Regulating the Collective Exploitation of Copyright

JEREMY THORPE

ABSTRACT *Collective enforcement of copyright law is an increasingly important element in copyright-based industries. This article suggests that collective enforcement creates two forces: increased compliance with copyright laws; and a tendency for copyright collecting societies to act as monopolists. The interaction of these forces is discussed and the price and output consequences identified. From this position, using the Australian regulatory experience as a guide, the article highlights a number of regulatory shortcomings and suggests a range of principles upon which to base the regulation of copyright collecting societies.*

Keywords: antitrust, collective licensing, collecting society, copyright, intellectual property, regulation.

A major thrust of recent regulatory reform and competition policy has been to challenge current legislative arrangements where they unduly restrict competition.[1] While this process has focused on appropriate arrangements for the regulation of significant market power and access issues in major infrastructure industries (although there have been many reforms across a range of industries), the reform process appears to have lightly passed over similar issues with respect to intellectual property. This article is a step towards correcting this oversight.

While copyright is often conceived as a form of natural right, it is better understood as an economic tool.[2] It exists to correct market failures inherent in the production of intellectual and creative works, and hence facilitates the optimal level of creativity. Copyright:

> ...protects the property rights of authors, composers and artists as an incentive to creative activity ... and in terms of economics, gives the copyright owner a temporary monopoly on the original work.[3]

In fact, in economic terms the market power provided is somewhat less than a monopoly. While the individual copyright owner has a monopoly over the particular copyrighted work, the monopoly power provided by the copyright protection can only be assessed in light of the market in which the copyrighted work competes.

Concern has been raised that moves towards collective enforcement of copyright may be a means by which the market power provided by copyright laws can be aggregated in an anti-competitive manner.[4] The focus of the concern is on copyright collecting societies.

Copyright collecting societies are non-government organisations that administer the

*This article draws upon and extends the analysis in J. Thorpe, 'Collective licensing of copyright—options for competitive reform', *Agenda*, 5, 2, 1998, pp. 213–224.

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rights of copyright owners. The members of a copyright collecting society license their copyrights to the society, which in turn licenses the copyrighted material, and collects and distributes royalties, on behalf of the copyright owners.[5] Societies also take legal action against those who infringe the copyrights to which they hold title.[6]

This article suggests that collective enforcement will have two effects: increased compliance with copyright laws; and a tendency towards monopoly behaviour by collecting societies. Using standard economic analysis, this article identifies the outcome of the interaction of these two effects. From this analysis, and in light of Australian experience, the article posits a regulatory approach that sees copyright (and its enforcement) as a tool to maximise community welfare.

Increased Compliance

The first effect of collective licensing by collecting societies is increased enforcement. This comes about because:

- the costs of licensing for all parties are reduced, hence encouraging licensing rather than unauthorised copying or use of copyrighted material; and
- the costs associated with enforcement are reduced.

Using the example of music performance rights (and the common use of blanket licences),[7] these drivers of increased copyright compliance are discussed below.[8]

Reduced Transaction Costs

The primary value of having a single organisation license the bulk of a particular type of right (e.g., music performing rights), particularly under a blanket licensing scheme, is that such a collecting society can substantially reduce the transaction costs associated with licensing.

Identification costs. Potential licensees of a given musical work may find it difficult to identify and locate the copyright owners who can authorise public performances. These difficulties are magnified because most users wish to license performance rights from many copyright owners. As a result, many such users (especially small businesses) may decide that the costs associated with obtaining a licence outweigh the benefits to be gained from the transaction. A single body handling a large selection of copyrights eliminates the confusion and expense associated with individual licensing.

Information costs. Without a collecting society, individual negotiations for music rights would be complicated by the expense and difficulty of obtaining the information necessary to negotiate a price for a given performance right. Because the value of music performance rights is largely a function of the performance itself (and therefore varies according to audience size, type of use, and number of performances rendered), the parties must have access to such information in order to negotiate prices. However, as most licenses are negotiated before a performance, users are forced to estimate the price and value of their performance rights. These estimates are based upon little more than:

- generalised information concerning a licensee's use of music;
- the parties' subjective notions of a composition's value; and
- premature indications of its popularity.

Clearly, there is a significant error margin associated with such a process. The existence

of this error margin is likely to add substantially to the costs of individual licensing transactions. Even if the parties were to base their negotiations on prices charged for similar performances, information costs would still be generated as such prices would vary according to the popularity of a particular piece.

