

The Proposed Statutory Copyright Licence for Private Use of Recordable Media

Explanatory Note

Introduction

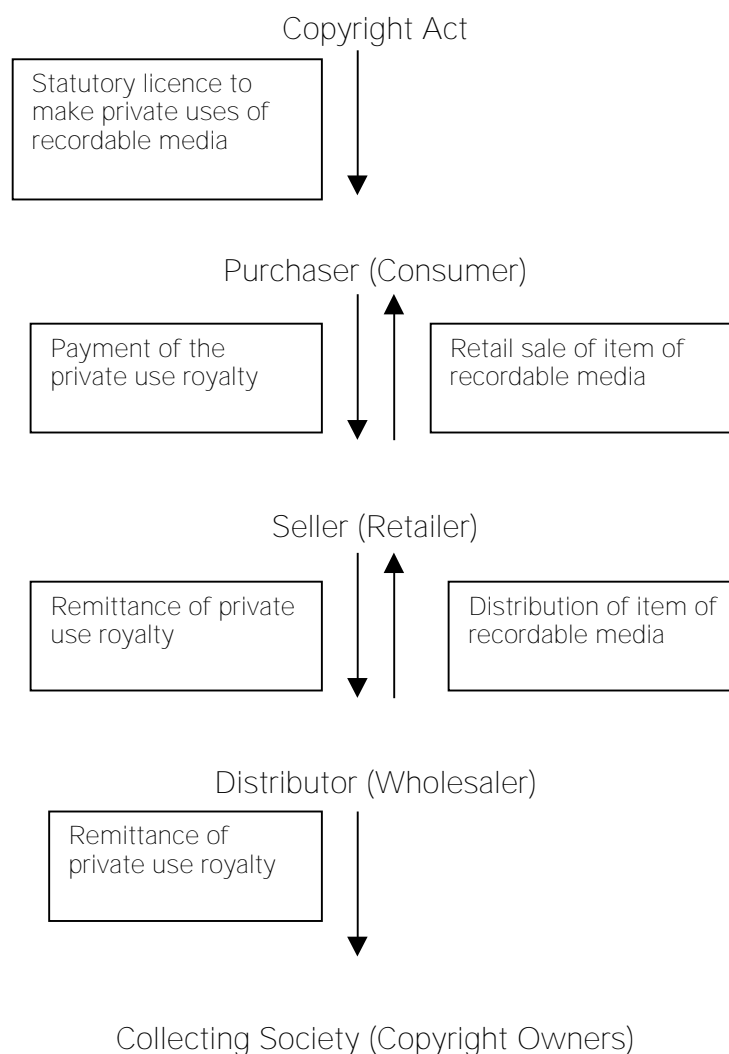
This explanatory note provides an explanation of how the proposed statutory licence for the private use of recordable media will operate in practice, includes the terms of the proposed drafting and contains an opinion from Dennis Rose QC as to the drafting's constitutional validity.

Part One comprises a ten point summary of the scope and application of the royalty. Part Two considers in some detail the operation of the royalty from the perspective of each of the relevant stakeholders.

Part One: Outline of operation

1. The royalty provides a licence to purchasers (that is, consumers) of recordable media to reproduce works for private purposes without infringing copyright.
2. Private use means reproduction or copying by a person for that person's own private and non-commercial use, or such use within that person's domestic circle. Accordingly, the exception to infringement of copyright does not apply where the reproduction or copy is: (a) sold or let for hire; (b) used so as to cause a work to be performed, seen or heard in public (whichever is applicable); (c) used so as to communicate to the public the work; or (d) used otherwise than for a private use.
3. The royalty is imposed on recordable media, a term defined to mean "any removable and portable item of electronic storage (such as a blank audio or video cassette containing magnetic tape, recordable compact disc or recordable DVD) of a kind ordinarily supplied for private use or uses that include private use". Computer hard drives are to be excluded from the operation of the royalty by this definition.
4. The licence allows for both on-line and off-line copying. However, the exception to copyright infringement will not apply where the reproduction or copying is made using a circumvention device or service.
5. It is possible for a purchaser of recordable media to 'opt-out' from the payment of the royalty by providing a declaration to the Collecting Society that the item will not be used to infringe copyright.

