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	**Michael Mabe**
Job Title	**Chief Executive Officer**
Organisation Name	**International Association of Scientific Technical and Medical Publishers**
Organisation's main products/services	**Industry association for publishers**

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).

Answer: A collecting society applying to extend an existing collective licensing scheme should have had a voluntary scheme for the same uses in place for at least 5 years. STM believes that a successful applicant for an ECL should have standing both in the sense of competency and expertise in the proper administration of a scheme for such uses and in the sense of being known to the likely markets of rightsholders and users for that ECL in the UK and even other English-speaking countries. A sound track record should be essential for a successful application (see the answer to Question 4).

As a result, Regulations 3(4) and 4 (especially 4(9)) should be amended to insert these qualifications, and there should be a cross reference in Reg 3(4)(a) to licensing schemes and licensing bodies in terms of Section 116 CPDA.

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?

Answer: STM has no specific additional proposals in relation to the determination of sufficient representativity of UK rightsholders at the time of first application.

So far as foreign rightsholders are concerned, a successful applicant should have current bilateral agreements with foreign counterparts, especially with its counterparts in other countries where English is an official language and from which countries works originate in respect of which there is significant use in the UK. The Regulations should therefore require an applicant to provide proof of the existence of such bilateral agreements, and Reg 4(15) should therefore specifically deal with the publication of the application to foreign rightsholders, as is suggested in the Consultation Document.

The reasons for proposing this are, firstly, that English is an international language and is the official language of, and is spoken in, many countries of the world. This is a feature which would distinguish a UK ECL from the Nordic model. Secondly, a large variety of languages are spoken in the UK by its migrant and immigrant communities. As a result, a large number of foreign rightsholders are bound to be affected by an ECL scheme in the UK, and there will be practical difficulties in finding and verifying the existence of such foreign rightsholders. Thirdly, an ECL in the UK will exist in a market that is a prime licensing target for many foreign rightsholders, meaning that a UK ECL has a far greater potential for interfering with some foreign rightsholders' primary sales and existing relationships in the UK.

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).

Answer: STM agrees with a threshold of 70-75% rightsholder support, provided that it is coupled with a minimum of a similar percentage of works mandated by the supporting members out of all the works with which the collecting society is mandated.

However, we anticipate that, considering the structures of existing copyright management organisations, a simple requirement of "75% membership support" might be too simplistic, even impractical, and that further deliberation may be required to determine the threshold that is appropriate to the circumstances. For instance, in addition to overall membership support, it may be advisable to divide the membership into classes for determining support for specific licences. (For instance, STM would want to see a significant threshold of support from members/rightsholders who publish scientific, technical and medical works for an ECL that would cover the use of such works and not find themselves "outvoted" by other members/rightsholders.) This requirement needs more discussion, but STM will continue to maintain that the threshold should be high, both so far as representation of rightsholders and works mandated, for the reasons set out in the answer to Question 2.

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).

Answer: Yes.

Such supporting information should include:

- **Details of all complaints made against the applicant by rightsholders (members and non-members), whether on the ground of breach of its code of conduct or otherwise, ,over the preceding 5 years and how those complaints were resolved or dealt with.**
- **History of collections and distributions over the past 5 years.**

The need for this kind of information relating to an applicant's track record is why we propose that an applicant should be a collecting society operating an existing collective scheme (see the answer to Question 1).

Regulation 4(10) should be amended accordingly.

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.

Answer: In principle, a collecting society must never treat members and non-members unequally. Doing so would expose an ECL scheme to objection under Section 129 CPDA.

Having said that, STM considers that there should be a differentiation in favour of non-member rightsholders to cater for a general duty of to contact non-mandating rightsholders (i.e. non-members), coupled with a specific obligation to do so if the work's demand under an ECL exceeds expectations, in other works specific procedures should be considered to reach non-member rightsholders whose works are used frequently or intensively under an ECL. The collecting society's track record in contacting such rightsholders is also something which should be considered in an application for renewal (see the answer to Question 12). (In this regard, there are analogies with the procedures contemplated in the Memorandum of Understanding on Out-of-Commerce Works concluded under the auspices of the European Commission in September 2011 - see http://www.researchinformation.info/news/news_story.php?news_id=839**.) We submit that such a differentiation does not constitute in a preferential treatment in the sense of normal licensing and distributions under the ECL, but is a practical consequence arising from handling the rights of rightsholders which have not mandated the collecting society and is therefore reasonable and necessarily required in the circumstances.**

Finally CMOs administering an ECL may be obliged to take more extensive steps to find non-members for the purpose of distributions (see the answer to Question 29).

