Copyright & Levies

Copyright: UK

In December 2011, the Government published proposals for implementing a number of the recommendations relating to copyright which it had accepted in its August 2011 response to the Hargreaves Review of IP and Growth. Simultaneously Baroness Wilcox, the IP minister at the time, launched a Government consultation seeking views on these proposals.

The consultation included 114 questions addressing a broad range of topics in five key areas: Orphan Works, Extended Collective Licensing, Codes of Conduct for Collecting Societies, Exceptions, and Copyright Notices. The consultation also included a programme of meetings around the country.

Specifically the Government proposed widening copyright exceptions with a view to modernising and opening them up to the maximum extent permitted under EU law. This would include allowing limited private copying (for format shifting), widening the exception for non-commercial research, widening the exception for library archiving, and introducing an exception for parody and pastiche.

In responding to the consultation the Federation broadly supported the Government's objective of improving the copyright system as a contributor to growth, emphasising that it is important to balance the interest of rightholders with those of companies who may wish to achieve strong, sustainable balanced growth through the development and launch of products on the UK and worldwide markets.

The Federation's response to the Consultation focused on specific areas of direct interest to members, endorsing the response made by Intellect, the UK trade association for the ICT (information and communications technology) and consumer electronics sector. On private copying the Federation pointed out that the exception should, on the one hand, be drawn as broadly as possible to embrace all those acts of format shifting that most reasonable people believe already are, or should be permissible. On the other hand, it is imperative that the exception remains narrow and sufficiently limited so that it causes no more than minimal harm to rightholders and as such does not give rise to a requirement for payment of compensation in accordance with the EU Copyright Directive 2001/29/EC.

The Consultation included a question on whether contract should be able to override exceptions. On this point the Federation explained that it would be harmful to the licensing model generally if rights owners were unable to license acts of private copying for the benefit of consumers. It must remain possible to include within a commercial licence all uses embraced within the private copying exception, and hence the private copying exception should not be afforded so-called 'imperative status'. (Note: the question whether authorised reproduction exhausts entitlement to levies is currently before the CJEU in combined cases C-457/11 to C-460/11, discussed below.)

The Federation also responded to the Consultation questions on parody, caricature and pastiche pointing out that in the case of *Schweppes Ltd and others v. Wellington Ltd* [1984] FSR 210, Falconer J found on summary judgement that a parody of a Schweppes tonic water label used in the packaging of bubble bath was an infringement of copyright, there being no defence based on parody. The Federation urged that no change of the law should have the effect that, on facts similar to those in *Schweppes v. Wellington*, a different decision might be made by the court.

Despite expectations that legislation on the private copy exceptions would follow quickly and perhaps be announced in the Queen's speech in May as one of the flagship initiatives flowing from the consultation, at the time of writing (early November 2012) nothing has materialised.

However, in June, the Government did publish a summary of the 471 responses to the consultation (plus 14 late responses), but did not at that time publish the responses themselves. This somewhat unusual measure was felt necessary because some respondents had openly criticised activities of others in the sector, and the Government did not want to publish any potentially defamatory material. In July the responses themselves *were* published but inappropriate or defamatory comments were redacted. Signatures and personal telephone numbers and email addresses were also omitted for information security purposes. This just goes to show how emotive copyright can be among vested interests, and it may help to explain why legislation has not followed as quickly as the government initially intended.

But in July the Government did publish a policy statement on modernising copyright in the light of the consultation. This indicated an intention to legislate "as soon as possible" to allow schemes to be introduced for the commercial and non-commercial use of 'orphan' copyright works and voluntary extended collective licensing of copyright works, subject to a number of important safeguards. It also proposed creating a backstop power to require collecting societies to adopt codes of conduct based on minimum standards. Once the necessary legislation is in place, there would be further consideration of the details of all these measures, generally through consultation, before the final schemes are laid before Parliament for approval.

It was also indicated in the July statement that policy decisions on other issues covered by the consultation – including plans to make changes to the UK's copyright exceptions and the proposed copyright notices scheme – would be set out in a subsequent document later in the year (2012). At the time of writing (early November) nothing more had materialised.

However, in late October the Government did publish a set of minimum standards to underpin the self-regulatory framework for collecting societies. The minimum standards, which cover fairness, transparency, and good governance, are intended to form the basis of collecting societies' individual codes of practice. An initial review of these codes will be undertaken by an independent code reviewer in November 2013, a year after launch.

Also back in July, Richard Hooper who is leading the feasibility study into a Digital Copyright Exchange published the Phase 2 final report, making a number of recommendations on how copyright licensing could be simplified including the establishment of an industry-led Copyright Hub based in the UK but linked to the growing national and international network of digital copyright exchanges, rights registries and other copyright-related databases.

Copyright Levies: EU – Brussels

The first phase of the much-heralded EU mediation process eventually got under way in April in the form of bilateral talks with a broad range of stakeholders including manufacturing companies, trade and consumer organizations, collecting societies and rightholders. Additionally the mediator received a significant number of written submissions.

This was followed in early October by a second phase of the mediation process comprising a series of roundtable stakeholder meetings. At this stage the net was cast even wider and included for example representatives of retailers and wholesalers.

The mediation process is being run by Mr António Vitorino, a former EU Commissioner, who was appointed by internal market Commissioner Barnier as the high level mediator in November 2011.

During the mediation the key message from DIGITALEUROPE, the European trade association for the ICT and consumer electronics sectors, which has members in common with the IP Federation, was that the levies system is fundamentally broken and is beyond repair.

There is no point in trying to fix it. The priority must be to find alternative forms of compensation for private copying in the digital era.

