Submission: Draft Guidelines on the Application of Competition Law to Intellectual Property Rights following the removal of Intellectual Property exceptions under the Commerce Act 1986

Submitter details

Name	[redacted]
Email	[redacted]
Organisation	Recorded Music New Zealand

About the Submitter

1. This is a submission on behalf of Recorded Music New Zealand Limited (Recorded Music). Recorded Music is a non-profit, collective management organisation (CMO), which acts on behalf of sound recording copyright owners and exclusive licensees (generally record companies, digital aggregators and individual recording artists) to license and collect for certain uses of sound recordings, including in public performance.

2. At the time of writing Recorded Music represents, by way of non-exclusive licence agreements, approximately 3,155 individual "master rights holders" (copyright owners or exclusive licensees of sound recordings), ranging from the New Zealand branches of the three major record companies to independent record companies and distributors and individual recording artists.

3. The catalogues represented by Recorded Music amount to many millions of individual recordings (the numbers growing every day with new music continuously being created and released).

Response to the Draft Guidelines

Summary

4. Our response is focused on the '**Collecting Society'** section of the Draft Guidelines at paras 84-86 (p.16 and 17).

5. We thank the Commerce Commission and support the inclusion & acknowledgement of CMOs or 'Collecting Societies' as they are referred to within the Guidelines and the recognition of their important function and role in improving efficiency in Intellectual Property licensing.

6. However, as set out below, we submit that if CMOs are to be included in the Draft Guidelines, the Collecting Society section should provide more relevant statutory and market context around CMOs. This should include:

    (a) Recognition of the relevance of the Copyright Act 1994 framework and Copyright Tribunal (the Tribunal) in providing for competitive outcomes from negotiations between licensees and CMOs; and
    (b) Acknowledgment that the application of competition law to CMOs is an issue well traversed around the world - with it being widely accepted that the efficiency provided to licensees, not just copyright owners, through the operation of CMOs is of benefit to the market.

Response to Paragraph 84

7. Para 84 of the Draft Guidelines states that "*Collecting Societies can improve efficiency in licensing for copyright owners, who would otherwise need to individually negotiate licensing for content*". This is of course true but the draft Guidelines still understate the importance of CMOs to a well-functioning Intellectual Property system and we request that para 84 is adjusted to reflect the more apt descriptions below.

8. In its November 2018 Issue Paper – Review of the Copyright Act 1994 – MBIE expressly stated that "*CMOs make it easier for copyright owners to monetise their works. They also make it easier for users to obtain permission to use those works*."[1]

9. A similar sentiment has been expressed globally. In January 2018 WIPO stated that:[2]

   "CMOs provide appropriate mechanisms for the exercise of copyright and related rights, in cases where the individual exercise by the rightholder would be impossible or impractical. Collective management is an important part of a functioning copyright and related right system, complementing individual licensing of rights, resting on robust substantive rights and corresponding enforcement measures. In this vein, CMOs are a policy bridge between rightholders and users."

10. In Europe the practical efficiencies of CMOs have been recognised and CMOs have been described as being "the most realistic way for copyright owners to exercise many of their rights":[3]

    "collecting societies are practically, economically, and legally both viable and essential: practically, because copyright owners cannot be in an indefinite number of places at the same time exercising individual rights, and foreign right owners would be unable to exercise their rights outside their country of origin without extreme expense and difficulty; economically, because it is cheaper to share the financial expenses of negotiation, supervision and collection among the greatest possible number of right owners; and, legally, ***because it is impossible for users of works to obtain permission from every individual copyright owner****, both national and foreign."*

11. It has also been recognised by the European Parliament that CMOs provide a particular benefit for smaller right holders who lack the bargaining power to negotiate a licence with large users of music. [4] *"Collective management organizations play … an important role as promoters of the diversity of cultural expression, both by enabling the smallest and less popular repertories to access the market and by providing social, cultural and educational services for the benefit of their rightholders in public."*

---

[1] Ministry of Business, Innovation & Employment – Issues Paper – Review of The Copyright Act 1994 <***https://www.mbie.govt.nz/dmsdocument/3441-review-of-copyright-act-1994-issues-paper-pdf*** >

[2] World Intellectual Property Organization, 'Working Document – WIPO Good Practice Toolkit for CMOs', January 2018, p6 <***https://www.wipo.int/edocs/mdocs/copyright/en/wipo_ccm_ge_18/wipo_ccm_ge_18_toolkit.pdf***>.

