COPYRIGHTAGENCY

screenrights

Dr Kevin Lindgren
Code Reviewer
Suite 704, 4 Young Street
Neutral Bay NSW 2089

7 September 2015

Dear Dr Lindgren

Proposals for amendment to Code of Conduct for collecting societies

Copyright Agency and Screenrights will continue to look for an agreed solution to the issues raised by the NSW Department of Justice (NSW) and the Copyright Advisory Group to the COAG Education Council (CAG).

In the event that a solution cannot be agreed, we thought we should clarify our position on the matters to be addressed in your report.

Our view is that the Code does not need to be amended to address the issues raised by NSW and CAG. Clause 2.3(b) of the Code requires collecting societies to ensure that their 'dealings with Licensees are transparent'.

In our reports to you on our compliance with the Code for 2014–15, we reported that NSW and CAG had raised concerns that Copyright Agency and Screenrights had not been sufficiently 'transparent', and how we had responded to those concerns. We expect that this will be a matter for comment in your report on our compliance with the requirements of the Code (which is made public). To date, as far as we are aware, any recommendations by the Code Reviewer regarding action a collecting society ought to take have been implemented.

We think that this is sufficient to address the concerns raised.

As you know, we have offered to include additional information in our annual reports. This includes information about the categories of recipients from various sources of licence fees, and additional information about funds held in trust regarding the source of the funds. We have also, in the past, included information at the request of the Attorney General, and stakeholders can continue to ask the Attorney General to ask us to include information in our annual reports. Copyright Agency and Screenrights expect that NSW and CAG will make further representations to the Attorney General, and we are very happy to continue to address those matters through that mechanism, responding to requests for additional information if necessary without any implications for the Code.

We do think that any information we provide to licensees should be consistent with the objectives of the Code. An important objective is promoting confidence in collecting societies and the effective administration of copyright.

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We also think that any information provided to licensees should be relevant to the role as licensees. We do not think that information about payments to particular individual recipients is relevant to licensees. As previously noted, recent distributions of licence fees from governments have not been based on data provided by the governments, but on the best data available to us at a reasonable cost in the timeframe.

We understand that NSW takes a different view, and regards information about payments to individual recipients to be relevant to the determination of licence fees payable by it. It is matter for the Tribunal to determine whether or not information about payments to individual recipients is relevant to determination of equitable remuneration, and what information the collecting society is required to provide.

Of course, we provide information to licensees about *usage* of content, based on data provided by them, that is taken into account in negotiation of licence fees. We have a data access protocol with CAG, whereby we provide access to all information provided by survey participants about usage of content. As you know, Copyright Agency has recently agreed, at CAG's request, to also provide the names of publishers whose content was recorded as used in a survey, even where this information was not provided by a survey participant. CAG has sought this information so that it can approach publishers to request direct licensing arrangements with them rather than use their material in reliance on the statutory licence. At the moment there is no similar data about usage from NSW. In Screenrights' case, data on usage is available to both parties, and the amounts payable per program are routinely reported to the relevant government.

We also note that the parties to an application to the Copyright Tribunal to review distribution arrangements (section 135SA, 135ZZEAA and 183F) are the collecting society or a member. A licensee has no standing.

Turning more generally to the question of how best to respond to the submissions of NSW and CAG, if you take the view that the Code should be amended, we suggest that your recommendation set out the matters to be addressed, rather than the language of the amendment. We think that the draft proposal put forward by NSW should be treated as a mechanism for setting out those matters, rather than a request for you to 'approve' particular drafting which with respect is quite out of step with the wording of the Code as it stands. This focuses attention on the substantive issues before any questions of drafting are considered. As we have previously noted, we think the drafting proposed by NSW is inconsistent with best practice and the style of the current provisions of the Code.

A further consideration is that any amendments to the Code are, of course, a matter for agreement amongst all the collecting societies that are signatories to the Code. Screenrights and Copyright Agency ultimately are not in a position to impose a change to the Code to which the other societies have not agreed. While the concerns raised apply specifically to declared collecting societies, the issues obviously have implications for all the societies. A recommendation stated in terms of substantive principles is more likely to be acceptable to the other societies than one the prescribes a very specific form of words out of context with the rest of the Code.

Yours sincerely

Libby Baulch

James Dickinson