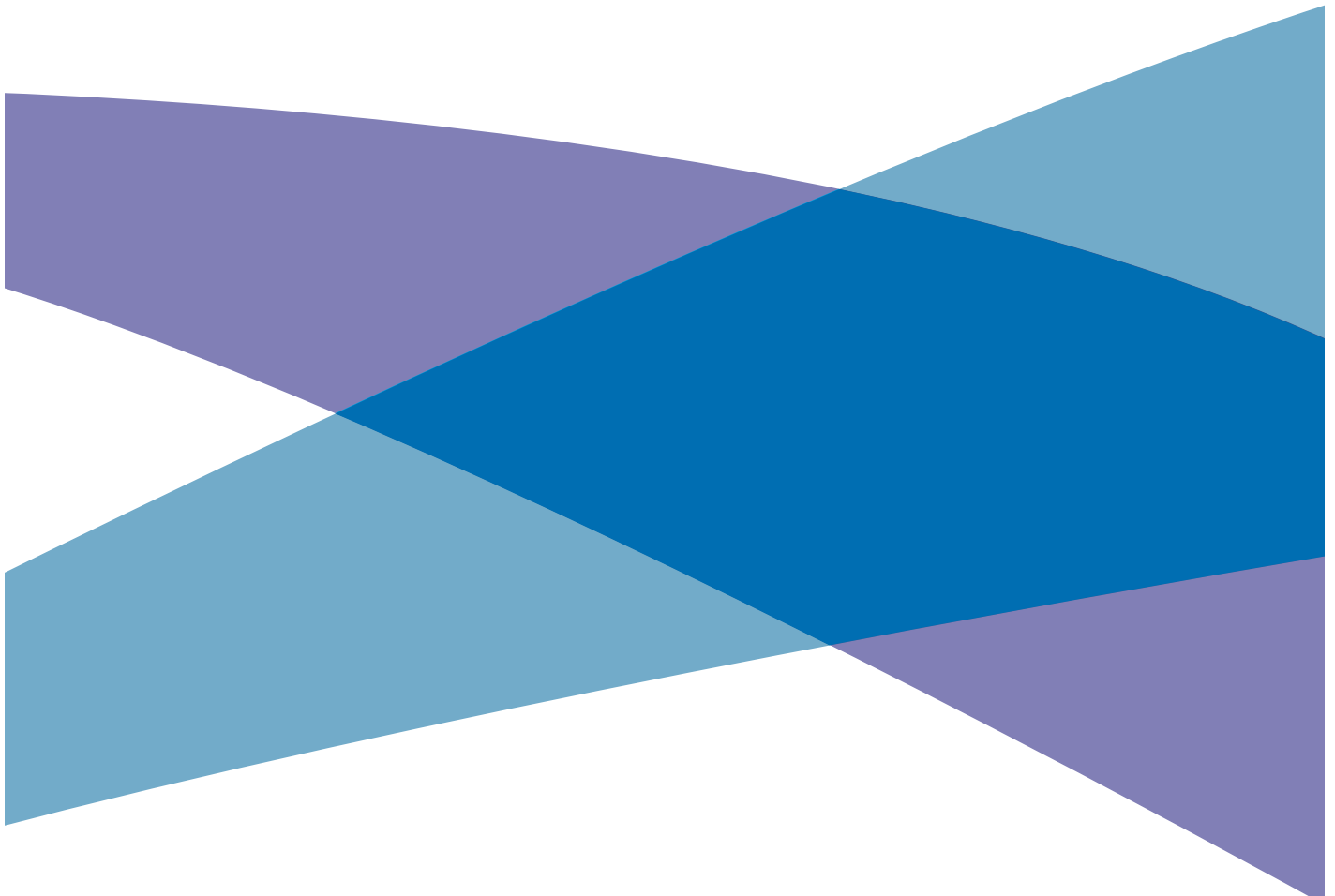




Intellectual
Property
Office

Extending the benefits of collective licensing

Consultation on the UK's new extended collective licensing scheme





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1. Ministerial Foreword

The licensing of copyright works is key in helping creators reap rewards from their creations while allowing others to use them in valuable ways in business and society. An effective licensing regime improves lawful access to copyright material and helps reduce the incentive to copy and share content unlawfully. Supporting effective licensing therefore also contributes to the Government's wider agenda of reducing the harm of copyright infringement.

Collecting societies are at the heart of the licensing landscape. At its best, collective licensing saves licensees time and trouble, makes it easier for creators to get paid, and encourages businesses to invest in areas where they know licences are readily available. But these benefits can be limited by the fact that not all works form part of the licence. Greater coverage of licences will tend to mean fewer temptations to use works without permission, whether as a licensee or as a collecting society, and more authors being paid.

The Government will make this possible by allowing extended collective licensing (ECL) in some circumstances. ECL is an arrangement that permits a collecting society to license non-members' works if it meets a series of stringent tests to make sure it treats those non-members fairly. This includes making sure non-members can opt out of ECL arrangements if they choose.

ECL rests on the assumption that collecting societies act responsibly. Both the new UK rules for collecting societies' codes of practice (on which we have consulted already) and the draft EU Directive on Collective Rights Management look to increase confidence that this is and will be the case.

With these safeguards in place, ECL schemes should reduce transaction costs and returns to rights owners by simplifying licensing, improve compliance with copyright law and enhance confidence in the UK copyright system. They will allow collecting societies that run *de facto* ECL schemes to operate on a legal footing, and should improve the circulation of more works, thereby enhancing the nation's cultural and creative capital. In addition, non-member rights holders will enjoy protections under the collecting society's code of practice. It is for these reasons that officially mandated ECL schemes have been in operation in some Nordic countries for more than 50 years, and why ECL is increasingly being seen as a licensing solution in many countries around the world.

The Government has already consulted on these basic principles and put in place a law that allows ECL schemes to be approved. It is important that we also get the detail of how this works right. This document therefore asks for in-depth views on what arrangements to put in place to protect non-member rights holders, make ECL schemes a feasible proposition for responsible collecting societies, and ensure licensees can benefit from the more comprehensive licences that ECL offers. It draws on input from an informal working group of creators, collecting societies and licensees, for whose contributions I am very grateful. Now it is time for everyone to be able to have their say.

Thank you in advance for your insights.

2. Introduction

The Government's extended collective licensing (ECL) proposals have been the subject of extensive consultation and debate. This began with its Copyright Consultation, which ran from December 2011 to March 2012¹. Many of the respondents to the consultation recognised that ECL could make the process of rights clearance faster and less complex. There was significant support for the proposal from licensees and more qualified support from some collecting societies and rights holder groups. Some rights holders, particularly those in sectors where collective licensing plays a limited role (for example, certain rights in literary works, photography, commercial archives) expressed concern that ECL could have a negative impact on existing direct licensing models. Accordingly, many consultation responses emphasised the need for proper protections for rights holders².

After careful consideration of the consultation responses, in July 2012 the Government published a policy statement, signalling its intention to legislate at the earliest opportunity to allow qualifying collecting societies to apply for authorisation to run ECL schemes. The Government subsequently introduced a clause into the (then) Enterprise and Regulatory Reform Bill, establishing a power to make regulations for those schemes³. The Bill received Royal Assent in April 2013.

In autumn 2012 the Government began a series of working group meetings to listen to stakeholders' views on how ECL schemes might work. The working group comprised a cross section of stakeholders, including collecting societies, licensees, and a significant number of rights holders, such as authors and photographers. This working group met 9 times, at roughly monthly intervals until July 2013, to develop the policy that would come to inform the detail of the regulations. It also met in October 2013 to go through the draft Regulations.

Alongside the working groups, the Government continued to liaise with a range of stakeholders in the UK and elsewhere, drawing on their expertise and experience to inform the Regulations which are the subject of this consultation.

ECL is largely separate from the orphan works proposals which the Government will consult on later this year. ECL allows a collecting society that represents a significant number of rights holders in its sector to license on behalf of all rights holders in that sector, subject to certain safeguards. The orphan works consultation – which will cover both the regulations to implement the UK's domestic licensing scheme and the separate regulations to implement the EU Directive – will allow the licensing of works in the UK where the rights holder is unknown or cannot be located. This consultation outlines the Government's thinking about whether and how orphan works can form part of an ECL scheme. The orphan works consultation will look at the detail of the overlap between the two schemes, so that stakeholders have an opportunity to give detailed feedback.

1 *Consultation on Copyright*, <http://www.ipo.gov.uk/consult-2011-copyright.pdf>

2 *Consultation on Copyright: summary of responses*: <http://www.ipo.gov.uk/copyright-summaryofresponses-pdf>

3 In respect of ECL (and orphan works) the Enterprise and Regulatory Reform Act inserted new sections 116A-D and paragraphs 1A-D into Schedule 2A of the Copyright Designs and Patents Act (CDPA) 1988

3. Executive summary

Extended collective licensing (ECL) is a form of licensing for which a collecting society is given permission to extend an existing collective licence to cover the works of all rights holders in the sector, except those who opt out. While traditional collective licensing relies on rights holders opting in by giving the collecting society an express mandate, extended collective licensing assumes that rights holders want their works to be licensed unless they opt out. Government is making extended collective licensing available to qualifying collecting societies who can use it to simplify the licensing process where it makes sense for the market and where it is wanted by the sector.

ECL schemes will help make sure money gets back to rights holders, and will create a new tool for rights clearance where there is strong support for it. This consultation is an opportunity for interested parties to comment on the Regulations for such schemes, including their legal effectiveness, structure, and effect. The Regulations cover a detailed description of the requirements and procedures to be followed when applying for an authorisation to operate an ECL scheme. They describe the obligations on the Secretary of State when considering those applications. There is also detail on both the procedural requirements should a collecting society (or Government) wish to modify an existing authorisation, and the circumstances in which an authorisation may be revoked.

For any collecting society to be successful in its application, the Secretary of State must be satisfied that it has met certain essential safeguards, including those of representativeness and consent. The Secretary of State must also be assured, amongst other things, that the collecting society's opt out procedures are robust, that arrangements for publicising the scheme are proportionate, and that the collecting society has robust arrangements for the distribution of undistributed monies to non-members.

These Regulations are being made against the backdrop of the proposed Collective Rights Management Directive ('CRM Directive'), currently being negotiated in Europe. A final draft text was agreed by Coreper on 5 November⁴, and Ambassadors voted in favour at the Coreper of 13 November. The European Parliament Legal Affairs Committee voted unanimously in favour of the dossier on 26 November and the full Parliament is expected to vote to adopt the text early in 2014. If adopted, the Directive may contain provisions which will impact on these Regulations. If so, the Government will revisit the Regulations as part of the transposition process and make changes if appropriate.

⁴ Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial rights in musical works for online uses in the internal market. Interinstitutional file 2012/0180 (COD) (15695/13)

4. How to Respond

2.1 In addition to previous consultations specifically on ECL, this policy was debated extensively during the ERR Act. Following the passage of this primary legislation, the Government is now developing the regulations that put this policy into effect. This consultation is an opportunity for interested parties to comment on the Regulations, including their legal effectiveness, structure, and effect. It is not an opportunity to comment on the policy itself. Therefore, we will not consider evidence that tries to re-open agreed policy.

