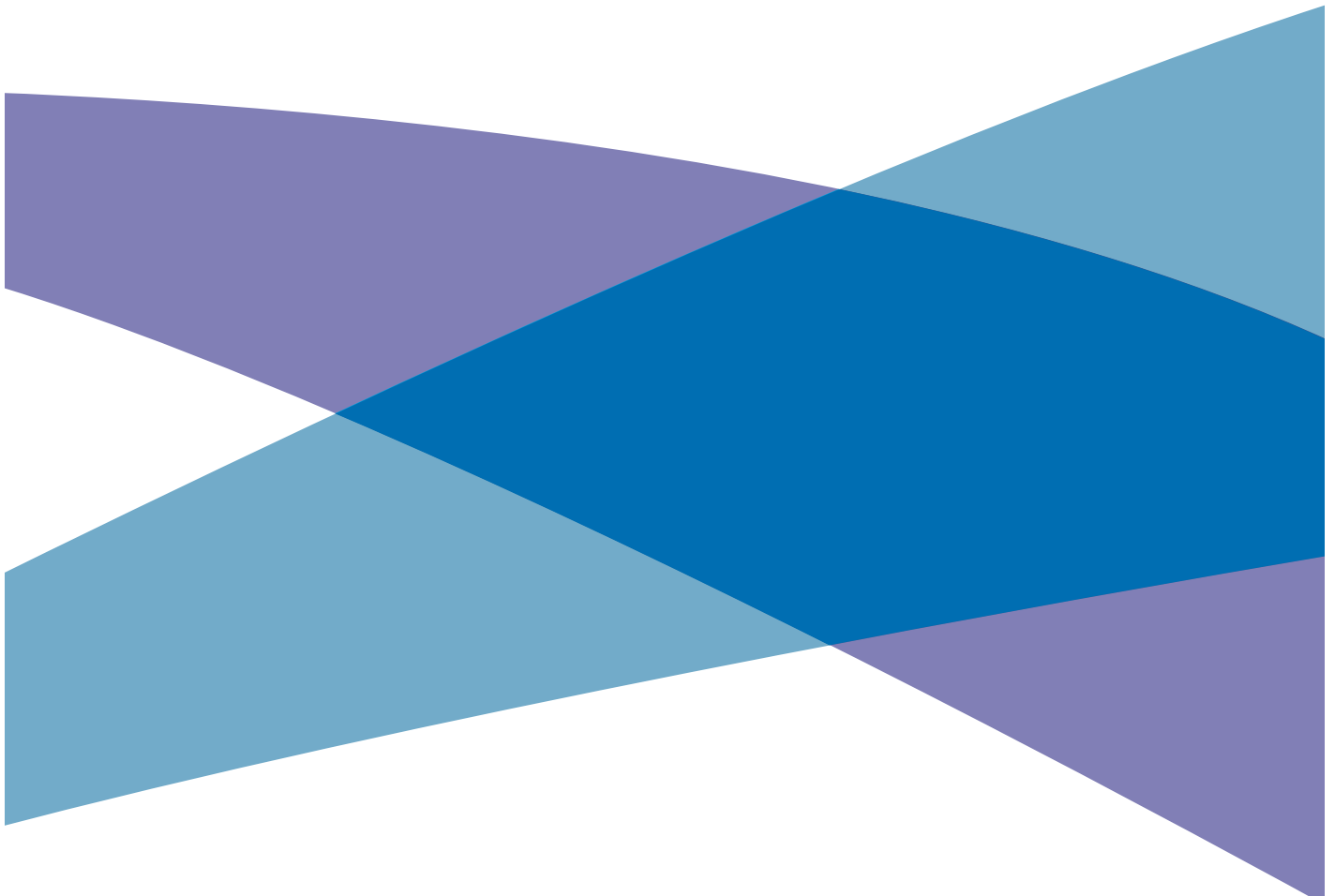




Intellectual
Property
Office

Government Response to the Technical Review of draft secondary legislation to regulate licensing bodies





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Summary

The Intellectual Property Office consulted between 9 September and 7 October 2013 on draft secondary legislation to regulate collecting societies. The consultation document was published on the [IPO website](#).

Having previously consulted widely on the relevant policy (enacted through primary legislation in the Enterprise and Regulatory Reform (ERR) Act 2013), respondents were asked to limit their comments to the contents of the draft secondary legislation, in particular its legal effectiveness. Not all respondents commented on all of the questions.

The IPO received **18 responses**¹ from collecting societies, representative bodies and other interested parties (see Annex A for a list of respondents). As the secondary legislation affects a very specific area of copyright law, the IPO believes this is a satisfactory response, particularly given the narrow scope of the consultation.

