



Intellectual
Property
Office

EXTENDED COLLECTIVE LICENSING (ECL): GUIDANCE FOR RELEVANT LICENSING BODIES APPLYING TO RUN ECL SCHEMES



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1. Introduction

Collective licensing works on the basis of rights holders mandating collecting societies to manage certain rights on their behalf. As such, those rights holders actively opt in to collective licensing schemes and become collecting society members.

The statutory extended collective licensing (ECL) framework allows a qualifying “relevant licensing body”¹ to be granted an authorisation to license not just on behalf of member rights holders but also on behalf of non-member rights holders. This means that non-member rights holders covered by a scheme are assumed to be in it unless they opt out.

The Government took a power in the Enterprise and Regulatory Reform Act (2013)² allowing the Secretary of State to consider applications from collecting societies be authorised to operate ECL schemes within the UK. The Secretary of State has the power to authorise or reject such applications, depending on whether certain criteria and safeguards have been met.

The Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014³ stipulate the evidence the collecting society has to provide when submitting an ECL application. The Regulations also cover the evidence that needs to be provided at the point of both renewal of an application and at subsequent reviews.

The Regulations do not, however, cover the detail of the evidence a collecting society may provide in order to meet application requirements. For example, the Regulations require a collecting society to be significantly representative of rights holders affected by an ECL scheme, but they do not specify how this might be demonstrated. The purpose of this guidance is to suggest ways in which those requirements may be met, taking account of sectoral differences.

This document does not offer guidance on each and every application or renewal requirement, on the basis that many of these requirements are self-explanatory. The Government is willing to engage in early dialogue with collecting societies that wish to apply for ECL schemes.

The Government has not included a template application form to accompany this guidance. Any such application form would contain headings that should be self-explanatory from the application requirements in Regulation 5.

1 The Regulations restrict an ECL applicaiton to a “relevant licensing body”. Such bodies are defined in the Regulations as follows:

“relevant licensing body” means any body that is a licensing body within the meaning of section 116(2) of the Act and which -

- (a) is authorised by way of assignment, licence or any other contractual arrangement to manage the rights of right holders in relevant works on behalf of more than one right holder, for the collective benefit of those right holders, as its sole or main purpose; and
- (b) is either owned or controlled by its members or organised on a not for profit basis;

Because a “relevant licensing body”, as defined, is identical in its functions to a “traditional” collecting society, this guidance shall refer to such bodies throughout as collectin societies

2 <http://www.legislation.gov.uk/ukpga/2013/24/contents> . See Clause 77 and Schedule 22.

Part I – guidance for ECL applications

2. Significant representation

Under Regulation 4(4)(b) the Secretary of State may only grant an authorisation if he is satisfied that a collecting society's representation is significant – in other words, further to the definition of representation in Regulation 2, where the collecting society can be said to be significantly representative of rights holders whose works are in the ECL scheme. In other words, the collecting society must already be holding the rights of a significant number of rights holders whose works are the subject of the scheme.

2.1 When can a collecting society be said to represent a rights holder?

A collecting society can usually be said to represent a rights holder if it has a direct, express mandate from them. Such a mandate often comes in the form of an assignment of rights, a transfer, a grant of exclusivity, or some other contractual arrangement, from the rights holder to the collecting society.

Although the significant representation definition does not require those a collecting society represents to be members, it is anticipated that in the vast majority of cases membership is a corollary of a grant of authority or a grant of rights.

2.1.1 Pre-existing collective licence

Where ECL schemes are extensions of existing collective licences, it is anticipated that collecting societies will have little difficulty in demonstrating the number of mandates they hold; consequently, it is not anticipated that they will need to produce a copy of the membership agreement for each and every rights holder they claim to represent but could, for example, point to the number of distributions they have made in respect of that pre-existing collective licence or to a register of rights holders they license.

2.1.2 No pre-existing collective licence

Where there is no pre-existing collective licence, the number of mandates a collecting society holds may be more difficult to prove depending on the scope and nature of the ECL scheme in question.

For example, in the case of a library wanting to digitise and display to the public an archive containing 1000 out of print works, the collecting society would need to demonstrate that it represented a significant number of the rights holders in the works. This might be a difficult threshold to reach unless each work was looked at to see who the rights holder was; thereafter, the collecting society would need to check whether or not it held the relevant rights of the identified rights holders, and if it did not it would have to secure these rights from a significantly representative number.