2.2 When responding, please state whether you are responding as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents by selecting the appropriate interest group on the consultation form and, where applicable, how the views of members were assembled. The form can be submitted by email or by letter or fax to:

Enquiries to: Hamza Elahi
Senior Policy Advisor
Copyright and Enforcement Directorate
Intellectual Property Office
First Floor,
4 Abbey Orchard Street,
London, SW1P 2HT

Tel: 020 7034 2813

Fax: 020 7034 2826

Email: copyrightconsultation@ipo.gov.uk

Issued: 28 November 2013

Respond by: 28 January 2014 (midday)

2.3 The contact details above may also be used to ask questions about policy issues raised in the document, or to obtain a copy of the consultation in another format.

2.4 The consultation response form is found at Annex D.

Confidentiality & Data Protection

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2.4 Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want information, including personal data that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

2.5 In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

What happens next?

2.6 The Government intends to publish a response to the consultation within 2 months of the closing date. The amended Regulations will be laid in Parliament at an appropriate time after the response, following established practices to clear the final version.

5. The Proposals

The draft ECL Regulations are set out in Annex A. This technical consultation explains the drafting of the Regulations and seeks comments on the way in which they implement Government policy.

These notes should be read in conjunction with the draft Regulations.

3.1 Regulation 2 – Interpretation

3.11 This part outlines the scope of the Regulations and sets out how they should be interpreted. The definition of “relevant licensing body” restricts an ECL authorisation to a ‘traditional’ collecting society⁵. For any organisation applying for an ECL authorisation there is an obligation to demonstrate, as part of its application (see Regulation 4 on Application for Authorisation), that it is indeed a “relevant licensing body”. In this consultation document, the “relevant licensing body” is referred to as “collecting society”⁶.

Representativeness

3.12 Collecting societies applying to run ECL schemes must be representative and this principle is at the heart of the Government's proposals. The definition of “representation” in the Regulations includes a stipulation that a collecting society seeking authorisation must already be licensing the works, and the rights in those works, which are to be the subject of the ECL scheme. This first arm of the definition is designed to capture a core principle of ECL policy: that of extending an *existing* collective licensing scheme. This principle is further strengthened under Regulation 4(9), in which there is a requirement to include in any ECL application a copy of the existing collective licence upon which the ECL scheme is based, and evidence of how long that collective licence has been in place.

Questions: Should a collecting society that is applying for an extension of an existing collective licensing scheme be required to have had the scheme in place for a minimum period? If so, what should that minimum period be? Please provide reasons for your answer(s).

3.13 In addition, the “representation” definition stipulates that the collecting society must be representative of rights holders affected by the scheme. This second arm of the definition is essential, as without it unacceptable schemes might be made possible. It is not impossible, for example, for one member rights holder to control ninety nine percent of works that were the subject of the proposed ECL scheme, and a further hundred non-member rights holders to control the remaining one percent. A collecting society with such a rights holder imbalance would not qualify as representative.

5 The definition of “relevant licensing body” is necessarily identical to that used in the codes of practice for collecting societies regulations. This can be found in Regulation 2 of The Draft Copyright (Regulation of relevant licensing bodies) Regulations 2014, p. 14. found at the rear of the *Regulation of Licensing Bodies* consultation, here <http://www.ipso.gov.uk/consult-2013-collecting.pdf>

6 Note that should the CRM Directive be agreed in its current form, it would become necessary to expand the scope of “relevant licensing body” at transposition. This is because certain provisions of the Directive would extend to so-called “independent management entities”. These are defined in the final draft text of the Directive agreed by Coreper on 5 November as:

“any organisation authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of these rightholders as its sole or main purpose and which is:

- (i) neither owned nor controlled, whether directly or indirectly, in whole or in part, by rightholders and
- (ii) organised on a for-profit basis”

Independent management entities would not be eligible to apply for ECL authorisation under these proposals because, assuming these are non-membership entities, they would not be able to demonstrate consent (see 3.16-3.18 below).

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3.14 Regulation 3-(4)(b) requires a collecting society's representation to be "significant" in respect of both arms of the definition. The Regulations do not prescribe a precise percentage because where the total number of non-members is not known the determination of a percentage is impossible. The need for representation to be "significant" therefore allows for some flexibility. This mirrors Nordic ECL schemes which typically require a collecting society to be representative of a "considerable" or "substantial" number of relevant rights holders.

3.15 It is not possible to assess the total number of works that will be covered by the proposed ECL scheme without making efforts to contact all known rights holders and assess the likely scale of unknown ones. In assessing a collecting society's application, the Secretary of State will review the amount and quality of the collecting society's efforts to contact those rights holders. In order to satisfy the representativeness test, a collecting society will therefore need to show:

- the number of right holders' mandates it has, relative to the (estimated) total number of mandates; and
- the number of works it controls relative to the (estimated) total number of works.

Questions: What kinds of efforts should a collecting society have to make to demonstrate it is significantly representative? For example, how easy would it be for a collecting society to produce evidence of total numbers of mandates and works? Please provide reasons for your answer(s).

Consent

3.16 A collecting society must also demonstrate in its application that it has the consent of its members to the proposed ECL scheme. By doing so, it would provide further evidence of a rights holder mandate. Collecting society members can reasonably be assumed to be proxies for their community of rights holders, because they all share the same interests and concerns. On this basis, their consent can be extrapolated to imply consent from non-member rights holders.

3.17 It is sometimes the case that rights holders, by virtue of standard contracts, assign certain rights to collecting societies. Collecting societies might not actually be collectively licensing those rights (and almost invariably they are not) but it is not unfeasible they could apply for an ECL scheme on the back of that existing mandate. A consent threshold therefore adds an extra layer of protection, allowing members the opportunity to block an ECL scheme for rights they were not aware they had assigned.

3.18 Among respondents to the Copyright Consultation, there was a level of support for the notion that a collecting society should have the approval of a clear majority of members (some suggested 75 per cent of its membership) in order to proceed with any ECL application⁷. The Government is consulting on this figure. Where a scheme is narrow in scope such that only certain members of a collecting society would be affected by it – for example, where the ECL applies only to certain rights or certain classes of rights holder – it is only affected members who would need to be balloted. Where a collecting society is wholly owned by other collecting societies or bodies, it would need the support of 75 per cent of the members of each of those collecting societies or bodies.

⁷ Consultation on Copyright: Summary of responses, *op. cit.*

Questions: Do you agree that a 75 percent threshold for membership support is appropriate? If not, what would be a better way to demonstrate membership support and consent? Please provide reasons for your answer(s).

3.19 Members of foreign collecting societies, with which the applying UK based collecting society has reciprocal agreements, are not members of the collecting society applying for the ECL. Neither are they non-members, as defined. Their relationship with a collecting society under an ECL scheme should continue in much the same way as it did under the applicable collective licence.

3.19a The works of foreign rights holders with whom the collecting society does not have a contractual agreement could be caught up in an ECL scheme. Foreign rights holders will be remunerated for the use of their work, they will be able to opt out, and will have all the same protections as other non-members. The collecting society will also be required, as part of its application under Regulation 4(15), to demonstrate how and where it will publicise the scheme to foreign rights holders in order to allow them to opt out. There is evidence that in some collective licences the works of foreign rights holders are already being caught up, so by obligating collecting societies to find and pay those rights holders, ECL should put them in a better position than they are at the moment⁸.

3.19b On the issue of territorial scope, the Government has already said that ECL would apply only to use in the UK, so it is not possible to extend these provisions to other jurisdictions.

3.2. Draft Regulations: Regulations 3 and 4 – Authorisation to operate an Extended Collective Licensing Scheme; Application for Authorisation

Regulation 3: Authorisation to operate an Extended Collective Licensing Scheme

3.21 The Secretary of State will decide whether an ECL application should be authorised. Regulation 3 outlines some of the safeguards that must be satisfied before that determination can be made. Those safeguards include the aforementioned stipulation that a collecting society's representation be "significant".

Regulations 4: Application for Authorisation

3.22 Regulation 4 provides a comprehensive list of materials that must accompany an ECL application. These materials include evidence of representativeness and consent; the collecting society's proposals for distributing monies to non-member rights holders; the works (and the rights in them) that are the subject of the application; the arrangements to be put in place for publicising the scheme; and how opt out will work.

3.23 The collecting society will have to demonstrate that it is a "relevant licensing body", as defined in the Regulations. In assessing applications, the Secretary of State may also look at the history of the collecting society and its length of experience as a collecting society. In spring 2014, the Government will be issuing guidance for collecting societies that wish to apply to run ECL schemes. In this guidance, the Government will outline the sort of evidence it is looking for to meet these and other application requirements.

⁸ For example, see p 26 of the CLA submission to the Copyright Consultation, found here: <http://www.ipo.gov.uk/re-sponse-2011-copyright-cla.pdf>. According to a CLA survey, of all titles copied, 0.2% were not covered by the CLA licence. This 0.2% figure would cover both opted out works and the works of foreign rights holders with whom the collecting society does not have a reciprocal agreement (and possibly also the works of some domestic non-members).

Questions: Should a collecting society have to demonstrate past compliance with its code of practice? If so, what sort of information might satisfy this requirement? Please provide reasons for your answer(s).

3.24 The introduction of a regulatory framework for collecting societies is already well advanced. This framework, built on the Government's minimum standards, aims to enhance governance, and increase transparency and accountability. These minimum standards were published in October 2012⁹. A large group of collecting societies, acting under the banner of the British Copyright Council, have published their codes of practice. The Government has just finished consulting on the detail of the Regulations enabling the statutory regulation of collecting societies¹⁰. With implementation planned from the common commencement date in April 2014, the codes regulations are expected to be in place before the ECL regulations.

3.25 The specified criteria in the schedule to the codes regulations¹¹ outline the additional requirements on a collecting society that operates an ECL scheme, in relation to protections for non-members. Those protections are at 2, 6, 18a and 19b of the specified criteria. As part of its application, the collecting society must provide the code of practice it intends to operate, which must include those protections for non-members.

Questions: Do you agree that a collecting society can sometimes be justified in treating members and non-members differently, even if the circumstances are identical? Please provide reasons for your answer.

3.26 Before granting an authorisation, the Secretary of State must be satisfied that a collecting society is adhering to its code of practice. In order to demonstrate that it is doing so, the collecting society could provide a signed declaration to that effect.

Questions: Do you think that a signed declaration from a collecting society is sufficient evidence that it is adhering to its code? If not, what additional evidence should a collecting society have to produce to demonstrate that it is adhering to its code? Please provide reasons for your answer(s).

3.27 The demands an ECL application places on a collecting society are essential, both to demonstrate support for the ECL scheme from rights holders and to ensure that robust arrangements are in place to protect non-members. It is for a collecting society, in conjunction with its members, to decide whether to apply to use ECL in relation to some or all of its licensing. The costs involved in applying for an ECL, and thereafter in running it, are therefore part of a commercial decision that falls solely to the collecting societies who choose to apply.

