



Neutral Citation Number: [2018] EWHC 2931 (Ch)

Case No: CH-2018-000129

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
INTELLECTUAL PROPERTY LIST (CHANCERY DIVISION)

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 6 November 2018

Before :

MR JUSTICE ARNOLD

Between :

(1) **BRITISH BROADCASTING
CORPORATION**
(2) **BBC WORLDWIDE LIMITED**

**Applicants/
Respondents**

- and -

(1) **MECHANICAL-COPYRIGHT
PROTECTION SOCIETY LIMITED**
(2) **PERFORMING RIGHT SOCIETY
LIMITED**

**Respondents/
Appellants**

- and -

(1) **SKY UK LIMITED**

**Intervener/
Respondent**

- and -

(2) **ITV NETWORKS LIMITED**

Intervener

**Rhodri Thompson QC and Lindsay Lane (instructed by BBC IP Litigation Department) for
the BBC and BBCW**

Robert Howe QC and James Segan (instructed by Simkins LLP) for MCPS and PRS
Martin Howe QC and Michael Conway (instructed by Sky Legal) for Sky

Hearing dates: 23-24 October 2018

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
MR JUSTICE ARNOLD

MR JUSTICE ARNOLD :

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Introduction

1. This is an appeal against a decision of the Copyright Tribunal (Ms Colleen Keck, Dr Lucy Connors and Mr Philip Eve) dated 26 April 2018 on a preliminary issue in a reference under section 126 of the Copyright, Designs and Patents Act 1988 brought by the British Broadcasting Corporation (“the BBC”) and BBC Worldwide Ltd (“BBCW”). The preliminary issue was in the following terms:

“In this reference to what extent (if any) does the Tribunal have jurisdiction to set the terms of licences in issue (being the BBC Agreement, the DVD Licence and the 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?”

2. The Tribunal's answer to this question was that it had jurisdiction to set the terms of the licences insofar as such licences concern copyrights subsisting under the laws of jurisdictions other than the United Kingdom. Mechanical-Copyright Protection Society Ltd (“MCPS”) and Performing Right Society Ltd (“PRS”) (collectively “PRStM”), who

are the respondents to the reference, contend that the Tribunal does not have such jurisdiction.

3. After the appeal had been filed, Respondents' notices filed, sequential skeleton arguments served and the appeal fixed for an expedited hearing, the parties entered into a confidential settlement agreement which provided that the reference would be withdrawn, but that the appeal should proceed subject to the Court's discretion as to whether to entertain it.
4. In *Hutcheson v Popdog Ltd* [2011] EWCA Civ 1580, [2012] 1 WLR 782 Lord Neuberger of Abbotsbury MR said at [15]:

“Both the cases and general principle seem to suggest that, save in exceptional circumstances, three requirements have to be satisfied before an appeal, which is academic as between the parties, may (and I mean ‘may’) be allowed to proceed: (i) the court is satisfied that the appeal would raise a point of some general importance; (ii) the respondent to the appeal agrees to it proceeding, or is at least completely indemnified on costs and is not otherwise inappropriately prejudiced; (iii) the court is satisfied that both sides of the argument will be fully and properly ventilated.”

5. In the present case all the parties to the appeal submitted that all three of these requirements were satisfied. I agreed with this, and so I decided to allow the appeal to proceed. As is common ground, the fact that the underlying dispute has settled does not alter the fact that the jurisdictional issue must be decided by reference to the circumstances of the reference as they existed at the time of the Tribunal's decision.

Background

6. The following account of the background to the preliminary issue is based on that given by the Tribunal in its decision at [2]-[16].
7. The BBC is a public corporation established by Royal Charter in the UK. Its Royal Charter sets out its public purposes and defines the activities which may be carried out by it. These include:
 - i) provision of the UK Public Services;
 - ii) provision of the BBC World Service; and
 - iii) through commercial subsidiaries, commercial activities.
8. The BBC's commercial activities are carried out by its wholly-owned subsidiary BBCW, a company organised and existing under English law.
9. MCPS and PRS are both UK collecting societies organised and existing under English law and each of them has its principal place of business in the UK. Both organisations grant licences of both UK and non-UK copyrights in music, although the extent of their ability to grant licences of foreign copyrights differs and depends on various factors which it is unnecessary to go into for present purposes.

10. 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.
11. Section 126 of the 1988 Act provides as follows:
 - “(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.
 - (2) Such an application may not be made until the last three months before the licence is due to expire.
 - (3) A licence in respect of which a reference has been made to the Tribunal shall remain in operation until proceedings on the reference are concluded.
 - (4) If the Tribunal finds the application well-founded, it shall make an order declaring that the licensee shall continue to be entitled to the benefit of the licence on such terms as the Tribunal may determine to be reasonable in the circumstances.
 - (5) An order of the Tribunal under this section may be made so as to be in force indefinitely or for such period as the Tribunal may determine.”
12. By the reference, the BBC and BBCW sought an order extending four licences referred to as the BBC Agreement, the TV Sales Licence, the DVD Licence and the DTO Licence, which they contended were extant but due to expire on 31 December 2016, for a period of five years and three months with reduced licence fees.
13. Under the BBC Agreement, the BBC was granted a joint licence by MCPS and PRS for its publicly funded, non-commercial services.
14. The other three licences related to the BBC/BBCW’s commercial (non-publicly funded) activities. There was a dispute between the parties as to what the precise contractual terms of the licences were. For the purposes of determining the preliminary issue, the Tribunal was not required to make, and did not make, any findings regarding the terms of the contractual relationship between the parties. It proceeded on the basis that the following licensed activities were involved:
 - i) the distribution and sale of BBC television programmes to other broadcasters (“the TV Sales Licence”);
 - ii) the distribution and sale in North America (i.e. 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 (i.e. Canada and USA) for television programmes made under the TV Sales Licence (“the DTO Licence”).
15. Save for the act of performing repertoire works in public, which was limited to the UK, the parties agreed that the BBC Agreement was predominantly a licence under UK copyrights, but also licensed acts restricted by non-UK copyrights (in particular, in relation to World Service radio broadcasts).
 16. The TV Sales Licence was not relevant to the preliminary issue as it was believed that this licence related solely to the UK, although PRSfM reserved their position should it turn out that some licensed activities occurred outside the UK.
 17. PRSfM contended that the DVD Licence was exclusively or predominantly a licence under non-UK copyrights. The BBC and BBCW’s position was that the DVD Licence also covered 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.
 18. The DTO Licence authorised (in essence) the distribution of programmes via DTO to end users in the USA and Canada, and for this purpose authorised the reproduction of the programmes on servers within much of Europe, the USA and Canada and such other territories as might be agreed. The BBC and BBCW’s position was that the DTO Licence also authorised a variety of preparatory steps that were taken in the UK once a programme was made in order to make the DTO content available in the USA and Canada.
 19. The Tribunal considered that, as a matter of practicality and commerciality, licensed activities occurring inside the UK were intertwined with the licensed activities occurring outside the UK, and that there was some degree of interconnectedness among the licence terms for the various activities.
 20. There was no dispute that all agreements were governed by English law and that the English courts had jurisdiction over disputes arising under those agreements.
 21. Sky UK Ltd (“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. It supported the BBC and BBCW’s position on jurisdiction and also advanced an alternative argument of its own which is the subject of a Respondent’s Notice on the appeal.
 22. ITV Network Ltd, the other intervener, did not participate in the preliminary issue.

The jurisdiction of a statutory tribunal

23. The Copyright Tribunal is a statutory tribunal. It is common ground that a statutory tribunal is a creature of statute, and as such it has no inherent jurisdiction: its jurisdiction is determined solely by the relevant statute, properly construed. If a statutory tribunal has jurisdiction over a particular issue, then such jurisdiction is mandatory; there is no power to exercise control by means of doctrines such as *forum non conveniens*.

24. It follows that the question whether the Copyright Tribunal has jurisdiction with respect to licences of foreign copyrights depends on the interpretation of the 1988 Act as it presently stands.

