



## Consultation response form

### Responding to the consultation

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	Frances Lowe
Job Title	Head of Legal, Policy and Public Affairs
Organisation Name	<i>PRS for Music</i>
Organisation's main products/services	Collective Management Organisation - Musical Works

*PRS for Music* welcomes the opportunity to comment on the draft Copyright (Regulation of relevant licensing bodies) Regulations 2014 ('the Regulations'). Our introductory comments, response to consultation questions and drafting suggestions with supporting notes are set out below.

### Introductory comments

It is crucial that the system of self-regulation is not undermined. It is, therefore, fundamental that the statutory interventions in relation to an individual licensing body would only be contemplated if the system of self-regulation by that organisation were to have broken down irretrievably. However, we note that although the Secretary of State may decide that the system of self-regulation of a licensing body is inadequate or appoint a Code Reviewer or Licensing Code Ombudsman, the Regulations do not specify the mechanism that would trigger the Secretary of State to contemplate such interventions. For example, unless it is apparent that the voluntary system of independent code review is unreliable, the Secretary of State should not in our view be in a position, as he or she would be under the draft Regulations, to exercise the power of appointment of a Code Reviewer in relation to any society operating under a voluntary regime or for the purposes of reviewing its voluntary code midway through the three year review cycle.

The Regulations do not specify any non-financial sanctions. We think that other remedial measures could be more appropriate than financial sanctions and have the added benefit of limiting the harmful impact on members.

Regulation 10 provides for sanctions up to £50,000 on individuals for failing to comply with an imposed code. This opens the possibility of a very high financial penalty on a several classes of individual for insufficiently particularised reasons. Companies legislation only provides for financial penalties on individual office holders (i.e. directors and other officers) for highly specific failures. Any drafting that on its face might expose members of staff of licensing bodies to an ongoing threat of personal liability for vaguely defined reasons is disproportionate.

### Response to Consultation Questions

**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?

**PRS for Music Response:** The IPO have chosen to use the definition of “collective management organisation” from the CRM Directive. It is confusing to use this definition in association with the term ‘*relevant* licensing body’. In the UK ‘licensing body’ has very specific meaning in s.116 CDPA and it is different from ‘*relevant* licensing body’ in the context of the proposed regulations. Confusion is inevitable if CDPA uses two highly similar definitions for different types of organizations. It would make more sense to use the term ‘collective management organisation’ here in relation to statutory codes. This would be more consistent with having published ‘*Minimum Standards for UK Collecting Societies*’ (*our emphasis*).

In our view this would also set the system up more logically with the introduction and adaptation of the regulations for the purposes of the future implementation of the CRM Directive.

**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.

**PRS for Music Response:** No. However, there are cases where the Secretary of State should not exercise the power to appoint an Ombudsman and/or Code Reviewer, including where the relevant licensing body already subscribes to an ombudsman scheme (or other independent and impartial ADR mechanism) and/or has adopted a code under a scheme subject to an independent review mechanism.

**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.

**PRS for Music Response:** In our view, 28 days is an unreasonably short a period in which to require a relevant licensing body to notify a code, especially given the fine/daily rate penalty proposal under Regulation 10)(1)(b) . Compliance with such a deadline is likely to consume a significant proportion of the resources of an organisation. The process of drafting, internal review and governance and external consultation can take several months. We suggest not less than three months.

We also refer to our response to Question 4 in relation to the right of appeal.

**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.

**PRS for Music Response:** We believe there are gaps as follows:

Regulation 3: The Secretary of State should be required to notify the “target” body of the findings of the independent Code Reviewer and any other evidence on which he has based his opinion that the system of voluntary self-regulation has failed. In the absence of such notification, the ‘relevant licensing body’ will not be in a position to exercise a right of appeal under Regulation 13 (as to which, we refer to our drafting comments immediately following our responses to this questionnaire).

Regulation 4: should make provision for partial compliance: at the moment there is an either/or situation, which could operate unduly harshly – it is not inconceivable that a relevant licensing body might notify a code that does not materially satisfy the specified criteria (especially if it is under pressure to meet the 28 day notification deadline), to which the response should not be notice of imposition but notice of non-compliance, together with a specified number of days to remedy or say why it is not compliant, for example. Given that breach of an imposed code carries severe penalty, an otherwise willing relevant licensing body should be given every reasonable opportunity to adopt a code by approval. If Regulation 5(2) is intended to address this, we would prefer to see it reflected in Regulation 4.

