

Questionnaire for the ALAI Study Days 2015 in Bonn

Remuneration for the use of works

Exclusivity v. other approaches

**RESPONSE OF BLACA (BRITISH LITERARY AND ARTISTIC
COPYRIGHT ASSOCIATION)**

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A. Questions in relation to scope and enforcement of exclusive rights under existing law

In many areas, exclusive rights can be exercised and enforced in relation to users either on the basis of license agreements or, in cases of infringements, on the basis of enforcement rules and mechanisms. However, in particular in the internet environment, it may be difficult to identify users, who may be anonymous, so that a license agreement in the first place cannot be concluded and infringements are difficult to pursue. The first set of questions addresses these problematic areas. Since most problems arise in the digital environment, questions focus thereon.

1. How are the following acts covered by the copyright law of your country (statute and case law):
 - i. Offering of hyperlinks to works
 - ii. Offering of deep links to works
 - iii. Framing/embedding of works
 - iv. Streaming of works
 - v. Download of works
 - vi. Upload of works
 - vii. Supply of a platform for 'user-generated content'
 - viii. Other novel forms of use on the internet.

ANSWER

At the time of writing the UK is still part of the EU, therefore the CJEU 'clarifications' of the copyright directives must be taken into account.

- i. *Offering of hyperlinks to works*

Following the CJEU decisions C 466/12 Svensson E A v Retriever Sverige, C-279/13 C More entertainment, and C-348/13 Bestwater International, it is safe to argue that, in principle, offering a hyperlink to freely available content is not an infringement of section 20 of the Copyright, Designs and Patent Act 1988 (CDPA). On the other hand, hyperlinks designed to circumvent pay-walls or other subscription-only services or geo-blocks [consequently] infringe section 20 CDPA (communication to the public).

Nevertheless it is not clear whether the content must be freely available or authorised, even implicitly by the author/copyright owner. This is of uppermost importance, especially in the case of content uploaded under limitations and/or exceptions which might not be extended to the hyperlink provider, and more generally hyperlinks to unauthorised content.

The IPO guidelines state that the activity is not infringing copyright 'providing the material itself has been published freely online with the permission of the rights holder' (ie

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/305165/c-notice-201401.pdf), however this question would deserve more attention.

A more authoritative reading (PRE-SVENSSON) has been provided by Arnold J in *Paramount Home Entertainment International Ltd & Ors v British Sky Broadcasting Ltd & Ors* [2013] EWHC 3479 (Ch) (13 November 2013). He made clear that while the mere provision of a hyperlink does not necessarily amount to communication to the public, in the particular case in question, the users uploaded content to the websites 'AND' provided hyperlinks to infringing content, therefore he concluded that the combined effect of these acts amounted to a communication to the public by the users.

Generally in light of the extensive CJEU decisions on communication to the public, it is thought that at least some degree of knowledge should be required to infringe the right of communication to the public via hyperlinking.

Finally, liability might nevertheless arise under section 16 (authorisation) (see below).

ii. Offering of deep links to works

Following the CJEU decisions referred to above, it is thought that offering a deep link to works would not change the above,

Further liabilities might also arise under moral rights legislation (CDPA sections 77 and 80 (to date there is no case law on this issue)).

iii. Framing/embedding of works

Following the CJEU decision C-348/13 (*Bestwater International*) framing/embedding freely available and authorised content is not an infringement of section 20 of the CDPA subject to the limitation mentioned above at (i).

Nevertheless moral rights might be infringed by these activities (CDPA section 77 and 80 (to date there is no case law on this issue)).

iv. Streaming of works

Following the CJEU decision C 607/11 *ITV v TV Catchup*, both Streaming-On-Demand and the streaming of a terrestrial broadcast simultaneously amount to communication to the public under section 20. The applicability of the section 73 defence (retransmission)

is still questionable following the referral of new questions to the CJEU by the court of appeal in the case ITV v ITV Catchup ([2015] EWCA Civ 204).

