

COLLECTIVISATION OF COPYRIGHT EXPLOITATION: COMPETITION ISSUES

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I. INTRODUCTION

In the information society, exploitation of intellectual property¹ is increasing in importance as a way to earn a living. While the inventor of a new type of solar cell, or the designer of a better chair may be able to deal directly with manufacturers, distributors and users of their intellectual property, this is not so easily achieved by writers, musicians and artists whose copyright works can be much more easily appropriated, often in an undetectable manner, through photocopying or pressing a button on a tape recorder, as the case may be.

To take just one example of the contribution of a copyright-based industry to the economy, the Australian music industry contributed around 700 million dollars to gross domestic product in 1993, has a turnover of \$1.4 billion and employs over 50,000 people.² There is also huge export potential for copyright; global sales of

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1 Intellectual property is "Copyright, patents - you know, that sort of thing" see further J McKeough and A Stewart, *Intellectual Property in Australia*, Butterworths (1991) at [101].

2 (1993) No 3 *Music Industry Advisory Council Bulletin* 2.

recorded music were A\$35-40 billion in 1991,³ and it is thought that Australia may be third in the world in terms of supply of English language music repertoire. At the moment, the Australian export figure (estimated to be 120 million Australian dollars) does not reflect our qualitative contribution to the world music scene, and the opportunity of earning vast export dollars for this creative enterprise will depend upon the existence of appropriate means of administering the rights incorporated in recorded music.

The Federal Government is keen to encourage an awareness of intellectual property and opportunities for exploitation. A paper prepared for the Prime Minister's Science and Engineering Council in June 1993 points out that "[t]he world intellectual property market represents \$600 billion of industrial products and processes annually".⁴ While the paper concentrated on the benefits of the patent system in enhancing Australia's role in the world market for intellectual property, the importance of intellectual property generally (including the copyright industries), in making Australia internationally competitive, is emphasised. The existence of adequate intellectual property protection both domestically and internationally provides "... the ability to prevent free-loader imitators from utilising the technology"⁵ in the legal sense. However, the administration and enforcement of the rights created by intellectual property laws is another matter altogether. In the absence of an effective method of policing and collecting revenue for the use of intellectual property, the rights are illusory.

This article discusses the collectivisation of copyright enforcement through aggregation of individual copyrights in the hands of collecting societies and focuses on the potential for conflict with competition law. Copyright holders as a group classically represent a large number of small competing enterprises on the supply side, none of which individually holds enough power to dominate or significantly affect the market by its actions but would fit into orthodox economic theory, which holds that such conditions of perfect competition promote efficiency in the market place. However, individual copyright owners are effectively unable to engage in the exploitation of their work at all without some degree of group action. It is the concentration of rights in powerful collectives that raises the potential for conflict.

A review of copyright collecting societies is presently underway, under the auspices of Mr Shane Simpson and a working group of representatives of interested Commonwealth Departments. The review arises out of the Federal Government's *Distinctly Australian* cultural policy, announced in March 1993 as part of the Prime Minister's election commitment to provide Australians with better opportunities to participate in the nation's cultural development. The purpose of the review is to i) enable the role of copyright collecting societies in Australia to be adequately taken into account in the development of cultural policy; and ii) to ensure that the societies operate in an efficient, effective and equitable

3 *Ibid.*

4 Office of the Chief Scientist, Department of the Prime Minister and Cabinet, *The Role of Intellectual Property in Innovation*, AGPS (1993) volume 1, p 9; volume 2, p 1.

5 *Ibid.*, volume 1, p 1.

manner. The review seems to be aimed at enhancing the operation of collecting societies (and assessing the need for additional ones) rather than addressing possible anti-competitive effects.

II. FUNCTION OF COLLECTING SOCIETIES

The ability of individual writers, musicians, recording artists and other producers of copyright material (and the companies which support them) to receive remuneration for the use of copyright material is increasing as collecting societies and their activities increase in number and scope.⁶ The linking of the licensing activities of producers of copyright material together through a collecting society has the potential to restrict competitive negotiation of terms of use of the copyright work and may affect access to, and price of, the material. It may be inevitable that intellectual property law, conferring monopoly or near-monopoly power on producers, conflicts with competition law,⁷ which seeks to prevent monopolistic practices, encourage competition and spread economic power as widely as possible, avoiding concentration of power in the hands of oligopolies. However, it is only through concentrating power (to licence out rights, and pursue those rights in litigation) in the hands of a central organisation that many copyright owners can hope to achieve any return for their income-producing activities.

Most people are aware that music played on the radio or television is protected by copyright. Similarly, books, magazines and other print material photocopied or scanned into a computer is also protected by copyright, as are films and broadcast material. What is less well understood is the way in which copyright owners are remunerated for the use of their property. Obviously, it is impossible for composers of popular material and their publishers to sit all day and night monitoring airplay of songs played on the electronic media. Even if this were possible, the hotels, clubs, shopping malls and other venues where music is also played cannot be constantly patrolled by copyright owners in search of copyright infringers. Similar practical reasons prevent the authors of textbooks inspecting school and university print rooms to see which of their works are being copied for distribution to students.

Direct arrangements between the owner and user of copyright can be entered into where, for example, a play, opera or musical is being presented, or a film made, and the parties are readily identifiable and the use of the material is defined and discrete. The practical problems of enforcing copyright in material used in an ephemeral and short term way on the one hand, and getting users to find and pay

6 "Core producers are not always strong enough to stand alone, and the demands of innovation in the high technology industries are encouraging various forms of licensing and collaborative practices": C Arup, *Innovation, Policy and Law*, Cambridge University Press (1993) p 169. These comments apply not only to copyright licensing but also to collaborative practices with respect to other forms of intellectual property.

7 However, for a contrary view in the field of patent law, see SC Oppenheim, "Patents and Antitrust: Peaceful Coexistence?" (1955) 54 *Michigan L Rev* 199. See also DF Turner, "The Patent System and Competitive Policy" (1944) 44 *New York U L Rev* 450.

the owner of copyright on the other, are evident. This is where the collecting societies come in. These agencies exist to licence out the use of copyrights in return for a fee which is collected and distributed back to the original owners, less administrative costs. Most collecting societies are non-profit organisations, distributing funds on the basis of payments related to use.⁸ Characteristics of a collecting society include protecting the rights of its members through litigation, where necessary, and exercising the right-owner's discretion in negotiating fees for use of copyright material.

In Australia, collecting societies exist as central organisations licensing copyright in respect of musical and literary works, as well as sound recordings, broadcasts and films. On the whole, the collecting societies exist to administer compulsory licences established under copyright legislation. These licences exist to draw a balance between the needs of the community to use copyright material and the rights of the creators and owners of copyright material to receive remuneration. Compulsory licences allow the use of copyright material where it is in the interests of commerce to allow non-copyright owners to produce goods protected by copyright (eg sound recordings), where it is necessary for business efficacy (eg making a reproduction of a work for the purpose of a broadcast), where it is desirable to be able to use copyright material without needing the express permission of many different owners (eg playing music in a shop, copying for educational purposes) or where technology allows infringing copyright in disregard of the rights of the copyright holder (eg the practice of 'home taping' sound recordings off air and item to item; and all of the above).

Compulsory licences, while allowing reproduction and use of copyright material without the need to notify the owner, do not confer free use of the material on the user. Rather, the *Copyright Act 1968* (Cth) requires that equitable remuneration be paid. This is in contrast to the "fair dealing" provisions of the *Copyright Act* which allow limited use of copyright material without the need to pay for such use. "Fair dealing" facilitates free speech in that reporting news, commenting upon published material, reviewing, criticism, private research and study, holding of judicial proceedings and the giving of legal advice may be conducted without infringement of copyright as long as any copying is within certain limits and proper acknowledgement of the source is given.⁹

A number of collecting societies exist in Australia, each dealing with a particular right or rights in relation to subject matter in which copyright subsists. They are often linked with overseas collecting societies and have reciprocal arrangements for collection and distribution of money on behalf of overseas copyright owners. International protection of copyright is achieved on a multilateral basis through membership of the Berne Convention and Universal Copyright Convention. It has been proposed that an international royalty scheme and dispute resolution tribunal

8 See B Cottle, "The Role and Management of Collecting Societies in Australia and the Asia Pacific Region" *Symposium: Copyright Law and Practice*, Sydney (1983).

