Annex D – Consultation response form

Responding to the consultation

On this form, please provide your responses to the questions outlined in this document. You do not have to complete the whole form – please answer the questions that are most relevant to you.

Please note: This consultation forms part of a publication exercise. As such, your response may be subject to publication or disclosure in accordance with access to information regimes (these are primarily the Freedom of Information Act (FOIA), the Data Protection Act (DPA) and the Environment Information Regulations (2004). We plan to post responses on the review website when they are received, and they may be subject to online discussion.

If you do not want part or whole of your response or name to be made public please state this clearly in the response, explaining why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system cannot be regarded as a formal request for confidentiality.

The closing date for responses is Tuesday 28 January 2014 at midday.

About You and Your Organisation

Your name	**UUK/Guild HE Copyright Working Group**
Job Title	To advise UUK/Guild HE on copyright matters affecting the higher education sector and to negotiate copyright licences on behalf of the sector
Organisation Name	UUK/Guild HE
Organisation's main products/services	Education

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).

It would not be unreasonable to require an existing society to demonstrate a previous good track record in collective licensing if it is applying for an extension of an existing scheme - particularly a good track record in relation to significant representation among potential membership, extent of repertoire; lean administrative costs and overheads; a robust infrastructure capable of administering rights and remunerations; transparency of operation; customer focus; mechanisms for consultation with licensees; low levels of dis-

satisfaction and complaints etc. At least a 5 year period of minimum operation is needed to demonstrate this.

Where completely new schemes are to be introduced, by completely new bodies it will be impossible to apply a minimum period requirement. In such circumstances we would expect the requests for authorisation to be thoroughly vetted by the Secretary of State and relevant body (presumably the IPO) before going out to public consultation.

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?

To determine a standard to demonstrate significant representation may not be easy because it is difficult to see how the depth of the relevant market/constituency (either in terms of potential rights-holder members, licensable works etc) can be truly accurately quantified. What is important is that strenuous efforts have been made by potential collective licensing schemes to reach/penetrate that market in terms of identifying rights-holders, mandates, the number of licensable works etc. Something akin to a "diligent search" for orphan works could be developed as a benchmark. This would act as a benchmark and assurance that a collecting society has been diligent in attempting to achieve significant representation among all potential members, and the licensed repertoire. A society should be required to publish what steps it has taken to contact potential members; how often it has done so; what information/advertising channels it has used to contact potential licensors etc.

Searching for non-members will be time-consuming. At a certain point the effort invested in doing so will not be reflected in the value that these non-members/works confer on a scheme (they may well be in the long tail of rights-holders whose works are not of great interest for use). It is in no-one's interests to impose unrealistic requirements here but what must be demonstrated are diligence and sound and systematic processes in trying to achieve significant representation, and regular reviews.

Collecting societies could and should collaborate to develop a best practice approach to this problem - allowing for the differences between sectors and types of works. Societies should be required to publish annually updated figures on their membership and repertoire, with separate information on new members joining the scheme in each reporting year (and statistics on those leaving a scheme) and/or significant additions to licensed repertoire. Societies should be required to regularly renew their efforts to find/contact potential members.

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 acknowledge that figures such as 75% are potentially arbitrary. Almost any figure is also open to disputation because a benchmark of 75% may be suitable in some fields but not in others. We suggest that the IPO looks into possible alternatives to demonstrate membership support e.g. (a) 75% of all members voting in a formal vote or (b) two-thirds of all members (voting/non-voting) in a formal vote or something similar.

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. If this were not to be the case then the development of codes of practice has been a sterile exercise. Demonstrating past compliance continues to legitimate the society, suggesting that it is a suitable and accountable organisation in managing rights and remunerations and providing a customer-focused service to licensees; and that it is an appropriate body for extended collective licensing. The types of information to be published must include information on obvious areas such as meeting standards relating to staff conduct, information and transparency, complaints handling, collecting societies' obligations to licensees, liaison/consultation with licensees, returning revenues to creators/rights-holders, financial accounts etc. Where specific complaints against a society have been made (e.g. in relation to a code of practice; references to the Copyright Tribunal etc) then a collecting society should be required to publish these and their outcomes on their websites and in annual reports. It would surely be uncontroversial to say that where an existing society is consistently and conspicuously falling short of meeting the standards in its own code that it is unlikely to be fit to be further licensed for the purposes of extended collective licensing.

