



House of Commons
Innovation, Universities,
Science and Skills Committee

**The work and
operation of the
Copyright Tribunal:
Government Response
to the Committee's
Second Report of
Session 2007–08**

Fifth Special Report of Session 2007–08

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The Innovation, Universities, Science & Skills Committee

The Innovation, Universities, Science & Skills Committee is appointed by the House of Commons to examine the expenditure, administration and policy of the Department for Innovation, Universities and Skills.

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Fifth Special Report

On 20 March 2008 the Innovation, Universities and Skills Committee published its Second Report of Session 2007–08, *The work and operation of the Copyright Tribunal* [HC 245]. On 22 May 2008 the Committee received a memorandum from the Government which contained a response to the Report. The memorandum is published as an appendix to this Report.

Government response

Introduction

The Government welcomes the interest that the Innovation, Universities, Science and Skills Select Committee has shown in the operation of the Copyright Tribunal. The Tribunal provides an important means by which 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, can be resolved. In future we may need it to perform a broader role. Given the contribution made by the creative industries to the UK economy and to the richness of UK culture, it is essential that the Tribunal operates effectively now and in future.

We are not starting from a poor position: there is much that is good about the Tribunal, and a number of incremental improvements have been made to it by the current Chair, the His Honour Judge Fysh. We do not accept that the Tribunal has been fundamentally flawed for 20 years. However, as the Committee's Inquiry makes clear, there are undoubtedly more radical improvements that could be made to its operation by the independent Chair in conjunction with the UK Intellectual Property Office (IPO) and the Ministry of Justice. Most significantly, and as the IPO said in its written evidence to the Committee, the Government "*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.*"

It was to achieve in part this vision that the IPO arranged for two of its experienced Trade Marks Tribunal Hearing Officers to review the operation of the Copyright Tribunal and make recommendations for improvement. The report of this review was published in May 2007, and made 30 recommendations. These focussed on improving the efficiency of the tribunal through practice changes, regulatory changes and an increase in the resources provided to it. The IPO consulted publicly on the recommendations. It did not, however, immediately seek the agreement of Judge Fysh to implement the recommendations on which there was broad agreement because there were 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 suggested that there were broader questions to be answered about the role and scope of the Tribunal, that went very much beyond the scope of the 2007 Review. We are now further forward in working on these issues, and along with Rt Hon Judge Fysh, are able to decide what recommendations of the

2007 Review are worth pursuing in this broader context. The IPO is publishing its response to the public consultation.

But that will mark only the start of a process. In addition to these largely procedural changes to the running of the Tribunal, we recognize that a more extensive programme of reform is needed if we are to achieve a Tribunal that is more accessible, quicker, and therefore more routinely used, and is able to potentially perform other roles being considered. The detailed response (below) to the Committee's recommendations provides some further information on what that reform may entail. But there are some fundamental issues on which we need to await developments in other work streams (such as that on dealing with orphan works) and consult more widely upon before deciding with the Chair what action to take. We expect the action we ultimately decide upon will go a long way towards delivering the sort of Tribunal, we the Committee, and users envisage.

We are mindful of the Committee's concern that development of the Tribunal is now urgently needed, and will therefore ensure that the process of consultation and development of this strategy is as swift as it can be.

We would welcome the Committee's continuing interest and support in this area.

Detailed Response

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)

We are glad that the Committee has welcomed the setting up of the Strategic Advisory Board for Intellectual Property. This is an important evolutionary step in ensuring that we are able to think more strategically about the way in which intellectual property practice and policy impacts on, and can best support other areas, such as, trade, health and broader innovation policy.

The Government is pleased to report to the Committee that following an open competition, Joly Dixon, CMG has been appointed as the inaugural Chairman of SABIP. Upon appointment, Joly joined the selection panel to appoint the remaining members of SABIP. The Government has recently announced these appointments and the inception of SABIP is on 2nd June.

The Committee also welcomed the construction of an economic research and evaluation unit in the IPO. We see this as an essential contribution to our being better able to understand the economic advantage that exploitation of intellectual property rights conveys, and in providing us with the information we need to ensure that UK companies and individuals make the most of their intellectual property assets.

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)

The Government considers that this issue merits further exploration. There may be a case for allowing collecting societies as well as licensees to have the right to make a reference in certain circumstances. This would require legislative change. Work to effect this change will be considered as part of the wider package of reform spoken of in the introduction, and upon which we expect to undertake a public consultation

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)

As has been noted previously, we do not accept that the Tribunal has been fundamentally flawed for 20 years. The Tribunal is an independent body under the responsibility of its Chair and deputies. Much has been done by current and previous Chairs to try to ensure that the Tribunal operated effectively. But we recognize that there is now a need for more extensive reform, and we are getting on with it.

