

# 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: Gillian Spraggs

Organisation (if applicable):

Address:

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](mailto: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)
- Charity or social enterprise
- Central government
- Public body
- Rights holder**
- Individual
- Other (please describe)

I am an author. My print publications include two books and a number of essays, poems and translations. My digital publications include several commissioned web learning packages. Between February 2010 and November 2012 I was the convenor of the group Action on Authors' Rights.

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

Since the Secretary of State and the Intellectual Property Office (IPO) are acting on behalf of one or more unlocated copyright holders, it behoves them to take as much care as possible of the rights in the work. With this in view, I do not think that an orphan works licence should ordinarily be transferable, and certainly not in the case of commercial licences. There is a risk of 'orphan works' licences being taken out on a speculative basis, and of a commercial traffic in them.

The only case where it might possibly be acceptable might be in the case of a non-commercial licence under the Copyright (Certain Permitted Uses of Orphan Works) Regulations (henceforward C(CPUoOW)R), in a situation where archives or similar institutions were amalgamated (as, for example, in recent years, the Corporation of London records have been moved to London Metropolitan Archives).

It should, in any event, be set out that no licence should be transferred without an application to the IPO, and the IPO should be bound to conduct an active scrutiny of the circumstances before granting any such proposal.

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?

'Non-commercial' (or non-profit) use could easily be quite sufficient to destroy all or nearly all the commercial value in a book, story, essay or other literary work. Specifically, once a book that is in copyright but (presumably) out of print has been digitised by a library or other institution and made available to the public by being placed on a website, a 'revenant' author/copyright holder will have virtually no prospect of finding a commercial publisher willing to reissue/issue it in a print or digital edition. This is likely to apply even if the work is withdrawn by the library, since if there is an interest in the work, the chances are extremely high that the digitised copy will have been appropriated and made available on other websites. There will, in other words, be little or no prospect of regaining control of the work. This would also impact on the author's/copyright holder's ability to make money from self-publishing the work.

For these reasons I believe that making books and other literary works available to the public, whether in digital form or otherwise, should **never** be considered a 'low value' use, and 'an annual licence or similar arrangement' would be entirely inappropriate.

Further to this, I note that on p. 37 of the consultation document, paragraph 3.62, it is stated, with regard to 'fair compensation':

As the Directive limits the use of works to digitisation and making available we would assume that this would be a low amount. The amount of compensation will be influenced by factors such as the cultural objective of the organisation to achieve its public-interest

mission, the non-commercial nature of the use of the work and the possible harm to rights holders.

Frankly, I consider the first sentence here to be altogether obtuse. Consider: ‘making available’ means *publishing*: and the right to publish is a primary right, and valuable. The second sentence raises the issue of ‘the possible harm to rights holders’, and I find this more encouraging. In some cases there may, however, be an issue of *actual* harm to rights holders, harm that can be demonstrated or reasonably inferred, and this should not be disregarded.

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?

‘It may be appropriate to limit liability for one generation, which is for seventy years from when the licence was issued.’ – *Copyright works: seeking the lost*, 5.9. That sounds fair; but there is then a question relating to the payment of interest. Surely interest should be paid, or at the very least, there should be compensation for inflation.

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

Rationally, it would seem to be at the point when the liability ends, as the consultation document suggests.

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

In the 2011 Consultation on Copyright conducted by the IPO the Action on Authors’ Rights group responded to a similar question (relating to ECL schemes) with the suggestion that it might be applied to ‘tracing unlocated copyright-owners, improving the available aids to finding them, and educating the public on copyright matters’. These still seem to me like good proposals. If these activities do not exhaust the money available, the remainder could be used for arts funding.

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?

An obvious risk is that some users with deep pockets, especially commercial users, might put excessive pressure on the system by way of repeated appeals. If appeals are to be allowed, care needs to be taken to design a system under which this will not be possible.

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

The IPO might wish to bear in mind that the Directive, and also the scheme being set up under the Economic and Regulatory Reform Act (2013), may well deter some persons from

depositing material in archives, especially personal material. This provision might give such persons some assurance.