In some sectors, in respect of some rights, even where there is no pre-existing collective licence it might be much easier to demonstrate significant representation. For example, in

music licensing, as a condition of membership the collecting society requires a legal transfer or assignment in respect of some rights; if it can be demonstrated that the collecting society represents the overwhelming majority of rights holders in the sector, this would support the case that for any given ECL scheme supporting those rights, the collecting society is significantly representative of affected rights holders.

Irrespective of a collecting society's coverage of rights holders, where there is no pre-existing collective licence it is expected that there will be a clear demonstration that a collecting society holds the relevant rights of a significantly representative number of rights holders. It is likely that the ease with which this can be demonstrated will vary from sector to sector.

2.2 When is a collecting society's representation significant?

Regulation 5 (1)(i) requires evidence of a collecting society's representation. To be significantly representative, the collecting society is expected to represent a very sizeable number of affected rights holders. Conclusions about a collecting society's representation are unlikely to be reached if the collecting society is unaware of the numbers of non-member rights holders in the extended portion. Collecting societies may therefore wish to provide as evidence the total numbers of rights holders in the ECL scheme, and demonstrate a transparent methodology for how they arrived at that figure. A poor understanding of total numbers may entail an incomplete publicity campaign, which in turn could mean that rights holders who want to opt out may not be able to do so.

Collecting societies could reach an understanding of total numbers of rights holders by conducting surveys or advertising in trade magazines. In the case of an existing collective license upon which the ECL scheme is built, collecting societies could look at user data to see how many non-members are inadvertently being licensed.

2.3 The views of non-members

It may be that, prior to application, the collecting society becomes aware of a small but not insubstantial number of non-members who do not want to be part of the ECL scheme.

Although there is no obligation on the collecting society to disclose the reasons why non-members do not want to be part of an ECL, those reasons may become apparent during the period of representations allowed for in Regulation 7(1)(a). The collecting society may, therefore, wish to find out what those reasons are, for if it is likely that other non-members shared those views then the collecting society could well expect (if authorised) a large numbers of opt outs, and therefore a dilution of the breadth and value of the repertoire.

2.4 The numbers of works in an ECL scheme

The numbers of works that a collecting society's members control relative to the number of works in the ECL scheme is not something that will be assessed in ECL applications. Provided the collecting society remains significantly representative of the rights holders affected, the ECL should be possible.

In the case of members, ECL schemes ought not to be impeded by very small numbers of member rights holders who control large volumes of works. Under Regulation 16 (3) (c), these members, if they oppose an ECL scheme, will be able to opt out of the scheme if their

contractual arrangements with the collecting society permit it. Non-members who do not want to be part of the ECL scheme will always have the option of opting out.

2.5 Works or rights already outside the ECL scheme

Where members of a collecting society have already opted out works or rights from a pre-existing collective licence on which an ECL scheme is based, those works or rights cannot be brought into the ECL scheme. This is on the basis that they have not given the collecting society a mandate and cannot be treated as non-members for the purposes of the ECL scheme.

Under the rules of some collecting societies it is possible for a member rights holder to have vested or otherwise mandated certain rights in certain works with a collecting society, but to have retained or excluded some rights in the same (or entirely different) works, because they want to exploit those rights themselves. Member rights holders sometimes keep such rights and/or works in a separate corporate vehicle which is not affiliated with any collecting society and on one reading of the Regulations those rights and/or works could be said to belong to a non-member rights holder. Where a collecting society is applying for an ECL scheme that covers the rights and/or works held by such entities, and is aware of the existence of those rights and/or works, it is not expected that they will be part of an ECL scheme, and they may in good faith put the works on the opt out list referred to in Regulation 16 (6) (see further below). This is on the basis that there is not, and never has been, any intention on the part of the member rights holder to have those rights and/or works collectively licensed. When proposing the extent of an ECL scheme⁴, then, the collecting society may not include these rights and/or works of member rights holders in the extended portion.

If the collecting society is not aware of these rights and/or works, the member rights holder might have a chance to make it aware before the scheme is proposed, or it could make it aware at the point where the collecting society seeks member consent.

Where the rights and/or works are unacknowledged in a collecting society's ECL application, the member rights holder has an opportunity to tell the Government of them during the period of representations, and the Secretary of State may raise the issue with the collecting society and may take the representations into account in making his decision whether to grant the authorisation.

Even if the collecting society inadvertently or inadvertently licenses those works, the member rights holder could always opt them out on the basis that they are a non-member for the purposes of those works. The Secretary of State may only grant an authorisation if he is satisfied that the opt out arrangements are adequate to protect the interests of rights holders (see further Section 4 below).