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).

Answer: See the answer to 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).

Answer:. On the basis that there will be (1) robust opt-out provisions (answers to Questions 19-22), (2) substantive examination of proposed permitted use (answer to Q9) and (3) limited authorisation and renewal periods (answer to Question 12), we do not propose additional minimum standards to protect non-member rightsholders.

We would, however, want to clarify the enforceability of the standards which have been proposed. There are no penalties foreseen in these draft regulations for failure to comply with the standards to protect non-member rightsholders and, in addition to penalties proposed in the draft Collecting Society Regulations, a persistent or repeated failure on the part of a licensing body to enforce such standards (eg by failing to implement opt-outs) should at the very least be one of the "specified criteria" to be considered by the Secretary of State in the renewal of an authorisation.

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.

Answer: STM proposes a minimum period of 90 days for all cases. The reason for this is that the works of foreign rightsholders will invariably form a significant component under any UK

ECL (see the answer to Question 2).

So far as the publishing industry is concerned, STM would like an assurance that the IPO will send notices of applications relating to the use of published print works to trade associations such as international publishing organisations (including STM itself), all country-based publishers' associations, especially in countries where English is widely spoken or an official language and publishers associations in the European Community.

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.

In considering any application, the Secretary of State must define the permitted uses in respect of an ECL so as to avoid the authorised permitted uses covering the legitimate interests of rightsholders to license their works directly, which definition must also exclude the scope of the licences to be provided under the Digital Copyright Exchange, once it starts its activities.

It still has to be borne in mind that an ECL can amount to a limitation to the rightsholder's exclusive rights of copyright and must in itself never be considered "normal" exploitation of those rights. No ECL should therefore extend to uses that would conflict with a normal exploitation of their works or unreasonably prejudice the legitimate interests of the rightsholders. Therefore, any "permitted uses" to be authorised under Regulation 3(2) should take into account at least all existing licensing undertaken by rightsholders in the sector concerned.

Regulation 7(2) should explicitly allow the Secretary of State to limit the scope of a permitted use that has been applied for.

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.

No opinion.

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).

Answer: STM agrees with the principle of proportionality. However, for the reasons set out in the answer to Question 2, we believe that the bar must be set quite high.

A publicity campaign in the publication sector should cover the ground set out in the answer to Question 8.

The scale of opt outs is a factor which should be taken into account in any application by the successful applicant to renew its authorisation for the ECL.

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).

Answer: STM agrees with the 5 year authorisation period. Any renewal period should also be for a maximum of 5 years.

The information needed for a renewal must take into account factors that necessarily follow

from the ECL having been authorised for the preceding period. These factors include:

- **A report on efforts to communicate with rightsholders who are not members and whose works have been subject to intensive and frequent use, for the purpose of distribution and also to encourage them to become a member. (See the answer to Question 5.)**
- **A report on opt outs over the preceding period (see the answer to Question 11).**
- **Compliance with the code of conduct applying to the ECL as well as the Regulations (see the answer to Question 15).**

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

Answer: STM agrees that a modification should not allow a broadening of permitted uses or of an ECL mandate generally.

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.

Answer: STM has no objection to the time periods proposed.

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.

Answer: Provided that criminal conduct on the part of the collecting society or its officers and the failure to comply with these Regulations are considered a breach of the code of practice or conditions of authorisation, STM does not propose any additional ground of revocation.

If a breach is remedied before a revocation takes place, then provided that such remedy means that members and non-members will still be in a position to receive full payment of the amounts to which they are entitled and any interest for any delay in distribution, then STM would not insist on a revocation of the authorisation. However, all material breaches affecting rightsholders, including those that have been remedied, should be taken into account in considering any renewal of an authorisation.

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).

No opinion.

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).

