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To: Extended Collective Licensing Application Consultation
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Copyright and Enforcement Directorate
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United Kingdom of Great Britain and Northern Ireland

by e-mail: collectiverights@ipo.gov.uk

The National Writers Union (NWU) submits the comments below and the attached exhibits in response to your consultation and solicitation of views from interested parties regarding an application by the Copyright Licensing Agency (CLA) to operate an Extended Collective Licensing (ECL) scheme, as published at <<https://www.gov.uk/government/consultations/application-to-operate-an-ecl-scheme>>. For the reasons below, we believe that this application should be denied.

The NWU is a national labor union in the USA that advocates for freelance and contract writers. The NWU includes local chapters as well as at-large members nationwide and abroad. The NWU works to advance the economic conditions of writers in all genres, media, and formats. NWU membership includes, among others, fiction and nonfiction book authors, journalists, business and technical writers, website and e-mail newsletter content providers, bloggers, poets, novelists, playwrights, editors, and academic writers. The NWU is a national amalgamated union, Local 1981, of the United Auto Workers, AFL-CIO.

We want to make clear that we do not claim to represent UK residents or to express any opinion on what, if any, organization does so. That is a matter for UK writers. The NWU is a US-based organization. These comments are submitted on behalf of our membership of writers resident predominantly in the US. NWU members publish and exploit rights to our work from readers and purchasers of copies and licenses worldwide, including – of course – readers in the UK.

The NWU does not require our members to tell us their citizenships. Postal addresses, much less e-mail addresses, do not always indicate where our members legally reside. We do have some members who are UK citizens and/or UK residents, but we believe that the overwhelming majority of our members are US residents.

In general, and with respect to this application, the NWU opposes extended collective licensing (ECL) of digital rights.¹

We have explained the basis for this position in detail, most recently in a joint submission to the US Copyright Office in response to the request of that office for comments concerning possible legislation to authorize a pilot program ECL for mass digitization in the US.² (After consideration of the public comments, the US Copyright Office decided to recommend against any such legislation.³)

As we said in our most recent comments to the US Copyright Office on ECL for digital rights, “Our primary concern is that any ‘extended collective licensing’ (ECL) for mass digitization of library or archival holdings will, regardless of any attempted limitations on the included works or authorized uses and any ‘opt-out’ provisions or nominal ‘royalty’ payments, inevitably result in the granting of licenses for new digital editions that will compete unfairly with, and cannibalize larger potential revenues from, our own digital editions of our work.”⁴

For this reason, we believe that approval of this application would interfere with our normal exploitation of digital rights to our works and constitute a violation by the UK of its obligations pursuant to the Berne Convention.

Our objection is *not* to collective licensing in general, or to ECL in general.

As we said in our most recent comments to the US Copyright Office, “The NWU and SFWA have supported collective licensing systems, and certain secondary uses of many NWU and SFWA members’ work are available for licensing through the [Copyright Clearance Center] or other such agencies.... The NWU, SFWA, and many of our members receive money from ... ECL schemes for photocopying in foreign countries of books, articles, etc. by US writers.”⁵

Our objection is specifically to *extended* collective licensing for *digital* rights.

- 1 See, “National Writers Union Priorities for Copyright Reform”, <<https://nwu.org/book-division/position-papers-and-resources/priorities-for-copyright-reform/>>.
- 2 Comments of the NWU and the Science Fiction and Fantasy Writers of America, Inc. (SFWA), “Mass Digitization Pilot Program”, October 9, 2015, available at <<https://nwu.org/wp-content/uploads/2015/10/NWU-SFWA-ECL-9OCT2015.pdf>>.
- 3 Letters to the Chair and Ranking Member of the Committees on the Judiciary of the US Senate and House of Representatives, September 29, 2017, available at <<https://www.copyright.gov/policy/massdigitization/senate-letter.pdf>> and <<https://www.copyright.gov/policy/massdigitization/house-letter.pdf>>.
- 4 Comments of the NWU and SFWA, October 9, 2015, note 2, *supra*, p. 4.
- 5 Comments of the NWU and SFWA, October 9, 2015, note 2, *supra*, pp. 7,9.

To reiterate the explanation we provided to the US Copyright Office:

“The test for the legality of these ECL schemes is whether they interfere with the normal commercial exploitation of writers’ rights to our ‘backlist’ works. Very few US writers are actively exploiting the rights to photocopying in foreign countries of editions of their work that were previously published in books, periodicals, or journals. And photocopies made in foreign countries are unlikely to make their way back into the US to compete with other editions of the same works. So ECL revenues for foreign photocopying are typically secondary and incremental. They add to, rather than detracting from, whatever revenues US writers are earning from new (perhaps self-published) US print or e-book editions of our previously published works, or from ads on our personal websites where we have posted our older work.

“On the other hand, ECL schemes for digitization, rather than photocopying, fail the same test. Digital copies made under ECL licenses directly compete with, and divert readers and revenues from, other authorized digital editions.

“Many writers are actively exploiting our digital rights, including our rights to works previously published on paper in books, periodicals, or ephemera, and potentially held by libraries or archives in these formats. The primary source of continuing revenues from the rights to most ‘backlist’ written works previously published in books, printed journals, ephemera, or other printed formats, and included in library or archival collections, is not photocopying or the publication of new hardcopy editions but the distribution of new digital editions. These new digital editions, often self-published, take the form of e-books, paid PDF downloads of digital ‘off-prints’, content on our own revenue-generating websites, smartphone app content, etc.

