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	Hubert Best
Job Title	Advocate & solicitor
Organisation Name	FOCAL International Limited
Organisation's main products/services	FOCAL is the umbrella organisation for commercial audiovisual archives worldwide

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).

Yes.

An existing collective licensing scheme (where extension for the same uses is applied for) should have been in place and operative for at least 5 years.

This is because (1) the collecting society must have a verifiable successful track record in operating the collective licence for which extension is applied, and (2) the collecting society and the collective licence must be established and known by the right holders and licensees in the relevant sectors (including outside the UK, if applicable).

Accordingly the draft Regulations (including 3(4) and 4(9)) should set out these requirements, and draft Regulation 3(4)(a) should refer to "licensing bodies" and "licensing schemes" as provided under section 116 CPDA.

Important basic principle about extending an existing collective licence

The Executive Summary of "Extending the benefits of collective licensing" defines ECL as "a form of licensing for which a collecting society is given permission *to extend an existing collective licence* to cover the works of all right holders in the sector, except those who opt out…" (p.4, 1st paragraph). Therefore, policy dictates that it must not be possible for a collective licensing scheme to be started up with the purpose in mind of making an ECL scheme. This policy is stated in various ways throughout "Extending the benefits of collective licensing."

Accordingly, if the SoS is to be able to assess an existing collective licensing scheme adequately, as to whether it is suitable to be extended, the original collective licensing scheme must be *bona* fide, fully operative, and have a good track record of collecting revenues and distributing them to right holders.

Equally, in order for the members of a collecting society to be able to make an informed decision whether or not to grant their consent to a proposed ECL scheme the collective licensing scheme (which is to be extended) must have been operative for a reasonable time. This should be at least several full revenue cycles through to distribution, as well as long enough for right holders to assess whether the scheme and the collecting society which administers it are effectively established in the market.

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?

As stated above, the Executive Summary of "Extending the benefits of collective licensing" defines ECL as "a form of licensing for which a collecting society is given permission *to extend an existing collective licence.…*"

If a collecting society is unable to produce evidence of total numbers of mandates and works, this means that the collecting society is not able to produce evidence of the right holders and works which will potentially be affected by the extended licence.

It follows that the collecting society will not be able to demonstrate that it has taken appropriate measures to publicise its proposed ECL to non-members.

Nor will it be able to show that proposed opt-out arrangements will be effective for non-members, as it will not be able to form any reasonable view as to whether it is effectively reaching them, so that they can know about the ECL and understand how to opt out if they want to.

Where an extension will potentially include non-UK rights, a collecting society must provide evidence that it is significantly representative of them (including appropriate publication to and through non-UK collecting societies). Draft

Regulation 4(15) should set out the requirement to produce such evidence and the SoS's obligation to consider it, in accordance with the Government policy set out in "Extending the benefits of collective licensing".

In addition there may for certain types of works exist several collecting societies, all claiming to be significantly representative of the relevant right holders. Without the production and assessment of evidence of total numbers of mandates and works, it will not be possible for the SoS to determine which of several potentially rival collecting societies should be permitted to operate an ECL for the types of works in question.

In these circumstances, it cannot be appropriate for a collecting society to be permitted to extend an existing collective licensing scheme.

Therefore, if a collecting society cannot produce convincing evidence of total numbers of mandates and works, no ECL should be authorised.

This is the view taken (for example) by the Swedish Parliament (in Sweden ECLs must be authorised by Parliament).

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 understand this to mean 75% of the members of a collecting society (i.e. those licensing their rights for the collecting society to license).

UK rights

As support for UK membership in favour of extending a collective licensing scheme covering rights licensed to a collecting society by UK right holders, 75 could be an appropriate minimum percentage.

However, 75% of *members of a collecting society* alone is not appropriate.

Where a collecting society offers many licences but wishes to extend only one, the 75 figure should be applied only to the relevant rights.

To the criterion of *members of a collecting society* must also be added the *works (or other rights)* which members have authorised collecting society to license *and* which are likely to be used by end user-licensees in the particular sector (not the total of works or rights available – for example, evidence to extend a collective licence for supplying articles of scholarly research would be confined to the publication of and market for such articles, and would not be publication of or market for all published articles; relevant language could also appropriately be taken into consideration).

Both these criteria (sufficient member-right holders and sufficient rights likely to be used) are necessary to evidence support for extending an existing collective licence for a particular use. For example, where different members hold greatly different proportions of rights, using a measure of rights rather than a measure of number of members could result in decisions which prejudice the greater number of smaller right holders. This is unlikely to be appropriate when dealing with

licensing of non-members' rights in an ECL scheme (contrasted for example with company shareholding, where minority shareholders have chosen to be minority members).

