
PPL v. The British Hospitality Association Judgement 2008

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Case No: CH/2008/APP/0204
CH/2008/APP/0210

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

ON APPEAL FROM THE COPYRIGHT TRIBUNAL
REFERENCES CT 91/05, CT 92/05 AND CT 93/05

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/11/2008

Before :

THE HONOURABLE MR JUSTICE KITCHIN

Between :

IN RESPECT OF THE APPEAL OF

PHONOGRAPHIC PERFORMANCE LIMITED

AND THE APPEAL OF

**THE BRITISH HOSPITALITY ASSOCIATION AND OTHER INTERESTED
PARTIES**

Robert Howe QC (instructed by **Eversheds LLP** and **Denton Wilde Sapte**) for the
Interested Parties
Pushpinder Saini QC (instructed by **GSC Solicitors**) for **Phonographic
Performance Limited**

Hearing dates: 30 October 2008

Judgment

MR. JUSTICE KITCHIN :

Introduction

1. These are appeals by Phonographic Performance Limited (“PPL”) and the British Hospitality Association, the British Beer and Pub Association and a consortium of other parties (“the Eversheds Consortium”) against a decision of the Copyright Tribunal dated 26 February 2008. They raise an important issue as to the scope of the jurisdiction of the Tribunal under sections 128A and 128B of the Copyright, Designs and Patents Act 1988 (the “CDPA”). These and other relevant sections of the CDPA are set out in the annex to this judgment.
2. PPL is a collective licensing body which acts on behalf of about 47,000 performers and 3,500 record companies. The record company members of PPL have transferred to PPL their exclusive rights under section 16(1)(c) and section 19 of the CDPA to perform, show or play in public sound recordings in respect of which they own the copyright or enjoy exclusive licences. But, as PPL is concerned to emphasise, these proceedings are not simply about the entitlement to royalties of recording companies. They also concern the financial entitlement of performers. For them, most of whom are of modest means, royalties are a vital part of their professional income.
3. The British Hospitality Association is the representative body for those owning and operating hotels, restaurants and cafes. Its members include 9,000 hotels, 11,000 restaurants and 18,000 contract catering outlets, employing over 500,000 people. The British Beer and Pub Association is the representative body for the beer and pub sector. It represents more than half of the 58,000 pub and bar owners in the UK, which together account for 98% of all beer brewed in the UK. The Eversheds Consortium consists of 17 music users, representative bodies and background music suppliers. They include two of the biggest UK retailers, Asda and the Arcadia Group, significant industry bodies such as the British Retail Consortium, the Association of Convenience Stores and the Music Users' Council and the vast majority of the specialist background music providers in the UK. In this judgment I refer to the British Hospitality Association, the British Beer and Pub Association and the Eversheds Consortium collectively as the “Interested Parties”.
4. This dispute has arisen in the context of references made to the Tribunal by the Secretary of State of various new licensing schemes issued by PPL for the licensing of the public performance as background music of sound recordings in public houses, bars, restaurants, cafes, shops, stores, factories and offices. These schemes

were developed by PPL following an amendment to section 72 of the CDPA made by the Copyright and Related Rights Regulations 2003 SI No 2498. This removed what was perceived to be an anomalous gap in the protection afforded to sound recordings which allowed commercial entities to play broadcasts of those sound recordings within their premises without the permission of the copyright owners. The recordings now protected are referred to as “excepted recordings”, reflecting the fact that they are excepted from the free use rights otherwise afforded by that section.

5. The new licensing schemes in issue are “delivery system neutral”, that is to say they are not limited to the licensing of broadcast sound recordings but extend to all ways of playing background music in public, such as by CD or tape. This makes obvious sense and is an approach which is, at least in principle, supported by all the parties before me. It means that licensees do not need to take separate licences in respect of different delivery systems for the same recordings. However, the parties are deeply divided over the fees which PPL is charging. The Interested Parties say the new schemes represent a very substantial departure from the established tariffs in respect of non broadcast sound recordings and that PPL has sought to take advantage of the amendment to section 72 to introduce an unprecedented and wholesale increase in its rates. PPL contends that the new schemes are entirely reasonable having regard to, inter alia, comparable licences granted by the PRS, the commercial value of the public performance of sound recordings, the factors which must be taken into consideration pursuant to sections 128A and 128B and that, for many users, the new schemes contain increases that amount to only a few pounds per year.

