

SOUTH-EAST ASIA



Conference on the Collective Management of Copyright and Related Rights in South-East Asia

Best Practices on Alternative Disputes' Settlement

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Outline

- I. Rules on Mediation and Disputes' settlement in EU Directives
- II. Copyright Tribunals; the Copyright Tribunal of the United Kingdom as an example
- III. Arbitration Boards; the Copyright Arbitration Board of Germany as an example
- IV. Mediation systems; the Copyright Experts Council of Hungary as an example

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Under the Cable & Satellite Directive 93/98/EEC all EU MS are obliged to ensure there is a mediation procedure for solving conflicts regarding the authorization for the cable retransmission of broadcasts.

Article 11. Mediators

- 1. Where no agreement is concluded regarding authorization of the cable retransmission of a broadcast. Member States shall ensure that either party may call upon the assistance of one or more mediators.
- 2. The task of the mediators shall be to provide assistance with negotiation. They may also submit proposals to the parties.
- 3. It shall be assumed that all the parties accept a proposal as referred to in paragraph 2 if none of them expresses its opposition within a period of three months. Notice of the proposal and of any opposition thereto shall be served on the parties concerned in accordance with the applicable rules concerning the service of legal documents.
- · 4. The mediators shall be so selected that their independence and impartiality are beyond reasonable doubt





Obligation for alternative dispute resolution procedures in Directive 2014/26/EU

Article 34. Alternative dispute resolution procedures

1. Member States may provide that **disputes between** [1] collective management **organisations**, [2] **members** of collective management organisations, [3] **rightholders** or [4] **users** regarding the provisions of national law adopted pursuant to the requirements of this Directive **can be submitted to a rapid, independent and impartial alternative dispute resolution procedure. (Internal numbering and emphasis added.)**





Dispute
Settlement
Mechanisms
in Directive
2014/26/EU

Dispute resolution for members and right holders:

 Member States shall ensure that CMOs make available to their members and right holders <u>effective</u> and <u>timely procedures</u> for dealing with complaints and for resolving disputes in particular in relation to authorisation to manage rights and termination or withdrawal of rights, membership terms, the collection of amounts due to right holders, deductions and distributions (article 33).

Dispute resolution for users:

- Member States shall ensure that disputes between CMOs and users concerning the existing and proposed licensing conditions, tariffs, and any refusal to grant a license can be submitted to a <u>court</u>, and if appropriate, to an independent and impartial dispute resolution body (mediation or arbitration) (article 35).
- On the other hand, due to specificities of multi-territorial licensing, the proposal foresees the submission of related dispute to <u>alternative dispute resolution bodies</u> (such as <u>arbitration</u>). This does not prevent parties from going to courts. (article 34 par. 2).



















Originally established under the Copyright Act 1956



changed in Copyright Designs and







 Primarily adjudicates commercial licensing disputes between collecting societies and business users of copyright material i.e. it determines the terms of/remuneration under collective licensing schemes





Jurisdiction

COVERS BOTH EXISTING LICENSING SCHEMES AND PROPOSED NEW LICENSING SCHEMES.

BUT THERE MUST BE EITHER AN EXISTING SCHEME OR A PROPOSED SCHEME. NO POWER TO REQUIRE A COPYRIGHT OWNER OR COLLECTING SOCIETY/LICENSING BODY TO PROPOSE A SCHEME OR LICENCE

NO COPYRIGHT OWNER REQUIRED TO JOIN A COLLECTING SOCIETY











Although most cases concern collective licences, Tribunal has matters e.g. licences of right



Jurisdiction includes copyright)





Orphan Works Jurisdiction

Appeal to Copyright Tribunal from IPO decisions:

- From applicants in UK scheme in relation to
 - · refusal to grant a licence
 - · level of licence fee
 - licence terms
- From reappearing rights holders if failure to agree fair compensation

Appeal to First Tier Tribunal for reappearing rights holders claiming:

- IPO as authorising body acted improperly
- IPO as authorising body failed to comply with its obligations under the regulations



















Rules set process for dealing with applications, hearings etc. and procedures are in line with English Civil Procedure Rules



