

EDUCATIONAL RECORDING AGENCY (“ERA”) DISPUTE RESOLUTION PROCEDURE

1. Background

In April 2016, The Collective Management of Copyright (EU Directive) Regulations 2016 (“the 2016 Regulations”) came into force.

The 2016 Regulations impose a number of obligations on collective management organisations such as ERA. In particular, Regulation 32 of the 2016 Regulations (set out at Appendix 1 hereto) requires collective management organisations to make dispute resolution procedures available in prescribed circumstances.

In compliance with the 2016 Regulations, ERA has put in place a dispute resolution procedure, details of which are set out below. The dispute resolution procedure should be interpreted in a manner that is consistent with the 2016 Regulations.

2. Definitions

Where not defined herein, capitalised terms are defined in ERA’s Articles of Association (“the Articles”) or Code of Conduct. Any references to costs, charges or fees are subject to paragraph 21 below.

3. Who can submit a dispute for resolution using the dispute resolution procedure set out in this document (“the DRP”)?

A dispute can be submitted for resolution using the DRP by:

- ERA;
- Any Member of ERA;
- Any other collective management organisation which is:
 - (a) authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one right holder, for the collective benefit of those right holders, as its sole or main purpose; and
 - (b) either owned or controlled by its members or is organised on a not for profit basis, or both;
- A Right Holder - any person or entity, other than a collective management organisation, that:
 - (a) holds a copyright or related right; or
 - (b) under an agreement for the exploitation of rights or by law is entitled to a share of the rights revenue;
- A User - a person or entity who:
 - (a) is carrying out acts subject to the authorisation of right holders, remuneration of right holders or payment of compensation to right holders; and
 - (b) is not acting in the capacity of a consumer.

4. What should I do if I have a complaint about ERA?

Complaints about ERA are dealt with in the first instance under ERA's complaints procedure which can be found [here](http://www.era.org.uk/about-us/governance/code-conduct) (www.era.org.uk/about-us/governance/code-conduct) in ERA's Code of Conduct ("the Complaints Procedure").

Applications for membership of ERA are dealt with by the procedures set out in the Articles – see Articles 10 and 12 which can be found [here](http://www.era.org.uk/about-us/governance/articles-association) (www.era.org.uk/about-us/governance/articles-association). For the avoidance of doubt, in the event that ERA accepts an application for admission as a Member of ERA, rejects an application for admission as a Member of ERA, or is unable to reach a decision with regard to such an application which may be the case, for instance, where there is an ongoing dispute between the applicant and another individual or entity, an individual or entity who can access the DRP (including without limitation either a Member (or Members) of ERA or an applicant for membership of ERA, or ERA itself) may refer the matter for review in accordance with the procedures set out in this document.

An individual or entity who can access the DRP shall not be obliged to use the Complaints Procedure prior to proposing submission to the DRP if the dispute relates to an application for membership of ERA (a "Membership Application Dispute").

An individual or entity who can access the DRP and who wishes to dispute or seeks a review of:

- (a) actual or proposed Distribution Shares,
- (b) a Distribution Category/membership category (including qualification or suitability as a member of a specified Distribution Category/membership category);
- (c) the percentage share of each of the members of a Distribution Category/membership category or new distribution category,

or wishes to make a proposal for a new distribution category or otherwise disputes or seeks review of a matter which relates to the Distribution Policy ("Distribution Disputes") shall not be obliged to use the Complaints Procedure prior to proposing submission to the DRP.

5. Which disputes can be submitted for resolution under the DRP?

The DRP can be used to resolve all disputes in respect of which the 2016 Regulations require ERA to permit submission to a dispute resolution procedure (see Appendix 1) and any other disputes which ERA deems (in its sole discretion) to be appropriate for submission to the DRP. The disputes which may be submitted to DRP may include, without limitation:

- (a) Membership Application Disputes;
- (b) Distribution Disputes; and
- (c) Any other disputes which the Articles state can be submitted for resolution using a dispute resolution procedure.

6. What form does the DRP take and is a determination binding?

The DRP is an independent and impartial expert determination procedure which is binding on all the parties to it (“the Parties”) and on ERA (even if it is not a Party) subject only to Clause 8 below. By participating in the DRP all Parties who are not already obliged to be bound by a determination made under the DRP agree to be bound by it. The DRP is a not an arbitration.

