances, where a right holder appears after this time, but will have no obligation to do so.

There are two relevant factors that support choosing a period towards the shorter end of the options set out in the consultation document:

- the diligent search process will mean that the level of emerging right holders is expected to be very low; and
- right holders are less likely to emerge many years after a work has been licensed than while it is being actively used under licence.

This argues against keeping funds for a lengthy period of time where there appears to be a small and diminishing prospect of a right holder emerging.

As the maximum licence period will be seven years, an eight year period is appropriate, as this allows an extra year after the licence has expired in case the right holder only spotted the work near the end of the licence's term or upon renewal of the licence. The authorising body will have the discretion (but no obligation) to make payments at any later time should a right holder emerge and there was good reason to make such a payment. This will be incorporated into the regulations.

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

There was no consensus among those that responded.

Cultural heritage organisations favoured the same, shorter periods of six or seven year period as for when a right holder should be able to claim remuneration.

Right holders were more varied in their views on when the Government should be able to use the funds. Responses suggested seven years, 10 years, 50 years and 70 years after death, amongst others. The primary concern of right holders was the ability to claim remuneration.

Government response

The regulations will allow the Government to access unclaimed licence fees at the expiry of the eight year period within which a right holder can claim remuneration (see Question 4 above).


Question

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

There was no consensus on what unclaimed funds should be used for, although right holders and right holder organisations favoured monies being distributed to creators or being used for “social, cultural and educational activities”.¹⁰ Two right holder respondents suggested using unclaimed monies to fund the Copyright Hub.

Cultural heritage organisations argued that because of the costs of preserving works, any unclaimed funds (or at least a proportion of them) should be returned to museums, libraries, archives and other owners of the physical orphan works who have already paid any licence fees, in order to fund their preservation, digitisation and diligent searches.

Government response

The regulations will set out that the first call on the unclaimed funds will be the set up and running costs of the orphan works licensing scheme. This means the cost of the scheme will not have to be met entirely from the administration fee charged to the applicant and should help ensure that the scheme is affordable for users. This will in turn encourage the search for absent right holders and help reunite them with their works and potential future licensees.

While the power to disburse unclaimed funds rests with the Authorising Body, any decisions on the use of unclaimed funds will be made by the Secretary of State. Any surplus funds may, for example, be used in line with the CRM Directive: for “social, cultural and educational activities”.

¹⁰ In line with Article 13(6) of the EU Directive 2014/26/EU on Collective Management of Copyright and Related Rights and Multi-territorial licensing of rights in musical works for online use in the internal market (the CRM Directive) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0026&from=EN>

Question**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?**

Once an application has been submitted to use an orphan work, it is for the Authorising Body to consider that application and decide whether to grant a licence. An application may be refused, for example, if the diligent search is inadequate. Where a licence is granted, a licence fee will be payable prior to a licence being issued.

There was a consensus in favour of a right of appeal on both grounds. Consultation responses from potential users and a large majority of right holders supported a right of appeal for users both on grounds of pricing and on the refusal to grant a licence. A small number of right holders opposed a right of appeal for users of orphan works, making the point that users of non-orphan photographs, film and so on cannot appeal against the price charged for individual works.

Government response

While it is true in many circumstances that there is no appeal against a refusal to license individual non-orphan works, in many other cases a negotiation is possible. Also, in the case of collective licensing an appeal can be made to the Copyright Tribunal. Therefore, for applicants, the Government will include an appeal right to the Copyright Tribunal, both in respect of licence fee tariffs and also against a refusal to grant a licence. This is similar to existing arrangement for non-orphan work licensing.

Right holders will have a right of appeal through the First Tier Tribunal if the Authorising Body has either acted improperly or failed to comply with its obligations under the regulations.

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

While the consultation responses were short on detail about the number of applications that might be expected, the general tenor of the responses was that potential users were cautious about how much they would use the scheme.

For the cultural heritage sector, the level of use will be determined by how costly the scheme is. There is concern from this sector that the scheme will be too onerous and expensive for them to use other than occasionally.

For other prospective users, the limited territorial extent of any licence (UK only, see also question 11) is a factor that would make use less attractive than a hypothetical global licence, as will other issues such as the non-transferability of licences.

