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Subject: collective rights management in the digital single market

## I. ABOUT BASCA

BASCA, the British Academy of Songwriters, Composers and Authors, is the single voice for British music creators as the professional association for music writers of all genres in the UK.

BASCA works to foster a sense of community amongst songwriters, lyricists and composers, and to campaign on their behalf in the domestic, European and international political arenas. As the only association in the country made up entirely of music writers, the organisation has an unparalleled insight into the issues affecting music creators in the UK today. We work closely with our members, keeping them informed in a constantly changing environment via our publications, websites, seminars and professional networking events. BASCA also presents the Ivor Novello Awards, British Composer Awards and Gold Badge Awards annually.

Membership of BASCA is open to working songwriters who are members of a royalty collection society, such as PRS for Music, BMI or ASCAP.

BASCA Fellows: John Adams, David Arnold, Sir Malcolm Arnold, John Barry, Don Black, Pierre Boulez, Sir John Dankworth, David Ferguson, George Fenton, Sir Elton John, Barry Gibb, Maurice Gibb, Robin Gibb, Sir Andrew Lloyd Webber, Sir Paul McCartney, Sir Peter Maxwell Davies and Sir Tim Rice.

For more information about us, please refer to the following website: [www.basca.org.uk](http://www.basca.org.uk).

## II. CONSULTATION RESPONSE

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

It is our belief that Option 2 for the transposition of the Directive is preferable as it will avoid any legal uncertainties linked to the existence of two parallel systems. Currently amongst the leading industries in the EU, UK CMOs maintain a high level of efficiency and transparency which BASCA hopes will be guaranteed uniformly across the European Member States by the implementation of the Directive.

**Question 2.** How important is it to retain those aspects of the 2014 Regulations that go beyond the scope of the Directive?

We believe that the protections for creators afforded by the 2014 Regulations are a milestone achievement; such as the requirement “to respect the rights of creators and right holders including their right to receive fair payment when their works are used” (regulation 2.3) and should be implemented in the new instrument. This will ensure that the minimum standards set by the Directive are met whilst also maintaining the exceptionally strong protections provided by the 2014 regulations and the self-regulation provided by the industry through its Codes of Conduct (e.g.: British Copyright Council).

**Question 3.** What is your best estimate for the overall cost of (a) implementation and (b) ongoing compliance with this Directive?

Although BASCA does not have all the information at hand to accurately estimate the overall costs of implementation and ongoing compliance with this Directive, there will be inevitable costs linked to the implementation process. Any costs linked to the process of creating the new set of Regulations will be outweighed by the benefit said Regulations will present to the industry since the clarity they will bring will avoid any adverse chilling effect caused by legal uncertainties posed by an amended version of the 2014 Regulations; this will also avoid lengthy litigation in resolving the arising uncertainties.

**Question 4.** 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?

N/A

**Question 5.** 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 you are a micro-business.

BASCA does not consider itself to qualify as either a collective management organisation or an independent management entity since we are a not-for-profit advocacy and membership organisation working to provide assistance to and representation for our members their interests. We do not hold or manage any of their rights.

**Question 6.** If you are a rightholder or a licensee, do you either have your rights managed or obtain your licences from an organisation which you think is an IME? If so, could you please identify the organisation, and explain why it is an IME.

We are concerned that the definition of what constitutes an Independent Management Entity is unclear and may lead to organisations relying on this status to avoid regulation by the Directive. It is here suggested that IMEs, as any organisation, must fall within the scope of the instruments implementing the Directive to ensure the protection of all parties involved, including creators and end-users, thus also maintaining a fair indiscriminate market for management organisations.

**Question 7.** Do you have subsidiaries? Which of the Directive’s provisions do you think would apply to them, and why? Please set out your structure clearly.

N/A

**Question 8.** Who do you understand the “rightholders” in Article 3(c) to be?

In general terms, our understanding of the term ‘rightholders’ is the following: rightholders are the owners of copyright and related rights and their representatives, or third parties who hold copyright on their behalf or are entitled to a share of the revenue generated by the use of copyright following agreement with the interested/entitled parties. Within this definition our members, as songwriters, composers and lyricists, are rightholders.

