

Kluwer Copyright Blog

Do not fail to pay the music man, another example at the UK IPEC.

Jeremy Blum (Bristows LLP) · Thursday, December 22nd, 2016

In *Phonographic Performance Ltd v Hagan & Ors (t/a Lower Ground Bar and the Brent Tavern)* [2016] EWHC 3076 (IPEC) HHJ Hacon considered the interplay of s.97(2) of the Copyright, Designs and Patents Act 1988 (**CDPA**) and art.13(1) of Directive 2004/48/EC on the enforcement of intellectual property rights (**the Enforcement Directive**) when awarding additional damages for copyright infringement. The effect of CPR Part 36 offers on the caps on costs and damages in IPEC was also considered.



Phonographic Performance Limited (**PPL**) brought a claim against the first defendant, Mr Hagan, for infringing its copyright by playing unlicensed music in his London bar. After Mr Hagan's defence was struck out for failure to give disclosure of relevant documents, he produced a clumsily fabricated acceptance email to PPL's earlier Part 36 offer to settle the case. The judgment dealt with PPL's claim for additional damages under the CDPA and the Enforcement Directive and an additional award for its unaccepted Part 36 offer.

As reported previously, HHJ Hacon had [recently considered](#) the relationship between s.97(2) and art.13(1) in *Absolute Lofts South West London Limited v Artisan Home Improvements Limited* [2015] EWHC 2608 (IPEC). His analysis of the UK and EU provisions in *Absolute Lofts* noted that art.2(1) of the Enforcement Directive preserved any provisions of national law that were more favourable to rights holders, although double compensation under both pieces of legislation was not intended. Therefore, as reiterated in this judgment, when additional damages for copyright infringement are claimed from both sources, the right holder shall be compensated by whichever provision provides the larger amount.

Applying both provisions to the facts, HHJ Hacon noted that art.13(1) emphasises the prejudice suffered by the right holder and that on the facts this was simply the non-

receipt of licence fees from Mr Hagan. S.97(2), on the other hand, also considers the flagrancy of the infringement, evidenced here by Mr Hagan's full knowledge of his obligation to pay the fees, having held a PPL licence in the past. Additional damages were therefore awarded under s.97(2) of the CDPA.

As a final point, the Court ruled that any additional costs orders made pursuant to CPR Part 36 would not be constrained by the caps on damages and costs that are in place in IPEC proceedings.

The judgment is consistent with the current judicial thinking about the interaction between the IP Enforcement Directive and UK Copyright Act; namely that additional compensation can be awarded for copyright infringement provided it is not double compensation. It does offer some good news for rights holders in cases where the actual loss suffered is low because the notional licence fee for the use of the copyright work is low. It means additional damages can supplement the notional licence fee which increases the level of quantum awarded for low value copyright claims which otherwise might not be enforced.

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