9 See note 1 *supra* at [820]-[825].

should be established to manage the exploitation of copyright more efficiently and equitably world wide.¹⁰

Existing collecting societies in Australia,¹¹ and the statutory compulsory licences under which they operate, are outlined below.

A. Australasian Performing Rights Association (APRA)

APRA was the first collecting society formed in Australia and was incorporated in 1926. It is an association of authors, composers, music publishers and other music copyright owners. The parts of copyright exercised by APRA are the broadcast, public performance and diffusion rights in works and sound recordings, known as 'performing rights'. The first performing right society was established in France in 1850, and the UK Performing Rights Society was formed in 1914 to exploit the extension of copyright to public performances of works since 1833. APRA licences any person or organisation giving or authorising a public performance, broadcast or diffusion of any musical work controlled by the association, whether or not the music is live or recorded and irrespective of whether a charge for admission is made. Premises requiring licences include cinemas, hotels, clubs, restaurants, shops, schools, factories, skating rinks, exercise centres, juke boxes, churches, karaoke bars, eisteddfods and sports meetings, as well as live concert performances and radio stations.

The compulsory licence which APRA administers is that of broadcasting sound recordings or causing them to be heard in public.¹² However, there are other performing rights also administered by APRA, although they are not the subject of compulsory licence provisions in the Act. These include performing *works* in public (s 27) (ie the underlying musical and literary works embodied in sound recordings which have their own copyright distinct from the sound recording copyright); the diffusion or cabling rights in works (s 31(1)(a)(v)) and other subject matter; and the broadcast rights with respect to works (s 31(1)(a)(iv)).

The definition of "performance" under the *Copyright Act* is very wide and includes "any mode of visual or aural representation" (s 27(1)(a)), whether it be radio, film, or delivery by lecture, address or sermon (s 27(1)(b)). In *APRA v Tolbush*,¹³ a shop selling car radios was said to be performing musical works by turning on the radios to demonstrate them to customers. Since the premises were not licensed by APRA to play music broadcast on radio this was held to be an infringement of copyright, much to the incredulity of the manager of the shop. Another person who thought he could ignore APRA, but did so at his peril, was the manager of the Old Windsor Tavern near Sydney, who refused to enter into licensing arrangements for the music played in the hotel and was found to be personally liable for procuring copyright infringement.¹⁴ In *APRA v*

10 T Stocks, "Payola and the Calculation of Music Royalties" (1987) 137 *New Law J* 391.

11 See note 1 *supra* at [2210]-[2215].

12 *Copyright Act* 1968 (Cth), ss 108-9.

13 [1986] AIPC ¶90-276.

14 *APRA v Valamo Pty Ltd* (1990) 18 IPR 216.

Commonwealth Bank of Australia,¹⁵ APRA sought declaratory relief as to whether the playing of music by the Commonwealth Bank to its employees in the course of training programs infringed copyright. Gummow J held that it did; the performance was “in public” in the sense that the “audience” was brought together in their public lives as employees, for the commercial purposes of the bank.

APRA is vigilant in detecting and prosecuting unlicensed use of performing rights in music, in a way which would be impossible for the original owners of the copyright material. In 1991/92 (the last audited financial year) APRA collected \$47.5 million, some six million dollars from overseas since APRA has reciprocal arrangements with foreign collecting societies. APRA is extremely efficient in terms of distribution of the money and returns 90 per cent of revenue (more than forty-two million dollars in 1991/92) to songwriters, composers and publishers of music.¹⁶ The performing rights societies are responsible for the earliest examples of ‘cornering’¹⁷ of the market for copyright material by concentrating the licensing out of the rights in a single organ. The potential monopoly effect of having certain classes rights under single control will be discussed below...”In various countries, indeed, the economic power of collecting societies has become suspect.”¹⁸

B. Phonographic Performance Company of Australia Ltd (PPCA)

Record companies also have performing rights in their recordings and a separate collecting society exists to administer these rights found in Part IV of the *Copyright Act*. Established in 1969, PPCA represents record producers and manufacturers in the administration of performing rights in sound recordings, collecting fees (in much the same way as APRA does) for composers and publishers.

C. Australasian Mechanical Copyright Owner’s Society (AMCOS)

AMCOS represents music publishers, the owners of copyright in published musical works and lyrics, in relation to reproduction licences (not performing rights). The ‘mechanical right’ is an industry term denoting the right to reproduce a musical work onto disc or tape. Putting music on the soundtrack of a film or other audio-visual product also amounts to reproducing the musical work, and AMCOS is the first point of contact for licences to dub music onto film. AMCOS also licences broadcasters to *reproduce* music for the purpose of broadcasting. This is to be distinguished from the *broadcasting* licence issued by APRA, as broadcasting and reproducing music (in a tangible form) are separate rights under the *Copyright Act*.¹⁹

15 (1992) 25 IPR 157.

16 J Casimir, “No Pay, No Play”, *Sydney Morning Herald*, 1 September 1993.

17 WR Cornish, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, Sweet & Maxwell (2nd ed, 1989) at [9-027].

18 *Ibid* at [11-024].

19 Sections 31(1)(a)(iv) and 31(1)(a)(i) respectively.

D. Copyright Agency Ltd (CAL)

CAL was established in 1974 to act as an agent of copyright owners in works being copied by photocopying and printing, particularly in educational institutions, but also by others such as press clipping services,²⁰ government departments, churches, corporations, law firms and other institutions. A major issue for CAL is the development and clarification of copyright law as it relates to electronic copying.²¹ Digitised works can be disseminated by computer networks, telephone, satellite and fibre optic cable, making hard copy (and the photocopier) all but obsolete as every student, academic and, in the future, home will have access to (and the means of copying) the whole oeuvre of human literary effort.

Regulation of copyright infringement traditionally lags behind the technology which allows such infringement. The introduction of cheap, effective photocopiers in the 1970's led to a dramatic drop in income for authors whose works were prescribed texts in schools and universities, as teachers began making multiple copies of extracts from books and articles for educational use, rather than having pupils or institutions purchase multiple copies of texts. Publishers were correspondingly disadvantaged by the loss in sales due to this alternative 'publishing' activity. Although such copying was fairly obviously infringement, many teachers were either unaware of the provisions of the *Copyright Act* or assumed the copying to be allowable as "fair dealing", and, in any event, responded to the introduction of new technology (the photocopier) by using it to the extent of its possibilities. No less is expected when computer technology makes copying and dissemination of copyright material even easier; "With the new technology, the opportunities for pirating are almost unlimited".²²

In 1980, following the recommendations of the Franki Committee, the *Copyright Act* was amended to allow a compulsory licence to educational institutions for the making of multiple copies of certain works for the teaching purposes of the institution. The payment made for the multiple copying right was collected by CAL. Initially, the "equitable remuneration" provided for in the legislation was set at 2 cents per page by the Copyright Tribunal,²³ however, a series of licensing agreements with schools and universities were developed in an attempt to streamline the process of record keeping and collecting of fees, and in 1989 amendments were introduced to give statutory recognition to the voluntary arrangements previously negotiated.

E. Audio Visual Collecting Society (AVCS)

Active since June 1990, AVCS was set up to administer the scheme for copying off-air material, as set up under the *Copyright Amendment Act 1989 (Cth)*.²⁴ The

20 See *De Garis v Neville Jeffress Pidler Pty Ltd* (1990) 95 ALR 625.

21 "The Future: Electronic Copying" (1993) 2(2) *Copyright Agency Ltd Newsletter* 1.

22 I Verrender, "The Thought Police", *Sydney Morning Herald*, Spectrum, 26 March 1994, p 4A.

23 *CAL v Department of Education* (1985) 59 ALR 172.

24 As validated in the *Copyright Re-Enactment Act 1993 (Cth)*.

scheme operates along the same lines as that for photocopying with a fee to be paid to AVCS under a licence and distribution of the money back to copyright owners.

F. Other Collecting Societies

In the future, there may be more collecting societies formed to licence out the rights associated with the 'blank tape levy', a possible blank computer disc levy, rental rights associated with sound recordings and computer software, and it has been suggested that there is a need for a visual artists' collecting agency.²⁵ There may be scope for 'electronic rights' collecting societies to administer the many copyrights involved in creating multimedia products, although these newer forms of exploitation could well be administered by existing agencies.

