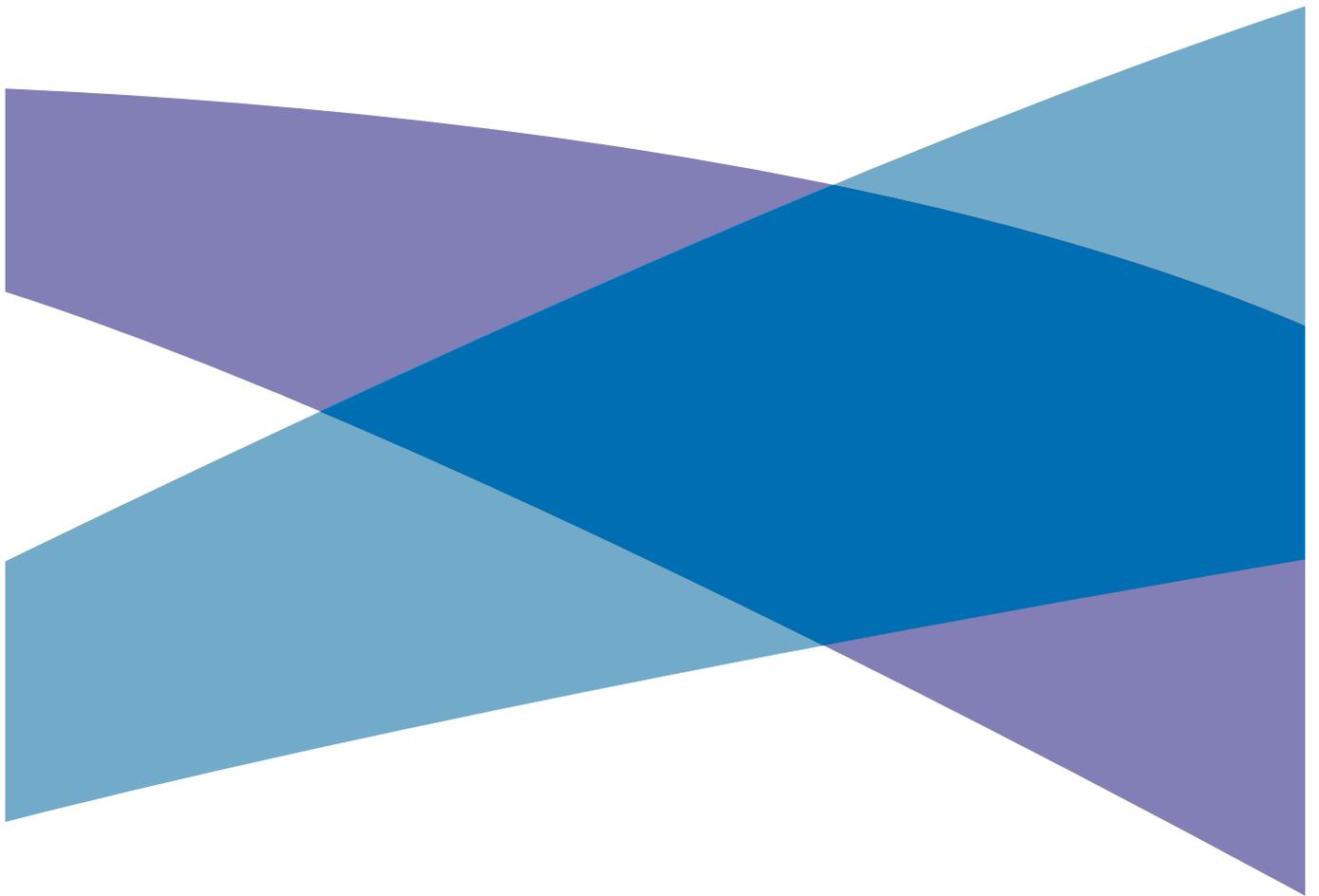
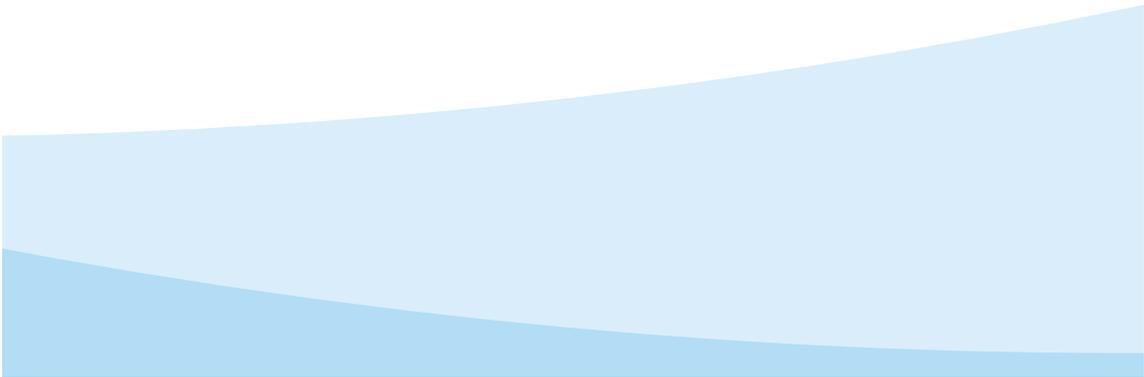




Intellectual
Property
Office

Regulation of Licensing Bodies





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1. Introduction

1.1 In May 2011 the Hargreaves Review recommended that collecting societies "should be required by law to adopt codes of practice, approved by the IPO and the UK competition authorities, to ensure that they operate in a way that is consistent with the further development of efficient, open markets". This was broadly accepted by the Government and was the subject of a full public consultation, which ended in March 2012.¹

1.2 Following this, the Government published a policy statement in July 2012, stating its intention to bring forward legislation to regulate collecting societies.² In April 2013, the Government took a power in the Enterprise and Regulatory Reform Act that would allow it to make secondary legislation to remedy and, where warranted, penalise gaps in self-regulation by collecting societies.

