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Department of Communications and the Arts

Bureau of Communications and Arts Research

Review into the efficacy of the Code of Conduct for Australian Copyright Collecting Societies

Discussion paper

August 2017

communications.gov.au/BCAR
#CommsAuBCAR



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Glossary

ACCC	Australian Competition and Consumer Commission
ALRC	Australian Law Reform Commission
AMCOS	Australasian Mechanical Copyright Owners' Society Limited
APRA	Australasian Performing Right Association Limited
ASDACS	Australian Screen Directors Authorship Collecting Society Limited
AWGACS	Australian Writers' Guild Authorship Collecting Society Limited
BCAR	Bureau of Communications and Arts Research
CAG	Copyright Advisory Group to the COAG Education Council
CISAC	International Confederation of Societies of Authors and Composers
Collecting society	An organisation that issues copyright licences, collects funds, and distributes royalty payments on behalf of its members. See also: CMO.
CMO	Collective management organisation. See also: collecting society
Copyright Agency	Copyright Agency Limited
Copyright Tribunal	Copyright Tribunal of Australia
DCE	Digital copyright exchange
Declared collecting society	A collecting society that has been declared under the <i>Copyright Right Act 1968</i> for the purposes of Part VA, Part VB, Part VC, Part VD or Division 2 of Part VII of the Act
DRM	Digital rights management
Federal Court	Federal Court of Australia
FPI	International Federation of the Phonographic Industry
Guidelines for Declaration of Collecting Societies	Australian Government Guidelines for Declaration of Collecting Societies (as revised in 2001)
IFRRO	International Federation of Reproduction Rights Organisations
Licensees	Copyright users that obtain a licence from a collecting society
Members	Rightholders that belong to a collecting society
OECD	Organisation for Economic Co-operation and Development



PC	Productivity Commission
PPCA	Phonographic Performance Company of Australia Limited
Rightsholders	Owners of copyright
SCAPR	Societies' Council for the Collective Management of Performers' Rights
Screenrights	Audio-Visual Copyright Society Limited
TAG of Excellence	An initiative of WIPO to improve the transparency, accountability and governance of CMOs through international standards of good practice
the Code	Code of Conduct for Copyright Collecting Societies (amended 20 March 2017)
the Department	Department of Communications and the Arts
the Government	Australian Government (or Commonwealth)
the Minister	Minister for Communications
Users	Users of copyright materials
Viscopy	Viscopy Limited
WIPO	World Intellectual Property Organization



Introduction

In August 2017 the Australian Government asked the Department of Communications and the Arts to review the efficacy of the voluntary Code of Conduct for Copyright Collecting Societies (the Code). The Bureau of Communications and Arts Research (BCAR), the Department's economic and statistical research unit, is leading the review, in consultation with the Australian Competition and Consumer Commission (ACCC).

This review implements the Government's response to Recommendation 5.4 of the Productivity Commission's (PC) 2016 inquiry report on Australia's intellectual property arrangements:¹

Box 1: Recommendation 5.4

The Australian Government should strengthen the governance and transparency arrangements for collecting societies. In particular:

- The Australian Competition and Consumer Commission should undertake a review of the current code, assessing its efficacy in balancing the interests of copyright collecting societies and licensees.
- The review should consider whether the current voluntary code: represents best practice, contains sufficient monitoring and review mechanisms, and if the code should be mandatory for all collecting societies.

This review will examine the extent to which the Code promotes fair and efficient outcomes for both members and licensees of collecting societies. This will include assessing:

- whether the Code meets its rationale and objectives, including promoting confidence and participation in the system, and mitigating any potential market power issues where these occur in relation to collecting societies
- the extent to which the Code promotes transparency, accountability and good governance, including whether the Code contains sufficient monitoring and review mechanisms to achieve this, and
- the extent to which the Code represents best practice compared to other domestic and international codes and guidelines.

The Department will provide a report of its review, including recommendations on ways to improve overall confidence in the system, to the Minister for Communications in 2018. Terms of Reference for this review are at [Appendix A](#).

Relationship to previous copyright reviews

The PC's report highlighted concerns about the governance of copyright collecting societies in Australia, and indicated the PC was unable to investigate these concerns in detail as part of its wide-ranging inquiry into Australia's intellectual property arrangements. The present review is therefore an opportunity for a targeted exploration of specific issues relating to the Code.

This review is also timely, as in the 15 years since the Code first came into force, new technologies have emerged that impact how copyright materials are made, distributed and licensed. Given the increasing extent to which copyright materials are produced and made available in digital form, and the ease with which these materials are shared, this review will assess how both collecting societies and the Code have evolved to respond to these changes.



In undertaking this review the BCAR will draw on previous research into the role of collecting societies within Australia's copyright regime. It will also examine the findings of the independent Code Reviewer (a role established under the Code to monitor compliance by collecting societies and review the operation of the Code), noting that the current review seeks to canvass a wider range of issues, including assessing the strength of the Code review process itself.

Structure of this paper

This paper has three main areas of discussion, consistent with the review's scope as outlined in the Terms of Reference:

- Section 1 provides an overview of collecting societies and the role of the Code in regulating their behaviour.
- Section 2 explores issues and concerns relating to the collecting societies, and the extent to which existing Code provisions address these concerns.
- Section 3 looks at comparable domestic and international approaches to regulation and regulator governance, to help determine best practice.

Making a submission

The Department is seeking submissions from stakeholders on the specific questions raised in this discussion paper, and other issues relevant to the Terms of Reference. Submissions should be received by 5pm Australian Eastern Standard Time, Friday, 15 September 2017, and can be lodged by:

Website: <https://www.communications.gov.au/codereview>
Post: Copyright Code Review
Director, Emerging Policy Issues
Bureau of Communications and Arts Research
Department of Communications and the Arts
GPO Box 2154
CANBERRA ACT 2601

Submissions should include the respondent's name, organisation (if applicable) and contact details. Submissions with no verifiable contact details will not be considered. Questions about the submission process can be directed to codereview@communications.gov.au.

Further public consultation will be held as the review proceeds, including with members and licensees of collecting societies. The BCAR intends to release a draft report in late 2017 and provide a final report to Government in 2018.

Publication of submissions and confidentiality

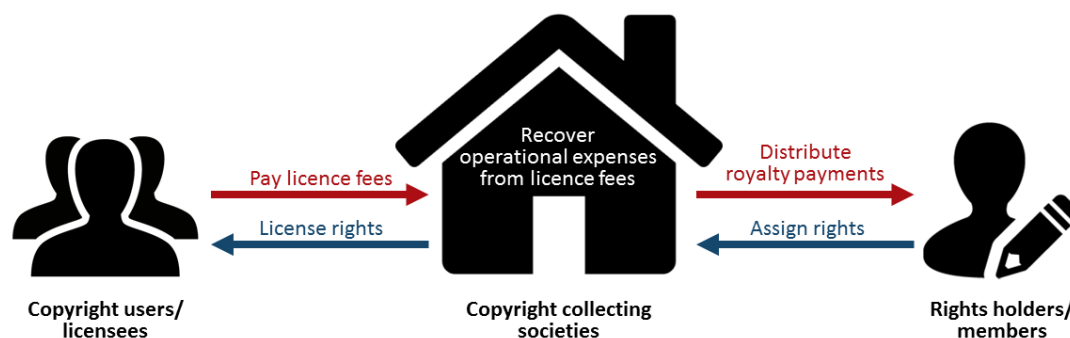
All submissions will be made publicly available by the Department unless a respondent specifically requests its submission, or a part of its submission, be kept confidential, and acceptable reasons accompany the request. The Department is subject to the *Freedom of Information Act 1982* and submissions may be required to be disclosed by the Department in response to requests made under that Act.

The Department reserves the right not to publish any submission, or part of a submission, which in its view contains potentially defamatory material, or for confidentiality reasons.

Section 1: Overview of collecting societies

Copyright collecting societies—otherwise known as collective management organisations (CMOs)—are not-for-profit organisations that collect royalties on behalf of their members: artists, musicians, creators or other rightsholders. Royalties are usually collected in the form of licence fees charged to users of copyright materials. After recovering their operational expenses, collecting societies distribute the remaining funds back to members as royalty payments (Figure 1).

Figure 1—Relationship between copyright collecting societies, members and licensees



There are eight major collecting societies in Australia, each of which has agreed to be bound by the Code. Each collecting society is responsible for a different type or class of copyright material. The majority of these societies offer ‘blanket’ licences, which permit licensees to use any of the copyright materials in the collecting society’s repertoire. These arrangements are voluntary, insofar as rightsholders must first allow the organisation to collectively licence their copyright materials.

Two of the societies—Copyright Agency and Screenrights—are ‘declared collecting societies’ under the *Copyright Act 1968* (Cth), responsible for administering certain statutory licensing schemes under that Act.² Unlike voluntary arrangements, the statutory licensing schemes allow for certain public interest uses of copyright materials without the user needing first to seek permission of the rightsholder.³

Together, collecting societies manage the copyright arrangements for nearly every lawful public performance and reproduction of creative materials in Australia, offering collective licensing to a disparate group of licensees: from large broadcasters to small business, and community organisations to government agencies.

Throughout 2015-16, Australia’s eight collecting societies together represented around 160,000 members and collected over \$500 million in licence fees on their behalf (Table 1).



