

## **Role of the Copyright Tribunal and its work to date**

### *The Hon Justice Sheppard AO*

The Copyright Tribunal is an arbitrator. It arbitrates disputes concerning the amounts which should be paid by way of reasonable or equitable remuneration under licences granted, or to be granted, sometimes by statute, for the use of copyright material. The Tribunal's jurisdiction is usually invoked in cases involving licence schemes as defined under the *Copyright Act 1968*, cases where the owner of copyright is alleged to have unreasonably withheld a licence, or under a compulsory licence. In cases involving licence schemes or the unreasonable withholding of a licence, there are limitations. Broadly they limit the Tribunal's jurisdiction to cases where the exclusive rights which are involved are the broadcast right and the public performance right. There is also jurisdiction where a person wishes to make a sound recording. The compulsory or statutory licences concern, in the main, educational copying. But there is also copying by institutions assisting handicapped readers. Educational copying may be of literary works which are reproduced in books or periodicals and such like or of sound broadcasts. There is also the obligation cast on the Crown by s.183 of the Act to pay remuneration to copyright owners whose work the Crown has used. In default of agreement, the amount to be paid is fixed by the Tribunal.

The Tribunal was established by the *Copyright Act 1968* which came into force on 1 May 1969. The principal provisions of the Act concerning the Copyright Tribunal are to be found in Part VI. These have undergone amendment from time to time but the core provisions are little changed. The constitution of the Tribunal is provided for in Division 2 of Part VI. Members are appointed by the Governor General; s.139. A person is not to be appointed as the President or as the Deputy President of the Tribunal unless he or she is a judge of the Federal Court of Australia; subs 140(1).

The Tribunal consists of a President, a Deputy President and such other members as are appointed in accordance with the Division; see section 138.

Subsection 140(2) of the Act provides:

- (2) A person shall not be appointed as a member (other than the President or the Deputy President) unless:
  - (a) he is or has been a Judge;
  - (b) he is enrolled as a legal practitioner of the High Court, of another federal court or of the Supreme Court of a State or Territory and has been so enrolled for not less than 5 years;
  - (c) he has had experience, for not less than 5 years, at a high level in industry, commerce, business, public administration, education or the practice of a profession;
  - (d) he has obtained a degree of a university, or an educational qualification of a similar standing, after studies in the field of law, economics or public administration; or

(e) he has, in the opinion of the Governor-General, special knowledge or skill relevant to the duties of a member.

By section 141, a member holds office for such period not exceeding seven years as is specified in the instrument of his appointment. A member whose period of office has expired is eligible for reappointment. A member who is a judge but ceases to be a judge is eligible for appointment as a member other than as the President or the Deputy President.

By subsection 146(2), subject to subs (3), the Tribunal shall be constituted by a single member. Subsection (3) provides that, where the Tribunal holds an inquiry under s.148 or any party to an application or reference requests that the Tribunal be constituted by more than one member for the purposes of that application or reference, the Tribunal shall, for the purposes of the inquiry, application or reference, be constituted by not less than two members of whom one shall be the President or the Deputy President. Nothing prevents a single member exercising the powers of the Tribunal in relation to matters of procedure.

The procedure of the Tribunal is regulated by Division 4 of Part VI and by the Copyright Tribunal (Procedure) Regulations. I shall say a little of procedure later on.

The establishment of the Tribunal had been foreshadowed in the Spicer Report (Report of the Committee Appointed by the Attorney-General of the Commonwealth to Consider what Alterations are Desirable in the Copyright Law of the Commonwealth, otherwise the Copyright Law Review Committee, 1959). The Chairman of the Committee was Sir John Spicer, the Chief Judge of the Commonwealth Industrial Court. In Chapter XXII, the Committee referred to what had been said in Copinger on Copyright, 9th ed. pg 406. Copinger there said:

In most countries over the last 30 years a development in the field of copyright protection has been the creation of organisations to control the exercise of copyright and in particular of performing rights. Such organisations either acquire copyrights from their members or act as agents on behalf of their members to enforce copyrights; they issue licences to persons owning places of public entertainment or desirous of giving public entertainments; and they appoint inspectors to see that unauthorised performances of works controlled by them do not take place and in the last resort they enforce the rights of their members by legal action. From the point of view of composers of music and owners of musical copyright the system has great advantages, in that no individual composer or copyright owner can in practice secure adequate protection for his work or deal with the very large number of persons and bodies desirous of exploiting such works. On the other hand, the system has considerable advantages from the point of view of the public and those giving entertainments, in that licences can be obtained from a single organisation, whereas, without such a system, it would be necessary to obtain individual licences from a large number of owners of copyright, and the delay and inconvenience and the risk of performing music without having obtained a licence from the person entitled to give one would greatly add to the difficulty and expense of performing music in public on any substantial scale.

