The Copyright Tribunal

CT 120/12

IN THE COPYRIGHT TRIBUNAL
IN THE MATTER OF A FURTHER REFERENCE TO THE COPYRIGHT TRIBUNAL
UNDER SECTION 120 OF THE COPYRIGHT DESIGNS AND PATENTS ACT 1988

Date: 31/01/2013

Before :

His Honour Judge Birss QC, Dr Lucy Connors and Mr Philip Eve

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Between :

CUTBOT LIMITED — **Applicant**

- and -

THE NEWSPAPER LICENSING AGENCY LIMITED — **Respondent**

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The Applicant in person
Berwin Leighton Paisner for the Respondent

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DECISION

The Tribunal: :

1. On 15th May 2012 this tribunal made an order in respect of the Newspaper Licensing Agency's licensing scheme relating to online media monitoring (OMM) services. The details of that scheme and the detailed consideration of the issues arising on that reference are dealt with in the tribunal's interim decision dated 14th February 2012 (case CT114/09). That reference arose from a reference by an OMM company called Meltwater. In this decision expressions will be used to mean the same thing as in the 14th February 2012 decision. The term PWA (Paid for Web Aggregator) was used in the Meltwater interim decision to refer to paid for OMMs like Meltwater (see paragraph 58 of the decision). The term also applies to the applicant, Cutbot.

2. On 1st December 2012 Cutbot applied to refer the same licensing scheme to the tribunal.

3. Cutbot argues that Meltwater was a large PWA whereas Cutbot is very small. Cutbot argues that the way in which the Meltwater reference was considered by the tribunal was coloured by the fact that Meltwater, the only PWA before the tribunal on that occasion, was substantial. Cutbot says that some of the financial provisions fixed by the previous reference, while they may have been fair from that point of view, are not fair when applied to a small PWA like Cutbot and unfairly discriminate between large and small PWAs. Thus Cutbot argues, the point of its reference is to consider the WDL/WEUL scheme from a somewhat different perspective to that considered in the Meltwater case. One of Cutbot's major arguments is that the £5,000 WDL fee for an OMM with fewer than 100 clients would make the business of a small OMM start up like Cutbot uneconomic.

4. Cutbot's reference states that it is brought under s120 of the Copyright Designs and Patents Act 1988. That section provides:

> **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—
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> (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
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> (c) an organisation claiming to be representative of such persons,
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> 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, either 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.

5. Thus, assuming these provisions apply to this reference, the reference cannot proceed without the special leave of the tribunal (s120(2)). Cutbot argues that special leave should be granted. The NLA contends no special leave should be given.

6. Rather than require the NLA to address the reference in detail before a decision on special leave was made, we gave directions for the question of special leave to be decided first. We received written submissions from both parties. This is our decision on that topic.

7. In its argument resisting special leave, the NLA also argues that the reference should be rejected under rule 9 of the Copyright Tribunal Rules 2010, on the basis that it discloses no reasonable grounds for bringing the application. We do not agree that this reference discloses no reasonable grounds. The thrust of Cutbot's case is properly arguable. Whether it will in fact succeed or not is not a question we can decide at this stage but it should not be rejected under rule 9.

The scheme of s120

8. The parties do not agree how s120 works. Section 120(1) refers to cases "of the description to which the order applies". Cutbot accepts primarily that this reference does relate to the same kind of case as the Meltwater reference and so s120(1) applies but Cutbot also purports to reserve the right to say that this reference does not relate to cases of the same description. If that were correct then s120 would not apply at all. The NLA argues that since Cutbot appears to suggest this case may not be of the same description as the cases to which the Meltwater order applies, that means the reference should be rejected because it falls outside s120(1).

