Consultation on Collective Rights Management in the Digital Single Market

Response on behalf of:-

The Copyright Licensing Agency Limited ("CLA")
Authors' Licensing and Collecting Society ("ALCS")
Publishers Licensing Society ("PLS")

1. Introduction

This Response is entered on behalf of CLA, ALCS and PLS, each of which is a collective management organisation (a "CMO"). CLA, ALCS and PLS are involved in the collective licensing in the UK of the right to copy, scan and store extracts (and to use and store digital extracts) from books, journals, magazines and other periodicals published in the UK and in the distribution of licence fees to the appropriate right holder. Works published in those overseas countries where a suitable Representation Agreement with another CMO has been concluded are also covered by such licences. CLA issues these licences as agent for ALCS and PLS who obtain their rights from their creators and publishers as appropriate.

We agree that the contents of this Response may be made publically available.

2. Key Points

2.1 We are pleased that the Government has adopted the copy out approach and, for the most part, avoided the risk of "gold-plating" the Directive. The draft Regulations are an excellent transposition of the provisions of the CRM Directive into Regulations that will work in a UK context. The draft is clear and presented in a way that helps with the understanding of some of the complexities of the Directive.

2.2 Inevitably there are still areas where some guidance on the interpretation of some of the original language in the Directive would be helpful. For example, understanding the term "managers" is crucial given the obligations and sanctions place upon them. We identify some of the other areas at the end of this Response.

2.3 Unfortunately the decision to add provisions and obligations relating to staff training is an example of gold-plating as is the imposition of financial penalties for non-compliance on CMOs (and potentially on Directors and managers of CMOs). Although this reflects, albeit in a more direct fashion, the regime that the 2014 Licensing Body Regulations introduced, it is not a requirement under the CRM Directive and it was not stated as settled policy in the Government Response to the Consultation on the Directive. It is not clear why managers of CMOs, almost alone amongst all sectors of British business, should be faced with this statutory burden. It is important to ensure a level playing field with CMOs elsewhere in the EU and it will be instructive to see to what extent they will be faced with an equivalent regulatory and sanctions regime.

3. Questions on the draft Regulations

1. Do the draft Regulations correctly implement the Directive?

Yes, except for:

(i) as above, the imposition of financial penalties which we believe go beyond what is required by the Directive and the additional obligations regarding staff training;

(ii) the lack of access to the Copyright Tribunal for CMOs: in its Response to the Consultation, the Government stated that it was not minded to make any change to the rules of access to the Copyright Tribunal. But we believe that this is not a matter of policy for the UK Government to determine but is instead a requirement of the Directive. Article 35 of the Directive requires that member states must ensure that disputes between CMOs and users concerning in particular ... *existing and proposed licensing conditions* can be submitted to a court (as they can be) but adds that such disputes may instead be submitted to another independent and impartial dispute resolution body with IP expertise. The UK Government has decided that it is appropriate for such disputes to be settled by the Copyright Tribunal. It is therefore obliged by Article 35 to ensure that such disputes can be referred there. It cannot be possible that the Directive requirement can be met by allowing only one party to the dispute, in the face of natural justice and any common sense interpretation of the provision, to make that referral.

2. Do you agree that the approach taken in the draft Regulations is consistent with that set out in the Government's response to the recent consultation?

Generally speaking yes, but, as above, the Government's Response to the Consultation left open the question of the retention of some of the Specified Criteria in Codes of Conduct required under the 2014 Regulations obligations and on appropriate sanctions, a position on which it has now reached a decision without any further evidence or consultation on those points.

3. Are there any additional consequences to this change that the Government should consider?

No. The definition of "licensing body" is probably wider than the definition of "CMO" under the CRM Directive. Whilst they are similar, the CDPA definition of "licensing body" does not have the

qualifier in the CRM Directive that a CMO must be either owned or controlled by its right holder members or be a not-for-profit organisation. Therefore it is unlikely that the addition will bring more organisations within the ambit of Chapter 7 of the CDPA.

4. **Do you believe that Regulation 7 accurately and appropriately captures the Government's stated intentions in the consultation response?**
   Yes. It is important to retain flexibility to cater for the various structures and operating methods of different CMOs.

5. **If you consider that you are a CMO or may be a CMO in the future, would you consider making use of the discretionary provisions in Regulation 7 (5-11)?**
   We do think it is important that the Regulations allow CMOs the discretion to convene an assembly of delegates to exercise some of the powers of a general assembly (being, normally, the Company in General Meeting) and to ensure that the functions of the general assembly may be exercised by the supervisory function (being normally the Board of Directors.

6. **If you are a rightholder, do you have any concerns about the discretionary provisions in Regulation 7 (5-11)?**
   N/A.

7. **Does regulation 9(4) provide appropriate protection to those dealing with CMOs, including by comparison to the equivalent provision of the 2014 Regulations?**
   and
8. **Is this the most appropriate way to achieve the desired objective?**
   As noted above, we believe that a formal legal requirement to ensure that a CMO undertakes staff training procedures for employers, agents and representatives is neither necessary nor required under the CRM Directive, and that a comparison with the equivalent provision in the 2014 Regulations is not appropriate.

   It is not clear what has happened, or what evidence has been supplied, since the Response to the Consultation to lead the Government to conclude that adding the staff training obligation, supported by financial penalties, is both right and necessary. There were only a few submissions to the original Consultation that raised this point; for example one complained of "inappropriate conduct" or "unjustified threats" by CMOs in their dealings with users, but no evidence was produced to support this assertion. It is, of course, almost impossible for CMOs to disprove the existence of a problem, although the low level of complaints, both in the period since the Regulations were introduced and in the years that preceded the Regulations, rather suggests that the problem, if it exists at all, is minor.