In contrast, blanket licensing avoids these difficulties and expenses because it provides an efficient system for determining the value and price of music performance rights based upon the benefit actually conferred by the licensed music.

Transaction time costs. In addition to eliminating the costs of separate licensing negotiations, blanket licensing eliminates the transaction costs associated with the time consumed by such negotiations or comparable licensing processes. For example, many users do not know in advance which compositions are to be performed. These users cannot rely upon prior authorisation from individual copyright owners to preclude possible infringements, but instead require access to the entire catalogue that blanket licenses provide. Furthermore, a blanket licence grants instant access to new (and likely popular) compositions that enter a society's catalogue over the term of the license, thereby doing away with the need for time-consuming licensing transactions. Many users place substantial economic value on the ability to perform any music in the society's repertory at a moment's notice and on the avoidance of the time-lag inherent in licensing negotiations.

Reduced Enforcement Costs

Collective enforcement of copyright has the added advantage of drastically reducing the average cost of enforcement. This can be explained by a series of interconnected factors:

- as a large litigant, collecting societies are perceived to have deep pockets to fund test cases and call the bluff of defendants;
- they enable collecting societies to signal to prospective parties that they are serious; and hence
- the strengthen deterrence and allow the collecting societies to shift resources to new investigations and education campaigns.

Aggregation of Market Power

A major concern with respect to collecting societies is that they employ actual or potential anti-competitive means to achieve their objectives.

Collecting societies bring together parties who would normally be competitors, with the effect of discouraging users from purchasing other material (tying), and jointly determining prices for the copyright material (price-fixing).[9] The potential for antitrust concerns is acknowledged by a collecting society's solicitor:

> It is not surprising that collecting societies have the potential to interfere with competition policy. Collecting societies by virtue of their importance to copyright owners, and the volume of rights they may control, will almost certainly dominate their respective markets. For example, they are usually the only relevant body from which users can obtain rights for different copyright owners.[10]

The market power that collecting societies have enables them to act in a manner contrary to that in a perfectly competitive market. It enables collecting societies to restrict supply and hence raise the price of the work above that which would otherwise be charged.[11]

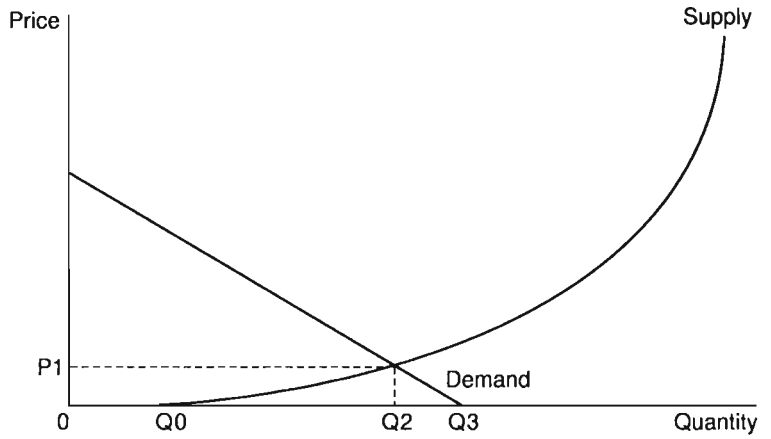

Figure 1. The creation of a market.

This restriction of supply need not be explicit. In practice it is likely to arise from a number of factors such as restrictive membership criteria or licensing conditions.

In addition to the primary costs of the market power held by collecting societies it is likely that there will also be secondary costs associated with quality. For example, the collecting societies' restriction of the diffusion and use of intellectual property goes some way towards explaining why low-quality material ('elevator music' or 'muzak') is used in locations where use of original material may be preferred.[12]

As a result of these concerns, collecting societies have often been the target of antitrust actions in Australia, the United States and Europe.[13]

The Consequences of Collective Enforcement

It is conceivable, and indeed to be expected, that collective licensing will increase compliance with copyright laws and, barring regulatory intervention of some sort, will be employed in a manner that maximises the collecting society's revenue. Using a simple (and highly stylised) economic example, the effect of these twin actions is discussed in this section.

The Creation of a Copyright Market

The first step is to understand how copyright creates a market.