Some other sectors, most notably some in the music sector, stated that orphan works were not really an issue in their sector so accordingly they did not envisage making much use of the scheme.

Government response

The Government is taking steps to ensure that, as far as possible, the concerns expressed by respondents are met. The need to make the scheme affordable and easy to use is acknowledged and, as described under question 3, consideration will be given to developing an annual or blanket type licence which would allow multiple works to be licensed under the umbrella of one licence for non-commercial use. It is envisaged that this would make the scheme more affordable for the non-commercial use of orphan works by cultural heritage institutions.

In the longer term, the use of unclaimed fees to off-set the set-up and running costs of the scheme will make the scheme more affordable for users, as these costs will no longer have to be recouped in their entirety from the administration fee payable for an application to use an orphan work.


Question

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

Responses were mainly provided by the cultural heritage sector. A number of these indicated that they would wish to use orphan works in the same way as non-orphan works, which could, for example, be to:

- publish images and stream film and sound recordings on their websites;
- use in educational materials;
- use within museums, such as exhibition display panels;
- use in marketing and promotional material;
- use in publications in printed and digital form;
- use on commercial prints and products, including merchandise;
- being able through specified licence conditions to supply copies through their website; and
- use in books, apps for mobile devices and e-books.

Examples were also provided of what they considered typical non-commercial uses:

- take digital copies of images for inclusion in museum image libraries and for record and archival use;
- make archival masters of the work by any means/in any media; and
- make electronic copies available via web-sites and for educational and promotional uses.

Others in the cultural heritage sector envisaged a more limited range of uses such as online publications, and occasionally physical publications.

Respondents from the audio-visual sector also envisaged the inclusion of orphan film footage clips in productions and the use of stock footage.

Government response

The Government notes the responses and the wide range of potential uses for orphan works. The licence fees will vary depending upon the type of use and will, as far as possible, reflect what is charged for an equivalent non-orphan being used in an equivalent way.

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

The fact that licences are non-exclusive did not appear to be a disincentive to use orphan works in the responses. However, one respondent stated that it would provide a disincentive to the commercial use of an orphan work.

The cultural heritage sector said that this was not an issue for them. Where responses were provided by other sectors the general tenor was supportive of licences being non-exclusive.

Government response

The Government notes the views of respondents that the fact that an orphan works licence will be non-exclusive will not deter many potential users from applying for a licence.


Question

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

There was a consensus among respondents from all sectors that the territorial limitation of the scheme would have a significant impact on its potential benefits and make respondents less likely to use the scheme.

Of particular concern, was whether orphan works could be licensed for website use if the licence is only for the UK and the risks to the user if orphan works were put online.

Government response

The orphan works licensing scheme applies only to the UK, in a similar way to the Copyright, Designs and Patents Act 1988. It is acknowledged that there may be circumstances where this makes the option of obtaining an orphan works licence less attractive or otherwise limits the potential benefits of using that work. It should be noted, however, that similar limitations apply to other territories that have introduced national orphan works schemes, such as Canada who, between 1991 and 2009 licensed the use of 12,640 different orphan works.

The Government is exploring the possibility of reciprocal agreements with other countries that allow for the use of orphan works in a similar way, such that UK-issued orphan works licences would be valid in those territories and vice versa. Also, it should be noted that within the EU, under the Directive on Certain Permitted Uses of Orphan Works, once the diligent search for an orphan work has been recorded on the OHIM database, its status as an orphan work is then recognised across the EU.

The Government notes the particular concerns about the use of licensed orphan works online and on websites, given that these can be viewed from outside the UK. Of course, the EU Directive is aimed at enabling cultural institutions to digitise orphan works in their possession and display them on their websites.

The Government has made clear that the uses that can be licensed under the UK scheme will include digitising orphan works and making them available online. An orphan works licence will cover the lawful use of the work in the UK, just as the Directive will cover the lawful use of the work across the EU. It will be the responsibility of the organisation or person reproducing the orphan work to ensure they comply with the law in other jurisdictions from where the works can be viewed lawfully.

