



**Consumer
Focus**
Campaigning for a fair deal

Consumer Focus response to the Intellectual Property Office Copyright Tribunal Consultation – Modernisation and Simplification of Rules of Procedures

Consumer Focus is the statutory independent watchdog for consumers across England, Wales, Scotland and (for postal consumers) Northern Ireland. Our role is to represent the interests of consumers, particularly the disadvantaged. We operate across the whole of the economy, persuading businesses, public services and policy makers to put consumers at the heart of what they do.

Consumer Focus has been working on intellectual property related issues for many years through our predecessor organisation, the National Consumer Council. Our current work focuses on copyright as part of our digital programme and we want to see a digital economy characterised by competitive, dynamic and innovative markets to which consumers have meaningful access and in which they are empowered to make informed choices. And we want to see a copyright culture that supports this by striking a fair balance between creators and consumers. To this end we work on issues such as copyright exceptions for consumers, proportionate enforcement and copyright term.

Licensing as a consumer issue

Consumer Focus welcomes the ongoing Intellectual Property Office led efforts to reform the UK copyright regime. One example of these ongoing reforms is the December 2008 Department for Innovation, Universities and Skills Simplification Plan, which has identified numerous opportunities to streamline the registration and licensing regime with a view to cutting costs.¹ Overheads are commonly passed on to the consumer, therefore consumers have an interest in an effective copyright regime that does not impose unnecessary costs upon rights holders and collecting societies, while at the same time not stifling competition or the emergence of new digital content business models.

Consumers do not obtain licences from collective societies for the use of copyrighted work and the Copyright Tribunal does not have jurisdiction over consumer issues relating to copyright, for example, copyright violation. However, consumers enjoy copyrighted works in public and commercial premises which need to obtain a licence from the collecting societies. This is particularly relevant with regards to copyrighted music; for example, any retail outlet or pub playing music to customers needs a licence, so do workplaces where employees listen to the radio.

More generally, consumers have an interest in a well-functioning copyright regime, which enables the consumption of copyrighted work in a way that allows a fair financial return to artists. Collecting societies also have a key role to play in enabling new digital content business models that make digital content, such as music and film, available to consumers.

¹ Department for Innovation, Universities & Skills, [Simplification Plan](#), December 2008

Reform of the UK licensing system

The final Digital Britain report notes that:

'Work will continue on the strategy throughout the summer. What is clear, though, is that changes are needed. Those changes may not necessarily be legislative changes but both within the UK, across Europe and globally there are key improvements that need to be made. Rights clearance and the visibility of rights is a major issue. We must find better ways of navigating the system. We want creators and creative businesses to be paid but we also want to maximise access to works. Too often the existing systems seem to be breaking down. This impacts on businesses, which cannot get access to works. It impacts on consumers and wider society as it reduces the pool of content that they can legitimately draw from. It also impacts on creativity as untapped opportunities mean less recognition and less reward.'²

Consumer Focus fully agrees with this position and it is important that the reform of the Copyright Tribunal is carried out in the spirit of the Digital Britain report and as part of the wider reform of the UK licensing system as proposed.

The Intellectual Property Office Copyright Tribunal Consultation states that:

'The Select Committee recommended that the licensing bodies should, like users, be able to refer cases to the Tribunal. The consultation on this recommendation will be dealt with separately as the changes could only be introduced by primary legislation. The scope of this consultation is limited to the procedural rules for the Tribunal.'³

Although we realise that the right to refer is not part of this consultation, we have concerns regarding the recommendation. Currently, anyone who has unreasonably been refused a licence by a collecting society, or who considers the terms of an offered licence to be unreasonable, may refer the matter to the Tribunal.⁴ Consumer Focus thinks that the right to refer is vital in ensuring that collecting societies and other licensing bodies do not abuse their monopoly.

Reform of the Copyright Tribunal

The reform of the Copyright Tribunal draws on recommendations made by the Innovation, Universities, Science and Skills Committee, in a review of the Copyright Tribunal, published in 2007/08 (Second Report of Session 2007-08, HD245). In summary the report concluded that:

'We examined the recent review of the Tribunal commissioned by the Intellectual Property Office (which has administrative responsibility for it) and concluded that the Government needed to take action to implement the

² BIS & DIUS, **Digital Britain Final Report**, June 2009, pg.20

³ IPO **Copyright Tribunal Consultation - modernisation and simplification of rules of procedure**, April 2009, Point 6, pg.6

⁴ Innovation, Universities & Skills Committee, **The work and operation of the Copyright Tribunal**, Second Report of Session 2007-08, pg. 5

recommendations, in the face of complaints about delays, costs and the fact that the Tribunal has failed to meet the challenges of the digital age.⁵

Collecting societies and other licensing bodies act in many cases as a critical interface between creators and the consumer. The monopoly-status collecting societies currently enjoy administrative benefits, ie, those wishing to use copyrighted work usually only need to approach one collecting society to obtain a licence. However, an inherent and ongoing tension exists by allowing a monopoly position in a market that needs to be dynamic and competitive.

