



The Copyright  
Tribunal

IN THE COPYRIGHT TRIBUNAL

CT 129/16

IN THE MATTER OF A REFERENCE TO THE COPYRIGHT TRIBUNAL UNDER  
SECTION 126 OF THE COPYRIGHT, DESIGNS AND PATENTS ACT 1988

Date: 26 April 2018

**BEFORE:**

**Ms Colleen Keck, Dr Lucy Connors and Mr Philip Eve**

**PARTIES:**

**THE BRITISH BROADCASTING CORPORATION and BBC WORLDWIDE LIMITED**

**The Applicants**

**-And-**

**MECHANICAL-COPYRIGHT PROTECTION SOCIETY LIMITED and PERFORMING  
RIGHT SOCIETY LIMITED**

**The Respondents**

**-And-**

**SKY UK LIMITED (Sky)**

**-And-**

**ITV NETWORKS LIMITED and fourteen connected companies (as named in their  
updated request to intervene) (together ITV)**

**SKY and ITV together The Interveners**

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Mr Rhodri Thompson QC and Ms Lindsay Lane (instructed by BBC IP Litigation Department)  
for the Applicants

Mr Robert Howe QC and Mr James Segan (instructed by Simkins LLP) for the Respondents

Mr Martin Howe QC and Mr Michael Conway (instructed by Sky Legal) for Sky  
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**DECISION**

**Background:**

1. This matter comes before the Tribunal pursuant to an application made by the Applicants under section 126 of the Copyright Designs and Patents Act 1988 (**CDPA**).
2. The British Broadcasting Corporation (**BBC**) is a public corporation established by Royal Charter in the United Kingdom (**UK**). Its Royal Charter sets out its public purposes and defines the activities which may be carried out by it which include:
  - 1) provision of the UK Public Services;
  - 2) provision of the BBC World Service; and
  - 3) through commercial subsidiaries, commercial activities.
3. The BBC's commercial activities are carried out by its wholly owned subsidiary BBC Worldwide Limited (**BBCW**) a company organised and existing under UK law.
4. Mechanical-Copyright Protection Society Limited (**MCPS**) and Performing Right Society Limited (**PRS**) are both UK collecting societies organised and existing under UK law and each of them has its principal place of business in the UK. Both organisations, for the benefit of their members, grant licences of both UK and non-UK rights in music.
5. MCPS and PRS are separate legal entities but by agreement the functions of MCPS are primarily managed and administered by PRS. Under this agreement licences may be granted jointly by PRS and MCPS.
6. The contractual relationship between the BBC/BBCW and MCPS/PRS is not straightforward and the parties disagree in some respects as to what terms govern what licensed activities and the extent to which the licences for all of the activities are interconnected. For the purposes of determining this preliminary issue, the Tribunal was not required to make, and has not made, any findings regarding the terms of the contractual relationship between the parties other than to note that as a matter of practicality and commerciality, licensed activities occurring inside the UK are intertwined with the licensed activities occurring outside the UK, and there is some degree of interconnectedness among the licence terms for the various activities.
7. Between 1 January 1989 and 31 March 2005 the BBC and BBCW were licensed under a series of successive agreements relating to both the publicly funded and commercial services of the BBC/BBCW (**Prior MCPS Agreement**).
8. The BBC's publicly funded non-commercial activities include its public television and radio services, the BBC World Service, and certain public non-linear services (such as BBC iPlayer and syndicating of content via third parties such as YouTube, podcasts and mobile services). In relation to the BBC's publicly funded non-commercial activities the Prior MCPS Agreement was superseded by a series of agreements the most recent of which is dated 29 March 2011 (**BBC Agreement**). Under the BBC Agreement the BBC was granted a joint licence by MCPS and PRS for its publicly funded, non-commercial services. Save for the act of performing

repertoire works in public, which is limited to the UK, the parties agree that the BBC Agreement is predominantly, but not exclusively, a licence under UK copyrights, but also licenses acts restricted by non-UK copyrights.