7. Who will make the binding determination?

Using the procedures set out below, the Parties will agree the appointment of an independent and impartial qualified professional who has appropriate and significant expertise in relation to the issue(s) in dispute (the “Expert”).

If the Parties are unable to appoint an Expert by agreement within 14 days of the date of ERA’s letter confirming plans to proceed with a DRP (see paragraph 16 below) any of the Parties or ERA shall be entitled to request that the Chairman of the Bar Council appoints an Expert.

8. What is the Expert’s role?

The Expert will act as an expert and not as an arbitrator. The Expert will determine the issue(s) in dispute. If the Parties are unable to define the issue(s) in dispute, the Expert shall work with the Parties to define the issue(s) in dispute taking into account the views of ERA and the need to ensure that costs are proportionate.

The Expert is required to prepare a written decision including reasons and give notice (including a copy) of the decision to the Parties and to ERA in the time period identified in paragraph 17.

The Expert's written decision on the matters referred to the Expert shall be binding on the Parties unless (in ERA’s sole opinion) the Expert fails to provide reasons for the decision (in which case the Expert shall be given a reasonable opportunity to provide such reasons and the decision shall thereafter be binding), and/or commits a manifest error or fraud.

If the Expert becomes unwilling or incapable of acting, or does not deliver the decision within the agreed timeframe (other than as a result of an agreed extension, the conduct of one or more of the Parties or as a result of settlement of the dispute prior to the Expert reaching a decision) then the Parties and ERA (if it is not a Party to the DRP) will seek to agree the appointment of a new Expert at the earliest opportunity. In the absence of an agreement as to the appointment of a new Expert within 14 days of it becoming clear that it will be necessary to appoint a new Expert, any Party to the DRP (or ERA, even if it is not a Party to the DRP) may apply to the Chairman of the Bar Council to appoint a new Expert who satisfies the criteria set out herein.

9. How does an Initiating Party start DRP proceedings?

Any individuals or entities who are considering proposing DRP proceedings are strongly encouraged to seek to resolve the dispute by agreement with any entities or

individuals whom it considers are likely to be interested in the outcome of the dispute before proposing submission to the DRP or, if appropriate, to use mediation to resolve the dispute. Where appropriate, whether attempts have been made by a party to seek to resolve the dispute before submission to the DRP may be taken into account by the Expert when considering allocation of the costs of the DRP. ERA may (in its sole discretion) and prior to the appointment of the Expert, agree to extend any of the time limits set out herein in order to enable the Parties to attempt to resolve the dispute by agreement.

A person or entity other than ERA who wishes to submit a dispute for resolution (“the Initiating Party”) under the DRP must first notify ERA in writing by letter addressed to:

The Chief Executive
Educational Recording Agency Limited
5th Floor
Shackleton House
Hay’s Galleria
4 Battle Bridge Lane
London SE1 2HX

(“the Initiating Party’s Letter of Notification”).

The Initiating Party’s Letter of Notification must set out:

- (a) Why the Initiating Party believes that they can submit the dispute for resolution under the DRP in accordance with Clause 3 above;
- (b) Details of the dispute and why the dispute qualifies for resolution under the DRP in accordance with Clause 5 above;
- (c) Which other individuals or entities (if any) are likely to have a direct commercial interest in the outcome of the dispute and whether they are aware of the dispute;
- (d) Details of what efforts, if any, have been made to resolve the dispute prior to sending the Initiating Party’s Letter of Notification;
- (e) A list of no more than three qualified professionals who the Initiating Party considers to be qualified to act as the Expert;
- (f) The issue(s) in dispute that the Initiating Party considers should be resolved by the Expert.

The Initiating Party’s Letter of Notification must also include an undertaking that the Initiating Party is prepared to be bound by the determination of the Expert and the DRP and will be responsible for paying the Expert’s fees (and any costs incurred by the Expert including the fees and costs of any advisers appointed by the Expert) on a timely basis in such proportions as the Expert considers appropriate.

10. What happens after the Initiating Party’s Letter of Notification?

ERA will send a response in writing to the Initiating Party’s Letter of Notification within 21 days of receipt (“ERA’s Letter of Response”) setting out, (giving reasons):

- (a) Whether it believes that the Initiating Party can submit the dispute for resolution under the DRP under Clause 3 above;
- (b) Whether it believes that the dispute qualifies for resolution under the DRP and/or should be resolved under the DRP under Clause 5 above.