Accessing a streaming transmission arguably does not infringe the right of reproduction (C-360/13 Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd and Others).

v. *Downloading of works*

Notwithstanding the lack of case law, downloading unauthorised content would definitely infringe section 17 CDPA (reproduction right). No limitations or defences are applicable.

vi. *Uploading of works*

Since 2005, it has been clear that the uploading of a work without authorisation infringes section 20 CDPA (see Polydor v Brown [2005] EWHC 3191 (Ch); (2006) 26(3) IPD 29021 and more recently, Dramatico Entertainment Ltd & others v British Sky Broadcasting Ltd & others [2012] EWHC 268 (Ch)).

Uploading software is covered by section 18 CDPA (issue of copies to the public/distribution); however, the exclusive right is exhausted when downloading is authorised in return for remuneration (Case C-128/11 UsedSoft GmbH v Oracle International Corp). Pre UsedSoft, a number of unreported decisions had been already handed down in the UK regarding the infringement of section 18 for file sharing of the video game 'Pinball' (2001-2005).

vii. *Supply of a platform for 'user-generated content'*

Per se this activity is not covered by copyright.

In case the content generated by the user is entitled to copyright protection, it seems implicit that the user uploading the content would authorise the platform to communicate the work to the public and reproduce it.

In case of infringing content, potential liabilities would include reproduction, communication to the public, authorization and joint tortfeasance, but see E-commerce directive and below 'Question 3'

viii. *Other novel forms of use on the internet.*

Depending on the nature of the service provided, most if not all economic and moral rights might be involved.

2. *In cases in which there are practical obstacles to the conclusion of licensing agreements, in particular where multiple individual (end) users do not address right*

owners before using works (eg, users uploading protected content on platforms like You Tube), are there particular clearing mechanisms? In particular, are license agreements possible and practiced with involved third parties, such as platforms, regarding the exploitation acts done by the actual users (e.g., license agreements with the platform operator rather than with the platform users (uploaders))?

ANSWER

Yes, for instance You Tube is licensed in the UK for music via PRS since 2013

3. a) If there is infringement of copyright, in particular of exclusive rights covering the acts listed under 1. above, and the direct infringer cannot be identified or addressed, does your law (including case law) provide for liability of intermediaries or others for infringement by third persons, namely:

- for content providers
- for host providers
- for access providers
- for others?

ANSWER

Yes, section 16 authorisation and section 20 communication to the public

Twentieth Century Fox Film Corporation & Anor v Newzbin Ltd [2010] EWHC 608 (Ch); Dramatico Entertainment Ltd & others v British Sky Broadcasting Ltd & others [2012] EWHC 268 (Ch).

No case law to date on access providers, but a site-blocking order has been made in respect of links to aggregators website *Paramount Home Entertainment International Ltd & Ors v British Sky Broadcasting Ltd & Ors [2013] EWHC 3479 (Ch) (13 November 2013).*

b) If so, under what conditions are they liable, and for what (in particular, damages, information on the direct infringer, information on the scope of infringement to estimate the amount of damage)?

ANSWER

To summarise and rephrase existing case law:

A court would take into consideration the following

- 1) The users and/or operators use the service provided to infringe copyright
- 2) The intermediary has actual knowledge
(not particular attention to the actual damage – PERSONAL OPINION)

To assess liabilities under authorisation, the court would consider the following factors

- 1) *The nature of the relationship*
- 2) *The means used to infringe*
- 3) *The inevitability of infringement*
- 4) *The degree of control*
- 5) *The steps taken in order to prevent infringement*

To assess joint tortfeasance, the court would take into consideration whether:

- 1) *the intermediary induced, incited or persuaded its users to commit infringements of copyright,*
- 2) *the intermediary and the users acted pursuant to a common design to infringe; and (but less relevant)*
- 3) *the intermediary profits from the infringing activities.*