9. We do not believe this is the right approach to s120. We believe the correct approach is this. Section 120(1) refers to cases of the same description because it is only those cases in which there might be a reason to seek to limit further references. Even if a licensing scheme has already been considered by the tribunal, there is no reason to

restrict a further reference of the same scheme as long as it relates to a genuinely different case. On the other hand the law generally seeks finality, the avoidance of multiplicity of proceedings and to discourage or prevent the reopening of disputes which have been decided. Thus a reference which was in effect simply an attempt to reargue points already decided might be thought to be prevented by legal doctrines such as issue estoppel, abuse of process and/or res judicata. The approach of s120 is that s120(1) expressly permits a further reference, even if it relates to the same kind of case, but s120(2) limits that permission in certain circumstances. A reference made more than one year after the tribunal's order (leaving aside s120(2)(b)) is permitted without express restriction. However references within one year require special leave under s120(2)(a). This must have been intended to create a degree of finality and certainty about tribunal decisions. Finality is desirable both from the point of view of the collecting society and also licensees or prospective licensees. The provision also has the effect of encouraging someone with an interest in a licensing scheme which has been referred to the tribunal to intervene and make their submissions in one legal proceeding.

10. As Cutbot's primary case recognises, this reference appears to us to be a reference which could only be permitted to go forward now with special leave. This reference does relate to a case or cases of the description to which the order of May 2012 applies. However even if that is wrong we reject the NLA's argument that this reference can be dismissed on the basis that the case is *not* of the same description as the cases covered by the May 2012 order. If it was not of the same description then there would be no restriction on the reference at all.

The need for special leave

11. 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. It will be for the person seeking to make the reference to explain why they should be given special leave. The merits of the reference itself are likely to be something to be taken into account at least at a threshold level. A reference which is plainly unarguable or which simply seeks to rehearse arguments already considered, without raising any additional factors, is unlikely to justify special leave. Reasons why the reference has to be made within the one year period will be important. If the reference could have been made at an earlier stage or could wait until the end of the one year period, then it is doubtful that special leave would be justified.

12. The granting of special leave must also involve a consideration of the wider public interest. The effect of a reference of a licensing scheme is that the terms of the scheme become subject to being changed by the tribunal. By s123(3) of the 1988 Act, if the tribunal's decision varies the amount of charges payable, it has the power to direct that the change has effect from a date earlier than the date it is made. The section gives the tribunal power to back date the effect of the decision as far as the date the reference was made, but no earlier. Thus once a reference is made, the relevant charges payable under the scheme from that date forwards are subject to the jurisdiction of the tribunal and that applies to all licensees, not just the parties to the reference.

Special leave in this case

13. Cutbot says special leave should be given for two reasons:

    i) *Cutbot was unable to participate in the previous reference.*

    Cutbot incorporated in March 2009, before the Meltwater reference. However it argues that it was not in full commercial operation at the time the Meltwater reference was made (late 2009) nor at the time the Meltwater reference was heard (summer 2011). In support Cutbot points out that the NLA itself has accepted that it would be fair to treat Cutbot's OMM activities prior to 1st January 2012 as essentially a "hobby" operation. So Cutbot argues it cannot be said that it should have made this reference at an earlier stage or intervened in the Meltwater reference.

    ii) *The NLA are threatening enforcement action against Cutbot.*

    The NLA and Cutbot have been negotiating for a long time. They have reached an impasse. Cutbot says the NLA has threatened to take enforcement action. It points out that in an email on 27th October 2012 the NLA said that Cutbot's options were to enter into a licence (on the existing terms), to request permission of the tribunal to make a referral or for the NLA to take enforcement action. Cutbot say this is a threat and that the NLA has therefore given Cutbot to understand that it must make a reference to the Tribunal in order to avoid legal proceedings. Cutbot says that it is not a viable option for it to pay the fees due under the WDL at present and thereby take advantage of s123(2) for the purposes of copyright infringement proceedings. It says the fees due are punitive for small businesses like Cutbot.

14. Section 123(2) of the 1988 Act provides that while an order is in force a person who is in the class to which the order applies can pay the sums which would be due under the scheme and if so, will be treated as being licensed by the scheme for the purposes of copyright infringement.

