

PAPER FOR ROUND TABLE MEETING WITH THE COPYRIGHT LAW  
REVIEW COMMITTEE ON 27 SEPTEMBER 1999

## Overview

In June 1999, the Copyright Law Review Committee released an Issues Paper on its current reference on the need for changes to the jurisdiction and procedures of the Copyright Tribunal. The Committee received 17 submissions in response to that paper. (A list of those who made submissions, and their respective acronyms and names, is included at the end of this paper.)

2. The purpose of this paper is to promote discussion and invite further comments on key matters raised in those submissions, and on some preliminary suggestions of the Committee, for a round table meeting with particular interests on 27 September 1999. For the purpose of promoting a productive and focussed discussion, the Committee has not sought, at this stage, further comments on all matters raised in submissions.

3. The venue for the round table meeting is:

Level 23  
Piccadilly of Sydney  
133 Castlereagh Street  
Sydney

4. The discussion will be facilitated by the Chairman of the CLRC, Professor Dennis Pearce. The Committee is particularly interested to discuss the following issues.

## Jurisdiction of the Copyright Tribunal

5. A comprehensive description of the jurisdiction of the Copyright Tribunal is set out in the Committee's Issues Paper. Submissions made in response to that paper generally favoured an expansion of the Tribunal's jurisdiction to all statutory and voluntary licences (although there was not agreement by all parties on the latter).

6. As a preliminary view, the Committee is in favour of an expansion of the Tribunal's jurisdiction to cover all collectively administered licence schemes (whether administered under a voluntary or a statutory licence) concerning all types of copyright material and copyright uses. The Committee makes this suggestion on the basis that a fundamental reason for the existence of the Copyright Tribunal - to counterbalance the monopoly position of collecting societies - applies to the collective administration of copyright generally. That reasoning underpinned the establishment of both the Copyright Tribunal and its predecessors. (A recent summary of the reasons for the establishment of the Copyright Tribunal and its predecessors was provided in *Re Applications by the Australasian Performing Right Association* [1999] ACompT 3 (16 June 1999), paras 57-62.)

7. In addressing an expansion of the Tribunal's jurisdiction, constitutional constraints on its jurisdiction should be borne in mind. The Copyright Tribunal is an administrative body and as such may not exercise judicial power. (For more detail, interests may wish to see the paper on *Constitutional Issues Affecting the Copyright Tribunal*, on the Committee's website at <http://www.law.gov.au/clrc> or on request from the CLRC Secretariat.)

#### *Collectively administered licence schemes*

8. If all collectively administered licence schemes were to fall within the Tribunal's jurisdiction, careful attention would need to be given the definition of a "collectively administered licence scheme". One definition of a collective administration system is where:

owners of rights authorize collective administration organisations to administer their rights, that is, to monitor the use of the works concerned, negotiate with prospective users, give them licenses against appropriate fees and, under appropriate conditions, collect such fees and distribute them amongst the owners of rights. (*Collective Administration of Copyright and Neighboring Rights*, World Intellectual Property Organisation, 1990, para 8).

9. While various forms of collective administration would fall within that definition, the Committee notes that collective administration generally operates where it would be impractical for individual copyright owners to exercise their rights.

10. The Committee also notes that CAL has proposed a definition of a collectively administered licence scheme as one which applies to an identifiable group in the community or a particular industry group.

11. Comments are invited on whether a definition of “collectively administered licence scheme” should include all rights collectively administered on behalf of copyright owners, as distinct from those rights which can practically be exercised individually (whether or not the particular use of the right is licensed by a copyright owner or by a collecting society). There might also be a constraint imposed by Australia’s international obligations. Whereas it is accepted that a country can prevent abuse of monopoly position by a collecting society representing all copyright owners of a class of material, query whether the exercise by a society of the right in a single work or works of a single author could justify cutting down that exclusive right. In this regard, CAL submitted to the Committee that the Tribunal’s jurisdiction should not extend to “transactional licences” (ie, licences for one-off copying of one member’s material). The Committee invites comments on whether such licences should be treated differently and, if so, why?

#### *Substitution of licence schemes*

12. Sections 154 and 155 of the Act provide that applications may be made to the Tribunal for an order confirming or varying a licence scheme, as the Tribunal considers reasonable in the circumstances. Section 157 of the Act provides for the review of a failure or refusal to grant a licence and the imposition of unreasonable terms.

13. A question which arises is whether the Tribunal should have a broader jurisdiction to *substitute* a licence scheme (eg, one put forward by a licensee) in relation to applications made under ss.154, 155 and 157. FACTS and FARB submitted that ss.154 and 157 are unnecessarily limited and should be extended in this way.

#### *Input arrangements*

14. Competing views were put to the Committee about whether the Tribunal should have jurisdiction over arrangements between collecting societies and their members

(input arrangements). The LCA submitted that the Tribunal's jurisdiction should be so extended because most copyright owners have no choice but to become members of a particular collecting society. FACTS submitted that the Tribunal's jurisdiction should be extended to disputes involving input arrangements of collecting societies, where those societies are not subject to statutory prescription. The AVCC and MCEETYA supported the Tribunal having a general supervisory role over input arrangements.