Twentieth Century Fox Film Corporation & Anor v Newzbin Ltd [2010] EWHC 608 (Ch); Dramatico Entertainment Ltd & others v British Sky Broadcasting Ltd & others [2012] EWHC 268 (Ch); Paramount Home Entertainment International Ltd & Ors v British Sky Broadcasting Ltd & Ors, [2013] EWHC 3479 (Ch) (13 November 2013); CBS Songs Ltd v Amstrad Consumer Electronics plc [1988] 1 AC 1013

As regards remedies sought:

- 1) *Claims in reported cases generally relate to non-monetary remedies such as injunctions, based on sample instances of infringement.*
- 2) *A successful claimant could ask for an enquiry as to damages, a further procedure to assess the full scope of infringement and the consequent award of damages, on a basis directed by the court.*
- 3) *Identification of direct infringers may be sought as a form of preliminary relief, but the courts are aware of in-efficiency of suing a large number of end-users, as for example in Dramatico Entertainment Ltd & others v British Sky Broadcasting Ltd & others [2012].*

4. *In these cases of infringement, who has standing to sue:*

- *the author*
- *the exclusive licensee*
- *the non-exclusive licensee*
- *the employer of the author*
- *the CMO that manages the exclusive right?*

ANSWER

The copyright owner (Section 96 CDPA)

Exclusive licensees (Section 101 CDPA)

*Non-exclusive licensees in respect of certain infringements (Section 101A CDPA);
[prior to enactment of S101A in 2003, exclusivity of licence was required.]*

The employer is the copyright owner where the author was employed under a contract of service or made the work in the course of employment, subject to any relevant agreement to the contrary (section 11 CDPA).

A CMO, where it has a valid mandate to enforce its members' rights by means of legal action

B. Questions regarding mechanisms to ensure adequate remuneration for creators and performers in their relationship with licensees

If authors and performers exercise their exclusive rights by licensing them to exploitation businesses, such as publishers, the question arises how they best may ensure an adequate remuneration from such licenses.

1. Does your law provide for legal rules, including by case law, on mechanisms for authors and performers to ensure an adequate remuneration in relation to exploitation businesses in the following cases:
 - as a general rule for all kinds of contracts;

ANSWER

There are no statutory rules for adequate remuneration save in relation to the right of rental where the CDPA 1988 does set down an unwaivable right to remuneration. Only the following are beneficiaries of the unwaivable right: authors of original literary, dramatic, musical and artistic works, directors of films, and performers.

In relation to authors, the unwaivable right to remuneration means such authors cannot, insofar as the rental right is concerned, and in relation to the use of the work in a sound recording or film – transfer this right to equitable remuneration for any rental of the work to a producer of a sound recording or film. The right cannot be excluded by contract.

In all other cases, the general rule is “freedom of contract”, and the common law on exploitation - discussed below.

- as regards ‘best-seller’ situations (i.e., when parties did not presume that the work would become a best-seller);

ANSWER

There are no “best-seller” clauses in the copyright law.

- *in the case of oppressive contracts;*

The common law doctrine of restraint of trade governs this area. Conditions which are in restraint of trade are prima facie unenforceable at common law, unless they are reasonable as between the parties, and insofar as the public interest allows it. If not, such conditions are void.

The seminal case in this area is Macaulay v Schroeder [1974] 3 All E.R. 616], where the House of Lords applied the doctrine of restraint of trade to publishing and recording agreements. Specifically, the Court held that the agreement was unduly restrictive and in unreasonable restraint of trade, and therefore was contrary to public policy and unenforceable notwithstanding that the agreement was in the publishers’ standard form and was in common usage. In the present case, the respondent assigned to the appellants the full copyright for the whole world in every musical composition composed, created or conceived by him alone or in collaboration with any other person during a period of five or it might be 10 years. [Note that this is possible under UK law i.e. an assignment of future copyright in works yet to be written]. He received no payment (apart from an initial £50) unless his work was published and the appellants need not publish unless they chose to do so. And if they did not publish he had no right to terminate the agreement or to have copyrights reassigned to him. It was sufficient for the Court to hold that such evidence as there was fell far short of justification.

