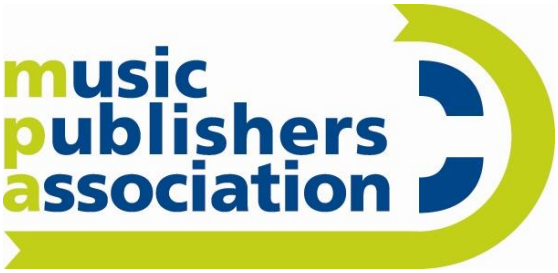

MPA response to the IPO consultation on the UK implementation of the EU Directive on the collective management of copyright and multi-territorial licensing of online music rights in the internal market

30 March 2015

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MPA response to the IPO consultation on the implementation of the CRM Directive in the UK

Background Information:

1. The MPA welcomes the opportunity to respond to the IPO's consultation on the implementation of the CRM Directive in the UK. The Music Publishers Association ("MPA") is the trade association for music publishers in the UK, with over 260 members. Our members include all three of the UK's major music publishers, independent pop publishers, classical publishers, production music publishers and also printed music publishers.

2. The MPA is also the owner of three licensing bodies: The Mechanical Copyright Protection Society ("MCPS"), Independent Music Publishers European Licensing ("IMPEL") and Printed Music Licensing Ltd ("PMLL").

3. Music Publishers have relationships with a number of licensing bodies in the UK. The majority will have arrangements with PRS for the performing right and MCPS for the mechanical right. In addition, print music publishers are able to mandate PMLL to collect on their behalf for the copying of sheet music in schools. IMPEL exists to license and administer the mechanical rights in the Anglo-American repertoire of independent publishers for pan- European (and wider) online activities.

4. For the purpose of this response, we are responding as rightholders, on behalf of our music publisher members. We have however contributed to, and reviewed the submissions to this consultation made by the MPA subsidiary companies – MCPS, PMLL and IMPEL and also that of PRS. We refer you those responses as and where appropriate. We also support the submissions made by UK Music and the British Copyright Council.

General Observations:

5. Our members 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 licensing bodies. As rightholders, our members look forward to having a greater influence in decision making at licensing bodies and anticipate a great improvement in accurate and timely royalty payments from these entities throughout the EU Member States.

6. **Subsidiaries:** The MPA is committed to ensuring that its three subsidiary licensing bodies (MCPS, PMLL and IMPEL) will all comply, as far as possible given their corporate structures, with the obligations set out in the CRM Directive, even though none of them meet the required definition of either CMO or IME.

7. In relation to the subsidiaries of CMOS or IMEs, as set out in the CRM Directive, our members believe that it will not always be sufficient for transparency and governance obligations to be met at the CMO parent company level. This is particularly important in the case of subsidiaries which are licensing entities and funded by and operating on behalf of rightholders. The requirement for subsidiaries to comply with the obligations set out in the Directive should be looked at on a case by case basis.

8. **User Data:** The quality and accuracy of user data is an important issue for music publishers, particularly in the context of digital licensing. We welcome Article 17 of the CRM Directive, with regards to new obligations on licensees in relation to provision of data. Not only will this improve the efficiency of the collective management process, but it will also help to ensure the correct rightholder, composer or songwriter is paid. All too often it is the smallest rightholder who is most disadvantaged in the case of inaccurate data reporting.

9. **Costs:** We refer you to the submissions made by MCPS/PMLL/IMPEL and PRS with regards to the costs to UK licensing bodies, and hence UK rightholders, of implementing the CRM Directive. We urge the UK Government to be mindful that all costs borne by licensing bodies for the implementation of, and compliance with, the Directive will be passed through to UK rightholders and ultimately to composers and songwriters. In implementing the Directive in the UK, we ask the UK Government not to layer in any additional costs for licensing bodies which are not explicitly required by the Directive.

Response to IPO Questions:

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

We support the Government's preferred route of implementing the CRM Directive in the UK via Option 2. The advantage of 'copying out' the Directive into UK law, rather than fitting around existing regulations, is that the new legislation will provide a clear legal framework for licensing bodies, rightholders and users and also will create a transparent and level playing field across all EU Member States.

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

The Directive adequately covers the majority of areas covered by the existing regulations. Where demands of the existing regulations go above and beyond those in the Directive and deliver best practice, they could be incorporated into UK licensing bodies' codes of conduct, or delivered by contract. As such repealing the existing regulations and replacing them with the Directive is likely to be the most transparent and efficient way of ensuring the best outcome for licensing bodies, rightholders and users.