1.3 The draft secondary legislation, to be known as The Copyright (Regulation of relevant licensing bodies) Regulations 2014, is the subject of this consultation. This document outlines the structure and content of the Regulations and asks specific questions on which the views of interested parties are sought.

1.4 Given the extensive formal consultation on the policy and discussions about it, including in the Codes Working Group, respondents are invited to submit substantive comments on the legal effectiveness of the Regulations only. The policy itself is out of scope of this consultation.

1 <http://www.ipo.gov.uk/consult-2011-copyright.pdf>

2 Government Policy Statement: Consultation on Modernising Copyright, July 2012, p.12 <http://www.ipo.gov.uk/response-2011-copyright.pdf>

2. Background to the Consultation

2.1 In drafting these Regulations, the Government has taken into account the outcome of previous consultations³ on the regulation of collecting societies.⁴ This indicated overall support for the principle of codes of practice as a means of promoting/ensuring good practice. There was general agreement on the scope of the Government's proposed minimum standards, including the presence of an independent Ombudsman and Code Reviewer. The key point of difference was around the proposal for statutory codes of practice. This proposal had overwhelming support from licensees, whereas most collecting societies and some rights holders preferred a purely self-regulatory model.

2.2 Alongside formal consultation, the Government further developed and finalised the minimum standards in the Codes Working Group, comprising users and collecting societies. The minimum standards were published in October 2012.⁵ Since then a large group of collecting societies, acting under the banner of the British Copyright Council (BCC), have published their codes of practice, based on the BCC's Principles of Collective Management Organisations' Codes of Conduct.⁶ The BCC collecting societies have put in place an independent Ombudsman and have just appointed an independent Code Reviewer.

2.3 The Government will take account of the independent Code Reviewer's evidence and report to assess performance against self-regulatory codes. If intervention through the reserve power becomes necessary, it will be based on robust evidence. The ability to impose a range of sanctions is a discretionary power reserved for the more serious and persistent breaches. Such sanctions are necessary to protect the interests of collecting society members and users, as well as non-members where the collecting society operates an extended collective licensing (ECL) scheme.

2.4 The impact assessment that was prepared for these proposals is in the process of being revised. The Government made a call for any new evidence and submissions from stakeholders are being used to update the impact assessment. The revised impact assessment will be published at the same time as the regulations are tabled.

3 <http://www.ipo.gov.uk/consult-2011-copyright.pdf>; <http://www.ipo.gov.uk/response-2011-copyright.pdf>; <http://www.ipo.gov.uk/copyright-summaryofresponses-pdf>

4 Also referred to as licensing bodies and/or collective management organisations (CMO)

5 <http://www.ipo.gov.uk/hargreaves-minimumstandards.pdf>

6 <http://www.britishcopyright.org/page/276/principles-of-collective-management-organisations-codes-of-conduct/>

3. The Proposed EU Directive on Collective Rights Management

3.1 These UK regulations, which are one of several measures introduced by Government to modernise the UK's copyright regime, are being made against the backdrop of the proposed Collective Rights Management Directive ('CRM Directive'), currently being negotiated in Europe.⁷ The Directive is part of the European Commission's "Digital Agenda for Europe" and "Europe 2020 Strategy." It has two main objectives:

- To introduce better standards for the operation of all EU collecting societies.
- To create a more efficient framework for the cross-border licensing of online music

3.2 This consultation does not have a direct bearing on the UK's position on the Directive, which is strategically important for the UK because it:

- largely complements domestic legislation for the regulation of collecting societies (ERR Act); and
- should help UK collecting societies to recoup royalties due back to UK rights holders.

3.3 The proposed CRM Directive has wide political support across the EU including from the UK. Its adoption is by no means guaranteed and transposition before 2016 at the earliest is highly unlikely. Any delay to the implementation of domestic legislation could breach the Government's goal to have measures in place by the end of this Parliament.⁸ It would also have a knock on effect on the implementation of ECL for which codes of practice are a pre-condition. Therefore, the domestic work is being progressed as per the original timetable. If the Directive is adopted, the Government will revisit the Regulations as part of the transposition process and make any necessary changes.

3.4 The UK's introduction of a regulatory framework for collecting societies, built on the Government's minimum standards of governance, transparency and accountability,⁹ is already well advanced. This means that UK collecting societies now have an excellent opportunity to showcase best practice in Europe.

7 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, (the "CRM Directive") published in July 2012. http://ec.europa.eu/internal_market/copyright/management/index_en.htm

8 See The Government Response to the Hargreaves Review of Intellectual Property and Growth, August 2011 <http://www.ipo.gov.uk/ipresponse-full.pdf>

9 <http://www.ipo.gov.uk/hargreaves-minimumstandards.pdf> published October 2012

4. Consultation Questions on the Draft Regulations

4.1 The draft Regulations are set out in Annex A. The sections below, which follow the structure of the Regulations, seek comments on the way in which the draft Regulations implement Government policy.

Part 1 - Preliminary

4.2 This part outlines the scope of the Regulations and sets out how they should be interpreted. Draft Regulation 2 includes the following definition of a ‘licensing body’:

“any organisation authorised 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 those rightholders as its sole or main purpose and which is:

- (a) owned or controlled by its members; or*
- (b) organised on a not for profit basis.”*

This definition is designed to capture the type of entity that was the subject of the Government’s Consultation on Copyright,¹⁰ namely the ‘traditional’ collecting society, which is usually owned and/or controlled by its members and has a not for profit status.

