THE NOTIONAL BARGAIN APPROACH TO THE DETERMINATION OF EQUITABLE REMUNERATION FOR COMPULSORY LICENCES: A COMMENT ON FOUR DECISIONS OF THE COPYRIGHT TRIBUNAL

One important consequence of technological development in the media and entertainment industries is the tendency towards the collectivization of authors' copyright. Non-voluntary licences both statutory and compulsory,[1] and the collective administration of authors' rights, are today important features of the Australian copyright regime. Increasingly compulsory licences are being regarded as compromise solutions to the practical difficulties of enforcing copyright in the traditional manner.[2] They have the advantage of allowing unrestricted access to works whilst also providing for the fair remuneration of copyright owners. The legal effect of a compulsory licence is to substitute for an author's exclusive right to commercial exploitation of the work, a mere right to claim remuneration when the work is exploited by others. So, new and important questions have arisen regarding the appropriate basis for the determination of fair or equitable remuneration payable in consideration of compulsory licences.

There is no statement of legislative purpose in the Copyright Act, 1968 (Cth) (the Act). However the Spicer Committee established in 1958 to examine and recommend changes to the then existing copyright law and whose report formed the basis of the 1968 Act stated that:

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[1] Both involve a licence whereby protected works can be used freely on the condition that the user group pays a royalty to the author or his collecting society. The terms of a statutory licence and the rights of a licensee under it are set by the statute that establishes the licence. Compulsory licences differ in that copyright owners retain the right to negotiate the amount of the fee they are to receive, with the proviso that if the parties are unable to agree on an amount that it will be set by an independent tribunal. 'Compulsory licence' is often used in a more general sense to refer to both type of licences. S. M. Stewart, *International Copyright and Neighbouring Rights*, London, Butterworths, 1983, p. 71.

[2] Historically there were two reasons for the introduction of non-voluntary licences; where a user required access to works but it was not practical for them to locate each copyright owner and obtain an individual licence, and secondly to prevent the creation of a monopoly use of copyright at the expense of other users. Stewart, *op. cit.* p. 71. In recent years, the introduction of compulsory licences has been proposed where new technologies enable undetectable use, render copyright unenforceable and copyright owners unrewarded. The introduction of a statutory licence in respect of the hometaping of audio and audio-visual works has recently been the subject of inquiry as part of the Attorney-General's Departments Review of Audio-Visual Copyright Law.

> . . . our task has essentially been one of balancing the interests of the copyright owner with those of copyright users and the general public. The primary end of the law on this subject is to give to the author of a creative work his just reward for the benefit he has bestowed on the community and also to encourage the making of further creative works.[3]

This is commonly recognised as the policy underlying Australian copyright law. Thus, copyright law particularly as applicable to the modern technological scene, can be analysed in terms of the different and frequently conflicting interests involved. Four major interests can be identified: those of the creator, publisher and disseminator, user, and society as a whole. In regard to compulsory licences, disputes involve copyright owners desiring more remuneration and users wanting less.

The Copyright Act establishes a Copyright Tribunal and grants it jurisdiction to determine or conduct an inquiry into the remuneration payable to copyright owners in consideration of compulsory licences.

The Tribunal was established to perform a politically sensitive function and operates to protect governments from continuous involvement in the resolution of contentious clashes of group interests. Yet it is the legislature which must be ultimately responsible for the determination and enactment of policy, and for the regulation and allocation of resources. Whilst it is an accepted practice for governments to delegate these functions and to create "buffers" in the form of quasi-judicial tribunals, the Australian government has effectively delegated even its final supervisory responsibility in regard to the determination of equitable remuneration. Nowhere in the Copyright Act has the legislature laid down guidelines which the Tribunal could follow in making its decisions. The development of such guidelines has been left to the Tribunal itself. The resulting criteria applied by the Tribunal are vaguely enunciated, if enunciated at all.

Broader questions regarding the appropriateness and desirability of compulsory licences have also been virtually ignored by the legislature: How do such licences accord with the perceived policy of the copyright legislation? In particular, do they usefully serve the interests of authors as opposed to corporate copyright owners, and how can compulsory licences be reconciled with respect for moral rights of authors? The following discussion of the four decisions in which the Copyright Tribunal has had the opportunity to consider the notion of equitable remuneration, and the basis on which it should be calculated, highlights the fundamental significance of these issues.

The reader should be aware that each of the cases now to be considered is distinct and self-contained and although cross-reference shall be made, each case will be considered separately and in turn.

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[3] *Report of the Copyright Law Review Committee*, 1959, paragraph 13.

I. Report of the Inquiry by the Copyright Tribunal into the Royalty Payable in Respect of Records Generally[4]

S. 55(1) of the Copyright Act 1968 (Cth) provides for a compulsory licence exempting persons from infringement for the making of a sound recording, subject to the payment of a royalty to copyright owners and certain specified conditions being met. The royalty payable in respect of musical recordings is specified in s. 56(1). Since 1912 this amount has remained fixed at 5 per cent of the retail selling price of the record.

In December 1977 the Attorney-General in accordance with s. 58(1) formally requested the Copyright Tribunal to hold an inquiry into the amount of the royalty that should be payable in respect of records generally. S. 58(1) provides that the Attorney-General may do this if at any time it appears to him that the royalty payable is not equitable. It is the function of the Tribunal to determine if the current royalty is equitable, and if it decides it is not, to recommend an equitable rate to the Attorney-General.[5]

Every person or organization that the Tribunal is satisfied has a substantial interest in the matter to which the inquiry relates, must be given an opportunity to present a case before it.[6]

At the preliminary hearings held in 1978 leave was given to Australian Copyright Owners (ACO) and the Australian Record Industry Association (ARIA) to appear before the Tribunal and present their cases. The first represented a number of composer and music publishing organizations, the latter the major record manufacturers in Australia. Leave to appear was also granted to the Australian Society of Authors (ASA).

Submissions

From the outset of the hearing the main parties adopted adversary positions.

ACO submitted that the present statutory royalty was not equitable and an equitable rate would not be less than 8 per cent of the retail selling price per record.

ARIA initially argued that the statutory rate should be reduced but later abandoned this and concentrated on its alternate claim that the present rate be retained. It further submitted that the royalty should be calculated net of sales tax.[7] ACO agreed with this submission.

The parties made submissions as to the meaning of "equitable" and as to the factors relevant to the determination of an equitable royalty. Evidence was adduced to assist the Tribunal in this regard.

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[4] Reported 24 December 1979. A decision of the Copyright Tribunal's Deputy President and Chairman Mr. Justice R. J. B. St. John and Mr. R. N. J. Purvis and Mr. D. K. Malcolm.

[5] The Tribunal has no power to fix the amount of the royalty; it has an advisory function only. However, s. 58(3) of the Act directs the Governor-General to take account of the Copyright Tribunal's Report in varying the rate by regulation.

[6] S. 148(3).

[7] A third claim that no royalty be payable on records disposed of gratuitously was abandoned during the inquiry. S. 60 of the Act provides to the contrary.

Decision

The Copyright Tribunal found that the present statutory royalty payable in respect of records generally is not equitable and should be increased to 6.75 per cent.[8] It agreed with both parties that the basis of the calculation should be changed from the retail selling price inclusive of sales tax to the retail selling price net of sales tax.[9]

(a) *An equitable royalty*

The Copyright Tribunal noted initially that there is no definition of the word "equitable" in the Copyright Act, nor does it set out any criteria or factors which would assist the Tribunal in its determination.[10]

The Tribunal determined that the proper definition of equitable was "fair and reasonable".[11] It suggested that any ambiguity in the use of the word equitable in s. 58(2) could be resolved by reference to the International Copyright Conventions to which Australia is a party.[12]

The Copyright Tribunal reasoned that the requirement that a copyright owner be paid an 'equitable' royalty in consideration of a compulsory licence is implicit in the nature of the right granted by the Statute.[13]

> . . . the statute grants a liberty to do that which otherwise could be prevented by the copyright owner . . . the countervailing obligation to the manufacturer's liberty is the payment of a royalty to the copyright owner.[14]

Significantly the compulsory licence amounts to an expropriation of the property right of the copyright owner to authorise use for the benefit of record manufacturers. The ability to bargain and to withhold consent is removed. The Statute fixes that which would otherwise be set by negotiation:[15]

Speaking of s. 19(2) of the 1912 Act, Isaacs, J. said in *Gramophone Co. Ltd.* v. *Leo Feist Inc.*[16] that he did not

> . . . see any justification for subordinating the absolute rights of authors of musical works to the works themselves, as to payment for them, to the conditional rights of persons desiring to reproduce those works.