In Sunshine Records (Pty) Ltd v Frohling [[1990] (4) S.A.782], the court held that an exclusive recording contract for an initial term of three years renewable for a further three years was in undue restraint of trade, because of the nature, extent and duration of the obligations and restrictions imposed on the artists, together with the absence of any real reciprocal obligation on the recording company. [This South African case would be regarded as persuasive authority in the UK.]

In John v James [[1991] F.S.R. 397.] it was held that an experienced and successful publisher assumed a dominating influence over young inexperienced writers. Even after a short acquaintance they were apprehensive of the publisher and anxious to have him as their publisher, trusting and relying on him that the terms of the contract proposed were reasonable. The publisher took charge of the arrangement and failed to explain the terms of the agreement. The agreement was liable to be set aside even though the publisher had acted in good faith and had made no conscious attempt to obtain an unfair bargain.

In Silvertone Records v Mountfield [[1993] EMLR 152 and 171] the following terms of an exclusive recording agreement were held to be unfair: the term of the agreement which made it possible to sterilise the artist's output for seven years; a rerecording restraint of 10 years; the record company's unrestricted right to authorise the use of the artist's records to endorse products; the right to withhold advances in the event of a breach of any kind; the unequal power to terminate the agreement; the record company's right to decide on all aspects of the recording process and the denial of any artistic control to the artists; and the record company's unlimited right of assignment, given the degree of co-operation required.

- in other cases;
and if so, under what conditions?

ANSWER

N/A - see above.

2. If your law provides for rules as addressed under B. 1. above, does the law determine the percentage of the income from exploitation to be received by authors and performers, or does it otherwise specify the amount of remuneration?

ANSWER

N/A – see 3.

3. Please indicate also whether these mechanisms that are addressed under B. 1. and 2. above are efficient in practice.

ANSWER

The remedy for an author or performer wishing to fix the amount of equitable remuneration or dissatisfied with the amount payable is an application to the Copyright Tribunal. As stated, in all other cases, the general principles of contract law apply.

Unlike civil law systems, such as Germany, the general legal system in the UK relies considerably on the notion of the independence of the judiciary (from the executive and legislature). Accordingly, the role of the judiciary is to enforce the law and interpret the law as it stands. This entails taking account not only of statute but also the common law precedents system, including the notion of “freedom of contract”, and the general common law doctrine of public interest, in order to carve out exceptions where it is clear that the facts and circumstances dictate that the contracts are unenforceable.

*A historical rationale for this approach is that it allows the industries and creators to react to economic and market conditions quickly under general contract rules, whilst bestowing the general mantle of guardianship of this relationship on the judiciary, rather than the legislature where law making can take a considerable time to reach the statute books. The rule of “freedom of contract” was derived primarily from the Industrial Revolution period - a response of the judiciary to the changing socio-economic climate from status-based agreements (e.g. indentures/tenants) to agreements between free persons. Indeed, during the 18-19th centuries, Courts were suspicious of interfering in contracts, whoever the parties were. Sir George Jessel MR in *Printing and Numerical Registering Co v Sampson* [(1875) 19 Eq 462, 465] was one of the first to hold:*

“contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice.”

The principles of English contract law have been stable and offer certainty to all those jurisdictions throughout the world with laws deriving from it; it would be very odd for such principles to be buttressed by different species of laws for example copyright law. Nevertheless, as the case law above shows, when inequitable and unfair terms are imposed on creators, the courts can be ruthless under their general powers of public policy and contract to render copyright contracts void and unenforceable ab initio.