The Monopolies and Mergers Commission report *Collective Licensing*, published in 1988, underlined this by concluding 'that collective licensing bodies are the best available mechanism for licensing sound recordings, provided they can be restrained from using their monopoly unfairly'. The subsequent 1996 report *Performing Rights*, published by the Monopolies and Mergers Commission, made a number of recommendations concerning the operation of the Performing Right Society Limited. It pointed out that the interests of users of music were primarily protected through the Copyright Tribunal.⁶ Consumer Focus would like to draw attention to the key role the Copyright Tribunal has to play in ensuring that collecting societies and other licensing bodies do not abuse their monopoly, and that a well functioning Copyright Tribunal will be the cornerstone of a dynamic and competitive digital content market.

The Copyright Tribunal and the monopoly of collecting societies

The Select Committee took evidence from collecting societies to the effect that the procedures of the Tribunal are not 'fair', in that they do not allow collecting societies to refer cases. Specifically the PPL stated that:

'The mere fact that it is called a Tribunal implies there was a feeling that collecting societies were monopolies, they needed to be controlled in some way and the [...] user needed somebody to look after them. In fact the cases that come before the Tribunal are between large parties, between a licensing society [...] and a big organisation, be it a broadcaster or [association representing an] industry. They are major parties that are in a commercial dispute.'

The Design and Artists' Copyright Society explained a change was needed because:

'When negotiating licensing schemes or licences, collecting societies are often confronted with the situation to either redraft a proposal according to the stipulations of the licensee or to risk a referral to the Tribunal, which results in costly and lengthy proceedings or that member's rights will be infringed without a real possibility of legally enforcing the member's rights when the licensee is simply refusing to accept the proposal.'⁷

Consumer Focus fundamentally questions the reasoning of this argument, because collecting societies do enjoy, by definition, a monopoly position. Collecting societies and other licensing bodies, such as record labels, are at the centre of efforts to create new and compelling digital content business models and the current UK licensing system has

⁵ Innovation, Universities and Skills Select Committee, **The work of the Committee in 2007-08**, 2 Committee inquiries and evidence sessions

⁶ Innovation, Universities & Skills Committee, **The work and operation of the Copyright Tribunal**, Second Report of Session 2007-08, pg.6 & 7

⁷ Innovation, Universities & Skills Committee, **The work and operation of the Copyright Tribunal**, Second Report of Session 2007-08, pg.13

not fully supported the emergence of digital content businesses. It is perhaps no accident that hardly any of the new innovative digital content business models, such as Spotify and iTunes, are UK based. Last.fm, which is UK based, has recently outlined the problems it sees with the current licensing system. Last.fm founder Martin Stiksel, commenting on a dispute between YouTube and the Performing Right Society, said, 'It is a fundamental problem that we have been facing, in that online music licensing is getting more complicated and more expensive.' He went on to say, 'We have to find commercially workable rates otherwise illegal services will win and take over.'⁸

There is plenty of anecdotal evidence to suggest that major rights holders, which include collecting societies and record labels, have thus far hindered the emergence of new digital content businesses, by refusing to give licences or demanding prices that are not viable in an online market. In the recently published book *Appetite for Self-Destruction*, Steve Knopper examines the music industry's resistance to online services like Napster. Knopper sites the example of Liquid Audio, which tried to launch a Digital Rights Management-protected music service years before iTunes (which was launched in 2001) and quotes Liquid Audio executive Gerry Kearby as saying, 'One day in a moment of pure honesty, [a Sony rep] said, "Look, Kearby, my job is to keep you down. We don't ever want you to succeed".'⁹

Allegations that collecting societies use their monopoly position in a way that stifles digital content businesses are also now dealt with at EU level, and in May the EU Competition Commissioner publicly demanded that the music industry should move quickly and change licences that currently restrict online music stores such as iTunes from offering the same songs for sale across Europe.¹⁰

Consumer Focus recommends:

- The Intellectual Property Office should establish the Copyright Tribunal as a well functioning institution that guards against the collecting societies and other licensing bodies abusing their monopoly position and stifling a competitive and dynamic digital content market.
- The reform of procedures with a view to supporting quick and cost effective resolution of licensing disputes so that the establishment of new UK based digital content business models are not unnecessarily delayed.
- The Intellectual Property Office should work to ensure that the procedures of the Copyright Tribunal do not compound the dominant position of licensing bodies, such as collecting societies and other rights holders, and reject demands to give collecting societies the right to refer cases to the Tribunal.

⁸ Jane Wakefield, [Last.FM joins Google's rights row](#), BBC News, 10 March 2009

⁹ Nate Anderson, [British music boss: we should have embraced Napster](#), ars technical, 28 June 2009

¹⁰ Aoife White, [EU pushes music industry to open up online rights](#), Associated Press, 26 May 2009

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