The territorial nature of copyright

25. It is common ground that copyright is territorial in nature. As Professor Wadlow put it in a passage quoted with approval by Lord Neuberger of Abbotsbury PSC in *Starbucks (HK) Ltd v British Sky Broadcasting Ltd* [2015] UKSC 11, [2015] 1 WLR 2628 at [59]:

“...the nature of copyright as a legal right of property arising in any given jurisdiction from national legislation, common law or self-executing treaty means that it must be wrong to speak as if there were a single international copyright.”

26. Consistently with the territorial nature of UK copyright, any act constituting a primary infringement of copyright must take place within the UK. Section 16(1) of the 1988 Act currently provides (emphasis added):

“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’.”

27. Even in the case of infringement by authorising another to do a restricted act, where the authorisation may take place outside the UK, the act authorised must still be done within the UK: see *ABKCO Music & Records Inc v Music Collection International Ltd* [1995] EMLR 449.

The legislative history

28. It is an important plank of PRSfM’s case that (i) the Copyright Tribunal’s predecessor the Performing Right Tribunal (“the PRT”) had no jurisdiction over licences of foreign copyrights under the Copyright Act 1956, (ii) the Copyright Tribunal had no such jurisdiction under the 1988 Act as originally enacted and (iii) although the 1988 Act

has been amended, none of the amendments were intended to confer such jurisdiction. Accordingly, it is necessary to consider the legislative history.

The Gregory Report

29. The origins of the Copyright Tribunal lie in the Report of the Copyright Committee chaired by Sir Henry Gregory which was presented to Parliament in October 1952. In Part VIII of their report the Committee recommended the creation of a new Tribunal (a) to review and revise tariffs set by collecting societies such as PRS, (b) to set new tariffs where none existed or existing ones were inappropriate and (c) to grant licences where licences had been refused or unacceptable conditions had been attached to licences. As the Committee explained, these proposals were made in response to complaints which it had received about the activities of the collecting societies and in recognition of the fact that “each of these bodies is in a position to exercise a control in its own field which is substantially monopolistic”.
30. In paragraph 205 of the Report the Committee drew attention to the following declaration made by the UK delegation in relation to the Brussels revision of the Berne Convention in 1948:

“The United Kingdom Delegation accepts the provisions of Article 11 of the Convention on the understanding that His Majesty’s Government remains free to enact such legislation as they may consider necessary in the public interest to prevent or deal with any abuse of the monopoly rights conferred upon owners of copyright by the law of the United Kingdom.”
31. Although the Committee did not say so in terms, this strongly suggests that what it had in mind was a Tribunal with jurisdiction in respect of UK copyrights, not foreign copyrights. The same goes for its recommendation in paragraph 215 that “Once tariffs or charges had been fixed by the Tribunal, and the appropriate fee paid or tendered to the collecting society no person should be liable for an action for infringement on that account ...”. It does not necessarily follow, however, that the legislation was so restricted.

The jurisdiction of the PRT under the Copyright Act 1956

32. The PRT was established, with effect from 5 November 1956, by section 23 of the Copyright Act 1956.
33. The jurisdiction of the Tribunal was set out in section 24 of the 1956 Act as follows:

“(1) Subject to the provisions of this Part of this Act, the function of the tribunal shall be to determine disputes arising between licensing bodies and persons requiring licences, or organisations claiming to be representative of such persons, either—

 - (a) on the reference of a licence scheme to the tribunal, or

- (b) on the application of a person requiring a licence either in accordance with a licence scheme or in a case not covered by a licence scheme.
- (2) In this Part of this Act ‘licence’ means a licence granted by or on behalf of the owner, or prospective owner, of the copyright in a literary, dramatic or musical work, or in a sound recording or a television broadcast, being—
- (a) in the case of a literary, dramatic or musical work, a licence to perform in public, or to broadcast, the work or an adaptation thereof, or to cause the work or an adaptation thereof to be transmitted to subscribers to a diffusion service;
 - (b) in the case of a sound recording, a licence to cause it to be heard in public, or to broadcast it;
 - (c) in the case of a television broadcast, a licence to cause it, in so far as it consists of visual images, to be seen in public and, in so far as it consists of sounds, to be heard in public.
- (3) In this Part of this Act ‘licensing body’ —
- (a) in relation to such licences as are mentioned in paragraph (a) of the last preceding subsection, means a society or other organisation which has as its main object, or one of its main objects, the negotiation or granting of such licences, either as owner or prospective owner of copyright or as agent for the owners or prospective owners thereof;
 - (b) in relation to such licences as are mentioned in paragraph (b) of the last preceding subsection, means any owner or prospective owner of copyright in sound recordings, or any person or body of persons acting as agent for any owners or prospective owners of copyright in sound recordings in relation to the negotiation or granting of such licences; and
 - (c) in relation to such licences as are mentioned in paragraph (c) of the last preceding subsection, means the Corporation or the Authority or any organisation appointed by them, or either of them, in accordance with the provisions of the Fifth Schedule to this Act:

Provided that paragraph (a) of this subsection shall not apply to an organisation by reason that its objects include the negotiation or granting of individual licences, each relating to a single work or the works of a single author,

if they do not include the negotiation or granting of general licences, each extending to the works of several authors.

- (4) In this Part of this Act ‘licence scheme’, in relation to licences of any description, means a scheme made by one or more licensing bodies, setting out the classes of cases in which they, or the persons on whose behalf they act, are willing to grant licences of that description, and the charges (if any), and terms and conditions, subject to which licences would be granted in those classes of cases; and in this subsection ‘scheme’ includes anything in the nature of a scheme, whether described therein as a scheme or as a tariff or by any other name.

...”

34. PRSfM contend that, by using the expression “a licence ... of the copyright” in section 24(2) of the 1956 Act, Parliament made it clear that the PRT had jurisdiction only over licences of UK copyright, because the word “copyright” was defined in section 1(1) as meaning (emphasis added):

“... the exclusive right, by virtue and subject to the provisions of this Act, to do, and to authorise other persons to do, certain acts in relation to that work *in the United Kingdom* or in any other country to which the relevant provision of this Act extends.”

(The reference to “any other country to which ... this Act extends” was a reference to (i) the Isle of Man, any of the Channel Islands, any colony or any other country in which Her Majesty had jurisdiction (ii) which had been designated by an Order in Council under section 31 of the 1956 Act.)

35. The BBC and BBW dispute this. They contend that the words “of the copyright” in section 24(2) went together with the words “the owner or prospective owner”. Accordingly, they contend, section 24(2) of the 1956 Act imposed no geographical restriction on the scope of the licences over which the PRT had jurisdiction.
36. In my judgment PRSfM’s construction of section 24(2) is the correct one. The definition of “licence” as a “licence granted by or on behalf of the owner, or prospective owner, of the copyright” plainly means a licence of the copyright as defined in section 1(1). The suggestion that the words “of the copyright” go together with the words “owner or prospective owner” does not alter this, because the only licence which the owner or prospective owner of the copyright could be granting is a licence of that copyright. That is why the remainder of section 24(2) went on to refer to licences of various acts restricted by (UK) copyright.

The Whitford Report

37. The Committee to Consider the Law on Copyright and Designs chaired by Whitford J considered the PRT in Chapter 16 of its Report which was presented to Parliament in March 1977. The Committee recommended that the jurisdiction of the PRT should be expanded in various respects, and that its name should be changed to the Copyright

Tribunal to reflect this. There was no suggestion that the jurisdiction of the Copyright Tribunal should be extended to licences of foreign copyrights. On the contrary, similarly to its predecessor, the Committee drew attention in paragraph 763 of its Report to a statement inserted at the instance of the United Kingdom delegation in the report of the Stockholm conference to revise the Berne Convention in 1967 that “questions of public policy should always be a matter for domestic legislation and that the countries of the Union would therefore be able to take all necessary measures to restrict possible abuse of monopolies”. The Committee’s recommendations formed the basis for the provisions contained in the 1988 Act as originally enacted.

