



**Consumer  
Focus**  
Campaigning for a fair deal

# **Consumer Focus response to Independent Review of IP and Growth**

**Part 1 - The Governance Framework:  
providing the institutional foundations for  
competition, innovation and growth**

**March 2011**

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# Executive summary

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Consumer Focus is the statutory consumer champion for England, Wales, Scotland and (for postal consumers) Northern Ireland. 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 welcomes the opportunity to respond to the [Independent Review of IP and Growth](#), announced by David Cameron in November 2011 and led by Prof Ian Hargreaves (the Hargreaves review thereafter).

In order to remove barriers to growth and innovation in the copyright framework, Consumer Focus believes the Hargreaves review should recommend changes in the governance framework and copyright law. In order to address the questions posed by the review adequately, we have divided our submission into two parts: Part 1 covers the Governance framework, focusing on its institutions, the balance between IP and competition law, and the question of how collecting societies can be restrained from abusing their monopolies. Part 2 covers key changes in the copyright framework necessary to support innovation and growth, including fair use rights, contract law, licensing solutions and enforcement.

In relation to the IP governance framework providing the foundations for competition, innovation and growth, we make the following key recommendations:

- Give the IPO a clear statutory duty to consolidate its policy functions, so that it supports innovation and growth in the long term
- Establish minimum standards for the treatment of members and users by collecting societies through a code of practice
- Consider merging the Copyright Tribunal into the Competition Appeal Tribunal and give it formal jurisdiction over abuse of dominant position by collecting societies

The two principal institutions of the UK IP governance framework are the IPO and the Copyright Tribunal. Historically the IPO has evolved from the patents system with the Patent Office formally becoming the IPO in 2007. The Copyright Tribunal has jurisdiction over the licensing of copyright and related rights by collecting societies and was established in 1988, succeeding the Performing Right Tribunal, which was established 1956 to restrain collecting societies from abusing their monopoly. Both institutions have undergone substantial change in the past four years. However, while significant progress has been made in building a working institutional governance framework, the UK currently lacks firm institutional foundations for a copyright system that supports innovation and competitive markets. The Gowers review did consider the IP governance framework, but focused mainly on the Patent Office, which subsequently became the IPO. The Copyright Tribunal was not reviewed at all, and only mentioned in the Review as part of the IP litigation system. The recent reform of the Copyright Tribunal has been progressed by the IPO following a 2007 review and an inquiry by the House of Commons Innovation, University and Skills Committee in 2008.<sup>1</sup>

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<sup>1</sup> See [The work and operation of the Copyright Tribunal](#), House of Commons Innovation, Universities & Skills, second report of session 2007-08, March 2008: [Review of the Copyright Tribunal](#), Intellectual property Office, May 2007

Consumer Focus believes that one of the main shortcomings of the Gowers review was to not consider the institutional IP governance framework in its entirety. In order to effectively identify the barriers to innovation and growth in the IP framework, the Hargreaves review needs to consider whether the institutional IP governance framework is effective. Specifically, the Hargreaves review should consider how an appropriate governance framework can be established to ensure that collecting societies do not abuse their monopoly and stifle competition in a wide range of markets. Restraining the collecting societies from using their monopoly unfairly<sup>2</sup> is central to an innovative and competitive market in copyrighted content and associated digital technology markets. Innovation and the mass use of copyrighted content requires appropriate licensing solutions by collecting societies. Yet the Gowers review only considered copyright licensing and the role of collecting societies very fleetingly, ignoring the apparent absence of a functioning IP governance framework to ensure that collecting societies do not abuse their monopoly. We believe the Hargreaves review team should consider the institutional governance framework with a view to facilitate competition.

Our response focuses on the role of the IPO in providing the necessary institutional governance framework to deliver copyright policy that continuously supports innovation and growth. After considering the appropriate balance of copyright and competition law in relation to relevant case law, we seek to answer the question how the UK can establish appropriate minimum standards through an approved code of practice. We also consider the case for bringing the abuse of dominant position by collecting societies formally within the jurisdiction of the Copyright Tribunal.

Part 1 of our response therefore seeks to provide input on the following questions posed by the call for evidence:

- Is there evidence of areas where the UK copyright framework does not deliver the optimal outcomes?
- Is there evidence to suggest that the current framework impacts the production and delivery of goods and services which consumers want?
- What evidence is there that the necessity / complexity / cost of obtaining permissions from existing rights holders constrains economic growth?
- What non-legislative changes could improve practices around copyright to improve overall outcomes?
- To what extent, if any, does the enforcement of IP rights operate as a trade barrier, particularly for UK companies attempting to expand overseas? Are there particular issues with particular countries?
- To what extent do the IP and competition frameworks complement or conflict with each other?
- Could growth and innovation be stimulated by a different balance between competition and IP?

A full list of recommendations on building an IP governance framework that provides the institutional foundations for competition, innovation and growth can be found below. Detailed recommendations on a statutory policy duty for the IPO and minimum standards for collecting societies reflecting relevant competition law are provided in information boxes on pg.11 and 40-41.

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<sup>2</sup> [The work and operation of the Copyright Tribunal](#), House of Commons Innovation, Universities & Skills, second report of session 2007-08, March 2008, pg.7 & 11

### Consumer Focus recommends that the Hargreaves review:

- updates the statutory functions of the Comptroller General, ie the IPO, to consolidate the IPOs policy functions and provide a institutional governance framework that supports innovation and growth in the long term
- recommends close co-operation between the IPO, BIS, the OFT and the Competition Commission to ensure the appropriate balance between competition law and IP law, this should include:
  - the OFT, together with the IPO, should issue guidance on the interplay between competition law and IP rights to UK companies
  - the new product and innovation balance tests should inform the UK's approach to competition questions in the creative and digital technology markets
  - relevant OFT and Competition Commission staff should be trained on case law relating to Article 102(b) of the EC Treaty/Section 18(2)(b) of the Competition Act 1998, ie abuse of dominant position includes – 'limiting production, markets or technical development to the prejudice of consumers'
  - the IPO, OFT and Competition Commission should raise awareness of relevant case law among the judiciary and UK based competition, IP and digital technology lawyers
  - the competition impact test for all changes to IP law should be published
- considers collective rights management and the role of collecting societies in facilitating innovative markets in detail
- recognises that collecting societies are effectively monopolies and that they must be effectively restrained from abusing their dominant position
- reviews the effectiveness of the UK's de minimus supervision of collecting societies in ensuring that collecting societies do not abuse their monopoly
- recognises that collecting societies need to adhere to minimum standards on the treatment of users, members and reciprocal representation agreements with other collecting societies
- establishes a code of practice for all collecting societies, approved either by the OFT or IPO, to ensure collecting societies refrain from abusing their monopolies
- recommends for a full market investigation into collective rights management by collecting societies as a matter of urgency, if collecting societies refuse to self-regulate through a code of practice
- Establishes an approved code of practice for collecting societies on the basis of the principles established in the 1988 and 1996 MMC investigations, relevant international commitments, relevant EU case law and UK competition law
- considers merging the Copyright Tribunal with the Competition Appeal Tribunal and extending its jurisdiction to instances where collecting societies have abused their dominant position
- considers a provision that would allow the OFT and Competition Commission to refer licences to the Copyright Tribunal

# The functions and duties of the Intellectual Property Office

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The IPO has a short but turbulent history, which is marked by a lack of purpose and policy capacity. The roots of the IPO are in the Patent Office, which was established by the Patents and Designs Act 1907 to assist the Comptroller General in registering patents and designs. 100 years later, in April 2007, the operational name of the Patent Office became the 'UK Intellectual Property Office'.<sup>3</sup> Like its predecessor the IPO became an executive agency of the Department of Trade and Industry (DTI) within the Office for Science and Innovation.<sup>4</sup> The change in name was recommended by the Gowers review in 2006, so as to correctly reflect the work of the executive agency and ease confusion.<sup>5</sup> The IPO's work was always thought to be linked to scientific innovation and, possibly in recognition of the IPOs increasing role in copyright, creativity. But the precise link between innovation and the work of the IPO and IP rights was not established. Yet the IPO was launched in 2007 with the strap line 'for creativity and innovation'<sup>6</sup> and the then chief executive, Ron Marchant, explained:



*'The name "The Patent Office" has been used for many years, during which time businesses have built upon other forms of Intellectual Property, such as Copyright, Trade Marks, and Designs. The strong recognition of the importance of all forms of Intellectual Property for successful and competitive UK businesses meeting the challenges of the global economy is reflected in the name change to the UK Intellectual Property Office.'*<sup>7</sup>

Following changes in the machinery of government in June 2007 the IPO became an Executive Agency of the Department for Innovation, Universities and Skills (DIUS).<sup>8</sup> DIUS had been established to deliver the previous Government's 'long term vision to make Britain one of the best places in the world for science, research and innovation'. The Government emphasised the importance of intellectual property for the UK economy and the role of the IPO was seen as 'enabling innovation in the widest sense'.<sup>9</sup>

Because the IPO's only statutory duty is to register patents, trademarks and designs it is particularly vulnerable to changes in machinery of government. The statutory basis for the IPO is the Section 26 of the otherwise repealed Patents and Designs Act 1907. It provides that the Patent Office should assist the Comptroller General in his duty to examine, grant and register patents, designs and trademarks as per the Patents Act 1977, the Trade Marks Act 1994, and the Registered Designs Act 1949. The Comptroller General acts under the

<sup>3</sup> [Name Change Fact Sheet](#), Intellectual Property Office, April 2007

<sup>4</sup> [What's in a name?](#) Intellectual property Office, April 2007

<sup>5</sup> [Gowers Review of Intellectual Property](#), HM Treasury, December 2006, pg.9

<sup>6</sup> [Name Change Fact Sheet](#), Intellectual Property Office, April 2007

<sup>7</sup> [What's in a name?](#) Intellectual property Office, April 2007

<sup>8</sup> [IPO Framework Document 2008/09](#), Intellectual Property Office, pg.3

<sup>9</sup> [New Minister of Innovation visits Newport](#), Intellectual property Office, July 2007

direction of the Secretary of State,<sup>10</sup> or responsible minister, and today the IPO Chief Executive acts as the Comptroller General and Principle Accounting Officer.<sup>11</sup> In relation to its statutory duties to register patents, trademarks and designs, the IPO furthermore has responsibility for maintaining patents granted by the European Patent Office under the European Patent Convention (EPC). It acts as a point of entry for transnational protection requests under the EPC and the Patent Co-operation Treaty and for the registration of Community Trade Marks or Trade Marks in other jurisdictions under the Madrid Protocol.<sup>12</sup>

In addition to these statutory functions the IPO, as an executive agency, is accountable to Secretary of State, or responsible minister. As such it undertakes functions beyond its statutory duties within the parameters of the framework agreements with ministers. As part of such framework agreements, the current and future executive and managerial functions of the IPO are drawn up by ministers and senior civil servants in the parent department.<sup>13</sup> In 2008/09 the IPO had the following executive functions:

- formulating and implementing UK Intellectual Property (IP) policy
- increasing awareness of business on the effective use of IP
- to raise awareness of, and the priority given to, anti-IP crime work and to build networks and capacity in the enforcement area<sup>14</sup>

According to the IPO's 2008/09 Framework Agreement, the primary aim of the IPO was to:

- 'manage an effective system for the protection of IPR as a foundation of the knowledge economy and a key element in promoting strong and competitive markets
- stimulate innovation and enhance the international competitiveness of British industry and commerce through the promotion and awareness of these rights and by promoting the UK's interests to harmonise, modernise and simplify international IP laws'

According to the framework agreement one of the core objectives of the IPO was to 'enhance innovation among British industry and commerce, and small and medium enterprises in particular' by increasing 'awareness, recognition and use of IP'. As such the IPO's work was supposed to contribute to the achievement of the DIUS objectives to:

- 'Accelerate the commercial exploitation of creativity and knowledge, through innovation and research, to create wealth, grow the economy, build successful businesses and improve quality of life
- Pursue global excellence in research and knowledge, promote the benefits of science and society, and deliver science, technology, engineering and mathematics skills in line with employer demand'<sup>15</sup>

Precisely how the IPO's work was supposed to contribute to the DIUS objective remains unclear, but the executive functions, aims and objectives of the IPO appear to assume that the use and enforcement of IP rights would encourage innovation and competitive markets. An overall implementation framework for DIUS's objectives was lacking, and a further change in the machinery of government saw DIUS merged with the Department for

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<sup>10</sup> [Patents and Designs Act 1907](#), Section 26

<sup>11</sup> [IPO Framework Document 2008/09](#), Intellectual Property Office, pg.5

<sup>12</sup> *Ibid*, pg.3

<sup>13</sup> Stuart Weir & David Beetham, [Political power and democratic control in Britain: the democratic audit of the United Kingdom](#), Routledge, 1999, pg.188

<sup>14</sup> [IPO Framework Document 2008/09](#), Intellectual Property Office, pg.3

<sup>15</sup> *Ibid*, pg.4

Business, Enterprise and Regulatory Reform (BERR) to form the Department for Business, Innovation and Skills (BIS) in June 2009. BIS was established to implement the previous Government's vision of competitiveness and productivity as set out in the New Industries, New Jobs paper published jointly by BERR and DIUS.<sup>16</sup> The IPO became an executive agency of BIS and has remained so following the 2010 general election and the transfer of media, broadcasting, digital and telecoms sector policy from BIS to dcms in January 2011.<sup>17</sup>

To the backdrop of the significant changes its parent departments underwent, the IPO has struggled to develop and consolidate its policy work ever since its formal creation in 2007. The weakness in policy capacity was inherited from the Patent Office, which despite its limited statutory duties to provide operational functions was made 'responsible for advising Ministers on the vast majority of IP policy'. Gowers recognised that the Patent Office had evolved beyond its narrow statutory duties and identified three principal concerns in relation to policy formulation at the Patent Office:

- 'policy development has often been reactive and has not taken into account changes in the economy and relevant developments in related policy areas
- there is no clear separation between operational and policy functions in the Patent Office, leading to a potential conflict of interest
- it has proven difficult to grow policy skills in the Patent Office'<sup>18</sup>

