

CLA Submission to Select Committee of Department of Innovation, Universities and Skills The Work and Operation of the Copyright Tribunal

1. Executive Summary

- 1.1 The Copyright Tribunal should provide a simple and inexpensive solution to disputes between owners and users of copyright. In reality, Copyright Tribunal proceedings are lengthy and complex and its role in providing a remedy for users only has led to a perception that it is more sympathetic to users than to copyright owners. The need for it to be seen as impartial was recently recognised in the IPO's own review of the Copyright Tribunal.
- 1.2 CLA made a submission to the IPO review of the Copyright Tribunal and responded to the published results of that review [; these documents are attached for convenience]. CLA agreed with many of the findings of the review and believes that it is important that the IPO are given the authority and resources necessary to proceed to implement the recommendations.
- 1.3 The main areas of concern are:-
 - 1.3.1 the role and purpose of the Tribunal – the perception of unfairness to rightsholders and the erroneous belief that collecting societies are powerful monopolistic bodies against whom users need protecting, which is often at odds with reality of the situation;
 - 1.3.2 that only users, and not rightsholders or their agents the collecting societies, have the right to seek a remedy from the Copyright Tribunal;
 - 1.3.3 the fact that claimants can – and do – launch cases without being required at least to consider mediation;
 - 1.3.4 the selection and composition of the Tribunal – the lack of transparency in the way lay members of the Tribunal are selected and the lack of any published criteria of the experience and skills that they are supposed to possess to enable them to discharge their role effectively and fairly;

- 1.3.5 the process and procedure of the Copyright Tribunal – the Copyright Tribunal rules of procedure differ from the normal rules for civil litigation. They often work to increase the length and complexity – and hence costs – of claims and unfairly prejudice collecting societies in contesting the case without a full understanding of the nature of the complaint at the outset;
- 1.3.6 the basis on which decisions are made – the Tribunal should have greater regard to agreements freely negotiated between the parties and not upset these lightly as being the best evidence of an appropriate rate. It is inherently unfair that a large and well resourced representative body can negotiate at length for the best possible deal – which the collecting society is contractually obliged to respect – and then seek review of that by the Tribunal.

1.4 Each of these points will be discussed briefly in the remainder of this submission with references to, and commentary upon, the IPO Review as appropriate.

2. CLA and its Role

- 2.1 The Copyright Licensing Agency Ltd (“CLA”) is a not-for-profit company limited by guarantee. Its owners are the Authors’ Licensing and Collecting Society Ltd (ALCS) and the Publishers Licensing Society Ltd (PLS), through whom it deals with authors and publishers respectively. It represents the interests of visual artists through an association agreement with the Design and Artists’ Copyright Society (DACS). CLA is a member of the British Copyright Council and has had the benefit of reading their submission to which it has also contributed.
- 2.2 Overseas, there are similar organisations to CLA typically known as Reprographic Rights Organisations (or “RROs”). CLA is a leading member of IFRRO, the International Non-Governmental Organisation for RROs, and CLA’s International Director is currently President of IFRRO.
- 2.3 CLA issues licences authorising a limited amount of copying in consideration of licence fees on behalf of the authors, artists, and publishers who create the works and who own the copyright

in the works. The licence fees collected by CLA are distributed (after deduction of CLA's operating expenses) to those rightsholders.

- 2.4 CLA was founded in 1983 and launched its first licence to schools and thereafter licensed universities, colleges and the rest of the education sector. Nowadays, in addition to the original education licensing sector, CLA licenses a wide range of businesses and other organisations, government department and other public administration bodies. Its licences originally covered photocopying (paper to paper), but now also include scanning (converting paper to digital format) and is on the verge of issuing its first truly digital licences (digital to digital).
- 2.5 CLA licences are typically limited to the copying of an extract of the original work so as not to prejudice the primary sale of that work. This enables educational establishments, businesses and other organisations to conduct their business under the cover of a "blanket" licence whereby for a modest annual payment they are authorised to copy such extracts from a wide range of books, learned journals and consumer and trade magazines published in the UK (other than from relatively small list of works specifically excluded by the copyright owner), as well as works published abroad where CLA has entered into a repertoire exchange agreement with the relevant RRO. These include, for example, the USA, Canada, Australia and most of mainland Europe.
- 2.6 The benefits of a voluntary collective licensing approach are recognised by government, echoed in copyright legislation and have been acknowledged by the Competition Authorities. CLA's licensees are saved the inconvenience, difficulty and expense of obtaining consent on each occasion they need to copy, failing which they could not undertake the copying lawfully. Rightsholders also benefit from a collective licence scheme as it would be difficult or impossible for them to license every use of their works and to enforce their rights on an individual basis.
- 2.7 In the financial year ended 31 March 2007, CLA collected £49m on behalf of its member organisations and rightsholders and the accumulated figure for the 5 years to 31 March 2007 was £214m of which £32m was from overseas. CLA therefore plays a significant role in supporting the creative and publishing industries whose worth to the UK economy was estimated at £60bn source.

2.8 CLA is a “licensing body” and the operator of “licensing schemes” for the purposes of the Copyright, Design and Patents Act 1988 (“CDPA”), the primary legislation and it is subject to the jurisdiction of the Copyright Tribunal. CLA has been engaged in one Copyright Tribunal case (Universities UK vs. CLA 2001).

