



Copyright licensing and collecting societies: a guide for copyright licensees

Draft for comment

November 2006

[NB: The Copyright Amendment Bill 2006, currently before Parliament, proposes several amendments to the *Copyright Act 1968*. Bold text in this document indicates such a proposed amendment. This text will be reviewed prior to final publication of this guide to ensure that it reflects the amendments as passed by Parliament.]



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List of abbreviations

ACCC	Australian Competition and Consumer Commission
ADR	alternative dispute resolution
AMCOS	Australasian Mechanical Copyright Owners Society Limited
APRA	Australasian Performing Right Association Limited
ASDACS	Australian Screen Directors Authorship Collecting Society Limited
AWGACS	Australian Writers Guild Authorship Collecting Society Limited
CAL	Copyright Agency Limited
Copyright Act	<i>Copyright Act 1968</i>
Copyright Regulations	<i>Copyright Regulations 1969</i>
the code	<i>Code of Conduct for Copyright Collecting Societies, amended April 2005</i>
PPCA	Phonographic Performance Company of Australia Limited
Screenrights	Audio-Visual Copyright Society Limited
Trade Practices Act	<i>Trade Practices Act 1974</i>
tribunal	Copyright Tribunal of Australia
Viscopy	Visual Arts Copyright Collecting Agency Limited

Preface

The Australian Competition and Consumer Commission (ACCC) is the independent Australian Government agency responsible for administering the *Trade Practices Act 1974*. A key objective of the Trade Practices Act is to prevent anti-competitive conduct and to encourage competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.

On 19 October 2006, the Copyright Amendment Bill 2006 was introduced into the Parliament. The bill makes two amendments to the *Copyright Act 1968* that are relevant to the ACCC:

- The Copyright Tribunal **of Australia** (the tribunal) may have regard to guidelines (if any) made by the ACCC.
- The tribunal will also be able to make the ACCC a party to a matter before the tribunal (if the ACCC applies and the tribunal is satisfied that it would be appropriate to do so).

Once these proposed amendments come into effect, the ACCC intends to issue a general information guide to users of copyright material to explain their rights and obligations under the *Copyright Act 1968*.

This draft guide has been released for comment by interested parties. Bold text in the guide indicates a proposed amendment to the Copyright Act. The ACCC seeks comment on all aspects of the guide.

With commencement of the Copyright Amendment Bill 2006, and after considering the views of interested parties, the ACCC will finalise its views and release a guide. A less detailed summary of the guide is also expected to be produced.

Interested parties should make submissions no later than **5.00 pm on 31 January 2007**.

The ACCC prefers that all written submissions be publicly available to foster an informed and robust consultative process. Submissions will be treated as public documents unless otherwise specified and will be published on the ACCC website. Where interested parties wish to submit confidential information they should provide both confidential and non-confidential versions of their submission. In such circumstances, the confidential version will need to highlight any such information.

Submissions should be emailed to:

transport.prices-oversight@acc.gov.au **and** john.laughlin@acc.gov.au

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1. Introduction

The Australian Competition and Consumer Commission (ACCC) has prepared this guide to provide general information to users of copyright material to help negotiate licensing arrangements with copyright collecting societies.

This publication is designed to provide general information only and not specific legal advice. Copyright law is a complex and constantly changing area of law; licensees or potential licensees are encouraged to seek independent legal advice as appropriate.

Copyright collecting societies

Copyright collecting societies act on behalf of certain copyright owners to facilitate the administration of copyright licences. Such organisations grant licences to use copyright material, collect royalties from users of copyright material and distribute revenue to owners of copyright. Collecting societies play an important role in both upholding the rights of copyright owners and facilitating access to copyright material. However, as collecting societies represent parties who would normally compete with each other in the supply of copyright material, their operation raises potential concerns regarding use of market power.

The remuneration payable for the use of copyright material is the most frequent cause of disputes between collecting societies and licensees. It is generally a matter for negotiation between the parties, or failing this, for determination by the Copyright Tribunal of Australia (the tribunal).

The tribunal was established ‘in response to the perceived need to control the exercise by collecting societies or other organisations of the rights given to them by copyright owners’.¹ **Recent amendments to the *Copyright Act 1968* allow the tribunal the discretion to have regard to relevant guidelines (if any) issued by the ACCC when making a determination under the Copyright Act² and to admit the ACCC as a party to tribunal proceedings.³** The ACCC will only seek to become a party to tribunal proceedings when it considers the intervention would be in the public interest. This is assessed on a case-by-case basis.

Matters dealt with in this guide include:

- an introduction to copyright law in Australia
- the nature of copyright collecting societies
- licensing

¹ Copyright Law Review Committee, *Jurisdiction and Procedures of the Copyright Tribunal*, December 2000, p. 14.

² **Section 157A of the Copyright Act.**

³ **Section 157B of the Copyright Act.**

- approaches to dispute resolution
- the operation of the tribunal
- the role of the ACCC and the application of the Trade Practices Act to copyright collecting societies and copyright licensees
- collecting societies and the problem of market power; and the tribunal's role in curbing that market power.

Throughout the guide, the example of a medical clinic playing CDs as background music in its waiting room is used to illustrate key concepts.

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2. Copyright protection in Australia

This chapter provides a brief overview of copyright protection and the obligations of parties wishing to use copyright material in Australia.

What is copyright?

Copyright protection in Australia arises under the *Copyright Act 1968*. The Copyright Act provides for both ‘economic’ rights, including exclusive rights to reproduce or communicate copyright material, and ‘moral’ rights, including the rights of attribution of authorship and integrity. Ideas themselves are not protected by copyright; copyright applies to the expression of those ideas.

The Copyright Act accords protection to original literary, dramatic, artistic and musical works, as well as published editions of such works.⁴ Literary work is defined to include computer programs.⁵ Protection also extends to films, sound recordings and television and sound broadcasts.⁶ It applies automatically without the need for registration and lasts for the period of time set out in the Copyright Act.

Copyright is infringed when a person who is not the copyright owner in Australia, without the licence of the owner, does any act which the copyright owner has the exclusive right to do.⁷

The precise nature of the acts comprised in the copyright differs according to the nature of the work or subject matter. In the case of literary, dramatic, artistic and musical works, the copyright may, depending upon the nature of the work, include the right to:

- reproduce the work
- publish the work
- perform the work in public
- communicate the work to the public
- make an adaptation of the work
- reproduce, publish, perform in public or communicate to the public an adaptation of an original work
- make a copy of a published edition of the work

⁴ Parts III and IV of the Copyright Act.

⁵ Section 10 of the Copyright Act.

⁶ Part IV of the Copyright Act.

⁷ Subsections 36(1) and 101(1) of the Copyright Act.

- enter into a commercial rental arrangement in respect of the work reproduced in a sound recording (or in respect of the program in the case of computer programs).⁸

In the case of films, sound recordings and television and sound broadcasts, copyright may, depending upon the nature of the work, include the exclusive right to:

- make a copy of the subject-matter
- cause the subject-matter to be seen or heard in public
- communicate the subject-matter to the public
- enter into a commercial rental arrangement in respect of the subject-matter.⁹

Example: Part 1

A medical clinic wants to play various CDs as background music in its waiting room.

The copyright acts in playing CDs in the waiting room include:

- 1) performing musical works in public **and**
- 2) causing sound recordings to be heard in public.

If the medical clinic played music in its waiting room using a **radio** instead of CDs, the copyright act would be performing musical works in public and **not** causing sound recordings to be heard in public.

The protection afforded to owners of copyright material by the Copyright Act is balanced with a number of detailed limitations, including exceptions and requirements to provide statutory licences in certain limited circumstances.

Copyright will not be infringed in certain circumstances if acts which would otherwise infringe copyright have been performed for the purposes of research or study,¹⁰ criticism or review¹¹, reporting news¹² and for judicial proceedings or providing professional advice.¹³ There are various other narrow statutory exceptions to copyright infringement under the Copyright Act, including educational use, use by libraries and archives, public recitation and performance, home copying of live broadcasts, various uses of artistic works, old films, computer programs, temporary reproductions in the course of communication and use of a legal copy. Parties should refer to the Copyright Act to determine whether any of the exceptions applies in a particular case.

