

BBC Response to the Consultation on the UK's new extended collective licensing scheme

As we are responding to only a few of the questions asked in the Response Form but also wish to raise a separate and more general concern which does not relate to any of the specific questions, we have set out below the questions and our responses below and have addressed our general concern at the end.

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).

At the Working Group meetings, we heard evidence from collecting societies that a 75% threshold for membership support would not, in practice, ever be achievable. Whilst it is for collecting societies and their members to advise on what would be a better way to demonstrate support, as a potential user of ECL schemes, we would strongly urge you to reconsider this proposal and not to put in place a process that would mean that any proposals for ECLs would inevitably fail.

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).

We consider that a 5 year authorisation would be reasonable and appropriate and is within the bounds of the terms of the BBC's current collective licensing agreements. However, we are concerned that Reg 9(1) provides that a licensing body can only apply for a renewal of an existing authorisation after expiry of that authorisation. This could cause significant problems and uncertainty for licensees if there is an indefinite period in which they will be unable to continue to use certain works and a lack of certainty as to whether they will be able to use them again in the future. Negotiations for renewals of collective agreements always commence well before expiry of the term to avoid this uncertainty and we believe these regulations should reflect this industry practice.

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

This question should read "Is the repayment of part of the licence fee a reasonable and proportionate requirement?" Our response is also relevant to Question 23.

As a potential user, what we would require under an ECL licence to make it of any value would be the business certainty that we could use the works for which we had taken a licence for the term of that licence. Repayment of the part of the licence fee is therefore not of any assistance or benefit to us. This appears understood in paragraphs 3.72 and 3.73 of the consultation document, in particular where it says "When an authorisation is revoked or cancelled, the Secretary of State will end the authorisation on the date on which the licence ends....The end date of an authorisation will respect the need for business certainty". There are, though, issues with this for a number of reasons:-

- As currently drafted the Regulations do not say this. They merely provide that the Secretary of State will set a date for the revocation or cancellation of the authorisation (Regs 12(5) and 13(1)). There appears to be no express protection for the continuation of the licences granted under the ECL scheme contrary to what is suggested in the consultation document. We consider that provisions to this effect should be inserted into Regs 12 and 13 (and Reg 15(1)(c) would also need to be clarified).
- As currently drafted, in fact, the implication is that the licences won't continue as Reg. 16(6) requires the licensing body to repay the balance of the licence fees paid which relate to any period of the licence which as at the date of the revocation or cancellation remains unexpired. We consider that this regulation should only be effective at the option of the licensee if for any reason the licensee does not require the continuation of the licence.
- The statement above refers to "the date on which the licence ends". Although ECLs are likely to be very specific about the use which is being licensed, there could well be more than one licensee under an ECL and each licence should be allowed to continue until the end of their respective terms (as should be set out in new provisions in Regs 12 and 13) subject to the licensee's option to accept early termination and receive a fee rebate (in an amended Reg. 16(6).)

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.

We believe that there are examples within the membership terms and conditions of some collecting societies of longer periods than 6 months and from the perspective of a user, a longer period would assist in being able to sort out the implications of the removal of a work or contribution which would have been incorporated in a programme and which is likely to have been distributed on different platforms and in different forms.

General Comment

We are concerned about the lack of consistency between the new definitions proposed in the draft regulations and the existing definitions in the Copyright, Designs and Patents Act 1988 ("CDPA") and the unintended consequences that might follow as a result. For example, the CDPA already contains definitions of "licensing scheme" and "licensing body" and it is these definitions that are used, in, amongst others, the CDPA sections that cover references and applications with respect to licensing schemes. The draft regulations introduce new terms "Extended Collective Licensing Scheme" and "relevant licensing body" which do not relate back in any way to the existing core definitions. Despite therefore the consultation document at para.3.81 asserting that the existing jurisdiction of the Copyright Tribunal would cover making determinations about the reasonableness of ECL schemes, because different definitions are used, we do not believe that this is the case. However, the ability of licensees to make such references is clearly a safeguard that needs to be built properly into these provisions. We would therefore urge you to review all the definitions to be adopted in these regulations to ensure that they are wholly consistent with existing definitions so that the regulations work effectively within the current copyright framework.