(i) Blank Tape Levy

The commercial piracy of sound recordings has been described as "a malign infection, directly destroying the red corpuscles of legitimate production and competition".²⁶ Home taping of sound recordings and broadcast material is, however, a "politer, more delicate issue",²⁷ but nevertheless argued to seriously undermine the sales of sound recordings and the return to copyright holders of fees for use of broadcast material collected by APRA. In 1989 the *Copyright Amendment Act* introduced a scheme to legalise home taping on audio tapes and provide for payment to the relevant copyright owners by levying a royalty (to be determined by the Copyright Tribunal) on blank audio tapes with a normal playing time of more than 30 minutes. The collecting society envisaged by the legislation was to be a company limited by guarantee, declared by the Attorney-General to be the collecting society, the rules to prohibit the payment of dividends and provide adequate protection of members' interests with respect to the collection and distribution of the royalty. All the relevant copyright owners were to be entitled to become members. The royalty was to be paid by the vendor first selling, hiring or otherwise distributing the blank tape in Australia.

The amendments to the Act were challenged²⁸ as being unconstitutional by an umbrella company (ATMA) formed of blank tape manufacturers. The bases of the challenge were that the blank tape royalty scheme was not a law with respect to "copyrights" within s 51(xviii) of the Constitution, that it constituted a tax and could not, therefore, be enacted via the *Copyright Act* and would amount to an unconstitutional acquisition of property on unjust terms contrary to s 51(xxxii) of the Constitution. The High Court, by a four-three majority, held that the Commonwealth had not adopted an appropriate legislative mechanism to implement the imposition of a "royalty" on blank recording tapes for the benefit of copyright owners. The scheme was held to amount to the imposition of a tax and

25 C Golvan, "Setting Up a Visual Artists' Collection Agency in Australia" (1991) 2 *EIPR* 39; see also "Copyright Fees for Visual Artists" (1990) 3(4) *Aust Intellectual Property Law Bulletin* 29.

26 WR Cornish, "Sound Recordings and Copyright" (1993) 24 *IIC* 306.

27 *Ibid* at 312.

28 *Australian Tape Manufacturers Association Ltd v Commonwealth of Australia* (1993) 25 *IPR* 1.

was invalid since the *Copyright Amendment Act* dealt with other matters, as well as the imposition of taxation, contrary to the Constitution. The Court found that the legislative scheme did constitute a law with respect to copyright and that the tax or levy did not effect an acquisition of property.

The successful challenge to the 1989 legislative scheme for imposing a blank tape levy does not mean the issue is dead. The music industry strongly supports the introduction of such a scheme and its introduction as a tax measure has been expected, although there is concern that this will look suspiciously like a form of the dreaded GST, something the Federal Labour government is anxious to avoid introducing, despite the existing sales tax.²⁹ The successful challenger of the 1989 scheme, the Australian Tape Manufacturers Association (ATMA), has proposed levying the royalty on *recorded* material at the point of sale, rather than on the *blank* media used for recording. The payment of such a levy would result in a "private licence" to make copies of the music for private use. A levy of 25 cents per item would result in the collection of about six million dollars per annum to be distributed to copyright owners.³⁰ The producers of the published music, however, prefer the levy to be placed on blank tapes rather than on pre-recorded media.

(ii) *Computer Blank Disc Levy*

The widespread copying of computer programs affects the computer software industry, perhaps to an even greater degree than the music industry is affected by home taping, since much copying of software is probably for commercial purposes (as well as home use for the purpose of leisure) and, it is therefore, likely that much of the computer software copied is directly substituting for sales of the product. In 1993 the Copyright Law Review Committee (CLRC) produced a Draft Report on Computer Software Protection. Submissions made to the CLRC included proposing the introduction of a levy on blank recording or storage media and hardware.³¹ The CLRC rejected this idea, taking the view that computer programs are different from musical works and sound recordings for which a blank tape levy was introduced in 1989 (although held invalid by the High Court). Unlike sound recordings, computer programs vary enormously in function and purpose: some are bought for entertainment, but a large portion of the market is for business computer programs and those with industrial applications. The result is a huge range in price, making it impossible to set a blanket royalty rate on blank storage media that would adequately and fairly compensate all computer copyright owners. Even if it were possible, the level of royalty would probably be so high in relation to the price of discs as to be strongly resisted by manufacturers, importers and buyers.

29 "The trade whisper is that this would involve a rise in the sales tax on blank tape from 21 per cent to about 30 per cent": D Frith, "Tape Makers Seek Royalties", *Sydney Morning Herald*, The Guide, 21 March 1994, p 4.

30 *Ibid.*

31 Copyright Law Review Committee, *Draft Report on Computer Software Protection*, (June 1993) at [9.72].

(iii) *Rental Right/ Re-sale Royalty Right*

Rental of copyright material (apart from videos) does not seem to be as widespread in Australia as in other places in the world, although there is a thriving second hand market for sound recordings. The Uruguay Round of the General Agreement on Tariffs and Trade (GATT), concluded in December 1993, saw agreement on standards of intellectual property protection. The Trade Related Intellectual Property (TRIPS) agreement explicitly extends commercial rental rights to the producers of sound recordings and other right-holders in sound recordings (with provision for compulsory licensing). This provision will require changes to Australian legislation, although the Government has already contemplated this,³² and the record industry supports the introduction of a rental right:

“...the blank tape royalty should not be seen as an ‘alternative’ to record rental, nor as the end of the record rental debate. The two are not co-extensive, as there is much off air taping, and taping of borrowed or already owned material. For the same reasons that the blank tape royalty scheme is introduced - use of copyright material that is a substitute or partial substitute for sales in a way that cannot be otherwise compensated - record rental should remain an active option in any market where rental becomes widespread. Of course, to the extent that rental leads to home taping, the blank tape royalty should be adjusted to avoid double compensation”.³³

The CLRC recommends the introduction of a rental right for computer programs, accepting the view that uncontrolled rental is likely to lead to an increase in unauthorised copying.³⁴

(iv) *Multimedia Rights Collectives*

Multimedia may be described as the combination of text, images, sound, video and computer software into one package that provides the user with a variety of experiences.³⁵ The developers of multimedia products have either to produce their own original content, or deal with licensing a multiplicity of copyrights located in the text, moving images, still images, sounds, music and characters used to create the product. Obviously, to do this on an individual basis is neither practical nor cost effective. It may be that existing collecting societies will simply licence the new-found uses of the works they administer, for example, CAL is already dealing with electronic uses of print material, and APRA could licence out the rights in published sound recordings. However it is not impossible that the ‘multimedia rights’ could be recognised as a distinct sub-category to be administered separately by a new collecting society. A group of photographers under the leadership of Nathan Benn has established the ‘Electronic Book Company’, to licence rights in

32 C Arup, “The Prospective GATT Agreement for Intellectual Property Protection” (1993) 4 *AIPJ* 14 at 20.

33 R Cobden, “The *Copyright Amendment Act* 1989 and the Music Industry”, presented at the Fourth Copyright Law and Practice Symposium, September 1989 at [6.5].

34 Note 31 *supra*.

35 See MD Scott and JL Talbot, “Interactive Media: What is it, Why is it important, and What does one need to know about it?” (1993) 8 *EIPR* 284.

photographs to CD-ROM publishers, and the American Society of Magazine Photographers is also reported to be considering forming a copyright collective.³⁶

III. LICENSING ARRANGEMENTS

Licensing arrangements between the collecting societies and users of copyright material are regulated by the Copyright Tribunal, which was established under Part VI of the *Copyright Act* to deal with disputes in relation to licensing schemes. Such a tribunal was first suggested in response to criticism of APRA, which led to a Royal Commission in 1932 under the chairmanship of Justice Owen to enquire into and report on the exploitation of performing rights. The Owen Commission concluded that many of the criticisms of APRA arose from misconceptions as to the legal nature of copyright owners' rights and that APRA was an organisation of great benefit to copyright owners, albeit a 'super monopoly' controlling or claiming to control most of the music which was performed or broadcast to the public.³⁷

After World War II in the United Kingdom, there also arose growing resentment from major copyright users over the terms on which the performing rights societies were prepared to do business. On the recommendation of the Gregory Committee, the 1956 UK *Copyright Act* established a Performing Right Tribunal³⁸ with power to review the licences and schemes of collecting societies. This followed a Canadian initiative and has in turn been implemented in Australia as the Copyright Tribunal. The relevant aspects of the Copyright Tribunal's jurisdiction with respect to collecting societies are its power to conduct inquiries into royalty rates and deal with applications granting licences, disputes as to licences and proposed licensing. The Tribunal's task is to determine "equitable" remuneration under a licence scheme; "equitable" being interpreted as what is fair and reasonable to the copyright owner rather than the public or the publisher, record maker or other producer. The Tribunal determines disputes before it according to a "notional bargain" approach: what a party seeking to use another's copyrighted work would be willing to pay as a royalty to a not unwilling owner of copyright.³⁹ The Tribunal is to take into account all relevant matters, which may go beyond the use to which the licensee will put the copyright material: *Re WEA Records Pty Ltd & Ors*.⁴⁰

Once a new licence scheme has been confirmed or an existing scheme varied by the Tribunal, any person who acts in accordance with it need not apply separately for a licence from the licensor: s 159 *Copyright Act*. Thus Tribunal determinations

36 DL Gersh and S Jeffrey, "Structuring the Multimedia Deal: Legal Issues" (1993) 6 *CD-ROM Professional* 36.

37 On the available evidence the Owen Commission found that APRA had a 90 per cent market share.

38 Now called the Copyright Tribunal.

39 See *Copyright Agency Ltd v Department of Education of New South Wales* (1985) 59 ALR 172; *Re WEA Records Pty Limited* (1981) 40 ALR 111.

