

# 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: Gwen Thomas

Organisation (if applicable): Association of Photographers Ltd

Address: Studio 9, Holborn Studios, Eagle Wharf Road London N1

Please return completed forms to:

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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)
	Charity or social enterprise
	Central government
	Public body
	Rights holder
	Individual
	Other (please describe)

## Questions:

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

As the licensing will now rest with the IPO we see no place for collecting societies involvement in the process, save to be a source for a diligent search. We do, however, feel it imperative that their involvement is retained in consultation processes around pricing and diligent search, and advising on market rates for certain uses to ensure OW licences do not undercut established markets.

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

No, if the licence was to be transferred to a third party it would be difficult to police and the IPO would have less control to ensure the use made was that which had been licensed.

**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?**

If it was true non-commercial use this would be allowed under the Directive, so no licence would be required. As stand alone visual works are not covered by the Directive, we can only assume that this question refers to the use of stand alone visual works under the ERRA. We could only condone a high volume annual licence if this was supplied to Cultural Institutions only, as described by the Directive.

**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?**

We believe that the period should be in line with the Limitation period ie 6 years from the time the licence was issued.

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

See above

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

As stated in our response to the ECL consultation, we are wholly against unclaimed licence fees being claimed as bona vacantia:

"Undistributed monies should not be transferred to the Crown. The idea of bona vacantia has been disputed from the outset. We are dismayed that this idea has been resurrected. Undistributed monies should always go back into the community for social, cultural and educational activities for the benefit of the rights holders."

**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, as a licensing body the IPO should be under the jurisdiction of the Copyright Tribunal and an appeal for any/all unreasonable actions (including the terms of the licence) should be heard by this Court as opposed to the First Tier tribunal.

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

n/a

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

n/a

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

Whilst this question is not applicable to us or our members, we should like to state that any licence must always be non-exclusive.

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

n/a

**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?**

n/a

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

n/a

**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?**

n/a

<p><b>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?</b></p> <p>n/a</p>
<p><b>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?</b></p> <p>This question is not applicable to our members, however we have a concern that States will have differing diligent search criteria - some more robust than others. We would want to see the search having to be made under a strong jurisdiction as there is a danger that States with weaker search criteria will become the ones used regularly.</p>
<p><b>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?</b></p> <p>n/a</p>
<p><b>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?</b></p> <p>n/a</p>
<p><b>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?</b></p> <p>n/a</p>
<p><b>20. How would you do this (for example by charging for access to your website)?</b></p> <p>n/a</p>
<p><b>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?</b></p> <p>n/a</p>
<p><b>22. Do you agree that we should not implement the optional provision?</b></p> <p>We agree.</p>

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

The sources are bound to be a moveable feast, with registers and search facilities being invented and current ones improving all the time. We are of the mind that the Copyright Hub, which we believe will encompass PLUS for searching the visual arts, will become an invaluable resource and should be a mandatory search vehicle.

**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?**

See Q23

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

As commercial use is not allowed under the Directive then civil sanctions would suffice under UK Copyright Law - however under the ERRA commercial use is allowed and so criminal and civil should apply.

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

We do not believe there should be a burden of proof required in the negotiation which should be referred to the Copyright Tribunal as is normal practice.

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

Our answer to Question 7 is relevant here, in that there should be an appeals process for all areas of the licensing process and administered by the Copyright Tribunal.

**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 consultation questions are difficult to answer given that they are covering both the Directive and ERRA implementation in the same questions.

We do not believe, given the differences between the different categories of works and the way they are managed, licensed and priced, that the ERRA provisions are suffice. We are particularly concerned that the concerns voiced over various consultations regarding the commercial use of stand alone visual arts; the difficulties in doing a digital search and pricing the licences (even given that working groups are trying to battle through this quagmire) have not been taken seriously. The Directive has recognised that even for non-commercial use stand alone visual works should not be included, yet the UK insists on non-commercial and commercial use being allowed.

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