MUSIC INDUSTRIES AND COPYRIGHT TRIBUNALS

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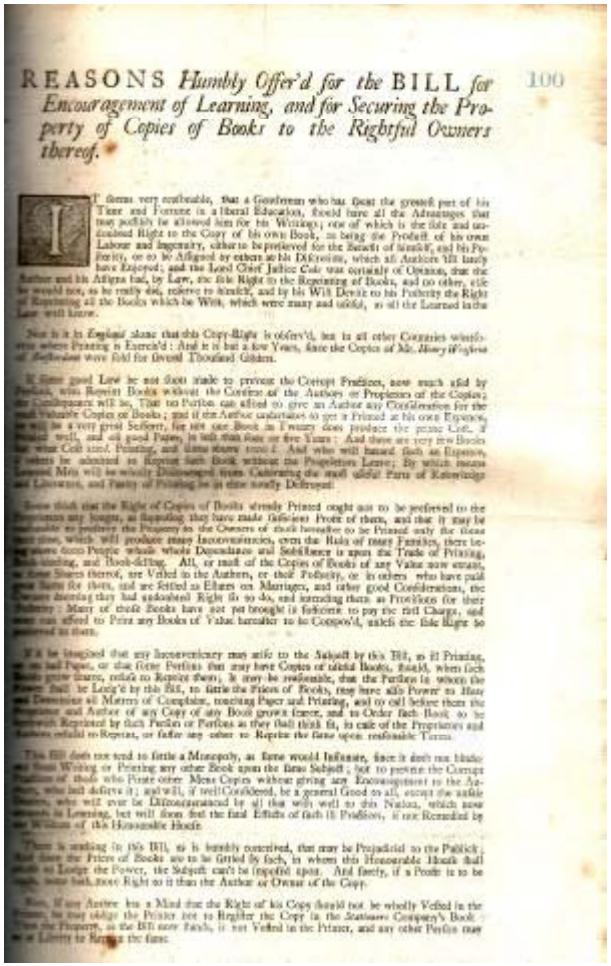
(views are personal and not necessarily those of my firm or clients)

(emphasis & highlight added except where noted)

Statute of Anne 1709-1710
entered into force April 1,1710



REASONS *Humbly Offer'd for the* BILL *for Encouragement of Learning, and for Securing the Property of Copies of Books to the Rightful Owners thereof.*

100

IT seems very reasonable, that a Gentleman who has Spent the greatest part of his Time and Fortune in a liberal Education, should have all the Advantages that may possibly be allowed him for his Writings; one of which is the sole and undoubted Right to the Copy of his own Book, as being the Product of his own Labour and Ingenuity, either to be preserved for the Benefit of himself, and his Posterity, or to be Assigned by others as his Discretion, which all Authors till lately have Enjoyed; and the Lord Chief Justice *Coke* was certainly of Opinion, that the Author and his Assigns had, by Law, the sole Right to the Reprinting of Books, and no other, else he would not, as he really did, reserve to himself, and by his Will Devise to his Posterity the Right of Reprinting all the Books which he Writ, which were many and useful, as all the Learned in the Law well know.

Now it is in *England* alone that this Copy-Right is observ'd, but in all other Countries wherever Printing is Exercis'd: And it is but a few Years, since the Copies of Mr. *Harry Hyghens* of *Rotterdam* were Sold for Several Thousand Guilders.

If Some good Law be not soon made to prevent the Corrupt Practices, now much used by Printers, who Reprint Books without the Consent of the Authors or Proprietors of the Copies; the Consequence will be, That no Person can afford to give an Author any Consideration for the most valuable Copies or Books; and if the Author undertakes to get a Printed at his own Expence, he will be a very great Sufferer, for not one Book in Twenty does produce the prime Cost, if Printed well, and on good Paper, in less than four or five Years: And there are very few Books that want Cost and Printing, and Time known to the Author. And who will hazard such an Expence, if others be admitted to Reprint such Book without the Proprietors Leave; By which means Learned Men will be wholly Discouraged from Cultivating the most useful Parts of Knowledge and Literature, and Parity of Printing be in time totally Destroyed.

