Introduction

While historically there has been much debate over the issue, I think the modern view of intellectual property laws and competition policy is not that they are in direct conflict with one another but rather that they are complementary.

As noted by the Intellectual Property and Competition Review Committee, chaired by Henry Ergas (the Ergas Committee):

[H]arm to competition should not, and cannot, be inferred from the mere existence of an exclusive right, such as those conferred by the intellectual property laws… The very protection an incumbent firm enjoys may provide the incentive for its rivals to invest in developing these alternatives—so that the intellectual protection, rather than undermining contestability, stimulates and channels it in directions that are usually socially beneficial.\(^1\)

Broadly, both sets of legislation have the objective of promoting innovation and consumer welfare.

The protections afforded by the Copyright Act 1968 give creators the right to prevent the copying of works that could otherwise be copied at a relatively low cost. This ensures that creators earn a return for the exploitation of their works and the level of creation remains at a socially optimal level, that is, at a level where the social benefits from the creation exceeds its costs.

Competition policy seeks to maximise social welfare by maintaining and enhancing competition. Without such protections, social welfare may be diminished through unscrupulous business practices and the exploitation of consumers.

To quote the Ergas Committee again:

Both intellectual property law and competition policy serve to correct market failure in the pursuit of economic efficiency. However, tension between the objectives and instruments of the

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two systems occurs when the correction of one form of market failure creates another.²

Collecting societies play a very important role in effectively enforcing the rights of copyright owners and facilitating access to copyright material for the benefit of copyright users. On the other hand, collecting societies may also raise competition concerns as they bring together the rights of parties who might otherwise compete with each other. This is an area of potential tension between copyright law and competition policy and the area of potential tension that I wish to focus on today.

While the ACCC has had a role in assessing applications for authorisation by copyright collecting societies for over 20 years, it has, over the last six months, markedly increased its involvement in the copyright industry. As many of you would be aware, the ACCC has issued a draft guide regarding the use of copyright material. The ACCC also sought (and was granted) leave to become a party to the reference currently before the Copyright Tribunal.³

These two actions by the ACCC reflect recent amendments to the Copyright Act 1968, and signal a new role for the ACCC in copyright and, potentially, a new dynamic between copyright collecting societies and users of copyright.

Today, I would like to first provide you with an overview of the ACCC—who we are and what we do. I would then like to discuss the ACCC’s recent shift towards involvement in copyright matters. I will discuss why the ACCC has become involved in copyright matters, the potential impact of copyright collecting societies on competition, the existing controls on collecting society market power and why we think the ACCC can make a valuable contribution to the copyright regime in Australia generally.

The Australian Competition and Consumer Commission

The Australian Competition and Consumer Commission is the independent Australian government authority that administers the Trade Practices Act 1974 (the Act). A key objective of the Act is to promote competition and fair trading for the benefit of consumers, business and the community.

The ACCC is the only national agency dealing generally with competition matters. We are concerned with a broad range of issues including unfair market practices, industry codes, mergers and acquisitions of companies, product safety and labelling, price monitoring and the regulation of industries such as telecommunications, gas and electricity.

The Copyright Act 1968 was recently amended to make specific reference to the ACCC. The Copyright Act now:

- requires the Copyright Tribunal, if asked to do so by a party to a proceeding, to have regard to any relevant guidelines issued by the ACCC; and

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³ Reference by Phonographic Performance Company of Australia Ltd under section 154(1) of the Copyright Act 1968 (CT 1 of 2006).
• gives the tribunal a specific power to make the ACCC party to proceedings if the ACCC applies and the tribunal is satisfied that it is appropriate.

**Background to the Copyright Act amendments—Ergas report**

These changes to the Copyright Act arose out of the recommendations of the Ergas report of September 2000.4

In considering the role of copyright collecting societies and their impact on competition, the Ergas Committee indicated that collecting societies would continue to remain pivotal to, and retain considerable power in, the copyright system. Given this, the Committee considered there needed to be effective means in place to ensure collecting societies do not abuse any market power they may have.

The Ergas Committee supported the then draft recommendation of the Copyright Law Review Committee5 to extend the jurisdiction of the Copyright Tribunal to cover collectively administered schemes. The Committee recommended that, in order to avoid unnecessarily increasing the burden on the tribunal as a result of the changes, the ACCC be given powers to act as a ‘gate keeper’ in determining whether a reference should be made to the Copyright Tribunal.