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

a) There should be searches on the web for authors' website(s), also searches on social media: Facebook, LinkedIn, Google+, etc. There should also be a search to see if the author/estate is listed as a client on the website of a literary agency. Further searches on the web may throw up other leads.

b) Agents are not mentioned. Arrangements should be set in place for making inquiries with agents via agents' associations.

c) PLR is not mentioned; yet the scheme may well hold the largest database of contact details for authors in the UK.

d) Where appropriate, death dates and family connections should be established using sources and techniques commonly used for genealogical research, including but not limited to sources available on the web. Probate records should be used to identify and access wills, to check for heirs to estates. Probate records are listed as a search resource in the *Sector-Specific Guidelines on Due Diligence Criteria for Orphan Works* issued by the European Digital Libraries Initiative (§2.2).<sup>1</sup>

e) With regard to listed source e), it should be acknowledged that:

i) ARROW (Accessible Registries of Rights Information) is not currently accessible, at any rate to ordinary users. At this point, the name is a joke...

ii) VIAF is accessible. It is not very useful. Most if not all entries lead only to lists of publications and links to library databases. Some of the links do not work. There appears to be an intention to 'crowdsource' information about the personal details of authors, which is deplorable. There have been comments by some authors that some of the details it already holds are unreliable; also that it is not conforming to EU data protection laws.

f) The Copyright Hub may provide connections that will make VIAF and the ISNI system useful for the purposes of conducting a diligent search. But at present that project is still to be implemented.

Searchers should not be told that they must search using databases that are not currently useful or even accessible.

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?

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<sup>1</sup> [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/hleg/orphan/guidelines.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/guidelines.pdf)

The sources suggested are only likely to be useful in cases where the work is by someone who has at some point been published. Otherwise they will be useless.

In many cases the search strategy most likely to bear fruit is one that uses sources and techniques commonly used for genealogical research, including but not limited to sources available on the web. Probate records should be used to identify and access wills, to check for heirs to estates.

This is not difficult. 'Family history' is a hugely popular hobby, pursued by large numbers of people with no special research training. There are numerous resources and handbooks available.

Searches for the owners of the rights to unpublished works must take full account of the nature of the work, the context in which it was produced, the circumstances of its deposit in the archive, etc. If it is material related to military service, there are regimental associations that may be able to help. Perhaps the British Legion may also; it is a huge organisation, and must have records. If it is material of specific local interest, there are local history societies in most part of the country who may be able to provide useful context and in some cases leads to contacting descendants.

Research is a creative activity. Imagination is required, and common sense, and a will to bring the search to a successful conclusion. Also some professional experience. Tracing people – and this is what is involved in any search for the owners of the rights to unpublished works – requires certain specific skills, or a willingness to acquire them.

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

As I pointed out under question 3, 'non-commercial use' is capable of doing enormous damage to the commercial value of a work. I am not a lawyer, but I have looked up the term 'civil sanctions' and I cannot find that it comprehends civil law suits. A copyright owner who can make a case that a diligent search has not been properly carried out and who can also demonstrate commercial losses as a result should have the power to sue the 'relevant body' in the appropriate track of the Patents Court.

On page 35 of the consultation document it states: 'A diligent search by a relevant body will be completed in good faith – there is no verification process.' I cannot see, in fact, that the Directive actually prohibits states from introducing a verification procedure, but perhaps there is something that I am missing. In any case, the absence of a verification procedure will make it the more crucial that there should be satisfactory procedures and remedies in the event that there is are questions over whether a search has been carried out in an appropriately diligent manner.

26. Do you agree with this approach?

I take this question to refer to the Copyright (Certain Permitted Uses of Orphan Works) Regulations 7(2): ‘The relevant body shall provide the rightholder with fair compensation for the body’s use of the relevant work or relevant phonogram’ and the comment at 5.19, that ‘fair compensation ... will be decided between the relevant body and the emerging rights holder’.

(I take it that this means compensation for the use made up until the point where the ‘reventant’ assumed control of the rights. The following comments are made on that assumption.)

I do not agree with what is being proposed. There are serious hazards here. The ‘relevant body’ will have a vested interest in keeping such payments low. It will be an institution of some kind: library, archive, museum, etc. In almost any imaginable case there will be a considerable imbalance of power between the institution and the ‘reventant’ copyright owner, especially with regard to financial resources and access to professional advice.

I recommend that the IPO should provide some oversight of the determinations between the ‘relevant body’ and the ‘reventant’, that it should act as a mediator in cases where an agreement cannot be reached, and that the copyright owner should be able to appeal to the Copyright Tribunal.

Moreover, and this is important: C(CPUoOW)R 7(1) states: ‘A rightholder in a relevant work or a relevant phonogram considered to be an orphan work may put an end to the orphan work status so far as his rights are concerned by providing the relevant body with evidence of his ownership of the rights.’

