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Innovation, Universities & Skills Committee

The work and operation of the Copyright Tribunal

Second Report of Session 2007–08

Report, together with formal minutes, oral and written evidence

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The Innovation, Universities & Skills Committee

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Summary

The Copyright Tribunal was established as an independent tribunal in 1988 to adjudicate in commercial disputes between copyright owners and users, to ensure that the monopoly of the owners and their agents, the collecting societies, is not abused.

From the outset there have been complaints about delay and the cost of going to the Copyright Tribunal. We find it unacceptable that the Intellectual Property Office, which has administrative responsibility for the Copyright Tribunal, has failed to address these problems in the past 20 years. At last it is waking up to need for improvement, which is now pressing.

Intellectual property is of increasing importance in the UK economy and the spread of digital technology is leading individuals and small businesses and institutions—in contrast to large companies—to become increasingly engaged in the distribution of creative works. In 2007 the Intellectual Property Office commissioned Review of the Copyright Tribunal produced 30 far-reaching recommendations, most of which have support from both copyright owners and users. The Government now needs to publish its response to the Review and to initiate action. It also needs to develop, as a matter of urgency, an affordable, alternative service that individuals and small businesses and institutions can use as well as a policy on works where the copyright owner cannot be established or traced.

1 Introduction

The Copyright Tribunal

1. The Copyright Tribunal is an independent tribunal established in 1988 as the successor to the Performing Right Tribunal. As the Intellectual Property Office described during our inquiry, the Copyright Tribunal's function is narrow but important.[1] Its main role is to adjudicate in commercial disputes and to ensure that the monopoly which copyright holders and their agents, the collecting societies, have is not abused. Anyone who has unreasonably been refused a licence by a collecting society, or who considers the terms of an offered licence to be unreasonable, may refer the matter to the Tribunal.[2] The Copyright Tribunal has the statutory task of conclusively establishing the facts of a case and of coming to a decision which is reasonable in the light of those facts. Its decisions can be appealed to the High Court only on points of law.[3] The Copyright Tribunal does not have jurisdiction over breaches of copyright. Nor is it a regulator supervising the workings of collecting societies. Regulatory responsibilities lie within the jurisdiction of the Office of Fair Trading and, in the case of matters affecting interstate trade, the Directorate-General Competition of the European Commission.[4]

2. The Copyright Tribunal comprises a Chairman, two deputies and a pool of up to eight lay members. The Chairman and deputies are appointed by the Lord Chancellor, in consultation with Scottish ministers. The Lord Chancellor is also responsible for issuing the Tribunal's Rules, which set out its scope and operational parameters. The lay members are appointed by the Secretary of State for Innovation, Universities and Skills.[5]

3. Since it began in 1988, 106 references have been filed with the Copyright Tribunal. Ninety-five of those references have been dealt with and 11 references are still outstanding. Of the 95 dealt with, 44 were withdrawn, 28 were resolved after a hearing, 14 were settled before a hearing, eight were dismissed and one was struck out.[6] Cases heard by the Tribunal are often substantial in size and lengthy, involving a large number of parties and substantial costs, with wide ranging judgements.[7]

1 Q 93

2 "About the Copyright Tribunal", Intellectual Property Office website, www.ipo.gov.uk/ctribunal/ctribunal-about.htm

3 "About the Copyright Tribunal", Intellectual Property Office website, www.ipo.gov.uk/ctribunal/ctribunal-about.htm; The Copyright Tribunal also has the power to decide some matters referred to it by the Secretary of State for Innovation, Universities and Skills and other matters even though collecting societies are not involved. For example, it can settle disputes over the royalties payable by publishers of television programme listings to broadcasting organisations.

4 Ev 29, para 19

5 Ev 34, para 8 and "About the Copyright Tribunal", Intellectual Property Office website, www.ipo.gov.uk/ctribunal/ctribunal-about.htm

6 Q 48

7 Ev 34, para 10; See recent decisions and order of the Copyright Tribunal at "About the Copyright Tribunal", Intellectual Property Office website, www.ipo.gov.uk/ctribunal/ctribunal-about.htm.

Collecting Societies

4. Collecting societies licence rights to use copyright-protected content to third parties. Because some organisations make use of a large amount of copyright material in different ownerships—for example, clubs and radio stations playing music—it would be impractical and very expensive to identify and pay the individual owners of the copyright of all the material being used. Consequently, collecting societies have been formed which licence a large repertoire of copyright works. One of the oldest is PPL (Phonographic Performance Limited) which was formed by EMI and Decca in 1934 and collects royalties for 47,000 performers and 3,500 record companies.[8] PPL explained to us that the monopoly it enjoyed was there for "a very good reason":

> It is because both the users and the rightsholders want us to have a monopoly. We are a straightforward service organisation aggregating the rights so that any music user can get a single licence covering the entire repertoire. In our case the entire repertoire is sound recordings. The pub […] has to get one licence to play music for the entire year and that is the entire catalogue, rather than three and a half thousand licences from three and half thousand record companies.[9]

As the means to copy and disseminate copyright material have grown and it has become easier to obtain, so the collecting societies have become more important in obtaining appropriate recompense for their members. The collecting societies are non-profit making organisations and the money that they collect, apart from administration costs, goes to their members—writers, composers, artists and performers.[10]

UK Intellectual Property Office

5. The Copyright Tribunal is an independent body but it lacks its own administrative support. This is provided by the UK Intellectual Property Office (the operating name of the Patent Office since April 2007),[11] which also has responsibility for policy on intellectual property. The Intellectual Property Office is responsible for granting Intellectual Property rights in the United Kingdom which include patents, designs, trade marks, and copyright. The Intellectual Property Office is a trading fund, for which the Department for Innovation, Universities and Skills (DIUS) is responsible.

Reviews

6. The Copyright Tribunal and its predecessor, the Performing Right Tribunal, have been subject to a number of reviews over the past 20 years. Because the rightsholders and their agents, the collecting societies, hold a monopoly with statutory protection, there have been two Monopolies and Mergers Commission reports: *Collective Licensing*[12] in 1988 and

8 *Review of the Copyright Tribunal*, Intellectual Property Office, 2007, para 4.4; Ev 25, Appendix B

9 Q 15

10 2007 IPO Review, para 4.8; Qq 5, 35–36

11 Administrative support is provided by a civil servant working in the UK Intellectual Property Office in Newport.

12 *Collective Licensing: A report on certain practices in the Collective Licensing of Public Performance and Broadcasting Rights in Sound Recordings*, Monopolies and Mergers Commission, Cm 530, December 1988

Performing Rights[13] in 1996. The 1988 Report concluded "that collective licensing bodies are the best available mechanism for licensing sound recordings provided they can be restrained from using their monopoly unfairly".[14] The 1996 Report made a number of recommendations concerning the operation of the Performing Right Society Limited and pointed out that the interests of users of music were primarily protected through the Copyright Tribunal.[15]

7. In December 2005, the Government asked Andrew Gowers to conduct an independent review into the UK Intellectual Property Framework. The *Gowers Review of Intellectual Property*[16] was published in December 2006. Although the Review recognised that the framework was broadly satisfactory, it made various recommendations.[17] It did not, however, examine the work of the Copyright Tribunal. In 2006 the Intellectual Property Office commissioned David Landau, Principal Hearing Officer in its Trade Marks Directorate, and Chris Bowen, Assistant Principal Hearing Officer, to undertake a review of the Copyright Tribunal. They were chosen on the basis that, as *inter partes* hearing officers[18] for the Trade Marks Directorate, they had experience of a tribunal, the proceedings of which were generally considered to be efficient and relatively inexpensive. They looked at all aspects of the work and the powers of the Copyright Tribunal.[19] Their report, *Review of the Copyright Tribunal*,[20] ("the 2007 IPO Review") was published in 2007 and made 30 recommendations, which, if implemented, will require significant changes to the existing arrangements. Comments were invited on the recommendations by 31 August 2007. We expect that the Intellectual Property Office will shortly publish its conclusions on the 2007 IPO Review.

Our inquiry

8. As part of our scrutiny of the work of DIUS and the public bodies for which it has responsibility, we decided to take evidence on the work and operation of the Copyright Tribunal. We received submissions from the licensing societies, performers, authors, users of copyright and the Intellectual Property Office. We held a two-part evidence session on 28 January 2008: first with the Authors' Licensing and Collecting Society (ALCS), Phonographic Performance Limited (PPL), a collecting society, and the Libraries and Archives Copyright Alliance, users of copyright-protected material; and secondly with His Honour Judge Fysh QC SC, Chairman of the Copyright Tribunal, and three officials from

13 *Performing rights: A report on the supply in the UK of the services of administering performing rights and film synchronisation rights*, Monopolies and Mergers Commission, Cm 3147, February 1996

14 Cm 530, para 1.5

15 Cm 3147, para 1.13

16 *Gowers Review of Intellectual Property*, HM Treasury, December 2006

17 Ev 34, para 15

18 In *inter partes* proceedings all interested parties are served with notices and are given a reasonable opportunity to attend and to be heard.

19 2007 IPO Review, para 2.1

20 *Review of the Copyright Tribunal*, Intellectual Property Office, 2007

the Intellectual Property Office, two of whom had been in post for a short time.[21] We are grateful to all those who contributed evidence for this inquiry.

9. Our Report examines:

a) the performance of the Copyright Tribunal, particularly its role and operation;

b) certain recommendations from the 2007 IPO Review;

c) possible arrangements to provide access for individuals and small businesses and institutions; and

d) orphan works.

21 Edmund Quilty, Copyright and IP Enforcement Director, and Andrew Layton, Trade Marks and Designs Director, joined the Intellectual Property Office in January 2008. Ian Fletcher, Chief Executive, who also gave oral evidence, took up his post in April 2007.

2 Role of the Copyright Tribunal

Importance of intellectual property to UK economy

10. The Intellectual Property Office explained in its memorandum that as the global economy developed, with centres of manufacturing shifting to countries with low cost economies, the UK needed to find new ways to compete successfully. The Government envisaged an economy built on innovation, with effective protection of intellectual property to provide creative individuals and businesses with the means to recoup their investment in bringing their creativity and inventiveness to the public.[22] The Intellectual Property Office pointed out that the "creative industries" in the UK's in 2005:

> accounted for 7.3% of Gross Value Added (GVA) of the economy, making them comparable to the financial services industry. They grew by an average of 6% per annum between 1997 and 2005, compared with an average of 3% for the whole of the economy over this period. In terms of employment, they accounted for over 1.1 million jobs in the summer quarter of 2006, with almost 800,000 further creative jobs within businesses outside these industries. Exports of services totalled £14.6 billion in 2005, about 4.5% of all goods and services exported.[23]

With the creative industries playing such an important role in the UK's economy, as well as their pivotal function in supporting and developing the UK's culture, the Government considered that it was important that the underpinning protections should function properly, especially given the rapid rate of technological and digital developments.[24] The Government had for this reason commissioned the Gowers Review to examine how the UK's intellectual property framework functioned in the digital age. Since the Review was published in 2006 the Intellectual Property Office has been "taking forward the many recommendations".[25] Although this work did not impact directly on the Copyright Tribunal, the Intellectual Property Office considered that it set in context "the Government's intention of delivering a copyright framework appropriate for the digital age".[26]

Economic analysis

11. Given the economic importance of the creative industries, we were concerned to be told by the Intellectual Property Office that neither it nor the Government more generally had access to the "quality of economic analysis" that it needed for its work.[27] However, in line with a recommendation in the Gowers Review, the Intellectual Property Office was setting up the Strategic Advisory Board for Intellectual Property, an advisory NDPB which

22 Ev 34, para 13

23 Ev 34, para 14

24 Ev 34, para 15

25 *Ibid.*

26 *Ibid.*

27 Q 91

will have a £500,000 research budget.[28] In addition, the Intellectual Property Office itself was in the process of setting up an economics and evaluation unit to ensure that:

a) the services it provides were subject to an appropriate level of evaluation from the point of view of the economic beneficiaries;

b) ensure that policy development, particularly in areas like copyright, was appropriately underpinned by economic evaluation; and

c) its policies were in line with the DIUS.[29]

12. **Given the value of the creative industries and the importance of intellectual property to the UK, we welcome the setting up of the Strategic Advisory Board for Intellectual Property and of an economics and evaluation unit within the Intellectual Property Office.**

Effect of digital technology on the licensing of copyrighted material

13. The 2007 IPO Review of the Copyright Tribunal found that as the means to copy and diffuse copyright material grew and such material became easier to obtain, the collecting societies became more important in obtaining appropriate recompense for their members. The explosion of digital technology has had enormous effects not just in relation to such obvious areas as the downloading of music from the Internet. The Review noted that RAJAR (Radio Joint Audience Research Limited) radio listening figures for the final quarter of 2006 were at a record high and that these showed that radio listening was now effected through digital television, the mobile telephone and the computer as well as traditional radio apparatus.[30] The Government's policy was that creators should be appropriately remunerated and as the Intellectual Property Office acknowledged in oral evidence, the challenge was to ensure that the framework of rules kept up to date with behaviour and technology.[31] ALCS told us that the move from analogue to digital was not taking place in a copyright policy vacuum and it too pointed to the Gowers Review, the thrust of which was to develop "the existing structures rather than saying that technology has overtaken us and there is nothing we can do about it".[32]

14. Mr Warburton, an author from ALCS, told us that most creators are not "concerned about what is in the black box as long as it delivers adequate incentive for us to carry on creating".[33] He did not want to see the existing licensing system abandoned as it "seems to be working" and delivering "incentives to creative artists".[34] The Libraries and Archives Copyright Alliance said that collecting societies had "been reluctant or perhaps their members have been reluctant to allow digital licensing because they are nervous [and] they

28 Qq 91–2

29 Q 92

30 2007 IPO Review, para 4.6

31 Q 88 [Mr Fletcher]

32 Q 20

33 Q 16 [Mr Warburton]

34 *Ibid.*

are scared of what the consequences are".[35] But the Alliance too agreed that licensing via digital technology was inevitable.[36]

15. From the evidence we received all parties—the Intellectual Property Office, the rightsholders and users—agree broadly that the existing licensing system can, and needs to, be adapted and developed to meet the challenges of the use of copyright material by digital processes. The question is what changes need to be made?

Impact of technological changes on the Copyright Tribunal

16. We received evidence that both the growth in creative industries and the change in technology was affecting the role and operation of the Copyright Tribunal. The collecting societies pointed out that the Copyright Tribunal's "Rulings can impact [on] licensing arrangements worth hundreds of millions of pounds"[37] and "any delay in the process and mounting costs are effectively taking money which might otherwise go to creative artists".[38] The Society of College, National and University Libraries (SCONUL) considered that the changes were having serious effects. The Copyright Tribunal was established by the Copyright, Design and Patents Act 1988 and, as we have noted, it is the successor to the Performing Right Tribunal, which was established by the Copyright Act 1956.[39] SCONUL pointed out that the "current legislative and administrative structures are built around a long tradition that copyright disputes occur between businesses".[40] It considered that this tradition going back to the 1950's had been shaken by the electronic age. It noted that, as well as businesses, educational and cultural institutions and private individuals "are increasingly engaged in the distribution of creative works".[41]

Is the Copyright Tribunal restraining the rightsholders' monopoly?

17. We considered whether, faced with the growth of the creative industries and changes in technology, the Copyright Tribunal was satisfactorily carrying out its primary function—restraining the collecting societies from using their monopoly unfairly. The answer to this question turns, we believe, on two issues.

- Is the Copyright Tribunal fair and perceived to be fair?
- Does the Copyright Tribunal deal with disputes effectively? (We address this question in the next chapter.)

35 Q 17

36 *Ibid.*

37 Ev 23, para 11

38 Q 10

39 2007 IPO Review, para 6.1

40 Ev 20, para 2

41 *Ibid.*

Fairness

18. Views on the fairness of the Copyright Tribunal varied. SCONUL, representing users, considered that "whether the complainant or the rightholder is correct in their view of the price, the Tribunal has no presumption either way".[42] PPL, a collecting society, took a different view:

> The Copyright Tribunal has often appeared to make a number of presumptions that mitigate against a fair hearing. Collective licensing societies are often perceived as large and powerful, while users are portrayed as small organisations with little bargaining power. The reality is usually the reverse.[43]

Judge Fysh rejected "completely the notion that there is bias".[44]

19. What we found were allegations that the *procedures* of the Copyright Tribunal were not fair to all the parties. The British Copyright Council, representing creators, submitted in its written evidence:

> the Copyright Tribunal does not deal even-handedly with collecting societies and users. The Review of the Copyright Tribunal identified a number of areas where the two sides in a dispute are treated differently and made Recommendations to address these. For example, a user may refer a proposed licence to the Tribunal whereas a collecting society may not.[45]

The collecting societies giving oral evidence echoed this view. ALCS told us that many of the recommendations in the 2007 IPO Review were "aimed at rebalancing the function provided by the Tribunal" and it cited the same recommendation that collecting societies should be able to make references to the Copyright Tribunal.[46] PPL considered that the unfairness

> goes back to when the Tribunal was set up. The mere fact that it is called a Tribunal implies there was a feeling that collecting societies were monopolies, they needed to be controlled in some way and the […] user needed somebody to look after them. In fact the cases that come before the Tribunal are between large parties, between a licensing society […] and a big organisation be it a broadcaster or [association representing an] industry. They are major parties that are in a commercial dispute.[47]

The Libraries and Archives Copyright Alliance, representing users, while expressing qualifications, agreed that a body to which one side could appeal but not the other did seem unfair.[48]

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42 Ev 20, para 1

43 Ev 22, para 8

44 Q 45

45 Ev 52, para 8.2; The recommendation in the 2007 IPO Review is at paragraph 9.7: that licensing bodies should be able to make references to the CT under sections 118 and 125 of the Copyright, Design and Patents Act 1988.

46 Q 2 [Mr Combes]

47 Q 11 [Mr McGonigal]

48 Q2 [Mr Padfield]

20. The British Copyright Council pressed for the implementation of the Review's recommendation to allow the collecting societies to make references to the Copyright Tribunal without further delay "as there is increasing reluctance by users to take out a licence in the online environment".[49] The Design and Artists' Copyright Society explained a change was needed because:

> When negotiating licensing schemes or licences, collecting societies are often confronted with the situation to either redraft a proposal according to the stipulations of the licensee or to risk a referral to the Tribunal, which results in costly and lengthy proceedings or that member's rights will be infringed without a real possibility of legally enforcing the member's rights when the licensee is simply refusing to accept the proposal.
>
> The possibility for collecting societies to refer proposed licensing schemes or licenses will therefore adjust this imbalance and introduce a more fair and even-handedly procedure which will support the collecting societies to avoid delays and uncertainties for their members.[50]

21. We conclude that the nub of the allegations concerning unfairness in the operation of the Copyright Tribunal is the imbalance in the rights of collecting societies and users to make reference to the Copyright Tribunal. **The 2007 IPO Review of the Copyright Tribunal recommended that collecting societies as well as users have the right to make reference. We support this recommendation. In addition, we recommend that the Government implement this recommendation ahead of the others in the 2007 IPO Review.**

49 Ev 51 , para 5.1

50 Ev 45, paras 3.4–3.5

3 Operation of the Copyright Tribunal

Complaints about the operation of the Copyright Tribunal

22. T-Mobile submitted evidence to us as an intervening party in a Copyright Tribunal reference concerning the downloading of music to its customers over its mobile phone network. It commented that "the proceedings were akin to High Court proceedings in terms of formal procedure, cross examination of witnesses, tactics, time spent (including at the oral hearing) and, crucially, costs involved".[51] It said that "15 parties were involved in this reference, which led directly to an increased burden on the parties, the schedule and the members of the Tribunal themselves" and "this reference lasted for 20 days and involved five expert witnesses".[52]

23. These criticisms are not new. In 1988 the Monopolies and Mergers Commission recommended that the Copyright Tribunal should be strengthened and changes made to its procedures "in order to expedite its decisions".[53] Again in 1996 the Commission commented:

> We were most concerned […] to hear that those who use the [Copyright] Tribunal felt that it provided neither a quick, cheap nor easy means of settling disputes. In the light of this, we took oral evidence from Mr Michael Bowers, the Chairman of the Tribunal, given to us in a personal capacity. He explained to us a number of the procedures which the Tribunal has adopted in order to simplify and speed up hearings. […][54]
>
> We believe the staff resources and financial resources with which the Copyright Tribunal is currently required to operate may be inadequate. We are concerned by the number of important issues which may shortly be added to its jurisdiction, once the relevant statutory instruments have been made to implement the existing three EC Directives on Rental, Cable and Satellite and Duration of Copyright […] We were told that additional funds might be made available should the workload require it.[55]

24. British Music Rights told us that experience of the operation of the Copyright Tribunal since its inception had been that cases referred to it have turned out to be "unduly lengthy and costly, involving complex and legalistic procedures, with the result that their members are invariably prejudiced, regardless of the final decision".[56] The 2007 IPO Review of the Copyright Tribunal found that previous reviews' recommendations about how to improve the workings of the Copyright Tribunal, including those made by the Monopolies and Mergers Commission and a chairman of the Performing Right Tribunal, had never been

51 Ev 40, para 3.2,

52 Ev 41, para 4

53 Cm 530, para 1.5

54 Cm 3147, para 2.92

55 Cm 3147, para 2.132

56 Ev 28, para 7

acted upon. The 2007 IPO Review recorded the previous criticisms of the Copyright Tribunal as falling in four main areas:

a) delay and expense;

b) lack of resources;

c) its membership; and

d) its relationship with the Intellectual Property Office.[57]

25. **We are concerned that complaints about delays and costs at the Copyright Tribunal going back 20 years were not resolved by the Patent Office. We hold it (now operating as the Intellectual Property Office) responsible for this unacceptable failure.**

Intellectual Property Office Review of the Copyright Tribunal

26. The 2007 IPO Review of the Copyright Tribunal made 30 recommendations, which, if implemented, will require extensive changes to the existing system. As the authors of the Review noted, their conclusions are very similar to those in the two Monopolies and Mergers Commission reports in 1988 and 1996. The main thrust of the recommendations in the 2007 IPO Review would:

- replace the Copyright Tribunal Rules 1989 with the Civil Procedure Rules and practice directions;[58]
- abolish lay members of the Copyright Tribunal;[59]
- make the position of Chairman, renamed the President of the Copyright Tribunal, salaried;[60]
- require licences and tariffs to be supported with hard facts and figures and methodologies which were available to licensees; similar requirements would apply to those challenging licences; the Copyright Tribunal's staff would assist in the drawing up of schemes;[61]
- require the Copyright Tribunal to take an active part in formulating methodologies for the conditions of a licensing scheme or licence;[62]
- significantly streamline the administrative procedures of the Copyright Tribunal to ensure cases were dealt with quickly to a timetable; the Copyright Tribunal would be set a target for completion of cases;[63] and

57 2007 IPO Review, para 8.1

58 2007 IPO Review, para 7.12

59 2007 IPO Review, para 8.32

60 2007 IPO Review, para 8.38

61 2007 IPO Review, para 7.22

62 2007 IPO Review, para 7.29

63 2007 IPO Review, paras 7.33–41

- increase the Copyright Tribunal's administrative resources and staff knowledge (to 2 staff), who would be based in London and who would report directly to the Chairman/President of the Tribunal.[64]

27. We found that there was a broad welcome for the recommendations in the 2007 IPO Review,[65] albeit with reservations about some recommendations, and a desire to see the recommendations "implemented promptly, efficiently and fully".[66] There were dissenting voices. Universities UK considered that:

> the problems for the [Copyright Tribunal] are caused by the UK statutory framework for licensing, which leaves the conclusion and administration of licences to bilateral negotiations between organisations representing users and rights-owners. This creates an adversarial context, and places the burden on the [Copyright Tribunal] of resolving conflicts. However, the [Copyright Tribunal]'s procedures are quasi-judicial and therefore also essentially adversarial, which makes it very difficult for it to provide a quick and cost-effective service. The Recommendations in the IPO's Report would certainly go some way to improving matters, but in our view the fundamental problems would remain the same.[67]

UUK's view chimed with PPL's analysis that the Copyright Tribunal operated as an adversarial system rather than a tribunal, and that the 2007 IPO Review "looked at it in the same way and came up with a number of recommendations to turn it into a proper court like function that can resolve commercial disputes when they arise".[68] This also resonated with what the IPO itself told us that:

> It is easy to get lost in the legal and technical stuff and forget that what we are talking about is an economic question. In economics, as in so many walks of life, there is often no right answer. The adversarial system gives you a way of getting to some balance but one of the dangers of approaching it from the other angle is that you end up with people thinking that they know what the right answer is. In any market it is very difficult for the expert or the bureaucrat to know what the price ought to be. Often what tribunals are being asked to do is adjudicate on where the balance of pricing ought to lay between two parties of quite different economic size.[69]

28. From the evidence we received it is clear that proceedings before the Copyright Tribunal are carried out in an adversarial manner and that it has at least some of the attributes of a commercial court. **To assist all those with an interest in the operation of the Copyright Tribunal, we recommend that the Intellectual Property Office set out how it expects the Copyright Tribunal to function, in particular whether it is expected**

64 2007 IPO Review, paras 8.10 and 8.21

65 For example, Ev 50–51 [British Copyright Council], paras 1.3, 5–6; Ev 17 [City of London Law Society, IP sub-committee]; Ev 17 [Libraries and Archives Copyright Alliance], para 1; Ev 20, [SCONUL], para 3; Ev 21 [PPL]; Ev 28, [British Music Rights], para 9; Ev 38 [ALCS]; Ev 41 [Copyright Licensing Agency], para 1.2; Ev 45 [Design and Artists' Copyright Society], para 2

66 Ev 50, para 1.5

67 Ev 48, para 3

68 Q2 [Mr McGonigal]

69 Q 78 [Mr Fletcher]

to function as an adversarial, commercial court. Once that is established, its role and operation can be more easily defined.

Procedural rules

29. The 2007 IPO Review described the Copyright Tribunal's Rules as "pernickety, repetitious, at times otiose and restrictive".[70] Judge Fysh disagreed with the description. He explained that the rules had evolved over the years to meet the needs of the Copyright Tribunal and had been revised by his predecessors and by him.[71] Mr Layton from the Intellectual Property Office, on the other hand, was more equivocal and told us that the rules

> have not prevented the operation of the Tribunal but, as with all legislation, it is a good idea to subject them to regular review to ensure that they remain fit for purpose. I think a number of areas were identified during the review where the rules perhaps were not fit for purpose and could be tidied up. We would support a review of the rules.[72]

30. PPL went further and said that the rules the Copyright Tribunal followed had fallen "behind modern standards of case management set by the Civil Procedure Rules".[73] It considered that the introduction of Civil Procedure Rules would "streamline a lot of the cases and bring in active case management".[74] It envisaged that case management "would get rid of frivolous claims at an early stage and would also ensure that there was a speedier process to resolution with all parties providing relevant information rather than just everything just in case it came up in the hearing".[75]

31. While we acknowledge the work that Judge Fysh and his predecessors have undertaken to update the Copyright Tribunal's rules, the evidence we received showed that more work is needed. **We recommend that the rules under which the Copyright Tribunal operates be reviewed.**

Chairman of the Copyright Tribunal

32. Judge Fysh explained that the work he did for the Copyright Tribunal was done for "free"[76] and mostly in his spare time.[77] The 2007 IPO Review concluded that the duties of the Chairman of the Copyright Tribunal should increase because he or she would have new responsibilities—for example, for staff and would be "driving forward the changes in culture and practice" in the Tribunal it recommended.[78] The 2007 IPO Review

70 2007 IPO Review, para 7.2

71 Q 42

72 Q 44

73 Ev 22, para 5

74 Q 4

75 Q 4 [Mr McGonigal]

76 Q 80

77 Q 53

78 2007 IPO Review, para 8.35

recommended making the Chairman, renamed the President, of the Copyright Tribunal a salaried position.[79] We support the 2007 IPO Review's recommendation but, even without the changes in the responsibilities recommended by the 2007 IPO Review, we consider that, given the volume and importance of the work carried out by the Copyright Tribunal, there is a strong case for making the post of Chairman salaried. **We recommend that the post of Chairman of the Copyright Tribunal be a salaried post.**

Composition of the Copyright Tribunal

33. Judge Fysh explained that he now has only a single deputy, who was by the tradition of the Copyright Tribunal "a senior silk at the Patent Bar […] or a senior solicitor in a firm that has done intellectual property work" and who currently charged at £316 per day.[80] On the lay members of the Tribunal, Judge Fysh said:

> I currently only have two lay members left; there was a time when there were more. I have a rear-admiral and a colonel from an artillery regiment. They are what I would call good chaps; they are splendid people, they say things like "I don't trust that witness". Otherwise it is all the Chairman.[81]

34. The 2007 IPO Review recommended abolishing the lay members of the Copyright Tribunal.[82] Mr Fletcher from the Intellectual Property Office explained the broader picture and the Office's current approach to lay members:

> The current rules of the Tribunal require us to have lay members so my first question is that if we are going to have lay members how are we going to have ones which are going to make a genuine and valid contribution to the workings of the Tribunal? That in turn leads us to think along the lines of what kind of background and expertise and qualifications might be helpful to Judge Fysh and to the deputy chairman of the Tribunal to discharge the Tribunal's functions in the most expeditious way. […] I think it is really a question that if we are going to have lay members how can they make the best contribution through having a technical background or qualifications which will assist the Tribunal in getting through the case work that it has got.[83]

Judge Fysh cautioned against members from the industry and suggested accountants would be more useful.[84]

35. The arrangements for appointing members of the Copyright Tribunal were criticised as "less than transparent" by the British Music Rights, whose members' experience was that "the expertise and relevant experience of many of the lay members has all too often been hard to discern". It also pointed out that the 2007 IPO Review had established that lay

79 2007 IPO Review, para 8.38

80 Q 80

81 Q 64

82 2007 IPO Review, para 8.32

83 Qq 66–7 [Mr Fletcher]

84 Q 67 [Judge Fysh]

members appear not to have been chosen for their expertise.[85] Both Judge Fysh and the Intellectual Property Office favoured transparent appointments on the basis of expertise.[86]

36. The IPO claimed that the 2007 IPO Review has opened up "a pretty vigorous debate" about the lay members of the Copyright Tribunal.[87] In our view that is not the whole story. The Monopolies and Mergers Commission back in 1988 recommended that the lay members be chosen on the basis of specific expertise that was relevant to the Copyright Tribunal.[88] Again, no action appears to have been taken. **We find it hard to understand why no action was taken on the Monopolies and Mergers Commission's 1988 recommendation that the lay members of the Copyright Tribunal be chosen on the basis of specific expertise.**

37. We cast no aspersion on the integrity or behaviour of the current lay members of the Copyright Tribunal, but from Judge Fysh's unfortunate description it appears that they may have neither legal or accounting training nor experience in intellectual property. We question what function they perform other than to meet the minimum statutory requirement to have two lay members. This state of affairs is regrettable, even reprehensible given the recommendation of the Monopolies and Mergers Commission's report going back to 1988. **We recommend that lay members continue to be appointed to the Copyright Tribunal, but that future appointments be open, transparent and based on expertise that is relevant to the work of the Copyright Tribunal.**

Administrative support

38. The Intellectual Property Office provides the Secretariat, and financial resources, for the Tribunal. This support was currently provided by a part time Secretary to the Tribunal based in Newport, South Wales, and, along with the other support Intellectual Property Office provided—for example the expenses of the lay members—the Copyright Tribunal cost around £20,000 per year, although this varied considerably with the volume of cases.[89]

39. The British Beer and Pub Association, which is currently involved in a reference to the Copyright Tribunal, considered that the "low level of administrative support for the Copyright Tribunal as a whole, and the Chairman in particular, is unacceptable".[90] It reported that correspondence sent to the Intellectual Property Office in Newport had not reached the Tribunal and that the Chairman had requested assistance in the past from one of the parties in the case to arrange Tribunal files since he did not have the necessary support.[91] The inadequacy of the Copyright Tribunal administrative support is not disputed by the Government. Mr Fletcher from the Intellectual Property Office was "absolutely clear that the amount of resource that the Intellectual Property Office puts into

85 Ev 29, para 15

86 Q 69

87 Q 69 [Mr Fletcher]

88 Cm 530, para 7.28

89 Ev 35, para 20

90 Ev 47

91 *Ibid.*

it needs to be beefed up. We are looking now to see if we can measure how much, at what level and so on we need to put in."[92]

40. **We conclude that the administrative support and resources that the Intellectual Property Office currently provides to the Copyright Tribunal are wholly inadequate. We recommend that level of support and resources be reviewed as a matter of urgency.**

Provision of evidence to the Copyright Tribunal

41. The 2007 IPO's Review recommended that the reasoning behind licences and tariffs should be clearly shown and "this must be based on hard facts and figures, actuarial calculations and projections".[93] Judge Fysh dissented: "I think at the moment that the Tribunal and the UK IPO should not really get involved in this part of the business at all; let the protagonists do this and we judge".[94]