With regards to Extended Collective Licensing, we welcome the assurance from Government that the stronger and more detailed protections afforded to rightholders in those recently adopted UK regulations will remain in place.

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

Please refer to PRS and MCPS/PMLL/IMPEL response.

4. **If Option 2 was the preferred option, as CMO would you consider retaining a revised code of practice as a means to making the new rules accessible to members and users?**

Please refer to PRS and MCPS/PMLL/IMPEL response.

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.

The MPA is a trade association with three subsidiary licensing bodies. Please refer to our response to question 7 for information on the structure of each of these organisations.

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.

Music Publishers may choose to have their rights managed by a number of licensing bodies in the UK. The two largest licensing bodies are PRS which collectively licenses and administers the performing right on behalf of member songwriters, composers and publishers and MCPS which collectively licenses certain uses of the mechanical right on behalf of its members (also songwriters, composers and publishers). In addition, print music publishers are able to mandate PMLL to collect on their behalf for the copying of sheet music in schools and IMPEL exists to licence and administer the mechanical rights in the Anglo-American repertoire of independent publishers for pan-European (and wider) online activities.

PRS is a CMO under the definition of the CRM Directive. MCPS, IMPEL and PMLL, however are not captured by the CRM Directive definition of either CMO or IME for the reasons set out in our response to question 7.

Our members wholeheartedly support the commitment made by the Boards of MCPS, PMLL and IMPEL to comply with the principles of the Directive, as far as it is possible given their corporate structures.

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.

MCPS, PMLL and IMPEL are all subsidiaries of the MPA. We do not believe that any of these licensing bodies falls under the definition of CMO or IME for the reasons set out below.

MCPS does not consider itself to be a CMO because it is not owned or controlled by its members (it is a wholly-owned subsidiary of MPA) and is constituted as a for-profit limited liability company. It operates collective licensing schemes for rightholders who exercise partial indirect control through their right to stand for election and vote directors onto the board. Hence, it is also not an IME.

Due to the level of its turnover (whether taking into consideration gross licensing income or commission income) it is not a micro-business.

PMLL does not consider itself to be a CMO because it is not owned or controlled by its members (it is a wholly-owned subsidiary of MPA) and is constituted as a for-profit limited liability company. It operates collective licensing schemes for rightholders who exercise partial indirect control through their right to stand for election and vote directors onto the board. Hence, it is also not an IME.

If "turnover" is defined as gross licensing income, PMLL is not a micro-business. However, if it is defined as commission income, then it is.

In addition to MCPS and PMLL, Independent Music Publishers European Licensing ("IMPEL") has been set up as a subsidiary company of the MPA. However, for the moment, all the IMPEL operations fall under MCPS (i.e. the IMPEL membership agreement is between the publisher and MCPS and all licensing and distribution is run through MCPS). We are currently in a transition period as it is envisaged that eventually IMPEL will run as a standalone entity. IMPEL acts on behalf of music publishers for the licensing and administration of the mechanical rights in their Anglo American repertoire for online activities.

IMPEL is still in the process of establishing its corporate structure, but it does not consider itself to be a CMO because it is not owned or controlled by its members (it is a wholly-owned subsidiary of MPA) and is constituted as a for-profit limited liability company. It intends to operate collective licensing schemes for rightholders who will exercise partial indirect control through their right to stand for election and vote directors onto the board. Hence, it is also not an IME.

If "turnover" is defined as gross licensing income, IMPEL is not a micro-business. However, if it is defined as commission income, then it is.

As mentioned above, even though none of these organisations are captured by the definition of CMO or IME in the Directive, our members support the commitment made by the Boards of these organisations to comply as far as reasonably possible with the principles of the Directive.

With regards to the compliance of subsidiary organisations more generally, our members believe it is absolutely vital - as a bare minimum - that the transparency obligations of the Directive extend to subsidiaries, particularly where these subsidiaries are entities funded by and operating on behalf of rightholders. Additionally, in the case where licensing activities are outsourced – either to a subsidiary or a third party – this should not reduce levels of transparency or compliance with the Directive. In fact, any such action should serve to increase transparency because the terms of the outsourcing arrangements should be made clear.

