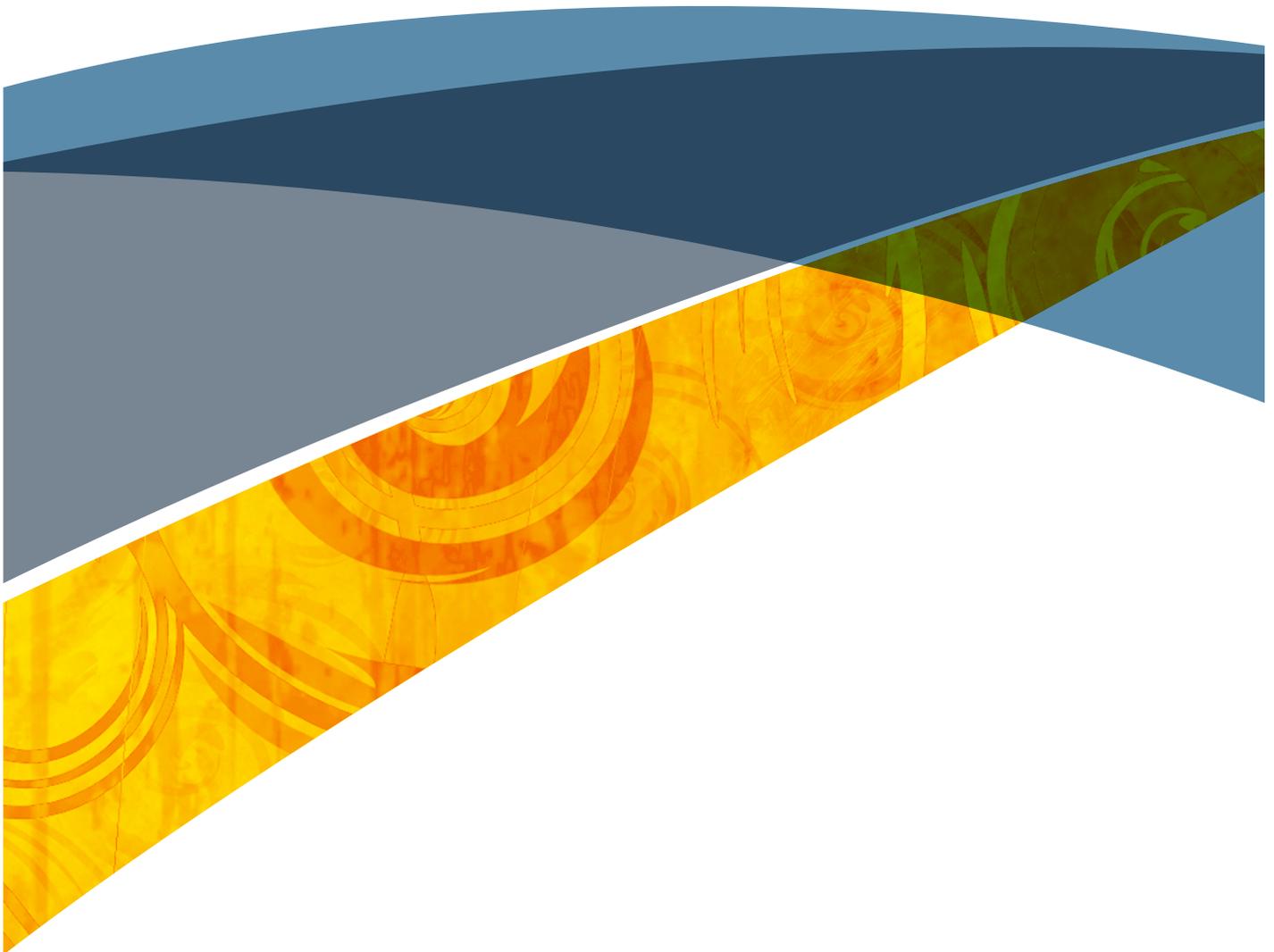




Intellectual
Property
Office

Government response to the technical consultation on draft secondary legislation for extended collective licensing (ECL) schemes





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Summary

The Government conducted a technical consultation between 28 November 2013 and 28 January 2014 on the draft secondary legislation for the authorisation of extended collective licensing (ECL) schemes.

Having previously consulted widely, both formally and informally (through working groups) on the policy, respondents were asked to limit their comments to some outstanding policy questions and the contents of the draft secondary legislation, in particular its legal effectiveness.

The Government received **37 responses** from broadly three categories of respondents: collecting societies (of which there were three in total), rights holders (and their representative bodies) and licensees (see Annex A for a list of respondents). There was one confidential response. The Government believes this is a reasonable response, particularly given the relatively narrow scope of the consultation.

Comment

The Government's view remains that ECL schemes will only be possible where the market wants them: this means, amongst other things, that a collecting society must be significantly representative of affected rights holders and have the consent of its members¹.

The proposals in the consultation document were informed by a working group comprising licensees, rights holders and collecting societies. The working group process, whilst valuable and necessary, yielded mixed results in terms of the evidence Government needed to arrive at definite policy positions. That is why the consultation was so important, helping both to crystallise the Government's views on some issues, and also persuade it that some suggested positions were not necessarily the correct ones.

Whilst many of the respondents were generally satisfied with the proposed approach to the secondary legislation, there were concerns over certain provisions. Having considered stakeholders' responses, the Government has made some amendments to the secondary legislation. These are highlighted in this response and are being scrutinised in a revised draft currently before the UK Parliament's Joint Committee on Statutory Instruments (JCSI). The finalised regulations will be published on the IPO website when the regulations are tabled.

It should be noted that most respondents did not answer all the questions, so where "licensees", "rightsholders" or "collecting societies" are referred to, it should be assumed that it is just those who responded, not the totality of any particular group.

¹ There is clear evidence that where ECLs are wanted in a sector, non-members licensed in the extended portion almost invariably join the collecting society when they learn of the use of their work or works. For example, Publishers Licensing Society (PLS) figures show that, in 2013, whilst 178 non-mandating publishers (whose works showed up in CLA surveys as having been copied) signed a PLS mandate, only one such publisher chose to opt out.

Next Steps

The Government intends to lay The Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014 before Parliament in the coming months, with the regulations entering into force on 1 October 2014. The regulations will be supported by legal guidance, so that rights holders and collecting societies are clear about what the Government expects to see in ECL applications. ECL is a new departure for the UK, so the guidance will be a living document, and will undoubtedly change over time, as ECL schemes are conceived and delivered. Draft guidance will accompany the regulations when they are laid in the coming months. That guidance will be informed by a small stakeholder working group which is likely to meet before the summer. Final guidance will accompany the regulations when they come into force in October.



Background

This policy was developed to help simplify licensing, with possible by-products of reduced transaction costs, improved legal offers, and enhanced confidence in the UK's copyright system. ECL schemes will also allow collecting societies that run de facto ECL schemes to operate on a legal footing, giving legal certainty to both licensor and licensee.

The Government formally consulted on a broad set of ECL proposals between December 2011 and March 2012. The November 2013 consultation followed a stakeholder working group process, which began in autumn 2012. Discussions with interested stakeholders continued both during and after the November 2013 consultation.


 Question

Government response to technical consultation on ECL regulations

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).

Rights holder respondents generally supported the idea that an ECL scheme could only be possible where there had been a pre-existing collective licence in operation for a minimum period. Although most favoured a five year minimum, there was some support for shorter time periods.

Collecting societies and licensees, however, generally argued for a more flexible approach that would allow ECLs without a corresponding existing collective licence, provided the collecting society applying for authorisation already had a mandate to collectively license for works that were the subject of the ECL. Licensees were particularly keen on this point; they said that this might improve prospects for digitisation projects.

