Cover Sheet for CLA Response on Regulation of Licensing Bodies

This response is entered on behalf of The Copyright Licensing Agency Ltd ("CLA"). CLA is a Collective Management Organisation (a "CMO"). It is a not for profit company incorporated in the UK, limited by guarantee. It was founded in 1983 by the Authors' Licensing Collecting Society Ltd and the Publishers Licensing Society Ltd who themselves represent, directly or indirectly, authors and publishers of most of the books, journals, magazines and other periodicals published in the UK. Artistic works such as photographs, illustrations and drawings appearing within those works are covered by virtue of an agency agreement between CLA and the Design & Artists Copyright Society Ltd. A network of repertoire exchange agreements with similar CMOs throughout the means that CLA's collective licences also cover a large number of overseas publications.

CLA acts as agent for the Music Publishers' Association and its subsidiary, Printed Music Licensing Limited ("PMLL"), is issuing to schools a licence to copy from sheet music and will also be acting as agent for the NLA media access Limited in issuing licences to the educational institutions to copy from newspapers.

Intellectual Property Office

Consultation response form

Responding to the consultation **Regulation of Licensing Bodies**

On this form, please provide your responses to the questions outlined in this document. You do not have to complete the whole form – please answer the questions that are most relevant to you.

Please note: This consultation forms part of a publication exercise. As such, your response may be subject to publication or disclosure in accordance with access to information regimes (these are primarily the Freedom of Information Act (FOIA), the Data Protection Act (DPA) and the Environment Information Regulations 2004).

If you do not want part or whole of your response or name to be made public please state this clearly in the response, explaining why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system cannot be regarded as a formal request for confidentiality.

The closing date for responses is Monday 7 October 2013 at 12 midday.

About You and Your Organisation

Your name	Martin Delaney
Job Title	Legal Director & Company Secretary
Organisation Name	The Copyright Licensing Agency Ltd
Organisation's main products/services	Collective Rights Management

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?

CLA Response: It is important that these Regulations establish and maintain a level playing field between all organisations which may be involved in the collective management of rights. It is unclear why the definition of a "relevant licensing body" is linked to the criteria that the entity be owned or controlled by its members, or organised on a not-for-profit basis:

- it is assumed the reference to "members" is intended to mean right holders as opposed to the UK corporate law concept of members of the company in the sense of shareholders;
- it would seem odd if those organisations which are owned and controlled by their members (and/or operated on a not-for-profit basis) should be required to comply with stringent conditions which do not apply to organisations which are not owned by their members;
- it would seem even more strange if a company operated on a for-profit basis was not to be subject to the same regulatory regime;

In terms of rightsholder protection, right holders who control a CMO probably have sufficient protection provided by the various company law governance requirements. Where they may need

protection is where their rights are being managed by organisations they don't control, particularly if that entity is operating commercially for its own account as a for-profit corporation.

From the user perspective, their interest in the transparency of the activities of collective management organisations ought to be at least equal as regards member-controlled/not-for-profit companies and for profit commercial entities. It may be thought, in fact, that they need higher protection as regards those entities which are acting on their own account for profit.

The draft CRM Directive imposes similar requirements on "independent management entities". It might be appropriate to adopt a similar approach provided it preserves the distinction between those undertaking collective management activities and those engaged in traditional publishing activities (so that only the former is captured).

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.

CLA Response: No. The key is to frame correctly the definition of a "licensing body" capturing both those entities described in the consultation as the "traditional collecting societies", as well as any other bodies, whether or not for profit and whether or not owned or controlled by rightsholders, who perform activities and functions similar to traditional collecting societies and who should be under the same regulatory requirements as regards standards of conduct and transparency.

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.

CLA Response: 28 days is too short a period. During this period, the relevant licensing body has first to decide whether or not to accept or to challenge the direction from the Secretary of State. The decision to challenge the direction and appeal to the First-Tier Tribunal may be a difficult one for a relatively small organisation with little or no previous experience of such procedures. There will be cost implications to the relevant licensing body in mounting such a challenge, as well as the risk of an adverse costs order against it. Whilst there may be cases where an organisation subject to these Regulations has wilfully ignored its obligations to adopt a code (or to comply with the relevant criteria set out in the Regulation), typically it is likely to be the case that there is a genuine difference of opinion either as to the need for a code or as to its contents.

The process of designing a Code of Conduct from scratch incorporating the statutory criteria, but tailored to the circumstances of the relevant licensing body, is likely to take months not weeks. Furthermore, if the notice is served during peak holiday times, e.g. August or just before Christmas, small organisations (such as PMLL) may find key members of staff away.

CLA would recommend that the initial period therefore for adoption of/challenge to the Secretary of State of direction should be a much longer period – perhaps at a minimum 2 months. The additional time would serve the interests of natural justice without unduly affecting the public interest in the adoption of suitable codes of conduct which are not in themselves especially time critical.

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.

