

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

screenrights

Submission by Screenrights
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INTRODUCTION

Screenrights is a not-for-profit copyright society representing rightsholders in film, television and radio. Screenrights has 4,277 members in 66 countries. Screenrights administers statutory licences relating to educational use of broadcasts in Australia, government copying of broadcasts and audiovisual material on the internet, and the retransmission of free to air broadcasts.

In addition, Screenrights provides a voluntary licence for educational use of audiovisual material in New Zealand, along with a range of ancillary services for copyright owners.

Screenrights appreciates this opportunity to make submissions and provide comments on the *Draft ACCC Guidelines to assist the Copyright Tribunal in the determination of copyright remuneration* (Draft Guidelines) that are proposed to be made for the purposes of s157A of the Copyright Act 1968.

We note at the outset that Screenrights does not operate a licence scheme that the Draft Guidelines would have direct relevance. However it is likely that any s157A guidelines will have relevance to Screenrights as it is a declared society for the administration of the three Australian statutory licences:

- Educational broadcast copying and communication provided for by s 113P(2);
- Retransmission of free-to-air broadcasts provided for by Part VC; and,
- Government copying of broadcasts provided for by ss 183, 183A.

Each involves a power in the Copyright Tribunal of Australia to determine what is equitable remuneration for use under the licence in the absence of agreement. Section 157A guidelines may be quite relevant to the Tribunal or the parties before it when making those equitable remuneration determinations.

Moreover, Screenrights has had some experience in relation to the matters discussed in *Part B: Pricing Principles of the Draft Guidelines* insofar as it was responsible for introducing the Copyright Tribunal to stated preference evidence (contingent valuation studies) in attempting to value use under the Part VC retransmission statutory licence.¹

We have had an opportunity to read in draft the submission of Copyright Agency to you, and we agree with the Copyright Agency that the language of monopoly in Part A is unhelpful insofar as distracts from the real nature of the exercise being undertaken by the Copyright Tribunal when exercising its pricing jurisdiction over licences. In that role, its position is more akin to a body that determines a price or rate arrangements under an access regime.

¹ Audio-Visual Copyright Society v Foxtel Management (No 1) [2003] ACopyT 2 and Audio-Visual Copyright Society Ltd v Foxtel Management Pty Ltd (No 4) [2006] ACopyT 2.

We will confine our detailed comments to Part B: Pricing Principles.

PRICING METHODS – 4.2

Screenrights agrees with selection of Benchmarking (i.e. observable actual rates) and Construction (i.e. modelling hypothetical rates) in the Draft Guidelines as the methods most appropriate for pricing copyright. Screenrights supports the implicit message that the Tribunal should favour properly adduced economic evidence-driven approaches. However, consideration might be given by the ACCC, based on our experience, to addressing explicitly three additional matters in this section: scope for judicial estimation; cases of direct licensee retail exploitation; and, overlap between Benchmarking and Construction.

Judicial Estimation

The first is whether there are any circumstances that judicial estimation should be resorted to, and if so the relationship between those circumstances and any benchmarking or modelling evidence that has been adduced in the course of the hearing. In our experience, rarely in the adversary style adopted in the Tribunal (which, although not bound to, broadly follows Federal Court procedures and cultures) is any evidence adduced that is accepted unconditionally by the other side. Often the Tribunal gives some weight, but not conclusive weight, to different evidence – most of which is itself contested.

Thus, the evidence-base to support a remuneration determination can be something of a collage of the whole evidence. In this setting it might be useful if the s157A guidelines indicate whether they expressly dissuade judicial estimation in all cases or whether they permit judicial estimation in certain cases where neither parties' benchmarking nor modelling evidence is wholly persuasive. If the latter (which Screenrights submits is commonly the outcome), broad guidance could be given on matters such as whether *a priori* what types of benchmarking or construction were likely to be more probative.

Direct Licensee Exploitation

Second, the possibility arises that the licensee is itself making a direct commercial exploitation of the copyright subject matter *per se* – that is with little incorporation or bundling of it with other unrelated goods or services such as when musical works are performed to contribute to the ambiance of a cafe. A past example of such a *per se* exploitation might be seen in a determination which involved licensing by another collecting society and was the sale of surveyors' plans by the NSW government in reliance upon ss 183, 183A.² It might be useful for the

² Copyright Agency Limited v State of New South Wales [2013] ACopyT 1.

Tribunal to have some greater guidance in future cases, where the licensee is in effect retailing the licensed subject matter in and of itself.