Freedom of bargaining between parties is always a pertinent issue and a concern for all, especially in relation to individual authors vis-a-vis the entrepreneurial rights holders. To this end, the UK has enacted several pieces of legislation - in the field of consumer protection - which apply equally to authors. (For e.g.. the Misrepresentation Act 1967, where the burden of proof was placed on businesses to prove that they were not negligent; and the Unfair Contracts Terms Act 1977 - whereby unreasonable terms could be extinguished by the court, irrespective of the “freedom” of parties to negotiate if the bargaining power of the parties proved the opposite).

A key policy approach in the UK now is to investigate the rights of authors vis-a-vis labour law (or workers’ minimum wages), etc. Moreover, EU laws on commercial contracts limit contractual practices which seek to unfairly exploit authors’ creativity.

Finally, a clear rationale for the UK approach (ie contract/judiciary as opposed to copyright statute/legislature) is that this independence of the judiciary assures that no lobbying of interested parties takes place - as can happen in the law-making process - and the most equitable and just conclusion is reached on the facts presented to the court, within the temporal context.

C. Questions in relation to statutory remuneration rights

The questions below concern the question of the scope of remuneration rights and their enforcement (which usually takes place through collective management organizations (CMOs)) towards users.

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1. In which cases do statutory remuneration rights exist in your country, e.g., public lending rights, resale rights, remuneration rights for private copying, or others (often, they are provided in the context with limitations of rights)?

ANSWER

- *Artist's Resale Right Regulations 2006/346*
- *The Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014*
- *S. 73 (4) CDPA 1988 – reception and cable retransmission of a wireless broadcast when the area in which the retransmission by cable takes place falls outside the area for reception in which the broadcast is made. In absence of an agreement, a reasonable royalty fee is set by the Copyright Tribunal*
- *S. 93B, CDPA 1988 – Right of author to equitable remuneration retained where rental right transferred.*
- *S. 135C, CDPA 1988 -- the Act provides for a statutory right to include sound recordings in broadcasts and simulcasts.*
- *S. 137, CDPA 1988 – in relation to reprographic copying of published literary, dramatic, musical or artistic works, or of the typographical arrangement of published editions by educational establishments, the Secretary of State has some powers to extend coverage of a scheme or licence, subject to the 3-step test of the Berne Convention.*
- *S. 182D, CDPA 1988, right to equitable remuneration for exploitation of sound recordings.*
- *CDPA 1988 Sch.2 Para 14A(1): lending of certain recordings can be licensed by the Copyright Tribunal upon payment of a reasonable fee – this however only applies if there is no alternative licensing scheme in place.*

2. Is there the possibility of obtaining compulsory licenses, and if so, under what conditions and for what categories of works?

ANSWER

- S. 66 CDPA 1988: *Public lending of literary, dramatic, musical, or artistic works, sound recordings or films. The licensing fee is set by the Copyright Tribunal in absence of a certified scheme (see responses to the 2014 Consultation on the extension of the Public Lending Right to Rights of holders of books in non-print formats).*
- S. 190 (1) - *consent provided by the Copyright Tribunal to a person wishing to make a recording, in case the whereabouts of the person entitled to the reproduction right in relation to the recording of a performance cannot be ascertained by reasonable inquiry.*
- *In relation to performers' property rights, CDPA 1988, Schedule 2A Para. 17: "Licences of right are available in respect of performers' property rights if the Secretary of State, the Competition Commission or the Office of Fair Trading reports that certain specified practices may be expected to operate or have operated against the public interest." In this regard, see also s 144 - Powers exercisable in consequence of report of Monopolies and Mergers Commission.*

3.

- i. For which statutory remuneration rights does your law provide for obligatory collective management?

ANSWER

- *Resale right (see regulations above)*
- *Orphan works (Extended Collective Licensing system)*
- *Cable-retransmission right s. 144A, CDPA 1988 (ECL)*
- *Rights managed by a CMO which is authorised to operate an Extended Collective Licensing Scheme in respect of works owned by non-member rights owners (SI 2588 which entered into force on October 1, 2014).*

- ii. For which statutory remuneration rights does your law not provide for obligatory collective management, but in practice, the right is managed by a CMO?

