

Extending the benefits of collective licensing

Response submitted by The National Library of Wales

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About You and Your Organisation

Your name	Dafydd Tudur
Job Title	Rights and Information Manager
Organisation Name	Llyfrgell Genedlaethol Cymru / The National Library of Wales
Organisation's main products/services	Library Services

The National Library of Wales is the largest library in Wales and holds over 6.5 million printed volumes. It is one of the six libraries in the United Kingdom and Ireland benefiting from statutory legal deposit privilege and approximately 67,000 books and 100,000 periodical and newspaper issues are added to its collection annually.

The National Library of Wales's collections also include:

- around 1,900 cubic metres of archival material;
- the most comprehensive collection of paintings and topographical prints in Wales (over 60,000 works);
- Wales's largest collection of portraits (c.15,000 paintings and portrait pictures);
- the largest collection of photographic images in Wales (c.1,000,000 images);
- Wales's largest cartographic collection (c.1,000,000 maps);
- The National Screen and Sound Archive of Wales, which contains over 5.5 million feet of film, more than 250,000 hours of video, and over 200,000 hours of sound recordings.

During the past fifteen years, we have embraced digital technologies as a means of preserving and widening access to our collections. As an organisation that has developed a capacity for mass digitisation, we see Extended Collective Licensing as a potential method of enabling and facilitating projects that aim to widen access to works, primarily for cultural, educational and research purposes.

The National Library of Wales is also a member of the Libraries and Archives Copyright Alliance and supports its response to this Consultation.

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. If it can be proven that a collecting society is 'representative' based on the number of rights holders' mandates it has relative to the estimated total number of mandates and the

number of works it controls relative to the estimated total number of works, then we regard this as sufficient.

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?

Collecting societies should have a transparent methodology/rationale for demonstrating that they are 'significantly representative' (i.e. for estimating the total number of mandates and works). There should also be transparency in relation to the evaluation of such applications as well as the evidential/methodological basis of the applications.

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).

We agree that a 75 percent threshold for membership support is appropriate.

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).

We believe that it would be reasonable to take into account whether or not a collecting society can demonstrate past compliance with its code of practice when evaluating its application.

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.

No comment

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).

No comment

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).

We regard the protections articulated in the ECL regulations as sufficient.

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.

We regard the minimum periods for representations and subsequent Secretary of State decision sufficient and 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 circumstances described are adequate to support the interests of authors/creators while also facilitating the use of additional copyright works under the ECL.

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 believe that there should be a dedicated route that would allow potential users of an ECL scheme to appeal against a refused application as we are concerned that a judicial review may be excessive.

There should be special provisions in place to ensure educational and research institutions' reasonable and non-commercial use of copyright works is protected against the detrimental impact of any such decision made by the Secretary of State.

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).

No comment

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 - we do not agree that a five year authorisation is appropriate as it would potentially limit the duration of licences to a maximum period of five years. Not only is this period too short and will create an administrative burden for licensees, but it will also limit the sustainability of their outputs (e.g. a resource using works licensed under ECL). Moreover, it conflicts with European policy in the area of mass-digitisation and is inconsistent with the proposed duration of licences issued under the new Orphan Works scheme.

We therefore believe that limiting the authorisation to five years will detract from the potential value of the ECL scheme and that the period should be agreed between the collecting society and the party applying for the licence.

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

While we cannot suggest additional conditions where modification would be appropriate, we believe that it would be prudent to permit some flexibility that would permit modification to an 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.

We regard the proposed time periods as adequate.

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.

Other circumstances in which revocation of an authorisation might be justified include erroneously claiming representation and/or wrongly claiming that a third party is infringing copyright.

Measures should be implemented to protect licensees should the authorisation for the ECL that they have used be 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).

We believe that in most cases 21 days will not be a reasonable time period for representations and the Secretary of State's decision.

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 a collecting society should be allowed to cancel its authorisation, there should again be measures in place to protect licensees (especially cultural, educational and research institutions) and their use of the ECL scheme in question.

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

The validity of licences that have been granted for education and research purposes should not be affected. The licence fee should however be revised if a large number of opt outs are received.

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 - we consider the requirements to be adequate.

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.

No comment

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).

No comment

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

No comment

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.

A revocation or cancellation could potentially cause disruption to resources or services using ECL and which are clearly in the public interest (e.g. for education and research). Measures should be taken to avoid interruption to the ongoing provision of access to those resources or services in the event of revocation or cancellation.

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.

See answer to Question 23.

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.

Yes - we agree that money collected for non-members should not be used to benefit members alone.

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

We believe that ensuring a clear and upfront pricing framework will be key to the success of ECL.

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).

No comment

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.

We would expect that incomplete or inaccurate data could be a significant issue when distributing monies, depending on the types of works in question, how they have been catalogued (i.e. whether the data included names of authors) and whether items contain numerous embedded copyright works.

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).

If redistributed monies are to be transferred to the Crown, we do not believe that a contingent liability should remain with the collecting society.

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.

We agree that these rules pertaining to remuneration and opt out are fair to absent rights holders.

We wish to underline the importance of ensuring that ECL is fair to users of orphan works (i.e. licensees) if it is to facilitate the use of potential orphan works in this way. In order to achieve this, the interests of the licensees should always be represented alongside those of the collecting societies and authors. To ensure fairness for licensees:

- licensees should be able to have an agreed licence fee and terms and conditions prior to obtaining a licence;
- the ECL schemes should support and facilitate the work of educational and research institutions, and this would be achieved at this stage by extending the proposed duration of authorisation/licences; and
- there should also be a straight-forward method for licensees to receive a rebate when there has been a high number of opt outs from an ECL scheme.

End.