9. In relation to BBC/BBCW's commercial (non-publicly funded) activities the precise contractual terms are to some extent both unclear and disputed. For the purposes of the issue the Tribunal must determine it is relevant that the licensed activities include :
  - i) the distribution and sale of BBC television programmes to other broadcasters (the **TV Sales Licence**);
  - ii) the distribution and sale in North America (Canada and USA) of DVDs of BBC television programmes made pursuant to the TV Sales Licence (the **DVD Licence**); and
  - iii) the provision of "Download to Own" ("**DTO**") services to DTO suppliers in North America (Canada and USA) for television programmes made under the TV Sales Licence (the **DTO Licence**).
10. The TV Sales Licence is not in issue as it is believed this licence relates solely to the UK, although the Respondents have reserved their position should it turn out that some licensed activities occur outside the UK.
11. The Respondents contend the DVD Licence is exclusively or predominantly a licence under non-UK copyright. The Applicants' position is that the DVD Licence also covers the creation and making of product master and copies within the UK for the purposes of manufacture and distribution of DVDs in the USA and Canada.
12. The DTO Licence authorises (in essence) the distribution of programmes via DTO to end users in the USA and Canada, and, for this purpose authorises the reproduction of the programmes on servers within much of Europe, the USA and Canada and such other territories as may be agreed. The Applicants' position is that the DTO Licence also authorises a variety of preparatory steps that are taken in the UK once a programme is made in order to make the DTO content available in the USA and Canada.
13. The terms of both the DVD Licence and the DTO Licence comprise a series of documents and correspondence between the parties reflecting the parties' practice. The Applicants' position is that all agreements are inextricably linked both commercially and practically.
14. There is no dispute that all agreements are governed by English law and that the English courts have jurisdiction over disputes arising under those agreements.
15. Sky, one of the Interveners, is a UK broadcaster whose services include a satellite service originating from the UK that delivers Sky news content to 138 countries.
16. ITV, the other Intervener, did not make submissions on the jurisdiction issue.
17. The Tribunal has been asked to answer the following question as a preliminary issue: ***"In this reference to what extent (if any) does the Tribunal have jurisdiction to set the terms of the licences in issue (being the BBC Agreement, the DVD Licence and***

*DTO Licence as defined in the Reply on Jurisdiction) insofar as such licences concern copyrights subsisting under the laws of jurisdictions other than the United Kingdom.”*

## **The Legal Framework**

18. The starting point is Chapter VIII of the CDPA, headed *The Copyright Tribunal*. Section 149 identifies the jurisdiction of the Tribunal by reference to ten types of proceedings which may be brought before it as follows:

### **149 Jurisdiction of the Tribunal**

*The function of the Copyright Tribunal has jurisdiction under this Part to hear and determine proceedings under- ...*

*(c) section 125, 126 or 127 (reference or application with respect to licensing by licensing body);*

19. The following sections of the CDPA are directly relevant in relation to an application made under section 126 of the CDPA:

### **116 Licensing schemes and licensing bodies**

*(2) In this Chapter a “licensing body” means*

*(a) a society or other organisation which has as its main object, or one of its main objects, the negotiation or granting, either as owner or prospective owner of copyright or as agent for him, of copyright licences, and whose objects include the granting of licences covering works of more than one author, or*

*(b) any other organisation which is a collective management organisation as defined by regulation 2 of the Collective Management of Copyright (EU Directive) Regulations 2016.*

*(3) In this section, “copyright licences” mean licences to do, or authorise the doing of, any of the acts restricted by copyright.*

### **124 Licences to which the following sections apply**

*Sections 125 to 128 (references and applications with respect to licensing by licensing bodies) apply to licences which are granted by a licensing body otherwise than in pursuance of a licensing scheme and cover works of more than one author, so far as they authorise--*