Under Regulation 5 (1)(h) the collecting society must disclose the numbers of rights holders (and the numbers of works those rights holders control, where known), who are already outside the scheme because (i) they have notified the collecting society that they want to opt out or (ii) because of some contractual agreement with the collecting society.

In respect of (ii), it is expected that the collecting society need only provide the details of known and relevant rights holders who are outside the scheme. For example, in music publishing, buyout libraries might be said to be outside ECL schemes, (in the same way that

⁴ See 2.3 above

they are outside collective licences), and may not be classified as non-members. It may also be the case that the retained rights and/or works referred to above are subject to some contractual agreement between the collecting society and the member rights holder, in which case those works are outside the scheme and must be included on the opt out list.

Regulation 5 (1)(h) is supplemented by Regulation 16 (6), which requires the collecting society to make available on its opt out list the names and works of rights holders who have opted out of the scheme or are outside the scheme because of a contractual relationship with the collecting society.

Applicants must include in their applications:

- The numbers of rights holders (and works, where known) that are outside the ECL scheme either because rights holders have opted out or are outside the scheme because of contractual arrangements with the collecting society
- Evidence of representation.

Applicants may wish to include in their applications:

- A clear demonstration of the numbers of rights holders they represent
- The estimated total number of rights holders in the ECL scheme and a clear methodology for how they have arrived at that figure
- A full, clear explanation for why, in their opinion, the representation qualifies as significant

3. Member consent

Regulation 4 (4)(f) stipulates that the Secretary of State may only grant an authorisation if the collecting society has obtained the required consent of its members to the proposed ECL scheme. Regulation 5 (1)(j) requires a collecting society to provide evidence of that consent. “Required consent”, as defined in Regulation 2, means the informed consent of a substantial proportion of the members who vote on the ECL scheme.

3.1 Who needs to be polled?

It is not anticipated that all members of the collecting society will be polled – polling may just be restricted to those member rights holders whose works are in the ECL scheme.

However, it may be that there are member rights holders whose works are not in the scheme, but who are still affected by it. A collecting society has the discretion to seek the consent of these members but is under no obligation to do so.

3.2 When do member rights holders need to be polled?

After polling member rights holders, collecting societies may wish to leave plenty of time to analyse their responses, speak to rights holder organisations (if they have not already done so), and generally do their due diligence to ensure the ECL scheme is something member rights holders want.

However, the Secretary of State does not require any minimum periods between polling members and submitting an application. It is anticipated that collecting societies will be responsive to the needs of their right holder members, and to consult them fully before submitting an application.

3.3 How might member rights holders be polled?

Collecting societies will have their own methods for how they seek the views of members, which may include a mail shot to members, or a form on an independently hosted website.

3.4 What information is expected to be included on the polling form?

It is a requirement of Regulation 5 (1)(k) that the collecting society provide as part of its application the information that was provided to its member rights holders when polling them. The following information on the polling form may support a collecting society’s argument that its member rights holders were adequately informed:

- Some explanation of what ECL is, as a concept
- The rights and uses that are the subject of the ECL scheme
- How the ECL scheme would benefit members
- The sorts of licences that will be granted, and to whom they will be granted
- An opportunity for members to confirm that they have enough information about the ECL scheme and feel confident to vote accordingly

- An opportunity for members to give reasons for why they have voted as they have
 - A straightforward method for members to seek more information about the ECL scheme
- Collecting societies may supplement these requirements in line with the needs of their member rights holders.

3.5 Results of the poll

In order to demonstrate that the consent of a substantial proportion of its members has been secured, the collecting society may wish to provide detailed results of the poll. A dissemination of the results may include, but is not limited to, the numbers who supported the scheme and why; the numbers who opposed the scheme and why; and an explanation of how and why the collecting society thinks it has achieved member consent. Where the collecting society has polled members whose works are not in the scheme, it is expected that the collecting society will split the results of the poll into those whose works are in the scheme and those whose works are outside it.

3.6 Representative organisations

There is no requirement in the Regulations for the collecting society to have consulted representative organisations. Nonetheless, collecting societies may wish to seek the support of such representative organisations and point to that support in their applications. A representative organisation could include a trade body or some other body representing rights holders.

3.7 ECLs that are not built on a pre-existing collective licence

It is anticipated that an ECL scheme built on an existing collective licence will, in many cases, be uncontroversial because rights holders have already assented to the rights and uses in question.