The jurisdiction of the Copyright Tribunal under the 1988 Act as originally enacted

38. On 1 August 1989, when the 1988 Act came into force, the PRT was “renamed the Copyright Tribunal”: see section 145(1) of the 1988 Act.
39. The provisions concerning the Copyright Tribunal were (and still are) contained in Chapter VIII of Part I of the 1988 Act. The Tribunal’s jurisdiction was (and is) exhaustively set out in section 149, which stated (and states) that the Tribunal “has jurisdiction to hear and determine proceedings under” the statutory provisions listed in that section. These include (so far as relevant for present purposes) “(a) section 118, 119 and 120 (reference of licensing scheme)” and “(c) sections 125, 126 or 127 (reference or application with respect to licensing by licensing body)”. As this indicates, there are separate provisions for disputes concerning licensing schemes on the one hand and licences on the other hand.
40. Section 116 of the 1988 Act as originally enacted contained the following definitions:
 - “(1) In this Part a ‘licensing scheme’ means a scheme setting out—
 - (a) the classes of case in which the operator of the scheme, or the person on whose behalf he acts, is willing to grant copyright licences, and
 - (b) the terms on which licences would be granted in those classes of case;and for this purpose a “scheme” includes anything in the nature of a scheme, whether described as a scheme or as a tariff or by any other name.
 - (2) In this Chapter a ‘licensing body’ means 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.
 - (3) In this section ‘copyright licences’ means licences to do, or authorise the doing of, any of the acts restricted by copyright....”

41. The BBC and BBCW point out that section 116(3) defined (and still defines) the term “copyright licences” solely for the purposes of section 116, and that that term did not (and does not) appear in the index of defined expressions in section 179.

42. Section 117 of the 1988 Act as originally enacted provided as follows:

“Sections 118 to 123 (references and applications with respect to licensing schemes) apply to—

(a) licensing schemes operated by licensing bodies in relation to the copyright in literary, dramatic, musical or artistic works or films (or film sound-tracks when accompanying a film) which cover works of more than one author, so far as they relate to licences for—

(i) copying the work,

(ii) performing, playing or showing the work in public, or

(iii) broadcasting the work or including it in a cable programme service;

(b) all licensing schemes in relation to the copyright in sound recordings (other than film sound-tracks when accompanying a film), broadcasts or cable programmes, or the typographical arrangement of published editions; and

(c) all licensing schemes in relation to the copyright in sound recordings, films or computer programs so far as they relate to licences for the rental of copies to the public;

and in those sections ‘licensing scheme’ means a licensing scheme of any of those descriptions.”

43. Section 124 of the 1988 Act as originally enacted provided as follows:

“Sections 125 to 128 (references and applications with respect to licensing by licensing bodies) apply to the following descriptions of licence granted by a licensing body otherwise than in pursuance of a licensing scheme –

(a) licences relating to the copyright in literary, dramatic, musical or artistic works or films (or film sound-tracks when accompanying a film) which cover works of more than one author, so far as they authorise –

(i) copying the work,

(ii) performing, playing or showing the work in public, or

- (iii) broadcasting the work or including it in a cable programme service;
- (b) any licence relating to the copyright in a sound recording (other than a film sound-track when accompanying a film), broadcast or cable programme, or the typographical arrangement of a published edition; and
- (c) all licences in relation to the copyright in sound recordings, films or computer programs so far as they relate to the rental of copies to the public;

and in those sections a ‘licence’ means a licence of any of those descriptions.”

44. Section 1(1) of the 1988 Act provided (and still provides) that “Copyright is a property right which subsists in accordance with this Part in the following descriptions of work ...”. Then as now, section 16(1) of the 1988 Act provided that the owner of the copyright in a work has the exclusive right to do various acts “in the United Kingdom”. PRSfM contend that, by using the expression “licensing schemes ... in relation to the copyright in” in section 117 and “licence(s) relating to (in relation to) the copyright in” in section 124 of the 1988 Act as originally enacted, Parliament made it clear that the Copyright Tribunal only had jurisdiction over licensing schemes for, and licences of, UK copyrights.
45. The BBC and BBW dispute this. Although some of their arguments replicate arguments they advance in relation to the current provisions which are considered below, a specific point which they make in relation to the 1988 Act as originally enacted is that neither section 117 nor section 124 used the expression “copyright licences” defined in section 116(3). They contend that, given the careful and precise drafting of these provisions, this must have been deliberate, and that it indicates that the draughtsman was not limiting the geographical scope of the acts licensed pursuant to sections 117 and 124, in contrast to sections 16(1) and 116(3), which they accept are limited to the UK.
46. I do not accept this argument. In the first place, it overlooks the fact that the definition of “licensing scheme” in section 116(1)(a) refers to “copyright licences” as defined in section 116(3) and thus, by the BBC and BBCW’s own admission, is limited to licensing schemes relating to UK copyrights. It must follow that section 117 is limited to licensing schemes relating to UK copyrights. If “licensing schemes ... in relation to the copyright in” in section 117 are limited to UK copyrights, then there is no reason to construe “licence(s) relating to (in relation to) the copyright in” in section 124 any differently. On the contrary, the index of defined expressions in section 179 states that “copyright (generally)” is defined in section 1. It follows that “copyright” in both section 117 and section 124 bears the same meaning as it does throughout the rest of Part I of the 1988 Act, namely as referring to UK copyright as defined in sections 1(1) and 16(1). Consistently with this, the wording of subsection (a) in both section 117 and section 124 tracks the wording of sub-subsections 16(1)(a), (c) and (d). This confirms that that the acts in question are those restricted by UK copyright.

47. On 26 November 1996 the Secretary of State made the Copyright and Related Rights Regulations 1996 which came into force on 1 December 1996. The 1996 Regulations were made under section 2(2) of the European Communities Act 1972 to give effect to three European Directives:
- i) Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (“the Rental Directive”);
 - ii) Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (“the Satellite and Cable Directive”); and
 - iii) Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights (“the Term Directive”), so far as not already implemented by the Duration of Copyright and Rights in Performances Regulations 1995.
48. None of these Directives was in any way concerned with the territorial jurisdiction of the Copyright Tribunal. The Rental Directive required amendments to the substantive copyright law of the UK which were made in regulations 10-14 of the 1996 Regulations, headed “Rental and lending right”. These amendments created new restricted acts of rental and lending. At the end of that group of regulations, regulation 15 provided for “Consequential modification of provisions relating to licensing”. This regulation substituted new versions of sections 117 and 124 of the 1988 Act in the following terms:
- “117. Sections 118 to 123 (references and applications with respect to licensing schemes) apply to licensing schemes which are operated by licensing bodies and cover works of more than one author, so far as they relate to licences for—
- (a) copying the work,
 - (b) rental or lending of copies of the work to the public,
 - (c) performing, playing or showing the work in public, or
 - (d) broadcasting the work or including it in a cable programme service;
- and references in those sections to a licensing scheme shall be construed accordingly.
124. 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) broadcasting the work or including it in a cable programme service;

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

49. If the 1996 versions of sections 117 and 124 are compared with the 1988 versions, it can be seen that there are two main differences. First, rental and lending are now included in the list of restricted acts to which licensing scheme and licences may relate. Secondly, the definitions have been equalised in the sense that they now extend equally to the specified restricted acts in relation to all types of works. This appears to me to have been a simplification in drafting with no intended substantive effect except to make it clear that section 117 only applied to licensing schemes operated by licensing bodies regardless of the type of work (cf. section 117(b) and (c) as originally enacted).
50. There is nothing in the 1996 Regulations, or in the Explanatory Memorandum which accompanied them, to suggest that regulation 15 was intended to expand the territorial jurisdiction of the Copyright Tribunal.

The 2003 amendments to the 1988 Act

51. On 27 September 2003 the Secretary of State made the Copyright and Related Rights Regulations 2003 which came into force on 31 October 2003. The 2003 Regulations were made under section 2(2) of the 1972 Act primarily to give effect to another European Directive, European Parliament and Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related in the information society. Regulation 6 amended sections 16(1) and 20 of the 1988 Act to create a new restricted act of communication to the public. Schedule 3, entitled “Consequential amendments”, paragraph 4(4) substituted “(d) communication to the public” in both section 117 and section 124 for the previous subsection (d).