Comment

Respondents were broadly supportive of the proposed approach to secondary legislation, although there were some concerns over certain provisions. Having considered stakeholders' responses, the Government has made some small amendments to secondary legislation. These changes are highlighted in this response and are being scrutinised in a revised draft currently before the UK Parliament's Joint Committee on Statutory Instruments (JCSI). The Government has also reviewed its original Impact Assessment in the light of new evidence provided. The revised impact assessment and the finalised regulations will be published on the IPO website when the regulations are tabled.

Next Steps

The Government intends to lay the Copyright (Regulation of Relevant Licensing Bodies) Regulations 2014 before Parliament early in 2014, with the regulations entering into force on 6 April 2014. Separate Guidance on the Regulations will be published before implementation.

¹ Annex A only lists the details of 16 respondents as 2 asked for their details to be kept confidential.

Background

This consultation focused on the Copyright (Regulation of Relevant Licensing Bodies) Regulations 2014, which will implement secondary legislation to remedy and, where warranted, penalise gaps in self-regulation by collecting societies.

This policy was developed to address concerns about certain practices of collecting societies in some sectors. In line with recommendations in the Hargreaves Review, the Government proposed self-regulation through the adoption of codes of practice incorporating the Government's minimum standards (published in October 2012)². This would be supported by a reserve power enabling it to introduce statutory codes of practice should self-regulation fail.

The Government formally consulted on these proposals between December 2011 and March 2012. The consultation document outlined draft minimum standards aimed at increasing transparency and governance, providing access to an independent complaints procedure, allowing recourse to an ombudsman, and for regular, independent reviews of compliance by an independent code reviewer. The Government worked with a stakeholder working group, comprising users and collecting societies, to develop and finalise its minimum standards. Most collecting societies have since published individual codes, based on the BCC Principles³ which are intended to adhere to the minimum standards, and have appointed an independent Ombudsman and an independent Code Reviewer.

The current consultation asked eight specific questions about the implementation of the draft regulations, the responses to which are summarised below.

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

² <http://www.ipso.gov.uk/hargreaves-minimumstandards.pdf>

³ British Copyright Council's (BCC) Principles of Collective Management Organisations' Codes of Conduct

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.
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.

Responses

Q1. 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.

Most respondents highlighted the potential for confusion between the use of the term “relevant licensing body” in the Regulations and the term “licensing body” in s116 of the Copyright Designs and Patents Act (CDPA) 1988. (The latter refers to an organisation that grants licences, making no reference to its ownership or control). Respondents pointed out that this would mean the Regulations would apply only to the “traditional” collecting society, which tends to be not for profit, with those operating for-profit models falling outside the regulatory scope. One respondent felt the definition broadly captured most organisations that should be within scope.

Some respondents queried whether the proposed definition of ‘micro business’ was consistent with that used elsewhere.

Government Response

The Government does not agree that the term “relevant licensing body” as applied within the context of the Regulations will be confused with the term “licensing body” used in S116 of the CDPA. The definition clearly describes the characteristics of a “relevant licensing body”, which applies to the traditional collecting society that was the subject of the 2011 consultation. Such entities are typically not for profit, and member owned and/or controlled.

This definition will be reviewed should the proposed Directive on collective management of copyright and multi-territorial licensing (‘CRM Directive’)⁴ be adopted. The “tentative final compromise text”⁵, which is expected to be agreed in early 2014 refers to ‘collective management organisations’ (CMO)⁶ and includes provision to extend the scope of certain requirements to ‘independent management entities’.⁷

The Government considers the definition of ‘micro business’ in the Regulations strikes the right balance between its deregulatory agenda and the need to ensure collecting society members and licensees, many of whom are also micro businesses and sole traders, are adequately protected.

4 Proposal for a directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market (COM(2012)0372)

5 <http://register.consilium.europa.eu/pdf/en/13/st15/st15695.en13.pdf>

6 The Directive defines ‘collective management organisation’ as “any organisation authorised by law or 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 these rightholders as its sole or main purpose, and which fulfils at least one of the following criteria: (i) it is owned or controlled by its members; (ii) it is organised on a not-for-profit basis.”

7 The Directive defines ‘independent management entity’ as “any organisation authorised by law or 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 these rightholders as its sole or main purpose and which is: (i) neither owned nor controlled, whether directly or indirectly, in whole or in part, by rightholders and (ii) organised on a for-profit basis.”

Q2. 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.

Many respondents felt confusion could arise between the power to appoint a statutory Ombudsman or Code Reviewer and self-regulatory appointments.

One respondent cited a licensing body's failure to adhere to an Extended Collective Licensing (ECL) authorisation as an example where the Secretary of State could exercise the power to appoint an Ombudsman or Code Reviewer. Others could not foresee any other circumstances, aside from those described, where there could be a need to exercise the power.

Government Response

The Government notes the concerns raised and will ensure there is clarity should such circumstances arise.

Q3. 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 relevant 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.