6. On 1 December 2004, PPL submitted the new schemes to the Secretary of State, as it was bound to do under section 128A. On 5 October 2005, the Secretary of State referred them to the Tribunal. Thereafter, matters proceeded through the course of 2006 with the parties submitting detailed representations and skeleton arguments until, in February 2007, HH Judge Fysh QC, as Chairman of the Tribunal, wrote to the parties expressing concerns about the extent of the Tribunal's jurisdiction and asking for a hearing. After a good deal of correspondence and a case management conference, the hearing took place on 8 November 2007 and gave rise to the decision against which both parties now appeal. In summary, the Tribunal held that
 - i) a reference under section 128A is limited to a consideration of a licensing scheme in so far as it concerns the public performance of broadcast sound recordings only; and

- ii) the Tribunal has no power under section 128B to order back payments in respect of users who use sound recordings not contained in a broadcast.
7. It also rejected the new schemes on a summary basis because they were not limited to licences to play broadcast music in public and indicated that the use of recordings delivered other than by broadcast remains covered by the established tariffs.

Sections 128A and 128B – an outline of the problem

8. Sections 128A and 128B were introduced into the CDPA in 2003 when section 72 was amended. They provide a new procedure for the consideration of proposed licensing schemes for excepted sound recordings. This exists in parallel with the existing and well established procedure provided in Chapter VII of the CDPA which allows licensees (or a body representing their interests) to refer existing or proposed licensing schemes put forward by a licensing body to the Tribunal.
9. In summary, a licensing body must notify the Secretary of State of the details of any proposed licensing scheme for excepted sound recordings included in broadcasts before it comes into operation. The Secretary of State will then consider the scheme and, having done so, may refer it to the Tribunal for a determination of whether it is reasonable in all the circumstances. The Tribunal must then investigate the scheme and assess its fairness, taking into account all relevant matters, including those referred to in sections 128A and 128B. In doing so it is required to act as an investigatory body rather than an adjudicatory body, a role which it has not hitherto performed.
10. Clearly the intention of the Government was to create a procedure which would minimise costs for users. Schemes are subject to consideration by the Secretary of State and then, where appropriate, investigation by the Tribunal with the result that users need not be party to the proceedings and so can avoid the risk of being liable for costs in the event of an unsuccessful challenge. In practice, however, it has created such difficulties that UKIPO considers the sections should be repealed. One such difficulty is that the Tribunal itself does not consider it has the appropriate remit or resources to cope with the procedure. Another is that the two track nature of the Tribunal's jurisdiction is overly complicated. A yet further difficulty, of direct relevance to this dispute, is the lack of clarity as to the scope of the jurisdiction conferred by the sections and the real practical problems this has created.

11. In order to explain this latter difficulty, I must say a little more about the users of sound recordings. They fall into three categories:
- i) commercial enterprises using only broadcast sound recordings;
 - ii) commercial enterprises using sound recordings not contained in a broadcast (such as those playing CDs); and
 - iii) commercial enterprises using both broadcast and non broadcast sound recordings (the “hybrid” users).
12. The new schemes cover all three. As I have mentioned, they are delivery system neutral and so envisage that the same charge should be paid irrespective of whether the sound recordings are included in a broadcast. Following the reference of these schemes by the Secretary of State to the Tribunal, the Interested Parties assumed that the reasonableness of the charge would be determined in the context of that reference and made their submissions accordingly. However, the consequence of the Tribunal’s ruling is that the Tribunal will only consider the reasonableness of the charge in the context of two separate references, one under the old procedure and one under the new. Moreover the hybrid users, or those representing them, must participate in both. Indeed, following the ruling the Interested Parties have, as a protective measure, made their own separate references to the Tribunal under sections 118 and 119 of the CDPA. Instead of the new procedure resulting in a saving of costs, it has proved expensive and wasteful.