ANSWER

In light of the scope of s. 143 (Certification of Licensing Schemes), CMOs are mostly responsible for the management of certain rights such as those under s. 66 (lending to public of copies of certain works) and section 141 (reprographic copying of published works by educational establishments). A previous version of s. 143 referred to schemes in relation to section 74 (sub-titled copies of broadcasts for people who are deaf or hard of hearing). This was repealed by way of The Copyright and Rights in Performances (Disability) Regulations 2014.

iii. Who has to pay the remuneration regarding each of these statutory remuneration rights – the user, a third person (e.g., a copy shop or a manufacturer of a copying equipment and devices) or a tax payer (through money allocated from the public budget)?

ANSWER

Each provision of the CDPA 1988 indicates the person responsible for the payment.

iv. How is the tariff / the remuneration for each of these remuneration rights fixed (in particular, by contract, by law, by a Commission, etc.)?

ANSWER

Normally, remuneration is agreed upon by negotiation between the parties on a contractual basis. When an agreement between the parties cannot be reached, the Copyright Tribunal plays a part in the licensing process (see supra). Certified schemes (s. 143) contribute to maintaining certainty as to the remuneration payable in relation to the said rights.

Only in the case of the resale right, are royalty rates set by statute.

v. Is there supervision of CMOs regarding tariffs, and if so, what are the criteria for supervision?

ANSWER

CMOs are self-regulated in the UK. The Copyright (Regulation of Relevant Licensing Bodies) Regulations 2014 include powers to enable the government to remedy any gaps in the system of self-regulation should they emerge. To date these powers have not been used.

In 2012, a document was produced by the British Copyright Council, entitled 'Principles of Collective Management Organisations' Codes of Conduct'. This contributed to the adoption of specific Codes of Conduct by individual CMOs. The Copyright Tribunal remains responsible for disputes concerning tariffs (<https://www.gov.uk/government/publications/copyright-tribunal-decisions-and-orders>).

Two examples of CMOs approaches to tariffs are considered below:

The PRS Code of Conduct, which followed the introduction of the Collective Management Directive and echoed its aims and objectives, is an example of an increased degree of transparency and accountability of collecting societies towards their members and, significantly, towards users in relation to tariffs (see pp. 26 - 28 on Tariffs specifically).

PRS for music:

“We reserve the right to review our terms and conditions of licensing, including our charges, from time to time. Our consultation processes vary depending on the rights and customer groups being considered and the extent of the changes proposed. Details of our consultation processes and any current tariff consultations on our website at:

prsformusic.com/customerconsultation

In addition, the published and proposed licensing schemes operated by us may be referred to the independent Copyright Tribunal, which has power to set royalty rates and other licence terms so as to ensure that they are reasonable in the circumstances. Tariffs or licensing schemes that are the subject of a Tribunal order cannot be varied unilaterally by us without the consent of the Tribunal. For more details about the Copyright Tribunal and its jurisdiction see: ipo.gov.uk.”

Educational Recording Agency Ltd (ERA) licences:

““Rights granted under ERA Licences shall be granted in consideration of payment to ERA of relevant ERA Licence Fees.

The ERA Licence Fees shall be calculated by reference to the period for which the ERA Licence has been granted and by reference to the applicable tariff published on the ERA website in respect of that period.

The annual tariff for fees under ERA Licences shall be calculated by category of student in the Relevant Educational Establishments to which an ERA Licence applies and against which Authorised Users relevant to the ERA Licence will be defined.

ERA Licence Fees for Agreements running for a period of less than one year shall be calculated on a pro-rata basis against the applicable annual tariff.

Discounted rates or fee abatements against published tariffs may be negotiated at ERA’s discretion when ERA Licence Fees are paid by or on behalf of recognised and identified groups of Relevant Educational Establishments to which the terms of an ERA Licence shall be applied”.