“Someone who reads a digital copy of one of our previously-published works made under an ECL scheme doesn’t pay to download a PDF offprint or self-published new e-book edition, and doesn’t click on any of the ads on the pages of our website on which we have republished all or parts of the work (or of a new edition of it).

“In a world where most revenues for Web publishing come from advertising, clickstream diversion deprives writers of revenues and interferes directly with the normal commercial exploitation of digital rights.

“Extended collective licensing for digitization would, in this way, deprive writers of income and violate the Berne Convention. ECL may be appropriate for photocopying and perhaps some other secondary rights, but not for digital copying or digital format conversion (scanning) rights — the primary and most valuable rights to most backlist works.”⁶

Most writers need publishers, distributors of physical copies, and/or collective licensing agencies to exploit our rights to physical copying and making available our works abroad in

6 Comments of the NWU and SFWA, October 9, 2015, note 2, *supra*, pp. 9-10.

hardcopy formats. Not so much, if at all, with respect to rights to digital copies, which we can distribute directly worldwide.

By enabling writers to distribute our work directly to readers abroad, and to generate revenues from that distribution, the Internet makes it unnecessary, in most cases, for us to rely on collective licensing agencies to exploit our digital rights.

Many writers, of course, would prefer to assign the exploitation of those rights to a collective licensing agency, just as many writers would prefer to assign the exploitation of print rights to a publisher. Those who wish to do so can. But many writers would choose to exploit these rights ourselves, and this is a choice to which we are equally entitled.⁷ Writers must be free to make this choice for ourselves. It should not be imposed on us by law or regulation.

Many of these same issues were raised by the UK orphan works scheme, to which we objected and which we continue to believe constitutes a violation by the UK of its obligations pursuant to the Berne Convention.⁸

We would probably support this application, although with reservations and subject to the need for further clarification and improvement of procedures, if it were limited to print (hard-copy) reprographic rights. We would probably stand aside if this application were limited to works for which there is evidence that the author is a UK resident and that they are published in the UK, and if the applicants had provided satisfactory evidence that they had established procedures capable of accurately determining the country of publication of all works to be licensed.

However, we oppose this application for authorization to represent all writers worldwide with respect to rights to reproduction and distribution in digital formats of all written works published anywhere in the world.

Within the framework of this overall analysis, the following are our responses to those specific questions posed by the UK Intellectual Property Office, and those specific statements made by CLA in its application, which implicate the interests of US writers:

7 The "NWU Guide to Book Contracts", as most recently updated, recommends that in negotiating contracts for print publication, writers should reserve digital rights so that they can be exercised or assigned separately from print rights, unless they are convinced that the print publisher will most effectively exploit those digital rights.

8 See NWU comments to the UK Intellectual Property Office, "Copyright works: seeking the lost; Consultation on implementing a domestic orphan works licensing scheme and the EU Directive on certain permitted uses of orphan works", February 28, 2014, available at <<https://nwubook.org/NWU-UK-orphans-28FEB2014.pdf>>.

“2. Do you consider that it is reasonable for the CLA to include the types of works and rights stated above as part of the application? If you believe that the application should be made narrower or broader, please give reasons.”

The application contains no apparent limitation on its scope (although the notices provided to writers, as discussed further below, imply otherwise).

We believe that, at an absolute minimum, the works to which the applicant is granted authorization should be limited to works for which a procedure has been established and demonstrated to be likely to be effective for accurately determining their authorship and place of publication, and which have been determined to have been created by a UK author and published in the UK. Inclusion of rights to works published outside the UK would be likely to result in violations of UK obligations pursuant to the Berne Convention, as discussed above.

Anonymous works should be excluded as incapable of being opted out, and thus as likely to interfere with all normal exploitation of rights to those works.

The rights granted should be limited to print (hardcopy) rights. Digital rights should be excluded as likely to interfere with normal exploitation of those rights.

“3. Has the CLA provided sufficient detail on its proposed opt-out arrangements? If you think that further detail is required, please give details.”

CLA has provided no information whatsoever as to how the list of works available for licensing will be compiled or maintained, or how works created by authors who have opted out of the ECL scheme will be identified and excluded.

“5. Is the proposed opt-out system adequate to protect the interests of right holders? If not, how could it be improved?”

No, it is not adequate to protect the interests of writers as rightsholders.

First, it is based on an existing system that is not working. CLA’s list of works available for licensing already includes works with respect to which CLA has received no authorization, including by writers who have opted out.⁹

9 See Appendix 2, “Declaration of Edward Hasbrouck”, January 25, 2018, and the Exhibits attached to that declaration. To avoid burdening the IPO with unnecessarily voluminous and repetitive declarations of similar facts, we have provided a case study in the form of this declaration from one of the officers of the NWU which exemplifies the problems with the opt out process and with CLA’s list of works available for licensing. This example is characteristic of the reports that we have received from our members and other writers.

Second, CLA states that, “Right holders will be asked to identify the list of their Licensed Works they wish to opt out.” This hasn’t happened when writers have opted out.¹⁰ Perhaps more importantly, it is not ordinarily possible for a writer to itemize or identify all of the titles in which their work has been published. This is especially true for foreign editions. It has been routine practice for decades for works published in the US to be retitled for UK publication. Typical publication contracts in the US give the publisher, not the author, control over titles.

Of course, it is often unclear what, if any, title to give to a Web page.

