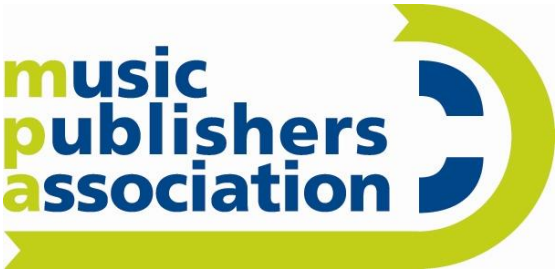

MUSIC PUBLISHERS ASSOCIATION

RESPONSE TO THE TECHICAL REVIEW OF REGULATIONS FOR EXTENDED COLLECTIVE LICENSING

28 January 2014

MPA response to the technical review of regulations for Extended Collective Licensing ("ECL")

1. The Music Publishers Association ("MPA") is the trade association representing and safeguarding the interests of its members, who are UK music publishing companies. The MPA also owns two collection societies: the Mechanical-Copyright Protection Society Ltd ("MCPS") which is appointed by its members - publishers and other owners of musical works - to manage certain uses of the mechanical rights in those musical works. These operations are contracted to PRS for Music as defined by a service level agreement. The MPA also owns Printed Music Licensing Ltd ("PMLL") which was set up in 2013 and manages the licensing of the copying of printed music in the UK on behalf of music publishers. Its Schools Printed Music Licence ("SPML") covers the copying of printed sheet music in schools and is offered to schools exclusively by The Copyright Licensing Agency ("CLA"), acting as sole agents.

   For the purpose of this response, the MPA will be responding on behalf of its music publisher members.

2. Background to the MPA submission

In the music industry in the UK we are fortunate to have well established national systems for licensing rights in musical works including national collection societies which represent and administer the vast majority of musical works in areas where rights are collectively licensed as well as established systems for direct licensing, licensing which is limited to specific repertoire and multi territory licensing solutions. In each case in accordance with voluntary mandates or contractual arrangements entered into by publishers, songwriters and composers.

As such, our members see no need for the introduction of Extended Collective Licensing into the UK market for musical works. Furthermore the principle of ECL is contrary to the basic principles of of copyright as it seeks to imbue entities with the right to exploit copyrights without the consent of the relevant rightsholder. We understand that the UK Government is nevertheless intent on introducing an ECL provision and therefore we believe that it is vital that any ECL scheme is narrowly construed so as to ensure that it has no impact on the operation of a free market for licensing the relevant class of rights nor that it interferes with choices made by rightsholders as to how they license their rights.

As indicated above the business models in the market are varied and in many cases rightsholders may have made clear elections not to participate in a UK collective licensing solution. There are many examples of areas where this is the case including:

(i) where a rightsholder that is a member of a collection society for certain schemes has elected to exclude their rights from other schemes (by way of example for the purpose of offering multi-

territorial licenses via another collective rights management organisation or for the purpose of licensing rights directly)

(ii) Where a rightsholder is not a member of a collection society because their commercial business model is designed to offer an alternative to collective licensing solutions (by way of example buy-out libraries)

(iii) Where a rightsholder has elected to license their rights outside of normal commercial arrangements (by way of example through licensing solutions such as Creative Commons)

It is critical that any regulation is drafted to ensure that an ECL cannot inadvertently or otherwise include any rights that belong to a rightsholder that has made clear decisions not to participate in a collective licensing scheme whether or not the relevant rightsholder makes a clear election to opt out. The results of the inclusion of such rights in an ECL would be not only be contrary to the clear wishes of the rightsholders (whether those wishes are expressed through an opt out process or not) but they would also provide for an obligation on the entity operating the ECL to compensate such rightsholders when they have made prior and alternative arrangements for compensation or have elected not to be compensated. Accordingly should such rights fall within an ECL they would result in additional cost being incurred by the collective and potentially in the dilution of royalties due to the members of the relevant collection society in each case to the detriment of the members.

