

## **Extended Collective Licensing**

### **General Briefing Note ECL on for CLA's CMO Partners**

This note is intended to advise CMOs with whom CLA has signed a reciprocal representation agreement of its intention to apply for an authorisation to operate an Extended Collective Licensing Scheme for CLA's blanket licences. It explains the background to CLA's application to the UK Government for an ECL authorisation, as well as the effect a successful application may have on the representation agreement and on copyright works published outside the UK.

#### **CLA and Extended Collective Licensing**

In 2014 the UK Government introduced The Copyright and Rights in Performances (Extended Collective Licensing) Regulations to enable CMOs in the UK to apply to operate an extended collective licensing scheme.

ECL enables licensing bodies that represent a significant number of rightsholders in a class to extend their licences to cover unrepresented rightsholders in the same class.

CLA intends to apply for an ECL authorisation to support the collective licences it provides to the education, business and public administration sectors in the UK. CLA's licences enable organisations to copy and re-use short extracts from print and digital published materials, including books, journals and magazines.

CLA is able to offer collective licences through the authorisation it receives from its members representing various classes of rightsholder: The Authors Licensing and Collecting Society (ALCS), The Publishers Licensing Society (PLS), the Design and Artists Copyright Society (DACS) and the Picture Industry Collecting Society for Effective Licensing (PICSEL). Further information on CLA's membership organisations can be found at the end of this document.

CLA's bilateral agreements with CMOs in foreign territories enable CLA to include works published in these territories in its repertoire, and to receive revenue when UK works are copied in those territories.

By applying for ECL, CLA will formalise its rights position and enhance transparency for both rightsholders and users. As with CLA's current licences, rightsholders can choose to opt out any or all of their works that they do not wish to be included in the licensing scheme.

During July 2017 ALCS, PLS, DACS and PICSEL contacted their members to inform them of CLA's intention to apply for an ECL authorisation and to seek their consent. The response to the proposed scheme has been overwhelmingly positive from UK rightsholders.

#### **ECL Benefits for Both Users and Rightsholders**

ECL offers users 'comprehensive blanket licences' guaranteeing the lawful right to copy and use all works protected by copyright, subject to any that have been opted-out, without the administration and cost involved in trying to locate individual copyright owners. Conversely collective licensing helps

rightsholders who cannot realistically seek to control hundreds and thousands of uses that may be made of their works.

An extension of collective licences to cover works of those rightsholders not already participating in collective licensing helps to build respect for copyright, by making it clear to users that they need a licence to use a copyright protected work and that they should pay a fee for it. It removes the need for wider exceptions to copyright while respecting the rights for creators and publishers to exclude their works, and allow for copying that may otherwise be done for free, whether under an exception (in the case of education, for example) or illegally.

CLA has been providing collective blanket licences to the education, business and public sectors for more than 30 years, and an ECL authorisation will regularise the current CLA scheme which allows limited copying of extracts only.

### **ECL Application Process**

CLA has obtained the necessary consent of its members, and of the publishers, authors and visual artists they each represent. The application will be submitted to the UK Government in October 2017.

Within 14 days of receipt of the application, the Government must publish a notice setting out details of the application and must consider any comments provided in response to that notice. The notice must allow a period of at least 28 days during which comments may be provided.

CLA will also publicise to non-members its intention to introduce an Extended Collective Licensing scheme in the UK under the regulations.

A decision must be taken on whether or not to grant the authorisation within 90 days following the end of the period for providing comments. The decision must also be published in an appropriate manner. Further information on how to provide comments to the Government will be available at <https://www.gov.uk/government/organisations/intellectual-property-office> once CLA has submitted its application.

We will notify you once our application has been submitted.

