

The Copyright Tribunal

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Background

- Originally established under s23 of the Copyright Act 1956 (was called Performing Rights Tribunal)
- Jurisdiction and powers substantially expanded and name changed in Copyright Designs and Patents Act 1988
- Independent of Intellectual Property Office (IPO)

Jurisdiction

- Various specific sections grant jurisdiction over particular types of matters (s 149, s 205B and Schedule 6 of CPDA 1988)
- Primarily adjudicates commercial licensing disputes between collecting societies and business users of copyright material i.e. it determines the terms of/remuneration under collective licensing schemes
- Caution: in each case must determine specific jurisdiction

Jurisdiction

- Covers both existing licensing schemes and proposed new licensing schemes e.g. *BBC v Eos* in 2013
- But there must be either an existing scheme or a proposed scheme. No power to require a copyright owner or collecting society/licensing body to propose a scheme or licence or to require a copyright owner to join a collecting society or make his/her/its works part of collecting society's repertoire
- The Collective Management of Copyright (EU Directive) 2016 regulations implements the Collective Rights Management Directive. Places minimum standards of governance, financial management and transparency on EU CMOs. Enforced in UK by IPO (NOT Copyright Tribunal). Sits alongside voluntary codes of practice.

Jurisdiction

- Although most cases concern collective licences, Tribunal has jurisdiction over some other matters e.g. licences of right
- Jurisdiction includes (in addition to copyright)
 - Performance rights
 - Database rights
 - Lending rights (for certain works)
 - Publication rights

Jurisdiction

- No jurisdiction on copyright infringement
- No investigatory jurisdiction
- No jurisdiction to deal with complaints by members of collecting societies who have issues with the collecting society of which he/she/it is a member
- As with licensees/prospective licensees PRS/PPL have implemented a code of practice for dealing with members (based on regulations and government guidance) but not within Tribunal jurisdiction

Orphan Works Jurisdiction

Appeal to Copyright Tribunal from IPO decisions:

- From applicants in UK scheme in relation to
 - refusal to grant a licence
 - level of licence fee
 - licence terms
- From reappearing rights holders if failure to agree fair compensation

Appeal to First Tier Tribunal for reappearing rights holders claiming:

- IPO as authorising body acted improperly
- IPO as authorising body failed to comply with its obligations under the regulations

Territorial Jurisdiction

- Recent Tribunal case – **BBC/BBCW v PRS/MCPS (Sky and ITV intervening)**
considered whether Tribunal had jurisdiction to set terms of those particular licences in so far as they concerned non-UK copyrights

Territorial Jurisdiction

- 3 inter-connected Licences before Tribunal:
 - **Primary** Licence covered integrated creation of content in the UK and broadcasting of programs from the UK to many countries
 - **2 Ancillary** licences cross referred to and incorporated terms of Primary licence and granted distribution rights of those programmes via DVD and on-line in USA/Canada

Territorial Jurisdiction

- Tribunal only has jurisdiction that is given to it by statute, properly construed (no inherent jurisdiction) and its jurisdiction is a mandatory jurisdiction
- Copyright is territorial right
- Questions: Did presumption of extra-territoriality apply? On proper construction of CDPA, did Tribunal have jurisdiction to set terms of these licences insofar as they related to non-UK copyrights?

Territorial Jurisdiction – Tribunal Decision

Tribunal decided it did have jurisdiction to set terms of licences of non-UK copyrights in this case because:

1. Presumption of extra-territoriality either did not apply or was so weak as to not be a factor as case involved a UK Collecting Society and UK Licensees, and the licences were predominantly licences of UK copyrights. The 'who' was more important than the 'what' in assessing whether presumption applied
2. There is no express territorial restriction on the Tribunal's jurisdiction in the CDPA
3. In these circumstances there was no compelling reason to construe the words of CDPA other than in accordance with their natural meaning, so as to imply a territorial restriction that is not in the wording.

Territorial Jurisdiction – Tribunal Decision

This construction was also consistent with the policy of the CDPA and establishment of the Tribunal, namely:

1. To curb the monopolistic power of the collecting societies: Disaggregating the licences would give the collecting society even greater monopolistic power.
2. To facilitate the efficient and cost-effective determination of tariffs and other terms of licences granted by UK collecting societies: Disaggregation of the licences would involve the parties and the Tribunal result in a cumbersome, expensive and time consuming disaggregation exercise that was not reflective of the commercial world in which the parties operated.

Territorial Jurisdiction – High Court Decision

- Decision was appealed to High Court as jurisdiction is a point of law
- Even though case settled before High Court decision issued, High Court decided (with parties agreement) to issue its decision as the point of law raised a matter of some general importance
- In interpreting the statute High Court did a thorough analysis of its legislative history and partially overturned Tribunal decision holding that:
 - Presumption of extra- territoriality **did** apply
 - The original language of the CDPA only conferred jurisdiction over licences of UK copyrights, and, although the language of the CDPA had changes substantially, it should NOT be presumed that Parliament intended to change the territorial scope of the Tribunal's jurisdiction without clear evidence that such change was intended (not 'by a sidewind').

