

**Copyright works: seeking the lost**

Annex F: Response Form

Please return completed forms to:

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**Questions:**

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

BAPLA (British Association of Picture Libraries and Agencies, representing over 200 members and their contributors) is supportive of the work of collecting societies in limited areas only. As their remit is licensing for secondary uses, such as photocopying, they do not generally engage in primary licensing for publication and would not hold rights data on significant volume or details of rights ownership. That said they may provide a useful resource where they operate on behalf of artists' estates. A monopoly of access allows for vigorous control in reprography, such as not cropping or altering works represented, and actively seeking examples of how a work is intended to be used prior to publication. Such checks and balances might prove useful in some instances, when upholding the moral rights of an author.

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

No.

BAPLA is delighted that the UK Government is seeking policies that enable rights holders to generate lost revenue for work that has become orphaned, and for cultural heritage to make available works in their collection through the scheme. We do not think that a transfer of rights to any third party or a transfer of rights from one set of agreed usage should be permitted in any circumstance. Only the owner may transfer rights, whether exclusively or non-exclusively and this must be legally binding. As the rights owner is not present to manage their rights, a third party authorising body will step in, but this action does not constitute a claim of ownership nor is it a right to title. A third party transfer enabling another unknown party to manage an Orphan Work, would expose the authorising body and the scheme to unnecessary potential risk. It may inadvertently or otherwise enable commercial organisations to profit from schemes designed for non-commercial entities, such as low usage fees, or less stringent diligent search requirements. It may also expose the initial licensee to risks associated with the possibility of that work being passed to other parties and used outside the scope of the initial licence. At worst such an idea may inadvertently support a regime that allows an unfettered right to make copies of Orphan Works. It may render the collection of fees - a key aspect of this policy - unworkable.

*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?*

BAPLA is supportive of schemes that allow for the efficient working of the scheme.

On pp 15 of the OW Consultation document it states; (reference diligent search 3.1.2)

"It will not be a pre-condition for an orphan works licence that the consent of all known rights holders should be obtained, which would unnecessarily slow the licensing of the work."

This conveys the opposite message from discussions at the working parties prior to the publication of this paper. This invalidates the purpose of a "license" where it is assumed that all copyrights (incl. within the works) have been sought. We have concerns about this.

Furthermore, our understanding of competition law as explained by the IPO, is that the authorising body must offer the same tariff to all parties, irrespective of volume, but mindful and reflective of the prescribed use - 'commercial' or 'non-commercial'.

BAPLA defines non-commercial use as a use se for preservation, private study and research that DOES NOT directly or indirectly generates revenue for the user.

The terms used to describe 'commercial'/ 'non-commercial' use will be a contestable area for many whether they are rights holder or potential licensees. Whilst we appreciate the EU Directive allows for non-commercial use only, it expresses that such uses are not for standalone photographs for a reason, especially in the case of online use.

If an authorising body were to offer a bulk pricing scheme, it must be possible for a revenant rights holder to negotiate market rates commiserate for a single use fee.

This scheme should not be available for commercial or fee charging organisations. Finally, it should be mindful of market distortion available for low costs.

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*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 acknowledge that the Canadian Orphan works scheme sets a maximum of five years after the end of the licence, however imposing a time restriction by which a rights holder must be aware that their work has been used within a UK Orphan Work Scheme and therefore make claim to the work/s as well as remuneration, is unfair to the rights holder, more so if the rights holder does not reside in the UK. Adding to that will be the burden of tracking whether a work that has been opted out of an ECL scheme to ensure that it remains under their direct control. Copyright - ergo ownership of a work, lasts for 70 years PMA. Only if the date of first publication or death of the rights holder can be reliably established, can a limitation be set upon the time limit to claim funds.

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

The point at which unclaimed funds may be distributed should depend upon whose interests this money will serve.

Government should keep a percentage of unclaimed funds in case a revenant rights owner returns.

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

Income to the Treasury from Bona Vacantia is in the regions of £400m per annum. The income from unclaimed funds will probably by comparison be a drop in the ocean to the Government therefore this money should be ring fenced for the benefit of creators. There should also be a remit to increase copyright awareness through education to users and the general public.

*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?*

No, it should cover neither a) or b).

Users should have no basis to argue over 'unreasonable fees'. The authorising body should be satisfied with its authority and that a refusal to issue a licence is non-negotiable.

*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?*

*On the subject of incidental use\* and for the avoidance of doubt BAPLA welcomes clarification on this point in the regulations as matter of importance*

On the subject of incidental use (q.v\*) and for the avoidance of doubt, BAPLA welcomes clarification on this point in the regulations as matter of importance

\*: See "Use for purposes incidental to application"

7. A person may make reasonable use of an orphan work and of an orphan right for purposes which are incidental to:

(1) the application for the grant of an orphan licence; and

(2) the processing of the application and the maintenance of the register referred to in regulation [5(2).]

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

n/a

*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

*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?*

Most of BAPLA's members do not have Orphan Works in the collections they hold/represent. Those that do hold minimal amounts and actively seek rights holders via BAPLA and other sources.

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

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?*

BAPLA has reservations about the potential exploitation by partners with a commercial remit in a public-private partnership. This may be due to lack of information or the inclusion of this concept at this stage of discussions. Our concerns are that there is a greater propensity for gaining indirect financial benefits for a commercial partner and distinguishing between the types of uses as technological advances grow, for example 'making available' online, where is the line drawn? For example, do the works remain on an institute's website or can they be republished or shared on a search engine, another non-profit website, a social media website, or repurposed for criticism and review?