The Tribunal decision and the parties’ contentions on the appeal

13. I think it fair to say the Tribunal considered the task it faced as far from easy and its ultimate conclusion as less than satisfactory. Having considered the categories of users to which I have referred, it first expressed its conclusions as to the general suitability of a delivery system neutral scheme at [11] to [14]:

“11. For reasons which will become clear, we have not considered in any detail the terms of the New Schemes – save for one. A feature which is common to all the New Schemes is that they are ‘delivery system neutral’. This means that they do not distinguish between whether the licensed sound recordings are heard in commercial premises via a CD or tape etc (as catered for in the Established Tariffs) or by radio, television – or indeed by *any* other means. As a general

proposition, the convenience of this is obvious and we record that the Interested Parties are also in agreement with this approach to licensing for hybrid users.

12. This 'delivery system neutral' approach to licensing does not however suit category (i) and (ii) users. They therefore do not need to sign 'delivery system neutral' licences – though they would be free to do so of course, if they so wished.

13. We do not therefore think that category (i) and (ii) users should be forced to take the New Tariffs on the basis that they may one day change their minds and need a broader licence; they should not have to pay for more than they need. If one wants a single can of tonic water for example, it may be a sound marketing strategy to force the purchaser to buy a pack of six. But when it comes to the licensing of copyright, it is our view that forcing would-be licensees in whatever category of commercial enterprise to sign up to more than they need is wrong in principle.

14. Therefore in our view the New Schemes are inappropriate when it comes to category (i) and (ii) users of musical recordings. The first category of user should be offered a re-drafted licence confined only to the consequences of legislative change. Since nothing has changed as far as they are concerned, the second category of users remain licensed under the Established Tariffs.”

14. It then accepted PPL’s submission that the jurisdiction of the Tribunal under sections 128A and 128B is limited to a consideration of licensing schemes only in so far as they are directed to the use of broadcast sound recordings, as is apparent from paragraph [37]:

“37. In spite of its unsatisfactory consequences, we prefer PPL’s approach to the construction of these sections. With some reluctance, we have come to the conclusion that the procedure arising in consequence of the amendment to CDPA '88, s72 stands alone to cater for the change. It is autogenous, being capable of being invoked in relation either to a licence for a category (i) user or to a category (iii)(ie hybrid) user. It is tailor-made only for the first category of user who now undoubtedly has to pay PPL royalties for the first time – but only in respect of a limited usage (see

above). We agree however with Mr Howe (and even with Mr Saini) that this finding does not yield a seamless procedure when applied to the hybrid user, where the paradigm licensing arrangement will desirably be 'delivery system neutral'. There was even some speculative discussion with counsel as to whether the draftsman was aware of the existence, let alone the benefit of such a licensing arrangement."

15. Finally, it added the following observations in relation to hybrid users at [53]-[54]:

"53. Our problem has been to identify and implement the legislative intention behind ss128A and B. This has not been easy and we recognise that the outcome is less than satisfactory. Nonetheless, as we see it, the changes to Part VII of CDPA '88 subject of this decision were intended by the legislature to be a discrete 'bolt-on' jurisdiction which was to be implemented by an entirely new (and streamlined) procedure.

54. Having regard to the way the matter was argued at the hearing, we feel obliged to add the following in the light of our conclusions. In relation to hybrid users wishing to avail themselves of a 'delivery system neutral' licence, our conclusion chimes neither with the basic philosophy of the New Schemes nor with the wishes of the Interested Parties. We therefore consider that the way forward would be for a fresh start to be made. The New Schemes should be amended (or replaced). What is required is a scheme apt in terms to cover *only* licences for sound recordings which are to be broadcast. This scheme would be offered to category (i) and of course, to hybrid users. The use of recordings other than by broadcast would remain covered by the Existing Tariffs. The Tribunal would thereby be in a position (if necessary) to adjudicate one issue only – as in fact, the Secretary of State plainly intended in this case."

16. On appeal, PPL argued that the Tribunal correctly characterised the scope of the jurisdiction under sections 128A and 128B but then fell into error in holding that users in category (ii) were entitled to be licensed under the established tariffs. In its notice of appeal and skeleton argument it sought an order that those parts of the decision

which go beyond the determination of the issues on jurisdiction be set aside and deleted including, specifically, paragraphs [14] and [54]. However, as the argument developed before me, it accepted that, in the light of its findings on jurisdiction, the Tribunal could properly order PPL to submit new schemes limited specifically to the licensing of broadcast sound recordings.