6. The royalty is added to the retail price of recordable media and collected by the seller (the entity who sells by way of retail sale such an item) from purchasers of that media. The seller is under an obligation to account for those monies to the distributor (whether a manufacturer, wholesaler or importer), who, in turn, must remit those monies to the relevant Collecting Society. Both sellers and distributors are compensated for the costs they incur in collecting and accounting for the royalty to the relevant Collecting Society. The operation of the licence and its collection regime may be summarised diagrammatically:



7. To simplify collecting the royalty, the proposed legislation provides for the royalty to be paid in advance by the seller to the distributor, who must then remit to the relevant Collecting Society within 21 days of the end of the quarter in which the funds are received. The advance payment by the seller is stipulated to occur three months from the date a seller obtained an item of recordable media from its distributor. However, it is intended that in practice this payment will occur at that time the seller pays its distributor for the items.
8. It is an offence for the seller or the distributor to fail to collect the royalty. The failure to discharge any obligation to pay the royalty also creates a debt recoverable by the Collecting Society.
9. The purpose of the royalty is to provide equitable remuneration to copyright owners for the reproduction and/or copying of their works by consumers for private use. The Copyright Tribunal determines what is the appropriate amount of equitable remuneration for private copying.
10. The Copyright Tribunal also determines the appropriate amount of compensation to be paid to the sellers and distributors for collecting the royalty.

Part Two: Perspectives on the Impact of Proposed Reform

Purchasers (Consumers)

Consumers are one of the principal beneficiaries of the royalty. The payment of the royalty enlivens the operation of the licence for consumers of recordable media to reproduce works for private purposes without infringing copyright.¹ The licence is limited by not only the private use stipulation² but also by the requirement that a consumer cannot rely on the licence where the private use had been made through the agency of a circumvention device or circumvention service.³

A consumer could, for example, purchase a recordable compact disc to which the licence applies by payment of the royalty. The consumer could with that item lawfully copy for private use any sound recording and the copyright works included therein so long as this involved no use of a circumvention device or service.

A consumer may not wish to avail himself of the licence. For example, a consumer may not wish to use the recordable media to reproduce third-party copyright material. In such cases consumers may 'opt-out' from the payment of the royalty by providing a declaration to the Collecting Society that the item will not be used to infringe copyright.⁴ By so doing, the consumer is entitled to a royalty refund from the Collecting Society.

From the consumer's perspective, the royalty (which reflects the equitable remuneration remitted to copyright owners) is paid as part of the price of the good at the time of purchase.⁵ The exact amount of the royalty will be determined by the Copyright Tribunal.⁶ To serve as a record of the consumer's payment and to clarify the existence of the licence, recordable media will have attached to it a prescribed notice stating that the private use royalty has been paid in relation to the item.⁷

The statutory licence attaches to the item in respect of which the royalty is paid, not the consumer making the payment.⁸ Thus, the consumer can

¹ Subsection 4(1)

² Subsection 4(2)

³ Subsection 4(3)

⁴ Subsection 10(1).

⁵ Subsection 5(1)

⁶ Subsection 100X(7)

⁷ Subsection 15(1)

⁸ Subsection 4(1)

transfer the media to another person, who is then entitled to use it to copy for their private purposes without infringing copyright.

Sellers (Retailers)

The retailer is obliged to collect the royalty from the purchaser when the good is sold.⁹ The royalty will effectively comprise part of the purchase price, and the retailer must remit the amount of the royalty to the distributor less an amount of compensation for the cost of so doing.¹⁰ The retailer has an obligation to ensure that a prescribed notice is affixed to the media item or its container (such as an adhesive label) which gives notice as to applicability of the private use licence.¹¹

To streamline the administration of the licence, and in place of the primary obligation to remit private use royalties actually collected, an obligation is placed upon the retailer to make an advance payment to its distributor.¹² This advance payment is made to the distributor in anticipation of receipt of private use royalties at the time of future retail sale.¹³ The advance payment by the seller must occur three months from the date a seller obtained the relevant item of recordable media from its distributor. This time period is intended to be the maximum period likely to be allowed for payment in any terms of trade between distributors and retailers. It is expected that in practice this advance payment will occur at the time when the retailer pays its distributor for the item.

