



AUSTRALIAN DIGITAL ALLIANCE

Copyright Law Review Committee Issues Paper - Jurisdiction and Procedures of the Copyright Tribunal

Submission from the Australian Digital Alliance (ADA)

1. Introduction

1.1. The Australian Digital Alliance (ADA) thanks the Copyright Law Review Committee for providing the opportunity to comment on the Issues Paper, *Jurisdiction and Procedures of the Copyright Tribunal* ('the Issues Paper').

1.2. The Australian Digital Alliance is a unique coalition of public and private sector interests formed to promote balanced copyright law and provide an effective voice for a public interest perspective in the copyright debate. ADA members include schools, universities, computer software producers, major cultural institutions, consumer organisations, Internet industry interests, scientific and research organisations, libraries, and individuals. ADA members are united by the common theme that copyright legislation must provide a balance between strong protection of copyright and reasonable and equitable access to information. The ADA's patrons are Sir Anthony Mason, former Chief Justice of the High Court of Australia, and Mr Neville Roach, Chairman of Fujitsu Australia.

1.3. In summary, the ADA supports the following:

- (a) Expansion of the Tribunal's jurisdiction to include a broader range of issues relating to collectively administered licence schemes;
- (b) The introduction of a procedure allowing the Tribunal to grant "interested third parties" a right to be heard where resolution of a dispute may have industry-wide implications;
- (c) The creation of an Ombudsman of Collecting Societies;
- (d) The introduction of new mediation facilities provided under the auspices of the Copyright Tribunal; and

- (e) Adequate publicity of the role and function of the Tribunal, and particularly any new alternative dispute resolution procedures, to the public.

2. Jurisdiction of the Tribunal

2.1. The CLRC has noted at paragraph 1 of the Issues Paper that the Copyright Tribunal was originally established in order to ensure that a copyright collecting society could not exploit its monopoly position when fixing royalties and establishing licence terms and conditions.

2.2. It is the ADA's submission that in view of the monopoly position that copyright collecting societies maintain, the Copyright Tribunal's jurisdiction must be expanded to cover a broader range of issues relating to collective licenses.

2.3. The ADA generally supports the statement made in the 1995 *Review of Australian Copyright Collecting Societies* (at p. 253) that:

All collecting societies' licence fees and conditions should be open to the potential scrutiny of the Tribunal simply because some arbitration mechanism is an essential requirement for the establishment of a working relationship between the society and users of its members property.

2.4. In relation to the expansion of the Copyright Tribunal's jurisdiction, the ADA suggests the following:

- (a) That the Tribunal's jurisdiction should be expanded to cover issues relating to the terms and conditions of a voluntary collective licence scheme where both parties are prepared to submit the dispute to the Tribunal for resolution.
- (b) That where a licensor has unreasonably refused to grant a licence, or has refused to grant a licence on reasonable terms, a party should have the right to apply to have the dispute heard by the Tribunal. In this circumstance, the Tribunal should have the power to grant a licence and/or set reasonable terms where that outcome is not unreasonably prejudicial to the legitimate interests of the rightsholder.
- (c) That the Tribunal should have jurisdiction and power to declare a voluntary collective licence scheme to be a 'blanket' licence scheme in certain circumstances (where for example it can be shown that a substantial majority of the relevant rightsholders are participating in the relevant licence scheme).

2.5. In the context of these suggestions, and in response to the question raised by the CLRC in the Issues Paper (at paragraph 17), the ADA supports a broad jurisdiction for the Copyright Tribunal covering all uses of copyright material, including uses in the digital environment.

3. Interested third parties

3.1. The CLRC has raised the issue of whether the Tribunal's role should be expanded to increase the range of persons who would have standing to apply to the Tribunal (at paragraph 25 of the Issues Paper)

3.2. In many Tribunal actions, an industry body or other organisation will be able to provide relevant and useful information on the wider implications for its constituents on a particular case before the Tribunal. In these circumstances, it should be open to the industry body to file arguments, make submissions or appear before the Tribunal in support of a party to the dispute.

