



---

# Extending the benefits of collective licensing

January 2014

---

To:  
Hamza Elahi  
Senior Policy Advisor  
Copyright and Enforcement Directive  
Intellectual Property Office  
First Floor, Abbey Orchard Street  
London SW1P 2HT

By Email: [copyrightconsultation@ipo.gov.uk](mailto:copyrightconsultation@ipo.gov.uk)

Your name	Dr Audrey McCulloch
Job Title	Chief Executive
Organisation Name	The Association of Learned and Professional Society Publishers (ALPSP)
Organisation's main products/services	<p>The Association of Learned and Professional Society Publishers (ALPSP) is the international membership trade body which works to support and represent not-for-profit organisations and institutions that publish scholarly and professional content around the world. Its membership also encompasses those that partner with and provide services to not-for-profit publishers. ALPSP's broad and diverse membership includes over 320 organisations in 39 countries, who collectively publish over half of the world's total active journals as well as books, databases and other products.</p> <p>ALPSP jointly owns the Publishers Licensing Society, with the Publishers Association and the Professional Publishers Association.</p>

This submission is made on behalf of the ALPSP Government Affairs Committee and ALPSP Members

**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).

1. We suggest that this may not be the most appropriate criteria as it may well prevent the introduction of new and evolving licences. Licences are regularly reviewed to ensure they are appropriate for both the users' requirements and in agreement with what is agreed by rights holders.
2. It would be more appropriate to consider the class of copyright works and the rights in those works the collecting society has been licensing.
3. Where no exact licence already exists, collecting societies should be able to demonstrate that they have been operating and offering collective licences on behalf of the relevant group of rights holders for a minimum period.
4. Assuming the other criteria have been addressed, it should be clear to the Secretary of State reviewing the application whether the collecting society has been, and is capable of, operating an established collective licensing scheme.

**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?

5. There are likely to be many different ways to demonstrate representativeness depending on the collecting society concerned, the works represented and the mandates they are given.
6. We suggest that the test should be flexible to deal with the different options available.

**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).

7. It is likely to be difficult to obtain the consent of 75% of the membership of any collecting society. This is due to the simple fact that not everyone will respond, despite repeated engagement attempts. This has been repeatedly demonstrated by many representative membership organisations and it would be overly ambitious to expect collecting societies to achieve this.
8. It would be more appropriate to link the 75% requirement to the view of actual respondents, on the understanding that all members are notified.
9. It should also apply to the 'relevant class' of members, depending on the works in question and the required licence.

**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).

10. A collecting society should be able to demonstrate past compliance with its code of conduct, and should not be penalised for minor lapses or complaints which have been corrected and/or addressed appropriately.



11. Repeated serious complaints and/or lapses in the society's obligations to its members, would certainly raise questions about a collecting society's ability to represent its members.

**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.

12. With regards the rights licenced and receipts distribution, members and non-members should be treated the same.

13. There will be some differences with regards to identifying, locating and contacting non-members and costs such as advertising.

14. Members and non-members cannot have the same rights as regards collecting society governance, management and operational issues.

**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).

15. The signed declaration should be sufficient, given that the society will already be complying with the Regulation of Licensing Bodies Regulations.

**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).

16. Given that members and non-members are to be treated equally for ECL, it is difficult to see what additional standards could be required.

**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.

17. These timescales seem 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.

18. We can think of no examples for when this might be required.

**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.

19. We are surprised there is no appeal process apart from judicial review, a very expensive process. We refer to the RRO-UK (CLA, PLS, ALCS and DACS) response in recommending an appeal to First-Tier Tribunal (General Regulatory Chamber), in line with Regulation of Licensing Body Regulations.

**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).

20. We agree that proportionality should be a key principle, but note that it would be unfeasible to advertise in every country, practically and in terms of cost.
21. A proportionate campaign will take into consideration the extent to which works from various countries are represented via previous usage surveys and consideration of the feasibility and appropriateness of advertising in particular countries. It will also take into account the nature of reciprocal agreements between the UK and overseas collecting societies.
22. If opt-outs were considerable, it is likely the collecting society would not make an application in the first place. Significant opt-outs after application would require the collecting society to reduce the scope of the scheme as appropriate.