Non-UK rights

A 75% threshold applied to the above two criteria must also be applied to any non-UK collecting society whose rights the applicant UK collecting society wishes to include in the extended licence.

In addition, extending the licensing of non-UK rights by virtue of reciprocal agreements with non-UK collecting societies should only be authorised *if the non-UK collecting society specifically allows for this under the reciprocal agreement.* It is conceivable that reciprocal agreements with some Nordic collecting societies could permit this.

Without such contractual support, licensing of non-UK held exclusive copyrights or rights in performances without the right holders' consent (whether individually or through reciprocal agreements which actually mandate specific rights) will be in breach of the UK's international treaty obligations. Our view is that the SI should clarify the application of ECLs to non-UK works, to avoid any risk of the UK Government being found in breach of international treaty obligations.

The SI should also make it clear that such rights will fall outside the scope of any permitted ECL scheme, unless specifically supported by reciprocal agreements with non-UK collecting societies which are themselves legally entitled to operate equivalent schemes, and which have obtained corresponding right holders' mandates for licensing the rights in the UK (or generally overseas). In other words, reciprocal contracts in both the UK and a foreign territory must both legitimately authorise ECL.

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).

Yes.

Collecting societies should be under a statutory obligation to disclose all complaints (including from licensees and right holders, *whether or not* relating to potential breaches of their codes) which they have received during a reasonable period prior to the application, e.g. 5 years, together with information about any steps they have taken to deal with them.

Unless the SoS makes independent enquiries (which seems impractical, and anyhow how would the IPO know who to ask?) this seems to be the only way to get the information, in order to assess whether an ECL authorisation should be granted.

We believe that *all* complaints should be disclosed and considered, not only those covered by codes of conduct. This is because (i) the codes of conduct are new and therefore at this point there is no information about compliance with them to consider, and (ii) at this incipient stage of codes of conduct, it appears that at least some CMOs' codes of conduct are directed more at the CMOs' licensees, and less or not at all at the right holders – and in an ECL scheme the most likely aggrieved

parties are in fact right holders, including of course non-member right holders..

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 general, no.

With the following important exceptions:

Use of revenues other than for distribution to right holders

Where members have agreed that revenues should be used for purposes other than direct distribution to right holders (less only strict operating costs of collection and distribution) those purposes should not be funded by revenues collected from use of non-members' rights.

For example, many collecting societies have spent considerable amounts of money (i.e. right holders' funds) on obtaining advice, campaigning, and participating in the Government's extensive copyright consultation, of which this ECL consultation forms a part. It does not seem right that such activities should be funded by non-members' revenues, as the non-members cannot have given their consent to such uses – and as *non*-members may indeed have chosen to stand apart from them.

It must be remembered that already the non-members have lost their exclusive property rights under an ECL scheme for the convenience of the collective licensors (we shall explain more about this below) therefore to use part of the payments which are derived from this non-voluntary use of rights for a *further* non-voluntary purpose cannot be justified, if copyright and rights in performances are still to be considered property rights in any conventional sense.

Further, the Specified Criteria for the Code of Practice (Annex C) should specifically require the collecting societies to "act in the best interest" and " deal transparently" also with non-members when operating an ECL scheme.

The view taken in the Nordic countries is that non-members must in all respects be treated equally to members, including having the same right to fees and remedies.

Individual remuneration

In addition, in the Nordic countries non-members have a right to claim individual remuneration should they be dissatisfied with the agreed level of remuneration or with the internal remuneration scheme or rate card of the collecting society. This right applies regardless of any decision made by the collecting society, and like the right to equal treatment it is an important safeguard to ensure that non-members are treated in conformity with international conventions. Non-members entitlement to "individual remuneration" instead of the "collective rate" is stated in "Extending the benefits of collective licensing" (on p.14) but is not in the Regulations, to which it needs to be added. As it can be difficult in practice for non-members to prove the extent of use of their work(s) they may base claims for individual remuneration on statistical samples.

Notifications to non-members

More extensive notification of application to extend a scheme and subsequent changes to the licensing terms and conditions of the scheme are probably appropriate (e.g. if members are notified of changes by email or letters, public announcements would additionally be required for non-members). The more so if rights of non-UK non-members are concerned.