In performing such a role, the Committee considered that the ACCC should be required to take account of:

• any market power that can be exercised by the collecting society;
• whether there are alternative means of dispute resolution that could be used and that would impose less burden on the public; and
• the public interest in balancing public access to copyright material with the legitimate commercial interests of copyright owners.

In its response to the Ergas report, the Australian government did not confer a gate keeper role on the ACCC. Rather, the government decided to:

• require the ACCC to issue guidelines on what matters it considers to be relevant to the determination of reasonable remuneration and other licence conditions that can be the subject of determination by the Copyright Tribunal;
• give the tribunal discretion to take into account these guidelines; and
• give the tribunal discretion to admit the ACCC as a party to tribunal proceedings.

With this policy background to the ACCC’s new role in mind, I would now like to discuss why this is an important role for the ACCC—why there is a need for ACCC involvement in the interaction between copyright collecting societies and users of copyright and why the ACCC is particularly well placed to perform this role.

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Copyright collecting societies and their impact on competition

Collecting societies are undoubtedly an important part of the copyright regime in Australia. By allowing for the collective administration of copyright, collecting societies provide the creators of copyright material with the opportunity to efficiently and effectively gain returns for use of their copyright material. In particular, they minimise the costs of administering licences for the use of copyright and the costs of enforcing the rights of copyright owners.

Collecting societies also provide benefits to users of copyright. They provide users with relatively easy access to a large volume of copyright material, including material produced overseas. This access can be inexpensive when compared to, for example, a situation in which potential users are required to locate and negotiate licences with individual copyright owners.

However, collecting societies also have the potential to raise competition issues. Collecting societies bring together the rights of parties who would otherwise be competitors in their respective markets. Because, in general, users of copyright material are only able to deal with a single entity to acquire a licence to use material of a particular kind, there is the potential for collecting societies to use this market power to impose higher prices or less favourable conditions on users.

Controls on collecting society market power

Of the various controls on collecting society market power, I would like to discuss the potential controls with which the ACCC has some involvement: the Trade Practices Act and the Copyright Tribunal.

The Trade Practices Act

Broadly, Part IV of the Trade Practices Act prohibits anti-competitive practices that limit or stop competition. As in any industry, the ACCC may investigate complaints against copyright collecting societies where there is an alleged breach of Part IV, and there is also scope for complainants to take private action under the Act.

However, the application of certain provisions of Part IV of the Trade Practices Act to copyright collecting societies may be limited by the exceptions in subsection 51(3) of Act. Subsection 51(3) currently provides an exemption from certain provisions of Part IV for intellectual property licence or assignment conditions. It is not clear the extent to which section 51(3) protects the activities of collecting societies from the operation of the Act, but this issue goes beyond the scope of today’s discussion so I will not canvass it today.

Whether a collecting society’s conduct risks breaching the Trade Practices Act is a matter for individual collecting societies and their legal advisors. Where a collecting society’s arrangements do risk breaching the Act, however, the society can apply for authorisation. Under the authorisation process, the ACCC can grant immunity for conduct that risks breaching the Part IV provisions of the Act (with the exception of misuse of market power) if it is satisfied that the likely public benefit from the conduct outweighs any likely public detriment.
While maintaining that their activities do not contravene the Trade Practices Act, both APRA\(^6\) and PPCA\(^7\) have sought authorisation from the ACCC. APRA last applied for re-authorisation of its arrangements in 2004 (with amendments to its applications lodged in January 2006) and was granted authorisation for four years in March 2006. PPCA recently lodged an application for re-authorisation and this is currently being considered by the ACCC.

In assessing applications for authorisation by collecting societies, the ACCC will take into account the broad range of benefits outlined earlier. Against the public benefits offered by collecting societies, the ACCC is required to weigh any associated detriment to the public. For example, the arrangements between collecting societies and creators may limit the degree to which users are willing or able to deal directly with the creators of works. In addition, blanket licences for the use of copyright material, while simplifying the administration of copyright licences, reduce incentives for creators and users to negotiate directly. These factors combined may mean that users have no genuine alternative means of acquiring a licence to use copyright works and collecting societies are able to set prices for access to copyright material without consideration as to what the efficient price of those rights would be.

The ACCC considers the anti-competitive detriment from a collecting society’s arrangements will be more limited where:

- the arrangements do not prevent direct negotiation between copyright owners and users;
- the output or licensing arrangements are as unrestrictive as possible and strike an appropriate balance between facilitating the administration of copyright and allowing flexibility in licensing as appropriate;
- licence fees and conditions for use of copyright are clear and readily available to users; and
- the arrangements allow for alternative dispute resolution processes where appropriate.

