

# Extending the benefits of collective licensing

## Annex D – Consultation response form

### Responding to the consultation

On this form, please provide your responses to the questions outlined in this document. You do not have to complete the whole form – please answer the questions that are most relevant to you.

Please note: This consultation forms part of a publication exercise. As such, your response may be subject to publication or disclosure in accordance with access to information regimes (these are primarily the Freedom of Information Act (FOIA), the Data Protection Act (DPA) and the Environment Information Regulations (2004). We plan to post responses on the review website when they are received, and they may be subject to online discussion.

If you do not want part or whole of your response or name to be made public please state this clearly in the response, explaining why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system cannot be regarded as a formal request for confidentiality.

The closing date for responses is Tuesday 28 January 2014 at midday.

### About You and Your Organisation

Your name	<b>Linda Royles, Consultant Ania Skurczynska, Corporate Counsel</b>
Job Title	<b>As above</b>
Organisation Name	<b>British Association of Picture Libraries and Agencies (BAPLA)</b>
Organisation’s main products/services	<b>Representing photo agencies and libraries</b>

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).

Yes.

A collecting society applying for authorisation under the proposed Extended Copyright Licensing ("ECL") regulations should be able to show a track record in licensing the relevant copyright works and dealing with the affected right holders. The minimum period for this purpose should be at least one full licensing cycle (i.e. from accepting mandate to distribution of royalties), which may exceed a calendar year. Accordingly, a period of 2 years is the minimum but we would be in favour of a longer period, such as 5 years, which would be more appropriate to assess consistency.

A minimum period is also desirable given that the ECL scheme proposed is only for areas where there is "strong existing support for collective licensing" (the IPO's Factsheet on Orphan Works and Extended Copyright Licensing, August 2013). We submit that this support, over a minimum period, needs to be assessed as part of the overall assessment of an ECL application under the ECL regulations. Again, for these purposes, a period between 2-5 years seems appropriate.

The minimum period should be reflected in a number of provisions of the ECL regulations. For example, it is the requirement of the ECL regulations that the relevant licensing body is representative in relation to copyright works and authors represented at the date of the application as compared to the ones subject of the extended licensing scheme proposed by it. The representativeness should be assessed over a minimum period suggested above. Similarly, the ECL's compliance with code of conduct or general principles of fair treatment (see Q4 below) should also be assessed by reference to the minimum period.

It should also be noted that although collecting societies have been useful in the licensing of rights in analogue works, with advances in digital technology it is possible to distribute usage payments on a more precise and equitable basis through direct licensing and as such ECL legislation and IPO policy should be set up with the likelihood of ECL obsolescence in areas where direct licensing is fully operational.

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?

To be representative, the licensing body must prove that at the time of application it represents a significant number of relevant rights holders and licenses a significant number of copyright works as compared to the totality of right holders and works proposed to be included in the ECL. As the proposed ECL scheme grants collecting societies a statutory licence to use works without the individual right owner's authorisation (subject to opt out only), and thus diminishes copyright protection available to authors, it is crucial that the collecting societies make every effort to show beyond reasonable doubt that they are representative.

According to the Notes in the IPO's consultation paper (at paragraph 3.15), it is provided that in order to satisfy the representativeness test (under Section 3.4)(b) of the draft Regulations) a collecting society will need to show to the Secretary of State, *inter alia*, "the number of works it controls relative to the (estimated) total number of works". In view of the diminishing rights to authors under an ECL scheme, we feel that this is a crucial point which should be included within the actual text of the regulations. This would provide immense comfort to the rights-holders of photographs, professional and non-professional alike, to know that a collecting society really would need to try contact them before being authorised to include their photographs as stand alone works in an ECL scheme. Considering that every person owning a camera or smartphone will be a rights-holder for photographs, this quite rightly would be a huge task, likely involving national advertising campaigns and the like, but one that we feel would be truly warranted if a collecting society is ever to be empowered to administer the rights every photograph in the country. Currently there is no collecting society that could come close to evidencing such representativeness but we nevertheless feel that this test should be written into the text of the Regulations to provide the necessary comfort. We appreciate that photographs might be an anomaly in this regard but this is all the more reason to provide this comfort.

