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

March 2015

Response from The Educational Recording Agency Limited (ERA)

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

ERA would support Option 2.

Recital 8 of the Directive provides "The aim of this Directive is to provide for co-ordination of national rules concerning access to the activity of managing copyright and related rights by collective management organisations, the modalities for their governance, and their supervisory framework."

Therefore ERA sees real advantage in all Member States effectively copying out the provisions of the Directive when implementing the Directive into national laws. However, in doing this, any transposition must properly recognise the ways in which the Directive provides for (but does not dictate) the way in which the bodies and individuals to whom the Directive relates actually operate, to ensure effective compliance. If this approach is taken, the framework for co-ordination of national rules will be set in a more transparent fashion than would be the case if provisions in national laws are "worked back" to compliance with the Directive.

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

ERA is a collective management organisation (CMO) operating within the United Kingdom and has been bound by S.I. 2014 No 898 (The Copyright (Regulation of Relevant Licensing Bodies) Regulations 2014) since they came into force on 6 April 2014.

Taking into account comments in response to question 1, ERA would suggest that it will be important, in the interests of transparency, that in any aspects of the 2014 Regulations which are regarded as "going beyond" the scope of the Directive should be clearly identified as such within an identifiable section(s) of any new Regulations.

Any such "additional obligations" should be addressed in the context of Recital 9 of the Directive.

This Recital provides "The aim of the Directive is to lay down requirements applicable to collective management organisations, in order to ensure a high standard of governance, financial management, transparency and reporting. This should not, however, prevent Member States from maintaining or imposing, in relation to collective management organisations established in their territories, more stringent standards than those laid down in Title II of this Directive, provided that such more stringent standards are compatible with Union law".

ERA believes that requirements for licensees to respect creators' rights and ensure that copyright material is used in accordance with licence terms and conditions are important. Such requirements are particularly relevant in the context of wider government initiatives to educate and inform all in society about the importance of respect for intellectual property, its value to creators and to the economy as a whole.

The provisions of paragraph 4 of the Schedule to the 2014 Regulations (Conduct of employee, agents and representatives) have been relevant to UK CMOs' adoption of their current Codes of Practice and will, for practical reasons, continue to be relevant after implementation of the Directive.

However, beyond this, care is needed that additional obligations do not impose burdens that go beyond, or are incompatible with, the application of company law to the operation of CMOs.

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

ERA is a micro business with fewer than 9 employees.

For the year ended 31 March 2014, ERA's turnover was £674,073.

In terms of time taken by officers and professional advisers of the company to ensure compliance with the 2014 Regulations (including engaging Ombudsman Services to provide the complaints service linked to the Code of Practice), it is estimated that the company incurred around £5,000 in costs during the last 12 months.

This equated to approximately 0.75% of the turnover to the year ended 31 March 2014.

Slightly higher costs may be incurred during the forthcoming year, since the company will be updating its Articles of Association and asking members to approve Governance changes to reflect any new provisions linked to implementation of the Directive.

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.

The ERA Code of Practice is a working document and will be developed to reflect agreed changes to distribution policies and the activities of the CMO in terms of the services that it offers to members.

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.

ERA is a "collective management organisation" within the definition set out in Article 3 (a) of the Directive. It is also a "micro-business" in that it operates with fewer than 9 employees.

ERA is a company limited by guarantee (and as such "an organisation").

It is authorised by its members to manage rights in copyright works and rights related to copyright on their behalf, for the collective benefit of the members of ERA.

The management of such rights is the main purpose of ERA and the company is organised on a not-for profit basis. It is also owned and controlled by its members.

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 – ERA operates as a collective management organisation (and therefore is excluded from the definition of "rightholder" in Article 3 (c) of the Directive).

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.

ERA has only one dormant subsidiary company.

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

In the case of ERA the rightholders who hold copyright or related rights relevant to the ERA Licensing Scheme are those who have either assigned or mandated one of the ERA members to represent the exclusive rights that are relevant to the ERA Licence.

These rights are described in the standard ERA Licence. They relate to the copyright works or related rights that fall within the description of works applied to an individual ERA member within the text of the standard ERA Licence.