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[8] *Supra*, n. 4 at xiii.

[9] *Ibid.* The Tribunal further recommended that the Act be amended to take account of the Trade Practices Act 1974 (Cth) and the present practice of the industry where the royalty is payable on the recommended retail price.

[10] *Id.*, 24.

[11] This was the definition stated in *R.* v. *Minister of Housing and Local Government* [1955] 1 W.L.R. 29, *Id.*, 25.

[12] *Gramophone Co. Ltd.* v. *Leo Feist Inc.* (1928) 41 C.L.R. 1, *Id.*, 98.

[13] *Id.*, 25.

[14] *R.C.A. Ltd* v. *Commissioner of Taxation* (1977) 51 A.L.J.R. 602, *per* Aickin, J. at 605, *Id.*, 25.

[15] *Id.*, 97.

[16] (1928) 41 C.L.R. 1 at 19-20. *Id.*, 25.

The Copyright Tribunal further states that Australia has covenanted under International Copyright Conventions that an author's right to receive "equitable" remuneration will not be prejudiced by the operation of compulsory licence schemes.[17]

The Copyright Tribunal was firmly of the opinion "that the basic question is what rate of royalty would provide equitable remuneration to the copyright owner".[18]

It emphasised that "equitable" means "equitable to the copyright owner".[19] It is not relevant to ask whether the rate is "equitable to the public" or to record manufacturers.[20]

(b) *The notional-bargain approach*

The Tribunal adopted the notional-bargain approach to the calculation of equitable remuneration. This was the approach used by the High Court in a number of cases concerned with the assessment of the value of compulsorily acquired land.[21] The Tribunal believed similar considerations applied to the determination of a royalty payable in respect of compulsorily acquired copyright. In the copyright context therefore, it is necessary to ascertain the amount of the royalty which a willing manufacturer would give to a not unwilling copyright owner for the right to record his work neither being under any compulsion.[22]

In the application of the hypothetical bargain approach, however, regard must be had to the existence of the compulsory licence; the constraints that exist in reality cannot be ignored.[23]

The Tribunal contended that it was not possible to assess the value of individual works because the Act contemplated a single rate regardless of the quality or success of any particular work.

> To arrive at a single equitable rate we need to postulate an industry-wide bargain struck by copyright owners on the one hand and the record manufacturer on the other.[24]

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[17] *Id.*, 25.
[18] *Id.*, 26.
[19] *Id.*, 99.
[20] The Tribunal referred to the decision of the High Court in *The Commonwealth* v. *Arklay* (1952) 87 C.L.R. 159 at 169 and to other more specific provisions of the Copyright Act; ss. 47(3), 107(3), and 108(1)(a) which refer to 'equitable remuneration to the owner', in support of this view. *Id.*, 98.
[21] *Id.*, 98. *Spencer* v. *The Commonwealth* (1907) 5 C.L.R. 418 at 432. *Commonwealth* v. *Arklay* (1952) 87 C.L.R. 159 at 169. In the first mentioned case Griffith, C.J. (at 432) stated the test as follows:

> What would a man desiring to buy the land have had to pay for it on that day to a vendor willing to sell it for a fair price but not desirous to sell . . . The necessary mental process is to put yourself as far as possible in the position of a person conversant with the subject at the relevant time and from that point of view to ascertain what according to the then current opinion of land values a purchaser would have had to offer for the land to induce such a willing vendor to sell it or in other words to inquire at what point a desirous purchaser and a not unwilling vendor would come together.

[22] *Supra*, n. 4 at 100.
[23] *Nelungaloo Pty* v. *Commonwealth* (1948) 75 C.L.R. 495 *per* Latham, C.J. at 540-1. *Ibid.*
[24] *Ibid.*

(c) *Analogy with cases concerning damages for infringement*

The Copyright Tribunal sought assistance in its application of the notional-bargaining approach from cases which used that approach to calculate damages for the infringement of a patent[25] or copyright.[26] In these, the measure of damages was the sum the infringer would have paid as a royalty, if instead of acting illegally, he had negotiated a licence from the owner.[27]

Although these cases where decided in regard to particular instances of infringement:

> . . . it is apparent that the courts have been prepared to face the difficulty of constructing a notional bargain and fixing the amount which would have been paid in connection with it, having regard to all relevant factors.[28]

The Courts have been prepared to do this, even when the matter has been completely at large, as here.[29]

(d) *Relevant factors*

The Tribunal decided that the following range of factors would be relevant to the hypothetical bargain between composers, authors and record manufacturers:

(a) the extent to which the fall in the value of money, at least since 1968 has affected the value of the royalty per record.
(b) the extent to which any such fall in the value of money has been compensated by rises in the retail selling price of records.
(c) technological and other changes in music publishing and record manufacturing which may have affected the extent of use by the public of works of composers and authors.
(d) the financial position and performance of composers and authors publishers, artists, record manufacturers and retailers; and
(e) the consequence of any variation in the statutory royalty including the effect on the retail price payable by the consumer.[30]

The factors and other more specific matters were weighed and compared in the light of the public interest considerations said to be underlying the compulsory licence: those of encouraging creativity and of ensuring that the public has access to a variety of recorded performances of musical works.[31]

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[25] *General Tire and Rubber Co.* v. *Firestone Tyre and Rubber Co. Ltd.* [1975] 2 All E.R. 173 at 178.
[26] *Stovin-Bradford* v. *Volpoint Properties Ltd* [1971] 1 W.L.R. 256; *Interfirm Comparison (Australia) Pty. Ltd.* v. *Law Society of NSW* (1974-75) 6 A.L.R. 445; *Australasian Performing Rights Association* v. *Grebo Trading Company* (1979) 23 A.C.T.R. 30.
[27] *Supra*, n. 4 at 26.
[28] *Id.*, 101.
[29] *Ibid.*
[30] *Id.*, 2.
[31] *Ibid.*

The Tribunal accepted ACO's submission that the real value of the statutory royalty per record has declined since it was first imposed, and found that the rise in the price of records has only partly compensated for the consequences of inflation. The Tribunal stated that if this was the only relevant factor then the royalty would be fixed at 7 per cent.[32]

The Tribunal did not agree that this amount should be reduced to take account of the benefits derived from new opportunities for exploitation and use of recordings. Nor did it agree that the reduced role of the music publisher was relevant.[33] However the Tribunal did take account of the deterioration in the bargaining power of composers, and of their share of sales revenue, vis-a-vis that of recording artists.[34]

In its submissions ARIA emphasised that its members bare the cost of unsold records, giveaways, record jackets and the fight against commercial piracy and hometaping. It was argued that as this was also to the benefit of composers and authors it should be taken into account in determining the royalty. The Tribunal agreed generally with this submission.[35]

It further considered the existence of a public policy to encourage creativity to be relevant. Equitable remuneration, the Tribunal believes, should be an "appropriate stimulus to or reward for creativity".[36] It was considered irrelevant, however, particularly in light of Australia's international copyright obligations, that a large part of the profits from record sales are transferred overseas; "What is equitable in Australia is dependent upon market factors prevailing in Australia",[37] and the Tribunal determined that whilst comparisons with overseas rates were helpful, only the broadest of inferences could be drawn from them.[38]

Finally, the Tribunal was concerned to ensure that a royalty was not set so high so as to discourage sales and restrict access to records. It considered that the price increases that would flow from the royalty rate increase to 7 per cent, would not be so high as to restrict access in contravention of the public interest.[39]

After it had weighed and considered all the above factors, the Tribunal determined that copyright owners and record manufacturers had they been free to bargain, would have fixed the sum at 6.75 per cent.