9 <http://www.ipso.gov.uk/hargreaves-minimumstandards.pdf>

10 *Regulation of Licensing Bodies, op. cit.*

11 Also found at Annex C of this consultation

3.28 When the Government published the minimum standards in 2012, it undertook to consult further on additional provisions that might be needed to protect non-member rights holders in an ECL scheme.

Questions: Is there a need for any additional minimum standards to protect non-member rights holders? Do you agree that the protections for non-member rights holders, as articulated in the ECL regulations, and elsewhere (including in this consultation document, where further protections Government would like to see in applications are specified), are sufficient to protect their interests? Is there anything else that could usefully be included in an ECL application to help assess that application's strength? Please provide reasons for your answer(s).

3.3. Regulations 5, 6 and 7 – Response to an application; Authorisation Procedure; Notice of Decision on Authorisation

Regulation 5: Response to an application

3.31 Regulation 5 describes the process that must be followed once an ECL application has been received. At this stage there will be no determination made about the quality of the evidence presented. A period of 14 days is therefore considered sufficient to establish the completeness of the application.

Regulation 6: Authorisation Procedure

3.32 Having confirmed to the applicant that all information necessary for an application has been received, the Secretary of State will publish a notice alerting affected parties to the application. This will signal the start of the period for making representations. Stakeholders will be alerted to the notice by email (the IPO has a comprehensive mailing list of stakeholders to whom alerts for policy developments such as consultation launches go) and it will also be published on the IPO website and on the website of the applying collecting society. The notice will include the collecting society's summary of application (as required under Regulation 4(1)), which must contain essential information required for third parties to respond without having to access the full application. The notice will also include a link to the full application.

3.33 The period for making representations is an opportunity for those affected by the proposed scheme to air their views. They may comment on any aspect of the application, including the evidence that has been presented; the opt out procedure proposed by the collecting society; or how the scheme will be publicised. They may also comment on potential impacts on the sector; on transaction costs or on the licence fee; the rationale for the scheme; or any social, cultural or educational benefits. The period for representations is an opportunity for both supporters and opponents of applications to have their say.

3.34 The period for making representations will be proportionate to the scope and scale of the proposed ECL scheme. Whilst the very smallest schemes may be at or near the 28 day minimum, it is envisaged that many of the schemes, and certainly the ones covering large numbers of works or rights holders, will be allowed much longer, most likely around 90 days. Some collecting societies also favour a longer timescale, so that any opposition has every opportunity to be voiced, and a more transparent mandate therefore achieved. Following the period for making representations, the Secretary of State will have a maximum of 90 days in which to consider all the evidence and make a decision.

Questions: Are the minimum periods for representations and subsequent Secretary of State decision sufficient and proportionate? If not, please explain why not, and make a case for a different period or periods.

Regulation 7: Notice of decision on authorisation

3.35 The Secretary of State will have the discretion to restrict the scope of an authorisation, or make it subject to certain conditions. If an applicant wanted to seek authorisation for the use of certain categories of works for which it had not demonstrated a mandate, the application would be narrowed to include only those works for which there was a mandate. An authorisation may also be subject to additional conditions, for example around the opt out procedure should the Secretary of State consider the procedure in the original application to be inadequate or incomplete.

Questions: In what circumstances, other than as described above, do you think an application should be narrowed or made subject to certain conditions, without the application being rejected? Please provide reasons for your answer.

3.36 If a collecting society's application was rejected it could re-apply for an authorisation by addressing the reasons for the rejection. If, on the other hand, it disagreed with Secretary of State's decision, that decision could be challenged through judicial review.

Questions: Do you agree that, aside from judicial review, there is no need for a dedicated appeal route? If not, please say why you think there should be alternative appeal routes and give examples of what they might be.

3.37 The period for publicising an ECL scheme begins if and when the Secretary of State has decided to authorise an application. Publicising the scheme is intended to draw the attention of the maximum number of rights holders in the sector to the existence of the scheme, so that they may opt out if they so wish. The reach and focus of the publicity and the time period for which it should run will mirror proposals in the application or, where those publicity arrangements were considered inadequate or incomplete, in line with any additional authorisation conditions. The reach of the publicity should be proportionate to the scale and reach of the ECL scheme. For example, where foreign rights holders in certain countries would be affected by the scheme, the collecting society must ensure that the scheme is publicised in those countries to enable rights holders in them to opt out.

Questions: Do you agree that proportionality should be the key principle that determines the scale of the publicity campaign? If not, what other principles should be factored in? What, in your view, should a proportionate campaign look like? It could be that the scale of opt outs, following the period of publicity, reaches a level that raises questions about the collecting society's representativeness. What should happen in this instance? Please provide reasons for your answer(s).

3.38 An ECL application will require an initial fee which is intended to operate like a deposit (Regulation 4(18)). That deposit should not exceed the final cost of application, but where it does the collecting society shall be reimbursed. The final cost of the application will be equivalent to the resource that has been used in processing it¹². The deposit will be subtracted from the final cost.

3.39 Under Regulation 7(2), the Secretary of State retains the discretion to include any other conditions deemed necessary for authorisation.

¹² For an assessment of that cost of an application, see the impact assessment published at the same time as the policy statement of July 2012: <http://www.ipo.gov.uk/consult-ia-bis1054-20120702.pdf>

3.4. Regulations 8, 9, 10 & 11 – Duration of an authorisation; Renewal of an authorisation; Modification of an authorisation; Notice of decision on modification

Regulations 8 & 9: Duration of an authorisation & Renewal of an authorisation

3.41 The Government considers five years to be an appropriate period for the authorisation of an ECL scheme. This reflects the costs associated with an ECL application, gives licensees certainty, and mirrors the authorisation period for ECL schemes found elsewhere in the world. A five year authorisation also mirrors the licence period for many existing collective licences. After expiry of the authorisation, the collecting society can re-apply for an authorisation.

Questions: Do you agree that a five year authorisation is appropriate? If not, please explain why not. What information should be required of a collecting society when it reapplies for an authorisation? Should this be contingent on the performance of its previous ECL scheme? How light touch can the re-application process be? Please provide reasons for your answer(s).

Regulation 10: Modification of an authorisation

3.42 An authorisation can be modified, but only in certain narrow circumstances. If a modification is required then it will only be available through application by either the collecting society or the Government (which, for the purposes of these Regulations, is the Comptroller, or the Chief Executive of the IPO). The opportunity to modify an authorisation is considered necessary in order to ensure that the authorisation keeps up with changes in the real world, especially where non-members are concerned. Circumstances in which it might be applicable could include the need to widen the publicity requirements to cover territories that were not covered in the original authorisation, or to strengthen opt out procedures.

3.43 Under no circumstances will a collecting society be allowed to apply to modify its authorisation to widen its mandate.

Questions: Under what conditions, if any, would modification to an authorisation be appropriate? Please provide reasons for your answer.

Regulation 11: Notice of decision on modification

3.44 Given the proposed range of circumstances in which a modification could be granted, the Government intends to make the process as light touch as possible. It is therefore consulting on a short minimum time period for representations and a short maximum period for Secretary of State's response thereafter. In the majority of cases the Government does not envisage the period for representations requiring much more than the 28 day minimum.

Questions: Are the proposed time periods for representations and Secretary of State decision adequate? If not, please explain why not, and make a case for a different time period or periods.

3.45 The duration of the authorisation will not change if a modification is granted. The five year term will continue and terminate as before.

3.5. Regulations 12 & 13 – Revocation of an authorisation; Cancellation of an authorisation

Regulation 12: Revocation of an authorisation

3.51 Where the Secretary of State considers a collecting society to be in breach of its authorisation, the evidence against that collecting society, in most circumstances, would need to be serious and sustained. However, it is not impossible for a very serious, one-off breach to warrant revocation. Such a situation might arise where, for example, the collecting society began to license rights in works beyond the scope of its authorisation. The Government might receive evidence of a breach of authorisation from a number of sources, including complaints to the minister, to the Code Reviewer, or the Codes Ombudsman.

3.52 The Government is currently considering responses to its recent consultation on the codes of practice regulations. For the purposes of revocation, a collecting society would be considered to be in material breach of its code of practice at the point where – self-regulation having failed – a code is imposed by the Secretary of State and statutory regulation begins¹³. That breach need not be confined to non-member obligations, for if a collecting society breaches its code in respect of its members, it cannot be deemed suitable to act on behalf of non-member rights holders.

Questions: Aside from breaching its code of practice or the conditions of its authorisation, are there any other circumstances in which revocation of an authorisation might be justified? If so, please specify those circumstances and give your reasons why. What, if anything, should happen if a collecting society had breached its code but remedied it before the Secretary of State had imposed a statutory code? Please provide reasons for your answer(s).

3.53 If a collecting society is in breach of any of the other conditions of its authorisation, (ie aside from a breach of its code), a period for representations will begin for the collecting society and any other interested parties to have their say. The Regulations stipulate a time period of 21 days, which can, however, be extended where appropriate. Following that period, the Secretary of State will have 21 days in which to make a decision on whether or not revocation is appropriate. These time periods are relatively short to ensure that a collecting society in breach of its authorisation is not operating an ECL scheme for any longer than necessary.

Questions: Are the proposed time periods for representations and Secretary of State's decision reasonable? Are the post revocation steps sufficient and proportionate? Please provide reasons for your answer(s).

Regulation 13: Cancellation of an authorisation

3.54 Consistent with the Government's position that ECL will always be voluntary, collecting societies may cancel an authorisation if they feel they no longer want to run an ECL scheme.

Questions: Do you agree that a collecting society should be allowed to cancel its authorisation? What, if any, penalties should be associated with a cancellation? Please provide reasons for your answer(s).

3.55 If a collecting society cancels its authorisation or has its authorisation revoked, under Regulation 16(6) it must return to its licensees monies equivalent to the length of time remaining on the licence.

¹³ For discussion of the procedure following a determination that a collecting a society has breached its code, please see the Regulation of Licensing Bodies consultation, op. cit.

Questions: Is the repayment of part of the license fee a reasonable and proportionate requirement? Please provide reasons for your answer.

3.6 Regulation 14 – Opting out of an ECL scheme

General principles

3.61 The right to opt out a work or works is absolutely central to any ECL scheme. The Government has been clear that opting out should be as simple as possible for rights holders and at zero to minimal cost. A collecting society should include in its application for authorisation details of its opt out procedure, including the mechanisms it will put in place to facilitate multiple opt outs.

3.62 The Regulations stipulate the following opt out requirements:

- that the collecting society acknowledges a rights holder's request to opt out and actions the opt out within a reasonable period of time;
- that rights holders wanting to opt out large volumes of works are able to do so;
- that an existing opt out effective by virtue of a contractual agreement between a collecting society and a member is recognised;
- that the collecting society informs licensees within a reasonable period of time of a work that has been opted out;
- that the collecting society makes it publicly known (the obvious place being its own website) of a work that has been opted out (or will soon be opted out);
- that a rights holder who has opted out a work is remunerated for use of that work up until the point where use ceases;
- where a rights holder has opted out a collecting society must maintain its obligations to that rights holder until the point where use ceases.

