Orchard KTV & Lounge Pte Ltd v Recording Industry Performance Singapore Pte Ltd
[2006] SGCRT 1

Case Number : CRT 1/2005

Decision Date : 03 May 2006

Tribunal/Court : Copyright Tribunal

Coram : Chiam Heng Him; Audrey Lim; George Wei

Counsel Name(s) : Surinder Singh Dhillon & Sunil Singh Panoo (Dhillon & Pnrs) for the referor/applicant; Andy Leck, Daniel Chia & Geoffrey Liem (Wong & Leow LLC) for the referee/respondent

Parties : Orchard KTV & Lounge Pte Ltd — Recording Industry Performance Singapore Pte Ltd

Judgment reserved

1 This Reference is brought under s 161 of the Copyright Act (Cap 63, 2006 Rev Ed) ("the Act") in respect of the terms and conditions of a licence scheme concerning the copying and "public performance" of film by way of use in the Karaoke On Demand System.

2 After the Reference was filed, a pre-trial conference was held, where it became apparent that there was a serious question as to whether the Copyright Tribunal ("the Tribunal") had jurisdiction over the licence scheme in question. The Tribunal accordingly directed the parties to file written submissions on this question. The Tribunal also decided that it would be more convenient to determine the question of jurisdiction first, and only to proceed to a full hearing on the substantive merits if the issue of jurisdiction was decided in favour of the referor.

3 Having carefully considered the oral and written submissions, the Tribunal has decided that it does not have jurisdiction over the licence scheme in question. The grounds for the decision are set out below.

Background

4 Orchard KTV & Lounge Pte Ltd (" Orchard KTV ") operates a KTV lounge in Singapore which offers karaoke facilities to its patrons including on-demand karaoke. Since 1992, it has applied for and obtained an annual public performance licence from the Recording Industry Performance Singapore Pte Ltd ("RIPS") covering the public performance of music videos and karaoke. The annual licence fee payable by Orchard KTV under the public performance licence ("PPL") scheme is $7,182. It is noted that RIPS has asserted that since or about 1 January 2004 Orchard KTV has not paid the PPL fees. However, for the purpose of this hearing on jurisdiction, nothing turns on this point.

5 On 1 July 2003, Orchard KTV installed a Karaoke On Demand ("KOD") System at its premises. According to RIPS (at para 6 of the written submissions):

> "The use of a KOD system requires encoding of a karaoke/music video into a computer or machine readable file as well as the reproduction and storage of this file onto a hard disk or other media. When a customer requests a particular song, the appropriate file will then be retrieved, processed by the KOD computerised system, and thereafter displayed on the relevant console. The creation and storage of such a computer- or machine-readable file, as well as the retrieval, processing and display of such file, constitute the reproduction of the karaoke/music video …."

6 RIPS is a collective licensing body which represents record companies including EMI Singapore, Sony BMG Music Entertainment (S) Pte Ltd, Universal Music Pte Ltd and Warner Music Singapore Pte Ltd ("the Record Companies"). According to RIPS the Record Companies are either copyright owners or authorised exclusive licensees of karaoke and music videos that they have produced. RIPS asserts that it is empowered by the Record Companies to grant PPL licences of karaoke and music videos, and licences for the reproduction of karaoke and music videos on KOD systems ("the KOD Licence"). For the purposes of the hearing on jurisdiction, the Tribunal assumes that RIPS does represent the Record Companies and that some of the karaoke and music videos used at Orchard KTV 's premises in the KOD system are under RIPS's control. In any event, this is not disputed by Orchard KTV .

PPL and KOD licence

7 Under the annual PPL granted to Orchard KTV , a licence is granted for the public performance of music videos and/or karaoke at Orchard KTV 's premises. Of particular importance to this hearing is the definition of "music video" and "karaoke". The PPL provides that "music video" means "a cinematograph film which has as its principal feature the performance or representation of a musical work or works or sound recording and in which cinematograph film the copyright in Singapore is owned and/or exclusively controlled by a Scheduled Record Company and to which this licence extends". The PPL also provides that "karaoke" means "any karaoke visual images or cinematograph film in which the copyright in Singapore is owned by and/or exclusively controlled by a Scheduled Record Company and to which this licence extends". In short, the PPL only covers the exclusive rights in cinematograph films (as defined in the Act). RIPS does not purport to act on behalf of or to represent owners of the copyright in any underlying literary, dramatic or musical works.

