

**COPYRIGHT LAW REVIEW COMMITTEE -
COPYRIGHT TRIBUNAL REFERENCE**

INTERNATIONAL MODELS FOR THE RESOLUTION OF COPYRIGHT DISPUTES
--

1. A consideration of the legislation of other jurisdictions has revealed that procedures for dealing with disputes in relation to licensing of copyright vary greatly. For comparative purposes, the following observations are made with respect to the dispute resolution processes of selected jurisdictions:

Canada

2. Section 66 of the Canadian Copyright Act establishes the Copyright Board. The Board consists of no more than five members, appointed by the Governor-General in Council. Members may be full or part time, and the Chairman must be a sitting or retired judge of a superior, county or district court. Pursuant to s.66.6, the Board may make regulations governing the conduct of proceedings and the manner in which the work of the Board is carried out. A decision of the Board may be made by an order of the Federal Court or any superior court and becomes enforceable as such.

Role of the Board in the collective administration of copyright

3. Section 70.2 provides that where a licensing body (defined as an organisation or association that collectively administers copyright for the benefit of those who authorise it to act on their behalf and which operates a licensing scheme setting out classes of uses and applicable royalties) and potential users are unable to agree on royalties to be paid, either may apply to the Board to fix the royalties and conditions for the use.

Role of the Board in the collective administration of performance rights

4. Section 67(2) requires societies that grant licences for public performance and communication by telecommunication with respect to musical and dramatico-musical works to file a statement with the Board specifying the royalties that the society proposes to collect in respect of those licences. The Board then considers the statement of royalties and approves it with or without alterations to the royalties and related terms and conditions. the Board is to ensure that there is a preferential royalty rate for small cable transmission systems.

Role of the Board in the licensing of rights held by untraceable owners

5. Section 70.7(1) provides that the Board, upon application by a person who wants to obtain a licence to use a published work in which copyright subsists, may issue the applicant a licence to perform specified acts where it is satisfied that the applicant has made reasonable efforts to locate the owner and that the owner cannot be located. The Board may impose upon such a licence such terms and conditions as it thinks fit.

6. In its Report, *Simplification of the Copyright Act 1968 Part 2 - Categorisation of Subject Matter and Exceptions and Other Issues*, the CLRC considered the scheme provided for by s.70.7 of the Canadian Act. The creation of such a scheme in Australia was however rejected on the basis that the cost of administrative resources associated with such a scheme would outweigh the likely benefits.

Denmark

7. Section 47(1) of the Danish Act on Copyright 1995 provides that if no agreement can be reached on the amount of remuneration to be paid in accordance with ss.17(2), 18(1), 35, 51(2) and 68, each party may submit the question to the Copyright Licence Tribunal, set up by the Minister of Culture. The rules governing the activities of the tribunal are prescribed by the Minister of Culture, and the decision of the Tribunal may not be brought before any other administrative authority.

8. The Tribunal may therefore determine the amount of remuneration payable in respect of:

- statutory licence conferred for the making of sound recordings of published literary works for the purpose of lending to the blind, sufferers from defective vision, dyslexia, backward readers and others unable to read ordinary books - s.17(2)
- statutory licence to reproduce minor portions from literary or musical works for inclusion of composite works consisting of works of a large number of authors and compiled for use in educational activities (five years must have elapsed from the publication of the works) - s.18(1)
- statutory licence to distribute by cable and retransmit works which are broadcast on radio or television where the redistribution/re-transmission takes place simultaneously with the original broadcast and without any alterations - s.35(1)
- extended statutory licence whereby a user who has reached an agreement with an organisation comprising a substantial number of Danish authors of a certain type of work may exploit other works of the same nature although those works are represented by the organisation, The extended statutory licence is available in respect of copying for educational use, copying of newspapers and the like by public or private institutions for internal use, copying by hospitals, prisons and the like for the brief use of patients/inmates and copying for visually handicapped or hearing impaired persons. An author whose work is copied under an extended statutory licence and is not represented by the organisation is entitled to remuneration on the same terms as those authors who are represented, despite the absence of an agreement with the organisation. If no agreement can be reached, either party may submit the issue of remuneration to the tribunal.
- statutory licence to use published sound recordings in radio and television broadcasts, and in public performances - s.68

European Communities

9. The Directives of the European Community prescribe requirements with which the laws of Member States must comply. Article 8(2) of Council Directive 92/100/EEC of 19 November 1992 on Rental and Lending Rights prescribes that Member States must provide a right to ensure that a single equitable remuneration is paid by the user where a phonogram is published for commercial purpose or reproduced for broadcasting or

other communication to the public. While not directly requiring the institution of measures for the determination of such remuneration, the requirement that the obligatory remuneration be equitable may be suggested to infer a requirement of an independent body to determine that which is equitable in the absence of agreement between the relevant parties.