If ERA believes that the dispute should be submitted for resolution under the DRP, in its response ERA will also (again, giving reasons):

- (c) confirm whether it agrees with the Initiating Party's assessment regarding the other individuals or entities who are likely to have a direct commercial interest in the outcome of the dispute;
- (d) identify any other individuals or entities who it believes are likely to have a direct commercial interest in the outcome of the dispute;
- (e) confirm whether it agrees with the Initiating Party's definition of the issue(s) in dispute and if not, what amendments it believes should be made.

In the event that ERA intends to participate in the DRP as a party, ERA will also confirm in ERA's Letter of Response whether it is willing to accept one of the three qualified professionals named in the Initiating Party's Letter of Notification as the Expert or provide the names of no more than three alternative qualified professionals who it considers are qualified to act as the Expert. ERA will also provide any comments it has on the Initiating Party's Letter of Notification.

ERA will promptly send a copy of ERA's Letter of Response and the Initiating Party's Letter of Notification to any individuals or entities named by the Initiating Party (pursuant to paragraph 9(c) above) and to any individuals or entities named by ERA (pursuant to paragraph 10(d) above) unless it considers in either case that it would be inappropriate to do so. All parties (other than the Initiating Party or ERA) provided with a copy of ERA's Letter of Response and the Initiating Party's Letter of Notification or an ERA Letter of Notification (see paragraph 11 below) shall be referred to as "Interested Parties".

11. What happens if ERA wishes to submit a dispute for resolution under the DRP?

If ERA wishes to submit a dispute for resolution under the DRP, whether or not a Party to the dispute, ERA will issue a letter of notification (an "ERA Letter of Notification") setting out the information listed at paragraphs 9 (a) to (f) above and will send the same to all individuals or entities who it believes are likely to have a direct commercial interest in the outcome of the dispute unless it considers that it would be inappropriate to do so. Upon request, ERA shall provide reasons if it considers it inappropriate to send the ERA Letter of Notification to an individual or entity named in such a request. The submission of a dispute by ERA to the DRP shall not in itself require ERA to participate in the DRP as a Party.

12. What happens if ERA does not believe that the dispute can or should be submitted for resolution under the DRP?

If, following receipt of ERA's Letter of Response indicating that ERA does not believe that the dispute should be submitted for resolution under the DRP but the Initiating Party still believes that the dispute should be submitted for resolution under the DRP, the Initiating Party must submit its reasons for such belief to ERA in writing within 14 days of receipt of ERA's Letter of Response. Interested Parties will also be entitled to make submissions as to whether the dispute should be submitted for resolution under the DRP provided they do so within 14 days of receipt of ERA's Letter of Response and ERA will take those submissions into account when making a final decision where appropriate. ERA will respond to the Initiating Party within 14 days of the expiry of the deadline for submissions from the Initiating Party and the Interested Parties (whichever is later) as to whether the dispute should be submitted for resolution under the DRP with a final decision as to whether the dispute can or should be submitted for resolution under the DRP. A copy of the letter communicating ERA's final decision ("the ERA Final Decision Letter") and all submissions from an Initiating Party will be sent to all Interested Parties unless ERA considers it would be inappropriate to send the same to an Interested Party or Parties. Upon request, ERA shall provide reasons if it considers it inappropriate to send the ERA Final Decision Letter to an individual or entity named in such a request.

13. What should Interested Parties do upon receipt of ERA's Letter of Response or an ERA Final Decision Letter if ERA has confirmed in the letter that it believes the dispute should be submitted for resolution under the DRP, or upon receipt of an ERA Letter of Notification?

Within 14 days of receipt of the letter, an Interested Party must confirm to ERA and the Initiating Party in writing (an "Interested Party Letter of Response") whether they wish to participate in the DRP as a Party and provide ERA and the Initiating Party with any comments it wishes to make on the contents of: (i) ERA's Letter of Response; (ii) ERA's Final Decision Letter (if any); and (iii) the Initiating Party's Letter of Notification or ERA's Letter of Notification.

If an Interested Party wishes to participate in the DRP as a Party ("an Interested Party Participant") it must also provide ERA in its Interested Party Letter of Response with an undertaking that it is prepared to be bound by the determination of the Expert and the terms and conditions set out in this Dispute Resolution Procedure and will be responsible for paying the Expert's fees on a timely basis (and any costs incurred by the Expert including the fees and costs of any advisers appointed by the Expert) in such proportions as the Expert considers appropriate. Further, the Interested Party Participant must confirm whether it is willing to accept one of the three qualified professionals who the Initiating Party or ERA has identified as qualified to act as the Expert and any amendments it considers appropriate in respect of the issue(s) in dispute to be resolved by the Expert.

