EXTENDING THE BENEFITS OF COLLECTIVE LICENSING
RESPONSE OF PERFORMING RIGHT SOCIETY LIMITED TO GOVERNMENT CONSULTATION

Your name	Frances Lowe
Job Title	Head of Legal, Policy and Public Affairs
Organisation Name	Performing Right Society Limited
Organisation's main products/services	Licensing Body – copyright musical and associated literary works

We have supported the policy of extended collective licensing on the assumption that all the safeguards are in place, for the society and the members. We note the scope of this consultation is for technical input on the draft regulations*.*

INTERPRETATION

Representativeness

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. For the purposes of answering this question accurately, we read the definition of 'collective licensing scheme' quite narrowly in relation to a scheme for usage in a particular context (i.e. a particular tariff or a specific sector licence). On that basis we do not think it is necessary that a scheme should have been in place for a minimum period. One could foresee a situation in which an interactive archive is developed and that such a use has not been licensed by the CMO before. There may be no appropriate existing licensing scheme to apply to that archive. The new licence would therefore be a new licence of members' rights and an application for the extended collective licence. It would seem to serve everyone's interest that the ability to license new services is not inhibited by rules about historic operation of the scheme prior to the application. If the definition of 'scheme' is broader and intended to cover generally the administration of rights in relation to works (i.e. performing rights in relation to musical works), then past history can be relevant to the criteria of representativeness.

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?*

The test of relative representativeness is not the right test. The only information that is known is number of right holders whose repertoire is licensed by the CMO and, to a certain extent, the number of works registered with that society or on other relevant industry databases (such as ICE, CIS and in the future GRD).

It is not possible to estimate the total mandates and total numbers of works not controlled by the CMO because (a) copyright arises automatically on creation of a work; (b) there is no registration of copyright works outside the CMO databases; (c) barriers to creation of copyright material are

virtually non-existent; and (d) there are systems of copyright work that exist outside collective management (e.g. Creative Commons, buy-out libraries, directly managed works). It would become possible to quantify the number of non member works covered by a scheme after it has started working if the licensee provides full usage reports. At that point, concrete data will be available about the amount of works of non member right holders in that particular scheme.

It should be sufficient for a collecting society to demonstrate its representative nature in relation to a scheme from:

- its Constitution and membership criteria;
- the fact that there are no other CMOs operating in relation to those rights/works in the UK;
- The fact that it operates a Code of Conduct meeting BCC Principles and the UK Minimum Standards;
- the absence of other active competitive licensing activity or substitute for the repertoire in the user market concerned.

***Question 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 and consent? Please provide reasons for your answer(s).*

No. We think that the 75% threshold is the wrong test for 'required consent'.

The first problem is that the test has been proposed because it sets up the consent of members as a proxy for the consent of non-members. Ironically this makes it harder and more costly for the CMOs with a large number of individual members to meet the consent threshold and harder for the more representative societies to meet it at all. If PRS had to get specific consent of 75,000 members it could cost a minimum of £75,000, which is a high cost proportionate to the likely value of the 'extension' that is likely to be negotiated for the non-member repertoire.

The right test of 'required consent' for collecting societies such as PRS, whose right holder members are members of the society as a matter of company law, would be to meet the requirements set out in the Companies Act and/or the company's constitution sufficient to carry a special resolution at a general meeting of the company on a show of hands, i.e. not less than 75% of members present at the meeting and entitled to vote.

Furthermore, PRS disagrees with the premise for the Government's position set out in paragraphs 3.16 and 3.17 of the consultation document for the following reasons:

- It would be an unwarranted interference in the governance of the society for the regulations to impose a requirement that CMO needed members' consent to the specific licensing scheme (rather than simply the principle of the application for the extension of the scheme) as part of the ECL application.

- Where a collecting society operates under voluntary mandates, the decision as to whether to apply for authorisation should and can only be taken by members acting in their own interests and that of the company as a whole. It is unfair and unreasonable to members and, indeed, non-members to impute to the former the views of music rights holders generally. The justification for the consent process in a collecting society such as PRS (whose Constitution of the Society arguably gives the Board power to apply for ECL authorisation) is to obtain the consent of members to the operation of a scheme that may require the society

to expend a higher proportion of its resources on safeguarding the rights of non-members, when there is unlikely to be any commensurate increase in the level of royalty charged for licence of members' rights.

- It is wrong to characterise the consent process as a mechanism for blocking the operation of a scheme for rights that members 'were not aware they had assigned'. The rights that members assign and the powers granted to the Board of PRS to manage the business of the society are clear on the face of PRS' constitutional documents and assignment. Transparency is a requirement of our Code of Conduct. PRS does not acquire rights from its members by stealth. It is therefore unreasonable and excessive to require a collecting society to incur substantial expenditure on securing consent that has already been given.

