

# **COLLECTIVE RIGHTS MANAGEMENT IN THE DIGITAL SINGLE MARKET**

Consultation on the implementation of the EU Directive on the collective management of copyright and multi-territorial licensing of on-line music rights in the internal market

## **RESPONSE FROM NLA MEDIA ACCESS LIMITED**

30 MARCH 2015



NLA media access is owned by 8 national newspaper groups and currently holds mandates from 234 newspaper and magazine publishers to license organisations to copy content from their publications. NLA additionally operates a database, holding copies of articles from the main national and regional newspapers, which enables it to supply data efficiently to media monitoring agencies for their services to their clients. Further information can be found at [www.nlamediaccess.com](http://www.nlamediaccess.com).

## **PROPOSALS FOR IMPLEMENTATION**

### **Initial Analysis of Options**

*Q1 Please say whether and why you would prefer to implement using Option 1 or 2?*

NLA preference is for **OPTION 2** – repealing the current Regulations and a copy out of the provisions of the Directive into a new set of Regulations.

It is important that there is total clarity as to the scope of the regulations and that UK CMOs are subject to the same regulations as their counterparts in other European territories – and we believe this can only be effectively achieved by a copy out of the Directive.

*Q2 How important is it to retain those aspects of the 2014 Regulations that go beyond the scope of the Directive?*

The provisions which are absent from the Directive, such as the ‘Requirements imposed on licensees’ – whilst ‘nice to have’, can be regarded as somewhat nebulous in nature and the principles apply in any event under copyright and contract law, so we do not believe it is important to retain these as part of the Regulations. In addition introducing additional elements may serve to confuse the ‘copy out’ option supported by NLA.

*Q3 What is your best estimate for the overall cost of (a) implementation and (b) on-going compliance with this Directive?*

An estimate of costs cannot be given at this stage but if, after due consideration, any organisational re-structure is required to allow full compliance with the Directive, there may be significant set up costs. Thereafter the costs for on-going compliance are not likely to be significant, in view of the fact that the NLA already has to bear the costs of compliance with the existing regulations, codes of practice and company law.

*Q4 If Option 2 was the preferred option, as a CMO would you consider retaining a revised code of practice as a means of making the new rules accessible to members and users?*

Yes, NLA would retain a revised Code of Practice as this is an effective means of providing the necessary transparency as regards NLA’s principles of operation in a way which is easily accessible by our licensors and licensees.

## **OVERVIEW OF DIRECTIVE’S REQUIREMENTS**

### **Title I: General Provisions: Scope and Definitions**

*Q5 Given the definitions of “collective management organisation” and “independent management entity”, would you consider your organisation to be caught by the relevant provisions of the Directive?*

*Which type of organisation do you think you are and why?*

*Please also say whether your are a micro-business*

NLA media access Limited is a company limited by shares. As its shareholders are also rightholders it falls under the definition of a “collective management organisation”.

NLA is not a micro-business.

**Q6** *If you are a rightholder or a licensee, do you either have your rights managed or obtain your licences from an organisation you think is an IME?*

*If so please could you identify the organisation, and explain why it is an IME.*

N/A

### **Subsidiaries**

**Q7** *Do you have subsidiaries? Which of the Directive’s provisions do you think apply to them, and why? Please set out your structure clearly.*

N/A

### **Rightholder**

**Q8** *Who do you understand the “rightholders” in Article 3(c) to be?*

We understand the ‘rightholders’ in Article 3(c) to be the persons and/or organisations whose rights the CMO is established to represent. ‘Rightholders’ are not necessarily ‘members’ of a CMO. In the case of NLA, as a limited company established to represent publishers, our only ‘members’ are our shareholders, but our ‘rightholders’ are the publishers who have entered into a mandate granting NLA rights to licence copying of their content.

**Q9** *If you are a CMO, what are the practical effects of a relatively broad definition of “rightholder” for you?*

The term ‘rightholder’ in relation to a particular CMO should encompass those persons who own rights relevant to the activities of that CMO, but the difficulty with a broad definition of ‘rightholder’ is that it can lead to requests for membership from persons or bodies who are not intended to be represented by the CMO.

