



The Copyright
Tribunal

IN THE COPYRIGHT TRIBUNAL

CT123/13

IN THE MATTER OF A REFERENCE TO THE COPYRIGHT TRIBUNAL UNDER
SECTION 119 OF THE COPYRIGHT DESIGNS AND PATENTS ACT 1988

Date: 21st March 2014

Before:

Ms Colleen Keck, Dr Lucy Connors and Mr Philip Eve

Between:

CUTBOT LIMITED (Cutbot)

Applicant

- and -

**THE NEWSPAPER LICENSING AGENCY
LIMITED (NLA)**

Respondent

Mr Mackenzie in person for the Applicant

Edmund Cullen QC (instructed by Berwin Leighton Paisner) for the Respondent

DECISION

Background:

1. On 15th May 2012, following a full hearing, the Copyright Tribunal made an order in respect of the Newspaper Licensing Agency's licensing scheme which relates to online media monitoring (**OMM**) services (the **OMM Scheme**). The background to that reference, CT114/09 (the **Initial Reference**), and the consideration of the issues arising from the Initial Reference, are set out in the Tribunal's interim decision on the Initial Reference dated 14th February 2012 (the **Interim Decision**).
2. In its final decision on the Initial Reference, dated 15th May 2012, (the **Final Decision**) the Tribunal determined, or, in the case of a number of issues agreed by the parties to the Initial Reference, approved, the terms of the licences comprising the OMM Scheme, namely the Web Database Licence (**WDL**) and the Web End User Licence (**WEUL**).
3. The WDL and the WEUL operate as a single licensing scheme and when a media monitoring organisation (**MMO**) chooses to participate in the OMM Scheme the MMO enters into a WDL with the NLA, and, with some limited exceptions, clients of that MMO enter into a WEUL with the NLA. A more detailed explanation of how the OMM Scheme operates can be found in the Interim Decision.
4. The Applicant, Cutbot, is a small MMO that has been carrying on business full time since December 2011 and requires a WDL under the OMM Scheme. For various reasons, Cutbot was unable to, and did not, participate in the Initial Reference. Currently Cutbot has fewer than ten paying clients.
5. On 1st December 2012 Cutbot applied under Section 120 of the Copyright Designs and Patents Act 1988 ("**CDPA**") to refer the OMM Scheme to the Tribunal. In decision CT 120/12 dated 31st January 2013 (the **Special Leave Decision**) the Tribunal determined that as twelve months from the date of the Final Decision on the Initial Reference had not yet passed, under the terms of Section 120(2) of the CDPA Cutbot required special leave of the Tribunal in order for the reference to proceed. For the reasons given in the Special Leave Decision the Tribunal decided it would not grant Cutbot special leave.
6. Accordingly, on 24th May 2013 Cutbot applied to the Copyright Tribunal for a review of the tariff and certain terms of the WDL and the WEUL. By order of the Tribunal dated 2nd August 2013 the interventions of COADEC – The Coalition for a Digital Economy (**COADEC**), Meltwater Holding BV (**Meltwater**), and UK Media Monitoring Association (**UKMMA**) were permitted and each intervener filed a statement of intervention. Subsequently COADEC ceased its participation in this reference and both Meltwater and UKMMA ceased active participation in this reference. Again, by way of background, Meltwater was the applicant in the Initial Reference and the UKMMA was an intervener in the Initial Reference. Broadly speaking, COADEC either supported Cutbot's position on the issues or did not state a position whereas Meltwater and UKMMA either supported the NLA's position on the issues or did not state a position.
7. Following the Case Management Conference on this reference, the review of the WEUL was stayed by the Tribunal's order dated 25th October 2013, pending the decision of the Court of Justice of the European Union in *Public Relations*

Consultants Association Limited v The Newspaper Licensing Agency and Others, for the reasons set out in that order. In this reference the Tribunal has considered the WDL tariff and a number of other terms of the WDL identified by Cutbot as being problematic. This is the Tribunal's decision on the WDL tariff and those other terms of the WDL.

The Legal Framework

8. This application has been made under section 119 of the CDPA. The Respondent contends the application should have been made under section 120 because there is an order in force in relation to the OMM Scheme. Although the Respondent is correct on this point, it is common ground that for practical purposes this does not matter because under both sections the Tribunal's remit is to consider the matter in dispute and to make such order either confirming or varying the scheme as the Tribunal may determine to be reasonable in the circumstances. (See section 119(3) and section 120(4) of the CDPA.)

