



BY EMAIL: copyrightconsultation@ipo.gov.uk

Copyright and Enforcement Directorate
Intellectual Property Office
First Floor, 4 Abbey Orchard Street
London SW1P 2HT

30 March 2015

Dear Sir or Madam,

Collective rights management in the digital single market (consultation on the implementation of the EU Directive on the collective management of copyright and multi-territorial licensing of online music rights in the internal market (“Directive”)).

BAPLA, the British Association of Picture Libraries and Agencies, welcomes the opportunity to provide a response to this consultation on behalf of its members, the picture libraries and agencies of the UK. The Directive presents an important milestone in the conduct of collecting societies. The photography industry in the UK, and photographic agencies in particular, are important contributors to the UK economy, generating significant revenue, employment and export earnings. Our sector is diverse, and combines professionals, semi-pros, amateurs, and increasingly the general public, all of whom stand to benefit from a well-regulated activity of collecting societies operating alongside their direct licensing activities. In our sector, the role of collecting societies has been limited to the management of certain secondary rights, which the libraries and agencies themselves cannot easily control. Our trade organisation represents a significant number of rightholders and it is in this role that we submit our views in response to the consultation questions, which pertain to our sector.

We start by highlighting the provisions of the Directive, which are of key importance to our members and the aims of the Directive in general. This summary is followed by detailed responses set out in the Annex to this letter.

1. Role of Collective Management Organisation (“CMOs”)

Recital (2) to the Directive states that the role of a CMO is to enable rightholders to be remunerated for uses that they would not be in a position to control or enforce themselves. This is a fundamental principle which should be guiding future decisions on implementation and interpretation of the Directive so that in areas where the activities of CMOs and primary licensors overlap, i.e. where the rightholders are able, and wish to, control uses of their works, they should be able to do that. This is particularly important for digital distribution. First, as technology evolves, it

becomes possible to control digital uses, and previous reliance on CMOs and blanket licences decreases. Rightholders should be free to choose business models which suit them the most. Secondly, licences for digital uses should not be assumed by CMOs on the basis of previous print-based mandates. As with all copyright licensing, licences not expressly granted by CMOs are reserved by rightholders. Finally, the lines between primary and secondary uses of copyright works begin to blur when copyright works are being re-posted on public networks including social media sites – again, rightholders should be able to pursue licensing of such uses unless they expressly grant the rights to a CMO.

2. Rights of Rightholders

The consultation questions draw attention to the broad definition of a rightholder. The breadth of the definition supports, in our view, the aims of the Directive in ensuring that the revenue collected by CMOs is distributed to all those who are entitled to claim a share of that revenue. The focus of the Directive is not on who the myriad of interested rightholders may be, but on ensuring that whoever they are, they should be given the same fundamental rights vis-à-vis CMOs.

Our members welcome this broad definition and resulting clarification of their rights. BAPLA members play an important role in the distribution of secondary licensing royalties in the visual sector and as such should have full membership rights in CMOs managing artistic works.

3. User Data and reporting

For many years the obscurity with which UK CMOs have operated, particularly with regard to visual arts, has led to much speculation on areas such as the extent of blanket licenses, how monies are collected, and the extent of reporting methods, all of which resulted in the lack of transparency and certainty over royalties from secondary uses of copyright works. BAPLA members believe that clarity over the obligations of users in relation to the data they are required to provide to CMOs is key. This is one area in which we feel the Directive doesn't go far enough and we encourage the IPO to offer further guidance on types of data that are expected from users in each creative sector. Clear requirements around the collection of good usable licensing data would form the foundation of a fair and transparent collective rights management envisaged under the Directive.

We trust that our preliminary remarks are useful in further review of our responses and are available to discuss any comments or questions you may have.

Yours faithfully,

Anna Skurczynska
Director
British Association of Picture Libraries and Agencies

Annex

Consultation questions and BAPLA's responses.

1. Please say whether and why you would prefer to implement using Option 1 or 2?

Option 2.

A wholesale adoption of the text of the Directive, supplemented by those provisions of The Copyright (Regulation of Licensing Bodies) Regulations 2014 (the "2014 Regulations") which extend the protection of rightholders beyond the provisions of the Directive, will be quicker, cheaper and ensure consistency in legal interpretation. The implementing regulations will thus be easy to refer to for rightholders, collective management organisations ("CMOs"), as well as those having to adjudicate on or enforce the regulations.