4.3 Should the CRM Directive be agreed in its current form, the Regulations would apply to entities that are considered to be ‘collective management organisations’ defined in the Presidency Compromise Text agreed upon at Coreper on 4 July 2013¹¹ 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 one or both of the following criteria:

- (i) it is owned or controlled by its members;*
- (ii) it is organised on a not-for-profit basis.”*

10 <http://www.ipso.gov.uk/consult-2011-copyright.pdf>

11 <http://register.consilium.europa.eu/pdf/en/13/st11/st11651.en13.pdf>

4.4 The definition may also be expanded to bring ‘independent management entities’ within the scope of certain aspects of the Directive. These are defined in the Compromise Text 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 by members and
- (ii) organised on a for-profit basis”

Question 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.

4.5 As proposed in the previous consultation on the legislative proposals in the Enterprise and Regulatory Reform Bill, this section of the Regulations includes provision for ‘micro businesses’ to be exempted from the scope of the backstop power to impose a code of practice.¹² This is in line with the Government moratorium on new domestic regulation for micro-businesses and start-ups. The Government will continue to encourage such businesses to adopt proportionate forms of self-regulation to ensure that they operate in a transparent manner.

Part 2 – Regulation of Relevant Licensing Bodies

4.6 This section makes provision for the statutory regulation of licensing bodies and the processes to be followed when the Secretary of State has made a judgement that there has been a gap in self-regulation. It describes the circumstances under which the Secretary of State may direct a licensing body to put in place a code of practice that complies with certain specified criteria in Schedule 3(1) of the draft Regulations and, failing that, impose a code on the licensing body. It provides the Secretary of State with the power, if needed, to appoint:

- a Code Reviewer to review and report on industry codes of practice; and
- an Ombudsman to investigate and determine complaints about compliance with codes.

4.7 The circumstances in which the Secretary of State would be most likely to appoint a Code Reviewer may include:

- where an individual collecting society (or several collecting societies) had either failed to appoint a Code Reviewer or refer its code to the industry’s independent code review scheme; or

¹² <http://www.ipso.gov.uk/consult-ia-bis0313-20120702.pdf>

- if there were a systemic problem with the industry appointed independent Code Reviewer (e.g. he or she has been brought into disrepute), rendering it untenable for that Reviewer to continue in the role.

4.8 The circumstances in which the Secretary of State would be most likely to exercise the power to appoint an Ombudsman may include:

- where an individual collecting society (or several collecting societies) had failed to appoint an Ombudsman within the self-regulatory framework; or
- in the unlikely event of a wholesale failure of the self-regulatory Ombudsman arrangements.

Question 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.

4.9 The ability of the Secretary of State to intervene in specific circumstances and apply the Regulations to an individual entity, rather than the industry as a whole, provides an effective, proportionate and dissuasive approach to non-compliance. It is designed to safeguard the interests of those collecting societies compliant with the Regulations through the self-regulatory framework. Those societies would have already borne the associated costs of compliance, including the set-up costs of developing codes of practice, establishing an independent Code Reviewer and costs of an ombudsman scheme. This approach should also help reduce the risks of reputational damage to the industry as a whole, should certain entities fail to comply with the self-regulatory framework.

Question 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 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.

Question 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.

4.10 Draft Regulations 6 and 7 provide for the Secretary of State to appoint an Ombudsman and Code Reviewer, each of whom must be “suitably qualified”.

Question 5: What should be the principal features that determine whether a Code Reviewer and/or an Ombudsman is “suitably qualified” for their statutory roles? (In considering this question you may wish to refer to the guidance published by the Ombudsman Association (see Annex C)

4.11 In accordance with the Enterprise and Regulatory Reform Act,¹³ Regulation 8 provides for the Secretary of State to levy a fee on a relevant licensing body to which Regulations 3, 4, 5, 6 and 7 apply, in order to reimburse the Secretary of State for the actual costs incurred, in accordance with the relevant Treasury guidance.¹⁴

Part 3 – Information, Sanctions and Penalties

4.12 This part of the Regulations outlines the Secretary of State's powers to impose information requirements on a relevant licensing body, including the provision of information to the statutory Code Reviewer and Ombudsman where necessary. It sets out the sanctions and penalties that may be imposed on a relevant licensing body or one of its directors, managers or similar officers for failure to comply with a direction and/or an information request as the Secretary of State considers appropriate, taking into account what is effective, dissuasive and proportionate.

4.13 Part 3 also outlines the procedures that the Secretary of State must follow before imposing a code and/or penalties and sanctions, and sets out the notice periods required. It explains the way in which financial penalties will be applied, within the boundaries of the limit of £50,000 as set out in the Act.¹⁵ Finally, it explains the possible grounds for appeal against the imposition of a code of practice or the nature of a sanction or penalty, together with the procedures that must be followed.

Question 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.

4.14 As advised by the Ministry of Justice (MoJ), Regulation 13 provides for appeals against the imposition of a code of practice and/or penalties to be heard by the First-tier Tribunal.¹⁶

4.15 The First-tier Tribunal is part of HMCTS, comprising seven chambers, which are structured around the subject of the appeals. When new appeal rights are created, the MoJ allocates them to a chamber handling appeals of a similar type. In this case, it is likely that appeals would be heard by the General Regulatory Chamber.

13 Schedule A1, Copyright, Designs and Patents Act 1988, Paragraph 6(2)

14 See HMT publication, "Managing Public Money" July 2013 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/212123/Managing_Public_Money_AA_v2_-_chapters_annex_web.pdf

15 Schedule A1, Copyright Designs and Patents Act 1988, Paragraph 5(4)

16 First-tier Tribunal established by section 3(1) of the Tribunals, Courts and Enforcement Act 2007 (c. 15)

Question 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.

