

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	Nancy Chillingworth
Job Title	Intellectual Property Officer
Organisation Name	Natural History Museum, London
Organisation's main products/services	Visitor attraction and science research centre.

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. Some of the most culturally, historically and scientifically beneficial uses of an ECL scheme would be to enable the mass digitisation of museum, library or archive collections. Such is the variety of works within these collections that affected rights holders, where they are identifiable, will include members of collecting societies and those unrepresented. Such collections cannot currently be digitised without work-by-work rights clearance as collecting societies do not currently have a mandate to operate schemes for mass digitisation. Under the proposals a licence for mass digitisation cannot be offered until an ECL mandate is granted by the Secretary of State. Consequently, as there is no existing licence scheme to be 'extended', imposing a minimum period of operation is impossible.

Question 2: What kinds of efforts should a collecting society have to make to demonstrate it is significantly representative? For example, how easy would it be for a collecting society to produce evidence of total numbers of mandates and works?

Question 3: Do you agree that a 75 percent threshold for membership support is appropriate? If not, what would be a better way to demonstrate membership support and consent? Please provide reasons for your answer(s).

There should be some flexibility in how this is measured as it is unlikely that a collecting society could secure responses from all existing members, if indeed they are able to ascertain what 100% response

would be. If a test of representativeness is to be numerical, it would be easier to measure if taken as 75% of those who vote, rather than 75% of overall members, many of whom may not express any opinion.

Given the difficulty in measuring representativeness numerically, it would be sensible to allow flexibility for collecting societies to measure this in other ways.

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 protections for non-member rights holders articulated in the proposed regulations seem appropriate.

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, these seem proportionate.

Question 9: In what circumstances, other than as described above, do you think an application should be narrowed or made subject to certain conditions, without the application being rejected? Please provide reasons for your answer.

The proposals seem adequate to protect creator interests, while facilitating mass digitisation and other digital library projects.

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. There should be the option to appeal against a refusal to grant an ECL mandate as the judicial review process would be inappropriately onerous. Reliance on judicial review could jeopardise educational, scientifically or culturally important projects which rely on third party funding conditions and timed delivery.

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).

Yes.

Question 12: Do you agree that a five year authorisation is appropriate? If not, please explain why not. What information should be required of a collecting society when it reapplies for an authorisation? Should this be contingent on the performance of its previous ECL scheme? How light touch can the re-application process be? Please provide reasons for your answer(s).

No.

Any time limit imposed on a collecting society's authorisation from the Secretary of State should not filter to the duration of licences it is allowed to grant. We support the British Library's position that a 5 year period of authorisation is too short and would not offer value for money for public institutions investing in digitisation projects. The duration of the licence should be determined between the collecting society and the digitising library or archive.

Question 14: Are the proposed time periods for representations and Secretary of State decision adequate? If not, please explain why not, and make a case for a different time period or periods.

Yes.

Question 15: Aside from breaching its code of practice or the conditions of its authorisation, are there any other circumstances in which revocation of an authorisation might be justified? If so, please specify those circumstances and give your reasons why. What, if anything, should happen if a collecting society had breached its code but remedied it before the Secretary of State had imposed a statutory code? Please provide reasons for your answer.

In circumstances where a collecting society has breached its code of conduct there should be provisions in place to protect and support licensees to ensure licensed works can continue to be used for the duration of the licence granted should permission to operate an ECL be revoked.

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

If cancellation is to be permitted there should be provisions in place to ensure licensees are not adversely affected and can continue to use works licensed prior to cancellation for the duration of the licence granted.

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

As above, the validity of licences already granted should not be affected, particularly if they relate to non-commercial use.

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.

Yes.

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.

Any revocation or cancellation should adequately consider the public interest in making works available for as long as possible for non-commercial, educational or research purposes, where individual rights clearance or use of an 'exception' are not possible. As mentioned above a 5 year licence is not adequate to encourage or enable library digitisation projects of in-copyright works.

Question 26: Do you agree with the principle of individual remuneration in ECL schemes? Please

provide reasons for your answer.

It is vital that for business continuity purposes, and enabling mass digitisation projects that clear pricing is agreed upfront.

Question 28: To what extent is incomplete or inaccurate data from licensees an issue when it comes to the distribution of monies? If a non-member rights holder fails to claim monies due, what uses of those funds should the Crown promote? Please provide reasons for your answer.

The data supplied to CMOs will vary in completeness for digitised library collections; for monographs it will be simple to provide author information, whereas for journals author level information is not available via standard library management databases, nor are details of embedded copyright works. Similarly library collections will contain orphan works for which it may be impossible to provide author or rights holder information.

If a non-member rights holder fails to claim monies due, these should be used to reimburse licensees either directly or indirectly through distribution to support related sector activities.

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.

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