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

In applying the wide definition of "rightholder" in Article 3(c) it will be important that CMOs are able to define **in their own terms** the "rights, categories of rights or types of work or other subject matter" for which management "falls within the scope of its activity" under the provisions of Article 5.2 of the Directive.

Only if this is done will CMOs be in a position to assess which rightholders will have the rights to which Article 5 – subsections 2 to 8, will apply.

Section 35 and paragraph 6 Schedule 2 Copyright, Designs and Patents Act 1988 (as most recently amended by S.I. 2014 No. 1372 (The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014) apply to state that specified acts are permitted under the provisions unless "licences are available authorising the acts in question and the educational establishment responsible for those acts knew or ought to have been aware of that fact".

It is important to note that the CDPA provisions only apply within England, Scotland, Wales and Northern Ireland.

Therefore when Article 5.2 states "Rightholders shall have the right to authorise a collective management organisation of their choice to manage rights …….for the territories of their choice,

irrespective of the Member State of nationality" – it needs to be noted that the "choices" available to rightholders for permitting acts to which the UK legal provisions apply include either permitting the exceptions to operate or linking to a licensing scheme which can be drawn to the attention of educational establishments across England, Scotland, Wales and Northern Ireland.

In practice, rightholders of any kind who have wished to license relevant rights have joined ERA for the specific purpose of enabling licences to be issued to relevant educational establishments.

This is potentially significant because, should a rightholder "withdraw" from ERA, then in the absence of a new licensing scheme being set up to operate in parallel to the ERA licence, the provisions of s 35 and paragraph 6 Schedule 2 may then operate to permit acts within the scope of those provisions.

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

Debate over the nature of "non-commercial" shows a differing range of opinion about the boundaries as between "users" and "rightholders".

http://mirrors.creativecommons.org/defining-noncommercial/Defining_Noncommercial_fullreport.pdf

It is therefore important that reaching an understanding over what matters a rightholder might wish to treat as non-commercial and the conditions attached to the exercise of that right in the context of Article 5.3 should be left in the first instance to be determined between a mandated CMO and its members.

The scope of such agreements may differ depending upon the nature of the works and the licences for which a particular CMO is mandated to cover within the scope of recognised licensing schemes.

In the case of ERA, its mandates relate to the licensing of mandated rights for use by or on behalf of educational establishments for the educational purposes of licensed educational establishments provided that the educational purposes are non-commercial. (s 35(1) CDPA as amended).

Recital 42 of Directive 2001/29 is important in that respect. This recognises:-

"When applying the exception or limitation for non-commercial educational and scientific research purposes, including distance learning, the non-commercial nature of the activity in question should be determined by that activity as such. The organisational structure and the means of funding of the establishment concerned are not the decisive factors in this respect".

ERA's licensing scheme is operated for rightholders who **have chosen** to license their rights within the ERA licensing scheme rather than allowing the copyright exception provisions set out in s 35 and paragraph 6 Schedule 2 Copyright, Designs and Patents Act 1988 (as amended) to apply.

Once that choice has been made, ERA works to ensure that licensees are clear about the rights that are regarded as part of "ERA Repertoire" as opposed to rights that fall outside ERA Repertoire.

The exception provisions in s 35 and paragraph 6 Schedule 2 CDPA specifically state that the exceptions will not apply "if or to the extent that there is a licensing scheme in place".

ERA's licensing scheme applies to authorise licensees to make use of works for "the educational purposes" of educational establishments but not for "commercial use".

It would therefore seem contradictory if Article 5.3 is somehow applied to permit the right holders who have authorised ERA members and ERA to license the educational uses to which the ERA Licence scheme applies directly as "non-commercial uses"?

Therefore, if ERA members wish to license directly the same non-commercial uses that members mandate ERA to license, it would be unnecessary for them to remain in membership of ERA and they would be invited to terminate membership of ERA.

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?

ERA mandates only link to the operation of the ERA Licensing scheme.

ERA members are free to license any rights in their repertoire outside the scope of the ERA Licence as they choose.

However, for the reasons described in the answer to question 10, it is hoped that Article 5.3 is not deemed to apply to "educational uses" relevant to s 35 and paragraph 6 Schedule 2 as though they equate to non-commercial licensing.