Website geo-blocking techniques have been suggested as one means of restricting access to the territories where viewing would be lawful. We understand that this approach may be complex for those who have a mix of content on their websites, both orphan and non-orphan.

Overall, both the introduction of the EU Directive and the UK licensing scheme are improvements on the current situation where almost any reproduction of orphan works is unlawful and the Government will continue to seek further information agreements to broaden lawful use.


Question

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?

On the question of how long it should take the Authorising Body to process an application, while there were a range of responses the broad consensus was that around 10 working days was reasonable.

Responses varied by sector on whether the scheme would be used to clear whole collections or just individual works. For example, a response from a representative body in the commercial audio-visual sector stated that the sector would only use the scheme for selected works because of the cost-benefit. Several other potential users from other sectors similarly stated that their use of the scheme would be to clear individual works as required.

On the other hand, the general view from the cultural heritage sector was that the scheme would be of most benefit if it allowed the clearance of large bodies of work, although some in the sector were of the view that they would only be making occasional, limited use of the scheme.

Some respondents misunderstood the question to be about clearing whole collections through Extended Collective Licensing. The orphan works scheme is about the licensing of individual works.

Other comments made included the view that the scheme should be flexible enough so that applicants are able to change their minds, for example, to add or remove items. Similarly, it was suggested that it would be beneficial if a user knew the costs upfront, or had paid the annual fee; this would help them make decisions regarding costs.

Government response

The Government notes the view from cultural heritage organisations that the scheme will be more attractive if it allows for the clearance of whole collections or large bodies of works. The Authorising Body is currently developing the IT system and processes necessary to support the licensing of orphan works. The intention is to allow for the uploading of multiple works, but this would not remove the requirement for a diligent search to be undertaken for all right holders for each work. The development process involves user testing in order to ensure that the system will be flexible and simple to use. As set out in the response to Question 8 above, as part of this work the Authorising Body will consider developing an annual or blanket type licence which will allow a large number of works to be used under the umbrella of one licence for non-commercial use.

It is the intention that potential applicants will know the total cost of an application before having to decide whether to proceed with it and that they will be able to add or remove works and uses as part of this process.

Question

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

The responses to this question were, with one exception, from the cultural heritage sector. These responses confirmed that a high proportion of the orphan works held by such institutions are unpublished, such as photos, unpublished text based works (diaries, letters etc), amateur films and sound recordings.

The only other response was from the commercial audio-visual sector and stated that the number of unpublished orphan works within their sector was likely to be low.

There were, in addition, a number of respondents who misunderstood the question and expressed the view that unpublished works should be excluded from the scope of the scheme.

Government response

As expected, the responses show that a majority of the orphan works held by museums, archives and libraries are unpublished. This confirms the importance of their inclusion in the scheme and will help in planning the operational requirements for the scheme.

Additionally, the Government has taken powers under the Enterprise and Regulatory Reform Act 2013 to provide for the copyright term for unpublished works to be brought in line with the term for published ones. For most works (other than films and photographs, which are not affected by this policy), this will mean that copyright will expire 70 years after the death of the author, regardless of whether the work is published or unpublished. At present, certain unpublished works created before 1989 are protected by copyright until the year 2039, instead of until 70 years after the death of the author as is the general rule for most works. This means very old works, even from before the Norman Conquest, can still be protected by copyright. The Government's changes will reduce the number of unpublished works which will require an orphan works licence (or otherwise need to qualify for use under the EU Directive) because they will no longer be in copyright. The Government intends to hold a consultation on this change later this year.

**Question****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?**

The responses to this question were mainly from the cultural heritage sector. These responses confirmed that the principal use of orphan works would be as part of the services and products they already provide. In particular, digitising and making works available online was mentioned by many of the respondents. Some respondents also made the point that once orphan works can be used under licence, then this is likely to open up the potential for other uses beyond those that are currently anticipated.

Responses from the commercial audio-visual sector indicated that they would use orphan works as part of the works that they already produce.

There was one concern expressed that an institution with large collections of orphan works could set up a commercial enterprise licensing their orphan works at a price which would disrupt the existing market by under-cutting the price for the equivalent use of non-orphan works, thereby reducing the value of the non-orphan works. This scenario, however, is based on a misunderstanding of how the orphan works licensing scheme will operate, as all prices will be set and licences issued by the Authorising Body. Licensees will not be able to sub-license.

