

September 2014

## **Response to Independent Code Review report**

We, the undersigned, are collective management organisations (CMOs) who have each adopted self-regulatory codes of conduct based on the British Copyright Council's Principles of Good Practice for CMO Codes of Conduct (BCC Principles).

The BCC Principles provide for an independent code review to be undertaken every three years, to assess CMO compliance and whether the BCC Principles remain fit for purpose. In this letter, we set out some shared observations on the Independent Code Review report published by Walter Merricks CBE in June 2014, following the first such review.

We welcome the Review's support for self-regulation, and its findings that CMOs have not only demonstrated compliance with their codes of conduct but also a collective commitment to make self-regulation work. We also welcome the Review's assessment that our complaints and disputes processes appear to be working well, and that complaints to Ministers about CMOs have declined to a small number which gives no cause for concern.

Turning to the Review's recommendations, these fall broadly into three categories: (1) that the BCC should consider whether it should continue to maintain the BCC Principles; (2) that CMOs should adopt certain practices to put them closer to being like public bodies; and (3) various recommendations that are either CMO or sector-specific. We comment further on these three categories below.

### **Maintaining the BCC Principles**

The Review commends the BCC and its CMO working group for having initiated its programme of self-regulation but notes that the Government has subsequently enacted the Copyright (Regulation of Relevant Licensing Bodies) Regulations 2014 which also set out specified criteria for CMO codes of conduct. The Review therefore questions whether the BCC Principles are still needed as a separate reference point.

The Government recently reaffirmed its preference for CMO self-regulation, stating that it wishes CMOs *"to run themselves to the highest possible standards"* and that *"the [CMO] sector is doing this and must be congratulated on its progress"*. It has made it clear that the 2014 Regulations are "backstop" powers designed to underpin self-regulation and, if necessary, fill any gaps. The BCC Principles and the 2014 Regulations are able to co-exist and, in our experience, the BCC Principles have served as a useful practical checklist when putting a code of conduct in place.

The Government also recognises, as do we, that the 2014 Regulations will need to be reviewed as part of UK implementation (by April 2016) of Directive 2014/26/EU on collective rights management (the CRM Directive).

We consider that it would therefore be premature to review the ongoing need for the BCC Principles prior to the outcome of the Government's own review and implementation process linked to the CRM Directive. We look forward to contributing to that process over the coming months.

### **Adoption of public body practices**

The Review suggests that CMOs should adopt certain public body practices (such as acting as if the Freedom of Information Act applies to them) in order to put them closer to operating like public bodies in terms of their transparency, accountability and functioning.

These recommendations appear to have been put forward on the basis of the Review comparing CMOs to public bodies, in particular focusing on the benefits of the licences offered by CMOs. We do not agree that this is an appropriate comparison. CMOs are private-sector companies which (save for those which do not have a licensing function) license businesses and others to use copyright works and performances. They do not provide “public services” in the sense that the term is commonly understood. Furthermore, CMOs do not receive any public funding which might justify the imposition of obligations of the type to which public bodies are subject and which are designed to allow for public scrutiny of the use of their money. Instead, they are funded by the private rightsholders who own and control them, with whose rights they are entrusted, and to whom CMOs have existing transparency and accountability obligations under company law. The CRM Directive recognises this, and its implementation will further develop our legal responsibilities to those rightsholders.

Whilst we therefore consider the Review’s “quasi-public body” conclusions to be inappropriate, we do agree that CMOs should be transparent, accountable and well-functioning, and that (for those CMOs which have a licensing role) it is important to provide high standards of customer service to our licensees in addition to the responsibilities we owe to our members. Those are already key principles upon which our operations and our system of self-regulation are based, which are further underpinned by existing provisions under the 2014 Regulations, and which we shall continue to take into account. They are also reflected in the wider regulatory framework applicable to CMOs (such as the role of the Copyright Tribunal) which has developed over decades in order to balance the *de facto* monopoly status of CMOs in many markets with the benefits to rightsholders and rights users from the collective management of private property rights.

Ideally, the crucial differences between CMOs and public bodies would have been addressed appropriately in the context of any Independent Code Review commentary or proposals in this area. Unfortunately however, the “quasi-public body” recommendations were not the subject of consultation with CMOs, members or licensees as part of the Independent Code Review process. Nor was their (potentially significant) cost/impact for rightsholders assessed.

### CMO/sector-specific recommendations

The Review’s specific recommendations for particular CMOs or sectors are broadly compatible with activities already being undertaken or proposed by the relevant CMOs, and we recognise that the Review includes a number of sensible suggestions in this regard.

The relevant CMOs are therefore respectively working on how best to incorporate the ideas and themes of the specific recommendations constructively into their ongoing operations, whether that is through existing or new initiatives, and will provide further updates in due course.

### Conclusion

We remain committed to maintaining effective CMO self-regulation, for the benefit of both licensees and members. We identified early on, in the course of setting up the self-regulatory framework, that an independent code review process would be an important part of that framework. Having now fulfilled our commitment to procure, fund and participate in the first such review, there are naturally some points of learning for us regarding the review process itself, for future reference. Nevertheless, we welcome the fact that the inaugural Review has independently highlighted many positives about CMO self-regulation.

Yours faithfully,