42. The Intellectual Property Office explained the background to the recommendation. It stemmed from a "reasonable view" from one of the reviewers that most issues brought before the Tribunal related to the tariff charge for a licence and that the parties before the Tribunal ought to come with a great deal of evidence to back up their claims or views. The Intellectual Property Office said that reaction to the recommendation had been "mixed".[95] British Sky Broadcasting, submitting written evidence to us as a user, said that it might not be able to provide actuarial figures and projections.[96] It pointed out that tariffs and sampling systems were generally proposed by the collecting society and there had often been limited scope for the licensee to propose an alternative scheme. In these circumstances placing such a significant burden on the licensee did not seem appropriate.[97]

43. **We share the concerns of those who have argued that placing a requirement on users to produce their own actuarial calculations and sampling figure risks adding to the burdens on users and also that it may add to the complexity to the proceedings in the Copyright Tribunal. We recommend that the IPO reconsider whether it is reasonable to impose such a requirement on users.**

Advice on drawing up licensing schemes

44. The 2007 IPO Review recommended that the Copyright Tribunal, with the benefit of extra resources, should become active in "formulating methodologies for the objectification of the criteria for the conditions of a licensing scheme or licence".[98] PPL agreed with this recommendation but with the qualification that the Tribunal should look at those factors that were relevant in a particular case. PPL did not consider it was appropriate—or a good use of public money—for the Tribunal reference to look at every

92 Q 88

93 2007 IPO Review, para 7.22

94 Q 78

95 Q 77

96 Ev 58, para 3

97 *Ibid.*

98 2007 IPO Review, para 7.29

single licensing scheme that came up. It pointed out that it was licensing several hundred thousand sites across a whole range of different tariffs for different types of businesses using music in a difference context and it had a team of rights negotiators who worked constantly and most of them never went anywhere near the Copyright Tribunal. PPL considered that it was "really only in those cases where there is a Tribunal in the offing that it would it be useful for the Tribunal to say those kinds of factors they were looking at for a valuation".[99] The British Copyright Council believed it would be "dangerous to load more work and responsibilities on the Tribunal at this time".[100]

45. Judge Fysh was concerned to safeguard his impartiality. When asked whether he could incorporate the collecting societies deeper into the Copyright Tribunal, he put the issue succinctly: "No. I stay clear of them because I have to adjudicate them".[101]

46. **We conclude that the 2007 IPO Review's recommendation that the Copyright Tribunal become active in formulating methodologies is problematic. The 2007 IPO Review failed to spell out what this work would entail, the degree of expertise and resources required or to consider whether such work would prejudice the Copyright Tribunal. We do not deny that the assistance proposed by the 2007 IPO Review may be valuable and we therefore recommend that the Intellectual Property Office consider an alternative to the Copyright Tribunal to provide the assistance.**

Case management

Delay

47. We asked how long adjudications took. Judge Fysh said that he was adjudicating one case that had started a year and a half to two years ago. He added that there were a couple on his desk that were at the evidence stage and "they are moving along, albeit somewhat slowly".[102] He said that there were "no quick fixes" and explained that:

> it takes a long time but you must appreciate […] that we are seeing here the combination of the British common law legal process coupling […] with this discipline of copyright IP adjudication. I have to abide by the common law system. If I make an order that evidence has to be delivered within six weeks and the parties agree that they cannot in due course possibly meet this and they want six months—which has happened—then that is the way it is. The evidence in my [recent] Downloading Case was over three metres high; this is an enormous amount of work. I certainly push them on. We have case management conferences, as we do in the court; I push people on, I try to put limits down. They miss the limits, we come back again.[103]

99 Q 23 [Mr McGonigal]

100 Ev 48, para 7.6

101 Q 85

102 Q 51

103 Q 55

He added that in a recent case he had discovered the costs to the parties had exceeded £12 million.[104]

48. The Intellectual Property Office considered that the Copyright Tribunal had "ended up the victim of the cases which have been brought to it which have been big gun cases and, as a result of their complications and expense, they have given it an unfair perception that it was unwieldy and hard to get access to".[105] From the evidence we received during the course of the inquiry we consider that the perception, far from being unfair, accords with reality. We found the information that Judge Fysh told us about the timescale for adjudicating cases and their costs disappointing but understandable. The Copyright Tribunal is the forum at which the important cases will be adjudicated. The cases that the Copyright Tribunal considers are large and complex. **While we expect that the streamlining and case management procedures that the 2007 IPO Review has recommended will achieve some improvement in the throughput of adjudications by the Copyright Tribunal, we recommend that the Intellectual Property Office and the Government examine other measures to increase the capacity of the Copyright Tribunal to handle a greater volume of references.**

Single experts

49. The 2007 IPO Review recommended that expert evidence should only be allowed if strictly necessary and that, if there was expert evidence, it should be by a single, joint expert.[106] PPL considered that it was desirable to have a single expert witness but added a qualification "in the case of a specific point".[107] The Libraries and Archives Copyright Alliance told us that it would be difficult to find one expert who was able and willing to be expert for both sides.[108]

50. **We conclude that, while the 2007 IPO Review's recommendation that there should be a single, joint expert witness is superficially attractive, it may not work in practice. We invite the Intellectual Property Office in responding to this Report to explain how it will work.**

Departmental responsibility for the Copyright Tribunal

51. The 2007 IPO Review considered whether departmental responsibility for the Copyright Tribunal should be transferred from the Intellectual Property Office to what is now the Ministry of Justice. The Report was "agnostic" but identified as key issues that the [Copyright Tribunal] "has the resources and structure to do its job efficiently; that is the proof of the pudding".[109]

104 Q 57

105 Q 100

106 2007 IPO Review, para 7.39

107 Q 26

108 Q 24

109 2007 IPO Review, paras 8.41–43

52. PPL pressed for a move as "a matter of propriety" to separate the policy making functions of the Intellectual Property Office from the court function of the Copyright Tribunal.[110] Judge Fysh saw "no immediate difficulty" with a transfer but pointed out that "historically this Tribunal has always been different. We have always been with the Patent Office for historical reasons and I think frankly that is the way we would like to stay".[111] The Intellectual Property Office said that the position of the Copyright Tribunal was examined as:

> part of the package of reforms or the package of work that led up to the tribunal reforms in 2003 and it was seen as a tribunal in those days which dealt with a specialist jurisdiction and it dealt with cases […] where the parties were generally representative bodies with UK-wide coverage and a good level of representation. [R]esources were provided by the Patent Office, as then was, and there was a sense that this was not a problem that needed to be fixed.[112]

53. In our view, having the Intellectual Property Office with responsibility for the Copyright Tribunal has not given, and does not appear to give, rise to conflicts of interest or propriety that require responsibility to be transferred to the Ministry of Justice. During the course of our deliberations management, rather than propriety, of the Copyright Tribunal came to the fore. The question which we kept coming back to was why it had not been reformed in the past 20 years. The Libraries and Archives Copyright Alliance thought no one had tried.[113] Mr McGonigal from PPL supported this view: "until last year nobody really looked at it and now the IP Office has done the report which is a very thorough report and went back through every single case that the Tribunal has ever looked at, all the evidence, all the judgments *et cetera*. I think that is really the first time that has been done".[114] At the end of the oral evidence session we asked Ian Fletcher, Chief Executive of the Intellectual Property Office, about his plans for the Copyright Tribunal over the next year. He hoped that at the end of a year the Tribunal would be taking on a wider range of cases as part of a process by Government to ensure that the whole copyright framework was "fit for purpose".[115]

54. In our view there is a compelling reason against transfer. As we explain in this Report, changes in the operation of the Copyright Tribunal are needed and the Intellectual Property Office, led by Mr Fletcher and his relatively new team, has shown a long overdue appreciation of the need to make changes. A transfer of responsibility is bound to set back the changes to the Tribunal which are clearly needed and which the Intellectual Property Office started in 2007. **We recommend that responsibility for the Copyright Tribunal remain with the Intellectual Property Office.**

110 Q 29

111 Q 43

112 Q 43 [Mr Fletcher]

113 Q 13

114 Q 14

115 Q 101

4 Access for small businesses, institutions and individuals

55. Straddling the question of fairness and effectiveness of the Copyright Tribunal is the position of the user or creator with limited resources—either an individual or a small business or institution. As we noted in chapter 2, the spread of digital technology is leading individuals and small businesses and institutions to become increasingly engaged in the distribution of creative works.

56. Speaking for users, Mr Padfield from the Libraries and Archives Copyright Alliance said that "the Tribunal does tend to hear the big cases, which is unfortunate because it means the small cases tend not to be heard; people are put off bringing the small cases because they do not feel they can afford or they do not dare".[116] He cited a recent case where the issue was:

> whether the NHS should have a licence and a licence was eventually taken out. The [Copyright Licensing Agency] seemed to my members to be putting forward a [particular] view of copyright law. […] I am not saying it was not correct but it was its own interpretation of the law. […] They were simply writing to librarians in this case saying, "This is the law; this is what research means in law" and it was simply their interpretation of what research means. There is no means of challenging that.[117]

Judge Fysh gave us an illustration of the problem faced by a single user:

> I had a funeral parlour owner who telephoned me recently saying he had been presented with a bill for playing no doubt Rachmaninov or something suitable in his parlour, he could not possibly pay it and what was he to do. I explained to him about how you made a reference and so on. He asked how much would that cost and you can imagine his reaction.[118]

Judge Fysh considered that the situation was "devastating for a small person".[119]

57. From the creator's perspective, ALCS said that:

> It is almost impossible for an individual creator to use [the Copyright Tribunal] and [they] are therefore reliant on their representative bodies, be it collecting societies who are representing them through licensing. […] A lot of the measures in the IPO Report aimed at simplifying and reducing costs and reducing process would indirectly benefit the individual creator through the greater abilities that it gives their representative bodies.[120]

116 Q 11

117 Q 12

118 Q 56

119 *Ibid.*

120 Q 5

58. The growth of creative industries and the amounts now at stake in licensing disputes have impelled the Copyright Tribunal to concentrate its limited resources on adjudicating high value commercial disputes. Neither the user nor the creator of copyrighted works with limited resources—whether an individual or a small business or institution—has any realistic prospect on his or her own of seeking redress in the Copyright Tribunal. In some cases a user, for example, who is a member of a trade association, may be able to persuade the organisation to initiate action. But those without either a well-disposed representative body or deep pockets stand little prospect of making a reference to the Copyright Tribunal. The denial of access to these groups contradicts the Copyright Tribunal's assertion that "anyone who has unreasonably been refused a licence by a collecting society or considers the terms of an offered licence to be unreasonable may refer the matter to the Tribunal".[121] **We conclude that the current arrangements unfairly exclude individuals and small businesses and institutions. We recommend the Government rectify this serious deficiency when it responds to the 2007 IPO Review of the Copyright Tribunal. Failure to provide access for individuals and small businesses and institutions casts doubt over the fairness of the operation of the licensing societies' monopoly.**

Arrangements to provide access

59. We have chosen not to reach any firm conclusions about the arrangements to provide access for small business and institutions and individuals but we set out the alternatives that have been put to us during the course of the inquiry.

Expansion of the Copyright Tribunal

60. One option would be a more radical expansion of the Copyright Tribunal than appears to be planned. Judge Fysh pointed out that the equivalent of the Copyright Tribunal in Canada had a staff of 12.[122] An expansion of the Copyright Tribunal would allow it to consider more cases and to reduce the time that references take to be adjudicated and could allow the Tribunal to provide a court or service dedicated to small businesses, institutions and individuals.

Ombudsman

61. SCONUL suggested that "recourse to the Copyright Tribunal could be avoided more easily if there were a Copyright Ombudsman to help regulate the operation of collecting societies".[123] Mr Fletcher from the Intellectual Property Office commented that one of the uses of ombudsmen was as a backstop to deal with issues of unfairness, "a catcher of the ball of last resort".[124] He considered that "there is scope there, but I would not use the word ombudsman but a smaller claims kind of question".[125]

121 "About the Copyright Tribunal", Intellectual Property Office website, www.ipo.gov.uk/ctribunal/ctribunal-about.htm

122 Q 84

123 Ev 20, para 6

124 Q 94

125 *Ibid.*

Copyright Small Claims Tribunal

62. As intellectual property claims can no longer be assigned to the Small Claims Court, the National Union of Journalists proposed the establishment of a Small Copyright Claims court. It pointed out that the copyright infringement cases which it dealt with were typically in the range of £200–£2,000. The costs of pursuing this size of case before the Copyright Tribunal "would almost certainly exceed the value of the claim".[126]

Mediation service

63. The Copyright Licensing Agency pointed out the Intellectual Property Office had established a mediation service and suggested that this could be extended to cover copyright disputes.[127] The mediation could serve two purposes: to provide mediation to parties in dispute; and to prevent references to the Copyright Tribunal for tactical advantage in negotiations. The Copyright Licensing Agency suggested that "parties wishing to launch a reference to the Tribunal should first seek to resolve the dispute through mediation. Currently there is no cost sanction against a claimant who shoots first and asks questions afterwards as there is in the Commercial Court and in civil litigation generally following the Woolf Reforms."[128] The Agency explained:

> Currently claimants can launch a reference—without any prior notice to the Respondent—as a negotiating ploy to apply pressure and to improve their bargaining position. Indeed this is specifically recognised in the Copyright Tribunal Rules where it states that it is aware that references are sometimes begun by parties simply to preserve their negotiating position. Given that only the users can launch a reference, this is deeply unfair and leads unnecessarily to the commencement of full scale litigation proceedings. Once started, legal proceedings acquire a momentum of their own which becomes increasingly difficult to stop.[129]

Licensing Agency

64. Universities UK preferred a recasting of the statutory framework for licensing for educational purposes, by establishing an Educational Licensing Agency (ELA). It argued that this would be a cost-effective solution, since the Agency would take over functions from existing collecting societies and so it would be funded—as they were—from a top-slice of the fee revenues. It envisaged the Agency with a Board including representatives of both users and rights-owners, as well as independent experts, which would be able to strike a "balance between rights of use and of remuneration, in a continuous and detailed way".[130]

126 Ev 48, paras 5.1–5.2

127 Ev 44, para 6.3

128 Ev 44, para 6.1

129 Ev 44, para 6.2

130 Ev 44, para 4

PPL's comments

65. Commenting on the ombudsman and mediation proposals, PPL said that it was not usually possible to:

> isolate a particular case so if, for instance, one hairdresser or a pub has a problem with PPL and says, "We do not want to pay the £52.50 a year to play music" it comes to PPL. Fine, that is a dispute between that hairdresser or that pub and the PPL. If a mediation service intervenes in that and comes to a decision, that would affect every other pub in the country. Although you might be thinking that you are dealing with an issue that is £100 actually it is about the entire sector and it is several hundreds of thousands or millions of pounds.[131]

66. The point PPL makes also applies to a Copyright Small Claims Court. It is a strong one and it describes how arrangements work at the moment as well as showing the nature of the obstacles to change. Our concern is that the inflexibility in the system prevents access to individuals and small businesses and institutions from making references to the Copyright Tribunal. We look to the Intellectual Property Office to find a solution. **We recommend that the Intellectual Property Office evaluate the options to provide access for small business and institutions and individuals that we describe in paragraphs 60 to 64 of our Report. We conclude that one of the tests against which any changes will be measured is whether the individual or the small business or institution can challenge and change charges for using copyright-protected material without costly litigation but also without incurring major consequences for people not a party to a particular action.**

131 Q 8

5 Orphan works

67. An orphan work is a copyrighted work where it is difficult or impossible to contact the copyright holder because the author is not known or, where the author is known, who represents them. The Libraries and Archives Copyright Alliance gave an example:

> A common example […] in libraries as well as archives […] is documentary photographs. The vast majority of documentary photographs have no identification of the author or the press agency or something of that sort; you simply have a photograph of a city street which lots of people want to print but there is no way of identifying the rightsholder.[132]

68. The British Academy explained that orphan works posed considerable difficulties for academic researchers in the humanities and social sciences, who were frequently unclear about the steps needed to comply with copyright requirements.[133] The problem is frustrating because the Academy believed that the majority of copyright works had little commercial value after a few years had elapsed from publication because the material was out of print, or sales were negligible or not significant. It found the situation "unsurprising, since if a copyright remains valuable the holder has a strong incentive to make him or herself known, while if the copyright has little value the holder has no real incentive even to respond to enquiries".[134]

69. The 2007 IPO Review recommended the Copyright Tribunal should be responsible for granting licences for the use of orphan works.[135] The Libraries and Archives Copyright Alliance expressed reservations:

> Given the significance of the recommendation […] we would have preferred the Review's consideration of the complex issues surrounding orphan works to have gone into greater depth and detail. Furthermore, the Report's recommendation seems incompatible with the Gowers Review's findings, since the former appears to favour just a licensing solution, whereas the latter favoured the exceptions solution.[136]

An exceptions solution would allow the publication of a work if the author could not be ascertained by reasonable enquiry. The Libraries and Archives Copyright Alliance pointed out that this approach was "considerably more cost-effective than the use of the Tribunal and an exception solution is the only one appropriate to unpublished works".[137] In contrast, the licensing solution favoured by the 2007 IPO Review presented:

> significant problems with regard to unpublished works. Firstly there is the issue of the duration of copyright in unpublished works in the UK (to 2039 at the earliest, no matter how old they are). Secondly because the issue of the large quantities of

132 Q 33

133 Ev 26, para 3

134 Ev 26, para 4

135 2007 IPO Review, para 12.8

136 Ev 18, para 5.1

137 Ev 19, para 5.3(ii)

> unpublished works. Thirdly the likelihood of a rights owner appearing is in most cases non-existent, so that the Tribunal would be building up a very substantial fund of fee income of benefit solely to the Exchequer.[138]

70. The Intellectual Property Office in its evidence to us accepted that that there was a "problem there to be addressed".[139] But Mr Fletcher from the Intellectual Property Office explained that if "we did anything nationally we would run the risk of it being overridden by later community law".[140] He said that the way forward was to work with EU. There was a lot of activity at the EU; there were working groups who were looking into how it might apply to different forms of copyright work. The Intellectual Property Office's "general feeling is that we should not jump on that until we know with a bit more clarity which way the EU process is going. My best guess perhaps is later this year, towards the end of the year, we might have some feeling on that and decide which way in the UK context we ought to move."[141] He added that the French Government, which would have the EU Presidency in the second half of 2008, wanted to concentrate on intellectual property which "may help to get the orphan works question further up the European agenda than might otherwise have been the case".[142]

71. The Gowers Review and the 2007 IPO Review do not agree on the treatment of orphan works. Academic institutions and researchers, for understandable and commendable reasons, do not want to run the risk of breaching copyright-protection. The Intellectual Property Office therefore needs to formulate a policy and to explain its approach to the negotiations on the issue taking place within the EU. **We recommend that in its response to this Report the Intellectual Property Office set out its policy on the treatment of orphan works and that, in particular, it explain whether it supports licensing of or exemptions for orphan works. We further recommend that, to give certainty to those to whom orphan works have caused difficulties, the Intellectual Property Office consider an interim solution based on the exception approach, pending the outcome of the EU's deliberations.**

138 Ev 19, para 5.3(i)

139 Q 72 [Mr Quilty]

140 Q 75 [Mr Fletcher]

141 Q 74

142 Q 75

6 Conclusions

72. **We are surprised that a tribunal headed by a judge, who does the work unpaid and in his spare time, assisted by a barrister paid £316 a day and two lay assessors with no relevant technical expertise, functions to the level that it does. Changes to the operation of the Copyright Tribunal should have been made in the 1980s and it is to no one's credit that nothing has been done for 20 years, particularly the Patent Office/ Intellectual Property Office. We have now reached the point where reform is long overdue and needs to be made expeditiously to meet the challenge of digital technology. We have high expectations of the Intellectual Property Office to implement a programme of major changes in the operation of the Copyright Tribunal.**

73. **The 2007 IPO Review of the Copyright Tribunal set out a list of changes, most of which have support from both users and rightsholders. The recommendations in the Review that give us most concern are those that add to the Copyright Tribunal's workload or could be perceived to compromise its impartiality. These need to be re-examined. The Government now not only needs to publish its response to the Review but also to set out clearly how it expects the system to operate, the volume of cases it expects the Copyright Tribunal to handle and the average time that a dissatisfied user or rightsholder can expect a case to take. It also needs to develop as a matter of urgency an affordable, alternative service that individuals and small businesses and institutions can use as well as a policy on orphan works. Given the increasing importance of intellectual property in the economy and the new challenges stacking up in this area, it is essential that serious attention be now paid to this rather neglected area of policy.**

Conclusions and recommendations

Importance of intellectual property to the UK economy

1. Given the value of the creative industries and the importance of intellectual property to the UK, we welcome the setting up of the Strategic Advisory Board for Intellectual Property and of an economics and evaluation unit within the Intellectual Property Office. (Paragraph 12)

Is the Copyright Tribunal restraining the rightsholders' monopoly?

2. The 2007 IPO Review of the Copyright Tribunal recommended that collecting societies as well as users have the right to make reference. We support this recommendation. In addition, we recommend that the Government implement this recommendation ahead of the others in the 2007 IPO Review. (Paragraph 21)

Complaints about the operation of the Copyright Tribunal

3. We are concerned that complaints about delays and costs at the Copyright Tribunal going back 20 years were not resolved by the Patent Office. We hold it (now operating as the Intellectual Property Office) responsible for this unacceptable failure. (Paragraph 25)

Intellectual Property Office Review of the Copyright Tribunal

4. To assist all those with an interest in the operation of the Copyright Tribunal, we recommend that the Intellectual Property Office set out how it expects the Copyright Tribunal to function, in particular whether it is expected to function as an adversarial, commercial court. (Paragraph 28)

5. We recommend that the rules under which the Copyright Tribunal operates be reviewed. (Paragraph 31)

6. We recommend that the post of Chairman of the Copyright Tribunal be a salaried post. (Paragraph 32)

7. We find it hard to understand why no action was taken on the Monopolies and Mergers Commission's 1988 recommendation that the lay members of the Copyright Tribunal be chosen on the basis of specific expertise. (Paragraph 36)

8. We recommend that lay members continue to be appointed to the Copyright Tribunal, but that future appointments be open, transparent and based on expertise that is relevant to the work of the Copyright Tribunal. (Paragraph 37)

9. We conclude that the administrative support and resources that the Intellectual Property Office currently provides to the Copyright Tribunal are wholly inadequate. We recommend that level of support and resources be reviewed as a matter of urgency. (Paragraph 40)

10. We share the concerns of those who have argued that placing a requirement on users to produce their own actuarial calculations and sampling figure risks adding to the burdens on users and also that it may add to the complexity to the proceedings in the Copyright Tribunal. We recommend that the IPO reconsider whether it is reasonable to impose such a requirement on users. (Paragraph 43)

11. We conclude that the 2007 IPO Review's recommendation that the Copyright Tribunal become active in formulating methodologies is problematic. The 2007 IPO Review failed to spell out what this work would entail, the degree of expertise and resources required or to consider whether such work would prejudice the Copyright Tribunal. We do not deny that the assistance proposed by the 2007 IPO Review may be valuable and we therefore recommend that the Intellectual Property Office consider an alternative to the Copyright Tribunal to provide the assistance. (Paragraph 46)

Case Management

12. While we expect that the streamlining and case management procedures that the 2007 IPO Review has recommended will achieve some improvement in the throughput of adjudications by the Copyright Tribunal, we recommend that the Intellectual Property Office and the Government examine other measures to increase the capacity of the Copyright Tribunal to handle a greater volume of references. (Paragraph 48)

13. We conclude that, while the 2007 IPO Review's recommendation that there should be a single, joint expert witness is superficially attractive, it may not work in practice. We invite the Intellectual Property Office in responding to this Report to explain how it will work. (Paragraph 50)

Departmental responsibility for the Copyright Tribunal

14. We recommend that responsibility for the Copyright Tribunal remain with the Intellectual Property Office. (Paragraph 54)

Access for small businesses, institutions and individuals

15. We conclude that the current arrangements unfairly exclude individuals and small businesses and institutions. We recommend the Government rectify this serious deficiency when it responds to the 2007 IPO Review of the Copyright Tribunal. Failure to provide access for individuals and small businesses and institutions casts doubt over the fairness of the operation of the licensing societies' monopoly. (Paragraph 58)

Arrangements to provide access

16. We recommend that the Intellectual Property Office evaluate the options to provide access for small business and institutions and individuals that we describe in paragraphs 60 to 64 of our Report. We conclude that one of the tests against which any changes will be measured is whether the individual or the small business or

institution can challenge and change charges for using copyright-protected material without costly litigation but also without incurring major consequences for people not a party to a particular action. (Paragraph 66)

Orphan works

17. We recommend that in its response to this Report the Intellectual Property Office set out its policy on the treatment of orphan works and that, in particular, it explain whether it supports licensing of or exemptions for orphan works. We further recommend that, to give certainty to those to whom orphan works have caused difficulties, the Intellectual Property Office consider an interim solution based on the exception approach, pending the outcome of the EU's deliberations. (Paragraph 71)

Conclusions

18. We are surprised that a tribunal headed by a judge, who does the work unpaid and in his spare time, assisted by a barrister paid £316 a day and two lay assessors with no relevant technical expertise, functions to the level that it does. Changes to the operation of the Copyright Tribunal should have been made in the 1980s and it is to no one's credit that nothing has been done for 20 years, particularly the Patent Office/ Intellectual Property Office. We have now reached the point where reform is long overdue and needs to be made expeditiously to meet the challenge of digital technology. We have high expectations of the Intellectual Property Office to implement a programme of major changes in the operation of the Copyright Tribunal. (Paragraph 72)

19. The 2007 IPO Review of the Copyright Tribunal set out a list of changes, most of which have support from both users and rightsholders. The recommendations in the Review that give us most concern are those that add to the Copyright Tribunal's workload or could be perceived to compromise its impartiality. These need to be re-examined. The Government now not only needs to publish its response to the Review but also to set out clearly how it expects the system to operate, the volume of cases it expects the Copyright Tribunal to handle and the average time that a dissatisfied user or rightsholder can expect a case to take. It also needs to develop as a matter of urgency an affordable, alternative service that individuals and small businesses and institutions can use as well as a policy on orphan works. Given the increasing importance of intellectual property in the economy and the new challenges stacking up in this area, it is essential that serious attention be now paid to this rather neglected area of policy. (Paragraph 73)

Formal Minutes

Monday 10 March 2008

Members present:

Mr Phil Willis, in the Chair

Mr Tim Boswell	Dr Brian Iddon
Mr Ian Cawsey	Mr Gordon Marsden
Dr Ian Gibson	Graham Stringer
Dr Evan Harris	Mr Rob Wilson

The Committee deliberated.

Draft Report (*The work and operation of the Copyright Tribunal*), proposed by Dr Ian Gibson, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 73 read and agreed to.

Summary agreed to.

Resolved, That the Report be the Second Report of the Committee to the House.

Ordered, That the Chairman make the Report to the House.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

Written evidence was ordered to be reported to the House for printing with the Report.

[Adjourned till Wednesday 12 March at 9.00am

Witnesses

Monday 28 January 2008

Page

Mr Richard Combes, Head of Rights and Licensing, Authors' Licensing and Collecting Society, **Mr Nigel Warburton,** Author, Authors' Licensing and Collecting Society, **Mr Dominic McGonigal,** Director of Government Relations, Phonographic Performance Limited, and **Mr Tim Padfield,** Chair, Libraries and Archives Copyright Alliance. Ev 1

His Honour Judge Fysh QC SC, Chairman of the Copyright Tribunal, **Mr Ian Fletcher,** Chief Executive, Intellectual Property Office, **Mr Edmund Quilty,** Copyright and IP Enforcement Director, Intellectual Property Office, and **Mr Andrew Layton,** Trade Marks and Designs Director, Intellectual Property Office. Ev 7

List of written evidence

List of Reports from the Committee during the current Parliament

Session 2007–08

First Report	UK Centre for Medical Research and Innovation	HC 185
First Special Report	The Funding of Science and Discovery Centres: Government Response to the Eleventh Report from the Science and Technology Committee, Session 2006–07	HC 214
Second Special Report	The Last Report: Government Response to the Science and Technology Committee's Thirteenth Report of Session 2006–07	HC 244

Oral evidence

Taken before the Innovation, Universities and Skills Committee (Sub-Committee on the Copyright Tribunal)

on Monday 28 January 2008

Members present

Dr Ian Gibson, in the Chair

Mr Tim Boswell	Dr Brian Iddon
Mr Ian Cawsey	Mr Phil Willis

Witnesses: **Mr Dominic McGonigal,** Director of Government Relations, Phonographic Performance Limited, **Mr Richard Combes,** Head of Rights and Licensing, Authors' Licensing and Collecting Society, **Mr Nigel Warburton,** Author, Authors' Licensing and Collecting Society and **Mr Tim Padfield,** Chair, Libraries and Archives Copyright Alliance, gave evidence.

Chairman: Thank you very much for coming to this Select Committee hearing. You will know the procedures, that we cross-question you, it is all recorded and everybody reads it. I think this is rather unique in a sense that you have never really been in front of a select committee that I am aware of in terms of the Copyright Tribunal. I may be wrong, but this is a good chance I think for you to put over some of your ideas when we question you. Before we start on questions we need to declare any interests. I chair the All Party Writers Group in the House.
Mr Boswell: I am Vice Chairman of the BBC Group and I am also involved with the Friends of the National Libraries.
Mr Cawsey: I am an officer of the All Party Music Group.

Q1 Chairman: Perhaps our witnesses would now introduce themselves.
Mr McGonigal: I am Dominic McGonigal; I am from PPL which is the licensing body for the record companies and artists.
Mr Combes: I am Richard Combes from ALCS which is the collecting society for writers.
Mr Warburton: I am Nigel Warburton, I am writer and I have also served on the board of ALCS and am currently on the board of CLA.
Mr Padfield: I am Tim Padfield. I am rather different from these gentlemen. My day job is at the National Archives where I advise on copyright but for this purpose I am the Chair of the Libraries and Archives Copyright Alliance which represents various bodies in the libraries and archives communities who deal with copyright.
Chairman: Thank you very much for coming here. Ian Cawsey will open up.

Q2 Mr Cawsey: Good afternoon gentlemen. I will start with a nice general question to open up with. Is the Copyright Tribunal operating in an effective manner? Is it ensuring that disputes are resolved quickly? If there are shortcomings in the system how serious are they?
Mr McGonigal: I am very happy to kick off if that is okay with my colleagues. I think there is a general recognition that the Copyright Tribunal was set up some time ago and actually things have changed in the intervening decades. As you will know the IP Office commissioned their own review of the Copyright Tribunal in response to a number of concerns from all sorts of stakeholders in the Tribunal and the reality now is that the copyright business, the creative economy, is a huge part of UK plc and is a major economic driver. The issues that the Copyright Tribunal are looking at have huge significance. What was set up several decades ago is generally recognised not to be necessarily right for today where there are significant commercial interests at stake. The way we view it is very much a party versus party arbitration system rather than a tribunal and indeed the IP Office review looked at it in the same way and came up with a number of recommendations to turn it into a proper court like function that can resolve commercial disputes when they arise.
Mr Combes: I think that Dominic has already explained that it is providing a different function than that originally envisaged when it was first conceived. In terms of the question as to whether it is operating effectively, the test for a body such as this which has to intervene and arbitrate in disputed matters is: is it operating fairly? I think a lot of the recommendations in the Intellectual Property Office report were certainly aimed at rebalancing the function provided by the Tribunal. In particular a recommendation that we would raise in that regard is the recommendation that licensing bodies themselves, in the introduction of new licences or new schemes, would have the opportunity to approach the Tribunal themselves rather than being solely a right for the user. I think that speaks very much to the first recommendation from the report which spoke of the need to give balance to the way the Tribunal approaches disputes and also to give each party an even hand and even and fair chance in the process of those disputes.
Mr Warburton: As a writer my main concern is that fair payment for use and anything which is expensive and time consuming within the process could

potentially affect the fairness of that payment when it comes through to a writer. I thoroughly support the recommendations from the IPO Review which seems to be moving in the direction of streamlining the operations of the Tribunal.

Mr Padfield: I suppose, not surprisingly, I have to differ from my colleagues to a certain extent. I have to agree that a body to which one side can appeal but not the other does seem unfair, but on the other hand I am not at all convinced about the idea of making it seem more and more like a court. We already have quite a lot of courts dealing with copyright issues. I would be much happier to see less formality rather than more. As it is the Copyright Tribunal is expensive. The Universities UK case cost the university side, as I understand it, something like £800,000 and that seems to be a lot of money for something which has not even gone to court. It also took 10 days of hearing so quite a lot of time as well. I am not sure that more formality is required; on the whole I would prefer to see less.