Overriding objective is to deal with cases justly and focus is on efficiency/cost effectiveness



Case management conferences/directions are common







Proceedings started when person files the application form (the same for all applications), a statement of grounds and pays the relevant fee

Chairman must decide whether to allocate to small or standard applications track

Small track – usually no case management conference or oral hearing

If allocated to small track, Tribunal obliged to give directions and set date for its decision







Respondent has 28 days to file response to include concise facts and relief and directions sought

Applications must be advertised

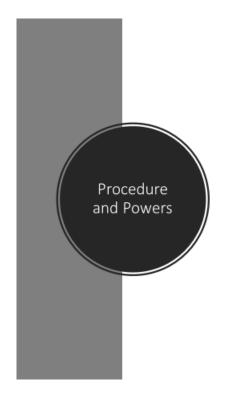
Under Rule 15(1) any person with substantial interest in outcome may, within 28 days, request to intervene

Tribunal must invite and consider observations of parties in deciding whether to give permission to intervene











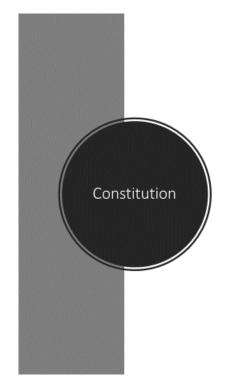
Tribunal has power to reject an application (on certain grounds and after giving parties opportunity to be heard)



Tribunal can give directions to remedy defects in application, response and/or interventions







One Chairman and two deputy Chairman with legal qualifications and experience

Up to eight non legal members with commercial experience

Appointments are on a renewable 5 year basis

Tribunal sits with a Chair or deputy Chair and two lay members

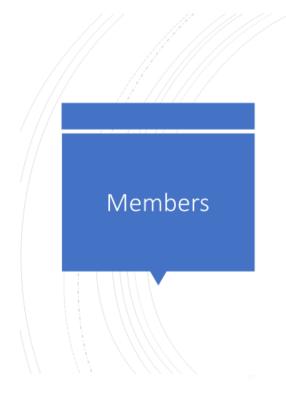
Decisions by majority vote

Tribunal is administered by a Secretary, who is a civil servant working in the UK IPO









• Non legal members provide commercial input. They come from variety of backgrounds - e.g. retired publisher, Chartered Accountant, magistrate in criminal court.





Criteria for setting tariff and other terms

Most references require the Tribunal to determine the royalties or tariffs payable and other key terms under the licence

Terms must be reasonable in the circumstances

Statutory and case history guidance given to Tribunal as what must be taken into account when considering the reference of a licensing scheme.





Criteria for setting tariff and other terms

- In essence, the Tribunal must consider comparable licences (where available), and ensure there is no unreasonable discrimination between licensees or prospective licensees under the referred scheme and licences under other comparable schemes
- May discriminate between licensees where reasonable basis to do so



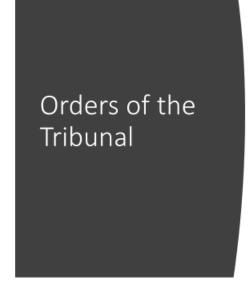




 In assessing the proper tariff Tribunal must have regard to the principle is that the rate is that which would be negotiated between a willing licensor and a willing licensee









Order can be backdated to date of application or date scheme came into force if later.





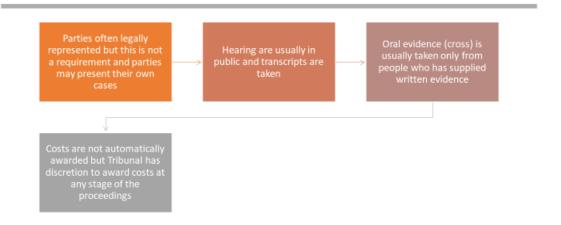


Application may not be made before last 3 months of the licence and licence remains in force until conclusion of proceedings