4.16 The General Regulatory Chamber's rules sets out procedures that apply to many types of cases, including specific arrangements for certain categories of appeals.¹⁷ The Government believes the standard arrangements will be fit for purpose for handling appeals arising from these Regulations, such that no additional provisions are required. (See Annex B for a summary of how the rules could be applied).

Question 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?

4.17 The draft Regulations do not set out a time limit for bringing an appeal as this would be governed by the relevant Chamber's rules.¹⁸

17 For more information about the General Regulatory Chamber Rules see <http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/rules.htm>

18 Assuming these appeals were formally allocated to the First-tier Tribunal general regulatory chamber, rule 22(1) (b) of SI 2009/1976 would apply.

5. Responding to the Consultation

5.1 The Government would welcome views as to whether the provisions are an effective implementation of the Government's policy? Please make your responses as brief as possible.

5.2 Should you wish to make specific drafting suggestions on the draft Regulations, please limit these to substantive (rather than stylistic) points and provide evidence, otherwise these may not be considered.

5.3 As the Government has already consulted widely on these proposals, including with the relevant stakeholder Working Groups, there will be short, four week consultation period for these proposals. The closing date for responses is **12 midday on Monday 7 October 2013**. A response can be submitted by letter or email using the response form included in Annex D to this document. When responding, please say whether you are doing so as an individual or representing the views of an organisation. If the latter, please make clear who the organisation represents (providing a link to the webpage would be ideal) and where applicable, how the views of the members were assembled. Similarly, if you as an individual have been encouraged to respond by an organisation, it would be useful to know which one.

5.4 Responses should be sent to:

Andrew Smith
Intellectual Property Office
1st Floor, 4 Abbey Orchard Street
London
SW1P 2HT
United Kingdom

Email: copyrightconsultation@ipo.gov.uk

6. Confidentiality and Data Protection

6.1 We will publish all formal responses to the consultation on the IPO website.

6.2 Information provided in response to this consultation, including personal information, may be subject to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Regulations 2004). If you want other information you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

6.3 In view of this, if you consider information you have provided to be confidential, it would be helpful if you could explain to us why this is the case. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the IPO.

6.4 The IPO will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

7. Comments or Complaints on the Conduct of this Consultation

7.1 This consultation has been drawn up in line with the Government's Consultation Principles https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60937/Consultation-Principles.pdf.

7.2 If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

John Conway,
BIS Consultation Co-ordinator,
1 Victoria Street,
London
SW1H 0ET

Telephone John on 020 7215 6402
or e-mail to:
john.conway@bis.gsi.gov.uk

7.3 You may make printed copies of this document without seeking permission. BIS consultations are digital by default but if required printed copies of the consultation document can be obtained from:

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7.4 Other versions of the document in Braille, other languages or audio-cassette are available on request.

Annex A – Draft Regulations

Draft laid before Parliament under paragraph 7(4) of Schedule A1 to the Copyright, Designs and Patents Act 1988, for approval by resolution of each House of Parliament.

STATUTORY INSTRUMENTS

2014 No.

COPYRIGHT

The Copyright (Regulation of relevant licensing bodies) Regulations 2014

Made - - - - ***

Coming into force - - - - ***

The Secretary of State, in exercise of the powers conferred by paragraphs 1 to 7 of Schedule A1 to the Copyright, Designs and Patents Act 1988 (a), and the draft regulations having been laid before and approved by each House of Parliament, makes the following Regulations:

PART 1

Preliminary

Citation and Commencement

1. These Regulations may be cited as the Copyright (Regulation of relevant licensing bodies) Regulations 2014 and shall come into force on [.....].

Interpretation

2. In these Regulations—

“Act” means the Copyright Designs and Patents Act 1988;

“Comptroller” shall have the same meaning as in the Patents and Designs Act 1907(b);

“ECL scheme” means a collective licensing scheme under which a relevant licensing body may grant licences in accordance with authorisation by the Secretary of State;

“First-tier Tribunal” means the First-tier Tribunal established by section 3(1) of the Tribunals, Courts and Enforcement Act 2007(c);

(a) 1988 c.48.
 (b) 1907 c.29.
 (c) 2007 c.15.

“micro business” means a business with less than ten employees and which has a turnover or balance sheet total of less than 2 million Euros per annum;

“relevant licensing body” means any organisation authorised 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 those rightholders as its sole or main purpose and which is:

- (a) owned or controlled by its members; or
- (b) organised on a not for profit basis.

“specified criteria” means the criteria set out in the Schedule.

PART 2

Regulation of relevant licensing bodies

Direction to adopt a code of practice

3.—(1) If the relevant circumstances are met, the Secretary of State may direct a relevant licensing body by a date stated in the direction (“Commencement Date”) to adopt and publish a code of practice that complies with the specified criteria.

(2) For the purposes of paragraph (1), the relevant circumstances are:-

- (a) the relevant licensing body is not a micro-business; and
- (b) that in the opinion of the Secretary of State the system of self-regulation of the relevant licensing body does not comply in material respects with the specified criteria.

(3) In deciding whether the code of practice of a relevant licensing body does comply in material respects with the specified criteria the Secretary of State may have regard to a report produced by a Code Reviewer who has been appointed in accordance with paragraph 24 of the specified criteria or by the Secretary of State under regulation 6.

(4) The Secretary of State may request a Code Reviewer to produce a report in order to assist him in making his decision under paragraph (3).

(5) The Commencement Date must be at least 42 days after the date on which the direction is made.

Effect of a direction

4. (1) The relevant licensing body must within 28 days of the date on which a direction is made notify to the Secretary of State a code of practice that complies with the specified criteria and that it proposes to adopt in accordance with the direction.

