Opening Address

The Hon Duncan Kerr MP
Minister for Justice

I commend you all for taking this opportunity to consider ways in which the Copyright Tribunal can most effectively serve our copyright community of owners and users.

As the Commonwealth Minister responsible for copyright, I take a keen interest in the Tribunal, especially considering the many recent developments in copyright.

After twenty five years' existence, a comprehensive review of the Tribunal's operations makes good sense.

The point I want to emphasise is that the Government not only values but needs your feedback on how to make the Tribunal as relevant and responsive as possible.

The obvious issue to grapple with is whether today's copyright owners and users have different requirements to those in 1969, when our current Copyright Act came into effect.

The answer would appear to be 'yes'.

Today I'll start by putting the Tribunal in an historical context. I'll talk about several of its landmark cases, and I'll end up by throwing some important issues into the arena.

Historical context

Pressure for a Tribunal started in 1926 when the Australasian Performing Right Association (APRA) was formed to collect royalties for use of musical works.

APRA provided the administration for individual music right owners to be paid for the public performance of their works.

It was the only society of its kind in Australia.

Users of musical works resented APRA's activities. Some accused the Association of unfairly exploiting its monopoly position.

This led to a Royal Commission into APRA's activities which recommended a tribunal to determine royalty rates independently if the parties couldn't do so.

The governments of the 1930's weren't very attracted to regulating business. The idea for a tribunal was quietly dropped in favour of changing the Copyright Act 1912 to provide for arbitration.

Interestingly, this provision was never used. The parties developed an effective working relationship once users accepted the basic concept that they had to pay owners for using their works.

This was a quantum leap in perception.

The next critical step was when the Commonwealth Government set up the Spicer Committee in 1959 to advise on reforms to the 1912 Act. The United Kingdom Copyright Act 1956 was the impetus behind this.

Eventually, the Spicer Committee's recommendations resulted in the completely revised Copyright Act 1968.

The new Act was a watershed, introducing many provisions that are still current. It also provided the platform for further amendments that underpin the Tribunal's present role.

The Copyright Tribunal's story is linked to provisions affecting the interaction between copyright owners and users.

A notable feature of the 1968 Act was the extent to which it provided for users' rights by exceptions to copyright owners' exclusive control. Times have changed, and rightly so.

The Act also expanded the copyright law to include certain licensing schemes and statutory licences, mainly in music.

These required users to pay equitable remuneration to owners.

An independent and expert body was needed to determine equitable remuneration if the parties sought a determination or could not agree to terms under the particular statutory licence.

This was the main reason for setting up a specialised copyright tribunal.

The Tribunal's other functions included determining the payments under broadcasting licensing schemes for commercial broadcasters and the ABC.

The Government was able to direct the Tribunal to review and advise on payments under the compulsory licence to manufacture music records.

Despite these statutory provisions, the interesting point is that the Tribunal had no work until almost the end of its first decade.

Landmark cases

I'd now like to focus on three landmark cases before the Tribunal - three cases that show the very different ways in which rates were settled.

The Government, rather than copyright owners or users, triggered the Tribunal's initial activity. Following representations from copyright owners, the Government asked the Tribunal to review and report on the royalty rate for manufacture of records.

The review has several interesting aspects.

One is the sheer magnitude and scope of the resources poured into preparing and conducting the case. Preparations took from December 1977 to April 1979. Presenting the case involved numerous QCs and perhaps the most intensive scrutiny of any industry for the time.

The Tribunal's lengthy report to Government was a classic report of its type, detailing the criteria to determine the rate of payment for use where no rate had ever previously been left to market forces to determine!

The Tribunal concluded that the royalty rate should rise from 5% to 6.75% of the recommend retail selling price.

The record manufacturers reacted strongly against this, and the issue became a political football. Both parties made vigorous representations to Government.

What interests me is not whether the Tribunal was correct or not in arriving at the rate, but the fact that ultimately the parties, not Government, resolved the issue.

The government of the day took the view that it should not second guess the Tribunal. It made an in-principle decision to abolish the licence.

Faced with this prospect, the parties found that it was possible for them to come to an agreement after all. They asked the Government to give effect to the agreed rates by amending regulations.

The second case I'll mention is interesting for different reasons. It involved the Copyright Agency Limited (CAL) and educational institutions. Amendments to the Act in 1980 paved the way for the case.