Q3 Mr Cawsey: Do you mean something of a mediation type?

Mr Padfield: Something of that sort or, interestingly, the possibility perhaps of an ombudsman to deal with questions between parties or complaints by one party or the other. That might be a more attractive solution.

Q4 Mr Cawsey: Is there any other support for the idea of a mediation or ombudsman type service?

Mr Combes: I think as a cost cutting exercise and a process-simplifying measure, arbitration and mediation available at a reasonable level before the final recourse to a full tribunal hearing is certainly something that has merit in terms of streamlining the process before the referral itself.

Mr McGonigal: One of the important recommendations from the IP Office Report was the introduction of civil procedure rules and that, I think, would streamline a lot of the cases and bring in active case management. Dealing with some of the points from Tim Padfield, active case management would get rid of any frivolous claims at an early stage and would also ensure that there was a speedier process to resolution with all parties providing relevant information rather than everything just in case it comes up in the hearing.

Q5 Mr Cawsey: Can you give us an example of how the shortcomings of the Copyright Tribunal are affecting creative artists in this country?

Mr Combes: A lot of the recommendations on streamlining the current process of how the Tribunal work to a certain extent speaks to how the organisations that represent individual creators are placed to represent the interests of their members—be it writers, composers, artists—at the Tribunal itself. It is clearly a very costly process, a heavy legalistic mechanism. To a certain extent it is almost impossible for an individual creator to use that facility and are therefore reliant on their representative bodies, be it collecting societies who are representing them through licensing. Even then those bodies are generally not for profit organisations run for the purpose of their individual members and are not necessarily in the best position to benefit from an overly costly process. Certainly in the more recent referrals that we have seen the parties who have brought references to the Tribunal are large international media organisations who are obviously well placed to use the process as it currently stands. A lot of the measures in the IPO Report aimed at simplifying and reducing costs and reducing process would indirectly benefit the individual creator through the greater abilities that it gives their representative bodies.

Q6 Mr Cawsey: Tim, you did not seem to be agreeing with that.

Mr Padfield: I entirely agree with the thrust. The intention is to reduce the costs and to make it simpler but I cannot see how making it more like a court will do that. I would say that the courts are even more expensive and take longer. Certainly going to court is not a pleasant process and I would say that people would be less inclined to go if it looks more and more like a court.

Q7 Chairman: Richard, in passing you raised the idea of the ombudsman. In fact it was SCONUL who also supported very strongly the idea of an ombudsman. Do you think putting that process in so that there is step before getting to the Tribunal, would in fact speed up the process and give justice, particularly to what I would call the individual performer who seems to be totally left out in this unless they are part of a larger collecting society?

Mr Combes: I think the Intellectual Property Office Mediation Service is aimed at that second tier down from the full tribunal level. I think that is probably a question of resource and experience. My understanding to date is that that has been largely concerned with other intellectual property matters such as patent and trademark disputes. If it is actually to fulfil a function in a tier below the Tribunal perhaps that needs greater resource to be able to take on that work that is currently addressed by the tribunal process.

Q8 Mr Boswell: Just a simple point to clarify in my own mind—you will appreciate we are lay people in this—the Tribunal issues are about the fair licensing of rights rather than are there evidential issues about the existence or otherwise of rights and their attribution to particular persons. When we discuss ombudsmen or mediation or whatever, there is a sort of intermediate tier which says, "This is a pragmatic solution; it would be sensible for all parties and reasonably fair to adopt it", which might not have too much relevance to the law and might not even require legal intervention. If you are in a head-to-head about who is entitled to what and/or whether the terms of a particular licence are reasonable, it does tend to end up with lawyers and I presume that nearly all the work in the Tribunal is actually conducted by lawyers rather than intelligent lay people other than the lay members of the Tribunal.

Mr McGonigal: I think that is a very important question because the reality is that the Tribunal is absolutely dealing with those commercial disputes. The Tribunal gets involved when the two parties cannot agree, for whatever reason, on what the price is, what the terms of the licence are, how much you will be paid for music or for photocopying or whatever it is. Dealing very quickly with the mediation ombudsman point, you cannot usually isolate a particular case so if, for instance, one hairdresser or a pub has a problem with PPL and says, "We do not want to pay the £52.50 a year to play music" it comes to PPL. Fine, that is a dispute between that hairdresser or that pub and the PPL. If a mediation service intervenes in that and comes to a decision, that would affect every other pub in the country. Although you might be thinking that you are dealing with an issue that is £100 actually it is about the entire sector and it is several hundreds of thousands or millions of pounds.

Q9 Mr Boswell: You do need lawyers for that.
Mr McGonigal: Yes, that is what happens.

Q10 Mr Cawsey: Nigel, do you have an example of how creative artists in the country may be adversely affected by the system?
Mr Warburton: Clearly any delay in the process and mounting costs are effectively taking money which might otherwise go to creative artists, as we have already seen in lawyers' fees and increased use of executive time on the licensing organisation's managerial side. I do not have a specific example but generically there is a problem whenever there is a delay in payment made.

Q11 Mr Cawsey: Dominic, in the evidence from PPL you seem to cast some doubt on the fairness of the Copyright Tribunal, implying that copyright users are given the benefit of the doubt. Is that a fair understanding of what you were saying? Are Tribunal hearings fair?
Mr McGonigal: I think it goes back to when the Tribunal was set up. The mere fact that it is called a Tribunal implies there was a feeling that collecting societies were monopolies, they needed to be controlled in some way and the poor little user needed somebody to look after them. In fact the cases that come before the Tribunal are between large parties, between a licensing society like PPL or CLA and a big organisation be it a broadcaster or the British Beer and Pubs Association or BEDA representing the entire nightclub industry. They are major parties that are in a commercial dispute. It is no longer the situation where one party needs to be controlled because it has a negotiating advantage, it has a balance of power in the bargaining situation. That is why, to us, it is a straightforward commercial dispute. It is about two parties that have not been able to agree and you need some kind of a court process to work out what is a fair price for that use of copyright material.
Mr Padfield: I would say that that is actually true, that the Tribunal does tend to hear the big cases, which is unfortunate because it means the small cases tend not to be heard; people are put off bringing the small cases because they do not feel they can afford or they do not dare.

Q12 Chairman: What happens to them? Do they just disappear into the ether?
Mr Padfield: That is right. I might mention a specific example. Recently there was a significant dispute—the rights and wrongs of which I will not go into—between the CLA and NHS over whether the NHS should have a licence and a licence was eventually taken out. The CLA seemed to my members to be putting forward a view of copyright law which was its own interpretation of the law but which was not necessarily what the law said. I am not saying it was not correct but it was its own interpretation of the law and there was no means of someone else saying what their interpretation was. They were simply writing to librarians in this case saying, "This is the law; this is what research means in law" and it was simply their interpretation of what research means. There is no means of challenging that.

Q13 Mr Cawsey: Between you you have all articulated a lot of problems that have grown up over the years with this system. Why do you think it has proved so difficult in the last 20 years to actually effect a reform of the Copyright Tribunal?
Mr Padfield: I do not think anybody has tried.

Q14 Mr Cawsey: You think it has just gone on for no better reason than that?
Mr Padfield: I think so.
Mr McGonigal: I think that until last year nobody really looked at it and now the IP Office has done the report which is a very thorough report and went back through every single case that the Tribunal has ever looked at, all the evidence, all the judgments et cetera. I think this is really the first time that has been done.

Q15 Chairman: From a lot of the evidence we have actually received in this inquiry—I confess to being a novice in this particular area so forgive me if I ask a rather naïve question—it does look like the collecting societies hold a monopoly in this area. They are the people who really have the power and that is what needs to be challenged. You seem to be rather worried about that challenge. Is that right?
Mr McGonigal: I am not worried about any challenges. You are absolutely right, we have a monopoly and there is a very good reason for that. It is because both the users and the rightsholders want us to have a monopoly. We are a straightforward service organisation aggregating the rights so that any music user can get a single licence covering the entire repertoire. In our case the entire repertoire is sound recordings. The pub we referred to earlier has to get one licence to play music for the entire year and that is the entire catalogue, rather than three and a half thousand licences from three and half thousand record companies.

Q16 Chairman: Once you have agreed that in fact you are a powerful monopoly and that is your specific role—I understand that; it is not a criticism, it is just a statement of fact which you have agreed with—it is very difficult to know how in fact you move this on. My second question is really about the move over the last 20 years but particularly over the last five years into a totally different digital world that we are now operating in. All these regulations were set up in a by-gone age and you seem to be defending the past rather than in fact creating a platform for the future. There seem to be two distinct positions, one that we extend the copyright arrangements even more draconically into the whole business of digital media in its broadest sense, or we actually now have a terrific change, we take the print's view of saying "Let us do something totally different in terms of actually creating one of the most hugely creative and liberating frameworks". Where do you all stand on that digital divide?

Mr McGonigal: Can I take one step back on that? If you start from the basis that actually musicians or authors or actors or anyone else should be paid for what they are doing, you are absolutely right that in the digital age that presents us with a real challenge. There is no longer live performance where the performer turns up and gets paid for that performance. They make a recording, that recording gets used throughout the world by all sorts of people that that performer has never seen and never will see. If you start from the basis that those performers should be paid then you need some kind of mechanism for doing that. I think actually the role of the collective licensing bodies is going to become more important in the digital age. Let me give one specific example within the PPL arena. Within our environment we used to have two performer distribution societies called PAMRA and AURA and that was complicating things. It was making it difficult for the performers, et cetera, et cetera. We decided to merge those with the agreement of all the performers and indeed the record companies. It was decided that this was the way forward, bring them all together, create a single body within PPL for all 47,000 performers and all the record companies. We did that: we went to the Office of Fair Trading and told them about this, put it forward as a merger, they did a few months of investigation when they actually talked to all sorts of people (we kept getting phone calls saying they had been in touch) and they gave a complete green light, no conditions whatsoever, to effectively the creation of a bigger monopoly because it has all the economic advantages and efficiencies both for the rightsholders and for the users.

Mr Warburton: From the point of view of creators I do not think most of us are concerned about what is in the black box as long as it delivers adequate incentive for us to carry on creating. It is important that a system which works and which could be transferred to the digital age as we now see it is not abandoned for the sake of an idea which may not be as effective as that in terms of delivering incentives to creators. My concern, particularly in a fast changing environment where almost monthly some new device or new potential evolves for communicating written, spoken, visual images and so on, would be that we do not abandon a system that seems to be working, that actually does deliver incentives to creative artists for the sake of the hope that we can come up with a modern solution which may be past its sell by date within months.

Q17 Chairman: When artists like Lily Allen start recording in a basement flat and putting their stuff out on the net, they were doing it as creative performers. It is only afterwards that the business takes over. The issue I am interested in is how in fact do we maintain this high level of creativity within a system which seems to be quite frankly going in the opposite direction?

Mr Warburton: ALCS did commission some research on incomes of writers and in the 24 to 35 year old age group the typical earnings of a writer was £5000 a year which is, by any standards, inadequate. This means that any loss of earnings or any expectations that they could work for less than that could actually undermine the drive to creativity. Because some people can afford to produce highly creative work in a new medium does not mean that everybody should be obliged to do that. If you were to have a vibrant creative community of writers there needs to be some possibility of earning money from writing directly.

Mr Padfield: I have a lot of sympathy for the need to provide some recompense to writers; they are entitled to it, they have created these works. There are a lot of difficulties, though. Certainly in the library community we find that collecting societies in general, if I may put it in that way, have been reluctant or perhaps their members have been reluctant to allow digital licensing because they are nervous, as we understand it, they are scared of what the consequences are. However, so far as we can see it it is inevitable that we are going to be moving in that direction.

Q18 Mr Boswell: Am I not right in saying that there is a problem about the licensing of digital rights in relation, for example, to a conversion for people with visual impairment. Is that now resolved?

Mr Padfield: There is now a special exception for visually impaired.

Q19 Mr Boswell: That rings a bell but it had to be negotiated and eventually legislated for.

Mr Padfield: That is right.

Q20 Chairman: Richard, would you go along with Dominic to some extent, would you?

Mr Combes: To address Phil's original point about how we move from an analogue age into a digital based age and move the structures that worked in one era into the next, it is probably worth noting that this is not taking place in terms of copyright policies in a vacuum. There is a detailed report in the last 18 months, the *Gowers Review of Intellectual Property* which, to a certain extent, has looked at addressing areas where there is now a need for the existing structures of collective licensing in the case of the

type of fees that ALCS receive for writers, a large portion of this comes from the CLA and Educational Recording Agency schemes—that are designed to find a way of making work available to students in education in return for a fair fee. Of course the repertoire of work that is available is incredibly broad and offers the facility of a licence at a single point. What Gowers has done has really put the onus on licensing societies and users—in this case education—to find ways of crossing over from the previous models into delivering so-called e-learning solutions so that copies of works are now available on school course intranets and on websites for students. The thrust of that really is developing the existing structures rather than saying that technology has overtaken us and there is nothing we can do about it. I think that there are initiatives in train and now the onus is on the existing licensing partners to actually work those through and deliver them.

Q21 Dr Iddon: I think there were 30 recommendations in the IPO *2007 Review of the Copyright Tribunal*; I just want to examine one or two of those. The first one is that the reasoning behind licences and tariffs should be clearly shown and "this must be based on hard facts and figures, actuarial calculations and projections". If fees are based on what the market will bear, do you believe that this recommendation can be achieved? In other words, is it capable of real implementation?
Mr McGonigal: Yes. In all our negotiations we absolutely take that approach. What you are trying to do to find the value—in our case of music—to that business, whether it is a pub or a broadcaster. It is no accident that most of the commercial radio stations play music. In fact about 70 per cent of their programming is music. Ofcom, when they were looking at radio, wanted to find out what people liked about radio and number one was music; that is the main reason for choosing a particular station and presenters come in at number two. Using choice analysis and economic modelling you can actually come up with at least value ranges for the music element within a lot of businesses. A couple of years ago it was very interesting when we revised all our tariffs for the pubs playing background music. There is a very famous pub chain which does not play music but all the others play music and they play it for a very good reason. The publican had a front page outburst at PPL putting up its fees and then had quotes from three landlords, all of which basically said, "This is outrageous, how can they charge £300 for the music; if we turn the music off we'd have no customers". I think that is an illustration of the value.

Q22 Chairman: It is cheap at the price.
Mr McGonigal: Yes, that is £300 a year. That is less than £1 a day. The job of the Tribunal then is if there is a dispute over whether it should be £300 or £350 and the Tribunal has to look at where the value is and where to split that effectively between the creators and the users.

Q23 Dr Iddon: The Review also envisaged that the Copyright Tribunal, with the extra resources the Review recommended, should take an active part in formulating criteria for the objectification of the criteria for the conditions of licensing schemes or licences. With the two staff recommended by the Review, is that possible? What level of expertise would those staff require?
Mr McGonigal: We agreed with this recommendation with an important qualification that the Tribunal should look at those factors that were relevant in a particular case, but we did not think it was appropriate—or a good use of public money actually—for the Tribunal to look at every single licensing scheme that might come up. The reality is that we are licensing several hundred thousand sites across a whole range of different tariffs for different types of businesses using music in a different context and we have a team of rights negotiators who work on that day in day out. Most of them never go anywhere near the Copyright Tribunal. It is really only in those cases where there is a Tribunal in the offing where it would be useful for the Tribunal to say those kinds of factors they were looking at for a valuation.
Mr Combes: The Review referred to building up a bank of knowledge—and clearly that would not be something that could not happen instantly—but once these two additional staff members were in place I think it would certainly be valuable to understand the differences between the types of collective licensing schemes that are available and likely to become the subject of references to the Tribunal. A rolling level of expertise would be valuable in that regard.

Q24 Dr Iddon: Both the rightsholders and the users, of course, have opinions, but the 2007 Review is recommending the use of only one single expert unless there are compelling reasons not to go down that route. Is that reasonable?
Mr Padfield: It would be difficult to find one, to find an expert who is able and willing to be expert for both sides,

Q25 Dr Iddon: Could you elaborate on what the real problem is behind that?
Mr Padfield: I would say that part of the problem is the interpretation of the law. The statute involves interpretation; it lays down areas where there is protection and areas where there are exceptions and limitations but it does not say precisely what the boundaries of those areas are. For example, a user may use material for non-commercial research but it does not say what non-commercial research is and that is a matter for interpretation and ultimately, when it comes to it, only the court can decide whether what is being done is research in this particular context at this particular time.

Q26 Dr Iddon: In the case of a dispute between rightsholders and users, where both sides would want to produce an expert witness and they were

available, do you think that is feasible under this recommendation? Would the Tribunal accept that? Is that a compelling reason?
Mr McGonigal: We considered this and our view was that it is desirable to have a single expert witness in the case of a specific point. That really comes back to the case management that if the judge or whoever it is hearing the case has a specific point they want to look at and a single expert is appointed for that, then we think that could work. However, you are absolutely right that in the lead up to the Tribunal—you have to remember there is an awful lot goes on before anything reaches the Tribunal—there will probably be months and months of negotiation, both sides would have prepared their own view of the economics of the situation and the financial value of what they are dealing with and both sides would want to put that to the Tribunal.

Q27 Chairman: Why does it have to be an expert? Why not a lay assessor of some kind? A man or woman off the street who has a brain and knows a bit of ethics and morality when they see it?
Mr Padfield: Or indeed a lay member of the Tribunal. I sympathise with that view; I find it odd that the Review has recommended removing the lay members.
Chairman: I think that as soon as you say "expert" it sounds like bias in some sense.

Q28 Mr Boswell: I would like to add something here too but I ought to declare the interest as an ex-lay member—a specialist lay member—of a tribunal which I left some 25 years ago, not in this field. I would like to hear the Panel's view as to the existence of laity, they are going to be pretty expert by the time they have had a couple of hearings. Does that add value? Is that the best way of adding expert value or, as it were, a degree of independence from this specifically legal input? Does it complicate things by making it even more ponderous? I think that may be one of the factors behind the recommendations to move it.
Mr Padfield: I cannot pretend to have any experience of lay members, but I would have thought it would give you the experience of a practitioner, a person who is actually or potentially involved at an active level. I hate to say that judges are aloof but they cannot know the details of what life is like at a practical level.

Q29 Mr Boswell: Would you like to say a work or two about the interaction between the Tribunal recommendation and the Department of Justice? There is the Intellectual Property Office who are sort of the sponsors and oddly enough the tribunal I was on was actually sponsored by a government department and administered by it. The move, which I suspect may have a tidiness in recommendation to move to the Department of Justice where most tribunals are in modern conditions, is that sensible? If so, could the Tribunal continue to be resourced by the IPO and how would it work?
Mr McGonigal: We have certainly been recommending a move just as a matter of propriety to separate the policy making functions of the IP Office—which is obviously a very important role—from the court function of the Tribunal.

Q30 Mr Boswell: Of course the budget would transfer as well.
Mr McGonigal: I would presume so.

Q31 Mr Boswell: Can I ask something about orphan works? The one thing I really want to get out of this is the handle on orphan works. I think it would be terribly handy if you could give us an example of an orphan work and tell us the sort of operational difficulties that arise? Are we talking mainly literary copy or conceivably recordings? That is one thing. What is the best solution, a licensing system or an exception solution? If it is going to be exception who is going to handle it? If you are going around licensing people by exception as it were, do you have a chance of recovering some resource from that as against going to the author? If there is an orphan could you have a system whereby you collected fees for the exceptional licences and you paid them either to persons when they were able assert their rights which they could not initially, and/or to help run the system?
Mr Warburton: I think there is a prior question of what exactly an orphan work is, exactly what process has been undergone before it is declared an orphan. A suspicion that a work is orphaned should not be enough.

Q32 Mr Boswell: To put it another way, if somebody is a publisher and not the author, how on earth are they going to know? Is this an orphan work, we do not know? Is it Anon who has written it or is someone under a pseudonym? Does it actually mean you are stopped from publishing quite a good piece of literature or music because you do not know who it is and you might be attacked if you did?
Mr Padfield: I would suggest that there are some categories of work where you might almost say it is obvious they are orphan works. If your grandmother had written to the Department of Health 60 years ago and that letter survived, that is a copyright work. I think it might be difficult to identify the owner of the rights in your grandmother's letter. Speaking as an archivist, there are record offices round the country with hundreds of thousands of works of that sort, almost all of which are orphan works effectively when you look at them.

Q33 Mr Boswell: Does that give rise to any practical difficulties?
Mr Padfield: Absolutely. I can give one other very common example which is true in libraries as well as archives, that is documentary photographs. The vast majority of documentary photographs have no identification of the author or the press agency or something of that sort; you simply have a

photograph of a city street which lots of people want to print but there is no way of identifying the rightsholder.

Q34 Dr Iddon: Does that mean that there are pots of money lying around that have not been transferred to the copyright owners? Have you got bank accounts with unclaimed money in them?
Mr Combes: Part of the process of a society such as ours giving a broad mandate to the licensing agencies and giving, as I described earlier, a blanket mandate for the broadest possible repertoire, to a certain extent we are giving a mandate on behalf of all writers of works who are not explicitly excluded from the scheme. The challenge that we have before us then is having received information that a certain work has been subject to a licensed act such as copying within an institution, if they are not already part of the organisation—we have 60,000 writers on our database—then we do have dedicated staff who put in train a process of tracing that member. At any given time certain sums may be unattached to a particular writer, although it is part of the function of a collecting society to do the necessary research to ensure that they are paid.

Q35 Mr Boswell: If they are never claimed what happens to them?
Mr Combes: To a certain extent, because we are a society of members, our ultimate responsibility in setting policy for anything and particularly something as serious as dealing with money, is always a matter for our members. We are governed in terms of distribution rules and distribution policy by the writers we represent so if we were to take a decision to apply money for a course for writers, for example, then clearly that would be something that the executives of the organisation would take a view on taking out to the membership.

Q36 Mr Boswell: Just to be clear, if you have not actually been able to pay it out because you do not know who it is, the income has arisen and it is then in your reserves and you might be able to use a discretion on behalf of your known members.
Mr Combes: Subject to it being a prudent use as agreed by our members.

Q37 Chairman: Are places like Kew Gardens full of material like this?
Mr Padfield: Yes, there are hundreds of thousands of such works. May I just answer one question which you raised as to whether it should be a licensing or exception solution, my answer would be both. In many cases there will be a licensing solution; libraries and archives would certainly welcome that.

Q38 Chairman: If I go to Kew Gardens to look at some drawing of some scientific thing I would have to pay for it; I would have to pay for looking at it.
Mr Padfield: You have to pay to get a copy of it from the archives but if you want to publish it you would probably have to go to DACS (Design and Artist Copyright Society) to get a licence to publish it.

Q39 Chairman: Who fixes the fee?
Mr Padfield: DACS does. The difficulty—which is why I say the answer is both—is that there are many types of work where there is no society to represent the writer, like your grandmother; there is no-one to represent the author of an unpublished letter.

Q40 Chairman: Is there a time limit?
Mr Padfield: Ultimately the time limit is the expiry of copyright, but if they are unpublished they are in copyright until 2039 at the earliest, which is a bizarre aspect of our copyright law[1].
Chairman: Thank you all very, very much indeed for coming along and confusing us slightly more but also clarifying many issues.

Witnesses: **His Honour Judge Fysh QC,** Chairman, Copyright Tribunal, **Mr Ian Fletcher,** Chief Executive, **Mr Edmund Quilty,** Copyright and IP Enforcement Director and **Mr Andrew Layton,** Trade Marks and Designs Director, Intellectual Property Office, gave evidence.

Q41 Chairman: Thank you very, very indeed for coming along. I think you were here for the first part so you have seen the formalities of the whole situation; you are very welcome to say what you like. I will ask you first of all to introduce yourselves.

His Honour Judge Fysh: My name is Michael Fysh. I am the Judge of the Patents County Court for England and Wales. I have a science background but, like all the patents judges, we regard ourselves rather as failed scientists, nonetheless we do our best. I am also Chairman, of course, of the Copyright Tribunal, a job that I have had for just over a year now. I have had a number of cases, one major case which might interest the Committee is the Downloading Case which yielded a decision of some 70 or 80 pages and that was delivered at the end of last year. I have a couple of cases sub judice and one of them affects one of the sections which is very much part of the discussion.
Mr Fletcher: I am Ian Fletcher; I am the Chief Executive of the Intellectual Property Office.
Mr Quilty: I am Edmund Quilty; I am Director of Copyright and Enforcement in the Intellectual Property Office.
Mr Layton: I am Andrew Layton; I am Director of Trade Marks and Designs in the Intellectual Property Office.

[1] *Note from the witness*: Until the passing of the Copyright Designs and Patents Act 1988, unpublished literary works were protected indefinitely. That indefinite protection was ended by the Act, but not until 50 years after it came into force in 1989. Currently therefore an unpublished literary work, such as a letter or a diary or a will, of any date is protected by copyright until 2039 at the earliest. From then on such works are protected for the standard term of the life of the author plus 70 years. The application of the standard term to all unpublished works would hugely reduce the quantity of orphan works at a stroke.

Q42 Chairman: Thank you very much. Let me lead off with the first question about the Copyright Tribunal operating under rules which were described in the IOP Report as "pernickety, repetitious, at times otiose and restrictive". Did you write that?

His Honour Judge Fysh: No, I did not; I disagreed with it. We have a judge's report which you may have seen. I was asked by the Chancellor and Lord Justice Jacob and a few other judges to take their opinions and to write not in any way a counter-blast but a report of our own. The rules have evolved over the years. My predecessors and the deputy chairmen have worked on these rules—I worked on the last lot before I actually took over—and they have, like other tribunal rules (for example the Asylum and Immigration Appeals Tribunal with whom I share a court building), evolved specifically to cater for the needs and aspirations of those who are our punters and our clients. It may appear pernickety in some ways in detail; they undergo constant revision; we look at them, the deputy chairman and I, and we tweak them and improve them as we go along. I do not agree that they are so characterised.

Q43 Mr Boswell: Could you just comment on any difficulty in transferring the formal jurisdictional sponsorship of your Tribunal to the Department of Justice? Clearly there is an important input and I think there has been a centralisation of most tribunals. There is no difficulty in that that you see provided the budget transfers with it.

His Honour Judge Fysh: I see no immediate difficulty but historically this Tribunal has always been different. We have always been with the Patent Office for historical reasons and I think frankly that is the way we would like to stay.

Mr Fletcher: I think the history of this is that the Copyright Tribunal was looked at as part of the package of reforms or the package of work that led up to the tribunal reforms in 2003 and it was seen as a tribunal in those days which dealt with a specialist jurisdiction and it dealt with cases, as we were hearing before, where the parties were generally representative bodies with UK-wide coverage and a good level of representation. As Judge Fysh has said, resources were provided by the Patent Office, as then was, and there was a sense that this was not a problem that needed to be fixed.

Mr Quilty: This is not a question with a yes or a no answer; there is no right answer. There will obviously be some reasons you could develop for moving it and there are other reasons why it stays where it is. I do not see there is anyone making a critically compelling argument for moving it now.

Q44 Chairman: Somebody in your organisation made those comments about it being pernickety, otiose and restrictive; who was it and why? Do they stand by it?

Mr Layton: I think those comments were written by the two inter-parties hearing officers. They are hearing officers in the Trade Marks Tribunal who were commissioned to review the operations of the Copyright Tribunal. I think what they were talking about there were the rules that underpin the Tribunal. The point I would like to make is, as Judge Fysh has said, the rules are subject to incremental change and have been since 1988. They have not prevented the operation of the Tribunal but, as with all legislation, it is a good idea to subject them to regular review to ensure that they remain fit for purpose. I think a number of areas were identified during the review where the rules perhaps were not fit for purpose and could be tidied up. We would support a review of the rules.

Q45 Chairman: Do you think the Copyright Tribunal hearings are in general fair or do they seem biased in side of one favour rather than the other? Judge Fysh, you obviously think it is fair.

His Honour Judge Fysh: Certainly, sir. I noticed that and reject completely the notion that there is bias. I had never heard such a complaint and I did appear before the Tribunal as a barrister. I do not know where it came from.

Q46 Chairman: Where did it come from?

Mr Layton: I do not think anyone is saying that the Tribunal is unfair in our reports. What they are seeking to preserve is the balance of the Tribunal and they came up with a number of recommendations that they thought would help do that.

His Honour Judge Fysh: The origin of this was, because the references are made in the way they are, the referee was always looked upon as the bully, in other words the collecting societies were felt to be the cause of all the trouble and hence we had to redress it. I think that is where it started, but I have never heard of a complaint in action of the Tribunal being unfair.

Q47 Chairman: So you were pretty incandescent when you saw it, were you?

His Honour Judge Fysh: I thought it was wrong.

Mr Fletcher: I think there are two or three separate things here. The Review that was published in 2007 looked at the Tribunal's rules and, as you have heard, that has triggered a debate about what those rules ought to be and Judge Fysh's own contribution is absolutely central to that. Where we have got to is that there is also a wider question about the scope of what the Tribunal does which is quite significant as we look at the relevance in keeping the copyright framework of the UK up to date.

Q48 Chairman: What is the record of the Tribunal? Can you give you give us some quantitative idea of what happens? How many cases have there been since time immemorial and what has happened to them?

Mr Layton: Since 1988 there have been 106 references to the Tribunal. A case might involve, as I understand it, more than one reference, but there have been 106 references. Ninety-five of those references have been dealt with in one way or another and 11 references are still outstanding. Of the 95 dealt with, 44 were withdrawn, 28 were

resolved after a hearing, 14 were settled before a hearing, eight were dismissed and one was struck out.

Q49 Chairman: Are there any waiting in limbo?
Mr Layton: There are 11 outstanding cases.

Q50 Chairman: How long have they been outstanding?
Mr Layton: I do not have the detail for that but we can send it to you.

Q51 Chairman: Weeks? Days? Hours?
Mr Layton: I cannot say.
His Honour Judge Fysh: I am adjudicating one that started a year and a half to two years ago; I am writing the judgment for it now. There are a couple that are sitting on my desk that are at the evidence stage and they are moving along, albeit somewhat slowly.

Q52 Chairman: What is it like being Chairman of this Tribunal? It is just a side job really; it takes a lot of time, you do not get paid for it.
His Honour Judge Fysh: I do not get paid for it, no.

Q53 Chairman: Why do you do it then?
His Honour Judge Fysh: Because my life has been in intellectual property and I actually enjoy adjudicating these disputes. I find it intellectually stimulating—those are the usual reasons—and I do most of this work in my spare time.

Q54 Chairman: That seems very rare for the world we live in.
His Honour Judge Fysh: A busy court like my Patents County Court takes most of my time.

Q55 Chairman: I have to say I am getting incandescent with frustration here, Judge Fysh. There was a review of the organisation 12 months ago which, in fact, made swingeing criticisms of the organisation and said an awful lot of things had to happen. You basically said to us in evidence that all is absolutely perfect; that is how I sum up what you said. There are cases that have been standing for at least three years without a decision; that seems to be inefficient to put it mildly. Out of 106 cases that Mr Layton said had actually come to the Tribunal only 20 have actually had a decision. There have been 15 directions and there are 71 where either people have withdrawn them out of sheer frustration or indeed there has been nothing happening at all. That is a record which I would not like to be proud of.
His Honour Judge Fysh: With great respect that is simply untrue and wrong. They have not been withdrawn, to take one point, out of sheer frustration; there are complex machinations going on between the users of music and other intellectual property rights and the big organisations, the collecting societies, of which we only see the tip of iceberg. They are complex, on-going discussions involving lots of people and lots of interests. We, in the Tribunal, get given a fait accompli. The references have been withdrawn. An order is made; I get presented with the order drafted by the parties, "Would you kindly put your moniker on the top" and I do. It is not out of sheer frustration. Yes, it takes a long time but you must appreciate, with great respect, that we are seeing here the combination of the British common law legal process coupling, if you like, with this discipline of copyright IP adjudication. I have to abide by the common law system. If I make an order that evidence has to be delivered within six weeks and the parties agree that they cannot in due course possibly meet this and they want six months—which has happened—then that is the way it is. The evidence in my Downloading Case was over three metres high; this is an enormous amount of work. I certainly push them on. We have case management conferences, as we do in the court; I push people on, I try to put limits down. They miss the limits, we come back again.

