

Extended Collective Licensing

Briefing for associations and societies representing publishers, authors and visual creators (Non-UK).

We are writing to advise you of the intention of the Copyright Licensing Agency (CLA) to operate an Extended Collective Licensing (ECL) Scheme in the UK. This note explains the background to CLA's application to the UK Government for an ECL authorisation, the effect of a successful application on rightsholders both in the UK and overseas, potentially including your members, and their right to opt out.

The key points for you to note are:

- CLA, on behalf of its members, is applying for an ECL authorisation to formalise its rights position under UK law.
- The application has been made in accordance with The Copyright and Rights in Performances (Extended Collective Licensing) Regulations, which were introduced in 2014.
- The UK Government will shortly commence a public consultation on CLA's application. I will send the details for this once it has launched.
- Rightsholders have the right to opt out any or all of their works from CLA licences and this will continue should the ECL authorisation be granted.
- The ECL scheme, if granted, will apply to CLA's licensing in the UK only.
- The majority of works copied under CLA's licences are published in the UK, and therefore the use of foreign works is minimal.

CLA and Extended Collective Licensing

In 2014 the UK Government introduced The Copyright and Rights in Performances (Extended Collective Licensing) Regulations (the Regulations) to enable licensing bodies, such as CLA, to apply to operate an extended collective licensing scheme.

ECL enables licensing bodies that represent a significant number of rightsholders in a class to extend their licences to cover unrepresented rightsholders in the same class.

In October 2017, CLA submitted an application to the UK Government for an ECL authorisation to support the collective licences it provides to the education, business and public administration sectors in the UK. CLA's licences enable organisations to copy and re-use short extracts from print and digital published materials, including books, journals and magazines.

CLA is able to offer collective licences through the authorisation it receives from its members representing the various classes of rightsholder: The Authors Licensing and Collecting Society (ALCS), Publishers' Licensing Services (PLS), the Design and Artists Copyright Society (DACCS) and the Picture Industry Collecting Society for Effective Licensing (PICSEL). Further information on CLA and its member organisations can be found at the end of this document.

CLA also has bilateral agreements with equivalent Collective Management Organisations (CMOs) in 39 territories which allow it to include works published in those territories in its licensed repertoire, and to receive revenues when UK works are copied in those territories.

By applying for ECL, CLA will formalise its rights position and enhance transparency for both rightsholders and users. As with CLA's current licences, rightsholders can choose to opt out any or all of their works that they do not wish to be included in the licensing scheme.

CLA's data shows that just under 8% of works copied under CLA licences were originally published outside the UK.

During July 2017, ALCS, PLS, DACS and PICSEL contacted their members to inform them of CLA's intention to apply for an ECL authorisation, and to seek their consent. The response to the proposed scheme has been overwhelmingly positive from UK rightsholders.

ECL Benefits for Both Users and Rightsholders

ECL offers users comprehensive 'blanket licences' guaranteeing the lawful right to copy and use all works protected by copyright, subject to any that have been opted out, without the administration and cost involved in trying to locate individual copyright owners to seek prior permission. Conversely, collective licensing helps rightsholders who cannot realistically seek to control hundreds of thousands of uses that may be made of their works.

An extension of collective licences to cover works of those rightsholders not already participating in collective licensing helps to build respect for copyright by making it clear to users that they need a licence to use a copyright protected work and that they should pay a fee for it. It removes the need for wider exceptions to copyright and ensures that copying that would otherwise be done for free, whether under an exception (in the case of education, for example – see below) or illegally, is properly licensed. Importantly, it also respects the rights of creators and publishers to exclude their works.

CLA provides blanket collective licences to copy limited extracts from books, magazines and journals to the education, business and public sectors. It distributes the licensing revenues generated to all rightsholders whose works are shown to have been copied under its licences. An ECL authorisation will regularise the current CLA scheme.

ECL Application Process

CLA submitted its application to the UK Government on 6 October 2017. The Government is obliged to publish a notice setting out details of the application and must consider any comments provided in response to that notice. The notice must allow a period of at least 28 days during which comments may be provided. The UK Government has indicated that it intends to run an 8-week consultation process, via the Intellectual Property Office, commencing in December 2017. Further information will be available at www.gov.uk/government/organisations/intellectual-property-office

Concurrent with the Government's consultation process, CLA will place advertisements in the UK trade press in order to publicise to non-members its intention to introduce an ECL Scheme. We are also notifying CLA's CMO partners and key trade associations around the world in order to raise awareness amongst rightsholders so that they can decide whether or not they wish to opt out of the ECL Scheme.