(2) In deciding whether the code of practice of a relevant licensing body does comply in material respects with the specified criteria the Secretary of State may have regard to a report produced by a Code Reviewer who has been appointed in accordance with paragraph 24 of the specified criteria or by the Secretary of State under regulation 6.

(3) Following receipt of a code of practice notified in accordance with regulation 4(1) and prior to the Commencement Date, the Secretary of State will inform the relevant licensing body in writing that the code of practice notified either:

- (a) meets the specified criteria and is approved by the Secretary of State; or
- (b) does not meet the specified criteria and that the Secretary of State intends to impose a Code of Practice on the relevant licensing body.

(4) Once its code of practice has been approved by the Secretary of State the relevant licensing body shall adopt the approved code of practice and operate its licensing activities in accordance with its approved code of practice from the Commencement Date.

Imposition of Code of Practice

5. – (1) Before imposing a code of practice the Secretary of State must –

- (a) be satisfied that the relevant licensing body has failed to adopt an approved code of practice in accordance regulation 4(4);
- (b) give notice of the code of practice to be imposed on the licensing body, and
- (c) consider any representations made by the relevant licensing body in accordance with the notice and not withdrawn.

(2) The notice must—

- (a) state the reasons for the proposed refusal of any code of practice notified by the relevant licensing body,
- (b) contain the code of practice that the Secretary of State proposes to impose on the licensing body; and
- (c) state the period (not less than 14 days starting with the date of delivery the notice) within which representations may be made in relation to the proposed imposition of the code of practice.

(3) Where the Secretary of State decides to impose the code of practice contained in the notice the Secretary of State will notify the relevant licensing body and give it a written statement of reasons for the determination together with the date from which the approved code of practice is to have effect as the code of practice adopted by the body (the “Effective Date”).

(4) The relevant licensing body shall operate its activities in accordance with the imposed code with effect from the Effective Date.

Code reviewer

6.-(1) The Secretary of State may appoint a suitably qualified person as Code Reviewer to review and report to the Secretary of State on the codes of practice adopted by the licensing bodies, including how they relate to the specified criteria, and on compliance with the codes of practice.

(2) Before making an appointment under paragraph (1) the Secretary of State shall consult with those persons who the Secretary of State considers to represent the interests of licensing bodies, licensees, the persons on whose behalf a relevant licensing body is authorised to negotiate or grant licences and the Comptroller.

(3) The Code Reviewer may serve notice on any relevant licensing body requiring it to supply to the Code Reviewer information for the purposes of a review or report to be produced by the Code Reviewer.

(4) The Secretary of State may pay the reasonable expenses and allowances of the Code reviewer.

Licensing Code Ombudsman

7.- (1) The Secretary of State may appoint a suitably qualified person as Licensing Code Ombudsman to investigate and determine disputes about a relevant licensing body's compliance with its code of practice.

(2) A relevant licensing body, licensee or a person on whose behalf a relevant licensing body is authorised to negotiate may refer a dispute about a relevant licensing body's compliance with its code of practice or other matter to the Licensing Code Ombudsman.

(3) The Licensing Code Ombudsman may serve notice on any relevant licensing body or other person requiring it to supply to the Licensing Code Ombudsman information for the purposes of investigating a dispute referred to in paragraph (1).

(4) A relevant licensing body shall comply with a determination of the Licensing Code Ombudsman.

(5) The Secretary of State may pay the reasonable expenses and allowances of the Licensing Code Ombudsman.

Recovery of costs by the Secretary of State

8.- The Secretary of State may require a relevant licensing body to which regulations 3 to 7 apply to pay the Secretary of State a fee to reimburse the Secretary of State any relevant costs incurred by the Secretary of State.

PART 3

Information, sanctions and penalties

Secretary of State's powers to request information

9. —(1) The Secretary of State may, for any purpose related to its licensing activity, serve notice on any relevant licensing body requiring it to supply to -

- (a) the Secretary of State;
- (b) the Code Reviewer, for the purposes of a review or report; or
- (c) the Licensing Code Ombudsman, for the purposes of an investigation or determination

such information as may be specified or described in the notice, and to supply it at a time and place and in a form and manner so specified.

(2) The person to whom any document is produced in accordance with a notice under this regulation may, for any relevant purpose, copy the document so produced.

(3) Any reference in this regulation to the production of a document includes a reference to the production of a legible and intelligible copy of information recorded otherwise than in legible form.

Sanctions and penalties for failure to comply with a condition or code of practice requirements

10. — (1) The Secretary of State may impose a sanction or penalty of such amount as he considers appropriate on a relevant licensing body or on a director, manager or similar officer of the relevant licensing body or, where the body's affairs are managed by its members, on a member ("relevant person") or any other person if the Secretary of State is satisfied that the relevant licensing body has failed to comply with its obligations under:

- (a) regulations 4(4) (adoption of an approved code of practice), 5(4) (compliance with an imposed code of practice) or 7(4) (compliance with determination of the Licensing Code Ombudsman); or
- (b) regulations 4(1) (notification of code of practice), 6(3) (supply of information to Code Reviewer), 7(3) (supply of information to Licensing Code Ombudsman) or 9(1) (supply of information in accordance with a requirement imposed by the Secretary of State).

(2) Any penalty imposed under paragraph (1)(a) shall not exceed £50,000.

(3) Any penalty imposed under paragraph (1)(b) shall not exceed a fine of up to level 5 on the standard scale and for continued contravention a daily default fine of up to one tenth of level 5 on the standard scale for each day until the required action is taken.

Imposition of sanctions and penalties: main procedural requirements

11. —(1) Before imposing a sanction or penalty under regulation 10, the Secretary of State must—

- (a) give notice of the proposed sanction or penalty, and
- (b) consider any representations made in accordance with the notice and not withdrawn.

