

## **ALCS Response to the Consultation on the Implementation of the EU Directive on the Collective Management of Copyright and Multi-territorial Licensing of Online Music Rights in the Internal Market.**

The Authors' Licensing and Collecting Society Limited (ALCS) is the UK collective rights management organisation representing the interests of writers. The current membership includes creators working across diverse genres for print, audio, audio-visual and digital publications. Established in 1977 and wholly owned and governed by the authors it represents (of whom there are currently over 85,000) ALCS is a not-for-profit, non-union organisation. ALCS exists to ensure that authors receive a fair reward when their works are used in situations in which it would be impossible or impractical to offer licences on an individual basis. To date ALCS has paid over £380m to authors.

ALCS is a member of the Copyright Licensing Agency (CLA) and the Educational Recording Agency (ERA) and supports the submissions made by these bodies.

### **Question 1**

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

Our preference is for Option 2. Introducing new regulations implementing the terms of the Directive will be a much clearer, simpler process than trying to amend the existing 2014 regulations, which were primarily designed to support the voluntary system of CMO codes.

### **Question 2**

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

In many cases the detailed elements in the Specified Criteria set out in the Schedule to the 2014 Regulations that go beyond the scope of the Directive can be dealt with through the terms of the CMO codes of conduct. This will provide a more flexible and responsive approach. We strongly support the principle expressed in 3(a) of the Specified Criteria although, beyond issuing and enforcing licences on behalf of 'creators and rightholders' there is little, in practice, a CMO can do to 'impose' this requirement. We suggest this principle would be better expressed in IPO guidance rather than legislation.

### **Question 3**

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

ALCS costs associated with implementation and compliance largely relate to obtaining specialist legal advice regarding necessary changes to our constitution and management time engaged in updating internal documents such as our code of conduct and distribution rules. Estimating costs is challenging, especially as we do not yet know the detail of UK implementation; our best estimate at this stage would be £40k - £60k.

#### **Question 4**

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

Yes, aside from any regulatory requirement, we see the code as a useful means for providing information and relevant contact points to our members.

#### **Questions 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.**

ALCS is covered by the Directive as a collective management organisation.

#### **Question 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.**

N/A

#### **Question 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.**

ALCS is a member of the CLA and ERA, both of which are CMOs for the purposes of the Directive.

Together with the British Equity Collecting Society (BECS), ALCS jointly owns the Authors and Performers Lending Agency Limited (APLA). A dormant company that has never traded, APLA was established to offer a licensing scheme for the lending of audiobooks in public libraries. Following the inclusion last year of audiobooks with the Public Lending Right scheme, there is no need for separate licensing arrangements. APLA will therefore be wound up later this year.

#### **Question 8**

**Who do you understand the “rightholders” in Article 3(c) to be?**

For ALCS ‘rightholders’, as defined in the Directive, will fall into three broad categories: 1) ALCS members, being authors or their heirs 2) authors who are members of overseas CMOs whose rights are represented by ALCS under representation agreements 3) authors who do not fall into either 1 or 2 but whose works have been identified as being used within the licensing schemes relevant to ALCS members.

## Question 9

### **If you are a CMO, what are the practical effects of a relatively broad definition of “rightholder” for you?**

The definition covers various scenarios in which a rightholder might be due rights revenue from a CMO and thus fall under the terms of the Directive. For ALCS ‘persons’ who are entitled to a share of rights revenue ‘under an agreement for the exploitation of rights’ encompasses authors represented under membership terms or agreements with CMOs as per 1 and 2 above. The definition also refers to rightholders who are due a share of rights revenue ‘by law’; this potentially covers authors who are not represented by ALCS but whose works are deemed to be included within a licence under The Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014.