We note that at 6.3.1 under the sub-heading ‘revealed preference methods’ some allowance is made for an assessment of WTP from revealed preferences. However, this discussion does not speak to the setting in the surveyors’ plans case directly, where the licensee is a retailer. In such cases Screenrights observes that an approach which involves halving the economic surplus appears to be consistent with the approach taken in the later discussion in the Draft Guidelines in particular at 6.5. In a case where a licensee is retailing the licensed subject matter *per se* the quantification of economic surplus can occur on a less hypothetical basis given the existence of an observable retail price.

Benchmarking – Construction Overlap

Third, and tied in with the above two matters, there is no necessary mutual exclusivity between benchmarking and construction. As presently drafted, section 4.2 of the Draft Guidelines when introducing them to the reader somewhat suggests that they are true alternatives, although as noted above later at 6.3.1 under the sub-heading ‘revealed preference methods’ some allowance is made for a degree of overlap. Our submission is that fuller and clearer allowance should exist in the s157A guidelines to cater for cases where the construction of a hypothetical bargain is informed by evidence of appropriate benchmarks – such as rates paid for similar uses, in comparable markets or in other jurisdictions. Such benchmarking data permits the Copyright Tribunal to estimate, in the same way that stated preference data might, a licensee’s WTP. In such cases the basic approach to economic surplus put forward at 6.5 also appears to be relevant.

BENCHMARKING – 5

Screenrights agrees that benchmarking against comparable going market rates or other observable prices can be highly probative of the value of the use under licence and the appropriate remuneration payable for it by a licensee. We note here that the leading UK authority (albeit in a patents case) stands for this very proposition.³

On the discussion in the guidelines, we make two caveats in relation to the discussion at 5.2 and 5.4 about existing rates determined either by past agreements or determinations whether in Australia or elsewhere. One is the possibility that rates arrived at in the settlement of litigation might not be an accurate measure of a fair market price. The second is the relevance of earlier arbitral or tribunal determinations that lack rigor.

³ General Tire & Rubber v Firestone Tyre & Rubber (No.2) [1975] FSR 273.

Past Litigation Settlements

The first is that an existing rate arrived at by settlement of litigation might be compromised by issues relating to a licensee dispute about the existence of the very property right being licensed. If that settlement price is in part discounted because the licensee disputes a truly existing right, but the licensor prefers to settle and move on rather than waste resources in protracted and sometimes global litigation, the price could be properly viewed with some caution. An English court has observed about licensing rates agreed in the shadow of patent litigation should not be used as a benchmark moving forward in subsequent settings:

[T]he worldwide state of hostility and opposition to General Tire was such as to result in their only being able to secure licensing agreements on terms which were financially less advantageous to them than would have been the case had that state of affairs not existed. ... To discover what is fair compensation to General Tire for Firestone U.K.'s unauthorised use of General Tire's property we have to put a value on that use. When using the royalty method to assess this we must assume that the hypothetical negotiations take place between parties must be on equal terms; in other words, there must be eliminated from the circumstances of the supposed market those elements of the circumstances of the actual market which would in any way distort the bargaining powers of the hypothetical negotiators.

Past Determinations

The second is that previous pricing determinations by arbiters, tribunals or courts (whether in Australia or foreign jurisdictions) which have not priced in a manner consistent with the philosophy implicit in the Draft Guidelines should be discounted. For example if a previous determination of a tribunal has engaged in what can rightly be described as arbitrary number-plucking based on an unexpressed intuitive synthesis in which all the evidence before it has been loosely considered, that price seems hardly apt to be an appropriate benchmark for future use.

CONSTRUCTING A HYPOTHETICAL BARGAIN – 6

Screenrights strongly supports the overall approach taken by the Draft Guidelines to the use of stated preference data in valuing copyright use under licence. With the exception of our firmly critical submissions on the topic of *Marginal Versus Average Pricing*, our comments below are largely observations and reflections based on our own experience in this field.⁵

⁴ General Tire & Rubber v Firestone Tyre & Rubber [1974] FSR 122, 147.

⁵ Audio-Visual Copyright Society Ltd v Foxtel Management Pty Ltd (No 4) [2006] ACopyT 2.

Screenrights is agnostic as to whether a stated preference valuation data is elicited via a choice experiment or contingent valuation. However, in the Copyright Tribunal setting of valuing use under a licence it seems that the latter is a reasonably straightforward and conservative method.

