

<b>Title:</b> Extended Collective Licensing (ECL)  <b>IA No:</b> BIS1054  <b>Lead department or agency:</b> IPO  <b>Other departments or agencies:</b>	<b>Impact Assessment (IA)</b>		
	<b>Date:</b> 18/05/2012		
	<b>Stage:</b> Final		
	<b>Source of intervention:</b> Domestic		
	<b>Type of measure:</b> Primary legislation		
<b>Contact for enquiries:</b> nadia.vally@ipo.gov.uk			

<b>Summary: Intervention and Options</b>	<b>RPC: GREEN</b>
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Cost of Preferred (or more likely) Option			
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Measure qualifies as One-Out?
-£0.09m	-£0.09m	£0.01m	Yes
			Zero net cost

**What is the problem under consideration? Why is government intervention necessary?**

The UK's existing rights clearance system is complex, involving multiple users and rights holders seeking and granting permissions; Hargreaves recommended that it be simplified. Government intervention is required to introduce ECL as a tool for simplification. ECL is a method of rights clearance used in the Nordic countries to clear multiple rights quickly and cheaply. Savings are made on search costs. ECL allows licensing bodies which represent a substantial number of rights holders in their sector to apply to act for all remaining rights holders, except those who instruct it not to do so.

**What are the policy objectives and the intended effects?**

The objective is to streamline licensing procedures so that rights clearance can be cheaper and more efficient than at present. The intended effects are to:

- Decrease transaction cost for users of the licensing system, thereby reducing barriers to entry
- Improve access to works and enhance legal certainty for consumers
- Ensure maximum possible royalties are collected for creators by reducing the cost and inconvenience of multiple transactions and by setting aside money for absent rights holders who might not otherwise have been compensated for the use of their works.

**What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)**

- Option 0 - Do nothing.
- Option 1 - Amend existing EU and international copyright framework. This is likely to be a protracted process requiring agreement on the European and international fronts with no guarantee of success.
- Option 2 - Introduce legislation that will allow collective licensing to take place on an "opt out" rather than an "opt in" basis (where authorised by Government) to expedite rights clearance and reduce transaction costs.

Option 2 is preferred as it achieves policy objectives and the intended effects in a relatively short time frame.

<b>Will the policy be reviewed?</b> It will be reviewed. <b>If applicable, set review date:</b> 04/2020					
Does implementation go beyond minimum EU requirements?				N/A	
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.		<b>Micro</b> Yes	<b>&lt; 20</b> Yes	<b>Small</b> Yes	<b>Medium</b> Yes
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)				<b>Traded:</b> n/a	<b>Non-traded:</b> n/a

***I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.***

Signed by the responsible SELECT SIGNATORY: \_\_\_\_\_ Date: \_\_\_\_\_

# Summary: Analysis & Evidence

# Policy Option 1

**Description:** Allow collective licensing to take place on an "opt out" rather than an "opt in" basis to expedite rights clearance

## FULL ECONOMIC ASSESSMENT

Price Base Year 2012	PV Base Year 2012	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: -0.17	High: -0.04	Best Estimate: -0.09

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	0	0	0.05
High	0	0	0.2
Best Estimate	0	0	0.1

### Description and scale of key monetised costs by 'main affected groups'

The cost to the IPO of administering ECL is expected to be around 0.2 Full Time Equivalent staff at a cost of £10,000. This cost is intended to be recouped from collecting societies so is a cost to business, but ECL is voluntary so collecting societies will only take on such costs if they believe there to be greater financial benefits or at the very least, equal to these costs.

### Other key non-monetised costs by 'main affected groups'

Collecting Societies will bear the set-up and administrative costs of operating ECL. The voluntary nature of ECL ensures that collecting societies would only use it in the event that they consider it to be commercially viable. There may be a cost to the rights holder of opting out but this is expected to be minimal so costs will be negligible. The cost of the licences offered to some users may increase (although the licence would cover a wider range of works).

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	0	0	0
High	0	0	0
Best Estimate	0	0	0

### Description and scale of key monetised benefits by 'main affected groups'

It is clear that there will be financial benefits but we have been unable to quantify these. This is because Government will be introducing legislation to enable collecting societies to seek authorisation to operate ECL on a voluntary basis. Therefore the level of benefits is dependent on the nature and volume of authorisations which are eventually granted, and the percentage of rights holders who choose to opt out. The expected benefits are described below

### Other key non-monetised benefits by 'main affected groups'

Users and rights holders benefit from a simpler system with reduced costs. Users get greater access to works through a simplified system. Rights holders, collecting societies and users have legal certainty. A lower cost system could make it easier to roll out new services, helping enterprise and growth. Because ECL will require compliance with a code of practice for collecting societies, users and rights holders will enjoy the benefit of enhanced standards of transparency and governance.

Key assumptions/sensitivities/risks	Discount rate (%)	3.5
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As ECL is voluntary, it is reasonable to assume that a collecting society will apply for an ECL licence only if is a commercially viable decision and if they believe their application is strong. We assume a low risk of legal challenge given that ECL is voluntary and that collecting societies will have applied for it with the consent of their members. Similarly, as rights holders would retain the ability to opt out of any ECL scheme, and as collecting societies would be required to demonstrate their representativeness + mandate as part of their application, we assume a low risk that ECL would create costs for rights-holders who did not want it.

## BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:	In scope of OIOO?	Measure qualifies as
Costs: 0.01	Yes	Zero Net cost
Benefits: 0.		
Net: 0		

# Evidence Base (for summary sheets)

## 1. Background

The international and domestic legislative framework gives copyright owners a number of exclusive rights in relation to their creative works, for example: the right to perform the work in public and the right to broadcast the work. The exclusive nature of these rights means that only the copyright owner can exercise them.

Most of these rights can be sold, transferred, or inherited. Some creative works contain more than one right; for example, some of the copyrights in a single song will be in the music, the lyrics, and the sound recording itself. These individual copyrights can be owned by one or more different people. For example, if the lyrics have been composed by two songwriters working together, they will jointly own that copyright. If the producer of that song is a different person, they will have a separate copyright for the sound recording of the song.

Anyone else wanting to use any of the rights will need the permission of the owner(s). This can be obtained directly from the owner or from a collecting society where the owner has given it a mandate to license on their behalf. On joining a collecting society, a copyright owner will authorise it to issue licences. The charges for these licences are distributed in the form of royalties to members after the collecting society has deducted its administrative costs

It is expensive and time consuming for some copyright owners to exercise control over the use of their works and to administer their rights, and for some users to obtain clearance to use copyright works legitimately. This problem persists in digital spaces where works can be used in large volumes and in numerous permutations. This means that a user can regularly need multiple authorisations and incurs high transaction costs. While collecting societies help alleviate this problem in some areas by enabling “many-to-many licensing”, the system can be complex. The Hargreaves Review called for the simplification of the current state of licensing. In particular, it supported an extended collective licensing arrangement in the UK.

At present, collecting societies operate on the principle of ‘opt in’ i.e. the owner of a copyright work opts into membership of a collecting society which then adds his or her work(s) to its repertoire. A collecting society cannot license the use of a work if it does not have permission from the rights holder: it would be infringing copyright. However, in some Scandinavian countries, a collecting society that represents a substantial proportion of rights holders is allowed to license specific uses of a work for all rights holders in a particular category. It does not need specific consent from each right holder in the category of right it manages, although rights holders usually retain the ability to opt out of the system. This type of rights management is referred to as extended collective licensing (ECL). ECL can be used to license either a single right or a multiplicity of rights associated with any given work. In order to simplify rights clearance for users and rights holders alike:

***The Government wants collecting societies to be able to apply for authorisation to license the use of particular rights on this basis within the UK, if certain conditions are met.***

Alongside the issue of complex rights clearance, there is also a large body of works whose authors cannot be identified or traced (orphan works). Any exemptions which allow use of these works are very limited in their scope. As a result, anyone who does anything which falls within the exclusive rights of the copyright owner risks civil and (if the work has been exploited commercially) criminal penalties because the use is unauthorised. The impact of this is felt most keenly by those wishing to undertake mass digitisation projects. The British Library for example, estimates that up to 40% of its archives are effectively orphaned works, with the problem being even greater in its collection of old newspapers. This is just one example of a valuable resource that is prevented from being made available digitally, because of legal restrictions on the use of orphan works. The BBC experiences a similar issue with its archive of sound recordings, and again this prevents or greatly complicates the use of that material for the cultural benefit of the nation. Hargreaves recommended that ECL be used for the mass clearance of orphan works.

***The Government wants to ensure that orphan works which are currently locked up can be accessed. Extended Collective Licensing is not proposed as a specific policy solution for orphan works, as by its nature an ECL will include all works within the scope of an authorisation (whether the copyright owner is traceable or otherwise, and except for any***

***works which are opted out). However, on this basis it is likely that some orphan works will be cleared for use through Extended Collective Licences to the extent that such licences are available. Separate proposals, and a separate Impact Assessment, address orphan works specifically.***

## **2. Problem under consideration**

Obtaining fairly comprehensive rights coverage through concluding one contract is near enough impossible (except in isolated cases of some music collecting societies which represent artists throughout the world). The existing system of rights clearance and licensing can be expensive and time consuming for those wanting to use copyright works. This is especially the case with digital platforms, or for users with large collections of work they wish to exploit.

The BBC's popular on demand catch up service iPlayer currently has a daily average of 1.5 million streams and downloads requested by users. The BBC told us that it took five years to create a framework in which the rights for 1000 hours of content are now potentially cleared to be made available weekly on the iPlayer across multiple platforms.<sup>1</sup> Despite this effort, a small team of rights professionals is required to check and cross check rights availability of content on an ongoing basis, and material will sometimes be withheld from the service because the rights have not been secured in time. It is right that the activity of clearing rights for legitimate use should take place, but a less time-consuming process would have benefits.

Complexity in the current system can inhibit the creation and development of new works (for example, where their completion is dependent on acquiring and clearing rights to other audiovisual material such as music or a film clip) and limit investment which can diminish the potential common cultural output of the UK. In their consultation response, the BBC estimated that clearance of their entire archive based on current costings would require over £70m of administrative expenditure. Other respondents to the consultation made similar points, focussing on the administrative burden of clearing copyrighted works in the absence of streamlined solutions (whether these were provided by transactional or collective models). Accordingly, there was general acceptance in the consultation responses that collective licensing was efficient in some circumstances and for some types of work. One collecting society referred to previous evidence which suggested that administrative costs (for users and rights holders combined) associated with one collective licensing scheme were £6.7million per year, compared with a range of £145m-£720m for a direct model<sup>2</sup>.

