Supplementary Report of the Code Reviewer (The Hon K E Lindgren AM, QC, Formerly a Justice of the Federal Court of Australia) upon a Review of the Operation of the Code of Conduct of the Copyright Collecting Societies of Australia

Issued 28 October 2015

TABLE OF CONTENTS

INTRODUCTION 3

COPYRIGHT AGENCY AND SCREENRIGHTS AS DECLARED COLLECTING SOCIETIES 4

THE CODE OF CONDUCT FOR COPYRIGHT COLLECTING SOCIETIES – TRIENNIAL REVIEW 5

SUGGESTIONS FOR A NEW CLAUSE 2.9 6

SUBMISSIONS 7

RELEVANT PROVISIONS OF THE *COPYRIGHT ACT 1968* 8

THE CODE ITSELF 9

ATTORNEY-GENERAL'S *GUIDELINES FOR THE DECLARATION OF COLLECTING SOCIETIES* 10

THE CONSTITUTIONS OF COPYRIGHT AGENCY AND SCREENRIGHTS 10

CONSIDERATION 12

CONCLUSION 17

ANNEXURE A EXTRACT FROM TRIENNIAL REPORT 2014 19

ANNEXURE B CODE AMENDMENT PROPOSAL - COPYRIGHT AGENCY AND SCREENRIGHTS 22

ANNEXURE C CODE AMENDMENT PROPOSAL – NSW DEPARTMENT OF JUSTICE AND CAG (VERSION 5) 23

Supplementary Report of the Code Reviewer (The Hon K E Lindgren AM, QC, Formerly a Justice of the Federal Court of Australia) upon a Review of the Operation of the Code of Conduct of the Copyright Collecting Societies of Australia

INTRODUCTION

1. In paragraphs 55 – 65 of my Triennial Report dated 30 April 2014 on the operation of the *Code of Conduct of the Copyright Collecting Societies of Australia* (the Code), I referred to what I described (at [55]) as "an important and fundamental issue relating specifically to the statutory licence under Div 2 of Part VII of the Act in favour of the governments of the Commonwealth and the states, and, in particular, the role of Copyright Agency Limited as a declared society for the purposes of that Division". I concluded (at [65]) that I would not deal with the issue in that report but would do so in a Supplementary Report, which would be preceded by wide ranging consultation on the issue. This is that Supplementary Report.

2. For convenience a copy of paras 55-65 is annexed to this Supplementary Report and marked "A".

3. The foreshadowed consultation has taken place. Meetings were held on 29 October 2014 and 11 June 2015 attended by representatives of collecting societies, the State of New South Wales (the State) and of the Copyright Advisory Group (CAG), which is responsible for copyright policy and administration for a broad range of State and Territory educational departments and institutions of various kinds. In addition, and at my suggestion, there has been considerable contact and correspondence between the State, CAG and two declared collecting societies, Copyright Agency Limited (Copyright Agency) and Audio-Visual Copyright Society Ltd (Screenrights). They are the two collecting societies that are directly affected by the submission of the State and CAG.

4. The issue between the State and CAG on the one hand, and Copyright Agency and Screenrights on the other may be called "the transparency/disclosure issue". It is whether a new clause 2.9 should be added to the existing clauses 2.1 – 2.8, imposing special obligations of disclosure on collecting societies that are declared under s135P of the Act (for Part VA), s135ZZB (for Part VB) or s153F (for Div 2 of Part VII). At present, all of the Code's provisions apply indiscriminately to all collecting societies, whether declared or not. It follows that the addition of the proposed new clause 2.9 would mark a new point of departure.

COPYRIGHT AGENCY AND SCREENRIGHTS AS DECLARED COLLECTING SOCIETIES

5. Copyright Agency is the declared collecting society for the purposes of the following statutory licences:

- The statutory licences in Part VB (the educational use of text, images and print music; and the use of them by institutions assisting people with disabilities); and
- The licence for *government copying* under Div 2 of Part VII of the *Copyright Act 1968* (the Act) (Screenrights is also declared for that purpose - Copyright Agency is declared in respect of "works and published editions, other than works that are included in the sound recording, cinematograph film, or a television or sound broadcast", while Screenrights is declared in respect of television and radio broadcasts).

It follows that for both the education (and disability) and government schemes, Copyright Agency is the declared collecting society for text, artworks and music, other than material that is included in sound recordings or cinematograph films, while Screenrights is the declared collecting society for audio-visual material, including sound recordings, cinematograph films and television broadcasts and radio broadcasts.

