# THE COPYRIGHT TRIBUNAL (1963-1988): AN ASSESSMENT

BY P.R. SPILLER, B.A., LL.B.(Natal), LL.M., M.Phil.(Cantab), Ph.D.(Natal)

*Senior Lecturer in Law, University of Canterbury*

The Copyright Tribunal of New Zealand was introduced in terms of Part V of the Copyright Act 33, 1962, which came into force on 1 April 1963. Much was expected of the Tribunal: on 24 October 1962, the Minister of Justice (the Honourable J.R. Hanan) hailed the establishment of the Tribunal as "[p]robably the most far-reaching innovation" in the Copyright Bill[1]. I propose to analyse the reasons for the creation of the Copyright Tribunal, its performance over the subsequent twenty-five years of its existence, and the extent to which it fulfilled the expectations initially held of it.

The revision of New Zealand copyright law, of which the creation of the Copyright Tribunal was a part, was stimulated by the recasting of British copyright law in 1956. Following the introduction of the British Act, a committee was appointed under the chairmanship of Judge Douglas Dalglish, to report on the possible revision of New Zealand copyright law[2]. In its report issued in 1959, the Dalglish committee recommended the establishment of a Copyright Tribunal, primarily to act as a guard against the abuse of the monopoly rights conferred upon owners of copyright in dramatic, dramatico-musical and musical works. This was of particular importance in view of the committee's recommendation that the proposed new Copyright Act should enshrine the *exclusive* right of the authors of such works to authorise the public presentation and performance of their works, and should cause the Crown (including the New Zealand Broadcasting Service) to be bound by the Act[3]. The committee noted that the action of A.P.R.A. (the Australasian Performing Rights Association, representing the interests of composers), in (at times) increasing its fees without negotiation with users of copyright material, indicated the "need for a proper oversight of fees and terms of licences by an independent body"[4]. The committee noted that the United Kingdom Act had established the Performing Right Tribunal with jurisdiction over questions of public performance fees and conditions of public performance licences, and recommended that the Copyright Tribunal exercise the same function. Furthermore, the committee recommended that the Tribunal assume certain other powers, such as the right to conduct any public enquiry as to the royalty rate payable under the system of compulsory licensing relating to the manufacture of records. The committee regarded the Tribunal as being ideally placed to fulfill these functions, as it would "naturally in the course of time become experienced in matters relating to copyright"[5]. In view of these additional functions, the tribunal would not bear the restricted title held by by the British (Performing Right) Tribunal, but would be known as the Copyright Tribunal[6].

The recommendations of the Dalglish Committee were implemented by the

1 *New Zealand Parliamentary Debates*, volume 332, 2326.
2 Op.cit., volume 331, 1653.
3 *Appendix to the Journals of the House of Representatives of New Zealand*, Session 1959, volume IV (1960), H 46, p.109.
4 Op.cit. p.65.
5 Op.cit. p.70.
6 Op.cit. p.112.

Copyright Act 33, 1962. This Act established a tribunal of three members, each to hold office for five years, with provision for re-appointment. The chairman was to be a barrister or solicitor of not less than seven years' practice[7]. The Tribunal was empowered to hear applications from any person who claimed in a case covered by a licence scheme that the licensor operating the scheme had refused or failed to grant him a licence in terms of the scheme; and from any person who claimed that he required a licence in a case not covered by a licence scheme and that a licensor had unreasonably refused or failed to grant the licence or that the charges, terms or conditions subject to which the licensor proposed to grant the licence were unreasonable[8]. The Tribunal might also have referred to it disputes relating to an existing license scheme between the licensor operating the scheme and a person requiring a licence or an organisation claiming to be representative of persons requiring licences[9]. The Tribunal was empowered to exempt persons, requiring licences to cause works to be transmitted to subscribers to a diffusion service in New Zealand, from paying charges for them, in certain circumstances[10]. The Tribunal might hear applications from persons who claimed that the owner of copyright in musical works had unreasonably refused to agree to a method of payment other than that prescribed by regulation, or had made his agreement subject to unreasonable conditions[11]. The Tribunal might be requested by the Minister of Justice to conduct a public enquiry where it appeared to the Minister that the ordinary rate of royalty or the minimum amount thereof, payable for the making or importing of records, may have ceased to be equitable[12]. The Tribunal might also be called upon to determine the terms of compensation payable by the Crown for the use of copyright material[13]. Decisions of the Tribunal could not be appealed against, nor, except for lack of jurisdiction, could any proceeding or order of the Tribunal be liable to be challenged, reviewed, quashed or called in question by any Court[14].

