MPA, MCPS, PMLL and IMPEL

Response to IPO technical review and draft Regulations implementing the Collective Rights Management Directive in the UK

10 November 2015

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Response to the IPO consultation on the implementation of the CRM Directive in the UK

Background Information:

1. The Music Publishers Association ("MPA") is a company limited by guarantee. The Mechanical Copyright Protection Society ("MCPS"), Printed Music Licensing Limited ("PMLL") and Independent Music Publishers European Licensing ("IMPEL") are all wholly owned subsidiaries of MPA. Their operations can be described as follows:

   - **MPA** is a trade organization whose mission is to safeguard and promote the interests of music publishers (including the writers signed to them) and to represent those interests in a wide range of fora.
   - **MCPS** is appointed by its members - publishers and other owners of musical works - to manage certain uses of the mechanical rights in those musical works. These operations are contracted to the Performing Rights Society ("PRS"), as defined by a service level agreement.
   - **PMLL** was established in 2013 and manages the licensing of the copying of printed music in the UK on behalf of music publishers. Its Schools Printed Music Licence ("SPML") covers the copying of printed sheet music in schools and is offered to schools exclusively by The Copyright Licensing Agency ("CLA"), acting as sole agents.
   - **IMPEL** acts on behalf of music publishers for the licensing and administration of the mechanical rights in their Anglo American repertoire for pan-European (and wider) online activities.

General Observations:

2. We support the introduction of the CRM Directive and hope that it will deliver the desired effect of modernising and improving standards of governance and transparency in all EU CMOs.

3. MPA is a trade association not a licensing body and, as such, falls outside the scope of the Directive. However, as the representative of 268 music publishers, it has a direct interest in ensuring the most

beneficial systems of collective licensing for its members and is concerned to promote best practice, good governance and transparency within collecting societies used by music publishers.

4. As currently structured, MCPS, PMLL and IMPEL do not consider that they are captured by the definitions of either CMO or IME as set out in the Directive. These three organisations are constituted as for-profit limited liability companies, and whilst they are not owned by the rightholder members of their licensing schemes (referred to throughout this response as "licensing scheme right holder members"), some of their licensing scheme right holder members do exercise partial indirect control of the organisations through their right to stand for election and vote directors onto the board. All three organisations have been in co-operative discussion with the IPO on their particular structure and how they relate to the Directive.

5. Notwithstanding the issue of the formal question of scope, as stated previously in the earlier consultation on the implementation of the Directive, the boards of each of these organisations recognise that MCPS, IMPEL and PMLL may be perceived to be "collection societies", and as such consider the principles of the Directive applicable to all three organisations. We believe all three organisations are generally compliant with the requirements of the Directive, and where they may not be, we are working to ensure that they do comply to the fullest extent that is compatible with their structures. Where there are some specific provisions which are difficult to apply directly given the constitution of MCPS/PMLL/IMPEL, we are taking a principled approach and are adapting such provisions to suit the structure within which we are operating.

Response to IPO Questions:

1. Do the draft Regulations correctly implement the Directive?

We consider that, in general, the draft Regulations do successfully implement the Directive.

We would like to raise at this point in our response the following issues that are not covered by specific questions that the Government has posed but which we feel are pertinent to the successful drafting of the Regulations in a way that fulfils the guiding principles of the Directive:-

Regulation 9(3)

We would like clarity as to which persons the obligation to make an annual individual statement pertains. Currently, we understand it to relate to board members. However the wording 'persons who manage' might also capture executive officers and would like the guidance to reflect whether the obligation also captures these individuals?

We are also concerned by the wording in paragraph (c), namely 'any amount received in the preceding financial year as a right holder from the collective management organisation'. In the case of a director who is the representative of a publisher licensing scheme right holder member, is the amount In question the amount received by the director personally (if a right holder) or the amount received by the publisher licensing scheme right holder member? In addition, we are concerned about the possible disincentive effect upon potential directors who do not want their income from MCPS, PMLL or IMPEL to be made public. If licensing bodies cannot attract directors, good governance will suffer. How does the Government propose to address this?