The 2016 amendments to the 1988 Act

52. On 24 February 2016 the Secretary of State made the Collective Management of Copyright (EU Directive) Regulations 2016 which came into force on 10 April 2016. The 2016 Regulations were made under section 2(2) of the 1972 Act to give effect to another European Directive, European Parliament and Council Directive 2014/26/EU of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (“the CMO Directive”).
53. Regulation 44 of the 2016 Regulations amended section 116(2) of the 1988 Act by inserting a new paragraph (b) so that section 116(2) now provides:

“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.”

54. Regulation 2 of the 2016 Regulations defines a “collective management organisation” as meaning an organisation which:

- “(a) is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one right holder, for the collective benefit of those right holders, as its sole or main purpose; and
- (b) is either owned or controlled by its members or is organised on a not for profit basis, or both”.

55. I will consider the effect of this amendment below. At this stage, I note that the definition in regulation 2 closely follows the definition of “collective management organisation” in Article 3(a) of the CMO Directive and that Article 2(1) of the CMO Directive provides that most of the provisions of the Directive “apply to all collective management organisations established in the Union”.

The Copyright Tribunal’s jurisdiction

56. PRSfM rely upon a series of arguments as leading to the conclusion that section 124 (and hence section 126) confers no jurisdiction on the Copyright Tribunal in respect of licences of foreign copyrights. The BBC and BBCW rely upon a series of arguments as leading to the opposite conclusion. I will consider these various arguments in turn.

The statutory language

57. PRSfM contend that the proper interpretation of the word “licences” in section 124 of the 1988 Act in its current form is that it refers to licences of UK copyright. Section 124 only extends to licences “so far as they authorise” “copying”, “rental and lending”, “performing” etc and “communication to the public” of the work. Like “copyright”, these are statutory terms of art: section 179 of the 1988 Act states that “communication to the public”, “copy and copying”, “lending”, “performance” and “rental” are defined in sections 20, 17, 18A(2)-(6), 19(2) and 18A(2)-(6) respectively. Those provisions are cross-referred to in section 16(1) of the 1988 Act, which defines the “acts restricted by the copyright” as “acts in the United Kingdom”.

58. Furthermore, PRSfM contend that this interpretation is supported by two other features of the current statutory scheme. First, PRSfM say that it is clear that section 117 only extends to “licensing schemes” relating to UK copyrights. This is because, as discussed above, section 116(1) defines a “licensing scheme” for this purpose by reference to

“copyright licences” and section 116(3) defines those as “licences to do or authorise the doing of, any of the acts restricted by copyright”, that is to say, the acts listed in section 16(1), which are restricted to acts “in the United Kingdom”. PRSfM submit that it would make no sense for section 117 to be confined to licensing schemes concerning UK copyrights, but for section 124 to extend to licences of foreign copyrights.

59. Secondly, PRSfM contend that their interpretation of section 124 is supported by section 128(1) of the 1988 Act, which provides:

“Where the Copyright Tribunal has made an order under section 125 or 126 and the order remains in force, the person entitled to the benefit of the order shall if he—

(a) pays to the licensing body any charges payable in accordance with the order or, if the amount cannot be ascertained, gives an undertaking to pay the charges when ascertained, and

(b) complies with the other terms specified in the order,

be in the same position as regards infringement of copyright as if he had at all material times been the holder of a licence granted by the owner of the copyright in question on the terms specified in the order.”

PRSfM contend that the reference to “infringement of copyright” must be a reference to UK copyright: as discussed above, “copyright” is defined in sections 1(1) and 16(1) as a right to do acts “in the United Kingdom”.

60. The BBC and BBCW reply to these arguments as follows. So far as the wording of section 124 is concerned, counsel for the BBC and BBCW submitted in paragraph 20 of the BBC and BBCW’s skeleton argument as follows:

“Unlike s. 116(3), ‘licences’ in s. 124 are *not* limited to doing or authorising the doing of ‘any of the acts restricted by copyright’; and unlike s. 16(1), the authorisation provided for in s. 124 is *not* geographically limited to acts done in the United Kingdom.”

61. I asked counsel for the BBC and BBCW whether section 124 extended to licences of works which either had always been in the public domain or the copyright in which had expired through effluxion of time. As he immediately appreciated, that would involve a licence of acts that do not require a licence. He submitted that in practice the point would not arise, but nevertheless accepted that section 124 was limited to licences of copyright works (but not necessarily UK copyrights). Later in his submissions, however, he resiled from that acceptance, and said that he had no position as to whether the Copyright Tribunal had jurisdiction over licensed acts which did not require a licence: it was a hypothetical question which did not arise in the present case.
62. In my judgment it is plain that section 124 can only apply to licences to do acts which require a licence because they are restricted by copyright. Accordingly, I do not accept the first submission in paragraph 20 of the BBC and BBCW’s skeleton argument. As

to the second submission, it is correct that section 124 does not explicitly refer to acts in the United Kingdom. Once it is appreciated that section 124 only applies to acts which require a licence because they are restricted by copyright, however, then it is obvious that the restriction must arise from UK copyright. As discussed above, this is confirmed by the use of the defined terms which denote the various restricted acts, which takes one back to section 16(1). I do not consider that it is significant, as the BBC and BBCW argue, that section 124 does not use the expression “copyright licences” defined in section 116(3).

63. As to the relationship between section 117 and section 124, counsel for the BBC and BBCW submitted that there was no anomaly of the kind suggested by PRSfM on the BBC and BBCW’s interpretation, because section 117 extended to licensing schemes relating to foreign copyrights. The reason he gave for this was the same as in relation to section 124, namely the absence of any restriction to acts in the UK.
64. The difficulty with this argument is that it provides no answer to PRSfM’s point that section 117 applies to “licensing schemes”, that section 116(1) defines “licensing schemes” by reference to “copyright licences”, that section 116(3) defines “copyright licences” by reference to “the acts restricted by copyright” and that (as the BBC and BBCW accept) the “acts restricted by copyright” are those specified in section 16(1), which are limited to acts in the UK. It is therefore clear that section 117 is confined to licensing schemes relating to UK copyrights. I agree with PRSfM that it would be highly anomalous if section 124 extended to licences of foreign copyrights when section 117 is restricted to UK copyrights.
65. Turning to section 128(1), counsel for the BBC and BBCW accepted that this only provided a defence to a claim for infringement of UK copyright and that Parliament would not have purported to try to control foreign courts seized with proceedings for infringements of foreign copyrights. He nevertheless submitted that an order of the Copyright Tribunal under section 126 extending a licence on the same or varied terms would be taken into account by a foreign court.
66. I do not accept this. The starting point for most foreign courts would be Article 5(2) of the Berne Convention, which provides that “the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed by the laws of the country where protection is claimed”, which is properly interpreted as being the laws of the country in respect of which protection is claimed (the *lex loci protectionis*). Accordingly, the foreign court would apply its own law to a claim for infringement of copyright conferred by that law. Section 126 provides for a non-consensual extension of a copyright licence to be imposed by the Copyright Tribunal on a copyright owner. Why should the foreign court treat such an order as affording the beneficiary of that order a defence to a claim for infringement of the local copyright, particularly when it is conceded that section 128(1) does not have that effect? In my judgment an order under section 126 would be very unlikely to provide the beneficiary with a defence to claims for infringement of foreign copyrights brought in the respective foreign courts. That being so, it is difficult to see why section 126 should be interpreted as conferring jurisdiction over licences of foreign copyrights, because there would be a real risk of the Tribunal wasting its time in dealing with such licences.
67. Counsel for Sky suggested that the licensee in such a case could obtain an anti-suit injunction from the English courts restraining proceedings by the copyright owner in

the foreign court. He offered no analysis in support of this suggestion, nor did he cite any authority. At present I cannot see any basis for an English court granting such an injunction in circumstances where it is conceded that section 128(1) does not apply.

