



BAPLA Submission to the IPO Collective Management of Copyright (EU Directive) Regulations 2016 Post-Implementation Review

About BAPLA

BAPLA welcomes the opportunity to comment on the Collective Management of Copyright (EU Directive) Regulations 2016 Post-Implementation Review.

Our members provide a 'vital economic link' for many professional photographers, videographers, illustrators and other image makers, supporting their ability to derive income and reinvest in their creativity.

Founded in 1975, BAPLA is the UK trade association for picture libraries and agencies representing over 115 members, of a unique area of the creative industry. We have a broad and diverse membership of image rights holders and purveyors, from sole traders to major news, stock and production agencies, as well as many SMEs, archives and cultural heritage institutions.

Our members are the main source of licensed images you see every day in print and digital media, and as such have contributed to the UK economy for over 40 years. BAPLA members generate revenue for and manage the interests of over 120,000 image creators and rights holders, encompassing a breadth of experienced and new young image-makers across the UK. Licensing digital content online is the significant driver of the image industry.

The majority of BAPLA's membership consists of small and medium enterprises (SMEs) accounting for approx. 72% of the membership, with 28% as sole traders - many operating on very tight economic margins.

BAPLA previously provided a submission to the IPO in 2015, prior to the introduction of the 2016 CRM regulations¹.

BAPLA's Response to Key Areas:

Section 1: Introduction and overview of the Regulations

- *Overall, do people consider that the Regulations have been of benefit to right holders?*

Yes, the introduction of the CRM regulations 2016 provided a positive outcome overall for BAPLA members, some of whom had not joined a Collective Management Organisation (CMO) prior to the introduction of the regulations, or were dissatisfied with the CMO they were collecting rights revenue from, due to the former monopolised system and what our members perceived as unfair and unequal treatment.

Since the new regulations were introduced, BAPLA members have in general experienced greater choice, more equitability and transparency, and better communication with relevant CMOs, particularly with the emergence of a new CMO specifically for image rightsholders, PICSEL, and with DACS as a result. Although there still remains a number of photo libraries and archives that are BAPLA members who have not yet joined a CMO.

¹ <https://bapla.org.uk/wp-content/uploads/2018/08/Implementation-of-the-EU-Directive-on-the-collective-management-2015.pdf>

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- *Do you feel more confident in the collective licensing system? Is it more efficient?*

Certainly, more is known and understood about collective licensing and the system used, although ambiguity remains despite efforts to educate rightsholders. Contractual terms provided by customers who aim to assert rights on secondary licensing often couch vague references, which we are vigorously addressing. Overall, we believe there has been a positive effect on collective management since the introduction of the 2016 CRM Regulations. In particular the introduction of competition in the marketplace, which would otherwise continue to be a monopolistic framework giving no choice or greater equality to rightsholders. That being said there remains room for improvement on areas such as transparency, including dealings with overseas CMOs and future licensing proposals affecting both CMO members and non-members. The latter, communication with non-members, would be best handled by better communication from all relevant CMOs to trade associations, such as BAPLA. Additionally, there still remains the challenge of engaging one specific CMO – the NLA, to reach an agreement on collective licensing where rights revenue for images used in news press publications are distributed to visual art CMOs.

As for efficiency, communication from CMOs that pay rights revenue for visual arts collective licensing (ALCS, DACS, PICSEL), is satisfactory, as are delivery of payments. ACS and DACS also cover Artists Resale Rights, which for the most part our members do not claim for.

Two key issues, however, stand out – the efficiency in withdrawing mandates or specific rights from CMOs in a timely and less burdensome fashion in order to move these to other applicable CMOs; and a lack of reporting transparency on distribution arrangements from CMOs in direct receipt of overseas rights revenue.

- *Have the Regulations resulted in any costs to right holders? If so, what have these been?*

None specifically reported by BAPLA members since the regulations came into force.

- *Have the Regulations resulted in any unintended consequences?*

None specifically observed by BAPLA members since the regulations came into force.

Section 2: CMOs' obligations towards right holders

- *Have these new rights delivered benefits for rights holders?*

Yes, for the most part these new rights have delivered benefits for rightsholders. The opportunity to provide marketplace competition has seen a greater emphasis on CMOs to deliver their obligations to their membership more effectively. We have seen greater picture agency representation on some of the CMO boards, and more communication between rightsholder members and CMOs, and an increase in numbers of rightsholders joining relevant CMOs. The Regulations have set a baseline of requirements on CMOs which has benefitted member rightsholders. We would like to see continued support for competition between CMOs, underpinned by the Regulations and upheld by the IPO, as a key benefit to rightsholders.