Accompanying the guidance for collecting societies wishing to run ECL schemes, (referred to in 3.23 above), the Government will issue guidance to rights holders wishing to opt out of ECL schemes. The guidance will outline in greater detail the mechanics of opt out procedure, what that procedure is expected to look like, and how they'd be able to opt out. It will also include a section on multiple opt outs. There is provision in Regulation 4(4)(d) that a collecting society's opt out procedure in respect of multiple opt outs is adequate.

Questions: Do you consider the opt out requirements listed above to be adequate? If not, please make a case for any additional obligations on collecting societies with respect to opt out.

Collecting society obligations following opt out

3.63 The Government considers a 14 day time limit for a collecting society to acknowledge receipt of an opt out request to be reasonable. The request to opt out may be made electronically or in postal form. In the latter case, 14 days might be necessary. The collecting society must also inform licensees of any work that has been opted out within 14 days of the opt out request, and notify them of when that work must stop being used. The rights holder will continue to be remunerated for the use of the work until the opt out has been made effective, and the collecting society must maintain its obligations to the rights holder until that point is reached.

3.64 There is no obligation on a collecting society to verify an opt out. This means that both an authorised representative and an exclusive licensee will be able to exercise an opt out. Verification is not considered necessary because there appears to be little evidence, either domestically (in de facto ECL schemes) or abroad, that works are fraudulently opted out. In addition, collecting societies would most likely question an opt out were there suspicions about its veracity, for they will suffer financially if that opt out is fraudulent. This is especially so if the work is of high value, or where multiple works have been opted out.

Questions: Do you agree that the 14 day time limit for both acknowledgement of opt out, and notification to licensees of that opt out, is reasonable? If not, please propose another period and say why you have done so. Do you agree that a low likelihood of fraud makes verification of identification unnecessary? If not, please say why not.

The list of opted out works

3.65 The collecting society will have to make available a list of works that have been opted out of the ECL scheme, or for which opt out is pending (opt outs are effective no longer than six months after the opt out is exercised – see 3.74 below). Lists which are easily accessible from the home page of the collecting society's website would be sufficient to discharge this obligation. The collecting society would be required to put a work on the pending list within 14 days of the work being opted out by the rights holder.

Questions: Do you agree that the proposed 14 day time limit is a reasonable amount of time for the collecting society to be required to list a work that has been opted out? Is it a reasonable requirement to have separate lists for works which are pending opt out, and works which have been opted out? Please provide reasons for your answer(s).

3.66 The opt out list would also need to include the works of those collecting society members who have already opted out works, by virtue of an existing contractual arrangement, from the collective licence that the collecting society has applied to have extended into an ECL scheme. Members would not usually need to opt out works from what are ostensibly opt in schemes, but Government has been informed that this does sometimes happen.

3.67 Some collecting societies wishing to run ECL schemes would therefore already have a list of opted out works from the period in which they were running the collective licence. They would have had to provide this list under Regulation 4(17)(b), because the scale of existing opt outs goes to the question of representativeness.

3.68 A list of opted out works, and details of where and how to contact the rights holders of those works, will not only inform licensees of what they cannot use, but may also give them the information they need to make enquiries about directly licensing those works. If the rights holder wants direct licensing to take place, they should provide the collecting society with contact details (as detailed as they are willing to disclose) and allow those details to be made visible on the list alongside their opted out work (or works). Someone who wanted to directly license an opted out work should by virtue of those contact details find the rights holders and ask their permission.

Questions: Are the obligations in 3.66-3.68 on a collecting society reasonable and proportionate? Please provide reasons for your answer.

3.7 Regulation 15 – Licensing of works or rights under an Extended Collective Licensing Scheme

3.71 Regulation 15 captures some of the key building blocks of an ECL scheme, including the concept of non-exclusivity. Non-exclusivity ensures that a non-member may directly license a work that is part of the ECL scheme.

Collecting society obligations following revocation or cancellation

3.72 Where an authorisation is revoked or cancelled, the Secretary of State will end the authorisation on the date on which the licence ends. An immediate end to the authorisation would be an unacceptable outcome for licensees because they would have to immediately stop using works that might be in use. For example, this might be the case with works that appear in course materials, or feature in a documentary. The end date for an authorisation will respect that need for business certainty. Rights holders will of course continue to be remunerated for the use of their works until the authorisation (and therefore the use) ends.

3.73 We can safely assume that a collecting society will want to inform licensees when its authorisation has been revoked or cancelled. This is so that it can ensure that its members' works stop being used on the date the authorisation ends and, in respect of non-members, to ensure that they are not licensing their works unlawfully. But in case this does not happen, there is provision in the Regulations for a collecting society to have to inform licensees of when its authorisation ends. This provision adds an extra safeguard without being unnecessarily prescriptive about the form or the time period in which the collecting society should inform licensees.

Questions: Is a revocation or cancellation date in line with the end of the licence period a proportionate and reasonable provision? What, if any, problems do you think might result if licence periods started and ended at different points of the year? Please give reasons for your answer(s), and propose an alternative time period or periods as necessary.

Collecting society obligations following opt out

3.74 Where a work has been opted out of a scheme, its use can continue for no longer than six months from the date of opt out. This is considered an appropriate maximum period, respecting as it does the needs of both the non-member rights holder and the licensee. The rights holder would of course continue to be remunerated for use of the work until the opt out is made effective. After the six months (or less, where applicable) has elapsed, a licensee who wanted to continue using the opted out work would have to negotiate directly with the rights holder.

Questions: Is cessation of use of an opted out work after a maximum of six months a proportionate and reasonable provision? If not, please explain why not, and propose an alternative time period or periods.

3.75 A collecting society will need to maintain its obligations to non-members until its authorisation ends.

3.8 Regulation 16 & 17 – Licence Fee; Retention and application of undistributed licence fees

3.81 Government believes there is existing jurisdiction for the Copyright Tribunal to make determinations about the reasonableness of ECL schemes. Section 118(1) of the CDPA allows a trade / representative body to refer a proposed licensing scheme to the Copyright Tribunal, while Section 118(3) allows the Tribunal to make a determination about the reasonableness of the scheme. If the ECL is considered to be part of an existing licence then there are rights of referral and jurisdiction for the Tribunal in Section 119 of the CDPA.

Non-member deductions

3.82 In collective licensing arrangements, collecting societies deduct a percentage from member royalties, which they use for administrative costs. Member representatives can act as a check to ensure such deductions are kept at a fair level and accounted for. The assumption is that, in doing so, members would also be helping to ensure that royalties taken from non-members in ECL schemes are kept fair, but as an added safeguard there is provision in the Regulations that any deductions are “reasonable”. The Secretary of State will check the collecting society’s licence terms accordingly.

3.83 It would be inappropriate for deductions from royalties collected on behalf of non-members to be used for collective purposes that solely benefit members. There is therefore provision for any deductions to also benefit non-members, and the collecting society’s distribution policy, required as part of their application under Regulation 4(12), will need to reflect this.

Questions: Do you agree with the proposal that money collected for non-members cannot be used to benefit members alone? If not, please say why.

Individual remuneration

3.84 Individual remuneration for a work is remuneration that is commensurate with the use of a work. A non-member, because they have not agreed to the collective rate that members have agreed to, should be entitled to individual remuneration should they feel that their work has not received remuneration commensurate with its use. In order to claim the remuneration they think their work is due, they will have to prove to the collecting society the extent of that use.

Questions: Do you agree with the principle of individual remuneration in ECL schemes? Please provide reasons for your answer.

Separating undistributed non-member monies

3.85 If monies collected for the use of non-member works have not been distributed within nine months of the end of the financial year in which they were collected, those monies should be put into a separate account. Monies in respect of non-members need to be separated in this way in order to ensure that there is transparency about what is due to them, and so that those monies are not subject to any deductions or any other charges collecting societies might apply. This proposal reflects Article 12(2) of the final draft text of the CRM Directive, which requires a collecting society to keep separate the monies of all relevant rights holders who have not been identified or located and to whom monies cannot therefore be distributed¹⁴.

¹⁴ Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial rights in musical works for online uses in the internal market, op. cit.

List of non-member works for which monies remain undistributed

3.86 A collecting society will be required to publish a list of all works (and, where applicable, corresponding authors) for which rights holders are unknown (or cannot be located), no later than three months after the expiry of the deadline for distribution (as outlined in 3.85). If the collecting society has a very comprehensive repertoire in relation to all available works of the kind covered by the ECL, as it should, and if its search procedures are diligent, as they must be, then the list of works and possibly authors should be very small. Such a list would allow swift and easy access for non-member rights holders to check to see if any monies are being held for them, would aid transparency, and would be at little or no extra cost to the collecting society. This proposal aligns with Article 12(3) of the final draft text of the CRM Directive, which requires such a list to be made available within the three month window¹⁵.

Questions: Are there any other ways in which a collecting society might publicise the works for which it is holding monies? Is there any danger that there will be fraudulent claims for undistributed monies? If so, how might this problem be addressed? Please provide reasons for your answer(s).

Treatment of undistributed non-member monies

3.87 In an ECL scheme, it is generally assumed that members' interests will approximate those of non-members as they are both rights holders in the same sector. However, the treatment of undistributed monies is one important way in which those interests might diverge. The uses to which deductions are put, referred to in 3.83 above, is another example. Government does not consider it appropriate that collecting societies re-distribute to their members monies they have been unable to distribute to non-member rights holders. Where those monies are for foreign non-members – as may be the case for the majority of undistributed monies – distribution to domestic members is considered particularly inappropriate. Any collecting society failing to make reasonable efforts to locate and pay non-member rights holders risks revocation of its authorisation. This provision aligns with Article 12(1) of the draft final text of the CRM Directive, which will require member states to ensure that a collecting society distributes and pays amounts due to rights holders “regularly, diligently, accurately and in accordance with the general policy on distribution” (that general policy being decided on by the general assembly of members)¹⁶.

3.88 The CRM Directive, if adopted, is likely to contain provisions that will impact on the treatment of undistributed monies. Article 12(4)¹⁷ of the final draft text of the Directive stipulates that “where the amounts due to rightholders cannot be distributed, after three years from the end of the financial year in which the collection of the rights revenue occurred, and provided that the collective management organisation has taken all necessary measures to identify and locate the rightholders (see 3.87 above), these amounts shall be deemed non-distributable.” Article 12(5)¹⁸ goes on to say that the general assembly of members shall decide on the use of the non-distributable amounts, in accordance with its general policy on distribution, without prejudice to the right of the rightholder to claim such amounts from the collecting society in accordance with the laws of the Member States on the statute of limitations of claims. Article 12(6)¹⁹ gives the member state the discretion to limit or determine the destination of those undistributed monies, including the possible option of using them in a “separate and independent way in order to fund social, cultural and educational activities for the benefit of rightholders”.

15 *Op.cit.*

16 Article 7(5)(a)

17 *Op. cit.*

18 *Op. cit.*

19 *Op. cit.*

Questions: To what extent is incomplete or inaccurate data from licensees an issue when it comes to the distribution of monies? If a non-member rights holder fails to claim monies due, what uses of those funds should the Crown promote? Please provide reasons for your answer.