8 The PPL also states that:

> "For the avoidance of doubt, nothing herein shall authorise your reproduction or use or operation of any computerised entertainment system enabling rapid or on demand retrieval and/or public performance of the Music Videos and/or Karaoke (including in particular but without limitation, any 'Karaoke-On-Demand' systems). In the event you wish to operate any such system in connection with the Music Videos and/or Karaoke, you agree and undertake to obtain from RIPS a further licence therefore on the prevailing terms thereof.
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> …
>
> The licence will only allow the public performance of the *cinematograph film* comprised in the Authorised Copies of Music Videos and/or Karaoke in the said premises …" [emphasis added]

9 It is thus clear that the PPL obtained by Orchard KTV does not cover use of the KOD system and if music videos and/or karaoke are to be made available at Orchard KTV 's premises through a KOD delivery system, a separate licence is needed. On this, the Tribunal notes that the exclusion of use of KOD systems in the PPL is set out in broad terms. Not only does the exclusion make clear that reproduction is not covered but further that the use of the KOD delivery system for on demand delivery or public performance is outside the PPL.

10 Aside from the PPL, RIPS also has a separate licence scheme covering the use of KOD equipment. The terms of the KOD licence are found in the Karaoke On Demand Licence Agreement. Clause 2.1 provides:

" … RIPS agrees to grant … a non-exclusive licence to Licensee to reproduce ONE copy of each Film comprised in the Repertoire on one computer hard disk used on the Karaoke on Demand System … and for the sole and exclusive purpose of publicly performing the same at the Fixed Commercial Premises … via the use of the Karaoke on Demand System, PROVIDED ALWAYS that Licensee at all times during the term of such licence:

2.1.1 maintains, in its own name, a valid and subsisting Public Performance Licence in respect of the Fixed Commercial Premises; and

2.1.2 has acquired and owns a licensed videogram containing an authorised reproduction of each of the Films so reproduced."

11 Further, Clause 2.3 provides:

"For the avoidance of doubt, all rights and licenses not specifically and expressly granted to and conferred upon Licensee by this Agreement are for all purposes reserved to RIPS and/or the Record Companies. Nothing contained in this Agreement may be construed as conferring upon Licensee any right or interest in any rights the Licence does not extend to, including but without limitation … public performance of the Films or the Repertoire …"

12 As with the PPL scheme, the KOD licence essentially covers rights in cinematograph films. Thus the KOD licence defines karaoke and music video to mean "a cinematograph film (and any part thereof) embodying a sound recording of a performance of a musical, literary or other original work which is synchronized with visual images …" Further the KOD licence provides that "public performance" and "performance in public" mean "in relation to any film, causing that Film to be heard and/or seen in public by any means whatsoever within the meaning of the Copyright Act". Repertoire is also defined as "those Films the copyright of which is owned by and/or licensed to the Record Companies". On this the Tribunal notes that s 83(b) of the Act only confers an exclusive right to cause the film insofar as it consists of visual images, to be seen in public. There is no exclusive right in films to cause the film to be heard in public.

13 Given these licence schemes, RIPS submitted that it was necessary for Orchard KTV to obtain a separate KOD licence to cover reproduction of films (karaoke and music videos). According to RIPS the storage and reproduction of the film into a hard disk of a KOD system constitutes an act of copying as well as any subsequent processing and display of the stored file. This is quite apart from the fact that a licence is needed to cause the visual images to be seen in public (public performance).

14 In this context, Orchard KTV essentially made two "complaints" against RIPS. First, to the extent that the KOD licence covers reproduction (storage) of the music video and/or karaoke in a KOD system, this was not an act for which it was responsible. Orchard KTV asserts that it hires the KOD system from a third party supplier for some $36,000 per annum. The "music box" that is hired already has the music videos downloaded by the third party or its agents. As such, Orchard KTV submitted that it did not need a KOD licence which authorises it to make a copy of the music videos and/or karaoke as this was not an act for which it was responsible. On this issue, the Tribunal notes that the relationship between Orchard KTV and the third party, and whether the third party had a licence to download the music videos and/or karaoke into the KOD system is not a matter on which the Tribunal makes any present finding.