6. Screenrights is also the declared collecting society for the purposes of the statutory licence for the copying ("communication" was added later) of

broadcasts by educational and other institutions under Part VA of the Act, and represents the owners of the copyright in sound recordings and cinematograph films (and of works included in such recordings and films) for the purposes of the statutory licence in favour or educational and other institutions under Part VB Div 4 of the Act. (In addition, Screenrights is the sole collecting society for the collection of equitable remuneration for the retransmission of free to air broadcasts under Part VC of the Act.)

7. Finally, Screenrights is, as noted above, the declared collecting society in respect of television and radio broadcasts under the government copying scheme in Div 2 of Part VII of the Act.

THE CODE OF CONDUCT FOR COPYRIGHT COLLECTING SOCIETIES – TRIENNIAL REVIEW

8. The Code is a voluntary code and was adopted by the collecting societies as from 1 January 2002, after approval by the Attorney-General and the Minister for Communications, Information, Technology and the Arts. Clause 1.2 of the Code provides that the Code applies to those collecting societies that have agreed to be bound by it.

9. The Code contains no provision as to how it is to be amended. No doubt amendment is within the capacity of all of the collecting societies that have agreed to be bound by it. In my view, nothing less than unanimity would be effective. No collecting society has agreed to be bound by an amendment supported only by a majority of any particular size. A dissentient could opt out of the Code régime, with whatever consequences might follow. Similarly, no doubt two or more of the collecting societies (thus, including a majority) could agree to be bound by a code that incorporated the amendment.

10. Clause 5.3 of the Code provides for a triennial "review" of the Code by the Code Reviewer; requires the Code Reviewer to prepare a report of the review; and requires the Code Reviewer to "make such recommendations as he or she considers appropriate in relation to the operation of the Code, including recommendations for amendments of the Code": clause 5.3(a) and (e). Implicitly,

the recommendations would be made to the collecting societies that have agreed to be bound by the Code.

11. There is no express limitation on the nature of the amendments that I am at liberty to recommend. It is a basic question what are the principles and parameters that apply to my making recommendations for amendment. Is it intended that my personal values and predilections are to dictate my making of recommendations? One would not think so.

12. Apparently, I should identify, and be guided and constrained by, the fabric formed by the Act, the constitutions of the collecting societies that have agreed to be bound by the Code, the statement of objectives and other provisions in the Code itself, and the Attorney-General's *Guidelines for the Declaration of Collecting Societies*. This legal and administrative fabric or context is important: it circumscribes the role of declared collecting societies and therefore of the nature of the recommendations that I might make. This limitation is reflected throughout this Supplementary Report.

SUGGESTIONS FOR A NEW CLAUSE 2.9

13. As noted earlier, the debate has concerned the question of whether a new clause 2.9 should be added to existing clauses 2.1 – 2.8 of the Code. The primary position taken by Copyright Agency and Screenrights is that no amendment of the Code is called for. Their secondary position is that if I should be minded to recommend an amendment, I should do so in terms of general principles rather than draft a recommended amendment. If I should be against them on their first and secondary positions, Copyright Agency and Screenrights have proposed a new clause 2.9 which is set out in Annexure B to this Supplementary Report.

14. In its submission dated 13 June 2014, PPCA, and in their submission dated 14 June 2014 APRA/AMCOS, likewise argue against the amendment of the Code as sought by the State and CAG. Although PPCA and APRA/AMCOS have agreed to be bound by the Code, they are not declared collecting societies.

15. The State and CAG submit that the Code calls for amendment and that if I should agree with them, I should, in the interests of certainty and clarity, recommend an amendment in precise terms so as to eliminate the possibility of ambiguity. They have submitted a suggested new clause 2.9 which is set out as Annexure C to this Supplementary Report.

16. One benefit that has arisen from the extensive and time consuming exchanges that have occurred between the parties is that already Copyright Agency and Screenrights have amended the form of their Annual Reports to include some, but not all, of the additional information sought by the State and CAG.

SUBMISSIONS

Since my Triennial Report dated 30 April 2014, the following submissions have been received on the transparency/disclosure issue.

1. Letter dated 11 June 2014 from Screenrights;
2. Letter dated 12 June 2014 from Australasian Performing Right Association Limited/Australasian Mechanical Copyright Owners Society Limited (APRA/AMCOS);
3. Letter dated 13 June 2014 from Phonographic Performance Company of Australia Limited (PPCA);
4. Letter dated 13 June 2014 from Copyright Agency;
5. Letter dated 24 June 2014 from CAG;
6. Letter dated 1 July 2014 from NSW Government Police & Justice;
7. Letter dated 3 July 2014 from the Australian Society of Authors;
8. Submission dated 1 September 2015 from Copyright Agency
9. Submission dated 2 September 2015 from CAG
10. Submission dated 11 September 2015 from Copyright Agency
11. Submission dated 13 November 2014 from Copyright Agency
12. Undated Submission from the NSW Department of Justice

RELEVANT PROVISIONS OF THE *COPYRIGHT ACT 1968*

17. A company limited by guarantee may apply to the Minister under s135P to be declared as the collecting society for the purposes of Part VA, or under s135ZZB to be declared as a collecting society for the purposes of Part VB, or to the Copyright Tribunal of Australia (the Tribunal) to be declared as a collecting society for the purposes of Div 2 of Part VII. Both Copyright Agency and Screenrights are companies limited by guarantee which, as noted above, have been declared collecting societies for the purposes previously indicated.