AUTHORISATION; APPLICATION FOR AUTHORISATION

***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).*

The collecting society should only have to demonstrate that it has adopted a code of conduct (or otherwise operates according to a satisfactory system of voluntary self-regulation). If there has been a review of the code of conduct, for instance by the Independent Code Reviewer, this would be indicative and supporting information.

***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*.

Yes as a matter of principle and practice:

With regard to principle, and with reference to paragraph 3.25 of the Consultation Document and the reference to the specified criteria relating to ECL schemes and the protection for non-members, we note that the specified criterion 2 requires the collecting society to act *fairly (our emphasis)* as between rights holders and does not impose an obligation of equal i.e. identical treatment.

In practice this means that it would be fair to treat non-members and member differently in relation to the following, for example:

5.1 the administrative costs to be deducted. The application for and operation of an ECL scheme would lead to increased administration costs to the society including: the application process itself; the maintaining and adhering to a register of opt-outs and non-member works; tracing and contact requirements, and separate accounting. These additional costs will not necessarily be compensated for by equivalent increases in the licence revenues if and where, relative to the society's existing voluntary repertoire, the value of the additional works to the user is marginal. Accordingly, it would in our view be fair to members and non-members for the additional variable cost burden associated with ECL to fall on non- members.

5.2 Non-members should not be entitled to contractual and other benefits of membership (including ordinary company law benefits), such as rights to attend general meetings and participate in the governance of the society;

5.3: if and to the extent that a non-members does not opt out, they should not be entitled to negotiate or claim from PRS a distribution of fees greater than that which would be paid to a member for the use of his work in identical circumstances; or indeed any distribution at all in any case where, under the Society's distribution policy, a member would not be entitled to an allocation of royalties in identical circumstances.

***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).*

Please see response to Q. 4. A declaration should be sufficient given the levels of oversight and scrutiny that are possible from members, the Independent Code Reviewer, Ombudsman Services and the Secretary of State, under the voluntary and proposed statutory regimes. There should be presumption that the society complies with regulatory and legal norms and rules; it should not have to demonstrate the fact.

***Question 7**: Is there a need for any additional minimum standards to protect non-member right holders? Do you agree that the protections for non-member right holders, as articulated in the ECL Regulations, and elsewhere (including this consultation document, where further protections that the 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).*

In our view the degree of regulatory oversight of the application process and the Codes are sufficient to protect non-member right holder interests.

Additional Comment on Reg 4(17):

Regulation 4 (17)(a) requires the applicant collecting society to support its application with the number of copyright owners or right holders who have notified it that they wish to opt out of the scheme. We refer you to our reply to Question 19 (opt out procedures) and the concerns expressed in relation to this proposal.

AUTHORISATION PROCEDURE; NOTICE OF DECISION ON 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.*

In our view the minimum period of 28 days for those affected by the scheme to make representations is sufficient. We think it is appropriate for representations to be made in relation to the application. However, we do not think it is appropriate to invite representations on matters beyond the formal requirement of the application process, such as the impact on the sector, on transaction costs or the licence, the rationale for the scheme or its benefits. These are and should be matters for the applicant and its members and, in some cases, where necessary, the Copyright Tribunal. In our view, this would lead to a degree of oversight that is excessive, given existing and proposed checks and balances the application process and the opt-out rights afforded to non-members.

The consultation in paragraph 3.34 makes a reference to the 'scope and scale' of the proposed ECL scheme. We would suggest that a scheme which, in the case of PRS for example, would cover 13 million of works of over 3 million member right holders (when one takes into account the members of PRS' affiliates) but which has been tailored to meet very specific rights requirements of one or a narrow class of, e.g. institutional, user(s) and extends the scheme to an unknown number of non-member right holders should reasonably be regarded as a small scheme for the purposes of Regulation 6.

***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 reason for your answer.*

An application could be made subject to conditions referred to in draft Regulations 4(15) (publicity) and 4(16) (contacting non-members). However, the collecting society should be given an opportunity to consider and make representation in relation to any proposals to impose conditions additional to those inherent in its application before authorisation is granted.

***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.*

We suggest following the appeal mechanisms that have been proposed for licensing bodies under the proposed Codes Regulations (e.g. in relation to appeals against the imposition of a Code of practice; or sanctions and penalties).

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).*

Proportionality is an appropriate principle. This would mean proportionality in terms of cost, territoriality and reach, relative to the scope and scale of the scheme. We have commented on 'scope and scale' in answer to question 8.