⁸ Sections 31 and 88 of the Copyright Act.

⁹ Sections 85, 86 and 87 of the Copyright Act. Subsection 85(1)(d), which provides the exclusive right to enter into a commercial rental arrangement in respect of the recording, is subject to limitations under subs. 85(2).

¹⁰ Sections 40 and 103C of the Copyright Act.

¹¹ Sections 41 and 103A of the Copyright Act.

¹² Sections 42 and 103B of the Copyright Act.

¹³ Sections 43 and 104 of the Copyright Act.

In addition, copyright will not be infringed if the copyright user has a statutory or voluntary licence to perform acts comprised in the copyright.

Statutory licences are licences which exist under legislation and which allow persons to perform acts in respect of certain types of copyright without the need for the copyright owners' consent. A statutory licence is likely to require payment of a fee by the copyright user, whereas a statutory exception can be relied upon without payment of a fee.

Where exceptions or statutory licences do not apply, copyright owners may voluntarily enter into copyright licences with copyright users. Again, a fee is usually payable for such a licence.¹⁴

Statutory and voluntary licences are examined in more detail in chapter 4.

More detailed information on Australian copyright law can be obtained from the Attorney-General's Department (www.ag.gov.au), the Australian Copyright Council (a private organisation representing the interests of many copyright owners, www.copyright.org.au) or by seeking independent legal advice.

¹⁴ In some circumstances a fee-free licence may be deemed to have been granted by the copyright owner although such a licence is likely to be limited in nature.

3. Copyright collecting societies

This chapter discusses the nature of copyright collecting societies and the various types of copyright material that each deals with. It also outlines the main provisions of the Code of Conduct for Copyright Collecting Societies (**the code**).

The role of collecting societies

Copyright collecting societies are organisations that collect royalties from the use of some forms of copyright works and subject matter. They issue licences to persons or organisations to perform acts comprised in the copyright, collect licence fees from such users and distribute royalty income to the original copyright owner.

Collective administration of copyright in this manner gives rise to cost savings because authors and owners of copyright works do not need to administer or enforce their rights individually in transactions for the commercialisation of their copyright. Collecting societies are likely to be able to licence copyright, monitor for infringement of copyright and enforce rights more cost effectively than individual copyright owners acting independently. Collecting societies can therefore be an effective and efficient means for copyright owners to commercialise their copyright.

Collecting societies also provide copyright users with relatively easy access to a large volume of copyright material (including materials produced outside Australia). The user is not required to locate and negotiate with individual copyright owners and may gain rights to a wide range of material through one licence, thereby significantly reducing transaction costs.

However, as collecting societies bring together the rights of parties who would normally compete with each other in the supply of copyright material, their operation creates scope for collecting societies to exercise market power in the setting of licence fees and conditions.¹⁵ In many instances, parties wishing to use copyright material have limited, if any, alternatives to dealing with the relevant collecting society. This may allow the collecting society to extract higher licence fees than may otherwise have been paid and may result in an inefficient use of resources, reducing the overall welfare of society. If prices are raised above a competitive level, consumption and production fall below the socially optimal quantities—some consumers who value the good or service more than the cost of production no longer buy the product. Further, there may be less pressure on a monopoly supplier to operate efficiently and to offer the types of products and level of service that consumers want.

¹⁵ The problem of market power is discussed further in chapter 8.

Collecting societies in Australia

The main copyright collecting societies in Australia are:

- Copyright Agency Limited (**CAL**)—represents owners of copyright in published literary and artistic works (such as authors, journalists, visual artists, surveyors, photographers and newspaper, magazine and book publishers) relating to statutory licences for copying for education, persons with disabilities, government and certain voluntary licences (www.copyright.com.au).
- Australasian Performing Right Association Limited (**APRA**)—represents music composers and publishers for the purpose of administering licences for communication to the public (including broadcasting) and public performance of musical works (www.apra.com.au).¹⁶
- Australasian Mechanical Copyright Owners Society Limited (**AMCOS**)—represents music composers and publishers for the purpose of administering licences for the reproduction of musical works (for example, by record companies or film makers) (www.apra.com.au).¹⁷
- Phonographic Performance Company of Australia Limited (**PPCA**)—represents record labels and recording artists for the purpose of administering licences for the broadcast, communication and public performance of sound recordings and music videos (www.pcca.com.au).¹⁸
- Audio-Visual Copyright Society Limited (**Screenrights**)—represents owners of copyright in films, television and radio relating to the statutory licences for off-air copying of broadcasts and other television programs and sound recordings and other radio programs for education, persons with a disability, governments and for retransmission of broadcasts (www.screen.org).
- Visual Arts Copyright Collecting Agency Limited (**Viscopy**)—represents visual artists for the purpose of administering licences to reproduce artworks (such as in catalogues and magazines) (www.viscopy.com.au).¹⁹

Other agencies include the Australian Screen Directors Authorship Collecting Society Limited (**ASDACS**) and the Australian Writers Guild Authorship Collecting Society

¹⁶ The ACCC on 8 March 2006 granted authorisation to APRA for its input, output, distribution and overseas arrangements for four years. More information about the authorisation is at the ACCC website, www.accc.gov.au.

¹⁷ APRA manages the reproduction rights business of AMCOS.

¹⁸ The ACCC granted authorisation to PPCA for its sound recordings licensing arrangements in 1985.

¹⁹ The nature of these agencies (with the exception of Viscopy which was established after the report) is discussed in detail in Shane Simpson's 1995 report, *Review of Australian copyright collecting societies, report to the Minister for Communications and the Arts and Minister for Justice*, Department of Communications and the Arts, Canberra. A more recent summary is included in the Copyright Law Review Committee report *Jurisdiction and procedures of the Copyright Tribunal*, Canberra, December 2000, pp. 27–32.

Limited (**AWGACS**), which collect money from overseas, and the Christian Copyright Licensing Asia-Pacific Pty Ltd, LicenSing (a division of MediaCom Inc.) and Word of Life Pty Ltd, which administer licences for the use of copyright material by churches.

Example: Part 2

APRA is the collecting society which represents music composers and publishers for the purpose of administering licences for the public performance of musical works (that is, for the copyright in the song including lyrics and composition).

PPCA is the collecting society which represents record labels and recording artists for the purpose of administering licences to play sound recordings in public.

The medical clinic therefore needs to obtain a licence from APRA **and** PPCA to play the CDs as background music in its waiting room.

If the clinic played music in its waiting room using a radio instead of a CD player, it would only require a licence from APRA.

The code of conduct

The Code of Conduct for Copyright Collecting Societies (the code) came into effect in July 2002 and was amended in April 2005. It is a voluntary code of conduct which has been agreed to by each of the major collecting societies: APRA, AMCOS, PPCA, CAL, Screenrights, Viscopy, AWGACS and ASDACS.

The code is intended to:

- promote awareness of and access to information about copyright and the role and function of collecting societies in administering copyright on behalf of members
- promote confidence in collecting societies and the effective administration of copyright in Australia
- set out the standards of service that members and licensees can expect from collecting societies
- ensure that members and licensees have access to efficient, fair and low-cost procedures for the handling of complaints and the resolution of disputes involving collecting societies.²⁰

Each member agency agrees to adhere to standards set out in the code, which govern all aspects of operation including dealings with members and licensees, the distribution of remuneration and licence fees, expenses, governance, accountability, complaints and disputes.

²⁰ *Code of Conduct for Copyright Collecting Societies*, amended April 2005, clause 1.3.