Rights management can be equally complex from the perspective of the rights holder whether the right is self-managed or managed through a collecting society. To fully derive the rewards due to them for exploitation of their rights, rights holders need to: identify all potential users; negotiate licence fees and content; collect the licence fee; and monitor the use of the licence. Creators who manage their rights themselves may find it difficult to control and manage every single use of their rights. This is not the case for all rights holders or for all types of rights/works – some respondents to the consultation (usually referring to types of work/right where direct licensing was prevalent) were clear that they found it straightforward to manage their rights using existing models, or through new technological solutions. However, the development of collecting societies worldwide clearly demonstrates that rights holders have found it advantageous to collectively manage certain rights for certain types of work (usually those rights related to high-volume, low value uses, where individual rights management would be disproportionately costly).

Even collecting societies, which have the experience and infrastructure to control and manage usage, report that they are not 100% accurate in being able to quickly match usage to the correct rights holder. For example, one collecting society has told us that although ultimately it is almost always able to match usage, on average 5% of usage is unmatched on a rolling basis.

Furthermore, the complexity of the system can lead to the legitimate use of a work being missed, either inadvertently (the user is unaware that the right needs to be cleared/ the rights holder is unaware of/unable to control his rights) or deliberately (the user decides to risk being unlicensed)

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<sup>1</sup> Conversations between BBC and IPO Officials, August 2009

<sup>2</sup> PriceWaterhouse Coopers (2011), "An economic analysis of copyright, secondary copyright and collective licensing", pp. 42-43, accessed at [http://www.cla.co.uk/data/corporate\\_material/submissions/2011\\_pwc\\_final\\_report.pdf](http://www.cla.co.uk/data/corporate_material/submissions/2011_pwc_final_report.pdf)

This has two consequences: first, the rights holder loses remuneration; secondly, the user runs the legal risks of infringement. Neither is desirable. Moreover, the mere existence of collecting societies does not automatically enable all rights holders to have their rights managed. It is possible that an owner may be unaware of their rights or simply unable to control and administer their rights in a mass use environment.

### **3. Rationale for intervention**

The introduction of ECL (the Government's preferred option) will enable a collecting society to apply for a permission from the Government to license specified rights within the UK for all works in a particular category (which will be defined in the application). The general principle in countries where ECL is used is that where a collecting society represents a substantial number of rights holders (its members), it can be authorised to act for all rights holders (i.e. including non members) in that class or category of right. So the works of all rights holders in the particular area that the collecting society represents are assumed to be in the collecting society's repertoire unless a rights holder specifically opts out of the system. By allowing for clearance of a greater number of works through a collective licence, ECL should mitigate against the complexities and costs associated with the current system as described in the previous section.

Precedent for extended collective licensing exists in, among others, the Nordic countries where it has been in existence since the 1960's. The key driver behind the introduction of ECL was not dissimilar from ours: the complexity brought on by mass use and exploitation of numerous rights. Extended collective licensing has been successfully deployed for a range of works and rights where the market is characterised by high volumes of transactions, including reprographic use and the broadcast of copyrighted works. It has also begun to be used to facilitate mass digitisation projects, demonstrated by the *Bokhylla* project which allows the Norwegian National Library to make 50,000 books available in full-text on its website for users within Norway<sup>3</sup>. It is envisaged that the introduction of ECL on a voluntary basis in the UK could enable similar uses to take place if the market – including rights holders - supported such an approach.

Around half of respondents who expressed a view on Extended Collective Licensing in their consultation responses supported the proposal to some degree, although it should be noted that a significant proportion qualified this by focussing on safeguards they felt were needed to protect rights holders, and/or arguments that ECL was only suitable for particular sectors/rights. The remainder of the responses were either broadly neutral, or opposed to the introduction of ECL usually because of concerns about the potential impact on rights holders (see discussion under Option 2). The impetus for ECL within the UK is also demonstrated by the fact that several collecting societies currently operate similar schemes despite the absence of an authorisation process (as acknowledged by responses to the consultation from these organisations and their users). These schemes have emerged as a practical solution to the mass clearance of particular rights, which would otherwise attract disproportionate administrative costs. Intervention would create a legislative basis for these schemes, and create safeguards to protect the interests of rights holders.

### **4. Policy objective**

The policy objective is to simplify the existing licensing system so that rights can be cleared more efficiently. This would reduce transaction costs for users of the licensing framework, which should decrease barriers to entry for the development of new products and services. Users would have improved access to works, while consumers would benefit from greater choice and legal certainty. Creators would be guaranteed remuneration for the use of their work under an ECL, where currently works may be used unlicensed.

### **5. Description of options considered (including do nothing)**

Option 0: Do nothing.

Option 1: Amend the European and international copyright framework to introduce an extended collective licensing framework.

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<sup>3</sup> <http://www.nb.no/bokhylla>

Option 2: Introduce legislation that will allow collective licensing to take place on an "opt out" rather than an "opt in" basis within the UK to expedite rights clearance and reduce transaction costs.