18. The Minister and the Tribunal may declare an applicant to be a collecting society only if satisfied, inter alia, that the applicant's rules contain provisions about certain matters: see s135P(3)(d); s135ZZB(3)(d); s153F(6)(e).

19. In the case of the first two provisions, it is such "provisions as are prescribed" with respect to the considerations listed in the Act, whereas in the case of the last, it is provisions for the considerations listed in the Act.

20. Regulation 23J of the *Copyright Regulations 1969* prescribes provisions for the purposes of s135P(3)(d), and reg 23JM prescribes provisions for the purposes of 135ZZB(3)(d). The two regulations are similar. They include in para (d) a requirement that the total amount of any gifts for cultural or benevolent purposes made by the society in respect of any accounting period must not exceed the percentage of the equitable remuneration received in respect of that period "as is specified in the rules". They include in para (e) a requirement that the administrative costs and other outgoings of the society paid out of equitable remuneration collected by it be reasonable.

21. The Act and the Regulations evince a concern to ensure that the amount of equitable remuneration available for distribution by the society not be diminished by excessive gifts or by excessive administrative costs and other outgoings that would reduce the monies available to those ultimately entitled to benefit. That is to say, there is a concern to safeguard the interests of those who are entitled to participate in the distribution of equitable consideration received by declared collecting societies. It is convenient to conceive of them as copyright owners.

22. The Parts VA and VB and Div 2 of Part VII provide for the payment of "equitable remuneration" by the statutory licensee to the relevant declared collecting society as agreed between them or, if not agreed, as determined by the Tribunal.

THE CODE ITSELF

23. I turn now to the Code itself.

24. The Code's objectives are stated in clause 1.3, and are as follows:

> "(a) 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;
> (b) to promote confidence in Collecting Societies and the effective administration of copyright … in Australia;
> (c) to set out the standards of service that Members and Licensees can expect from Collecting Societies; and
> (d) to 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."

25. Paragraphs (b) and (c) are, at least arguably, relevant to the transparency/disclosure issue.

26. The one provision of the Code that is directly relevant to the transparency/disclosure issue is clause 2.3(b), which is as follows:

> "Each Collecting Society will ensure that its dealings with Licensees are transparent" (clause 2.3(b))

On its face, this provision is directed to benefiting licensees, such as the State and CAG, or licensees whose interests they represent.

ATTORNEY-GENERAL'S *GUIDELINES FOR THE DECLARATION OF COLLECTING SOCIETIES*

27. These Guidelines relate to declarations by the Minister – not to a declaration by the Tribunal for the purposes of Part VII Div 2.

28. The Guidelines are totally concerned with the protection of the interests of copyright owners, and stipulate that the rules of a collecting society seeking to be declared must contain certain provisions safeguarding the interests of copyright owners. The Guidelines state:

"Fundamental objectives of regulation are to ensure:

- that each society diligently collects all money to which it is entitled, and none to which it is not;
- that the society manages its operations efficiently and does not incur improper expenses;
- that the distribution of royalties to relevant copyright owners is fair, and is seen to be fair;
- that the society maintains an even hand as between current and future beneficiaries.

In sum, the requirements are directed to efficiency, honesty and equity."

The Guidelines betray no interest in the position of licensees.

THE CONSTITUTIONS OF COPYRIGHT AGENCY AND SCREENRIGHTS

29. Clause 2 of Copyright Agency's Memorandum of Association sets out the objects for which Copyright Agency is established. None of those objects suggests an object of serving the interests of licensees, although the final paragraph in clause 2, namely paragraph (u), is: "To do all such other things as are incidental or conducive to the attainment of the objects and the exercise of the powers of the Company".

30. Article 3 of Copyright Agency's Articles of Association deals with eligibility for membership, Generally speaking, eligibility is limited to copyright owners and those claiming through them, such as their agents.