17. The Interested Parties argued the Tribunal ought to have found that it had jurisdiction to consider all the terms of the new schemes and that this court should so order and declare. Moreover, in their notice of appeal and skeleton argument they contended this court should also order, in accordance with the Tribunal's findings, that the established tariffs apply to users who do not wish to play broadcast sound recordings; and order that the tribunal has jurisdiction to give directions for any necessary repayment of sums overpaid by such users.

Jurisdiction

18. This is the issue at the heart of the appeal and it is convenient to address it first. There can be no doubt that sections 128A and 128B are directed to licences and licensing schemes which authorise the playing in public of excepted sound recordings included in broadcasts. The crucial question is whether the sections apply to such licences and schemes *only* in so far as they are directed to excepted sound recordings exploited in this way.
19. PPL submits that they are. It says section 128A is clear in providing that it "only" applies to a proposed scheme that will authorise the playing in public of "excepted sound recordings included in broadcasts". The use of the word "only" has no purpose if schemes which authorise the playing of sound recordings delivered in some other way are also included.
20. Moreover, PPL continues, the further subsections of section 128A all make clear that the notification by the licensing body, the actions of the Secretary of State and the reference to the Tribunal are expressly tied to a scheme for excepted sound recordings included in broadcasts. The factors that the Secretary of State must consider under section 128A(7) (and which the Tribunal must consider by virtue of section 128B(2)(a)) are also all directed at the use of broadcast sound recordings.
21. These are powerful arguments and they certainly introduce an unfortunate measure of ambiguity into the meaning of these sections. However, I do not believe them to be determinative, for reasons I shall now explain.

22. It seems to me that the starting point is section 116(1) which defines a licensing scheme for the purposes of Part I and, more specifically, Chapter VII of the CDPA. Anything in the nature of a scheme which sets out the classes of case in which and the terms on which licences are to be granted is a licensing scheme. Importantly, it is a unitary concept. It does not contemplate a single tariff containing multiple schemes. In my judgment the schemes proposed by PPL are licensing schemes within the meaning of this definition.

23. Turning to section 128A, subsection (1) makes clear it only applies to a proposed licence or licensing scheme that will authorise the playing in public of excepted sound recordings included in broadcasts. Similarly, subsection (2) requires the licensing body to notify the Secretary of State of the details of any such proposed licence or licensing scheme for excepted sound recordings before it comes into operation. Clearly the subsections exclude licensing schemes which do not authorise the playing in public of sound recordings included in broadcasts. But I believe their terms are cast in sufficiently general terms as to embrace delivery system neutral schemes which not only authorise the playing in public of excepted sound recordings included in broadcasts but also sound recordings delivered by other systems. Moreover, I see no warrant in the language to qualify the definition of licensing scheme and so permit a delivery system neutral scheme to be notionally divided into those portions which authorise the playing in public of excepted sound recordings included in broadcasts and those which authorise the playing in public of sound recordings exploited in other ways. On a natural reading of the subsections, the scheme must be notified as a whole, as happened in this case.

24. Once a scheme has been notified, the Secretary of State is bound to consider it. There can be no doubt the matters he is required to take into account are focused on the authorisation to play sound recordings contained in broadcasts. Indeed, they form the exclusive subject matter of subsection (7). However, once the Secretary of State has completed his considerations, he must, under subsection (5), either refer the licensing scheme to the Tribunal for a determination of whether it is reasonable in the circumstances or notify the licensing body that he does not intend to do so. If he decides to refer the scheme then the subsection appears to contemplate that it must be referred as a whole.

25. The Tribunal must then establish whether it is reasonable in accordance with the procedure set out in section 128B. Here and in contrast to the position under section 128A, the Tribunal must take into account not only the factors referred to in section 128A(7) but also any other factors it considers relevant (subsection (2)(b)), as further emphasised by the provisions of sections 129 and 135. Moreover, under the terms of subsection (3), it must confirm or vary the scheme in so far as it relates to cases of any description. There is nothing here to

suggest the jurisdiction of the Tribunal is limited to a consideration of the terms of the licensing scheme only in so far as they relate to excepted recordings included in sound broadcasts. To the contrary, it seems as broad as its general jurisdiction under sections 118 and 119 (respectively dealing with licensing schemes which are proposed or in operation).