In the case of NLA, which is owned by and established to represent publishers, it is acknowledged that publishers may not own all rights in the content that is included in their publications but, as evidenced by the recent survey undertaken by NLA on behalf of newspaper publishers, in aggregate our newspaper publishers own or control the necessary rights for NLA licences to over 99% of the content copied during the survey period (noting that in the main publishers remunerate agencies and individual contributors directly at the point of commission). Therefore, whilst it is acknowledged that the third party rightholders may be entitled to a small share of revenue (for further information on how NLA deals with this please see [www.nlamediaaccess.com/default.aspx?tabid=210n](http://www.nlamediaaccess.com/default.aspx?tabid=210n) for an explanation of our Special Contributors’ Scheme) any definition of ‘rightholder’ should not be such that a de minimis share would entitle such rightholders to membership or representation in the NLA.

## **Title II: Collective Management organisations**

### **Representation of Rightholders**

**Q10** *What do you consider falls in the scope of “non-commercial?”*

What is “non-commercial” will vary from CMO to CMO and how it is defined should be a decision made by the rightholders / members of a CMO. NLA regards “non-commercial” as an activity that does not interfere with the normal exploitation of the works.

**Q11** *If you are a CMO, to what extent do you already allow members scope for non-commercial licensing? Please explain how you do so?*

The rights granted to NLA under its publisher mandates are non-exclusive (except against other CMOs) and therefore our publishers are free to directly enter into both commercial and non-commercial licences.

**Q12** *What will be the impact of allowing rightholders to remove rights or works from the repertoire?*

It is acknowledged that the impact of allowing rightholders to remove rights or works will vary from CMO to CMO. NLA operates on an ‘opt-in’ basis and our rightholders already have contractual rights to remove their rights and works from our repertoire. However any such removal has to be on a suitable period of notice so that end user licences can be adjusted with minimum disruption.

**Q13** *Under what circumstances would it be appropriate for a CMO to refuse membership to a rightholder i.e. what constitutes “objective, transparent and non-discriminatory behaviour?”*

It is difficult to envisage a ‘one size fits all’ answer to this question as what is ‘objective, transparent and non-discriminatory’ will vary from case to case and CMO to CMO.

NLA is owned by and was established to represent publishers, and therefore it should not be obliged to offer membership to bodies that do not fulfil this criterion. As stated in Q9 it is acknowledged that there may be third parties that retain certain rights in the works included in the publishers’ publications (noting that such works are not necessarily copied for media monitoring purposes) but such limited (and diminishing) interest should not entitle such rightholders to membership and representation.

**Q14.** *What should “fair and balanced” representation in Article 6(3) look like in practice?*

The CMO should be transparent as to what classes of rightholders it represents and how it is structured. It has to be acknowledged that (as the Directive allows) CMOs have different structures and therefore flexibility is required in what is regarded as ‘fair and balanced’. In the case of NLA, to provide balanced representation, its Board of Directors currently includes representatives from each of its shareholders, a representative for the classes of mandating publishers it represents (presently magazine and regional newspaper publishers), and a representative for “Special Contributors” (even though, as explained in Q9 they represent less than 1% of the content copied).

**Q15.** *What do you consider to be an appropriate “regular” timeframe for updating members’ records?*

What is an appropriate timeframe will vary from CMO to CMO. NLA updates its records with any changes to the publishers, publications and rights it represents as and when such changes are confirmed.

As regards ‘members’, as these are NLA’s shareholders, we have to comply with company law requirements in updating our register of members.

## **Rights of rightholders who are not members of CMOs**

- Q16. *Is there a case for extending any additional provisions in the Directive to rightholders who are not members of the CMO? If so, which are these, why would you extend them and to whom (i.e. non-members in ECL schemes, mandating rightholders who are not members, or any other category of rightholder you have identified in answer to question 7)? What would be the likely costs involved? What would be the impact on existing members?*

NLA does not believe that it is necessary to extend additional provisions in the Directive to rightholders who are not members of the CMO outside of (as set out in Article 7(1)) those rightholders who have a direct relationship with the CMO.

## **The General Assembly of Members**

- Q17. *Which of the discretionary provisions of Article 8 do you think should be adopted?*

As is acknowledged in the consultation some flexibility and discretion is required in implementing the provisions of Article 8 to recognise that CMOs have different corporate structures, and that UK company law needs to be taken into account in provisions regarding governance and supervision, but otherwise NLA does not believe it necessary to adopt the discretionary provisions.