Judge Douglas James Dalglish was appointed as Chairman of the new Copyright Tribunal, and he held office from its inception in 1963 to 1966. Judge Dalglish (born 1904) held the LL.B. degree, had practised as a barrister, and had held the offices of Judge of the Compensation Court (from 1952), Judge of the Motor Spirit Licensing Authority (from 1955), Chairman of the Copyright Commission (1957-59) and Judge of the Trade Practices Appeal Authority (from 1959)[15]. He was assisted on the Tribunal by E.C. Simpson (who had a background in Arts) and M.J. Mason (a chartered accountant)[16]. By September 1963, the Tribunal had had a preliminary meeting to consider questions relating to the manner of initiating proceedings before the Tribunal. The Tribunal decided that there was no need at the time for the issue of regulations, but it decided that the procedure laid down under the United Kingdom Act for the hearing of matters by the Performing Right Tribunal would provide an adequate guide to interested parties in New Zealand[17].

7 Section 30.
8 Section 38.
9 Section 39.
10 Section 41.
11 Section 22 (12).
12 Section 23 (1).
13 Section 53 (3). See also section 54 (3).
14 Section 48.
15 *Who's Who in New Zealand* 8 ed. (1964) p.111.
16 Letter from Department of Justice, Tribunals Division, 12 July 1988.
17 1963 *New Zealand Law Journal* p.493.

Curiously, there is no record of the Copyright Tribunal having fulfilled any further functions during the tenure of Judge Dalglish. In 1966, he was succeeded as Chairman by Judge John Bryce Thomson. Judge Thomson (born 1903) held the LL.B. degree, had been a law lecturer and practitioner in Dunedin, was a stipendiary magistrate from 1951 to 1967, was Chairman of Borstal Parole Boards (1961-66), and was on the Local Government Appeal Authority (from 1966)[18]. Judge Thomson remained as Chairman of the Copyright Tribunal for ten years, but throughout this period there is no record of he and the other members of the Tribunal (Messrs Simpson and Mason) being called upon to act in any matter[19].

In 1976, Judge Jack Raymond Poppleton Horn succeeded Judge Thomson as Chairman. Judge Horn (born 1917) held the LL.B. and LL.M. degrees, had practised as a barrister and solicitor (1947-67), was appointed a stipendiary magistrate in 1967, and became Chairman of the Manawatu Licensing Commission and the Palmerston North Land Valuation Commission[20]. Also new to the Tribunal in 1976 was Donald William Bain, who replaced E.C. Simpson. Bain (1907-82) held the M.A. degree and a Diploma in Journalism, and had enjoyed a lengthy career in newspapers as editor and leader writer[21]. In 1977, Margaret M. Hutchison, B.Com., A.C.A., a chartered accountant, replaced M.J. Mason[22]; and in 1982, on Bain's death, William Newton Sheat, B.A., LL.B., barrister, solicitor, actor, writer and producer, became the third member of the Tribunal[23].

Judge Horn's tenure as Chairman (1976-86) proved to be the most active in the history of the Tribunal to date, and during this period it issued three decisions and one report. The three decisions all related to the matter between *The Federation of Independent Commercial Broadcasters (N.Z.) Ltd.* and *Phonographic Performances (N.Z.) Ltd.* The Broadcasters Association represented the seven private commercial radio stations in New Zealand, and Phonographic Performances represented the record producing and marketing companies operating in New Zealand. The application was brought in terms of section 39 of the Act, which provided for reference of disputes affecting existing licence schemes, and the Tribunal was called upon to determine the royalty, if any, to be paid to the record companies for the airplay of their records by the broadcasting radio stations[24]. The main hearing was conducted over nine days in March 1977, and Judge Horn recalls that the Tribunal heard a great deal of evidence from New Zealand and from a wide variety of countries overseas[25]. Judgment was given on 23 May 1977. In this judgment the Tribunal noted that (on 30 May 1972) an agreement had been reached between the Broadcasters and Phonographic that the Broadcasters would pay royalty for an initial period at 1% of gross income rising to a maximum of 3%, subject to the Broadcasters not broadcasting in excess of two-thirds of total daily broadcasting time of the radio stations. The Tribunal noted a decision of the British Performing Right Tribunal that "where there is evidence available of an agreement freely negotiated between a willing operator of a