In order to address the identified shortcomings, Gowers recommended a clear split of responsibility between delivery and policy directorates and the establishment of a new Strategic Advisory Board for IP Policy (SABIP). SABIP was to replace the Intellectual Property Advisory Committee (IPAC), established in 2001 by the DTI, and the Gowers review took the view that a 'strong, independent body' was best placed to contribute to IP policy development. The failure of IPAC was attributed to an insufficiently clear remit, inadequate resources, and a 'membership drawn from too narrow a group of stakeholders.' SABIP was therefore to be given a 'clear and coherent remit to provide a strategic overview of policy and to challenge Government policy-making' while being operationally independent from Government. The Board was to be drawn from a wide range of external experts and relevant government departments, and it was given a significant function in commissioning external research.<sup>19</sup>

While Consumer Focus believes that SABIP had an important role in driving the debate on IP policy issues and commissioned excellent, and much needed, independent research, we believe that Gowers' recommendation was not designed to address the problems he identified. Namely that policy development by the Patent Office had frequently been reactive and that policy skills within the Patent Office were not further developed. Gowers found that the Patent Office had not been effective 'at taking a strategic view of IP policy' and 'has not always been effective at linking IP and other, related areas, such as, trade, health and broader innovation policy.'<sup>20</sup> In recommending the creation of a non-departmental public body, with principal responsibility to commission independent research, Gowers effectively prevented the newly established IPO from developing the necessary internal policy capacity to accomplish its duty as an executive agency to advise the responsible Minister on IP policy and implement such policy. The newly established IPO lacked the resources to develop policy internally, or to commission independent research, to help shape forward looking

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<sup>16</sup> [Change in the machinery of Government](#), No10, June 2009

<sup>17</sup> [Transfer of responsibilities from BIS to DCMS](#), Department for Culture, Media & Sport, January 2011

<sup>18</sup> [Gowers Review of Intellectual Property](#), HM Treasury, December 2006, pg.111

<sup>19</sup> [Gowers Review of Intellectual Property](#), HM Treasury, December 2006, pg.112-113

<sup>20</sup> [Gowers Review of Intellectual Property](#), HM Treasury, December 2006, pg.112

policy. Therefore the IPO was ill equipped to fulfil its executive function of formulating and implementing IP policy.

Under the coalition Government the IPO has made important steps towards fulfilling its executive functions. SABIP was abolished and the IPO is now an 'integral part of BIS' efforts to promote innovation by protecting and helping to build on UK strengths in knowledge-intensive industries such as design, the creative industries and innovative manufacturing.' According to BIS, the IPO is the executive agency responsible for patents, trademarks, designs and copyright, and it is the role of the IPO to 'promote innovation in the UK by providing a clear, accessible and widely understood IP framework that enables creators, users and customers to benefit from knowledge and ideas.' The role of IP in enabling innovation is understood primarily in terms of allowing 'businesses and individuals to commercialise their ideas and innovations, providing an incentive to the creation and dissemination of knowledge, culture and products that create value for consumers.'<sup>21</sup> The policy capacity of the IPO has been strengthened by the employment of a chief economist, and the IPO is now undertaking in-house research and commissions research where necessary, to support the development of appropriate IP policy.

Despite the progress that has been made in the past year, Consumer Focus believes that the IPO has not yet fully matured as executive agency. The IPO needs to provide the appropriate institutional governance framework to establish and maintain an IP framework that supports an innovative and competitive markets. In order to provide a firm basis for the IPO, the Hargreaves review should make recommendations with a view to strengthen the IPO's policy capacity and provide the IPO with a clear duty in relation to IP policy. Over the past 300 years the IP framework has continuously developed to remain relevant in the face of technological change. The past 10 years have seen an accelerated proliferation of digital technologies, which is due to continue. Therefore there is an urgent need for an executive agency that can guide policy making so as to ensure that the IP framework does not become rapidly outdated, to the point of becoming irrelevant and/or a significant barrier to innovation and growth.

The IPO will only be able to provide the Minister with timely advice on the wide range of economic and technological developments relating to IP policy, if it has the corresponding policy and research capacity. And the IPO will only be able to implement the Minister's IP policy, and changes to the legal IP framework, if it has a strong internal policy capacity. Since the last comprehensive update of copyright law in 1988 the law has become severely outdated to the point where it hinders innovation. Successive attempts to update the law, such as the Gowers review, have failed. We believe that the lack of an executive agency with clear policy mandate and fully developed internal policy capacity has contributed to this situation. We therefore recommend that the IPO should be given a clear mandate to consolidate and strengthen its policy capacity and in doing so provide the UK with firm institutional foundations for an IP system that supports innovation and competitive markets.

In order to put the policy work of the IPO on firm foundations we recommend that Section 26 of the Patents and Designs Act 1907 is repealed and that a section on the duties of the Comptroller General, and by extension the IPO, is amended into the Copyright, Designs and Patents Act 1988. Formally giving the IPO functions and duties appropriate for the digital age some 100 years after the Patent Office was established is not merely a symbolic change, it would be the foundation for an IP framework where businesses effectively innovate by harnessing technological developments to meet consumer demand. It would establish the IPO as the principal governance institution, able to support ministers in the implementation

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<sup>21</sup> [IPO Corporate Plan 2010/11 – Creativity, Innovation, Ideas](#), Department for Business, Innovation and Skills, October 2010, pg.5

of IP policies. IP provides the regulatory backbone for a wide range of industries, with copyright effectively regulating the production, distribution, reuse and consumption of creative content. As such the IPO needs to be effectively equipped to provide continuous policy development and implementation work, withstanding changes in the machinery of government.

### **Functions and duties of the Intellectual Property Office: Proposal for inclusion in the Copyright, Designs and Patents Act**

The Intellectual Property Office shall be under the immediate control of the comptroller, who shall act under the direction of the Secretary of State.

The Intellectual Property Office shall have the function of assisting the comptroller in performing his functions under this Act or under any enactment

It is the function of the comptroller to –

- register patents, designs and trade marks under this Act, the Patents Act 1977, the Registered Designs Act 1949 and the Trade Marks Act 1994, and
- make proposals, or give other information or advice, on matters relating to patents, designs, trade marks and copyright to the Secretary of State or other public authority (including proposals, information or advice as to any aspect of the law or a proposed change in the law).

In carrying out those functions the comptroller shall –

- obtain, compile and keep under review information about matters relating to the carrying out of his functions,
- carry out, commission or support (financially or otherwise) research,
- give information or advice in respect of matters relating to any of his functions to the public, and
- carry out and publish an assessment of the likely impact of implementing where a proposal is likely to have a significant impact on inventors, designers, authors, consumers, the general public or businesses in relevant markets.

It shall be the principal duty of the comptroller, in carrying out his functions –

- to further the interests of inventors, designers, authors, consumers and the general public in relation to patents, designs, trade marks and copyright;
- to encourage production, markets or technical development for the benefit of consumers;

In carrying out his duties the comptroller must have regard, in all cases, to –

- the desirability to promote innovation and competition in relevant markets
- the desirability to promoted research and education
- the interests and duties of educational establishments, library and archives
- the public interest provisions in this Act, including but not limited to, the provisions on visual impairment, education, libraries and archives and public administration

We therefore strongly recommend that the Hargreaves review team assesses the IP governance framework as part of the review, with a view to establishing the institutional framework for innovative and competitive market. The IPO should build close relationships with relevant competition authorities in the UK and EU. The precise role of the IPO in supporting competition as part of its mandate to develop IP policy should be subject to further debate. The fact that the IPO needs to consider the impact of competition as part of its policy making is inherent, given that copyright effectively regulates the creation, mass production, distribution, adaptation and consumption of creative content. The interplay between IP and competition law, and the implications for a IP governance framework fit to support innovation and growth are explored further below.

**Consumer Focus recommends that the Hargreaves review:**

- updates the statutory functions of the Comptroller General, ie the IPO, to consolidate the IPOs policy functions and provide a institutional governance framework that supports innovation and growth in the long term

# Creative and digital technology industries – balancing competition law and IP rights to support the network effect

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Historically UK courts have been reluctant to apply competition law in cases where copyright law or other IP rights have been engaged.<sup>22</sup> Overall the UK has a weak track record in aligning competition law and copyright law, and the link between the two areas of law is generally poorly understood. There is little guidance available on IP rights and UK competition law. In 1998 the OFT published *Guidelines on the Application of the Competition Act to Intellectual Property*, which was welcomed by the legal profession and business community, though the need for further clarification was emphasised. In 2005 it was reported that the OFT intended to publish updated guidelines.<sup>23</sup> But neither the original guidelines nor any updated guidelines appear to be currently available. Guidance should be issued as a matter of urgency, and the IPO, the OFT and the Competition Commission should co-operate more closely to ensure that competition and copyright policy together foster competitive and innovative markets for the benefit of consumers.

Domestic competition law is primarily derived from the Competition Act 1998, which was a radical departure from the previous competition regime. The Competition Act harmonises UK competition law with EU law, namely Article 101 and 102 of the EC Treaty, to ensure that UK businesses do not have to comply with two vastly different competition regimes. Section 60 of the Competition Act requires consistency with EU law<sup>24</sup> and Chapters I and II of the Competition Act on *Agreements* and *Abuse of Dominant Position* are closely modelled on Article 101 and 102 of the EC Treaty.<sup>25</sup>

## EU competition law – Article 101 and 102 of the EC Treaty

The competition rules of the European Community can be found in Chapter 1 of the Treaty on the Functioning of the European Union (the EC Treaty thereafter), Chapter 1 Rules on Competition, Article 101 to 109. Together with a range of regulations these articles form EU competition law, with 101 and 102 (formerly Articles 81 and 82) being of special importance.

Article 101(1) prohibits agreements, decisions or concerted practices which restrict or distort competition and which may affect trade between member states. Article 101(2) confers the power to declare any such agreement void. Anti-competitive agreements are defined as agreements which have ‘as their object or effect the prevention, restriction or distortion of competition’ and in particular those which:

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<sup>22</sup> Catherine Colston & Jonathan Galloway, [Modern Intellectual Property Law](#), Taylor & Francis, 2010, pg.432

<sup>23</sup> *Ibid*, pg.26 & 27

<sup>24</sup> *Ibid*, pg.25-27

<sup>25</sup> [Competition Law](#), Department for Business, Innovation & Skills

- ‘Directly or indirectly fix purchase or selling prices or any other trading conditions
- Limit or control production, markets, technical development, or investment
- Share markets or sources of supply
- Apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage
- Make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts’

Article 102 prohibits any abuse by one or more undertakings of a dominant position which may affect trade. Such abuse may, in particular, consist in:

- ‘Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions
- Limiting production, markets or technical development to the prejudice of consumers
- Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage
- Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.’<sup>26</sup>

Prior to the Competition Act 1998 UK competition authorities generally considered IP rights to be similar to property agreements, such as leases, and IP rights, such as copyright, were thought to have a benign effect on competition.<sup>27</sup> In contrast the European competition authorities have, since the mid 1980s, produced significant case law on the alignment between IP rights and competition law under the EC Treaty. When the Competition Act 1998 became law it was understood that it would apply to IP rights. The Department for Trade and Industry (DTI) at the time planned for European competition case law in relation to IP rights to be applied in the UK, with a consultation from the time stating that:

*‘Our present view on intellectual property under a prohibition-based approach is that the boundaries of what is acceptable and what is anti-competitive is best established from European jurisprudence. Different treatment for intellectual property rights under the Competition Act regime and European regime seems neither necessary nor desirable and is likely to increase the burden on business of compliance.’<sup>28</sup>*

The two key legal principles established by EU case law in relation to abuse of dominant position and IP rights are the ‘new product’ test and the ‘innovation balance’ test. Both tests relate to the interpretation of Article 102(b) of the EC Treaty, which is mirrored in section 18(2)(b) of the Competition Act 1998.<sup>29</sup> The provision states that conduct amounting to abuse of a dominant position in particular if it consists in:

<sup>26</sup> [Consolidated version EC Treaty](#), Article 101 and 102

<sup>27</sup> Catherine Colston & Jonathan Galloway, [Modern Intellectual Property Law](#), Taylor & Francis, 2010, pg.26

<sup>28</sup> Competition Act 1998, Exclusion of Vertical Agreements, Consultation on Draft Order, para 2, quoted in Catherine Colston & Jonathan Galloway, [Modern Intellectual Property Law](#), Taylor & Francis, 2010, pg.26

<sup>29</sup> Jae Hun Park, [Patents and Industry Standard](#), Edward Elgar Publishing, 2010, pg.72; Damian Chalmers, Christos Hadjiemmanuil, Giorgio Montis & Adam Tomkins, [European Union Law Book and Updating Supplement Pack: Text and Materials](#), Cambridge University Press, 2008, pg.78–79

*'(b) limiting production, markets or technical development to the prejudice of consumers'*<sup>30</sup>

In the 'new product test' and 'innovation balance' test consumer prejudice for the purpose of Article 102(b) is primarily interpreted in terms of consumer choice, or lack of it.<sup>31</sup> While the 'new product test' primarily focuses on the development of new products for consumers in the downstream market, the 'innovation balance' test also considers innovation, limitations of markets and technological development.<sup>32</sup> The new product test was established through case law in the late 1980s and the innovation balance test rests on 2007 case law. The case law is legally binding in the UK, though we are not aware of the UK competition authorities having applied either test in relation to IP rights and competition. Section 18(2)(b) of the Competition Act 1988 is identical to Article 102(b), and Consumer Focus believes that the two tests should inform the UK approach to competition law and IP rights with a view to support innovation in UK-based digital and creative industries. In order for the UK to build a functioning competition framework that supports innovation and competition in the creative and digital technology industries, UK competition authorities need to take better account of the network effects operating in these markets. Particularly when determining the impact of monopolies and dominant players on upstream and downstream markets.