Table 1. Collecting societies in Australia, 2016

Copyright material	Responsible collecting society	Primary licence type	Members	Revenue derived from licence fees (\$m)
Literature and visual art	Copyright Agency Limited (Copyright Agency)	Statutory	30,500	137.1
Literature and visual art	Viscopy	Voluntary	13,900	2.5
Music, lyrics, sound recordings and music videos	Australasian Performing Right Association (APRA)	Voluntary	89,400	257.2
Music, lyrics, sound recordings and music videos	Australasian Mechanical Copyright Owners' Society (AMCOS)	Voluntary	16,100	73.7
Music, lyrics, sound recordings and music videos	Phonographic Performance Company of Australia (PPCA)	Voluntary	2,100	46.1
Film, video, radio and television	The Audio Visual Copyright Society (Screenrights)	Statutory	4,000	46.4
Film, video, radio and television	Australian Screen Directors Authorship Collecting Society (ASDACS)	N/A	1,000	1.0
Film, video, radio and television	Australian Writers' Guild Authorship Collecting Society (AWGACS)	N/A	2,200	0.5

Note: Figures sourced from the most recent available annual reports for each of the societies. Licensing revenue does not include interest payments or other forms of income. ASDACS and AWGACS collect and distribute secondary royalty income but do not issue licences. APRA and AMCOS operate under joint organisational arrangements, as do Copyright Agency and Viscopy.

The Australasian Performing Right Association (APRA) and the Australasian Mechanical Copyright Owners' Society (AMCOS) operate under joint organisational arrangements as APRA AMCOS. In 2015-16, APRA AMCOS collected \$331m in revenue derived from copyright licence fees, representing approximately 60 per cent of all revenue derived from licence fees by Australian collecting societies for that year.⁴

Another of the larger non-declared collecting societies, the Phonographic Performance Company of Australia (PPCA), collected \$46m, or 8 per cent of licence fees. A further \$184m (33 per cent) was collected by the declared collecting societies, predominately from the statutory licences for schools, universities and government agencies.



Efficiency versus market power

A fundamental issue to consider in relation to collecting society administration is where the balance lies between promoting efficient outcomes and addressing potential market power issues where these may arise.

In collectively managing a large number of rights, and offering ‘blanket’ licences over entire classes of material, copyright collecting societies generally make transactions cheaper and easier for both rightsholders and licensees. It would be impractical, for example, to require a hairdresser to identify and negotiate the performance rights for each of the hundreds of songs that are played in their salon, or to expect the relevant rightsholders to seek out the hairdresser to arrange royalty payments. Collecting societies act as an intermediary, and in doing so, are able to reduce the average (or per unit) cost of administering copyright. Consequently, *collective* administration will generally be a more efficient way to manage copyright than *individual* administration, particularly for low-value transactions.

It will also generally be more efficient for a single, large collecting society to exclusively administer an entire class of rights, rather than several smaller firms competing to administer the same copyright materials. This is because a consolidated organisation can take advantage of economies of scale: their average costs fall as their repertoire increases. In this context, a World Intellectual Property Organization (WIPO) publication states that:

...there should be only one organization for the same category of rights for the same category of rights owner in each country’ as the ‘existence of two or more organizations in the same field may diminish or even eliminate the advantages of joint management of rights.’⁵

However an outcome of this is that collecting societies are often regarded as natural monopolies, owing to their exclusive control over the administration of a particular class or user of copyright on a region-by-region basis.⁶ As administrators of their members’ copyright material, the existence of collecting societies may reduce competition where they bring together rightsholders who would otherwise have been competitors in an open market.⁷ Potentially, this consolidation may enable collecting societies to achieve and exploit some degree of market power in their dealings both with members and with licensees. As a general proposition, competitive pressures incentivise organisations to provide services at fair or efficient prices, to reduce costs, invest in innovative business systems, and to respond to the needs of consumers by offering a range of products of varying price and quality.

While it is clear that collecting societies represent an efficient way to administer copyright materials, the consideration of any advantages pertaining to them needs to also have regard to the potential costs of collective administration.

Overview of the Code

When an organisation is not subject to competitive pressures, governance arrangements play a critical role in regulating behaviour and achieving fair and efficient outcomes. These arrangements may be mandatory (imposed by government), or voluntary (agreed upon by the industry).

To regulate the behaviour of Australia’s copyright collecting societies, and provide greater protections for both members and licensees, a voluntary code of conduct came into force in 2002 following the recommendations of two separate government inquiries. The ‘Review of Australian Collecting Societies’ (Simpson Report) in 1995 and the ‘Don’t Stop the Music!’ inquiry into copyright,



music and small business (DSTM Report) in 1998 both highlighted concerns relating to the potential market power of Australia's collecting societies and called for greater scrutiny by way of an industry code.^{8, 9} The societies developed the Code in consultation with the Government.¹⁰

Objectives of the Code

In response to the DSTM Report, the then Government stated that greater oversight was needed to '...ensure the societies operate efficiently, effectively and equitably.'¹¹ To this end, the Code has a series of aspirational statements that reflect these underlying objectives, calling on collecting societies to:

- achieve best practice in their operations
- be responsive to the needs of members and licensees
- ensure transparency and accountability in the conduct of their operations, and
- achieve efficiency in the process of allocating and distributing payments to members.¹²

To strengthen governance arrangements and build confidence in the broader system of copyright administration, the Code also provides the following objectives, to:

- promote awareness of and access to information about copyright and the role and function of collecting societies in administering copyright on behalf of members
- promote confidence in collecting societies and the effective administration of copyright in Australia
- set out the standards of service that members and licensees can expect from collecting societies, and
- 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.¹³

In order to meet these objectives, participating collecting societies have agreed to be bound by obligations under the Code. These obligations include that societies must treat all parties fairly, honestly and impartially, while being transparent in their dealings. The Code also includes provisions that require the publication of and adherence to complaints handling and dispute resolution processes, establish rules concerning governance and accountability, and outline the societies' obligations with regard to education and awareness.

Finally, to encourage compliance, the Code establishes a monitoring and review scheme to be conducted by an independent Code Reviewer appointed by the collecting societies. At present, the Code Reviewer is retired Federal Court judge and former President of the Copyright Tribunal, the Honourable Justice Kevin Lindgren AM QC. To date, the independent Code Reviewer has found all participating collecting societies to be generally compliant with their Code obligations, with no reports of major breaches over the past 15 years.

Question 1: To what extent is the Code meeting its original purpose: to ensure collecting societies operate 'efficiently, effectively and equitably'? If it is not meeting its original purpose, do the Code's stated objectives need to be revisited to better deliver on its purpose?

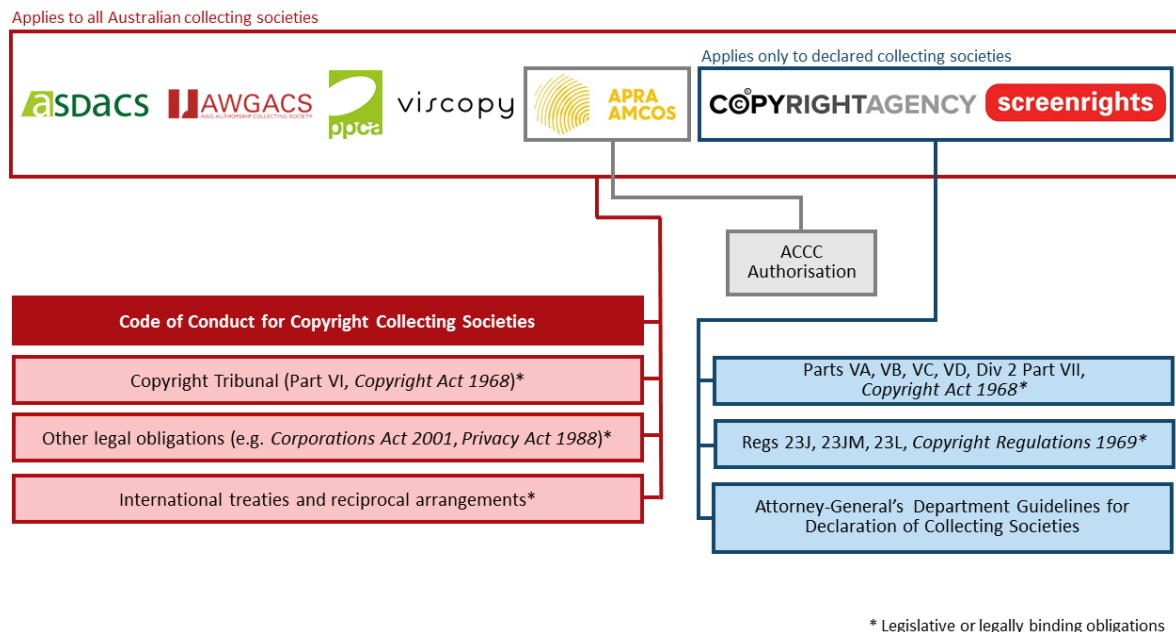
Question 2: How effective is the Code in regulating the behaviour of collecting societies? Does it remain fit-for-purpose?



Regulatory framework

While the Code (including its independent review process) is the primary self-regulatory instrument for collecting societies in Australia, it forms just one part of a broader legal framework which regulates the behaviour of these organisations. This broader framework can be complex, including because there are various legal obligations that are not referenced in the Code, some of which apply to only some of the societies, and others that apply to all collecting societies (Figure 2).