### **Protection for Rightsholders**

The ECL Regulations contains important safeguards for rightsholders including:-

- (i) CLA must show evidence of the informed consent of its members;
- (ii) an ECL licence must be operated by a licensing body owned or controlled by the rightsholders themselves and organised on a not for profit basis;
- (iii) CLA must operate in accordance with The Collective Management of Copyright (EU Directive) Regulations 2016;
- (iv) there is an overriding requirement for CLA to show it is truly representative of the class of rightsholders whose works are to be covered by the ECL authorisation;

- (v) generally applications will relate to the extension of an existing scheme (this suggests there is already a general acceptance of the licence amongst the relevant rightholders);
- (vi) an ECL scheme must allow opt-outs so that no copyright owner is forced to participate in the scheme against their wishes (see below for details on how rightholders can opt-out);
- (vii) proposals for ECL schemes must be widely publicised so that all rightholders (members and non-members) are aware of the existence of the scheme and of the possibility to opt out;
- (viii) there are strict rules regarding the distribution of licence fees (see below);
- (ix) the authorisation for an ECL scheme is limited to an initial 5 years, although it can be renewed after 3 years. It is then subject to a 3 yearly review cycle;
- (x) authorisation for an ECL scheme cannot be transferred to another organisation and can be revoked at any time if CLA is in default of any of its obligations.

### **Important Information on Use of Extracts in UK Education Institutions**

Following the changes to UK copyright law in 2014, there is a statutory exception to copyright which allows educational institutions to copy up to 5% of a copyright protected work each year. This exception does not however apply if there is a licence available which authorises at least that amount of copying.

Thus, the existence of CLA licences mean that this exception does not apply as the CLA licences override the exception. But a copyright protected work that is not currently covered by a CLA licence (for example, many non-UK published works not covered by CLA's existing bilateral agreements), is subject to the exception meaning that up to 5% of the work can be copied without remuneration. Under an ECL authorisation CLA would be able to include all works, wherever published (subject to the right to opt out) so that a licence fee would be payable for copying that could otherwise be done for free under this statutory exception.

**Please note that any works that are opted out of CLA's ECL scheme will therefore remain available for copying under this statutory exception by educational institutions and will not share in the allocation of CLA licence revenues.**

### **Opting Out of ECL**

The ECL legislation allows rightholders to opt out some or all of their works from an ECL scheme. To do this, they must give notice to CLA (or one of its members) and identify themselves. They may give details of all of the works they want to opt-out but are not obliged to do so; if they do not CLA is only required to give to its licensees such details as it has received.

Rightholders (including exclusive licensees) can opt out at any time from an ECL scheme and can also opt out from a proposed ECL scheme in advance of it being granted authorisation by the UK Government. If any of your members wish to opt out of CLA's ECL scheme directly with CLA they can do so by sending an email to CLA at [optout@cla.co.uk](mailto:optout@cla.co.uk). They can opt out from some ECL licences or all. Equally they can opt out only some of their works or all of their works. Ideally they should always identify the opted-out works to enable CLA to notify its licensees which works are excluded from a particular ECL licence. They must confirm that they are the rightholder and/or have the rights to receive collective licensing revenues; they face a risk of a legal claim for damages if they wrongly opt

out when they do not have the authority since they may deprive the true owner of a share of collective licensing revenues.

If you wish to opt out on behalf of one or more of the members you represent, then, in addition to the above, you must confirm that you have their written authority to opt out and you should be aware that you would also face the risk of a claim for damages if you opt out works on behalf of one of your members who does not possess the relevant authority and therefore deprives the true owner of a share of CLA's licensing fees.

Please note that all existing opt outs from CLA's current collective licensing schemes will be honoured. While there is no technical requirement to notify CLA of these opt outs again, it would be advisable for the respective rightsholder to review them to ensure that they are still relevant and are not depriving themselves unnecessarily of an entitlement of a share of CLA's licence fees.

For further information on the opt-out process and its implications, please see the attached FAQs.

### **Distribution of Licence Fees**

Under the Collective Rights Management of Copyright (EU Directive) Regulations 2016 licence fees must be distributed as soon as practicable and, in any event, within 9 months of the relevant year end where the rights holder is identified and located.

The ECL Regulations require undistributed funds are to be held in a separate designated account pending discovery of the right holder and after 3 years CLA must pay any undistributed funds to the UK Government unless otherwise directed by the Government.

CLA and its members will maintain searchable lists of works that have revenue allocated to them but where an identified rightsholder has not been traced

### **The effect of ECL on your Representation Agreement with CLA**

An ECL licence may grant permissions beyond the authority contained in our Representation Agreement with you (e.g. as to copying limits or uses that may be licensed or sectors to whom licences may be granted). If this is the case CLA would be relying on the statutory authority granted to it under the ECL authorisation and not on the grant of authority in its Representation Agreement with you. You are therefore not exposed to any legal claims for copyright infringement and your indemnity to CLA in the Representation Agreement does not apply except to the extent that you receive sums allocated to your right holders as a share of the licence fees derived from an ECL licence (see below).