Consistency is particularly important with the UK having adopted the Copyright and Rights in Performances (Extended Copyright Licensing) Regulations 2014 ("ECL Regulations"). We note that the difference between the definition of a rightholder in the Directive and the ECL Regulations should be removed by adopting the broader definition from the Directive. A failure to do so may result in a category of rightholders being deprived of rights in respect of ECL schemes.

We also want to point out that although the tenor of the 2014 Regulations may be similar to that of the Directive, the latter is more prescriptive, giving rightholders more certainty as to what their rights are, and most importantly, it gives rightholders direct legal recourse against CMOs for breached of their statutory obligations, rather than the complaint route envisaged under the 2014 Regulations. We support alternative dispute resolution mechanism, but a recourse to courts is a powerful right not currently available in disputes with CMOs.

2. How important is it to retain those aspects of the 2014 Regulations that go beyond the scope of the Directive?

The 2014 Regulations contain important rights, which are not expressly enshrined in the Directive. They include:

- the definition of "transparency";
- the obligation to offer fair and balanced representation in the internal decision making of a CMO to all members (this, in our view, goes beyond participation through the members' general assembly and points to the need for member representatives having influence on the day-to-day running of a CMO through its executive body); and
- certain consultation obligations and standards.

These provisions serve the overall aim of the Directive to ensure that the CMOs act in the best interest of rightholders and should therefore be retained.

3. What is your best estimate for the overall cost of (a) implementation and (b) ongoing compliance with this Directive?

BAPLA has no data which would allow us to provide an estimate, we understand, however, that some, including the largest UK collecting societies have already taken steps to implement the Directive by revising their constitutional documents providing complaints procedures. The BCC Code Review process enabled those involved to examine their

procedures, with some acting on the observations and feedback. Based on assurances of compliance BAPLA has received, we would caution against claims that the implantation of the Directive is prohibitively expensive, or that collecting societies' administrative fees need to be increased to the detriment of rightholders' revenue in order to cover the cost of implementation.

4. If Option 2 was the preferred option, as a CMO would you consider retaining a revised code of practice as a means of making the new rules accessible to members and users?

Whilst neither BAPLA or its members are CMOs, we wish to point out that with discrepancies in how CMOs are organised and run, and with many different membership structures, it is important that CMOs have an updated code of practice and be transparent in their operation and standards, so that rightholders know what they may expect from their CMOs, and have a course of action to follow if they have concerns to raise.

5. Given the definitions of “collective management organisation” and “independent management entity”, would you consider your organisation to be caught by the relevant provisions of the Directive? Which type of organisation do you think you are and why? Please also say whether you are a micro-business.

The requirement that the rights are managed for the collective benefit of the rightholders takes BAPLA members outside of the definition of a collective management organisation, or an independent management entity. BAPLA members manage rights for the benefit of each individual rightholder.

For the sake of clarity, as well as representing the interests of other independent rightholders, many BAPLA members also own copyright in some of the photos they represent. In all cases, BAPLA members do far more than manage copyright in the ways outlined in the Directive. They actually deliver market ready copies of their photos to customers (rather than simply collecting on use where the user has sourced the content itself) and invest considerable resources in the curation, adding of metadata, marketing, promotion and delivery of the photos. BAPLA members most commonly are able to grant direct licenses for all types of uses.

We note that the Directive does not interfere with individual management arrangements (recital 12) and therefore do not consider that either BAPLA or its members are subject to the various obligations imposed on CMOs and IMEs.

6. If you are a rightholder or a licensee, do you either have your rights managed or obtain your licences from an organisation, which you think is an IME? If so, could you please identify the organisation, and explain why it is an IME.

We are not aware of any IME within the photography sector. Whilst many BAPLA members have historically applied to the DACS Payback scheme to claim back revenue from secondary rights (in the capacity as rightholders for their own content and for that of their contributing rightholders), we note that the DACS payback scheme is operated on a not-for-profit basis and therefore DACS would be regarded as a CMO rather than an IME for this part of its business.

