

INTELLECTUAL PROPERTY OFFICE: CONSULTATION ON EXTENDING THE BENEFITS OF COLLECTIVE LICENSING

Response by the Wellcome Trust

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KEY POINTS

- We support extended collective licensing (ECL) as a means to facilitate licensing for mass use, reducing the associated costs of rights clearance and enhancing the credibility of the UK copyright system.
- While broadly supporting the IPO's proposals, we feel that they are currently unduly weighted towards protecting rights holders as opposed to enabling beneficial end-use.
- Proposals concerning the application for an ECL license from collecting societies should be relaxed and made flexible to allow for appropriate evidence concerning representation and consent.
- A five-year license is far too short and, in combination with the strict demands proposed for an ECL application, will prevent uptake of the ECL as a viable rights clearance solution in the UK. We suggest a minimum 10-year license term.

INTRODUCTION

1. The Wellcome Trust is pleased to respond to the Intellectual Property Office's consultation on extended collective licensing (ECL). As a global charitable foundation dedicated to achieving extraordinary improvements in human and animal health, we are committed to ensuring that the outputs of the research we fund – including both research publications and data – can be widely accessed and used in a manner that maximises the resulting benefits to society.
2. We also provide the Wellcome Library – one of the world's foremost resources for research and discovery on the history of medicine and on contemporary developments in biomedical science and health. In the past year the Wellcome Library had more than 40,000 in-person visitors and around 500,000 unique visitors to its web sites. The Library is also undertaking a major transformation project to create a ground-breaking digital library that will expand access to our collections for users the world over.
3. We strongly agree with the recommendations made by the Hargreaves Review that ECL could provide for an efficient way to license collections of works in a more straightforward and cost-effective manner, offering benefits for users and creators alike within commercial and non-commercial contexts. Indeed, the message of the Hargreaves Report as a whole was to ease the process of licensing material in copyright, and we are pleased that these recommendations were adopted in full by the Government.
4. Our submission focuses on proposals in the consultation document relating to the implementation of ECL schemes. It summarises our views in response to the questions in these sections of relevance to our organisation, and includes additional perspectives from our stance as a potential licensee and user of ECL that are not necessarily addressed in the questions posed in the consultation document.

GENERAL COMMENTS

5. As a potential ECL licensee and user, we do not feel that the questions set out in the consultation address some of our key areas of concern, such as the appropriate scope and definition for an ECL license when applied to libraries and archives. While the ECL Impact Assessment (BIS1054) cites mass digitisation in libraries and archives as part of its evidence base and rationale for intervention, the current consultation makes almost no mention of end use or the benefits of ECL, let alone mass digitisation. While there are multiple layers of protection for the rights holder, the end use case has largely been left out of these proposals.
6. In examining the Nordic precedents for ECL (referred to within the consultation document) it can be noted that the first ECLs were motivated in large part by the educational and cultural benefits that would arise. This theme has been perpetuated by ECL extension to photocopying for educational purposes and, more recently, to agreements such as that between the Norwegian collecting society Kopinor and the National Library of Norway to digitise and make available 50,000 books as part of the Bokhylla ("Bookshelf") project. The special use of ECL for educational purposes merits further consideration.
7. We would like to undertake more digitisation projects such as that described in the use case below, and on a larger scale, but we are currently faced with the reality of being restricted to digitising historic works which are out of copyright. The use case was undertaken as a pilot study, the conclusion of which was that a diligent search methodology for rights clearance was not viable, or even conclusive, in identifying the views of rights holders on the digitisation project in question.

Use case: Genetics books, 1850-1990

As part of its 'Codebreakers' Project the Wellcome Library wanted to make available online 1,773 out-of commerce works, published between 1850 – 1990, related to modern genetics.

As ECL was not (and is not) a viable option, the Wellcome Library worked with ALCS and PLS in a project to seek to clear rights. A short case study, highlighting the outcomes of this is available at: <http://wellcomelibrary.org/content/documents/policy-documents/rights-clearance-exercise.pdf>

Of the 1773 works that were included in this study we found:

297 (17%) were out of copyright
485 (27%) permission was granted by the rights holder to make them freely available
205 (12%) were classed as orphans
369 (21%) were classed as "did not respond"
206 (11%) permission denied
211 (12%) no decision

The cost of this project (to identify rights holders) was around £45,000. This was a one-off project with no recurring cost. That said, the Wellcome Library recognises that this content has been made available without the protection which an ECL would provide.

We would like to understand whether this project could have been undertaken using ECL and, if so, how the costs would compare. We are interested because we are of the view that the rights-clearance model we used would not scale up to work with tens of thousands of titles, and ECL may be a viable alternative.

8. As well as published material, the Wellcome Library also holds a large quantity of archival material (more than 500 separate collections containing over 1.5 million items). A due diligence regime is also unsuitable for this content, which is unstructured and does not conform to standard publishing conventions. Identification of rights holders would be such an onerous task as to render impossible any attempts to clear copyrights. As such we would also like any ECL provision to encompass unpublished material. Unpublished archival material could be similarly accommodated under the established rights holder protections for ECL, such as the ability to opt out.
9. Any effort to deal with licensing for the forms of mass digitisation described above via an ECL license solution would require a proper discussion around the scope of ECL licenses for cultural institutions, including what a suitable cut-off date might be for mass digitisation. Unfortunately, however, the current consultation fails to address this.

COLLECTING SOCIETY REPRESENTATION AND CONSENT

Q2: 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?

Q3: Do you agree that a 75 per cent threshold for membership support is appropriate? If not what would be a better way to represent membership support and consent?