This seems fair when the option for rights owners who do not wish to assert rights under the licensing scheme is available by means of the copyright exception provisions of s 35 and paragraph 6 Schedule 2 CDPA applying without remuneration flowing to the right owners who are happy for the exception provisions to apply.

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

Rightholders mandate ERA with rights through the bodies who are agreed as eligible to be members of ERA.

Unless rightholders who are linked to one of the ERA members remove a significant amount of the repertoire that the ERA member has previously mandated for ERA to license, there will be no significant impact on operation or application of the ERA Licence.

Withdrawal of repertoire from ERA by any rightholder will in practice mean that a rightholder who had previously chosen to "assert" rights within a licensing scheme and who has not immediately asserted rights in the context of a new legitimate licensing scheme may have "chosen" to allow copyright exceptions to cover relevant use. The practicalities and economics of a rightholder withdrawing repertoire from the ERA licensing scheme and licensing rights through a scheme operating separately but in parallel with the ERA licensing scheme was one of the issues that led to the "use it or lose" it structure included in s 35 of the CDPA, when enacted.

The market benefits of there being two or more licensing schemes which educational establishments would need to comply with for the narrow area of use enabled by s 35 and paragraph 6 Schedule 2 CDPA, are hard to envisage.

Nevertheless, the possibility of this happening has been a reality since 1989, when the ERA licensing scheme was launched.

In practice gradual consolidation of repertoire through additions to ERA membership and the winding down of the originally separate Open University scheme after the OU joined ERA, has been the actual result.

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"?

At present, any society, guild, association or other body (whether corporate or unincorporated) which is a substantial copyright owner or represents a substantial number of copyright owners not already represented by one of the existing members of ERA for the purposes of licensing the rights relevant to the ERA Licensing Scheme, is eligible to apply for membership of ERA.

As such, each ERA member is either a collective management organisation, society, guild, association or other body (whether corporate or unincorporated) which is a substantial copyright owner or represents a substantial number of copyright owners not already represented by one of the existing members of ERA, for the purposes of licensing the rights relevant to the ERA Licensing Scheme.

The definition of "rightholder" in Article 3 (c) of the Directive applies to "any person or entity, **other than a collective management organisation**, that holds a copyright or related right or, under an agreement for the exploitation of rights or by law, is entitled to a share of rights revenue".

The definition of "member" in Article 3 (d) of the Directive recognises that a collective management organisation may be a member of another collective management organisation and that "associations of rightholders" may also be members of a collective management organisation provided that they fulfil the membership requirement of a CMO and are admitted by it.

ERA distributes the Licence Fees it collects to its members for onward distribution or allocation for the benefit of the copyright owners or performers which are represented by the individual ERA member. The CMO members of ERA have acquired mandates from the rightholders and are responsible for reporting on monies that they receive from ERA within approved distributions.

Similar delegation applies to the non CMO bodies who are "substantial" rightholders who have fulfilled the current membership criteria of ERA.

For the above reasons it is thought that a "substantial representation" test is an objective criteria to be applied to grounds for ERA membership.

When a new membership application to ERA is made and membership criteria are satisfied, the existing members of ERA have to agree to change the way in which the total monies distributed by ERA are split and allocated to existing members in order to provide for an agreed allocation to the new member at a level that is also acceptable to the new member.

This process distinguishes ERA from other collective management organisations where an individual copyright owner owns rights and mandates certain rights to a collective management organisation in return for securing payments linked to direct use of the licensed works, without directly affecting the

entitlement of other members of the collective management organisation. When a new member joins ERA the distribution share of one or more of the existing members will go down in percentage terms to allow for the recognised share to be allocated to the new ERA member.

The ERA Code of Conduct refers to these arrangements and explanations of the process are accepted as important to ensure that any membership application is "transparent" (but necessary).

In addition, the requirement for a representative body or CMO seeking to become a member of ERA to show that they are not seeking to represent rights that are relevant to mandates granted by an existing ERA member is seen as both "objective" and "non-discriminatory" (bearing in mind the need for transparency above the allocation of distribution shares across all the members of ERA at any one time).

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

Article 6.3 refers to the provision of "appropriate and effective mechanisms" for the participation of members in the organisation's decision making process. This is in addition to providing that representation of the different categories of members in the decision making process being fair and balanced.