18 *Who's Who in New Zealand* 9 ed. (1968) p.321-2.
19 Letter from Department of Justice, Tribunals Division, 7 June 1988.
20 *Who's Who in New Zealand* 11 ed. (1978) p.146.
21 Op.cit. p.49.
22 Letter from Department of Justice, Tribunals Division, 12 July 1988.
23 *Who's Who in New Zealand* 11 ed. (1978) p.246.
24 Reference Cop.1 (Department of Justice, Tribunals Division).
25 Letter from J.R.P. Horn, 29 August 1988.

performing right, . . . and a willing seller, the price so agreed amounts . . . to evidence of the proper value of that right"[26]. However, the Tribunal concluded from evidence that "an element of considerable commercial pressure employed by Phonographic destroyed the normal equality of a freely negotiated commercial bargain" and so held that it was not "bound to consider the royalty then agreed as the necessary starting point"[27]. The Tribunal then went on to examine overseas precedents of broadcasting royalties. It noted that there were no similar broadcasting royalties in the United States of America and in Canada. In Australia, where a proportion of recordings from the U.S.A. and some European countries were not subject to royalties, the bargaining strength this gave to the Australian broadcasters allowed them to reach an agreement with the record companies whereby in exchange for the use of their records the broadcasters gave the record companies a certain amount of free advertising time. In the United Kingdom, in an agreement that the Broadcasters said was virtually imposed upon them without negotiation, an agreement provided for 3% of net advertising revenue in the first year, rising to 7% in the fifth year[28]. The Tribunal then noted that the royalty agreements between the Broadcasters and the Australasian Performing Rights Association (representing the interests of composers), which ranged between 1% and 2.4%, had some general relevance by way of comparison. This was because the Tribunal held that as a matter of law the performance right of record companies was not in a position subservient to that of the composers[29]. The Tribunal then addressed itself to the general issue involved in the dispute: [30]

> Does airplay of Phonographic records by itself advertise the records and thus enhance sales? If so, should the Broadcasters then pay any royalty? Conversely, since the airplay of records is the very basis of the Broadcasters' operations from which, by selling advertising time, they derive revenue, should not the Broadcasters pay something in addition to the purchase price of records and the built-in costs of broadcasting them?

The Tribunal considered the results of surveys produced by the Broadcasters and Phonographic, to determine the value of airplay. The Tribunal concluded that these surveys showed that airplay did provide an advertising medium leading to sales for Phonographic records. It also suggested that "in the fast moving and rapidly changing area of contemporary or 'pop rock' or country music etc prompt exposure via airplay is of vital consequence to the record company"[31]. At the same time the Tribunal concluded that airplay of records was also the "commercial lifeblood of the Broadcasters"[32]. It therefore decided that a royalty should be paid by the Broadcasters but that it should not be as high as Phonographic sought. It noted that "assessment of the quantum of royalty is a matter of great difficulty and devoid of suitable guidelines". This was because overseas experience was of no assistance and evidence of any and what price was largely absent[33]. Thus, within its own discretion, the Tribunal concluded that the royalty henceforth would be 1.5% of gross

[26] Reference Cop.1: p.6.
[27] Ibid.
[28] Op.cit. pp.7-9.
[29] Op.cit. pp.9-10.
[30] Op.cit. pp.10-11.
[31] Op.cit. p.13.
[32] Op.cit. p.14.
[33] Op.cit. pp.14-15.

advertising revenue, based on needle time of two-thirds of total broadcasting time[34].

The Tribunal reserved the right to both parties to apply to the Tribunal on matters arising from the above decision or to settle the terms of any final determination. The result was the second hearing on the Broadcasters and Phonographic matter, held on 6-7 March 1980[35]. In its judgment dated 31 July 1980, the Tribunal reported that it had incorporated its decision on the items in dispute in a re-drawn agreement for execution by the parties. The definition of gross income had been spelt out in detail. It was defined as:[36]

> [T]he gross earnings of the licensee received from all sources during a financial year in respect of the provision or disposal of programmes, advertisements, or other matter broadcast or intended to be broadcast by the licensee; and includes the money value of any consideration received otherwise than in cash.

The Tribunal noted that the term of the agreement had been carried to 31 March 1990, as it regarded stability as an important factor. It stated that in the scheme for the logging of needle time (to monitor the two-thirds time limit), the Tribunal had "endeavoured to provide for a practical method without undue restriction upon a broadcaster's activities and yet which will provide sufficient protection for Phonographic"[37]. As to costs, the Tribunal held that the Broadcasters had substantially succeeded at the original hearing and should therefore have a contribution to their costs from Phonographic, fixed at $5000[38].