31. Article 13 of Copyright Agency's Articles of Association identifies the business of an Annual General Meeting as including the reception and consideration of the Report of the Directors. I understand that both Copyright Agency and Screenrights make use of the Annual Report to satisfy the Act's requirements of an annual report of which a copy is to be sent to the Attorney-General and a copy laid before Parliament: see ss 135R, 135ZZD, 183D. No doubt this is the Annual Report to which both versions of a possible new clause 2.9 refer (see [13] – [16] below and Annexures B and C to this Supplementary Report).

32. Articles 73 and 74 – 76 are relevant to the receipt and allocation of funds, both Equitable Remuneration and other funds. The submission of the State and CAG do not suggest any amendment in these respects. What they seek is disclosure.

33. The objects of Screenrights are set out in clause 7A of its Memorandum of Association. As in the case of Copyright Agency, there is no suggestion in the (very short) statement of objects of any object of serving the interests of licensees. However, in substance the object of Screenrights is to "operate as a collecting society", and this very general concept might be broader than the stated objects of Copyright Agency.

34. Article 2 of Screenrights' Articles of Association, like Article 3 of those of Copyright Agency, limits eligibility for membership to copyright owners and those claiming through them, such as exclusive licensees.

35. Article 4.1 of Screenrights' Articles of Association provides that the business of an annual Members' meeting is, relevantly, to receive and consider the Directors' Report. My comments above in relation to the similar provision in the Articles of Association of Copyright Agency are applicable.

36. Article 15.4 provides that Screenrights must establish and operate a "Statutory Trust Fund", a "Voluntary Trust Fund" and a "Society Reserve Fund". Article 16 provides for the allocation and distribution of monies.

37. Again, the State and CAG did not submit that any change in this respect should be made to the Constitution of Screenrights – what they seek is disclosure.

CONSIDERATION

Duty of Directors

38. Ultimately, the legal duty of the directors of Copyright Agency and Screenrights, as companies limited by guarantee, is to act in the interests of their respective members as a whole. Apart from well established general law principles to that effect, the references in sections 180 and 181 of the *Corporations Act 2001* (Cth) to "the best interests of the corporation" are a statutory endorsement of that position.

39. The question of the extent to which the directors of companies are at liberty to take into account other interests, such as those of a local community, society as a whole, the environment, employees, and so on, has been much debated.

40. The debate has usually taken place in the context of trading or financial companies limited by shares, but analogous issues arise in relation to companies limited by guarantee, such as Copyright Agency and Screenrights: see the definition of "corporation" in s 57A of the *Corporations Act 2001.*

41. It is accepted that the directors of a company are free to take into account matters of the kind described provided they genuinely believe that doing so will ultimately enure to the benefit of their members.

42. Apparently in 2002 when the Code was adopted, the directors of Copyright Agency and Screenrights thought it to be in the best interests of their members, for those societies to agree to be bound by the Code, including the obligation found in clause 2.3(b) to ensure that their dealings with licensees were "transparent".

43. The Code arose out of the *Don't Stop the Music!* report's recommendation that

> "a voluntary code of conduct for copyright collecting societies be developed in consultation with the collecting societies, relevant Commonwealth Government departments, user groups and other interested parties. The code of conduct should outline standards of acceptable licensing practices and activities" (Recommendation 6, p 126).

44. The Commonwealth Government's stated objective was:

> "for collecting societies to adopt a common Code of Conduct which achieves greater public acceptance and understanding of copyright as it relates to their activities and results in fair and equitable dealings with all stakeholders" (Government Principles and Objectives, p 1)

45. I do not think that I am prevented from recommending the adoption of the amendments sought by the State and CAG by the fact that on their face they would not be for the immediate benefit of the members of the two declared societies.

46. Nonetheless, and this is important, the member-focused nature of the legal duties of directors, the member-oriented nature of the constitutions of Copyright Agency and Screenrights (and, I presume, the other collecting societies that have agreed to be bound by the Code) , the fact that the Code is a purely voluntary one, and the fact that amendment would require the agreement of all of the collecting societies, including Copyright Agency, Screenrights, PPCA, and APRA/AMCOS, all of which have evinced opposition to the amendment sought by the State and CAG, combine to suggest strongly that I should not recommend the making of the amendments sought unless I am clearly convinced of the case for it. As will appear below, I am not.

How much of the equitable remuneration paid by the State and CAG reaches the copyright owners?

47. A particular point of disagreement between the State and CAG of the one part and Copyright Agency and Screenrights of the other, is that the former would wish to be informed as to how much of the equitable remuneration they pay in respect of particular works or other subject matter reaches the copyright owners. A reason is that this would assist the State and CAG in negotiating, or at least in deciding whether to negotiate, for a licence directly with those copyright owners.

48. Apparently, the State and CAG suspect that so much of the equitable remuneration paid by them goes to administrative costs (payment of administrative costs out of equitable remuneration collected is expressly

contemplated by s153F(6)(e)(ii) of the Act), or for other reasons does not reach the copyright owner, that it would or might be to the advantage of both themselves and the copyright owner, to "eliminate the middle man".