As our fellow US writers from the American Society of Journalists and Authors (ASJA) pointed out in an earlier submission to the UK IPO, “Nothing in a typical book contract in the United States requires a publisher to notify an author about the sale of foreign rights. Sometimes it happens, sometimes it doesn’t. Therefore, please don’t assume that an American writer (or any foreign writer) necessarily will know if a book or other work ... is re-published or re-licensed in the U.K. Neither can a writer be presumed to know if an article, letter or any other work has been placed in a U.K. database or archive. No law obliges a publisher (including a self-publisher) to name the place a book, article or other written ephemera are being published. No law requires saying where the author resides, the author’s nationality, or whether all or a portion of a work previously has been published in another country.”¹¹

For a writer of numerous short-form works that have been published in an unknown number of editions, perhaps under multiple (and unknown) titles, and licensed or sublicensed for distribution at thousands or tens of thousands of URLs on multiple (and often unknown) domain names, an “opt out” limited to a list of named works would be wholly inadequate to protect the writer’s rights.

Third, CLA says in its application that, “The CLA website (cla.co.uk) has an online search tool with which licensees can check whether titles can be copied under the licence (Check Permissions).... CLA’s Check Permissions tool makes it easy for users to check what is or is not included in the licences.”

However, CLA fails to note that its search tool returns results only for names of authors of entire books, and for titles of entire books or titles of periodicals. It does not appear to return results for authors or titles of articles, stories, poems, or other works included in periodicals, anthologies, or collections.

The CLA search tool is thus completely useless for authors of short-form works. It cannot be used to determine whether or which of their works are being offered for licensing by CLA, or to verify whether their opt-out requests have been acted on.

¹⁰ See Exhibit B to Appendix 2, which contains no request for a list of titles.

¹¹ “ASJA response to UK IPO proposal”, February 28, 2014, available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/327006/American_Society_of_Journalists_and_Authors.PDF>

Of course, CLA will have received no complaints about those listings in its database which writers can neither search for nor review. In the absence of any means for writers to verify the completeness, accuracy, or opt-out status of these entries in the database for short-form works included in periodicals, anthologies, or collections, it would be premature to make any finding that the database is accurate or complete, or provides an adequate basis for an opt-out scheme.

For those works and writers for which searches can be performed, the results are filled with errors.¹² Hardly any of the writers we know who have searched for their own names and the titles of their own books have not found errors, ranging from missing or inaccurate attribution to inclusion of unauthorized works.

Fourth, CLA states that, “Any copyright owners... may opt out of the proposed ECL licence.” However, CLA fails to note that the applicable IPO regulations require that, “A non-member right holder who wishes to exercise their right to opt out must provide the relevant licensing body with their name, so that the relevant licensing body may list the name under paragraph (6)... The relevant licensing body shall in respect of each Extended Collective Licensing Scheme maintain and make available to the public a list of — (a) the names of those non-member right holders who have opted out; (b) any relevant works which have been identified as opted out.”¹³

With respect to a writer who has chosen to publish her work anonymously, a “right” to opt out which is contingent on identifying herself as the author of that work, and having her name and that identification made public, is no right to opt out at all. It is certainly not adequate to protect her rights.

Because the IPO regulations make it impossible for authors of anonymous works to opt out without “outing” themselves, effectively preventing them from opting out, all anonymously published works must be excluded from any ECL license. To do otherwise is to ensure that ECL licensing will interfere with normal exploitation of these works, in flagrant violation of the Berne Convention and of the rights and interests of the authors of these works.¹⁴

12 See Appendix 2, and the Exhibits to that Appendix, for a case study of types of errors which have characterized responses to searches by NWU members and other writers.

13 The Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014, made 11th September 2014, coming into force 1st October 2014, section 16.

14 Works self-published anonymously are, by definition, “orphan works” from the moment of creation, because the rightsholder cannot be identified. This is true regardless of how actively the rights to these works are being exploited. The inevitable interference with the normal exploitation of anonymously self-published works is one of the most obvious ways in which “orphan works” schemes such as those in the UK and the European Union violate the rights of writers and the obligations of parties to the Berne Convention. See NWU comments to the US Copyright Office on “orphan works” and mass digitization, February 4, 2013, available at <<http://www.nwubook.org/NWU-orphan-works-4FEB2013.pdf>>, NWU reply comments on “orphan works” and mass digitization, March 6, 2013, available at <<http://www.nwubook.org/NWU-orphan-reply-comments-6MAR2013.pdf>>, and comments of the NWU and the American Society of Journalists and

This is especially significant with respect to digital publications. In the hardcopy world, a writer typically needs a publisher as an anonymizing proxy in order to exploit rights to her work anonymously. In the digital environment, there are numerous ways that works can be profitably self-published anonymously. Revenues can be generated through advertising, through payments for digital downloads or subscriptions by PayPal to an account associated with an anonymous e-mail address, or through licensing of editions in other digital formats.

The greater ease of anonymous exploitation of rights in the digital environment has led to a publicly beneficial explosion of anonymous publication. Muckrakers, whistleblowers, writers on stigmatized subjects or in stigmatized genres, writers who would fear stalking, harassment, or retaliation if their identities became known, and writers who want to write on intimate topics without themselves or their intimate friends or families being identified, all have new options in the digital environment for earning a living from their writing. The public benefits from the availability of these works.

Many of these writers could not afford to produce these works if they were not able to exploit their rights to them. Many of them would not publish these works if publication or exploitation of rights required being publicly identified.

Fifth, the opt out requirement will be unreasonably burdensome because it will be applicable solely to this scheme in the UK. A writer who is exploiting her worldwide rights directly, particularly via the Internet, will probably wish to opt out of ECL schemes in all countries if she wishes to opt out of any of them. It would be unfair, and likely be prohibitively burdensome, to require her to opt out separately from each such scheme in each country in the world.

