

Extending the Benefits of Collective Licensing

Annex D - Consultation Response Form

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**Content of the following answers is given to the best of knowledge and belief.
Clarification of any legal aspects may be advisable.**

Question 1:

A minimum period of ten years establishing a reputable Organisation that is not mandated by virtue of Membership or Rules and does not deny, to certain categories of Members, voting 'Rights' or the 'Right' to hold office within the Organisation but profits from their Intellectual Property.

Question 2:

Reputable Collecting Societies operate a Computer Database from which they should be able to instantly print lists of Members, Rights Holders and their Assigned Works.

Past routine practice was to submit a Two or Three Part Form to a Collecting Society for listing in their files. Whether or not this practice exists to date, it would appear a simple precautionary measure to adopt.

Question 3:

The Crown will no doubt become a 'Collecting Society' and a 'Rights Holder' with Voting Rights.

Former European Directives have deemed certain 'Rights' - Individual and Irrevocable.

Having regard to the personal nature of these 'Rights' and to facilitate legality and transparency (as with a General Election) Rights Holders/Members should be formally Registered with the Intellectual Property Office (IPO) and granted the right to Vote on IPO proposed legislation direct (enabling comparison with lists submitted by applicants for a Collective Licence) thereby giving IPO direct percentage analysis of support.

Question 4:

Yes: A Collecting Society should demonstrate past compliance with any existing Code of Practice.

Communication with the Rights Holders, Members and Licensees is the only means of establishing satisfaction with or endorsement of a Collecting Society's administration.

Rights Holders do not always receive adequate information on matters affecting their Rights.

An Annual Financial Report/Audit (as with Companies) to IPO stating the degree of activity in licensing.

Lack of complaint from Rights Holders, Members and Licensees.

Question 5:

No: Code of Practice protection should be available to all, with the exception of Members' Voting rights.

Question 6:

No: In the interest of transparency consideration may be given to submission of the following to IPO:

- a) Copy of Annual Accounts/Audit - detailing Revenue earned and Revenue distributed to Rights Holders.
- b) Annual total of Registered Rights Holders and Members.
- c) Annual total of Registered Rights Holders and Members 'opting out'.
- d) Details of Revenue used for funding within Societies (i.e. Benevolent Funds, Pension Funds etcetera including identification of sources from which such revenue is raised.
- e) Annual list of complaints/disputes from Rights Holders and Licensees together with status.

Question 7:

Responsibility lies with the Collecting Societies (if, within the requirements of the Regulations they are granted a Licence) whether they accept the legal responsibility of administration of Rights for non-members.

It is assumed that reciprocal Agreements exist between the UK and overseas Societies copies of which could be provided to IPO.

The legal status of any Agreements may require research.

Question 8:**Not Necessarily:**

Communication with Rights Holders and Members of Societies is the weakest link in the chain of information. Government Departments have facilities for swift and direct communication with Societies who, in turn, have similar facilities and staff to assimilate the required information from sources on their databases.

However, communication between Societies and Rights Holders and Members (including heirs of Members who may have inherited Rights and may be entitled via said Rights to comment on Consultations, vote or 'opt out) can be diverse as not all have on-line access or their location known to the Societies.

Rights Holders may be anywhere on the Globe.

Working Members may be at various locations for various periods of time fulfilling their employment.

Neither are guaranteed to check any electronic facilities on a daily basis.

It is questionable whether all Rights Holders and Members will source the information, find time to acquaint themselves with Directives and Consultations and respond thereto within 28 days.

Does the possibility exist that registration with and communication from IPO direct to Rights Holders would result in a more conscientious response.

Question 9:

It would seem advisable that only 'mandated or assigned' Works should be licensed.

A signed form should be required for each Work mandated or assigned to Societies, lists of which should be individually numbered and supplied to IPO.

Is there any case to be made for IPO issuing or accepting questions direct to or from Rights Holders and Members who may not always want their preferences supplied via Societies?

