

Name: R Jenner Hobbs

Organisation: NA3T Archive of Transport Travel & Trade (NA3T)
(NA3T is an archive of original photographs (negatives etc) and as such is the rights holder for all bar less than 1% of its holdings.

Address: 14 Gannon Road, Worthing, BN11 2DT

Organisation description: Rights holder and social enterprise

NOTES:

1) THIS RESPONSE IS IN RELATION TO PHOTOGRAPHIC ORPHAN WORKS ONLY.

2) THROUGHOUT THIS RESPONSE "PHOTOGRAPH" MEANS AN ORIGINAL PHOTOGRAPHIC IMAGE AS DEFINED IN CDPA 1988. (e.g the negative)

3) COPYRIGHT SUBSISTS IN THE ORIGINAL PHOTOGRAPH, E.G. THE ORIGINAL NEGATIVE OR TRANSPARENCY ETC. IT FOLLOWS THAT UNLESS THERE IS EVIDENCE TO THE CONTRARY THE OWNER OF THE ORIGINAL PHOTOGRAPH OWNS THE IP RIGHTS.

Q1: Yes. By establishing a register of rights holders which includes amateur and professional photographers alike as well as collections of original photographs held in private, society and associations collections and archives.

Q2: Yes, but only in cases where the licensee in a business that is taken over by another business that will use the licensed orphan work (OW) in the manner for which the license was issued.

OW licenses should not be regarded as an asset of the business with a cash value that attaches to the photo.

Q3 Once a photographic print is published in a "low value" or non-commercial application such as a museum, any potential commercial value will be significantly reduced or destroyed. Further, such use would undermine the rights holder's right to manage the future use of unpublished photographic prints. (Assuming that the museum has obtained the original photographer's prints when the photographer has already transferred his negatives to NA3T)

Q4 Yes. Given that the right holder (RH) might have been, say, 20 years old when taking the photograph and that the print was licensed as an OW when the photographer was 40, then should the RH live to be 80 the IP rights would expire 70 years after his death - 120 years after the license was issued.

I would suggest a time limit of 200 years OR the expiry of bona vacantia should the RH identity become known and no beneficiaries are forthcoming.

Q5 See Q4 above

Q6 Unclaimed funds should be made available to RHs with photographs that that are neither catalogued nor digitised to facilitate that work and reduce the risk that any prints might be wrongly categorised as OWs.

Q7 The question is unclear. Why is an OW being used if the authorising body has refused to issue a license?

It could be argued that an authorising body granting an OW license to, say, a publishing house is acting unreasonably if the identity of the RH is already known to other publishing houses or organisations. In such cases the legitimate user of the image may have good grounds to appeal against the issuance of a OW license, particularly if they have purchased an exclusive license from the RH.

Q8 NA3T is an archive of original photographs (negatives etc)and as such is the RH for all bar less than 1% of our holdings where we act as agents for the RHs. We are not, therefore, users of OWs.

Q9 See Q8 above

Q10 See Q8 above

Q11 See Q8 above

Q12 See Q8 above

Q13 See Q8 above

Q14 See Q8 above

Q15 "Diligent search" in respect of photographic prints is undefined and given that everybody with a smart phone is now a photographer, many posting their digital images on the Internet or advertising prints for sale on eBay, it is doubtful that any search for a digital photographic RH would be successful, with the result that a digital image could be declared an OW within days of it being taken!

With respect to photographic prints taken from negatives, we have already had a case where a well established museum specialising in transport history received a bequest of prints mounted in albums with the history of each vehicle. Despite the images being listed in our on-line catalogue the museum was unable to find us and allowed some of them to be used in a book. In this case the author was more diligent and did indeed find us but only by chance as he was looking for better images.

It should be noted that there are millions of photographs of transport subjects listed on the Internet and there is not a search tool capable of identifying any specific image. The best we have tried so far found over 7000 possible matches when asked to find a particular image of a London bus that was on our web site. It failed to find the target image.

Q16 In "Copyright works: seeking the lost" section 3.44 says, in relation to OW exceptions in the EU "The types of orphan works are restricted to books, journals, newspapers, magazines or other writings, cinematic or audiovisual works and phonograms. The scope does not include the use of artistic works such as standalone photographs, illustrations and paintings, but embedded artistic works within works are permitted."

Q17 See Q16 above. It follows that NO diligent searches for photographic RHs will be conducted under the EU Directive.

Q18 As RHs for all of the photographs in the NA3T archive we will not be using the domestic OW scheme but will be trying to defend ourselves against it.

Q19 The images on the NA3T website [www.na3t.org] are available for use on non-commercial heritage and cultural web sites free of charge. We make photographic prints available for museum display at cost plus 10%.

Q20 If a heritage or cultural web site charges for access we would grade them as commercial and they would need to acquire a license from us to use our images since our images are not orphans. In the event that such an image was given an OW license in error we would add on 100% unlicensed use loading in accordance with our published rates.

Q21 Digitisation of our uncatalogued collections is now a matter of priority and we have opened a new web site [www.na3t.net] to display these images. This site also allows members of the public to submit information to assist with the cataloguing activity; we are effectively crowd sourcing catalogue data.

Q22 See Q16 above

Q23 Yes. Photograph archives, on-line catalogues, associations, clubs and societies that hold collections of photographs and other sources that sell photographic prints. These are all prime sources of photographic OWs.

Q24 See Q16 and Q23 above.

Q25 Yes, there a very realistic prospect that civil sanctions will not provide appropriate remedies. If a major organisation has made unlawful non-commercial use of an OW in such a way that it has damaged the commercial potential of that work or has violated the author's moral rights, it is most unlikely that a small enterprise could afford to bring a civil action.

Q26 Yes, the claimant must be able to prove that he is the RH.

Q27 The County Court, with no option to escalate to a higher court and thus stop any organisations with fat chequebooks putting any appeal beyond the reach of the little guy.

GENERAL COMMENTS:

Throughout this response I have used the word "photograph" in the manner defined in CDPA, that is the original image e.g. original negative/transparency/etc.

As an archive holding around 300,000 photographs I have no OWs but rather a lot of documents assigning IP rights.

Since 1996 I have sold over 250,000 prints for personal use only, many of which are now in the hands of various organisations through gifts and bequests. My problems will start when these organisations, some of which are museums, start applying for OW licenses as an easy option should the diligent search criteria not be adequately defined.

COMMENTS ON CONSULTATION DOCUMENT

Completed response form fields did not print out in full if the text extended below the response entry frame. It is normal in these cases to have an expanding box rather than a scroll bar.

There was no facility to send the completed form electronically (I use Windows XP) thus the time taken to complete the on-line form first time around was totally wasted.

PLEASE ACKNOWLEDGE REPLY

PLEASE KEEP ME ON THE LIST FOR OTHER CONSULTATION DOCUMENTS