Tariffs applicable under the New ERA Licence can be found by visiting www.era.org.uk

...

Consultation takes place when terms of ERA Licences are changed in any significant way.”

vi. What problems exist when right holders assert the statutory remuneration right in relation to users or others who are obliged to pay the remuneration (e.g., a claim is rejected and results in long legal proceedings; those who are obliged to pay in the meantime go bankrupt, etc.)?

ANSWER

N/A

vii. If problems to assert the remuneration exist, does your law provide for any solutions to these problems (e.g., an obligation to deposit a certain amount in a neutral account)?

ANSWER

A safeguard system exists in the case of orphan works:

S. 10(2) of the Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014 provides a payment system for orphan licences. The provision reads as follows: “(2) The authorising body shall—

(a) hold all licence fees paid under this regulation in a designated account;

(b) adopt accounting procedures that ring-fence in a separate account all monies received from orphan licences; and

(c) retain unclaimed licence fees for a period of not less than eight years from the date of the grant of the relevant orphan licence.”

D. Mechanisms to ensure adequate remuneration for creators and performers

The questions below address the issue of existing mechanisms, in particular within CMOs, to ensure that authors and performers, also in relation to exploitation businesses such as publishers and phonogram producers, receive an adequate remuneration.

1. In respect of the statutory remuneration rights under your law, does the law determine the percentage of the collected remuneration to be received by particular groups of right owners (e.g., the allocation between authors and producers, among different kinds of authors, performers, and producers, et al.)?

ANSWER

In the UK, there is no statutory remuneration scheme in place in this sector. Notably, since October 2014 the UK exception for personal copies for private use is in force but it does not provide for any form of remuneration such as fair compensation (c.f. Article 5 (2b) Information Society Directive). New Section 28B (personal copies for private use) Copyright Designs and Patents Act 1988 as amended, has been challenged by the music industry and the impact of an eventual decision remains to be seen. Politically, it is unlikely that the UK Government will introduce a statutory remuneration scheme following the decision.

The Public Lending Right, i.e. the right for authors to receive payment for the loans of their books (including audio and electronic books downloaded to library premises for taking away as loans) by public libraries, is the closest to a statutory remuneration scheme in the UK but is not a copyright-based scheme. This right has been introduced in 1979 via the Public Lending Right Act 1979 as an additional and separate property right for authors. Annual payments are made from Government (Department Culture Media and Sports) on the basis of loans data collected from a sample of public libraries in the UK. According to the PLR website, it is not possible to predict the entitlement and the amount as this depends on the popularity of your registered books, and the ‘pence per loan figure’, which changes each year. The amount available for operation of the PLR scheme and distribution in 2013/2014 was £6.8. million. The UK PLR scheme is administered by the British Library which is also responsible for complaints.

2. If so, what percentages are fixed by the law? Are these percentages different for different statutory remuneration rights?

ANSWER

N/A

3. If there are no such legal determinations, how are the percentages or the otherwise fixed distribution keys for the different rights of remuneration determined in practice (in particular, by which decision-making procedures and by whom are these distribution keys determined inside CMOs)? Which percentages are in practice applied?

ANSWER

By negotiation between the copyright owners and users, through their representative bodies, including their respective CMOs.

4. If owners of derived rights (such as publishers who derived the rights from their authors) transfer these derived statutory remuneration rights to a CMO, how and on the basis of which agreement is the remuneration distributed between them in this case?

ANSWER

See answer to question 3.

5. Which mechanisms of supervision exist in your country to control the distribution keys applied by CMOs, if any?

ANSWER

Generally, supervision of CMOs is carried out by the Copyright Tribunal. Currently, the UK IPO is discussing the establishment of a national competent authority to supervise CMOs in the context of the implementation of the CRM Directive 2014/26/EU.