### **Option 0: Do nothing**

Under this option the complexity of the existing rights clearance system would, in the best case scenario, remain the same. We can reasonably expect the volume of works in circulation to continue to increase as existing works are not deleted and new works continue to be created. We can also expect negotiation of the system to become more difficult. In this scenario, we could reasonably expect costs- both in time and money- to increase accordingly for rights holders and users of their rights.

No additional benefits would accrue from doing nothing. On this basis, this option has been rejected.

### **Option 1: Amend the European and international copyright framework**

This option envisages re-opening the international framework for copyright and making amendments to it to introduce an extended collective licensing framework which would then be transposed into domestic legislation. This option would, first of all, depend on the appetite for a re-examination of international legislation and obligations. In the event that that were present, then there would have to be lengthy negotiations spanning many years with no guarantee of the desired outcome. Even if changes were secured to expedite rights clearance, there would be a long lead time while agreement was obtained.

### **Costs**

The UK would be unlikely to introduce any ECL scheme without some safeguards to counterbalance the additional powers that would be given to collecting societies running such schemes. This is intended to be in the form of codes of conduct based on minimum standards set by Government. Thus, we can assume that there will be a cost to collecting societies of adhering to codes of conduct. These costs are accounted for in the separate IA on Codes of Conduct. They have not been added in here because we do not want to double count the costs, and because codes have a value in their own right.

The collecting society is likely to incur set up costs which would include: application fees, putting in place the infrastructure for locating and paying rights holders whose works sit in the extended portion of the repertoire, demonstrating a mandate from their members for the application to operate ECL, and advertising the proposed scheme to give rights holders the opportunity to opt-out. Collecting societies will also need to bear any costs associated with the operation of an opt-out scheme.

These costs are difficult to quantify as they are to a large extent dependent on the precise nature of any proposed scheme. For example, some Scandinavian societies have reported negligible opt-out rates (with the consequence that costs associated with the management of opt-outs are minimal). Similarly, the CLA report that UK works excluded from their current blanket licence (which operates in a similar fashion to an ECL scheme) amount to only 0.0007% of repertoire offered. However if a scheme within the UK attracts a significant number of opt-outs, collecting societies will face additional costs to ensure these are processed and that their licensees are informed. Similarly, costs incurred in advertising an ECL could vary considerably dependent on the scale and scope of the authorisation.

However, extended collective licensing is not mandatory. Therefore, it would be fair to say that those collecting societies which decide to apply to set up such schemes would only do so if they felt that it was a commercially viable decision for them to do so i.e. where they assess that the cost of setting up the scheme would be offset by the financial benefits that flow from the extended repertoire and any cost savings from a streamlined licensing procedure

The long lead time for securing change through this option would mean that the status quo remains intact for some time. The best case scenario is that there will be no additional costs from this extended timeframe. But, if we reasonably assume that the volume of works in circulation continues to increase, then we can also expect negotiation of the system to become more difficult. In this scenario, we could reasonably expect costs- both in time and money- to increase accordingly for

rights holders and users of their rights. We can expect increased transaction costs to act as barriers to entry and hinder the development and rollout of new goods and services.

## **Benefits**

We expect that, as the timescale is so long, the discounted value of the benefits is likely to be very low. We have sought data on the monetised benefits of amending existing legislation over the course of several years, but have not been able to gather any. We believe, given the low likelihood of successfully implementing this option, that it would be disproportionate to seek further data.

If ECL were secured through this option, then we would expect the following high-level benefits to accrue: improved access to works for users; reduced administration leading to more efficient collection; this could lead to lower licensing costs for users and improved remuneration for copyright owners. However the long lead time associated with this option, and the low likelihood of success, have led to the decision to reject this option.

## **Option 2: Introduce legislation**

Under this option, the Government would bring forward legislation to allow collecting societies to apply to license a defined class of works, for defined uses, on an “opt out” basis. This would be completely voluntary; there would be no compulsion on collecting societies to use ECL. At present, a collecting society can only license the rights of someone who has opted in to their repertoire. ECL would allow a collecting society that represents a substantial number of rights holders in a particular sector, to apply to license on behalf of all remaining rights holders in that sector for a defined right or rights. The only exceptions to this would be where rights holders opt out of the collecting society’s scheme. As the collecting society would be given additional powers to act on behalf of rights holders from whom it does not have a specific mandate, the Government would need to introduce safeguards to ensure that rights holder’s interests were protected. These would include minimum standards of fairness, transparency, and good governance which would be enshrined in codes of conduct (see separate IA).

## **Costs**

The following are the key costs that would be associated with ECL.

1. Cost to the body granting authorisation (£5,000 - £10,000- £20,000 p.a.)

Applications for authorisation to operate an ECL will be assessed and processed by staff at the Intellectual Property Office. The cost of doing so is intended to be recouped through the cost of the authorisation. The level of any authorisation fee would be set by regulation. In the consultation stage IA, we estimated the cost to Government to be around two full-time employees costing approximately £100,000 per annum. We now consider this figure to have been an overestimate, based on information received during the consultation about the likely take-up of ECL, and on a reassessment of the administrative procedure involved. We now estimate that the additional cost is equivalent to roughly 0.2 full time staff estimate (FTE), which equates to £10,000 p.a. This assumption has been based on two factors. Firstly, as ECL is voluntary, we would expect a collecting society seeking a licence to have consulted fully with its members and to have gone thorough due diligence to ensure that ECL makes commercial sense to it. This would have the effect both of limiting the number of applications, and should ensure that those received are of a reasonable quality.