**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?

**PRS for Music Response:** Previous regulatory experience, independence and clarity of mind and judgment; proven experience and expertise in evidence gathering and report writing for publication. The position should be advertised and filled in accordance with Nolan principles.

For:

- the Code Reviewer, the Secretary of State should not appoint the same Independent Code Reviewer as that appointed by relevant licensing bodies operating in the voluntary sphere: a voluntary ICR and statutory ICR are mutually exclusive roles and cannot be occupied by the same individual without publicly undermining the concept and credibility of voluntary self-regulation.
- For Ombudsman: British and Irish Ombudsman Association membership.

**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.

**PRS for Music Response:** Generally, the gradation system works in terms of separating out those specific infractions which attract the £50,000 maximum fine (failure to adopt an approved code; failure to comply with a determination of the Licensing Code Ombudsman) and those which attract the level 5 fine (breach of information obligations; failure to notify a code). However, imposing a fine of up to £50,000 for breach of an imposed code is or could be a disproportionate penalty for what might be a relatively trivial breach for which the victim may already have adequate redress through an ombudsman scheme. The offence of non-compliance with an imposed code is simply too vaguely drawn to justify a penalty/sanction under draft Reg 10(1)(a) and we would ask the Government to revisit this provision. We refer to our drafting suggestions.

Where financial sanctions are imposed on a licensing body, the cost of meeting those sanctions is ultimately borne by members through their commissions, since collective management organisations are owned by members and operated on a non-profit basis. If the basis for the sanction relates to a provision established for the benefit of right holders it may not be appropriate for a sanction to be payable at all.

Too many individuals are potentially caught within the scope of the financial sanctions regime. The purpose of the sanctions is presumably to ensure that the adoption of compliance with a code of conduct is endorsed and supported at the very highest levels of the organisation’s management and therefore the financial risk of any failure to adopt and/or comply should, if personal liability is appropriate, ultimately borne by those individuals; i.e. at the level of Board Director or equivalent where the governing body of the organisation is differently constituted.

**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.

*PRS for Music 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.

*PRS for Music Response:* No comment.

**Please note:** The information you supply will be held in accordance with the Data Protection Act 1988 and the Freedom of Information Act 2000. Information will only be used for its intended purpose. It will not be published, sold or used for sales purposes.

## PART 1

### Preliminary

#### Citation and Commencement

1. These Regulations may be cited as the Copyright (Regulation of relevant licensing bodies) Regulations 2014 and shall come into force on [.....].

#### Interpretation

2. In these Regulations—

“Act” means the Copyright Designs and Patents Act 1988;

“Comptroller” shall have the same meaning as in the Patents and Designs Act 1907;

“ECL scheme” means a collective licensing scheme under which a relevant licensing body may grant licences in accordance with authorisation by the Secretary of State<sup>a</sup>;

“First-tier Tribunal” means the First-tier Tribunal established by section 3(1) of the Tribunals, Courts and Enforcement Act 2007(c);

“micro business” means a business with ~~less~~ fewer than ten employees and which has a turnover<sup>b</sup> or balance sheet total of less than 2 million Euros per annum;

“relevant licensing body” means any organisation authorised by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders as its sole or main purpose and which is:

(a) owned or controlled by its members; or

(b) organised on a not for profit basis.

“specified criteria” means the criteria set out in the Schedule

“system of self-regulation” means any code of practice or other arrangement in accordance with which the relevant licensing body operates its activities.

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<sup>a</sup> We support the point made by the Educational Recording Agency that the regulations also need to take account of ‘certified schemes’ in the CDPA.

<sup>b</sup> We support the point made by the Educational Recording Agency that the definition should be consistent with the definition of ‘micro-business’ definitions used in other legislation.

## PART 2

### Regulation of relevant licensing bodies

#### Direction to adopt a code of practice

3.—(1) If the relevant circumstances are met, the Secretary of State may direct a relevant licensing body by a date stated in the direction (“Commencement Date”) to adopt and publish a code of practice that complies with the specified criteria.

