



BSAC COMMENTS ON DRAFT LEGISLATION FOR EXTENDED COLLECTIVE LICENSING (ECL) SCHEMES

1. Protecting non-members

- 1.1 There is some recognition of the need to protect the interests of non-members of a licensing body whose rights might be swept into an ECL scheme. But, at the moment, this protection seems to apply largely after an ECL scheme has been authorised because they are then able to opt out. There is also some protection if non-members become aware of the ECL scheme application when it is published by the Secretary of State for representations to be made, which the Secretary of State must then consider before authorising the ECL scheme. But the Secretary of State may not be best placed to ensure that non-members are aware of the application. Whilst these safeguards are therefore welcome, there should also be some clear safeguards for non-members at an earlier stage.
- 1.2 For example, it may not be unreasonable for a licensing body to provide some evidence of how it has tried to alert non-members to its proposal to apply for authorisation of an ECL scheme. In some cases, a licensing body might even know that a number of non-members are actively licensing uses of works directly that would otherwise fall within the scope of a proposed ECL scheme. In such a situation, a licensing body should be required to declare this in any application for authorisation of an ECL scheme. Of course, in such a situation, authorising an ECL scheme may not be reasonable in any case. For example, this issue raises the question as to whether it would be fair to expect all those right holders who are already independently licensing use of their works to have to opt out of an ECL scheme to continue to do so.
- 1.3 This issue is clearly relevant to the representativeness of the licensing body, but it may be helpful to make it clear that issues such as this should be specifically part of the evidence that a licensing body seeking authorisation of an ECL scheme should provide. It may be that the legislation should also make it clear that the Secretary of State has the option of not authorising an ECL scheme where he is aware of independent licensing, for the same use of the same type of work, by non-members that precedes the application for authorisation of an ECL scheme.

2. Multiple licensing bodies

- 2.1 It is not necessarily the case that there will be only one licensing body collectively licensing a certain use of a particular type of copyright work. If there is more than one such licensing body, then extending the licensing of one licensing body to cover the rights of non-members is much more problematic. This issue does not appear to be specifically addressed in the consultation document. We accept that a licensing body applying for an ECL scheme to be authorised is required to provide evidence of representation. Where there is another licensing body licensing the same type of work for the same use this should be part of the evidence about representation. It would, of course, also be possible for the Secretary of State not to authorise an ECL scheme in such a situation.
- 2.2 We do, though, wonder whether there should be a specific obligation on a licensing body seeking authorisation for an ECL scheme to provide evidence of any other licensing bodies it is aware of that are licensing the same use of the same type of copyright work. The issue is whether this too should be specifically part of the required evidence about representation provided by the licensing body. It may also be appropriate to make it clear that the Secretary of State is able to refuse to authorise an ECL scheme where he is aware of licensing of the same type of work for the same use by another licensing body.

3. Consent by members

- 3.1 Evidence of consent from the relevant members of a licensing body, ie those who have mandated collective licensing of a particular use of a particular type of copyright work in which they have rights, is important. Evidence of those members who have specifically not consented to the ECL scheme, and, where known, their reasons why, may, though, be just as important. For example, there may be a large number of members who have consented to the ECL scheme, but very good reasons why a few members have opposed ECL. Even where there is a relatively small percentage of members who have not consented, the licensing body should therefore be required to provide evidence of non-consent and the reasons why, where known, in an application to the Secretary of State as much as the evidence of consent. The Secretary of State can then take that evidence into account as the reasons why some members have not consented may indicate a good reason for not authorising an ECL scheme.

4. Relationship with existing law and jurisdiction of the Copyright Tribunal

- 4.1 As well as wanting to prevent an ECL scheme from being authorised when that is not appropriate, we do want the protection for licensees under an ECL scheme to be fair. Some BSAC members expect there to be situations from which they might benefit from a licence under an ECL scheme. Making it possible for licensees to be able to challenge the terms and conditions of an ECL scheme before the Copyright Tribunal is therefore important. Existing copyright law (the Copyright, Designs and Patents Act 1988 as amended) defines a “licensing scheme” (in section 116) and then goes on to make provision for adjudication

by the Copyright Tribunal about terms and conditions of licensing schemes that cover the works of more than one author (in section 117). A licensing scheme as defined in section 117 would certainly be what many people refer to as a collective licensing scheme, but this is not a term that actually seems to be used in the existing law. (Licensing schemes are also defined in relation to performers' property rights with adjudication by the Copyright Tribunal applying to licensing schemes covering the performances of more than one performer.) The drafting of the provision on ECL does not seem to take these existing definitions as starting points, but, rather, seems to try and define terms afresh, and by using terms like "a collective licensing scheme", which are then not defined. It is therefore far from clear that an ECL scheme could only be authorised where the terms and conditions can be subject to adjudication by the Copyright Tribunal as seems to be indicated in paragraph 3.81 of the consultation document.