Over the course of the past two years we have had regular meetings with IPO officials to explain our concerns that the introduction of ECL into the UK, if not very carefully drafted and without sufficient safeguards for rightsholders, could set a dangerous precedent which may be taken up by legislative bodies in Europe and be used by foreign collection societies, some of which operate on a non-representative and non-transparent basis to override clear licensing choices made by rightsholders. We have welcomed this engagement with the IPO and would also like to be closely involved in the development of ECL guidelines for rightsholders and collecting societies which are due to be published in the Spring.

A number of the concerns we raised, particularly around opt-out procedures for rightsholders, have been incorporated in the proposed regulations – although we would like to see the regulations in this area strengthened further, please see our response to questions 19 – 24.

The publication of these regulations has, however, raised a greater concern with regards to the practicalities of the opt out process. We are concerned that the reference to the opting out of “works” rather than “rightsholders” may render the opt out process completely unworkable for both rightsholders and collecting societies. Given the volume of new musical works which are created on a daily basis, it is very difficult to imagine how every new work which is subject to an existing catalogue-wide opt out by a rightsholder can be effectively publicised by a collecting society and accurately communicated to the licensee. It places an impossible burden on both the rightsholder and the society.

3. MPA response to consultation questions

Question 1: Should a collecting society that is applying for an extension of an existing collective licensing scheme be required to have had the scheme in place for a minimum period? If so, what should that minimum period be? Please provide reasons for your answer(s).

We believe that any ECL scheme must be an extension of an existing scheme and within the scope of a clear mandate from its members (respecting and being subject to any previous exclusion from a mandate by any member). In addition, the society should be able to prove that it has the required royalty processing systems in place, that the distribution policy is well established and running smoothly and that it has adhered to its Codes of Conduct. The key to allowing a collecting society to apply to run an ECL scheme rests on its representativeness within the appropriate class of rights, as well as the amount of time it has been successfully operating a scheme.

Question 2: What kind of efforts should a collecting society have to make to demonstrate it is significantly representative? For example, how easy would it be for a collecting society to produce evidence of total number of mandates and works?

It should be a relatively straight forward exercise for a collecting society to produce evidence of their total number of mandates and works – although this is likely just to be a 'snapshot' as the repertoire of a collecting society is changing constantly with new works being added on a daily basis.

What is crucial, however, is that the collecting society is representative of the market for the particular class of rights for which it is seeking an ECL. There are examples of other ways of licensing rights beyond the collecting society model, including by way of example but not limitation (i) multi territorial licensing arrangements which are outside the national collecting society network, (ii) direct licensing on a commercial basis including via buy out libraries or (iii) licensing on a non-commercial basis including via a Creative Commons licence. The extent to which a market for rights exists beyond the scope of the collecting society mandates needs to be taken into account when considering whether a collecting society is truly representative.

We propose that a suitable test as to whether a collecting society is "significantly representative" should be that the applicant represents all or substantially all "known" and commercially exploited repertoire within the relevant category with respect to the relevant scheme. A test which could be used to determine representativeness could be that the collecting society should be able to demonstrate that they represent, through specific mandates, 100% of the works that represent the top 50% of the usage in the area covered by the relevant scheme and that there should not be a material decline below that until you are well into the long tail/commercially insignificant territory (e.g. 90% overall).

Question 3: Do you agree that a 75 percent threshold for membership support is appropriate? If not, what would be a better way to demonstrate membership support and consent? Please provide reasons for your answer(s).

We propose that a more appropriate measure to ensure that membership support has been obtained and that the membership support is suitably representative, would be to have a 'double' test by which not only 75% of membership were in favour, but also that these members represent 75% of works in the proposed scheme.

Question 4: Should a collecting society have to demonstrate past compliance with its code of practice? If so, what sort of information might satisfy this requirement? Please provide reasons for your answers?

Yes, this is a fundamental requirement. A collecting society should adhere to the BCC principles for collective management organisations[1] and have a published Code of Conduct. Ideally the collection society should also have been subject to review by the BCC Independent Code Reviewer and a copy of this report should be made available to the Secretary of State. Any former non-compliance with the Codes of Conduct should also be made available to the Secretary of State with detail of the breach and subsequent remedy.

Question 5: Can a collecting society sometimes be justified in treating members and non-members differently, even if circumstances are identical? Please provide reasons for your answers?

