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Mr Hamza Elahi
Copyright and Enforcement Directorate
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By email to: copyrightconsultation@ipo.gov.uk

Dear Mr Elahi

Collective rights management in the digital single market: Implementation of the EU Directive on the collective management of copyright and multi-territorial licensing of online music rights in the internal market: technical review of draft Regulations

DACS welcomes the opportunity to comment on the UK Government's implementation of Directive 2014/26/EU (the **'Directive'**) through the draft of the Collective Management of Copyright (EU Directive) Regulations 2016 (the **'draft Regulations'**) and the effect on the Copyright (Regulation of Relevant Licensing Bodies) Regulations 2014 (the **'2014 Regulations'**). DACS' response to this technical review is informed by a stakeholder meeting with the Intellectual Property Office (IPO) held on Wednesday 4 November 2015.

About DACS

Established by artists for artists, DACS is a not-for-profit visual artists' rights management organisation. Founded over 30 years ago, DACS is a flagship organisation that campaigns for artists' rights, championing their sustained and vital contribution to the creative economy. We are passionate about transforming the financial landscape for visual artists through innovative new products and services, and act as a trusted broker for 90,000 artists worldwide.

In our support of artists and their work, DACS collects and distributes royalties to visual artists and their estates through four rights management schemes: Payback, Artist's Resale Right, Copyright Licensing and Artimage.

DACS is a member of the British Copyright Council (the BCC) and supports their response to this consultation.

1. **Do the draft Regulations correctly implement the Directive?**
2. **Do you agree that the approach taken in the draft Regulations is consistent with that set out in the Government's response to the recent consultation?**

We believe that the approach taken in the draft Regulations is consistent with the copy-out approach discussed with Government and as set out in the response to the prior consultation released in March 2015.

We appreciate the Government's choice to place the decision on the policy and use of non-distributable amounts in the hands of the general assembly and therefore in the power of the members themselves, rather than in the power of the Government. We also support the choice to create the National Competent Authority (NCA) within the IPO and for the Government to fund the running of the NCA directly rather than including provisions into the draft Regulations obliging Collective Management Organisations (CMOs) and therefore indirectly rightholders to fund the NCA.

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DACS confirmed in our response to the consultation in March 2015 that we would retain our Code of Conduct, which is based on and informed by the BCC Principles of Good Practice and by the 2014 Regulations. However DACS also warned about the potential gold-plating by retaining provisions from the 2014 Regulations that go beyond the obligations set out in the Directive. We have noted that the Government has opted for an extension of the obligations of CMOs under the Directive to include specific provisions that were included in the 2014 Regulations as obligations to be recognised in a CMO's Code of Conduct. By choosing to incorporate these provisions into the draft Regulations, Government has created statutory duties for CMOs to comply with under a regime of sanctions rather than a regime of self-regulation, which in our opinion is substantially different. In particular, the Government's decision to retain the micro-business exemption is, we believe, contrary to the overall policy aim of the Directive to level the playing field internationally and also nationally.

We have further observed on several occasions that where a duty was placed on a Member State under the Directive, in the draft Regulations the references to 'Member States' have been changed to 'CMOs', although these substitutions are not suitable in every instance. We have set these out in our more specific answers below.

We were expecting a substantial guidance note to accompany the draft Regulations as announced by Government previously. Following Government's indication that the guidance note will be key in the interpretation and application of the final Regulations we believe it prudent for there to be an opportunity to review and comment on the guidance note once it is available.

In addition we note the ambition for the draft Regulations to be in force at the implementation deadline on 10 April 2016 and the absence of transitional provisions that would grant CMOs a transitional period to comply with law. This risks that CMOs may be in breach of the law before their next Annual General Meeting is held or before their next financial year comes to an end. DACS believes that there would have been scope for transitional provisions without the UK breaching their obligations under EU law to implement the Directive before the deadline as long as the Regulations are in place on or before 10 April 2016. This seems to be another example of the confusion between obligations on the Member States and the CMOs.

Overall we believe that the draft Regulations are reflective of the stated policy aims, that the copy-out approach has been largely followed and that the draft Regulations generally implement the Directive correctly.

