

CLA's Submission to the IPO Consultation on the Copyright Tribunal

1. Introduction

CLA welcomes the Consultation paper issued by the Intellectual Property Office to reform the procedure of the Copyright Tribunal. The introduction of rules based on the Civil Procedure Rules ("CPR") has been widely accepted as being a necessary step to modernise as well as to streamline the procedure and to improve the balance of fairness of the Tribunal as between users/licensees and the licensing bodies and their authors, artists and publishers.

The proposed reforms should help to produce a fairer and more effective resolution of disputes whilst reducing the cost and delays that have characterised proceedings in the past. However, the introduction of a small claims track is problematic and the absence of a timetable to introduce reform to the jurisdiction of the Tribunal to allow licensing bodies access to the Tribunal is disappointing.

2. Summary

This submission is structured to answer each of the questions highlighted in the Consultation document (section 3) and then addresses some other questions arising out of the draft Rules (section 4).

The key points in this submission are:-

Right for Licensing Bodies to apply to the Tribunal

1. The IPO should seek to introduce such legislation as may be required to give licensing bodies a right of access to the Copyright Tribunal (in effect their regulatory body) as a matter of urgency.

Small Claims Track

2. The small claims track could prove extremely difficult to operate fairly in practice as the outcome will often have implications for other licensees and financial implications for rightsholders that would make it inappropriate for it to be dealt with in an expedited manner.
3. The criteria for the allocation of cases to the small claims track must include the potential effect of the outcome of the case on copyright owners as well as on licensees.

Time limit for Response

4. 21 days is too short for the significance and complexity of the cases in the Tribunal. The standard 28 day period in the CPR should be used as a minimum, although there is a strong argument for aligning these copyright cases with the periods allowed for in the Competition Appeals Tribunal and proposed for the Patent County Court (6 weeks).

Early disclosure of copying/use of copyright material

5. Linked to the response period is the need for the Respondent to have access to the information held by the Claimant as to the amount of copyright material it uses and the use to which it puts such material. This could be by way of an order by the Chairman at a case management conference under draft Rule 21 for the Claimant to obtain this information or could be made a requirement to be included in the Statement of Grounds by means of a practice direction pursuant to the Rules.

Mediation

6. The proposal to encourage ADR is welcome, but should be linked to the cost regime applying in the Commercial Court to ensure that it is not ignored.

Hearing

7. It is most important that the parties have a chance to present their case and to cross examine the other parties' evidence at a full hearing; rarely, if ever, would it be appropriate for the matter to be dealt with by means of a paper only procedure.

Striking out

8. The Respondent should be allowed to apply to the Tribunal to reject a case to prevent frivolous claims rather than having to rely on the Tribunal deciding this of its own volition.

3. The Consultation Questions

General

Do you agree that the draft Rules will achieve the policy objectives set out above?

CLA believes that the draft rules will go a long way to achieving the policy objectives set out in the Consultation paper and represent a major advance, subject to the comments in this submission and to the matters not yet addressed and discussed in section 4 below.

Parts II – IV Commencing proceedings

Do you agree with the reduction of procedures to a single application system?

The proposal to have a single application system (and a standard application form as set out in Schedule 1) seems sensible. However, cases can involve more than one reference under different sections of the 1988 Act, and while little is gained by requiring separate forms often covering the same ground, it is important that the statement of grounds discloses fairly the nature of the complaint as well as the remedy sought.

A common complaint of collecting societies is that often the real issues are only revealed later on in the case after much time and money has been spent. It is vital that the initial pleadings do set out exhaustively the grounds of complaint and that these pleadings are then adhered to. CLA is pleased to note in this context that the Applicant may only amend the statement of case with the permission of the Tribunal.

The Practice Director of June 1995 required the Applicant to “specify exactly what variation” was sought whereas draft Rule 8 (2) (d) requires it only to “specify the remedy” sought. It should be made clear that this must include the exact terms, conditions and rate payable that is being sought along with an indication of the volume and use of copyright material (actual or proposed).

Do you support the proposal for a simplified procedure for intervening?

Yes, although it would be important that in practice the intervener’s “credentials” are rigorously assessed to ensure it represents a genuine interest to avoid additional complexity, cost and delay.