In its policy statement of 8 May 2014⁵, the Government committed to having a higher threshold for member consent where ECL schemes were not based on a pre-existing collective licence. For such ECL schemes, a collecting society may further demonstrate that the ECL scheme is supported by member rights holders by securing the support of at least one organisation that represents member rights holders covered by the scheme. In its application, a collecting society should give some background to this organisation, the organisation's coverage of the rights holders affected, what discussions it has had with it, and the outcome of those discussions. A collecting society's application will be stronger if it has the support of an organisation that represents many or most of the affected rights holders.

A collecting society may provide supplemental evidence, or find alternative ways in which to demonstrate the higher threshold.

⁵ http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/309883/government-response-ecl.pdf

3.8 Collecting societies without individual rights holder members

The Government is aware of collecting societies which do not have individual rights holder members from whom they can directly seek a mandate – these rights holder members, represented by collecting societies that own the applying collecting society, might be one, or even two, steps removed from the applying collecting society. The applying collecting society's members are sometimes, in fact, the collecting societies that own it.

The Government is also aware of collecting societies that do not have any “members”, as defined in the Regulations, but mandated rights holders who have agreements with the collecting society akin to membership.

The Government is willing to engage in dialogue with such collecting societies to discuss a fit with requirements in the Regulations.

Applicants must include as part of their applications:

- The information that was provided to member rights holders when seeking their informed consent
- Evidence that the collecting society has secured the informed consent of a substantial proportion of its voting members

Applicants may wish to include in their applications:

- Evidence that the member rights holders who are directly affected by the ECL scheme have been polled
- The outcome of the poll, including a clear breakdown of the results
- Where there is no pre-existing collective licence, evidence that they have the support of an organisation representing rights holders, or alternatively some other, robust demonstration of member consent
- A full clear explanation for why, in their opinion, the consent threshold has been met

4. Opt out arrangements

Regulation 4 (4)(d) stipulates that the Secretary of State may only grant an authorisation if the collecting society's opt out arrangements are adequate to protect the interests of rights holders, and Regulation 5 (1)(g) requires evidence of those arrangements.

4.1 Methods by which non-member rights holders can opt out

A collecting society may wish to consider having a page in an appropriate part of its website where non-member rights holders can opt out of an ECL scheme. It is expected that that page is easily navigable from the home page and provide simple and straightforward mechanisms for the non-member rights holder to opt out.

At minimum such mechanisms may include:

- an email address to which the non-member rights holder can make an opt out request
- an online form which includes fields for (i) the rights holders name and (ii) the rights holders works

4.2 Acknowledging opt outs

Under Regulations 16 (4)(a) and 16 (4)(b), within 14 days of a non-member's opt out request the collecting society must (i) acknowledge that request, and (ii) inform the non-member of when their work or works will be removed from the ECL scheme.

As part of its application it is expected that the collecting society will specify how it will notify the non-member rights holder. It is intended that this should be easy and cost-effective for the collecting society, but also that the non-member is provided with the information they need.

In response to an emailed opt out request, for example, a collecting society may provide the non-member rights holder with an automated response that acknowledges the opt out and lets them know that their works will be removed from the licence after 6 months, unless licensees are educational institutions, in which case they will be removed after 9 months. Collecting societies may wish to respond in similar terms to a non-member rights holder who submits an online form.

The Regulations are clear that works of rights holders who opt out before the commencement of an ECL scheme, cannot be included in that ECL scheme.

In order to reduce the incidence of fraudulent opt outs (which could dilute the breadth and value of the repertoire), collecting societies may want opting out rights holders to produce evidence of ownership. There is nothing specific in the Regulations regarding the evidence the opting out rights holder should produce or that the collecting society must accept. It should be in the interests of both rights holders and collecting societies that disputes over ownership are avoided and that the process of opting out is not burdensome. It is expected that the collecting society will outline in its application what it considers to be sufficient evidence, that evidence to be proportionate and necessary; rights holders will have an opportunity to comment on this aspect of the collecting society's application during the period of representations.

4.3 Informing licensees

It is a requirement under Regulation 16 (4)(c) that when a non-member rights holder opts out their works the collecting society must inform licensees of (i) the names of those works, and (ii) when the works will be removed from the ECL scheme. Regulation 16 (4)(d) requires the collecting society to update a list of opted out rights holders and works, and 16 (6) contains further requirements regarding that list.

It is anticipated that a collecting society will provide as part of its application evidence of how it intends to tell licensees of rights holders and works that have been opted out. One option might be for the collecting society to update the opt out list so that it specifies when works would no longer be available under the ECL scheme, or to have a separate list of works which are pending opt out.