Each collecting society undertakes to ‘treat Licensees fairly, honestly, impartially, courteously, and in accordance with its Constitution and any licence agreement.’²¹ Collecting societies must:

- ensure dealings with licensees are transparent
- make available to licensees and potential licensees information about licences and licence schemes
- take reasonable steps to ensure that all licences offered are drafted to be plainly understood by licensees and are accompanied by practical and suitable explanatory material
- consult with relevant trade associations regarding the terms and conditions applying to licences or licence schemes
- charge licence fees for the use of copyright material that are fair and reasonable.²²

The code states that collecting societies may consider the following matters in setting or negotiating licence fees:

- the value of the copyright material
- the purpose for which, and the context in which, the copyright material is used
- the manner or kind of use of the copyright material
- any relevant decisions of the tribunal
- any other relevant matters.²³

Compliance with the code is recorded in each member collecting society’s annual report and is monitored in an annual independent review.²⁴ Each collecting society is required to report annually to the Code Reviewer, including information on the number of complaints it has received and how those complaints have been resolved.²⁵ In conducting an independent investigation of compliance with the code, the Code Reviewer may also call for submissions from licensees on the level of compliance by collecting societies with the obligations imposed on them by the code.

Licensees have the opportunity at least once every three years to make written submissions on the operation of the code, including any amendments that are necessary

²¹ *ibid.*, clause 2.3(a).

²² *ibid.*, clauses 2.3(b)–(d).

²³ *ibid.*, clause 2.3(d).

²⁴ *ibid.*, clauses 5.1, 5.2.

²⁵ *ibid.*, clause 5.2(b).

or desirable.²⁶ The Australian Government has indicated that it will consider the development of a mandatory code if a voluntary code of conduct is not effectively implemented or if there is significant dissatisfaction among copyright users and members of collecting societies with the code and its operation.²⁷

A copy of the code, the reports of the Code Reviewer and details on how to make submissions to reviews are available at the websites of the participating collecting societies.

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²⁶ The review of the code is conducted by the Code Reviewer responsible for the independent annual reports. The inaugural review of the operation of the code was issued in April 2005. It recommended one amendment to clause 2.3(c)(ii)

²⁷ Government response to recommendation 6 of the House of Representatives Standing Committee on Legal and Constitutional Affairs report, *Don't stop the music!*, 2 November 2000.

4. Licensing and remuneration for use of copyright material

This chapter discusses licensing for the use of copyright material and outlines remuneration requirements under the Copyright Act.

Statutory licences

Statutory licences can be important in ensuring efficient and timely access to copyright material. The Copyright Act provides that statutory licences may be relied upon in respect of:

- use by educational institutions or other institutions assisting individuals with disabilities²⁸
- use for the services of the Commonwealth or a state or territory²⁹
- causing a published recording to be heard in public³⁰
- making a record of an already recorded musical work³¹
- certain uses for the purposes of making a broadcast.³²

In order to rely upon a statutory licence, users of copyright material (i.e. ‘licensees’) must meet the specific requirements set out in the Copyright Act. Statutory licensees may be required to agree with the copyright owner the amount of remuneration payable or undertake to pay an amount of remuneration determined by the tribunal to be ‘**equitable remuneration**’ or ‘an equitable amount of royalty payable’.³³ The statutory licence for the use of copyright material for the services of the Commonwealth or a State or Territory requires ‘terms’ to be agreed between the parties or, in default of agreement, terms to be ‘fixed’ by the tribunal.³⁴ However, if the relevant activities of the Commonwealth or State or Territory fall within the ‘government copying’ provisions of the Copyright Act, ‘equitable remuneration’ is payable.³⁵

²⁸ Parts VA and VB of the Copyright Act.

²⁹ Part VII, Division 2, of the Copyright Act.

³⁰ Subsection 108(1) of the Copyright Act.

³¹ Section 55 of the Copyright Act.

³² Part VC, subss. 47(3), 47A(8), 70(3), 107(3), and s. 109 of the Copyright Act.

³³ Sections 55 and 152A(5) of the Copyright Act. The tribunal stated in *Audio-Visual Copyright Society Ltd v Foxtel Management Pty Ltd (No. 4)* ACopyT 2006 at 135, that for the purposes of determining remuneration, ‘royalty that was “equitable” could be treated as having the same meaning as ‘equitable remuneration’.

³⁴ Subsection 183(5) of the Copyright Act.

³⁵ Subsection 183A(2) of the Copyright Act.

Remuneration notices

Remuneration notices apply in respect of statutory licences for educational institutions and other institutions identified under Parts VA and VB of the Copyright Act.

A remuneration notice requires administering bodies of educational and other applicable institutions to pay equitable remuneration to collecting societies and must specify how remuneration is calculated. The systems which may be used to calculate remuneration vary between the provisions and include assessment by way of:³⁶

- a records-based system—which requires payment per actual copy/usage based on records of each copy/usage kept during the period in which the remuneration is calculated³⁷
- a sampling-based system—which requires payment based on a representative sample taken during the period in which remuneration is calculated³⁸
- an electronic use system—which may be based on a records system, a sampling system or any other process or system.³⁹

A remuneration notice using a records system is referred to in the Copyright Act as a ‘records notice’, a remuneration notice using a sampling system is referred to as a ‘sampling notice’ and a remuneration notice using an electronic use system is referred to as an ‘electronic use notice’. Only an electronic use notice may be given in respect of electronic copying of copyright material.⁴⁰

If a records notice is given by an administering body, the administering body must:

- mark each licensed copy made or any container in which such a copy is kept
- keep a record of the making of each licensed copy, with such particulars as are prescribed
- retain that record for the prescribed retention period after the making of the copy
- send copies of such records to the collecting society in accordance with the *Copyright Regulations 1969*.⁴¹

Sampling systems are intended to simplify the calculation of remuneration payable in comparison with a records system. They create a method by which a conclusion can be reached as to the quantity and nature of copying that has taken place by reference to a sample taken during the relevant period, so that the remuneration to be paid can be calculated without imposing on licensees the burden of complete record keeping. The

³⁶ Sections 135G, 135ZU and 135ZZL of the Copyright Act.

³⁷ Sections 135H, 135ZV and 135ZZN of the Copyright Act.

³⁸ Sections 135J and 135ZW of the Copyright Act.

³⁹ Section 135ZWA of the Copyright Act.

⁴⁰ Subsection 135ZU(2A) of the Copyright Act.

⁴¹ Subsections 135K(1) and 135ZX(1) Copyright Act. Particulars and retention periods prescribed in the Copyright Regulations 1969, and differ according to nature of the work or subject matter.

copying obligations of institutions under a sampling-based system are as determined by agreement between the collecting society and relevant institution or as determined by the tribunal.⁴²

However, institutions giving a sampling notice must still mark each copy made under the licence, or the container in which the copy is kept, in accordance with the Copyright Regulations.⁴³

Declared collecting societies

The effective operation of many of the statutory licences in the Copyright Act depends on there being a ‘declared’ collecting society relevant to that particular licence. A collecting society may be declared as the collecting society for a particular part of the Copyright Act. Only one declared collecting society may exist for a specified class of copyright owners,⁴⁴ giving it a monopoly over that class of material.

In general, a society may be declared to be the relevant collecting society by the Attorney-General.⁴⁵ The tribunal must declare a society for the purposes of administering statutory licences for use of material by government.⁴⁶ **The Attorney-General may also refer an application for declaration to the tribunal⁴⁷ if greater transparency is needed, for example where an application is contested and it would be appropriate to have open hearings.**

The declared collecting societies at the time of publication are:

- CAL, for the copying of printed material by educational and other institutions⁴⁸ and by government⁴⁹
- Screenrights, for off-air copying and communication of broadcasts by educational and other institutions⁵⁰ and by government⁵¹ and for the retransmission of free-to-air broadcasts by pay-TV services.⁵²

Declared collecting societies are subject to guidelines prepared by the Attorney-General’s Department.⁵³ These guidelines set out matters which might give rise to the withdrawal of the declaration of a collecting society. They restate the requirements of the Copyright Act and, to some extent, elaborate on these requirements. The guidelines

⁴² Section 135J of the Copyright Act.

⁴³ Subsections 135K(3) and 135ZX(3) of the Copyright Act.

⁴⁴ Subsection 135ZZB(2) of the Copyright Act.

⁴⁵ Subsection 135ZZB(1) of the Copyright Act.

⁴⁶ Section 153F of the Copyright Act.