### **EU competition case law: the 'new product test'**

The 'new product test' was developed through case law at the EU level from the mid 1980s onwards. The most significant case is *Magill* (1989), concerning television programme schedules. The case was heard as a competition case, though the UK and Irish TV broadcasters used copyright law to argue that they would not need to issue reliable advance TV programme schedule information, as they owned the copyright to the information. EU copyright law is only partially harmonised with the UK and Ireland being the only EU member states in which television programme schedules are copyrighted because copyright law includes 'a table or compilation other than a database' in the definition of 'literary work'.<sup>33</sup>

In other EU member states comprehensive TV guides were popular and common, and the EC found that each of the three broadcasters were dominant in the market for weekly TV listings in the UK and Ireland. The refusal by the BBC, RTE and ITP to provide the Irish publisher Magill with information for a comprehensive TV guide was judged to be a refusal to supply. EU competition authorities concluded that the broadcasters intended to protect their own weekly TV guides in the downstream market by restricting the availability of the information. As such their refusal to supply was ruled to be a violation of Article 102 of the EC Treaty in that the broadcasters abused their dominant position by 'limiting production, markets or technical development to the prejudice of consumers'.<sup>34</sup>

In what became known as the 'Magill requirements', or the 'new product test', the refusal to license by a copyright owner can be an abuse of a dominant position under competition law if doing so prevents the appearance of a new product for which there is

<sup>30</sup> Competition Act 1998, section 18(2)(b) & EC Treaty Article 102(b)

<sup>31</sup> Catherine Colston & Jonathan Galloway, [Modern Intellectual Property Law](#), Taylor & Francis, 2010, pg.432

<sup>32</sup> Jae Hun Park, [Patents and Industry Standard](#), Edward Elgar Publishing, 2010, pg.72; McMahon, Kathryn, [Interoperability: 'Indispensability' and 'Special Responsibility' in High Technology Markets](#), Warwick School of Law Research Paper Series, 2009

<sup>33</sup> [Copyright, Designs and Patents Act 1988](#), Section 3(a)

<sup>34</sup> Damian Chalmers, Christos Hadjiemmanuil, Giorgio Montis & Adam Tomkins, [European Union Law Book and Updating Supplement Pack: Text and Materials](#), Cambridge University Press, 2008, pg.78–79; Alison Jones & Brenda Suftrin, [EC Competition Law: Text, Cases and Materials](#), Oxford University Press, 2007, pg.557–558

consumer demand and if it eliminates all competition in this downstream market. The test was subsequently confirmed in *Ladbroke* (1997) and more recently in *IMS Health versus NDC Health* (2004).<sup>35</sup>

As such the 'innovation balance test', which specifically considered network effects, should be a guiding principle for UK competition authorities when dealing with cases involving the creative and digital technology industries. Both the creative and the digital technology industry are characterised by dominant companies with large market shares and monopolies, as well as a complex ecosystem of entrepreneurs, micro-businesses and SMEs. This is a side effect of the 'network effect', where a single standard emerges as dominant once sufficient numbers of consumers have adopted it. As such, one producer tends to dominate the market and their products become the 'standard' or the 'gatekeeper' for complementary products. Despite the dominance of some players, such markets can experience a high degree of competition through the 'neo-Schumpeterian' effect; if they are characterised by rapid innovation and paradigm shift. Competition is on innovation, not price of a product, and companies will invest in innovation and development to dislodge the incumbent with new technology. This leads to fragile, temporary and serial monopolies.

However, the ability to dislodge the incumbent is reduced if the dominant company can prevent network effects by, for example, constraining consumer choice through lock-ins and high switching costs, or by preventing other companies from producing complementary interoperable products. A 'direct network effect' includes the utility consumers derive from the number of other consumers who choose to use the same product. An 'indirect network effect' is the sale of complementary goods and services. Consumers will attach a higher value to products, for example an operating system, if a high number of complementary products, such as software applications, can interoperate with the product. At the same time companies are more likely to develop interoperable complementary products for a product which has attracted a high number of consumers, known as 'positive feedback'. In economic terms companies that operate in markets with network effects produce products for a 'two-sided market', as they have to attract both consumers and producers of interoperable complementary products.<sup>36</sup>

### **EU competition case law: the 'innovation balance test'**

The 'innovation balance test' originates in the *Microsoft* (2007) case where Microsoft refused to provide interoperability information for its operating system to software companies. The case specifically looked at competition in the digital technology market and the ability of other companies to develop software that is interoperable with Microsoft's operating system. Microsoft claimed that the information is protected under copyright and other IP rights<sup>37</sup> and argued that the technology of the operating system itself was protected by IP rights. This defence was rejected by the European competition authorities who concluded that Microsoft's refusal to supply interoperability information could not be objectively justified merely by the existence of IP rights.

It was held that Microsoft's refusal to provide interoperability information had the effect of 'stifling competition in the impacted market and of diminishing consumers' choice by locking them into a homogenous Microsoft solution.' Microsoft's operating system had a market share of 90 per cent and Microsoft was found to be dominant in the 'client PC market'. The dominance was maintained through a positive feedback loop, which acted

<sup>35</sup> Ibid, pg.561: McMahon, Kathryn, [Interoperability: 'Indispensability' and 'Special Responsibility' in High Technology Markets](#), Warwick School of Law Research Paper Series, 2009

<sup>36</sup> Ibid

<sup>37</sup> Ibid

as significant barrier to entry for competitors. The dominance was further reinforced by a direct network effect as consumers chose a product they believed offered network gains. This allowed Microsoft to set the de facto standard for competitors and software developers in particular.

As such the interoperability information was judged to be indispensable, as it was necessary for others to operate in the upstream and downstream market, and only Microsoft could provide the information. Reverse engineering was found to be costly, time-consuming and technically difficult,<sup>38</sup> and the Software Directive confirms that EU law on reverse engineering is 'without prejudice to the application of the competition rules under Articles 101 and 102 of the Treaty if a dominant supplier refuses to make information available which is necessary for interoperability'.<sup>39</sup>

European competition authorities concluded that Microsoft's conduct was at 'risk of eliminating competition' and that 'technologies that will lead to further locking into Microsoft's products at the work group server and client PC level are quickly gaining traction in the market.' Evidence of a causal link between the market evolution and the interoperability advantage enjoyed by Microsoft was established and that Microsoft wanted to leverage its power from the PC client market to the downstream server market, two markets which were judged to have 'strong associative links, both commercial and technological'. European competition authorities concluded that Microsoft's real intention was to protect its dominant position by reinforcing barriers to entry in the PC market, as the market was shifting from the client PC model to the server-oriented model. Microsoft wanted to prevent entry to this market by 'imposing its own proprietary technology as the de facto standard'.<sup>40</sup> In doing so European competition authorities established what is now known as the 'innovation balance test'<sup>41</sup> concluding that 'on balance, the possible negative impact of an order to supply on Microsoft's incentives to innovate is outweighed by its positive impact on the level of innovation of the whole industry (including Microsoft). As such, the need to protect Microsoft's incentives to innovate cannot constitute an objective justification that would offset the exceptional circumstances identified'.<sup>42</sup>

Software, including video games, is the creative content most closely associated with network effects, although music and e-books equally rely on the effects. The need for other compatible goods, eg hardware and software that can read, reproduce, and interoperate with digital music or e-books, is the most obvious example of the network effect.<sup>43</sup> Licensing practices, including the refusal to licence, allows copyright owners to influence the development of new products in these markets and consumer choice. Through the network effect copyright owners have a direct impact on downstream markets, such as the retail market and the associated hardware and software markets.

UK competition law is concerned with competition in the UK market, while EU competition law has jurisdiction over the single market and cross-border trade within it. The failure of the UK competition authorities to apply the case law underlining the new product test and the

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<sup>38</sup> Ibid

<sup>39</sup> [Software Directive \(Directive 91/250/EEC\)](#), Preamble

<sup>40</sup> McMahon, Kathryn, [Interoperability: 'Indispensability' and 'Special Responsibility' in High Technology Markets](#), Warwick School of Law Research Paper Series, 2009

<sup>41</sup> Jae Hun Park, [Patents and Industry Standard](#), Edward Elgar Publishing, 2010, pg.73; Catherine Colston & Jonathan Galloway, [Modern Intellectual Property Law](#), Taylor & Francis, 2010, pg.432

<sup>42</sup> McMahon, Kathryn, [Interoperability: 'Indispensability' and 'Special Responsibility' in High Technology Markets](#), Warwick School of Law Research Paper Series, 2009

<sup>43</sup> Susanne Royer, [Strategic management and Online selling: creating competitive advantage with intangible Web goods](#), Routledge, 2005, pg.65

innovation balance test means that UK companies now effectively have to comply with two different treatments for IP rights under the Competition Act regime and European regime. The prevailing treatment of IP rights by UK competition authorities makes it likely that they would come to a different conclusion than their European counterparts in relation to cases involving questions of competition and IP rights. This is evident with regards to *ITV Publications v Time Out* (1984), a case similar to *Magill* which was first considered by European competition authorities in 1986 and decided in 1989. In *ITV Publications v Time Out* the BBC and ITV were sued by a UK publisher for not providing TV programme schedule information. The case was decided in favour of ITV and the BBC and the copyright was upheld. A reference was made to the Monopolies and Mergers Commission in 1985, which found that the copyright had been abused, but that this was not to the detriment of the 'public interest'. The dispute came to an end with the Broadcasting Act 1990, which placed a statutory duty on ITV and the BBC to provide TV listings free of charge, while copyright was maintained on additional programme information.<sup>44</sup> The example points to another problem with UK competition framework prior to the Competition Act 1998, when anti-competitive behaviour frequently went unchallenged because it is not against the 'public interest', an approach that lacked transparency and definition.

Failure by the UK competition authorities to implement the new product and innovation balance tests will be to the detriment of SMEs who want to develop new products in the market dominated by an incumbent, or the downstream markets the incumbent influences through copyright licensing. While this may attract more incumbents to headquarter in the UK, it will act as a deterrent for entrepreneurs, micro-businesses and SMEs, who find that the UK regulatory system does not allow them to compete with incumbents in an innovation focused market. Therefore rapid innovation and paradigm shift, ie the 'neo-Schumpeterian' effect, would be prevented and incumbents would establish permanent dominance and monopolies. Faced with a market that makes dislodging the incumbent through innovation, or even just producing complementary products to existing ones, near impossible, entrepreneurs, micro-businesses and SMEs may choose to locate in another EU country, such as Ireland. This would allow them to take advantage of EU competition law and use EU competition authorities to challenge UK based incumbents, eg force them to release interoperability information. A lack of entrepreneurs, micro-businesses and SMEs who challenge the incumbent with new innovative products will be to the detriment of consumers, as their demand is not matched by technological developments and their choice is diminished through lock-ins by the incumbents. And it would be to the detriment of the UK economy as economic growth through innovation is prevented.

No change in primary legislation is required for the new product test and the innovation balance test to inform UK competition authorities' approach to competition questions in the creative and digital technology industries. Article 102(b) of the EC Treaty is mirrored in Section 18(2)(b) of the Competition Act 1998, and the European case law underlining both tests are relevant in the UK jurisdiction. We therefore believe that the Hargreaves review should make recommendations that facilitate the application of competition law to IP rights and establish close working relationships between the IPO, BIS, the OFT and Competition Commission. Relevant staff should receive training on case law and the interpretation of Section 18(2)(b) and network effect theories. The OFT should, in close collaboration with the IPO, provide the creative and digital technology industries with guidance on the new product and innovation balance tests. It is also important that the judiciary and the legal profession are aware of the relevant case law. Therefore the IPO, OFT and Competition Commission should work together to raise awareness among judges and UK based competition, IP and

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<sup>44</sup> Catherine Colston & Jonathan Galloway, [Modern Intellectual Property Law](#), Taylor & Francis, 2010, pg.432

digital technology layers, through relevant training and seminars. It is encouraging that the *Competition impact test guidelines* issued by the OFT for new legislation acknowledges that changes to IP law require special competition consideration, we believe that the IPO needs to work more closely with the OFT in relation to proposed changes to UK IP law.<sup>45</sup> The Competition Impact assessment for any changes to IP law, whether through primary or secondary legislation, should be published and the impact of the proposed changes on new entrants to a market, or upstream and downstream markets should be fully assessed.