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

In that this relates to copyright term in sound recordings and performers' rights in sound recordings, this question is N/A.

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

Yes.

This list should be reviewed no less frequently than every two years.

*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?*

We do not think that it would be in the interest culture or society to allow a blanket agreement that allows non published Orphan Work images to be used and exceptional tests should be required for commercial use. Photographers whose works, which includes negatives, transparencies, contact sheets and prints, may not agree with their works being published. It is widely known that Magnum Photos founder Henri Cartier-Bresson, for example, was meticulous in selecting which of his works were published, he would remove from his collection any prints for public view that were not to his standard of artistic execution, expressing his moral right to choose what the public saw.

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

Too few members and their photographer contributors can afford the expense of using the First Tier Tribunal system. BAPLA would like to sanction the use of the Small Claims Court to claim for breaches or infringements of works.

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

We are in agreement with CRA in their direct submission to Viscount Younger of Leckie, that the burden of proof must lie on the body that granted the licence and has the resources to research evidence and best practice.

“In this European context, the concept of “fair compensation” must lead to the presumption that the revenant creator is entitled to a fee not less than would have been paid for a normal licence at the time the orphan work licence was issued, plus a consideration for the delay in receiving the funds – in the same way that the civil courts are empowered to uplift damages for unauthorised use.” CRA

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

Yes. This should be administered by the Copyright Tribunal and the Small Claims Track as stated above.

*Do you have any other comments that might aid the consultation process as a whole? Please use this space for any general comments that you may have, comments on the layout of this consultation would also be welcomed.*

Thank you for this opportunity to address our comments in detail. In addition to the point below, BAPLA has a series of questions on diligent search and a series of points and questions regarding OW that we wish send separately and meet to discuss these with you.

- We would seek the opportunity to discuss the use of ECL and Orphan Work interchangeably, with IPO. They must not be conflated and ECL must not be used in place of direct licensing.

- BAPLA has made available to the IPO a chart that compares the language used in drafting. We note that the terms used, are used differently to mean the same and likewise the same terms to mean different things. For the sake of clarity and certainty we would like to see this addressed.
- We have indicated here our definition of commercial / non-commercial and we strongly urge that an agreed industry definition is used in the SI.
- The authorising body should reserve the right to refuse a licence on a case-by-case basis. This should not be seen as a curtailment of freedom of speech or a public remit.
- We would urge IPO to offer guidelines to licensees about using an Orphan Work image which contains the following within the copyright works: people including children; trade marks and brands; artworks; sculptures; 3-D registered design works; buildings; or other related rights.
- We would urge the IPO to offer guidelines on cropping and editing photographs to ensure that moral rights are not breached. In the case where an image is cropped or altered in any way, we advise that a pre publication example be held on record by the IPO.
- We would wish in its response to the consultation, to see how IPO might enforce such as scheme.
- We would also urge the IPO to make widely known about the requirement to seek a licence, and the responsibilities and obligations on users when an Orphan Work licence has been granted to them.
- We are hopeful that in the next round of copyright discussions we can again impress upon the authorising body the importance of an approach to strengthen moral rights, particularly the author's right to be identified in any publication.
- In the case of the revenant author, it should be presumptive of title and as easy as possible to claim ownership. Where rights holders have contracts in place with their agents and representatives, they should be allowed to assert their rights as in their normal business claims for ownership on behalf of their contributors.
- The inclusion of metadata should be compulsory. A limitation by file size should be compulsory when using or displaying an image by a cultural heritage organisation for non-commercial use online, for example no high resolution photographs/images should be 'made available', in order to safeguard the exploitation or possible infringements by third parties.
- BAPLA is delighted that the UK government is seeking policies that enable rights holders to generate lost revenue for work which has become orphaned, and we would supportive of a market assessment before and after the Orphan Works scheme has come into place. This should include a test on the scheme's impact on reducing copyright infringement.
- Arguably, in the case of photographers, the economic impact assessment was based on the Canadian model, which deems the commissioner not the author as the owner of the copyright.
- We do not think that this is sufficient given the growing importance and the rise of photographic usage in the past three years.
- We would like to see active steps and measures by the IPO to help both creators and users re-connect with their works, also to ensure that revenant rights copyright owners are aware of the Orphan Works scheme and can claim a share of any revenues due to them. Use of the 'PicScout' system to track and manage Orphan Work usage may be of interest to all parties
- In order to ensure that Orphan Works are not reproduced again without permission safeguards should be actively in place, also to ensure watermarking, accreditation, metadata are in place for any works published.
- We would request the limit of an Orphan Work licence for charities to the same rights as public cultural heritage by limiting usage to non-commercial only.

For the avoidance of doubt, we would be supportive of stage approach to the clearance of individual works for photography, starting with analogue works only used by cultural heritage institutions for non-commercial purposes.

BAPLA is supportive of the aims and aspirations of annual report to outline how copyright policies have achieved their objectives. We would welcome a detailed description of what will be covered and hope that the following areas included: the number OW licenses refused, number of OW applications rejected on the basis of an inadequate diligent search, number of applicants who breach licensing terms, etc. We would also welcome an independent review board to oversee the IPO OW scheme, as this would substantiate positive findings and allay any concerns.