*(a) copying the work*

*(b) rental or lending of copies of the work to the public,*

*(c) performing, showing or playing the work in public, or*

*(d) communicating the work to the public*

*and references in those sections to a licence shall be construed accordingly.*

**126 Reference to tribunal of expiring licence**

*(1) A licensee under a licence which is due to expire, by effluxion of time or as a result of notice given by the licensing body, may apply to the Copyright Tribunal on the ground that it is unreasonable in the circumstances that the licence should cease to be in force.*

**129 General considerations: unreasonable discrimination**

*In determining what is reasonable on a reference or application under this Chapter relating to a licensing scheme or licence, the Copyright Tribunal shall have regard to--*

- a) the availability of other schemes or the granting of other licences, to other persons in similar circumstances, and*
- b) the terms of those schemes or licences,*

*and shall exercise its powers so as to secure that there is no unreasonable discrimination between licensees, or prospective licensees, under the scheme or licence to which the reference or application relates and licensees under other schemes operated by, or other licences granted by, the same person.*

**135 Mention of specific matters not to exclude other relevant considerations**

*The mention in sections 129 to 134 of specific matters to which the Copyright Tribunal is to have regard in certain classes of case does not affect the Tribunal's general obligation in any case to have regard to all relevant considerations.*

20. The following section is also relevant to the submissions made in this case:

**16 The acts restricted by copyright in a work**

*The owner of the copyright in a work has, in accordance with the following provisions of this Chapter, the exclusive right to do the following acts in the United Kingdom--*

- a) to copy the work (see section 17);*
- b) to issue copies of the work to the public (see section 18);*
- ba) to rent or lend the work to the public (see section 18A);*
- c) to perform, show or play the work in public (see section 19);*
- d) to communicate the work to the public (see section 20);*
- e) to make an adaptation of the work or do any of the above in relation to an adaptation (see section 21);*

*and those acts are referred to in this Part as the "acts restricted by the copyright".*

21. There is no dispute about the following legal principles and their application to this case:
1. The Tribunal is a statutory tribunal and therefore its jurisdiction is determined only by the relevant statute, properly construed.
  2. The jurisdiction of the Tribunal is a mandatory jurisdiction, and the Tribunal has no power to exercise control over the scope of its jurisdiction by means of concepts such as convenient forum i.e. if the Tribunal has jurisdiction over a matter it must hear and determine that matter.
  3. The relevant statute is the CDPA.
  4. Copyright is a territorial right, being a “*legal right of property arising in any given jurisdiction from national legislation*”. (***Starbucks (HK) Ltd & Anor v BskyB& Ors*** [2015] 1 WLR 2628 per Lord Neuberger quoting Professor Wadlow at para 59). Accordingly, there is no such thing as a global copyright, and a UK copyright is a different and separate right from the copyright subsisting in the same work under the laws of another jurisdiction.
22. There is also no dispute that (i) each of the Respondents is a ‘*licensing body*’ within the meaning of Section 116, and (ii) each of the Applicants is a ‘*licensee*’ within the meaning of Section 126.
23. The Applicants’ and Sky’s position is that there is nothing in the express language of either Section 116(2) or Section 124 (which defines the scope of Section 126) of the CDPA that limits the jurisdiction of the Tribunal to setting the terms of licences for UK copyrights only and that the Tribunal has jurisdiction to set all the terms of the licences in dispute in this case. It is the Respondents’ position that on a proper construction of the CDPA the Tribunal does not have any jurisdiction to set the terms of the licences in issue insofar as such licences concern copyrights subsisting under the laws of jurisdictions other than the UK.

