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Australian Libraries Copyright Committee

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ADA

Australian Digital Alliance

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***Submission to the Code Reviewer:
Code of Conduct for
Copyright Collecting Societies:***

**Joint Submission of the
Australian Digital Alliance and the
Australian Libraries' Copyright Committee**

February 2008

Submitted by email: codereviewer@gmail.com

1. Introduction

This submission is made on behalf of the Australian Digital Alliance (ADA), and the Australian Libraries' Copyright Committee (ALCC).

The ADA is a non-profit coalition of public and private sector interests formed to promote balanced copyright law and provide an effective voice for a public interest perspective in the copyright debate. ADA members include universities, schools, consumer groups, galleries, museums, IT companies, scientific and other research organisations, libraries and individuals.

Whilst the breadth of ADA membership spans various sectors, all members are united in their support of copyright law that balances the interests of rights holders with the interests of users of copyright material.

The ALCC is the main consultative body and policy forum for the discussion of copyright issues affecting Australian libraries and archives. It is a cross-sectoral committee which represents the following organisations:

- Australian Library and Information Association
- Australian Council of Archives
- Australian Government Libraries Information Network
- Council of Australian University Librarians
- National Library of Australia
- National and State Libraries Australasia

The ADA and ALCC commend the provision for review within the Code of Conduct for Copyright Collecting Societies (the **Code**) and we are pleased to provide our comments on behalf of the members of the ADA and ALCC.

In summary, the ADA and the ALCC believe that the Code contains some useful provisions and standards for Collecting Societies to refer to, but we believe that because many of the provisions are drafted very broadly, the rights and responsibilities contained in the code become uncertain in scope and application. We suggest further detail and possible examples be inserted into the Code, in order to provide Copyright Collecting Societies with clearer guidance, and in turn, to assist licensees in their dealings with Collecting Societies.

2. Transparency

We commend clause 2.3(b) of the Code, which states: "Each Collecting Society will ensure that its dealings with licensees are transparent". We believe this is an important feature of negotiations (and other dealings) between Collecting Societies and licensees. Transparency assists licensees in negotiating a fair and reasonable agreement. As the ACCC has recognised, Collecting Societies often raise a number of competition issues. This makes it even more important that Collecting Societies act transparently in their dealings with licensees.

However, clause 2.3(b) is drafted very broadly, making it difficult for licensees to know to what extent they can expect transparency in their dealings with Collecting Societies. This has led to disputes over the appropriate level of transparency which can be expected. We request that the Code Reviewer include guidance and comments in the Report on the scope and nature of “transparency” as it is used in the Code.

We believe the Code would operate far more effectively if clause 2.3(b) contained further detail, setting out specific matters in relation to which Collecting Societies should be transparent. This would certainly assist Copyright Collecting Societies in complying with this clause, and would provide licensees with clearer standards to expect from Collecting Societies.

One area where our members see a particular need for transparency is in the availability of data that Collecting Societies hold. Collecting Societies often collect information from licensees relating to their use patterns of copyright material, as part of the process of determining the license terms (including pricing) and for the purposes of distribution. An example of this is the data collected by the Copyright Agency Limited (CAL) as part of its sampling surveys.

One of the implications of transparency in dealings is that information from surveys should be available to both the surveyed party and the collecting society. If this data remains unavailable to licensees (or the parties negotiating on their behalf), we have a situation where one party (the Collecting Society) is able to selectively use the hard data which exists, leaving the other party at a severe disadvantage. Transparency in this regard would level the playing field when negotiating and re-negotiating licenses, as both parties would be fully informed of the types and quantities of materials covered under the license, and the patterns of use within the licensee organisation. An added benefit for the licensee is that this would allow them to analyse its own patterns of use of copyright materials and make adjustments in use where it sees wastage or unnecessary use of copyright material.

However, we note that the matter of access to material is currently before the Copyright Tribunal in the case of *Copyright Agency Limited v Queensland Department of Education*. We would therefore ask that this matter be kept under review, and that opportunity for canvassing this issue in particular be provided following the decision of the Tribunal.

3. Dispute Resolution Procedures

Clause 3 of the Code requires Collecting Societies to “develop and publicise procedures for... resolving disputes between A. its Members; **and/or** B. its licensees.”[emphasis added].

We are concerned that due to the presence of “or”, this clause does not in any way obligate Collecting Societies to develop a procedure for resolving disputes between licensees. The clause allows Collecting Societies to develop a procedure for one or other of members and licensees.

As a result, we see that a number of Collecting Societies currently appear only to have developed and publicised dispute resolution procedures for members. This can be quite problematic for licensees. If, for example, during negotiations between Collecting Societies and licensees (or an organisation representing licensees), the parties are unable to come to an agreement, it would certainly be beneficial if these parties can go down the dispute resolution path, rather than having to pursue the time-consuming and costly option of going to the Copyright Tribunal. This may be particularly important for smaller licensees, such as individual businesses.