Q56 Chairman: I always hear this from the legal profession, with the greatest of respect; there is always a reason why things cannot move more speedily. Surely that is your job as the Chairman of the Tribunal to make sure they do move quickly. We do not have a case that we had with T-Mobile where 15 parties were involved in a relatively simple case; 20 days of witnesses were brought before the Tribunal. That is alright for big companies like T-Mobile, but for the small person actually coming to the Tribunal it just simply gets squashed aside. I would jump in the Thames.
His Honour Judge Fysh: I agree with you; it can be devastating for a small person. I had a funeral parlour owner who telephoned me recently saying he had been presented with a bill for playing no doubt Rachmaninov or something suitable in his parlour; he could not possibly pay it and what was he to do. I explained to him about how you made a reference and so on. He asked how much that would cost and you can imagine his reaction. I have full sympathy with that, but what can I do? These are huge organisations; it is a quasi-legal proceeding and we cannot say, as some continental judges can, "Okay, I've got the general idea; I'm going to give a decision now". We have to give a rational decision. If you look at my 70 or 80 pages in the Downloading hearing it is hugely complex. We have professors come in; there are people called forensic accountants who are hideously expensive, they give very complex evidence, maybe 30 or 40 pages of evidence with 200 exhibits. What is the next stage? The next stage is the professor of statistics; he comes in to answer that, he is an even bigger one. In no time we have this amazing multiplication of evidence. I cannot stop it. I can look at it and say, "What is the relevance of that?" and I do. Sometimes I say, "I don't want to hear that".

Q57 Chairman: Surely one of the key roles that you have as Chairman—indeed that Ian has as Chief Executive—is to actually speak out about that, to say that this is unacceptable and something has to be done about it, and to make some recommendations as to how that process can in fact be simplified

because that has been going on for 20 years. Simply saying, "Woe is us, I've got six metres more work" is not the answer, is it? What should we do?
His Honour Judge Fysh: With respect, you want to see the last couple of paragraphs of my last judgment; when I discovered the costs had exceeded £12 million I blew my top.

Q58 Chairman: For one case?
His Honour Judge Fysh: There were a lot of lawyers involved, a lot of forensic accountants, a lot of professors; we even had some lawyers over from Brooklyn. I gave permission for a New York team to address the Tribunal.

Q59 Chairman: With all these hundred-odd cases, what do you think that adds up to?
His Honour Judge Fysh: I do not know; it is awfully difficult to say.

Q60 Chairman: Would the money buy Northern Rock?
His Honour Judge Fysh: I can say this as an ex-lawyer: you often have something like 20 Counsel and lawyers involved from huge firms of solicitors.

Q61 Mr Boswell: What you are essentially saying is that there are no quick fixes to this. If we change the sponsoring department or we change the rules or we provide you with two more administrative assistants or whatever it is, because there is a residue of contested cases—the ones that come before your Tribunal—there will always be this kind of complication however attentive we are. There is no easy way of waving a magic wand and making it easy for everyone.
His Honour Judge Fysh: Yes, and it is because of our common law system. We cannot do without it. We cross-examine, we have rules of evidence, of disclosure and all this kind of thing; it takes time. The disclosure documents, the files, were about two metres high alone.

Q62 Mr Boswell: On cross-examination you make notes.
His Honour Judge Fysh: Yes, days' worth.

Q63 Mr Boswell: Rather like our oral sessions it becomes clearer with all the submissions we have had.
His Honour Judge Fysh: I wish I could agree with you. Sometimes after cross-examination a situation, to me as Chairman at any rate, looks infinitely more complex.

Q64 Mr Cawsey: Can we move on to the subject of lay members on the Tribunal. There have been a lot of comments about that, about whether we should have them and, if we do, where should they come from and on what basis should they be appointed. Currently, how are lay members of the Tribunal appointed?
His Honour Judge Fysh: I currently only have two lay members left; there was a time when there were more. I have a rear-admiral and a colonel from an artillery regiment. They are what I would call good chaps; they are splendid people, they say things like "I don't trust that witness". Otherwise it is all the Chairman.

Q65 Chairman: I am looking at the man next to you, Ian Fletcher, who does get paid for his job.
Mr Fletcher: Not much!

Q66 Chairman: What is your take on the lay members?
Mr Fletcher: The current arrangements for the Tribunal require us to have at least two lay members. As Judge Fysh has said there are two remaining and their appointment at the Tribunal comes to an end in September 2009. The current rules of the Tribunal require us to have lay members so my first question is that if we are going to have lay members how are we going to have ones which are going to make a genuine and valid contribution to the workings of the Tribunal? That in turn leads us to think along the lines of what kind of background and expertise and qualifications might be helpful to Judge Fysh and to the deputy chairman of the Tribunal to discharge the Tribunal's functions in the most expeditious way. That is how our thinking is going. The formal appointing authority is the secretary of state for the lay members just as the Lord Chancellor is the appointing authority for the chairman and the deputy chairman. We will be looking at the question as to whether lay members are likely to continue and, if so, what are we going to do to ensure we have the ones who make the best kind of contribution?

Q67 Mr Cawsey: In the memorandum we received we were told that there was a recommendation in 1988 from the Monopolies and Mergers Commission that lay members should be chosen for expertise that is relevant to the Copyright Tribunal. Are you saying that that is what you intend to do with future appointments or do you think you are doing that with the appointments you have made? Or have they just been ignored and, if so, why?
Mr Fletcher: I cannot comment on the appointments that have been made and I certainly would not want anything that I say to cast any aspersions on the contribution which the existing lay members have made. The 1988 Monopolies Commission Report was made in the context of foreshadowing the establishment of the Tribunal and in the context of looking in particular at the monopoly position of PPL, it talked about the lay members as kind of industry representatives. That is not what I was saying. I think it is really a question that if we are going to have lay members how can they make the best contribution through having a technical background or qualifications which will assist the Tribunal in getting through the case work that it has got.
His Honour Judge Fysh: I had this experience as a barrister both here and in Singapore where I have appeared before their Copyright Tribunal. The most useful lay members are accountants. They are not members of the industry and frankly, as a judge, I would not want members from the industry.

Q68 Chairman: What kind of accountants? Forensic or non-forensic accountants?
His Honour Judge Fysh: Senior partners in big firms who are used to commercial work. Also, for example in Singapore, they had a wonderful lady who was head of the Singapore National Library and she made a very interesting contribution. That is the sort of lay member I would like. My colonel and my admiral are wonderful but as far as I am concerned they are pretty useless.

Q69 Mr Cawsey: What about the future of lay members? Would it be abolition or would it be transparent appointments on the basis of expertise?
His Honour Judge Fysh: The latter in my view.
Mr Fletcher: I think that is where I am coming to as well; I have yet to consult ministers on this. The review that we did last year has opened up a pretty vigorous debate about this. That is probably the answer I will be coming too as well and, in terms of the kind of workload that the Tribunal has at present, that feels about right.

Q70 Mr Boswell: Would it be open to the Tribunal at an early stage—or you, as the Chairman of it—to invite somebody to sit as an assessor or advisor to you or to give expert evidence outside the request of the parties?
His Honour Judge Fysh: That would be tempting but dangerous. I can see all kinds of problems arising, for example appeal points. We do have an appeal to the High Court.

Q71 Mr Boswell: It would be possible to provide an expert input, that is what you are rather anxious to have.
His Honour Judge Fysh: That is right.

Q72 Mr Boswell: I just want to touch on orphan works. I would like to get a handle on how big a problem this actually is in your experience. Who is really suffering from this? Is it really frustrating what is presumably the idea of copyright which is to provide a fair exchange and get material out for use? Given that this is obviously a matter under debate within government, when are we going to know which way it is going to go?
Mr Quilty: On the first question, is it frustrating the use of this, the representations we have had certainly suggest that it is. Putting an economic figure on that could be quite tricky I suspect. Clearly I think our view is that there is a problem there to be addressed.

Q73 Mr Boswell: Where are those broadly coming from?
Mr Quilty: You heard about them in the earlier session.

Q74 Mr Boswell: That is consistent with your experience.
Mr Quilty: Yes. As to the way forward, this is an area where we have to work within the context of the European perspective as well; the EU has an interest in it. There is a lot of activity at the EU level at the moment; there are working groups who are looking into this and looking into how it might apply to different forms of copyright work. I think our general feeling is that we should not jump on that until we know with a bit more clarity which way the EU process is going. My best guess perhaps is later this year, towards the end of the year, we might have some feeling on that and decide which way in the UK context we ought to move.

Q75 Mr Boswell: There is no directive at the moment that directly bears on this, but there might be.
Mr Quilty: There might be action at that level but exactly what that might be it is difficult to say right now. I think in about a year or so it might be a good time to be looking at it.
Mr Fletcher: It is worth saying that copyright is in principle a matter of community competence so we are looking at a community framework. If we did anything nationally we would run the risk of it being overridden by later community law so that is part of the thinking. To add colour to what Mr Quilty has said, we are pretty aware that the French Government—who have the Presidency in the second half of this year—want to make intellectual property one of the things they make a bit of a push on so that may help to get the orphan works question further up the European agenda than might otherwise have been the case.

Q76 Mr Boswell: Is it your impression that there is a wide divergence in practice at the moment within European Member States?
Mr Quilty: I am not sure actually. I am two weeks into the job so I have to be a bit careful. I think that is something that will come out of discussions and we may be able to see what other Member States are doing.
Mr Fletcher: I think there is either divergence or complete absence.

Q77 Chairman: One of the recommendations is the 2007 Review is that licences and tariffs will have to be supported with hard facts and figures and methodologies which are available to licensees. The British Music Rights have argued that its methodology for setting these tariffs is reliant on licensees providing realistic estimates and projections about their new businesses and a high degree of cooperation from them. It goes on to talk about revenue projections and so on. Are the recommendations in this area sound, do you think?
Mr Layton: I think the recommendation in the Review stems from a reasonable view from one of the reviewers that most issues brought before the Tribunal relate to the tariff charge for a licence, that the parties before the Tribunal ought to come with a great deal of evidence to back up their claims or views. It was calling for more use of actuarial evidence, sampling results. Having conducted the Review we put out the recommendations for public consultation, as you are aware, to see what other people thought of them and I think that is one of the recommendations where there is a huge amount of mixed opinion as the value of taking a more structured and disciplined approach. As we have

heard, insisting that more evidence is brought to a tribunal might not in all cases be the way to swifter justice in this. It might give rise to more expert opinions from forensic accountants and so on; it might just give the lawyers more things to argue about. I think what this recommendation has resulted in is a very clear understanding that a one size fits all approach does not necessarily work.

Q78 Chairman: You have heard the Judge talking about how difficult it is to make decisions, how expensive it is; what do you think, Judge, about methodologies and evidence based policy rather than policy based evidence?
His Honour Judge Fysh: I think at the moment that the Tribunal and the UK IPO should not really get involved in this part of the business at all; let the protagonists do this and we judge.
Mr Fletcher: There is a kind of issue that lies behind this. One of the things that is a truism that bears repeating is that intellectual property is an economic question carried on by legal and technical means. It is easy to get lost in the legal and technical stuff and forget that what we are talking about is an economic question. In economics, as in so many walks of life, there is often no right answer. The adversarial system gives you a way of getting to some balance but one of the dangers of approaching it from the other angle is that you end up with people thinking that they know what the right answer is. In any market it is very difficult for the expert or the bureaucrat to know what the price ought to be. Often what tribunals are being asked to do is adjudicate on where the balance of pricing ought to lay between two parties of quite different economic size. This is where economics meets law and that is quite difficult.
His Honour Judge Fysh: It helps us in this to look at what are called 'comparables', in other words what men of business have come to agree in a free dealing basis, arms length negotiation. We spend a lot of time looking at agreements between different parties and arguing as to whether it is a true comparable or not, but it does help the Tribunal to get a ball park figure.

Q79 Chairman: In drawing up these licensing schemes you have these two supporters or helpers; when do they get involved and when should they? After the scheme or before the drawing up of the scheme? Where should they come in, do you think?
His Honour Judge Fysh: The scheme is promulgated before I ever get to see it by some of the gentlemen you have seen before us. They devise it; they have a large in-house legal department; they have precedence and some of these proposed licences run to 30 or 40 pages detailing the most amazingly complex deals, for example how far away from a bar you can hear music at 20 decibels normal volume and that kind of thing—and that is a certain tariff. All this is negotiated before we see it. We see it when a party says "no". In other words, we have no part in the drafting of the liscence although if a particular clause is particularly objectionable that comes under focus, I can say, "I think that clause is unreasonable for the following reasons".

Q80 Chairman: How much does it cost to run your section in the whole enterprise? They get you for free, obviously.
His Honour Judge Fysh: Yes, I do not want to overdo it, but I do do all of this for free. My deputy—I only have one left now—is a senior silk at the Patent Bar as is the tradition, or a senior solicitor in a firm that has done intellectual property work. They charge at £316 per day but, as his clerk said to me recently, "I think we may have to have a look at that again".

Q81 Chairman: Do you think it would be better if the Tribunal was in the Ministry of Justice? What is your view on that, Judge Fysh?
His Honour Judge Fysh: I am happy with the UK IPO. Intellectual property is a very specialist part of the law and as I know from my own court, the Patents County Court which was set up to cater for litigants in person, they are absolutely lost in this area of law. I feel very comfortable going along with the UK IPO rather than the Ministry of Justice where tribunals range from the Brown Egg Marketing Board to the one in my own building, the Asylum and Immigration Appeals Tribunal.

Q82 Chairman: So if it is not broken, do not fix it.
His Honour Judge Fysh: Precisely.

Q83 Mr Boswell: Would you be a little more comfortable if you could move along a little more quickly.
His Honour Judge Fysh: Yes.

Q84 Chairman: How can we improve the interaction between the Tribunal and the IPO, do you think? Is there a way of doing that?
His Honour Judge Fysh: We get on pretty well I think at the moment. I have gripes and so on about the staffing and about the furniture; we do not really have a proper courtroom in my view. I went to Canada—I was sent there by the UK IPO, by Mr Fletcher' predecessor—to have a look at what they do. They have a staff of 12 and a proper courtroom. The Chairman of the Canadian Tribunal, like me, is an IP judge and he does it part time (he is paid). We get on very well; there is a symbiosis, we have an understanding.

Q85 Chairman: How about the collecting societies? Could you incorporate them deeper into the organisation in any way?
His Honour Judge Fysh: No. I stay clear of them because I have to adjudicate over them. I am very friendly with them; I meet them on social occasions; one of them shook hands here as he went out.

Q86 Mr Boswell: We have not mentioned the word "fees" this afternoon and as I understand the recommendation in the report is actually to dispense with them. If I understand Judge Fysh, he is saying

you have to hit out or get out, there is no point in going half way. If there is a problem with resourcing, if these are very high end cases with a huge legal input—up to £12 million you quoted—is it reasonable to say that the parties should put something towards this?

His Honour Judge Fysh: I would think yes, and I would think the fees should be quite hefty but we would have to look at them carefully because we do not want to deter people. People who have no resources must obviously not be kept out of court. By the same token, some fees are a good idea. I was admitted as an Indian advocate before I became a judge and the fees there remained absurdly low so the whole system gets entirely plugged up with frivolous applications. I have not detected that with the Copyright Tribunal; these are all serious players.

Mr Fletcher: One of the things that has emerged from the debate which has followed the publication of last year's review is the question of the kind of secretariat support for the Tribunal. I am absolutely clear that the amount of resource that the Intellectual Property Office puts into it needs to be beefed up. We are looking now to see if we can measure how much, at what level and so on we need to put in. I want to be really clear that I share Judge Fysh's view.

Q87 Chairman: How long will it take to determine all this?

Mr Fletcher: Probably two to three weeks at least. The work is going on now and that is something we should do and we are going to do. The case for that is absolutely clear.

Q88 Mr Cawsey: The ALCS submission to us spoke about the proliferation of digital technology having upset the balance between rightsholders and users as opportunities to obtain creative works for free have increased. What effect do you see the emergence in growth of digital technology has had on the balance between the rightsholders and users?

Mr Fletcher: It has put it under real, real strain. When I look at the ministerial post bag, when I look at our own rate of enquiries across the entire field of intellectual property, I think it is 98 per cent plus in the area of copyright. There is little dispute even among those who are passionately involved about the patent regime or the trade mark regime even though both of them are immensely valuable to the economy; they do not give rise to the kind of conflict that we often see in the copyright area. The second thing is that it is an area where, as you rightly say, changes in technology have actually combined with changes in user behaviour and expectations, what people think is fair at the kind of level of the teenager as well as the other end of the scale the entry into the wider copyright world of some pretty unsavoury characters. There is very wide spectrum of behaviour and technology providing significant opportunities for people to develop new ways of behaving or new ways of making money. I think the fundamental point that I start from is, as I said before, that intellectual property is an economic question carried on by legal means. It is clearly the Government's policy that creators should be appropriately remunerated and the challenge we face is to ensure that the framework of rules keeps up to date with that as far as we can. The Government's response to unlawful activity is as clear as it can be and, turning to the subject of your inquiry, the means of setting remuneration within that framework is as up to date as we can get it. I think that is the wider picture.

Mr Quilty: The Gowers Review which was referred to earlier on was fairly comprehensive and it made some recommendations which were designed to address the problems of the digital age. We have a programme of work there to do in putting a lot of that stuff in. Obviously that Review and the implementation of it will not be the end of the story because we will be hit by new technology and challenges. The problem for us will be to try and construct a regulatory system which survives each new technology as it comes up. That might be the thing we would really need to look at in the future.

Q89 Mr Cawsey: Professor Lessig, chairman and co-founder of Creative Commons posed the question, does copyright have limits? Historically copyright was relatively tightly drawn but in the past quarter century it seems to have extended exponentially and is set to conquer digital technology. Is the Government aware that these other views are out there? Have you actually considered whether the creative industries might flourish under a less restrictive regime?

Mr Quilty: One answer to that is actually Gowers itself. In certain areas the recommendations of Gowers will actually result in a de-restriction of the copyright regime, particularly if the format shifting exemption is put into place. It is quite right that there are certain ways in which the system could be tightened up but there are also ways in which it can be made more relevant to the age. The main thing is that we have to keep a balance at the end of it and we have to try to make sure that where we get to is that the interests of the users and rightsholders are balanced.

Q90 Mr Cawsey: So you rule nothing in and nothing out; that is what improves the overall system.

Mr Quilty: Yes.

Mr Fletcher: That has to be the right answer. Certainly we participate in debates with people who advocate revolutionary changes as well as evolutionary changes. The Creative Commons people are a good example of that. We have to go back to the starting point that we are looking to ensure that the economic objectives if the IP system are foremost and that includes, I think, the clear understanding that creators and rightsholders need an appropriate level of remuneration for their efforts. Against that broad test there is nothing that ought to be excluded.

His Honour Judge Fysh: Could I just draw your attention to the fact that in this field counterfeiting is on an enormous scale. The people who come to our Tribunal are the goodies, if I may call them that. We had evidence at the Downloading hearing that there are now so many sites whereby one can download all

sorts of things but above all recorded music. If we set the tariffs too high people will just go to the sites where you can get the latest songs within half an hour of them being published.

Q91 Mr Boswell: I want to come in on the consultation process following the IPO study. I am sure it would characteristic of this sort of occasion that the representations you receive from the interested parties are almost predictable in advance and you may well know what you are going to have from them. Have you had much interest—I am not asking for the details here—from what might be termed persons who may have an intellectual interest in this area and/or have you got much access to outside academics and experts in helping to formulate the policy? I think this has been an interesting exercise for us because it is something we have not addressed for a long time and I am glad that we have, and clearly you have, I am not suggesting you have not. I am interested in how much the debate is a real one and how much it is a kind of re-run of the parties of the Tribunal in fact.
Mr Fletcher: One of the things which has been very apparent over the last year has been that the Intellectual Property Office and the Government more generally has not had access to the quality of economic analysis that we needed. One of the solutions was contained in one of the recommendations in the Gowers Review which was a recommendation that Government establish something with the accurate but uninspiring name of the Strategic Advisory Board for Intellectual Property as an advisory NDPB and we are in the process of doing that.

Q92 Mr Boswell: Will that have a strong economic input?
Mr Fletcher: And a £500,000 research budget which is a lot of money in research terms; you can buy a lot of academic time for that. We provide the secretariat and the budget but it is to be an independent advisory NDPB. That will go some way from broadly the middle of this year when I expect it to get underway to fill that gap. There is an interesting Australian kind of precedent for that, the Australian Council for Intellectual Property which has played this role which I actually suspect was the Gowers model. Secondly, the Intellectual Property Office itself is in the process of setting up an economics and evaluation unit to do three things. One is to ensure that the normal services that we offer are subject to an appropriate level of evaluation from the point of view of the economic beneficiaries and I think that is an important piece of our accountability. The second thing is to ensure that policy development, particularly in areas like copyright, is appropriately underpinned by economic work to ensure that we can focus on the changes in the economy or the changes in economic behaviour that we would like to get. The third reason is to ensure that we can connect to the rest of the DIUS departmental agenda appropriately. That is something that is really our top priority in terms of organisational change exactly so that we can we can begin to be in the position to have the best possible economic insight to the development.

Q93 Mr Cawsey: Over the last 20 years of so the governments of the day's preferred way of pleasing monopolies has been regulators. Is it the Government's objective that the Copyright Tribunal should become a regulator for copyright and for fees?
Mr Fletcher: I know of no suggestion that it should become a regulator in the sense that you are talking about. I think the role that the Tribunal plays is narrow but I do not mean that pejoratively; it is a carefully circumscribed but important one of adjudicating on licensing arrangements, particularly collective licensing arrangements. The wider question of how the creative industries work does not necessarily to my mind give rise to regulatory questions which are not resolvable through the normal operation of the competition laws and/or the civil courts. I am not sure there is the kind of special position you get in power and gas for example or telecom where you need an independent regulator.

Q94 Mr Cawsey: Would you have an ombudsman then?
Mr Fletcher: I think one uses ombudsmen to deal with issues of unfairness as a kind of backstop, a kind of catcher of the ball of last resort. Our thinking about this is that the Tribunal has tackled cases brought to it by applicants who have been large, well-resourced with big legal guns behind them. I think there is a question—I think Judge Fysh's comments this afternoon have alluded to it—about the extent to which the Tribunal's scope includes ready access for smaller applicants or people who have a particular interest. I think there is scope there, but I would not use the word ombudsman but a smaller claims kind of question.

Q95 Mr Cawsey: Exactly. It has been put to us that recourse to the Tribunal might be avoided in some cases if there were somewhere else to go that was more simple in the first place.
Mr Fletcher: I think there is a real question there that we need to think through. Some of it might be through thinking through how we would handle under the Tribunal kind of ambit smaller claims. The other is the question that was raised by your previous witnesses about mediation where my office has mediation services in the patent area particularly which we are really just experimenting with. We have only had the first few cases and it is not yet clear how far it goes.

Q96 Mr Boswell: Is there going to be a Government policy on orphan works or is it just simply going to wait for Europe?
Mr Quilty: We have to wait for Europe and we then have to evaluate what they have come up with in terms of direction and then figure out what it would mean for us.

Q97 Mr Boswell: Given that you are an arm of Government this is important and an area where I have had interests myself in the past. Can we at least be certain that Government will go to Europe with a fairly clear position as to what you would like rather than appearing that you were the passive recipients? I am fairly anxious that we should be seen to be influencing the debate for good, bearing in mind, as Mr Fletcher has reminded us quite properly, this is a serious economic interest and not some kind of antiquarian or lawyers side show.
Mr Quilty: One point is that the Government is feeding into those European negotiations. Another thing is that DCMS have the lead role. I think so far as we are concerned it is in our interests to have a fairly clear idea of what we want to achieve out of it. If you are involved in European negotiations you have to be a little bit clever about how you phrase your suggestions, you do not want to start with a position that immediately puts you on the sidelines. Yes, we need to know what we want but we also need to know how we handle it properly.
Mr Fletcher: I guess the real point that you are driving at is that we are in consultation with particularly the library sector but also others on the wider question and as Mr Quilty says our approach is an active one, we are not sitting back passively waiting expectantly for the answers.

Q98 Chairman: If we looked at the Copyright Tribunal again in a year what difference would we see do you think?
His Honour Judge Fysh: You will see one change which is to do with a sub-judice case. There is a section called section 128 A and B which is mysterious. It came as a result of the EU Rental Directive. Section 72 was amended to bring in what is called excepted sound recordings, in other words broadcasts performed in commercial premises were formerly excepted but now they are not. There was consultation about that, then when the Act was amended we discovered on the amendment that there was a quite complex series of steps to be taken involving a reference to the Secretary of State and an extraordinary inquisitorial role imposed upon the chairman, almost continental style, such that I was to go around barber shops and shops and garages and so on and find out what people thought about it.

Q99 Chairman: That is our job.
His Honour Judge Fysh: It sounds rather fun, in fact I have just done it for the purpose of my judgment which will not doubt raise howls of irritation. That, I would hope, will change.

Q100 Chairman: Ian, what is your gravestone going to say on it about what you have done about this whole Copyright Tribunal.
Mr Fletcher: Our intention is to look at amending the Tribunal's remit to respond to current copyright challenges, something we have started to talk about this evening. I do not think the Copyright Tribunal is or has ever been failing but I think it has ended up the victim of the cases which have been brought to it which have been big gun cases and as a result of their complications and expense they have given it an unfair perception that it was unwieldy and hard to get access to.

Q101 Chairman: So you will be the man who radicalises the Copyright Tribunal, will you?
Mr Fletcher: I hope at the end of a year or so the Tribunal will be taking on a wider range of cases and I hope that that perception which, as I say, is unfair will have gone away. I hope that will be part of a process that government will have been involved in to ensure that the whole copyright framework is fit for purpose. I think that is the important agenda that we have.

Q102 Chairman: Professor Lessig in his very interesting paper to us did a chronology of the history of the Copyright Tribunal and in his last paragraph he said, "Copyright designed to benefit authors, if allowed to become too powerful, becomes the tool of monopolies and again we ask the question does copyright have limits and if it does not have limits who should decide them?" I just wondered what your response to that was.
Mr Fletcher: All intellectual property rights should have boundaries. Patents, designs, trade marks, copyright are all legal monopolies granted in different circumstances and like any monopoly there should be a very clear "bargain" between the state granting the monopoly and the beneficiary. That means those boundaries are really important for the good functioning of the economy. Who should determine the rules? That is Parliament; there is no question about that. This is a legislative question. The role of the Tribunal is to look at individual disputes within an established framework of law and then say on the facts of a particular case where the boundary is. It is important that we recognise that this is a central function of the state.

Q103 Chairman: Given the digital age questions we asked earlier, do you feel that Parliament should revisit this?
Mr Fletcher: That is for ministers to look at.

Q104 Chairman: What do you think?
Mr Fletcher: I think that the volume of debate and public interest about copyright in the Gowers recommendations that the Government is already taking forward—orphan works is a good example—the sheer volume of correspondence the Government is getting now suggests to my mind that that debate has actually started.

Q105 Chairman: When was the Gowers Report published?
Mr Fletcher: December 2006.
Chairman: Thank you. Can I thank you very, very much indeed for coming along and being lucid and clear and amusing at the same time, and for sharing with us your frustrations but also the work you are putting in behind the scenes. Whether or not we will have a report will depend on our subsequent

meeting, but we thank you very, very much for opening up a lot of the avenues for us. A very clear picture has been given in that there are no straight solutions but certainly we have got over some of the problems which we did not when we first came. Thank you very much for your time.

Written evidence

Memorandum 1

Submission from City of London Law Society, IP sub-committee

INTELLECTUAL PROPERTY OFFICE REVIEW OF THE COPYRIGHT TRIBUNAL ("CT")

The City of London Law Society ("CLLS") acts as the local law society of the City of London. It represents the professional interests of City solicitors, who make up 15% of the profession in England and Wales, by commenting on matters of law and practice and by making representations on the issues and challenges facing the profession and their clients. It organises itself into committees, around legal topics. The intellectual property committee is made up of representatives of members' firms who practise solely or mainly in the intellectual property field and who have extensive experience in litigating IP rights and in transactions involving the exploitation of IP rights.

The CLLS has considered the UKIPO review of the CT and, in general terms, supports the recommendations of the authors of the review. In particular, the CLLS is in favour of the appointment of a full time President/Chairman to provide continuity, and of the proposal that early and effective case management powers should be exercised by the Chairman and deputy chairmen to ensure that cases are dealt with quickly, effectively and at a proportionate cost. To this end, the CLLS is in favour of dispensing with lay members, the substitution of the CPR for the CT rules and the giving of clear directions with strict timetables at an early case management conference. The proposal that the CT should take an active part in formulating methodologies for the objectification of the criteria for the conditions of a licensing scheme, tariff or licence, and the suggestion that, when tariffs or licensing schemes are introduced, the reasoning behind their structure should be clearly shown, are also supported by the CLLS. The CLLS notes that the proposals will require proper funding from the Government and hopes that this will occur.

With regard to evidence, however, whilst the CLLS agrees that it would be useful for the chairmen to encourage the parties to direct their evidence to answering specific questions and for the chairmen to exercise their powers to award costs against parties whose evidence has not been directed towards the key issues, the CT should not be prescriptive in the manner in which the parties choose to present their cases. For example, the CLLS feels that the parties should be free to adduce their own expert evidence and to conduct oral cross-examination of witnesses, subject always to being penalised in costs should their evidence or case presentation unnecessarily prolong the proceedings. Again proper case management should be used to ensure that any dispute is dealt with sensibly and proportionately, but not at the expense of compromising quality of justice.

The CLLS supports the recommendation that licensing bodies should have the ability to commence a reference under ss 118 and 125 CDPA 1988 (provided that there are clear rules concerning the ability of third parties to challenge a scheme or tariff after a ruling) and the re-statement of the principle that the CT should be balanced in its approach to the issues between the licensor and the user and have no disposition in favour of one party or the other.

January 2008

Memorandum 2

Submission from the Libraries and Archives Copyright Alliance

INQUIRY INTO THE WORK AND OPERATION OF THE COPYRIGHT TRIBUNAL

1. EXECUTIVE SUMMARY

Our submission is based on issues raised in the Review of the Copyright Tribunal which reported to the UK Intellectual Property Office (UKIPO) in 2007.[1] While LACA broadly welcomes the Review's recommendations, there are, however, a number of points and recommendations we wish to make, mostly, but not exclusively, relating to the Tribunal's role with regard to Orphan Works. The other points relate to public statements by licensing bodies, publication of decisions, costs, budget and workload of the Tribunal, and proposals for a single expert to represent both sides in a dispute.

[1] http://www.ipo.gov.uk/ctribunalreview.pdf

2. Licensing Bodies' Public Statements

We urge that the Copyright Tribunal extend its scope to include hearing referrals made to it with regard to public statements by licensing bodies in order to encourage clear public mention of uses permitted by statute as well as uses for which payment must be made.

3. Publication of Decisions[2]

We believe that full publication of all decisions, not just brief summaries, should appear on the Tribunal's web site.

4. Costs and Budget

1. *Cost of using the Tribunal potentially impedes fair and equal treatment*

The Tribunal's Decision on Costs in *Universities UK v The Copyright Licensing Agency (Interveners: Design and Artists Copyright Society) (2002)*[3], exemplifies the potential financial burdens to those involved in a case before the Tribunal. The potential for very high costs, which cannot be calculated at the outset, is a significant disincentive to many licensees and licensors referring cases to the Tribunal. Notwithstanding the Tribunal's powers to award costs, those organisations with the greatest financial resources enjoy a great advantage, whereas the risk of high costs impedes fair and equal treatment for others through access to the Tribunal. We urge that in future the Tribunal ensures that genuine cases are not prevented from being brought because of fears over costs.

2. *Tribunal workload and budget*

We urge that a workable mechanism be set out to give warning if there is a danger of the workload exceeding the budget available to the Tribunal, and that there be a strategy in place to ensure that neither licensees nor licensors are disadvantaged.

5. Orphan Works[4]

1. *General*

(i) Given the significance of the recommendation that the Tribunal should be given the power and responsibility to license the use of orphan works, subject to appropriate amendment of the Information Society Directive and the Copyright Designs and Patents Act 1988 (CDPA), we would have preferred the Review's consideration of the complex issues surrounding orphan works to have gone into greater depth and detail. Furthermore, the Report's recommendation seems incompatible with the Gowers Review's findings, since the former appears to favour just a licensing solution, whereas the latter favoured the exceptions solution.

(ii) The Report seems to have taken its lead from a provision in CDPA s190 for orphan recordings of performances under which the Tribunal can issue licences, and from the Canadian approach under which the Copyright Board of Canada can issue licences. It ignores the exception solution approach, which seems likely eventually to be adopted in the USA and takes no account of the other pre-existing provisions outlined below.

(iii) While we accept that a mixed economy approach utilising licensing and diligent searches is the most pragmatic, particularly with regard to mass digitisation projects, we believe that in most other cases the exceptions option is preferable, because it avoids the problems with licensing schemes, which we summarise below. However, were the licensing option to be pursued, we believe that the Copyright Tribunal should be responsible for supervising the scheme(s) but that the licensing bodies are much better placed to set up and run them.

2. *Other existing provisions*

(i) Under the Copyright Act 1956 and the CDPA an unpublished literary, dramatic or musical work, together with any illustrations, may be published and subsequently broadcast without permission, provided: it is available to the public in a record office or similar; it is at least 100 years old; it is by an author who died at least 50 years ago; and its copyright owner is unknown to the prospective publisher (CDPA 1988 Sch 1 para 16; Copyright Act 1956 s7(6, 7, 8, 9(d))).

