

The Copyright Tribunal, and the process of copyright law review

Tom Cochrane, Australian Libraries Copyright Committee

One of the difficulties with copyright for practising professionals in librarianship is the extent to which both members of the profession, and many of the people with whom they must interact in the development of policy, are relatively uninterested in the detail, or alternatively find it a little formidable.

It is true that copyright law is detailed, and that is one reason for the call for simplification, a call which has been made in more than one country.

The issues which have brought it into a greater public view, with more frequent commentary in the press, are those that broadly relate to the development of the digital world. But it is also fair to say that even without this development, the issue of determining just amounts for the compensation of copyright owners has been one of rising concern, especially to institutions whose primary role is the provision of educational and research services to students and staff, or reading and copying facilities to other publics.

Therefore the assessments made by and at the Copyright Tribunal of this issue of 'what a copy is worth' has been a focus of attention for some years, as has the more general issue of the powers of the tribunal.

The Tribunal

The Copyright Tribunal was established by Section 138 of the *Copyright Act* in 1982. It was in turn based on a long-standing perceived need to establish a body with binding powers of determination, in particular to deal with disputes that might come from the exercise, by collecting societies or other organisations, of the rights given to them by copyright owners.

At the time of its establishment, the particular form of copyright to which the Tribunal's activities were seen to be most directed were those relating to the public performance and broadcast of musical works and sound recordings.

In recent years, however, the tribunal has had a major role to play in settling disputes between collecting societies in other media, and in the case most familiar to libraries, the

Copyright Agency Limited, the collecting society with authority to collect for the copying of print works.

The tribunal has indeed been called on to seek to determine a 'fair' rate for high-volume and daily activities in the use of Australian libraries, and the teaching activities of schools and universities, as well as copying in other corporate areas.

In exercising its powers, however, the tribunal has naturally been constrained by the extent of jurisdiction accorded it under the Act.

The Copyright Law Review Committee

The Copyright Law Review Committee is a relatively small group established from time to time by the attorney-general to provide expert advice to the commonwealth government on specific copyright law issues referred to it.

Its range of tasks has varied considerably in the last few years, and many who work in libraries would be aware of some of its major pieces of work, such as the review of copyright in computer software.

The committee was established in 1983 and until 1995 was chaired by the justice IF Shepherd, AO. There followed a brief period where Peter Banki became chair, and the committee was asked to advise on the issue of simplification of the *Copyright Act*. Following the 1996 general election the structure and function of the committee was reviewed, and by September 1996 a new appointment had been made as chair. Professor Dennis Pearce has occupied that role since.

The current committee comprises Maureen Barron, Susan Blackwell, Mara Bun, Tom Cochrane, Chris Cheswell and Warick A Rothnie. The present reference to inquire into, and report on, the need for changes to the jurisdiction of the Copyright Tribunal was issued by the attorney-general in April 1999.

The process

The committee's reference to review the tribunal took effect in April of 1999. Since then the committee has met on several occasions, and conducted a public forum in Sydney in

September 1999 and a meeting with the past and current presidents of the tribunal.

The committee also met with the author of the only review of Australian collecting societies to be carried out to date, Shane Simpson.

Principal issues

Following a pattern which is recognisable in other areas of law reform in complex areas, the committee, generally speaking, has followed a practice in which it generates an issues paper for public circulation and response by interested parties to the issues raised therein. The issues themselves tend to be generated by a rather amorphous mix of evidence from those engaged in or with tribunal processes, and observations made about the effectiveness or otherwise of various aspects of the exercise of the powers and processes of the tribunal. In simple terms the issues of main concern to users are:

- Given the observation that those who really use the services of the tribunal are large organisations with considerable resources to spend on the specialist representation necessary, is there a problem of access by other groups?
- Given the tribunal's particular role in relation to the collecting societies, is there any change which should be made to its jurisdiction?
- Should there be other methods of resolving disputes than a duly constituted hearing of the tribunal?
- Should there be more members, and greater use of those with industry experience?
- Are there ways in which the tribunal's method of resolving copyright disputes which could be procedural and 'on the papers'?
- Should an the idea of an ombudsman of collecting societies, as suggested in the *Simpson review*, be pursued?

Like a lot of government-sponsored inquiries there are constraints on the extent to which any major changes that are likely to absorb resources should be recommended. Nevertheless the terms of reference

do contemplate possible expansion in the tribunal's role, as they asked the committee to consider the consequences of any such expansion.

It is a specific requirement also in the terms of the reference of the review that the Committee is to 'advertise widely and consult with key interest groups and affected parties'.

Since the reference was provided, the Copyright Law Review Committee has:

- distributed the issues paper;
- received submissions in response to this;
- organised and conducted a forum for interests;
- consulted as referred to above with the president and immediate past president of the tribunal;

- drafted a full report;
- issued this report for public submission in response; and
- considered those responses.

Unless there is any unusual development it is likely that a final report will go to government for it to consider any legislative or regulatory action which might there be recommended.

I have been personally impressed by the extent of commitment to the task of review, and the mix of talents and inputs from my fellow members of the committee. It is very ably chaired, and is also well supported by the relevant staff in the Attorney-General's Department.

It is too early to say what precise effect the changes will have, as indeed

it is finally at the government's discretion whether and how to respond to any report that it receives. Normally speaking, however, a legislative process would follow in which the necessary changes and amendments to the Act would be made. Most who have been connected with the process would hope that these changes would improve the capacity to resolve disputes that arise between owners and users of copyright material (or for that matter users and re-users), and that the exercise of judgement before and in the tribunal will be strengthened by the processes that may be provided for in any future changes to the law.

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