9. In determining the reasonable terms of a licensing scheme or a licence the CDPA directs the Tribunal to take into account certain factors in coming to its decision. Section 129 is relevant to this application and provides as follows:

“In determining what is reasonable on a reference or application under this Chapter relating to a licensing scheme or licence, the Copyright Tribunal shall have regard to –

(a) the availability of other schemes, or the granting of other licences, to other persons in similar circumstance; and

(b) the terms of those schemes or licences,

and shall exercise its powers so as to secure that there is no unreasonable discrimination between licensees, or prospective licensees, under the scheme or licence to which the reference or application relates and licensees under other schemes operated by, or other licences granted by, the same person.”

10. Section 135 of the CDPA is also relevant. It states:

“The mention in sections 129 to 134 of specific matters to which the Copyright Tribunal is to have regard in certain classes of case does not affect the Tribunal's general obligation in any case to have regard to all relevant considerations.”

11. The NLA argued strongly that by approving the terms of the WDL following the Initial Reference the Tribunal effectively determined that all the terms of the WDL are reasonable, and it is therefore not open to Cutbot to argue that any of the terms are unreasonable or should be changed, and it is not open to the Tribunal to reconsider or change any of those terms, unless there has been a relevant change of circumstances, and, the NLA says, there has been no relevant change of circumstances. The NLA argued that this is the case both for those terms the Tribunal specifically considered as part of the Initial Reference, and for terms that were not considered by the Tribunal because they had been agreed by the parties to the Initial Reference, and thus were not put in issue at the Initial Reference.

12. In the alternative, the NLA argued that even if the Tribunal has the power to depart from what it decided last time, there should be a very strong presumption in favour of the existing scheme and there must be a convincing explanation given as to why the Tribunal should depart from the existing scheme.
13. We do not accept the NLA's submissions on this issue. We disagree because Section 120(1) of the CDPA expressly provides for, and permits, the review of Tribunal decisions, and, subject to the limited restrictions set out in Section 120(2), there are no restrictions or requirements imposed on the right to apply for review or the Tribunal's authority or discretion to re-consider the terms of the licensing scheme.
14. Section 120 provides as follows:

120 Further reference of scheme to tribunal.

(1) Where the Copyright Tribunal has on a previous reference of a licensing scheme under section 118, 119 or 128A, or under this section, made an order with respect to the scheme, then, while the order remains in force—

(a) the operator of the scheme,

(b) a person claiming that he requires a licence in a case of the description to which the order applies, or

(c) an organisation claiming to be representative of such persons,

may refer the scheme again to the Tribunal so far as it relates to cases of that description.

((2) A licensing scheme shall not, except with the special leave of the Tribunal, be referred again to the Tribunal in respect of the same description of cases

(a) within twelve months from the date of the order on the previous reference, or

(b) if the order was made so as to be in force for 15 months or less, until the last three months before the expiry of the order.

(3) A scheme which has been referred to the Tribunal under this section shall remain in operation until proceedings on the reference are concluded.

(4) The Tribunal shall consider the matter in dispute and make such order, confirming, varying or further varying the scheme so far as it relates to cases of the description to which the reference relates, as the Tribunal may determine to be reasonable in the circumstances.

(5) The order may be made so as to be in force indefinitely or for such period as the Tribunal may determine.

15. The meaning of Section 120 is very clear when read in its entirety: a decision of the Tribunal that is in force for more than 15 months should not be subject to review for a period of twelve months from the date of the initial order, except with special leave of the Tribunal. However, after the twelve month period has expired, special leave is not required. Special leave is another method of requiring ‘special circumstances’, or a ‘relevant change of circumstances’ or ‘presumption in favour of the existing scheme’. As stated in para 11 of the Special Leave Decision “*The need for special leave is intended to prevent references **within the one year period** save in certain circumstances. Those are circumstances which can fairly be called special.*” (emphasis added) In other words, the grant of special leave requires special circumstances; if special leave is not required, neither are special circumstances. To limit Section 120(1) as the NLA suggests would require the Tribunal to read a great deal into Section 120 that is simply not there either expressly or implicitly.
16. To conclude that the law prohibits the Tribunal from reconsidering the OMM Scheme (or the Applicant from arguing it should be reconsidered) unless there has been a change of circumstances, or to adopt a presumption in favour of the existing scheme, because the Tribunal had previously made a decision on the OMM Scheme, would, in effect, extend the special leave requirement beyond the twelve month period prescribed in section 120(2). Rather than prohibiting the Tribunal from considering the OMM Scheme where an application has been made after expiry of the twelve month period, section 120(4) expressly requires the Tribunal to “*consider the matter in dispute and make such order, confirming, varying or further varying the scheme so far as it relates to cases of the description to which the reference relates, as the Tribunal may determine to be reasonable in the circumstances*”.
17. As the Special Leave Decision made clear, after twelve months had elapsed Cutbot was entitled to apply for a review. Cutbot having made the application, it is open to Cutbot to argue that any of the terms of the WDL are unreasonable and/or should be changed, and the Tribunal must, by virtue of section 120(4), consider these arguments, and the WDL anew, on its and their merits without, in addition, requiring a change of circumstances or imposing a presumption in favour of the existing scheme.
18. We have therefore considered anew the terms of the WDL that Cutbot has put in issue in light of the evidence and arguments presented in this case. Like the Tribunal in the Initial Reference, in reaching our decision we have followed the approach set out by Mr Justice Arnold in *PPL v BHA* [2009] EWHC 209 (Ch) (see paras 29-31 of the Interim Decision). This approach makes it clear that although the Tribunal should take comparators into account, it is for the Tribunal to then adapt any relevant comparator to the case under review, in particular taking into account any relevant considerations. It is also clear that the Tribunal may discriminate between licensees where there is a logical reason to do so. Applying this approach to the present case, in reaching our decision we have taken into account the fact that other licensees have entered into the WDL, and also considered other relevant factors.

