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The Hon KE Lindgren AM QC  
The Code Reviewer  
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13 November 2014

Dear Dr Lindgren

Following the meeting between representatives of collecting societies and of the NSW government and the Copyright Advisory Group on 29 October, I have attached a proposal for an amendment to the Code of Conduct for the Collecting Societies regarding matters for reporting by declared collecting societies. The attached document also addresses some issues raised by the proposal put forward by the NSW Government and Copyright Advisory Group.

As indicated by Screenrights in its response, we will now seek to reach an agreed position with Screenrights, the NSW Government and Copyright Advisory Group.

Regards



Libby Baulch  
Policy Director

## **PROPOSAL FOR AMENDMENT TO CODE OF CONDUCT REGARDING REPORTING**

13 November 2014

### **BACKGROUND**

The NSW Department of Justice (NSW) and the Copyright Advisory Group to the COAG Education Council (CAG) have made a joint proposal to amend the Code of Conduct for Collecting Societies by inserting a new Clause 2.9 headed 'Transparency in dealing with statutory licensees'.

The Clause is intended to apply only to collecting societies that are 'declared' under the Copyright Act for the purposes of Part VA, Part VB, and section 183A.

### **Objectives of Code**

The objectives of the Code are:

*(a) to **promote awareness of and access to information** about copyright or the resale royalty right or both and the role and function of Collecting Societies in administering copyright or the resale royalty right or both on behalf of Members;*

*(b) to **promote confidence** in Collecting Societies and the effective administration of copyright or the resale royalty right or both in Australia;*

*(c) to set out the **standards of service** that Members and Licensees can expect from Collecting Societies; and*

*(d) to ensure that Members and Licensees have access to efficient, fair and low cost **procedures for the handling of complaints and the resolution of disputes** involving Collecting Societies.*

[emphasis added]

The proposed amendment relates to paragraphs (a) and (b) of the objectives.

### **Reporting by Copyright Agency**

Copyright Agency provides information on its activities in a variety of ways including:

- provision of audited accounts and annual reports to the Attorney General and Minister for the Arts as required by the Copyright Act and Resale Royalty Right for Visual Artists Act; and
- publication of information on its website (including audited accounts, annual reports and distribution policy).

The Attorney General and Minister for the Arts are obliged to table the audited accounts and annual reports in Parliament.

The annual reports provide detailed information about Copyright Agency's activities, much of it reflecting specific requests by Attorneys General and the Attorney General's Department from time to time.

### **Commitment to transparency**

In addition to its reporting obligations, Copyright Agency has commitments to transparency in policies such as its client service charter and corporate governance statement, which are published on its websites.

### **Guidelines for distribution of statutory licence fees**

The distribution policies and practices of declared collecting societies are governed and influenced by:

- their constitutions;
- the Attorney General's Department Guidelines for Declared Collecting Societies;
- the Copyright Act and Copyright Regulations;
- legal entitlements of members of companies limited by guarantee; and
- fiduciary obligations relating to moneys held in trust.

In addition, the Copyright Tribunal has jurisdiction to review a collecting society's distribution arrangement (e.g. under ss153DE and 153KA).

### **Relationship between data for 'volume' estimates and distribution**

Most of the licensing arrangements managed by declared collecting societies are blanket licences, which apply for fixed terms with pre-agreed flat fees.

In some (but not all) cases, the negotiations to set the licence fees take into account estimates of the extent of usage of copyright content during the licence period by the people covered by the agreement. These 'volume' estimates are based on surveys of usage by samples of licensees, in most cases conducted by an independent research company. The survey design is developed by an independent consultant in consultation with licensee representatives (such as CAG) and the collecting society.

For the Part VB statutory licence for education, the survey is primarily designed to indicate the overall usage by licensees in reliance on the statutory licence, and the relative proportions of types of content (e.g. poetry, images) and types of use (e.g. in coursepacks).

Information from surveys for 'volume' estimates can also be used in connection with schemes of allocation for distribution of licence fees. The way the survey data is used for distribution does not, however, directly correlate to the way the data is used for volume estimates.

For example, the distribution of licence fees from schools for 2014 was based on survey data from 2011, 2012 and 2013 (partly because surveys are conducted on a two-year cycle, and partly because using data received before licence fees enables quicker distribution).

The extent to which a usage record from a survey can be used for distribution is dependent on the amount of information provided by the licensee. In some cases, a record can be relevant for volume estimates but not for distribution. For example, a usage record may show that a licensee copied an image, but not provide sufficient information to enable identification of the rightsholder. It indicates a type of work (e.g. image) copied by the licensee population as a whole.

Insufficient information about the rightsholder does not, of itself, indicate that the work was not copied in reliance on the statutory licence.

There are processing protocols, agreed between Copyright Agency and licensee representatives such as CAG, for identifying uses that are presumed to have been made outside the statutory licence, such as uses made in reliance on Creative Commons licences. A usage record is excluded from volume estimates if one of these 'exclusion' conditions applies.