(2) The notice must state—

- (a) that the Secretary of State proposes to impose a sanction or penalty,
- (b) the nature of the proposed sanction or the amount of the proposed penalty,
- (c) the obligation that the Secretary of State is satisfied has been contravened or is being contravened,
- (d) the acts or omissions which the Secretary of State considers constitute the contravention,
- (e) any other facts which the Secretary of State considers justify the imposition of a sanction or penalty and the nature of the proposed sanction and the amount of the proposed penalty,
- (f) the manner in which, and place at which, it is proposed to require the penalty to be paid, and
- (g) the period (not less than 21 days starting with the date of publication of the notice) within which representations may be made in relation to the proposed penalty.

(3) As soon as practicable after imposing a sanction or penalty, the Secretary of State must give notice of the sanction or penalty.

(4) The notice must state—

- (a) the Secretary of State has imposed a sanction or penalty on the relevant licensing body or relevant person,
- (b) the nature of the sanction or the amount of the penalty,
- (c) the acts or omissions which the Secretary of State considers constitute the contravention,
- (d) any other facts which the Secretary of State considers justify the imposition of a sanction or penalty and the nature of the sanction or the amount of the penalty,
- (e) the manner in which, and place at which, the penalty is required to be paid, and

(f) the date or dates, no earlier than the end of the period of 28 days from the date of service of the notice on the relevant licensing body or relevant person, by which the penalty or (as the case may be) different portions of it, are required to be paid.

(5) A notice under this regulation must be given by—

(a) serving a copy of the notice on the relevant licensing body and any relevant person, and

(b) publishing the notice in such manner as the Secretary of State considers appropriate for the purpose of bringing the matters to which the notice relates to the attention of persons likely to be affected by them.

Sanctions and Penalties: further procedural requirements

12.—(1) If, after giving notice under regulation 11 the Secretary of State decides not to impose a sanction or penalty, the Secretary of State must give notice of that decision.

(2) A notice under this regulation must be given by—

(a) serving a copy of the notice on the relevant licensing body and any relevant person, and

(b) publishing the notice in such manner as the Secretary of State considers appropriate for the purpose of bringing the matters to which the notice relates to the attention of persons likely to be affected by them.

Appeals

13. —(1) If a relevant licensing body or relevant person is aggrieved by—

(a) the imposition of a code of practice; or

(b) the nature of a sanction or the amount of any penalty

the relevant licensing body or relevant person may apply to the First-tier Tribunal.

(2) On an application under this regulation, the First-tier Tribunal may make such order as it considers appropriate.

(3) Where the appeal is against the imposition of a code of practice the code shall continue in force until the First-tier Tribunal has determined the application.

(4) Where an application has been made under this regulation, the sanction or penalty may not be required to be performed or paid until the application has been determined, withdrawn or otherwise dealt with.

(5) Where the First-tier Tribunal substitutes a lesser penalty it may require the payment of interest on the substituted penalty at such rate, and from such date, as it considers appropriate.

Recovery of fees, sanctions and penalties

14. Where fees imposed under regulation 8 or a sanction or penalty imposed under regulation 10, or any portion of such costs, sanction or penalty, has not been paid or performed by the date on which it is required to be performed or paid and—

(a) no application relating to the sanction or penalty has been made under regulation 13 during the period within which such an application may be made, or

(b) any such application which has been made has been determined, withdrawn or otherwise dealt with,

the Secretary of State may recover from the relevant licensing body or relevant person any of the costs, sanction or penalty which has not been paid or performed; and in England and Wales and Northern Ireland such costs, sanction or penalty may be recovered as a civil debt

.....2013

Viscount Younger of Leckie
Parliamentary Under Secretary of State for Intellectual Property
Department for Business, Innovation and Skills

Schedule Regulation 3(1)

The specified criteria for the code of practice are set out in this Schedule.

The code of practice shall require the relevant licensing body to:

Obligation to rights holders

1. offer membership to all rights holders in the sector it manages;
2. have rules or constitution that enables members (and non-members if operating an ECL scheme) to withdraw their rights on reasonable notice;
3. offer fair and balanced representation of rights holder members in the internal decision making process of the relevant licensing body;
4. provide copy of rules/constitution to members and potential members;

Representation

5. act in the best interests of its members as a whole;
6. treat all members (and non member rights holders if operating an ECL scheme) fairly, honestly, reasonably, impartially, courteously and in accordance with its rules and membership agreement;
7. deal with all members transparently;

Obligations to licensees

8. treat its licensees and potential licensees fairly, honestly, impartially, courteously and in accordance with its rules and any licence agreement;
9. ensure that its dealings with licensees or potential licensees are transparent;
10. consult and negotiate fairly, reasonably and proportionately in relation to the terms and conditions of a new or significantly amended licensing scheme;
11. provide information to licensees and potential licensees about its licensing schemes, their terms and conditions and how it collects royalties;
12. ensure that all licences and licensing schemes are drafted in plain English and are accompanied by suitable explanatory material.

Licensees

13. The code of practice shall set out the requirements that the relevant licensing body will impose on licensees including:

- (a) to respect the rights of creators and rights holders including their right to receive fair payment when their works are used; and
- (b) that copyright material will only be used in accordance with the terms and conditions of a licence.

Conduct of employees, agents and representatives

The code of practice shall require the relevant licensing body to ensure that:

14. its staff training procedures for employees, agents and representatives includes conduct that complies with the obligations to members and licensees set out in these specified criteria;

15. its staff provide licensees and potential licensees with clear information, including information about cooling off periods which may apply to new licences; and

16. its employees and agents are aware of procedures for handling complaints and resolving disputes and are able to explain those procedures to members, licensees and the general public in plain English.

