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**Extending the benefits of collective licensing
IPO Consultation on the UK's new extended collective licensing scheme**

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**Organisation's main
product/services**

The British Copyright Council represents those who create, hold interests or manage rights in literary, dramatic, musical and artistic works, performances, films, sound recordings, broadcasts and other material in which there are rights of copyright and related rights.

Our members include professional associations, industry bodies and trade unions which together represent hundreds of thousands of authors, creators, performers, publishers and producers. These right holders include many individual freelancers, sole traders and SMEs as well as larger corporations within the CCIs. Our members also include collecting societies which represent right holders and which enable access to works of creativity (see list at Appendix A).

GENERAL POINTS

The British Copyright Council makes the following comments on the general nature of the consultation taking into account the invitation to interested parties to comment on the legal effectiveness, structure and effect of the proposed Regulations:-

- Many of our members take the view that the proposals are impractical and unworkable. However, the BCC wishes to make a positive contribution to this consultation and has sought to achieve a consensus view of its members on a number of key points. Please note that our member BAPLA does not agree with a number of the points made in this submission and has reserved its position. Very many of our members will be making their own individual submissions and IPO should look to these for comments on the impact of the proposal.
- Some questions in this consultation on Regulations to extend the benefits of collective licensing through Extended Collective Licensing are difficult to answer without cross referencing to the full Orphan Works proposals which only became available on 10th January and well into the consultation period for the draft ECL Regulations.
- The BCC highlights the unsatisfactory nature of the consultation process through the IPO Working Groups convened to advise on the issues behind both sets of Regulations which included some interests but excluded others with a practical interest in the development of the rules covered by this consultation. We understand from those directly involved with the Group that the proposals are, in a number of ways, out of line with the conclusions which they thought they had reached.

SPECIFIC POINTS NOT COVERED BY CONSULTATION

CDPA Section 107

The BCC notes that one question which the Working Group asked to see addressed during the consultation has not been covered. It relates, to whether or not it is really necessary for the current criminal sanctions under s 107 CDPA to remain applicable to cases where a licensing body authorises the use of a group of works within an acknowledged licensing scheme, when some of the works may be deemed 'orphan' after diligent search.

We understand that it is the IPO's view that retention of s .107 in its current form is required by the Enforcement Directive but we are unclear as to why that is, since the Directive does not seem to require Member States to impose criminal sanctions as such. It only requires that sanctions be "effective, dissuasive and proportionate". It certainly requires a range of remedies and sanctions (such as injunctions, right of seizure of infringing goods) but does not specifically require that infringers be subject to criminal liability. Whilst copyright owners of course welcome the application of the criminal law in appropriate cases of piracy (infringement on a commercial scale) they don't believe that including CMOs operating recognised copyright licensing schemes in this category is helpful or appropriate. The BCC believes the same point can be made about Extended Collective Licensing schemes to the extent they cover the use of what may be orphan works.

Requirement to distribute within nine months of the end of the financial year

The requirement to distribute within nine months of the end of the Financial year tracks the wording of the CRM Directive. It should also provide for an exception where distributions are not feasible as per the CRM Directive.

Proposal that undistributed funds for non-member rights holder should go to the Crown

As far back as 2008, the British Copyright Council and others made it clear that the transfer of undistributed revenues back to the Crown, or any type of "*bona vacantia*" arrangement was totally unacceptable to rights holders. Please take this into account when reviewing our response to Question 29.

The BCC reiterates concerns expressed by a number of members about the way in which the Regulations ignore the claims and trust fund procedures put in place in good faith by a number of collecting societies to support the allocation and provision for payment to rights owners when the location of a payee is not know at the time funds are properly received by a CMO.

RESPONSE TO QUESTIONS

REPRESENTATIVENESS

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 the minimum period be? Please provide reasons for your answer(s).

Rather than using a minimum period as the sole criteria by which a collecting society may apply for an extension to an existing scheme, a better qualification might be that the collecting society demonstrates

- a) that it is owned by/or acting on behalf of and with the consent of members;
- b) that it is already licensing the class of works and the rights in those works, which are to be the subject of the ECL scheme and how long it has been licensing those works and rights for; and
- c) that its application to extend its existing collective licence includes a reference to the pre-existence of similar collective licences operated by the applicant.

The BCC has no views on the minimum period but if collecting societies are able to respond on the other criteria then it will be clear that a *bona fide* scheme of a similar type is already well established.

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?

The BCC agrees that the collecting society should be representative. However the answer to this question, particularly with regard to representation of works, will vary according to the sector and categories of works and rights involved and we leave it to our individual members to respond on these points.

CONSENT
Question 3

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

The requirement to obtain positive consent from 75% of all members, while superficially attractive, may not be feasible in practice. Asking individual members to give such consent will, in most cases, be extremely costly and is impractical. Any representative body made up of members whether trade union, professional association or collecting society can speak from experience on this.

It is the BCC's view that this requires more careful thought.

CODES OF CONDUCT
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).

A Collecting society should demonstrate compliance with its code of conduct, in line with the expected requirements of The Copyright (Regulation of Relevant Licensing Bodies) Regulations 2014.

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.

Wherever possible, treatment of members and non-members should be identical. However, circumstances may differ, when it comes to identifying, locating and contacting non-member right holders particularly for the purpose of distributing revenue back to those non-members. Costs such as advertising may be higher for non-members and the Regulations should allow for this.

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?

A signed declaration should suffice, as it will sit alongside regulations on the draft Regulation of Relevant Licensing Bodies SI.

PROPORTIONALITY**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).

The BCC agrees that proportionality should be the key principle.

The requirement to publicise the scheme broadly in every country in which copyright works exists and may be used is impractical and will be costly. It also fails to take account of the nature of the reciprocal agreements between UK and overseas collecting societies for the representation of their members.