Immediately after the second round of talks, DIGITALEUROPE launched a paper on alternatives to the device-based levy system, and simultaneously issued a press release calling for a proper public debate on alternatives and the new and emerging concepts in this space. The paper articulated some initial ideas as a catalyst for debate.

The next stage in the mediation process is that Mr Vitorino is expected to deliver a report with formal recommendations to Commissioner Barnier around the turn of the year. The report will be in the public domain. The Commission will then decide next steps.

The mediation process has so far been confidential, but it has been acknowledged publicly that Mr Vitorino has demonstrated a willingness to consider alternative models to device-based levies, recognizing that some Member States (notably Spain, Netherlands, Finland and UK) are already going down this path, and this trend cannot be ignored. Mr Vitorino also understands the trend towards access over ownership, i.e. cloud based consumption over copying, and he is acutely aware of many of the practical problems with the current levies system.

Realistically, however, Mr Vitorino will not recommend any kind of 'big-bang' approach, i.e. a sudden abolition of device-based levies, but is more likely to concentrate on a few specific improvements in the functioning of the existing levies system, which would be less politically controversial, and – as he sees it – completely in line with his official mission. Nevertheless industry is hopeful that Mr Vitorino will also see his report as an opportunity to lay the seeds of a longer-term EU-led transition away from device-based levies towards alternative and fairer compensation solutions fit for the digital era.

Copyright Levies: EU – Member States

At Member State level, we are seeing a growing number of initiatives emerging around alternative, fairer approaches to rightholder compensation – but the situation is volatile.

In December 2011 Spain suddenly abolished levies with effect from January 2012, replaced by a payment of euros 5 million from the state budget by way of 'fair compensation' for harm to rightholders under the terms of the EU Copyright Directive. However, as this amount is less than was being collected through the former levy system, the collecting societies have retaliated and have filed a Complaint with the EU Commission. In October a new draft regulation surfaced (supposedly produced by the collecting societies in liaison with the office of the Secretary of Culture). This not only defines the method for determining the amounts to be compensated by government funds, but also has retroactive implications requiring companies to pay levies allegedly due under the former system. Industry is mounting a coordinated opposition.

The Netherlands has for some time been proposing the formal abolition of levies, and since 2008 there has been in place a Government "freezing" order preventing levies being applied to new devices. Part of the Government's proposal to end the levy system was to amend the law to make it clear that unauthorized downloading of protected works was illegal. Unfortunately, this proposal came to Parliament at the time when there was a loss of confidence in the Government and new elections were planned. Therefore, there was no appetite in Parliament to upset their voters by placing a "restriction" on their perceived downloading rights. The Dutch Government then pulled back from their plans to end the levy system due to the inability to push forward the illegal downloading law. In parallel NORMA, the author's rights organization, won a judgment against the Dutch Government invalidating the freezing order. That judgment also suggested that the Government would be liable for paying fair compensation if the freeze was maintained. Consequently, in order to protect itself from further exposure, the Dutch Government took steps – albeit reluctantly – to reinstate a new device-based levies system which will extend to tablets and smartphones, due to take effect in January 2013. This may only be a temporary measure because in late October it became clear that, after the elections, the same minister who was pushing to abolish levies will remain in office and is likely to reinstate plans to phase

out levies. Again industry is coordinating its efforts to challenge the re-introduction of levies in 2013.

In the UK, as reported above, the Government consultation following the Hargreaves Report on IP and Growth, included proposals to introduce a narrow private copying exception for format shifting of content, but without introducing levies on the basis that this would cause no more than minimal harm to rightholders recognising that the ability to make private copies of music, for example, is already priced into the purchase. The UK 'priced into purchase' model is regarded as an alternative to device-based levies.

In December 2011 the Finnish Government had announced it would have a new, alternative system in place by 2013, following a report earlier in the year commissioned by the ministry of Culture which recommended moving away from device-based levies to alternative sources of compensation for private copying and cultural funding. A second report in May 2012 proposed expanding the current system, but that met with a critical backlash. The political steering group in Finland is understood to be still looking at alternatives as the preferred way forward, although a renewed system is unlikely before 2014 now. In an interesting development in May, key stakeholders Nokia, Teosto (the Finnish Composers' Copyright Society), Sanoma (a leading European media group) and IFPI from different sides of the debate jointly made a public statement supporting use of the TV fee (YLE-payment) as an alternative to device-based levies for compensating private copying.

CJEU cases

During 2012 two new cases were referred to the CJEU, bringing the total number of CJEU cases on levies to six. Two of these have now been decided, namely the *Padawan* case C-467/08 which, among other things, confirmed that devices solely for professional use are not subject to levies, and the *Opus* case C-462/09 concerning cross-border 'distant' sales which confirmed that foreign web shops have to pay levies.

In September the Dutch Supreme Court asked whether illegal downloading is entitled to be compensated by levies (*ACI Adam et al* case C-435/12). Then, in October in *Copydan* case C-463/12 the Danish Østre Landsret referred questions concerning levies on memory cards for mobile phones, specifically seeking guidance on the *de minimis* rule which says that compensation may not be due when any private copying causes no more than minimal harm to rightholders.

Other cases pending before the CJEU look at possible double payments in cross border sales (*Amazon* case C-521/11); and in the context of reprography whether or not levies can be claimed when use has been authorised *Fujitsu, Canon, HP et a*l case C-457/11 to C-460/11.

This continuing trend of cases coming before the CJEU may itself have positive effects not only in the evolving jurisprudence on levies in Europe (in terms of favourable interpretation of the Copyright Directive), but it also helps to demonstrate that the levies system is not working and so provide a platform for eventual legislative change.

Tim Frain, 4 November 2012