Non-members have expressly chosen not to be part of a collection society network and as such they should not automatically expect to share the same privileges as a member (for example involvement in operational and governance matters). Non-members will, however, benefit from the protections afforded by the society's Codes of Conduct which will to a certain extent create a level playing field for member and non-member rightsholders.

Question 6: Do you think that a signed declaration from a collecting society is sufficient evidence that it is adhering to its code? If not, what additional evidence should a collecting society have to produce to demonstrate that it is adhering to its code? Please provide reasons for your answers.

No a signed declaration is not sufficient. As suggested above, the collecting society should be adhering to the BCC principles and have been subject to a review by the BCC Independent Code Reviewer and the latest copy of the report should be included with the application to the SoS.

Question 7: Is there a need for any additional minimum standards to protect non-member rightsholders? Do you agree that the protections for non-member rightsholders, as articulated in the ECL regulations, and elsewhere (including in this consultation document, where further protections Government would like to see in applications

[1] http://www.britishcopyright.org/page/350/british-copyright-council-launches-principles-for-collective-management-organisations-codes-of-conduct/

are specified), are sufficient to protect their interests? Is there anything else that could usefully be included in an ECL application to help assess that application's strength? Please provide reasons for your answers?

We believe the proposed protections are sufficient to protect the interests of non-member rightsholders.

Question 8: Are the minimum periods for representations and subsequent Secretary of State decision sufficient and proportionate? If not, please explain why not, and make a case for a different period or periods?

This period seems to be sufficient given that the scheme has already been authorised by the collecting society members at this stage.

Question 9: In what circumstances, other than as described above, do you think an application should be narrowed or made subject to certain conditions, without the application being rejected? Please provide reasons for your answer.

If there are any changes to an application, which have not been authorised by the members, it needs to be returned to members to ratify the proposed amendments. Members must be allowed the opportunity to accept or reject any amendments or conditions imposed by the Secretary of State. Once this has been done, the society can reapply for the licence through the route set out in the regulations.

Question 10: Do you agree that, aside from judicial review, there is no need for a dedicated appeal route? If not, please say why you think there should be alternative appeal routes and give examples of what they might be?

The granting of a licence by the Secretary of State should not be a subjective exercise. In order to receive a licence a collecting society needs to demonstrate that it has met all the necessary requirements clearly set out in the legislation – if these have been met, the licence will be granted and if not it will be rejected and the collecting society will have to go back and reapply with the appropriate authorisations from members in place. As such we do not think it necessary to appoint an appeals body and the system of judicial review should be sufficient to address the needs of any society wishing to appeal.

Question 11: Do you agree that proportionality should be the key principle that determines the scale of the publicity campaign? If not, what other principles should be factored in? What in your view, should a proportionate campaign look like? It could be that the scale of opt outs, following the period of publicity, reaches a level that raises questions about the collecting society's representativeness. What should happen in this instance? Please provide reasons for your answers.

Yes, any publicity campaign must be proportionate and cost effective for members. Suggested routes to reach members and non-members would be advertising on collecting society websites, in their newsletters, via the trade

press, trade bodies and the IPO website. It is however critical that any categories of rights that are licensed via alternative routes which are broadly known in the market should be automatically deemed excluded/opted out without the requirement for the relevant rightsholder to make an election to opt out.

If the scale of opt outs following the period of publicity is too great, then the collecting society should be deemed to have failed the representativeness test and the Secretary of State should reject the application.

Question 12: Do you agree that a five year authorisation is appropriate? If not, please explain why not. What information should be required of a collecting society when it reapplies for an authorisation? Should this be contingent on the performance of its previous ECL scheme? How light touch can the re-application period be? Please provide reasons for your answers.

Yes, 5 years is appropriate. There should be no change in information required of the collecting society or any shortening of the period of re-application. If a collection society and its members decide to renew the scheme and the process for the Secretary of State to grant a licence should be exactly the same. The reason for this is that members need to be able to fully evaluate the success of the scheme and that it continues to work in their best interests both commercially and financially. The pace of change in our sector is currently very fast, and the commercial opportunities for licensing rights could quite possibly change dramatically in a five year period.

