TMPDF

Trade Marks Patents and Designs Federation

Communication from the Commission on the management of copyright and related rights in the Internal Market

COMMENTS OF THE TRADE MARKS PATENTS AND DESIGNS FEDERATION

Introduction

The Trade Marks Patents and Designs Federation represents the intellectual property interests of many British-based industrial companies, both large and small.

Although its members generate significant intellectual property in the copyright field, for instance for computer software, its experience with collecting societies arises mainly when members decide they need to acquire a licence from a collecting society to copy print materials. Its members normally choose not to offer their own works for licensing through collecting societies.

The TMPDF gives a cautious welcome to the proposal as foreshadowed in the consultation paper. Its members find that there are disparities between collecting societies in different countries that make operating on a Europe-wide basis more difficult than it should be. Harmonisation to reduce these disparities could be useful.

However, harmonisation will be useful only if it is in the direction of increasing flexibility and removing restrictions that at present limit what is possible for users in some countries but not others. In the experience of TMPDF members, the current position in the UK is more satisfactory than in some other member states For instance, it is possible to obtain a blanket licence to make copies of paper originals for purposes of commercial research in the UK when there appears no corresponding possibility in some other member states The TMPDF would be extremely concerned if any proposal were to worsen the position for UK users of collecting societies by, for instance, imposing a more rigid framework than currently exists in the UK.

Our comments on the specific legislative framework set out in Section 3.5 of the paper are as follows.

1. Governance of collecting societies (Section 3.5.1)

Collecting societies exist solely for the convenience of their right-holders and users, who are the stakeholders in their activities. They have no separate validity and there is no other justification for their existence. From that principle spring a number of consequences:

- ***Provisions which might give collecting societies an entrenched interest separate from those of their stakeholders must be prevented..*** They are not there to look after their own interests at the expense of the other stakeholders. As one example, they must not be in a position to hold back developments in new technological methods in granting licences that might render their services redundant.
- ***Collecting societies must not be given a statutory monopoly or an exclusive or mandatory position that removes from right-holders the ability to grant licences for their works in whatever form suits them.*** Individual right-holders must be free to decide whether they wish to

use a collecting society to grant licences in respect of their works or not. Collecting societies do have a valuable role to play when both right-holders and users want to make use of their services, but it should be voluntary on both sides.

- ***As nearly as can be practicably achieved, the receipts of a collecting society should be directed to the right-holders whose works are used and payments should be in proportion to the extent of use of the works concerned.*** Payments for social purposes should not be permissible, and neither should payments to local authors instead of or in addition to the right-holder whose works were actually used.
- ***Users of collecting societies should be participants in the governance of collecting societies.*** At present Section 3.5.1 of the paper treats collecting societies solely as an organ of right-holder. However, accountability should be to more than just right-holders. The whole point of a collecting society is to act as an intermediary between right-holders and users, to the public benefit. That would best be secured by a user involvement in the oversight of collecting societies, for instance by a user presence in their governing councils

All the above points should be contained in any legislative instrument if a real advance is to be achieved towards a more uniform and beneficial system throughout the internal market.

2. Relations with users (Section 3.5.2)

Transparency in rates and tariffs, and indeed in operations of collecting societies, is certainly deficient at present and is owed as much to users as it is to right-holders.

Any legislative instrument should require the following:

- ***There should be transparency as to the underlying rationale for tariffs, to cover both rates and (where collecting societies can impose charges, for instance by way of levies) the reason for applying it.*** No collecting society should be able arbitrarily to propound a tariff without explaining objectively how it reflects the use to be made of the work and the value of that use.
- ***Rates should be fair in relation to the use to be made of the rights granted.***
- ***Tariffs should be published and should be maxima only.*** Users must know the upper bounds of their potential payments. But a tariff must not be a straightjacket. Scope must be allowed to users, individually or through representative organisations, to negotiate lesser rates where their use does not correspond to the assumptions underlying the tariff.
- ***There should be transparency as to the destination of the receipts of the collecting society.*** In particular, it is essential that the breakdown between payments to right-holders and administrative expenses is clearly and promptly published. Administrative expenses are moneys lost to users and right-holders and confer no other public benefit: they should be minimised to the greatest extent possible. The greater the visibility the more pressure on the collecting society to be efficient.
- ***Licences permitting free use must be permissible.*** The consultation paper suggests otherwise in the second paragraph of Section 3.5.2, but there is no reason to restrict the normal ability of the right-holders not to charge for the grant of a licence if they do not want to. That ability must include the right not to charge when acting through a collecting society. There can be advantages to a free licence which nonetheless contains conditions on the operation of the licence: for

instance, the mere existence of the licence might serve to exclude the operation of certain exceptions (as is the position in the UK with respect to licences for the benefit of the visually impaired).

