

Consultation on the UK's New Extended Collective Licensing Scheme

Response on Behalf of:-

The Copyright Licensing Agency Limited ("CLA")
Authors' Licensing and Collecting Society ("ALCS")
Publishers Licensing Society ("PLS")
Design & Artists Copyright Society ("DACS")

1. Nature of the Submission

This is a joint submission by all 4 of the above mentioned organisations who are involved in the licensing in the UK of the right to copy, scan and store extracts (and to use and store digital extracts) from books, journals, magazines and other periodicals published in the UK. Works published in those overseas countries where a suitable Repertoire Exchange Agreement with another collective management organisation has been concluded are also covered by such licences.

CLA issues these licences as agent for ALCS, PLS and DACS (the "Societies"); the Societies themselves obtain their rights from authors, publishers and artists as appropriate. Each of the Societies has completed an Appendix giving details of:

- (i) their constitution;
- (ii) their governance structure;
- (iii) their membership structure;
- (iv) the way in which they obtain their mandates;
- (v) their procedures for obtaining consent/authorisation to new licence schemes; and
- (vi) their distribution policy.

It will be apparent that CLA, as the primary licensing body, can only fulfil obligations under the draft Regulations to the extent that the rightsholder-facing obligations are covered by the Societies.

2. Executive Summary

Key issues arising from the questions in the Response Form:-

- (i) the requirement to obtain a 75% consent of all members is unworkable. Instead we suggest a threshold of 75% of those who vote. There could also be an option for alternative

- discretionary power for the Secretary of State where an applicant demonstrates consent in some other way;
- (ii) the need for a licence to exist before it can be extended under the Regulations; we suggest instead that there should be a reference to the pre-existence of similar collective licences operated by the applicant. Alternatively it could be the case that the applicant has been in existence for a period of time and operating collective licences, and can show that it is owned by/acting on behalf of and with the consent of the relevant class of right holders;
 - (iii) the requirement to publicise the scheme broadly in every country whose copyright works may be covered by an ECL licence is impracticable and disproportionately burdensome;
 - (iv) the authorisation period should not determine the life of the licence. If a licence is granted during the currency of the authorisation period, that licence should not end either when the authorisation finishes or is revoked. But one of the conditions attached to the authorisation could be to limit the period for which licences may be granted under the authorisation;
 - (v) the possibility of revocation for breaches of code of conduct: these should be a factor only where they are both material and relevant so that breaches of obligations to right holders should be taken into account when considering the revocation, whilst some failure in complying with obligations to an individual licensee would not appear to be relevant to the validity of ECL licences offered to licensees as a whole;
 - (vi) the proposal that there should be a right to set an individual rate within a collective licence runs contrary to the fundamental principles of collective licensing whereby a recipient's share of total licence fees is calculated in the same way as the share of other right holders in a similar position;
 - (vii) the proposal that undistributed funds for non-member rightsholders should go to the Crown. We believe the approach of the CRM Directive should be followed so that it would be for the 'General Assembly' of members to determine the use of such funds after a due period (probably 6 years) and which could probably be for various social and cultural purposes.

3. Other points not arising directly from questions on the Response Form

- (i) some forward guidance on the level of fees (initial, application, modification fees) would be useful;
- (ii) some clarification on the interaction between the jurisdiction of the Copyright Tribunal and the authorisation of the Secretary of State would also be useful. Regulation 16(1) requires the licensing body to "charge the licensee a reasonable fee". This seems to overlap with the jurisdiction of the Copyright Tribunal which has a general duty to determine that terms of a licensing scheme are reasonable. It seems unnecessary, and is potentially confusing, to have 2 separate pieces of legislation imposing identical obligations;
- (iii) it is not clear whether the fees (or the way in which they are to be calculated) would be a part of the application or could be a condition of the authorisation. It would be logical from a rightsholder perspective if they were to form part of the application as the level of fees could

be an important factor for rightsholders in deciding whether or not to object to the scheme or to opt out of it (this also goes to the question of individual remuneration; see 2(vi) above). If the Copyright Tribunal is to retain jurisdiction to vary fees under a “licensing scheme” or of licences issued by a “licensing body” (as those terms are defined by the 1988 Act) where that fee has formed part of an authorisation under the ECL Regulations, is the only remedy of a rightsholder to a fee decrease then to opt out of the scheme?