3.89 Government wishes to consult on what is a reasonable period of time to allow for a missing rights holder to reappear or be found and claim any monies due. Precedents for time periods found elsewhere include: claims for the adverse possession of land (up to 12 years in many cases, but with longer periods in some cases), and dormant bank accounts (15 years).

3.89a Government favours a lengthy time period, to allow ample opportunity for the rights holder to appear or be located. If, as expected, a sizeable percentage of undistributed monies will be those due to foreign non-member rights holders, a long time period will allow collecting societies to enter into reciprocal agreements with collecting societies in the relevant countries, thereby facilitating the process of distribution to them. Also, if a rights holder to whom monies are due is on a list for at least as long as the collecting society is licensing their work, the collecting society would continue to perform searches for them at each distribution cycle, thereby improving chances of distributing money to that rights holder.

Questions: What is the appropriate period of time that should be allowed before a collecting society must transfer undistributed monies to the Crown? When this happens, should there be a contingent liability, and if so for how long should it run? Please provide reasons for your answer(s).

6. Overlap between the ECL and orphan works scheme

The orphan works consultation, to be launched shortly, will set out both the regulations for the licensing of orphan works or performances under the domestic scheme (“licensed orphans”) and those for the exception to implement the Directive on certain permitted uses of orphan works. Orphan works for the purposes of both sets of regulations are works for which a licensee has performed a diligent search for the rights holder(s) but has been unable to locate all the relevant rights holders.

The Government has previously made it clear that UK ECL schemes are not designed to be used for the mass licensing of orphan works. ECL does not include a diligent search in advance of the use so it has not been proposed as a solution to orphan works specifically.

The scenarios below cover the main areas of overlap between ECL schemes and the UK orphan works licensing scheme. It should be noted that licences for orphan works under the UK scheme and licences for the works of non-members in ECL schemes are non-exclusive, so nothing precludes the possibility of them co-existing in respect of the same work. Use of orphan works under the Directive will be as an exception to copyright law, subject to certain safeguards, so no licensing is required.

In brief, the Government’s intention is that:

- Works in an ECL scheme may continue to be licensed under that scheme even if the rights holder cannot be located by the collecting society;
- The fact of a work being within an ECL scheme will not preclude it being licensed as an orphan work, if it genuinely is one. (If the rights have been assigned to the collecting society, for example, the work will not be orphan.);
- An ECL scheme may include known, licensed orphan works;
- Works opted out of an ECL scheme may be licensed as orphan works if they meet the criteria.

The orphan works consultation will contain a section on how the regulations for the domestic orphan works scheme and those implementing the Directive will overlap. Respondents are free to submit their responses to the question below now, or they may wish to wait until the launch of that consultation, so that they are aware of the details of the orphan works proposals.

Questions: Do you agree that these rules are fair to both absent rights holders and potential users of orphan works? Please provide reasons for your answer.

Annex A – Draft Regulations

Draft Order laid before Parliament under section 116D (5) of and paragraph 1D(5) of Schedule 2A to the Copyright, Designs and Patents Act 1988, for approval by resolution of each House of Parliament.

STATUTORY INSTRUMENTS

2014 No.

COPYRIGHT

The Copyright (Extended Collective Licensing) Regulations 2014

Made - - - - ***

Coming into force - - ***

The Secretary of State, in exercise of the powers conferred by sections 116B to 116D of and paragraphs 1B to 1D of Schedule 2A to the Copyright, Designs and Patents Act 1988^(a), makes the following Regulations a draft of which has been approved by each House of Parliament:

Citation and Commencement

1. These Regulations may be cited as the Copyright (Extended Collective Licensing) Regulations 2014 and shall come into force on [.....].

Interpretation

2. In these Regulations—

“Act” means the Copyright Designs and Patents Act 1988;

“acts restricted in relation to a performance” means the acts to which sections 182,182A, 182B, 182C, 182CA, 183 or 184 of the Act apply in respect of a performance;

“authorisation” means an authorisation granted by the Secretary of State to a relevant licensing body under regulation 3;

“Codes Regulations” mean The Copyright (Regulation of relevant licensing bodies) Regulations 2014^(b)

“Comptroller” shall have the same meaning as in the Patents and Designs Act 1907^(c);

“Extended Collective Licensing Scheme” means a collective licensing scheme under which a relevant licensing body may grant licences in accordance with an authorisation under regulation 3 in respect of

(a) copyright works in which copyright is owned by non member right holders; or

(b) performer’s rights where the acts restricted in relation to the performance are owned by non member right holders;

(a) 1988 c.48 as amended by the Enterprise and Regulatory Reform Act 2013 c.24.
(b) SI 2013/ [].
(c) 1907 c. 29

“member” means a person who under the constitution of the relevant body is permitted to participate in certain decisions of the relevant body;

“net licence fee” means the licence fee received by a relevant licensing body under an Extended Collective Licensing Scheme in respect of a copyright work or performer’s right less a reasonable administration fee;

“non member right holder” means a right holder who is not a member of the relevant licensing body and whose rights are not the subject of an express contractual agreement with the relevant licensing body for the license of copyright works or performer’s rights ;

“opt out arrangements” means the steps to be followed by a right holder to limit or exclude the grant of licences under an Extended Collective Licensing Scheme;

“performer’s right” means the right to authorise or prohibit the acts restricted in relation to a performance;

“permitted use” means the acts restricted by the copyright and the acts restricted in relation to a performance that a relevant licensing body is authorised to licence;

“relevant licensing body” means any organisation authorised by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one right holder, for the collective benefit of those right holders as its sole or main purpose and which:

- (a) is owned or controlled by its members or
- (b) organised on a not for profit basis;

“representation” means the extent to which the relevant licensing body currently

- (a) acts on behalf of right holders in respect of copyright works or performers’ rights of the type which will be the subject of the proposed Extended Collective Licensing Scheme; and
- (b) licenses copyright works or performers’ rights of the type which will be subject of the proposed Extended Collective Licensing Scheme;

“required consent” means the consent of:

- (a) not less than 75% of the members of the relevant licensing body, or
- (b) not less than 75% of those members whose rights will be affected by the Extended Collective Licensing Scheme in a case where the Extended Collective Licensing Scheme will only apply to a portion of the works administered by the relevant licensing body;

“required parent consent” means the consent of not less than 75% of the members of any body which directly or indirectly, on its own or together with other bodies controls the relevant licensing body;

“right holder” means the copyright owner of a copyright work or of a performers’ right and includes an exclusive licensee of the copyright owner;

“specified criteria” means the criteria set out in the Schedule to the Codes Regulations.

Authorisation to operate an Extended Collective Licensing Scheme

3. (1) The Secretary of State may authorise a relevant licensing body to operate an Extended Collective Licensing Scheme after receiving an application made in accordance with regulation 4 and completion of the procedure in regulations 4 - 7.
- (2) An authorisation must specify
 - (a) the types of copyright work or performance to which it applies; and

(b) the permitted use.

- (3) A relevant licensing body authorised under paragraph (1) may license all rights within the scope of the Extended Collective Licensing Scheme provided that the relevant licensing body -
- (a) grants scheme licences in accordance with the terms and conditions notified to the Secretary of State under regulation 4(11);
 - (b) carries out its licensing activities in accordance with its code of practice;
 - (c) complies with the requirements of these regulations; and
 - (d) complies with the conditions of its authorisation.
- (4) An authorisation may only be granted to a relevant licensing body if the Secretary of State is satisfied that –
- (a) at the time of the authorisation, the relevant licensing body licenses by way of collective licence copyright works or performer’s rights of the type which are to be the subject of the proposed Extended Collective Licensing Scheme;
 - (b) the relevant licensing body’s representation is significant in relation to the proposed Extended Collective Licensing Scheme;
 - (c) the code of practice of the relevant licensing body is consistent with the specified criteria including the criteria concerning the protection of non member right holders;
 - (d) the opt out arrangements, including those for multiple works, are adequate to protect the interests of right holders;
 - (e) the arrangements for publicising the scheme, for contacting non –member right holders in order to distribute licence fees and for distributing any licence fees which remain undistributed are appropriate to the scope of the proposed scheme, having regard to the interests of non-member right holders;
 - (f) the relevant licensing body has obtained the required consent or the required parent consent to the application; and
 - (g) any additional requirements imposed by the Secretary of State in writing on the relevant licensing body are satisfied.
- (5) A licensing body shall not transfer an authorisation.

Application for authorisation

- 4.** An application for authorisation under regulation 3 shall be made in writing to the Secretary of State in the form required, including in electronic form and must contain
- (1) a summary of the application;
 - (2) the name of the applicant;
 - (3) evidence that the applicant is a relevant licensing body;
 - (4) an address for service in the European Economic Area;
 - (5) the code of practice that the relevant licensing body will operate in relation to its licensing activities if the authorisation is granted and which is consistent with the specified criteria including the criteria concerning the protection of non- member right holders;
 - (6) the opt out arrangements that the relevant licensing body will adopt;
 - (7) evidence of the representation provided by the relevant licensing body;
 - (8) evidence that the relevant licensing body has obtained the required consent or the required parent consent;

- (9) a copy of the terms and conditions of any collective licence, in force at the date of the application for authorisation, under which the relevant licensing body licenses copyright works or performers' rights of the type which are to be the subject of the proposed Extended Collective Licensing Scheme together with a statement of the date on which the collective licence came into force;
- (10) a declaration signed on behalf of the relevant licensing body confirming that at the time of the application it is complying in all material respects with the terms of its code of practice;
- (11) a copy of the terms and conditions which the relevant licensing body proposes to issue to its licensees under the Extended Collective Licensing Scheme;
- (12) a copy of the distribution policy which the relevant licensing body proposes to operate in relation to its licensing activities if the authorisation is granted;
- (13) the types of work to which the Extended Collective Licensing Scheme will apply;
- (14) the acts restricted by the copyright and the acts restricted in relation to a performance which the relevant licensing body seeks to be authorised to license;
- (15) the arrangements for publicising the Extended Collective Licensing Scheme to members and third parties before its introduction and during the life of the scheme;
- (16) the methods by which the relevant licensing body will contact non-member right holders and distribute licence fees to them;
- (17) the number of copyright owners or right holders
 - (a) who have notified the relevant licensing body that they wish to opt out of the proposed Extended Collective Licensing Scheme; or
 - (b) whose rights, as a result of contractual arrangements with the relevant licensing body, will not fall within the Extended Collective Licensing Scheme
 together, in each case, with the number of works in which those copyright owners or right holders have rights; and
- (18) the initial fee.

Response to an application

- 5.- (1) If an application submitted in accordance with regulation 4 complies with the requirements of that regulation the Secretary of State shall within 14 days of its receipt inform the relevant licensing body –
 - (a) that the application has been received and is complete; and
 - (b) of the date by which the application will be determined.
- (2) If the application submitted in accordance with regulation 4 does not meet the requirements of that regulation the Secretary of State shall within 14 days of receipt inform the relevant licensing body in writing that the application has been rejected, together with a statement of the reasons for that decision.