The WDL Tariff

19. Under the approach set out by Mr Justice Arnold the terms of comparable licences, or comparators, provide the Tribunal with the evidential basis upon which it can decide what terms, and what tariff, is reasonable according to the willing buyer/willing seller test. Applying this test, the NLA says the existing WDLs that have been entered into by other licensees provide a direct comparator to the WDL Cutbot is being asked to enter into, as these are licences of exactly the same rights as the rights licensed to Cutbot. The NLA says the current WDL was the result of consultation and negotiation between the NLA and market participants, both large and small, that the WDL has been freely entered into by at least twenty-two licensees other than Cutbot, and that Meltwater, and the UKMMA which represents both large and small MMOs, both support the terms of the existing WDL. The NLA says the existing WDLs that have been entered into therefore represent the best possible comparators the Tribunal could hope for and that there could not be any better evidence of the terms a willing buyer and willing seller would agree for the relevant rights granted under the WDL.
20. The NLA presented evidence that the tariff and other terms of the WDL were freely agreed to by Meltwater and the UKMMA and by seven other licensees at the time of the Initial Reference, and that since the Final Decision a number of new licences have been entered into by new entrants to the market, some of whom, like Cutbot, have very few clients. The NLA indicated that, apart from Cutbot, five WDL licensees have fewer than 10 clients, and three WDL licensees have four or fewer clients. The NLA also pointed out that not one of these other licensees has supported Cutbot in this reference.
21. Cutbot did not dispute the evidence that a number of other parties, both large and small, have signed up to the existing WDL, but contended that the argument that the best comparator for the WDL should be the WDL signed by other licensees was circular logic. Cutbot also argued that this is not necessarily evidence of the terms agreed by a willing licensor and a willing licensee. Cutbot says on that analysis it could be said to be a willing licensee as it has signed up to the WDL, but did so only to avoid being the subject of copyright infringement proceedings. However, Cutbot is in fact a very reluctant licensee. Cutbot also speculated (although it did not put forward any evidence to support this speculation), that other existing WDL licensees may be equally reluctant licensees, and that other licensees did not support Cutbot in these proceedings because they found the cost and complexity of participating daunting, noting that even MMOs the size of Meltwater decided not to actively participate in this hearing for cost reasons.
22. In essence, Cutbot's position is that the existing WDL tariff should be changed because it is unreasonable, and it is unreasonable because
 - i) it provides MMOs that have more clients with a competitive advantage over those MMOs that have fewer clients, and correspondingly discriminates against small MMOs, because the fee structure under the WDL results in the smaller MMOs paying a fee that is a much higher proportion of its revenues than that of larger MMOs that have more clients;
 - ii) the current structure acts as a hindrance for new entrants into the market;