49. It is not disputed by Copyright Agency and Screenrights that the State and CAG are entitled to take licences directly from copyright owners. But this point of disagreement illustrates the difficulty of my recommending an amendment that would facilitate this particular objective of the State and CAG. If the overall amount of equitable remuneration received by Copyright Agency and Screenrights falls, a greater burden of their administrative costs and other outgoings would fall on others, that is to say, on the other copyright owners who are their members.

50. Perhaps this is as it should be. Perhaps, as the State and CAG seem to suspect, there is "fat" that should be cut away, improving the positions of both copyright owners and themselves as statutory licensees. The point is, however, that it would take an investigation far broader than that which is expected of the triennial review of the operation of the Code, and than that of which I am capable, to enable me as Code Reviewer to be confident that I had reached the "correct" conclusion.

51. It should be remembered that it is a role of the Tribunal to fix the amount of equitable remuneration payable to declared collecting societies. It is open to the State and CAG to apply to the Tribunal to fix an amount arrived at after elimination of unwarranted expenditure.

52. The State and CAG may respond to this suggestion by pointing to the costliness of such an exercise. The Tribunal would have to examine in detail the use that Copyright Agency and Screenrights make of the equitable remuneration that they collect.

53. But a similar detailed investigation would have to be undertaken by me in order to recommend the amendment of the Code sought by the State and CAG.

54. Indeed, it is possible to view the submission by the State and CAG as a kind of application for preliminary discovery which would enable them to decide whether

to apply to the Tribunal, or to negotiate directly with copyright owners or not to do either of those things.

Monopoly

55. The State and CAG have made much of the statutory functions and monopoly position conferred by the Act on declared collecting societies. Thus, the State says:

> " … statutory licensees are generally obliged to make agreements with the declared collecting societies, often under threat of legal proceedings, or during the course of such proceedings. Similarly, copyright owners and rightsholders are generally obliged to deal with the declared collecting societies when their material is used by the statutory licensees. Declared collecting societies thus hold a privileged position and should be under appropriate obligations to make available the details of their administration of the statutory licences. The State submits that declared collecting societies are not entitled to treat the statutory licence agreements and their terms and conditions as if they were ordinary commercial dealings that may be kept secret" (letter dated 1 July 2014 from NSW Police & Justice, p 2).

56. CAG made a submission to a generally similar effect in its letter dated 24 June 2014.

57. The State and CAG have referred to general statements to the same overall effect in the Independent Code Review by Mr Walter Merricks CBE, which he prepared for the British Copyright Council, in particular, at pp 11 – 15.

58. But I note that the recommendations arrived at by Mr Merricks did not descend to anything like the level of detailed disclosure sought in the State's and CAG's proposed clause 2.9.

59. In any event, it is rather one-sided to say that the declared collecting societies occupy a privileged position. They do, but so do the statutory licensees. The statutory licensees are permitted by the Act to commit acts that would otherwise constitute infringement of copyright. Moreover, they are permitted to do so without having to seek out and negotiate with numerous individual copyright owners. Being at liberty to deal exclusively with a declared collecting society is less

burdensome for them. As well, they cannot be "held to ransom" by a particular copyright owner who seeks to be paid more than "equitable remuneration".

60. I do not find references to the "privileged" or "monopolistic" position of the declared collecting societies particularly helpful on the precise question whether I should recommend that the collecting societies amend the Code as sought by the State and CAG.

The equitable remuneration paid by the State and CAG to the declared collecting societies comes from public monies

61. The State and CAG point to the fact that the source, immediate or ultimate, of the equitable remuneration that they pay to the declared collecting societies is public funds for which they are accountable. So, the argument runs, the declared collecting societies should be required to account in the same way as other bodies that are entrusted with the role of collecting and distributing public funds.

62. With respect, in my view, there is a flaw in this argument. It equates the declared collecting societies with official bodies that expend monies for public purposes. But those for whom Copyright Agency and Screenrights collect are, or are substantially, private interests—the copyright owners. Those private interests are represented by a declared collecting society in the same way that the private interests of manufacturer, distributor, wholesaler and retailer are served in the sale by the retailer to the ultimate consumer. Another analogy might be found in dealings by a union of employees or an association of employers. In all of these cases, once a government purchases from the retailer or pays money to the union or association, the money paid ceases to have a "public" quality. It may be squabbled over by the various private interests involved, but the government could hardly lay claim to be given details of the earning of the money or its ultimate destination.

63. In the present case, it is a matter for the copyright owners whether they are content with the distribution policies of Copyright Agency and Screenrights.