But the existence of such organisations has given rise to complaints of the abuse of monopoly rights, since virtually all popular music is now controlled by such societies. Moreover the creation of additional rights such as the performing right in gramophone records, and, more recently, the creation of broadcasting and television rights, has created the possibility that there should be a number of different organisations such that a licence will be required from each for a particular public performance.

The question of a tribunal in the United Kingdom was referred to in the Report of the Copyright Committee (October 1952 - Cmd. 8662). The Report is known as the Gregory Report after the Chairman of the Committee. The relevant part of the Report is contained in Part VIII. In para. 210 the Committee concluded that what was required was the establishment of a standing tribunal with powers of determination which would be binding. In short the Tribunal was to act as an arbitrator to determine disputes which would arise, at least principally, between collecting societies and those who sought to deal with them. At that time the major collecting society in the United Kingdom was the Performing Right Society just as, in Australia and New Zealand, the collecting society was the Australasian Performing Right Association. The Performing Right Tribunal was established in the United Kingdom by the Copyright Act 1956 (UK); see Part IV.

The recommendations of the Spicer Report were adopted by the government of the day and included in the Bill for what was to have been the 1967 Act. The 1967 Act became the 1968 Act. In the course of his second reading speech in which he introduced the 1967 Bill, Mr N.H. Bowen, QC (then the Attorney- General but subsequently the first Chief Justice of the Federal Court of Australia, Hansard for 18 May 1967, House of Representatives, pp. 2334-2335), the Attorney-General said that the main function of the Tribunal would be to arbitrate in disputes between owners of copyright and persons who wished to perform in public or to broadcast copyright works. The Tribunal was also to have the function of conducting enquiries relating to revision of the royalty payable by record manufacturers to copyright owners under the statutory provisions relating to the recording of musical works. The Attorney-General said that he believed that all parties welcomed the proposed establishment of the Copyright Tribunal. He added that any person who was dissatisfied with the charges or other conditions imposed by APRA on the performance or broadcasting of works which it controlled would be able to have the matter reviewed by the Copyright Tribunal. Additionally, APRA would be entitled to initiate a reference to the Tribunal. Performance or broadcasting of music in accordance with the decision of the Tribunal would not be an infringement of copyright so long as the user of the music observed the conditions and paid the royalties determined by the Tribunal.

Despite the hope for the Tribunal expressed at the time that it was constituted, it was not to be troubled for over eight years. On 30 December 1977 the then Attorney-General requested the Tribunal to hold an inquiry in accordance with s.148 of the Copyright Act "in relation to the royalty payable in respect of records generally." Section 148 was repealed by the Copyright Amendment Act 1989. It provided that the section applied where the Attorney-General requested the Tribunal, pursuant to s.58 of the Act, to hold an inquiry in relation to the royalty, or the minimum royalty, payable in respect of records generally or in respect of records included in a particular class of records. Section 58 was in Division 6 of Part III of the Act. Division 6 dealt with the recording of musical works. Section 56 provided that, subject to the Division, the royalty payable in respect of a record was 5 per cent of the retail selling price of the record. Section 58 of the Act provided that, if at any time after the expiration of one year after the commencement of the Act, it appeared to the Attorney- General that the royalty, or the minimum royalty, payable in respect of records generally, or in respect of records included in a particular class of records was not equitable, he might request the Copyright Tribunal to hold an inquiry into the matter and report the result of its inquiry to the Attorney-General. The Tribunal published its report on 24 December 1979. This was the first report or decision completed by the Tribunal. The Tribunal reported that the statutory royalty of 5 per cent was not equitable and should be increased. The recommendation was that the royalty payable in respect of records

generally should be increased to 6.75 per cent of the retail selling price of each record. There were some other subsidiary recommendations. The recommendation was not accepted but the amount of the royalty was increased to 6.25 per cent; see now s.55 of the Act which empowers a person to make a recording of the work in the circumstances there provided for. A condition of the person's right to make the recording is the payment of the royalty of 6.25 per cent of the retail selling price of the record.

Since the inquiry into records generally, 14 matters have come before the Tribunal. Some of these have involved the filing of multiple applications. I think that the number of applications actually filed in the Tribunal number almost 100 but in substance 14 disputes were involved. Two of these are still current although one is dormant at the moment pending the outcome of an independent action in the Federal Court. Of the 12 finalised matters six have been settled and six have been decided by the Tribunal. The average hearing length of matters which preceded the hearing was approximately ten hearing days. In nearly all matters the parties have had legal representation.