3.3. The ADA submits that an interested party (not being a party to the Tribunal proceedings in question), should be able to apply to the Tribunal for the right to be heard on a particular matter under consideration in Tribunal proceedings.

3.4. If the interested party can demonstrate that the result of the proceedings could have a direct impact on it or its members, the Tribunal should be given the power to have regard to any relevant information that the interested third party could provide.

4. Alternative Dispute Resolution

4.1. The CLRC has requested comment on several issues relating to the need for, and possible model of, alternative dispute resolution mechanisms (at paragraph 30 of the Issues Paper).

4.2. The ADA strongly supports the introduction of new procedures which would provide a cost effective, accessible, independent, and relatively informal mechanism to deal with minor complaints and other copyright disputes. It is the ADA's view that as society embraces new communications technologies and the information economy develops, an informal and accessible dispute resolution process will become increasingly important to all owners and users of copyright material.

4.3. Whilst the Copyright Tribunal may be an adequate means of resolving copyright disputes between major industry groups or institutional users of copyright material, due to its complexity and the associated expense it is not a practicable recourse for small users.

4.4. The Copyright Tribunal exists in part to provide a check on the monopoly positions of the collecting societies in their dealings with users of copyright material, who often do not hold a great deal of bargaining power. If the Tribunal is not practicably accessible to small users, and particularly if the relevant rightsholder is fully aware of this fact, then there is no effective means of ensuring that check in practice. It should be noted that practices resulting from lack of competition extend beyond the bigger issues such as rates of royalty payments and terms of use, to include poor customer service and poor customer relations.

4.5. Amongst a host of others (see discussion in the House of Representatives Standing Committee on Legal and Constitutional Affairs in its 1998 report of the inquiry into copyright, music and small business '*Don't Stop the Music!*' at Chapter 7), the Australian Competition Tribunal has recognised this deficiency in the current system. The ACT has recently stated that:

In the case of small users of music and in respect of small disputes, we consider that criticisms about the Copyright Tribunal's procedures have weight as the cost of presenting a dispute to the Tribunal in those situations may be disproportionate to the licence fees likely to be payable. (Re Applications by Australasian Performing Right Association Ltd [1999] AComp T3 (16 June 1999) at paragraph 314).

4.6. As a means of addressing these concerns, the ACT suggests the following:

We think that there is force in the submission that there should be a simple, quick procedure for dealing with small disputes... (paragraph 315)

4.7. For these reasons, the ADA strongly supports the creation of an Ombudsman of Collecting Societies. This specialised Ombudsman should have the power to hear complaints and conduct investigations, where appropriate, into practices of the collecting societies. The Ombudsman should also offer mediation facilities.

4.8. The ADA also submits that the Copyright Tribunal should offer mediation facilities for parties that are prepared to attempt to resolve a dispute through independent mediation prior to commencing proceedings in the Tribunal.

4.9. The introduction of these alternative dispute resolution procedures will benefit not only small users, but all parties to Tribunal actions. Mediation procedures, for example, would in some cases remove the need for large institutional parties or industry groups to commence or continue with a hearing before the Copyright Tribunal. This would not only reduce costs, but theoretically speed the whole process up, allowing parties to commence operating under the relevant licence much sooner.

5. Publicity of role and function of the Copyright Tribunal

- 5.1. The ADA submits that public awareness programs and information campaigns on the role and procedures of the Copyright Tribunal generally are important.
- 5.2. The ADA further submits that if new alternative dispute resolution procedures or complaints mechanisms are adopted, in order to maximise the benefit to the public of these changes, it will be essential to adequately publicise the existence of these mechanisms.
- 5.3. As noted in the Issues Paper (at paragraph 31), the true benefit from increasing public awareness will be the increase in public scrutiny of the activities of collecting societies and the corresponding improvement in the services offered by these societies (where deficiencies do in fact actually exist). If the public is generally well aware of the existence of an effective and accessible appeals system for copyright disputes, it is likely that licensors will be further encouraged to refrain from engaging in monopolistic activities and practices.