

**Extending the Benefits of Collective Licensing Consultation
Submission from The Publishers Association
28 January 2014**

Name: Richard Mollet
Role: Chief Executive
Organisation: The Publishers Association
Services: Representative voice for the UK publishing sector

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).

The PA supports the position that a collecting society applying to run ECL schemes must already be licensing the works and the rights in those works, which are to be the subject of the ECL scheme. In addition, The PA believes that an existing scheme upon which the ECL is to be based should have been in place for a minimum period of five years.

However, The PA accepts that in some cases ECL may involve the offering of wholly new licences. In this circumstance the Secretary of State should consider whether the applicant can show that it has been in existence and offering collective licences on behalf of rights holders in the same sector and covering the same class of copyright works for a minimum period of five years.

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 PA agrees that there should be two considerations in determining representativeness: first, that the collecting society represents a significant proportion of rightsholders in a class in relation to the total number of possible mandates; and secondly, that it represents a significant proportion of works relative to the estimated total number of works. We would expect to see representation of no less than 80% of rights holders, representing no less than 80% of works in a sector or sub-sector.

Furthermore, having met these two criteria, an application to operate an ECL would need to be agreed by 75% of the collecting society's members (notwithstanding certain special cases and therefore alternative representativeness criteria, as we outline in our response to Q3).

We welcome the fact that any application to the Secretary of State would need to be accompanied by a copy of the existing collective licence upon which the ECL scheme is based – although we note there may be circumstances, as outlined in Question 1 where a licence offered under ECL may be wholly new.

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).

When it comes to the existing collecting society seeking consent in support of ECL through a vote, we agree that a 75% threshold of total membership support is appropriate. We do not agree that the 75% threshold should be applied only to the number of members who actually vote, as in cases where there is low participation, this could easily result in only a minority of members authorising an ECL scheme.

However, we recognise that some CMOs, specifically in the publishing sector, will have a structure that does not lend itself to the standard tests for obtaining members consent familiar in company law or in direct membership organisations such as the music CMOs. In these unique circumstances it may therefore be appropriate for alternative arrangements to be made.

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).

Yes. The collecting society should demonstrate that it is, at a minimum, a signatory to the Regulation of Licensing Bodies codes of practice.

Any submission to the Secretary of State should include details of all complaints made against the CMO on the grounds of breach of its code of conduct over the preceding five years. It should also set out how these complaints were dealt with and how they resolved. It will be for the Secretary of State to determine how relevant these complaints and/or breaches are.

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.

In operating an extended collective license, a collecting society would need to treat member and non-member rights holders in exactly the same manner. However, CMOs administering an ECL may be obliged to take more extensive steps to advertise the scheme to non-members and to find non-members for the purpose of distributions.

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).

Yes, this should be sufficient so long as it sits alongside conditions set out in the Regulations such as 4(5). As noted in response to question 4, any submission to the Secretary of State should include details of all complaints made against the applicant on the ground of breach of its code of conduct over the preceding five years and how these complaints were dealt with.

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).

What has been proposed is 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.

Yes, the periods proposed are proportionate.

However, whilst it is welcome that stakeholders will be alerted to the notice by email, it would need to be established that the IPO is in possession of a comprehensive, fully up-to-date mailing list of stakeholders. The PA would be very happy to assist with this for the publishing sector.

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 Secretary of State may wish to make changes to the proposed publicity campaign the CMO intends to undertake if an ECL licence is granted, to ensure the campaign is as comprehensive as possible in line with the terms set out in the Regulations. However, under no other circumstances should an application be made subject to certain conditions: if the conditions set out in the Regulations are not met, the ECL application should simply be rejected.

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 agree with the answer put forward in CLA's response to this consultation that there should be a separate dedicated appeal route against a refusal to grant an application.

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).

The PA agrees that proportionality should be the key principle, and agrees with the example put forward in the Consultation regarding foreign rights holders.