Government response

One of the prerequisites of an ECL application is that the collecting society must be significantly representative of rights holders and works affected by the ECL scheme. If the collecting society is significantly representative, and meets all of the other safeguards, it should be able to apply for ECLs involving uses that it has not been collectively licensing before, *provided it obtains the clear, informed consent from member rights holders to proceed with an application for an ECL authorisation*. A collecting society might be in a position to apply for an ECL authorisation to license rights it has not been collectively licensing before, by virtue of having acquired those rights from members when they joined, for example, or having subsequently asked members for those rights.

Allowing ECLs where there is no pre-existing collective licence ensures that ECLs which are demanded by the market can be introduced quickly and efficiently, for the benefit of all concerned, including member rights holders. The Government has heard the concerns of rights holders and is confident that the policy has sufficiently strong safeguards to address those. The issue of clear, informed member consent is an absolutely central plank of the policy and will be explored in more detail in the answer to question three.

The draft regulations required a collecting society to be licensing the types of works that are the subject of an ECL application. There is a new requirement under which a collecting society must submit evidence with its application of having issued collective licences covering the types of works that are the subject of the ECL application. Combined, these safeguards mean that a collecting society cannot apply for, or be granted, an ECL in respect of the types of works it is not already collectively licensing.


 Question

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 majority of licensees and collecting societies suggested that a flexible, pragmatic approach be taken when determining representativeness. One collecting society suggested that the total number of works in the audio-visual (AV) sector could be the numbers of works for which there was a demonstrable demand for licensing among commercial users, and that a collecting society's representativeness should be judged accordingly.

Some rights holders, on the other hand, tended to favour concrete and quantifiable thresholds. Accordingly, there were suggestions that a collecting society should achieve a minimum percentage of works and rights holders relative to the total number of works and rights holders; that the collecting society should achieve a certain percentage of the revenue relative to the total revenue that would be generated by an ECL; that it should have the support of every rights holder (photographer) worldwide; or that it should represent at least a two thirds majority of affected rights holders.

Several respondents suggested that representativeness might be deduced from the fact that there was no other CMO in the sector licensing works and rights.

There were very few suggestions for methods by which the collecting society might be able to discern the total number of rights holders and works; but where suggestions were offered, these included surveys, and something akin to a "diligent search" being used as a benchmark in order to determine total numbers of licensable works.

Government response

The Government believes that the representativeness test needs to be flexible. Requiring absolute thresholds could prevent ECL schemes where they are needed most. Further detail on the sorts of evidence that a collecting society should have to provide to show that it is significantly representative will be in the guidance.

Collecting societies must show that they have made all reasonable efforts to find out total numbers of rights holders and works, using a transparent methodology. A poor understanding of the total numbers of rights holders and works will necessarily entail an incomplete publicity campaign, which in turn will mean that rights holders who might want to opt out may not be able to.

The presence of two collecting societies in a sector representing the same rights holders and works will clearly go to the question of representativeness. However, it does not follow that having just one collecting society in a sector creates a presumption of representativeness.


Question
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).

Whilst most rights holders were in favour of a 75% threshold of membership support, collecting societies and potential licensees almost unanimously saw it as unworkable. This was not only because it was unfeasible to get such a large percentage of the membership to vote (especially if that membership was in the tens of thousands), but also because the total number of members was not always known. The need for a more achievable test was also recognised by several rights holders.

Many of those who saw the consultation proposal as unworkable, favoured a threshold requiring 75% of those voting to be in agreement, in line with the Special Resolution Procedure in the Companies Act.

Government response

The Government agrees that a 75% threshold of membership support is largely unachievable. However, it does not think that a 75% threshold of *those voting* to be high enough; in the event of a low turnout, 75% of those voting could represent a very low percentage of overall membership.

The Government has constructed a test that should satisfy the demands of both members and collecting societies. For collecting societies, which tend to be member controlled or owned, it should hold true that a low level of member support for an ECL application should not satisfy them. However, member rights holders have reported tangentially in consultation responses, and more directly in private, that they are wary, if not deeply concerned, about the possibility of collecting societies applying for ECLs that are not in member interests. The Government believes that these two factors demand a high threshold.

However, the Government also recognises that collecting societies vary significantly from sector to sector: some have large memberships, some do not; some have very active members, others do not. These factors underpin the Government's position that setting a specific threshold for membership support is unworkable.

These considerations lead to the conclusion that a high but non-specific threshold is the only practical and credible option. Therefore, the regulations have been amended so that the collecting society has to demonstrate the support of a substantial proportion of its voting members for any ECL application. On the face of the regulations, the same threshold applies to ECLs both with and without pre-existing collective licences. But in practice, the threshold for an ECL which is not built on a pre-existing collective licence must be higher. The Government considered stipulating that a "higher than substantial proportion" of members was required where there was no pre-existing collective licence; however, the Government's legal advice was that such a threshold could not be meaningfully distinguished from "substantial proportion" and therefore, for the purposes of the regulations only, the same threshold applies to each. The guidance will elaborate on how collecting societies will need to demonstrate the higher threshold where there is no pre-existing collective licence.

As a further safeguard, the regulations require that that consent should be *informed*; this goes to how and when members are told of the ECL application, what they are told about the ECL application, and how and when they are polled. There will also be an obligation on the collecting society, in its application, to provide details of the polling process. How, when and what the collecting must do in order to satisfy the Government of the thoroughness and transparency of the process will be fleshed out in the guidance.

The need for informed consent is partly in response to complaints from *some* member rights holders that the process by which *some* collective licences are agreed by *some* collecting societies is at best opaque, and at worst surrounded by wilful obfuscation. The Government might therefore be said to be raising the bar, insofar as ECL schemes are concerned. Member rights holders should also be reminded that the ECL proposals allow:

- multiple opportunities for representations from interested parties before and after the grant of the ECL authorisation;
- an evidence-based decision by the Secretary of State which is public and open to scrutiny and challenge; and
- the ongoing possibility of revocation of the ECL authorisation

The Government believes that this set of measures affords member rights holders protections which are generally unavailable in the decision making process that leads to an ordinary collective licence.

The Government's ECL proposals operate in a tighter regulatory environment. With the codes regulations in place, it is now possible to regulate a collecting society that may fail in its duties towards its members or non-members. That regulatory environment has been greatly enhanced by the coming into force of the Collective Rights Management Directive² in April 2014, which must be transposed into UK law by April 2016. This Directive has been an important driver in the Government's policy, not least because it is especially strong on member protections. It does much to address some members' fears; for example, some have told the Government that they are concerned about collecting societies' exploiting rights which are currently lying dormant, or which were part of a suite of rights assigned to them at the point of joining up. Their fear is that collecting societies could apply for ECLs on the back of these types of rights, without member consent.

As explained above, an ECL is impossible without a clear, informed member mandate. Bolstering this, the Directive will allow member rights holders to "...terminate the authorisation to manage rights, categories of rights or types of works and other subject-matter granted by them to a collective management organisation or to withdraw from a collective management organisation any of the rights, categories of rights or types of works and other subject-matter of their choice..." There are numerous other protections in the Directive and the Government encourages all member rights holders to read both the preamble and the Title II provisions. The Government has not been able to transpose these provisions from the Directive into the ECL regulations, for reasons explained in the answer to question 19. There are some Directive provisions which both match Government policy and which it has the legal power to transpose into these regulations, and these will be dealt with in answers to questions 28 and 29.

2 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2014:084:0072:0098:EN:PDF>

· The Government is confident that the safeguards for member rights holders are robust
· and proportionate. Some arguments for further regulation have been based on finding
· solutions for some tensions in the relationship between a collecting society and its
· members, but it is not the purpose of these regulations to regulate every facet of that
· relationship. If members feel a collecting society is applying for an ECL that is not in
· their interests, they have a responsibility to organise themselves and oppose it. If that
· opposition means the collecting society does not have the support of a significant
· proportion of its voting members, the Secretary of State must adjudicate in favour of
· the dissenters.