- Q18. *Do you have an existing supervisory function that complies with the requirements in Article 9? If not, can you give an estimate of the likely costs of compliance?*

NLA's Board of Directors carries out the supervisory function in compliance with Article 9.

- Q19. *Which of the Directive's provisions are existing requirements under UK company law?*

We understand that IPO is producing a report on this question.

## **Chapter 2 – Management of Rights Revenue**

- Q20. *If you do not already have a distribution system that complies with the provisions of Article 13, can you say what the cost of implementing the requirements will be?*

NLA already has a compliant distribution system. NLA currently distributes revenues to its mandating publishers / the PLS on a monthly basis and all its revenues are distributed (net of NLA's permitted retention). NLA distributes to overseas CMOs on an annual basis.

- Q21. *What are your organisation's current levels of undistributed and non-distributable funds, as defined in Article 13?*

NLA does not hold 'non-distributable' funds. All royalties (net of NLA's retention) are distributable to publishers (noting that the majority of NLA revenues are derived from media monitoring agencies and their clients where the copying is of current publications).

The amount of 'undistributed' funds NLA has in its accounts at any time is dependent on the time lapse between collection and its monthly distributions, and the level of invoicing which varies from month to month. Its model is to license in month 1, collect revenue in month 2 and distribute in month 3. NLA is currently holding £10m in its accounts which will be distributed to publishers over the next couple of months.

- Q22. *What is your estimate of the current size and scale of non-distributable amounts that are used to fund social, cultural and educational activities in the UK and elsewhere in the EU?*

NLA has for the past ten years donated £100k pa to the 'Journalism Diversity Fund' on behalf of its shareholders (to encourage diversity in the editorial workplace). Otherwise NLA has no information on the activities of other CMOs in this respect.

- Q23. *Do you collect for rightholders who are not members of your CMO? If so, how much of that rights revenue is undistributed and/or non-distributable? If you collect for mandating rightholders who are not members of your CMO, to what extent do those rightholders have a say in the distribution of non-distributable amounts, and what do you think of the Government exercising its discretion in relation to those amounts?*

In addition to the 8 National Publisher groups who are its shareholders, the NLA represents 38 regional publishers who have entered into a direct mandate with NLA, and 196 magazine publishers via a mandate from PLS. NLA also has reciprocal arrangements with overseas CMOs for licensing of each other's content in our respective areas of operation.

As set out in Q21, no NLA licensing revenues are undistributable.

- Q24. *What should be the criteria for determining whether deductions are "unreasonable"?*

CMOs should be transparent as to what deductions are made from rights revenue and such deductions should be approved by its supervisory board or general assembly as is appropriate for the organisational and cost structure of the CMO. Rightholders have the option whether or not to sign up to a CMO and therefore by default have the right to decide whether such deductions are reasonable or not.

- Q25. *Are there any pros and cons to be particularly aware of in case the Government exercises the discretion?*

N/A

### **Chapter 3 – Management of rights on behalf of other CMOs**

- Q26. *Is there currently a problem with discrimination in relation to rights managed under representation agreements? If so, what measures should be in place to guard against this?*

NLA handles the rights it is granted under representation agreements in the same way as it handles rights granted to it directly by publishers and is not aware of any problems. In the case of NLA, it is granted rights on behalf of magazine publishers via an agreement with PLS (which clearly sets out the obligations of NLA in its representation of the magazine publishers' rights), and has various reciprocal agreements with overseas RROs to represent their repertoire in the UK.

### **Chapter 4 – Relation with users**

- Q27. *What do you consider should be the "necessary information" CMOs and users respectively should provide for in licensing negotiations (Article 16(1))?*

CMOs should provide information as to proposed licence terms (content, rights, duration, restrictions), and tariffs.

Users should provide information as to how they use the relevant content such as to enable the CMO to model the reasonableness of its proposed tariffs.



- Q28. *What format do you think the user obligation should take and how might it be enforced? What is “relevant information” for the purpose of user reporting?*

Accurate reporting from primary users is essential for the proper attribution of revenues. What is ‘relevant information’ will vary from CMO to CMO, but in the case of NLA, we require the media monitoring organisations who are licensed to distribute articles to their clients to provide information every month (noting that NLA makes monthly distributions to publishers) as to the publications they have copied from, the number of copies distributed and the identity of their client organisations (so that NLA can ensure such organisations are in turn properly licensed). The reporting also needs to be in a format that is compatible with NLA’s reporting and accounting systems. If the organisation fails to respond to reasonable requests for information the CMO should be permitted to enforce the obligation through the courts and get compensation for any costs incurred in such enforcement.

