

Extending the benefits of collective licensing: Consultation on the UK's new extended collective licensing scheme

pact.

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Executive summary

Overview

- The UK's audiovisual sector plays an important cultural role in people's lives and makes a significant economic contribution to the UK. In 2012, sector revenues for the UK independent production sector were £2.8 billion¹.
- An effective copyright regime is vital to securing future growth in the sector.
- Content producers are both rights holders and rights users and therefore have an interest in fair access to available rights, provided that rights holders are adequately compensated for their use.
- Pact responds to each of the questions in the consultation on extended collecting licensing but highlights the following to provide an overview:
 - Collecting societies should have been in existence for 5 to 10 years before they qualify for extended collective licensing
 - Representation should involve a significant proportion of companies and exceed the 75% threshold
 - Collecting societies must demonstrate previous adherence to the code of practice and such a code should be independently audited
 - An appeal system should be put in place
 - Pact comments where the minimum periods of representation are not sufficient as currently drafted
 - Further definitions are needed to clarify the draft 2014 Regulations
 - Money collected from non members should not benefit members alone and vice versa

¹ Pact Census Independent Production Sector Financial Census and Survey 2013, by Oliver & Ohlbaum Associates Limited (July 2013)

Introduction

- 1) Pact is the trade association that represents the commercial interests of the independent production sector.
- 2) The UK independent television sector is one of the biggest in the world, with revenues of £2.8 billion in 2012.²
- 3) The copyright licensing framework underpins growth in this sector. It enables rights holders to exploit their intellectual property by controlling access to their content which they use to generate revenues to invest in future productions.
- 4) The UK copyright framework is considered to be one of the best in the world. It has been effective in enabling competition and growth in the television production sector, and as a result:
 - The UK is now the second-largest exporter of television programmes in the world.
 - Audiences in the UK and across the globe have had access to high-quality, thought provoking and entertaining content in a range of different genres, much of which is provided free-of-charge via television broadcasting.
 - The flexibility of the copyright licensing regime has allowed independent producers, including many SMEs, to adapt to changes in market conditions and find new business opportunities in the UK and overseas.
 - There are now many examples of audio-visual content producers working with non-linear digital content providers to create new, innovative content and services for consumers in the UK and elsewhere.

² Pact Census Independent Production Sector Financial Census and Survey 2013, by Oliver & Ohlbaum Associates Limited, July 2013

- 5) Any disruption to the ecology of this complex market would have a significant impact on UK original content production.

- 6) Secondary sales rights are vital to the continued growth of the UK creative industries. Any changes to the existing IP regime must take into account the value of these rights and the potential impact which changes would have on content producers in this sector.

- 7) For further information on this issue please contact Pact's Head of Legal Affairs, Amanda Russell at amanda@pact.co.uk or on 020 7380 8237.

Consultation Questions

- 1. Should a collecting society that is applying for an extension of an existing 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).**

A collecting society's scheme should have been in place for a minimum of 5 to 10 years. The scheme should be fully operational, working in practice to agreed criteria and have been concurrently active for that period of time. The current length of some of the collecting societies is worth considering, for example BECS (British Equity Collecting Society), which has been actively in place since 1998, in comparison with Directors UK which was set up in 2008. A minimum of 5 years is an appropriate time for a scheme establish itself with members, gain recognition of its representation in the industry as well as implement the scheme's rules and codes of practice. These attributes can only be established through a functioning society. In addition, a collecting society should be not-for-profit organisation.

- 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 collective society to produce evidence of mandates and works?**

A collecting society should have to use best endeavours to provide evidence of mandates and works, such efforts to include conducting surveys of existing members and the industry as a whole (including other industry bodies). A number of factors should be considered including percentage of revenue controlled by the collecting society compared to the revenue generated by the rights holders affected by the scheme as a whole (ie. the financial implications of granting the authorisation should be considered) as well as the ability to demonstrate that the number of members constitutes a significant proportion of

the possible overall representation. For example, would the society qualify for status in the list under the Trade Union and Labour Relations (Consolidation) Act 1992 to enter into collective arrangements? Alternatively, it may be that the IPO considers developing a qualification list where a society may not have not been established and recognised by the industry. Pact would be concerned if a small number would qualify for them without a genuine establishment of representation.

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

Pact considers this to be an appropriate threshold, however, the 75% should be achieved in ballot and not a roll over. The ballot should be undertaken by independently recognised electoral reform services.

- 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).**

Pact considers that any failure to comply with a code of practice would undermine the collecting society, demonstrating its ability to be fair and transparent to non members. We therefore consider that a collecting society must have an established code of practice with members and also establish a complaints system for members. An independent audit should be required to establish compliance of to the code of practice when applying for authorisation.