(2) For the purposes of paragraph (1), the relevant circumstances are:-

- (a) the relevant licensing body is not a micro-business; and
- (b) that in the opinion of the Secretary of State the system of self-regulation of the relevant licensing body does not comply in material respects with the specified criteria.

(3) In deciding whether the ~~code of practice~~ system of self-regulation<sup>c</sup> of a relevant licensing body does comply in material respects with the specified criteria the Secretary of State may have regard to a report produced by a Code Reviewer who has been appointed in accordance with paragraph 24 of the specified criteria or by the Secretary of State under regulation 6.

(4) The Secretary of State may request a Code Reviewer to carry out a review of the system of self-regulation of the relevant licensing body and to produce a report on the compliance of that system with the specified criteria in order to assist him in making his decision under paragraph (3).

(5) The Commencement Date must be at least 42 days after the [date on which the direction is made]<sup>d</sup>.

#### Effect of a direction

4. (1) The relevant licensing body must within ~~28 days~~ [three months?<sup>e</sup>] of the date on which a direction is made notify to the Secretary of State a code of practice that complies with the specified criteria and that it proposes to adopt in accordance with the direction.

(2) In deciding whether the code of practice of a relevant licensing body does comply in material respects with the specified criteria the Secretary of State may have regard to a report produced by a Code Reviewer who has been appointed in accordance with paragraph 24 of the specified criteria or by the Secretary of State under regulation 6.

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<sup>c</sup> The use of “code of practice” pre-judges the issue. It should be possible for a relevant licensing body to operate without a code as such but under a constitution, contract that is consistent with e.g. the BCC Principles or Government Minimum Standards etc and which is materially compliant with the specified criteria. The Secretary of State should be concerned with the substance rather than form of self-regulation.

<sup>d</sup> The timetable is too compressed, coming only a fortnight after date on which the relevant licensing body would be required to notify the Secretary of State of a code under Reg 4(1). The 42-day period should be extended and/or run from a date not sooner than the date on which the relevant licensing body notifies the code to the Secretary of State, if not the date on which the Secretary of State approves the Code.

<sup>e</sup> Please *PRS for Music*’s response to Q.3 of the consultation questionnaire.

(3) Following receipt of a code of practice notified in accordance with regulation 4(1) and prior to the Commencement Date, the Secretary of State will by notice [\[under Regulation 5\(2\)<sup>f</sup>\]](#) inform the relevant licensing body in writing that the code of practice notified either:

- (a) meets the specified criteria and is approved by the Secretary of State; or
- (b) does not meet the specified criteria and that the Secretary of State intends to impose a Code of Practice on the relevant licensing body.

(4) Once its code of practice has been approved by the Secretary of State the relevant licensing body shall adopt the approved code of practice and operate its activities in accordance with its approved code of practice from the Commencement Date.

### **Imposition of Code of Practice**

5. – (1) Before imposing a code of practice, the Secretary of State must –

- (a) be satisfied that the relevant licensing body has failed to adopt an approved code of practice in accordance [with](#) regulation 4(4);
- (b) give notice of the code of practice to be imposed on the licensing body, and
- (c) consider any representations made by the relevant licensing body in accordance with the notice and not withdrawn.

(2) The notice must—

- (a) state the reasons for the proposed refusal of any code of practice notified by the relevant licensing body,
- (b) contain the code of practice that the Secretary of State proposes to impose on the licensing body; and
- (c) state the period (not less than 14 days starting with the date of delivery [of](#) the notice) within which representations may be made in relation to the proposed imposition of the code of practice.

(3) Where the Secretary of State decides to impose the code of practice contained in the notice the Secretary of State will notify the relevant licensing body and give it a written statement of reasons for the determination together with the date from which the approved code of practice is to have effect as the code of practice adopted by the body (the “Effective Date”).

(4) The relevant licensing body shall operate its activities in accordance with the imposed code with effect from the Effective Date.

[\(5\) The Effective Date must be at least \[X months<sup>g</sup>\] from the date on which the notice referred to in Regulation 5\(3\) is delivered to the relevant licensing body.](#)

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<sup>f</sup> Please refer to *PRS for Music*'s response to Q.4 of the consultation questionnaire.