Figure 1 demonstrates the social benefits from the introduction of copyright protection. Without the copyright protection provided by a legislative grant of market power, only Q0 of copyrighted works would be created by authors.[14] While some of Q0 may be sold at relatively high prices, the public's ability to copy the work means that there may only be a single (or at least very few) sales because the remaining consumers have an incentive, absent any intellectual property, technological or contractual protection, to produce (Q3 minus Q0) copies and pay nothing to the authors in return.

Once copyright protection is granted, each person has a monopoly right over his or her own work, but competes in a broader market of copyrighted material. The grant of copyright protection permits the authors to stop users free-riding; and hence a market is created. As a result, Q2 copies of the good are sold and produced at P1.

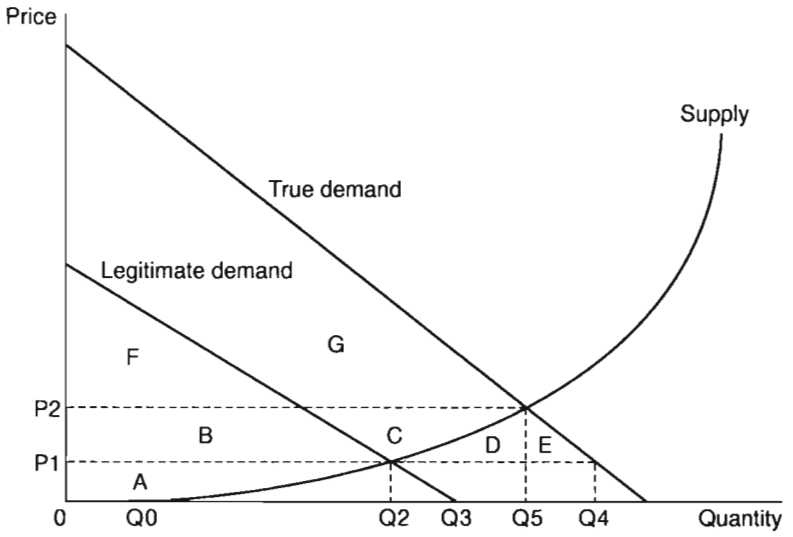

Figure 2. Consequences of complete enforcement.

Increased Enforcement

This section assumes that there is a market for a type of intellectual property right. It is not feasible that individuals can licence and enforce their copyrights. Hence, a collecting society is free to act as a monopolist.[15]

If one of the outcomes of collective administration is improved enforcement then it is necessary to consider what effect that may have on community welfare.

Figure 2 assumes that there is a group of people who will breach copyright no matter what the price. Thus, the demand curve in Figure 1 is extended to the right. Using the notation in Figure 1, a competitive market will result in the sale of Q2 copies at P1. However, at price P1 consumption will be Q4, with Q4 minus Q2 copies made.

It is interesting to observe the effects of this on producer surplus (the area between the supply curve and the licence price) and consumer surplus (the area between the demand curve and the licence price).

With suboptimal enforcement the producer surplus is equal to area A. With complete enforcement the producer surplus increases to area A + B + C.

The change in consumer surplus is more interesting. With suboptimal enforcement the consumer surplus equal to the area F + B (the consumer surplus of honest licensees), plus the area G + C + D + E (the consumer surplus of those who would pay but choose instead to copy). With complete enforcement, the consumer surplus represented by area B + C is transferred to producer surplus, and the consumer surplus represented by area D + E is lost.

Monopoly Pricing

If the formation of a copyright collecting society results in an effective monopoly over distribution, the result will be increased prices and a restriction in distribution.

A monopolist has the power to limit the availability of licences for the purpose of raising prices.[16] Standard monopoly theory states that a profit-maximising monopolist

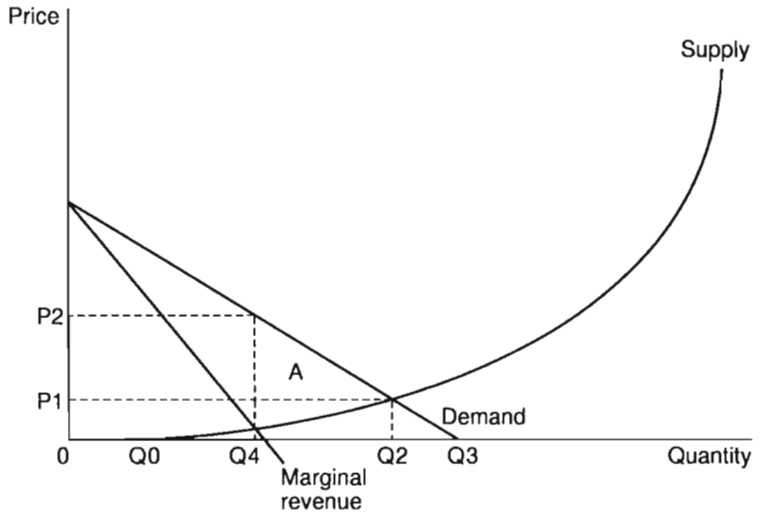

Figure 3. Competitive restrictions.

will reduce output to the point where the marginal revenue equals the marginal cost of supply.