Also importantly for the photographic sector where many works are incorporated, or embedded, into other works, the relevant licensing entity must show that it is representative for each description (each "type") of the copyright works it proposes to include in the ECL. There is a number of licensing bodies that are media specific, e.g.

collecting societies for book or magazine publishing, newspapers, music publishing, and broadcasting. Where images are included in the scope of the ECL proposed by such bodies, the relevant collecting society must show significant, direct and express mandate for representing images and photographers. And a fair share of ECL revenues should then of course be apportioned to and paid directly to any such rights holders that are represented (as opposed to being routed via the rights holder of the work containing the embedded photo). However, if the collecting society is unable to demonstrate representativeness for such embedded works, the Secretary of State should require that the relevant type of embedded work be expressly excluded from the applicable ECL scheme.

In terms of evidence, BAPLA is supportive of recommendations in this regard, as made by CLA<sup>1</sup>, supplementing it to include the following, reliable, accurate and up to date information:

- Actual number of work-specific, current, mandates (including a sample of agreements granting the mandate) by the UK authors in the minimum period (see Q1 above)
- Actual number of the relevant works licensed in the minimum period
- Data on the anticipated numbers of right holders and works subject of the ECL
- governance history and length of experience;
- fair and accurate cost-effective distribution systems;
- cost-effective administration charges;
- absence of complaints from rights holders (if there are complaints they must be listed); and
- evidence of positive support from other bodies generally recognised to represent specific groups of relevant rights holders.

The collecting society should be subject to an overarching requirement to act in good faith in submitting the application for the ECL. It should not be possible for a CMO to, say, recruit students of photography or overseas members to bolster its numbers in the run up to the application for the ECL authorisation. As regards copyright works (including embedded works as discussed above), these should be properly and expressly licensed to the licensing body. The volume of works that were licensed under Creative Commons or indirect licences should not be taken into account.

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<sup>1</sup> <http://www.ipo.gov.uk/response-2011-copyright-cla.pdf>

All information submitted in the application process should be made available by the collecting society to interested parties, members and right holders alike in order that these groups can meaningfully participate in the consent process (members), opt out (non-member right holders), and the application review (interested parties).

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).

The 75% threshold is sufficient only if it translates into the consent of 75% majority from UK rights holder members that had mandated the collecting society to license the copyright work and the type of use that is proposed to be covered by the ECL. In the current draft, the ECL regulations propose that the "required consent" is a consent of the members "who under the constitution of the relevant [licensing] body [are] permitted to participate in certain decisions of the relevant [licensing] body". It is completely unclear from this definition who such members are. Most importantly, the definition provides an insufficient link to the actual right holders whose works will end up competing for licensing revenue with non-member right holders.

It is also unclear to us in what circumstances the 'required parent consent' must be given (see regulation 3(4)(f)). As above, it is crucial that the consent comes from right holder members.

We support the submission of FOCAL in respect of consents required to license non-UK copyright.

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).

Yes.

It is crucial, however, that the collecting societies who are given statutory licences show compliance not only with the code (which as yet, has not been compulsory – the British Copyright Council survey records that up until December 2012, only four CMO's had accessible member and user codes of conduct) but, more generally, provide convincing

evidence of fair, transparent and with equitable treatment of right holders whose works the society has represented in the minimum period (see Q1). In all instances there should be an opportunity for representatives of all rights holders to air their concerns with regards to the past conduct of the collecting society.

As stated by the IPO: "a code of conduct on its own does not provide greater redress for users - independent and inexpensive dispute resolution is additionally required." (Collecting Societies Codes of Conduct, Executive Summary p. 4).