Payment to non-members

Every ECL authorisation of an ECL must include an ongoing obligation on the collecting society to make reasonable efforts to find non-members in order to pay them, and the SoS must assess its ability to do this, as part of the authorisation and renewal processes. This should be included in the Regulations. On the other hand, it seems appropriate for the onus to update a collecting society concerning address, bank account details, etc. to fall on a member who has voluntarily joined and granted rights to the collecting society.

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).

No.

As stated above there must be a statutory disclosure obligation, which must require comprehensive disclosure of all complaints (including from licensees and right holders, *whether or not* relating to potential breaches of their codes, for reasons stated above) which they have received during a reasonable period prior to the application, e.g. 5 years, together with information about steps they have taken to deal with them. (Why more than only breaches of the code, see the answer to Q4 above.)

The need for the CMO Directive throughout the EU indicates *inter alia* that not all collecting societies have always acted with full transparency in the past. ECL is especially sensitive because a collecting society can grant rights which it has not been granted. Therefore absolute transparency, and the assurance of absolute transparency, is required.

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).

The SoS (obviously in reality the IPO) must be subject to clearly stated obligations in relation to protecting non-member right holders.

"Extending the benefits of collective licensing" (on p.11) states that "The IPO has a comprehensive mailing list of stakeholders to whom alerts for policy developments such as consultation launches go." This list must be publicly available on the IPO website (it could be possible to omit organisations if any do not wish to be publicly

identified - but those organisations would not be eligible to *operate* ECLs as secret consultation can never be appropriate in relation to licensing rights which have not been granted to the licensor) and any interested party must be able easily to have its details added, updated and corrected promptly.

We believe that the IPO should set up a transparency register like the EC's at http://ec.europa.eu/transparencyregister/info/homePage.do

The SoS must have an obligation to notify all on the list.

The SoS must have a statutory obligation to be pro-active in consulting right holders, who as non-members and thus not participating in an existing collective licence, are most likely not to know about or be on the lookout for an ECL application.

As stated above the Specified Criteria for the Code of Practice (Annex C) must require the collecting societies to "act in the best interest" and " deal transparently" also with non-members when operating an ECL scheme.

Further, non-members should have the right to claim individual remuneration not only where there may have been a higher level of use but also if they are dissatisfied with the agreed level of remuneration or with the internal remuneration scheme or rate card of the collecting society (see non-members' entitlement to "individual remuneration" instead of the "collective rate" as stated in "Extending the benefits of collective licensing" (on p.14) which needs to be added to the Regulations). In situations where it is difficult to prove the extent of use it should be possible to base a claim for individual remuneration on statistical samples.

Irrespective of whether a non-member has opted out or not, the ECL scheme should not apply in situations where there are any reasons to believe that the non-member would object to the exploitation (the non-member may for example have been criticised for the work or have changed his political views or religious beliefs[1]).

All the above minimum standards should be specifically articulated in the Regulations. Their appearance in other policy documents is not enough, as future changes must be subject to proper Parliamentary process. This is particularly important because of the potentially confiscatory nature of ECL if it is not fully and transparently regulated and the regulations are not effectively implemented.

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.

28 days is less than a month (except February) and bearing in mind that the issue is *non-members*, i.e. right holders who are not involved in collective licensing of their rights, it is hard to imagine that 28 days could ever be adequate.

90 days could be an appropriate minimum where only UK rights are involved.

If any foreign right holders are involved 90 days cannot be enough: the non-UK collecting societies affected will need time to canvass their members as to whether

[1] Illustrated in *Doktor Murkes gesammeltes Schweigen* by Heinrich Böll.

they want their rights in the licensed by ECL, and then those right holders must have opportunity to make their representations to the SoS. In most foreign countries, where ECL is not practised and even its principles are not known, the foreign collecting societies are likely to require considerably more than 3 months to explain the issues and publish them to non-members.

It is instructive to remember the almost total non-comprehension about ECL by all (right holders, licensors and users alike) at the IPO's first stakeholder meeting about ECL and Orphan Works in Westminster on 27 January 2012: the writer of this submission remembers the general disbelief of right holders' representatives when they were told that ECL could enable rights which had not been voluntarily granted to be licensed, and this despite the history of clause 43 of the Digital Economy Act two years before - so UK right holders have had several years to understand and get used to the idea of ECL, yet many individual right holders still have no idea of what it is. Foreign CMOs will have to go through this information process with their right holders and non-members, before they will be able to deliver meaningful consents to UK CMOs. Clearly this is not a task for 28 days.

