



Intellectual
Property
Office

Extended Collective Licensing (ECL): Guidance for relevant licensing bodies applying to run ECL schemes





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1. Introduction

Collective licensing works on the basis of rights holders mandating licensing bodies to manage certain rights on their behalf. As such, those rights holders actively opt in to collective licensing schemes and usually become members of the body.

The statutory extended collective licensing (ECL) framework allows a qualifying licensing body to be granted an authorisation to license not just on behalf of member rights holders but also on behalf of non-member rights holders¹. This means that the rights of non-members covered by a scheme are assumed to be in it unless they opt out.

The Government took a power in the Enterprise and Regulatory Reform Act (2013)² allowing collective management organisations³ to apply to the Secretary of State to operate ECL schemes within the UK. The Secretary of State has the power to authorise or reject such applications, depending on whether certain criteria and safeguards have been met.

The Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014 (“the Regulations”) stipulate the evidence the collective management organisation has to provide when submitting an ECL application. The Regulations also cover the evidence that needs to be provided at the point of both renewal of an application and at subsequent reviews.

The Regulations do not, however, cover the detail of the evidence a collective management organisation may provide in order to meet application requirements. For example, the Regulations require a collective management organisation to be significantly representative of rights holders affected by an ECL scheme, but they do not specify how this might be demonstrated. The purpose of this guidance is to suggest ways in which those requirements may be met, taking account of sectoral differences.

This document does not offer guidance on every application or renewal requirement, on the basis that many of these requirements are self-explanatory. The Government is willing to engage in early dialogue with collective management organisations that wish to apply for ECL schemes, or with potential licensees who might, for example, want to know more about how the ECL Regulations operate before approaching a collective management organisation to make an application on their behalf.

This is the April 2016 version of the guidance. It has been updated to reflect the implementation into UK law of the Collective Rights Management Directive (the “Directive Regulations”)⁴ and consequential amendments to the Regulations. It also explains some of the areas of overlap with the Directive Regulations.

1 A “non-member” is sometimes referred to in ECL literature as an “outsider” or a “non-mandating rightholder”.

2 <http://www.legislation.gov.uk/ukpga/2013/24/contents> . See Clause 77 and Schedule 22.

3 In order to be eligible to apply to operate an Extended Collective Licensing scheme, the collective management organisation must also meet the definition of ‘relevant licensing body’ in the 2014 Regulations. We anticipate that the vast majority of CMOs will meet this additional definition. This guidance will refer to ‘collective management organisations’ throughout to describe relevant licensing bodies.

4 <http://www.legislation.gov.uk/uksi/2016/221/contents/made>. The guidance underpinning under the Directive Regulations can be found here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/503421/Guidance_on_CRM_Directive_implementing_regulations.pdf

Part I – guidance for ECL applications

2. Significant representation

Under regulation 4(4)(b) the Secretary of State may only grant an authorisation if he is satisfied that a collective management organisation's representation is significant. In practice, this means that the collective management organisation must already be holding the rights of a significant number of rights holders whose works are the subject of the scheme.

2.1 When can a collective management organisation be said to represent a rights holder?

A collective management organisation can usually be said to represent a rights holder if it has a direct, express mandate from them. Such a mandate often comes in the form of an assignment of rights, a transfer, a grant of exclusivity, or some other contractual arrangement, from the rights holder to the collective management organisation. Regulation 4 of the Collective Management of Copyright (EU Directive) Regulations 2016 sets out requirements that collective management organisations must meet in relation to mandates from rights holders.

Although the significant representation definition does not require those a collective management organisation represents to be members, it is anticipated that in the vast majority of cases membership is a corollary of a grant of authority or a grant of rights.

2.1.1 Pre-existing collective licence

Where ECL schemes are extensions of existing collective licences, it is anticipated that collective management organisations will have little difficulty in demonstrating the number of mandates they hold; consequently, it is not anticipated that they will need to produce a copy of the membership agreement for each and every rights holder they claim to represent but could, for example, point to the number of distributions they have made in respect of that pre-existing collective licence or to a register of rights holders they license.

2.1.2 No pre-existing collective licence

Where there is no pre-existing collective licence, the number of mandates a collective management organisation holds may be more difficult to prove depending on the scope and nature of the ECL scheme in question.

For example, in the case of a library wanting to digitise and display to the public an archive containing 1000 out of print works, the collective management organisation would need to demonstrate that it represented a significant number of the rights holders in the works. This might be a difficult threshold to reach unless each work was looked at to see who the rights holders were; thereafter, the collective management organisation would need to check

whether or not it held the relevant rights of the identified rights holders, and if it did not it would have to secure these rights from a significantly representative number.

In some sectors, in respect of some rights, even where there is no pre-existing collective licence it might be much easier to demonstrate significant representation. For example, in music licensing, as a condition of membership the collective management organisation requires a legal transfer or assignment in respect of some rights; if it can be demonstrated that the collective management organisation represents the overwhelming majority of rights holders in the sector, this would support the case that for any given ECL scheme supporting those rights, the collective management organisation is significantly representative of affected rights holders.