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[2] http://www.ipo.gov.uk/ctribunal/ctribunal-decisionorder.htm

[3] http://www.ipo.gov.uk/ctribunal/ctribunal-decisionorder/ctribunal-decisionorder-20002003/ctribunal-decisionorder-20002004-uukvcla.htm

[4] See also LACA's Statement on Orphan Works of 19 December 2007 http://www.cilip.org.uk/policyadvocacy/copyright

(ii) CDPA also provides an exception allowing the publication of an anonymous or pseudonymous work if the author cannot be ascertained by reasonable enquiry and may be assumed to have died over 70 years ago (CDPA ss57, 66A as amended). Although not strictly an orphan works provision it shows the application of an exception solution.

(iii) There are already nine other sets of circumstances in which some sort of compulsory licence applies or can be issued (see *Copinger and Skone James on Copyright (15th edition) chapter 29*), none of which is referred to in the report. In several of these there is no involvement of any body in the issue of licences, in others there is involvement of a person (the Secretary of State, the Comptroller), and in only two is there a role for a judicial or quasi-judicial body. The Tribunal has at times a role in considering the fees that are payable.

3. *The Licensing solution*

(i) The licensing solution presents significant problems with regard to unpublished works. Firstly there is the issue of the duration of copyright in unpublished works in the UK (to 2039 at the earliest, no matter how old they are). Secondly because the issue of the large quantities of unpublished works. Thirdly the likelihood of a rights owner appearing is in most cases non-existent, so that the Tribunal would be building up a very substantial fund of fee income of benefit solely to the Exchequer.

(ii) The cost of running the licensing scheme and maintaining the funds would be increased by the need to maintain information about the licences issued so that any payments could properly be made. An exception solution or a solution using existing reproduction rights organisations would be considerably more cost-effective than the use of the Tribunal and an exception solution is the only one appropriate to unpublished works.

(iii) If a licensing scheme were to operate, it would need to have a quick turnaround (say 10 working days) and be able to deal with large numbers of requests.

4. *The Exception solution*

(i) **Responsibility for defining reasonable search:** The Review also recommends that the Tribunal, rather than the Intellectual Property Office, be responsible for the preparation and issue of guidance on what would be a reasonable search for the owner of the rights in an orphan work. Not only was this not the conclusion of the Gowers Review, but we do not believe this is appropriate. In our view such matters seem more suitable for a policy body than for the Tribunal.

(ii) **Proof of diligent search and proof of right ownership:** In the interests of a fair balance, we believe that if{rightowners require{proof that a diligent search was undertaken (and there needs to be clarification on what constitutes a diligent search), those who are using the content should have the right to ask for proof that that the copyright owner is indeed the current owner of the rights. Therefore attention needs to be given as to how that could be achieved.

(iii) **Protection for genuine efforts:** There must be protection for people who have genuinely striven to obtain clearance from action being taken against them, so long as a set of criteria is met. Users need legal certainty about the extent of their exposure to liability in the event of the rightowner surfacing in the future.

(iv) **Cap on rightowner charges:** Ideally there should be a cap would be put on the amount of compensation that could be charged by the rightowner. Failing that criteria should be set out in order to judge whether the fees are unreasonable, and therefore a statutory licence be issued at a predetermined rate in those circumstances.

(v) **Unjustifiable threats of proceedings:** Unjustifiable threats of infringement proceedings should be treated in the same way as under s70 of the Patents Act. The Copyright Tribunal should be able to adjudicate in any such cases.

(vi) **Reliability of database:** If there is to be reliance on a database, people should not be penalised for relying in good faith on such a database if it turns out that the information is inaccurate or out of date.

6. About LACA

LACA: the Libraries and Archives Copyright Alliance, is convened by CILIP: the Chartered Institute of Library and Information Professionals. LACA brings together the UK's major professional organisations and experts representing librarians and archivists to advocate a fair and balanced copyright regime and to lobby about the copyright issues affecting the ability of library, archive and information services to deliver access to knowledge in the digital age.

January 2008

Memorandum 3

Submission from the Society of College, National and University Libraries

INQUIRY ON THE WORK AND OPERATION OF THE COPYRIGHT TRIBUNAL

SCONUL (Society of College, National and University Libraries) is an association representing the heads of library and information services in all the universities in the UK and Ireland (and in most other institutions of higher education in the UK), together with the directors of the national libraries of the UK and Ireland.

Executive Summary

The Copyright Tribunal is a vital part of the UK's copyright regime. The digital age has brought new and exciting uses of copyright material, and with increased exploitation of copyright works, the Tribunal's work is likely to increase. We discuss various proposals put forward in the recent review of the Tribunal, supporting those most likely to make it more efficient and accessible. We suggest a copyright ombudsman to assist in the Tribunal's role. We do not believe the Tribunal should be involved in the question of orphan works.

Evidence

1. Copyright aims to support creativity by rewarding creators. The prices for the use of copyright material are determined by the market, but copyright material is by definition a monopoly product (being based on an exclusive right), so the market is imperfect. The Copyright Tribunal provides solutions in cases of disagreement over price. It is essentially a safeguard for a would-be-user who believes the price set by a rightholder is too high. As to whether the complainant or the rightholder is correct in their view of the price, the Tribunal has no presumption either way.

2. Current legislative and administrative structures are built around a long tradition that copyright disputes occur between businesses. In the electronic age this tradition has been shaken. Educational and cultural institutions, and private individuals, are increasingly engaged in the distribution of creative works. The Copyright Tribunal is an important safeguard for them, but it could be made more effective as its workload inevitably increases.

3. Because the Copyright Tribunal was recently reviewed formally, a good reference point for our evidence is a brief discussion of the findings of the review. We applaud the aim of the review of the Tribunal: to simplify its procedures. We specially approve its recommendation 5, since rational and open licensing schemes will be less susceptible to dispute.

4. We believe that the Tribunal needs to be as available as possible. Consequently we disagree with several proposals of the review. A restriction on oral evidence would tend to restrict references to those bought by wealthy complainants. Above all, as the review recognises, the proceedings of the Tribunal need to be less costly. This could be achieved by strong case management allowing cases to be settled in 5–7 days.

5. The idea of Tribunal officials assisting with surveys on behalf of the different parties seems to us to add to an undesirable level of complexity and to difficulties as to impartiality. Similarly the review's recommendation of a single expert to represent the views of both sides is an implausible solution. Removal of lay members would make the Tribunal less able to adjudicate, in our view, since expertise in law needs to be complemented by knowledge of how copyright restrictions operate in field.

6. Recourse to the Tribunal could be avoided more easily if there were a Copyright Ombudsman to help regulate the operation of collecting societies. Government regulation is unpopular, but the Tribunal is a more elaborate regulator than will often be needed. The need for regulation arises because, unusually in the business world, right-holders have the full weight of a statute behind them when they collect their revenue. They can quite reasonably threaten legal proceedings if a licence is not agreed.

7. But their statutory backing sometimes tempts them to make exaggerated claims about their powers. For example, literary critics have been coerced into paying royalties for the reproduction of parts of copyright works, even when the critical use is permitted by an exception to copyright. Contrary to natural justice, a collecting society has been known to demand payment for hypothetical infringements in the past as a condition of granting a licence for the future. Failing specific statutory protection for consumers (for example, we believe it is an offence to make an unjustified threat of action alleging infringement of a patent), an ombudsman could settle such questions quite simply. Then the unusual level of statutory backing for right-holders could be matched by a defence mechanism for users of copyright material.

8. Finally we do not agree that the Tribunal has a role to play in providing a solution to the problem of orphan works. In this regard we support the arguments of the Libraries and Archives Copyright Alliance, of which SCONUL is a member.

January 2008

Memorandum 4

Submission from PPL and VPL

WORK AND OPERATION OF THE COPYRIGHT TRIBUNAL

PPL[5] and VPL[6] welcome the Innovation, Universities and Skills Select Committee's interest in the Copyright Tribunal. In the creative economy, the Copyright Tribunal plays a crucial role in resolving disputes over the pricing and other terms of use of creative works.

The IP Office recently completed a thorough Review[7] of the workings of the Copyright Tribunal which proposes a number of Recommendations to make the Tribunal suitable for the online environment. We support these Recommendations, in particular the aim of the IP Office Review to:

- Ensure that the Copyright Tribunal is a party vs party arbiter with a balanced approach.
- Introduce the principles of the Civil Procedure Rules (CPR) and effective case management.
- Ensure the parties can justify their arguments and prepare a clear case for a fair Hearing.
- Provide the Copyright Tribunal with the resource and independence appropriate to the new creative economy.

We urge the Government to accept and implement the Recommendations of the IP Office Review. In addition, we make one further recommendation:

- The Copyright Tribunal should be administered by the Department of Constitutional Affairs, just like any other party vs party court.

A. A Balanced Approach

1. The key feature of the Copyright Tribunal has been its adversarial approach to resolving disputes between parties. This is in our view the best procedure for determining tariffs and operating conditions, which should reflect the market conditions.

2. The IP Office Review concurred with this approach and made a number of recommendations to apply this to the Copyright Tribunal. Those Recommendations are[8]:

Recommendations of the IP Office Review

(1) The CT[9] should be balanced and have no disposition in favour of one side or the other. (4.11)

(25) Licensing bodies should be able to make references to the CT under sections 118 and 125 of the CDPA. (9.7)

(26) The provisions of sections 128A and 128B of the CDPA should be reviewed. (10.9)

(27) Whether there should be a reference to the CT under section 128(A) of the CDPA should be determined by the chairman of the CT. (10.11)

(30) The collecting societies should be referred to as licensing societies. (13.4)

3. We agree with these Recommendations. We would expect any review of sections 128A and 128B (Recommendation 26) to propose repealing these sections as they change the nature of the Copyright Tribunal and were introduced into law with no apparent justification.

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5 PPL is the UK licensing society for 47,000 performers and 3,500 record companies.
6 VPL is the UK licensing society for 1,000 music video producers.
7 *Review of the Copyright Tribunal*, IP Office, 2007.
8 The original numbering has been preserved for ease of cross-reference. The complete list of Recommendations in the IP Office Review is reproduced in Appendix A.
9 CT = Copyright Tribunal.

B. Case Management

4. The Copyright Tribunal Rules are set out in a Statutory Instrument[10], supplemented by practice directions issued by the Copyright Tribunal.

5. The current rules do need to be amended. Many of the rules are derived from the Arbitrations Act 1950, which causes confusion as that statute has been repealed. Furthermore, there are no provisions in these rules for some of the jurisdictions given to the Copyright Tribunal following amendments to the 1988 Act. Overall, they fall behind modern standards of case management set by the Civil Procedure Rules.

6. The IP Office Review investigated the processes and procedures of the Copyright Tribunal in some depth, going through all previous Hearings and Rulings. In addition to their general Recommendation that the Copyright Tribunal should follow Civil Procedure Rules (CPR), they propose a number of specific changes to improve case management.

Recommendations of the IP Office Review

(2) The Copyright Tribunal Rules 1989 should be repealed and the proceedings of the CT governed by the CPR and practice directions. (7.12)

(3) There should be one standard form for all references to the CT. (7.14)

(4) The fees of the CT should be abolished. (7.16)

(7) The CT (with the extra resources mentioned in recommendation 18) should take an active part in formulating methodologies for the objectification of the criteria for the conditions of a licensing scheme or licence. (7.29)

(8) Once an application has been made to the CT the case should be allocated to the chairman or deputy chairman, who should be responsible for all aspects of the case from thence forward. (7.32)

(9) Once the counterstatement has been received a case management conference (cmc) should be called as soon as possible to direct the management of the case. (7.33)

(13) If a hearing is to take place it should be the subject of a strict timetable. (7.37)

(15) The CT should set a target for the completion of all cases, from receipt of application, to issue of decision. (7.41)

(16) Alternative Dispute Resolution (ADR) should be used when appropriate, there should be no compulsion to use it. (7.42)

(28) There should not be any change in the basis for appeal from a decision of the CT. (11.6)

7. We agree, subject to Recommendation 7 applying to the approach the Tribunal expects to take at a case management conference (rather than an interventionist role in licensing schemes not referred to the Tribunal).

C. Fair Hearing

8. The Copyright Tribunal has often appeared to make a number of presumptions that mitigate against a fair hearing. Collective licensing societies are often perceived as large and powerful, while users are portrayed as small organisations with little bargaining power. The reality is usually the reverse. In most of the cases heard by the Tribunal, the user has been significantly larger and more powerful than the collective licensing society. Furthermore, in some cases, the copyright user has been given the benefit of the doubt in the treatment of evidence which on closer examination proves inaccurate.

9. The IP Office Review considered the treatment of the parties in Tribunal cases and made a number of Recommendations to ensure a fair hearing.

Recommendations of the IP Office Review

(5) The reasoning behind licence schemes and tariffs should be clearly shown. (7.22)

(6) A challenge to the terms of a licence should be based on fact. (7.23)

(10) The CT should ask for particular questions to be answered in the evidence. (7.34)

(11) The CT should put clear limitations on the type and quantity of the evidence that is submitted. (7.34)

(12) The emphasis should be on written rather than oral evidence. (7.35)

(14) Expert evidence should only be allowed if strictly necessary. If there is expert evidence it should be by a single, joint expert. (7.39)

10. We agree, subject to the appointment of a single, joint expert being at the discretion of the President, and not a requirement in all cases.

[10] 1989 SI No 1129, as amended by 1991 SI No 201 and 1992 SI No 4667.

D. Resourcing the Copyright Tribunal

11. The creative economy is now some 8% of GDP. Although the Tribunal handles relatively few cases, individual Rulings can impact licensing arrangements worth hundreds of millions of pounds. If it is to carry out its task effectively, the Tribunal needs the resource to be able handle cases efficiently and it should have the expertise to understand the commercial value of copyright.

12. The IP Office Review identified that the Tribunal is currently under-resourced, both in staffing and in availability of Chairmen and others to sit. The IP Office Review's Recommendations on resourcing and expertise were:

Recommendations of the IP Office Review

(17) The staff of the CT should be based in London and the UK Intellectual Property Office should supply the necessary accommodation. (8.10)

(18) There should be a permanent staff of two who will report directly to the chairman of the CT. (8.21)

(19) There should be no restriction on the number of deputy chairmen. (8.23)

(20) The lay members should be abolished. (8.32)

(21) The head of the CT should be called the President. (8.34)

(22) The position of president/chairman should be salaried and an open recruitment exercise held for the appointment of the first and future presidents. (8.38)

(23) An annual budget for the CT should be set by the president/chairman in conjunction with the UK Intellectual Property Office (8.39)

(24) The CT should be responsible for all content on its own website but the UK Intellectual Property Office should manage and administer the site for the CT. (8.42)

13. We agree with these Recommendations.

E. Orphan Works

14. There is one remaining Recommendation from the IP Office Review, relating to orphan works.

Recommendation of the IP Office Review

(29) The CT should be responsible for granting licences for the use of orphan works. (12.8)

15. As the music industry has captured the vast majority of its catalogue in PPL's database CatCo (which contains metadata, including ownership, of 9m tracks), it is unlikely there would be too many orphan work requests in relation to sound recordings.

16. We support this Recommendation. However, we would caution against giving the Copyright Tribunal additional responsibilities until it is properly resourced.

F. The Copyright Tribunal's Place in the Judicial System

17. As a body set up to resolve disputes between parties, the Copyright Tribunal is similar to a Court, but with a specific remit. Like a court, it should therefore be independent of Government and, in particular, the policy-making departments which relate to copyright.

18. One of the key findings of the Leggatt Review of Tribunals[11] was that the Copyright Tribunal should move to the Lord Chancellor's department (now the Department for Constitutional Affairs). Sir Andrew Leggatt recommended that "the administration of tribunals should become the responsibility of the Lord Chancellor". He noted that the Copyright Tribunal was a party vs party system, more like a court, whereas most tribunals are citizen vs state. This recommendation was accepted by the Lord Chancellor in 2003 but has yet to be implemented.

19. We support this recommendation that the Copyright Tribunal should be administered by the Department for Constitutional Affairs.

January 2008

[11] *Tribunals for Users—One System, One Service: Report of the Review of Tribunals,* Sir Andrew Leggatt, 2001.

APPENDIX A

IP OFFICE REVIEW OF THE COPYRIGHT TRIBUNAL SUMMARY OF RECOMMENDATIONS

(1) The CT should be balanced and have no disposition in favour of one side or the other. (4.11)

(2) The Copyright Tribunal Rules 1989 should be repealed and the proceedings of the CT governed by the CPR and practice directions. (7.12)

(3) There should be one standard form for all references to the CT. (7.14)

(4) The fees of the CT should be abolished. (7.16)

(5) The reasoning behind licence schemes and tariffs should be clearly shown. (7.22)

(6) A challenge to the terms of a licence should be based on fact. (7.23)

(7) The CT (with the extra resources mentioned in recommendation 18) should take an active part in formulating methodologies for the objectification of the criteria for the conditions of a licensing scheme or licence. (7.29)

(8) Once an application has been made to the CT the case should be allocated to the chairman or deputy chairman, who should be responsible for all aspects of the case from thence forward. (7.32)

(9) Once the counterstatement has been received a case management conference (cmc) should be called as soon as possible to direct the management of the case. (7.33)

(10) The CT should ask for particular questions to be answered in the evidence. (7.34)

(11) The CT should put clear limitations on the type and quantity of the evidence that is submitted. (7.34)

(12) The emphasis should be on written rather than oral evidence. (7.35)

(13) If a hearing is to take place it should be the subject of a strict timetable. (7.37)

(14) Expert evidence should only be allowed if strictly necessary. If there is expert evidence it should be by a single, joint expert. (7.39)

(15) The CT should set a target for the completion of all cases, from receipt of application, to issue of decision. (7.41)

(16) Alternative Dispute Resolution (ADR) should be used when appropriate, there should be no compulsion to use it. (7.42)

(17) The staff of the CT should be based in London and the UK Intellectual Property Office should supply the necessary accommodation. (8.10)

(18) There should be a permanent staff of two who will report directly to the chairman of the CT. (8.21)

(19) There should be no restriction on the number of deputy chairmen. (8.23)

(20) The lay members should be abolished. (8.32)

(21) The head of the CT should be called the President. (8.34)

(22) The position of president/chairman should be salaried and an open recruitment exercise held for the appointment of the first and future presidents. (8.38)

(23) An annual budget for the CT should be set by the president/chairman in conjunction with the UK Intellectual Property Office (8.39)

(24) The CT should be responsible for all content on its own website but the UK Intellectual Property Office should manage and administer the site for the CT. (8.42)

(25) Licensing bodies should be able to make references to the CT under sections 118 and 125 of the CDPA. (9.7)

(26) The provisions of sections 128A and 128B of the CDPA should be reviewed. (10.9)

(27) Whether there should be a reference to the CT under section 128(A) of the CDPA should be determined by the chairman of the CT. (10.11)

(28) There should not be any change in the basis for appeal from a decision of the CT. (11.6)

(29) The CT should be responsible for granting licences for the use of orphan works. (12.8)

(30) The collecting societies should be referred to as licensing societies. (13.4)

APPENDIX B

BRIEFING NOTE ON PPL AND VPL

PPL Facts and Figures

- Licenses on behalf of 3,500 record companies and 47,000 performers.
- Licenses 200 TV channels and 300 radio stations broadcasting recorded music, as well as over 200,000 pubs, nightclubs, restaurants, shops and other places playing recorded music in public.
- Has negotiated bilateral agreements with 30 other licensing societies to collect overseas airplay royalties.
- Collected £97.9 million in airplay royalties for performers and record companies in 2006.
- Distributes revenue using a comprehensive track-based system—analysing over 17m uses of recorded music reported by TV and radio stations, background music suppliers and venues playing recorded music in public. All track plays are matched to PPL's repertoire database CatCo, containing information on 9m tracks.
- Distributes to all the performers—featured artists, session musicians and backing vocalists—as well as the record companies that create the sound recordings that are played.
- Is the largest performer/producer collective licensing society in the world.

PPL Recent Achievements

- In 2006, achieved a 12% growth in net revenue for the rightholders.
- In the last five years, has increased net revenue by 50%, generating an additional £28 million payable to record companies and performers, and almost halved the cost/revenue ratio.
- In 2005, PPL's CatCo was selected as the database underpinning the official combined download and singles chart.
- Signed the IFPI Simulcast Agreement in 2002 and the Webcast Agreement in 2003 paving the way for multi-territorial licences.

PPL and Performers

- In 2006, merged with AURA and PAMRA and restructured to bring performers into PPL, for the first time in its 73 year history. Created four Performer Directors, five Performer Guardians and established the Performer Board to oversee performer interests.

VPL Facts and Figures

- Represents 1,000 music video producers.
- Licenses 60 TV channels broadcasting music videos, including 25 specialist music channels.
- Licenses around 2,000 pubs, nightclubs and other places playing music videos in public.
- Collected £12.4 million in airplay royalties for music video producers in 2006.
- Analyses usage information from TV stations and background music services for distribution to rightholders.
- Offers a sourcing service, Music Mall, for back catalogue video clips and other footage.
- Is the largest music video collective licensing society in the world.

VPL Recent Achievements

- Recently concluded a licence with MTV on behalf of independent companies throughout Europe.
- In 2003, integrated management operations with PPL resulting in cost efficiencies to rightholders.
- Concluded licence arrangements for new video on demand services, such as Home Choice, NTL and Telewest, and the new store forward and narrowcast services.
- Announced a video digitisation project to provide online delivery of music videos to users.

Memorandum 5

Submission from the British Academy

THE WORK AND OPERATION OF THE COPYRIGHT TRIBUNAL

Introduction

1. The British Academy welcomes the opportunity to comment on the work and operation of the Copyright Tribunal.

2. The British Academy seeks to promote the interests of scholarship and research in the humanities and social sciences, and is composed of eminent scholars who are elected to its Fellowship on the basis of their scholarly standing and achievement. As the country's national academy for the humanities and social sciences, whose Fellows are both producers and users of original copyright work, the Academy is well placed to consider how the issues raised in the consultation may affect research in these disciplines. Copyright is a very important issue for academic researchers in the humanities and social sciences, because it impacts on the way in which they gain access to, and use, research material.

3. Our comments focus on recommendation 29 that the Copyright Tribunal should be responsible for granting licences for the use of orphan works. Orphan works—works either by authors whose date of death is unknown, and/or of which the right-holders cannot be traced—pose considerable difficulties for academic researchers in the humanities and social sciences, who are frequently unclear about the steps needed to comply with copyright requirements.

Summary

4. The British Academy believes it is important to recognise that the majority of copyright works have little commercial value after a few years have elapsed from publication: the material is out of print, or current catalogue and sales are negligible or not significant. Almost all practical problems relative to orphan works, where the copyright holder cannot be identified, fall into this category. This is unsurprising, since if a copyright remains valuable the holder has a strong incentive to make him or herself known, while if the copyright has little value the holder has no real incentive even to respond to enquiries.

5. The main problem with orphan works, as experienced by Fellows of the Academy, is where a scholar wishes to use old material and copyright may continue to apply but the right-holder cannot be traced. In the overwhelming majority of these cases, our experience is that the right-holder will never come forward. There may be a very small minority of cases in which the holder of a valuable copyright cannot be traced, but these few cases should not create complications in the more general case for the normal, conscientious scholar. We believe these few cases are more than adequately dealt with by our proposed remedies.

Specific Points in Response to Recommendation 29

6. While the problems with orphan works can often be addressed by demonstrating that "reasonable efforts" have been made to trace the heirs of a deceased author, in UK law there is currently statutory protection for such efforts only in relation to anonymous and pseudonymous works. There is no protection for works where the present holder of the copyright simply cannot be traced, or the date of the author's death is uncertain. The current lack of coverage in UK law therefore presents considerable practical difficulties for academic researchers.

7. As a result, valuable works are often unavailable for academic researchers to reuse for the development of new creative material and the advancement of scholarship. Estimates of the number of orphan works suggest that the problem is significant. For example, the British Library estimates that 40% of all print works are orphan works.

8. The British Academy believes that if the author or publisher of an orphan work cannot be identified by reasonable search, others should be allowed to produce derivative works from that material. This will, for example, greatly aid the presentation of historical research, since it will permit the incorporation both of primary and of secondary material that is otherwise still in copyright.

9. The Academy therefore supports efforts to amend aspects of copyright and related rights so that there is provision for the use of orphan works. It favours the policy adopted recently by the US Copyright Office, which in January 2006 published the results of its study of the problems related to orphan works (see http://www.copyright.gov.orphan). Their report made a number of recommendations, including setting a standard of a "reasonably diligent search for the copyright owner" and a "limitation of the remedies that would be available if the user proves that he conducted a reasonably diligent search". The Academy considers that it would be useful if the UK could adopt a similar policy and define what should count as 'reasonable efforts' (see paragraph 13 below).

10. The Academy therefore welcomes the recommendation that the Copyright Tribunal should issue guidelines on orphan works. However it does not believe that the UK should follow the Canadian practice of granting licences for the use of orphan works. The Academy does so on the grounds that:

(a) The procedure is unduly onerous, given that it is unlikely in the majority of cases that the right-holder will subsequently emerge.

(b) Clear guidelines on what constitutes "reasonable efforts" to locate the right-holders of orphan works should address the current problems and uncertainties.

11. Under the Canadian model, a licence to use an orphan work is given only upon payment of a licence fee, which we understand must usually to be paid to a copyright collective society that would represent the untraceable right-holder. The consultation document is unclear whether it also proposes to adopt Canadian practice and introduce licences that would be given only on payment of a fee. The Academy is strongly opposed to any proposal that will require academic researchers to pay to use orphan works when the right-holder has not been identified. As the experience of Fellows and other researchers shows, the overwhelming majority of these right-holders will never come forward, and it is unlikely that the payment of licence fees would be of benefit to the right-holder of the orphan work. Rather, it would be used by the collective society to benefit other right-holders.

12. If the right-holder of an orphan work is subsequently located and a fee is required for use of the orphan work, the terms for academic researchers should be set at a modest level, in view of the fact that they will already have invested time (and funds) in making "reasonable efforts" to identify and locate the right-holder.

13. In setting the standard for a "reasonable search", the British Academy's own Guidelines on copyright and academic research in the humanities and social sciences (available from http://www.britac.ac.uk/reports/copyright) might offer a helpful starting point for the Copyright Tribunal's deliberations.

14. The Academy decided to draw up these Guidelines because it had found that there was considerable uncertainty and confusion within the academic community about issues related to copyright law. The Academy's Guidelines seek to clarify the situation for academic researchers in the humanities and social sciences. In particular, they provide guidance on what might count as "reasonable efforts" in relation to anonymous and pseudonymous works, and set out some practical steps for other cases, with the aim of keeping a check on expenditure that can be disproportionately wasteful or lead to unjustified abandonment of projects. They reflect current UK law and what might be deemed reasonable practice in this context.

January 2008

Memorandum 6

Submission from the British Music Rights

THE WORK AND OPERATION OF THE COPYRIGHT TRIBUNAL

Introduction

1. British Music Rights is the consensus voice of Britain's composers and songwriters, music publishers and their collecting societies. The members of British Music Rights are the British Academy of Composers & Songwriters, the Music Publishers Association (MPA), the Mechanical-Copyright Protection Society (MCPS) and the Performing Right Society (PRS).

2. We welcome the initiative by the Innovation, Universities and Skills Select Committee to look into the work and operation of the Copyright Tribunal with specific reference to the final Recommendations of an independent review put forward in 2007.

3. We are at the disposal of the Innovation, Universities and Skills Select Committee to expand further on our submissions below and also to answer any specific questions the Select Committee may have regarding our members' most recent experience of the Copyright Tribunal in the reference concerning tariffs for the online and mobile delivery of music.[12]

I. Executive Summary

4. The Copyright Tribunal has a pivotal role to play in settling the terms and conditions of licences and licensing schemes proposed by collecting societies in cases where potential licensees claim they are unreasonable. Accordingly the Copyright Tribunal is of considerable importance to the UK's composers, songwriters and their music publishers whose livelihood depends upon the licensing of their music by their collecting societies.

[12] "Online" decision CT84-90705: http://www.ipo.gov.uk/ctribunaldownloadingdecision.pdf

5. Referral to the Copyright Tribunal is typically instigated by commercial music users such as broadcasters, record companies and telecommunications companies as well as by licensees whose businesses are not premised predominantly on music use, such as airlines.

6. MCPS and PRS represent some 50,000 composers, songwriters and music publishers, all of whom (with the exception of fewer than 10 multinational publishers) are either individuals or SMEs. Their members derive well over 80% of their income from the use of their music in the UK from the licensing and royalty collecting activities of MCPS (in respect of the reproduction of their music in recorded form) and PRS (in respect of the performance and broadcast of their music).[13] The amount they each earn from individual uses of their music licensed on their behalf by MCPS and PRS respectively can usually be counted in pence or, more commonly in fractions of a penny. It is only through the multiplicity of licences that MCPS and PRS are able to secure on their behalf that some of them are able to derive a meaningful income. It should be noted that even this is not always achievable. In 2006 over 90% of PRS members earned less than £5,000 in royalties from PRS, and less than 5% earned over £20,000.

7. The experience of MCPS and PRS of the operation of the Copyright Tribunal since its inception has been that cases referred to it have turned out to be unduly lengthy and costly, involving complex and legalistic procedures, with the result that their members are invariably prejudiced, regardless of the final decision. Any delay in promulgating new licences and licensing schemes has a direct impact on the individual members of MCPS and PRS, both in terms of having to wait longer to be paid for the use of their music and in terms of such payments being depleted by virtue of their share of the costs of Copyright Tribunal proceedings.

8. As new means of delivering music emerge and new business models are being developed and implemented in the online and mobile environments the incidence of users seeking to challenge new licences and licensing schemes is set to grow exponentially. Reform of the working and operation of the Copyright Tribunal is not only long overdue—we have been pressing for reform since well before the Leggatt Review launched in 2000[14]—but it is now critical for the health of the music industry and the growth of the UK economy that reform is both thorough and swift.

II. Recommendations of the Completed Review of the Copyright Tribunal[15]

9. British Music Rights welcomes the recommendations made by the UK Intellectual Property Office following its comprehensive review of the Copyright Tribunal. The recommendations address most of our long standing concerns for a more commercial approach and for greater transparency and efficiency in the workings of the Tribunal.

10. We welcome the proposal for a more commercial approach generally and the following recommendations in particular:

(1) a more even handed approach to the parties on each side to a reference including:
   (a) the recommendation that any challenge to a licence should be based on fact to balance the requirement that the workings behind any proposed licence are also disclosed; and
   (b) the recommendation that licensing bodies (collecting societies) should be able to refer their proposed schemes to the Copyright Tribunal in the same way that users are entitled to refer schemes to which they object; we believe this will avoid abuses of the system and consequent delays;

(2) active case management, which we believe will lead to greater efficiency and therefore cost effectiveness in the handling of cases by the Copyright Tribunal;

(3) the adoption of the Civil Procedure Rules, so bringing the Copyright Tribunal into line with the Woolf reforms implemented in the civil courts in 1999 and which are likely to result in less adversarial proceedings;

(4) the encouragement of the parties to consider alternative dispute resolution; and

(5) the commitment to funding the work of the Copyright Tribunal.

11. We attach[16] some specific concerns of MCPS and PRS about the proposal for the UK Intellectual Property Office to become involved in developing licensing schemes and which should be taken into account in the implementation of the Recommendations.

12. Subject to these, we look forward to assisting the UK Intellectual Property Office in whatever way may be required in order to achieve the swift implementation of those Recommendations and we urge this Select Committee to do everything within its power to expedite such implementation.

[13] Whilst the majority of members have traditionally derived the greatest share of their income from MCPS, this balance has shifted with the recent decline in CD sales with the result that the balance between the two income sources is, on average, more or less even.
[14] Published August 2001. See http://www.tribunals-review.org.uk/index.htm
[15] BMR detailed comments on specific recommendations, August 2007 http://www.bmr.org/page/submission-48
[16] See Appendix 1.

III. Further Issues

13. Notwithstanding the excellent outcome of the UK Intellectual Property Office's Review of the Copyright Tribunal, subject to prompt implementation of its recommendations, we invite the Select Committee to take into account our views on the following issues:

The structure of the panel

14. The Copyright Tribunal is often required to adjudicate on licensing schemes involving millions of pounds over their lifetime. These schemes, once settled upon, are often in place for generations and have strong precedential value. We therefore maintain that the chairman of the Copyright Tribunal should be a judge of high standing and certainly at least a High Court judge. We note that other jurisdictions, notably Australia, the USA and Canada to name but three appoint senior judges to chair their equivalent bodies.