4.4 Updating the opt out list

Regulation 16 (6) requires a collecting society to maintain an opt out list in respect of rights holders and works (to the extent that they are known) that are outside the scheme. It is anticipated that a collecting society's ECL application will include the following:

- details of an opt out list which should include fields for both rights holders and works, and where that list will appear on its website.
- a commitment to include on the list, before commencement of the ECL scheme, the names of all rights holders (including member rights holders) and their works which are outside the scheme because of contractual arrangements with the collecting society.
- following commencement of the ECL scheme, details of how quickly the collecting society will update the list in respect of those member rights holders and works which are opted out of the scheme, or those rights holders and works which because of new contractual arrangements with the collecting society, now fall outside the scheme. The collecting society may also choose to include a justification for this time period.
- A commitment to include (somewhere on the webpage hosting the opt out list), a statement to the effect that the list will change over time and licensees should regularly check the list to see what is and what is not in the repertoire.

4.5 Member rights holders & authorised representatives

Regulation 16 (2)(c) permits a member rights holder to opt out of an ECL scheme only where their membership agreement or some other contractual relationship permits them to opt out of collective licences or ECLs. Apart from an obligation to maintain the opt out list in respect of those outside the ECL scheme, there are no other obligations on the collecting society.

There is nothing in the Regulations requiring collecting societies to accept opt outs from authorised representatives acting on behalf of rights holders. However, collecting societies may choose to indicate in their application forms whether or not they will accept opt outs from authorised representatives or any other persons acting on behalf of rights holders.

4.6 Opt outs in perpetuity

Regulation 16 (3)(b) allows a non-member rights holders to opt out of a “proposed” ECL scheme. This provision does not permit a non-member to opt out of all future ECL schemes, only a scheme that is already in the pipeline.

Although there is therefore no requirement for collecting societies to have systems in place to process opt outs from non-members before an ECL scheme has even been mooted, collecting societies may wish to allow such opt outs, on the basis that they will have advance notice of what will always be outside the repertoire of any given ECL scheme.

4.7 Educational establishments

Under Regulation 16 (5)(b), where collecting societies are aware that licensees will be educational establishments, they may request from the Secretary of State a longer opt out period of up to 9 months. In order to succeed with such a request the collecting society may wish to provide evidence that it has licensees who are educational establishments.

Applicants must include in their applications:

- Details of the opt out arrangements they plan to adopt

Applicants may wish to include in their applications:

- Details of an email account, an online form, and a postal address via which non-member rights holders can opt out
- Details of how they propose to respond to an emailed opt out request, an opt out via the online form, and an opt out by post
- Details of the evidence a non-member rights holder should produce to demonstrate ownership of works when opting out, that evidence to be proportionate and necessary
- Details of who, if anyone else, can opt out on behalf of non-member rights holders
- A commitment to, and details of, a page on their website that contains a list of opted out works, and how that page can be accessed via the home page
- Details of what will be included on the opt out list and how that list will be maintained, including in respect of member rights holders
- Details of how they will tell licensees of rights holders and works that have been opted out
- Evidence that licensees are educational establishments
- A full, clear explanation for why, in their opinion, the opt out arrangements, as described, are adequate to protect rights holder’s interests

5. Distribution policy

Regulation 5 (1)(q) requires the collecting society to provide a copy of its Distribution Policy as part of its ECL application.

Regulations 18 (1) and 18 (2) contain requirements regarding both the level of deductions and the use of those deductions. Information on such matters is usually found in a collecting society's Distribution Policy but there is no requirement in the Regulations that it must be, or indeed that the collecting society must provide evidence in its application of how it will meet these requirements.

5.1 Level of deductions

Regulation 18 (1) allows a collecting society to deduct a reasonable administration fee from the non-member rights holder.

In making a judgement about the reasonableness of an administration fee the Secretary of State may look to see how non-member deductions compare with member deductions and, where there is a difference in the level of deductions, whether that difference is justified.

5.2 Use of deductions

Regulation 18 (2) requires a collecting society to apply deductions towards the general costs of the collecting society and for the benefit of members and non-members alike. This means that deductions may not be used just for activities benefitting member rights holders.

Applicants may wish to include in their applications, usually as part of their Distribution Policy:

- The deductions they intend to make from both members and non-members, and where there is a difference, to justify that difference
- Where deductions will be applied, and why the destinations for those deductions meet requirements in the Regulations

6. Publicity

Under Regulation 4 (4)(e), the Secretary of State may only grant an authorisation if the arrangements for publicising the ECL scheme to non-member rights take adequate account of their interests.