In Figure 3, a monopolist collecting society will reduce the number of available licences from Q2 to Q4 and hence raise the price from P1 to P2. This contraction in output and increased price has two principle effects:

- first, there is a transfer to the collecting society (and hence the authors) from consumers equal to P2 minus P1 multiplied by Q4; and
- second, there is a welfare loss to society because some consumers who value the work above what they would have paid in a competitive market (P1) do not value the work sufficiently to purchase it at the monopoly price (P2). This results in a welfare loss equivalent to triangle A.

Though a stylised example, Figure 3 demonstrates that there are social benefits to encouraging competition in the distribution of copyrighted works, and as a corollary, there are costs in allowing copyright collecting societies to operate as monopolies in the distribution of copyrighted material.

The Combined Effect

The combined effect of increased market power and complete enforcement, shown in Figure 4, is that:

- initial sales are Q1 at price P1. However, because of copying, consumption is at Q2;
- perfect enforcement of copyrights by a collecting society causes total consumption to fall from Q2 to Q3, but sales increase from Q1 to Q3. Additionally, the price increases from P1 to P2; and
- a monopoly pricing strategy by the collecting society means that the society will reduce licences from Q3 to Q4 and raise the price from P2 to P3.

The net effect then, is:

- reduction in sales of Q1 minus Q4. If unauthorised use/copying is significant then the

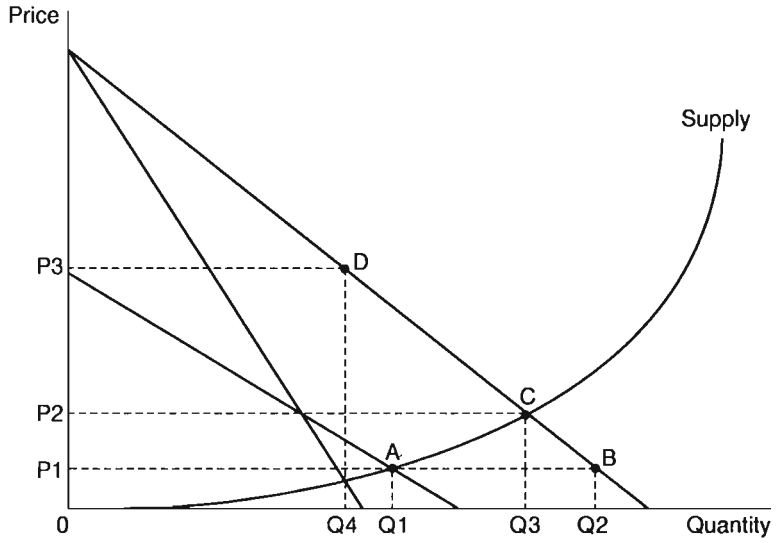

Figure 4. Competitive restrictions.

full enforcement/monopoly equilibrium (point D) may be at a point where Q4 is greater than Q1. Nevertheless, Q4 will be less than Q2 and Q3;
- reduction in consumption of Q2 minus Q4; and
- price increase of P3 minus P1.

Regulation of Collecting Societies—the Australian Experience

The Independent Price Setter—The Copyright Tribunal

The Copyright Tribunal sets copyright licence fees. Under the Copyright Act 1968, the Copyright Tribunal has the power to hear disputes about terms and conditions of licences or licence schemes administered by collecting societies. Licensors, licensees and persons desiring a licence may refer disputes to the Tribunal for determination.[17] In this way:

> The Copyright Tribunal is an arbitrator. It arbitrates disputes concerning the amounts which should be paid by way of reasonable or equitable remuneration under licences granted, or to be granted, sometimes by statute, for the use of copyright material.[18]

The Tribunal has heard disputes about terms and conditions of licences or licence schemes administered by collecting societies only 14 times since 1968.[19]

The task facing the Tribunal is far from easy. A former President of the Tribunal, Justice Shepherd, has described the process of determining a price, particularly when employing the 'notional bargaining approach',[20] in these terms:

> The Tribunal's task is one of evaluation or estimation. ... The starting point will be a search for a market. If there is a market, probably the market value will be the value which prevails. If there is no market, or if the object ... is not well sought after so that comparable sales are not easily found, the court will have to construct or endeavour to construct, a notional buyer. This becomes a much more theoretical

> exercise. It involves a degree of subjective judgement and minds will often differ as to what the appropriate outcome is.