- (iv) Regulation 16(2) provides that a reasonable administration fee “may only be applied towards the general costs of the relevant licensing body and for the benefit of non member right holders” which assumes that the interests of members are synchronous with the interests of the licensing body. That may well be the case but dealing with the interests of members and non members differently may create an unnecessary problem of interpretation. This would be better phrased as:
“may only be applied towards the general costs of the relevant licensing body and for the benefit of members and non member right holders alike”;
- (v) whilst the requirement in Regulation 16 (3) to distribute within 9 months of the end of the financial year tracks the wording in the draft CRM Directive, it should also provide for an exception where distributions are not feasible as per the draft CRM Directive;
- (vi) the obligation in Regulation 16 (3) (a) to “distribute the net licence fee to those non member right holders who have been identified and located” should be slightly amended to deal with the distribution of “net licence fees **due** to non member right holders” to clarify the identity of the money in question (and Regulation 16(3)(b) should be similarly phrased);
- (vii) it is not possible to maintain a comprehensive list of “ all copyright works whose right holders have not been identified or located” as required by Regulation 16 (5); instead there should be a general obligation to identify and publish on the relevant website fees that have been allocated to copyright owners and not claimed or collected;
- (viii) Regulation 16(6): in the Response Form we have argued that licences issued during the currency of an authorisation should not expire when the authorisation ceases (whether by expiration of time or revocation). It would follow that there would be no requirement for a licensing body to repay a portion of a licence fee following revocation or cancellation as set out in Regulation 16 (6).

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	Martin Delaney
Job Title	Legal Director
Organisation Name	The Copyright Licensing Agency Ltd on behalf of ALCS, PLS & DACS
Organisation's main products/services	Licensing

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).

CLA Response: Whilst in a normal case an ECL application would be to extend the effect of an existing licence, a '2 step' process with any significant minimum period requirement could make it difficult to introduce wholly new licences, even on a pilot basis.

In practice the application of ECL coverage in Nordic countries often follows on almost directly from the agreement reached between the licensing body and the user representative body to provide immediate broad coverage. It should also be noted that the Nordic approach involves a broad definition of a licensing scheme - e.g. for the licensing of literary

works in the education sector - meaning that an initial application can cover the renewal or further development of ECL schemes under the existing authority. For instance in Denmark we understand our counterpart organisation has a general approval from their Ministry covering licensing where the subject matter is well understood (such as in educational licensing) or supplements existing licences.

It is suggested therefore that the Regulations should allow new schemes to be authorised:

- (i) where they are similar to, or replace, existing ones in the same sector and covering the same class of copyright works for broadly similar uses; or
- (ii) (in a case where no such licence already exists) if the applicant can show that it has itself been in existence and offering collective licences on behalf of rights holders in the same sector and covering the same class of copyright works for a minimum period.

The representative and consent test should provide sufficient rights holder protection. While draft Regulation 3(4)(a) does appear to follow this approach, Regulation 4(9) seems less clear and this question (and its accompanying text) seems to suggest that the scheme for which an ECL authorisation is sought must itself have been in existence so some clarification would be helpful.

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?

CLA Response: Broadly we believe that the representativeness test should be flexible as representativeness can be shown in a variety of ways (e.g. the number of mandates or membership, the support of relevant industry bodies,).

Generally on mandates, estimating the total number of mandates/copyright works in existence for the purposes of comparison with number of mandates held/works covered is almost impossible given that there are many millions of works in the UK alone, with countless new works each year.

See the attached Appendices from each of ALCS, PLS & DACS describing their constitution, governance and membership structures and their consultation and consent procedures.

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).

CLA Response: Whilst it may be relatively easy for an organisation to demonstrate that it is truly representative of the vast majority of the class of rightsholders it claims to represent, it would not be feasible in practice to obtain explicit consent from 75% of a membership which may be many thousands members on each occasion. We believe:

- i) the 75% test should be linked to the numbers who actually vote or respond to the request for approval (rather than the class of relevant members as a whole) as is the case under Company law for the passing of a Special Resolution. It is recognised that all members would need to have been notified; and
- ii) while the proposed definition of “member” in the draft Regulations rightly looks beyond just those who may be members under a Company Law definition, we think it may need some further clarification. On the assumption that the 75% test applies only to those who vote as in (i) above, it should also encompass those right holders, or their representative bodies, whose rights are subject to an express contractual

- agreement with the licensing body (in line with the proposed definition of “non member right holder”); and
- iii) the test should apply to a “relevant class” of members. A “relevant class” of members might be identified by the types of copyright works in which they own or control the copyright; a class might also be identified by reference to the territory in which copyright works were published;
 - iv) finally there should be a discretionary test, in lieu of the 75% test, where the applicant can demonstrate proof of consent in other ways to the satisfaction of the Secretary of State.

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).