II. *WEA Records Pty. Ltd.* v. *Stereo FM*[40]

S. 109 of the Copyright Act provides for a compulsory licence for

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[32] *Id.*, 44.
[33] *Id.*, 45.
[34] *Ibid.*
[35] The Tribunal stated specifically in relation to return records that 'in a hypothetical bargain the record manufacturers could well seek a concession from the copyright owners to limit royalty payments to net sales of records manufactured'. Significantly however record manufacturers had never sought such a concession. *Id.*, 46.
[36] *Id.*, 47.
[37] *Ibid.*
[38] *Id.*, 50.
[39] *Id*, 54.
[40] (1983) 48 A.L.R. 91. A decision of the Copyright Tribunal; Deputy President Mr. Justice Lockhart, and Messrs. Purvis, Q.C. and Malcolm, Q.C.

the broadcast of sound recordings. Where broadcasters and copyright owners are unable to agree on the amount of the royalty payable in respect of this licence, the Copyright Tribunal will upon an application determine the amount payable pursuant to s. 152.[41] This amount cannot exceed 1 per cent of the gross yearly revenue of the broadcaster.[42]

In this instance negotiations between the record companies licensing agent, the Phonographic Performance Company of Australia (PPCA) and Stereo FM[43] broke down when the latter refused an offer of a licence on payment of an annual fee of 1 per cent of the station's gross earnings. 2MMM and other broadcasters made an undertaking under s. 109(1). The major record companies then made applications to the Copyright Tribunal for orders determining the amount payable to them as owners of copyright in published sound recordings by the holders of FM broadcasting licences in Australia.[44]

In making its order, the Tribunal must take into account all "relevant matters" including the extent to which the broadcaster uses for the purpose of broadcasting, sound recordings in which the copyright is owned by persons who are parties to the application.[45]

The Tribunal's order is made only in respect to "protected recordings", that is, records in which a broadcasting right subsists. This excludes recordings to which s. 105 applies—those recordings where copyright only subsists by virtue of its first publication in Australia under s. 89(3). Moreover, the Tribunal has determined that this exclusion extends to those overseas recordings in which copyright subsists in Australia by virtue only of the first publication in a copyright convention country which does not recognize performing or broadcasting rights in sound recordings.[46] This was a significant decision as it excluded from consideration recordings made in the United States.

Notably this case is concerned with a compulsory licence covering rights in subject matter other than works. Such rights are protected by Part IV of the Act. From the time sound recordings are made[47] they are the subject matter of copyright existing independently from copyright subsisting in the literary, dramatic, musical or artistic works embodied in the records. Essentially the right protected in this instance is that of the manufacturer rather than that of the creative artist, here the composer and librettist. The owner of copyright in a sound recording is the maker of the recording.[48] As a general rule the maker will be a record company. Thus copyright will not necessarily vest in a natural person,[49] or in

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[41] S. 109(1)(a) requires that broadcasters give an undertaking in writing to the copyright owners that it will comply with an order of the Copyright Tribunal.

[42] S. 152(8).

[43] The operator of Sydney Radio Station 2MMM.

[44] The application related to the period commencing the 1st October 1980 and ending the 30th June 1983.

[45] S. 152(7).

[46] *In Re WEA Records Pty. Ltd.* (1981) 40 A.L.R. 111 at 124.

[47] S. 22(3)(a) deems this to be the time the first record embodying the recording was produced.

[48] S. 89.

[49] S. 84(b) provides that a body corporate incorporated under the law of the Commonwealth or States is a qualified person.

persons whose creative and technical skill produced the recording. Rather it vests in the company which financed and made possible its production. It follows that the interests involved in this case differ fundamentally from the other decisions. Most notably the copyright interests of the creative artists involved in composing a musical work are not directly affected. The competing claims in this instance are those of record producers desiring a reasonable return for their investment and effort in making records and on the other side the interest of broadcasters in using recordings as freely or as cheaply as possible.

Submissions

The parties agreed that the inquiry to be undertaken by the Tribunal under s. 152 was to determine taking all relevant matters into account the value to 2MMM of the right to broadcast protected recordings.

The applicant and respondent disagreed as to the appropriate method of assessing this value, and as to which factors should be taken into account in the assessment process.

The record companies proposed two bases of calculation: a process analogous to an account of profits in an infringement action, or alternatively a determination based on the extent of use of protected recordings. It was claimed that there was a direct relationship between the broadcasting of records and earnings by way of advertising revenue.[50]

The respondent preferred the second mentioned approach and considered the account of profits analogy inappropriate. Counsel for 2MMM emphasised the notional bargain method that the Tribunal had earlier adopted and contended "that the value of the right to broadcast was the amount which the parties would have agreed to in 'arm's length' negotiations".[51] Accordingly it was said that the best guide to the amount which the record companies should pay was to be found in the licence agreements made with AM broadcasters since 1970. 2MMM argued that these indicated the sort of terms PPCA and the FM radio stations would freely negotiate. These agreements had been reached after the imposition of a ban in 1970 by AM radio stations on the broadcasting of protected sound recordings.

In reply the applicant submitted that these agreements were irrelevant, as they had not been freely negotiated. Further, in respect to the existing bargaining power of AM stations, it was submitted that the provisions of the Trade Practices Act 1974 (Cth)[52] would operate to

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[50] *Supra*, n. 40 at 111. This submission is not detailed in the report. Presumably the applicant is referring to the close link between ratings, market share, and advertising rates. The contention is that playing records attracts audiences and audience size is the basis on which advertising revenue is determined. "It was said that the programming policy of 2MMM is heavily oriented towards the broadcasting of sound recordings and that s. 152 recognizes a direct link between the uses of sound recordings and advertising revenue". *Id.*, 126.

[51] *Id.*, 111.

[52] Ss. 45(2)(a)(ii), 45(2)(b)(ii), 45A, 45B.

prevent a recurrence of the imposition of any ban such as that imposed in 1970.[53]

In regard to submissions as to the factors each party believed the Tribunal should take into account, the issue of the significance of airplay was particularly contentious. Each party down played the benefit to themselves and highlighted the benefits of airplay to its adversary. 2MMM submitted that its airplay of sound recordings, gave publicity to and promoted sales of, those recordings. Whilst the record companies emphasised the disadvantages supposedly flowing from airplay and the fact that broadcasters attract listeners and hence advertising revenue from the broadcast of sound recordings.

The parties submitted evidence as to the royalty payments made by broadcasters overseas, the relationship between music broadcasting and the derivation of income, the benefits of airplay to both parties and survey evidence as to the extent of hometaping and its general effects.

Decision

The Copyright Tribunal determined that the amount of the royalty payable in respect of the broadcast licence would be 0.45 per cent of the gross earnings of 2MMM.[54] Gross earning was defined in accordance with s. 152(19) as advertising, "contra" and other revenue.[55]

(a) *Equitable remuneration*

The Copyright Tribunal commenced its consideration with the observation that the basis upon which the amount is set is not specified in the Act. However, in other provisions in which the Tribunal is given jurisdiction to determine amounts payable, reference is made to "equitable remuneration".[56] Sections 109 and 152 make no such reference.