We are in agreement with FOCAL, that for the avoidance of doubt, all complaints received by the relevant collecting society in the minimum period (see Q1) should be disclosed and considered, whether or not relating to potential breaches of their codes together with information about any steps it has taken to deal with them.

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.

No, unless such treatment favours the non-member right holder.

The ECL scheme already places non-member right holders at a disadvantage as compared to its members – the exploitation of works held by non-member right holders is restricted because they don't have the opportunity to expressly consent to the ECL and its terms. This prejudicial treatment, which potentially breaches the UK's obligations under the international copyright treaties, should be counterbalanced by the requirement that the licensing revenue due to non-member right holders is ring-fenced and that any administrative or extraordinary costs of the ECL do not diminish such revenue. Furthermore, aside for the royalties available under the terms of the ECL, a non-member should be guaranteed the effective right to claim individual remuneration if he/she disagrees with the terms of the scheme. Without such right, non-member right holders are only given a choice between imposed level of revenue (ECL) or the lack of revenue (opt out), which skews the balance between the content creator and the content user unduly in favour of the latter.

See also our response to Q7 below in relation to additional protections of non-member

right holders.

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).

No.

BAPLA supports FOCAL's submission in relation to this point.

Reliance on (recently introduced) codes alone is not enough. In the words of the Independent Code Reviewer, Walter Merricks CBE, codes differ – they can be member/rights holder facing and/or user/licensee facing. There should, in addition, be a statutory disclosure of all complaints over an agreed minimum period (see Q1). We believe that this will greatly add to checks afforded under regulation 3(4)(c).

The 2012 EU CRM Directive states that in addition to codes of conduct, collecting societies should ensure minimum standards of governance, transparency and protection for non-member rights holders. This should include a policy of open membership on a non-discriminatory basis.<sup>2</sup> Refusals for membership must be based on objective and publicised criteria. It is widely acknowledged that signing up to a code is a first stage minimum. Collecting societies must be able to prove through evidence (see examples of evidence required under Q2) that they consistently adhered to the principles enshrined in the codes or their constitutional documents and are, and have been, accountable for any failures to do that.

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).

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<sup>2</sup> Besen, Kerby & Salop, n. 10

Yes, there is a need for additional minimum standards to protect non-member right holders. The protections of non-member right holders currently envisaged under the ECL regulations and elsewhere are not sufficient.

As currently envisaged, non member right holders have only the following rights:

- to opt out (thus depriving him or herself of the licensing revenue);
- to rely on the obligations of collecting societies to "act in the best interest" and "deal transparently" with non member right holders (both of which terms are vague as neither has been tested);
- to make a complaint to the Comptroller in relation to the authorization of the relevant collecting body (under the ECL regulations), or the Licensing Code Ombudsman (under the relevant licensing bodies regulations) for breaches of the code. The timeframe for a decision under neither of the mechanism is clear, and neither mechanism has been tested.

Accordingly, the non-member right holders protection is minimal and potentially expensive because it will require legal advice.

There is a considerable uncertainty and controversy over the introduction of the ECL in the UK (including its effect on the non-UK right holders). A more detailed legislative and self-regulatory framework would go some way towards reassuring rights holders that their property rights will not be abused. These include:

- each collecting society should provide to members and non-members appropriate access to an appeal or ombudsman-style independent complaints service for its members and licensees to use in circumstances where the society's complaints procedure has not resolved a complaint to the complainant's satisfaction;
- there should be detailed reporting of the number of complaints received by users and resolutions;
- in addition to the above, the terms of the ECL should form a legally enforceable contract between the collecting society and non member right holders giving each of them a direct recourse against the collecting society if it breaches the terms of the ECL or its authorization;
- it should be made possible that under certain circumstances a collecting society might undergo an annual independent audit, or monitoring which may be instigated by a member or a non-member right holder at the society's expense;

- See Qs 5 and 26 in relation to ring-fencing the revenue and the right to individual remuneration
- The collecting society should bear sole liability, and indemnify non member right holders who have opted out of the scheme and whose work has been used in breach of privacy, defamation, data protection or other such acts protecting the rights of the author or subject included therein.