Question 13: Under what conditions, if any would modification to an authorisation be appropriate?

We do not think that any modification to the conditions of an authorisation is acceptable without the express consent of rightsholder members.

In order to ensure that rightsholders/members are fully aware and in agreement with any proposed modifications, the licensing body must be required to return to its members and once again seek the required consent or the required parent consent for <u>any</u> changes to the initial scheme.

Question 14: Are the proposed time periods for representations and Secretary of State decision appropriate?

Please see response to question 13.

Question 15: Aside from breaching its code of practice or the conditions of its authorisation, are there any other circumstances in which revocation of an authorisation might be justified? If so, please specify those circumstances and give your reasons why. What, if anything, should happen if a collecting society had breached its code but remedied it before the Secretary of State had imposed a statutory code? Please provide reasons for your answer.

If a collection society operates beyond the limits of the ECL as this would be an infringement of copyright and should lead to the revocation of an authorisation. If the Secretary of State receives complaints from more than 25% of rightsholders represented by the scheme a revocation of an authorisation would also be appropriate.

With regards to a society which has breached its code of conduct, but remedied it, this would be reviewed on a case by case basis and should be viewed in conjunction with the report from the Independent Code Reviewer.

Question 16: Are the proposed time periods for representations and Secretary of State's decision reasonable? Are the post revocation steps sufficient and proportionate? Please provide reasons for your answers.

We agree that the time frame has to be as short as is reasonable and that the proposed post revocation steps are sufficient.

Question 17: Do you agree that a collecting society should be allowed to cancel its authorisation. What, if any, penalties should be associated with a cancellation? Please provide reasons for your answers?

Yes we think this is reasonable, but there must be evidence that rightsholder members have authorised the cancellation of the scheme. There should not be any penalties as this is likely to be a commercial decision taken by members and it should not be up to the Secretary of State to impose damages if the commercial circumstances around the scheme have changed.

Question 18: Is the repayment of part of the licence fee a reasonable and proportionate requirement? Please provide reasons for your answer.

This requires a collecting society, if it cancels its authorisation or has its authorisation revoked, under Regulation 16 (6) to "return to its licensees monies equivalent to the length of time remaining on the licence." We agree that any collected monies must be distributed to beneficiaries of the ECL scheme – however the regulations make no assumptions about how the monies should be distributed. It is vital, for the interests of both member and non-member rightsholders that the monies are distributed according to the usage/distribution model agreed at the point of application. Undistributed monies should, after a given period of time, be distributed to rightholders that can be identified whose rights were or were likely to have been exploited by the relevant licensee in recognition of the fact that due to limitations in reporting capability on the part of licensees, data quality or the costs associated with a full and accurate distribution it may be impracticable to distribute all monies accurately based on usage. An objective basis for such distributions should be determined by the Board of the collecting society but should be open for challenge if it is unfair or discriminatory. See our response to Q. 28.

Questions 19 – 24 on 3.6 - Regulation 14 "Opt out from an Extended Collective Licensing Scheme

We were pleased to note that a number of concerns we raised in previous consultation documents and in meetings with IPO officials have been covered in this consultation document and the draft regulations. There are a few further points on the opt out process which we think require further clarification and which we believe must

be covered either by the regulations governing extended collective licensing or in the forthcoming guidelines for rightsholders and collecting societies.