15. The criteria for appointing the lay members of the Copyright Tribunal have been less than transparent. Our members' experience is that the expertise or relevant experience of many of the lay members has all too often been hard to discern. Indeed we note that the UK Intellectual Property Office Review established that lay members appear not to have been chosen for their expertise.

16. Whilst we agreed with the UK Intellectual Property Office's recommendation that lay members should be abolished in the light of the reasoning they put forward, the Select Committee should nevertheless be aware that we have previously proposed that lay members should be selected for relevant expertise or that, alternatively, they should be provided with adequate training. We still believe that this could be beneficial and, indeed, a great support to the Chairman. Some of the cases which come before the Copyright Tribunal involve complex economic arguments and/or require the benefit of some experience or knowledge of the music industry.

17. A more usual approach in the context of tribunals would be for each side to nominate an appropriate lay member who would not have a conflict of interest but who would have some understanding of that side's field of operation. We also remain ready and willing to contribute towards some appropriate training for lay members.

18. In the circumstances we would not wish the lay members to be abolished if our above proposals are put into effect.

Double Jeopardy

19. It is vital that the Copyright Tribunal confines its remit to the supervision of licensing terms and conditions and that it does not become involved in considering any regulatory aspects of the workings of collecting societies. The latter are within the jurisdiction of the Office of Fair Trading and, in the case of matters affecting interstate trade, DG Competition of the European Commission. The collecting societies must not be subjected to double jeopardy.

Orphan works

20. It has been suggested that the Copyright Tribunal should be empowered to license works in cases where the copyright owner cannot be identified or traced upon reasonable inquiry. We understand that section 190 of the Copyright Designs and Patents Act 1988, which provides a mechanism for addressing this problem when it arises, has only ever been invoked twice.

21. To the extent that the copyright owners of musical works may be unidentifiable or untraceable, we believe that the scale of this problem is *de minimis*. The royalty collecting societies, both in the UK and across the world, have between them very comprehensive databases containing all the relevant information about virtually all the millions of works protected by copyright. Therefore anyone making reasonable inquiries should approach the relevant collecting society as a matter of course. In the rare case of the collecting societies not being able to provide the inquirer with the information required we would agree that the Copyright Tribunal should be the final resort for obtaining the necessary licence.

22. We suggest, however, that it is premature to make any decision on the role of the Copyright Tribunal in the case of orphan works as their treatment is currently being considered both by the UK Intellectual Property Office and the European Commission following the recommendation in the Gowers Report[17] that there should be an exception to copyright for orphan works.

January 2008

[17] Published December 2006. See: http://www.hm-treasury.gov.uk/media/6/E/pbr06_gowers_report_755.pdf

APPENDIX 1

REVIEW OF THE COPYRIGHT TRIBUNAL
MCPS-PRS ALLIANCE RESPONSE

1. Introduction

The Mechanical-Copyright Protection Society ("MCPS") and the Performing Right Society ("PRS") are the mechanical rights and performing rights collecting societies respectively operating in the United Kingdom in respect of musical works. Whilst remaining separate societies, MCPS and PRS operate through an operational alliance. Together they represent some 50,000 thousand individual UK songwriters and composers of musical works and their publishers, the majority of which are SMEs, as well as hundreds of thousands more right holders from abroad via arrangements with overseas collecting societies.

Right holders earn on average some 80% to 90% of their income from the collective management of their rights by collecting societies. Collective management benefits licensees using high volumes of music and who wish to have access to the full repertoire, both national and international, without the need for individual prior clearance. It is also beneficial to individual right holders for whom the low unitary value for each individual usage of their music makes the licensing and collection of royalties from users both unreasonably onerous and uneconomic. It is important to keep in mind that the societies represent vast numbers of small individuals and that for the most part they each earn a small amount from each scheme or tariff promulgated by their societies.

MCPS-PRS is a member of British Music Rights and the submission of BMR fully reflects our views on the recommendations as to reform of the Copyright Tribunal (CT). It was felt, however, that it may be useful if, as the parties directly involved on a day to day basis in scheme development and negotiation with licensees, we offer some more detailed observations regarding the practical implications of Recommendations 5, 6 and 7. We hope these observations may prove useful in further consultation in the creation of practice directions or other guidelines or set methodologies as envisaged by the Recommendations.

2. Recommendation 5: The Reasoning Behind Licence Schemes and Tariffs should be Clearly Shown

MCPS-PRS welcomes this Recommendation. In our experience we find generally that an open and transparent approach to scheme development enables more effective negotiation with licensees and licensee groups. We believe, however, that there are some practical considerations to be borne in mind when setting out the extent and detail of the reasoning that will have to be shown, particularly in the light of some of the points made in paragraphs 7.17–7.22 of the Review.

2.1 *Establishing a tariff*

The main area of difficulty in licence negotiations, and therefore of contention, tends to be in determining and agreeing the underlying "unit price". How much is a minute of music worth? Ultimately this is a point for commercial negotiation between a buyer (the music user) and a seller (the collecting society on behalf of all its right holder members). The value of music is not measurable on a scientific basis involving "actuarial figures and projections" but rather is dependent on finding the right balance between three factors, namely:

- the value as perceived by our members;
- the value to the licensee's business, which is often a new business where a new licensing scheme is being developed, as perceived by the licensee; and
- accepted precedents and/or comparables established via existing tariffs if and to the extent there may be any that are relevant in the case of a new business.

Once the underlying value has been determined we rely on concrete factors wherever these exist to set the guidelines for establishing a tariff based on that underlying value. These include, for example, box office takings or other licensee revenues, size of the premises, product sales, audience figures, music usage and so on.

Our methodology for setting tariffs for new areas of business is necessarily reliant on licensees providing realistic estimates and projections about their new businesses and a high degree of co-operation from them. However, regardless of the depth of research conducted in advance and the level of co-operation from licensees, market predictions and revenue projections relating to new products are, in our experience, notoriously unreliable.

We also have to be responsive to the fact that a user may want to launch their new product to market before the evidence exists to enable us to make realistic projections. Rather than insisting on a systematic approach based on "actuarial figures and projections", which will only cause unwelcome delay in some cases

and may in any event be impossible prior to launch, we need to be flexible. This can sometimes involve offering a flat-fee non-precedential trial licence which allows the licensee to launch their product and gives us the chance to make an informed licence proposal once the market for the product is more established.

Furthermore, the scale and nature of any dispute may be relevant to what sort of detail on the reasoning behind any scheme should be given. If a long established scheme is sought to be varied by a licensee, then perhaps the onus should be more on the licensee to justify the reasoning behind the need to vary. Also some regard should be had to the "value" of the actual licence in dispute so that any obligation to provide reasoning is proportionate.

Because of all the above factors it is very important that any rules or guidance as to what has to be provided and how it has to be provided is flexible and not too systematic or prescriptive.

2.2 *Disclosure of methodology*

An essential part of the process in establishing any scheme is to explore all possibilities, whether internally, with our members or with other third parties, before promulgating any scheme. Many possibilities may be rejected in the process. This may well involve confidential and/or commercially sensitive discussions and exchanges which neither we nor our members would wish to have to disclose. Whilst we accept that societies should be required to explain their reasoning to the CT in the event that a scheme or tariff is disputed, they should not be subject to an unreasonably onerous or oppressive obligation to divulge all prior documentation and reasoning.

Furthermore, the extent and scope of information and documentation that the CT should require to be disclosed should be proportionate to the value of the licence at issue and relevant to the aspects in dispute.

3. Recommendation 6: A Challenge to the Terms of a Licence should be Based on Fact

We agree that licensees should be required to support their objections to the terms of a licence with fact, and the disclosure of the figures as envisaged in paragraph 7.23 of the Review. We also consider they should also justify the reasoning behind their position or any alternative licensing terms that they promulgate.

4. Recommendation 7: The CT (with the Extra Resources mentioned in Recommendation 18) should take an Active Part in Formulating Methodologies for the Objectification of the Criteria for the Conditions of a Licensing Scheme

4.1 *Role of Tribunal in scheme development*

We welcome and support the opportunity of working with the officials of the CT in order to assist with understanding the schemes and tariffs at issue in any particular case and so to promote efficiencies within CT proceedings.

However, we would welcome some clarification as to the scope of this Recommendation and, in particular, whether it is envisaged that the officials are to be consulted at any stage during the development of a scheme or tariff or whether they are only to become involved if and when a scheme or tariff has been referred to the CT. If it is to be at the former stage, is such consultation with CT officials to be compulsory? MCPS-PRS is concerned that the CT's involvement will create an additional layer of consultation and complexity and could delay the introduction of new or revised schemes to the detriment of right holders and licensees.

Alternatively, is it proposed that the Tribunal and societies together will formulate a series of general overarching principles to which societies must have regard in respect of any licensing scheme?

4.2 *Resource*

We note that it is proposed that two members of CT staff should undertake the work envisaged in paragraph 7.29 of the Review.

Subject to the clarification sought above, it should be noted that scheme development is an ongoing and key element of the societies' business in which we invest considerable resource as well as time and effort in training that resource. Several members of our staff are engaged full time in developing and consulting on new schemes as well as in reviewing, amending and renewing existing schemes and tariffs. They also draw on support and expertise from other areas of the societies' business including the legal, research and distribution teams. They have, as a consequence, developed considerable breadth and depth of knowledge and expertise not only on the schemes and tariffs promulgated by the societies but also in relation to the markets in which their licensees operate.

It would be quite an undertaking to raise the expertise of CT staff in such a wide range of markets and music users, quite apart from other rights users, to a sufficient level to assist in the scheme development process. Furthermore, in the context of a dispute, the knowledge of Tribunal staff could not be a substitute for evidence supplied by the parties.

We also stress the importance for licensees of the timely introduction of licensing structures. It would be very important to ensure that Tribunal involvement in scheme development does not create unacceptable delays.

4.3 *Publication of a practice direction as to what data should be provided to support the basis for terms and conditions of licences*

Guidance as to what data needs to be provided will be of great assistance and we do agree that this should lead to increased efficiency of the Tribunal. It is important, however, that any such guidance takes account of the sheer breadth and variety of the relevant licences. We do have genuine concerns that it may prove impossible to draft a meaningful Practice Direction that would fit all the possible licensing schemes for the use of music and that this is likely to be restrictive rather than helpful in developing new schemes. We operate a wide range of over 100 schemes and tariffs, each of which is tailored to specific circumstances of music usage, whether offline or online and whether involving performing rights, mechanical rights or both. These are subject to periodic review, amendment or renewal at different times. We also develop new schemes and tariffs at an increasing rate in consultation with users to meet new market and technological demands and the criteria for each of these vary according to the individual circumstances. It is vital that societies should have the freedom to be responsive to market demands.

4.4 Discussions with CT officials should not be seen to indicate approval

We completely endorse the concern that the impartiality of the Tribunal should not be prejudiced in any way and therefore it is also important that the discussions with the CT are not at a deep enough level as to affect the commercial terms but are directed more at the presentation of the explanation of them. We also repeat that, for the reasons set out above, we are concerned that such discussions should not unduly delay the licensing process for users as this would be against the interest of all parties.

5 September 2007

Memorandum 7

Submission from the Music Users' Council

THE WORK AND OPERATION OF THE COPYRIGHT TRIBUNAL

Background

The Music Users' Council is an umbrella body representing the interests of 25 trade organisations and individual companies which, between them, represent some 300,000 individual businesses. All these businesses have issues concerning the playing of copyright music which involves the negotiation of licences for the public performance of that music in all delivery forms—from live performance, through jukeboxes to background music delivered via satellite broadcast.

As far as the United Kingdom is concerned there are only two monopoly organisations that issue music copyright licences—Phonographic Performance Limited (PPL) representing producers and record companies and Performing Rights Society (PRS) representing authors and music publishers. Every user of copyright music, from a voluntary organisation holding a dance in a village hall to a multi-national operating a cross-border streaming service has to obtain a licence from one or both of the above companies.

If a music user is forced to pay a licence fee which they consider to be far in excess of the fee hitherto negotiated or if onerous terms are imposed as a condition of granting the licence there is no other recourse than applying to the Copyright Tribunal in order to try to lessen the financial obligation or ameliorate the conditions of the licence.

The Copyright Tribunal—Today and Yesterday

As things stand the Tribunal is seriously understaffed and under funded and relies on out dated practice directions. In a current case a group of users have had to wait more than a year for determination of a case which has so far cost £100,000 while still paying the copyright collection society. Should the case go against the collection society a further appeal will probably be brought to law. These proceedings prove to be very costly to users whereas the collection societies have unlimited funds to pursue their case. As evidence of this it should be noted that PPL distributed some £90 million to its members according to latest figures (2006).

The Copyright Tribunal—A Possible Future

Our further evidence to the committee regarding the future reflects our response to the external report prepared last year for the UK Intellectual Property Office (previously the Patent Office).

- It is a sensible idea to have the proceedings of the Copyright Tribunal governed by civil procedure rules and at the same time a review of practice direction undertaken.
- From receipt of application to a decision the Tribunal should be in a position to provide a clear timetable for completion of a case.
- More resources in terms of manpower and finance should be made available.
- There needs to be a clearer definition of the sections 128a and 128b, introduced as revisions to the Copyright, Designs & Patents Act (1988) in 2003.

In summary these are our immediate thoughts when considering evidence to the Committee. We would welcome the opportunity to provide more detailed evidence either orally or in written format.

January 2008

Memorandum 8

Submission from the UK Intellectual Property Office

Executive Summary

1. The Copyright Tribunal is an independent tribunal established under the Copyright, Designs and Patents Act (CDPA) 1988. Some operational support for the Tribunal is provided by the UK Intellectual Property Office (UK-IPO). This memorandum sets out some of the Tribunal's background, context and future work being considered by UK-IPO.

2. The memorandum also discusses some recent intellectual property reviews and their connection with the work of the Copyright Tribunal.

Introduction

3. This note is submitted in response to the Innovation, Universities and Skills Select Committee's invitation to supply written evidence to assist in its sub committee's inquiry into the operation of the Copyright Tribunal.

4. UK-IPO welcomes the Committee's inquiry, which comes at an opportune time as UK-IPO has been looking at the Tribunal, and considering how its operation might need to change, along with Judge Fysh, the Chair of the Tribunal. UK-IPO is now a considerable way down that track and hopes soon to take this forward. This memorandum therefore, informs the Committee of where matters rest, and the work that we plan to do next.

Background to the Copyright Tribunal

5. The Copyright Tribunal is an independent tribunal established by the 1988 Copyright Designs and Patents Act. The Copyright Tribunal is a successor to the Performing Right Tribunal (PRT) established by the Copyright Act 1956. There have been a number of personnel changes and additions to the Tribunal's remit since 1988, but its structure has not changed.

6. The Tribunal's primary purpose is to resolve disputes between collecting or licensing societies (for example the Phonographic Performance Limited) and users (for example the BBC) on the terms and conditions of licenses, or on the refusal by licensing societies to provide licenses. But the Tribunal also has a wider responsibility to hear cases referred by the Secretary of State. Not all these referred cases will necessarily involve collecting or licensing societies. The Secretary of State may choose to refer cases to the Tribunal for other reasons, for example the Tribunal can settle disputes regarding the royalties payable to Broadcasters for the publication of television listings. The Secretary of State may also direct the Tribunal in respect of the coverage of a licensing scheme or license in respect of reprographic copying by an educational establishment. Annex A sets out the full jurisdiction of the tribunal.

7. The Monopolies and Mergers Commission reported on Collective Licensing in 1988 and Performing Rights in 1996, both of these reports made comments on the Copyright Tribunal.

Composition of the Tribunal

8. The Tribunal comprises of a Chairman, two deputies and a pool of up to eight lay members. The Chair and deputies are appointed by the Lord Chancellor, who is also responsible for issuing the Tribunal's Rules, which set out its scope and operational parameters. The Secretary of State for Innovation, Universities and Skills appoints lay members and UK-IPO provides operational support for the Tribunal's activities.

Work of the Tribunal

9. Since it began in 1988, 106 references have been filed with the Copyright Tribunal. Decisions were reached on 20 of these references. A further 15 references have had Directions Hearings but are still ongoing, or have been withdrawn or settled without a final decision by the Tribunal.

10. Cases heard by the Tribunal are often very substantial in size involving a large number of parties with wide ranging judgements and substantial costs. For example a recent case on downloading involved 15 parties with an interim judgement of some 80 pages, multi-million pound legal costs and almost 18 months between reference to the Tribunal and the first hearing.

11. These long, complicated and expensive cases have led to a perception in industry that the Tribunal is unwieldy and inaccessible in small cases. Indeed the perception of the Tribunal as slow has carried over from its predecessor, the PRT, following the case of AIRC v PPL which ran from 1978–86. In addition there is a perceived imbalance as reference to the tribunal over a proposed licensing scheme or license may only be made by users and not by licensing agencies except in relation to the distribution of equitable remuneration.

12. The perception of the tribunal as expensive and slow is something UK-IPO aspires to break. Our intention is to look at amending the Tribunal's remit to respond to current Copyright challenges. Should the remit be increased UK-IPO would substantially increase the Tribunal's operational resource. UK-IPO hopes that the Tribunal will seize the opportunity a wider remit and increased resource would present. UK-IPO would like to encourage a wider range of cases to be put before the Tribunal, demonstrating how it can operate efficiently and economically as a matter of course, rather than being a matter of last resort. UK-IPO acknowledges that the Tribunal's Rules have not been updated for some time, and will work with the Tribunal and the Ministry of Justice to amend these, to ensure the Tribunal is appropriate for a wider range of cases.

Tribunal in Context of Wider Copyright Issues

13. As the global economy develops, with centres of manufacturing shifting to countries with low cost economies, the UK needs to find new ways to compete successfully. The Government recognises that this can be done most effectively by building an economy built on innovation: encouraging the delivery of high value innovative goods and services, by well-skilled people employed in high quality jobs, by successful businesses. Whilst there are various elements outside the scope of this memorandum which need to be in place to support such innovation, the one that is of most interest here is the means of adequately protecting it, via the intellectual property framework.

14. Intellectual property provides a set of tools for individuals and businesses to be able to recoup their investment in bringing their creativity and inventiveness to the public. Copyright is perhaps the most important of these tools for the creative industries which include businesses involved in advertising, computer and video games, design, film, music, software and television. These industries are an important part of the UK's economy. Their success is illustrated by the most recent figures[18] from the Department of Culture, Media and Sport. In 2005 they accounted for 7.3% of Gross Value Added (GVA) of the economy, making them comparable to the financial services industry. They grew by an average of 6% per annum between 1997 and 2005, compared with an average of 3% for the whole of the economy over this period. In terms of employment, they accounted for over 1.1 million jobs in the summer quarter of 2006, with almost 800,000 further creative jobs within businesses outside these industries. Exports of services totalled £14.6 billion in 2005, about 4.5% of all goods and services exported.

15. With the Creative Industries playing such an important role in the UK's economy, as well as their pivotal function in supporting and developing the UK's culture, it is important that the underpinning protections should function properly, especially given the rapid rate of technological and digital developments. The Government commissioned a review of the UK's intellectual property framework by Andrew Gowers to look at how it functions in the digital age. The Review reported at the end of 2006 and concluded that the framework was broadly satisfactory, but made various recommendations to improve it. Since then the UK-IPO has been concentrating on taking forward the many recommendations for which it is responsible, and has most recently issued the first part of a two-part consultation about potential amendments to copyright exceptions. Whilst this does not impact on the Copyright Tribunal directly, it is important to set in context the Government's intention of delivering a copyright framework appropriate for the digital age.

[18] Bulletin on the creative industries economic estimates 2007: http://www.culture.gov.uk/Reference_library/rands/statistics/creative_industries_eco_est.htm

16. Copyright enables the Creative Industries to protect their works by controlling levels of access and setting remuneration appropriate to that access. For example, over the internet, the public can access films in a variety of ways, from "free shorts" to "pay per view" to full price purchase of the whole film. Copyright owners may choose to set fees directly themselves, as may be the case for accessing works over the internet, or more often may be done via collecting or licensing societies, which have been set up by various of the creative industries for the express purpose of managing and licensing their rights on a collective basis. These organisations are often "not-for-profit". They enable the administrative burdens of licensing to be shared by rights owners, as well as giving potential users an easier way of licensing—especially for the use of multiple works, as would be required for example when playing music in a pub or club—than by approaching individual rights owners.

17. Collecting or licensing societies are mandated by their members to set the terms and conditions of their licensing arrangements. They will often negotiate with relevant trade bodies representing users' communities to set terms including levels of remuneration, to ensure that there is as widespread a level of agreement as possible for all parties. Unsurprisingly, this is not always possible, and the terms may be disputed by users. The Copyright Tribunal exists to resolve such disputes, but can only receive cases referred to it by users (or some circumstances, as mentioned in paragraph 6, by the Secretary of State) except in relation to the distribution of equitable remuneration. It will take evidence from both sides and determine what terms and conditions are appropriate in the circumstances. The Copyright Tribunal's decision is binding: the only appeal is on matters of law.

UK-IPO Support for the Tribunal

18. The successful operation of the Copyright Tribunal is important to UK-IPO because Copyright is a vital tool to protect Intellectual Property and the Tribunal has an important role in maintaining an efficient and equitable licensing system for Copyrighted works. Consequently, the Office has had significant involvement with it in a number of ways.

19. Firstly, while the Ministry of Justice has appointed the judicial members of the Tribunal, and has issued the Tribunal Rules, UK-IPO has contributed to previous revisions of those rules and liaises closely with Ministry of Justice on matters relating to the judicial members of the Tribunal. UK-IPO also appoints the lay members of the Tribunal.

20. Secondly the office also provides the Secretariat, and other financial resources, for the Tribunal. This support is currently provided by a part time Secretary to the Tribunal and, along with the other support UK-IPO provide, (for example the expenses of the lay members) costs around £20,000 per annum although this varies considerably with the volume of cases.

21. Thirdly, and perhaps most importantly, the UK-IPO provides the Tribunal with the benefit of the expertise it has acquired as a result of operating other similar Tribunals concerned with intellectual property issues, such as the Trade Marks Tribunal. The UK-IPO also receives income from the tribunal, from fees and charges for copies of previous decisions, at present this income is around £2,000 per annum, as with the expenditure this varies with case volume.

Recent UK-IPO Consideration of the Copyright Tribunal

22. We recently commissioned two experienced Trade Marks inter partes hearing officers to review the Copyright Tribunal, largely focussing on operating practices. The report of this review was published in May 2007, and made 30 recommendations. These broadly focussed on improving the efficiency of the tribunal through practice changes, regulatory changes and resources provided to the Tribunal. The UK-IPO consulted publicly on the recommendations made. That consultation closed on 31 August 2007. Twenty responses were received, mostly from the collecting or licensing societies and copyright user groups. Respondents to the consultation generally split between user representatives and rights holder representatives. Most on both sides accepted the operational recommendations and welcomed changes that would increase the efficiency of the Tribunal. Many respondents on both sides were also in support of legislative changes such as the adoption of CPR and practice directions to replace the Copyright Tribunal Rules.

23. But there have been other developments in intellectual property (such as the formation of our strategic response to the Gowers Report), and some other issues involving copyright specifically, which now suggest that there are questions to be answered about the role and scope of the Tribunal, that go beyond the scope of the 2007 Review, which primarily focussed on improving the efficiency of the Tribunal's operation rather than considering in detail its scope.

24. The UK's intellectual property framework is set within the bounds of numerous international conventions and directives, but there is some scope within that for the UK to develop certain aspects to suit its own needs. The Gowers Review of Intellectual Property, although recognising that the framework was

broadly satisfactory, made various recommendations to improve it. Although none of these relate specifically to the operation of the Copyright Tribunal, those relating to orphan works may have a bearing on it, specifically the recommendation to make a proposal to the European Commission to introduce a provision for orphan works. Such a provision may give rise to the need for a mechanism to resolve disputes or otherwise grant consent to use orphan works. As the Review of the Copyright Tribunal notes, the Copyright Tribunal may be an appropriate location for such a function.

25. We note that the Gowers Review takes a different approach to that within the EU which suggests that this is primarily an issue for member states to address on an individual basis. Such work is continuing through the coordinated efforts of the Digital Libraries initiative, which is part of DG Information Society's "i2010" programme. This work focuses on an approach more in line with Gowers other recommendations in this area, such as the production of guidelines. This work will move forward in parallel with the work of UK-IPO and will be invaluable to the work in the UK. But the different stances taken by the EU and Gowers mean that UK-IPO needs to assess very carefully how to take this forward. UK-IPO is currently gathering information from various stakeholders before drawing up plans for a consultation on the best way of proceeding.

Next Steps

26. Having recently discussed the results of the summer 2007 review and public consultation, UK-IPO is currently concluding how to follow up the recommendations. But UK-IPO has not lost sight of the need for more radical change to the Tribunal, and UK-IPO recognises that until this question is resolved it may not be appropriate, or the best use of Tribunal or UK-IPO resources, to press on with some of the recommendations. UK-IPO expects to have reached a view on these strategic Copyright questions in time to publicly consult on options in the summer.

27. This memorandum has been cleared by departmental lawyers and seen by the Ministry of Justice.

January 2008

Annex A

The CT was set up by the Copyright, Designs and Patents Act 1988 (CDPA). The jurisdiction of the CT under Part 1 of the CDPA is set out in section 149 CDPA and under Part 2 in section 205B CDPA. The authors of *Copinger and Skone James on Copyright* (Fifteenth edition) conveniently list the jurisdiction of the CT (footnotes excluded).

"Specifically it now has jurisdiction to hear and determine:

(1) Jurisdiction under Part I of the 1988 Act

(a) applications to determine the royalty or other remuneration to be paid to a copyright owner with respect to the cable re-transmission in certain circumstances of a wireless broadcast including a work owned by him;

(b) applications to determine the amount of equitable remuneration payable to authors of literary, dramatic, musical and artistic works and principal directors of films where their rental right concerning a sound recording or film has been transferred to the producer of the sound recording or film;

(c) references of proposed or existing licensing schemes dealing with copyright licences;

(d) applications with respect to entitlement to a copyright licence under a licensing scheme;

(e) references or applications with respect to licensing by a licensing body dealing with copyright licences;

(f) references by the Secretary of State of licences or licensing schemes in relation to the playing of sound recordings under section 128A of the 1988 Act;

(g) applications to settle the terms of payment or as to the reasonableness of any condition in relation to the use as of right of sound recordings in broadcasts;

(h) appeals against an order by the Secretary of State as to the coverage of a licensing scheme or licence in respect of reprographic copying by an educational establishment;

(i) applications to settle a royalty or other sum payable for lending of certain works to the public;

(j) applications to settle the terms of a copyright licence available as of right consequent on the exercise of their powers by the Secretary of State, the Office of Fair Trading and the Competition Commission;

k) applications to settle the terms of payment under a compulsory licence inrespect of information about a programme service;

(2) Jurisdiction under Part II of the 1988 Act

(l) applications to determine the amount of equitable remuneration payable to performers where commercially published sound recordings of their performances are played in public or communicated to the public;

(m) applications to give consent to the making of a recording of a performance on behalf of a performer who cannot be traced;

(n) applications to determine the amount of equitable remuneration payable to performers where their rental right concerning a sound recording or film has been transferred to the producer of the sound recording or film;

(o) applications to determine the royalty or other remuneration to be paid to the owners of the rights conferred by Part II of the 1988 Act in relation to a performance or recording of a performance with respect to the re-transmission by cable of a wireless broadcast including the performance or recording;

(p) references of proposed or existing licensing schemes relating to performers' property right licences, namely for copying a recording of a performance or renting or lending of copies of such a recording to the public;

(q) applications with respect to entitlement to a licence under a licensing scheme relating to performers' property right licences;

(r) references and applications with respect to licensing by a licensing body dealing with performers' property right licences;

(s) applications to settle the royalty or other sum payable for the lending of certain recordings treated as licensed by performers by virtue of an order of the Secretary of State;

(t) applications to settle the terms of licences in respect of performers' property rights available as of right consequent on the exercise of their powers by the Secretary of State, the Office of Fair Trading and the Competition Commission;

(3) Other jurisdiction

(u) applications to settle the royalty or other remuneration payable in respect of the use as of right of works in which revived copyright subsists;

(v) applications to settle the remuneration payable in respect of the doing as of right with regard to performances in which revived performance right subsists of any acts which require the consent of the owner of such rights;

(w) references and applications with respect to licensing schemes, licences and licensing bodies relating to licences in respect of the database right conferred in respect of the contents of databases ("database right licences") and in particular:

(i) references of proposed or existing licensing schemes relating to database right licences;

(ii) applications with respect to entitlement to licences under a licensing scheme relating to database right licences;

(iii) references or applications with respect to licensing by a licensing body dealing with database right licences;

(iv) applications to settle the terms of a database right licence available as of right consequent on the exercise of their powers by the Secretary of State, the Office of Fair Trading and the Competition Commission;

(x) equivalent references and applications with respect to licensing schemes, licences and licensing bodies relating to licences in respect of the publication right conferred on publishers of previously unpublished works in which copyright has expired;

(y) applications to determine the royalty or other remuneration payable to the trustees for the Hospital for Sick Children in respect of the use of the play "Peter Pan" by Sir James Matthew Barrie".

Memorandum 9

Submission from the Authors' Licensing and Collecting Society (ALCS)

THE WORK AND OPERATION OF THE COPYRIGHT TRIBUNAL

Executive Summary

Our evidence sets out our comments on the work and operation of the Copyright Tribunal under three headings: fairness and balance; efficiency and resource; accessibility and remit.

To a great degree the evidence in this submission responds to the recommendations included within the Copyright Tribunal undertaken last year by the IPO ("the IPO Report"). In the view of ALCS the review was thorough and timely piece of work and the IPO Report made a number of useful and progressive suggestions.

ALCS are grateful for the opportunity to contribute to this review and would be happy to provide further input into the inquiry as required.

Fairness and Balance

In a digital use environment the demand for large-scale rights clearances offered by licensing bodies is likely to increase. It is therefore vital that the Tribunal applies a fair and balanced approach to dealing with user groups and licensing bodies. ALCS supports strongly the IPO Report recommendations aimed at placing Licensing bodies and Licensees on a more even footing in their dealings before the Tribunal.

Efficiency and resource

ALCS also supports strongly the IPO Report recommendations aimed at making the Tribunal more efficient in terms of cost, time and processes, such as the adoption of the standard civil procedure rules and the institution of a more permanent, specialised staff.

Accessibility and remit

In certain cases, where the full resource of the Tribunal may be unnecessary or inappropriate, ALCS queries the need for a second tier of dispute resolution services—particularly with a view to finding a service better suited to the needs of an individual creator. We also suggest that the proposal in the IPO Report to extend the powers of the Copyright Tribunal to the licensing of orphan works may require further consideration.

1. Introduction

1.1 The Authors' Licensing and Collecting Society Limited ("ALCS") is the UK rights management society for writers of all genres of literary and dramatic copyright works including fiction, journalism, plays, poetry, academic texts, TV and radio scripts and story-lines, dramatisations, translations, abridgements and adaptations.

1.2 In addition to being a licensing body in its own right, ALCS is also a member of the Copyright Licensing Agency (which it founded together with publishers 25 years ago to provide a pragmatic means for the licensing of published works) and the Educational Recording Agency. On behalf of almost 60,000 writers ALCS is able to provide a broad mandate to CLA and ERA to cover a vast repertoire of written/scripted works for inclusion in licensing schemes. Since its foundation in 1977 ALCS has distributed over £160 million to writers, the majority of which has been licensed through CLA and ERA. Over the years the testimony of our members has revealed the importance to writers of these additional, "secondary revenue streams". We support strongly the evidence submissions made by CLA, ERA and the British Copyright Council to this inquiry.

1.3 The proliferation of digital technology has upset the balance between rights-holders and users, as opportunities to obtain creative works "for free" have increased. Recent research by Bournemouth University[19] highlighted the struggle professional writers face to make a living from their work, suggesting their annual earnings are falling in real terms, with typical earnings down at less than two thirds of the national average wage.

1.4 In this challenging environment support for the rights of creators is more vital than ever if they are to sustain their role as drivers of the creative industries, providing the raw materials for a sector contributing 7.3% to the economy.[20] Aside from offering access and compliance to users of copyright works though the

[19] http://www.cippm.org.uk/publications/index.html
[20] *Staying ahead: the economic performance of the UK's creative industries* (DCMS).

provisions of licences, licensing organisations play a key role in obtaining fair remuneration for creators (on terms that they would be unable to secure on an individual basis). It is therefore vital that the Copyright Tribunal provides a fair and effective framework for the resolution of disputes involving copyright licensing schemes, to safeguard the legitimate interest of the creators represented by licensing bodies in receiving a fair return for the use of their work.