15 Further it is noted that RIPS had asserted in its written submissions (at para 5 above) that the processing and display of the stored files constitute separate acts of copying or reproduction. On this, given the Tribunal's decision on jurisdiction below, it is not necessary for the Tribunal to make any finding as to whether the processing and display amounts to copying of the cinematograph film.

16 Second, Orchard KTV submits that if a separate licence was indeed needed to cover the public performance of music videos and/or karaoke in its premises through use of a KOD system, that the licence fee charged was unreasonable and excessive.

The statutory framework for the Reference

17 This Reference is made under s 161 of the Act. The Reference is in respect of the applicability and terms of the KOD licence. It does not relate specifically to the PPL although the latter forms an important part of the backdrop for the Reference.

18 Section 161 confers upon the Tribunal jurisdiction in respect of existing licence schemes. A section 161 reference essentially looks at the licence scheme as a whole as it applies to cases included in the class of cases to which the reference relates. In the present case, the class of cases is said to concern "All entertainment outlets that use the Karaoke On Demand System." At the conclusion of the reference, the Tribunal can either confirm or vary the scheme as is considered reasonable.

19 The existence of a valid licence will of course provide a good defence to a claim for infringement in respect of acts within the licence. However, it is not within the scope of the Tribunal's jurisdiction under s 161 to determine issues of infringement and liability for infringing acts that may have occurred. Infringement actions have to be brought before the court. Neither does the Tribunal have a general jurisdiction to arbitrate between copyright owners, exclusive licensees and users of copyright subject-matter. Instead it has specific jurisdiction to investigate the terms of licences in particular areas.

Music videos and karaoke

Are music videos and karaoke cinematograph films?

20 As a preliminary point, the Tribunal had to determine whether music videos and karaoke are cinematograph films and hence whether cinematograph films are "works" or "subject-matter other than works" for the purposes of copyright protection under the Act. This is important as will be seen later when examining the scope of the Tribunal's jurisdiction under Part VII of the Act.

21 RIPS submitted that karaoke and music videos are cinematograph films, and this definition is also found in its KOD licence (see para 12 above). The Tribunal agrees. Section 7(1) of the Act defines cinematograph films as:

> "… the aggregate of visual images embodied in an article or thing so as to be capable by the use of that article or thing –
>
> (a) of being shown as a moving picture; or
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> (b) of being embodied in another article or thing by the use of which it can be so shown,
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> and includes the aggregate of the sounds embodied in a sound-track associated with such visual images."

Copyright in cinematograph films – "works" or "subject-matter other than works"

22 It is well established in copyright law that the copyright in a cinematograph film is separate and distinct from the works on which it may be based. On this point, reference may be had to s 117 which states, *inter alia*, that copyright subsisting in any subject-matter under Part IV (which includes cinematograph film) of the Act is

in addition to and independent of any copyright subsisting under Part III of the Act. Part IV of the Act deals with copyright in subject-matter other than works, and includes copyright protection for cinematograph films. Part III deals with copyright in literary, dramatic, musical and artistic works. Further, s 7(1) defines "work" to mean "literary, dramatic, musical or artistic work". Cinematograph film is not treated by the Act as a species of author's works. Instead, it is protected in Part IV as a type of "subject-matter other than works". As such, the Tribunal could not accept Orchard KTV 's submission that "musical" works under the Act would include music videos and karaoke as a species of cinematograph film.

23 Having determined that music videos and karaoke are cinematograph films, and that cinematograph films are not "works" but "subject-matter other than works" as defined under the Act, the next question is whether the Tribunal had jurisdiction over the licence scheme in question. On this, it is of course clear that cinematograph films such as music videos and karaoke may well embody literary and musical works. However, the key point is that RIPS does not, under either the PPL or KOD licence scheme, represent or licence rights in respect of any underlying works.

"Licence scheme" and "licence"

24 "Licence scheme" is defined in s 149(1) of the Act to mean, essentially, a scheme formulated by a licensor setting out the classes of cases in which the licensor is willing to grant licences. In the present case, there is clearly a scheme formulated by RIPS for the granting of reproduction and "public performance" licences in connection with the use of the KOD systems. The question however, is whether this is the type of scheme that is intended to be covered by s 161. In this regard, the Tribunal is of the view that, for the purposes of Part V11 of the Act, the term "licence scheme" cannot be interpreted without regard to the statutory definition of "licence" and "licensor" under s 149(1). This is because s 161(1), which is the basis for the Reference, relates to "licence schemes" where there is a dispute between the "licensor" and the person requiring a "licence".