The presumption against extraterritoriality

68. PRSfM contend that the presumption against extraterritoriality means that the 1988 Act is presumed not to regulate matters outside the UK unless the contrary intention appears.

69. In *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153 Lord Rodger of Earlsferry (with whom Baroness Hale of Richmond and Lord Carswell agreed and Lord Brown of Easton-under-Heywood concurred) stated the relevant principles as follows:

“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. ...

48. Even in the case of British citizens, a court may readily infer that legislation is not intended to apply to them outside the United Kingdom. See *Maxwell on the Interpretation of Statutes*, 12th ed, p 171:

‘In the absence of an intention clearly expressed or to be inferred either from its language, or from the object or subject-matter or history of the enactment, the presumption is that Parliament does not design its statutes to operate on its subjects beyond the territorial limits of the United Kingdom.’

In *Tomalin v S Pearson & Son Ltd* [1909] 2 KB 61, 64, Cozens-Hardy MR approved an earlier version of this statement. The court held that the Workmen's Compensation Act 1906 did not apply where a workman, employed by a British company, had been killed in the course of his employment in Malta. Leaving aside the rule of construction, various provisions of the Act indicated that it was only intended to apply in certain specific circumstances outside the United Kingdom.

49. Again, this rule of construction has to be seen against the background of international law. One state is bound to respect the territorial sovereignty of another state. So, usually, Parliament will not mean to interfere by legislating to regulate the conduct of its citizens in another state. Such legislation would usually be unnecessary and would often be, in any event, ineffective. But sometimes Parliament has a legitimate interest

in regulating their conduct and so does indeed intend its legislation to affect the position of British citizens in other states. For example, section 72 of the Sexual Offences Act 2003 makes certain nasty sexual conduct in other countries an offence under English law. So, if the words of a statute are open to more than one interpretation, whether or not it binds British citizens abroad “seems to depend ... entirely on the nature of the statute”: *Maxwell on the Interpretation of Statutes*, p 169.”

70. PRSfM contend that there is nothing in the language, object, subject-matter or history of section 124 of the 1988 Act to displace the presumption that Parliament did not intend it to operate beyond the territorial limits of the UK.
71. The BBC and BBCW contend that there is no, or only a weak presumption, against the subject-matter jurisdiction of the Copyright Tribunal extending beyond the UK, because of the way in which the *in personam* jurisdiction of the Tribunal is limited. Whether under section 117 or under section 124, the Copyright Tribunal only has jurisdiction over licensing schemes operated, and licences granted, by licensing bodies as defined in section 116. In order to fall within paragraph (a) of the definition (which was the whole definition prior to the 2016 amendments), an organisation must have as its main object, or one of its main objects, “the negotiation or granting ... of copyright licences”. As discussed above, it is common ground that the definition of “copyright licences” in section 116(3) is restricted to licences of UK copyrights.
72. The BBC and BBCW point out that it follows that, in order to be a licensing body for the purposes of sections 117 and 124 on the basis of paragraph (a) of the definition, the organisation must have as one of its main objects the granting of licences of UK copyrights. In the present case, there is no dispute that both MCPS and PRS are both English companies and organisations which have as one of their main objects the granting of licences of UK copyrights. In those circumstances the BBC and BBCW argue that there is no, or only a weak presumption, that the subject-matter jurisdiction of the Copyright Tribunal under sections 117 and 124 does not extend to licences of foreign copyrights granted by such licensing bodies.
73. Counsel for the BBC and BBCW acknowledged that paragraph (b) of the definition was not limited in the same way, but he submitted that it must be limited to organisations established in the EU in accordance with Article 2 of the CMO Directive and that this modest expansion of the Copyright Tribunal’s *in personam* jurisdiction in 2016 did not undermine the point that it was primarily concerned with organisations which were mainly engaged in licensing UK copyrights.
74. I am not persuaded by this argument. On the contrary, the limit on the *in personam* jurisdiction of the Copyright Tribunal contained in section 116(2)(a) appears to me to be entirely consistent with the presumption that Parliament does not intend to regulate conduct outside the UK (and section 116(2)(b) does not make any difference to this). Moreover, I agree with PRSfM that there is nothing to displace that presumption.
75. A further point raised by counsel for the BBC and BBCW in connection with section 116(2)(b) was that he argued that it confirmed that the Copyright Tribunal must be taken to have jurisdiction over licences of foreign copyrights. The basis for this argument is that Article 23 of the CMO Directive requires Member States to ensure that

collective management organisations established in their territory “comply with the requirements of [Title III] when granting multi-territorial licences for online rights in musical works”. Nothing in Title III requires the Copyright Tribunal to have jurisdiction over licences of foreign copyrights, however. Article 34(2) in Title IV provides that Member States shall ensure, for the purposes of Title III, that certain types of disputes “relating to a collective management organisation established in their territory which grants or offers to grant multi-territorial licences for online rights in musical works can be submitted to an independent and impartial dispute resolution procedure”. Article 35(1) provides that Member States shall ensure that disputes between collective management organisations and users “concerning, in particular, existing and proposed licensing conditions ... can be submitted to a court, or if appropriate, to another independent and impartial dispute resolution body where that body has expertise in intellectual property law”. Article 34(2) does not require jurisdiction to be conferred on the Copyright Tribunal, however, while Article 35(1) does not require the Copyright Tribunal’s jurisdiction to extend to foreign copyrights.

76. The final point which I need to address in this context is the reliance by the BBC and BBCW upon a series of three decisions of the House of Lords and Supreme Court concerning the jurisdiction of Employment Tribunals: *Lawson v Serco Ltd* [2006] UKHL 3, [2006] ICR 250; *Duncombe v Secretary of State for Children Schools and Families (No 2)* [2011] UKSC 36, [2011] ICR 1312; and *Ravat v Halliburton Manufacturing & Services Ltd* [2012] UKSC 1, [2012] 2 All ER 906. I agree with PRSfM that these decisions are of little assistance. The jurisdictional provisions of the Employment Rights Act 1996 do not contain any geographical limitation, yet it is plain that some limitation must be implied. Accordingly, the courts have had to work out as best they can what the territorial reach of those provisions is. In the present case, however, the relevant provisions do contain words which can be interpreted, and in my judgment should be interpreted, as imposing a territorial limit on the Copyright Tribunal’s jurisdiction.

The legislative history

77. PRSfM contend that, as discussed above, it is clear that neither the PRT under the 1956 Act nor the Copyright Tribunal under the 1988 Act as originally enacted had jurisdiction over foreign copyrights. For the reasons I have given above, I agree with this.
78. The Tribunal in its decision did not articulate any view as to the jurisdiction of the Copyright Tribunal under the 1956 Act or the 1988 Act as originally enacted. It nevertheless expressed the opinion at [35] that it was “highly unlikely that very substantial amendments would be made to the wording of section 124 [by the 1996 Regulations] with the intention that its meaning would remain substantively the same”. The difficulty with this statement is that it is clear that the amendments to section 124 in 1996 were intended to extend the Copyright Tribunal’s jurisdiction to licences of rental and lending. Thus there is no question of the meaning of section 124 having remained the same.
79. The real question is whether the concomitant re-drafting of section 124 was intended to change the territorial jurisdiction of the Copyright Tribunal. In this regard PRSfM rely upon the presumption that the law should not be subject to casual change. This principle is stated in *Bennion on Statutory Interpretation* (7th ed) as follows:

“Section 26.8: Law should not be subject to casual change

- (1) It is a principle of legal policy that law should be altered deliberately rather than casually, and that Parliament should not change either common law or statute law by a sidewind, but only by measured and considered provisions. In the case of common law, or Acts embodying common law, the principle is somewhat stronger than in other cases. It is also stronger the more fundamental the change is.
- (2) The court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle. The court should therefore strive to avoid adopting a construction which involves accepting that Parliament contravened the principle.”

80. The Tribunal in its decision stated at [36(2)] that:

“That the term [‘copyright licences’] is not used in section 124, and is restricted to section 116, suggests that 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.”