Regulation 10

We have been in direct consultation with the IPO concerning the interpretation of Article 11(3) of the Directive, transposed to Regulation 10 of the draft Regulations. Under 10(b) a CMO must keep separate in its accounts rights revenue and own assets (such as management fees). We are concerned as to when commission taken from a particular income stream becomes own assets. We appreciate the legitimate desire of a right holder to ensure that rights revenue should not be improperly used, and support robust financial controls to ring-fence right holder revenue. However, the obligation should properly reflect the individual processes of receipt and distribution undertaken by licensing organisations. In the case of MCPS, for example, although there is a willingness to distribute as quickly as possible, commission can only be ascertained once sufficiently clear works information (eg. split ownership and control on certain works and releases) and/or usage data (eg firm sales after returns) is obtained. We would recommend, therefore, that the Government undertake further investigation of these issues to ensure that the proper application of Regulation 10 reflects the diverse systems that exist while protecting right holders' interests as intended by the Directive.

Regulation 12(9)

It has transpired from the consultation that there is some confusion about how the obligation under Regulation 12(9) to treat certain income as non-distributable relates to the statutory six-year period of limitation under UK Law. Our understanding is that, after 3 years, if the revenue cannot be distributed and the CMO has taken all necessary measures to identify and locate the rightholder, the income must be deemed non-distributable. However, that income can then be dealt with under the CMO's general policy regarding the use of non-distributable amounts. This would allow non-distributable amounts to be held for a longer period to allow for the possibility of a claim within the remainder of the statutory limitation period. If this is correct, we think it would be helpful to specify it within the guidance.

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?

We consider that the draft Regulations are consistent with the approach set out in the response to the consultation, and we hope that the Government will use the forthcoming guidance on the interpretation and application of the Directive in the areas highlighted in this response in such a way as to promote of the interests of right holders, members and users by also supporting the need of licensing organisations to operate effectively in a commercial market.

3. Are there any additional consequences to the change of the definition of 'licensing body' within section 116 of the CDPA that the Government should consider?

We do not anticipate any additional consequences.

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

In general, we welcome the Government's decision to allow for flexibility around the function and powers of the General Assembly to accommodate existing practice and the different corporate structures that exist amongst UK CMOs and licensing entities. We consider that this flexibility will facilitate greater compliance within the sector. In particular, we welcome the inclusion in the draft Regulations of Regulation 7(5) and (6) which reflects the serious

consideration being given by the Government to the exercise of the discretion allowed to member states under Article 8(12) of the Directive. We would strongly encourage the Government to retain these provisions within the final Regulations. As private limited companies, the boards of directors of MCPS, PMLL and IMPEL have a primary role within the governance of those organisations and, whilst we welcome the governance safeguards within the Regulations aimed at transparency and representativeness, a focused and effective decision-making body is also essential to achieved the agreed objectives of these companies.

Turning to the drafting, where Regulation 7(6)(b) modifies Regulation 7(1), we are concerned that similarly to paragraph (1)(b), paragraphs (c) (d) and (e) need to be subject to the company's statute. The statutes of MCPS, PMLL and IMPEL all give the management role to the board of directors but leave it subject to the reserve power of MPA as holding company. In the first instance, all of the issues elaborated in (c), (d) and (e) would be decided upon by the board. In almost every case they would not be reviewed by MPA. However, in the case of matters affecting the group company structure, such as mergers and alliances, the setting up of subsidiaries and the acquisition of other entities or shares or rights in other entities, it is quite conceivable that they might be subject to approval by MPA. In any event, the formal governance hierarchy of the organisation in question should be reflected within the Regulations in relation to decisions taken on the issues set out in paragraphs (c), (d) and (e) and we would urge the IPO to make this amendment.

5. If you consider that you are a CMO or may be CMO in the future, would you consider making use of the discretionary provision in Regulation 7(5-11)?

As set out above, if MCPS, PMLL and IMPEL were to become CMOs, the application of Regulation 7(5) and (6) would be of crucial importance. MCPS has over 20,000 writer licensing scheme right holder members and over 6,000 publisher licensing scheme right holder members. The extraordinarily broad spectrum of MCPS licensing income represented by individual licensing scheme right holder members would make it difficult to create the "fair and balanced" representation in decision-making required by Regulation 6(b). From a practical perspective, collective decisions taken through a general assembly would be prohibitively expensive and time-consuming, and it would be extremely difficult, if not impossible, to create the cohesiveness required for strategic decision-making.