<sup>g</sup> The Regulations should give the licensing body a reasonable period of months in which to comply with an imposed code (e.g. the appointment of an ombudsman or code reviewer, implementation of staff training are not processes that can be put in place “overnight”). As the Regulations provide for the severest financial sanction to apply to breaches of an imposed code, the licensing body must be given every reasonable opportunity to comply.

### **Code reviewer**

6.-(1) The Secretary of State may appoint a suitably qualified person as Code Reviewer to review and report to the Secretary of State on the codes of practice adopted by the licensing bodies, including how they relate to the specified criteria, and on compliance with the codes of practice.

(2) Before making an appointment under paragraph (1) the Secretary of State shall consult with those persons who the Secretary of State considers to represent the interests of licensing bodies, licensees, the persons on whose behalf a relevant licensing body is authorised to negotiate or grant licences and the Comptroller.

(3) The Code Reviewer may serve notice on any relevant licensing body requiring it to supply to the Code Reviewer information for the purposes of a review or report to be produced by the Code Reviewer.

(4) The Secretary of State may pay the reasonable expenses and allowances of the Code reviewer.

### **Licensing Code Ombudsman**

7.- (1) The Secretary of State may appoint a suitably qualified person as Licensing Code Ombudsman to investigate and determine disputes about a relevant licensing body's compliance with its code of practice.

(2) A relevant licensing body, licensee or a person on whose behalf a relevant licensing body is authorised to negotiate may refer a dispute about a relevant licensing body's compliance with its code of practice or other matter to the Licensing Code Ombudsman.

(3) The Licensing Code Ombudsman may serve notice on any relevant licensing body or other person requiring it to supply to the Licensing Code Ombudsman information for the purposes of investigating a dispute referred to in paragraph (1).

(4) A relevant licensing body shall comply with a determination of the Licensing Code Ombudsman.

(5) The Secretary of State may pay the reasonable expenses and allowances of the Licensing Code Ombudsman.

(6) No appointment may be made under this Regulation where the relevant licensing body has appointed a person to act as a Licensing Code Ombudsman in accordance with Regulation 22 of the specified criteria.<sup>h</sup>

### **Recovery of costs by the Secretary of State**

8.- (1) The Secretary of State may require a relevant licensing body to which regulations 3 to 7 apply to pay the Secretary of State a fee to reimburse the Secretary of State any relevant costs incurred by the Secretary of State<sup>i</sup>.

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<sup>h</sup> Please refer to *PRS for Music's* Response to Q5 of the Consultation questionnaire.

<sup>i</sup> Where following Secretary of State's request under Reg 3(4), the relevant licensing body is found by the Code Reviewer to operate a system of self-regulation that complies in material respects with the specified criteria, the Regulations should provide that the Secretary of State may not require a relevant licensing body to pay fees by way of reimbursement.

(2) For the purposes of paragraph (1), “relevant costs” are the costs to the Secretary of State of administering the operation of regulations 3 to 7.<sup>j</sup>

## PART 3

### Information, sanctions and penalties

#### Secretary of State’s powers to request information

9. —(1) The Secretary of State may, ~~for any purpose relating to its licensing activity,~~<sup>k</sup> serve notice on any relevant licensing body requiring it to supply to -

(a) the Secretary of State, for the purposes of making a determination under regulation [....]<sup>l</sup>;

~~(b) the Code Reviewer for the purposes of a review or report; or~~

~~(c) the Licensing Code Ombudsman for the purposes of an investigation or determination<sup>m</sup>~~

such information as may be reasonably specified or described in the notice, and to supply it at a time and place and in a form and manner so specified.

(2) The person to whom any document is produced in accordance with a notice under this regulation may, for any relevant purpose, copy the document so produced.

(3) Any reference in this regulation to the production of a document includes a reference to the production of a legible and intelligible copy of information recorded otherwise than in legible form

#### Sanctions and penalties for failure to comply with a condition or code of practice requirements

10. — (1) The Secretary of State may impose a sanction or penalty of such amount as he considers appropriate on a relevant licensing body or on a director, ~~manager or similar officer,~~ where the licensing body is not a limited company, equivalent officer of the relevant licensing body or, where the body’s affairs are managed by its members, on a member (“relevant person”) ~~or any other person<sup>n</sup>~~ if the Secretary of State is satisfied that the relevant licensing body has failed to comply with its obligations under:

(a) regulations 4(4) (adoption of an approved code of practice), ~~5(4) compliance with an imposed code of practice<sup>o</sup>~~ or 7(4) (compliance with determination of the Licensing Code Ombudsman); or

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<sup>j</sup> To comply with Schedule A1, para 6(2).

