

CLA Response to the Review of Copyright Tribunal

Rec. No.	Review Recommendation	CLA Comment
Rec. 1	CT to be balanced – No disposition in favour of one side or the other.	CLA welcomes the recognition that there has been a certain predisposition against collecting societies and wholeheartedly supports the proposal for balance.
Rec. 2	CPR and Practice Directions to replace Copyright Tribunal Rules 1989.	CLA agrees with this proposal.
Rec. 3	One standard form for all references to the CT.	CLA agrees the proposal.
Rec. 4	Abolition of fees of CT.	CLA agrees that the differing levels of very small fees are an irritant and cannot possibly finance the workings of the tribunal. CLA therefore agrees that the fees should be abolished but is concerned that the Tribunal should be properly funded (as suggested in Recommendation 23).
Rec. 5	Reasoning behind Licence scheme/Tariffs to be clearly shown.	<p>CLA believes this may be a counsel of perfection. In some circumstances it may be possible to determine with some accuracy how much copyright material is used e.g. the playing of music on a radio station or in a nightclub, but the value attaching to that is always going to be problematic.</p> <p>However, for CLA there can be a further difficulty of obtaining hard evidence as to what is copied, exacerbated by dispute as to what element of this unknown quantity of copying requires a licence or is subject to a statutory exception. The valuation of a disputed element of an unknown quantity is unlikely to be easily subject to actuarial analysis given the absence of hard data in the form of comparables. This is particularly so in what economists describe as a “bilateral monopoly” where there is a single supplier (a collecting society) and a large single purchaser (e.g. BBC, NHS, Universities UK).</p>

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Rec. 5 (cont.)		Subject to that, CLA agrees that the broad methodology and reasoning behind a tariff should be stated: most collecting societies do include this information on their websites. Licensees do see the results of sampling exercises where conducted to assist in setting the licence fee (as opposed to those conducted purely for distribution purposes).
Rec. 6	A challenge to the terms of a Licence should be based on fact.	CLA supports the proposal that a challenge to a collecting societies' data ought actually to propose a credible alternative rather than merely seeking to cast doubt on it.
Rec. 7	CT to play active part in formulating methodologies.	<p>From foregoing, it would be apparent that CLA believes that it would be very difficult for the CT officials to produce a sensible practice direction as to what data it expects to be provided. It would of course be enormously helpful if this could be done and CLA would welcome the opportunity to discuss with CT officials what possibilities may exist.</p> <p>CLA is also concerned at the risks inherent in a process of objectifying criteria that may not be agreed with the collecting societies and which may or may not be reasonable and/or feasible. It could become a 'de facto' code of best practice which could unfairly operate to the detriment of copyright owners where for perfectly good reasons a different method is chosen.</p>
Rec. 8	Case to be allocated to Chairman/Deputy Chairman to remain responsible for case management from then on.	CLA agrees with this very sensible proposal.
Rec. 9	Case management conference to be called as soon as possible to direct the management of the case.	CLA agrees.
Recs. 10 & 11	CT to ask for particular questions to be answered in evidence. CT to put clear limitations on type and quantity of evidence.	CLA agrees with this proposal and the expansion of it contained in the Review itself. CLA agrees that it is particularly important that the Tribunal be robust in striking out irrelevant and/or excessive evidence and that parties must be limited to the parameters of their pleadings.

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Rec. 12	The emphasis should be on written rather than oral evidence.	CLA agrees that the emphasis should be on written evidence but believes it will always be necessary for the parties to have the opportunity to cross-examine where appropriate.
Rec. 13	Hearings to be subject to a strict timetable.	This must be right, but risks being unfair if implemented in isolation from the other procedural recommendations to ensure evidence is relevant, constrained and within pleadings. A common complaint from collecting societies is that they often only find out what is the real complaint towards the latter end of the case or even at proceedings. This may be a natural result of a party shifting its position in response to the evidence (and to its legal advice on its chances of its success) so it would remain important to be able to cross-examine, particularly where evidence has been submitted which may put a different complexion on the case from that first pleaded.
Rec. 14	Expert evidence to be allowed only if strictly necessary with single joint expert.	<p>CLA agrees that expert evidence should only be admissible if the Copyright Tribunal in the exercise of its discretion directs that there should be specified expert evidence, and that it should only do so once it has heard applications both as to the scope of the proposed expert evidence and as to its need. The application for permission to produce expert evidence must make clear the ambit of that expert evidence and the Copyright Tribunal should emphasise to the parties that it will not admit expert evidence for which it has not given permission in advance. These safeguards are important in order to ensure that the expert evidence in question really is necessary, given the time and cost which will be incurred as a result.</p> <p>However we disagree with the suggestion that expert evidence should be provided by a single joint expert unless there are “exceptional and compelling reasons”.</p>