The Copyright Tribunal is almost invariably faced with a situation where there is no clear or comparable market price upon which it can base a price. Thus, the Tribunal usually tries the 'notional bargaining approach'—constructing, as best it can, from the available material, the factors and considerations which it considers the parties themselves would consider if they were entering into such a bargain.[21]

The Tribunal's approach to pricing has been relatively controversial.[22] Concern has been expressed that the Tribunal has at times been inconsistent in administering this approach, vacillating between setting prices based on use and prices based on compensation for forgone sales.[23]

While the Tribunal's decisions are acknowledged to be value judgements,[24] there is a clear appreciation of the economic forces of supply and demand substitution and cross-elasticities:

> In the background is the anxiety that the figure, if too high and thus unfair, may operate adversely because it may paradoxically deny to the authors the remuneration s.53B intended them to have and also deny to educational institutions the ability to use as wide a range of material as they should. All in all the task is a most difficult and responsible one.[25]

While this passage implicitly acknowledges the importance of understanding economic forces (such as the cross-elasticity of demand) when setting licence fees, the Tribunal appears to lack the economic expertise to adequately evaluate those forces. Also, because of its case by case approach, it does not have the time, mandate or experience to seek to establish a consistent methodology or set of best-practice guidelines for determining the appropriate price-setting methodology.[26]

The difficulty in establishing an equitable price can be appreciated by referring to Figure 3. For example:

- P1 may be reasonable if it is thought that copyright protection is 'excessive' to take into account of underenforcement;
- P2 may be reasonable if it is thought that the scope of copyright protection was devised with full enforcement in mind; and
- a price between P2 and P3 may be appropriate if it is thought that copyright should provide, in economic terms, an 'above normal' profit for copyright owners. This would appear to be the implicit preference of the Tribunal; bucking the move to view the goal of policy as maximisation community welfare (the producer plus consumer surpluses) the Copyright Tribunal views equitable as, 'equitable to the copyright owner'.[27]

The Antitrust Enforcement Agency—The ACCC

The anti-competitive behaviour of collecting societies is currently regulated by the Australian Competition and Consumer Commission (ACCC) under the Trade Practices Act 1974. The Trade Practices Act attempts to accommodate the different emphases adopted by intellectual property laws and competition policy. Sub-section 51(1) states that anticompetitive conduct permitted under intellectual property legislation is subject to the Trade Practices Act. This blanket coverage is subject to subsection 51(3), which provides an exception to the prohibitions contained in Part IV, except for sections 46 and 46A (misuse of market power) and 48 (resale price maintenance).[28] Significantly,

however, the ACCC has the power to authorise otherwise anti-competitive conduct where the anti-competitive effect is outweighed by the public benefit.[29]

The Effectiveness of Dual Regulation

On its own antitrust enforcement of collecting societies is problematic.[30] This does not mean, however, that Australia's dual regulator approach is the most appropriate method.[31]

The current scope of the Tribunal is limited in three fundamental respects:

- first, the Tribunal is purely reactive. It relies on parties to bring disputes brought before it (which happens often after many years of protracted and expensive negotiation), and does not have any powers to regulate to avoid disputes;[32]
- second, the Tribunal does not examine the anti-competitive or public interest effects of any licensing arrangement;[33] and
- the Tribunal lacks the resources to make a transparently reasoned assessment of prices. While parties to a case may suggest appropriate prices, often these are at such variance that the Tribunal would be better off making its own reasoned assessment without reliance on the parties to the case.