It cannot be taken for granted that foreign right holders who are content with ECL in their own countries will be willing to have their rights licensed by ECL in the UK. For example, most foreign ECLs operate for narrowly limited uses in small markets and tightly controlled and transparent regulatory environments, and right holders may wish to see how the UK ECL environment develops before agreeing to ECL in the UK. They would also be likely to consider that the draft Regulations (in their current form) provide less security than their domestic ECL provisions, and could therefore be reluctant to agree to UK ECLs.

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.

The SoS must be obliged to have regard to existing exploitation in the industry sector concerned, specifically including licences offered by right holders themselves and licences offered through the Copyright Hub. This is because an ECL regime must not conflict with right holders' normal exploitation of their works (the Berne "3-step test").

Therefore any uses permitted under draft Regulation 3(2) must take into account all existing licences offered by right holders, and must not interfere with them; and draft Regulation 7(2) must permit the SoS to specify appropriate limitations to the use permitted under an extended collective licence, including for example limitations on the permitted use itself, quantities, media. Uses outside the specified limitations can be licensed voluntarily by collective or individual licences.

Regarding the applicant collecting society, we wonder whether the SoS is likely to be sufficiently informed about the detailed licensing practices of an applicant collecting society to be able to order relevant or workable conditions without consulting the collecting society itself.

Therefore we think that there should be an opportunity for consultation between the collecting society and the IPO after the SoS's initial finding, if he finds that narrowing or conditions are called for. We wonder whether it would be helpful to allow for such consultation (at the SoS's request) in the process.

(We imagine that there is much consultation between many collecting societies and the IPO anyhow, so we guess this would happen anyway – the process should be official and transparent, including introduction of transparency register like the EC's at http://ec.europa.eu/transparencyregister/info/homePage.do.)

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.

There should be a simple, inexpensive and unbureaucratic means by which right holders or groups of right holders can appeal an authorisation or conditions imposed at the administrative level, before court proceedings become necessary. As the essential issue is use of rights which right holders have not licensed, right holders should not be required in the first instance to mount a judicial review. The cost and time involved would mean that many ordinary right holders would not in reality be able to challenge any SoS decisions at all, thus making an ECL in effect a compulsory licence (for example, if right holders considered that representation and opt-out were inadequately provided for, but were unable to challenge).

As stated in the answer to Q9, we think there should additionally be some openly acknowledged consultation between the collecting society and the IPO, where the IPO sees the need for some adjustment.

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).

Depends on what is considered "proportionate."

As stated above (Q8) 28 days seems far too short to be realistic in any circumstances, if the purpose is genuinely to reach and inform non-members.

The proportion of potential opt-outs should be taken into account in assessing whether to authorise an application, and also renewal. However, this must be considered in conjunction with evidence that the reach of a collecting society's advertisement of its application to non-member right holders was effective.

Further, Nordic experience has shown that in reality the only effective safeguard for non-members in ECLs is the initial authorisation, of which the most crucial element is determining the question of representation: unless the collecting society not only represents a substantial number of the right holders, *but will also be in a position genuinely to represent the interests of the non-members*, an ECL is not authorised. This is because in reality the opt-out is not the great safeguard it is held out as: in collective licensing schemes of any size, opt-outs are in practice difficult for the collecting societies to enforce, and harder still for the individual non-member right holders to track (which they invariably have to, where sizeable licence fees are involved – even though they choose not to be part of the scheme).

Therefore, to say that "a non-member can always opt out" is not in reality enough.

It must be possible for a non-member, or groups of non-members, to challenge a proposed authorisation of an ECL scheme, *before it comes to opting out* on an individual basis. They must not only have enough time to be able to get to know about the proposal. There must also be a way in which their objections can be brought to the SoS's notice, he must have a duty to take them into consideration, and there should be a simple and effective appeal procedure (see our answer to Q10). Such objections may be that the collecting society is not numerically/ proportionately representative of right holders; but the SoS must also have a duty to consider other factors, such as the ability of the collecting society to represent the interests of a particular group of right holders adequately (a Swedish example was photographers: collecting societies/unions which represented professional photographers were not considered appropriate to represent the interests of amateur photographers).

The draft Regulations set out "6 – Authorisation procedure" and "7 – Notice of decision on authorisation." There should be two provisions in between these two sections:

(i) setting out how objections can be made (this is in fact referred to in 3.32 of "Extending the benefits of collective licensing" and should therefore be included in the Regulations) and

(ii) the matters which the SoS has a duty to take into consideration.

Further, §3.37 of "Extending the benefits of collective licensing" states that publication must be made in foreign countries where right holders are affected. This should be inserted in Regulation 7(6).