Ms Silink, my associate, has prepared a schedule showing, in summary form, the matters which have come before the Tribunal. There are copies of that here for those who are interested, although not, I think, a copy for everyone. To the extent that any copyright is involved in its compilation, Ms Silink yields her rights in that respect which probably belong to the Crown in any event.

The Tribunal's task is one of evaluation or estimation. This is a task which has to be engaged in by courts in many areas of the law. Every time a court assesses damages for breach of contract or for tort, the exercise has to be undertaken. There are many cases in which the court has been concerned with the valuation of various items or commodities. I instance land, shares, livestock and artistic works. Many other examples could be given. Usually the court will be assisted by the evidence of one or more valuers. This will not always be the case; sometimes it will be inappropriate for valuation evidence to be called. But in cases involving the valuation of shares or land, artistic works and so on the court would almost certainly need to have such evidence. The starting point will be a search for a market. If there is a market, probably the market value will be the value which prevails. If there is no market, or if the object, perhaps a particular block of land or a particular parcel of shares, is not well sought after so that comparable sales are not easily found, the court will have to construct or endeavour to construct, a notional bargain between a willing but not anxious seller and a willing but not anxious buyer. This becomes a much more theoretical exercise. It involves a degree of subjective judgment and minds will often differ as to what the appropriate outcome is.

The Copyright Tribunal is almost invariably faced with a task of this kind. It is unlikely that there will be a market for the particular right which is involved. If there is not, the Tribunal usually tries the notional bargain approach constructing, as best it can from the available material, the factors and considerations which it considers the parties themselves would consider if they were entering into such a bargain.

The most difficult case which, in my experience, the Tribunal had was the educational copying case to which reference is made in the schedule. There really was, despite a substantial amount of evidence, very little guidance to assist the Tribunal in reaching a conclusion. The eventual conclusion was 2 cents per page. For the various reasons given in the decision, this was a most arbitrary selection of a figure but it at least

provided a starting point for the parties to begin negotiations which, I believe, have led to a reasonably satisfactory situation in which educational institutions or educational departments pay a flat fee to the appropriate collecting society, Copyright Agency Limited, for what is involved. There was to have been a second leg of the educational copying saga concerning copying of journals. The parties settled the matter and the Tribunal was not troubled by it.

One of the current cases before the Tribunal concerns the copying, for educational purposes, of broadcasts. That case is brought by a collecting society, the Audio-Visual Copyright Society Limited. Undoubtedly, the case will give rise to difficult questions of estimation.

Another very interesting case which the Tribunal had some years ago concerned the Australian Broadcasting Corporation. The Tribunal had to estimate reasonable remuneration for the use by the ABC of all music, including incidental music, on ABC television and radio stations throughout Australia. Up to the time the decision was given, the royalty payable by the ABC to APRA had been based on cents per head of population. A critical question in the case was whether or not that base should be changed to a base which would involve the payment of a fee in effect as a percentage of revenue. That is what the Tribunal decided should happen except that the percentage was calculated as a percentage of expenditure or budget rather than revenue. Some matters were excluded from the assessment. There is not time here to discuss the detail of the case but it is referred to in the schedule.

The Tribunal has in more recent times had two cases which were in a sense settled but which gave rise to some difficulty. One of these concerned music played in discos and the other music played in gymnasiums or fitness centres.

It became clear to the Tribunal that its decision would have the effect of bringing in what might be described as a common rule as to the terms upon which a licence would be granted. Theoretically a party not prepared to accept a licence on the terms of the scheme approved by the Tribunal could make a separate application. But bearing in mind the likely cost of such an exercise, the Tribunal was conscious in each case that its decision would in effect set the going rate in the community for that kind of use. The applications were of course advertised widely and notified directly to associations representing either discos or fitness centres. Nevertheless, their coverage was not complete. Particularly in the case of fitness centres, there was great concern that bringing in the original rate proposed by APRA might have had the effect of causing some smaller centres run on a voluntary basis to close down. Numbers of members of Parliament wrote to the Tribunal concerning the apprehension of some of their constituents about these matters. In the end the Tribunal in each case was satisfied that the rates were eminently reasonable and not excessive.

At an early stage the Tribunal made it clear that it would not accept an argument based upon the inability of a user of copyright material to pay. The Tribunal said that users, particularly those carrying on business, paid market rates for rent, telephone and other outgoings and paid proper amounts for salaries and wages. It emphasised that it would not countenance a situation in which copyright owners were disadvantaged as against other groups in the community because, for some unexplained reason, it was suggested that the amount otherwise payable to copyright owners should be discounted to take account of the ability of a particular organisation or group of organisations to pay. This was in accordance with ordinary wage fixing principles

established by industrial tribunals although, I think, in more recent times they may have drifted away from this somewhat.