### Presumption against Extra-Territoriality

24. The Respondents submit that, in interpreting a statute, there is a presumption against extraterritorial effect which is to be understood as applying to subject matter and also more generally. The Respondents acknowledge that there is a relaxation of the presumption in relation to British citizens, but, argue there is still a presumption against extraterritoriality: “*unless the contrary intention appears, an enactment is presumed not to apply to matters outside of the territory to which it extends*” (***R (Al-Skeini) v Secretary of State for Defence (The Redress Trust Intervening)*** [2007] UKHL 26; [2008] AC 153 at para 11 per Lord Bingham of Cornhill; also Lord Mance in ***Masri v Consolidated Contractors International (UK) Ltd & Ors (No 4)*** [2010] 1 AC 90 at para 10: “*The principle relied upon is one of construction, under-pinned by consideration of international comity and law. It is that “Unless the contrary intention appears.....an enactment applies to all persons and matters within the territory to which it extends but not to any other persons and matters”*: Bennion, *Statutory Interpretation*, 4<sup>th</sup> ed. (2002) p 282 s106 cited with approval, along with the considerable case-law, by Lord Bingham of Cornhill in *R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening)* [2007] UKHL 26, [2008] AC153

*para.11. The principle may not apply, at any rate with the same force, to English subjects (see e.g. The Zollverein (1856) Swab. 96, 98, per Dr Lushington and Ex p. Blain, Ex p Sawers (1879) 12 Ch D 522, 526 per James LJ, cited with approval by Lord Scarman in Clark v Oceanic Contractors Inc. [1983] 2 AC 130, 144E-H) but that is presently irrelevant. Whether and to what extent it applies in relation to foreigners outside the jurisdiction depends ultimately as Lord Wilberforce said in Clark v Oceanic Contractors Inc. (p152C) upon who is “within the legislative grasp, or intendment of the relevant provision”).*

25. The Respondents also submit that, linked to this principle, each statute must be interpreted in its context and the most important part of the context for interpreting the CDPA is that it is a statute concerning copyright and copyright is inherently territorial in nature. “*Behind the various rules of construction, a number of different policies can be seen at work. For example, every statute is interpreted “so far as its language permits, so as not to be inconsistent with the comity of nations or the established rules of international law” Maxwell on the Interpretation of Statutes, 12<sup>th</sup> ed (1969), p 183.*” (Lord Rodger in *R (Al-Skeini) v Secretary of State for Defence (The Redress Trust Intervening)* [2007] UKHL 26; [2008] AC 153 at para 45.)
26. However, it is clear from established authorities that where the parties are within the jurisdiction of the statutory body there is no presumption of extraterritoriality, or if such a presumption exists, it is very much weakened, even where the relevant acts occur abroad. In other words, in determining jurisdiction, the primary question is ‘who’ rather than ‘what’, and that so long as the ‘who’ question is satisfactorily answered, it is not really a case of extraterritoriality at all, but simply a question of construing the statute. (See in *Office of Fair Trading v Lloyds TSB Bank plc and Ors* [2007] UKHL 48; [2008] 1 AC 316 Lord Hoffmann at para 4 “*extra-territorial effect means seeking to regulate the conduct or affect the liabilities of people over whom the United Kingdom has no jurisdiction.*”)
27. That copyright is a territorial or jurisdictional right does not affect what is at best a weak presumption in this case. There are a number of examples of where a statute has given a tribunal or regulatory body jurisdiction over foreign matters or transactions carried out by a UK national or resident. In *Office of Fair Trading v Lloyds TSB Bank plc and Ors* [2007] UKHL 48; [2008] 1 AC 316 the House of Lords held that a form of statutory protection for UK consumers engaged in credit card transactions issued by a UK bank extended to transactions between foreign suppliers and consumers taking place entirely outside the UK. Also *Lawson v Serco Ltd* [2006] UKHL3; [2006] ICR 250 held that s 94(1) (the right not to be unfairly dismissed) under the Employment Rights Act 1996 applied to (and therefore the Employment Tribunal had jurisdiction over claims made by) employees working outside Great Britain when those employees were working for an employer based in Great Britain and there were other strong connections with Great Britain. Lord Rodger in *R (Al-Skeini) v Secretary of State for Defence (The Redress Trust Intervening)* [2007] UKHL 26; [2008] AC 153 (which concerned whether the Human Rights Act 1998 applied to acts of UK public bodies occurring outside Great Britain) summed it up as follows (para 47): “*The cases indicate, therefore, that British individuals or firms or companies or other organisations readily fall within the legislative grasp of statutes passed by Parliament. So far as they are concerned, the question is whether, on a fair interpretation, the statute in question is intended to*

