

## Consultation on the UK's New Extended Collective Licensing Scheme

### 1. Nature of the Submission / Exec Summary

The British Library, the national library of the United Kingdom, very much welcomes the opportunity to comment on the proposed secondary legislation regarding the implementation of the extended collective licensing provisions contained within the Enterprise and Regulatory Reform Act.

As probably the national library of the United Kingdom and the largest research library in the European Union, the Library knows well the importance of copyright as a tool to manage and control the flow of copyright goods to create a well-educated society that underpins the UK knowledge economy. The Library has direct and a probably unique experience of the information ecology. It is not only a legal deposit library, purchaser of content, and licensee of publishers and collecting societies but also a publisher of databases, CDs and books, clearer of rights, licensor of IPR and exerciser of exceptions in law. We also support the creative industries through not only our unique collections but the Business and Intellectual Property Centre which is the largest resource of business information in the UK and also runs popular training courses on intellectual property for small businesses.

We believe a healthy copyright regime requires a balance of not only limitations and exceptions with exclusive rights held by individual rightsholders, but also a third and vital function of collective rights management. The fundamental importance of exclusive rights being exercised by the creator / author themselves is inviolate, however collective rights management is essential where there is no limitation and exception, and it is not possible or proportionate to contact each and every rightsholder in order to use their work for societally and economically important activities. Such scenarios relate to the mass use of copyright works, where individual agreements with creators would not be possible. Examples of this include internal organisational copying, broadcasting and more recently mass digitisation of in-copyright works by libraries.

We respectfully recommend to government that it is important that the public interest function of extended collective licensing is clearly recognised in a way that is perhaps not so evident from this consultation.

In examining the Nordic precedents for ECL, it can be noted that they were first created in Scandinavia in the early 1960s motivated in large part by the educational and cultural importance of the public broadcasters. This theme has been perpetuated by the extension of ECL to photocopying for educational purposes during the 1980s and, more recently, to agreements such as that between the Norwegian CMO Kopinor and the National Library of Norway to digitise and make available all in-copyright books available in Norwegian up to the year 2000 as part of the Bøkhylle ("Bookshelf") project.

Given that much collective licensing that has taken place in this country for decades has been recognised by government to be already a *de facto* ECL, combined with the fact that collective licensing performs essential and vital public interest functions, we believe that the paper could explore more satisfactorily the aftermath of the rejection or withdrawal of an ECL.

If an ECL application was rejected or withdrawn voluntarily or involuntarily we would argue that the government has to find other legal mechanisms to ensure that the following activities can legally continue uninterrupted:

- i) Internal copying (analogue and digital) of in-copyright works by schools, colleges, universities, libraries, government (and business);
- ii) The use of in-copyright works on VLEs / internet for educational establishments and libraries.

Given that business, government, libraries and educational establishments must have licences / statute based limitations and exceptions in order to perform their basic functions we think it imperative that in the case of withdrawal of a licence to operate an ECL that there should be other legal measures in place to ensure that the core functions of schools, colleges, universities, libraries (and businesses) are allowed to continue uninterrupted.

In addition to the above we would highlight the following points that are vital in order to make licensing easier than it currently is in the UK and therefore encourage the growth of digital markets:

- 1) The operation of an ECL has to balance the needs of creators, intermediaries such as CMOs / publishers, AND licensees who given how exclusive rights and exceptions in UK law are delineated must have a licence in order to function;
- 2) In the case of mass digitisation it is not possible for a pre-existing licence to exist given the significant proportion of non-members / orphan works that will exist in any digital library project;
- 3) The duration of a licence has to be independent of the right to operate an ECL and we respectfully make the point that a 5 year licence will in our view not facilitate any licensing for mass digitisations projects;
- 4) Non-members must have the right to opt-out and be appropriately remunerated for their work in line with members;
- 5) We believe that any criteria relating to representivity must be pragmatic and flexible and recognise the public interest function of any particular collecting society – as highlighted above some licences are “must-haves” in order for education and business to function;
- 6) Some form of cross-border communication to the public is an element of many *de facto* extended collective licences currently on offer from collecting societies, as well as the new licences that will be enabled by ECL.

