

Consultation response form

About You and Your Organisation

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Job Title	Head of Research
Organisation Name	British Film Institute
Organisation's main products/services	Screen related

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).

Such a provision - to prevent opportunistic behaviour - works for many types of content where a small number of CMOs working together in an umbrella organisation such as the CLA are involved in its licensing. For audio-visual works, however, such a situation does not exist other than for educational use where ERA (the Educational Recording Agency) provides an umbrella body to facilitate the licensing override provided under Section 35 of the CDPA. We would therefore argue that this provision should be modified to allow a new organisation to be created which could apply for an extended collective licence where no existing body could act. This would be very much in the public interest in potentially allowing a considerable amount of audio-visual material to be released benefiting both underlying rights holders and the wider public. The BFI's is keen to achieve a balance between rewarding rights holders appropriately and maximising public access and believes this new scheme has the potential to assist our work in this regard.

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?

We do not have sufficient evidence to offer a view on this issue.

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).

This figure seems wholly unrealistic if it requires a minimum of 75% of members to vote affirmatively. A percentage slightly higher than a simple majority of those who do vote, perhaps 60% would seem more appropriate.

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 high standard of ethical behaviour is necessary when looking after the interests of members of CMOs. Unless there is well validated documentation that compliance with a CMO's Code of Practice has been poor this provision would appear unnecessarily burdensome.

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.

No this should be precluded under the ECL scheme given that the CMO will be acting under any scheme on behalf of both members and non-members

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).

See answer to Q.4.

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).

We believe the protections for non-member rights under the published regulations are adequate.

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.

Yes.

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.

For the Secretary of State to have this level of discretion seems unnecessarily bureaucratic. If an application fails to meet the criteria for approval it should be rejected and, if appropriate, the CMO advised to reapply.

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.

We have insufficient knowledge to make any useful comments on this

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).

This phase of the implementation of any scheme has to adopt the principle of proportionality. If the scale of opt outs is significant this should not lead to revocation of the extended collective licence as this would directly disadvantage both the members of the CMO who wish to see a scheme introduced and those non-members who will benefit from it.

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 reappplies 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).

These provisions seem appropriate. It is difficult to know what adequate performance of a scheme means but clearly if there are any misgivings on application for renewal these should be considered. Otherwise a light touch approach seems sufficient.

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

As noted in the consultation document any modification should be made to align the scheme with the real world whenever unforeseen consequences from rapid changes in technology occur.

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.

Yes the proposed periods for representation seem adequate

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 BFI is not in a position to answer these questions

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).

We are not in a position to answer these questions

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).

Cancellation of an authorisation should be permitted without the imposition of any penalty on the CMO. As this is a new and untested measure in the UK it would be unfair, and probably counterproductive, to penalise CMOs which apply, undertake the level of consultation required, and then begin to operate a scheme which then prove unworkable.

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

Yes, this arrangement seems equitable given the licensee will have incurred costs prior to cancellation of the authorisation

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.

This list of opt out requirements and the consequent obligations of the CMO is sensible.

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.

We do not have a framework against which to assess this time limit but fear it could have the effect of dissuading some CMOs from seeking authorisation in case the volume of opt outs is so high that there is an undue administrative burden to be completed in a relatively short period of time. We would think twenty working days would be better

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).

It is difficult to assess these matters but we would suggest a more cautious approach in relation to time frames to carry out this work. It would be sensible to have separate lists for works pending opt out and works which are opted out

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

Yes albeit that they provide the opted out rightsholder with a significant benefit which arguably could encourage wider opt outs than would otherwise happen

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.

We do not have a view on this

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.

A six month limit may prove unworkable where a work is embedded in materials which have a shelf life, or are sublicensed, for longer periods. As noted, in these circumstances a negotiation with the licensee will be required to compensate the rightsholder in the opted out work for this continued exploitation of their work.

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.

Yes. Any money collected as a result of an ECL scheme should be used for the benefit of all whose works are subject to the licence.

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

Yes. Individual remuneration has proved workable in a number of schemes which collect monies for photocopying or cable retransmission and should be an inherent part of any ECL scheme

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).

The provisions in the Regulation seem adequate in terms of transparency. Any additional publicity would incur unnecessary costs. Safeguarding against fraudulent claims for monies will be the responsibility of the CMOs which already provide this level of assurance to members in these matters

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.

Where a non-member rightsholder fails to claim monies due they should revert to the Crown and, as per CRM Directive, should be used to fund social, cultural and educational activities

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).

It is difficult to provide useful evidence on these matters, but given the licences will be of five years duration it may well be sensible to align these dates with the transfer of at least a proportion, possibly 50 per cent, of the undistributed monies

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.

Yes but we are slightly puzzled by the reference to orphan works for which a separate provision is in discussion. We assume that it will not be necessary to secure permission for a work under the Orphan works provision if an ECL licence already covers its use.