Contingent Valuation

On contingent valuation, we note the statements in Appendix 2 at p 32 that a 'respondent may have an incentive to understate their true WTP' and that this 'is a serious problem for copyright determinations'. However, given the quasi-judicial nature of Copyright Tribunal processes, this problematic understatement also has the virtue of its very conservatism. It might be useful for the guidelines to point that out explicitly: that a well-constructed, properly phrased and conducted contingent valuation study should yield WTP data that, while reliable, is more likely to understate rather than overstate true WTP preferences. We note that in attempting to value use under the retransmission statutory licence in 2004 a Screenrights-commissioned contingent valuation survey asked about the value of that use to licensee customers directly.⁶

It might also be noted within the s157A guidelines that many of the controversies and criticisms levelled at contingent valuation studies are specific to the environmental nature of the public goods which have commonly been their subjects and not the valuation of copyright use.

⁶ The primary WTP preference elicitation question was:

As a result of recent changes in Australian law, Cable TV providers may be required to make payments to the owners of the programs in order to continue transmitting via cable the regular channels (that is, ABC, Channel 7, Channel 9, Channel 10 and SBS). If that happens, one possibility is that the Cable TV providers would remove transmission of the regular channels from the Pay TV service. Provided subscriber demand was sufficient, Pay TV may then offer the transmission of the regular channels as a separate service for an additional fee. This would mean that Cable TV subscribers would pay a monthly fee to receive Pay TV channels and an extra monthly fee to continue receiving the regular TV channels through cable.

Please remember that if the regular TV channels were no longer available through your Cable TV, you could still have access to these channels through a TV aerial.

We are now going to ask you some questions about whether or not you would be prepared to pay to continue to receive the regular TV channels through your cable service.

If you had the choice of paying [\$1] extra per month to continue receiving the regular TV channels through your cable TV service or paying what you do now and losing this part of the service, in which case you would have to receive the regular channels through a TV aerial, would you?

Pay [\$1] extra per month to continue receiving the regular channels through your cable TV, which amounts to [\$12] per year that you would not have to spend on other things / Not pay [\$1] extra per month and lose access to the regular channels through your cable TV / Don't know.

We also note in this regard that in the US, in the wake of litigation seeking to value the damage caused to Alaskan wilderness by the *Exxon Valdez* oil spill in 1989, the US National Oceanic and Atmospheric Administration (NOAA) convened in the early 1990's a panel of experts co-chaired by Nobel Prize winners Kenneth Arrow and Robert Solow. The NOAA panel examined both the theory and practice of contingent valuation. In its final 1993 report it concluded that if certain guidelines were followed in the conduct of a contingent valuation survey, then such a survey would 'convey useful information'.⁷ The recommended NOAA panel's guidelines for the conduct of a contingent valuation survey included: the use of the elicitation of willingness-to-pay data (rather than willingness-to-accept); in-person survey interviews; a binary discrete choice question, and a careful description of the product to be valued and its substitutes. The NOAA panel went on to say:

We think it is fair to describe such information as reliable by the standards that seem to be implicit in similar contexts, like market analysis for new and innovative products and the assessment of other damages normally allowed in court proceedings ... Thus, the Panel concludes that [contingent valuation] studies can produce estimates reliable enough to be the starting point of a judicial process of damage assessment.

Given the detailed examination and acceptance of these matters as a matter of public law in the US, a reference might be added to Appendix 2 of the s157A guidelines to this report of the NOAA panel.

Choice Experiments

Screenrights understands the propositions put in the Draft Guidelines positing choice experiments as preferable in eliciting stated preference valuation data. It might however be helpful if the guidelines made under s157A address one aspect of choice experiments given the public law and open justice nature of Copyright Tribunal determinations in a quasi-judicial process. That is while choice experiments may overcome strategic biases that might lead to understatements or overstatements of value, they do so in part because as stated in Appendix 2 at p 34 'the monetary value associated with a particular attribute is not directly asked' and noted there '[t]he monetary value of a particular attribute is hidden'. It might be helpful for the Copyright Tribunal and parties who are before it if the guidelines made under s157A made clearer that this is a necessary and inherent feature of choice experiments.

⁷ Proposed Rules, Department of Commerce, National Oceanic and Atmospheric Administration, Natural Resource Damage Assessments Under the *Oil Pollution Act of 1990*, 58 Federal Register 4601, 15 January 1993, Appendix I – Report of the NOAA Panel on Contingent Valuation.