25 Section 149(1) states that subject to contrary intention, "licence":

> (a) in relation to a literary, dramatic or musical work, means a licence … to perform the work or an adaptation of the work in public, to broadcast the work or an adaptation of the work, to make a sound recording or cinematograph film of the work or an adaptation of the work for the purpose of broadcasting the work or adaptation or including it in a cable programme service; or
>
> (b) in relation to a computer program or sound recording, means a licence granted by or on behalf of the owner or prospective owner of the copyright in the program or recording to enter a commercial rental agreement in respect of the program or recording;

26 The definition of licence under s 149(1) is expressly given a specific scope in relation to five categories of subject-matter, namely literary, dramatic and musical works, and computer programs and sound recording. The definition of licence under s 149(1) makes no express reference to the exclusive rights for cinematograph films. Further, licences for reproduction (copying) are not covered save for making a sound recording or film of a work for the purposes of broadcasting or cable transmission.

27 The KOD licence is on its own terms limited to music videos and karaoke as species of cinematograph film. RIPS does not assert or claim any right to licence the public performance rights in the underlying literary, dramatic or musical works that may be embodied in the cinematograph film. The critical question on which the issue of jurisdiction depends is whether s 161 in fact covers licences in respect of the copying or public performance (causing the visual images to be seen in public) of cinematograph film copyright. The Tribunal is of the view that it does not, for the reasons below.

28 The definition of "licence scheme" under s 149(1) refers to schemes setting out cases where the licensor is prepared to grant licences. "Licensor" is in turn defined in the same section to mean "the owner … of the copyright in the *work* …" (emphasis added). There is no reference to owners of copyright in other subject-matter such as cinematograph film, which is not a "work" for the purposes of the Copyright Act.

29 Having said that, the Tribunal recognises that s 149(1) covers licences for rental rights in respect of sound recordings, which are not "works" but "subject-matter other than works". The question then arises as to how the definition of "licensor" in s 149(1), which means the owner of the copyright in the "work", apply to a licensor of rental rights for sound recording (which is not a "work"). This can be explained when one examines the legislative history of the Act and the rationale for the inclusion of "licence" under s 149(1) to cover computer program and sound recording.

30 When the Copyright Act 1987 came into force, "licence" under s 149(1) was defined as meaning a licence granted for certain acts in respect of literary, dramatic and musical works. No mention was made with regard to cinematograph films. The Copyright (Amendment) Act 1998 amended s 149(1) to its present form to give the Copyright Tribunal a jurisdiction over commercial rental licences for computer programs and sound recordings. Computer programs are protected by copyright as a species of literary work. Sound recording copyright is not regarded as a work.

31 Thus in the case of commercial rental licences of sound recordings, the definition of "licensor" in s 149(1) must include the owner of the copyright in the sound recording. This interpretation can be achieved by resort to the opening words in s 149(1) which states that "unless the contrary intention appears", licensor means that which is set out in s 149(1). No such contrary intention exists to support a view that "licensor" can also include the owner of copyright in a cinematograph film. Since the KOD licence (and the PPL) are only concerned with licences for reproduction and public performances of cinematograph film, the problem of jurisdiction under s 161 is acute.

32 First, it should be noted that even in the case of licences for literary and musical works, the jurisdiction of the Tribunal under s 161 is limited (by virtue of the definition of "licence"). Copying and reproduction are only covered where a sound recording or cinematograph film of the work is made for the purposes of broadcasting or inclusion of the work in a cable programme service. A feature of the KOD licence is that it deals with the right of the licensee to copy the film into the hard disk of a KOD system.

33 If s 161 is interpreted as applying to licences for cinematograph film, it would mean that Parliament had conferred an unlimited jurisdiction over the types of cinematograph film licences for which the Tribunal was given jurisdiction – including licences of the right to make a copy of the film. This surely could not be Parliament's intention and would sit uncomfortably with the overall structure of the definition of "licence". After all, if Parliament had conferred a limited and specific closed jurisdiction with respect to literary and musical works (essentially public performance and broadcasting) why would it nevertheless intend an unlimited jurisdiction in the case of cinematograph film licences?