**Consumer Focus recommends that the Hargreaves review:**

- recommends close co-operation between the IPO, BIS, the OFT and the Competition Commission to ensure the appropriate balance between competition law and IP law, this should include:
  - the OFT, together with the IPO, should issue guidance on the interplay between competition law and IP rights to UK companies
  - the new product and innovation balance tests should inform the UK's approach to competition questions in the creative and digital technology markets
  - relevant OFT and Competition Commission staff should be trained on case law relating to Article 102(b) of the EC Treaty/Section 18(2)(b) of the Competition Act 1998, ie abuse of dominant position includes – 'limiting production, markets or technical development to the prejudice of consumers'
  - the IPO, OFT and Competition Commission should raise awareness of relevant case law among the judiciary and UK based competition, IP and digital technology lawyers
  - the competition impact test for all changes to IP law should be published going forward

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<sup>45</sup> [Completing competition assessments in Impact Assessments – Guidelines for policy makers](#), Office of Fair Trading, August 2007, pg.8, 25 & 32

# Restraining collecting societies from abusing their monopoly – reconciling monopolies with competitive and innovative markets

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Collecting societies emerged shortly after the establishment of copyright law<sup>46</sup> and, like copyright law, have historically evolved at national level. Traditionally collecting societies have discouraged membership application from nationals of other countries<sup>47</sup> and only granted licences to users based in the country they are based. Today authors, composers, publishers, writers, photographers, musicians and performers are commonly represented by collecting societies. Collecting societies undertake collective rights management on behalf of their copyright and related rights-owner members. Rights typically administered by collecting societies include the right to public performance, eg playing music in clubs; the right to broadcasting, eg the broadcast of live or recorded performances; and mechanical reproduction rights in recorded music, eg the reproduction of recorded music as CDs. Collecting societies act on behalf of their members and issue copyright licences to users, authorising the use of the works of their members. Collecting societies negotiate the royalty rates and other licence terms on behalf of their members, who are typically not directly involved in the licence negotiations. Once the license has been issued collecting societies collect royalty payments and distribute them to relevant members.<sup>48</sup>

Consumers have an interest in effective collective rights management that does not impose unnecessary costs on collecting societies and does not stifle competition or the emergence of new digital content business models. Consumers do not obtain licences from collecting societies, but consumers enjoy copyrighted works in public and commercial premises which need to obtain a licence. This is particularly relevant to copyrighted music; for example, any retail outlet or pub playing music to consumers needs a licence, as do workplaces where employees listen to the radio. Broadcasters, pubs, clubs, advertisers, and online and mobile retailers cannot give consumers access to music, or meet consumer demand for music, without obtaining a licence from the music collecting societies, Performing Rights Society (PRS) and Phonographic Performance Limited (PPL). In relation to collective rights management, the music sector frequently deserves special attention because, as the European Commission has stated, 'no other sector operates such complex licensing arrangements.'<sup>49</sup> Though there are also ongoing issues in relation to other content types,

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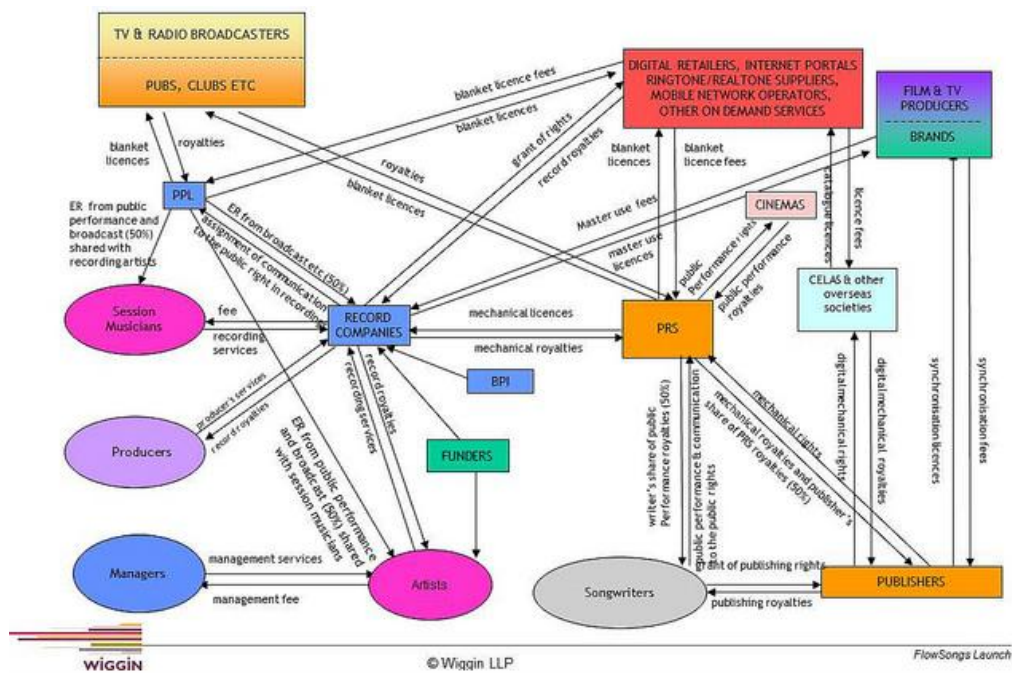
<sup>46</sup> [Collective Management in Reprography](#), World Intellectual Property Organisation & International Federation of Reproductive Rights Organisations, pg.9

<sup>47</sup> Nigel Parker, [Music business: infrastructure, practice and law](#), Sweet & Maxwell, 2004, pg.208

<sup>48</sup> [Collective Management of Copyright and Related Rights](#), World Intellectual Property Organisation

<sup>49</sup> [Commission Staff Working Document: Study on a Community Initiative on the Cross-Border Collective Management of Copyright](#), Commission of the European Communities, Brussels, 7 July 2005, pg.7

such as film and literary works, particularly in relation to the licensing to educational institutions and libraries.



[Wiggin LLP: Working in Music, The flow of rights and royalties in music](#)

Consumer Focus is particularly concerned that individual entrepreneurs, micro-businesses and SMEs who seek to obtain a licence from collecting societies are unreasonably refused a licence, or have unreasonable licence terms or rates imposed on them. Entrepreneurs, micro-businesses and SMEs have a key role to play in a competitive and innovative market in copyrighted content. But they will be unable to challenge the licence terms and rates imposed on them by collecting societies because the cost of doing so in the Copyright Tribunal is unaffordable. This puts entrepreneurs, micro-businesses and SMEs at a severe disadvantage when negotiating licences and is likely to stifle competition and prevent the development of new products in line with technological developments and consumer demand. The cost of obtaining necessary licensing, especially in terms the time it takes to negotiate such licences, is likely to act as a barrier to the development of new digital business models by entrepreneurs, microbusinesses and start-ups. In 2005, the European Commission, quoting the European Digital Media Association (EDIMA) which represents online music providers, said that, 'The direct cost of negotiating one single licence amounts to €9,500 (which comprises 20 internal man hours, external legal advice and travel expenses). As mechanical rights and public performance rights in most Member States require separate clearance, the overall cost of the two requisite licences per Member State would amount to almost €19,000.'<sup>50</sup>

Ongoing issues in relation to the way in which UK collecting societies operate and treat both their members and users make it, in our view, necessary for the UK to reconsider its de minimus approach to the supervision of collecting societies. All collecting societies should meet minimum standards on transparency, accounting, the publication of tariffs, distribution keys, annual accounts and management costs. To ensure that they effectively serve the interest of their members and users, and support the innovative mass use of copyrighted

<sup>50</sup> Digital Economy Bill Impact Assessment, Department for Business, Innovation & Skills, November 2009, pg.192-193

content in competitive market, minimum standards on the treatment of users, members and reciprocal representation agreements with other collecting societies should be set. Such minimum standards would ensure that collecting societies operate effectively without imposing unnecessary cost on the creative and digital technology industries. They are necessary to support economic growth through innovation, and to maintain the UK's international competitiveness. UK collecting societies will increasingly have to compete with collecting societies from other member states, who in many cases will offer their members and users minimum standards of efficiency and accountability. The European Commission has been, for a number of years, considering whether to harmonise the supervision of collecting society at a minimum level.<sup>51</sup> We believe that the UK should support the European Commission in its efforts in the long term. In the short term the UK should take action at national level to ensure that UK collecting societies are able to compete with their European counterparts and take full advantage of cross-border licensing to generate exports and inward investment.

### **Online and mobile distribution of copyrighted content: four content delivery models**

- Streaming – the online delivery of sound recordings, listened to once in real time
- Downloading – online delivery of copies of sound recordings, allowing repeated listening
- Simulcasting – simultaneous real-time online delivery of a conventional TV or radio broadcast programme or service
- Webcasting – real-time exclusively online delivery of services similar to conventional TV and radio programmes which include music

In order to take account of online distribution of content the InfoSoc Directive introduced a new exclusive right under copyright law, the so called 'making available' right. The right covers the 'making available' of copyright works 'to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them'. The making available right covers on-demand services, ie those services whose content is controlled by the consumers, such as streaming and downloading. But it does not apply to simulcasting or webcasting because the consumer has no choice over the content of these services.<sup>52</sup>

Restraining the collecting societies from abusing their monopoly is central to an innovative and competitive market in copyrighted content and associated digital technology markets. Innovation and the mass use of copyrighted content requires appropriate licensing solutions by collecting societies. The licensing of copyrighted content is central to the economy; without it much of what has been created would not be seen or heard by any significant number of consumers. This is particularly true for collective right management, ie the collective licensing of copyright and related rights, by collecting societies. The businesses that provide the link between consumers and the owners of copyright and related rights, such as BSkyB, iTunes, Amazon, YouTube, start-ups and technology SMEs, all depend on collective rights management, and so does the local pub and shop playing music.

It would not be economically viable to make large amounts of content with different copyright and related rights owners available to consumers without collective rights management, because the cost of clearing all rights on a individual basis would be prohibitive. By licensing

<sup>51</sup> Ernst-Joachim Mestmacker, [Collecting Societies](#), European University Institute, 2005, pg.10

<sup>52</sup> Nigel Parker, [Music business: infrastructure, practice and law](#), Sweet & Maxwell, 2004, pg.211

large repertoires of copyright works collecting societies effectively facilitate the mass use of copyrighted content. According to PPL, one of the oldest collecting societies, they are:

*'a straightforward service organisation aggregating the rights so that any music user can get a single licence covering the entire repertoire. In our case the entire repertoire is sound recordings. The pub [...] has to get one licence to play music for the entire year and that is the entire catalogue, rather than three and a half thousand licences from three and half thousand record companies.'*<sup>53</sup>

### **Collective rights management v the free market**

In 1988 the Monopolies and Mergers Commission (MMC) investigated PPL and after considering the pros and cons of collective rights management the investigation concluded that 'collective licensing bodies are the best available mechanism for licensing sound recordings provided they can be restrained from using their monopoly unfairly'.<sup>54</sup>

The MMC began its analysis by looking at the feasibility of a free market, that is, a situation in which the owner of copyright and related rights negotiate separately with each prospective user. This would reduce the bargaining power enjoyed by copyright and related rights owners who are members of a collecting society, and permit fees that are determined by a freer interplay of supply and demand. Although the MMC noted that substantial power would continue to rest on the supply side with the large record companies and on the buyer side with large users such as the BBC. According to the MMC a free market would result in a wide variety of contract emerging. Copyright and related rights owners may offer a fee for unlimited use of repertoires, or only licence part of their repertoire, while other owners would negotiate a different fee for all uses. The existing practice of new record companies offering new recordings for free to encourage their consumption, could be extended according to the MMC. Ultimately removing the collective rights management structure would remove 'a number of factors which currently restrict or distort the choices available to both owners of copyright and related rights, and users'.<sup>55</sup>

However, the MMC also noted that if collective rights management would be abolished, larger owners of copyright and related rights and larger users such as the BBC would be able to continue to negotiate licences, while smaller owners and users would be unable to cope. On this basis the MMC considered the merits of collective rights management and concluded that the collective rights management should offer the following benefits:

- Guarantee users immediate access to the licensor's repertoire
- Keep to a minimum the administrative costs incurred by users and owners
- Provide for the use of copyright from works that have yet to be made (and hence are of unknown value)
- Meet the needs of owners and users whatever the scale of their business.

The MMC also noted that the convenience collecting societies offer to both its members

<sup>53</sup> [The work and operation of the Copyright Tribunal](#), House of Commons Innovation, Universities & Skills, second report of session 2007-08, March 2008, pg.6

<sup>54</sup> [Collective Licensing: A report on certain practices in the Collective Licensing of Public Performance and Broadcasting Rights in Sound Recordings](#), Monopolies and Mergers Commission, 1988, summary

<sup>55</sup> [Collective Licensing: A Report on certain practices in the Collective Licensing of Public Performance and broadcasting Rights in Sound Recordings](#), Monopolies and Mergers Commission, 1988, pg.31

and users is unlikely to be matched by any other means. The MMC also noted that the decisions of the European Court of Justice and the European Commission make it clear that collecting societies are compatible with article 106 of the EC Treaty, as long as they comply with the Article's term on abuse of dominant position, in particular by "limiting production, markets or technical development to the prejudice of consumers' and 'directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions'.<sup>56</sup> Article 106 states that:

- 'In the case of public undertakings and undertakings to which Member States grants special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.
- Undertakings entrusted with the operation of services of general economic interest or having the character of revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.<sup>57</sup>

With the proliferation of digital communication technology, consumers are able to access and purchase copyrighted content on an ever increasing number of platforms. The licensing practices of collecting societies determine the ability of businesses to take advantage of technological developments to meet consumer demand in an increasingly wide range of industries. Consumer Focus believes that it is a significant shortcoming of the Gowers review to not have reviewed copyright licensing in detail. Less than a year after the publication of Gowers the 2007, IPO Review of the Copyright Tribunal found that the importance of collecting societies to the economy had increased as 'the means to copy and diffuse copyright material grew'. It was noted that radio listening was at record numbers as consumers listened to radio via digital television, the mobile phones and online, as well as traditional radios. In response to the 2008 inquiry by the Innovation, Universities & Skills Committee into the 'The work and operation of the Copyright Tribunal' the IPO acknowledged the challenge in ensuring that the framework of rules kept up to date with behaviour and technology.<sup>58</sup>

Consumer Focus recommends that the Hargreaves review therefore specifically considers the question of how collecting societies can be effectively restrained to ensure that they do not abuse their monopoly. It is important that collecting societies are recognised as monopolies, which are subject to competition law. Collecting societies monopoly status in itself can offer enormous benefits to the economy, in that they make cost effective mass use of copyrighted work possible. However, the monopoly position of collecting societies carries an inherent danger, and if they abuse their monopoly, they can impose significant costs on the economy and stifle innovation in a wide range of creative and digital technology markets. The comprehensive review of IP law in advance of the Copyright Act 1956 by the Gregory Committee, published in 1952, explicitly recognised this and established the Performing

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<sup>56</sup> [Collective Licensing: A report on certain practices in the Collective Licensing of Public Performance and Broadcasting Rights in Sound Recordings](#), Monopolies and Mergers Commission, 1988, pg.32

<sup>57</sup> [Consolidated version EC Treaty](#), Article 106

<sup>58</sup> [The work and operation of the Copyright Tribunal](#), House of Commons Innovation, Universities & Skills, second report of session 2007-08, March 2008, pg.10

Rights Tribunal, the predecessor of the Copyright Tribunal, to prevent the PPL and PRS from abusing its monopoly.<sup>59</sup>