Question
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).

The vast majority of respondents agreed that a collecting society had to demonstrate past compliance with its code of conduct.

Views on how that compliance should be demonstrated varied. Some respondents, mainly rights holders, thought that all complaints against the collecting society over a certain minimum period needed to be disclosed. A few wanted this condition expanded to deal with all complaints (not just those covered by the codes) and steps taken to deal with those complaints, while others wanted the condition narrowed so that just complaints in respect of members (and non-members where they had been licensed) needed to be included.

One collecting society qualified its support for the principle that past compliance with the code was important, by arguing that compliance needed to be proportionate and relevant and that complaints from members were most pertinent. Another collecting society thought that it was sufficient for a code to be in place, and that the Code Reviewer's report could be used as supporting evidence. The third collecting society's view was that, given the newness of the code, having the resources and capability to operate a licensing scheme for both users and members would be more relevant. A few rights holders also commented on the newness of the code, and this encouraged them to ask, in one case, not only for complaints made under the codes, but *all* complaints made to the collecting society over a certain period.

Government response

To satisfy the Government's minimum standards, an independent Code Reviewer must conduct regular reviews of collecting societies' compliance with their self-regulatory codes. By the time these regulations are in force any collecting society applying for an ECL should have had its code reviewed at least once by the independent Code Reviewer. The need to include the relevant parts of *all* previous Code Reviewer reviews has been added to the regulations.

In assessing the Code Reviewer's review (or reviews), the Secretary of State will pay particular attention to the collecting society's treatment of member rights holders and other factors pertinent to the effective running of an ECL. The Government agrees that a collecting society's treatment of licensees, whilst it may have some bearing on its working practices, is of secondary importance to its treatment of members for the purposes of an ECL application.

There is a new provision in the regulations permitting the Secretary of State to seek further evidence that might be pertinent to an ECL application. The Secretary of State may exercise this power if he feels that previous Code Reviewer reviews provide an incomplete picture of the collecting society's activities. There is also a further power permitting the Secretary of State to ask for any information of a collecting society within 14 days. This is identical to a power in the codes regulations³.

³ Section 9 of The Copyright (Regulation of Relevant Licensing Bodies) Regulations 2014, found here: <http://www.legislation.gov.uk/uksi/2014/898/regulation/9/made>

: Since the introduction of the minimum standards there has been a significant
: reduction in complaints received by the Government about the conduct of collecting
: societies. Whilst it is too early to say whether this signals any permanent change, it
: seems unfair for the collecting society to have to disclose all complaints prior to the
: introduction of the minimum standards. The Government believes that in most cases a
: Code Reviewer review or reviews should be sufficient.

Question**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.

There was near unanimity that members and non-members should be treated alike.

The collecting societies, whilst generally agreeing with the principle, qualified it somewhat. All of them argued that non-members should not be afforded the same rights as members in relation to, for example, governance, management and operational issues.

One of the collecting societies argued that whilst there was an obligation in the specified criteria that non-members should be treated fairly, they need not be treated identically. Differential treatment might cover increased administrative costs to be deducted from non-members (an issue returned to in answer to question 25). The same collecting society also said that there should not be the possibility of a higher rate for a non-member than that received by a member for uses of a work in identical circumstances.

Government response

The Government agrees that as a matter of principle members and non-members should be treated alike. However, the Government agrees that the contractual benefits of membership need not be extended to non-members. A higher deduction in the administrative fee will be dealt with later in this response, as will the issue of individual remuneration (in answer to questions 25 and 26 respectively).

Question**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).

There was general agreement that a signed declaration was sufficient for a collecting society to demonstrate present compliance with its code of practice. However, most respondents thought that such a declaration needed to sit alongside evidence of past compliance with its code. There was also some support, from rights holders, for some kind of verification of collecting society behaviour, such as polling members, or having an independent audit.

Government response

A signed declaration to the effect that a collecting society is complying with its code of practice is a prerequisite for any ECL application, and should help to allay any concerns about present behaviour.

The Government agrees that some evidence of past compliance is necessary to build a composite picture of collecting society behaviour, and that is why previous reviews by the Code Reviewer – together with the possibility of the Secretary of State requesting additional information – have been added as requirements. This was discussed in answer to question 4 above.


Question
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).

There was near unanimity that the protections afforded to non-members were sufficient. A minority of rights holders suggested some additional protections, including access to an appeal or complaints service, the ability for non-members to set their own price and licence terms, and added protections for foreign non-members.

There were very few suggestions for additions to an ECL application, but those that were made included an obligation on collecting societies to meet non-member representatives and agree the terms of the ECL, and a statutory obligation on the Secretary of State to meet rights holders who as non-members would not know of the ECL scheme.

Government response

The Government is satisfied that there are sufficient protections in place for non-members.

The Government is not minded to place an obligation on the collecting society to meet non-member representatives, on the basis that such representatives may often not exist. It is important that the Secretary of State hears the views of non-member rights holders in making an assessment of any ECL application, and the Government believes the first opportunity to do this would be through the period for representations; thereafter, if an ECL authorisation was granted, there would be further opportunities during the life of the scheme. It is worth remembering that where ECL schemes are wanted by the market, non-members almost without exception join the relevant collecting society⁴.

Whilst the application requirements are intended to be exhaustive, there is a possibility the Secretary of State will need further evidence pertinent to an ECL application. For this reason, as mentioned in answer to question 4 above, a provision allowing the Secretary of State to request any such evidence has been added to the regulations. There is also a further power in the regulations permitting the Secretary of State to ask for any information of a collecting society within 14 days. This is identical to a power in the codes regulations (referenced in answer to question 4).

4 Op cit footnote 1

Question**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.

A clear majority of respondents felt that the periods for both representations and Secretary of State decision were appropriate. However, there was some support, amongst a small number of rights holders and licensees, for a longer period for representations. These tended to favour a 90 day minimum, and even longer where foreign rights holders were concerned.

Several respondents either wanted to know more about who was on the Government's mailing list of stakeholders it would be seeking representations from, or offered to assist in putting together such a list in their sectors.

Government response

The Government understands the concerns of rights holders who want a longer minimum period for representations. However, the present 28 day minimum allows for the flexibility to set longer or shorter terms according to the scope and reach of the ECL scheme.

Data protection requirements mean that the Government cannot make the mailing list publicly available. However, the Government is willing to add to that mailing list the names of any who wish to be on it, as it is to begin compiling lists on a sector by sector basis.


Question
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.

A majority of respondents supported the idea that applications could, in theory, be narrowed or made subject to conditions. Suggestions for where this might be appropriate included where uses impacted on primary rights or aspects of moral rights.

However, a few respondents, mainly rights holders, thought that any change to an application should automatically entail its rejection. There was also a view that changes not authorised by members should be returned to the members, and that if they rejected those changes, the application itself should be rejected. Another respondent argued that the uses of works needed to be made explicit in the authorisation.

One collecting society expressed the view that if any conditions were imposed, the collecting society should be able to make representations in relation to those conditions. Another collecting society couldn't conceive circumstances in which a narrowing would be appropriate.

Government response

The Government believes that, where necessary, applications should be subject to narrowing or that conditions should be added to them, without the application having to be rejected in its entirety.

Allowing conditions to an authorisation will give the scheme maximum flexibility, including the ability to better protect non-member rights holders. Similarly, allowing applications to be narrowed could help to ensure that an ECL scheme did not inadvertently cover, for example, a class of rights holders, or a time period, that it shouldn't.

If an application needs to be narrowed or made subject to certain conditions such that its original scope or effect is meaningfully altered, the Secretary of State should have to reject the application. The Government's view is that, where conditions or a narrowing are necessary, the application should not be returned to the members, for fear of creating an unnecessarily bureaucratic process. In making judgements on whether or not to make adjustments to applications, the Secretary of State will need to consider the needs of all parties, including any views expressed during the period of representations. It is the responsibility of the applicant to submit complete, evidentially robust applications that do not need any, or at least very little, interference.