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.

It is difficult to see how this can be justified in relation to non-members who are ignorant of the scheme. This is especially true in relation to remuneration - where all rights holders, members and non-members should be remunerated under equal treatment rules.

However, where potential members are aware of the scheme but choose to opt out entirely (either in terms of all of their potential licensable works, or a list of individual ones) then we believe that opting out from collective schemes can, and should, be made an unattractive course of action. Opting out of existing schemes is already a significant problem for educational institutions where the time and costs associated with removing opted out works (e.g. removing digitised works from online learning environments) and dealing with the very adverse impact of opt outs and then clearing individual and direct permissions to use opted-out works, is disruptive, burdensome, time-consuming and expensive.

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).

It is not unreasonable for a collecting society to be able to furnish independent corroboration that it is complying with its code. "Self-declaration" may undermine accountability. User representation on collecting society structures is something that collecting societies should strive for. A signed declaration approach might be appropriate if it was separately and specifically endorsed by 2 or 3 representative users specifically invited on to Boards, management committees or structures of a collecting society. Or a collecting society could seek a signed endorsement from one or more representative bodies in the relevant sector that it is adhering to its code. In this context we would cite the mutually beneficial relationship that UUK has developed with the Copyright Licensing Agency. CLA engages strongly and constructively with UUK as the major representative body in the educational sector and UUK would be one body (among others) who could provide independent endorsement that CLA is adhering to its code. Alternatively an endorsement from the Ombudsman of a collecting society's self-declaration could also be made a requirement.

Given the largely monopolistic position of most collecting societies we believe that accountability is essential.

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 believe that the measures in the proposals are 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.

The 14 day periods in Regulation 5(1) and 5(2) are sufficient and proportionate.

The minimum period in Regulation 6(2) of 28 days within which representations must be made would be far too tight to allow full and effective consultation on any proposals affecting the higher educational (HE) sector. A variety of bodies are likely to want to respond and make representations. They may find it useful to consult on or produce joint responses. The need to make representations may come at difficult and busy times of the

academic year for educational institutions. Such institutions may need time to collect and present evidence of their own in relation to an application. Invariably academic institutions do not have easy access to legal scrutiny of such documents and more time will be required for them to digest the implications of both summary and full applications and comment on them appropriately. Therefore, we favour at least the 90 day period referred to in the consultation document for any scheme affecting the HE sector.

It is in everybody's interests to ensure that the best possible schemes are authorised.

The notification period of 90 days set out in Regulation 7(4) is suitable.

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.

It is difficult to answer this without reference to specific proposals. Some schemes might have to be narrowed if it transpired that the permitted uses were impacting negatively in some unforeseen or unintended way on primary rights associated with copyright, or indeed even certain aspects/exercise of moral rights - where they apply.

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.

Judicial review is a complex and expensive process. A possible alternative appeal route could be to the Copyright Tribunal (if it could even be given jurisdiction over such appeals) but this would seem to be a further and probably unwelcome burden for that body.

Hopefully, there should be no need for a dedicated appeal route. This simply adds further bureaucracy. If a collecting society is given feedback on why its application has been rejected it has the option to address the issues and re-submit its application. To make the chances of applications for authorisation being as successful as possible collecting societies also have options to consult with their existing or potential members and user constituencies on a proposed scheme; and in preparing applications collecting societies should be able to draw on advice and guidance from the IPO.

It may be that following 3 refusals to grant an authorisation that an appeal route against the Secretary of State's decision should be available but judicial review, as noted, would seem to be an excessive option.