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)

The Government believes that different users of the Tribunal have a requirement for it to operate in different ways. While some may desire the Tribunal to continue to operate in a court-like manner, others may have a need for simple advice or mediation. We suspect that there is a need to provide any increased pool of potential users (that we want the Tribunal to attract) with a wider range of practical and functional services than currently exists. The “function” of the Tribunal is therefore one of the fundamentals on which further consultation is needed, and it would be wrong to pre-empt that work now by opting (without clear evidence of need) for a Tribunal operating in a certain way.

What we are clear about at this stage though, is that the Copyright Tribunal (as a body empowered to establish at the request of an interested party, the royalties to be paid for the use of copyrighted works) will in future be a place where users should be able to present their own cases effectively, assisted by good quality, imaginatively presented information, and by expert procedural help from tribunal staff. We are taking immediate steps to ensure that users have access to improved advice and guidance. This will be provided by a newly established office of support, the *Copyright Tribunal Registry*, which will include for the first time additional professional legal staff (see the response to recommendation 9 below) able to dispense advice that is not currently provided. We are also in the process of improving the written guidance available to users.

Once we decide the scope and function of the Tribunal we will need to match services offered by providing advice and guidance to new users.

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

The Government agrees with the Committee. With the agreement of the Ministry of Justice, the IPO is taking forward this recommendation. Given that any new Rules will

need to take full account of any changes that stem from consultation on other aspects of Copyright Tribunal reform, the work will not be completed however until we have publicly consulted and decided on action. We expect a small team co-chaired by the IPO, and His Honour Judge Fysh, to review the Copyright Tribunal Rules 1989.

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

Responsibility for the appointment, employment and remuneration of the Chairman of the Copyright Tribunal lies with the Ministry of Justice. It is a general principle that Crown servants already in receipt of a public salary (as the current Chairman is) do not normally receive additional remuneration for any further public offices held concurrently on a fee-paid basis. The current Chairman's arrangements as a judicial office holder allow for 25 days per annum (that would otherwise be spent on his other judicial duties) to be spent on activities relating to the Tribunal.

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)

Taking recommendations 7 and 8 together, the Government agrees with the Committee that lay members should continue to be appointed to the Copyright Tribunal, and that they should be chosen on the basis of specific, relevant expertise. Given that the current term of office for the remaining lay members expires in September 2009, work has begun to recruit a new panel.

Discussion to determine the parameters of the "relevant experience" and agree appropriate selection criteria has begun between the current Chairman of the Copyright Tribunal, the MoJ and the IPO. Early consensus suggests that candidates drawn from the fields of specialist solicitors in commercial law, forensic accountants and librarians are most likely to provide the necessary breadth of specialist expertise required.

A recruitment exercise, conducted in accordance with OCPA guidelines, will commence in July.

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)

The Government agrees with the Committee that some change is needed. The IPO has discussed the level of support and resources with the current Chairman of the Copyright Tribunal and agreed to a new office of support, the *Copyright Tribunal Registry* being established in London at the IPO premises. A recruitment exercise to provide increased, dedicated administrative support for the Copyright Tribunal is underway. Furthermore,

we also intend that new additional professional legal support to assist the Chairman in the progress of cases will be provided and in place very shortly.

But we believe it essential to keep the resources available to the Tribunal under review. We are aware that similar Tribunals overseas (but often with wider remits) have a much higher level of resources allocated to them. If the UK Tribunal radically alters, and provides the same or new services to a larger number of users, then we would expect to have to increase the resources available to it.

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)

Given that disputes currently brought to the Tribunal often entail considerable cost and have far reaching implications, it is not unreasonable to hope that the positions taken and proposals made by the parties should be well conceived. This is not always the case. The IPO Review therefore recommended that the “*reasoning behind licensing schemes and tariffs should be clearly shown*”. However, discussion with Tribunal members, and public consultation have shown that attempting to be prescriptive in this area may cause more problems than it solves. Potentially, as the Committee notes, it may add to the complexity and cost of bringing disputes before the Tribunal, and could therefore run counter to our aim of encouraging more routine use of it. We have therefore concluded that this recommendation of the 2007 IPO Review should not be pursued.

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)

It is probably unwise, in terms of propriety, for the Tribunal Chair or deputies to attempt to formulate or propose methodologies once disputes have reached an advanced stage. Indeed, the Chair’s unequivocal advice to the Committee was that he should not get involved in this. However, there is a need to look at whether a mediation service can be offered in the context of copyright disputes, and at whether it could identify common methodologies or specimen agreements that might be used by parties to amicably settle their differences. We are considering this.

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)

The current Chair of the Tribunal is considering a number of ways by which the processes of the Tribunal might be streamlined. He is, for example, considering the need for a revised Practice Notice to guide those currently appearing before him.