Authorisation procedure

- 6. -(1) Before authorising an application made under regulation 4 the Secretary of State shall –
 - (a) publish a notice setting out details of the application in such manner as the Secretary of State considers appropriate for bringing it to the attention of persons likely to be affected by the authorisation; and
 - (b) consider any representations made in accordance with the notice and not withdrawn.
- (2) The notice must state the period (not less than 28 days starting with the date of publication of the notice) within which representations may be made to the Secretary of State regarding the proposed authorisation.

Notice of decision on authorisation

7. (1) The Secretary of State shall decide whether to grant the authorisation and shall provide the relevant licensing body with a notification in writing setting out whether the authorisation has been granted or not together with the reasons for the decision.
- (2) If the authorisation has been granted, the notification shall also set out whether the authorisation has been granted subject to conditions, and if so, what the conditions are and the commencement date of the authorisation.
- (3) The Secretary of State may require a relevant licensing body to pay to the Secretary of State an application fee to reimburse the Secretary of State for any costs incurred in connection with the application, including those associated with a consideration of whether the requirements set out in paragraphs 3(3) and (4) are satisfied.
- (4) When setting the application fee the Secretary of State shall take account of any initial fee which has already been paid.
- (5) The Secretary of State shall notify the relevant licensing body of his decision within 90 days of the end of the period for making representations, under regulation 6.
- (6) The Secretary of State shall publish his decision.

Duration of an authorisation

8. An authorisation will continue in force for five years from the date of grant or until revoked or cancelled in accordance with regulation 12 or 13.

Renewal of an authorisation

9. – (1) Upon the expiration of an authorisation a relevant licensing body may apply for a further authorisation under regulation 3.
- (2) An application for a further authorisation under regulation 3 shall be made in writing to the Secretary of State in the form required, including in electronic form and must contain the items listed in paragraphs [] to [] of regulation 4.

Modification of an authorisation

10. - (1) The Secretary of State may, upon the request of a relevant licensing body or of the Comptroller, modify the conditions of an authorisation other than those relating to the conditions of authorisation described in regulation 3(2).
- (2) Before making a modification under this regulation the Secretary of State must—
 - (a) give notice of the modification, and
 - (b) consider any representations made in accordance with the notice and not withdrawn.
- (3) The notice must—
 - (a) summarise the modification;
 - (b) state the reasons for the modification, and
 - (c) state the period (not less than 28 days starting with the date of publication of the notice) within which representations may be made in relation to the proposed modification.
- (4) A notice under paragraph (2) must be given by—
 - (a) serving a copy of the notice on the relevant licensing body, and
 - (b) publishing the notice in such manner as the Secretary of State considers appropriate for the purpose of bringing the matters to which the notice relates to the attention of persons likely to be affected by them..

- (5) The Secretary of State may require a relevant licensing body to pay to the Secretary of State a fee to reimburse the Secretary of State for any costs incurred in connection with the application for modification.

Notice of decision on modification

- 11.** - (1) The Secretary of State shall within 28 days of the end of period for making representations, under regulation 10, determine the application for modification, shall publish the decision and shall notify the relevant licensing body in writing of the decision and of the reasons for it.
- (2) If the application has been approved, the notification shall also set out whether the application has been approved subject to conditions, and if so, what the conditions are and the commencement date.

Revocation of an authorisation

- 12.** - (1) If the Secretary of State is satisfied that the relevant licensing body has failed in material respects to operate its licensing activities in accordance with the specified criteria the Secretary of State shall revoke the authorisation.
- (2) If the Secretary of State is satisfied that the relevant licensing body is unable to comply with any other conditions of its authorisation the Secretary of State may, subject to satisfying the requirements set out in paragraphs (3) to (6) below, revoke the authorisation.
- (3) The Secretary of State shall:
- (a) publish a notice in such manner as the Secretary of State considers appropriate for bringing the intention to revoke together with the reasons for taking this action to the attention of the relevant licensing body and of persons likely to be affected by the revocation or cancellation; and
 - (b) allow the relevant licensing body and persons likely to be affected by the revocation to make representations in writing.
- (4) Representations under paragraph (3)(b) must be made within 21 days from the date of the notification under paragraph (3)(a) or within such greater period as is specified in the notice.
- (5) The Secretary of State shall provide the decision on revocation, together with the reasons for the decision and, where relevant, the date on which the authorisation shall cease, to the relevant licensing body within 21 days of the expiration of the time for making representations referred to in paragraph (4) .
- (6) The Secretary of State shall publish his decision in such manner as the Secretary of State considers appropriate together with any conditions attached to it and the date on which the authorisation shall end.

Cancellation of an authorisation

- 13.** - (1) If a relevant licensing body informs the Secretary of State that it wishes to cancel its authorisation, the Secretary of State shall set a date for the cancellation of the authorisation and notify the relevant licensing body of that date.
- (2) The Secretary of State may require a relevant licensing body to pay to the Secretary of State a fee to reimburse the Secretary of State for any costs incurred in connection with the cancellation.

Opt out from an Extended Collective Licensing Scheme

- 14.** - (1) A right holder may exclude or limit the grant of licences under an Extended Collective Licensing Scheme in relation to their rights in a copyright work or their performers' rights by following the opt out arrangements which are set out in the authorisation including those relating to the form of notice.
- (2) Within 14 days of receipt of a notice of opt out the licensing body shall

- (a) acknowledge receipt of the right holder's request to opt out;
 - (b) inform any relevant licensees that the work has been opted out together with the termination date of the licence such termination to take effect not later than 6 months from the date of the opt out; and
 - (c) update the list referred to in paragraph (3).
- (3) The relevant licensing body shall in respect of each Extended Collective Licensing Scheme maintain and make available to the public a list of those rights in a copyright work or performers' rights which are outside the scheme either as a result of
- (a) being the subject of an opt out under these regulations or
 - (b) as a result of any contractual arrangements that the relevant licensing body has entered into with rights holders.
- (4) The list referred to in paragraph (3) shall identify the relevant rights in a copyright work or performers' rights and, to the extent that a right holder has consented, identify the right holder.

Licensing of works or rights under Extended Collective Licensing Scheme

15. (1) A relevant licensing body may only grant a licence under an Extended Collective Licensing Scheme which:

- (a) permits non-exclusive use of the work or rights;
 - (b) has effect as if granted by the owner of the work or rights;
 - (c) terminates on or before the expiration, revocation or cancellation of the authorisation of the relevant licensing body; and
 - (d) terminates to the extent that a right holder has excluded from the Extended Collective Licensing Scheme their rights in a copyright work or their performers' rights such termination take effect not later than 6 months from the date of exclusion.
- (2) A relevant licensing body shall notify the relevant licensees of a termination of the licence and shall as soon as practicable, after a termination, deliver to the relevant right holders any payments due together with a written statement of account in relation to those payments, in accordance with its Distribution Policy.
- (3) A relevant licensing body shall maintain a record of the distributions of the licence fee that it has made.

Licence Fee

16. (1) On the grant of a licence of a copyright work or of performer's rights a relevant licensing body shall charge the licensee a reasonable licence fee for the period of the licence.

- (2) The relevant licensing body may deduct a reasonable administration fee from any licence fee which it receives and the administration fee may only be applied towards the general costs of the relevant licensing body and for the benefit of non member right holders.
- (3) The relevant licensing body shall, within nine months from the end of the financial year in which a licence fee was collected
- (a) distribute the net licence fee to those non member right holders who have been identified and located; and
 - (b) transfer any part of the net licence fee that remains undistributed to a designated account.

- (4) A non member right holder may produce to the relevant licensing body evidence of the level of use to which a copyright work or performer's right has been put during the term of the licence and request the relevant licensing body to adjust the net licence fee which is distributed under paragraph (3)(a) to take account of that level of use.
- (5) A relevant licensing body shall publish and maintain a list of the copyright works and performer's rights which have been licensed under the Extended Collective Licensing Scheme but whose right holders have not been identified or located together, where appropriate, with the name of the right holder and shall update each entry within twelve months from the end of the financial year in which the licence fee was collected.
- (6) If the authorisation of a relevant licensing body is revoked or cancelled, the relevant licensing body shall repay to each licensee that portion of the net licence fee which relates to any period of the licence which, at the date of the revocation or cancellation, remains unexpired.

Retention and application of undistributed licence fees

- 17. - (1) The relevant licensing body shall retain in a designated account any net licence fees which have not been distributed for a period of not less than [] years from the date of receipt or from the date of expiration, revocation or cancellation of its authorisation whichever is later.
- (2) The relevant licensing body shall distribute net licence fees from the designated account to any non member right holders who are subsequently identified and located.
- (3) Where not less than [] years have elapsed since the grant of the licence under the Extended Collective Licensing Scheme and a non member right holder has not been identified or located, the relevant licensing body shall transfer a sum equal to the net licence fees received in respect of that non member right holder from the designated account to the Secretary of State.
- (4) The Secretary of State shall retain any net licence fee which has not been distributed for a period of [] years and may then pay the undistributed net licence fee to [].

Lord Younger of Leckie

Parliamentary Under Secretary of State for Intellectual Property
 Department for Business, Innovation and Skills