Figure 2—Regulatory framework for copyright collecting societies



The Copyright Tribunal (the Tribunal) is a central pillar of this system. The Tribunal is an independent body empowered under the *Copyright Act 1968* to hear disputes and make binding decisions relating to licence fees, licence schemes, distribution arrangements or conditions imposed by collecting societies. Initially created in response to the 'perceived need to control the exercise by collecting societies of the rights given to them by copyright owners',¹⁴ the Tribunal plays a pivotal role in counteracting potential monopolistic behaviours of copyright collecting societies.¹⁵

As they are companies limited by guarantee, collecting societies are also bound by a number of broader legal obligations set out in legislation. These include privacy obligations under the *Privacy Act 1988* (Cth), director's duties and obligations outlined in the *Corporations Act 2001* (Cth), and compliance with the fair trading and competition obligations set out in the *Competition and Consumer Act 2010* (Cth).¹⁶ Collecting societies must also adhere to obligations set out in a number of international treaties, such as those under the *Berne Convention for the Protection of Literary and Artistic Works*, as well as any reciprocal agreements between international collective management organisations (CMOs) and their affiliates. These allow for Australian collecting societies to collect funds for the use of Australian copyright materials overseas, and for international CMOs to collect funds in Australia for the use of international copyright materials.

The two declared collecting societies, Copyright Agency and Screenrights, must also comply with a number of legislative provisions, as outlined in the *Copyright Act 1968* and the *Copyright Regulations 1969*, and clarified in the *Guidelines for Declaration of Collecting Societies* (2001). These legislative provisions require that declared collecting societies meet higher standards in their operations, such as ensuring their administrative costs are reasonable and their trust funds



are handled appropriately. In cases of non-compliance with the *Copyright Act 1968*, regulations or other guidelines, or where the society is found to not be 'functioning adequately', the Minister or the Tribunal may revoke the declarations of these societies.¹⁷ While this power has never been exercised, revocation would mean a previously declared society would no longer be permitted to administer the relevant statutory licence scheme or schemes.

Beyond their regulatory obligations, some collecting societies have subjected themselves to additional oversight. APRA, for example, voluntarily submits its operational arrangements to the ACCC for review once every five years, in order to seek authorisation to offer exclusive licences that could give rise to competition issues under the *Competition and Consumer Act 2010*. The ACCC last authorised APRA's membership, licensing, distribution and international arrangements in June 2014, after finding the public benefit of these arrangements outweigh any potential public detriment.

Question 3: Is there sufficient clarity as to how the Code interacts with the broader regulatory framework? Should the Code be modified to help parties better understand the broader legislative obligations of collecting societies?

Question 4: Considering the differences in the way different collecting societies operate, is a framework in which a single code applies to all societies effective?

Changing landscape

Collecting societies in Australia have long played an important role in administering copyright materials. The emergence of the internet and popularity of digital content has, however, challenged their traditional business models. Collecting societies need to adapt to respond to new competitive threats, and to take advantage of new technologies.

Since the Code came into effect in 2002, the internet has dramatically impacted on the creation, licensing and distribution of creative materials. Consumer preferences are also changing, including a shift from physical to digital media, and from owning content to renting or subscribing to access the digital content of the increasingly-popular online service offerings that are emerging, such as subscription video on-demand services (for example, Stan and Netflix).¹⁸

Collecting societies now operate in an increasingly international and fragmented copyright system, administering ever-growing repositories of creative materials from around the world.¹⁹ Yet while this complex global landscape has arguably made collective rights management more difficult, it appears to have helped, and not hindered, the financial performance of Australian collecting societies.

Most societies have seen considerable growth in the years since the Code's inception, increasing their membership, number of licensees and annual revenues. APRA AMCOS, for example, has thrived in recent years, doubling its consolidated operating income and growing its membership by 75 per cent between 2007–08 and 2015–16.²⁰ Copyright Agency, Screenrights and the PPCA have all experienced comparable growth during this time. This is despite the increased complexity of collective rights management (Box 2).



Box 2: Impact of the internet on collecting societies

Collective management of copyright in the digital era is complex. Collecting societies must navigate cross-territorial licensing arrangements, working with global content aggregators and rights intermediaries.²¹ In response, some organisations are taking advantage of new technologies in an attempt to simplify copyright licensing. Digital copyright exchange (DCE) systems, such as the UK's Copyright Hub, aim to bring users and rightsholders together through contestable online markets. These aim to further reduce administrative costs and encourage more rightsholders to pursue direct licensing arrangements.

At present, opportunities offered by these DCE systems are yet to be fully realised, lacking the popular support required for mass adoption. Instead, rights owners such as artists and authors remain reliant on third-party intermediaries to publish their materials and administer their rights. Large global content aggregators such as Google provide platforms which allow for the commercialisation of independent creative materials. They are also able to negotiate directly with major publishers and rightsholders to allow existing content to be available through their services.

As more organisations seek to make it easier for individuals and businesses to access creative materials legally, this may ultimately have implications for the scope of or need for government regulation. However, while global internet companies may be viewed as new sources of competitive pressure on the traditional business model of the collecting societies, the size and scale of these companies means they may be in a position to exercise market power, particularly in relation to their dealings with rightsholders.

As well as seeking to grow revenues collecting societies can reduce costs, including by making use of digitalisation and new technologies which can capture more accurate usage samples and better inform their distribution activities. Screenrights, for example, runs Enhance TV Direct, an audio-visual content aggregation service that allows educators to access recorded TV programs online. Usage information from this service replaces the need to conduct annual surveys of schools. Similarly, APRA installs music recognition technology devices in a number of large clubs around Australia, which helps determine the distribution of nightclub funds between its members.

Question 5: What have been the impacts of the internet on the collecting society business model?

Question 6: What administrative costs has digitalisation enabled collecting societies to reduce or avoid? How has digitalisation impacted on the way collecting societies collect and distribute funds?

Ongoing concerns

In 1996, following the recommendations of the Simpson Report but prior to the introduction of the Code,²² an inter-departmental committee held a number of roundtable discussions with stakeholders about their broad dissatisfaction with the role and performance of collecting societies. Some stakeholders were critical of the proposal to use undistributed funds for cultural purposes, arguing these funds were evidence of over-collection and should therefore be returned to users. Others raised experiences of non-payment or underpayment to certain rightsholders due to poor sampling methodologies. Small business representatives in particular viewed collecting societies as 'over-zealous,' 'self-interested' and 'inefficient' in their fee raising efforts.²³



Despite the Code's introduction and a strong record of compliance with it, many of the concerns outlined above still persist. Recent submissions to the Australian Law Reform Commission (ALRC),²⁴ the PC and the Code Reviewer suggest some stakeholders continue to be dissatisfied with how collecting societies determine their licence fees and distribute these funds. These concerns are dispersed across a range of parties including both licensees and members, and are expressed about both declared and non-declared societies. While these concerns remain unresolved, pockets of the community may lack trust in Australia's copyright collecting societies, even given the stronger regulatory protections provided by the Code and its subsequent amendments.



Section 2: Addressing impediments to efficiency and effectiveness

A fair and efficient copyright system should balance the interests of rightsholders (to commercialise and be rewarded for their creative endeavours) with the community benefit of accessing and using these copyright materials. Collective administration helps to achieve this balance by reducing transaction costs and making it easier for both users and rightsholders to reach licensing agreements.

However the existence of collecting societies also raises the potential for competition issues which may result in unfair or inefficient outcomes. While the Code is designed to mitigate potential market power issues, recent inquiries suggest that it may not adequately address some longstanding concerns regarding the efficiency and fairness of the licensing system. This may undermine the public trust in the Australian system of collective rights management.

Section 2 explores longstanding issues, as well as more recent concerns relating to the operation of collecting societies from both members and licensees, to determine the extent to which the Code is promoting fairer and more efficient outcomes.

Review framework

The Code will be assessed against three principles of best-practice regulation:

- **Transparency** is the availability and accessibility of relevant information about a firm's activities. Increasing transparency addresses information asymmetry and promotes fairer and more efficient outcomes by increasing the negotiating position for buyers and sellers while creating greater certainty and predictability.²⁵
- **Accountability** enables greater scrutiny of a firm's operations to ensure it complies with correct processes or otherwise faces tangible consequences. Accountability measures encourage firms to deliver on their promises and treat parties in a fair and consistent manner, improving stakeholder confidence.²⁶
- **Good governance** mechanisms ensure a firm acts in accordance with its underlying purpose and objectives while taking into account the interests of stakeholders. As such, strong corporate governance arrangements address principal-agent problems by preventing firms from acting in self-interest when they are meant to operate according to the interests of their shareholders.²⁷

These principles are consistent with the WIPO 'TAG of Excellence' initiative for collecting societies,²⁸ and build on guidance from organisations, including the Office of Best Practice Regulation, the ACCC and the Organisation for Economic Co-operation and Development (OECD). Each of these 'TAG' principles are essential to strengthening the incentives for collecting societies to operate efficiently and fairly.

How effective is the Code in promoting transparency?

Transparency is considered to be an essential element of all robust governance arrangements.²⁹ Where collecting societies provide information about their conduct, members and licensees are better able to make informed decisions. This reduces the power imbalance between parties which helps mitigate potential misuses of market power.³⁰



The Code contains several transparency provisions requiring societies to publish or disclose information about their standards of service, financial performance and policies and procedures that directly impact either members or licensees. Greater transparency is supported through the Code review process which is conducted openly and its findings made publicly available. The distribution rules of the declared collecting societies are also subject to the scrutiny of the Minister and the Copyright Tribunal.³¹

Despite these measures, some stakeholders have suggested that greater transparency is required, particularly on the calculation of licence fees and distribution of funds. The opaque nature of this process was recently highlighted by the PC, with the Commission's Deputy Chair, Karen Chester, noting that:

...you need to be able to follow the money. And [the Commission] couldn't and nor could rightsholders or rights users'.³²

Calculation of licence fees

A primary role of collecting societies includes issuing licences and collecting fees for the use of copyright materials. The methodologies for calculating these licence fees vary between societies and across licence types. Some rates are fixed while others are negotiated between parties.