CLA Response:

Past compliance: a requirement for past compliance needs to be proportionate and relevant. Occasional or minor lapses, especially where remedied, ought not automatically disqualify an applicant (nor should it lead to a revocation). Furthermore it is not clear why complaints, even if upheld, in relation to a licensing body’s obligations to licensees ought to be relevant in an ECL application designed to improve the position for licensees. It would be odd if the result of a complaint by a user about a licensing body would, in effect, be to penalise other licensees. But material complaints regarding a licensing body’s obligations to members that are found to have substance ought to be a relevant factor in assessing an application.

Required information demonstrating compliance: this overlaps question 6 to some extent. If information is required to be provided to demonstrate past compliance with the code of practice, it could be done by reference to the information available on the website to deal with transparency obligations, proof of internal training programmes to make staff aware of obligations under the Codes of Conduct and internal processes for dealing with requests/complaints. A record of any complaints to licensing body or to the Ombudsmen and their outcome and details of any findings of a code reviewer could be produced.

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.

CLA Response: Generally not in terms of how their works are covered under an ECL scheme and how fees for such works are distributed, but clearly non-members necessarily cannot have the same rights as members regarding governance, management and operational issues.

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).

CLA Response: If a signed declaration is to be provided, it should be in lieu of information required to demonstrate past compliance as per question 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).

CLA Response: It is hard to see what additional protection could be offered to non-members given that they are to be treated the same as members and also in view of the opt-out and publicity requirements.

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.

CLA Response: 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.

CLA Response: It is hard at this stage to conceive the circumstances in which a narrowing of an existing application would be appropriate.

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.

CLA Response: We believe that it should be possible to appeal against a refusal to grant an application to safeguard against any improper or unfair process in reaching the decision, but which falls short of the test normally associated with judicial review (that the decision is so unreasonable that no reasonable administrative body could have reached that view). Judicial review is also such a major expensive undertaking that an appeal to First-Tier Tribunal (General Regulatory Chamber) in line with the Licensing Body Regulations would be preferable.

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).

CLA Response:

Proportionality: this must be a key principle, but the requirement to advertise in every country as suggested in Para 3.3.7 is not feasible.

The benefit of an ECL scheme would be in its comprehensive worldwide coverage of repertoire. Advertising in the 196 countries in the world would be impractical, inordinately expensive and unnecessary. It should be noted there is no such requirement in any of the Nordic ECL schemes.

Other principles: the Secretary of State should have regard to the nature and extent of any consultation and publicity campaign undertaken by the licensing body prior to making the application.

Nature of campaign: There seems to be some confusion between Regulation 6(1)(a) which states that it is for the Secretary of State to publish the application and the text in the

Consultation document related to this question which focuses on the obligation on the applicant to publicise the scheme. Assuming that the obligations on the applicant relate to its various pre-application efforts to obtain consent, ensure representativeness and to publicise its intention to apply for an ECL authorisation an applicant should, at most, be required to:

- (i) assess the extent to which overseas works are used by reference to past survey results and to identify any country in which there is a significant usage; and
- (ii) to consider how feasible and appropriate it would be to advertise in that country.

These considerations, and any resulting campaign, should form part of the application which the Secretary of State would consider when determining the application and any conditions of an authorisation.

Scale of opt-outs: opt-outs on a scale that questioned the representativeness of a licensing body would presumably result either in the licensing body not proceeding with the application in the first place or, if it did, in its rejection by the Secretary of State. If opt-outs developed significantly post-application, probably no action need follow as the scheme would simply reduce in coverage to match the repertoire that has not been opted-out.

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).

CLA Response:

Period: if licences granted under an authorisation had to be co-terminus with the expiry of that authorisation, a 5 year period could prove problematic in agreeing multi-year licences towards the end of the 5 year term. It would, for example, prevent users and licensing bodies concluding a 3 year agreement in the 3rd year of the term. If necessary the initial application could specify the maximum length of licence to be granted pursuant to the scheme and the authorisation should then permit the grant of such licences throughout the period of the authorisation.

Information to be supplied on renewal: statistics on the number of right holders who had opted out or objected (compared to numbers of participating right holders) could be given and any material changes to information supplied in the original application.

Relevance of previous performance on renewal: this should be a factor in any decision taken by the SoS in renewing an authorisation.

Light touch approach to renewal: the costs of applying for an ECL authorisation could well be significant and a 5 year authorisation period could make the investment marginal if the renewal process was to involve a similar effort – the experience of DACS with the 4 yearly reviews of the Artist's Resale Right is instructive (see the DACS Appendix). This would suggest that a light touch approach to a renewal should be adopted in normal circumstances (but would need to be judged on a case by case basis depending on the extent to which there were objections from significant numbers of right holders either to the existing scheme or to its renewal).

