

1 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

Please return completed forms to:

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Copyright and Enforcement Directorate

Intellectual Property Office

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Fax: 020 7034 2826

Email: 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)

Stop 43. (Simon Chapman on behalf of Stop43)

Business representative organisation for photographers.

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

Prospective users of orphan works should contact collecting societies (CS) as part of their diligent search for the rightsholders of orphan works. The bigger and more complete database that CS have, the more likely that rightsholders will be found and works no longer orphaned. Databases should be searchable by text and visual search software.

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

No. Orphan works licences should be specific, for both usage and time period. Allowing OW licences to be transferable could result in a market for orphan works, undermining markets for known works.

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?

We are fundamentally opposed to this, which would be tantamount to a collective licence for orphan works. Orphan works licences should be for specific work for a specific usage for a specific time period. Allowing high volume use of orphan works would distort and undermine existing markets. There would be problems in defining "low value" and "non-commercial" use.

Some rightsholders earn money through low value usage and from fees for “non-commercial” use, and some users gain greater value from associated services such as advertising used alongside “low value” use of content. “Non-commercial use” should not be equated with “low value”, and the supply of goods and services for “non-commercial use” constitutes a substantial proportion of UK GDP. Allowing such an annual licence for non-commercial use would both damage the non-commercial use market and markets for commercial use by devaluing the content through ubiquity.

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?

There should be no limit, because new technology may become available improving the search capabilities and increasing the likelihood that creators may be identified or find out their work has been used.

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

10 years. This allows time for creators to come forward, but even if they come forward after this time they should still receive the fee for use of their work, which can come out of current surplus funds.

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

Unclaimed funds should only be used for the benefit of creators generally. They should not be subsumed into general taxation.

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, if users don't like the licence fee or a refusal they can find alternatives to use. But there should be a right of appeal by rightsholders against the level of the licence fee if it is too low. And rightsholders should be able to appeal against an existing orphan works licence and have it terminated if it conflicts or competes with their own marketing and selling of their work.

Orphan works licensing schemes should not disadvantage rightsholders so as not to distort their markets.

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

Not applicable to Stop 43 as a creators' organisation.

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

Not applicable to Stop 43 as a creators' organisation.

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

Not applicable to Stop 43 as a creators' organisation.

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

Not applicable to Stop 43 as a creators' organisation.

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?

We are not a potential licensee, but will comment that orphan works schemes should not be used to 'clear' whole collections of work, which would be tantamount to an orphan works extended collective licence.

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

Not applicable to Stop 43 as a creators' organisation.

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?

Not applicable to Stop 43 as a creators' organisation.

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?

Not applicable to Stop 43 as a creators' organisation.

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?

Not applicable to Stop 43 as a creators' organisation.

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?

Not applicable to Stop 43 as a creators' organisation.

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?

Not applicable to Stop 43 as a creators' organisation.

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?

Not applicable to Stop 43 as a creators' organisation.

20. How would you do this (for example by charging for access to your website

Not applicable to Stop 43 as a creators' organisation.

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?

Not applicable to Stop 43 as a creators' organisation.

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

We are not clear what the "optional provision" refers to.

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

We can advise on this on a continuing basis, as the list of essential sources will change and develop over time.

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 are very concerned that use of unpublished works will pose problems such as privacy, confidentiality, protection of journalist sources. If there are any of these concerns, then such unpublished works should not be licensed.

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

There is, because most creators are individuals who will not be able to afford to take legal action. Will legal redress be available via the Small Claims Court?

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

The burden of proof must lie with the licensing body, who should have the resources to provide such proof. The relevant rightsholder should receive a fee for use of their (orphan) work which should not be less than the fee they would have charged had they licensed the work to the user themselves directly. And

they should also receive an additional fee in compensation for the delay in receiving the fee.

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

Creators would find the expense of a court case a major obstacle to launching an appeal, so there must be a low or no cost route for an appeal.