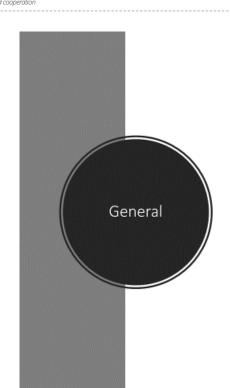


General









Decisions must be in writing

Appeals on points of law only to single judge in High Court in England and Wales and Court of Sessions in Scotland







- Not many cases are referred to the CT. Since 2010 when new Rules were introduced CT has determined only 7 substantive cases - approx. 1 per year. Probably indicates the market works reasonably well as few disputes
- Some cases involve preliminary or procedural hearings as well
- 2 cases in 2018 before the CT more than usual
- Although CT has jurisdiction over a number of matters, all cases since 2010 have involved determined the financial and other terms of a collective licence. The key issue is always the amount to be paid for the licence.









- A number of cases are started in the CT but are settled before getting to hearing stage e.g. In a case I am currently hearing the parties have jointly requested 2 lengthy extensions to allow parties to continue to negotiate and either resolve matter entirely or reduce the number of issues
- · CT encourages negotiation and settlement
- · Consequently the cases that are determined the CT tend to be big - i.e. worth many £millions - and complex as the decision often affects either an entire industry or a large number of copyright works or both
- Small applications track is rarely used











Composition, secretariat and supervision of the Arbitration Board

Collecting Societies Act of 2016

Section 124. Structure and composition of the Arbitration Board

- The Arbitration Board shall be constituted at the [German Patent and Trademark Office]. It shall comprise the chairperson or his deputy and two assessors.
- (2) The members of the Arbitration Board must be qualified under the terms of the German Judiciary Act to hold judicial office. They shall be appointed by the Federal Ministry of Justice and Consumer Protection for a specific period of time, which shall be at least one year; they may be reappointed.
- (3) Several chambers may be constituted at the Arbitration Board. The composition of the chambers shall be determined in accordance with subsection (1), second sentence, and (2).
- (4) The allocation of court business among the chambers shall be regulated by the President of the German Patent and Trade Mark Office.

Section 125. Supervision

- (1) The members of the Arbitration Board shall not be bound by instructions.
- (2) The President of the German Patent and Trade Mark Office shall exercise administrative supervision over the Arbitration Board. (Emphasis added.)

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Jurisdiction of the Arbitration Board

Collecting Societies Act of 2016

Section 92. Jurisdiction relating to disputes under the Copyright Act and to inclusive agreements

- (1) Any party to a dispute to which a collecting society is party may apply to the Arbitration Board (section 124) if the dispute concerns one of the following matters:
- 1. the use of works or contributions which are protected under the Copyright Act, 2. the obligation to pay remuneration for appliances and storage media in accordance with section 54 of the Copyright Act or to operators in accordance with section 54c of the Copyright Act, 3. the conclusion or amendment of an inclusive agreement.
- (2) Any party to a dispute to which a broadcasting organisation and a cable operator are party may also apply to the Arbitration Board if the dispute concerns the obligation to conclude a contract concerning cable retransmission (section 87 (5), Copyright Act). (Emphasis added.)







Application and procedure

Collecting Societies Act of 2016

Section 97. Application to institute proceedings

- (1) The Arbitration Board shall be seised by written application. ..
- (2) The Arbitration Board shall serve the application on the respondent together with the invitation to submit comments in writing within one month.

Section 99. Written procedure and hearing

- (1) The proceedings shall be conducted in writing, subject to subsection (2).
- (2) The Arbitration Board shall schedule a hearing if one of the parties so requests and the other parties consent thereto or if it deems it to be expedient to clarify the facts or to reach an amicable settlement.

Section 100. Procedure in the event of a hearing

 (2) The hearing before the Arbitration Board shall not be public.
 Authorised representatives of the Federal Ministry of Justice... of the [Patent and Trademark Office] and of the Federal Cartel Office shall be entitled to participate. (Emphasis added.)