14. What happens if an Interested Party does not respond within the time limit?

If the Interested Party does not respond within the time period specified in paragraph 13 above and in the form specified in paragraph 13 above, it will not be permitted to participate in the DRP unless ERA consents to an extension of time for a response.

15. What happens if no Interested Party responds within the time limit?

If no Interested Party responds within the time limit or extended time limit confirming that it wishes to participate in the DRP as an Interested Party Participant, ERA may (if appropriate): (i) seek to negotiate a resolution of the dispute with the Initiating Party or (ii) participate in the DRP itself and send an ERA Letter of Notification to the Initiating Party, to which the Initiating Party must respond within 14 days in the form of a compliant Interested Party Letter of Response if it still wishes to participate in the DRP. If the Initiating Party does not respond within the time limit in the form of a compliant Interested Party Letter of Response, the Initiating Party will not be permitted to participate in the DRP unless ERA consents to an extension of time for a response.

16. What happens next if an Interested Party Participant sends an Interested Party Letter of Response within the time limit?

ERA will write a letter to the Initiating Party and any Interested Party Participants who have provided a compliant Interested Party Letter of Response within the time limit (or extended time limit) confirming plans to proceed with a DRP. The Initiating Party, any Interested Party Participants and ERA (in the event that ERA is obliged to or wishes to participate in the DRP as a Party) will seek to agree the identity of the Expert within 14 days of the date of ERA's letter confirming plans to proceed with a DRP. Initiating Parties, Interested Party Participants and ERA must also seek to agree a definition of the issue(s) in dispute.

Within 14 days of appointment of the Expert, ERA will provide the Expert with a copy of the Initiating Party's Letter of Notification, the ERA Letter of Notification (if any), ERA's Final Decision Letter (if any), ERA's Letter of Response, all Interested Party Letters of Response and any other documentation ERA considers relevant.

Once ERA has provided the documentation set out herein to the Expert, there shall be no obligation upon ERA to participate in the DRP unless the dispute relates directly to the conduct of ERA or ERA is a Party.

17. What procedures will the Expert follow?

Unless provided for herein, the Expert may in their reasonable discretion determine such procedures to assist with the conduct of the determination as they consider just or appropriate taking into account the value of the dispute and the need for costs to be proportionate and subject to the following guidelines:

- (a) Requests from the Expert for statements of case and supporting documentation from the Parties in dispute will be issued within a week of the appointment of the Expert;
- (b) Statements of case invited from the Parties in dispute will be limited to 5 pages of A4 paper and supporting documentation to 100 pages of A4 paper;
- (c) Statements of case and supporting documentation will be submitted within two weeks of the Expert's request;
- (d) Requests from the Expert for further information will be made within two weeks of receipt of statements of case and supporting documentation;

- (e) Further information will be supplied within two weeks of the request being made by the Expert;
- (f) Notice of an oral hearing (if any) will be issued by the Expert within three weeks of receipt of statements of case and supporting documentation;
- (g) Oral hearings will be held within two weeks of their notice being issued by the Expert;
- (h) Oral hearings will last no longer than one day and will take place in London;
- (i) The Expert may (in consultation with ERA) invite other appropriate individuals or entities to participate in the DRP;
- (j) The Expert will consider all material provided to the Expert (subject to the material and its submission complying with the procedures determined by the Expert and any reasonable directions given by the Expert) before reaching a decision;
- (k) The Expert will come to a decision no later than four weeks after final submissions, (oral or in writing) , unless extended in exceptional circumstances by the Expert with the agreement of the Parties and ERA;
- (l) The Expert will apply English law

The Expert may in their reasonable discretion determine all procedural and evidential matters including those relating to:

- (i) Any application to amend a statement of case (and any matters resulting from such amendment);
- (ii) Any application to join the DRP;
- (iii) The procedure for the inspection of documents (if inspection is required);
- (iv) The procedure for submitting other material, including whether to apply strict rules of evidence and the necessity (or otherwise) for expert evidence.

In the event of default by any Party under any procedural order or direction, the Expert shall have the power to debar a Party from further participation, and/or to proceed with the DRP and come to a determination, and/or to make any other direction or decision as they see fit.