DURATION OF AN AUTHORISATION; RENEWAL, MODIFICATION

***Question 12**: Do you agree that a five year authorisation is appropriate? If not, please explain why not. What information should be required of the 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).*

A five year authorisation is not unreasonable, provided that it is possible for a collecting society to apply for and be granted a renewal or extension of its authorisation prior to expiration of the initial authorisation period. Collecting societies need to make decisions as to whether to develop systems to operate an ECL scheme and we also understand that some institutional users would be willing to undertake long term projects reliant on the benefits of an ECL scheme only if they have the certainty that licences granted under the scheme will be capable of enduring for a comparable period. Given that the Regulations already make provision for revocation and cancellation of authorisation, authorisation of indefinite duration is arguably appropriate, subject only to an obligation on the part

of the society to inform the Secretary of State if there is a material change in circumstances on which the original decision to grant authorisation was predicated.

If authorisation is for a fixed period, however, a collecting society should be able to re-apply for authorisation on the basis of information previously supplied unless there has been a material change to the information supplied in the initial application. In addition, the society should be in position to demonstrate how it has managed the opt out process and accounted for undistributed monies attributable to non-member, non opted-out repertoire.

Performance of the collecting society under the previous scheme should be a factor in any decision to grant fresh authorisation.

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

It is difficult to respond to this question in the absence of any indication as to what conditions might be attached to an authorisation, although we agree with the proposal that modifications relating to works and permitted use (Reg 3(2))should not be permitted under Regulation 10.

We also agree that modifications should not be permitted if the effect would be to allow the society to act ultra vires the terms of its members' consent to the initial application for authorisation.

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

The proposed time periods are adequate.

REVOCATION: CANCELLATION OF AN AUTHORISATION

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

The Government has said that it will regard a code as having been breached if it is forced to impose a statutory code. Accordingly, if the breach has been remedied, our view is that this is evidence that statutory self-regulation is working and the collecting society should not have authorisation revoked in such circumstances.

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

We think the minimum period for representation relating to revocation should at the very least mirror those relating to authorisation, i.e. they should not be less than 28 days. The scale and scope of the ECL at stake (including the number of licensees likely to be affected) should also be taken into account in determining the period for representations.

The post-revocation steps seem sufficient. However, draft Reg 12 should be amended so as to give the collecting society an opportunity to make representations not only as to the revocation but as to

the conditions that might be attached to any such a revocation (Reg 12(6)), especially given the potentially disruptive effects on the society's and licensees' respective position.

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, a society should be able to cancel. Penalties should not be associated with cancellation, since the Scheme is voluntary, and so long as the collecting society has satisfied the Secretary of State that non-members and licensees are or will not be prejudiced by the cancellation of the Scheme, no penalties should be imposed.

Question 18: *Is the payment of part of the fee a reasonable and proportionate requirement? Please provide reasons for your answer(s).*

Please see above.

OPTING OUT OF AN ECL SCHEME

***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.*

Regulation 14, is flawed because it grants opt out requirements for 'right holders' and as defined that includes non-members and members.

The regulations should not grant members, who have voluntarily mandated and authorised the society to manage the rights covered by the scheme and have rights to withdraw rights in accordance with their membership agreement, a right to opt out of a licensing scheme if an application is made for the purposes of operating an extended licence:

(a) The regulations (that are intended to give effect to a process involving non-member rights and repertoire) substantively change members' rights that have been negotiated under the terms of their contract of membership and/or the society's constitution;

(b) The membership contract/constitution already satisfies legal and regulatory requirements concerning the rights of members to withdraw and reserve rights from the control of the collective management organisation;

(c) The society had already obtained consent from its members (under the representative hurdle) to the operation of the scheme and

(d) Members are directly involved through the governance in the processes and decisions to approve licensing schemes for the collectively represented repertoire.

The only members who should be entitled to opt-out of ECL should be non-member right holders. In our view, any regulations insofar as they purport to regulate arrangements and schemes covering the rights of members are *ultra vires* and would unreasonably prejudice the society's existing blanket licences. The financial value of those licences are in large part based on (a) the benefit to licensees of the breadth of the right to exploit the performing right in any and all works in the society's repertoire; and (b) the "robustness" of the repertoire comprised within such blanket licences.

The risk that the Regulations might provoke fragmentation of the voluntary, core repertoire will undoubtedly deter applications for authorisation and undermine the value of the ECL schemes to users.

We would like the opportunity to comment on the guidance that the Government has indicated that it intends to publish in relation to this matter in April 2014.

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.*

14 days seems reasonable for acknowledgement of receipt. A slightly longer period, up to 28 days, might be required depending on the number of licensees affected and means of notification required by the authorisation. As far as licensees are concerned, the more significant deadline is the date from which the opt out takes effect from the licensee's perspective. It should not be less than three months.

