President

Paul Greengrass

Chairman

Charles Sturridge

Board Members

Lara Akeju

Yousef Ali Khan

Dan Clifton

Philippa Cousins

John Dower

Paul Elston

Coky Giedroyc

Piers Haggard

Menhaj Huda

Cath le Couteur

Kevin Macdonald

Rebecca Manley

Beryl Richards

Tom Roberts

Robin Sheppard

Steve Smith

Iain Softley

Delyth Thomas

Chief Executive

Andrew Chowns

DIRECTORS UK

RESPONSE TO INTELLECTUAL PROPERTY OFFICE CONSULTATION ON EXTENDING THE BENEFITS OF COLLECTIVE LICENSING

January 2014

Directors UK
8-10 Dryden Street
London, WC2E 9NA
Tel: 020 7240 0009
www.directors.uk.com

About You and Your Organisation

Your name	Andrew Chowns
Job Title	Chief Executive
Organisation Name	DIRECTORS UK
Organisation’s main products/services	Copyright in works of film and TV directors

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, there should be no minimum period. This would prevent any applicant CMO from proposing a new licensing scheme from scratch. Far more important in judging whether a CMO is "representative" would be to assess its relationship with its members, its mandate and its ability to operate an ECL scheme.

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?

If a scheme is to represent the rights on non-members then it is vital that a CMO can demonstrate a significant level of representation at the point of application. Otherwise new CMOs could seek authorisation on the basis of representing a small number of members and a very large number of non-members who will have little or no control over what such a society is doing in their name. It could also give rise to a position where there is more than one CMO representing members in a particular sector: this could lead to great confusion for both CMOs and licensees. At the moment most rights registries and databases of works that are used by CMOs internationally rely on a one-to-one mapping of member to their designated CMO. If this becomes one-to-many, one can foresee an enormous amount of confusion as payments are sent to the “wrong” CMO.

It would be straightforward for a CMO to show its member size and the number of works it manages. It would be impossible to express this as a percentage of all works in the AV sector – even if one knew, for example, the total number of AV works on Youtube or Vimeo, how would this help determine whether a CMO had a “significant” level of representation for the purposes of their application to run an ECL scheme? Perhaps this might be better assessed by way of determining the total number of works for which there is a demonstrable demand for licensing among commercial users as a starting point. This could be measured in terms of representation of a CMO’s repertoire on internationally-recognised rights registries and databases of 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 it would be virtually impossible for any CMO to achieve a 75% response from the whole membership. A 75% threshold of members voting in an electoral poll would be a

significant hurdle to jump, but a more realistic aim. The threshold should be more in line with the process for passing a Special Resolution under the Companies Act, where the threshold is 75% of the attending members.

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).

As the codes have only been introduced recently it would be too early to set too great a value on past compliance. Over time, this should be a recognised requirement. More relevant – and missing from the list of requirements in clause 4 – would be a demonstration that the applicant CMO has the resources and capability to operate a licensing scheme for both users and members.

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.

In relation to CMO's distribution activities, members and non- members should be treated the same. However, where a CMO is providing other services and benefits to its members beyond its collection and distribution activities, non -members have to be treated differently. Non-members should not be entitled to benefit, for example, from the activities a CMO offers such as members events, benefits such as discounts and offers, legal advice or campaigning services.

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).

Yes

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).

No, minimum standards are sufficient. Evidence of demand for an ECL scheme from existing or potential licensees should be permitted in an ECL application

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.

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

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

We agree that proportionality should be the key principle. The requirement to publicise the scheme broadly in every country in which copyright works exists and may be used is impractical and will be costly. It also fails to take account of the nature of the reciprocal agreements between UK and overseas CMOs for the representation of their members

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).

Should not be less than 5 years.

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

We believe that a CMO should be allowed to seek authorisation to widen its mandate, in exactly the same way that the Government might do so. This could arise from a number of different sources: in response to developments in technology, for example, that created a new opportunity to use copyright works, changes in the business models of existing uses in the UK or in other territories. It may also arise where a CMO manages to regain from another party a set of rights that it then wishes to licence on an ECL basis. It should be noted that a factor that inspired the Government to seek a modification is highly likely to have an impact upon many if not all CMOs operating existing schemes.

We also note that the licensing body is expected under clause 10 (5) to pay for the Secretary of State's costs, including cases where the modification has been initiated by the Government. This seems manifestly unfair to the CMO concerned.