ECL must not be allowed to evolve into depriving the photographic industry of its exclusive rights to monetize creative works. We believe that reg. 4(16) should oblige collecting societies to meet and agree terms of the ECL with non-rights holder representatives given that collecting societies cannot show mandates from non-members.

Where members have agreed for funds to extend to grants, fellowships or bursaries, these should be available to members and non-members alike.

We support FOCAL's submissions in relation to the transparency of IPO's email list of stakeholders referred to at point 3.32 of the ECL consultation.

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.

BAPLA suggests that during this initial launch period for ECL, minimum periods should be as long as possible, as many rights holders whose works will be included in ECL for photography will mostly likely be non-members and therefore will be unaware of the existence of collecting societies. This is especially the case for overseas rights holder. We propose 90 days minimum.

Where a UK collecting society has a reciprocal agreement with a foreign society to collect payments for use of UK works overseas, details of these schemes should also be treated in the same way to allow UK rights holders the right to the revenue or the opt out.

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.

There may be certain instances where the authorisation should make clear that a scheme should apply to a specific usage only and not for example an extension of a generic "digital" license. The rights to be administered should be required to be narrowly and precisely defined so as to ensure they only cover any evident market failure and so that rights holders can make an informed decision whether to become a member or to opt-out and exploit directly if they prefer. For example, a rights owner might view digital reproduction on a private intranet site differently from digital reproduction on a public facing internet site (if it could police the latter but not the former itself).

Generic digital licences have the potential of proliferating infringement instead of curbing it (which is the opposite of what the Government is trying to achieve (ref. to the second paragraph of the Ministerial foreword to the ECL consultation)). This is because works may be freely 'lifted' and re-used without the licence. In this context, additional conditions may include an obligation to monitor, police and report on infringement of copyright in works subject of the ECL.

Authorising the granting of secondary licences for digital use also risks that the scheme will exceed its geographical scope as works licensed by a UK licensing society for, ostensibly, the use in the UK will, in fact, be available globally.

Many CMO's will exclude members whose works have been licensed under Creative Commons (CC); these CC works should be excluded from ECL.

Embedded works should require certain conditions before an ECL scheme can be approved, as it will affect a wider range of rights holders, including non-members. IPO consultation with non-members and their representatives when looking to approve an ECL scheme, which involves embedded works, should be sought.

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.

We support the submission of FOCAL in this respect.

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).

No.

Proportionality is not precise enough in this context – does the requirement relate to the volume of works, number of right holders, the size of the collecting society?

The publication requirements must take into account the fact that the aim of the ECL scheme is to license copyright work without the express permission of the copyright holder. Collecting societies should therefore be under an obligation to comply with certain prescribed methods of communication as well as undertake further communication as appropriate. Communication methods should include publication on a state-held register of ECLs; national press; communication with the relevant trade bodies; communication with foreign collecting societies and trade bodies.

As representativeness of the relevant collecting society is a core requirement for the granting of the ECL authorisation, collecting societies should be under an obligation to regularly monitor and report the level of opt outs as compared to their representativeness pre-ECL authorisation. In circumstances where the scale of opt outs reaches a level that raises questions about the collecting society's representativeness, it should notify the Secretary of State who should have the power to revoke the authorisation.