IMPEL, with 38 licensing scheme right holder members, and PMLL with 78 licensing scheme

right holder members are not so problematic. Nevertheless, the concentrated expertise represented by the boards of those organisations are critical to their success, and we would consider that, albeit on a less dramatic scale, the same principled arguments as apply to MCPS apply to PMLL and IMPEL.

6 If you are a right holder, 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?

We are concerned that the obligation on CMOs to 'ensure that staff training procedures for employees, agents and representatives include training about conduct that complies with its obligations under these Regulations' is too broad. Certainly training is key to the ability of CMOs to comply with the Regulations. However, a blanket obligation to train all staff in all aspects of the Regulations would impose an unnecessary burden on CMOs. We would argue that training should be targeted and appropriate to the role of the individuals concerned.

8 Is this the most appropriate way to achieve the desired objective"

We would suggest that a better way to approach this would be to require CMOs to ensure that staff are aware of the requirements of the Regulations as they apply to their role, and that they provide good quality training, where necessary.

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?

We are concerned that reference to 'good faith' might create uncertainty for users since the primary responsibility of CMOs is towards their members and their members legitimately expect the organisation that licenses their works to get the best price that it can reasonably obtain within the prevailing market. There should be no doubt that 'good faith' is not intended

to restrict the commercial imperative underpinning the existence of the CMO.

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

Subject to our comments in Point 9 above, we would understand 'good faith' to mean fees established by arms length negotiations within the context of a transparent process with no discrimination between users other than commercial differentiation on the basis of legitimate objective criteria. We suggest that the Government uses the guidance to clarify the interpretation.

11 Are there any important standards in this area that are not covered either by Regulation 15 or other regulations in the implementing Regulations?

We do not consider that there are any gaps.

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?

The corresponding provisions of the Directive refer only to members whereas the Regulations extend the CMO's obligation to users who already have the right to refer to the Copyright Tribunal. Although an organisation engaged in collective licensing should always be client-focused in order to succeed in a commercial market (particularly one such as the EU where cross-border competition is supported), we are concerned that this might open the door to vexatious complaints. These are a drain on resources that would otherwise be directed to serving the interests of right holders. We are also concerned that, as a general principle, right holder members should not pay the direct costs of formal complaints by users.

In addition, we assume that these regulations are not necessarily intended to confer the same level of protection on a user as they do on a member and suggest that the guidance elaborate on the distinctive types of complaint processes that might be deemed 'suitable' for users and members respectively.

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

No. We consider that it is valuable for individual CMOs to be able to craft a bespoke process that is suitable to its membership and licensing context. However, we would appreciate the Government's guidance to reflect the fact that access to the ombudsman service is an 'independent and impartial dispute resolution procedure' for the purposes of Regulation 32(1).

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

Yes.

15 Do you agree that the Government should retain an exemption for micro-businesses for those provisions that are not explicitly required by the Directive?

As a general principle, we believe that competition is healthy and that, consequently, the needs of small organisations may need particular consideration if new licensing bodies are to emerge. However, a level playing field also serves best the interests of right holders and users and therefore unequal treatment should only be admitted when it has a reasonable levelling effect. So, where the application of a provision would have a disproportionate impact on micro-businesses, we are sympathetic to exemptions being applied so as to ensure that micro-businesses have access to the market. Where removal of an obligation would offer micro-businesses an unfair advantage, we are opposed to it. For example, we do not see how the 'good faith' obligation in Regulation 15(5)(d) bears unfairly on micro-businesses and therefore do not support an exception. In the case of the obligation to train staff in Regulation 9(5), we consider that creating the exception is neither in the interests of stakeholders nor the micro-business itself. However, a targeted and proportionate obligation (see our comments to Question 7) would encourage the development of good practice without imposing a burden that is disproportionate to the CMO's size.

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?**

Not significantly.

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?

No.

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