2. Fairness and Balance

2.1 The role of the Copyright Tribunal is to ensure that licensing arrangements strike a fair balance between the interests of rightsholders and those that seek to make use of their protected works. The IPO Report noted the need to preserve this balance in the face of emerging technologies, "As the means to copy and diffuse copyright material grow and become easier to obtain, so the collecting societies become more important in obtaining appropriate recompense for their members".[21]

The same chapter of the IPO Report acknowledges the role played by licensing societies in supporting rightsholders (irrespective of their economic status) and upholding the right of creators to receive a fair reward from the use and re-use of their works.

2.2 To enable licensing organisations to represent effectively and, where necessary defend, the interests of rightsholders, ALCS wholeheartedly supports the recommendation in the IPO Report that the Tribunal should be balanced in its approach to each party in any matter referred to it. This is clearly a guiding principle for any arbitrating body, and we feel that balance is particularly important at a time when technology allows for unprecedented levels of access to copyright works.

2.3 This application of a balanced approach also needs to recognise the relative strengths, particularly in commercial terms, of the parties that are likely to appear before the Tribunal. Licensing societies are generally run on a not-for-profit basis with excess funds applied in lowering member ommissions. Conversely the blanket nature of many licensing schemes means that licensees will often be large organisations or the representative body of an entire licensed sector, and will therefore be well equipped to deal with the Tribunal process.

2.4 As a specific measure ALCS strongly supports the proposals set out in the IPO Report to bring the position of licensing societies into line with licensees, who already have the right to refer existing or proposed licences and schemes to the Tribunal.[22] Aside from the fairness argument, this facility may be particularly useful in resolving long-standing difficulties during the licence negotiation process, thereby reducing the financial and resource burden for both parties and strengthening the overall credibility of the licensing framework.

2.5 Finally under this heading we support the recommendation in the IPO Report that challenges to the terms of a licence (or the sampling systems underpinning it) should be based on fact.[23] The Gowers Report noted that copyright in the UK suffered from, "a marked lack of public legitimacy".[24] Part of the process of re-establishing this legitimacy is to ensure that the reasoning behind copyright licensing schemes is clearly understood and that challenges cannot be made, for example, on the basis that other parties within a licensed sector have resisted the offer of licensing.

3. Efficiency and Resource

3.1 On the basis that costly delays in the Tribunal process ultimately impact on the revenue available for distribution to rightsholders, ALCS welcomes the suggestion in the IPO Report to abandon the Copyright Tribunal Rules (1989) in favour of the Civil Procedure Rules and Practice Directions, in addition to the other measures referred to in the report aimed at adding efficiency to the hearings process.[25]

3.2 As to the question of resource we agree with the IPO Report proposals to centralise the Tribunal with a permanent staff based in London, under the direction of a salaried president/chair. Regarding all staff and members of the Tribunal we stress the importance of acquiring and maintaining the "bank of knowledge" referred to in point 8.14 of the Report, and feel that this must also extend to an understanding not simply of the mechanics of the licenses and schemes but also the underlying rationale behind them, and the relationship between the licensing societies and their members.

[21] UK-IPO Review of the Copyright Tribunal, paragraph 4.6.
[22] UK-IPO Review of the Copyright Tribunal, paragraph 9.7.
[23] UK-IPO Review of the Copyright Tribunal, paragraph 7.23.
[24] Gowers Review of Intellectual Property, paragraph 3.26.
[25] UK-IPO Review of the Copyright Tribunal, Chapter 7.

4. Accessibility and Remit

4.1 Even if the various measures suggested by the IPO Report are adopted and implemented, the Copyright Tribunal will remain a forum for the hearing of disputes between licensing bodies and users/their representative bodies. Individuals, such as authors and performers may often be unable or unwilling to pursue costly litigation to resolve disputes. The Select Committee may wish to consider what structures or services may be developed or devised to fill this gap in the current system.

4.2 Aside from the recommendations concerning operational matters, the IPO Report also suggested that the Tribunal take on a new function as the body responsible for granting licences for the use of orphan works.[26] In carrying out this function the IPO Report envisaged that the Tribunal would assume responsibility for issuing guidelines on matters such as the definition of a reasonable search prior to the classification of a work as "orphan".

4.3 This new function is premised upon an amendment to the European Copyright Directive, enabling the implementation of an orphan works use exception in UK copyright law. As it is likely that considerable time may elapse before this could take place, ALCS suggests that, in the interim, licensing bodies and other interested parties could usefully work with the IPO to investigate, among other things, the actual extent of the demand for use of orphan works, the form of guidelines for search processes and the extent to which existing databases may be developed to provide access to information to assist in the identification and location of rightsholders. In this way a resolution may be found more quickly to an issue seen by some as a serious problem with the current copyright regime, leaving the Tribunal to adjudicate in areas not covered by any resulting rules and licensing schemes.

January 2008

Memorandum 10

Submission from T-Mobile

THE WORK AND OPERATION OF THE COPYRIGHT TRIBUNAL

1. Executive Summary

T-Mobile welcomes the opportunity to respond to the Sub-Committee's inquiry into the work of the Copyright Tribunal. T-Mobile intervened in the recent Copyright Tribunal reference in relation to the appropriate royalty for the sale of digital music. T-Mobile respectfully suggests that the Committee considers ways to simplify procedure with a view to reducing the costs involved and therefore improving access to the Tribunal.

2. Background

2.1 T-Mobile International (UK) Limited ("T-Mobile") is part of T-Mobile International which is wholly owned by Deutsche Telekom AG.

2.2 T-Mobile was an intervening party in Copyright Tribunal reference CT 84-90/05 BPI (and others) v MCPS-PRS Alliance (and other) in relation the to Joint Online Licence.[27] T-Mobile was involved as it offers full track music downloads to its customers over its mobile phone network.

2.3 Initially 0_2 and then T-Mobile co-ordinated the involvement of the participating UK mobile networks.

2.4 T-Mobile considers it appropriate to set out a number of observations based on its experiences in that Copyright Tribunal reference, in case they may be of assistance.

3. T-Mobile's Experiences of the Copyright Tribunal

3.1 T-Mobile's experience of the Copyright Tribunal was comparable to large scale High Court proceeding rather than an arbitration.

3.2 This may have been due to the complexity of the issues, the number of parties or the individuals involved, but the proceedings were akin to High Court proceedings in terms of formal procedure, cross examination of witnesses, tactics, time spent (including at the oral hearing) and, crucially, costs involved.

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[26] UK-IPO Review of the Copyright Tribunal, Chapter 12.

[27] (1)The British Phonographic Industry Limited (2) Musicnet (UK) Limited (3) Yahoo! UK Limited (4) AOL (UK) Limited (5) Real Networks Limited (6) Napster LLC (&) Sony United Kingdom Limited (8) iTunes SARL (9) O_2 (UK) Limited (10) T-Mobile International (UK) Limited (11) Vodafone UK Content Services Limited (12) Orange Personal Communications Services Limited -v- (1) Mechanical Copyright Protection Society Limited (2) Performing Right Society Limited (3) British Academy of Composers and Songwriters.

3.3 T-Mobile has not had previous involvement with the Tribunal and therefore does not know if its experience is unusual but it considers that the prospect of engaging in such a daunting exercise might serve as a very substantial deterrent on smaller licensees wishing to challenge the terms of a licence.

3.4 T-Mobile's recommendations are focussed on identifying ways to improve access to the Copyright Tribunal and to "de-formalise" its procedures.

4. T-Mobile Recommendations

4.1 In considering the work and operation of the Copyright Tribunal T-Mobile recommends that the Committee consider the following issues:

4.1.1 *Number of Parties*—15 parties were involved in this reference, which led directly to an increased burden on the parties, the schedule and the members of the Tribunal themselves. It is appropriate to consider whether this burden could be reduced by, for example, limiting the number of parties (on a case by case basis) and encouraging intervening parties to give evidence in support of one party instead.

4.1.2 *Length of hearing/number of witness*—this reference lasted for 20 days and involved five expert witnesses. In order to improve the efficiency of the Tribunal it is reasonable to question whether there should be a limit on the length of the final hearing and the number of witnesses (including expert witnesses) called to give oral evidence and to be cross-examined.

4.1.3 *Procedure*—greater transparency of procedure would benefit parties to the Tribunal. The rules are of course set out in The Copyright Tribunal Rules 1989 (as amended) and a short practice direction accompanies them. However for parties engaging in the Tribunal for the first time, a more "hands-on" practice direction drawing those two sources together and adding any new appropriate procedural rules would be very useful. T-Mobile would be happy to participate in any consultation about such a document.

5. Conclusion

5.1 T-Mobile commends the important work of the Copyright Tribunal, which leads the way in Europe in providing a vital recourse for music licensees in the UK.

5.2 T-Mobile hopes that its brief views are useful to the Committee and is happy to provide further information to the Committee, whether written or verbal.

January 2008

Memorandum 11

Submission from the Copyright Licensing Agency

THE WORK AND OPERATION OF THE COPYRIGHT TRIBUNAL

1. Executive Summary

1.1 The Copyright Tribunal should provide a simple and inexpensive solution to disputes between owners and users of copyright. In reality, Copyright Tribunal proceedings are lengthy and complex and its role in providing a remedy for users only has lead to a perception that it is more sympathetic to users than to copyright owners. The need for it to be seen as impartial was recently recognised in the IPO's own review of the Copyright Tribunal.

1.2 CLA made a submission to the IPO review of the Copyright Tribunal and responded to the published results of that review [; these documents are attached for convenience]. CLA agreed with many of the findings of the review and believes that it is important that the IPO are given the authority and resources necessary to proceed to implement the recommendations.

1.3 The main areas of concern are:

1.3.1 the role and purpose of the Tribunal—the perception of unfairness to rightsholders and the erroneous belief that collecting societies are powerful monopolistic bodies against whom users need protecting, which is often at odds with reality of the situation;

1.3.2 that only users, and not rightsholders or their agents the collecting societies, have the right to seek a remedy from the Copyright Tribunal;

1.3.3 the fact that claimants can—and do—launch cases without being required at least to consider mediation;

1.3.4 the selection and composition of the Tribunal—the lack of transparency in the way lay members of the Tribunal are selected and the lack of any published criteria of the experience and skills that they are supposed to possess to enable them to discharge their role effectively and fairly;

1.3.5 the process and procedure of the Copyright Tribunal—the Copyright Tribunal rules of procedure differ from the normal rules for civil litigation. They often work to increase the length and complexity—and hence costs—of claims and unfairly prejudice collecting societies in contesting the case without a full understanding of the nature of the complaint at the outset;

1.3.6 the basis on which decisions are made—the Tribunal should have greater regard to agreements freely negotiated between the parties and not upset these lightly as being the best evidence of an appropriate rate. It is inherently unfair that a large and well resourced representative body can negotiate at length for the best possible deal—which the collecting society is contractually obliged to respect—and then seek review of that by the Tribunal.

1.4 Each of these points will be discussed briefly in the remainder of this submission with references to, and commentary upon, the IPO Review as appropriate.

2. CLA and its Role

2.1 The Copyright Licensing Agency Ltd ("CLA") is a not-for-profit company limited by guarantee. Its owners are the Authors' Licensing and Collecting Society Ltd (ALCS) and the Publishers Licensing Society Ltd (PLS), through whom it deals with authors and publishers respectively. It represents the interests of visual artists through an association agreement with the Design and Artists' Copyright Society (DACS). CLA is a member of the British Copyright Council and has had the benefit of reading their submission to which it has also contributed.

2.2 Overseas, there are similar organisations to CLA typically known as Reprographic Rights Organisations (or "RROs"). CLA is a leading member of IFRRO, the International Non-Governmental Organisation for RROs, and CLA's International Director is currently President of IFRRO.

2.3 CLA issues licences authorising a limited amount of copying in consideration of licence fees on behalf of the authors, artists, and publishers who create the works and who own the copyright in the works. The licence fees collected by CLA are distributed (after deduction of CLA's operating expenses) to those rightsholders.

2.4 CLA was founded in 1982 and launched its first licence to schools and thereafter licensed universities, colleges and the rest of the education sector. Nowadays, in addition to the original education licensing sector, CLA licenses a wide range of businesses and other organisations, government department and other public administration bodies. Its licences originally covered photocopying (paper to paper), but now also include scanning (converting paper to digital format) and is on the verge of issuing its first truly digital licences (digital to digital).

2.5 CLA licences are typically limited to the copying of an extract of the original work so as not to prejudice the primary sale of that work. This enables educational establishments, businesses and other organisations to conduct their activities under the cover of a "blanket" licence whereby for a modest annual payment they are authorised to copy such extracts from a wide range of books, learned journals and consumer and trade magazines published in the UK (other than from relatively small list of works specifically excluded by the copyright owner). The licence also includes works published abroad where CLA has entered into a repertoire exchange agreement with the relevant RRO. These include, for example, the USA, Canada, Australia and most of mainland Europe.

2.6 The benefits of a voluntary collective licensing approach are recognised by government, echoed in copyright legislation and have been acknowledged by the Competition Authorities. CLA's licensees are saved the inconvenience, difficulty and expense of obtaining consent on each occasion they need to copy, failing which they could not undertake the copying lawfully. Rightsholders also benefit from a collective licence scheme as it would be difficult or impossible for them to license every use of their works and to enforce their rights on an individual basis.

2.7 In the financial year ended 31 March 2007, CLA collected £49 million on behalf of its member organisations and rightsholders and the accumulated figure for the five years to 31 March 2007 was £214 million of which £32 million was from overseas. CLA therefore plays a significant role in supporting the creative and publishing industries whose worth to the UK economy was estimated at £60 billion (Source: DCMS Creative Industries Economic Estimates Statistical Bulletin, October 2007).

2.8 CLA is a "licensing body" and the operator of "licensing schemes" for the purposes of the Copyright, Design and Patents Act 1988 ("CDPA"), the primary legislation governing copyright and it is subject to the jurisdiction of the Copyright Tribunal. CLA has been engaged in one Copyright Tribunal case (Universities UK vs CLA 2001).

3. The "Need" for Users to be Defended Against Collecting Societies

3.1 The perception that collecting societies are more powerful than their users is in many cases misplaced. CLA's resources, both in terms of manpower and money, are considerably more limited than those available to many of its licensees. In the recent Music Online case the claimants included Yahoo, AOL, Napster, Sony iTunes, O_2, T-mobile, Vodaphone and Orange. These vast multinational organisations are considerably larger than the collecting societies from whim they supposedly need protection.

3.2 The original thinking behind the right for users to seek a ruling from the Tribunal presumably was that they were thought to be unable to negotiate licence terms on an equal footing. This is simply untrue in many cases. Large and well funded licensees are quite capable of negotiating on an equal basis—indeed in many cases it is the licensee who holds the greater degree of negotiating power given the difficulties that rightsholders sometimes have to prove cases of copyright infringement and to obtain appropriate payment through licence fees.

3.3 There is often a perception that it is the licensing body against whom the user is litigating rather than against the rightsholders it represents. This may falsely reinforce the notion that the defenceless" user needs protection against a powerful and monopolistic licensing body. But as a non profit making body CLA's revenues (after deduction of running expenses) are passed on to the individual authors, artists and other visual creators who create the work as well as to the publishers who make it available to the public. It is these rightsholders who are most affected by the decisions handed down by the Tribunal. They often are unable to enforce their rights individually for reasons of practicality or cost and perforce must rely on their collecting society to do so on their behalf.

4. Composition of the Tribunal

4.1 The Monopolies and Mergers Commission in its inquiry on collective licensing recommended that the Chairman of the Tribunal should be either a retired High Court judge or other person of similar standing with experience in the law of intellectual property and available to serve at short notice. The IPO review did not go this far but suggested that the appointment should be a salaried post at a judicial level carrying the title of President. The key is that the President should have appropriate legal qualifications and experience. The same would apply to the Deputy Chairmen.

4.2 The criteria for selection of the lay members of the panel are not currently disclosed and greater transparency in the selection criteria and procedure would help address some of the concerns of collecting societies. The lay members need to have, and be seen to have, the appropriate experience to deal with complicated cases of the evidence is produced in written form in advance. CLA had submitted that lay members should be balanced with one drawn from or representing users and one representing copyright owners. The IPO review recommended the abolition of the lay members completely, but this would impose an onerous burden on the Chairman who has to decide on matters both of law and fact from extensive and complicated evidence and whose decision, on grounds of fact alone, cannot be appealed.

5. Copyright Tribunal Proceeding

5.1 Copyright Tribunal cases have all the trappings of judicial proceedings, but without some of their rigour. The collecting societies in particular are often presented with the worst of both worlds in that they are forced to the trouble and expense of dealing with potentially wide ranging pleadings, but without the certainty that these will define completely the cause of action. Broadly constructed pleadings may disguise what is in fact the main complaint which may often only emerge much later in the proceedings. CLA believes that a much more robust approach ought to be taken by the Tribunal in striking out evidence on matters not put in issue through pleadings.

5.2 Most Copyright Tribunal references turn on the use by, and value to, the user of the relevant copyright material. That data inevitably is in the hands of licensees. CLA believes that time and money would be saved were the licensee required to provide standard disclosure in accordance with the Civil Procedure Rules, at least in relation to these elements, prior to exchange of first round evidence. CLA believes this could lead to major savings for both sides.

5.3 The IPO Review recommended replacing the existing Copyright Tribunal Rules 1989 with the standard CPR and Practice Directors applicable to normal civil litigation. This would overcome many of the above problems.

6. Mediation

6.1 CLA believes that parties wishing to launch a reference to the Tribunal should first seek to resolve the dispute through mediation. Currently there is no cost sanction against a claimant who shoots first and asks questions afterwards as there is in the Commercial Court and in civil litigation generally following the Woolf Reforms.

6.2 Currently claimants can launch a reference—without any prior notice to the Respondent—as a negotiating ploy to apply pressure and to improve their bargaining position. Indeed this is specifically recognised in the Copyright Tribunal Rules where it states that it is aware that references are sometimes begun by parties simply to preserve their negotiating position. Given that only the users can launch a reference, this is deeply unfair and leads unnecessarily to the commencement of full scale litigation proceedings. Once started, legal proceedings acquire a momentum of their own which becomes increasingly difficult to stop.

6.3 The Patent Office has established its mediation service. Although this seems to have had mainly patent and trademark disputes in mind, there is no reason why it could not be extended to cover copyright disputes.

7. Rights of Licensing Bodies

7.1 Licensing bodies have no right to launch a reference (other than where a Licence or Licensing Scheme has already been the subject of a reference). This always places them unfairly in the position of "defendant".

7.2 The IPO Review recognised that this was unfair and recommended that collecting societies should be able to launch a reference in appropriate circumstances. CLA agrees and would welcome details of how this might be implemented.

8. Factors to be Considered in a Reference

8.1 The Tribunal ought to have a greater regard to existing agreements where freely entered into by the parties. The Tribunal should be wary of imposing its own judgement of what it considers to be reasonable in all the circumstances where it differs from the position of the parties mutually agreed after negotiation. This is particularly so given that only the user can refer the contract to the Tribunal. In effect, it can "tear up" the contract whereas the licensing body is obliged to continue to honour it.

8.2 The exercise by the Tribunal of its jurisdiction to review what was a binding contract diminishes the incentive for the licensing body to enter into negotiations and to try to reach a mutually acceptable agreement in the first place. A licensing body ought not to be discouraged from granting concessions in an attempt to reach a settlement because it fears that this is but one step in a process which can then be litigated before the Tribunal and lead to further claims for reduction.

January 2008

Memorandum 12

Submission from the Design and Artists Copyright Society

THE WORK AND OPERATION OF THE COPYRIGHT TRIBUNAL

1. Introduction

1.1 DACS welcomes the inquiry of the Innovation, Universities & Skills Select Committee into the Work and Operation of the Copyright Tribunal, and in particular welcomes the recommendations aiming to achieve a fair balance between the interests of copyright creators and owners and copyright consumers before the Tribunal.

1.2 DACS was established in 1984 as a not-for-profit organisation to promote and protect the copyright and related rights of artists and visual creators.

1.3 DACS currently represents over 50,000 artists and their heirs, comprising 36,000 artists, in addition to 16,000 photographers, illustrators, craftspeople, cartoonists, architects, animators and designers, including some of the biggest names in contemporary visual arts as well as many emerging and unknown artists.

1.4 DACS belongs to an international network of visual artists' organisations; we currently hold reciprocal agreements with 32 other societies in 27 countries. In addition, DACS belongs to the following international federations: EVA, IFFRO, and CISAC.

1.5 Under our membership agreements right-holders mandate DACS to act as an exclusive agent in the exercise of those rights granted to creators of artistic works under s. 16 of the Copyright, Design & Patents Act 1988 (as amended) on behalf of its members.

1.6 DACS achieves its objectives of promoting and protecting visual creators' intellectual property rights (IPRs) by offering the following services:

— transactional licensing and individual rights management as an agent for our UK and international membership;

— collective rights management for the entire UK visual repertoire through participation in a range of collective licensing schemes, with the addition of mandates from fourteen professional associations and trade unions representing visual creators. In some cases these rights are exercised on our behalf by agencies such as the Educational Recording Agency (ERA), and the Copyright Licensing Agency (CLA); and

— artist's resale right administration: new service of collection and distribution of resale royalties launched by DACS in 2006 as a result of the implementation of the *EU Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art*.

For further information on DACS' activities, please refer to our official website: www.dacs.org.uk.

2. Reference to the British Copyright Council's Submission

As noted, DACS largely welcomes the recommendations of the Committee, and we find ourselves in agreement with the points submitted by the British Copyright Council. Rather than reiterate these points here, may we take the liberty of referring you to the submission prepared by the Council on behalf of its members (ourselves included).

3. Comment on Recommendation 25 of the Committee's Report

3.1 We would like to take this opportunity to comment on Recommendation 25, in which it is proposed that licensing bodies should be able to make reference to the Copyright Tribunal under sections 118 and 125 of the CDPA.

3.2 In agreement with the British Copyright Council's description of the nature of collecting societies under number 8 of their submission we would like to stress the importance of the Tribunal to deal even-handedly with collecting societies and users. To keep a fair and balanced position between licensors and licensees it is vital for collecting societies to be able to make references to the Tribunal under sections 118 and 125 of the CDPA. The current situation that collecting societies can only act as defendants before the Tribunal rather then instigating proceedings themselves has a negative effect on collecting societies when negotiating licensing schemes or licences.

3.3 Paired with the weak enforcement provisions of the CDPA and the very cost intensive enforcement proceedings when members' rights are infringed, the licensee's bargaining power is unjustly enhanced by the current situation caused through sections 118 and 125 of the CDPA.

3.4 When negotiating licensing schemes or licences, collecting societies are often confronted with the situation to either redraft a proposal according to the stipulations of the licensee or to risk a referral to the Tribunal, which results in costly and lengthy proceedings or that member's rights will be infringed without a real possibility of legally enforcing the member's rights when the licensee is simply refusing to accept the proposal.

3.5 The possibility for collecting societies to refer proposed licensing schemes or licenses will therefore adjust this imbalance and introduce a more fair and even-handedly procedure which will support the collecting societies to avoid delays and uncertainties for their members.

3.6 In agreement with the British Copyright Council's description of collecting societies in their initial submission that collecting societies are not large commercial companies we would therefore like to fully support Recommendation 25 of the Committee Report to ensure a fair and balanced procedure before the Copyright Tribunal, which ultimately will not only benefit the individual creator but the whole creative industry.

January 2008

Memorandum 13

Submission from the British Beer and Pub Association and the British Hospitality Association

THE WORK AND OPERATION OF THE COPYRIGHT TRIBUNAL

Introduction

The British Beer and Pub Association (BBPA) represents just under two thirds of the 57,000 pubs and bars in the UK. This sector contributes over £18 billion to the economy, which equates to over 2% of GDP, and employs around 650,000 people in full and part-time jobs. The British Hospitality Association (BHA) represents 9,000 hotels, 11,000 restaurants and 18,000 contract catering outlets, employing over 500,000 people.

Our Associations, along with a Consortium led by the legal firm Eversheds, are currently pursuing a joint action in the Copyright Tribunal challenging the implementation by Phonographic Performance Ltd of the new copyright charge for broadcast music, as introduced by the Copyright and Related Rights Regulations 2003 (SI No 2498) which amended Section 72 of the Copyright, Designs and Patents Act 1988 (the 1988 Act). The new statutory regime is contained in Section 128A of the 1988 Act, which requires PPL to notify the Secretary of State of the details of any proposed licence or licensing scheme for the excepted sound recordings before it is introduced.

Brief Summary of the BBPA.BHA Case

In considering its licence terms under Section 128A of the 1988 Act, PPL took the opportunity to review its existing public performance licence and tariff for public houses, restaurants and cafes. The BBPA and the BHA believe that such an approach is outside the scope of the 1988 Act, which is primarily concerned with the collection of royalties for the new broadcast right. Other background music royalties were already subject to an existing tariff which had been fully negotiated with our sector, and the new broadcast right should not have been used as a mechanism for increasing current charges. The increases to the PPL background music tariff on the basis of the new broadcast right, which average between 200 to 400%, are neither fair nor reasonable and were not subject to an appropriate level of consultation or negotiation with the industry.

At our request, the Secretary of State for the then Department of Trade and Industry referred the proposed PPl scheme to the Copyright Tribunal on 10 October 2005 under Section 128A(4) of the 1988 Act, having given due consideration to a number of statutory factors in respect of the PPL proposals.

The Copyright Tribunal

Both the BBPA and the BHA are very supportive of the role of the Copyright Tribunal in resolving disputes. However, our experience since the referral of our case over two years ago has been extremely frustrating, since until recently there was little or no progress made towards resolving the dispute. Full written submissions were made to the Tribunal by all parties, which were supported by further skeleton arguments and correspondence where necessary.

In hindsight, one of the main reasons for the delay may have been the change of personnel at the Copyright Tribunal a few months after the referral of the BBPA/BHA case. From discussions with officials at the Patent Office (now the Intellectual Property Office (IPO)) at the time, we understood that the judicial and lay members of the Tribunal were originally briefed on the objectives of the new referral procedure and subsequent process introduced by Section 128B, namely that this was intended to by-pass the need for a full referral to the Copyright Tribunal under section 199 of the 1988 Act by providing both the licensor and the licensee a quick route to resolving disputes on schemes to collect monies in respect of the new broadcast right. We are not sure, however, that the new members of the Tribunal received such a briefing, and therefore the background knowledge to the process was lost following the handover. In our view the IPO should have ensured that this did not happen.

While we recognise that the approach PPL have taken to implementing the broadcast right has complicated the consideration of the case somewhat, we would take this opportunity to make the following points in light of our experience over the last two years:

— The Copyright Tribunal appears to receive a very low level of support from the IPO, particularly with regard to administrative and secretarial support for the Chairman of the Tribunal. We were concerned to learn recently from the Chairman that certain correspondence relating to our case, which was sent by our legal representatives to the secretariat in Newport for his attention, did not

appear to have been forwarded to hime and he had never received it. The Chairman has also requested assistance in the past from one of the parties in the case with regard to arranging Tribunal files since he does not have the necessary support in this area.

We consider that this low level of administrative support for the Copyright Tribunal as a whole, and the Chairman in particular, is unacceptable. While the situation has perhaps been exacerbated by the relatively recent relocation of the IPO to Wales, we believe that it must be addressed in order to ensure the smooth running of the Tribunal and to relieve pressure on the Chairman and the lay members.

Our suggested solution would be a dedicated, London-based, administrative.secretariat resource which is available to the Chairman and the Tribunal as and when necessary, especialy during period of intense activity.

— The Copyright Tribunal is currently severely understaffed. The Chairman does not presently have the two Deputy Chairmen who would normally assist him, and there are only two lay members when a full quorom would be eight. This places unnecessary pressure on the existing Tribunal members, and means unless all three are available to attend a hearing, then the Tribunal risks being inquorate. Again, this is an unacceptable situation for the Tribunal and needs to be resolved as soon as possible.

Both the BBPA ands the NHA are grateful for the efforts of the Chairman of the Copyright Tribunal to move our case forward in recent months, and are currently awaiting a judgement on an issue of jurisdiction relating to the case following an oral hearing on 8 November 2008. The delay in resolving the dispute with PPL has been extremely costly for our Association in terms of the legal fees (which are in the regional of £100,000 to date), and also for our member companies which have been paying PPL under the revised traiff since January 2006.

We appreciate the opportunity to bring these issues to the attention of the Committee and hope that our observations will prove helpful to their Inquiry.

January 2008

Memorandum 14

Submission from the National Union of Journalists

THE WORK AND OPERATION OF THE COPYRIGHT TRIBUNAL

The National Union of Journalists represents 40,000 journalists in the United Kingdom and Ireland, 20% of them freelance. Copyright is a crucial element in the working lives of our freelance members in particular.

We have a number of important points to make in response to the *Review of the Copyright Tribunal*.

1. We have no objection in principle to Recommendation 29 on Orphaned Works, and we would like the Committee to take notice of the Canadian model, which, for the most part, we recommend.

2. It is our strongly held opinion that any system established to regulate orphaned works would only be viable if the moral rights of authors were strengthened. At present, the various exceptions to the paternity right will work against the principle of limiting the number of orphaned works in circulation.

3. Recommendation 20, seeking to eliminate lay members, including authors' representatives, would be counter-productive, we believe. In considering orphaned works in particular the skills and experience of lay representatives who are authors in negotiating licences would be of inestimable value.

4. If the scope of the Tribunal is expanded it would become more adversarial, and for this reason we oppose Recommendation 14. Both parties to a dispute should continue to have the right to call expert witnesses in support of their claims.

5. And, as the expansion of the Tribunal is under consideration, we suggest expanding it in another direction.

5.1 In our submission to the Gowers Review, the NUJ suggested the creation of a quarterly Small Copyright Claims court, As intellectual property claims can no longer be assigned to the Small Claims Court, this option is no longer viable. See www.londonfreelance.orq/ar/gowers.html

5.2 Nevertheless, the problem remains. The NUJ typically deals with copyright infringement cases with values in the range of £200–£2,000. The costs of such cases are substantial and would almost certainly exceed the value of the claim. This precludes pursuing most such cases.

5.3 The current legal system is, in effect, deterring many victims of copyright infringement from enforcing their statutory rights.

5.4 If the Copyright Tribunal were to expand to cover adjudication of such small claims, this would provlde claimants with a more efficient and more economic system of redress.

5.5 We would suggest that If this Idea meets with approval, consideration should be given to enabling the Tribunal to hear cases outwith London.

5.6 We note that the Monopolies and Mergers Commission recommended In 1988 that the Tribunal should not act—a Small Claims Court and reply that the recent change to CMI Procedure Rules makes it hnperative that some forum cariy out this function to ensure access to justice for creators.

6. Incidentally, recommendation 30 is that "The collecting societies should be referred to as tensing societies". This would cause more confusion than clarity, since the collecting societies role with respect to our members is to license only secondary rights.

7. We support the submission of DACS, rejected by the review team, that the Tribunal be empowered to regulate contracts between creators and users.

January 2008

Memorandum 15

Submission on behalf of the Universities UK-Guild HE Copyright Group

THE WORK AND OPERATION OF THE COPYRIGHT TRIBUNAL

1. The UUK-GHE Copyright Group is responsible for the negotiation of educational licences on behalf of Higher Education Institutions (HEIs), with both the Copyright Licensing Agency (CLA) and the Educational Recording Agency (ERA). This submission is based on over 20 years of experience in negotiating these licences, and more specifically the experience of having brought the references to the Copyright Tribunal which resulted in its decision in *UUK v CLA* (2001).

2. The main point we wish to make is that the working of the Copyright Tribunal (CT) cannot be considered in isolation from its functions within the UK copyright system. Its central role is to help to maintain an appropriate balance between rights-owners and users of copyright works, specifically in contexts where the law provides rights for users subject to reasonable remuneration for owners. This is especially important in the area of educational use, which we assume will be of special interest to the Committee.

3. In our view, the problems for the CT are caused by the UK statutory framework for licensing, which leaves the conclusion and administration of licences to bilateral negotiations between organisations representing users and rights-owners. This creates an adversarial context, and places the burden on the CT of resolving conflicts. However, the CT's procedures are quasi-judicial and therefore also essentially adversarial, which makes it very difficult for it to provide a quick and cost-effective service. The Recommendations in the IPO's Report would certainly go some way to improving matters, but in our view the fundamental problems would remain the same.

4. Our preference would be for a recasting of the statutory framework for licensing for educational purposes, by establishing an Educational Licensing Agency (ELA). As we outlined in our evidence to the Gowers Review, this would be a cost-effective solution, since (i) this Agency would simply take over functions from existing collecting societies, and hence (ii) it would be funded (as they are) from a top-slice of the fee revenues. Establishing the ELA with a Board including representatives of both users and rights-owners, as well as independent experts, would make it much better able to strike the appropriate balance between rights of use and of remuneration, in a continuous and detailed way.