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).

5 years seems appropriate, subject to the possibility of a licence being terminated earlier if a right holder opts out (as proposed).

"Extending the benefits of collective licensing" says, "After expiry of the authorisation, the collecting society can re-apply…." This should probably rather be "during the last [year?] of the authorisation's validity," so that licences can be renewed as appropriate and there is no interruption of rights for the licensees (assuming renewal is approved).

Renewal should be strictly contingent on previous performance. Renewal must never be allowed to become perfunctory – because whatever the legal fiction, the collecting society is actually licensing rights which the right holder has not entrusted to it; and however much opt-out is emphasised, in an ECL of any size the majority of non-member right holders don't in practice have the chance to opt out until the ECL has been going for a considerable time – especially where foreign right holders are concerned. Also, as stated above, in practice opt-out is rarely

certain, and non-members always have to be on the look-out (they only receive payment usually 9 months or a year later or in the case of foreign right owners even later, so that is no help to them in policing the extended use of their exclusive rights).

Therefore, on renewal all the factors and criteria for granting authorisation must be reconsidered *ab initio*, and collecting societies must have a statutory duty of disclosure covering the whole previous authorisation period.

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

"Covering [*sc.* non-UK] territories," mentioned in 3.42 as an example, seems most unlikely to be appropriate (see answer to Q14 below).

"Strengthening opt-out procedures" also suggested in 3.42 emphasises the need mentioned in the answer to Q11 for non-members' objections to be taken into account.

There we said that the SoS must have a duty to take such objections into account in making his decision whether to authorise an ECL. Here, it is clear from "Extending the benefits of collective licensing" itself that the SoS must have an ongoing duty to take issues affecting non-member right holders into account throughout the life of an ECL, and also in considering an application for renewal.

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.

Time periods in relation to modification etc.

The "light touch" proposed in "Extending the benefits of collective licensing" doesn't correspond with the issues set out in 3.42.

Extending UK ECLs to territories outside the UK has serious consequences practically (for non-UK right holders and CMOs) and legally (concerning the UK's international treaty obligations to provide minimum standards including exclusive rights, which ECL potentially undermines). Modifications of existing ECLs for such purposes would require evidence of extensive consultation with the non-UK right holders, and legal consultation by the Government potentially including with non-UK organisations such as the EC, WIPO and WTO. For such issues, great care and caution are indicated, rather than a "light touch."

Time periods for representations in general

The 28 days in Regulation 6(2) is too short. The point of ***E***CL is that the right holders have not voluntarily granted their rights for licensing. Therefore, they may not even be aware of the prospect of their rights being exploited without their consent – this is, after all, not the usual treatment of exclusive rights, which owners are used to considering as their property to do with as they wish. They are unlikely to have databases and the administrative means of contacting many individuals affected quickly and easily. Potential interests of foreign right holders, including right holders who do not speak English, must be taken into account. It seems hard

to imagine that a period of less than three months, as a minimum, could be fair and reasonable.

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.

Compensation of right holders and licensees

How will affected right holders and licensees be compensated for any losses suffered by a collecting society's default? e.g. failure to manage opt-outs correctly.

It doesn't seem right that in particular a non-member right holder should have to sue to obtain recompense for mishandling of rights arising in relation to an ECL authorisation, who might well in fact not have known that her rights were being licensed at all (e.g. before – or in default of – distribution).

At least, the SoS should have the power to order a collecting society to compensate non-member right holders and licensees, if they suffer loss or damage through a collecting society's ECL-related failure.

The condition of "significant representation"

The Regulations should state that an authorisation must be revoked in the event that a collecting society during the five year authorisation period is no longer significantly representative of the right holders for the types of works in question.

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).

Revocation of authorisation to operate an ECL and suspension of an ECL scheme should be dealt with separately.

In the case of an apparent maladministration of an ECL, the SoS should have the power to stop the collecting society from at least issuing further licences, pending the outcome of the SoS's investigation including considering any representations by the collecting society. This power should be able to be exercised immediately if the apparent maladministration is serious.

Depending on the issues, a collecting society could require more than 21 days to assemble evidence for its reply, but this appears to be allowed for in the draft Regulations.

Elsewhere we have commented that the Regulations ought to embody the ECL policies fully, which as currently drafted they do not. This is necessary so that the grounds on which representations can be made, and the matters which the SoS must consider, are effective and comprehensive. This issue needs special care as the ECL regime will be effected and regulated by secondary legislation. The general tendency to draft the widest possible regulations, to give the SoS the

maximum leeway and make challenges as difficult as possible, needs to be resisted in this particular instance of ECL, since individual citizens' property rights are potentially confiscated and international obligations breached, if the regulations are not fully detailed, effective and enforceable.