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

CLA Response: It is hard to speculate on what changes might be required without knowing the sort of conditions that might have been imposed in the authorisation. It would be appropriate for a change in the terms or conditions in a licence, either requested by members/right holders and/or negotiated with licensees, and which does not affect the type of work covered (as per draft Regulation 3(2)), to be handled as a modification rather than requiring an entirely new application.

No modification to the permitted use is allowed (Regulations 10(1) and 3(2)). This must be right if interpreted as meaning the broad scope of use for which authority has been given (e.g. an ECL application for an educational licence could not be 'modified' to enable commercial uses), but it should not be interpreted so restrictively that a minor modification to the terms attaching to the use could not be covered by this process. As an example, it would be appropriate for the easing of a restriction on the period for which copies made under an ECL scheme could be used or stored to be dealt with by the modification process and not a new authorisation.

The draft Regulations also envisage that a modification may be made at the request of the Comptroller (presumably at the instigation of either users/licensees or non member right holders) and, as drafted, suggests that the licensing body may have to pay the costs of the Secretary of State: a licensing body should only be responsible for costs where it has initiated the application.

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.

CLA Response: We agree that this should be a 'light touch' process and the timescales are suitably tight.

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.

CLA Response:

Reasons for a revocation: No, revocation should only occur as a result of a breach of the conditions of authorisation (if material) or as a result of material and relevant breaches of a Code of Conduct (see Response to Q.4).

Breach remedied before imposition of Code: there is no reason why an authorisation should be revoked on account of a breach that has been remedied (again see Response to Q.4).

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).

CLA Response:

Time periods: 21 days is too short a period for making representations for what could be a 5 year licence. A revocation would be a major disruptive event affecting the ability of tens of

thousands to copy under licence and jeopardising the revenue stream of hundreds of thousands of right holders. Sufficient time must be allowed for the licensing body to assess the reasons advanced for the revocation, to gather evidence to test the validity of those reasons and to take legal advice as appropriate.

The period for filing a defence to a Claim Form is 28 days following the filing of Particulars of Claim (and this can be extended by application to the Court). Further the process of pleadings under the Civil Rules of Procedure over a period of months allows a defence to be developed in detail over time rather than the Defence and Reply Form representing the only opportunity to answer the Claim. We would suggest a period of at least 42 days.

Post revocation steps: the Regulations should clarify that a revocation applies only to the authority to grant future licences and does not affect the validity of licences already granted or the right of the licensing body to collect fees under those licences or of the right of right holders to receive a distribution of such fees (see also Response to Q. 23).

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).

CLA Response:

Cancellation by a licensing body: Assuming that a cancellation would not affect the validity of licences already granted under the authorisation, a licensing body could simply decide to not exercise its rights under the authorisation in the future. But equally there is no reason why it should be able to cancel its authorisation (although it might conceivably be required to do so by its members).

Penalties: there is no reason why any penalty should be imposed; it would only discourage a licensing body from making an application in the first place to the detriment of users who want the widest possible repertoire. Again this response assumes that a cancellation would be without prejudice to licences already granted.

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

CLA Response: No – as per the Response to Q.16 the validity of licences already granted should not be affected. Of course a greater number of right holders could opt out during the life of the licence which, depending on the extent, could result in a diminution in the value of the licence. But this can be accommodated through existing mechanisms (potential renegotiation of the licence fee with the backdrop of the Copyright Tribunal).

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.

CLA Response: We agree that these requirements are both adequate and necessary.

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.

CLA Response:

14 day periods: 14 days is appropriate to acknowledge an opt-out. Notification should be by way of an update to the website, rather than notice via email or postal contact, but the period should be 28 days.

Verification: We agree with the analysis in the Consultation document. If there is a dispute between right holders as to who can validly exercise an opt out (i.e. the owner of the relevant copyright) it must be settled between those right holders.

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).

CLA Response:

14 day period: as above 28 days would be appropriate.

the requirement to maintain a list: it is unclear how this opt-out obligation will work where a rights holder simply opts out “all works” without identifying the works; this is likely to be the case with visual creators and authors. A licensing body cannot be obliged to research and compile such a list on their behalf and so the notice to licensees may not be title-specific.

separate lists: we do not believe that a licensing body should be obliged to keep a separate list of “pending” opted-out works; and indeed that might be confusing to users. The “list” of opted-out works may include a generic opt-out of “all works” by a particular rights holder (see Response to Q. 14 above) and may be constituted by a “list” or by other information, such as an online search facility. This appears consistent with the commentary but may not be apparent from a literal reading of the draft Regulations.

