

## **Public Consultation on Changes to the Jurisdiction and Operational Aspects of the Copyright Tribunal, 11<sup>th</sup> February to 10<sup>th</sup> March 2008**

IPOS is seeking feedback on the proposed changes to the jurisdiction of the Copyright Tribunal.

### **1. Introduction**

The purpose of this paper is to invite feedback on whether the jurisdiction and procedures of the Copyright Tribunal should be changed to:

- a. meet the growing needs of businesses and users in their use of new technologies to exploit copyright materials; and
- b. more effectively strike a fair balance between ownership interests of copyright holders and the interests of users to have access to copyright works on reasonable terms.

Several options on possible ways of addressing the stated needs are given below.

Your feedback on the proposed options, and any other options you may wish to suggest, may influence and determine changes to the law that will be implemented.

### **2. The Copyright Tribunal: An overview**

The paragraphs below give a brief overview of the jurisdiction and powers of the Tribunal. Detailed information on the Tribunal is found in **Annex A**.

#### **2.1 Jurisdiction**

The Tribunal is an administrative tribunal established under the Copyright Act to hear disputes involving licences, determine equitable remuneration payable to copyright owners for specified uses of their works, royalties payable for records of musical works and equitable remuneration payable for making of copies by educational institutions. The current jurisdiction of the Tribunal is confined to reviewing a very limited range of licence schemes and related issues due to a narrow definition of "licence".

#### **2.2 Members & Quorum**

The Tribunal consists of a President of the Tribunal and between 2 to 4 other members appointed by the Minister. Members are usually appointed for a period of two years.

The quorum required for a sitting is the President and 2 other members. The Tribunal decides matters by the votes of the majority. The President has a casting vote in the event of an equality of votes.

### 2.3 Questions of law and orders of the Tribunal

The Tribunal or any party to the dispute may refer any question of law to the High Court and orders in relation to licence fees may be recoverable as a debt by the licensor.

## 3. **Proposed changes to the jurisdiction and operational aspects of the Copyright Tribunal**

### 3.1 **Expansion of jurisdiction to hear licence disputes for all uses of all works and other subject matter:**

Currently, the Tribunal has jurisdiction to hear disputes involving a narrow range of licence schemes due to the narrow definition of “licence”. The definition only covers:

- a. a licence granted by a copyright owner for the performance, broadcast, making of a sound recording or film, or the inclusion in a cable programme service, of a literary, dramatic or musical work (or their respective adaptations); or
- b. a licence granted by a copyright owner to enter into a commercial rental arrangement for a computer program or a sound recording.

The narrow definition means that agreements for the licensing of a majority of works or derivative works would not come within the purview of the Tribunal. For instance, the Tribunal may not have jurisdiction to hear a dispute on charges payable under a licence for the reproduction of a film.

This was demonstrated in the recent case of *Orchard KTV & Lounge Pte Ltd v Recording Industry Performance Singapore Pte Ltd*<sup>1</sup>. The applicant had requested that the Tribunal adjudicate on the reasonableness of the licence fees for the reproduction of Karaoke music videos (i.e. films) on its computer server using the “Karaoke On Demand System”. The Tribunal decided that it did not have any jurisdiction over the licence scheme for the copying and “public performance” of films by way of use in the Karaoke On Demand System.

The current jurisdiction of the Tribunal does not address the concerns of unreasonable licence fees and terms that businesses have in employing new technologies to exploit sound recordings and films. There are also few viable alternatives for aggrieved users. In the long run, the lack of a proper forum to seek redress may have an adverse impact on the growth of the Interactive Digital Media and entertainment sectors<sup>2</sup>, which are increasingly employing new technologies to exploit films and sound recordings in their business models.

It is proposed that the jurisdiction should be expanded to include licences for all uses of all works and other subject matter.

A table comparing the current and proposed expanded scopes of jurisdiction may be found at **Annex B**.

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<sup>1</sup> [2006] SGCRT 1.

<sup>2</sup> This term covers nightspots like pubs, bars, karaoke lounges, and discotheques.

This may be achieved by broadening the definition of “licence” to include the above matters. With the consequential broadening of the jurisdiction of the Tribunal, it is envisaged, for instance, that businesses in the entertainment sectors, which use sound recordings and films extensively, would have an avenue to seek redress for alleged unreasonable charges or licence terms imposed by copyright owners.

