

Dealing with complaints against collecting societies

Tracey Meredith

There is no utility in a copyright regime which protects the rights of creators if it acts as a disincentive to legitimate commercial exploitation. Finding that balance is not a simple matter but it is important in the processes to keep in mind that collecting societies are arguably only a means to an end. They have had and will continue to have a significant role to play because it is impossible for all right owners to negotiate and collect fees for the many and varied uses of their works. But as Shane Simpson's report acknowledges, collecting societies are monopolists, in part as a consequence of the nature of their activities, in some cases membership requirements and also because of the extent of available works within their control.

In the context of examining the appropriate structures for collecting societies, Shane Simpson observed that a society should be able to select the legal framework which most suits it. He makes the following comment: "The satisfaction of the rights owners and rights users is a matter for contract. If they are not satisfied, they will not renew".

I don't believe the proposition is quite that clear-cut. If I am a copyright owner, as a practical matter in most cases I must join a collecting society if I want to exploit a number of the rights that I have in my work. I have no choice of society because there is only one which deals with specific rights in my area of creativity. Some societies, such as APRA, require that if I join I must join in respect of all works of which I am the author or owner during the term of my membership. You can see that as a copyright owner, if I have no choice of society, the rules and conduct of that society have heightened significance.

On the other side of the coin, as a copy-right user, I may conduct a business which relies only in small part on a particular intellectual property right administered by a collecting society but that part may be an integral component. If I do not get a copyright licence for the utilisation which may form no more than one hundredth of my product, I cannot run my business. What's more, if I do not agree with the collecting society's terms, it may be that I cannot obtain an alternative creative work because the society has the rights to all comparable works and in some cases, I cannot even approach a rights owner directly because of the terms of membership of the society.

So it is not simply a case of "if I don't like the terms I need not renew". The problem that may users face in dealing with a collecting society is that because of the monopoly, they have no ability to influence the type of licence which is offered and are often not in a position to reject a licence fee or increase in fees because of the great dependence of their business. It often becomes an analysis of whether the increase is of sufficient magnitude to outweigh the expense of Tribunal proceedings. If the user is a small organisation or an individual, they will not have the expertise or funds to conduct even a relatively uncomplicated matter before the Tribunal.

Rights owners who are dissatisfied with their collecting societies also have little recourse. In the UK recently I understand a number of members of the Performing Right Society have made complaints to the Office of Fair Trading about certain of that organisation's practices, including concerns about managerial inefficiency, restrictions applying to members who wish to leave and certain distribution policies. These have

been referred to the Monopolies and Mergers Commission. It does not seem appropriate that members need to this fairly extreme course.

It seems to me that there is a very good case made for the establishment of a body which has amongst its objectives the protection of the public interest, the protection of rights owners and users and reporting to Government on competitive safeguards in relation to access to copyright property.

Ideally that entity would have three levels of activity: an informal dispute resolution process, and adviser to Government on law reform, technological and other relevant developments and a formal dispute resolution mechanism which is, I believe, appropriately the provenance of the Tribunal.

The informal process could take a hybrid form an ombudsman/mediator who would be empowered to examine any issue relating to the collective licensing of copyright works and referred by an owner or user. This person should have a primary function of encouraging the parties to reach a resolution. In circumstances where the ombudsman thought it appropriate, a written report and recommendations to the parties could be made.

This process should have the following objectives:

- > It should be at minimal cost and speedy. Perhaps written submissions only and a conference/report within a specific time frame.
- > The ombudsman should have the right to decline to deal with a dispute, within certain guidelines.
- > Tribunal proceedings should not be able to be commenced while a matter is before the ombudsman.
- > The ombudsman should report to the Government and/or appropriate law review committee on the types of issues coming before him or her.

This concept necessarily involves no right of appeal to the Tribunal - because at this stage there should be no enforceable decision. Once that element is introduced each party will feel obliged to chase every rabbit down every burrow and defeat the essential component of economy and speed.

In the case of a dispute involving a rights user some consideration would need to be given to the issue of access or protection for use during the period the matter is before the ombudsman.

I am mindful that the last thing that anyone wants is to create another bureaucracy but in my opinion, in the coming information age, an informal dispute resolution process will be increasingly important to all participants and in particular, small rights owners and users.