

Dear Sirs

This is our response to your Consultation on the UK's new extended collective licensing scheme.

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Job Title: Managing Director

Organisation name: Thames & Hudson Limited

Main products/services: Publishers of illustrated books on the visual arts (including art, photography, architecture and landscape, design, fashion and textiles, lifestyle and popular culture, travel, the performing arts, biography and literature, children's books, natural history, science and the environment, mind, body & spirit, and history)

We will restrict our responses to the questions below. However, we would be grateful if, alongside this, you would also consider our further comments attached.

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?

We concur with the Publishers' Association that the collecting society should represent a significant percentage of rightholders in a class and a significant proportion of works in relation to the estimated total number of works. In both cases, we consider the threshold should be 80%. We do not know what practical criteria could be applied to demonstrate that a collecting society is representative in this way – as far as we are aware, there are no reliable statistics in the field of visual culture for the numbers of rightholders over and above those who are already members of a collecting society and their associated societies ex UK.

In any event, subject to meeting this double threshold criterion, an application to operate an ECL should be agreed by 80% of the collecting societies 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 consider that the same threshold as above should apply namely, 80 percent as this demonstrates the necessary significant support.

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).

We see no reason why authorization should not be revoked if the threshold of representation falls below 80% as this will demonstrate that the collecting society does not have the requisite significant support.

Questions 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.

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.

For the reasons enumerated in the attachment, we remain strongly opposed to an opt-out system. There are many occasions when we obtain copyright permission directly from rightholders who do

not wish to be members of a collecting society and we consider it an unwarranted imposition on them being forced to actively opt-out from something they have never wanted. It is essential therefore that opt-out is kept as simple and undemanding as possible and we do not consider that 14 days is sufficient in this respect. We would have thought 28 days to be more reasonable.

It is also not clear that opt-out can operate for the entire body of work of a rightsholder (past as well as future) rather than individual works. The former is necessary to ensure that the burden of opting out not be onerous and on-going.

IPO – Extending the benefits of collecting licensing

Thames & Hudson comments on the UK's new Extended Collecting Licensing scheme

- 1 Firstly, to declare an interest, Thames & Hudson is the only British publishing house that can show a continuous focus on encouraging and improving visual education in the UK and internationally for 65 years. Necessarily, a component of its programme of publications in this field is the use of visual material that is in copyright.
- 2 How is the 'value' of a copyright in this area of activity to be established? There are two possibilities:
 - i) A commercial negotiation appropriate for a publication that is to serve two functions: to educate, formally or informally, at a time when visual education has assumed greater importance in our society; and to ensure that a programme of publications that has consistently contributed to the UK export industry is sustained.

This commercial negotiation is currently the form of transaction that applies to all the intellectual property to be included in a publication (for example, the text supplied by an author) except for any content regulated by a collecting society.

- ii) A non-commercial scale of tariffs, which is derived primarily from the extensive administrative costs of running a collecting society, so that these are the first priority to be covered, and with a tariff structure that enables the total revenues of the collecting society to reach an amount that will ensure the administrative costs do not exceed 25% of the total, the balance being for the copyright holders. While it is of course the right of any copyright holder to charge what that holder wishes for use of his or her copyright material, the consequence of such a policy is that no account of the market place is taken in the tariff structure nor no possibility of negotiation for the licensee. The assertion, sometimes made by collecting societies: that their tariffs relate to 'the commercial nature of the project' is not substantiated. Currently, it is the experience of this publisher that either publications cannot proceed because the tariffs make them uneconomic or funds or subsidies have to be supplied from other sources; either result is hostile to enterprise and education and neither serve the wider interests of the copyright holder.

- 3 On the question of education, we need to ask how is a copyright holder's reputation made? Clearly, there are various mechanisms (for example, in the case of visual art, exhibition), but the principal means is the critical discussion of the artist's work in publications of various kinds. This is why many artists who have the opportunity to be represented by DACS, the artists' collecting society in the UK, are positively motivated to give permission direct to the publisher and are not members of the collecting society. Any opt-out system will be administratively cumbersome and harmful to the critical debate about visual creativity, which is an important part of our society.
- 4 The proposals, in their nature, are bound to engender dispute. This is because the exceptions rendering licensing unnecessary – being incidental inclusion; fair dealing by way of quotation for purposes such as criticism or review; or establishing that the visual object at issue is clearly non-artistic – are all open to legal dispute. Provision needs to be made in an ECL scheme to take account of these exceptions.