Question**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.

The majority of those that responded saw judicial review as an expensive and time-consuming process and favoured something less onerous. Of those that suggested alternatives, the First Tier Tribunal found most favour, but there was also some limited support for involvement of the Copyright Tribunal.

However, there was a view, shared by some rights holders and at least one licensee, that if a collecting society should fail in its application it should re-submit that application based on the issues it needed to address. This would ensure that it reflected both the will of member rights holders and licensees.

Government response

The Government will not be allowing an appeal route because in reaching his decision, the Secretary of State will have subjected every ECL application to extremely thorough and public scrutiny.

In the case of a rejected application, if a collecting society or potential licensees are dissatisfied with the Secretary of State's decision there is always the option of re-submitting an application, or judicial review.


Question
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).

Nearly all respondents agreed that proportionality was the key principle. The collecting societies favoured proportionality in line with the scope and scale of the scheme, and making an assessment of how feasible or appropriate it was to publicise in the light of surveys indicating where non-member foreign rights holders were found. They did not think that advertising in every country where non-member rights holders were located was necessary.

Some rights holders didn't think proportionality was sufficient, or qualified their support of the principle in some way, for example by saying that publicity should encompass all sister collecting societies.

Suggestions for where collecting societies should publicise the ECL included notices on their own website, in one relevant national publication, in newsletters, the IPO website, the relevant trade press and their websites, relevant rights holder groups, and on a state held register of ECLs.

There was general agreement that where the level of opt outs reached a level that brought the collecting society's representativeness into question, the authorisation should be reviewed or revoked. There were also a suggestion that the level of opt outs relative to the level of pre-authorisation opt outs should be regularly monitored. However, one collecting society suggested that if opt outs developed significantly post authorisation, then no action need follow and the scheme would reduce in coverage. The same collecting society (and several licensees) argued, in response to a later question, that there could be a corresponding diminution in the value of a license following a certain number of opt outs.

Government response

The Government agrees that proportionality should be the key principle in designing a publicity campaign. This principle encompasses the appropriateness and scale of publicising in a foreign country where there are very few non-member rights holders.

The Government is grateful for evidence on some of the possible avenues for a publicity campaign. The Government would expect most if not all of these suggested routes to be followed for most if not all ECLs. There will be further detail on these matters in the guidance.

It should be noted that an increase in the level of opt outs should not always reflect negatively on a collecting society's representativeness; for example, it could be that, whilst the number of opt outs has increased, the number of members has proportionately increased, making the collecting society *more* representativeness than it might have been before.

: But the Government agrees that where the level of opt outs is such that the collecting society's representativeness is called into question, the authorisation will need to be looked at. As mentioned previously, the Secretary of State will have a new power to ask for any information, which could include information on the level of opt outs (as well as representativeness) should he at any stage be concerned about either. Even if the scale of opt outs is not sufficiently high for revocation to be appropriate, such opt outs could impact on the licence fee, but this is rightly a commercial matter for the collecting society and its licensees.

: Formal reviews of levels of opt out (as well as representativeness) take place both at the point of application for renewal of authorisation, and also at three-yearly review cycles during the lifetime of the second authorisation period. There is further detail on this in answer to the following question.


Question
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).

The majority of rights holders and collecting societies thought that five years for the initial authorisation was an appropriate time limit. However, some did favour three years or an ongoing review process. One rights holder pointed out that in their sector the pace of change was very fast and commercial opportunities for licensing rights could change dramatically in five years.

Many potential licensees thought that five years was too short and was an obstacle to digitisation efforts. Where they suggested a different authorisation period, this tended to vary between ten and fifteen years.

Several collecting societies and licensees argued that it should be possible for licence periods to exceed overrun the five year authorisation, but conceded that this couldn't be by much. They wanted the possibility of overrunning in this way because it would enable greater flexibility in setting licence periods – for example, a five year authorisation continuing a little beyond the five year term would permit two three year licences.

There were wide-ranging views on what should be included in an application for renewal. Some rights holders favoured a comprehensive process, including the re-supply of everything that was required for the original application. But most rights holders seemed to agree that in any application there should be a review of how the collecting society had treated non-members (including complaints and efforts to find them); the level of opt outs; the representativeness of the collecting society relative to what it was at the time of application; and compliance with the code of practice (including information on whether there had been any material breaches). Some wanted greater granularity in relation to compliance with the code, including the disclosure of *all* complaints made against the collecting society.

Two of the collecting societies argued for less onerous conditions. They favoured a re-application on the basis of information supplied in the original application unless there had been any material change, together with information on the treatment of non-members. One of the collecting societies acknowledged the need to provide information on opt outs relative to the numbers of participating rights holders. Another floated the possibility of an indefinite authorisation, following the initial authorisation, subject to an obligation to inform the Secretary of State of material changes in initial authorisation conditions.

Several respondents, nearly all licensees or collecting societies, pointed out that the regulations only allowed applications for renewal after expiry of the original authorisation.

Government response

The Government is sympathetic to respondents who feel that a five year authorisation is insufficient to get digitisation projects off the ground. However, the Government feels that the initial authorisation period, which is akin to a pilot, should be short. A renewal is an opportunity to take stock and audit the original authorisation; a shorter period will allow this to happen sooner rather than later. The initial authorisation period will therefore remain five years.

At the point of application for a renewal of authorisation, the Government will ask the collecting society to provide information on:

- the informed consent of its members and how that was obtained;
- representativeness;
- management of the opt-out process and changes in opt out levels since the original application;
- publicity to non-members, including efforts to find them;
- levels of distribution to non-members;
- compliance with its code of practice, including its declaration and code reviews;
- complaint levels, their nature, and how they were resolved; and
- a summary of the re-application.

The outstanding pieces of information that were supplied at the point of application, but do not appear on the above list, must be re-supplied by the collecting society *unless they have not changed*.

As with the application process, the Secretary of State may also ask for any further information that he feels necessary to assist with the application.

The Government thinks that an application for renewal of authorisation is an opportunity for an audit. Thus, it should be thorough and transparent. Representations should be invited, and the results made public – in other words, the application for renewal should mirror as closely as possible the initial application process.

If the application for renewal of authorisation is successful, the second authorisation will continue subject to the successful outcome of three-yearly reviews conducted by the Secretary of State. These reviews require exactly the same information as at the application stage, except that that the collecting society does not have to provide evidence of the informed consent of its members, *unless evidence of that consent is requested by the Secretary of State*.

This is because, for most collecting societies, getting the informed consent of members will be a costly process. An absolute requirement for obtaining informed consent at review is unnecessarily burdensome where an ECL scheme is running perfectly smoothly. However, the Government recognises the need to have the *option* of requiring the collecting society to provide evidence of consent where there is a concern that the members no longer support the ECL scheme, and therefore the regulations give the Secretary of State discretion to do so. If the Secretary of State decided not to exercise his discretion, he must say why in the report he is required to publish following provision of all the evidence. It should also be noted, as previously flagged, that using the new information power, the Secretary of State could potentially ask a collecting society for the informed consent of its members *at any time*.

The other difference in the process between the original application and the review is that there is no mandatory period of representations in the latter. However, Secretary of State retains a *discretion to request a period of representations*, for example, if there is a particular issue about which he feels the need for a wider range of views. This is in line with the policy of having a streamlined review process, though the three year intervals are regular enough to pick up problems early on. There is sufficient flexibility in the process for the Secretary of State to scrutinise a review as strictly as a renewal if he feels the need to.

The Government believes the renewal and review provisions are sensible and well-balanced, allowing for a thorough, open audit of ECL schemes at regular intervals, whilst also incentivising ECL applications by giving reassurance that, provided the criteria (especially those in respect of non-member rights holders) are being met, authorisations may continue.