8. Who do you understand the “rightholders” in ARTICLE 3(c) to be?

Rightholders, in simplest terms, are all those persons (natural or legal) who are entitled to claim a share of the revenue collected by CMOs. This entitlement arises as a result of creating a work within the relevant CMO's repertoire, obtaining an assignment of copyright in such work, or being granted a licence to exploit such work and derive revenue from it (including, where such revenue is shared between the person exploiting copyright and the author, which is the position of the majority of our members).

The definition is purposefully broad to enable proper functioning of CMOs which exist to facilitate distribution of royalties from use of copyright works. The focus of the Directive is not on who the myriad of interested rightholders may be, but on ensuring that whoever they are, they should be given the same fundamental rights vis-à-vis CMOs.

By the terms of Article 3(c) of the Directive, BAPLA members are rightholders: in many cases they hold copyright in content, in others they are entitled to a share of the rights revenue under an agreement for the exploitation of rights. Many visual creators choose to market their work through agencies. Our members play an important role in the collective rights management and need to be recognised not only as intermediaries but as rightholders in their own right by CMOs. Without that recognition:

- the strength of licenses may be undermined if repertoire becomes excluded from licenses;
- CMOs governance remains weak because an important group of rightholders is excluded from management processes;
- creators' freedom to choose how to exercise their rights is inhibited.

Given the breadth of the definition and the many arrangements for exploitation of copyright that exist in the market, BAPLA would welcome official guidance from the IPO on the spectrum of rightholders in each industry.

10. What do you consider falls in the scope of “non-commercial”?

This broad term may have many different meanings across creative industries. Having defined commercial uses for the purpose of the orphan works guidance, the IPO will be aware that in the photography industry, the term “commercial” refers to, essentially, promotional uses. Non-commercial uses fall within the “editorial” category encompassing uses that are illustrative of the context in which the image appears. “Non-commercial” may also mean private, personal use. This type of use is to some extent covered by copyright exceptions and so an additional permission to reserve the right to such use under Article 5(3) of the Directive would be superfluous. In our view, this Article should be read in the light of industry practice, and in the context of the recitals in the Directive. Under recital 2, CMOs enable rightholders to be remunerated for uses that they would not be in the position to control or enforce themselves. Further, under recital 19, the Directive does not “prejudice the possibility of rightholders to manage their rights individually, including for non-commercial purposes” (emphasis added). Rightholders should therefore be able to decide freely which uses they wish to control and enforce themselves, be it commercial or non-commercial uses. Article 5(3) is merely an example of how rightholders may limit the rights of CMOs, consistent with the aims of the Directive, and general principles of copyright law.

This has been the practice in our industry where the starting point is always that the copyright holder retains all rights not specifically and expressly granted by him to others.

12. What will be the impact of allowing rightholders to remove rights or works from the repertoire?

This is a question of scale – one photographer removing one image is likely to have little impact; however if a significant number of works is removed, such removal would have a perceptible impact on a CMOs repertoire, which should in turn be recognised in the level of the CMOs licensing rates. Under the Directive, the right to terminate a mandate is one of the fundamental rights of a rightholder and we feel strongly that for this right to be meaningful, it needs to be supported by an easy notification process, prompt action by the CMO receiving termination notice, prompt expiry of any licences granted for the use of the relevant work(s), the rightholder’s right to obtain information on compliance by the CMO with the terms of the termination notice, and compensation from the CMO for uses licensed despite termination.

13. Under what circumstances would it be appropriate for a CMO to refuse membership to a rightholder i.e. what constitutes “objective, transparent and non-discriminatory behaviour”?

As long as the works of a rightholder applying for membership of the CMO, form a part of the “product” offered by the CMO to end users, the CMO should not be allowed to refuse membership. A refusal in such circumstances would not be objective, transparent and it would be discriminatory.

The establishment of different classes of membership, where certain right holders have fewer rights than others and may not be fully represented in the governance of the CMO would also constitute discriminatory treatment.

14. What should “fair and balanced” representation in Article 6(3) look like in practice?

“Fair and balanced” means ensuring that all types of rightholders are afforded the same rights to participate in the governance of the CMO. Currently certain CMOs operate “quasi memberships” which do not meet the requirements of the Directive.

15. What do you consider to be an appropriate “regular” timeframe for updating members’ records?

Within 30 days of receiving information from a member.