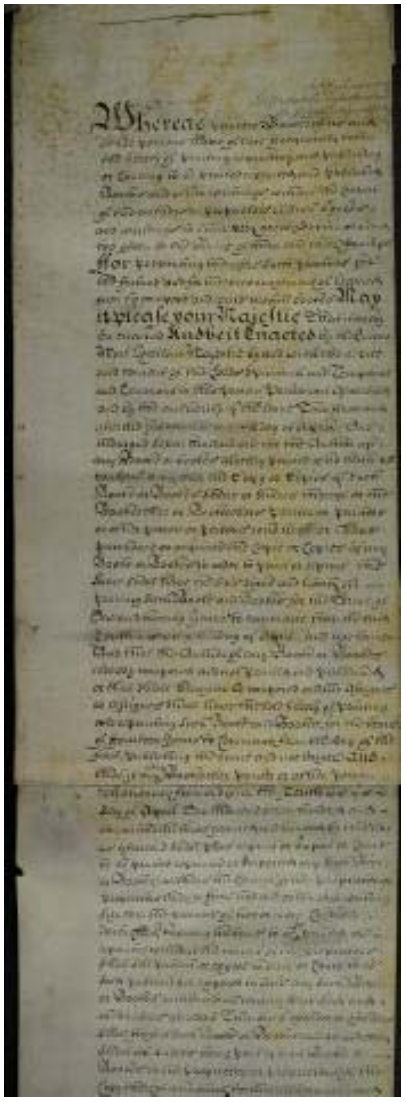
Some think that the Right of Copies of Books already Printed ought not to be preserved to the Proprietors any longer, as Supposing they have made sufficient Profit of them, and that it may be reasonable to preserve the Property to the Owners of such hereafter to be Printed only for three more nine, which will produce many Inconveniencies, even the Ruin of many Families, there being above three Thousand People whose whole Dependance and Subsistance is upon the Trade of Printing, Book-binding, and Book-selling. All, or most of the Copies of Books of any Value now extant, or those Shares thereof, are Vested in the Authors, or their Posterity, or in others who have paid great Sums for them, and are settled as Estates on Marriages, and other good Considerations, the Owners knowing they had undoubted Right so to do, and intending them as Provisions for their Posterity: Many of those Books have not yet brought in sufficient to pay the first Charge, and none can afford to Print any Books of Value hereafter to be Compos'd, unless the like Right be preserved in them.

If it be imagined that any Inconveniency may arise to the Subject by this Bill, as if Printing, or the said Paper, or that some Persons that may have Copies of useful Books, should, when such Books grow scarce, refuse to Reprint them; it may be reasonable, that the Parties to whom the Power shall be Lodg'd by this Bill, to settle the Prices of Books, may have also Power to Hear and Determine all Matters of Complaint, touching Paper and Printing, and to call before them the Proprietor and Author of any Copy of any Book grown scarce, and to Order such Book to be forthwith Reprinted by such Person or Persons as they shall think fit, in case of the Proprietors and Authors refusal to Reprint, or suffer any other to Reprint the same upon reasonable Terms.

This Bill does not tend to settle a Monopoly, as some would Insinuate, since it does not hinder any from Writing or Printing any other Book upon the same Subject; but to prevent the Corrupt Practices of those who Pirate other Mens Copies without giving any Encouragement to the Author, who first deserves it; and will, if well Considered, be a general Good to all, except the unlawful Printers, who will ever be Discountenanced by all that wish well to this Nation, which now appears in Learning, but will soon find the fatal Effects of such ill Practices, if not Remedied by the Wisdom of this Honourable House.

There is nothing in this Bill, as is humbly conceived, that may be Prejudicial to the Publick; And since the Prices of Books are to be Settled by such, in whom this Honourable House shall think fit to Lodge the Power, the Subject can't be Imposed upon. And lastly, if a Person is to be Judge, none has more Right so to do than the Author or Owner of the Copy.

Now, if any Author has a Mind that the Right of his Copy should not be wholly Vested in the Printer, he may oblige the Printer not to Register the Copy in the *Stationers* Company's Book: Then the Property, as the Bill now Stands, is not Vested in the Printer, and any other Person may have a Liberty to Reprint the same.