CLA Response: Broadly speaking, yes although some clarity on timetable for appeals may be required. The draft Regulations contain the detailed 28/42 day procedure for the Secretary of State to issue a Direction and to impose a code of practice. Regulation 13 provides an Appeals mechanism involving the First-Tier Tribunal; it does not itself contain any timetable. The description of Her Majesty's Courts and Tribunals Service First-Tier Tribunal (General Regulatory Chamber) Rules in Annex B states that the effect of the use of this procedure would mean any person wishing to appeal must do so within 28 days of the date of notice on which the decision was sent to them.

Given the detailed timetable laid down for the issue of a Direction by the Secretary of State to impose a code of practice, it seems odd that the right of appeal should be subject to a timetable only described in an Annex by reference to other legislation. It is, for instance, unclear from reading this whether the 28 days applies both to an appeal launched by a relevant licensing body on receipt of a Direction by the Secretary of State as well as to an appeal against a final decision by the Secretary of State to impose a code of practice under Regulations 5 (3).

It would perhaps be clearer if Regulation 13 set out a timetable for relevant licensing bodies either to appeal against the initial Direction as well as against a final decision to impose a code.

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?

CLA Response: Experience and knowledge of the relevant Regulatory and Legal Framework (including the particular copyright law) plus:

- for the Code Reviewer, experience of comparable Code systems or working for or with a regulatory or statutory body that requires similar adherence to standards;

- for the Ombudsman experience of mediation (or other dispute-settling mechanisms) or similar and the ability to analyse complex and sometimes conflicting data and then to be able to draw a balanced conclusion.

The ability to maintain independence and impartiality of thought and judgement would be key to both posts as would the experience of taking verbal and written evidence from individuals and organisations and the ability to distil, analyse and report on such evidence. Both posts would require proven personal authority, gravitas, integrity and credibility at a senior level and in public life.

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.

CLA Response: HMG has invited comments on the legal effectiveness of the Regulations only, the Policy itself being out of scope. But the Policy Statement says:

"The Government will develop draft regulations for codes of conduct, both through an existing informal working group of users and collecting societies, and through wider consultation. This consultation will seek to ensure that....an effective enforcement mechanism can be constructed."

The various CMOs who participated in the informal consultation with the IPO made it clear that they thought financial sanctions were inappropriate and that there was no need to look beyond the existing framework for corporate and individual liability set out in the Companies Act and other relevant legislation. Furthermore it has never been expressed as settled government policy (such policy to be based on "robust evidence"), that ordinary employees of CMOs could be at risk of personal liability at all, let alone at these levels. It cannot be said that the Consultation has been properly undertaken in this respect.

The level of sanctions proposed by the draft Regulations seem draconian, disproportionate and in many cases unnecessary:

- the fines are imposed on any "Director, Manager or similar Officer". There seems to be little justification for extending the scope of liability at a personal level beyond the Directors of a relevant licensing body. It may be that the intention is to follow the lead of the EU Draft CRM Directive which also seeks to impose obligations on "managers" (as opposed to Directors). But that may reflect the very different corporate law tradition (common in civil law countries) where often the "Directors" sit on a supervisory Board with defined and limited powers regarding strategic direction of the company and "managers" (who in the UK would in fact be "Directors") sit on an operating Board responsible for the running of the company. It is inappropriate to apply an alien corporate law structure on to the UK system with an ill-defined reference to "managers" a term which could encompass many individuals much lower down the decision – making hierarchy in an organisation.

- the Companies Act does impose liability at times on “Officers” of the company, as well as “Directors” and where the term “Officer” is defined as including any “Director, Manager or Secretary”. But the inclusion of the word “Manager” alongside “Director” and “Secretary” (meaning the Company Secretary) indicates the level of Manager intended to be caught (someone more or less exercising the powers of a Director) and where case law indicates that it implies that it is aimed at those occupying a senior position in a company formulating and implementing policies and decisions.

- by contrast there is no accepted body of understanding as to which “Managers” in a licensing body should be responsible. For example, should the Customer Services Manager be held responsible for the failure of the Board of Directors to adopt a code of practice?

- personal liability for Directors, and occasionally Officers, is generally limited to certain specific areas such as competition law, environment law, health and safety or in criminal situations such as fraudulent trading, theft, bribery, etc. There seems no reason why licensing bodies have been singled out for this level of liability for routine activities of the company against an almost complete lack of evidence as to the nature and scale of the problem to be addressed.

- the cap of £50,000 under Regulations 10.2 is inappropriate and unnecessary for a failure to adopt an approved code of practice (see Regulation 10 (a) and Regulations 4.4). It seems inconceivable that any loss suffered as a result would justify such a financial penalty. The better remedy is contained within the powers of the Secretary of State to impose a code by statute where there is a failure to adopt. Moreover that is a remedy which actually addresses the problem rather than simply penalising those thought responsible.

- the cap of £50,000 is potentially applicable also for a failure to comply with an imposed code of practice or with the determination of the Ombudsmen; again this seems excessive given that these may be quite minor infractions.

- the penalty for the supposedly more minor infractions under Regulation 10 (b) of the statutory level 5 (£5,000) with a daily default fine of potentially up to £500 again seems excessive.

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.

CLA Response: No comment.

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.

CLA Response: No comment.

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