The Government must publish its decision on whether or not to grant the authorisation. CLA expects the decision to be made by 31 March 2018.

Protection for Rightsholders

The Regulations contain important safeguards for rightsholders including:

- (i) CLA must show evidence of the informed consent of its members (see below);
- (ii) an ECL licence must be operated by a licensing body owned or controlled by the rightsholders themselves and organised on a not for profit basis;
- (iii) CLA must operate in accordance with [The Collective Management of Copyright \(EU Directive\) Regulations 2016, a set of rules that regulate licensing bodies](#);
- (iv) there is an overriding requirement for CLA to show it is truly representative of the class of rightsholders whose works are to be covered by the ECL authorisation;
- (v) generally, applications will relate to the extension of an existing scheme (this suggests there is already a general acceptance of the licence amongst the relevant rightsholders);

- (vi) an ECL scheme must allow opt outs so that no copyright owner is forced to participate in the scheme against their wishes (see below for details on how rightsholders can opt out);
- (vii) proposals for ECL schemes must be widely publicised so that all rightsholders (members and non-members) are aware of the existence of the scheme and of the possibility to opt out;
- (viii) there are strict rules regarding the distribution of licence fees (see below);
- (ix) the authorisation for an ECL scheme is limited to an initial 5 year period, although it can be renewed after 3 years. It is then subject to a 3 yearly review cycle;
- (x) authorisation for an ECL scheme cannot be transferred to another organisation and can be revoked at any time if CLA is in default of any of its obligations;
- (xi) authorisation for an ECL scheme applies only to copyright uses taking place within the UK.

Important Information on Use of Extracts in UK Education Institutions

Under UK copyright law there is a statutory exception to copyright which allows educational institutions to copy up to 5% of a copyright protected work each year. This exception does not however apply if there is a licence available which authorises at least that amount of copying.

The CLA licences override this exception in respect of works which CLA is authorised to license by rightsholders, whether through their representative organisations in the UK or through overseas CMOs under their bilateral agreements with CLA. However, a copyright protected work that is not currently covered by a CLA licence, (for example any non-UK published works not covered by CLA's existing bilateral agreements) is subject to the exception, meaning that up to 5% of the work can be copied without remuneration. Under an ECL, CLA's licences would include all works (other than any that have been opted out), wherever published, and the licence fees cover copying that would otherwise be done for free under this statutory exception.

Please note that any works that are opted out of CLA's ECL scheme will therefore remain available for copying under this statutory exception by educational institutions and will not be eligible for a share in the allocation of CLA licensing revenues.

Opting Out of ECL

The Regulations allow rightsholders to opt out some or all of their works from an ECL scheme. To do this, they must give notice to ALCS or CLA and identify themselves. They may give details of all of the works they want to opt out but are not obliged to do so. If they do not, CLA is only required to give to its licensees such details as it has received.

Rightsholders (including exclusive licensees) can opt out of an ECL scheme at any time, whether before or after CLA has been granted authorisation by the UK Government. If any of your members wish to opt out of CLA's ECL scheme they can do so by contacting ALCS at Richard.Combes@alcs.co.uk. They can also opt out by sending an email to CLA at optout@cla.co.uk.

Rightsholders can choose to opt out of particular ECL licences or all of them. Equally they can choose to opt out some of their works only or all of their works. Ideally, they should always identify the opted out works to enable CLA to notify its licensees which works are excluded from a particular ECL licence. They must confirm that they are the rightsholder and/or have the rights to receive collective licensing revenues. Otherwise, they face the risk of a legal claim for damages if they opt out a work for which they do not have the authority since they may deprive the true copyright owner of a share of collective licensing revenues.

Please note that all existing opt outs from CLA's current collective licensing schemes will be honoured. While there is no requirement to notify CLA of these opt outs again, it would be advisable for the rightsholders in each case to review them to ensure that they are still relevant and are not depriving themselves unnecessarily of an entitlement to a share of licence fees collected by CLA.

For further information on the opt out process and its implications, please see the attached FAQs.

