



**IAML (UK & Irl) Response to Consultation on the transposition of Directive (EU)
2019/790 Consultation Paper No. 3**

1. Name (and contact details if you wish)

IAML (UK & Irl)
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2. Are you:

- a rightsholder;
- a user;
- a content-creator;
- a platform (in particular an “online content-sharing service provider”, as defined by Article 2(6) of the Directive);
- a press publisher;
- an organisation representing the rights of rightsholders (such as a collective management organisation); or
- **other – please describe?**

See our response to question 3.

3. If you are providing a submission on behalf of an organisation, who does your organisation represent?

IAML (UK & Irl) is the UK and Ireland branch of the International Association of Music Libraries, Archives and Documentation Centres. We represent a wide range of personal and institutional members. For more information see here: <https://iaml-uk-irl.org/about>

4. Do articles 8-12 of the Directive on Copyright in the Digital Single Market impact or place obligations on you/your organisation directly?

IAML (UK & Irl’s) members are directly and indirectly affected by all of these provisions.

5. In relation to the licensing of out-of-commerce works, do you have any views on what the requirements should be for a collective management organisation to be deemed to be sufficiently representative of rightsholders in a particular type of work?

We believe a key consideration will be the granularity of “type” of work, which will require clear and specific definition. Too wide a definition will make it hard to define the denominator (i.e. total number of creators). For example, mixing up leaflets, letters, diaries etc. with books may lead to works that were never intended to be commercially exploited falling under the same licensing regime as that for commercial books. It is important to avoid a situation where a CMO which represents only a small share of creators is able to collect

money on behalf of all. There should be a mechanism in place for cultural heritage organisations to challenge the representativeness claims of a CMO.

6. Where there is more than one collective management organisation representative of the relevant works, what rules should apply with regards to joint licences or agreements between the relevant organisations?

We would encourage collective management organisations to join forces in offering a joint licence (at no greater cost than if only one CMO was involved), but in the absence of cooperative agreement between collective management organisations, it is important that cultural heritage institutions should be able to rely on the exception.

7. Is it necessary to specify in Irish legislation who should have responsibility for monitoring compliance with the licensing of out-of-commerce works as set out in Article 8? If so, what information is necessary to ensure that there is compliance with the Directive in this regard?

We believe that obstacles should not be put in the way of cultural heritage institutions making out-of-commerce works available and, as such, any body tasked with monitoring compliance should only intervene at the request of the licensor or licensee in the event that they believe the other party to be in breach of the terms of the legislation.

In order to judge compliance the following must be satisfied:

- The CMO is sufficiently representative of creators
- The CMO has the rights to allow a cultural heritage institution to make the works available on the open web.
- The licence is non-exclusive
- All rightsholders are guaranteed equal treatment in relation to the terms of the licence
- The work is in the permanent collection of the cultural heritage institution (and we believe this should include items on long-term loan, or that have been licensed to the cultural heritage institution)
- The work is out-of-commerce
- The work should not be subject to a request from a rightsholder to be taken down
- The work was not first published or broadcast in a non-EU country, was not by a producer based in a non-EU country, or created by a non-EU citizen unless their nationality is unknown or incidental

8. What are your views on whether Irish legislation should specify the requirements for determining whether a work or set of works is out of commerce? What should those requirements be, e.g., a certain period of time to have elapsed since the work was first made commercially available or a cut-off date?

Similar legislation has already been implemented in a number of EU countries. A publication cut-off date is a sensible starting point, but this needs to be a “moving wall”. We would recommend a standard cut-off date of 20 years prior to the act of digitization, however this should not come at the expense of allowing works from after this date to be declared out-of-commerce where reasonable searches determine this to be the case.

9. Who should be responsible, and why, for determining if a work is out-of-commerce, the Collective Management Organisation or the Cultural Heritage Institutions?

If the CMO is going to be offering the licence the burden should fall on them – but a judgment should be offered within 72 hours and if the CMO claims a work to be in-commerce then they should be required to evidence this.

10. What do you consider to be “reasonable effort” when determining if a work is out-of-commerce?

We believe it should only be necessary to check publicly available free-to-use non-subscription sources in the country in which the cultural heritage institution is established. For large collections of similar material, it is important that the legislation doesn't necessitate item-by-item checking, and that a cultural heritage institution can deem a whole collection to be out of commerce if it is reasonable to assume so from a sample (as provided for in article 38).

11. In general, do you have any other views on the operation of the proposed licensing mechanism?

In order for the objectives of the Directive to be achieved, CMOs must be encouraged to allow works they license to be made available across the EU.

12. Cultural Heritage Institutions can incur significant cost in the digitisation and dissemination of works in their collections. Should Irish legislation clarify that those costs must be taken into consideration in determining the licence fee charged under this mechanism?

Yes, we believe that the inherent costs involved in digitisation and dissemination should be taken into account when CMOs determine their licence fee.

13. What are your views on whether additional publicity measures are necessary to increase awareness for rightsholders about the use of their works under this mechanism? If so, what should those additional publicity measures be?

We would imagine that CMOs would take the lead in raising awareness amongst rightsholders, but national intellectual property offices should ensure that the legislative changes are displayed prominently on their websites and disseminated through their usual channels.

14. Is there currently a structure in place for sector specific stakeholder dialogue and if so, how does this operate? If no such structure exists, how could sector specific stakeholder dialogue be best achieved?

We are not aware of a structure being in place for sector specific stakeholder dialogue, and would recommend that this be coordinated by the Intellectual Property Office of Ireland. It shall be important that there is strong representation from cultural heritage institutions in such dialogue.

15. Do you think that collective licensing with extended effect should be provided for in Irish legislation, and if so, why?

We believe there are advantages to providing ECL beyond the remit of articles 8-11 in order that users can benefit from access to a larger range of works. However there remain some caveats. CMOs must be well regulated to ensure, for example, openly licensed works aren't mistakenly licensed under ECL, and also to avoid creating a "black box" of unclaimed royalties. It is also worth noting that ECL has been suggested as a possible solution to facilitate licensing under Article 17. However the fact that rightsholders can opt out of the scheme creates legal uncertainty meaning that online service providers are unlikely to be able to rely on this mechanism to avoid filtering.

16. Should it be decided to provide for collective licensing with extended effect, what requirements should be satisfied for a collective management organisation to be considered sufficiently representative of rightsholders in a specific type of work?

We would refer you to our answer to question 5.

17. Do you have any other issues you wish to raise related to the transposition of articles 8-12 specifically?

Regarding articles 8-11, for the avoidance of doubt, we wish to make clear that where a CMO does not meet the requirements to be able to offer a licence, and thus a cultural heritage institution can make use of the exception pathway, that no remuneration should be payable.