Secondly, the number of known collecting societies in the UK is low: accepted sources only name fifteen (Copinger and Skone James on Copyright, Vol 1, p. 27). Not all of them will want an ECL authorisation, and those who do will not all want them at the same time (in responses to the consultation, some collecting societies expressed a clear interest in operating ECL schemes, while others indicated that they were reserving their position). For these reasons we think that it is reasonable to assume that the granting of a licence and monitoring of compliance with its terms and conditions will need a relatively low amount of administration at a relatively low cost.

We have carried out a sensitivity analysis on this assumption to provide a low and high estimate. For the low estimate we consider the UK IPO faces half of the best estimated administrative costs for running an ECL system. This equates to 0.05% FTE for two members of staff, which is

£5,000 per annum. The high estimate considers if the IPO faces double the best estimated administrative costs for ECL. This equates to 0.2% FTE for two members of staff, which is £20,000 per annum. As stated the cost of administration to the IPO is intended to be recouped through the cost of the authorisation, so this administrative cost is ultimately a cost to business.

However, extended collective licensing is not mandatory. Therefore, those collecting societies that decide to apply for ECL would only do so if they felt that it was a commercially viable decision, i.e. where they assess that the cost of setting up the scheme would be less than or at least offset by the benefits that flow from the extended repertoire and any cost savings from a streamlined licensing procedure.

## 2. Costs to the Collecting Society (neutral)

The collecting society is likely to incur set up costs which would include: application fees, putting in place the infrastructure for locating and paying rights holders whose works sit in the extended portion of the repertoire, demonstrating a mandate from their members for the application to operate ECL, and advertising the proposed scheme to give rights holders the opportunity to opt-out. Collecting societies will also need to bear any costs associated with the operation of an opt-out scheme.

These costs are difficult to quantify as they are mainly dependent on the precise nature of any proposed scheme. For example, some Scandinavian societies have reported negligible opt-out rates with the consequence that costs associated with the management of opt-outs are minimal. Similarly, the CLA report that UK works excluded from their current blanket licence (which operates in a similar fashion to an ECL scheme) amount to only 0.0007% of repertoire offered. However if a scheme within the UK attracts a significant number of opt-outs, collecting societies will face additional costs to ensure these are processed and that their licensees are informed. Similarly, costs incurred in advertising an ECL could vary considerably dependent on the scale and scope of the authorisation and any conditions imposed by the Secretary of State.

However as described above; extended collective licensing is not mandatory. Therefore, collecting societies that decide to apply to set up such schemes would only do so if they felt that it was a commercially viable decision, i.e. where they assess that the cost of setting up the scheme would be less than or at least offset by the benefits that flow from the extended repertoire and any cost savings from a streamlined licensing procedure.

## 3. Cost to the User

In the consultation stage Impact Assessment, the Government made the assumption that the cost of licences for users would not be expected to increase in most cases. This was because (taking the example of public performance of musical works) the marginal price of music tends towards zero once listeners have more than they can readily listen to. If the user already has access to the collecting society's entire repertoire, including current chart music, then it is unlikely that he or she would need a million new songs. In any case, most collecting societies have a high percentage of rights coverage, so the additional number of rights holders scooped up in an extended licence should not be so high as to warrant an increase in price. Thus, the PRS licence, for example, would not be worth very much more, if anything.

This argument was supported to some extent by the consultation responses. For example, CLA stated that their existing repertoire already covered 99.8% of works copied within the UK – suggesting that the direct increased value of an extended licence to the user would be minimal (although there would be other benefits in terms of increased legal certainty and reduced transaction costs). PRS also supported this view. Multiple responses from users felt that there would not be any justification for increased licence fees, and indicated that any savings for collecting societies as a result of ECL should be passed onto the users in the form of reduced licence fees.

However, responses from rights holders and collecting societies countered the initial position. In particular, collecting societies argued that an increase in the licence fee may be justified where ECL was offered, owing to:

- a) The fact that the licence would include a larger repertoire of works;
- b) The assertion that ECL would lead to increased administrative costs which a collecting society would need to recoup in order to maintain its distribution rates to members, and;



- c) That a collecting society would need set aside remuneration for non-member rights holders, potentially leaving less available for distribution to its members unless the cost of a licence increased to compensate (this argument was also made by some rights holders, who felt it would be unjustified should they receive reduced remuneration as a result of ECL)

It is therefore possible that ECL could lead to an increase in the cost of existing licences where it applied. However, any increased cost would be accompanied by increased value/benefits, such as a significant increase in the repertoire offered to a user, a reduction in the administrative costs the user was previously forced to incur to obtain clearance, or greater legal certainty. In this case, additional costs in the system would be likely to be counteracted by additional value for users, as they would be for the collecting society. Ultimately, the cost of a licence is a matter for commercial negotiation between the collecting society and potential licensees.