Distribution of Licence Fees

Under the Collective Management of Copyright (EU Directive) Regulations 2016, licence fees must be distributed as soon as practicable and, in any event, within nine months of the relevant year end where the rightsholder is identified and located. The ECL Regulations require undistributed funds to be held in a separate designated account pending discovery of the rightsholder, and after three years CLA must pay any undistributed funds to the UK Government unless otherwise directed by the Government.

CLA has notified its distribution policy to the Government in its application, namely:

CLA will distribute licence fees collected under an ECL Scheme to its members and to CMOs outside the UK in accordance with existing arrangements for distribution onwards to rightsholders under their respective distribution policies.

Any licence fees collected prior to an ECL Scheme, which are payable to overseas rightsholders in a territory where CLA does not yet have a bilateral agreement, will be retained by CLA for a period of three years from the end of the financial year in which the money was collected. If, after the three year period, the money remains unpaid, CLA will distribute such monies to its members for distribution onwards to rightsholders.

For licence fees collected under an ECL Scheme which are payable to overseas rightsholders in a territory where CLA does not yet have a bilateral agreement, CLA will distribute these monies to its members for distribution onwards to rightsholders.

CLA and its members will maintain searchable lists on their websites of works that have revenue allocated to them but where the rightsholder has not yet been identified or traced.

Further Information

If you would like more detail or have any questions, please contact:

Richard Combes, Head of Rights and Licensing, ALCS: Richard.Combes@alcs.co.uk

Or

Madeleine Pow-Jones, Policy and International Relations Manager, CLA: madeleine.pow-jones@cla.co.uk
+44 20 7400 3138

Extended Collective Licensing (“ECL”) FAQs for Trade Associations and Societies

Q What do I need to do now?

A You may wish to notify your members of CLA’s intention to apply for ECL authorisation. This will publicise the scheme to them and would enable them to exercise their rights to opt out if that is what they wish to do.

Q What is meant by an “opt out”?

A An “opt out” enables a rightsholder or an exclusive licensee in any of the works that are to be covered by a proposed ECL scheme, or which are covered by an existing ECL scheme, to exclude their works from some or all of the licences in the scheme.

Q When can my members opt out?

A They may opt out at any time by giving notice to ALCS or CLA whether before or at any time after an ECL scheme has come into effect following authorisation by the Government.

Q How can my members opt out?

A They can send an email to Richard.Combes@alcs.co.uk . They can also opt out via CLA by emailing optout@cla.co.uk .

Q Do they have to opt out all of their works and from all CLA licences?

A No, they are free to exclude all or some of their works, and can choose from which CLA licence(s) they are opting out.

Q Do rightsholders have to give an exhaustive list of titles when opting out?

A No, although it is helpful if they wish users to be clear as to what they can and cannot copy under a licence. If they wish to exclude only some of their works from an ECL scheme, it is in their interest to identify those works very clearly, both so that users know that they are not covered by the licence and also so that those works left in an ECL scheme can be identified as eligible for a share in the distribution of licence fees.

Q When will an opt out notice be implemented?

A Rightsholders who opt out will receive an acknowledgement within 14 days, licensees will be notified of the exclusion of these works, and this will take effect within 6 months from the date of their notice.

Q Do my members have to give notice to opt out when they have already opted out of existing CLA licence schemes?

A Any existing opt out arrangements are preserved and will be implemented in any ECL scheme. Therefore, they do not need to notify ALCS or CLA again of any works they wish to opt out of an ECL scheme where these have already been opted out of existing CLA collective licences.

They should, however, take the opportunity to review their arrangements and decide whether they are appropriate, especially given the recently widened copyright exceptions that allow some copying in educational institutions where no collective licence exists.

Q What evidence do my rightsholders have to give of copyright ownership?

A They must confirm in their opt out notice that they are the publisher, author or visual creator of the works being opted out, as the case may be, and that they retain either copyright ownership or at least the right to receive collective licensing royalties.

They should be aware that if they wrongly opt out a work to which they do not hold the relevant rights, or no longer hold the rights, they may be depriving the rightful copyright owner of their share of licence fees collected and may face a claim for damages from that rightsholder. They should therefore check carefully their entitlement to issue the notice.

Q What else will happen?

A If a rightsholder opts out directly with CLA, then their opt out notice will be copied to PLS, ALCS, DACS or PICSEL (depending on the category of rightsholder) who will be in touch with them to discuss collective licensing arrangements.