- ***There should be a route of appeal by users to an independent tribunal*** It should be broader than suggested in the first paragraph of Section 3.5.2 - it should allow rates, conditions, the need for a licence at all and refusal to grant licences all to be challenged. And, contrary to what is suggested there, a challenge should not be conditional on depositing "a certain amount" with the collecting society. A swift, effective, cheap and independent tribunal that can consider the need for a licence and the reasonableness of rates is particularly necessary because of the tendency of collecting societies to impose unreasonable tariffs without discussion or justification (though the latter point will become less relevant if a proper published justification is required). It certainly appears the case that in some member states collecting societies are empowered to impose tariffs or levies that are wholly unreasonable in amount, or even not justified at all, without any effective means of challenge by those who must pay them.

3. Relations with right-holders (Section 3.5.3)

We agree with the various suggestions in this sections aimed at ensuring that collecting societies properly serve the interests of the right-holders they represent and serve, but it must be remembered that the societies also owe obligations towards the public in general and users in particular. As we have pointed out, that requires that there should be transparency on the fixing of tariffs and the way collecting societies use their receipts and also that there should be participation by users in the governing of collecting societies.

The paper contains a cautious acceptance of the relevance of Digital Rights Management (DRM) systems to relations between right-holders and collecting societies, especially as a way of permitting individual management of rights. That is to be welcomed, especially in the light of the acknowledgement in the Copyright Directive that in the digital world DRMs are a better route to fair compensation than levies. But we think any legislation should be more robust in this area than the paper implies:

- The final sentence of Section 3.5.3, states "Furthermore, in the light of the deployment of Digital Rights Management (DRM) systems, rightholders should have, in principle, and unless the law provides otherwise, the possibility if they so desire to manage certain of their rights individually". We are pleased to see the acknowledgment that DRMs should allow right-holders to manage their rights individually, though the limitation to "certain" of their rights is unhelpful and should be dropped. ***However, the proviso "unless the law provides otherwise" should be removed.*** If left in it will undoubtedly be used to prevent individual rights management in those countries that have traditionally accorded collecting societies a mandatory role, which is precisely where the provision is most needed.
- The disparate levy regime is one of the most extreme examples of the current lack of harmonisation. The legislation would offer the chance to stop things getting worse and pave the way to a world where DRMs replace levies as the means of delivering fair compensation. ***The legislation should prohibit collecting societies or member states from introducing new levies and freeze the rates of existing levies.***

4. External control of collecting societies (Section 3.5.4)

We agree that all aspects of the operations and policies of collecting societies should be subject to overall control by an independent body. The body must be effective and it should offer redress at reasonable cost to all stakeholders, right-holders and users alike. We believe it should be judicial or quasi-judicial and its findings should normally be binding. However, this is an area where the precise nature of the eventual provisions will determine how useful the body would be and we would want to see the proposals before commenting in more detail.

5. Towards a harmonised internal market

We come to the most difficult aspect of the whole consultation paper. The object of the legislation is explained to be to encourage the creation of a unified internal market in the grant of rights under copyright and related rights.

There are two aspects to such a market:

- ***There should be competition between collecting societies in the offer of licences.*** Only if there is a genuinely competitive and non-monopolistic market where the user can obtain his licence from the society offering the best terms, both financial and by way of licence conditions, can we be sure that inefficiencies will be driven out of the system and collecting societies kept vigorous and responsive. That means that collecting societies based in different countries should all be able to provide licences in a given country.
- ***A user should be able to obtain licences that apply throughout the EU, or which cover selected countries of the EU*** In the modern world, which is increasingly based on on-line distribution, there is a need for one-stop shopping for the whole area of interest to the user. At the same time, charging schemes must be sufficiently flexible to ensure the user is charged only for those countries in which he will actually use the rights. It would not be in the public interest for all licences to become Europe-wide at a corresponding multiple of the single-country price.

The prerequisite for both these outcomes is that a collecting society should be able to grant licences outside its own home territory. Unfortunately, while the measures described in the paper could be useful in encouraging a more uniform approach that will help the internal market if it has already been agreed that rights can be granted internationally, the paper offers no real justification as to why these measures would encourage collecting societies to move towards a genuine pan-European mode of operation if they have not already agreed to do so There is also a dilemma, as the paper points out. If collecting societies are to be able to grant rights internationally they must in turn be empowered by their right-holders to do so. However, it would not right, even if it were possible under Berne or TRIPS, for the EU to force right-holders to grant rights of such a broad scope if they do not want to. Hence, in the view of the TMPDF,

- ***Further thought needs to be given to the development of mechanisms that would encourage right-holders to facilitate one-stop shopping by making pan-European rights available through collecting societies..***

21 June 2004