Irrespective of a collective management organisation's coverage of rights holders, where there is no pre-existing collective licence it is expected that there will be a clear demonstration that a collective management organisation holds the relevant rights of a significantly representative number of rights holders. It is likely that the ease with which this can be demonstrated will vary from sector to sector.

2.2 When is a collective management organisation's representation significant?

Regulation 5 (1)(i) requires evidence of a collective management organisation's representation. To be significantly representative, the collective management organisation is expected to represent a very sizeable number of affected rights holders. Conclusions about a collective management organisation's representation are unlikely to be reached if the collective management organisation is unaware of the numbers of non-member rights holders in the extended portion. Collective management organisations may therefore wish to provide as evidence the total numbers of rights holders affected by the ECL scheme, and demonstrate a transparent methodology for how they arrived at that figure. A poor understanding of total numbers may result in an incomplete publicity campaign, which in turn could mean that rights holders who want to opt out may not be able to do so.

Collective management organisations could reach an understanding of total numbers of rights holders by conducting surveys or advertising in trade magazines. In the case of an existing collective licence upon which the ECL scheme is built, collective management organisations could look at user data to see how many non-members are inadvertently being licensed.

2.3 The views of non-members

It may be that, prior to application, the collective management organisation becomes aware of a small but not insubstantial number of non-members who do not want to be part of the ECL scheme.

Although there is no obligation on the collective management organisation to disclose *the reasons* why non-members do not want to be part of an ECL, those reasons may become apparent during the period of representations allowed for in regulation 7(1)(a). The collective management organisation may, therefore, wish to find out what those reasons are, for if it is likely that other non-members shared those views then the collective management organisation could well expect (if authorised) a large numbers of opt outs, and therefore a dilution of the breadth and value of the repertoire.

2.4 The numbers of works in an ECL scheme

The numbers of *works* that a collective management organisation's members control relative to the number of works that would be within scope in the ECL scheme is not something that will usually be assessed in ECL applications. Provided the collective management organisation remains significantly representative of the rights holders affected, the ECL should be possible.

In the case of members, ECL schemes ought not to be impeded by very small numbers of member rights holders who control large volumes of works. Under regulation 16 (3)(c), these members, if they oppose an ECL scheme, will be able to opt out of the scheme if their contractual arrangements with the collective management organisation permit it. Non-members who do not want to be part of the ECL scheme will always have the option of opting out.

2.5 Works or rights already outside the ECL scheme

Where members of a collective management organisation have already opted out works or rights from a pre-existing collective licence on which an ECL scheme is based, those works or rights cannot be brought into the ECL scheme. This is on the basis that they have specifically not given the collective management organisation a mandate and cannot be treated as non-members for the purpose of the ECL scheme.

Under the rules of some collective management organisations it is possible for a member rights holder to have vested or otherwise mandated certain rights in certain works with a collective management organisation, but to have retained or excluded some rights in the same (or entirely different) works, because they want to exploit those rights themselves. Member rights holders sometimes keep such rights and/or works in a separate corporate vehicle which is not affiliated with any collective management organisation and on one reading of the Regulations those rights and/or works could be said to belong to a non-member rights holder. Where a collective management organisation is applying for an ECL scheme that covers the rights and/or works held by such entities, and is aware of the existence of those rights and/or works, it is not expected that they will be part of the ECL scheme, and they may in good faith put the works on the opt out list referred to in regulation 16 (6) (see further below). This is on the basis that there is not, and never has been, any intention on the part of the member rights holder to have those rights and/or works collectively licensed. When proposing the extent of an ECL scheme⁵, then, the collective management organisation may not include these rights and/or works of member rights holders in the extended portion.

If the collective management organisation is not aware of these rights and/or works, the member rights holder might have a chance to make it aware before the scheme is proposed, or it could make it aware at the point where the collective management organisation seeks member consent.

Where these rights and/or works are unacknowledged in a collective management organisation's ECL application, the member rights holder has an opportunity to tell the Government about them during the period of representations, and the Secretary of State may raise the issue with the collective management organisation and may take the representations into account in deciding whether to grant the authorisation.

⁵ See 2.3 above

Even if the collective management organisation advertently or inadvertently licenses those works, the member rights holder could always opt them out on the basis that they are effectively a non-member for the purposes of those works. The Secretary of State may only grant an authorisation if he is satisfied that the opt out arrangements are adequate to protect the interests of rights holders (see further Section 4 below).

Under regulation 5 (1)(h) the collective management organisation must disclose the numbers of rights holders (and the numbers of works those rights holders control, where known), who are already outside the scheme because (i) they have notified the collective management organisation that they want to opt out or (ii) because of some contractual agreement with the collective management organisation.

In respect of (ii), it is expected that the collective management organisation need only provide the details of known and relevant rights holders who are outside the scheme. For example, in music publishing, buyout libraries might be said to be outside ECL schemes, (in the same way that they are outside collective licences), and may not be classified as non-members. It may also be the case that the retained rights and/or works referred to above are subject to some contractual agreement between the collective management organisation and the member rights holder, in which case those works are outside the scheme and must be included on the opt out list.