81. If the Tribunal was suggesting that section 124 was amended in 1996 to remove a reference to “copyright licences”, that is inaccurate. As can be seen from paragraph 43 above, section 124 as originally enacted did not employ the expression “copyright licences”. Rather, it used the expression “licence(s) relating (in relation) to the copyright”. For the reasons I have given above, I consider that the original language only conferred jurisdiction over licences of UK copyrights. That being so, I agree with PRSfM that it should be presumed that Parliament did not intend to change the territorial scope of the Copyright Tribunal’s jurisdiction over licences by a sidewind simply as a result of the re-drafting of section 124 in 1996, there being nothing in the new wording to suggest any such intention. That is particularly so when section 117 was re-drafted in a similar manner in 1996, and yet it is clear for the reasons discussed above that the Copyright Tribunal’s jurisdiction over licensing schemes remained restricted to UK copyrights.

The vires of the 1996 Regulations

82. PRSfM contend that, assuming that the Copyright Tribunal did not have jurisdiction over licences of foreign copyrights prior to the 1996 amendments, then regulation 15 of the 1996 Regulations would be *ultra vires* if it were interpreted as conferring such jurisdiction. Section 2(2) of the 1972 Act, under which the 1996 Regulations were made, empowers only changes which “naturally arise from or closely relate to the primary purpose being achieved”: *Oakley Inc v Animal Ltd* [2005] EWCSA Civ 1191, [2006] Ch 337 at [39] (Waller LJ). It requires a “close link to the relevant obligation or right”: *United States of America v Nolan* [2015] UKSC 63, [2016] AC 463 at [61] (Lord Mance). None of the Rental Directive, the Satellite and Cable Directive or the Term Directive concerned the territorial jurisdiction of the Copyright Tribunal at all,

however. The courts should not adopt an interpretation of delegated legislation that would render it *ultra vires*: *R v O'Brien* [1985] 1 WLR 464 at 469 (Hobhouse J).

83. In my view this argument adds little to the previous one. The essential point is that there is no reason to believe that the amendments in 1996 were intended to enlarge the territorial scope of the Copyright Tribunal's jurisdiction.

The jurisdiction of the courts

84. PRSfM point out that, at the time of the making of the 1996 Regulations, the courts of England and Wales were understood to lack subject-matter jurisdiction to entertain an action for infringement of a foreign copyright: see *Lucasfilm Ltd v Ainsworth* [2011] UKSC 39, [2012] 1 AC 208 at [50]-[100] (Lord Walker of Gestingthorpe and Lord Collins of Mapesbury). Against that background, PRSfM contend that it would have required very clear words to create a statutory tribunal with jurisdiction to set terms for licences of foreign copyrights, of which there are none.
85. Again, in my view this argument adds little to the argument based on the presumption against casual change in the law. The essential point is the same.

Curbing monopoly power

86. It is common ground that the policy behind the establishment of the PRT and its transformation into the Copyright Tribunal was to curb the monopoly power of the collecting societies. The BBC and BBCW contend, and the Tribunal agreed, that this policy supported a construction of the relevant provisions as conferring jurisdiction in respect of the foreign copyrights. The Tribunal expressed the point in its decision at [40] as follows:

“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.”

87. In my judgment there are three problems with this reasoning. The first is that, while collecting societies such as MCPS and PRS undoubtedly occupy a monopoly position with respect to UK copyrights, the same is not true of foreign copyrights.
88. The second and third problems are highlighted by a previous decision of the Copyright Tribunal which is also relevant to Sky's alternative argument, namely *Meltwater Holding BV v Newspaper Licensing Agency Ltd* (unreported, Copyright Tribunal, 14 February 2012). In that case Meltwater referred a licensing scheme for media monitoring rights promulgated by the NLA comprising two licences known as the WDL and the WEUL to the Tribunal under section 119 of the 1988 Act. The WDL was a licence which would be granted to a user like Meltwater, while the WEUL was a licence for its customers. The NLA's position was that the licences granted by the scheme were worldwide and that Meltwater's foreign customers would have to enter into the WEUL to receive links to UK newspapers from Meltwater. Meltwater disputed this, and contended that the NLA could only justify the need for users to enter into the WEUL by reference to UK copyright law.
89. The Tribunal, which was chaired by HHJ Birss QC, as he then was, dealt with this issue as follows:
- “251. We have found this territorial dispute to be a difficult one to resolve. Neither party suggested that it fell outside our jurisdiction. We can see that the fact the jurisdiction of the Copyright Tribunal is a UK jurisdiction under the 1988 Act does not mean that this dispute falls outside our jurisdiction. The licensing scheme is properly before us and we are required to rule on it. Nationally negotiated licences often have clauses which are extra-territorial in effect in various ways and we need to consider them in this case. However the basis on which we are doing so is that they are part of a licence of UK copyright. The members of the Tribunal sit as persons either with experience in UK copyright law or with lay, UK based, experience. We do not purport to have relevant experience outside the UK.
252. On the material before us, we are not in a position to rule on US copyright law or any other foreign copyright law even if such a ruling was required. On the material available it seems to us that we can say this much. It is clear that it is not clear. We believe the correct position as things stand before us is that a willing licensee in the position of Meltwater and a willing licensor in the position of the NLA would look at the matter in the following way. Given that end users in the UK need a licensee under UK copyright, there are likely to be some countries in which local end users will need the newspaper's permission under the newspaper's local copyright to receive and use Meltwater's service when it includes UK content. Equally however there may well be other countries in which local end users do not need the newspaper's permission under the newspaper's local copyright to receive and use Meltwater's service when it includes UK content.
- ”

253. It seems to us in the circumstances before us that a willing licensor would see the force in a willing licensee's desire not to have the WEUL imposed on its customers in a given country if they did not need it. Equally it seems to us that a willing licensee would see the force in a willing licensor's desire not to over-complicate the licensing provisions. These competing factors are a reason why some businessmen agree to licences expressed simply as worldwide licences with a blanket royalty to be paid whereas in other cases licences are broken down by territory such that a royalty is only paid for acts in territories in which the licensor actually has relevant rights. We also believe a willing licensee would accept as legitimate a willing licensor's wish to counter avoidance.

...

256. We have decided that it would not be reasonable to treat foreign users of the service licensed by the WDL in the same way as UK end users. Willing parties negotiating the WDL would know that it cannot be assumed that the position in the UK is the same elsewhere and they would also know that in a foreign country, UK newspaper content will not necessarily have the same value as it has from the point of view of UK end users.

257. We have decided that terms on the following basis would be reasonable:

i) The WEUL is and will remain a worldwide licence. The permission given to licensees under the WEUL is not limited by territory. A licensee who enters the WEUL pays the royalty set in the WEUL regardless of the territory in which the acts take place.

...

iii) A service provider entering the WDL will have a choice either to take a worldwide permission and thereby require all its users receiving NLA content to enter WEUL or to take UK permission only and thereby only require its UK users to enter the WEUL. It is a matter for the service provider entering the WDL to choose. ...

258. Part of the point of these requirements is to avoid the automatic imposition of the WEUL on a party who may not need it and does not want it. The WEUL is not unreasonable in the UK context but it is not trivial. If the PWA wishes to operate on the basis that all its foreign customers have to sign the WEUL, they are able to do so. On that basis all its customers have permission worldwide. If the PWA wishes to operate on the footing that it only has permission under UK copyright then it can do so but that means its foreign end users have no automatic permission

applicable in their home country in relation to the UK content either. If permission is in fact needed in that home country then steps can be taken to sort that out. A foreign end user of LA content obtained from a service provider under the WDL would be free to enter the WEUL if they wished. For a given state the NLA may be able to persuade the end users to enter the WEUL. On the other hand it would not be reasonable to impose on a foreign end user a licence settled in the UK. It may or may not be reasonable from the local foreign point of view. If it is not, the state may have its own mechanisms for regulating the reasonableness of what would be a licence under local copyright.”