We agree that a low likelihood of fraud makes verification of identification unnecessary for the purposes of any opt-out rights**.**

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 answers.*

21-28 days would be better, as the list may require "editorial intervention" to the extent that Regulation 14 (3), (4), require the society to identify not only the works concerned but, the right holder, to the extent that person "has consented" . It is not reasonable to have separate lists in view of that timescale.

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

No. The obligations are unreasonable where collecting societies operate under voluntary mandates, where no opt-in scheme exists. Please refer to our reply at q. 19.

LICENSING OF WORKS UNDER ECL

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 answers, and propose an alternative time period or periods as necessary.*

Para 3.7.1: Non-exclusivity (Reg 15(1)(a) should apply in relation to the licensee, not the licensing body. If he or she has not opted out, the non-member should not be free to grant direct licences

(and this is arguably inconsistent with the scheme of Regulation 15(1)(b), which provides that ECL "has effect as if granted by the owner").

The revocation or cancellation date is in line with the end of the licence period is not unreasonable or disproportionate, provided it relates only to works and rightholders who are brought within the terms of the extended provisions of the Scheme. However, licences granted by the Society during the terms of the ECL's Scheme's operation should be allowed to continue insofar as they contain the works of members. In relation to Reg. 15(1)(d), PRS grants blankets licences for the rights to use each and every work in its repertoire from time to time and should one or more works within that repertoire cease by operation of law or otherwise to form part of PRS' repertoire, PRS' licence should still continue.

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 believe this is proportionate and reasonable provision.

LICENCE FEE, RETENTION OF UNDISTRIBUTED LICENCE FEES

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.*

Regulation 16(1) does not reflect how blanket licences are priced by PRS. The royalty charged by PRS in consideration of a blanket licences reflects the fact that the user benefits from a licence to user each and every work in PRS' repertoire from time to time. Royalties are not collected for individual members or non-members' works.

In relation to paragraph 3.82 of the consultation document and Reg 16(2), administration rates are determined by contract between member and society, and are not referred to in the licence. It is reasonable for PRS to deduct costs from non-members at the point of distribution if and to the extent the cost of administering the ECL's Scheme in relation to them exceeds that in relation to other members. We disagree with the proposal therefore because the burden of ECL may otherwise fall disproportionately on members. A non-member can choose to join a collecting society and reap all the benefits of collective licensing but if and to the extent that expenses are deducted over and above the rate applicable to members in order to cover PRS' costs in administering the extended scheme, it is entirely legitimate that PRS and its members be entitled to retain for the Society's own account and applied for whatever purposes it sees fit.

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

No: It is incompatible with extended collective licensing and extended collective rights management that a non-member, who has not opted out of the Scheme, should be entitled to enter into negotiations for separate and individual remuneration. Members will not be willing to consent to their society making an application for ECL authorisation if the end result of such authorisation is that a rightholder is able to enjoy, at members' their expense, a right to extract a higher distribution for identical usage than members would under their approved rules.

***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 reason for your answers.*

There is a danger that fraudulent claims for undistributed sums could be made, if and where the sums are substantial but this can be addressed, as is currently the case by asking the claimant to provide appropriate supporting documentation, including where necessary contracts, grants of probate etc.

***Question 28:** To what extent is incomplete or inaccurate date from licensees 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.*

Incomplete or inaccurate data from licensees is an issue when it comes to process of matching usage (exploitation of a work as reported by the licensee) to a work or works on the collecting society's database as notified to the society by or on behalf of rights holder. These are referred to as "unmatched performances". PRS publishes to its members a file of such unmatched performances in order to enable them to claim fees that would have been distributed to them in respect of the performance concerned.

Unmatched performances however are not the same as undistributable monies, which are sums that have been allocated under the collecting society's distribution policy for payment to the right holders interested in the works performed under its licences but which the collecting society has not been able to pay out because it has been unable to locate the member or right holder concerned. Under an ECL scheme, this could include fees that have been allocated to works of non-members, but in respect of which no claim has been made by the individuals concerned.

Such unclaimed monies should be held by the collecting society until the expiration of the limitation period, after which we think it is reasonable that they should be applied towards defraying the costs of the ECL scheme and not become bona vacantia.

***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).*

Any contingent liability should be equivalent to that provided by the Society under its own Rules in relation to member claims for undistributed monies and/or in the long run, any provision under the CRM Directive.

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

The Rules are fair to both absent rightholders and potential users of orphan works. The use of orphan works will only need to follow that particular regime if and where an ECL scheme is not available to cover the use in question. As a general rule, an effective ECL scheme could in fact reduce the incidence of orphan works, by providing information about rightholders who are outside the collecting society system and therefore may be difficult to locate and identify.