### **Collecting societies as ‘monopolies’**

In response to a memorandum submitted by PRS maintaining that the collecting society was not a monopoly in the strict legal sense, as there is a wide field of non-copyrighted music, the Gregory Committee recalled the finding of the Select Committee on the Music Copyright Bill in 1929. The Select Committee had concluded that ‘apart from classical and educational music the Society controls 90 per cent, or even more, of the performing rights in copyright music’. The Gregory Committee concluded that PRS was ‘substantially monopolistic’ in that:

‘practically all music publishers and popular composers are members, that all the rights of all its members in the public performance of their copyright music (other than the performance in full of such major works as opera) are assigned by members to the society and that, in consequence it is virtually impossible for the promoters of musical entertainments generally to avoid the necessity for obtaining a licence from the Performing Rights Society if they are to stay in business. Further, by reason of their international affiliations, a vast quantity of copyright music from abroad is also within the control of the Society. We think it must be accepted that the Society in fact, if not in nature, is in a position to exercise monopolistic control.’<sup>60</sup>

In 1988 the MMC considered formally whether PPL enjoyed a monopoly. The MMC noted that copyright and related rights owners got a monopoly granted by statute, and that nearly all individual owners of copyright and related rights in sound recordings assigned their rights to collecting societies. Nearly all owners of broadcasting and public performance rights assigned their rights to the PPL, as a result the PPL as supplier of licences to radio stations and venues of public performances “is in a position of near-total monopoly”.<sup>61</sup>

In 1996 the MMC considered whether PRS was a monopoly, and concluded in reference to the Fair Trading Act 1973 that PRS was the only licensing body which provides in the UK the service of administering performing rights and film synchronisation rights. Defining a monopoly situation as one where ‘the supply of services of that description in the United Kingdom is, to the extent of at least one-quarter, supply by one and the same person, or supply for one and the same person’ the MMC found that a monopoly situation exists in favour of PRS.<sup>62</sup>

The Gregory Committee was mainly concerned with the conduct of the music collecting societies, the Performing Rights Tribunal was established to stem abuse of monopoly by collecting societies in relation to performing rights per se. Its remit was the refusal to licence and unreasonable licensing terms by collecting societies administering performing rights, ie the related rights of performers in literary, dramatic, musical and artists works.<sup>63</sup> In 1988 the Copyright Tribunal, as successor to the Performing Rights Tribunal, saw its jurisdiction widened to all licensing by collecting societies. This coincided with MMC inquiry into the

<sup>59</sup> Copyright and Designs Law – Report of the Committee to consider the Law on Copyright and Designs, (Whitford report), HM Stationery Office, 1977, pg.99

<sup>60</sup> Ibid, pg.99-100

<sup>61</sup> [Collective Licensing: A report on certain practices in the Collective Licensing of Public Performance and Broadcasting Rights in Sound Recordings](#), Monopolies and Mergers Commission, 1988, pg.30

<sup>62</sup> [Performing rights: A report on the supply in the UK of the services of administering performing rights and film synchronisation rights](#), Monopolies and Mergers Commission, 1996, pg.9

<sup>63</sup> Copyright and Designs Law – Report of the Committee to consider the Law on Copyright and Designs, (Whitford report), HM Stationery Office, 1977, pg.104

collective licensing of sound recordings in 1988, which found that collecting societies are monopolies with statutory protection and ‘that collective licensing bodies are the best available mechanism for licensing sound recordings provided they can be restrained from using their monopoly unfairly.’ A further MMC inquiry into Performing Rights in 1996 found that the interests of music users were primarily protected through the Copyright Tribunal.<sup>64</sup> However, in reality the Copyright Tribunal has never effectively restrained collecting societies from abusing their monopoly in relation to their users, ie licences. And it has no jurisdiction in cases where collecting societies abuse their monopoly vis-a-vis creators, ie its members.

### **Article 12 Rome Convention: equitable remuneration for performers**

The 1988 MMC inquiry established that members of PPL had a right to equitable remuneration in relation to the royalties collected by PPL. In reference to PPL’s method of distributing royalties, the inquiry concluded that the UK did not meet its obligation under Article 12 of the Rome Convention, stating that performers of a commercial recording, or the performers, or both, are entitled to a “single equitable remuneration” in relation to broadcasting or public performance of that recording. The inquiry found that PPL since 1934 passes only 20 per cent of its net royalty income to named performers, and since 1946 a passed 12.5 per cent of its net royalty income to the Musician Union to recognise the contribution of unidentified session musicians. The MU however, did not pass on any of this money to its members, instead using it for the payment of administration and event promotion. The MU also required its members, when entering into a contract with the more than 500 record companies which are not members of the BPI, to use a standard form of consent, which required the record company to assign the resulting right to public performance to PPL, a PPL member or the MU. No equivalent consent form existed for BPI members, because they were assumed to assign the public performance right to PPL. According to the inquiry this reflected the fact that the record companies that are BPI members control the PPL.

The inquiry concluded that this regime resulted in royalties collected by the PPL being unlikely to be paid to the musicians who had performed on a recording. It was concluded that it was unlikely that a member of PPL would receive what is due to him. The MMC asked PPL to remedy the situation, by amongst others keeping better records of member’s whereabouts and using computer programmes to record actual use of members’ recordings at low cost. The model consent form with the MU was concluded to be a ‘highly effective mechanism for maintaining PPL’s monopoly’ and with reference to Article 12 of the Rome Convention the MMC required the model consent form to be withdrawn.<sup>65</sup>

While Consumer Focus believes the Copyright Tribunal is central to a well functioning collective rights management regime, and we welcome the recent reforms to streamline its process, we believe it is unrealistic to expect a tribunal to function as the quasi supervisor of collecting societies. In the face of the growing challenge to find appropriate and workable licensing solutions in the digital multi-media environment, we believe it is vital that the UK sets minimum standards to protect the interest of members and users. We also believe that the role of the Copyright Tribunal in ensuring that collective rights management is undertaken in compliance with applicable competition law should be strengthened. It is vital

<sup>64</sup> [The work and operation of the Copyright Tribunal](#), House of Commons Innovation, Universities & Skills, second report of session 2007-08, March 2008, pg.6-7

<sup>65</sup> [Collective Licensing: A report on certain practices in the Collective Licensing of Public Performance and Broadcasting Rights in Sound Recordings](#), Monopolies and Mergers Commission, 1988, pg.37-38

that the UK establishes the appropriate institutional governance framework, and regulatory framework, to support innovative markets. Particularly in relation to the digital technology industries, where innovation often comes from micro-businesses and SMEs, it is vital that the markets not subject to abuse of dominant position and anticompetitive agreements imposed on them by collecting societies. How minimum standards may be imposed, relevant EU case law, and the role of the Copyright Tribunal are considered in turn.

**Consumer Focus recommends that the Hargreaves review:**

- considers collective rights management and the role of collecting societies in facilitating innovative markets in detail
- recognises that collecting societies are effectively monopolies and that they must be effectively restrained from abusing their dominant position
- reviews the effectiveness of the UK's de minimus supervision of collecting societies in ensuring that collecting societies do not abuse their monopoly
- recognises that collecting societies need to adhere to minimum standards on the treatment of users, members and reciprocal representation agreements with other collecting societies

# Collective rights management and competition – minimum standards for collecting societies

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As previously outlined, Consumer Focus supports collective rights management because it allows consumers access to a wide variety of content within a competitive and innovative market. Mass use of copyrighted works is only cost effective through collective rights management. Collecting societies are central to the use, performance and retailing of copyrighted works in film and broadcasting, education, hospitality and entertainment, as well as online and mobile commerce. Collecting societies therefore facilitate the mass consumption of copyrighted content and access to knowledge for a wide section of the population. Essentially collective rights management enables copyright and related rights owners and users to jointly access lower transaction costs. By reducing transaction costs, collective rights management increases the range of rights that are traded. The facilitation of trade is a key role of collecting societies. As more copyright and related rights owners join a collecting society the scope for gains from economies of scale is increased.

Therefore collection societies are central to the monetisation of copyrighted content and are a precondition for thriving creative and digital technology industries. In the absence of collective rights management, transaction costs would deter individuals and small businesses, and trade in copyrighted content would be reduced. However, collective rights management also entails the monopoly position of the collecting societies, who may abuse their dominant position and so hinder competition and innovation. A wide variety of industries have a significant interest in collecting societies effectively administering copyright and related rights on behalf of their members. Thousands of collecting society members have an equally strong interest in collecting societies operating effectively and transparently, ensuring royalties are distributed fairly. Collecting societies are by nature monopolies which historically did not have to compete for members or users. In other words, copyright and related rights owners cannot choose which collecting society should administer their rights, and users cannot choose which collecting society to buy a licence from. Because collecting societies are monopolies and not subject to actual competition, they are subject to regulation and supervision in most countries to ensure they comply with competition law.<sup>66</sup>

However, the UK is one of only three EU member states, along with Ireland and Poland, that does not regulate collecting societies by providing for the formation of collecting societies or the regulation of their activities in law.<sup>67</sup> The Copyright, Designs and Patents Act 1988 defines a collecting society as a 'licensing body', which is any 'society or other organisation which has as its main object, or one of its main objects, the negotiation or granting, either as owner or prospective owner of copyright or as agent for him, of copyright licences, and whose objects include the granting of licences covering works of more than one author.'<sup>68</sup>

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<sup>66</sup> Nigel Parker, [Music business: infrastructure, practice and law](#), Sweet & Maxwell, 2004, pg.207–208

<sup>67</sup> Lucie Guibault & Stef van Gompel, [Collective Management in the European Union](#), in Daniel Gervais ed, *Collective Management of Copyright and Related Rights*, Kulwer Law International, 2006, pg.129

<sup>68</sup> [Copyright, Designs and Patents Act 1988](#), Section 116(2)

But other than providing for ad hoc resolution of complaints in relation to copyright licences through the Copyright Tribunal, no regulation or supervision of collecting societies is provided in law. In contrast to most other European countries and the US, the UK does not provide for the formation of collecting societies, or the regulation of their activities, in law and no authority is charged with the ongoing supervision of collecting societies.<sup>69</sup>

There are a number of models for the regulation and supervision of collecting societies. The US and most EU member states are taking an intermediate position to the supervision of collecting societies,<sup>70</sup> while a minority of countries, namely Germany, Austria and Portugal pursue strict supervision of collecting societies. German has the most comprehensive legal system for the control of collecting societies in the world. Under German law anybody wanting to undertake collective rights management must seek prior permission. Once authorisation is granted the collecting society remains under permanent supervision, so as to ensure that it does not abuse its power in relation to members or users.<sup>71</sup> Intermediate supervision, as operated in the majority of EU member states and the US, typically imposes transparency and accountability requirements and makes collecting societies subject to supervision by an independent person or administrative body. An example is the Netherlands, where any collecting society that enjoys a legal or state supported monopoly falls under the jurisdiction of a supervisory body. The supervisory body must, by law, exercise supervision on the collection and distribution of payments by the collecting society, and ensure that the collecting societies:

- provide adequate awareness of general and financial policy to copyright owners and those
- are obliged to make payments
- are adequately equipped to be able to fulfil duties properly
- lawfully distribute collected payments among copyright owners in accordance with the reallocation regulations
- take adequate account of the interests of those obliged to make payments when carrying out their work
- make use of a reliable dispute resolution scheme for copyright owners

Competition authorities in the Netherlands supervise all collecting societies not covered under these provisions.<sup>72</sup> Intermediate supervision occurs either based on minimum standards for the operation of collecting societies in statute law, or on the basis of undertakings by competition authorities. Civil law European countries typically provide for minimum standards in statute law but may take a hybrid approach, in that they provide for minimum standards in statute and through undertaking by competition authorities. In the US the supervision of collecting societies and the establishment of minimum standards therefore occurs entirely through the local competition law framework and undertakings.

In the US, the establishment of minimum standards followed a suit from the Antitrust Division in 1934 against ASCAP, which licenses music performance rights to hospitality businesses. The Department of Justice concluded that ASCAP dominated the radio industry and should

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<sup>69</sup> Lucie Guibault & Stef van Gompel, [Collective Management in the European Union](#), in Daniel Gervais ed, *Collective Management of Copyright and Related Rights*, Kulwer Law International, 2006, pg.129

<sup>70</sup> Nigel Parker, [Music business: infrastructure, practice and law](#), Sweet & Maxwell, 2004, pg.207-208

<sup>71</sup> Lucie Guibault & Stef van Gompel, [Collective Management in the European Union](#), in Daniel Gervais ed, *Collective Management of Copyright and Related Rights*, Kulwer Law International, 2006, pg.10

<sup>72</sup> *Ibid*, pg.11

be dissolved, though the case went dormant. In 1941, the Department of Justice sued both ASCAP and BMI on the principal ground that their blanket licenses, which were their sole offerings, restrained trade. The Department of Justice initially challenged the very existence of the collecting societies, but later negotiated antitrust consent decrees designed to target anti-competitive licensing practices. The consent decrees among others specify that licensing must be non-exclusive, ie members can join other collecting societies and can issue individual licences,<sup>73</sup> that collecting societies issue licences to anyone requesting one, and not to discriminate arbitrarily between users of the same type.<sup>74</sup> The Department of Justice maintains flexibility by adjusting the consent decrees over time to reflect the developments of new technologies and new markets. Though their thrust has remained the same and they essentially regulate pricing and licensing to limit collecting societies' anti-competitive potential. This potential is assumed to be inherent, hence the consent decrees are not allowed to expire.<sup>75</sup>

In the UK two inquiries by the MMC did not lead to the establishment of an equivalent system. In 1988 PPL was investigated, and in 1996 PRS, both investigations resulted in undertakings for the respective collecting societies. The recommendations of the MMC point to substantial problems with the licensing practices PPL employed at the time, which were neither in the interest of members or users. Similarly the 1996 inquiry found substantial problems with the licensing practices and operational arrangements of PRS. The 1996 investigation took a narrower scope than the 1988 inquiry, which occurred while the Copyright, Designs and Patents Bill passed through parliament. Although the MMC was 'urged' not to question existing or prospective statutory provisions, the MMC did not regard itself as bound by any such constraints.<sup>76</sup> The recommendations of the 1988 investigation in relation to the Copyright Tribunal, designed to remedy broader problems with collective rights management by collecting societies, were non-enforceable, and they were not included in the bill or otherwise implemented in practice.