Answer: Yes, but subject to sufficient prior notice for the benefit of non-members – see the answer to Question 8. If there is sufficient notice, then STM would not insist on penalties.

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

No opinion.

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.

Answer: The opt out provisions are deficient if interpreted literally, namely that they only relate to "a copyright work." STM submits that it should be possible for a rightsholder to opt out all of its works, whether existing or future, and that therefore an opt out should be capable of definition by identification of the rightsholder and not only of the work.

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.

Answer: STM agrees with both postulations, but may need to revise its position if there were to be contrary developments once ECL schemes are up and running. The acknowledgement should contain the termination date (just as the notices to licensees are required to do).

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).

Answer: STM agrees with both postulations, but may need to revise its position if there were to be contrary developments once ECL schemes are up and running.

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

Answer: Subject to its answer to Question 19, STM agrees with the postulations in paras 3.66-3.68, but may need to revise its position if there were to be contrary developments once ECL schemes are up and running.

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.

No opinion.

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.

Answer: STM has no objection to the six month period on the basis that it means that all licensed use under the ECL must terminate at the end of the six month period.

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.

Answer: Yes, since this is in line with a rightsholder's right to the normal exploitation from the use of his or her work.

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

Answer: Yes. This is a safeguard for a non-member whose works are frequently and intensively used, and is in line with a rightsholder's right to the normal exploitation of the use of his or her work. Having said that, the standard to which the individual remuneration should

be measured should not be the remuneration which the rightsholder would have obtained from a direct licensing, but the remuneration that is reasonable when compared to the remuneration from collective licences for similar works which have a similar frequency and intensiveness of use. In this regard, we note that the proposal for the principle of individual remuneration goes hand-in-hand with the non-member having to prove its entitlement to the remuneration.

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).

Answer: Managing an ECL in a country with an international language (that is, the UK with English), with the resultant probability of significant distributions to non-members in other jurisdictions, does in STM's view hold the prospect of fraudulent activity needing special solutions. For instance, this is more the case here than in respect of ECLs in the Nordic countries. In this regard, the UK ECLs with be charting new territory. It is, however, beyond STM's remit to advise on what such solutions could be, and Government would be well advised to consult specialists in the field.

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.

Answer: Existing collecting societies would be in a better position to answer the first question from their own experiences of existing licensing schemes.

In response to the second question, STM believes that undistributed licence fees due to non-members should be retained as long as possible. This is especially so if the works of a specific absent rightsholder / non-member is subject to intensive use. There could be an exception in respect of licence fees collected for works which turn out to be orphan works if there is specific legislation in place to deal with orphan works, in which case it might be possible to deal with those funds in accordance with such other legislation.

In line with the European CRM Directive which may be passed into law early in 2014, any direction by the Crown relating to the use of undistributed moneys will be limited to the funding of "social, cultural and educational activities for the benefit of rightsholders."

We therefore submit that Regulation 17(3) and (4) should be amended so as not to allow the default of simply transferring undistributed licence fees to the Crown.

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).

Answer: STM believes that undistributed royalties due to non-members should be retained for as long as possible, and that there should not be an obligation to transfer such monies to the Crown, except perhaps following the liquidation and winding up of a collecting society in line with laws on bankruptcy prevailing at the time.

In line with the European CRM Directive which may be passed into law early in 2014, any decision on undistributed monies must be taken by the general assembly of members of the CRM, and we submit that it would be in order to bring in similar rules here, albeit subject to an obligation to take reasonable and diligent measures, on the basis of good faith, to identify and locate the relevant non-members. There should be a specific obligation to find an absent rightsholder / non-member whose works have been subject to subject to intensive use. (This would be one of the practical differences between the treatment of members and non-members – see the answer to Question 5.)

We therefore submit that Regulation 17(3) and (4) be amended so as not to allow the default of simply transferring undistributed licence fees to the Crown.

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.

Answer: No. There is no obligation on the collecting society to undertake reasonable and diligent measures, on the basis of good faith, to identify and locate absent rightsholders, especially if they are non-members. STM also does not consider that the default position of transferring licence fees due to absent rightsholders to the Crown to be fair. This is especially so in the circumstances facing a collecting society managing a UK ECL for the reasons described in the answer to Question 2.

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.