- iii) the current fee structure does not recognise, and it should recognise, the substantial efforts made by MMOs to provide a complex service based only in part on the scanning of copyright works, and
 - iv) of the works scanned in providing an OMM service only a minority represent the titles licensed under the OMM Scheme. Cutbot's case is that these factors, and the inherent unreasonableness of the fee, should override the evidence of the comparators and the Tribunal should substitute a fee structure that is a flat per client fee. Cutbot says fairness suggests there should be a direct causal connection between the use of content licensed through the WDL (for which the number of clients is a proxy) and the fee payable.
23. Cutbot did not suggest a specific per client fee but indicated the fee should be between £6.60 per client at the lower end and £25.50 per client at the higher end. The £6.60 per client amount is arrived at by taking the current WDL fee paid by Meltwater and dividing that by the number of clients the NLA has indicated Meltwater has reported that it has. The £25.50 per client amount represents the figure that is arrived at if you take all of the WDL income currently being received by the NLA and divide that by the current number of all the clients of WDL licence holders. These clients include both WEUL licensees and the clients of press clippings agencies or PCAs. A £25.50 per client fee would ensure the NLA's current fees from WDL licensees would be maintained. Both per client fees would greatly decrease the WDL fee paid by WDL licensees with a small number of clients, and correspondingly substantially increase the WDL fee paid by WDL licensees with a large number of clients.
24. The NLA's position is that a tariff based on revenues, or the number of clients as a proxy for revenues, or use of the content, was inappropriate for the WDL because the activities licensed under the WDL/WEUL fall into two categories:
- i) scraping the content from the licensed sites (currently in excess of 1,000 sites) and creating an index of that content;
 - ii) using that index to provide an alert service or reports of relevant content to its customers.
- The activity described in (ii) varies enormously from MMO to MMO, being dependant on the number of clients an MMO has and the number and breadth of reports or alerts a particular client wants covered, and the amount of press coverage the client receives. The NLA says that the charges for this variable element are obtained under the WEUL, which is why that tariff structure has a great deal of variation in it, based on the number of clients or per link. However the activity described in (i) is essentially the same for each licensee. It does not vary depending on the number of clients. Also, the activity described in (i) would, in the absence of a WDL licence, constitute copyright infringement, and this is the case whether or not a WDL licensee has any clients or is generating any revenue from these activities. A party who wants to conduct the activities described in (i) needs a licence from the copyright owner to do so, and if that is the case, it needs to pay, and the copyright owners are entitled to receive, a reasonable fee for that licence.
25. We recognise that the NLA's position on the per client fee issue is not entirely consistent as the WDL tariff is based on the number of clients, as the fee structure has

two tiers of fees, the applicable tier being determined by the number of clients. The licensee that has 1-100 clients pays half the fee of a licensee that has more than 100 clients; whereas if one applied without compromise the NLA's logic as set out in para 24, all licensees would pay the same fee. We do not consider this logical inconsistency to be a material factor. It is a reasonable and pragmatic (as opposed to a logically pure) approach to have some differential based on the size of the business, both as a concession to concerns expressed by smaller licensees, and as a means of encouraging smaller businesses to take a licence. We also note that as a compromise the NLA had suggested an alternative structure which contained several tiers based on the number of clients. Cutbot and the Interveners objected to this alternative structure.

26. Cutbot also regarded the payment of a minimum fee under the WDL as inappropriate. They did not consider a copyright owner was entitled to any compensation for the licence to conduct the otherwise infringing activities described by the NLA in para 24(i) above, if the licensee has no clients. Nor did Cutbot consider it was necessary to have a minimum fee to cover the minimum cost of licensing.
27. Cutbot cited a number of other collective licences as comparators to support its position that a per client tariff should be utilised for the WDL (although these licences were not cited as a guide to any specific rate or amount). The licences cited by Cutbot as comparators were issued by the Performing Rights Society (**PRS**) or by the Phonographic Performance Limited (**PPL**), and each licence grants rights to use music in different circumstances. The fees charged under the specific tariffs cited by Cutbot were variable fees, although the type of variable was different under each licence (e.g. based on percentage of revenue, or square footage of audible area, or the number of persons admitted to the venue, or user numbers, and other variables.) Cutbot argued that where user numbers are accessible to the licensee and licensor as part of the licensee's normal business operations, the number of users is the most appropriate method of calculating the fee. Although these other collective licences demonstrate that a wide variety of tariff structures are used for different types of collective licences, because the type of rights licensed under these licences, both in terms of the subject matter of the licensed rights and the nature of the licensed activities, are very different from the works and rights licensed under the WDL, and because these licences do not assist us in determining which variable might be most appropriate, or the per user amount that should be charged, we did not find the examples cited by Cutbot to be particularly helpful in determining the appropriate tariff structure for the WDL.
28. Cutbot acknowledged that the most directly relevant comparator was the OMM licence issued by the Copyright Licensing Agency (**CLA**). However, Cutbot argued that the Tribunal should disregard the CLA OMM licence because the CLA and NLA have an on-going partnership over licensing, and because the CLA's OMM licence is very closely based on the WDL, and was introduced only after the WDL was determined. The NLA did not rely on the CLA OMM licence as a comparator. The CLA OMM licence was not a comparator we have relied upon in reaching our decision.
29. As noted above, the approach the Tribunal must adopt is to take comparators into account, but then adapt the comparators to the case under review, in particular taking into account any relevant considerations. We consider that the existing WDLs that

have been entered into by other licensees are very strong comparators, as these licences cover exactly the same type of rights and authorise exactly the same activities. The existing WDL has been entered into by (at least) 22 other entities, some of whom have fewer clients than Cutbot. The UKMMA, which represents some of these licensees (including small outfits like Cutbot) has expressed its support for the existing WDL terms as has Meltwater. This is very strong evidence that the existing WDL terms represent the terms that a willing licensee and a willing licensor would agree for the relevant rights granted under the WDL.