3. The “Need” for Users to be Defended Against Collecting Societies

3.1 The perception that collecting societies are more powerful than their users is in many cases misplaced. In the recent Music Online case the claimants included Yahoo, AOL, Napster, Sony iTunes, O2, T-mobile, Vodaphone and Orange. In CLA’s case its resources, both in terms of manpower and money, are considerably more limited than those available to many of its licensees.

3.2 The original thinking behind the right for users to complain to the Tribunal was presumably that they were thought to need protection as they were unable to influence the terms of the licence or negotiate terms on a fair basis. This is simply untrue in many cases. Large and well funded licensees are quite capable of negotiating on an equal basis – indeed in many cases it is the licensee who holds the greater degree of negotiating power given the difficulties that rightsholders have to prove cases of copyright infringement and to obtain appropriate payment through licence fees.

3.3 There is often a perception that it is the licensing body against whom the user is litigating rather than against the rightsholders it represents. This may falsely reinforce the notion of the “weak” user needing protection against the “strong” licensing body. CLA is a non profit making organisation whose revenues (after deduction of running expenses) are passed on to its rightsholders: the individual authors, artists and other visual creators and publishers who create the work and made it available to the public. It is they who are most affected by the decisions handed down by the Tribunal. They often are unable to enforce their rights individually for reasons of practicality or cost.

4. Composition of the Tribunal

4.1 The Monopolies and Mergers Commission in its inquiry on collective licensing recommended that the Chairman of the Tribunal should be either a retired High Court judge or other person of

similar standing with experience in the law of intellectual property and available to serve at short notice. The IPO review did not go for this but suggested that the appointment should be a salaried post at a judicial level carrying the title of President. The key is that the President should have appropriate legal qualifications and experience. The same would apply to the Deputy Chairmen.

- 4.2 The criteria for selection of the lay members of the panel are not currently disclosed and greater transparency in the selection criteria and procedure would help address some of the concerns of collecting societies. The lay members need to have, and be seen to have, the appropriate experience to deal with complicated cases of the evidence is produced in written form in advance. CLA had submitted that lay members should be balanced with one drawn from or representing users and one representing copyright owners. The IPO review recommended the abolition of the lay members completely, but this would impose an onerous burden on the Chairman who have to decide on matters both of law and fact from extensive and complicated evidence and whose decision, on grounds of fact alone, cannot be appealed.

5. Copyright Tribunal Proceedings

- 5.1 Copyright Tribunal proceedings have all the trappings of judicial proceedings, but without some of their rigour. The collecting societies in particular are often presented with the worst of both worlds in that they are forced to the trouble and expense of dealing with potentially wide ranging pleadings, but without the certainty that these will define completely the cause of action. Broadly constructed pleadings may disguise what is in fact the main complaint which may often only emerge much later in the proceedings. CLA believes that a much more robust approach ought to be taken by the Tribunal in striking out evidence on matters not put in issue through pleadings.
- 5.2 Most Copyright Tribunal references turn on the use by, and value to, the user of the relevant copyright material. That data inevitably is in the hands of licensees. CLA believes that time and money would be saved were the licensee required to provide standard disclosure in accordance with the Civil Procedure Rules, at least in relation to these elements, prior to exchange of first round evidence. CLA believes this could lead to major savings and cost for both sides.

5.3 The IPO Review recommended replacing the existing Copyright Tribunal Rules 1989 with the standard CPR and Practice Directions applicable to normal civil litigation. This would overcome many of the above problems.

6. Mediation

6.1 CLA believes that parties wishing to launch a reference to the Tribunal should first seek to resolve the dispute through mediation. Currently there is no cost sanction against a claimant who shoots first and asks afterwards as there is in the Commercial Court and civil litigation following the Woolf Reforms.

6.2 Currently claimants can launch a reference – without any prior notice to the Respondent – as a negotiating ploy to apply pressure and to improve their bargaining position. Indeed this is specifically recognised in the Copyright Tribunal Rules where it states that it is aware that references are sometimes begun by parties simply to preserve their negotiating position. Given that only the users can launch a reference, this is deeply unfair and leads unnecessarily to the commencement of full scale litigation proceedings. Once started, legal proceedings acquire a momentum of their own and become more difficult to stop.

6.3 The Patent Office has established its mediation service. Although this seems to have had mainly patent and trademark disputes in mind, there is no reason why it could not be extended to cover copyright disputes.

7. Rights of Licensing Bodies

7.1 Licensing bodies have no right to launch a reference (other than where a Licence or Licensing Scheme has already been the subject of a reference). This always places them unfairly in the position of “defendant”.

7.2 The IPO Review recognised that this was unfair and recommended that collecting societies should be able to launch a reference in appropriate circumstances. CLA agrees and would welcome details of how this might be implemented.

8. Factors to be Considered in a Reference

- 8.1 The Tribunal ought to have a greater regard to existing agreements where freely and fairly entered into by the parties. Once the parties have reached an agreement, the Tribunal should be wary of imposing its own judgement on what it considers is reasonable in all the circumstances where it differs from the position of the parties mutually agreed after negotiation. This is particularly so given that only the user can refer the contract to the Tribunal. In effect, it can “tear up” the contract whereas the licensing body is obliged to continue to honour it.
- 8.2 The Tribunal ought not to exercise its jurisdiction to review what was a binding contract. To do so diminishes the incentive for the licensing body to enter into such negotiations and to try to reach a mutually acceptable agreement in the first place. A licensing body ought not to be discouraged from granting concessions in an attempt to reach a settlement if it fears that this is but one step in a process which can then be litigated before the Tribunal and lead to yet further claims for reduction.

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