*apply to them only in the United Kingdom or also, to some extent at least, beyond the territorial limits of the United Kingdom."*

28. In this case, each Respondent is a collecting society incorporated and having its primary place of business in the United Kingdom and whose principal activity is the licensing of UK copyrights. It could not be clearer that the Respondents are persons over whom the United Kingdom has jurisdiction and it would be entirely consistent with the comity of nations and established rules of international law for Parliament to legislate in respect of such persons, including in relation to transactions conducted by them that concern foreign copyrights. The licensees are also UK entities, with their principal place of business in the UK, and the licences in question are governed by English law, subject to the jurisdiction of the UK courts, and primarily concern the licensing of UK copyrights. In such circumstances the Tribunal does not consider that there is a presumption against extra-territoriality, or alternatively, if there is such a presumption, in the present circumstances it is so weak as to not be a factor in interpreting the CDPA and the jurisdiction of the Tribunal under the CDPA with regard to licences of non-UK copyrights granted by a UK collecting society.
29. This case is therefore one of statutory construction of the relevant sections of the CDPA.

#### **Interpretation of the CDPA**

30. The Respondents' second main point is that, as a matter of statutory construction, section 124 should be interpreted as restricting the Tribunal's jurisdiction to setting the terms of licences of UK copyrights only.
31. Both section 116(2) and section 124, which together define the jurisdiction of the Tribunal in this case, (or their equivalent sections), have been amended by Parliament many times since the Tribunal (or its predecessor, the Performing Rights Tribunal) was established under The Copyright Act 1956. At the hearing the Respondents helpfully produced a table which shows the changes to the relevant sections of the CDPA over a number of years.
32. The Respondents took the Tribunal through the evolution of the various sections. The amendment made to section 124 on 1 December 1996 by the Copyright and Related Rights Regulation 1996 (SI 1996/2967) is particularly important. In that amendment section 124 was substantially recast, and all references to 'copyright licences' or 'licences in relation to copyright' were removed. Indeed all references to copyright were removed, and instead the revised section 124 referred to various specific acts which correspond to a number of the acts set out in section 16(1), but without the words 'in the United Kingdom' that are contained in section 16(1).
33. It is the Respondents' submission that, even though very substantial amendments were made to the relevant sections of the CDPA, in making those amendments there was no intention to change the substance of the provisions. In particular, their position is that although the 1 December 1996 amendments (which took place as a result of implementing EU Directives) removed from section 124 all references to 'copyright' licences, this removal did not suggest that a different meaning was intended to be attached to the word 'licence', and the terms 'licence' and 'copyright licence' should be read interchangeably. Therefore, the Respondents submitted, the

Tribunal should interpret the existing section 124 as though the word ‘copyright’ had not been removed from the section when it was amended on 1 December 1996, and as though the word ‘copyright’ is still there, notwithstanding its removal.