The amendments allowed educational institutions to make multiple copies for teaching purposes without infringing copyright. This was subject to paying copyright owners and keeping records for them to inspect.

CAL and the educational interests adopted a co-operative approach in bringing their case before the Tribunal.

They wished to avoid a piecemeal approach to determining rates. This would have involved hearings for different materials to establish rates for specific categories.

The parties asked the Tribunal to decide upon a single rate, after taking evidence on a selected range of materials.

There was some doubt about the Tribunal's capacity to rule on a general rate, as opposed to an individual rate. Nonetheless, the Tribunal was prepared to accommodate the parties' needs.

The Tribunal arrived at a general rate of 2 cents per copy page.

The President of the Tribunal, Justice Sheppard, formed the view that it came down very much to a matter of judgement. He indicated that estimating the appropriate amount was one of his most difficult tasks ever.

I am pleased to say that the parties accepted this decision which formed the basis for dealings between them.

The final Tribunal hearing I wish to refer to provides a natural linkage to the question of access to justice which I will refer to later.

The case involved two academics who created computer software modelling programs to help fight bushfires. Two large state government agencies copied the software and refused to pay for using it.

The circumstances are different to the two cases I've already mentioned. The initiating party was an individual, an ordinary person without the significant financial resources available to major collecting societies or institutional users.

Professor Kessell wrote about his experience. I welcome him to the Seminar. I'd like to outline his case briefly because I think it highlights the moral rights of individual creators of copyright. It's also a salutary lesson in showing the need to protect people's access to justice without risking their financial ruin.

Professor Kessell was successful in mounting a legal action without legal representation against two large government departments, the NSW National Parks and Wildlife Service and the Victorian Department of Conservation and Environment.

The difficulties he faced were compounded by the fact that this involved an obscure part of the Copyright Act that had never before been tested in court.

As Professor Kessell put it, "Miracles do happen." This Government wants to ensure that there is no need for miracles. That's why we are reforming the justice system to make it fairer, cheaper and more accessible to ordinary Australians.

After five years trying to settle out of court, Professor Kessell's family company applied to the Copyright Tribunal in Sydney to determine the case.

The action hinged on section 183 of the Act that states, in effect, that the Crown must pay a fair amount to a copyright owner.

Both agencies eventually settled out of court, one five days into the hearing.

I commend Professor Kessell's attitude. If I can quote him:

> We basically risked everything... The more the...attitude became, 'buzz off,... we'll put ten lawyers on the case, we will wear you down and drag this out forever', the more determined we were to fight.

And he wouldn't be put off, despite several setbacks. Through his local member, Peter Shack, he brought his case to the attention of my predecessor, Senator Tate. They brought his attention to section 183, when it seemed that section 7 granting immunity to Government meant the case would fail.

Justice Sheppard rightly indicated that he was less than impressed that government agencies might adopt the view that there was nothing wrong in stealing intellectual property.

I agree.

That's the link with access to justice.

There are a number of points we can draw from Professor Kessell's experience, including the following:

> the system should help people with a just cause even if the odds against them are substantial;

> the key to success lies in people knowing and being able to establish their rights under the law;

> the Tribunal Secretary's help was instrumental in enabling the applicant to proceed with his case;

> Professor Kessell kept costs down by spending much of his own time and energy in preparing his case;

> location of parties is not necessarily a major barrier given modern telecommunications. The Tribunal, located in Sydney, was able to take evidence interstate and overseas via a satellite link;

> there were no complaints about the Tribunal's procedures. Professor Kessell considered them reasonable, effective and efficient in the circumstances; and,

> negotiated settlements are possible once both parties accept that there is an obligation to pay for using copyright materials.

This is the only case I am aware of involving individuals before the Tribunal. However, that is not so much a reflection of the awesome nature of the task. It is more to do with the scope of the Tribunal's present jurisdiction.

In fact, there are only a small number of cases for which the Tribunal has made determinations.

Many disputes are settled by the parties themselves before they reach the Tribunal hearing stage.

Experienced owners and users of copyright material are generally able to come to amicable commercial arrangements for the use of copyrights.

In most cases, parties find that they can negotiate suitable arrangements for copyright use and prefer to do so. This is less time consuming and costly than preparing for, and participating in, a Tribunal hearing.

The Government supports negotiated settlements as a means of resolving disputes wherever possible, be it in family law or copyright law.

This cannot be a precise art. As many potential applicants know, it is difficult to predict with certainty what rate the Tribunal will set. Hence, there is an incentive for parties to keep the determination of rates in their own hands.