The guidance notes published by the IPO in support of the ECL Regulations state that CMOs should adopt ‘proportionate’ measures in setting a distribution policy for very small payments to non-members, thus avoiding unjustifiable costs for existing members. However Article 13 of the Directive requires a CMO to take ‘all necessary measures’ to locate and pay rightholders, irrespective of the sums due. Furthermore the section of the consultation document comparing the Directive and ECL regulations states that ‘stronger’ provisions in the Directive will take precedence over the ECL Regulations.

Recital 29 of the Directive refers to ‘reasonable and diligent measures’ to identify and locate rightholders. It would be helpful if the regulations implementing the Directive recognised the practical issue of tracing rightholders who are due small amounts of money and the need to adopt a reasonable and proportionate approach. The processes outlined in Article 13(3) involving making certain information publicly available will allow for cost-effective means of tracing rightholders. The ability of members to set general distribution policies, under Articles 13(1) and 8(5) of the Directive is the key to finding the correct balance; for example, the general policy could confirm a diligent process for tracing rightholders subject to the principle that the cost of search for an individual should not exceed the amount of fees due to them.

A broad interpretation of ‘rightholder’ may also have practical implications in the context of reporting under Article 18(1). This requires that a CMO makes available certain information to rightholders ‘to whom it has attributed’ revenue, at least once a year. Within ALCS’s substantial database of rightholders who have contributed to works there are some cases where allocated payments fall below the threshold at which it is economic to administer them (the current threshold of £10 is included in the Distribution Rules which are approved by the members in general meeting). A mandatory annual report to each such rightholder would be unproductive and result in unjustifiable, additional costs for existing members; a requirement to make this information available to the relevant rightholders *on request* would be workable and accord with our existing business practice.

#### **Question 10**

##### **What do you consider falls in the scope of “non-commercial”?**

To a large extent this will involve a case-by-case analysis. The licences authorised by ALCS involve the delivery of high-volume repertoires of works to various sectors. We believe the scale and value of the intellectual property rights covered by these licences fall outside the kind of ‘non-commercial’ uses rightholders may wish to authorise on an individual basis as envisaged by Recital 19 of the Directive.

#### **Question 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?**

The member mandates operated by ALCS do not require an exclusive transfer of rights; members are free to license their works on a non-commercial basis if they wish. In the event that a member notifies us that a work should be made available for free within a licensed sector, that work would be excluded from the licence.

#### **Question 12**

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

The ALCS membership terms already permit members to serve notice to remove rights or works from their mandated repertoire. In practice members very rarely remove rights or works.

#### **Question 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”?**

For ALCS, this would be in a situation in which the rightholder was not eligible for membership being neither an author nor an author’s heir.

#### **Question 14**

##### **What should “fair and balanced” representation in Article 6(3) look like in practice?**

This may differ between CMOs with different organisational and membership structures. In the case of ALCS, each member has a) equal voting rights and b) the right to stand for election to the board of directors.

### **Question 15**

**What do you consider to be an appropriate “regular” timeframe for updating members’ records?**

ALCS requests its members to provide updates on new works and changes to personal records (such address or banking details) as and when they occur. Our two annual distributions include reminders to members to provide updates.

### **Question 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?**

We believe the rights for non-member rightholders set out in Article 7(1) are sufficient. The 2014 ECL Regulations also provide certain safeguards for non-member rightholders. The ALCS Code of Conduct extends service level standards to members and non-members alike.

As explained in our response to question 8, if non-members affected by an ECL scheme are ‘rightholders’ under the Directive, the provisions of Article 13 will need to be interpreted to avoid situations in which the cost of tracing non-members unreasonably increases costs for existing members.

### **Question 17**

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

Article 8 seeks to balance the necessity for a CMO’s members to approve key areas of policy – for CMOs like ALCS that have a large number of individual members, this means seeking approval at an Annual General Meeting – and the delegation of more ‘operational’ policy decision-making to a group that includes members and is responsible for overseeing the policy implementation by those managing the CMO’s day-to-day business.

In practical terms, the discretion within Article 8(7) may be seen as a flexible measure to provide members with important details on the policies guiding investments but not, for example, requiring that decisions on individual investments are subject to member approval.