The second concern, the separation of the price-setting function from an explicit assessment of competition in the market, is particularly worrying given that the market's existence is made feasible only by the legislative grant of market power. Furthermore, the separation is inconsistent with the treatment of firms in other industries which enjoy significant market power and are subject to some form of price-setting mechanism.[34]

While dual regulation can be useful if it discourages overregulation (e.g., mutual recognition), dual regulation is unlikely to be desirable when there is the potential for distortions created by different regulatory approaches, or where issues that should be considered together fall between the regulators. In this case, the potential distortions may include arises because of differing approaches to what constitutes the appropriate market, and the lack of coordination means that the Tribunal does not consider the wider competitive effects of its decisions. Where possible it is useful to remove the potential for such distortions and overlapping oversight.

A Strategy For Reform

A reform option canvassed in a number of fora is to expand, and in the process clarify and formalise, the jurisdiction of the Copyright Tribunal:

> It therefore seems vital that the jurisdiction of the Copyright tribunal be widened, and resources increased, to ensure that every licence scheme offered by collecting societies is subject to the tribunal's authority and that the Tribunal can examine questions of anticompetitive behaviour. Schemes ensuring access to copyright material when in the public interest will also need to be considered.[35]

This view is consistent with the approach identified by the European Commission.

> As far as collective management is concerned, there are already indications for the need to define, both under the Single Market and the competition rules of the EC Treaty, at Community level the rights and obligations of collecting societies, in particular with respect to the methods of collection, to the calculation of tariffs, to the supervision mechanisms, and to the application of the rules on competition to collecting societies and collective management.[36]

However, care needs to be taken to ensure that any such extension of the Tribunal's jurisdiction is effective and does not create new distortions. For example, compulsory supervision and arbitration would be prohibitively expensive for many small participants.

Potential problems associated with the expansion of the Tribunal's role can be minimised by the establishment of a set of principles to ensure that licensing arrangements are used to further anti-competitive ends.

Such a set of principles has been suggested by Lupton and Drahos. They suggest a range of principles, including:

- the licensing scheme must be the least restrictive possible;
- the arrangements should not discourage direct dealings between creator and user;
- the fee should accord with the amount of material used;
- if blanket licences are necessary, they must have carve-out provisions;
- the person who decides which material to use should be, where possible, the person who negotiates and pays for the licence;
- all users should have unrestricted and automatic access to the societies' published licence terms;
- the membership input agreements should not exclude the member's ability to licence directly;
- membership of the society should not be restricted; and
- licence terms should not extend beyond the rights protected by the copyright of the societies' members.[37]

These principles form a reasonable basis upon which any reform should proceed.

While some of these elements have been unilaterally adopted by societies, and others required by the ACCC in the context of authorisations, a more transparent process would be ensured if they were incorporated in legislation.

Given that the United States has a broadly similar scheme to that advocated above,[38] it would be difficult, although not impossible, for it to oppose the introduction of such a scheme. Equally, such an approach appears to be consistent with clause 2 of Article 40 of the international TRIPs Agreement:

> Nothing in this Agreement shall prevent Members from specifying in their national legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grantback conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.

The thrust of the Lupton and Drahos principles is that regulatory oversight (of both pricing, and terms and conditions) cannot be separated from competitive consequences. This suggests that, at a minimum, there is a need for a specific public-benefit type[39] or competition-related test, either in conjunction with, or in place of, the current 'reasonableness' test. Importantly, however, the incorporation of such a test does not suggest that it is necessary to exempt collecting societies from general antitrust oversight.

Will Collecting Societies Continue to be the Focus of Regulatory Attention?

Any consideration of the appropriate regulatory regime and regulatory methodology

should attempt to look forward to assess if market fundamentals are likely to change, and how so.

An interesting question that must be asked is whether collective licensing will continue to be the force that it is today, or whether, at least with respect to some rights, technology will allow cheaper individual enforcement and hence reduce the imperative for collective administration.

The second school of thought—that technological developments will make collecting societies less important—is interesting because it suggests that technology will itself reduce the market power of collecting societies (by lowering transaction and enforcement costs for individuals). The potential for such a change has been acknowledged by the European Commission:

> At the hearing of interested parties ... the Commission departments put forward questions regarding the administration of rights in the information society. One question asked whether the role of collecting societies needed to be reviewed in the context of the information society; the answers given varied with the particular organization's own experience, but some broad tendencies can be discerned.
>
> Some participants were strongly of the opinion that rights to equitable remuneration would no longer be justified in the information society, and that a return to individual management would be possible.[40]

This may swing concern away from the power of traditional collecting societies to the power of the providers of the technical enforcement solutions. This does not bode well; if competitive regulators have problems coping with intellectual property, then it can be equally said that they have trouble dealing with industries involving complex and rapidly moving technical developments.