15. On the other hand, collecting societies argued that it would be inappropriate and unnecessary for the Tribunal to have such an expanded jurisdiction, and that there are existing mechanisms for members to pursue grievances (eg, declaration and revocation procedures under the Act; general meetings; contractual remedies; requirements of the Corporations Law). The Committee also draws attention to the jurisdiction of the ACCC and the Australian Competition Tribunal over input arrangements. The Committee invites comments on the adequacy of these mechanisms as a means of protecting the interests of members. Comment is also invited on why it would be necessary or desirable to extend the Copyright Tribunal's jurisdiction to also deal with these matters.

#### *Establishment of an Ombudsman*

16. In their submissions, the ADA and ALCC supported the establishment of an Ombudsman as a mechanism of dealing quickly with small disputes arising between members of a collecting society and the society itself, and also between members of the public and a collecting society. The ADA pointed to the findings of the *Don't Stop the Music!* report by the House of Representatives Standing Committee on Legal and Constitutional Affairs that the cost of proceedings before the Tribunal may be disproportionate to the licence fee payable. The Committee also notes that the establishment of an Ombudsman of Copyright Collecting Societies was recommended in the *Review of Australian Copyright Collecting Societies* (the Simpson report). The establishment of an Ombudsman was opposed by CAL in its submission to the Committee.

17. The Committee is conscious of difficulties in the establishment of an Ombudsman, particularly who should bear the cost of the office - the Government or the societies. Accordingly, such a proposal may depend on the demonstrated

inadequacy of existing or proposed mechanisms (such as collecting societies' internal mechanisms or existing ADR facilities) for dealing with small disputes or complaints.

18. It appears to the Committee that arguments for the establishment of an Ombudsman are based largely on the assumption that such a body would deal with numbers of small and less complex disputes. Accordingly, further comments are invited on the likely nature and quantity of complaints or disputes which might be dealt with by an Ombudsman or, if an office of Ombudsman is not established, might be referred for resolution to the Copyright Tribunal.

#### *Code of Conduct*

19. The *Don't Stop the Music!* report recommended the establishment of a voluntary code of conduct for collecting societies, to outline standards of acceptable licensing practices and activities. The Committee invites comments on this recommendation and in particular whether and, if so, how such a code would be enforced.

#### *Minor anomalies*

20. Screenrights has suggested that there is an anomaly in the Act, in that the Copyright Tribunal has the jurisdiction to determine matters necessary or convenient to be assessed under a sampling system (see s.135J(3)) but not under a record keeping system (see s.135H). Screenrights suggested an amendment to correct that anomaly, a suggestion endorsed by the ACC. The Committee invites further comments from interests. Comment is also invited on whether there are other comparable anomalies in the Tribunal's jurisdiction.

#### *Declaration of a collecting society under Parts VA and VB of the Act*

21. The Committee notes CAL's suggestion that the power to declare a collecting society under Parts VA and VB of the Act be transferred from the Attorney-General to the Copyright Tribunal. The Committee seeks participants' views on this suggestion.

### **Structure and constitution of the Tribunal**

22. Submissions to the Committee reflected a general consensus for some change to the constitution of the Tribunal. A number supported the Tribunal being constituted in such a way as to ensure that it maintains an even-handed approach to both copyright

owners and users, and so that it can rely on relevant industry experience. In response to those submissions, further comments are invited on whether:

- more Judges and non-presidential members should be appointed to the Tribunal;
- there should be a requirement to appoint persons with relevant industry experience. Should such appointments be made in all cases? Would the appointment of members with such experience address, for example, difficulties inherent in the determination of what amounts to equitable remuneration? (In this regard, the Committee notes that s.140(2) of the Act already provides for the appointment of non-presidential members on the basis of their relevant industry experience.);
- interested third parties should be able to make submissions as of right. Alternatively, should explicit provision be made for the Tribunal to invite written submissions from third parties where a matter has broad implications? and
- the Tribunal could rely on an *amicus curiae* or a panel of experts. Could such a mechanism be relied on only in particular matters, such as those relating to the determination of equitable remuneration? Additionally, or alternatively, should the Tribunal sit with 3 members or a single member?

## **Procedure and practices of the Tribunal**

### *Delays in matters before the Tribunal*

23. A number of submitters to the Committee expressed concerns about delays experienced before the Tribunal. The Committee invites further information about evidence of delays before the Tribunal and whether, to the extent that interests are aware, the time taken to hear matters before the Tribunal is greatly different from similarly sized matters conducted in other tribunals or courts.

### *Use of Federal Court case management*

24. Many of the suggestions made to improve the procedure of the Copyright Tribunal reflect the case management initiatives of the Federal Court: for example, the phasing out of interrogatories, limitations on the use of discovery (Practice Note No.

14, 12 February 1999), and the conduct of uncontested directions hearings by a Registrar. Should these mechanisms be explicitly incorporated into the procedures of the Copyright Tribunal?