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).

Yes. No organisation can be forced to stay in business or carry on a particular kind of business for ever.

Terminating a licence early could give rise to damage claims over and above a refunded licence fee. However penalties *per se* are unenforceable in English law.

Right holders must also be paid.

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

See answer to Q17.

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.

No.

In the first instance, not because of specific deficiencies in these particular provisions in the first instance – but because where ECL already operates, opt out in itself has been shown to be an ineffective and inefficient protection for non-members who do not wish their rights to be licensed under an ECL.

It is important that collecting societies comply with the opt-out rules, and if they apply to renew the ECL authorisation they must be required to provide evidence that they have, and details of any complaints and how the complaints were addressed.

The Regulations must provide that right holders can opt out in respect of all their works (i.e. if they choose to, opt out altogether without having to notify the collecting society of every individual work, including future works) or in respect of individual works or individual rights in works, groups of works or all works. (We use the term "works" but mean all rights covered by an ECL including rights in performances.)

§3.62 of "Extending the benefits of collective licensing" states that right holders wanting to opt out large volumes of rights must be able to do so – this must also be stated in the Regulations. (§3.62 refers to a procedure for multiple opt-outs in Regulation 4(4)(d), but there is no draft Regulation 4(4)(d).)

The Regulations must also provide that right holders can opt out prospectively. In

other words, a right holder who does not want its rights licensed must not have to opt out every time new works (or other productions) are published, or when an opted-out work is republished (e.g. in a second edition, or embedded in a new production).

Works or other productions can have more than one right holder. For example:

- the hardcover, paperback and e-book publishers of a novel can be different, and are all different from the novel's author
- works are embedded in other works, such as illustrations in a book, archive clips in a documentary film, various works and rights in a broadcast.
- all the right holders must be able to opt out (including in large volumes and prospectively).

The policy expressed in "Extending the benefits of collective licensing" appears to assume that right holders can immediately identify all their rights individually. This would be true of new digital rights, if their creators have handled them effectively (unfortunately not always the case). However, this is unlikely to be true of many large, long-established right holders with historic catalogues (e.g. an archive which has been gathering materials for many years, including acquiring whole collections from other archives; or a publisher which has been acquiring rights from authors, as well as buying up back catalogues from other publishers, for many years). Such right holders may need to opt out their rights covered by certain periods, or groups of rights identified in other ways, rather than by individual names of works or authors. This possibility must be recognised and provided for in the Regulations.

Also (§3.75) that a collecting society must maintain its obligations to an opted-out non-member until its authorisation ends – and, it must be added, until the society's obligations (e.g. to distribute revenues) are discharged, as this may be after the end of the authorisation (bearing in mind revenue distribution cycles).

However, the main onus of protecting non-members in an ECL scheme falls on the SoS, when he determines whether the collecting society should be authorised to extend an existing collective licence into an ECL. The following issues need to be clarified and strengthened in the SI:

- Although "Extending the benefits of collective licensing" starts by saying, "ECL is a form of licensing for which a collecting society is given permission *to extend an existing collective licence* to cover the works of all right holders in the sector, except those who opt out…" (our emphasis) *nowhere* in the SI is this basic principle actually stated. An applicant collecting society has to supply an existing collective licence, but the SI does not state that *this is the collective licence that will be extended* (or not, depending on whether or not authorisation is granted). This needs to be stated clearly and unambiguously (e.g. at Regulation 5(13) which only refers to works in general), as this is the absolute basis of ECL. We realise that the term "scheme" is used because of the existing structure and terminology of the CDPA, but it must be stated plainly that what will emerge from the SoS's consent is *an existing collective licence*, which will be extended on specified terms to include non-members' rights.
- Accordingly, Regulation 2 "Extended Collective Licensing Scheme" should

read "… a relevant licensing body may ~~grant~~ extend licences in accordance…."

- Therefore, the Regulations must also state clearly that an ECL may only confer on the user the right of exploitation provided by *the existing collective licence*, and must in any case include (a) which licence is being extended, (b) types of works to which it applies and (c) the right(s) of exploitation conferred by the licence.