Question 10:**Not Necessarily:**

It is believed the Copyright Tribunal has the legal authority to address disputes or appeals.

On past occasions it is also believed the Competition Commission (previously titled Monopolies & Mergers Commission) has addressed situations involving Collecting Societies and revenue distribution.

The vast experience of both Organisations could be engaged.

Question 11:**Qualified Yes:**

Apart from Collecting Societies' communications (on-line or postal) with their known Rights Holders and Members, what is available on a mass scale to draw attention to this subject?

- a) Media (TV/Radio Personalities/Presenters giving information slots within appropriate programmes.
- b) Newspapers/Magazines (Advertisements or Leaflets).
- c) Leaflets - Libraries/Art Galleries/Museums/Cinemas/Theatres/Halls/Clubs
- d) Retail Audio-Visual Outlets
- e) Facebook

Should a modified version of the selected original campaign be repeated annually?

As Rights can exist in perpetuity the ability to Register those Rights (including opt out) should equally exist in perpetuity. If queries are raised regarding a Collection Society's representativeness, Rights Holders and Members should be entitled to immediately opt out and select another more representative Society or create new Societies which can apply for Supplementary Licensing. IPO could research interested sources and arrange a process for setting-up new Societies, advising Rights Holders and Members accordingly of the facility. Lists formerly supplied by Societies with Licensing Applications would enable direct communication by IPO with Rights Holders and Members.

Question 12:

Yes: The degree of participation in the entertainment business varies considerably - constant change.

Annual accountability in the form of Company Accounts/Audit should inform IPO of Licence Holders activities.

Application or re-application for Licensing should be contingent on performance of all schemes undertaken by the Applicants. No "Light Touch" facility should be seen to be available.

Problems incurred by Societies should be brought to the attention of IPO at an early stage.

Strict adherence to Regulations and accountability to IPO is paramount in precluding any lack of representativeness leading to complaints, appeals and the considerable time and manpower engaged in addressing same.

Question 13:

Constant change in the entertainment business may require occasional adjustment to the Regulations governing applications for collective licensing.

Societies applying for Licence should provide detailed information (together with written proof from Rights Holders and Members - Forms) establishing the parameters of it's mandate as modification to widen a mandate will not be available.

Are there levels of membership required when licence applications are made?

In the eventuality that a considerable reduction in revenue or membership occurs, what provision should be made relevant to the Licence?

Do the Regulations include adequate consideration and procedure in the event of failure of Societies?

Question 14:

Yes

Providing procedures are established ensuring Rights Holders are informed.

Question 15:

Societies associated with the entertainment business were founded many years ago and they are all well acquainted with the reasons they were required and the legal requirements of Acts of Parliament which are incurred in the administration of same.

Some have Solicitors on their Staff.

Breaches of Administrative Codes or acts of illegality (of whatever nature) are therefore totally unacceptable. If they occur IPO should initiate an investigation.

If Societies are in any doubt regarding proposed actions that cannot be clarified by Solicitors they should consult IPO.

Societies should account to Rights Holders and Members at all times and for all actions.

Societies should not be entitled to sell their database of Rights Holders, Members or Licensees.

Said information should be placed in the custody of IPO for further Licensing where appropriate.

The facility for retrospective accountability and action should also be available.

Question 16:

Yes

Question 17:

Immediate cancellation of a Licence would cause considerable problems.

If cancellation is a legal right for the Licensor, safeguards will need to be in place protecting the rights and interests of all associated parties, the first of which should be 'advance notice of intent' to IPO, Licensees and Rights Holders and Members - enabling them to exercise their 'opt out' Right to make alternate administrative arrangements for their Works.

Licensees would be placed in difficulty if they had paid for a specific period of use (probably incorporated in an agreement between the Collecting Society and the Licensee - possibly irrevocable) and planned to use the licensed material within the agreed time frame. Licensees may have contracted other parties to provide services within this period of time who will also encounter difficulties.