Whereas

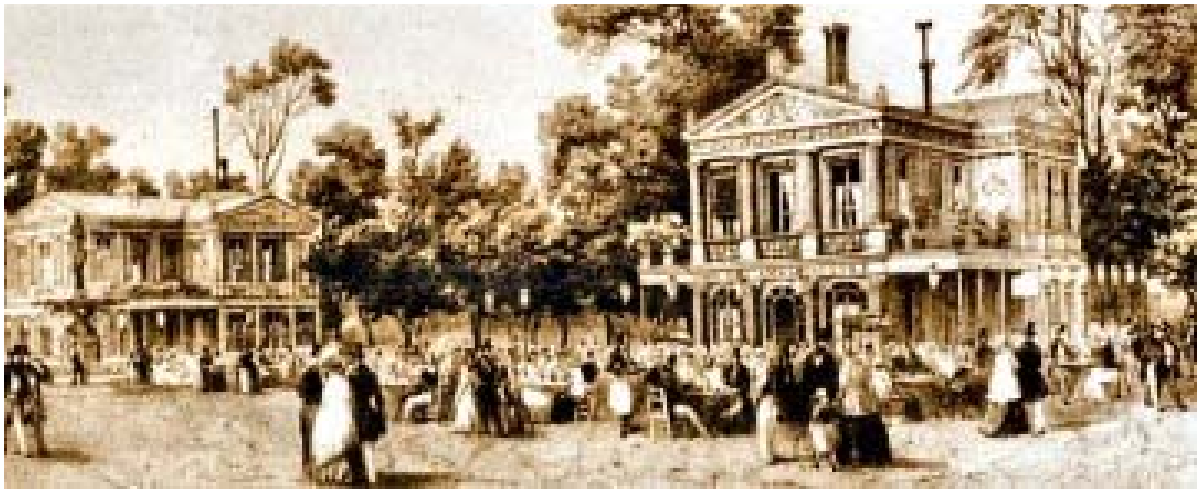
For

May it please your Majestie

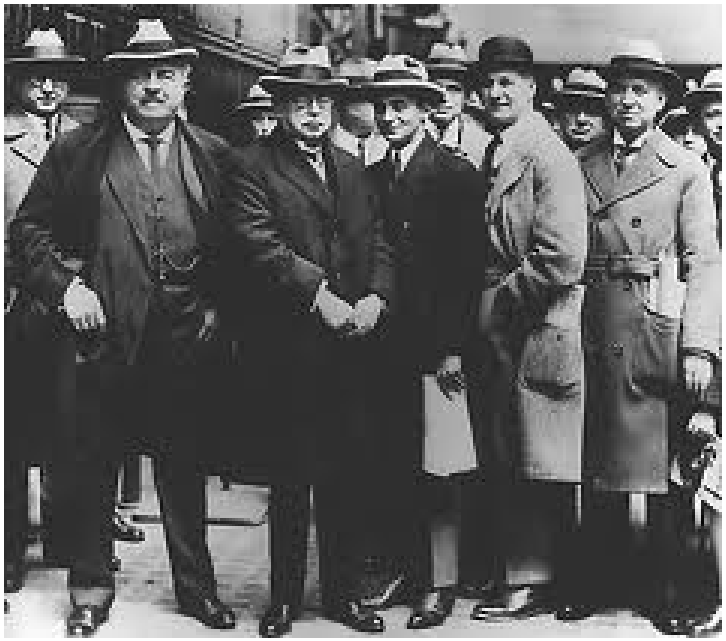
Be it Enacted

Beaumarchais - 1777 - SACD

Ernest Bourget au Café les Ambassadeurs – Paris 1847



ASCAP - 1914



Some Music Industry Collective Stats

- ASCAP reported revenues of $931.8 million for 2010 and BMI reports revenues of almost $917 million for 2010. These are the two largest musical performing rights collectives in the United States. SESAC (much less transparent – reportedly has revenues of about $0 million p.a.)
- GEMA, the mega music collective in Germany, reported revenues of more than €863 million (about US $1.130.20886 billion) for 2010.
- SACEM, the enormous French music collective, reports revenues of about €819.6 million (about US $1.073 billion for 2010).
- The UK Performing Rights Society collected £425 million (US $675 million) in 2010. Thus, the five music industry collectives had income of USD $4.7 billion in 2010.
- Turning to Canada, SOCAN's revenues, which are in excess of $275 million a year , are well over the normal benchmark of 10% of the comparable American figures (i.e., ASCAP + BMI) that one would expect to see.
- The Neighbouring Rights Collective of Canada ("NRCC"), which now is known as "Re:Sound", of course, has no counterpart in the USA because the USA does not have neighbouring rights. It reported income of about $29.6 for 2010.
- CPCC (Canadian Private Copying Collective) has collected more than $300 million to date in private copying levies in Canada. There is no comparable mechanism in the USA.