Other practical issues

64. Other practical issues arose in the exchanges between the parties. First, some of the information called for by the form of clause 2.9 proposed by the State and CAG was information that Copyright Agency or Screenrights or both of them do not collect at present. Second, some of the information sought is confidential to the members of Copyright Agency and Screenrights, and those collecting societies take the view, with some justification, that an undertaking by the State and CAG to preserve that confidentiality does not meet the problem. The consent of the copyright owners who provided the information would be required.

CONCLUSION

65. For the reasons outlined above, I am not persuaded to recommend that the collecting societies amend their Code as sought by the State and CAG.

66. It may seem from those reasons that I see no merit whatever in their submissions. This is not so: I simply do not think that the present review is the occasion for the making of what I see a fundamental change to the Code.

67. This is not, however, the end of the matter.

68. First, the State and CAG could apply to the Tribunal for a determination fixing equitable remuneration which, according to State and CAG, would be an amount that would exclude unwarranted administrative expenditures.

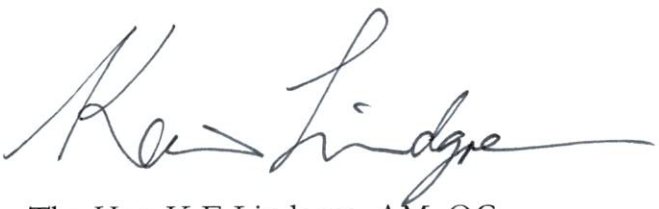
69. Second, they could make representations to the Minister for Communications, as the Minister responsible for the administration of the Copyright Act.

70. Third, and ultimately, they could seek to muster political support for appropriate amendments to the Act.

71. Obviously, it remains possible, in the absence of any of these coercive measures, for the State and CAG to attempt to persuade Copyright Agency and Screenrights to provide further degrees of disclosure in their Annual Reports. Although this

has not, to date, given, and apparently will not in the future give, to the State and CAG all that they seek, it may be that further quite specific forms of disclosure will be offered.

Dated this 28th day of October 2015



The Hon K E Lindgren, AM, QC

Code Reviewer

ANNEXURE A

EXTRACT FROM TRIENNIAL REPORT 2014

STRENGTHENING OF CODE'S REQUIREMENT OF TRANSPARENCY, PARTICULARLY IN RELATION TO DECLARED COLLECTING SOCIETIES AND STATUTORY LICENCES

55. The New South Wales Department of the Attorney-General and Justice has raised an important and fundamental issue relating specifically to the statutory licence under Div 2 of Part VII of the Act in favour of the governments of the Commonwealth and the States, and, in particular, the role of Copyright Agency as a declared collecting society for the purposes of that Division.

56. Although the issue arises out of a particular dispute between the State and Copyright Agency (see *Copyright Agency Limited v State of New South Wales* (2008) 233 CLR 2789; [2008] HCA 35; *Copyright Agency Limited v New South Wales* (2013) 102 IPR 85; [2013] ACopyT1; *Copyright Agency Ltd v New South Wales (2)* (2013) 103 IPR 68; [2013] ACopyT2), the question raised has wide ranging ramifications.

57. Shortly, the issue arises in this way. The statutory licence allows the State to do acts that would otherwise constitute an infringement of the copyright of registered surveyors who produce survey plans. Copyright Agency represents the interests of registered surveyors. The State makes use of the survey plans lodged in the office of the Registrar General for the purposes of land title registration as required by the *Conveyancing Act 1919* (NSW).

58. The State asserts that it has experienced significant difficulties in obtaining from Copyright Agency information concerning the use made of the remuneration that it is required to pay to Copyright Agency for the use that the State makes of the survey plans. The State asserts that as the custodian of public monies, it has, as a matter of public policy, an interest in ensuring that the money that it pays to Copyright Agency is used for purposes consistent with the State's obligation as custodian of public monies.

59. In its submission, the State states as follows:

"Publicly available information provides little assistance in identifying how much of the remuneration paid to Copyright Agency for Government copying of works … will eventually be remitted to copyright owners. A review of Copyright Agency's annual report indicates that large amounts of money are not distributed and are ultimately turned to other purposes, which would appear contrary to the intent of the legislation. As the vast majority of the income of the declared collecting societies is public money, the State considers that these collecting societies should, at least, account to the public in detail as to the amount that is distributed to copyright owners and the manner in which the undistributed money is spent."

60. The State advises that Copyright Agency's response has been that it is a declared collecting society for the purposes of Div 2 of Part VII of the Act, and that the expenditure and distribution of monies paid to it are matters between itself and its members.

