

BAPLA response to IPO: ECL Application Consultation 2nd February 2018

BAPLA welcomes the opportunity to comment on the first UK Extended Collective Licensing scheme application proposed by the Copyright Licensing Agency (CLA). For the image industry, this first ECL application is an important moment leading – if the scheme is successful – to the improved financial management of rights revenues for image owners, and therefore one that requires closer scrutiny to ensure that every effort has been made, by all Collective Management Organisations involved, to follow UK regulations.

This consultation also provides an invaluable opportunity to take note of the points raised, both during the stakeholder meetings and rights holder submissions, to ensure such points are acted upon. It is also important to emphasise that, in this first application, images feature as embedded content in books, magazines, and periodicals, and not as stand alone images; they are sourced across the globe and enrich many of the publications copied under the current CLA licences.

About BAPLA

BAPLA, founded in 1975, is the largest UK trade association for picture libraries and agencies representing members of a unique part of the creative industry. BAPLA has a broad and diverse membership of image rights holders and purveyors, from sole traders to major news, stock and production agencies, as well as SMEs, archives and cultural heritage institutions.

BAPLA members are the main source of licensed images seen every day in print and digital media, and as such have contributed to the UK economy for over 40 years, furnishing organisations across all forms of publishing, news, advertising & marketing, retail, science & medicine, and public bodies. Our members generate revenue for, and manage the interests of over 120,000 creators and rights holders, encompassing a breadth of experienced and new young image-makers. The photo library and agency sector is unique within the framework of the image industry as it is a vital economic link for many professional image-makers.

Direct licensing (also sometimes known as ‘primary’ licensing) is the key driving force behind a strong global image industry¹. Our members specialise in the ‘direct licensing’ of images; strengthening the marketplace value of images, and for decades, supporting the ability of professional image-makers to derive income and reinvest in their creativity. It is from this basis that image rights holders have the opportunity to claim secondary rights revenue.

Overview

Since ECL was first muted by the UK Government, BAPLA has taken a keen interest in following and commenting on the introduction of Extended Collective Licensing, particularly as the breadth of it’s membership includes those who are not members of any collective

¹ The United Kingdom is one of the three largest markets in the world, alongside the US & Germany, providing two thirds of all image suppliers - Page 4, http://www.stockimagemarket.uni-hd.de/downloads/GSIM_Survey_2012_Part_III.pdf

management organisation (CMO), as well as those who collect secondary rights revenue. We are clear on the understanding that the UK ECL regulations will provide a licence for extended rights covering all rights holders whether they are members of a collecting society or not.

BAPLA members represent the largest significant number of image rights holders claiming secondary rights revenue from visual arts collective management organisations, such as DACS and PICSEL. We are supportive of the role of CMOs in deriving income in areas of market failure – i.e. where it would be uneconomic or impossible for authors and rights holders to only directly collect revenues themselves. BAPLA also supports the existence of a choice for rights holders to claim secondary rights revenue, and respects the right of each visual arts CMO as a member of the CLA. It is with this in mind that BAPLA therefore supports the CLA's application for an ECL to cover the existing licences², with the following caveats.

Recommendations

- Consulting members and non-members of a CMO:

Picture libraries and agencies have successfully supported the remuneration of hundreds of thousands of image rights holders for more than 40 years. It is the combination of expertise and investment in bringing their works to the commercial market that has helped to make the UK an enviable cultural industry. A publisher has a plethora of choice and is not restricted by the geographical scope of a rights holder, as digital technology has helped to bring the remotest works to their desktop, it means that a publisher can use any image from any rights holder in the world to use in a publication. This poses a potential issue when it comes to extending the rights of a collective licensing scheme.

Representativeness needs to be measurable and consider the scope of rights holders, particularly in relation to images and locating image rights holders. The widespread and effective publicity, advertising, and consent of a scheme becomes a key element for embedded works containing images. With the introduction of the UK CRM Directive, there is also far greater responsibility to ensure the protection of rights holders and a duty by CMOs to be fair and transparent.

(i) Consent

It goes without saying that CMOs should be duty-bound to contact members in direct receipt of royalties from CMOs for relevant issued licences, when requesting consent of an ECL application. The process of contacting those who are not members of a CMO, but may have works included in the scope of the licences, will undoubtedly be challenging, however the UK CRM regulations still requires CMOs to locate rights holders where possible through publicity of a scheme.

(ii) Publicity & advertising

Publicity of any scheme relies on best practice, using an agreed approach that includes a wide variety of stakeholder rights holders and trade organisation representatives. Communicating schemes for embedded works via national and overseas territories,

² As of November 2017, when the CLA ECL application was made.

especially for rights holders who are not members of a CMO, and may choose not to be, is crucial. It also relies on the communication of a scheme to be clear and transparent, so that there is little misunderstanding of its intentions.