⁴⁷ **Section 135P(1A) of the Copyright Act.**

⁴⁸ Part VB of the Copyright Act.

⁴⁹ Part VII, Division 2 of the Copyright Act.

⁵⁰ Part VA of the Copyright Act.

⁵¹ Part VII, Division 2, of the Copyright Act.

⁵² Part VC of the Copyright Act.

⁵³ Attorney-General, *Guidelines for the declaration of collecting societies*, June 1990, revised April 2001.

do not generally cover the interaction between declared collecting societies and statutory licensees.

Voluntary licences

Where owners of copyright have assigned their rights to collecting societies, collecting societies may enter into voluntary licence arrangements with copyright users.

A common means of doing this is through the creation of a licence scheme. Licence schemes were described by the Copyright Law Review Committee as ‘typically standard licences for a particular industry or other collectively identifiable group which require the payment of a standard fee regardless of the level of use.’⁵⁴ That is, they offer ‘blanket’ protection to users. Such licences simplify both the administration of copyright licences for collecting societies and the process of obtaining a licence for users.

While the Copyright Act does not specify terms and conditions for licence schemes, as noted above collecting societies that subscribe to the code must charge licence fees that are ‘fair and reasonable’.⁵⁵

Licence schemes (both proposed and existing) may be referred to the tribunal for its consideration.⁵⁶ The tribunal may make such orders, either confirming or varying the scheme, that it considers ‘reasonable in the circumstances’.⁵⁷ Licence schemes confirmed by the tribunal have, in general, been found to be reasonable in the circumstances. However, even if a scheme has been confirmed by the tribunal as being reasonable in the circumstances, it remains open to potential licensees to apply to the tribunal for an order that the licensor grant them a licence on different terms because in the circumstances of the particular case the licence scheme would not be reasonable.⁵⁸

In practice, copyright licence fees take a variety of forms. Licence fees are often paid annually and may be based on a variety of factors, such as the number of times the copyright material is used, the revenue of the licensee, the number of people given access to the copyright material and the size of the area in which the copyright material is used. The rates applied to each base of calculation may differ between licensees according to the importance to the business of the material used.

Aside from blanket licences, users of copyright may be able to enter into a specific or ‘transactional’ licence. Transactional licences are voluntary licences ‘tailored to the specific circumstances of a user’.⁵⁹ Such licences may be appropriate for users of copyright who intend to use particular copyright material in a particular context at a

⁵⁴ Copyright Law Review Committee, *Jurisdiction and procedures of the Copyright Tribunal*, December 2000, p. 28.

⁵⁵ *ibid.*, clauses 2.3(b)–(d).

⁵⁶ Sections 154–156 of the Copyright Act.

⁵⁷ *ibid.*

⁵⁸ Section 157 of the Copyright Act. See Reference by Australasian Performing Right Association Ltd [2006] ACopyT 3 at 9.

⁵⁹ Copyright Law Review Committee, *Jurisdiction and procedures of the Copyright Tribunal*, December 2000, p.69.

specified time or times. Copyright users may be able to enter into a transactional licence directly with copyright owners.

Example: Part 3

The medical clinic can obtain a licence from APRA for the playing of background music, such as CDs, by completing a standard licence application form.

The medical clinic can also obtain a licence from PPCA for the playing of sound recordings by completing a standard application form.

The medical clinic may also choose to complete a single application form for both the APRA and PPCA licences at <https://transactions.business.gov.au/BLIS/musiclicence.aspx>.

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5. Resolving disputes with collecting societies

This chapter discusses the process for resolving disputes directly with copyright collecting societies.

General process for dispute resolution

When a licensee or prospective licensee wishes to dispute copyright licence terms and conditions, they should first contact the relevant collecting society.

Most collecting societies have developed procedures for complaints-handling and dispute resolution. Information on who can make a complaint, the procedure for making a complaint and details on what happens once a complaint has been lodged can be found at the respective collecting society websites. If no formal complaints procedure is available, licensees should contact the relevant collecting society and outline the nature of their complaint, including as much information and documentation as possible to assist in resolving the dispute.

If a licensee or potential licensee does not accept the society's final response to a complaint, the collecting society may offer a more formal alternative dispute resolution (**ADR**) procedure. Licensees may be bound under the terms of the licence to participate in such procedures before taking any action in the tribunal or Federal Court. Where a collecting society has not developed an ADR procedure, the society and licensee or potential licensee may be able to agree on a suitable process.

If either party is unsatisfied with the outcome of negotiation and/or any ADR process, they may, in certain circumstances, apply for review by the tribunal.

Requirements under the code

As noted above, the code is intended to ensure that licensees have access to efficient, fair and low-cost procedures for the handling of complaints and the resolution of disputes involving participating collecting societies.

Under the code, each collecting society undertakes to develop and publicise procedures for dealing with complaints from licensees and for dispute resolution between the collecting society and its licensees and/or members.⁶⁰ In developing such procedures, each collecting society has to comply with the requirements of the Australian Standard 4269-1995 *Complaints handling*, and have particular regard to the following principles:

- the procedures should define the categories of complaints and disputes they cover and explain the way in which each will be dealt with

⁶⁰ *Code of Conduct for Copyright Collecting Societies*, clause 3(a).

- information on how to make complaints should be readily accessible to members and licensees
- each collecting society should provide reasonable assistance to members and licensees in the formulation and lodgement of a complaint
- procedures should recognise the need to be fair to both the person complaining and the collecting society to which the complaint relates
- procedures should specify by position who in the first instance will handle complaints on behalf of the collecting society
- procedures should indicate time frames for the handling of complaints and disputes
- each collecting society should provide a written response to a complaint that is made in writing
- each collecting society should establish alternative dispute resolution procedures
- each collecting society will ensure that adequate resources are made available to respond to complaints and resolve disputes.⁶¹

Example: Part 5

Should the medical clinic wish to lodge a complaint about the relevant licences from APRA or PPCA, or dispute some aspect of licence terms and conditions, it should first contact the relevant collecting society in accordance with its complaints-handling and dispute resolution policies and procedures.

Both APRA and PPCA have agreed to be bound by the code and have in place ADR procedures. Further information about the code and the complaints-handling and dispute resolution policies and procedures at APRA or PPCA is available from each organisation or at their respective websites.

⁶¹ *ibid.*, clause 3(c).

6. The tribunal

This chapter explains the role of the tribunal and provides a general introduction to how it has approached the task of determining rates of remuneration and other licence conditions. Consideration of how the tribunal has undertaken the process of determining remuneration in the past may help parties to reach agreement without them making an application to the tribunal.

The ACCC understands that proceedings in the tribunal are conducted with as little formality and as quickly as possible. The tribunal has no filing fees and is not bound by the rules of evidence. It closely monitors the preparation of cases to prevent unnecessary delay and expense.

However, matters before the tribunal are often quite complex and licensees will usually require legal representation, particularly as collecting societies are almost certain to be legally represented. Proceedings can be lengthy and quite expensive for individual organisations.

More detailed information regarding the tribunal can be obtained from the Attorney-General's Department (www.ag.gov.au), the Federal Court (www.fedcourt.gov.au), by writing to the **Registrar** of the Copyright Tribunal, Level 16, Law Courts Building, Queens Square, Sydney NSW 2000 or by seeking independent legal advice.

Composition and jurisdiction of the tribunal

The tribunal was established 'in response to the perceived need to control the exercise by collecting societies or other organisations of the rights given to them by copyright owners'.⁶² It is established by the Copyright Act and its membership, functions, powers and procedures are set out in the Copyright Act and the Copyright Tribunal (Procedure) Regulations 1969.

The tribunal consists of a president (who must be a judge of the Federal Court of Australia), any number of deputy presidents (who must also be, or have been, judges of a federal court or a state or territory Supreme Court), and other members with appropriate qualifications.⁶³

Most applications are heard by a single member; however, if a party requests that the tribunal be constituted by more than one member for the purposes of an application the matter must be heard by no less than two members, one of whom must be the president or a deputy president.⁶⁴

The **registrar** of the tribunal is a registrar of the Federal Court of Australia in Sydney, which serves as the tribunal registry.