Regulation 5 (1)(h) is supplemented by regulation 16 (6), which requires the collective management organisation to make available on its opt out list the names and works of rights holders who have opted out of the scheme or are outside the scheme because of a contractual relationship with the collective management organisation.

Applicants must include in their applications:

- The numbers of rights holders (and works, where known) that are outside the ECL scheme either because rights holders have opted out or are outside the scheme because of contractual arrangements with the collecting society.
- Evidence of representation.

Applicants may wish to include in their applications:

- A clear demonstration of the numbers of rights holders they represent.
- The estimated total number of rights holders in the ECL scheme and a clear methodology for how they have arrived at that figure.
- A full, clear explanation for why, in their opinion, the representation qualifies as significant.

3. Member consent

Regulation 4 (4)(f) stipulates that the Secretary of State may only grant an authorisation if the collective management organisation has obtained the required consent of its members to the proposed ECL scheme. Regulation 5 (1)(j) requires a collective management organisation to provide evidence of that consent. Regulation 2 defines “required consent”, as “the informed consent of a substantial proportion of the members of the relevant licensing body who vote on the proposal.”

3.1 Who needs to be polled?

It is not anticipated that *all* members of the collective management organisation will be polled – polling may just be restricted to those member rights holders whose works will fall into the proposed ECL scheme.

However, it may be that there are member rights holders whose works are not in the scheme, but who are still affected by it –for example, because the costs of operating an ECL scheme could impact on their distributions. A collective management organisation has the discretion to seek the consent of these members but is under no obligation to do so.

3.2 When do member rights holders need to be polled?

After polling member rights holders, collective management organisations may wish to leave plenty of time to analyse their responses, speak to rights holder organisations (if they have not already done so), and generally do their due diligence to ensure the ECL scheme is something member rights holders want.

However, the Secretary of State does not require any minimum periods between polling members and submitting an application. It is anticipated that collective management organisations will be responsive to the needs of their right holder members, and to consult them fully before submitting an application.

3.3 How might member rights holders be polled?

Collective management organisations will have their own methods for how they seek the views of members, which may include a mail shot to members, or a form on an independently hosted website.

3.4 What information is expected to be included on the polling form?

It is a requirement of regulation 5 (1)(k) that the collective management organisation provide as part of its application the information that was provided to its member rights holders when polling them. The following information on the polling form may support a collective management organisation’s argument that its member rights holders were adequately informed:

- Some explanation of what ECL is, as a concept.
- The rights and uses that are the subject of the ECL scheme.
- How the ECL scheme would benefit members.

- The sorts of licences that will be granted, and to whom they will be granted.
- An opportunity for members to confirm that they have enough information about the ECL scheme and feel confident to vote accordingly.
- An opportunity for members to give reasons for why they have voted as they have.
- A straightforward method for members to seek more information about the ECL scheme.

Collective management organisations may supplement these requirements in line with any specific needs of their member rights holders.

3.5 Results of the poll

In order to demonstrate that member consent has been secured, the collective management organisation may wish to provide detailed results of the poll. A dissemination of the results may include, but is not limited to, the numbers who supported the scheme and why; the numbers who opposed the scheme and why; and an explanation of how and why the collective management organisation thinks it has achieved member consent.

3.6 Representative organisations

There is no requirement in the Regulations for the collective management organisation to have consulted representative organisations. Nonetheless, collective management organisations may wish to seek the support of such representative organisations and point to that support in their applications. A representative organisation could include a trade body or some other body representing rights holders. Where the collective management organisation has polled members whose works are not in the scheme, it is expected that the collective management organisation will split the results of the poll into those whose works are in the scheme and those whose works are outside it.

3.7 ECLs that are not built on a pre-existing collective licence

It is anticipated that an ECL scheme built on an existing collective licence will, in many cases, be uncontroversial because rights holders have already assented to the rights and uses in question.

In its policy statement of 8 May 2014⁶, the Government committed to having a higher threshold for member consent where ECL schemes were not based on a pre-existing collective licence. For such ECL schemes, a collective management organisation may further demonstrate that the ECL scheme is supported by member rights holders by securing the support of *at least one organisation that represents member rights holders covered by the scheme*. In its application, a collective management organisation should give some background to this organisation, the organisation's coverage of the rights holders affected, what discussions it has had with it, and the outcome of those discussions. A collective management organisation's application will be stronger if it has the support of an organisation that represents many or most of the affected rights holders.

6 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/309883/government-response-ecl.pdf

A collective management organisation may provide supplemental evidence, or find alternative ways in which to demonstrate the higher threshold.

3.8 Collective management organisations without individual rights holder members

The Government is aware of collective management organisations which do not have individual rights holder members from whom they can directly seek a mandate – these rights holder members, represented by collective management organisations that own the applying collective management organisation, might be one, or even two, steps removed from the applying collective management organisation. The applying collective management organisation’s members are sometimes, in fact, the collective management organisations that own it.

The Government is also aware of collective management organisations that do not have any “members”, as defined in the Regulations, but mandated rights holders who have agreements with the collective management organisation akin to membership.