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

CLA Response: Broadly yes, but:

- it seems inconsistent to require a licensing body to identify a copyright work (and the relevant copyrights in that work) that has been opted out, but also to be obliged to obtain the consent of the right holder before identifying that right holder. It may not be possible to identify the work without identifying the right holder. It will often be public knowledge anyway and how is another right holder who believes they own the relevant copyright to challenge the opt-out if they cannot identify the originator of the opt-out?
- the obligations envisaged in para. 3.68 to append contact details of the right holder alongside details of works opted out is disproportionate and impractical.

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.

CLA Response: The Consultation document seems at odds with the draft Regulations. The Regulations state that any licence granted under an authorisation must end on or before the expiration (or earlier termination) of an authorisation (and this is the thrust of Qs. 16 and 18) whereas this question assumes the reverse, namely that a revocation of an authorisation will be co-terminus with the end of a licence period.

The problems that an early termination of licences consequent on a revocation or cancellation of an authorisation would cause for licensees would be significant. There is no reason why their rights under a licence already granted should be retrospectively affected by a licensing body's failure to meet the conditions of the authorisation or to comply with its Code of Conduct.

As before, the better answer is that the revocation would apply only to any future grant of licence and the rights of right holder protected by the opt-out mechanism. The only exposure then for a right holder would be if a licensing body failed to implement the opt-out. But the prospect of fines being levied against licensing bodies, their Directors and seemingly even their managers (under the Licensing Bodies Regulations) plus the possibility of civil damages against the licensing body ought to be a sufficient safeguard.

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.

CLA Response: For educational licensing an academic year would be preferable as it allows students access to course materials (either physical or digital copies) that have been placed in a repository for the life of the course. But we recognise that a year may be too long in other circumstances and it is suggested that this period should not be specified in the Regulations but be a condition of the grant of an authorisation so that the Secretary of State may determine when it would be appropriate to have a period longer than 6 months.

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.

CLA Response: We agree with this proposal – it is key that a licensing body seeks to distribute licence fees to the appropriate right holder regardless of whether they are a 'member'.

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

CLA Response: No, this would be impractical to operate and is the very antithesis of collective licensing where a collective rate is set on behalf of the works of all the right holders whose works are covered. The licensing body will be unable in practice to seek a retrospective uplift in fee from licensees to comply with draft Regulation 16(4) (indeed the rate may have been set by the Copyright Tribunal) and therefore could only fund such an adjustment by reducing payments to other right holders. This would amount in effect to a cross-subsidy whereby non-members, who had not contributed to the creation and development of a collective licensing scheme, benefited unfairly at the expense of members. Right holders should always be free to license their works individually if they believe that to be in their best interests and so the ability to opt-out is a better safeguard for them.

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).

CLA Response: Notice on a licensing body's website should be sufficient – please see attached Appendices outlining current practice and procedures of ALCS/PLS/DACS. NB the 9 month period should be subject to a caveat that such distribution is feasible as per the final text of the CRM Directive.

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.

CLA Response: The quality of data provided by licensees is variable: good in some sectors, poor in others and non-existent in some. The Regulations therefore should recognise and allow the possibility of non-title specific distributions and that distribution models may vary between sectors according to rights holder choice. It should be noted that whilst we strive to attach data to titles copied under licence (thus enabling title specific distributions) we often receive fees from counterpart organisations overseas without any such title data thus requiring a non-title specific distribution.

We do not agree with the principle that undistributed funds should revert to the Crown as 'bona vacantia'; instead licensing bodies should be able to treat them in the same way as permitted by the draft CRM Directive.

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).

CLA Response:

Period of time before payment to the Crown: This would not be an issue if it were accepted that undistributed funds could be used after the expiry of a suitable period (e.g. 6 years) for purposes (such as social and cultural purposes) decided upon by the 'general assembly' of members (as per the CRM Directive).

Contingent liability: If undistributed funds are to be passed to the Crown there should be no question of any possible contingent liability on the licensing body.

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.

CLA Response: We will deal with this in detail as part of our Response to the Consultation on Orphan Works, but would observe that an ECL licence must necessarily cover works that are "orphan" and to that extent the due diligence requirements of the proposed Orphan Works Regulations would not apply to an ECL scheme or licence.

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.

Authors Licensing and Collecting Society

1. Constitution

ALCS is a collective rights management organisation representing the interests of authors. The current membership of around 78,000 includes authors working across diverse genres for print, audio, audio-visual and digital publications. ALCS is a private company limited by guarantee owned by its members.