We broadly and strongly support the submission made by:

The Copyright Licensing Agency Limited (“CLA”)

Authors’ Licensing and Collecting Society (“ALCS”)

Publishers Licensing Society (“PLS”)

Design & Artists Copyright Society (“DACS”)

Based on a meeting with PRS for Music we believe that many of our answers complement their submission. Given the importance of collective licensing, where our answers are substantially similar to those of PRS for Music the British Library we would like to support their submission also.

## About You and Your Organisation

Your name	Benjamin White
Job Title	Head of Intellectual Property
Organisation Name	British Library
Organisation's main products/services	National Library of the United Kingdom

*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).*

No. As stated above one of our main areas of interest around extended collective licensing is to make licensing in the UK easier than it currently is – in particular within the education and research sector the licensing of works for digital library projects / mass digitisation.

By definition such projects contain a mixture of rightsholders who will be registered with collecting societies, those who are not, as well as orphan works. Given this it is not desirable for research libraries to be offered a licence for mass digitisation, without being offered an extended collective licence, and therefore it is not possible for a pre-existing licence to exist.

*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).*

We believe that a pragmatic approach should be taken regarding the representivity of collecting societies rather than a quantitative one. As S.3.4.(b) is currently drafted we believe this wording to be appropriate and pragmatic. We think it will be clear upon application to the Secretary of State a collecting society's position within a particular market place and whether a collecting society's representation is qualitatively "significant" or not.

As stated at the beginning of the paper it needs to be recognised that collecting societies perform a unique function – namely the facilitation of the reuse of copyright works where a limitation and exception does not exist, and where direct licensing of a copyright work is not feasible. Given this we believe that the government needs to take a pragmatic approach to enable extended collective licensing that recognises the vital economic, social and educational functions that collective licensing can and does facilitate.

*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 outlined in the ECL regulations to be an appropriate balance between the interests of members, non-members and the beneficiaries / customers of collecting societies. We believe this balance to be appropriate to facilitate the cultural, economic and educational conditions that we as a society require and can in the current copyright framework only be realised by extended collective licensing.

*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. We believe the periods are proportionate.

*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.*

Given the vital public interest function that collective management of rights serves, ranging from allowing the use of multiple copies in schools / universities (in analogue form as well as on virtual learning environments), through to mass digitisation we believe that it would be important for the government to ensure that any conditions imposed are positive and enabling of education and research.

We believe that it is imperative the government realises not only that safeguards to protect creators are important, but they are balanced with the public interest around accessing copyright works through schools, colleges, universities and their libraries.

*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.*

It should be possible to appeal against a refusal to grant an application. A judicial review would be too onerous and inappropriate, and special provisions should be put in place if any such decision by the Secretary of State were to affect this country's educational and research institutions' reasonable and non-commercial use of copyright works.

*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).*

We would support the response of CLA, DACS, ALCS and PLS in regards to this question.

*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).*

No.

We believe the period of 5 years to be extremely problematic, conflicts with European policy in the area of mass digitisation, and acts as a strong disincentive to in-copyright digitisation projects, for the following reasons:

- i) The investment and funding of mass digitisation projects is significant. The costs of investing in project managers, scanners, scanning technology, a digital platform, infrastructure that changes over time, hosting costs, digitisation as well as licensing the right to communicate in-copyright materials to the public are substantial. We enter into many public private partnerships<sup>1</sup> and private publishers always require as long agreements as possible in order to recoup their high levels of investment in the process of digitisation, and where relevant, rights clearance. For example the digitisation agreements that European libraries including the national libraries of the Netherlands, Austria and the UK signed for large scale digitisation projects with Google last for 15 years reflecting the large amounts of investment involved.<sup>2</sup> We are also aware of digitisation arrangements between other national libraries and ProQuest that last 15 years.
- ii) Large-scale projects by libraries have been strongly encouraged by the European Commission since 2006 with the establishment of the 2010 Digital Libraries Expert Group, and reports such as the 2011 “The New Renaissance – Bringing Europe’s Cultural Heritage Online”<sup>3</sup>, as well as the MOU on the digitisation of Out of Commerce Works.<sup>4</sup> As a participant in these discussion we can vouch that the MOU does not mention any duration for the licence as it was felt that any such discussions were best left to the libraries and the relevant collecting societies who represented rights holders’ interests. Although relating to out of copyright works, it is also important to note that the amended Public Sector Information Directive 2013 in its final form contains no maximum duration for the period of exclusive licences for digitisation projects. The reason for this was that Member States recognised the high costs of digitising library and archive collections and the need to recoup one’s investment in such projects.
- iii) We can also confirm that as recipients of public funding from the Funding Councils and the European Union for in copyright digitisation projects, funders require contractually in return for their investment guaranteed long term / perpetual access to the digitised items they have invested money in – otherwise the project will not go ahead.
- iv) We are also concerned given the market norms around durations of contracts for digitisation projects that the use of public funds (whether grant-in-aid or funding from public bodies like Jisc / Research Councils UK) by publicly funded organisations in purchasing a 5 year licence would not constitute a responsible use of public money as outlined in documents such as HM Treasury’s “Managing Public Money.”<sup>5</sup>
- v) We have also asked colleagues at national libraries in Denmark, Finland, Norway and Sweden about whether governments in those countries seek to regulate the duration of a licence offered by a collecting society. In the Nordic countries where a time based approval to operate an ECL is required from the government, national library colleagues have confirmed that the duration of a licence is independent of the