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 are in agreement with the principle of renewal. The time scale of 5 years allows both rights holder or user to file a complaint or comments, for example where the conditions relating to the extension of the licence were not respected, or where there has been a large number of subsequent opt outs, these should be taken into consideration when an application for renewal is sought. However there should be no justification for a light touch approach as this could lead to a ECL scheme renewed without any scrutiny over the conduct of the collecting society, most importantly where a CMO deals with embedded works for which the level of complexity increases such as the number of non-members including those of non-UK residency. Accordingly, all requirements for the grant of the initial authorisation must be met in order for the extension to be granted. In addition, the collecting society must make the renewal application in good time so that neither the right holders nor licenses are exposed to the risk of a 'gap' in the society's right to continue the scheme (if it qualifies). Delays should be penalised by fines and an indemnity to right holders and licensees.

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

Modifications to authorisation should be allowed if this is needed to account for the use of embedded works, for the collecting society's conduct, in particular if such conduct adversely affects non-member right holders.

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.

No.

We do not agree that 28 days should be the maximum amount of time for all representations to be considered, more so in the case of works containing collective/embedded works where there is likely to be more than one copyright work and more than one rights holder, as well as in all cases and where non-UK rights holders are involved. Foreign rights holders are unlikely to be following publicity of ECL schemes and therefore in the interest of such there should be a minimum of 90 days.

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.

The ECL authorisation should be revocable if it interferes with the normal exploitation of the works for a non-member who utilises a direct licensing method.

The authorisation should also be revoked if the collecting society fails to meet the minimum requirements (see Q7) or ceases to be representative (see Q11).

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).

No.

The time to make representations should be extended to minimum 60 days to give stakeholders, especially those based outside of the UK, to evaluate evidence made available by the collecting society in the process of application and seek legal advice where needed.

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).

Yes, a collecting society may be allowed to cancel its authorisation.

A mechanism for dealing with claims of right holders, including a ring fenced compensation fund, should be approved by the Secretary of State

A new application for ECL must be sought before an ECL scheme is transferred to other collecting societies. Any monies due to non-members must be paid out.

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

Yes, part repayment of the licensing fees to the licensees is reasonable provided that the repayment does not trigger a back-to-back obligation to repay royalties by right holders and does not diminish the compensation fund referred to in Q17.

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.

No, opt out requirements are not appropriate.

We are concerned that the right to opt out without the right to guaranteed individual remuneration will put right holders – in our case, photographers – in a position in which they must either consent to imposed terms of the ECL (including the pricing and royalty rate) or the lack of any revenue at all.

Notwithstanding this, we are pleased to see that any rights holder, including where their work appears as an embedded work, is able to opt out, meaning that further use of

their work must cease.

Further safeguards must be introduced in law to ensure that licensees take account of any opt outs and users do not assume that a licence can cover all works. See our response to Q 9 in relation to monitoring and policing infringement by collecting societies.

If a CMO fails to manage an opt-out it should be liable for compensation to those rights-holder affected.

In addition, collecting societies should have an obligation to maintain an online database of excluded works and opt outs.

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.

No. A 14-day period is too long.

The images industry is a high-speed transaction environment in which exclusivity is often very valuable. Any delay in the opt out derails the exclusivity and news market, especially if collecting societies are permitted to grant digital licences giving licensees immediate access to new content (see also Q9). In any case, exploitation of copyright works after the author withdrew authorisation constitutes infringement of copyright which infringement should not be legitimised by the ECL regulations. Collecting societies should be required to have in place arrangements that make it possible for them to withdraw content from future licensing immediately on opt out (which is standard in direct licensing). Any licences already in place, which includes content created prior to opt out, may be allowed to continue until expiry but no longer than 6 months.

In order to maximise the protection of property rights of right holders in accordance with international conventions the UK is signatory to, verification of opt out should be a secondary consideration. There should be a presumption of validity of an opt out with action being taken on opt out immediately as suggested above, and the burden of

proof that an opt out is fraudulent put on the collecting society.

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).

No.

A 14-day period is too long and the opted out right holders and works should be listed immediately and no later than within 24 hours (ref Q20).

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

We are in agreement with FOCAL that an ECL scheme could not operate without the obligations set out in 3.66-3.68 and that these should be included in the ECL regulations.

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.