Q What if CLA fails to secure an ECL authorisation?

A If CLA failed to secure an ECL authorisation, it would in all probability have to amend its current licensing scheme to clarify that its licences only cover works mandated by its members (ALCS, PLS, DACS and PICSEL). To copy other works, licensees would have to seek individual permissions directly from the relevant rightsholders. In addition to placing an additional cost and administrative burden on licensees and rightsholders alike, licensees could put pressure on CLA to reduce its licence fees which, in turn, would mean reduced distributions to rightsholders.

Q Does ECL extend to copyright uses in countries outside of the UK?

A No. The authorisation granted by the UK Government would apply only to copyright uses taking place within the United Kingdom.

Q Will CLA's ECL authorisation impact on my primary rights?

A No. The authorisation would apply to CLA's existing licences which permit secondary uses of copyright works only, such as the copying and re-use of short extracts from print and digital published materials, including books, journals and magazines.

Q How can I make comments to the UK Government about the proposed ECL scheme?

A Now that CLA has submitted its application, the UK Government is required to publicise the scheme, allowing at least 28 days for comments. This will be done via the UK Intellectual Property Office. A public consultation will run for 8 weeks commencing in December 2017. Further information will be available at:
www.gov.uk/government/organisations/intellectual-property-office

About CLA, ALCS, PLS, DACS and PICSEL

The **Copyright Licensing Agency (CLA)** is the recognised UK collective rights management organisation for licensing text and images from book, journal and magazine content to the education, business and public sectors. CLA exists to simplify copyright for content users and copyright owners. Our mission is to help customers legally access, copy and share the published content they need, while also making sure that copyright owners are paid royalties for the use of their work. We've been providing rights and licences, as well as a growing range of services that simplify copyright and make it easier to access content, for over 30 years. CLA distributes the revenue it collects to ALCS and PLS, DACS and PICSEL who in turn distribute to authors, publishers and visual artists.

For further information please visit www.cla.co.uk

The **Authors' Licensing and Collecting Society Limited (ALCS)** is the UK collective rights management organisation representing the interests of authors. The current membership includes creators working across diverse genres for print, audio, audio-visual and digital publications. Established in 1977 and wholly owned and governed by the authors it represents (of whom there are currently over 95,000) ALCS is a not-for-profit, non-union organisation. ALCS exists to ensure that authors receive a fair reward when their works are used in situations in which it would be impossible or impractical to offer licences on an individual basis. To date ALCS has paid over £400m to authors. In addition to collecting fees, ALCS campaigns on behalf of authors at a national and international level.

For further information please visit www.alcs.co.uk

Publishers Licensing Services (PLS) is a collective management organisation representing the interests of publishers. It aims to provide efficient and effective copyright and licensing solutions to support publishers in providing access to their content. Its core activity is managing collective licensing on behalf of book, journal, magazine and website publishers and the centralised administration of their rights. Over 3,620 publishers are currently signed up to PLS. PLS is a private company limited by guarantee and was incorporated in 1981.

For further information please visit www.pls.org.uk

Established by artists for artists, **DACS** is a not-for-profit visual artists' rights management organisation. Passionate about transforming the financial landscape for visual artists through innovative new products and services, DACS acts as a trusted broker for 100,000 artists worldwide. DACS is a flagship organisation that campaigns for artists' rights, championing their sustained and vital contribution to the creative economy. DACS receives collective licensing revenues from the CLA on an annual basis, which is distributed to visual artists and their authorised representatives through DACS' Payback service. DACS also collects and distributes royalties to visual artists and their estates through Artist's Resale Right and copyright licensing. Since DACS was founded in 1984, it has paid over £100 million in royalties to artists and their estates – a significant source of income supporting artists' livelihoods, their practice and legacy.

For further information please visit www.dacs.org.uk

PICSEL is a new CMO for the visual arts, bringing with it wide experience of the picture agency industry. Its aim is to ensure that entities such as picture libraries and agencies of all sizes representing visual artists and creators, as well as those individuals licensing visual rights directly, can claim royalty payments effectively. PICSEL is a not-for-profit organisation, committed to taking care of member's interests, giving them a level platform to engage in secondary licensing. To this end PICSEL welcomes innovative solutions for secondary licensing as the industry adapts to a fast-changing digital environment, whilst protecting right holders' primary licensing businesses.

For further information please visit www.picssel.org.uk