But, for obvious reasons, a record is not excluded solely on the basis that insufficient information about the rightsholder is provided.

### **Data access protocol**

Copyright Agency provides access to usage records to CAG, in accordance with the Data Access Protocol. CAG is entitled to (and does) inspect records, and request further information about them.

### **Arrangements with peak bodies and individual licensees**

In some cases, licensing arrangements are made with peak bodies such as CAG, Universities Australia, or a government department. In other cases, there are arrangements with individual licensees. For example, Copyright Agency has individual arrangements with more than 1,000 licensees under Part VB, including commercial colleges.

### **Management of statutory licence for governments**

Section 183 of the Copyright Act provides a statutory licence to the Commonwealth, States and Territories (governments) to make any use of any copyright material 'for the services of the government.

Where the use is a 'government copy', the government must pay equitable remuneration to the relevant declared collecting society. In other cases, s183(4) requires the government to notify the copyright owner, unless that is 'contrary to the public interest'. The copyright owner is entitled to negotiate terms or seek a determination from the Copyright Tribunal. The statutory licence is not conditional upon notification, but a government has a statutory obligation to notify the copyright owner.

Copyright Agency is agent for its members for s183(4) notifications. This agency is different in nature to Copyright Agency's appointment by its members as their agent to license their content through Copyright Agency's 'voluntary' licence schemes.

### **Proceedings relating to NSW government's sale of survey plans**

The proceedings against NSW regarding its sale of survey plans were instigated by surveyors' associations. The proceedings related to the sale of survey plans; surveyors have not sought payment for administrative uses of survey plans.

The determination of equitable remuneration by the Copyright Tribunal in the surveyors' proceedings places the value primarily on communication rather than reproduction. This means that Copyright Agency's arrangements with NSW are partly in its capacity as the declared collecting society for s 183A, but also as agent for s183(4) notifications.

It also means that NSW has a statutory obligation to notify surveyors directly under s183(4) where Copyright Agency is not the agent for notifications.

The arrangements for surveyors for current and future sales of survey plans are essentially 'transactional' in the sense that NSW is providing information in relation to each survey plan. This is atypical compared to other arrangements with governments, which are for 'blanket' use of all available content.

### **Data on government use apart from survey plans**

Information from governments about their use of content in reliance on the statutory licence has been scant since at least 2003. There have been ongoing discussions between Copyright Agency and various government representatives, and a range of proposals considered, but no concluded arrangements for data collection.

As a result, recent distributions of licence fees from governments have had limited reliance on actual usage data. We have instead used a range of 'proxy' indicators for content likely to have been used, and/or available for use, to distribute the licence fees.

### **PROPOSAL BY NSW AND CAG**

Copyright Agency currently reports on the matters listed in 2.9(a) of the proposal, apart from amounts received from individual licensees. It does, however, report on licence fees received from licensee sectors. Copyright Agency also reports on the matters set out in 2.9(b)(i).

We have concerns, however, with the proposed requirements for disclosure of information about payments to individual members, and by individual licensees. Copyright Agency regards this information as private and confidential, as do its members and licensees. Providing such information would undermine rather than promote confidence in collecting societies and the effective administration of copyright.

For example, the proposal would:

- entitle a commercial college to information about the licence fees paid by a competitor (and to deduce information about student numbers and fees);
- entitle a peak body such as CAG or Universities Australia to information about licence fees paid by institutions that are not represented by them (such as registered training organisations or individually licensed universities); and
- entitle a publisher member to information about amounts paid to a competitor.

Transparency in relation to both licence fees paid and distributions made can be provided by reporting with aggregated data in relation to classes of licensees or members, without disclosing details associated with individuals.

While we do not think changes to the Code are necessary given the existing requirements in the Code and elsewhere in relation to transparency, we do not object to an amendment to the Code that sets out particular matters for reporting, and we have attached a proposed amendment to that end.

**PROPOSAL FOR AMENDMENT TO CODE OF CONDUCT FOR COLLECTING SOCIETIES****New Clause 2.9****2.9 Information provided by declared collecting societies in Annual Reports**

The Annual Report of a Declared Collecting Society shall include information, in relation to statutory licences for which it is declared, for the year to which Annual Report pertains, about the following matters:

- (a) the amount of licence fees received from each class of licensee;
- (b) the interest earned on licence fees;
- (c) the amount of the licence fees received from each class of licensee that were allocated and paid;
- (d) classes of recipients of licence fees;
- (e) the operating expenses deducted from licence fees;
- (f) the amount of licence fees held in trust; and
- (g) the amount of licence fees held in trust for which the trust period expired.

**New definition in Clause 6.1**

**'Declared Collecting Society'** means a Collecting Society that has been declared by the Attorney General under ss 135P, 135ZZB and 135ZZT of the Copyright Act, or declared by the Copyright Tribunal under ss 153F of the Copyright Act.