

COPYRIGHTAGENCY

Comments on ACCC draft guidelines for Copyright Tribunal

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1 ABOUT COPYRIGHT AGENCY

Copyright Agency is a not-for-profit copyright management organisation that manages copyright licensing arrangements for writers, artists and publishers. It collects and distributes more than \$100m a year in copyright fees and royalties. It is affiliated with similar organisations in other countries, enabling the licensed use of content from other countries in Australia, and revenue to Australian creators from the use of their content in other countries.

Copyright Agency is appointed ('declared') by the Minister for Communications and the Arts to manage the statutory licence for education in relation to reproduction and communication of text, images and print music. It is appointed (declared) by the Copyright Tribunal to manage the statutory licence for governments in relation to reproduction of text, images and print music. It is also authorised by its members to receive notifications regarding communications of works by governments under section 183(4) of the Copyright Act. Copyright Agency is also appointed by the Minister for Communications and the Arts to manage the artists' resale royalty scheme.

In addition to its role as a declared collecting society for statutory licence schemes, Copyright Agency is authorised by its members, as their non-exclusive agent, to include their content in voluntary licences offered by Copyright Agency. Most of these licences are blanket (whole of repertoire) licences, but some are pay-per-use for particular works.

Licensees can, and do, get licences directly from Copyright Agency's members for activities covered by the statutory and voluntary licences managed by Copyright Agency.

2 PURPOSE OF GUIDELINES

We understand that the Guidelines are intended to set out the ACCC's views on matters that are relevant to pricing determinations by the Copyright Tribunal regarding voluntary licences, as an input into the Tribunal's considerations. The Tribunal may have regard to the guidelines in cases where the ACCC is not a party.

3 CURRENT PROCEEDINGS

Copyright Agency is currently involved in a number of proceedings in the Tribunal. They relate to:

1. licences with three media monitoring organisations (voluntary licences);
2. equitable remuneration and reporting on usage by the New South Wales government under the statutory licence for governments; and
3. equitable remuneration and reporting on usage by universities under the statutory licence for education.

4 SOME COMMENTS ON THE DRAFT GUIDELINES

In addition to the market power concerns in the draft guidelines, the contribution of licence fees to the production of creative material is also an important consideration. Indeed, in the digital age, the revenue streams from copyright licences are a growing contributor to the overall return from producing creative works.

This point is made in the NERA Economic Consulting response to the ACCC's draft 2006 guidelines:

*We very much agree that the **socially optimal level of production is the correct reference point in economic terms** from which to consider the pricing of copyright material. We also agree that the fact that the additional cost of producing an extra unit ('the marginal cost') of copyright material is often near zero lies at the heart of the problem of determining prices for such material that will encourage the socially optimal level of production. The near zero price that a 'text book' economic*

*analysis would normally call for is unlikely to deliver a socially optimal production of copyright works. [emphasis added]*¹

Benchmarking can provide a basis for setting licence fees, and has been used by the Tribunal in past determinations. An existing rate may, however, need to be reviewed in the light of changing conditions. Changes to the conditions for the creating copyright material can be a relevant factor, given that licensees have an interest in ensuring the future production of creative content.

The hypothetical bargain can also be a useful approach to setting licence fees, and has been used by the Tribunal. Basing this on marginal customers may, however, lead to the wrong outcome depending on the population used for analysis. It could lead to licence fees that are too low to support the public interest in future content production.

¹ Houston and Haddock, Remuneration for the use of copyright material – comment on the ACCC draft guidelines, NERA Economic Consulting, page 4