⁶² Copyright Law Review Committee, *Jurisdiction and Procedures of the Copyright Tribunal*, December 2000, p. 14.

⁶³ Section 140 of the Copyright Act.

⁶⁴ Section 146 of the Copyright Act.

The tribunal has the power to determine disputes over:

- **voluntary licences that are administered by collecting societies**
- **the refusal of collecting society to grant a voluntary licence**
- **various matters in respect of statutory licences.**

Matters that might be in dispute between parties include:

- **whether remuneration is ‘reasonable in the circumstances’ under a voluntary licence**
- **the amount of ‘equitable remuneration’ under a statutory licence**
- **other conditions of a voluntary licence**
- **the sampling or records system used for the purposes of a statutory licence.**

The tribunal has the power to confirm or vary a referred voluntary licence or licence scheme or substitute a new licence or licence scheme if one is put forward by one of the parties to the reference.

The tribunal also has the power to compel parties to undertake ADR processes when it thinks it appropriate.⁶⁵ Parties may be requested to engage in a range of ADR processes including conferencing, mediation, neutral evaluation, case appraisal and conciliation. The tribunal may not order the undertaking of arbitration or court procedures or services.

As well as its jurisdiction in respect of licensing arrangements, the tribunal may hear applications seeking declaration (or revocation of declaration) of a collecting society in relation to government copying or regarding **other statutory licences if the matter is referred to it by the Attorney-General.**

⁶⁵ Sections 169A and 169B of the Copyright Act.

Example: Part 6

Both of the licences that the medical clinic requires are voluntary licences which are collectively administered and provided through a licence scheme.

If the medical clinic is dissatisfied with the arrangements (including after any ADR processes) it may lodge an application with the tribunal. The tribunal has the power to confirm or vary the referred licence or licence scheme, including the rates of remuneration, to what it considers to be ‘reasonable in the circumstances’.

It is also possible for an organisation that is a representative of persons or businesses requiring licences to which a licence scheme applies, to make an application to the tribunal. The medical clinic may therefore seek to have an appropriate industry body represent it and other similar businesses before the tribunal.

Tribunal determination of rates of remuneration

The tribunal has acknowledged that determining an appropriate rate of remuneration for the use of copyright material is very difficult.⁶⁶ In general, when disputes are referred to it, the tribunal is required by the Copyright Act to determine ‘equitable remuneration’ in the case of statutory licences and remuneration that is ‘reasonable in the circumstances’ in the case of voluntary licences.

There is no definition of either ‘equitable remuneration’ or remuneration that is ‘reasonable in the circumstances’ in the Copyright Act. The Copyright Act does prescribe factors that the tribunal may or in some cases must have regard to in determining equitable remuneration for certain statutory licences for educational and other institutions. These vary between provisions but include:

- the nature of material
- the institutions for which the copies are made
- the purpose and character of the copying
- the effect of the copying on the market for or value of material
- special circumstances of external students
- any unremunerated contribution by institutions to the creation of material in the copied material

⁶⁶ *First Schools Case* at 27; *Copyright Agency Ltd v Queensland Department of Education & Ors* (2002) 54 IPR 19 at 25 per Finkelstein DP.

- the need to ensure adequate incentive for the production of educational material.⁶⁷

More generally, the tribunal has indicated that ‘equitable remuneration’ means remuneration that is ‘fair and reasonable’ or remuneration that is ‘just in all the circumstances’.⁶⁸ In determining remuneration that is ‘reasonable in the circumstances’, the tribunal has considered that the ‘ultimate question’ is whether a licence fee is ‘fair and reasonable’.⁶⁹ Where the reference is to determine an ‘amount payable’ under s. 152 of the Copyright Act in respect of broadcasting public sound recordings, the tribunal considered that it should determine an amount that represents ‘equitable or fair and reasonable’ remuneration to the copyright owner.⁷⁰ It therefore appears that the task of determining an appropriate rate of remuneration is similar regardless of the type of licence.

In determining whether an amount demanded by a collecting society is unreasonable, the tribunal has approached the task by first deciding what is a ‘reasonable rate’.⁷¹

The tribunal has approached the task of determining remuneration in three ways:

- **Market rate:** inquire as to the normal rate charged by the copyright owner in similar circumstances which can establish a ‘market’ or ‘going’ rate.
- **Notional bargain rate:** seek evidence which may enable the tribunal to objectively determine the notional remuneration that would be agreed in a hypothetical bargain between willing but not anxious parties—this includes evidence of comparable bargains (not in the same market but sufficiently similar to the notional bargain).
- **Judicial estimation:** engage in ‘judicial estimation’ of equitable remuneration.⁷²

⁶⁷ Copyright Tribunal (Procedure) Regulations 1968, rr 25A and 25B.

⁶⁸ *Copyright Agency Limited v Queensland Department of Education & Ors* (2002) 54 IPR 19 at 24-25 per Finkelstein DP. See also Report of the Inquiry by the Copyright Tribunal into the Royalty Payable in Respect of Records Generally 24 December 1979; *Copyright Agency Limited v Department of Education New South Wales* (1985) 4 IPR 5, 27; *Copyright Agency Limited v University of Adelaide & Ors* (1999) 42 IPR 529; *Audio Visual Copyright Society Limited v New South Wales Department of School Education & Ors* (1997) 37 IPR 495; *University of Newcastle & Ors v Audio-Visual Copyright Society Ltd* (1999) 43 IPR 505 at 520.

⁶⁹ *Reference Brought by Australasian Performing Right Association Limited Under section 154 of the Copyright Act 1968* (1992) 25 IPR 257 at 266.

⁷⁰ *WEA Records Pty Ltd and Others v Stereo FM Pty Ltd* 48 ALR 91, 112-113.

⁷¹ *Re Applications by MCM Networking Pty Ltd and Others* (1998) 25 IPR 597 at 611.

⁷² *Copyright Agency Limited v Department of Education New South Wales and Ors* (1985) 4 IPR 5, 15-16. These approaches were developed in the context of assessing damages to be awarded in infringement cases. In discussing the issue, the tribunal cited in particular Lord Wilberforce of the House of Lords in *General Tire and Rubber Co v Firestone Tyre and Rubber Co Ltd* [1976] RPC 197. A similar approach has also been adopted by the tribunal to determine remuneration that is ‘reasonable in the circumstances’: *Re Applications by MCM Networking Pty Ltd and Others* (1989) 25 IPR 597; *Fair Fitness Music Association v Australasian Performing Right Association Limited* (1998) 43 IPR 67. Other cases generally identify at least the first step of finding a ‘going rate’, then follow a more general approach to determining remuneration that is reasonable in the circumstances: *Australasian Performing Right Association Limited v Federation of Australian Radio Broadcasters Limited* [1999] ACopyT 4.

The tribunal recently considered it possible that judicial estimation ‘appropriately describes the tribunal’s approach to its task in all cases’ with the market rate and notional bargain rate approach being but ‘particular useful tools of judicial estimation.’⁷³

Market rate

The market rate approach to determining remuneration is based on the theory that ‘rational people will not sell or provide a thing for less than it is worth to them, nor buy it for more than it is worth’.⁷⁴

Factors that the tribunal has considered relevant in establishing a going rate include whether the market under consideration is competitive, whether there are sufficient transactions in the market ‘to provide a reliable indicator of value’ and whether ‘the circumstances in which the market operates are the same as, or at least comparable with, those in which the equitable remuneration is to be fixed’.⁷⁵

Past agreements and rates of remuneration in other jurisdictions have also been accepted by the tribunal as relevant to the determination of a market rate. However, a number of difficulties are associated with the use of these, which are discussed below in ‘Judicial estimation’.