This might do as an initial procedure, for speed and convenience all round, but there must be scope for appeals: first to the IPO and secondly to the Copyright Tribunal.

First, any orphan works scheme is imbued with moral hazard from the outset. In the case of the scheme to be operated under C(CPUoOW)R, the risks taken by the institution – expenditure on diligent search and (for example) digitisation – are small compared to the risks to which such a scheme exposes an author/copyright owner of a literary work of continuing value. See my response to question 3 above. And frankly, the risks taken by the salaried employees of the institution are trivial indeed compared to the risks faced by a freelance author who has invested months and (often) years of work in a single book.

This should be borne in mind when considering every aspect of any kind of orphan works scheme.

Secondly, in the specific case of a ‘revenant’ copyright-owner, institutions will have a vested interest in protecting their own investment in the work: they should not be absolute judge and jury in their own case, when it comes to determining the claim made by the ‘revenant’.

At this point it seems proper to raise an issue that is not made explicit, so far as I can see, either in C(CPUoOW)R or the commentary in the consultation document: will a ‘revenant’ copyright owner be permitted to assume control of the work and either prevent its continued use by the ‘relevant body’, or negotiate a licence on new terms? This is a strange and to me disquieting omission. I will add that I believe that the owner should be permitted to resume full control, and this policy was always strongly urged by the Action on Authors’ Rights group.

Where should the burden of proof lie, and why?

I take it that the reference to ‘the burden of proof’ refers back to this sentence: ‘The burden of proof of ownership of a work will be on the emerging rights holders.’

It is necessary to require proof to protect against false claims. At the same time, it should be noted that many works, especially shorter works like stories and poems, certainly have been and probably continue to be published on ‘gentlemen’s agreements’, without a contract or even a letter. Also, if there ever was a contract, it may have been destroyed. Authors and their heirs should not be subjected to unreasonable demands to produce paperwork that may never have existed, or that cannot be found.

Section 104(2) of the Copyright Designs and Patents Act 1988 should apply:

Where a name purporting to be that of the author appeared on copies of the work as published or on the work when it was made, the person whose name appeared shall be presumed, until the contrary is proved -

- (a) to be the author of the work;
- (b) to have made it in circumstances not falling within section 11(2), 163, 165 or 168 (works produced in course of employment, Crown copyright, Parliamentary copyright or copyright of certain international organisations).

In the absence of direct proof to the contrary, it should be assumed that the copyright belongs to the author or his/her heirs. Reasonable proof of identity and (where necessary) inheritance should then be all that is required to establish ownership.

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

In the event that an agreement cannot be reached, there must be some procedure for impartially assessing the level of compensation. See what I have said above in answer to question 26:

I recommend that the IPO should provide some oversight of the determinations between the 'relevant body' and the 'reventant', that it should act as a mediator in cases where an agreement cannot be reached, and that the copyright owner should be able to appeal to 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.

### **Further Comments**

i) I note C(CPUoOW)R 2(5)(b) which, following Article 1(3) of the Directive, states that unpublished works can only be used when they 'have been made publicly accessible by the organisations referred to in paragraph 1 with the consent of the rightholders, provided that it is reasonable to assume that the rightholders would not oppose the uses referred to in Article 6.'

I am disquieted that I can find no mention of this in the commentary contained in the consultation document.

The requirement that the works should have previously been made 'publicly accessible ... with the consent of the rightholders' is an important restriction. Guidance should be offered as to what constitutes making 'publicly accessible', how to establish whether or not the rightholders have actually given their consent to this, and on what basis it might be possible to 'assume that the rightholders would not oppose the uses' to be made of the works.

Moreover, and very importantly: guidance should be offered covering the point that many works deposited in archives have not been deposited by the rightholders, nor with their consent. They have (presumably) been deposited by the owners of the physical documents, etc, which is not necessarily the same thing at all.

Unless unpublished works have been deposited by the actual rightholder(s), and i) these have expressed their consent to making them publicly accessible ii) it is 'reasonable to assume' they would not oppose the uses being made, then neither the Directive nor C(CPUoOW)R provides a legal framework either for i) treating them as orphan works or ii) to making them available.

This needs to be made quite clear.

## ii) Draft Statutory Instruments

a) The two draft statutory instruments have different definitions of 'orphan work': compare the Copyright (Certain Permitted Uses of Orphan Works) Regulations 2014 3(1) with the Copyright (Licensing of Orphan Works) Regulations 2014 3(1). The differences seem to go beyond what is entailed by the different bases on which the schemes are being set up, and to introduce an unnecessary source of confusion.

b) A minor point, but noticeable: C(LoOW)R has 'right holder' throughout. C(CPUoOW)R has 'rightholder'. The commentary has 'rights holder'.