10. There is a danger here that the bar will simply be placed too high for collecting societies to allow for ECL applications to be commercially viable, particularly for smaller projects. This in turn would act to discourage use of ECL by potential users. We therefore encourage the IPO to demonstrate the greatest degree of flexibility and proportionality when drawing up regulations for the ECL application process.
11. With regard to the efforts a collecting society should undertake to demonstrate representation, proof that the licensing body's representation is "significant" (as described in the draft regulations in section 3.4.b) is the most important factor, and is a pragmatic approach that should be maintained within the regulations. It might also be suggested that, when collecting societies are already operating collective licenses (including de facto ECLs), the collecting societies should not have to prove representation again for each ECL application.
12. The idea of demonstrating "significant" representation or consent is also more realistic than assigning any arbitrary figure. The collecting societies will have difficulty in establishing an exact number of members as representative of, and therefore consenting to, any given project. From this basis it does appear difficult to accurately measure consent levels for an ECL scheme in particular and it is currently unclear how responses to a request for consent would be counted. From our own experience we have noted that typically there is a high non-response rate during due diligence rights clearance, which could also be a factor in response levels to publicity for an ECL scheme.
13. Using our use case as an example, it can be seen that of the 1,476 books that were in copyright, 369 rights holders (25%) did not respond, which combined with orphan works and no decision made, meant a total of 785 (53%) effective non responses. Any measure of consent would therefore have to be based on *actual* responses. Even then, at 70% consent, the above project would not be able to proceed. Given the relatively low risk nature of this project, and extrapolating those results to the wider sector, it would seem unlikely that many projects could clear this threshold.

SCOPE AND DEFINITION OF ECL LICENSES

Q9: 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?

14. Our perspective is that for an ECL license to provide the intended benefits, the license would have to be significantly broad – a view shared by other potential ECL users undertaking mass digitisation, and the Copyright Licensing Agency (CLA), as established by a recent stakeholder meeting at the IPO offices on 13 January 2013. We would not want applications to be penalised because the collecting society had been subjected to an overly harsh ECL application procedure.
15. Looking again to existing precedents: within the Nordic ECL model there is frequent use of broad ECL licenses to cover the reproduction activity of entire sectors. Sweden provides for an ECL provision for all forms of reproduction of works in educational activities. Norway and Finland provide broad ECL provisions for communication to the public and reproductions of works in the collections of archives, libraries and museums. If the UK ECL scheme is to facilitate mass digitation then the scope of the ECL licence needs to be defined in broad terms, akin to the Nordic model.

Q11: 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?

16. We would like to see a common sense approach, with consideration given to overseas rights holders in proportion to the scope and scale of the project. An important point to make regarding cross-border dissemination is that we now have safe harbour policies across Europe for the use of orphan works under the EU Orphan Works Directive. We should be aiming for a similar outcome when it comes to ECL.

LENGTH OF AUTHORISATION AND LICENSE

Q12: 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?

17. A five year authorisation is too short and will put users off from engaging with the process. From the start, because the license is granted to the collecting society, the end user and licensee will not be able to enjoy the full five-year term of that license. This is unlike the Nordic ECL model, where there is no link between the duration of the license for the collecting society and the authorisation. In the Nordic model, the user simply pays for the amount of time they wish the license to last and we would encourage this option to be explored.

18. From the perspective of those undertaking mass digitisation, such projects are intended to provide long term access. Moreover, a five year licence goes against established evidence that commercial publishers require at least a ten-year cycle in order to recuperate their investment in significant projects. As an example, one mass digitisation project being undertaken at Wellcome Library as a commercial collaboration (with ProQuest) is operating on a 15-year cycle. Expressed simply, if ECL schemes are to be widely adopted by cultural heritage organisations (libraries and archives) and commercial entities the period of the licence must be longer than five years. We suggest a minimum 10-year license term.

RISKS ASSOCIATED WITH AN ECL APPLICATION

Q 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?

19. We do not believe that there should be other circumstances justifying revocation. Should a breach of code of practice or authorisation occur, it is important that the collecting society be given sufficient opportunity to rectify the error. Where such a breach absolutely cannot be repaired, the needs of licensees and the end user of licensed products of that ECL also need to be considered, with legal use permitted until another avenue of approach for re-issuing a new ECL to license that material in accordance with the regulations can be found.
20. Based on our stakeholder meeting at the IPO on January 13, the risk of application rejection is already perceived to be high. As such, it appears that collecting societies will begin their engagement with ECL on a low risk basis, delaying involvement with mass digitisation until ECL is tried and tested, a period likely to last several years. Mass digitisation is unlikely to be a primary concern for collecting societies. As such, it would seem that it will take some time for users engaged in mass digitisation to experience the benefits of ECL, and then with no guarantees that the scope of the licenses will be sufficiently broad to make them worthwhile.
21. The UK already has collecting societies that have the well-developed structure and culture of collective management necessary to provide a solid foundation for ECL schemes. To give some perspective, the fact that the ECL model is functioning well in Sweden without government approval proves that the model can work even without such authorisation. As it stands, users will need to carefully risk-assess each proposed project for ECL according to the sector making the application, the age of material and the intended use of that material, or face rejection. This needs to be balanced with the existing authority that collecting societies already have in delivering collective licensing.

Q19: 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.

22. We recognise the importance of the possibility for rights holders to opt out of an ECL scheme. Alongside equal treatment for non-members of the collecting society, the option to opt out provides important and adequate protection for rights holders. The requirements are also reasonable. For perspective, it may be noted that while opt out is considered a fundamental part of an ECL license, it is by no means universal to other examples of existing ECL legislation.

The Wellcome Trust is a global charitable foundation dedicated to achieving extraordinary improvements in human and animal health. We support the brightest minds in biomedical research and the medical humanities. Our breadth of support includes public engagement, education and the application of research to improve health. We are independent of both political and commercial interests.