

SUPPLEMENTARY SUBMISSION TO THE

# DRAFT REPORT OF THE REVIEW OF THE CODE OF CONDUCT FOR COPYRIGHT COLLECTING SOCIETIES.

29 March 2018

Universities Australia is pleased to provide a supplementary submission in response to the draft report of the Review of Code of Conduct for Australian Copyright Collecting Societies (Draft Report).

We wish to elaborate on the reasons why Universities Australia is strongly urging the Bureau to include, in its final report, a recommendation for the Government to consider the issues that we and other education sector stakeholders have raised during the course of this review process regarding the governance arrangements applying to declared collecting societies. There is, in our submission, an urgent need for a review that focuses on the approach that declared collecting societies, and Copyright Agency in particular, have taken to the administration of the educational statutory licences.

## THE ROLE OF A DECLARED COLLECTING SOCIETY

More than 17 years ago, the Intellectual Property and Competition Review Committee predicted that

*...collecting societies will face substantial challenge in the decade ahead, as the growth of information transmissions over the Internet shifts the location of copyright transactions and alters the technical form they take. Some of the resulting changes seem likely to erode the position of the collecting societies, as direct contracting becomes more feasible.<sup>1</sup>*

That prediction has come true. In the electronic environment, rather than copying content universities deal directly with rights holders to purchase the content that they need for teaching. There has also been a sharp increase in the use of open educational resources. These trends will continue, with the result that universities (and other educational institutions) will become even less reliant on the statutory licence. Consequently, there is a diminishing role for the “middle man” role assumed by a collecting society.

Copyright Agency’s response to this development has been to view it as a “threat” to its business model. A threat to be addressed through an aggressive campaign of new product development.<sup>2</sup> That is of great concern to us. The university sector will shortly commence negotiations with Copyright Agency for a new licence to take effect from January 2019, and will be seeking to

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<sup>1</sup> Intellectual Property & Competition Review Committee Interim Report, April 2000, <https://web.archive.org/web/20060820080341/http://www.ipcr.gov.au/interim/finalreport.pdf> p 75

<sup>2</sup> See our September 2017 submission, p 12-16 for more on this

negotiate significantly lower licence payments that reflect the sector's sharply declining use of the statutory licence. At the same time, Copyright Agency is spending significant amounts of money on its product development and seeking to leverage its role as the declared collecting for the educational statutory licence to force this product upon universities. This is not demand driven innovation by Copyright Agency: UA has sent a very clear message that universities have no interest in the purported "added value" that Copyright Agency claims its new product would deliver. What they want is a licence fee that better reflects the reduced role and value of the statutory licence in the university sector. No more, no less. It is hard to avoid the conclusion that Copyright Agency's aggressive product development activities are designed to ensure its own continuing relevance, and the continuation of artificially high licence fees. This is not the proper role for a declared collecting society.

## ADDRESSING THIS SITUATION

As we set out in our September 2017 submission to this review, the concerns that we have raised are not capable of being addressed through amendments to the voluntary Code of Conduct.

While we welcome the recommendations in the Draft Report as an important first step in improving the *transparency* of collecting societies, there remains an urgent need for a comprehensive review of the *governance* arrangements applying to declared collecting societies with a view to developing a fit-for-purpose governance regime. This should include consideration of how best to ensure that declared collecting societies confine their activities to administering the statutory licence, leaving it to commercial entities to compete in a free market to develop products that may, or may not, be of interest to educational institutions.

## UNDISTRIBUTED FUNDS

We have identified three concerns regarding the accumulation and use of undistributed funds by declared collecting societies:

- Firstly, there must be greater transparency about how these funds are *accumulated*. Draft recommendation 8 (a) would go some way towards addressing that.
- Secondly, it is in our view *inappropriate* for a declared collecting society to have discretion as to how it uses these funds. Draft recommendation 8(c), which calls for transparency as to how collecting societies have used undistributed funds, is premised on the assumption that the only concern is transparency about how these funds are ultimately used. In our submission, it should not be a matter for collecting societies to determine how to use these funds. They should be distributed back to licensees.
- Thirdly, the fact that Copyright Agency has been able to accumulate such a large pool of undistributed funds highlights one of the fundamental flaws in the statutory licence: that is, that universities and schools pay millions of dollars a year for uses that no one ever expected to be paid for and that cause no harm to any rights holders. Copyright Agency is *unable* to distribute that money. Ultimately, this problem will only be addressed with the enactment of a flexible exception, such as fair use, that can be relied on by educational institutions for such "non-harmful" uses. In the meantime, the way in which Copyright Agency administers the statutory licence has resulted in it accumulating millions of dollars from publicly funded institutions and UA submits that this deserves urgent consideration by Government.