<sup>k</sup> Text deleted as the enabling provisions of Schedule A1 make no provision for Secretary of State to exercise powers for this purpose.

<sup>l</sup> This provision is not fully consistent with the enabling powers at Schedule A1, paragraph 5(6); the purpose for which the Secretary of State (or the third party) adjudicator may request the information should be stated.

<sup>m</sup> Deleted provisions are adequately covered in Regulations 7(3) and 6(3) with sanctions for breach at Reg 10 (1)(b)

<sup>n</sup> Text deleted as Schedule A1 provides no enabling power to imposed sanctions on “any other person” than those already specified in para 5(2).

<sup>o</sup> It is not clear why a breach of an imposed code should carry such a potentially Draconian penalty when breach of a voluntary or even Approved Code would not. Many breaches could be dealt with by the Licensing Code Ombudsman for example (and where the breach is a failure to appoint an Ombudsman, the remedy is for the

(b) regulations 4(1) (notification of code of practice), 6(3) (supply of information to Code Reviewer) or 7(3) (supply of information to Licensing Code Ombudsman) or 9(1) (supply of information in accordance with a requirement imposed by the Secretary of State.

(2) Any penalty imposed under paragraph (1)(a) shall not exceed £50,000.

(3) Any penalty imposed under paragraph (1)(b) shall not exceed a fine of up to level 5 on the standard scale and for continued contravention a daily default fine of up to one tenth of level 5 on the standard scale for each day until the required action is taken but shall not exceed £50,000<sup>p</sup>.

(4) In determining whether there has been a failure to comply with an obligation under regulation 10 (1)(a) or (b), the Secretary of State shall have regard to [....]<sup>q</sup>

### **Imposition of sanctions and penalties: main procedural requirements**

11. —(1) Before imposing a sanction or penalty under regulation 10, the Secretary of State must—

- (a) give notice of the proposed sanction or penalty, and
- (b) consider any representations made in accordance with the notice and not withdrawn.

(2) The notice must state—

- (a) that the Secretary of State proposes to impose a sanction or penalty,
- (b) the nature of the proposed sanction or the amount of the proposed penalty,
- (c) the obligation that the Secretary of State is satisfied has been contravened or is being contravened,
- (d) the acts or omissions which the Secretary of State considers constitute the contravention,
- (e) any other facts which the Secretary of State considers justify the imposition of a sanction or penalty and the nature of the proposed sanction and the amount of the proposed penalty,
- (f) the manner in which, and place at which, it is proposed to require the penalty to be paid, and
- (g) the period (not less than 21 days starting with the date of publication of the notice) within which representations may be made in relation to the proposed penalty.

(3) As soon as practicable after imposing a sanction or penalty, the Secretary of State must give notice of the sanction or penalty.

(4) The notice must state—

- (a) the Secretary of State has imposed a sanction or penalty on the relevant licensing body or relevant person,

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Secretary of State to do so (with a right of reimbursement). If the provision is to be retained, it should specify the types of breach of imposed code that would justify the imposition of a sanction.

<sup>p</sup> Suggested cap for the purposes of proportionality.

<sup>q</sup> Schedule A1 para 5(3)(a) states that regulations must provide for determining whether there has been a failure to comply etc. The draft regulations do not appear to do this.

- (b) the nature of the sanction or the amount of the penalty,
- (c) the acts or omissions which the Secretary of State considers constitute the contravention,
- (d) any other facts which the Secretary of State considers justify the imposition of a sanction or penalty and the nature of the sanction or the amount of the penalty,
- (e) the manner in which, and place at which, the penalty is required to be paid, and
- (f) the date or dates, no earlier than the end of the period of 28 days from the date of service of the notice on the relevant licensing body or relevant person, by which the penalty or (as the case may be) different portions of it, are required to be paid;

(g) that the relevant licensing body and any relevant person on whom the notice is served has a right of appeal.