15. In response to Cutbot's arguments the NLA argues as follows:

    i) Cutbot were well aware of the WDL/WEUL since before the Meltwater reference began and have been well aware of it ever since. In October 2009, two months before the first reference in the Meltwater case, the Commercial Director of the NLA, Mr Hughes, was in email correspondence with Mr Mackenzie of Cutbot attaching a draft copy of the WDL. At that time the Cutbot OMM business was in fact in operation at http://cutbot.net/. Thus Cutbot in fact had ample opportunity to intervene in the Meltwater case but chose not to do so. The NLA also argues that if special leave were available because a prospective applicant was not in "full commercial operation" at the time the earlier reference was made and heard, all collecting societies would be exposed to repeated and speculative challenges to their licensing schemes by any "new" commercial operation which just happened to come into existence after a reference.

    ii) The argument that enforcement has been threatened is not a ground for special leave at all. The WDL is in force. Cutbot has not entered into the WDL neither has it paid the charges due under the WDL. Thus Cutbot cannot claim

the immunity available under s123(2) and the NLA is perfectly entitled to enforce copyright against the applicant. The NLA has elected to wait for the decision on special leave before doing anything further but reserves the right to enforce its copyright. The NLA argues that otherwise it would be unreasonably discriminating between prospective licensees and licensees.

16. We have not found this an easy application to decide. As a tribunal we have no wish to cause small organisations like Cutbot to be forced unjustifiably to pay fees they cannot afford. Nevertheless we note that Cutbot has been well aware of the WDL since before the Meltwater case began. Cutbot has been content to stand by and watch the Meltwater reference unfold and be decided by the tribunal over an extended period.

17. The Meltwater reference involved the investment of very considerable cost by the various parties to that reference and the commitment of considerable time and effort by the tribunal. Having decided not to get involved before, Cutbot will need to show that they have a sound justification for reopening the issues within the period set by s120(2). After all once the one year period has expired, Cutbot will be free to make the reference they seek without restriction.

18. If we refuse leave to Cutbot, then the NLA may sue it for copyright infringement. That is something Cutbot wishes to avoid. We understand Cutbot's desire not to be sued. However the only reason the NLA has a potential claim against Cutbot is because Cutbot has gone ahead and committed acts which require a licence from the NLA. It undertakes an OMM service as a PWA. If it was not prepared to take a licence on the terms being offered by the NLA in 2009 then its options at that time were to make a reference (or intervene) or not to commit the restricted acts. Once the Meltwater reference was decided and the terms of the WDL/WEUL fixed by the tribunal in May 2012, if Cutbot again did not want to take a licence, this time on the terms settled by the tribunal, then it could avail itself of the protection afforded by s123 or wait for the one year period to expire before committing restricted acts.

19. Cutbot argues that the level of fees in the WDL (and other things) make the licensing scheme unviable for a small PWA like Cutbot. However by the time Cutbot's service had reached a full commercial scale (1st January 2012) neither the interim nor final decisions of the tribunal had been published. Thus Cutbot were content to go forward without knowing what level of charges the tribunal would arrive at. It seems to us that a business which chooses to take this approach cannot use its own decision to act in this way as a basis to seek special leave to re-open the licensing scheme less than a year after the decision.

20. Even assuming it is fair to characterise Cutbot as a new business, we do not accept that this justifies granting special leave. Neither do we regard the threat of enforcement action particularly when the party concerned started carrying out the restricted acts before the tribunal's decision, to be a basis for special leave. Such a party can use the protection afforded by s123(2). We are not persuaded that the two arguments taken together provide a fair basis for special leave either.

21. Looking at the matter overall, one might say that since Cutbot can start this reference in May 2013 anyway, surely it is a small thing to allow them to start the reference 6 months early. However that overlooks the effect of s123(3), whereby the charges

under the licensing scheme will be subject to the tribunal's jurisdiction from the date the reference was made. That will have an impact on the NLA and every one of its existing licensees. Permitting this reference to go ahead in relation to the WDL/WEUL licensing scheme will re-open the charges as from December 2012, well before the end of the one year period of certainty which is contemplated by the 1988 Act.

22. At the heart of the matter, the true reason Cutbot wishes to have special leave to start the reference now is simply because it wishes to continue to carry on committing restricted acts but does not wish to take advantage of s123(2). To deprive the NLA and all existing licensees of the only period of certainty in relation to the charges under the scheme which the Act contemplates, after a major reference like the Meltwater case, would need good reasons. We do not believe Cutbot's reasons are sufficient to justify that. Cutbot must wait until after 15th May 2013.

Conclusion

23. We will not give special leave for this reference.

His Honour Judge Birss QC

Chairman