The Government agrees that the regulations should be amended to allow a collecting society to apply for renewal of authorisation during the initial authorisation, in order to allow licensing to continue uninterrupted. The Government's position is that a collecting society can apply for a renewal three years into the initial authorisation period. This will accommodate initial licence periods of between one and three (perhaps even four) years, therefore giving collecting societies the maximum degree of flexibility about how they structure their licences. Following, say, a three year licence term, or three one year licence terms, the collecting society would be able to apply for renewal. A decision on renewal as early as possible into the initial authorisation period should ensure a much greater degree of business certainty. The cut off for an application for renewal is three months before the initial authorisation period of five years. These time periods are reflected in the regulations.

Some respondents, both in answer to this and previous questions, believed the Government would be circumscribing the duration of individual licence periods within the five year authorisation. This is not the case, and licence terms remain something for collecting societies and licensees to agree between themselves. However, licence periods cannot exceed the authorisation period because there is no legal vires for allowing the use of non-members works beyond that authorisation period. This is the legal advice the Government has received.


 Question
Question 13:

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

The collecting societies who responded commented that it was hard to speculate on the need for modification without some knowledge of the conditions attached to an authorisation. One of them went on to say that modification should not be ultra vires in terms of member consent, and should not interfere with works covered, or their permitted use; the other thought that a change to the terms and conditions of a licence that didn't affect the fundamentals of the authorisation (including the works, rights or uses) would be appropriate for a modification. A third collecting society thought that a modification could be possible in response to developments in technology, or changes in the business models of existing uses. Two others argued that, as envisaged by the regulations, collecting societies should not have to pay for a modification initiated by the Secretary of State.

Some respondents agreed that making adjustments to the publicity requirements or opt out arrangements would be appropriate areas for modification, and others that modifications could deal with changes in technology. Several licensees urged a pragmatic, flexible approach reflecting changes agreed between the collecting society and the licensee.

A small number of rights holders felt that change under any circumstances was unacceptable, or that the modification needed to be returned to the member rights holders first for agreement. One of the collecting societies felt that modification should not run counter to member consent, but fell short of saying *any* change to the authorisation would need member approval.

Government response

The Government maintains its position that modification to an authorisation should be reserved for certain relatively narrow circumstances. There must be some allowance for ECLs to be changed so that they remain current and reflect the needs of all parties. If a collecting society makes modifications that affect its members, it would obviously be desirable for the collecting society to consult its members, but the Government will not be putting an obligation on it to do so. A modification cannot be used to widen a collecting society's mandate to include new rights, uses or works. The Government will have to reject a modification that seeks to meaningfully alter an authorisation.

The Government envisages most, if not all, modifications to take place at the behest of the collecting society. However, the Government needs to retain the flexibility to initiate changes if it thinks them necessary. For example, modifications might be necessary in response to domestic or international legal changes.

If member rights holders object to a modification, they will always have an opportunity to make their feelings known during the period of representations.

Question**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.

There was near unanimity that the time periods were appropriate. Those that opposed the time periods did so because of an in-principle objection to modification, or because they thought the time periods were too short. Those who felt the time periods were too short felt that 3 months would best allow harder to reach rights holders (foreign rights holders, for example) to respond.

Government response

The Government believes that the period for representations and Secretary of State decision are adequate, on the basis that they afford maximum flexibility. The 28 day minimum time period must be understood in the context of the (narrow) circumstances in which modifications would be permitted. If ECL schemes contained significant numbers of foreign rights holders, the Government agrees that much longer than the present 28 day minimum might be appropriate.


 Question
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 collecting societies felt, variously, that only material and relevant breaches of the code should be considered; that there should be no revocation provided the collecting society wasn't being regulated with a statutory code; and that the collecting society should be allowed to remedy the failure that led to the threat of revocation.

Licensees generally agreed with the collecting society position. There was also a concern that if licences vital to the continuation of copying in educational and cultural institutions were lost, there would be no lawful way for that copying to continue⁵.

Many rights holders voiced the view that an authorisation should be revoked if the collecting society could no longer be said to be representative. Other suggestions for circumstances appropriate to revocation included: complaints from more than 25% of rights holders; distortion of market price or other competition law concerns; the collecting society ceasing to be not for profit; interference with direct licensing activity; and failure to limit licensees' use of opted out works.

Government response

The Government agrees that, in assessing revocation, only material and *relevant* breaches of the specified criteria need be considered. The imposition of a code demonstrates a serious failure of the collecting society's system of self-regulation, but in exceptional circumstances this may not warrant revocation. If, for example, a collecting society operating an ECL has had a code imposed on it for failings in its obligations to licensees, but in its treatment of members and non-members it has been impeccable, then revocation may not be appropriate. The Government's legal advice is that a "material" breach of the specified criteria covers the need for that breach to also be "relevant."

Revocation can have substantial impacts on the collecting society, member rights holders and licensees. The Government has taken on board concerns around the impacts on cultural and educational institutions of the revocation of certain licences essential to core activities such as photocopying. Nonetheless, the Government agrees that an authorisation should be revoked if the collecting society could no longer be said to be significantly representative. As mentioned above, the Secretary of State will be seeking updates on the collecting society's representativeness, both as a condition for successful renewal of authorisation, and at 3 yearly intervals during the second authorisation period itself.

⁵ There is a parallel here: in both 1984 and 2006, the Norwegian Ministry of Culture and Kopinor (the Norwegian CMO in the field of reproduction rights) failed to agree on licensing terms for copying in schools, which in turn led to a prohibition on copying in schools. In 2006 this amounted to a 96 day prohibition. Although the ban was not initially respected, when Kopinor made it publicly known that such copying was unlawful, the prohibition was respected, with all the concomitant problems.

Question**Question 16:**

Are the proposed time periods for representations and Secretary of State decision reasonable? Are the post revocation steps sufficient and proportionate? Please provide reasons for your answer(s).

Whilst some who responded to the question felt that the time periods were appropriate, the majority, who included rights holders, collecting societies and licensees, wanted the time periods increased. Suggestions included 42 days, 60 days, and three months.

Government response

The regulations allow the Secretary of State's notice of representations to allow for a period greater than the 21 day maximum. Government appreciates that revocation can have a significant impact on all in the licensing chain, and will allow more, or much more, than the 21 day maximum where it is needed.

The Government accepts that, where there are a large number of representations, the Secretary of State might not be able to consider all of them within the present 21 day maximum. The time period is therefore being changed to a 42 day maximum.


Question
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).

Most respondents agreed that collecting societies should be able to cancel their authorisation. Circumstances in which this might be appropriate included opt outs of key parts of the repertoire, or if the collecting society felt it no longer had a mandate.

Several licensees reiterated the view that in the event of cancellation some licensing activity had to continue, including copying (analogue and digital) in schools, colleges, universities, libraries and government. Their preference was for licensing to continue without interruption, rather than any form of reimbursement. There was also a view that cancellation should be subject to public scrutiny in the same way as procedures adopted for authorisation, modification and revocation.

Aside from a small minority of rights holders, respondents did not favour the imposition of a penalty in the event of a cancellation. Licensees were almost universally against this idea. One collecting society felt that penalties should not be necessary if non-members were not prejudiced and monies owed were distributed. Another felt a collecting society might have a perverse incentive to continue with a scheme in order to avoid the imposition of a penalty.

Government response

Applying for and running an ECL scheme is a voluntary, commercial decision for a collecting society, so it follows that cancellation should be too. The Government agrees that there should be no penalties for cancellation. The Government will set a date for cancellation which ensures business certainty and which allows sufficient time for the collecting society to negotiate and commence collective licences minus the extended portion.

The Government has added to the regulations a provision for the Secretary of State to put conditions to a cancellation before a cancellation date can be set. Such conditions could include certain obligations towards licensees (e.g. around the commencement of collective licences following the termination of the ECL), or towards non-members. A cancellation date will not be set until and unless the Secretary of State is satisfied that some or all of these conditions have been met, or are on course to being met.