Regarding restrictions on voting rights, this is not something that applies directly to ALCS. To the extent that such restrictions are optional and left to the individual CMO guided by a ‘fair and proportionate’ requirement, adopting this discretion will provide useful flexibility.

### **Question 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?**

Article 9 envisages a supervisory function to monitor the activities and performance of a CMO's management. Within the ALCS structure, this oversight is currently performed by the board of directors which meets six times a year and provides a formal reporting to all members ahead of the Annual General Meeting in accordance with UK company law. In line with Article 9 (2) of the Directive, the board is primarily composed of ALCS members. The ALCS board may also appoint non-members with relevant professional expertise as directors, as envisaged by Recital 24 of the Directive. The ALCS CEO is the only executive member of the board. Recital 24 states that a 'supervisory function' may be undertaken by some or all of the directors not involved in managing the business. This suggests that the current ALCS board could undertake the relevant supervisory monitoring activities provided that the CEO was not directly involved in this process.

Assuming the above interpretation is correct, we do not envisage significant costs associated with the implementation of a 'supervisory function'.

### **Question 19**

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

We understand that the IPO will analyse and report on the areas of existing overlap.

### **Question 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?**

Our current distribution system provides for the allocation and payment of funds due to members within the time limits prescribed by the Article 13. Where fees are due to non-members, ALCS takes 'all necessary measures' to locate those individuals who then join ALCS as a member and register their works for future collections. As outlined in our response to Question 9, a strict obligation to locate and pay each rightholder due any sum of money would, in some cases, mean the cost of tracing exceeded the value of the payment – in effect the administration fees charged to members subsidising the cost of this activity. Our preferred approach is for our members to approve a balanced approach within the general distribution policy which includes both direct tracing activities and public awareness campaigns as envisaged by Article 13.

### **Question 21**

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

During the financial year to 31<sup>st</sup> March 2015 ALCS distributed £30m to 70,000 authors. In terms of undistributed funds we are currently holding £37m, pending distribution; the vast majority of these funds will be distributed to members during the next 12 months, the

balance will be paid out within the timeframe set by the Directive, in accordance with our distribution policy.

ALCS distribution policies are designed to minimize the accumulation of 'non-distributable funds' – 98% of all fees collected since the establishment of ALCS have been distributed. In 2006, to deal with the £5m of undistributable funds accumulated during the first 30 years of ALCS's existence, the members approved the decision to purchase a building to house the organisation, as a means of reducing costs passed on to members in administration fees.

A further £2m has since accumulated that remains undistributed, primarily made up of hundreds of thousands of individual micropayments of such small value that it is currently uneconomic to trace the individual rightholders (beyond advertising the titles due payments on our website).

When we update our distribution policies at our Annual General Meeting this year, we will be asking members to approve further policies to deal with undistributed and undistributable funds in line with the principles set out in the Directive.

## **Question 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?**

Our colleagues from other CMOs will comment on any UK funding they support. ALCS has a Support & Sponsorship fund based on a 0.25% deduction on distribution providing annual funding of around £70k for projects supporting writers and writing.

Regarding the EU, many countries allocate a proportion of income from private copying levies to fund social and cultural projects. A report commissioned by the IPO in 2011 (Private Copying and Fair Compensation: An empirical study of copyright levies in Europe) includes data on the scale of these apportionments. The 2013 WIPO International Survey on Private Copying (page 10, table 4,) also provides useful data in this regard.

## **Question 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?**

ALCS members' works are licensed by the CLA in the education, business and public sectors. CLA 'blanket licences' cover all published works held by a licensee except works that have been specifically excluded. This means that sometimes works by authors who are not ALCS members will be copied under a CLA licence. CLA allocates the relevant share of licensing fees to such authors; ALCS then traces the writers who join as members and receive the outstanding fees.

We do not see the necessity for the Government to determine uses for non-distributable fees. As the representatives of the class of rightholder for whom the money was collected, CMO members are the most appropriate group to take such decisions, as per Article 13(5).