Despite this the Tribunal decides the amount payable in this case on the same basis as in its Record Royalty Inquiry. In its opinion the royalty should represent equitable or fair and reasonable remuneration to the copyright owner for the broadcasters use of protected recordings.[57] Again, a willingness to negotiate and a collective bargain between the parties is assumed.[58]

The Tribunal refers to those cases cited in its earlier decision where the notional bargain approach was applied to assess damages for the infringement of a patent or copyright.[59] In particular the Tribunal refers

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[53] *Supra*, n. 40 at 114. These submissions were also relevant to a ban applied to select record companies by nine Sydney commercial AM and FM broadcasters on the 29th September 1982. *Id.*, 115.
[54] *Id.*, 140.
[55] *Ibid.*
[56] Ss. 107(3), 150(1), 108(1) and 151(1).
[57] *Supra*, n. 40 at 112-113.
[58] *Ibid.*
[59] *Supra*, nn. 25 and 26.

to the judgement of Lord Wilberforce in *General Tire and Rubber Co.* v. *Firestone Tyre and Rubber Co.*[60]

There his Lordship referred to two situations which give rise to two different measures of damage. First, where the infringer diverts sales from the owner, the measure of damages will be the profit the owner would have had, if he had made the sale. This is the account of profits approach that the applicant originally proposed. The Tribunal indicated that it considered this method of calculation inappropriate, and does not discuss it further.[61] Secondly in the other type of cases, Lord Wilberforce contended the measure of damages will be the amount of the royalty that the infringer would have paid had he acted lawfully and not unlawfully. In this situation "evidence of a royalty paid by others who negotiated by way of a free bargain to establish a going rate is relevant provided the circumstances are comparable".[62]

The Tribunal goes on to say that where there is no going rate a Court is required to apply the notional bargain approach stated in *Meters Ltd.* v. *Metropolitan Gas Meters Ltd.*[63] This was referred to with approval by Lord Wilberforce in the *General Tire* case.[64]

The Tribunal sees further significance in Lord Wilberforce's statement that it should not be assumed that the hypothetical licensor or licensee are capable of bargaining on equal terms. A reference to a willing licensor or licensee is always a reference to the actual licensor and licensee—"they bargain as they are with their strengths and weaknesses, in the market as it exists".[65]

In adopting the approach of Fletcher-Moulton, L.J. in *Meters* the Tribunal recognized that its task was to determine in the light of the submissions and evidence adduced, what 2MMM would have paid had it negotiated a licence in 1980 instead of merely giving an undertaking to comply with the Tribunal's order.[66]

(b) *Relevant factors*

As in its previous inquiry the Tribunal weighed and considered the factors relevant to a hypothetical bargain between the parties in a general fashion. No monetary value was assigned to any factors, no quantification process was carried out.

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[60] *Supra*, n. 25 at 212-215.

[61] *Supra*, n. 40 at 112-113.

[62] Cf. *Aktiengesellschaft Fur Autogene Aluminium Schweissung* v. *London Aluminium Co. Ltd. (No. 2)* (1923) 40 RPC 107.

[63] (1911) 28 RPC 157 *per* Fletcher-Moulton, L.J. at 164-165.

[64] *Supra*, n. 25 at 179. "A proper application of this passage, taken in its entirety, requires the judge assessing damages to take into account any licences actually granted and the rates of royalty fixed by them, to estimate their relevance and comparability, to apply them so far as he can to the bargain hypothetically to be made between the patentee and the infringer, and to the extent to which they do not provide a figure on which the damage can be measured, to consider any other evidence according to its relevance and weight upon which he can fix a rate of royalty which would have been agreed."

[65] *Id.*, 185.

[66] *Supra*, n. 40 at 113.

As to the relevance of the licensing arrangements made in 1970, the Tribunal determined that although regard must be had to these in the fixing of the amount, the fact that PPCA was attempting to alter these arrangements so that the AM broadcasters would be paying a percentage of their gross revenue, should also be taken into account. For this reason, 2MMM's claim that these arrangements were the best guide to what should be paid was considered an "unreal approach".[67]

The Tribunal gained some assistance in determining the amount of the royalty from licensing agreements between the Federation of Australian Radio Broadcasters (FARB) and the Australasian Performing Rights Association (APRA), and from evidence of decisions of overseas tribunals. However it was said that it was necessary to remember that the Tribunal's decision ultimately had to be made with particular reference to s. 152(7) of the Act, and to the commercial situation existing in Australia.[68]

The Tribunal stated that s. 152(7) requires that it take into account the extent of the use of protected recordings. It found on the basis of surveys submitted by the parties that an average 54 per cent of recordings broadcast by 2MMM were protected.[69] The Tribunal further agreed, that there was a correlation between the broadcast of music and derivation of revenue by 2MMM and this correlation was reflected in the allocation of airtime.[70]

The Tribunal recognized that the airplay of records was beneficial to both parties in the ways stated above.[71] It considered it would be wrong to ignore the benefit accruing to record companies from increased sales, in the calculation of the royalty. To do so, it believed, would result in record companies receiving a double benefit.[72] Thus the royalty would be reduced by the amount of the benefit, although the Tribunal admits that this would be impossible to quantify precisely.[73] At the same time the Tribunal noted that it is important to balance this reduction by the amount reflecting the risk of lost sales from over-exposure or from radio listening being a substitute for purchase.[74]

The hometaping of broadcasts which were said to lead to lost sales was considered to be of limited relevance although the Tribunal recognized that its significance was conjectural, and its extent difficult to quantify.[75]

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[67] *Id.*, 123.
[68] *Id.*, 125-126.
[69] *Id.*, 128.
[70] The Tribunal stated that it considered that " . . . the relevant matter to be looked at in this regard when measuring the contribution made by protected recordings to the earning capacity of 2MMM is the proportion of broadcasting time as a whole occupied by the playing of protected recordings less advertisements." *Id.*, 130.
[71] *Supra*, text following n. 53.
[72] *Supra*, n. 40 at 133.
[73] *Ibid.*
[74] *Id.*, 134.
[75] *Id.*, 139.

Finally the Tribunal did not consider the bans imposed by the radio broadcasters relevant to the construction of a hypothetical bargain.[76]

III. *Copyright Agency Ltd.* v. *Department of Education of New South Wales and Others*[77]

The establishment of a statutory licence scheme covering the photocopying of works in schools, tertiary educational institutions and libraries was a major recommendation of the Franki Committee,[78] in 1976. The Copyright (Amendment) Act 1980 (Cth) introduced s. 53B which establishes a licensing scheme for the multiple copying of a reasonable portion of works and periodical publications in educational institutions. The photocopying must be done for teaching purposes and records of the copying must be kept.[79] Copyright owners are to be paid "equitable remuneration" on request at an amount decided by the parties, or in the absence of agreement, as determined by the Copyright Tribunal[80] in accordance with s. 149A.

This was a test case brought before the Copyright Tribunal pursuant to s. 53(B)(i) and s. 149A. Fifteen applications were made regarding specific instances of copying. These were selected to give a representative sample of the type of copying that takes place in various educational institutions. The applications were made by Copyright Agency Ltd (CAL), as the agent and collecting society for member authors and publishers. The respondents to the application were various educational institutions, State education departments, independent schools, universities, CAEs, and TAFE colleges.

Submissions

CAL contended that if there was not a going rate, then there existed a most common fee or charge for copying by educational bodies. It adduced evidence of permissions granted from 1980-1984 for educational copying by authors and publishers, in support of this. CAL provided tabulated actuarial evidence which it said established that equitable remuneration would be 4-5c per page. However, it further submitted that this amount should be increased to 10c per page, so as to compensate authors for their inability to stipulate conditions for copying, for the lack of attribution and to take account of collection costs.