- 4.2 The Government has quite rightly recognised the jurisdiction of the Copyright Tribunal to be an important safeguard for licensees under ECL schemes, but we believe that this would only be the case if the starting point is that there must be a licensing scheme as defined in section 117 of the 1988 Act in the application for an ECL scheme (or a licensing scheme as defined in paragraph 2 of Schedule 2A of the 1988 Act for performers' rights). In this respect, such licensing schemes cannot relate to the restricted act of issuing copies of copyright works to the public for example (and for performers licensing schemes can only relate to the performers' property rights, other than consent for recording a live performance), whereas the draft legislation seems to attempt to cover schemes licensing any of the acts restricted by copyright or any of the performers' rights.

5. Renewal of an ECL scheme

- 5.1 This is another issue where the current proposal may adversely affect licensees under an ECL scheme. The draft appears to only permit renewal of an ECL scheme after it has expired and so there could be a problem for licensees in the period before another authorisation has been obtained. (There could also be problems for licensing bodies of course.) It should therefore be possible to apply for renewal before the existing authorisation has expired. Whether or not a scheme is renewed should, though, then provide an opportunity to check again the various issues relevant to whether or not the ECL scheme is appropriate, but this process should be possible before an existing authorisation expires so that, if renewal is authorised, there is no gap in licensing under the ECL scheme.

6. Revocation and cancellation of authorisation

- 6.1 If the evidence supplied to the Secretary of State about representation, consent and so on is accurate (including modified as we have suggested above), then the expectation would be that there would be few opt outs from an ECL scheme that has been authorised. However, there should be a remedy to bring the ECL scheme to an end where the initial assessment was wrong and there have been a significant number of opt outs from an ECL scheme. A

large number of opt outs would mean that an ECL scheme is not appropriate. It does not at the moment seem to be clearly possible to revoke the authorisation of an ECL scheme where there have been a significant number of opt outs.

- 6.2 We wonder why the Secretary of State is only able to specify conditions that should apply to a revocation and not also a cancellation of an authorisation, and why other provisions seem to unduly limit how a revocation or cancellation applies. There could be situations where conditions would be appropriate in both cases, for the protection of licensees or otherwise. For example, it should be possible to provide that a licence already granted under an ECL scheme can last as long as the licensee expected it to last, or at least for a minimum period, rather than terminate at the same time as a revocation or cancellation comes into force.

7. Non-exclusive licence

- 7.1 Our comment here arises in part because of a sentence in the consultation document. In paragraph 3.71 of the consultation document, there is a sentence that says non-exclusivity ensures that a non-member may directly license a work that is part of an ECL scheme. We are concerned about what the Government might be thinking of with this comment as the point of collective licensing is that a licensee gets a licence to use all the works for a particular use that come within the scope of the collective licence. A licensee would not expect that a right holder would then be able to approach them for another licence for that use of one of the works as they would have believed that they had already paid for this with their collective licence under the ECL scheme. Of course, if a non-member has opted out of the ECL scheme, then a direct licence from the non-member would be essential in order to be able to use the work in the way covered by the ECL scheme, but this is not what the consultation document seems to be suggesting. Moreover, we would expect that a person who has a licence under an ECL scheme to be granted a non-exclusive licence as it would be right that any other person should also be able to get a licence under the ECL scheme. There are issues of non-exclusivity therefore, but the one mentioned in the consultation document does not seem right.

8. Overlap with orphan work scheme

- 8.1 We wonder whether the relationship between an ECL scheme and an orphan work scheme as indicated in the consultation document has been established appropriately. Looking at this from the point of view of a licensee, it would seem that there would be a double payment if they have a licence under the ECL scheme that covers a particular use of types of work that include one or more orphan works and then they could also be asked to pay again were they to apply for an orphan work licence. If an ECL scheme has been approved for appropriate situations where collective licensing makes sense because licensees will want to use many copyright works in the same way, then a licensee should be unlikely to want a licence just for an orphan work for that use. Were they to apply for a specific orphan work licence, it would therefore make sense for the IPO to point out that this is not

necessary because the use is covered by a collective licence under the ECL scheme. Moreover, if there is a work opted out of an ECL scheme where the right holder is no longer traceable, then, having a mechanism where that work is opted back into the ECL scheme would seem preferable for a licensee rather than having to seek an orphan work licence. This second point does, of course, raise the question of how existing opt outs would be dealt with when there is an application for renewal of the authorisation of an ECL scheme. Maybe at that point there needs to be some way of establishing whether or not existing opt outs are still current in that there is a traceable right holder. Where this is not the case, it would be possible for the rights to no longer be opted out in any renewal of the ECL scheme.

- 8.2 As the consultation paper acknowledges, the issues here will be explored further in the orphan works consultation and so we may return to this issue in a response to that consultation.