Territorial Jurisdiction – High Court Decision

- High Court therefore concluded Tribunal does not have jurisdiction under the Act in respect of licences of non-UK copyrights
- BUT High Court held that, nonetheless the Tribunal had the power to set the terms of the entirety of the Primary Licence including in so far as it related to non-UK copyrights notwithstanding its lack of jurisdiction over non-UK copyrights
- Why did the Tribunal have jurisdiction to set the terms in relation to non-UK copyrights under the Primary Licence?
Reasons given were:

Territorial Jurisdiction – High Court Decision

- Overall, the Primary Licence treated the BBC's services including those provided by communication to the public outside the UK, as a single set of activities which were the subject of a single licence in respect of which a single fee was payable
- In contrast Ancillary Licences were predominantly licences to carry out restricted acts in US/Canada, with only a small UK element. Therefore court was not persuaded it could make an order in respect of the whole of those Ancillary licences on the basis of its jurisdiction over the UK elements
- Conclusion: Tribunal general does not have jurisdiction to set the terms of licences of non-UK copyrights but nevertheless has power in some circumstances to make an order in respect of the whole licence which covers both UK copyrights and foreign copyrights.
- Both High Court and Tribunal commented that there was need to review statutory provisions dealing with the jurisdiction of the Copyright Tribunal given lack of clarity

Key Collecting Societies

Music Sector

- PRS for Music (PRS) - UK association of composers, songwriters and music publishers. It administers the performing right in their music.
- Phonographic Performance Limited (PPL) - UK-based music licensing company which licenses recorded music to be played in public or broadcast
- Printed Music Licensing Limited (PMLL) - a wholly owned subsidiary of the Music Publishers Association that manages the licensing of the copying of printed music in the UK on behalf of music publishers.
- PRS/PPL JV for UK public performance licensing operations (announced and cleared by Competition Commission Sept 2016)

Key Collecting Societies

Visual Arts Sector

- Artists Collecting Society (ACS) - collects royalties on behalf of artists in the UK
- Design and Artists Copyright Society (DACS) - represents visual artists

Publications Sector

- NLA Media Access (NLA) - provides access to and re-licenses the use of published content for clients in the media monitoring market - principally press cuttings agencies and their clients

Key Collecting Societies

Publications sector (cont'd)

- Authors Licensing and Collecting Society (ALCS) - collects secondary royalties on behalf of writers
- Publishers Licensing Society (PLS) - oversees a collective licensing scheme in the UK for book, journal, and magazine copying
- Copyright Licensing Agency (CLA) - issues licences which enable the copying and sharing of printed information by organisations

Key Collecting Societies

Audiovisual Sector

- British Equity Collecting Society (BECS) - oversees a collective licensing scheme on behalf of audiovisual performers.
- Directors UK - oversees a collective licensing scheme on behalf of those who direct films and TV programmes.

Film Sector

- Filmbank oversees a collective licensing scheme on behalf of Warner Bros. Entertainment, Sony Pictures Releasing and NT Digital Partners
- Motion Picture Licensing Company (MPLC)- oversees a collective licensing scheme on behalf of over 400+ film and TV producers and distributors from major Hollywood studios to independent and foreign producers.

Who can bring a case to the Tribunal?

- Only individual licensees or their representative bodies (e.g. trade associations) can refer cases to the Tribunal
- Where there is an existing Tribunal decision in relation to a scheme or licence, either the collecting society or licensee can apply to vary the terms of the scheme
- Licensing scheme can be prospective or an existing scheme
- Licensing scheme can be in operation while proceedings pending
- Tribunal can backdate decisions to date of application or date scheme comes into force

Procedure

- in 2010 new Rules of Procedure introduced which included Small Applications track of £50,000 limit
- Rules set process for dealing with applications, hearings etc. and procedures are in line with Civil Procedure Rules
- Overriding objective is to deal with cases justly and focus is on efficiency/cost effectiveness
- Case management conferences/directions are common

Procedure

- Proceedings started when person files the application form (the same for all applications), a statement of grounds and pays the relevant fee
- Chairman must decide whether to allocate to small or standard applications track
- Small track – usually no case management conference or oral hearing, though either party has right to demand an oral hearing or Tribunal may decide one is required
- If allocated to small track Tribunal obliged to give directions and set date for its decision