3. Are there any additional consequences to this change that the Government should consider?

We think it would be beneficial if the Government included additional guidance about the interpretation of the definition of a CMO in the guidance notes, especially considering that this definition will now extend the definition of licensing body in the Copyright, Designs and Patents Act 1988 (CDPA).

Further clarification would be needed whether the Directive adopts a 'vertical' rather than 'horizontal' application: i.e. whether it only applies to certain services a CMO offers or if it will apply to a CMO as a whole where at least some of a CMO's activities fall within the requisite definition under the Directive. As this could also have an implication on the jurisdiction of the Copyright Tribunal, we would be grateful to receive further guidance on this matter.

The Artist's Resale Right Regulations 2006 (as amended) provides a definition of 'collecting society' as one which has as at least one of its main objects the administration of rights on behalf of one or more artist. This definition is not the same as the criteria for a CMO under the Directive and there is a lack of clarity over how these two definitions will be dealt with in tandem. We urge the Government to address this in the guidance notes.

4. Do you believe that regulation 7 accurately and appropriately captures the Government's stated intentions in the consultation response?

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

As each of DACS' services is provided for the collective benefit of rightholders in artistic works, we consider that DACS is a CMO within the definition of regulation 2(1) of the draft Regulations. DACS' governance structure has been substantially changed to give effect to the aims communicated under the Directive (and thus the draft Regulations) and is compliant with both. Therefore we do not envisage that we will make use of the discretionary provisions under regulation 7(5-11).

Nevertheless we would like to emphasise the need for a robust framework under which CMOs are treated equally and under which the legal form chosen by the CMO does not lead to a situation where rightholders affected by that CMO's activity receive no protection under the draft Regulations. NLA Media Access, for example, identify themselves as a CMO (as per page 3 of their response to the March 2015 consultation on the CRM Directive) and would fall within regulation 7(5) of the draft Regulations as their shareholders, who are their board directors, exercise supervisory functions. However, we believe that under this mechanism the visual rightholders that are included and affected by the NLA Media Access licence are not represented and therefore do not have proportionate influence in the decision making process or the policies affecting them.

In this part of the draft Regulations there is a clear example of where the phrasing that shifts the duty to 'ensure' from the Member States onto the CMO is incorrect and cannot be applied in practice. Regulation 7(1)(h)(iii) requires the CMO to ensure that a proxy holder casts their vote at a general assembly in accordance with the instructions issued by the appointing member. It would be impossible for the CMO to police this or 'ensure' that this has happened.

6. If you are a rightholder, do you have any concerns about the discretionary provisions in regulation 7 (5-11)?
7. Does regulation 9(4) provide appropriate protection to those dealing with CMOs, including by comparison to the equivalent provision of the 2014 Regulations?
8. Is this the most appropriate way to achieve the desired objective?

DACS does not believe that creating a statutory duty for staff training is suitable and nor does it accurately reflect the current obligations under the 2014 Regulations. For DACS it is without question that it is of utmost importance that the appropriate staff is trained in the appropriate areas relating to the draft Regulations.

However, to create statutory duties that are relatively wide and non-descript will create an enforceable obligation on the CMO and can result in severe penalties of individuals employed by the CMO, which is disproportionate and unjustified. One of the core aims of the Directive and the draft Regulations is that CMOs adhere to best practice principles and this should, in DACS' opinion, be sufficient reassurance that the appropriate staff will receive the necessary training relating to duties and responsibilities under the Directive and draft Regulations. At the very least, a more specific wording would be necessary and further explanations would need to be included in the guidance notes in order to avoid any abuse of the complaints process.

9. Does regulation 15(5)(d) provide an effective mechanism to oblige CMOs to maintain good standards of behaviour in their relations with users, such as those usually found in their existing codes of practice?
10. What do you understand by 'good faith' in this context?
11. Are there any important standards in this area which are not covered either by regulation 15, or other regulations in the implementing Regulations?

As stated in the response to questions 7 and 8 in respect of staff training, we equally believe that the Government should not create a statutory duty for a CMO to conduct good faith negotiations in order to uphold best practice principles. As pointed out previously, DACS has adopted a Code of Conduct that formally

recognises the need to negotiate and deal with licensees and other users in good faith. This is not only a prerequisite for good practice but also essential to safeguard the respect for and recognition of our members' rights.