5. Our evidence to Gowers pointed out that this is increasingly important in the era of digital communication, due to (i) the rapid technological changes, and (ii) the much wider range of potential uses of copyright works. Both these factors mean that new issues are constantly arising, which are not anticipated by fixed regulatory arrangements. We cited as an example the statutory exemption for educational recording and use of broadcasts, which was amended in 2003 in line with the European "Information Society" Directive, but still leaves major grey areas such as whether it is permissible to record and use for educational purposes a BBC programme from its "Listen Again" service.

6. Licences are somewhat more flexible than legislation. However, our experience is that issues of interpretation constantly arise, which if the parties agree can be dealt with by User Guidelines. Unfortunately, however, it is not always possible to reach agreement. This can leave areas of uncertainty which undermine the security on which blanket licensing relies for credibility. A recent example is the interpretation of the limitation of the repertoire of the CLA's Trial Scanning Licence for HE to works 'published in the UK', as applied to multinational publishers. The CLA introduced a significant change to the agreed guidelines interpreting this definition in September 2007, just at the beginning of the academic year. Since many licensees had already scanned material for the forthcoming session in reliance on the published guidelines, this created considerable uncertainty, which has persisted. Yet this type of issue hardly seems appropriate for a reference to the CT, nor even for alternative dispute resolution procedures.

7. Clearly, the CT is not designed to be a referee in the continuing interactions between users and rights-owners, but an adjudicator of last resort. In our view, it would be much more able to perform this role if the licensing societies were designed as bodies which could try to strike the best balance between users and owners, so that the CT would only have to deal with appeals from (in stricter legal terms, reviews of) their decisions.

8. The Committee may feel that this goes beyond the immediate remit of improving the operation of the CT. If so, we suggest as an alternative (not our preferred option), that the role of the CT should extend to supervising the work of the licensing societies, and their governance. It could do so by issuing Directions or Guidelines, to cover matters such as the scope of licence indemnities, survey methodologies, distribution arrangements, consultations with users, and so on. To facilitate this, its staff should play a more active part in monitoring the processes of negotiating and administering licences. This is likely to mean some expansion in the number of staff, and consequently an increase in costs.

9. This is an important reason why our preferred option is that the licensing societies themselves should be restructured, to provide a framework to facilitate continuous accommodations between the views of users and rightsowners. As we have outlined, the private bargaining model in the present UK legal framework for licensing creates an adversarial environment, which we consider that the reforms of the CT's procedures would not ameliorate.

January 2008

Memorandum 16

Supplementary memorandum from the Society of College, National and University Libraries following evidence session on 28 January

I attended the hearing on Monday and was pleased to see the Sub-Committee's interest in the idea of a Copyright Ombudsman to supplement the Tribunal. SCONUL's reason for putting forward the idea is that many copyright disputes nowadays involves small businesses, small cultural institutions, or individuals. None of these have serious access to the Tribunal for low level disputes. Yet the questions that might arise in their disputes may be important in the public interest.

A couple of examples (based on real instances, but all names fictitious) may illustrate this point.

1. Nether Wallop Public Library runs a project with secondary schools about a local nuclear power station. The library wants to circulate photocopies of extracts of newspapers to schoolchildren. This would infringe copyright unless a licence is obtained, so the library applies to the Local Newspapers Licensing Society for a licence. The LNLS, as a matter of routine, will issue a licence only if the licensee pays for seven years' supposed infringement of copyright before the licence begins. This is unfair on the Library but the Society insists. The Library has no choice but to pay for something it doesn't need, because it cannot risk infringement.
2. Joe Brown, a doctoral student at the University of Poppleton, is delighted to have his article on a famous modern English poet accepted for publication in the Journal of Poppletonshire Studies. The journal editor (a part-time amateur publisher) asks permission from the poet's publisher for two extracts of her poems to be reproduced in the article. Joe feels sure that this is unnecessary because his university has said that fair dealing for criticism and review is an exception to copyright. But the publisher insists and Joe has to pay a fee to the poet's publisher in order to see his article in print.

If appeal were available to an ombudsman in cases like this, a lot of unnecessary cost and complication for small-scale users of copyright could be avoided. That would serve the aim of encouraging creativity—the purpose of copyright.

The need is all the greater now that the internet offers greater use of creative material to all manner of people—beyond established publishing and entertainment businesses.

February 2008

Memorandum 17

Submission from the British Copyright Council

1. Introduction

1.1 The British Copyright Council is an association of bodies representing those who create, hold interests or manage rights in literary, dramatic, musical and artistic works, films, sound recordings, broadcasts and other material in which rights of copyright or related rights subsist under the United Kingdom's copyright law (Copyright, Designs and Patents Act 1988 as amended) and those who perform such works (see the attached list at Appendix I).

1.2 Our members include professional associations, industry bodies and trade unions representing hundreds of thousands of authors, creators, performers, publishers and producers. These rights holders include many sole traders and SMEs as well as some larger corporations. Members of the Council also include the collecting societies, the majority of whose members are individuals or SMEs. The collecting societies license and manage the rights in copyright works on behalf of their members and represent their interests. As licensing bodies they are subject to supervision by the Copyright Tribunal.

1.3 The British Copyright Council strongly supports the reform of the Copyright Tribunal and has, over several years, commented extensively on its work and operation, both in an informal context at meetings with Government representatives and in response to various reviews, including most recently in response to the UK Intellectual Property Office (then known as the Patent Office) Review of the Copyright Tribunal (our papers dated 31 May 2006 and 31 August 2007 attached at Appendix II and III).

1.4 Among the many omissions in the Gowers Review was a lack of recognition of the crucial role now played by the Copyright Tribunal and the need for reform to meet the challenges of the digital age. However, the IP Office independently conducted its own review of the Copyright Tribunal and produced a report which was thorough, rigorous and pragmatic.

1.5 Our greatest concern now is to see the recommendations of the IP Office's Review of the Copyright Tribunal implemented promptly, efficiently and fully, and with this in mind, we welcome the Select Committee's interest in the work and operation of The Copyright Tribunal.

2. Executive Summary

2.1 As stated we, along with a number of our members, have worked on previous papers and submissions on the Tribunal making it difficult to provide the Select Committee with evidence which is new or original.

2.2 This submission addresses:

- Concerns with the Tribunal in its present form.
- Support for Recommendations of the UK Intellectual Property Office.
- Implementation of those Recommendations—practical and legislative.
- Developments since the Review.
- Comment in relation to the Gowers Review of Intellectual Property.
- Nature of collecting societies.

3. Comments on the Tribunal in its Present Form

3.1 In March 2003, the Council presented a paper outlining its concerns with the Tribunal, with positive suggestions for change, to representatives of the UK Intellectual Property Office, at one of our regular Joint Consultative Meetings. In preparing our response to the UK Intellectual Property Office Review of the Tribunal in 2006 we felt that little had changed and that in fact, during the intervening period, cases involving our members which had passed through the Tribunal reinforced our original views. We identified the following major issues:

- Cost and time involved in cases.
- Lack of even-handed approach as between right holders and users.

— Procedural complexity.
— Tribunal membership—improvement to expertise and balance of interests represented.
— Need to improve understanding and raise awareness of the individual interests represented by collecting societies.

4. Support for Recommendations of the UK Intellectual Property Office

> "Reform of the Copyright Tribunal is a long standing concern for the British Copyright Council and we are pleased that it is now being addressed in the recommendations put forward in the report. Our main concern now relates to the timely implementation of these recommendations and we look forward to seeing a timetable for implementation. The British Copyright Council would be very pleased to assist the Intellectual Property Office with implementation in any way it can.
>
> Following our detailed contribution to the consultation in 2006, we welcome the Review which we feel is thorough and support the recommendation which will achieve a great many of our original objectives".
>
> BCC response to Recommendation arising from the review of the Copyright Tribunal, 31.08.07

4.1 In our response to the Review we suggested a number of possible solutions including review of Tribunal procedures; some form of mediation either as a solution to certain cases or at the preliminary stage of others; reduction in costs; changes to the composition of the Tribunal's membership and the need for guidance and training for its members; review of the Tribunal's responsibilities taking into consideration the impact of their decisions on the individual members of the collecting societies and the possibility of extending the Tribunal's powers over users of licensing schemes.

4.2 The Recommendations addressed the majority of our concerns, either directly, for example, changes to the Copyright Tribunal procedures in line with the Civil Procedure Rules, or indirectly, for example, simplification of procedure which will result in reductions in cost and time. We very strongly support the Recommendation that the Tribunal should be properly resourced along with those Recommendations which will promote a better understanding of the nature of collecting societies and copyright licensing by Tribunal members.

5. Developments since the UK Intellectual Property Office Review

5.1 There is a greater urgency than ever before for societies to be able to refer their schemes to the Tribunal for approval as there is increasing reluctance by users to take out a licence in the online environment. Recommendation 9.7, which is entirely new and other related Recommendations, should be implemented without further delay. We believe that proper implementation of its Recommendations will increase user respect for the Copyright Tribunal.

5.2 The IP Office's Review of the Copyright Tribunal was published in May 2007. The BCC, along with many other users of the Tribunal, welcomed the Report.

6. Implementation of the UK Intellectual Property Office Recommendations

6.1 We understand that one of the main aims of the Review was to provide the Copyright Tribunal "with the resource and independence appropriate to the new creative economy". Copyright licensing through collecting societies provides an efficient and economic means of rights clearance for both copyright owners and users, particularly in the case of online usage of rights. It is often the only practicable means of legitimising certain types of content use. Where disputes arise between societies and users these should, for the good of the creative economy, be dealt with in a speedy, fair and cost efficient way. Implementation of the Review Recommendations will contribute significantly towards providing such a service.

6.2 The Recommendations of the UK Intellectual Property Office Review Team were published in May 2007 and were welcomed by those who responded to the original consultation. The majority of those Recommendations require only practical implementation and do not involve any major legislative change. With the involvement and co-operation of copyright interests, these changes should be relatively easy to achieve. Swift implementation is needed and as a first step we would like to see or be involved in the development of a timetable for implementation of the Recommendations.

6.3 While we support the recommendation that the Copyright Tribunal should be properly resourced and housed within the UK Intellectual Property Office, we note the Review Team's observation that the Tribunal should function independently of the UK Intellectual Property Office. We would welcome further consideration of whether the proper place for the Tribunal is within the Department for Constitutional Affairs.

6.4 We support the recommendation that S128A and 128B of the Copyright Designs and Patents Act 1988 (as amended) be reviewed. This is a matter of particular interest to our member, Phonographic Performance Limited and we refer the Select Committee to their submission for more detailed views on this recommendation.

7. Comments in Relation to the Gowers Review of Intellectual Property

7.1 The Gowers Review of Intellectual Property makes only three references to the Copyright Tribunal. The first in its call for evidence, the second in a flow chart showing the current IP litigation system and the third by an incomplete definition in the Glossary.

7.2 In the section of the Gowers Review report which reviewed the IP Litigation System, Gowers acknowledged that the cost of IP litigation was high. This is particularly true for those individuals and SMEs whose works circulate in the Creative Economy.

7.3 As far as the Copyright Tribunal is concerned, this is recognised and will be dealt with through the Recommendations resulting from the UK Intellectual Property Office Review. However, this still leaves individual copyright owners, whether individual creators or performers or SMEs involved in publishing, producing or distributing copyright works without an affordable alternative to costly litigation. UK-IPO now offers a Mediation service but as we said in our response to the Patent Office consultation on Innovation: a Strategy for Support (13.08.06):

> "We have expressed our strong support for the Office's proposal to provide Mediation Services. However, the Council and its individual members are confused about the extent to which the Mediation Service is intended to apply to the copyright community".
>
> BCC response to Patent Office consultation on its Innovation Support Strategy (13.08.06)

7.4 We understand that the Mediation Service has not yet dealt with any copyright related cases and literature explaining the Service is patent and trade-mark centric. Members of the Council are still seeking clarification on whether the Mediation Service is intended for cases involving copyright, particularly where it involves infringement of the works of individual creators, performers and other copyright owners.

7.5 Though we believe it is too early to act and while we also have some reservations, we look forward to participating in future discussions on the potential widening of the role of the Tribunal and in the context of orphan works. For example, we note that section 190 Copyright, Designs and Patents Act 1988 (as amended), which already provides for the Tribunal to give consent to the making of recordings of a performance in cases where the identity or whereabouts of the person entitled to the reproduction right cannot be ascertained by reasonable enquiry, has been little used in practice. Our members BPI, BECS, Equity and the Musicians' Union can provide further information. In our view, this matter requires the fullest discussion with all stakeholders and it must be recognised that a "one size fits all" solution is not appropriate for all categories of works or right owners.

7.6 Furthermore, with the Tribunal's current lack of resources and the failings identified by the Review, we believe it would be dangerous to load more work and responsibilities on the Tribunal at this time. Any discussion on the widening of the Tribunal's responsibilities must wait until it is in a position to demonstrate that it can function in a proper and timely way with its primary workload.

8. Nature of Collecting Societies

8.1 Collecting societies exist because right holders (individual creators, SMEs and major companies) want to license their repertoire simply and efficiently. This mechanism provides users with a single licence for a multiplicity of repertoire and uses, a facility which is becoming increasingly valuable in the online environment. The system relies on right holders being able to receive a fair reward for uses of their creative work through a collecting society. The Copyright Tribunal plays a crucial role in this as it is the principal means by which disputes between collecting societies and users are resolved.

8.2 At present, the Copyright Tribunal does not deal even-handedly with collecting societies and users. The Review of the Copyright Tribunal identified a number of areas where the two sides in a dispute are treated differently and made Recommendations to address these. For example, a user may refer a proposed licence to the Tribunal whereas a collecting society may not.

8.3 As there are frequent misunderstandings about the nature and function of such societies, we believe it is worth repeating the point made in our original submission to the Review team.

> "As mentioned in the introduction to this submission, our membership includes those who are represented by collecting societies as well as collecting societies themselves.
>
> They are individual rights owners who choose to license their rights or certain of their rights, collectively through their collecting societies which are, in the main, not for profit companies limited by guarantee wholly owned and governed by those members. Collecting societies are not large commercial companies.
>
> It is vital that this is understood when considering matters relating to the de facto monopolistic nature of such societies. It is why Tribunal panel members should have a proper understanding of the role of collecting societies and copyright licensing. It is also why the Tribunal should better understand the commercial aspects of negotiations between collecting societies and commercial users. Finally, it is why there is a need for greater clarity and differentiation between the roles and responsibilities of the Copyright Tribunal and the Office of Fair Trading".
>
> BCC response to the consultation on the Review of the Copyright Tribunal, 31.05.06

8.4 As representatives of individual creators, performers, publishers and producers we wish to emphasise that the decisions of the Copyright Tribunal have a direct impact on the level of royalty that is paid to each of these individuals, via their collecting society, for the use of his or her work and their ability to earn a living from their creativity.

January 2008

APPENDIX I

The following organisations are members of the British Copyright Council:

Association of Authors' Agents
Association of Illustrators
Association of Learned and Professional Society Publishers
Association of Photographers
Authors' Licensing and Collecting Society
BPI (British Recorded Music Industry) Limited
British Academy of Composers and Songwriters
British Association of Picture Libraries and Agencies
British Computer Society
British Equity Collecting Society
British Institute of Professional Photography
Broadcasting Entertainment Cinematograph and Theatre Union
Chartered Institute of Journalists
Copyright Licensing Agency
Design and Artists' Copyright Society
Directors' and Producers' Rights Society
Equity
Educational Recording Agency
Mechanical Copyright Protection Society
Music Managers' Forum
Music Publishers' Association
Musicians' Union
National Union of Journalists
Performing Right Society
Periodical Publishers' Association
Phonographic Performance Limited
Publishers Association
Publishers' Licensing Society
Royal Photographic Society
Society of Authors
Writers' Guild of Great Britain

APPENDIX II

REVIEW OF THE COPYRIGHT TRIBUNAL, 31 MAY 2006

The British Copyright Council is an association of bodies representing those who create, or hold interests or rights in, literary, dramatic, musical and artistic works in which rights of copyright subsist under the United Kingdom's copyright law (Copyright, Designs and Patents Act 1988 as amended), and those who perform such works (see the attached list).

Members of the Council include a number of the UK's collecting societies which are subject to the Copyright Tribunal. The Review is also of interest to the many thousands of individual creators, performers and publishers represented by the professional associations, industry bodies and trade unions which make up the remainder of our membership. These individuals and SMEs are members of the collecting societies which license their works and represent their interests.

The Council welcomes this review of the Tribunal. We believe that improvements could be made to the way in which it works and we have raised the need to reform the Tribunal with Patent Office officials on a number of occasions in the past. In March 2003 at its regular consultation meeting with officials the Council made a presentation on the subject and proposed a number of possible solutions. The views expressed by Council members at that time remain largely unchanged.

The Council notes the appointment of Judge Michael Fysh, QC as the new Chairman of the Tribunal. Judge Fysh combines expertise in copyright with a knowledge of dispute resolution procedures from the Patents County Court. We hope he will play an active part in this consultation and welcome his appointment.

OBJECTIVES

In proposing changes to the Copyright Tribunal, the Council's objectives are to:

— Reduce the cost and time involved in cases laid before the Copyright Tribunal.
— Lessen the adversarial nature of the Tribunal by simplifying procedures.
— Improve the expertise and balance of interests represented by Tribunal members.
— Raise awareness of authors' interests, as members of collecting societies, and as distinct from the collecting society itself.
— Consider potential issues for the future, such as the [potentially] increasing numbers of challenges on the scope of licences.

The Council believes that existing Tribunal procedures contribute to many of the problems which both rights owners and user interests experience during Tribunal cases. For example, the very high cost, both in terms of finance and of time, of Tribunal cases is in part due to extensive paperwork, preparation of evidence and of witnesses, etc. Its procedures also encourage an adversarial approach and inhibit speedy resolution of conflicts.

The Council would prefer to see a Tribunal which is led by a desire for dispute resolution ie solution led, rather than being led by procedure. It is with this in mind that we suggest the following:

POSSIBLE SOLUTIONS

Review Tribunal procedures to achieve a less adversarial approach

We believe the Tribunal should introduce a mediation or conciliation or other active dispute resolution element into its work on a range of levels.

This could take the form of an automatic first stage meeting or preliminary hearing between the Tribunal Chairman and representatives of each side in a case aimed at isolating and identifying the issues in dispute. This would be akin to the case management role of the civil courts under the Civil Procedure Rules.

We note that issues initially cited by users in Tribunal cases do not always turn out to be the main issue on which the case ultimately turns. Identification of the main issues at an early stage would reduce the length of time which cases currently take, as well as the evidential workload thereby reducing the resulting costs for both parties.

This preliminary stage of a reference could be fairly flexible with a general aim of settling disputes in the most appropriate way. Therefore it may be that some issues could be dealt with in a more informal manner such as in a voluntary committee for dispute resolution. The Tribunal and the collecting societies could work together through a code of practice to introduce such a voluntary committee which obviously would not make decisions but would explore the possibility of consensus on appropriate issues. The Committee could include representatives of both rights owners and users. Such a committee would go some way in reducing costs. More complex issues may, however, be more appropriately considered in a more formal dispute resolution framework.

Obligation to use mediation

In order for such a procedure to be effective a method of encouraging the use of mediation if the Chairman of the Tribunal felt the matter appeared appropriate for mediation and also to use his discretion in the matter of costs in the event of a party's unreasonable non compliance with that recommendation. This procedure would again be similar to the civil procedure process where a judge can use his discretion in this area, perhaps reflecting any lack of cooperation in the award of costs.

We note the recent introduction of The Patent Office Mediation Service which though aimed at all forms of IP appears to anticipate a much greater take up by Patent and Trade Mark interests. We feel that such a service could provide an appropriate service for smaller users, in most cases individuals and SMEs.

In addition we wonder whether the Patent Office Mediation Service could play a useful role in the preliminary stages of Tribunal cases.

Reducing costs

As already stated, a preliminary hearing as an automatic first stage may go some way to reducing costs for all concerned.

However, BCC members feel that there are some cases where a hearing akin to a summary judgment proceeding would be appropriate. For example, where a challenge by a user is based on a previous Tribunal decision and no new issues arise in the reference, the Chairman of the Tribunal should be in a position to state that the case is inadmissible.

In addition, where there is no pre-existing decision, but the reference is clearly mischievous or spurious or even wholly premature in the light of on-going negotiations or market developments, the Chairman should be in a position to reject the reference at an early point.

Composition of the Tribunal

The BCC members feel that the effectiveness of the Tribunal could be greatly improved by a review of the composition and expertise of the Tribunal panel, as suggested in the British Music Rights response to the Leggatt Review.

One option might be to retain a legally qualified Chairman (with two deputies). However, the current panel of between two and eight ordinary members could be replaced with two people with industry expertise, one appointed for their appropriate expertise for each side of the case and selected by the parties to the referral. An alternative solution, if the ordinary members do not have industry expertise, would be to provide thorough training in copyright and copyright licensing to ensure a proper understanding of the role and function of collecting societies. Our members would be very pleased to work with the Tribunal to provide information on the way in which such Societies operate.

Such training could follow the pattern already established by the Patent Office which, we understand, trains its Hearing Officers.
We also strongly agree with the point made by British Music Rights in their submission to this current review, that transparency in the appointment of Tribunal members is essential.

Responsibilities of the Tribunal

The duties of the Tribunal should take into account the position of the members of the collecting society and not just the collecting society itself. Ordinary members of the Tribunal and users sometimes have difficulty in recognising that individual authors, publishers and creators are affected by decisions of the Tribunal rather than the collecting societies which represent them.
At present the Tribunal has some guidance as regards factors to be taken into consideration when making its decision (section 129 CDPA). It would be helpful to the parties of Tribunal references if there were more certainty in the factors to be considered. In the area of setting tariffs, for example it would be useful if there were an obligation on the Tribunal to give detailed consideration to the commercial reality of negotiations between collecting societies and commercial users.

The Tribunal has powers over licensing schemes but what about powers over users of licensing schemes?

The Tribunal's powers could be extended to allow it to make orders over users on certain issues eg refusal to take a licence, under-licensing, order to make a non-copying declaration, orders to third parties for disclosure.

Note on the nature of collecting societies

As mentioned in the introduction to this submission, our membership includes those who are represented by collecting societies as well as collecting societies themselves.

They are individual rights owners who choose to license their rights or certain of their rights, collectively through their collecting societies which are, in the main, not for profit companies limited by guarantee wholly owned and governed by those members. Collecting societies are not large commercial companies.

It is vital that this is understood when considering matters relating to the de facto monopolistic nature of such societies. It is why Tribunal panel members should have a proper understanding of the role of collecting societies and copyright licensing. It is also why the Tribunal should better understand the commercial aspects of negotiations between collecting societies and commercial users. Finally, it is why there is a need for greater clarity and differentiation between the roles and responsibilities of the Copyright Tribunal and the Office of Fair Trading.

APPENDIX III

COPYRIGHT TRIBUNAL

Comments on Recommendations arising from the Review, 31 August 2007

The British Copyright Council is an association of bodies representing those who create, or hold interests or rights in, literary, dramatic, musical and artistic works in which rights of copyright subsist under the United Kingdom's copyright law (Copyright, Designs and Patents Act 1988 as amended), and those who perform such works (see the attached list).

Some of our collecting societies members were involved in the principal disputes brought before the Tribunal in recent years (cf DACS, as intervener in the case of *Universities UK Ltd v Copyright Licensing Agency Ltd* [2002] RPC 36, and MCPSı PRS Music Alliance). The Review is of key interest to the many thousands of individual creators, performers and publishers represented by the professional associations, industry bodies and trade unions which make up the remainder of our membership and who rely on rewards for their creativity to ensure their livelihood. Collecting societies broadly represent the economic interests on their behalf in negotiations with commercial users and any dispute between them has a direct impact on individual creators, performers and publishers. In the case of publisher, the vast majority comprise SMEs for whom collective representation provides additional value in similar ways as for individuals.

Reform of the Copyright Tribunal is a long standing concern for the British Copyright Council and we are pleased that it is now being addressed in the recommendations put forward in the report. Our main concern now relates to the timely implementation of these recommendations and we look forward to seeing a timetable for implementation. The British Copyright Council would be very pleased to assist the Intellectual Property Office with implementation in any way it can.

Following our detailed contribution to the consultation in 2006, we welcome the Review which we feel is thorough and support the recommendations which will achieve a great many of our original objectives. These were to:

Reduce the cost and time involved in cases laid before the Copyright Tribunal thus increasing its overall efficiency

We welcome the recommendations which will ensure a more cost and time efficient procedure, in particular governance linked to the well established Civil Procedure Rules (CPR) (Recommendation 2). We welcome the repeal of the Copyright Tribunal Rules 1989 and look forward to further co-operation with all stakeholders on the details of the adaptation of the CPR to be applicable to the Copyright Tribunal.

In conjunction with a proficient and pro-active case management (Recommendations 8 to 15) through the president of the Copyright Tribunal the implementation of these recommendations will improve the operations in particular by focussing the parties on:

- the real factual issues of the dispute (Recommendation 6);
- the limitation of evidence to relevant facts of the dispute (Recommendations 11, 12, 14); and
- a stringent timeline (Recommendation 13).

Improve the expertise and balance of interests represented by Tribunal members

Balance: We welcome the first recommendation of the review which transposes the overriding objective of the Civil Procedure Rules to the operations of the Copyright Tribunal. The Copyright Tribunal has in the past often been perceived as a regulatory restriction on the operation of collecting societies and has approached the disputes correspondingly. This recommendation addresses the concern that the tariffs put forward by collecting societies are presumed unfair by virtue of the quasi monopolistic position of the latter. The scope of the Copyright Tribunal is to judge impartially on a commercial dispute without any regulatory considerations.

Expertise: We are confident that an adequately staffed and funded body will benefit all parties of a dispute. We believe a better resourced Tribunal and more expert Tribunal membership will improve awareness of authors' interests in their collecting societies and bring about a greater understanding of function and purpose of those societies.

We are particularly pleased that that the recommendations state that the Copyright Tribunal should be properly resourced and London based and its status given proper recognition (Recommendations 17 and 18).

Consider potential issues for the future, such as the [potentially] increasing numbers of challenges on the scope of licences

Formulation of licensing methodologies: Whilst guidelines for the methodology are certainly welcome in the spirit of transparency (Recommendation 7), any further active role of the Copyright Tribunal needs careful consideration in view of the multiplicity of licenses available for the variety of licensees and the complexities of the tariff structure. Eg a photocopying licence for a copy shop in Manchester will be based on different criteria from a blanket music licensing to a big national broadcaster. Considering licensing methodologies will be a useful aspect part of the case management conference to identify the real issue of the dispute.

Transparency: It should be remembered that most collecting societies (eg CLA and MCPS-PRS Music Alliance) already provide detailed information of their licenses on their website.

Collecting societies to make references: We welcome the ability of collecting societies to make references (Recommendation 25) which is appropriate ensuring a more balanced approach to be taken by the reformed Copyright Tribunal.

Provisions of sections 128A and 128B of the CDPA: We agree with the need to reform of sections 128A and 128B CDPA (Recommendation 26) and support the detailed points raised by PPL in their response to this consultation.

Orphan works: the suggestions that it should be the Copyright Tribunal which itself should be responsible for more proactive granting of licences for the use of orphan works seems premature in view of the ready availability of databases and licensing structures through the relevant collecting societies.

In addition we support the submissions made by British Music Rights and by our colleagues at Phonographic Performance Limited and the Copyright Licensing Agency on those areas which require further thought before implementation.

Memorandum 18

Submission from British Sky Broadcasting

BACKGROUND

British Sky Broadcasting LTD ("Sky") is a broadcaster and provider of audiovisual content services to consumers in the UK and republic of Ireland. Sky distributes audiovisual content via a variety of platforms, including digital satellite, cable, and digital terrestrial television, as well as online and via other new media platforms.

Sky's audiovisual content services include in-house, commissioned and acquired programmes, all of which contain copyright works. Sky has negotiated a number of licences from licensing Bodies (as defined by the Copyright, Designs and Patents Act 1988, ("Act")) relating to music. The relevant licences permitting exploitation of those sound recordings and musical works within programmes are acquired principally from the MCPS and PRS (the Alliance) for use across all Sky's audiovisual content services, irrespective of the means of distribution. The use of sound recordings and music videos in Sky's content is mainly licensed vis PPL and VPL.

In 1997, Sky and Sky television plc were applicants on a matter in the Copyright Tribunal and The Performing Rights Society Limited were the respondents.

EXECUTIVE SUMMARY

1. The Civil Procedure Rules should govern the proceedings of the Copyright Tribunal, subject to (2).

2. Licensees should continue to be able to appoint their own experts to give evidence in any challenge to a licensing scheme.

3. Licensees should not be required to provide actuarial figures and projections as part of their evidence.

4. The Copyright Tribunal should not take an active part in formulating criteria for conditions for licensing schemes or licenses.

5. Licensing Bodies should not be able to make references to the Copyright Tribunal.

6. The Copyright Tribunal should be entitled to consider a pan-European scheme to the extent that it has a material effect on a UK scheme.

THE COPYRIGHT TRIBUNAL

On 16 August 2007, Sky made a submission to the Trademarks Directorate as part of the Review of the Copyright Tribunal. This letter sets out similar issue to that submission.

1. Civil Procedure rules ("CPR")

   As recommended by the Review (recommendations 2 and 3), we consider that the Copyright Tribunal's proceedings should be governed by the CPR and practice directions and that there should be one standard form for all references to the Copyright Tribunal.

The recommendations for case management in the review of the copyright tribunal (recommendations 8, 9 and 15) are sensible as proper case management should ensure that proceedings are subject to tighter control.

2. EXPERT EVIDENCE

In its recent decision on the Joint Online Licence (CT84-90/05), the Copyright Tribunal refers to "the overkill on expert evidence" and was critical about the disproportionate amount spent by the parties on fees for the experts.

Recommendation 14 of the Review of the Copyright tribunal provides that expert evidence should only be allowed when "strictly necessary" and where necessary the parties should appoint a single, joint expert. In our view, expert evidence can be crucial in making as compelling and comprehensive a case as possible

before the Copyright Tribunal. Whilst expert advice might not be essential to every Tribunal case (and we agree that a disciplined approach must be adopted so that any evidence provided is pertinent, removing the ability for applicants and respondents to call upon such advice and evidence could, in particularly complicated cases, restrict the wide range of evidence we believe the Tribunal needs in order to reach a satisfactory conclusion.

We also foresee real practical difficulties in finding and using a single joint expert.

3. Evidence before the Tribunal

Recommendation 6 of the Review of the Copyright Tribunal provides that challenges to the terms of a licence should be based on fact. In the body of the Review, paragraph 7.23 provides that a challenger should provide "*actuarial figures and projections with full disclosure of the basis for the calculations*". While Sky would be able to provide the rationale including the business context for why Sky and the relevant licensing body of the scheme are in dispute and/or why Sky is challenging the terms of the licence, Sky may not necessarily be able to provide actuarial figures and projections.

Given that tariffs and any sampling system are generally proposed by the licensing body, there is often limited scope for any licensee to propose a wholly alternative scheme and/or sampling system. In these circumstances, placing such a significant evidentiary burden on the licensee does not seem appropriate.

4. The Copyright Tribunal's Role

Recommendation 7 of the Review of the Copyright Tribunal suggests that the Copyright Tribunal should "*take an active part in formulating criteria for the objectification of the criteria for the conditions of licensing schemes or licences*".

We consider that the benefit of the Copyright Tribunal is its impartial nature and that its role should be to assist with resolving disputes and challenges to schemes only once market-based and commercial negotiations between parties on any licence have been completely exhausted.

However carefully controlled, the involvement of the Copyright Tribunal in "formulating criteria" might prejudice this role. In addition, it has not been our experience that licensees have particular difficulty in understanding the logic or reasoning of any licensing scheme or sampling system. As such, the involvement of the Copyright Tribunal officials in discussing the basis of schemes or sampling systems with Licensing Bodies may not significantly assist the process of negotiating between Licensing Bodies and Licensee.

5. References to the Copyright Tribunal

The Review of the Copyright Tribunal recommends that Licensing Bodies should be able to make references to the Copyright Tribunal in accordance with sections 118 and 125 of the Act (recommendation 25). We disagree with this recommendation as we do not share the view that an imbalance currently exists because:

(a) the Licensing Bodies are *de facto* monopolies; and

(b) the Licensing Bodies tend to be the contractual party in the negotiations with licensees that propose the tariffs and sampling system.

For these reasons the Licensing Bodies do not need and should not be given the additional leverage or power which the ability to make a reference to the Copyright Tribunal would give them.

6. Pan-European Scheme

If the terms and conditions of a panıEuropean licensing scheme is incorporated into a UK scheme or is used as the rationale for a UK scheme, then Sky proposes that the Copyright Tribunal should be entitled to consider that panıEuropean scheme to the extent that it has a material effect on a UK scheme.

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