90. The Tribunal made two important points in this passage which are relevant here. The first, which the Tribunal made at [251], is that the Copyright Tribunal is a specialist tribunal whose expertise lies in the field of UK copyright. It does not possess any expertise with respect to foreign copyrights. The second, which the Tribunal made at [258], is that the regulation of licence schemes and licences offered by licensing bodies is a matter for the law and policy of each of the states in which the copyrights subsist. This is the same point which the UK delegations made at the Brussels and Stockholm conferences to revise the Berne Convention and which was picked up in the Gregory Report and the Whitford Report. To put the same point another way, as a matter of comity, a UK statutory tribunal should not interfere with the regulation of copyrights in other states. Certainly, it should not do so in the absence of a clear statutory mandate.
91. Accordingly, I conclude that consideration of the policy behind the establishment of the Copyright Tribunal supports PRSfM’s interpretation of section 124, and not the BBC and BBCW’s interpretation.

Practicality

92. The BBC and BBCW contend, and the Tribunal agreed, that considerations of practicality support the BBC and BBCW’s interpretation of section 124. The Tribunal expressed the point in its decision as follows:
 - “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, 7th 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.*')"
93. I agree with the Tribunal that, in construing the 1988 Act, it is proper to take into account the practical consequences of the rival interpretations. I also agree that it would be more convenient for the Tribunal to be able to consider licences of the kind in issue in the present case as a whole rather than have to dissect them into UK and non-UK components. The convenience of considering them as a whole should not be overstated, however. None of the licences in issue were global licences. The DVD Licence and the DTO Licence are both focussed on North America. Thus comparable licences would also need to be focussed on North America if the Tribunal were to make a like-for-like comparison for royalty-setting purposes. Moreover, the Tribunal would need to have regard to the North American context and market. In previous cases, the Tribunal has

found considerable difficulty in using foreign licences as comparables to UK licences: see e.g. *Association of Independent Radio Companies Ltd v Phonographic Performance Ltd* [1993] EMLR 181 at 221-222 and *British Sky Broadcasting Ltd v Performing Right Society Ltd* [1998] EMLR 193 at [10.1]-[10.7]. Some of these difficulties related to the fact that the comparison was not a like-for-like one, but some of them related to the fact that the Tribunal had difficulty in assessing the foreign context and market.

94. In any event, I do not agree that this is a case in which the relevant provisions are open to both interpretations, and thus considerations of practicality can be prayed in aid of the BBC and BBCW's interpretation. Accordingly, I consider that these considerations are more relevant to Sky's alternative argument.

Conclusion on the appeal

95. For the reasons given above, I conclude that the Copyright Tribunal does not have jurisdiction under section 124, and hence section 126, in respect of licences of foreign copyrights. That is not the end of the matter, however. It remains necessary to consider Sky's alternative argument.

Sky's alternative argument

96. Sky contends that, even if the Copyright Tribunal lacks formal jurisdiction in respect of licences of foreign copyrights, that did not prevent it from exercising jurisdiction with respect to the licences in issue in the present case.
97. The foundation for this argument is sections 126(4) and 135 of the 1988 Act. Section 126(4) requires the Copyright Tribunal, if it finds the application well founded, to make an order that the licensee shall continue to be entitled to the benefit of the licence "on such terms as the Tribunal may determine to be reasonable in the circumstances". Furthermore section 135 provides that the Tribunal is under a general obligation in any case "to have regard to all relevant considerations".
98. There has been a series of previous cases in which the Copyright Tribunal has faced difficulties arising out of limitations on its jurisdiction which have conflicted with its duty to have regard to all relevant considerations.
99. The first is *British Phonographic Industry Ltd v Mechanical-Copyright Protection Society Ltd (No 2)* [1993] EMLR 86, which concerned a reference under section 118 of the 1988 Act. In its decision the Tribunal (chaired by Robin Jacob QC, as he then was) said at 98-99 (footnotes omitted):

"In relation to jurisdiction it was also pointed out that Parliament seems to have created an odd situation. The restricted acts relevant to the activities of making and selling records are two-fold, namely copying the work (restricted by section 17) and issuing copies of the work to the public (restricted by section 18). The rights given by the sections can conveniently be labelled the 'copying right' and the 'distribution right' respectively. However section 117 says that sections 118-123 relate to licensing schemes 'so far as they relate to licences for ... copying

the work' and certain other restricted acts. There is no reference to the distribution right.

Accordingly, at first sight, it would be open to the MCPS to refuse to grant any licences under the distribution right save on its terms and outside the jurisdiction of this Tribunal. The MCPS could provide a scheme for manufacture only. Such a scheme would in effect be a licence only to fill warehouses with records or export them. This would make no commercial sense. The MCPS has sensibly not promulgated such a scheme. Its scheme provides for licences to manufacture records for retail sale.

The MCPS mildly suggests that the fact that two restricted acts are licensed by the scheme whereas under the statutory scheme only a reproduction right was in effect licensed should in itself result in an increased payment. It goes on to point out that, in the case of some major record companies who press their records in continental Europe, all it is in effect licensing in the UK is the distribution right and the making of the master recording where that occurs here; and, it says, that it is only because it, the MCPS, is a member of a wide international system with links with foreign copyright holders, that it is able to put forward a single comprehensive licensing scheme. Whilst this is true, we do not consider that it makes any difference to the questions we have to decide.

We think that the fact that the rate is a payment for the licence to carry out both forms of restricted act, and the system terms likewise relate to both forms of restricted act, means that we can look at the scheme as whole. The omission by Parliament of an express jurisdiction in relation to the distribution right makes no difference to the commercial issues raised in this reference. And commercial considerations are relevant as being part of all the circumstances of the case. In fact all the parties' evidence was founded on the basis that the distribution right was an inseparable part of one single licence and that its value was a matter for us to consider in connection with the associated copying right.”

100. It may be noted that, 27 years later, the lacuna in the Tribunal's jurisdiction which was identified in that case has still not been rectified. It is a matter for speculation, but perhaps the fact that the Tribunal provided a workable solution to the problem meant that it was felt that there was no need to legislate. I should also note that, although counsel for PRSfM observed that it should not be assumed that *BPI v MCPS* was correctly decided, he did not go so far as to submit that it was wrong.
101. The second case is *Phonographic Performance Ltd v British Hospitality Association* [2008] EWHC 2714 (Ch), [2008] RPC 7. In that case PPL had submitted to the Secretary of State pursuant to section 128A of the 1988 Act new schemes for the licensing of the public performance as background music of sound recording in public houses etc. The new schemes were “delivery system neutral”, in that they were not

limited to the licensing of broadcast sound recordings, but extended to all ways of playing background music in public. On a preliminary issue as to the scope of the Tribunal's jurisdiction under section 128A, the Tribunal held that it was limited to consideration of a licensing scheme in so far as it concerned the public performance of broadcast recordings and did not extend to other methods of using sound recordings.

102. Kitchin J, as he then was, allowed an appeal by the interested parties, holding as follows:

“23. Turning to s. 128A, subsection (1) makes clear it only applies to a proposed licence or licensing scheme that will authorise the playing in public of excepted sound recordings included in broadcasts. Similarly, subsection (2) requires the licensing body to notify the Secretary of State of the details of any such proposed licence or licensing scheme for excepted sound recordings before it comes into operation. Clearly the subsections exclude licensing schemes which do not authorise the playing in public of sound recordings included in broadcasts. But I believe their terms are cast in sufficiently general terms as to embrace delivery system neutral schemes which not only authorise the playing in public of excepted sound recordings included in broadcasts but also sound recordings delivered by other systems. Moreover, I see no warrant in the language to qualify the definition of licensing scheme and so permit a delivery system neutral scheme to be notionally divided into those portions which authorise the playing in public of excepted sound recordings included in broadcasts and those which authorise the playing in public of sound recordings exploited in other ways. On a natural reading of the subsections, the scheme must be notified as a whole, as happened in this case.

...