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<sup>1</sup> Publishers the British Library has and does have digitisation agreements with include Cengage Learning, Adam Matthew, ProQuest, Find My Past, Google, Microsoft, Brill, DC Thomson, Routledge etc.

<sup>2</sup> <https://www.openrightsgroup.org/assets/files/pdfs/BL%20Google%20Contract.pdf>

<sup>3</sup> “Comité des Sages” on Bringing Europe’s Cultural Heritage Online - [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/comite\\_des\\_sages/index\\_en.htm](http://ec.europa.eu/information_society/activities/digital_libraries/comite_des_sages/index_en.htm)

<sup>4</sup> [http://ec.europa.eu/internal\\_market/copyright/out-of-commerce/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/out-of-commerce/index_en.htm)

<sup>5</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/212123/Managing\\_Public\\_Money\\_AA\\_v2\\_-\\_chapters\\_annex\\_web.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/212123/Managing_Public_Money_AA_v2_-_chapters_annex_web.pdf)

- duration of the governmental grant to a CMO to operate an ECL.
- vi) As outlined above we believe that there is strong public interest in having a well-functioning collective management organisation infrastructure. Given that ECL will support the dissemination of knowledge not only in a business environment, but in schools, colleges, universities and publicly-owned libraries we believe that it is important that a balance between the interests of CMOs, creators and the public interest in the circulation of more copyright goods rather than less is actively recognised by the government. We believe that the interests of creators are appropriately met with the promotion / opt-out provision of an ECL, but neither the public interest nor the interests of creators opted-in will be met if the duration of an ECL is too short, thus preventing the digitisation of in-copyright works in the first place.
- vii) We also note that the new German law to allow the digitisation of in-copyright out of commerce works (Article 2. 1 October 2013. *Gesetz zur Nutzung verwaister und vergriffener Werke und einer weiteren Änderung des Urheberrechtsgesetzes*) contains no limits on the duration of the licence from WG Wort, the German collecting society. Rather leaving any contractual discussions to the licensing and investing parties to agree upon.

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

We believe that a pragmatic approach is desirable. Where a modification affects the broad scope, and raison d'être of the ECL then we would agree that no modification should be possible, however modifications that fall within these broad parameters will have to be negotiated, and potentially modified dependent on the outcome of negotiations between the licensor and the licensee if licences are to be developed and offered by a CMO.

*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.

*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.*

Reflecting standard legal practice we believe that a CMO should have the opportunity to rectify any breach, and that any breach should be material.

If any licence to run an ECL were revoked, it is extremely important that interim provisions were put in place by the Secretary of State. We believe in the context of education, research and learning that it is not acceptable for the education sector to be left in a situation for example where in-copyright works cannot be handed out in classrooms, research projects could no longer function or material had to be removed from a Virtual Learning Environments due to the revocation of a CMO's ability to operate an ECL.



*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 believe that 21 days is too short given the complexities of the issue.

As stated above, given that all / nearly all the licences that are used by schools, colleges and universities are de facto ECL at the moment, we believe that special provisions to ensure the uninterrupted use of these works must be put in place if permission to operate an ECL were revoked.