The Copyright Tribunals in Main Common Law Countries

- USA
  - The “Rate Court” model in SDNY
  - Second Circuit Appellate Review
  - The Copyright Royalty Board
- Canada
  - Copyright Board
  - Review by Federal Court of Appeal
- UK
  - Copyright Tribunal
  - Review by High Court
- Australia
  - Copyright Tribunal
  - Review by Federal Court of Australia
- New Zealand
  - Copyright Tribunal
  - Tribunal may state a case or parties may appeal to High Court

EC & Court of Justice of the European Union (CJEU, formerly ECJ)

Canada – Parker Commission 1935

(3) That the Copyright Act be amended so as to provide for the establishment of an Appeal Tribunal, to determine disputes arising out of performance in public and to approve of the tariffs of the Canadian Performing Right Society Limited from time to time before they become effective. (emphasis added)

The Commission recommends that legislation be introduced having the objects:-

(1) That there be included in the Canadian Copyright Act a clause similar 40 of the Patent Act (R.S.C., 1927, c. 150), to prevent vexatious and unwarranted legal proceedings;

(2) That Section 17 of the Copyright Act be further amended to make the societies mentioned in Subsection (i), (vii), (viii) fully exempt from infringement and from the payment of performing right fees, notwithstanding the fact pay a fee to the individual performers; providing they do not lend to promoters;

(3) That the Copyright Act be amended so as to provide for the establishment of an Appeal Tribunal, to determine disputes arising out of performance in public and to approve of the tariffs of the Canadian Performing Right Society Limited from time to time before they become effective.

The position now is that the Society, having a monopoly of the performing rights in copyright music, has also the right to impose whatever fees it chooses. Where other monopolies have existed, it has been found necessary to have some independent body analyse and pass on the tariffs of fees that may be charged, e.g. freight rates, express rates, telephone rates, etc. If the Society can continue to dictate its own terms, and pursue a policy of greatly increasing those terms, then finally the community will be prevented from listening to its music.

The Commission is altogether in accord with the recommendation of the Honourable Mr. Justice Owen in his report resulting from the Inquiry in Australia, with the recommendation and the report of the Select Committee of the House of Commons in 1930, and with the recommendation contained in the report of the Honourable Mr. Justice Ewing in 1932, that there should be an amendment to the Copyright Act to the effect that either the various tariffs as filed by the Canadian Performing Right Society, Limited, should first receive the approval of some independent board, or to the effect that if any users felt that they were being charged unfair and exorbitant fees they would have a right of appeal to an independent body. Some doubt exists as to whether this could be done without offending against the terms of the Rome Convention, but this Commission is of the opinion that as long as the representation of the British and foreign societies remains in the Canadian Performing Right Society, Limited, which must be considered a Canadian national, that Parliament can regulate the Society at least to this extent.

(emphasis added)

Canada in 2012

- Canada has about 37 active collectives with annual revenues approaching $500,000,000. Contrast this with only about a half dozen or so counterpart collectives in the USA. Canada's Copyright Board, which has a staff of 16 plus up to five full time members, is by far the largest such organization anywhere.
- Canada's Parliament has essentially delegated to the Copyright Board a *carte blanche* to fashion entire complex schemes with respect to such issues as cable retransmission and private copying tariffs that are or would be dealt with in some detail by elected bodies in most European and common law countries. See Copyright Board Website: *Copyright Collective Societies* and *Copyright Board Report 2011-2012*
- Average cost of a hearing per party exceeds $500,000
- Concern have included:
  - Excessively intrusive and irrelevant interrogatories that have driven some important and otherwise interested objectors to withdraw (some signs of improvement here)
  - Excessive reliance on non-independent "experts"
  - A process "that is tilted in favour of the rights holders and their representatives" (Hayes et al)
  - Onus seems to be "on users to prove why unsubstantiated requests by collectives are unjustified, rather than the reverse"" (Hayes et al)
  - Hearings structured in reverse of normal litigation – i.e. interrogatories first with factual and legal basis to follow
  - Lengthy timeline for holding of hearings (except in certain cases where "warp speed" is required)
  - Lengthy delay in rendering decision (Daigle & O'Neill)
  - Long hearing process and delayed rendering of decisions resulting in long periods of retroactivity
  - Imposition of interim tariffs
  - Imposition of multiple or "layered" tariffs for the same transaction
- Useful 20th anniversary book published November 11, 2011

Four of Five Pending © Cases Heard in SCC on December 6 & 7, 2011 Affect Music Industry and Arise From Copyright Board

