



Submission to Commerce Commission on 19 December 2022 Draft Guidelines on the Application of Competition Law to Intellectual Property Rights

Introduction

Copyright Licensing Limited (CLNZ) is a not-for-profit organisation, part of a global network of collecting societies that provide licensing services for the copying of extracts from books, magazines, newspapers, journals other written content, and in relation to reproduction of visual artists' works by auction houses. For particularly high volume users, licences are agreed to run for multiple years with renegotiations of licence terms prior to the end of each cycle. For other licence holders, licences are renewed on an annual basis.

CLNZ is committed to meeting and exceeding a high benchmark of operational conduct. We actively contributed to and have aligned our operations with the World Intellectual Property Organisation's TAG (Transparency, Accountability and Governance) Compendium on best practice for collecting societies, and we are a member of the International Federation of Reproduction Rights Organisations. We hold mandates to represent both local and international rightsholders in offering licensing services in New Zealand.

In 2020, CLNZ's licensing activity returned \$5,249,807 to content creators whose work was copied in New Zealand.

Collecting societies provide significant benefits for both copyright owners and users of copyright by providing mechanisms for efficiently licensing works where the barriers to transactions would often otherwise be prohibitive. The benefits of collection societies such as CLNZ are acknowledged by the statutory recognition of licensing schemes such as those operated by CLNZ in the Copyright Act 1994, with the established mechanism of the Copyright Tribunal in place to address any perceived unfairness in the terms or operation of licensing schemes. The current draft of the Guidelines (paragraphs 84-86) ignores this established mechanism.

Moreover, the current suggestion in the draft Guidelines that the Commerce Commission might intervene in the terms or operation of licensing schemes, including in relation to the scenarios set out in paragraph 86 and the example, cuts across the statutory framework set out in Part 8 of the Copyright Act. That suggestion has potential to create confusion, cause unnecessary transaction and administrative costs, and undermine confidence in both the Copyright Tribunal and Commerce Commission.

CLNZ submits that the Guidelines should instead identify that the current mechanism for oversight of licensing schemes by the Copyright Tribunal established by the Copyright Act is in place to address perceived unfairness or misuse of market power in the terms and operation of copyright licensing schemes operated by collecting societies.

Some more detail about perceived market power and the operation of licensing schemes under the Copyright Act are set out in the following pages.

Submitted by:

Collecting societies, efficiency, and market power

While we appreciate the reference made in paragraph 84 to the efficiency provided by collecting societies, we question whether paragraphs 84 to 86 take into full consideration the efficiency collecting societies provide to the market and their value for licence holders.

With respect to the licences provided by CLNZ specifically:

- Within the scope of the material that we license, licence holders may effectively make use of an unlimited repertoire of works that span new and old, familiar and obscure works.
- Fee structures are based on the head-count of recipients of copyright works copied; by using this basis rather than volume of material copied for licence fees, copying is not artificially limited by cost considerations.
- Distribution of material is flexibly permitted through existing systems and procedures.

With respect to collecting societies generally:

- Price is commonly decisive in licensing copyright works. Owing to the interchangeability of works in different media and distribution formats, collecting societies may compete to obtain a more advantageous marketplace position by decreasing licence fees. Ironically, where fees are too high remuneration to rightsholders is likely to be lower, thus striking at collecting societies' *modus vivendi*.
- By permitting the operation of a single collecting society for a given market format (note that for reasons discussed in this document we do not regard this as a monopoly state) greater costs and legal uncertainty for licence holders and rights holders resulting from multiple overlapping collecting societies and licensing activity is avoided. For example, those inefficiencies have been observed in Brazil where a third umbrella organisation was introduced to distribute remuneration to other separate societies, with the triad deducting their administrative costs.¹

We also argue that by failing to take into consideration the alternative avenues available for licensing of material, paragraphs 84 to 86 do not accurately reflect the genuine limits on CLNZ's market power:

- Scholarly databases licensed directly from scholarly publishers contain a large array of copyright works that are available only digitally, and also increasingly older works that were formerly only available in print. These databases significantly undermine the market power of CLNZ licences.
- The use of the open access publishing model in scholarly journal articles and books is rapidly growing; these growing bodies of works (generally licensed under permissive Creative Commons licences) further undermine the market power of CLNZ licences.
- Other forms of direct licensing such as ebook platforms like OverDrive and Amazon Kindle, publishers' bespoke content platforms like those produced by many K12 education publishers, and licensing directly with publishers either B2B and through platforms like CCC Rightslink. This material is not covered by CLNZ licences and those other forms also diminish CLNZ's market power.
- The growing use of freely available quasi-authoritative 'grey literature', such as the large bodies of articles, videos, and podcasts on commerce and organisational management produced by firms such as McKinsey.

¹ World Intellectual Property Organisation. *Collective Management of Copyright and Related Rights*. 2022, third edition. DOI 10.34667/tind.47101

This material is increasingly used in tertiary education. This material is also not covered by CLNZ licences and also undermines market power.

Copyright works licensed through CLNZ may be replaced by works available through these alternative licensing avenues. Further, works licensed through CLNZ may also be replaced by works licensed through other collecting societies.

To summarise, we suggest that the market power CLNZ holds as a collecting society is significantly lower than paragraphs 84 to 86 appear to posit, that the much lower market power that CLNZ holds is conducive to efficient market operation, and that the guideline should balance consideration of market power with consideration of factors that both create efficiencies and diminish market power, and that the market should be understood as being diverse, complex, dynamic, and by no means favourable to collecting societies.

Paragraph 86.3

The draft guideline does not take into consideration the role of the Copyright Tribunal in determining the appropriateness of fees negotiated between collecting societies and licence-holders. The Tribunal's role is articulated in Part 8 of the Copyright Act 1994. We note particularly in respect to paragraph 86.3 the following provisions:

- Sections 149 and 150 of the Copyright Act state that the Tribunal may confirm or vary terms of licensing schemes by order as it determines reasonable.
- Section 151 provides a further referral or appeal process to the Tribunal.
- Section 152 contains explicit provisions pertaining to the payment of licence fees.
- Section 155 contains protections against liability for infringement of copyright where an order has been made by the Tribunal.

Other provisions of Part 8 of the Copyright Act also contain provisions of relevance to paragraph 86.

This existing mechanism is in place to address the possible issues set out in paragraph 86, including the potential for fee adjustment issues such as those alluded to in paragraph 86.3 and the example provided after paragraph 86.