Should the Licensees be given a choice of re-imbursement or continuation to the end of the Licence period?

Revenue held by the Licensor must be distributed, revenue collected after the 'notice of intent' is advised to all concerned should be distributed, (either procedure with appropriate accountability) or deposited with IPO - with a copy of all relevant information held by the Society) for distribution - a similar process to bankruptcy.

If Societies have been granted a Licence and conducted business under that Licence they should not be permitted to cancel the Authorisation other than in extreme circumstances i.e. financial, inappropriate administration by staff, a severe reduction in membership or collective objection of membership or Licensees for whatever reason. They should operate until the expiration date of the Licence.

The possibility could be considered for the availability of three and five year Licences giving Societies the opportunity of operating the new Regulations for a shorter period of time, extending a renewal application to five years if required.

If the reason for requested cancellation of the Licence is straightforward penalties may not be appropriate. The administrative expenditure involved in the cancellation may require recovery.

If, however, the requested cancellation is the result of inappropriate administrative action on the part of the Collecting Society then penalties may be incurred and should be met by those whose actions placed the Society in such a position and not taken from revenue which is the property of Rights Holders, Members and possibly Customs and Excise or Inland Revenue.

It may be considered that Collecting Societies require Indemnity Insurance funded by the administrative percentage charged to Licensees.

Question 18:

3.55) **No:** The Licensee should be given a choice of refund or continuation to end of License period.

As replied in question:17, cancellation of a Collecting Society's Authorisation is not straightforward. Further consideration of the Regulations to address difficulties seems relevant.

Question 19:

Yes:

Question 20:

3.63) **Yes:** Providing 'acknowledgement receipt' confirming 'Works' involved is supplied to all parties.

3.64) **Undecided**

Question 21:

3.65) **Yes:** 14 days is deemed a reasonable period of time to list Works 'opted out'.

Yes: It seems advisable to have separate lists for Works 'opted out' and Works 'pending opt out'. Licensees consulting Societies during the time periods covering 'opt out' will need to be fully aware of the situation of each Work being considered for 'usage planning schedules'. It would be costly to commit to uncertainty and they would probably decline usage.

Rights Holders and Members would also need to know the precise date(s) upon which their 'Pending opt out' Work(s) attain 'opt out' status.

Six months from notification may be applied to affix 'opt out' status, but, Licensees should be entitled to use the Work(s) for which they have paid the Society within their Licensed time frame.

Question 22:

3.66) **Yes**

3.67) **Yes**

3.68) **Yes**

Question 23:

See answer in questions 17 and 18

Question 24:

If the Collecting Society has been mandated by the Rights Holder(s) or Members to administer Work(s) and the Society Licenses the Work(s) to Licensee(s) should not consideration be given to the situation faced by Licensee(s) who expected to operate within the terms of the agreement to the end of the term of the License? Having to re-negotiate usage mid-planning may cause havoc with schedules.

The Work(s) may have reached official 'opt out' status - could the option to fulfill Licensee agreements be added - possibly with the agreement of Rights Holders and Members?

Licensees could as a reciprocal arrangement submit lists of 'usage' to relevant Rights Holders & Members.

Question 25:

Yes:

Collecting Societies' administrative costs should be added to the Licence Fee(s) charged to Licensees.
Deductions from royalties should not be permitted.

Distribution should be made of revenue earned by the Work(s) of identified Rights Holders and Members or Non-Members.

Unidentified revenue should be placed with IPO for contingency use.

Revenue can be collected on the basis of donations to Benevolent Funds, BBC Funds or general funds for an organisation

Clarification of circumstances under which Crown entitlement to revenue is enshrined in Law would be helpful.

Question 26:

Yes:

Rights Holders and Members are not consulted or given the right to agree or disagree with collective rates or the Terms and Conditions of the Agreements.