The revocation and cancellation of the ECL scheme should be extraordinary events. They may occur when, for example, the collecting society has breached the terms of the authorisation. There is no reason why licences granted by such collecting society were to last longer than absolutely necessary. The regulations should state that all licences granted under such revoked or cancelled scheme will continue until their next renewal date or until the end of 6 months from the date of revocation/cancellation whichever is earlier.

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.

It depends.

The experience of Denmark shows that the licensing of a right holder's work comes to an end three months after the rights holder has indicated his or her intention to withdraw from the CMO. There may be a case where the cessation of use should be shorter if there is a dispute over the work for example, when the interests of subjects depicted in a photograph, or the safety or interests of a photographer, as a result of the disregard of a direct licence or breach of contract.

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 believe that funds from ECL should be ring-fenced. Where members have agreed for funds to extend to grants, fellowships or bursaries, these should be available to members and non-members alike.

We are in agreement with FOCAL that greater transparency is required when non-member revenues are used for lobbying, obtaining advice when such activities may be prejudicial to the interests of non-members. These activities should not be paid for out of payments received from ECL licences.

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

Yes, but we do not agree with the requirements to claim the individual remuneration.

First, the level of remuneration should be adjusted on request of a member not only if it

is not commensurate with use, but also if it is not comparable to the standard market rate for the work in question.

Secondly, it will be virtually impossible for a right holder to produce evidence of the level of use beyond giving examples only. These requirements make the principle of individual remuneration illusory. The collecting societies will have the usage data. Accordingly, collecting societies should put in place mechanisms allowing individual right holders to request such data and claim appropriate individual remuneration.

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).

For those collecting societies housing collective/embedded works, there should be an obligation to contact all relevant stakeholders, which includes non-members and trade bodies that represent them. For the photographic industry there are several trade bodies representing a broad spectrum of photographers.

We are in agreement with FOCAL that those CMOs which already demonstrate a clear and transparent process for royalty payments to non-members should have better chances to run an ECL scheme, whereas a CMO which has little or no current evidence of a payment process to non-members should not be granted authorisation to operate an ECL, until it can do so otherwise.

Naturally, fraudulent claims may occur but as in all title claims, it will be for the right holder to prove the entitlement, through courts if necessary.

There is a concern that the list of unclaimed works will be taken to be an official list of orphan works. We await the opportunity to comment on the proposed orphan works scheme and we trust that appropriate safeguards will be put in place to avoid any presumption of an orphan work status.

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.

The issue of incomplete or inaccurate data should fall to be dealt with by the CMO and the members they represent. All efforts should be made to identify and collect the money from licensees.

It is known for some collecting societies to use a contractual arrangement to place responsibility on the member receiving royalties to then contact those non-members whose work they have used. This then creates a Catch-22 situation for a non-member rights holder to claim remuneration even if they can provide evidence of the work/s used. Such systems are unworkable.

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).

There must be an agreement that undistributed, unclaimed fees are ring fenced for rights holder entities, representatives of members and non-members to tender for an award or bursary. Awards should be widely publicised, and serve to fix problems arising in the technical era, such as copyright and rights education metadata and in support of innovation.

General consensus from the creative industry was that Bona Vacantia was the least preferred option for unclaimed monies, as these do not belong to the Crown. From our readings of the first Report Stage debate, the Grand Committee debate and letters from the Minister, Viscount Younger of Leckie our understanding was that unclaimed monies should be applied to the benefit of creators as a whole, e.g. for training and education.

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.

Following IPO guidance, ECL's will be granted on the basis that works contained are not Orphan Works, as these require a diligent search. Orphan Works will have the same rights granted upon them as known rights holders.

See also our comment regarding orphan works at Q27.

Please note: The information you supply will be held in accordance with the Data Protection Act 1988 and the Freedom of Information Act 2000. Information will only be used for its intended purpose. It will not be published, sold or used for sales purposes.