

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:

Denise Swanson

Organisation (if applicable):

British Institute of Professional Photography

Address:

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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?

They could improve the licensing of orphan works by acting in an advisory capacity to provide experience and knowledge.

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

No. The license should only be useable by the applicant with any additional use subject to a new application. If another license is sought then a fresh application should be sought.

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?

The users which the Cultural/Heritage sector claim do not require or seek payment are likely to be artists or those with more artistic endeavours who are happy just to have their work seen. However, this is far removed from those who seek to earn a living by providing images. The needs of these two groups have to be taken into account. A clear definition as to what constitutes commercial use also needs to be agreed. Using an image in an exhibition is one thing but what if there is an entry charge? Or the image is used for advertising and promotion on flyers, posters, website etc?

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?

Yes but this would largely depend on how easy it is made for rights holders to discover that their work has been used in the first place. A period of one generation would seem to be fair. A longer period would not be helpful as subsequent generations may not know enough about any works found to be able to identify as such. Shorter periods would go against what is currently accepted under Copyright law.

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

A period of 50 years would seem appropriate - it is shorter than the lifetime plus 70 years as is currently the case in UK Copyright law yet would seem to be long enough for a rights holder to come forward. Too long a period would be unhelpful and seems to be as much of an issue as too short, so this seems a good compromise.

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

Something similar to the Payback scheme operated by DACS seems most appropriate, so that any funds are shared amongst creators, helping to incentivise further creativity in the future and inspire a feeling of fair play. If funds were claimed by government or given to the Cultural/Heritage sector to offset the costs of implementing a system they themselves asked for, it would be viewed as grossly unfair by creators and remove any incentive to create. A system should require registration by those who believe they have works likely to have become orphans, so that the onus is on rights holders to claim rather than a system of automatic payout, to maintain a level of fairness.

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?

Yes there should be a right of appeal against license fee tariffs. In this scenario if an emerging rights holder can show that a unique image has been under valued, they should have a right of appeal. There should also be a right of appeal against the granting of a license if an image is subsequently proven as already on an exclusive license for example.

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

Never - we are only interested in works where the creator is known.
None.

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

None - we are only interested in works where the creator is known.

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

We would not be using such as scheme but it would seem the only option would be non-exclusive. You cannot grant an exclusive license for a work where the creator is unknown as there is no way of knowing if there is a pre-existing license.

<p>11. How much does the fact that licences are limited to the UK impact upon your potential use of the scheme?</p> <p>It seems obvious that UK only licenses will mean that no licenses for Internet use can be given as websites, by their very nature, are international and cover all territories. There are no means to stop an image on a website being viewed around the world, where it could then be used as an orphan elsewhere.</p>
<p>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?</p> <p>N/A</p>
<p>13. What proportion of your applications would be for unpublished works and what sort of works would these be?</p> <p>N/A</p>
<p>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?</p> <p>N/A</p>
<p>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?</p> <p>N/A</p>

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?

N/A

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?

N/A

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?

N/A

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?

N/A

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

N/A

<p>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?</p> <p>N/A</p>
<p>22. Do you agree that we should not implement the optional provision?</p> <p>Yes, we agree that the optional provision should not be implmeneted</p>
<p>23. Are there any other sources that should be added to this list of essential sources?</p> <p>There are a lot of additional sources: Obvious ones would be using Google and Bing to search for images by description. Other sources include TinEye and PicScout which can check to see if any matches are found anywhere on the Internet. The PLUS registry is not mentioned, neither is the US Copyright Register. Additionally, every photograph contains embedded metadata showing camera serial number, name of photographer, etc by default so this should be checked for indentifying information. Professional photographers spend time embedding IPTC metadata which provides caption, copyright, contact details, terms of use, name of library or publisher, GPS co-ordinates, name of client or event, etc (providing it has not been subsequently stripped out).</p>
<p>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?</p> <p>Snswer as for 23 above: Google and Bing to search for images by description, TinEye and PicScout to see if any matches are found anywhere on the Internet. The PLUS registry, the US Copyright Register. Embedded metadata within each photograph in addition to IPTC metadata. Even if only the name is known, a quick Internet search should reveal website, social media profiles etc allowing easy identification. Many images are also watermarked.</p>
<p>25. Is there a realistic prospect that civil sanctions will not provide appropriate remedies? In what circumstances?</p> <p>Civil sanctions would seem to be appropriate</p>

26. Do you agree with this approach? Where should the burden of proof lie, and why?
Yes, we agree with this approach. The burden of proof should be on the emerging rights holder to show that they are indeed the rights holder as they should have the necessary evidence to show ie RAW files, previous licenses for use etc. It would seem this is a more sensible approach rather than the relevant body having to try to prove orphaned status which is clearly a flawed argument.

27. Is it necessary to provide for an appeals process on the level of fair compensation? Who should administer such an appeals process?
This appears to be similar to question 7 in that there should be a right of appeal against the level of fair compensation if an emerging rights holder can show a different level should have been given, they should have a right of appeal.
The Copyright Tribunal should administer the appeals process in conjunction with the relevant authorising body

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.

The whole process does seem to be concerned with the enabling of the cultural/heritage sector to conduct mass digitisation projects. Whilst we have no objection to the use of genuine orphan works being used in this way in a purely non-commercial basis, we do still have concerns over what is regarded as non-commercial and feel this still needs to be addressed.

We also have concerns over works which have been made and which continue to be made into orphans on a daily basis. We strongly believe that steps to stop this process of orphan-making need to be taken and that a wider program of educating users be implemented, to enable greater understanding that the livelihoods of professional image-makers are potentially at risk.

A world without good images will be a very dull one indeed!

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