In other cases, such as APRA licences, the cost of the licences in relation to other business costs mean that it does not pay the parties to seek a determination by the Tribunal.

The general position seems to be that an application to the Copyright Tribunal only arises where one or more of the parties:

> wish to resolve an issue that is central to striking a rate; or

> are inexperienced and do not accept that they have obligations to pay for using copyrights.

Several key issues

I'll now raise several key issues concerned with aligning the Tribunal's role and functions more closely to contemporary needs.

I am grateful to Mr Shane Simpson for his report on *The Review* of *Australian Copyright Collecting Societies* presented to my colleague, the Minister for Communications and the Arts, the Hon. Michael Lee, and myself.

It concludes that there is fundamental support for the Copyright Tribunal and its work, although some concerns are raised. The report offers some suggestions for reforms.

One important question is whether the Tribunal should deal with concerns of individual members of copyright collecting societies, and anybody who needs a licence to use copyright materials.

Part of the problem appears to be a lack of knowledge and communication.

As the Justice Minister I have received many letters from the public voicing their concerns about collecting societies' operations and about paying for the use of copyright materials administered by the societies.

Even though APRA has been operating for some 70 years, I receive letters from small business people whose major concern seems to be that APRA may not be a bona fide organisation. Should this be happening?

Of course, I respond personally to such letters seeking to reassure them that they need have no fears in that regard.

I tend to agree that it would probably not be appropriate for the Tribunal to take on the role of a consumer complaints tribunal and deal with these concerns. And I am particularly interested in Justice Sheppard's views on this.

The alternative would be to set up a specialised part-time position of Ombudsman of Collecting Societies, perhaps with financial contributions from collecting societies.

I am interested in getting as much feedback about this proposal as possible.

Another recommendation in the report is that the scope of the Tribunal's jurisdiction should:

> be as wide as possible and have a role in collecting arrangements whether or not they involve licences specifically provided for in the Act or not;

> include all aspects of licensing arrangements such as supervising sampling schemes; and

> take into consideration the interests of parties other than immediate signatories to licensing arrangements.

To subject all licensing schemes to the Tribunal's jurisdiction would involve changing the Copyright Act. It would also have major resource implications which would need to be fully considered.

Do we need to look at the existing statutory provisions? There may be scope to consolidate and simplify provisions covering licences, especially considering that they have been added to the Act in an ad hoc fashion.

One option is for the Copyright Law Review Committee to examine this as part of its present reference.

I note Mr Simpson's view that it is desirable to simplify the Tribunal's procedures to make the Tribunal more user-friendly.

Justice Sheppard has raised the issue of making the best use of the Tribunal's resources.

He questions whether the requirement that a single member copyright tribunal be constituted by a presidential member should continue in view of other members' capabilities.

I support both these issues being given further consideration.

One further issue that I would like to raise myself is whether the Copyright Tribunal can promote a greater understanding of its role in the broader community.

All these issues are relevant to access to justice which is one of the Government's top priorities.

As the Prime Minister emphasised recently in the Justice Statement, it is fundamental to our democratic way of life that our tribunals are accessible to all and operate fairly, efficiently and effectively.

The justice system must provide all Australians with appropriate ways of protecting their rights and interests, as well as resolving disputes using due process. Further, it must also ensure that everyone meets their obligations in this society.

Our justice system operates on the basic principle that all are equal before the law. Respect for others' property, including intellectual property, is part of this equality.

The Justice Statement's recommendations will be taken into account in the continuing development of the Tribunal's practices.

We also need to consider whether access to the Copyright Tribunal is good enough according to general access criteria.

In other words, is it reasonable to expect applicants such as Professor Kessell to expend the effort and take the financial risks he did in order to obtain justice. If not, what help should such applicants receive, and from whom?

Should the Tribunal be able to make an alternative costs order to cap the costs of a party where parties have unequal resources? The present rule of loser pays all legal costs effectively denies access to justice for a party with a reasonable prospect of success.

The Tribunal currently operates very much as a court.

Is this appropriate? Can we develop a more informal approach? Can we streamline procedures so that the Tribunal is a less intimidating venue for people who use its services?

I'll conclude by emphasising the importance of making sure that the Copyright Tribunal stays relevant and effective in a time of rapid change in intellectual property and information technology.

There is no better time than now for consultation and exchanging ideas. I urge you to make the most of it.