It is important that the definition of "member" recognises that individual members of a CMO may be "other collective management organisations and associations of rightholders" in their own right.

This is an important recognition which must be clearly transposed for any UK implementation of the Directive.

At present, each member of ERA is entitled to nominate a representative to sit as a Director on the Board of ERA and each member is entitled to attend and vote on issues at meetings of the members.

As such, the one member one vote at all levels of the decision making process allows for representation of members in the decision making process in a fair and balanced way.

Members of ERA are allocated into categories by reference to the types of copyright works and/or performances owned by rightholders which the member represents for the purposes of distribution allocations. When decisions are relevant only to members in a particular category, all the members in that category continue to be able to participate in the decision making process on the basis on one member, one vote.

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

ERA members are asked to inform ERA of changes to status as soon as they are aware of these.

In practice, since ERA has only 20 members the changes can be noted and other members informed within 14 days.

Recognition of any repertoire updates will to be linked to publication of changes to mandates within the context of the ERA Licence itself.

Making sure that changes are noted and linked to publication of Annual Reports would seem a helpful “minimum” against which all updates should take place.

In the case of ERA, Licences are issued on an annual basis and there are two key starting points during the year from which licences run. In the case of schools, annual licences run from 1 April and in the case of establishments of Further and Higher education, annual licences run from 1 August.

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?

The way in which ERA mandates operate alongside application of copyright exception provisions should be noted.

There is a concern that imposing additional liabilities on a CMO to address the potential interests of those who have chosen to allow their works to be use within the scope of a copyright exception would create burdens for rights owners who have chosen to assert rights, without any real benefit for rightholders who are not members of ERA as a CMO.

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

Transparency objectives would not be served if implementation of the discretionary provisions of Article 8 created ambiguities, or lack of clarity, over application of current company law to governance of the operation of companies limited by guarantee which operate as collective management organisations within the United Kingdom.

This is important when considering authority for alternative systems or modalities for the appointment and removal of the auditor.

Company law requirements are designed to ensure the independence of an auditor from the persons who manage the business of a collective management organisation.

Under Article 9 ERA would support adoption of Regulations which allow for CMOs to adopt rules that allow for flexible application of the options set out under Article 8.

The nature of the membership of ERA means that it is practical for organisations to nominate or appoint a person as proxy to vote on their behalf at general meetings to allow appropriate and effective participation of members in the decision-making process of the collective management organisation.

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?

The notes below set out how ERA currently addresses the issues relevant to Article 8 and Article 9 of the Directive. The ERA Articles of Association will be updated and revised to ensure compliance with the Directive. Legal costs and associated overheads in dealing with this have already started to be incurred and are likely to run up to £50,000 as the process towards adoption of revised or updated governance structures are put in place.

Art 8.1	Member States shall ensure that the general assembly of members is organised in accordance with the rules laid down in paragraphs 2 to 10.	
Art 8.2	A general assembly of members shall be convened at least once a year.	ERA holds an Annual General Meeting in accordance with relevant provisions of UK Company Law.
Art 8.3	The general assembly of members shall decide on any amendments to the statute and to the membership terms of the collective management organisation, where those terms are not regulated by the statute.	The Articles of Association of ERA can only be changed by the Members voting in General Meeting.
Art 8.4	The general assembly of members shall decide on the appointment or dismissal of the directors, review their general performance and approve their remuneration and other benefits such as monetary and non-monetary benefits, pension awards and entitlements, rights to other awards and rights to severance pay. In a collective management organisation with a dual board system, the general assembly of members shall not decide on the appointment or dismissal of members of the management board or approve their remuneration and other benefits where the power to take such decisions is delegated to the supervisory board.	Each Member of ERA is able to nominate a person to act as their nominee on the Board of Directors. The appointment of any new Director is in practice ratified by the full ERA Board (rather than Members) – Directors are not currently remunerated but ERA Articles will need amending to make sure that the terms provide for any relevant appointments and remuneration arrangements are approved by the Members.
Art 8.5	In accordance with the provisions laid down in Chapter 2 of Title II, the general assembly of members shall decide at least on the following issues:	All Members are required to unanimously to approve the distribution policy as regards allocation of shares to the 5 categories of ERA membership. This is the general policy. Breakdowns of shares between the members of a category has, until now, been regarded as "specific" to just the members within the Category.
	(a) the general policy on the distribution of amounts due to rightholders;	
	(b) the general policy on the use of non-distributable amounts;	In practice ERA has no non-distributable monies. All sums are distributed to Members under distribution policy rules (endorsed by all Members).
	(c) the general investment policy with regard to rights revenue and to any income arising from the investment of rights revenue;	The ERA Articles will be amended to make it clear that the "Members" rather than the Board will approve general investment policy for any