To the extent that opting out is a condition for the continued exercise by creators of their rights, in the manner of their own choosing, it is a *de facto* “formality” for copyright protection. The Berne Convention prohibition on formalities contains no *de minimis* exception. The more burdensome the opt-out process is, the more likely it is to constitute a prohibited formality.

To minimize the burden on those who wish to opt out, it should be possible to opt out from all such schemes in all countries with a single request. At a minimum, the NWU has recommended that the EU make available a single opt out through the portal operated by the EU Intellectual Property Office (EUIPO) applicable to all ECL, “out of commerce”, and “orphan works” schemes throughout the EU.¹⁵ We also recommend that the UK join and continue to participate in such a pan-European opt-out system that remains applicable to the UK and the EU after Brexit.

Authors (ASJA), “Removal of Personally Identifiable Information from Registration Records”, October 17, 2016, available at <<https://nwu.org/wp-content/uploads/2016/10/NWU-ASJA-PII-registration-17OCT2016.pdf>>.

15 Amendments to Article 7 of the proposed EU directive on copyright in the digital single market proposed by the NWU, available at <<https://nwu.org/wp-content/uploads/2016/11/NWU-amendments-out-of-commerce.pdf>>.

“To date, no right holders have opted out of the proposed ECL scheme.”

This claim by CLA is false. We do not know how many writers have opted out of the proposed ECL scheme, but we know that some writers have done so.¹⁶ The numbers of writers who have opted out are undoubtedly small, but only because so few US writers are aware of the scheme and of CLA’s plans to expand it to encompass US works.

The most charitable interpretation for the erroneous claim that no rightsholders have opted out is that CLA and/or its members have failed to keep track of those writers and other rightsholders who have opted out. But we have no reason to think that they will retroactively be able to retrieve and reconstruct their lost records of the opt-out list with any confidence that they have found all such opt-outs that were previously requested and confirmed.

This failure is likely to be incurable. Once a writer has received confirmation that their opt-out request has been received and that their works will be excluded, they are unlikely to pay any attention to further notices about an opt-out from that scheme. As far as they are concerned, they have already taken care of that.

“7. Has the CLA demonstrated that it is sufficiently representative of the type of right holder affected by the scheme?”

No, it has not.

We reiterate that we express no opinion as to whether CLA is representative of writers in the UK. However, CLA is not representative of US writers, who make up a substantial portion of the rightsholders who would be affected by this scheme.

We do not believe that CLA, any of the members of CLA, the NWU, or any other organization is, or is likely to be in the foreseeable future, qualified to represent all US writers.

“8. If not, where do you consider that the representation is insufficient? Please provide reasons and evidence for your response.”

CLA is a UK-based organization all of whose members are UK-based organizations. So far as we can tell, those writers who are members of CLA affiliates are predominantly UK-based or published in the UK. CLA’s application provides no information regarding membership by US or other foreign writers.

We have no reason to think that any significant percentage of US writers are members of ALCS or any of the other creator or publisher organizations which constitute CLA.

¹⁶ See Attachment 2, “Declaration of Edward Hasbrouck”, and Exhibits A and B therein, opt-out request and message confirming opt-out.

We cannot speak for the business practices of UK writers, but most NWU members and other working writers in the US self-publish at least some of their work. Self-publication formats are mainly (although by no means exclusively) digital, and include e-books, other digital downloads, Web content including personal websites and blogs, e-mail newsletters, and social media postings.

To put it another way, most working US writers are also publishers. The NWU, like most other organization of working writers in the US, is thus an organization both of writers and of publishers.

CLA's rules require that members can belong to only one category, either "creators" or "publishers".¹⁷ It appears that the NWU would be ineligible on this basis for membership in CLA, even if we otherwise qualified. Organizations of self-publishers appear to be structurally disenfranchised by CLA's membership rules. It is scarcely surprising, in light of this, that self-publishers (especially self-publishers of new, mainly digital, editions of works previously published in print editions) are among those writers who would be most adversely impacted by approval of this application.

According to the ECL application, CLA has mandates from 3,748 publishers. This is a tiny percentage of the number of publishers in the US, much less the number of publishers in the world, and especially small in relation to the numbers of digital publishers including digital self-publishers around the world.

As a lower bound to the number of commercial publishers in the world, Google reported in 2010 that more than 2 million publishers were receiving payments through the Google AdSense online advertising brokerage.¹⁸ Note that (1) this was 2 million publishers, not 2 million websites, and (2) these were all publishers of websites that were being actively, commercially exploited through online advertising, not publishers of noncommercial websites.

Presumably, the number of publishers is larger now than it was in 2010. We suspect that there are at least hundreds of thousands of these publishers, perhaps a million or more, in the US. Many, perhaps most, of these are self-publishers.¹⁹

17 "Members Agreement Relating to the Copyright Licensing Agency Ltd.", <<https://www.cla.co.uk/sites/default/files/alcs-pls-members-agreement.pdf>>.

18 "Google AdSense Rolls Out New UI; Now Used By 2 Million Publishers", by Leena Rao, TechCrunch, November 10, 2010, <<https://techcrunch.com/2010/11/10/google-ad-sense-now-used-by-2-million-publishers-rolls-out-new-ui/>>.

19 Facebook claims to be a platform, not a publisher. The NWU thinks that this is sophistry. Facebook is a publisher, and almost certainly the largest publisher in the world. Facebook is a for-profit commercial publisher and monetizes every posting on Facebook, even if Facebook doesn't share any of the revenue with the creator. There is no such thing as a non-commercial posting on Facebook. But if Facebook's claim to be a platform, not a publisher, is accepted, that implies that everyone who posts on Facebook is a self-publisher on the Facebook "publishing platform". That would mean that there are several billion publishers in the world, and more than a hundred million in the US.

