

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: Christy Henshaw

Organisation (if applicable): Wellcome Trust

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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.

	Business representative organisation/trade body
	Large business (over 250 staff)
	Medium business (50 to 250 staff)
	Small business (10 to 49 staff)
	Micro business (up to 9 staff)
X	Charity or social enterprise
	Central government
	Public body
	Rights holder
	Individual
	Other (please describe)

Questions:

<p>1. Could collecting societies improve the licensing of orphan works in their areas of expertise? If so, how?</p> <p>Yes, but to a limited extent. The proposed extended collective licensing (ECL) scheme would complement the two orphan works schemes in the following ways:</p> <ol style="list-style-type: none"> a. Where occurrence of orphan works in a licensed collection is small (e.g. occasional embedded rights) b. To license works formerly orphan but where relevant rights holders have come forward as a result of the publicly accessible orphan works databases in the UK and EU.
<p>2. Should an orphan works licence be transferable? If so, in what circumstances would this be appropriate?</p> <p>Our main concern is the ability to sub-license; for example, to a digitisation services provider.</p>
<p>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?</p> <p>We believe that the proposed Licensing scheme is likely to be too cumbersome (and costly) for many libraries and archives to take advantage of. One way this could (at least in part) be mitigated is with the introduction of an annual licence arrangement as this would ensure that the costs of the licensing scheme are kept to a minimum.</p> <p>Of course, institutions covered by the EU Directive on Orphan Works may apply for a licence under the EU Directive which already allows use of orphan works for non-commercial use.</p>
<p>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?</p> <p>We believe it may be reasonable to offer compensation for a limited period to cover the term of the license and a reasonable time after, but we don't have a strong view.</p>
<p>5. At what point should the Government be able to distribute unclaimed funds? What is the rationale for your answer?</p> <p>As above.</p>
<p>6. What should any unclaimed funds be used for and why?</p> <p>Ideally the funds would be returned to the license holder, but we recognise that there are administrative burdens (especially if the fees are appropriately set low or nil for non-commercial uses) and the unclaimed funds may be used to reduce operating costs and/or donated to a relevant charity.</p>
<p>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?</p> <p>Yes, there should be a right of appeal and it should cover both licence fee tariffs and the refusal to grant licenses.</p>

<p>8. Approximately, how often would you anticipate using the orphan works scheme/how many applications a year would you envisage making?</p> <p>We believe that the proposed legislation – with its emphasis on undertaking a due diligent for each and every rights holder – will be too difficult for most libraries to comply with. As such we anticipate that the number of applications a year from the Wellcome Library will be trivial (or more likely, none at all).</p> <p>Our current focus is on digitising archival materials. However, to secure an Orphan Work licence we would be required to try to identify the rightholders for every single letter and document we wished to make available. This approach is simply not practical.</p>
<p>9. What types of use do you envisage using orphan works for?</p> <p>Initially, we had hoped to use the scheme as a means by which we could provide free access to digitised copies on the Internet for non-commercial purposes. However, as stated previously, we now believe that the requirements of the proposed Licensing scheme are too cumbersome and costly for this scheme to be of any real use in making orphan works available on the Internet, for non-commercial use.</p>
<p>10. How much does the fact that licences are non-exclusive impact upon your potential use of the scheme?</p> <p>No impact.</p>
<p>11. How much does the fact that licences are limited to the UK impact upon your potential use of the scheme?</p> <p>Though we understand the reason why licences are limited to UK users, such a restriction does further weaken the value of this scheme.</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>If we applied for a licence, we would only do this where the EU Directive of ECL scheme would not be sufficient for our needs. It is likely we would only apply for a small number of works due to the costs of applying for individual works and the time-limitations of the licenses under the proposed scheme. Ideally we would apply for books in batches – for example if we wanted to make use of 50 orphan works that required the same due diligence process, we could provide these details in a list exported from our own database, describing the due diligence process for the whole set as part of the application process. We would then receive a license for each work on the list.</p> <p>Once the due diligent search had been undertaken (which should be the most time consuming part of the process), we would suggest a maximum period of 15 working days for an application to be processed.</p>

