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Mr Guy Donald
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By email: Guy.Donald@acc.gov.au

Dear Mr Donald

Draft ACCC Guidelines to assist the Copyright Tribunal in the determination of copyright remuneration

Free TV thanks the ACCC for the opportunity to comment on the *Draft ACCC Guidelines to assist the Copyright Tribunal in the determination of copyright remuneration (the Draft Guidelines)*, which have been developed to assist in the determination of reasonable copyright remuneration in proceedings relating to voluntary licences and licence schemes before the Copyright Tribunal.

Free TV represents Australia's commercial free-to-air television broadcasters. At no cost to the public, our members provide a variety of channels of content across a broad range of genres, in addition to a range of online and mobile offerings. The value of commercial free-to-air television to the Australian public remains high. On any given day, free-to-air television is watched by an average of 13 million Australians.

As major owners, licensors and licensees of copyright material, Free TV recognises the importance of the role of copyright collecting societies for both rightsholders and licensees. The collective administration of copyright by collecting societies makes transactions easier for both parties, is the most effective way to manage these rights and is generally working well.

At the same time, it is important to recognise that exclusive collective administration of rights by a single collecting society removes or significantly limits competitive pressures on those organisations and gives rise to monopolies or monopoly like effects, which in turn can lead to excessive licence fees or restrictive licence terms and conditions. In such cases, a licensee's only recourse is often limited to the commencement of expensive, protracted and ultimately uncertain Copyright Tribunal proceedings. Free TV supports any measures designed to bring increased certainty to such a process.

As licensees of copyright material who have been involved in both copyright licence negotiations with music collecting societies as well as Copyright Tribunal proceedings in the past, Free TV Members recognise the role of the Draft Guidelines in assisting the Tribunal to make fair determinations that achieve pricing outcomes closer to those that would have prevailed in a competitive environment.

Purpose of the Guidelines

As noted in the Consultation Paper, the ACCC has a role in assisting the Copyright Tribunal in the performance of its functions under the Copyright Act 1968 (**the Act**). Under section 157A of the Act, the Tribunal is required to have regard to the Guidelines, if requested by a party to a proceeding. They are intended to be advisory, not determinative, and may assist the Tribunal in making a decision in a particular case. The Consultation Paper provides:

The ACCC considers that the Copyright Guidelines should focus on providing a framework that focuses on countering any market power held by collecting societies and providing material to assist parties preparing economic evidence to support their claims. Indirectly, they can also facilitate licence negotiations and thereby reduce the number or scope of matters requiring determination by the Copyright Tribunal, as well as assist the Copyright Tribunal in matters that are brought before it.¹

Free TV supports the ACCC's approach to framing the Guidelines. It is consistent with the Ergas Report and the Government's response to it,² and it will provide assurances to licensees that the Tribunal will have regard to the Guidelines (without, of course, constraining its powers to consider other relevant matters).

Approach to pricing in the Guidelines

The Guidelines recommend two key methods for pricing copyright materials if feasible in the particular circumstances of the case; benchmarking and construction of a hypothetical bargain.

Free TV supports the approach adopted by the ACCC in the Guidelines, which is consistent with the approaches adopted by the Tribunal in a number of applications over the last 10 years or so. While the Commission has acknowledged that these approaches may not be practicable or appropriate in all cases, we agree that they are an appropriate starting point to assist the Tribunal in determining a fair price.

Free TV notes that circumstances where benchmarking against existing rates may not be appropriate include the use of existing rates to reinforce inappropriate benchmarks simply because they are already in place. For example, there is a risk that Rate A is used to justify an increase in Rate B, which in turn is then used to justify a further increase in Rate A. In our view, a licensee must always be free to argue alternative benchmarks and/or that circumstances (such as fundamental or significant changes in market conditions) which necessitate a complete re-evaluation.

Benchmarking

The Consultation Paper sets out a range of appropriate benchmarks that the Tribunal may have regard to.

In section 5.1, the Consultation Paper lists a number of appropriate benchmarks including the existing rate for the licensing of the copyright material. In our view, these benchmarks should also include the existing rates for the licensing of complementary uses of copyright material. For example, the rates paid for the communication of recordings may provide a benchmark for the rates paid for the musical works or vice versa, depending on the circumstances in which those other rates were determined.

¹ Consultation Paper, 9.

² Ibid.

In Section 5.2 the appropriateness of the existing rate is discussed in more detail and a list of three factors is provided when considering whether existing rates are an appropriate benchmark or not.

In our view, an additional factor should be included here as flagged above, namely, fundamental or significant changes in the market. At the moment, we consider that this section implicitly proceeds on the assumption that the market has remained constant, which will not always be the case. For example, the home entertainment market has been heavily disrupted over the last decade or so, first with console games, then YouTube and more recently Netflix etc. The market has therefore so fundamentally changed that, in our opinion, earlier/existing rates would no longer be a reliable benchmark (assuming that they were otherwise appropriate). We consider that the Draft Guidelines should be amended to acknowledge that the appropriateness of any existing rate as a benchmark must be considered in the light of changes in the market.

Section 5.3 refers to rates for the same copyright material used for different purposes or supplied to different types of end users as a benchmark. Our view is that rates for the same material in different uses should be considered as benchmarks. If the rates differ, it will be important for the Tribunal to consider the reasons why and, in particular, whether the differing rates are due to an increased investment or innovation by the licensee. In our view, a fundamental principle of the valuation process should be to exclude from consideration the impact of some new or innovative feature developed by the licensee. It has been observed, for example, that copyright owners sometimes seek increases in licence fees for “digital” uses, it being asserted that such uses have a higher inherent value. Typically, however, the perceived added value of such services will be due entirely to the investment or innovation of the licensee.

Constructing a hypothetical bargain

Free TV agrees with the Consultation Paper that, ‘there could be cases where the hypothetical bargain approach cannot be applied with a high level of precision’.³ It will not always be possible to construct a hypothetical bargain. For example, it would be difficult if not impossible to isolate the value of the benefit that music provides to a program from the many other components of the program (including but not limited to; the script, production, acting, cinematography, set design etc).

Contact

If you have any queries or wish to discuss any of the matters raised in this letter, please do not hesitate to contact me on (02) 8968 7100.

Kind regards,



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Free TV Australia

³ Consultation Paper, 19.