We therefore recommend that “or” be deleted from this clause, so that all Collecting Societies are required under the Code to come up with a dispute resolution procedure which licensees or their representatives can pursue as an alternative to going to the Tribunal.

4. Amendment of the Code

Clause 5.3

The provision for amendment of the Code is set out at Clause 5.3, and from this clause, we understand that wide consultation occurs (clauses 5.3(b) – (d)), followed by a report of the Code Reviewer that includes recommendations for amendments to the Code (clause 5.3(e)). This is the procedure that has been followed for the current review of the Code, and for the first review, conducted in April 2005.

The Code does not set out what happens after the report of the Reviewer is made. Are the recommended amendments automatically made to the Code? If there a process whereby Collecting Societies consider the amendments and decide to adopt them? We seek the Code Reviewer’s guidance on what the procedure is at this stage of amendment, and recommend that further detail on this step in the amendment process be included in the Code.

Amendment outside clause 5.3

We are aware that the Code was also amended in May 2007. To our knowledge these amendments did not arise from a review of the Code, as provided for under Clause 5.3.

One version of the Code on the website of the Phonographic Performance Company of Australia L td (PPCA) includes a table of amendments to the code, and states that the May 2007 amendments occurred “following agreement by the societies”¹.

We wish to make two points on these amendments:

1. The Code does not appear to contain provision for amendment in this way. If amendments can occur this way, this should be included in the Code.

¹ *Code of Conduct for Copyright Collecting Societies* at 17, available at: <http://www.pcca.com.au/documents/FinalAmd_ReinstateCode2007.pdf>

2. More importantly, it seems problematic to us that the Code can be amended without the consultation required under clause 5.3, by the simple agreement of the Collecting Societies. How can Licensees be expected to rely upon, and have confidence in, the Code if it can be changed without formal review, by the Collecting Societies, at any time? We note, in this regard, the original government response to the recommendations of the *Don't Stop the Music* Report, that 'a code of conduct should be developed **in consultation with the Government and interested parties such as copyright users** and members of the collecting societies.'² All amendments of the Code should be approached in the same way.

5. Impartiality of the Code Reviewer

We are a little confused about the apparent amendments to the Code in May 2007. We see that the Code is available on many of the webpages of the Collecting Societies. However, in preparing this submission, we notice that these versions of the Code, although all claiming to be current are not identical.

Some versions contain a table of amendments at the end, and some do not.³ However, the difference that is of most concern to us is that there is at least one version, on the CAL website,⁴ which has removed part of clause 5.1(b), providing:

The Code Reviewer will be independent of the Collecting Societies and will have no association with any of them. neither a lack of independence nor any 'association' will, however, be inferred purely by virtue of that person having provided professional services to a collecting society of a kind that does not, or did not, relate to a matter covered by the Code.

It is naturally a concern to us if this part of the Code has been removed, without any explanation. The Code Reviewer must not only be impartial, but perceived to be so. If this part of the Code has been removed, there is a danger that the Code Reviewer will not be perceived to be objective.

More generally, we would suggest that the provisions of the Code, particularly without the 'independence' provision, do not provide a framework which guarantees the independence of the Code Reviewer. In particular:

- The Code Reviewer is appointed by the Collecting Societies who have adopted the Code;

² Government response to the *Don't Stop the Music* Report, available at <http://www.ag.gov.au/www/agd/agd.nsf/Page/RWP98F2DD5EE11E2072CA2571B100202F05>.

³ For example, the Code available at these sites contains the table of amendments: <<http://www.copyright.com.au/reports%20&%20papers/Final%20Amended%20Code%202007.pdf>>, and <http://www.pcca.com.au/documents/FinalAmd_ReinstatementCode2007.pdf>.

The Code available at these sites does not have the table of amendments:

<http://www.copyright.com.au/code_of_conduct_4.htm#5> and <<http://www.viscopy.com/pdfdocuments/COC.pdf>>

⁴ Available at:

<<http://www.copyright.com.au/reports%20&%20papers/Final%20Amended%20Code%202007.pdf>>

- The Code Reviewer is paid by the Collecting Societies;
- Reappointment of the Code Reviewer is at the absolute discretion of the Collecting Societies.

We would recommend that, in order to increase confidence in the operation of the Code, consideration be given to incorporating strong guarantees of the independence of the Code Reviewer; including, for example, input from licensees, government, and Collecting Societies into appointment decisions.

6. Conclusion

As mentioned earlier, Collecting Societies are often in a powerful position, indeed a monopoly position, when negotiating and dealing with licensees. The ADA and the ALCC support this Code and recognise its importance in providing recommended procedures and standards for Collecting Societies to follow.

However, as we have noted in our submissions, we do have concerns with particular provisions, and with the lack of practical detail in parts of the Code.

The ADA and ALCC thanks the Code Reviewer for the opportunity comment on the Code and we hope to see our recommendations adopted. Please contact Laura Simes should you have any further queries or like us to provide any further information.

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