		revenues held by ERA prior to distribution.
	(d) the general policy on deductions from rights revenue and from any income arising from the investment of rights revenue;	The Members agree (unanimously) to the budget for ERA costs on an annual basis. The Articles will need amending to make this process clearer - and when done will cover all deductions that are made by ERA against Licence receipts including approved arrangements for the payment of commission to approved agents involved in the ERA Licensing process.
	(e) the use of non-distributable amounts;	See 8.5 (b) above.
	(f) the risk management policy;	The ERA Articles will be amended to make it clear that the "Members" rather than the Board will approve the risk management policy (although at present the Board already does this).
	(g) the approval of any acquisition, sale or hypothecation of immovable property;	8(g),8(h) & 8(i)These are already matters that require the approval of ERA Members but to the extent that approvals are currently delegated to Directors – revised Articles will need to make it clear that the necessary approvals are secured from all the Members (when effectively covering relevant supervisory functions linked to Members).
	(h) the approval of mergers and alliances, the setting-up of subsidiaries, and the acquisition of other entities or shares or rights in other entities;	
	(i) the approval of taking out loans, granting loans or providing security for loans.	
Art 8.6	The general assembly of members may delegate the powers listed in points (f), (g), (h) and (i) of paragraph 5, by a resolution or by a provision in the statute, to the body exercising the supervisory function.	Since the current structure allows for Members of ERA to act unanimously, it is going to be more a matter of process matching the Directive provisions about Members working wearing "supervisory function" hats or in general assembly within updated ERA Articles, than anything else.
Art 8.7	For the purposes of points (a) to (d) of paragraph 5, Member States may require the general assembly of members to determine more detailed conditions for the use of the rights revenue and the income arising from the investment of rights revenue.	See above re 8 (a) to (d)
Art 8.8	The general assembly of members shall control the activities of the collective management organisation by, at least, deciding on the appointment and removal of the auditor and approving the annual transparency report referred to in Article 22.	This is addressed by the Members at the ERA AGM
	Member States may allow alternative systems or modalities for the appointment and removal of the auditor, provided that those systems or modalities are designed to ensure the independence of the auditor from the persons who manage the business of the collective management organisation.	

Art 8.9	All members of the collective management organisation shall have the right to participate in, and the right to vote at, the general assembly of members. However, Member States may allow for restrictions on the right of the members of the collective management organisation to participate in, and to exercise voting rights at, the general assembly of members, on the basis of one or both of the following criteria: (a) duration of membership; (b) amounts received or due to a member, provided that such criteria are determined and applied in a manner that is fair and proportionate. The criteria laid down in points (a) and (b) of the first subparagraph shall be included in the statute or the membership terms of the collective management organisation and shall be made publicly available in accordance with Articles 19 and 21.	Each ERA Member has one vote.
Art 8.10	Every member of a collective management organisation shall have the right to appoint any other person or entity as a proxy holder to participate in, and vote at, the general assembly of members on his behalf, provided that such appointment does not result in a conflict of interest which might occur, for example, where the appointing member and the proxy holder belong to different categories of rightholders within the collective management organisation.	Proxy votes are permitted within the ERA Articles although it is recognised that appointed Directors and their alternates may be recognised as "ongoing" proxy appointments for the purposes of the Members agreeing to address business as "members" on approved short notice.
	However, Member States may provide for restrictions concerning the appointment of proxy holders and the exercise of the voting rights of the members they represent if such restrictions do not prejudice the appropriate and effective participation of members in the decision-making process of a collective management organisation.	
	Each proxy shall be valid for a single general assembly of members. The proxy holder shall enjoy the same rights in the general assembly of members as those to which the appointing member would be entitled. The proxy holder shall cast votes in accordance with the instructions issued by the appointing member.	
Art 8.11	Member States may decide that the powers of the general asssembly of members may be exercised by an assembly of delegates elected at least every four years by the members of the collective management organisation, provided that: (a) appropriate and effective participation of members in the collective management organisation's decision-making process is ensured; and (b) the representation of the different categories of members in the assembly of delegates is fair and balanced. The rules laid down in paragraphs 2 to 10 shall apply to the assembly of delegates mutatis mutandis.	At present all Members are able to conduct business in general assembly.
Art 8.12	Member States may decide that where a collective management organisation, by reason of its legal form, does not have a general assembly of members, the powers of that assembly are to be exercised by the body exercising the supervisory function. The rules laid down in paragraphs 2 to 5, 7 and 8 shall apply mutatis mutandis to such body exercising the supervisory function.	See 8.11
Art 8.13	Member States may decide that where a collective management organisation has members who are entities representing rightholders, all or some of the powers of the general assembly of members are to be exercised by an assembly of those rightholders. The rules laid down in paragraphs 2 to 10 shall apply mutatis mutandis to the assembly of rightholders.	See 8.11