Date

Explanatory Note

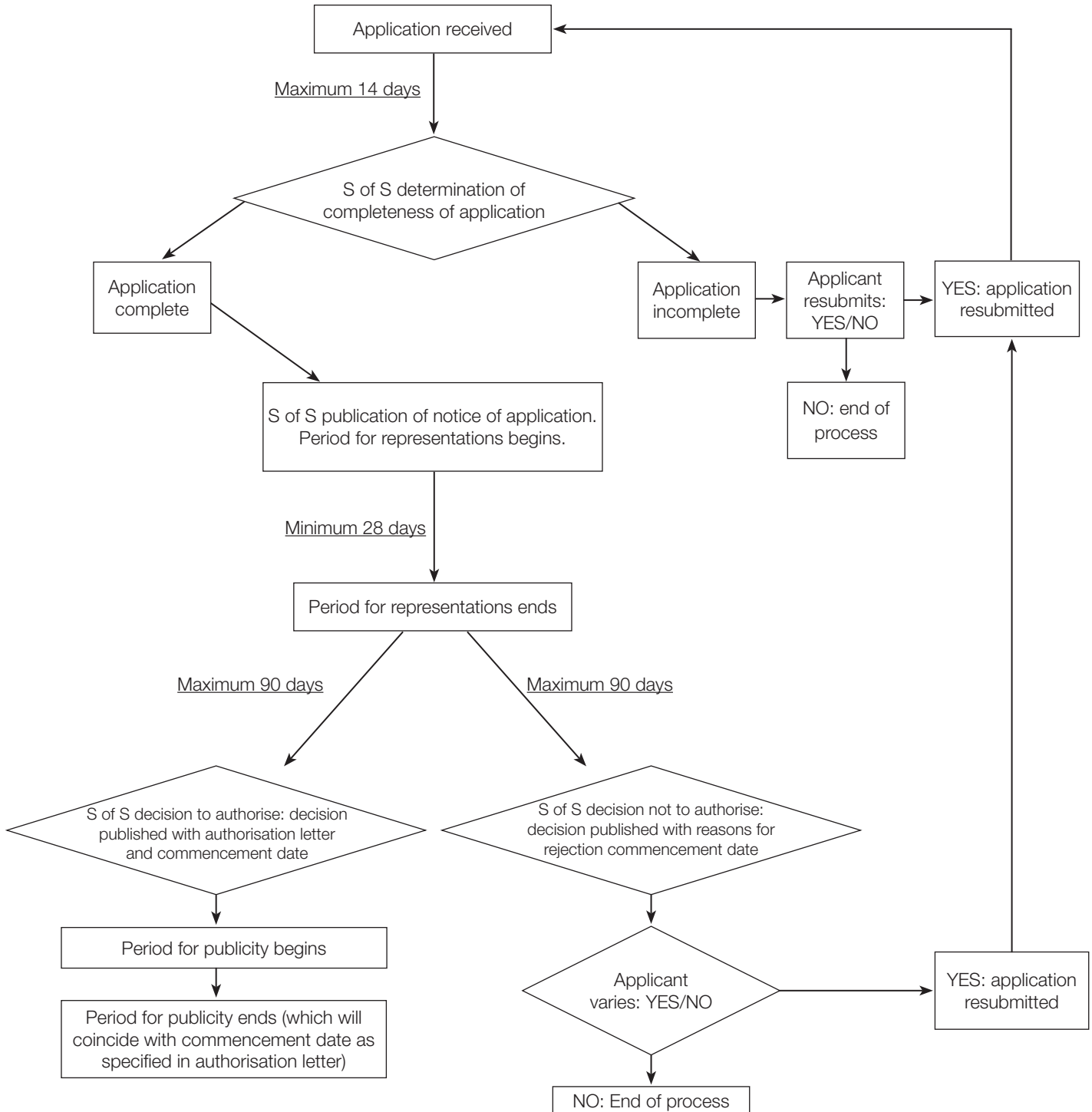
(This note does not form part of the Regulations)

The Regulations provides that the Secretary of State may authorise a relevant licensing body to operate an Extended Collective Licensing Scheme.

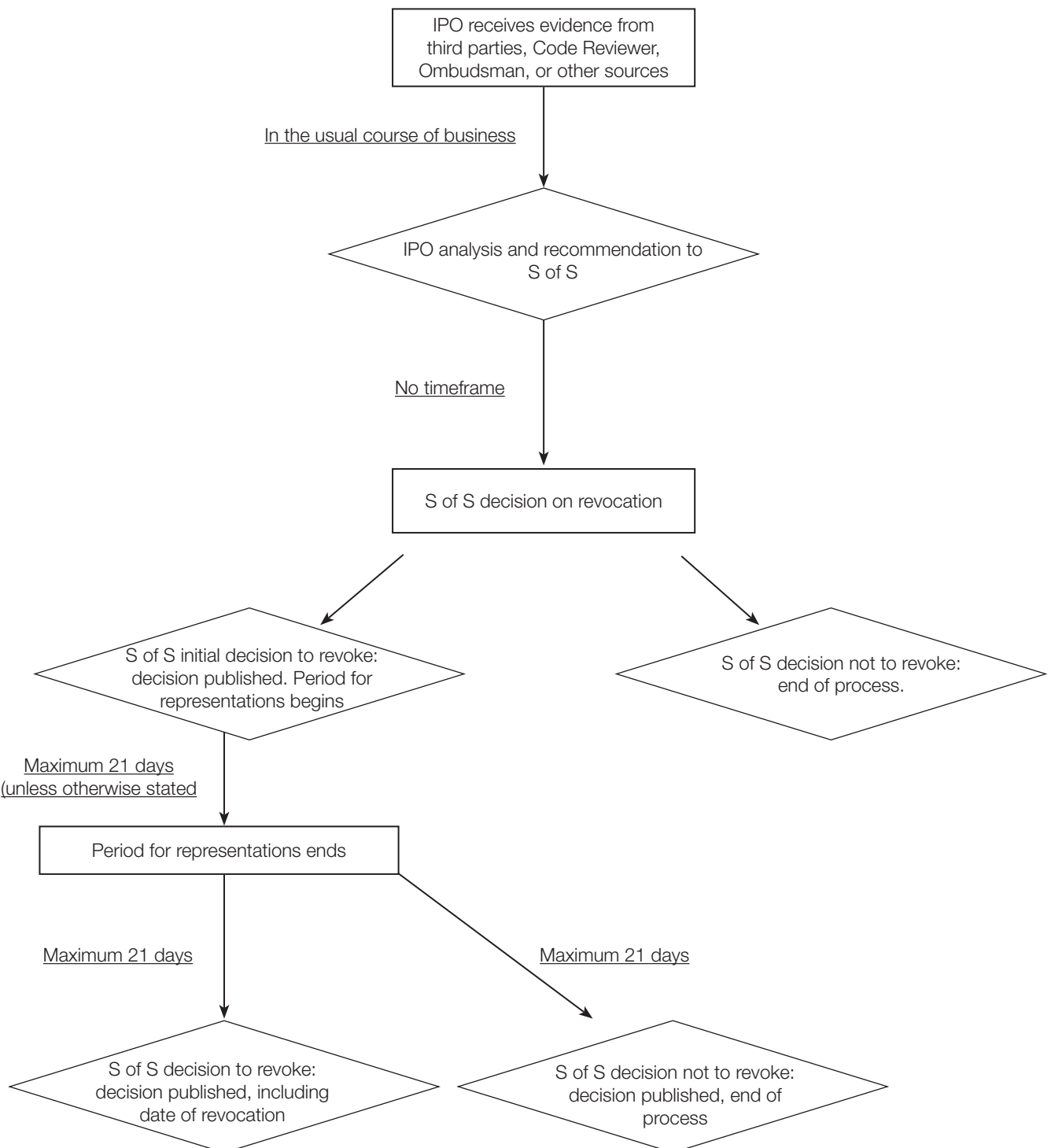
A full impact assessment of the effect that this instrument will have on the costs of business and the voluntary sector is available from the Intellectual Property Office, Concept House, Cardiff Road, Newport NP10 8QQ and is annexed to the Explanatory Memorandum which is available alongside the instrument on www.legislation.gov.uk. Copies have also been placed in the libraries of both Houses of Parliament.

Annex B – Process maps

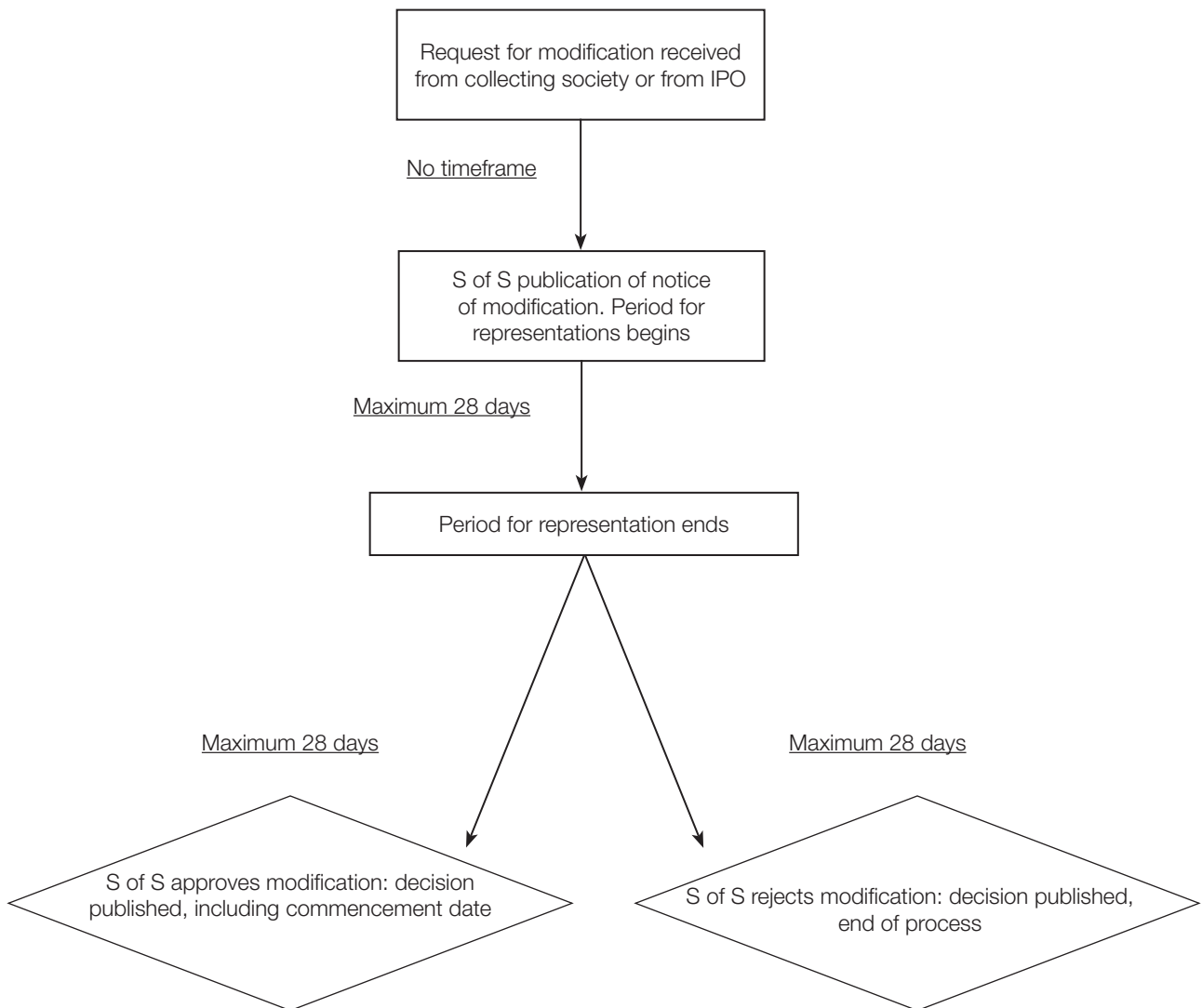
ECL Process Map 1: Application



ECL Process Map 2: Revocation of authorisation (not for breach of code)



ECL Process map 3: request to modify authorisation



Annex C – Specified Criteria

The specified criteria for the code of practice are set out here.

The code of practice shall require the relevant licensing body to:

Obligation to rights holders

1. offer membership to all rights holders in the sector it manages;
2. have rules or constitution that enables members (and non-members if operating an ECL scheme) to withdraw their rights on reasonable notice;
3. offer fair and balanced representation of rights holder members in the internal decision making process of the relevant licensing body;
4. provide copy of rules/constitution to members and potential members;

Representation

5. act in the best interests of its members as a whole;
6. treat all members (and non member rights holders if operating an ECL scheme) fairly, honestly, reasonably, impartially, courteously and in accordance with its rules and membership agreement;
7. deal with all members transparently;

Obligations to licensees

8. treat its licensees and potential licensees fairly, honestly, impartially, courteously and in accordance with its rules and any licence agreement;
9. ensure that its dealings with licensees or potential licensees are transparent;
10. consult and negotiate fairly, reasonably and proportionately in relation to the terms and conditions of a new or significantly amended licensing scheme;
11. provide information to licensees and potential licensees about its licensing schemes, their terms and conditions and how it collects royalties;
12. ensure that all licences and licensing schemes are drafted in plain English and are accompanied by suitable explanatory material.