The third hearing on the matter between the Broadcasters and Phonographic was held on 15 May 1981[39]. The Broadcasters had returned to the Tribunal seeking clarification of clause 10 of the agreement as settled by the decision given on 31 July 1980. This clause prevented the Broadcasters from broadcasting "any programme, advertisement or commercial embodying a sound recording" unless the Broadcasters or the persons supplying the programme to them had first obtained written authorisation allowing the inclusion of the sound recording. The Broadcasters contended that the word "programme" should not be interpreted to cover the "creative utilisation" of sound recordings in any broadcast. However, the Tribunal, in its judgment of 18 August 1981, decided that the term "programme" was wide enough to cover such utilisation. The Tribunal added that it hoped that "the existing practice of readily obtainable consent [between the parties] will continue harmoniously"[40].

On 14 July 1986, the Tribunal conducted a public enquiry pursuant to section 23 of the Copyright Act. This section provides that where the Minister of Justice considered that the royalty rate, payable in terms of a statutory licence to make in or import into New Zealand records on certain terms and conditions, had ceased to be equitable, he might request the Copyright Tribunal to hold an enquiry into the matter[41]. The royalty fixed by the Copyright Act was 5% of the original retail selling price of a record[42]. In 1982, the Australian

[34] Op.cit. pp.15-16.
[35] Decision No.1/80, Reference No.COP-1 (Department of Justice, Tribunals Division).
[36] Op.cit.: clause 1(h) of the agreement, annexed to the judgement.
[37] Op.cit. p.2.
[38] Op.cit. p.3.
[39] Decision No.1/81, Reference No.COP-1.
[40] Op.cit. p.2.
[41] Section 23 (1).
[42] Section 22.

Music Publishers Association Limited (which carries on business in Australia and New Zealand), the Musical Copyright Owners Association of New Zealand (comprising music publishers carrying on business in New Zealand only), and the Australian Mechanical Copyright Owners Society Limited (which owns or controls the rights of reproduction of copyright musical works and lyrics in the form of records and licences), sought a formal agreement on procedures and practices and an increased royalty rate. After negotiation with the Recording Industry Association of New Zealand (which records, manufactures, distributes and sells records), an agreement was reached to increase royalty rate to 5.3% until 31 December 1987 and 5.6% from 1 January 1988. The parties requested the Minister of Justice to approach the Copyright Tribunal to hold an enquiry into the matter. At the hearing, the parties to the agreement appeared[43]. The Tribunal produced its report on 30 July 1986. It stated that, in deciding whether or not the rate of royalty had ceased to be equitable, it was "guided by the careful considered views of the makers and owners [the parties named above] being the parties primarily affected by any change in the royalty rate". It added that it had been assured by counsel for the parties that any increase in the royalty would have little if any effect on the retail price of records and that consequently there would be no real effect on the public[44]. The Tribunal therefore endorsed the agreement reached and recommended the proposed increase in royalty rate to the Minister[45].

On 27 September 1986, Judge J.W. Dalmer replaced Judge Horn as Chairman of the Copyright Tribunal. Judge Dalmer holds the LL.B. degree and is the resident District Court Judge at New Plymouth[46]. In 1987, Professor D.C. Gunby (Professor of English at the University of Canterbury) was appointed to replace Miss Hutchison; and Ms. E. Hird (LL.B. (Hons.), barrister and solicitor) was appointed to replace Mr. Sheat. Since 1986, no issues have been brought before the Tribunal[47].

Perusal of the decisions and the royalty report of the Copyright Tribunal, between the years 1977-86, clearly indicates that, when the Tribunal was called upon to exercise its jurisdiction, it did so in an admirable fashion. The judgments of the Tribunal were carefully prepared, thorough, balanced, well-reasoned and lucidly expressed. The intriguing question is: why has the Tribunal been so little used? Members of the Tribunal have suggested that this is because of the limited jurisdiction conferred upon the Tribunal, and because parties might consider that other remedies (particularly in the High Court) are more effective for resolving copyright disputes[48]. Judge Horn, however, suggests that, with the increasing interest in intellectual property, the Copyright Tribunal "could well have a more lively future"[49].

43 Op.cit. p.2.
44 Ibid.
45 Op.cit. p.3.
46 Letters from Department of Justice, Tribunals Division, 12 July 1988, and J.W. Dalmer, dated 6 September 1988.
47 Ibid.
48 Letters from J.R.P. Horn, 29 August 1988, W.N. Sheat, 1 September 1988, and J.W. Dalmer, 6 September 1988.
49 Letter from J.R.P. Horn, 29 August 1988.