About You and Your Organisation

Your name	LINDA ROYLES
Job Tile	SENIOR CONSULTANT
Organisation Name	BAPLA
Organisation's main products/services	Trade association representing companies and individuals licensing photographic images. BAPLA supports its members in a number of ways: 1) Sign posts buyers and images users to archives and specialist in their subject field, that facilitate licensing of photographic content direct between client and supplier. Some also offer illustration footage and syndicated text. All archives are accessible on line, some offer full e-commerce facilities behind pay walls to lawfully acquire content. All operate in international as well as specialist UK markets. 2) Conducts surveys, such as the Pricing Trends survey to evaluate licensing practices, granularity of tariffs in line with new technology and media, client and market trends. The industry, worth $2bn globally and in the UK around £650m[1]. Our own research shows that BAPLA members alone contribute about half of this turnover in the region of £310m per year. Our members employ in the region of 2,500 people in the UK and generate revenue for, and manage the interests of 120,000 creators and rights holders

BAPLA wish to reserve further comment until sight of ECL legislation.

Regulation of Licensing Bodies

Question 1: Does the proposed definition correctly capture the type of body on which we consulted? Is it too narrow or too broad? What, if any impact, will this definition have on the various entities that are currently operating in the collective licensing market? Please give reasons for your answer?

We are supportive of the role of "*traditional collecting* societies" in deriving income in areas of market failure – i.e. where it would be uneconomic or impossible for authors and rights holders to only directly collect revenues themselves. Our members manage use and re use of content in directly controlled ways on behalf of mandated authors. We see limited scope for secondary rights – often applied to traditional media – such as print, applied in the current digital era.

Government's proposals to include an exemption for businesses by size / turnover to the code will have the following effects:

[1] UK figure equates to a 1% contribution to UK GVA(DCMS figures state that in 2008 film, video and photography combined were responsible for 0.3% GVA).

1. Because collecting societies are not particularly prevalent or active in our sector, those who license secondary use would always fall outside of this regulation.
2. This would enable them to trade without fear of penalty and may shut down options of appeal as outlined in Part 3 of the Regulations and close down options for authors to take resolve disputes.
3. The exclusion of micro-businesses creates a loophole that would enable larger collecting societies to avoid the sanctions by simply splitting up into smaller entities.

This section raises the following questions, which we wish to see addressed:
a) Why the revenue threshold is cited in EURO? Does this indicate that the UK is therefore consulting on the CMO Directive?
b) What is meant by "an organisation authorised by way of assignment, licence ***or any other contractual arrangement*** to manage copyright etc". What other contractual arrangements are included? The right to use the other's copyright may only be granted by a licence or an assignment.

We think that the proposed definition; "*that are neither owned nor controlled by members and for profit",* is too wide.

We support the wording ". . . which fulfils one or both of the following criteria:

(i) it is owned or controlled by its members;
(ii) it is organised on a not-for-profit basis."

Reasoning:

A) Should a collecting society be neither owned nor controlled by members?
No, if it is neither owned nor controlled by its members, whom is it controlled by and whose interests does it hold? Its shareholders? This wording implies an intention to include all intermediary businesses, content aggregators and suppliers under one definition as a collecting society.
Whilst CMO's are not alone in managing rights on behalf of third parties, there should be no assumption that others would want to be categorized as a CMO.

Unlike other entities in the creative sector, collecting societies are removed from the creative process; from setting up creative projects to managing clients. They can dictate terms to clients and threaten action against them without fear commercial consequence. If the link between CMO and members were lost, their remit would be entirely self-serving.

This would not be in accordance with Schedule Regulation 3(1) obligation to rights owners.

At a time when IPO wishes to introduce new powers for collecting societies – ECL, we think that this would be problematic for most, except the CMO's.

We believe that CMO members have greater say in the running of their organization, including a vote for their directors and in the appointment of board members.