1. We do not think it is sufficiently clear from the regulations or the consultation document that rightsholders will be able to opt out with immediate effect if they withhold their rights from an ECL from the very start of an ECL scheme or if they have held away their rights by way of previous contractual arrangements. These rights should automatically be withheld from the scheme by the collecting society with no further obligations on the rightsholders. This would avoid a situation where an opt out is exercised prior to authorisation by the SoS, but might still be subject to regulation 14 (2) (b) whereby "such termination [is] to take effect not later than 6 months from the date of the opt out" – allowing the collecting society to include the opted out works in the ECL for an unacceptable period of time.
2. In addition, with relation to 14 (2) (b) it must be clear that this regulation cannot be used to extend the term of any existing mandate which might expire prior to the expiry of the ECL.
3. It is not sufficiently clear that a rightsholder may opt out at any point during the authorised period of an ECL scheme – this is necessary as our industry is in a period of rapid change and there needs to be the flexibility to opt out of a scheme at any time in order to address potential future business needs. In the instance of a rightsholder opting out whilst a scheme is in operation we are in agreement that cessation of the use of a work after a maximum of six months is reasonable.
4. When making it publically known that a rightsholder has opted out, it must be the responsibility of the collecting society, not the rightsholder, to compile and publish the list of opted out works. Although in reality, implementing this vital component of the ECL scheme may prove unworkable given the volume of new musical works registered on a weekly basis.
5. In answer to Q. 20 we agree that a 14 day time limit for both acknowledgement of the opt out and notification to the licensees is appropriate and on Q. 21 we agree that 14 days is a reasonable amount of time for the collecting society to list a work which has been opted out.

Question 25: Do you agree with the proposal that money collected for non-members cannot be used to benefit members alone? If not, please say why.

Provided it is possible to determine that money collected relates to non-members then that money should be retained and made available for collection by those non-members for a period up to the expiry of the relevant limitations period but then it should be available to the relevant collection society to apply towards the reduction of its costs on the basis that the operation of the ECL is likely to have resulted in additional costs for members. Where it is not possible to determine whether monies collected relate to members or non-members then those monies should be distributed to rightsholders on an objective basis.

Question 26: Do you agree with the principle of individual remuneration in ECL schemes? Please provide reasons for your answers.

Distribution generally occurs based on a usage model - whereby remuneration is commensurate with the use of a work. We do not agree with individual remuneration at a work level as this would increase the costs of operation of a license and could benefit non-members over existing members. Given that the ECL would be non-exclusive and non-member is able to opt out of any scheme, individuals will always be able to license their rights directly if they need to.

Question 27: Are there any other ways in which a collecting society might publicise the works for which it is holding monies? Is there any danger that there will be fraudulent claims for undistributed monies? If so, how might this problem be addressed?

For collecting societies to respond.

Question 28: To what extent is incomplete or inaccurate data from licensees an issue when it comes to the distribution of monies? If a non-member rightsholder fails to claim monies due, what uses of those funds should the Crown promote? Please provide reasons for your answers.

Incomplete or inaccurate data is a problem for collecting societies – but it is important to distinguish between between 'unmatched monies' and 'undistributed monies'. Unmatched monies (where it is impossible or impracticable or too costly to identify to whom it should be paid) should be distributed on an equitable basis to all known rightsholders whose rights may have been exploited by the relevant licensee. Undistributed monies (where a non-member rightsholder has been identified but where the collection society has been unable to pay them) should remain with the relevant collection society and made available for collection by the relevant non-member up to the end of the period prescribed by the relevant limitations provisions following which time it should be used to reduce the costs of operation of the relevant ECL scheme.

We do not agree that undistributed monies should revert to the Crown.

Question 29: What is the appropriate period of time that should be allowed before a collecting society must transfer undistributed monies to the Crown? When this happens, should there be a contingent liability and if so for how long should this run? Please provide reasons for your answers.

Please see response to Q 28.

Question 30: Do you agree that these rules are fair to both absent rightsholders and potential users of orphan works?

Yes, there appear to be sufficient safeguards in place to protect the interests of non-member/absent rightsholders.

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ABOUT THE MPA:

The Music Publishers Association (www.mpaonline.org.uk) is the trade association for music publishers in the UK, with over 270 members, representing nearly 4,000 catalogues covering every genre of music. Our members include all three of the UK's "major" music publishers, independent pop publishers, classical publishers, production music publishers and also printed music publishers. We estimate that our members represent around 95% of publishing activity in the UK.

The vast majority of our member companies are small or medium sized enterprises. Many of our member companies are multi-disciplinary music companies, operating not just as music publishers but as record labels, managers, promoters, producers, manufacturers, distributors and retailers.

The MPA is the owner of the Mechanical Copyright Protection Society (www.prsformusic.com) and of Printed Music Licensing Limited (www.printmusiclicensing.co.uk), which licenses the copying of sheet music in schools.