Government response

The Government notes respondents' views that while it is envisaged that orphan works will be used as part of existing products and services, the ability to reproduce orphan works is likely to open up licensed uses that are not currently contemplated.

**Question**

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 right holder following a diligent search?

The only responses received that addressed this question were from the cultural heritage sector. One response, from a representative body, put the figure at 5-10%.

Two other responses did not directly address the question but simply stated that diligent searches usually did not lead to a right holder being found.

In addition, responses from the cultural heritage sector also provided estimates of how often a right holder subsequently emerges after a diligent search has failed to find them, from a low point of 1% to a span of 5-10% of cases.

Government response

The number of responses to this question was relatively low, and contained little new evidence against which to test the assumptions in the Impact Assessment. Responses were, however, consistent with the Government's assumptions.

In particular, the estimates that very few right holders subsequently emerge after a diligent search confirm the Government's view of the likely numbers of absent right holders for licensed orphan works that will come forward.

**Question****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?**

The responses from the cultural heritage sector only supported this assumption partially. It was pointed out that it would depend on the type of work that is being used and for what purposes. In particular, it was noted that the EU Directive does not cover stand-alone artistic works, and these form the basis of many public galleries' and museums' collections. It was also noted that collections of stand-alone artistic works are not only held in art galleries. For example, the second largest art collection in the UK is held by the Imperial War Museum, and the Natural History Museum collection contains over 500,000 artworks.

Government response

The Government notes the caveat that standalone artistic works may well form a significant proportion of the diligent searches and that these are, of course, outside the scope of the EU Directive. The estimated proportion of standalone artistic works that are orphan was taken into account when developing the assumptions on diligent search in the two Impact Assessments (Directive and domestic scheme).

**Question****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?**

The general tenor of the responses was that such cases would be occasional with some respondents stating that this would probably arise rarely.

Circumstances where this would occur were where the organisation subsequently wished to make commercial use of that orphan work. The most common example given was the use of digitised material in a publication. The view was also expressed that it was more likely that a third party user would wish to make use of the domestic scheme for the commercial use of an orphan work that had been digitised and put on the organisation's website under the Directive.

Government response

The Government notes that cultural heritage organisations only appear to contemplate making limited use of orphan works under the domestic scheme for commercial purposes. This is at odds with some of the responses to Question 9 which indicated that museums, archives and libraries would look to use orphan works in the same way as non-orphan works. This cautious assessment by cultural heritage organisations is, however, reflected in the assumptions on potential levels of use in the Impact Assessment for the domestic scheme.

Question**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?**

The views of respondents echoed the responses to Question 17 in respect of works covered by the Directive. For such works, respondents suggested that use under the domestic scheme would be occasional at best, with some organisations saying that such use would be rare.

The biggest potential use of the domestic scheme for bodies covered by the Directive was likely to be in respect of standalone photographs and other artistic works, as these are outside the scope of the Directive.

The point was also made that the cost of using the domestic scheme would be a key factor in determining how often museums, archives and libraries used the scheme (see also Question 3 above).

Government response

The Government notes that one of the main uses of the domestic scheme, by cultural heritage organisations, will be in respect of those orphan works outside the scope of the Directive (standalone photographs and other artistic works). This is consistent with what such organisations have told the Government in the Working Group and the Sector-Specific Groups and is reflected in the assumptions that have been developed on potential levels of use.

The Government notes that some respondents are concerned about the cost of using the scheme and that affordability will be a key factor in how frequently they use it. The Government reiterates that it is keen to ensure that the scheme is affordable for users so that it encourages the widest use of orphan works to maximise the benefits to both cultural heritage and growth. As part of this, the Authorising Body will consider developing a blanket or umbrella licence to facilitate the non-commercial use of orphan works.

Question

Orphan Works Exception in the EU (Implementation of the Directive)

This section relates specifically to the EU Directive, not the UK Licensing scheme.

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?