⁸ Ibid.

Licensee's Customer Data

Screenrights firmly endorses the comments in the Draft Guidelines at 6.3.2 concerning the relevance of preference data being elicited from licensee's customers.

Average Versus Marginal Pricing

Screenrights has strong reservations about the comments in the Draft Guidelines at 6.3.2 concerning marginal pricing and the example put forward in Box 2 of Appendix 1. In that example, a rational licensing body who is required to set a single price point for all prospective licensees would not select a price which generates a lower return to copyright owners than a price that delivers a higher return. In the example \$3 delivering a profit of \$10 would not be chosen in preference to \$4.50 delivering a profit of \$22.50. Moreover, the basis for selecting the \$3 – to not exclude prospective licensee number 10 whose WTP exceeds the WTS – is itself problematic insofar as the relevant WTS may be, as the Draft Guidelines state at 6.4.1, close to zero.

An implication of Box 2 of Appendix 1 is that pricing should not exclude any prospective licensee whose WTP exceeds what may be to be a close-to-zero WTP, even if this results in lower economic returns to copyright owners under the licence. This approach seems unlikely to result in equitable remuneration and could not be supported by a copyright collecting society that has trustee obligations to its copyright owner members. In any event marginal cost pricing has long been seen to be deficient for the pricing of intellectual property and other for other services that require a large fixed cost to establish and have a near-zero marginal cost of provision. In this regard we agree with the Copyright Agency's criticisms regarding the pricing methodology adopted by the ACCC (and consistent with our introductory comments regarding access regimes) the pricing of broadband example put forward by Copyright Agency is a useful comparison.

It might be that some of the pricing issues canvassed in the Draft Guidelines can be approached by a consideration of the possibility of Ramsey pricing, long considered suitable in such settings. We note in this regard that the desirability of Ramsey pricing was one reason that the Hilmer Committee recommended the repeal of the price discrimination prohibition.⁹ We also note that such pricing is apt in a setting such pricing use under a copyright licence where there are high fixed establishment costs, the marginal costs of supply are close to zero, there is a desire to allow prospective licensees who might not otherwise be able to afford access to acquire access and a desire on the part of the provider to appropriate market value.¹⁰ Indeed Screenrights in the statutory licensing of educational broadcast copying and communication provided for under s 113P(2) has for

⁹ Report by the Independent Committee of Inquiry (Hilmer Committee), *National Competition Policy* (August 1993), 79.

¹⁰ Stephen Corones, *Competition Law in Australia* (2010, 5th ed), [8.150].

decades engaged in a form of Ramsey pricing supported by the Copyright Tribunal through differential licence fees between the school and university education sectors.¹¹

Practice Notes

Screenrights endorses the reference made in the Draft Guidelines (at the top of p 26) to the Survey Evidence Practice Note of the Federal Court of Australia. While the Practice Note is merely directory, it serves important purposes in terms of open process and informing the issues of survey conduct.¹² Screenrights' position is that there is much to be said for the adherence to the Practice Note to have more of a mandatory nature when a survey is being undertaken as a valuation exercise for Copyright Tribunal purposes. It would be open to the ACCC to consider making compliance with the Practice Note a more important matter within any s157A guidelines.

Finally, Screenrights submits that the ACCC might also give some consideration to including in the s157A guidelines a suggestion that the Expert Evidence Practice Note (EEPN) of the Federal Court of Australia also be substantively followed to by parties and the Tribunal.¹³ We note that this provides procedures that might assist the Tribunal to arrive at a determination on rates. These include: the possibility, especially relevant in cases where the Tribunal does not have an economist as a sitting member, of appointing an expert as an independent adviser to the Tribunal (EEPN 2.1); the convening of a conference of experts of the parties – a so-called 'hot-tub' (EEPN 7.4-7.9); and, the preparation of a joint report by the parties' experts (EEPN 7.10).

MORE INFORMATION

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¹¹ Audio-Visual Copyright Society Ltd v New South Wales Department of School Education & Ors [1997] ACopyT 1 (setting a rate of \$2.60 per school student) and University of Newcastle v Audio-Visual Copyright Society Ltd [1999] ACopyT 2 (setting a rate of \$5.50 per equivalent full-time university student unit).

¹² Audio-Visual Copyright Society v Foxtel Management (No 1) [2003] ACopyT 2.

¹³ Federal Court of Australia, *Expert Evidence Practice Note* available at <http://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-expt>.