**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).

23. We agree that a five year authorisation is appropriate in the first instance. This might be reviewed (perhaps extended on renewal of the authorisation) in light of the performance of the scheme and the collecting society.
24. The collecting society might be asked to provide information on the number of participating rights holders, compared to those who had opted out. This is likely to be included in any report of performance of the original scheme. It could be expected that the collecting society specifies any material changes to the information supplied in the original application.
25. If a licence is granted during the authorisation period, it would remain reasonable that, in the absence of specific time restraints on the licence, that licence should remain in place, even if the authorisation expires.

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



26. There is the possibility that the terms and conditions of a licence might change, given that they are regularly reviewed to ensure they are appropriate for both users and rights holders. This should be taken into account in the Regulations.

**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.

27. We agree with the proposed time periods.

**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.

28. Any possible revocation should be considered only where breaches are major and relevant. A minor breach that is swiftly resolved should not be grounds for revocation.

29. Where a collecting society is no longer representative, revocation should likely be considered by the Secretary of State.

**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).

30. We refer to the submission made by RRO UK (CLA, PLS, ALCS and DACS) in response to this question.

**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).

31. We are unsure as to the reasons why a collecting society would wish to cancel its authorisation. It could simply choose not to exercise its rights under the authorisation.

32. We would expect that if any cancellation did occur, it would not affect the validity of licences granted.

33. Assuming the ECL scheme assured the continuation of licences granted, we see no reason why the collecting society should be penalised.

**Question 18:** Is the repayment of part of the licence fee a reasonable and proportionate requirement? Please provide reasons for your answer.

34. Licences granted should not be affected, therefore no repayment would be required.

35. Should a significant number of rights holders opt out during the life of the licence, this could result in a change in the value of the licence and would be dealt with by the collecting society.

**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.

36. Yes, we agree that the opt-out requirements are adequate.

**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.

37. We agree that the 14 day time limit is reasonable for acknowledgement of opt-out. Notification should be permitted for a longer timescale, a further 14 days (total 28 days).

**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).

38. We would suggest a 28 day timescale in line with the response above.

39. However, we suggest that separate lists would be time-consuming and confusing.

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

40. We believe the obligations are broadly reasonable and proportionate, but refer to individual collecting societies to provide further detail on this.

**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.

41. It is likely that the termination of licences on revocation or cancellation of an authorisation would cause both users and rights holders significant problems. We do not see why these interested parties should be penalised by the subsequent behaviour of the authorised society.

**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.



42. This very much depends on the nature of the licence involved. For example, with educational licensing, an academic year would be more appropriate so that students are not denied access to course materials part way through their course.
43. It would therefore be more appropriate to determine the period in the application and authorisation process.

**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.

44. Yes, we agree with this proposal that such money should 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.

45. We do not agree with the principle of individual remuneration. This is contrary to the principles by which an ECL scheme operates and would be impractical to operate.

**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).

46. It should be sufficient for the collecting society to publicise the works on its website.

**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.

47. Data from licences is very variable and non-existent data is the reason why non-title specific distributions are part of collecting society distribution practice.
48. We do NOT support the idea that where a non-member rights holder fails to claim monies, the monies should revert to the Crown. Collecting societies should be able to treat them in the same way as permitted by the CRM Directive.

**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).

49. As noted, we do not agree that undistributed monies should be paid to the Crown, but instead, following a suitable period, they should be used for purposes to be decided upon by the membership of the collecting society. This follows the CRM Directive.

50. As previously discussed, the monies should not be used for the sole purpose of collecting society members, but for the wider industry represented by the collecting society.

**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.

51. This question will be answered in light of the detail of the proposed Orphan Works Regulations.