DURATION OF AN AUTHORISATION**Question 12**

Do you agree that a five-year authorisation period is appropriate? If not, please explain why not. What information should be required of a collecting society when it reappplies for 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).

Our members hold differing views on this point. On the one hand, if a licence is granted during the authorisation period i.e. the life of the scheme itself, it would seem reasonable, in the interests of market certainty and for the benefit of licensees, that the licence should remain in place. On the other hand, the BCC recognises that rights holders involved in such a scheme may want to evaluate the success of the scheme as well as any changes in the market during that period.

Of course, as with other schemes and licences, it is possible that one of the conditions attached to the authorisation could be to limit the period for which licences may be granted under that authorisation.

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.

The possibility of revocation for breaches of its Code of Conduct should be a factor only where those breaches are both material and relevant, so that breaches of obligations to rights holders should be taken into account when considering the revocation, whilst some failure in complying with obligations to an individual licensee, for example, a one-off customer service issue, would not appear to be relevant to the validity of Extended Collective Licences offered to licensees as a whole.

Where a collecting society lost a substantial number of members and was no longer representative then the Secretary of State might have grounds for revoking an authorisation.

OPTING OUT**Question 19**

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

Yes, the opt out requirements listed above are adequate.

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.

A 14 day limit is reasonable to acknowledge opt out.

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).

There is no need for two separate lists. That would be confusing.

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.

Six months is a reasonable provision. However where licences link to the use of materials used for educational purposes, opt out linked to licences granted for an academic year may need to be taken into account. Therefore it may be reasonable that the period is not set by the Regulations. Instead it might be a condition of the grant of an authorisation that the Secretary of State may determine when it would be appropriate to have a period of longer than 6 months.

NON-MEMBER DEDUCTIONS**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.

The BCC agrees that such money should not be used to benefit members alone.

Question 26

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

The BCC disagrees with the principle of individual remuneration which is contrary to the principles by which an ECL scheme operates.

INCOMPLETE OR INACCURATE DATA**Question 28**

To what extent is incomplete or inaccurate data from licensees an issue when it comes to 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 answers.

Licensees who provide incomplete or inaccurate data are, in some sectors and for some classes of works, a major issue. The BCC is sure that its collecting society members can provide additional information in response to this question.

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 answers.

The BCC is opposed to the idea that undistributed funds should go to the Crown and has made its position on this clear ever since the idea was first raised by IPO in 2008.

Furthermore, the BCC believes that the approach of the CRM Directive is correct, that is, that any direction relating to use of undistributed monies should be limited to the funding of "social, cultural and educational activities for the benefit of rights holders". This wording should be reflected in the Regulations.

APPENDIX A – The British Copyright Council represents:

BCC Members	Membership numbers	President/Chairman
Artists Collecting Society (ACS)	800 artists and estates	Harriet Bridgeman Chairman
Association of Authors' Agents	99 agencies representing authors and other rights holders	Peter Straus Rogers, Coleridge & White Ltd Chairman
Association of Illustrators (AOI)	1,450 illustrators and artists	Andrew Coningsby Chairman
Association of Learned and Professional Society Publishers (ALPSP)	210 publishers	Simon Ross Cambridge University Press Chairman
Association of Photographers (AOP)	950 professional photographers	-
Authors' Licensing & Collecting Society	85,000 authors	Maureen Duffy, FRSL President
BPI (British Recorded Music Industry) Ltd	300 independent music companies and the 3 UK major record companies	Tony Wadsworth, CBE Chairman
British Academy of Songwriters & Composers	2,000 composers and songwriters	Simon Darlow Chairman
British Association of Picture Libraries & Agencies	300 agencies and libraries	David Redfern President
British Equity Collecting Society (BECS)	CMO with 27,000 performer members	Jean Rogers Chairman
British Institute of Professional Photography (BIPP)	3,200 professional photographers	Roy Meiklejon, FBIPP President
Broadcasting, Entertainment, Cinematograph & Theatre Union (BECTU)	25,000 including staff, contract and freelance workers in the audiovisual sector	Christine Bond President
Chartered Institute of Journalists (CIOJ)	2000 members	Charlie Harris President
Copyright Licensing Agency (CLA)	CMO with 2 members and 1 agency agreement	Tom Bradley Independent Chairman
Design and Artists Copyright Society (DACS)	CMO representing 60,000 visual artists & artists estates worldwide	Mark Stephens CBE Chairman
Directors UK	CMO and professional body with 4500 director members	Paul Greengrass President
Educational Recording Agency Ltd (ERA)	CMO with 20 members including broadcasters	Deborah Annetts Chairman
Equity	36,000 performers	Malcolm Sinclair President
Incorporated Society of Musicians (ISM)	6500 musicians	Richard Hallam MBE President
Music Publishers Association (MPA)	259 companies	Chris Butler Chairman
Musicians' Union	30,500 musicians and performers	Kathy Dyson Chairman
National Union of Journalists (NUJ)	32,000 staff, contract and freelance journalists	Barry McGall President
PPL	CMO with 65,000 record company and musician members	Fran Nevrla President
Professional Publishers Association (PPA)	250 publisher members	Kevin Hands Chairman
PRS for Music (MCPS & PRS)	CMO with 100,000 composer, author and publisher members	Guy Fletcher President
Publishers Licensing Society (PLS)	CMO with 2,325 publisher members	Mark Bide Chairman
The Publishers Association	200 publishing companies	Nick Fowler Elsevier

The Royal Photographic Society	11,000 photographers	Roy Robertson Hon FRPS President
The Society of Authors	9,000 authors	Philip Pullman President
The Writers' Guild of Great Britain	2,100 authors	Olivia Hetreed President