Regulation 5 (1)(r) requires a collecting society to provide evidence of how it proposes to publicise the ECL scheme both before the introduction of the scheme and during its life.

6.1 The principle of proportionality

The appropriateness of a scheme's publicity arrangements will be considered within the context of whether or not those arrangements are proportionate. This was the Government's position in its response to the consultation on the draft regulations⁶.

6.2 Publicity before commencement of the scheme

As part of its application, the collecting society may need to demonstrate some understanding of the numbers of non-members in the extended portion, and also where those non-members are (see section 2 above). It is expected that publicity arrangements will refer to and be designed with these non-members in mind.

It is not expected that a collecting society advertise its scheme extensively in countries where there might be extremely few non-member rights holders; equally, it may be inappropriate for a collecting society to do nothing to target those rights holders.

Collecting societies that have reciprocal agreements with collecting societies abroad may wish to publicise the scheme through each of them. An identical advertisement going out to each of the collecting societies appears to be a proportionate approach. However, collecting societies may have more targeted publicity campaigns in territories where they are most active, whether or not there is a reciprocal agreement with a collecting society in that territory.

Where sectors have international bodies, and where there are foreign non-members in ECL schemes, it is anticipated that the collecting society will notify those bodies and appropriate dissemination of the scheme to ensue. The collecting society may wish to consider whether it is appropriate to notify the main international IP bodies, including (but not limited to), IFFRO (International Federation of Reproduction Rights Organisations), OHIM (Office for Harmonization in the Internal Market) and WIPO (World International Property Organisation).

In the UK, it may be appropriate for the collecting society to publicise prominently on its own website, with the BCC (British Copyright Council), in the relevant trade press, and with relevant rights holders groups.

6.3 Publicity for the life of the scheme

While it may be fairly straightforward for a collecting society to plan and deliver a pre-commencement publicity campaign according to the probable number and location of non-member rights holders, effective, targeted publicity arrangements for the life of the scheme may be much more difficult to predict.

⁶ Op cit, page 4

For most ECL schemes, there is an expectation that the collecting society will continue, on an annual basis, the publicity scheme it had in place before commencement. It is expected that the collecting society will make a commitment to target geographical areas from which non-members seem to emerge with effective, proportionate publicity arrangements.

In exceptional circumstances it may not be appropriate for continued publicity. If, for example, the ECL has a finite number of non-member rights holders, and all those non-members had been reached and had either joined the collecting society or opted out (or allowed the continued use of their works without either opting out or joining), an ongoing campaign may be unnecessary.

6.4 Minimum content of publicity material

At minimum, it is anticipated that any publicity material will contain the following information:

- Some explanation of what ECL is as a concept
- The rights and uses that are the subject of the ECL scheme
- Which rights holders will be affected by the ECL scheme and how
- How rights holders can opt out of the ECL scheme. This may include provision of a postal address through which the non-member can opt out, an email address, and a link to a web page containing an online form
- A straightforward method for rights holders to seek more information about the ECL scheme.

Applicants must include in their applications:

- Arrangements for publicising the ECL scheme to non-member rights holders and third parties before the introduction of the scheme and during the life of the scheme

Applicants may wish to include in their applications:

- In respect of publicity both before commencement of the ECL scheme and during its life, a clear explanation of where and how they will be advertising, and why such an approach is appropriate bearing in mind the interests of rights holders
- A copy of the publicity material they intend to issue before commencement of the ECL scheme
- A commitment to adapt, where necessary, the opt out arrangements during the life of the scheme in response to changing circumstances, including a commitment to target areas from which non-members are emerging
- A full, clear explanation for why, in their opinion, the methods by which they propose to publicise the scheme is appropriate for the proposed scheme, having regard to the interests of non-member rights holders

7. Contacting non-members and distributing licence fees

Under Regulation 4 (4)(e), the Secretary of State may only grant an authorisation if he is satisfied that a collecting society's arrangements for contacting non-member rights holders and distributing licence fees is appropriate for the proposed scheme, having regard to the interests of non-member rights holders.

Regulation 5 (1)(s) requires a collecting society to provide evidence for the methods by which it will contact non-member rights holders and distribute licence fees to them.