27. I believe the consequences of PPL's arguments are unsatisfactory in two further respects. First, in considering a delivery system neutral scheme the Tribunal would be required to divide the scheme into a licence to play sound recordings which are broadcast and a licence to play sound recordings which are not. Its jurisdiction to consider the scheme under s.128B would be limited to the former. Yet in exercising that jurisdiction it would inevitably have to assess the reasonableness of the licence fee for the playing of sound recordings on, for example, tapes and CDs and then compare it to the fee for the playing of broadcast sound recordings.

28. Second, I foresee real practical problems in the implementation of s.128B(4). This confers on the Tribunal a power to direct that its order, in so far as it reduces the amount of charges payable, has effect from a date before that on which it is made. It also provides that if such a direction is made then any necessary repayments to a licensee must be made in respect of charges

already paid. If the Tribunal were to make such a direction in relation to the schemes in issue in this case and if, as PPL contends, the jurisdiction of the Tribunal under s. 128B is limited to a consideration of such schemes only in so far as they relate to broadcast recordings, it would then have to try to apportion the single charge into a payment in respect of different forms of usage, a self evidently complex and difficult exercise.

29. In the light of these matters and despite the focus in s.128A(7) upon the broadcast of excepted sound recordings, I have reached the conclusion that the submission of the Interested Parties is to be preferred and that the Tribunal does have jurisdiction under s.128B to consider a delivery system neutral licensing scheme as a whole. ...”
103. Section 128A has subsequently been repealed, and so this problem no longer exists. Again, counsel for PRSfM did not submit that this decision was wrong.
104. The third case is *Meltwater*, which I considered above. In that case, where there was no dispute as to the Tribunal’s jurisdiction to consider the scheme, the Tribunal was able to strike a balance between the limitation of its jurisdiction to UK copyrights and its duty to take all relevant considerations into account in determining what was reasonable by giving the users the choice between accepting the worldwide licence offered by the licensing body or a UK-only licence. I would point out that the Tribunal clearly did have jurisdiction to make an order for a UK-only licence. Thus *Meltwater* stands in a different position to the two earlier cases.
105. Turning to the present case, Sky argues that, even if the Copyright Tribunal’s jurisdiction under section 126 is restricted to licences of UK copyrights, that jurisdiction extends to all terms that are commercially linked to the licensing of those copyrights, or at least to all terms that as a matter of reasonable commercial necessity should be settled in order to make effective the licensee’s exercise of its rights under the licence, and in particular to terms concerning cross-border activities.
106. In support of this argument, Sky points out that, in the case of communication to the public, a single restricted act may originate in the UK and be received in a foreign territory such that it will infringe copyright in both territories if unlicensed: see *EMI Records Ltd v British Sky Broadcasting Ltd* [2013] EWHC 379 (Ch), [2013] ECDR 8 at [33]-[38] regarding the position under EU law. The Satellite and Cable Directive avoids this problem for communication to the public by satellite within the EU, since it deems the communication to occur solely in the Member State where the uplink takes place; but this does not apply outside the EU. Sky argues that, where there was a single licence to broadcast from the UK for reception overseas, the Tribunal would have power to consider the terms of the licence as a whole, including terms which authorised the reception in the foreign territories, in the same way as the Tribunal held that it could look at the scheme as a whole in *BPI v MCPS* and as Kitchin J held that the Tribunal could look at the scheme as a whole in *PPL v BHA*. Sky relies upon the practical consequences if the Tribunal could not do so.
107. PRSfM contend that Sky’s argument confuses the subject-matter of the licences over which the Copyright Tribunal has jurisdiction with the reasonable terms of such

licences. A permission to do something which would otherwise infringe a foreign copyright (i.e. a licence under that copyright) is a different permission than one to do something which would otherwise infringe a UK copyright. To say that such licences are sometimes granted together and are therefore “commercially linked” says nothing about whether the Copyright Tribunal has jurisdiction over the former, the latter or both.

108. PRSfM also contend that Sky’s approach would give rise to difficulties in practice. What counts as “commercially linked” or “reasonable commercial necessity”? What counts as a “cross-border activity”? How real and substantial does the UK copyright element have to be? PRSfM point out that no guidance on such questions can be found in the statute.
109. Finally, PRSfM contend that, even if accepted, Sky’s alternative argument would lead to the conclusion that the Tribunal had no jurisdiction over the DVD and DTO Licences.
110. In my view these arguments raise difficult, and to some extent fact-sensitive, questions. They are fact-sensitive to some extent because a certain amount must depend on the nature of the reference to the Copyright Tribunal, and in particular the nature of the licensing scheme or licence which is the subject of the reference. Thus in both *BPI v MCPS* and *PPL v BHA* the references concerned unitary schemes promulgated by licensing bodies covering both acts falling within the Tribunal’s jurisdiction and acts falling outside that jurisdiction in relation to which it could be said that the schemes treated those acts, at least for commercial purposes, as being indivisible.
111. If one takes the paradigm case postulated by Sky of a single licence to broadcast copyright works from the UK for reception abroad (let us say, in Balkan countries outside the EU, so that the Satellite and Cable Directive does not apply) with commercial terms that treated that licence as indivisible, then I agree with Sky that the Tribunal would have power under section 126 to consider the terms of the licence as a whole even though its jurisdiction was limited to UK copyrights. In such a case I consider that the reasoning of the Tribunal in *BPI v MCPS* and of Kitchin J in *PPL v BHA* would hold good. The further one moves away from that paradigm case, however, the less convinced I am that this approach can be applied.
112. Turning to the present case, the BBC Agreement mainly related to the UK, but Schedule 4 paragraph 2.1 provided that the rights granted by PRS in respect of the World Service were granted in respect of all the territories listed in Schedule 12 and any other territories in respect of which the PRS was able to grant such rights. Schedule 12 listed (in addition to the UK) some 43 Commonwealth, mainly small, territories ranging from Anguilla to Zimbabwe. In respect of other territories, paragraph 2.2 provided that the rights granted by PRS in respect of the World Service were granted only in respect of those Repertoire Works the rights in which had been assigned to PRS by its members. By clause 3 of the BBC Agreement, the licence granted by PRS was, so far as relevant for present purposes, a licence to communicate to the public Content containing Repertoire Works as part of the Licensed Services, which included the World Service.
113. Although the BBC Agreement thus did to some extent make separate provision in respect of non-UK territories, I think it is fair to say that, overall, it treated the BBC’s publicly-funded services, including those provided by communication to the public of the World Service outside the UK, as a single set of activities which were the subject of a single licence in respect of which a single annual fee was payable. That licence was

predominantly a licence of UK copyrights. Moreover, the licence of the communication to the public right could have covered communications from the UK for reception in the foreign territories, although whether it actually did do would depend on the *lex loci protectionis*. On balance, therefore, I conclude that the Tribunal would have had the power to make an order under section 126 in respect of the whole of the BBC Agreement notwithstanding its lack of jurisdiction over foreign copyrights.

114. In contrast, the DVD Licence and the DTO Licence were predominantly licences to carry out restricted acts in Canada and the USA, albeit that there was a small UK element. I am not persuaded that the Copyright Tribunal would have had the power to make an order under section 126 in respect of the whole of those licences on the basis of its jurisdiction over the UK elements. As a matter of substance and reality, that would amount to the Tribunal exercising jurisdiction over foreign copyrights rather than exercising jurisdiction over UK copyrights with an incidental effect on foreign copyrights.

Conclusion

115. For the reasons given above, I conclude that the Copyright Tribunal does not have jurisdiction under section 126 of the 1988 Act to set the terms of licences of foreign copyrights; but that it nevertheless has the power in some circumstances to make an order in respect of the whole of a licence which covers both UK copyrights and foreign copyrights. In the present case the Tribunal would have had that power in respect of the BBC Agreement, but not in respect of the DVD Licence or the DTO Licence. Accordingly, the appeal is allowed to the extent that the Tribunal concluded that it had jurisdiction to set the terms of the DVD Licence and the DTO Licence (save in so far as they relate to UK copyrights).

Postscript

116. I cannot forbear from commenting that, in my opinion, this appeal demonstrates the need for the statutory provisions governing the jurisdiction of the Copyright Tribunal to be reviewed and overhauled.