E. Questions on new business models and their legal assessment

1. Which new business models do you know in your country in respect of the supply of works via the internet?

Please list such business models, such as Spotify, Netflix, etc., and describe them briefly.

ANSWER

Audiovisual services:

Provision of films and television programmes on demand subject to payment of subscription fees or transactional VOD/DTO fees. Examples: Netflix, Amazon Prime, Blinkbox.

Provision of television programmes by broadcasters on demand in their own catch-up services. These are provided without charge; some include advertising. In catch-up services programmes may be downloaded within a short period after their broadcast and are then available for viewing for a limited period thereafter.

Streaming of broadcast channels by third parties. There is currently litigation to determine whether the streaming of the public service channels by the company TVCatchUp falls within the exception in section 73 of the Copyright, Designs and

Patents Act 1988. The Government announced in a consultation paper dated 26 March 2015 that it intends to abolish section 73 entirely.

The UK cable operator Virgin Media has been authorised by some broadcasters to retransmit their channels to subscribers over the internet as well as on the cable network owned by Virgin Media.

Provision of user-generated content: YouTube.

Music services

Provision of music on demand either free on services which include advertising or subject to payment of subscription fees or transactional DTO fees. Examples: Spotify, iTunes, Deezer, Rdio. Users may download tracks for retention on their devices. Our understanding is that rights holders are increasingly sceptical of ad-supported free services on the basis that they do not sufficiently upsell users to premium tiers. As a result, we expect that free ad-supported tiers will be shut down by rights holders in the near future.

Other services

These include:

Streaming of radio channels and provision of catch-up and on demand programming by radio broadcasters.

Audiobooks streamed for listening and available for downloading. Examples: Audible, Scribd, Spokenink and also such services as Spotify and iTunes. These services are provided against subscription or per download fees.

Books made available for purchase for downloading to reading devices such as Kindles.

2. Which of these business models have raised legal problems, which are, or have been, dealt with by courts? If there have been problems, please describe them and the solutions found

ANSWER

*As mentioned above, the retransmissions of broadcasters' channels by TVCatchUp has been the subject of litigation, including references of issues to the CJEU. The most recent decision in the matter is that of the Court of Appeal on 26 March 2015: *ITV Broadcasting Limited and others v TVCatchup Limited and Others* [2015] EWCA Civ 204. The broadcasters obtained a decision that TVCatchUp infringed their rights by streaming their non-public service channels. As regards their public service channels, the broadcasters established that section 73 does not apply to*

retransmissions to mobile devices. The Court of Appeal has decided that a question must be referred to the CJEU to determine whether the scope of the section 73 exception can extend to retransmissions on the Internet.

3. In your country, are there offers that are based on flat rates, 'pay-per-click' or on other micro-payment models? Please indicate how popular (frequently offered or used) each of these models is.

ANSWER

There are a variety of such models in use in the UK. We do not know of reliable statistics which would show the extent of use of each type of payment system. However, per-click/micro-payment models are in the minority as compared to monthly recurring subscription models which provide access to broad catalogue. We do see more services attempting to offer limited or niche catalogue in return for a lower subscription fee, (e.g. 02 Tracks, which provides top 40 music content only).

4. Within these business models, how do authors and performers get paid?

ANSWER

In relation to audiovisual works, authors of screenplays or of underlying works on which an audiovisual work is based may have received an initial buy-out payment covering all forms of exploitation, or they may have contracts entitling them to royalties or shares of profits or other additional payments when specific types of use are made of their work.. Performers are in a similar position. In many cases the entitlements of authors and performers will be governed by the terms of agreements negotiated between their unions and guilds with associations of producers.

Authors of musical works in internet-based audiovisual or audio services will generally receive remuneration through collective management organisations from authorised use of their works. Artists are paid a royalty under recording agreements with record labels.

Authors of literary works used in audiobook services will usually receive royalties or other payment through their contracts with the publisher of the printed version of their work.

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