30. We are not persuaded that we should discount this very strong evidence because other licensees, as well as Cutbot, may not be 'willing licensees', simply because we must make our decision based on the evidence that was presented, not on the basis of speculation. Whilst we accept other WDL licensees may have been daunted by the cost or complexity of participating in these proceedings, it would have been possible to express their opposition to the WDL tariff in other, simple, low cost ways e.g. by writing a letter to the Tribunal, or through the UKMMA (if they are members of the UKMMA). There is no evidence that any licensee other than Cutbot finds the existing WDL tariff unacceptable, whereas there is evidence that a number of licensees find the existing WDL acceptable and do not wish to have that tariff changed.
31. Given this very strong evidence of what a willing licensee and a willing licensor would agree, are there any relevant considerations that suggest we should adapt the terms of the existing WDL? We do not consider that there are, and consider that the WDL tariff is a reasonable amount to charge for the rights granted. In particular:
 - i) Although Cutbot argued that the current structure acts as a barrier to entry to the market by small operators no evidence was presented by Cutbot to support this assertion. There was however evidence that a number of licensees with fewer clients than Cutbot have taken out a WDL. This is an indication that the fees are not acting as a barrier to entry by small players into the market.
 - ii) The copyright owners are entitled to reasonable compensation for a licence of their copyright works. We consider that the fees under the WDL are reasonable and proportionate having regard to (a) the extensive amount of copyright material that is licensed under the WDL, namely over 1,000 websites; (b) the extensive otherwise infringing acts that are carried out in relation to those copyright works even in the absence of any clients, as described in para 24(i); and (c) the fact that these copyright works are an essential part of the MMOs business, not merely incidental. This is the case even though (a) the WDL is not comprehensive and the licensee may also require other licences to conduct its business, and (b) the licensee's business is not merely the scanning of copyright works but requires substantial additional efforts to provide its service.
 - iii) We do not consider that the current tariff discriminates against small MMOs because the fee structure under the WDL results in the smaller MMOs paying a much higher proportion of its revenues as compared to larger MMOs. Many essential inputs of a business have an initial cost that is incurred at the outset when a business may have no or very few clients and a business can often take on many more clients without increasing that initial start-up cost. This is

particularly true of ‘infrastructure costs’ such as the cost of premises and IT hardware. For example, a business with few clients does not pay less for a computer than a business with many clients and many clients can be added to the business before another computer must be purchased. As the content licensed under the WDL is provided in its entirety from the outset, and is essential to the business, it is more in the nature of such infrastructure. We do not consider that it would be reasonable for the copyright owners to receive nothing or very little by way of a licence fee simply because the licensee has few clients.

32. We have therefore concluded that the existing WDL tariff should be confirmed.

Other terms of the WDL in issue

33. Cutbot also put a number of other terms of the WDL in issue. Some of these issues were resolved in the course of the hearing but a number of them remain in dispute. Having concluded that the existing WDLs that have been entered into by other licensees are strong comparators, the other terms of the WDL similarly represent the terms that a number of willing licensees and a willing licensor have agreed for the relevant rights granted under the WDL. In relation to these other terms we must consider whether we should adapt any of these other terms to take into account any relevant considerations presented in this case. We have concluded that, against the background that many other licensees, including a number of licensees with very few clients, have entered into a WDL containing these terms, there are no relevant considerations in this case that would cause us to substitute different terms for those already agreed by a number of willing licensees and a willing licensor.
34. However we have considerable sympathy with Cutbot’s position with regard to a number of these other terms, as outlined below, and in relation to some of these other terms reached this conclusion because of the explanation given by the NLA as to how it operates the relevant terms in practice. Should the NLA’s practice change in relation to these terms, we would consider that there are relevant considerations that may warrant adapting these terms of the WDL. We will briefly address each of the other issues raised by Cutbot.

eClips

35. Cutbot’s position is that:
- i) the eClips service operated by the NLA directly competes with part of the OMM Scheme, and
 - ii) the NLA should not be permitted to operate a competing service or licensing scheme because this provides the NLA and its members with a direct commercial interest in implementing technical measures to make it more difficult for WDL licensees without an eClips licence to conduct scraping of the websites licensed under the OMM Scheme, thereby creating anti-competitive pressure on WDL licensees to sign up to the eClips service.

Cutbot submitted that a clause should be added to the WDL to prevent the NLA from operating commercial services that compete with any part of a WDL licence holders’

legitimate operations. In essence, Cutbot asked that the Tribunal impose a non-compete obligation on the NLA, and force the NLA to stop offering the eClips service.