40 (1981) 40 ALR 111 (Copyright Tribunal).

have a binding effect applicable to persons other than parties to the reference to the Tribunal.⁴¹

The Copyright Tribunal has dealt with the question of fair and reasonable remuneration in a number of references under the Copyright Act, which illustrate how such disputes are resolved by it. In *Reference by APRA*,⁴² the Tribunal, composed of Sheppard J as President, Mr A Horton and Professor S Ricketson, considered a reference under s 154 of the *Copyright Act* of a proposed licence scheme for public performance of recorded musical and literary works to accompany dancing, under which licence fees would be charged on a “box office principle”, proportional to actual takings, instead of venue capacity, the previous method of assessing fees. The Tribunal held that the question it had to determine was whether the method of setting fees was reasonable; relevant factors were whether the proposed method was basically fair or not and whether the new outcome would be fair in light of previous levels of fees. The proposed licence scheme was confirmed by the Tribunal, and the new licence fees were to be progressively staged in. The Tribunal also held that it was within its jurisdiction to confirm a proposed licence scheme so as to give it general applicability, not just applicability to those parties represented before it.

“Equitable remuneration” for photocopying of material for distribution to students in educational institutions was set at 2 cents per page in *CAL v Department of Education of NSW*,⁴³ a co-operative action between CAL and various Departments of Education brought as a test case before the Copyright Tribunal (Sheppard J). The case discusses the functions of CAL, the requirements of educational institutions engaging in multiple copying for students, and the inter-relationship of the multiple copying and fair dealing provisions of the *Copyright Act*. The per page payment set in the case has been replaced by a payment per capita for enrolled students, which is distributed by CAL on the basis of evidence of use of copyright material as established by sampling. In 1989, amendments to the *Copyright Act* gave statutory recognition to the licensing schemes in place between CAL and educational institutions. CAL has successfully negotiated licences with Commonwealth Government Departments, press clipping agencies, State Government Departments, corporations and other users of copyright materials without resort to the Copyright Tribunal.

In *Reference by APRA re Australian Broadcasting Corporation*,⁴⁴ a reference under s 154(4) of the *Copyright Act*, APRA proposed a variation to its licensing scheme for the ABC so that fees would be charged as a percentage of gross revenue, instead of the existing per head of population basis. The ABC objected on the ground that the new method of setting fees was not reasonable. Since the previous method was “reasonable”, it was likely that a new basis of setting fees would be less reasonable, and in any event the new method amounted to a

41 *Reference by APRA* (1992) 25 IPR 257.

42 *Ibid.*

43 (1985) 59 ALR 172.

44 (1985) 5 IPR 449.

percentage "taxation" of parliamentary appropriations for the ABC and therefore could not be reasonable. The Tribunal (Sheppard J and A Horton) held that its task was to decide whether the scheme should be confirmed by examining what formula or basis of setting fees would be most likely to yield equitable remuneration. It upheld APRA's new method of setting fees as more likely to yield equitable remuneration than setting an arbitrary lump sum or a population-based assessment. A percentage of the ABC's revenue was more reflective of the value the community, as expressed through its parliamentary representatives, placed on the services of the ABC, and allowed flexibility for factors such as inflation. Further, the percentage of revenue method was noted by the Tribunal as being used as a measure of damages in copyright infringement cases.⁴⁵

In making this determination, the Tribunal considered that relevant factors included the history of APRA's dealings with the ABC; the small audience of the ABC and its obligations under its charter to provide services to the entire nation regardless of profitability; and the nature and extent of the ABC's use of music on television and radio. Fees were therefore set at 1.25 per cent of revenue for radio, and 0.06 per cent for television. The Tribunal noted that overseas decisions supported the percentage of revenue method.

The ABC raised an argument that competition issues arose under ss 45 and 46 of the *Trade Practices Act* and that, therefore, the Tribunal did not have jurisdiction, this being a matter for the Federal Court.⁴⁶ However the Tribunal found that there was simply insufficient evidence of breaches of these sections for this to be a serious issue.⁴⁷

Trade practices issues also arose before the Copyright Tribunal (Lockhart J as President, RNJ Purvis QC and DK Malcolm QC) in *WEA Records Pty Ltd & Ors v Stereo FM Pty Ltd*.⁴⁸ In that case, the major record companies made an application for orders under s 152 of the *Copyright Act* determining the amount of royalty payable by holders of commercial FM radio licences. Record playing bans by PPCA were in force following disputes as to royalties, and the applicants and respondent accused each other of breaches of the *Trade Practices Act 1974* (Cth). The Tribunal made some observations on the trade practices implications of the activities of PPCA without really considering the allegations, as they were not perceived by it to be relevant to the issues at hand. The Tribunal took the view that its task under s 152 of the *Copyright Act* was to assess a fair and reasonable remuneration for the broadcasting right, and the fairness and reasonableness of that amount would not be affected by the lawfulness of the bans and their effect on the record companies, even if they were unlawful. The fact that the record companies were engaging in collective bargaining was envisaged by s 152, and the correct

45 *Ibid* at 461.

46 In *Re APRA and Australian Broadcasting Commission* (1982) 62 FLR 20 (Copyright Tribunal), the ABC objected to the Tribunal's jurisdiction under s 154 of the *Copyright Act*, on the ground that as a Commonwealth instrumentality, it lay outside that jurisdiction. Lockhart J disagreed, holding that the ABC was sufficiently independent of the Commonwealth to come within its jurisdiction.

47 Note 44 *supra* at 462-5.

48 (1983) 48 ALR 91.

approach would be to assume each party was willing to negotiate and reach agreement. The Tribunal found that the previous relationship between the parties was relevant and that there was a correlation between gross revenue and the level of use of music in broadcasting. It allowed a fee based on a percentage of revenue.

The Copyright Tribunal has a reactive role: it can only initiate inquiries upon a reference from the Attorney-General (s 148 *Copyright Act*), or deal with disputes brought before it by aggrieved parties. It is left to copyright owners and those seeking to use copyright material to negotiate the details of licensing arrangements between themselves, with recourse to the Tribunal if negotiations break down.⁴⁹ This system may work well in general, but it does not prevent arrangements being set up by agreement or foisted on copyright users, which are anti-competitive in effect, to the detriment of the public. These problems are generally left to the Trade Practices Commission or other bodies dealing with competition law.

IV. TRADE PRACTICES ISSUES

It is quite possible that a copyright licensing scheme confirmed by the Copyright Tribunal as reasonable under s 154(4) of the *Copyright Act* may be in breach of competition law. Reservations about the monopoly of APRA and corresponding performing rights societies overseas led to investigations such as the Owen Commission, referred to above. Subsequently, the 1943 Parliamentary Standing Committee on Broadcasting did not question the need for organisations like APRA but stated that they create monopoly situations and that it was the duty of the state to provide a means of safeguarding the community from possible exploitation. The Australian delegation to the 1948 Berne Convention, in associating itself with the view of the delegation of the British government (which accepted the convention on condition that it be free to continue to legislate on the abuse of monopoly rights), took the view that a tribunal ought to be established to deal with royalty rates to avoid monopolistic price-setting.⁵⁰ However, it was not until the enactment of the 1968 *Copyright Act* that the Copyright Tribunal was established.