- 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 answers?**

Pact considers that in order for stakeholders to have confidence in any extended collective licencing scheme that a collecting society must treat their members and non-members equally in order to be transparent and fair.

- 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).**

Pact does not consider a signed declaration is sufficient, as already explained in the submission, an independent audit should demonstrate adherence to their code. The basis for this should be universal terms in order for the comfort of non members who do become aware, so that they may feel confident that they are not being treated unfairly. Due to the potential impact of extended collecting licencing, adherence to the code is paramount, as is an open, effective and efficient system to deal with complaints. This enables confidence to users of such licences as well.

- 7. Is there a need for any additional minimum standards to protect non members' 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).**

It is not clear from the ECL regulations how these are considered to be protections and this should be made clearer. Pact believes that, provided an independent audit establishes that a collecting society has adhered to its code of practice, proof of its 75% of representation on one ballot (undertaken by an

independent election monitor) should be sufficient. There should be an appeal system in place for members, as well as non members within the collecting society and failure to adhere to such a scheme in relation to non members could result in an entitlement to lodge an appeal via an appeal system under the ECL regulations. There should be no prejudice to a particular subgroup of non members.

Pact appreciates that there is no established appeal system in the ECL regulations and considers this should be implemented in the legislation.

An ECL collecting society should be “not for profit”. Also the IPO could consider introduction a flat fee for administration costs across all collecting societies. There could be more controls introduced over how the collecting societies are run i.e. collecting societies must operate efficiently and their financial provisions (e.g. fees charged etc.) should be reasonable.

8. Are the minimum periods for representations and subsequent Secretary of State decision sufficient and proportionate? If not, please explain why not, and make case for a different period or periods.

Pact does not consider that the 28 days is an appropriate time for representations to be made by the industry.

This position takes into account the fact that UK trademarks are open to opposition for 2 months with a further one month extension from the date of advertisement of the application by an opponent. Whilst community trade marks are automatically open for a fixed three month period from the date of application. This time frame has been shown to be a fair and effective time frame to allow genuine oppositions to be made which can help inform the Secretary of State's position.

Anything less would be unfair, given the time needed to collate evidence. It is too short a time for any company to consider and appropriately respond with evidence, given the timeframe in which the Secretary of State can respond is 90 days. This time frame should also be granted to those making representations and allow appropriate evidence to be put forward. Given that an applicant is not limited to the number of times it can apply for authorisation, the time frame must be extended to allow for adequate and fair responses.

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.

Pact does not consider that any application should be narrowed or made subject to certain conditions. If the Secretary of State considers a narrowing of the application is required or further conditions should be imposed, the application should be rejected and, applicants have the opportunity to re-apply.

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

Pact considers that there should be an appeal route in place. However, this is not for collecting societies to appeal a Secretary of State decision but an appeal procedure where a member or non member can appeal against the grant of a licence where a licence has been granted and the member or non member has evidence to show that it should not have been granted. This could initiate the revocation procedure under the ECL regulation or an appeal to the Copyright Tribunal which, if successful, allows the appellant to appeal to the Secretary of State for revocation.

Pact highlights that the 'code reviewer' is not defined within the draft Copyright Regulations 2014 nor is the proposed 'ombudsman'. Pact is concerned that the opt-out appears to be the main arrangement for protection, which is not sufficient.

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).

Proportionality is important however there needs to be a period of time in which the society has to make efforts to actively publicise. In addition, there should also be consideration given to the type of publication to publicise which is relevant to rights (the publications should be market appropriate and have a readership composed of a reasonable proportion of the rights holders in that market), the types of rights holders and possible territory where non members maybe located.

If there is a question about the collecting society's representativeness, the application should be rejected and the collecting society should have to re-apply.

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).

Pact recommends that in three years a review of the 5 years is undertaken to see if this is an appropriate time frame and if it is effective.

When reapplying the collecting society should go through the same process again, that 75% of membership is in agreement, that the codes of practice are transparent and have proven fair to members as well as non members.

Pact does not consider a light touch approach is appropriate for a reapplication, as factors may have changed in respect of the scope, behaviour of that collecting society and transparency.

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

Pact does not agree to a modification to an authorisation.

14. Are the proposed time period 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.

As described above Pact does not consider that the 28 days is an appropriate time for representations to be made by the industry.

We consider that an appropriate time is 3 month period for representations to be made.

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 answers.