We see no evidence in the CLA application that CLA or any of its members are representative of the bulk of writers in the US or around the world, either as creators or as self-publishers.

It's unclear whether self-publishers are expected to join separate CLA-affiliated organizations to represent their interests as creators and as publishers. It's also unclear whether any of CLA's publisher members have membership or dues categories appropriate and accessible to typical digital self-publishers (such as self-publishers of Web and e-mail content), or any significant number of such members, from the US or anywhere else.

Pursuant to CLA's Articles of Association, one independent director "shall be appointed...in consultation with any appropriate third parties to represent rights-holders whose Works are licensed by the Agency under extended collective licensing."²⁰

US writers are one of the most obvious classes of rightsholders who are not likely to be members of CLA-affiliated organizations, but whose works would be licensed under the proposed ECL scheme. But so far as we can determine, the NWU has never been consulted by CLA concerning the appointment of the independent director who supposedly represents us. We have been unable to find any indication on the CLA website or in any communication we have received from CLA of which Director is supposed to represent us and other non-UK writers.

"12. Are the terms and conditions, and the distribution policy that the applicant intends to apply to the scheme appropriate to protect the interests of right holders? If not, how do you think this could be achieved?"

CLA says in relation to this question that, "This evidence was provided as an appendix to the application and can be viewed at appendix 3." Appendix 3 to the application consists only of links to the distribution schemes of organizations which are members of CLA. It is entirely silent on CLA's policy for dividing revenues between authors and publishers.

We understand, however, that in general CLA divides all revenues received under its existing licensing schemes 50/50 between authors and publishers.

We express no opinion on whether this distribution policy is appropriate to protect the interests of UK writers, in light of UK norms of author-publisher contracts.

We can say, however, that this policy and division of revenues is inappropriate and wholly inadequate to protect the interests of US writers. Until recently, typical contracts for print publication in the US pertained only to print (hardcopy) rights. This was often true for book publication, and almost always true for publication in periodicals. Under US copyright law, rights not explicitly assigned were retained 100% by the writer.

20 "Articles of Association of the Copyright Licensing Agency Ltd.", Section 29.1.3, <<https://www.cla.co.uk/sites/default/files/articles-of-association.pdf>>.

In *New York Times v. Tasini*,²¹ a lawsuit brought by the NWU, the US Supreme Court found that when rights to reproduction in digital form were not explicitly assigned by a writer to a publisher, a contract for print publication could not be presumed to imply an assignment of rights to copying or distribution in digital formats. Those rights were retained by the writer.

The NWU took publishers to the Supreme Court – successfully and at great organizational cost – to establish that, under US law, writers retain and are entitled to control and receive 100% of the revenue from exploitation of digital rights to most work still in copyright that was published in US print periodicals such as are subject in the UK to CLA licenses.

Publishers of US print periodicals in which our works were published before the late 1990s, sometimes later, generally have no legal interest whatsoever in rights to digitization or digital use of those works. That legal principle having been established by the US Supreme Court, it would be grossly unfair, and a violation of US writers’ rights under the Berne Convention, to require us to divide revenues for current digital editions and uses with publishers of previous print editions of our works. Such a distribution policy would deprive us of half of the revenues to which we are entitled, as well as interfering with our exclusive rights to control the content, format, and mode of monetization (sale, licensing, or advertising) of those new editions.

“13. Are the proposed publicity arrangements sufficiently detailed?”

No, they are not. In particular, they give insufficient information about the scope of the requested ECL authorization, the works and rights to which it pertains, and the licenses that CLA would be authorized and intends to grant.

The notices describe CLA’s existing licenses and the corpus of works currently being licensed by CLA. They seem intended to create the impression that the licenses granted, if this application is approved, would be similar in scope.

But on closer reading, that appears to be incorrect. The application is for authorization to license use within the UK (and perhaps outside the UK by “private networks” connected to UK servers, which could encompass, e.g., a worldwide student body of unlimited size of a nominally UK-based online educational institution) of any written work published anywhere in the world.

Nothing in the application or the requested authorization to operate an ECL scheme would be limited, so far as we can tell, to the current CLA licenses.

Indeed, the whole point of obtaining authorization to operate an ECL scheme is to be able to offer *new* types of licenses to a *larger corpus* of works.

21 533 U.S. 483 (2001). The lead plaintiff, Jonathan Tasini, was the president of the NWU and is a freelance journalist and author who had licensed articles for publication in the print edition (the only edition that then existed) of the *New York Times*.

But neither these facts, nor their implications, are spelled out in the notices. Once these facts are known, it becomes obvious that the impact of the ECL scheme on foreign writers is potentially far greater than that of the current CLA licenses.

For example, CLA is already negotiating to offer a license, if this application is approved, authorizing the digitization and making available in digital form of one of the world's largest archives of magazines. Most of the works in this collection are in copyright, and many of them were published in the US.