However, the need for the Tribunal to handle a step-change in the number of references made to it turns on the implementation of our plans for more extensive reform. We definitely do want it to deal with a greater volume of references, and as we agree actions that will result in this, we will have regard to the capacity of the Tribunal to deliver them. That may well require further change to processes and structure.

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)

The IPO has reconsidered the recommendation that there should be a single, joint expert witness. Following further discussion with the Chair of the Copyright Tribunal, and in light of comments received in response to the public consultation exercise, it has concluded that the recommendation should not be pursued.

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

The Government agrees with the Committee that responsibility for the Copyright Tribunal remain with the IPO, we believe this is the best home for it.

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)

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 The work and operation of the Copyright Tribunal 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)

Taking recommendations 15 and 16 together, and recognising their links with earlier recommendations 2 and 12, the Government agrees with the Committee that the current arrangements unfairly exclude a number of potential users from bringing licensing disputes before the Copyright Tribunal.

As has been stated earlier in this response, we are embarking on a programme of extensive reform that will deliver a tribunal that meets the needs of all potential users, and might be markedly different from the Tribunal operating today. Our aim in doing so is to establish a

reformed Copyright Tribunal which provides the optimum flexibility for interested parties to resolve any differences and achieve an appropriate licensing arrangement.

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)

The Government is keen to find a solution to the orphan works issue. It would favour solutions which allowed orphan works to be used by third parties ("would be users"), provided there were appropriate searches for rights holders to be made in advance, and that any solution prescribed adequate standards of due diligence for those searches.

The Committee should be aware generally that copyright law in the UK has to be consistent with our international obligations both at the EU level and in terms of the Berne Convention, to which we are a signatory. Any solutions we create should respect those obligations.

The Committee asks whether the UK Government would support the concept of licensing or an exception.

On exceptions, currently there are no exceptions available, either under UK law or at EU level, permitting the use of orphan works. This means that the general copyright law applies. The use of the whole or a substantial part of an orphan work still in copyright without consent, and which consent could not be obtained in the absence of the owner or exclusive licensee, would represent an infringement of copyright if no exception applies. If the original owner or exclusive licensee were to reappear, he or she could have an action against any users of that work.

In order to create an orphan works exception under UK law which respects our international obligations, there would need to be an amendment of EU law. This was why the Gowers review proposed in recommendation 13 that the UK Government should propose a provision for orphan works to the Commission amending the relevant Directive (29/2001/EC).

On solutions involving licensing, the Government believes that the term "licensing" in the context of orphan works is not really appropriate, as there is no readily-identifiable copyright owner or exclusive licensee who can grant such a licence. Any licensing would need to be directed at creating an indemnity to guard against the reappearance of the true rights holder or exclusive licensee.

The Government has been engaging informally with UK parties interested in orphan works, and meetings and discussions are taking place about the way ahead. A number of bodies in the copyright field in the UK have been looking at creating voluntary solutions, whereby an organisation or organisations such as a collecting societies would take fee income from the user of an orphan work, subject to the society being satisfied that an appropriately diligent search had been made, and offer an indemnity in the event that copyright was enforced at a later date. Government is keen to determine how such

voluntary solutions might work in practice and to what extent they might represent alternatives to legislation-driven solutions.

At the same time the European Commission has been consulting national level experts from industry, academic and cultural backgrounds across Europe to discuss orphan works, and is expected to produce guidelines in the summer which Member states could use as a framework from which to implement their own solutions. The dialogue with UK stakeholders referred to earlier has enabled the Government to keep a watching brief on how this work is developing.

The Government wants to see the outcome of the Commission's process before it moves to put in place any solutions in the UK. This is because it believes that, rather than focusing the energy and effort of stakeholders on interim and hence temporary solutions, the interests of rights holders, would-be users and the general public would be better served by working up a durable, sustainable and permanent solution which can take account of our the current state of all our international obligations in this area, and which is genuinely capable of resolving this problem once and for all.

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)

We are embarking on a programme of reform that fully recognises the Committee's commentary and recommendations; the recommendations of the earlier IPO review and the responses made following the public consultation; takes proper account of wider developments in Copyright; and that will benchmark the service offered in the UK with that offered in other countries.

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 reexamined. 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)

The Government notes this recommendation. The perception given in the report that the tribunal is expensive, slow and of limited access is something that the IPO aspires to break. Its intention has always been to look at amending the Tribunal's remit to respond to current Copyright challenges. As stated in its evidence to the Committee, it 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.

We will be making a detailed formal response, setting out what aspects of the 2007 IPO review of the Copyright Tribunal, might be taken forward ahead of our more fundamental reforms later this month.

May 2008

List of Reports from the Committee during the current Parliament

The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

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