## iii) Sample Orphan Works Licence (Annex E)

Section 6 of the Sample Orphan Works Licence reads:

(6) The issuance of the Licence does not release the Licensee from the obligation to obtain permission from any other rights holder in the work.

Other than whom or what? Nothing is said elsewhere about a rights holder/rights holders. This is incoherent and confusing.

## iv) Comments on some of the questions

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

As I am not particularly likely to become a user, I did not answer this question. I note, however, that it implies that the issuing of exclusive licences is under consideration; though as I understand it, this would require an amendment to the Act (at 116A 5(b)). The issuing of exclusive licences would dispossess the copyright owner completely, leaving him/her no scope for using the work or authorising its use on a non-exclusive basis until the expiry of the licence. This seems highly unfair and unreasonable.

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?

This question assumes that a 'diligent search' is a well-defined entity, when in fact guidance on conducting such a search in the UK is still being prepared. It also appears to make the assumption that the searches for copyright owners that have been and are being conducted (no doubt conscientiously) by UK librarians and archivists are always carried out along lines most likely to lead to a successful result. I believe that to be a dubious assumption. I note, for instance, that in Barbara Stratton's admirably well documented study of a rights clearance

project, *Seeking New Landscapes*,<sup>2</sup> she states that ‘enquiries into authors’ wills were not pursued’ on grounds of time and cost (p. 15). Without wishing to criticise decisions made in the context of a specific project conducted within what appears to have been a very tight time-frame, I will say that I believe that in certain cases researching probate records is going to be the only way forward in tracing copyright holder(s). If searches of this kind are excluded, or if the searches are in other respects deficient, the percentage of unlocated copyright holders is inevitably going to be higher.

v) Further to the matter of ‘diligent search’

On p. 17 of the consultation document, at paragraph 3.21 it is stated:

Consultation responses from museums, libraries and archives show that when they use orphan works on a risk basis at the moment, it is rare for a rights holder to reappear and that it is even rarer for the rights holder to want to stop the use or to claim remuneration.

As against this, I would like to point out that in Barbara Stratton’s study, cited above, she offered as one of her key findings the following:

Permission to digitise was sought for 73% of the books in the sample. Of these:

- rightsholders gave permission for just 17% of the books to be digitised;
- permission was not granted for 26% of the titles;
- for 26% of the titles no response was received;
- rightsholder contact details for the remaining 31% of the titles could not be located. (p. 5)

Permission was not granted in the case of more than a quarter of the books in the sample. Moreover, since the rights holders for 31% of the titles could not be traced, that figure translates as over a third of the books whose rights holders were actually contacted. It is very noticeable that rather more of the respondents withheld permission to digitise than granted it.

I believe these are figures that rather weigh against the assumption that

ather heavily against the anecdotal evidence that rights holders

should give us pause when we are

It is anticipated that this is likely to be the case with non-commercial use under the orphan works scheme, particularly if a proper diligent search has been performed.

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<sup>2</sup> Barbara Stratton, *Seeking New Landscapes. A rights clearance study in the context of mass digitisation of 140 books published between 1870 and 2010*, British Library, 2011

Anecdotal Compare figures in seeking new landscapes

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EU directive ---

3.53 Relevant bodies already seek reproduction permissions when works are deposited where possible and it is anticipated that with any unpublished works deposited after the transposition date the rights holders or relevant bodies will ensure that it is clear how the works can be used. If this is not the case then the Directive would still apply. Moreover, as with unpublished works that have been deposited before the cut off date, cultural organisations will need to conduct a diligent search before using the work. The choice of whether to publish something is likely to apply to living professional creators who are both more likely to be found in the diligent search than non-professionals and whose work is less likely to be of a type residing in archives. For example, it is less likely that an archive would have an unpublished manuscript of a novel by a living author than unpublished diaries written by non-professionals who are no longer alive.

Estates. Short works.

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Will it be possible to seek an orphan works licence for a work where the rights holder has opted out of a relevant ECL scheme, is not a member of the collecting society concerned and who cannot now be located?

Yes. If the current contact details of the opted out rights holder are not available and if the diligent search does not locate that rights holder, the prospective licensee can apply for an orphan works licence.

Pernicious

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

x..... Yes

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?

x..... Yes