Parts V Allocation

Do you support the introduction of a small applications track?

We believe this may contain risks disproportionate to the problem being solved. Licensing bodies tend to operate in one of two ways:-

- a. The promulgation of a scheme with an announced tariff of rates.
- b. Individual licence negotiations, either with the licensee or a representative body;

a) The promulgation of a tariff: what may seem simple to an individual applicant may involve complex technical and legal issues for the Respondent. It is hard to see how one individual claiming that the tariff was unreasonable could ever be treated in isolation as it would always be likely to have repercussions for the tariff as a whole. Indeed collecting societies are encouraged, and the Tribunal required, by statute (s.129 CDPA 1988) to avoid unreasonable discrimination between licensees. Therefore a verdict on the rate or other terms and conditions of the licence for one claimant would be

highly likely to have an effect on the rate for all other licensees. In all these cases the licensing body would be likely to apply for the matter to be dealt with on the standard track.

b) Individual licence negotiation: it is likely that any such negotiation would have involved a detailed negotiation. In such cases the small claims track would not be an appropriate way of resolving the dispute. s. 129 (CDPA 1988) applies also to individual licences, so a verdict on one has implications for others.

A series of small claims could conceivably establish a multitude of different licence rates and terms which could be either impracticable or prohibitively expensive to operate. The necessarily “broad brush” approach of collective licensing schemes could be endangered to the detriment, not just of rightsholders, but also of licensees as the costs of running the scheme would rise.

We think a better answer, therefore, is to ensure that a quicker and cheaper process is achieved through a rigorous approach to case management. Additionally the code of practice mentioned in the Consultation and being proposed in the Digital Britain report may be of assistance.

Do you consider that it can achieve the objective of improving access for licensees and prospective licensees to the Tribunal?

It may improve access, but possibly to the detriment of other licensees and rightsholders.

If not, what alternative method would you propose for improving access, particularly for small-scale licensees, within the current legislative framework?

As above, we believe a code of practice may help and additionally greater use of mediation or other forms of ADR may be helpful. But quite often the complaint about the licence fee rate or other terms of a licence is in reality a disguised reaction to the need for a copyright licence. As stated in our submission to the Digital Britain report, what is required is a large government-supported campaign of education not just to explain what copyright is and what activities might infringe it, but to explain the economic, social and cultural benefits to society of maintaining a sound copyright framework.

Do you agree with the criteria for determining allocation to the small applications track?

Subject to our comments on the need for a small claims track, we believe the criteria listed in Rule 19 (2) for determining allocation to the small applications track should include not just the importance of the outcome to other licensees or putative licensees but, crucially, the importance of the outcome to the rightsholders represented by the Respondent.

The Consultation paper specifically notes that the Tribunal should take into account the importance of the outcome to other licensees or prospective licensees, but omits to mention the impact on the

copyright owners and on the livelihood of the many thousands of authors, artists and publishers involved.

The criteria for small claims track allocation should also include the views expressed by the parties and the likely amount of evidence (both factors listed in the CPR).

As a technical point, Rule 18 (dealing with the initial allocation) should also refer to these factors which should apply at the outset and not just in responding to an application for a change of a track already allocated (Rule 19).

Part VI Case management

Do you agree that the rules for the small applications procedure will allow for a quick, cheap and just resolution of cases?

The procedure might prove to be quick and cheap, but as stated above might not be just when looked at in the wider context of the licensing scheme of which the particular claim forms part.

Do you agree that, under the small applications procedure, each party should, as a matter of routine, bear their own costs?

Yes, to the extent that there is a genuinely “small” claim that would be appropriate.

Do you consider that Part VI of the draft Rules will achieve the policy aim of reducing the length and cost of proceedings before the Tribunal whilst allowing a just resolution of disputes?

We think the draft Rules represent a significant improvement in the position, but note the power to reject in Rule 10 should be exercisable on an application by the parties as well as on the Tribunal’s own initiative in accordance with the rules in part 3 of the CPR on striking out powers.

CLA supports the suggestion that the Tribunal should encourage alternative dispute resolution procedures, but the Commercial Court regime should be applied so that an unreasonable refusal to participate in ADR could lead to an adverse cost order.