Art 9.1	Member States shall ensure that each collective management organisation has in place a supervisory function for continuously monitoring the activities and the performance of the duties of the persons who manage the business of the organisation.	The ERA Board of Directors currently provides for the supervisory function envisaged under Article 9. Depending upon the form of the Regulations transposing the Directive ERA may need to update how the Articles and the Membership Agreements recognise how nominees of the Members grant relevant approval in the capacity of "Members" rather than as "Directors" – although care will have to be taken that demands from "Members" can always be reconciled by "Directors" as being compatible with UK Company Law requirements and their obligations to the company as "Directors" of ERA.
Art 9.2	There shall be fair and balanced representation of the different categories of members of the collective management organisation in the body exercising the supervisory function.	All Members of ERA are represented on the ERA Board.
Art 9.3	Each person exercising the supervisory function shall make an annual individual statement on conflicts of interest, containing the information referred to in the second subparagraph of Article 10(2), to the general assembly of members.	ERA currently operates a detailed Register of Interests for individuals appointed as Directors or alternate Directors of ERA. It may be that a separate Register will need to be kept to apply when these individuals (and any additional representatives who attend Member meetings by proxy) are acting in their capacity as "Members" rather than "Directors".
Art 9.4	The body exercising the supervisory function shall meet regularly and shall have at least the following powers: (a) to exercise the powers delegated to it by the general assembly of members, including under Article 8(4) and (6); (b) to monitor the activities and the performance of the duties of the persons referred to in Article 10, including the implementation of the decisions of the general assembly of members and, in particular, of the general policies listed in points (a) to (d) of Article 8(5).	The ERA Board meets 6 times a year. In addition the Members meet in AGM and on a quarterly basis to approve distributions. Certain work has been delegated to appointed committees of the Board with approved Terms of Reference.
Art 9.5	The body exercising the supervisory function shall report on the exercise of its powers to the general assembly of members at least once a year.	This is currently covered by the Members meeting in Annual General Meeting and issues reported in the Annual Report (which is currently prescribed by the 2014 Licensing Bodies Regulations).

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

ERA would suggest that such an analysis is a matter for Government to address.

CMOs would be concerned to ensure that auditors and directors are able to note and easily identify any reporting requirements under the Directive which will have to be linked to Annual Reports and Reports of Directors and Financial Statements, in order that those who read such reports can see and identify the additional reporting areas and compliance with these.

In this context, it is hoped that the IPO will consult with and secure advice from the Accounting Standards Authorities to ensure that auditors are aware of and able to assess compliance in a way that supports the general intention of transparency behind Regulations to implement the Directive.

This approach would appear to properly reflect the provisions of Recital 56 of the Directive:-

"The provisions of this Directive are without prejudice to the application of rules on competition, and any other relevant law in other areas including ……"

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?

ERA has in place processes for all members of ERA to note and approve the budget for the running costs of ERA and for ongoing expenditure to be noted and reported to the Board (on which each member of ERA is represented).