*Determination of small matters 'on the papers'*

25. It has been suggested that the Copyright Tribunal should be able to determine smaller matters on the papers, in a similar manner to the way in which costs are assessed under Order 62, rule 46 of the *Federal Court Rules*. Under that procedure, a Registrar may make an estimate of the taxable costs. The parties then have 14 days to file a notice of objection to the estimate. If they do not object, the estimate is deemed to be the amount for which a certificate of taxation may issue. If a party does object or files a notice requiring a full taxation, he or she bears the costs of the taxation of all parties from the date of the notice unless he or she achieves a 15% better result on the taxation than on the estimate of taxed costs. The Committee asks participants to consider whether it would be appropriate for the Copyright Tribunal to adopt a similar model. For example, should non-presidential members of the Tribunal make an assessment on the papers where the amount in dispute is below a certain limit?

*Preliminary determinations*

26. The AVCC submitted that the Tribunal should have an express power to make a preliminary determination, on which interested parties could make submissions within a 28 day period, prior to making a final determination. Such a procedure is similar to the procedure followed by the ACCC under s.90A of the *Trade Practices Act 1974* (Cth). In making this suggestion, the AVCC noted that there is no right to appeal from a decision of the Tribunal regarding a rate of equitable remuneration. The Committee asks participants to comment on this approach.

**Alternative Dispute Resolution**

27. The Committee notes that there is a widely held perception that the Copyright Tribunal is principally a forum for the resolution of complex disputes between large organisations. Therefore the issue of ADR may arise particularly as a mechanism to address smaller disputes.

28. There has been a uniform call in submissions for the use of alternative dispute resolution, although divergent views were expressed about the form which such a mechanism should take. Some different models which have been put forward are:

- mediation as part of the Federal Court's mediation service (Practice Note No. 8, 8 April 1994);
- mediation by non-presidential members of the Copyright Tribunal (eg, in the case of small disputes);
- establishment of a mediation service based on existing models such as the Arts Law Centre and the Australian Commercial Disputes Centre;
- private mediation by a selected panel or by professional organisations such as the Australian Commercial Disputes Centre;
- arbitration of disputes through the internal mechanisms of collecting societies.

29. A major issue for the Committee is that dispute resolution mechanisms are capable of being used by the parties without the need for formal intervention by the Tribunal. Indeed, most depend on the cooperation of the parties to use them as a means of resolving their dispute. Why then is it necessary for the Tribunal to be vested with an ADR role?

30. If it is thought necessary or desirable for the Tribunal to have an ADR function, the Committee invites comment on the scope of the function, the extent to which its use should be able to be compelled, encouraged or taken into consideration by the Tribunal, and who should pay for the exercise of the ADR process.

31. A number of submissions commented that it was appropriate that the formal procedures of the Tribunal, under the direction of an experienced Judge, be used to resolve large and complex disputes. In that case, the Committee invites comments on whether ADR would be particularly suitable to the resolution of small disputes. If so, further comments are invited on what should be classified as a "small" dispute for that purpose. For example, comments are invited on whether the following would be regarded as small disputes:

- complaints by a small business that an existing licence scheme is particularly unreasonable in their circumstances;

- a dispute concerning whether a small business has an obligation to enter into a licence at all;
- disputes peripheral to licensing issues, such as disputes concerning the conduct of collecting societies in their dealings with users; and
- disputes concerning minor issues in the administration of licence schemes - such as disputes regarding small matters of non-compliance with the scheme (eg, minor delays).

### **Accessibility and promotion of the Tribunal**

32. The Committee notes that there has been general support for suggestions to improve the accessibility and promotion of the Copyright Tribunal. One suggestion of the Committee, which would not appear to require expense to implement, would be for collecting societies to notify parties that they may take a dispute up with the Copyright Tribunal (including an outline of its procedures and functions) at the time of sending out notifications of decisions. The Committee invites further suggestions and comments in this regard.

## **Table of Acronyms and Names**

**ACC** (Australian Copyright Council)

**ACCC** (Australian Competition & Consumer Commission)

**ADA** (Australian Digital Alliance)

**ALCA** (Arts Law Centre of Australia )

**ALCC** (Australian Libraries Copyright Committee)

**ALCQ** (Arts Law Centre of Queensland Inc.)

**APRA** (Australasian Performing Right Association Limited)

**ASTRA** (Australian Subscription Television and Radio Association)

**AVCC** (Australian Vice-Chancellors' Committee)

**CAL** (Copyright Agency Limited )

**FACTS** (Federation of Australian Commercial Television Stations )

**FARB** (Federation of Australian Radio Broadcasters Limited)

**LCA** (Law Council of Australia)

**MCEETYA** Taskforce on Copyright (representing each State Department of Education, each Catholic Diocese and the National Council of Independent Schools Association)

**Ms Anna Ward**, Executive Officer, Vi\$copy

**Screenrights** (Audio-Visual Copyright Society Limited )

**ScreenSound** (ScreenSound Australia )