Question**Question 18:**

Is the repayment of a part of the licence fee a reasonable and proportionate requirement? Please provide reasons for your answer.

Many licensees repeated what they said in their answer to the previous question, namely that they would much prefer licences ran to the end of their term, rather than repayment of part of a licence fee. Licensees also reiterated their point that protections needed to be in place in the event of cancellation of certain critical non-commercial licences, like those used in schools and museums.

There was an acknowledgement from both a collecting society and a licensee that large numbers of opt outs would affect the level of the licence fee.

Only a minority thought that part repayment of the licence fee was appropriate.

Government response

The Government has previously made it clear that it will try to set cancellation or revocation dates that coincide with the end of licence terms. But even if it were unable to do so, part repayment of a licence fee would be a commercial matter between the collecting society and its licensees; accordingly what was formerly regulation 16 (6) has been removed.


 Question
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.

Most respondents thought that the opt out arrangements were adequate and fair.

Most licensees were content with the opt out arrangements. There were observations that not all Nordic ECL schemes offered the opportunity to opt out, and that opt out should be discouraged otherwise key parts of the repertoire might become unavailable. Many licensees also felt that, where licensees are educational establishments, works in their licenses should not be opted out of ECLs until an academic year has elapsed.

One collecting society expressed a concern that the regulations would enable member rights holders to opt out of ECLs; the corollary, they argued, was a fragmentation of the voluntary, core repertoire. Another collecting society thought that the name of the member was as important as the names of their works, especially if they wanted to opt out all future works.

Some of the more common rights holder concerns were that there didn't seem to be provision for opting out before the ECL scheme had started; that there needed to be a facility for multiple opt outs; and that rights holders should not have to list all their works. One respondent pointed out that opt outs are often ineffective, because they are difficult for collecting societies to enforce, and for rights holders to track.

One respondent suggested that opt out lists should be freely searchable, publicly accessible indexes.

Government response

The Government's clear legal advice is that it will not meet its legal and international obligations if it does not allow non-members to opt out of UK ECL schemes.

The regulations already allow for opt outs before the commencement of an ECL scheme. However, in order to reassure rights holders, the Government has made this explicit on the face of the regulations.

The regulations make clear that an authorisation will only be granted to a collecting society that has adequate opt out arrangements, including for multiple works. The guidance will set out what Government expects to see in a collecting society's opt out procedure in respect of multiple opt outs.

Some collecting societies allow member rights holders to pick and choose which licences they want to be a part of, and which rights they want the collecting society to manage. Other collecting societies do not. Member rights holders have also told the Government that some contracts with collecting societies appear to give the impression that members can opt out of collective licences, but that, in practice, difficult or impossible hurdles are put in their place.

It is not the Government's aim, through these regulations, to enable member rights holders to do what they are not permitted to do in their member contracts; neither does the Government wish to interfere where member rights holders cannot opt out works or rights even when their contracts appear to allow them to do so. These are matters governed either by the contracts between member rights holders and collecting societies or the relationship between the two parties. To the extent that some of these issues are covered by the codes regulations and the forthcoming CRM Directive, members will have recourse to these measures. The Government's policy, then, is that collecting society members can opt out of ECLs only if their existing

membership contracts allow for opting out of collective licences or ECLs. This puts them in no better or worse position than they currently enjoy. The regulations have been amended accordingly.

As mentioned earlier in this response document, the CRM Directive, when transposed, should allow member rights holders to withdraw rights, categories of rights or types of works and other subject-matter of their choice, from collective licences and ECLs. The Government cannot replicate this provision in these regulations because although the Directive is now in force, it has not been implemented, and therefore the Government has no legal power to include the provision. Furthermore, implementation of the Directive can only take place following consultation and a thorough consideration of how the Directive will apply more generally.

The Government will retain the provision requiring collecting societies to add to the opt out list the name and the works of those member rights holders who have already effectively opted out of the ECL, either because they have opted out of a pre-existing collective licence upon which the ECL is based, or because of some other contractual arrangement. Although there is no specific provision for how and when the collecting society should add those works to the list, there is a requirement on the collecting society to *maintain* that list. The guidance will make clear how it should meet that obligation. The regulations will require works “which have been identified as opted out” to be added to that list. How such identification takes place, and the burdens (if any) to be placed on the member rights holder in relation to the provision of information about those works, will also be covered by the guidance.

Where a collecting society is extending an existing collective licence, member rights holders who have already withdrawn their works or rights from that collective licence cannot be included in the extended portion. This is because, firstly, the collecting society will have no mandate from the member rights holder to do this. Secondly, the extended portion can only include the works of *non-members* that have not been opted out, and therefore, by definition, cannot include the works of members.

There is some concern that after a member has withdrawn their rights from a collective licence, and a collecting society subsequently gets an ECL authorisation for an extension of that collective licence, the member could be treated as a non-member for the purposes of the regulations. This is not the case. The collecting society must put the name of the member, and their works (however and by whomsoever they are identified), on the list of opted out works.

If there is no pre-existing collective licence, members may not have previously had the chance to withdraw their works or rights. They will, of course, at the point of application, have the option of voting on that ECL and stopping it if they feel it is not in their interests. If the ECL authorisation is granted, then they will still be able to opt out their works or rights to the extent that they are able to do so under their existing contracts. The collecting society must put the opting out member’s name, and their works (however and by whomsoever they are identified), on the list of opted out works.


 Question
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.

The vast majority of respondents agreed that the 14 day limit was satisfactory.

Only a very small minority, in the images and other high-speed transaction environments, such as news media, felt that 14 days was too long, and that both acknowledgement and notification of the removal of works from licences needed to be instantaneous or near instantaneous.

Collecting society respondents agreed that the very low likelihood of fraud made verification of opt out unnecessary.

One respondent pointed out that the non-member must also be told when use of the work must stop.

Government response

Both acknowledgement and notification of removal must take place *within* 14 days of receipt of notice of opt out. This can allow the Secretary of State, as a condition of the authorisation, to specify a shorter period where necessary.

The Government agrees that the incidence of fraud is low, and that responsibility for its detection should lie with the collecting society.

The Government has added to the regulations a requirement that, when acknowledging opt out, the collecting society should tell the non-member when their work will be removed from the ECL scheme. How this should be done will be expanded on in the guidance.


Question
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).

The vast majority of respondents agreed that the 14 day time limit was appropriate. However, two of the collecting societies favoured slightly longer, 21-28 days, and 28 days respectively. For one of the collecting societies, the rationale for this slightly longer time period was that the list might require “editorial intervention”.

Although some respondents were in favour of a separate pending list, the majority view was that such a list might prove confusing.

Again, the view from the images and high-speed transaction environments, was that much shorter time periods were necessary.

Government response

The Government believes that 14 days is an adequate time period for a work to appear on the opted out list. By putting the work on the opted out list the collecting society can be said to discharging its obligation to notify licensees that the work has been opted out; collecting societies, may, however, choose to discharge this obligation in additional ways. The collecting society must list the opted out work *within* 14 days of receipt of notice of opt out. This can allow the Secretary of State, as a condition of the authorisation, to specify a shorter period where necessary.

The Government has made a commitment that rights holders should be able to opt out at zero to minimum cost. This means that if the regulations were to make it obligatory for a non-member rights holder to opt out, say, 50 works individually, the principle might be violated. However, if the opting out non-member did not list all their works individually and, for example, provided just their name, it might be for the collecting society to research and compile the list, or for the list to remain as it was and the licensee to figure out what couldn't be used.