**Question 9.** If you are a CMO, what are the practical effects of a relatively broad definition of “rightholder” for you?

N/A

**Question 10.** What do you consider falls in the scope of “non-commercial”?

The definition of non-commercial uses should be one agreed upon by the industry and should reflect the rightholder perspective.

**Question 11.** If you are a CMO, to what extent do you already allow members scope for non-commercial licensing? Please explain how you do so?

N/A

**Question 12.** What will be the impact of allowing rightholders to remove rights or works from the repertoire?

The Directive states ‘categories of rights or types of works and other subject-matter granted by [the rightholder]’. Arguably this can still lead to confusion. PRS already allows members to remove rights or works from their repertoire (the GEMA categories) with due notice but from a member perspective our concerns are that any extension of this practice could lead to increased uncertainties, administrative complexities, accentuated rights clearance difficulties and an attendant increase in costs. The ability of CMOs to centrally manage rights with certainty is hugely beneficial to songwriters and composers since it creates an efficient collection system whilst allowing members to focus on their creative output rather than the management of their works.

**Question 13.** 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”?

N/A

**Question 14.** What should “fair and balanced” representation in Article 6(3) look like in practice?

It is essential to ensure the demographic of members is fairly represented at the management level in CMOs across Europe and that members have an opportunity to fully participate in the decision making processes of the board. This will ultimately ensure that every rightholder group has the opportunity to share their concerns and experience. The PRS for Music balance of an equal representation of publishers and writer members is effective, fair and balanced.

**Question 15.** What do you consider to be an appropriate “regular” timeframe for updating members’ records?

BASCA is satisfied with the current quarterly timeframe adopted by PRS for Music but would like to emphasise that CMOs are only able to operate insofar as the data provided by user services is

accurate. BASCA welcomes stricter clarity and regulation surrounding the reporting obligations of user services which would ultimately enhance the efficiency of the system.

**Question 16.** 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?

By adopting this broad definition in the context of Article 3(c) of the Directive, this would lead to CMO duties and obligations being extended to non-members. CMOs are only mandated to make decisions in the interest of their members and may not be in the best position to accurately represent the interests of non-members. By including non-members in ECL schemes and rightholders who are not members, this places an unreasonable burden on CMOs and would add undue financial pressure on CMOs which is not justifiable in light of their specific mandate to use resources exclusively in the interest of members.

**Question 17.** Which of the discretionary provisions of Article 8 do you think should be adopted?

BASCA is satisfied with the current rules governing and responsibilities given to members at the PRS for Music Annual General Assembly. We would recommend referring to their position for guidance on the application of Article 8.

**Question 18.** 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?

N/A

**Question 19.** Which of the Directive's provisions are existing requirements under UK company law?

N/A

**Question 20.** 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?

N/A

**Question 21.** What are your organisation's current levels of undistributed and non-distributable funds, as defined in Article 13?

N/A

**Question 22.** 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?

BASCA is not in a position to estimate the scale of non-distributable amounts which are used to fund social, cultural and educational activities in the UK or elsewhere in the EU but would welcome more transparency and reporting regarding this aspect.

**Question 23.** 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?

N/A

**Question 24.** What should be the criteria for determining whether deductions are ‘unreasonable’?

CMOs have been created by and for creators to assist in their ability to earn a livelihood and exist to pay as much of the monies collected back to members as possible. By way of example, PRS for Music undertake annual reporting where it documents the use of its management resources and the distribution of revenue to members. We believe they offer exemplary transparency through such reporting.

**Question 25.** Are there any pros and cons to be particularly aware of in case the Government exercises the discretion?

BASCA has previously expressed concerns over Article 13(6). We do not accept the principle that the rights of creators should be subject to state intervention. Government control of the determination of how royalties are used amounts to an unfair confiscation. Un-distributable revenues, whether they are members or not, are not the property of the CMOs or governments in the territories they were collected, they are royalties due to creators from across Europe. Members of the CMOs themselves need to be responsible for determining how un-distributable revenues are used.