36. There was a great deal of discussion about whether or not eClips does compete with the OMM Scheme, and some discussion about whether the Tribunal has the power to impose such a term as such matters are more commonly dealt with by competition authorities. We have concluded that whether or not eClips competes with the OMM Scheme, and even if the Tribunal has the power to impose a non-compete obligation on the NLA (and we are doubtful that the Tribunal does have this power) we would not impose a non-compete obligation on the NLA for the following reasons:

- i) A non-compete obligation is a very serious restriction on a party's ability to conduct its activities. It is not an obligation that is lightly agreed by a willing licensor, or lightly imposed by competition authorities, and in the latter case, is usually done only when there is clear evidence that it is required to permit the proper functioning of a particular market. No evidence was presented by Cutbot to support the conclusion that the OMM market had been adversely affected because the NLA operates the eClips service. Such evidence as there was suggests that MMOs see the two services as largely complementary, and some MMOs take licences under both the OMM Scheme and eClips, and some do not.
- ii) Cutbot accepted that even if a non-compete obligation was imposed on the NLA, the NLA's members, the owners of the licensed copyrights, are free to offer competitive services and to licence their content in a way that competes with the OMM Scheme. Thus, even if we imposed the requested non-compete obligation on the NLA there would be nothing to stop the relevant members of the NLA from setting up another entity to provide the eClips service. It therefore seems pointless to require the NLA to shut down eClips (which would be expensive and highly disruptive to the NLA, its members and its customers), when the same service could easily be offered via the copyright owners. The NLA is a not for profit entity and therefore the NLA itself has no particular commercial interest in encouraging WDL licensees to take out competing licences or use competing services. It is its members, the copyright owners, that have (or may have) such a commercial interest, and Cutbot does not dispute the copyright owners are free to engage in competitive activities. Also, the WDL grants non-exclusive rights, and the fee paid for the WDL reflects this.
- iii) There was no evidence that the NLA or its members have implemented technical measures to make it more difficult for WDL licensees without an eClips licence to conduct scraping of the websites licensed under the OMM Scheme or created any other anti-competitive pressure on WDL licensees to sign up to the eClips service. Firstly the NLA does not appear to have the technical ability or the authority to implement technical measures to make accessing the licensed websites more difficult, as this is entirely controlled by the owners of those websites, the copyright owners. Also, Mr Hughes, the Commercial Director of the NLA, gave evidence that those of its members that participate in the OMM Scheme derive significant revenue from the WDL and the WEUL associated with it, and therefore it would be economically irrational

for those members to damage that revenue stream by seeking to drive business away from the OMM Scheme.

When we examine all of Cutbot's submissions on this issue, Cutbot's primary complaint is that the News UK publications are part of eClips, but are not part of the OMM Scheme, as News UK has decided not to participate in the OMM Scheme. That creates difficulties for Cutbot because they have been unable to obtain access to News UK content, other than via eClips. That is unfortunate for Cutbot but it is for News UK to decide how and whether it licenses its content and whether it wishes to participate in the OMM Scheme. It is not for the Tribunal to indirectly seek to force News UK to participate in the OMM Scheme by imposing a non-compete obligation on the NLA.

An obligation to be imposed on the NLA to maintain a canonical list of RSS feeds or index pages

37. In his evidence Mr Mackenzie on behalf of Cutbot explained that if a member publisher redesigns its website and, as part of that redesign the publisher changes the RSS feed, then there is a period of time when the licensee does not pick up the content, because it is unaware that the RSS feed has changed although this sorts itself out within a relatively short time. He gave the analogy of a radio station changing its frequency without notifying the listeners forcing them to hunt around for it. He said WDL licensees should be notified when a publisher changes its RSS feed for any of the licensed content. Cutbot did not dispute the NLA's evidence that this is not information that the NLA currently has, and the NLA would have to obtain this information from the copyright owners/publishers before it could provide it to WDL licensees.
38. There was a considerable difference of view as to the level of burden this would impose on the NLA and the publishers. Cutbot did not consider that it would impose a significant burden on either the publishers or the NLA to provide this information to the WDL licensees as in the average year; the RSS feeds will not change at all. Mr Hughes of the NLA said he had checked the position with one major publisher, a regional newspaper publisher, and their view was that it was an unreasonable and onerous obligation because the newspaper websites are complex and ever changing. The publisher Mr Hughes had consulted considered that the cost of maintaining that type of index would be considerable and they were not sure it could be done.
39. Mr Mackenzie acknowledges that the information concerning RSS feeds must come from the publishers. The publishers do not currently provide this information to the NLA, the NLA has no means to force the publishers to provide it, and it is not clear that the publishers would voluntarily agree to provide it to the NLA. Also, the Tribunal cannot force the publishers to provide this information. Accordingly, we do not think it equitable to impose an obligation on the NLA under the WDL to provide certain information when it not at all clear that the NLA is able to meet that obligation, or to put itself in a position where it can meet that obligation. We would however encourage the NLA to see if this issue can be addressed through agreement with the publishers.