We already have concerns of the economic impact if CMO's are encouraged to migrate from the unchartered analogue copying space into the digital market. We do not believe they have the necessary framework of rights management to move into this area, without eroding the primary rights of non-CMO members who operate in the image-licensing arena. CMO's have a culture of collecting revenues from creators, whose status as members or UK nationality is uncertain.

As technology moves apace, it will be possible to track uses and reuses in the digital space. If members – or indeed non members of a collecting society believe that a CMO's management of their rights and ergo their role is rendered redundant by technology or that they can derive higher income elsewhere, this right should be equally supported by government in its copyright thinking and policies.

B) Should a collecting society be for profit? No

A collecting society run for profit will put its own commercial interests, growth and survival before that of its community or members, and greater odds with those interests it does not serve, i.e. CMO non-members. This is of particular importance with regards to changes in legislation that will facilitate Extended Collective Licensing.

In so doing it may seek greater market share, possibly in areas and territories already serviced by its own members. This culture may put a CMO in direct competition with its members.

Because of their size and / or monopoly status, the desire for profit may drive out or prevent others from moving into this space, either intentionally or unintentionally. This we feel would have the adverse objective of this policy. Central to Hooper and Hargreaves thinking is the requirement to move away from a 'siloed licensing approach'. This would stifle innovation and deter nascent business models and innovative micro business in the creative industries at a time of rapid change. Such dominance will further limit and constrain user choice.

Businesses in the creative sector are continuously working to develop income streams in the digital space. This is a space not held by "traditional collecting societies", yet an area that, for reasons of survival, innovation and growth, some are aggressively looking to pursue.

Many of our members are commercial companies that work within a competitive global market economy. They respond to market and client demand, but do not benefit from a monopoly status in the market place.

Like collecting societies our members contractually manage copyright on behalf of more than one rightsholder for the collective benefit of their contracted rightholders. These are direct permissions from rights holders to manage individual works within an author's repertoire.

We do not think that a for-profit status would encourage CMO's to reduce their overhead or running costs. We believe that a system of transparency afforded by

the codes of conduct should encourage them to do so. This climate of much needed and greater transparency would enable rights holders look to where the greatest redistribution of revenues from secondary – not digital use / reuse could be found and challenge their societies towards greater efficiency.

Question 2: Are there any other circumstances in which you think that the Secretary of State may need to exercise the power to appoint an Ombudsman and/or Code Reviewer? Please describe what these are and give reasons for your answer.

Thank you for the opportunity to expand on areas of policy and law where we believe our comments would contribute to making this more robust and fair.

We are supportive of the appointment of Walter Merricks CBE by the collecting society members of the British Copyright Council to review the CMO code.

The Secretary of State may wish to rely on an Ombudsman or support the remit of a Code Reviewer to ensure processes are in place to ensure fairness and transparency under regulation 3(1) to:

- Manage and log complaints against a CMO not adequately resolved by the CMO's complaints procedure to the complainant's satisfaction.
- Manage complaints regarding the market impact of collective management on existing and functioning markets
- Ensure the effective and **lawful** management of any licensing scheme including and not limited to ECL, especially where this impacts on the economic benefit of non-members. This should include a register that identifies every owner of a work when dissipating funds back to owners and for those owners it is unable to identify
- Review or ensure that mandates, especially where these affect non-members, are both fair and are readily available
- Effective management of an opt out scheme
- Audit / detail unclaimed fees; if they are distributed detail to whom, and ensure that these are distributed fairly i.e. not just benefitting the CMO or its members. It would be possible to do so in way that does not breach confidentiality.
- Undertake an annual independent audit to ensure equitable and fair rights collection and distribution – UK and overseas, a register of complaints **and** resolutions, details of the tariffs **and** how were came about
- The regulations do not prescribe the frequency of any of the activities of the Code Reviewer or the Ombudsman. The reporting in particular should take place on regular basis (e.g. annually, 6 months after the deadline of annual reports by the collecting societies).
- Compliance to the code by overseas collecting societies operating, or wishing to operate in or derive income from the UK
- Penalties for repeated non-compliance and safeguards to ensure that if a collecting society failed to implement a code of conduct, it may cease its operations before re-opening under a new identity to circumvent the proposed regulations.