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Rec. 14 (cont.)		<p>This is in fact inconsistent with the CPR (Rule 35.7) which provides the court with a <u>discretion</u> on the appointment of a single joint expert but does not restrict the appointment of separate experts to exceptional cases. The Commercial Court Guide (paragraph H2.2) also has no such presumption and indeed acknowledges that there will be many cases where expert evidence provided by a single joint expert would be inappropriate and where each party would generally be given permission to call separate experts.</p> <p>Where, as is often the case before the Copyright Tribunal, expert evidence may involve at least two different opinions, it is for the Copyright Tribunal to decide between those two expert opinions, having had the benefit of explanations from, and cross-examination of, each of them. Where there are different approaches, these can be explored through cross-examination of each expert. If the parties have different approaches it would be extremely difficult, and time consuming, to agree on joint instructions to an expert who would be in an the invidious position in trying to put forward contrary views; in effect taking on the role of the Copyright Tribunal in seeking to reconcile the conflicting approaches of those jointly instructing him.</p>
Rec. 15	CT to set a target for completion of all cases.	CLA agrees.
Rec. 16	ADR to be used where appropriate.	CLA agrees that ADR should be recommended but not compulsory. However, the Tribunal should have a discretion to take into account an unreasonable refusal to engage in ADR when assessing costs.
Rec. 17	Staff of the CT to be based in London with appropriate accommodation.	CLA agrees.
Rec. 18	Permanent staff of two to report directly to the Chairman.	CLA agrees with this recommendation and would welcome the chance to establish a working relationship with the staff as recommended by the Review.

Rec. No.	Review Recommendation	CLA Comment
Recs. 19 & 20	No restriction on number of Deputy Chairmen. Lay members to be abolished.	<p>CLA agrees that the number of Deputy Chairmen should be increased as appropriate to increase resources.</p> <p>CLA had questioned the criteria for recruitment of lay members and the transparency of their selection process but abolishing them leaves a heavy burden on the Chairman or Deputy Chairman in handling large and complicated cases, which as the Review points out elsewhere, are highly significant in terms of their impact on the everyday workings of a large number of institutions, people and businesses, and where the final decision relies much on “judicial estimation” and less on an analysis of hard facts and/or the law.</p> <p>This is particularly so given that there is no prospect of appeal from the Tribunal on grounds of fact alone. CLA still believes it might be appropriate to have lay members in certain cases assuming they have appropriate levels of expertise and the selection criteria are transparent. If it is proposed that Deputy Chairman should be able to sit to assist the Chairman in large or complicated cases, this would be a better solution and CLA would agree with the abolition of lay members.</p>
Recs. 21 & 22	Head of CT to be President; position to be salaried.	CLA agrees with the general upgrading of the role and duties of the Head of the Copyright Tribunal and in particular that it should be a salaried appointment. CLA agrees that a retired judge would be ideal, but notes that the Review does not consider that this should be a requirement. However, CLA believes that it is necessary that the President should have appropriate legal qualifications and, critically, experience.
Rec. 23	Annual Budget to be set by President and IPO.	CLA agrees.
Rec. 24	Tribunal responsible for its website, but managed by IPO	CLA agrees.

Rec. No.	Review Recommendation	CLA Comment
Rec. 25	Licensing bodies to be able to make references to the CT under ss118 and 125 of CDPA.	CLA agrees wholeheartedly with the proposal and would welcome the opportunity to work with the IPO to develop the details of how this might operate. The ability to make informal approaches to the staff of the CT as per Recommendation 7 could also be of assistance here.
Recs. 26 & 27	ss128 A&128B CDPA to be reviewed.	CLA has no comment on these recommendations.
Rec. 28	No change in the basis for appeal from a CT decision.	CLA understands the concerns about altering the current position which would in any event be improved if the Review's other procedural recommendations were implemented.
Rec. 29	CT to be responsible for granting licences for use of orphan works.	CLA believes that this recommendation needs further consideration and that the need for a statutory exception is unproven. In any event any such statutory licence should only be in the absence of any voluntary licensing scheme.
Rec. 30	Collecting societies to be referred to as Licensing societies.	CLA believes this to be a helpful suggestion.