



Copyright Guidelines 2019

Consultation outcomes report

April 2019

ACCC release of copyright guidelines

The ACCC has released guidelines to assist the Copyright Tribunal of Australia (the Tribunal) in the determination of copyright remuneration (Copyright Guidelines).

Under section 157A of the *Copyright Act 1968*, the Tribunal must, if requested by a party or on application, have regard to relevant guidelines (if any) made by the ACCC regarding certain licences and license schemes. The Copyright Guidelines are designed to assist the Tribunal in the determination of revenue that is available from collecting societies in the provision of blanket licences.

The Copyright Guidelines may also help collecting societies and copyright users negotiate reasonable copyright remuneration for blanket licences outside of the Tribunal.

The Tribunal is required to have regard to the Copyright Guidelines in proceedings concerning certain copyright licences and licence schemes, if requested by a party. The ACCC may also seek to become a party to such proceedings.

Public consultation

The ACCC released [draft guidelines](#) for [public consultation](#) on 20 October 2018. Submissions to the consultation closed on 20 November 2018.

We received submissions from Apra Amcos, Australian Broadcasting Corporation (ABC), Australian Copyright Council (ACC), Copyright Agency, Free TV Australia, isentia (with an expert report from Dr Christopher Pleatsikas), Live Performance Australia (LPA), Phonographic Performance Company of Australia (PPCA), Screenrights and Special Broadcasting Service (SBS) which are available on our consultation webpage.

Changes to the Copyright Guidelines following the public consultation

The final [Copyright Guidelines](#) include a number of changes in response to submissions to the consultation. The key changes are as follows.

Executive summary

Several stakeholders submitted that there is some difficulty in carrying out useful surveys to estimate willingness to pay (WTP) for copyright material, and its acceptance by the Tribunal is difficult to predict. We address this concern by clarifying the hypothetical bargain approach and by noting that in situations where it may be too costly or difficult to carry out a survey, the Tribunal should consider what information is available in the circumstance and that this approach can still be supplemented with other approaches. We also clarify that the hypothetical bargain approach is a pragmatic response to the difficulty of applying cost-based approaches.

Copyright and incentives

Some stakeholders submitted that our characterisation of the economics of copyright mentioned in the Copyright Guidelines required some clarification, as the exclusive rights of the copyright owner not only enable the copyright owner to be remunerated for their work, but it also enables them to control their artistic output. It was submitted that whether or not a copyright owner has market power and whether substitutes exist, depends on the market.

In response to these submissions, we explain in the Copyright Guidelines how copyright materials tend to be differentiated products, and that this provides each producer with a

degree of market power because each can raise prices without losing all of their demand. We also clarify that the mere grant of exclusive rights rarely raises competition concerns, because while for some individual works there are few alternatives for consumers, for most works substitutes are readily available.

Collecting societies and market power

Several stakeholders noted that the Copyright Guidelines should address the potential lack of bargaining power by licensees in negotiations with licensors and implications on achieving an economically efficient licensing fee, and that market power should be assessed from both a licensor and licensee perspective.

We address these submissions by clarifying that determining reasonable remuneration based on an existing market rate or on the basis of a hypothetical bargain are potential solutions to determining reasonable remuneration in the absence of feasible cost-based approaches. We also clarify that these approaches are primarily designed to counter the market power of collecting societies and lead to better pricing outcomes, and we explain that the hypothetical bargain approach seeks an outcome that balances the bargaining power of the negotiating parties.

Pricing principles

We received submissions around pricing not only affecting incentives to create new works but also decisions to invest in new distribution methods or innovative applications (such as Netflix or Shazam), with one stakeholder contending specifically that inefficient license fees can discourage innovative products. In response to these submissions, we have added that another way in which pricing can affect social welfare is by developing new applications, such as applications that can assist consumers identify and/or provide information concerning a copyright work, such as how it can be accessed.

Several stakeholders submitted that it may be difficult to use surveys to determine WTP and that it may be difficult to apply the hypothetical bargain approach. In response to these submissions, we clarify that where it is difficult to estimate WTP, it may still be possible to identify a reasonable range of prices or obtain insights using the available information. We also clarify that in circumstances where the construction of the hypothetical bargain is problematic, the Tribunal may still have regard to the overall principles set out in our guidance.

Benchmarking approach

We have amended the discussion of the benchmarking approach to recognise that benchmarking is about finding price indications that are more reflective of competition than may be the case for blanket licences.

Construction of the hypothetical bargain

A stakeholder submitted that the example we provided in Box 2 of Appendix 1 implies that pricing should not exclude any prospective licensee whose WTP exceeds what may be close-to-zero WTP, even if this results in lower economic returns to copyright owners under the license. In response to this submission, we clarify that the use of the WTP of the marginal user does not imply that price ends up equal to marginal cost. We explain that the division of surplus means that price will exceed marginal cost, and prices that exceed marginal cost contribute to the recovery of fixed costs and are part of the incentive for the creation of new works.

Responses to other issues raised in submissions

Several submissions recommended that the Copyright Guidelines more explicitly state that some of the approaches such as benchmarking and the construction of the hypothetical bargain may not be appropriate in certain situations and that the Copyright Guidelines should not restrain the discretion of the Tribunal to adopt other pricing methodologies such as judicial estimation. The Copyright Guidelines acknowledge that the benchmarking and hypothetical approaches are 'recommended' where they are 'feasible in the circumstances of the particular case,' and that the Tribunal retains the discretion about whether to apply these approaches or whether to adopt alternative pricing methodologies.