16. Is there a case for extending any additional provisions in the Directive to rightholders who are not members of the CMO? If so, which are these, why would you extend them and to whom (i.e. non-members in ECL schemes, mandating rightholders who are not members, or any other category of rightholder you have identified in answer to question 7)? What would be the likely costs involved? What would be the impact on existing members?

BAPLA feels strongly about extending additional provisions to rightholders who are non-members but who are represented by a CMO under an ECL scheme. For as long as they are so represented they should be treated in the same way as members and have the same rights to participate in governance, obtain information, and be paid royalties as members. Opt out rights of these rightholders should be as effective as the termination rights

discussed in our response to questions 12.

Additionally, UK photographers and agencies license significant volumes of content for use in other EU countries. Agencies and photographers should not be disadvantaged from protecting and exploiting their rights in other EU countries because they are not members of local CMOs. It is noted that under the recently introduced ECL Regulations, works of rightholders from any global location can be included in the UK license extension, which further strengthens the argument that non-members should be afforded equal protection.

17. Which of the discretionary provisions of ARTICLE 8 do you think should be adopted?

- Article 8(7) – further regulation is needed. Currently, CMOs do not account to rightholders for the revenue from an investment of royalties. Payments to rightholders lag behind collections of licensing fees by CMO (in some cases, CMOs hold royalties for 12 months), it is not unreasonable that rightholders would expect any income earned on their royalties to be accounted for and paid appropriately. Our members feel that statutory regulation will achieve this result.
- Article 8(9) – further regulation is not appropriate. There is no reason why any category of members should have different rights from others. This goes against the fundamental rights of rightholders.
- Article 10(10) – further regulation is not appropriate. There is no reason why rightholders should be restricted from voting by proxy. These rights are generally available under in commercial and charitable organisations and CMOs should not be treated differently.

23. Do you collect for rightholders who are not members of your CMO? If so, how much of that rights revenue is undistributed and/or non-distributable? If you collect for mandating rightholders who are not members of your CMO, to what extent do those rightholders have a say in the distribution of non-distributable amounts, and what do you think of the Government exercising its discretion in relation to those amounts?

Whilst not a CMO, BAPLA wishes to address this question. Our members and right holders they represent have suffered in the past as a result of CMOs not distributing funds to non-members (and barring them from membership) particularly with regard to the way that NLA MA has failed to recompense them for licenses granted, as was recognised in Walter Merricks’ report¹. CMOs such as NLA have not responded adequately to right holder pressure for transparency and fairness, so we believe it is appropriate that the government should act to ensure that CMOs are behaving properly with regard to “non-distributed” amounts.

24. What should be the criteria for determining whether deductions are ‘unreasonable’?

We note the differences in the levels of administrative costs deducted by various CMOs, ranging from 5% to 18%. We would like to suggest two ways of establishing a reasonable level of deductions:

- Providing that CMOs set their administrative fees by tracking their actual costs on an annual basis. This would result in more flexibility for CMOs whilst at the same time allowing for closer monitoring of expenditure; and/or
- Drawing up a like-for-like comparison between the UK and other EU CMOs and

¹ http://www.independentcodereview.org.uk/files/9714/0171/5251/ICR_Report_2014.pdf

formulating bands of permitted deductions on the basis of findings.

25. Are there any pros and cons to be particularly aware of in case the Government exercises the discretion? [To regulate how CMOs may use undistributed amounts]

Pros: Strict regulation of how CMOs may use undistributed amounts will support the ECL Regulations, and reinforce the role of CMOs as not-for-profit, quasi-public service organisations.

Cons: The regulation under Article 13(6) should be underpinned by strict standards relating to data gathering (see more on that topic in our response to question 27 below) to avoid complacency by CMOs in finding rightholders.

26. Is there currently a problem with discrimination in relation to rights managed under representation agreements? If so, what measures should be in place to guard against this?

BAPLA members are in a position of a quasi-membership with DACS. In contrast to other members of that CMO, they have no representation in the day-to-day running of the CMO through a board representative. This is discriminatory.

Certain CMOs restrict membership to other CMOs only, which prejudices interests of rightholders whose licensing revenue is reduced in the process.