Said rates are agreed between organisations and production companies in Agreements and advised to interested parties as a 'fait accompli'.

Contracts issued contain the Terms and Conditions of Agreements.

Is Restrictive Practice a consideration in these Agreements?

Question 27:

3.86) a) Answers given in question 11 - no further ideas come to mind at the moment.

Contractors engaging the services of performers should have comprehensive lists of those hired.

Production Companies engaging services direct should also have such lists.

Whether heirs & successors inheriting deceased Contractors' Rights retain lists information varies.

Some retain & administer, some become Contractors, others give lists to the Musicians' Union.

Example:

The BBC enter into Agreements with the Musicians' Union (MU).

The BBC established BBC Worldwide Ltd to Licence use of BBC Contracted programmes or Parts thereof.

Payment(s) due to Rights Holders for this usage can be delegated to a Licensees who, in turn, makes said payment(s) to the Musicians' Union, with whom the Licensee has entered into another Agreement.

This process overrides Contracts existing between the BBC and Contractors.

Are such procedures considered Regulated Authorised Licensing, Breach of Contract or Restrictive Practice?

Difficulties arise in the eventuality that lists and identification of Rights Holders are unknown and distribution of revenue impossible.

TV Production Companies issue Contracts for recording programmes - the transmission (TX) date of programmes may be different to the recording date.

When repeats of the programme are transmitted payment should be made direct to the Contractor or the Performer by the Production Company, dependent upon Contract Clauses.

However:

If payment for usage of complete or part of original programmes is made to a Collection Society (authorised or unauthorised) or delegated under terms of Agreements with Licensees, usage will be listed on web-sites if identification of Rights Holders is unavailable.

The problem arises here that the (TX) dates are not always correctly quoted.

Contracts and Contractors supplanted.

Choices are the Production Company's first TX date and subsequent repeat TX dates, and the Licensees' first TX date and subsequent repeat TX dates.
Performers will consult Diaries for quoted dates and either claim or decline to claim based on the information of where they were on the quoted date(s).

In considering the eventuality of a Contractor or a Performer becoming bankrupt, or dying intestate & the status of Works administered within Limited Companies, are these situations whereby assets can revert to the Crown?

Legal determination regarding the terms under which this may occur would be helpful.

Question 28: and Question: 29

Answers in Question 27 address the consequences of incomplete data

Collecting Societies receiving applications from potential Licensees will know from their database whether or not they can identify Rights Holders and Members.

If inadequate information is available they should advise the potential Licensee, decline to issue a Licence for usage and add the Work(s) to their database for future investigation.

Are Collecting Societies legally entitled to license use, collect revenue and retain the revenue while they attempt to identify Rights Holders?

Any undistributed revenue should revert to the Crown within six months.

As the undistributed Work(s) and revenue therefrom has no 'representation' (being placed in the custody of IPO) the views of originators will be unknown but would probably incline toward performance related organisations.

i.e. Scholarships to the Royal College of Music for young talented musicians.

The Variety Club of Great Britain.

If at a later date the IPO receives information relevant to tracing Rights Holder(s) - or Rights Holder(s) come forward application can be made by said Rights Holder(s) for the Work(s) to be returned to a Society (or wherever the Rights Holder(s) wants them held) for administration.

In the interim, if the Licensee wishes to use the Work(s), application should be made to the IPO.

It is believed European and Parliamentary Laws can enshrine Rights in perpetuity.

Work(s) reverting to the Crown may require contingent liability planning relative to those Laws.

Question 30:

Response to the question of 'Orphan Works' is best considered when the final Directive is available defining the status of Orphan Works - many of which will probably belong to the Crown.

This Consultation has demonstrated a considerable understanding of the entertainment business within the proposed enshrinement in Law of Regulations and Authorisations.

It has also requested further information from interested parties.

It is believed a combination of all aspects of input will result in fair legally based representation.

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