10. Article 11 of Council Directive (EEC) No. 93/83 of September 27 1993 on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Re-transmission provides that where no agreement is concluded regarding authorisation of the cable re-transmission of a broadcast, Member States shall ensure that either party may call upon the assistance of one or more mediators.

Japan

11. Chapter VI of the Japanese Copyright Act provides the mechanisms for the settlement of disputes concerning copyright. Article 105 provides that the Agency of Cultural Affairs is to provide mediators for the settlement of disputes concerning copyright. Where a dispute arises in relation to any of the rights provided for in the Act, the parties concerned may apply to the Commissioner of the Agency for Cultural Affairs for mediation. The Commissioner shall appoint not more than three mediators from among persons 'of learning and experience in the field of copyright or neighboring rights'. An application fee is payable, and is to be determined having regard to the actual cost. Mediation procedures other than those specified in the Act are provided for by Cabinet Order.

Malaysia

12. Section 28 of the Malaysian Copyright Act 1987 provides for the establishment of the Copyright tribunal. The Minister shall appoint a suitable Chairman and other members to the Tribunal not exceeding twenty in number. Proceedings are to be heard by the Chairman and three other members. The Minister may make regulations prescribing the procedures of the Tribunal and the manner in which its business is to be carried on.

13. Any person may apply to the Tribunal for a licence to produce and publish in the national language a translation of a literary work written in another language - s.31(1). Upon satisfaction of certain criteria, the Tribunal may then grant the licence on the condition that the applicant pay the owner of the translation right royalties at a rate determined by the Tribunal. An applicant may appeal the decision of the Tribunal to the High Court within thirty days of the decision. The Tribunal may compel such information as it deems necessary for the purpose of exercising its powers under the Act.

New Zealand

14. Section 205 of the New Zealand Copyright Act 1994 provides for the existence of the Copyright Tribunal. The Tribunal consists of a Chairperson, who must be a barrister or solicitor of the High Court with at least 7 years experience, and two other members. All are to be appointed by the Governor-General on the recommendation of the Minister.

15. Section 213 provides that all 3 members of the Tribunal are to be present for the hearing of all matters except those which are interlocutory or ancillary. Pursuant to

s.214. the tribunal shall determine its own procedure. The decision of the Tribunal is that of the majority of members. The tribunal may appoint a barrister or solicitor to appear and be heard in proceedings as council assisting the Tribunal. Parties to proceedings before the Tribunal may appear personally or by a barrister, solicitor or agent. The Tribunal may receive as evidence any statement, document or information as will assist it to effectively deal with the matters before it, whether or not such evidence would be admissible in court. The tribunal may permit a witness to give evidence by written statement. Subject to the foregoing qualifications, the rules of evidence are to apply to matters before the Tribunal.

16. Sections 161-166 of the Act provide a number of factors to be taken into account in certain classes of cases. The provisions include matters to which the Tribunal is to have reference in determining what is reasonable under a reference or application.

17. Section 211 prescribes that the Tribunal 'shall have such functions as are conferred on it by this Act and any other enactment'. In practice the bulk of the Tribunal's jurisdiction is conferred by the Copyright Act, although it has jurisdiction under the Layout Designs Act 1994 to determine equitable remuneration in certain cases where the relevant parties cannot agree. The jurisdiction of the Tribunal as conferred by the Copyright Act is divided as follows:

References and applications with respect to licensing schemes

18. The following references or application may be made to the Tribunal in respect of licensing schemes:

- a proposed licensing scheme may be referred to the Tribunal which may confirm or vary the order as it considers reasonable - s.149
- a licensing scheme in operation may be referred to the Tribunal for an order varying or confirming the scheme as is reasonable in the circumstances - s.150
- s.151 provides for the reference of a licensing scheme previously referred to the Tribunal where certain criteria are satisfied
- s.153 provides that applications may be made to the Tribunal for the grant of a licence where
 - in a case covered by a licensing scheme, the operator has refused or failed to grant a licence in accordance with the scheme
 - in a case excluded from a licensing scheme, the operator has refused or failed to procure the grant of a licence, or proposes terms for a licence that are unreasonable
- under s.154 an application may be made for review of an order previously made under s.153 that a person is entitled to a licence under a licensing scheme

References and applications with respect to licensing by licensing bodies

19. References and applications relating to licensing by licensing bodies may be made as follows:

- the terms on which a licensing body proposes to grant a licence may be referred to the Tribunal, and the Tribunal may make an order varying or confirming the terms of the licence as it considers reasonable in the circumstances - s.157