Cultural organisations that responded to this question stated that the possibility of recouping all costs is unlikely due to the non-commercial nature of the Directive, but some costs could be recouped indirectly through increased interest in the organisation and the commercial services it provides. It was suggested that the domestic licensing scheme could be used to make commercial use of the work. Many cultural organisations stated that it is not their function to recover costs but to provide access to their collections.

Government response

The Government believes that the Directive is potentially cost-neutral in regards to digitisation costs. Although works can only be used for non-commercial use, the Directive does allow for organisations to generate revenue for the sole purpose of recouping their cost of digitisation. It is important to note that the scheme is voluntary so the costs to organisations will be optional. We have amended the Impact Assessment in light of the comments received with the assumption that some of the costs related to digitisation could be recouped but not all of them.

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

It was noted that this would mainly come through indirect sources such as an increased interest in commercial activity provided by organisations. The idea of charging for access to a website was criticised on the grounds that cultural organisations have a responsibility to provide access to works.

Government response

The Government has amended the Impact Assessment to reflect these views. It is noted that providing access to works is fundamental to the mission of cultural organisations covered by the Directive.

**Question**

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?

Respondents suggested that a public-private partnership is possible but unlikely given that the orphan works cannot be used for commercial gain, and that commercial partners are precluded from securing any rights to use or control the use of such orphan works.

Government response

The Government has noted the responses.


Question

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

The Directive provides an optional provision to limit its application to unpublished works and phonograms that have been deposited with relevant bodies before the transposition date of 29 October 2014.

The majority of the responses received agreed that the provision should not be implemented as this would unnecessarily restrict access to unpublished works after an arbitrary date.

It was suggested by a respondent from the audio-visual sector that cultural organisations should be recording the relevant details of works, including unpublished works, through standard digital rights management.

A few respondents commented that more clear definitions and guidance was needed on the meaning of “publicly available” as opposed to “publication” and that consideration was needed as to the original intentions of the right holders. One respondent asked for careful assessment of whether the exploitation of certain works never intended for publication complies with the 3-step test in the Berne Convention for the Protection of Literary and Artistic Works and is therefore lawful.

One respondent asked for a further review of the proposal as they thought that privacy sensitivities and confidentiality issues of the right holder to the unpublished works would need to be considered, as they would not have expressed how they would want the work used.

There were a number of respondents that expressed the view that unpublished works should be excluded from the scope of the scheme.

Government response

The Government agrees with the majority of responses that the optional provision relating to unpublished works should not be implemented.

Recording relevant information in relation to the right holders and uses allowed for that work is not always possible when unpublished works are donated to a cultural organisation and that donor is not the right holder. The benefit of implementing the Directive without the optional provision means that it will not restrict the use of unpublished works donated after the transposition date.

The Government notes the comments on the definitions of ‘publicly available’ and ‘publication’ but believes the meaning is clear enough in the regulations. It allows published and unpublished works to be used if they are held within collections in libraries, educational establishments and museums and are publicly available to view on request. It also applies to published and unpublished works that are held within the collection of archives, film and audio heritage institutions and public-service broadcasters, but these do not need to be publicly available. The Directive assumes that moral rights have been asserted as long as it is reasonable to assume that the right holder would not oppose the use of the work.

The question has been raised as to whether the provisions of the Directive are compatible with the Berne Convention. The UK believes proposals within the Directive adopted by the Council of Ministers in October 2012 to be compatible with relevant international obligations because users of the work under the Directive must assume moral rights have been asserted and ensure that the use does not unreasonably

: prejudice the legitimate interests of the right holders. Right holders will receive fair compensation if they emerge and are more likely to be reunited with their work following its use on a cultural organisation's website and the use being recorded on the Organisation for Harmonization of the Internal Market (OHIM) database.


Question

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

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?

Questions 23 and 24 have been dealt with together as they both cover the list of appropriate sources for a diligent search. There was no consensus from respondents on the sources for published and unpublished works, with views generally polarised. Right holders suggested further sources, while potential users from the cultural heritage sector said the current sources set out in the Directive were sufficient. There was a suggestion that the Government needed to engage with representative organisations to create a list.

There were some views expressed that unpublished works should be excluded from the scope of the scheme.