34 Second, the definition of "licence" under s 149(1) does not contain any express reference to licences of cinematograph film rights. Orchard KTV 's position on this point is that the KOD licence is a type of licence scheme as defined in s 149(1). It further submits that although the word "licence" is given a specific scope in relation to five types of subject-matter, namely, literary, dramatic and musical works, and computer program and sound recording, nowhere is it expressly stated in s 149(1) that the definition of "licence" only applies and is limited to the five types of subject-matter. In other words, Orchard KTV submitted that the definition of "licence" in s 149(1) is inclusive and not exclusive.

35 The Tribunal is of the view that this could not be so. If Orchard KTV 's position were correct, it would mean that for cinematograph films, Parliament was content in having no specific provisions on applicable licences and any licence scheme for a cinematograph film would be subject to the Copyright Tribunal's jurisdiction. It could not have been the intention of Parliament to have enacted a restricted closed definition of licence for works, computer programs and sound recordings, and at the same time, by silence, intended an open approach for cinematograph films. It is the decision of the Tribunal that the better view is that licences in respect of cinematograph films are not covered by the definition of "licence".

36 Moreover if Orchard KTV's argument were correct, there would have been no need for Parliament to amend, in 1998, the definition of licence in s 149. The Copyright (Amendment) Act 1998 made some significant changes to Singapore's copyright law. This includes the introduction of new commercial rental rights for sound recordings and computer programs. Given the new commercial rental rights and the desire to confer a jurisdiction on the Copyright Tribunal over licences in respect of the new rental rights, the definition of licence was specifically extended to cover licences for the commercial rental of sound recordings and computer programs. It should be noted that "sound recordings" were not specifically referred to in the original un-amended definition of licence. If Orchard KTV's argument were to be accepted, it would have been unnecessary for Parliament to have extended the definition of licence to cover rental rights for sound recordings as licences for sound recordings had never been specifically excluded.

37 Orchard KTV further submitted that the Parliamentary debates in 1986 support a broad interpretation of the Tribunal's jurisdiction. The formation of the Copyright Tribunal was clearly an important development in Singapore's copyright framework. Undoubtedly the Tribunal has been given significant jurisdiction in connection with statutory licences and to settle licence disputes in connection with the terms of broadcasting and performing right licences. Under s 161 the Tribunal enjoys a broad power to confirm or vary the scheme as it considers reasonable. Once it has jurisdiction to hear a dispute over the terms of a licence, s 161 does confer a "wide jurisdiction to determine the remuneration payable" (see the Parliamentary Debate on the Second Reading of the Copyright Bill 1986). Nevertheless as a creature of statute, the jurisdiction (and powers) of the Tribunal must be based on the statutory provisions in question. That the Tribunal might or should have the jurisdiction is a matter that should be addressed elsewhere.

Australian Copyright Act and the legislative history of s 149(1) of the Singapore Copyright Act

38 Orchard KTV then submitted that in the United Kingdom Copyright Act the jurisdiction of its equivalent Tribunal is expressly stated as covering cinematograph films and there is no restriction on the jurisdiction of the Tribunal to only certain works. In the Tribunal's view, this is irrelevant. The Singapore Copyright Act as originally enacted was modelled on the Australian Copyright Act 1968 and not on the English Act. That our Copyright Act is largely modelled on the Australian Act is stated in the Parliamentary debates.

39 Turning then to the Australian Copyright Act 1968. Like the Singapore Act, the Australian Act sets out the same division of copyright subject-matter into "works" (meaning literary, dramatic, musical and artistic works) and "subject-matter other than works" (which includes cinematograph film). In addition, the definition of "licence" in the Australian Copyright Act 1968 is found in s 136(1) which states:

> "licence" *means* a licence granted by or on behalf of the owner … of the copyright in a literary, dramatic or musical work … being … a licence to perform the work or an adaptation of the work in public, to broadcast the work or an adaptation of the work, to make a sound recording or cinematograph film of the work or of an adaptation of the work for the purpose of broadcasting the work or adaptation …" [emphasis added]

40 Commenting on these provisions, *Lahore on Copyright and Designs*, para 30,200 states that in Australia "The Tribunal has no jurisdiction at all in relation to licences for artistic works, films, broadcasts and published editions." Similarly Ricketson & Creswell, *The Law of Intellectual Property: Copyright, Designs & Confidential Information* (2001 Ed), para 15.115, states that "This jurisdiction, however, does not cover the licensing of copyright in general, but is limited to licences in relation to performing and related rights in literary, dramatic and musical works and sound recordings."