(5) A notice under this regulation must be given by—

- (a) serving a copy of the notice on the relevant licensing body and any relevant person, and
- (b) publishing the notice in such manner as the Secretary of State considers appropriate for the purpose of bringing the matters to which the notice relates to the attention of persons likely to be affected by them.

### **Sanctions and Penalties: further procedural requirements**

12.—(1) If, after giving notice under regulation 11 the Secretary of State decides not to impose a sanction or penalty, the Secretary of State must give notice of that decision.

(2) A notice under this regulation must be given by—

- (a) serving a copy of the notice on the relevant licensing body and any relevant person, and
- (b) publishing the notice in such manner as the Secretary of State considers appropriate for the purpose of bringing the matters to which the notice relates to the attention of persons likely to be affected by them.

### **Appeals**

13. —(1) If a relevant licensing body or relevant person is aggrieved by—

- (a) the imposition of a code of practice; or
- (b) the determination that there has been a failure to comply with a requirement or code of practice... ..<sup>†</sup>
- (c) the nature of a sanction or the amount of any penalty

the relevant licensing body or relevant person may apply to the First-tier Tribunal.

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<sup>†</sup> Proposed and further wording required in order to comply with Schedule A1 para 5(3)(c).

(2) On an application under this regulation, the First-tier Tribunal may make such order as it considers appropriate.

(3) Where the appeal is against the imposition of a code of practice the code shall continue in force until the First-tier Tribunal has determined the application.

(4) Where an application has been made under this regulation,

(a) in respect of a requirement to adopt a code of practice, the code of practice may not be required to be adopted;<sup>s</sup>

(b) in respect of a sanction or penalty, the sanction or penalty may not be required to be performed or paid

until the application in question has been determined, withdrawn or otherwise dealt with.

(5) Where the First-tier Tribunal substitutes a lesser penalty it may require the payment of interest on the substituted penalty at such rate, and from such date, as it considers appropriate.

### **Recovery of fees, sanctions and penalties**

14. Where fees imposed under regulation 8 or a sanction or penalty imposed under regulation 10, or any portion of such costs, sanction or penalty, has not been paid or performed by the date on which it is required to be performed or paid and—

(a) no application relating to the sanction or penalty has been made under regulation 13 during the period within which such an application may be made, or

(b) any such application which has been made has been determined, withdrawn or otherwise dealt with,

the Secretary of State may recover from the relevant licensing body or relevant person any of the costs, sanction or penalty which has not been paid or performed; and in England and Wales and Northern Ireland such costs, sanction or penalty may be recovered as a civil debt

Viscount Younger of Leckie  
Parliamentary Under Secretary of State for Intellectual Property

Schedule Regulation 3(1)

The specified criteria for the code of practice are set out in this Schedule.

The code of practice shall require the relevant licensing body to:

### **Obligation to rights holders**

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<sup>s</sup> The adoption of a code is an onerous obligation and unless and until the issue is finally determined, the relevant licensing body should not be put to expense of adoption.

1. offer membership to all rights holders in the sector it manages;
2. have rules or constitution that enables members (and non-members if operating an ECL scheme) to withdraw their rights on reasonable notice;
3. offer fair and balanced representation of rights holder members in the internal decision making process of the relevant licensing body;
4. provide copy of rules/constitution to members and potential members;

### **Representation**

5. act in the best interests of its members as a whole;
6. treat all members (and non member rights holders if operating an ECL scheme) fairly, honestly, reasonably, impartially, courteously and in accordance with its rules and membership agreement;
7. deal with all members transparently;

### **Obligations to licensees**

8. treat its licensees and potential licensees fairly, honestly, impartially, courteously and in accordance with its rules and any licence agreement;
9. ensure that its dealings with licensees or potential licensees are transparent;
10. consult and negotiate fairly, reasonably and proportionately in relation to the terms and conditions of a new or significantly amended licensing scheme;
11. provide information to licensees and potential licensees about its licensing schemes, their terms and conditions and how it collects royalties;
12. ensure that all licences and licensing schemes are drafted in plain English and are accompanied by suitable explanatory material.

### **Licensees**

13. The code of practice shall set out the requirements that the relevant licensing body will impose on licensees including:

- (a) to respect the rights of creators and rights holders including their right to receive fair payment when their works are used; and
- (b) that copyright material will only be used in accordance with the terms and conditions of a licence.