### **1988 Monopolies and Mergers Commission: investigation into PPL**

The 1988 MMC investigation took place during the later stages of the Copyright Designs and Patents Bill going through parliament, now the Copyright, Designs and Patents Act 1988. The remit of the 1988 investigation was to consider copyright assigning to collective licensing bodies, and those bodies stipulating royalties, common tariffs and restrictions on performance. However, even though the licensing of sound recordings for broadcasting and public performance was undertaken by four collective licensing bodies, only PPL was found to be in the scope of the terms of reference. PPL stood accused of abusing its monopoly by the BBC and independent local radio companies. The investigation concluded that 'collective licensing bodies are the best available mechanism for licensing sound recordings provided they can be restrained from using their monopoly unfairly'<sup>77</sup> and found that PPL was abusing its monopoly position. To remedy the abuse the investigation recommended that:

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<sup>73</sup> John Buckman, [European Collecting Societies need to be non-exclusive](#), like in the USA, Magnatune: Daniel Gervais ed, [Collective Management of Copyright and Related Rights, Kulwer Law International](#), 2006, pg.322

<sup>74</sup> Nigel Parker, [Music business: infrastructure, practice and law](#), Sweet & Maxwell, 2004, pg.207–208

<sup>75</sup> Daniel Gervais ed, [Collective Management of Copyright and Related Rights, Kulwer Law International](#), 2006, pg.313-314

<sup>76</sup> [Collective Licensing: A report on certain practices in the Collective Licensing of Public Performance and Broadcasting Rights in Sound Recordings](#), Monopolies and Mergers Commission, 1988, pg.30

<sup>77</sup> [Collective Licensing: A report on certain practices in the Collective Licensing of Public Performance and Broadcasting Rights in Sound Recordings](#), Monopolies and Mergers Commission, 1988, summary

- PPL should be obliged to permit the use of its repertoire in return for equitable remuneration
- users should be entitled to a statutory licence, initially on the basis of self-assessed royalties, pending a Copyright Tribunal order on equitable remuneration
- PPL's injunctive right should be limited
- the Copyright Tribunal should be strengthened and changes made to its procedures in order to expedite its decisions
- no changes in PPL's current royalty rates
- performers should be given equitable remuneration from the royalty income received by PPL, in substitution for the existing unsatisfactory arrangements
- PPL should no longer require larger discotheques to employ musicians as a condition of licensing
- the BBC and ILR stations should be subject to a common tariff, related to audience size
- abandonment of PPL's needletime constraints<sup>78</sup>

It is feasible that the MMC felt compelled to recommend the strengthening of the Copyright Tribunal because it recognised that the PPL, in co-operation with the Musicians Union, had for decades abused its monopoly to impose anti-competitive licensing conditions on users. The request for PPL to stop requiring larger venues to employ musicians as a condition for granting them a licence to play recorded music put an end to a practice that had occurred for more than three decades. In fact the predecessor of the Copyright Tribunal, the Performing Right Tribunal, was established in the Copyright Act 1956 following a recommendation by the Gregory report in specific reference to these unreasonable licensing conditions. However, nearly 20 years later, in 1977 the 'Report of the Committee to consider the Law on Copyright and Designs', chaired by Mr Justice Whitford, (the Whitford report thereafter) highlighted that PPL still made licences to larger venues conditional on agreements with the Musicians Union about the employment of live musicians.<sup>79</sup> Similarly, the PPL imposed 'needletime' on radio stations as conditions for a licence to limit the time they could broadcast recorded music, instead of performance by live musicians. Again, PPL acted in co-operation with the Musicians Union, and the practice had already been highlighted in the 1977 Whitford report.<sup>80</sup> The 1988 resulted in the MMC requiring PPL to abandon both practices as they were held to be anti-competitive.<sup>81</sup>

### **1996 Monopolies and Mergers Commission: investigation into PRS**

The MMC was asked to investigate whether there is a monopoly situation in relation to the supply of the services of administering performing rights and film synchronisation rights by the OFT following complaints by members. Attention had been drawn in particular to concerns that the revenue distribution policies of the PRS were not equitable, misgivings about the Society's requirement that members assign their rights to it

<sup>78</sup> Ibid

<sup>79</sup> Copyright and Designs Law – Report of the Committee to consider the Law on Copyright and Designs, (Whitford report), HM Stationery Office, 1977, pg.101-102

<sup>80</sup> Ibid, pg.102-103

<sup>81</sup> [Collective Licensing: A report on certain practices in the Collective Licensing of Public Performance and Broadcasting Rights in Sound Recordings](#), Monopolies and Mergers Commission, 1988, pg.42

exclusively, and claims of managerial inefficiency. The investigation found a substantial number of problems which were attributed to the monopolistic situation brought about by the fact 'that in most cases its members cannot effectively administer their rights themselves' and 'there is no other licensing body from which members can obtain similar services. This means that the PRS has been and will continue to be under no commercial pressure to provide an efficient, transparent and equitable service to its members.' The MMF also found that more than 20 years after the European competition authorities had decided on the treatment of members by the German collecting society GEMA, PRS had not implemented the relevant case law.<sup>82</sup> The investigation held that:

'In matters of corporate governance, the PRS has failed to organize itself in such a way so as to ensure that it operates efficiently in that:

- It has failed to divide activities appropriately between the General Council and the executive management of the Society so that nothing is formally delegated to the executive. This is not good business practice, nor is it conducive to the making of clear, strategic decisions
- It has failed to take adequate account of the views of the executive because it has too many (12) committees and groups composed entirely of Council members and where the role of the executive is accordingly limited
- Its failure to appoint a Chief Executive for almost two years has had a prejudicial effect on the way in which the Society has been managed
- It is insufficiently clear about its objectives and has failed to take the necessary steps to evaluate and develop a coherent long-term strategy

'The PRS has failed to adopt efficient management practices and systems for distribution of royalties in that:

- It has failed to link the development of overall business strategy with improvements in administrative procedures and the introduction of integrated information systems, and to ensure that these three areas change rapidly and in parallel
- It has failed to do sufficient work to remedy the deficiencies in the PRS database which were revealed by the PROMS project
- It has failed to adopt a proper costing system which would enable it to identify costly or inefficient areas of operation and to allocate the great majority of its costs to the appropriate revenue sources, which results in disguised cross-subsidies. For example, it has failed to allocate equitably among members the costs of routine membership activities
- It has failed to put in place an adequate system for assessing the financial consequences to members of changes to its distribution policies
- It has failed to sample or monitor public performances on a continuing basis as adequately or effectively as it should, and has not sought independent, professional advice in this area. In particular, this has resulted in the case of the LMDP in some members being cross-subsidised at the expense of others
- In the distribution of broadcasting revenues, totalling some £50 million a year, it has failed to take into account the size of the audience actually listening at different times of day to each musical work performed

'The PRS has failed to provide adequate information to its members and to operate with sufficient transparency in that:

<sup>82</sup> [Performing rights: A report on the supply in the UK of the services of administering performing rights and film synchronisation rights](#), Monopolies and Mergers Commission, 1996, pg.26

- It has failed to set out sufficiently clearly and transparently its responsibilities to members, its policies and procedures and the limitations of the service which it offers
- It has failed to make clear to its members how it allocates costs
- It has failed to consult the membership adequately in order to allow them to contribute to policy-making; and to choose whether they wish cross-subsidies from one group of members to another to occur or not
- It has failed to make clear to its members that they may self-administer those categories of performing rights set out in the GEMA decision
- The PRS has failed to ensure that its members have a right of appeal in matters of dispute and thus to provide a suitable procedure for dealing with their grievances
- The PRS has refused to allow members to administer their own rights in respect of live performances<sup>83</sup>

Essentially, uncompetitive practices and abuse of monopoly by collecting societies is deeply entrenched and historic. The need to restrain collecting societies from abusing their monopoly was recognised in the UK in the 1950s, but the Performing Rights Tribunal, later the Copyright Tribunal, which was set up for this purpose had few competition law underpinnings. The tribunals could only consider individual cases, not investigate markets. US competition authorities fully scrutinised collecting societies as early as 1941, while UK competition authorities first formally considered collecting societies in 1988. But the MMC inquiries have resulted in piecemeal solutions. While PPL and PRS have made substantial changes to their operations following the 1988 and 1996 MMC investigations, other collecting societies remained entirely unaffected and no reassurances exist that new uncompetitive or unsatisfactory practices are not taken up. Consumer Focus believe that there is a strong case for a full Competition Commission investigation into collective rights management by collecting societies, covering the 10 plus UK based collecting societies. The need for a comprehensive approach is in our view overwhelming. A full Competition Commission market investigation into collective rights management would help to address the structural problems underlying collective rights management in the UK, by effectively imposing minimum standards on all collecting societies.

Such a market investigation should seek to ascertain whether UK based collecting societies comply with Chapter I and II of the Competition Act 1998, and relevant EU case law on Article 101 and 102. In particular the market investigation should focus on whether collecting societies limit the emergence of new products, markets or technical development to the prejudice of consumers. Markets that should be considered in particular are music, film and broadcasting, education, hospitality and entertainment, as well as online and mobile commerce. Reciprocal representation agreements with collecting societies in other EU member states and with collecting societies in English speaking markets such as the US and Australia should also be within the terms of reference for the market investigation. Such a market investigation should be initiated jointly by the Secretary of States for Business, Innovation and Skills, ie BIS, and for Culture, Media and Sport, ie dcms.

However, such a market investigation would not function to effectively impose minimum standards on collecting societies similar to the US antitrust consent decrees. Unlike the US Department of Justice, which has updated the consent decrees over the course of 50 years,

<sup>83</sup> [Performing rights: A report on the supply in the UK of the services of administering performing rights and film synchronisation rights](#), Monopolies and Mergers Commission, 1996, pg.26-27

the Competition Commission can't update the undertaking resulting from such a market investigation. The 1996 MMC investigation and complaints by the Federation of Small Businesses to the Secretary of State in 2008 have prompted PRS to adopt its own code of conduct, with the Ombudsman providing the dispute resolution mechanisms. Given that some collecting societies have acknowledged problems with their licensing practices and recognise that they need to modernise their operations to provide effective services to members and users, we suggest that the Hargreaves review recommends minimum standards to be imposed on all collecting societies. Individual codes of conduct will lead to a piecemeal approach and are in our view not effective in ensuring that all collecting societies refrain from abusing their monopolies. All collecting societies should adhere to the same minimum standards, which should reflect the undertakings of the 1988 and 1996 MMF investigations, relevant international commitments, relevant EU case law and UK competition law.

### **Strict supervision of collecting societies: the German Online and mobile distribution of copyrighted content: four content deliver**

In Germany collecting societies had first formed in 1871, more than 30 years after the first copyright law was established in Germany in 1873. In 1933 the first law on collecting societies was passed, making them state sanctioned monopolies and made them subject to prior authorisation. After a comprehensive revision of German copyright law in 1965, taking account of new technological developments such as broadcast, comprehensive laws were introduced to regulate collecting societies. This was regarded as central to the reforms and in the interests of members and users. Collecting societies are assumed to be trustees of their members, which need to operate in the public interest. Copyright and related rights owners have a right to equitable remuneration, though some related rights are subject to mandatory collective rights management.

The so called LACNR, the law on collecting societies, provides a comprehensive legal framework for collecting societies, including formation, rights and obligations, dispute resolution and supervision. The law also states the aims of collective rights management by collecting societies in Germany, which is based on the principles that:

- Protecting and fostering creativity is an important function of copyright
- Collective rights management through collecting societies protects creativity and the rights of natural persons, notable authors and performers
- Collective rights management and collecting societies are beneficial for members and users, as well as culture and society
- Collective rights management is an indispensable part of the German copyright framework
- Collective rights management can function well only on the basis of reasonable balance of all rights and interests<sup>84</sup>

Germany has the most comprehensive legal framework on collecting societies in the world. However it is difficult to find realistic evaluations of whether the system has achieved its stated aims. The fact that the German collecting society GEMA has been subject to major competition cases by the European competition authorities in 1971 and 1972, some six years after the LACNR was established in relation to abusing its dominant position by imposing unreasonable membership terms suggests that the system does not necessarily prevent collecting societies from abusing their monopoly.

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<sup>84</sup> Daniel Gervais ed, [Collective Management of Copyright and Related Rights](#), Kulwer Law International, 2010, pg.215-224

Minimum standards could be imposed on all collecting societies through an OFT code of practice, a supervised self-regulation scheme.<sup>85</sup> Such codes are approved by the OFT under Section 8 of the Enterprise Act 2002. However, these codes of practice are defined as ‘consumer codes’ in statute<sup>86</sup> and the OFT can’t currently approve codes that only cover business to business conduct under the scheme.<sup>87</sup> Given that collecting societies and their licensing practices have an overwhelming influence on a wide variety of markets and industries designed to provide consumers with access to copyrighted work, we believe that there is a strong consumer interest in collective rights management being regulated through an industry wide code of practice. Establishing such a code of practice, modelled on the OFT consumer codes, could occur through an amendment to the Enterprise Act, allowing the OFT to approve a code of practice for collecting societies, or to amend the Copyright, Designs and Patents Act 1988 to allow the IPO to approve such a code of practice.

Consumer Focus believes that the establishment of a code of practice similar to that of OFT consumer codes, is a more appropriate solution than establishing a supervisory body for collecting societies as has been done in civil law European countries. Comprehensive minimum standards in law and a supervisory body would be an inherently costly approach, which would not necessarily lead to the desired result. Instead, we believe that a approved code of practice is the most appropriate approach. Giving the IPO a statutory role in approving such a code of practice would be in line with our recommendation on providing a statutory underpinning for the IPO’s policy role. It would also enable the IPO to support competitive markets going forward. The IPO could approve such a code in close collaboration with the OFT, which has extensive experience in approving consumer codes. We believe that many collecting societies will welcome such proposals, as it allows for self-regulation initiatives to be formalised and assist the collecting societies in modernising their operations to meet the needs of members and users. Should the collecting societies be unwilling to self-regulate through a code of practice approved by the OFT or IPO, we believe the relevant Secretary of State should ask the Competition Commission to launch a full market investigation into collective rights management as a matter of urgency.