34. The Respondents assert that in amending section 124 on 1 December 1996 all that happened is that the words ‘licences relating to copyright’ have effectively fallen out, and been replaced by licences of the particular specific acts, and as those acts are couched in the same language as the corresponding provisions in section 16(1) of the CDPA, that is clearly a reference back to section 16(1) of the CDPA, and the same UK territorial restriction that is stated in section 16(1) should therefore be read in to section 124. They submit that the changes that were made to the wording of section 124 in 1996 were merely incidental changes and were not intended to make substantive changes to the section. Essentially, although the Respondents did not put it in these terms, it appears to us the Respondents’ position is that the word ‘copyright’ should be implied before the word ‘licences’ in section 124.
35. The Tribunal thinks it highly unlikely that very substantial amendments would be made to the wording of section 124 of the CDPA, in this case by regulation, with the intention that its meaning would remain substantively the same. Indeed we consider that, if any inference is to be drawn from the changes made to the section, it is that the making of substantial changes to the wording suggests some substantive change was also intended.
36. We also do not accept that the word ‘copyright’ should, directly or indirectly, be implied before the word ‘licences’ (or that the words ‘of copyright’ should be implied to follow the word ‘licences’) in section 124, or that the omission of those words was incidental or an error of the draughtsman. We do not consider that the parliamentary draughtsman approaches his job with such casualness. That the draughtsman deliberately did not use the term ‘copyright licences’, but instead deliberately chose the wider term ‘licences’, in section 124 is supported by the following considerations:
  1. If the draughtsman was simply recasting the language of section 124 to mirror the acts specified in section 16(1), it would have been very easy to follow those words exactly, but the draughtsman quite pointedly did not include the words ‘in the United Kingdom’.
  2. The term ‘copyright licences’ is defined in section 116(3), and the definition is expressly restricted to use in that section: “*In this section “copyright licences” means licences to do, or authorise the doing of, any of the acts restricted by copyright.*” The term ‘copyright licence’ is not included in either section 178 (Minor definitions) or section 179 (Index of defined expressions) precisely because it is limited to section 116. As the term ‘copyright licence’ is specifically defined in the CDPA it would have been very easy for the draughtsman to extend this term to encompass section 124 if he had so wished. That the term is not used in section 124, and is restricted to section 116, suggests it was a deliberate choice to refer only to ‘licences’ and remove the reference to ‘copyright’ licences, and that section 124 was not intended to contain a territorial restriction.
37. In construing the CDPA the Tribunal must also consider the policy that lies behind the relevant provisions (See *Office of Fair Trading v Lloyds TSB Bank plc and Ors* [2007] UKHL 48; [2008] 1 AC 316 - see Lord Hope at para 13.)

38. It was not disputed that the policy behind the establishment of the Copyright Tribunal was to curb the monopoly power of the collecting societies. (See the Whitford Committee Report, which preceded the CDPA at para 754 and the Gregory Committee Report at paras 204-210 (which preceded the Copyright Act 1956 and established the Performing Rights Tribunal, predecessor body to the Copyright Tribunal.)) In particular, the Whitford Report emphasised, when considering the jurisdiction of the Tribunal in relation to recording rights, that the Tribunal's jurisdiction should deal with all the circumstances in which collecting societies could wield monopoly or quasi-monopoly powers (at para 777).
39. In cross-border activity, licensees inevitably engage in acts in various jurisdictions that are inextricably linked to each other, and, in the commercial licensing world, these acts are not disaggregated and assigned individual values, much less on a territory by territory basis. The comments of Birss J in *Unwired Planet International Ltd v Huawei Technologies Co Ltd* [2017] EWHC 711 (Pat) (para 543) when setting the terms of a FRAND licence of a portfolio of patents are equally applicable to copyrights and broadcasting, online and similar activities: *“Unwired Planet’s portfolio today .....has sufficiently wide geographical scope that a licensor and licensee acting reasonably and on a willing basis would agree on a worldwide licence. They would regard country by country licensing as madness.”*
40. To limit the Tribunal's jurisdiction to setting the tariffs for licences of UK copyrights would severely impair the Tribunal's ability to curb the monopolistic power of collecting societies. When faced with an interconnected multi-jurisdictional activity such as broadcasting or on-line services, if a licensee considered that the collecting society was seeking exorbitant licence fees, that licensee would be caught between the devil and the deep blue sea. It would either have to accept the terms presented by the collecting society, or bring numerous actions before numerous regulatory bodies (where regulatory remedies exist) or negotiate specific licences from local bodies (or some combination of the two), and agree, or seek to have a regulatory body determine, specific values for acts that are not usually disaggregated in the value chain. This is self-evidently a difficult, time consuming and costly exercise. Timing issues alone would almost certainly force them to accept the terms offered, however unreasonable. In fact, the power of the collecting societies would be greatly increased in such a scenario, and interpreting the CDPA so as to limit the Tribunal's jurisdiction in the manner advocated by the Respondents would thwart the primary policy behind the establishment and existence of the Copyright Tribunal.
41. Parliament also intended that the Tribunal should be a cost effective means of settling disputed tariffs. (See the Whitford Committee Report recommendation at para 790.) Furthermore, in setting a tariff the Tribunal must take into account comparable licences, adapting any comparator to the case under review having regard to relevant considerations. (See section 129 of the CDPA and *PPL v BHA* [2009] EWJC 209 (Ch) paras 29-31.)
42. If the Tribunal adopted the interpretation advocated by the Respondents and restricted its jurisdiction to setting the tariffs for UK copyrights only, the Tribunal would have to engage in a disaggregation exercise in order to be able to properly consider the comparable licences, and thereby set the tariff for the relevant acts occurring within the UK. This is because, in the context of integrated cross-border activity, as noted above, commercial licensing practice does not normally allocate, to any great extent,