The balance of all monies collected by ERA is able to be distributed to members because of the way in which distribution is made to ERA members who are each either CMOs in their own right or representatives of a substantial group of individual rightholders.

For small companies such as ERA, the costs of ensuring that all systems are compliant with a new set of Regulations to replace those for which new provisions had to be made in 2014, primarily relate to the allocation of staff time, the costs of engaging professional advisers to assist in updating the Articles of Association of the company and membership and other governance documentation.

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

None. See response to question 20 above.

Due to the opt in nature of ERA licensing from the point of view of rightholders, ERA is able to apply a distribution policy that enables all distributable monies to be allocated across the members of ERA and for all sums to be paid out to members. Members of ERA are then free to decide how they wish to allocate ERA monies amongst rightholders for whom they act.

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?

None. See responses to questions 20 and 21 above.

23. Do you collect for rightholders who are not members of your CMO?

No. All monies collected by ERA are for ERA members and rightholders representing rightholders who have mandated rights in works that fall within the definition of ERA Repertoire under the ERA Licence.

If so, how much of that rights revenue is undistributed and/or non-distributable?

None. See responses to question 20 and 21 above.

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?

Once earned and after recoupment of approved budget expenditure, all monies collected by ERA are distributed to ERA members in accordance with resolutions confirmed by all ERA members prior to each distribution taking place.

There are no "non-distributable" amounts as between ERA and its members.

The provisions of s 35 and paragraph 6 Schedule 2 CPDA apply to rightholders who are neither themselves a member of ERA nor linked to a member of ERA.

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

ERA responds to this question on the basis that it relates to Article 12.4 of the Directive?

That provides "Where a collective management organisation provides social, cultural and educational services funded through deductions from rights revenue or from any income arising from the investment of rights revenue, such services shall be provided on the basis of fair criteria, in particular as regards access to, and the extent of, those services".

Whilst ERA is able to operate its Licensing Scheme on the basis that all monies collected for members can be distributed to them, the issue of deductions from undistributable monies is not an issue for ERA, but may be relevant to the way in which individual CMO members of ERA allocate monies for onward distribution to rightholders.

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

ERA would leave issues to be raised by other CMOs and stakeholders for whom deductions are, or may be, relevant.

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?

ERA currently only offers its licensing scheme to educational establishments within the United Kingdom of Great Britain and Northern Ireland, (and by special agreement, the Channel Islands and the Isle of Man). No representation agreements are in place linked to licensing activities beyond this.

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

The statutory provisions in s 35 and paragraph 6 Schedule 2 CDPA 1988 (as variously amended) have been the background to the licensing of educational establishments under ERA Licences since 1990.

Until implementation of S.I. 2014 No 1372 - The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014 – it was a requirement that the main ERA Licence terms be certified by the Secretary of State every time changes were agreed.

This formed a backdrop to discussions with representatives of different types of educational establishment about any proposed changes to terms. Such discussions included exchange of information over the usefulness of the licence to users, the scope of the repertoire to be covered by the licence and the commercial effects of changes to the scope of licensing options against the statutory provisions (online uses being made relevant) and cost of living adjustments.

Due to the nature of the ERA Licence, rightholders have been prepared to take a light touch approach to reporting requirements applied to individual educational establishments. Instead a sampling approach to usage reporting has been adopted.

With advances in the use of digital technologies within educational establishments, ERA is addressing ways in which these technologies can assist in enabling ERA to receive "automated" information about use of ERA Repertoire under ERA Licences, keeping reporting burdens on educational establishments to a practical minimum.

Nevertheless "necessary" information from ERA is provided to users through publication of ERA's Code of Practice and other information about licence terms and the scope of ERA Repertoire on the ERA website and through provision of background information to representative bodies of educational establishments, whenever changes to terms or to tariffs are being proposed.

Necessary information that ERA requires from licensees includes confirmation that ERA Recordings will be clearly labelled, recognition that sample reporting may be required from selected educational establishments and confirmation that all licensed recordings will be destroyed or deleted if an ERA Licence is terminated without renewal.

The sample reporting received by ERA is of particular importance to the CMO members to ERA who are required to report on distribution of ERA monies to their own rightholder members.