According to one report in 2015, quoting James Hyman of the Hyman Archive, "We are working with the Copyright Licensing Agency (CLA) and industry stakeholder groups (publishers, authors and photographers) to obtain an Extended Collective Licence (ECL) which will enable us to digitise and commercialise the contents of the Archive. Having obtained an ECL, we will then digitise the archive's contents.... Undoubtedly, it will be the biggest and most important new print digitalisation project taking place in the world today."²²

These plans are not mentioned in any of the publicity to rightsholders about this application. The NWU learned of these plans from news reports and from our own meetings with the Hyman Archive, not from CLA or any CLA member.²³

This is an issue of the accuracy as much as of the level of detail of the notices. CLA is seeking authorization to license rights to the corpus of all written work ever published anywhere in the world. Notwithstanding the significant scale and importance of UK publishing, the UK is a minority of world publishing.

This application is predominantly about the licensing of non-UK works, a significant fraction of which were created and published in the US.

The vast majority of the global corpus of works that CLA would be authorized to license was neither created by UK writers nor published in the UK. To provide meaningful notice to US or other non-UK authors, it is essential for this to be stated prominently and explicitly.

Similarly, it is essential for meaningful notice to inform writers explicitly that the application, if approved, would allow the creation of entirely new licenses for new uses of new classes of works.

It would also be essential in the interest of fair notice for CLA to provide details of the licenses it is considering offering, including for digitization of the Hyman Archive.

22 James Hyman, quoted in "At work with: James Hyman, The Hyman Archive", by Madeleine Morley, Magculture, November 30, 2015, <<https://magculture.com/james-hyman-the-hyman-archive/>>

23 Mr. Hyman has told the NWU that he has discussed these plans with the UK IPO.

Most NWU members and other US writers with whom we have shared what we have learned about the plans for licensing of digitization of the Hyman Archive through an ECL scheme are shocked and outraged. This would be a clear violation of our rights, and a clear violation by the UK of its obligations pursuant to the Berne Convention. If the intention of the CLA to offer such a license had been explicitly stated in any widely publicized notice of this application, we imagine that the IPO would have been inundated with objections from US writers.

We are concerned that the notice of this application received by the NWU²⁴ differed from the notice submitted by CLA to the IPO as part of this application.²⁵

The notice submitted to the IPO, Appendix 12 to the CLA application, included the following: “CLA’s data shows that just under 8% of works copied under CLA licences were originally published outside the UK.”

Obviously, the percentage of uses of non-UK works from the corpus currently being offered by CLA under its current licenses is not dispositive of the likely percentage of non-UK works that would be used under new licenses to a much larger corpus, a larger percentage of which corpus is from outside the UK.

But this percentage is, nonetheless, an important disclosure.²⁶

However, in the notice received by the NWU, this statement was preceded by a boldface list of “key points for you to note” including the following: “The majority of works copied under CLA’s licences are published in the UK, and therefore the use of foreign works is minimal.”

We do not regard 8 percent of CLA’s turnover as “minimal”. We are disturbed that CLA chose to alter the notice it submitted to the IPO to explicitly “minimize” the potential implications for foreign works. And we believe that this statement in the notice we received would be likely to mislead most recipients into believing that the scope of works and rights covered by this application and proposed ECL scheme would be comparable to that of CLA’s existing licenses. Consideration by CLA of far larger projects implicating a larger percentage of US and other non-UK works, such as digitization of the Hyman Archive, makes clear that this would be a mistaken inference which should not be encouraged by CLA.

24 Attachment 1 to this submission, “Copyright Licensing Agency Application for ECL”, received by the NWU as an attachment to an e-mail message on December 7, 2017.

25 Appendix 12 to CLA Application for Authorisation to operate an Extended Collective Licensing Scheme, “Briefing Note on ECL for Non-UK Trade Associations”.

26 If only 8% of the usage (copying) that would be carried out pursuant to the ECL authorization applied for by CLA would be of non-UK works, then excluding those works from the ECL authorization would reduce the ECL revenues of CLA, its members, and UK writers by only 8%. If this is “minimal”, then any adverse effect on the incomes of UK writers from limiting any ECL authorization to UK works, as we believe is essential to protect the rights of non-UK writers and avoid violations of UK obligations pursuant to the Berne Convention, would also be minimal.

CLA's notice to non-UK rightsholders, both in the form submitted to the IPO and in the form received by the NWU, also contains a material, misleading, boldfaced misstatement of the law regarding our rights, as follows:

“[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.”

In fact, the UK Copyright Act²⁷ provides that, “Acts which would otherwise be permitted by this section are not permitted if, or to the extent that, licences are available authorising the acts in question and the educational establishment responsible for those acts knew or ought to have been aware of that fact.”

Contrary to the false claim in the CLA notice, it is not the case that any work opted out of CLA's ECL scheme would be available for copying under the statutory exception. It will be available for copying under this exception only to the extent that *no* license was available. The statute imposes no requirement that this license be from CLA. A writer or other rightsholder can offer whatever license they want, directly or through whatever intermediary they choose.

This statement in the CLA notice appears to be intended to mislead recipients into thinking that licensing through CLA is their only option if they wish to receive remuneration for these uses of their works. This is not true. CLA is not the only game in town, nor are its licenses.

An accurate notice should clearly advise rightsholders that their work will not be subject to this statutory exception if *any* license is available, as long as those responsible for copying knew or should have known of that license.²⁸

Collective licensing through CLA must be a free and informed choice. We support those writers who make that choice, and those who choose alternative licensing schemes or other modes of exploitation of their work. That choice should not be procured through misleading

27 Copyright, Designs and Patents Act 1988, Section 36(6).

28 CLA could make the availability and source of these other licenses known to potential licensees, for example by providing contact information for creators who wish to offer licenses directly or provide referrals to other licensing agencies such as stock photo agencies that offer licenses to copy photos. CLA has not done so, even when creators have provided CLA with contact information. See Exhibit A to Attachment 2 (opt-out request providing contact information for licensing requests) and Exhibits C and D to Attachment 2 (listings for opted-out works, not mentioning licenses other than through CLA).

claims that there is no alternative to CLA.