7.1 The list of information on works for which rights holders are unknown or cannot be found

Under Regulation 18 (5), the collecting society must publish information on works and other subject matter for which rights holders have not been found or identified, but to whom monies are due. It is anticipated that this list will be found on an appropriate page on the collecting society's website, and that it will be easily navigable from the home page. It is also expected that this web page will contain information both on how non-member rights holders can claim monies due to them and how and where they can opt out.

7.2 Information on undistributed monies

It is anticipated that the information on undistributed monies will include the following, where available:

- the title of the work or other subject matter
- the name of the rights holder
- the name of the relevant publisher or producer
- any other relevant information available which could assist in identifying the rights holder⁷

7.3 Contacting non-members

The Government does not expect collecting societies to make efforts to contact every non-member rights holder to whom monies are due, especially where the monies involved are very small. A collecting society's efforts need only be proportionate. It is anticipated that methods to contact non-member rights holders will include:

- A commitment to advertise on an annual basis in appropriate domestic and international publications, and with collecting societies with whom it has a reciprocal relationship.
- Such advertisements to contain information on the ECL scheme, the fact that monies are due to rights holders who are unknown or haven't been located, the amount undistributed over the last financial year, the total amount undistributed (since authorisation), a link to the collecting society's list of works for which rights holders

⁷ This list is identical to that found at Article 13(3)(b) of the Collective Rights Management Directive. This provision in the Directive lists information that collecting societies should make available in respect of works for which one or more rights holders have not been identified or located.

haven't been located, and an email address and postal address via which the non-member can make a claim or a query about monies owed to them.

Applicants must include in their applications:

- Evidence of the methods by which they will contact non-members and distribute net licence fees to them

Applicants may wish to include in their applications:

- Details of where on their website the list of information on the works for whom the rights holder has not been found or identified can be located, and a commitment to include on that list as much information as possible
- Details of where and how often they will be advertising in order to attract the attention of as many non-members to whom monies are due as possible
- Details of how they will be advertising, including a copy of the advertisement
- Some indication of the efforts they will make to contact non-members to whom larger amounts are due
- A full, clear explanation for why, in their opinion, the methods by which they propose to contact non-member rights holders in order to distribute monies is appropriate for the proposed scheme, having regard to the interests of non-member rights holders

8. Types of works

Under Regulation 4 (4)(a) the Secretary of State cannot grant an authorisation unless he is satisfied that the applicant collecting society is already licensing the types of works that are the subject of the ECL scheme.

A collecting society may be able to demonstrate that this requirement is satisfied by providing as part of its application, in accordance with Regulation 5(1)(l), a collective licence, in force at the time of application, which demonstrates that the collecting society is already licensing the types of works that are the subject of the ECL scheme.

9. Other application requirements

9.1 Evidence that the applicant is a relevant licensing body

Regulation 5 (1) (c) requires the collecting society to provide evidence that it is a “relevant licensing body”, as defined in Regulation 2. In order to do so, and as a general introduction to its application, a collecting society may wish to describe its history, structure, the sector it operates in, the rights holders it represents, and how it collects and distributes,

9.2 Signed declaration

Regulation 5 (1)(o) requires the collecting society to provide a signed declaration that it is complying in all material respects with the terms of its code of practice. It is expected that an officer authorised to sign on behalf of the collecting society will sign the declaration.

9.3 Terms and conditions of licences

Regulation 5 (1)(p) requires a collecting society to provide a copy of the terms and conditions of the licence which it proposes to grant licensees under the ECL scheme. The collecting society may seek to exclude terms that are commercially sensitive, but the information provided should include information relevant to the ECL scheme, especially the uses for which the licence will be granted.

Part II – guidance for applications for renewal

10. Operation of opt out arrangements

Regulation 10 (2)(c)(i) requires a collecting society to provide information demonstrating how it has operated its opt out arrangements during the initial authorisation.

There is no requirement for collecting societies to have changed the opt out arrangements, as reflected in their authorisation. But there does remain a possibility that a collecting society may have adapted the process by which non-member rights holders can opt out.

Applicants must include in their applications:

- information demonstrating how the opt out arrangements have been operated during the previous period of authorisation

Applicants may wish to include in their applications:

- How authorisation requirements may have changed, and confirmation that they have met authorisation requirements
- Details of how opt out arrangements may have been adapted to accommodate the changing needs of non-member rights holders
- A full, clear explanation for why, in their opinion, the opt out arrangements they have operated have been, and will continue to be, adequate to protect the interests of rights holders

11. Distributions

Regulation 10 (2)(j) requires a collecting society to provide details of the distributions it has made to non-member rights holders and the monies that remain undistributed.