8 Who do you understand the "rightholders" in Article 3(c) to be?

From the definition of rightholder in Article 3(c), we understand that all MPA members are rightholders, regardless of whether they are members or non-members of a CMO. In addition to this we would consider the following to also be captured by the definition of rightholder:

- composers and lyricists (i.e. holds copyright);
- publishers (i.e. holds copyright and/or is entitled to a share of the rights revenue);
- any other third party who holds copyright as a result of copyright assignment (e.g. relative of a composer) or a copyright reversion (e.g. estate of deceased composer);
- any other third party who is entitled to a share of the rights revenue (e.g. depending on existing agreements, this may be co-writers, performers or managers).

It is important that the definition of rightholder is independent from the membership of a licensing body as it ensures that non-members of schemes, such as Extended Collective Licensing, are afforded adequate protections.

9 If you are a CMO, what are the practical effects of a relatively broad definition of "rightholder" for you?

The rightholder definition appears appropriate since it can capture both members in the corporate sense and rightholder members of licensing schemes. It also affords protection to

non-members of schemes such as ECL.

10 What do you consider falls in the scope of "non-commercial"?

Our members do not believe that Government should attempt to define what constitutes a "non-commercial" use as instances are likely to vary on a case by case and rightholder by rightholder basis. We also note that the Directive itself does not attempt to define "non-commercial".

For example, one area which could potentially be classed as "non-commercial" use is the use of a musical work for "promotional" purposes - confusing the two could lead to downside pressure being exerted by labels and artists on non-artist writers to agree to royalty free uses which have promotional value for the label and artists, but not for the third party writer. As such promotional uses should not fall under the scope of "non-commercial".

Another area which could be classed as "non-commercial" is the use of music by/for charitable purposes. This current practice in the UK adequately deals with "non-commercial" uses in such instances. For example, MCPS licenses charity uses, but then leaves it to the discretion of the individual rightholder to decide how or if they want to support the charity/non-commercial use in question once they have received their royalty payments.

Our members have also expressed concern that the ability for rightholders to grant licences for "non-commercial" uses may lead to an increased administrative burden and cost for the licensing bodies – with no corresponding financial gain. If these costs are not attributed to the rightholder in question, they will be shared by all members of the licensing body. An example of this would be a rightholder agreeing to allow their music to be used on a "non-commercial" basis by a broadcaster for a charity event. This would interfere and disrupt the smooth running of blanket licences, which are held with all major broadcasters and designed to streamline and simplify the licensing process – in line with the aims of the Directive.

Given that defining "non-commercial" is so complex, we believe that this should remain a matter to be decided between a licensing body and their members, and should not be defined in law.

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?

Please refer to PRS and MCPS/PMLL/IMPEL response.

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

CMOs have in theory been operating with the removal of categories of works from the repertoire since the GEMA decision in the early 70s, which stated that GEMA members have the right:

- to assign their rights entirely to GEMA or to divide them by category among several authors' rights societies; and
- to withdraw the administration of certain categories of rights after due notice at the end of each year and without losing membership status or incurring penalties.

However, in reality, very few of the societies ensured that these rights were made clear to members or made them easy to exercise, to the point that in some cases legal proceedings had to be taken to enforce the ability to remove the rights or repertoire.

As such, this is a key article of the Directive for music publishers as it allows rightholders to control the management of their rights. It also means that licensing bodies throughout the EU will have to compete for repertoire on the basis of service standards and efficiency. Rightholders and creators will be able to make informed choices about how best to administer the repertoire they create and invest in.

However, the administrative costs associated with the repertoire specific licensing must be apportioned appropriately. Just as it is counter-intuitive for a collective to try and charge right owners whose rights are outside of the licensing body, equally it is wrong to charge a rightholder whose rights are withdrawn for the cost of setting up services benefitting only those whose rights remain in. A licensing body could provide a menu of services to its members and charge each member for just the services the rightholder chooses to take. This would be one way of ensuring that a licensing body avoids unfair and discriminatory cost structures associated with the withdrawal and active management of rights.

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"?

If it can be clearly established that the rightholder or entity representing rightholders is acting against the interests of the existing members of the collective.

Please refer to PRS and MCPS/PMLL/IMPEL response.

14 What should "fair and balanced" representation in Article 6(3) look like in practice?

Please refer to PRS and MCPS/PMLL/IMPEL response.