**Question 26.** 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?

BASCA has no knowledge of any discrimination occurring in the representation agreements, as PRS will testify, its rates apply equally to all individuals falling within the same category of rightholders. Further, the Professional Rules provided by CISAC guarantee a strong framework of operational transparency.

**Question 27.** What do you consider should be the “necessary information” CMOs and users respectively should provide for in licensing negotiations (Article 16(1))?

As BASCA is not a CMO we are not in a position to answer this question in respect to licensing negotiations. However, from the perspective of songwriters and composers we would like to suggest an increased amount of membership accountability to CMOs and services (‘users’). Indeed, CMOs are currently tied to strict proscriptive non-disclosure agreements (NDAs) whereby they are unable to discuss the rates and usage by different service providers with their own membership. We believe this is detrimental both to creators and to the end-user since there is little information on the industry rates and price per spin. Although we recognise the importance of privity to contract and the benefits to the competitive market NDAs can have, we also acknowledge that CMOs enter these agreements on behalf of their members who should therefore be entitled to receive such information. This is why BASCA is calling for increased accountability of service providers, as will be explained in our answer to Question 28.

**Question 28.** 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?

Outside the scope of licensing negotiations which is not within our remit to comment on, we would like to emphasise the need to expand the reporting obligations of licensees such as digital service providers (DSPs). Ultimately increased accountability and transparency would award better protection to creators thus ensuring the correct sums are collected and distributed to the creators rather than being held up with the DSPs.

As to what constitutes ‘relevant information’ we believe this should be agreed upon by the industry itself and prescribed internationally in, for example, a Code of Conduct with minimum standards for protection. For example, such information could include the disclosure of the measures services will take to ensure the content hosted and/or provided is obtained legally, the systems employed to track and report their usage and the advertising revenue generated through by the service and its use.

**Question 29.** What is the scale of costs incurred in administering data returns that are incomplete and/or not in a suitable format?

N/A

**Question 30.** Which of the Transparency and Reporting obligations differ from current practice, and what will be the cost of complying with them?

As BASCA is not a CMO, we are not regulated by these. However, we believe high standards in transparency and reporting are essential aspects of the governance of a CMO which will benefit creators across the EU as it will guarantee their rights and interests are maintained. We believe PRS for Music already work to such standards.

**Question 31.** What do you think qualifies as a “duly justified” request for the purposes of Article 20?

N/A

**Question 32.** What factors help determine whether a CMO is able to identify musical works, rights and rightholders accurately (Article 24(2))?

N/A

**Question 33.** What standards are currently used for unique identifiers to identify rightholders and musical works? Which of these are voluntary industry standards?

N/A

**Question 34.** What would you consider to be a “duly justified request for information”? (Article 25(1)) What is not?

N/A

**Question 35.** What would you consider to be “reasonable measures” for a CMO to take to protect data (Article 25(2))? What would be an unreasonable ground to withhold information on repertoires?

N/A

**Question 36.** What period of time would you consider would constitute “without undue delay” for the purposes of correcting data in Article 26(1) and for invoicing in Article 27(4)?

We are satisfied that the current standards are met by PRS for Music and hope that the Directive will provide a positive harmonisation of similarly high standards throughout Europe.

**Question 37.** 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?

N/A

**Question 38.** 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.

Use of the system similar to that implemented by the 2014 Regulations which would also enable the framework to be maintained and a minimal disruption of services during the implementation period.

**Question 39.** What is your preferred option for the national competent authority? Please give reasons why.

We agree that at this time and moment, certainly to start off with, the NCA should be a team from within the IPO as it can use the expertise and resources already residing within the organisation.

**Question 40.** 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.

BASCA is not in a position to estimate these elements.

**Question 41.** How should the costs of the NCA be met?

We would like to emphasise the inability of CMOs to absorb costs: as they are member organisations all costs will be passed on to their members to the detriment of their income. In exercising public authority, we believe that administrative costs of the NCA should be borne by Government. It could also be seen as a conflict of interest if the CMO is having to pay for its own independent oversight.