It remains to say a little about procedure. Matters come into the Tribunal's list very soon after they are commenced. The idea is that directions be made to get them ready for hearing. An initial question arises as to whether or not the application requires advertising. Sometimes it is clear that there is no point in advertising an application; in other cases - I instance the discos and the fitness centres - advertising is clearly necessary. Directions are then given for statements of each party's case to be filed. There follows discovery and, finally, the lodging of witness statements. These are in writing. It is unusual for evidence in chief to be given orally before the Tribunal. The Tribunal adopts the procedure provided for in the Act and the regulations but, in substance, that procedure is very similar to that which prevails in the Federal Court itself. At first sight that may seem to be an unfortunate statement to have to make. But the Federal Court itself has evolved a very modern procedure for the disposition of its cases, a procedure which is admired and adopted by other courts in this country and, to a degree, in others elsewhere.

Directions hearings are held as necessary to iron out problems and to keep an eye on the progress of a case as it nears readiness for hearing. I said earlier that the average time taken for the hearing of cases was ten days. I think it right to say that as the years have gone on, hearing times have been substantially reduced. I do not think that any case would now last as long as either the Copyright Agency case concerning educational copying or the ABC case lasted. There are of course some cases which are complex and wide ranging. A case held up in the Tribunal's list at the moment is a case involving APRA and FACTS (Federation of Australian Commercial Television Stations) which raises the question of the royalty to be paid for music played on commercial television stations throughout Australia. It involves substantial issues and substantial questions. The case has stalled at the moment because FACTS have taken out an application in the Federal Court raising questions concerning the proposed licence scheme in relation to the operation of Part IV of the Trade Practices Act, that is the Part dealing with restrictive trade practices. I am not prepared to say that no case in the Tribunal will last more than a week or so. I will say that I would be surprised if any but a case such as the FACTS case did so.

In this brief discussion I have not mentioned a further case which has its interest. It was a case brought by an applicant in person in relation to the alleged copying by the Crown in right of the States of New South Wales and Victoria of computer programs which the applicant claimed to be his. This matter has been mentioned by the Minister in what he has said. The programs related to methods of fighting bush or forest fires and was said to have been copied by the National Parks and Wildlife Services - that may not be their correct names - of the two States. Copying was strongly denied and that was the principal issue in the proceedings. The case against the Victorian Department was settled on undisclosed terms before the hearing began. The case against the New South Wales Department was settled after four days or so of hearing, again on undisclosed terms. Obviously the applicant laboured under some difficulty in preparing his case, but in fact he managed remarkably well. He is extremely intelligent and I do not think that he was in fact disadvantaged by his not being legally represented. I have never been informed of the basis upon which the two cases were settled. I do not know whether they were settled favourably to one party or the other. I believe the applicant is here and he may say something of his experience during the course of the afternoon.

One feature of the case was the taking of a witness's evidence by video link. The witness was in Chicago. She was called by the applicant in relation to an aspect of his case. It was my first experience of taking the evidence of a witness in this way. Since then it has become not uncommon for judges of the Federal Court (and other courts) to take evidence of overseas or interstate witnesses by video . We have found that it works very satisfactorily. The Court now has video terminals in each capital city. They are used, not only for hearings, but also for conferences. Recently, some 30 judges of the Court were present in Sydney to hear presentations by a Canadian professor in the eastern part of Canada and a United States District Judge in Washington State. We could see them both at the same time each of them could see us and the other presenter. A free flowing discussion followed the presentations and was most valuable.

In relation to taking evidence, there are one or two things that I should say. One has to endeavour to arrange the hearing to suit the local time of the witness and the tribunal or court. In the case of the witness from Chicago, it was morning for the Tribunal and about 8 pm at night for the witness. The evidence lasted for about two hours. At times the questioning was quite intensive. I thought that the witness appeared to tire and, if the cross-examination had proceeded much longer, I would probably have adjourned the taking of the evidence until the following day when the witness would have been more refreshed. By the time the evidence concluded, the time for the witness was at least 10 pm. I do not think that the procedure would work well if a witness was to be in the witness box for more than a day or even for a full day but, for a witness who would otherwise need to travel a long distance at great expense, the facility is undoubtedly a boon and must have resulted in a great saving in expense and the avoidance of a great deal of inconvenience.

This account of the Tribunal's work is necessarily superficial. It has been given in a very summary way. I hope it will give you some idea of the way the Tribunal has operated up to now. I also hope that the contributions this afternoon will result in constructive suggestions being made for improvements in the way in which the Tribunal operates and that these suggestions may be implemented. I am happy to answer questions about any aspect of the Tribunal's jurisdiction or procedure.