

# The Libraries and Archives Copyright Alliance



Convened by CILIP: the Chartered Institute of Library and Information Professionals

c/o CILIP 7 Ridgmount Street London WC1E 7AE

## Consultation on the UK's New Extended Collective Licensing Scheme January 2014

LACA supports the submission made by The British Library.

### About You and Your Organisation

Your name	Naomi Korn
Job Title	Chair
Organisation Name	Libraries and Archives Copyright Alliance (LACA)
Organisation's main products/services	N/A

The Libraries and Archives Copyright Alliance (LACA) is a UK umbrella group convened by CILIP (Chartered Institute of Library and Information Professionals). LACA brings together the UK's major professional organisations and experts representing librarians and archivists to lobby in the UK and Europe about copyright issues which impact delivery of access to knowledge and information by libraries, archives and information services in the digital age.

LACA has responded to questions 1-3, 7-26 & 28-30 and made one additional comment (see page 6)

*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).*

No. It is important that ECL improves licensing for libraries and archives, particularly those involved in mass digitisation and other digital library projects. This is because these types of projects are likely to a range of rights holders, such as those who are members/registered with collecting societies, those who are not and Orphan Works – it is therefore by definition not possible to offer a licence for mass digitisation before ECL is granted.

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Representing ARA: The Archives & Records Association, ARLIS/UK & Ireland: The Art Libraries Society of the UK and Ireland, BIALL: British and Irish Association of Law Librarians, The British Library, CILIP: the Chartered Institute of Library and Information Professionals, IAML/UK & Ireland: The International Association of Music Libraries, Archives and Documentation Centres, JISC: Joint Information Services Committee, LIS-COPYSEEK online community, Museum Libraries, The National Library of Scotland, The National Library of Wales, Share the Vision, Society of Chief Librarians in England and Wales, and SCONUL: Society of College, National and University Libraries, Wellcome Trust.

*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?*

*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).*

In response to questions 2 & 3, we believe that the drafting of S.3.4.(b) is appropriate, but it is important that there are necessary safeguards in place to protect the interests of licensees of ECL.

*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).*

We believe the protections outlined in the ECL regulations to be appropriate.

*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.*

Yes. We believe the periods are proportionate.

*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.*

We are satisfied that the proposals are adequate in order to support creators' interests, whilst facilitating mass digitisations and digital library projects.

*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 believe that it should be possible to appeal against a refusal to grant an application. A judicial review would be too onerous and inappropriate, and special provisions should be put in place if any such decision by the Secretary of State were to affect this country's educational and research institutions' reasonable and non-commercial use of copyright works.

*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).*

Yes.

*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 reappeals 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).*

No.

We strongly support the case presented by the BL about this. We believe the period of 5 years to be far too short and subsequently, it conflicts with European policy in the area of mass digitisation, and most importantly acts as a strong disincentive to in-copyright digitisation projects.

As an organisation that represents university libraries and archives in the UK we cannot envisage any of our member institutions investing in mass digitisation projects if the maximum period of a licence was 5 years. We believe that the duration of the licence should be agreed between the collecting society and the digitising library, archive or publisher.

We also note that the new German legislation that reflects the Out of Commerce MOU leaves the duration of the licence up to the negotiation between the digitising library and WG Wort, the German RRO.

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

Whilst standardization is important, we believe that at times a pragmatic approach will be appropriate, as cases may arise which require more nuanced considerations. The scheme must have the flexibility to respond if and when such instances arise.

*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.*

Yes.

*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.*

Other conditions might include:

- If the CMO is found to have claimed rights to copyright materials that it in fact did not hold (whether part of an ECL or not);

- If the CMO is found to have engaged in advertising or promotional activities, or correspondence, which misleadingly claimed that a third party was, or might be, infringing or required a licence, when in fact that third party was not infringing, e.g., by virtue of using exceptions to copyright, or because the material in question is not part of the repertoire of that collecting society.

In the instance that ECL is revoked, we strongly recommend that provisions must be in place to support the licensees, particularly as most of the licences that are used by schools, colleges and universities are de facto ECL at the moment. It is important that special provisions are put in place to ensure the uninterrupted use of these works should permission to operate an ECL were to be revoked.

*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).*

We believe that 21 days is too short given the complexities of the issue.

*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).*

Please see the answers to Questions 15. We believe that a collecting society authorisation should not be able to be revoked unless provisions are put in place to support the licences that schools, colleges and universities must have in place in order to continue teaching and learning.

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

The validity of licences already granted should not be affected if they relate to education and research. However if there were a large number of opt outs it would be important that there are mechanisms for this to be reflected in a revised licence fee.

*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.*

We agree that these requirements are both 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.*

*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).*

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

In response to questions 20-22, we believe that the answers from collecting societies on these points should be strongly heeded.

*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.*

We believe that any revocation or cancellation has to deal adequately and proportionately with the public interest in ensuring that the use of in-copyright works, not covered by an exception but where individual rights clearance is not possible, in the context of education and research remains as uninterrupted as is practicable. As highlighted above we believe the 5 year period to be utterly impractical and if implemented, it would not encourage or enable mass digitisation programmes.

*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.*

Please see the answer to Question 23.

*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.

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

We believe that it is vital for business continuity purposes, and enabling projects like mass digitisation to happen that clear and agreed pricing is agreed and provided upfront.

*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 data supplied to CMOs will be extremely varied. Much data operates, certainly in the case of journals at publisher level, and not author level. Similarly given that ECL will cover orphan works where it is not even possible to identify rightsholders, or where the cataloguing of a copyright work may not include an embedded work we believe that while an issue it needs to be dealt with practically and pragmatically by both the Secretary of State and the CMO.

There should be provisions to ensure that unclaimed money is placed into an account, and used to reimburse the licensees, either directly or indirectly.

*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)*

If undistributed funds are to be passed to the Crown we believe no possible contingent liability should remain with the CMO.

*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.*

We believe it is right and appropriate to give absent right holders rights as envisaged by the draft regulations – namely the right of remuneration and opt out.

On the issue of whether the regulations are fair for licensors of an extended collective licence we would refer you to the responses above. In summary we are concerned that the regulations do not adequately reflect or protect the needs of customers of CMOs. In particular:

- i) It will be important to ensure that the Secretary of State provide business continuity for customers of CMOs who need to have before purchasing a licence an agreed licence fee and stable terms and conditions.
- ii) In the case of educational and research institutions it is vital that they are not put in a position where they cannot perform what constituents part of their day to day function – namely the sharing and building on of in-copyright works.
- iii) The licence period proposed is far too short and will not encourage mass digitisation by either universities, cultural bodies or publishers. It also cuts across clear EU policy in this area.
- iv) A quick, low cost and uncomplicated way of receiving a reasonable rebate where there have been a high level of opt outs.

**Additional comment:** LACA believes it is of the uppermost importance that ECL has cross-border effect. Universities need this for communication to the public in the context of Virtual Learning Environments (VLEs), teaching and learning. Libraries need it for mass digitisation projects.