41 It could be argued that the Australian Copyright Act 1968 uses stronger language in that s 136(1) states that licence "means" a licence in respect of literary, dramatic, musical works and sound recordings. It should be noted that the definition of "licence" in s 149(1) of the Singapore Copyright Act 1987 was worded exactly as s 136(1) of the Australian Act. However in 1998, the words to s 149(1) was amended to state that "licence *in relation to* a literary, dramatic or musical work, *means* …" Does it follow, from the 1998 amendment,

that Parliament in Singapore intended to confer a broad jurisdiction in the case of licences for other types of copyright subject-matter? Based on an examination of the legislative history of s 149(1) of the Singapore Copyright Act, it is the Tribunal's view that this was not the case.

42 In the Copyright Bill 1986 (Bill No 8/86), clause 139(1) defined "licence" as meaning a licence granted for certain acts in respect of literary, dramatic and musical works. The explanatory statement to the Bill stated that:

> "A Copyright Tribunal is established by the Bill. The constitution, jurisdiction and procedure of the Tribunal are dealt with in Part VII of the Bill. The Tribunal has a wide jurisdiction to determine the remuneration payable under statutory licences and to settle licence disputes in relation to performing and broadcast rights."

43 The provisions in Clause 139(1) of the Copyright Bill 1986 are similar in structure to the provisions in the Australian Copyright Act 1968. The 1986 Bill was subsequently referred to a Select Committee of Parliament and the provision in clause 139(1) endorsed without comment. The provision then became law as section 149(1) of the Copyright Act 1987. Subsequently, the Copyright (Amendment) Act 1998 was passed to give effect to Singapore's obligations under the Agreement on Trade-Related Aspects of Intellectual Property Right ("TRIPs"). TRIPs, *inter alia*, required a new rental right for sound recordings and computer programs. Section 149(1) was accordingly amended to its present form so as to give the Copyright Tribunal a new jurisdiction to determine the terms of licence schemes for the new rental right.

44 Thus, the explanatory note to the Copyright (Amendment) Bill 1998 states that:

> "Clause 29 amends section 149 to extend the meaning of "licence" in Part VII to include to enter into a commercial rental agreement for computer programs and sound recordings. This will allow reference of licensing schemes in respect of such a licence to the Copyright Tribunal."

45 It is therefore clear that the intention of Parliament in making the amendment in 1998 was not to confer a broad, open jurisdiction in respect of cinematograph film licence schemes. The 1998 amendment, whilst changing the structure of the definition of "licence" (as compared to the original and the present Australian Copyright Act) was intended to widen the jurisdiction to only include commercial rental licence schemes for sound recordings and computer programs.

Conclusion

46 Having examined the history behind the definition of "licence" in s 149(1), and the language and structure of the provisions of the Act, the Tribunal is of the view that s 161 does not apply to licences in respect of cinematograph films. Since the KOD licence is restricted to cinematograph film rights, it follows that the Tribunal does not enjoy a jurisdiction in respect of the terms of the licence.

47 The dispute before the Tribunal is not one which arises in respect of a "licence scheme" which falls within the definition of s 149(1) as the class of "licence" within the definition of s 149(1) does not include a licence in relation to cinematograph films. The Tribunal further finds that the definition of "licence" under s 149(1) is exclusive and not inclusive, and hence given a specific and limited scope in relation to five types of subject-matter only, namely, literary, dramatic and musical works, and computer program and sound recording.

48 In arriving at its decision, the Tribunal notes that s 9A(1) of the Interpretation Act (Cap 1) provides that in the interpretation of a provision of a written law, "an interpretation that would promote the purpose or object underlying the written law … shall be preferred to an interpretation that would not promote that purpose or object". In so doing, the Interpretation Act allows for the use of extrinsic materials such as reference to explanatory statements in Bills and speeches made in Parliament by the Minister moving the Bill.

49 Further, in declining jurisdiction, the Tribunal is not making any finding on the fairness or reasonableness of the terms of the KOD licence (or the PPL).

BACK TO TOP