

Key Areas of CT Review for CLA

1. **Balance of Tribunal/Predisposition to Favour User**

Our complaint was accepted by the Review. It recommends that the role of the CT should be balanced; it should have no disposition to favour of one side or the other and accepts our argument that certain parts of the CDPA contain an inbuilt leaning towards users.

2. **Inability of Licensing Bodies to Launch Claims to CT**

The Review also accepted that licensing bodies should be able to make reference themselves to the Tribunal. The detail of this, and the circumstances in which this might be appropriate, are not discussed and we will need to address this in our response to the consultation. Our original submission and following papers had discussed some of the circumstances in which it would be appropriate for licensing bodies to have this right.

3. **Composition and Quality of the Tribunal Panel**

The review broadly accepts the arguments that the present composition is inadequate and that the process of selection is not transparent. It recognises the force in the argument that a retired High Court judge would be appropriate, but does not go far as to say this should be a mandatory requirement. Instead it proposes that lay members should be abolished and that there should be increase in the number of Deputy Chairman. The Chairman of the Copyright Tribunal should be called the President and that this should be a high level appointment. It suggests it might be a part-time role, but would carry on the salary (pro rata) of a High Court judge.

This raft of suggestions goes a long way to meet our concerns.

4. **Evidence on Which the Decision is to be Based**

The Review stresses the need for hard evidence to be produced to enable the decision to be reached more accurately and fairly. But there is a somewhat naive belief that it is possible always to obtain hard facts and figures supposedly based on “actuarial calculations and projections”. I think this would be difficult in most disputes and particularly in ours where not only is there a lack of knowledge on both sides as to the amount of copying being undertaken, there is basic disagreement on the element of that copying that needs to be licensed. I can't see any way in which such a decision can ever get beyond a reasoned estimate or approximation as opposed to being hard and fast actual calculation.

The good side is that it recognises that the “discipline cannot be a one-sided affair” and that any challenge to the terms of the licence should have a firm basis of “solid cold fact”. In other words, the challengers should also produce actual figures and projections with full disclosure of the basis of the calculation. If a challenger is to attack a sampling system, whether in methodology or in practice, this might be the subject of a detailed factual analysis. It quotes with approval the view of Canadian judge that it is not good enough simply to try to discredit the collecting societies proposed approach; the claimant should actually suggest a better alternative that can be used. This has echoes to our case where UUK spent a lot of time trying to attack our survey, but had nothing else to put in its place.

The downside is the Review requires the collecting society to have “clear and robust” sampling systems where the reasoning behind the licence and tariff should be clearly shown. This, too, is to be based on hard facts and figures and actuarial calculations and projections. The data is to include a projected effect of different types of licensees. This is an easy thing to say and a vastly harder thing to do; not just hard, but perhaps impossible, as well as extremely expensive. The supporting evidence for the tariff should be readily available to licensees or potential licensees with full disclosure of the methodology and how to supply it in practice – in other words transparency.

Even more far fetched is the notion that staff at the Copyright Tribunal could be tasked with assisting with the formulation of methodologies and taking an active part in formulating “criteria for the objectification of the criteria for the conditions of licensing schemes”. They are expected to publish a practice direction as to what data they expect to support the basis of licensing

terms and conditions, and they should assist collecting societies by discussing these. Such discussions are not to be seen as indicating approval of a scheme, but would be an assistance to the collecting societies to make their reasoning plain. I can't believe that this is going to happen, or indeed is workable, and could simply apply another layer of bureaucracy. I suppose it could of course lead to an increased understanding of the Copyright Tribunal staff of the difficulties we face in obtaining any kind of meaningful evidence at all.

5. Procedure and Case Management Rules

In our submission we had covered many areas where this was thought to be defective, producing lengthy and at times unfair proceedings. For instance, the "pleadings" of a case, i.e. the initial argument put forward by the claimant, is suppose to define the debate and it is that to which the defence responds. But it seemed throughout that UUK kept widening the grounds of argument and changing the emphasis as they went along. The only major point UUK won unreservedly – the abolition of CLARCS – was based on its complexity and administrative burden which had not been in their original case.

The Review recommends that the civil procedure rules ("CPR"), which are applicable in all other Court cases, should apply in place of the Copyright Tribunal rules. There should be a more active case management by the Chairman to ensure that parties stick to the pleadings, and stick with the timetable and do not allow the evidence to get out of hand. The emphasis is still to be written rather than oral evidence and that expert evidence should only be allowed "if strictly necessary" and that there should be a single joint expert. I think most litigation lawyers are unconvinced by the "single joint expert" approach.