specific amounts in the value chain either by specific act or by territory. Contrary to the approach taken in the commercial world, in order to set a tariff, the Tribunal would need to consider precisely what acts take place in and are restricted under the laws of the UK and under other relevant countries. As the Tribunal must have regard to comparable licences and all relevant considerations in setting tariffs, when looking at comparable licences most or all of which would have an aggregate value, the Tribunal would need to determine, or make assumptions about, the value of those territorial elements outside its jurisdiction in order to determine the value of the UK elements only under the comparable licences. To do this it would also need to try to disaggregate the tariffs of the comparable licences put in evidence. Also, if in the ensuing negotiations concerning, or regulatory determinations of, the non-UK elements of the licence the UK collecting society (or other licensor or regulatory body) attributed a value to those elements outside the Tribunal's jurisdiction that differed from the Tribunal's assumed value of those elements, the licensee would need to return to the Tribunal for a review of the value of the UK element, as a key assumption underlying the Tribunal's valuation of the UK element (namely the value of the non-UK elements) had turned out to be incorrect. It is apparent that such a process for setting a tariff would be cumbersome, inefficient and time consuming, and correspondingly expensive.

43. The Respondents say that the practical convenience of licensees before the Tribunal is irrelevant to the interpretation of the CDPA, and that it would not be absurd or unworkable for the Tribunal to have jurisdiction to determine the tariffs of only UK copyrights, it would merely be less convenient and efficient. Whilst the convenience of licensees is not relevant to construing the words of the statute, the Tribunal does regard the policy of the statute, including its policy to have an efficient and cost effective process for determining tariffs, to be relevant to its interpretation. In particular, the Tribunal considers that it is unlikely that Parliament intended that the Tribunal would be obliged to engage in a cumbersome and expensive exercise when setting tariffs in the context of cross border licences granted by UK collecting societies. (See *Bennion on Statutory Interpretation*, Butterworths, 7<sup>th</sup> Edition (2017) Section 12.2 pp 363-365 citing inter alia *Gill v Donald Humberstone & Co Ltd* [1963] 1 WLR 929 at 933 per Lord Reid: “If the language is capable of more than one interpretation, we ought to discard the more natural meaning if it leads to an unreasonable result, and adopt that interpretation which leads to a reasonably practicable result.”)
44. The Respondents also submitted that unless sections 124 and 116(2)(b) are interpreted so as to limit the Tribunal's jurisdiction to setting the terms of licences for UK copyrights only, the Tribunal will enjoy a remarkable and exorbitant global jurisdiction. This could result in e.g. the Australian equivalent of PRS finding itself subject to the mandatory jurisdiction of the UK Copyright Tribunal, or the Tribunal being asked to set reasonable terms for a licence exclusively of Japanese copyright so long as it was granted by a ‘licensing body’ within the meaning of the CDPA, and it is inconceivable that Parliament intended to constitute the Copyright Tribunal as the arbiter of reasonable terms for a licence under foreign copyrights.
45. It is quite probable that the jurisdiction of the Tribunal under section 116(2)(b) is not so all encompassing as has been indicated by the Respondents in their hypothetical examples. For example, the Applicants in their submissions suggested that the term