In the context of voluntary licences, there may be relevant licence schemes which have been confirmed by the tribunal as ‘reasonable in the circumstances’. Although the tribunal’s determination in relation to a particular scheme does not in itself establish a market rate, the tribunal may apply the same reasoning in subsequent cases in relation to that scheme unless an applicant can differentiate itself from licensees that have accepted the scheme.⁷⁶

Notional bargain rate

Determining the notional remuneration that would be agreed in a hypothetical bargain will often require separate examination of the notional bargain that would be reached between ‘a willing, but not anxious, licensor and a willing, but not anxious, licensee’.⁷⁷

In the case of statutory licences, the tribunal has stated that the hypothetical bargain should assume that the statutory licence does not exist and so parties must successfully bargain with each other.⁷⁸ However, the tribunal has also indicated that it is entitled to

⁷³ *Audio-Visual Copyright Society Ltd v Foxtel Management Pty Ltd and Others (No. 4)* [2006] ACopyT 2 at 134.

⁷⁴ *Copyright Agency Limited v Queensland Department of Education & Ors* (2002) 54 IPR 19 at 25 per Finkelstein DP.

⁷⁵ *Copyright Agency Limited v Queensland Department of Education & Ors* (2002) 54 IPR 19 at 25 per Finkelstein DP. See also *Re Applications by MCM Networking Pty Ltd and Others* (1989) 25 IPR 597.

⁷⁶ *Fair Fitness Music Association v Australasian Performing Right Association* (1998) 43 IPR 67 at 72.

⁷⁷ *Audio-Visual Copyright Society Ltd v Foxtel Management Pty Ltd and Others (No. 4)* [2006] ACopyT 2 at 134.

⁷⁸ *Audio-Visual Copyright Society Ltd v Foxtel Management Pty Ltd and Others (No. 4)* [2006] ACopyT at 156.

‘reconstruct the background to the hypothetical bargaining process’ if there is a factor which would prevent that process from yielding an equitable price, for example if one party was ‘misusing a substantial degree [of market power]’.⁷⁹

Judicial estimation

The Copyright Law Review Committee summarised the factors that the tribunal has taken into account in conducting judicial estimation of equitable remuneration as:

- previous agreements between the parties
- negotiations between the parties preceding the application to the tribunal
- comparison of determinations under similar legislative regimes in other jurisdictions
- comparison between royalties set by other licensors/collecting societies
- the capacity of the licensee to pay
- the value to the licensee of the use of the copyright material
- the general public interest and the interest of consumers
- the administrative costs of a licensing body.⁸⁰

These are discussed below.

Previous agreements and negotiations

Any previous agreements between the parties are almost invariably considered by the tribunal. For example, the tribunal has stated that it ‘could hardly ignore’ previous rates agreed between the parties because they may be ‘an indication of what the parties regarded as fair.’⁸¹ However, the usefulness of these agreements is limited, among other factors, by:

- ‘the period of time that has elapsed since the agreements were made’
- ‘the circumstances in which the agreements were entered into’ (e.g. the parties relative strength in negotiations)
- changes that have taken place since the agreements were made.⁸²

⁷⁹ *ibid.* at 157.

⁸⁰ Copyright Law Review Committee, *Jurisdiction and Procedures of the Copyright Tribunal* (December 2000) p. 115.

⁸¹ *Copyright Agency Limited v Queensland Department of Education* (2002) 54 IPR 19 at 28.

⁸² *Copyright Agency Limited v Queensland Department of Education* (2002) 54 IPR 19 at 28.

Indeed, the tribunal recently considered that a high percentage increase in rates could be acceptable if the existing rates were unduly low.⁸³

Negotiations between the parties before the application also have the potential to inform the tribunal's decision. The tribunal has accorded particular significance to the level of experience and expertise exhibited by the negotiating parties. The tribunal has expressed the view that where both representatives are sufficiently experienced:

... the settlement negotiations between the two have a degree of relevance in that they indicate to the tribunal that these two most experienced people thought that the area in which to negotiate was in the range, or close to the range, of the figures which they discussed. I would not hold either to the precise figures which were nearly achieved. But I think that there is much to be said for the view that their negotiations give good guidance as to the area or range in which the tribunal's determination should fall.⁸⁴

Other rates of remuneration

The tribunal has indicated that comparable rates of remuneration in other jurisdictions may be helpful.⁸⁵ However, it has also noted that comparisons are very difficult to draw.

Difficulties highlighted include those which arise:

... in selecting appropriate exchange rates and also in drawing comparisons when one is uncertain of the comparative purchasing power of money in different countries. And there is the fact that the existence of a rate elsewhere does not of itself establish that it is inherently correct. To rely on it as a benchmark may be productive of error.⁸⁶

Despite such difficulties, the tribunal has relied on international comparisons when the circumstances are generally similar.⁸⁷

Capacity to pay and value to the licensee

The capacity of the licensee to pay is a practical consideration in determining copyright licence fees. The tribunal has noted that '[i]f the buyer is not willing or is not able, business cannot be done.'⁸⁸ In addition, the tribunal has commented that the use of copyright material may be discouraged (to the disadvantage of both owners and users) if rates are too high.⁸⁹ However, the tribunal has also indicated that it is not appropriate for copyright owners to subsidise users of copyright by accepting lower payments.⁹⁰

⁸³ Reference by Australasian Performing Right Association Ltd [2006] ACopyT 3 at 120.

⁸⁴ *Audio-Visual Copyright Society Ltd v New South Wales Department of School Education & Ors* (1997) 37 IPR 495 at 508.

⁸⁵ *WEA Records Pty Ltd and Others v Stereo FM Pty Ltd* (1983) 48 ALR 91 at 125; *Copyright Agency Limited v University of Adelaide & Ors* (1999) 42 IPR 529 at 15.

⁸⁶ *Reference Brought by Australasian Performing Right Association Limited under section 154 of the Copyright Act 1968* (1992) 25 IPR 257. See also *Audio Visual Copyright Society Ltd v Foxtel Management Pty Ltd (No 4)* [2006] ACopyT 2 at 144-145.

⁸⁷ Reference by Australasian Performing Right Association Ltd [2006] ACopyT 3 at 124.

⁸⁸ *Audio-Visual Copyright Society Limited v New South Wales Department of School Education & Ors* (1997) 37 IPR 495, 517.

⁸⁹ *Audio-Visual Copyright Society Limited v New South Wales Department of School Education & Ors* (1997) 37 IPR 495.

⁹⁰ *Copyright Agency Limited v Department of Education New South Wales and Ors* (1985) 4 IPR 5, 33.

The value of the licence to the licensee is influenced by the durability of the copy and the use to be made of the copy. For example, copyright owners may request higher rates for copies made onto transparencies as opposed to paper; such copies are more durable and can be viewed by many students at once.⁹¹ Similarly, recorded programs may be useful over a shorter or longer period of time⁹² and technological advances may change the effectiveness of copying and the value drawn from copying.⁹³

The tribunal has been cautious of relying on surveys to measure the value to users of copyright material, particularly ‘stated preference surveys’ that ask consumers to predict their future actions.⁹⁴

Other considerations

As well as determining a rate of remuneration that balances the interests of copyright owners and users, the tribunal may take into account the general public interest and the interests of consumers.⁹⁵

The Australian Competition Tribunal has noted:

Whilst the Copyright Tribunal might not be obliged to treat competition issues as paramount, we cannot accept that it would not take them into account and strive to determine what constitutes reasonable charges and conditions having regard to the wider public interest as well as to the interests of the immediate parties before it.⁹⁶

The administrative costs of the licensing body have also been relevant to tribunal determinations. The tribunal has allowed reasonable collection costs to be taken into account in the setting of licence fees.⁹⁷

In addition, rates have been adjusted for arrangements that reduce the costs of both the licensing body and the licensee. For example, the provision of accurate and timely records by the licensee may benefit the collecting society and warrant a discount in the amount paid. Or switching to a sampling-based agreement from a records-based one may reduce the administrative costs of both parties and should be reflected in the licence fees paid.

⁹¹ *Copyright Agency Limited v Queensland Department of Education* (2002) 54 IPR 19 at 91.

⁹² *Audio-Visual Copyright Society Limited v New South Wales Department of School Education & Ors* (1997) 37 IPR 495, 520.