“14. Are the proposed publicity arrangements adequate to protect the interests of right holders? If not, how do you consider could they be improved?”

No, they are not. They could be improved, but they will not reach most of the US writers whose rights and revenues would be adversely affected.

Most working US writers are not members of the NWU or of any other organization which represents their interests as writers or as self-publishers. That is not likely to change as long as US antitrust law forbids collective bargaining on behalf of freelancers by the NWU or other writers' organizations.²⁹

“15. Are you aware of particular groups of right holders who may be difficult to contact regarding the proposed scheme? What methods could be most appropriate to reach them?”

As long as organizing among freelance and/or self-published writers in the US is constrained by current US antitrust law, no organization of writers in the US is likely to have more than a tiny percentage of US writers as members.

We do not believe that there is any realistic method by which most of those US writers who would be affected by this scheme could be notified.

Without trying to speak for writers in any other country, we can say with confidence that it would simply never occur to most US writers that any country, perhaps especially a country such as the UK which they presume has a legal system somewhat similar to that of the US and a general respect for copyright and other rights, would allow their published works to be digitized and redistributed in new digital editions without their affirmative permission.

This is the very essence of copyright under US law and the Berne Convention.

US writers who are directly exploiting their own worldwide rights, and are not seeking distributors in the UK or other countries, are especially unlikely to pay any attention to information about UK or other non-US licensing schemes.

Most US writers who would be negatively impacted if this application is approved, and whose current modes of exploitation of their rights would be interfered with, would never know why their earnings have declined. Even if visitors to their websites or revenues from advertising, downloads, or subscriptions decline, and even if they have sufficiently detailed Web analytics to attribute the decline to the UK, they are unlikely to guess the cause.

²⁹ Legislation to change this, supported by the NWU, has been introduced in the US Congress, most recently in H.R. 4643, “Freelance Writers and Artists Protection Act of 2002”, <<https://www.congress.gov/bill/107th-congress/house-bill/4643/>>. But despite 29 sponsors, this bill was never voted on by the full US House of Representatives.

“18. Are there any other negative or positive effects on right holders who do not belong to the CLA or one of its member organisations as a result of the application being authorised or refused, that the Government should be aware of?”

Yes, there are negative effects on US and other non-UK writers if the application is authorized, which the UK Government should be aware of, but appears not to be aware of.

Pursuant to the Berne Convention, these impacts must be considered.

As we said in our most recent submission to the U.S. Copyright Office concerning ECL for mass digitization, specifically mentioning the UK IPO:

“The NWU has consistently recommended, and reiterates in response to this inquiry, that the Copyright Office, Congress, WIPO (the international copyright treaty organization), other international entities such as the European Union, and counterparts of the Copyright Office in other countries such as the UK Intellectual Property Office, start their inquiries into digital copyrights by consulting writers about our new business models, before they begin considering new copyright legislation that might impact our livelihoods.

“As a result of the failure to conduct this essential prerequisite inquiry, proposal after proposal has been brought forward for unauthorized mass digitization schemes that would interfere with writers’ revenues from our own digitization efforts, and thus violate both the Berne Convention and the principles of ‘fair use’. These proposals include both the Copyright Office draft legislation to exempt certain uses of so-called ‘orphan works’ from penalties for copyright infringement, and this proposal for legislation to authorize ECL for mass digitization.

“Like the draft ‘orphan works’ legislation proposed by the Copyright Office, legislation to authorize ECL for ‘out-of-commerce’ works would sweep in digitization rights to many works which are being actively, commercially, and often profitably exploited by their authors, or whose authors would have been able to earn much more through other modes of exploitation of their digital rights than by default ECL licensing at default royalty rates.”³⁰

As we explained to the European Commission at the start of the review of European Union copyright law which led to the pending proposal for an EU directive on copyright:

“We support the ‘three-step test’ for permissible exceptions to copyright, which is incorporated in the Berne Convention and in the definition of ‘fair use’ in the U.S. Copyright Act. The problem for writers is not with the three-step test. The problem is that governments often fail to carry out the third step of the test, or to conduct the inquiry necessary to do so.

30 Comments of the NWU and SFWA, October 9, 2015, note 2, *supra*, p. 25.

“The Berne Convention permits certain exceptions to copyright, ‘provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.’

“An understanding of the diverse forms of ‘normal exploitation’ of writers' work is thus an essential prerequisite to the three-step test. Unfortunately, governments often assume that all commercial exploitation is carried out by third-party publishers, and ignore how writers exploit our own work. To the extent that they consider self-publication or new disintermediated business models at all, they often make mistaken assumptions about how we exploit our work, or rely on third parties who don't know or understand the ways writers earn our living in the digital age.

“The Berne Convention protects the rights of foreign writers and creators. The application of the three-step test requires an understanding of ‘normal exploitation’ of our work. In order to apply the three-step test, you must first consult foreign writers about how we normally exploit our work. Such a consultation must occur before you will be able to apply the three-step test.”³¹

We are disappointed that CLA and its members chose to submit this application without first consulting us. We would welcome an opportunity to discuss these issues with the IPO.

We encourage the IPO to schedule a meeting by telephone conference and/or Internet audio/video conferencing with non-UK stakeholders, in order to learn about the impact on non-UK writers. Understanding the new and emerging business models and the “new normal” of modes of exploitation of copyrights by non-UK authors is an essential, factual predicate to being able to apply the Berne Convention tests for permissible exceptions or limitations to copyright.