The Government is willing to engage in dialogue with such collective management organisations to discuss a fit with requirements in the Regulations.

Applicants must include as part of their applications:

- The information that was provided to member rights holders when seeking their informed consent.
- Evidence that the collective management organisation has secured the informed consent of a substantial proportion of its voting members.

Applicants may wish to include in their applications:

- Evidence that the member rights holders who are directly affected by the ECL scheme have been polled.
- The outcome of the poll, including a clear breakdown of the results.
- Where there is no pre-existing collective licence, evidence that they have the support of an organisation representing rights holders, or alternatively some other, robust demonstration of member consent.
- A full clear explanation for why, in their opinion. The consent threshold has been met.

4. Opt out arrangements

Regulation 4 (4)(d) stipulates that the Secretary of State may only grant an authorisation if the collective management organisation's opt out arrangements are adequate to protect the interests of rights holders, and regulation 5 (1)(g) requires evidence of those arrangements.

4.1 Methods by which non-member rights holders can opt out

A collective management organisation may wish to consider having a page in an appropriate part of its website where non-member rights holders can opt out of an ECL scheme. It is expected that that page is easily navigable from the home page and provides simple and straightforward mechanisms for the non-member rights holder to opt out.

At minimum such mechanisms may include:

- An email address to which the non-member rights holder can make an opt out request.
- An online form which includes fields for (i) the rights holders name and (ii) the rights holders works.

4.2 Acknowledging opt outs

Under Regulations 16 (4)(a) and 16 (4)(b), within 14 days of a non-member's opt out request the collective management organisation must (i) acknowledge that request, and (ii) inform the non-member of when their work or works will be removed from the ECL scheme.

As part of its application it is expected that the collective management organisation will specify how it will notify the non-member rights holder. It is intended that this should be easy and cost-effective for the collective management organisation, but also that the non-member is provided with the information they need.

In response to an emailed opt out request, for example, a collective management organisation may provide the non-member rights holder with an automated response that acknowledges the opt out and lets them know that their works will be removed from the licence after 6 months, unless licensees are educational institutions, in which case they will be removed after 9 months. Collective management organisations may wish to respond in similar terms to a non-member rights holder who submits an online form.

The Regulations are clear that works of rights holders who opt out before the commencement of an ECL scheme, cannot be included in that ECL scheme.

In order to reduce the incidence of fraudulent opt outs (which could dilute the breadth and value of the repertoire), collective management organisations may want opting out rights holders to produce evidence of ownership. There is nothing specific in the Regulations regarding the evidence the opting out rights holder should produce or that the collective management organisation must accept. It should be in the interests of both rights holders and collective management organisations that disputes over ownership are avoided and that the process of opting out is not burdensome. It is expected that the collective management organisation will outline in its application what it considers to be sufficient evidence, that evidence to be proportionate and necessary; rights holders will have an opportunity to comment on this aspect of the collective management organisation's application during the period of representations.

4.3 Informing licensees

It is a requirement under regulation 16 (4)(c) that when a non-member rights holder opts out their works the collective management organisation must inform licensees of (i) the names of those works, and (ii) when the works will be removed from the ECL scheme. Regulation 16 (4)(d) requires the collective management organisation to update a list of opted out rights holders and works, and 16 (6) contains further requirements regarding that list.

It is anticipated that a collective management organisation will provide as part of its application evidence of how it intends to tell licensees of rights holders and works that have been opted out. One option might be for the collective management organisation to update the opt out list so that it specifies when works would no longer be available under the ECL scheme, or to have a separate list of works which are pending opt out.

4.4 Maintaining the opt out list

Regulation 16 (6) requires a collective management organisation to maintain an opt out list in respect of rights holders and works (to the extent that they are known) that are outside the scheme. It is anticipated that a collective management organisation's ECL application will include the following:

- Details of an opt out list which should include fields for both rights holders and works, and where that list will appear on its website.
- A commitment to include on the list, before commencement of the ECL scheme, the names of all rights holders (including member rights holders) and their works which are outside the scheme because of contractual arrangements with the collective management organisation.
- Following commencement of the ECL scheme, details of how quickly the collective management organisation will update the list in respect of those member rights holders and works which are opted out of the scheme, or those rights holders and works which because of new contractual arrangements with the collective management organisation, now fall outside the scheme. The collective management organisation may also choose to include a justification for this time period.
- A commitment to include (somewhere on the webpage hosting the opt out list), a statement to the effect that the list will change over time and licensees should regularly check the list to see what is and what is not in the repertoire.

4.5 Opt outs in perpetuity

Regulation 16 (3)(b) requires non-member right holder to be allowed to opt out of a "proposed" ECL scheme. This provision does not permit a non-member to opt out of all future ECL schemes, only a scheme that is already in the pipeline.

Although there is no requirement for collective management organisations to have systems in place to process opt outs from non-members before an ECL scheme has even been mooted, collective management organisations may wish to allow such opt outs, on the basis that they will have advance notice of what will always be outside the repertoire of any given ECL scheme.

