

AV-CC

Australian Vice-Chancellors' Committee

the council of Australia's university presidents

(A.C.N. 008 502 930)

Our Ref. E - 01 - 012

12 July 1999

Mr Peter Treyde
Director
Copyright Law Review Committee Secretariat
Attorney-General's Department
Robert Garran Offices
Barton ACT 2600

Dear Mr Treyde

Jurisdiction and procedures of the Copyright Tribunal

The Australian Vice-Chancellors' Committee ("AVCC") is a committee of the Vice-Chancellors of 37 universities in Australia. As such, it represents the higher education sector in Australia on a range of matters affecting universities. These include the extent to which universities and their staff and students have access to copyright material and the terms upon which they may copy that material for educational and other purposes.

The universities have been party to two proceedings heard in the Copyright Tribunal over the last 12 months. The first related to the amount of equitable remuneration that should be paid to Screenrights for the copying of broadcast audio-visual material. The second related to amounts payable to Copyright Agency Limited for photocopies and other reproductions of published literary, artistic and other works. In both matters the Tribunal has determined a rate of remuneration. However, both proceedings remain on foot as matters relating to the appropriate sampling system and the like remain to be agreed or determined by the Tribunal.

The university sector is currently paying total annual amounts by way of statutory licence fees under Parts VA and VB of in excess of \$10 million. Accordingly, they have both a real interest in the deliberations of the Copyright Law Review Committee on this particular reference and significant recent experience of the Tribunal. In the time allowed for comment it is not possible for the AVCC to properly canvass the views of its members and to prepare and settle a detailed response. There is a sub-committee which provides advice to the AVCC on policy matters relating to copyright and information matters which meets on 16 August 1999. A draft submission will be circulated and discussed at that meeting with a view to being provided to your Committee on or before 23 August 1999. I trust that your Committee will receive and consider that information and would be grateful if you would let me know if

this will not be possible. In the meantime, the AVCC wishes to make the following general comments.

1. Decisions of the Copyright Tribunal often involve claims for millions of dollars being made by a monopoly collecting society whose sole interest is in maximising the economic return from the exploitation of copyright works and subject matter. In such a situation it is important that the ultimate decision is made by an experienced Tribunal after a proper hearing at which the necessary evidence can be obtained, tested by cross-examination and assessed for relevance and weight. The nature of the process, the amount at stake and the types of copyright law issues being considered dictate that an experienced judge should be a part of the Tribunal making these decisions, however constituted. Any alternate dispute resolution process should be an attempt to assist the parties to agree a quicker, cheaper resolution of issues rather than a substitute for a proper hearing in those cases where agreement cannot be reached.
2. The complexity and inconsistency of the drafting of the statutory licence provisions make them unnecessarily complex with a resulting increase in the issues and costs involved in disputes before the Copyright Tribunal. Further, recent decisions of the Tribunal which allow for the fixing of different rates of remuneration for different types of copying increase the range of issues which the Tribunal can be asked to decide and on which evidence must be led. It goes without saying that the simpler the questions that the Tribunal is asked to resolve the quicker and cheaper disputes before the Tribunal will become. While this issue is not within the scope of the current reference to the Copyright Law Review Committee, it is a fundamental issue which needs to be addressed.
3. The Copyright Tribunal should have a more general supervisory role over the conduct of monopoly collecting societies *vis à vis* both their members and the users of copyright works and subject matter. This role might assist the resolution of disputes relating to the negotiation of licence and other agreements where the collecting societies have great bargaining power. Their statutory monopoly means that failure to agree to the terms that they propose results in a Tribunal action. The record will show that they can be quite slow in prosecuting claims that they bring before the Copyright Tribunal with the result that universities are unable to use copyright material in the meantime with any certainty as to the amount they will have to pay. A removal of the right to claim retrospective payments would remove this uncertainty and impose a discipline on collecting societies who commence proceedings before the Tribunal.
4. Consideration should be given to requiring the Tribunal to determine matters within a specified period after the conclusion of a hearing. Consideration should also be given to requiring the Copyright Tribunal to issue a preliminary determination which is open for submissions for a 28 day period before a final determination is made. A similar procedure applies under the Trade Practices Act with respect to many of the decisions that the Australian Competition and Consumer Commission is required to make. Given that the Copyright Tribunal's decisions on equitable remuneration are largely a matter of judicial estimation, and the amounts of money involved, some check and balance is appropriate. There is no right of appeal on the merits with respect to the estimation itself.

5. The case load of the Copyright Tribunal is likely to increase. This is both because disputes over which it has long had jurisdiction seem to be increasing and because proposed legislation such as the Copyright (Digital Agenda) Bill will confer new jurisdiction on the Tribunal. Consideration should be given to having a panel of Federal Court judges who are also appointed to the Tribunal and to rotating the judge which sits on Copyright Tribunal cases as they arise. There are disadvantages in having the same judge sit as the Copyright Tribunal on all matters that come before it. Inevitably, the same few monopoly collecting societies will regularly appear before him or her and there is a risk of the regulator being "captured" by the industry that it is appointed to regulate.
6. There is a role for assisted mediation or other alternate dispute resolution processes in trying to resolve disputes brought before the Copyright Tribunal. What those processes should be and the powers of the Tribunal to compel them are issues which AVCC and its members are giving further consideration.

If you have any questions relating to the general comments made above I would be pleased to discuss them with you or members of the Copyright Law Review Committee. I am out of the office this week and next but return on 26 July 1999.

Yours sincerely

A handwritten signature in black ink, appearing to read 'T J Mullarvey', with a long horizontal flourish extending to the right.

T J Mullarvey
Deputy Executive Director