Information and transparency – monitoring and reporting requirements

17. The code of practice shall state that the relevant licensing body shall:

- (a) inform members, licensees and potential licensees, on request, about the scope of its repertoire, any existing reciprocal representation and the territorial scope of its mandate;
- (b) maintain and make available to members on request, a clear distribution policy that includes the basis for calculating remuneration, the frequency of payments, and clear information about deductions and what they are for;
- (c) provide details of tariffs in a uniform format on website;
- (d) provide details of its code of practice and complaints procedure, accessible via a link on the website homepage;
- (e) undertake that all information provided is kept up to date, is readily accessible and written in clear language that can be easily understood by licensees, potential licensees and members.

Reporting requirements

18. The code of practice shall state that the relevant licensing body shall publish an annual report which includes:

- (a) the number of rights holders represented, whether as members or through representative arrangements including, where possible and if applicable, an estimate of the number of rights holders represented by an ECL scheme;
- (b) the distribution policy;
- (c) total revenue from licences granted for its repertoire during the reporting period;
- (d) total costs incurred in administering licences and licensing schemes;
- (e) itemised costs incurred in administering licences and licensing schemes;
- (f) allocation and distribution of payments of revenues received and extent to which this is compliant with its distribution policy;
- (g) procedures for the appointment of directors to the relevant licensing body and details of any appointment during the course of the reporting period;
- (h) details of remuneration of each director of the relevant licensing body during the reporting period; and
- (i) a report regarding compliance with code of practice over the past year, including data on total level of complaints and resolution methods.

Complaints handling

19. The code of practice is to provide that the relevant licensing body shall adopt and publicise:

- (a) procedures for dealing with complaints from members, non member rights holders (if operating an ECL scheme), licensees and potential licensees; and
- (b) a complaints procedure.

20. The complaints procedure shall:

- (a) define the categories of complaints and explain how each will be dealt with;
- (b) ensure information on how to make complaints is readily accessible to members, licensees and potential licensees;
- (c) provide reasonable assistance to a complainant when forming and lodging a complaint;

- (d) specify who will handle a complaint on behalf of the relevant licensing body;
- (e) indicate timeframe for the handling of a complaint or dispute;
- (f) provide that the relevant licensing body will give a written response to each complaint made in writing;
- (g) provide that the relevant licensing body will give a written decision in any dispute and give reasons for that decision;
- (h) ensure that the relevant licensing body makes adequate resources available for the purpose of responding to complaints and resolving disputes; and
- (i) provide that the relevant licensing body will regularly review its complaint handling and dispute resolution procedure to ensure they comply with the minimum standards.

Ombudsman Scheme

21. The code of practice shall require the relevant licensing body to appoint and fund an independent and impartial person to arbitrate on disputes.
22. The code of practice shall provide that the Ombudsman shall be the final arbiter on complaints between the relevant licensing body and its members or licensees in relation to these specified criteria for their code of practice.
23. The Ombudsman service will not include matters that are within the jurisdiction of the Copyright Tribunal.

Independent Code Reviewer

24. The relevant licensing body shall appoint and fund an independent code reviewer to monitor and review the performance of the relevant licensing body against these specified criteria.
25. The independent review shall comprise an initial review of the code of practice against the specified criteria one year after implementation and then at intervals of at least three years thereafter.
26. The code of practice shall provide for the code reviewer to publicise and consult during the course of his review and to publish his conclusions.

Explanatory Note

(This note does not form part of the Regulations)

Part 2 of the Regulations sets out the circumstances in which the Secretary of State can direct a relevant licensing body to adopt or impose on a relevant licensing body a code of practice which contains the specified criteria set out in the Schedule.

Part 3 of the Regulations sets out the powers of the Secretary of State concerning information, sanctions and penalties.

A full impact assessment of the effect that this instrument will have on the costs of business and the voluntary sector is available from the Intellectual Property Office, Concept House, Cardiff Road, Newport NP10 8QQ and is annexed to the Explanatory Memorandum which is available alongside the instrument on www.legislation.gov.uk. Copies have also been placed in the libraries of both Houses of Parliament.

Annex B

Her Majesty's Courts and Tribunals Service First-Tier Tribunal (General Regulatory Chamber) Rules

The First-tier Tribunal (General Regulatory Chamber) Rules set out its procedure as applicable to many types of case. In the case of [The Copyright [Regulation of relevant licensing bodies] Regulations 2014] this would mean:

- i. A person who wishes to appeal against any of the following decisions of the Secretary of State: (a) [the imposition of a code of practice]; or (b) [the nature of a sanction or the amount of any penalty] must provide to the tribunal their notice of appeal within 28 days of the date on which notice of the decision was sent to them. The notice of appeal would set out the grounds for the appeal, and the reasons of the Secretary of State for the decision.
- ii. Where the decision of the Secretary of State was to [impose a sanction or penalty], and the appeal is lodged prior to the implementation of the decision taking effect the implementation will be suspended pending the outcome of the appeal.
- iii. Following lodging of the notice of appeal, the Secretary of State must then submit his response to the notice of appeal and provide grounds for his opposition to the appeal and the reasons for his decision (if not already provided by the appellant). The Secretary of State must provide this information within 14 days.
- iv. Once the tribunal has received the information required at (iii), it will forward copies to the appellant who then has 14 days in which to provide any reply (with any further documents).
- v. The appellant may give notice of withdrawal of their appeal at any time, and this will be effective if the tribunal consents.
- vi. As soon as the case is ready and the requirements of the Rules and any directions have been met the case will be listed for hearing. The appellant and the Secretary of State are entitled to attend the hearing and present their cases. Both parties can cross-examine witnesses.
- vii. If the appellant fails to attend the hearing, the tribunal can still reach a decision on the appeal if it considers it is in the interests of justice to do so, and that the appellant had been notified of the hearing, or that reasonable steps were taken to notify the appellant of the hearing. The appellant can ask for such a decision to be set aside and for the appeal to be re-listed. However, in these circumstances this will only happen where the tribunal is satisfied that it is in the interests of justice to do so.

