British Beer & Pub Association and UKHospitality Member Briefing Note

New Copyright Tariff for films/TV shows broadcast on hotel and pub letting bedroom televisions

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Summary

- From the 9th December 2019, MPLC will start approaching businesses regarding their new tariff for Film/TV for copyrighted content owned by their members and broadcast on hotel/pub bedroom televisions. The tariff will commence from 1st January 2020.
- This follows negotiation with BBPA and UK Hospitality regarding the tariff rates and structure as well as the legal basis for the tariff itself.
- This area is copyright law is complex and our legal advisers have thus far concluded that the legal basis does remain somewhat uncertain. MPLC are convinced, however that they have a very strong basis for the tariff introduction and hence are now pressing ahead.
- This note contains a summary background to the tariff introduction, the significantly reduced tariff rates negotiated by the Associations (page 3), a brief summary of the key legal points from our advisers (pages 3-5), and a joint statement agreed by BBPA, UK Hospitality and MPLC (page 6). The note will be updated if any subsequent legal advice changes our views on the tariff and MPLC's ability to collect it.
- Ultimately it will be for businesses to determine whether to accept the tariff and therefore remove any subsequent risk of litigation.

Background to MPLC's New Tariff

The Motion Picture Licensing Company (MPLC) is a licensing body representing film studios and TV production companies. This is a different body compared to music collection bodies PPL (record companies) or PRS (music writers and performers). Under UK copyright law MPLC can collect royalties on behalf of their membership, from business that show relevant content.

MPLC is based in the USA and has had an established UK branch for a number of years. Previously, it has been mainly limited to collecting copyright for DVD/Blu-Ray presentations

in various businesses and public sector organisations. It should be noted that MPLC do not represent all TV studios and production companies, and that other organisations exist.

MPLC is unlike the PRS and PPL in that they represent the vast majority of copyright owners of music and recordings and are therefore able to provide almost 'blanket' cover in their annual licences. MPLC, however, represents and licenses only some of the copyright owners of programmes and films broadcast on television, so other copyright owners of films and programmes and their representatives, may also request licences.

In 2015 changes were made to the Copyright Act 1988 because a legal decision (relating to televised football) had established that UK copyright law was incompatible with EU law and had to be amended. In brief, the changes enabled copyright on 'film in a public broadcast' (motion pictures and television programmes) to be collected much more clearly and easily than before the amendment. Various bodies had raised this as a risk to the Intellectual Property Office (IPO) ahead of the changes, however the IPO were legally required to make the changes.

Live broadcasts such as rolling news and live sporting events are not subject to copyright.

Current MPLC tariff impact on the hospitality sector

MPLC began approaching different sectors that use televisions (pubs, bars, hotels, restaurants, gyms, hairdressers etc.) in 2016. Initially, MPLC insisted that simply having a television would make a premises liable for a copyright fee, but after negotiation with trade bodies it was agreed that the fee would only be payable if the business was actually broadcasting copyrighted content to customers. So, for example, a bar showing only rolling news to customers (and could prove this was the case e.g. staff trained that channels should not be changed) would not be liable for the fee. A bar showing pre-recorded TV programmes and/or motion pictures would be liable.

MPLC has developed an annual 'umbrella licence', which has been in place since 2017. There is a separate tariff for different sectors; for hospitality businesses such as pubs, hotels and restaurants the charge is broadly similar – based on floor area, calculated on the area of the business where the TV is visible.

Conversations with businesses suggest that some have paid the charge, others have put systems in place to show only live broadcasts, and others have removed televisions entirely. It should be noted that MPLC had the ability to effectively target both large and small businesses and the same will presumably be true of the new hotel bedroom tariff.

Proposed new MPLC tariff for hotel bedrooms – rationale

In 2018 MPLC signalled their intention to introduce a new tariff for hotel bedrooms. PPL and PRS for Music have successfully argued in the courts that hotel bedrooms come under the definition of public place for the purposes of copyright law to collect music tariffs for televisions in hotel bedrooms. MPLC have decided they will exercise their right to collect for

the broadcast of copyrighted 'film' (i.e. TV programmes/motion pictures) shown on televisions in hotel bedrooms.

Although the terminology used is 'hotel bedroom', this fee would apply to any business offering letting rooms with televisions, such as B&Bs, pubs, hotels etc. As with PPL and PRS, MPLC are not seeking to charge copyright tariffs to platforms such as AirBNB at the current time.

Proposed new MPLC tariff for hotel bedrooms – tariff structure

The initial MPLC proposal was £106.20 per 15 bedrooms with televisions. This equated to £7.08 per bedroom w/television. (PPL currently charge £52.92 per 15 bedrooms with televisions. This equates to £3.53 per bedroom w/television. PRS for Music currently charge £51.80 per 15 bedrooms with televisions. This equates to £3.45 per bedroom w/television.)