1. *Whether a download of a video game that includes music is a communication of that music to the public by telecommunication (*Entertainment Software Association, et al. v. Society of Composers, Authors and Music Publishers of Canada)
2. *Meaning of "copyright" in s. 3 of Copyright Act, Jurisdiction to interpret s. 3 – Test for when right to communicate a work to the public by telecommunication is engaged – Standard of review of interpretation of s. 3 – Balance between court's supervisory powers and legislative supremacy – Scope of the supervisory role of the courts – Consistency in meaning given to exclusive rights granted by s. 3.* Rogers Communications Inc., et al. v. Society of Composers, Authors and Music Publishers of Canada
3. *Whether providing previews consisting of excerpts of works is fair dealing for the purpose of research that does not infringe copyright. Some commercial internet sites that sell downloads of works allow users to preview the works. A preview typically consists of an extract taken from the work, for example a 30-second extract of a musical track, streamed online and accessible to consumers.* Society of Composers, Authors and Music Publishers of Canada, et al. v. Bell Canada, et al.
4. *Whether the definition of "sound recording" in s. 2 of the Copyright Act precludes equitable remuneration under s. 19 for pre-recorded music forming part of a soundtrack.('"sound recording" means a recording, fixed in any material form, consisting of sounds, whether or not of a performance of a work, but excludes any soundtrack of a cinematographic work where it accompanies the cinematographic work')* Re:Sound v. Motion Picture Theatre Associations of Canada, et al.

(based on SCC summaries)

USA – CRB and the Courts

- CRB has very specific jurisdiction
- Consists of three (3) full time Copyright Royalty Judges (limited terms) 17 USC § 801& 802
- Staff of three (3) to support 17 USC § 802
- Specification of pendency limit of 11 months 17 USC §803(c)(1) & 15 days from expiration of a current statutory rate & terms
- Appeal to United States Court of Appeals for the District of Columbia Circuit 17 USC §803(d)(1)

How Is the CRB Working?

- Established "possibly as an attempt to render the process more specialized and "professional" (Lunney)
- SoundExchange – RIAA roots
- Internet Radio imbroglio arising from May 1, 2007 decision
- Subsequent negotiations and settlements, i.e. 2009 deal with FCC licensed radio stations
- Will the CRB and SoundExchange kill internet radio?