61. The State submits that the present issue is relevant to the Code's provisions dealing with transparency, and refers to the following provisions of the Code:

"Each Collecting Society will ensure that its dealings with Licensees are transparent" (clause 2.3(b))

"Make available to Licensees and potential Licensees information about the licences or licence scheme offered by the Collecting Society, including the terms and conditions applying to them, and about the manner in which the Collecting Society collects remuneration and/or licence fees for the use of Copyright Material " (clause 2.3(c)(i))

"Each Collecting Society will at all times maintain proper and complete financial records, including in relation to:
(i) the collection and distribution of Revenue; and
(ii) the payment by the Collecting Society of expenses and other amounts described in clause 2.5. " (clause 2.6(b))

62. The State's ultimate submission is as follows:

"The State respectfully submits that the Code of Conduct should provide for greater transparency, and to achieve this the Review could consider whether to:

1. Consult with the statutory licensees as to whether specific requirements should be added to clause 2.3(b);
2. Amend clause 2.3(c)(i) to require that the Collecting Societies provide information as to the distribution of monies received from licensees;

3. Amend clause 2.3(c) to require that the Collecting Societies provide access to the financial records described in clause 2.6(b)."

63. While the State's position as licensee is a special in one respect: in that the money that it pays to Copyright Agency is public money, other statutory licensees may argue that they are also entitled to information of the kind referred to by the State.

64. Moreover, although the position is not so clear, licensees under licences voluntarily entered into may wish to make a similar case.

65. In view of the fundamental and important nature of the State's submission, I have decided not to deal with it in this Report but to do so in a supplementary Report. It will be necessary for wide ranging consultation on the issue to take place. As to the extent and form of that consultation, I will seek submissions from the State, the collecting societies and the Commonwealth.

ANNEXURE B

CODE AMENDMENT PROPOSAL - COPYRIGHT AGENCY AND SCREENRIGHTS

2.9 REPORTING BY DECLARED COLLECTING SOCIETIES

(a) The Annual Report of a Declared Collecting Society shall include the following information in relation to each statutory licence for which the society is declared, for the financial year to which the Annual Report pertains:

(i) For each Statutory Licensee Class:

A. total licence fees received;
B. income on investments of licence fees;
C. total amount allocated and paid to members;
D. the total amount of licence fees held in trust; and
E. total licence fees for which the trust period expired.

(ii) the total expenses of the Declared Collecting Society.

(b) A Declared Collecting Society will, upon request from a representative of a Statutory Licensee Class, provide the following information to the extent that it can do so at a reasonable cost:

(i) proportions to classes of recipients from the distribution of licence fees from the Statutory Licensee Class;

(ii) for each of the total amounts referred to in clause 2.9(a)(i)(E), the proportion not paid to rights holders due to:

A. the entitled member not being located;
B. the relevant rights holder not being a member;
C. entitlement disputes;
D. the amounts being below the distributable threshold; and
E. other reasons (which reasons the Declared Collecting Society may elect to specify).

(c) In this clause 2.9:

Declared Collecting Society means a Collecting Society that has been declared under ss. 135P, 135ZZB or 153F of the *Copyright Act 1968*;

Statutory Licensee Class means:

(i) the Commonwealth Government;
(ii) the State and Territory Governments;
(iii) schools;
(iv) universities;
(v) Technical and Further Education institutions; and
(vi) other educational institutions.

ANNEXURE C

CODE AMENDMENT PROPOSAL – NSW DEPARTMENT OF JUSTICE AND CAG (VERSION 5)

Note: An amendment to cl. 2.9(c)(i) was proposed at the last meeting and inadvertently left out of earlier drafts. It is shown in **bold**.

2.9 TRANSPARENCY IN DEALINGS WITH STATUTORY LICENSEES

(a) This clause 2.9 only applies to Declared Collecting Societies.

(b) The Annual Report of a Declared Collecting Society shall include, in addition to any matters required by law to be included, the following information in relation to each statutory licence distribution pool during the financial year to which the Annual Report pertains:

(i) the total amount of the Equitable Remuneration Fund relating to each Statutory Licensee Class ("**Class Fund**"), including and separately itemising:

A. the amount received from each Statutory Licensee Class;

B. the amount rolled into the Equitable Remuneration Fund due to expiration of the trust period for amounts paid in previous years and held on trust; and

C. the amount of income on investments, including investments of amounts held on trust and paid into the Equitable Remuneration Fund,

(ii) the total amount of the Class Fund paid from the Equitable Remuneration Fund **to the Declared Collecting Society [NOTE: BOTH ARE IN THE NAME OF THE DECLARED COLLECTING SOCIETY];**

(iii) the total amount of the Class Fund set aside out of the Equitable Remuneration Fund to meet anticipated expenses of the Declared Collecting Society or to satisfy obligations to its members;