We do not intend or consider this submission to be confidential. Pursuant to the UK Data Protection Act, we authorize the public disclosure of these comments and the attached exhibits, including any personal information therein.

31 Response of the NWU Re: “Public Consultation on the review of the EU copyright rules”, March 5, 2014, <<https://www.nwubook.org/NWU-EU-copyright-5MAR2014.pdf>>.

Respectfully submitted,

/s/
Larry Goldbetter, President

Susan E. Davis,
National Contract Advisor and
Co-Chair, Book Division
Edward Hasbrouck,
Co-Chair, Book Division

Attachment 1: “Copyright Licensing Agency Application for ECL”
(Notice received by the NWU, December 7, 2017)

Attachment 2: Declaration of Edward Hasbrouck
Exhibit A: Opt-out request (March 12, 2015)
Exhibit B: Confirmation of opt-out (March 12, 2015)
Exhibit C: Result of search by name “Hasbrouck”
Exhibit D: Result of search by title “Practical Nomad”
Exhibit E: Copyright page of 1st edition of “The Practical Nomad:
How to Travel Around the World”
Exhibit F: Copyright page of 5th edition of “The Practical Nomad:
How to Travel Around the World”

ATTACHMENT 1

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

ATTACHMENT 2

THE PRACTICAL NOMAD

EDWARD HASBROUCK

1130 Treat Avenue, San Francisco, CA 94110, USA

phone +1-415-824-0214

edward@hasbrouck.org

<https://hasbrouck.org>

The Practical Nomad: How to Travel Around the World
The Practical Nomad Guide to the Online Travel Marketplace

Avalon Travel Publishing (Perseus Books Group / Hachette)

<https://practicalnomad.com>

"The Practical Nomad" books and Web site are written by union labor:
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Declaration of Edward Hasbrouck

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Executed in the City and County of San Francisco, California, 25 January 2018.

_____/s/
Edward John Hasbrouck

Exhibit A

12 Mar 2015

From: Edward Hasbrouck <edward@hasbrouck.org>
To: ben.pearson@alcs.co.uk
Subject: opt-out from ECL
Date sent: Thu, 12 Mar 2015 07:53:05 -0700

Dear Mr. Pearson --

It has been brought to my attention that ALCS is applying for authorization to license work by writers who are not members of ALCS.

Please be advised that I opt out of any such scheme. I hereby expressly forbid ALCS from acting on my behalf, or from licensing or purporting to license any work I have created or any rights I hold. I hereby expressly revoke any permission for such licensing that might be implied or presumed in relation to any grant of authorization to operate such an ECL scheme.

Please be assured that this is not any particular criticism of ALCS. But I have already chosen to exploit my works and my rights, or not to do so, in the manner I think best serves my interests.

Individuals seeking licenses for use of my work are welcome to contact me directly. You now have my contact information, should any wish to do so.

Please reply to confirm your receipt of this notice.

Sincerely,

Edward Hasbrouck

Exhibit B

12 Mar 2015

From: "Pearson, Ben" <ben.pearson@alcs.co.uk>
To: Edward Hasbrouck <edward@hasbrouck.org>
Date sent: Thu, 12 Mar 2015 15:26:29 +0000
Subject: RE: opt-out from ECL

Dear Edward,

Many thanks for your email. I have added you to the opt-out list which will ensure your works will not be included in a UK ECL scheme.

Kind Regards,

Ben Pearson
ALCS (UK) Ltd.

-----Original Message-----

From: Edward Hasbrouck [<mailto:edward@hasbrouck.org>]
Sent: 12 March 2015 14:56
To: Pearson, Ben
Subject: opt-out from ECL

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Please be assured that this is not any particular criticism of ALCS. But I have already chosen to exploit my works and my rights, or not to do so, in the manner I think best serves my interests.

Individuals seeking licenses for use of my work are welcome to contact me directly. You now have my contact information, should any wish to do so.

Please reply to confirm your receipt of this notice.

Sincerely,

Edward Hasbrouck

Edward Hasbrouck

<edward@hasbrouck.org>

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First Edition

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THE PRACTICAL NOMAD

How to Travel Around the World

Fifth Edition

Edward Hasbrouck

Please send all feedback about this book to:

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About the Author

EDWARD HASBROUCK



Award-winning travel writer and consumer advocate, Edward Hasbrouck is a leading expert on travel. With a background that includes working as a travel agent specialising in airfares. Since its first publication, *Nomad* has been hailed as the go-to for independent international travel.

Edward's most recent work was to update the 5th edition, which has lasted more than a year.

80,000 miles through 28 countries on 6 continents. By bicycle, train, bus, boat, car, taxi, rickshaw, donkey, and more. Stayed in hostels, bed-and-breakfasts, homestays, rural motels large and small, urban and rural, rudimentary and luxurious.

Edward has been seen on CNN and BBC television. He has been quoted everywhere from *The New York Times* and *Wall Street Journal* to *Scientific American*. He has spoken at venues in the United States and overseas ranging from hostels and university campuses to the National Geographic Society, and has testified at public hearings in the United States, Canada, and Europe.

Edward is an avid traveler, bicyclist, and peace activist. He is a member of the Area Travel Writers, the National Writers Union, the National Travelers, the Railroad Passengers, the San Francisco Bicycle Coalition, the Traveler, and the War Resisters League. In addition, he is involved in the Identity Project on travel-related civil liberties and human rights.

For more travel advice, visit Edward's website at www.edwardhasbrouck.com