**Consumer Focus recommends that the Hargreaves review:**

- establishes a code of practice for all collecting societies, approved either by the OFT or IPO, to ensure collecting societies refrain from abusing their monopolies
- recommends a full market investigation into collective rights management by collecting societies as a matter of urgency, if collecting societies refuse to self-regulate through a code of practice

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<sup>85</sup> [Consumer Codes Approval Scheme – Core Criteria and Guidance](#), Office of Fair Trading, March 2008, pg.5

<sup>86</sup> [Enterprise Act 2002](#), Section 8

<sup>87</sup> [Consumer Codes Approval Scheme – Core Criteria and Guidance](#), Office of Fair Trading, March 2008, pg.4

# Minimum standards and competition law – a code of practice for collecting societies to support competitive and innovative markets

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The failure of the UK to restrain collecting societies from abusing their monopoly through minimum standards is amplified by the apparent non-enforcement of competition case law in relation to collecting societies. Collecting societies are subject to competition law at the EU level, as set out in Article 101 and 102, which corresponds to Chapter I and II of the Competition Act 1998. The licences that collecting societies issue are subject to Article 101; this restricts agreements where the object or effect is to restrict, prevent or distort competition. The conduct of collecting societies is subject to Article 102; which prohibits the abuse of dominant position.<sup>88</sup> However, in the UK collecting societies are effectively not subject to competition law. With the exception of the 1998 and 1996 MMC investigation into PPL and PRS, collecting societies have escaped the attention of UK competition authorities, ie the Competition Commission and OFT. Neither investigation fully considered the relevant EU case law, which had been established since the early 1980s by EU competition authorities. As a consequence the Competition Appeal Tribunal has not ruled on any significant case involving collecting societies, or copyright more generally.

Collecting societies can, through their licensing practices, distort markets and prevent entry to markets. The terms of a licence can hinder the emergence of new products and licence tariffs can impose unreasonable cost on markets, as well as preventing companies from entering a market. If the UK wants to build and maintain creative and digital technology industries that are competitive and effectively respond to consumer demand, collecting societies need to adhere to competition law. Minimum standards for collecting societies don't do away with the need for a Copyright Tribunal, but would ensure that all UK collecting societies implement best practice to avoid the negative impacts their monopolies can have on a wide range of markets.

## **EU competition case law: relationship between collecting societies and users**

Regarding collecting societies' relationship with their users, ie the businesses that require a licence from them, the European competition authorities have established a substantial body of case law. In the seminal *Tournier* case French disco owners had complained that the fees charged by the French collecting society SACEM were excessive, particularly because the disco owners mainly played Anglo-American music, while SACEM's fees were calculated for the use of the worldwide repertoire. The disco owners tried and failed to obtain licences from relevant UK music collecting societies.

The *Tournier* decision established three important points. It was ruled that national

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<sup>88</sup> Nigel Parker, [Music business: infrastructure, practice and law](#), Sweet & Maxwell, 2004, pg.208

collecting societies may only refuse to grant direct access to its own national repertoire to users established in other EU member states for efficiency reasons. For example if it is too burdensome to manage and monitor use of their repertoire in a foreign country. However if the refusal is the result of an agreement between the collecting societies, ie an agreement that a particular collecting society will not give a license to users based in France, it would restrict competition in the common market and as such be a violation of Article 81. It was considered whether collecting societies could refuse to grant licenses for only part of their repertoire in relation to SACEM's refusal to grant the disco owners a license for only the part of the repertoire they used. It was ruled that such a refusal would only be in compliance with Article 101 if it was not possible to license parts of the repertoire without increasing the costs of managing contracts and monitoring the use of the protected work. The EU competition authorities observed that one of the most significant divergences between collecting societies in different member states was the level of operational expenses and overheads. In relation to the disco owners' complaint that SACEM charged excessive, nonnegotiable and unfair royalties, it was decided that national collecting societies impose unfair trading conditions under Article 102 if the royalties charged are appreciably higher than those charged in other member states, unless the difference was justifiable by objective and relevant factors.<sup>89</sup>

Minimum standards would particularly benefit individual entrepreneurs, micro businesses and SMEs, who in most cases will not be able to afford to bring a case in the Copyright Tribunal. By ensuring that all collecting societies adhere to minimum standards collective rights management could gain significantly in efficiency, bringing down transaction costs and the number of protracted disputes, and most importantly, build trust in collective rights management. In order for collecting societies to establish innovative and cost effective licensing solutions, such as extended collective licensing, they need to effectively serve both their members and users, and accomplish a significant amount of transactions cost effectively. Minimum standards would also ensure that UK collecting societies remain internationally competitive, as EU case law clearly indicates that UK-based collecting societies will have to compete with collecting societies in other countries for members and users. Unless collecting societies offer members a fair service and keep administrative fees to a minimum, UK collecting societies will find that UK-based copyright owners will ask collecting societies in other member states to administer their copyright and related rights. Business users will choose the collecting society that is best suited to licence the copyrighted content they are using. With UK music enjoying significant popularity in other EU member states it should be UK collecting societies who license their members' work for use abroad. Users will only choose UK collecting societies if they licence their repertoire on reasonable terms, and without unnecessary delay.

### **EU competition case law: relationship between collecting societies and their members**

The two most important decisions on collecting societies' relationships with members both concern membership terms of the German writers' and publishers' performance rights society. In *GEMA 1* (1971) and *GEMA 2* (1972) EU competition authorities found that GEMA had abused its dominant position under Article 82, on the grounds of duration, coupled with the breadth of rights which the society required its members to assign. The EU competition authorities felt that members should be free to choose to administer some

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<sup>89</sup> Lucie Guibault & Stef van Gompel, [Collective Management in the European Union](#), in Daniel Gervais ed, *Collective Management of Copyright and Related Rights*, Kulwer Law International, 2006, pg.122–123

of their public performance rights themselves. GEMA was forced to allow the re-assignment of 12 different performance rights for self administration by its members on request.<sup>90</sup> Aspects of the *GEMA* decisions were confirmed in *BRT v SABAM*. This case established that the decisive factors, when examining the statutes of a collecting society in the light of European competition rules, are a) whether the statutes exceed the limits absolutely necessary for effective protection, the 'indispensability test', and b) whether they limit the individual copyright owner's freedom to dispose of work more than necessary, the 'equity test'.<sup>91</sup>

In *GEMA 1* the European competition authorities also ruled that GEMA had abused its dominant position by discriminating among members as regards the distribution of income. The practice of paying supplementary fees, from the revenue collected from the membership as a whole, only to those members who had been ordinary members for at least three years, was ruled to be unlawful. The European competition authorities also ruled that collecting societies: may not refuse nationals of other EU member states as members, and could not impose discriminatory terms concerning their membership rights, such as preventing foreign rights holders from becoming an 'ordinary' member or an 'extraordinary member' (with voting rights)<sup>92</sup> Such practices violate Article 102(c), as they are against the principle of equal treatment.<sup>93</sup>

The establishment of minimum standards for reciprocal representation agreements that reflect the relevant EU case law and UK competition law would ensure that UK collecting societies take advantage of cross-border licensing opportunities. Imposing minimum standards in this regard is necessary because the single biggest obstacle to the cross-border licensing of copyrighted content made in the UK to markets abroad is the refusal of collecting societies to establish appropriate reciprocal representation agreements which adhere to competition law. If the UK wants to export creative content it relies on UK collecting societies to establish the appropriate business agreements to facilitate cross-border licensing, particularly collecting societies based in other EU member states. Cross-border licensing would bring down the cost of licensing transactions and increase commercial certainty<sup>94</sup> for entrepreneurs, micro-businesses and SMEs who want to sell copyrighted content from abroad to UK consumers, or offer UK copyrighted content to consumers abroad. Online and mobile commerce potentially allow creative industries to export their work digitally, and creative content made in the UK has a significant potential market in EU member states and internationally. 2009 saw a substantial increase in revenues for the UK music industry, up 19 per cent to £166.9 million, on the back of increased licensing of UK music abroad.<sup>95</sup> But the continuous refusal of collecting societies to establish appropriate agreements, particularly in the music sector, means that UK exports of creative content have so far stayed below their potential. Collecting societies are holding back the UK's digital economy by preventing UK-based companies from meeting consumer demand and taking full advantage of a significant potential export market.

The European Commission has identified cross-border collective rights management as the most significant obstacle to the establishment of innovative and dynamic online and mobile

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<sup>90</sup> Nigel Parker, [Music business: infrastructure, practice and law](#), Sweet & Maxwell, 2004, pg.209

<sup>91</sup> Lucie Guibault & Stef van Gompel, [Collective Management in the European Union](#), in Daniel Gervais ed, *Collective Management of Copyright and Related Rights*, Kulwer Law International, 2006, pg.121

<sup>92</sup> *Ibid*, pg.121

<sup>93</sup> *Ibid*, pg.122

<sup>94</sup> [IFPI Intervention – Public Hearing on the Governance of Collective Rights Management in the EU](#), 23 April 2010

<sup>95</sup> [PRS for Music Financial Results 2009](#), PRS, March 2010

music services, including simulcasting, webcasting, streaming and downloading. The insistence of collecting societies to licence copyrighted content on a territorial (ie country) basis means that online content-providers have to renegotiate multiple licences for the same content in different countries. Unless online providers of copyrighted content have acquired the multiple licences required they are exposed to liability for copyright infringement in the various countries in which their service is accessible. Territorial licensing is a relic of the analogue age<sup>96</sup> and in order to harness the potential of the internet, UK collecting societies need to facilitate innovative cross-border licensing solutions for multiple territories. This is particularly the case in music licensing, where the retail of one song requires several licences, and multi-media, where online providers need multiple licences to cover several content types.

### **EU competition case law: reciprocal representation agreements**

Regarding the reciprocal relationship between collecting societies, the *Tournier* (1989) and *Lucazeau* (1989) cases established that reciprocal representation agreements do not, as such, fall under Article 81(1), provided that no concerted action is demonstrated. It was also held that reciprocal representation agreements are economically justified in the context of the requirement to monitor usage of copyrighted works across borders. In the network environment of the digital age, it was held that monitoring usage could occur cost effectively from a distance. This built on a 1985 decision by European competition authorities which clarified that collecting societies in different member states must compete with each other, at least in certain areas. In 2002 the European Commission found that reciprocal agreements can lead to substantial economic benefits, namely where companies need to respond to increasing competitive pressure and to a changing market driven by globalisation, the speed of technological progress and the generally more dynamic nature of markets.

Relying on *Tournier* and *Lucazeau*, the *IFPI Simulcasting* (2002) decision saw European competition authorities ordering collecting societies to amend their reciprocal agreement. The IFPI was ordered to allow users established in the territory of the European Economic Area, to approach any collecting society, established within the territory and party to the agreement, to seek and obtain a multi-territorial simulcasting licence. It was ruled that the monitoring task of collecting societies in the online environment can easily be carried out directly online and can therefore take place from a distance. Furthermore it was ruled that collecting societies must undertake to increase transparency as regards the payment charged, by separating the tariff which covers the royalties from the fee meant to cover the administrative costs. This transparency should enable users to identify the most efficient collecting societies and to seek their licences from the collecting society with the lowest cost.<sup>97</sup>

The refusal of collecting societies to set up appropriate reciprocal agreements to facilitate cross-border licensing of copyrighted content represents a barrier to growth for UK-based mobile and online music services. Having spent years negotiating the licences necessary for offering a comprehensive music repertoire to UK consumers, they find that they have to start from scratch if they want to offer their services to consumers outside the UK. Over the past

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<sup>96</sup> [Commission Staff Working Document: Study on a Community Initiative on the Cross-Border Collective Management of Copyright](#), Commission of the European Communities, Brussels, 7 July 2005, pg.6–7

<sup>97</sup> Daniel Gervais ed, [Collective Management of Copyright and Related Rights](#), Kulwer Law International, 2010, pg.143-145

years a number of UK entrepreneurs, micro-businesses and SMEs have built innovative services which meet consumer demand, including we7, Last.fm and 7digital.

These services are in a good position to meet the demand of consumers outside the UK, but expanding beyond UK borders exposes them to significant licensing transaction costs. So far only Last.fm and 7digital have expanded into other EU countries and North America, but their efforts have been significantly slowed by the need to negotiate licences all over again. In practice the great majority of UK-based online music providers, which are frequently SMEs, are not able to sell or provide music to consumers based abroad. With English being a widely spoken first and second language for consumers around the world, and music produced in the UK enjoying considerable popularity abroad, the UK is missing out on a substantial potential export market.

Minimum standards should be established through an approved code of practice to ensure that collecting societies refrain from abusing their monopoly and so hinder innovation and competition in UK markets, and the ability of UK based businesses from taking advantage of significant export markets. The OFT or IPO should only approve a code of practice drawn up with collecting societies if it meets the principles established in the 1988 and 1996 MMC investigations, relevant international commitments, relevant EU case law and UK competition law. On this basis we have established a set of principles which should underline the approval of a code of practice for collecting societies.

