Review of Code of Conduct for Copyright Collecting Societies

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We are grateful for the opportunity to provide feedback on the Code of Conduct in this review. We are academic researchers based in the Queensland University of Technology (QUT) School of Law, specialising in copyright and innovation research. In this submission, we focus on three key issues: transparency; voluntary licensing; and undistributed funds.

1.Transparency

In the 2016 Inquiry Report on Intellectual Property Arrangements, the Productivity Commission expressed concern that Australia's copyright collecting societies were not more transparent about their methods and calculations for collecting and distributing licensing revenue.[3] The UK Intellectual Property Office's 2012 report also provides a good summary of the problems of Australia's regulatory model and collective licensing system.[4] We share these concerns, and believe that the Code of Conduct for Copyright Collecting Societies should provide for greater transparency in reporting data about the collection and distribution of funds.

Greater transparency is critical for a number of reasons. First, as the Productivity Commission noted, greater transparency is required for participants (both licensors and licensees) in statutory licensing schemes to inform negotiations. The efficiency of these systems relies on good information being available to inform decisions.[5]

Second, at a time when copyright law is facing a crisis of legitimacy,[6] greater transparency of the flows of licensing payments would help promote public confidence in the functioning of our copyright system. The objectives of the guidelines applying to collecting societies include not just that the distribution of royalties to copyright owners is fair, but also that is it *seen to be fair.* The public's perception and faith in the fairness of the system can only be

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[3] Australian Government Productivity Commission, *Intellectual Property Arrangements*, Productivity Commission Inquiry Report No. 78, 23 September 2016, 160.
[4] https://www.gov.uk/government/publications/collecting-societies-codes-of-conduct
[5] The Productivity Commission was particularly concerned that users were unable to access information that would allow them to more efficiently negotiate with copyright owners to achieve "efficient and fair market outcomes": ibid.
[6] See Dan Hunter and Nicolas P Suzor, 'Claiming the Moral High Ground in the Copyright Wars' in Phillipa McGuinness (ed), *Copyfight : Firing Up Conversation about Copyright* (University of New South Wales Press, 2015) 131 https://eprints.qut.edu.au/85010/.

occasioned if the public can actually see what is going on. So long as these processes are obscured, the Australian public has no reason to trust in the integrity of the system.

Third, greater transparency is crucial to help inform copyright law and practice. We are in a period of rapid global change in copyright, and there are heated ongoing debates about the future of copyright industries and policy. Unfortunately, neither copyright owners, users, or regulators have access to sufficiently good evidence to inform their decisionmaking.[7] There is a striking absence of quality empirical data,[8] and existing economic methods and analyses have so far been unable to predict the long-run effect of potential changes to copyright.[9]

The health of Australian copyright industries and the extent to which copyright collecting societies are serving the public interest is a matter of public concern. This is self-evidently true in the case of statutory collecting societies and collecting societies that operate under ACCC authorisation. In the context of ongoing public policy debates, data from other collecting societies is also extremely important in order to understand potential changes to the law. Good data is also important for a rapidly emerging group of artist managers and other entrepreneurial copyright creators, all of whom need better access to information that helps them to strategically manage their licensing arrangements in the digital age.

Currently, there is almost no information available about the internal bookkeeping or workings of Australia's collecting societies, or how moneys received relate to moneys provided to creators. There is also great inconsistency in reporting between Australian collecting societies on these matters. Some reporting practices have improved over the last few years, but the level of detail is still far below what is necessary for either participants or the general public to be reassured that Australia's collective licensing systems are performing well. More detail is required, particularly including detailed breakdowns by geography, licensing scheme, type of member (e.g. publisher vs creator), and distribution channel. We suggest that the UK system provides a best-practice model of reporting requirements for collecting societies, and Australia would benefit from a similar regulatory system.

While complete transparency may not always be possible, there is significant room for improvement in the amount and quality of data shared with the Australian public. The Productivity Commission recommended that "greater information about the size of payments to classes of rights holders should be made available in collecting society annual reports."[10]

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[7] Terry Flew, Nicolas Suzor and Bonnie Rui Liu, 'Copyrights and Copyfights: Copyright Law and the Digital Economy' (2013) 1(3) *International Journal of Technology Policy and Law* 297.

[8] Jeremy De Beer, Kun Fu and Sacha Wunsch-Vincent, 'The Informal Economy, Innovation and Intellectual Property-Concepts, Metrics and Policy Considerations' (World Intellectual Property Organization, 2013) <http://www.wipo.int/edocs/pubdocs/en/wipo_pub_econstat_wp_10.pdf>; National Research Council, *Copyright in the Digital Era: Building Evidence for Policy* (National Academies Press, 2013).

[9] Ruth Towse, 'What We Know, What We Don't Know and What Policy-Makers Would like Us to Know about the Economics of Copyright' (2011) 8(2) *Review of Economic Research on Copyright Issues* 101; Christian Handke, 'Economic Effects of Copyright: The Empirical Evidence so Far' (Committee on the Impact of Copyright Policy on Innovation in the Digital Era, 2011).