Competition law in Australia is largely regulated by Part IV of the *Trade Practices Act*, which deals with restrictive trade practices. 'Competition' is not actually defined in the Act, although it is of crucial importance to its interpretation and application. The economic role of competition as a device for controlling the disposition of society's resources has been focused on decisions based on the *Trade Practices Act*. "Thus we think of competition as a mechanism for the discovery of market information and for enforcement of business decisions in the light of that

49 S Ricketson, *The Law of Intellectual Property*, The Law Book Company Ltd (1984) at [15.54].

50 *Ibid* at [15.15]-[15.17].

information.”⁵¹ ‘Competition’ is said to refer to a process or state of affairs in the market.⁵²

The concept of ‘market’ is also of crucial importance in deciding whether the conduct complained of involves the sort of anti-competitive purpose or effect which the various provisions of Part IV are intended to prevent.⁵³ The ‘market’ was considered in *Queensland Wire Industries Pty Limited v The Broken Hill Proprietary Company Ltd & Anor* by the High Court.⁵⁴ In that case, the question before the Court was whether BHP had breached s 46, in refusing to supply a steel product, Y bar, to Queensland Wire except at unrealistically high prices. The Court had to decide whether BHP had misused its market power, and to do this it needed to identify the relevant market. Mason CJ and Wilson J found that the relevant market was the market for steel and steel products, and within that market there were high barriers to entry resulting from economies of scale, the high capital costs involved in the steel industry, and the size of the main competitor (BHP). There was little competition owing to BHP’s dominance. Deane J held that a market could exist, even though there was no actual trade, owing to the unrealistically high prices BHP could charge. Dawson J analysed the market as being defined by the existence of a product for exchange and held that factors such as high barriers to entry were useful in identifying the scope of the market, the degree of market power and whether that power was exercised. Toohey J looked at the market as being defined by substitutability of products on the supply and demand side.

The concept of ‘market’ has also been considered in *Pont Data Australia Pty Ltd v ASX Operations Pty Ltd & Anor*,⁵⁵ where Australian Stock Exchange Ltd and a subsidiary were held to have a substantial degree of market power in the market for providing facilities for public trading of stocks and securities and the market for the supply of information about activities on stock exchanges. They were found to have contravened Part IV of the *Trade Practices Act* in that they used that market power with the purpose of lessening competition in those markets (s 46), entered arrangements with the effect of substantially lessening competition (s 45) and engaged in price discrimination between subscribers to their electronic information service (s 49). In *APRA v Ceridale Pty Ltd*,⁵⁶ it was found that APRA enjoyed dominance in the market for music rights. It has been argued that the last two cases expand the scope of s 46 greatly by their analysis of the ‘market’, creating difficulties for decision-makers in corporations now at risk of

51 *Re Queensland Co-Operative Milling Association Ltd* (1976) 25 FLR 169 at 188 (Trade Practices Tribunal).

52 *Outboard Marine Australia Pty Ltd v Hecar Investments No 6 Pty Ltd* (1982) 66 FLR 120 at 124; see also *Adamson v West Perth Football Club* (1979) 39 FLR 199 at 224, per Northrop J.

53 See G de Q Walker, “Product Market Definition in Competition Law” (1980) 11 *Federal Law Review* 386; and “Geographic Market Definition in Competition Law” (1983) 13 *Federal Law Review* 299.

54 (1987) 83 ALR 577.

55 (1990) 12 ATPR ¶41-007.

56 (1991) 97 ALR 497, discussed below.

being found to possess a substantial degree of market power.⁵⁷ This is particularly applicable to copyright collecting societies.⁵⁸

The Australian case which best raises the policy issues concerning the potential anti-competitive power of collecting societies to date is *APRA v Ceridale Pty Ltd*.⁵⁹ In that case, APRA sought an injunction against Ceridale (the owner of a night-club business) for the use of APRA's copyrighted works without a current licence. There had been a lengthy sequence of correspondence between the parties and their representatives in relation to outstanding licence fees, including one demand by APRA's solicitors threatening proceedings if Ceridale did not pay APRA's solicitor-client costs. APRA terminated the existing licence, and Ceridale submitted applications for a new licence, which were rejected by APRA for the reason that they failed to provide full and accurate information. The trial judge characterised APRA's action as effectively a debt-collecting exercise for outstanding licence fees and refused the injunction on discretionary grounds.

On appeal, the Full Court of the Federal Court held that there was no evidence that the amount of the outstanding fees was in genuine dispute, that Ceridale was continuing to use APRA's music without a licence, and that Ceridale had failed to submit a proper licence application. The real issue was whether Ceridale was prepared to make a proper application, providing a full disclosure of its use of APRA's music, and to pay the right fee. APRA was only bound to issue a licence if these pre-conditions were met.⁶⁰ The question arose as to whether APRA's exercise of its legal right to prevent infringement of its copyright could amount to taking advantage of market power in breach of s 46 of the *Trade Practices Act*. The Court in the *Queensland Wire* case,⁶¹ held that s 46 only requires a "taking advantage of" market power, not "abuse" in a pejorative sense (despite the heading of s 46 in the *Trade Practices Act*). The Court in the *Ceridale* case found that APRA did in fact dominate the market for music rights as prohibited by s 46, but its actions could not be characterised as being done for the purpose of lessening competition or harming a competitor. APRA's purpose was merely to prevent unauthorised use of its copyright material, and it was willing to grant a new licence if a proper application were made.⁶²

This decision has been criticised for the reason that the Full Court may have intruded too far upon the trial judge's findings of fact and the exercise of his

57 W Pengilly, "Doing the Right Thing" (1991) 26(2) *Australian Law News* 20-2.

58 S McVicar, "Copyright Collecting Societies, Blanket Licences and the Misuse of Market Power" (1992) Nos 2 and 3 *Arts and Entertainment Law Review* 1.

59 Note 56 *supra* at 510.

60 *Ibid.*

61 Note 54 *supra*. See also S Corones, *Competition Law and Policy in Australia*, The Law Book Company Ltd (1990) pp 13-15.

62 Note 56 *supra* at 510. The issue of whether exercise of a legal right can amount to an abuse of market power in the section 46 sense was also considered in *Cadbury Schweppes Pty Ltd v Kenman Developments Pty Ltd* (1991) 13 ATPR ¶41-116. In that case Olney J held that taking action against a competitor for a breach of s 52 of the *Trade Practices Act* (misleading or deceptive conduct by Kenman in marketing a product whose get-up was very similar to Cadbury's well-known "Dairy Milk" chocolate) was not conduct in breach of s 46, as the claim was genuine, although in other circumstances it could amount to such conduct.

discretion. Also, the Full Court appears to have applied the s 46 test in APRA's favour by counting its absence of hostile motive as an extenuating circumstance, even though this is not really relevant to the test.⁶³ The case is significant in that it is authority for the proposition that it is not a misuse of market power in the s 46 sense for a corporation holding intellectual property rights, with a substantial degree of market power, to restrain other parties from infringing those rights. However, such action must not be for any purpose extraneous to protecting its intellectual property rights.⁶⁴

V. SECTION 51(3) TRADE PRACTICES ACT

It is usually assumed that creation and invention require protection in order to be continued. Some query this,⁶⁵ however, that debate is beyond the scope of this discussion, and it will be assumed that the copyright regime is worthwhile, which is why s 51(3) of the *Trade Practices Act* provides some exemptions to the operation of the restrictive practices sections in respect of intellectual property rights. Section 51(1)(a) of the *Trade Practices Act* makes it clear that the Act is to apply to the owners of statutory intellectual property rights other than where specifically exempted.

Section 51(3)(a) provides a limited class of exemptions for conditions contained in licences or assignments of intellectual property rights. It is to be noted that "the imposing of, or giving effect to, a condition" of a licence or assignment in relation to a patent, design or copyright, in relation to the invention, design or subject work as the case may be, will not be taken to be a contravention. However, the entire licence or agreement may fall foul of Part IV, and the exemption does not apply to s 46 (abuse of market power) or s 48 (resale price maintenance).⁶⁶ In relation to copyright, the section appears to cover the first material embodiment of a work but not other subject matter such as reproductions, copies or records.⁶⁷ Section 46

63 K Puri, "Australian Copyright and Competition Policy: The Interface" (1991) 11 *EIPR* 413 at 420-1; W Pengilly, "Misuse of Market Power" (1990) 6(7) *Australian and New Zealand Trade Practices Law Bulletin* 49 at 56.