   These provisions risk introducing an uneven playing field with CMOs elsewhere. Provided such CMOs are not "established in the UK", they will be able to operate here with the advantage of a

lighter regulatory regime. Given that the impetus for the CRM Directive was the behaviour of certain CMOs based in the EU (but not in the UK), it would be unacceptable if the outcome was that UK CMOs had to face the highest level of regulatory burden and risk.

The provisions also introduce uncertainty. There is a risk of a significant number of nuisance claims being made to the NCA: it should be borne in mind that an allegation of what is perceived to be a unjustified threat by an unlicensed user of copyright may well be seen by the author whose works are being used illegally and without remuneration as an entirely justified attempt to enforce the law on their behalf. Given that copyright, unlike other forms of IPs such as patents, does not have a "threats action", it is wrong to introduce provisions that have a similar effect through secondary legislation which goes beyond that which is needed to comply with implementation of the CRM Directive.

It is worth noting that most voluntary codes of conduct adopted in accordance with the BCC guidelines set standards on staff training with the possibility of referral to the Copyright Licensing Ombudsman who can apply certain penalties if the standards are not met. We believe this is a more proportionate response for the majority of 'operational' issues.

9. **Does regulation 15 (5) (d) provide an effective mechanism to oblige CMOs to maintain good standards of behaviour in their relations with users, such as those usually found in their existing codes of practice?**

and

10. **What do you understand by 'good faith' in this context?**

Good faith is well understood in UK law, although it is difficult to provide a general definition out of context that works in all cases. We agree that it would certainly include some of the elements of the Specified Criteria in the 2014 Regulations such as fairness, honesty and impartiality and it may include a notion of reasonableness, but it certainly would not include, either in the way that 'good faith' is generally understood in the UK or we believe under the CRM Directive, an obligation to act "courteously". That may go to best practice and how a CMO wishes to be perceived, but should certainly not be seen as a "dealing in bad faith" with potential consequences of fines levied on managers, directors and CMOs.

11. **Are there any important standards in this area which are not covered either by regulation 15, or other regulations in the implementing Regulations?**

No.

12. **Do you agree that regulations 31-32 of the draft Regulations provide for a suitable complaint process for members, users, and other parties dealing with CMOs?**

Yes, and as the Government Response to the Consultation noted, this already goes beyond the strict requirements of the CRM Directive which required only a complaints procedure for members and not one also for users and right holders.

13. **Do you have any concerns about the proposal to allow CMOs to make their own arrangements in relation to Alternative Dispute Resolution?**
N/A

14. **Do you agree that the draft Regulations provide for an effective, proportionate and dissuasive sanctions regime?**
As stated in the introduction, we believe that the provisions of the draft Regulations go beyond what is required under the CRM Directive. The risk of financial penalties being applied on individuals within CMOs (whether managers or directors) is wrong in principle and entirely disproportionate to the perceived problem. For some of the obligations, e.g. staff training and the need to act courteously almost no evidence has been supplied to demonstrate the existence of any problem, let alone one of such a scale and of such a public interest as to justify these measures. Fines on CMOs, together with the right of right holders to withdraw their repertoire, would constitute a better sanction that was both proportionate and effective.

15. **Do you agree that the Government should retain an exemption for micro-businesses for those provisions which are not explicitly required by the Directive?**
We have no view on this.

16. **Based on the mechanisms for dispute resolution, complaints and enforcement set out in the draft Regulations, has your assessment of the likely workload of the NCA changed since the publication of the original consultation and Impact Assessment?**
No.

17. **Do the suggested amendments to the ECL Regulations capture the Government's stated intentions in its consultation response?**
Yes.

18. **Do the suggested amendments leave any misalignments between the draft Directive Regulations and the ECL Regulations, particularly with regard to protections for non-member rightholders?**
We believe not, although further detailed work may be needed to confirm this.

4. Guidance

Further guidance on certain aspects not already covered would be extremely helpful. We understand that the Government is proposing to issue Draft Guidance in the New Year and it may be appropriate to discuss with the IPO some of these issues beforehand:

1. the definition of manager: UK company law imposes some obligations on "managers" of companies. Although the term is not statutorily defined it is relatively well understood. But these

Regulations impose a heavy burden on “managers” regarding the management of the business and expose them to potential individual fines of up to £50,000. It further requires disclosure of personal information, remuneration, etc. in what would be an exemption to the Data Protection Act, but without the public debate or public interest that preceded the disclosure requirements for directors in accordance with the Companies Act.

2. Regulation 8 – CMOs and Supervisory Function: It would be helpful if formal guidance repeated what has been generally understood, namely that a Board of Directors constituted under UK company law, as long as it comprised a majority of non-executive directors, will constitute the supervisory function required for continuously monitoring the activities and performance of the duties of the managers of the business.

3. the practical application of the rules and processes described in Regulation 12(7).

5 Drafting points

5.1 Regulation 7(7) could be more clearly laid out. Paragraph (a) sets out the conditions for the Regulation to apply so paragraphs (b) and (c) should be presented as provisions that must be complied with as in Article 8(11) of the CRM Directive.

5.2 Regulation 15(4)(a) places an impossible obligation on CMOs to “ensure that right holders receive appropriate remuneration”. This is out of their hands as it requires, firstly, for users to take licences (for which there is no enforcement mechanism) and for the rates to amount to “appropriate remuneration” which may or may not be the same thing as a “reasonable” royalty rate as determined by the Copyright Tribunal. By contrast, Article 16(2) of the CRM Directive states, almost as an obligation on Member states, that right holders should receive appropriate remuneration and only then goes on to list what are the CMOs obligations.

5.3 Article 13 should read “must not discriminate against...”

5.3 Article 21 (1) should have the 8 month period for the ATR

5.4 Part 3 heading note the spelling of “Licencing”