[10] Australian Government Productivity Commission, *Intellectual Property Arrangements*, Productivity Commission Inquiry Report No. 78, 23 September 2016, 160.

We agree with this as a minimum requirement; however, where content is distributed and consumed digitally, digital technologies can be leveraged to collect and distribute far more accurate data about the media consumption habits of Australians.

2. Voluntary licensing

Voluntary licensing is an essential part of managing copyright in the digital environment. Collecting societies exist to make it easier for individuals and businesses to access creative materials in a legal way. Collecting societies provide a solution in situations where users would ordinarily be unable to negotiate directly with rightsholders because of barriers presented by transaction costs.[11] In all other cases, negotiated agreements are likely to lead to greater efficiency and, therefore, innovation and growth. It follows that users should be able to bargain directly with rightsholders should they wish.

Currently, for copyright owners to become members of some collecting societies, they must assign their ownership in the relevant right to the collecting society. For example, to allow APRA to collect licence fees on their behalf, musicians assign their public performance right in any music created to APRA. This makes it impossible for musicians to share even some of their music freely using a Creative Commons[12] or other voluntary licence. It also makes it impossible for authors to enter into commercial negotiated agreements on a per-title basis -- APRA members are required to assign the relevant rights in their entire body of work. Without this flexibility, Australian creators are prevented from managing their rights in a way that is appropriate to them and maximises their value according to their own individual circumstances.

This lack of flexibility is easily avoidable. In the US, Performance Rights Organisations (PROs) offer collecting services which include both non-exclusive licences and assignments of copyright, allowing rightsholders to choose what licence they seek to govern the work. It is also entirely possible to enable collection on a per-title basis, rather than all-or-nothing on an entire catalogue. The lack of flexibility is a hangover from the pre-digital age, where cross-jurisdictional accounting was complex. In the digital age, where accounting on a per-title basis is now possible, this unduly restricts the ability of creators to take advantage of innovative new opportunities to license portions of their repertoire. Unlike some rights organisations in Europe and the US, Australian collecting societies have not yet improved their systems to allow more sophisticated and flexible accounting processes.

We recommend that, where possible, collecting societies do not take copyright assignments from their members, but allow their members to elect to grant to the collecting society authorisation to collect licensing fees on their behalf. This authorisation should be possible on a per-title basis. The Code of Conduct should require collecting societies to offer these flexibilities to their members.

[11] Ibid.

[12] QUT is one of the two host organisations and A/Prof Suzor is the Legal Lead of Creative Commons Australia.

3. Undistributed funds

We acknowledge that collecting societies may well experience significant issues in managing the distribution of funds in relation to orphan works, and that it may be appropriate to retain collected funds for a period of time in case unknown or unidentified rightholders come forward. However, we strongly believe that undistributed funds should not be redirected towards political purposes or lobbying. We share the concerns expressed by CAG and the ADA about the revelation in the *Sydney Morning Herald* that Copyright Agency has been diverting undistributed funds to a copyright "future fund" to fight changes to the law, including the possible introduction of a fair use style exception.[13]

The Code of Conduct permits collecting societies to deduct from their total revenue any amounts authorised by their constitutions, including for educational programs and donations in support of creators and copyright owners (2.6(b)). The Code further provides that each collecting society will engage in appropriate activities to promote awareness among members, licensees and the general public about the importance of copyright (2.8(a)(i)). We recommend that these provisions be clarified, either within the Code itself or in accompanying guidance documents. Using revenue to educate the public about copyright law and about the importance of copyright compliance is not the same thing as using funds to fight copyright law reform. In fact, we submit that it is manifestly inappropriate to use revenue for political lobbying purposes.

In the case of fair use, it is not necessarily true that more flexible exceptions for copyright reuse will harm collecting society members. In fact, some members may benefit significantly from being able to utilise the exceptions themselves; some may be willing to forgo receiving some licensing revenues in exchange for greater access to content (without fees) for their own reuse. There is insufficient data on the likely economic impact of greater copyright flexibilities. Without reliable data, it is impossible to know whether the collecting societies are acting in the interests of all their members when they lobby against law reform.

Collecting societies that adhere to the Code commit to treating both their members and licensees fairly, honestly and impartially (2.2(b) and 2.3(a)). It is highly likely that collecting societies are breaching these commitments when they engage in protracted lobbying against law reform. At the very least, this is not impartial behaviour. If particular rightsholders wish to oppose certain law reform recommendations, such as the ALRC and Productivity Commission's recommendations that Australia adopt a fair use style exception, then they should be empowered to fund this opposition themselves. The funding for lobbying efforts should not come from users, via the collecting societies. We recommend that where undistributed funds are not claimed within a reasonable time, they should be refunded to licensees. We note again here the best practice UK model, which specifically states that collective management organisations may make certain permitted deductions, but otherwise must not use rights revenue "for purposes other than distribution to rights holders."[14]

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[13] Peter Martin, 'Copyright Agency diverts funds meant for authors to $15m fighting fund', *Sydney Morning Herald*, 24 April 2017.

[14] The Collective Management of Copyright (EU Directive) Regulations 2016 (UK), Reg 10(c).