Licensees

13. The code of practice shall set out the requirements that the relevant licensing body will impose on licensees including:

- (a) to respect the rights of creators and rights holders including their right to receive fair payment when their works are used; and
- (b) that copyright material will only be used in accordance with the terms and conditions of a licence.

Conduct of employees, agents and representatives

The code of practice shall require the relevant licensing body to ensure that:

- 14. its staff training procedures for employees, agents and representatives includes conduct that complies with the obligations to members and licensees set out in these specified criteria;
- 15. its staff provide licensees and potential licensees with clear information, including information about cooling off periods which may apply to new licences; and
- 16. its employees and agents are aware of procedures for handling complaints and resolving disputes and are able to explain those procedures to members, licensees and the general public in plain English.

Information and transparency – monitoring and reporting requirements

17. The code of practice shall state that the relevant licensing body shall:

- (a) inform members, licensees and potential licensees, on request, about the scope of its repertoire, any existing reciprocal representation and the territorial scope of its mandate;
- (b) maintain and make available to members on request, a clear distribution policy that includes the basis for calculating remuneration, the frequency of payments, and clear information about deductions and what they are for;
- (c) provide details of tariffs in a uniform format on website;
- (d) provide details of its code of practice and complaints procedure, accessible via a link on the website homepage;
- (e) undertake that all information provided is kept up to date, is readily accessible and written in clear language that can be easily understood by licensees, potential licensees and members.

Reporting requirements

18. The code of practice shall state that the relevant licensing body shall publish an annual report which includes:

- (a) the number of rights holders represented, whether as members or through representative arrangements including, where possible and if applicable, an estimate of the number of rights holders represented by an ECL scheme;
- (b) the distribution policy;
- (c) total revenue from licences granted for its repertoire during the reporting period;
- (d) total costs incurred in administering licences and licensing schemes;
- (e) itemised costs incurred in administering licences and licensing schemes;
- (f) allocation and distribution of payments of revenues received and extent to which this is compliant with its distribution policy;
- (g) procedures for the appointment of directors to the relevant licensing body and details of any appointment during the course of the reporting period;
- (h) details of remuneration of each director of the relevant licensing body during the reporting period; and
- (i) a report regarding compliance with code of practice over the past year, including data on total level of complaints and resolution methods.

Complaints handling

19. The code of practice is to provide that the relevant licensing body shall adopt and publicise:

- (a) procedures for dealing with complaints from members, non member rights holders (if operating an ECL scheme), licensees and potential licensees; and
- (b) a complaints procedure.

20. The complaints procedure shall:

- (a) define the categories of complaints and explain how each will be dealt with;
- (b) ensure information on how to make complaints is readily accessible to members, licensees and potential licensees;
- (c) provide reasonable assistance to a complainant when forming and lodging a complaint;
- (d) specify who will handle a complaint on behalf of the relevant licensing body;

(e) indicate timeframe for the handling of a complaint or dispute;

(f) provide that the relevant licensing body will give a written response to each complaint made in writing;

(g) provide that the relevant licensing body will give a written decision in any dispute and give reasons for that decision;

(h) ensure that the relevant licensing body makes adequate resources available for the purpose of responding to complaints and resolving disputes; and

(i) provide that the relevant licensing body will regularly review its complaint handling and dispute resolution procedure to ensure they comply with the minimum standards.

Ombudsman Scheme

21. The code of practice shall require the relevant licensing body to appoint and fund an independent and impartial person to arbitrate on disputes.

22. The code of practice shall provide that the Ombudsman shall be the final arbiter on complaints between the relevant licensing body and its members or licensees in relation to these specified criteria for their code of practice.

23. The Ombudsman service will not include matters that are within the jurisdiction of the Copyright Tribunal.

Independent Code Reviewer

24. The relevant licensing body shall appoint and fund an independent Code Reviewer to monitor and review the performance of the relevant licensing body against these specified criteria.

25. The independent review shall comprise an initial review of the code of practice against the specified criteria one year after implementation and then at intervals of at least three years thereafter.

26. The code of practice shall provide for the Code Reviewer to publicise and consult during the course of his review and to publish his conclusions.

Annex D – Consultation response form

Responding to the consultation

On this form, please provide your responses to the questions outlined in this document. You do not have to complete the whole form – please answer the questions that are most relevant to you.

Please note: This consultation forms part of a publication exercise. As such, your response may be subject to publication or disclosure in accordance with access to information regimes (these are primarily the Freedom of Information Act (FOIA), the Data Protection Act (DPA) and the Environment Information Regulations (2004). We plan to post responses on the review website when they are received, and they may be subject to online discussion.

If you do not want part or whole of your response or name to be made public please state this clearly in the response, explaining why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system cannot be regarded as a formal request for confidentiality.

The closing date for responses is Tuesday 28 January 2014 at midday.

About You and Your Organisation

Your name	[Desirable]
Job Title	[Desirable]
Organisation Name	[Desirable]
Organisation's main products/services	[Desirable]

Question 1: Should a collecting society that is applying for an extension of an existing collective licensing scheme be required to have had the scheme in place for a minimum period? If so, what should that minimum period be? Please provide reasons for your answer(s).

Question 2: What kinds of efforts should a collecting society have to make to demonstrate it is significantly representative? For example, how easy would it be for a collecting society to produce evidence of total numbers of mandates and works?

Question 3: Do you agree that a 75 percent threshold for membership support is appropriate? If not, what would be a better way to demonstrate membership support and consent? Please provide reasons for your answer(s).

Question 4: Should a collecting society have to demonstrate past compliance with its code of practice? If so, what sort of information might satisfy this requirement? Please provide reasons for your answer(s).

Question 5: Can a collecting society sometimes be justified in treating members and non-members differently, even if the circumstances are identical? Please provide reasons for your answer.

Question 6: Do you think that a signed declaration from a collecting society is sufficient evidence that it is adhering to its code? If not, what additional evidence should a collecting society have to produce to demonstrate that it is adhering to its code?? Please provide reasons for your answer(s).

Question 7: Is there a need for any additional minimum standards to protect non-member rights holders? Do you agree that the protections for non-member rights holders, as articulated in the ECL regulations, and elsewhere (including in this consultation document, where further protections Government would like to see in applications are specified), are sufficient to protect their interests? Is there anything else that could usefully be included in an ECL application to help assess that application's strength? Please provide reasons for your answer(s).

Question 8: Are the minimum periods for representations and subsequent Secretary of State decision sufficient and proportionate? If not, please explain why not, and make a case for a different period or periods.

Question 9: In what circumstances, other than as described above, do you think an application should be narrowed or made subject to certain conditions, without the application being rejected? Please provide reasons for your answer.

Question 10: Do you agree that, aside from judicial review, there is no need for a dedicated appeal route? If not, please say why you think there should be alternative appeal routes and give examples of what they might be.

Question 11: Do you agree that proportionality should be the key principle that determines the scale of the publicity campaign? If not, what other principles should be factored in? What, in your view, should a proportionate campaign look like? It could be that the scale of opt outs, following the period of publicity, reaches a level that raises questions about the collecting society's representativeness. What should happen in this instance? Please provide reasons for your answer(s).

Question 12: Do you agree that a five year authorisation is appropriate? If not, please explain why not. What information should be required of a collecting society when it reapplies for an authorisation? Should this be contingent on the performance of its previous ECL scheme? How light touch can the re-application process be? Please provide reasons for your answer(s).

Question 13: Under what conditions, if any, would modification to an authorisation be appropriate? Please provide reasons for your answer.

Question 14: Are the proposed time periods for representations and Secretary of State decision adequate? If not, please explain why not, and make a case for a different time period or periods.

Question 15: Aside from breaching its code of practice or the conditions of its authorisation, are there any other circumstances in which revocation of an authorisation might be justified? If so, please specify those circumstances and give your reasons why. What, if anything, should happen if a collecting society had breached its code but remedied it before the Secretary of State had imposed a statutory code? Please provide reasons for your answer.

Question 16: Are the proposed time periods for representations and Secretary of State's decision reasonable? Are the post revocation steps sufficient and proportionate? Please provide reasons for your answer(s).

Question 17: Do you agree that a collecting society should be allowed to cancel its authorisation? What, if any, penalties should be associated with a cancellation? Please provide reasons for your answer(s).

Question 18: Is this a reasonable and proportionate requirement? Please provide reasons for your answer.

Question 19: Do you consider the opt out requirements listed above to be adequate? If not, please make a case for any additional obligations on collecting societies with respect to opt out.

Question 20: Do you agree that the 14 day time limit for both acknowledgement of opt out, and notification to licensees of that opt out, is reasonable? If not, please propose another period and say why you have done so. Do you agree that a low likelihood of fraud makes verification of identification unnecessary? If not, please say why not.

Question 21: Do you agree that the proposed 14 day time limit is a reasonable amount of time for the collecting society to be required to list a work that has been opted out? Is it a reasonable requirement to have separate lists for works which are pending opt out, and works which have been opted out? Please provide reasons for your answer(s).

Question 22: Are the obligations in 3.66-3.68 on a collecting society reasonable and proportionate? Please provide reasons for your answer.

Question 23: Is a revocation or cancellation date in line with the end of the licence period a proportionate and reasonable provision? What, if any problems, do you think might result if licence periods started and ended at different points of the year? Please give reasons for your answer(s), and propose an alternative time period or periods as necessary.

Question 24: Is cessation of use of an opted out work after a maximum of six months a proportionate and reasonable provision? If not, please explain why not, and propose an alternative time period or periods.

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Question 25: Do you agree with the proposal that money collected for non-members cannot be used to benefit members alone? If not, please say why.

Question 26: Do you agree with the principle of individual remuneration in ECL schemes? Please provide reasons for your answer.

Question 27: Are there any other ways in which a collecting society might publicise the works for which it is holding monies? Is there any danger that there will be fraudulent claims for undistributed monies? If so, how might this problem be addressed? Please provide reasons for your answer(s).

Question 28: To what extent is incomplete or inaccurate data from licensees an issue when it comes to the distribution of monies? If a non-member rights holder fails to claim monies due, what uses of those funds should the Crown promote? Please provide reasons for your answer.

Question 29: What is the appropriate period of time that should be allowed before a collecting society must transfer undistributed monies to the Crown? When this happens, should there be a contingent liability, and if so for how long should it run? Please provide reasons for your answer(s).

Question 30: Do you agree that these rules are fair to both absent rights holders and potential users of orphan works? Please provide reasons for your answer.

Please note: The information you supply will be held in accordance with the Data Protection Act 1988 and the Freedom of Information Act 2000. Information will only be used for its intended purpose. It will not be published, sold or used for sales purposes.



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