2. Governance Structure

ALCS is governed by a board of directors comprising the CEO, Chair and members elected by the membership. The board has the option to appoint up to three directors who may not be members subject to the proviso that the majority of directors must be members elected by the membership. Decisions at board meetings require a majority vote.

3. Membership Structure

ALCS has two categories of membership: Ordinary Members (authors) and Successor Members (the successors/beneficiaries of deceased authors/Members). All members are given equal voting rights and all have the right to stand for election to the board when vacancies arise.

4. Ways in which mandates are obtained

Authors joining ALCS are required to sign an application form which confirms their acceptance of the terms of membership as reflected in the company's Articles of Association. Under the terms of the Articles, authors provide a non-exclusive authority to ALCS to license certain rights on their behalf and institute proceedings in the event of any infringement of the rights. In the event of any proposal to extend the scope of the mandated rights, the Articles provide Members with the right to exclude their works from any such extension. The Articles also provide for a general right for members to opt their works out of any scheme on giving notice to the company.

5. Procedures for obtaining consent/authorisation to new licence schemes

Where new schemes are proposed that do not involve the extension of mandated rights but vary the means by which such rights are exercised, ALCS consults within a forum of bodies representing the different sectors of the writing community.

6. Distribution Policy

The ALCS Distribution Rules are set by the board and approved by the members in a general meeting. A sub-committee of the board, the Distribution and Membership Committee, is responsible for setting distribution policy.

Publishers Licensing Society

1. Constitution

PLS is authorised under its Articles of Association to exercise and enforce the copyright and related rights of rightsholders in literary, dramatic, musical and artistic works. In practice its core activity so far has been the collective licensing of secondary copying rights on behalf of book, journal and magazine publishers and centralised administration of publishers' rights.

PLS is a private company limited by guarantee and was incorporated in 1981.

2. Governance Structure

The Board of Directors is appointed by the members of PLS (see below). Each member is entitled to appoint at least one and no more than four directors who shall be approved in a general meeting of the members. The Board of Directors may appoint the Chief Executive to the Board. The Board may also appoint a chairman independent of any appointment of the members. Directors are appointed to serve for three years and may serve up to two further terms of three years if elected. After three terms they are not eligible for re-election but may offer themselves for election after a break of one year.

The Board currently comprises the Chairman (independent of the members), the Chief Executive and nine directors (each member having appointed three directors). The practice of the members is to appoint two publishers from their membership and one employee or consultant.

3. Membership Structure

Those eligible for membership of PLS are properly constituted trade associations representing rightsholders of copyright works.

The current members of PLS are the Publishers Association, the Association of Learned and Professional Society Publishers and the Professional Publishers Association.

4. Ways in which PLS obtains mandates

PLS obtains signed mandates from publishers directly. A publisher need not be a member of a trade association member of PLS in order to mandate PLS. PLS currently holds mandates from 3,182 publishers.

The basic mandate authorises PLS to license the publisher's rights through collective licensing by CLA for paper copying of limited extracts of works. PLS is obliged to obtain the

publisher's express opt-in to each and every digital licence that may be offered by CLA. PLS also seeks opt-ins to international digital licences on a territory by territory basis.

Some magazine publishers have recently required that their mandate be amended to authorise PLS to license their rights for the business and government sectors only through NLA media access and PLS has given effect to this.

Publishers may exclude, in writing to PLS, particular titles from their mandate. Any such exclusions will be notified to CLA immediately for notification on to licensees in their quarterly updates. Publishers may terminate their PLS mandate on six months written notice.

PLS has an agreement in place with each of CLA and NLA media access under which it authorises those licensing agents to license the relevant rights for which PLS has mandates.

5. Procedures for obtaining consent/authorisation to new licence schemes

When a new licensing scheme is being considered and developed PLS invites its mandating publishers to a consultation meeting or meetings, as appropriate in each case and depending on the response rate. We invite the relevant licensing agent to attend and present the proposal. Publishers have a chance to test the proposal and to make suggestions as well as to give an indication as to whether their company would be likely to opt in to any such new arrangement.

Once the new proposal has been fully developed and refined, usually in consultation also with potential licensees, the proposal is presented to the PLS Board and circulated to the trade association members of PLS for approval. The PLS members consult their own respective memberships to inform their decision as to whether or not to approve a particular proposal. PLS will then approve the proposal or not, according to the advice from all the members of PLS.

Most new licences are digital licences and so the ultimate approval rests with each publisher. They must decide whether or not to opt-in to the licence in each case.