Other CMOs refuse membership to rightholders of embedded works who therefore have no say over how these CMOs are run, and are not remunerated. Again, this is discriminatory.

To guard against any discriminatory treatment all members should have the same fundamental rights, and should be treated equally. See also our responses to questions 12 and 13 above.

27. What do you consider should be the “necessary information” CMOs and users respectively should provide for in licensing negotiations (Article 16(1))?

In light of the ECL Regulations, we strongly believe that there must be a clear and transparent process for reporting and tracing uses and licenses. Data collection is vital for a rights holder to trace usage, and with today’s technological advancements with tracking exactly what a user is selecting to view or copy, it should be possible to relay this information at all levels.

28. What information do you think the user obligation should take and how might it be enforced? What is “relevant information” for the purpose of user reporting?

Article 17 is key for the implementation of the Directive. Used and enforced rigorously, it would form the foundation of a fair and transparent collective rights management envisaged under the Directive. Without reliable data on usage, and associated revenue, rightholders’ protections afforded under the Directive will be illusory. Their rights are only as good as the information they obtain. We encourage the IPO to issue guidance on this part of the Directive to help rightholders and CMOs in formulating processes for acquiring the relevant information.

“Relevant information” is likely to be industry specific but in all cases the critical information comprises what exactly is used by the licensee. Specifically in the photography industry this

will be:

- title data of what is copied – ISBN/ISSN, full title, issue number, publication date; and
- within the copied work, which pages or articles are copied. Data should encompass all works, including embedded images, and be passed on to relevant rightholders.

As mentioned above, technology that enables tracing of that information, especially in digital formats, already exists and CMOs and users should be encouraged to use it.

29. What is the scale of costs incurred in administering data returns that are incomplete and/or not in a suitable format?

Lack of suitable data affects visual artists' royalty – despite the increase in the consumption of visual works, a vast number of uses is not reported which results in visual artists such as photographers only currently receiving approx. 8% of royalty payments in the UK.

Some of the burden associated with data gathering is pushed onto the rightholders who are required to prove usages (which they do not control). BAPLA feels strongly that this should not be the case – the burden of confirming use should rest on capturing the copied data² by the user and the data should be passed on by the CMO to rightholders.

30. Which of the Transparency and Reporting obligations differ from current practice, and what will be the cost of complying with them?

Although the 2014 Regulations impose on CMOs obligations of transparency and reporting, BAPLA's members experience has been that these are not necessarily followed.

As quasi members of a CMO, or not being able to apply for membership, photography agencies are not privy to information on issued licenses and usages to the extent needed to claim for all uses of works held or represented by them which have been licensed by a CMO.

Article 18 (c) requires that the CMO reports to right holders on amounts paid per category of rights managed and per use. In our industry, we do not obtain report on type of use (for example TV versus magazines versus books) under the DACS Payback scheme, nor do we obtain information on which funds are sourced from CLA or ERA or other sources for different rights. This information should be provided to right holders so as to allow them to manage their rights most effectively.

We believe the cost of complying with this will be minimal as this information used to be provided as part of Payback until a few years ago, so we believe there already is capacity to do so.

31. What do you think qualifies as a "duly justified" request for the purposes of Article 20?

Whether a request is duly justified should be assessed on a case by case basis, but the circumstances in which a request is duly justified should include a reasonable suspicion by a rightholder that his rights are being used without permission, in a case of a dispute between the CMO and another CMO which impacts the rightholder, on passage of time if the rightholder needs to confirm the extent of the licensing granted, and in connection with

² Including visual media such as photographs.

termination of a mandate.

38. What do you think are the most appropriate complaints procedures for handling disputes and complaints between CMOs, users and licensees, including for multi-territorial disputes? Please say why.

For our members who are predominately SME's we would support the following methods as alternative dispute resolutions (ADR) – mediation and ombudsman services. The status for many of our members and their contributing photographers means that a small issue has a large impact on their business. However, with the current ombudsman service, it is unclear who to contact and what they can assist with, in relation to questions and complaints from non-members of a CMO they are complaining about.

39. What is your preferred option for the national competent authority? Please give reasons why.

BAPLA would support the IPO as a NCA given IPO's proven record of understanding of the complexities of our industry, and their demonstrated impartiality in mediation.