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).

Yes, proportionality should be the key principle. What is proportionate will depend on the types of works and composition of the rights-holder constituencies. For example, in extending collective licensing for reprographic copying of literary works, then works involving foreign rights holders in English speaking countries are likely to be of considerable importance; within those, some countries (USA, Australia, Canada, New Zealand, South Africa etc) are also likely to be more important than others. Further criteria will obviously emerge to guide what would be a proportionate publicity campaign in all of the circumstances of the extended scheme. It would be burdensome and wasteful to expect a collecting society to adopt the same advertising strategy in every possible country.

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).

A 5 year authorisation period may be acceptable only if an extended collecting society is authorised to grant licences where the licence duration is flexible (possibly up to a maximum period). An authorised body (notwithstanding the current provisions of draft Regulation 15 which are potentially very problematical) should be able to grant licences of varying terms - e.g. 3, 5, 10 or whatever years independently of its authorisation life. Otherwise significant practical problems could arise. It is accepted, however, that such grants (if possible) could not extend too far beyond an authorisation period.

For example, a 3 or 5 year licence may be suitable for some purposes (e.g. extended licensing for reprographic copying of literary works). It may not be suitable for other applications (e.g. large-scale digitization of copyright works where the planning, time, investment and expertise needed to complete and maintain a large digitisation project effectively means that a 5 year licence is extremely unlikely to be an attractive proposition). Short authorisation periods will also affect the ability to renew licences towards the end of an existing authorisation if there is not some kind of "neat fit" between multiple licence durations and the body's authorisation period, and also especially if there is uncertainty that an authorisation will be renewed. Even it if will be it may still be problematical.

Licences extending across authorisations (if this is possible) would have to remain valid in

the event a society fails in renewing its authorisation, or if it goes out of business. Since it is possible that one society could be involved in licensing both of the above activities (reprographic copying of literary works and large-scale digitization) then either significant flexibility in authorising and granting licence durations is needed; or authorisation periods themselves need to be rather longer than 5 years. One cannot see why authorised societies cannot be given flexibility in negotiating and agreeing different licence terms with different licensees, especially for complex, longer-term and expensive projects such as large-scale digitization.

If this flexibility is impossible then rather longer authorisation periods than 5 years will be needed for some extended collective licensing societies and purposes. If this has to be the case then this is why accountability mechanisms for collecting societies granted extended licensing privileges need to be very robust.

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

The answer here is similar to that for question 9 - it is difficult to answer this without reference to specific proposals. However, schemes need certainty (both for operators of and users of the scheme) and significant changes are unlikely to be welcome to HE sector institutions during the lifetime of an authorisation. This should not preclude smaller and relatively non-controversial alterations which could be agreed by the scheme operator and its licensees.

The consultation process singles out some modifications, for example, "the need to widen the publicity requirements" or to "strengthen opt out procedures." We would envisage that ongoing, flexible and new approaches to publicity are something that the collecting society should be doing anyway; we might have concerns if strengthening opt out procedures means making it easier, or too easy to opt out, since, firstly, educational institutions rely on having a stable licensed repertoire; secondly, opting out during a scheme reduces the value of a scheme to HE sector institutions; and, thirdly, it means that HE sector institutions incur staff, IT and other costs in dealing with opt outs during the course of a licence - depending on how a licence provides for the treatment of material which is opted out.

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

Our views on the proposed time period in regulation 10 (Modification of an authorisation) are the same as for question 8. The key point is that the HE sector needs to be given a realistic amount of time to receive, analyse and comment on changes. Modifications are likely to require less time to assess than that required for reviewing and commenting on a draft full authorisation. The 28 day period proposed, therefore, would seem about right for most modifications.

The period stated in Regulation 11 appears 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.

The ultimate sanction of revocation (which is potentially seriously disruptive for licensees) should only be exercised in extreme cases or in "material respects" as referred to in Regulation 12(1). These could include repeated significant breaches of the code of practice; egregious breaches of the conditions of authorisation etc.