MPLC's starting position was roughly the combined PPL and PRS charges already in existence, using the same 15-bedroom metric previously established.

Note – as with the umbrella licence for hotel bars, lobbies etc. liability for MPLC's tariff can be avoided if bedroom TVs are locked to only be able to show non-copyright material such as guest services, hotel info, or live content (rolling news), or televisions removed.

Details of the Tariff

The agreed tariff after negotiations with MPLC is:

- A significant 30% reduction in the level of the fee to £5.00 (+VAT) per room per year.
- Reduced the level of the fee still further to the requested £4.00 (+VAT) per room as an 'Introductory Rate' in 2020. Then increase to £5.00 per room on 1st January 2021.
- Annual increases in line with CPI only.
- Removal of the 15-room minimum fee. The tariff will be calculated on a simple per-room basis.
- A 25% seasonal discount for accommodation open less than nine months per year.
- Delayed introduction of the tariff by one year. Collection would start from **1 January 2020**.
- Agreement not to seek past fees.
- 'Higher Rate' to the tariff of £6.00 (+VAT) per room. This is payable in the first year of the licence by those not applying when first approached. MPLC have explained that the higher rate is to compensate for the additional costs involved detecting and taking action for these "infringements of copyright". They advise that this would be in addition to the copyright infringement itself which, if proven, carries statutory penalties.

MPLC have indicated that they will begin sending notices to venues from **9 December 2019**.

MPLC's claims under s19 CDPA 1988 – Advice from Squire Patton Boggs

MPLC has approached the BBPA and UKH offering a scheme that allows reduced licence fees for viewing by residents of hotels and pubs of free to air television programmes. MPLC suggest that the fact that the BBPA and UKH (the "Associations") have entered into similar schemes with PRS and PPL shows that MPLC have a right to charge licence fees for viewing of such programmes by guests in hotel and similar ("private") rooms. MPLC's claim does not cover viewing in the common parts of hotel and pubs.

The Associations have been unable to find records of the negotiations with PRS and PPL and the basis of any agreed tariffs regarding the status of bedrooms with those collecting societies is not clear. We are therefore unable to draw any helpful comparison with those existing tariffs

MPLC base their claim on s19 of the Copyright, Designs and Patents Act 1988. This section concerns a "performance of the work in public". They do not rely on s20, which concerns "communication to the public". They have not explained this stance, but it is likely that reliance on s20 would raise other concerns.

MPLC's legal case relies principally on English Law, though they point out that cases in the European Court of Justice support their claim. Most of the English (and Scottish) cases they refer to concern situations where a "performance" (which undoubtedly can include the showing of a television programme) takes place in a venue in which an audience has gathered. Obviously this will apply to cinemas and theatres, but the scope extends to other places where members of the public are present. This can include venues such as record shops where the presence of an "audience" is not actually coordinated but members of the public will nonetheless be present.

However, MPLC take a step further and suggest that a performance in public can occur when only one person, such as a guest in a hotel room, is present. They suggest that, if a television programme is viewed by hotel guests in their hotel rooms, that would amount to a performance in public.

Nonetheless, national law must reflect EU law. MPLC say that EU law supports their position. In particular, in the case SGAE v Rafael Hotels (C-306/05), the European Court of Justice held that the distribution of a signal by means of television sets by a hotel to customers staying in its rooms constitutes "communication to the public". MPLC argue that, even though this is concerned with "communication to the public", which is reflected in s20 CDPA, the definition of "the public" must be the same for the purposes of "performance in public" under s19 CDPA. This is, in a sense, correct, since "the public" must refer to an indeterminate class of people, but it does not tell us what "in public" means. Communication to the public includes communication to individuals in their private dwellings, and this cannot be regarded as a "performance in public".

The Court of Justice noted that the term "public" refers to an "indeterminate number of potential television viewers" but that:-

"*…a general approach is required, making it necessary to take account not only of customers in hotel rooms … but also customers who are present in any other area of the hotel and able to make use of television sets installed there. It is also necessary to take into account the fact that, usually, hotel customers quickly succeed each other. As a general rule, a fairly large number of persons are involved so that they need to be considered to be "a public" …. the*

clientele of a hotel forms such a new public … the hotel is the organisation that intervenes, in full knowledge of the consequences of its action, to give access to the protected work to its customers. In the absence of that intervention, its customers, although physically within that area, would not, in principle, be able to enjoy the broadcast work …

It is also sufficient that the work is made available to the public… Therefore it is not decisive that customers who have not switched on the television have not actually had access to the work."