- The SoS must be unambiguously stated to have a duty to consider all the various criteria which must be applied to determine whether a collecting society is adequately representative for an ECL authorisation. Criteria are scattered throughout the draft SI, and the SoS is empowered to make his decision, but the two things must be interdependent – otherwise it is not possible to mount a legal challenge against the SoS's decision. Which probably looks clever to the draftsman, and of course no one likes to assume any potential responsibility - but it is deceitful and the opposite of open and accountable government and only likely to result in challenge at the European level.

- Whether the collecting society is "proportionately" representative, comparing the number of right holders represented and not represented, is important; but it is not enough. The ability of the collecting society properly to take into account and represent the rights of the non-members must also be a decisive criterion (as it is in Nordic ECLs).

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.

There are many situations where 14 days notification to licensees of an opt-out is inappropriate, e.g. news media (where even 24 hours can be too long) and high value licences (where a right holder may lose considerable value if a non-exclusive licence remains in force). The SoS should be obliged to consider this time limit individually in relation to each application for an ECL, taking all the circumstances (including the types of work and uses) into account.

Different time limits may also be appropriate for different ECLs administered by the same collecting society, depending on the kind of rights and licensed exploitation.

The collecting society should be required to inform licensees *and non-members who are opting out* when use of the right must stop – otherwise the non-member may commence infringement proceedings against a still *bona fide* licensee, not knowing that the use is still licensed during the ECL's notice period.

"This is especially so where the work is of high value" (from "Extending the benefits of collective licensing") – this is one of the greatest causes for concern about the unprecedentedly wide possibilities for ECL which the UK is introducing. Nordic ECL is first and foremost used where there are many very low value transactions (like photocopying at one end of the scale, or making some digitised documents available on an internal library screen at the other) – the idea that ECL can be used

to grant high value licences where the right holder has not authorised the collecting society to do so is entirely novel throughout the world. This – combined with the doubtful efficacy of opting out – is why the application process must be tightened (especially the "representative" criteria) as explained elsewhere in this questionnaire.

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).

14 days may be appropriate for some ECLs which have a 6-month termination notice period.

However, it is plainly not appropriate for *all* ECLs to have a termination notice period of 6 months.

As stated above, the appropriate termination notice period in some media could be days or hours.

The appropriate time limit in which a collecting society must list an opted-out work must therefore be considered individually by the SoS in the case of each individual application to authorise an ECL, in the context of the media sector and the particular collective licence for which authority to extend is being requested.

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

The obligations are necessary, because an ECL could not operate without these obligations.

The obligations must be set out in the Regulations.

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.

Do you mean, *if the licence to use a right under the ECL terminates before the standard collective licence which has been extended to include the non-members' rights*?

If that is what is meant, it is essential that an ECL (i.e. a right licensed under an ECL, where the collecting society does not hold the right from the right holder) must be able to be terminated in accordance with the criteria appropriate to the right and its use in the relevant media (as explained above) and this may well be before the general voluntary collective licence terminates.

In any case, most collective licences roll on for many years, the anniversaries (whether annual or longer) being in reality a formality of no practical significance to the right holders or users, and of which both are unaware.

Anyhow, it is standard practice for works to fall in and out of collective licences during their term (e.g. members leaving, members migrating to another collecting society, works entering the public domain) – both collecting societies and collective users are fully used to dealing with this. Therefore, there can be no problem with ECLs terminating other than on the anniversaries of voluntary collective licences.

(We hope we haven't misunderstood the question.)

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.

We assume that you mean *Six months until the use licensed by the extended collective licence ceases* and not *The collecting society can continue to issue licences to users for six months*.

The latter would not be acceptable, as in the case of a 5-year licence term (proposed as policy elsewhere) licensed use would continue for 5 and a half years.

In the case of the former, it is hard to see that longer than 6 months could be acceptable, in dealing with rights whose holders have not granted the rights to the collecting society – longer than that must surely be approaching some kind of compulsory licence (even taking into consideration the possibility of opt-out).

On the other hand, some uses require certainty for longer periods than 6 months, e.g. where revocation of the licence means that the work/production which incorporates the licensed rights must be destroyed or is no longer viable.

The conclusion must be that these latter situations are not suitable for ECL, even though a voluntary collective licence may be in operation in the sector - i.e. the rights must be got in from a willing licensor. Sadly, it has to be acknowledged that ECL isn't appropriate in all situations.

The obligations of the ECL operator should run not for 6 months (as in "Extending the benefits of collective licensing" § 3.75) but until all the obligations of the ECL operator to the opting-out right holder (including financial obligations) have been fulfilled. Bearing in mind revenue cycles, this is likely to be more than a year after the licensed use ceases.