However, CLA would always prefer to license with your full authority and, if following analysis of your Representation Agreement with CLA there are found to be any restrictions in the Representation Agreement that fall short of a grant of authority under the ECL licence, we will write to you in the coming months to see if these can be reconciled.

Otherwise no changes will be needed to your Representation Agreement with CLA, although CLA will notify you of a change to Schedule A in describing its licensing activities to reflect the ECL

authorisation. The Representation Agreement will therefore remain valid and enforceable and CLA would, in any event, continue to pay to you the appropriate share of licence fees derived under ECL licences that are attributable to the rightholders in your country.

To the extent that you accept any share of ECL licence fees carried out under the ECL authorisation (as opposed to being carried out under the authority granted by your representation agreement), you will in the normal way in accordance with your representation agreement be obliged to try and pay them on to the correct rightholder in accordance with the principle of national treatment and indemnify CLA up to the amount received should any right holder in your country complain they were not paid the relevant amount.

### **Further Information**

If you would like more detail or have any questions, please contact Madeleine Pow-Jones

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## Extended Collective Licensing (“ECL”) FAQs for CLA’s CMO Partners

**Q What do I need to do now?**

A You may wish to notify your rightholders and members of CLA’s intention to apply for ECL authorisation as described in the briefing note. This will publicise the scheme to them and would enable them to exercise their rights to opt out if that is what they wish to do.

**Q What is the effect on my representation agreement with CLA?**

A Generally there need be no change to your representation agreement. CLA will, in due course, notify you of a change in Schedule A describing its licensing activities so that it reflects its grant of authority to operate an ECL scheme should its application be successful. CLA will also be analysing all of its representation agreements to see whether they contain limits in the grant of authority that would mean it is licensing more widely under the ECL authorisation. CLA would always prefer to be operating with the full authority of its rightholders, and the CMOs who represent them for overseas works, and will contact you should your representation agreement contain any such restrictions to see if they can be reconciled to the scope of the ECL application.

**Q Will there be any impact on my share of CLA licence fees?**

A No, CLA will continue to conduct its various data collection exercises to determine the copying under an ECL licence and to enable a fair allocation of the licence fees it receives. As an example the PwC survey CLA commissioned for the purposes of the review into UK copyright law revealed that only a very small fraction of what was copied in universities was not already covered by a CLA licence and therefore it is unlikely that significant amounts of CLA licence fee revenues will be attributable to works or to countries not already covered and therefore there should be no significant diminution in the pool of licence fees available for distribution under existing representation agreements in the immediate future.

Equally, it is unlikely that there would be any significant uplift in CLA licence fees to reflect an increased repertoire that might result in an increase in licence fees. However, this will be monitored and should the data collection exercises reveal a significant increase in copying of works bought in by an ECL scheme, then CLA would review the position.

**Q What is meant by an “opt out”?**

A An “opt out” enables a rightholder in any of the works that are to be covered by a proposed ECL scheme, or which are covered by an existing ECL scheme, to exclude their works from some or all of the licences in the scheme.

**Q When can my rightholders opt out?**

A They may opt out at any time by giving notice to CLA or its relevant members, whether before or after the ECL scheme has come into effect following authorisation by the Government.

**Q How do my rightholders opt out?**

A They can send an email to [optout@cla.co.uk](mailto:optout@cla.co.uk). They can also opt-out via ALCS, PLS, DACS or PICSEL. You may also choose to provide CLA with a list of your rightsholders who wish to opt-out.

**Q Do they have to opt out all of their works and from all CLA licences?**

A No, they are free to exclude some or all of their works, and can choose from which CLA licence (s) they are opting out.

**Q Do they have to give an exhaustive list of their titles?**

A No, although it is helpful if they wish users to be clear as to what they can and cannot copy under a licence.

If they wish to exclude only some of their works from an ECL scheme, it is in their interests to identify those very clearly, both so that users know that they are not covered by the licence, but also so that those works left in an ECL scheme can be identified and qualify to share in the distribution of licence fees.

**Q When will an opt out notice be implemented?**

A Rightsholders who opt out will receive an acknowledgement within 14 days. Licensees will be notified of the exclusion of the works, and this will take effect within 6 months from the date of their notice.