*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).*

Please see the answers to Questions 15 and 16.

*Question 18: Is the repayment of part of the licence fee a reasonable and proportionate requirement? Please provide reasons for your answer.*

The validity of licences already granted should not be affected if they relate to education and research. However if there were a large number of opt outs it would be important that there are mechanisms for this to be reflected in a revised licence fee.

*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.*

We agree that these requirements are both 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.*

*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.*

We would support the responses of CLA, DACS, ALCS and PLS in regards to these questions.

*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.*

As stated above we believe that in the context of education and research any revocation or cancellation has to deal adequately and proportionately with the public interest in ensuring that the use of in-copyright works, not covered by an exception but where individual rights clearance is not possible, remains as uninterrupted as is practicable. Given that the reuse of in-copyright works is fundamental to modern day education – from handing out multiple copies in classrooms, using works on a VLE, through to use inclusion of works in a school project, we believe that the cancellation / revocation of a licence could severely and negatively impact on learning needs and therefore has to be adequately thought through by the government.

*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.*

Please see the answer to Question 23.

*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 we believe it is an important principle that a licensing body seeks to distribute licence fees to the appropriate right holder regardless of whether they are a 'member' or not.

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

It is unclear what this question means. If it refers to an individual being able to set a fee retrospectively this would be impractical, and undermine the business certainty needed around collective licensing. Organisations as varied as libraries, schools, business, government, pharmaceutical companies, universities etc all invest and pay in advance for the use of copyrighted works. It is vital for business continuity purposes, and enabling projects like mass digitisation to happen, that clear and agreed pricing upfront is provided.

*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.*

The data supplied to CMOs will be extremely varied. Much data operates, certainly in the case of journals at publisher level, and not author level. Similarly given that ECL will cover orphan works where it is not even possible to identify rightsholders, or where the cataloguing of a copyright work may not include an embedded work we believe that while an issue it needs to be dealt with practically and pragmatically by both the Secretary of State and the CMO.

*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).*



If undistributed funds are to be passed to the Crown we believe no possible contingent liability should remain with the CMO.

*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.*

We believe it is right and appropriate to give absent right holders rights as envisaged by the draft regulations – namely the right of remuneration and opt-out.

On the issue of whether the regulations are fair for licensors of an extended collective licence we would refer you to the responses above. In summary we are concerned that the regulations do not adequately reflect or protect the needs of customers of CMOs. In particular:

- i) It will be important to ensure that the Secretary of State provide business continuity for customers of CMOs who need to have before purchasing a licence an agreed licence fee and stable terms and conditions.
- ii) In the case of educational and research institutions it is vital that they are not put in a position where they cannot perform what constitutes part of their day to day function – namely the sharing and building on of in-copyright works.
- iii) The licence period proposed is far too short and will not encourage mass digitisation by either universities, cultural bodies or publishers. It also cuts across clear EU policy in this area.
- iv) A quick, low cost and uncomplicated way of receiving a reasonable rebate where there have been a high level of opt outs.
- v) We are also extremely concerned that the government has stated that the territorial scope of the licence is limited to the UK. Not only are a number of CLA licences international in their scope currently (document supply licence, multinational business licence, multinational pharmaceutical licence etc) benefitting both UK rights holders and enabling businesses to function and compete, there is clearly a demand from the education and research sector for the licences to be international. The UK impact assessment justifying the introduction clearly envisages mass digitisation being one benefit of ECL, and yet no one institution would invest in a mass digitisation project that did not allow the digitised objects to be available on the internet.
- vi) There are over 598,925<sup>6</sup> students studying for a UK degree overseas in foreign campuses<sup>7</sup>. Given the international reputation of UK higher education our universities increasingly have overseas campuses in the EU, Middle East and Asia, and will no doubt also be targeting territories such as Brasil. In order to be able to teach, and students be able to learn across borders, it will in our view be imperative to have licences in place to allow cross-border use of in-copyright works in the context of a university Virtual Learning Environment available to foreign students.

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<sup>6</sup> Source: Higher Education Statistics Agency

<sup>7</sup> <http://www.timeshighereducation.co.uk/421485.article>