64 W Pengilly, *ibid*; J Lehmann, "Exercise of Monopoly Power? Section 46 of the *Trade Practices Act*" (October 1990) *Current Developments in Intellectual Property and Trade Practices* 40; Y Hazan, "Market Power and the *Trade Practices Act*" (1991) 4(4) *Australian Intellectual Property Law Bulletin* 37; N Curtis, "Copyright and Competition Policy: A Conflict?" (May 1991) *Current Developments in Intellectual Property and Trade Practices* 47; K Puri, "Intellectual Property Rights and the *Trade Practices Act* - A Potential Conflict?" (1992) 12(2) *Queensland Lawyer* 91; G Webeck, "Collective Licensing and the *Trade Practices Act*" (1991) 9(1) *Copyright Reporter* 23.

65 D Vaver, "Some Agnostic Observations on Intellectual Property" (1991) 6 *IPJ* 126.

66 The Law Book Company Ltd, *Trade Practices Law Reporter* at [790]; GQ Taperell, RB Vermeesch and DJ Harland, *Trade Practices and Consumer Protection*, Butterworths (2nd ed, 1978) at [1108]-[1109]; note 49 *supra* at [54.34]-[54.36]. A similar provision exists in the New Zealand *Commerce Act* 1986 as amended by the *Commerce Law Reform Act* 1990; for a critique of this legislation see DC Calhoun and BWF Brown, "New Zealand: Interface between Misuse of a Dominant Position and the Exercise of Intellectual Property Rights" (1990) 12 *European Intellectual Property Review* 437.

67 See GQ Taperell, RB Vermeesch and DJ Harland, *ibid*; S Ricketson, *ibid*; and K Puri, note 64 *supra* at 415, for a discussion of the limitations of s 51(3) in relation to copyright.

appears to be the more important provision in relation to collecting societies,⁶⁸ which usually enjoy monopoly or near-monopoly positions.

The effect of s 51(3) was considered by the High Court in *Transfield Pty Ltd v Arlo International Ltd*,⁶⁹ in the context of patents. Arlo held the licence of a patent for a process for making and erecting steel poles by pumping telescope-like steel segments with liquid cement to set up each pole. It granted a sub-licence to Transfield throughout Australia. The sub-licence contained a "best endeavours" clause requiring Transfield to use its best endeavours in the design, fabrication, installation and selling of the pole and to energetically promote and develop the market for the pole. However, Transfield made a successful tender for the construction of transmission lines using a pole of its own design. Arlo then sued Transfield for breach of the sub-licence.

The majority in the High Court found that Transfield had breached the clause in the sub-licence. Arguments that the clause contravened the *Trade Practices Act* failed. The Court noted that s 51(3) would exempt a condition permissible under the *Patents Act* 1952, and on construction of the clause, the majority held that it did not breach s 112 of the *Patents Act* (which invalidates conditions in licences of patents whose effect is to prohibit or restrict the use of a substitute product), as it did not compel use of the Arlo pole but merely required promotion of the product.⁷⁰ The Court considered the case *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd*,⁷¹ where the majority held that a provision in the United Kingdom *Patents and Designs Act* 1907, much like s 112, applied only to conditions whose effect was to compel the licensee to trade with the patentee. Mason J (as he then was) observed that s 51(3) bridges the differing policies of the *Trade Practices Act* and the *Patents Act* to allow a degree of control over the licensee by the licensor so that the benefits of the patent may be enjoyed. Mason, Stephen and Wilson JJ found no evidence to support the allegation that there was a substantial lessening of competition to support a claim under s 45 of the *Trade Practices Act*, in any event. The decision appears to embody the view that the holders of intellectual property-related monopoly rights ought to be free to exploit those rights as long as the exploitation stays within the legitimate bounds of the monopoly and is not extended to collateral matters, in which case the *Trade Practices Act* will be invoked.⁷²

The exemptions allowed for in s 51(3) were examined in the *Hilmer Report*,⁷³ August 1993. The *Hilmer Report* recommends implementation of a national competition policy for Australia, with universal application of a set of competitive conduct rules of the kind in Part IV of the *Trade Practices Act*.

68 See *APRA v Ceridale* (1991) 97 ALR 497.

69 (1979-80) 144 CLR 83.

70 Per Barwick CJ, Stephen, Mason and Wilson JJ. Murphy J dissented, holding that the clause was voided by s 112 of the *Patents Act*.

71 [1955] 2 All ER 657.

72 K Puri, note 64 *supra* at 416.

73 Report by the Independent Committee of Inquiry, *National Competition Policy*, AGPS (August 1993) pp 149-51.

However, it was recognised that there must still be suspension or adjustment of market conduct rules on public interest grounds and that the primary basis for permitting exemptions should continue to be an authorisation process of the kind presently administered by the Trade Practices Commission or the proposed successor to that body, the Australian Competition Commission. The *Hilmer Report* notes:

“the difficulties of determining the proper balance between the exercise of intellectual property rights and the promotion of competition ... On the one hand, licensing of intellectual property rights benefits the competitive process by encouraging rapid commercial application of innovations, helping competitors to capture their rewards, and increases incentive to innovate. At the same time, licensing agreements can be used to cartelise an industry or to increase the market power of a single licensor”.⁷⁴

No submissions to the Committee pointed to practical problems with the current provisions, although the Trade Practices Commission recommended repeal of the exemption in s 51(3) but with provision for intellectual property licensing matters to be addressed in the authorisation process.⁷⁵

The Committee saw force in the argument of removing the current exemption and leaving licensing matters to be scrutinised through the authorisation process, however, it recognised that a separate review by appropriate officials and experts in consultation with interested groups was required before a concluded view could be reached. The present system of authorisation by the Trade Practices Commission is discussed below.

VI. TRADE PRACTICES COMMISSION AUTHORISATIONS

In 1991 the Trade Practices Commission issued a paper⁷⁶ outlining its views as to the applicability of the provisions of Part IV of the *Trade Practices Act* to intellectual property rights, focussing mainly on s 46, the most important provision not exempted by s 51(3), but also dealing with other provisions when the exemption does not apply. It describes various forms of conduct which are likely to contravene Part IV, including enforcement actions and settlements,⁷⁷ the acquisition of intellectual property rights,⁷⁸ refusal to licence, and imposition of restrictive licence terms and conditions. Refusals to licence users of copyright material may well place collecting societies in breach of s 46.⁷⁹ So too may a variety of licence provisions aimed at more fully exploiting the intellectual property right involved. Any use of a position of market power will carry with it the danger

74 *Ibid*, p 150.

75 *Ibid*, p 149.

76 Trade Practices Commission, “Section 46 of the TPA and Intellectual Property: the TPC View” (June 1992) 5(4) *Australian Intellectual Property Law Bulletin* 37; (July 1992) 5(5) *Australian Intellectual Property Law Bulletin* 49.

77 See *APRA v Jain* (1990) 18 IPR 663.

78 Including the creation of new rights, eg “electronic rights”.

79 Note 76 *supra* at 38.

of contravening s 46, however, the effect of *APRA v Ceridale* appears to be that it will not be an unlawful restriction on competition to take action to protect one's intellectual property rights, providing there is no demonstrable or inferable purpose of preventing a person from engaging in competition or harming a competitor. Other provisions of Part IV may also be contravened by conduct which falls outside the exemption provided in s 51(3), when that conduct ranges beyond what is necessary to enjoy the intellectual property right in question.

Section 88, found in Division 1 of Part VII of the *Trade Practices Act*, allows the Trade Practices Commission to authorise conduct which would otherwise be in breach of ss 45, 47 or 50 of the Act. Division 2 of Part VII provides a process of notification to the Commission of conduct which may breach s 47. The general effects of the activities of copyright collecting societies have been dealt with by the Commission in two applications for authorisation.