Question 3: The Secretary of State must leave at least 28 days for the relevant licensing body to adopt a code of practice once it has been directed to do so. Is this a sufficient period of time for the licensing body to adopt such a code? If so, please say why. If not, please explain why not and make a case for a different period of time.

No comment

Question 4: Do the steps described between the Direction in Regulation 3 to the Imposition of a Code of practice in Regulation 5 make it sufficiently clear what process must be followed? If not, please say where you think the gaps are and how they might be filled.

We would wish to see the word "lawful" included when discussing licenses in Section (1) 12.

"Ensure that all licences and licensing schemes are "lawful", drafted in plain English and are accompanied by suitable explanatory material. " Section (1) 12.

Section 22 states that the code of practice shall provide that the Ombudsman "*shall be the final arbiter on complaints between the relevant licensing body and its members or licensees in relation to these specified criteria for their code of practice*".

The opportunity to present the options available from Annex B namely recourse from another source to settle his complaint such the Courts, the Copyright Tribunal, or First Tier Tribunal, seems a missed one.

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Question 5: What should be the principal features that determine whether a Code Reviewer and/or an Ombudsman is "suitably qualified" for their statutory roles?

Whilst aspects of this question fall outside of our scope, we can communicate our member's requests for transparency and the need for an unbiased, impartial approach when dealing with issues, decisions raised by members or non-members against a CMO. For example details of the above should be recorded in the form of minutes or reports and made available and accessible. Neither the Reviewer not the Ombudsman should in any way be involved in the running or oversight of any collecting society subject to the regulations, throughout the period of his service in those respective offices. Past involvement would be acceptable subject to the overriding requirement of impartiality.

Question 6: Do you consider the proposals for applying a graduated scale to financial penalties will provide a proportionate response to reflect the respective severity of the breach? Do you consider the proposed difference in the quantum of the penalties is appropriate? If not, please explain your reasons.

This question extends beyond our knowledge of constitutional/criminal law. Also, we are not privy to discussion regarding the application of a graduated scale to financial penalties.

Where we can comment is by communicating the feedback of our members who:

1. 1. Feel strongly that any penalties should come out of the operating or administrative fees of collecting societies only and not from the royalties that rightfully belong to rights holders.

2. Have several questions relating to criminal sanctions, which we will be asking the IPO directly.

Question 7: Do you think that the General Regulatory Chamber is the correct route of appeal? If not could you please say why and suggest an alternative appeal route.

We cannot comment on the workings of the General Regulatory Chamber regarding CMO's. Very few in the copyright licensing sector are aware of the Copyright Tribunal, even less so the General Regulatory Chamber. We congratulate the work of the IPO is raising awareness to the small claims court procedures for copyright, and would urge that such awareness to processes available to rights holders, without incurring excessive legal costs, would be most welcome.

The conduct of the collecting societies touches on livelihoods of creators. It is a concern that the decisions regarding the conduct might be confined to an obscure administrative procedure. The appeal from the decisions of the SoS should be to the Intellectual Property
Enterprise Court.

Question 8: (Asked on behalf of the Tribunal Procedure Committee):
If you believe that the standard rules of procedure need to be supplemented to deal with appeals arising from these regulations, please explain why this is the case.

As above
In the Schedule specifying conditions:

Para 1. How will the membership be offered to foreign members? (if the collecting society runs an ECL scheme). The regulations should impose minimums in this respect. Similarly, para 4 – how will this be carried out in practice?

s, 18 – the collecting societies should report not only on licensing revenue from their repertoire but from all copyright works subject to licences granted (or purported to be granted) by the CC. This change is needed to address the issue of embedded works.