



## IPO Consultation on the UK's New Extended Collective Licensing Scheme: Response from The Association of Authors' Agents: 28 January 2014

This response is prepared on behalf of The Association of Authors' Agents, a voluntary trade organisation whose membership comprises 96 British literary agencies. Our members, between them, represent the vast majority of authors writing for the general trade market in the UK.

### **Introduction and key points in our submission**

We are grateful to have had the opportunity to respond to the IPO's consultation. We are pleased to observe that as drafted the regulations adequately protect the commercial value of the primary licensing market in literary works which our members are principally engaged in.

- 1) We are concerned that provision should be made for a review by the Secretary of State in the event of a certain level of opt-outs occurring following commencement of an ECL scheme and would welcome a re-examination of the relevant section of the draft Regulations.
- 2) Para 3.43 of the Consultation Document reads: "Under no circumstances will a collecting society be allowed to apply to modify its authorisation to widen its mandate." and we strongly support this statement, however we question whether the language of Regulation 10 (1) sufficiently clearly enforces this restriction.
- 3) We would like to see greater clarity in the language of the Regulations in order to ensure that works opted out before commencement of an ECL scheme may never be included in it, and therefore at 15(1)(d) we recommend the insertion of the language "following commencement of the Scheme" between the words "performers' rights" and "such termination".
- 4) We would like to see, set out in the Regulations, an obligation on a collecting society running an ECL scheme to report any successfully-identified right holders of works that have previously been licensed as orphan under the Orphan Works scheme to the OW Authorising Body, in order to reduce the number of orphans as quickly as possible.

## ABOUT YOU & YOUR ORGANISATION

<b>Your name</b>	Sam Edenborough
<b>Job Title</b>	President
<b>Organisation Name</b>	Association of Authors' Agents
<b>Organisation's main products/services</b>	Trade Association representing UK literary agencies

**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).**

AAA Response: Yes. We suggest a period of one year. We understand that ECL is envisaged as a means to extend an existing collective licensing scheme to include non-members, and one year seems a reasonable minimum period during which the collecting society will have had the opportunity to begin issuing licences and thus demonstrate in its application to run an ECL scheme that it is actively licensing the type(s) of rights in the type(s) of works that the scheme would affect.

**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?**

AAA Response: We believe that collecting societies in our sector (the CLA on behalf of ALCS, PLS, and DACS) are well placed to answer this question and refer Government to their response. Besides from a collecting society's own efforts to demonstrate its representativeness we would hope that the Secretary of State, when assessing an application to run an ECL scheme, would also take into consideration the relative number of right holders represented by the applicant collecting society's membership compared with the numbers of right holders represented by any other collecting society or societies active in the same sector.

**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).**

AAA Response: We believe that the 75% threshold for membership support as drafted would provide maximum safeguard to both members and non-members alike. However, we recognise that this may be an unfeasible requirement for some collecting societies. Should the Government decide to reconsider this provision, we would recommend a requirement that the society must be able to demonstrate a minimum threshold of 75% support from those members who have responded to the request for consent. Furthermore we suggest that the regulations allow the Secretary of State at his or her discretion to consider other evidence of majority membership consent provided by the collecting society in its application.

**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).**

AAA Response: Yes, however we believe that the collecting societies in our sector are best placed to specify the sort of information to be required.

**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.**

AAA Response: No. The ECL scheme must be designed to guarantee non-members the same protections and compensations as those enjoyed by the collecting society's members except that monies held for untraced non-members should not be used solely for the members' benefit.

**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).**

AAA Response: Yes, providing that the collecting society has provided evidence as envisaged under Question 4 above.

**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).**

AAA Response: Non-members and members should be treated identically and we believe that the various protections articulated in the ECL regulations and elsewhere should be sufficient.

**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.**

AAA Response: Yes, we believe the periods are appropriate.

**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.**

AAA Response: At this stage it is difficult to give examples of specific circumstances however we strongly support the provision in draft Regulation 7(2).

**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.**

AAA Response: We defer to the views of collecting societies in our sector.

**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).**

AAA Response:

a) Yes we agree that proportionality should be the key principle that determines the scale of the publicity campaign.

b) A proportionate campaign should include (but not necessarily be limited to): notice in at least one relevant national publication (newspaper/magazine); a notice on the collecting society's own website; notices/advertisements placed in all relevant trade publications and on their websites;

notices to all relevant trade associations and right holder groups; and notices to any foreign CMOs whose members are likely to be affected.

c) In the event that opt outs reach a level that raises questions about the collecting society's representativeness the regulations should require a review of the ECL authorisation to be undertaken by the Secretary of State. This important safeguard would protect non-member right holders in particular, especially if for any reason large numbers of them were unaware of the scheme's existence until after approval of the application.

