



20 September 2017

Copyright Code Review
Director, Emerging Policy Issues
Bureau of Communications and Arts Research
Department of Communications and the Arts
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Dear Ms Jones

The Australian Publishers Association (APA) is pleased to provide a response to the Review into the efficacy of the Code of Conduct for Australian Copyright Collecting Societies.

The APA is the peak national body for Australian book, journal and electronic publishers. Established in 1948, the Association is an advocate for all Australian publishers - large and small; commercial and non-profit; academic and popular; locally and overseas owned. The Association has approximately 210 members and, based on turnover, represents over 90% of the industry. Our members include publishers from all sectors of the publishing industry - trade and children's, schools and academic publishing.

The collecting society for the publishing industry is the Copyright Agency. The majority of comments related to the Code of Conduct and how it applies are, therefore, largely limited to the Copyright Agency.

The following submission has been developed with the direct feedback of many of our educational publishers which rely on the remuneration of licences administered by the Copyright Agency for their businesses. Many of our members regularly and directly deal with the Copyright Agency.

We would welcome the opportunity for further dialogue regarding the Code of Conduct Review.

Yours sincerely,

Michael Gordon-Smith
Chief Executive

Position Summary

The APA supports the statement that collecting societies are: "...generally a more efficient way to manage copyright than individual administration, particularly for low-value transactions." [10: Code of Conduct Review Discussion Paper:August 2017] The APA supports the statutory licence system as both efficient and cost-effective for both users and rightsholders.

No member of the APA, in the course of internal consultation, has raised concerns that the Copyright Agency does not, or has not, complied with the Code of Conduct for Collecting Societies, complied with the Agency's own constitution or with any other legislative or regulatory obligation.

The APA supports the aims and objectives of the Code of Conduct and sees no reason to change either. The APA does not support the use of the Code of Conduct as a mechanism to compromise legitimate commercial licensing negotiations in such a way as to be anti-competitive or a lessening of rightsholders rights to be fairly remunerated.

Discussion Paper Questions

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?

The APA sees the Code of Conduct as meeting its purpose of ensuring that collecting societies operate efficiently, effectively and equitably. The APA views as evidence of the Code's appropriateness, the Copyright Agency is performing its role efficiently and effectively. However, we add that the Code should not be considered the sole mechanism for achieving efficiency.

The distribution of rightsholders remuneration is considered to be equitable within the limitations of current sampling methods. The data currently available, such as sample surveys in schools and universities, are transparent to members. Survey design is agreed to by licensees.

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?

The Code is sufficiently clear and appropriately detailed. A redrafted explanatory memorandum that addresses the scope of the Code could address any perceived ambiguities. The Code should not carry the communication burden of explaining other legislative instruments and regulatory obligations that govern 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?

The APA makes no detailed comment on other collecting societies and their governance. However, the aims and objectives of the Code are applicable to all collecting societies regardless of governance or structure.

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

The advent of the internet and its impact on publishers cannot be overstated. It has propelled the publishing industry, and in particular the educational publishing sector into new modes of creation, production and distribution. The change has presented opportunities for innovation and growth but has also greatly increased the problems of unlicensed copying. Widespread copyright infringement has mitigated some of the benefits of the digital revolution in publishing.

Current licensing agreements under the statutory licence have been extended to digital and internet content. This is a necessary extension given the increasingly predominant use of digital material in educational institutions.

The impact of the internet in allowing collecting agencies to, for instance, more easily identify authors and rightholders is useful. The proliferation of multiple platforms in which content is being delivered has presented data collections challenges. Greater transparency of data collection from licensees would go a long way to increasing rightholders confidence in the statutory licence system.

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?

The APA has no detailed comment. Digitisation has, no doubt, enabled savings in communication, distribution, and improved on the speed of some businesses processes. Detailed comment can only come from the collecting societies.

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?

The APA supports the three principles of best-practice regulation:

- Transparency
- Accountability
- Good governance.

The APA is comfortable with the current level of transparency.

The publishing industry, as key rightsholders and members of the Copyright Agency is represented at the Board level. Two directors of the Agency are nominated by the APA Board. It has been the practice of the APA for some years for one or both of those directors to present a report at the Association's AGM.

APA members confirm that they are regularly kept informed regarding licence negotiations, licence funds and their distribution.

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

The APA is comfortable with the current level of transparency.