4.6 Educational establishments

Under regulation 16 (5)(b), where collective management organisations are aware that licensees will be educational establishments, they may request from the Secretary of State a longer opt out period of up to 9 months. In order to succeed with such a request the collective management organisation may wish to provide evidence that it has licensees who are educational establishments.

4.7 Member rights holders

Under the Directive Regulations, a “right holder” is defined as:

“any person or entity, other than a collective management organisation, that holds a copyright or related right or, under an agreement for the exploitation of rights or by law, is entitled to a share of the rights revenue.”

This definition would include all member right holders and any other right holder that has given a collective management organisation a mandate.

Under regulation 4(d) of the Directive Regulations, collective management organisations are required to ensure a right holder can withdraw their rights, categories of rights, or types of works and other subject matter (the “Copyright Material”), from a collective management organisation upon serving reasonable notice not exceeding 6 months. However, a collective management organisation may decide, at its discretion, that termination may take effect only at the end of its financial year. Mandating right-holders should be able to opt out of an ECL scheme on this basis – the terms of their membership agreement or contract with the relevant collective management organisation should give more details.

4.8 The distinction between withdrawal of rights by non-members under the Directive Regulations and opting out of ECL schemes

As discussed in 4.7 above, the “right holder” definition covers member right holders and any other right holder who has given a collective management organisation a mandate.

However, the definition would also cover a non-member in an ECL scheme, on the basis that that non-member is, by law, entitled to a share of the rights revenue.

The Government has previously said that where the ECL Regulations go further than the Directive Regulations, it will maintain existing protections (subject to alignment with the Directive and overall regulatory policy)⁷. The Directive Regulations have amended the ECL Regulations to achieve this effect. Therefore, a collective management organisation running an ECL scheme should allow non-member right holders to opt out in line with the ECL Regulations should they choose to do so.

⁷ Consultation on the implementation of the EU Directive on the collective management of copyright and multi-territorial licensing of online music rights in the internal market: Government response: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/446772/response-crm-directive.pdf, p.11

Options available for opting out, or withdrawing rights, from an ECL scheme may be summarised as follows:

Right holder ⁸		
Mandating right holder		Non-member
Member	Other right holder	
Opt out on basis of contractual agreement with the collective management organisation (which should meet requirements in Directive Regulations)		Opt out on basis of provisions in ECL Regulations

Applicants must include in their applications:

- Details of the opt out arrangements they plan to adopt.

Applicants may wish to include in their applications:

- Details of an email account, an online form, and a postal address via which non-member rights holders can opt out.
- Details of how they propose to respond to an emailed opt out request, an opt out via the online form, and an opt out by post.
- Details of the evidence a non-member rights holder should produce to demonstrate ownership of works when opting out, that evidence to be proportionate and necessary.
- Details of who, if anyone else, can opt out on behalf of non-member rights holders.
- A commitment to, and details of, a page on their website that contains a list of opted out works, and how that page can be accessed via the home page.
- Details of what will be included on the opt out list and how that list will be maintained, including in respect of member rights holders.
- Details of how they will tell licensees of rights holders and works that have been opted out.
- Evidence that licensees are educational establishments.
- A full, clear explanation for why, in their opinion, the opt out arrangements, as described, are adequate to protect rights holder's interests.

⁸ For a full discussion of the "right holder" definition, and who it might include, please see the guidance underpinning the Directive Regulations: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/503421/Guidance_on_CRM_Directive_implementing_regulations.pdf, pp.8-9

5. Distribution policy

Regulation 5 (1)(q) requires the collective management organisation to provide a copy of its Distribution Policy as part of its ECL application. An applying collective management organisation may fulfil this requirement by providing a link to its Distribution Policy, which it is required to make publicly available under the Directive Regulations⁹.

Regulations 18 (1) and 18 (2) contain requirements regarding both the level of deductions and the use of those deductions. Information on such matters is usually found in a collective management organisation's Distribution Policy but there is no requirement in the Regulations that it must be, or indeed that the collective management organisation must provide evidence in its application of how it will meet these requirements.

5.1 Level of deductions

Regulation 18 (1) allows a collective management organisation to deduct a reasonable administration fee from the non-member rights holder.

In making a judgement about the reasonableness of an administration fee the Secretary of State may look to see how non-member deductions compare with member deductions and, where there is a difference in the level of deductions, whether that difference is justified.

Additionally, under regulation 11(3) of the Directive Regulations, management fees (which should be considered synonymous with the administration fee) should not exceed the justified and documented costs of the collecting management organisation. A management fee may not be justified if, for example, there is no correlation between the costs involved in rights management and the management fee applied to right holders¹⁰.

Furthermore, by making a declaration that it is complying in all material respects with the Directive Regulations (see further 9.2 below), an applying collective management organisation will have declared to the Secretary of State that its management fees do not exceed its justified and documented costs.

5.2 Use of deductions

Regulation 18 (2) requires a collective management organisation to apply deductions towards the general costs of the collective management organisation and for the benefit of members and non-members alike. This means that deductions may not be used just for activities benefiting member rights holders.

Applicants may wish to include in their applications, usually as part of their Distribution Policy:

- The deductions they intend to make from both members and non-members, and where there is a difference, to justify that difference.
- Where deductions will be applied, and why the destinations for those deductions meet requirements in the Regulations.