6. Distribution Policy

PLS's policy, set by the Board, is to distribute fairly, transparently, efficiently and swiftly. To this end PLS:

- distributes on a title by title basis strictly in accordance with the usage data received from CLA and NLA media access as a result of their surveys and any other data collection methods. Where no data is provided (as happens most commonly with monies received from overseas) the monies are allocated to those publishers to whom PLS has already

distributed according to data in the same proportions of those distributions. We have processes in place to identify and trace publishers for whom we receive monies. If we are unable to find and locate the publishers after exhausting those procedures then the monies are re-allocated on a pro rata basis to those mandating publishers to whom we have distributed fees earned from licensing in the UK;

- distributes promptly and, as far as is practicable, no later than in the calendar month following receipt of such monies; and
- deducts 6% to cover its administration costs.

Full details of the PLS distribution policy are available on our website at <http://www.pls.org.uk/about/plsdistributioncharter/default.aspx?PageView=Shared>

Design and Artists Copyright Society

1. Constitution

Established by artists for artists, DACS' mission is to transform the financial landscape for visual artists and estates. We collect and distribute royalties to visual artists and their beneficiaries through our rights management services: Payback, Artist's Resale Right and Copyright Licensing. We also operate an image bank service for customers seeking digital images alongside copyright licensing. As well as campaigning on behalf of artists and their rights, we are also developing new services to generate more revenue for a greater number of visual artists.

DACS is a not-for-profit organisation, established in 1984 by artists for artists. We are a company limited by guarantee, and incorporated in England and subject to the relevant laws and regulations.

DACS administers rights in artistic works as defined by section 4 of the Copyright, Designs and Patents Act 1988 (as amended). DACS also administers the Artist's Resale Right pursuant to the Artist's Resale Right Regulations which implement European Directive 2001//84/EC which created a harmonised resale right for artists in Europe.

DACS is a collective management organisation (or CMO). CMOs provide valuable services both to creators and rightsholders in copyright works and those wishing to use them by providing an efficient system of collection and distribution of licence fees for the use of copyright material.

DACS is part of a network of visual societies around the world and we hold agreements with many other societies enabling us to offer the works of over 60,000 foreign artists for copyright licensing to customers in the UK. We offer our foreign repertoire to our licensing customers on the same terms as our UK artists' repertoires.

For more information about DACS, and to view our Articles of Association visit: <http://www.dacs.org.uk/about-us/what-is-dacs>

2. Governance Structure

DACS is governed by a Board of Directors comprising nine non-executive directors, appointed by the Board in accordance with a published role description and person specification which we advertise widely among members and users of all our services. We conduct a rigorous shortlisting process in accordance with good equal opportunities and diversity practice, and interview selected candidates in a competitive process.

Each Director appointed to the Board shall be appointed to serve a term of three years. At the end of such term, a Director shall be eligible for re-appointment to the Board for a further term of three years. At the end of such further term, the Director will not be eligible to reapply for appointment until a further period of three years has elapsed.

Our current Articles provide that there be an adequate number of visual artists on the Board. The Board is entitled under the Articles to appoint the Chair.

In February 2014 DACS' Members are expected to adopt new Articles of Association.

DACS' new articles set out the composition of its Board of Directors which will comprise of 12 non-executive directors, six being Members and or associate members and six being non-members.

Directors will continue to be recruited through an open process, advertised widely among members and users of all our services. We will conduct a rigorous shortlisting process in accordance with good equal opportunities and diversity practice, and interview selected candidates in a competitive process. The Board will have the authority to appoint Directors. Member Directors will be approved by the Members at the Annual General Meeting of Members.

Each Director appointed to the Board will be appointed to serve a term of four years. At the end of such term, a Director will be eligible for re-appointment to the Board for a further term of four years. At the end of such further term, the Director will not be eligible to reapply for appointment until a further period of four years has elapsed.

The Board will be entitled under the Articles to appoint the Chair.

3. Membership Structure

Copyright Licensing

Membership of our Copyright Licensing service is open to all artists or heirs of a deceased artist under the condition of granting DACS an exclusive licence in all their works, which covers primary and secondary licensing. Copyright Licensing members can become Company Members under our Articles of Association.

The membership agreement authorises DACS for the exploitation of the copyrights owned by the artist or heir. We do not ask for an assignment of copyright: we ask for an exclusive grant of rights to enable us to authorise third parties to reproduce works on terms set by DACS.

Members can resign by providing three months' written notice in accordance with the provisions of the membership agreement.

The members of our international partners grant DACS the same authorisations by virtue of the representation agreements we have signed with them.