**Q Do my right holders have to give notice to opt out when they have not already participated in CLA licence schemes?**

A Any existing opt out arrangements are preserved and will be implemented in any ECL scheme. Therefore, they do not need to notify CLA again of any works they wish to opt out of an ECL scheme where these have already been opted out of existing CLA collective licences.

They should, however, take the opportunity to review their arrangements and decide whether they are appropriate, especially given the recently widened copyright exceptions that allow some copying in educational institutions where no collective licence exists.

**Q What evidence do my right holders have to give of copyright ownership?**

A They must confirm in their opt out notice that they are either the publisher, author or visual creator of the works being opted out and that they retain either copyright ownership or at least the rights to receive collective licensing royalties.

They should be aware that if they wrongly opt out a work to which they do not hold the relevant rights, or no longer hold the rights, they may be depriving the rightful copyright owner of their share of licence fees collected and may face a claim in damages from that right holder. They should therefore check carefully their entitlement to issue the notice.

**Q What else will happen?**

A If the rightsholder opting out is a publisher, their opt out notice will be copied to the Publishers Licensing Society Ltd who will be in touch with them to discuss collective licensing arrangements. Similarly, if they are an author their notice will be referred to the Authors'

Licensing and Collecting Society Ltd. Similar arrangements will be in place for visual creators with ALCS, DACS and PICSEL. If you are opting out on behalf of your rightsholders CLA will liaise with you directly.

**Q How do I or my rightholders make a representation regarding an ECL application?**

A Once CLA has submitted its application, the UK Government is required to publicise the scheme, allowing at least 28 days for comments. This will be done via the UK Intellectual Property Office. Further information will be available at:  
[www.gov.uk/government/organisations/intellectual-property-office](http://www.gov.uk/government/organisations/intellectual-property-office) once CLA's application has been submitted.



## About ALCS, PLS, DACS and PICSEL

**The Authors' Licensing and Collecting Society Limited (ALCS)** is the UK collective rights management organisation representing the interests of authors. The current membership includes creators working across diverse genres for print, audio, audio-visual and digital publications. Established in 1977 and wholly owned and governed by the authors it represents (of whom there are currently over 95,000) ALCS is a not-for-profit, non-union organisation. ALCS exists to ensure that authors receive a fair reward when their works are used in situations in which it would be impossible or impractical to offer licences on an individual basis. To date ALCS has paid over £400m to authors. In addition to collecting fees, ALCS campaigns on behalf of authors at a national and international level.

**The Publishers Licensing Society (PLS)** is a collective management organisation representing the interests of publishers. It is authorised under its Articles of Association to exercise and enforce, and to authorise others to exercise and enforce, the copyright and related rights of rightsholders in their works. In practice its core activity is the managing of collective licensing on behalf of book, journal, magazine and website publishers and the centralised administration of their rights. Over 3,620 publishers are currently signed up to PLS. PLS is a private company limited by guarantee and was incorporated in 1981.

Established by artists for artists, **DACS** is a not-for-profit visual artists' rights management organisation. Passionate about transforming the financial landscape for visual artists through innovative new products and services, DACS acts as a trusted broker for 90,000 artists worldwide. DACS is a flagship organisation that campaigns for artists' rights, championing their sustained and vital contribution to the creative economy. DACS receives collective licensing revenues from the CLA on an annual basis, which is distributed to visual artists and their authorised representatives through DACS' Payback service. DACS also collects and distributes royalties to visual artists and their estates through Artist's Resale Right and copyright licensing. Since DACS was founded in 1984, it has paid over £90 million in royalties to artists and their estates – a significant source of income supporting artists' livelihoods, their practice and legacy.

**PICSEL** is a new CMO for the visual arts, bringing with it wide experience of the picture agency industry. Its aim is to ensure that entities such as picture libraries and agencies of all sizes representing visual artists and creators, as well as those individuals licensing visual rights directly, can claim royalty payments effectively. PICSEL is a not-for-profit organisation, committed to taking care of member's interests, giving them a level platform to engage in secondary licensing. To this end PICSEL welcomes innovative solutions for secondary licensing as the industry adapts to a fast-changing digital environment, whilst protecting right holders' primary licensing businesses.