26. This impression is further confirmed by the terms of section 128A(8), (9) and (10). These provide a mechanism which seems designed to ensure there will be only one set of proceedings in relation to any particular scheme. A licensing scheme including an authorisation to play excepted sound recordings included in broadcasts may only be referred to the Tribunal under the terms of section 118 *before* it is notified to the Secretary of State. If the Tribunal entertains the reference then subsections (2) to (5) do not apply with the result that the licensing scheme is not referred to or considered by the Secretary of State at all. It takes a different course – that of the conventional reference. If, on the other hand, it is notified to the Secretary of State then it may not be referred to the Tribunal under section 119 until *after* the Secretary of State has notified the licensing body that he does not intend to refer it to the Tribunal.
27. I believe the consequences of PPL's arguments are unsatisfactory in two further respects. First, in considering a delivery system neutral scheme the Tribunal would be required to divide the scheme into a licence to play sound recordings which are broadcast and a licence to play sound recordings which are not. Its jurisdiction to consider the scheme under section 128B would be limited to the former. Yet in exercising that jurisdiction it would inevitably have to assess the reasonableness of the licence fee for the playing of sound recordings on, for example, tapes and CDs and then compare it to the fee for the playing of broadcast sound recordings.
28. Second, I foresee real practical problems in the implementation of section 128B(4). This confers on the Tribunal a power to direct that its order, in so far as it reduces the amount of charges payable, has effect from a date before that on which it is made. It also provides that if such a direction is made then any necessary repayments to a licensee must be made in respect of charges already paid. If the Tribunal were to make such a direction in relation to the schemes in issue in this case and if, as PPL contends, the jurisdiction of the Tribunal under section 128B is limited to a consideration of such schemes only in so far as they relate to broadcast recordings, it would then have to try to apportion the single charge into a payment in respect of different forms of usage, a self evidently complex and difficult exercise.

29. In the light of these matters and despite the focus in section 128A(7) upon the broadcast of excepted sound recordings, I have reached the conclusion that the submission of the Interested Parties is to be preferred and that the Tribunal does have jurisdiction under section 128B to consider a delivery system neutral licensing scheme as a whole. Such an interpretation does no violence to the words of sections 128A or 128B and is one which gives effect to the evident intention of the draftsman to create a procedure which allows a licensing scheme which authorises the playing in public of broadcast sound recordings to be considered in one set of proceedings only. The alternative interpretation means that delivery system neutral schemes must be considered in two separate sets of proceedings with different procedures or, worse still, and contrary to the understandable wishes of all parties, cannot be promulgated at all. I agree with the Interested Parties that to divide up the consideration of a licensing single scheme in this way is inconvenient, cumbersome, expensive and involves a waste of judicial and public resources. I should not conclude this was the intention of the draftsman unless compelled to do so by clear language and that I do not find. In my judgment the Tribunal fell into error and I would allow this aspect of the appeal of the Interested Parties.

Other issues

30. I can now deal with the remaining issues which arise on these appeals relatively shortly. The Interested Parties invite me to order that the established tariffs apply to users who do not wish to play broadcast sound recordings and to make consequential directions for repayment under section 128B. I am entirely satisfied such an order would not be appropriate. As is clear from the decision of the Tribunal, the hearing on 8 November 2007 took place to allow it to determine the scope of its jurisdiction under section 128A and 128B. It was not concerned with the substantive merits. In so far as the Tribunal made observations as to the terms of the tariffs which should be applied to users of sound recordings, it did so without reference to the evidence and submissions of PPL filed in support of the delivery system neutral licensing schemes in issue. In all the circumstances I believe the correct course is to set aside the decision of the Tribunal and to remit the references to the Tribunal for further consideration and directions in the light of this judgment. All parties before me indicated that were I to take this course it would be desirable for that consideration to be conducted by a freshly constituted Tribunal.