The respondents submitted that the starting point of the calculation of the amount payable should be the royalty the author would receive on

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[76] *Id.*, 121. To the extent the "notional bargain" was the correct approach, the ability of the relevant party to impose an unlawful ban would not be relevant. If the bans were lawful the ability to impose them would not be relevant if the notional bargain was to be constructed on the basis of the product of a bargain freely negotiated as distinct from one negotiated in circumstances of oppression. Cf. *General Tire & Rubber Co.* v. *Firestone Tyre and Rubber Co. Ltd.* (1975) RPC 203 at 221 and 228.

[77] (1985) 59 A.L.R. 172. A decision of Mr. Justice Sheppard.

[78] The full name of this committee was the *Copyright Law Committee on Reprographic Reproduction.* It was chaired by Mr. Justice Franki.

[79] S. 53B(6) and s. 53B(7).

[80] S. 53B(1).

the sale of books. This was usually 10 per cent of the retail selling price. They denied there was any going rate or common charge, and challenged the reliability of CAL's evidence particularly in view of the large number of free permissions. The educational bodies submitted their own tabulations to establish a ceiling level for the royalty. They further argued that the royalty should be discounted because of the transient nature of photocopying compared to the original work and submitted that the proper royalty was 0.25c per page. Since Australian authors are not accorded rights directly equivalent to the *droit moral* of Civil law, it is argued that there should be no increase in the royalty amount because of the copyright owners' inability to stipulate attribution and other conditions. Nor did they consider it appropriate to include a figure for collection costs in the amount to be awarded. The effect of the inability of educational institutions to photocopy at a reasonable price, it was argued, would be to discourage copying and to cause a decline in the quality of education.

The applicant submitted in reply that if the respondent's royalty approach was correct, then the calculation of the royalty should take account of the amount of conversion damages which may be awarded in an infringement action under s. 116 of the Act.[81]

Decision

The Copyright Tribunal decided following its previous decisions that the rate should be determined by analogy to the measure of damages for the infringement of a copyright licence and as there was no going-rate the royalty should be derived from a judicial estimation of the available indications.

The Tribunal set the equitable remuneration at two cents per page.[82]

Mr. Justice Sheppard recognized that the Tribunal's function in this case was to fix an equitable or fair remuneration.[83] He observes that the right to authorize reproduction is an exclusive right granted to an author under s. 31(1)(a)(i) of the Act and states that it follows from this that the equitable remuneration which needs to be determined is that which would equitably compensate the owner for the loss of that exclusive right.

Again the Tribunal makes the point that the determination of an equitable royalty is made referable to copyright owners only.[84]

(a) *The notional bargain approach in the absence of a going-rate*

Justice Sheppard observed that the earlier cases of the Tribunal were

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[81] *Supra*, n. 77 at 193.

[82] Although the Tribunal determined that the Act requires an assessment of the amount payable for each instance of copying it complied with the request of the parties that it set a single rate which would apply to copying done in all educational institutions. *Id.*, 176.

[83] *Id.*, 193.

[84] Justice Sheppard states at *id.*, 180. "It is important to emphasize that no question of the right of any other person for example a publisher unless he happens to be an owner of copyright is involved." The Copyright Tribunal made the same point strongly in its Record Royalty Inquiry, *supra* n. 4 at 6-7.

not dissimilar to this one, except in the [vital] circumstance that the Record Royalty and 2MMM cases arose in a truly commercial situation.[85] Unlike record manufacturers or radio broadcasters, educational institutions do not carry on business for the purpose of making profit. This creates difficulties in the application of the notional bargaining approach, as a going rate does not always exist.

Sheppard, J. was guided as to the proper approach in this situation by the judgements of Lord Wilberforce in the *General Tire Case*[86] and of Fletcher-Moulton, L.J. in *Meters Ltd.*[87] He said that a proper analysis of these judgements showed that the question of the assessment of equitable remuneration should be approached first, by examining the normal rate of profit or royalty in comparable circumstances. This establishes the going rate, and is the best guide to what the parties would themselves have decided in negotiations. If, however, the evidence shows no going rate then it still may be possible to approach the assessment on the basis of a hypothetical bargain.[88]

Lord Wilberforce had stated that in cases where there is no normal rate of profit nor established royalty it is for the plaintiff to adduce evidence to guide the court. This evidence of common practice, or expert opinion evidence is likely to be of a general or hypothetical nature and is thus less weighty and concrete than evidence showing a going rate. However, Lord Wilberforce states that there is nothing preventing the court from taking general considerations into account. "The ultimate process" he states "is one of judicial estimation of the available indications".[89] Similarly Fletcher-Moulton, L.J. says in effect, that judges must exercise their judgment in the circumstances of the case.[90]

Thus Sheppard, J. concluded that

> If a notional bargain approach is not available or thought to be fallible in the circumstances of a given case the task becomes one of judicial estimation, the court or tribunal doing its best in the circumstances upon the basis of the evidence which there is.[91]

Sheppard, J. recognized that judicial estimation was a difficult task, and it is necessary to be on guard that the evidence or comparisons with other cases do not lead to artificial results.[92]

(b) *Relevant factors*

The Tribunal rejected all the bases of calculation suggested by the parties. The evidence of the applicant is said not to establish that there

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[85] *Supra*, n. 77 at 181.
[86] *Supra*, n. 25.
[87] *Supra*, n. 63.
[88] *Supra*, n. 77 at 183.
[89] *Supra*, n. 25 at 179.
[90] *Supra*, n. 63 at 164-5.
[91] *Supra*, n. 77 at 183.
[92] *Ibid.*

is a common charge, and the tabulations offered in support of the respondents royalty approach ignores the fact that the remuneration to authors is often higher than 10% and that authors themselves frequently retain the ownership of copyright.[93] Furthermore Justice Sheppard came to the conclusion that it would be inappropriate in most cases to draw on s. 116 as the applicant has here, for the purpose of determining the equitable remuneration to which a copyright owner is entitled.[94]

In making a small award to copyright owners the Tribunal recognized, that copying would be discouraged if the sum awarded was too high. This would disadvantage authors, educational institutions and the public "because lecturers and teachers may not be able to make use of much material that desirably should be freely available to students and pupils".[95] However Justice Sheppard emphasised that he only took this essentially public policy consideration into account because he believed the parties would have done so, had they been able to negotiate freely.[96]

On the other hand Justice Sheppard makes it clear that he has not taken anything into consideration which would reduce the figure payable on the basis that this would be an onerous burden on educational bodies.[97] Thus the users' capacity to pay is considered irrelevant. The subsidization of education, Justice Sheppard states, is not the role of authors but is a matter for governments only.[98]

In making these points His Honour is emphasising that the sum he is to arrive at must be fair and reasonable but it cannot be "extravagant or excessive".[99]

The Tribunal further agreed that the amount of the royalty should be reduced because photocopies of works are of no lasting use.[100]

Although Justice Sheppard receives some guidance in his task from the tabulations provided by the applicant and respondent,[101] he rejected the evidence concerning comparable overseas calculations,[102] of the non-commercial motivations of academic writers,[103] and the inability of copyright owners to insist on attribution.[104] Moreover he disregarded the evidence which was said to establish that photocopying was causing lost

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[93] Justice Sheppard noted the difficulties the parties had in formulating a yardstick and establishing an across the board figure that is fair to all parties. *Id.*, 197.

[94] Justice Sheppard stated that s. 116 can result in the awarding of damages which are more than compensatory and cities *Infabrics Ltd.* v. *Jaytex Ltd* [1982] A.C. 1 *per* Lord Scarmon at 26 and *W. H. Brine Co.* v. *Whitton* (1981) 37 A.L.R. 190 *per* Fox, J. at 200 in support. He goes on to say that there is no "legislative warrant for the Tribunal to take account of s. 116"; It is the Tribunal, not Parliament, which has used the analogy of the measure of damage in infringement actions. But the Tribunal is not justified in pursuing that analogy if it leads to remuneration which is excessive. *Id.* 198.

[95] *Id.*, 200.