CLA does not agree that the Tribunal should have power – at least not without the consent of both parties – to dispense with the need for the parties to attend any hearing. Copyright Tribunal references turn on a mix of law, fact, a subjective interpretation of what is ‘reasonable’ and of public policy considerations. It is unlikely that there will be many straightforward cases of the sort that might justify dispensing with a hearing under the CPR; the complexity and financial significance in most

cases before the Tribunal would, in the interest of justice, require a full hearing with the parties able to give evidence and cross examine the other party.

In particular, do you support the provision to the Tribunal of circumscribed powers to limit evidence?

Yes, but it is linked to a need to control the pleadings. The wider the pleadings, the broader the evidence the parties need to adduce.

It is equally important that statements should not be amended (at least without a potential adverse costs implication) without allowing the Respondent proper opportunity to obtain further evidence to address any revisions. However, if the case management powers are consistently and fairly applied to narrow down the issues at an early stage, it would then be most helpful for the Tribunal to control the amount of evidence required.

It is important to note that the key evidence and volume of copying and/or use of copyright material by the licensee is something within the knowledge of the Claimant. The Respondent will only have such survey information which a Licensee has permitted it to acquire; it will have none where the claimant is not yet a licensee. The Chairman should have the power, at any pre-trial review or other case management conference, to require the licensee, at its own cost, to produce complete and accurate evidence of copying and use of copyright material relevant to the case. Additionally a Practice Direction issued pursuant to the Rules could require that the Statement of Grounds contains or annexes the crucial evidence of the volume of copying and use of copyright material on which any assessment of a reasonable fee is dependent.

Part IX Appeals from the Tribunal

Provision for Tribunal to stay a decision or order during an appeal on consent of all parties

CLA agrees this is a sensible proposal provided any revision or Appeal to the decision or order is retrospectively implemented. Either way there may have to be payment adjustments.

There seems to be a slight inconsistency between draft Rules 34 (2) and (3) as to whether the Tribunal can issue a suspension order only with the consent of both parties. We think the Tribunal should be able to issue such an order either on the application of one of the parties or of its own violation; Rule 34(3) would then require notice to the other parties as currently drafted.

Part X Interim Orders and Awards

Do you agree that the Tribunal should only have power to make interim orders and awards in standard track cases?

It is not clear that the draft rules do limit provisional relief to standard track cases, but it seems axiomatic that any case sufficiently complicated as to require an interim award could not (or should not) be the subject of a small claims procedure.

Part XII Transitional and Revocation

Do you agree that the new Rules should apply to cases which are part heard when they come into force?

It is likely to be administratively difficult, and potentially prejudicial to current cases, for parties to switch during proceedings from one regime to another; an early implementation of the new rules is therefore desirable.

Schedule I

Do you agree with the reduction of forms so that there is only one for an application?

Yes, subject to the concerns stated above.

Schedule II

Do you agree with the proposal to retain fees at a nominal cost aimed at deterring frivolous applications, increased over 1989 rates in line with HM Treasury's GDP deflator?

CLA agrees that the fees should be set so as to discourage frivolous claims.

4. Issues Not Specifically Raised in the Consultation Questions

1. Right for Licensing Bodies to apply to the Tribunal

The Consultation paper notes that the Innovation, Universities, Science and Skills Select Committee recommended that licensing bodies should, like users, be able to refer cases to the Tribunal. The IPO, rightly, wishes to press ahead with such changes as it can by means of secondary legislation as soon as possible, but it is most disappointing that this important aspect is being left to a later date. There seems no logic to this postponement. The proposal to adopt a "stepwise" approach to implement these Rules first, then to consider a code of conduct for complaints and dispute resolution and only then to consider reforming the jurisdiction of the Tribunal will delay inordinately something which has been generally accepted as both important and urgent.

If primary legislation is required to achieve this, then efforts should now be being made to register the need for this in the parliamentary queue. It may also be possible to introduce amending legislation as part of any implementation of the Digital Britain report to the extent that requires primary legislation.