The seller is entitled to keep part of the royalty as compensation for their role in collecting the royalty.¹⁴ The amount of compensation is determined by the Copyright Tribunal, and takes into account any actual or likely financial costs for a seller of temporarily outlaying funds in order to make an advance payment.¹⁵ The compensation amount is expressed as a percentage of the private use royalty.

If a retailer has made an advance payment in respect of goods ultimately not the subject of a retail purchase (for example stolen, destroyed, returned or unsold goods), then the seller is entitled to be refunded that payment by the collecting society.¹⁶

⁹ Subsection 5(1)

¹⁰ Subsection 6(1), paragraph 100X(7)(b) and subsection 100X(9)

¹¹ Subsection 15(1)

¹² Subsection 7(3)

¹³ Subsection 7(1)

¹⁴ Subsections 6(1) and 7(1)

¹⁵ Paragraph 100X(7)(b) and subsection 100X(9)

¹⁶ Subsection 7(4)

Distributors (Wholesalers, Importers, Manufacturers)

Distributors are the intermediaries between retailers and the collecting society (which represents copyright owners). Distributors must remit any private use royalties received to the collecting society within 21 days of the end of the quarter in which the funds are received. This time limit applies irrespective of whether or not the funds are received pursuant to an advance payment.¹⁷ Like retailers, distributors are compensated for their part in collecting the royalty.¹⁸ However, this compensation will take into account any actual or likely financial benefits for a distributor of temporarily retaining funds holding amounts received from sellers under subsection 7(1).¹⁹ The Copyright Tribunal determines the compensation amount which is expressed as a percentage of the private use royalty.²⁰

Collecting Society & Copyright Owners

The payment of the royalty enlivens the operation of the statutory licence, which grants to consumers a copyright licence in relation to private uses of recordable media. Copyright owners can not refuse permission for private uses within the terms of the licence provided the royalty for the statutory licence is paid. They are, under the proposal, entitled to receive equitable remuneration (derived from the royalty) payable in accordance with the distribution policy of the collecting society. Copyright owners may continue to directly license the private uses and may continue to rely on technical protection mechanisms in so doing.²¹ If a copyright owner brings an infringement action against a person who has paid the royalty but has subsequently breached copyright, then the payment of the royalty may be considered by the court in determining damages for infringement.²² For example, the court may determine to reduce the damages by an amount equivalent to the royalty paid.

The collecting society is the copyright owners' non-profit, intermediary receiver of the private use royalty (less the compensations deducted for collection of the royalty) from the distributors. The society distributes the collected royalty to the relevant copyright owners, less the society's administrative expenses. The collecting society is appointed by the Commonwealth Attorney-General²³ and the Attorney may revoke that

¹⁷ Subsections 6(2) and 7(2)

¹⁸ Subsections 6(2) and 7(2), paragraph 100x(7)(c) and subsection 100X(10)

¹⁹ subsection 100X(10)

²⁰ Subsections 100X(7)(c),(d)

²¹ Section 19

²² Section 20

²³ Subsection 11(1)

declaration, if the society fails in its duties.²⁴ The collecting society must have a particular corporate structure consistent with its role in administering the statutory licence.²⁵ For example, the society is non-profit. The society must present its accounts to the Attorney who tables them in Parliament.²⁶

The society also has a role in ensuring the royalty is collected properly. After providing written notice, the collecting society may inspect the records of distributors and sellers that the society believes has failed to make a payment provided for under the royalty.²⁷ In carrying out that inspection, which the distributor or seller must reasonably assist²⁸, the society must provide identity cards to personnel authorised to conduct the inspection²⁹ and that person must display that card.³⁰

²⁴ Section 12

²⁵ Subsection 11(3)

²⁶ Section 13

²⁷ Subsection 16(1)

²⁸ Subsection 16(2)

²⁹ Subsection 17(1)

³⁰ Subsection 17(2)