

## Extending the benefits of collective licensing 37

### Annex D – Consultation response form

#### About You and Your Organisation

**Name:** Simon Chapman

**Job Title:** Photographer

**Organisation name:** self, freelance self-employed

**Organisation's main products/services:** Photography

**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:** 3 years. This allows time for any problems or issues with the existing licence scheme to have come to light.

**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:** a collecting society (CS) should demonstrate that it represents a majority of the rightsholders for whose work it seeks to offer a licence. Ideally this would be at least a two thirds majority. It is hard to see how a CS could represent a majority of creators of photography, both professional and amateur, whose work is now published online, not least on social media. Evidence of mandates from CS members should be in the CS records, but the majority of rightsholders will not be members and not have given the CS a mandate. Estimating the number of works, for instance photographs, would be extremely difficult and only approximate.

**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:** Yes, 75% threshold of the total membership of that CS, not just those voting. But really the CS should have a large majority of all rightsholders in the relevant sector, to be representative in the first place.

**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. Reports from the Independent Code Reviewer, and internal audit documents.

**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.

**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:** No. It should have reports from the Independent Code Reviewer, and internal audits.

**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:** There may need to be additional measures to protect foreign rightsholders. Non members must have the right to opt out, set their own price and licence terms, and to say no to any prospective buyer.

**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:** There should be no difference between periods for small and large schemes as rightsholders need the same amount of time for consideration.

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.

**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.

**Answer:** There must be a separate appeal process, as well as a judicial review to ensure cost effective fairness for rightsholders.

**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:** if it could be shown that an ECL was damaging the existing market for that type of work. Why let an ECL carry on for 5 years if it is not actually promoting growth of creative work but damaging the rights and livelihoods of creators? In such circumstances an ECL scheme should be at least reviewed, if not revoked.

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).

**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:** A CS should be allowed to cancel its authorisation, not least if a majority of its members vote for it to do so. And they should pay all outstanding ECL fees to rightsholders before closure.

**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 must be free, not merely low cost for rightsholders. Opt outs should be available on a rightsholder basis so that they can opt out all their works in one go, or be able to opt out groups of work, rather than face the impossible task of opting out thousands of works on an individual basis. Also opt out must be quick, preferably instant, so that hard news and topical material can be opted out but sold to clients immediately by the rightsholder. If opted out works must be displayed, they must be properly protected otherwise that could lead to their work being misappropriated.

**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:** Opt outs must be immediately available, so that time sensitive material can be both exploited by the rightsholder, and protected from ECL use if the rightsholder wishes.

**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:** Opt outs must be immediately available, so that time sensitive material can be both exploited by the rightsholder, and protected from ECL use if the rightsholder wishes.

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

**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.

**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:** I'm not sure what the question means. Does it mean a work which had previously been opted in and is already in use, but which the rightsholder now wants

to opt out? If it means any opted out work can still be used for up to 6 months after it is opted out then it makes a mockery of the right to opt out.

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

**Answer:** yes. Otherwise how would rightsholders be rewarded for the use of their work, if they are not paid individually?

**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:** Unclaimed funds should only be used for the welfare of creators in the relevant sector of the licencing scheme.

**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:** Unclaimed funds should only be used for the welfare of creators in the relevant sector of the licencing scheme. This should be done after 10 years.

**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, they are not fair to absent rightsholders, because there is no current automatic or enforceable right to attribution (credits) and so millions of works, particularly photographs, are orphaned every day.

I also can't see how ECL rules can be fair to absent rights holders (orphan works) when OW should be licensed on an individual per use basis rather than collective licensing, to avoid undermining existing markets. Orphan works users should go through the OW licensing system and not use ECL for OW. An ECL scheme should not include known licensed OW.