Government response

The appropriate sources are a minimum requirement for cultural organisations who are required to carry out a reasonable search of the relevant sources to find right holders. The regulations will now provide for guidance on diligent searches which will include suggested sources for cultural organisations to consider. This guidance is being produced in conjunction with sector-specific groups representing literary works, film and sound, and still visual art. The guidance will provide flexibility for future additions, rather than adding complexity to the regulations.

The Directive has been negotiated with other Member States to include unpublished works as it was identified that a majority of orphan works held by museums, archives and libraries are unpublished.

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

The majority of respondents thought that the current sanctions of civil remedies for making non-commercial use of works were appropriate. However, there were a number of other respondents who thought that criminal sanctions were more appropriate as there could be an incentive not to complete a diligent search thoroughly and there is no offence for deliberately creating an orphan. A comment was made that criminal sanctions should be available when commercial gain was made from the work.

There was a particular comment that criminal sanctions would apply under section 107 of the Copyright, Designs and Patents Act 1988 (CDPA) in any case where the scale of infringement was such as to affect prejudicially the right holders.

Government response

The Government notes that most respondents think civil remedies are appropriate for the non-commercial use of the work. If an orphan work is used outside of the limited parameters of the Directive (such as making commercial use of a work) then the relevant offences that are available for copyright infringement under the CDPA would apply. The actual offence would depend on the infringement of the work, as is the case for non-orphan.

For clarity the regulations will explicitly exclude the criminal offence under section 107 of the CDPA for using an orphan through the Directive.

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

The Government suggested that fair compensation due to right holders should be decided between the relevant body and the emerging right holders. The vast majority of respondents who answered this question agreed with this approach with the burden of proof lying with the returning right holder. Others suggested that the burden of proof should lie with the relevant body using the work, the Authorising Body (IPO) or through alternative dispute resolution. There were comments on what “fair compensation” means and suggestions that guidance would be needed. It was also noted that the level of compensation should reflect rates charged in industry for the same use.

Government response

The Government notes that the approach taken for agreeing fair compensation and where the burden of proof lies was accepted by the majority of respondents. A number of the responses appeared to confuse the Directive with the domestic licensing scheme as they referred to the burden of proof lying with the Authorising Body. The Directive provides an exception for cultural organisations to use the work after a diligent search has been completed and the responsibility of the search lies with them, not the Authorising Body, which here takes the role of the national competent authority.


Question

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

There was consensus from those who responded to this question that an appeals process was needed. The vast majority suggested the most appropriate administrator would be the Copyright Tribunal. Other suggested organisations were the County Court small claims track, an independent body or mediator, an internal appeals process with the relevant body, the European Copyright Tribunal and the Intellectual Property Enterprise Court.

Respondents commented that the appeals process would need to be as low cost as possible.

Government response

The Government notes that there was consensus for an appeals body under the Directive when the relevant parties cannot decide fair compensation. The Government approached the Intellectual Property Enterprise Court (IPEC) to discuss who would be the most appropriate body to administer the appeals process. They advised that the Copyright Tribunal would be best placed to fulfil this function. Given the responses to the consultation and advice from IPEC the regulations will name the Copyright Tribunal as the appeals body.

Other issues

These issues were raised by consultation respondents.

Impact on existing licensing practices

The view was expressed by some collecting societies that it should be made clear that the orphan works scheme is not intended to (and does not) interfere with existing collective licensing agreements that are in place.

Government response

The Government can confirm that the UK's orphan works licensing scheme is not intended to interfere with, or replace, existing licensing agreements, but to provide a way for users to be able to lawfully use works where there are no legal means to do so at present. Individual, genuine orphan works may still be licensed, even if the work is in a collective licence, such as under the Extended Collective Licensing arrangements. This was set out in the original orphan works consultation.¹¹

Rights of identified owner

At paragraph 3.36 of the consultation document it stated that once a right holder has been identified then the orphan works licence will continue for the remainder of its term (subject to any notice period in the licence). It was thought that the right holder could then take over the licence from the Authorising Body.