To assist in setting fees, the Code lists a series of factors which societies may take into account. These include:

- the value of the copyright material in question
- the purpose for which and the context in which it is being used
- any relevant decisions of the Copyright Tribunal, and
- any other relevant matters.³³

The Code also requires that the policies, procedures and conduct of collecting societies are 'fair and reasonable' with regard to the setting of licence fees,³⁴ and notes that societies will consult in good faith with relevant industry associations on licensing terms and conditions.

A key issue for licensees is their perception that fees under this system may not bear a direct relationship to their actual usage. The fees under many APRA licences, for example, are calculated based on factors such as the size of the premises or the number of devices playing music, not the type or amount of music actually being played. While using proxy data for usage makes licensing easier and cheaper to administer, and frees licensees from the administrative burden of having to keep accurate and comprehensive usage records, a lack of visibility of how funds are calculated is nevertheless a point of contention.

Several statutory licensees argue their fees are too high because sampling methodologies overestimate usage and capture non-remunerable materials such as orphaned materials or materials that are in the public domain and freely available online (such as fact sheets or general information pages).³⁵ These claims are difficult to verify due to a lack of information about how usage surveys actually inform the setting of fees, or the methodologies adopted for pricing materials. Greater transparency about these processes could help relieve concerns that fees are overinflated due to a lack of competition.

The principle of transparency is also concerned with the communication of information in a more easily understood manner. On this point, the Code requires licences to be drafted to be plainly understandable and accompanied by practical explanatory guides.³⁶



Despite this, the Office of the Australian Small Business Commissioner expressed concern with the complexity of navigating licensing arrangements.³⁷ Business owners looking to play a music CD in their place of work, for example, may not be aware of their obligations to acquire a blanket licence from both APRA (which provides royalty payments to songwriters and composers) and PCCA (which provides royalty payments to record companies). To make it easier and simpler for licensees, APRA AMCOS and PCCA recently announced a 'one-stop-shop' joint venture to be launched in 2018.

Question 7: Are additional measures needed to ensure licensees have greater transparency over how their licence fees are calculated? If so, how could this be achieved?

Distribution of funds

Stakeholder concerns about transparency also extend to collecting society costs and the distribution of funds to members. Under the Code, each collecting society must maintain and make available a distribution policy which sets out the basis for calculating entitlements, the manner and frequency of payments and the general nature of administrative expenses.³⁸ The Code does not, however, provide any guidance as to how comprehensive or granular this distribution information must be.

Increased transparency around the distribution of funds could help build greater confidence in the system by enabling parties to more easily exercise their rights. In the 2014 review of the Code, the NSW Department of Justice and Copyright Advisory Group to the COAG Education Council (CAG) both argued that having access to information about the individual payments made to members may allow public institutions to negotiate better licensing arrangements directly with rightsholders, in turn saving the taxpayer money.³⁹ This could also provide greater scrutiny over the societies' administrative expenses and further incentivise them to keep costs low.⁴⁰

These concerns are not limited to statutory licensees. Live Performance Australia argued there is insufficient information available to discern whether royalty revenue is distributed fairly to the relevant owners of copyright.⁴¹

One often-cited argument against extending the transparency obligations under the Code is that many of the actual payment rates are 'commercially negotiated and therefore commercially sensitive'.⁴² APRA points out that they would require permission from each rightsholder to report that information, which would increase their administrative costs and ultimately reduce the total amount of funds for members. Copyright Agency also states that the provision of this information would provide licensees with an unfair commercial advantage, undermining rather than promoting confidence in collecting societies.⁴³

This issue was considered by the Code Reviewer in 2015, who indicated he was inclined to agree with the views of the collecting societies and did not recommend the changes to the Code proposed by NSW and CAG.⁴⁴ The Code Reviewer considered there were other avenues the State and CAG could pursue to seek to address their concerns, including applying to the Copyright Tribunal for a determination fixing equitable remuneration and lobbying for appropriate amendments to the *Copyright Act 1968*.

Notwithstanding the outcome of this Code review, collecting societies agreed to amend the Code in March 2017 to impose new transparency obligations on the declared collecting societies (see Box 3 below). More granular distribution information was published as part of the most recent annual reporting, but it is unclear whether this fully addresses outstanding transparency concerns.

A related concern is the lack of transparency over the treatment of funds held in trust. These undistributed funds are held for a minimum of four years, during which time the declared societies are required to try and identify the rightful owners and distribute the funds in a timely manner.



There is little information on how diligent collecting societies are in this search, or what happens to the funds once they return to general revenue.

Question 8: What additional measures may be needed to achieve greater transparency in the distribution of funds? How could these measures be implemented?

Question 9: Should there be more guidance around the treatment of undistributed funds held in trust? If so, what specific issues should this address?

How effective is the Code in promoting accountability?

Accountability is the process of being called to account to some authority for one's decisions or actions.⁴⁵ Accountability measures provide incentives to organisations to meet their stated objectives, comply with correct processes and procedures and act in a fair and consistent manner towards all parties. For collecting societies this means being accountable to their members, licensees, government and the broader community, as well as having fair and accessible avenues for resolving complaints and disputes.

The Code imposes obligations on collecting societies, reinforced through record keeping obligations,⁴⁶ complaint and dispute resolution arrangements,⁴⁷ and independent oversight through a code compliance and review process.⁴⁸ While acknowledging that collecting societies consider the Code to be robust, concerns remain as to the strength and independence of accountability measures.

Reporting and financial record keeping obligations

Collecting societies in Australia collect hundreds of millions of dollars annually on behalf of their members. A large portion of these funds are made up of payments made under statutory licences, funded by public institutions. As such, financial accountability is essential to building trust with members and licensees and promoting confidence in the efficiency and fairness of the broader system.

The Code establishes several obligations relating to financial accountability, such as requiring all societies to maintain proper and complete financial records, to have these regularly audited, and for relevant financial information about revenue, expenses and distributions to be included as part of annual reporting.⁴⁹ One issue for consideration in relation to the financial accounts of declared collecting societies is whether Copyright Agency and Screenrights use statutory licence fees to fund non-statutory aspects of their business. The 2001 *Guidelines for Declaration of Collecting Societies* state that declared collecting societies should not cross-subsidise between their different business activities.⁵⁰

Building on the recommendations of CAG, the PC suggested that accounting separation may be an appropriate safeguard against statutory funds being used and distributed for non-statutory use.⁵¹

Question 10: How could safeguards be strengthened to improve reporting and financial record keeping by collecting societies? What would be the impact of more robust reporting obligations?



Complaints and dispute resolution

A key measure of accountability is the ease with which parties impacted by an organisation's decisions can access efficient, fair and low-cost complaint and dispute resolution processes.

This measure is one of the four primary objectives of the Code,⁵² which requires each collecting society to develop and publicise procedures for both dealing with complaints from members and licensees, and resolving disputes between the societies and its members or licensees. These procedures must comply with the relevant Australian Standard for customer satisfaction,⁵³ and include appropriate avenues for alternative dispute resolution (ADR).⁵⁴

According to past code reviews, despite a growing number of members and licensees, there has been a significant drop in the aggregate number of complaints fielded by the societies since the Code came into force.⁵⁵ There is also some evidence that, as a result of ongoing scrutiny, societies have made improvements to their ADR processes and increasingly provide access to mediation and arbitration services. Screenrights, for example, recently made it easier for members with low-value competing claims to resolve disputes through its 'Express Resolution Process'.⁵⁶ Similarly, as a condition of its ACCC re-authorisation, APRA AMCOS developed its 'Resolution Pathways' mediation service, which has been widely praised.⁵⁷

These developments, while positive, may not fully address the difficulty some members and licensees face when looking to challenge the decisions of collecting societies. The primary role of the Code Reviewer is to assess and handle complaints but not to mediate disputes between parties. If disputes are unable to be resolved internally, members and licensees have no further remedies or avenues of appeal under the Code. Instead, they have to take their issues before the Copyright Tribunal, which can come at considerable expense and is therefore considered by many to be an avenue of last resort (Box 3).

Box 3: Role of the Copyright Tribunal

Established under the *Copyright Act 1968*, the Copyright Tribunal is an independent body with jurisdiction to determine what constitutes an 'equitable' remuneration or royalty payable, as well as other ancillary issues with respect to licensing operations.⁵⁸ Proceedings before the Tribunal are designed to be conducted quickly, with as little formality and technicality as possible. It is not bound to the rules of evidence, but can refer matters to the Federal Court of Australia on a question of law.⁵⁹

A key issue with the Copyright Tribunal is the perceived cost of initiating a case. The PC highlighted this in its 2014 Access to Justice Arrangements report, noting that the Copyright Tribunal was one of the more expensive tribunals in Australia, and also took considerably longer than most to resolve its disputes.⁶⁰ This is of particular significance for smaller licensees or members who likely lack the knowledge, time or financial resources of the collecting societies to pursue such legal remedies. This may give collecting societies an unfair advantage in licence negotiations.⁶¹

Beyond the cost factor, the Copyright Tribunal has also been criticised for arbitrary and inconsistent approaches to determining tariffs and licensing conditions, often without regard to the commercial impact on users of copyright materials. Following a decision in 2007, for example, APRA and PPCA increased their tariffs for Australian nightclubs by as much as 1300 per cent.⁶² Both the Association of Liquor Licensees Melbourne and the Australian Small Business Ombudsmen have flagged issues with the underlying economic analysis adopted by the Tribunal.