- a licence that is due to expire may be referred to the Tribunal on the ground that it is unreasonable in the circumstances that the licence cease to be in force - s.158
- a licensing body or person entitled to the benefit of an order under s.157 or 158 may apply to the Tribunal for a review of that order - s.159

Applications for the determination of equitable remuneration

20. Section 168 provides that, in the absence of agreement, a party may apply to the Tribunal for a determination of remuneration to be paid under statutory licences for:

- copying by a librarian of literary, dramatic, musical or artistic works in certain circumstances - s.54
- acts done in relation to a work by the Crown for the purposes of national security or during a period of emergency, or done in the interests of public health and safety - s.63
- acts done by the Crown under s.63 in respect of which an exclusive licence is in force - s.64(2)
- copying by media monitors of a broadcast or cable program consisting substantially of news or discussions of current affairs - s.91

21. The section further provides that a person is entitled to recover payment from the copyright owner or exclusive licensee where payments are made under s.64(2) or 63 to the owner or exclusive licensee and the payment relates to a work in which the person has a licence.

Applications for consent on behalf of a performer

22. Section 192 provides that a person who wishes to make a copy of a recording but requires the consent of a performer and the identity or whereabouts of the performer cannot reasonably be ascertained or the performer unreasonably withholds his consent may apply to the Tribunal for consent to make the copy.

Singapore

23. The provisions in the *Copyright Act* (Singapore) are closely based on those found in the Australian Act. As such, the jurisdiction and procedures of the Tribunal, although not identical, are similar in most respects to their Australian counterpart.

United Kingdom

24. Section 145 of the *Copyright, Designs and Patents Act 1988* renames the previous Performing Rights Tribunal (established under s.23 of the now repealed *Copyright Act 1956*) the Copyright Tribunal. The section further provides that the Tribunal shall consist of a chairman and two deputy chairmen, appointed by the Lord Chancellor after consultation with the Lord Advocate, and no less than two but not more than eight ordinary members appointed by the Secretary of State. In order to be appointed as chairman or deputy chairman, a person must be a barrister or solicitor of seven years experience, or have held judicial office.

25. The Tribunal has jurisdiction to hear and determine proceedings relating to:

- applications to determine the amount of equitable remuneration with respect to retransmission of a broadcast including a copyright work - s.73

- applications to determine the amount of equitable remuneration where rental right is transferred - s.93C
- references of licensing schemes - ss.118, 119, or 120
- applications with respect to entitlement to a licence under a licensing scheme - ss.121 and 122
- references or applications with respect to licensing by a licensing body - ss.125, 126 or 127.
- applications or references with respect to use as of right of sound recordings in broadcasts or cable programme services - ss.135D or 135E
- appeals against orders as to coverage of licensing schemes or licences - s.139
- applications to settle the royalty or other sum payable for the lending of certain works - ss.142
- applications to settle the term of a copyright licence available as of right - s.149

26. In addition, the Tribunal has jurisdiction to:

- settle the royalty in respect of revived copyright - reg 24
- to determine the royalty or other remuneration to be paid to the trustees for the Hospital for Sick Children, Great Ormond Street, London - Sch 6, para 5(5)
- to settle the terms of payment for licences of right in programme listings under the *Broadcasting Act*
- to hear and determine disputes relating to rights in performances
- to hear and determine disputes relating to database right

27. For the purposes of proceedings, the Tribunal is to consist of a chairman or deputy chairman and two or more ordinary members. Section 150 confers power on the Lord Chancellor to make rules for regulating proceedings before the Tribunal in consultation with the Lord Advocate. Section 152 provides that an appeal may be made to the High Court on an issue of law.

United States of America

28. Chapter 8 of the US Copyright Act (17 U.S.C.) establishes a Copyright Royalty Commission for the purpose of periodically reviewing and adjusting statutory royalty rates for use of copyrighted materials pursuant to compulsory licences provided by the Act in respect of secondary transmissions by cable systems, mechanical royalties and jukeboxes. The Commission is also empowered to make determinations as to reasonable terms and rates of royalty payments in relation to public broadcasting, and to resolve disputes over the distribution of royalties paid pursuant to statutory licences with respect to secondary transmissions by cable systems and jukeboxes.

29. Section 802 provides that Copyright Arbitration Royalty Panels are to consist of three arbitrators selected by the Librarian of Congress. Proceedings before the panels are governed by the Code of Federal Regulations subject to the adoption of supplemental or superseding regulations by the Librarian of Congress.