Procedure/Interventions

- Respondent has 28 days to file response to include concise facts and relief and directions sought
- Applications must be advertised
- Under Rule 15(1) any person with substantial interest in outcome may, within 28 days, request to intervene
- Tribunal must invite and consider observations of parties in deciding whether to give permission to intervene

Procedure and Powers

- Tribunal has power to reject an application (on certain grounds and after giving parties opportunity to be heard)
- Tribunal can give directions to remedy defects in application, response and/or interventions
- An application, response or statement of intervention may only be amended, and an application may only be withdrawn, with the permission of the Tribunal, which may be subject to conditions
- Where application withdrawn absent contrary direction interim orders other than costs orders cease to have effect

Powers and Evidence

- Wide scope for directions and wide powers to control the nature of the evidence, issues to be covered and the manner in which the evidence to be placed
- Power to require certain evidence and to exclude otherwise admissible evidence where not provided within time or manner required or otherwise unfair to admit OR (crucially) if not proportionate to the issues or necessary for fair disposal of the case
- Expert evidence requires Tribunal permission
- In England, Wales and Northern Ireland can require persons to attend and give evidence and produce documents

Constitution

- One Chairman and two deputy Chairman with legal qualifications and experience
- Two - Eight non legal members with commercial experience
- Appointments are on a renewable 5 year basis
- Tribunal sits with a Chair or deputy Chair and two lay members
- Decisions by majority vote
- Tribunal is administered by a Secretary, who is a civil servant working in the UK IPO

Members

- Non legal members provide valuable commercial input. They come from variety of backgrounds – e.g. currently includes
 - research physicist
 - CEO of Borough Council
 - Retail banking management
 - Chartered Accountant
 - Pharma regulatory consultant/MBA

A number are retired from previous roles but currently are non-executive directors etc. in addition to Copyright Tribunal role

References to Tribunal

- The 'scheme' (i.e. the existing or proposed licence) can be referred to the Tribunal in its entirety or in respect of certain classes of licence only
- Tribunal may not vary the scheme save in a manner which relates to the matters which have been argued before it except with the consent of the parties [See *Association of Independent Cinemas v PRS PRT 9/60*]

Criteria for setting tariff and other terms

- Most references require the Tribunal to determine the royalties or tariffs payable and other key terms under the licence
- Terms must be reasonable in the circumstances
- Statutory guidance given to Tribunal as what must be taken into account when considering the reference of a licensing scheme (see in particular sections 129 and 135 of CDPA 1988)

Criteria for setting tariff and other terms

- In essence, the Tribunal must consider **comparable licences** (where available), and ensure there is no **unreasonable** discrimination between licensees or prospective licensees under the referred scheme and licences under other comparable schemes
- May discriminate between licensees where reasonable basis to do so
- An overriding obligation to have regard to all relevant considerations (See *PPL v BHA* [2009] EWHC 209 (Ch))

Criteria for setting tariff and other terms

- The Tribunal must also ensure so far as practicable that licensees do not pay twice over for the rights granted and, in certain cases must have regard to any payments the copyright owner under the scheme may in turn be liable to make to others
- In assessing the proper tariff Tribunal must have regard to the principle is that the rate is that which would be negotiated between a willing licensor and a willing licensee

Effect of Orders of the Tribunal

- Where a licensing scheme has been confirmed or varied by the Tribunal after a reference under ss 118, 119 or 120, the scheme remains in force as long as the order is in force
- While the order is in force any person (of the relevant class to which the order applies) who pays the requisite charges, or if the amount cannot be ascertained, gives an undertaking to pay them when ascertained, is considered as being the holder of a licence.

Orders of the Tribunal

- Order can be backdated to date of application or date scheme came into force if later.
- Tribunal has power to award interest
- Where licence due to expire, licensee may apply for a continuation on basis that it is unreasonable that it should cease to be in force
- Application may not be made before last 3 months of the licence and licence remains in force until conclusion of proceedings

Review of Existing Orders

- Where the Tribunal has made an order further reference to the Tribunal in respect of the scheme covered by that order may be made only:
 - Within 3 months prior to the expiry of the order where the original order was made in force for 15 months or less
 - Where the original order was for more than 15 months, after expiry of 12 months
 - With leave of the Tribunal

General

- Parties often legally represented but this is not a requirement and parties may present their own cases
- Hearings are usually in public and transcripts are taken
- Oral evidence (cross) is usually taken only from people who have supplied written evidence
- Costs are not automatically awarded but the Tribunal has discretion to award costs at any stage of the proceedings

General

- Decisions must be in writing
- Decisions/award in respect of particular issues/claims/cross-claims may be made at different times
- Appeals on points of law only to single judge in High Court in England and Wales and Court of Sessions in Scotland; Must have leave to appeal to CA
- Case in front of Tribunal may be stayed in whole or in relation to certain issues only pending court decision

The Copyright Tribunal

QUESTIONS?