The IPO should also give consideration to whether changes could be made by secondary legislation pursuant to the Enforcement Directive. Some of the cases put forward by CLA and other organisations for a licensing body to have the right to apply to the Tribunal might be seen as consistent with the requirement of the Enforcement Directive to give intellectual rights property management bodies (like CLA) rights of enforcement.

2. Period for response

The draft rule specifies 21 days for the respondent to enter its response from receipt of the copy of the application; CLA believes this is too short given the complexity and financial implications of many references to the Tribunal.

The applicant will have been able to prepare their statement of case at leisure and, even with the proposed encouragement of ADR, the Respondent may have had no notice of the forthcoming claim (as was the case in the Universities UK vs. CLA reference) and therefore had no chance to marshal its facts and consider its approach. Requiring a Respondent to rush its response will not assist in achieving the overriding objective nor correct the perception that the Tribunal is a licensee-friendly body. The Respondent may be forced to apply for an extension of time and/or later apply to rectify its response thereby incurring further cost.

28 days is a standard in the CPR (and is indeed the period stated in draft Rule 33 for appeals against a Tribunal decision) and this should be a minimum. We understand that a period of 6 weeks has been proposed in a consultation on Patent Count Court procedure (with 10 weeks where there has been no prior mediation). 6 weeks is also the period contained in the Competition Appeal Tribunal Rules 2003 (which the Consultation notes is one of its two main precedent sources) which deals with cases which are in many ways closer to Copyright Tribunal references than many claims dealt with by the CPR.

A reasonable period for the Respondent to put together a complete defence is not likely to lengthen the overall time for the case, but rather the reverse if active case management is then applied to the rest of the proceedings.

3. Hearings to be held in public

Whilst the greater part of most cases can be heard in public, there may be occasions where some sessions need to be held in private when evidence of a confidential nature is being discussed. Draft Rule 29 should allow for the possibility for particular sessions to be held in private.

By contrast, the draft rules (R. 23 (3)) provide for the case management conference or pre-hearing to be held in private; we think the default position should be that it is in public, as for the full Hearing, as the case management conference can affect those who are not party to the proceedings.

4. Costs

The Tribunal should have the power to make an order for security for costs.

5. Distinction between licensing scheme and licensing body

CLA has previously raised the unfairness inherent in allowing a position where a representative body which has negotiated at length with a licensing body to agree on standard terms or a model licence can then refer that contract to the Tribunal seeking a further improvement on the position freely negotiated (provisions dealing with licensing schemes ss. 118 to 123 CDPA 1988).

This injustice could be corrected by introducing, as one of the cases where a licensing body could apply to the Tribunal, the possibility for it to clear a prospective scheme in the same way that a user can apply to the Tribunal to review the terms of a proposed licence or expiring licence (ss. 125 to 128 CDPA 1988). Alternatively the licensing body could also be given a right to apply to the Tribunal to review an agreement it has made when it believes a change of circumstances justify that.

Additionally, however, it would be appropriate for any amending legislation to include as factors that the Tribunal must take into account when reaching its decision (s. 129 & s. 130 CDPA 1988) the pre-existing contractual and bargaining history of the parties. This has also been covered in previous CLA submissions and could be covered in more detail in the promised consultation on reviewing the jurisdiction of the Tribunal.

6. Composition of Tribunal

The Consultation records the measures the IPO has undertaken to improve the staffing and resources of the Tribunal and these are to be welcomed.

However, CLA repeats its submission that it believes the role of the Chairman and Deputy Chairman should be filled, as recommended by the Monopolies and Mergers Commission in its enquiry on

collective licensing, either by a retired High Court judge or by another person of similar standing, both to ensure that the Chairman has the necessary expertise and authority, but crucially who also is available. One of the causes of the length of Copyright Tribunal proceedings has been the difficulty in timetabling the hearing to coincide with the availability of the Chairman and Deputy Chairman.

Lay members: CLA welcomes the recruitment of new lay members on the basis of relevant expertise using the Judicial Appointments Commission best practice guidelines. The identities of the new lay members are not yet known, but it is important to ensure that, apart from having the necessary expertise; the appointees represent a fair balance (as had been recommended in the Leggatt review of Tribunals) to provide some knowledge and understanding of the position of the licensing body, and the individuals within the creative industries that it represents, as well as those of the user/licensee.

M T Delaney

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