#### **Members:**

- Members are entitled to equitable remuneration. Specifically, all royalties, minus reasonable administrative cost, should be passed to members. Using the appropriate technology, collecting societies should distribute royalties transparently and based on licensed usage. As such collecting societies need to maintain accurate records of member's whereabouts (1988 MMC investigation)
- Collecting societies must establish the appropriate long and short terms business strategies, integrated information technology systems and corporate governance framework to ensure equitable remuneration for members (1996 MMC investigation)
- Members must be adequately consulted on long and short terms business strategies (1996 MMC investigation)
- Collecting societies must establish appropriate grievance procedures and formal appeals mechanism, and must inform members of their rights in relation to these procedures and their right to appeal (1996 MMC investigation)
- Collecting societies must provide members with information to account for administrative charges (inc operational expenses and overheads) and royalties paid to members. All administrative charges must be justifiable by objective and relevant factors. (1996 MMC investigation and Tournier)
- Collecting societies may not limit individual copyright owners' freedom to dispose of work more than necessary. They must administer the rights of members on a non-exclusive basis. With reference to the indispensability test and the equity test, collecting societies may not require that members assign all their rights to collecting societies. Members in principle have the right to not assign their rights to a collecting society. (1988 and 1996 MMC investigations, GEMA 1, GEMA 2 and BRT v SABAM)
- Collecting societies may not discriminate among members with regards to distribution of royalties, and members should have equal rights to equitable remuneration from the day they assign their rights to a collecting society (GEMA 1)

- Collecting societies may not impose discriminatory membership rules, and all members should have equal voting rights (GEMA 1)
- Collecting societies may not refuse membership to nationals of other countries (GEMA 1)

**Users:**

- Collecting societies may not directly or indirectly fix purchase or selling prices (UK competition law)
- Collecting societies may not directly or indirectly limit or control production, markets, technical development, or investment (UK competition law)
- Collecting societies may not apply dissimilar conditions to equivalent transactions and thereby place licences at a competitive disadvantage; (UK competition law and 1988 MMC investigation)
- Collecting societies may not make licences subject to acceptance of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts (UK competition law and 1988 MMC investigation)
- Collecting societies may not refuse to grant a licence to part of their repertoire, rather than their entire repertoire, unless the cost of managing contracts and monitoring use is disproportionate (Tournier)
- Collecting societies must use appropriate technology to monitor usage cost effectively for repertoire licensed in the UK and abroad (Tournier)
- Collecting societies must provide users with a breakdown of tariffs to account for administrative charges (inc operational expenses and overheads) and royalties paid to members. All administrative charges must be justifiable by objective and relevant factors (Tournier)
- Collecting societies may not refuse to grant a licence for UK repertoire to users based outside the UK (Tournier)

**Other collecting societies:**

- Reciprocal agreements must ensure that the UK collecting society can rely on the collecting society based abroad to protect the relevant repertoire. UK collecting society may not refuse to establish a reciprocal agreement, unless it is not possible to establish appropriate arrangements with the collecting society based abroad for the monitoring of usage of UK repertoire by users who have been issued a multi-territory licence (Tournier)
- Reciprocal agreements with collecting societies abroad may not prevent these collecting societies from issuing a multi-territorial licence covering UK content to users from any territory (IFPI Simulcasting)
- Collecting societies must use appropriate technology to monitor usage of UK repertoire in other territories (Tournier and IFPI Simulcasting)
- Collecting societies issuing multi-territory licences must provide users with a breakdown of tariffs to account for administrative charges (inc its own administrative charges and that of relevant collecting societies in other territories) and royalties paid to members (Tournier and IFPI Simulcasting)

**Consumer Focus recommends that the Hargreaves review:**

- Establishes an approved code of practice for collecting societies on the basis of the principles established in the 1988 and 1996 MMC investigations, relevant international commitments, relevant EU case law and UK competition law

# The Copyright Tribunal within the competition framework – serving its original purpose

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The Copyright Tribunal is an independent tribunal established by the Copyright, Designs and Patents Act 1988. Its main role is to adjudicate in commercial disputes and to ensure that the monopoly held by collecting societies is not abused. The Copyright Tribunal hears cases where a collecting society has unreasonably refused a licence, or where the terms of the offered licence are unreasonable. A decision by the Tribunal can be appealed to the High Court on a point of law. The Copyright Tribunal does not have jurisdiction over copyright infringement. Neither is it responsible for regulating or supervising the work of collecting societies.<sup>98</sup>

Historically the predecessor of the Copyright Tribunal, the Performing Rights Tribunal, was established by the Copyright Act 1956 to restrain collecting societies from abusing their monopoly.<sup>99</sup> However, in reality the Tribunal has never effectively restrained collecting societies from abusing their monopoly in relation to their users, ie licences. And it has no jurisdiction in cases where collecting societies abuse their monopoly vis-a-vis creators, ie its members. As previously mentioned, Consumer Focus believes it is unrealistic to expect a tribunal to function as quasi supervisor of all collecting societies. Though the Tribunal does have an important role in resolving licensing disputes and in establishing competitive and reasonable licensing terms, including tariffs, when these cannot be agreed through negotiation between the collecting society and users. The failure of the Copyright Tribunal and its predecessor to effectively accomplish this was in large part due to the cost of referring a case to the tribunal.

Between 1956 and 1988 only 38 cases, or just over one a year, were referred to the Performance Rights Tribunal.<sup>100</sup> 106 cases were referred to the Tribunal between 1988 and 2008, equivalent to just over 10 a year, and cases are typically of substantial size and length, involving a large number of parties and substantial costs.<sup>101</sup> The Performance Rights Tribunal had been established in the Copyright Act 1956, after a recommendation in the Gregory Report which specifically referencing the anti-competitive licensing conditions imposed by the PPL on users by requiring the employment of musicians as a condition for granting venues a licence to play recorded music. This practice was again highlighted in the 1977 Whitford report, which noted that the cost of referring the case to the Performance Rights Tribunal was too great for the owners of the affected venues. The practice was finally brought to an end with the 1988 MMC investigation. Therefore the fact that the Performance

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<sup>98</sup> [The work and operation of the Copyright Tribunal](#), House of Commons Innovation, Universities & Skills, second report of session 2007-08, March 2008, pg.5

<sup>99</sup> Copyright and Designs Law – Report of the Committee to consider the Law on Copyright and Designs, (Whitford report), HM Stationery Office, 1977, pg.99-100

<sup>100</sup> [Collective Licensing: A Report on certain practices in the Collective Licensing of Public Performance and broadcasting Rights in Sound Recordings](#), Monopolies and Mergers Commission, 1988, pg.34

<sup>101</sup> [The work and operation of the Copyright Tribunal](#), House of Commons Innovation, Universities & Skills, second report of session 2007-08, March 2008, pg.5

Rights Tribunal only heard 38 cases in 32 years should not be seen as evidence that collecting societies did not abuse their monopoly, to the contrary. Until very recently users requiring licences from collecting societies needed to rely on large trade associations, such as the British Hospitality Association can find redress through the tribunal. In theory 'anyone who has unreasonably been refused a licence by a collecting society or considers the terms of an offered licence to be unreasonable may refer the matter to the Tribunal'.

### **Copyright Tribunal: recent introduction of small application track**

With the spread of digital technologies, individuals and SMEs are increasingly involved in the distribution of creative works for which they will need a copyright licence. *The work and operation of the Copyright Tribunal: second report of session 2007–08* by the Innovation, Universities and Skills Committee highlights particular issues in relation to individuals and SMEs having access to the Copyright Tribunal to resolve licensing disputes. Until recently the focus of the Tribunal was on adjudicating high value disputes and the cost of bringing a case to the Tribunal has meant that SMEs were unlikely to obtain redress this way. Only through trade associations with the necessary resources that individuals or SMEs could realistically hope to bring a case.

With the intention of saving time and money new rules of procedures were introduced in April 2010 by statutory instrument. The case management procedures of the Tribunal were improved to reduce costs and delays to large cases. Furthermore a small application track was introduced for the benefit of smaller business and individuals.<sup>102</sup> The Copyright Tribunal can now allocate cases to the small applications track or to the standard applications track, taking into account the financial value of the application, the complexity of the case and whether the case has wider implications for companies in a similar situation. If the financial value of a case is less than £50,000 and the facts and legal issues involved are simple, it is expected that a case would be allocated to the small application track.<sup>103</sup> These changes are very much welcome and in theory make the Copyright Tribunal more accessible for entrepreneurs, micro businesses and SMEs. Nearly a year after these reforms it would be appropriate to assess the cases brought under the new tracks to establish whether they have made the Tribunal more accessible and affordable for entrepreneurs, micro businesses and SMEs.

Collecting societies are invariably monopolies or have a dominant position and they will, in most cases, have considerably more resources than users. Generally the balance of power is considerably more in favour of the collecting societies which are in a dominant position when negotiating licence fees since they have an exclusive right to licence. This means that if negotiations break down, the society can refuse to license. In the absence of a licence commercial users are at risk of being sued by the collecting society for copyright infringement. Currently the only backstop that users have in negotiations with collecting societies is to refer the case to the Copyright Tribunal. The Copyright Tribunal has recently made significant rulings, for example a case brought by the British Hospitality Association in relation to PPL charging hotels, pubs and restaurants an unreasonable tariff led to PPL paying a refund to up to 41,000 establishments and lowering its tariffs.<sup>104</sup> The case exemplifies the ongoing problems in relation to music licensing. There are currently 40 different types of licenses for different categories of hospitality, retail and workplaces alone. These licences are subject to index-linked annual rises and micro-businesses have consistently complained that the licensing rates imposed on them are excessive.<sup>105</sup>

<sup>102</sup> [The Copyright Tribunal Merger](#), Lawdit Solicitors, 18 October 2010

<sup>103</sup> [Copyright Tribunal Rules 2010 \(SI 2010/791\)](#), section 17(1)-(3)

<sup>104</sup> [Advice to British Hospitality Association Members on Refunds from Phonographic Performance Ltd \(PPL\)](#), British Hospitality Association, May 2010

<sup>105</sup> [Motion 4](#), Federation for Small Business, 2009 Conference

As previously outlined, we believe that a code of practice should establish minimum standards for all collecting societies, which would provide additional safeguards to users in negotiations. At the same time we believe that the Copyright Tribunal must become more effective in ensuring collecting societies comply with competition law. Chapters I and II of the Competition Act on *Agreements and Abuse of Dominant Position* (corresponding to Article 101 and 102 of the EC Treaty) are clearly engaged when the Copyright Tribunal adjudicates instances of refusal to licence or unreasonable licence terms. Therefore the relevant competition law case law should inform the Copyright Tribunal in its ruling. The UK competition law framework was only consolidated in 1988, some 30 years after the Performance Rights Tribunal was established to restrain collecting societies from abusing their monopoly. We think that the Hargreaves review team should consider how the Copyright Tribunal can become an effective forum to resolve instances where collecting societies have abused their dominant position, and for the setting of competitive and reasonable tariffs, which is one of the most significant current functions of the Tribunal.

We don't necessarily think that it is appropriate to merge the Copyright Tribunal into the Tribunal Service, as is planned for early next year. The Tribunal Service effectively operates a range of tribunals with jurisdiction such as employment and immigration. None of these tribunals are primarily commercial or closely linked with competition law. Instead, we believe it would be more appropriate to establish close operational ties between the Copyright Tribunal and the Competition Appeal Tribunal. The reform of the Copyright Tribunal's rules and procedures, which have been progressed in the past four years by the IPO, are welcome and were primarily focused on establishing an effective tribunal that is affordable for entrepreneur, micro business and SME users of collecting societies. These reforms, initiated after the Gowers review which largely ignored the Tribunal, followed an IPO review in 2007. The review was led by David Landau, Principal Hearing Officer in its Trade Marks Directorate, and Chris Bowen, Assistant Principal Hearing Office, on the basis that, as hearing officers they had experience of a tribunal, the proceedings of which were generally considered to be efficient and relatively inexpensive.<sup>106</sup> The Hargreaves review should build on this work, primarily designed to improve the operational capacity of the Tribunal, by considering the strategic dimension of the Tribunal. The Copyright Tribunal should become a cost effective avenue for redress when collecting societies abuse their dominant position and for the establishment of competitive and reasonable tariffs.

We believe that the Hargreaves review team should seriously consider merging the Copyright Tribunal into the Competition Appeal Tribunal, where both tribunals maintain separate procedures, but share court facilities. The Hargreaves review should also consider extending the jurisdiction of the Copyright Tribunal so that it can apply relevant competition law when it finds that a collecting society has abused its dominant position or engaged in anti-competitive practices. Currently decisions of the Copyright Tribunal can be appealed to the High Court on a point of law. If the Copyright Tribunal finds abuse of dominant position or anti-competitive behaviour it should be possible to appeal these cases to the Competition Appeal Tribunal. We believe that serious consideration should be given to a provision in statute which would allow the Competition Commission and the OFT can refer licences to the Copyright Tribunal in relation to licensing terms and tariffs. This would allow the competition authorities to effectively deal with instances where it find that a particular licence raises competition concerns, but the practices of the collecting society more generally would

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<sup>106</sup> [The work and operation of the Copyright Tribunal](#), House of Commons Innovation, Universities & Skills, second report of session 2007-08, March 2008, pg.7

not merit a market study or investigation. A similar arrangement exists in Canada, where competition authorities may refer licences to the Copyright Board, ie the tribunal.<sup>107</sup>

Such reforms should not lead to the undoing of the reforms that have been carried out in the past four years, and the Copyright Tribunal should aim to provide access to entrepreneurs, micro-businesses and SMEs. This is particularly important in the light of the fact that the creative and digital technology industries depend on a healthy ecosystem of smaller players, which are frequently in the vanguard when it comes to developing innovative business models that harness digital technology. Innovative business models, particularly when they are novel and new, will always present a challenge for collecting societies, as they will not be able to draw on precedence or prior experience when setting tariffs. It is therefore important that the Copyright Tribunal, particularly in relation to tariffs, resolves referrals promptly, and cost effectively.

**Consumer Focus recommends that the Hargreaves review:**

- considers merging the Copyright Tribunal with the Competition Appeal Tribunal and extending its jurisdiction to instances where collecting societies have abused their dominant position
- considers a provision that would allow the OFT and Competition Commission to refer licences to the Copyright Tribunal

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<sup>107</sup> Daniel Gervais ed, [Collective Management of Copyright and Related Rights](#), Kulwer Law International, 2010, pg.324



**Consumer Focus response to Independent Review of IP and Growth Part 1 - The Governance Framework: providing the institutional foundations for competition, innovation and growth**

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