⁹ Regulation 20 (3)(e)

¹⁰ The annual transparency report requires a CMO to document detailed information on the cost of rights management, including all operating and financial costs and resources used to cover costs (regulation 21(4)(i)).

6. Publicity

Under regulation 4 (4)(e), the Secretary of State may only grant an authorisation if the arrangements for publicising the ECL scheme to non-members take adequate account of their interests.

Regulation 5 (1)(r) requires a collective management organisation to provide evidence of how it proposes to publicise the ECL scheme both before the introduction of the scheme and during its life.

6.1 The principle of proportionality

The appropriateness of a scheme's publicity arrangements will be considered within the context of whether or not those arrangements are proportionate. This was the Government's position in its response to the consultation on the draft regulations¹¹.

6.2 Publicity before commencement of the scheme

As part of its application, the collective management organisation may need to demonstrate some understanding of the numbers of non-members in the extended portion, and also where those non-members are (see section 2 above). It is expected that publicity arrangements will refer to and be designed with these non-members in mind.

It is not expected that a collective management organisation advertise its scheme extensively in countries where there might be extremely few non-member rights holders; equally, it may be inappropriate for a collective management organisation to do nothing to target those rights holders.

Collective management organisations that have reciprocal agreements with collective management organisations abroad may wish to publicise the scheme through each of them. An identical advertisement going out to each of the collective management organisations appears to be a proportionate approach. However, collective management organisations may have more targeted publicity campaigns in territories where they are most active, whether or not there is a reciprocal agreement with a collective management organisation in that territory.

Where sectors have international representative or trade bodies, and where there are foreign non-members in ECL schemes, it is anticipated that the collective management organisation will notify those bodies in order to support appropriate international publicity for the scheme. The collective management organisation may wish to consider whether it is appropriate to notify the main international IP bodies, including (but not limited to), IFFRO (International Federation of Reproduction Rights Organisations), OHIM (Office for Harmonization in the Internal Market) and WIPO (World International Property Organisation).

In the UK, it may be appropriate for the collective management organisation to publicise prominently on its own website, with the BCC (British Copyright Council), in the relevant trade press, and with relevant rights holders groups.

¹¹ Op cit, page 4

6.3 Publicity for the life of the scheme

While it may be fairly straightforward for a collective management organisation to plan and deliver a pre-commencement publicity campaign according to the probable number and location of non-member rights holders, effective, targeted publicity arrangements for the life of the scheme may be much more difficult to predict.

For most ECL schemes, there is an expectation that the collective management organisation will continue, on an annual basis, the publicity scheme it had in place before commencement. It is expected that the collective management organisation will make a commitment to target geographical areas from which non-members seem to be emerging with effective, proportionate publicity arrangements.

In exceptional circumstances it may not be appropriate for continued publicity. If, for example, the ECL has a finite number of non-member rights holders, and all those non-members had been reached and had either joined the collective management organisation or opted out (or allowed the continued use of their works without either opting out or joining), an ongoing campaign may be unnecessary.

6.4 Minimum content of publicity material

At minimum, it is anticipated that any publicity material will contain the following information:

- Some explanation of what ECL is as a concept.
- The rights and uses that are the subject of the ECL scheme.
- Which rights holders will be affected by the ECL scheme and how.
- How rights holders can opt out of the ECL scheme. This may include provision of a postal address through which the non-member can opt out, an email address, and a link to a web page containing an online form.
- A straightforward method for rights holders to seek more information about the ECL scheme.

Applicants must include in their applications:

- Arrangements for publicising the ECL scheme to non-member rights holders and third parties before the introduction of the scheme and during the life of the scheme.

Applicants may wish to include in their applications:

- In respect of publicity both before commencement of the ECL scheme and during its life, a clear explanation of where and how they will be advertising, and why such an approach is appropriate bearing in mind the interests of rights holders.
- A copy of the publicity material they intend to issue before commencement of the ECL scheme.
- A commitment to adapt, where necessary, the opt out arrangements during the life of the scheme in response to changing circumstances, including a commitment to target areas from which non-members are emerging.
- A full, clear explanation for why, in their opinion, the methods by which they propose to publicise the scheme is appropriate for the proposed scheme, having regard to the interests of non-member rights holders.

7. Contacting non-members and distributing licence fees

Under Regulation 4 (4)(e), the Secretary of State may only grant an authorisation if he is satisfied that a collective management organisation's arrangements for contacting non-member rights holders in order to distribute licence fees to them is appropriate for the proposed scheme, having regard to the interests of non-member rights holders.

Regulation 5 (1)(s) requires a collective management organisation to provide evidence for the methods by which it will contact non-member rights holders and distribute licence fees to them.

7.1 Information on works for which rights holders are unknown or cannot be found

Under regulation 18 (5), the collective management organisation must publish information on works and other subject matter for which non-member rights holders have not been found or identified, but to whom licence fees are due. This information must be made publicly available three months after the end of the financial year in which the licence fee was collected. It is anticipated that this information will be found on an appropriate page of the collective management organisation's website, and that it will be easily navigable from the home page. It is also expected that this web page will contain information both on how non-member rights holders can claim licence fees due to them and how and where they can opt out.