It can be seen from this that, although the Court of Justice takes a broad view of "communication to the public", it conflates viewing in hotel bedrooms with viewing in the common parts of the hotel. What is more, if the hotel's clientele can access the televisions in the public areas (because a licence fee has been paid for that) it is difficult to say that they do not have access to the work without being able to view it in the hotel bedrooms.

However, this case concerns "communication to the public". This includes "making available by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them", of performance, phonograms, films etc. Clearly this is not particularly relevant to a "performance in public" for the purposes of UK law.

Whilst the EU cases lend a certain amount of support to MPLC's claims, they do not, and cannot, deal with the central issue, which is whether the use of a television in a hotel bedroom can constitute a "performance in public".

With this in mind, MPLC rely on a New South Wales case from 1983 (Rank Film Production v Dodds which considered the meaning of "in public" as it was used in the (Australian) Copyright Act 1968. The court decided that "performance in public" means "performance to the public" and that "public" includes a portion of the public, however small. Thus the exhibition of films in motel rooms issuing a video cassette recorder (without licence) was an infringement of the copyright of the owner.

Whilst it is true that an English Court might have regard to a case (only at first instance) in Australia for guidance it is by no means clear that it would be followed as regards s19 since it suggests that there is little or no difference between s19 and s20 (Communication to the public).

Conclusion

The law relating to copyright is complex and the UK law does not easily match up with applicable EU law. It does not appear to us that MPLC and their lawyers have been able to spell out with clarity why s19 CDPA applies to the use of televisions in hotel rooms. MPLC's claim is novel and they have not drawn to our attention any binding authority to this effect. MPLC say that they have obtained counsel's opinion on this point but have refused to let us see it, claiming legal privilege.

If the Associations were to endorse MPLC's claim under s19, there is a risk that a legal challenge to MPLC's claim made by another party would succeed, with the consequence that the Associations might be accused of issuing incorrect advice. In the circumstances, therefore, the safer course is to make it clear that the Associations offer no opinion on whether MPLC's claims are justified.

It should also be noted that we have taken no steps to verify MPLC's general right to licence any copyright in television broadcast content or the rights acquired by the broadcasters themselves, which may have a bearing on MPLC's rights. This would be a very substantial exercise and would be very intrusive. However, MPLC have specifically confirmed that cable operators/broadcasters have not been given public exhibition rights (enforceable through s.19) from MPLC's 1000+ plus rightsholders/studios.

Squire Patton Boggs (UK) LLP

26 November 2019

In addition, we are currently awaiting further legal advice on the tariff; if that advice changes our view on the validity of the tariff and/or MPLC's right to collect it, we will update this note accordingly and advise our members.

Wording of agreed statement for public use between BBPA, UKHospitality and MPLC

"The BBPA and UKHospitality (UKH) have been in discussions with MPLC concerning the possibility of negotiating a new standard tariff for showing free to air television programmes in guest rooms in pubs, hotel bedrooms and other accommodation providers where relevant. These discussions have arisen following changes in legislation in June 2016. MPLC base their claim on s.19 Copyright Designs and Patents Act 1988 (Performance in Public).

The law relating to copyright infringement is extremely complex and the application of s.19 cannot be said to be entirely clear. MPLC draw parallels with the practices of the Performing Rights Society and PPL, both of whom introduced tariffs for music and sound recordings on televisions playing free to air broadcasts in guest/hotel bedrooms a number of years ago. However, the BBPA and UKH have been unable to conclude that those practices provide for a conclusive basis for the claims made by MPLC.

Furthermore, the BBPA and UKH have not commissioned any extensive investigation, led by a legally qualified expert, of the particular programme rights of which MPLC claim it is entitled to license the performance. MPLC have, however, emphasised that they are convinced of that entitlement and intend to pursue a policy of making such collections. They will be contacting pubs, hotels and other accommodation providers soon and it should be noted that failure to obtain a licence may lead to litigation for the infringement of their copyright. The BBPA and UKH express no opinion as to the likely outcome of any such proceedings.

With that in mind, the BBPA and UKH have negotiated a tariff with MPLC which we reasonably believe reflects the likely value of the rights for which MPLC collect on the assumption, for this purpose only, that MPLC's claims are fully justified.

These negotiations have resulted in some important fee reductions including:

- A reduction in both the initial level proposed and calculation of the fee.
- Seasonal concessions.
- Agreement MPLC would not seek retrospective payments.

It should be noted, MPLC have made it clear that the negotiated lower rate obtained by BBPA and UKH will only be available to those taking out a licence with MPLC for televisions in pubs and hotel bedrooms without the necessity for MPLC to detect and take action for these infringements of copyright. The scheme is made available for all those who operate pubs, hotels and other relevant accommodation providers in the UK."

BBPA & UKH

06.12.19

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