18. What are the obligations of the Initiating Party and Interested Party Participants to the DRP?

When participating in the DRP, the Initiating Party and Interested Party Participants must act in good faith and must use all reasonable endeavours to enable the Expert to reach a decision within the prescribed time period. All Parties must send copies of any documents sent to or from the Expert to ERA, and provide ERA with reasonable notice of any hearings or meetings (including video meetings, online meetings and conference calls) in order to enable ERA to attend or contribute to the same should it wish to do so.

Each Party shall with reasonable promptness supply the Expert when requested to do so with all information and give the Expert such access to documentation and

personnel and/or things as the Expert may reasonably require to make a determination.

19. What is ERA's role in the DRP?

ERA shall be entitled to participate in any dispute resolution procedure commenced under this policy in any way which it deems appropriate including as a Party. However, there shall be no obligation upon ERA to do so unless the dispute relates directly to the conduct of ERA (as opposed to, for example, being a Distribution Dispute or a membership application in respect of which ERA is unable to reach a decision) and the Expert considers it necessary for ERA to participate in the DRP as a Party.

Irrespective of whether ERA is a party to the DRP, ERA will seek to maintain a position of neutrality unless ERA considers it would be inappropriate to do so.

ERA will not be responsible or liable for any costs, damages, claims or other losses of any kind (including, without limitation, relating to the DRP or the determination) arising from or in relation to the DRP save as set out in paragraph 21 below.

20. Is the DRP confidential?

Unless ERA, acting reasonably in its sole and absolute discretion, considers it appropriate to disclose information relating to the DRP or the Parties thereto, the fact of the dispute and all matters concerning the process and result of the determination by the Expert should be kept confidential by Initiating Parties, Interested Parties and all those who are participating in or are aware of the DRP.

21. Costs and Fees

Each Party shall bear its own costs in relation to the DRP and shall promptly pay invoices sent by the Expert (including any interim invoices). The Expert's fees and any costs properly incurred by the Expert in arriving at a determination (including any fees and costs of any advisers appointed by the Expert) shall be borne by the Parties equally or in such proportions as the Expert shall direct taking into account the conduct of the Parties and any other matters the Expert, acting reasonably, considers relevant.

For the avoidance of doubt, ERA shall not be liable for any fees or costs unless ERA is a Party to the DRP, in which case ERA shall be liable only for the Expert's costs in such proportion as the Expert shall determine is appropriate on the basis of unreasonable conduct on the part of ERA.

22. Will ERA continue to make distributions to Members in the event of a dispute?

ERA shall not be required to suspend distributions to Members pending the resolution of any dispute but shall have the power to do so if in ERA's sole and absolute discretion, ERA considers it appropriate to do so.

23. Can a dispute be re-submitted to the DRP if circumstances change?

In the event that it considers that there has been a substantive change in circumstances following an expert decision pursuant to the DRP or a substantive change in the law following such a decision, an entity or individual (including ERA) who wishes to re-submit a dispute for resolution pursuant to the DRP may seek to do so in accordance with and subject to the provisions and procedures set out herein.

APPENDIX 1

Regulation 32 of the 2016 Regulations:

(1) A collective management organisation must ensure that disputes to which –

- (a) paragraph (2) applies, or
- (b) paragraph (3) applies

can be submitted to an independent and impartial dispute resolution procedure.

(2) This paragraph applies to disputes between a collective management organisation and one of its members, a right holder, a user or another collective management organisation concerning compliance with these Regulations other than—

- (a) a dispute to which paragraph (3) applies; or
- (b) a dispute concerning paragraph (4)(b) of regulation 15 (tariffs).

(3) This paragraph applies to disputes between a collective management organisation to which Part 3 of these Regulations applies which grants or offers to grant multi-territorial licences for online rights in musical works with—

- (a) an actual or potential online service provider regarding compliance with regulations 15 (licensing), 24 (transparency), 25 (accuracy of multi-territorial repertoire information) and 26 (reporting and invoicing);
- (b) a right holder regarding compliance with regulations 24, 25, 26, 27 (payment to right holders), 28 (agreements between collective management organisations), 29 (representation of other collective management organisations) and 30 (access to multi-territorial licensing); and
- (c) another collective management organisation regarding compliance with regulations 24, 25, 26, 27, 28 and 29.

(4) Paragraph (1)(a) does not apply where the collective management organisation is a business with fewer than ten employees and which has a turnover or balance sheet of less than 2 million euros per annum.