Collective management organisations also have separate publicity obligations under the Directive Regulations in relation to other right¹².

7.2 Information on undistributed monies

It is anticipated that the information on undistributed monies will include the following, where available:

- The title of the work or other subject matter.
- The name of the rights holder.
- The name of the relevant publisher or producer.
- Any other relevant information available which could assist in identifying the rights holder¹³.

¹² These obligations are found at regulation 12(7) and 12(8). The guidance underpinning the Directive Regulations refers to these obligations in a timeline at page 32.

¹³ This list is identical to that found at Article 13(3)(b) of the Collective Rights Management Directive. This provision in the Directive lists information that collective management organisations should make available in respect of works for which one or more rights holders have not been identified or located.

7.3 Finding and paying non-members

Under regulation 12(1) of the Directive Regulations, collective management organisations are under an obligation to regularly, diligently and accurately distribute and pay amounts due to right holders in accordance with the general policy on distributions. As explained in section 4 above, non-members in ECL schemes can be considered “right holders” for the purposes of the Directive Regulations.

A collective management organisation’s efforts to contact non-member right holders should be proportionate and compliant with relevant obligations in the Directive Regulations. It is anticipated that methods to contact non-member rights holders will include:

- A commitment to advertise on an annual basis in appropriate domestic and international publications, and with collective management organisations with whom it has a reciprocal relationship.
- Such advertisements to contain information on the ECL scheme, the fact that licence fees are due to rights holders who are unknown or haven’t been located, the amount undistributed over the last financial year, the total amount undistributed (since authorisation), a link to the collective management organisation’s list of works for which rights holders haven’t been located, and an email address and postal address via which the non-member can make a claim or a query about licence fees owed to them.

Applicants must include in their applications:

- Evidence of the methods by which they will contact non-members and distribute net licence fees to them.

Applicants may wish to include in their applications:

- Details of where on their website the list of information on the works for whom the rights holder has not been found or identified can be located, and a commitment to include on that list as much information as possible.
- Details of where and how often they will be advertising in order to attract the attention of as many non-members to whom licence fees are due as possible.
- Details of how they will be advertising, including a copy of the advertisement.
- Some indication of the efforts they will make to contact non-members to whom larger amounts are due.
- A full, clear explanation for why, in their opinion, the methods by which they propose to contact non-member rights holders in order to distribute licence fees is appropriate for the proposed scheme, having regard to the interests of non-member rights holders.

8. Types of works

Under regulation 4 (4)(a) the Secretary of State cannot grant an authorisation unless he is satisfied that the applicant collective management organisation is already be licensing the types of works that are the subject of the ECL scheme.

A collective management organisation may be able to demonstrate that this requirement is satisfied by providing as part of its application, in accordance with regulation 5(1)(l), a collective licence, in force at the time of application, which demonstrates that the collective management organisation is already licensing the types of works that are the subject of the ECL scheme.

9. Other application requirements

9.1 Evidence that the applicant is a relevant licensing body

Regulation 5 (1) (c) requires the collective management organisation to provide evidence that it is a “relevant licensing body”, as defined in regulation 2. In order to do so, and as a general introduction to its application, a collective management organisation may wish to describe its history, structure, the sector it operates in, the rights holders it represents, and how it collects and distributes.

9.2 Signed declaration

Regulation 5 (1)(o) requires the collective management organisation to provide a signed declaration that it is complying in all material respects with the regulations which implement the CRM Directive. It is expected that an officer authorised to sign on behalf of the collective management organisation will sign the declaration.

9.3 Terms and conditions of licences

Regulation 5 (1)(p) requires a collective management organisation to provide a copy of the terms and conditions of the licence which it proposes to grant licensees under the ECL scheme. The collective management organisation may seek to exclude terms that are commercially sensitive, but the information provided should include information relevant to the ECL scheme, especially the uses for which the licence will be granted.

Part II – guidance for applications for renewal

10. Operation of opt out arrangements

Regulation 10 (2)(c)(i) requires a collective management organisation to provide information demonstrating how it has operated its opt out arrangements during the initial authorisation.

There is no requirement for collective management organisations to have changed the opt out arrangements, as reflected in their authorisation. But there does remain a possibility that a collective management organisation may have adapted the process by which non-member rights holders can opt out.

Applicants must include in their applications:

- Information demonstrating how the opt out arrangements have been operated during the previous period of authorisation.

Applicants may wish to include in their applications:

- How authorisation requirements may have changed, and confirmation that they have met authorisation requirements.
- Details of how opt out arrangements may have been adapted to accommodate the changing needs of non-member rights holders.
- A full, clear explanation for why, in their opinion, the opt out arrangements they have operated have been, and will continue to be, adequate to protect the interests of rights holders.

11. Distributions

Regulation 10 (2)(j) requires a collective management organisation to provide details of the distributions it has made to non-member rights holders and the licence fees that remain undistributed.