Notes and References

1. See Organisation for Economic Co-operation and Development, *The OECD Report on Regulatory Reform*, OECD, Paris, 1997.
2. See Peter Drahos, *A Philosophy of Intellectual Property*, Dartmouth, Aldershot, 1996; and Office of Regulation Review, *An Economic Analysis of Copyright Reform: A Submission to the Copyright Law Review Committee's Review of the Copyright Act (Cth) 1968*, AGPS, Canberra, 1995.
3. Antony Dnes, *The Economics of Law*, International Thomson Business Press, London, 1996, p. 33.
4. Peter Brudenall, 'The collective administration of copyright and competition policy: tension in the digital age', *Australian Intellectual Property Journal*, 8, 1997, pp. 121–133. This concern is somewhat slow in emerging given that concerns about aggregated market power have been long-standing with regards to patent pools. This may be a good indicator of the recent increased value placed on information protected by copyright in comparison to processes and methods protected by patents.
5. See also *International Guide to Collective Administration Organizations: Profiles of National Laws and Organizations Administering Copyright and Neighboring Rights*, Little, Brown, Waltham, MA, 1993.
6. The move towards greater recognition of moral rights in Australia—see D. Clode, 'Power to the artist: the false promise of moral rights', *Agenda*, 5, 1, 1998, pp. 123–132—does not sit comfortably with the role played by collecting societies, since if collecting societies grant licences to anyone who is prepared to pay for them, this appears to convert the exclusive rights under the *Copyright Act* to mere rights of remuneration.
7. A blanket licence is a licence whereby the licensee acquires the right to use an entire repertoire or collection, rather than individual works.
8. See J. M. Fujitani, 'Controlling the market power of performing rights societies: an administrative substitute for antitrust regulation' *California Law Review*, 72, 1984, pp. 103–137.
9. Treasury, 'The economic role of copyright', *Economic Roundup*, Autumn, 1996, pp. 55–75.
10. Brudenall, *op. cit.*, Ref. 4, pp. 125–126.

11. An exception may be those collecting societies that administer statutory licensing schemes and are obliged to make available their collection of copyrighted material at an externally set fee.
12. Peter Lupton & Peter Drahos, *Copyright Collecting Societies: Towards a Regulatory Balance of Public and Private Interests—A Response to the Simpson Report*, Australian National University, Canberra, August 1996.
13. See G. A. Clark, 'Blanket licensing: the clash between copyright protection and the Sherman Act', *The Notre-Dame Lawyer*, 55, 1980, pp. 729–750; Organisation For Economic Co-operation and Development, *Competition Policy In OECD Countries: 1994–1995*, OECD, Paris, OCDE/GD(97)85; Brudenall, *op. cit.*, Ref. 4; Reinhold Kreile & Jürgen Becker, 'Collecting societies in the information society: economic and legal aspects', 1997, available at http://www.gema.de/eng/public/jahr97/index.html
14. Office of Regulation Review, *op. cit.*, Ref. 2, pp. 13–15 and 43–50.
15. For the sake of simplicity the supply of licences is not disaggregated. Therefore, a supply of ten licences could be two copyrights supplied five times or ten different copyrights each supplied once. A more thorough (mathematical) analysis would make such a distinction—see A. Hollander, Market structure and performance in intellectual property: the case of copyright collectives', *International Journal of Industrial Organization*, 2, 1984, pp. 199–216.
16. This holds true only if entry barriers restrict the ability of other parties to enter the market.
17. The Tribunal's jurisdiction and procedures are explained in Australian Competition and Consumer Commission, *Draft Determination—Applications for Authorisation and Notification: Australasian Performing Right Association*, Authorisation Nos A30166 to A30173 and N30714, File Nos CA95/26 to CA95/33 and CN95/17, 16 October 1996, pp. 8–12.
18. Ian Shepherd, 'Copyright tribunal', unpublished article, 1995, p. 1.
19. Australian Competition and Consumer Commission, *op. cit.*, Ref. 17, p. 8. This low number is presumably because the proceedings are thought to be expensive, slow and unnecessarily legalistic—Shane Simpson, *Review of Australian Copyright Collecting Societies: A Report to the Minister for Communications and the Arts*, Commonwealth of Australia, Canberra, 1995, p. 254.
20. See *Spencer v. The Commonwealth* (1907) 5 CLR 418 at 432, per Griffith CJ.
21. Shepherd, *op. cit.*, Ref. 18, pp. 8–9.
22. J. Court, 'The notional bargain approach to the determination of equitable remuneration for compulsory licences: a comment on four decisions of the Copyright Tribunal', *Sydney Law Review*, 11, 2, 1987, pp. 348–373 at pp. 368–372.
23. *Ibid.*, p. 368.
24. *Copyright Agency Ltd v. Department of Education of New South Wales* (1985) 59 ALR 172 at 183, per Shepherd J.
25. *Ibid.*, p. 201, per Shepherd J.
26. Compare this with the ACCC's process of issuing draft and refined merger guidelines setting out the methodology employed when assessing mergers under the Trade Practices Act.
27. *Report of the Inquiry by the Copyright Tribunal into the Royalty Payable in Respect of Records Generally*, 24 December 1979, pp. 98–99. This view was justified by reference to *The Commonwealth v. Arklay* (1952) 87 CLR 159 at 169, and to subsections. 47(3), 107(3) and 108(1)(a) of the Copyright Act which refer to the 'equitable remuneration of the owner'.
28. J Thorpe, 'In defence of intellectual property tie-ins', *Corporate and Business Law Journal*, 8, 1, 1995, pp. 81–92.
29. Subsection 90(6). See Australian Competition and Consumer Commission, *op. cit.*, Ref. 17; and Trade Practices Commission, *Application of the Trade Practices Act to Intellectual Property*, AGPS, Canberra, 1991, pp. 11–13.
30. Fujitani, *op. cit.*, Ref. 8. The United States regulation relied upon consent decrees and standard application of antitrust law. In 1994 the Antitrust Division of the Department of Justice filed documents in *US v. Broadcast Music Inc.* (SDNY filed 29 June 1994) agreeing to a proposed modification of a 1966 consent decree involving licensing to broadcasters of music performance rights by Broadcast Music Inc. The proposed modification provides a mechanism to enable the court to set an appropriate licensing fee when BMI and a potential licensee are unable to agree on a fee.