It is not expected that the collecting society need provide information on undistributed monies in respect of each rights holder or title; a total amount of undistributed monies should suffice. Where rights holder or title specific information is known, it is expected that collecting societies will volunteer this information subject to any data protection requirements.

It is expected that collecting societies will provide a breakdown according to distribution cycle and territory.

On an application for renewal, a large sum of undistributed monies or a large amount of money being held for individual works may indicate that the distribution policies adopted by the collecting society have not been very successful.

Applicants must include in their applications:

- Details of the distributions made to non-member rights holders and monies which have been undistributed

Applicants may wish to include in their applications for renewal:

- The total monies that were both distributed and undistributed to non-member rights holders during the authorisation period (up to the point of application for renewal)
- A breakdown of monies distributed to non-member rights holders by territory, and for each distribution cycle
- A breakdown of monies undistributed to non-member rights holders by territory, and for each distribution cycle, this to be rights holder or title specific where possible
- In respect of rights holders who have not been found or identified, the detail of the information the collecting society has provided on its website about the works held by those rights holders, if it is different from the detail provided at the time of application
- How authorisation requirements may have changed, and confirmation that they have met authorisation requirements
- Details of any additional efforts made to contact non-member rights holders and pay them
- A full, clear explanation for why, in their opinion, the arrangements for distributing monies have been, and will continue to be, appropriate for the scheme

12. Publicity

Regulation 10(2)(k) requires a collecting society to provide information on the publicity arrangements it has operated, including information on the effectiveness of that publicity.

The effectiveness of publicity arrangements (as outlined in the authorisation) can be difficult to measure, but it is expected that the collecting society will be able to produce at least some evidence. It is not inconceivable that a publicity campaign has not produced any discernible results; where this is the case, and where further efforts by the collecting society would be proportionate, it is expected that the collecting society would make those efforts, and provide evidence of them.

Applicants must include in their applications:

- Details of arrangements for publicising the scheme to non-members and third parties during the life of scheme together with information demonstrating the effectiveness of that publication

Applicants may wish to include in their applications:

- The number of non-members who either opted out or joined the collecting society immediately after publicity campaigns
- The numbers of non-members who came forward to claim undistributed monies immediately after publicity campaigns
- Details of any other measures of the effectiveness of publicity campaigns
- How authorisation requirements may have changed, and confirmation that they have met authorisation requirements
- What modifications, if any, were made to the original publicity campaign and publicity material
- Evidence of any other efforts the collecting society has made to publicise the scheme to non-member rights holders
- A full, clear explanation for why, in their opinion, the publicity scheme they have operated, has been, and will continue to be, appropriate for the scheme, having regard to the interests of non-member rights holders

Part III – miscellaneous

13. Period of representations

Regulation 7 allows for a period of representations during which any party interested in any aspect of a collecting society's ECL application can have their say. The period of representations can be no less than 28 days, following which the Secretary of State has a duty to consider all submissions before making a decision on whether or not to authorise the proposed ECL scheme.

The public scrutiny to which all ECL applications will be put should encourage collecting societies to provide evidence that is as transparent and robust as possible.

14. Cost of an ECL application

In its July 2012 impact assessment⁸, the Government estimated the annual cost of processing ECL applications at £10,000 per annum. The impact assessment also contained low and high estimates of £5,000 and £20,000.

The Government's cost estimate was based on 2 or 3 applications per year.

The Government has looked again at the cost figures and believes them to be robust. It is, therefore, currently anticipated that each ECL application is likely to cost between £3,333 and £5,000, with a low estimate of between £1,666 and £2,500 and a high estimate of between £6,666 and £10,000. The estimates vary even after variation in the number of applications is accounted for, because administrative costs are uncertain.

An understanding of the cost per application will be kept under review and may change as ECL applications are processed and costed.

⁸ <http://www.ipo.gov.uk/consult-ia-bis1054-20120702.pdf>, pp 7-8

15. Renewal requirements under Regulation 10 (2)(c)

Regulation 10 (2)(c) requires certain information on opt out arrangements that the collecting society has operated and the numbers of rights holders and works that have opted out of the ECL scheme up until date of renewal relative to those opted out at the time of the original application for authorisation.

Regulation 10 (2)(b) requires the collecting society to confirm that some of the information provided at the time of the application for authorisation remains the same, failing which it should provide details of any changes. Some of the information requested overlaps with the information requirements of Regulation 10 (2)(c). Where there is such an overlap, the collecting society need only provide the information requested under 10 (2)(c), and need only provide that information once.

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