On the death of a Copyright Licensing member their membership of DACS ceases. However, DACS continues to manage the artist's rights for seven years after their death, unless the artist's successor chooses to resign. If there are licences for the artist's work in force at the time of the artist's death then DACS will continue to manage the rights vested in the licence until the end of the licence. Payments due to the artist will be paid to their appointed representative, usually the executor, until probate is settled and the artist's successor identified, after which time royalties will be paid to the successor. At the end of the seven-year period, DACS will stop managing the rights, unless the artist's successor signs a new membership agreement.

Image Bank

Membership of our Image Bank service is open to artists or heirs of a deceased artist. However, due to the complexity of managing rights in images, membership to the service goes through an internal committee for approval.

The membership agreement gives DACS the right to store digital copies of images, to make copies and to make copies available to Image Bank customers for the purpose of reproduction and the right to rent and/or lend high resolution electronic copies of the works to Image Bank clients.

Members of the Image Bank service can resign by providing three months' written notice in accordance with the provisions of the Image Bank membership agreement.

On the death of the artist, their beneficiaries may elect to become members of DACS.

Artist's Resale Right

Under the current UK regulations, the Artist's Resale Right can only be exercised through a collecting society. Artists or their heirs can mandate DACS to collect resale royalties on their behalf. When DACS is notified of a royalty arising from a sale of art work by an artist who is not represented by DACS, or another collecting society, we will seek to collect the royalty and find the artist, or their heirs, in order to distribute the royalty to them.

Artists or their heirs can resign from this service by providing three months' written notice in accordance with the provisions of the mandate.

Payback

Payback is an annual distribution scheme run by DACS. We negotiate on behalf of visual artists to secure a share of collective licensing revenue which we distribute to thousands of artists every year.

Rightsholders do not have to be a member of DACS in order to make a Payback claim. DACS invites all artists (or their heirs) to claim a share of the royalties we receive for collective licensing of artistic works. We treat these claims in exactly the same way as we do for those who have granted us mandates.

We have agreements with a number of trade unions and professional associations whose members create artistic works in which they retain the copyright. These agreements mandate DACS as the representative body for managing the collectively licensed rights of the members of those organisations.

In addition, we have an individual mandate available for artists of any discipline (or their heirs) not represented by a mandating organisation or by a DACS Copyright Licensing membership agreement.

4. Ways in which mandates are obtained

Copyright Licensing and Image Bank

Mandates are obtained through individual contractual agreements with rightsholders (as outlined above).

Artist's Resale Right

This right is managed through a system of compulsory collective management as well as individual mandates received from rightsholders.

Payback

As outlined above, Payback mandates are obtained through mandating societies (e.g. trade unions and professional associations), authorised representatives (e.g. picture libraries) and direct mandates from claimants.

5. Procedures for obtaining consent/authorisation to new licence schemes

DACS consults widely with its members, and other rightsholders using DACS' services, on issues relating to rights management, including new licensing schemes.

Under our existing Articles of Association, DACS convened the Creators Council – a body of members and visual artists of all disciplines who served as advisors on matters affecting visual artists, including developments in copyright licensing.

Under the new Articles of Association, DACS is reinstating Annual General Meetings of Members where they will be consulted on these issues and consent for new schemes will be sought. Licensing

schemes that fall outside the current authorisation given through membership agreements will require amendments to those agreements that will need to be approved by the Members at the AGM.

6. Distribution Policy

DACS has established distribution policies covering the distribution of royalties arising from Copyright Licensing, Artist's Resale Right and Collective Licensing (distributed through our Payback scheme). Our distribution policies can be found on our website at <https://www.dacs.org.uk/about-us/distribution-policies>

7. Artist's Resale Right process

DACS has been operating an Artist's Resale Right service since the implementation of the Right in the UK in 2006. Because the Right is operated through a system of compulsory collective management, DACS has been collecting and distributing resale royalties for non-members since its introduction. Non-members receive the same treatment as members in all areas of collection and distribution of the Right. Where we do not hold the contact details for the artist or their beneficiary, DACS has an established process for finding missing artists and heirs and confirming their entitlement to the royalties.

The Resale Right Directive (2001/84/EC) timetables a regular review of the Directive and its implementation in member states. The Directive stipulates that there should be a review every four years. The review cycle has resulted in significant resources being dedicated to ensuring that DACS has sufficient research and data available to enable an informed contribution to the review. We recognise the importance of regularly reviewing the implementation of the resale right, in the same way that a collecting society should be asked to participate in a review and re-authorisation process for extended collective licensing. However, this needs to be balanced by ensuring the process is light touch and does not excessively add to the increasing reporting burden carried by collecting societies.