#### **Question 24**

**What should be the criteria for determining whether deductions are ‘unreasonable’?**

CMOs are typically run on a non-profit basis, administration fees should be justifiable to cover the cost of serving the members’ needs within the framework set by the Directive and regulations.

#### **Question 25**

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

As stated above, provided that they are genuinely representative of a class of rightholders, our view is that CMO members are best placed to take decisions on using undistributable funds. A possible downside to exercising the discretion is that funds or schemes that are formally prescribed for certain purposes may not be sufficiently flexible to meet the changing needs of a particular rightholder community.

#### **Questions 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?**

In certain territories (the report referred to in the response to question 22 identifies these) some revenue collected by overseas CMOs is automatically allocated to domestic social or cultural funds. This can prejudice UK rightholders who receive neither the income nor the benefit of the fund. The requirement in Article 15(1) of the Directive for express consent may provide greater scope for challenging this approach within the structure of representation agreements. However often such deductions are linked to approved statutory licensing or remuneration schemes – such as private copying compensation - meaning that the issue cannot necessarily be addressed in negotiations between CMOs and may require a policy intervention.

#### **Question 27**

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

We support the response made by CLA to this question.

#### **Question 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?**

We support the response made by CLA to this question.



### **Question 29**

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

ALCS manages large amounts of data in the course of administering its members' rights. Although we are engaged in various initiatives with national and international partners to improve processes for data sharing and management, considerable work is still required to maximise the value of the data we acquire for distribution purposes. In addition, ALCS invests in third party data products to augment the information received from partner organisations. The annual scale of costs for this work within ALCS is £100k - £120k.

### **Question 30**

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

For the most part the information to be provided in the annual transparency report is already reported in our annual financial statements and directors' report.

### **Question 31**

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

In terms of representations agreements between CMOs, in our experience the information referred to in Article 20 will be routinely exchanged in the normal course of business.

### **Questions 32 -36 (N/A)**

### **Question 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?**

Typically ALCS does not have a direct relationship with licensees, in the vast majority of cases our member's works/ rights are exploited through agreements with licensing agencies or overseas CMOs. The direct licensing arrangements we do have are with broadcasting organisations whose turnover substantially exceeds that of ALCS.

### **Question 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.**

Clearly there is no 'one-size-fits-all' solution here; there is a significant difference between a complaint by an individual member to a CMO over service levels and a dispute between a CMO and an industry body over the value of a multi-million pound licence.

ALCS has designed its code of conduct and complaints processes to enable members to pursue any complaints internally and, should the matter not be resolved to their satisfaction, externally via the Copyright Licensing Ombudsman. For a 'member-facing' CMO we consider this to be an appropriate system.

In terms of disputes, we have consistently supported a more balanced role for the Copyright Tribunal whereby, in certain circumstances, licensing bodies representing our members' works would have rights of referral.

#### **Question 39**

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

Through working with UK CMOs on the development of the self-regulatory framework and the subsequent regulations the IPO has gained a good understanding of the way the sector works and is therefore the body best placed to fulfil the NCA function.

#### **Question 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 an upper and lower estimate.**

The self-regulatory environment, including independently-reviewed codes of conduct and the Copyright Licensing Ombudsman, already provides a framework for dealing with a broad range of compliance issues. For more substantial disputes, mediation services and/or the Copyright Tribunal (with more balanced referral rights for users and CMOs as noted above) are available options. On the basis that much of the compliance activities will be covered by existing structures, a team of 2 or 3 staff members should be sufficient for the NCA.

#### **Question 41**

**How should the costs of the NCA be met?**

CMOs have already expended considerable funds putting in place a self-regulatory framework and are now investing further to ensure compliance with the Directive. As non-profit bodies, the cost of these activities reduces the funds available to pay out in distributions to rightholders. We therefore believe that the cost of the NCA should be met by IPO budgets.