[96] *Ibid.*

[97] *Ibid.*

[98] *Ibid.*

[99] *Ibid.*

[100] *Ibid.*

[101] *Ibid.*

[102] *Id.*, 202.

[103] *Id.*, 197-198.

[104] *Id.*, 199.

book sales, and said that he tended to think that such fears are groundless.[105]

Ultimately, Justice Sheppard decides he has to make a value judgement or "judicial estimation", of the type that must be made in industrial arbitration and personal injury cases. This he admits is often a difficult task and states at the end of his judgement:

> I confess that I have found this case poses as intractable a problem in the area of evaluation as any I can remember so far encountering that is because of a lack of a market and a lack of any satisfactory guidelines as to what the outcome should be . . . I do not feel able to give further reasons for my decision . . . .[106]

IV. *Reference by Australasian Performing Right Association Ltd; Re Australian Broadcasting Corporation*[107]

APRA is the owner of performance rights in musical works.[108] In 1979, APRA and the Australian Broadcasting Corporation (ABC) began negotiations regarding a new licence scheme involving a licence fee calculated on a percentage of the ABC's expenditure, minus that not relevant to musical broadcasting. Previously the ABC had paid an annual fee based on a specified amount per head of population. The negotiations regarding the proposed scheme were unsuccessful and APRA brought this reference before the Copyright Tribunal under s. 154(4) of the Act. This provides that the Tribunal may after hearing the cases of the respective parties make an order confirming or varying the scheme as the Tribunal considers reasonable in the circumstances.

Submissions

APRA sought 2 per cent of the ABC's gross operational expenditure incurred in the provision of domestic and overseas radio broadcasting less the expense of broadcasting the proceedings in Parliament. In regard to television APRA sought 1.5 per cent of the gross operational expenditure, less the cost of maintaining ABC orchestras and concerts and the production of television programmes.[109]

APRA's central claim was that the present basis of calculation provided no guide as to the true value of the APRA licence. It was contended that the existing formula yielded an inadequate amount, far below that paid by commercial broadcasters and its proper market value.

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[105] *Id.*, 202. As Justice Sheppard points out there is also evidence which shows book sales are increasing.

[106] *Id.*, 201.

[107] (1986) 5 *Intellectual Property Reports*, 449. A decision of Sheppard, J. and Mr. Allan Horton.

[108] APRA is a collecting society. Composers assign their copyright to the society. APRA collects the money owed to it by broadcasters and through the use of sampling techniques distributes these funds to composers, in accordance with the use of their works.

[109] *Supra*, n. 104 at 451. "Provided that the total amount so deducted shall be no more than 40 per cent of the ABC's gross operational expenditure in the provision of television broadcasting services during the relevant year."

The true value APRA argued would only be provided by a method of remuneration based upon the value the community placed on programmes which the ABC broadcasts. The measure of this is said to be the appropriation which Parliament, as the community's representative makes to the ABC. Expenditure was considered a more appropriate basis than the total appropriation.[110]

APRA sought to bring the ABC in line with commercial broadcasters who pay a percentage of their advertising revenue. Parliamentary appropriation is equated to the income of the commercial stations.

Counsel for the respondents argued that a change in the basis of calculation was not warranted, as the basis earlier established set the fair market value of the music broadcast, and provided a fair return to copyright owners. The ABC emphasized that it could not be equated with commercial broadcasters, as it existed to provide a public service and in so doing incurred expenses to which other broadcasters were not subject.

Alternatively, if APRA's submissions were preferred, then the ABC argued, the sum payable should be a fixed lump sum for the years covered by the licence scheme. Moreover if the percentage approach was adopted then the number of persons who listen or watch the ABC (as reflected in the ratings) and the trend towards talk programming on radio, should be taken into account.

Decision

The Copyright Tribunal confirmed but varied APRA's licence scheme, so that 1.25 per cent of expenditure was payable in respect to radio and 0.6 per cent in regard to television.[111]

(a) *Damages for infringement analogy as a guide to reasonable remuneration*

The Tribunal points out that this case is different from the earlier three cases that came before it. It is not concerned with calculating the equitable remuneration payable to copyright owners, in respect of existing licences, but with whether a licence scheme should be confirmed without variation. Therefore the Tribunal agreed that there is some force in the ABC's submission that the analogy to damages for infringement is of no assistance or relevance in this case, but state that in the end they:

> . . . need to consider what is reasonable in the circumstances in order to provide ourselves with a guideline as to what view we should take of the reasonableness or otherwise of APRA's scheme.

The Tribunal members did not believe they needed to deal with the submission further.[112]

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[110] There were practical reasons for this. Expenditure rather than revenue, more easily enables the base figure on which the percentage is to be charged to be arrived at. *Id.*, 454.

[111] *Id.*, 487.

[112] *Id.*, 461-562.

The Tribunal did however approach its task by considering which formula or basis is most likely to yield equitable remuneration.[113]

In a departure from the trend established by its earlier decisions, the Tribunal does not expressly apply the "notional-bargain" analysis. However as before it does commence its consideration by examining whether a going-rate is in existence.

(b) *A reasonable basis of calculation*

Three alternative bases of calculation were presented to the Tribunal: cents per head of population; an annual lump sum; and a percentage of the ABC's expended revenue.

The Tribunal considered that the existing formula provided a going-rate but a going-rate which did not lead to a true reflection of the value of the APRA licence.[114]

The fixing of an annual lump sum was rejected on the basis that it involved a high degree of arbitrariness, and was an "entirely judgemental exercise".[115]

The Copyright Tribunal agreed with the applicant that the licence fee should be a percentage of the corporation's operational expenditure. This has the advantages of taking account of inflation and of "reflecting the value which the community through the Parliament from time to time places upon the ABC's operations".[116] Moreover the evidence presented shows that there is a "balance of world opinion in favour of a percentage of revenue being the accepted measure of the value of public performance and broadcasting rights".[117]

The Tribunal did not agree that the ABC should pay the same percentage of its revenue as the commercial broadcasters. Rather it treated the percentage paid by commercial broadcasters as a "ceiling amount". The Tribunal held that the percentage payable by the ABC was to be set at an amount which would suit the parties and the circumstances before them.[118]

(c) *Relevant factors*

The Tribunal determined that the nature and extent of the licence APRA is conferring should be considered, and emphasised that the ABC should pay a "fair commercial price" for the right to broadcast a sound recording.[119] In making the point that it was irrelevant for its purpose that the ABC is providing a public service, the Tribunal was reiterating

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[113] *Id.*, 477.
[114] *Id.*, 478.
[115] *Id.*, 479.
[116] *Id.*, 482.
[117] *Id.*, 449.
[118] *Id.*, 481-482.
[119] *Ibid.*

its view expressed in the earlier photocopying decision that it is for the government and not copyright owners to subsidize such services.[120]

The Tribunal agreed with the ABC that the fact that the ABC does not attract large audiences was relevant, as is the ABC's obligation to follow its charter in its programming, and the fact that it gives exposure to Australian composers.[121] The "continuing trend" from music to talk programming in radio broadcasting was considered,[122] and the provision and cost of satellite services was taken into account in a general manner.[123]

V. Commentary—the notional bargain: contradictions in principle and in approach

In the decisions discussed above, the Copyright Tribunal has been consistent in its general approach to the question of the determination of equitable or reasonable remuneration. The notional bargain approach has been followed where possible or relevant. Otherwise the Tribunal made an estimation on the basis of the evidence and indications before it. The "judicial estimation" variant was adopted and applied expressly in the photocopying case[124] and its application was apparent though not expressly recognised in the ABC decision.[125]

In applying the notional-bargaining approach to the determination of royalties payable in respect of compulsory licences, the Copyright Tribunal frequently emphasised that at the basis of its calculation was the principle of payment for the use of copyright material. Taking the same approach as the courts do in measuring damages in an action for infringement, equitable remuneration was said to be that amount which the two parties would have negotiated for the use of the copyright material had they been freely able to do so.