The change means that the Tribunal would be able to hear references / applications from users involving all uses of the following works and other subject matter:

Works	Other Subject matter
<ul style="list-style-type: none"> <li>• literary work</li> <li>• dramatic work</li> <li>• artistic work</li> <li>• musical work</li> </ul>	<ul style="list-style-type: none"> <li>• films</li> <li>• sound recordings</li> <li>• cable programmes</li> <li>• television and radio broadcasts</li> <li>• published editions of literary, dramatic and musical works</li> </ul>

However, there may be some difficulties having such a broad definition of “licence” in the light of Section 163(3) of the Copyright Act. Section 163(3) states that where no licence scheme is in existence, it is possible for a potential licensee to make an application to the Tribunal requesting a review of a copyright owner’s refusal to grant a license. The Tribunal can order a copyright owner to grant a license if the Tribunal determines that refusal is unreasonable. One commentator has stated that the provision is a “serious limitation on the rights of copyright owners...<sup>3</sup>”.

A broad definition of “licence”, coupled with the ability to order the grant of licenses, may be seen as conferring overly broad powers on the Tribunal to award compulsory licenses.

In order to ensure that the Tribunal’s jurisdiction does not seriously limit the rights of individual copyright owners who are not exercising monopoly powers, the Tribunal’s jurisdiction may be restricted to reviewing licences administered by collecting societies only. This can be achieved by amending the definition of “licensor” to cover collecting societies only.

<p>Proposal A:</p> <ul style="list-style-type: none"> <li>i. Broaden the definition of “licence” in Part VII of the Copyright Act to enable the Tribunal to hear disputes concerning remuneration and/or royalties payable in respect of licenses for all uses of all works and other subject matter; and</li> <li>ii. Narrow the definition of “licensor” to exclude individual copyright owners and cover collecting societies only.</li> </ul>
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<sup>3</sup> Colin Marks, “The Copyright Tribunal in Australia” *Journal of the Copyright Society of the USA* (1987) 34, at p. 226, commenting on Section 157(3) of the Australian Copyright Act, which is *in pari materia* with our Section 163(3).

### 3.2 Appointment of more members to the panel

The Copyright Act provides that a quorum for any proceedings of the Tribunal consist of the President and at least two members of the panel<sup>4</sup>. However, under current provision<sup>5</sup>, a maximum of 4 Tribunal panel members may be appointed. This can pose practical difficulties where more than 2 members are unable to sit, for whatever reason.

If a quorum cannot be formed, then it will become necessary to appoint a new member on a six-month basis<sup>6</sup>. This is unsatisfactory as it means that the hearing of applications will be delayed while suitable new members are sought and appointed.

It is proposed that this number be increased. Other administrative review boards in Singapore have panels of between 15<sup>7</sup> to 50<sup>8</sup> members from which to draw members to form the requisite quorums.

Increasing the number will ensure that we will have a sufficient number of panel members to draw on to form a quorum during proceedings. This consideration is particularly pertinent as we anticipate heightened Tribunal activity if the proposed expansion of its jurisdiction is implemented.

It is suggested that for added flexibility, rather than fix a maximum number of panel members under the Copyright Act, the Minister should be conferred the discretion to fix a number under Regulations. Adjustments can then be efficiently made in response to needs.

We suggest that the initial number of panelists be initially set at 20.

Proposal B:

Increase the number of members.

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<sup>4</sup> Section 154.

<sup>5</sup> Section 151.

<sup>6</sup> Pursuant to section 153 of the Copyright Act.

<sup>7</sup> Property tax Valuation Review Board constituted under the Property Tax Act (Cap. 254).

<sup>8</sup> Goods and services tax Board of Review constituted under the Goods and Services Tax Act (Cap. 117A).

### 3.3 Appointment of Deputy Presidents

As stated earlier, if the jurisdiction of the Tribunal is expanded, it is anticipated that there could be more Tribunal cases. In order to give greater flexibility in the hearing of cases, up to 2 Deputy Presidents should be appointed. Each of the Deputy Presidents may form quorums with 2 other members to hear cases concurrently. This is similar to other administrative tribunals / boards here<sup>9</sup> and to the Copyright Tribunal in Australia.

It is proposed that a Deputy President should either be :

- a) a former District Judge; or
- b) a qualified person<sup>10</sup> of not less than 5 years standing.

A Deputy President, like the President<sup>11</sup>, shall also have a casting vote where there is an equality of votes.

Proposal C:

Appoint up to 2 Deputy Presidents.

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<sup>9</sup> Valuation Review Board (Property Tax); Strata Titles Board; the Boards of Review for income tax and Goods and Services Tax respectively.

<sup>10</sup> As defined in section 2 of the Legal Profession Act (Cap. 161).

<sup>11</sup> Section 155 of the Copyright Act.

4. **Public Consultation**

Written comments on the proposed changes and any other aspect of the Copyright Tribunal are now invited from all interested parties, including representatives of copyright owners, businesses, educational institutions, libraries and archives, scholars, researchers and members of the public.

Your written comments should be sent to IPOS at the address stated below or submitted through the IPOS website <http://www.ipos.gov.sg> from **11<sup>th</sup> February to 10<sup>th</sup> March 2008.**

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