EXPLANATORY MEMORANDUM TO

THE COPYRIGHT AND RIGHTS IN PERFORMANCES (EXTENDED COLLECTIVE LICENSING) REGULATIONS 2014

2014 No. 2588

1 This explanatory memorandum has been prepared by The Department for Business, Innovation and Skills and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

Licensing bodies manage copyright for rights holders. A collecting society is a type of licensing body (known as a "relevant licensing body" in the Regulations) which manages copyright on behalf of its members who give it express permission to do so. In most sectors where such collective licensing takes place, relevant licensing bodies tend to represent the majority of rights holders in the sector. An extended collective licensing (ECL) scheme is one under which a relevant licensing body, subject to certain safeguards, is authorised by the Secretary of State to license specified copyright works on behalf of all right holders in its sector (therefore encompassing non-members), and not just those members from whom it has specific permission to act. These Regulations set out the requirements that a relevant licensing body must meet if it wishes to be eligible to apply for authorisation to run an ECL scheme. The Regulations also set out the process that the Secretary of State must follow before arriving at a decision about whether to authorise or not. The Regulations provide for representations from interested parties about the application and for modification and revocation of an authorisation. They set out the obligations on relevant licensing bodies in relation to non-member right holders whose works are being licensed under an ECL scheme.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 Section 77 of and Schedule 22 to the Enterprise and Regulatory Reform Act 2013 inserted Sections116B to 116D of and paragraphs 1B to 1D in Schedule 2A to the Copyright, Designs and Patents Act 1988 ("CDPA"). The draft Regulations are made under the powers contained in these new sections and paragraphs.

4.2 These regulations were preceded by The Copyright (Regulation of Relevant Licensing Bodies) Regulations 2014 S.I 2014/898 (the "Codes Regulations"), which were made on 6 April 2014, and which provided for the statutory regulation of collecting societies where

self-regulation, in the form of adherence to codes of practice, failed to work. Relevant licensing bodies that are authorised to operate ECL schemes are given enhanced powers (in being able to manage the rights of non-members), so a relevant licensing body, seeking authorisation, is required to provide the Secretary of State with a copy of the code of practice that it will operate in relation to its licensing activities and which is consistent with the specified criteria set out in the Codes Regulations, including those designed to protect non-members.

4.3 These Regulations are being made against the backdrop of the proposed Collective Rights Management Directive ('CRM Directive')[1], which came into force in April 2014. The CRM Directive contains some provisions for the use of monies which cannot be distributed by relevant licensing bodies; to this extent there is some overlap with the Regulations.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales, Scotland and Northern Ireland. It does not apply to the Channel Islands or the Isle of Man.

6. European Convention on Human Rights

6.1 The Viscount Younger of Leckie has made the following statement regarding Human Rights:

"In my view the provisions of the Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014 are compatible with the Convention rights"

7. Policy background

- ***What is being done and why***

7.1 The relevant licensing bodies are bodies that copyright owners, also known as right holders, use to grant copyright licences for their rights and collect royalties on their behalf. These licensing bodies tend to be owned or controlled by their members, the copyright owners, and often have a not-for-profit status. In the UK, they are also referred to as collecting societies.

7.2 Relevant licensing bodies usually operate in sectors where there are increasingly large numbers of works being used in high volumes, as a result of which it makes sense for rights to be licensed collectively. ECL schemes would allow relevant licensing bodies to represent all right holders in respect of any given scheme, provided the relevant licensing body is significantly representative of affected right holders, has the consent of its member right holders, and meets a number of other safeguards.

[1] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2014:084:0072:0098:EN:PDF

7.3 This seeks to remedy a number of gaps in the market. For example, the licensee buying an ECL licence is buying a more complete product containing the most number of works possible. As a result, the need for the licensee to seek out and conclude individual licensing arrangements with rights holders who are not members of the collecting society is kept to a minimum. An inability or unwillingness to conclude such agreements might encourage licensees to use works outside the collective licence unlawfully, or not at all. In the first case, right holders are not remunerated for the use of their works; and in the second case, society is deprived of a desirable dissemination of works. In those sectors where there is a strong appetite for collective licensing, right holders works are usually outside the collective licence because those rights holders are unaware of the relevant collecting society; in an ECL arrangement, when they become aware that their works are being licensed, they nearly always join the relevant licensing body.

7.4 A statutory ECL scheme will allow collecting societies to apply for ECLs in respect of some or all of their licences, and if successful in their applications, allow them to regularise their business models.

7.5 In 2011, Professor Ian Hargreaves' review, 'Digital Opportunity' recommended ECL being made available in the UK. This recommendation was broadly accepted by the Government and formed part of its Copyright Consultation, which ended in March 2012.

7.6 Following the consultation the Government published a policy statement in July 2012, stating its intention to bring forward legislation to allow the authorisation of ECL schemes. The Government then did this by introducing clauses into the Enterprise and Regulatory Reform Act. In April 2013, the Enterprise and Regulatory Reform Act was enacted giving the Government a power to introduce secondary legislation to enable relevant licensing bodies to operate ECL schemes.