Given the variety of factors that could impact on the price of a licence, and the fact that the scope and nature of any ECL schemes is not known, it is impossible to quantify any potential costs for users. The Government's proposals for codes of conduct for collecting societies would require a collecting society to consult with representatives of licensees in relation to any significant proposed change to a licence, giving an assurance to licensees that they would be able to input into this process. In addition, licensees would retain their current capacity to make a referral to the Copyright Tribunal in relation to the terms of a licence.

#### 4. Costs to rights holders (zero/negligible)

Opposition to ECL proposals in the consultation document tended to come from rights holders and their representatives within sectors where rights (in particular *primary* rights) were usually managed by direct/transactional models (i.e. where collective licensing played no role, or a limited role). These respondents (who generally came from the audio-visual, literary or photography sectors) expressed the concern that if their current licensing model was replaced by ECL, their ability to control their rights would be compromised (unless they opted-out of any ECL scheme where their works were in scope). Consequently, it was argued they could lose their ability to negotiate on a price for the use of their rights (because a tariff would be set by the relevant collecting society) and would incur losses as a result.

For example, FOCAL described the potential impact of ECL on their sector as follows: "Introduction of ECL would result in less income for footage archives: the licensing organisation would deduct commission, standard pricing and the length of time before an archive receives payment via a collecting society would negatively impact the sector's economy"<sup>4</sup>. Respondents were not able to quantify the cost of such a change, but noted that the industries which could be (potentially) affected currently produced significant turnover (for example, the British Association of Picture Libraries and Agencies noted that they represent a turnover of £310m p.a.).

In addition, rights holders expressed a concern that their existing income from collectively managed rights could also be reduced: either as a result of increased administrative costs for collecting societies, or because the requirement for collecting societies to pay royalties to non-members would reduce the 'pot' available to members (in the absence of a compensatory rise to licence fees).

Both of these assertions represent a potential cost to rights holders. However, they are mitigated by the safeguards in the Government's proposals:

- a) A collecting society could only successfully apply for ECL if it was able to demonstrate it represented a substantial proportion of affected rights holders for the rights concerned, and that it had the support of its members (who are themselves rights holders for the type of work in question, and can be expected to have similar interests to those of non-member rights holders) for the application. In practice, this would suggest that ECL would only be a feasible option for rights where collective licensing was already practiced, or where rights holders recognised that it was a suitable basis for rights clearance.
- b) All rights holders would retain the capacity to opt-out of an ECL scheme, removing some or all of their works from the scope any licences concluded on that basis. Collecting societies will be required to operate opt-out systems which work on a zero or negligible cost basis for rights

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<sup>4</sup> FOCAL International Limited, response to the copyright consultation, p. 20

holders, and will be required to advertise the introduction of an ECL scheme to ensure rights holders who may wish to opt out have the information required to do so.

These safeguards should significantly limit or prevent any additional direct costs for rights holders as a result of ECL. It is highly unlikely that a collecting society would be able to successfully apply to operate ECL for rights currently exercised through direct/transactional models, i.e. those rights where the consultation responses indicated that the risks associated with ECL were greatest (because they would not be able to meet the representation/support requirements, as these rights are not). Similarly, members of a collecting society would be able to vote to deny their support to any application which they believed would adversely affect their existing collective income (and non-members would be able to opt-out of any such scheme if it were authorised). The possibility that returns to rights holders might be reduced could also be offset by reduced costs of associated with a more streamlined clearance system; in this event, these cost reductions could be added to the distribution 'pot' where a collecting society considered it appropriate.

## **Benefits**

The following are the key benefits that have been experienced in those jurisdictions where collecting societies are able to operate extended collective licensing schemes. As copyright is a global system, applied locally, we reasonably assume that the same categories of benefits would apply in the UK.

### **1. Simplification and Improved Access to copyright works**

The introduction of ECL in other jurisdictions has been shown to improve access to creative works for users. The simpler system means that aside from negotiating with rights holders who opt out of the extended repertoire, users would only need to negotiate with one body per category of right. This should reduce administration costs and remove a barrier to the development of new services (or new market entrants) seeking to make legitimate use of copyright works. Consequently, the public should benefit from increased access to cultural resources.

An illustration of simplification, in stark contrast to the BBC's experience of rights clearance (see p.6 of this IA), is that narrated to us by KOPINOR, a large umbrella for Norwegian collecting societies. KOPINOR recently concluded a complex agreement with the Norwegian National Library for making approximately 50,000 works by Norwegian authors available on the internet. This took two months to conclude.<sup>5</sup> Similarly, ECL has been used in Denmark to make available a Dictionary of Old Norse Prose online, hosted by Copenhagen University at [http://www.onp.hum.ku.dk/index\\_e.html](http://www.onp.hum.ku.dk/index_e.html).

We envisage that these benefits will be of particular importance to those organisations which currently hold large archives of work that it is currently not feasible to clear for use. In its response to the consultation, the British Library calculates that it currently spends £86,248 per year on the storage and preservation of unpublished sound recordings, and £5,832,960 per year on the storage, preservation etc. of 'orphan' books. To the extent that ECL makes it easier for users to obtain licences to make use of material which such organisations are currently not able to use, the consequent reduction in clearance costs and added value from new services and uses could offset the cost of storage and preservation. In this scenario both public and private archive-holders will be able to free resources for other projects and services, while rights holders whose works may be used can be confident that royalties will be collected for such use. Furthermore, if ECL is used to license uses which are *not* currently being licensed (for example owing to the prohibitive cost of obtaining clearance), then this will represent a new revenue stream for users. The *Bokhylla* project in Norway is an example of where ECL has had such an effect (albeit within a pilot scheme); estimates are that annual remuneration of €0.64m will have been paid to authors by 2012 as a result of a single licence to the Norwegian National Library for the making available to the public (within Norway) of 50,000 books.

