

Expanding the Copyright Tribunal's jurisdiction

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1. Should the tribunal deal with all collective licensing schemes?

As far as I am aware, the Copyright Agency Limited is the only collecting society which administers both "statutory licences" and "voluntary licences". Some aspects of CAL's statutory licences are subject to the Tribunal's jurisdiction, such as the sample system used and the equitable remuneration payable under the educational licence but the Tribunal has no jurisdiction over CAL's voluntary licences. To understand CAL's experience of the value of the Tribunal's jurisdiction over licensing schemes it may be useful for me to contrast two of CAL's licensing schemes and the negotiations in respect of those schemes. The Tribunal has jurisdiction over the remuneration payable under one licence but not the other.

(a) Universities - academic journals

The first is the licence CAL has with universities. Because it is an educational licence the Tribunal has jurisdiction over the setting of the equitable remuneration for the licence. The issue I want to refer to is the dispute between CAL and the universities regarding payment for the copying from academic journals by universities.

In short, the universities refused to pay for copying from academic journals. They asserted that as the authors of articles in the journals did not receive payment and also as many of the authors were employed by the universities, if universities had to pay to copy articles from academic journals the universities would be paying twice.

CAL's position was that the university should pay at least the same as they paid for the copying of other copyright material. CAL also suggested that perhaps the fee should be higher because academic journals were particularly vulnerable to photocopying.

As you can see, there were ideological and emotional questions at issue as well as economic ones.

Negotiations between the parties proved fruitless and in 1990 CAL made an application to the Copyright Tribunal to determine a fee for the copying by universities from academic journals. Shortly after making the application we were able to satisfactorily settle the dispute with the universities agreeing to phase in payments.

So, how did the application to the Copyright Tribunal advance the settlement of the matter?

It may sound odd to say that an application to the Tribunal which was never heard helped parties discover common ground and led to a settlement. However, in my view it did because it forced the parties to stop concentrating on their differences and to start focusing on the practical issue that if there was to be a rate of payment what the rate should be.

(b) Media monitors

The other licensing scheme is CAL's Media Monitors licence which is entirely voluntary. The Tribunal does not have jurisdiction over any aspect of the scheme. Again, licence negotiations were protracted.

In the negotiations CAL asserted that copyright owners should be compensated by the payment of fees and the media monitors stressed the public interest in disseminating news of the day and asserted that fair dealing exemptions should apply. The media monitors were also concerned about the economic effects on their business of making licence fee payments. A copyright infringement action was commenced against a media monitoring company in the Federal Court. (*De Garis & Moore v. Neville Jeffress Pidler*). The purpose of the case was to protect CAL's members' rights. The option of referring the proposed licence to the Copyright Tribunal was not available.

You might ask what is the difference between these two examples - after all CAL and the media monitors eventually negotiated a licence agreement. My response to that question would be that in a Tribunal action the parties are forced to focus on "what payment (if any) would be reasonable" whereas in a federal court action for copyright infringement both parties approach the case as litigation, you are defending an action in which the other side could obtain an injunction, damages or an account of profits and costs. In an infringement action you're trying to win.

In a Tribunal application; all the evidence is about the value of the work which has been used and in a copyright infringement action all the evidence is about infringement.

Therefore, my view is that in principle the Tribunal should have jurisdiction over all collective licensing schemes. This would benefit both the collecting society and the Prospective licensee because the dispute is removed from an adversarial legal context into a forum that's entire purpose is to debate the question of an appropriate fee. For the collecting societies one important benefit of a separate forum is that the relationship with the licensee is preserved - after all, if they do require a licence, you're going to have a continuing relationship with them.

2. Who are the parties affected?

I would like to consider who would be affected by an extension of the Tribunal's jurisdiction and what that effect would be. I have identified the following groups:

(a) The collecting societies

There are of course different considerations for different societies and I can only speak for CAL. I note that Shane Simpson's comments that there is a widely held view among collecting societies that the jurisdiction of the Tribunal should extend to all voluntary licences. CAL certainly supports that view.

From my experience, the most successful negotiating tactic for a licensee in dealing with CAL is to delay coming to an arrangement regarding payment. A reference to the Copyright Tribunal short circuits that for three reasons:

- (i) the Copyright Tribunal sets a timetable

- (ii) the licensee is incurring costs for the first time and sometimes the commercial reality is that the size of legal costs may be greater than the licence fees at issue.
- (iii) as I said earlier, it encourages the parties to move from an ideological stance to a practical one.

(b) The licensee or the prospective licensee

I am probably the least qualified person to speak for licensees regarding the benefits of access to the Tribunal, but my view is that it is a forum for them to be heard regarding the terms of a licence scheme.

(c) Society generally

It is CAL's view that benefits to society will arise from the exercise of the Tribunal's discretion in balancing the competing public interests of access to copyright materials and the protection of copyright owners' interests.

In considering whether the Tribunal's jurisdiction should be extended to CAL's other voluntary licences we should ask whether there are sufficient public interest considerations or benefits to society from those schemes being referable to the Tribunal.

I believe that the Tribunal has an important role to play in balancing the public interests of access to information and giving effect to the rights of copyright owners. The manner in which these public interests are balanced will of course vary from licence scheme to licence scheme.

(d) The copyright owner

At this point I would like to contrast CAL's position with that of APRA's. As I understand it APRA is the copyright owner and APRA also represents virtually all of the relevant copyright owners.

However, CAL only acts as an agent for its members, it is not the copyright owner and depending on the particular licence scheme in question CAL may or may not represent the majority of copyright owners whose works would be copied. My view is that this is largely a function of the respective periods of operation of performing right collecting societies and reprographic right collecting societies, but it is also related to the type of rights CAL deals with.

One concern for authors and publishers is whether giving the Tribunal jurisdiction over all CAL's licence schemes means defacto statutory licensing. I would like to consider copyright owners separately: those who are members of the collecting society and those that are not.

This may not overly concern those copyright owners who have chosen to become members of a collecting society because after all they have decided to be involved in collective licensing.

However there are different considerations for those copyright owners who are not members of a collecting society. After all, it is the choice of the copyright owner to decide whether to grant a licence over their material or not. Extending the Tribunal's

jurisdiction, might mean that the Tribunal would make this decision for those copyright owners.

There is a view that the position of non-members can be preserved by including an "opting out" provision. This provision could operate in the following way. In the interests of providing certainty for the licensees, copyright owners who don't want to be involved in the licensing scheme could notify the Tribunal and the scheme determined by the Tribunal could exclude the works of those copyright owners. If this approach were adopted a balance must be struck between accommodating these copyright owners, and ensuring that the licence is of value to the licensee.

I draw your attention to the provisions of the United Kingdom Copyright Act 1988, particularly sections 130 and 136, where in schemes for reprographic licensing the licensee is entitled to assume the copyright owner is participating - unless otherwise notified by the collecting society.

In conclusion, benefits accrue to all groups from the widening of the Tribunal's jurisdiction to include all collective licensing schemes. For those groups that may be disadvantaged such as some copyright owners who are not members of the collecting society, practical means of preserving their rights can be developed.