Question 11: How effective is the Code in facilitating efficient, fair and low-cost dispute resolution for members and licensees? What alternative models could be considered to provide these outcomes?

Monitoring and review

Monitoring the operations of the societies and reviewing their compliance with the Code are other important measures of accountability. As discussed above these functions are performed by an independent Code Reviewer established under the Code who assesses participants' compliance annually, and reports on the operation of the Code on at least a triennial basis.

Accountability generally involves an external body with the ability to seek answers, demand responses and impose sanctions. The powers of the Code Reviewer in this regard, however, are limited. While having some discretion to seek information and explore issues, the Code Reviewer cannot make binding decisions or enforce their recommendations under the Code. This could be considered a weakness in the construction of the Code, with several stakeholders noting its lack of substantive enforcement mechanisms or sanctions for non-compliance.⁶³

There are also no specific provisions setting out how the Code is to be amended, or who is to be consulted in this process. This means the Code could be changed by participating collecting societies without consultation or input from members or licensees, or consideration by the Code Reviewer.

Box 4: Prior amendments to the Code

There have only been a small number of amendments to the Code since 2002. According to past reports of the Code Reviewer, the absence of major amendments is testimony of the Code's effectiveness.⁶⁴ Other stakeholders, however, suggest it is instead evidence of the Code's inflexibility and lack of enforcement mechanisms to compel societies to implement the recommendations of the Code Reviewer.⁶⁵

In March 2017, prior to the release of the most-recent Triennial Review report, the collecting societies agreed to amend the Code to address certain issues that arose in the 2014 Code review.

One of the new provisions, clause 2.9, requires the two declared collecting societies to provide more detailed information about their distribution processes in their annual reporting. The other substantive change was to clause 2.3(d), which was changed from the requirement that licence fees be fair and reasonable to the 'policies, procedures and conduct' in setting licence fees be fair and reasonable (this amendment was supported by recommendation of the Code Reviewer).⁶⁶ While not required under the Code, discussions with the Australian Government or licensee groups did not precede the adoption or publication of these amendments.

Given their long-standing relationship with collecting societies, and the voluntary nature of the regulatory arrangements, the Code Reviewer may also be vulnerable to regulatory capture. While there is nothing to indicate current processes are lacking independence, there may be ways to achieve greater levels of accountability, for example by having different parties perform the annual compliance and triennial code review functions, or making the appointment of the Code Reviewer subject to agreement of member and licensee representatives.

Question 12: Does the Code Reviewer have sufficient powers to make collecting societies accountable for their compliance with the Code? If not, what alternative monitoring and review processes could be introduced to improve outcomes for members and licensees?



How effective is the Code in promoting good governance?

Corporate governance arrangements contribute to fair and efficient outcomes by ensuring firms act in accordance with the underlying purpose for which they were established. For collecting societies this means, among other things, representing the interests of their members, making it easier for people to obtain permission to use copyright material, and reducing the transaction costs for both members and licensees.⁶⁷

Common practices of good governance are generally held to include the disclosure of information about an organisation's board, including its makeup, remuneration, qualifications, the selection process and any potential conflicts of interest.⁶⁸ A well-governed organisation will also typically have senior management teams that oversee risk, and ensure operational and financial auditing mechanisms are in place.⁶⁹

While collecting societies are bound by a number of legislative governance requirements,⁷⁰ as well as the rules established under their respective corporate constitutions, the Code offers additional measures for achieving good governance in the context of collecting societies. It states that, for example, a Board of Directors will be accountable to its members, but also notes that each society should aspire to be responsive to the needs of both members and licensees.⁷¹

The Code is unique among the broader legal framework in its consideration of the interests of licensees. This is significant, as much of the debate around whether the Code promotes fair and efficient outcomes is centred on whether there is an appropriate balance between the rights of members and licensees.

The rights and interests of users and the broader community

The PC's final report of its inquiry into IP arrangements expressed concerns that Australia's copyright system was imbalanced; placing greater weight on the interests of rightsholders over that of copyright users.⁷² The governance arrangements for collecting societies mirror this general trend as they are geared heavily towards protecting the interests of members with little to no recognition of licensees beyond the direct obligations set out under the Code. Neither the *Copyright Act 1968* nor the *Copyright Regulations 1969*, for example, address the interactions between a collecting society and its licensees. There is also no formal representation of licensees on any of the societies' boards of directors nor any provision in the Code enabling licensee input in framing key policies or procedures.

The Code Reviewer discussed whether greater balance was required as part of his 2015 supplementary report to the Triennial Review of the Code. He concluded that, as it was the legal duty of the directors to act in the interests of their respective members,⁷³ collecting societies should only take into account the interests of other stakeholder if they had a 'genuine belief that doing so will ultimately enure benefit of their members'.⁷⁴



Greater consideration of the interests of licensees may nevertheless be desirable, particularly in response to the treatment of undistributed funds by the declared collecting societies. As expired trust account funds represent money that could not be distributed to members, some statutory licensees consider that these funds should never have been collected in the first place. They argue that this money should therefore be returned to statutory licensees and used to benefit the public rather than allowing collecting societies to use these funds at their discretion. The PC sympathised with this view, suggesting that:

...any funds that cannot be paid to rightsholders...should be returned to government, rather than distributed to other rightsholders who have no connection with the work used.⁷⁵

While this may help address some of the concerns of statutory licensees, the effect of such a decision would be to reduce the total pool of funds that is able to be distributed to members. Indeed, as the operational expenses of collecting societies are borne by members, any changes to existing governance arrangements to provide licensees with greater protections would likely come at a cost to rightsholders.

Question 13: Does the Code adequately balance the interests of members and licensees? If not, what criteria could be used to assess whether that balance is achieved?

The rights and interests of all members

As discussed above, collecting societies work to administer copyright on behalf of their members. However it is worth considering the extent to which these societies face principal-agent issues—that is, where the interests of a member (as the principal) differs from that of a collecting society (as the agent). Where such issues may exist, governance measures can help prevent collecting societies from acting solely out of self interest.

Earlier this year, it was reported that Copyright Agency had been reallocating all expired trust money into a ‘Future Fund’ since 2013, rather than redistributing these funds to members as is the usual practice.⁷⁶ The Australian Digital Alliance (ADA) publicly criticised this \$15.5 million fund as Copyright Agency would be primarily using taxpayer money to fund litigation and actively campaign against proposed changes to the copyright law in Australia.⁷⁷ CAG similarly expressed concerns about this practice, arguing that money directed into the Future Fund was not taking money away from Australian authors or publishers, and could therefore be returned to education budgets.⁷⁸

Beyond the immediate concerns of licensees, the Future Fund issue also raises a question as to whether non-distributing activities undertaken by collecting societies are in the best interests of their members. The Code is silent on whether use of funds for advocacy purposes is anticipated, but does allow for deductions for things such as educational programs, promotional activities, cultural funds or ‘any other amounts authorised by its Constitution’.⁷⁹ While the creation of the Future Fund may be permitted under the Copyright Agency’s current constitution and distribution policy, and members have been provided notice about the fund’s existence since 2013, it is unclear whether members support the creation of this Future Fund or would prefer the amount be distributed as royalty payments.



Other governance issues may arise when there are differences of opinion between individual members as to what is in their best interests. This may arise, for instance, where more influential members are seen to be getting preferential treatment over other members due to stronger representation within the organisation.

The Australian Writers' Guild (AWG), for example, notes that Screenrights' distribution of funds appears to favour producers and investors, when compared to screenwriters and composers.⁸⁰ The AWG alleges that Screenrights has failed to pay Australian scriptwriters their royalty entitlements and has taken this matter before the Federal Court.⁸¹ The outcome of these proceedings may go some way to helping understand whether governance arrangements need strengthening to ensure that the societies are promoting *all* members rights and interests, regardless of differing power or influence.

Question 14: Does the Code need to be improved to better ensure collecting societies act in the best interests of their members? How could members be given a greater say in a collecting society's key policies and procedures, such as the distribution of funds and use of non-distributable amounts?



Section 3: Regulatory approaches—international and domestic precedents

Section 2 detailed a number of longstanding stakeholder concerns relating to the Code and how it regulates the behaviours of collecting societies. Section 3 briefly examines regulatory approaches that may help identify options for addressing perceived issues with the Code to deliver better outcomes for both rightsholders and users of copyright materials. The section discusses the benefits and costs of prescribing existing obligations under law and looks at various international models for regulating collecting societies and other avenues for self-regulation.

The regulation spectrum

Regulatory frameworks and mechanisms range from self-regulation to government regulation, and include combinations of both (that is, co-regulatory arrangements). Self-regulation represents a ‘light-touch’ form of regulation with rules generally developed by industry, and often administered without any government involvement. Self-regulatory arrangements are often voluntary in nature in terms of parties in an industry having a choice in whether they adopt or agree to be bound by obligations. By contrast, government regulation is prescribed under law and is usually binding on all industry participants.

The Code is a voluntary instrument which operates within a broader regulatory framework that includes the *Copyright Act 1968* and the *Guidelines for Declaration of Collecting Societies*. When the then Government first recommended the development of the Code in 2000, it noted that self-regulation was preferable to more prescriptive mechanisms because it encouraged a cooperative resolution to issues of concern to stakeholders, while avoiding the high costs typically associated with making and maintaining legislation.⁸² Other potential advantages of self-regulation include flexibility to respond to changes in the environment, and tailoring solutions to specific conditions and challenges of the particular industry.