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 ERA Licence has included terms which set out how licensed educational establishments are expected to maintain records about their compliance with the ERA Licence.

The terms have been developed to recognise the shift from use of analogue to digital recordings.

The terms include agreement from licensees that they will permit ERA to have access to inspect relevant records which are required to be maintained under the licence, to ensure compliance with licence terms.

In practice, any such inspections have been linked to a Field Liaison Officer visiting schools and other licensed educational establishments to discuss how the ERA licence can best be used to support teaching and learning and how labelling of ERA resources is important to distinguish these from other educational resources available. This in turn has helped to support sampled reporting from establishments, when it has been required.

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

Whilst rightholder members of ERA remain willing to accept a sampled approach to usage under the ERA Licence, costs of administering data returns have been kept to a minimum.

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

Since ERA has only 20 members and each of these has a representative who also sits on the Board of ERA, it is relatively easy for ERA to ensure that all of its members are kept fully informed of all the transparency and reporting envisaged under Article 18 of the Directive.

In order to ensure literal compliance, it is envisaged that changes will be required to the Governance structure to ensure that "members" (as opposed to nominated Directors of members) receive and approve appropriate reports and distribution activities of ERA.

This will have a relatively significant cost impact for a small organisation such as ERA, because any increase in legal and professional fees will make a significant percentage change to overall overheads.

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

If a request is made in good faith for a legal purpose and in accordance with the terms of any contractual terms in place under representation agreements, these tests would seem to amount to a request being "duly justified".

In ERA's case, information about the types of works and related rights that ERA represents, the rights that is manages and the territorial limitations are all published on the ERA website and included within published Licence documents.

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

The provisions of Title III in the Directive are not relevant to ERA's licensing activities.

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

See response to question 32.

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

See response to question 32.

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?

See response to question 32.

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)?

See response to question 32.

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?

ERA is only authorised to license "educational establishments" as they are defined by s 174 CPDA.

Educational establishments range in size dramatically.
ERA licences 161 universities each of which would have a turnover vastly in excess of the £670k turnover of ERA.

There are 377 Further Education Colleges across the UK.

There are nearly 30,000 schools who receive the benefit of ERA licences across England, Scotland, Wales and Northern Ireland.

The turnover of most FE colleges and secondary schools would also exceed the turnover of ERA.

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.

ERA only operates its licensing scheme within the United Kingdom.

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

ERA believes that existing structures and institutions are in place within the United Kingdom to provide most of the compliance functions to which Article 36 of the Directive refers.

The Copyright Tribunal should continue to be the body to which disputes about licensing terms and conditions can be referred.

However, the current imbalance which prevents CMOs from referring disputes to the Copyright Tribunal should be corrected.

In addition to the reference point for resolution of disputes about licensing terms and conditions, the structure put in place for complaints about CMOs to be referred to Ombudsman Services (Copyright), already provides for other UK based disputes to be addressed when necessary.

The Ombudsman Services website states clearly the types of complaint which they can deal with and those which are not within the remit of Ombudsman Services.

It is submitted that this is a clear and transparent system which does not need further requirements added to it (particularly in the case of small CMOs).

To the extent that any additional overarching monitoring is required, ERA would see that identifying a dedicated team within the Intellectual Property Office is the preferred option.

This approach would avoid costs of setting up a separate body and allow the existing institutional structures to continue to operate and report on experience within the United Kingdom.

It would also allow for levels of demand linked to the exchange of information requirements under Article 37 of the Directive to be monitored and adopted in a gradual and flexible way (rather than establishing an authority at great cost that finds itself in a positon of seeking out issues to deal with to justify its existence).

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.

For the reasons set out in response to question 39, ERA would suggest a very small team be tasked to cover the relevant competent authority role when Regulations implementing the Directive are adopted. It is hard to see why more than one or two people would need to be relevant points of contact in the first instance.

41. How should the costs of the NCA be met?

ERA believes that the costs of establishing any dedicated team within the IPO to provide the National Competent Authority should be a matter for Government and not impose additional cost burdens on CMOs which seek to anticipate any ultimate activities of National Competent Authorities to be put in place across Member States following implementation of the Directive.

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