If the scale of opt-outs following the publicity campaign is such that the threshold of representation becomes questionable, in the absence of a collecting society abandoning their application, the Secretary of State should have the ability to revoke the authorisation on the grounds that the CMO fails to meet the qualifying criteria of proportionality for the operation of ECL and initiate proceedings in line with 12(3) of the regulations.

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).

We agree that a five year authorisation period is appropriate; however we agree with CLA that the end of an authorisation period should be without prejudice to the length of a pre-existing licence.

When a CMO re-applies for authorisation it should be required to provide information on:

- the scale of opt outs for the duration of the existing licence;
- details of any complaints from rightsholders and how these were managed;
- Information about communication with and dispersal of funds to non members

Re-application should not be light touch, but should absolutely be contingent on the performance of previous ECL scheme(s).

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

Under the two conditions set out in the Consultation (i.e., widening publicity requirements and strengthening opt-out procedures).

We agree that a collecting society should not be allowed to modify its authorisation to widen its mandate in a substantive way. Instead a new ECL application following the necessary produces set out in the Regulations must be repeated.

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, they are 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.

If a collecting society lost members such that its representativeness criteria was called into question this should be grounds for the Secretary of State to revoke authorisation.

If a collecting society breached its code but remedied the breach before the Secretary of State had imposed a statutory code, the seriousness of the breach would need to be assessed by the Secretary of State to determine whether revocation of an authorisation might be justified. However, a better solution may be to look at all breaches, including those that have been remedied, when considering any renewal of an authorisation.

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).

No opinion.

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 collecting society should be allowed to cancel its authorisation, in particular if it feels it no longer has a mandate to proceed with an application/licence (for example due to a higher than anticipated level of opt outs).

We have no opinion on penalties to be associated with a cancellation.

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

No opinion.

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 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.

We agree that a 14 day time limit is reasonable.

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).

We agree that a 14 day time limit is reasonable.

We do not believe that there is any need for separate lists for works which are pending opt out and works which have been opted out, especially if CMOs will be complying with a 14 day time limit. Having two separate lists would, in our view, be unnecessary and an added layer of bureaucracy for no obvious gain, and which could potentially be

confusing to users.

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

Yes, but collecting societies are better placed to advise on the practicalities.

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 date in line with the end of a licence period would be unworkable if it meant that a licence was cut short. Instead, in line with Question 12, the end of an authorisation period (in this case due to cancellation or revocation) should be without prejudice to the length of a pre-existing licence.

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.

Yes, six months is proportionate and reasonable.

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.

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

No. The principle of individual remuneration runs against the grain of ECL schemes and is only appropriate for individual rather than collective licensing.

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).

A collecting society should publicise the works for which it is holding monies in the same ways it will publicise both its notice of application and lists of works included and opt-ed out of an ECL scheme.

No further 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.

The first question is not for The PA to answer.

If a non-member rights holder fails to claim monies due, it should be up to the governing board of the society operating an ECL as to how the funds should be used. However, after three years (in line with the CRM Directive) unclaimed funds could be used to subsidise the costs of the scheme for the benefit of known rightsholders, or potentially for non-profit activity of the society intended for the public good.

In line with the European CRM Directive which may be passed into law early in 2014, any direction by the Crown relating to the use of undistributed moneys will be limited to the funding of "social, cultural and educational activities for the benefit of rightholders." This should be reflected in 17(3) and 17(4) for the Regulations.

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).

Please see our response to Questions 28. We have no comment on contingent liability.

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.

No. Whilst in principle the bullet points setting out the Government's intentions are reasonable, the Consultation states that ECL does not include a diligent search in advance of their use. It is therefore unclear how collecting societies will avoid sweeping up Orphan Works in any proposed ECL. As a first step, we would suggest that bullet point 4 on p21 of the consultation, which sets out the Government's intentions, should read: "works opted out of any ECL scheme may be licensed as orphan works if they meet the criteria, *including diligent search.*"