While voluntary codes of conduct allow industry members to opt-in, mandatory codes, by contrast, provide a minimum standard that all participants in the industry must adhere to.⁸³ These are prescribed as regulation, for example, under Commonwealth or state and territory fair trading laws, and are able to be enforced by a regulator.⁸⁴

In 2000, the Government left open the prospect of prescribing a mandatory code for collecting societies if, for example, copyright users or members were to become dissatisfied with the Code or its operation.⁸⁵ The PC has raised the possibility that the Code be made mandatory for all collecting societies.⁸⁶

For a code of conduct to be prescribed under the *Competition and Consumer Act 2010* (Cth), the Government must first be satisfied that there are clearly defined issues that the industry is either unable or unwilling to address.⁸⁷ While longstanding concerns identified in this paper could suggest the Code is not meeting its objective with respect to maintaining confidence in the effective administration of copyright, more evidence may be required to show that these problems cannot be addressed by industry.

Making the Code mandatory may be expected to provide greater levels of accountability. When an industry code is prescribed, a regulatory body (often the ACCC) is able to monitor and enforce compliance.⁸⁸ In relation to collecting societies, this would also allow for specific enforcement measures, which could range from corrective advertising to financial penalties for non-compliance.



While there may be benefits to prescribing the Code obligations in legislation, there could also be a significant regulatory impact and compliance costs for affected parties. A prescribed code may also be considerably less flexible, as any amendments would likely require formal public consultation and need to be approved by the responsible minister. Finally, the cost of administering a voluntary code is often lower for industry and does not impose implementation, compliance monitoring and enforcement costs on government.⁸⁹

The current governance framework of collecting societies in Australia is based on a combination of government regulation (via legislation) and self-regulation (via the Code). Continuing concerns about the efficacy of the current Code may suggest that the balance could be improved and that the system would benefit from greater government oversight.

Question 15: What would be the costs and benefits of prescribing the Code under legislation? What factors should be considered and which are most important in weighing the costs and benefits?

International models

In its 2016 inquiry into intellectual property, the PC noted that Australia was far from alone in seeking to ensure collecting societies are efficiently managed and work in the best interests of rightsholders and users.⁹⁰ Examining international regulatory models can provide insight as to whether the current Code reflects international best practice in transparency, accountability and governance arrangements for collecting societies.

Regulatory frameworks for copyright collecting societies vary significantly from country to country. In some, for example Singapore and New Zealand, CMOs are not specifically regulated by the government, although they may voluntarily adhere to an industry code of conduct, professional rules, or individual codes of practice.

While many countries have some form of government oversight of CMOs, the degree of supervision and regulation by the government varies widely. The United Kingdom (UK) and other member states of the European Union (EU) have implemented an EU Directive which establishes minimum standards of governance, financial management and transparency for CMOs.⁹¹ Some countries go further and make the establishment of a CMO conditional on the approval or vetting of a public authority, for example, in France, Germany, Japan and South Korea.⁹² This contrasts with arrangements in Australia, in which only collecting societies that administer certain statutory licences are required to be 'declared'. In some jurisdictions, including most Nordic countries, Canada, the USA and Korea, the terms and conditions on which CMOs may license uses of certain copyright materials must also be set or approved by government authorities.⁹³

The formal processes available in countries for resolving disputes with CMOs also varies. Disputes between CMOs and users in relation to licence fees or conditions are generally dealt with by external bodies such as a court, or an administrative authority⁹⁴ or, as in Australia, a specialist copyright tribunal.⁹⁵ Non licence fee-related disputes (that are not resolved through CMO complaints-handling processes) may be dealt with either by a relevant external body or through ADR processes.

Beyond these regulatory measures, CMOs are usually also subject to the general law of competition and the powers of the relevant competition authorities, as well as company and business laws.



A number of international authorities and organisations also play a role in regulating the operations of collecting societies. In 2012, the European Commission put forward a proposal for a European Directive on collective administration of rights in the EU, which was adopted by the European Parliament in 2014. The PC considered that this EU framework could provide a useful benchmark for exploring ways in which governance and transparency requirements could be strengthened in Australia (Box 5).⁹⁶

Box 5: Overview of the EU Directive

On 4 February 2014, in response to concerns about the functioning of CMOs in the EU, the EU Parliament adopted a directive on *Collective Rights Management of Copyright and Related Rights and Multi-territorial Licensing of Musical Works for Online Use* (Directive 2014/26/EU). This created a new legal framework for the regulation of CMO activities in the EU by establishing common governance, financial management and transparency standards. These rules are mandatory, and more extensive than those that apply to Australian collecting societies.

Fundamental to the Directive is to ensure that CMOs act in the best interests of the rightsholders they represent (Article 4). Key measures to improve the governance of CMOs include rules that support rightsholders to make free and informed choices about who manages their rights, and that enable members to participate in the CMO's decision-making processes. For example, core policies such as the distribution and investment of revenue, deductions from revenue, and use of non-distributable amounts are to be decided upon by the general meeting of members of the CMO (Article 8).

To improve transparency for rightsholders, the EU Directive requires CMOs to provide 'detailed information on the collected revenue and the deductions' to rightsholders and other CMOs who manage their rights. CMOs are also to provide information on their repertoire to rightsholders and users on request, and publish a range of information on their websites, including an annual 'transparency' report (Articles 18-22 and Annex).

The provisions relating to the rights of users are more obscure. The Directive requires EU members to ensure that CMOs and users conduct negotiations for the licensing or rights in good faith, and that they shall provide each other with 'all necessary information' (Article 16). It further provides that licensing terms shall be based on objective and non-discriminatory criteria and tariffs shall be reasonable having regard to the economic value of the use of the rights in trade given the nature and scope of the use of the material and the economic value of the service provided by the CMO.

Different dispute resolution mechanisms are contemplated under the EU Directive for rightsholders and users (see Articles 33-35). Disputes between the CMO and rightsholders may be resolved internally through a complaint-handling mechanism or externally, via a court, mediation or other form of dispute resolution. By contrast, the EU Directive envisages that disputes between the CMO and users will be dealt with through an independent and impartial dispute resolution body such as a court.

If such a legal framework were to apply to Australian collecting societies it could provide clearer, more visible and enforceable rules and practices, which would likely create greater certainty and confidence in the system more generally. However the copyright landscape in Australia is very different to that of the EU. The EU Directive provides EU-wide standards for the 250 CMOs operating across the 28 Member States, and is primarily designed to ensure a better-functioning system that helps protect the interests of rightsholders. By contrast most of the criticism of collecting societies in Australia has stemmed from licensees or users. The absence of specific measures aimed at improving the services that CMOs provide to users, or provision for independent and inexpensive means for resolving disputes between CMOs and users, may limit the effectiveness of such a framework in meeting the needs of users.



International organisations or federations of CMOs also provide governance instruments in the form of codes of conduct or professional rules which their member organisations are either required or recommended to comply with. A consortium of international federations⁹⁷ are currently working with WIPO on its TAG of Excellence Project in developing a 'Compendium' of best practices which will provide guidance to CMOs on how their transparency, accountability and governance might be improved. The Compendium (which is currently available in the form of a 'working document') draws on the EU Directive as well as the codes of conduct and professional rules of four international federations and certain national and regional legislation. As the TAG Compendium contains more detailed provisions dealing with the relationship between the CMO and user, including the information that should be provided by CMOs to users, it may be a useful international source to draw on.

Question 16: Which international regulatory models, or aspects thereof, could best meet the objectives of improving the fairness and efficiency of copyright collecting societies? How feasible is the introduction of these models in Australia and what would be the impact on collecting societies, members and licensees?

Domestic models

While it is useful to compare how collecting societies are regulated overseas, there is also value in investigating other approaches to regulation adopted domestically and the extent to which they may offer insights into strengthening effective models of self-regulation. In undertaking such investigation, however, it is important to note that often regulation of a sector is designed to deal with competitors in an industry, whereas each collecting society tends to be the single collective management entity responsible for a different type or class of copyright.

There are examples of existing arrangements where a voluntary code of conduct is prescribed in legislation, meaning that participants can still opt in or out, but a regulator is delegated power through legislation to ensure the signatories are compliant.

The 2015 Food and Grocery Code of Conduct is one such example of a prescribed voluntary code.⁹⁸ The ACCC has regulatory oversight of these arrangements and industry members can choose not to sign on to the code. The three biggest supermarkets in Australia (Coles, Woolworths and Aldi) have all agreed to be bound and this grants the ACCC power to monitor the behaviour of the supermarkets and apply remedies if a complaint has been upheld. While the food and grocery industry has its own particular features, certain elements of the industry's regulatory framework may be relevant in the context of collecting societies.

Prescribed voluntary codes do have their limitations, particularly where firms either have little incentive to join or where remaining in a scheme would raise compliance issues. In these situations, a prescribed voluntary code could prove to be ineffective at addressing fairness or efficiency concerns.

Another model provides for self-regulatory measures that are overseen by an independent industry self-regulatory body. In Australia, the media is one example of an industry that operates under this form of self-regulatory arrangement, with oversight provided by the Australian Press Council (APC). The APC is the self-regulatory body with responsibility for promoting standards relating to media practice and is the principal body with responsibility for handling complaints about most major newspapers, magazines and associated digital outlets, plus some independent online-only news services.⁹⁹



While the APC's membership is not comprehensive there is significant industry buy-in to the framework.¹⁰⁰ Most major print news publications are represented as 'constituent bodies' of the APC, meaning they have agreed to provide funding for the APC, to cooperate with the APC's consideration of complaints against them and to publish any resultant adjudications.¹⁰¹ Strong APC membership helps strengthen the effectiveness of its self-regulatory mechanisms, and avoids the need for government intervention in the sector.