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.

The 28 day minimum proposed time period may be too short, depending on how disruptive the modifications are expected to be.

We are concerned that where a modification that is sought or required and granted towards the end of a five-year term, and such modification requires significant extra investment and resources it would be economically unfair that the term of the original licence is maintained, leaving a very short time to recoup the value of the investment. This is particularly so where the modification originates with the Government and is therefore unpredictable.

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 proposals seem fair and reasonable. However, the process followed by the Secretary of State should include a period in which a CMO could have the opportunity to remedy any failure that had given rise to the threat of revocation.

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

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

A CMO should be allowed to cancel its authorisation if circumstances change. There should not be a penalty as this could create a false incentive to keep a scheme running purely in order to avoid a financial penalty

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

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

The proposals are very much geared to the concept of a "work" being the subject of an opt-out, whereas we think it equally likely that a member may decide to opt-out, embracing not only their existing works, but also any future works. Therefore the name of the member opting out is just as important as the titles of the works.

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.

Yes.

It is very rare that a right holder fraudulently claims works. One area where verification could be important is in respect of the works of a deceased copyright holder, where there is a dispute over who is the rightful beneficiary of their estate.

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).

Yes

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

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

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

Yes

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.

To be clear, this is a question about deductions of management fees from money due to non-members. Directors UK deducts management fees in order to finance its distribution scheme. Directors UK requires a director to become a member in order to receive payment of their royalties – i.e. we do not currently pay royalties out unless a director agrees to join. Our reasons for this are essentially to protect the new member so that we can, for example, gather and ensure that we handle and protect their personal information in accordance with Data Protection laws, so that they can have a right to representation in accordance with our Membership Agreement, and we can have a continuing relationship with them when we collect further royalties. Any scheme operated in this way would always allocate management fee income to members alone.

We would also like the IPO to be aware that currently there are a number of reasons where

a CMO might not pay out royalties to members, contrary to clause 16 (3) (a). These include payments that are the subject of a dispute, payments owed that are less than our *de minimis* threshold, cases where we do not have complete bank account information.

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

A non-member should be able to bring to the attention of a CMO any use of a work that has not been identified and paid out by the CMO where appropriate. However, we do not agree that non-members can also demand a "bespoke" fee for any such use, as this runs counter to the entire concept of collective licensing. All rights holders should receive the same rate – a rate that has been set through proper procedures and where no individual member has had any undue influence over the rate set. It would be impossible to assess a different rate for each rights holder. If a rights holder is not satisfied with the rate they are receiving they have the option to remove their work from the 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).

We do not agree with the statement that the list of unknown works and authors would be very small. Directors UK takes the task of diligently searching for non-members very seriously. We find it more effective to publicise the names of directors who we have identified rather than publicising works. Many methods are needed to locate non-members, not simply publication on one's own website. It should also be noted that non-members can be very sceptical about a claim from a group they have not heard of that they are holding money for them. Word of mouth or a recommendation from a trusted colleague is extremely valuable in this respect.

It must be noted that the cost of publicising must be related to the amount of monies that have been allocated to a missing director. We have several dozen non-members who are owed less than £1, for example.

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.

This is a very substantial issue. Reporting standards vary enormously between licensees. If we receive incomplete data an increased amount of time and staff resources has to be used in the effort to identify the director. This can become very time consuming and thus result in the delay of distribution of monies to the member because collective schemes require complete data – unlike individual licensing schemes where one piece of missing data impacts on that licence alone.

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).

The time period should be in line with the Statute of Limitations which is currently 6 years. This is also reflected in the proposed CRM directive. The directive states that monies should be held for 3 years before become they can regarded as undistributable. However a CMO should retain a fund to pay out to rights holders who appear during the additional time frame of 3 years.

The CRM directive stipulates that a CMO must have a policy for undistributed monies, and the Directive permits Member States to impose some restrictions or conditions upon the types of use that a CMO can make of such funds. We are very surprised to see the suggestion in the IPO's proposals that undistributed monies should go to the Crown, because that would mean that the obligation on a CMO to provide a policy becomes redundant. We therefore think this proposal would not be consistent with the Directive

For the record, Directors UK supports the provisions of the Directive in this regard, and we believe that any suggestion that undistributed funds should go to the Crown is likely of itself to render this scheme unacceptable to most CMOs.

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

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