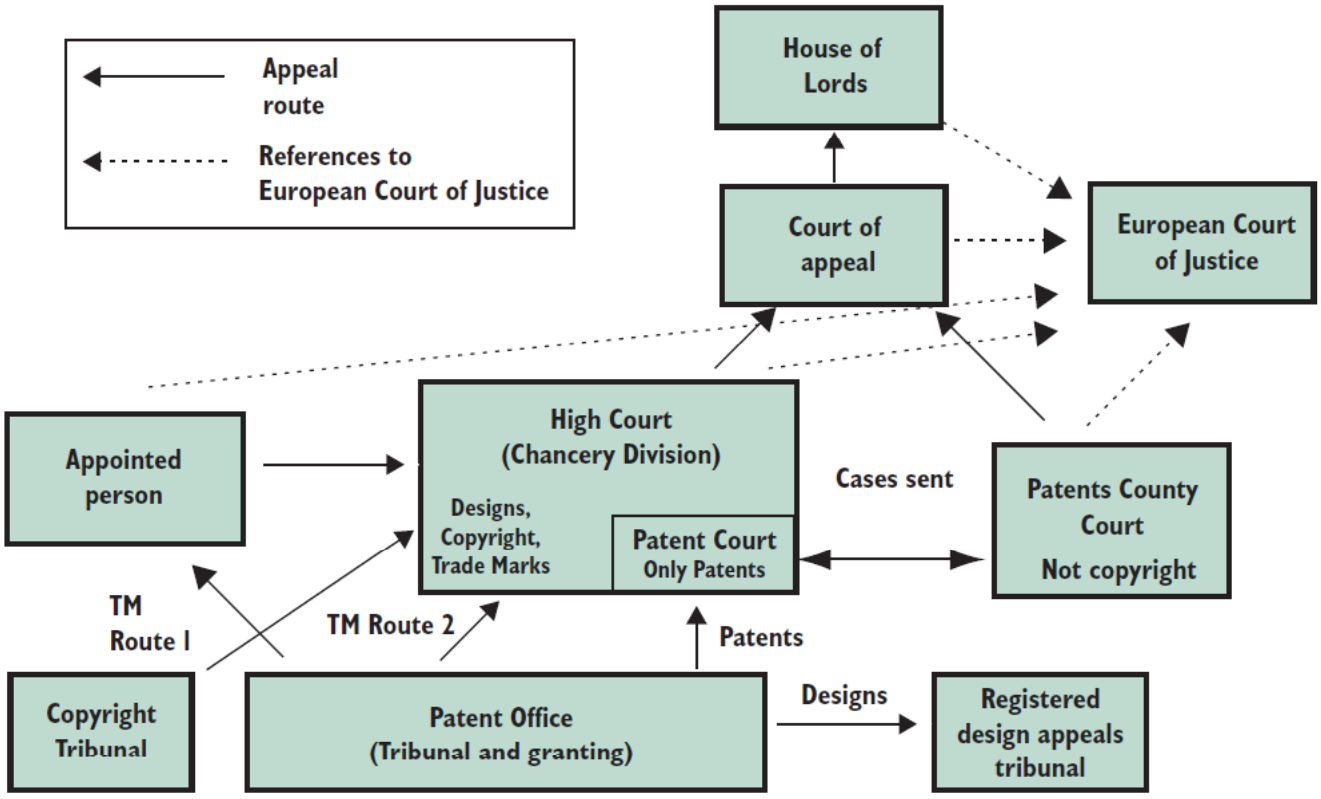
The US "Rate Court" Mechanism

- Historic concern with "antitrust" issues
- CMO's as a "necessary evil" (Lunney)
- Distinction between "copyright collective" which sets prices for its members (e.g. ASCAP) & a "copyright society" which allows individual© owners to dictate terms (e.g. Copyright Clearance Center) (Lunney)
- "Public performance" – from *Victor Herbert v. Shanley* 242 U.S. 591 (1917)
- Reliance on consent decrees and oversight by SDNY from 1934 to the Second Amended Final Judgment ("AFJ2) in 2001 t the present
- Much substantive litigation throughout – e.g. *Alden-Rochelle v. ASCAP* 80 F. Supp. 888 (S.D.N.Y. 1948) to *U.S. v. ASCAP* 627 F. 3rd 64 (2010) (cert denied)

UK IP Litigation System

(Gowers Report 2006)

Chart 6.2: Current IP litigation system



Source: Treasury analysis.

UK Tribunal

- 2008 Select Committee Report and rapid Government Response from 2008 "The Work and Operation of the Copyright Tribunal" has led to new rules of procedure which streamlined the processes of handling cases
- Has one part time Secretary
- Presided over by Judge Birss (a full time judge) and other part time members as needed on "fee paid" basis
- Can move quickly on "small" applications – i.e. Archive Media – Sept. 30, 2010 to May 3, 2011 start to finish – these are the exception
- Contrast with Meltwater, which has involved referrals to High Court and two lengthy decisions – but both issued quickly – one in three weeks and other in five months from the hearing
- Note that Tribunal can award costs
- Deals with four or five cases per year

Australia

Welcome to the Copyright Tribunal of Australia Website

The Copyright Tribunal of Australia is an independent body administered by the Federal Court of Australia.

The Tribunal was established under Part VI of the Australian Copyright Act 1968.

The Tribunal consists of a President, a number of Deputy Presidents and other members as appointed by the Governor-General. A presidential member must be a judge of the Federal Court of Australia. Other members must have a knowledge of, or experience in one of the areas of expertise as set out in s. 140(2) of the Copyright Act, which includes law, industry, public administration and economics.

The Tribunal has no physical resources of its own. The funds appropriated by Parliament for the purpose of the Tribunal are managed by the Federal Court of Australia. Registry services and administrative support for the Tribunal are provided by staff of the Federal Court.

This web site provides information about the Tribunal's history, current practice, members and decisions.

(emphasis added)

Note: A useful comparison between the Australian and Canadian tribunals can be found in Mario Bouchard, *Collective Management of Copyright and Related Rights* (ed. Daniel Gervais, 2010)

More About the Australian Tribunal

Jurisdiction

Generally, the Tribunal has jurisdiction with respect to the following forms of licensing:

Statutory Licences; (or statutory exclusions from infringement) are created by the Act when specified conditions are satisfied. These permit reproduction of certain copyright materials by educational institutions, institutions assisting persons with certain disabilities.
Generally, statutory licences are characterised by provisions:

…

that the user must notify the declared society of the use being made of the copyright material, and, except where the user is the Commonwealth or State Government, must undertake to pay to the declared collecting society for the use of the copyright material, an amount described (for example, as "equitable remuneration"), either as agreed, or, failing agreement, as determined by the Tribunal;

…

Voluntary Licences; …are the result of negotiation between a copyright owner or its representative, such as a collecting society, and the licensee. Many of the Act's provisions relevant to voluntary licences depend on the notion of a "licence scheme". Most licence schemes are administered by collecting societies. Licences granted under licence schemes are often referred to as "blanket licences". They cover all works in the particular collecting society's repertoire.