6. Mediation/Alternative Dispute Resolution

The Review recommends the importance of this, but states that it is not a universal panacea. It can in places be expensive and add to the length and cost of a dispute. It seemed perverse to us that there wasn't even a requirement to consider ADR before launching a reference to the Copyright Tribunal. Claimants often deliberately resort to the Tribunal to protect their position and to place the defendant collecting society under pressure. Any thoughts they may have had

of them moving to mediation or ADR are quickly lost in the fog of war. The defendant has to marshal its defence within a timetable and cannot get sidetracked by mediation before it has done this. Once the arguments on both sides have been deployed, it becomes increasingly difficult to back away from the fight.

It is helpful that the review recognises the importance of ADR and by using the CPR it incorporates a requirement for the Chairman of the Tribunal to consider whether mediation ought to be encouraged. They do not go as far as we suggested in terms of making consideration of it compulsory with a potential adverse cost reward for a premature litigant who does not.

7. Orphan Works

The review picks up on the Gowers recommendation that there should be a statutory right to obtain a licence for using orphan works and that the Copyright Tribunal should have this responsibility to oversee this. Given the link with Gowers, this recommendation needs to be taken seriously. Clearly a voluntary, collective licensing approach to this would provide a better alternative to a legislative exception and which we are beginning to look at.

M T Delaney

20 June 2007

Comparison of CLA Submission and CT Review

CLA SUBMISSION	CT REVIEW RECOMMENDATION
<ul style="list-style-type: none"> Overlapping jurisdiction of Copyright Tribunal and competition law to be resolved. 	<p>The “double jeopardy” issue which we and others raised is discussed, but review decides that there is necessarily potential overlap between the role of AFT and CT and it proposes that this should continue.</p>
<ul style="list-style-type: none"> Chairman and Deputy Chairman of the Tribunal to be a judicial appointment. 	<p>Acknowledges that a retired High Court judge would be appropriate, but not mandatory. It suggests a new position – CT President – be created and properly resourced at a salary equivalent to the judiciary’s salary.</p>
<ul style="list-style-type: none"> Lay members of Panel to have appropriate experience and expertise – selection criteria to be disclosed and appointment process to be more transparent. 	<p>In fact it proposes that lay members be abolished.</p>
<ul style="list-style-type: none"> Lay members to represent a balance between users and licensing bodies. 	<p>See above.</p>
<ul style="list-style-type: none"> Pleadings to be retained but rules of evidence enforced more rigorously. 	<p>Broadly accepted.</p>
<ul style="list-style-type: none"> Requirement for parties to a dispute to formulate proposed terms of licensing scheme to be retained. 	<p>Not addressed as such, but dealt with in procedural recommendations and the suggestion that a challenge to the terms of the licence should be based on fact.</p>
<ul style="list-style-type: none"> Statement of Case not to be amended without permission. 	<p>CPR rules now to apply.</p>
<ul style="list-style-type: none"> Standard disclosure of evidence at outset in accordance with CPR. 	<p>CPR rules to apply.</p>
<ul style="list-style-type: none"> Mediation either to be compulsory prior to launch of proceedings or consideration of it to be compulsory as in Commercial Court. 	<p>Benefit of ADR recognised but not to be compulsory. However, CPR rules to apply and these would require as part of the CT’s “case management” responsibility the encouragement of parties to use ADR if appropriate.</p>
<ul style="list-style-type: none"> Licensing bodies to have rights to launch reference in appropriate circumstances. 	<p>Accepted, although detail unclear.</p>
<ul style="list-style-type: none"> Copyright Tribunal to have power to issue orders to users (e.g. disclosure of copying habits and no copying declarations). 	<p>Implicitly it is accepted in recommendations that CT can ask for particular questions to be answered in evidence, but challenges to terms of licence</p>



	should be based on fact.
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CLA SUBMISSION	CT REVIEW RECOMMENDATION
<ul style="list-style-type: none"> Copyright Tribunal should not substitute its own commercial evaluation for that of the parties save in exceptional circumstances. 	<p>Not addressed, but a stray paragraph seemingly included in error (page 20 in para 6.10 itemised as 110), the review quotes out of context from the CT decision in our own case against the UUK referring to this point which we had made in argument at the time [improve this, refer to guideline and binding contract].</p>
<ul style="list-style-type: none"> Copyright Tribunal to have regard to guidelines on when it is appropriate to review a binding contract. 	<p>As above.</p>
<ul style="list-style-type: none"> Copyright Tribunal to have regard to international comparables. 	<p>Not addressed.</p>
<ul style="list-style-type: none"> The onus should be on the Claimant to show that a licence/licence scheme that has been agreed between the parties is unfair. 	<p>Not accepted in whole, but perhaps encompassed in requirement for challenge of terms of licence to be based on facts with more detailed sampling.</p>
<ul style="list-style-type: none"> Improved accommodation for the Hearings should be found. 	<p>Confirms adequate accommodation should be provided in London.</p>

M T Delaney
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