In *EMI Records (Australia) Ltd & Ors on their own behalf and on behalf of Phonographic Performance Company of Australia Ltd* ("PPCA"),⁸⁰ major record companies (including AMI, Festival, CBS, WEA, Polygram and RCA) applied to the Trade Practices Commission for authorisation of their proposed standard licence schemes, granting PPCA the right to licence others to perform copyright recordings of musical works in public and to collect licence fees. Under the proposed arrangement, PPCA would become the main licensing body, and the major record companies (the applicants for authorisation) would give it a blanket licence to represent them for the purpose of monitoring and collecting royalties for public performances and broadcasting in respect of existing and future copyrights for an indefinite period. The arrangement was not exclusive, in that the copyright owner could be approached by any broadcaster or person seeking to perform the subject works in public and would be at liberty to negotiate with them. The relevant test to be applied by the Commission was not whether the conduct was in breach of the *Trade Practices Act*, but whether the arrangement would result in a net benefit to the public, which outweighed the detriment from any lessening of competition (s 90(6)).

After considering the evidence and submissions, the Commission found that there was a public benefit, resulting from the efficiency and cost savings the arrangement would effect; without it, there would have to be many more individual licence negotiations.⁸¹ This outweighed the detrimental effect of diminished competition resulting from PPCA's enormous market share (90 per cent on the evidence) and bargaining power. This detriment was alleviated by the potential for individual negotiations, the ceiling on fees from the *Copyright Act* and the availability of recourse to the Copyright Tribunal to deal with disputes as to licences. The proposed arrangement was therefore authorised.

80 (1985) 7 ATPR ¶50-096.

81 Under the PPCA the number of licence transactions would be 4,360. Without it, if record companies had to transact individually, there would be 26,160 transactions. The TPC was impressed by the efficiency of the scheme and the cost savings.

In *Phonographic Performance Company of Australia Ltd*,⁸² the Trade Practices Commission dealt differently with an application for authorisation by PPCA for collective licensing arrangements for performances of video clips, on the grounds that there was a lessening of competition which was not offset by any significant public benefit. The Commission found that the bargaining position of record companies was significantly advanced, and broadcasters and other users of video clips lost their ability to negotiate individually. Further, the procedures and forms for applications for licences were inflexible and not negotiable. Effectively, the collecting society was found to be seeking to force its terms on users of the subject material, and the efficiency savings of the scheme benefited only members of the collecting society, not the public in general. The Commission in fact doubted whether it was necessary at all to have a collecting society for these kinds of works. Prior to 1987, video clips had been supplied free to television stations as a promotional tool for recorded music. From the early 1980's the sophistication and cost of production of music videos developed at a rapid rate. The major companies decided to try and recoup the cost of production by introducing a "pay-for-play" system, so the music videos were no longer supplied free of charge. They got together (through PPCA) and demanded uniform licensing agreements, in order to avoid competition as to price. This was strenuously opposed by television stations and other users of music videos.

VII. OVERSEAS COLLECTING SOCIETIES: COMPETITION ISSUES

A. United States

The approaches taken by American courts in dealing with allegedly monopolistic practices of collecting societies are illustrative of the conflicts which may arise between intellectual property rights and the policy implicit in competition law. The United States antitrust and anti-monopolistic legislation, the *Sherman Act*, the *Clayton Act* and various state legislation, have been in operation since the end of the last century, and a large body of case law and jurisprudence exists, dealing with these problems. Further, the Australian *Trade Practices Act* is largely modelled on the United States federal legislation and United States case law is helpful in dealing with similar problems which may arise in the Australian context. One should, however, not lose sight of the obvious fact that the economy of the United States is much larger than the Australian economy. Inevitably a much higher degree of concentration of market power generally exists in Australian markets, and economies of scale make it less likely that many competitors can exist within a given market (although this is by no means universally true).

82 (1991) 13 ATPR ¶50-105.

In *Alden-Rochelle Inc v ASCAP*,⁸³ an injunction was awarded against the collecting society ASCAP as its practices were found to be monopolistic. It was found that ASCAP controlled the rights to 80 per cent of musical compositions used in films and was withholding from film producers the right to perform these compositions for profit. ASCAP was subsequently requiring exhibitors to pay for exclusive annual blanket licences to exhibit sound films containing these compositions. The monopoly power of ASCAP, the exclusivity of the licences, and the pooling of their rights and the fees derived therefrom by members were the main factors which put the licensing arrangements in breach of antitrust laws, and the arrangements were held to involve breaches of the *Sherman Act* and the *Clayton Act*.⁸⁴ The Court held that owners of a number of copyright works may not combine their copyrights by arrangement or agreement, even to preserve their property rights, without transgressing competition law. The necessity or convenience of the copyright holders which were served by such an arrangement were not enough to justify its anti-competitive effects. The Court also held that an unlawful situation of monopoly may exist if there is power to raise prices or to exclude competition, even though these do not actually occur. However, the plaintiffs were not awarded damages as they were not able to bring sufficient evidence.

Since this decision, United States courts appear to have softened their attitude somewhat. In addition, a number of consent decrees have been made which set out legitimate terms for licences and appropriate or acceptable forms of conduct by collecting societies, so that their position of monopoly is not abused.⁸⁵

In *Columbia Broadcasting System Inc v ASCAP*,⁸⁶ the television network CBS issued proceedings to enjoin ASCAP and other licensing agencies from using a blanket licence scheme to convey non-dramatic performing rights to television stations. The court decided that the "rule of reason" analysis required it to determine whether the agreement was on balance an unreasonable restraint of trade: did the anti-competitive detriment outweigh the pro-competitive effects of the scheme? The scheme passed this test, and, as there was no evidence of any price-fixing among competitors (the agency members), which would be illegal per se, the injunction was not granted.⁸⁷ It was open to applicants to acquire the relevant rights from the copyright holders themselves. A similar decision was made in *Buffalo Broadcasting Inc v ASCAP*.⁸⁸ A class action by around 750 local television stations against ASCAP's system of blanket licences failed, the Court finding on a "rule of reason" approach that there was no restraint of trade in breach of s 1 of the *Sherman Act* and that blanket licences were not per se unlawful. In

83 80 F Supp 888 (1948) (New York District Court).

84 See also M Ryan, "Copyright and Competition Policy - Conflict or Peaceful Co-existence?" (1991) 2 *AIPJ* 206 at 210.

85 *United States v Broadcast Music Inc* (1940-3) Trade Cases 56,096; (1966) Trade Cases 71,941; and *United States v ASCAP* (1940-3) Trade Cases 56,104; (1950-1) Trade Cases 62,595; (1960) Trade Cases 69,212; see also *ibid* at 211.

86 620 F 2d 930 (1980) (US Court of Appeals, 2nd circuit).

87 See JT McCarthy, "Intellectual Property and Trade Practices Policy: Co-existence or Conflict? The American Experience" (1985) 13 *Aust Bus LR* 198 at 214-5, for an economic analysis of this case.

88 223 USPQ 478 (1984) (US Court of Appeals).

addition, the court noted that individual licensing was possible but was little used, so the blanket licence must enjoy an efficiency advantage.⁸⁹

In *K-91 Inc v Gershwin Publishing Corporation Inc*,⁹⁰ the owners of the copyright in various musical works brought an infringement action against a radio station operator. The Court held that the activities of an association acting as a licensing agency for composers, authors and publishers of music, in issuing licences for broadcasting of copyrighted musical works, was not a combination in restraint of trade or a monopoly under the *Sherman Act*. In this case licence applicants could deal directly with the copyright owners, independently of the licensing agency, and the agency did not have the exclusive authority to deal with the copyrights, so there was no breach of antitrust laws. Further, each applicant had the right to apply to the District Court to fix a reasonable licence fee, and this therefore could not be price-fixing. Similarly, in *Broadcast Music Inc v Columbia Broadcasting System Inc*,⁹¹ blanket licences issued by ASCAP and BMI were attacked by CBS as involving illegal price-fixing, because the fees set did not depend on the amount of use but were a flat fee or were set at a percentage of total revenue. The Court decided that such licences were not illegal price-fixing per se under the antitrust laws. It was significant that earlier consent decrees had made such arrangements legitimate. The relevant question, the Court held, was whether the purpose and effect of such arrangements threaten the proper operation of a free market economy. Historically the blanket licence appeared to be an acceptable mechanism for licensing the rights associated with the subject works, and a more exacting review based on much more detailed evidence would be required to decide if the arrangements were in fact unlawful.