⁹³ *Copyright Agency Limited v Queensland Department of Education* (2002) 54 IPR 19 at 74. In speculating about the effect of technological advancements in the future, however, the tribunal has remained wary of forecasting. In *Audio-Visual Copyright Society Limited v New South Wales Department of School Education & Ors* Sheppard P stated that he could not ‘decide a case which is largely based upon what has happened up to now upon what might happen in the future’: (1997) 37 IPR 495, 512.

⁹⁴ *Audio-Visual Copyright Society Ltd v Foxtel Management Pty Ltd and Others (No. 4)* [2006] ACopyT 2 at 507-512.

⁹⁵ *Report of the Inquiry by the Copyright Tribunal into the Royalty Payable in Respect of Records Generally* (1979) at xix: Copyright Law Review Committee, *Jurisdiction and Procedures of the Copyright Tribunal*, (December 2000) p 214. See also *Reference by Australasian Performing Right Association Limited Re Australian Broadcasting Corporation* (1985) 5 IPR 449.

⁹⁶ *Re Applications by Australasian Performing Right Association Ltd* (1999) 45 IPR 53 at 113.

⁹⁷ *Copyright Agency Limited v University of Adelaide & Ors* (1999) 42 IPR 529 at 21.

Tribunal determination of other licence conditions

The Copyright Act does not prescribe factors relevant for determining other conditions of licences to use copyright material.

The tribunal has noted that the manner of payment and other licence conditions are important since ‘selection of a proper method is likely to yield the fairest result’.⁹⁸ However, the tribunal has also quoted the United Kingdom Copyright Tribunal and stated that ‘[i]f the price is right then the basis on which it is calculated ceases to be unreasonable ... The basis of calculation is a subsidiary issue.’⁹⁹

The tribunal has identified three principal aspects of a sampling system as important if the system is to satisfy the objective of providing a means of estimating the amount and nature of the copying by licensees:

- ‘specify the type of information that is to be obtained by the licensee’
- ‘establish procedures for the collection of that information’
- ‘set up a process for the analysis of that information’.¹⁰⁰

The tribunal has also noted that there must be a balance struck between the amount of work undertaken in the sampling process and the cost involved. The more sophisticated a sampling system the more accurate the conclusions, however, the costs associated with such a system may not justify the benefit.¹⁰¹

⁹⁸ *Reference Brought by Australasian Performing Right Association Limited under Section 154 of the Copyright Act 1968* (1992) 25 IPR 257.

⁹⁹ *Fair Fitness Music Association v Australasian Performing Right Association Ltd* (1998) 43 IPR 67 at 72.

¹⁰⁰ *Copyright Agency Limited v University of Adelaide* [2000] A CopyT 2 at 6.

¹⁰¹ *Copyright Agency Limited v University of Adelaide and Others (No 2)* [2000] A CopyT 6 at 19.

7. The role of the ACCC

This chapter outlines the role of the ACCC in copyright licensing and copyright collecting societies.

Application of the Trade Practices Act

As noted above, the ACCC is responsible for administering the Trade Practices Act. A key objective of the Trade Practices Act is to prevent anti-competitive conduct and encourage competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.

Copyright collecting societies and licensees, like other businesses, are subject to the operation of the Trade Practices Act. The conduct of both copyright users and collecting societies in negotiating licence agreements has potential to raise concerns under some provisions of the Trade Practices Act.

Collective bargaining by users of copyright

Copyright users' negotiations with collecting societies for a licence to use copyright material or an application to the tribunal in respect of such a licence are often of interest to a large number of licensees or potential licensees. Users of copyright that are sufficiently similar to warrant the same licence conditions being applied may therefore consider negotiating collectively with collecting societies or negotiating through a representative, such as a formal industry body. Licensees might also consider working together in lodging an application with the tribunal.

Collective bargaining is an arrangement whereby multiple competitors in an industry come together, either directly or through the appointment of a representative, to negotiate the terms and conditions of supply with another business. Because these are agreements between competitors, collective bargaining arrangements will ordinarily raise concerns under the competition provisions of the Trade Practices Act.

Collecting societies

As collecting societies bring together the rights of copyright owners that might otherwise compete in the supply of such material, their arrangements may also risk breaching the competition provisions of the Trade Practices Act. Given their dominant position in the market regarding the types of rights they control they may also be at risk of breaching the prohibition on misuse of market power.

Seeking immunity – authorisation and notification

The ACCC can grant immunity from legal action for anti-competitive conduct (with the exception of misuse of market power) in certain circumstances if parties apply for ‘authorisation’ or lodge a ‘notification’.¹⁰²

Broadly, the ACCC may grant authorisation when it is satisfied that the likely public benefit from the arrangement outweighs any likely public detriment.¹⁰³ The ACCC conducts a comprehensive public consultation process and issues a draft determination before making a decision to grant or deny authorisation.

APRA and PCCA have been granted authorisation for their licensing arrangements.

For more information on authorisation, see the ACCC’s *Guide to authorisations*, available on the ACCC website. Some public documents regarding authorisations previously considered by the ACCC are also available on the website, www.accc.gov.au.

Following recent amendments, the Trade Practices Act now provides small businesses with a more streamlined process for gaining immunity - this process is known as notification and it applies to collective bargaining arrangements. More information about the collective bargaining notification process is available from the ACCC’s *Guide to collective bargaining notifications* and from the ACCC website.

Relationship between collecting society authorisation and remuneration

As noted, by acting collectively for copyright owners, collecting societies may risk breaching the competition provisions of the Trade Practices Act. The activities for which a collecting society may seek authorisation might include:

- input arrangements—the assignment or other transfer of rights in respect of copyright material from owners to a collecting society
- output arrangements—the licensing arrangements between a collecting society and copyright users
- distribution arrangements—the arrangements for distributing fees raised from licensees to copyright owners
- overseas arrangements—reciprocal arrangements between a local and overseas collecting society through which each grants the other the right to licence in their territory works for which they represent the copyright owner.

The role of authorising the above arrangements is complementary to the tribunal’s role of setting rates of remuneration.¹⁰⁴ In particular, input arrangements determine the

¹⁰² Part VII, Divisions 1 and 2 of the Trade Practices Act.

¹⁰³ Section 88 of the Trade Practices Act.

¹⁰⁴ The Australian Competition Tribunal found that the Copyright Tribunal has no jurisdiction to set input arrangements: *Re Applications by Australasian Performing Right Association* (1999) 45 IPR 53 at 218.

structure under which arrangements to licence copyright users (that is output arrangements) are made. The ACCC and the Australian Competition Tribunal (which has the jurisdiction to hear appeals of the ACCC's decisions regarding applications for authorisation) therefore have complementary roles to the Copyright Tribunal.

The ACCC considers that collecting societies should make input and output arrangements that minimise the anti-competitive effect of their operation.

In particular, arrangements will be less anti-competitive if they:

- do not prevent direct negotiation between copyright owners and users
- are as unrestrictive as possible, striking an appropriate balance between flexibility in licensing and standard application forms
- allow adjustments to blanket licences in appropriate circumstances, including an appropriate adjustment to the fee
- are clear and readily available to users of copyright
- allow for alternative dispute resolution processes where appropriate.

Allowing direct negotiation between copyright owners and users of the copyright material is important because it potentially affects the prices of licences to use copyright material. Where licensees have the option of negotiating a license directly with the owners of copyright, this is likely to place a competitive constraint on collecting societies in setting licence terms and conditions, driving them toward efficient outcomes. Such provisions should **in practice** not deter direct dealings between copyright owners and users of the copyright material.

Flexibility in licensing and allowing users to acquire licences with adjustments to the normal rate charged is only appropriate when the additional costs associated with administration, enforcement and calculation of charges do not outweigh the benefit.

As a party to tribunal proceedings

The Copyright Act gives the tribunal discretion to allow the ACCC to become a party to tribunal proceedings if the ACCC applies and the tribunal is satisfied that it would be appropriate to do so.¹⁰⁵

However, the ACCC will only seek do so in very limited circumstances. The ACCC's primary consideration whether to intervene in private proceedings is whether it would be in the public interest. The ACCC will make this decision on a case-by-case basis.