It is not expected that the collective management organisation need provide information on undistributed licence fees in respect of each rights holder or title; a total amount of undistributed licence fees should suffice. Where rights holder or title specific information is known, it is expected that collective management organisations will volunteer this information subject to any data protection requirements.

It is expected that collective management organisations will provide a breakdown according to distribution cycle and territory. Where the licence fees due to non-member right holders have remained undistributed more than three years from the end of the financial year in which the licence fees were collected, then the undistributed licence fees will be subject to the requirements of regulation 19 as well as being non-distributable amounts for the purposes of the Directive Regulations. A collective management organisation must ensure that it complies with both the Directive Regulations and the ECL Regulations as appropriate with regards to its treatment of undistributed amounts, bearing in mind all relevant limitation periods which may apply.

On an application for renewal, a large sum of undistributed licence fees or a large amount of money being held for individual works may indicate that the distribution policies adopted by the collective management organisation have not been very successful.

Applicants must include in their applications:

- Details of the distributions made to non-member rights holders and licence fees which have been undistributed.

Applicants may wish to include in their applications for renewal:

- The total licence fees that were both distributed and undistributed to non-member rights holders during the authorisation period (up to the point of application for renewal).
- A breakdown of licence fees distributed to non-member rights holders by territory, and for each distribution cycle.
- A breakdown of licence fees undistributed to non-member rights holders by territory, and for each distribution cycle, this to be rights holder or title specific where possible.
- In respect of rights holders who have not been found or identified, the detail of the information the collecting society has provided on its website about the works held by those rights holders, if it is different from the detail provided at the time of application.
- How authorisation requirements may have changed, and confirmation that they have met authorisation requirements.
- Details of any additional efforts made to contact non-member rights holders and pay them.
- A full, clear explanation for why, in their opinion, the arrangements for distributing licence fees have been, and will continue to be, appropriate for the scheme.

12. Publicity

Regulation 10(2)(k) requires a collective management organisation to provide information on the publicity arrangements it has operated, including information on the effectiveness of that publicity.

The effectiveness of publicity arrangements (as outlined in the authorisation) can be difficult to measure, but it is expected that the collective management organisation will be able to produce at least some evidence. It is not inconceivable that a publicity campaign has not produced any discernible results; where this is the case, and where further efforts by the collective management organisation would be proportionate, it is expected that the collective management organisation would make those efforts, and provide evidence of them.

Applicants must include in their applications:

- Details of arrangements for publicising the scheme to non-members and third parties during the life of scheme together with information demonstrating the effectiveness of that publication.

Applicants may wish to include in their applications for renewal:

- The number of non-members who either opted out or joined the collecting society immediately after publicity campaigns.
- The numbers of non-members who came forward to claim undistributed licence fees immediately after publicity campaigns.
- Details of any other measures of the effectiveness of publicity campaigns.
- How authorisation requirements may have changed, and confirmation that they have met authorisation requirements.
- What modifications, if any, were made to the original publicity campaign and publicity material.
- Evidence of any other efforts the collecting society has made to contact non-member rights holders and distribute licence fees to them.
- A full, clear explanation for why, in their opinion, the publicity scheme they have operated, has been, and will continue to be, appropriate for the scheme, having regard to the interests of non-member rights holders.

Part III – miscellaneous

13. Period of representations

Regulation 7 allows for a period of representations during which any party interested in any aspect of a collective management organisation's ECL application can have their say. The period of representations can be no less than 28 days, following which the Secretary of State has a duty to consider all submissions before making a decision on whether or not to authorise the proposed ECL scheme.

The public scrutiny to which all ECL applications will be put should encourage collective management organisations to provide evidence that is as transparent and robust as possible.

14. Cost of an ECL application

In its July 2012 impact assessment¹⁴, the Government estimated the annual cost of processing ECL applications at £10,000 per annum. The impact assessment also contained low and high estimates of £5,000 and £20,000.

The Government's cost estimate was based on 2 or 3 applications per year.

The Government has looked again at the cost figures and believes them to be robust. It is, therefore, currently anticipated that each ECL application is likely to cost between £3,333 and £5,000, with a low estimate of between £1,666 and £2,500 and a high estimate of between £6,666 and £10,000. The estimates vary even after variation in the number of applications is accounted for, because administrative costs are uncertain.

An understanding of the cost per application will be kept under review and may change as ECL applications are processed and costed.

15. Renewal requirements under regulation 10 (2)(b)

Regulation 10 (2)(c) requires certain information on opt out arrangements that the collective management organisation has operated and the numbers of rights holders and works that have opted out of the ECL scheme up until date of renewal relative to those opted out at the time of the original application for authorisation.

Regulation 10 (2)(b) requires the collective management organisation to confirm that some of the information provided at the time of the application for authorisation remains the same, failing which it should provide details of any changes. Some of the information requested overlaps with the information requirements of regulation 10 (2)(c). Where there is such an overlap, the collective management organisation need only provide the information requested under 10 (2)(c), and need only provide that information once.

¹⁴ <http://www.ipso.gov.uk/consult-ia-bis1054-20120702.pdf>, pp 7-8

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