A number of matters in these American cases are worth observing. First, the question of exclusivity of the licensing arrangement is given weight, even though as a practical matter it may be unreasonably burdensome to negotiate individually with copyright holders. Second, the commercial necessity of these arrangements, to give effect to the rights involved, may exempt such arrangements from being held to be per se breaches of antitrust law, although in theory they may be anti-competitive. Third, the availability of the District Court as a forum of recourse, should it not be possible to negotiate fees directly, weakens the monopoly power of the collecting society. The terms of the consent decrees in place reflect a concern to balance the demands of competition law on the one hand, and the legitimate exploitation of intellectual property rights and the social policy served thereby, on the other. A degree of monopoly power and the exercise of monopoly power will be tolerated within commercial necessity, but the restrictive character of such arrangements will be limited as far as possible, preventing collateral discrimination or restrictive effects.⁹²

89 See note on this case in *APRA*, December 1984, p 41; and M Ryan, note 84 *supra* at 210.

90 372 F 2d 1 (1967) (US Court of Appeals, 9th circuit).

91 441 US 1 (1979) (US Court of Appeals, 2nd circuit).

92 D Ladd, "Anti-trust Policy and Copyright: The United States Experience" in WR Cornish (ed), *Copyright in Free and Competitive Markets*, ESC Publishing Ltd (1986) pp 99-100; note 84 *supra* at 210-11.

B. Europe and the United Kingdom

Competition law in the European Community between member states is governed by the Rules on Competition contained in the Treaty of Rome. A number of provisions are relevant to intellectual property rights. Articles 30-35 provide for the free movement of goods between member states, and article 36 creates an exception for intellectual property. However, article 36 has been held by the European Court of Justice to be limited to the existence of intellectual property rights, and the exploitation of these will be subject to the other provisions.⁹³ Article 85 deals with agreements, decisions and concerted practices which are capable of appreciably affecting trade between member states and which have as their object or effect the perceptible reduction of competition within the Common Market.⁹⁴ Article 86 outlaws any abuse of a dominant position within the Common Market, or within a substantial part of it, so as to affect trade between member states.⁹⁵

The application of Article 85 to copyright collecting societies was examined by the Court of Justice in *Ministère Public v Tournier*⁹⁶ and *Lucazeau v SACEM, SACEM v Debelle, SACEM v Soumagnac*.⁹⁷ The Court held that the reciprocal arrangements that existed between various collecting societies within the European Community were not restrictive of competition and were set up to ensure that identical conditions of use for consumers would be established, whatever the origin of a work, and that each society would be able to rely upon the protection put in place by other societies in other member states. However, a refusal of direct access to their repertoires to consumers in other states would have fallen within article 85.⁹⁸ Article 85 has also often been used to attack copyright licensing agreements on the basis of geographical and import and export restrictions.

Article 86 is usually attracted when a national collecting society, enjoying a position of dominance, discriminates against parties from another member state.⁹⁹ In *Basset v SACEM*,¹⁰⁰ the Court of Justice dealt with a supplementary mechanical reproduction fee charged by the French collecting society SACEM, above its normal royalty for performances of recordings at discotheques, on juke-boxes and on radio where the recording was imported from other states in which no such fee was payable. The Court upheld the fee, as it was within SACEM's power under the relevant French legislation. However, the Court held that the level of the fee could place it in breach of article 86, especially as a national court had found that SACEM enjoyed a dominant position.¹⁰¹ In *Re GEMA*,¹⁰² the practices of

93 H Pearson and C Miller, *Commercial Exploitation of Intellectual Property*, Blackstone Press (1990) p 242.

94 EP Skone-James (ed), *Copinger and Skone-James on Copyright*, Sweet & Maxwell (13th ed, 1991) at [14-98]-[14-103].

95 *Ibid* at [14-121].

96 unreported, 13 July 1989 cited in Skone-James, *ibid* at [14-116].

97 unreported, 13 July 1989 cited in Skone-James, *ibid* at [14-116].

98 *Ibid*.

99 R Whish, *Competition Law*, Butterworths (2nd ed, 1989) pp 676-7.

100 [1987] ECR 1747; [1987] 3 CMLR 173.

101 Note 94 *supra* at [14-123]; note 99 *supra*, p 676.

the German authors' rights society, GEMA, in discriminating against non-German works and authors or publishers, and imposing unjustified obligations upon its members, was held to infringe article 86. Other breaches of article 86 were dealt with in *GVL v Commission* Case 7/82 (refusal to allow membership of a collecting society to foreigners)¹⁰³ and *Belgische Radio & Television v SABAM* (compulsory assignment by a member author of all his/her copyrights, past, present and future).¹⁰⁴ In the latter case, the Court held that a balance must be struck between the needs of the members of collecting societies for freedom from restraint and for effective management of their rights.¹⁰⁵

The law of the European Community is to a degree unique and only applicable within Europe, as its policy is to promote the integration of the member states.¹⁰⁶ However, the approach taken by the European Court of Justice reflects similar concerns to those which have been perceived in other jurisdictions. In essence, the Rules on Competition seek to prevent the same anti-competitive effects as are dealt with by American legislation and the Australian *Trade Practices Act*. It can be seen that the exploitation of intellectual property rights will be lawful as long as it does not unreasonably exceed what is envisaged by the corresponding intellectual property right and the need for collecting societies as a matter of commercial reality is not questioned.

As well as European Community law, the United Kingdom has its own legislation in relation to competition, the *Restrictive Trade Practices Act 1976* and the *Competition Act 1980*. Registration and notification procedures exist whereby conduct which is potentially in breach of the relevant legislation may be exempted from the effect of this legislation. However, copyright pooling is not registrable and is subject to the legislation's full effect. The position of collecting societies was considered by the Monopolies and Mergers Commission under a reference from the Secretary of State in March 1988,¹⁰⁷ in relation to licensing of sound recordings by Phonographic Performance Ltd and complaints from commercial radio stations as to royalties. The Commission reported that copyright collecting societies generally produce favourable effects and are the best available method of licensing the use of sound recordings. The Commission added the proviso that they enjoyed a great deal of market power and must be restrained from abusing that power, and to that end the Commission recommended a number of safeguards in the licensing arrangements to protect licensees and increased powers for the Copyright Tribunal.¹⁰⁸

102 [1971] CMLR 335.

103 [1983] ECR 483; [1983] 3 CMLR 645.

104 Case 127/73 [1974] ECR 313; [1974] 2 CMLR 238.

105 Note 94 *supra* at [14-127] - [128].

106 See, for example, S von Lewinski, "Rental Right, Lending Right and Certain Neighbouring Rights: The EC Commission's Proposal for a Council Directive" (1991) 4 *EIPR* 117, as to greater harmonisation of laws among member states; and M Moeller, "Copyright and the New Technologies: the German Federal Republic's Solution?" (1988) 2 *EIPR* 42, which deals with German copyright law and the enactment of the Berne Convention.

107 *Report of Monopolies and Mergers Commission to the House of Commons*, Command Paper 530 (1988).

108 Note 99 *supra*, pp 82 and 674.

VIII. CONCLUSIONS

There is clearly a potential for anti-competitive effects arising from the activities of copyright collecting societies. It is also clear, however, that they are necessary to allow copyright owners a realistic method of enjoying the benefits of their copyright. If the plethora of statutorily created copyrights are to have some kind of meaningful value as proprietary rights, they must be enforceable, and the practicalities of this require some kind of collectivisation.

The general approach taken to such problems has been to recognise their existence and to restrain blatant abuses of competition law, while continuing to permit the existence and operation of collecting societies which inevitably wield considerable market power. A dispute resolution procedure such as that created by the Copyright Tribunal, coupled with perhaps a greater educational role by the Trade Practices Commission, would appear to avert most situations where market power might otherwise be abused. The view of the Copyright Tribunal and the courts (as seen in *APRA v Ceridale*) seems to be that exploitation of copyright is not objectionable, even if it involves inequalities of bargaining, as long as that exploitation is contained within the legitimate boundaries of the copyright as defined in the relevant law. A similar view may be seen in overseas decisions. The *Hilmer Report* points to the need for further investigation by appropriate experts before determination of the proper balance between the exercise of intellectual property rights and the promotion of competition is possible.

In the end it must be remembered that trade practices law exists to benefit the public and is not to be applied as an end in itself. On one view the public also benefits if copyright is available as an enforceable and valuable property right, as creativity will thereby be encouraged. This view may be somewhat naive; in the Australian context it must be noted that the rights to very many, if not most, of the works exploited by copyright collecting societies belong to a few large, often foreign-dominated or multi-national corporations; their interests do not coincide with those of the Australian public. There is therefore a real need for vigilance against abuses of economic power in the exploitation of copyright, one which becomes more pressing in light of the decision in *APRA v Ceridale*.