31. Germany also has a dual regulator approach—Kreile & Becker, *op. cit.*, Ref. 13.
32. However, a former President of the Tribunal acknowledges that the Tribunal is a *de facto* industry price setter and has an obligation to look beyond the matter before it to consider the consequences of its decisions in the wider marketplace—Shepherd, *op. cit.*, Ref. 18, pp. 10–11.
33. *WEA Records v Stereo FM* (1983) 48 ALR 11.
34. Examples include: telecommunications regulation (under the general provisions of Parts IIIA and IV of the Trade Practices Act), in addition to the telecommunications specific Part XIB (regulating anticompetitive conduct in telecommunications markets) and Part XIC (a telecommunications access regime); and prices surveillance under the Prices Surveillance Act 1983, in addition to Parts IIIA and IV of the Trade Practices Act.
35. Brudenall, *op. cit.*, Ref. 4, p. 133.
36. Commission of the European Communities, *Communication from the Commission: Follow-up to the Green Paper on Copyright and Related Rights in the Information Society*, Brussels, November 1996, COM (96) 586 Final, pp. 26–27.
37. Lupton and Drahos, *op. cit.*, Ref. 12. They also suggest that, 'licence rates should not differ between equivalent users'. While this principle is justifiable on equity grounds, it is difficult to justify on economic grounds or in practice. As the access regimes in the Trade Practices Act shows, once a fair framework for negotiation is set in place then regulators should not intervene. Even if intervention was allowed, in practice it would be difficult to establish what level of equivalence was necessary to be an 'equivalent user'.
38. Australian Competition and Consumer Commission, *op. cit.*, Ref. 17, pp. 29–30 and 85; A. Schlesinger, 'Collecting societies and United States anti-trust law', in D. Pepperkorn & C. van Rij (eds), *Collecting Societies in the Music Business: Reports Presented at the Meeting of the International Association of Entertainment Lawyers*, Maklu Publishers, Apeldoorn, 1989, pp. 85–90, at p. 85.
39. For example, subsection 90(6) of the Trade Practices Act.
40. Commission of the European Communities, *Green Paper: Copyright and Related Rights in the Information Society*, Brussels, August 1995, COM 95) 382 Final, p. 75.