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CRM Directive Review
Copyright and Enforcement
Directorate
Intellectual Property Office

BAPLA[©]

Wednesday, 02 March 2016

Dear Sir or Madam,

Writing on behalf of BAPLA, I attach BAPLA's response to the Government's technical review of the Collective Management of Copyright (EU Directive) Regulations 2016.

Please do not hesitate to contact me if you have any questions regarding BAPLA's response.

Yours faithfully,

Ania Skurczynska

BAPLA response to the technical review of the Collective Management of Copyright (EU Directive) Regulations (“Directive Regulations” or “Regulations”)

1. Do the draft Regulations correctly implement the Directive?

BAPLA has not conducted this analysis.

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

BAPLA has not conducted this analysis.

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

BAPLA has not conducted this analysis but our preliminary view is that bringing collective management organisations (or CMOs) within the scope of Chapter VII of the Copyright Designs and Patents Act 1988 will provide clarity as to the correct forum for disputes relating to licensing schemes to which Chapter VII applies. In practice, there may be some confusion as to the hierarchy of remedies available under the Directive Regulations – should other remedies available under the Directive Regulations (such as ADR or the NCA) be exhausted before an application to the Copyright Tribunal? Further guidance on this would be appreciated.

Referring to its submission commenting on the Directive itself, BAPLA does wish to reiterate the need for clarity (either in the Directive Regulations or in the IPO’s guidance) that commercial organisations that select, curate and sell content as part of their commercial activity conducted for the benefit of the entity as much as the creators (such as photo libraries) are not considered independent management entities. With improving technology and available data, it will become more feasible to licence copyright directly including in the markets typically dominated by collecting societies. Extending the provisions of the Directive Regulations to commercial entities would impose regulatory burden which is not contemplated within the aims of the Directive (as expressed in the recitals to the Directive) and was certainly not consulted upon.

4. Do you believe that Regulation 7 accurately and appropriately captures the Government stated intentions in the consultation response?

BAPLA has not conducted this analysis.

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 Regulations 7(5)-(11)?

Regulations 7(5)-(11) deal with instances when the CMO either does not have a general assembly of members; or chooses not to have one and instead enable its members to exercise their rights to participate in decision making through an assembly or delegates, or through an assembly of right holders (if the CMO members are other CMOs or representatives of right holders).

Speaking for right holders BAPLA represents, this question is not applicable, however with the intentions of our members to set up a new CMO to represent rights holders that issue licenses for visual works such as photographs, the new entity may make the use of the options awarded it by the Regulations.

6. If you are a right holder, do you have any concerns about the discretionary provisions in Regulation 7(5)-(11)?

There is a concern that if the discretion under reg. 7(9) (assembly of right holders) is never exercised by a CMO, a category of right holders may not be effectively represented through their

member(s) and thus erode CMOs obligation to ensure fair and balanced representation of members in accordance with Reg. 6. For example, if members of a large CMO are other CMOs or representatives of right holders, and decisions are taken by a simple majority, interests of certain groups of right holders may be disregarded by the majority of other members (such as interests of photographers by the interests of news publishers). It is understood that in such circumstances the under-represented right holders would have recourse under the CMO complaints procedure, or to the NCA.

7. Does regulation 9(4) provide appropriate protection to those dealing with CMOs including by comparison to the equivalent provision of the 2014 Regulations?

Yes, for the most part, if the provisions are based on the duties of those responsible for dealing with areas of conflict including a complaints procedure or reporting and distribution enquiries.

8. Is this the most appropriate way to achieve the desired objective?

BAPLA has not conducted this analysis.

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?

10. What do you understand by “good faith” in this context?

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

The relationship between CMOs and users under the Regulations lacks clarity.

Good faith

It is appreciated that the Directive Regulations contain consistent obligations in respect of the treatment of users at the stage of licence negotiation **and** after the licence is granted, but these obligations refer to “good faith”, a doctrine which sits uneasily within English contract law and poses interpretational difficulties. There is a considerable body of case law around the meaning of “good faith” in commercial contracts with the term having a different meaning depending on the length and the nature of the specific agreement. “Good faith” has been held to mean:

- observing reasonable standards of commercial fair dealing;
- being faithful to the parties common agreed purpose;
- behaving consistently with the reasonable expectations of the other party in relation to the performance of their obligations under the agreement
- providing information that may affect the other party’s ability to perform its obligations under the agreement,

as well as many other specific obligations, in each case depending on the terms of the agreement subject of the decision.

We note further that an express obligation to engage in good faith negotiations has been held unenforceable due to uncertainty¹. It remains to be seen how English court (and before them, the NCA) would treat and enforce this statutory obligation.

We encourage the IPO to seek specific legal advice in this area.

Our final comment is in relation to reg. 15(6) exempting micro-businesses from compliance with obligations of good faith. The rationale behind this exemption is unclear – could smaller CMO

¹ *Halifax Financial Services v. Intuitive Systems* [1999] 1 All ER 303

conduct negotiations and grant licences in bad faith? Or might “good faith” involve additional obligations or cost considerations which are too onerous for smaller businesses? If so, what are they?

Usage data

The comments on the application of the obligation of good faith should be seen against the broader concerns over the effectiveness of the obligations imposed by the Directive Regulations on users of copyright content.