**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).**

AAA Response:

a) Authorisation term: 5 years is appropriate for the authorisation period however the regulations should specify a maximum licence duration which may be granted under the scheme, such licences to be allowed to survive the end of the authorisation period until the end of the licence term. We suggest that licences granted may not be longer than 3 years.

b) a renewal of an ECL scheme should be contingent on the performance of the previous scheme, and should take into account any objections or complaints received from right holders, as well as the level of opt-outs during the life of the scheme relative to the number of licences issued.

**Question 13: Under what conditions, if any, would modification to an authorisation be appropriate? Please provide reasons for your answer.**

AAA Response: It is hard to speculate as to such conditions. We note that para 3.43 of the Consultation Document reads: "Under no circumstances will a collecting society be allowed to apply to modify its authorisation to widen its mandate." and we strongly support this statement. However we question whether the language of Regulation 10 (1) sufficiently clearly enforces this restriction and suggest that it is made more explicit.

**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.**

AAA Response: Yes we believe the proposed time periods are adequate.

**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.**

AAA Response: See our response to Question 11 point c). Should the Secretary of State conduct a review of the scale of opt-outs from an ECL scheme and judge that the collecting society was no longer sufficiently representative then a revocation of the authorisation might be justified.

**Question 16: Are the proposed time periods for representations and Secretary of State's decision reasonable? Are the post revocation steps sufficient and proportionate? Please provide reasons for your answer(s).**

AAA Response: Yes we believe the time periods as drafted are reasonable. Should a notice of intention to revoke be published by the Secretary of State we believe that the process of revocation should not be unduly delayed thereafter, in order to protect right holders – the periods as drafted in Regulation 12 will minimise the number of new licences that may be granted in the period during which representations are allowed, prior to a revocation.

**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).**

AAA Response: We defer to the opinions of collecting societies in our sector.

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

AAA Response: We defer to the opinions of collecting societies in our sector.

**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.**

AAA Response:

a) We agree that the opt out requirements listed are adequate however we urge the Government to clarify in the Regulations that, should a right holder opt out a work (or works) prior to commencement of an ECL scheme, that the 6 month provision (see Regulation 15(1)(d)) shall not apply.

b) Regulation 15(1)(d) appears to be missing the word “to” between “such termination” and “take effect”. Further, in 15(1)(d) we recommend the insertion of the language “following commencement of the Scheme” between the words “performers’ rights” and “such termination”.

**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.**

AAA Response: We agree that the 14 day time limit above is reasonable. We recommend that Government is guided by the views of collecting societies in our sector as to whether verification of identification is necessary (and feasible) or not.

**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).**

AAA Response: We agree that 14 days is a reasonable period within which a collecting society must list a work as opted out.

**Question 22: Are the obligations in 3.66-3.68 on a collecting society reasonable and proportionate? Please provide reasons for your answer.**

AAA Response: Yes we believe the obligations above are reasonable and proportionate because they ensure transparency on the part of the collecting society regarding which works are not included in the ECL scheme and clarity for right holders and licensees alike. In addition, as Para 3.68 of the Consultation Document makes clear, potential licensees wishing to license an opted out work directly will be able to make contact easily with the right holder.

**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.**

AAA Response: This question is confusing. Should an ECL authorisation be revoked or cancelled due to material breach by the collecting society then we believe any licences in force at the time should be allowed to run until the term granted by the collecting society ends in order to avoid confusion and to allow licensees some business certainty.

**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.**

AAA Response: Yes we believe this time limit is reasonable, however please see our response to Question 19.

**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.**

Yes, we agree that money collected for non-members must not be used to benefit members alone.

**Question 26: Do you agree with the principle of individual remuneration in ECL schemes? Please provide reasons for your answer.**

AAA Response: We believe that non-members should be able to interrogate the basis on which the collecting society has calculated monies remitted for use of their work(s) and if necessary appeal to the collecting society on production of evidence of any errors. However our view is that members and non-members should receive the same fees, calculated on the same basis, for licences granted under an ECL scheme.

**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).**

AAA Response: We defer to the views expressed in answer to this question by collecting societies in our sector.

**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.**

AAA Response: We defer to the views expressed in answer to the first part of this question by collecting societies in our sector. Unclaimed monies due to non-member right holders should only be used by the Crown to promote educational, cultural causes and to educate users regarding copyright.

**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).**

AAA Response: We defer to the views expressed in answer to this question by collecting societies in our sector. Additionally our view is that any non-member right holder should be able to claim undistributed income at any time for the duration of the term of copyright in the affected works.

**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.**

AAA Response: We shall respond to this in our response to the Orphan Works consultation. However at this stage we recommend that the ECL Regulations should include the following obligation: should a collecting society successfully identify and locate the right holder of a registered Orphan Work used under an ECL scheme, then the society must report this to the Orphan Works Authorising Body in order that the right holder may be alerted to the fact that their work has been registered and licensed as Orphan.