All licensing body respondents expressed reservations about the proposed time limit, on the grounds that this would be insufficient to allow for drafting a new code, consulting with members and relevant boards and so on.

One respondent suggested that if only part of a code were non-compliant, a relevant licensing body should be allowed to replace only that part and maintain the compliant provisions.

Respondents suggested various periods for compliance with Regulation 4, ranging from 42 days to 3 months.

Government Response

In their submissions licensing bodies argued that a revised code would need to be consulted on and/or approved by their members before it could be submitted to the Secretary of State for consideration; the period of 28 days to submit a revised code would not allow them to do so. Having considered the arguments, the Government intends, subject to scrutiny by the JCSI⁸, to raise the time period to 49 days. This would represent an increase of 3 full weeks, which the Government believes strikes the right balance between allowing sufficient time for a licensing body to revise its code and the need to protect members and licensees from any shortfalls in an existing code. Once the Secretary of State has approved the revised code of practice, the relevant licensing body would have to adopt it within 7 days.

The Government agrees, subject to the views of the JCSI, that where only certain provisions of a code of practice are found to be non-compliant, the Secretary of State should limit the direction to the non-compliant provisions, thereby shortening the time needed to agree changes.

Q4. Do the steps described between the Direction in Regulation 3 and 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.

Some respondents commented on the lack of detail in the Regulation 5 timetable, compared with the provisions in Regulations 3 and 4. Others thought it was also unclear how the timing provisions in Regulations 4 and 5 would link to any appeal. Respondents suggested Regulation 13 should set out a timetable for a relevant licensing body to make references under the provisions.

Some respondents argued that the Regulations failed to explain what would happen if an appeal succeeded, especially regarding liability for any costs incurred.

Government Response

Having reviewed the timetable set out in Regulations 3, 4 and 5 in the light of comments received, Government concludes there is no overlap in the timings; rather they are part of a linear process.

The timings related to appeals contained in the rules of the First-tier Tribunal are not included in the Regulations on the advice of the Ministry of Justice which, by law, makes the rules regarding the First-tier Tribunal procedure, including the time limit for appeals.

Q5. What should be the principal features that determine whether a Code Reviewer and/or an Ombudsman is “suitably qualified” for their statutory roles?

All respondents agreed that the Ombudsman and Code Reviewer should be independent, with no recent ties to organisations representing licensees, copyright owners or collecting societies. There was also widespread support for the requirement to consult prior to appointing a Code Reviewer.

Some respondents suggested that the Code Reviewer should have knowledge of the regulatory and legal framework under which relevant licensing bodies operate. Others felt that membership of the Ombudsman Association www.ombudsmanassociation.org was a suitable qualification.

Government Response

Having considered stakeholders' comments, the Government will ensure that the relevant parties' views are taken into account should the Secretary of State be required to make an appointment using the statutory provisions.

Q6. 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.

Several respondents were concerned about the inclusion of provisions for penalties on employees of relevant licensing bodies below board level and individual managers or members. They argued that the requirements extend beyond UK company law.

Some respondents queried the repetition in the Regulations of the proposed quantum for financial penalties, given that the ERR Act allows for a maximum penalty of £50,000.

Government Response

The wording in the Regulations has been carefully chosen to allow the Secretary of State to identify the appropriate person on whom to levy financial penalties. The financial penalties are designed to deter non compliance with the provisions in the Regulations. The levels of financial penalties are maximum amounts so there is scope for them to be set below these limits. The Government view is that these requirements do not extend beyond company law.

Q7. 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.

Some respondents thought that the First-tier Tribunal was the correct place for the appeals arising from these Regulations to be heard. One respondent felt it should be the Copyright Tribunal and another that it should be the Intellectual Property and Enterprise Court.

Government Response

Having reviewed the responses, the Government concludes that the First-tier Tribunal is the most appropriate place for appeals arising from the Regulations. These appeals will be administrative in nature, focused mainly on the process through which the Secretary of State reached a decision rather than issues relating to intellectual property. The First-tier Tribunal has experience of dealing with appeals of this type.

**Q8. (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.**

Several respondents believed the standard rules of procedure would suffice. One respondent pointed out that changes would have to be made to the Copyright Tribunal's jurisdiction, should it be required to hear these appeals.

Government Response

The Government agrees that the First-tier Tribunal's standard rules of procedure are sufficient to deal with the appeals arising from the Regulations.

Annex A – List of respondents

Association of Scientific, Technical and Medical Publishers

Authors Licensing and Collecting Society

British Association of Picture Libraries and Agencies

British Copyright Council

British Equity Collecting Society

Copyright Licensing Agency

Creators Rights Alliance

Design and Artists Copyright Society

Educational Recording Agency

Libraries Archives and Copyright Alliance

Music Publishers Association

NLA Media Access

Patents High Court Judges

Phonographic Performance Limited

PRS for Music

Publishers Licensing Society





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