**Copyright Tribunal**

The Copyright Tribunal was established in response to a perceived need to control the exercise by collecting societies of the rights given to them by copyright owners in respect of the public performance and broadcast musical works and sound recordings.\(^8\) In making determinations as to remuneration and other licence conditions, the Copyright Tribunal acts as an important constraint to the exercise of market power.

A fee for the use of copyright material that has been determined by the Copyright Tribunal has the potential to have wide spread consequences.

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\(^6\) Australasian Performing Right Association Limited.
\(^7\) Phonographic Performance Company of Australia Ltd.
As the fees under licence schemes affect an entire class of copyright user, they are likely to be universally applied to all competitors in a given industry. As a result, in competitive industries, the costs incurred in using copyright material may be passed on to consumers as businesses seek to recover the cost of the copyright material.

Further, it is not only the markets directly affected by a Copyright Tribunal determination that may be affected by the outcome. A tribunal decision may influence the fees set by that or other collecting societies for similar uses of copyright material. In addition, the reasoning and methodology applied in the proceeding may have a significant impact on future negotiations between a range of collecting societies and users.

The ACCC believes it can assist the Copyright Tribunal, as well as copyright owners and users more generally, balancing public access to copyright material with the interests of copyright owners by acting in accordance with the amendments to the Copyright Act, namely by:

- issuing guidelines regarding the use of copyright material; and
- seeking to become a party to Copyright Tribunal proceedings.

A guide for copyright licensees

In November last year, the ACCC issued Copyright licensing and collecting societies: a guide for copyright licensees—draft for comment. In developing such a guide, the ACCC aims to do two things. First, the guide is intended to provide information to businesses, which may assist them to understand their copyright obligations. Second, the guide aims to provide general discussion of factors the ACCC considers relevant to the setting of copyright remuneration to assist parties in negotiating licences to use copyright material and to provide assistance to the Copyright Tribunal in determining remuneration.

The second of these aims is clearly the more challenging. The ACCC has received some positive feedback in this respect, while other submissions highlight areas for improvement. I note that there are inherent limits to what a guide can achieve. A guide will be drafted to cover a broad range of situations and will therefore necessarily be expressed in general terms. However, I will also say that the draft guide released by the ACCC is still under development and we expect it to be refined over time. Specific issues raised by interested parties are being considered, and it is also likely the ACCC will consult further before finalising the publication.

Involvement in Copyright Tribunal proceedings

The second way in which the ACCC considers it can assist in resolving some of the potential tension between copyright law and competition policy is by seeking to become a party to Copyright Tribunal proceedings.

On 1 May this year, the ACCC applied for the first time to be made a party to the PPCA reference to the Copyright Tribunal. With the consent of the other parties,
the tribunal has ordered that the ACCC be made a party, subject to its role being the subject of further determination.

In general, the ACCC will only seek to become a party to Tribunal matters where it considers it to be in the public interest. For example, the ACCC may seek to become involved where we consider that a decision of the Copyright Tribunal is likely to impact a broad range of businesses and consumers and we consider we can assist the tribunal in making the determination.

On becoming a party to a proceeding, the ACCC considers it is in a unique position to assist the Copyright Tribunal. The ACCC is an independent body that can bring to the tribunal its own analysis and expert opinions on the views expressed by parties before the tribunal. The ACCC hopes its involvement in copyright licensing matters will bring a new dynamic to dealings between copyright collecting societies and users of copyright material, and will result in fees that reflect an appropriate balance between access to copyright material and the rights of copyright owners to receive returns for original work.

**Conclusion**

As noted in my opening remarks, the role of the ACCC is broadly to promote competition and fair trading for the benefit of consumers, business and the community.

Copyright is one area in which the ACCC considers it can play an important role in ensuring businesses are treated fairly and equitably by copyright collecting societies, which will have flow on effects for consumers. The ACCC recognises that copyright collecting societies play an important role in the effective operation of the copyright regime in Australia and that they require sufficient revenue to promote a socially optimal level of new material. However, collecting societies occupy a position of some power in respect of the rights they control and it is essential to ensure this power is not abused to the detriment of business and consumers.

Setting remuneration and other licence conditions for the use of copyright material is an undeniably difficult task. The ACCC hopes that it can assist the Copyright Tribunal as the most important check on the potential market power of collecting societies, as well as copyright owners and users more generally, strike an appropriate balance between access to copyright material and the rights of copyright owners.