### **2. Reduced Administration and More Efficient Collection**

Collecting societies charge their members, the copyright owners, administration fees. These are deducted from the licensing fees, leaving the balance available for distribution as royalties to their

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<sup>5</sup> Example related to us by KOPINOR, a large Norwegian collecting society

members. Among the major collecting societies in the UK, these fees range from around 10% to approximately 25%.

Insofar as a collecting society operates an Extended Collective Licence scheme for part or all of its licensing activities, it should benefit from some reductions in administration and repertoire management (because it will have greater clarity about the extent of its repertoire). This could allow collecting societies to dedicate more resource to more accurate recording and monitoring of usage, thereby enabling more precise collection of royalties. Evidence provided by a UK collecting society prior to the consultation had suggested that the introduction of ECL could result in administrative savings of between 2-5%. However, in responses to the most recent consultation, collecting societies argued:

- a) That in some cases, any use of ECL might only apply to a small proportion of a collecting society's overall activities (and that therefore any benefit from administrative savings would be reduced), and;
- b) That ECL would lead to additional costs in some areas (as discussed in the costs section of this document).

Evidence from the consultation did not necessarily contradict the assertion that savings could result in some areas, but rather questioned the extent of these savings and asserted that they would be countered by additional cost elsewhere. Again, it is worthwhile to reiterate that extended collective licensing would only be introduced on a voluntary basis; therefore it can be assumed that collecting societies will only choose to apply for authorisation if they and their members perceive there to be a benefit. One collecting society has suggested that a potential benefit could take the form of indirect savings rather than an immediately quantifiable reduction in administrative cost base (for example, through a reduction in queries about repertoire, or reduced exposure to litigation resulting from the increased certainty provided by ECL). However, it is not possible to quantify these benefits given the evidence presented in the consultation. It would not be proportionate to carry out any further work to try and estimate these costs because (as discussed above) ECL is voluntary, and therefore would only be expected to be taken up where a collecting society believe the benefits outweigh any costs. The markets in which different collecting societies operate have different characteristics, and costs of clearance. Each society and its members and users will make different judgements on the benefits of ECL. The incentive for each to take part in what is an entirely voluntary scheme will depend on the judgement of members that the benefits derived from the extension of the repertoire outweigh any risks to revenue or additional administrative burdens.

### 3. Guaranteed Remuneration

Collecting societies do not provide the only method of obtaining rights clearance. In some sectors, a significant proportion of rights are self-managed. For example, one major collecting society estimates that it has 90% coverage, with the remaining 10% presumably self-managed or unmanaged. Self-management can be a conscious decision and one which the Government would want to ensure remains possible. However, in many other cases a lack of active management or even lack of awareness that they *are* the rights holder means that they do not enjoy any financial benefits - and their lack of consent prevents others from making use of the work legally.

A key benefit of ECL is that these rights holders will automatically have their rights safeguarded. If their rights have been used, they will be compensated if they subsequently come forward (for example in response to advertising by the collecting society) or are traced by the collecting society during its distribution process. Should the rights-owner prefer to manage their rights in another way, they would retain the capacity to opt-out of the scheme. In 2004, 13% of rights holders whose works were used under the Finnish broadcasting ECL were non-identified<sup>6</sup>. The application of ECL in this instance ensured that remuneration was collected for those rights holders, whose work may otherwise have been used on an unlicensed and uncompensated basis.

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<sup>6</sup> Koskinen-Olsson, T. (2006) 'Collective management in the Nordic countries', in D. Gervais (ed.), *Collective management of copyright and related rights*, The Hague: Kluwer Law International, p. 272

This benefit also serves to counteract any risk to users who may have wished to opt-out of a scheme, but did not (for example because they were not made aware of the scheme in a timely fashion.) Currently, a rights holder who finds that their work has been used without permission only has recourse through the legal system. This is usually expensive and time consuming, so is not an option for the majority. If the work has been used under an Extended Collective Licensing scheme, the rights holder would be able to approach the relevant collecting society and claim any money that has been collected for its use (which would have been collected automatically, even if the collecting society did not know the identity of the rights holder). The rights holder will also maintain the option to tell the collecting society to stop licensing their work.

#### 4. Legal Certainty

The Government calculates that the current business models and operations of certain collecting societies could, in theory, give rise to the risk of civil or criminal sanctions. This is because, in the context of mass usage in numerous permutations, it can be difficult - if not ultimately impossible - for a collecting society to obtain a mandate to represent all rights holders, whether domestic or foreign (foreign rights are usually dealt with by means of reciprocal agreements with overseas collecting societies, but the same problems of coverage apply as with domestic rights). Given the demand for different types of usage of different rights, it is possible that a collecting society could get to a point where it may be licensing outside its repertoire. This is supported by Professor Daniel Gervais's study<sup>7</sup> prepared for the Department of Canadian Heritage in which he looked at the issues related to the implementation of ECL in Canada. Professor Gervais, a leading international authority on ECL, concluded that in Canada, at least, very few collecting societies could boast a complete repertoire.