Were there a view that self-regulatory arrangements administered by an independent body offer a model on which collecting societies could draw, the processes of a body such as the APC may be worth exploring further.

As outlined above, a range of measures could be used to strengthen regulatory arrangements in the copyright industry. However, identifying which model could be used requires identifying the objectives of regulation and how these could best be met.

Question 17: Are there features of other domestic industry codes that could be adopted to improve the fairness and efficiency of Australia's collecting societies?



Appendix A: Terms of reference

Background

This review responds to recommendation 5.4 of the Productivity Commission's Inquiry Report into Intellectual Property Arrangements, noting the Australian Government's stated preference for the Department of Communications and the Arts to undertake the review, in consultation with the Australian Competition and Consumer Commission (ACCC).

Scope

The Bureau of Communications and Arts Research (BCAR), within the Department of Communications and the Arts, will review and report on the efficacy of the Code of Conduct for Collecting Societies (the Code).

In undertaking this review, the BCAR will assess the extent to which the Code promotes fair and efficient outcomes. This will include assessing:

- whether the Code is meeting its rationale and objectives, including promoting confidence and participation in the system, and mitigating any potential market power issues where these occur in relation to collecting societies
- the extent to which the Code promotes transparency, accountability and good governance including by examining whether the Code contains sufficient monitoring and review mechanisms, and
- the extent to which the Code represents best practice in comparison with other domestic and international codes and guidelines.

Any other matters that are deemed significant and relevant to the scope of the review following stakeholder consultation may also be examined.

The review will then make findings and recommendations on ways to improve overall confidence in the system and how these could be implemented. Recommendations will address whether the Code should be made mandatory and whether objectives or provisions of the Code should be amended, taking into account additional compliance costs for affected parties.

The review will, where appropriate, draw on the work of previous inquiries into copyright, but only insofar as they relate to the operations and governance of collecting societies. This review will not include examination of the jurisdiction and decisions of the Copyright Tribunal, and whether or not specific licence fees or royalty payments are fair and reasonable.

Process and governance

The review team will be informed by subject-matter expertise from within the Department, as well as broader support and technical advice from the ACCC, and other relevant government agencies on the implications for any changes for competition and the general interests of consumers.

The BCAR will consult widely with collecting societies, user groups and other relevant stakeholders about the Code's efficacy and the review's proposed recommendations. Public consultation will be undertaken following the release of a discussion paper in mid-2017, and the publication of a draft report in late-2017. Public submissions will be made available on the Department's website.



An external reference group consisting of key representatives from collecting societies, licensee groups and other interested parties will also be assembled after the publication of the discussion paper to provide input into the process. Membership of this group will be published on the Department's website once finalised.

The review team will report on its findings and recommendations to the Minister for Communications in 2018. The final report will be publicly released.

Endnotes

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- ¹ Australian Government (2017), *Australian Government Response to the Productivity Commission Inquiry into Intellectual Property Arrangements*, August 2017; Productivity Commission (2016), [Intellectual Property Arrangements](#), Inquiry Report No. 78, 23 September, p.32 (recommendation 5.4)..
- ² See Parts VA, VB, VC, VD and Division 2 of Part VII of the *Copyright Act 1968*.
- ³ For example, the use of copyright material on behalf of educational institutions under Parts VA and VB of the *Copyright Act 1968*. Although statutory licensees do not need to seek authorisation to use copyright materials, they must still pay equitable remuneration for the use of these materials.
- ⁴ BCAR analysis, based on data sourced from Australian collecting societies' annual reports. Licensing revenue does not include interest payments or other forms of income.
- ⁵ Ficsor, M. (2002), *Collective Management of Copyright and Related Rights*, WIPO, p. 160.
- ⁶ Baumol, W. (1977), 'On the proper cost tests for natural monopoly in a multiproduct industry', *American Economic Review*, 67, pp. 809–822.
- ⁷ ACCC (2006), [Copyright licensing and collecting societies: a guide for copyright licensees—Draft for comment](#), November, p. 10.
- ⁸ Simpson, S. (1995), [Review of Australian Collecting Societies: A report to the Minister of Communications and the Arts and the Minister of Justice](#), July.
- ⁹ House of Representatives Standing Committee on Legal and Constitutional Affairs (1998), [Don't stop the music! A report of the inquiry into copyright music and small business](#), June.
- ¹⁰ Copyright Agency (2016), [Submission to Productivity Commission Intellectual Property Arrangements Draft Report](#), June, p. 18.
- ¹¹ Australian Government (2000), Government response to the report of the House of Representatives Standing Committee on Legal and Constitutional Affairs: 'Don't stop the music!—A report of the inquiry into copyright, music and small business', November, pp. 2-3, 9.
- ¹² *Code of Conduct for Copyright Collecting Societies* (2017), clause 1.1(b).
- ¹³ *Code of Conduct for Copyright Collecting Societies* (2017), clause 1.3.
- ¹⁴ Copyright Law Review Committee (2000), *Jurisdiction and Procedures of the Copyright Tribunal*, December, p. 14 ([Section 2, Chapter 1, paragraph 1.05](#)); Lindgren, Justice K. (2005), 'Market Power, collecting societies and the role of the Copyright Tribunal' 79(9), *Australian Law Journal*, pp. 561 - 584.
- ¹⁵ House of Representatives Standing Committee on Legal and Constitutional Affairs (1998), [Don't stop the music! A report of the inquiry into copyright music and small business](#), June, p. 111.
- ¹⁶ Intellectual property licensing is currently exempt from some of the restrictive trade practices provisions under s. 51(3) of the *Competition and Consumer Act 2010* (Cth). This means that intellectual property rights are not subject to the same competition laws as other property rights. The Productivity Commission has recommended to repeal s. 51(3): Productivity Commission (2016), [Intellectual Property Arrangements](#), Inquiry Report No. 78, 23 September, p. 37 (Recommendation 15.1). The Government supports this recommendation: Australian Government (2017), *Australian Government Response to the Productivity Commission Inquiry into Intellectual Property Arrangements*.
- ¹⁷ Noting that there are some differences between the various statutory licensing schemes. For the government licence under Division 2 of Part VII of the *Copyright Act 1968*, for example, only the Tribunal has this power to make and revoke a declaration.
- ¹⁸ For instance, an ACMA-commissioned consumer survey found that 44 per cent of Australia's internet users accessed catch-up television services in 2014, up from 38 per cent in 2013. See, ACMA (2015), [Supply and Demand: Catch-up TV leads Australian's online video use](#), February.



- ¹⁹ Handke, C., Quintais, J. & Balazs, B. (2013), [‘The Economics of Copyright Compensation Systems for Digital Use’](#), paper presented at the SERCI Annual Congress, July; Intellectual Property Office [UK Government] (2012), [Collecting Societies Codes of Conduct](#), December, p. 47.
- ²⁰ BCAR analysis based on figures sourced APRA financial reports, 2007-08 to 2015-16.
- ²¹ Haunss, Sebastian (2013), [‘The changing role of collecting societies in the internet’](#), Research Center on Inequality and Social Policy, University of Bremen, Germany, 30 September.
- ²² Simpson, S. (1995), [Review of Australian Collecting Societies: A report to the Minister of Communications and the Arts and the Minister of Justice](#), July.
- ²³ Communication Law Bulletin (1997), [‘Copyright Review’](#) 16(1), *Communications Law Bulletin*, p. 22.
- ²⁴ ALRC (2013), [Copyright and the Digital Economy](#), ALRC Report 122, November.
- ²⁵ ACCC (2013), [Authorisation guidelines](#), June, p. 59.
- ²⁶ Governance Institute of Australia (2015), Guidelines: Whole-of-organisation governance, October, p.2; Office of Best Practice Regulation (2014), Regulator Performance Framework, October, pp. 13 and 24-25.
- ²⁷ ACCC (2013), [Authorisation guidelines](#), June, p. 60.
- ²⁸ The TAG Compendium is a practical guide for CMOs, providing recommendations on how these organisations can improve on their transparency, accountability and governance arrangements, drawing on various jurisdictions’ legislation, codes of conduct and other source documents. This includes examples from Australia’s code and the CMO Directive from the European Union: WIPO (2013), [TAG of Excellence: TAG Compendium of Good Practices Concerning the Collective Management of Copyright and Related Rights](#).
- ²⁹ See, for example, OECD (2015), [G20/OECD Principles of Corporate Governance](#).
- ³⁰ It should be noted, however, that these hypothetical benefits of transparency have been challenged. Specifically, the UK Intellectual Property Office notes there is limited evidence to suggest that greater transparency alone will improve efficient or fair outcomes, particularly in the context of entirely voluntary models; Intellectual Property Office [UK Government] (2012), [Collecting Societies Codes of Conduct](#), December, pp. 50-51.
- ³¹ The *Copyright Act 1968* provides that the Minister and the Copyright Tribunal must not declare a body to be the collecting society unless its rules contain such other provisions as are prescribed including, inter alia, provisions about ‘the distribution of amounts collected by it’: see ss. 135P(3)(d)(iii), 135ZZB(3)(d)(iii), 135ZZT(3)(d)(iii), 135ZZO(7)(d)(iii) and 153F(6)(e)(iii). Any alteration by a declared collecting society of its rules so that they no longer comply with these provisions may be cause for revocation of its declaration: see ss. 135Q(1)(c), 135ZZC(1)(c), 135ZZU(1)(c), 135ZZP(1)(c) and 153G(5)(c).
- ³² Chester, K. (2017), [‘What is Fair?’](#), a speech presented to the Australian Digital Alliance Forum, Canberra, 24 February.
- ³³ *Code of Conduct for Copyright Collecting Societies* (2017), clause 2.3(d).
- ³⁴ *Code of Conduct for Copyright Collecting Societies* (2017), clause 2.3(d).
- ³⁵ See, for example, Commonwealth Department of Communications and the Arts (2015), [Submission to the Productivity Commission Issues Paper \(October 2015\) - Intellectual Property Arrangements](#) (Submission DR154), October, p. 2; Productivity Commission (2016); Statement of Ms Delia Browne, National Copyright Director of the COAG Education Council, Inquiry into intellectual property arrangements - transcript of proceedings, Sydney, 27 June, p. 808.
- ³⁶ *Code of Conduct for Copyright Collecting Societies* (2017), clause 2.3(c)(ii).
- ³⁷ Australian Small Business Commissioner (2015), Productivity Commission inquiry into Intellectual Property Arrangements – Submission by the Office of the Small Business Commissioner (Submission 101), December, pp. 13-14.
- ³⁸ *Code of Conduct for Copyright Collecting Societies* (2017), clause 2.4.
- ³⁹ Lindgren, K. (2015), Supplementary Report of the Code Reviewer upon a Review of the Operation of the Code of Conduct of the Copyright Collecting Societies of Australia, p. 13
- ⁴⁰ New South Wales Department of Justice (2016), [Response to the Productivity Commission’s Draft Report—Intellectual Property Arrangements](#) (Submission DR610), p. 3.
- ⁴¹ Live Performance Australia (2017), [LPA Submission to Review of Copyright Collecting Societies Code of Conduct](#), 15 March, paragraph 4.3.
- ⁴² Simpson, S. (1995), [Review of Australian Collecting Societies: A report to the Minister of Communications and the Arts and the Minister of Justice by Shane Simpson](#), July, p. 116.
- ⁴³ Copyright Agency (2014), Proposal for amendment to code of conduct regarding report, 13 November.
- ⁴⁴ Lindgren, K. (2015), Supplementary Report of the Code Reviewer upon a Review of the Operation of the Code of Conduct of the Copyright Collecting Societies of Australia, paragraphs 64-65.
- ⁴⁵ Mulgan, R. (2000), [‘Accountability’: An ever-expanding concept?](#), 78(3) *Public Administration*, pp. 555-573.