Failure to appear at the hearing

Collecting Societies Act of 2016

Section 101. Failure to appear

- (1) If the applicant fails to appear at the hearing, the application shall be deemed to be withdrawn. If the applicant was prevented, through no fault of his own, from appearing at the hearing, he shall be granted restitutio in integrum upon motion. The Arbitration Board shall decide on the motion; its decision shall be non-appealable. In other respects the provisions of the Code of Civil Procedure shall apply mutatis mutandis to restitutio in integrum.
- (2) If the respondent fails to appear at the hearing, the Arbitration Board may propose a settlement on the basis of the files.
- (3) Parties who fail to appear without excuse shall carry the costs arising on account of their failure to appear.
- (4) The consequences of their failure to appear shall be indicated to the parties in the summons to the hearing.





Amicable dispute resolution; settlement

Collecting Societies Act of 2016

Section 102. Amicable dispute resolution; settlement

(1) The Arbitration Board shall work towards achieving an amicable resolution of the dispute...

Section 105. Settlement proposal by the Arbitration Board; objection

- (1) The Arbitration Board shall propose a settlement to the parties within one year following service of the application. The period may be extended, with the consent of all the parties, by six months in each case.
- (3) The settlement proposal shall be deemed to have been accepted and an agreement corresponding to the content of the proposal shall be deemed to have been reached if the Arbitration Board has received no written objection within a period of one month following service of the proposal. If... concerns cable retransmission, the period shall be three months.

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Collecting Societies Act of 2016

Section 128. Assertion of claims in court

- (1) In the case of disputes under section 92 (1) and (2), an action shall be permissible only where proceedings before the Arbitration Board have preceded it...
- (2) In the case of disputes under section 92 (1) nos 1 and 2, subsection (1) shall apply only if the applicability or the appropriateness of the tariff is in dispute...

Section 129. Jurisdiction of the higher regional court

- (1) In disputes under section 92 (1) Nos 2 and 3 as well as (2), under section 94 and under section 108, the higher regional court with jurisdiction over the place at which the Arbitration Board has its seat alone shall decide as the court of first instance.
- (3) An appeal on points of law shall be possible, in accordance with the provisions of the Code of Civil Procedure, against final judgments handed down by the higher regional court.











Establishment and tasks of the Copyright **Expert Council**

Hungarian Copyright Act

- (1) Concerning specific issues arising in copyright-related legal disputes, courts and other authorities may consult the Council of Copyright Experts operating attached to the [Intellectual Property] Office requesting it to give its expert pinion. The members of the Council shall be appointed for a five years' term by the Minister responsible for justice in agreement with the Minister responsible for culture...
- (3) Upon request, the Council of Copyright Experts may give expert opinions also in extraiudicial procedures on issues connected with the exercise of the right of use.
- (4) Where a court or other authority requests an expert opinion from the Council of Copyright Experts, the Council shall be informed about the resolution on merits of the case by sending a copy thereof.
- (5) The detailed rules of the Council's organisation and operation shall be established by separate legislation.
- > The detailed norms are contained in the 156/1999. (XI. 3.) Korm. governmental decree.





The Council, the Board and the panels

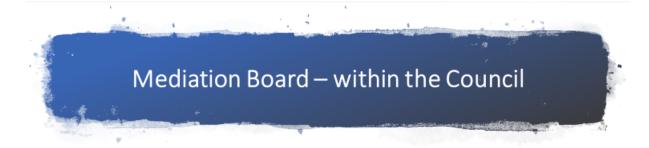
156/1999. (XI. 3.) Korm. governmental decree

- The Copyright Expert Council has at maximum 200 members appointed by the Minister of Justice (at present cca. 180 members).
- The 15 Board and the president (who is member of the Board) are appointed specifically. There is a general category of members: experts with law degrees specialized in copyright and there lists of experts according to the various categories of works and copyright-related activities (authors, performers, software developers, publishers, producers, etc.)
- The Council acts in three-member or five-member of panels or in simpler cases by individual experts. The panels and the individual experts are appointed by the President of the Council; the chairman of a panel and an individual expert must have a law degree and be specialized in the filed of copyright.
- . The panels do not hold hearings and decide on the basis of documents made available by the police, prosecutors, courts or by those who ask for expert opinion.