<p>13. What proportion of your applications would be for unpublished works and what sort of works would these be?</p> <p>We would be unlikely to apply for orphan works licenses in any real quantity for our unpublished works as long as the regulations require us to identify and research every singly copyright holder in such collections. We hold large collections of archival records with far too many copyright holders to identify and trace, the majority of which are not recorded in the catalogue in any structured way.</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>We would develop our existing online resources containing many orphans and partial orphan to improve access to these collections for research.</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>In a recent copyright clearance project related to 20th century books we were unable to trace ANY rights holders for 12% of the titles.</p> <p>Of the 88% of titles where we were able to trace at least one rights holder, we received no reply from any rights holder for 24% of titles after multiple attempts to contact them at the known address.</p>
<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?</p> <p>Yes, this is the case.</p>
<p>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?</p> <p>Only in exceptional and rare circumstances, for example, if we wanted to use a work for commercial purposes (a highly unlikely scenario).</p>
<p>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?</p> <p>As with the previous question, this would be used only in the unlikely event we need to use a work for commercial purposes.</p>

<p>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?</p> <p>The Wellcome Library does not (and will not) make any charges for users who wish to access our digitised content.</p> <p>The costs of a diligent search, however, is not trivial. In a rights-identification project we undertook last year, with the Author Licensing and Collecting Society (ALCS) and the Publishing Licensing Society (PLS), ALCS/PLS charged £20 per work with the overall cost capped at £34k. In addition, Wellcome spent (in staff time) around £10k over the course of the project. In total therefore, the work required to identify rightsholders (including sending letters, chasers, recording this in the database, meetings, emails etc.) cost around £45k.</p> <p>The fee set by ALCS/PLS however, did not cover their full costs, primarily as a result of additional work associated with rightsholders not identified in the original library catalogue records and they have indicated that if they were to provide this service in the future the costs would have to rise.</p> <p>Taking the total administration costs of diligent search and rights clearance to be around £45k, we can calculate that for each of the works which has been made available (987 in total) we have incurred a rights-identification cost of around £46 per work. To be clear, this fee does not include any copyright licence fee, and, did not include trying to identify each and every rights holder. See: http://wellcomelibrary.org/content/documents/policy-documents/rights-clearance-exercise.pdf</p>
<p>20. How would you do this (for example by charging for access to your website)?</p> <p>We do not attempt to recover costs.</p>
<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>This may be possible, but usually a public-private partnership only works where the private partner expects to make a profit.</p>
<p>22. Do you agree that we should not implement the optional provision?</p> <p>We agree. An arbitrary limit would not be helpful.</p>
<p>23. Are there any other sources that should be added to this list of essential sources?</p> <p>The existing list covers the essential sources.</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>We agree with the addition for non published works, and have no suggestions for other freely available sources.</p>
<p>25. Is there a realistic prospect that civil sanctions will not provide appropriate remedies? In what circumstances?</p> <p>No. We believe civil sanctions would be adequate.</p>

<p>26. Do you agree with this approach? Where should the burden of proof lie, and why?</p> <p>Yes. The burden of proof should be with the rights holder in order to ensure compensation is granted to the correct individuals. Rights holders should also be required to declare any co-rights holders (e.g. co-heirs).</p>
<p>27. Is it necessary to provide for an appeals process on the level of fair compensation? Who should administer such an appeals process?</p> <p>Yes. As the compensation provided will be presumably vary depending on circumstance – therefore rights holders should be able to appeal where they feel the decision is unreasonable.</p>

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.

Overall, we believe that the way the licensing scheme has been devised it is highly unlikely that it will be used by libraries and archives as a means by which orphan works can be made readily available on the Internet.

First and foremost the requirement to undertake a diligent search, for all rightsholders is too high a hurdle, especially for unpublished works and archives. We urge IPO to look again at how a diligent search is defined, and focus especially on the need for diligent searches to be proportionate and that the standards of due diligence must be appropriate to the type of material.

Second, when setting up-front payments to license orphan works, we urge the IPO to sets fees which are proportionate (and in some cases, it may be appropriate to set no fee). The Wellcome Library's experience of digitising orphan works (see: <http://wellcomelibrary.org/content/documents/policy-documents/rights-clearance-exercise.pdf>) suggests that in some circumstances, some rights-holders may be prepared to allow their works to be made available online without seeking payment.

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~~