

# PROPOSALS FOR AMENDMENT TO CODE OF CONDUCT FOR COLLECTING SOCIETIES

9 June 2015

## BACKGROUND

The NSW Department of Justice (NSW) and the Copyright Advisory Group to the COAG Education Council (CAG) have proposed a number of amendments to the Code of Conduct for Collecting Societies (the Code) relating to disclosure of information by declared collecting societies. The current proposed amendments follow an earlier proposal from NSW and CAG, an alternative proposal from Copyright Agency and Screenrights, and a meeting convened by the Code Reviewer on 29 October 2014.

We have attached the document (dated 13 November 2014) we provided following the meeting on 29 October 2014, as a number of points set out there remain relevant.

Since the meeting there have been a series of communications amongst NSW, CAG, Copyright Agency and Screenrights regarding the proposed amendments.

## COPYRIGHT AGENCY'S POSITION

We remain supportive of an amendment to the Code along the lines we proposed in our document of 13 November:

### **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.

We have concerns, however, about disclosure of information regarding payments to individual recipients, or other personal information, without recipients' consent.

Apart from any legal obligations regarding disclosure of personal and confidential information, disclosing information about payments to individual recipients without their consent would undermine rather than promote their confidence in collecting societies (Code objective (b)).<sup>1</sup>

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<sup>1</sup> For example, we make payments in accordance with contractual arrangements for sharing of Copyright Agency payments (e.g. between an author and a publisher), where we have that information. That information is provided to us on a confidential basis.

## INFORMATION ALREADY PROVIDED IN ANNUAL REPORTS

We currently provide information in our annual report on each of the matters in (a) to (g) of our proposed new Clause 2.9. The annual report is provided to the Attorney General and Minister for the Arts and tabled in Parliament.

## INFORMATION PROVIDED UNDER DATA ACCESS PROTOCOL

We currently provide CAG with access to all information provided by survey participants in schools and TAFE, in accordance with the Data Access Protocol. As noted by CAG, this protocol was agreed between Copyright Agency and CAG.

In response to a request from CAG, this information now includes the name of the publisher of content recorded as used by a survey participant, where this information is provided as part of the survey.

The Data Access Protocol only applies to information that is provided by survey participants. It does not apply to other information collected or produced by Copyright Agency, such as amounts paid to individual recipients and contact information for members. The Protocol specifically refers to Copyright Agency's concern that 'the private information of copyright owners is not disclosed'.

The Data Access Protocol enables CAG, if it wishes, to contact copyright owners in relation to instances of copying that are reported in surveys, and to request direct licensing arrangements.

## NOTIFICATION TO MEMBERS ABOUT CAG'S REQUEST FOR INFORMATION

Our eNewsletter to members, sent on 2 June, included the following item:

### **Notice to members**

*The organisation responsible for negotiating the fees paid to the Copyright Agency for schools' use of copyright material, the Copyright Advisory Group (CAG), is seeking detailed information about payments to our members. The Copyright Agency reports on classes of recipients in its [annual reports](#), but currently does not disclose information about payments to individuals except as allowed by its [privacy policy](#). CAG would like to ask Copyright Agency members for a direct licence for the school sector. If you would like to provide CAG with information about your Copyright Agency payments, contact the [National Copyright Unit](#). You are under no obligation to do this. If you would like your content to be used in schools without payment, in some or all circumstances, please [contact us](#).*

## RELATIONSHIP BETWEEN DATA FOR 'VOLUME' ESTIMATES AND DISTRIBUTION

We refer to the points we made about the relationship between data for 'volume' estimates and distribution in our document of 13 November 2014.

In particular, we note that:

- usage data may be relevant for volume estimates (e.g. because it indicates content of a particular type, such as artistic works or poetry), but not for distribution (because there is insufficient information to identify a rightsholder);
- the [Attorney General's Department Guidelines for Collecting Societies](#)<sup>2</sup> specifically contemplate that the data used for volume estimates may be different to that used for distribution:

*There need be no exact correspondence between the statistical or recordkeeping basis for assessing (agreeing or awarding) quantum of royalty due to the Society and the statistical basis for quantifying amounts to be allocated to those entitled. For example, it would be*

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<sup>2</sup> <http://www.copyright.com.au/about-us/governance>

*permissible (provided it was in line with the "criteria" in force for the society under para 11) for different weightings to be applied to different categories of material for allocation purposes, whether or not they are taken into account in assessing equitable remuneration/royalties due.<sup>3</sup>*

*Inadequacy in copying records might be another reason to apply fresh considerations to the allocation task.*

- our current practice is to use data from previous licence periods to distribute licence fees from schools, to enable the licence fees to be distributed as quickly as possible;<sup>4</sup>
- our current practice is to use a rolling dataset from eight terms, the first four terms of which have been used in the previous distribution;<sup>5</sup> and
- our recent distributions of licence fees from governments (apart from the recent distribution of fees paid by NSW for sales of survey plans) have been based on 'indicative' data (data indicating content used or available for use) rather than data about actual use.

### COMMENTS ON THE AMENDMENT PROPOSED BY NSW AND CAG

We suggest that any amendments to the Code be drafted in a similar style to the Code itself. The Code enables collecting societies to meet the requirements in accordance with their business practices from time to time, and any amendments should be couched in a similar way. In particular, any amendment should encompass future developments in the ways that we collect, analyse and report on information.

Assuming the Code is amended, we will be required to report annually on our compliance with the new requirements to the Code Reviewer. Any stakeholders who think we have not complied will have the opportunity to make their views known to the Code Reviewer.

With that in mind, we think that the matters set out in **paragraph (a)** and **subparagraphs (b)(i) to (vi)** are covered by the amendment we proposed in October 2014.

We currently include information in our annual report on the detailed matters set out in **subparagraph (b)(vii)**, but we understand that Screenrights does not currently capture this information, and that a requirement to report in such a prescriptive way would be unfairly burdensome.

The matters set out in **subparagraph (c)(i)** would also seem to be covered by our proposed amendment, except insofar as they relate to subparagraph (b)(viii), for the reason set out above.

**Subparagraph (c)(ii)**: we note the information provided to CAG under the Data Access Protocol. Recent distributions of licence fees from governments (apart from those for survey plans) have been primarily based on information from sources other than licensees.

**Subparagraph (c)(iii)**: we are not sure what financial information is intended, given the information in our annual reports (which includes audited accounts and trust fund statement).

**Subparagraph (d)**: we believe that we should not disclose details of payments to individual recipients, or other personal information, without their consent, irrespective of any confidentiality undertakings by a person to whom the information is disclosed.

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<sup>3</sup> Article 13.

<sup>4</sup> Currently, licence fees from the school sector are due by 30 April, and we distribute in May or June.

<sup>5</sup> For example, the data for the distribution of 2015 licence fees was from term 3 of 2012 to term 2 of 2014. The data from term 3 of 2012 to term 2 of 2013 was also used in the 2014 distribution, together with data from the previous four terms.