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 that such treatment would be contrary to European law. The GEMA I case (*Gesellschaft fur Musikalische Auffuhrungs—und Mechanische Vervielfaltigungsrechte (GEMA) v. Commission of the European Communities* (1971) O.J. L. 134/15) for example, made this clear as amongst members - but clearly the same principles must apply in the case of non-members where the collecting society is licensing their rights and receiving income from them.

An affected non-member right holder, or a group of them, must be able to refer the

payment to the Copyright Tribunal. She – or they – must be able to claim individual *actual* payments from collecting societies and have these reviewed by the Copyright Tribunal, as well as collecting societies' rate cards.

Above we have also stated that a non-member dissatisfied with individual remuneration needs some kind of appeal to the SoS, as an individual right holder may not have the resources to make a reference to the CT, and where non-licensed rights are concerned the burden of that is likely to be unfair. The same applies to this issue. This is because if collecting societies can in reality not be challenged over their licensing of unlicensed rights (where a legal route exists but is not accessible for cost or other reasons) a *de facto* compulsory licensing regime will develop, in reality.

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

See Regulation 16(4) – add "rate" – it isn't only "level of use." Non-member right holders must be able to challenge the collecting society's rate card ("collective rate" is mentioned in "Extending the benefits of collective licensing" but not in the Regulations).

And not only "collective rate" because non-members must be able to get "individual remuneration" instead of the "collective rate" – this is stated in "Extending the benefits of collective licensing" (on p.14) but is not in the Regulations, to which it needs to be added.

This non-members' right to individual remuneration should be stated in the Regulations, and also in the Code of Practice.

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).

Some collecting societies already have a practice of holding royalties which they receive in respect of non-members' works in suspense accounts, and pay them out on appropriately authenticated claims.

Others appear to apportion licensing revenues by more arbitrary methods, sometimes even unsupported by empirical evidence of use of the rights for which the licence fees are charged.

The former collecting societies can potentially manage in an ECL environment.

The latter collecting societies should not be granted authorisation to operate ECLs.

The potential for fraudulent claims will be greater where a collecting society will distribute to non-members who are outside the UK (e.g. difficulties in authenticating non-English language and non-English law right ownership documentation), yet it is in this area that collecting societies will need to be especially diligent in paying non-members, whose international treaty rights will otherwise potentially be infringed.

The SoS should have a duty to satisfy himself that receipt and payment of licence monies is properly correlated to actual use of licensed rights (including statistical analyses where appropriate) and that appropriate safeguards are in place for authentication of claimants before authorising an ECL.

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.

As a basic principle, a non-member right holder should not be penalised because an ECL user (or, indeed, an ECL operator) fails to provide adequate rights information.

There is much excuse for inadequate historic rights information. But today, where rights are being used in a new production, especially a digital production, there is no satisfactory reason why rights information should not be properly recorded and processed.

Therefore, if licensees cannot provide adequate rights information, an ECL should not apply.

Otherwise, the ECL regime will simply become an excuse not to clear rights properly – which is exactly what many right holders fear.

The late Charles Clark's dictum, "The answer to the Machine is in the Machine" has proved true of digital production – as Richard Hooper has emphasised in his work on the Copyright Hub: many rights-related sectors which in the analogue age could not have functioned without collective licences, can and indeed do in the digital age now function on an entirely transactional basis. *ECL must not be allowed to become an excuse to perpetuate outdated business methods*.

Under the CMO Directive (likely to be enacted shortly) any use by the Crown of undistributed monies will be limited to the funding of "social, cultural and educational activities for the benefit of *right holders*" (our emphasis). Draft Regulation 17(3) and (4) should therefore limit the Crown's potential use of undistributed monies accordingly, in particular making a clear distinction between the class of right holders which must be benefited - i.e. including non-members, and excluding members of the collecting society whose rights are not included in the licence in question.

Question 29: What is the appropriate period of time that should be allowed before a collecting society must transfer undistributed monies to the Crown? When this happens, should there be a contingent liability, and if so for how long should it run? Please provide reasons for your answer(s).

Every ECL authorisation must include an ongoing obligation on the collecting society to find absent right holders (and the SoS must assess its ability to do this, as part of the authorisation and renewal processes).

Monies should be retained for a minimum of the period of limitation, measured from the end of the cycle of distribution of the relevant funds.

Draft Regulations 17(3) & (4) should specify the minimum obligations.

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.

No.

The collecting society must be obliged to use reasonable efforts to identify, find and pay absent right holders including non-members.

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.