In its Report of the Inquiry into the Royalty Payable in Respect of Records Generally, the Tribunal pointed out that:

> The common principle which applies throughout all areas of copyright, is that remuneration is dependent on extent of user.[126]

In the 2MMM case the extent of the use of copyright material was a factor that had to be considered under s. 152(7) of the Act. A major issue was the proportion of broadcasting time taken up by the broadcast of protected recordings.[127] Indeed it was in that case that the Tribunal first established

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[120] *Ibid.* The ABC it was held "should pay a price for the right which the licence confers which is fair in commercial terms, just as the prices it pays for other commodities and services are fair". See *supra*, n. 98.

[121] *Id.*, 480.

[122] *Id.*, 482.

[123] *Id.*, 483.

[124] *Supra*, n. 77.

[125] *Supra*, n. 107.

[126] *Op. cit. supra* n. 4 at 102.

[127] *Supra*, n. 69.

the pay-for-play-principle. Similarly in the ABC decision a comparison of the time devoted to talk as opposed to music programmes was considered relevant.[128]

Payment in accordance with a certain percentage[129] also reflects the user principle. The idea behind this is that volume measures success and reflects the market acceptance of works:

> A royalty per record has the effect that volume rewards that which is publicly acceptable. Earnings increase as copies are sold.[130]

The Tribunal points out that the same philosophy underlies the decision that broadcasters will pay copyright owners a percentage of their revenue, rather than paying them on some other basis, such as lump sum.[131] And it explains why audience size is considered relevant in the ABC case[132] and why the sum payable by educational institutions to CAL for the photocopying of works, is calculated on a per page basis.

The payment for use principle is implicit in the Tribunals insistence that it is the interests of copyright owners—and the interests of copyright owners only, that are relevant to the determination of an equitable royalty, and in its disregard of the users' capacity to pay.

A number of writers have commented on the increasing tendency, here and overseas, to base the assessment of royalties payable pursuant to compulsory licences on the principle of harm or compensation for lost sales, rather than on the traditional use principle. This trend, largely caused by the problems and uses made possible by the new communication technologies has been the subject of some criticism:

> The idea of harm as the basis of copyright is novel. It represents a principle not just of compensation for use but political apportionment of the value of what authors create and publishers realize.[133]

Despite the emphasis on payment for use, the Copyright Tribunal has also taken account of a number of factors that are compensatory or political in nature. Thus, there is some tension in the damages or notional-bargain approach in the form of the contradictory and incompatible "use", "compensation" and "policy" bases for the assessment of payments.

The decline in the bargaining position of composers and authors and its consequences,[134] the effect and extent of hometaping,[135] and the

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[128] *Supra*, n. 122.

[129] I.e. a certain percentage per record.

[130] *Supra*, n. 4 at 103.

[131] *Supra*, n. 107 at 479. The Tribunal states that, "A percentage of revenue has a long history of acceptance as a measure of the worth of copyright . . . The philosophy underlying this approach . . . [is] that over the years the copyright owner has been perceived to have an interest in the success or otherwise of his work. If it is highly successful and substantial returns are yielded, he should receive more. If his work is a failure he will receive little or nothing . . . ."

[132] *Id.*, 481.

[133] D. Ladd, "The Harm of the Concept of Harm in Copyright" (1983) 30 *Journal of the Copyright Society of the United States of America* 421 at 432.

[134] *Supra*, n. 34.

[135] *Supra*, n. 75.

benefits and risks of reduced sales from the radio broadcast of sound recordings,[136] were all factors considered in the cases, inconsistently with the use principle. These factors were irrelevant to the determination of a royalty based on use.

Public policy considerations, such as the concern that the price of records should not be greatly increased,[137] concern that access to copyright material would be ensured,[138] the obligations imposed on the ABC by its charter,[139] and the cost of satellite transmissions[140] are also matters irrelevant to the use of copyright material. They were considered relevant on the questionable ground that the Tribunal believed that they would be factors that the parties themselves would have taken into account in their own negotiations.

The account of profits approach originally suggested by the applicants in the 2MMM case lacks the tension and inconsistencies of the damages approach, and seems to reflect the remuneration for use principle more properly. Account of profits is an alternative remedy to damages in an action for the infringement of copyright whereby the court orders the defendant to make over to the plaintiff all the profits which he has made from the use of the plaintiffs copyrighted work.[141]

The Tribunal rejected the argument that the appropriate measure of equitable remuneration was an account of profits. It did not discuss the remedy or give any reasons for the rejection of the record companies' submission. The Tribunal did state, however, that the amount represented by equitable remuneration could not be greater than the amount of damages that would be awarded in an infringement action.[142] The problem with the account of profits remedy is that the plaintiff is entitled to all the profits the defendant derived from the use of his copyright, even if the plaintiff could not have earned the same profit from the exploitation of his own work.[143] It may be this that led the Tribunal to reject account of profits as a basis of calculation.

It is interesting that the possibility of an account of profits approach to the calculation of equitable remuneration was only raised in one of the four cases, and then the Tribunal gave it only cursory consideration. The reasons for this general lack of interest in an alternative approach are unclear. Account of profits is an established remedy for the infringement of copyright and is expressly provided for in the Copyright Act.[144] Given this, Parliament clearly intended the remedy to be used; it made it avail-

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[136] *Supra*, n. 72, n. 74.
[137] *Supra*, n. 39.
[138] *Supra*, n. 95.
[139] *Supra*, n. 121.
[140] *Supra*, n. 123.
[141] *Colbeam Palmer Ltd and Another* v. *Stock Affiliates Pty. Ltd.* (1968) 122 C.L.R. 25.
[142] *Supra*, n. 40 at 111.
[143] *Colburn* v. *Simms* (1843) 67 E.R. 224 at 231 *per* Sir James Wigram, VC.
[144] S. 115(2) provides: Subject to this Act, the relief that a court may grant in an action for an infringement of copyright includes an injunction (subject to such terms, if any, as the court thinks fit) and either damages or an account of profits.

able for a reason. The account of profits approach perhaps deserves a more serious consideration than it has received thus far.

This said, it is nevertheless unlikely that the application of the account of profits approach would have made the Tribunal's task any easier. A number of the factors that are considered relevant to notional-bargains would necessarily be considered in awarding an account of profits. Evidence as to the extent of use is an obvious example. Difficulties in quantifying use accurately and statistical unreliability would still exist. Moreover it may be difficult to show the proportion of a large and complex commercial organization's profits which are attributable to the use of the copyright material, and the sort of application which an account of profits approach would have to a user whose activities are not carried out for profit, for example public educational bodies and the ABC. It maybe for these reasons also, that the possibility of an account of profits approach has only been raised in the 2MMM case, and then unsuccessfully.

The Copyright Tribunal has approached its task of assessing equitable remuneration in an expansive, generalised manner. No strict mathematical formula was applied nor were the various factors taken into account by the Tribunal quantified, nor it seems were they all expressly stated.[145] It is said that a number of the considerations, by their very nature, defy quantification.[146]

In its Record Royalty Inquiry the Copyright Tribunal described its approach as follows:

> In determining the weight to be given to any one factor or submission we have found it impossible to find any simple mathematical formula on which to base our final determination. We have had to balance the factors and in light of all the evidence and arguments to assess where we consider a notional-bargain would be struck between parties determined to arrive at the equitable remuneration for copyright owners.[147]

The Tribunal did not elaborate further. It did not describe in any case how this balancing process was carried out.

In general the consequence of this approach is that the Tribunal's reasoning appears unclear, the decisions and selection of relevant factors provide little guidance for the Tribunal and parties in the future, and the selection of relevant factors and hence the determination of the royalty payable appears to be a fairly arbitrary process. Indeed, what is involved in each instance is a balancing of the competing interests argued for. It is this and not a strict application of any one mode of calculation, which determines the Tribunal's decisions.