The obligation on WDL Holders to determine whether their clients have a WEUL

40. Para 2 of Part B of Service Schedule 5 provides “*The Licensee must ensure that each client within the elected Scope of this agreement has in place an NLA Web End User Licence*”. Cutbot submitted that it is unreasonable to impose on the licensee an absolute obligation (in effect a guarantee) that each of its clients has a WEUL in place, particularly as Cutbot reports the identity of its clients to the NLA and there is an obligation under clause 2.4 to notify its clients that they must have their own NLA licence. Cutbot says this is adequate to protect the interests of the NLA. The NLA in its evidence explained that in practice it notifies a WDL licensee when one of its clients has not entered into a WEUL and requests that the WDL licensee cease supplying that client with content, and if the WDL licensee ceases that supply, that is the end of the matter. The NLA said it does not seek to enforce this clause against the WDL licensee in any other way e.g. they do not seek financial compensation from the WDL licensee as a result of a WDL licensee’s client infringing copyright. The Tribunal has considerable sympathy with Cutbot’s position but has concluded that it will not alter this term provided the NLA continues to operate this clause in the manner described and does not seek to enforce it against a WDL licensee as a form of guarantee, or as a procure obligation. We do not consider the WDL licensee should be responsible for the activities of its clients, and its sole obligation should be to cease providing its service to a client if the NLA notifies the WDL licensee that such client does not have a required WEUL.
41. A related issue was raised in relation to Appendix 1, para 3 of the WDL, which states: “*Certain Publishers may require direct licences to be entered into between the Publisher and the End User for access and/or use of the Publisher content. Details will be notified to the Licensee from time to time. Any such relevant Publisher content must not be included in a Licensed Service without such a licence.*” Cutbot accepted that the publisher/copyright owner has the right to require that Cutbot’s clients enter into a direct licence with the publisher/copyright owner, whether that is a WEUL or some other licence, and so provided the NLA operates this clause in the same way as described in para 40 above, we consider this clause to be reasonable.

The obligation on WDL holders to report the specific number of links to individual publishers’ sites provided to clients

42. Cutbot submitted that the obligation to report to the NLA on a monthly basis the specific number of links to individual publishers’ sites provided to Cutbot’s clients is disproportionate and unduly onerous in light of the fact that this information is only required because the NLA and its publisher members have determined that this is the basis on which the publishers’ remuneration under the OMM Scheme is distributed. Mr Hughes indicated that the reason monthly reporting is required is because the revenue is distributed on a monthly basis to the publisher members, and this has been the case since the NLA came into operation in 1996. Mr Hughes’ evidence was that the production of these reports is largely automated and that other MMOs have not indicated that they find this reporting to be an onerous task. In response to a question from the Tribunal Cutbot estimated that on a monthly basis the ‘man hours’ required to produce the required monthly reports was 45 minutes per month. In any collective licensing scheme there needs to be a fair method of distribution of revenue to the copyright owners. Also, it is reasonable for the copyright owners to expect monthly payments, and therefore monthly reporting of some description, is necessary.

Balancing these considerations against a licensee spending 45 minutes per month to produce these reports we do not consider this reporting obligation to be disproportionately onerous on Cutbot.

Audit

43. It is unclear whether this issue was abandoned by Cutbot by the end of the hearing. The issue is that under clause 6.5 of the WDL the NLA has the right to audit the licensee once a year to determine the licensee's compliance with the WDL. The licensee is obliged to pay the cost of that audit, up to a maximum of £2,500. Cutbot says such a clause is very onerous for a small business and could potentially represent an unreasonably large cost for small MMOs, and requested that this clause be removed from the WDL. Cutbot's position is that the NLA is adequately protected by clause 5.6 of the WDL which allows the NLA to conduct an audit where it reasonably suspects there has been a material breach or that the licensee is infringing any intellectual property rights in any publisher content. Under this clause the licensee bears the audit costs only if there has been a breach or an underpayment of 5% or more.
44. Each of the parties cited other collective licences in support of its position, some of which have an audit right similar to clause 6.5, and some of which do not. The NLA indicated in its evidence that it did not automatically conduct an audit of every MMO every year, that for small licensees with few clients the actual cost was likely to be significantly less than £2,500, and the £2,500 was a cap, not a fixed fee. The NLA also indicated that the way it managed audits under this clause meant this was not an issue in practice. By the end of the hearing Cutbot appeared to accept this and ceased to press the point.
45. The Tribunal has considerable sympathy with Cutbot's position on this issue. We recognise that an annual audit fee of £2,500 in addition to the licence fee of £5,148 could be very burdensome for a small business. However, in light of the NLA's reassurances about how it operates this audit clause in practice, we are reluctant to start tinkering with individual terms of the WDL on the basis that other willing licensees have agreed to these terms as a whole and have not found them problematic, at least not so far. However, if the NLA ceased to operate this audit clause in the pragmatic way it described, such that this resulted in a significant cost being imposed on small licensees, we would consider the change in practice to be a relevant consideration warranting a reconsideration of this term.