BAPLA notes that in the ECL application³ the CLA made fair efforts to reach rights holders initially through respective CMOs and subsequently through trade organisations. We recommend CMOs start the publicity & advertising of ECL schemes at the same time as contacting CMO members in order to maximise the level of consent. Using a robust approach to publicising a scheme that precisely demonstrates its merits to rights owners provides assurances and increases trust.

(iii) Distribution & reporting

Schemes also rely on the proper process of distribution and reporting to ensure all rights holders (members and non-members, from the UK and abroad) that can be located are able to claim secondary licensing royalty fees collected on their behalf [Reg 4(4)(e)]. None should be withheld by the exclusivity of membership to a CMO. It also should not be mandatory for a rights holder to either join a CMO or have to opt-out of collecting rights revenue.

- Effective opt outs:

Opting out of a scheme is a fundamental choice left to the rights holder, and it should be a prerequisite that a CMO operating an ECL scheme has a clearly accessible web page⁴ referencing the maintenance of an opt out list for those rights holder who choose to opt out, explaining both the reason for the ECL scheme, the pros and cons of opting out, the requirements to do so, and how it will be implemented [Reg 4(4)(d) & 16].

Following discussions about data collection, since the introduction of ECL and UK CRM regulations, BAPLA recognises the challenges of collecting secondary rights data on the uses of images in copied works. It is widely acknowledged that at present there is not yet an effective system for identifying image rights holders when works are copied, unless they happen to be an author of a book or article.

Data collection has predominately focused on text – the title of a book or article and the name of the author. Other industry standard data is also used, such as an ISBN or ISSN, to identify works. As yet user or licensee data recording has not extended to images. It is however possible to remedy this issue.

With the general move from the copying of printed publications to digital copying, we would expect the technology to identify the copying of images to improve. This requires a combination of licensees (users)⁵ and CMOs working towards implementing such advances, combined with data matching where possible. Therefore we recommend implementation as each improves.

³ Application to operate an ECL scheme - <https://www.gov.uk/government/consultations/application-to-operate-an-ecl-scheme>

⁴ The CLA has 'opting-out' featured on the following web page: <https://www.cla.co.uk/ecl>

⁵ UK CRM Regulations requires licensees (users) to provide relevant information (data) - Reg.16 (1) - http://www.legislation.gov.uk/uksi/2016/221/pdfs/ukxi_20160221_en.pdf

- Digital copying:

CMOs tend to increase their offer to licensees by introducing new products, and market pressures means they have to adapt and broaden licences they provide. Under this ECL application current CLA licences are tightly defined, and we understand that there is a restricted list of approved website URLs. However, whilst we acknowledge that CLA licensees often request the broadening of uses at the point of renewing licences, and changes to these licences are approved by member CMOs, we must stress that any modifications should not interfere with our members ability to provide direct licensing online.

Our concern lies with the possibility of a digital creep into direct licensing, as we move away from printed publications to digital access publications. By the very nature of ECL, which covers the rights of rights holders who are not members of a collecting society, this issue of expanding licences to cover digital copying is important. The challenge the image industry has in maintaining a thriving online marketplace for direct licensing of images cannot be overstated, particularly as the demand for monetising images online rapidly increases. Therefore we recommend that at the point of the renewal of the application in 5 years⁶, a review of the status of the CMO's licences (incl. publicity and consent) be made.

- Future ECLs:

Whilst BAPLA supports the CLA's current application for an ECL, the application should not set precedence for a "one size fits all" approach to future ECL applications. Our members depend upon direct licensing to support their UK and international businesses, and in turn this revenue supports image owners, the continuing digitisation of their analogue work, and correspondingly growth, reinvestment and innovation. Therefore we recommend that each ECL application should be based on it's own merit as a safeguard. Renewals or modifications of a granted application should also be thoroughly scrutinised to ensure that it meets with the criteria originally granted, so that rights holders are not adversely affected.

BAPLA looks forward to continuing to work with the IPO and relevant CMOs, in order to ensure that whenever there is an ECL application including images, BAPLA is consulted on the requirement of that application. Both to ensure a represented level of rights holders (including both members and non-members of CMOs) are reached, and to ensure each application does not interfere or replace the direct licensing market, but rather compliments and supports it.

On behalf of BAPLA
Isabelle Doran
BAPLA Chairperson

<http://www.bapla.org.uk>

⁶ Authorisation to operate an ECL scheme - The Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014 Reg 4(6), Reg 10(2)(b) - http://www.legislation.gov.uk/ukSI/2014/2588/pdfs/ukSI_20142588_en.pdf