- ⁴⁶ *Code of Conduct for Copyright Collecting Societies* (2017), clause 2.6.
- ⁴⁷ *Code of Conduct for Copyright Collecting Societies* (2017), clause 3.
- ⁴⁸ *Code of Conduct for Copyright Collecting Societies* (2017), clause 5.
- ⁴⁹ *Code of Conduct for Copyright Collecting Societies* (2017), clause 2.6.
- ⁵⁰ Attorney-General's Department (2001), [Declaration of Collecting Societies Guidelines](#), April, paragraph 22.
- ⁵¹ Productivity Commission (2016), [Intellectual Property Arrangements](#), Inquiry Report No. 78, September, p. 160.
- ⁵² *Code of Conduct for Copyright Collecting Societies* (2017), clause 1.3(d).
- ⁵³ Complaints handling processes must comply with the Australian Standard for customer satisfaction: Guidelines for complaints handling in organizations (AS ISO 10002-2006/AMDT 1-2011); *Code of Conduct for Copyright Collecting Societies* (2017), clause 3(c).
- ⁵⁴ *Code of Conduct for Copyright Collecting Societies* (2017), clause 3(viii).
- ⁵⁵ See, for example, Lindgren, K. (2016), *Report of Review of Copyright Collecting Societies' Compliance with their Code of Conduct for the Year 1 July 2015 to 30 June 2016*, 26 October, pp. 74-121.
- ⁵⁶ Screenrights (2015), [Screenrights to lower Medium Value Multiple Claims Threshold](#), 9 December.
- ⁵⁷ APRA AMCOS (2016), [APRA AMCOS wins Australian Dispute Centre Award](#), 23 August.
- ⁵⁸ *Copyright Act 1968*, Part VI, Division 3, Subdivisions B to H.
- ⁵⁹ *Ibid*, s. 161.
- ⁶⁰ Productivity Commission (2014), [Access to Justice Arrangements \(Volume 1\)](#), Inquiry Report No. 72, September, p. 361.
- ⁶¹ Collecting societies have, in the past, been accused of threatening parties with Copyright Tribunal proceedings as a tactic to encourage them to pay their outstanding fees: House of Representatives Standing Committee on Legal and Constitutional Affairs (1998), [Don't stop the music! A report of the inquiry into copyright music and small business](#), June, p. 113; Lindgren, K. (2015), *Supplementary Report of the Code Reviewer upon a Review of the Operation of the Code of Conduct of the Copyright Collecting Societies of Australia*, paragraph 55 (referring to submissions made by the State of NSW).
- ⁶² According to the Association of Liquor Licences Melbourne, PPCA tariffs for nightclubs increased from \$0.0748 to \$1.05 per person, while APRA tariffs increased from \$0.1121 to \$1.05 per person; Association of Liquor Licences Melbourne (2015), [RE: Intellectual Property Arrangements](#) (Submission 62), 28 November.
- ⁶³ See, for example, Copyright Advisory Group to the COAG Education Council (2015), [Submission in response to the Productivity Commission Draft Report on Intellectual Property Arrangements](#) (Submission DR429), p. 33.
- ⁶⁴ Burchett, J. C. S. (2008), *Report of The Code Reviewer upon a Review of the Operation of the Code of Conduct of the Copyright Collecting Societies of Australia*.
- ⁶⁵ See, for example, Copyright Advisory Group to the COAG Education Council (2016), [Submission in response to the Productivity Commission Draft Report Intellectual Property Arrangements](#) (Submission DR429), pp. 33-34.
- ⁶⁶ Lindgren, K. (2014), *Report of The Code Reviewer upon a Review of the Operation of the Code of Conduct of the Copyright Collecting Societies of Australia*, April, paragraph 25-27.
- ⁶⁷ *Code of Conduct for Copyright Collecting Societies* (2017), clause 1.1(a).
- ⁶⁸ OECD (2015), [G20/OECD Principles of Corporate Governance](#), p. 44.
- ⁶⁹ *Ibid*, p. 56.
- ⁷⁰ *Ibid*, p. 56.
- ⁷¹ *Code of Conduct for Copyright Collecting Societies* (2017), clause 1.1(b)(ii).
- ⁷² Productivity Commission (2016), [Intellectual Property Arrangements](#), Inquiry Report No. 78, September, pp. 7-10.
- ⁷³ Lindgren, K. (2015), *Supplementary Report of the Code Reviewer upon a Review of the Operation of the Code of Conduct of the Copyright Collecting Societies of Australia*, p. 38.
- ⁷⁴ Lindgren, K. (2015), *Supplementary Report of the Code Reviewer upon a Review of the Operation of the Code of Conduct of the Copyright Collecting Societies of Australia*, p. 41.
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- ⁸¹ *Australian Writers Guild Limited and Anor v Audio-Visual Copyright Society Limited* NSD319 of 2016.
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- ⁸³ The Treasury (2011), [Policy guidelines on prescribing industry codes under Part IVB of the Competition and Consumer Act 2010](#), May, p. 3.
- ⁸⁴ Department of Industry, Innovation and Science (2016), [Codes of Practice | business.gov.au](#).
- ⁸⁵ Australian Government (2000), Government response to the report of the House of Representatives Standing Committee on Legal and Constitutional Affairs: 'Don't stop the music!—A report of the inquiry into copyright, music and small business', November.
- ⁸⁶ Productivity Commission (2016), [Intellectual Property Arrangements](#), Inquiry Report No. 78, September, p. 161.
- ⁸⁷ ACCC (2011), [Guidelines for developing effective voluntary industry codes of conduct](#), July, p. 26.
- ⁸⁸ The Treasury (2011), [Policy guidelines on prescribing industry codes under Part IVB of the Competition and Consumer Act 2010](#), May, p. 9.
- ⁸⁹ Ibid p. 2.
- ⁹⁰ Productivity Commission (2016), [Intellectual Property Arrangements](#), Inquiry Report No. 78, September, p. 159.
- ⁹¹ See, for example, *The Collective Management of Copyright (EU Directive) Regulations 2016* (UK) (2016 No. 221).
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- ⁹³ Gervais, D (ed.) (2016), *Collective Management of Copyright and Related Rights*, Wolters Kluwer, p. 255 (Finland, Denmark, Iceland and Norway), pp. 279-282 (Canada) and pp. 343-347 (USA); *Copyright Act 2009* (Korea), Chapter 7, Article 105.
- ⁹⁴ As, for example, the Arbitration Board in Germany. See Gervais, D (ed.) (2016), *Collective Management of Copyright and Related Rights*, Wolters Kluwer, pp. 229-236.
- ⁹⁵ As, for example, in the UK (Copyright Tribunal), Canada (Copyright Board of Canada), Korea (Copyright Tribunal), New Zealand (Copyright Tribunal) and Singapore (Copyright Tribunal).
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- ⁹⁷ International Federation of Reproduction Rights Organisations (IFRRO), International Federation of the Phonographic Industry (IFPI), the International Confederation of Societies of Authors and Composers (CISAC) and the Societies' Council for the Collective Management of Performers' Rights (SCAPR).
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