- viii. The tribunal's decision may be given at the end of the hearing or later. In either case, it will be confirmed in writing.
- ix. No fees are charged to appellants for using the tribunal. However, the tribunal may award costs where it finds that a party has acted unreasonably in bringing, defending or conducting the appeal.
- x. Either party can ask for permission to appeal against the decision of the tribunal but only on a point of law. Such an application for permission must be provided to the tribunal within 28 days of the date on which the tribunal gave its decision in writing.
- xi. The tribunal will consider the application, and may also undertake a review of the tribunal's decision. If, on review, it is satisfied that there was an error in law in the tribunal's decision, the tribunal will notify the parties. Alternatively, the tribunal can give permission to appeal to the Upper Tribunal or refuse to give such permission.
- xii. If an appeal against a decision of the tribunal reaches the Upper Tribunal, the latter can set aside that decision and give a new decision, or it can refer the case back to the tribunal for re-hearing.

This is a summary of important aspects of the First-tier Tribunal's general rules. It is not intended to be exhaustive. You can find more information about the General Regulatory Chamber Rules at: <http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/rules.htm>

Further information about how to make an appeal to the First-tier Tribunal and the rules which apply to such appeals can be found on the HMCTS website: <http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/transport/appeals.htm>

Annex C

Principal Features of an Ombudsman Scheme

In the majority of cases, the principal features of an ombudsman scheme are:

- Ombudsman schemes resolve complaints. They are not regulators, though some of their decisions may be seen as precedents and have wider effect
- The ombudsman model is used to resolve complaints made by someone 'small' (citizen/consumer) against something 'big' (public body or commercial business)
- Ombudsman scheme procedures are designed to redress the difference between the resources and expertise available to the citizen/consumer and those available to the body/business
- Access to ombudsman schemes is free for citizens/consumers, and they are not at risk of an order for costs. Ombudsman schemes handle enquiries as well as complaints, because dealing with an enquiry may head off a complaint (for example, by resolving a misunderstanding)
- The citizen/consumer first complains to the body/business, accessing the ombudsman scheme if dissatisfied with the body/business's response (or if it does not respond within a reasonable time)
- When dealing with complaints, ombudsman schemes seek to achieve a fair resolution at the earliest possible stage – rather than working towards an assumed future hearing
- Ombudsman schemes use flexible and informal procedures – resolving cases by mediation, recommendation or decision as appropriate
- Ombudsman schemes do not just rely on the evidence the parties volunteer. They actively investigate cases (using their specialist expertise) – calling for the information they require
- So the outcome is not affected by how well either of the parties presents his/her/its case, and representation by lawyers (or others) is not necessary
- Ombudsman scheme recommendations/decisions are based on what is fair in the circumstances, taking account of good practice as well as law
- Ombudsman schemes publicly feed back the general lessons from cases they have handled, so stakeholders (including government/regulators) can take steps to improve things for the future

- Because there is a flexible and informal process, and representation is not necessary, the costs of an average ombudsman case are significantly less than an equivalent case in a court or tribunal

Statutory Ombudsman Schemes

- With the 'statutory' model as employed in recent times, typically:
- An independent board of non-executive directors is appointed by a statutory regulator, to oversee the strategy, efficiency and effectiveness of the ombudsman scheme
- The directors are all required to represent the public interest, and only a minority must be connected with businesses in the sector involved
- The budget is proposed by the Chief Ombudsman, adopted by the independent board and approved by the statutory regulator
- The Chief Ombudsman and any other Ombudsmen are appointed by the non-executive directors, on terms that secure the independence of the Ombudsmen.
- The independent Board helps safeguard the independence of the ombudsmen, and helps ensure there are adequate resources to handle the work
- The Ombudsmen are independent decision-makers (as a judge would be) and the Chief Ombudsman acts as chief executive of the organisation
- The independent Board is not involved in deciding cases, nor in the day-to-day management of the ombudsman scheme
- Typically, the statute provides a framework of powers, enabling the regulator and/or the ombudsman scheme (with the approval of the regulator) to make detailed rules about jurisdiction/process/powers, so that these can be kept up-to-date without requiring primary legislation.

Source: The Ombudsman Association

<http://www.ombudsmanassociation.org/about-principle-features-of-an-ombudsman-scheme.php>

Annex D

Consultation Response Form

Responding to the Consultation

On this form, please provide your responses to the questions outlined in this document. You do not have to complete the whole form – please answer the questions that are most relevant to you.

Please note: This consultation forms part of a publication exercise. As such, your response may be subject to publication or disclosure in accordance with access to information regimes (these are primarily the Freedom of Information Act (FOIA), the Data Protection Act (DPA) and the Environment Information Regulations 2004).

If you do not want part or whole of your response or name to be made public please state this clearly in the response, explaining why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system cannot be regarded as a formal request for confidentiality.

The closing date for responses is Monday 7 October 2013 at 12 midday.

About You and Your Organisation

Your name	[Desirable]
Job Title	[Desirable]
Organisation Name	[Desirable]
Organisation's main products/services	[Desirable]

Question 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?

Question 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.

Question 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 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.

Question 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.

Question 5: What should be the principal features that determine whether a Code Reviewer and/or an Ombudsman is “suitably qualified” for their statutory roles?

Question 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.

Question 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.

Question 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.

Please note: The information you supply will be held in accordance with the Data Protection Act 1988 and the Freedom of Information Act 2000. Information will only be used for its intended purpose. It will not be published, sold or used for sales purposes.

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