Sections 154 to 156 contain provisions for reference to the Tribunal by a licensor and by would be licensees and organisations representing them of existing and proposed licence schemes. The Tribunal has jurisdiction to confirm, or vary a licence scheme or proposed licence scheme. It may also substitute a new scheme for the one referred to it.

Section 157 provides for various kinds of applications to the Tribunal by licensors and would be licensees and organisations representing them, where there has been a failure to agree on the grant of a licence. Application may be made in cases to which a licence scheme applies and in cases to which a licence scheme does not apply, by persons who require a licence or by organisations representing them. The Tribunal is given power to make orders as to the charges and conditions the Tribunal considers applicable under a licence scheme, or, depending on the circumstances in which the application is made, those charges and conditions that the Tribunal considers "reasonable in the circumstances", in relation to the granting of a particular licence.

Generally

The Tribunal may, of its own motion, or at the request of a party, refer a question of law arising in proceedings before it for determination to the Federal Court of Australia (s 161).

The Tribunal is not bound by the Rules of evidence (s 164(b)).

Costs orders may be made by the Tribunal in any proceeding (s 174).

As Advised by Australian Tribunal

- *The Copyright Tribunal of Australia, is administered by staff of the Federal Court, it has no full time administrative staff. No members are full time, the judicial members the President and Deputy Presidents are all Judges of the Federal Court of Australia. Lay members sit to determine matters as required.*
- *The Tribunal has no separate budget. It is funded as part of the Federal Court.*
- *Matters tend to be conducted in a manner similar to matters before the Federal Court, the length of time taken to prepare a matter will depend on the matter's complexity and the amount of expert evidence required.*
- *A matter probably takes about two to two and a half years from filing of the originating application to hearing.*
- *The most recent case involving the music industry, related to the use of copyright music material by Gyms.*
- *We currently have three matters in the Tribunal; none involves the music industry.*

  (emphasis added)

Recent Decisions from Australian Copyright Tribunal

May 2010

Phonographic Performance Company of Australia Limited (ACN 000680 704) under section 154(1) of the Copyright Act 1968 [2010] ACopyT 1 (17 May 2010)

October 2009

Phonographic Performance Company of Australia Limited under section 154(1) of the Copyright Act 1968 (Cth) [2009] ACopyT 1 (29 October 2009)

December 2009

Australasian Performing Right Association Limited and Australasian Mechanical Copyright Owners Society Limited [2009] ACopyT 2 (17 December 2009)

February 2008

Phonographic Performance Company of Australia Limited (ACN 000 680 704) under section 154(1) of the Copyright Act 1968 (Cth) [2008] ACopyT 1 (27 February 2008)

July 2007

Phonographic Performance Company of Australia Limited (ACN 000 680 704) under section 154(1) of the Copyright Act 1968 (Cth) [2007] ACopyT 1 (10 July 2007)

November 2007

Phonographic Performance Company of Australia Limited (ACN 000 680 704) under section 154(1) of the Copyright Act 1968 (Cth) [2007] ACopyT 2 (15 November 2007)

2006 Copyright Tribunal Decisions

April 2006

Copyright Agency Limited v Queensland Department of Education [2006] ACopyT 1 (7 April 2006)

May 2006

Audio-Visual Copyright Society Ltd v Foxtel Management Pty Ltd (No 4) [2006] ACopyT 2 (3 May 2006)

September 2006

Reference by Australasian Performing Right Association Ltd [2006] ACopyT 3 (29 September 2006)

April 2005

Audio-Visual Copyright Society Ltd v Foxtel Management Pty Ltd & Ors (No 3) [2005] ACopyT 1; [2005] [2005] ACopyT 1 (21 April 2005)

New Zealand Copyright Tribunal

Licensing scheme disputes

Licensing scheme disputes. Individuals or licensing bodies can make an application to the Tribunal

Licensing scheme dispute applications can be made about:

- *The reasonableness of an existing licensing scheme in a dispute between the operator of such a scheme and a person claiming that they require a licence under the scheme*
- *The terms of an existing licensing scheme*
- *A proposed licensing scheme that is not yet in operation*

File sharing infringements

File sharing is where material is uploaded via, or downloaded from, the internet using an application or network that enables the simultaneous sharing of material between multiple users. Uploading and downloading may, but need not, occur at the same time.