For more information, the guide *ACCC intervention in private proceedings* is available at the ACCC website, www.accc.gov.au.

¹⁰⁵ Section 157B of the Copyright Act.

8. Remuneration for the use of copyright material

The ACCC does not have a role determining the appropriate level of remuneration for the use of copyright material or other licence conditions. It is a matter for negotiation between the parties (including through any ADR processes) or, failing this, for determination by the tribunal.

The problem of market power

Although collecting societies give rise to considerable practical benefits, they also bring together the rights of parties who would normally compete with each other in the supply of copyright material. This creates scope for collecting societies to exercise market power in the setting of licence fees and conditions because parties wishing to use copyright have limited, if any, alternatives.

The exercise of market (or monopoly) power results in an inefficient use of resources and reduces the overall welfare of society. When prices are raised above a competitive level, consumption and production fall below the socially optimal quantities, since some consumers who value the good or service more than the cost of production no longer buy the product. There is also less pressure on a monopoly supplier to operate efficiently and to offer the types of products and level of service that consumers want.

Concern over the monopoly power of collecting societies was raised as early as 1932 when a Royal Commission was appointed to inquire into and report on the exploitation of performing rights.¹⁰⁶ In particular, the inquiry sought to address complaints about the dominant market position of APRA and the charges the agency imposed. The Royal Commission concluded that APRA was ‘to all intents and purposes, a super-monopoly controlling or claiming to control most of the music which users in public must use and is able to dictate its own terms’.¹⁰⁷

More recently, the *Review of Australian Copyright Collecting Societies* (the Simpson report), which investigated the major copyright collecting societies of the time, APRA, AMCOS, PPCA, CAL and Screenrights (then called the Audio-Visual Copyright Society), stated that

... whenever a number of exclusive rights owners join together to form a licensing system, there is a potential for abuse and there is no doubt that each of the five collecting societies do have a dominant position in the market-place with respect to the types of rights that each controls.¹⁰⁸

¹⁰⁶ L Owen (Commissioner), *Report of the Royal Commission on Performing Rights*, Commonwealth, 1933.

¹⁰⁷ *ibid.*, p. 44.

¹⁰⁸ Shane Simpson, *Review of Australian Copyright Collecting Societies, report to the Minister for Communications and the Arts and Minister for Justice*, Department of Communications and the Arts, Canberra, 1995, at 33.3.

The role of the tribunal

The tribunal was ‘principally established under the Copyright Act to counterbalance the monopoly position of particular collecting societies’¹⁰⁹ and may be called on to set licence fees and conditions in the absence of agreement between parties.

Although the tribunal is not required under the Copyright Act to refer specifically to competition issues when determining an appropriate rate of remuneration, the Australian Competition Tribunal has noted:

Whilst the Copyright Tribunal might not be obliged to treat competition issues as paramount, we cannot accept that it would not take them into account and strive to determine what constitutes reasonable charges and conditions having regard to the wider public interest as well as to the interests of the immediate parties before it.¹¹⁰

Further, a recent article by the current President of Copyright Tribunal, Justice KE Lindgren, discusses the role of the Copyright Tribunal and the market power of collecting societies.¹¹¹ It concludes that:

As a matter of legislative history, the [Copyright] Act’s provisions giving the tribunal jurisdiction to quantify amounts payable can be seen to have arisen from concern in the 1920s to 1960s with APRA’s monopoly.

...

Under [the existing statutory descriptions of the amounts payable to copyright owners] the tribunal must determine an amount which provides equitable or reasonable or just or fair remuneration to the copyright owner, but no more than that. The amount must be fair to the user of the copyright material as well as to the copyright owner.

Pricing of copyright material

Given the relatively high degree of market power held by copyright collecting societies, the ACCC has included in this guide for copyright licensees some broad principles it considers relevant to the pricing of copyright material.

Price greater than marginal cost

In general, the socially optimal price for a good in a competitive market is the marginal cost of its production, that is, the additional cost from producing an extra unit of the good. When price is equal to marginal cost, all consumers who value the product more than it costs to produce will buy it. However, application of this principle requires consideration of both ‘short-run’ and ‘long-run’ implications.

¹⁰⁹ Copyright Law Review Committee, *Jurisdiction and Procedures of the Copyright Tribunal*, December 2000, p. 15.

¹¹⁰ *Re Applications by Australasian Performing Right Association* (1999) 45 IPR 53 at 113.

¹¹¹ Justice KE Lindgren, *Market power, collecting societies and the role of the Copyright Tribunal*, in *The Australian Law Journal* (2005) 79 ALJ 561, pp. 561-584.

Static (or short-run) analysis assumes that the copyright material has already been produced. The marginal cost of non-rival goods such as copyright material is the cost of distribution of that material, which is likely to be zero or very close to zero. For example, the marginal cost of producing another CD is minimal, and the marginal cost of having another commercial venue playing a CD is zero.

Setting total remuneration equal to the short-run marginal cost would not provide an incentive for further creation of original works, and the production of such works would fall well below the socially optimal level.

To provide incentives for investment in the production of new copyright material, the sum of remuneration paid by all users of the material should also cover the cost of creating new material. This should include, for example, appropriate reward for the risks associated with production of copyright material.

Difficulty in determining the cost of production

While it may be accepted that remuneration for the use of copyright material should be an amount greater than marginal cost, the task of determining remuneration remains complex. In particular, in the case of copyright, as with other forms of intellectual property, determining the total cost of production is extremely difficult. For example, it is difficult to measure and value the time costs incurred by the creator of the material.

The cost of production is a fundamental factor to pricing goods in general. As this is difficult to calculate, the remuneration payable by copyright licensees is similarly difficult.

Price discrimination and licence fee structure

If the total return to copyright owners is set to an appropriate level, it will encourage an appropriate level of production. How that return is generated may affect whether the arrangements are equitable.

Efficient pricing of copyright material will usually involve some degree of price discrimination between different categories of users. That is, remuneration for the use of copyright material may to some extent reflect the value to and ability to pay of particular (or particular groups of) licensees. How much a licensee values copyright material is likely to be a reflection of the use made of that material and the importance of the material to the licensee's business.

When various classes of copyright users have different elasticities of demand (i.e. are more or less price sensitive in respect of copyright material), it is more efficient to charge a higher price to those with relatively inelastic demand and a lower price to those with a relatively elastic demand. As prices rise above marginal cost, classes of consumers that are more price-sensitive will reduce their consumption of a good by more than those that are less price-sensitive. Charging less to these consumers (and more to those consumers that are less price-sensitive) might allow copyright owners to recoup the returns owed to them under the Copyright Act in a more efficient way.

The method of calculating licence fees may assist in ensuring that the value of the copyright material to the licensee is reflected in the licence price. For example, it may be that the value is closely correlated with an individual business's revenue and licence fee can be calculated according to this. In other cases, a more complex approach will be appropriate. For example, the licence scheme for background music for retail and general business use proposed by APRA calculates a fee according to:

- the type and number of devices on which the music is played (with more sophisticated systems attracting a higher fee on the presumption that a more sophisticated system indicates higher value of the music to the licensee or its potential audience)
- the size of the floor area where the music can be heard (on the presumption that larger floor area equates to a larger number of people listening to the music).¹¹²

There may also be scope for 'two part tariffs' in setting remuneration for copyright material. This is where copyright licensees pay a base fee for access to the copyright material and an additional fee according to use. This additional fee could be based on, for example, each hour of use, each item of copyright material used or the number of people that have access to the copyright material.

The ACCC notes that it is important that copyright collecting societies strike an appropriate balance between charging different prices to different consumers and offering licences that provide for ease of administration and enforcement. If licences are too highly individualised or too complex to administer, this may result in excessive costs to both users of the copyright (e.g. in recording details from which to calculate fees) and to the relevant collecting society (e.g. in enforcing the agreement). The costs of negotiating licences and agreeing on the fee payable will also increase to both the collecting societies and licensees if licensing arrangements are highly tailored and/or complex.

¹¹² Reference by Australasian Performing Right Association Ltd [2006] ACopyT 3.