

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

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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)

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<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?

Collecting societies do not license orphan works within the law, therefore their licensing of orphan works in their areas of expertise could not be improved.

Do you mean, "Could collecting societies contribute to the improvement of licensing of orphan works in their area of expertise, when it becomes possible to license orphan works?" (i) Collecting societies' databases may be a useful tool as part of a diligent search for an author, if collecting societies are willing to make their databases available for that purpose; (ii) collecting societies may be able to contribute useful information regarding the pricing of orphan work licences within their areas of expertise.

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

If an orphan work is licensed for use within in another work or production (for example, an illustration in a book, or an archive clip in a documentary film) the orphan works licence would need to be transferable to the same extent as the rights in the work or production as a whole are transferrable.

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?

An annual or rolling licence to which new individual works or rights were added (for use under the terms of the licence) as the respective diligent searches were approved could be workable, provided the authorising body has the administrative resources to operate it.

If you mean an annual licence to use orphan works in general, such a licence is unlikely to be compliant with the requirement for a diligent search before an orphan works licence can be granted.

4. Should there be a limit on the period of time in which a rights holder can claim his/her remuneration?

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Yes.

If yes, taking into account the examples of time limits set out at paragraph 5.9, what should that period be and why?

Many claims for copyright-related remuneration are limited by the statute of limitation, the claim in general being limited to 6 years from the time when the claimant became aware of the claim. However, the Government appears to be trying to set the limitation in relation to *when the right was used* rather than in relation to the *reappearance of the right owner* (i.e. when she became aware of her claim) – for the convenience of those administering and using the orphan right.

The right owner should be able to claim remuneration up to 6 years after she becomes aware of the issue of the orphan work licence or use of the work under it, and if the corresponding funds are distributed before that time the liability must remain indefinitely.

The orphan licence regime is being introduced in the digital age, so there can be no difficulty in keeping accurate and easily accessible records for a very long time.

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

Provided liability is retained (as in answer to Q4) at any time.

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

Under the CMO Directive (likely to be enacted shortly) any use by the Crown of undistributed monies will be limited to the funding of “social, cultural and educational activities for the benefit of right holders.” Therefore, to the extent that the administration of orphan works licences falls within these provisions the funds will have to be used for these purposes; which seem appropriate for all the funds in any case.

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.

c) both.

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

Various.

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

Inclusion of orphan film footage clips in productions.

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

In our industry all licences are non-exclusive.

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

Territorial limitation of orphan works licences is extremely important. Cross-border licences could not be contemplated until issues such as reciprocally compatible diligent searches were

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effective.

In practice, this will mean that orphan works will not be included in productions destined for international exploitation (as is currently the case).

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?

“Clearing whole collections of works in your archives” where the collection is from a single source and a single right holder (or set of right holders) has to be cleared for the whole collection, clearing the whole collection is likely to be as cost effective as clearing a single production in the collection (e.g. one diligent search will cover all the contents).

However, where there are many orphan works or rights all from various sources in a collection, “clearing whole collections of works in your archives” is not likely to be cost-effective if the use of – and thus income to be realised from – the exploitation of all of the orphan works is not already clear. In this situation, the scheme would only realistically be used for selected works with a foreseeable exploitation which will justify processing the application.

We assume that processing the application will be quite simple and un-bureaucratic, and thus not take more time than any typical licence application where the right holder is known. (The aspect of using orphan works which can potentially be time-consuming can be establishing that a work is orphan, before making the application to use an orphan work, i.e. conducting the diligent search for the right holder.)

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

Proportions of unpublished works will vary from archive to archive, but usually be low.

They will be unpublished (frequently amateur) film footage.

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 former.

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?

We don't understand the first two sentences. Only a diligent search can establish whether a work is an orphan work or not. Therefore, it will not be appropriate for an application for an orphan licence to be considered unless a diligent search has been carried out. How could orphan licences be granted to the assumed 90% of applications, if it had not been established that the applications were actually for licences to exploit orphan works?

Or do you mean that if only 10% of applications will be able to establish that the work is orphan, and therefore that an orphan licence should be granted, the scheme will not be worth implementing at all?

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<p>To answer the question in the third sentence, with the exception of certain specific small archives, orphan works are not a significant issue for commercial audiovisual footage archives,</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>N/a, because our archives are commercial and the EU Directive is therefore of very limited relevance.</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>N/a.</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>N/a.</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>N/a.</p>
<p>20. How would you do this (for example by charging for access to your website)?</p>
<p>N/a.</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>Our members have partnered with cultural/public organisations in such schemes for digitisation and making available of works which are not orphan.</p> <p>In this situation, organisations could provide commercial services (such as restoration and digitisation) for a fee, rather than for a share of profits.</p>
<p>22. Do you agree that we should not implement the optional provision?</p>
<p>No.</p> <p>The issues are now well known by all organisations concerned, and it is open to them to make appropriate provisions when materials are deposited. Clearly they should in any case be doing this as part of standard digital rights management – which is after all the reason that most organisations want orphan works licences in the first place.</p> <p>Otherwise, there will be a danger that orphan works licences will be used as a substitute for proper rights management.</p>
<p>23. Are there any other sources that should be added to this list of essential sources?</p>
<p>The sources are indicated as it were in principle (i.e. the types of organisations or other sources). The licensing authority should have an obligation to keep a register of the specific</p>

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organisations and other sources within each category, with contract details, to which organisations can apply to be added, with a transparency register like the EC's at <http://ec.europa.eu/transparencyregister/info/homePage.do>. The register should be publicly accessible on the authority's website.

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?

The same answer as for Q23.

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

Yes.

If only civil sanctions apply and values are very low, damages awarded would also be very low; so the sanctions will provide little incentive for diligent observance of the regime. In reality, the only sanction will be stopping use of a work, which will provide no realistic incentive for diligent observance of the regime. Criminal sanctions will provide an appropriate incentive.

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

Only if there is a simple, clear and easily accessible means for a reverant right holder to appeal the authority's decision. A private individual right owner should not be obliged to embark on a bureaucratic, legalistic or expensive process to challenge the fairness of the compensation awarded to her in her absence and without her consent.

The burden of proof must lie with the licensing authority – it will have the evidence to support its own choice of licence fee. It could have licensed a use which the right owner would not have consented to and therefore has no track record to produce. The right owner should not be disadvantaged by procedural or other matters.

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

Yes.

The same criteria as stated in the answer to Q26 must apply to an appeal process, which should probably be heard by an independent mediator agreed by the authority and the right holder. If that process is exhausted, appeal through the courts must be allowed.

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 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.

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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