Sections 122A to U of the Copyright Act 1994 provide a process for copyright owners to use when they consider an internet user has infringed their copyright via a file sharing network.

Major Decision from NZ

- A major 114 page recent decision (2010) re Phonograhic Performances
- A four week hearing
- Hearing finished July 30, 2009 and decision released May 19, 2010
- Contains comment about comparators with other tribunals and why they were not very useful
- The tribunal had its jurisdiction extended under the *Copyright (File Sharing) Amendment Act* 2011. Under that Act 3 more tribunal members are supposed to be appointed pursuant to the regulated response system. No cases have been heard under it. 2,500 notices have been issued. Copyright holders say the notice fee is too high which is why they say they have not issued many

EC & Court of Justice of the European Union (CJEU)

- Cross Border Licensing:
  - The 2008 CISAC decision
  - Buma/Stemra's action and PRS's reaction
  - Situation in EC appears to be a "chaos"
- "In summary, the collective management of rights at the European level is in a state of chaos." (Guibault & Gompel)
- CJEU Padawan decision (2010) – the beginning the end of levies in EU?

3. Article 5(2)(b) of Directive 2001/29 must be interpreted as meaning that a link is necessary between the application of the levy intended to finance fair compensation with respect to digital reproduction equipment, devices and media and the deemed use of them for the purposes of private copying. Consequently, the indiscriminate application of the private copying levy, in particular with respect to digital reproduction equipment, devices and media not made available to private users and clearly reserved for uses other than private copying, is incompatible with Directive 2001/29.

Main Past, Present and Future Issues

- How can creators make a living from a “business of pennies”?
- The problems of proxies, valuation and “free market” theories
- Perception that specialized copyright tribunals sometimes work backwards to justify results
- Public choice theory and the economics of opposition
- Collectives controlling not just entertainment but A2K
- Paradox that increased oversight may actually result in higher revenues and less efficiency
- Perverse economics and the “P” word in the music industry (payola)
- The most important issue?

The Most Important Issue?

- Antitrust
- Antitrust
- Antitrust

- See Glynn Lunney in D. Gervais, Collective Management of Copyright and Related Rights in 2010; Ariel Katz, Commentary: Is Collective Administration of Copyrights Justified by the Economic Literature? ; Copyright Collectives: Good Solution But for Which Problem?

Solutions to Avoid

- Extended collective licensing, which may violate treaties and which tends towards “socialism”
- Any licensing of repertoire for which there is no chain of title
- Unnecessary blanket licenses
- Any solution that departs unnecessarily from technological neutrality and/or that tends to preserve outmoded business models
- Automatic assumption that collectives operate efficiently and fairly internally
- Automatic assumption that virtually any right can be efficiently administered collectively without antitrust implications
- Isolation of copyright tribunals from antitrust oversight
- Reliance on non-independent witnesses as “experts”
- Overly specialized tribunals
- Insufficiently independent tribunals
- Overly vague mandates

The Solution(s)?

- Careful dismantling of specialized "oversight" mechanisms
- Direct licensing of actual repertoire or categories of repertoire as needed instead of blanket licensing of unnecessary and sometimes non-existent repertoire
- Adequate disclosure of repertoire and rates
- Requirement to allow individual owner determination of rates
- Carrot and stick encouragement of online rights markets, i.e.
  - Incentives and disincentives re level of damages
  - Tax incentives for royalties received from direct online licensing
- Not as in schemes such as this that never materialize
- Elimination of collective activity where it functions as a "tax" on significant number of users who don't "use" the rights or repertoire – e.g. private copying levies. Note CJEU *Padwan* decision
- New internet based approaches such as Google Book settlement and registry, Darnton' "Digital Public Library", iTunes, Kindle and self-publishing
- Class action mechanism – but Google Books and Wal-Mart problems
- But note Canadian "pending lists" settlement
- Vigorous and adversarial antitrust oversight needed for most of these possibilities

Thank you for your attention.

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www.excesscopyright.blogspot.com