(iv) the total amount of the Class Fund comprising the Distributable Fund, including:

A. the total amount allocated and paid to members during that financial year;

B. the total amount not paid to members during that financial year and instead transferred to a trust fund under the Declared Collecting Societies' constitution ("**Trust Fund**"),

(v) of the total amount referred to in clause 2.9(b)(iv)(A), the proportion of that amount paid to each Class of Recipient;

(vi) of each of the amounts collected from each Statutory Licensee Class and paid into the Trust Fund during that financial year and each preceding financial year for which amounts are still held on trust:

A. each of the amounts held in the Trust Fund as at 1 July of that financial year;

B. each of the amounts paid from the Trust Fund to members;

C. each of the amounts paid from the Trust Fund into the Equitable Remuneration Fund due to the expiration of the relevant trust period;

D. the income from the investment of moneys in the Trust Fund paid into a fund or account other than the Trust Fund;

E. each of the amounts held in the Trust Fund as at 30 June of that financial year,

(vii) of each of the total amounts referred to in clause 2.9(b)(vi)(C), the proportion not paid to rights holders due to:

A. the member of the Declared Collecting Society who is entitled to be paid not being located;

B. the relevant rights holder not being a member of the Declared Collecting Society;

C. entitlement disputes;

D. the amounts being below the distributable threshold;

E. other reasons (which reasons the Declared Collecting Society may elect to specify).

For the financial year ending 30 June 2016, clause 2.9(b)(vii) only applies if the amount referred to in clause 2.9(b)(vi)(C) exceeds 5% of the original Distributable Fund for the relevant year.

(c) A Declared Collecting Society will upon request from a Statutory Licensee provide:

(i) a statement that clearly specifies, of the amounts referred to in clause 2.9(b)(ii) to (vii), each of those amounts that is related to moneys paid to the Declared Collecting Society by the requesting Statutory **Licensee in respect of whom there have been payments**;

(ii) the identities of members of the Declared Collecting Society to whom or by whose direction the Declared Collecting Society has paid money in any financial year under the statutory licence from moneys paid by the requesting Statutory Licensee, the amount of such payment and the title of works which attracted the payment; and

(iii) details of such other records of the Declared Collecting Society (including membership records) that the Statutory Licensee may reasonably request.

(d) If a request is made under paragraph 2.9(b)(i) or (ii) the Declared Collecting Society may, if it reasonably considers that such information is commercially sensitive to the rights holder, require the Statutory Licensee or the Member to enter into appropriate confidentiality agreements, provided they do not prevent the Statutory Licensee from using such information for its legitimate purposes.

(e) In this clause 2.9:

Class of Recipient means:

(i) in relation to the Part VA statutory licences and the Part VII statutory licence to the extent that it applies to sound recordings, cinematograph films, television or sound broadcasts, or to works included in a sound recording, cinematograph film, a television or sound broadcast, each of the following classes of recipients of licence fees:

A. broadcasters;

B. producers;

C. distributors;

D. music publisher;

E. directors, scriptwriters, artists and other individual content creators;

F. overseas collecting societies;

G. other organisations;

H. other classes that the Declared Collecting Society may from time to time specify),

(ii) in relation to the Part VB statutory licence and the Part VII statutory licence except to the extent it applies to sound recordings, cinematograph films, television or sound broadcasts, or to works included in a sound recording, cinematograph film, a television or sound broadcast, each of the following classes of recipients of licence fees:

A. authors, illustrators and other individual content creators;

B. publishers;

C. news media organisations;

D. overseas collecting societies;

E. government bodies;

F. other organisations;

G. other (which other classes the Declared Collecting Society may elect to specify),

Declared Collecting Society means a Collecting Society that is declared under s135P or s 135ZZB or s. 153F of the *Copyright Act 1968*;

Distributable Fund means the residue of the Equitable Remuneration Fund remaining after payment of the amounts referred to in clause 2.9(b)(ii) and (iii);

Equitable Remuneration Fund means:

(i) all equitable remuneration paid to the Collecting Society pursuant to a statutory licence in a particular year;

(ii) all income on investment of such moneys; and

(iii) all such equitable remuneration and income rolled over from (not distributed in respect of) previous years;

Statutory Licensee means a Government or an organisation representing educational or disability institutions under a statutory licence created by the *Copyright Act 1968*;

Statutory Licensee Class means each and every one of the following classes of Statutory Licensees:

(i) the Commonwealth Government ;

(ii) the State and Territory Governments ;

(ii) schools;

(ii) universities;

(iii) TAFEs;

(iv) other educational institutions that the Declared Collecting Society may elect to break down or specify further.