“collective management organisation” in section 116(2)(b) means an EU based collective management organisation as the amendment introducing this change was a statutory instrument implementing an EU Directive, and this submission may have considerable merit. However, the Tribunal does not need to consider or decide that issue in this case; nor does it need to consider or decide the hypothetical cases put to the Tribunal by the Respondents. The case that is before us concerns two UK collecting societies whose primary activity is the licensing of UK copyrights to UK licensees. A very substantial part of the licences the Tribunal has been asked to consider concern UK copyrights. We do not think it is inconceivable that Parliament intended to constitute the Tribunal as the arbiter of reasonable terms for a licence under foreign copyrights in this case.

46. In the end, the Tribunal must construe the wording of the CDPA as it exists today. In this case, where we have UK collecting societies and UK licensees before us, and the licences in issue, when considered in their entirety, deal primarily with UK copyrights, the Tribunal can find no compelling reason to construe the words of those sections other than in accordance with their natural meaning, so as to imply a territorial restriction that is not in the wording. The Tribunal has therefore concluded that the Tribunal has jurisdiction to set the terms of the licences before us in this reference in so far as they relate to copyrights subsisting under the laws of jurisdictions other than the United Kingdom. Furthermore, the Tribunal having this jurisdiction in the case that is before us is entirely consistent with the policy of the CDPA in so far as it furthers both the objective of curbing the monopoly power of UK collecting societies and facilitates the efficient and cost-effective determination of tariffs and other terms of licences granted by UK collecting societies.

#### **Alternative Approach**

47. Sky, in addition to endorsing the position advocated by the Applicants, put forward an alternative approach, namely that, even if one accepts that the word ‘licences’ in sections 124 and 126 means ‘copyright’ licences, the Tribunal nonetheless has the jurisdiction to set the terms of the licences before us insofar as they concern copyrights subsisting under the laws of jurisdictions other than the UK because in settling terms relating to acts taking place under UK copyrights the Tribunal necessarily has power to settle commercially related terms.
48. Sky’s submission is that where the terms of a licence concerning the UK copyrights and the non-UK copyrights cannot be meaningfully split up the Tribunal can use the power it has to set commercially related terms in order to settle the terms of the licences in so far as they relate to non-UK copyrights. Sky gave a number of examples where, in cross border activities, the use of UK and non-UK copyrights cannot meaningfully be separated. Sky submitted that, as a practical matter, the focus of licensors and licensees in commercial negotiations in such cases would be to ensure that the activities as a whole are properly licensed on appropriate terms, rather than engaging in a minute investigation of whether restricted acts take place in one country or another, and urged the Tribunal to take the same approach as would commercial parties.
49. Having concluded that, as a matter of construction of the CDPA the Tribunal has jurisdiction to set the terms of the licences before us in this reference in so far as they relate to copyrights subsisting under the laws of jurisdictions other than the United

Kingdom, the Tribunal does not need to decide whether its ancillary power to set commercially related terms would also provide it with such jurisdiction. However we consider that this submission has merit.

### **Decision**

50. Like the Tribunal in *Meltwater Holding BV and Others v NLA Ltd* (CT 114/09, 14 February 2012, at para 251) this Tribunal has found the jurisdictional issue a difficult one to resolve. The relevant provisions of the CDPA have been amended in a piecemeal fashion over circa 20 years and would benefit from clarification regarding the Tribunal's jurisdiction. Nonetheless we must decide this issue based on the case before us and the wording of the CDPA as it currently exists.
51. For the reasons set out above, the Tribunal has decided that, in the present case, in addition to having jurisdiction to set the terms of the licences in issue in this case insofar as such licences concern UK copyrights, the Tribunal also has jurisdiction to set the terms of those licences insofar as such licences concern copyrights subsisting under the laws of jurisdictions other than the United Kingdom. The application of the Applicants should therefore proceed and be determined on that basis.



Colleen Keck  
Chair

The Copyright Tribunal  
The UK Intellectual Property Office  
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Tribiwnlys Hawlfraint  
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