¹¹ Section 4, *Copyright Works: Seeking the Lost* <http://www.ipso.gov.uk/pro-policy/consult/consult-live/consult-2014-lost.htm>

Government response

Once a right holder has been identified, then the orphan works licence will continue for the remainder of its term (subject to any notice period in the licence). It would be complex and involve additional processes for the right holder to take over the licence from the Authorising Body, and the Government does not believe the case for this is compelling. However, the work will not be licensed as an orphan again if the right holder has reappeared.

Annex A

List of Respondents

Individual responses will be available online in due course.

American Society of Journalists and Authors

Archives and Records Association (UK and Ireland)

Archives Centre, King's College Cambridge

Association of Authors' Agents

Association of Illustrators (AOI)

Association of Photographers Ltd

B Totterdell

BBC

Booksellers Association of the UK and Ireland

British Association of Picture Libraries and Agencies (BAPLA)

Bristol Design

British Copyright Council (BCC)

British Equity Collecting Society Ltd

British Film Institute

British Institute of Professional Photography

British Library

British Screen Advisory Council

Creators' Rights Alliance

D Taylor Computing Solutions

Derek Simpson

Education Photos

Equity

Federation of Commercial Audio-visual Libraries (FOCAL) International

Gillian Spraggs

Imperial War Museums

Independent Film & Television Alliance

International Association of Scientific, Technical & Medical Publishers

International Federation of Reproduction Rights Organisations (IFRRO)

John McNairn

Karen Sayers

Music Publishers Association

Musicians' Union

Museums IP Network and National Museum Directors' Conference (joint response)

NA3T Archive of Transport Travel & Trade

National Library of Scotland

National Library of Wales

National Records of Scotland

National Writers Union

Producers Alliance for Cinema and Television (PACT)

PRS for Music

Publishers Association

SAGE Publications Ltd

Scottish Council on Archives and CREATE (joint response)

Sipara

Society of London Theatre and UK Theatre (joint response)

Stop43

The Association of Learned & Professional Society Publishers

The Copyright Licensing Agency Limited (CLA), Authors' Licensing and Collecting Society (ALCS) and Publishers Licensing Society (joint response)

The Design and Artists Copyright Society (DACS)

The Libraries and Archives Copyright Alliance

The Newspaper Society and The Newspaper Publishers Association (joint response)

UK Music

Webb Aviation

Wellcome Trust

Annex B

Sector-Specific Group members

	Pricing and Licensing	Diligent Search
Literary Works	Association of Authors' Agents BBC British Library Channel 5 National Archives (TNA) Publishers Association The Copyright Licensing Agency Limited (CLA) The Libraries and Archives Copyright Alliance Universities UK	Association of Authors' Agents Archives and Records Association (UK and Ireland) Authors' Licensing and Collecting Society National Archives (TNA) The Copyright Licensing Agency Limited (CLA) Universities UK Wellcome Trust
Film and Sound	BBC British Film Institute Channel 5 Federation of Commercial Audio-visual Libraries (FOCAL) International Huntley Film Archives Imperial War Museums Musicians' Union Producers Alliance for Cinema and Television (PACT) PRS for Music UK Music The Libraries and Archives Copyright Alliance	BBC British Film Institute British Library British Universities Film & Video Council Directors UK Federation of Commercial Audio-visual Libraries (FOCAL) International Huntley Film Archives Imperial War Museums Musicians' Union PRS for Music
Still Visual Art	Association of Illustrators (AOI) Association of Photographers BBC Bridgeman Art British Association of Picture Libraries and Agencies British Institute of Professional Photography British Press Photographers' Association Corbis Images Glasgow Life Imperial War Museums Loupe Images Oxford University Press The Design and Artists Copyright Society (DACS) The Royal Photographic Society	Association of Illustrators (AOI) Association of Photographers British Association of Picture Libraries and Agencies (BAPLA) British Institute of Professional Photography British Press Photographers' Association Corbis Images Editorial Photographers UK Getty Images Imperial War Museums JISC Loupe Images Tate The Design and Artists Copyright Society (DACS) Topfoto

Concept House
Cardiff Road
Newport
NP10 8QQ

Tel: 0300 300 2000
Fax: 01633 817 777

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