- *Have the Regulations made it easier to withdraw rights or terminate a mandate?*

Not entirely. Whilst the Regulations did provide the opportunity to do so, which is welcomed, flexibility for CMOs to determine how and under what conditions this should be administered has proven to be challenging for rightsholders who choose to move their mandates or some of their rights to another CMO. The interpretation of the Regulations by some CMOs does not always put



rightsholders' interests first. The length of time for rightsholders to notify CMOs (such as waiting until the last day of the eleventh month, before the end of the financial year), and efforts to conclude a mandate before moving can take place, has put off a number of rightsholders who want the flexibility to choose which CMO they want to move to and manage their rights. Additionally, communication about the withdrawal of rights is often confusing and complex, meaning rightsholders can miss the deadline and have to wait another year to consider terminating or believe that it isn't possible – we believe such terms are not objectively necessary. The monopolistic nature of a CMO is often misquoted and applied to the business environment rather than market conditions of collective licensing. Further clarification from the IPO would be welcome on this issue.

- *Has it been easier to grant non-commercial licences independently from CMOs?*

No change in this area has been observed by BAPLA members since the regulations came into force.

Section 3: Governance and management of rights revenue

- *Have these measures delivered benefits for rights holders?*

Measures around governance and the management of rights revenue, might be more burdensome for CMOs, but we believe it is an integral process for rightsholders to hold CMOs to account. The regulations have led to much needed and greater improvements in our sector. There still remains some degree of obfuscation in the management and reporting of rights revenue – particularly where overseas revenue is collected directly; as well as the number of rightsholders represented – where member numbers jump from one extreme to another. We recognise that some of the information on the collection of data on rights revenue distribution comes from Reproduction Rights Organisations (RROs) and so there can be restrictions on full transparency, or lack of collection data. But we recognise that where data-matching policies have been introduced on rights revenue there have been cumulative improvements each year. In this regard, the Annual Transparency Reports (ATR) are an essential guide for rightsholders, whether members or non-members, to review how transparent CMOs are about their distribution policy and management of rights revenue, including the use of rights revenue for other purposes.

- *Has there been any improvement in the level of member participation in your CMO's decision-making processes?*

In part, yes. The establishment of a new CMO for image rightsholders - PICSEL, has incorporated the Regulations from the offset, and from reports to BAPLA, endorsed the decision-making process throughout its membership and at its General Assembly. As for DACS, the decision-making process remains the same as prior to the regulations, in that there is a sub-committee/working group which includes picture agencies.

Management and supervisory function

- *Have there been any improvements in the governance arrangements of the licensing bodies you have dealt with since the Regulations came into force?*

It is important to recognise that there has been improvement in the access to governance. Certainly, from reports those BAPLA members that have joined PICSEL are involved in the governance of the organisation, and importantly there is a tiered system of representatives on the board of directors to fulfil its obligations of fairness, balance, and proportionality. DACS have also added a picture agency representative to their board, which is positive and fulfils the requirements, although communications on inviting participation in its governance review have not been made clear.

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- *Are there any areas where you consider that the requirements under the Regulations fall short of what is needed to ensure good governance by CMOs? Alternatively, are there any areas where you consider that the requirements under the Regulations go beyond what is needed to ensure good governance?*

These provisions serve the overall aim of the Directive to ensure that CMOs act in the best interest of rightsholders and therefore should be retained. The IPO provides an important role in handling complaints from rightsholders on whether CMOs fulfil their good governance requirements and we continue to support the IPO's oversight. However, as 'transparency' is not defined in law, it would be constructive to see the inclusion of each CMO's annual governance policy in more detail, such as the decision-making process including those conducted during AGMs, and number of received and upheld complaints in the financial year, listed on ATRs and if they have been upheld.

- *In particular, has the supervisory function resulted in any benefits for right holders, or have there been any unintended consequences?*

We are not aware of any supervisory function established at any CMO BAPLA members have mandated since the regulations came into force. We would support its inclusion in the ATR.

Collection, management and distribution of rights revenue

- *Do you consider that the Regulations have resulted in improvements to the collection, distribution and management of rights revenue?*

In general, yes, the Regulations have resulted in improvements, particularly the inclusion of the ATR. There remain some gaps on how some CMOs decide on the distribution of rights revenue, so it is difficult for rightsholders to judge whether they are fairly and equitably remunerated, except if they have been a member for more than a year and can judge their own last payment.

In terms of reviewing beyond member's own payments, we believe it is important for rightsholders, both members and non-members, to know if the systems used by CMOs to determine rights revenue payments are fair and transparent – some CMOs report better on this than others. This will become more imperative with the expected introduction of Extended Collective Licensing (ECL) schemes, where non-members works will have rights revenue collected on their behalf. Some CMOs already utilise ECL schemes, but it is unclear who it affects, how this is collected, and then claimed for and distributed to non-members. Data collection is vital for rightsholders to trace usages of their works, and will certainly become so under certain licensing schemes, including those undertaken by CMOs internationally. Without reliable data on usage in these cases rightsholders' protections afforded under the Regulations will be illusory. We encourage the IPO to issue further guidance on this part of the Regulations to help both rightsholders and CMOs.

Section 4: Transparency

- *Have the Regulations resulted in a greater degree of transparency when dealing with licensing bodies?*

In general, yes, the Regulations have resulted in a greater degree of transparency, but again we would stress only up to a point, and to some extent because there is a requirement to publish an Annual Transparency Report (ATR), which is an obligation set out in the Regulations.

