

THE COPYRIGHT TRIBUNAL

This is a paper Shane presented at a conference on 23rd June 1995 to the Commonwealth Attorney General's Department, the Copyright Society of Australia and the Australian Copyright Council, summarising and critiquing the jurisdiction of the Copyright Tribunal.

EXPANDING THE COPYRIGHT TRIBUNAL'S JURISDICTION

During the preparation of the Report into Australian Copyright Collecting Societies, inquiry was made of the societies as to whether the Copyright Tribunal should have control over their:

- processes for dealing with licence applications;
- procedures for dealing with licensee inquiries;
- procedures for dealing with licensee complaints;
- procedures for dealing with licensor complaints;
- setting of licence fees;
- non-financial terms of agreements with licensors;
- use of undistributed funds; and
- other matters not presently controlled by the Tribunal

Jurisdiction Over All Licensing Schemes

All of the societies recognised the importance of having an independent body, such as the Copyright Tribunal, which is able to review collectively administered licensing schemes and set fees in the absence of the parties reaching their own agreement.

There was a clearly expressed view that this should be possible, regardless of whether the relevant rights were administered under voluntary or statutory licence.

The **present** jurisdiction of the Tribunal is complex to describe. To determine it from the Act itself is the stuff that migraines are made of and to refer to either Ricketson or Lahore to get a simple answer is only to confirm that it is almost impossible to articulate the jurisdiction simply and clearly.

Lahore summarises the jurisdiction of the Tribunal under two headings:

(1) Applications to the Tribunal:

(a) for the determination of remuneration payable upon exercise of a statutory licence. (These include:

- licences permitting the copying of literary works, radio broadcasts and television broadcasts in favour of educational institutions, institutions assisting handicapped readers and institutions assisting intellectually handicapped persons;
- licences for sound broadcast by the holder of a print-handicapped radio licence);
- sampling systems relating to statutory schemes

[This jurisdiction is however restricted to copying performed in educational institutions and thus really only relates to CAL and AVCS. Even then, the Act restricts the possible parties to the educational institution and the collecting society. A rights owner does not have the right to bring such a sampling grievance before the Tribunal.

The limited jurisdiction of the Tribunal to hear matters concerning sampling schemes should be extended so that it has an explicit jurisdiction to hear grievances about the equity of **all** processes used in the identification of rights owners and quantification of royalty payments.

Moreover, the jurisdiction over sampling should be extended to cover matters arising out of commercially negotiated schemes, not just the statutory schemes. It is widely acknowledged that these schemes are important and given that they are even being used in some instances to avoid the terms of a statutory scheme, it is essential that there be a mechanism to deal with grievances that arise];

- the mechanical licence scheme; even appropriateness of apportionment between the owners of the musical work and the literary work in a song;
- the recording or filming of works or the making of copies of sound recordings, for subsequent ephemeral television broadcast;
- the right to play sound recordings in public or to broadcast that sound recording; and

(b) Where a licence scheme applies to performing and related rights, in respect of literary, dramatic or musical works and sound recordings.

Note that this jurisdiction is limited to certain types of copyright material and certain types of uses.

Note also that the Tribunal has no jurisdiction in relation to licences to publish a literary dramatic or musical work or to reproduce those works or to copy sound recordings other than for broadcast purposes.

It has no jurisdiction in relation to licences for artistic works, films, broadcasts and published editions.

It has no jurisdiction where the person who seeks a licence under a scheme is excluded from the licence scheme by reason of the conditions of the licence scheme (other than merely factors relating to charges;

(c) Limited powers in relation to the granting of individual licences:

(i) where there is a scheme in operation.

[These include where there is a failure or refusal to grant a licence in accordance with a scheme or where the person claims that the charges or conditions of grant are not reasonable.]

(ii) where there is no scheme in operation.

(2) References to the Tribunal of:

(a) proposed licensing schemes;

[This was a very useful, sensible extension which resulted from Spicer Committee recommendations]; and

(b) existing licensing schemes.

Proposals For Extension

It is my belief and the belief of most of the Societies, that the Tribunal should have as wide a jurisdiction as possible in respect of licences and licence tariffs. This includes:

- the setting of licence fees;
- the setting of any non-financial terms of agreements with licensors;
- the equity or otherwise of sampling schemes and other methods for the identification of rights owners or quantification of payments).

It should have jurisdiction whether or not the licence is statutory.

It should have jurisdiction whether or not it is a voluntary licence dealing with the public performance of literary, dramatic and musical works and sound recordings or in broadcasts and diffusion services.

It should have jurisdiction over **all** collectively administered licensing schemes. That its jurisdiction should be limited by the nature of the copyright material licensed, is specious.

It should be the appropriate forum for the variation, approval and interpretation of all licensing schemes, proposed/negotiated by collecting societies.

The rationale for this call is threefold:

- (i) It makes sense to allow as many aspects of the copyright administration function as possible, to come before the expert tribunal rather than the general court system.
- (ii) The system should provide a mechanism by which rights owners and rights users can resolve that which they have been unable to resolve through negotiation.
- (iii) All collecting societies' licence fees and conditions should be open to the potential scrutiny on the Tribunal. Some arbitration mechanism is an essential requirement for the establishment of a working relationship between the society and users of its members' property.

Locus Standii

This raises the issue of locus standii. At the moment, the Copyright Act has an overly limited (and indeed overly complicated) attitude taken to who has standing before the Tribunal.

Where the interested parties are unable to reach agreement or have a grievance, the party with that grievance should have the right to approach the Tribunal.

This right of access should also extend to responsible representative bodies.

Consequences Of Expansion Of Jurisdiction

One obvious consequence of the extension of jurisdiction would be the increase in workload of the Tribunal. Accordingly, it is important to have a mechanism which sifts the problems before they actually get to the Tribunal.

Alternate Dispute Resolution is now an accepted part of the legal system and should be implemented in the Tribunal arena to assist in the Tribunal's regulation of its workflow. Hence the recommendation in the Report that there be a pre-condition to access, namely that grievances be first subjected to the alternate dispute resolution procedures which would be available through the Ombudsman's office.

Even with that innovation, there would have to be an increase in the number of full-time and the part-time members of the Tribunal. Accordingly the resources presently accorded to the Tribunal would have to be substantially

increased. On the other side of the balance, there would be an overall benefit to the efficiency and equity of the copyright system generally in that those with bone fide grievances would have an expert mechanism by which those grievances could be expressed and dealt with.

Conclusion

In summary, there is little apparent rhyme or reason in the jurisdiction accorded and the limitations imposed, both as to jurisdiction and as to locus standii. It is a hotchpot. That there is historical reason for that hotchpot is not doubted, but loyalty to history is no reason for limiting a potentially extraordinarily useful mechanism with the rationalisations of the past. We must review the mechanism so that it fulfils our needs of the present and future.

It was not a part of my terms of reference to actually devise a model for the extended jurisdiction. However, from the representations made to the Inquiry, there is little doubt that there is a large body of interested and expert voices who believe that the extension of jurisdiction would be timely and useful.

What should we be seeking? A system whereby all sectors of the community who have a genuine cultural or economic interest in the licensing of rights and the collective administration of rights, would have access to an expert tribunal to provide speedy and cost effective resolution to the widest practicable range of copyright issues.