Pact considers that where there will be a distortion in market price or other competition law concerns, this should be addressed by the Secretary of State; also where the collecting society becomes a “for profit” organisation.

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).

As described above Pact does not consider that indicating that 28 days or ‘no timeframe’ is an appropriate time for representations to be made by the industry.

We consider that an appropriate time is 3 month period for representations to be made.

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).

Pact agrees that it can cancel its authorisation and become inactive in terms of new licences but this should not have the effect of terminating the ECL rights granted prior to cancellation. Pact is concerned about how collecting societies will deal with errors in respect of opt outs, for example if someone hasn’t opt out but they noted that they had and doesn’t make payment to the member. How will this be dealt with?

18. Is this a reasonable and proportionate requirement? Please provide reasons for your answer(s).

Pact is unable to provide a view in this respect. Licences should continue rather than the collecting society providing a repayment to licensees of the ECL. If used

in an audio visual work if the licences are terminated, even if part of the licence fee is returned, revocation or cancellation of a licence could have huge financial implications. Therefore it should be that no new licences can be granted but existing licences are honoured.

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

In some instances there should be an ability for rights holders to opt out generally without the necessity for such rights holder to identify each and every work.

20. Do you agree that the 14 day 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?

We consider that the 14 day limit for acknowledgement is a reasonable time frame.

It is difficult for Pact to make assertions as to whether there is a likelihood of fraud. Pact is aware that there is a possibility of disputes in terms of who asserts copyright and that this may cause difficulties. In terms of piracy, a number of people copy other peoples work and may attempt to assert rights, however it is not an area in which Pact can provide any further information.

21. Do you agree that the proposed 14 day time limit is a reasonable amount of time for the collecting society to list a work that has been opted out,

and works which have been opted out? Please provide reasons for your answer(s).

This is a reasonable amount of time for listing an opt out work. Pact considers that there should be a time limit for the collecting society to verify, before opt out.

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

These appear to Pact to be reasonable. There may be issues of members and non members at making such a list available; however, Pact is unable to provide any such views at this stage in this matter.

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 periods and ended at different points of the year?

Pact considers that when a licence is granted, the licence should run until the end of the licence period originally granted so give the licensee certainty of time frame. If there was an immediate end to the licence, this would cause many issues for a licensee for example, if used in an audio visual work such as a change to the licence, as a result of a revocation or cancellation, could have huge financial implications. Therefore, when an authorisation is revoked or cancelled, no new licences should be granted by the collecting society but licences granted prior to the date of such revocation or cancellation should be honoured.

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.

If a work has been licensed legitimately under an authorised licence and paid for then that licence should not be able to be revoked. Any new licence should not be granted but a licence that has been granted should be honoured. In the instances of audio visual works, this would have huge cost implications to remove.

25. Do you agree with the proposal that money collected for non members cannot be used to benefit members alone? If not, why.

Money collected for non members should not be used for the benefit of members. It would be inappropriate to provide member's money to other members and the same principal applies for non members. The basis of extended collective licence should not be a benefit to members otherwise the basis for extending is undermined as to being fair.

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

The basis for this is not clear. Pact considers that such individual remuneration within a collecting society may lead to higher overall rates being forced rather than as a result of independent negotiations with the copyright holder who wish to opt out.

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 undisputed monies? If so how might this problem be addressed? Please provide reasons for your answer?

The process should be fair and transparent, and clearly accessible and publicised. Pact would want to ensure that ownership is established and that they have a clear system for where there is disputes of that ownership as well as when there is more than one copyright owner attached. Pact considers that given the potential for fraudulent claims and how this would be dealt with, requires further investigation.

28. To what extent is incomplete or inaccurate data from licences an issue when it comes to the distributions 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 money should be used as a result of consultation with the industry to a nominated charity or a charity set up by the industry to its promotion and further creativity.

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

The monies should be held in escrow or liability for the period of the copyright to the copyright owner. Pact does not agree that monies should be transferred to the Crown. However, Pact considers any interest on such monies should be returned to the industry. The industry should agree to nominate a charity or training provision. There should be a consultation process to enable the industry to agree where such proceeds should go.

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

Pact is unable to provide a view on whether these are fair. However, Pact believes that there needs to be adequate safeguards to ensure that companies are not created to seek remuneration or inflate prices as a result of encompassing non members rights or used to prevent non members to undertake independent negotiations of their works. There also needs to be the ability, if someone opts out, that they do not have to opt out for each work but any collection they are party to.

There should also be a system in place where co-authors exist, if one wishes to opt out but another doesn't, that there is an ability for this situation to be resolved fairly and proportionately.