### **Conduct of employees, agents and representatives**

The code of practice shall require the relevant licensing body to ensure that:

14. its staff training procedures for employees, agents and representatives includes conduct that complies with the obligations to members and licensees set out in these specified criteria;

15. its staff provide licensees and potential licensees with clear information, including information about cooling off periods which may apply to new licences; and

16. its employees and agents are aware of procedures for handling complaints and resolving disputes and are able to explain those procedures to members, licensees and the general public in plain English.

**Information and transparency – monitoring and reporting requirements**

17. The code of practice shall state that the relevant licensing body shall:

- (a) inform members, licensees and potential licensees, on request, about the scope of its repertoire, any existing reciprocal representation and the territorial scope of its mandate;
- (b) maintain and make available to members on request, a clear distribution policy that includes the basis for calculating remuneration, the frequency of payments, and clear information about deductions and what they are for;
- (c) provide details of tariffs in a uniform format on website;
- (d) provide details of its code of practice and complaints procedure, accessible via a link on the website homepage;
- (e) undertake that all information provided is kept up to date, is readily accessible and written in clear language that can be easily understood by licensees, potential licensees and members.

## **Reporting requirements**

18. The code of practice shall state that the relevant licensing body shall publish an annual report which includes:

- (a) the number of rights holders represented, whether as members or through representative arrangements including, where possible and if applicable, an estimate of the number of rights holders represented by an ECL scheme;
- (b) the distribution policy;
- (c) total revenue from licences granted for its repertoire during the reporting period;
- (d) total costs incurred in administering licences and licensing schemes;
- (e) itemised costs incurred in administering licences and licensing schemes;
- (f) allocation and distribution of payments of revenues received and extent to which this is compliant with its distribution policy;
- (g) procedures for the appointment of directors to the relevant licensing body and details of any appointment during the course of the reporting period;
- (h) details of remuneration of each director of the relevant licensing body during the reporting period; and
- (i) a report regarding compliance with code of practice over the past year, including data on total level of complaints and resolution methods.

## **Complaints handling**

19. The code of practice is to provide that the relevant licensing body shall adopt and publicise:

- (a) procedures for dealing with complaints from members, non member rights holders (if operating an ECL scheme), licensees and potential licensees; and
- (b) a complaints procedure.

20. The complaints procedure shall:

- (a) define the categories of complaints and explain how each will be dealt with;
- (b) ensure information on how to make complaints is readily accessible to members, licensees and potential licensees;
- (c) provide reasonable assistance to a complainant when forming and lodging a complaint;
- (d) specify who will handle a complaint on behalf of the relevant licensing body;
- (e) indicate timeframe for the handling of a complaint or dispute;
- (f) provide that the relevant licensing body will give a written response to each complaint made in writing;

(g) provide that the relevant licensing body will give a written decision in any dispute and give reasons for that decision;

(h) ensure that the relevant licensing body makes adequate resources available for the purpose of responding to complaints and resolving disputes; and

(i) provide that the relevant licensing body will regularly review its complaint handling and dispute resolution procedure to ensure they comply with the minimum standards.

### **~~Ombudsman Scheme~~<sup>†</sup>**

21. The code of practice shall require the relevant licensing body to appoint and fund an independent and impartial person to arbitrate on disputes

### **Ombudsman Scheme**

22. 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.

23. The Ombudsman service will not include matters that are within the jurisdiction of the Copyright Tribunal.

### **Independent Code Reviewer**

24. The relevant licensing body shall appoint and fund an independent code reviewer to monitor and review the performance of the relevant licensing body against these specified criteria.

25. The independent review shall comprise an initial review of the code of practice against the specified criteria one year after implementation and then at intervals of at least three years thereafter.

26. The code of practice shall provide for the code reviewer to publicise and consult during the course of his review and to publish his conclusions.

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<sup>†</sup> If it is contemplated that the role of the independent arbitrator under Reg 21 could be carried out by a different person to the Ombudsman referred to in Reg 22, we think Reg 21 properly belongs above the header "Ombudsman Scheme". Otherwise, the switch from the reference to "independent and impartial person" to "Ombudsman", which is a specific type of independent and impartial person, is confusing.