ATR provides crucial information for rightsholders to see at face value the distribution of rights revenue. It is important that this system is maintained especially for those rightsholders that are not CMO members.

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- *Are there any areas where you considered that the Regulations fail to deliver sufficient transparency for right holders?*

Some ATRs were more transparent and informative than others. In our sector, it is clear that there has been concerted effort to improve the collection, distribution and management of rights revenue overall. However, there is always room for further improvement, as some CMOs provide minimal information on the types of collective licensing revenue acquired, particularly direct payments from overseas CMOs, and rights revenue collected from ECL. Going forwards, as the copyright acquis widens between the UK and Europe (where there are a number of visual arts CMOs), rightsholders' concerns on the transparency of rights revenues collected under ECL will be heightened.

There is a lack of clarity over the use of rights revenue that sits outside of payments to members and are not operational costs. Also, payments from overseas licensing, such as the EU, remains largely opaque, which we are concerned about, particularly once the UK has completed the transitional period with the EU. We believe it will become increasingly necessary to know where rights revenue has originated from and under which types of licences, such as ECL and OOCWs – having a short summary indicating the amount collected does not provide the necessary disclosure required.

- *Have the audit requirements in the Regulations resulted in a higher degree of trust in the information published by your CMO?*

Yes, we support the requirements for CMOs to undertake audits particularly on rights revenue paid by RROs to respective CMOs, which are subsequently paid to rightsholder members. We would like to understand why some auditing costs appear unduly far higher for smaller CMOs, and whether that is an industry standard, as that cost affects payments due to rightsholders.

Section 5: Dispute resolution and enforcement

- *Has there been any change in CMO complaint procedures since the Regulations came into force?*

We understand most complaints from BAPLA members are taken up with the IPO in the first instance if they receive an unsatisfactory answer from the CMO in question. We are not aware of any member having taken steps beyond this to use the dispute resolution and enforcement service at this stage. However, that is not to say that having a dispute resolution and enforcement service is not an important service to provide, more that it acts to ensure CMOs follow the Regulations.

- *What are your views on the enforcement provisions in the Regulations? For example, is the IPO the right body to monitor and enforce the Regulations? Do the Regulations grant the right investigative powers? Are the penalties sufficiently dissuasive? Would a different enforcement regime be more effective?*

As commented previously, in relation to the rights of rightsholders to withdraw their mandate or rights and select another CMO to act on their behalf, the enforcement provisions do not seem to be effective enough. Rightsholders chiefly focus on their primary source of income generation, and so the amount of time required to deal with disputes relating to withdrawing collective licensing mandates becomes over burdensome and often confusing, making it difficult to withdraw their mandate and/or rights. It seems unnecessary barriers have been placed on rightsholders leaving



relatively few powers for the IPO to address these issues more vigorously, leading to rightsholders remaining powerless where they are².

We fully support the IPO's involvement, and position as an NCA, in these matters to resolve complaints to the level it is able to, demonstrating its impartiality. We also continue to believe that it would be beneficial for rightsholders to have an independent regulatory body in place that could act on behalf of rightsholders where complaints go beyond the means of the IPO at a national level without the burden of having to use legal measures. In addition, going forwards we are concerned about how effective the IPO will be as an NCA on a bilateral basis with EU counterparts to address conflicting actions undertaken by CMOs based in European member states, particularly where they decide not to recognise certain groups of rightsholders and therefore do not conclude representation agreements. It will be extremely pertinent with the expected national interpretations of the DSM Copyright Directive, introducing new licensing models such as ECL for Out-of-Commerce works and Platform liability. We would welcome the IPO issuing further guidance on how rightsholders can enforce their rights both in the UK and overseas, and what mechanisms are available for rightsholders to use without the need to seek costly legal redress.

Final Comment

BAPLA welcomes the IPO issuing this post implementation review, which has given us an important opportunity to reflect on the impact the new legal framework for CMOs to operate provides. The implementation of the Regulations has given much needed guidance to CMOs, rightsholders, and licensees, which has seen progress in a number of areas, and room for improvement in others.

Looking forwards we believe it is vital that the IPO continues to monitor the activities of CMOs, as well as provide guidance and support to stakeholders, particularly in relation to the rights of rightsholders and the important of maintaining a competitive marketplace to ensure CMOs act accordingly. As new digital and online business models emerge, such as in areas like AI, data transparency and reporting will take on more importance to safeguard both rightsholders' and licensees' interests. We need to set a globally recognised 'gold standard' on how CMOs function, which includes their responsibilities to members, but also to non-member rightsholders and users within their repertoires, so that CMOs in other territories follow suit.

Sincerely,
Tim Harris
BAPLA Treasurer
<https://bapla.org.uk/>

² Note: Rightsholders would find the process of using an ADR too onerous, time consuming and costly to consider that option, hence not pursuing matters beyond either querying the CMO in question, or the IPO.