Equally, it may not be practically possible for users to clear every single right that they wish to exploit and they may decide to risk going ahead without full clearance. In some cases, users may simply not be aware of the need to clear certain rights or are unable to negotiate the sheer complexity of the system.

ECL would enable the licensing system to be structured to significantly reduce the risk of infringement. Collecting societies would be able to license confidently with a substantially reduced risk of licensing outside their repertoires, and a consequent reduction in their exposure to legal claim. Users would be able to obtain licences for the use of an increased number of works from one body. Once they have bought their licences, users can be more confident that their exploitation will not be interrupted by unexpected claims from one or more rights holders.

#### 5. We think that there could be additional impact in the form of economic activity and growth in the following ways:

- Cost and value improvements in the production of other creative works. Many commercial creative works employ elements of others for which licences are required. Making licensing of other work easier should increase the range of works that can be used. This may lead to further value creation and cumulative innovation.
- Incentive improvements: ECL should tend to improve the returns to "marginal" creators, i.e. those who are not signed up with collecting societies from ignorance or omission rather than by conscious decision. Increased returns to these creators would tend to increase the supply of creative works, creating competition that will drive up quality and/or drive down prices in general.

Although we would expect these benefits to be realised, we have not been able to quantify the extent to which they would do so. We have looked for evidence both in the Nordic countries and among stakeholders (including through the recent consultation process), but have found that what little exists in the way of quantification is not directly useful for our purposes.

### **Risks and assumptions**

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<sup>7</sup> Professor Daniel Gervais, 'Application of an Extended Collective Licensing Regime in Canada: Principles and Issues Related to Implementation.' (June 2003)

ECL would enhance the existing powers of collecting societies in so far as they will be authorised to administer the rights of non-members. The Hargreaves Review of Intellectual Property and Growth recommended that collecting societies be regulated by being required by statute to adopt codes of conduct. The Government has accepted this recommendation. It is assumed that the risk of enhanced powers to collecting societies (which are generally monopolies) will be mitigated through the successful passage of legislative provisions for the adoption of codes of conduct, and by ensuring that any legislation which enables applications for ECL includes relevant safeguards (such as the ability of rights holders to opt-out).

We assume that there is a low risk of legal challenge/ judicial review to legislative provisions for extended collective licensing. This is because ECL is purely voluntary. The Government will put in place provisions for a collecting society to apply for an ECL licence only if it wants to do so. We would expect the collecting society to have the consent of its membership to operate in extended collective licensing mode. Additionally, we would anticipate it to have done thorough due diligence to make sure that operating in ECL mode would make financial and commercial sense to it. Because rights-holders would maintain the capacity to opt-out of a scheme (and because a scheme could only be introduced by a collecting society which met representation requirements and had the support of its members), we assume a low risk of costs to rights holders who did not want ECL to apply to their works.

### **Summary and preferred option with description of implementation plan**

Professor Hargreaves, in his independent Review of Intellectual Property and Growth highlighted the economic importance of the UK's copyright industries, arguing that efficient markets for copyright licensing are essential for the UK's growth prospects. He noted the complex and time consuming nature of the licensing system and made several recommendations for simplification. He supported a system that included extended collective licensing, a type of licensing that has been shown to reduce transaction costs and make for a simpler and more efficient system.

The Government intends to introduce a legislative package that would include provisions for extended collective licensing. The legislation would be in the form of an enabling power that would allow the Secretary of State to make, by regulation, provision for collecting societies to apply to be authorised to run extended collective licensing schemes. An enabling power is necessary: it allows for some future-proofing in an area of policy that can often struggle to keep up with the pace of technological changes. However, the regulations will be published and widely consulted on before being laid before Parliament. These proposals are subject to securing an appropriate legislative slot.

### **Direct costs and benefits to business calculations (following OIOO methodology)**

Introducing the ECL will involve recasting the existing legislation. Under the "One In, One Out" rule, a measure that has a net cost to business must have a measure or measures of equivalent cost removed in order to be implemented. This Impact Assessment aims to introduce regulation and is therefore an 'In'. The regulation introduced will result in an entirely optional service that collecting societies can use. Therefore there is no direct cost to business unless they wish to use the service. For this reason we have counted this as a zero-cost measure.

### **Evaluation**

A full evaluation strategy and Post Implementation Review is being developed for the introduction of the Hargreaves recommendations. The Post Implementation Review will detail the benefits associated with the introduction of the copyright reforms and will include input from external stakeholders. The plan will also set out how and when the benefits will be measured, which will depend on the type of benefit, as some benefits will be measured by applications and take-up that can be measured from the first year of operation, whereas others will depend on information that will take several years. The evaluation strategy will set out the activities that will be undertaken in order to evaluate the policy, drawing on management information collected through the copyright system, as well as research that is commissioned in order to measure the benefits.

The main source of data available for evaluation will be collated using industry figures. These statistics, alongside other management information on the operation of the system will be used by Government to assess the impact of the copyright reforms, including assessing whether benefits have been achieved and how policy or operations can be developed to realise benefits more effectively.