It should perhaps be noted that the Copyright Tribunal has ruled the NLA’s requirements to be reasonable (most recently in the Cutbot reference, CT123/13, Decision dated 21 March 2014).

In addition it is a sad fact that some organisations still undertake unlicensed copying and are less than honest when questioned as to their copying activities. It would be useful therefore to be able to have some form of legal obligation on such organisations to provide accurate information on reasonable requests from CMOs.

- Q29. *What is the scale of costs incurred in administering data returns that are incomplete and/or not in a suitable format?*

It is difficult to give an accurate assessment of the costs incurred in administering data returns that are incomplete and/or not in a suitable format as these are absorbed into the general costs of administering the monthly data returns - but we would estimate the specific costs of checking and cleansing data to be over £75k a year. It should be noted that the costs of administering returns are in any event a significant part of NLA’s general financial administration costs (including that there are staff dedicated to monitoring and processing returns and IT systems costs) as accurate and complete reports are essential for the efficient operation of NLA reporting and revenue distribution systems.

## **Chapter 5 – Transparency and reporting**

- Q30. *Which of the Transparency and Reporting obligations differ from current practice, and what will be the cost of complying with them?*

The procedures NLA currently has in place are compliant with existing company law and accounting standards. However it is acknowledged there are some obligations for detailed information in the annual transparency report which are additional to current reporting requirements (for example information on refusals to grant a licence, detailed information on relationships with other collective management organisations) but as NLA holds the information the costs of complying with such reporting requirements should not be significant.

- Q31. *What do you think qualifies as a “duly justified” request for the purposes of Article 20?*

Any rightholder or user should be entitled to have information as to the rights and repertoire represented by a CMO and the licences it offers with associated tariffs. NLA makes such information available on its website so would not have difficulty in providing the information by electronic means.

## **[Title III – Multi-territorial licensing of online rights in musical works by collective management organisations. Q32 -36 - N/A]**

#### **Title IV: Enforcement Measures**

Q37. *How many licensees do you have in total? Of these, are you able to say how many are small and medium enterprises and how many have a bigger turnover than you do?*

NLA currently has 9009 licensed end-user organisations. Using the headcount of the organisations, the number of small and medium enterprises holding NLA licences is as follows:

Small (<50 employees) = 3918

Medium (<250 employees) = 2240

NLA cannot provide information as to how many of its licensees have a bigger turnover.

Q38. *What do you think are the most appropriate complaints procedures for handling disputes and complaints between CMOs, users and licensees, including for multi-territorial disputes? Please say why.*

NLA believes that the current systems for dispute resolution are adequate and should be maintained including:

- Complaints procedures for licensees as set out in Codes of Practice, culminating in a referral to the Ombudsman
- Mediation services
- Copyright Tribunal
- Courts of Law

CMOs should have the freedom to follow the most appropriate route in relation to the type and level of dispute or complaint.

However, CMOs have been requesting for some time that they should have the right to refer matters to the Copyright Tribunal and its remit should not be restricted to only hearing complaints from end-users – equal access would provide a more balanced and fair tribunal service.

#### **Monitoring and compliance**

##### **Options for a national competent authority**

Q39. *What is your preferred option for the national competent authority? Please give reasons why.*

NLA preferred option is for IPO to act as the national competent authority as it has the necessary experience and resources to fulfil this function (including the Copyright Tribunal and mediation services)

Q40. *Bearing in mind the scope of its ongoing responsibilities, what would you consider to be an appropriate level of staffing and resources needed? Please give an upper and lower estimate.*

The appropriate level of staffing and resources will need to be agreed once it is clear what level of work the NCA will be required to do – but it is difficult to envisage that more than 2 staff members will be required.



*Q41. How should the costs of the NCA be met?*

NLA believes that Government should meet the costs of the NCA as this is a regulatory body required by the EU Directive. If the costs were to be passed to CMOs this would effectively be a charge to rightholders. It is important that the NCA is seen as an independent and impartial body and this can only be achieved through central funding. The complaints procedure could be arranged so that a small charge is made to file a complaint (refundable if the complaint is upheld) to deter frivolous complaints.