However, the licensing of rights is a notoriously complex area. It is the experience of UUK that collecting societies are assiduous in trying to ensure that rights are licensed and dealt with appropriately. It could only be in extreme circumstances that revocation could be contemplated. If it should happen, then the position of licensees needs to be protected from the consequences of revocation (e.g. ideally the use of works should continue for the term of the licence).

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).

Given the potential enormous ramifications of a revocation (both for the licensing body and licensees) 21 days is insufficient for the representation period in Regulation 12(4). 42 days is our suggestion, certainly where a scheme in the HE sector is affected.

The 21 day period in Regulation 12(5) for communication of the Secretary of State's decision may be challenging in practice if (a) many representations are received and need to be reviewed (b) the matter in dispute is a complex one and (c) a large number or the majority of representations disagree with the Secretary of State's proposal to revoke. We suggest that the IPO considers raising the 21 days maximum to provide more time, if needed. As with question 15 the position of licensees needs to be protected from the consequences of revocation.

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).

Circumstances could be envisaged where a cancellation might need to be permitted (e.g. a small number of rights-holders who license access to large amounts of repertoire, or key repertoire, decide to opt out of the scheme rendering it inoperable or very unattractive to existing licensees).

However, the proposed procedures are inadequate. Cancellation of a scheme would have huge ramifications for other licensors and licensees and it should be justified and defended publicly. It should not be made easy for a collecting society to cancel a scheme. We believe that a decision by a collecting society to cancel a scheme should, therefore, be subject to public scrutiny. Cancellation could be subject to the formal procedures being adopted for authorisation, modification and revocation. So the collecting society might be required to make a written case for cancellation to the Secretary of State (merely informing the Secretary of State as draft Regulation 13 suggests is surely not enough); the Secretary of State should publish that case and allow a period for receipt of representations from other licensors and licensees; and a period within which the Secretary of State should consider and issue his decision should be set. Where cancellation is granted then as with several questions above the position of licensees needs to be protected from the consequences of cancellation.

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

Again as with several answers above, if a cancellation is allowed, most licensees would probably prefer to continue to use the licensed content for the full term of the licence rather than receive a repayment of a part of the licence fee.

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.

We acknowledge that opt out arrangements are necessary. We repeat our concerns, however, that opting out either large amounts of works, or certain core works, always present issues, problems and costs for HE sector institutions in dealing with this problem.

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 is adequate for acknowledgement and notification.

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).

14 day time limit is a reasonable period.

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

N/A.

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.

As indicated previously the position of licensees needs to be protected from the consequences of cancellation or revocation. In such circumstances, existing licensees should enjoy continued use of the work for the full term.

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.

Answers to this again depend on the type of scheme and works. Teaching and instruction on HE sector courses are planned well in advance of delivery and depend heavily upon literary and other works which are known elements of the licensed repertoire of a scheme. Academics will have prepared courses based on the assumption of licensed access to those works. Opting them out during a course of instruction which has already commenced, even with a maximum grace period of 6 months, may still radically affect students on a course. They may lose access to works for revision purposes or, even worse, lose access to materials which are needed later on in the course but which may become unavailable through opting out. Educational institutions would much prefer to see opting out not being effected until the end of the academic year in which the course is currently running.

In other circumstances opting out could present huge problems for libraries, archives, museums and cultural institutions - for example, as previously mentioned in the case of large-scale digitisation projects.

It may well be that the detail surrounding opt outs is best left to negotiations between licensors and licensees.

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 with this proposal.

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

This is more a matter for collecting societies and rights-holders but such a position appears to contradict some fundamental bases of 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).

N/A.

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 believe that the institutions represented by UUK always strive to provide as good and accurate data as we are asked to by collecting societies. In some cases reporting requirements are indeed onerous and challenging but the sector cooperates closely with collecting societies in providing the data and information needed.

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).

N/A.

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.

N/A.