[3] Gillian Davies et al, *Copinger and Skone James on Copyright* (17th ed, Sweet & Maxwell Ltd, London: 2016) at 27-02, 27-07.

[4] Recital 3, Directive 2014/26/EU on collective rights management and multi-territorial licensing of rights in musical works for online uses (EU Directive 2014/26/EU).

Response to Paragraphs 38.4, 85 and 86

12. Para 38.4 states that "*a collecting society might enjoy market power because of the breadth of intellectual property rights to which the society has access*" and Para 85 of the Draft Guidelines states that "*the aggregation of intellectual property rights may confer market power on collecting societies, with the potential to foreclose competition, particularly where collecting societies act as a gatekeeper to the accessing of important copyright*". The draft wording at para 86, which begins with "*Conduct by a collecting society, or the agreements under which they are created or maintained, is less likely to harm competition*" then seems to take the approach of starting with the presumption that a CMO is *likely* to harm competition and that the Commerce Commission is best placed to intervene.

13. In our view these paragraphs create confusion and are unhelpful as they overstate the potential market power of CMOs and, crucially, fail to recognise:

    (a) CMOs following established international codes of industry practice; and
    (b) the key role of the Tribunal and the bespoke statutory framework in facilitating competitive outcomes from negotiations between CMOs and licensees provided for in the Copyright Act 1994.

CMO Good Practice

14. At Recorded Music NZ we take significant learnings from the international operation of CMOs. We operate in accordance with the recorded music industry's global representative body IFPI's Code of Conduct for Music Industry Licensing Companies published in May 2021 ("*IFPI Code*"); and the World Intellectual Property Organisation's (WIPO) Good Practice Toolkit for Collective Management Organisations published in September 2021 ("*WIPO Toolkit*").

15. We operate transparently and our licensing is based on objective and non-discriminatory criteria, which is conducive to efficient market operation. Tariffs (which apply to different types and scales of copyright licensees) are transparent and publicly available on our website. Often we are able to offer a blanket licence but licensees always have the option of directly approaching copyright owners - as Recorded Music's licenses with copyright owners are **non-exclusive**.

16. We are committed to operating fairly and before issuing a new or amended tariff in a specific industry or business area, we will typically consult within that industry and with any industry representative bodies in order to establish a fair and reasonable licensing scheme.

The Application of the Copyright Act and Jurisdiction of the Tribunal

17. CMO licence arrangements are negotiated in the context of a statutory scheme under the Copyright Act which grants specific powers to the Tribunal. The Tribunal's role is set out in ***Part 8 of the Copyright Act 1994*** and allows anybody seeking a licence in relation to a scheme operated by a CMO to apply to the Tribunal for the scheme to be reviewed. The Tribunal can hear disputes about the reasonableness of a licence fee or the licence terms and has the power to rewrite the licence terms as it determines (including changing the licensing fees). The key provisions are as follows:

    (a) Sections 149 and 150 of the Copyright Act state that the Tribunal may confirm or vary terms of licencing licensing schemes by order as it determines reasonable.

(b) Section 151 provides a further referral or appeal process to the Tribunal.
(c) Section 152 contains explicit provisions pertaining to the payment of licence fees.
(d) Section 155 contains protections against liability for infringement of copyright where an order has been made by the Tribunal.

Response to The Collecting Society (exclusive dealing) Example

18. Since 2010 Recorded Music NZ's Agreements with licensees have been **non-exclusive**. Accordingly, we query the value for the broader commercial community of the inclusion of this highly specific and historic example. However if it is to be included, we submit:

    (a) the language should not include emotive language such as "exorbitant"; and
    (b) to ensure balance and accuracy, the Guidelines should make reference to the Copyright Act statutory scheme, which allows IP users to apply to the Tribunal to address any licensing dispute with a CMO.

19. We thank the Commerce Commission for the opportunity to provide feedback and hope that our input is helpful to you. We are of course happy to provide any further information if needed.

Yours faithfully