The users’ key obligation is to provide data on the use of the rights licensed to them (reg. 16). This information is crucial to the proper functioning of the collective licensing system as envisaged by the Directive. And yet, the users’ obligations are minimal and limited to the provision of only such information as exists “at their disposal”. Short of a complaint to the NCA or court, CMOs have no remedies to encourage the submission of data by users. We note that recital (2) of the Directive lists various methods used in the management of copyright, including auditing of users. It is submitted that the inclusion of an audit right in the Directive Regulations would go a long way towards helping obtain usage data. In the absence of practical means to ensure compliance with reg. 16 by users, the burden and the investment in data systems will fall onto the CMOs. This cost will, in turn, be passed on to the right holders through deductions from distributions. To avoid that, we would look to the Government to support the development of the technology facilitating automated or semi-automated reporting on content usage.

It should be noted further that without accurate and complete usage data, CMOs may at best approximate the distribution of the revenue per right holder. This poses risks of non-compliance with onerous distribution provisions of reg. 12. Note that unless CMOs obtain proper data from users, the right holders’ right to **accurate** distributions (reg. 12(1)) is illusory. At worst, the lack of data puts right holders at the risk of delay in distribution (reg. 12(3) and (4)).

Whilst BAPLA members are happy to see the tightening of distribution obligations of CMOs, there is a concern that at the present moment data is sparse and does not allow for the distribution based solely on the “money follows rights” approach. BAPLA is aware that the topic of usage data and industry standards is important to the IPO and that the IPO plans to initiate discussions about data gathering processes within the creative industries. This is appreciated and encouraged. In the meantime, BAPLA members are concerned that about the impact of any radical changes to distribution models on revenue currently distributed to photographers they represent. We submit that any change to current practices is gradual and, if need be, supported by longer transitional periods for the implementation of the provisions applying to distributions and data.

Accordingly, BAPLA proposes that the regulations 12 is implemented over a 24-month transition period. Alternatively, we propose that the IPO reviews the functioning of reg. 12 in the first report published pursuant to regulation 51 and until such time adopts leniency in the enforcement of regulation 12.

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. We note that reg. 31(1)(b) seems to repeat a part of the definition of the term “right holder”. As a result it seems that right holder who “hold” copyright (part (a) of the definition, meaning, presumably, “own”) are excluded from the scope of this regulation. Reg. 31(1)(b) should simply state “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?

Alternative Dispute Resolution may be costly just as much a litigation. In addition, if different ADR mechanisms are adopted by different CMOs this may result in confusion and inconsistent decision making. Consequently, the obligation to use an ADR process before litigation may hinder, and not help, enforcement of rights. We submit that ADR is optional, and that the IPO suggests a list of recommended ADR processes and providers.

14. Do you agree that draft Regulations provide for an effective, proportionate and dissuasive sanctions regime?

The Directive Regulations do not provide for an effective, proportionate or dissuasive sanctions regime.

First, the sanctions may be imposed when the Secretary of State (SoS) “thinks” that a failure to comply occurred (reg. 37(1) and (2)). It is noted that the SoS must have regard to evidence presented (reg. 35) but regulations 35 and 37 should be connected more directly. Sanctions may be imposed by the SoS acting reasonably having reviewed relevant evidence and subject to any appeal and other process rights.

Reg. 39(3) compounds our concerns about the discretionary nature of the sanctions regime – on what grounds, and following what process, can a penalty be rescinded?

Finally, what are the consequences of the penalty being expressed as “a debt due to the SoS” under reg. 41(1)? We would appreciate clarification on this.

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?

Yes, subject to our comments on good faith obligations.

16. Based on the mechanism for dispute resolution, complaints and enforcement set out in the draft Regulations, has your assessment of the likely workload of the NCA changes since the publication of the original consultation and Impact Assessment?

BAPLA welcomes the IPO taking on the role of the NCA. BAPLA did not comment on its potential workload in the past. Given current tensions between collecting societies in the visual arts sectors, we believe NCAs workload may be significant.

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

BAPLA has not conducted this analysis.

18. Do the suggested amendments leave any misalignment between the draft Directive Regulations and the ECL Regulations, particularly with regard to protections of non-member right holders?

There seems to be a misalignment between reg. 19 of the ECL Regulations (Retention and application of undistributed licence fees) and reg. 12 of the draft Directive Regulations (Distributions of amounts to right holders).

Under reg. 19 of the ECL Regulations, a body operating an ECL scheme must deal with undistributed licence fees within 3 years of the receipt of a licence fee² by depositing such amounts within the SoS who will hold them for 8 years.

² Query which licence fee – how are the time periods calculated? A licence fee comes in, and within 3 years of the receipt of it, the CMO must decide on the application of undistributed amounts within that period?

Under reg. 12(9) of the draft Directive Regulations, amounts not distributed within 3 years (from the end of the financial year in which collection of the revenue occurred – i.e. a longer period of time than that referred to under reg. 19) must be treated as non-distributable. At that point, these amounts are dealt with in accordance with the relevant policy approved pursuant to reg. 7(d)(ii).

It may be, that the undistributed amounts from an ECL scheme need to be treated with greater caution, and given to the SoS for safekeeping. If this is the rationale for the misalignment, the draft Directive Regulations should account for the restriction on members' decision making powers in respect of such amounts.

We also wish to raise concern over reg. 46(9), removing the provisions of reg. 17(3), (4) and (5) of the ECL Regulations. Reg. 17 provides important safeguards for non-member right holders giving them insight into licences for the use of their work granted by the CMO. We would appreciate the IPO's clarification of the rationale for this deletion.

The protection for non-members of a Collecting Society, particularly for visual works, needs to rely on robust regulations to ensure rights holders are able to claim monies owed without the necessity of becoming a member of a CMO, particularly if they are a foreign rights holder and no reciprocal CMO is available.

This would suggest ongoing payments to the SoS. The calculation of periods should be aligned with the draft Directive Regulations (see, e.g. reg 12(9)(a)).