The APA supports greater transparency of data collection reporting from licensees. Currently systems of data collection rely on an honour system from licensees. The confidence of rightsholders in the statutory licence system would be significantly increased with greater transparency from licensees.

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

Undistributed funds should be distributed in accordance to the priorities of the boards of collecting societies in so far as they represent the interests of rightsholders.

Currently, in accordance with the Code, the Copyright Agency reserves monies paid by licensees (and identified by licensees) as orphan works. These monies are kept in reserve for four years until the works' rightsholders are identified. It is particularly important to note that the Copyright Agency provides a service to users by identifying the authors and publishers of material used by licensees. To make it easier for users, the Copyright Agency accepts a large number of records where there is no attribution of ownership. However, there is a risk that this accommodation and service by the Copyright Agency may have been exploited by user advocates in inflating the number of orphan works. Most records from licensees with "don't know" in the rights owner

fields by licensees are found to have authors and publishers. Care should be taken not to regard “Don’t know” as equivalent to “unknown”. Most of these works should not be considered as orphan works. What monies remain are distributed in accordance with the decisions of the Copyright Agency board and in the interests of rightsholders.

It is inevitable that a small set of records will remain unidentified, and appropriate for there to be a small portion of the overall sum collected to be allocated to activities that support the interests of all rights owners. APA members are supportive of the Copyright Agency’s Cultural Fund and the many supportive activities that the Copyright Agency undertakes in support of rightsholders interests. APA members have expressed the view that they would not support an increase in the percentage of revenue set aside for the Cultural Fund.

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?

The APA views that the current safeguards are adequate. To the knowledge of the APA, the Copyright Agency has never been in breach of any reporting requirement either under its constitution or the several governing legislations that the Agency is regulated by. APA members have confirmed that the financial reporting they receive from the Copyright Agency is clear and complete.

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?

The APA is not aware of any disputes involving APA members that have had to be escalated to the level of an official complaint or an official dispute resolution process in recent years.

The APA remains unconvinced that the code should stipulate conflict resolution but that the Tribunal remains the appropriate body for copyright disputes. The Tribunal may need to consider the reasonable commercial concerns of users and rights holders equally but no defined process should impinge on the independence of the Copyright Tribunal.

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?

The APA views that the Code Reviewer has sufficient powers. Amendments to the Code demonstrate that the Reviewer is able to recommend changes to the Code and have them adopted. No breaches have been reported against the Code, which would suggest that collecting societies are compliant.

Making the decisions or recommendations of the Code Reviewer mandatory would, necessarily, impose the need for an additional appeal process. This would, necessarily, add costs to the system of monitoring and not necessarily address concerns raised.

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?

Yes. Care should be taken to consider the Code in itself.

There is a natural incentive for managers and governments to seek to reduce costs. The educational statutory licence aggregates the 'equitable remuneration' paid for extensive use of copyright materials so that it is dealt with by central managers not by users. Front line educators are the users who benefit from the simplicity, easiness and breadth of the license. Their central managers are exercised by the total, aggregate costs for all students in a jurisdiction. It may be inevitable that this would give rise to occasionally strident rhetoric about costs unconnected with the reality of use or of the administration with the scheme.

Care should be taken not to allow the Code to be exploited as a proxy for commercial negotiations between rightsholders and licensees.

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?

The APA supports the Copyright Agency's current board structure, which includes rightsholder representatives. In addition, the APA supports the Copyright Agency's current membership engagement and communication strategies. There is an appetite within the APA membership to support these strategies further and to ensure even greater participation of all members in the direction and decisions of the Copyright Agency.

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?

The APA remains unconvinced that there is significant value in legislating the Code of Conduct. Legislating the Code would make it inflexible and difficult to amend. To make the Code inflexible would run contrary to the interests of rightsholders and licensees.

There may be a value in making the code mandatory but not legislated.

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?

The EU directive cited in the Discussion Paper is satisfied by many elements already in place within governing legislation and covered by the voluntary code. The Copyright Tribunal is an independent body to adjudicate between agency and rights holders and users.

The EU directive was developed out of a very different imperative – addressing the concerns of rights holders rather than users/licensees. Other mechanisms are predicated on very different legal frameworks – for instance a lack of comprehensive competition law as there exists in Australia.

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?

The Code of Conduct is already a flexible mechanism, oriented to the domestic context, and, as such, fit for purpose.