The selection of the relevant factors is central to the application of the hypothetical bargain approach. Save for the initial consideration of

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[145] *Supra*, n. 77 at 201.
[146] *Supra*, n. 4 at 55.
[147] *Ibid.*

whether there was a going rate, there seems to be no consistency or underlying rationale running through the four cases, regarding the factors taken into account. It is worth noting however that the Tribunal's attitude to evidence as to determinations of overseas tribunals was fairly consistent. It was considered to be only of limited relevance until the ABC decision where there was some departure from this approach and the "balance of world opinion" in favour of a percentage of revenue payment method was considered a decisive factor.[148]

Generally however in regard to the factors considered, each case is self-contained and is only internally consistent. The Tribunal accepts or discounts factors on the basis of the evidence presented before it and does so according to the circumstances of the case, and the commercial context in which the licence operates and in which the hypothetical negotiations would be made.

The justification for the selection of certain factors, is that the parties themselves would have taken them into account. No reasons are given as to why they would do so, and in a number of instances this assumption appears to be fairly dubious.[149] As we have seen even public policy considerations are introduced into the analysis in this way.[150]

The question thus arises as to whether this *ad hoc* case-by-case approach is adequate or desirable. Is the notional-bargain method as followed by the Tribunal useful or appropriate?

The short answer to these questions is that it depends on the case. Although a certain degree of arbitrariness is unavoidable, the notional-bargain approach to the assessment of equitable remuneration seems to work reasonably well in cases where the contest is between commercial organizations, and where a going rate exists. The going rate and commercial circumstances provide firm and clear guidelines for the Tribunal to follow.[151]

Where such guidelines are absent and a judicial estimation is made, and where public policy considerations must necessarily be taken into account,[152] the notional bargain approach is of little use.

Justice Sheppard recognized the difficulties in making a judicial estimation in *Copyright Agency Ltd* v. *Department of Education* and that his decision in that case was in the nature of a value judgement.[153]

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[148] *Supra*, n. 117.

[149] For example, see *supra*, nn. 35, 96. Why would copyright owners agree to take account of return records in the first instance and access considerations in the second, in negotiations to determine the remuneration payable in respect of compulsory licences? Surely it is in their best interests to negotiate for the highest amount possible.

[150] See *supra*, n. 39, n. 96.

[151] For example previous licencing agreements, and financial dealings with the opposing and other parties. Such guidelines existed in the 2MMM case.

[152] For example in respect to education or public broadcasting.

[153] *Supra*, n. 77 at 183. He cites Justice Aicken on this point. In a case concerning the valuation of share property, Aicken, J. stated: "The process of valuation in accordance with ordinary principles may produce different results from different judges approaching the task in accordance with proper principles and making no errors of law. There is thus invariably a range of figures any one of which may quite well satisfy a particular judge that it is as close to the true value as it is possible for him to attain." *Federal Commissioner of Taxation* v. *St. Helens Farm [A.C.T.] Pty. Ltd.* (1981) 146 C.L.R. 336 at 398.

Mr. Justice Sheppard's comparison of the case before him and the difficulties confronting the courts in personal injury cases is an apt one. Fleming states that the award of lump sums in such cases involves a "speculative guess concerning all future contingencies".[154] According to Mr. Justice Windeyer in *Skelton* v. *Collins*[155] the measure of damages in actions for personal injury are based on "unprovable predictions metaphysical assumptions and rationalized empiricism". The parallel drawn may well be a damning one.[156]

The notional bargain or judicial estimation approach does not completely obscure the central dilemma confronting the Tribunal in the photocopying case. This was the difficulty of ensuring that copyright owners received fair remuneration, while at the same time allowing continued access to photocopied works.[157] Mr. Justice Sheppard's determination of two cents per page was a compromise solution which pleased neither party. Indeed, given the difficulty of arriving at an acceptable level of remuneration and the complexity and cost of the collection and enforcement process, it is doubtful that the statutory licence was an appropriate response to the fact of the practical unenforceability of authors copyright, in respect of photocopying in schools, colleges, and universities.

VI. Conclusion

The Copyright Tribunal is based on the judicial model, and in many ways operates similarly to a court. However, it is a statutory body with advisory and adjudicative functions. Ultimately what the Tribunal has done in all the cases that have come before it, is to make policy decisions on the basis of the evidence presented by the opposing parties.

The four decisions considered reveal the importance and desirability of the development of certain standards and principles. The use of the notional bargain concept by the Tribunal may be the first step towards this. However, the formulation of these guidelines should not be left entirely to the Tribunal. Given the issues and interests at stake government should take a more active role in their determination. Clarifying legislation would be useful. It would be proper (as a matter of legislative function) for the legislature to outline the basis of the Copyright Tribunal's adjudicative and policy decisions, and in particular for the nature, extent and importance of the public's interest in copyright matters to be defined.

Clearly what is needed is parliamentary consideration of the fundamental questions, first, those relating to the role and justifications of copyright in this era of rapid technological development, secondly those

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[154] J. G. Fleming, *The Law of Torts*, Sydney, Law Book Co. Ltd., 1983, 203.

[155] (1966) 115 C.L.R. 94 at 136.

[156] It is recognised however that this analogy should not be taken too far. Whilst valid in theoretical terms, in practice the Court's do have precise guidelines for the assessment of damages for personal injury, in the form of numerous previously decided cases. These cases themselves provide the going-rate.

[157] *Supra*, n. 77 at 201. "In the background", Sheppard, J. states, "is the anxiety that the figure, if too high, and thus unfair may operate adversely because it may paradoxically deny to authors the remuneration s. 53B intended them to have and also deny to educational institutions the ability to use as wide a range of material as they should. All in all the task is a most difficult and responsible one."

concerning the appropriate legal responses to the problems that have arisen. The contradictions between compulsory licence solutions and the recent concern with the protection of the moral rights of copyright owners and performers,[158] could be examined in this context. Compulsory licences involve loss of rights and the loss of control over works. Authors whose artistic creations are subject to compulsory licences are unable to prevent their use, to insist an attribution, or to ensure the preservation of their integrity. It is paradoxical that technological development in the fixing and reproduction of copyright works is seen to be necessitating the loss of rights on the one hand and the granting of new rights to new groups on the other. A number of commentators have warned against the taking of an overly pragmatic approach to the problems posed by new technologies:

> Considered from an angle that is some times justified by the pretext of realism the very existence of non-voluntary licences could result in a "two-speed" conception of copyright: the "high speed" being the exclusive right and the "low speed" being the mere right to claim remuneration, where the selection of one of the two "speeds" would be made according to a demarcation as arbitrary as that between operations subject to copyright and free operations.[159]

In some situations of course there is no practically enforceable alternative to compulsory licences apart from free use.[160] However, the loss of exclusive rights should in each case be measured against the possible economic and cultural benefits perceived to flow from compulsory licences both to the authors and society at large. The reduction to a "low speed" copyright will only be worthwhile and justifiable if the economic returns are truly fair and equitable, particularly for creative interests. The creation of objective principles and guidelines for the determination of equitable remuneration would go some way in achieving this. Any loss of flexibility of approach resulting from clarifying legislation and parliamentary consideration would be adequately compensated by the greater certainty and fairness that this would provide.

JOANNE COURT, B.A. (Hons.), Third Year Student

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[158] Moral Rights formed part of the terms of reference of the Copyright Law Review Committee and is presently under the consideration of this advisory body.

[159] A. Kerever, "Is Copyright an Anarchronism?". *Copyright* (W.I.P.O.) No. 12, December 1983, p. 377.

[160] Where for example it would be impracticable for a user such as a broadcaster, to contact each copyright owner and form individual licences, or where use is undetectable.