7.7 In autumn 2012 the Government began a series of working group meetings to listen to stakeholders' views on how ECL schemes might work. The working group comprised a cross section of stakeholders, including relevant licensing bodies, licensees and a significant number of right holders.

7.8 Following those working groups, the IPO issued a consultation on the draft Regulations in November 2013. That consultation closed at the end of January 2014.

7.9 The Regulations set out the evidence that the relevant licensing body must provide as part of its ECL application. Such evidence includes the need for the relevant licensing body to show it is significantly representative of right holders that are to be part of the scheme; that the relevant licensing body has the support of a significant proportion of its members for its application; that it has mechanisms in place to allow right holders to opt out of the scheme; and that it would look after the interests of non-members by, amongst other things, making efforts to make

them aware of the ECL scheme (so that they can opt out if they choose to), and make reasonable efforts to find and remunerate them for the use of their works. ECL is entirely voluntary; relevant licensing bodies only need apply if they and their members want to. For this reason, the regulations include a process for allowing the relevant licensing body to cancel its authorisation. There are also processes in place for the revocation and modification of an ECL by the Secretary of State, and what a relevant licensing body needs do to renew its authorisation.

7.10 In their responses to the consultation, licensees made it clear that, in the case of revocation or cancellation, they would prefer ECL schemes to run to the end of their licence periods so that they can use the works licensed under the ECL for the duration of the licence term with confidence. The Secretary of State will endeavour to set revocation or cancellation dates accordingly. Some licensees may want to exercise the option of not wanting the licence to run its course and instead be reimbursed the requisite proportion of the licence fee. The Government expects relevant licensing bodies and licensees to negotiate such terms between themselves. Licences granted under an ECL authorisation would come to an end upon the date of revocation or cancellation.

7.11 A relevant licensing body wishing to apply for an ECL, must have a code of practice in place. That code of practice requires the relevant licensing body to appoint an independent code reviewer who, at least once every three years, produces a report on the relevant licensing body's performance against its code of practice. Although the code reviewer's report is part of a self-regulatory framework, the Secretary of State may take into account that report when assessing a relevant licensing body's suitability for an ECL authorisation.

8. Consultation outcome

8.1 In December 2011 the Government held a three month consultation – the Copyright Consultation – on the implementation of the copyright proposals contained in Professor Ian Hargreaves' review, 'Digital Opportunity.' This included proposals for ECL schemes. The consultation, to which there were in excess of 450 responses, found that there was wide support from relevant licensing bodies and licensees in particular for the policy. Right holders were concerned that existing direct licensing models could be impacted negatively by ECL and that ECL schemes might result in them losing control of their exclusive rights. For this reason they lobbied for proper protections for right holders before any relevant licensing bodies were authorised to operate ECLs.

8.2 Given the extensive consultation on the policy, the consultation on the draft Regulations was an eight week technical consultation. There were 37 responses, of which most were from right holders and licensees. 3 were from relevant licensing bodies. The responses were largely technical in nature and related to how the Regulations would work in practice. However, some of the responses did cover

some of the larger policy questions to which the working groups had not provided a definitive answer. Most of the licensees and relevant licensing bodies did not support the thresholds for member consent, the possibility of individual remuneration for non-member right holders, and some of the detail around the opt out arrangements. Right holders generally wanted to strengthen the opt out procedure, wanted high member consent thresholds, and supported the idea of an ECL being built on a pre-existing collective licence. Following consultation, the Regulations have been amended to reflect drafting and policy suggestions made by some of the respondents.

9. Guidance

9.1 The relevant website pages on the IPO website have been updated with an explanation of the changes. Further updates to the website will take place closer to the implementation of the Regulations, with a more detailed explanation of the changes and guidance material.

10. Impact

10.1 ECL is voluntary. Therefore, relevant licensing bodies that decided to apply to set up such schemes would only do so if they felt that it was a commercially viable decision.

10.2 Applications for authorisation to operate an ECL will be assessed and processed by staff at the Intellectual Property Office. In the impact assessment published in July 2012, there were high and low estimates. The low estimate equates to 0.05% full time equivalent (FTE) for two members of staff, which is £5,000 per annum. The high estimate equates to 0.2% FTE for two members of staff, which is £20,000 per annum. The costs for processing applications will be recouped from the relevant licensing bodies, by way of an application fee.

10.3 The July 2012 Impact Assessment is attached to this memorandum and will be re-published.

11. Regulating small business

11.1 The Regulations apply to small business.

11.2 However, as stated above, only relevant licensing bodies who believe it to be commercially viable, or who want to regularise their business models, will apply to operate an ECL scheme.

12. Monitoring & review

12.1 A review to evaluate the effectiveness of the licensing scheme will take place five years after the scheme becomes operational.

13. Contact

13.1 **Hamza Elahi** at the Intellectual Property Office can answer any queries regarding the instrument. Tel: 020 7034 2813 or email: Hamza.elahi@ipo.gov.uk