Imposition of Paywalls

46. Cutbot initially raised a potential issue, namely that although a WDL licensee is granted a licence to scrape certain websites, it is open to any individual publisher to introduce a paywall to its website at any time, in effect rendering the content on that website inaccessible to the licensee. The evidence presented by the NLA, and not disputed by Cutbot, was that one publication in the OMM Scheme had on one occasion introduced a paywall, but had removed it fairly quickly after its introduction. This therefore seems to be more of a theoretical than a practical issue for WDL licensees. We also note that Appendix 4 of the WDL contains a mechanism for reducing the licence fee in the event of certain reductions in the number of websites covered by the WDL. We consider that the introduction of a paywall effectively

removes that website from the WDL and therefore if paywalls were introduced to a number of licensed sites this could give rise to a review of the licence fee under this clause.

Other terms of the WDL put in issue, but resolved in the course of the hearing

47. Cutbot raised issues on a number of other terms of the WDL, but these issues were resolved in the course of the hearing. We mention them here for completeness.

Restriction on making Automatic Summaries

48. Clause 4.1.6 of the WDL provides that “... *the Licensee shall not (except as expressly set out in this agreement and/or except to the extent that such acts do not constitute infringement of intellectual property rights) make any summaries of Publisher Content or Scraped Content (other than Text Extracts)*” (emphasis added). Cutbot accepted that the copyright owners had decided not to grant the right to make automatic summaries in the WDL, and that neither the Tribunal nor the NLA could force the copyright owners to license these rights under the WDL. However, Cutbot submitted that the WDL should not prohibit licensees from making automatic summaries where those summaries do not infringe the copyright owners’ rights. Mr Cullen helpfully pointed out that the introductory wording to the clause, in particular that contained in the bold text above, did not prohibit the making of non-infringing summaries by automatic means, which interpretation satisfied Cutbot’s concerns.

Clarity around the definition of the term “character” in the WDL

49. In the WDL the term “Text Extract” is defined as “a headline and/or a direct text extract of no more than 256 characters of an Article generated under Scraped Content”. Cutbot submitted that the term “character” is ambiguous where diacritics are considered. Cutbot suggested the following phrase be added to the end of the definition of “Text Extract”: “treating each Unicode extended grapheme cluster as a single character”. In response to an NLA comment that they regarded the proposed phrase as overly complex, at the hearing Cutbot suggested the following alternative wording: “For the avoidance of doubt, symbols like E-acute and C with a cedilla should be considered as single characters.” In cross examination Mr Hughes stated that although he considered it a non-issue, he would be very happy to issue a side-letter to the effect that the NLA accepted this interpretation of the word ‘character’, and Cutbot was satisfied with the proposed “side letter” solution.

Restriction on sub-licensing or use of a licence by a joint venture

50. Cutbot indicated that it is seeking to grow by making joint venture arrangements with companies who offer related services. Cutbot’s view was that where such a joint venture only has a single data repository, namely, the one held by a partner who already holds a WDL, the joint venture should not be required to take out another, separate WDL. The NLA expressed a concern about the vagueness of the term ‘joint venture’, a concern that the Tribunal shares. However, in cross examination Mr Hughes indicated that the NLA’s approach to the licensing activity is open and flexible, and that the NLA looks positively at arrangements which help companies increase the distribution of their own service, but that it does not support coalitions that undermine the licence fee structure. He went on to state that he thought this issue

had been addressed in direct dialogue between the NLA and Cutbot, and that Cutbot should be comfortable on this issue as a result of that dialogue. Mr Mackenzie appeared to accept this and did not press the point further with the Tribunal.

Conclusion

51. For the reasons set out above we order that the terms of the WDL in the form set out in the Final Decision be confirmed, save for the amendment to the first sentence of Part B of Service Schedule 5 which shall be amended as set out in the Directions Order dated October 25, 2013.



Colleen Keck
Chairman
The Copyright Tribunal
The UK Intellectual Property Office
Newport NP10 8QQ