The Copyright Law on the Mediation Board

Article 102

If no agreement is reached between the users and the rightholders, or between the users or their organisations and the collective management organizations on the remuneration to be paid and other terms of licensing, or between the collective management organizations, the members of such organizations, the rightholders or the users in respect of any other legal dispute concerning collective management, any party may turn to the Mediation Board set up pursuant to Article 103.

- (1) The provisions of Chapter II of Act LXXI of 1994 on Arbitration shall apply concerning the setting up of the Mediation Board, on the understanding that the members of the Mediation Board shall be appointed from among the members of the Council of Corpyright Experts (Article 101).
- (2) The Mediation Board shall operate within the Council of Copyright Experts. (Emphasis added.)









The Copyright Law on the Mediation Board

- (1) The objective of the procedure of the Mediation Board is to facilitate the conclusion of an agreement between the parties on the remuneration to be paid and other licensing conditions or concerning any other dipute having emerged in connection with collective management. In the case of a procedure initiated in a dispute concerning collective management of rights, the Mediation Board shall promptly inform the Minister of Justice, the Minister of Culture and the Office.
- (2) If no agreement is reached between the parties, the Mediation Board shall draft a proposal concerning the content of the agreement which it communicates to the parties in writing.
- (2) The parties may accept the agreement expressly or tacitly. It shall be regarded as a tacit acceptance if no objection is made by the parties to the Mediation Board with regard to the proposal for agreement within three months from the date of its delivery. (Emphasis added.)







Procedure of the Mediation Board

The Copyright Law on the Mediation Board

- (1) Equal treatment shall be given to the parties during the proceedings of the Mediation Board and either party shall have the possibility to present his position. The Mediation Board may not oblige the parties to participate in the proceedings and carry out acts of proceedings unless the parties have agreed thereto. As regards other matters, the Mediation Board shall itself establish its rules of proceedings within the frameworks of the statutes referred to in Paragraph (2) and determine its tariffs. (Emphasis added.)
- (2) The statutes of the Mediation Board shall be elaborated by the Council of Copyright Experts and approved by the Minister of Justice. Prior to the approval, the Minister supervising the Office [currently the Minister of Economy] and the Minister of Culture have to be consulted as regards their opinions.









Mediation between beneficiaries of exceptions and rightholders applying technological measures (1)

Copyright Act on procedure of the Mediation Board at the request of beneficiaries of exceptions in case of application of technological protection measures

Article 105/A

- (1) If no agreement is reached between the beneficiary of free use and the rightholder on the conditions of making the free use possible (Article 95/A) despite the protection against the circumvention of technological measures (Article 95), any of the parties may turn to the Mediation Board.
- (2) The procedure may also be initiated by the representative organisations of the beneficiaries...
- (3) The provisions of Article 103 shall apply mutatis mutandis to the establishment of the Mediation Board on the understanding that the members of the Mediation Board shall be appointed by the president of the Council of Copyright Experts if the parties do not reach an agreement on that matter within eight days from the commencement of the procedure.
- (4) Articles 104(1) and (2) and 105(2) shall apply mutatis mutandis to the procedure of the Mediation Board... (Continues.)







Copyright Act on procedure of the Mediation Board at the request of beneficiaries of exceptions in case of application of technological protection measures

Article 105/A (contd.)

- (5) The parties may accept the agreement proposed by the Mediation Board either explicitly or tacitly. It shall be regarded as a tacit acceptance if no objection is made by the party to the Mediation Board with regard to the proposed agreement within 30 days from its delivery...
- (7) If no agreement has been reached on the basis of Paragraph (5), the beneficiary of free use may initiate a lawsuit at the court within 15 days from the expiry of the deadline provided for in Paragraph (5) and may request a court decision ordering the rightholder to make the free use possible according to the conditions stipulated in the claim.
- (8) The representative organisations of the beneficiaries shall also have the right to initiate lawsuits under Paragraphs (6) and (7) within the same deadline on the understanding that the effect of any final court resolution shall extend to the members of these organisations, who are beneficiaries under this Act. (Emphasis added.)





Intellectual Property: Key to innovation, economic growth and cooperation