The Government hopes that non-member rights holders will list the works they want to opt out of ECL schemes and in so doing lower the chances of their works being used unlawfully. Opting out non-members who don't list their works greatly increase the chance of licensees not doing the due diligence on what is in the repertoire. However, as mentioned above, the Government cannot compel opting out non-members to list their works. Neither does the Government want to put an obligation on the collecting society to research and compile a list of those works. If the opting out rights holder does not list their works, it will be up to the licensee to find out what those works are.

This is something that licensees already have to do, both in de facto ECL schemes (where publishers may not necessarily list all their works), and for opt-in collective licences, where they usually have to check what is or is not in the repertoire.

∴ The Government has therefore amended the regulations so that there is now no obligation on the opting out non-member to provide a list of all their works.

∴ As for member rights holders, as mentioned above the regulations allow members to opt out works if their contracts permit them to do so. The collecting society should put on the opted-out list the name of the member and the works that have been identified as opted out.

Question**Question 22:**

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

The majority view was that these requirements were proportionate and reasonable; some said that they needed to be written into the regulations.

However, two of the collecting societies were less supportive. One of them argued that it might not always be possible to identify a work without knowing who the rights holder was, and that if it wasn't a requirement to disclose the name of the rights holder it might not be possible to challenge an opt out; another argued that the regulations interfered with voluntary member mandates.

Government response

The Government agrees that rights holders should have to provide their names when opting out of ECL schemes. If a rights holder does not provide their name it can be very hard to challenge opt outs; and if there are two works with the same title, but there are no details of the rights holder, licensees may not know what is in the repertoire. The regulations have been amended accordingly.


 Question
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.

Licensees argued that revocation or cancellation dates needed to terminate at the end of the licence period; very few rights holders expressed an opinion on this, but those who did tended to agree. Licensees again took the opportunity to argue that there was a strong public interest argument for the continuation of licences essential for non-commercial educational, research or educational purposes.

One collecting society argued that revocation or cancellation should only apply to any future grant of licence and that the rights of the rights holder would be protected by opt out. It also commented that there would be problems for licensees if revocation or termination took place before the end of the licence term. Another collecting society argued, firstly, that non-members who have not opted out should not be able to license directly in parallel with the ECL; and secondly that a termination at the end of licence period was proportionate provided it applied only to the extended portion of the licence – in other words, that the member portion should be allowed to continue.

Government response

Government will set revocation or cancellation dates that run to the end of the licence period. However, it may be that a shorter time period is sufficient, if collecting societies can quickly begin to run a collective licence without the extended portion. It may be the case that there is provision in licence terms and conditions for licensees to claim some or part of the licence fee in lieu of having the licence continue to the end of its term; if there is such a provision, and that is what licensees choose to do, that is a commercial matter between them and the collecting society. Non-member rights holders who have not opted out of an ECL scheme will be able to continue licensing their rights outside of the ECL scheme, if that is what they wish to do. This is because ECL licences can only be granted on a non-exclusive basis.

An authorisation for an ECL scheme is an authorisation for the collecting society to grant licences for all the works in the repertoire of the ECL, that is to say, the works of both members and non-members. This means that if the authorisation is revoked by the Secretary of State, or if the ECL is cancelled by the collecting society, then neither the works of members nor those of non-members can be licensed under that authorisation. In particular, the collecting society cannot carry on licensing members' works under the ECL even though it has an existing mandate from them. There is nothing to prevent a collecting society from issuing a collective licence covering the works of its members alone, alongside the ECL.

Question

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.

The vast majority of respondents agreed that six months was a proportionate and reasonable time period for the cessation of use of an opted out work. However there was a view, shared by a collecting society and several licensees, that for educational licensing an academic year was more appropriate.

Some rights holders pointed out that in other Nordic countries opt out periods were shorter (for example, in Denmark it was 3 months) and that in the images and other high-speed transaction environments much quicker opt out would be appropriate.

Government response

The Government accepts that where licensees are “educational establishments” (as defined by the CDPA⁶), a post opt out period of longer than 6 months is necessary, in order to cover an academic year. The regulations have therefore been amended to allow the collecting society – having presumably discussed the matter with such educational establishments – to request, at the point of application, a longer post opt out period or periods in respect of these licensees. The Secretary of State would then need to consider representations on the proposed opt out period, and exercise a discretion to allow longer than six months where a robust case has been made. The Government has, in private, heard evidence that whilst nine months in most cases adequately covered the academic year, in some cases educational establishments would need twelve months. The Government feels that twelve months comes perilously close to a compulsory licence and is therefore restricting the period to nine months.

The regulations stipulate that opt out of ECLs must take place *within* 6 months of notice of opt out, or *within* nine months where the licensee is an educational establishment. This allows the Secretary of State, as a condition of the authorisation, to specify a shorter period. The Government agrees that for some types of works quicker opt out might be appropriate.


Question
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.

The majority of respondents, including the collecting societies, agreed that where a collecting society elects to spend a portion of the administration fees collected from ECLs for the benefit of members, it should also take into account the benefit to non-members.

One collecting society also argued that the administration fee in respect of non-members should be higher, if and to the extent the cost of administering an ECL in relation to them exceeds that in relation to other members.

Government response

In ordinary collective licences a portion of the administration fee can be used for the benefit of members; common destinations for those fees include political lobbying, scholarships and the like. The Government believes that to the extent this is done with money collected from ECLs, it should be done with the benefit of members and non-members in mind. The collecting society's Distribution Policy will be interrogated accordingly.

Whilst it is possible for deductions from non-members to be higher than those for members in order to meet the costs of the scheme, those deductions must still qualify as "reasonable" and must accord with the principle of fair treatment to non-members enshrined in the codes. If a collecting society is to apply a differential rate to non-members it must demonstrate clearly in its Distribution Policy why such a rate is justified, and why costs associated with non-members shouldn't be met in some other way, through an uplift in the license fee, for example.


 Question
Question 26:

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

All the collecting societies and many licensees felt, variously, that individual remuneration contradicted some of the central principles of collective licensing; that it would be difficult for members to accept; that a definite licence fee needed to be known upfront; and that non-members unhappy with what they have received should instead opt out.

Some licensees and many rights holders felt that the principle was correct and that the regulations must make specific mention of rate as well as usage.

Government response

Some respondents misunderstood the concept of individual remuneration, believing that it amounted to the possibility of non-members being able to set their own rate separately from the collective rate. The correct position is that individual remuneration allows the non-member, who has not agreed to the collective rate, to *question* the reasonableness of that collective rate. This could be a very difficult or impossible hurdle to climb, especially if that rate has been set by the Copyright Tribunal. The level of the collective rate can also be challenged if the work is being licensed directly, in that where the collective rate is lower than the direct rate, the rights holder is being deprived of what they are otherwise achieving. Individual remuneration also allows the non-member to question the usage of their work. However, under these regulations there is no obligation on the collecting society to track that usage.

The principle of individual remuneration is enshrined in all the Nordic ECL schemes, and Government legal advice is that it is essential for compliance with its international legal obligations.

The revised regulations mention both rate and usage, and have capped the period in which a non-member can make a claim to three years from the end of the financial year in which a fee for the work was received; this is also the same time period as that after which, under the CRM Directive, monies are deemed non-distributable (there is more on this in answer to questions 28 and 29). The Government does not think it equitable that a collecting society should have to face claims for individual remuneration from non-members many years after usage.

The Government has heard evidence from colleagues in the Government offices in the Nordics that claims for individual remuneration are extremely rare.


 Question
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).

One collecting society felt that it was sufficient for the collecting society to publicise undistributed non-members' monies on its website. Another argued that the publicity for non-members monies should be proportionate to the quantum of monies being kept for those non-members. The same collecting society argued, in response to the next question, that poor quality data, especially from collecting societies abroad, means that title specific distributions are not always possible. Accordingly they favoured a general obligation to identify and publish on the relevant website fees that have been undistributed.

A few rights holders took the threat of fraudulent claims seriously, and felt that the collecting society had to be sure that ownership had been established. One of the collecting societies agreed, especially where the sums being held were substantial, but said that verifying identity was something that they were already experienced in.