15 What do you consider to be an appropriate "regular" timeframe for updating members' records?

We would suggest as soon as reasonably possible, and with modern technology this is not difficult to achieve. Up to date records are equally important for both rightholders and end users.

Please see PRS and MCPS/IMPEL/PMLL responses for current best practice in our sector.

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?**

Non-member rightholders are well served by the Directive. Article 7 ensures that they have access to the information as provided in Article 20 and 29 and the rights to enforce them as per Article 33. It would be wrong to extend any additional provisions in the Directive to those who are not members of the licensing body – particularly as they do not contribute to the upkeep of the organisation.

With regards to non-members in ECL schemes, these rightholders are afforded protection as set out in the 2014 UK regulations which specifically relate to the legal relationship established in

the case of Extended Collective Licensing.

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

Please refer to PRS and MCPS/PMLL/IMPEL response.

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

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

N/A

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

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

N/A

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?

N/A

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?

Please refer to MCPS/PMLL/IMPEL response in respect to amounts collected on behalf of non-members by the entities which are owned by the MPA.

24 What should be the criteria for determining whether deductions are 'unreasonable'?

All deductions made by a licensing body must be transparent to the rightholder and must be as cost reflective as possible. There should be no cross subsidisation between either rights areas or licensing areas.

Please refer to PRS and MCPS/PMLL/IMPEL response for further information on current practices.

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

We do not believe that the Government has a role to play in relation to non-distributable amounts in the music industry. The only area where it is acceptable for Government to exercise this discretion is in relation to non-distributable revenues is in the case of Extended Collective Licensing where it involves the monies of non-members. The parameters for Government exercising this discretion in relation to ECL are clearly set out in paragraph 19 of the 2014 regulations (Retention and application of undistributed licence fees).

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?

Our members have reported issues with rights managed under representation agreements in some member states. "Social and Cultural" deductions are the major concern for members, particularly when they are taken as part of the commission rate in some Member States, which we do not believe is fair or appropriate. In some Member States, licensing bodies are known to take deductions from international repertoire, which they then spend domestically – this means that rightholders are effectively being taxed in those territories without seeing any direct benefit or being able to claim any relief, unlike a normal tax.

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

The standard for disclosure should be any fact which if known would materially impact on the negotiating positions of the parties.

For a detailed response to this question, please see the PRS and MCPS/PMLL/IMPEL submissions.

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?

The quality and accuracy of usage data is an enormous issue for music publishers - particularly in the context of licensing digital services. As such we welcome Article 17 and the introduction of user obligations – and particularly in relation to data provision.

Users, who are relying on our content to drive their business models, must take the appropriate steps to develop systems which are able to capture and report accurately on usage data. At the moment there are no serious obligations placed on users to track what they are using, and certainly no sanctions for those who fail to report accurately. Our members estimate that some of the better digital service providers are able to provide in the region of 60% of songwriter/composer information, whilst others provide none at all – yet many of these digital services are sourcing their content from the same suppliers, so usage information should be standardised and perfectly easy to collect. It is most often the small rightholder, composer or songwriter who is at the greatest disadvantage if usage information is not accurately collected or communicated to licensing bodies.

We view that the obligations on users as introduced in the Directive is key to raising the issue of user obligations on data reporting. It is absolutely vital that users/ licensees are able to provide licensing bodies with all the necessary data required to distribute to rightholders. The data must be accurate and delivered in a timely manner. Users should be transparent about the capabilities of their systems and the security measures in place to guard against activities outside of the scope of the licence (e.g. stream ripping).

We accept that data collection is time consuming and expensive, but users must accept this as

an expense of operating a business relying on our content. There is certainly scope for new business models to develop in this area, and the collection of data should at no point be seen as a disincentive for using musical works in digital services.

We look forward to working with licensing bodies and the IPO to establish clear guidelines for user obligations in this area. It may well be that the best solution is for the industry to establish a set of minimum standards in this area which could be communicated to users by way of a code of conduct , in IPO guidance notes or through copyright notices. We will be working with licensing bodies to establish what relevant information should be included for users in these communications.

For further information please refer to the submissions made by PRS and MCPS/PMLL/IMPEL.

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

Please refer to PRS and MCPS/PMLL/IMPEL response.

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

Please refer to PRS and MCPS/PMLL/IMPEL response.