The transposition of article 16 of the Directive into regulation 15 of the draft Regulations is another example of where the language used in the draft Regulations has shifted a duty from the Member State onto the CMO, which is not appropriate. The Member States can exercise their duty under article 16(1) without having to impose a new duty on CMOs, which would be unable to balance the interests of rightholders it represents and users in the same transaction to the benefit of both sides.

The adoption of the micro-business exemption is not appropriate as it contradicts the overall policy aim to create a level playing field, as detailed in our response to question 15. In addition it is unclear why a micro-business should be allowed to negotiate in bad faith.

DACS believes that these matters continue to be dealt with best through appropriate provisions in Codes of Conduct, which are predominantly self-regulated and do not warrant a statutory duty on CMOs, thus avoiding additional administrative overheads at a cost to rightholders.

12. **Do you agree that regulations 31-32 of the draft Regulations provide for a suitable complaint process for members, users, and other parties dealing with CMOs?**
13. **Do you have any concerns about the proposal to allow CMOs to make their own arrangements in relation to ADR?**

DACS is concerned that regulation 31 of the draft Regulations creates a situation in which the CMO can be accountable for a vast number of complaints from a wide range of complainants and this would unduly burden the CMO's resources. For instance, a user under regulation 31(1) may make a complaint about DACS' membership terms under regulation 31(2). This is particularly an issue where DACS' membership terms allow a member to refuse permission for the use of their works, which is a reflection of their exclusive nature of their rights under the CDPA. It wold be nonsensical to receive and deal with complaints by users about rightholders exercising their legal rights in this respect, and would also use significant resources at the detriment of rightholders.

The micro-business exemption is not necessary in regulation 32 of the draft Regulations as it does not meaningfully address what alternative dispute resolution (ADR) solutions are suitable for a CMO. DACS believes that all CMOs should be afforded the ability to make an ADR offering based on their size and therefore can decide what is appropriate.

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

DACS believes that the Government is correct in establishing and funding the National Competent Authority (NCA). However, we do not think that the ability of the NCA to impose a financial penalty on the CMO or on 'any senior figure' is justified. Equally it is not clear who should be determined to be a 'senior figure', whether this would be limited to one person per organisation, such as a director, or if this could include managers.

Although the Government states that it is envisaged that a financial penalty would be rarely exercised, it is still inappropriate to create a statutory penalty as CMOs would be required to effectively insure against this risk, at additional cost to the rightholder. Having the legislation in place merely to dissuade from non-compliance is in fact costly even for those CMOs who are compliant.

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

We do not agree that there should be any exemptions for micro-businesses. In summary, the main reasons are:

- The intention of the Directive and thus the draft Regulations is to level the playing field internationally and nationally. Creating exemptions goes against this principle.
- All CMO funds are rightholders' money, therefore any extra regulatory steps that one CMO has to take that a micro-business CMO does not take results in increased costs to the rightsholder of the better regulated CMO and is therefore anticompetitive and counterproductive.
- A micro-business exemption is unjustified in a competitive environment.
- The markers for what constitutes a micro-business does not contemplate what would happen where a micro-business exceeds the turnover threshold one year but not the next. This could have severe consequences for the planning and enacting of obligations under the draft Regulations for micro-business: their compliance review and the associated administrative burden would be disproportionate.

16. **Based on the mechanisms for dispute resolution, complaints and enforcement set out in the draft Regulations, has your assessment of the likely workload of the NCA changed since the publication of the original consultation and Impact Assessment?**

As stated, we are pleased to see that the costs of the NCA will be borne by Government. We feel however that there are certain situations in which DACS may become burdened with complaints due to the structure of regulation 31 as outlined above. In addition, where such obligations are imposed on CMOs that they cannot fulfil, this will impact on the workload of the NCA. Statutory duties that were initially dealt with by a self-regulatory regime will now be referred to the NCA quite readily, which will also increase the NCA's workload.

17. **Do the suggested amendments to the ECL Regulations capture the Government's stated intentions in its consultation response?**
18. **Do the suggested amendments leave any misalignments between the draft Directive Regulations and the ECL Regulations, particularly with regard to protections for non-member rightholders?**

DACS believes that the suggested amendments to the ECL Regulations are correct and have appropriately protected non-member rightholders.

For further information please contact
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