Government response

As a condition of its authorisation, the collecting society is under an ongoing obligation to find non-member rights holders for whom it is holding monies, in line with the arrangements it outlined in its application. There will be additional distribution obligations when the CRM Directive is transposed. The Government agrees that a collecting society's efforts to find the non-member rights holders must be proportionate to the amount it is holding for that rights holder.

Collecting societies have considerable experience and expertise in dealing with contentious claims. Errors in judgement may take considerable time and expense to remedy if monies are misdirected and the correct rights holder comes forward. These are matters best left to the collecting society and the Government will not regulate in this area.

The Government recognises that because of poor quality data from licensees, title-specific distributions are not always possible. This is also recognised by the Directive. Because the Government agrees with the Directive, and because the Government has vires to legislate in this area, the regulations have been amended to track the wording in the Directive. Therefore the wording now requires the collecting society to make available information on works and other subject-matter for which rights holders have not been identified or located. The specifics of that required information, and where and how the collecting society should be advertising these undistributed monies, will also be made clear in the guidance.

Question

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.

There was little comment on incomplete or inaccurate data. However, one collecting society and a couple of rights holders agreed it was a problem; a couple of licensees pointed out that the data they provide is often at the publisher level, not author level.

There was widespread belief either that Government could, and would, be keeping undistributed monies for itself; or that Government would keep members' monies for itself, as well as that of non-members.

One of the collecting societies pointed out that unmatched monies are not the same as undistributed monies. Another suggested it was reasonable for undistributed monies to revert to the crown for defraying the costs of the ECL scheme.

Rights holder suggestions for where undistributed monies should be directed included relevant trade associations and bodies benefitting creators (subject to the agreement of collecting society members; a nominated charity set up by the industry to promote creativity; purposes decided upon by the collecting society; and the promotion of educational and cultural causes and the education of users regarding copyright; to other holders of similar rights; organisations that support creators; and 50% going to the crown. Several rights holders concurred that the Government should use undistributed monies for the purpose specified in the Directive.

A couple of licensees argued that undistributed monies are placed into an account and used to reimburse licensees directly or indirectly.

Question

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).

Licensees who expressed a view on it, and two of the collecting societies, all agreed that the collecting society should retain no contingent liability if monies went to the crown. The other collecting society said that any contingent liability should be equivalent to that provided by the collecting society under its own rules in relation to member claims for undistributed monies and/or any eventual provision under the CRM Directive.

One collecting society said that undistributed monies should be kept until the end of the period of limitations, and another that it should be kept for 6 years.

Rights holders argued, variously, that monies due to non-members should be kept for the period of copyright; for as long as possible; or at minimum for the period of limitations. Other suggestions included 6 years and 10 years.

Government response to questions 28 and 29

As previously stated, where consistent with Government policy and where Government has the legal vires to do so, these regulations are being made with the transposition of the CRM Directive in mind. Government policy is that where funds remain undistributed that have been collected on behalf of non-members, these should not automatically revert to the collecting society. Returning undistributed rights holders' monies to licensees seems an even more inappropriate destination for those monies.

Under the CRM Directive, monies are deemed "non-distributable" if they have not been distributed after three years from the end of the financial year in which the monies were collected. These regulations make provision for the handling of monies collected on behalf of non-members in line with the period in the Directive. On the expiry of the three years after the end of the financial year in which the licence fees were collected, title passes to the Secretary of State. The Secretary of State may either hold these monies on deposit or direct a collecting society to retain these funds (in order to improve distribution prospects) for any period up to 8 years from when the ECL authorisation began.

Where the collecting society has been directed to hold the monies, it must transfer these back to the Secretary of State after the expiry of the directed period. After a total of 8 years, the Secretary of State may determine what happens to these monies, including that they be used for social and cultural purposes.


Question
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.

One collecting society said that orphan works are allowed to be used in ECLs so a diligent search should not need to be done for each one. Another collecting society said that the use of orphan works will only need to follow that particular regime if and where an ECL scheme is not available to cover the use in question; it added that as a general rule, an effective ECL scheme could reduce numbers of orphans by locating non-member rights holders.

One rights holder argued that collecting society should have to notify the authorising body if it found the rights holder in a work that was licensed as an orphan. Several rights holders thought that ECLs should not contain orphans because that was the purpose of the orphan works scheme.

Government response

The Government's position is identical to that set out in the orphan works consultation, published in January 2014⁷.

Licences for orphan works under the UK scheme and licences for the works of non-members in ECL schemes are non-exclusive, so nothing precludes the possibility of them co-existing in respect of the same work.

If at the point that a collecting society distributes money, a rights holder cannot be found, the work owned by that rights holder can continue to be licensed under an ECL scheme. To run an ECL scheme the collecting society must demonstrate it has a mandate from rights holders, which includes a requirement that it is significantly representative of rights holders affected by the ECL scheme, as well as works covered by it. The number of actual or potential orphans in an ECL scheme needs to be consistent with these principles. Additionally, ECL assumes consent barring opt out and there is no assumption made that absent rights holders would opt out of an ECL scheme.

Finally, searches by the collecting society for missing rights holders (which will be akin to a diligent search under the domestic orphan works licensing scheme and will be repeated for as long as the work is used under the licence) will increase the chances of any missing rights holders being reunited with their work. The collecting society will collect remuneration on behalf of the rights holder, who will always retain the absolute right to opt out if they re-emerge or are found by the collecting society.

A licensee can apply for an orphan works license even if that work is an ECL, provided the collecting society had been unable to locate the relevant rights holder, the rights holder was not a member of the society and all other requirements of the diligent search under the domestic orphan works licensing scheme were met. Money would be set aside for the rights holder as with other licensed orphan works.

Licensed orphans can be used in an ECL scheme provided the collecting society meets the mandate requirements and is significantly representative of rights holders in the sector. Therefore, the majority of works in the scheme could not be orphan works licensed through the UK scheme (or identified through the exception in the Orphan Works Directive).

The Government response to the orphan works consultation may supplement what is here.

⁷ <http://www.ipso.gov.uk/consult-2014-lost.pdf>

Annex A

List of respondents

Association of Authors Agents (AAA)
Association of Illustrators (AOI)
Association of Learned and Professional Society Publishers (ALPSP)
Association of Photographers (AOP)
BBC
British Recorded Music Industry (BPI)
British Association of Picture Libraries and Archives (BAPLA)
British Copyright Council (BCC)
British Film Institute (BFI)
British Library
British Screen Advisory Council (BSAC)
Copyright Licensing Agency (joint submission with PLS and ALCS)
Directors UK
Editorial Photographers UK
FOCAL
Harry Stoneham Music Services
International Association of Scientific Technical and Medical Publishers (STM)
Jonathan Webb
Libraries and Archives Copyright Alliance (LACA)
Mechanical-Copyright Protection Society (MCPS)
Music Publishers Association (MPA)
Musicians Union
National History Museum
Open Rights Group
Producers Alliance for Cinema and Television (PACT)
Performing Right Society (PRS)
Printed Music Licensing Limited (PMLL)
Simon Brown
Simon Chapman
Society of London Theatre (SOLT)
Stephen Dodd
Thames and Hudson
The National Library of Wales
The Publishers Association
Universities UK (UUK)
Wellcome Trust

Annex B

Other issues raised in the consultation

1. Territorial reach

The Government made it clear in its consultation document that its legal advice was that works in ECL schemes could not be used beyond the UK, so it is not possible to extend the ECL provisions to other jurisdictions.

Licensees concerned about this might want to consider other options such as disclaimers or technical measures.

2. There were several interesting ideas that came out of the consultation, which Government will want to explore further through the working groups. One such idea was that where a collecting society identifies a work that is on the orphan works register, it should have to notify the orphan works authorising body.

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