31 What do you think qualifies as a "duly justified" request for the purposes of Article 20?

Please refer to PRS and MCPS/PMLL/IMPEL response.

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

Please refer to PRS and MCPS/PMLL/IMPEL response.

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

Please refer to PRS and MCPS/PMLL/IMPEL responses for a full list of current identifiers used in our industry.

We urge Government to support rightholders and licensing bodies with ensuring standard unique identifiers are used and adopted by end users of musical works.

34 What would you consider to be a "duly justified request for information" (Article 25(1))? What is not?

Please refer to PRS and MCPS/PMLL/IMPEL response.

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?

We support the approach taken by PRS and MCPS/PMLL/IMPEL with regards to confidentiality and data protection. However, we also note that there is a benefit, to both rightholders and end users, of having access to certain data held in society databases.

As such, we believe that there should be a duty for licensing bodies to provide rightholder access to databases which have been paid for by rightholders. These include society/CISAC controlled databases such as CIS-Net, Fastrack and ICE.

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)?

Please refer to PRS and MCPS/PMLL/IMPEL response.

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

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.

The UK has well established and well functioning bodies in place to deal with complaints and dispute resolution. These comprise the Ombudsman Service, the Copyright Tribunal, mediation services and the UK Courts. Each of these bodies has a clearly defined role in relation to complaints and disputes, and we would be against Government extending the remit of any of them – which would perhaps lead to them operating beyond their clearly defined areas of expertise (for example we do not believe that the Ombudsman Services should handle complaints relating to multi-territory licensing).

We are currently less clear as to how multi-territorial disputes will be resolved given the potential number of different agencies in each Member State who may need to be involved. Given that the system of national copyright law – which we endorse – prevails in each EU jurisdiction, we believe it is not appropriate for issues of value to be decided outside of the national territory.

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

We agree that the IPO is probably best positioned to house the National Competent Authority and that staffing and costs should be kept to a minimum at all times. If the NCA is housed within the IPO, it should be able to draw on the expertise of those around them. However, it is clear that the NCA should be independent from the daily work of the IPO, particularly with regards to policy setting.

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 and upper and lower estimate.

As mentioned above, we envisage that the NCA will be a small agency, housed within the IPO and view that a staff of 2 should be sufficient to run such an organisation – certainly at the outset. We imagine that those appointed to the organisation will need a practical understanding of copyright and company law.

We would welcome clarity on the role the NCA is expected to play in relation to interaction with NCAs from other EU Member States and whether it is envisaged that NCAs will attend EU experts meetings, for example. As mentioned above, we do not believe that the NCA should be involved in policy developments for our sector.

41 How should the costs of the NCA be met?

As a small agency, whose primary responsibility is to monitor licensing body compliance with the Directive, the modest cost of setting up and running this agency should be borne by the Government - on the basis that licensing bodies (and therefore their rightholder members) are bearing the costs of implementation of the Directive.

In addition, and in line with the principles of good governance, we do not believe that it is appropriate that the costs of the NCA should be borne by the CMOs it is monitoring. The NCA should operate as a wholly independent entity – and therefore should not be dependent on income from those entities it is supposed to be monitoring.

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About the MPA:

The Music Publishers Association ("MPA") is the trade association for music publishers in the UK, with over 260 members, representing nearly 4,000 catalogues covering every genre of music. Our members include all three of the UK's "major" music publishers, independent pop publishers, classical publishers, production music publishers and also printed music publishers. We estimate that our members represent around 95% of publishing activity in the UK.

The vast majority of our member companies are small or medium sized enterprises. Many of our member companies are multi-disciplinary music companies, operating not just as music publishers but as record labels, managers, promoters, producers, manufacturers, distributors and retailers. www.mpaonline.org.uk

The MPA also owns three collection societies:

- The **Mechanical Copyright Protection Society Ltd** ("MCPS") which 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 PRS for Music ("PRS") as defined by a service level agreement.

- **Printed Music Licensing Ltd** ("PMLL") which was set up 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. www.printmusiclicensing.co.uk
- In addition, **Independent Music Publishers European Licensing** ("IMPEL") has been set up as a subsidiary company of the MPA. However, for the moment all the IMPEL operations fall under MCPS (i.e. the IMPEL membership agreement is between the publisher and MCPS and all licensing and distribution is run through MCPS). We are currently in a transition period as it is envisaged that eventually the IMPEL will run as a standalone entity. 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.