

Response to the IPO consultation on “CRM” in the Digital Single Market

March 2015

Collective Rights Management (“CRM”) in the digital single market

Ombudsman Services’ consultation response

1 Summary

1.1 About Ombudsman Services

Established in 2002, the Ombudsman Service Ltd (Ombudsman Services) is a not-for-profit private company limited by guarantee which runs national, multi-sectorial private sector ombudsman schemes for the telecommunications, energy, property, copyright licensing, the glass and glazing sectors, the Green Deal, the Asset Based Finance Association (ABFA), reallymoving.com and Which? Trusted Traders.

We’re an entirely independent, service-oriented organisation. Through the services we run, we help our members to provide independent dispute resolution to their customers and each scheme is entirely funded by its members. Our aim is to raise public trust and confidence in the sectors we work with by providing effective independent redress when problems arise.

We now have around 9,200 participating companies. During the year ending 31 December 2014, we resolved 53,000 complaints. The company currently employs more than 500 people in Warrington, Cheshire, and has a turnover in excess of £27 million.

Ombudsman Services’ complaints resolution service operates once a company’s own complaints handling system has been exhausted, and we have the authority to determine a final resolution to each complaint. We have an enquiries department which handles primary contacts and where decisions on eligibility are taken. If a complaint is not for us, or has been brought to us too early, we signpost the consumer and offer assistance. Eligible complaints are then triaged. The simplest can be resolved quickly, usually by telephone, and taking a maximum of three hours. Around 10% are dealt with

in this way. For the majority of complaints we collect and consider the evidence from both parties, reach a determination and seek agreement; about 55% are settled like this. The most complex cases require a more intensive investigation, may require more information and lead to further discussion with the complainant and the company to achieve clarification. The outcome will be an Ombudsman Services Decision. Whatever process is followed there is always a right of appeal and escalation. An Ombudsman can issue a final decision in any one of the processes where it is clear that there is no evidence that would require changes to the initial determination.

Our service is free to consumers and, with the exception of an annual subscription from Department of Energy and Climate Change (DECC) for the Green Deal, operates at no expense to the public purse. It is paid for by the participating companies under our jurisdiction by a combination of subscription and case fee on a 'polluter pays' principle. Participating companies do not exercise any financial or other control over the company. Ombudsman Services' governance ensures that we are independent from the companies that fall under our jurisdiction.

2 Specific response to the questions

2.1 Ombudsman Services Response

The consultation poses a series of questions; the most relevant to Ombudsman Services is question 38. Ombudsman Services has responded to this question in detail and has offered general comments, too.

Additionally, we have responded to questions 1, 2, 8 and 10. Ombudsman Services has not responded to the remainder of the questions either because these are explicitly intended for different stakeholders or because they engage with issues outside of our sphere of experience.

Q1: “Please say whether and why you would prefer to implement using Option 1 or 2?”

In our view the differences between the two methods of implementation look to be largely nominal. Option 1 presents difficulties inasmuch as it would necessitate significant alterations being made to the existing Regulations. In a sense, then, it looks to be logical to simply replace the existing Regulations in their entirety.

Equally, as the Consultation document notes, the existing provisions go above and beyond the Directive requirements in some regards. We agree it is important that these provisions be retained, assuming Option 2 is adopted.

Q2: “How important is it to retain those aspects of the 2014 Regulations that go beyond the scope of the Directive?”

Ombudsman Services agrees with the Government that pre-existing provisions which go beyond the Directive requirements ought to be retained in order i) to better invigilate the maintenance of creators’ rights and the licensed use of copyright material, and ii) to ensure CMOs dispense their duties competently.

As discussed below, we agree with the Intellectual Property Office’s initial assessment that, “where possible, existing infrastructure from the current system (e.g. the Ombudsman or complaints procedure)” ought to be utilised.

Q8: “Who do you understand the ‘rightholders’ in Article 3(c) to be?”

The definition of rightholders looks to be broad, encompassing authors and publishers who are not members of CMOs or IMEs.

Q10: “What do you consider falls in the scope of ‘non-commercial’?”

We would presume that ‘non-commercial licences’ are generally intended to enable rightholders to differentiate and allow their works to be used by charities, not-for-profit organisations, educational establishments, etc, while prohibiting or regulating the use of the same works for profit or gain.

Q38: “What do you think are the most appropriate complaints procedures for handling disputes and complaints between CMOs, [Collective Management Organisations] users and licensees, including for multi-territorial disputes? Please say why.”

Ombudsman Services welcomes the directive requirement that member states must ensure that there are proper arrangements in place for handling complaints and resolving disputes. We support the Intellectual Property Office approach, outlined in option 2, that “where possible, existing infrastructure from the current system (e.g. the Ombudsman or complaints procedure) may be used.” To this end, we would point out that Ombudsman Services already provides independent redress for 11 collecting societies and has developed a considerable amount of experience while operating in this sector.

We would recommend the continued adoption of a scheme that uses the funding model we have utilised (i.e. which is free to complainants and made independent from CMOs via robust governance mechanisms). Such a model ensures blanket coverage without placing a burden upon public finances.

A multi-sectorial organisation, such as Ombudsman Services, would also be most suitable because it would be able to import best practices, and transferable standards, from other industries and sectors. Generally, we would caution against adopting a scheme that is dedicated to CMO complaints exclusively. Such an entity could become overly influenced by, or too close to, the sector. Instead, an organisation that offers a diverse range of schemes would be able to exercise greater independence.

We would further recommend the use of a single independent scheme in order to ensure uniformity of standards across the sector. This would allow for consistency of decision making and of outcomes. To this end, we would note that any award or remedy should, in the first instance, seek to place the complainant in the position they would’ve been in if nothing had gone wrong. The IPO may also wish to consider making a specific provision as to how any additional award should be calculated, i.e. to mark the trouble and inconvenience suffered by the complainant. Decisions reached by

the scheme should be enforceable by the complainant (for example, via a covenant entered into by the CMO under deed poll).

We would further recommend a complaints handling model that is as dynamic as possible – i.e. one that is able to adjust its mechanisms appropriately to proportionately resolve complaints dependent upon the complexity, or simplicity, of issues in contention. The redress scheme should also be obliged to feedback to the CMO, setting out clearly expressed complaint outcomes that will drive improvements. A mechanism should also be made available for the scheme to report grave or systemic failures to the competent authority and the IPO.

Further, in order for the complaints procedure to be effective, and drive positive behaviours, generally, complainants should be made aware of its availability. Therefore, parties who have a complaint about the service they receive from a CMO, should be advised of their right to take their complaint to ADR.

Other matters

There are additional matters that Ombudsman Services recommends the IPO might give further consideration to when transposing the directive into UK law.

Ombudsman Services believes that the IPO should give consideration as to how complaint remedies are to be enforced. Ombudsman Services' current experience is that ongoing intervention is required in a small number of cases to ensure remedy implementation. The IPO may wish to give this aspect further consideration; failed or delayed remedy implementation has the potential to critically undermine the process of redress.

Additionally, in order to ensure that the redress scheme operates effectively, in the interests of both the consumers and the copyright holder, it would need the ability to ensure as full disclosure as possible from the parties involved. Further guidance on this would be helpful.

As previously mentioned Ombudsman Services has considerable experience in the field of dispute resolution. We would be happy to provide clarification on any point in this evidence or if there is any other way we can help, please contact me.

Lewis Shand Smith
Chief Ombudsman

30 March 2015